

August 19, 1996. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Ordering Clauses

11. This Notice of Inquiry is issued pursuant to authority contained in Sections 4(i), 4(j), 403 and 628(g) of the Communications Act of 1934, as amended.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96-16817 Filed 7-1-96; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 192 and 195

[Docket No. PS-94; Notice 5]

RIN 2137-AB38

Qualification of Pipeline Personnel

AGENCY: Research and Special Programs Administration (RSPA); Department of Transportation (DOT).

ACTION: Notice of Intent (NOI) to Form a Negotiated Rulemaking Committee.

SUMMARY: RSPA proposes to establish a Negotiated Rulemaking Committee under the Negotiated Rulemaking Act of 1990 and the Federal Advisory Committee Act of 1992 to develop a recommended rule on the qualification of personnel performing certain safety-related functions for pipelines subject to 49 CFR Parts 192 and 195. The Committee will adopt its recommendations through a negotiation process. The Committee will be composed of persons who represent the interests affected by the rule, such as gas pipeline operators, hazardous liquid and carbon dioxide pipeline operators,

members of state and federal governments, and persons from the public sector. The purpose of this NOI is to invite interested parties to submit comments on the issues to be discussed and the interests and organizations to be considered for representation on the Committee.

DATES: RSPA must receive written comments and requests for representation or membership by August 1, 1996.

ADDRESSES: Written comments should be submitted in duplicate to the RSPA Dockets Office, attention Verdell Simpkins, Room 8421, Nassif building, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Albert C. Garnett, (202) 366-2036, or Eben M. Wyman, (202) 366-0918, regarding the subject matter of this NOI; or the Dockets Unit, (202) 366-4453, for copies of this NOI or other material in the docket.

SUPPLEMENTARY INFORMATION:

I. Background

Notice of Proposed Rulemaking (NPRM)

An NPRM titled "Qualification of Pipeline Personnel" was published on August 3, 1994 (Docket No. PS-94; 59 FR 39506). The NPRM proposed qualification standards for personnel who perform, or supervise persons performing, regulated operation, maintenance, and emergency-response functions. The purpose of the NPRM was to improve pipeline safety by requiring operators to assure the competency of affected personnel through training, testing, and periodic refresher training.

Written comments to the NPRM.

RSPA received 131 comments to the docket that expressed a wide variety of interests and concerns. Commenters stated that the NPRM was too prescriptive and that the many references to training requirements should be modified to place the focus of the NPRM on actual qualification, not the methods of achieving it. Most commenters asserted that the NPRM should have proposed a more general approach of broad requirements for persons performing "safety related" functions. Following review of the extensive comments to the NPRM, RSPA decided that a regulatory process other than traditional rulemaking would better address the issues surrounding operator qualifications.

Advisory Committees

The Technical Pipeline Safety Standards Committee (TPSSC) and the

Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC) were established by statute to evaluate proposed pipeline safety regulations. The committees are required to report on the technical feasibility, reasonableness, and practicability of the proposals.

Following consideration of the issues of this proposed rulemaking, both the TPSSC and THLPSSC expressed their disapproval of the NPRM. Instead the Committees presented several motions calling for amendments to the proposal. Those motions generally reflected written comments submitted to the Qualification of Pipeline Personnel proposed rulemaking.

Petition for Withdrawal

On December 1, 1995, the American Gas Association (AGA), the American Public Gas Association (APGA), and the Southern Gas Association (SGA) filed a petition for withdrawal of the August 3, 1994, NPRM and offered an alternative proposal.

Notice of withdrawal of NPRM

Along with this NOI, RSPA is publishing elsewhere in this issue of the Federal Register a document withdrawing the NPRM in Docket No. PS-94. RSPA briefly indicated the negotiated rulemaking process was an alternative method of rulemaking for use in this regulatory action. RSPA contends that a negotiated rulemaking process will provide the appropriate level of communication among interested parties that is needed to resolve the controversies surrounding the qualification issues.

II. Regulatory Negotiation

It can be difficult for an agency to craft effective regulatory solutions to certain problems. In the typical rulemaking process, the participants often develop adversarial relationships that prevent effective communication and creative solutions. The exchange of ideas that may lead to solutions acceptable to all interested groups often does not occur in the traditional notice and comment system. As the Administrative Conference of the United States (ACUS) noted in its Recommendation 82-4:

Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute.

47 FR 30708; June 18, 1982.

The thrust of this recommendation is that representatives of affected interests should be assembled to discuss the issue or hazard and all potential solutions, reach consensus, and prepare a proposed rule for consideration by the agency. After public comment on any proposal issued by the agency, the group would reconvene to review the comments and make recommendations for a final rule. This inclusive process is intended to make the rule more acceptable to all affected interests and prevent the need for petitions for reconsideration and litigation that often follow promulgation of a final rule.

The movement toward negotiated rulemaking gained impetus with enactment of the Negotiated Rulemaking Act of 1990, 5 U.S.C. 561 *et seq.* More recently, President Clinton issued Executive Order 12866 (EO) (58 FR 51735, October 4, 1993), which states the need to reform the current regulatory process into one that is effective, consistent, and understandable. The objectives of the EO are:

To reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.

Id. Section 6(a) of the EO charges government agencies with providing the public meaningful participation in the regulatory process:

In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation . . . Each agency is also directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Id. at 51740.

Negotiated rulemakings have been used successfully by the Department of Transportation, including the Federal Aviation Administration, the United States Coast Guard, the Federal Highway Administration, and the National Highway Traffic Safety Administration. In addition, the Environmental Protection Agency, and the Occupational Safety and Health Administration have successfully used the process.

RSPA now intends to use this process for the first time, and does so with enthusiasm and high expectations. RSPA welcomes the opportunity to work with those who will be affected directly by a personnel qualification rule, and is confident that the agency and its partners will benefit from the

process by creating an effective and reasonable regulation.

Section 563(a) of the Negotiated Rulemaking Act and recommends that an agency consider whether:

- (1) There is a need for the rule;
- (2) There is a limited number of identifiable interests;
- (3) These interests can be adequately represented by persons willing to negotiate in good faith to reach a consensus;
- (4) There is a reasonable likelihood that the committee will reach consensus within a fixed period of time;
- (5) The negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking;
- (6) The agency has adequate resources and is willing to commit such resources to the process; and
- (7) The agency is committed to use the result of the negotiation in formulating a proposed rule if at all possible.

RSPA believes that these criteria have been met with respect to pipeline safety issues.

RSPA would charter a negotiated rulemaking committee (Committee) under the Federal Advisory Committee Act (FACA), 5 USCS App. 1, and would be represented on the Committee to take an active part in the negotiations. However, pursuant to section 566(c) of the Negotiated Rulemaking Act, the person(s) designated to represent RSPA would not facilitate or otherwise chair the proceedings. RSPA is committed to this process and is quite optimistic that it will result in the issuance of an NPRM and final rule that will be acceptable to the members of the Committee. Because of the mandate to issue a rule on this subject, RSPA is prepared to go forward with an NPRM that is not the product of the negotiations in the unlikely event the negotiation fails.

III. Procedures and Guidelines

The following proposed procedures and guidelines would apply to this process, subject to appropriate changes made as a result of comments on this Notice or as determined to be necessary during the negotiating process.

(A) *Facilitator:* RSPA is considering persons to serve as facilitator for the negotiating group. This individual will chair the negotiations, may offer alternative suggestions toward the desired consensus, will help participants define and reach consensus, and will determine the feasibility of negotiating particular issues. The facilitator may ask members to submit additional information or to reconsider their position. RSPA has contacted mediation organizations for candidates.

(B) *Feasibility:* RSPA has examined the issues and interests involved to

determine whether it is possible to reach agreement on: (a) individuals to represent those interests; (b) the preliminary scope of the issues to be addressed; and (c) a schedule for developing a notice of proposed rulemaking. On the basis of the history of this issue and our preliminary inquiry, RSPA believes that regulatory negotiation can be successful in developing a workable proposal for a notice of proposed rulemaking and a final rule, and that the potential participants listed below would adequately represent the affected interests.

(C) *Requests for Representation:* The following have been tentatively identified as representing interests that are likely to be significantly affected by the rule:

- (1) Small pipeline operators;
 - (2) Large pipeline operators;
 - (3) State pipeline safety representatives;
 - (4) Representatives of other interested Federal agencies;
 - (5) Public environmental organizations;
 - (6) Other interested public organizations;
 - (7) Representatives of labor unions; and
 - (8) RSPA's Office of Pipeline Safety.
- RSPA proposes that persons or organizations selected by the various interests be named to the Committee. The following organizations have been tentatively identified as organizations that would serve on the committee:
- (1) American Gas Association;
 - (2) American Petroleum Institute;
 - (3) Interstate Natural Gas Association of America;
 - (4) American Public Gas Association;
 - (5) National Association of Pipeline Safety Representatives;
 - (6) National Association of State Fire Marshals;
 - (7) Midwest Gas Association (a training organization);
 - (8) Environmental Defense Fund; and
 - (9) RSPA's Office of Pipeline Safety.

Each organization would send a representative to serve on the committee. RSPA will consider applications for representation from any interests not appropriately represented by those named in this list. Please identify such interests if they exist.

Each application for membership or nomination to the Committee should include: (i) the name of the applicant or nominee and the interests such person would represent; (ii) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent; (iii) a written commitment that the applicant

or nominee would participate in good faith; and (iv) the reasons representatives identified in the Notice do not accurately portray the interests affected by the rule. If an additional person or interest requests membership or representation on the Committee, RSPA shall determine (i) whether that interest will be substantially affected by the rule, (ii) if such interest would be adequately represented by an individual already on the Committee, and (iii) whether the requester should be added to the group or whether interests can be consolidated to provide adequate representation. Please note that each individual or organization affected by a final rule need not have its own representative on the Committee. Rather, each interest must be adequately represented, and the Committee should be fairly balanced. Individuals who are not part of the Committee may attend sessions and confer with or provide their views to Committee members.

(D) *Good Faith:* Participants must be committed to negotiate in good faith. Therefore, it is important that senior individuals within each interest group be designated to represent that interest. No individual will be required to "bind" the interests he or she represents, but the individual should be at a high enough level to represent the interest with confidence. For this process to be successful, the interests represented should be willing to accept the final Committee product.

(E) *Notice of Intent to Establish Advisory Committee and Request for Comment:* In accordance with the requirements of FACA, an agency of the federal government cannot establish or utilize a group of people in the interest of obtaining consensus advice or recommendations unless that group is chartered as a Federal advisory committee. It is the purpose of this NOI to indicate our intent to create a Federal advisory committee, to identify the issues involved in the rulemaking, to identify the interests affected by the rulemaking, to identify potential participants who will adequately represent those interests, and to ask for comment on the use of regulatory negotiation and on the identification of the issues, interests, procedures, and participants. The first meeting is tentatively scheduled for August 28, 1996.

(F) *Final Notification:* After evaluating comments received as a result of this NOI, RSPA will issue a final document announcing the establishment of the Federal advisory committee, unless it determines that such action is inappropriate in light of comments received, and the composition of the

Committee. After the Committee is chartered the negotiations would begin.

(G) *Administrative Support and Meetings:* Staff support would be provided by RSPA and meetings would take place in Washington, D. C., unless agreed otherwise by the Committee.

(H) *Tentative Schedule:* If the Committee is established and selected, RSPA will publish a schedule for the first meeting in the Federal Register. The first meeting will focus on procedural matters, including dates, times, and locations of future meetings. Notice of subsequent meetings would also be published in the Federal Register.

RSPA expects the Committee to reach consensus and prepare a report recommending a proposed rule within eight months of the first meeting. However, if unforeseen delays occur, the Administrator may agree to an extension of time if the consensus of the Committee is that additional time will result in agreement. The process may end earlier if the facilitator so recommends.

(I) *Committee Procedures:* Under the general guidance of the facilitator, and subject to legal requirements, the Committee would establish detailed procedures for the meetings.

(J) *Record of Meetings:* In accordance with FACA's requirements, RSPA would keep a record of all Committee meetings. This record would be placed in the public docket for this rulemaking. Meetings of the Committee would generally be open to the public.

(K) *Consensus:* The goal of the negotiating process is consensus. RSPA proposes that the Committee would develop its own definition of consensus, which may include unanimity, a simple majority, or substantial agreement such that no member will disapprove the final recommendation of the Committee. However, if the Committee does not develop its own definition, consensus shall be unanimous concurrence.

(L) *Notice of Proposed Rulemaking:* The Committee's first objective is to prepare a report containing a notice of proposed rulemaking, preamble, and economic evaluation. If consensus is not obtained on some issues, the report should identify the areas of agreement and disagreement, and explanations for any disagreement. It is expected that participants will address cost/benefit, paperwork reduction, and regulatory flexibility requirements. RSPA would prepare an economic assessment if appropriate.

RSPA would accept the Committee proposal unless it is inconsistent with statutory authority of the agency or other legal requirements or does not, in

the agency's view, adequately address the subject matter. In that event, the preamble to the NPRM would explain the reasons for its decision.

(M) *Key Issues for Negotiation:* RSPA has reviewed written comments, petitions, and pipeline operating practices, and has engaged in extensive dialogue on the issue of qualification of pipeline personnel. Based on this information and rulemaking requirements, RSPA has tentatively identified major issues that should be considered in this negotiated rulemaking. Issues related to operator qualification not specifically listed in this Notice may be addressed as they arise in the course of the negotiation. Comments are invited concerning the appropriateness of these issues for consideration and whether other issues should be added:

(1) *Covered functions.* What is the definition of a covered function? What areas of an operator's pipeline system be covered by this rule? Should these be the specific duties named in the NPRM, or should a more general approach be implemented to describe what functions will be covered?

(2) *Level of proficiency.* What level of skill must be obtained to achieve qualification? How will this be measured in evaluating an employee's qualification?

(3) *Supervisory persons.* What is the definition of a supervisory position? What criteria must be maintained to allow one to "supervise" unqualified personnel performing covered functions?

(5) *Personnel to be qualified.* Which employees should be subject to this rule? How should contractor personnel qualification be addressed? How will small gas operators and master meter systems be required to comply?

(6) *Instructors.* Who will be responsible for qualifying unqualified personnel? Who will designate these individuals? What skill level will be appropriate for one to serve as an instructor?

(7) *Employee evaluation.* What criteria will be observed in evaluating qualification? Who will conduct this evaluation? How will previous training, testing, work experience, and other methods of qualification be addressed?

(8) *Elements of qualification.* What methods would be appropriate in order to make one qualified? Should these methods be specifically addressed, or should the operator have discretion in choosing how their personnel may become qualified?

(9) *Maintaining qualification.* How can operators ensure that employees performing covered functions maintain

the proper amount of skill to be considered qualified? Are "refresher" courses needed?

(10) *Competency reviews.* In the event an incident or accident is attributed to error, how will the operator reevaluate and monitor an individual's qualification? How long should such a competency review take?

(11) *Recordkeeping.* How will qualification records be maintained? What sorts of qualification schedules (i.e.—training/testing results) must be maintained?

(12) *Compliance dates.* What time frame would be required for implementation of an operator's qualification program? When would personnel evaluation take place? Should time frames be consistent between large and small pipeline operators?

IV. Public Participation

RSPA invites comments on all issues, procedures, guidelines, interests, and suggested participants embodied in this NOI.

Issued in Washington, D.C. June 26, 1996.
Kelley S. Coyner,
Deputy Administrator.
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49 CFR Parts 192 and 195

[Docket No. PS-94; Notice 4]

RIN 2137-AB38

Qualification of Pipeline Personnel

AGENCY: Research and Special Programs Administration (RSPA); Department of Transportation (DOT).

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document is to inform the public that RSPA is withdrawing the Notice of Proposed Rulemaking (NPRM) in Docket No. PS-94 titled "Qualification of Pipeline Personnel." RSPA is required by Congressional mandate to establish requirements on the qualification of personnel conducting certain tasks on a pipeline facility. The NPRM has been subject to considerable scrutiny from many commenters. However, RSPA believes that an alternative method of rulemaking can provide a better forum to establish communications between the interested parties and that a consensus may be achieved on a new rule on the qualification of pipeline personnel. RSPA is publishing elsewhere in this issue of the Federal Register a document titled "Notice of Intent to Form a Negotiated Rulemaking

Committee" that will provide a complete description of the regulatory alternative.

FOR FURTHER INFORMATION CONTACT: Albert C. Garnett, (202) 366-2036, or Eben M. Wyman, (202) 366-0918, regarding the subject matter of this document; or the Dockets Unit, (202) 366-4453, for copies of this document or other material in the docket.

SUPPLEMENTARY INFORMATION: A NPRM titled "Qualification of Pipeline Personnel" was published on August 3, 1994 (Docket No. PS-94, Notice 2; 59 FR 39506). The NPRM proposed qualification standards for pipeline personnel who perform, or supervise persons performing, regulated operation, maintenance, and emergency-response functions. The intended effect of the NPRM was to improve pipeline safety by requiring operators to assure the competency of affected personnel through training, testing, and periodic refresher training. Following extensive interaction with the interested parties, this Notice withdraws that proposal from Docket No. PS-94. In light of the many concerns expressed by these parties, RSPA believes that an alternative to traditional rulemaking would be affective to reach consensus on an personnel qualifications rule. RSPA is planning to form a committee that will represent all affected parties to negotiate the many aspects of this issue, and to achieve consensus on a new NPRM to be published in the Federal Register. The following discussion of the written comments to the previous NPRM should be helpful in understanding the reasons for this withdrawal.

Discussion of Comments to NPRM and Development of Rules

RSPA received 131 comments to Docket No. PS-94, which expressed a wide variety of interests and concerns. Comments were received from 111 pipeline companies, 8 pipeline-related associations, 4 state and federal agencies, and 8 other interested parties. The following provides a summary of the commenters' issues.

Definitions

Comments were received on certain definitions in the NPRM. The definitions of "qualified administratively" and "supervisory persons" needed clarification, according to many commenters. Commenters alleged that the "qualified administratively" provisions would be redundant, because qualification in any manner would be sufficient, as long as the person was found proficient in

performing a covered job function or supervised by a qualified person. Also, commenters noted that the word "supervisor" might be inappropriate because the term can be indicative of a number of positions, including those located away from a job site. These commenters thought the term "supervisor" should be deleted and alternate terms, such as "qualified employee," "lead person," or another term should be used to describe someone who directly oversees personnel performing job functions covered in the NPRM.

Personnel to be Qualified

A number of commenters expressed concern about those who would be subject to this rule. The role of a persons' educational background and work experience in determining qualification was also addressed. Concern was also expressed over whether small gas systems operated by mobile home parks should be subject to a qualification rule. Also, the question of how the proposed rule would cover contractor personnel was the subject of many comments. Most commenters argued that contractors should be held accountable for their own qualification and recordkeeping, because it would be overly burdensome to require pipeline operators to maintain qualification records for contractor personnel. RSPA never proposed to require operators to be responsible for qualifying contractor personnel, only to ensure that they are in fact qualified. This issue is a prime example of why RSPA believes an alternative rulemaking method would provide a better channel of communication to resolve the controversy surrounding this regulatory initiative.

Evaluation and Scheduling

Another major issue was the evaluation of personnel and how past experience, education, and other factors would be considered in assessing qualification. Many comments stressed that the operator or the operator's designee would know the capabilities of their personnel and therefore be in the best position to evaluate and to ensure their qualification. RSPA believes the NPRM's intent was not far from this view, and that, with open communication, consensus can be reached among interested parties.

Qualification Training

The NPRM listed training that would be required if an employee was found to be not qualified. This issue generated many written comments. The commenters alleged that the language in