

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2014

PHILADELPHIA, FRIDAY, MAY 9, 2014

VOL 249 • NO. 90

An **ALM** Publication

Process Safety Management at Oil and Gas Operations

BY TODD D. KANTORCZYK

Special to the Legal

Approximately one year ago, a small fire at the West Fertilizer Co. in Texas ignited ammonium nitrate stored at the facility, causing a huge blast that killed 15 people—including 12 first responders—and leveled nearby homes, apartments, a nursing home and a school. In response to concerns that federal and state regulators, local officials and the public were not adequately informed of the presence of ammonium nitrate at the plant and the explosion risks posed by its use, President Obama issued Executive Order 13650, which, among other things, directed the secretary of the U.S. Department of Labor to review its process safety management (PSM) standard and issue a request for information (RFI) “designed to identify issues related to modernization” of the standard.

Generally, the PSM standard requires affected facilities to implement a systematic and potentially complex program to identify, evaluate, prevent and respond to releases of hazardous chemicals in the workplace. The RFI issued by the secretary identified 17 topics related to possible changes to the PSM standard. Among the topics were questions related to expanding the



TODD D. KANTORCZYK is an attorney at the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd, Pa. He can be reached at 484-430-2359 or tkantorczyk@mankogold.com.

role of PSM as applied to the rapidly growing domestic oil and gas industry. As described below, however, such an expansion may require revisions to the PSM standard, impose new detailed compliance burdens on the oil and gas industry, or both.

CURRENT PSM STANDARD AND OIL AND GAS OPERATIONS

The PSM standard was first promulgated by the Occupational Safety and Health Administration (OSHA) in 1992 as part of an overall comprehensive hazardous substance release prevention program authorized by Congress following the catastrophic release of methyl isocyanate from a Union Carbide plant in Bhopal, India. As adopted and enforced since that time, however, the PSM standard included some key exceptions directed toward oil and gas operations. First, the PSM standard exempted oil and gas well

servicing because OSHA had begun a separate rulemaking due to the unique nature of those operations. OSHA dropped that rulemaking from its regulatory agenda before the agency promulgated a final rule, but the PSM exemption remained. Second, following concerns raised by the American Petroleum Institute about the absence of an economic analysis of the PSM standard as applied to oil and gas production facilities (which, according to OSHA, begins at the top of the well), OSHA suspended enforcement of the PSM standard for oil and gas production operations. Third, the PSM standard includes an exception for flammable liquids stored in atmospheric storage tanks, which an administrative law judge subsequently held included tanks connected to a PSM-covered process. Fourth, the PSM standard exempted normally unoccupied remote facilities. The combined application of these four items necessarily meant that the PSM standard had limited applicability to oil and gas exploration and production operations.

THE PSM RFI AND RESPONSE

As part of the RFI issued in 2013, OSHA sought feedback on three of the four items described above, thereby raising the possibility that,

in OSHA's view, "modernization" of the PSM standard includes requiring previously exempt oil and gas operations to comply with the PSM standard. Specifically, the RFI requested comment on whether OSHA should retain the exemption for oil and gas well servicing operations, complete an economic analysis on PSM enforcement at oil and gas production facilities, and clarify the atmospheric storage tank exemption so as to cover stored flammables connected, or in close proximity, to a covered process.

Industry groups responding to the RFI, including the American Petroleum Institute, the Marcellus Shale Coalition, the Texas Oil and Gas Association and the Gas Processors Association, have raised a number of concerns associated with subjecting previously exempt oil and gas operations to the PSM standard. For example, the industry commenters assert that the PSM standard is designed to address the threat of a catastrophic release of a hazardous substance from repetitive processes at fixed facilities. By contrast, oil and gas well drilling and servicing operations are temporary and variable to better address the specific geological and geographical attributes of each well location. Accordingly, subjecting oil and gas well drilling and servicing operations to the PSM standard would necessarily require the allocation of significant resources

toward developing a unique plan for each well to satisfy compliance with the PSM standard's numerous elements. Certain commenters also argue that OSHA's authority to impose PSM standards on gas transmission facilities is preempted by authority given to the Pipeline and Hazardous Materials Safety Administration by Congress to regulate pipeline safety matters.

More broadly, many industry groups state that oil and gas facilities must already comply with numerous safety standards tailored to those operations even in the absence of a specific PSM requirement. For example, while most atmospheric storage tanks in use at oil and gas facilities are currently exempt from the PSM standard, they must comply with OSHA's flammable liquids standard, as well as other state and local safety standards. Thus, subjecting oil and gas facilities to the PSM standard would mostly serve to add layers of compliance complexity without a commensurate safety benefit.

Notwithstanding industry concerns over subjecting oil and gas operations to the current PSM standards, a number of the comments appear to acknowledge that OSHA may ultimately propose that oil and gas facilities be required to comply with some type of PSM standard. To that end, certain industry comments urge OSHA not to proceed to a notice of proposed rulemaking with respect to PSM revisions, but rather convene a focused stakeholder group

to discuss these issues. Thereafter, if OSHA still believes revisions are warranted, it should issue an advance notice of proposed rulemaking to provide additional opportunities for public comment.

Finally, it should be noted that a potential revision to the PSM standard is only one of a number of federal, state and local efforts to examine release prevention standards applicable to oil and gas operations. For example, the U.S. Environmental Protection Agency has recently placed greater emphasis on examining oil and gas facility compliance with the "general duty clause" of the Clean Air Act's risk management program. EPA enforcement in this area has led to several consent orders in instances where the agency felt that the facility in question had not appropriately identified accidental release hazards or designed and maintained a safe facility. This renewed focus on release prevention requirements at oil and gas facilities, whether through changes to the PSM standard, application of the general duty clause, or other regulatory efforts by OSHA and the EPA, will likely continue and could have a significant impact on the industry as it continues to expand. •

Reprinted with permission from the May 9, 2014 edition of THE LEGAL INTELLIGENCER © 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 347-227-3382, reprints@alm.com or visit www.almreprints.com. # 201-05-14-06

MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE