

**Discussion of Operator Qualification at Joint Meeting of
Technical Hazardous Liquid Pipeline Safety Standards Committee and
Technical Pipeline Safety Standards Committee
March 26, 2003**

The Committee's were briefed by Stacey Gerard, Associate Administrator for Pipeline Safety, on the current status of discussions between OPS and industry regarding implementation of the operator qualification rule. Ms. Gerard's comments included:

- NTSB had closed a recommendation in this area as unsatisfactory. Testimony and hearings a year ago, while otherwise complimentary of OPS, still indicated this recommendation was considered unsatisfactory. OPS is trying to clear the record.
- At the same time, a GAO report on integrity management, considering planned approach to implement the rule using inspection protocols, etc., was positive. NTSB also reviewed the planned approach to implementing IM. NTSB commented at the Bellingham meeting that our approach, if implemented, would be successful.
- We considered the value of using a similar approach to OQ, despite already having trained inspectors to other guidelines. Congress became aware of our efforts. We met with NTSB to see if revising our approach might change their conclusion on this recommendation. The then-chair of NTSB agreed that it would.
- The Pipeline Safety Improvement Act of 2002 requires development of standards and criteria to evaluate operators methods to qualify employees. OPS believes the Act accepts the existing regulation but requires standards and criteria for its evaluation. OPS has drafted protocols to serve as these standards and criteria. They are in the public domain. They are guidelines for inspectors. OPS considers that there is flexibility to pursue with an operator how it is meeting the general requirements in the regulation.
- OPS has had 3 public meetings. Comments made by the industry led to the definition of 13 issues. The third meeting was just completed. Six issues were discussed there:
- Process evaluation. Given that the regulation is management-based, OPS believes it has the right to delve into the basis for operator decision making, especially with regard to reevaluation intervals. Industry commenters still believe this is going beyond the scope of the regulation. OPS believes this represents discomfort with the protocol approach and is working to address this discomfort without weakening inspections guided by protocols. The recent statute requires that inspections must be completed in 3 years (from 12/17/02).
- Notice of areas for recommended improvement (NARI). This is a new communication vehicle created in liquid integrity management. OPS recognized, in that area, that the rule represented a significant increase over earlier standards and that there is difficulty in getting there right away. The NARI allows communicating about areas to work on during the developmental period. Operators see it as enforcement without due process.

OPS views it as a way to communicate how to get to the goal line. The Committees' advice is sought on whether to change the policy and return to notices of amendment.

- Industry seems to recommend OPS collect data that would be used to define consequences of failure, to be used by operators for determining reevaluation intervals.
- Industry is doing benchmarking to see how OPS standards compare to those used for other industries. OPS hasn't seen a report yet.
- There is continuing disagreement about what is a maintenance activity and what is new construction. For example, OPS believes that reconditioning is not new construction.
- Developing a standard. OPS is committed to the concept of identifying new criteria and embodying them in a standard and will commit personnel to participate in the standard-development process.

Comments from floor

Bob Cave noted that there are concerns with the protocols. Additional clarification is needed. A group has been formed consisting of LDCs, propane companies, and small liquid operators. We intend to look at the protocols and see how they can be implemented. Mike Comstock, City of Mesa, co-chairs.

Mike Comstock added, with regard to small operators, that there are 3 issues:

1. How to define a small operator (e.g., number of meters – perhaps 0 to 500 as Tier 1, 501 to 20,000 as Tier 2, and above that exposed to the full protocols).
2. Provide guidance to operators re: how to comply with the rule (i.e., develop something to meet the protocol)
3. Including guidance in a proposed standard. Meet the time-line of OPS (i.e., 6/3/03 for guidelines)

The holdup is the development of protocols. We are waiting for them. We think we can move forward quickly thereafter.

Daron Moore:

The Tier 1 team has been meeting monthly since January to develop a going forward approach. Industry has no problem with protocols. They are a means for inspectors to understand the rule and what to discuss. We understand that some protocols will lie outside the final rule. We are working to help finalize protocols inside the rule.

Protocols outside the rule pose a threat due to the possibility that they will become enforced. This would constitute rulemaking without due process. The use of protocols outside the rule is unacceptable and not legal, if used for enforcement.

Industry submitted comments on March 10, identifying what is outside the rule and why.

For example, one protocol reads, “How does the training organization fit into the implementation of the plan”. Many small operators don’t have a “training organization”.

NARI is a new tool. The intent is to use it to communicate deficiencies that are outside what exists in the rule or where there are overall deficiencies but not enough for enforcement. There are several issues with this:

1. There is no due process as in Part 190. There is no legal way to respond. NARIs are not acceptable to industry as an enforcement or compliance tool. OPS says it is the latter.
2. Discovery by future litigation. If an operator disagrees with a NARI, and does not take action, it establishes a presumption of guilt if it is discovered in a later litigation.
3. NARIs could present a moving target and represent a means by which standards could constantly be adjusted upwards.

A possible alternative solution is to use a letter of inquiry. OPS is seeking additional information about how an operator is complying with the rule. Industry will discuss anything, but needs to be able to contest actions outside the rule.

There has been no “dialog” so far. The meetings consist of one side presenting its position, then a caucus for as much as a day, and a presentation by the other side.

Industry is preparing comments for the open docket. We will address what protocols are outside the rule and why. We don’t want to, but we feel it is necessary to protect our positions.

Mr. Moore then addressed the issues highlighted by Ms. Gerard:

1. We don’t have a problem with discussion. We will engage in written dialog. Enforcement is the issue.
2. NARI is an option. We would like to stay within Part 190, because it provides due process and an ability to resolve misunderstandings.
3. We will address this in the standard. The standard will be “housed” at ASME.
4. There was a presentation by Bernie Selig yesterday. It was well received by all parties. The report is in final editing. It will be submitted to the docket shortly.
5. Maintenance vs. new construction. This is a classic case of pipeline safety vs. what the rule says. The rule doesn’t address it well enough. Regulators agreed yesterday that this issue would go to the standard, which will form the basis for a new rule.

Ms Gerard noted that OPS had always expected that operators would respond to NARIs. It’s just not required.

Lois Epstein asked if OPS had thought about a supplemental rulemaking? Ms. Gerard responded that OPS has not wanted to call the old rule inadequate, but rather believes that broad performance language provides the flexibility to probe how it is being done. Richard Huriaux

(OPS) added that there was never any question, during the negotiated rulemaking, that inspectors would have to look at how qualification decisions are made.

Andy Drake commented that the negotiated rulemaking developed an unprecedented performance-based rule. We have since learned that total performance-based is almost impossible to implement, because the target is invisible and changing. We need an actionable standard. Ms. Gerard noted that OPS would probably endorse the standard by rulemaking and then revise the protocols. In the meantime, OPS needs to inspect and enforce the existing rule.

Richard Feigel (Committee member) expressed concern with the tenor of an agreement to use a performance-based standard and then backing into prescriptiveness via a standard.

Lois Epstein noted that there has always been a tension between performance-based and enforcement. She suggested that it sounds like we now have a rule that is absolutely unenforceable.

Ms Gerard noted that there will be a public meeting in Atlanta about 4/23. She will read, and have the rest of the staff read, the March 10 letter. OPS will do its best to finalize the protocols in a reasonable fashion. Both Industry and staff are going to have to adjust to the need to have techniques to enforce very flexible language. We intend to be reasonable, but we need to go forward.

Linda Kelly (acting as committee chair) asked if any action was required of the Committee. Ms. Gerard responded that there was not, and that this briefing was intended solely to apprise the Committee of ongoing activities.