

August 10, 2016

**By Facsimile 202-606-5050**

Mr. John X. Cervený  
Executive Secretary  
Occupational Safety and Health Review  
Commission One Lafayette Centre  
1120 20th Street, NW, 9th Floor  
Washington, DC 20036-3419

**Re: *Secretary of Labor v. Wynnewood Refining Co. LLC*, OSHRC Docket Nos.  
13-0644 and 13-0791**

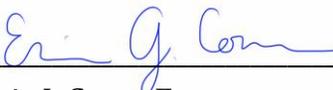
Dear Mr. Cervený:

Enclosed for filing in the above-referenced case are the following documents:

- Motion for Leave to File Amicus Brief by American Fuel & Petrochemical Manufacturers and the American Petroleum Institute on Behalf of Respondent, Wynnewood Refining
- Statement of Corporate Affiliations of American Fuel & Petrochemical Manufacturers and the American Petroleum Institute.
- Amicus Brief for American Fuel & Petrochemical Manufacturers and the American Petroleum Institute in Support of Respondent.

Thank you for your consideration of our Motion and Brief.

Respectfully,



Eric J. Conn, Esq.

*Counsel for American Petroleum & Petrochemical  
Manufacturers and the American Petroleum  
Institute*

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor,  
U.S. Department of Labor

Complainant,

v.

WYNNEWOOD REFINING CO., LLC, and  
its successors,

Respondent,

OSHRC Docket Nos.: 13-0644 & 13-0791

**MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENT**

Pursuant to Commission Rule 24, 29 C.F.R. § 2200.24, the American Fuel & Petrochemical Manufacturers and American Petroleum Institute move for an order allowing them leave to file the attached *amici curiae* brief in support of Respondent Wynnewood Refining Co., LLC (“Wynnewood”). This action arises from Wynnewood’s challenge to citations issued to it by OSHA pursuant to inspections initiated as a result of a boiler explosion at Wynnewood’s facility. The central issue under review for purposes of this Amicus Brief is the Administrative Law Judge’s (“ALJ”) determination that the steam boiler at issue is covered by OSHA’s Process Safety Management of Highly Hazardous Chemicals (“PSM”) Standard, 29 C.F.R. §1910.119, *et seq.*

**American Fuel & Petrochemical Manufacturers and American Petroleum Institute Have a Compelling Interest in These Cases, and Their Participation Will Assist the Commission in Assessing the Impact of the Decision on Affected Industries.**

American Fuel & Petrochemical Manufacturers (“AFPM”) is a trade association representing approximately 400 companies, including virtually all U.S. petroleum refiners and petrochemical manufacturers. Its membership is comprised of high-tech American

manufacturers of essentially the entire U.S. supply of gasoline, diesel, jet fuel, and other fuels and home heating oil, as well as manufacturers of U.S. petrochemicals used in a wide variety of products. American Petroleum Institute (“API”) is also a trade association, representing more than 650 members from all facets of the petroleum and natural gas industry, including large, integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms.

AFPM and API are two of the main voices for the petroleum and petrochemical industries. As such, both associations and their members will be directly impacted by the Commission’s decision in this matter. Moreover, they are well-positioned to share valuable knowledge, expertise, and experience with process safety management that will afford the Commission important context and insight into the issues relevant to disposition of this case.

The ALJ’s holding in this matter, particularly as it pertains to establishing the boundaries of a PSM-covered process through interconnectivity and proximity, would have a significant impact on the petroleum and petrochemical industries. Indeed, it has the potential to expand PSM coverage far beyond the applicability of the PSM Standard contemplated by OSHA during its promulgation of the Standard. Moreover, the ALJ’s decision would make facilities and refineries throughout our members’ industries inherently less safe by discouraging employers from voluntarily adopting best practices reflected in the PSM Standard, even for equipment that is not technically covered.

Thus, AFPM and API have a significant interest in this matter and join Wynnewood in requesting that the Commission reverse the ALJ’s decision that the steam boiler at the Wynnewood Refinery is a PSM-covered process or is part of a PSM-covered process. As representatives of industries regulated by the PSM Standard, AFPM and API also ask that the

Commission make clear that voluntary implementation of best practices as outlined by the PSM Standard does not make equipment PSM-covered and subject to penalty.

For these reasons, AFPM and API respectfully request that they be granted leave to participate as *Amici Curiae* by filing a brief in support of the Respondent in this case.

Date: August 10, 2016

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of August 2016, I served a copy of American Fuel & Petrochemical Manufacturers' and American Petroleum Institute's Motion for Leave to File an *Amicus Brief* In Support of Respondent, Wynnewood Refining Co., LLC, Statement of Corporate Affiliations for AFPM and API and the Brief of Amicus Curiae by First Class Mail upon the following:

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UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,  
Complainant,

v.

WYNNEWOOD REFINING COMPANY, LLC  
and Its Successors,  
Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351,  
Authorized Employee Representatives.

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*AMICUS* BRIEF FOR  
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,  
and  
AMERICAN PETROLEUM INSTITUTE

IN SUPPORT OF RESPONDENT

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Date Submitted: August 10, 2016

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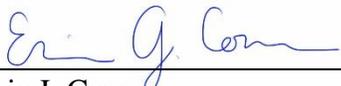
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## **CORPORATE DISCLOSURE STATEMENT**

The *amici curiae* are American Fuel & Petrochemical Manufacturers (AFPM) and the American Petroleum Institute (API). Pursuant to Rule 35 of the Occupational Safety and Health Review Commission (OSHRC or the Commission), the undersigned counsel for the *amici curiae* files this corporate disclosure statement. The *amici curiae* are non-profit organizations, they have no parent corporations or subsidiaries, and none have issued stock to the public.

