

OSHA's RESPONSES TO PUBLIC COMMENT ON ITS NEW INTERPRETATION OF THE TERM "RETAIL FACILITIES" IN THE PSM STANDARD

BACKGROUND

In August 2013, President Obama issued Executive Order 13650 *Improving Chemical Facility Safety and Security* to improve the safety and security of chemical facilities and reduce risks to workers, communities, and first responders. As directed by the Executive Order on Improving Chemical Facility Safety and Security (EO 13650), The Department of Homeland Security, the Environmental Protection Agency, the Department of Labor, the Department of Justice, the Department of Agriculture, and the Department of Transportation worked collaboratively to enhance operational coordination among agencies and across all levels of state and local government; to strengthen information sharing efforts and further expand outreach to the chemical industry, emergency managers, first responders, and other stakeholders; and modernize policies, regulations, and standards. –The EO was issued in the wake of several catastrophic explosions at facilities handling hazardous chemicals. One of these incidents was the explosion at the West Fertilizer Company in West, Texas. This incident was particularly tragic, resulting in the deaths of 15 people, primarily volunteer fire fighters. According to Reuters, “[t]he blast caused an estimated \$100 million in damages to homes, businesses and schools near the fertilizer plant”. As part of the EO effort, the Secretary of Labor was directed to identify any changes that needed to be made in the PSM standard’s exemption for retail facilities and to request comment on the PSM standard in a Request for Information (RFI, Docket No. OSHA-2013-0020) on December 9th 2013.

OSHA’s Process Safety Management (PSM) standard was promulgated on February 24, 1992 to address the hazards of facilities processing “highly hazardous chemicals.” The standard exempts “retail facilities” from its coverage. The preamble to the standard explained that the exemption was adopted because hazardous chemicals would be present in these facilities only in small volume packages, containers and allotments, and therefore retail facilities would not present the same degree of risk of a catastrophic release as other workplaces. It listed gasoline stations as one example of such a facility. In the RFI, OSHA described the varying interpretations of the retail facility exemption it has provided over the twenty years the PSM standard has been in effect, and pointed out that some of these were inconsistent with both the standard’s protective purpose, and the explanation provided in the preamble.

For example, the RFI identified a 2001 interpretive letter stating that a facility selling 75% of its anhydrous ammonia (a “highly hazardous chemical”) to farmers qualifies for the retail exemption because farmers were the “end users” of the product. Under this interpretation, a facility could be considered retail, and therefore exempt from coverage under the PSM standard, even if it handled and sold hazardous chemicals in large or bulk quantities. This approach is at odds with the purpose of the retail facilities exemption as set out in the PSM standard’s preamble. The RFI also noted that classifying facilities that handle large quantities of highly

hazardous chemicals as retailers is inconsistent with the definition of retail facility adopted by the Department of Commerce for use in the North American Industry Classification System (NAICS). The NAICS Manual defines retail establishments, in relevant part, as those “organized to sell merchandise in small quantities to the general public.” Retail facilities fall into NAICS sectors 44 and 45. Facilities that sell large or bulk quantities of materials typically fall into NAICS sector 42 – Wholesale Trade, which includes facilities that sell or arrange the purchase or sale of raw and intermediate materials and supplies used in production.

The RFI requested information and data on whether OSHA should use the NAICS definition of retail establishments in interpreting the retail facilities exemption in 29 C.F.R. 1910.119 (a)(2) (i). If OSHA used this interpretation, the RFI explained, the retail facilities exemption would apply only to establishments within NAICS sectors 44 and 45 that sell highly hazardous chemicals in small containers, packages, or allotments to the general public. Commenters were asked to respond to the following questions:

1. Does your facility qualify for the PSM exemption for “retail facilities” under OSHA’s current enforcement policy? If so, would changing OSHA’s enforcement policy to only exempt facilities in NAICS sectors 44 and 45 that sell highly hazardous chemicals in small containers, packages, or allotments to the general public result in PSM coverage for your facility?
2. Please provide any data or information on workplace accidents, near misses, or other safety-related incidents involving highly hazardous chemicals at “retail facilities” exempt from PSM coverage under §1910.119(a)(2)(i).
3. Please discuss any economic impacts that would result from changing OSHA’s retail-facilities policy to only exempt facilities in NAICS sectors 44 and 45 that sell highly hazardous chemicals in small containers, packages, or allotments to the general public. Are there any special circumstances involving small entities that OSHA should consider with respect to this option?
4. Is there a definition of “retail facilities” that OSHA should use to protect workers under the PSM standard? Please discuss any economic impacts associated with your suggested definition. Are there any special circumstances involving small entities that OSHA should consider with respect to your or other definitions?”

THE COMMENTS AND OSHA’S RESPONSES

OSHA received 13 comments in response to the RFI questions on retail facilities. Several commenters agreed that any change in the retail facilities exemption must account for the danger posed by facilities that handle large quantities of highly hazardous chemicals. The U.S. Chemical Safety and Hazard Investigation Board (CSB -0074) noted that prior to the explosion at the West Fertilizer Company on April 17, 2013, the facility stored more than 50,000 lbs. of anhydrous ammonia, greater than 5 times the threshold quantity for the chemical listed in Appendix A of the PSM standard, yet West did not comply with the PSM standard because it

sold anhydrous ammonia products directly to farmers. Had West complied with the standard, the Board believed that the incident could have been prevented or mitigated. Another commenter provided additional examples of incidents in which employees had been injured while working with or near bulk storage tanks of anhydrous or aqueous ammonia. (MKOPSC -0064). One commenter noted that the storage of a significant amount of small containers of hazardous chemicals was a potential hazard that should be considered in defining retail facilities under the PSM standard. (Oregon OSHA -0013).

OSHA also received comments urging it to retain the existing interpretation of the exemption, or even to expand it. The Fertilizer Institute (TFI -0065) and the Agricultural Retailers Association (ARA -0061) argued that OSHA's consistent position for over 20 years was that if a facility derived more than 50% of its income from direct sales to end users, it was considered a retail facility, and thus exempt from PSM coverage. Because OSHA's past interpretive guidance had been consistent, these commenters believed that there was no need for a change in interpretation. These commenters also argued that applying the exemption based on the percentage of sales to "end-users" was consistent with the normal understanding of a retailer as an entity that sells directly to the ultimate consumer. TFI also submitted a letter from one of its members that believed the revised interpretation would force its distributorships to be required to deliver anhydrous ammonia in smaller quantities.

Some commenters recommended that OSHA use notice and comment rulemaking to implement any change in its existing interpretation. The Fertilizer Institute argued that a new interpretation would not receive judicial deference unless it was embodied in a rule. The National Association of Chemical Distributors (NACDA -0083) thought that rulemaking was necessary to enforce a new interpretation. Two other commenters asserted that OSHA should determine whether there is a significant risk of harm associated with the existing policy before it proposes a new interpretation. American Petroleum Institute (API -0085), American Chemistry Council (ACC -0087).

Only one commenter directly addressed the economic impact of the change in interpretation. The ARA stated that its surveys indicated that "installation of a PSM program would cost upwards of \$36,000 for new sites and \$5,500 to \$7,500 to maintain a PSM program at a site." (ARA -0061).

After considering these comments, OSHA has decided to adopt the interpretation set out in the RFI. The new interpretation can be found on OSHA's web site at the following address: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=29528. OSHA believes that the new interpretation is necessary to ensure that the agency's position on the retail facilities exemption is clear and enforceable, and consistent with the PSM standard's original intent and protective purpose. OSHA's responses to the specific concerns raised by the RFI comments are set forth below.

First, OSHA does not agree with the commenters who asserted that its prior interpretive statements have established a consistent, unambiguous policy. These commenters relied on OSHA guidance stating that a facility that derives more than half of its income from direct sales to end users is a retail facility exempt from the PSM standard. However, as noted in the RFI, OSHA has also stated that the exemption applies to retail establishments as delineated in the Standard Industrial Classification (SIC) Manual (the predecessor to NAICS). And even with respect to the “more than half its income” test, OSHA has issued inconsistent guidance on whether, in determining a facility’s eligibility for the exemption based on the percentage of sales to end-users, the agency considers the total sales of all products or only the sales of highly hazardous chemicals (see TFI -0065 at 12-13). These conflicting statements from OSHA as to the meaning of the retail facilities exemption raise fair notice concerns that could seriously impede effective enforcement of the provision. A new interpretation is therefore necessary to provide clear notice of the agency’s intent.

OSHA also disagrees with the argument that interpreting the exemption to apply to a facility based solely on its sales to end-users (however such sales are defined) is consistent with the normal meaning of retail. It is true that the sale of goods directly to consumers as opposed to the sale of goods for further processing or resale is one factor that distinguishes a retailer from a wholesaler. However, the quantity of the goods and the form in which they are sold are also relevant considerations. The NAICS classification of retail facilities considers both the facility’s location in the chain of distribution, i.e., whether it sells to the ultimate consumer, and also whether it is organized to sell merchandise in small quantities. This latter characteristic of retail facilities is the basis for the exemption in the standard. As explained in the preamble, OSHA excluded retail facilities from the need to comply with PSM in the expectation that any hazardous chemicals they handled would be in small volume packages, containers and allotments, which lessened the risk of a catastrophic release. An interpretation that considers only whether the facility sells to end-users, without regard to the quantities in which highly hazardous chemicals are stored, packaged and sold, is inconsistent with the normal understanding of a retail facility, and with the protective purpose of the exemption. Additionally, OSHA wants to clarify that anhydrous ammonia distributorships will be able to conduct business the same way they do now. They will just be required to comply with those PSM requirements that are not now required under EPA’s Risk Management Program. The size of storage vessels and shipments likely will not change. It is important to note that OSHA does not regulate shipment of anhydrous ammonia in nurse tanks nor does OSHA regulate the application of anhydrous ammonia as a soil nitrifier at farms.

OSHA has carefully considered whether it should issue a Notice of Proposed Rulemaking (NPRM) before implementing a new interpretation. An NPRM would permit interested parties an additional period for comment and might induce some stakeholders who did not respond to the RFI to participate. However, issuance of an NPRM, followed by a comment period and further agency consideration of commenters’ views, would significantly delay implementation of

what OSHA believes is a critically needed policy. It should also be noted, that when OSHA issued its previous retail exemption policy, it did not issue an NPRM. Furthermore, the 2013 RFI provided an extensive explanation of the problem created by past interpretive guidance, set forth a specific proposed new interpretation, and identified the information to be provided in unusual detail. OSHA believes that the comments received in response to the RFI reflect generally the spectrum of views held by stakeholders on this issue, especially given the agency's extensive outreach efforts to inform stakeholders of the RFI: issuing a [special edition of its QuickTakes email blast](#) (which currently reaches about 90,000 subscribers) announcing the release; featuring it in the Department's weekly electronic newsletter (which currently reaches about 450,000 subscribers); and distributing a [news release](#). Accordingly, OSHA has decided to issue the new interpretation without additional notice and comment procedures. OSHA appreciates the concerns of some commenters on the level of judicial deference the new interpretation will receive. However, OSHA is entitled to change even a long-standing and consistent position, if it provides an explanation for its departure from the prior view. OSHA has provided that explanation and believes that, if challenged, the new interpretation would be upheld by the courts.

Finally, OSHA believes that the ARA's estimate of the PSM compliance costs that its members would incur based on the new interpretation of the retail facilities exemption is overstated in two respects. First, the estimate of the cost of bringing a new site into compliance is too high. Second, the estimate does not account for the fact that many facilities are already complying with at least a portion of these requirements. OSHA believes that the new interpretation will mean that approximately 4800 firms considered exempt from the PSM standard under the prior guidance will have to comply. All of these firms are already required to comply with EPA's Risk Management Program (RMP) rule (40 CFR 68). OSHA has an unusual degree of confidence in this number because the EPA rule contains reporting procedures, and OSHA derived the number from EPA reports. Moreover, the RMP rule imposes requirements that overlap many of those in OSHA's PSM standard, with the result that these newly covered facilities are already effectively complying with many of the PSM requirements. As a result, OSHA anticipates that the cost to bring these facilities into compliance with PSM should only be about 25% of the cost of bringing a brand-new facility into compliance.

Moreover, these are relatively simple facilities in PSM terms, generally involving only a single anhydrous ammonia process, which would make the costs even lower. In general, these employers only have to review and enhance their current RMP Program systems in fairly straightforward ways. OSHA believes the process safety information, maintenance, and emergency response elements that are included in RMP Program requirements would likely need no further modification by the employer to be PSM-compliant. However, employers may need to review existing standard operating procedures and process hazard analyses, and develop systems for pre-startup review, management of change, and safe hot work (e.g. welding), as well as ensuring worker involvement in the development and implementation of the employer's

overall PSM program. If ARA's cost estimates are annualized (including both first year and subsequent annual costs) and aggregated across all affected establishments then, those costs would only be approximately \$50 million per year. However, ARA's costs estimates seem to contemplate setting up an entire new PSM program, not just enhancing an existing RMP program, which is all that would actually be needed. Therefore, although OSHA agrees with ARA that annual recurring costs represent 15 to 20 percent of initial costs for these facilities, OSHA believe a lower initial cost estimate is appropriate. Taking account of the small size, simple processes and the fact that affected establishments are already required to be in compliance with RMP, OSHA estimates the first year costs would be only \$10.4 million (\$2,160 per establishment).