AGRICULTURAL RETAILERS ASSOCIATION

August 12, 2016

Dr. David Michaels
Occupational Safety and Health Administration
U.S. Department of Labor
Room N-2625, 200 Constitution Avenue, NW
Washington, D.C. 20210

RE: OSHA's Proposed Revisions to 29 CFR § 1910.119 Process Safety Management and 29 CFR § 1910.109 Explosives and Blasting Agents; OSHA-2013-0020

Dear Dr. Michaels,

On behalf of the Agricultural Retailers Association (ARA) I am submitting comments on the Process Safety Management Small Entity Representative Background Document (SER Background Document). In the docket, OSHA states the purpose of this action is to improve safety at facilities that use and distribute hazardous chemicals in response to Executive Order (EO) 13650, "Improving Chemical Facility Safety and Security" issued on August 1, 2013.

Statement of Interest

ARA represents farm supply dealers, which are scattered throughout all 50 states and range in size from local family-held businesses and farmer cooperatives to larger companies with hundreds of retail outlets across the USA. Retailers play an important role in feeding the world and provide farmers with essential crop input products such as seed, fertilizer, crop protection products and equipment. We are a cooperating partner in the regulated community and understand the importance of chemical safety and security.

We appreciate the opportunity to provide comments to prevent events like the April 17, 2013 tragedy at the fertilizer facility in West, Texas from occurring in the future. Our employees' first priority is the protection of the workers, first responders and neighbors living in their communities. ARA previously submitted comments on this docket on March 10, 2014 during the Request for Information (RFI) and reiterate those comments in this submission. In addition to submitting comments to the RFI, four ARA members participated in the Small Business Regulatory Enforcement Fairness Act (SBREFA) process by acting as Small Entity Representatives (SERs).

ARA members communicate and engage with employees, local first responders, and the community to enhance Environmental Health Safety and Security (EHS&S) matters. Our member companies routinely report EHS&S metrics to their respective executive board annually and often quarterly in an effort to maintaining safety and preventing accidents. Typically, ARA member companies train their employees monthly on core EHS matters such as: hazard communication, hazardous energy, confined spaces, air, water, waste, and driving.

Comments

Anhydrous Ammonia and the PSM Retail Facility Exemption

On July 22, 2015 OSHA issued an enforcement memorandum titled, "*Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption*" overturning more than 20 years of the PSM Retail Facility exemption being applied to agricultural retailers carrying anhydrous ammonia. Since the promulgation of the PSM standard in 1992, OSHA has defined the "retail exemption" to include ag retailers that "at which more than half of the income is obtained from direct sales to end users."[1] The July 22, 2015 memo did away with this "50 percent test" and instead only allows the "retail exemption" for facilities "engaged in retail trade as defined by... sectors 44 and 45 of the NAICS Manual..."[2]

This issue was not in the original SBREFA Issue Document, but OSHA added it in an attempt to alleviate concerns with the lack of opportunity for the public to comment. ARA welcomes a full-fledged rulemaking on the "retail exemption" issue, but strongly encourages OSHA to withdraw the July 22, 2015 memo until the rulemaking process is completed. To do otherwise, OSHA would be enforcing a standard *a priori*.

ARA is very concerned with doing away with the "retail exemption" for anhydrous ammonia ag retailers and expressed these concerns in our initial comments to this

[1] Letter from Patricia K. Clark, Director, OSHA to Gary Myers, President TFI (June 19, 1992); OSHA "Process Safety Management of Highly Hazardous Chemicals: Compliance Guidelines and Enforcement Procedures" (Sept. 28, 1992).
[2] Letter from Thomas Galassi, Director, OSHA to Regional Administrators and State Plan Designees, OSHA (July 22, 2015)

document on March 10, 2014 during OSHA's RFI.[3] Those comments remain relevant and ARA reiterates and incorporates them here.

