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NW Region

May 14, 2018

Via email to tari.enos@lni.wa.gov

Ms. Tari Enos
Administrative Regulations Analyst
Washington State Department of Labor & Industries
P.O. Box 44620
Olympia, WA 98504

Re: Process Safety Management Amended Rulemaking, (Chapter 296-67 WAC, Safety Standards for Process Safety Management of Highly Hazardous Chemicals)

Dear Ms. Enos:

The Western States Petroleum Association (WSPA) is a non-profit trade association representing companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in Washington and four other western states. WSPA values the opportunity to provide comments on the Washington State Department of Labor & Industries' discussion draft of the Process Safety Management (PSM) rule for petroleum refineries (Discussion Draft).

WSPA and its member companies would like to express our appreciation to the Washington State Department of Labor & Industries (L&I) for the stakeholder process that has allowed WSPA and others to provide feedback throughout the rule making process. WSPA shares L&I's commitment to reduce the risk of accidental releases. The protection of our workers, contractors, and neighbors is of paramount importance. WPSA member representatives, with over 150 years of practical process safety experience, have spent over 2500 hours reviewing and commenting on the Discussion Draft in an effort to create a revised rule that accomplishes the shared goal of improved process safety management in the State of Washington.

WSPA has general and specific concerns with the Discussion Draft language. The enclosure of this letter entitled "*WSPA Comment Matrix on the Discussion Draft*" documents each of WSPA's specific concerns. WSPA's general areas of concern are addressed in this letter, which align with the following core principles that WSPA submits for consideration by all stakeholders as this regulatory process progresses:

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- Performance-based regulations are more effective than prescriptive-based regulations when it comes to managing risks associated with highly hazardous chemicals. The performance-based PSM rule that exists today has encouraged innovative approaches for managing risk, and WSPA believes that the current rule, with some modifications, can facilitate further innovation.

- Petroleum refiners are not the only companies that handle highly hazardous chemicals in the State of Washington, and WSPA does not know of any evidence to indicate that petroleum refiners warrant additional PSM regulation over that which applies to employers in other industries. Thus, in the spirit of preventing all catastrophic incidents, WSPA believes that the revised PSM rule should extend to all facilities currently covered by the WAC PSM rule.

- To address the potential for catastrophic incidents, the key focus of the Discussion Draft must be on process safety. Some of the language used in the Discussion Draft is overly broad and would trigger significant and burdensome operational requirements with little to no process safety benefit. If this language remains, employer resources will likely be diverted toward unproductive compliance obligations and away from preventing process safety incidents that have the potential to be catastrophic.

- Precise regulatory language ensures better industry understanding and compliance. To that end, there are several terms used throughout the Discussion Draft that are vague and open to interpretation, both by industry and the regulator. Vague terms such as "effective" and "best practice" should be avoided.

- Consistency across WAC rules leads to better understanding of the requirements and eliminates conflict with existing regulations. WSPA believes that it would be more effective to reference existing WAC rules where applicable, rather than restating them, in whole or in part, within the Discussion Draft. Furthermore, WSPA recommends eliminating redundancies within the Discussion Draft where certain requirements, such as "Employee Collaboration," are included in multiple elements.

- Clear and concise lines of accountability between employers and contractors must be maintained. Employers and contractors have distinct responsibilities for the safety and safe actions of their employees while working in and around highly hazardous chemicals. The existing WAC PSM rule correctly distributes those responsibilities without creating co-employment issues.

- New or changed requirements must include reasonable implementation timelines so that compliance is feasible.

- Any changes must be justified in accordance with the requirements of RCW 34.05.328, which states that the probable benefit of the proposed changes must be shown to exceed the probable cost, and those changes must be the least burdensome alternative necessary to

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achieve the general goals and specific objectives of the regulator. The proposed changes must also be consistent, to the maximum extent practicable, with other applicable federal, state, and local laws.

I. The Current PSM Requirements Are Effective

WSPA shares L&I's commitment to continually improving process safety and minimizing the frequency and severity of accidental chemical releases. The protection of our members' workers, contractors, and neighbors is of paramount importance. However, WSPA members believe that the current PSM regulation, when properly implemented, is effective in preventing and mitigating the consequences of catastrophic releases of highly hazardous chemicals. Process safety is a continuous journey; past incidents have spurred the petroleum refining industry to focus on and achieve process safety improvements without requiring any changes to the current rule. Although WSPA members support some modifications to improve and modernize the current PSM regulations, they do not believe that the broad-stroke and prescriptive revisions drafted by L&I are necessary to the shared goal of reducing risks of accidental releases and making the workplace safer for workers.

