

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

New Commission Chairman, New Commission and Executive Staff Changes at TCEQ

Over the past several weeks, key executive personnel and position changes have been made at TCEQ. Governor Perry has appointed a new Commissioner, Carlos Rubinstein, who has a distinguished career at TCEQ, most recently as Deputy Executive Director. He also serves on the Governmental Advisory Committee that provides advice to the U.S. Environmental Protection Agency (EPA) Administrator on environmental concerns regarding NAFTA, the North American Agreement on Environmental Cooperation, and the Commission for Environmental Cooperation. He is also a Texas representative in the Border Governors Conference Water worktable and was formerly the Rio Grande Watermaster. Mr. Rubinstein replaces Commissioner Larry Soward, whose term ends on August 31, 2009.

Perry also appointed Commissioner Bryan Shaw, Ph.D., as Chairman of the Commission, effective September 10, 2009. Shaw was appointed to the Commission in 2007. He is chair of the Texas Advisory Panel on Federal Environmental Regulations, a member of the Texas Environmental Flows Advisory Group, and a member of the U.S. Department of Agriculture - Agricultural Air Quality Task Force. Shaw is also a member of several committees for the EPA Science Advisory Board including the Environmental Engineering Committee. Buddy Garcia will continue to serve as a Commissioner.

Zak Covar has been appointed the Deputy Executive Director. Mr. Covar has been with the agency since 2007 and has served as executive assistant to Commissioner Bryan W. Shaw, Ph.D. and most recently as Assistant Deputy Executive Director in the Executive Office. Before joining TCEQ, Zak served as the Governor's environmental advisor and clerked for the House Environmental Regulation Committee for Chairman Dennis Bonnen.

TCEQ Holds Meeting on Anticipated Air Emissions Fee Rulemaking

On August 11, 2009, TCEQ held a stakeholder meeting regarding an anticipated rulemaking proposal to replace the nine bases in 30 TAC §101.27(a) pursuant to which payment of an emissions fee is required with a single basis: whether the owner or operator of the site or source is required to obtain a Title V federal operating permit. The majority of facilities currently required to pay an emissions fee would continue to pay the fee pursuant to the change. However, some facilities would no longer be required to pay an emissions fee, and others would have to pay an emissions fee for the first time. TCEQ is accepting comments on the proposed change through September 1, 2009. The Executive Director's staff plans to present the rulemaking proposal to the Commissioners during December 2009, and request that the Commissioners consider adoption of the changes during June 2010. Information about this expected proposal is available at http://www.tceq.state.tx.us/permitting/air/announcements/advisory/Current/titlev_meet.html.

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EPA Awards \$9 Million in Recovery Act Funds for Clean Diesel at the Port of Houston

On August 26, 2009, EPA announced it was awarding \$9 million in American Recovery and Reinvestment Act of 2009 funds to the Houston-Galveston Area Council (H-GAC) to support the SmartWay Clean Diesel Finance Program in the Houston-Galveston area. The award targets the Port of Houston - particularly, drayage trucking operations at the Port.

The SmartWay Clean Diesel Finance Program, part of EPA's National Clean Diesel Campaign, uses cooperative agreements to establish innovative finance programs for buyers of eligible diesel vehicles and equipment. The H-GAC award will fund a bridge loan program that provides resources for new, cleaner, or retrofitted drayage trucks - diesel-fueled, heavy-duty trucks that transport shipping containers at the Port. Over 3,000 drayage trucks operate at the Port of Houston.

The grant application was a collaborative effort by Environmental Defense Fund, H-GAC, and the Port of Houston Authority. According to a joint press release by those organizations, the following emission reductions are anticipated over the life of the project: 1,638 tons of nitrogen oxides; 26.7 tons of particulate matter; 27.4 tons of volatile organic compounds; 239 tons of carbon monoxide, and 3,636 tons of carbon dioxide.

Southeast Texas Photochemical Modeling Technical Committee Meeting

On August 19, 2009, TCEQ held a Southeast Texas Photochemical Modeling Technical Committee meeting in Houston at which TCEQ and EPA Region 6 representatives provided state implementation plan (SIP) updates for southeast Texas. Information provided by TCEQ staff included an update on various aspects of SIP modeling (e.g., 2018 control strategy modeling and base case model performance evaluations), and discussion of the Commissioners' anticipated September 23, 2009 consideration of proposed Houston/Galveston/Brazoria 1997 eight-hour ozone Attainment Demonstration and Reasonable Further Progress SIP revisions. The meeting agenda and materials presented at the meeting are available at http://www.tceq.state.tx.us/implementation/air/airmod/committee/pmtc_set.html.

Revised TCEQ Modeling/Effects Review Guidance Document Issued

TCEQ has issued a revised version of its guidance document entitled "Modeling and Effects Review Applicability: How to Determine the Scope of Modeling and Effects Review for Air Permits." The agency's Air Permits Division personnel use this "MERA" document for direction regarding how to review the impact of emissions of constituents that have effects screening levels (ESLs) rather than applicable state or federal air quality standards. ESLs are ambient air concentration guidelines used to gauge the potential of constituents associated with modification of an existing facility or construction of a new facility to cause adverse health or welfare effects. They are permit review screening tools, the exceedence of which triggers a more in-depth health effects review. Along with other changes, the revised document clarifies how to evaluate emissions from multiple emission points and adds a description of how TCEQ conducts toxicology effects evaluations.

The revised MERA guidance document is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_7_31_09.html.

TCEQ Responds to Drought and Restricts Junior Water Rights

On August 10, 2009, TCEQ's Executive Director provided notice to non-municipal junior rights holders, with a priority date of 1980 and later, that their right to divert water from the Brazos River Basin has been immediately suspended. Those water rights holders who have authorization for impoundment of water are not required to release any previously stored water. However, under a senior call, they must release any current inflows to their impoundments downstream in order to meet senior needs. The notice of suspension leaves open the possibility that TCEQ may take additional actions, including suspension of junior

municipal diversions, to protect senior water rights in the Brazos River Basin.

Texas has been suffering a historic drought. Reportedly, nine of the 254 counties in Texas are suffering the worst drought conditions since modern record-keeping began in 1895, with the most affected counties in south-central Texas. About 230 public water systems have declared mandatory water restrictions, and agricultural losses have been tallied at \$3.6 billion and could rise by year-end. Additional information about how TCEQ is responding to the drought is available at <http://www.tceq.state.tx.us/agency/drought.html>.

Recent Enforcement Action

On August 26, 2009, the TCEQ Commissioners approved administrative penalties totaling \$706,063, against 86 regulated entities. Earlier this month, at its August 12, 2009 Agenda, the Commissioners approved \$1,487,452 in penalties against 86 regulated entities. A summary of the Commissioners' August 26 and August 12 action can be found at http://www.tceq.state.tx.us/comm_exec/communication/media/08-09Agenda8-26.html and http://www.tceq.state.tx.us/comm_exec/communication/media/08-09agenda8-12.html.

TCEQ Accepting Applications for Texas Excellence Awards

Applications are now being accepted for the 2010 Texas Environmental Excellence Awards. The annual awards, which recognize achievements that significantly reduce waste, conserve natural resources, and prevent pollution, are presented by the governor's office and the Texas Commission on Environmental Quality. A governor's blue ribbon committee identifies outstanding contributions in eleven diverse categories. The public may nominate an individual, community, company, or organization for an award.

Award categories include: Agriculture, Civic/Nonprofit, Education, Government, Individual, Innovative Technology, Large Business/Nontechnical, Large Business/Technical, Small Business, and for the second consecutive year, Water Conservation.

For additional information, please go to: www.teea.org/apply.htm. The deadline for applications is October 16.

