

August 12, 2016

Mr. Bryan Lincoln  
Occupational Safety & Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**RE: OSHA Docket ID: OSHA-2013-0020; Comments on the Small Business Advocacy Review of OSHA's Process Safety Management Regulations**

Dear Mr. Lincoln:

The National Association of Chemical Distributors (NACD) appreciates the opportunity to provide comments as part of the Small Business Advocacy Review of potential revisions to the Occupational Safety & Health Administration's (OSHA) Process Safety Management (PSM) regulations. NACD provided comments on the Request for Information (RFI) on Potential Revisions to OSHA's PSM regulations on March 31, 2014. The issues raised in those comments remain valid today.

#### About NACD

The National Association of Chemical Distributors is an international association of nearly 440 chemical distributors and supply-chain partners. NACD's membership comprises businesses representing in total more than 85% of the chemical distribution capacity in the nation and generating 93% of the industry's gross revenue. NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

Chemical distributors play a unique and integral role in the supply chain. Manufacturers increasingly rely on chemical distributors to market and sell their products in a variety of packaging sizes to an exceptionally varied customer base. Every seven seconds, an NACD member company moves chemical products to and from their facility. This constant movement of those products results in chemicals being frequently added to and removed from inventory. Unlike the regular changes in inventory, NACD members' safety processes remain the same.

#### NACD Members' Commitment to Safety

A member-voted condition of membership in NACD is a signed commitment to NACD Responsible Distribution®. Under this robust program, each member must follow 13 Codes of Management Practice in order to protect the environment, promote health and safety of employees and community members, enhance product stewardship, and ensure the security of its facilities and products. Under each Code, member companies have an active program designed to improve safety continuously and reduce incidents. Each member must develop,

implement, and undergo periodic third-party verification of policies and procedures in each of the 13 areas, which include Risk Management, Handling & Storage, Emergency Response & Public Preparedness, Community Outreach, and Product Stewardship.

Owners and managers of NACD member companies have a personal stake in the safety and security of their employees, companies, and communities. They demonstrate this through the commitment to Responsible Distribution, relationships with employees, involvement in local communities, including participation in Local Emergency Planning Committees, and careful compliance with numerous environmental, transportation, safety, and security regulations at the federal, state, and local levels.

## **Changes to the Scope of the Rule**

### Clarifying the exemption for atmospheric storage tanks

OSHA is considering amending the PSM standard to specifically limit the atmospheric storage tank exemption to NAICS 4247 Petroleum and Petroleum Products Merchant Wholesalers. This change would subject hundreds of additional NACD member facilities to PSM and will impact thousands of storage tanks, including those not permanently connected to a process.

OSHA's cost and impact estimates are severely underestimated. Numerous NACD members, most of which are small businesses, store flammable liquids in tanks. If OSHA adopts the change as proposed, these facilities would be subject to PSM and would need to spend substantial time and resources, including hiring outside experts, to come into compliance. This is exacerbated by the fact that once a facility is subject to PSM it is also subject to the Environmental Protection Agency (EPA) Risk Management Program (RMP) requirements.

Another concern is that by subjecting these tanks to PSM, facilities may switch to storing the materials in drums. While this might prevent facilities from being subject to PSM and EPA's RMP, it would also increase the potential for handling incidents because more worker activity is needed to transfer materials in and out of these smaller containers.

If OSHA makes changes to the atmospheric storage tank exemption, NACD urges the agency to maintain the exemption not only for NAICS Code 4247 Petroleum and Petroleum Products Merchant Wholesalers, but for all tanks used for storage and not connected to a process.

### Expanding PSM coverage and requirements for reactive chemical hazards

OSHA is considering adding language to the PSM standard extending coverage to processes that mix substances with a listed functional group, if the heat of reaction is above 100kcal/mol or if the reaction generates a toxic product and the substance is at the threshold quantity. OSHA would adopt the functional group list from the New Jersey Toxic Catastrophe Prevention Act (NJ TCPA) Guidance.

Again, OSHA's cost and impact estimates are severely underestimated. Many companies will not have in-house technical expertise to conduct the required analyses and calculations. Therefore, work would have to be sent away for lab testing.

Lastly, and importantly to many NACD members, the scope of this will be even greater if OSHA places Sodium Hydroxide on Appendix A - as every water treatment plant in the U.S. would be brought in.

### Updating and expanding the list of highly hazardous chemicals in Appendix A of the existing PSM standard

OSHA is considering adding several chemicals to the Appendix A list.

If OSHA moves forward with the addition of any newly covered chemicals, as outlined on the Occupational Safety and Health Act, the agency must demonstrate based on substantial evidence in the record as a whole that: (1) the proposed standard will substantially reduce a significant risk of material harm; (2) compliance is technically feasible in the sense that the protective measures being required already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be developed; (3) compliance is economically feasible in the sense that industry can absorb or pass on the costs without major dislocation or threat of instability; and (4) the standard employs the least expensive protective measures capable of reducing or eliminating significant risk.

Below are some of NACD's top concerns with additions to Appendix A:

Sodium Hydroxide - NACD has grave concerns about OSHA's proposal to add sodium hydroxide to Appendix A. This is a widely used chemical that poses minimal risk. It is not subject to EPA RMP requirements nor other state and fire code standards. The purpose of PSM is to prevent catastrophic chemical releases, and a release of sodium hydroxide would not be catastrophic.

Hydrochloric Acid - OSHA should only consider covering hydrochloric acid at the EPA RMP threshold of 37%. If covered at concentrations of 1%, the rule would significantly expand coverage and we would seek justification for coverage at that level when hydrochloric acid has been exempt from PSM since 1992, the beginning of the program.

Hydrofluoric Acid - OSHA should only consider covering hydrochloric acid at the EPA RMP threshold of 50%.

Removal of "Anhydrous" Forms - hazards associated with the anhydrous and hydrous forms of a chemical do not pose equivalent risk; therefore, the 1% rule would not be an appropriate guide for coverage.

OSHA's estimate that 79 facilities will be impacted is unrealistic, particularly with the addition of sodium hydroxide. With the addition of sodium hydroxide, one NACD member estimated that well over 100 of their customers would be brought under PSM. Sodium hydroxide is a widely used chemical and present at most chemical distribution facilities, as is hydrochloric acid, especially since OSHA includes storage as a process. Further, how can impact be estimated when there are no proposed threshold quantities?

### **Changes to the PSM Rule Affecting All Covered Facilities**

Amending Paragraph (d) of the existing PSM standard to require evaluation of updates to applicable recognized and generally accepted good engineering practices (RAGAGEP)

OSHA is considering requiring periodic review of the most current RAGAGEP and implementation of these updates.

Such a change would be a significant undertaking as a company would be required to constantly keep up with all thousands of various standards. This responsibility would require a full-time engineer. OSHA's cost estimates are severely underestimated as it is a huge undertaking of time and expertise to keep up to date on all RAGAGEPs.

This potential change also raises several questions: Are companies immediately out of compliance when a new standard emerges?; How long do they have to comply with newer standards?; Is a company automatically out of compliance when a new standard arises?; How does a company determine if they have done enough?

The use of these practices is further complicated by the fact that some organizations, including the National Fire Protection Association, do not even allow direct industry input to their standards.

From an OSHA inspection standpoint, inspector knowledge is a significant concern for regulated entities. A lack of inspector knowledge of the most current RAGAGEPs could result in inspectors attempting to apply inappropriate standards to a particular industry segment (i.e. American Petroleum Institute standard at a chemical distribution facility).

#### Expanding the scope of Paragraph (e) by requiring safer technology and alternatives analysis

OSHA is considering requiring employers to use the hierarchy of controls in considering safer alternatives and technology when identified hazards result in an employer-specified level of risk.

This change as proposed by OSHA would apply to all NAICS codes, including chemical distribution. Any safer technology and alternatives analysis (STAA) would not make sense for existing facilities as Process Hazard Analyses (PHA) are sufficiently rigorous in identifying hazards for facilities to address. NACD requests that OSHA not require employers to adopt specified inherently safer technologies as a result of STAA limited options for chemical distributors would not justify the cost and effort.

Lastly, this type of analysis would be tremendously difficult to define and enforce due to its complex nature and lack of resources.

#### Expanding the scope of Paragraph (j) of the existing PSM standard to cover the mechanical integrity of any critical equipment

OSHA is considering expanding the mechanical integrity requirements beyond the six current explicit categories of equipment to include all equipment deemed "critical."

This type of expansion would be similar to the New Jersey TCPA, which includes items such as forklifts, pallet lifters, lighting, and ventilation. During the PHA, safeguards are included for equipment, but not necessarily critical equipment. While we understand the principle, these requirements should focus on the chemical process where a failure could lead to a release.

Revising Paragraph (n) of the existing PSM standard to require coordination of emergency planning with local emergency-response authorities

OSHA is considering expanding emergency planning requirements to increase coordination with local responders through annual meetings with responders, emergency drills, and evaluation of local emergency response capabilities.

NACD supports the concept of emergency response coordination. In fact, under Responsible Distribution, NACD members are required to coordinate with local emergency responders by making them aware of the potential hazards of the chemicals they have on-site, conducting plant tours, and coordinating emergency response plans. Our concern about regulatory mandates in this area is that many local emergency response providers have limited resources and are not always available to devote the manpower and resources to exercises with facilities. Every community is different; and while this may be achievable in some areas, others simply do not have the resources. Public response organizations have numerous demands, and this is only increasing today with the need for additional exercises such as active-shooter and bomb drills in their communities, particularly schools. Industry cannot compel them to participate in activities; therefore, the industry should not be subject to a regulatory mandate.

In addition, the proposal that establishments formally assess the capabilities of local responders is not realistic and must be narrowed to clarify that small businesses are not required to conduct on-site audits of emergency responders.

Amending Paragraph (m) of the existing PSM standard to require root-cause analysis

OSHA has proposed adding a requirement specifying that the employer conduct a root cause investigation of all incidents that require an investigation under the current PSM standard.

While NACD supports the concept of root cause analyses, these may not be appropriate for every incident and near miss. This would be particularly burdensome for small businesses, which would need to be trained in analysis or hire experts to conduct the analyses.

Expanding a root cause analysis requirement to near misses would create an enormous burden for all businesses, with the most substantial impact on small businesses. It is not feasible to conduct a true root cause analysis on every near miss. In addition, the term *near miss incident* is difficult to define across the board at a national level. A near miss at one location may not be considered a near miss at another location because of differing operations. Without a clear definition of *near miss*, the determination would be left to each individual inspector, which would result in confusion, a lack of certainty, and uneven enforcement.

Revising Paragraph (o) of the existing PSM standard to require third-party compliance audits

OSHA has broadly proposed that all PSM-regulated facilities conduct an independent third-party audit by a qualified auditor.

NACD believes this requirement is unnecessary. It seems based on the assumption that internal auditors may be biased or lenient, which is not the case. NACD requests OSHA provide data to support the assumption that third-party auditing is more effective than internal audits in identifying potential safety concerns.

Facilities should continue to have the flexibility to select the audit methods most appropriate for their unique operations. Of utmost importance is that the auditor has a thorough knowledge of a facility's processes. This flexibility and understanding of a facility's unique processes are the keys to improving safety. Third-party auditors cannot be inherently familiar with all processes and systems at a facility without substantial retraining. It is difficult now to find well-qualified third-party auditors. The costs of training these auditors on the unique aspects of all regulated facilities would be substantial, which would further limit the availability of these auditors and drive up costs for regulated facilities. One NACD member estimated that each audit would cost approximately \$25,000.

OSHA should continue to provide facility operators the ability to select the audit method most suited to their individual operations, whether internal or using third-party firms. A mandate to use third-party auditors would impose substantial costs on companies. In addition, internal company audits provide many benefits that would be lost with third-party audits. For example, some companies have hired personnel to perform internal auditing functions, including PSM audits. Adopting a regulatory mandate to perform third-party audits could cost jobs such as this and further reduce mutual safety goals whereby these employees also supplement other safety and environmental auditing. Some companies may not be able to support both in-house internal auditing and contract auditing.

Thank you for the opportunity to comment and your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer C. Gibson". The signature is fluid and cursive, with the first name being the most prominent.

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