

Washington Watch

OSHA Kicks Off the "Chemical NEP"

New pilot program will focus on facilities' compliance with the PSM standard

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With little fanfare, the United States Occupational Safety and Health Administration (OSHA) has rolled out its much anticipated "PSM Covered Chemical Facilities National Emphasis Program." This one-year pilot program, launched in July 2009, focuses on facilities' compliance with the OSHA Process Safety Management (PSM) standard,¹ which aims to blunt the hazard of fires or explosions resulting from releases of "highly hazardous chemicals."²

This "Washington Watch" column reviews the new pilot program and assesses the implications of the program for regulated facilities.

A New Approach to PSM Compliance Inspections

At the core of the new national emphasis program (NEP) is enforcement of OSHA's PSM standard. The Chemical NEP (as OSHA calls the new program) "establishes policies and procedures for inspecting workplaces that are covered by" the standard.³

The Chemical NEP represents a new approach to PSM compliance inspections. OSHA states:

The program's inspection process includes asking detailed questions designed to gather facts related to PSM requirements and verifying that employers' written and implemented PSM programs are consistent. The intent of the NEP is to conduct quick inspections at a large number of facilities that will be randomly selected from a list of worksites likely to have highly hazardous chemicals in quantities covered by the [PSM] standard.⁴

Background: The PSM Standard and National Emphasis Programs

Originally issued in 1992, the PSM standard represented OSHA's response to a number of catastrophic incidents that had occurred worldwide at industrial facilities using "highly hazardous chemicals" (HHCs). Such incidents, though generally infrequent, can be catastrophic when they occur, often resulting in deaths and serious injuries.

The "Enforcement Deficit" and NEPs

In connection with the PSM standard, OSHA issued directive CPL 02-02-045 (formerly CPL 2-2.45A), entitled the "Process Safety Management of Highly Hazardous Chemicals -- Compliance Guidelines and Enforcement Procedures."⁵ This document sets forth policies, procedures, standard clarifications, and compliance guidance applicable to enforcement of the PSM standard.

The directive notes that inspections carried out under the PSM standard, called Program Quality Verifications (PQVs), are resource-intensive. Accordingly, OSHA stated that it would perform only a "limited number" of facility inspections each year.

The relatively small number of PQV inspections conducted under the PSM standard led many to perceive an “enforcement deficit.” OSHA’s “national emphasis programs” are intended in part to address this perceived deficit. Over the years, OSHA has instituted a number of NEPs aimed at specific industries or hazards.⁶

OSHA has made widespread use of NEPs, often because national emphasis programs are much easier to develop and implement than are full-fledged OSHA standards. OSHA’s Director of Enforcement Programs, Richard E. Fairfax, has been quoted as saying, “I have developed and launched an NEP in a month.”⁷ By contrast, developing an OSHA standard is a complex process that can take several years. OSHA also clearly values NEPs as a method for assessing the “state of play” in key enforcement areas and determining whether it needs to develop more formal standards.⁸

Petroleum Refinery NEP

Among the most prominent of the NEPs is the Petroleum Refinery PSM National Emphasis Program, which was launched in 2007.⁹ This program may be of particular interest to facilities that are subject to the new Chemical NEP because inspections conducted under the petroleum refinery program will likely provide a model for inspections under the Chemical NEP.¹⁰

In an interview conducted during the time period when the Chemical NEP was being developed, OSHA’s Fairfax reportedly singled out the petroleum refinery NEP as a template for future OSHA inspection efforts. The article containing the interview reported:

Fairfax advises employers in any industry, should they have questions about the process safety management standard, to turn to the NEP for refineries and observe the list of elements OSHA addresses in every inspection. Fairfax says this list, which includes 20-25 items, represents “the key elements of process safety management.”¹¹

The Chemical NEP

The Chemical NEP is described in OSHA Directive CPL 02-09-06, entitled “PSM Covered Chemical Facilities National Emphasis Program,” issued on July 27, 2009.¹²

Under the Chemical NEP, many more facilities with significant quantities of chemicals on site will be inspected for PSM-standard compliance -- a result that the Democratic Congress and the Obama Administration are likely to find comforting. PSM-covered facilities, however, may be less enthusiastic about the NEP, especially since OSHA is required to cite any employer for violations discovered under the program.

Facilities Excluded from the Chemical NEP

The Chemical NEP specifically excludes petroleum refineries, which are covered by a separate NEP, as noted above.¹³ In addition, OSHA indicates that it will not target any facility that:

- is an approved participant in OSHA’s Voluntary Protection Program (VPP),
- is an approved participant in the OSHA Consultation’s Safety and Health Achievement Recognition Program (SHARP), or

- has “received a comprehensive PSM inspection within the last two years.”¹⁴

State Participation

States may choose whether to participate in the Chemical NEP. They also may opt to use the program’s approach to inspecting PSM-covered facilities even if they are not participating in the NEP. States must indicate whether they will participate in the Chemical NEP by sending a notice of intent to OSHA.¹⁵

“Programmed” and “Unprogrammed” Inspections

Under the Chemical NEP, OSHA intends to conduct both “programmed” and “unprogrammed” inspections. Programmed inspections are “inspections of worksites which have been scheduled based upon objective or neutral selection criteria.”¹⁶ Unprogrammed inspections are “inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite.”¹⁷

OSHA plans to conduct programmed inspections within the following regions at “facilities that are known to OSHA as having a risk of catastrophic releases” of HHCs:

- Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont),
- Region VII (Iowa, Kansas, Missouri, and Nebraska), and
- Region X (Alaska, Idaho, Oregon, and Washington).¹⁸

In addition, “unprogrammed” inspections will take place in all OSHA regions.¹⁹

Choosing Facilities for Programmed Inspections

For programmed inspections under the Chemical NEP, OSHA will use four sources of information when choosing which facilities to target. These sources are:

- the U.S. Environmental Protection Agency Chemical Accident Prevention Provisions, Program 3 Risk Management Plans;
- explosives manufacturing NAICS codes;
- OSHA’s Integrated Management Information System database; and
- OSHA area-office knowledge of local facilities.²⁰

Using these sources, OSHA will identify facilities to target for inspections. In addition, the relevant OSHA regional offices will create “master lists” for three categories of facilities (with categorization being based on the chemicals that facilities are considered likely to have on-site):

- Category 1 -- Facilities where the only HHC is likely to be ammonia used for refrigeration.
- Category 2 -- Facilities where the only HHC is likely to be chlorine used for water treatment.

- Category 3 -- Facilities that are likely to have: both ammonia and chlorine; either ammonia or chlorine used for purposes other than refrigeration or water treatment; or HHCs other than ammonia or chlorine.²¹

Scheduling Programmed Inspections

OSHA states that "Regions I, VII and X should each complete an average of 5-10 programmed inspections per [OSHA area office] per year" under the Chemical NEP.²² These regions' area offices are directed to "randomly select inspection sites from their master lists."²³

OSHA wants to ensure that inspections are "appropriately allocated across all hazardous processes." Accordingly, OSHA states that 25% of inspections should focus on Category 1 facilities, 25% on Category 2 facilities, and 50% on Category 3 facilities. Where this is not possible, the area office may adjust the mix of facilities "as necessary."²⁴

Chemical NEP Inspections

OSHA's general facility inspection procedures are set forth in chapter 3 of its *Field Operations Manual*.²⁵ The Chemical NEP provides that these general procedures "shall be followed" except as modified by the NEP.²⁶ This exception is important to keep in mind since the Chemical NEP inspection process differs from the PQV approach typically used under the PSM standard.

OSHA notes that the PQV approach employs a broad, open-ended inspection strategy. By contrast, inspections under the Chemical NEP will "rely on specific investigative questions." These questions are "designed to gather facts related to requirements of the PSM standard, and include guidance for reviewing documents, interviewing employees, and verifying implementation."²⁷

The Chemical NEP directive makes clear that it emphasizes "implementation over documentation," stating:

Based on past inspection history at refineries and large chemical plants, OSHA has found that employers may have an extensive written process safety management program, but insufficient program implementation. Therefore, [OSHA compliance safety and health officers] should verify the implementation of PSM elements to ensure that the employer's actual program is consistent with their written program.²⁸

Inspection Procedures

During the "opening conference" portion of an inspection conducted under the Chemical NEP, the OSHA inspectors must confirm that the facility has a PSM-covered process, determine what chemicals are on-site, and gather information on key topics, such as the facility's processes and its emergency response procedures.²⁹ This information will help determine the focus of the inspection. As part of the opening conference, the OSHA team may request any of a long list of documents, as spelled out in the Chemical NEP directive.³⁰

Following the opening conference, the OSHA inspection team will ask for an explanation of how the facility's PSM program works. The team will also evaluate personal protective equipment at the facility.³¹

The actual inspection process may begin with a brief “walkaround inspection” of the parts of the facility affected by the PSM standard. The inspection team leader will then select a PSM-covered process (or processes) to evaluate for compliance with the standard. The process chosen for evaluation is referred to in the Chemical NEP directive as the “selected unit.”³²

OSHA will base its Chemical NEP inspections largely on a series of questions drawn from “dynamic lists” that will be periodically updated and modified. In order to maintain “inspection integrity,” the questions will not be publicly disclosed.³³ According to OSHA, this list-based evaluation is intended to be used as a kind of “gap analysis.”³⁴

The questions will aim to “assess and verify the employer’s PSM compliance with specific areas such as design, fabrication, installation, startup, operation, maintenance, change, controls (engineering and administrative), safe work practices, contractor safety,” and other related items. The questions are designed to elicit a response of “yes,” “no,” or “N/A.”³⁵

Expanding the Inspection

If the compliance evaluation reveals that “PSM deficiencies may exist outside of the selected unit or dynamic list questions,” then the OSHA team can expand the scope of the inspection after consultation with the area office director.³⁶

The Chemical NEP directive also specifies that all “contractors (including subcontractors) working on or adjacent to” a selected unit “shall be inspected.”³⁷

Citations for PSM Violations

The Chemical NEP directive provides that citations for violations “shall be issued” in accordance with the OSHA *Field Operations Manual*. In addition, the following directions “shall be used” for citations of PSM violations:

- “The requirements of the PSM standard are intended to eliminate or mitigate catastrophic releases of HHC. The provisions of the standard present closely interrelated requirements, emphasizing the application of management controls when addressing the risks associated with handling or working near HHC.”
- “Any violation of the PSM standard is a condition that could kill or seriously harm employees.”
- “Violations of the PSM standard shall *not* normally be classified as ‘other-than-serious’” (emphasis in original).³⁸

Program Evaluation

Since the Chemical NEP is a pilot program, its success will be evaluated with a view toward program extension. OSHA states specifically that after one year, “this pilot NEP will be evaluated and considered for renewal and expansion to other regions.”³⁹

The pilot program will be evaluated using data collected from the case files and follow-up site visits submitted by each area office within the OSHA regions. These data will be passed on to the OSHA Office of General Industry Enforcement and then to the Directorate of Enforcement Programs.⁴⁰

OSHA has not expressly indicated how success will be defined under the Chemical NEP. Presumably, however, at least one measure of success will be the number of citations issued. Other indicators will likely reflect how many facilities implement measures to correct noncompliance in response to NEP inspections, thus diminishing the potential for catastrophic releases of HHCs.

Implications of the Chemical NEP for Industry

Plainly, the most significant impact of the Chemical NEP will be increased inspections of facilities with significant quantities of HHCs (and their contractors) located in the specified OSHA regions -- and possibly elsewhere. Certainly, facilities that are subject to the new program will want to respond to the NEP proactively and comprehensively.