Upcoming TCEQ Meetings and Events

- **The Water Rights Advisory Work Group (WRAWG)** will meet in Austin on Monday, September 14, 2009. WRAWG is a voluntary group of participants who meet quarterly to discuss water rights related issues. Additional information is available at www.tceq.state.tx.us/permitting/water_supply/water_rights/wrawg.html.
- TCEQ will host a **Water Quality/Storm Water Seminar** in Austin on September 17-18, 2009. Subjects covered will include Phase II MS4 Storm Water Permits, Storm Water Construction Permits, Wastewater Permitting, Compliance Improvements Strategies, Homeland Security and Pretreatment. Additional information is available at <http://www.tceq.state.tx.us/assistance/events/stormwater.html>.
- TCEQ will hold its annual **Advanced Air Permitting Seminar** and an **Oil & Gas Facilities Workshop** in Austin on September 28-29, 2009. The Commission's draft agenda for the seminar includes sessions entitled Differential Absorption Light Detection and Ranging ("DIAL") Technology Overview; Maintenance, Startup and Shutdown ("MSS") Updates; State Implementation Plan (SIP) 101; and Ambient Air Quality Monitoring Overview. The Oil & Gas Facilities Workshop includes sessions entitled Houston Case Study Involving Infrared (IR) Camera; Updates on 2007 IR Camera Aerial Survey, and Emission Calculation Updates for Oil and Gas Facilities. Early registration for the Advanced Air Permitting Seminar is available for \$225 on or before September 21, 2009. The fee for registrations submitted after that date will be \$250. The fee for the Oil & Gas Facilities Workshop is \$100.

Texas Rules Updates

For more information on new TCEQ rule developments, please see the TCEQ website at <http://www.tceq.state.tx.us/rules/whatsnew.html>.

NATIONAL DEVELOPMENTS

California Air Resources Board Proposes New VOC Limits for Multi-Purpose Solvents, Paint Thinners and Air Fresheners

On August 7, 2009, the California Air Resources Board (CARB) released proposed amendments to the California Consumer Products Regulations¹ and its Initial Statement of Reasons for the rulemaking. The proposed amendments would set new limits for volatile organic compounds (VOCs) in paint thinners and multi-purpose solvents; create certain labeling and reporting requirements for paint thinners and multi-purpose solvents; lower the existing VOC limits for double phase aerosol air fresheners; and prohibit the use of high global warming potential (GWP) compounds and certain toxic air contaminants (TACs). Written comments on the proposed amendments are due by noon on September 23, 2009.

Proposed VOC and TAC Restrictions for Paint Thinners and Multi-Purpose Solvents

The proposed amendments include new VOC limits for paint thinners and multi-purpose solvents. Under the proposed amendments, a 30% by weight VOC limit would become effective December 31, 2010, with a lower, 3% limit to take effect on December 31, 2013. The proposed amendments would also prohibit, effective December 31, 2010, the sale, supply, offer for sale, or manufacture for use in California of any paint thinner or multi-purpose solvent that contains: (a) chemical compounds that have a GWP value of 150 or greater; (b) methylene chloride, perchloroethylene, or trichloroethylene (hereinafter referred to as "specified TACs"); or (c) greater than 1% "aromatic compounds" by weight.²

The proposed amendments applicable to paint thinners and multi-purpose solvents include a three-year sell-through provision (which would allow manufacturers, retailers, and distributors a grace period to sell products manufactured before the effective date of the regulation if certain labeling and purchaser notification requirements are met). Certain exemptions and exclusions from the proposed paint thinner and multi-purpose solvent restrictions may apply. For example, under proposed section 94509(u)(4), high GWP compounds would not be prohibited if they were present as impurities in a combined amount equal to or less than 0.1% by weight, and the specified TACs would not be prohibited if they were present as impurities in a combined amount equal to or less than 0.01% by weight.

Proposed Labeling and Reporting Requirements for Paint Thinners and Multi-Purpose Solvents

For each paint thinner and multi-purpose solvent sold or offered for sale in areas of California outside the South Coast Air Quality Management District (and manufactured after the applicable December 31, 2010 or 2013 effective date), the manufacturer and responsible party must clearly display the VOC content in percent by weight on the outside of the product container/packaging. The proposed amendments would also prohibit, effective December 31, 2010 until December 31, 2015, the sale, supply, offer for sale, or manufacture for use in California of any "Flammable" or "Extremely Flammable" (as defined) paint thinner, multi-purpose solvent, clean-up solvent, or paint clean-up product unless the products were labeled according to specific guidelines. See Proposed Amendments section 94512(e)(2) (B).

In addition, the proposed amendments would require all responsible parties for paint thinners and multi-purpose solvents to report to CARB information on California product sales and composition information for the year 2011 and to provide a written update regarding their

research and development efforts undertaken to achieve the 3% VOC limit slated to take effect for these products December 31, 2013.

Proposed Exclusions from Paint Thinner Definition and Temporary Exemption for Small Containers

It is worth noting that the definition of “paint thinner” does not include thinners labeled for the thinning of “industrial maintenance coatings,” “zinc-rich primers,” or “high-temperature coatings” (as defined), nor does it include “artist’s solvent/thinner” in containers of thirty two fluid ounces or less. The proposed amendments would also provide a temporary exemption (December 31, 2010 through December 31, 2013) from the paint thinner VOC limits and aromatic compound prohibition for paint thinners sold in containers of eight fluid ounces or less.

Proposed Reduction of Existing VOC Limits for Double Phase Aerosol Air Fresheners

Under the proposed amendments, the current 25% VOC limit applicable to double phase aerosol air fresheners would be lowered to 20% effective December 31, 2012. The proposed amendments would also prohibit the sale, supply, offer for sale, or manufacture for use in California of double phase aerosol air fresheners that contain any high GWP chemical compound. Similar to the amendments applicable to paint thinners and multi-purpose solvents, a three-year sell-through provision would apply and the GWP prohibition would not apply to any chemical compound present as an impurity in a combined amount equal to or less than 0.1% by weight.

Proposed Amendments Related to Method 310

Finally, the proposed amendments specify that the analytical method to be used to determine VOC, GWP, and aromatic compound content of paint thinners and multi-purpose solvents is Method 310. The proposed amendments would also include new VOC content calculations for consumer products with high water content or low VOC content. These amendments include specific VOC content calculations.

Contacts

For additional information or guidance regarding the CARB Consumer Products Regulations, please contact Laura Duncan (lduncan@bdlaw.com) or Amy Lincoln (alincoln@bdlaw.com).

¹ “Consumer product” for the purposes of these regulations, means a chemically formulated product used by household and institutional consumers, including, but not limited to detergents, cleaning compounds, polishes, floor finishes, cosmetics, personal care products, home, lawn and garden products, disinfectants, sanitizers, aerosol paints and adhesives and automotive specialty products; but does not include other paint products, furniture coatings, or architectural coatings. Note that “consumer” includes any person who seeks, purchases or acquires a consumer product, for personal, family, household or institutional use. However, persons acquiring a consumer product for resale are not “consumers” of that product.

² “Aromatic compound” means a VOC that contains one or more benzene or equivalent heterocyclic rings. At the August 4, 2009 CARB Public Workshop on the proposed amendments, industry representatives expressed resistance to the weight based (rather than reactivity based) limits proposed for aromatic compounds, citing the lack of flexibility for reformulation created by this approach.

CARB Seeks Federal Approval of Amended Consumer Products Regulations for Inclusion in CAA State Implementation Plan

On June 26, 2009, the U.S. Environmental Protection Agency (EPA) proposed approval of amended California regulations that restrict the levels of volatile organic compounds (VOCs) present in consumer products.¹ Comments on the proposed EPA action may be submitted until August 27, 2009.²

If approved by EPA, the amended regulations would be included in the California State Implementation Plan (SIP) and would be federally enforceable under the Clean Air Act.³

The revisions under consideration by EPA include 2008 amendments by the California Air Resources Board (CARB) to the general Consumer Products regulation (which became effective in California on July 18, 2009),⁴ as well as previously submitted revisions to the Antiperspirant and Deodorant regulation, general Consumer Products regulation, and Aerosol Coating Products regulation that are not yet incorporated into the California SIP. CARB's amended regulations cover more product categories than the previous versions, generally set more stringent VOC limits than before, and are more demanding than EPA's national Consumer Products rule (40 C.F.R., Part 59, Subpart C).

Manufacturers, distributors, and retailers that sell covered products into the California market (a substantial portion of the national market) should take note of the changes. At a time of when many states are enacting material restrictions for consumer products targeted at specific components (such as mercury or brominated flame retardants), these amendments also restrict the content of consumer products.

I. California's Antiperspirant and Deodorant Regulation (Article 1)

CARB's Antiperspirant and Deodorant regulation restricts the percent of high volatility organic compounds (HVOC) and medium volatility organic compounds (MVOC) that may be present in these consumer products. The amendments submitted by CARB to EPA formally repeal a zero percent limit for HVOC aerosol antiperspirants (due to technical infeasibility), update the definition of VOC, and extend the sell-through period for antiperspirants and deodorants from 18 months to three years (which allows manufacturers, retailers, and distributors a grace period to sell products manufactured before the effective date of the regulation). However, the CARB regulation is also more demanding than the federal Consumer Products rule in that it contains stricter HVOC and MVOC limits, requires laboratory testing or calculation to show compliance, prohibits the use of toxic air contaminants, and applies to retailers as well as manufacturers.

II. California Consumer Products Regulation (Article 2)

CARB's general Consumer Products regulation sets limits on the percentage of VOCs that may be present in specific product categories and restricts or prohibits several additional compounds in consumer products. The 2008 amendments include new or revised VOC limits for personal care products such as non-FDA regulated astringent/toner and personal fragrance products; non-aerosol sealants and caulking compounds (including chemical and non-chemical curing); motor vehicle and motor vehicle part cleaners (including non-aerosol); carpet and upholstery cleaners (including non-aerosol); gas dusters and dusting aids (including non-aerosol); floor maintenance products; penetrants and multi-purpose lubricants; degreasers; glass cleaners; and odor remover/eliminator products (including non-aerosol).⁵ There are also new VOC restrictions on single-use dryer fabric softeners.⁶ Most of the new VOC limits are effective December 31, 2010; however, a few will not take effect until December 31, 2012, 2013 or 2015. Special VOC-related reporting for multi-purpose lubricant and penetrant products will also be required on or before March 31, 2012.⁷

In addition to VOC content restrictions, the 2008 amendments also prohibit, as of December 31, 2010, the sale, offer for sale, or manufacture for use in California of any carpet or upholstery cleaner, fabric protectant, multi-purpose lubricant, penetrant, sealant or caulking compound or spot remover containing (1) methylene chloride, (2) perchloroethylene, or (3) trichloroethylene.⁸ To the extent that products containing any of these three compounds were manufactured before December 31, 2010, they may be sold until December 31, 2013 if they comply with applicable product dating requirements. Pressurized gas duster products containing methylene chloride, perchloroethylene, or any other chemical compound with a Global Warming Potential (GWP) value of 150 or greater are also prohibited effective December 31, 2010.⁹ A one year sell-through provision for pressurized gas duster products applies (expiring December 31, 2011).

Other amendments to the general Consumer Products regulation previously adopted by CARB but awaiting EPA approval for incorporation into the SIP include a prohibition on solid air fresheners or toilet/urinal products containing para-dichlorobenzene; required notifications of purchasers regarding products sold near the end of a sell-through period; and clarifications of defined terms.

In contrast to EPA's national Consumer Products Rule, CARB's Consumer Products regulation extends to retailers, prohibits the use of toxic air contaminants and ozone-depleting substances, covers more categories of consumer products, has more stringent two-tier VOC limits, limits the sell-through period to three years, and requires compliance by lab testing or calculation.

III. Aerosol Coating Products (Article III)

The amendments CARB submitted to EPA on the Aerosol Coating Products regulation for inclusion in the SIP include clarifications of previously overlapping requirements between the Aerosol Coating Products and the general Consumer Products regulations. The amendments clarify that cosmetics and other products used on the human body, "rubber/vinyl protectants" and "fabric protectants" would be regulated exclusively under the Consumer Products regulation (and exempted from the Aerosol Coatings regulation).

IV. CARB Method 310

CARB has also submitted updates to the EPA, American Society for Testing and Materials (ASTM) and National Institute for Occupational Safety and Health (NIOSH) testing and emission calculation methods referenced in CARB Method 310.

V. Evaluation Criteria and Public Comments

Pursuant to Clean Air Act (CAA), EPA will evaluate the submitted regulations to determine if they: (1) are enforceable (CAA section 110(a)); (2) require Reasonably Available Control Technology (RACT) for qualifying sources (CAA sections 182(a)(2) and (b)(2)); and, (3) do not relax existing requirements (CAA sections 110(l) and 193).

The public comment period for this EPA action was originally set to close on July 27, 2009, but has been extended to August 27, 2009. Unless EPA receives convincing new information during the comment period, the agency intends to publish a final approval action that will incorporate the California regulations into the federally enforceable SIP.

Contacts

For additional information or guidance regarding the California Consumer Products regulations, please contact Laura Duncan (lduncan@bdlaw.com), Mark Duvall (mduvall@bdlaw.com) or Amy Lincoln (alincoln@bdlaw.com).

¹ See 74 Fed. Reg. 30,481 - 30,485 (June 26, 2009).

² See 74 Fed. Reg. 36,980 (July 27, 2009).

³ California regulates VOC emissions from consumer products pursuant to its obligations under federal Clean Air Act section 110(a). EPA approved previous versions of CARB's Antiperspirant and Deodorant, Consumer Products and Aerosol Coating Products regulations for inclusion into California's SIP in 2005. See 60 Fed. Reg. 43,379 (Aug. 21, 1995) and 70 Fed. Reg. 53,930 (Sept. 13, 2005).

⁴ See <http://www.arb.ca.gov/regact/2008/cp2008/frooalfin.pdf> for text of the 2008 amendments.

⁵ See <http://www.arb.ca.gov/regact/2008/cp2008/frooalfin.pdf>, 17 C.C.R. § 94509(a).

⁶ See *id.* § 94509(s).

⁷ See *id.* § 94513(f).

⁸ See *id.* § 94509(q).

⁹ See *id.* § 94509(r).

OSHA Launches Pilot PSM National Emphasis Program for Chemical Facilities

On July 27, 2009, the Occupational Safety and Health Administration (OSHA) launched its much-anticipated National Emphasis Program (NEP) for chemical facilities. The Chemical NEP establishes an inspection program to ensure compliance with OSHA's standard on Process Safety Management of Highly Hazardous Chemicals (PSM).¹ The NEP will operate as a one-year pilot program with programmed inspections targeting Regions I, VII, and X,

and with unprogrammed inspections in all regions. After one year, OSHA will evaluate the NEP and consider renewal and expansion of the program to other regions.

1. Background: The PSM Standard and Refinery NEP

OSHA developed the PSM standard in 1992 following a number of catastrophic incidents at refinery and chemical facilities. The standard is intended to prevent or minimize the consequences of a catastrophic release of toxic, reactive, flammable or explosive highly hazardous chemicals (HHCs) by requiring a comprehensive management program integrating technologies, procedures, and management practices. In 1994, OSHA released a guidance document that established Program Quality Verifications (PQVs) as the primary enforcement mechanism for the PSM standard.² However, due to the resource-intensive nature of PQV inspections, the guidance acknowledged that OSHA would perform only a limited number of such inspections each year. A recurrence of substantial incidents in the petroleum refining industry after the standard went into effect, most notably the 2005 incident at BP's Texas City, Texas refinery, led OSHA to recognize the need for more effective enforcement of the PSM standard.

Through NEPs, OSHA has identified industries or hazards deserving priority attention from its national, regional, and area offices as well as states that choose to implement similar programs.³ OSHA unveiled in 2007 an NEP for petroleum refineries that established a comprehensive inspection strategy for refineries considered at greatest risk of catastrophic accident.⁴ Under the refinery NEP, OSHA has issued a large number of serious, willful, and repeat citations of the PSM standard.⁵ Patrick Kapust, a safety and health specialist in OSHA's Enforcement Directorate, noted that the program turned up "more violations than [OSHA] expected" and significantly taxed the agency's inspection resources.⁶ Plans to extend the refinery NEP to chemical facilities were announced in 2008; however, the agency delayed the effort for over a year because of several significant accident investigations. The long-awaited Chemical NEP attempts to build on the refinery NEP while committing limited agency resources to chemical facility selection and inspection.

2. The Chemical NEP's Targeted Approach

The Chemical NEP mandates a high volume of narrowly-focused, relatively low-resource inspections. As a pilot program, it is limited to Regions I (Connecticut, Maine, New Hampshire, Rhode Island, and Vermont, although Vermont has a state plan covering private sector employees), VII (Iowa, Kansas, Missouri, and Nebraska; Iowa also has a state plan covering private sector employees), and X (Alaska, Washington, Oregon, and Idaho). These regions are not known for their chemical facilities. In contrast, Region II (which includes New Jersey) and Region VI (which includes Louisiana and Texas) were not included in the pilot. Regions I, VII, and X do have facilities where ammonia, chlorine, or other HHCs are used, and, as indicated below, that might be enough to include those facilities within the pilot program.

Facilities that may be subject to programmed (i.e., planned) inspections will be identified through the coordinated development of a "master list." The OSHA Directorate of Enforcement Programs (DEP) and the Office of Statistics are required to develop a list targeting the following facilities:

- OSHA PSM facilities that are covered by EPA's Risk Management Program as RMP Program 3 sites;
- explosive manufacturers; and
- facilities that have been previously cited for PSM violations.

Facilities identified in each master list will be divided into three categories: (1) facilities likely to have ammonia used for refrigeration as the only HHC; (2) facilities likely to have chlorine used for water treatment as the only HHC; and (3) facilities likely to have both ammonia and chlorine, ammonia or chlorine used for other than refrigeration or water treatment, or HHCs other than ammonia or chlorine.

Facilities that are participants in OSHA's Voluntary Protection Program or Safety and Health Achievement Recognition Program, as well as facilities that have received a comprehensive PSM inspection within the previous two years, will not be included in the national list.

The Chemical NEP mandates between five and ten programmed inspections in each Area Office. Sites will be randomly selected but should consist of 50% from the Category 3 master list, 25% from the Category 2 master list, and 25% from the Category 1 master list. The agency will conduct unprogrammed inspections (targeting facilities that have received a complaint or referral or that have had a catastrophic incident) at chemical facilities in all OSHA regions. In addition, some facilities may be selected for inspection pursuant to the current Site-Specific Targeting Plan.

3. Building on the Experience of the Refinery NEP

OSHA inspections under the Chemical NEP will employ a "dynamic list" of Inspection Priority Items to review PSM compliance similar to the list employed in the refinery NEP. This approach differs from the broad and open-ended PQV process in that it relies on specific, investigative questions designed to gather facts related to the PSM requirements. DEP will develop the dynamic list questions in five substantive categories:

(1) PSM general; (2) ammonia refrigeration; (3) water and/or wastewater treatment; (4) storage; and (5) chemical processing. Periodically, DEP will revise the questions on the dynamic lists.