Dated: August 10, 2016

  
\_\_\_\_\_  
Eric J. Conn  
Founding Partner, Conn Maciel Carey PLLC  
*Counsel for Amici Curiae*

## INTEREST OF AMICI CURIAE

Through this brief, the *amici curiae* AFPM and API add their collective voice on the issues to be decided by the Occupational Safety and Health Review Commission. Members of the *amici curiae* operate or provide services in support of processes regulated under the Occupational Safety and Health Administration's (OSHA's) Process Safety Management of Highly Hazardous Chemicals standard, 29 C.F.R. § 1910.119 (the PSM Standard), and accordingly will be directly impacted by the Commission's decision in this matter. In addition, AFPM and API have a wealth of institutional knowledge and experience with process safety management that will provide the Commission helpful context on issues relevant to the disposition of this case.

AFPM is a national trade association of approximately 400 companies, including virtually all U.S. petroleum refiners and petrochemical manufacturers. AFPM represents high-tech American manufacturers of essentially the entire U.S. supply of gasoline, diesel, jet fuel, and other fuels and home heating oil. In addition, AFPM members manufacture U.S. petrochemicals, which are then used in a wide variety of products, including plastic, medicines and medical devices, cosmetics, TVs and radios, computers, solar power panels, and parts used in every mode of transportation. AFPM members help meet the fuel and petrochemical needs of the nation, strengthen economic and national security, and support nearly two million American jobs. Their expertise and understanding of the application of the PSM standard to refinery and petrochemical facilities is unsurpassed. Ultimately, the Commission's decision in this case will have major policy implications and affect thousands of workers and employers throughout the United States, including AFPM's members.

The American Petroleum Institute is the national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API has more than 650 members that include large, integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. Collectively, they provide most of the nation's energy and many will be directly impacted by the Commission's decision in this matter affecting the scope of OSHA's PSM Standard.

It is not hyperbole to say the ALJ's determination in this case threatens to bring all equipment at a refinery under PSM coverage, from every vessel containing a highly hazardous chemical to water faucets, electrical outlets, and computer equipment within a facility's fence line. The ALJ's decision uses a steam header that connects non-PSM equipment to various PSM-covered processes, to expand the reach of the PSM standard, and to expand it without limit. Not only is such an expansion contrary to the terms and regulatory guidance of the PSM standard, but it also drastically increases the burden of compliance (in both employee time and company expenditures) without measurably increasing employee safety.

Even more troubling is that the ALJ's decision in this case was based, at least in part, on the fact that the Refinery voluntarily implemented features of its PSM program in maintaining and assessing hazards related to the steam boiler. *See* Decision and Order p. 34. Specifically, the ALJ concluded that because the Refinery chose to implement parts of its process safety management program for the boiler, the Refinery had not conclusively determined that the PSM standard did not apply to the boiler. If the Commission allows such a holding to stand, it will create a disturbing disincentive against voluntarily applying best practices to enhance safety out of concern for expanding legal and regulatory liabilities for having done so.

## **I. Introduction**

*Amici curiae* AFPM and API join Respondent in challenging the decision of the Administrative Law Judge (ALJ) regarding Wynnewood Refining Company, LLC's (Wynnewood) citations issued by OSHA for alleged violations of the Process Safety Management of Highly Hazardous Chemicals standard (the PSM standard) at its Wynnewood, OK refinery (the Refinery).

OSHA promulgated the PSM standard in 1992 for the important and limited purpose of “preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals.” 29 C.F.R. § 1910.119 (Purpose). The PSM Standard was *not* designed as or intended to be a catch-all regulation to address any and all hazards present at chemical facilities or petroleum refineries. Indeed, prior to the implementation of the PSM Standard, and still today, OSHA enforces a host of other standards and regulations that address hazards involving highly hazardous chemicals (HHCs) other than catastrophic releases (29 C.F.R. § 1910.1200 – the Hazard Communication standard), as well as standards and regulations that address the hazards of highly hazardous chemicals present at such facilities but not included in process vessels (e.g., 29 C.F.R. § 1910.106 – the Flammable Liquid Storage standard).

In this matter, OSHA attempts to impermissibly broaden the narrow scope, purpose, and intent of the PSM standard by extending PSM coverage to a steam boiler that is not part of a covered process. This expansive and unprecedented application of the PSM Standard proposed by OSHA in its citations to the Refinery and accepted by the ALJ exceeds OSHA's regulatory authority under the PSM Standard, as evidenced by its inconsistency with the plain language of the PSM Standard, prior OSHA regulatory interpretations of the PSM Standard, and the regulatory and enforcement history of the PSM Standard. In addition to being legally impermissible, the expansion of PSM that would follow from the ALJ's decision in this matter

would diminish rather than enhance employee safety by encouraging employers to implement industry best practices only when they are legally required and not voluntarily to improve employee safety. Equally troubling for industry, the ALJ's determination undermines and amends years of experience by regulated entities applying OSHA's PSM coverage criteria without any notice or opportunity to comment on the new interpretation.

## **II. Overview**

On September 28, 2012, an incident occurred at the Refinery during the lighting of a steam boiler that resulted in the death of two employees. *See Secretary of Labor v. Wynnewood Refining Co., LLC*, 2016 OSAHRC Lexis 13, at \*1 (O.S.H.R.C. Feb. 5, 2016). As a result of the incident, OSHA conducted two inspections at the Refinery. *See id.* at \*2. OSHA concluded one of these inspections by issuing citations alleging violations of the PSM Standard based on a determination that a steam boiler that is located outside of any covered process was part of a PSM-covered process. *See id.* at \*19.

In supporting its determination that the steam boiler falls within PSM coverage, OSHA had to develop novel interpretations of several elements of 29 C.F.R. § 1910.119(b); interpretations that, if not overturned, could ultimately stretch PSM coverage to include every piece of equipment inside refineries' fencelines. However, such an outcome is not supported by the plain language or the regulatory history of the PSM Standard. OSHA has not enforced the PSM Standard in this manner over the twenty plus years since it promulgated the rule. Furthermore, and importantly based on the performance-oriented nature of the PSM standard, the subject Refinery reasonably determined this steam boiler was not covered by its PSM Program. For OSHA to second-guess Wynnewood's reasonable determination regarding PSM coverage of a piece of equipment made by expert personnel at the Refinery, without providing support that

the determination was unreasonable, undermines the discretion given employers by the language of the PSM Standard.

Despite inconsistency with the regulatory language, regulatory history, and past OSHA guidance, the ALJ found in favor of OSHA on application of the PSM Standard to the steam boiler. Specifically, the ALJ made four erroneous findings related to the steam boiler at the Wynnewood Refinery. First, the ALJ should have ruled that the steam boiler alone cannot be a process, and therefore, is not PSM-covered, because it contains no HHCs above a threshold quantity or a flammable gas or liquid above 10,000 pounds. Second, the ALJ should have determined the steam boiler is not “interconnected” to a covered process in a manner that makes it PSM-covered. Third, the ALJ had no basis in fact for a finding that the steam boiler is located in such close proximity to an otherwise covered PSM process such that the boiler became part of a PSM-covered process. Fourth, the ALJ erred by ruling that the Refinery’s voluntary application of process safety management best practices to its steam boiler was evidence that the requirements of the PSM Standard apply to the boiler. For these reasons, the Commission should reverse the ALJ’s decision and vacate the PSM-related citation items issued to Wynnewood.

### **III. Since the PSM Standard was proposed in 1990, OSHA and industry have consistently interpreted the Standard to apply meaningful process boundaries.**

#### **A. The PSM Standard is a performance-based regulation.**

The PSM Standard was welcomed by the petroleum refining and petrochemical manufacturing industries when it was introduced in the early 1990s. Most facilities in these industries had long embraced process safety management before OSHA promulgated its standard, and many facilities already had comprehensive PSM programs, policies, and procedures in place before OSHA published the final rule in 1992. Throughout the rulemaking

process, OSHA considered comments from the regulated community and accepted many proposed changes from industry. OSHA also designed the PSM Standard as a performance-based rule, setting general compliance objectives and giving employers latitude to determine how best to meet those performance objectives. *See generally* 57 FR 6356 (Feb. 24, 1992) (“Preamble to the Final PSM Standard”). *See also, e.g.*, Siemens Energy & Automation, Inc., 2005 OSAHRC Lexis 106, at \*10 fn.8 (O.S.H.R.C. Feb. 25, 2005).

The record in this case establishes that Wynnewood Refinery did a PSM applicability assessment and concluded, based on its understanding of its own processes and equipment, that the steam boiler could neither cause a release of HHC nor interfere with the systems designed to mitigate against such a release. (*See Resp’t Br.* 30-33.) The Record at the hearing also shows that OSHA made no real effort to discredit the Refinery’s reasonable determination. (*See Resp’t Br.* 32 (citing Tr. 976-81).)

**B. OSHA intended for employers to define boundaries between processes.**

The performance-oriented nature of the PSM standard gives discretion to the employer to determine the scope of the Standard’s application, as long as there are no broad deviations from the Standard’s mandates and the employer’s determinations are reasonable. The scope of the PSM Standard is limited to processes involving chemicals listed in Appendix A at certain threshold quantities, or to flammable gases and liquids that are “on site in one location, in a quantity of 10,000 pounds . . . .” 29 C.F.R. § 1910.119(a)(1). The scope of the PSM standard is further limited by the definition of “process” in 29 C.F.R. § 1910.119(b). A PSM-covered process includes any non-exempt “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.” 29 C.F.R. § 1910.119(b).

During the comment period for the PSM Standard, the regulated community requested clarification on the limits of OSHA's definition of "process," as some were concerned that OSHA might try to apply the PSM standard to an entire facility once the standard applied to any one part. OSHA explained this well in the Preamble to the final rule:

"OSHA's view at that time [1990, when the proposed rule was issued] was that if a plant exceeded the threshold quantity of a listed chemical but the chemical was used in smaller quantities around the plant and was not concentrated in one process or in one area, then OSHA believed that a catastrophic release of the threshold quantity would be remote due to the reduced availability of a concentrated amount of the chemical in one location. However, OSHA requested comment on the point at which a chemical should be considered in its aggregate due to the proximity of the sites at which it was being used in a plant.

"While a few participants indicated that the amounts of a highly hazardous chemical used at various sites around the plant should all be counted toward the threshold amount for coverage . . . , most participants who discussed this issue noted that the threshold quantity should not be aggregated . . . . They agreed that highly hazardous chemicals in less than threshold quantities distributed in several processes would not present as great a risk of catastrophe as the threshold quantity in a single process.

"OSHA continues to believe that the potential hazard of a catastrophic release exists when the highly hazardous chemical is concentrated in a process and therefore agrees with these commenters. OSHA has clarified the language contained in the application paragraph to reflect its intent that coverage is triggered by a specified threshold quantity of an appendix A substance being used in a single process."

