




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY
RESPONSE

November 24, 2015

MEMORANDUM

TO: Superfund Division Directors, Regions V, VI, IX
Director, Office of Environmental Stewardship, Region I
Director, Emergency & Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Air, Pesticides and Toxics Management Division, Region IV
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Air and Waste Management Division, Region VII
Director, Enforcement, Compliance and Environmental Justice Division, Region VIII
Director, Office of Compliance and Enforcement, Region X

FROM: R. Craig Matthiessen 
Director
Regulatory Implementation Division
Office of Emergency Management

SUBJECT: EPA Policy on OSHA Reinterpretation of PSM Retail Exemption

Purpose: The purpose of this memorandum is to establish EPA policy on the effect of the Occupational Safety and Health Administration's (OSHA's) reinterpretation of the retail exemption under the Process Safety Management (PSM) standard.

Background: On July 22, 2015, OSHA announced a revision to its interpretation of the exemption of retail facilities from coverage under the PSM standard (29 CFR 1910.119). As a result of the revision, the PSM standard retail exemption at 29 CFR 1910.119(a)(2)(i) will only apply to facilities, or portions of facilities, engaged in retail trade as defined in sectors 44 or 45 of the North American Industrial Classification System (NAICS) Manual¹.

When effective, this change will result in several thousand facilities² that had been eligible for the retail exemption under OSHA's previous interpretation becoming subject to the PSM standard. Most of these facilities were already subject to the EPA Risk Management Program regulations at 40 CFR Part 68, but due to their exemption from PSM, were generally subject to RMP Program 2 requirements. As a result of OSHA's action, formerly Program 2 facilities that are no longer exempt from the PSM standard will become subject to the more stringent Program 3 requirements.

¹ See https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=29528

² Most affected facilities are agricultural chemical distribution facilities, but the action will also affect other bulk chemical wholesalers.

OSHA initially announced a six-month delay in enforcing its new interpretation in order to give affected facilities time to implement the requirements of the PSM standard. On September 16, 2015, OSHA was sued in the U.S. Court of Appeals, D.C. Circuit, by the Agricultural Retailers Association and The Fertilizer Institute, who are seeking a reversal of OSHA's action³. The lawsuit is pending. On October 20, 2015, OSHA announced an additional six-month enforcement delay, moving that Agency's compliance date for affected facilities to July 22, 2016⁴.

Action:

The RMP regulation contains a provision at section 68.190(b)(7) requiring facilities to revise and update risk management plans within 6 months of a change that alters the Program level that applied to any covered process. In the *General Guidance on Risk Management Programs for Chemical Accident Prevention (40 CFR Part 68)*, EPA explained that this provision applies in the event that OSHA eliminates a PSM exemption that previously applied. In this case, EPA is interpreting the RMP rule and *General Guidance* as requiring affected facilities to update RMPs to reflect compliance with the new program level within six months of the end of OSHA's enforcement delay. As OSHA's enforcement delay is intended to give affected facilities time to implement the requirements of the PSM standard, EPA believes that the OSHA action does not change the Program level of a facility until OSHA begins to enforce full compliance with the PSM standard at affected facilities. It is appropriate for EPA to provide additional time beyond OSHA's phase-in period, because the RMP rule requires additional actions beyond those required under PSM (i.e., affected facilities must perform a full RMP update, which may also prompt revisions to a facility's five-year accident history or offsite consequence analysis).

Therefore, if the current compliance date announced by OSHA (i.e., July 22, 2016) remains effective, EPA will require RMP updates for affected facilities to be submitted by January 22, 2017. If the compliance date for OSHA's interpretation is subject to further extensions, EPA's compliance date will automatically change to take effect six months after the expiration of such additional extension. Prior to the EPA compliance date, facilities affected by OSHA's action are subject to the Program level that applied to their process before OSHA announced its reinterpretation of the retail exemption.

In the event that OSHA rescinds (or is ordered by a court to rescind) its interpretation, this memo is also rescinded.

EPA Regional offices should communicate the contents of this memo to partner State and local agencies that have accepted delegation of the CAA 112(r) program, and request that those agencies adopt this policy for affected RMP facilities in their jurisdictions.

If you have any questions, please contact me or have your staff contact Jim Belke in the Office of Emergency Management at (202) 564-8023.

cc: Regional Counsel, Region I-X
CAA Section 112(r) implementation officials, Region I-X
CAA Section 112(r) Implementation Officials in Delaware, Florida, Georgia, Mississippi, New Jersey, North Carolina, North Dakota, Ohio, South Carolina, Allegheny County, Pennsylvania, Jefferson County, Kentucky, and Forsyth, Mecklenburg & Buncombe Counties, North Carolina

³ Case No. 15-1326

⁴ See https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=29525