Although chemical plants would appear to be an obvious target of the program, other industries should take note as well. Based on the criteria used for targeting sources for inspection, a range of facilities -- including explosives manufacturers, entities identified as violators of the PSM standard, and facilities known to OSHA area offices as potential candidates for inspection -- will likely be considered for inclusion in the Chemical NEP. These facilities need to be mindful of the new program, and of the possibility that they could be swept into its reach.

Facilities that meet the selection criteria and that are located in the regions chosen for piloting the Chemical NEP should take special note. They would be well advised to read OSHA Directive CPL 02-09-06, a detailed document issued in connection with the new NEP. Although the specific questions OSHA can be expected to ask as part of the inspection process are not publicly available, the Chemical NEP directive (along with the FAQ Sheet issued in connection with the earlier petroleum refinery NEP) can provide a great deal of useful information that should help entities prepare for an inspection -- if they are unlucky enough to face one.

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Notes

¹ See Petterson, D. (2009, July 28). U.S. Labor Department's OSHA national emphasis program targets workplaces that release highly hazardous chemicals. OSHA national news release. Available online at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=16119.

² 29 C.F.R. § 1910.119.

³ See OSHA national news release, note 1.

⁴ *Ibid.*

⁵ Available online at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1559.

⁶ The subject areas covered by NEPs range from combustible dust to hazardous machinery. A partial list of NEPs can be found in OSHA's National & Special Emphasis Program Index, available online at <http://www.osha.gov/dcp/neps/nep-programs.html>.

⁷ See Torres, K. (2008, April 9). Fairfax: OSHA plans PSM inspections for chemical plants. EHS Today. Available online at http://ehstoday.com/safety/chemical/ehs_imp_79656/.

⁸ *Ibid.*

⁹ See OSHA (2007, June 7). FAQ Sheet -- Petroleum Refinery PSM National Emphasis Program, OSHA CPL 03-00-004. Available online at http://www.primatech.com/info/faq_petroleum_refinery_psm_national_emphasis_program_nep_osh_cpl_03_00_004.pdf.

¹⁰ See Torres, op cit. note 7.

¹¹ *Ibid.*

¹² Available online at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02_09-06.pdf.

¹³ CPL 02.09.06 at 5.

¹⁴ *Ibid.* at 9.

¹⁵ *Ibid.* at 6.

¹⁶ OSHA's Field Operations Manual, CPL 02-00-148 at 51. Available online at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

¹⁷ *Ibid.* at 50.

¹⁸ CPL 02.09.06 at 4.

¹⁹ *Ibid.* at 4.

²⁰ *Ibid.* at 8.

²¹ *Ibid.* at 8-9.

²² *Ibid.* at 10.

²³ *Ibid.* at 10.

²⁴ *Ibid.*

²⁵ CPL 02-00-148.

²⁶ CPL 02.09.06 at 16.

²⁷ *Ibid.* at 14.

²⁸ *Ibid.* at 15.

²⁹ *Ibid.* at 17.

³⁰ *Ibid.* at 18. These documents include, among others: all contract employee injury and illness logs as required by 1910.119(h)(2)(vi.); a list of all PSM-covered processes/units at the facility; a list of all facility units and the maximum intended inventories of all chemicals in each of the listed units; a summary description of the facility's PSM program; unit process flow diagrams; piping and instrumentation diagrams, including legends; unit plot plans; unit electrical classification diagrams; process narrative descriptions; and descriptions of safety systems (e.g., interlocks, detection, or suppression systems).

³¹ *Ibid.* at 20.

³² *Ibid.* at 21-22.

³³ *Ibid.* at 15.

³⁴ *Ibid.* at 23.

³⁵ *Ibid.* at 27.

³⁶ *Ibid.* at 15-16.

³⁷ *Ibid.* at 23.

³⁸ *Ibid.* at 23-24.

³⁹ *Ibid.* at 7.

⁴⁰ *Ibid.* at 24.