

APR 28 09

Mr. David W. Bredin
Director of Operations
ENSTAR Natural Gas Company
P. O. Box 190288
401 East International Airport Road
Anchorage, AK 99519-0288

Re: CPF No. 5-2004-0003

Dear Mr. Bredin:

Enclosed is the Final Order issued in the above-referenced case. It makes findings of violation, withdraws three other allegations of violation, assesses a reduced civil penalty of \$21,500, and specifies actions that need to be taken by ENSTAR to comply with the pipeline safety regulations. The penalty payment terms are set forth in the Final Order. When the civil penalty has been paid and the terms of the compliance order completed, as determined by the Director, Western Region, this enforcement action will be closed. Your receipt of the Final Order constitutes service of that document under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Chris Hoidal, Director, Western Region, PHMSA

BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005 1160 0001 0047 7056]

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

)	
In the Matter of)	
)	
ENSTAR Natural Gas Company,)	CPF No. 5-2004-0003
)	
Respondent.)	
)	

FINAL ORDER

On June 18 - 19, 2003, pursuant to 49 U.S.C. § 60117, representatives of the Research and Special Programs Administration (RSPA)¹, Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the Operator Qualification (OQ) records and procedures of ENSTAR Natural Gas Company (ENSTAR or Respondent) in Anchorage, Alaska. ENSTAR operates natural gas transmission and distribution systems throughout Southern Alaska. As a result of the inspection, the Director, Western Region, OPS (Director), issued to Respondent, by letter dated March 11, 2004, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had violated 49 C.F.R. §§ 192.805(b) and 192.807(b) and proposed assessing a civil penalty of \$24,000 for the alleged violations. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violations.

By letter dated April 7, 2004, ENSTAR requested and subsequently received a 14-day extension for responding to the Notice. Respondent replied to the Notice by letter dated April 20, 2004 (Response). The company supplemented its Response by letter dated May 14, 2004, indicating the allegations it was contesting and requesting a hearing. The hearing was held on May 4, 2005, in Anchorage, Alaska, with an attorney from the Office of Chief Counsel, PHMSA, serving as presiding official. By letter dated May 24, 2005, Respondent provided a summary of the information and supporting documents it had presented at the hearing (Closing). The following order is divided into four sections: Findings of Violation (contested and uncontested); Withdrawal of Allegations; Assessment of Penalty; and Compliance Order.

¹ On November 30, 2004, the Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. No. 108-426, 118 Stat. 2423, created the Pipeline and Hazardous Materials Safety Administration (PHMSA) and transferred the authority of RSPA exercised under chapter 601 of title 49, United States Code, to the Administrator of PHMSA. *See also* 70 Fed. Reg. 8299, 8301-8302 (2005) (delegating authority to the Administrator of PHMSA).

FINDINGS OF VIOLATION

Contested Items

The Notice alleged that Respondent violated 49 C.F.R. Part 192, as follows:

Item 1A: 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:

- (a) Identify covered tasks;
- (b) Ensure through evaluation that individuals performing covered tasks are qualified;...

The Notice alleged that Respondent violated § 192.805(b) by failing to ensure through evaluation that individuals performing covered tasks were qualified. Specifically, the Notice alleged that during a written examination of employees regarding a certain leak investigation procedure, Respondent provided the employees with copies of the exam answer key that showed the correct answers underlined and in bold typeface, rather than with blank answer sheets.

In its Response, ENSTAR admitted that it had inadvertently distributed the exam key during its evaluation of a group of employees on leak investigation procedures but asserted that it had subsequently re-tested them after the inspection, using a new exam, and that each employee had passed. In its Response and Closing, Respondent acknowledged that its “record keeping” was inadequate but argued that its employees were adequately trained and qualified.²

Regardless of how well trained or qualified its employees actually are, the fact remains that ENSTAR failed to properly administer an effective OQ test to its employees. Providing a test that reveals all the answers obviously undermines the purpose of such evaluation and fails to give Respondent an accurate indication of whether its personnel are qualified. After considering all the evidence, I find that Respondent violated 49 C.F.R. § 192.805(b) by failing to ensure through proper evaluation that individuals performing covered tasks were qualified.

Item 2A: The Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), as quoted above, by failing to ensure through evaluation that individuals performing covered tasks were qualified. Specifically, the Notice alleged that Respondent’s OQ examinations did not address abnormal operations conditions (AOCs) in any form.

Under the OQ regulations, operators have an obligation to ensure that individuals performing covered tasks are properly qualified. The terms “qualified” and “abnormal operating condition” are defined in § 192.803, which states:

§ 192.803 Definitions.

Qualified means that an individual has been evaluated and can:

- (a) Perform assigned covered tasks; and

² Closing at 1.

(b) Recognize and react to abnormal operating conditions. . . .

and

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

- (a) Indicate a condition exceeding design limits; or
- (b) Result in a hazard(s) to persons, property, or the environment.

In its Response, at the hearing and in its Closing, Respondent contended that it had adequately trained employees on covered tasks, including AOCs. Respondent admitted, however, that it did not actually use the terms “abnormal operating conditions” or “AOCs” in its OQ evaluation. In its Closing, Respondent provided sample OQ test questions regarding unusual or abnormal operating conditions associated with various covered tasks; the company argued that these questions adequately addressed AOCs. The evidence shows, however, that the test questions were cursory and general in nature and did not adequately evaluate an individual’s actual knowledge and ability to recognize and react to specific AOCs; they failed to assess an individual’s skills in terms of the detailed stepwise actions that one must take in response to AOCs. In the absence of such detail, I find that Respondent’s evaluation process was inadequate to determine whether individuals were properly qualified.

Accordingly, upon considering all of the evidence, I find that Respondent violated § 192.805(b) by failing to ensure through evaluation that individuals performing covered tasks were qualified to recognize and react to AOCs.

Item 2B: The Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), as quoted above, by failing to ensure through evaluation that individuals performing covered tasks were “qualified,” as defined in § 192.803. Specifically, the Notice alleged that the company’s Operations Technicians, Surveyors, Gas Control Dispatchers and Pipeline Supervisors were not properly qualified to recognize and react to AOCs for the covered tasks that Respondent’s records indicated they were qualified to perform. The Notice alleged that:

i) During a field verification inspection, a welder was asked about AOCs that might occur during hot tapping and stoppling tasks. The welder was unfamiliar with the term “abnormal operating condition;” and

ii) During a field verification inspection in the Gas Control Center, OPS inspectors discussed AOCs and the necessary responses and reactions to them with ENSTAR personnel. The inspectors observed that the Gas Control Center personnel, including the supervisor, had only a weak knowledge of AOCs and the appropriate responses to them. For example, the inspectors observed that Control Center personnel did not view temporary pressure excursions above the maximum allowed operating pressure (MAOP) as AOCs. On the contrary, the Control Center personnel considered them to be normal events that occurred periodically, if not frequently, with steps taken to reduce the pressure only as time and circumstances permitted.

The employees’ lack of familiarity with AOCs and how to recognize and react to them indicated

that Respondent had not taken proper steps to ensure through evaluation that the employees were qualified to perform their covered tasks. In its Response, at the hearing, and in its Closing, Respondent contended that while certain individuals questioned by OPS during the inspection may have been unfamiliar with the term “AOC,” they nonetheless knew how to identify and react to AOCs.

The record, however, shows that certain ENSTAR employees were clearly not able to recognize and react to AOCs. During the inspection, Respondent’s Control Center personnel were questioned by the OPS inspection team and could not properly recognize excursions above MAOP as AOCs.³ An excursion above MAOP is a significant AOC that demands immediate attention. The ability to properly recognize and prevent potential pipeline overpressure situations is necessary to protect the safety of Respondent’s pipeline system. Control Center personnel must be able to readily identify excursions from MAOP as AOCs in order to address quickly and properly these potentially dangerous conditions.

