

**INITIAL STATEMENT OF REASONS
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
CALIFORNIA CODE OF REGULATIONS
TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
Chapter 4. Division of Industrial Safety
Subchapter 7. General Industry Safety Orders
Group 16. Control of Hazardous substances
Article 109. Hazardous Substances and Processes
Section 5189.1**

Process Safety Management for Petroleum Refineries.

The California Occupational Safety and Health Standards Board's (Board) mission is to promote, adopt, and maintain reasonable and enforceable standards that will ensure a safe and healthful workplace for California workers. The Board's objective is to adopt reasonable and enforceable standards at least as effective as federal standards. The Standards Board also has the responsibility to grant or deny applications for variances from adopted standards and respond to petitions for new or revised standards. The part-time, independent board holds monthly meetings throughout California.

The Board proposes to amend the Process Safety Management standards ("PSM"), section 5189.1 ("PSM amendments"). The proposal would:

- Amend and clarify the definitions of highly hazardous material, major change, and employee representative;
- Amend and clarify the requirements pertaining to the Hierarchy of Hazard Control Analysis; and
- Amend and clarify, with respect to employee participation in PSM activities, how employers will allow for effective participation by employees engaged in such activities.

INFORMATIVE DIGEST

SUMMARY OF EXISTING LAWS AND REGULATIONS

The following are summaries of the existing laws that relate directly to the proposed regulations. (Gov. Code, § 11346.5 subd. (a)(3)(A)).

Labor Code (LC) Section 142.3 establishes the Occupational Safety and Health Standards Board (Standards Board) as the only agency in the state authorized to adopt occupational safety and health standards. Section 142.3 requires that California's standards be at least as effective as federal occupational safety and health standards. LC Section 7856 mandates the adoption of process safety management standards for

refineries. The proposed regulations implement, interpret, and make specific LC Section 7856.

The federal Clean Air Act Amendments of 1990 [42 U.S.C. Section 7412(r)] directed the federal Occupational Safety and Health Administration (OSHA) and the United States Environmental Protection Agency (EPA) to develop regulations to prevent accidental chemical releases. These became known as the Process Safety Management (PSM) and Risk Management Plan (RMP) regulations, respectively. On February 24, 1992, OSHA published a Final Rule for Process Safety Management of Highly Hazardous Chemicals (57, Fed. Reg., 6356, February 24, 1992), codified as 29 CFR Section 1910.119.

The Standards Board subsequently adopted a PSM standard (CCR Title 8, Section 5189) pursuant to its mandate to adopt standards that are at least as effective as federal standards. Section 5189 is substantially the same as the federal counterpart, in that it addresses the prevention of catastrophic releases of toxic, reactive, flammable, and explosive chemicals and applies to employers who use a process involving a particular chemical (or chemicals) at or above certain threshold quantities (listed in Appendix A) or a flammable liquid or gas as defined in subsection (c) of the regulation.

Since 1992, California's PSM standard has covered approximately 1,500 facilities in the state that handle or process certain hazardous chemicals including its 11 oil refineries, which process approximately two million barrels of crude oil per day into gasoline, diesel fuel, jet fuel, and chemical feedstocks.

Following a chemical release and fire at the Chevron refinery in Richmond, CA, on August 6, 2012, the Governor's Interagency Working Group on Refinery Safety prepared a report raising concerns and recommendations about the safety of California's oil refineries. The report recommended the establishment of an Interagency Refinery Task Force to: (1) coordinate revisions to the state's PSM regulations and California Accidental Release Prevention Program (Cal/ARP) regulations; (2) strengthen regulatory enforcement; and (3) improve emergency preparedness and response procedures.

In accordance with the recommendations of the report, the Division of Occupational Safety and Health (known as Cal/OSHA), a division of DIR, promulgated a new PSM regulatory proposal for oil refineries, GISO Section 5189.1, which the Standards Board adopted in 2017. Section 5189.1 implements the recommendations of the report and other PSM elements that safety experts learned over the preceding two decades are essential to the safe operation of a refinery. These beneficial elements include applying a hierarchy of controls to implement first- and second-order inherent safety measures; conducting damage mechanism reviews; applying rigorous safeguard protection analyses; integrating human factors and safety culture assessments into safety planning; involving front-line employees in decision-making; conducting root-cause analysis following significant incidents; and performing comprehensive process hazard analyses.

The refineries operating in California have come into compliance with the requirements of section 5189.1, with significant improvements in safety performance; however, the industry continues to experience significant upset events.

In 2019, a petroleum refinery advocacy group (the Western States Petroleum Association, or WSPA) filed two lawsuits regarding Section 5189.1. In a complaint filed in Sacramento Superior Court, WSPA alleged in pertinent part that Section 5189.1 was invalid and unenforceable because it was inconsistent, and in conflict, with governing statutes, and was neither reasonably necessary nor sufficiently clear. In a complaint filed in the Eastern District of California, WSPA alleged that Section 5189.1 was preempted by the National Labor Relations Act.

As part of a settlement to resolve these lawsuits, the Board and the Division agreed to engage in rulemaking to amend Section 5189.1 to address the stakeholders' concerns.

In accordance with the terms of the settlement agreement, the California Environmental Protection Agency (Cal/EPA) will also submit a rulemaking package for their regulations in accordance with the APA rulemaking process.

The following actions triggered the settlement agreement between the above agencies:

- *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, California Division of Occupational Safety and Health, and California Environmental Protection Agency* (Sacramento Super. Ct., Case No. 34-2019-00260210).
- *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, and The California Environmental Protection Agency* (E.D. Cal., Case No. 2:19-cv-1270-JAM-DB).

SUMMARY OF SECTIONS AFFECTED

Amend: 5189.1

SUMMARY OF EFFECT OF PROPOSED REGULATORY ACTION

The proposed regulatory action provides clarity to the public and the regulated petroleum refineries for activities addressed under the PSM regulations. Specifically, the proposed regulatory action will clarify the definitions of employee representative, highly hazardous materials, and major change; add details to the hierarchy of hazard control analysis (HCA) requiring the HCA team to take additional steps in conducting the HCA; and explain an additional means of compliance to the section pertaining to employee participation. These changes address stakeholders' concerns about inconsistent application of the regulations resulting from the alleged vagueness and necessity of the language of Section 5189.1.

The proposed amendments are outlined below.

Amend Subsection (c): Definitions.

Employee Representative

The current definition of “employee representative” states that, “A union representative, where a union exists, or an employee-designated representative in the absence of a union that is on-site and qualified for the task. The term is to be construed broadly, and may include the local union, international union, or a refinery or contract employee designated by these parties, such as the safety and health committee representative at the site.”

The amendment revises who may qualify as an “Employee Representative.” Specifically, the proposal would define “employee representative” as a person who is “on-site and qualified for the task” and either selected by a union, or where there is no union, selected by the employees.

This change is necessary because employees who are on-site and qualified for the task are most likely to be knowledgeable about the employer’s procedures and also available to help explain the details of how these procedures are carried out from day to day. The proposed change will ensure that employee representatives are qualified to perform the process under discussion and can thus appropriately and knowledgeably represent employees.

Further, the amendment adds, “Nothing in this subsection shall be construed to supersede an employee representative selection process in a collective bargaining agreement.” The change is necessary to clarify that the definition does not supersede the selection process in a collective bargaining agreement, to ensure that section 5189.1 does not impede compliance with the National Labor Relations Act (29 U.S.C. §§ 151-169), and to protect the bargaining rights of employees.

Highly Hazardous Material

The current definition of “highly hazardous material” is defined without reference to a threshold quantity. External stakeholders have stated that the current definition is overbroad and vague. The amendment revises the definition of highly hazardous material to add that “highly hazardous material does not include any substance in quantities below the lesser of thresholds set forth in the California Hazardous Materials Business Plan rules at the Health and Safety Code section 25507(a)(1)(A) or Tables 1, 2, and 3 in CCR, title 19, section 5130.6.”

This change is necessary because it clarifies that highly hazardous materials will not include any substances in quantities below the lesser of the thresholds set forth in the California Hazardous Materials Business Plan rule in the Health and Safety Code section 25507(a)(1)(A) or Tables 1, 2, and 3 in CCR, title 19, section 5130.6. The amendment would delineate a petroleum refinery’s regulatory responsibility as to highly hazardous material and harmonize obligations under this rule with existing safety requirements elsewhere in the law.

Major Change

The current definition of “major change” lists three specific conditions that constitute a major change. External stakeholders have stated that the current definition is overly broad, vague, and incorporates even trivial changes.

The proposal revises “major change” by adding the word “introduction” at the beginning of the second and third triggers. In addition, the amendment adds numbers to each trigger. These proposed changes are non-substantive and without regulatory effect. The proposed changes also add that a major change includes any alteration in a process, process equipment, or process chemistry that results in any operational change outside of established safe operating limits. Furthermore, the proposed amendments clarify that an alteration in process or process equipment does not include a replacement in kind, and that an introduction of new process equipment or alteration in process or process equipment must result in an operation change outside of established safe operating limits to be considered a major change.

These changes are necessary because they clarify the types of triggers which constitute a major change within a process. Major changes trigger certain additional obligations under the existing rule. (See Cal. Code Regs., tit. 8, § 5189.1, subds. (k)(4), (l)(2)(C), (n)(3), and (s)(2).)

Amend Subsection (l) Hierarchy of Hazard Controls Analysis

Subsection (l)(4)(D)

The current subsection refers to provisions regarding the Hierarchy of Hazard Control Analysis (HCA). The subsection establishes performance standards for employers. The employer is required to ensure the safety and integrity of refinery processes by applying inherent safety measures and safeguards in a specific sequence and priority order. External stakeholders have stated that the current provisions contain undefined terms and phrases that render the provisions vague and overly broad.

The amendment corrects a spelling error. This proposed change is non-substantive and without regulatory effect.

The amendment also revises what information may be considered in identifying, analyzing, and documenting publicly available information on inherent safety measures and safeguards. The amendment removes a mandatory provision to identify, analyze, and document types of inherent safety measures and safeguards and, instead, moves this provision to a note at the end of the subsection to be informational rather than mandatory. The proposed change to remove the mandatory provision will clarify the type of information that must be included during the HCA process. These amendments do not lessen the scope of publicly available information on inherent safety measures and safeguards that must be identified, analyzed, and documented.

These proposed changes are necessary because they clarify what information needs to be considered by the HCA team when identifying, analyzing, and documenting all inherent safety measures and safeguards for each process safety hazard.

Subsection (I)(4)(E)

This subsection sets forth further performance standards for employers. Following the requirement to identify, analyze, and document all inherent safety measures and safeguards, etc. (found in subsection (I)(4)(D)), the HCA team must establish written recommendations for prevention and control measures, in priority order, to eliminate or minimize a hazard at a petroleum refinery. Hazard prevention and control measures are ranked from most effective to least effective as follows: First Order Inherent Safety, Second Order Inherent Safety, and passive, active, and procedural protection layers. (See CCR, tit. 8, 5189.1, subds (c) [“Hierarchy of Hazard Control”] and (I)(4)(C).) External stakeholders have said that this section requires the HCA team to make recommendations to eliminate hazards in a prescribed order of priorities, which does not allow individual refineries to select safety measures and safeguards that are best suited for the process.

The amendment adds that the HCA team responsible for conducting the analysis shall consider all process safety hazards that may be impacted by a particular safety measure or safeguard and shall select those safety measures or safeguards that, in the team’s judgment, are most effective at reducing all such process safety hazards.

This change is necessary because it gives the HCA team the discretion to consider all process safety hazards that may be impacted by a particular safety measure or safeguard and also select safety measures that the HCA team determines would be most effective at reducing process safety hazards for that specific process.

Subsection (I)(5)(F)

The proposal would add a new subsection, (I)(5)(F). This amendment adds that the HCA team include in their HCA report the rationale for not recommending any inherent safety measures and safeguards analyzed by the team and identified pursuant to subsection (I)(4)(D).

This change is necessary because it clarifies that the HCA shall include, in writing, the rationale for not recommending the inherent safety measures and safeguards that it analyzed but did not ultimately recommend. The amendment is necessary to ensure transparency and accountability in the HCA process and to assess the extent to which employers reject recommendations made by the HCA team. The additional requirement to document the rationale for not recommending any inherent safety measures and safeguards analyzed is critical to ensure transparency and for accountability.

Amend Subsection (q) Employee Participation**Subsection (q)(1)(D)**

The current subsection outlines provisions for employee participation relating to PSM activities. The proposed change will add a new subsection (q)(1)(D) with respect to employee participation. Stakeholders raised concerns that the current subsection

impermissibly interferes with employers' collective bargaining rights under the National Labor Relations Act.

The proposed amendments require that the employer will allow for "effective participation" by employees in such activities if it provides "advance notice" of each such PSM activity and considers input provided by individuals participating in each such activity, including the employee representative.

Further, if the notice is provided as required, employers are not required to delay PSM activity due to the failure by a union, or employees in the absence of a union, to select an employee representative, or the failure of a selected employee representative to participate in the noticed activity. The proposed change also clarifies that nothing in the subdivision shall be construed to require employers to accept the recommendations or findings of employee representatives.

This change is necessary to ensure that collective bargaining rights are preserved for both workers and employers as structured under the National Labor Relations Act, because it clarifies the provisions relating to employee participation in PSM activities.

Subsection (q)(2)

The amendment revises this subsection to state that the written employee-participation plan will determine how employees are selected to participate in overall PSM program development, implementation planning, PSM teams, and other activities. Stakeholders raised concerns that the current subsection impermissibly interferes with employers' collective bargaining rights under the National Labor Relations Act by purporting to assign specific rights and responsibilities to authorized collective bargaining agents without going through the collective bargaining process.

The proposed amendment states that a written employee participation plan will determine how employees will be selected to participate in overall PSM program development and implementation planning, and how employees will be selected to participate in PSM teams and other activities. The proposed amendment also states that employees shall be on-site and qualified for the task for which they are selected and shall be subject to all provisions of subsection (q)(1) of this regulation. Employees who are on-site and qualified are often in the best position to understand and explain the details of day-to-day operation, and to know and understand how procedures are carried out in practice.

This change is necessary because it clarifies that the written employee participation plan will control employee participation, not authorized collective bargaining agents. The change is necessary to ensure adequate employee representation in the PSM program.

BUSINESS IMPACT STATEMENT

Although the proposed regulation will directly affect petroleum refineries, the Board has concluded that the economic impact of the proposed regulations will not be significant. These amendments only clarify existing regulations and requirements that apply to petroleum refineries.

The Board anticipates that the only costs to refineries would be for those associated with updating written operating procedures and training materials reflecting the proposed regulatory amendments. The total costs for all businesses (i.e., 11 petroleum refineries) would be \$21,260.80 during the first year after the regulation goes into effect. For the purposes of the economic analysis, the Board has selected a typical timeframe of 10 years as the lifetime of the proposal. Because the proposed amendments would not require refineries to continually update their operating procedures and training materials every year over the 10-year lifetime, the Board estimated that costs to refineries would be incurred only in the first year after the regulation goes into effect.

ECONOMIC IMPACT ANALYSIS / ASSESSMENT OF JOB/BUSINESS CREATION OR ELIMINATION

The Board has made an initial determination that this proposed regulatory action would have no significant adverse economic impact on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states or create or expand business in California, and will not affect creation or elimination of jobs in the State of California. The proposed regulatory amendments are not projected to exceed the major regulation threshold because they do not have potential costs exceeding ten million dollars in any single year or fifty million dollars in any 12-month period. This regulatory proposal is intended to provide worker safety at places of employment in California. These proposed amendments simply clarify existing regulatory provisions that have been in place since 2017. Additionally, the proposed changes will not create any new compliance obligations that will result in the creation or elimination of jobs.

HEALTH AND WELFARE BENEFITS FOR CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT

This proposed regulatory action will benefit the welfare of California residents and worker safety by providing clarity and consistency to the regulated entities in the petroleum refinery industry and helping to further prevent hazardous material accidental releases in the state.

CONSIDERATION OF ALTERNATIVES

The Board has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than the proposed amendments. The Board also determined that there are no reasonable alternatives to the proposed regulations that are less burdensome and equally effective in achieving the purposes of the regulations.

The Board rejected the no-action alternative because it would not achieve the objectives of the proposed revisions and would be inconsistent with the court-approved resolutions. The no-action alternative would lead to further litigation, which could jeopardize the existence of Section 5189.1's protections. The no-action alternative could also jeopardize on-going enforcement of Section 5189.1, in that employers cited for violations of the standard could raise — and potentially prevail — on the same

grounds raised in the lawsuits: federal preemption, invalidity and unenforceability, and lack of necessity and clarity. The proposed revisions do not regulate the actions of small businesses, thus there is not a need to identify and consider alternatives that would lessen overall adverse impacts on small businesses.

ANTICIPATED BENEFITS OF THE PROPOSAL

The proposed amendments would clarify and add greater specificity to existing regulatory provisions. The proposed amendments would benefit the petroleum refineries that implement the PSM program by allowing for greater efficiency and consistency in implementation and compliance by those entities. The proposed changes would also facilitate uniform and efficient compliance. These amendments would provide more clarity so that there is better enforcement of the regulations and would allow petroleum refineries to better understand their compliance obligations. The proposed clarifications would also help ensure worker safety at the regulated petroleum refineries themselves.

DOCUMENTS RELIED ON BY THE BOARD

1. Bureau of Labor Statistics, Employer Cost of Employee Compensation, Table 7, Pacific Region, News Release Tables (XLSX table), Sept. 2024.
<https://www.bls.gov/ecec/tables.htm>.
2. Bureau of Labor Statistics, California Occupational Employment and Wage Estimates, May 2023.
https://www.bls.gov/oes/current/oes_ca.htm#tophttps://www.bls.gov/oes/current/oes_ca.htm#top (downloadable XLS file).
3. Process Safety Management for Petroleum Refineries, Title 8, New Section 5189.1 of the General Industry Safety Orders, *Initial Statement of Reasons* (2016)
4. Process Safety Management for Petroleum Refineries, Title 8, New Section 5189.1 of the General Industry Safety Orders, *Final Statement of Reasons* (2016)
5. Edmund G. Brown Jr., Governor. (2014). Improving Public and Worker Safety at Oil Refineries, Interagency Working Group on Refinery Safety.
<https://www.dir.ca.gov/oshsb/documents/Process-Safety-Management-for-Petroleum-Refineriess-governorreport2014.pdf>
6. Jordan Barad. (2010). OSHA Deputy Assistant Secretary Testifies Before Senate Subcommittee on Employment and Workplace Safety on Worker Safety in Energy Production Industries (Release Number 10-0819-NAT).
<https://www.dol.gov/newsroom/releases/osha/osha20100610>
7. U.S. Chemical Safety and Hazard Investigation Board. (2009). Urgent Recommendations (No. 2009-14-I-TX-1).
<https://www.csb.gov/file.aspx?DocumentId=5928>

8. U.S. Chemical Safety and Hazard Investigation Board. (2015). Final Investigation Report Chevron Richmond Refinery Pipe Rupture and Fire (No. 2012-03-I-CA). https://www.csb.gov/assets/1/20/chevron_final_investigation_report_2015-01-28.pdf
9. *Western States Petroleum Association v. California Occupational Health and Safety Standards Board, et al.*, Sacramento County Superior Court, Case No. 34-2019-00260210, Complaint (filed July 9, 2019).
10. *Western States Petroleum Association v. California Occupational Health and Safety Standards Board, et al.*, Sacramento County Superior Court, Case No. 34-2019-00260210, Joint Stipulation and Order to Substitute Parties (filed Oct. 7, 2021).
11. *Western States Petroleum Association v. California Occupational Health and Safety Standards Board, et al.*, Sacramento County Superior Court, Case No. 34-2019-00260210, Request for Dismissal and Dismissal (filed Sept. 17, 2024).
12. *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, et al.*, E.D. Cal., Case No. 2: 19-cv-01270, Complaint (filed July 9, 2019).
13. *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, et al.*, E.D. Cal., Case No. 2: 19-cv-01270, Order Substituting Defendants (filed Sept. 23, 2021).
14. *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, and The California Environmental Protection Agency*, E.D. Cal., Case No. 2:19-cv-1270-JAM-DB, Notice of Motion and Motion for Voluntary Dismissal (filed Sept. 23, 2024), and Minute Order Granting Voluntary Dismissal Pursuant to FRCP 41(a)(2) (filed Sept. 24, 2024).
15. Settlement Agreement to resolve two lawsuits: *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, et al.* (Sacramento Superior Court, Case No. 34-2019-00260210); *Western States Petroleum Association v. California Occupational Safety and Health Standards Board, et al.* (E.D. Cal., Case No. 2:19-cv-1270) (“Federal Case”)

These documents are available for review by appointment Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board Office located at 2520 Venture Oaks Way, Suite 350, Sacramento, California and online at [Petroleum Refinery Process Safety Management Standards Rulemaking - Advisory Meetings](#).

SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

PETITION

This proposal was not the result of a petition.

ADVISORY COMMITTEE

This proposal was developed with the assistance of an advisory committee, which was convened on January 9, 2025. (A list of advisory committee members, attendance sheets, and minutes are included as Documents Relied Upon and can be found at [Petroleum Refinery Process Safety Management Standards Rulemaking - Advisory Meetings.](#))

FIRE PREVENTION STATEMENT

This proposal does not include fire prevention or protection standards. Therefore, approval of the State Fire Marshal pursuant to Government Code section 11359 or Health and Safety Code section 18930(a)(9) is not required.