



## Federal Court Affirms OSHA's Broad Interpretation of its Process Safety Management Standard

Chemical plant owners and operators need to carefully review a recent federal appellate court decision that could substantially expand [process safety management](#) (PSM) considerations and related chemical safety and accidental release regulatory requirements under EPA's [Risk Management Plan \(RMP\) program](#).

On October 27, 2020, the U.S. Court of Appeals for the Tenth Circuit, affirmed OSHA's interpretation and jurisdiction of its PSM program in ruling that a vessel *does not actually need* to contain a highly hazardous chemical to be subject to PSM – in this case a steam boiler – as long as the vessel is interconnected to a process that is subject to the standard. [Scalia v. Wynnewood Refining Co., LLC, \\_\\_ F.3d. \\_\\_ \(10th Cir. 2020\)](#) 2020 WL 6279210.

The underlying facts of the case stem from a 2012 natural gas explosion in a steam boiler at the Wynnewood Refinery in Oklahoma resulting in two workplace fatalities. While OSHA agreed that the steam boiler did not contain any highly hazardous chemicals, OSHA pursued an enforcement case against the refinery under the theory that the steam boiler was a PSM-covered process because it was interconnected to two other units of the refinery which were subject to PSM.

At all stages of the administrative litigation before [administrative law judge](#), the full [Occupational Safety and Health Review Commission](#), as well as the Tenth Circuit Court of Appeals, the focus involved regulatory intent and language of what constitutes a covered process, including, namely the definition of "process" at [29 CFR 1910.119\(b\)](#):

Process means any activity *involving a highly hazardous chemical* including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or a

combination of these activities. For purposes of this definition, *any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process.*

As a result of the Tenth Circuit's ruling, time will tell if OSHA will seek to further expand the types of activities, vessels, and units that the agency believes are covered by the PSM standard due to "interconnectedness" regardless of attenuated or remote aspects of the connection, all with accompanying obligations and elements of a robust PSM program (i.e., PHAs, PSSR, mechanical integrity, SOPs, etc.). And, of course, EPA's RMP program includes coverage as a Program 3 facility for those processes subject to the OSHA PSM standard at [40 CFR 68.10\(i\)](#).

OSHA practitioners should also take note of this decision's discussion about "repeat" violations concerning whether a "substantial continuity" exists for purposes involving a successor business entity. And appellate practitioners might find the companion [Fifth Circuit's first-to-file analysis](#) fascinating, in which the appeal was transferred to the Tenth Circuit given that OSHA filed its appeal in the Tenth Circuit just a few hours before the refinery filed its appeal in the Fifth Circuit.

This post was drafted by [Andrew Brought](#), an attorney in the Kansas City, MO office of Spencer Fane LLP. For more information, visit [www.spencerfane.com](http://www.spencerfane.com).