

In addition to the jointly agreed upon facts set forth in the Stipulations, Complainant submitted in Complainant's Contention of Relevant Facts additional facts it believed to be relevant and accurate. Respondent submitted in Respondent's Counter-Contentions additional facts it believed to be relevant and accurate. However, Complainant's Contention of Relevant Facts and Respondent's Counter-Contentions do not form a basis for this Opinion; such disputed facts would need to be presented at a Hearing.

This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

General Background of Case

In February 2012 Respondent maintained a place of business in Reidsville, North Carolina (the "Reidsville Facility"). Respondent is a manufacturer of car care products, including but not limited to summer and winter car care products. Respondent uses methanol in producing some of its winter car care products. Pure methanol is a flammable liquid.

On February 8, 2012 a Compliance Safety and Health Officer employed by the North Carolina Department of Labor conducted an inspection (the "Inspection") of Respondent's Reidsville Facility. The Citation issued to Respondent alleged violation of 16 different provisions of the PSM Standard. These violations related to Respondent's manufacture of the following winter windshield washing fluid products (collectively the "Winter Products):

- a -20° F product (consisting of 60% to 70% water and approximately 35% methanol, with a flashpoint of 91° F, and a specific gravity of 0.950 to 0.960 at 68°F);
- a -25° F product (consisting of 50% to 70% water and approximately 35% methanol, with a flashpoint of 90° F, and a specific gravity of 0.940 to 0.950 at 68°F); and
- a -30° F product (consisting of 60% to 70% water and approximately 35% methanol, with a flashpoint of 93° F, and a specific gravity of 0.950 to 0.960 at 68°F).

Respondent primarily produces, on as needed basis, the Winter Products approximately four to five months out of the year while also continuing to produce its summer products year round.

At the time of the Inspection the Reidsville Facility consisted of an office on the first floor of a building and the following work areas within various locations on the same tract of real property:

- Atmospheric bulk storage tank area ("Atmospheric Bulk Storage Tank Area", with tanks in such area referred to as the "Atmospheric Bulk Storage Tanks"), located outside of the plant building;
- Mixing or blending tank area ("Blending Tank Area", with the tanks in such area referred to as the "Blending Tanks"), located outside of the plant building;
- Soap tank area ("Soap Tank Area");

- Filling area (“Filling Area”), located inside of the plant building;
- Bottling area (“Bottling Area”), located inside of the plant building;
- Palletizing area (“Palletizing Area”);
- Finished product storage area (“Finished Product Storage Area”), located inside of the plant building; and
- Shipping area (“Shipping Area”).

Atmospheric Bulk Storage Tank Area

The Atmospheric Bulk Storage Tanks were in a diked containment area and located 310 feet or more from Respondent’s plant building. There were three Atmospheric Bulk Storage Tanks. At the time of the Inspection, one such tank (capacity 6,000 gallons) contained propylene glycol (a non-flammable liquid); another such tank (capacity 6,000 gallons) was empty; and the third such tank (capacity 15,000 gallons) contained methanol at atmospheric pressure without the benefit of chilling or refrigeration. At one point during the Inspection, when the Winter Products were being produced and transferred, the quantity of flammable liquid in the Atmospheric Bulk Storage Tanks was in excess of 10,000 pounds of methanol.

When methanol was needed to manufacture Winter Products it was transferred from the Atmospheric Bulk Storage Tanks to the Blending Tanks. The method used for transfer appears to have been by means of either petroleum methanol rated flexible hoses that could be disconnected, or hard piping systems (the “Piping System”).

Blending Tank Area

The Blending Tanks were located outside of Respondent’s plant building, but within 73 inches or more of the building’s outside wall and adjacent to the Soap Tank Area. There were four Blending Tanks, numbered #1, #2, #3 and #4. All Blending Tanks were polyethylene tanks on metal stands. Although Blending Tanks #2, #3 and #4 each were 5,200 gallon tanks and Blending Tank #1 was a 3,000 gallon tank, during the manufacturing of Winter Products the maximum potential capacity of Blending Tanks #2, #3 and #4 was approximately 4,900 gallons of finished Winter Product. At one point during the Inspection the Blending Tanks contained over 10,000 pounds of methanol.

