

Wynnewood Case and COVID-19 **Under the Biden Administration**

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Safety Moment

- COVID-19 Vaccination Plan:

- **TEXAS:** <https://www.dshs.texas.gov/news/updates.shtm#Vaccine>

- **LOUISIANA:** <https://ldh.la.gov/index.cfm/page/4042>

- 8 Things to Know:

- <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/8-things.html>

Safety Moment

- Management of Organizational Change (MOOC)

- **BP Texas City (USA, 2005): Minimal staffing to run normal day-to-day operations**
- **Esso Langford (AUSTRALIA), 1998): Remote technical support due to reduction in staff**

Virtual PSM Forums 2021

- Human Error and Human Factors
 - API RP 754 Process Safety Performance Indicators
 - Refinery PSM Best Practices
 - Asset Integrity & Reliability
 - And more....
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Guest Speakers

Mark Dreux



Alexandra Romero



Overview of the Presentation

- **Summary of *Wynnewood* Decision**
- **Determining the Boundaries of the Process:**
 - Where does the PSM-covered process end?
- **Transfer and Atmospheric Storage**
- **Consequences: The Tenth Circuit Affirms the *Wynnewood* Decision**
- **EPA RMP: RAGAGEP and “Existing Equipment”**
- **OSHA Enforcement Under the Biden Administration**

Wynnewood Refining Co., LLC (“Wynnewood”): PSM Standard

- OSHA issued citations to Wynnewood alleging PSM violations related to a steam boiler powered by natural gas at the company’s oil refinery in Wynnewood, Oklahoma
- The “Wickes” boiler at issue was one of 4 boilers in the refinery’s Alkylation Unit and Fluid Catalytic Cracking Unit (“FCC”) that provided steam to a 225-pound steam header used for various purposes within the FCC
- During a Sept. 2012 “turnaround,” the Wickes boiler exploded during the start-up process, ultimately killing 2 employees

Wynnewood: PSM Standard

- Wynnewood argued unsuccessfully at trial that the boiler was not part of a covered “process” under the PSM standard, and thus the citations should be vacated because the PSM standard did not apply
- Wynnewood appealed to the Commission, which affirmed all citations and issued a problematic decision
- Wynnewood appealed to the Tenth Circuit which affirmed the Commission’s decision

Wynnewood: PSM Standard

- The PSM standard defines a covered “process” as “any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities”
- For the purposes of this definition, the PSM standard states that “any group of vessels which are **interconnected** and separate vessels which are **located** such that a highly hazardous chemical **could be involved** in a potential release shall be considered a single process”

Wynnewood: PSM Standard

- The Secretary argued that the Wickes boiler was part of a covered process because:
 - The boiler was *interconnected* with the facility's Alkylation Unit and FCC through a refinery fuel gas pipeline, and was interconnected with "virtually all the refinery's processes" through the steam header; and
 - The boiler was centrally *located* in the FCC such that an "event like the explosion in this case could result in a catastrophic release of a highly hazardous chemical"

Wynnewood: PSM Standard

- The Commission rejected each of Wynnewood's arguments
- First, the Commission held that a single process consists of either (1) "any group of vessels which are interconnected" or (2) "separate vessels which are located such that a highly hazardous chemical **could be involved** in a potential release"
 - In other words, the Secretary does not need to show that the cited vessel *itself* could cause or contribute to a catastrophic release of HHCs
 - The Secretary does not need to show that the vessels even contain a HHC

Wynnewood: PSM Standard

- Second, the Commission disagreed with Wynnewood that the pipeline and steam header were insufficient to establish “interconnection” because neither played a direct role in the FCC or Alkylation Unit processes
 - Because the PSM standard uses the word “**interconnect**” rather than “connect,” it was irrelevant whether the Wickes boiler was directly connected to, or involved with, the processes of the FCC and Alkylation Unit

Wynnewood: PSM Standard

- Third, the Commission disagreed with Wynnewood that the boiler could not have been “located such that a highly hazardous chemical could be involved in a potential release” because it was approximately 100 feet away from the FCC reactor column, the closest part of the process containing HHCs
 - In doing so, the Commission rejected Wynnewood’s argument that the Secretary can only establish the “location” prong of the test if the potential for a catastrophic release was “probable”
 - Instead, all that is required is that the vessel is located such that a HHC “*could be involved*” in a potential release

Wynnewood: PSM Standard

– Takeaways from the *Wynnewood* decision:

- The Commission firmly rejected the argument that interconnected vessels may be considered a single process *only* if there is a reasonable probability that a catastrophic release of HHC would affect the interconnected vessels.
- The *Wynnewood* decision could dramatically expand the applicability of the PSM standard to any vessel that is physically connected in any way to a covered process
- After *Wynnewood*, a vessel could be deemed co-located by the PSM standard even if its ability to impact a nearby covered process is only possible.

