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### Process Safety

## Agriculture Industry Pushes to Vacate PSM Retail Revision



By Brian Dabbs

Jan. 27 — The agriculture industry in recent days leveled its most comprehensive argument to date in its challenge to OSHA's 2015 revision on process safety management (PSM) retail exemptions, arguing that revision is an outright standard change rather than an interpretation and therefore requires traditional rulemaking (*Agric. Retailers Ass'n. v. Dep't. of Labor*, D.C. Cir., No. 15-1326, *brief filed*, 1/22/16).

The petitioners, led by the Agricultural Retailers Association and The Fertilizer Institute (TFI), filed their opening brief in the case, No. 15-1340, to the U.S. Court of Appeals for the District of Columbia Circuit. That follows a December decision by the court to refer the case to a merits panel, a move that also outlined the briefing schedule for stakeholders.

The referral indicates the court is interested in testimony on all motions so far filed, including the petition for review, the Occupational Safety and Health Administration's motion to dismiss and a United Steelworkers (USW) motion to intervene, said counsel for the petitioners, Chris Leason with Gallagher and Kennedy, in a Jan. 27 Bloomberg BNA interview.

"The court wants to hear the 'standard' v. 'regulation,' the jurisdictional argument," Leason said, saying regulations are the jurisdiction of a district court. "They want to be fully briefed, with oral arguments perhaps, before they grant a decision." The petitioner brief refers to a "regulation" as an enforcement policy, distinct from a standard change.

Industry members and lawmakers have lashed into the revision, a memorandum that aligns the definition of a retail facility for PSM purposes to the North American Industry Classification System, since its release in July. The agriculture industry argues the change will impose stricter regulations on roughly 4,000 facilities (45 OSHR 1207, 12/3/15).

### Congress Blocks Implementation

Republicans on Capitol Hill tacked a policy rider on fiscal year 2016 appropriations legislation to bar implementation of the memo until OSHA leads a comment-included rulemaking process for the change, and the agency then delayed implementation until Sept. 30. (46 OSHR 16, 1/7/16)

OSHA previously interpreted a retailer as an entity that sells 50 percent or more of its product directly to end-users. That change imposes new safety procedures and processes for facilities in response to a specific hazard and therefore constitutes a standard, the petitioners argue. President Barack Obama's executive action in the wake of a West, Texas, fertilizer facility explosion spawned the revision.

The opening brief, which the petitioners filed Jan. 22, urged the court to vacate the OSHA memo and points to, as precedent, a 1999 decision to vacate the agency's cooperative compliance program.

### Petitioners Contest USW Intervention

The petitioners also called on the court to reject the USW motion to intervene, arguing the union lacks standing in the case and filed its motion too late for consideration. Leason and TFI Vice President of Public Policy Andy O'Hare, also in a Jan. 27 interview with Bloomberg BNA, said USW backed up that call.

"The union members they represent don't work at retail facilities; it's seems to be apples and oranges, and I'm a bit confused by it," O'Hare said. "If the court doesn't think they have standing, it will reject their motion. That will be the next step in the process, I think."

OSHA is next in line to brief the court. The schedule marks Feb. 19 for the agency brief, followed by a Feb. 26 date for USW to submit a brief. The merits panel probably won't render a decision on that motion before the Feb. 26 deadline, said Marilyn Sargent, chief deputy clerk with the court, in a Jan. 27 interview with Bloomberg BNA.

"That likely won't be decided until the decision on the whole case is decided," Sargent said. "But the bottom line is it's hard to tell." An OSHA spokeswoman said the agency isn't opposed to USW's motion but declined to comment further in light of the ongoing litigation.

### BNA Snapshot

**Key Development:** The agriculture industry argues that the PSM retail revision constitutes a standard change and therefore necessitates a traditional rulemaking.

**What's Next:** OSHA is set to file a brief in mid-February.

**USW Intervention:** The court is likely to hear the USW brief before it decides on a motion to intervene

The motion to intervene argues USW has standing due to its 22,000-strong workforce in refineries. The OSHA revision points to gasoline and service stations as legitimate retailers, and the document doesn't emphasize the agriculture industry.

**'Implications Go Far Beyond Industry.'**

USW Director of Health, Safety and Environment Mike Wright said the OSHA memo applies to all industries and therefore paves the way for USW participation in the case.

"The implications go far beyond [the agriculture] industry," he said in a Jan. 27 interview with Bloomberg BNA. "You have refineries where virtually all of the product is sold as jet fuel to airlines. One could argue most of those products are sold directly to end-users." USW counsel in the case, Randy Rabinowitz, declined to comment on USW standing.

The union motion, authored by Rabinowitz, admitted it was 15 days late in filing, saying it was uninformed on the legal proceedings.

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**For More Information**

The brief filed in *Agric. Retailers Ass'n. v. Dep't. of Labor* by the agriculture industry is available at <http://src.bna.com/cfM>.

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