57 Fed. Reg. 6356, 6364 (Feb. 24, 1992).

Even at the outset, OSHA acknowledged that PSM coverage was not to be determined on a plant-wide basis, leaving individual employers to determine the boundaries of their own processes. But OSHA did not leave employers to sort this out alone, providing more guidance on the determination of boundaries in the Preamble to the final PSM Standard:

"The boundaries of a 'process' would extend to **quantities** in storage, use, manufacturing, handling or on-site movement which are interconnected and would include separate vessels located such that there is a reasonable

probability that an event such as an explosion would affect **interconnected and nearby unconnected vessels which contain quantities of the chemical** that when added together would exceed the threshold quantity and provide a potential for a catastrophic release. In order to clarify this intent, a new sentence has been added to clarify the fact that **interconnected and nearby vessels containing a highly hazardous chemical would be considered part of a single process** and the quantities of the chemical would be aggregated to determine if the threshold quantity of the chemical is exceeded. . . . Vessels located at more remote distances must be evaluated by the employer to determine if they would interact during an incident, and if such a reasonable condition exists these vessels would be included in the process.”

*Id.* at 6372 (emphasis added).

Not only did OSHA explicitly endorse employers drawing boundaries between processes, the Agency also identified the critical factor in drawing those boundaries – the location of the regulated chemicals. OSHA did not say that the boundaries of a process would extend to all equipment connected to a PSM-covered process by pipeline, electric line, or computer data cable. Instead, OSHA clearly states that “vessels containing a highly hazardous chemical” that are interconnected or proximate should be considered part of a process. At no point in the Preamble did OSHA suggest that steam or other utilities, or other equipment without HHCs, must be included in the boundary of a covered process.

This interpretation by OSHA was reinforced in a 2008 interpretation letter to Howard Feldman, an API employee, when OSHA agreed with Mr. Feldman’s description of the method of drawing process boundaries, affirming that “[t]he boundaries of the covered process are based on the equipment which contain HHCs.” 2008 OSHA Stand. Interp. LEXIS 131. This letter also clearly delineates factors that should be examined to determine whether non-HHC equipment could be considered part of a covered process through interconnection. Specifically, the letter instructs Mr. Feldman to determine:

- if interconnected equipment “can affect or cause a release of HHC or interfere in the mitigation of the consequences of a release of HHC,”

- if interconnected equipment is considered a “safeguard in the process” through the covered process’s PHA, or
- if “a failure in a component of an interconnected system cannot affect a potential release of a covered chemical”.

*Id.* The record in the Wynnewood case does not indicate that any of these factors was specifically considered by OSHA or the ALJ. Further, the letter explicitly states that “OSHA’s position regarding PSM coverage of utility systems is as follows: [b]ased on *the employer’s analysis*, utility systems may be subject to various elements of PSM . . .”. *Id.* (emphasis added). In this case, not only did OSHA conveniently disregard its own interpretation of how to determine whether a utility system is an interconnected part of a covered process, it also ignored its presumption that the employer is responsible for making that determination.

**C. The boundaries of a process extend only to vessels where there is “a reasonable probability that an event such as an explosion would affect interconnected and nearby unconnected vessels which contain quantities of the chemical.”**

In the Preamble, OSHA further explained that the boundaries of a covered process include only vessels that could be impacted by a single event. OSHA stated:

“The intent of the standard is to cover a ‘process’ where the use, storage, manufacturing, handling or the on-site movement of a highly hazardous chemical exceeds the threshold quantity at any time. The boundaries of a ‘process’ would extend to quantities in storage, use, manufacturing, handling or on-site movement which are interconnected and would include separate vessels located **such that there is a reasonable probability that an event such as an explosion would affect interconnected and nearby unconnected vessels which contain quantities of the chemical** that when added together would exceed the threshold quantity and provide a potential for a catastrophic release.”

*Id.* (emphasis added).

With this element, OSHA gave employers another tool to separate vessels into distinct processes, and demarcate a covered process from other non-covered equipment at the facility; i.e., to properly draw the boundaries of their PSM-covered processes. In a modern petroleum

refinery or complex chemical facility, this is critical because it is not unusual to have some amount of interconnection or co-location essentially among and between all equipment in the facility. With this guidance from OSHA, employers can be confident dividing an Alkylation (Alky) unit from a Crude unit, or a boiler for a utility from a fluid catalytic cracking unit (FCCU), so long as an event such as an explosion will not affect the interconnected or co-located vessels. A single process should only include interconnected and co-located equipment that can be affected by a common event, such as an explosion.

Since the initial promulgation of the PSM Standard, there has been a dearth of OSHA guidance and Commission decisions clarifying PSM coverage as it relates to “interconnectedness” of a single process or “separate vessels” sufficiently proximate to other vessels in a covered process. The little guidance OSHA has published and few cases decided by the Commission, however, take a narrow approach as to how process boundaries should be determined. For example, in guidance discussing the role of utility systems, like boilers, OSHA recognizes that utility equipment is not part of a PSM-covered process if there are “credible safeguards” to protect against a utility’s failure, or a failure of the utility would not cause a release or interfere with the mitigation of a release of HHC. *See* 2008 OSHA Stand. Interp. LEXIS 131 (Jan. 31, 2008); *see also* 1995 OSHA Stand. Interp. LEXIS 316 (Sept. 14, 1995) (“utility systems would be subject to all of the provisions of the PSM standard until such point where a failure in component of the system can no longer affect a potential release of a covered chemical, or where the utility leaves the control of the employer.”). This interpretation is important because it demonstrates there is refinery equipment that is connected throughout the refinery that is intended to fall outside the boundaries of a covered process.<sup>1</sup>

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<sup>1</sup> It also establishes an exemption for utility equipment, like the boiler in this case, if it has proper safeguards and/or its failure would not cause a release or interfere with the mitigation of a catastrophic release of HHC to qualify for

Furthermore, in OSHA's Akzo-Nobel interpretive letter that speaks directly to the limits of the boundaries of covered process equipment, OSHA explain that if a piece of downstream equipment that connects with a covered process does not itself contain HHC or a threshold quantity of flammable gas or liquid, and it cannot cause a release of HHC or interfere with the mitigation of the consequences of a HHC release, then, based on an employer's analysis, "such equipment could safely be considered outside the limits or boundaries of the covered process." 1997 OSHA Stand. Interp. LEXIS 222 (Feb. 28, 1997). As demonstrated above, in this case, the employer's thorough analysis of a failure of the steam boiler determined that the steam boiler was appropriately outside of PSM coverage. If the ALJ's decision in this case is upheld, it would turn this interpretation on its head, literally leaving no equipment in a refinery outside the scope of the PSM Standard.

#### **IV. The steam boiler in this case is not covered under the definition of "process" in the PSM Standard.**

##### **A. The steam boiler on its own is not covered by the PSM Standard.**

As an initial matter, the steam boiler at issue in these citations is not itself a PSM-covered process because it has never processed, used, or stored a threshold quantity of HHCs, and it is not even physically capable of doing so. *See* Decision and Order at 15. The boiler was used for the sole purpose of creating steam, which is neither an HHC nor a flammable liquid. Although the boiler used small quantities of a flammable gas as an internal fuel, it never contained anything close to a threshold quantity of flammable gas. Therefore, the only way the boiler

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PSM coverage. *See, e.g.*, 1995 OSHA Stand. Interp. LEXIS 316 (Sept. 14, 1995). The Refinery in this case established this exemption applies to the boiler based on the assessment it performed to determine PSM coverage.

could be covered by the PSM standard is if it, along with other vessels, are interconnected or co-located in a manner that causes it to become part of some other covered process.

**B. The steam boiler was not “interconnected” with a PSM-covered process.**

Broadening the scope of interconnectivity to equipment like the Refinery’s steam boiler would result in an absurd interpretation of 29 C.F.R. § 1910.119(b) where anything, indeed, essentially everything, is considered interconnected and, therefore, subject to PSM coverage. The steam boiler in this case does not meet the criteria necessary for interconnectivity.

OSHA alleged the boiler is “interconnected” to the FCCU and Alky Units, both PSM-covered processes, by way of the Refinery’s internal fuel gas pipeline that feeds the boiler and separately feeds the FCCU and Alky Units, as well as through the utility steam system fed to various parts of the Refinery by the steam boiler. Neither connection establishes that the boiler is interconnected to a covered process as intended to establish coverage by the PSM Standard.<sup>2</sup>

**i. Interconnection under the definition of process requires a reasonable probability that an event like an explosion would affect the interconnected vessels.**

The definition of “process” in the PSM Standard makes clear that PSM coverage of vessels outside a covered process based on a theory of interconnectivity depends not only on a physical connection between vessels, but also on the reasonable probability that a remote but

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<sup>2</sup> In finding that the steam boiler is covered by the PSM standard because of interconnection, the ALJ discussed the Commission's recent decision in *Delek* at length. While we disagree with the decision in *Delek*, the ALJ's decision makes much of that decision's expansive definition of “process.” But that emphasis demonstrates an important misunderstanding or distortion of the *Delek* decision. While the Commission did quote from the definition of “process” in *Delek*, the issue in that case was whether the cited equipment was “process equipment” subject to the mechanical integrity requirements of 29 C.F.R. § 1910.119(j). In *Delek*, the cited equipment was installed in a control room that operated a process that was indisputably covered by the PSM Standard, so the boundary of the covered process in terms of interconnected piping was never at issue. In this case, the purported link between the cited equipment and indisputably covered processes is far more remote and tenuous. Reliance on the *Delek* decision is, therefore, inapposite here.

interconnected vessel could be involved in, or due to interconnectivity, cause a potential release related to the covered process to which it is interconnected. *See id.* § 1910.119(b). As discussed in section III.C. above, this matches both with the plain meaning of the Standard and with OSHA’s interpretation of the Standard in the Preamble to the final rule. *See* 57 Fed. Reg. 6356, 6372 (Feb. 24, 1992).

Under this definition, the boiler is not part of a PSM-covered process by “interconnection” because it could not be involved in the potential release of HHCs from the covered process. Mere physical connection alone is not sufficient to meet the express purpose of the PSM Standard; i.e. to prevent or mitigate the consequences of catastrophic releases. *See* 29 C.F.R. § 1910.119 (Purpose). Based on the way the definition of process is drafted and the overall purpose of the PSM Standard, it follows that PSM coverage should apply only to interconnected equipment “located such that a highly hazardous chemical could be involved in a potential release.” 29 C.F.R. § 1910.119(b). Indeed, this is the only logical reading of the plain language of the Standard.

Beyond the plain language of the Standard and OSHA’s explanation in the Preamble, we also know from OSHA’s later interpretations that in order to establish PSM coverage, OSHA required proof of both “interconnection” and a reasonable probability that an event, like an explosion, could affect vessels in a covered process. *See e.g.*, 1997 OSHA Stand. Interp. LEXIS 222 (Feb. 28, 1997) (stating that if interconnected equipment does not have the potential to cause a catastrophic release or inhibit mitigation it would be considered outside the boundaries of the process). In light of its previous, consistent, logical interpretations, OSHA’s new, expansive construction of “interconnected” that is advanced in this case turns the meaning of the regulation on its head, eliminates one of the two elements necessary for PSM coverage, and creates nearly

limitless coverage for the PSM standard. Such a change cannot be made without providing appropriate notice to the regulated community.

OSHA has attempted in more recent guidance documents to try and chip away at the original limitations built into the purpose and scope of the Standard. For instance, in a rather egregious paraphrasing of the Standard, OSHA indicated in a 2007 interpretation (the *Motiva* interpretation) that the Standard covers “vessels that are **interconnected, or** in such proximity that the HHC could be involved in a potential catastrophic release”. 72 Fed. Reg. 31,453 (June 7, 2007) (emphasis in original). By inserting a comma where one did not exist and changing an “and” to “or”, OSHA attempted to alter the limitation that was built into the original definition of process, abandoning the plain meaning of the PSM standard and adopting an unreasonable interpretation. This case simply follows the trend: OSHA is attempting to expand its jurisdiction by ignoring or obfuscating the plain language of the Standard.

In this case, the ALJ relies on the *Motiva* interpretation to contradict the plain reading of the Standard and OSHA’s interpretation from the Preamble and the Akzo-Nobel interpretive letter. In 2007, OSHA issued the *Motiva* interpretation in the wake of an adverse ruling in the *Motiva* case. See 72 Fed. Reg. 31,453. While the interpretation focused on the definition and applicability of the phrase “on site in one location,” OSHA seized the opportunity to go against the Preamble and its earlier interpretations. Whereas OSHA previously advised that PSM coverage required proof of a reasonable probability that interconnected vessels could be involved in a potential release, OSHA now said that it could be **presumed** that any interconnected vessels would be involved in a potential release. OSHA’s decision to publish the *Motiva* interpretation without notice and comment rulemaking is another demonstration of the limits of impact on PSM-coverage determinations. If the ALJ’s reading of the *Motiva* response is correct, he takes a

minor deviation and makes it major, and makes it directly conflict with the plain language of the Standard and the implementing interpretation in the Preamble to the Final Standard. To make such a change, OSHA would have had to undertake notice and comment rulemaking. Otherwise, OSHA's interpretation is not a reasonable interpretation of the Standard, and is not enforceable.

Even if the *Motiva* interpretation were reasonable, the presumption that interconnected equipment is PSM-covered is rebuttable. *See, e.g.*, 2008 OSHA Stand. Interp. LEXIS 131 (Jan. 31, 2008) (finding that utilities are PSM-covered unless it can be proven that a component failure would not affect the release of HHCs). The fact that the letter makes clear it is only a presumption implies that there has to be some action the employer can take to demonstrate the equipment is not PSM-covered. Otherwise, the letter could have simply stated that all physically connected equipment is PSM-covered. In other words, even the *Motiva* letter preserves the requirement that physically connected equipment must also have the reasonable likelihood of affecting a release of HHC to be PSM-covered. The Record in this case demonstrates, and the Refinery took significant steps including conducting PHAs and engineering studies about the steam boiler, to determine it was safely outside the scope of PSM coverage.

**ii. OSHA's Cost-Benefit Analyses During the PSM Standard Rulemaking Indicate that OSHA Intended a Narrow View of Interconnectivity.**

The drastic change to OSHA's interpretation of PSM coverage by interconnecting vessels reflected by OSHA's and the ALJ's position in this case is further illuminated by a review of the original cost-benefit analysis done by OSHA during the PSM Standard rulemaking process.

When promulgating the PSM Standard, OSHA considered the costs associated with complying with the various elements of the Standard, and these costs do not reflect an interpretation that would effectively make all refinery equipment PSM-covered. *See, e.g.*, Proposed OSHA Rule For the Process Hazards Management of Highly Hazardous Chemicals: An Industry Profile, Cost

Assessment And Benefits Analysis (January 24, 1990); Final Regulatory Impact and Regulatory Flexibility Analysis (RIA) of the Final Standard for Process Safety Management of Highly Hazardous Chemicals (§ 1910.119, subpart H), OSHA Office of Regulatory Analysis (Feb. 24, 1992). To the contrary, OSHA's modest compliance cost estimates demonstrate OSHA's assumption that a limited number of vessels/equipment would be subject to the requirements of a PSM program. *See, e.g.*, Final Regulatory Impact and Regulatory Flexibility Analysis of the Final Standard for Process Safety Management of Highly Hazardous Chemicals, Table B-6 (labor costs for only a single element of a PSM program – Process Hazard Analyses). According to OSHA's estimates, the annual labor costs for a PHA at a large refinery were envisioned to be \$8,347, a small fraction of the actual costs to perform a PHA on every piece of equipment in a refinery.

If the ALJ's determination is affirmed, every boiler, and other equipment, that may be tangentially related to covered processes up and downstream could now be covered. Moreover, any attempt by an employer to draw a reasonable boundary around a PSM-covered process by determining that the equipment at issue could not cause or interfere in mitigating the consequences of a catastrophic release would still be subject to a sufficiency determination after the fact. That would cause the actual cost of maintaining a compliant PSM program, including the costs associated with PHAs, to skyrocket, making them vastly higher than the cost estimates presented by OSHA in support of the PSM rulemaking to establish the Standard was economically feasible, a necessary prerequisite to any OSHA Standard.

**C. The steam boiler does not qualify as a “separate vessel . . . located such that a highly hazardous chemical could be involved in a potential release.”**

- i. Establishing co-location to extend PSM coverage requires proof that separate vessels are “located such that there is a reasonable probability that an event such as an explosion would affect . . . nearby unconnected vessels.”**

OSHA also alleged that the steam boiler is sufficiently proximate to part of the FCCU such that it should be considered part of the FCCU covered process. However, separate vessels are considered part of a single process for purposes of PSM coverage only where they “are located such that a highly hazardous chemical could be involved in a potential release . . . .” *See* 29 CFR 1910.119(b). In the Preamble to the final PSM Standard, OSHA clarified that a separate vessel should be included in the boundary of a PSM-covered process when “there is a reasonable probability that an event such as an explosion would affect interconnected and nearby unconnected vessels which contain quantities of the chemical that when added together would exceed the threshold quantity and provide a potential for a catastrophic release.” 57 Fed. Reg. 6356, 6372 (Feb. 24, 1992).

But in this case there was no evidence of such a reasonable probability. Instead, to formulate this holding, the ALJ relied on conjecture and the mere possibility that an explosion would affect nearby unconnected vessels. For example, the ALJ states (without a single citation to the Record) that “[h]ad the ladder and platform simply been blown in a *different direction* as a result of the explosion, *perhaps* toward the FCCU, it is reasonable to *assume* a catastrophic release would have occurred.” *See* Decision and Order at 31 (emphasis added). The ALJ later states that “[t]he fact that a catastrophic release from an adjacent PSM-covered process did not actually occur under these circumstances does not, in any way, establish that such an eventuality *could not occur*.” *See* Decision and Order at 31 (emphasis in original). At no point in the Decision does the ALJ cite to any evidence that would establish a “reasonable probability” that an explosion could affect nearby vessels. In the absence of such analysis of the evidence, the ALJ’s holding on this issue is not based in evidence, instead it ignores the Refinery’s PHAs and facility siting study, and should be vacated.

**ii. The ALJ’s reliance on the analysis of a control room in the *Delek* decision is inappropriate here.**

In holding that OSHA adequately proved the elements of co-location, the ALJ erred by comparing the facts in this case to the facts in the *Delek* decision (26 BNA OSHC 1365 (No. 08-1386, 2015)). The ALJ stated that “perhaps the strongest justification for deeming the [steam boiler] to be part of a single process, and thus PSM-covered, is the potential impact on the control room.” Decision and Order at 32. He goes on to describe the ladder and pieces of refractory that were blown into an “operator shelter” at the Refinery before drawing parallels to the Commission’s *Delek* holding with regard to the positive pressure unit in *Delek*’s FCCU control room. *Id.* The ALJ in this case goes on to call *Delek*’s control room a “control room (operator shelter),” and later calls Wynnewood’s operator shelter a “control room” that was “actually in the line of fire of the explosion.” *Id.* at 32-33. At no point, however, does the ALJ cite to evidence in the Record to show that Wynnewood’s operator shelter has any of the important attributes of *Delek*’s control room, namely, controls that are used to operate a PSM-covered process. There is good reason for this, of course, as Wynnewood’s operator shelter is not a control room. The ALJ’s mistake is likely unintentional, but if affirmed, would create absurd results and lead to an erroneous conclusion on this issue.

**iii. In the absence of clear guidance on equipment spacing, OSHA must defer to employers’ reasonable determinations about co-location.**

OSHA concedes that it does not have a defined basis for determining “adequate separation distances,” and determines the distance on a case-by-case basis based on factors such as “the nature of chemicals and covered processes, total inventories, threshold quantities of pertinent chemicals, and facility layout.” 29 CFR 1910.119 Appendix B. Such malleable considerations would only be appropriate in a flexible, performance-oriented standard, and

further demonstrate OSHA's expectation that so long as they are reasonable, employers are entitled to deference when determining "adequate separation distances."

The Record in this case demonstrates the Refinery did analyze the boiler and found that it was not part of a covered process. R.94; Tr. 1610-1611. For OSHA, in retrospect, to decide that the steam boiler was sufficiently proximate to a covered process without demonstrating the employer's determination was unreasonable, and then retroactively enforcing on that basis (particularly where a worst-case explosion actually did occur and did not result in any catastrophic release of an HHC) is arbitrary and impermissible. *See Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336 (6th Cir. 1978) ("a regulation...if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed.").

**D. Voluntarily adopting PSM-styled practices for non-PSM covered equipment cannot make non-PSM covered equipment covered by the PSM standard.**

The PSM Standard includes effective tools to create safer workplaces. These tools, and the PSM Standard itself, derive from industry consensus standards, which represent best practices in our members' industries. Therefore, even before the PSM Standard was promulgated, our members have utilized PSM-type tools throughout their facilities, even for processes or equipment that are not technically subject to the PSM Standard. For example, many companies conduct hazard assessments similar to PHAs on equipment in storage tank farms, even where those tanks and other equipment are exempt from PSM coverage. Surely the act of performing a hazard assessment for such equipment, similar to the assessment done for covered equipment, does not make the equipment subject to the requirements of the PSM Standard. Even OSHA acknowledged in the Akzo-Nobel interpretation letter that the PHA is a preferred tool to document a site's coverage determination, and should not be construed to imply PSM-coverage.

1997 OSHA Stand. Interp. LEXIS 222 (Feb. 28, 1997). Nevertheless, the ALJ's determination in this case was based in part on the fact that the Refinery implemented some of the features of its PSM program for managing the steam boiler. *See* Decision and Order 34. Specifically, the ALJ concluded that because the Refinery implemented some elements of PSM for the boiler, the boiler should have been covered. This conclusion is not grounded in the law, but more importantly, it would create disturbing disincentives against being proactive, and voluntarily applying best practices to enhance safety out of concern for expanding legal and regulatory liabilities for having done so.