WSPA notes that L&I has not provided the analysis required under RCW 34.05.328(1)(b), which states that L&I must (i) demonstrate that its proposed changes further the general goals and specific objectives of the Washington Industrial Safety and Health Act (WISHA), and (ii) examine alternatives to the Discussion Draft and the consequences of not adopting them.[1] WSPA looks forward to seeing these materials.

The federal Occupational Safety and Health Administration's (OSHA) own data is instructive in demonstrating the effectiveness of the current version of the PSM standard. When OSHA recently considered revising the federal PSM standard, the agency's background documents noted the "long term trend of declines in the kinds of events [the PSM standard] is intended to prevent."[2] OSHA also observed that there had been a substantial decrease both in the overall number of fatalities and injuries that involved days away from work between 2003 and 2013 at PSM-covered facilities, with the decrease in fatalities having become "more pronounced in recent years."[3] Using the Environmental Protection Agency's (EPA) Risk Management Program (RMP) data set, OSHA also concluded that, as a percentage of RMP- and PSM- covered facilities, reportable incidents, injuries, and fatalities all decreased by at least half between 2000 and 2010.[4] And although OSHA asserted that "a variety of incidents of the kind PSM is intended to prevent continue to occur," it made note of only three specific examples—each of which involved employers who had failed to comply with

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[1] RCW 34.05.328(1)(b)

[2] OSHA, SER Background Doc. 13 (2016), https://www.osha.gov/dsg/psm/.

[3] *See id.*

[4] *See id.* at 7–8.

existing PSM procedures and programs.[5] WSPA is unaware of reasons why the PSM standard's effectiveness at petroleum refineries would materially differ from its effectiveness at other types of covered facilities.

The scarcity of incidents cited by OSHA is telling. Moreover, the available data does not suggest that petroleum refineries are any less safe than other facilities in the State of Washington that handle highly hazardous chemicals. WSPA members have had a long and strong commitment to the safety and health of their employees and to the environment that has continuously improved over time. Data from the Bureau of Labor Statistics (BLS) does not support L&I's decision to apply the Discussion Draft solely to the petroleum refining industry. According to 2016 BLS data, the total recordable incident rate for the manufacturing sector as a whole is 3.6 job-related injuries and illnesses per 100 full-time employees. The 2016 API Occupational Injury & Illness Report stated that the total recordable incident rate for both company employees and onsite contractors working at petroleum refining facilities was 0.6 incidents per 100 full time employees. In other words, refinery workers are 6 times safer than workers at manufacturing sites as a whole. Out of these recordable incidents, 79% of injuries were minor in nature and allowed the worker to return to work immediately. As such, in the spirit of preventing and minimizing the consequences of all potential catastrophic incidents, WSPA believes that any proposed improvements should extend to all companies, in all industries, currently covered by the existing PSM rule.

II. PSM Works Best as a Performance-Based Regulation

The last quarter of a century of experience with the PSM standard demonstrates that it works best as a performance-based regulation in which the regulator sets specific goals and the covered employer selects the best means of compliance. However, WSPA is concerned that certain provisions in the Discussion Draft are inconsistent with that basic principle and would include overly prescriptive and inflexible requirements that would limit the ability of refiners to implement efficient and innovative approaches to meet their regulatory obligations.

OSHA stated in the preamble to the final PSM rule that "[w]hen OSHA issued its final report on the Special Emphasis Program for the Chemical Industry (Chem SEP), among its findings were that 'specification standards . . . will not . . . ensure safety in the chemical industry . . . [because such standards] tend to freeze technology and may minimize rather than maximize employers safety efforts.' The Chem SEP report recommended a new approach to the identification and prevention of potentially catastrophic situations. This approach would involve 'performance-oriented standards . . . to address the overall management of chemical production and handling systems.'"[6]

A PSM performance-based standard enables subject matter experts with specific, detailed knowledge of each covered process and its potential hazards to safely and effectively control those potential process safety hazards. The performance-based PSM rule that exists today has

[5] *Id.* at 14.

[6] 57 Fed. Reg. 6,356, 6,357 (Feb. 24, 1992).

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encouraged innovative approaches to managing risk, which has led to new industry consensus documents on a variety of issues like facility siting, fatigue management, high temperature hydrogen attack, process safety indicators, and other PSM procedures and practices. These innovations occurred within the confines of the existing PSM rule and did not require additional regulations to prompt those changes. In fact, broad prescriptive requirements would make it less likely that employers could exercise engineering judgment in the development of new and innovative methods to control and eliminate process safety hazards. A prescriptive approach may hinder the regulatory goal of safely eliminating or reducing process hazards by imposing unnecessary burdens on covered employers' time and resources without addressing actual underlying hazards.