ARA takes issue with the use of the North American Industrial Classification System (NAICS) to increase the scope of the PSM regulation. NACIS was developed for use in the collection, tabulation, presentation, and analysis of statistical data that show the economic status of the United States. This classification system was never intended to determine whether a business is subject to or exempt from federal regulations. [4]

At the most fundamental level, ARA objects to OSHA attempting to regulate anhydrous ammonia as its response to the ammonium nitrate (AN) explosion at West Fertilizer in April 2013. Such action is arbitrary. The two products have very different physical and chemical properties, and anhydrous ammonia played **no role** in the incident at West Fertilizer. Regulating ammonia in response to an AN incident is no more justifiable than regulating trucks in response to a rail accident, and it will have absolutely no effect in preventing another AN incident because it is focused on the wrong product. OSHA's effort would be better spent evaluating the storage and handling requirements for ammonium nitrate found at 29 CFR 1910.109(i). ARA reiterates its earlier offer to work with OSHA on this task.

Furthermore, if anhydrous ammonia is an issue, the most logical regulation for OSHA to increase safety would be to update 29 CFR 1910.111, storage and handling of anhydrous ammonia. ARA offered to work with OSHA to review and update this standard shortly after the July 22, 2015 memo, but OSHA has instead focused on regulating a product that was present but not involved in the incident at West Fertilizer.

Adding anhydrous ammonia retailers to PSM will only create a duplicative regulation and do nothing to prevent another West, Texas incident. This duplication would be extremely costly. On average, the ag retail industry estimates the cost of moving one facility from RMP Level 2 into compliance with PSM to be more than $20,000 for completing the paperwork alone.[5] Compliance could (and likely would) be much more expensive because of equipment upgrades. For example, if a retailer has to buy a new bullet storage tank as a result of a missing data plate or U-1A Report, it could cost the retailer $100,000. To ARA's knowledge, there are only two manufacturers of bullet storage tanks in the U.S. There would be a significant backlog and delay of tank orders

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[3] DAREN COPPOCK, ARA COMMENTS TO OSHA-2013-0020, (March 10, 2014).
[4] UNITED STATES CENSUS BUREAU, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM http://www.census.gov/eos/www/naics/faqs/faqs.html#q17 (last visited Aug. 8, 2016).
[5] Letter from Daren Coppock, ARA, Charles Conner, NCFC, Chris Jahn, TFI to Dr. David Michaels, OSHA (September 23, 2015); DAREN COPPOCK, ARA COMMENTS TO OSHA-2013-0020, p. 13 (March 10, 2014).

in the event the 3,800 ag retailers affected by this change would have to order new bullet tanks.

Subjecting ag retailers that sell anhydrous ammonia to the additional requirements of the PSM regulation would be detrimental to the industry. ARA has been made aware of at least several dozen anhydrous ammonia dealers that have already stopped selling the product due to the possibility of being subject to PSM. PSM will have little to no safety benefits for ag retailers and will only serve to put them out of business. OSHA has not been able to quantify the benefits of their proposal, and with no quantified benefits, has also not completed a cost/benefit analysis as required by Executive Order 13563. If the purpose of the July 22, 2015 memo adding anhydrous ammonia dealers to PSM is to create consolidation, push ammonia tanks onto unregulated farm sites, cause more highway transportation of ammonia over longer distances, and reduce competition in ag retail business, it is serving its purpose.

At the very least OSHA should follow the SBREFA Panel's recommendation and consider requiring only those elements of the PSM standard that are appropriate for the storage and distribution of anhydrous ammonia. The elements of the PSM standard that are appropriate for the storage and distribution of anhydrous ammonia should not exceed the requirements of EPA's Risk Management Program Level 2. To do this, OSHA should rescind the July 22, 2015 enforcement memorandum.

Ammonium Nitrate and Appendix A

OSHA is considering adding Ammonium Nitrate (AN) as a listed chemical under PSM, in part because of the West Fertilizer Company incident on April 17, 2013.[6] ARA does not believe PSM is necessary to provide a safe working environment for the storage and handling of ammonium nitrate. AN is perfectly safe with proper storage and good housekeeping, and compliance with current regulations including 29 CFR 1910.109(i) and the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards (CFATS).

In the Chemical Safety Board's *Final Investigation of West Fertilizer Company*, it was recommended that OSHA ***EITHER*** add AN to PSM's Appendix A, ***OR*** update the Explosives and Blasting Agents standard, 29 CFR 1910.109(i).[7] Because AN is a solid

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[6] The Fire at West that caused the explosion was intentionally set. *See* Reward Notice, ATF (May 11, 2016), https://www.atf.gov/news/pr/atf-announces-50000-reward-west-texas-fatality-fire.

[7] U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT, 241 (January 2016) (CSB also found no evidence to suggest that any detonation of AN in the U.S. has occurred at a facility compliance with 1910.109(i)).

substance and stable when properly stored, ARA prefers Alternative 8 OSHA is considering by updating 29 CFR 1910.109(i) instead of adding AN to PSM Appendix A. ARA members that carry AN are already subject to 29 CFR 1910.109(i). Increasing the scope of PSM to subject ARA members that carry AN would only give ARA members one more regulation to comply with and add to the confusion, not provide clarity and increased safety. If and when OSHA updates 1910.109(i), it should complete the notice-and-comment rulemaking process and work closely with ARA and ag retailers to develop consistent and clear interpretations of the regulations and its applicability to the industry.

In addition to complying with 1910.109(i), the ag retail industry is committed to safety through ResponsbileAg. Ag retailers storing AN can participate in ResponsibleAg and work toward compliance and safety through its AN checklist.[8]

PSM's requirements of Recognized and Generally Accepted Good Engineering Practices RAGAGEP would require the instillation of a fire-suppression system/sprinkler system. The requirement of a sprinkler system would be costly and is not the only means to prevent an explosion from a fire containing AN. Other factors that might prevent an explosion include the proper ventilation of the building. In Athens, Texas on May 29, 2014. East Texas Ag Supply caught fire while storing more than 70 tons of AN. Like West Fertilizer, East Texas Ag Supply did not have a sprinkler system. However, unlike West, no explosion occurred at East Texas Ag Supply. This is most likely due to the fact that the East Texas Ag Supply facility was better ventilated than the West Facility.[9] Even if West Fertilizer had sprinklers, there would not have been enough water to put out the fire.

OSHA estimates that installing sprinkler/fire-suppression systems will cost a range of $2 to $7 per square foot for existing buildings and $1 to $2 per square foot for new constructions. The SBREFA panel described a SER that installed a sprinkler system in a new construction almost five years ago which cost the business $13 per square foot for a 7,770 square foot bin, totaling $101,010. The $13 per square foot cost for a new construction is much higher than OSHA's $1 to $2 estimate.

When requiring the installation of a sprinkler system, OSHA should seriously consider the availability of water. Many locations in the U.S. do not have an abundant source of water readily available and in other locations water pipes are undersized (which restricts

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[8] *See* ResponsibleAg Assessment: Dry Fertilizer Warehouse, p 16-17 (January 5, 2016).
[9] U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD, INVESTIGATION REPORT, 64-66, 129-133 (January 2016).

the flow of water) and some have been known to freeze. Furthermore, OSHA should consider the potential wastewater concerns should the sprinkler system be used.

Third-Party Audit Compliance Audits

OSHA is considering amending § 1910.119 to require that an audit be conducted by a qualified third-party auditor. Although OSHA has yet to propose a definition of "third-party auditor," ARA cautions OSHA in deciding to require a third-party auditor. Simultaneously, the EPA is proposing to increase the RMP's compliance audit provisions to require independent third-party compliance audits after an accident or findings of significant non-compliance by an implementing agency. The EPA's proposed definition of "independent third-party" is "a private auditor, inspector or other type of verifier external to the facility..." This definition excludes the regulated entity or any firm that has had a "supply-chain relationship" as well as contractors, consultants, or purchasers of the facility's good or services. ARA has serious concerns about EPA's definition and the overly restrictive nature of this proposal as it will make it very difficult for a facility to find a qualified auditor with any relevant industry experience.

While we certainly understand the need for auditor independence, ARA believes this can be accomplished whether a team is comprised of internal or external auditors. Internal auditors can provide a better understanding of the facility and process and will likely improve the quality and substance of the audit. Should OSHA consider it, ARA opposes any professional engineer (PE) requirements as they add unnecessary costs and these individuals do not automatically understand auditing techniques and may not qualify to perform an effective audit. The PE licensing process is not specific to process safety, and is state regulated with various non-standardized requirements.

The overall circumstances under which a company conducts a PSM audit at one of their facilities should be left up to the company as it is a performance-based standard. We are also extremely concerned with blanket restrictions on consultants from performing audits due to previous or potential future work. This will only reduce the overall number of capable individuals able to perform the audit and will have unintended consequences on the quality of the audit.

ARA is very concerned with the potential requirement that the auditor submit the report to the agency at the same time or BEFORE it is provided to the owner or operators, and that the audit report and related records will not be privileged as attorney-client communications or attorney work products, even if written for or reviewed by legal staff. This is contrary to the basic due process and legal rights that should be afforded the owner or operators of the facility. Audit reports, either in draft or final form, contain confidential business information that must be properly secured. Any requirement to publish incomplete or unvetted audit reports will only create unnecessary confusion and the potential for litigation and controversy.

In contrast, providing accurate and credible audits consistently across the entire group of carefully trained ResponsibleAg credentialed auditors is at the heart of the ResponsibleAg initiative. Each auditor must successfully complete a week long course, as well as an annual refresher training to maintain proficiency and certification.

If OSHA does require third-party compliance audits, it should ensure that ResponsibleAg auditors qualify to conduct these audits. ResponsibleAg auditors are in the best position to inspect ag retailers and go through extensive training to become licensed and maintain certification. The goals of ResponsibleAg are:

- Improve and document industry-wide compliance with federal fertilizer regulations;
- Prepare facilities for regulatory inspections;
- Validate internal compliance programs;
- Demonstrate responsibility and transparency to the public and regulators;
- Assure continued access to products;
- Provide safety for employees, customers and neighbors.

These goals coincide with the logic behind requiring third-party audits. Facilities that participate in ResponsibleAg receive an assessment every three years by auditors who are credentialed on the ResponsibleAg protocol. Auditors verify a facility's compliance. Facilities that successfully complete their assessment will be recognized, and any site that does not successfully complete the assessment will be provided a list of recommended corrective actions. ResponsibleAg provides for verifications of a statistically significant sample of audits to ensure consistent quality control and independence.

If OSHA does move forward with a third-party compliance, ARA prefers Alternative 10 which makes third-party compliance audits voluntary, leaving the discretion to conduct a third-party audit with the employer.

Safety Technology and Alternatives Analysis

OSHA is considering adding a requirement to PSM that employers identify and evaluate applicable safer technology and alternatives. This includes adding requirements to the Process Hazard Analysis (PHA) specifying that employers must consider safer technology and alternatives when identified hazards result in an employer-specified level of risk.

ARA urges OSHA to not require safer alternatives options. The EPA previously reviewed this issue regarding their RMP regulations and correctly rejected the idea to impose an inherently safer technology analysis when the regulations were first issued on

June 20, 1996. The same arguments were made by anti-chemical groups at that time. The fundamental issues/problems of potentially imposing a safer technology analysis federal mandate that EPA considered then remain the same today. In the RMP Final Rule issued in 1996, it states the following:

> *EPA has decided not to mandate inherently safer technology analyses. EPA does not believe that a requirement that sources conduct searches or analyses of alternative processing technologies for new or existing processes will produce additional benefits beyond those accruing to the rule already. As many commenters, including those that support such analysis, pointed out, an assessment of inherently safer design alternatives has the most benefit in the development of new processes. Industry generally examines new process alternatives to avoid the addition of more costly administrative or engineering controls to mitigate a design that may be more hazardous in nature. EPA believes these processes can be safely operated through management and control of the hazards without spending resources searching for unavailable or unaffordable new process technologies.* [10]

ARA agrees with EPA's rationale for rejecting a safer technology analysis mandate then, and OSHA should reject instituting a safer technology analysis mandate in the future. ARA members and other sectors of the agricultural industry regularly review and update existing industry consensus standards such as ANSI K61.1, which covers anhydrous ammonia storage facilities and nurse tank loading stations. These industry consensus standards are similar to those adopted by OSHA.[11] OSHA inspectors already have the ability to cite violations against a facility under the agency's "General Duty" clause if a facility fails to follow industry consensus standards.

ARA opposes any OSHA mandate that would require facilities substitute products for "safety alternative chemicals." Ammonia is a basic building block for the manufacture of nitrogen fertilizer products. As there are no safer alternatives to replace this product, required to conduct a safer technology analysis is nonsensical.

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[10] Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7), 60 Fed. Reg. 31668, 31699-31700 (Envtl Prot. Agency June 20, 1996).
[11] 29 CFR § 1910.111 (2016).

Anti-chemical groups contend that the option could be used to replace existing PSM and RMP safety requirements with a system that requires employers to present to regulators a structured argument supported by a body of evidence which provides a compelling, comprehensible and valid case that a system is safe for a given application in a given operating environment. However, ARA and other impacted industry segments believe regulations should be straightforward and easy to understand. The current federal regulatory scheme is already complex. Changing the regulatory structure utilizing a "safety case" model will create additional confusion and do little to improve safety. The U.S. Chemical Safety Board also declined to make this recommendation to the state of California, in response to the Chevron explosion. The "safety case" would be a major departure from the current regulatory model, and we believe it would require legislative action to implement.

Regarding Alternative 5, OSHA would have to announce the list of chemicals or hazards that would not be subject to the safer technology analysis before ARA comments on whether it supports it or not. However, we reiterate that ammonia is the building block for nitrogen fertilizer products, for which there are no safer alternative. Therefore, OSHA should not require a safer technology analysis of ammonia, or other fertilizers.

Emergency Response Planning and Coordination Requirements

OSHA is considering adding additional requirements for emergency response planning, including coordination with local responders, conducting emergency drills, and evaluation of local emergency response capabilities. OSHA is considering requiring employers establish a process to identify, prevent, prepare for, and/or respond to emergencies, including the:

- Development of plans to prevent and minimize risks for potential emergencies, such as the availability of emergency response resources (e.g., medical rescue, crisis response, law enforcement, fire departments, etc);
- Periodic testing of the emergency plans through drills and similar activities, such as table top exercises.

ARA members support increased efforts to more closely coordinate with their local emergency responders related to education and training activities to ensure they are well prepared in case of an accidental release. As OSHA points out, current OSHA standards already require of emergency planning coordination with local emergency response authorities.

OSHA should be focusing on providing additional resources and training towards emergency responders in smaller, more rural communities that have limited staff and resources. ARA concurs with the concerns raised by the U.S. Conference of Mayors, the

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National Association of Counties (NACO) and the National League of Cities (NLC) with the costs and impacts of a more prescriptive regulation that will fall disproportionately on smaller facilities and smaller rural communities, only compounding the challenges of complying with new federal mandates. These facilities and communities already manage a wide range of federal regulations and compliance issues. It is puzzling that OSHA failed to involve key stakeholders, such as state and local governments in the SBREFA process. SERs are referred to Small *Entity* Representatives, not Small Business Representatives, to be inclusive of non-business organizations such as local governments. It would have made sense to have state and local government involved in this process to discuss their specific issues with this proposal.

Root-Cause Analysis

OSHA is considering the addition of a requirement to specify that the employer conduct a root-cause investigation of all incidents.

ARA is concerned with this potential requirement and believes the decision to conduct a root-cause analysis and the selection of the methodology used should be left to the discretion of the employer. Requiring an investigation of "all incidents" is difficult to define. Would "near misses" require a root-cause analysis? If so, what exactly is a "near miss?" Because of this ambiguity, the discretion to conduct a root-cause analysis should be left up to the employer.

Conclusion

Thank you for your review and consideration of our comments. If you have any questions or would like further information, please do not hesitate to contact me at 202-595-1706 or kyle@aradc.org.

Sincerely,

Kyle Liske
Public Policy Counsel
Agricultural Retailers Association