

March 22, 2023

VIA ELECTRONIC MAIL TO: darrell_ricketson@kindermorgan.com

Mr. Darrell Ricketson
Chief Operating Officer
Kinder Morgan CO2 Company, LLC
1001 Louisiana Street, Suite 1000
Houston, Texas 77002

Re: CPF No. 5-2021-002-NOA

Dear Mr. Ricketson:

Enclosed please find the Decision on Petition for Reconsideration issued in the above-referenced case to Kinder Morgan CO2 Company, LLC. It denies your Petition and the stay I granted during the pendency of the Petition is now terminated. When the terms of the Order Directing Amendment issued in this case are completed, as determined by the Director, Western Region, this enforcement action will be closed. Service of the Decision on Petition for Reconsideration by certified mail is effective upon the date of mailing as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure (Decision on Petition for Reconsideration)

cc: Mr. Dustin Hubbard, Director, Western Region, Office of Pipeline Safety, PHMSA
Mr. Jaime Hernandez, Director, Engineering, Codes and Standards, Kinder Morgan,
jaime_hernandez@kindermorgan.com

Ms. Jessica Toll, Assistant General Counsel, Kinder Morgan,
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Ms. Annie Cook, Esq., Bracewell LLP, Outside Counsel for Kinder Morgan,
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CONFIRMATION OF RECEIPT REQUESTED

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

In the Matter of

Kinder Morgan CO2 Company, LLC,

Respondent.

CPF No. 5-2021-002-NOA

DECISION ON PETITION FOR RECONSIDERATION

In an October 25, 2022 Order Directing Amendment (Order), I found that certain written operating and maintenance procedures of Kinder Morgan CO2 Company, LLC (KM CO2 or Petitioner) were inadequate for the safe operation of a pipeline following an inspection by the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), of a hazardous liquid pipeline facility operated by Petitioner.¹ I found that seven of KM CO2's procedures were inadequate as alleged in the August 16, 2021 Notice of Amendment. I further found that Petitioner had made amendments to its procedures that corrected six of the seven inadequacies, and I specified actions that needed to be taken by KM CO2 to correct the remaining inadequacy in its procedures for maintaining records in accordance with the pipeline safety regulations.

On November 14, 2022, KM CO2 submitted a Petition for Reconsideration of the Order (Petition). The Petition requested that PHMSA reconsider its finding in Item 7 of the Order that Petitioner's procedures for maintaining records indicating which contractor and/or employee performed "covered tasks" under the Operator Qualification (OQ) regulations are inadequate to ensure safe operation of its pipeline system. Because the Petition failed to show that the finding of inadequacy in Item 7 of Order was erroneous, I am denying the Petition.

Background

From September 28, 2020, through October 2, 2020, pursuant to Chapter 601 of title 49, United States Code, OPS inspected the written procedures for welding, certification, inspection, and OQ procedures of KM CO2. As a result of the inspection, the Director, Western Region, OPS (Director), issued to Petitioner, by letter dated August 16, 2021, a Notice of Amendment (Notice). The Notice alleged seven instances of inadequacies in Petitioner's written operating and maintenance procedures and proposed requiring KM CO2 to amend its procedures to comply

¹ *In the matter of Kinder Morgan CO2 Company, LLC*, Order Directing Amendment, CPF No. 5-2021-002-NOA (Oct. 25, 2022) (Order).

with the provisions of 49 C.F.R. Part 195. KM CO2 did not contest six of the seven alleged inadequacies and submitted revised procedures to address these inadequacies.

With respect to the seventh alleged inadequacy involving Petitioner's procedures for maintaining records indicating which contractor and/or employee performed "covered tasks" under the OQ regulations, Petitioner contested the allegation and requested an informal hearing. A hearing was subsequently held via videoconference on March 3, 2022, before a Presiding Official from the Office of Chief Counsel, PHMSA. Following the hearing, on October 25, 2022, I issued an Order that, with respect to Notice Item 7, found that Petitioner's procedures for maintaining records indicating which contractor and/or employee performed "covered tasks" under the OQ regulations are inadequate to ensure safe operation of its pipeline system and specified actions that needed to be taken by Petitioner to correct this inadequacy. On November 14, 2022, KM CO2 filed a Petition requesting that PHMSA reconsider its finding in Item 7 of the Order that Petitioner's procedures for maintaining these records were inadequate.

Standard of Review

Under 49 C.F.R. § 190.243, a respondent in a pipeline compliance proceeding is afforded the right to petition the Associate Administrator for reconsideration of an order. However, that right is not an appeal or an opportunity to seek a de novo review of the record.² It is a venue for presenting the Associate Administrator with information that was not previously available or requesting that any errors in the order be corrected. Requests for consideration of additional facts or arguments must be supported by a statement of reasons as to why those facts or arguments were not presented prior to the issuance of the order. Repetitious information or arguments will not be considered.

Analysis

In determining the adequacy of a pipeline operator's written plans or procedures, the Associate Administrator may consider: relevant available pipeline safety data; whether the plans or procedures are appropriate for the particular type of pipeline transportation or facility and for the location of the facility; the reasonableness of the plans or procedures; and the extent to which the plans or procedures contribute to public safety, in accordance with 49 C.F.R. § 190.206.³

As an initial matter, the Order analyzed the application of § 195.404(c)(1) which states that "the date, location, and *description*" of each repair must be maintained in the operator's records. OPS argued that while the regulations did not expressly define the word "description," the plain meaning of the term is "the who, what, when, where, and why" of the subject being described and that the "who" had particular relevance to this case. OPS argued that since KM CO2's procedures did not include recording the name of the individual who performed the repair, the "who" was missing and therefore Respondent did not comply with the requirement to fully

² 49 C.F.R. § 190.243(a)-(d).

³ 49 C.F.R. § 190.206 (b) and (c). Paragraph (c) provides that an order directing amendment of an operator's plans or procedures under paragraph (a) is in addition to, and may be used in conjunction with, other appropriate enforcement actions prescribed in Part 190.

describe the repair.⁴

At the hearing and again in its Petition, KM CO2 disagreed that the word “description” should be defined in the manner suggested by OPS. Petitioner pointed to a dictionary definition of this term as meaning “kind or character” or “a statement or account giving the characteristics of someone or something.”⁵ KM CO2 believes that its interpretation is more consistent with this dictionary definition and argued that the OPS explanation of how it was applying this term was exceedingly novel and expansive. KM CO2 stated that it believed OPS was attempting to impermissibly expand the requirements of § 195.404(c)(1) without providing fair notice or due process and requested that Item 7 be withdrawn.⁶

In the Order, I agreed with Petitioner that the language of the general recordkeeping requirement in § 195.404(c)(1) does not specify that the word “description” means that all records created and maintained by a pipeline operator must automatically include the “who, what, when, where, and why” of any and all repairs. I found that OPS could have included such precision in § 195.404(c)(1) when it promulgated the regulation but did not do so. Accordingly, the Order did not apply such an automatic requirement to all recordkeeping generally done by Petitioner.⁷

The Order then turned to the specific allegation in the Notice concerning the alleged failure to have procedures for having records that indicate which contractor and/or employee performed pipeline repair tasks which there is no dispute are “covered tasks” under the OQ regulations found in subpart G of Part 195.⁸ In assessing the relevance of the OQ regulations, the Order reviewed the purpose and intent of the OQ regulations. PHMSA promulgated the OQ regulations in 1999 in order to ensure that pipeline operators employ a qualified workforce and reduce the probability and consequences of accidents caused by human error. 64 Fed. Reg. 46853 (Aug. 27, 1999).⁹ Of particular relevance to this case, the OQ regulations include a section on recordkeeping that reads as follows:

§ 195.507 Recordkeeping.

Each operator shall maintain records that demonstrate compliance with this subpart.

(a) Qualification records shall include:

(1) Identification of qualified individual(s);

(2) Identification of the covered tasks the individual is qualified to

⁴ Order, at 5.

⁵ *Description*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/description>.

⁶ Order, at 5.

⁷ Order, at 6.

⁸ The term covered task is defined in § 195.501(b). Covered tasks are identified as such in the operator’s written OQ program and include operations and maintenance tasks performed as a requirement of Part 195 and that affect the operation or integrity of the pipeline.

⁹ The Pipeline Safety Act states: “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.” 49 U.S.C. 60102(a)(3).

perform;

(3) Date(s) of current qualification; and

(4) Qualification method(s).

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

The Order noted that the first item on the list of what must be included in the employee qualification records in § 195.507(a)(1) is “Identification of the qualified individual(s).” The reason for this is obvious, the name and qualifications need to be matched up with a field activity record such as a covered repair task to determine if the qualifications were met. If the field record does not identify the individual, it is not possible to then match it up with the qualifications of that individual to ascertain whether or not the individual was qualified to perform that task.¹⁰

At their core, the primary purpose of the OQ regulations is to ensure that the individual assigned by an operator to perform a covered task was fully trained and qualified to perform that task. If a review of the covered tasks performed on a given day or at a given project location does not indicate which individuals performed one or more of the covered tasks, it is not possible to determine if the individual was qualified to perform such task and not possible to determine whether compliance with the OQ regulations was achieved. Such an outcome would negate the core purpose and effect of the OQ regulations, which is to ensure it can be verified that individuals performing pipeline repair tasks are qualified to perform those tasks. Thus, while § 195.507 is aimed at the qualification records and not the covered repair records directly, it serves to clarify the content needed in the repair records to make the qualification records fulfill their function.

Petitioner argued that rationale in the Order was flawed in that the OQ regulations were promulgated long after the general recordkeeping requirement in § 195.404(c)(1).¹¹ While it is true the OQ regulations were promulgated after the general recordkeeping requirement, it does not mean that they can be ignored. It is well established that regulations, like statutes, must be construed holistically and in a manner that, where possible, gives effect to all of the provisions.¹² Many of the pipeline safety regulations in Part 195 were promulgated after the general recordkeeping regulation in § 195.404(c)(1), but that does not mean the appropriate records to demonstrate compliance with these newer regulations need not be kept. Plainly, § 195.507 clarifies what the content of the qualification and covered task records must include. When the

¹⁰ Order, at 7.

¹¹ Petition, at 4-5.

¹² “As with statutes, regulations must be construed holistically.” See *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 356 n.10 (D.C. Cir. 1993); see also *Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 349 (D.C. Cir. 2019) (“[I]n expounding a statute, we must not be guided by a single sentence ... but look to the provisions of the whole law.”) (quoting *Del. Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 895 F.3d 90, 97 (D.C. Cir. 2018)); see also *Black & Decker Corp. v. Comm’r*, 986 F.2d 60, 65 (4th Cir. 1993) (“We must read the body of regulations ... so as to give effect, if possible, to all of its provisions.”)(internal citation omitted).

Part 195 regulations are read together and in a cohesive manner, it is clear that the records for a pipeline repair that is a covered task under the OQ regulations must include the identification of the individual(s) performing the covered task. Petitioner's argument that the general recordkeeping requirement must be read to the exclusion of later promulgated regulations such as the OQ regulations is entirely inconsistent with the manner in which the Part 195 regulations have been applied for decades.

With regard to Petitioner's argument that it lacked fair notice of which records were required because it could not have anticipated that the OQ recordkeeping requirements had any relevance, the Notice was absolutely clear that the allegation focused on covered repair tasks which is a central aspect of the OQ requirements. Petitioner did present three other documents it maintained that it believed painted an adequate picture of the repairs, but as a factual matter they simply did not identify the individual who performed the covered repair task.¹³ If Petitioner had other records such as OQ records that were not presented at the hearing, they could have been included with its Post-hearing Brief or the Petition but no such additional records were submitted.

Finally, Petitioner argued that maintaining records indicating which contractor and/or employee performed "covered tasks" under the OQ regulations was burdensome and the reference to the OQ recordkeeping requirements in the Order expanded the scope of the alleged failure to comply with the regulations.¹⁴ However, the opposite is true. The reference to the OQ regulations focused the identification requirement from any repair performed on a pipeline to only those covered repair tasks under the OQ regulations. As discussed above, the Order did not apply any sweeping requirement that the "who" be included in all repair recordkeeping generally done by pipeline operators and the reference to the OQ regulations in the Order serves to focus the identification requirement to OQ covered repairs.¹⁵ Moreover, the fact that § 195.507 appears prominently in the Part 195 regulations and OPS is not relying on some form of obscure guidance belies any such fair notice concerns. This is particularly true in light of the fact that the remedy sought by OPS is for Petitioner to simply correct its recordkeeping procedures going forward as opposed to imposing any penalty. The requirement to maintain records that identify the individual who performs an OQ covered repair task is a straightforward recordkeeping requirement and it is unclear why Petitioner would find it confusing or burdensome.

RELIEF DENIED

Based on the information provided in the Petition, a review of the record, and for the reasons stated above, the relief sought in the Petition is denied and the stay is terminated.

This Decision is the final administrative action in this proceeding.

March 22, 2023

¹³ Order, at 8.

¹⁴ Petition, at 3.

¹⁵ There may also be other areas of the regulations where identification of an employee in a record of an operator's activity is necessary to demonstrate compliance, but we need not address that here.

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued