

New Interpretations, COVID, NEP and the Changing Face of PSM

**2022 Environmental Technical Conference –
Midwest A&WMA**

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Topics to Cover

- *New Interpretations of what's covered in a process*
- *National Emphasis Program (NEP) and where this stands*
- *PSM and Enforcement – What's Happening?*
- *Continuing impacts of COVID on PSM*
 - How to address these impacts

New Interpretations of Processes

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New Interpretations

- *“The first sentence of the regulation defines process as “any activity involving a highly hazardous chemical.” § 1910.119(b). Nothing on the face of this definition requires a vessel to contain a highly hazardous chemical in order to be part of a process. And its plain terms do not suggest that we should construe this definition to apply to such a narrow category of vessels. Instead, its terms suggest the opposite—the comprehensive phrase “any activity involving” captures a wide swath of vessels in that they need only be part of an any activity that involves a highly hazardous chemical. Thus, the definition of process unambiguously includes vessels which do not contain a highly hazardous chemical. And because the text of the regulation is unambiguous, we do not consider Wynnewood’s arguments based on extratextual sources, including the preamble, and we conclude that the Wickes boiler may be considered part of a process even though it did not contain any highly hazardous chemicals.”*

October 27, 2020, the U.S. Court of Appeals for the Tenth Circuit [Scalia v. Wynnewood Refining Co., LLC](#)

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National Emphasis Program (NEP)

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OSHA's NEP

- CPL 03-00-021 - PSM Covered Chemical Facilities National Emphasis Program - 01/17/2017
 - January 2017, OSHA issued a new National Emphasis Program for PSM Covered Chemical Facilities to further protect workers' health and safety in certain industries that pose high risks to people and the environment. This is still in play.

OSHA's NEP

- DIR 2021-03(CPL 03) - Revised National Emphasis Program – Coronavirus Disease 2019 (COVID-19) - 07/07/2021
 - This new Updated Interim Enforcement Response Plan will become effective for workplaces not covered by the COVID-19 ETS, and will **remain in effect until further notice.** This guidance is intended to be time-limited to the current COVID-19 public health crisis.

PSM and Enforcement – What's Happening?

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Increased Budgets

- ***EPA to increase funding 21% - up \$2 Billion, including:***
 - Increase of 128% in Enforcement, notable 16% increase in civil and criminal AND,
 - Increase of **2,382%** in Environmental Justice Enforcement
- ***OSHA to increase funding by 14% to be used primarily to*** increase its Compliance Safety and Health Officer ranks by fifty from current staffing levels, resulting in an additional 500 inspections will be conducted in FY 2021.

Most Frequent PSM Citations

1910.119

- ***(f)(1) Operating procedures.....38***
- ***(d)(3) PSI pertaining to equipment28***
- ***(e)(3) PHA specific criteria.....26***
- ***(j)(4) MI Inspection and Testing21***
- ***(e)(5) PHA recommendation12***
- ***(l)(1) MOC implementation12***

And then there was COVID

811 OSHA COVID-Related Issued Citations thru April 15, 2022, with Total Initial Penalties of \$7,188,207. Most common Citations:

- General Duty Clause,
- Respiratory protection (1910.134),
- Personal protective equipment (1910.132), and
- Injury and illness recordkeeping and reporting (Subpart 1904).

180% increase in citations in last 15 months; 78% increase in penalty dollars. Max penalty \$273,064

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Tips from Inspectors

- *Consider getting all required documentation in electronic format,*
- *Consolidate your recordkeeping,*
- *Make plans for transfer of ownership from current PSM Program Manager to his/her successor,*
- *Don't wait for inspector to show up to review your PSM elements – pull them out occasionally and review them.*

**Continuing Impacts of COVID
on the PSM (AND RMP)**

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General Duty Clause – 112(r)(1)

- *“The owners and operators of stationary sources producing, processing, handling or storing such substances [i.e., a chemical in 40 CFR part 68 or any other extremely hazardous substance] have a general duty [in the same manner and to the same extent as the general duty clause in the Occupational Safety and Health Act (OSHA)] to **identify hazards which may result from (such) releases** using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.”.*“

General Duty Clause – Section 5(a) -OSHA

- ***“Each employer -- shall furnish to each of his employees employment and a place of employment which are free from **recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.**”***

- Section 5 (a) (1) of the Occupational Safety and Health Act of 1970.

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EPA Definitions

- *Hazardous Material*: *The EPA incorporates the OSHA hazardous material definition, and adds:*
 - any item or chemical which can cause harm to people, plants, or animals when released by spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment. (40 CFR 261)

OSHA Definitions

- **Hazardous Material: The Occupational Safety and Health Administration (OSHA) defines a hazardous material as any substance or chemical which is a “health hazard” or “physical hazard,” including:**
 - chemicals which are carcinogens, toxic agents, irritants, corrosives, sensitizers;
 - agents which act on the hematopoietic system;
 - **agents which damage the lungs, skin, eyes, or mucous membranes;**
 - chemicals which are combustible, explosive, flammable, oxidizers, pyrophorics, unstable-reactive or water-reactive; and
 - chemicals which in the course of normal handling, use, or storage may produce or release dusts, gases, fumes, vapors, mists or smoke which may have any of the previously mentioned characteristics. dusts, gases, fumes, vapors, mists or smoke which may have any of the previously mentioned characteristics. **(29 CFR 1910.120 Sub Part H)**
- **Agent: Biological agents include bacteria, viruses, fungi, other microorganisms and their associated toxins.**

And then there was COVID

290 OSHA COVID-Related Issued Citations thru January 14, 2021, with Total Initial Penalties of \$4,034,288

Most common Citations:

- General Duty Clause,
- Respiratory protection (1910.134),
- Personal protective equipment (1910.132), and
- Injury and illness recordkeeping and reporting (Subpart 1904).

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OSHA Standards Impacted by COVID

General Industry (29 CFR 1910)	
<u>1910 Subpart I</u> – Personal Protective Equipment	<u>1910.132</u> , General requirements
	<u>1910.133</u> , Eye and face protection
	<u>1910.134</u> , Respiratory protection
	<u>1910.138</u> , Hand protection
	<u>1910.141</u> , Sanitation
<u>Subpart J</u> – General Environmental Controls	
<u>Subpart Z</u> – Toxic and Hazardous Substances	<u>1910.1020</u> , Access to employee exposure and medical records
	<u>1910.1030</u> , Bloodborne pathogens
	<u>1910.1200</u> , Hazard communication

COVID Impacts in the PSM

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Process Safety Management (PSM) Elements

- ***Employee Participation***
- ***Process Safety Information (PSI)***
- ***Process Hazard Analysis (PHA)***
- ***Operating Procedures***
- ***Training***
- ***Contractor Safety***
- ***Pre-Start Up Process Safety Review***
- ***Mechanical Integrity***
- ***Hot Work Permit***
- ***Management of Change***
- ***Incident Investigation***
- ***Emergency Planning and Response***
- ***Compliance Audits***
- ***Trade Secrets***

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BOLD Red – includes components impacted by COVID

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Addressing COVID Impacts in the PSM

- ***Employee Participation***

- Consult with employees and their representatives on the development and conduct of hazard assessments RE: COVID and provide access to these and other records required under the standard
- Make sure there is a process for employees notifying management regarding COVID issues

- ***Process Safety Information (PSI)***

- Make sure that safe distances between workers and appropriate PPE is addressed for EACH process

Addressing COVID Impacts in the PSM

- ***Process Hazard Analysis (PHA)***
 - Human factors and weather impacts are typically addressed as hazards. Address how COVID can impact processes and operations and safeguards
- ***Operating Procedures***
 - Make sure that safe distances between workers and appropriate PPE is addressed for EACH applicable operating procedure
- ***Training***
 - Confirm workers are trained on use of COVID PPE, social distancing, what to do in event of COVID outbreak and how to report it
- ***Contractor Safety***
 - Are Contractors trained and equipped with appropriate PPE to contend with COVID?

Addressing COVID Impacts in the PSM

- ***Pre-Start Up Process Safety Review***
 - Has everyone involved in any process change been trained on safe distances and use of COVID appropriate PPE, particularly if equipment spacing or placement has changed
- ***Incident Investigation***
 - Consider a COVID specific Incident Investigation team and II process
- ***Emergency Planning and Response***
 - Incorporate Emergency Response particular to COVID in your ERP. May mean COVID specific group and health care responders.
 - Drills unique to COVID

QUESTIONS??

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