Several provisions of the Discussion Draft pose particular concern in that respect, and include, but are not limited to the following:

- The Discussion Draft would require that, for each scenario in a Process Hazard Analysis (PHA) that identifies the potential for a major incident, the employer must perform an effective written safeguard protection analysis (SPA) to determine the effectiveness of existing individual safeguards. WSPA agrees that the adequacy or effectiveness of safeguards should be considered as part of the PHA process when employers' risk criteria are met. However, WSPA believes that including a general requirement that employers assess the effectiveness of safeguards is sufficient without including specific requirements regarding what employers must evaluate as part of that process. Furthermore, such an approach would be consistent with the current regulatory treatment of other PHA techniques, which are listed in the regulation but not otherwise specified. Providing industry the ability to develop the best methodology and tools to address this new compliance obligation would be consistent with a performance-based standard and would avoid unnecessarily prescriptive requirements, which risk stifling further innovation.

- The Discussion Draft would require refineries to conduct a Hierarchy of Hazard Controls Analysis (HCA) for all existing processes that considers inherently safer design measures. Although WSPA agrees that hierarchy of controls principles should be appropriately integrated into the PHA process and the development of other PSM recommendations, WSPA members believe that a prescribed preference for higher order of hazard prevention and control measures should not be dictated by L&I. Rather, measures with different inherent reliability can be equally effective at reducing risk, and employers should be free to select and apply the measures that best reduce risk, in keeping with a performance-based regulation.

- The Discussion Draft would require employers to develop, implement and maintain an effective written human factors program within eighteen months following the effective date of the rule. WSPA agrees that human factors serve an important part in process safety. However, WSPA believes that human factors should be integrated into several of the PSM

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Section, and that the specific list of factors specified in the Discussion Draft that must be considered as part of that process go outside the bounds of a performance-based regulation.

- The Discussion Draft "Process Safety Management Program" Section would require employers to "develop, implement, and maintain an effective program to track, document, and assess process safety performance indicators against best practices, as well as leading and lagging factors." The Discussion Draft defines leading and lagging factors to include a list of factors that must be assessed as part of this requirement. Although WSPA recognizes the value of tracking process safety performance indicators, and acknowledges that its member companies already do so, employers should have the flexibility to identify those process safety indicators that in their judgment track process safety performance best at their facilities.

In summary, WSPA believes that L&I should revise the Discussion Draft to provide for performance-based rather than prescriptive methodologies.

III. WISHA Mandates That Certain Criteria Be Met Before Expanding Current PSM Requirements

WSPA is concerned about the expansion of the rule, which must be consistent with RCW 34.05.328(h). When enacting a rule that differs from any federal regulation or statute applicable to the same activity or subject matter, L&I must "[c]oordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter."[7] However, taken as a whole, WSPA believes that the scope of the Discussion Draft is much broader than the federal PSM rule in several significant ways.

First, the federal PSM standard applies to processes involving certain listed highly hazardous chemicals above a threshold quantity, and states that its purpose is to "prevent[ ] or minimiz[e] the consequences of catastrophic releases."[8] However, the Discussion Draft applies to *all* processes within petroleum refineries, without regard to the quantity of the highly hazardous chemical that is present. This would extend coverage to all utility systems, which do not usually involve any highly hazardous chemicals. The inclusion of the phrase "release mitigation" in the definition of "process" would also expand the units and/or equipment that could be considered part of a process. Furthermore, the Discussion Draft eliminates the fuel exemption contained in the current WAC rule, which defines a "process" to exclude those that involve hydrocarbon fuels used solely for workplace consumption as a fuel. Not all processes in a refinery have potential for catastrophic releases; expending resources to comply with these Discussion Draft requirements on scenarios

[7] RCW 34.05.328(h).

[8] *See* 29 C.F.R. § 1910.119(a)(1)(i). Washington state has adopted the approach as part of its statutory mandate to "[p]rovide for the adoption of occupational health and safety standards that are at least as effective as" federal OSHA's standards. RCW 49.17.050(2).

without the potential for catastrophic release dilutes the ability to focus on those scenarios having potential for catastrophic releases.

