

October 25, 2022

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 Order Directing Amendment issued in the above-referenced case. It makes findings of inadequate procedures, finds that certain amended procedures provided by Kinder Morgan CO2 Company, LLC are adequate, and specifies actions that need to be taken by Kinder Morgan CO2 Company, LLC to address a remaining inadequacy in its written procedures in accordance with the pipeline safety regulations. When the amendment of procedures has been completed, as determined by the Director, Western Region, this enforcement action will be closed. Service of the Order Directing Amendment by e-mail is effective upon the date of transmission and acknowledgement of receipt 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 (Order Directing Amendment)

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, jessica_toll@kindermorgan.com

Ms. Annie Cook, Esq., Bracewell LLP, Counsel Kinder Morgan, annie.cook@bracewell.com

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.

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CPF No. 5-2021-002-NOA

ORDER DIRECTING AMENDMENT

From September 28, 2020 through October 2, 2020, pursuant to Chapter 601 of title 49, United States Code, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), inspected the written procedures for welding, certification, inspection, and Operator Qualification (OQ) procedures of Kinder Morgan CO2 Company, LLC (KM CO2 or Respondent). KM CO2 is the largest transporter of carbon dioxide in North America, transporting approximately 1.2 billion cubic feet per day of CO2 from its source fields in Southwest Colorado to New Mexico and West Texas.¹

As a result of the inspection, the Director, Western Region, OPS (Director), issued to Respondent, by letter dated August 16, 2021, a Notice of Amendment (Notice). The Notice alleged seven instances of inadequacies in Respondent's written operating and maintenance procedures and proposed requiring KM CO2 to amend its procedures to comply with the provisions of 49 C.F.R. Part 195.

KM CO2 responded to the Notice by letter dated September 14, 2021 (Response). 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, Respondent contested the allegation and requested a hearing. A hearing was subsequently held via videoconference on March 3, 2022, before a Presiding Official from the Office of Chief Counsel, PHMSA. At the hearing, Respondent was represented by counsel. Respondent provided additional written material prior to the hearing on February 21, 2022 (Pre-hearing submission) and following the hearing on April 4, 2022 (Post-hearing submission). The Director submitted a post-hearing recommendation on May 4, 2022 (Recommendation).

¹ KM CO2 website, available at <https://www.kindermorgan.com/Operations/CO2/Index> (last accessed Aug. 31, 2022).

STANDARD OF REVIEW

Pursuant to 49 C.F.R. § 190.206(a), a Regional Director begins a proceeding to determine whether an operator's plans or procedures required under parts 192, 193, 195, and 199 are inadequate to assure safe operation of a pipeline facility by issuing a Notice of Amendment. The Notice specifies the alleged inadequacies and the proposed revisions. After considering all material presented by an operator in writing or at the hearing in response to a Notice of Amendment, the Associate Administrator determines whether the plans or procedures are inadequate as alleged and orders the required amendment if they are inadequate or withdraws the Notice if they are not.

In determining the adequacy of an operator's 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. § 190.206.²

FINDINGS OF INADEQUACY

The Notice alleged that Respondent's written operating and maintenance procedures were inadequate under 49 C.F.R. Part 195, as follows:

Item 1: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. §§ 195.202 and 195.204, which state:

§ 195.202 Compliance with specifications or standards.

Each pipeline system must be constructed in accordance with comprehensive written specifications or standards that are consistent with the requirements of this part.

§ 195.204 Inspection - general.

Inspection must be provided to ensure that the installation of pipe or pipeline systems is in accordance with the requirements of this subpart. Any operator personnel used to perform the inspection must be trained and qualified in the phase of construction to be inspected. An operator must not use operator personnel to perform a required inspection if the operator personnel performed the construction task requiring inspection. Nothing in this section prohibits the operator from inspecting construction tasks with operator personnel who are involved in other construction tasks.

The Notice alleged that KM CO2 did not have a procedure specifying what training and qualifications are required by inspectors for the specific phase of construction they are

² 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.

inspecting. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 2: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.208, which states:

§ 195.208 Welding of supports and braces.

Supports or braces may not be welded directly to pipe that will be operated at a pressure of more than 100 p.s.i. (689 kPa) gage.

The Notice alleged that KM CO2 did not have a procedure for welding supports directly to the pipeline or a statement that prohibits supports being welded directly to the pipeline. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 3: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.222(a), which states:

§ 195.222 Welders and welding operators: Qualification of welders and welding operators.

(a) Each welder or welding operator must be qualified in accordance with section 6, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, *see* § 195.3), or section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC), (incorporated by reference, *see* § 195.3) except that a welder or welding operator qualified under an earlier edition than listed in § 195.3, may weld but may not requalify under that earlier edition.

The Notice alleged that KM CO2's procedures for welding qualifications did not clearly identify the process used to qualify each welder. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 4: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.234(a), which states:

§ 195.234 Welds: Nondestructive testing.

(a) A weld may be nondestructively tested by any process that will clearly indicate any defects that may affect the integrity of the weld.

The Notice alleged that KM CO2's procedures for nondestructive testing did not accurately identify the correct acceptance standards to be used in the testing. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 5: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.234(g), which states:

§ 195.234 Welds: Nondestructive testing.

(a) ...

(g) At pipeline tie-ins, including tie-ins of replacement sections, 100 percent of the girth welds must be nondestructively tested.

The Notice alleged that KM CO2's procedures for nondestructive testing did not include requirements for tie-ins in the section of the procedures where they should appear. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 6: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.216, which states:

§ 195.216 Welding: Miter joints.

A miter joint is not permitted (not including deflections up to 3 degrees that are caused by misalignment).

The Notice alleged that KM CO2's procedures for welding did not clearly indicate when the installation of miter joints is restricted or prohibited. In its Response, KM CO2 provided its amendments. The Director, Western Region, reviewed the amended procedure and concluded that the inadequacies had been corrected.

Accordingly, based upon a review of all the evidence, I find that Respondent's procedures were inadequate, as alleged in the Notice, but have subsequently been adequately amended. Therefore, no further action is necessary with regard to this Item.

Item 7: The Notice alleged that Respondent's operations and maintenance procedures were inadequate with regard to 49 C.F.R. § 195.404(c)(1), which states:

§ 195.404 Maps and records.

(a)...

(c) Each operator shall maintain the following records for the periods specified:

(1) The date, location, and description of each repair made to pipe shall be maintained for the useful life of the pipe.

The Notice alleged that KM CO2's did not have procedures for creating and maintaining records indicating which contractor and/or employee performed certain tasks involved in pipeline replacements and sleeve installations following in-line inspections. Specifically, the Notice alleged that KM CO2 did not have procedures for maintaining records indicating which contractor and/or employee performed "covered tasks" under the OQ regulations.

Section 195.404(c)(1) states that "the date, location, and *description*" of each repair must be maintained in the operator's records. At the hearing, 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.³ 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 describe the repair.⁴

KM CO2 strongly disagreed that the word "description" should be defined in the manner suggested by OPS. Respondent 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 Respondent 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.⁶ 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.⁷

Having considered these arguments, I agree with Respondent that the language of the general

³ Recommendation, at 4.

⁴ Recommendation, at 6.

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

⁶ Post-hearing submission, at 2.

⁷ *Id.*

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. OPS could have included such precision in § 195.404(c)(1) when it promulgated the regulation but did not do so. Accordingly, this order does not apply such an automatic requirement to all recordkeeping generally done by Respondent.

Turning to the specific part of the 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 At the hearing, OPS pointed out that the OQ regulations in subpart G include specific requirements that bear on the question of whether an operator’s record of a pipeline repair that involved a covered task under the OQ regulations must include the identification of the individual who performed the covered repair task. OPS argued that the OQ requirements were relevant and that the recordkeeping requirements should be read in a wholistic manner.

Respondent disagreed with OPS’ arguments concerning the relevance of the OQ regulations. Respondent pointed out that the Notice itself did not cite the OQ regulations and noted that the OQ regulations were put in place long after the general recordkeeping requirement in § 195.404(c)(1). Respondent argued that the general recordkeeping requirement in § 195.404(c)(1) should be viewed by itself without regard to the OQ regulations.

In evaluating these arguments, it must first be recognized that recordkeeping is not required merely for the sake of creating documentation. The primary purpose of the recordkeeping required by the regulations is to demonstrate compliance with the regulations and facilitate oversight of personnel. As OPS correctly pointed out:

PHMSA has previously stated that “[m]aintaining complete and accurate records is itself important to safety because, in the absence of complete records, an operator’s managers cannot perform effective oversight of personnel who perform pipeline maintenance.” In re Pacific Operators Offshore, LLC, Final Order, 2010 WL 1323384, at *2 (Mar. 17, 2010) (emphasis added). If personnel are not identified on repair records, then supervisors cannot track their performance to ensure repairs are made safely.⁹

In assessing the relevance of the OQ regulations, it is helpful to understand the purpose and intent of these regulations. PHMSA promulgated the OQ regulations in 1999 in order to ensure a qualified workforce and reduce the probability and consequences of accidents caused by human

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 Recommendation, at 6.

error. 64 Fed. Reg. 46853 (Aug. 27, 1999).¹⁰ 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 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.

Notably, the first thing 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. 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 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.

While Respondent is correct that the OQ regulations were promulgated long after the general recordkeeping requirement in § 195.404(c)(1), that 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.¹¹ Many of the pipeline safety

¹⁰ 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).

¹¹ “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).

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 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. I find that Respondent's argument that the general recordkeeping requirement must be read to the exclusion of later promulgated regulations such as the OQ regulations, was unpersuasive.

With regard to the fair notice concern raised by Respondent, it should be noted that as discussed above I did not apply any sweeping requirement that the "who" be included in all repair recordkeeping generally done by operators and the relevance of the OQ regulations serves to narrow the identification requirement to OQ covered repairs.¹² 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 concerns. While it may have been helpful if OPS had referenced § 195.507 in the Notice itself, the Notice was sufficient to inform Respondent that the records at issue were for OQ covered repairs. This is particularly true in light of the fact that the remedy sought by OPS is for Respondent to simply correct its recordkeeping procedures going forward as opposed to imposing any penalty on Respondent.¹³

Finally, Respondent pointed to three other documents it maintained concerning repairs that it believed painted an adequate picture of the repairs. The first is the Pipeline Inspection/Repair Report (PIR). This fillable form includes information on when and where the repair was completed, what repair activity was performed, and why it was needed. It does not record who performed the repair. The second document Respondent provided is an Employee Sign-in Sheet, a fillable form that records the names of individuals present at a work site and the times they enter and leave the site. It does not record who performed specific repair activities. Finally, Respondent submitted a Job Hazard Analysis Worksheet. This fillable document records the sequence of basic job steps, potential hazards of each job step, and a plan of action to control or eliminate the hazard(s).¹⁴ While Respondent is correct that the regulations do not require any specific type of record or form be used, these documents did not serve to identify the individual who performed a given covered repair task.

Accordingly, having considered all of the evidence, I find that Respondent'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.

The Recommendation proposed requiring Respondent to "amend its procedures, and any

¹² 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.

¹³ This should not be construed to mean that Respondent's fair notice argument would have prevailed if OPS had sought a civil penalty.

¹⁴ Post-hearing submission, at 3-6.

corresponding forms, to document names of individuals performing repair activities.”¹⁵ As stated above, however, I did not find that the general recordkeeping regulations automatically required that the “who” be documented for any and all repair activities, only for those that triggered determining compliance with applicable OQ regulations which is reflected in the modified ordering clause below.

Pursuant to 49 U.S.C. § 60108(a) and 49 C.F.R. § 190.206, Kinder Morgan CO2 is ordered to make the following amendments to its procedures:

1. Amend the procedures for maintaining records to ensure that each individual who performs a covered task under the OQ regulations is identifiable for the purpose of determining compliance with the OQ regulations.
2. Submit the amended procedures to the Director, Western Region, OPS within 30 days following receipt of this Order.
3. The Regional Director may extend the period for compliance with this Order upon a written request timely submitted by the Respondent and demonstrating good cause for an extension.

Failure to comply with this Order may result in administrative assessment of civil penalties not to exceed \$200,000, as adjusted for inflation (49 C.F.R. § 190.223), 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. § 190.243, Respondent may submit a Petition for Reconsideration of this Order to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. The written petition must be received no later than 20 days after receipt of the Order by Respondent. Any petition submitted must contain a statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243.

The terms of the order, including corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. The terms and conditions of this Order are effective upon service in accordance with 49 C.F.R. § 190.5.

October 25, 2022

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued

¹⁵ Recommendation at 1.