4. Inspection Procedures

The Chemical NEP inspections will follow the procedures outlined in Chapter 3 of OSHA's Field Operations Manual⁷ with several modifications as outlined in the NEP. Each inspection will consist of: (1) an opening conference; (2) a facility-led overview of the site's PSM programs; (3) an initial walkaround; (4) a compliance evaluation of a selected PSM-covered unit within the facility; (5) an inspection of contractors working on or adjacent to the selected unit; and (6) issuance of citations for any alleged PSM violations.

Inspections must be staffed by at least one "Level 1" qualified Compliance and Safety Health Officer (CSHO, i.e., inspector).⁸ The CSHO will select a PSM-covered process to evaluate for purposes of PSM compliance. Approximately fifteen questions will be drawn from the applicable dynamic list for each evaluation of a selected unit (ten questions from the applicable chemical process dynamic list and five questions from the PSM general dynamic list). The NEP also identifies a list of general and process-related documents that the CSHO is to consult during the inspection, including documents beyond what are required by the PSM standard, such as a list of all PSM-covered process units or a summary description of the facility's PSM program. If an inspection reveals deficiencies outside of the dynamic list questions, the scope of the inspection may be expanded after consultation with the Area Director. The CSHO may also recommend citations for hazardous conditions or violations of OSHA standards regardless of whether they are specifically addressed by the dynamic list.

5. NEP Evaluation and Next Steps

The pilot will be effective for one year. The program will be evaluated using data collected from case files and reports submitted to OSHA headquarters by each Area Office. OSHA has indicated that it will consider renewal of the NEP and expansion of the programmed inspections to other regions following the conclusion of the pilot program. No formal timeline for that expansion has yet been announced.

For more information, please contact Mark Duvall at mduvall@bdlaw.com, Maddie Kadas at mkadas@bdlaw.com, Ken Finney at kfinney@bdlaw.com, Laura McAfee at lmcafee@bdlaw.com or Steve Richmond at srichmond@bdlaw.com. This alert was prepared with the assistance of Lauren Hopkins.

⁷29 C.F.R. § 1910.119.

¹ CPL-02-02-045, Process Safety Management of Highly Hazardous Chemicals – Compliance Guidelines

and Enforcement Procedures (Sept. 13, 1994), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1558.

³ In addition to the chemical and refinery NEPs, OSHA currently operates NEPs for combustible dust, buttered flavored popcorn, lead, silica, amputations, trenching, and shipbreaking operations. Others, such as one on injury and illness recordkeeping, are under development.

⁴ CPL 03-00-004, Petroleum Refinery Process Safety Management National Emphasis Program (June 7, 2007); Statement of Richard Fairfax, Director of Enforcement Programs, OSHA, Before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce, U.S. House of Representatives (May 16, 2008), available at http://archives.energycommerce.house.gov/cmte_mtg/110-oi-hrg.051607.Fairfax-Testimony.pdf.

⁵ Katherine Torres, "Fairfax: OSHA Plans PSM Inspections for Chemical Plants," EHS Today (Apr. 9, 2008), available at http://ehstoday.com/safety/chemical/ehs_imp_79656/.

⁶ Bureau of National Affairs, OSHA Official Confirms Emphasis Program Will Be Extended to Chemical Facilities, 39 Occupational Safety & Health Reporter 567 (July 9, 2009).

⁷ OSHA Instruction CPL 02-00-148, Field Operations Manual (2009), available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

⁸ The NEP classifies inspection team personnel according to the training and experience he or she has received. Level 1 personnel generally must have completed specified OSHA training courses and must have prior experience with chemical industry safety.

FIRM NEWS & EVENTS

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