



The
Fertilizer Institute
Nourish, Replenish, Grow



September 23, 2015

The Honorable James Lankford
Chairman, Subcommittee on Regulatory Affairs and Federal Management
U.S. Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Heidi Heitkamp
Ranking Member, Subcommittee on Regulatory Affairs and Federal Management
U.S. Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

RE: September 23, 2015 Hearing Entitled: “Examining the Use of Agency Regulatory Guidance”

Dear Chairman Lankford and Ranking Member Heitkamp:

The Fertilizer Institute (TFI) and the Agricultural Retailers Association (ARA) are pleased to provide the perspectives of the two organizations on recent changes made by the Occupational Safety and Health Administration (OSHA) to the Process Safety Management (PSM) program. In particular, we are very concerned with the July 22, 2015, enforcement directive revoking a longstanding definition of what constitutes a retail facility (“retail exemption”) under the PSM program. This and the other changes made to the PSM program significantly expand the scope, complexity and costs for the regulated community. Because of these impacts, we believe the agency should have first solicited feedback from the regulated community through a formal notice and comment process, rather than through an informal request for information (RFI). The RFI did not provide an indication as to where the agency was headed from a policy perspective.

As outlined herein, the costs imposed by the changes to the PSM program are substantial and should have been considered by the Office of Management and Budget. We further believe that the failure of the agency to consider the full impact on the agricultural retail sector dictates that these policy changes be withdrawn. Barring full withdrawal, TFI and ARA have formally requested that OSHA extend the compliance period to implement these changes for up to three years, to July 2018.

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers, and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic, information, and public communications programs.

ARA is a nationwide, not-for-profit association representing agricultural retailers and distributors of agronomic crop inputs with members covering all 50 states and representing over 70 percent of all crop input materials sold to America's farmers. ARA's retail members provide their farmer customers with essential crop inputs like fertilizer, seed, pesticide, and equipment; application services; and crop consulting services, including conservation methodologies.

Background

Earlier this year, OSHA made three significant changes to the PSM program, as follows:

- **June 5, 2015:** Revised the covered concentrations of chemicals in Appendix A
- **June 8, 2015:** Modified the basis for determining what are considered Recognized and Generally Acceptable Good Engineering Practices (RAGAGEP)
- **July 22, 2015:** Modified the retail exemption, subjecting agricultural retailers to the PSM program for the first time.

All three changes were made in the context of agency enforcement directives to OSHA regional directors. The regulated community was not consulted in advance about the changes to longstanding policy, and the new policies were not announced by OSHA or otherwise shared with the regulated community once they were completed. In fact, the changes were discovered accidentally.

These new program interpretations substantially change the underlying program. They will cost those facilities newly subject to the standards tens of millions of dollars to implement. Taken together, the costs imposed by the changes will easily exceed the \$100,000,000 threshold used by the Office of Management and Budget when determining whether a regulatory action is "major," thereby requiring OMB review. As detailed below, the costs imposed by the withdrawal of the retail exemption alone will exceed this threshold.

The change to the retail exemption is arbitrary and does not promote worker safety. OSHA has stated that the change is a response to the 2013 West, Texas fertilizer incident and Executive Order (EO) 13650. However, the incident at West was a result of ammonium nitrate; not anhydrous ammonia ("ammonia")¹. Although ammonia was present at the West facility,

¹ **Facts about Anhydrous Ammonia:** Found in water soil and air, ammonia is an essential element for plant, animal and human life. Most of the ammonia in the environment comes from the natural breakdown of manure, dead plants and animals. Anhydrous ammonia is manufactured via the Haber Bosch process which combines nitrogen

there were no known issues associated with its storage or handling. Concerns with ammonia management should be addressed, as necessary and appropriate, through review of the standards under 29 CFR 1910.111.

The change to the retail exemption may be counterproductive to safety. Ammonia facilities may consolidate or close, resulting in the potential sale of ammonia tanks to farmers. As farmers are exempt from PSM, ammonia may now be more routinely stored at unregulated farms. Also, trucks hauling ammonia may have to travel longer distances to reach farm customers. None of these outcomes support safer storage and handling of ammonia.

There are approximately 6,500 agricultural retail facilities in the United States. More than 3,800 of these facilities manage ammonia, an essential crop nutrient and a chemical regulated under the PSM program above certain thresholds. Many of these facilities will be severely challenged to implement these new regulatory obligations in the short six month time frame that OSHA has stipulated. TFI and ARA have formally requested that the agency extend that compliance period by at least two and a half years to facilitate a thorough and orderly implementation of the new program². A three-year compliance timeframe was provided by OSHA when the PSM rules were originally promulgated, as allowed by the Clean Air Act. The additional time is necessary to:

- Understand the regulations
- Acquire the capital for facility upgrades
- Make those facility changes
- Complete the new paperwork and documentation required by PSM, and
- Train employees on the new obligations.

Member Survey

TFI and ARA conducted a survey over the past few weeks of our agricultural retail members across the country to assess the impact of the PSM program changes. The results, which are discussed below, raise a variety of issues, which were not considered by OSHA and will increase the already formidable challenges associated with agricultural retail compliance with PSM.

from the air with hydrogen from natural gas. Because of its high nitrogen content (82%), it is often the most cost-effective nitrogen fertilizer. Anhydrous ammonia is also a basic building block for other forms of important nitrogen fertilizer products. It is applied by injecting it into the subsoil, where it reverts to a gaseous state and combines with the soil's moisture to provide the essential nitrogen nutrient. Agricultural fertilizer retailers take exceptional care in handling anhydrous ammonia with specialized equipment that is inspected and certified, personnel that are extensively trained, and specialized personal protective equipment for employees.

² Affected facilities will actually be tasked at implementing TWO new programs, PSM and the Risk Management Plan Program 3 requirements imposed by the Environmental Protection Agency.

In the survey, we requested feedback on our retail member's understanding of the PSM compliance requirements, an identification of any upgrades they would need to make to their facilities, the availability of both internal staff and external contractors or consultants to make upgrades or otherwise assist with compliance, and any other challenges they foresaw with complying with PSM. The survey was completed by 32 companies, representing 363 facilities that handle ammonia in threshold quantities (TQ). The companies ranged in size from small independent retailers with only one facility to larger retailers with many locations across the country that also have corporate environmental, health, and safety staff.

Survey Results

The challenge most frequently identified was the uncertainty surrounding the type of facility changes necessary to comply with PSM and the cost and timeframe for making those changes. Retailers have been complying with their state laws governing the storage and handling of ammonia, many of which do not meet the federal rules. Of the retailers surveyed, a large number reported having ammonia storage tanks that are missing the American Society of Mechanical Engineers (ASME) data plate. These facilities will need to recertify or replace these tanks. Both options are costly. An experienced ammonia tank supplier estimates that it will cost in excess of \$90,000 to replace a single tank. Recertifying an existing tank will cost approximately \$45,000. The survey results indicate that at least 240 of the 363 facilities—or almost 70% of the respondents—will have to make some type of upgrade to their ammonia systems. The upgrade costs, without consideration for ammonia tanks missing data plates, ranged from \$5,000 to \$100,000 per facility. The average across the 240 facilities was \$20,000 per facility. The total potential cost across the potentially affected agricultural retail sector—for facility upgrades alone—exceeds \$76 million. Total compliance costs easily exceed \$100 million.

Further complicating compliance, many retailers reported that contractors who are qualified to replace ammonia tanks, or make other upgrades to ammonia systems are already in tight supply. According to survey responses, there are only two certified contractors in the entire state of Kansas, the third largest consumer of ammonia. Several respondents who recently made upgrades to their ammonia systems, stated that it took more than a year to get a certified contractor onsite to make the upgrades. This was before the PSM retail exemption change was announced. Given the demand for upgrades to comply with PSM, these contractors are going to be in even shorter supply, and the time necessary to perform upgrades is going to be even longer.

In the survey, we also asked retailers about their understanding of the PSM compliance requirements and their ability to comply with them. A majority of the respondents stated that they did not fully understand what it would take to comply with PSM. There was confusion regarding how these requirements would mesh with those these facilities are already implementing³. This is of great concern, as we are already two months into the six month

³ Federal Rules that Apply to Retailers Handling 10,000 lbs. of Ammonia:

compliance deadline. Only seven of the respondents indicated that they knew of available resources or had retained the resources to comply with PSM. All the respondents indicated that they were working to understand the requirements, but were also still trying to run their businesses. Multiple respondents indicated that they would need at least two years to understand the requirements, make upgrades, complete the paperwork and documentation and train their employees. Two respondents suggested that they would hire an additional full time staff member just to ensure that their facilities complied with PSM. Finally, the respondents estimated that it would cost anywhere from \$5,000 to \$30,000 to either hire contractors or divert internal resources to comply with PSM.

A variety of other challenges became apparent from the survey results. First and foremost, the six month compliance period coincides with the busy harvest season and ammonia fertilizer application season. Many retailers also operate grain handling facilities and will have all their available staff involved in either harvest or grain handling operations. After harvest comes the ammonia application season, and it is nearly impossible to make upgrades during the busy time, because the ammonia systems are in constant use. Retailers who have been making upgrades to their ammonia systems schedule them far in advance to ensure they do not interrupt important business operations.

Conclusion

TFI and ARA believe that the information collected through the survey strongly supports immediate withdrawal by OSHA of the change to the retail exemption under the PSM program. These types of significant changes to the program—if done at all—should be done only in the context of notice and comment rulemaking. Short of withdrawal of the change to the retail exemption, TFI and ARA believe that the agency must grant three years for compliance, as TFI and ARA have formally requested.

TFI and ARA appreciate the opportunity to provide our perspectives on this matter. Fertilizer is essential to life and its use is responsible for 50% of the world's food production.

U.S. Department of Homeland Security (DHS)

Chemical Facility Anti-Terrorism Standards (CFATS)
Maritime Transportation Security Act (MTSA)

Occupational Safety and Health Administration (OSHA)

General Duty Clause
Standard 1910.111: "Storage and Handling of Anhydrous Ammonia"
Standard 1910.1000: "Air Contaminants"

U.S. Environmental Protection Agency (EPA)

Emergency Planning and Community Right-to-Know Act (EPCRA)
Clean Air Act, Section 112(r)(7) Risk Management Plans (RMPs) – Program 2 (myRMP)

We are proud of our role in helping to feed the world and we look forward to working with you to address these policy changes that will have a significant impact on the agricultural sector.

Sincerely,



President
The Fertilizer Institute



President and CEO
Agricultural Retailers Association