In keeping with both the terms and the purpose of the PSM Standard, as well as the OSH Act in general, we request the Commission clearly hold that an employer's voluntary implementation of best practices above and beyond the minimum legal requirements may not be used as evidence that such best practices are legally required by an OSHA standard.

**V. Even if OSHA considers the steam boiler PSM-covered, Respondent lacked notice.**

The Record reflects that OSHA inspected the Wynnewood Refinery on prior occasions, including specifically an evaluation of the Refinery's steam boilers, and at that time, OSHA did not conclude that the boilers were PSM-covered. (Resp't Post Hr'g Brief at 6.) This demonstrates that OSHA's interpretation about interconnectivity is new, different, and a departure from OSHA's original intent. At the least, it is a departure from the understanding of industry for decades. Therefore, OSHA provided inadequate notice regarding Wynnewood's obligations under the PSM Standard.

The Fifth Circuit recently reinforced the principle that if OSHA does not raise an issue of noncompliance for a reasonably similar issue during a prior inspection, OSHA may not later cite an employer for the same condition. *Wal-Mart Distrib. Ctr. #6016 v. OSHRC*, 819 F.3d 200 (5th

Cir. 2016). In *Wal-Mart*, the employer successfully challenged a citation from OSHA for not performing a site-specific PPE hazard assessment at one of its distribution centers (instead relying on a common assessment for all of its similar distribution centers). The Fifth Circuit rejected the citation, not because OSHA's interpretation was unreasonable that a site-specific assessment was required, but because OSHA had recently granted approved status in its Voluntary Protection Program to a different Wal-Mart center, after completing a compliance review without raising the issue with that center's PPE hazard assessment. *Id.* at 205. The Fifth Circuit concluded the alleged PPE violation could not be applied because Wal-Mart could not have had notice of any deficiency with its assessments based on OSHA's past approval. *See id.* ("To establish a lack of fair notice, [the employer] must show that, through the VPP, it had a fair expectation that OSHA had found its procedures satisfactory.") (quoting *Austin Indus. Specialty Servs., L.P. v. OSHRC*, 765 F.3d 434, 440 (5th Cir. 2014)).

Here, a Refinery boiler was at the center of a prior incident. R-46 at 1-2. At the time, OSHA issued a citation to the Refinery about the boiler, but did so under Section 5(a)(1) of the OSH Act (29 U.S.C. § 654 (2012)) – the general duty clause – not for failure to include the boiler within a PSM-covered process. *Id.* at 5. Like the *Wal-Mart* case, Wynnewood Refinery lacked fair notice that a boiler should have been considered PSM-covered. To the contrary, the fact that the boiler was not cited under the PSM Standard signaled precisely the opposite (and correct) conclusion – that OSHA found steam boiler outside the scope of the PSM Standard. Therefore, OSHA should not be permitted now to cite the Refinery for PSM violations.

After undertaking its own thorough assessments and engineering analysis, as part of process hazard analyses and PHA revalidations every five years, Wynnewood concluded time and again that the steam boiler was not a covered process or part of a covered process, and that

incidents involving the steam boiler could not cause a release in a covered process or vice versa. OSHA made no effort to demonstrate those conclusions were unreasonable, so the Refinery's determinations in that regard are entitled to deference. *See, e.g., Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196 at \*1 (No. 00-1052, 2005) (performance standard gives discretion to employer unless their determination is unreasonable). The Akzo-Nobel interpretive letter by OSHA makes this point. It states that if interconnected equipment does not contain an HHC, then it is based on the employer's analysis to determine what elements of PSM would apply to that equipment. *See* 1997 OSHA Stand. Interp. LEXIS 222 (Feb. 28, 1997).

While it may seem that OSHA is also entitled to deference in interpreting its regulation, the Agency, in this instance, conditioned regulatory applicability on the likelihood of interconnected vessels affecting each other during catastrophic releases. Myriad factors would influence whether such an event would occur, all of which the facility operator is in the best position to analyze. For instance, specific controls and safeguards at one unit may make remote the likelihood of a neighboring unit affecting it during a catastrophic release.

The Record demonstrates that the employer did conduct a PHA of the steam boiler, and found that its failure does not cause a HHC release nor does it interfere with the mitigation of HHC release. (Tr. 1610, 1671-1672). At no point in the Record in this case does OSHA produce evidence that the Refinery was unreasonable in its determination that the steam boiler was not part of a PSM-covered process. Perhaps more troubling, the Record seems to indicate that the ALJ either discounted or completely ignored the Refinery's unique expertise about its processes and equipment in analyzing the consequences of releases from its own equipment.

Upholding the ALJ's decision in this case will create significant uncertainty in the regulated community, and give OSHA unfettered authority to retroactively assert that any

equipment involved in an incident at the workplace should have been covered by the PSM Standard. OSHA defined “interconnected” to mean equipment that could affect each other during catastrophic releases – until OSHA changes the language of the regulation, it cannot ignore the Standard it has set for PSM applicability.

## **VI. Conclusion**

For the aforementioned reasons, we urge the Commission to reverse the ALJ’s decision that the steam boiler at the Wynnewood Refinery is a PSM-covered process or is part of a PSM-covered process. At the very least, we urge the Commission to make clear that voluntary implementation of best practices, as outlined by an OSHA standard, does not make those efforts mandatory and subject to penalty.