Second, the Discussion Draft defines "highly hazardous chemical" to include all substances found within a petroleum refinery in any quantity and with any degree of toxicity, reactivity, flammability, or explosivity. The definition of "toxic" contained in the Discussion Draft extends the application of the standard to all chemicals that pose an "unreasonable risk to health or the environment." In contrast, Section 112(r) of the Clean Air Act Amendments (CAAA) mandated that OSHA's PSM standard include a precise list of only those highly hazardous chemicals that "pose the *greatest* risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases."[9] Section 112(r) required the Environmental Protection Agency (EPA) to take the same approach in crafting its Risk Management Program (RMP) rule. Both agencies selected the chemicals listed with an eye to narrowly tailoring the application of the PSM standard and RMP rule to those chemicals that posed significant process safety and environmental risks. Many years and many man-hours went into the development of OSHA and EPA's list of chemicals and WSPA does not believe that there is any basis to deviate from it.

Third, WSPA does not believe that there is evidence to justify the elimination of the exemption for atmospheric storage tanks (ASTs). In OSHA's 1992 *Summary and Explanation of the Final Rule*, OSHA stated:

> The second proposed exemption concerned flammable liquids stored or transferred which are kept below their atmospheric boiling point without benefit of chilling or refrigeration and was proposed paragraph (b)(1)(ii)(B). Again, OSHA did not believe that the flammable liquids as described in the exemption have the same potential for a catastrophe as those proposed. Again an OSHA standard already regulates the treatment of the exempted flammable liquids (1910.106, flammable and combustible liquids).[10]

WSPA knows of no data or studies which show that the existing regulatory requirements regarding ASTs are insufficient to assure employee safety. 29 C.F.R. § 1910.106 makes clear that "[a]tmospheric storage tanks shall not be used for the storage of a flammable liquid at a temperature at or above its boiling point."[11] Section 1910.106 also sets forth the conditions by which the risks of storing flammable liquids in ASTs can be minimized, such as requiring certain materials of construction, drainage and dikes; that tank construction be in accordance with good engineering design; that tanks have venting and flame arrestors; that employers eliminate and control sources of ignition; and that employers comply with certain spacing requirements for tanks and fire resistant

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[9] 42 U.S.C. § 7412(r) (emphasis added).

[10] 57 Fed. Reg. 6,356, 6,367 (Feb. 24, 1992).

[11] 29 C.F.R. § 1910.106(b)(1)(iii)(d).

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steel supports.[12] And OSHA's own citation data shows that there is no inspection history associated with ASTs that would justify the removal of this exemption.[13]

WSPA members take the risks associated with flammable liquids very seriously, and have implemented controls that have successfully mitigated those risks. However, WSPA believes that the original basis for exempting ASTs from PSM coverage is still valid, and that there is insufficient evidence of a significant risk that would justify the removal of that exemption from the PSM standard. Moreover, the Discussion Draft ignores the many other regulatory provisions and voluntary industry efforts that address hazards presented by ASTs. As such, WSPA does not believe that a sufficient demonstration can be made that deviating from the existing PSM standard is warranted.

IV. The Discussion Draft Includes Overbroad, Vague, and Inconsistent Provisions

WSPA believes that precise regulatory language ensures better industry understanding and compliance. Accordingly, WSPA is concerned that the Discussion Draft contains a number of ambiguous terms that are used throughout the Discussion Draft and that remain open to interpretation, both by industry and the regulator. These terms, which include the words "effective," "expertise," "best practices," and "greatest extent feasible," are overly vague as written and fail to provide employers with any sense as to what compliance would entail.

Regulated entities are required to be put on notice as to what activity will violate a health and safety standard. A safety and health standard is unconstitutionally vague if "the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application."[14] Putting it another way, "so long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster."[15] The terms listed above fail this test, as the "common man," and employers alike, will be left guessing as to their precise meaning and application, as demonstrated by the variety of comments in the Discussion Draft meetings.

Moreover, a number of the definitions contained in the Discussion Draft are duplicative of, and in many cases, inconsistent with, definitions and terms in other safety and health standards. This

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[12] *See generally* 29 C.F.R. § 1910.106.

[13] In 2001, OSHA issued 850 serious violations of 29 C.F.R. § 1910.106—approximately 1% of all citations issued that year. OSHA, Office of Statistical Analysis, *PSM Citation Data* (2001–2013). Each year thereafter, the number of citations issued under Section 1910.106 declined, and in 2013, OSHA issued only 350 serious citations, which constitutes a 60% decline in the number of citations issued. *See id.* In contrast, over this thirteen year period, OSHA has issued approximately one million total citations. *See id.* This data demonstrates that Section 1910.106's provisions are sufficiently adequate to regulate hazards associated with ASTs and have been successful in reducing risks and eliminating hazards associated with the handling and storage of flammable liquids.

