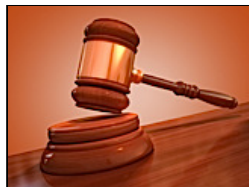


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Process Safety

Fertilizer Exemption Guidance Vacated in Win for Agriculture



By Sam Pearson

Sept. 23 — Occupational Safety and Health Administration guidance narrowing the scope of exemptions to its Process Safety Management regulations amounts to regulation and should have gone through the rulemaking process, a federal appeals court ruled (*Agricultural Retailers Assoc. v. DOL*, D.C. Cir., No. 15-01326, 9/23/16).

Writing for a unanimous three-judge panel, Judge Sri Srinivasan of the U.S. Court of Appeals for District of Columbia Circuit said in the Sept. 23 opinion that the action was significant enough to require a traditional rulemaking procedure. The decision vacates the year-old action by OSHA. The court agreed with petitioners the Agricultural Retailers Association and The Fertilizer Institute, who argued OSHA's changes required a rulemaking under the OSH Act.

The changes are "a big win" for industry groups, Daren Coppock, president and chief executive officer of the said in a statement Sept. 23, though the guidances's proponent warn the decision will put communities at risk.

The OSHA guidance scrapped a 50 percent test that granted a retail exemption to facilities receiving more than half of their income from the direct sale of chemicals, such as anhydrous ammonia that are covered by the process safety management standard, to end users. Basing the exemption on sales allowed companies to claim the exemption for selling chemicals in bulk to end users that are commercial establishments. OSHA had delayed enforcement of the change until Oct. 1.

The ruling will make it more difficult for OSHA to promulgate similar changes in the future, taking away what the agency saw as a faster way to close an important safety loophole identified after a fertilizer plant explosion in West, Texas, in 2013 killed 15 people. For some farm-state lawmakers, the decision vindicates more than a year of warnings the rule was unfair and harmful to the agriculture industry.

The panel also included Judges Judith Rogers, who was appointed by President Bill Clinton, and Patricia Millett, who like Srinivasan was appointed by President Barack Obama.

"Under our decisions, when an action by OSHA corrects a particular hazard, as opposed to adjusting procedures for detection or enforcement, it amounts to a 'standard,'" the ruling said. "Applying that understanding, we conclude that the agency's narrowing of the substantive scope of the exemption for retail facilities qualified as issuance of a 'standard.'"

OSHA attorneys maintained the use of interpretive rules was appropriate. The agency cited a recent Supreme Court decision, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (U.S. 2015), that notice-and-comment requirements under the Administrative Procedure Act are not necessary for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."

Because the court agreed that the changes constituted a standard under the Occupational Safety and Health Act, it did not address the Administrative Procedure Act issue, Chris Leason, an attorney at Gallagher & Kennedy and the lead counsel for The Fertilizer Institute in the case, told Bloomberg BNA Sept. 23.

OSHA representatives said the agency is reviewing the decision.

Impact Seen as Limited

The ruling's effect is likely to be limited because the court only addressed procedures under the OSH Act, Leason said.

The decision shows the court will evaluate OSHA interpretive rules on their practical effect, rather than if OSHA classifies it as an interpretive rule or not, Leason said.

Agriculture groups had criticized the guidance memo for more than a year, calling it burdensome for companies, and lawmakers barred OSHA from implementing it during fiscal year 2016. Industry groups sued over the change

Snapshot

- OSHA's loss at the D.C. Circuit blocks enforcement of an interpretation memo for fertilizer facilities
- The agency proposed the change as a guidance document without public comment
- The unanimous ruling rejected OSHA's arguments and will make it more difficult to narrow the retail exemption

in September 2015.

"OSHA made a bad decision in regulating ammonia in response to an ammonium nitrate incident, and the agency made that decision incorrectly," Coppock said. "Although ARA could only challenge on the procedural point and not the decision itself, we're still very pleased to see the court rule in our favor and to provide this relief to our members."

Lawmakers from rural states praised the court decision.

The ruling "sends OSHA back to square one to ensure that producers are heard," Sen. John Hoeven (R-N.D.) said in a statement Sept. 23.

In a statement Sept. 23, Sen. Heidi Heitkamp (D-N.D.) said the ruling was "a victory for rural communities whose economies rely on farmers' accessing inputs like anhydrous ammonia fertilizer."

Safety groups and labor unions expressed dismay over the outcome.

The ruling "undermines OSHA's ability to move forward efficiently in a reasonable amount of time to clarify interpretations of existing rulemakings that they have," Ron White, a public interest environmental health consultant and the former director of regulatory policy at the now-defunct Center for Effective Government, told Bloomberg BNA Sept. 23.

Michael Wright, the director of health, safety and environment at the United Steelworkers union, called the ruling "troublesome" and would make it harder to ensure safety at storage facilities.

Chemical Safety Initiative

OSHA's effort stems from an executive order Obama issued in 2013 for federal agencies to identify gaps in chemical security regulations.

The agency's revised policy changed how sites become eligible for the retail exemption. The change would have scrapped a policy that let sites that receive more than half their income from the direct sale of covered chemicals to end users qualify as exempt retail facilities, even if they still keep large quantities of hazardous chemicals on hand.

In West, Texas, a fertilizer plant that exploded in 2013 qualified for the retail exemption even though it stored more than 100,000 pounds of anhydrous ammonia.

However, industry groups later noted, it was not anhydrous ammonia but another chemical, ammonium nitrate, that ignited at the West Fertilizer Co. facility. At the same time, the Chemical Safety and Hazard Investigation Board said in its report on the incident the failure of the anhydrous ammonia tanks to explode marked a "near-miss of potentially significant consequence."

The West Fertilizer site qualified because OSHA policy let it claim the exemption for selling bulk quantities of chemicals to commercial establishments.

Retail Exemption May Come Back

Embarking on a formal rulemaking means it could take much longer for OSHA to change the regulations.

Leason said OSHA could consider changing the retail exemption as part of its ongoing Process Safety Management update rulemaking (RIN:1218-AC82).

OSHA can abandon the policy change or request a hearing before the full circuit court within 45 days. However, Leason said it appears unlikely OSHA would take this step because none of the judges accepted its position.

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For More Information

The decision in *Agricultural Retailers Assoc. v. DOL* is available at <http://src.bna.com/iSd>.

Contact us at <http://www.bna.com/contact-us> or call 1-800-372-1033

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