Boundaries of the Process

– OSHA’s AKZO Nobel Interpretation Letter – February 28, 1997

- Determine boundaries of process without considering engineering and administrative controls
- Determine whether there is a TQ of a HHC within the process
- Evaluate each aspect of the process to determine extent of coverage – could it cause or contribute to a catastrophic release or interfere with mitigations of a release?
- “If based on this analysis, it is determined that interconnected equipment downstream from the stipulated covered process cannot cause the HHC release or interfere with the mitigation of the consequences of a HHC release, and the equipment does not itself contain a TQ or greater amount of a HHC, then such equipment could safely be considered outside the limits or boundaries of the covered process.”

Boundaries of the Process

- **Question: Does the *Wynnewood* decision nullify the AKZO Nobel letter?**
 - “We find, that the indirect, physical link between the Wickes boiler and the FCC and Alkylation unit is sufficient for PSM coverage.”
 - “The main point is that RFG generated by the FCC and the Alkylation Unit is piped to the Wickes boiler, and steam from the boiler is piped to the FCC and Alkylation Unit . . . are interconnected . . . and . . . covered as part of the process.”
- **Conclusion: yes, the requirement for limiting the boundaries of a covered process to the potential for catastrophic release has been rejected**
- **Question: do you need to reexamine the boundaries of your process?**

The Transfer and Atmospheric Storage Exemption

- **1910.119(a)(ii)(B)**
 - “Flammable liquids . . . stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.”
- ***Wynnewood* decision probably does not affect the atmospheric storage exemption which is expressly set forth in the PSM standard**
- **We currently have a case in Region 1 in which OSHA is arguing that *Wynnewood* eliminates the atmospheric and transfer exemption**

Consequences: The Tenth Circuit Affirmed the *Wynnewood* Decision

- Reexamine the boundaries of your PSM-covered processes?
- Are additional vessels, equipment, or utilities now part of the process?
- Do additional employees need training and refresher training?
- Do additional contractors need to be evaluated and audited?
- Do PSIs, PHAs, MOCs, SOPs, and the MI program need to be expanded?

PSM Update

- Letter of Interpretation dated June 28, 2019 to Mr. Ordile

- Facts:

- Storage of consumer aerosol products in metal cans at distribution centers and warehouses.
- Aerosol containers contain up to 33 total ounces of product such as shaving cream or hairspray plus flammable gas propellant.
- Typical propellants are butane, isobutene and propane.

- OSHA's conclusion: potentially covered by PSM

PSM Update

- Definition of process extends to “separate vessels which are located such that a HHC could be involved in a potential release are considered a single process.”
- Storage and onsite movement (forklift with a pallet) are PSM-covered activities
- Need to calculate the number of pounds of flammable gas
- OSHA suggests that you use the percentage of flammables based on the data in the SDS
- If greater than 10,000 pounds of flammable gas in the containers, then covered under PSM

PSM Update

- Concerns with this Letter of Interpretation (“LOI”)
 - These are finished consumer goods and not involved in processing
 - Is a can of shaving cream really a “process vessel”?
 - SDSs show a range of flammables
 - Gillette Shaving cream: Isobutane 1-5% and butane .1-1%. How can you reliably calculate TQs?
 - Ignores the impact of NFPA 30-B entitled Code for the Manufacture and Storage of Aerosol products
 - LOI is a solution in search of a problem

EPA RMP: RAGAGEP and “Existing Equipment”

- EPA conducted an inspection of an RMP-covered Program 3 facility
- The facility had an ammonia refrigeration process that was built in the 1970s, with some of the ammonia equipment located **outside** of the facility machinery room
- EPA alleged that the facility violated 40 C.F.R. § 68.65(d)(2) – which requires owner/operators to document that equipment complies with RAGAGEP – because it did not have ammonia detectors as required by IIAR 2 - 2014

EPA RMP: RAGAGEP and “Existing Equipment”

- The facility argued that its equipment was designed in accordance with ASHRAE 15 – 1971, which was the RAGAGEP in effect at the time of construction and did not require the use of ammonia detectors outside of a machinery room
- IIAR 2 – 2014 has an express grandfather clause which stated that it did not apply to new facilities. The facility argued that it did not need to comply with it
- Like the PSM standard, the RMP rule does not require owner/operators to update equipment to comply with the newest versions of applicable RAGAGEP

EPA RMP: RAGAGEP and “Existing Equipment”

- In response, EPA changed its legal theory: instead of alleging a violation of Section 68.65(d)(2), EPA alleged the lack of ammonia detectors violated Section 68.65(d)(3)
- Section 68.65(d)(3) applies to existing equipment, and requires owner/operators to “determine and document that the equipment is designed, maintained, inspected, tested, and operating in a safe manner” where that equipment is “designed and constructed in accordance with codes, standards, or practices that are no longer in general use.”

EPA RMP: RAGAGEP and “Existing Equipment”

- EPA alleged that the facility could not determine that its existing process equipment was safe because it did not have ammonia detectors, and wanted the facility to conduct a complex study to determine the appropriate placement and number of ammonia detectors to install
- The facility argued that Section 68.65(d)(3) applied only to existing equipment, and could not be used to require the installation of new equipment like ammonia detectors

EPA RMP: RAGAGEP and “Existing Equipment”

- The facility also relied on *BP Products North America, Inc.* (“*BP Husky*”), an OSHRC decision interpreting an identical provision in the PSM standard
 - OSHA alleged that the “fire water” system posed a hazard because it had cross-connections to other water systems, which would be prohibited under current codes
 - Although the cross-connections were compliant with RAGAGEP in effect at the time they were installed, the OSHRC affirmed a violation because BP Husky did not conduct a PHA or hazard analysis to determine that they were still operating in a safe manner

EPA RMP: RAGAGEP and “Existing Equipment”

- In contrast to BP Husky, the facility had conducted a thorough PHA that squarely addressed the ammonia equipment outside of the machinery room and determined it was safe even without ammonia detectors
- The facility also had an excellent emergency action plan, and had conducted job hazard analyses of lone worker tasks in the area with ammonia equipment
- Based largely on the strength of the PHA and EAP, EPA withdrew the requirement to install ammonia detectors

OSHA Enforcement Under the Biden Administration

- The Biden transition team – unsurprisingly – identified COVID-19 as one of its top four priorities in the first 100 days of the administration
- During the campaign, Biden called on OSHA to immediately issue an emergency temporary standard (“ETS”) to address the COVID-19 pandemic
 - California, Michigan, Oregon, and Virginia state plans have already issued COVID-19-specific ETSs

Biden Administration: COVID-19 Plan

- Improve testing and tracing
- Focus on producing more PPE supplies in the US
- Provide national guidelines for reopening schools, when to open or close certain businesses, restrictions on size of gatherings, and when to issue stay-at-home restrictions
- Invest in and coordinate vaccine distribution and other treatments
- Establish plan for protecting the elderly and other vulnerable populations
- Reestablish White House National Security Council Directorate for Global Health Security and Biodefense
- Mask mandates

OSHA Enforcement Under the Biden Administration

- The Biden campaign also stated that it would seek a permanent infectious disease standard
 - After H₁N₁, OSHA under the Obama administration spent time developing an infectious disease standard
 - The Biden administration can be expected to rely heavily on that version

OSHA Enforcement Under the Biden Administration

- Employers can also expect an increase more generally in enforcement activities under the Biden administration
- Biden has criticized the decrease in OSHA compliance officers and has called for increased hiring to bring the number of compliance officers (currently ~ 761) up to historical norms (~ 1000)
 - Increased hiring will depend on the Congressional budget process
- OSHA may also return to its practice under the Obama administration of issuing press releases publicizing large citations and penalties
 - “Publicity as deterrence,” David Michaels, OSHA Administrator (2010 – 2017)

Questions and Answers

1. Will all boilers in any plants now pull the plant into PSM? Will all boilers in plants in PSM areas need to be covered?
2. Interested in rulings that may change OSHA and EPA mechanical integrity boundaries.
3. Curious how the Wynnewood decision will impact facilities w/ integrated utility production from a PSM/RMP applicability standpoint.
4. Whether Oil and Gas Installation required to implement PSM?
5. Can employers require vaccine when returning to work?
6. Maintaining safety while working from home, is that going to be a part of PSM?
7. Why is OSHA allowed to force employers to report COVID-19 cases that are transmitted at work as 'Recordable Illnesses' but not for transmission of Seasonal Influenza that also results in time off work?
8. What is the key issue for deciding COVID exposure at work that is recordable event?
9. Most interested in 10th Circuit decision on Wynnewood and possible further challenges (e.g. en banc hearing, etc.).
10. Years ago, OSHA said utilities were not PSM covered, unless the PHA team determined loss of a given utility would lead to a PSM incident. Yet, in the Secretary of Labor v. Wynnewood Refining Co. case, OSHA argued in favor of utilities being PSM covered if they are interconnected to a PSM covered process. If possible, please provide feedback on this issue.

THANK YOU!

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