[14] *Allis-Chalmers Corp. v. O.S.H.R.C.*, 542 F.2d 27, 30 (7th Cir. 1976).

[15] *Ryder Truck Lines, Inc. v. Brennan,* 497 F.2d 230, 233 (5th Cir. 1974).

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creates confusing compliance obligations that are not in keeping with L&I's obligation to harmonize, to the maximum extent possible, any proposed rules with existing federal and state standards on the same topic.[16] For example, the Discussion Draft defines "hot work" differently than it is defined in the federal PSM standard and other state safety and health standards. WSPA believes adopting a different definition would result in confusion that could be detrimental to process safety. The Discussion Draft's definition would also unnecessarily expand the circumstances in which a hot work permit would be required due to the Discussion Draft's expanded definition of process and the inclusion of vague and overly broad terms such as "extreme heat" and "procedures." The fact that the Discussion Draft applies to all refinery processes regardless of the quantity of chemicals present further compounds the expanded definition of hot work. As such, this definition would significantly increase the burden on covered employers without any likely safety benefit.

Accordingly, WSPA believes that L&I should delete references contained in the Discussion Draft to the vague terms listed above, and should revise the Discussion Draft so that defined terms are consistent with the definitions contained in other federal and state standards.

V. Provisions of the Discussion Draft Exceed WISHA Statutory Boundaries

A. Some provisions in the Discussion Draft would exceed L&I's statutory mandate.

Under Washington's Administrative Procedures Act (APA), agency regulations cannot exceed the agency's statutory mandate.[17] WISHA's central purpose is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington."[18] The statute confers upon the director of L&I the authority to "[p]rovide for the preparation, adoption, amendment, or repeal of rules and regulations of safety and health standards governing the conditions of employment of general and special application in all workplaces."[19]

Several of the provisions contained in the Discussion Draft, however, exceed this scope. Certain drafted revisions attempt to regulate management and personnel decisions that have no impact on safe and healthful working conditions. For example, the Discussion Draft expressly requires employers to task the refinery manager with certain functions, and the provisions regarding the human factors analysis require an assessment of the employer's scheduling and pay practices. These provisions would limit an employer's ability to make staffing and other important decisions about its business operations without any clear process safety benefit. Moreover, certain provisions of the Discussion Draft require employers to consider the impact of process safety decision making on "the environment," "external events, including seismic events," and individuals other than

[16] RCW 34.05.328(h).

[17] RCW 34.05.570(c).

[18] RCW 49.17.010.

[19] RCW 49.17.050(1).

employees. And other provisions require employers to attempt to exert control over employee "values and beliefs," rather than employee behaviors or practices. These considerations are not likely to further WISHA's goal of regulating "safe and healthful working conditions."

B. The Discussion Draft raises questions regarding whether the probable benefits of the rule will justify the probable costs.

Any rulemaking activity conducted by L&I must ultimately involve an analysis of the costs and benefits of the proposed rule. L&I is authorized to promulgate regulations only if "the probable benefits of the rule are greater than its probable costs."[20] In other words, L&I must determine that "the burden imposed by the regulation is justified by the risk which it eliminates."[21] As Washington courts have explained, "the idea behind [a] regulation[ ] [is] not to create a risk-free workplace, but a safe one," and "a workplace can hardly be considered unsafe unless it threatens the workers with a significant risk of harm."[22] Any contrary rulemaking approach "would give an agency the power to impose enormous costs that might produce little, if any, discernible benefit."[23]

WSPA is concerned that the Discussion Draft's expanded compliance obligations will require significant expenditures by employers without any commensurate benefit in terms of process safety or risk reduction. Although there are a number of provisions within the Discussion Draft that pose concern, the definition of "feasible" and the sections pertaining to recognized and generally accepted good engineering practices (RAGAGEP) and the Hierarchy of Hazard Controls Analysis (HCA) are particularly noteworthy.

1. <u>The Discussion Draft's definition of "feasible" does not reference economic feasibility.</u>

In assessing the costs and benefits of the Discussion Draft's provisions, the definition of "feasible" will greatly increase the cost of compliance. As currently defined, "feasible" does not include any consideration of economic factors. If employers will be required to implement recommendations or corrective actions without regard to the economic feasibility of such measures, then compliance costs may be significantly higher than refineries' historical risk reduction costs. Accordingly, the definition of feasible must incorporate economic factors for compliance costs to be reasonable. Employers have an established history of evaluating and investing in risk reduction measures, and the regulation must continue to allow the practice of considering cost in process safety decision-making.

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[20] RCW 34.05.328(d).

[21] *Aviation W. Corp. v. Wash. State Dep't of Labor & Indus.*, 138 Wash. 2d 413, 452–54, 980 P.2d 701, 721–22 (1999).

[22] *Id.* (internal quotation omitted).

[23] *Id.* (internal quotation omitted).

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2. RAGAGEP should be broadly defined but enforced only within the expressed terms of the standard.

The PSM standard is a performance standard, in which overall safety provides the threshold to judge compliance. As such, L&I should limit any changes regarding RAGAGEP to only that RAGAGEP which is applicable to *process equipment*. As defined in the Discussion Draft, RAGAGEP includes any standard published by numerous organizations that include ANSI, API, ASHRAE, ASME, ASTM, NFPA, and ISA. This definition incorporates hundreds of standards, many of which have nothing to do with process safety. Compliance with this obligation would thus be incredibly expensive and time-consuming. Accordingly, L&I could significantly reduce the burden of compliance by limiting its definition of RAGAGEP accordingly.

Some of these concerns can be addressed at least in part if L&I adopts the approach currently being taken by OSHA. WSPA recommends that the definition of "RAGAGEP" in the Discussion Draft be consistent with an OSHA Memorandum issued to Regional Administrators by the Directorate of Enforcement Programs dated May 11, 2016.[24] The Memorandum provides examples of the various types of RAGAGEP documents and when each could apply. The Memorandum also makes clear that RAGAGEP includes internal standards and safe practices utilized by individual employers at their individual establishments. WSPA believes that RAGAGEP originates from subject matter experts who have the most familiarity and experience with the covered process and worksite in question. Such practices have been modified and refined over time in response to technological advances, industry experience, and shared engineering knowledge. An approach that excludes internal employer standards would not be able to respond to those future developments.

Finally, unless expressly stated, consensus standards pertain to the point forward design of equipment, and thus these standards apply to the construction phase of a new process equipment and are not retroactive. WSPA is concerned that a requirement for existing processes to comply with applicable RAGAGEP would be extremely burdensome, if not impossible, where the relevant consensus standards involve significant engineering such as foundations, siting, or other structural elements. Accordingly, the touchstone in determining compliance with the PSM standard's RAGAGEP requirement must be whether the workplace is *actually* safe, and not whether it simply reflects the most recent thinking on best practices. WSPA believes that L&I should incorporate a concept that allows employers to conduct an engineering analysis based on good engineering practice to establish that existing equipment is safe to use and operate, similar to the provision in WAC 296-67-013(c) (equipment constructed in accordance with codes and standards no longer in general use).[25] These revisions to the provisions governing RAGAGEP would more closely align the probable cost of compliance with the benefits to process safety.

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[24] Dorothy Dougherty, OSHA, *RAGAGEP in Process Safety Management Enforcement* (May 11, 2016), https://www.osha.gov/laws-regs/standardinterpretations/2016-05-11-0.

[25] WAC 296-67-013(c).

3. Requiring refineries to conduct a separate, standalone Hierarchy of Hazard Controls Analysis would be more complex and burdensome than L&I anticipates.

The Discussion Draft would require refineries to conduct a standalone Hierarchy of Hazard Controls Analysis (HCA) for all existing processes. Although WSPA agrees that the consideration of hierarchy of control principles can be a useful tool in risk reduction at an appropriate time in a PHA, requiring such an analysis with respect to existing processes would be unduly burdensome and would create an unnecessary documentation requirement with limited process safety benefit.

There is little data to suggest that requiring an analysis of inherently safer design measures on existing processes provides any measurable benefit or reduces the frequency or severity of incidents. WSPA is unaware of any empirical studies showing that an HCA effectively improves process safety. In New Jersey, which has required facilities to conduct an analysis of inherently safer technologies since 2008, data provided by OSHA during recent rulemaking activities to update the PSM standard for PSM- and RMP-covered facilities shows that the number of reportable incidents has not decreased since the implementation of the inherent safety requirement—in fact, there have been more reportable incidents in the five years after the requirement went into effect than the five years prior.[26]

The application of inherently safer design strategies is most effective during the process design stage. With respect to existing processes, inherently safer design provides only negligible benefits. Furthermore, inherently safer design is, in essence, a philosophical approach to the design and operational life cycle of a process, rather than an established set of procedures or practices. It is simply one strategy among many to reduce risk. No published consensus standards on how to conduct an HCA exist, largely because inherently safer design strategies require an operation- and site-specific evaluation based on engineering judgment and the consideration of many variables that include hazards, the location of the facility, surrounding populations, exposures, technical feasibility, and economic feasibility. As such, compliance with the Discussion Draft's HCA provisions would require significant expertise, time, and money, with very little process safety benefit for existing processes.

VI. The Discussion Draft Contains Provisions That Conflict With the Requirements of Federal Law

A. The Discussion Draft falls short of the federal OSH Act's requirements for state plan standards.

Section 18(c)(2) of the federal Occupational Safety and Health Act (OSH Act) states that whenever a state agency seeks to promulgate a standard that is applicable to products that are moved in interstate commerce and that relates to the same issues covered by federal OSHA standards, the state must show that the requirements of the state standard are "required by compelling local

[26] OSHA, Office of Statistical Analysis, *PSM Citation Data*.

conditions and do not unduly burden interstate commerce."[27] One factor OSHA has historically considered in determining whether a state's interest is a compelling one is the extent to which the industrial hazard sought to be addressed is prevalent within the state.[28]

Generally, refineries across the country are similar, using similar raw materials, the same basic equipment, and the same basic processes. There is no apparent local compelling interest unique to Washington State to support the Discussion Draft's proposed revisions to the existing PSM rule. Furthermore, many companies or their affiliates are involved in petroleum refining operations in the State of Washington and elsewhere in the United States, so there would not be any expected significant differences in their operations inside the state.

The Discussion Draft could also have a negative impact on interstate commerce. Holding petroleum refineries in the State of Washington to a more burdensome standard in many important respects will drive up costs for these refineries in the areas of capital needed and operations.

B. The Discussion Draft's employee collaboration provisions conflict with the federal National Labor Relations Act.

The Discussion Draft contains a number of provisions requiring employee collaboration on committees and teams involved in various stages of process safety management. The Discussion Draft's core approach to employee collaboration compels employers to develop and implement a written plan for employee collaboration in all PSM elements that includes specific requirements. The Discussion Draft also mandates that in non-union settings the employer must establish, in consultation with employees, procedures for selecting employee representatives to participate on required teams, committees, and advisory capacities.

WSPA and its members support employee participation in workplace safety programs and in process safety management. WSPA recognizes, however, that the National Labor Relations Board (NLRB) has established limitations on the power of state regulators to impose particular forms of employee participation. As drafted, the Discussion Draft would be deemed invalid because it ignores the restrictions of federal labor law. Compelling employers to establish procedures for selecting employee representatives and for meeting with employee representatives in committees and on teams that will consider and make recommendations regarding safety issues would require employers to violate Section 8(a)(2) of the National Labor Relations Act (NLRA). Covered employers must have flexibility to engage with their employees in ways that are effective and lawful. Compliance with the employee participation requirements of the Discussion Draft would require employers to engage in unfair labor practices, and therefore the Discussion Draft unlawfully intrudes on the exclusive jurisdiction of the NLRA to regulate labor relations and certify labor organizations to deal with employers.

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[27] 29 U.S.C. § 667(c)(2).

[28] Supplement to Cal. State Plan; Approval, 62 Fed. Reg. 31159-01 (June 6, 1997).

It is an unfair labor practice under Section 8(a)(2) for an employer "to dominate or interfere with the formation or administration of any labor organization." The Board and the courts take an expansive view of what constitutes a labor organization under Section 2(5) of the NLRA.[29] In *Electromation, Inc.*, the NLRB found a violation of Section 8(a)(2) based on action committees comprised of employees, supervisors, and managers formed to discuss various working conditions (absenteeism/infractions, no smoking, pay progression, communications, and attendance bonus).[30] Although the NLRB acknowledged that management did not dominate committee discussions, the company had organized the committees, created their nature and structure, determined their functions, provided committee meeting space and supplies, and paid employees for their committee time.

Following the rationale of *Electromation*, the NLRB's General Counsel explained in a Memorandum issued by the Division of Advice, *Goody's Family Clothing, Inc.*,[31] the decision to issue an unfair labor practice complaint alleging that Section 8(a)(2) was violated by an employee safety committee composed of employer and employee representatives who were mandated by Tennessee's occupational safety and health law to meet and discuss safety issues.[32] The NRLB found a Section 8(a)(2) violation after it concluded that the safety committee was tantamount to a labor organization under the NLRA. The NLRB reached this conclusion because the Tennessee law required employers to consider, evaluate, and respond to safety proposals made by employees on the committee, who were selected to serve in a representational capacity by their fellow employees.[33] As a "bilateral mechanism" for dealings between the employer and employee representatives on a mandatory subject of bargaining, the committee was unlawful.[34] The fact that Tennessee law required the employer to deal with the Safety Committee concerning mandatory subjects of bargaining was no defense to the Section 8(a)(2) complaint, because the state law was deemed preempted by the NLRA.[35]

Like the Tennessee statute, the Discussion Draft's employee participation provisions would conflict with the NLRA's policies and express prohibitions in non-union workplaces. The Discussion Draft's requirement that employers establish committees and teams to deal with safety-related conditions of employment and determine which employees will serve implicitly imposes on

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[29] *See, e.g., St. Vincent's Hospital*, 244 N.L.R.B. 84, 86 (1979) (employee council that discussed proposals for employee facilities and fringe benefits); *Predicasts, Inc.*, 270 N.L.R.B. 1117, 1122 (1984) (personnel committee that mediated grievances and made recommendations on working conditions and grievances); *Ona Corp.*, 285 N.L.R.B. 400 (1987) (employee action committee designed to improve working conditions and facilitate communications between employees and employer).

[30] 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

[31] NLRB Div. of Advice, No. 10-CA-26718, 1993 WL 726790 (Sept. 21, 1993).

[32] Tenn. Code Ann. § 50–6–501, et seq.

[33] *Goody's Family Clothing, Inc.*, 1993 WL 726790 at *3.

[34] *Id.*

[35] *Id.*

employers the duty to determine the structure and procedures of the committees and teams and to set their agendas. These requirements are inconsistent with the NLRB's interpretation of Section 8(a)(2) because they establish a mechanism for bilateral engagement on mandatory subjects of bargaining between employers and employees who speak on behalf of the entire employee population. In other words, the requirements would establish an employer-controlled forum for de facto bargaining in the absence of an actual union. This result would violate the NLRA, and the fact that this form of employee participation was required by statute would not provide employers with a defense.

The Discussion Draft's employee participation requirements may also expose employers to liability under Section 8(a)(1) of the NLRA. The committee and team requirements of the Discussion Draft could be interpreted as requiring employers to solicit and remedy employee grievances regarding workplace safety, which can violate Section 8(a)(1) if the employer's response is interpreted as suggesting that union representation is unnecessary because "management alone ha[s] the wherewithal to address and resolve employee problems."[36] Preemption of these elements of the Discussion Draft would be necessary to preserve the policies and prohibitions of the NLRA.

VII. The Discussion Draft Contains Provisions That Blur the Lines Between Employers and Contractors

The Discussion Draft contains a number of provisions that require covered employers to exercise a level of control over contractor employees that would essentially convert independent contractors into employees. Courts in the U.S. Court of Appeals for the Ninth Circuit, which includes the State of Washington, analyze the following factors to determine whether an individual is appropriately classified as an independent contractor or employee: (1) the extent to which the work performed is an integral part of the employer's business; (2) the degree of control exercised or retained by the employer over work schedules or conditions of employment; and (3) whether the employer maintained employment records for the contractor employees.[37]

L&I's draft changes to the existing WAC standard's contractor, training, and employee participation requirements expose employers to a greater risk of misclassification claims and liability under federal and state wage and hour laws. Additionally, involving independent contractors in the creation of workplace policies and programs may cause friction in unionized workplaces where the union has negotiated for specific terms and conditions of employment for individuals in the bargaining unit. Increasing the scope of work for independent contractors may also invite grievances or unfair labor practice charges alleging that the employer has sought to transfer bargaining unit work to non-bargaining unit members. And finally, the Discussion Draft would blur the line between independent contractors and employees under tort law principles, and bring with it increased risk that employers will be held vicariously liable for the negligence of an independent contractor.

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[36] *Traction Wholesale Ctr. Co. v. N.L.R.B.*, 216 F.3d 92, 103 (D.C. Cir. 2000).

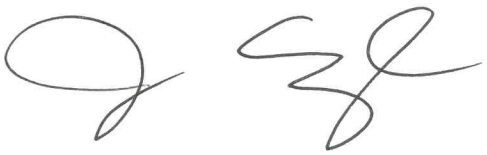
[37] *See Moreau v. Air France*, 356 F.3d 942, 946–47 (9th Cir. 2004).

VIII. Conclusion

WSPA thanks L&I for reviewing its members' comments regarding the Discussion Draft. Our members would also like to reiterate our desire to share their practical experience and to continue to meet and work with L&I on improving process safety in the state of Washington. WSPA members and L&I have a long history of working together to improve employee safety and health, and WSPA believes that tradition can and should continue here.

Thank you again and please contact me at (360) 352-4512 or by email at Jessica@wspa.org if you have any questions regarding WSPA's comments. We would be pleased to meet with you to review and explain these comments in detail.

Respectfully submitted,



Attachment

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