



Oyango A. Snell, Esq.
Senior Vice President and General Counsel

May 22, 2020

Ms. Christina Shupe, Executive Officer
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

via e-mail at: oshsb@dir.ca.gov

Re: Petition Requesting Change in Existing Safety Order - PSM Section 5189.1

Dear Ms. Shupe:

The Western States Petroleum Association (WSPA) formally petitions the Occupational Safety and Health Standards Board (OSHSB) to request a change in Title 8, Section 5189.1 of the General Industry Safety Orders, Process Safety Management for Petroleum Refineries (CalPSM Section 5189.1). Subsections of concern in the current version of CalPSM Section 5189.1 are as follows:

- §5189.1(c) Definition of Major Change
- §5189.1(c) Definition of Employee Representative and §5189.1(q)(1) & (2) Employee Participation
- §5189.1(l)(4)(D) & (E) Hierarchy of Hazard Controls Analysis
- §5189.1(c) Definition of Highly Hazardous Material

WSPA is a non-profit trade association that represents companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California and four other western states.

It is our understanding that the California Department of Industrial Relations (Division of Occupational Safety and Health) has submitted to OSHSB Cal/OSHA Form 9s (requests for change in existing safety orders) for: §5189.1(c) Definitions: Major Change, §5189.1(c) Definitions: Employee Representative, and §5189.1(q)(2) Employee Participation. WSPA supports making revisions to the definitions of "Major Change" and "Employee Participation" as well as changes to certain provisions of §5189.1(q) and further petitions OSHSB to revise the following subsections : §5189.1(l)(4)(D) & (E) Hierarchy of Hazard Controls Analysis and §5189.1(c) Definitions: Highly Hazardous Material, all as described below. Please note we reserve the right to request additional changes to the provisions identified in this petition.

Request 1: Change to §5189.1(c) - Definition of Major Change

WSPA requests revision of §5189.1(c) which currently states:

*"Major Change. **Any of the following:***

- *Introduction of a new process, new process equipment, or new highly hazardous material;*
- *Any operational change outside of established safe operating limits; or,*
- *Any alteration that introduces a new process safety hazard or worsens an existing process safety hazard"*

When coupled with the definitions of “process equipment,” and “highly hazardous material,” the definition of “Major Change” is vague and overly broad and could apply to very minor equipment changes. Such a broad application could undermine the safety of a refinery and its employees by diverting focus and resources away from those critical changes that are appropriately considered “major” changes.

In addition, the regulation utilizes vague language such as the phrase “worsens an existing process safety hazard,” which does not put the regulated community sufficiently on notice of what constitutes a “Major Change.” Furthermore, because the definition of “Major Change” in the CalPSM regulation is different from the definition of the same term in the California Office of Emergency Services Accidental Release Prevention (CalARP) regulations enacted by the California Office of Emergency Services, there is uncertainty as to how the regulated community must comply with both regulations.

WSPA requests that this subsection of the regulation and related definitions be revised to (1) provide further clarity that minor equipment changes are not covered; (2) eliminate the reference to “worsens an existing process safety hazard,” and (3) provide consistency with the definition of the “Major Change” in the CalARP regulations.

Request 2: Change to §5189.1(c) - Definition of Employee Representative and §5189.1(q) - Employee Participation

WSPA requests revision of both §5189.1(c) - Definition of Employee Representative and §5189.1(q) - Employee Participation.

The regulation requires the participation of an “employee representative” in all elements of process safety management. While the regulation requires “employee representatives” at non-union refineries to be qualified for the task and to work on-site at the refinery, “employee representatives” at refineries with unionized employees, by contrast, are not required to meet these same prerequisites. That is, employee representatives selected at unionized refineries may be *unqualified* for the task because they lack the requisite experience required for the task, and/or are unfamiliar with the refinery’s equipment and processes if they are not employees at that facility. This provision would allow unqualified employee representatives to participate in safety programs, thereby jeopardizing refinery safety.

Section 5189.1(q)(2) also impermissibly interferes in the collective bargaining process by specifying the rights of unions to appoint employee representatives and the terms for employee participation in safety programs in refineries with union-represented employees.

Finally, Section 5189.1(q)(1) requires that employees and employee representatives be afforded the opportunity to “effective[ly] participat[e]” in all phases of process safety program development, implementation, training and maintenance, including individual process safety activities (e.g. incident investigations). However, the regulation does not define or provide any criteria for what constitutes “effective participation.”

WSPA requests (1) that the definition of employee representative be revised to require that all employee representatives be employees of the refinery at issue and be qualified to participate in the relevant activity(ies) for which they will serve as employee representatives; (2) deletion of Section (q)(2) and its language conferring rights on authorized collective bargaining agents; and (3) that, as used in Section 5189(q)(1), “effective participation” be defined to mean the timely

invitation of the designated employee representative to participate in the relevant process safety activity.

Request 3: Change to §5189.1(l) - Hierarchy of Hazard Controls Analysis

WSPA requests revision of §5189.1(l)(4)(D). This section ostensibly requires petroleum refineries to conduct a worldwide review of publicly available information regarding safety measures and safeguards and then make a subjective determination as to whether a measure or safeguard is “inherently safe,” and whether it has been “achieved in practice,” without any guidance on the meaning of these terms. Moreover, this search is not limited to the measures and safeguards used in the petroleum refining industry but also includes “related industries,” again without providing guidance as to what constitutes such “related industries.”

Moreover, Section 5189.1(l)(4)(E) fails to provide any guidance for how to resolve scenarios in which there is a conflict between inherent safety measures for different hazards. For example, an inherent safety measure or safeguard that minimizes one hazard could potentially adversely impact inherent safety measures or safeguards that minimize one or more other hazards, could worsen another existing hazard, or could introduce a new hazard.

Section 5189.1(l)(4)(E) also includes prescriptive requirements for adopting safety measures and safeguards that are contrary to the performance-based goals of the enabling statutes and regulations themselves.

WSPA requests that this subsection be revised to (1) provide clear, specific criteria for performing the review referenced in Section (l)(4)(D), including the meaning of the terms “achieved in practice” and “related industrial sectors;” (2) provide a reasonable and useful boundary on the geographic and technical scope of what publicly-available information on inherent safety measures and safeguards is required to be identified, analyzed, and documented; (3) provide guidance on resolving Hazard Controls Analysis scenarios where an inherent safety measure or safeguard for one hazard adversely impacts the refinery’s control of other hazards; and (4) eliminate the prescriptive order of priorities in Section (l)(4)(E) for selecting recommended safety measures and safeguards as inconsistent with the performance based nature of the PSM standards.

Request 4: Change to §5189.1(c) - Definitions of Highly Hazardous Material

WSPA requests revision of §5189.1(c) which currently states:

“Highly Hazardous Material. A flammable liquid or flammable gas, or a toxic or reactive substance.”

“Flammable Liquid. As defined in CCR Title 8, Section 5194, Appendix B.”

“Flammable Gas. As defined in CCR Title 8, Section 5194, Appendix B.”

“Toxic Substance. Acute toxicity, as defined in CCR Title 8, Section 5194, Appendix A.”

“Reactive Substance. A self-reactive chemical, as defined in CCR Title 8, Section 5194, Appendix B.”

The term “highly hazardous material” is defined as “A flammable liquid or flammable gas, or a toxic or reactive substance.” Those terms are defined by reference to the California hazard communication regulation, which in turn references the federal hazard communication regulation, which provides specific tests for determining whether a chemical qualifies as a flammable liquid or gas or a toxic or reactive substance. These tests in the federal hazard communication regulation are not intended for process safety management purposes and are highly complex, requiring the application of chemical classification criteria, formulas, guidance values and other

Ms. Christina Shupe
May 22, 2020
Page 4

hazard categories. This definition creates significant uncertainty and risk of confusion or inconsistent application. By contrast, the original CalPSM regulation contained tables that clearly identified the chemical substances covered by the regulation.

The regulation also eliminates the previous requirement for a threshold quantity, with the result that very small quantities could trigger the requirements of CalPSM, even if they present no meaningful process safety hazard. As with the definition of "Major Change," WSPA believes that the absence of meaningful threshold quantities risks unintended and undesired dilution of the overall process safety management effort.

WSPA requests that the definition of "highly hazardous material" in §5189.1(c) be revised to provide a clear and straightforward way for employers to understand what chemicals are subject to the regulation, with associated threshold quantities.

If you have any questions regarding this petition, please contact me (916) 325-3115 or via email at osnell@wspa.org.

Sincerely,

A handwritten signature in cursive script that reads "Oyango A. Snell".

Oyango A. Snell, Esq.