ORAL ARGUMENT REQUESTED

Nos. 19-9533 & 19-9578 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECRETARY OF LABOR,	**WYNNEWOOD REFINING CO., LLC,**
CROSS-PETITIONER/RESPONDENT,	PETITIONER/CROSS-RESPONDENT,
v.	v.
WYNNEWOOD REFINING CO., LLC,	**SECRETARY OF LABOR,**
PETITIONER/CROSS-RESPONDENT,	CROSS-PETITIONER/RESPONDENT,
and	and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,	**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,**
RESPONDENT.	RESPONDENT.

ON PETITIONS FOR REVIEW OF A FINAL ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, OSHRC NOS. 13-0791 and 13-0644

RESPONSE AND OPENING BRIEF FOR THE SECRETARY OF LABOR

KATE S. O'SCANNLAIN
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

RONALD J. GOTTLIEB
Senior Trial Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5494
gottlieb.ronald@dol.gov

December 18, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

Statutes

Regulations

MISCELLANEOUS:

STATEMENT OF RELATED CASES

To the Secretary's knowledge there are no prior or related appeals.

GLOSSARY

ACC	American Chemistry Council
Alky	Alkylation
CRA	Corn Refiners Association
CVR	CVR Energy, Inc.
FCC	Fluid Catalytic Cracking
FCCU	Fluid Catalytic Cracking Unit
GWEC	Gary Williams Energy Company
HHC	Highly Hazardous Chemical
OSH Act	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
NLRA	National Labor Relations Act
Wynnewood Company	Wynnewood Refining Company
Wynnewood LLC	Wynnewood Refining Company, LLC

STATEMENT OF JURISDICTION

The Occupational Safety and Health Review Commission (Commission) had jurisdiction under § 10 of the Occupational Safety and Health Act (OSH Act) to resolve Wynnewood Refining Co., LLC's (Wynnewood LLC) contest to citations the Secretary of Labor had issued under § 9 of the OSH Act. *See* 29 U.S.C. §§ 658, 659 (authorizing issuance of citations and establishing procedure for contesting citations). This Court has jurisdiction under § 11(a)-(b) of the OSH Act because both the Secretary and Wynnewood LLC filed a petition for review within sixty days of the Commission's final order. *See* 29 U.S.C. § 660(a)-(b) (authorizing aggrieved persons and the Secretary to seek review of Commission orders). The Commission issued its final order, which disposes of all claims in the proceedings below, on March 28, 2019, and the Secretary and Wynnewood filed their petitions for review on May 24, 2019. Venue lies in this Court because the OSH Act violations occurred in Wynnewood, Oklahoma, 29 U.S.C. § 660(b), and the United States Court of Appeals for the Fifth Circuit transferred Wynnewood LLC's petition to this Court pursuant to 28 U.S.C. § 2112(a).

STATEMENT OF ISSUES

1. A safety standard for processing high hazardous chemicals (HHCs) defines "process" as any activity involving an HHC and includes a group of interconnected vessels. The Wickes boiler, a type of vessel, performed process-related functions and was interconnected to other vessels used in the processing of HHCs. Did the Commission correctly determine that the Wickes boiler was part of a process involving HHCs as one of a group of interconnected vessels?

2. The definition of process also includes separate vessels that are located such that a highly hazardous chemical could be involved in a release of HHCs. Expert testimony showed that an explosion involving the Wickes boiler could cause a release of HHCs from a refinery unit located nearby. Does substantial evidence support the Commission's finding that the Wickes boiler was part of a process involving HHCs because of its location?

3. Consistent with the plain language and purpose of the Process Safety Management (PSM) standard, the Secretary has repeatedly stated that equipment that performs process-related functions is part of a process. Did Wynnewood LLC have fair notice from the terms of the

standard and the Secretary's guidance materials that the Secretary would consider the Wickes boiler part of a covered process?

4. A predecessor's violation may be considered in characterizing a successor's similar violation as repeated if the totality of the circumstances show that the successor substantially continued its predecessor's business operations. The Commission determined Wynnewood LLC was not a successor because, although it substantially continued its predecessor's business operations, a new parent corporation changed some safety policies and did not change Wynnewood LLC's legal identity solely to avoid a repeat characterization. Did the Commission misapply the test for determining successor liability?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The OSH Act

Congress enacted the OSH Act to "assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). To help achieve this purpose, the OSH Act

authorizes the Secretary to promulgate occupational safety and health standards.[1] *Id.* 651(b)(3), 655.

The Occupational Safety and Health Administration (OSHA) enforces these standards when it determines that a violation has occurred. *See* 29 U.S.C. § 658(a) (authorizing issuance of citations); Secretary's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012) (order delegating authority to Assistant Secretary for Occupational Safety and Health).[2] Violations can be characterized as other-than-serious, serious, repeated, or willful. *Id.* § 666(a)-(c). A violation is repeated if at the time of the violation a final order establishes that the employer had previously committed a substantially similar violation. *Potlach Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979).

[1] An occupational safety and health standard is "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).

[2] In light of OSHA's delegated authority to administer the OSH Act, this brief uses the terms "Secretary" and "OSHA" interchangeably.

A civil penalty may be proposed for each violation of a standard. 29 U.S.C. §§ 659(a), 666(a)-(c). In assessing penalties, "due consideration" must be given to four factors: the gravity of the violation, the employer's size, good faith, and history of violations. *Id.* § 666(j). The maximum penalty that can be assessed for a repeated violation is ten times the maximum penalty for a serious violation. *Id.* § 666(a), (b).

An employer may challenge a citation by filing a notice of contest seeking review by the Commission, an agency independent of the United States Department of Labor.[3] *Id.* §§ 651(b)(3), 659(a), 661. After providing an opportunity for a hearing, a Commission administrative law judge (ALJ) issues a decision affirming, modifying, or vacating the citation. *Id.* §§ 659(c), 661(j). The Commission may review the ALJ's decision.[4] *Id.* § 661(j). An aggrieved employer or the

[3] If the employer does not timely contest a citation, the citation is deemed a final order of the Commission upon expiration of the contest period. 29 U.S.C. § 659(a).

[4] If the Commission does not direct the ALJ's' decision for review within thirty days of its issuance, the decision becomes the final order of the Commission by operation of law. 29 U.S.C. § 661(j).

Secretary may seek judicial review of a final Commission order in an appropriate court of appeals. 29 U.S.C. § 660(a), (b).

2. The PSM Standard

OSHA's PSM standard governs the use of flammable liquids and gases and other HHCs when they are present in the workplace in large enough quantities to create a potentially catastrophic hazard. 29 C.F.R. § 1910.119(a). The PSM standard requires employers to adopt a comprehensive management program that integrates technologies, procedures, and management practices to "prevent[] or minimiz[e] the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals." *Id.* § 1910.119 (purpose section). "Catastrophic release means a major uncontrolled emission, fire, or explosion, involving one or more highly hazardous chemicals, that presents serious danger to employees in the workplace." *Id.* § 1910.119(b) (italics deleted).

The standard defines "process" as:

> any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be

> involved in a potential release shall be considered a single process.

Id. § 1910.119(b) (italics deleted).

Under an exception known as the workplace fuel consumption exemption, the standard does not apply to "[h]ydrocarbon fuels used solely as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not part of a process containing another highly hazardous chemical covered by this standard." *Id.* § 1910.119(a)(ii)(A).

B. Statement of Facts

1. The Wynnewood Refinery's Zone 2

Wynnewood LLC operates a crude oil refinery in Wynnewood, Oklahoma that is divided into four zones. ALJ Dec. 1, 3; Tr. 2113-14.[5]

[5] This brief uses the following forms for citations to the record: The ALJ's decision and order will be cited as "ALJ Dec. [number]." The Commission's final order will be cited as "Comm'n Dec. [number]." The hearing transcript will be cited as "Tr. [number]." The Secretary's exhibits will be cited as "Ex. C-[number]" and Wynnewood LLC's exhibits will be cited as "Ex. R- [number]." All other documents will be cited as they are entitled in the Certified List filed in No. 19-9533. The ALJ's decision and the Commission's final order are in part twenty-one of the record filed electronically, and the hearing transcript is in part one. The first time any other document is cited the citation will include a citation to the part of the record in which it can be found in the format: "ROA Part [number]."

Zone 2 contains the Alkylation (Alky) Unit, the Fluid Catalytic Cracking Unit (FCCU), and the Wickes boiler. ALJ Dec. 3. The Alky Unit converts olefin and isobutene into gasoline, and the unit contains 100,000 pounds of flammable materials. Ex. C-5 at 001378, 001382, ROA Part 2. The FCCU processes gas oils into liquefied petroleum gases, gasoline, distillate, and slurry oil, and it has 150,000 pounds of a flammable materials. Tr. 916-17; Ex. C-5 at 001378, 001393. The Alky Unit and FCCU are each covered processes under the PSM standard, and both processes produce as a byproduct a flammable gas that is used as fuel for four boilers at the refinery, including the Wickes boiler. Comm'n Dec. 3, 8-10.

Fuel lines running from the FCCU and the Alky Unit, as well as other units that create the fuel used for the boilers, go to a fuel drum, where the fuel is mixed with purchased natural gas and then distributed to various processes via pipes running from the drum. Commn' Dec. 3, 8. The Wickes boiler is connected via one of these pipes to the fuel drum, and thus to the fuel lines running from the FCCU and the Alky Unit. Comm'n Dec. 3, 8-10. Of the four boilers at Wynnewood,

the Wickes was "by far the workhorse of the plant for steam." Comm'n Dec. 3.

The Wickes boiler (along with the three other boilers) produces steam that is sent to a steam header, which then routes steam to the processes that need it. Comm'n Dec. 3. Steam is used in several ways in the Alky Unit and FCCU. Comm'n Dec. 3. For example, steam is used in the FCCU to remove substances from the crude oil, to clear the FCCU riser of hydrocarbons during an emergency shutdown, to put out small fires, and to power turbines and pumps. Comm'n Dec. 3; ALJ Dec. 7, 24.

2. OSHA's Previous Inspections and Citations

OSHA inspected the Wynnewood refinery in 2006 and 2007-08, when it was owned by the Wynnewood Refining Company (Wynnewood Company), a subsidiary of Gary Williams Energy Company, Inc. (GWEC). Comm'n Dec. 12; Exs. C-25, C-27. OSHA issued citations to Wynnewood Company for violations of OSHA's PSM standard in both instances. Comm'n Dec. 12; ALJ Dec. 5. Both citations resulted in Commission final orders that form the basis for the repeated characterization of the citations in this case. Comm'n Dec. 12; Ex. C-22

(repeat citation items 2, 3, 4, and 5 in docket no. 13-0791), ROA Part 2; Ex. C-68 (repeat citation item 1 in docket no. 13-0644), ROA Part 10.

In 2007, OSHA conducted another inspection related to a boiler in Zone 1 that resulted in a citation alleging a violation of the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), which requires employers to abate recognized hazards that are likely to cause death or serious physical harm. Ex. R-45, ROA Part 11. As part of a settlement, OSHA withdrew that citation item. Ex. R-47, ROA Part 11.

3. The Change of Ownership of the Wynnewood Refinery in 2011

On December 15, 2011, CVR Energy, Inc. (CVR), acquired GWEC and its subsidiaries by purchasing all of the stock of GWEC and its subsidiaries. Comm'n Dec. 3. In February 2012, Wynnewood Company became Wynnewood LLC. Comm'n Dec. 3.

Operations at Wynnewood did not substantially change following the change in ownership from Wynnewood Company to Wynnewood LLC. Comm'n Dec. 13. Wynnewood LLC made the same products for the same customers, and the employee's job duties and working conditions remained the same. Comm'n Dec. 13. CVR's 2011 annual report acknowledged Wynnewood LLC's continuing obligation to abate

past OSH Act violations, and in 2012 and early 2013 Wynnewood LLC continued Wynnewood Company's practice, which it began in 2009, of submitting quarterly abatement reports to OSHA. Tr. 1752; Exs. C-16, p. 21, ROA Part 2; Ex. C-63, ROA Part 10; Exs. R-131-143, ROA Part 17.

The supervisory personnel responsible for implementing Wynnewood LLC's safety policy also remained essentially the same after the acquisition. *See* Comm'n Dec. 14 n.13; *id.* at 18-19 (dissenting opinion); Ex. C-16, p. 54 (CVR's annual report acknowledging importance of retaining "key management personnel and other key employees"). As for plant-wide supervisory personnel, the vice president of refining, Wayne Leikert; the safety manager, Dan Looney; the PSM manager, Dick Jackson; and the operations manager, Darin Rains, held those positions for both Wynnewood Company and Wynnewood LLC. Tr. 1578-79, 1699-01, 1752, 2136; Ex. C-63; Exs. R-131-142. And as for Zone 2 supervisory personnel, Mitch Underwood and Troy Stephenson were supervisors in Zone 2 for both companies. Tr. 571, 618-19. Paul Howard was a Zone 2 supervisor until May 2011, when he became a "DCS tech" whose responsibilities included assisting

Mr. Stephenson and he continued in this position with Wynnewood LLC. Tr. 683-86. Kyle McCurtain was a console technician, the highest level of operator, Tr. 345, in Zone 2 for both companies and shortly September 28, 2012, became a shift supervisor for Wynnewood LLC. Tr. 510-11. David Johnson, a safety specialist, worked at Wynnewood Company and then Wynnewood LLC from 1995 to 2013. Tr. 2102-2103.

Under CVR's auspices, Wynnewood LLC hired an assistant for Mr. Jackson (the PSM manager), two additional "safety technicians or whatnot," and four new assistant operations foremen (also called assistant operations supervisors). Tr. 1612, 1702. CVR also invested $130 million in equipment upgrades and sought to improve Wynnewood LLC's safety training and PSM programs. Comm'n Dec. 14. Two high-level CVR executives, its vice president of environmental health and safety and its executive vice president of operations, frequently visited the refinery to oversee the transition of Wynnewood Company to Wynnewood LLC. Comm'n Dec. 13-14.

4. The Boiler Explosion that Led to the Citations Under Review

On September 28, 2012, Wynnewood LLC was in the midst of a large-scale maintenance project known as a turnaround. Comm'n Dec. 3. Wynnewood LLC decided to start the Wickes boiler so it could use steam to purge HHCs from various lines and equipment as part of the turnaround. Comm'n Dec. 3; ALJ Dec. 10.

Operator Russell Mann operated the fuel bypass valve, which supplied natural gas to the firebox. ALJ Dec. 10. Operator Billy Smith was positioned at a sight glass to verify ignition. ALJ Dec. 10. After the bypass valve was opened, the firebox became flooded with gas. Comm'n Dec. 3; ALJ Dec. 11. Although Console Technicians in the control room noticed the problem, they were unable to relay their concerns to Mr. Mann in time. ALJ Dec. 11. The gas ignited and the firebox exploded. Comm'n Dec. 3; ALJ Dec. 11. Mr. Smith died at the scene, and Mr. Mann was critically injured and died twenty-eight days later. Comm'n Dec. 3; ALJ Dec. 11.

A ladder and platform attached to the boiler was blown across the street to an operator shelter located approximately forty feet from the boiler. Comm'n Dec. 10 & n.8; ALJ Dec. 11, 30. Wynnewood LLC's

expert, Steve Arendt, acknowledged that the explosion damaged fuel lines and was "more surprised maybe" that the fuel lines did not catch fire. Tr. 2072-73.

In addition, according to the Secretary's expert, James Johnstone, an explosion of the Wickes boiler could have caused far more damage than what had actually occurred. Tr. 829-35. If an explosion occurred while the boiler was producing steam, or had a flammable mixture in other portions of the boiler, the damage would have been much worse and could easily have caused a release of HHCs from the FCCU. Tr. 829-35, 963. Mr. Johnstone also testified that one of a safety engineer's "biggest worries is having a steam boiler blow up on you" and referred to a prior steam boiler explosion that "essentially leveled a city block." Tr. 831-32.

OSHA initiated an inspection of Wynnewood LLC in response to the explosion. While that inspection was ongoing, OSHA initiated another inspection after receiving complaints about conditions in the refinery's warehouse. Comm'n Dec. 4; ALJ Dec. 1-2. As a result of these two inspections, OSHA issued citations alleging, *inter alia*, twelve

violations of the PSM standard, 29 C.F.R. § 1910.119, five of which were characterized as repeat violations. Comm'n Dec. 1-2.

Eleven of the twelve violations involved the Wickes boiler for deficiencies in required process safety information, process hazard analysis, operating procedures, training, and procedures for managing changes for operating the Wickes boiler. Ex. C-22 at 6-13, 20-25 (alleging violations of 29 C.F.R. §§ 1910.119(d)(3)(i)(F), .119(e)(3)(i), (iii), (iv), .119(f)(1)(i)(A), (f) (3), .119(l)(3) as serious violations and of §§ 1910.119(f)(1)(ii), .119(g)(2), .119(j)(2), .119(l)(1) as repeat violations). Four of these Wickes boiler violations were characterized as repeat violations based on prior affirmed violations of the same provisions by Wynnewood Company from the 2006 and 2007-08 inspections. Ex. C-22 (repeat citation items 2 through 5); *supra* p 9. The twelfth violation (and fifth repeat violation) did not involve the Wickes boiler and was for deficient work practices to control the entrance, presence, and exit of contract employers and employees in the FCCU, Alky Unit, and other covered process areas. Ex. C-68 (alleging repeat violation of § 1910.119(h)(2)(iv)). Wynnewood LLC contested the citations. ALJ Dec. 2.

5. The ALJ's Decision

Following a hearing, the ALJ issued a decision affirming all twelve PSM violations as serious violations. ALJ Dec. 45-63, 71-81, 102-05, 111-12. He ruled that the PSM standard applied to the Wickes boiler because through its connections to the FCCU and Alky Unit processes it was part of those processes. ALJ Dec. 13-29. The boiler was also covered by the PSM standard because a boiler explosion could have caused a catastrophic release from the FCCU and Alky Unit. ALJ Dec. 29-34.

The ALJ re-characterized the five alleged repeat violations to serious violations based on his determination that Wynnewood LLC was not a successor to Wynnewood Company. ALJ Dec. 35-45. To make this determination, the ALJ applied the "substantial continuity" test used to determine if a predecessor's violations are attributable to the successor for the purpose of characterizing the successor's violations as repeated under the OSH Act. ALJ Dec. 39-45; *see infra* pp. 58-60 (describing test).

Wynnewood LLC sought Commission review of the ALJ's decision to affirm the eleven PSM violations related to the Wickes boiler.

Employer's Petition for Discretionary Review, ROA Part 21. The Secretary sought Commission review of the ALJ's decision to re-characterize five repeat violations to serious violations. Secretary's Petition for Discretionary Review, ROA Part 21. The Commission granted review of both aspects of the ALJ's decision. Commission's Briefing Notice, ROA Part 21.

6. The Commission's Decision

The Commission decision unanimously affirmed the PSM violations related to the Wickes boiler, and by a two-to-one vote, affirmed the ALJ's re-characterization of the repeat violations to serious. Comm'n Dec. 4-23. With regard to the merits of the violations, the Commission noted that the standard defines process as "any activity involving a highly hazardous chemical including any . . . combination of [enumerated] activities," and stated that "[f]or purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process." Comm'n Dec. 5. The Commission determined that this definition established two categories of vessels that are part of covered process: a

group of vessels that are interconnected, and separate vessels that by their location can cause a release of a highly hazardous chemical. Comm'n Dec. 5-7.

The Commission determined that the Wickes boiler was covered by the plain language of standard referring to interconnected vessels. Comm'n Dec. 8-10. The Commission found that the Wickes boiler was a "vessel" because it contained water. Comm'n Dec. 8. Moreover, under the plain meaning of "interconnected," the Wickes boiler was interconnected with vessels of the FCCU and Alky Unit—two PSM-covered processes. Interconnection was established because all of those vessels were connected to fuel lines that fed fuel from the covered processes to the Wickes boiler, and all of those vessels were connected to the steam system that fed steam produced by the Wickes boiler to those covered-processes. Comm'n Dec. 9-10. Accordingly, "the Wickes boiler is . . . one of a 'group of vessels which are interconnected,' and therefore covered as part of a 'process' by the PSM standard." Comm'n Dec. 10 (citation omitted; quoting 29 C.F.R. §§ 1910.119(b) and 1910.119(a)(1)(ii)).

The Commission also determined that the Wickes boiler was "located such that a highly hazardous chemical could be involved in a potential release." Comm'n Dec. 10-11. The Commission rejected Wynnewood LLC's argument that a catastrophic release of HHCs had to be a "probable" consequence of an explosion, noting that the standard required only that such a release "could" be a consequence of an explosion. Comm'n Dec. 10. The Commission then found that that an explosion of the Wickes boiler could have caused a release of HHC. Comm'n Dec. 10-11. The Commission relied on the boiler's central location in the FCCU, the 2012 explosion's propulsion of a ladder and platform forty feet into an operator shelter, the testimony of the Secretary's expert of the possibility of a worse explosion that "could definitely cause damage to other equipment" such as "pipes or vessels in" the facility, and the testimony of Wynnewood LLC's expert acknowledging that the 2012 explosion could have ignited the fuel lines to the boiler.[6] Comm'n Dec. 10-11.

[6] The Commission also determined that the workplace fuel exemption did not apply to the Wickes boiler. Comm'n Dec. 11-12. Wynnewood LLC does not challenge that ruling on appeal. Similarly, the Commission's penalty assessment is not at issue in this proceeding.

As for the repeat characterization, the Commission limited its analysis to whether Wynnewood Company's citation history could be attributed to Wynnewood LLC under the "substantial continuity" test for determining successor liability. Comm'n Dec. 12-16. This test considers "factors falling into three categories: (1) the nature of the business . . .; (2) the jobs and working conditions . . . ; and (3) continuity of the personnel who specifically control decisions related to safety and health." Dec. 13. As had the ALJ, the Commission found that the first two factors, the nature of the business and the jobs and working conditions, "were the same under both entities." Comm'n Dec. 13. Similarly, the Commission found that the third factor, continuity of personnel, did not support successor liability, and that therefore Wynnewood Company and Wynnewood LLC could not be considered to be the same "employer" for the purpose of characterizing Wynnewood LLC's violations as repeat violations. Comm'n Dec. 13-15.

The Commission acknowledged the substantial continuity among the managerial personnel who implemented Wynnewood LLC's safety

policies.[7] Comm'n Dec. 13-14 & n.13. It determined, however, that this continuity was outweighed by evidence that two members of Wynnewood LLC's parent company participated on a frequent basis in overseeing improvements to Wynnewood LLC's safety program. The Commission concluded that this involvement by CVR upper management resulted in a shift in safety culture "significant enough to break the chain of liability stemming from Wynnewood [Company's] previous actions." Comm'n Dec. 13-14 & n.13. The Commission also relied on its determination that Wynnewood LLC had not "altered its legal identity . . . [simply to] avoid a repeat characterization." Comm'n Dec. 14-15.

Commissioner Attwood dissented from the majority's application of the substantial continuity test. Comm'n Dec. 17-19. She noted that

[7] Despite this acknowledgement, the Commission noted that the number of safety personnel at the refinery—apparently referring to Mr. Jackson's assistant, the two safety technicians, and four assistant operations foremen Wynnewood LLC hired—"nearly doubled." Comm'n Dec. 14. The Commission did not explain, however, how this increased staffing disrupted the substantial continuity of personnel controlling safety decisions at the refinery. Comm'n Dec. 14. Similarly, the Commission noted that $130 million of equipment upgrades were made but did not explain its relevance to the personnel factor. Comm'n Dec. 14.

the issue under the personnel prong was whether there was "a substantial continuity of safety and health personnel '*between the two enterprises*'—the entity that was issued the prior citation and the entity that was issued the instant one." Comm'n Dec. 18 (quoting *Sharon & Walter Constr.*, 23 BNA OSHC 1286, 1294 (No. 00-1402, 2010); Commissioner Attwood's emphasis). The majority's reliance on the actions of two CVR officials was misplaced, she wrote, because there was no legal basis for disregarding the distinct legal identities of CVR and Wynnewood LLC. Comm'n Dec. 18. "[W]hile parent company executives [had] changed," she continued, the personnel who "actually controlled refinery safety on a daily basis *for the pertinent entities* remained the same under both Wynnewood [Company] and Wynnewood LLC." Comm'n Dec. 19 (Commissioner Attwood's emphasis). Accordingly, Commissioner Attwood concluded, Wynnewood Company's prior violations were attributable to Wynnewood LLC for purposes of a repeat characterization.[8] Comm'n Dec. 19.

[8] Commissioner Attwood also determined that the violations were properly characterized as repeat violations because they were substantially similar to the prior violations. Comm'n Dec. 19-23. The substantial similarity of the violations, however, is not before this Court

SUMMARY OF ARGUMENT

The Commission correctly affirmed the PSM violations based on its determination that the Wickes boiler was part of PSM-covered processes. The PSM standard covers two types of vessels: any group of interconnected vessels involved in the processing of a HHC and separate vessels that are located such that they could be involved in a release of an HHC. The Commission correctly found that the Wickes boiler fell within both categories of vessels.

Wynnewood LLC does not contest the Commission's findings that the Wickes boiler was functionally as well as physically interconnected with processes involving large quantities of flammable materials in the Alky and FCC Units. Thus, the plain meaning of the definition of process supports the Commission's conclusion that the Wickes boiler is "one of a 'group of vessels which are interconnected,' and therefore covered as part of a 'process' by the PSM standard." The Commission also properly found that an explosion of the Wickes boiler could cause a release from a covered process, and that therefore it was part of that

---

because the Commission majority did not make any findings on this issue.

process because of its location. Wynnewood LLC's arguments that the definition of process does not cover the Wickes boiler absent an additional showing by the Secretary that interconnected vessels can be affected by a common event, and that the boiler itself contains HHCs, are entirely unsupported and must be rejected.

Wynnewood's claim that it lacked fair notice of the PSM standard's applicability is also unsupported. The Commission properly found that the plain meaning of the definition of "process" encompasses the Wickes Boiler, and therefore Wynnewood had fair notice from the terms of the standard itself. Wynnewood LLC also had notice from OSHA guidance materials that the Secretary considers equipment involved in the operation of a covered processes, such as a boiler providing steam to power turbines and pumps and perform other necessary functions, is part of that covered process.

The Commission erred in modifying the repeat classification of five of the items. The record establishes that Wynnewood LLC is a successor of Wynnewood Company because it continued without interruption or substantial change Wynnewood Company's business operations. In concluding otherwise, the Commission misinterpreted

the substantial continuity test by failing to consider the totality of the circumstances and misapplying the personnel factor of the test by relying on factors having no bearing on the continuity of personnel between Wynnewood Company and Wynnewood LLC.

ARGUMENT FOR NO. 19-9578.

I. Standard of Review

The Commission's findings of fact are reviewed under the substantial evidence standard of review. 29 U.S.C. § 660(a); *Slingluff v. OSHRC*, 425 F.3d 861, 866 (10th Cir. 2005). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id.*

The Commission's legal conclusions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Jake's Fireworks Inc. v. Acosta*, 893 F.3d 1248, 1257 (10th Cir. 2018). If an occupational safety and health standard has a clear meaning, it must be enforced according to its plain language. *Jake's Fireworks*, 893 F.3d at 1261, 1263;

Tierdael Constr. Co. v. OSHRC, 340 F.3d. 1110, 1114 (10th Cir. 2003). If a clear meaning cannot be discerned, the Secretary's interpretation must be upheld if it is reasonable, i.e., if it "sensibly conforms to the purpose and wording of the" standard. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-52 (1991); *Tierdael Constr.*, 340 F.3d at 1114-15.

II. The Commission Correctly Determined that the PSM Standard Applied to the Wickes Boiler

The Commission properly determined that the Wickes boiler is part of the FCCU and Alky Unit processes—two processes concededly covered by the PSM standard.[9] The Wickes boiler is a vessel interconnected to these processes, and an explosion of the Wickes boiler could cause a release from the FCCU.

[9] This determination establishes that the PSM standard applied to the cited conditions involving the Wickes boiler. The applicability of the PSM standard to those conditions is the only disputed element of a violation that is at issue in this proceeding. *See Jake's Fireworks*, 893 F.3d at 1256 (stating elements of a violation under the OSH Act).

A. *The Commission Correctly Determined that the PSM Standard's Plain Meaning Covered the Wickes Boiler Because the Boiler Is One of a Group of Interconnected Vessels Involved in PSM-Covered Processes.*

The first step in construing a standard is to determine if it has a plain meaning to the situation at issue. *Peabody Twentymile Mining, LLC v. Secretary of Labor*, 931 F.3d 992, 996-97 (10th Cir. 2019); *Jake's Fireworks*, 893 F.3d at 1261, 1263. The Commission correctly determined that the PSM standard's plain meaning covered the Wickes boiler.

The PSM standard applies to processes involving flammable gases and liquids "on site in one location, in a quantity of 10,000 pounds" or more. 29 C.F.R. § 1910.119(a)(1)(ii). The term "process" is defined in relevant part as "*any activity involving* a highly hazardous chemical" and includes "any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release." 29 C.F.R. § 1910.119(b) (emphasis added). Accordingly, the PSM standard's text unambiguously covers the Wickes boiler if it is one of a group of interconnected vessels involved in processing flammable gasses in excess of 10,000 pounds.

The record demonstrates, without contradiction in this Court, that the Wickes boiler is part of a PSM-covered process under the definition in § 1910.119(b). As the Commission found, the Wickes boiler is one of a group of interconnected vessels involved in the processing of flammable materials in the refinery's Alky and FCC Units. Both of these units contain flammable materials in excess of the 10,000 pound threshold for coverage in § 1910.119(a)(1)(ii). Comm. Dec. 8. The Wickes boiler is physically connected to both units via a network of pipes, headers and drums. Comm. Dec. 8-9; *supra* pp. 8-9. And the Wickes boiler is "involved in" the processing of flammable materials in the Alky and FCC Units in a direct way. First, the refinery flammable gasses generated by the Alky and FCC Units are piped to the Wickes boiler for use as a fuel. Comm. Dec. 3, 9-10; *supra* pp. 9. More significantly, steam from the Wickes boiler is routed to the Alky and FCC Units to power the turbines and pumps, remove substances from crude oil, clear the FCCU riser of hydrocarbons during an emergency shutdown, and to put out small fires. Comm. Dec. 3, 10; *supra* p. 9. The Commission therefore correctly concluded that: "the Wickes boiler

is . . . one of a 'group of vessels which are interconnected,' and therefore covered as part of a 'process' by the PSM standard." Comm'n Dec. 10.

B. *The Wickes Boiler Is also Part of the FCCU Process Because its Location is such that it Could Be Involved in a Release of HHCs from the FCCU.*

The definition of "process" also states that "separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process." 29 C.F.R. § 1910.119(b). This provision applies when vessels are not necessarily interconnected, but an event involving one vessel could affect or cause a release from another vessel. Ex. C-3, ROA Part 2 (copy of Federal Register containing OSHA's interpretation of provision). The evidence supports the Commission's alternative finding that the Wickes boiler was covered by the PSM standard under this aspect of the process definition because the boiler was so located that it could affect or cause a release from the FCCU. Comm'n Dec. 10-11. The boiler's location proximate to the FCCU is a separate basis for PSM coverage independent of the physical interconnection between the boiler and the Alky and FCC units described in argument section II. A. above.

Undisputed evidence shows that the Wickes boiler was centrally located in the FCCU and that the force of the January 2012 explosion caused a ladder and platform to fly across the street to an operator shelter (control room) approximately forty-feet away. ALJ Dec. 30-31 (citing Tr. 152, 156-57, 364, 367, 829-30, 2071; Ex. C-11, ROA Part 2; Ex. C-62 at 3, 4, ROA Part 9). In addition, the evidence shows that the explosion damaged fuel lines running from the fuel drum to the Wickes boiler, and Wynnewood LLC's expert, Mr. Arendt, was surprised that the fuel lines did not catch fire. Tr. 2072-73. Moreover, the Secretary's expert, Mr. Johnstone, testified that the Wickes boiler could have caused a much worse explosion than the one that occurred in 2012, which involved only an explosion of the firebox of the boiler. Tr. 829-35. He explained that if the boiler had been producing steam or was under pressure at the time, a much worse explosion could have occurred sufficient to "definitely cause damage to . . . pipes or vessels in that facility" and cause a release from the FCCU. Tr. 829-35, 963.

The foregoing evidence amply supports the Commission's conclusion that a Wickes boiler explosion could have caused a release of HHCs from the FCCU. The firebox explosion that did occur in January

2012 was of sufficient force to demonstrate that an HHC could be involved in a potential release. Indeed, Wynnewood LLC's own expert was surprised that the fuel lines to the boiler did not ignite. Moreover, the Commission reasonably relied on Mr. Johnstone's testimony that a worse explosion "definitely" capable of causing damage to pipes and vessels in the FCCU could have occurred. As a result, the Court should affirm the Commission's finding that "the Wickes boiler was 'located such that a highly hazardous chemical could be involved in a potential release,'" and was thus covered by the PSM standard independent of the boiler's physical interconnection with the Alkylation and FCC Units. Comm'n Dec. 10-11; *see Slingluff*, 425 F.3d at 866, 868-69 (explaining deferential nature of substantial evidence standard); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996) (under substantial evidence standard court affirms finding even if court could have come to different result).

C. *None of Wynnewood LLC's Arguments Has Merit.*

Wynnewood LLC argues that the Commission erred in determining that the Wickes boiler was covered by the PSM standard under the standard's plain meaning and because the boiler was located

so that it could be involved in a potential release from the FCCU. Wynnewood LLC also argues that, if the PSM standard is ambiguous, the Secretary's interpretation is not entitled to deference, that Wynnewood LLC lacked fair notice of the Secretary's interpretation, and that the Secretary improperly amended the standard without using notice and comment procedures. None of Wynnewood LLC's arguments has merit.

1. *Wynnewood LLC's Challenge to the Commission's Plain Meaning Ruling Is Without Merit.*

a. *The Commission properly applied the traditional tools of regulatory construction.*

Wynnewood LLC contends that the Commission erred in determining that under the PSM standard's plain meaning "the Wickes boiler is . . . one of a 'group of vessels which are interconnected' and therefore covered as part of a 'process' by the PSM standard." Comm'n Dec. 10. According to Wynnewood LLC, the Commission erred by failing to consider the purpose of the standard, and when the purpose of the standard is considered, the standard requires a showing that interconnected vessels could cause a release of HHCs from a covered

process and only covers interconnected vessels that contain an HHC. Wynnewood Br. 27-34. These arguments lack merit.

As support for its plain-meaning argument, Wynnewood LLC relies on *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). The Supreme Court in *Kisor* reaffirmed its precedent that courts must defer to an agency's reasonable interpretation of a regulation it administers. *Kisor*, 139 S. Ct. at 2418-23. In the portion of the decision on which Wynnewood LLC relies, the Supreme Court reminded reviewing courts that they must first use the traditional tools of construction to determine if the regulation has a plain meaning or instead is "genuinely ambiguous." *Id.* at 2414-15. Only if application of the traditional tools of construction fails to reveal a plain meaning, and instead reveals that the regulation is ambiguous, should the reviewing court determine whether the agency's interpretation is deserving of deference. *Id.*

Kisor has limited applicability here, because the Commission did not defer to the Secretary's interpretation of an ambiguous regulation; it applied the traditional tools of construction to determine the standard's plain meaning. Comm'n Dec. 5-10. And contrary to Wynnewood's argument, the Commission did not fail to consider the

standard's purpose. Instead, the Commission explained that "general statements of . . . purpose" cannot "override the plain meaning of specific provisions." Comm'n Dec. 6 n.6 (citing *Reeves v. Astrue*, 526 F.3d 732, 737 (11th Cir. 2008)).

This reasoning is entirely consistent with *Kisor*, as nothing in that decision purports to alter the relative weight to be assigned to each of the different tools of construction. *See, e.g., Kisor*, 139 S. Ct. at 2413 (noting regulation can have unambiguous meaning in some circumstances but not others). The courts, including this one, and the Commission have traditionally placed far greater weight on the text and structure of a rule than on its general purpose. *Callahan v. U.S. Dep't of Health & Human Servs.*, 939 F.3d 1251, 1259, 1262 (11th Cir. 2019) (noting that *Kisor* reiterates that the court should start with the text and structure of a regulation, and that where the text is clear the court need not consult extra-textual evidence concerning history and purpose); *Peabody Twentymile Mining*, 931 F.3d at 996-98; *Jake's Fireworks*, 893 F.3d at 1261, 1263; *The Davey Tree Expert Co.*, 2016 WL 845440 *1 (No. 11-2556, 2016) (noting Commission starts and ends interpretation of standard with its text and structure if the standard's

meaning is clear). Wynnewood LLC fails to show the Commission erred in following that mode of interpretation in this case.

In fact, despite claiming that applying the traditional tools of interpretation supports its position, Wynnewood LLC quite remarkably fails even to attempt to show how the definition's language can be reasonably construed to require a showing that an interconnected vessel such as the Wickes boiler could be involved in a potential release of HHCs. Wynnewood Br. 18-34.[10] Instead, Wynnewood relies on the

[10] The Amicus Curiae Brief of the Corn Refiners Association (CRA) and National Oilseed Processors Association (CRA Am. Curiae Br.) attempts to show that the text and structure of the standard supports its argument that the Commission's plain meaning ruling is erroneous. CRA Am. Curiae Br. 17-24. Their effort fails, however. They also ignore the critical language establishing the two types of vessels that constitute a single process, and the related provisions on which they rely undermine rather than support their arguments. They rely on standard's purpose and applicability provisions, the workplace fuel consumption exemption, an exclusion for certain types of storage tanks, and an exemption for retail facilities and normally unoccupied remote facilities. CRA Am. Curiae Br. 17-21. If anything, the existence of these exceptions shows that OSHA knew how to create exceptions for interconnected equipment when it thought that such an exception would be appropriate. CRA's failure to show that the Wickes boiler falls within an exception therefore undermines its point. Similarly, CRA's reliance on the various requirements the PSM standard imposes to prevent a catastrophic release buttresses the Secretary's points that operating process equipment is an activity involving HHCs and that it is important to operate a process as it was designed to prevent catastrophic releases. CRA Am. Curiae Br. 21-24; *infra* pp. 36-41.

standard's statement of purpose, the standard's applicability provision, statements in the standard's preamble, and OSHA's post-promulgation guidance documents referring to the potential of interconnected and separate vessels to cause a potential release. Wynnewood Br. 18-34. By ignoring the language and structure of the definition, Wynnewood LLC fails to show that the Commission erred.

b. *Wynnewood LLC's reliance on the purpose and history of the PSM Standard is misplaced.*

Wynnewood LLC's reliance on *Kisor* to attempt to shift the interpretive focus away from the standard's plain text is wrong for the reasons discussed above. Of perhaps greater significance, Wynnewood LLC's reliance on the standard's stated purpose—"to preven[t] or minimiz[e] the consequences of catastrophic releases" of HHCs, 29 C.F.R. § 1910.119—as support for its interpretation of "process" is also wrong. Wynnewood Br. 19, 29-31. In fact, Wynnewood LLC's reading runs counter to the standard's central premise that *any activity*

The Amicus Curiae Brief of the American Chemistry Council (ACC) and others (ACC Am. Curiae Br.) alternatively asserts that only vessels containing an HHC can be an "activity involving" an HHC. ACC Am. Curiae Br. 6. But common sense and the numerous provisions showing that operating equipment to process HHCs is an activity involving HHCs defeats that argument. *See infra* pp. 39-41.

involving a large quantity of a highly hazardous material involves the potential for a catastrophic release and therefore requires systematic evaluation and analysis.

The concept of process is at the very core of the standard. The employer's threshold requirement is to identify all processes involving HHCs at its facility. The employer must then compile written safety information about each process (process safety information), § 1910.119(d), and perform an initial process hazard analysis to identify, evaluate and control the hazards involved in the process. § 1910.119(e). The process hazard analysis must be updated and revalidated at 5-year identified hazards. § 1910.119(e)(5), (6). The standard contains additional ancillary provisions related to the process hazard analysis, including training for employees engaged in operating processes, and inspecting, testing and maintaining process equipment. *E.g.*, § 1910.119(g), (j).

It is readily apparent from this structure that "process" must be broadly defined for the standard to serve its purpose of preventing or mitigating catastrophic releases. Furthermore, the standard does not purport to identify any specific risk factors as triggers for coverage, but

squarely places on employers the obligation to evaluate "any activity involving a highly hazardous chemical" to identify the specific hazards and the means of controlling them. § 1910.119(b), (e).

Against this background, Wynnewood LLC's argument that the Secretary must show that all interconnected vessels actually contain HHCs and that they could be affected by a common event, such as an explosion, to establish their coverage as a process is plainly wrong. Wynnewood Br. 27-32. A group of interconnected vessels need only be shown to "involve" a HCC to be considered a single process under the standard; it is the employer's obligation in performing a process hazard analysis to evaluate the risk they pose of a catastrophic release of that HHC. This includes evaluation of the risk that a group of interconnected vessels could be affected by a common event, but also includes evaluation of other risks posed by the interconnection of vessels. As discussed *supra* pp. 28-29, the Wickes boiler was one of a group of interconnected vessels that involve HHCs in a direct way, including by producing the steam that powers the various components of the Alky and FCC Units. The standard's process hazard analysis requirements specifically encompass the inspection and testing of

process equipment such as pressure vessels, piping systems, emergency shutdown systems and pumps. 29 C.F.R. § 1910.119(j)(1)(i)–(v).

The fact that the boiler itself does not contain HHCs is not determinative, as the standard does not state or imply that all interconnected vessels must contain HHCs to be considered part of a covered process. Other provisions of the standard confirm that the presence of a HHC in a vessel is not a precondition to coverage. The standard's hydrocarbon fuels exception for example, provides that hydrocarbon fuel consumption used solely for work place consumption as a fuel are not covered provided they are not part of a process containing another highly hazardous chemical. § 1910.119(a)(1)(ii)(A). This plainly implies that vessels, such as the Wickes boiler that would not be covered by the standard based on the HHCs they themselves contain, are nevertheless covered if they are part of a process containing other HHCs, as the Wickes boiler is here via its interconnection with the Alky and FCC Units. In other words, this exemption shows OSHA's intent that a vessel may be part of a process even when it does not contain the HHCs triggering coverage of the process.

Similarly, other provisions of the standard show that operating equipment to process HHCs is an "activity involving" HHCs. *E.g.*, § 1910.119(d)(3) (requiring employer to compile written process safety information concerning equipment in the process); § 1910.119.119(f)(3) (requiring written operating procedures to "reflect current operating practice, including changes that result from changes in . . . equipment"); § 1910.119(j) (requiring employers to maintain the integrity of "process equipment," which includes pressure vessels, piping systems, controls, pumps, and emergency shutdown systems). Thus, equipment need not contain HHCs to be part of the process.

More specifically, the Secretary has also explained, in the preamble adopting the standard and consistently since that time, that equipment such as boilers that are directly involved in the operation of a covered process or perform other process-related functions in a covered process are part of that process. 57 Fed. Reg. 6356, 6367 (Feb. 24, 1992) (preamble to PSM standard explaining that workplace fuel consumption exception does not "exclude from coverage hydrocarbon fuels used for process related applications such as furnaces, heat exchanges, and the like at facilities covered by the rule"); Ex. C-4 at

1535, 1540, 1541, ROA Part 2 (interpretive letters). Because the Wickes boiler performs several process functions for the FCCU and Alky Unit processes, the PSM standard requires the boiler to be operated properly to prevent or minimize the risk of a catastrophic release from those processes. *See Sanderson Farms, Inc. v. Perez*, 811 F.3d 730 735 (standard presumes hazard it addresses).

The non-textual sources on which Wynnewood LLC relies do not establish that the Commission erred. With regard to the preamble, Wynnewood LLC quotes the following passage:

> The intent of the standard is to cover a 'process' where the use, storage, manufacturing, handling, or the on-site movement of a highly hazardous chemical exceeds the threshold quantity at any time. **The boundaries of a 'process' would extend to quantities in** storage, use, manufacturing, handling or on-site movement which are interconnected and would include separate vessels **located such that there is a reasonable probability that an event such as an explosion would affect interconnected and nearby unconnected vessels which contain quantities of the chemical** that when added together would exceed the threshold quantity **and provide a potential for a catastrophic release.** In order to clarify this intent, a new sentence has been added to clarify the fact that **interconnected and nearby vessels containing a highly hazardous chemical would be considered part of a single process** and the quantities of the chemical would be aggregated to determine if the threshold quantity of the chemical is exceeded.

Wynnewood Br. 22-23 (quoting 57 Fed. Reg. 6372; Wynnewood LLC's emphasis).

None of this language suggests that the definition requires a showing that an interconnected vessel is capable of causing a release to be considered part of a covered process.[11] The section does not purport to explain what is meant by the definitional phrase "[f]or purposes of this definition, any group of vessels which are interconnected . . . . shall be considered a single process." § 1910.119(b). Rather, it clarifies that the *quantities* of HHCs contained in each of a group of interconnected vessels are aggregated for purposes of determining whether the process involves the threshold quantity of an HHC necessary for coverage. It also clarifies that the *quantity* of an HHC contained in a separate vessel is aggregated with the quantities of HHCs contained in a group of interconnected vessels and in other separate vessels provided the vessels are located such that an event such as an explosion could cause a catastrophic release from

[11] Wynnewood LLC's reliance on this passage for its claim that each vessel must contain an HHC is discussed below. *Infra* pp. 46-47.

all of them. This language is not relevant here, since there is no dispute that the Alky and FCC Units each contained well in excess of the threshold amount of highly hazardous chemicals needed for coverage, without regard to the amount of flammable materials contained in the Wickes boiler itself. The statements simply do not address whether the Wickes boiler may be considered part of the covered Alkylation and FCC processes because of its physical and functional interconnection with these processes.

Wynnewood LLC also relies on statements in three post-promulgation guidance documents. In these documents, OSHA summarized the definition's vessel-related language as covering storage vessels "which are interconnected with or in proximity to a covered process such that they could be involved in a covered release." Wynnewood Br. 24-26 (quoting an OSHA Compliance Directive and two Letters of Interpretation). This rephrasing means, Wynnewood LLC argues, that OSHA intended the definition of process to cover only those interconnected and separate vessels that the Secretary demonstrates

could be involved in a potential release.[12] Wynnewood LLC's claim is without merit.

The guidance documents do not (and could not) revise the clear language of the standard unambiguously creating two types of vessels, one of which (interconnected vessels) by its terms does not require any showing of an ability to cause a release. Two of the statements on which Wynnewood LLC relies merely identify situations in which storage vessels would not be considered to be adequately dispersed to avoid application of the PSM standard. Wynnewood Br. 24-26. Neither document undermines the Secretary's position that "any group of vessels which are interconnected" containing the threshold quantity of HHCs has the potential to be involved in a catastrophic release. *See id.*

[12] As support, Wynnewood LLC asserts that the re-phrasing used in the guidance documents "sets up a compound predicate where each includes a preposition ('connected with' and 'in proximity to') that uses 'a covered process' to complete its prepositional phrase. With such a construction, 'a covered process' serves as the object of both prepositions. *Am. Nat'l Fire Ins. Co. v. Rose Acre Farms*, 107 F.3d 451, 455-56 (7th Cir. 1997)." Wynnewood Br. 25 n.1. But Wynnewood LLC does not explain how this grammatical rule applies to the text of the standard, or how its application compels acceptance of the company's interpretation. Indeed, after applying this rule, the *Rose Acre* court found the language ambiguous. 107 F.3d at 455-58. Ambiguous language in guidance documents cannot override plain language in the standard's text.

These documents do not indicate that the Secretary has the burden to establish that a hazard exists in such a situation.

Indeed, the third and final guidance document on which Wynnewood LLC relies, a 1997 memorandum referred to as the Akzo-Nobel Letter of Interpretation, states this presumption. *See* Wynnewood Br. 26, Addendum p. 137 (stating that controls required by PSM standard to prevent a catastrophic release cannot be used to determine the extent of a process because of the "assumption that an event such as an explosion will take place in the process notwithstanding such controls."). Moreover, the letter is limited to providing guidance on how an employer can determine that "interconnected equipment downstream from the" process is not part of a process. This guidance is irrelevant to vessels such as the Wickes boiler that perform functions upstream from the process. *See* ALJ Dec. 24 (Wickes boiler performs both downstream and upstream process functions). Even if it were relevant, the Azko Nobel letter merely provides guidance on how an employer can rebut the presumption that all interconnected vessels of a process are part of the process—guidance that has no bearing on the Secretary's burden under the standard. *See*

Sanderson Farms, 811 F.3d at 735-36 (employer has burden to prove that hazard presumed by a standard does not exist to establish affirmative defense that violation was de minimis).

Wynnewood LLC fares no better with its claim that the preamble and early guidance documents show that each and every vessel must contain HHCs to be considered part of a covered process. Wynnewood LLC refers to statements that quantities of HHCs in interconnected vessels will be aggregated to determine if the threshold quantity of HHCs has been reached to trigger applicability of the PSM standard. Wynnewood Br. 32-34.[13] Wynnewood LLC argues that these statements show that OSHA intended to exclude vessels that do not contain HHCs. *Id.*; *see also supra* pp. 41-43 (discussing preamble language on aggregation of HHCs in interconnected and separate vessels); 57 Fed. Reg. 6363-64, 6372; Wynnewood Br. Addendum pp. 64-

[13] There is no support for Wynnewood LLC's assertion that the Commission's holding on this point "discredit[s] the process boundaries previously drawn at every PSM-covered worksite in the country." Wynnewood Br. 32. *E.g.*. ALJ Dec. 34-35 (finding that Wickes boiler had been determined to be part of the FCCU process and necessary steps to revise that determination had not been taken).

138 (containing guidance documents on which Wynnewood LLC relies); Ex. C-4 (additional interpretive letters).

Explaining that the boundaries of a process encompasses all interconnected vessels containing HHCs does not reflect any intent to exclude vessels that are involved in the processing of HHCs, such as the Wickes boiler, but that do not themselves contain HHCs in sufficient quantity to trigger coverage. Instead, it reflects the importance of ensuring that employers understand that the standard applies if the aggregate amount of a HHC exceeds the threshold notwithstanding that each of multiple interconnected vessels may contain less-than-threshold amounts of the substance. Similarly, it is irrelevant that the preamble refers to extending coverage to "quantities" in other vessels and did not discuss extending coverage to additional equipment. The PSM standard unambiguously covers equipment used in processing HHCs. *E.g.,* 29 C.F.R. § 1910.119(d)(3), (f)(3), (j). OSHA had no reason to repeat that point in explaining why interconnected vessels were part of a covered process.

c. *The Commission's plain meaning ruling does not produce absurd results.*

In a footnote, Wynnewood LLC claims that the Commission's plain meaning ruling leads to absurd results because it would eliminate the boundaries of a process and lead to water fountains and toilets in a refinery's administration building being covered by the PSM standard. Wynnewood Br. 28 n.2; *see also* ACC Am. Curiae Br. 10-11 (making similar argument). But this claim rests on the false assertion that the Commission ruled that a vessel may be considered "interconnected" under the definition of process "by virtue of any degree of physical connection to a PSM-covered vessel, regardless of its potential impact on the other vessels." Wynnewood Br. 28 n.2; *see also* ACC Am. Curiae Br. 10-11; CRA Am. Curiae Br. 16-17. The Commission's rulings, however, that the plain meaning of the standard does not require a vessel to contain HHCs or the Secretary to prove the potential for an interconnected vessel to cause a release do not support Wynnewood LLC's argument. The Commission did not find that "any degree of physical connection to a covered PSM vessels" is sufficient to establish that the vessels are interconnected within the meaning of the standard. It found that the interconnection between the FCC and Alky Units and

the Wickes boiler was sufficient in this case to bring the boiler within the standard's coverage. In reaching this conclusion, the Commission relied on the various process-related functions the Wickes boiler's steam performed—"powering turbines and pumps, putting out small fires, 'stripping' crude oil of certain substances during the refining process, and clearing the 'FCCU riser' of hydrocarbons." Comm'n Dec. 3, 9-10. Wynnewood LLC does not dispute that the Wickes boiler performed the functions upon which the Commission predicated its coverage finding. And given the nature of the boiler's interconnection, there is nothing absurd about applying the PSM standard to that vessel. *See* Comm'n Dec. 6-7 (standards addressing particular conditions presume existence of a hazard from those conditions); ALJ Dec. 18 ("there is nothing patently unusual or unreasonable about considering vessels that are physically connected by pipeline to be part of the same process, nor is it unreasonable to presume that vessels connected in such a way could be involved in a potential release of HHCs").

In sum, Wynnewood LLC fails to undermine the Commission's conclusion that the plain meaning of process encompasses the Wickes boiler because of its interconnection to a covered process.

2. *Wynnewood LLC Provides No Basis for Disturbing the Commission's Conclusion that the Wickes Boiler Was Located such that it Could Be Involved in a Potential Release of HHCs.*

Wynnewood LLC contends that the Commission's finding that the Wickes boiler was located such that it could be involved in a potential release suffers from two flaws. First, Wynnewood LLC argues the Commission applied the wrong legal standard for showing that the Wickes boiler could be involved in a potential release. Wynnewood Br. 35. Second, it argues that the Commission's factual finding that the Wickes boiler could be involved in a potential release is not supported by substantial evidence. Wynnewood Br. 48-54. Neither argument has merit.

The Commission applied the causality standard expressed in the standard: whether the Wicks boiler "could" be involved in a release of HHCs. Comm'n Dec. 10. Wynnewood LLC argues that this was error because in the preamble to the standard, OSHA stated that separate vessels were included in the definition when "there is a **reasonable probability** that an event such as an explosion would affect . . . nearby unconnected vessels." Wynnewood Br. 35 (quoting 57 Fed. Reg. 6372; Wynnewood LLC's emphasis). The standard's text, rather than the

preamble, states the binding legal standard the Commission had to apply, and the Court should therefore reject Wynnewood's argument that the Commission applied the wrong legal standard in determining that the Wickes boiler could be involved in a release of HHCs. *See Peabody Twentymile Mining*, 931 F.3d at 997-98 (explaining inability of preamble to alter regulation's plain meaning).[14]

Wynnewood LLC's attack on the Commission's factual finding that the Wickes boiler could be involved in a potential release is also unavailing. Wynnewood LLC's principal challenge claims that Mr. Johnstone, the Secretary's expert who testified that an explosion could cause a release, failed to provide a factual basis for his opinion that the Wickes boiler was capable of producing a much worse explosion than the 2012 explosion.[15] Wynnewood Br. 48-54.

---

[14] Moreover, Wynnewood's quotation of the preamble omits the latter part of the sentence, which refers to the reasonable probability that affecting nearby vessels creates a "potential" for a catastrophic release. 57 Fed. Reg. at 6372. And there can be no doubt that an explosion of the type of that occurred in September 2012 had a reasonable probability to "affect" the vessels of the FCCU and Alky Units, since it would have deprived those vessels of the steam the Wickes boiler provided to those units to process HHCs.

[15] As support for this claim, Wynnewood LLC states that Mr. Johnstone "testified that he did not have sufficient information to determine that

To the contrary, Mr. Johnstone explained that a steam boiler explosion would have been much worse than the 2012 explosion because the latter explosion involved only the boiler's firebox, which is only one part of the boiler. Tr. 831-33. If the boiler had been producing steam and been under pressure, the entire boiler as well as associated tubes and stacks could have exploded, creating an "horrendous explosion" and a "much worse case scenario" than the 2012 firebox explosion. Tr. 831-33.

It was plainly reasonable for the Commission to rely on Mr. Johnstone's testimony that steam boiler explosion could cause a release from the FCCU even though a firebox explosion did not cause such a

---

an explosion of an operating steam boiler – the theory behind the possibly larger explosion event – could present a significant hazard. (Tr. 832)." Wynnewood Br. 51. The cited transcript page says no such thing, and neither does any other portion of Mr. Johnstone's testimony. Tr. 783-1045.

Wynnewood LLC also fails to address the Commission's reliance on its own expert, whose testimony the Commission found supported Mr. Johnstone's because it showed that the explosion that occurred in 2012 created a fire hazard in the interconnected fuel system. While Wynnewood LLC points to evidence it claims shows that an explosion could not cause a release of HHC, it fails to show how this evidence undermines the substantial nature of the evidence on which the Commission relied.

release. Accordingly, Wynnewood LLC's attack on the sufficiency of the evidence on which the Commission relied fails. *See Slingluff*, 425 F.3d at 866, 868-69; *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d at 1551.

3. *Wynnewood LLC Fails to Show that the Secretary's Interpretation is Unreasonable, and the Company Had Fair Notice the PSM Standard Applied to the Wickes Boiler.*

Wynnewood LLC argues that, to the extent the PSM standard is ambiguous, the Secretary's interpretation does not deserve deference and that Wynnewood LLC lacked fair notice that the standard applied to the Wickes boiler. Wynnewood Br. 38-45. The bases for both arguments is the same: OSHA issued guidance documents that are inconsistent with the Secretary's plain language interpretation here, and in 2007 OSHA issued Wynnewood Company a citation for a violation of the OSH Act's general duty clause, 29 U.S.C. § 654(a)(1), for an incident involving a different boiler. The general duty clause requires employers to abate recognized hazards likely to cause death or serious physical harm and applies to hazards that are not covered by a standard.[16] Therefore, Wynnewood LLC argues, the 2007 citation must

[16] Although OSHA follows the policy of using the general duty clause only if a standard does not address the cited condition, Wynnewood LLC misstates the law in asserting that it is "not lawfu[l]" to cite the general

be interpreted as reflecting the agency's determination that the PSM standard did not apply to boilers such as the Wickes boiler. Wynnewood Br. 41. Neither argument has merit.

As shown above, the guidance documents that Wynnewood LLC claims are inconsistent with the Secretary's interpretation here are entirely consistent with the Commission's plain language ruling. *Supra* pp. 40-47. For the same reasons that the text, structure, purpose and history of the PSM standard support the Commission's plain language ruling, the Secretary's interpretation is plainly reasonable, and Wynnewood had fair notice of that interpretation. *See Tierdael Constr.*, 340 F.3d at 1115-16, 1117-18 (applying deference standard and rejecting fair notice claim). Indeed, the 2012 explosion and the process hazards presented by the Wickes boiler's connection to the Alky and FCC Units make any expectation that OSHA would adopt an interpretation excluding the boiler from the process unreasonable.

---

duty clause for a condition addressed by a standard. Wynnewood Br. 40. To the contrary, such a citation is not invalid; it merely provides the employer with an affirmative defense, which would entail showing that a "specific standard permits the cited condition and compliance resolves any obvious hazard to employees." *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004).

The 2007 citation does not introduce any ambiguity into the standard or deprive Wynnewood LLC of fair notice of the PSM standard's applicability to the Wickes boiler. The boiler involved in the 2007 incident was in Zone 1, rather than Zone 2, and different activities occur in Zone 1 than in Zone 2. Ex, R-45; Tr. 643, 2113-14. The record does not show OSHA's awareness of the nature of the 2007 boiler's connection to and the role steam played in a covered process or the boiler's potential to be involved in a release from a covered process because of its location (assuming it had that potential). Exs. R-45, R-46, R-47. Moreover, OSHA withdrew the citation as part of a settlement agreement, thus undermining the inference that OSHA determined that the general duty clause applied to that boiler. Ex. R-47. Accordingly, the prior inspection cannot be understood as a determination that the 2007 boiler, much less the Wickes boiler, was not covered by the PSM standard.[17] *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC

[17] Wynnewood LLC's argument (Wynnewood Br. 45-48) that the Secretary improperly amended the PSM standard is frivolous. This case involves a citation—not the reviewability of other agency action as was involved in *Agric. Retailers Ass'n v. United States Dep't of Labor*, 837 F.3d 60 (D.C. Cir. 2016)—and the Commission decision enforces rather than amends the PSM standard.

1218, 1223-24 (No. 88-821, 1991) (discussing case law precluding employers from relying on prior OSHA inspections).

ARGUMENT FOR NO. 19-9533

I. Standard of Review

The substantial continuity test is a legal test for determining whether an employer is a successor to a predecessor employer for the purpose of attributing the predecessor's prior violation to the successor and characterizing the successor's substantially similar violation as a repeat violation. *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010). The proper interpretation of this legal test is a

---

Finally, to the extent Wynnewood's brief (or either of the Amicus Curiae's briefs) can be construed as arguing that the employer's obligation to determine the boundaries of the processes it operates somehow undermines the Commission's decision, the argument is without merit. The employer's obligation to determine those boundaries does not authorize the employer to contravene the standard's plain terms, which as shown above unambiguously encompasses the Wickes boiler. Nor does that obligation excuse an erroneous determination concerning the potential for a separate vessel to be involved in a release merely because the employer argues that its determination was otherwise reasonable. Indeed, if the employer's determination of the boundaries of its processes were relevant, that would also support the conclusion that the standard applied. As the ALJ found, prior to the September 2012 explosion, the Wickes boiler had been determined to be part of the FCCU process and the necessary steps to revise that determination had not been taken. ALJ Dec. 34-35.

question of law the Court reviews de novo. *See Mountain Side Mobile Estates Partnership v. Secretary of Housing & Urban Dev.*, 56 F.3d 1243, 1250 (10th Cir. 1995) (court reviews de novo questions of law such as the "failure to apply the correct legal standard or provide . . . a sufficient basis to determine that appropriate legal principles have been followed"); *see also Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 93 (3d Cir. 2011) (court has "plenary review over district court's choice and interpretation of legal precepts" used in determining successor liability).

II. The Commission Erred in Determining that Wynnewood LLC Was Not a Successor to Wynnewood Company.

The Commission modified the repeat characterization of five items because it determined that under the substantial continuity test Wynnewood LLC was not a successor to Wynnewood Company. Therefore, Wynnewood Company's prior PSM violations could not be attributed to Wynnewood LLC for the purpose of determining whether Wynnewood LLC's PSM violations were repeated.

The Commission misinterpreted the substantial continuity test in two respects. First, it erroneously determined that if there is a lack of substantial continuity with regard to any individual factor—here,

continuity of personnel—the employer cannot be deemed a successor employer. Second, in determining that there was a lack of substantial continuity of personnel, the Commission erroneously relied on irrelevant factors.

A. *The Commission Improperly Failed to Consider the Totality of the Circumstances.*

In *Sharon & Walter Constr.,* 23 BNA OSHC 1286, the Commission agreed with the Secretary that the term "employer" in the OSH Act encompassed predecessor and successor entities as determined under federal law. Under federal law, to hold a successor company liable for acts of its predecessor, there must be "substantial continuity" between the two companies. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The test for substantial continuity is factual in nature and based on the totality of circumstances in each case. *Id.*; *see Howard Johnson Co., v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 n.9 (1974) (successorship cases require an analysis based on "the facts of each case and the particular legal obligation which is at issue"). It focuses on "whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River Dyeing &*

Finishing Corp., 482 U.S. at 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S 168, 184 (1973)). Under the OSH Act, a successor entity is charged with the violations of its predecessor for the purpose of characterizing the successor's violation as repeated. *Sharon & Walter Constr.,* 23 BNA OSHC at 1292-96.

The Commission distilled the criteria used in applying the substantial continuity test under the National Labor Relations Act (NLRA) as mainly falling into three categories. *Sharon & Walter Constr.*, 23 BNA OSHC at 1295-1296. The first category is the nature of the business, which is relevant "because continuity in the type of business, products/services offered and customers served indicates that there has been no substantive change in the enterprise. Such continuity also typically indicates that the nature of the activities associated with the business and the inherent safety and health considerations are likewise unchanged." *Id.* at 1295. The second category, jobs and working conditions, "is especially relevant under the Act because of its close correlation with particular safety and health hazards." *Id.* The third, personnel, examines continuity of personnel who control decisions regarding safety and health and is relevant to

cases arising under the OSH Act "because the decisions of such personnel relate directly to the extent to which the employer complies with the statute's requirements." *Id.* at 1295.

Here, the Commission determined that the first two factors favored the conclusion that Wynnewood LLC was a successor to Wynnewood Company "given that the refinery's business, products, jobs, and working conditions were the same under both entities." Comm'n Dec. 13. The Commission thus reasoned that the "issue here comes down to the third" factor, and concluded that because the continuity of personnel did not favor finding Wynnewood LLC to be a successor, Wynnewood LLC was not a successor. Comm'n Dec. 13-15.

This reasoning is contrary to law. The law is clear that even if one or more factors does not weigh in favor of successor liability, the "totality of the circumstances" can still establish that a subsequent entity is a successor because it "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 43.

This point was addressed by the D.C. Circuit in a case under the NLRA. *United Food & Commercial Workers Int'l Union, AFL-CIO, Local 152 v. NLRB*, 768 F.2d 1463 (D.C. Cir. 1985). The court stressed that, although a change in "upper level personnel," a change in ownership, and significant capital renovation and improvements occurred in that case, the NLRB did not explain how these changes effected any substantial transformation in the basic "*operations*" at the plant. 768 F.2d at 1473 (court's emphasis). As a result, the court reversed the NLRB's determination of no-successor liability and affirmed the ALJ's determination of successor liability because "the same work continued . . . at the same place, with the same or substantially similar procedures, processes, and machinery." *Id.* at 1473-74.

This Court has similarly heeded the command that the totality of circumstances "must" be considered and determined that some changes in supervisory personnel did not defeat a finding of substantial

continuity. *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1452-53 (10th Cir. 1990).[18]

The Commission neither acknowledged its obligation to weigh the totality of the circumstances where factors point in different directions nor attempted to explain why its analysis of the personnel prong outweighed the evidence showing that Wynnewood LLC "continued, without interruption or substantial change, [Wynnewood Company's] business operations." Instead, it reasoned that because the personnel factor did not favor successor liability, Wynnewood LLC was not a successor to Wynnewood Company. Comm'n Dec. 13-15.

At a minimum, therefore, this Court should remand this matter to the Commission to consider the totality of the circumstances, rather than affirm on the basis of the Commission's flawed analysis. However, the Secretary believes that this Court can properly reverse the Commission's holding on substantial continuity without an

[18] For other examples of courts finding substantial continuity despite new supervisors or changes in management, see *WXGI, Inc. v. NLRB*, 243 F.3d 833, 845 (4th Cir. 2001); *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 294 (9th Cir. 1987) (also specifically noting that the absence of one factor is not fatal to a claim of successorship); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 465 (9th Cir. 1985).

intermediate remand because as explained below the personnel factor also favors a finding of successorship. Therefore, the Court should determine that Wynnewood LLC is a successor to Wynnewood Company, and remand for the Commission to determine whether the cited violations are substantially similar to Wynnewood Company's prior violations.

B. *The Personnel Factor, and therefore the Totality of the Circumstances, Shows that Wynnewood LLC Was a Successor to Wynnewood Company.*

Properly applied, the continuity of personnel factor favors successor liability. In applying this factor, the Commission focuses on the managers and supervisors responsible for OSH Act compliance. *Sharon & Walter Constr.*, 23 BNA OSHC at 1295-96. The evidence demonstrates that most of Wynnewood LLC's managers and supervisors responsible for OSH Act compliance held the same or similar positions for Wynnewood Company.

Wayne Leikert, as Vice President of Refining for both Wynnewood Company and Wynnewood LLC, was involved in certifying OSHA abatement efforts beginning in 2009 and continuing after the change in legal identity from Wynnewood Company to Wynnewood LLC. Exs. R-

131-142. He was assisted during this period by Dan Looney, who was the safety manager for both companies. Tr. 1752, 2136. Dick Jackson, Wynnewood LLC's current PSM Manager, held that position for Wynnewood Company. Tr. 1578-1579. Darin Rains was the Operations Manager at both Wynnewood Company and Wynnewood LLC and in that capacity was "responsible for the entirety of the operations department." Tr. 1699-1701. And as for Zone 2 supervisory personnel, Mitch Underwood and Troy Stephenson were supervisors for both companies. Tr. 571, 618-19. Paul Howard was a Zone 2 supervisor until May 2011, when he became a "DCS tech" whose responsibilities including assisting Mr. Stephenson and he continued in this position with Wynnewood LLC. Tr. 683-86. Kyle McCurtain was a console technician, the highest level of operator, Tr. 345, in Zone 2 for both companies and shortly before the September 2012 explosion he became a shift supervisor for Wynnewood LLC. Tr. 510-11. David Johnson, a safety specialist, worked at Wynnewood Company and then Wynnewood LLC from 1995 to 2013. Tr. 2102.

These plant-wide and Zone 2 supervisors controlled safety decisions at the refinery on a daily basis. They developed and approved

safety procedures regarding the Wickes boiler and operations in Zone 2, and trained employees on how to perform their jobs safely. In particular, the evidence shows that the start-up procedures for the Wickes boiler were reviewed and approved by Mr. Underwood in 2009, and Mr. Stephenson in 2011 and 2012. Ex. C-36, pp. 2188, 2194, 2199, 2204. Mr. Underwood also reviewed standard operating procedures for the Alky Unit. Tr. 576-577. Mr. Howard testified that he was involved with revising those procedures in 2009 and continued to review them through at least 2012. Tr. 696; Ex. C-36, pp. 2194, 2226. Mr. Howard also testified that he provided training to Zone 2 employees on the FCCU and on how to light the Wickes boiler. Tr. 689-690. And Mr. McCurtain was the supervisor on duty on the night the Wickes boiler exploded in September 2012. Tr. 510-11. This evidence indicates a high degree of continuity among managers and supervisors who were responsible for OSH Act compliance.

The only personnel changes Wynnewood LLC could point to were the hiring of an assistant for Mr. Jackson, two "safety technicians or whatnot," and "four assistant operations foremen or assistant operations supervisors." Tr. 1612, 1702. In light of the continuity of

four plant-wide supervisors and at least three Zone 2 supervisors (or as many as five, depending on how one classifies Mr. McCurtain and Mr. Johnson), the hiring of an assistant for the PSM manager, two safety technicians, and four low level supervisors cannot reasonably be understood as a substantial change in the supervisory personnel "who specifically control decisions related to safety and health." *Sharon & Walter Constr.*, 23 BNA OSHC at 1295-96.

Indeed, the Commission did not suggest that these seven hires substantially disrupted the continuity of supervisory personnel at Wynnewood LLC. Instead, the Commission primarily rested its determination on the ground that through the daily involvement of two high-level CVR executives, CVR had sufficiently changed Wynnewood LLC's "management practices, procedures, and culture . . . to break the chain of liability stemming from Wynnewood [Company's] previous actions." Comm'n Dec. 14 & n.13. The Commission also relied on its finding that Wynnewood LLC did not alter its legal identity from that of Wynnewood Company "simply to avoid a repeat characterization." Comm'n Dec. 14-15. Neither ground supports the Commission's

determination that the personnel factor weighed against determining that Wynnewood LLC was a successor to Wynnewood Company.

A parent's influence on its subsidiary is not sufficient to find that a parent's executives are personnel of its subsidiary. *See generally United States v. Best Foods*, 524 U.S. 51, 61-73 (1998) (discussing common law principles related to when parent's assistance to subsidiary exposes parent to liability as operator of subsidiary's business). There is no evidence the two CVR executives were also executives of Wynnewood LLC. As a result, their participation in changing Wynnewood LLC's safety policies does not represent a change in personnel "'*between the two* [relevant] *enterprises'*–the entity that was issued the prior citation [Wynnewood Company] and the entity that was issued the instant one[,]" Wynnewood LLC. Comm'n Dec. 18 (Commissioner Attwood dissenting; Commissioner Attwood's emphasis; quoting *Sharon & Walter*).

Even if the two CVR executives could be considered personnel of Wynnewood LLC, the continuity of personnel factor would still favor finding Wynnewood LLC to be a successor to Wynnewood Company. In describing the "personnel who specifically control decisions related to

safety and health," the Commission in *Sharon & Walter* did not place significance on the policy-making authority of executives, such as the executives of a parent corporation. Instead, it referred to the "managers and supervisors" who made "safety-related decisions." *Sharon & Walter Constr.*, 23 BNA OSHC at 1296. This reflects that managers and supervisors responsible for safety-related decisions on a day-to-day basis are at least as important as ultimate policy-makers in assuring compliance with the OSH Act. *See id.*; *see generally Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987) (emphasizing that for safety program to be effective it must be effectively implemented as well as be effectively designed).

In light of "the facts of [this] case and the particular legal obligation . . . at issue," *Howard Johnson*, 417 U.S. at 262 n.9, it was unreasonable to attach more significance to the activities of two policymakers than to the substantial continuity of personnel responsible for implementing Wynnewood LLC's safety program. The Commission wholly ignored the fact that even if new safety policies were implemented by Wynnewood LLC's executives, they did not prevent a recurrence of the PSM violations. Comm'n Dec. 8-15. As a

result, additional decision-making was required to prevent those violations. And both as a factual and legal matter, it was the responsibility of the Wynnewood LLC supervisors who continued from Wynnewood Company to make and implement those decisions. *Supra* pp. 63-66.

Similarly, the Commission's reliance on the supposed safety improvements CVR implemented rests on the misguided notion that it would be unfair or inequitable to assess heightened penalties against Wynnewood LLC based on safety lapses of its predecessor. *E.g.* Comm'n Dec. 14 ("[W]e find these are not the appropriate circumstances to affirm a repeat characterization"). However, the repeated characterization is not intended as a punishment, but rather as an inducement to employers who have received citations for OSH Act violations "to take steps to prevent the second violation." *Wal-Mart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005); *see also Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982) ("Once an employer has been cited for an infraction under a standard, this tends to apprise the employer of the requirements of the standard and to alert him that special attention

may be required to prevent future violations of that standard"). The employer's general outlook on safety is irrelevant in this analysis and a citation for a violation substantially similar to one for which a prior citation was issued is no less repeated because the employer made good faith efforts to improve its overall compliance with the Act. *See Kent Knowlin Constr. Co v. OSHRC*, 648 F.2d 1278, 1281-82 (10th Cir. 1981) (rejecting argument that employer's intent was relevant in determining whether a citation should be classified as repeat); *Sharon & Walter*, 23 BNA OSHC at 1296 n.16 (successor rather than predecessor must bear burden of enhanced penalties so that repeat classification has its intended deterrent effect); *Potlach Corp.*, 7 BNA OSHC 1061, 1064 (No. 16183, 1979) (employer's attitude not pertinent to whether a violation is repeated but is a factor bearing on the amount of the penalty for the violation assessed under section 17(j) of the Act, 29 U.S.C. 666(j)). For these reasons, the Commission erred in determining that safety and attitudinal changes defeated the substantial similarity of personnel of the two Wynnewood entities.

The Commission also erred in giving significant weight to the fact that Wynnewood LLC did not change its legal identity "simply to avoid

a repeat characterization." Comm'n Dec. at 14-15. The employer's motive for changing its legal identity is not a factor under the personnel prong of the *Sharon & Walter* test, and an entity may be deemed a successor though it has entirely legitimate business reasons for continuing in substantially the same manner the predecessor's operations under a new legal identity. *See NLRB v. Tricolor Prods. Inc.*, 636 F.2d 266, 270 (10th Cir. 1980). The presumptively legitimate motive for changing Wynnewood Company's legal identity does alter the fact that CVR and Wynnewood LLC retained Wynnewood Company's "key management personnel and other key employees." Ex. C-16 at p. 54, and continued the refinery's business operations in the same manner as under the former owner. For these reasons, the continuity of personnel factor favors a finding that Wynnewood LLC is a successor to Wynnewood Company. *Supra* pp. 63-69; *see also supra* pp. 10-11 (citing evidence that CVR acknowledged Wynnewood LLC's obligation to abate Wynnewood Company's prior violations).

In sum, the facts on which the Commission relied did not undermine the substantial continuity of personnel who controlled safety on a daily basis at the refinery. Because this means that all three main

factors of the substantial continuity test weigh in favor of finding successorship liability, the Court should find that Wynnewood LLC is a successor to Wynnewood Company and that therefore Wynnewood Company's violation history is attributable to Wynnewood LLC. *Sharon & Walter Constr.*, 23 BNA OSHC at 1296.

CONCLUSION

For the foregoing reasons, the Court should deny Wynnewood LLC's petition for review. It should grant the Secretary's petition for review and remand with instructions that Wynnewood LLC is a successor to Wynnewood Company and to determine whether the five violations cited as repeat are substantially similar to Wynnewood Company's prior violations.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

EDMUND C. BAIRD
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

/s/Ronald Gottlieb

RONALD J. GOTTLIEB
Senior Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5494

STATEMENT REGARDING ORAL ARGUMENT

The proper application of the legal test for successor liability is an important legal issue that affects the Secretary's ability to enforce the OSH Act beyond the circumstances present in this case. The Secretary requests oral argument to advance his position in this case.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that with respect to the foregoing Response and Opening Brief for the Secretary of Labor:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus program, Microsoft Virus Scan, updated on December 18, 2019, and according to the program are free of viruses

(3) the document complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(B). It uses 14-point Century font and contains 14,121 words.

(4) the paper copies are exact copies of the ECF filing.

/s/Ronald Gottlieb
Ronald J. Gottlieb
U.S. Department of Labor
Office of Solicitor
200 Constitution Ave. NW
Washington, D.C. 20210
202 693-5494
gottlieb.ronald@dol.gov

CERTIFICATE OF SERVICE

I, Ronald Gottlieb, certify that on this 18th day of December, 2019, I filed the Response and Opening Brief for the Secretary of Labor by using the Court's ECF system and the ECF system served the document on counsel of record.

/s/Ronald Gottlieb
Ronald J. Gottlieb
U.S. Department of Labor
Office of Solicitor
200 Constitution Ave. NW
Washington, D.C. 20210
202 693-5494
gottlieb.ronald@dol.gov

ADDENDUM

marked in accordance with DOT regulations.

(6) *Farm vehicles.* (i) Farm vehicles shall conform with State regulations.

(ii) All trailers shall be securely attached to the vehicle drawing them by means of drawbars supplemented by suitable safety chains.

(iii) A trailer shall be constructed so that it will follow substantially in the path of the towing vehicle and will not whip or swerve dangerously from side to side.

(iv) All vehicles shall carry a can containing 5 gallons or more of water.

(h) *Systems mounted on farm vehicles for the application of ammonia.* (1) This paragraph applies to systems utilizing containers of 250 gallons capacity or less which are mounted on farm vehicles (implement of husbandry) and used for the application of ammonia to the soil. Paragraph (b) of this section applies to this paragraph unless otherwise noted. Where larger containers are used, they shall comply with paragraph (g) of this section.

(2) *Design pressure and classification of containers.* (i) The minimum design pressure for containers shall be 250 p.s.i.g.

(ii) The shell or head thickness of any container shall not be less than three-sixteenths inch.

(3) *Mounting of containers.* All containers and flow-control devices shall be securely mounted.

(4) *Container valves and accessories.* (i) Each container shall have a fixed liquid-level gage.

(ii) The filling connection shall be fitted with a combination back-pressure check valve and an excess-flow valve; one double or two single back-pressure check valves: or a positive shutoff valve in conjunction with an internal back-pressure check valve or an internal excess-flow valve.

(iii) The applicator tank may be filled by venting to open air provided the bleeder valve orifice does not exceed seven-sixteenths inch in diameter.

(iv) Regulation equipment may be connected directly to the tank coupling or flange, in which case a flexible connection shall be used between such regulating equipment and the remainder of the liquid withdrawal system. Regulating equipment not so installed shall be flexibly connected to the container shutoff valve.

(v) No excess flow valve is required in the liquid withdrawal line provided the controlling orifice between the contents of the container and the outlet of the shutoff valve does not exceed seven-sixteenths inch in diameter.

[39 FR 23502, June 27, 1974, as amended at 43 FR 49748, Oct. 24, 1978; 49 FR 5322, Feb. 10, 1984; 53 FR 12122, Apr. 12, 1988; 61 FR 9238, Mar. 7, 1996; 63 FR 1269, Jan. 8, 1998; 63 FR 33466, June 18, 1998; 72 FR 71069, Dec. 14, 2007]

§§ 1910.112–1910.113 [Reserved]

§ 1910.119 Process safety management of highly hazardous chemicals.

Purpose. This section contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. These releases may result in toxic, fire or explosion hazards.

(a) *Application.* (1) This section applies to the following:

(i) A process which involves a chemical at or above the specified threshold quantities listed in appendix A to this section;

(ii) A process which involves a Category 1 flammable gas (as defined in 1910.1200(c)) or a flammable liquid with a flashpoint below 100 °F (37.8 °C) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more except for:

(A) Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by this standard;

(B) Flammable liquids with a flashpoint below 100 °F (37.8 °C) stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.

(2) This section does not apply to:

(i) Retail facilities;

(ii) Oil or gas well drilling or servicing operations; or,

(iii) Normally unoccupied remote facilities.

(b) *Definitions. Atmospheric tank* means a storage tank which has been designed to operate at pressures from

atmospheric through 0.5 p.s.i.g. (pounds per square inch gauge, 3.45 Kpa).

Boiling point means the boiling point of a liquid at a pressure of 14.7 pounds per square inch absolute (p.s.i.a.) (760 mm.). For the purposes of this section, where an accurate boiling point is unavailable for the material in question, or for mixtures which do not have a constant boiling point, the 10 percent point of a distillation performed in accordance with the Standard Method of Test for Distillation of Petroleum Products, ASTM D–86–62, which is incorporated by reference as specified in §1910.6, may be used as the boiling point of the liquid.

Catastrophic release means a major uncontrolled emission, fire, or explosion, involving one or more highly hazardous chemicals, that presents serious danger to employees in the workplace.

Facility means the buildings, containers or equipment which contain a process.

Highly hazardous chemical means a substance possessing toxic, reactive, flammable, or explosive properties and specified by paragraph (a)(1) of this section.

Hot work means work involving electric or gas welding, cutting, brazing, or similar flame or spark-producing operations.

Normally unoccupied remote facility means a facility which is operated, maintained or serviced by employees who visit the facility only periodically to check its operation and to perform necessary operating or maintenance tasks. No employees are permanently stationed at the facility.

Facilities meeting this definition are not contiguous with, and must be geographically remote from all other buildings, processes or persons.

Process means any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process.

Replacement in kind means a replacement which satisfies the design specification.

Trade secret means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. *See* Appendix E to §1910.1200—Definition of a Trade Secret (which sets out the criteria to be used in evaluating trade secrets).

(c) *Employee participation.* (1) Employers shall develop a written plan of action regarding the implementation of the employee participation required by this paragraph.

(2) Employers shall consult with employees and their representatives on the conduct and development of process hazards analyses and on the development of the other elements of process safety management in this standard.

(3) Employers shall provide to employees and their representatives access to process hazard analyses and to all other information required to be developed under this standard.

(d) *Process safety information.* In accordance with the schedule set forth in paragraph (e)(1) of this section, the employer shall complete a compilation of written process safety information before conducting any process hazard analysis required by the standard. The compilation of written process safety information is to enable the employer and the employees involved in operating the process to identify and understand the hazards posed by those processes involving highly hazardous chemicals. This process safety information shall include information pertaining to the hazards of the highly hazardous chemicals used or produced by the process, information pertaining to the technology of the process, and information pertaining to the equipment in the process.

(1) *Information pertaining to the hazards of the highly hazardous chemicals in the process.* This information shall consist of at least the following:

(i) Toxicity information;

(ii) Permissible exposure limits;

(iii) Physical data;

(iv) Reactivity data;
(v) Corrosivity data;
(vi) Thermal and chemical stability data; and
(vii) Hazardous effects of inadvertent mixing of different materials that could foreseeably occur.

NOTE: Safety data sheets meeting the requirements of 29 CFR 1910.1200(g) may be used to comply with this requirement to the extent they contain the information required by this subparagraph.

(2) *Information pertaining to the technology of the process.* (i) Information concerning the technology of the process shall include at least the following:
(A) A block flow diagram or simplified process flow diagram (see appendix B to this section);
(B) Process chemistry;
(C) Maximum intended inventory;
(D) Safe upper and lower limits for such items as temperatures, pressures, flows or compositions; and,
(E) An evaluation of the consequences of deviations, including those affecting the safety and health of employees.
(ii) Where the original technical information no longer exists, such information may be developed in conjunction with the process hazard analysis in sufficient detail to support the analysis.
(3) *Information pertaining to the equipment in the process.* (i) Information pertaining to the equipment in the process shall include:
(A) Materials of construction;
(B) Piping and instrument diagrams (P&ID's);
(C) Electrical classification;
(D) Relief system design and design basis;
(E) Ventilation system design;
(F) Design codes and standards employed;
(G) Material and energy balances for processes built after May 26, 1992; and,
(H) Safety systems (e.g. interlocks, detection or suppression systems).
(ii) The employer shall document that equipment complies with recognized and generally accepted good engineering practices.
(iii) For existing equipment designed and constructed in accordance with codes, standards, or practices that are no longer in general use, the employer shall determine and document that the equipment is designed, maintained, inspected, tested, and operating in a safe manner.

(e) *Process hazard analysis.* (1) The employer shall perform an initial process hazard analysis (hazard evaluation) on processes covered by this standard. The process hazard analysis shall be appropriate to the complexity of the process and shall identify, evaluate, and control the hazards involved in the process. Employers shall determine and document the priority order for conducting process hazard analyses based on a rationale which includes such considerations as extent of the process hazards, number of potentially affected employees, age of the process, and operating history of the process. The process hazard analysis shall be conducted as soon as possible, but not later than the following schedule:
(i) No less than 25 percent of the initial process hazards analyses shall be completed by May 26, 1994;
(ii) No less than 50 percent of the initial process hazards analyses shall be completed by May 26, 1995;
(iii) No less than 75 percent of the initial process hazards analyses shall be completed by May 26, 1996;
(iv) All initial process hazards analyses shall be completed by May 26, 1997.
(v) Process hazards analyses completed after May 26, 1987 which meet the requirements of this paragraph are acceptable as initial process hazards analyses. These process hazard analyses shall be updated and revalidated, based on their completion date, in accordance with paragraph (e)(6) of this section.
(2) The employer shall use one or more of the following methodologies that are appropriate to determine and evaluate the hazards of the process being analyzed.
(i) What-If;
(ii) Checklist;
(iii) What-If/Checklist;
(iv) Hazard and Operability Study (HAZOP);
(v) Failure Mode and Effects Analysis (FMEA);
(vi) Fault Tree Analysis; or
(vii) An appropriate equivalent methodology.

(3) The process hazard analysis shall address:

(i) The hazards of the process;

(ii) The identification of any previous incident which had a likely potential for catastrophic consequences in the workplace;

(iii) Engineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies to provide early warning of releases. (Acceptable detection methods might include process monitoring and control instrumentation with alarms, and detection hardware such as hydrocarbon sensors.);

(iv) Consequences of failure of engineering and administrative controls;

(v) Facility siting;

(vi) Human factors; and

(vii) A qualitative evaluation of a range of the possible safety and health effects of failure of controls on employees in the workplace.

(4) The process hazard analysis shall be performed by a team with expertise in engineering and process operations, and the team shall include at least one employee who has experience and knowledge specific to the process being evaluated. Also, one member of the team must be knowledgeable in the specific process hazard analysis methodology being used.

(5) The employer shall establish a system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.

(6) At least every five (5) years after the completion of the initial process hazard analysis, the process hazard analysis shall be updated and revalidated by a team meeting the requirements in paragraph (e)(4) of this section, to assure that the process hazard analysis is consistent with the current process.

(7) Employers shall retain process hazards analyses and updates or revalidations for each process covered by this section, as well as the documented resolution of recommendations described in paragraph (e)(5) of this section for the life of the process.

(f) *Operating procedures.* (1) The employer shall develop and implement written operating procedures that provide clear instructions for safely conducting activities involved in each covered process consistent with the process safety information and shall address at least the following elements.

(i) *Steps for each operating phase:*

(A) Initial startup;

(B) Normal operations;

(C) Temporary operations;

(D) Emergency shutdown including the conditions under which emergency shutdown is required, and the assignment of shutdown responsibility to qualified operators to ensure that emergency shutdown is executed in a safe and timely manner.

(E) Emergency Operations;

(F) Normal shutdown; and,

(G) Startup following a turnaround, or after an emergency shutdown.

(ii) *Operating limits:*

(A) Consequences of deviation; and

(B) Steps required to correct or avoid deviation.

(iii) *Safety and health considerations:*

(A) Properties of, and hazards presented by, the chemicals used in the process;

(B) Precautions necessary to prevent exposure, including engineering controls, administrative controls, and personal protective equipment;

(C) Control measures to be taken if physical contact or airborne exposure occurs;

(D) Quality control for raw materials and control of hazardous chemical inventory levels; and,

(E) Any special or unique hazards.

(iv) *Safety systems and their functions.*

(2) Operating procedures shall be readily accessible to employees who work in or maintain a process.

(3) The operating procedures shall be reviewed as often as necessary to assure that they reflect current operating practice, including changes that result from changes in process chemicals, technology, and equipment, and

changes to facilities. The employer shall certify annually that these operating procedures are current and accurate.

(4) The employer shall develop and implement safe work practices to provide for the control of hazards during operations such as lockout/tagout; confined space entry; opening process equipment or piping; and control over entrance into a facility by maintenance, contractor, laboratory, or other support personnel. These safe work practices shall apply to employees and contractor employees.

(g) *Training*—(1) *Initial training.* (i) Each employee presently involved in operating a process, and each employee before being involved in operating a newly assigned process, shall be trained in an overview of the process and in the operating procedures as specified in paragraph (f) of this section. The training shall include emphasis on the specific safety and health hazards, emergency operations including shutdown, and safe work practices applicable to the employee's job tasks.

(ii) In lieu of initial training for those employees already involved in operating a process on May 26, 1992, an employer may certify in writing that the employee has the required knowledge, skills, and abilities to safely carry out the duties and responsibilities as specified in the operating procedures.

(2) *Refresher training.* Refresher training shall be provided at least every three years, and more often if necessary, to each employee involved in operating a process to assure that the employee understands and adheres to the current operating procedures of the process. The employer, in consultation with the employees involved in operating the process, shall determine the appropriate frequency of refresher training.

(3) *Training documentation.* The employer shall ascertain that each employee involved in operating a process has received and understood the training required by this paragraph. The employer shall prepare a record which contains the identity of the employee, the date of training, and the means used to verify that the employee understood the training.

(h) *Contractors*—(1) *Application.* This paragraph applies to contractors performing maintenance or repair, turnaround, major renovation, or specialty work on or adjacent to a covered process. It does not apply to contractors providing incidental services which do not influence process safety, such as janitorial work, food and drink services, laundry, delivery or other supply services.

(2) *Employer responsibilities.* (i) The employer, when selecting a contractor, shall obtain and evaluate information regarding the contract employer's safety performance and programs.

(ii) The employer shall inform contract employers of the known potential fire, explosion, or toxic release hazards related to the contractor's work and the process.

(iii) The employer shall explain to contract employers the applicable provisions of the emergency action plan required by paragraph (n) of this section.

(iv) The employer shall develop and implement safe work practices consistent with paragraph (f)(4) of this section, to control the entrance, presence and exit of contract employers and contract employees in covered process areas.

(v) The employer shall periodically evaluate the performance of contract employers in fulfilling their obligations as specified in paragraph (h)(3) of this section.

(vi) The employer shall maintain a contract employee injury and illness log related to the contractor's work in process areas.

(3) *Contract employer responsibilities.* (i) The contract employer shall assure that each contract employee is trained in the work practices necessary to safely perform his/her job.

(ii) The contract employer shall assure that each contract employee is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan.

(iii) The contract employer shall document that each contract employee has received and understood the training required by this paragraph. The contract employer shall prepare a

record which contains the identity of the contract employee, the date of training, and the means used to verify that the employee understood the training.

(iv) The contract employer shall assure that each contract employee follows the safety rules of the facility including the safe work practices required by paragraph (f)(4) of this section.

(v) The contract employer shall advise the employer of any unique hazards presented by the contract employer's work, or of any hazards found by the contract employer's work.

(i) *Pre-startup safety review.* (1) The employer shall perform a pre-startup safety review for new facilities and for modified facilities when the modification is significant enough to require a change in the process safety information.

(2) The pre-startup safety review shall confirm that prior to the introduction of highly hazardous chemicals to a process:

(i) Construction and equipment is in accordance with design specifications;

(ii) Safety, operating, maintenance, and emergency procedures are in place and are adequate;

(iii) For new facilities, a process hazard analysis has been performed and recommendations have been resolved or implemented before startup; and modified facilities meet the requirements contained in management of change, paragraph (l).

(iv) Training of each employee involved in operating a process has been completed.

(j) *Mechanical integrity*—(1) *Application.* Paragraphs (j)(2) through (j)(6) of this section apply to the following process equipment:

(i) Pressure vessels and storage tanks;

(ii) Piping systems (including piping components such as valves);

(iii) Relief and vent systems and devices;

(iv) Emergency shutdown systems;

(v) Controls (including monitoring devices and sensors, alarms, and interlocks) and,

(vi) Pumps.

(2) *Written procedures.* The employer shall establish and implement written procedures to maintain the on-going integrity of process equipment.

(3) *Training for process maintenance activities.* The employer shall train each employee involved in maintaining the on-going integrity of process equipment in an overview of that process and its hazards and in the procedures applicable to the employee's job tasks to assure that the employee can perform the job tasks in a safe manner.

(4) *Inspection and testing.* (i) Inspections and tests shall be performed on process equipment.

(ii) Inspection and testing procedures shall follow recognized and generally accepted good engineering practices.

(iii) The frequency of inspections and tests of process equipment shall be consistent with applicable manufacturers' recommendations and good engineering practices, and more frequently if determined to be necessary by prior operating experience.

(iv) The employer shall document each inspection and test that has been performed on process equipment. The documentation shall identify the date of the inspection or test, the name of the person who performed the inspection or test, the serial number or other identifier of the equipment on which the inspection or test was performed, a description of the inspection or test performed, and the results of the inspection or test.

(5) *Equipment deficiencies.* The employer shall correct deficiencies in equipment that are outside acceptable limits (defined by the process safety information in paragraph (d) of this section) before further use or in a safe and timely manner when necessary means are taken to assure safe operation.

(6) *Quality assurance.* (i) In the construction of new plants and equipment, the employer shall assure that equipment as it is fabricated is suitable for the process application for which they will be used.

(ii) Appropriate checks and inspections shall be performed to assure that equipment is installed properly and consistent with design specifications and the manufacturer's instructions.

(iii) The employer shall assure that maintenance materials, spare parts and equipment are suitable for the process application for which they will be used.

(k) *Hot work permit.* (1) The employer shall issue a hot work permit for hot work operations conducted on or near a covered process.

(2) The permit shall document that the fire prevention and protection requirements in 29 CFR 1910.252(a) have been implemented prior to beginning the hot work operations; it shall indicate the date(s) authorized for hot work; and identify the object on which hot work is to be performed. The permit shall be kept on file until completion of the hot work operations.

(l) *Management of change.* (1) The employer shall establish and implement written procedures to manage changes (except for ''replacements in kind'') to process chemicals, technology, equipment, and procedures; and, changes to facilities that affect a covered process.

(2) The procedures shall assure that the following considerations are addressed prior to any change:

(i) The technical basis for the proposed change;

(ii) Impact of change on safety and health;

(iii) Modifications to operating procedures;

(iv) Necessary time period for the change; and,

(v) Authorization requirements for the proposed change.

(3) Employees involved in operating a process and maintenance and contract employees whose job tasks will be affected by a change in the process shall be informed of, and trained in, the change prior to start-up of the process or affected part of the process.

(4) If a change covered by this paragraph results in a change in the process safety information required by paragraph (d) of this section, such information shall be updated accordingly.

(5) If a change covered by this paragraph results in a change in the operating procedures or practices required by paragraph (f) of this section, such procedures or practices shall be updated accordingly.

(m) *Incident investigation.* (1) The employer shall investigate each incident which resulted in, or could reasonably have resulted in a catastrophic release of highly hazardous chemical in the workplace.

(2) An incident investigation shall be initiated as promptly as possible, but not later than 48 hours following the incident.

(3) An incident investigation team shall be established and consist of at least one person knowledgeable in the process involved, including a contract employee if the incident involved work of the contractor, and other persons with appropriate knowledge and experience to thoroughly investigate and analyze the incident.

(4) A report shall be prepared at the conclusion of the investigation which includes at a minimum:

(i) Date of incident;

(ii) Date investigation began;

(iii) A description of the incident;

(iv) The factors that contributed to the incident; and,

(v) Any recommendations resulting from the investigation.

(5) The employer shall establish a system to promptly address and resolve the incident report findings and recommendations. Resolutions and corrective actions shall be documented.

(6) The report shall be reviewed with all affected personnel whose job tasks are relevant to the incident findings including contract employees where applicable.

(7) Incident investigation reports shall be retained for five years.

(n) *Emergency planning and response.* The employer shall establish and implement an emergency action plan for the entire plant in accordance with the provisions of 29 CFR 1910.38. In addition, the emergency action plan shall include procedures for handling small releases. Employers covered under this standard may also be subject to the hazardous waste and emergency response provisions contained in 29 CFR 1910.120 (a), (p) and (q).

(o) *Compliance Audits.* (1) Employers shall certify that they have evaluated compliance with the provisions of this section at least every three years to verify that the procedures and practices developed under the standard are adequate and are being followed.

(2) The compliance audit shall be conducted by at least one person knowledgeable in the process.

(3) A report of the findings of the audit shall be developed.

(4) The employer shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

(5) Employers shall retain the two (2) most recent compliance audit reports.

(p) *Trade secrets.* (1) Employers shall make all information necessary to comply with the section available to those persons responsible for compiling the process safety information (required by paragraph (d) of this section), those assisting in the development of the process hazard analysis (required by paragraph (e) of this section), those responsible for developing the operating procedures (required by paragraph (f) of this section), and those involved in incident investigations (required by paragraph (m) of this section), emergency planning and response (paragraph (n) of this section) and compliance audits (paragraph (o) of this section) without regard to possible trade secret status of such information.

(2) Nothing in this paragraph shall preclude the employer from requiring the persons to whom the information is made available under paragraph (p)(1) of this section to enter into confidentiality agreements not to disclose the information as set forth in 29 CFR 1910.1200.

(3) Subject to the rules and procedures set forth in 29 CFR 1910.1200(i)(1) through 1910.1200(i)(12), employees and their designated representatives shall have access to trade secret information contained within the process hazard analysis and other documents required to be developed by this standard.

APPENDIX A TO §1910.119—LIST OF HIGHLY HAZARDOUS CHEMICALS, TOXICS AND REACTIVES (MANDATORY)

This appendix contains a listing of toxic and reactive highly hazardous chemicals which present a potential for a catastrophic event at or above the threshold quantity.

CHEMICAL name	CAS*	TQ**
Acetaldehyde	75–07–0	2500
Acrolein (2-Propenal)	107–02–8	150
Acrylyl Chloride	814–68–6	250
Allyl Chloride	107–05–1	1000
Allylamine	107–11–9	1000
Alkylaluminums	Varies	5000
Ammonia, Anhydrous	7664–41–7	10000
Ammonia solutions (>44% ammonia by weight)	7664–41–7	15000
Ammonium Perchlorate	7790–98–9	7500
Ammonium Permanganate	7787–36–2	7500
Arsine (also called Arsenic Hydride)	7784–42–1	100
Bis(Chloromethyl) Ether	542–88–1	100
Boron Trichloride	10294–34–5	2500
Boron Trifluoride	7637–07–2	250
Bromine	7726–95–6	1500
Bromine Chloride	13863–41–7	1500
Bromine Pentafluoride	7789–30–2	2500
Bromine Trifluoride	7787–71–5	15000
3–Bromopropyne (also called Propargyl Bromide)	106–96–7	100
Butyl Hydroperoxide (Tertiary)	75–91–2	5000
Butyl Perbenzoate (Tertiary)	614–45–9	7500
Carbonyl Chloride (see Phosgene)	75–44–5	100
Carbonyl Fluoride	353–50–4	2500
Cellulose Nitrate (concentration >12.6% nitrogen	9004–70–0	2500
Chlorine	7782–50–5	1500
Chlorine Dioxide	10049–04–4	1000
Chlorine Pentrafluoride	13637–63–3	1000
Chlorine Trifluoride	7790–91–2	1000
Chlorodiethylaluminum (also called Diethylaluminum Chloride)	96–10–6	5000
1-Chloro-2,4-Dinitrobenzene	97–00–7	5000
Chloromethyl Methyl Ether	107–30–2	500
Chloropicrin	76–06–2	500
Chloropicrin and Methyl Bromide mixture	None	1500
Chloropicrin and Methyl Chloride mixture	None	1500
Cumene Hydroperoxide	80–15–9	5000
Cyanogen	460–19–5	2500
Cyanogen Chloride	506–77–4	500
Cyanuric Fluoride	675–14–9	100
Diacetyl Peroxide (Concentration >70%)	110–22–5	5000
Diazomethane	334–88–3	500
Dibenzoyl Peroxide	94–36–0	7500
Diborane	19287–45–7	100
Dibutyl Peroxide (Tertiary)	110–05–4	5000
Dichloro Acetylene	7572–29–4	250
Dichlorosilane	4109–96–0	2500
Diethylzinc	557–20–0	10000
Diisopropyl Peroxydicarbonate	105–64–6	7500
Dilaluroyl Peroxide	105–74–8	7500
Dimethyldichlorosilane	75–78–5	1000
Dimethylhydrazine, 1,1-	57–14–7	1000
Dimethylamine, Anhydrous	124–40–3	2500
2,4-Dinitroaniline	97–02–9	5000
Ethyl Methyl Ketone Peroxide (also Methyl Ethyl Ketone Peroxide; concentration >60%)	1338–23–4	5000
Ethyl Nitrite	109–95–5	5000
Ethylamine	75–04–7	7500
Ethylene Fluorohydrin	371–62–0	100
Ethylene Oxide	75–21–8	5000
Ethyleneimine	151–56–4	1000
Fluorine	7782–41–4	1000
Formaldehyde (Formalin)	50–00–0	1000
Furan	110–00–9	500
Hexafluoroacetone	684–16–2	5000
Hydrochloric Acid, Anhydrous	7647–01–0	5000
Hydrofluoric Acid, Anhydrous	7664–39–3	1000
Hydrogen Bromide	10035–10–6	5000
Hydrogen Chloride	7647–01–0	5000
Hydrogen Cyanide, Anhydrous	74–90–8	1000
Hydrogen Fluoride	7664–39–3	1000
Hydrogen Peroxide (52% by weight or greater)	7722–84–1	7500
Hydrogen Selenide	7783–07–5	150
Hydrogen Sulfide	7783–06–4	1500
Hydroxylamine	7803–49–8	2500
Iron, Pentacarbonyl	13463–40–6	250

CHEMICAL name	CAS*	TQ**
Isopropylamine	75–31–0	5000
Ketene	463–51–4	100
Methacrylaldehyde	78–85–3	1000
Methacryloyl Chloride	920–46–7	150
Methacryloyloxyethyl Isocyanate	30674–80–7	100
Methyl Acrylonitrile	126–98–7	250
Methylamine, Anhydrous	74–89–5	1000
Methyl Bromide	74–83–9	2500
Methyl Chloride	74–87–3	15000
Methyl Chloroformate	79–22–1	500
Methyl Ethyl Ketone Peroxide (concentration >60%)	1338–23–4	5000
Methyl Fluoroacetate	453–18–9	100
Methyl Fluorosulfate	421–20–5	100
Methyl Hydrazine	60–34–4	100
Methyl Iodide	74–88–4	7500
Methyl Isocyanate	624–83–9	250
Methyl Mercaptan	74–93–1	5000
Methyl Vinyl Ketone	79–84–4	100
Methyltrichlorosilane	75–79–6	500
Nickel Carbonly (Nickel Tetracarbonyl)	13463–39–3	150
Nitric Acid (94.5% by weight or greater)	7697–37–2	500
Nitric Oxide	10102–43–9	250
Nitroaniline (para Nitroaniline	100–01–6	5000
Nitromethane	75–52–5	2500
Nitrogen Dioxide	10102–44–0	250
Nitrogen Oxides (NO; NO_2; N204; N203)	10102–44–0	250
Nitrogen Tetroxide (also called Nitrogen Peroxide)	10544–72–6	250
Nitrogen Trifluoride	7783–54–2	5000
Nitrogen Trioxide	10544–73–7	250
Oleum (65% to 80% by weight; also called Fuming Sulfuric Acid)	8014–95–7	1,000
Osmium Tetroxide	20816–12–0	100
Oxygen Difluoride (Fluorine Monoxide)	7783–41–7	100
Ozone	10028–15–6	100
Pentaborane	19624–22–7	100
Peracetic Acid (concentration >60% Acetic Acid; also called Peroxyacetic Acid)	79–21–0	1000
Perchloric Acid (concentration >60% by weight)	7601–90–3	5000
Perchloromethyl Mercaptan	594–42–3	150
Perchloryl Fluoride	7616–94–6	5000
Peroxyacetic Acid (concentration >60% Acetic Acid; also called Peracetic Acid)	79–21–0	1000
Phosgene (also called Carbonyl Chloride)	75–44–5	100
Phosphine (Hydrogen Phosphide)	7803–51–2	100
Phosphorus Oxychloride (also called Phosphoryl Chloride)	10025–87–3	1000
Phosphorus Trichloride	7719–12–2	1000
Phosphoryl Chloride (also called Phosphorus Oxychloride)	10025–87–3	1000
Propargyl Bromide	106–96–7	100
Propyl Nitrate	627–3–4	2500
Sarin	107–44–8	100
Selenium Hexafluoride	7783–79–1	1000
Stibine (Antimony Hydride)	7803–52–3	500
Sulfur Dioxide (liquid)	7446–09–5	1000
Sulfur Pentafluoride	5714–22–7	250
Sulfur Tetrafluoride	7783–60–0	250
Sulfur Trioxide (also called Sulfuric Anhydride)	7446–11–9	1000
Sulfuric Anhydride (also called Sulfur Trioxide)	7446–11–9	1000
Tellurium Hexafluoride	7783–80–4	250
Tetrafluoroethylene	116–14–3	5000
Tetrafluorohydrazine	10036–47–2	5000
Tetramethyl Lead	75–74–1	1000
Thionyl Chloride	7719–09–7	250
Trichloro (chloromethyl) Silane	1558–25–4	100
Trichloro (dichlorophenyl) Silane	27137–85–5	2500
Trichlorosilane	10025–78–2	5000
Trifluorochloroethylene	79–38–9	10000
Trimethyoxysilane	2487–90–3	1500

*Chemical Abstract Service Number.

**Threshold Quantity in Pounds (Amount necessary to be covered by this standard).