Respondent also indicated that after the inspection, it provided additional training to its employees on AOCs, both generally and for specific covered tasks. While PHMSA appreciates Respondent’s efforts to provide such training after the inspection, this does not reduce the company’s obligation to comply with the OQ regulations at all times. Accordingly, upon considering all of the evidence, I find that Respondent violated 49 C.F.R. § 192.805(b) by failing to ensure through evaluation that its personnel were qualified to recognize and react to AOCs.

Uncontested Items

In its Response and at the hearing, Respondent did not contest the allegations in the Notice that it violated 49 C.F.R. Part 192 as follows:

Items 3A, 3B, 3C, and 3D: The Notice alleged that Respondent committed four violations of 49 C.F.R. § 192.807(b), which states:

§ 192.807 Recordkeeping.

Each operator shall maintain records that demonstrate compliance with [Subpart N].

(a)

(b) Records supporting an individual’s current qualification shall be maintained while the individual is performing the covered task. Record of prior qualification and records of individuals no longer performing covered tasks shall be retained for a period of five years.

Items 3A, 3B, 3C, and 3D in the Notice alleged that Respondent did not maintain adequate records demonstrating each individual’s current qualifications while the individual performed covered tasks. Specifically, Items 3(A-D) alleged the following:

Item 3A: Numerous qualification tests were missing the signatures of either the individuals being evaluated or their supervisors, or were missing other pertinent information that should have been recorded on the test form before the instructor/evaluator released the individual from the examination.

³ Notice at 3.

Item 3B: Several individuals had apparently completed skills evaluations for various fusion (welding) covered tasks but their supervisors had failed to sign the evaluations to confirm they were satisfactorily completed.

Item 3C: Respondent provided OPS with a matrix showing the qualification of each individual for particular covered tasks. Respondent indicated that the matrix was used to track and plan for qualified personnel, but the inspector observed that it was incomplete and had numerous errors.

Item 3D: Qualification tests were taken by individuals other than the ones being qualified.

Respondent did not contest these allegations and provided information about the steps it had already taken, and that it proposed to take, to correct the violations.⁴ Accordingly, I find that Respondent violated 49 C.F.R. § 192.807(b), as set forth in Items 3(A-D), by failing to keep adequate records supporting individuals' current qualifications while performing covered tasks.

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

WITHDRAWAL OF ALLEGATIONS

Items 1B, 1C, and 1D: The Notice alleged that Respondent violated 49 C.F.R. § 192.805(b), as quoted above, by failing to qualify certain welders on the performance of three types of covered tasks. The Director has reviewed certain information that ENSTAR provided in its Response, at the hearing, and in its Closing, and has determined that Respondent was in compliance with the regulation at the time of the inspection. Regarding Item 1B, Respondent demonstrated that the particular welder at issue was qualified by examination on February 20, 2003, and was therefore qualified at the time of the inspection. Regarding Item 1C, Respondent explained in its Response that cadwelding was not identified as a covered task at the time of the inspection. Respondent indicated that it added cadwelding as a covered task immediately after the inspection. Regarding Item 1D, Respondent demonstrated that although the welder performing the covered task was not qualified, he was being directed and observed by someone who was qualified, as permitted under § 195.805(c). As a result, I hereby withdraw the allegations of violation set forth in Items 1B, 1C, and 1D.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative 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.

⁴ While the Notice alleged that there were multiple "instances found where a qualification test was completed by an individual other than the one being qualified," ENSTAR demonstrated at the hearing that there was only one such instance.

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: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$24,000 for the alleged violations.

Notice Item 1A proposed a civil penalty of \$5,000 for violation of 49 C.F.R. § 192.805(b), for Respondent's failure to ensure through evaluation that individuals performing covered tasks were qualified. Respondent requested reduction of the proposed penalty on the basis that it had re-tested the individuals who had been improperly evaluated. While OPS appreciates Respondent's efforts to remedy the OQ testing violation, ENSTAR is obliged to comply with the OQ regulations at all times. Subsequent remedial action neither reduces the gravity of a violation nor constitutes good faith in attempting to comply with the regulations.

The OQ evaluation requirements are of particular importance in the pipeline safety regulatory scheme because they indicate whether personnel are qualified to safely perform covered tasks. In this case, when Respondent evaluated its employees by giving them a test which showed the answers already marked, the diagnostic and safety purposes of the regulation were defeated. Respondent has provided no information that would warrant a reduction in the proposed civil penalty for this Item. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$5,000, for violation of 49 C.F.R. § 192.805(b).

Notice Items 1B, 1C, and 1D proposed civil penalties of \$500, \$1,000, and \$1,000, respectively, for violations of 49 C.F.R. § 192.805(b), for Respondent's failure to ensure through evaluation that individuals performing covered tasks were qualified. Specifically, the Notice alleged that ENSTAR failed to qualify certain welders on the performance of three types of covered tasks. In its Response, at the hearing, and in its Closing, ENSTAR provided credible evidence, as discussed above, that it was in compliance with the regulation at the time of the inspection. Accordingly, I withdraw the proposed penalties for Items 1B, 1C, and 1D.

Notice Item 2A proposed a civil penalty of \$5,000 for violation of 49 C.F.R. § 192.805(b), for Respondent's failure to ensure through evaluation that individuals performing covered tasks were qualified to address AOCs. This violation reduced the safety of ENSTAR's pipeline facilities because it increased the risk that AOCs would not be promptly identified and safely addressed by qualified personnel.

In its Closing, Respondent argued that it had covered AOCs in its testing program and that it had provided sample examination questions to OPS that proved the adequacy of its evaluation process. As discussed above, I found that the exam questions were general in nature and did not adequately test an individual's actual knowledge and ability to recognize and react to specific AOCs. As a result, the examination questions themselves do not warrant a reduction in the gravity of the violation or a corresponding reduction in the penalty.

ENSTAR also argued that it took corrective action after the inspection to ensure that its personnel were properly trained to recognize and respond to AOCs. Subsequent remedial measures, while helpful, neither reduce the gravity of a violation nor constitute good faith in attempting to comply with the regulations. Respondent has provided no information that would warrant a reduction in the proposed civil penalty for this Item. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$5,000, for violation of 49 C.F.R. § 192.805(b).

Notice Item 2B proposed a civil penalty of \$1,000 for violation of 49 C.F.R. § 192.805(b), for Respondent's failure to ensure that individuals performing covered tasks were qualified. OPS inspectors reviewed OQ records and then questioned certain individuals in the field to determine their familiarity with AOCs. In its Closing, Respondent requested a reduction in the proposed penalty on the basis that the proposed civil penalty for Item 2B was a "continuation" of the penalty proposed in Item 2A. I disagree. Item 2A involved Respondent's failure to include sufficient coverage of AOCs in its written evaluation program, whereas Item 2B involved Respondent's failure to ensure through evaluation that individual ENSTAR personnel were actually qualified to recognize and react to AOCs.

Respondent also sought reduction in the civil penalty on the basis of its "initial and post audit training." As discussed above, Respondent's OQ evaluation program that was in place at the time of the inspection was inadequate because it did not include an effective process for evaluating individual employees. Subsequent remedial action neither reduces the gravity of the violation nor constitutes good faith in attempting to comply with the regulations. Respondent has provided no information that would warrant a reduction in the proposed civil penalty for this Item. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$1,000 for violation of 49 C.F.R. § 192.805(b).

Notice Item 3 proposed a civil penalty of \$10,500 for four (4) violations of 49 C.F.R. § 192.807(b), for Respondent's failure to maintain adequate records supporting individuals' current qualifications while performing covered tasks. Respondent's failure to properly maintain OQ records makes it difficult, if not impossible, to determine accurately the qualifications of individuals performing covered tasks. This creates the risk that unqualified individuals might perform covered tasks on Respondent's pipeline system.

In its Response and Closing, Respondent requested reduction of the proposed civil penalty for this Item on the basis of ENSTAR's efforts to achieve compliance. Although PHMSA appreciates ENSTAR's efforts to review each individual's qualifications and correct its recordkeeping deficiencies since the date of the inspection, these are steps that any reasonable and prudent operator would take in response to a Notice of Probable Violation. The fact remains that at the time of the inspection, Respondent was out of compliance with the OQ regulations. Respondent has provided no information or arguments that would warrant a reduction in the civil penalty. Therefore, I assess Respondent a civil penalty of \$10,500 for multiple violations of 49 C.F.R. § 192.807(b).

Accordingly, having reviewed the record and considered the assessment criteria for all of the Items listed above, I assess Respondent a reduced total civil penalty of **\$21,500**.

Respondent has presented no information that indicates payment of this penalty would adversely affect its ability to continue in business.

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 269039, Oklahoma City, OK 73125; (405) 954-8893.

Failure to pay the \$21,500 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.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Items 1A, 2A, 3A and 3B in the Notice for violations of 49 C.F.R. §§ 192.805(b) and 192.807(b). Under 49 U.S.C. § 60118(a), each person who engages in the transportation of gas or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. Pursuant to the authority of 49 U.S.C. § 60118(b) and 49 C.F.R. § 190.217, Respondent is ordered to take the following actions to ensure compliance with the pipeline safety regulations applicable to its operations.

Respondent must -

1. With regard to Item 1A, review the examinations given to all personnel for *SOP 2010R, Leak Investigation Procedure*, and determine which individuals received the exam key for the test. Each person who received the key exam shall be re-qualified to perform the task. The necessary documentation of qualifications shall be completed and submitted within sixty (60) days of receipt of the Final Order.
2. With regard to Item 2A, review each covered task designated by ENSTAR and determine the possible AOCs that could be encountered while performing such task. Also, determine any other AOCs that could be encountered on ENSTAR's pipeline facilities during general operations.

Submit to the Director the list of AOCs established and their relationship to specific covered tasks and general operations. Also, prepare and submit your plans and proposed scheduling for ensuring that all personnel performing covered tasks, documented in your database, are presented with the listed AOCs and that they can recognize and react to those AOCs. The list of AOCs and plan shall be submitted within sixty (60) days of your receipt of the Final Order. The presentation of AOCs to personnel performing covered tasks shall be completed and documentation submitted within one hundred twenty (120) days of your receipt of the Final Order.

3. With regard to Items 3A and 3B, review the qualification records of existing employees to determine whether any individuals who perform covered tasks are not qualified. Review all test records to ensure that necessary information, including individual and evaluator signatures, is complete. Develop a list of all individuals whose qualification records are not currently in ENSTAR's possession. Develop plans and proposed scheduling for evaluation and qualification of those individuals in the aforementioned list. Submit the list of individuals within sixty (60) days of your receipt of the Final Order. Complete and submit documentation of the evaluation and qualification of the individuals on the list within one hundred twenty (120) days of your receipt of the Final Order.

Upon completion of the actions required in the paragraphs above and preparation of appropriate records demonstrating compliance with this Compliance Order, submit a statement describing the actions you took to comply, along with supporting records and any other necessary materials to the Director, Western Region, PHMSA, 12300 West Dakota Avenue, Suite 110, Lakewood, CO 80228.

The Director may grant an extension of time to comply with any of the required items upon a written request timely submitted by the Respondent demonstrating good cause for an extension.

Failure to comply with this Order may result in administrative assessment of civil penalties not to exceed \$100,000 for each violation for each day the violation continues or in referral to the Attorney General for appropriate relief in a district court of the United States.

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 contain a brief statement of the issue(s). The terms of the order, including any required corrective action and amendment of procedures, shall remain in full force and effect unless the Associate Administrator, upon request, grants a stay. The terms and conditions of this Final Order shall be effective upon receipt.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued