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U.S. Department of Labor
Occupational Safety and Health Administration
OSHA Docket Office, Room N-2625
200 Constitution Avenue NW.
Washington, DC 20210

Submitted via <http://www.regulations.gov>

Re: Docket ID No. OSHA-2013-0020, Process Safety Management Standard, Request for Comments. 87 FR 57520, September 20, 2022.

Deputy Assistant Secretary of Labor James Frederick,

The U.S. Occupational Safety and Health Administration (OSHA) is soliciting comments from stakeholders pertaining to the review of possible changes OSHA is considering to the scope of current Process Safety Management (PSM) program regulations.¹

Kansas Agribusiness Retailers Association (KARA) is a voluntary trade association whose membership includes over 700 agribusiness firms that are primarily retail facilities supplying fertilizers, crop protection chemicals, seed, and bulk fuel to Kansas farmers. KARA serves as a representative voice for the agribusiness industry to its members, the public, and government, and is committed to business viability for the plant nutrient and crop protection industry.

KARA members engage in the handling, storage, and transportation of bulk fuel and fertilizer products. KARA members remain fully committed to chemical safety and security within our industry. Anhydrous ammonia fertilizer (NH₃) is subject to the OSHA PSM standard when present at a facility above designated threshold quantities. As such, proposed revisions to the PSM standard are of interest to our members. KARA submits this comment on behalf of its member companies.

PSM is a comprehensive set of performance-based standards that were established by OSHA in response to accidents and chemical releases at very large chemical manufacturing and processing facilities. The standard requires employers to implement safety programs that identify, evaluate, and control highly hazardous chemicals.

On August 1, 2013, President Obama's Executive Order 13650, *Improving Chemical Facility Safety and Security*, tasked OSHA and other agencies (including the Environmental Protection Agency) with modernizing policies, regulations, and standards to enhance safety and security in chemical facilities, including coordinating with stakeholders to develop proposals to improve the handling and sale of ammonium nitrate.²

¹ 29 CFR 1910.119

² See <https://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

The Order also instructed the agencies to seek “opportunities to lessen the reporting burden on regulated facilities,” “minimize the duplicative collection of information” from such facilities and develop a “unified Federal approach for identifying and responding to risks in chemical facilities.”³

OSHA is now reengaging stakeholders to provide comments on a list of proposed modernization topics to PSM. It is our understanding that such changes may include changes to the scope of the long-standing retail facilities exemption, an expansion of the list of covered chemicals (to potentially add ammonium nitrate), and other proposals. Please find our comments below.

Agricultural Retail Facilities Currently Regulated by OSHA

The retail fertilizer industry is highly regulated by many state and federal authorities, often with overlapping jurisdictions. Safety in all segments of our members’ operations is of paramount importance, and a considerable amount of time and effort is devoted to training and safety program implementation.

KARA supports reasonable regulatory oversight, as necessary to ensure worker safety, but opposes regulations that exceed what is reasonable and create an unnecessary regulatory burden. Regulations must be risk-based, practical, and economically feasible. In addition, where the statutory and/or regulatory framework allows, implementing agencies should employ flexibility to meet the regulatory goals while reducing the regulatory burden on industry.

OSHA currently regulates retailers of anhydrous ammonia (NH₃) and ammonium nitrate (AN) through various OSHA standards, including 29 CFR 1910.109(i) (storage of ammonium nitrate), 29 CFR 1910.111 (storage and handling of anhydrous ammonia), 29 CFR 1910.120 (hazardous waste operations and emergency response), and 29 CFR 1910.1200 (hazard communication).⁴ These standards are valuable agency tools which ensure the safety of workers in these industries. Anhydrous ammonia is specifically, and directly, regulated via OSHA standard 1910.111.⁵

OSHA Regional Emphasis Program

On September 25, 2018, OSHA announced a Regional Emphasis Program (REP) for Regions VI and VII. The REP targets commercial facilities that handle fertilizer-grade ammonium nitrate (FGAN) and agricultural anhydrous ammonia (NH₃).

Following the announcement of the REP, members of the Kansas agribusiness industry met with OSHA Region 7 to gain more information about the basis for the emphasis program on their industry. OSHA referred industry to the 2013 incident at the agribusiness retail facility in West, Texas and the resulting *Presidential Executive Order 13650*.

³ See <https://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

⁴ See Memorandum to Regional Administrators – Process Safety Management Retail Exemption Enforcement Policy | Occupational Safety and Health Administration (osha.gov)

⁵ *Id.*

At the West, TX facility, however the product that caught fire and ignited was FGAN. While multiple NH₃ storage tanks were present at the facility, agricultural NH₃ was not a cause of the explosion, and after the explosion the agricultural NH₃ storage tanks were still sitting, unmoved, in their concrete saddles. OSHA provided no information as to why agricultural NH₃ facilities were included in this REP.

Industry provided OSHA with agricultural NH₃ safety/incident statistics for Region VII which demonstrated that although agricultural NH₃ facilities make up 66% of all NH₃ facilities in the Region, agricultural facilities had been responsible for only 16% of the NH₃-related injuries over the previous 5 years, demonstrating a good safety record of agricultural NH₃ facilities.

Industry also requested a list of the regulations under which the inspections would be conducted under the REP. OSHA indicated that the General Duty Clause allows inspectors to cite violations of industry standards and other RAGAGEP, but that inspectors look for “worker hazards” and do not conduct inspections based on a set of codes or standards.

The regulated industry views this REP as both overly broad and unnecessary, as there is no statistical justification for the REP to be applied to agricultural NH₃ retail facilities. The REP in Region VII is scheduled to expire on September 30, 2024. We believe that expiration of this REP is appropriate due to the extremely low incident rate involving the storage and handling per ton of fertilizer products moved through the Region.

In addition, in many instances, the agricultural retailers are a part of businesses that handle and store grain. OSHA’s regional grain emphasis and powered industrial truck emphasis programs would provide OSHA access to those agribusiness facilities. The existence of this additional emphasis program on agricultural retailers is redundant and unnecessary.

We include information concerning the REP within this comment to reiterate to OSHA that retailers of agricultural NH₃, and FGAN, are already heavily regulated by OSHA, even outside of the PSM standard.

OSHA Retail Facility Exemption

OSHA's PSM standard - which contains requirements for preventing or minimizing toxic, fire, and explosion hazards associated with catastrophic releases of toxic, reactive, flammable, or explosive chemicals - does not apply to "retail facilities."⁶

In July of 2015, OSHA issued an enforcement directive, via a memo, which revoked a 23-year-old definition of a “retail facility” under the PSM standard. OSHA’s historic - and current - retail facility definition exempted any establishment from PSM which “derived more than 50 percent of its income from direct sales of highly hazardous chemicals to the end user.” In the case of anhydrous ammonia and ammonium nitrate, the end user is the American farmer.

⁶ See 29 CFR 1910.119(a)(2)(i).

OSHA's proposed policy would have reinterpreted the "retail facility" exemption to limit the exemption to only facilities engaged in retail trade as defined by the current and any future updates to sectors 44 and 45 of the NAICS Manual. This action would have greatly increased the number of agricultural retailers subject to PSM.

On September 23, 2016, the United States Court of Appeals for the District of Columbia Circuit invalidated the OSHA memo. In light of the D.C. Circuit Court's decision, OSHA released the following PSM enforcement policy guidance:

"OSHA will not issue citations under the PSM standard for employers in the North American Industry Classification System (NAICS) codes 424510 - Grain and Field Bean Merchant Wholesalers; 424590 - Other Farm Product Raw Material Merchant Wholesalers; and, 424910-Farm Supplies Merchant Wholesalers."⁷

Concerning the retail exemption for PSM coverage, the preamble to the PSM standard⁸ states:

With respect to the exclusion of retail facilities ... OSHA believed that such facilities did not present the same degree of hazard to employees as other workplaces covered by the proposal. Therefore, OSHA should not require a comprehensive process safety management system in addition to other applicable OSHA standards addressing flammable and combustible liquids, compressed gases, hazard communication, etc., for retail facilities...

Certainly highly hazardous chemicals may be present in [retail] ... operations. However, OSHA believes that chemicals in retail facilities are in small volume packages, containers and allotments, making a large release unlikely. OSHA received few comments disagreeing with the exemption of retail facilities (e.g., gasoline stations). OSHA has retained the exemption in the final rule.⁹

If OSHA were to change the retail exemption in a way that would require agricultural retailers to comply with the PSM standard, such a change would have the absurd effect of decreasing public safety. Many agricultural retailers would close underperforming locations as the increased costs and burden of compliance would outweigh the benefit of continuing to do business at those locations. When this happens, NH₃ bulk storage tanks are often sold to large farming operations that are exempt from OSHA regulations.

This change would also decrease farmers' access to nitrogen fertilizer. With fewer retail locations, farmers would be forced to transport NH₃ nurse tanks over greater distances on public roads. This seems an illogical consequence to a regulatory change intended to increase chemical process safety.

⁷ See Memorandum to Regional Administrators – Process Safety Management Retail Exemption Enforcement Policy / Occupational Safety and Health Administration (osha.gov)

⁸ See 57 Fed. Reg. 6356, 6369 (Feb. 24, 1992).

⁹ See Memorandum to Regional Administrators – Process Safety Management Retail Exemption Enforcement Policy / Occupational Safety and Health Administration (osha.gov).

KARA agrees with OSHA's long-recognized interpretation of the retail facility exemption to the PSM standard, and to OSHA's well-reasoned logic behind exempting agricultural retail operations from the standard. KARA opposes amending the retail facility exemption in any way that would weaken the exemption for agricultural retailers.

Third-Party Compliance Audits

OSHA proposes to amend the PSM standard to require compliance audits by third parties. There is a recognized lack of qualified auditors for such compliance audits. The expertise on site at the facility is nearly always going to be more qualified to conduct a compliance audit at that facility than a third party.

If OSHA deems a compliance inspection necessary, OSHA should conduct that inspection directly. In addition, requiring such audits to be conducted after two or more reportable incidents within five years may have the unintended consequences of under-reporting incidents.

Expansion of Chemical List in Appendix A – Addition of Fertilizer Grade Ammonium Nitrate

OSHA proposes to update and expand the list of highly hazardous chemicals in Appendix A. As there is no process involved in the storage or use of ammonium nitrate fertilizer, PSM would not be the appropriate regulatory standard for this product.

In addition, as mentioned above, ammonium nitrate fertilizer is already highly regulated under multiple OSHA regulations. For these reasons, KARA would strongly oppose adding fertilizer grade ammonium nitrate to the highly hazardous chemicals list in Appendix A.

Consistency with EPA Risk Management Program (RMP)

The Environmental Protection Agency (EPA) has a separate, pending proposal addressing Risk Management Program (RMP) requirements. In the Clean Air Act Amendments of 1990, Congress required OSHA to adopt the PSM standard to protect workers and required EPA to protect the community and environment by issuing the RMP rule.

The PSM and RMP rules were written to complement each other in accomplishing these Congressional goals. The existence of differences between these standards creates unnecessary confusion for the regulated community and would frustrate compliance by the industry.

For this reason, we would encourage OSHA to ensure that any changes to PSM continue to remain consistent with EPA's RMP and avoid the creation of any conflicts. Therefore, KARA would ask OSHA to not modify the PSM standard until EPA has finalized its changes to RMP.

Safer Technology and Alternatives Analysis (STAA)

OSHA proposes to expand paragraph (e) by requiring safer technology and alternatives analysis (STAA). STAA is not a viable option for many industries, to include the agricultural retail industry. For instance, acid and anhydrous ammonia are required to make 10-34-0 fertilizer. Use of any other products are not possible to create this fertilizer product.

These fertilizer products are widely used throughout modern agriculture and are necessary for the production of crops for food, feed, fiber, and fuel. Tight supply chains and markets worldwide have made it very difficult for retailers to secure product and operate in this market. For these reasons, KARA would oppose adding a safer technology and alternatives analysis requirement to PSM.

Other Modernization Proposals

OSHA's proposed modernization topics also include, in part, the following:

1. Clarifying the exemption for atmospheric storage tanks;

Comment: The current exemption clearly states that: "Flammable liquids with a flashpoint below 100 °F (37.8 °C) stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration." KARA does not see any valid reason to clarify this exemption and would discourage any attempt to do so that would limit its application.

2. Expanding PSM coverage and requirements for reactive chemical hazards;

Comment: As presented, this proposed change is overly broad, as most chemicals are reactive with some other chemical. As such, the proposed change could greatly, and unintentionally, expand the scope of PSM.

3. Amending paragraph (b) to include a definition of critical equipment;

Comment: The PSM standard does not cover critical equipment. Adding a definition for critical equipment would be unnecessary and possibly generate confusion.

4. Expanding paragraph (c) to strengthen employee participation and stop work authority;

Comment: Employee participation and stop work authority are practices broadly used within the regulated community and would not need to be added as an additional regulatory standard.

5. Amending paragraph (d) to require evaluation of updates to applicable recognized and generally accepted as good engineering practices (RAGAGEP);

Comment: RAGAGEP evaluation and incorporation can be extremely cumbersome for many facilities as the updates and revisions for consensus standards continually come out. Staying

abreast of the standards and evaluating them is a burdensome and tedious task that will not substantially increase process safety for the agricultural retail industry.

6. Amending paragraph (d) to require continuous updating of collected information;

Comment: Because this practice is already done as a part of the MOC process, the addition of this requirement to PSM would be redundant and unnecessarily add an element for a potential citation without advancing process safety.

7. Amending paragraph (e) to require formal resolution of Process Hazard Analysis team recommendations that are not utilized;

Comment: Because most companies currently document when PHA recommendations are not adopted, the addition of this requirement to PSM would unnecessarily add an element for a potential citation without advancing process safety. There is no added safety element by requiring formal resolutions to non-adopted PHA items.

8. Clarifying paragraph (e) to require consideration of natural disasters and extreme temperatures in their PSM programs, in response to E.O. 13990;

Comment: As weather events are already considered in most company's PHAs, we would recommend against this proposed change as it would merely increase the regulatory burden without advancing process safety.

9. Expanding paragraph (j) to cover the mechanical integrity of any critical equipment;

Comment: Current mechanical integrity provisions cover vessels, tanks, piping systems, relief and vent systems, emergency shutdown systems, controls, and pumps. It is unclear what OSHA might seek to add to this list of critical equipment without amending the paragraph to make the language more vague. KARA would oppose amending the language in any manner to make it overly comprehensive or increase vagueness.

10. Clarifying paragraph (j) to better explain "equipment deficiencies"

Comment: This paragraph is very clear as currently presented, and no further clarification is necessary.

11. Clarifying that paragraph (l) covers organizational changes;

Comment: Changes to this paragraph could be made to indicate that a change in operations personnel should be treated as a MOC.

12. Amending paragraph (m) to require root cause analysis;

Comment: As the PSM standard currently requires an incident investigation team to determine a conclusion for the root cause of an incident, there is no need to amend PSM regulations to specifically require a “root cause analysis.”

13. Revising paragraph (n) to require coordination of emergency planning with local emergency-response authorities;

Comment: EPA’s Risk Management Program requires emergency planning coordination with local emergency response authorities. To decrease the regulatory burden on regulated facilities, minimize duplicative regulations, and develop a “unified Federal approach for identifying and responding to risks in chemical facilities,”¹⁰ OSHA should ensure that its PSM requirements for emergency coordination mirror those of the RMP.

14. Requiring employers to develop a system for periodic review of and necessary revisions to their PSM management system (previously referred to as “Evaluation and Corrective Action”);

Comment: A specific requirement for a periodic review and revision of the PSM management system would be a new and additional requirement. However, in actual practice, such review and evaluations are already being conducted through PHA team recommendations, compliance audit findings, and incident investigation reports. The addition of this specific topic would be redundant and unnecessarily increase the regulatory administrative burden on facilities.

15. Requiring the development of written procedures for all elements specified in the standard, and to identify records required by the standard along with a records retention policy (previously referred to as “Written PSM Management Systems”).

Comment: This standard is intended to be performance-based, where implementation of the standard’s requirements is accomplished through the performance. Procedures for compliance with the standard are generally found in the RAGAGEP. Additional written procedures for all elements of the standard, and a records retention policy, would be unnecessary and would only serve to increase the regulatory burden on facilities. Therefore, KARA would recommend against adopting this proposal. Regulated facilities would also be faced with the decision to either follow the PSM record retention rule or the existing RAGAGEP.

Economic Impacts

The costs associated with implementation and compliance with PSM would cause economic harm to the agricultural retail industry. Several of the issues noted above, if adopted, would significantly increase direct compliance costs (including additional time on record keeping, maintenance, and reporting) and indirect costs to farmers. In fact, in 2015 it was estimated that

¹⁰ See <https://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

OSHA's attempt to redefine the retail facility exemption would have increased compliance costs on the agricultural retail industry by over \$100 million.

Such costs are unnecessary to achieve OSHA's desired outcomes of increased process safety, would place an unreasonable burden on the regulated community, and cannot be justified by a corresponding increase in process safety and management. These increased costs would increase input costs to farmers and would ultimately be passed on to consumers of food, fiber, and fuel – a concern that should resonate during periods of high inflation.

Conclusion

The agribusiness retail industry has a strong safety record operating under OSHA's current regulations, and those regulations have proven sufficient to meet the agency's goal of ensuring process safety.

For very large and complex processing facilities, PSM can be a helpful tool for tracking processes and anticipating failures that could lead to chemical exposures. However, this regulatory protocol is beyond the scope of most retail facilities. In addition, the costs of PSM compliance are economically prohibitive for most agricultural retailers, and greatly exceed any perceived benefit.

We would encourage OSHA to retain the current PSM standard, and to not adopt any new proposal that would unnecessarily increase the regulatory burden on the agricultural retail industry without increasing occupational safety. However, should OSHA deem it necessary to further regulate the NH₃ or FGAN retail industry, we would recommend a review of OSHA standard 1910.111 or other standards more specific to the fertilizer chemical industry.

Thank you for considering these comments. KARA looks forward to working with OSHA and our industry partners.

Cordially,

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