Published on *The National Law Review* https://natlawreview.com

Process Safety Management, Union Style

Article By:

D.A. Duggar

Arthur G. Sapper

If you've ever wondered what a process safety standard drafted by a union would look like, the State of Washington's recent draft Process Safety Requirements for Petroleum Refineries provides a glimpse. Using California's 2017 Process Safety Management for Petroleum Refineries as its baseline, Washington's Department of Labor and Industries released a draft of a process safety management standard that would apply to the state's 5 petroleum refineries. The Washington refineries, combined with California's 17 active refineries, account for roughly 16 percent of U.S. refineries.

Washington's draft standard, however, includes proposals that not even California adopted, making the draft the most pro-union and the most onerous of the various federal and state proposals to date.

While unlikely under the current administration, these programs could, in the future, serve as the blueprint for a change to the federal Process Safety Management (PSM) Standard applicable to not just refineries, but to chemical plants, wastewater treatment facilities, and cold storage warehouses across the county.

"Collaboration" and "Partnership," Not Just "Participation"

For starters, Washington's draft would replace all references to employee "participation" with employee "collaboration." Although such a change may seem innocuous at first, it was made with evident purpose. The executive summary that accompanied the draft states, "The term 'collaboration,' which replaces the current 'participation,' clarifies the degree of *partnership* between employees and employers expected by the Department." (Emphasis added.) The term "partnership" implies that the voice of the employee will equal the voice of the employer. Moreover, the draft standard states that such employee-management "collaboration" must occur "*throughout all phases*" when performing process hazard analyses (PHAs), incident investigations, etc. (Emphasis added.) (We discuss below the legal issues that this may raise.)

Such a requirement would substantially affect how and whether recommendations from PHAs, incident investigations, and compliance audits are resolved. If a decision to reject a recommendation does not meet with consensus from both management and the union workforce, the employer would

have to jump through certain narrow hoops to reject the recommendation: The employer would have to "demonstrate in writing" that the analysis underlying the recommendation "contains material factual errors"—not errors of judgment—or is "infeasible," the determination of which may "not be based solely on cost." These criteria are so narrow that employers may believe with justice that they would be effectively deprived of the right to control their refineries.

No Role for Economics? No Role for Management Judgment?

The draft standard would also eliminate economics from process safety considerations. Like the California standard, the draft standard would in several places use the words "feasible" and "infeasible." But while the California standard uses the word "economic" to define the term "feasible," the Washington draft would omit the word. This means that when Washington's draft petroleum refinery standard calls for the elimination of a hazard to the "greatest extent feasible," the cost of eliminating the hazard could not be considered. That would be far reaching indeed.

Another interesting change is the absence of the word "management" from the title of the draft standard. The word is used in the titles of the federal, California, and Washington PSM standards, as well as the title of the California standard on petroleum refineries. At least one Washington employer had argued that, "The purpose of the word "management" in the
Process Safety *Management* Standard is not that [the Department] will manage the process, or that the Board [of Industrial Insurance Appeals] and its judges will manage the process, but that the employer will do so." (Emphasis in the original.) One may ask whether the removal of the word was intended to deprive employers of the flexibility that the word "management" had conferred, and to allow the department to freely second-guess every decision involved in the running of a refinery.

Changed Rules for Storage Tanks and Utilities

As with California's new standard, the exemption for atmospheric storage tanks would be eliminated and utility systems would be expressly included. Washington's draft goes further, however, for it would define the boundaries of a process to include areas where either "a highly hazardous chemical or utility could be involved in a potential release." California, at least, limits utility coverage to only those utilities that "could potentially contribute to a major incident."

The draft would require refineries to conduct damage mechanism reviews, hierarchy-of-hazard control analyses, process safety culture assessments, and safeguard protection analyses, as well as manage organizational changes.

Union and Industry Divisions

Although the members of Washington State's PSM Advisory Committee appear to have contributed to the draft, a sharp division of opinion appears to have emerged during the committee's meeting on Wednesday, January 24, 2018, when its members went over the definitions in the draft. Labor representatives supported all the proposed definitions whereas industry representatives expressed numerous concerns. This follows the revelation by Steve Garey, a retired United Steelworkers (USW) Local 591 member, that the BlueGreen Alliance, which he currently heads, had at least one private meeting with the governor of Washington regarding the proposed draft.

USW support for the proposal is not surprising in light of its new Triangle of Prevention (TOP) initiative. Under that initiative, local unions at each TOP workplace seek to have a company-paid

USW TOP representative direct the TOP safety program while reporting directly to the local union, not the company.

Is This the End of Management Control? A Hard Look at the "Employee Collaboration," "Stop Work," and Nondiscrimination Provisions

Several provisions of the draft proposal—its "employee collaboration" and "stop work" provisions, coupled with its nondiscrimination provisions—would be onerous and would raise serious legal questions.

As noted above, the "employee collaboration" provision would require employers to provide for employee "collaboration" in all PSM elements "throughout all phases" of plant operation. "Collaboration" would be defined as "*working with* someone to produce or create something." (Emphasis added.) (The corresponding California provisions use the word "consult" instead.)

If the phrase "all phases" includes deciding whether to continue operating or shutting down a unit, then the employer would be required to "work with" employees when making such a decision. That amounts to shared decision-making—the giving to employees of a veto over operations. Such a provision would effectively transfer to others a key incident of property ownership: the right of control. The refinery would, by mere regulation, no longer be the employer's property alone.

The draft also appears to have even more far-reaching provisions. It would require employers to have "Stop Work" procedures authorizing "all employees" to refuse to perform tasks that "could reasonably result" in serious harm. The proposal then goes on to say that employers may not retaliate or discriminate against such employees. What does that mean? Suppose that John refuses a task, but Bill agrees to do it. Would refusing to pay John be retaliation or discrimination? Would John thus be paid for not working? Would John be entitled to return to work whenever he wanted, bumping someone who had been working steadily from his place? Wouldn't that reverse decades of federal labor policy saying that economic strikers (which include safety strikers) are neither entitled to pay nor to bump replacements?

The "Stop Work" provision would authorize unit operators to shut down a process "based on a process safety hazard." If, as is usual given the complexities of plant operation, the PHA requires a judgment call on shutdown to be made, the draft regulation would effectively empower a unit operator to impose a binding decision on the owner. The prohibition against retaliation and discrimination would arguably bar the owner from relieving the operator of duty and substituting another worker. This would amount to a transfer of all control—not just shared control—to someone other than the owner, and appears to be unlawful on several grounds.

Owners can take no comfort from the limitation that the shutdown must be "based on a process safety hazard," for the draft would define "process safety hazard" to mean "[a] hazard of a process that has the *potential* for causing a *major* incident, death, or serious physical harm." (Emphasis added.) Inasmuch as "potential" means merely possible, the draft would literally permit shutdowns for risks that are statistically insignificant. Although the term "major incident" is also defined, it would, as a practical matter, impose no additional restrictions on the employee's conduct, for it would be defined to mean, "An event within or affecting a process that causes a fire, explosion or release of a highly hazardous material and which has the *potential* to result in death or serious physical harm." (Emphasis added.) Again, the use of "potential" means that a shutdown could be imposed on the employer for insignificant risks.

The petroleum industry would be wise to vigorously oppose these draft provisions, to carefully examine each of its deviations from the PSM Standard, and to do so as early as possible.

© 2025, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

National Law Review, Volume VIII, Number 33

Source URL:https://natlawreview.com/article/process-safety-management-union-style