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Occupational Safety and Health Standards Board
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**PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 584)**

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on May 22, 2020 from Oyango A. Snell, Esq., Senior Vice President and General Counsel of the Western States Petroleum Association (Petitioner), a trade association representing companies that explore for, produce, refine, transport, and market petroleum and related products. Petitioner seeks changes to title 8, section 5189.1¹ of the General Industry Safety Orders, Process Safety Management for Petroleum Refineries (CalPSM).

Labor Code section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and render a decision no later than six months following receipt. This period has been extended 120 days by Governor Gavin Newsom's Executive Orders N-63-20 and N-71-20, in recognition of the State of Emergency caused by COVID-19.

Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation, and the Division has 60 days after receipt to submit an evaluation regarding the proposal; this timeline, running concurrently with the Board's timeline as described above, has also been extended 120 days pursuant to Executive Orders N-63-20 and N-71-20.

SUMMARY

Petitioner identifies Requests 1-4, seeking amendments to several provisions in the CalPSM regulations:

- **Request 1** - section 5189.1(c), definition of "major change";
- **Request 2** - section 5189.1 subdivision (c), definition of "employee representative" and section 5189.1, subdivisions (q)(1) and (2), "employee participation";
- **Request 3** - section 5189.1(l)(4)(D) and (E) hierarchy of controls analysis; and

¹ All references are to California Code of Regulations, title 8, unless otherwise stated.

- **Request 4** - section 5189.1 subdivision (c), definition of “highly hazardous material”.

Petitioner takes issue with a number of definitions found in section 5189.1, subdivision (c). Petitioner argues that the definition of “major change” is vague and overbroad, and could be applied to minor equipment changes. The definition is also different from that of the same term in the California Office of Emergency Services Accidental Release Prevention (CalARP) regulations, which Petitioner believes creates uncertainty regarding compliance with both regulatory schemes. Petitioner also finds the phrase “worsens an existing process safety hazard”, as used in section 5189.1, subdivision (c), to be vague.

The Petition requests revision of the term “employee representative”, also found in section 5189.1, subdivision (c). That definition states in part, “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.” Petitioner reads the definition as creating a different standard for employee representatives at union and non-union refineries.

The final definition raised by Petitioner is the section 5189.1, subdivision (c) definition of “highly hazardous material.” Petitioner traces the definitions of “highly hazardous material”, “flammable gas”, “flammable liquid”, “toxic substance”, and “reactive substance” to Federal OSHA requirements within the hazard communication regulation, and asserts that the tests within the federal hazard communication regulation are not intended for process safety management purposes, and are highly complex.

As to Petitioner’s other requests, Petitioner states that the requirement found in section 5189.1, subdivisions (q)(1) and (2), that employees and their representatives be given the opportunity to “effectively participate” is impermissibly vague, and also constitutes interference in the collective bargaining process.

Lastly, Petitioner requests changes to section 5189.1, subdivision (l), the hierarchies of control analysis. According to Petitioner, the section fails to provide guidance as to how to resolve scenarios in which there is a conflict between inherent safety measures for different hazards. Petitioner also finds that the section includes prescriptive requirements for adopting safety measures and safeguards that run contrary to the performance-based goals of the enabling statutes and regulations themselves.

DIVISION EVALUATION

As of the drafting of the proposed decision, the Division had not submitted an evaluation for consideration in this matter.

BOARD STAFF’S EVALUATION

Board staff prepared a detailed evaluation discussing the Petitioner’s requested changes to the CalPSM regulations. As to the Petitioner’s arguments regarding definitions found in section

5189.1, subdivision (c), the staff evaluation finds little merit. Rather, the staff evaluation concludes that the definition of “major change” is not, in itself, vague and overbroad, and that the exclusion of “minor equipment changes” from “major change” would not necessarily improve workplace safety. Indeed, Petitioner’s proposed amendments to the regulation, that would exclude new processes, new process equipment, and new highly hazardous materials as “minor” changes, could have a detrimental impact on workplace safety.

The staff evaluation also disagrees with Petitioner’s assertion that the definition of “major change” in the CalPSM safety orders must be identical to the definition found in the CalARP regulations. Regarding the Petitioner’s assertion that the phrase “worsens an existing process safety hazard” is impermissibly vague; the Board staff evaluation disagrees, and finds the intent of the phrase to be clear in the context of the regulation. The staff evaluation also concludes that the definition of “employee representative” does not require any modification. An employee representative may be a labor union representative, an outside expert, or some other individual appointed by employees; there is no requirement that an employee representative have specific knowledge of the facility. As the staff evaluation notes, the necessary refinery-specific information may come from the represented employees themselves, who can provide such information to their appointed representative.

As to the definition of “highly hazardous material”, the Board staff evaluation does agree that amendment to the subdivision, to reflect a more contemporary scope of process safety management augmented with threshold quantity limits, may be worthy of an advisory committee, and recommends section 5189 (including Appendix A), title 19, section 2770.5, and the Seveso III, Directive 2012/18/EU as discussion starting points, to establish threshold quantities.

Regarding section 5189.1, subdivisions (q)(1) and (2), the staff evaluation-- which is a technical evaluation drafted by a Board safety engineer with expertise in occupational safety and health-- finds that the question raised regarding interference with collective bargaining rights is beyond the scope of the evaluation. The staff evaluation does find, however, that there is no impermissible vagueness in the requirement that participation be “effective”, and that the word “effective” as used in the regulation can be understood using the plain language meaning of the term.

The Board staff evaluation agrees with Petitioner that section 5189.1, subdivision (l)(4)(D) may benefit from review, to further clarify the terms “achieved in practice” and “related industrial sectors”. However, the staff evaluation concludes that geographic or other limitations on what practices and processes should be reviewed does not promote workplace safety, and would be an unnecessary and arbitrary limitation on the scope of such a review.

In sum, the Board staff evaluation recommends:

- **Denying** Petitioner’s request to amend section 5189.1, subdivision (c) as regards the definition of major change, and employee representative.
- A limited **grant** to allow an advisory committee to consider amending the definition of “highly hazardous material” found in section 5189.1 to reflect a more contemporary scope of process safety management augmented with threshold quantity limits.
- **Denying** requests to amend section 5189.1, subdivision (q)(1) and (2), as relates to employee participation.
- **Granting** the request to amend section 5189.1, subdivision (l), the hierarchy of hazard controls analysis, to the extent that an advisory committee consider amending or clarifying the phrases “achieved in practice” and “related industrial sector.”

DISCUSSION

The Board currently lacks a Division evaluation of Petition 584. The Board is aware that the Division has submitted a Request for New, or Change in Existing, Safety Order (Form 9) to Board staff, also seeking amendments to section 5189.1, although of a different scope to the Petitioner’s request. As such, this informs the Board’s order, but stands apart from its consideration of the Petition.

The Board staff evaluation argues convincingly that Petitioner’s proposal to exclude new processes, new process equipment, and new highly hazardous materials as “minor” changes is overbroad and would serve to lessen workplace protections currently provided by the CalPSM standards. The Board accepts the staff evaluation of Petitioner’s request for changes in definitions and/or clarity for “major change”, “employee representative”, and “worsens an existing process safety hazard” as thorough, and finds the existing language to be permissibly clear.

The Board finds that the staff evaluation does show that an advisory committee, which includes experts in the field of Process Safety Management for Petroleum Refineries, should be convened to further explore Petitioner’s “Request 3” and “Request 4”.

Finally, the Board staff finds that Petitioner’s assertion regarding interference with collective bargaining rights is improperly included, as it raises issues argued by Western States Petroleum Association in pending legal challenges to the CalPSM regulations. As such, the Board will refrain from responding, and instead limits its decision to the merits of the Petitioner’s remaining requests.

CONCLUSION AND ORDER

Having read and considered the Petition and the evaluation by Board staff, the Board hereby GRANTS, IN PART, Petition 584, to the extent that it directs Board staff to work with the Division to convene a representative advisory committee meeting. The advisory committee is tasked with consideration of Petitioner's "Request 3", regarding section 5189.1, subdivision (l), to the extent of amending or clarifying the phrases "achieved in practice" and "related industrial sector", and "Request 4", to the extent of reviewing the definition of "highly hazardous material" as found in section 5189.1, subdivision (c), considering amendments to reflect a more contemporary scope of process safety management and the addition of threshold quantity triggers.

The Petitioner should be invited to participate. Representatives for the following stakeholders should also be invited to participate:

1. California Governor's Office of Emergency Services (CalOES);
2. The Division's Process Safety Management Unit; and
3. A representative cross-section of Labor and Management representatives.

Additionally, in the interest of efficient rulemaking, Board staff is to proceed in considering the Division's pending Form 9, which also requests amendments to section 5189.1, and including elements of the Division's proposal in the advisory committee discussion, as Board staff deems appropriate.