The Blending Tanks were the tanks in which the Winter Products were actually manufactured by mixing methanol and water using air pressure from an air-line (with a pressure of 80 psi) that was located near the bottom of the tank. The combination of air and water with methanol created the final Winter Product. No electricity or chemical reactions were used to mix any product in the Blending Tanks and the Blending Tanks were not chilled or refrigerated.

Filling Area

The Filling Area, located inside the plant building, utilized an automated line for bottle loading and bottle filling. There was a float inside of the filler bowl which operated with a pump that pushed the Winter Product through the lines and into the filler bowl. The filler bowl had 18 filling valves which were used to dispense the Winter Product into one gallon plastic containers. A dike was located underneath the filler bowl and filling valves (the "Filler Dike") to capture any excess liquid from the filling bowl which did not go into the plastic containers.

Capping Area

The Capping Area was adjacent to the Filling Area and located inside the plant building facility. In the Capping Area every plastic container was checked to ensure that it was properly capped. Top foil sealing was completed using an ultrasonic sealing machine.

Finished Product Storage Area

The Finished Product Storage Area was located inside of the plant building and contained the Winter Products bottled in one gallon plastic containers awaiting shipment. At one point during the Inspection the Finished Product Storage Area contained in excess of 10,000 pounds of methanol.

General Procedure For Manufacturing Winter Products

In general, the procedure for manufacturing a Winter Product ("Respondent's Operation") was as follows:

- * water was filled into a Blending Tank; it took approximately 30 minutes to transfer the required quantity of water;
- * methanol from the Atmospheric Bulk Storage Tanks was piped into the Blending Tank via the Piping System; it took approximately 15 minutes to transfer the required quantity of methanol;
- * the mixing of methanol and water was completed by using an air hose for blending the water and methanol to produce the final Winter Product; the time required for such mixing was not indicated by either the Complainant or Respondent;
- * the final Winter Product was moved to the filler bowl at an approximate rate of 76 gallons per minute; it took approximately 64 minutes to empty the contents of a Blending Tank into the filler bowl; the final Winter Product was not chilled or refrigerated during its movement from the Blending Tank into the filler bowl; the movement of the Winter Product from the Blending Tank to the filler bowl was via a two-inch PCV piping system;
- * as the final Winter Product in a Blending Tank was being emptied into the filling bowl, another Blending Tank began to be filled with water to start the production of a new batch of Winter Product in that Blending Tank;

* the Winter Product in the filling bowl was dispensed into one gallon plastic containers; any excess Winter Product which was dispensed that did not go into a plastic container went into the Filler Dike and was transferred back to the Blending Tanks; (the Winter Product after being dispensed into one gallon containers is sometimes referred to as the “Finished Product”);

* after the one gallon plastic containers were filled they were sent to an adjacent area for capping;

* after completion of the capping process, the plastic containers were labeled and packed into cases; each case, when full, held 6 one-gallon plastic containers of the Winter Product;

* cases were stacked on pallets;

* each pallet, when full, held 35 cases;

* pallets were wrapped by a palletizer; and held in the Finished Product Storage Area awaiting shipment;

* pallets were loaded onto a tractor trailer to go to distribution facilities for customers to purchase.

Citation and Notification of Penalty

29 CFR 1910.119 , captioned “Process safety management of highly hazardous chemicals” is generally referred to as the “PSM Standard”. The stated Purpose of the PSM Standard is to set forth “...requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals. These releases may result in toxic, fire or explosion hazards.”

As a result of the Inspection, Complainant issued Respondent a Citation and Notification of Penalty carrying the following items (“PSM Items”) related to the PSM Standard:

CITATION NUMBER ONE (SERIOUS)

<u>Item No.</u>	<u>Standard</u>	<u>Brief Description of Violation</u>
3	29 CFR 1910.119(c)(1)	The employer did not develop a written plan of action regarding the implementation of the employee participation required by 29 CFR 1010.119
4	29 CFR 1910.119(d)(2)(i)	Process safety information pertaining to the technology of the process did not include the elements specified in 29 CFR 1910.119(d)(2)(i)(A) through (E)
5	29 CFR 1910.119(d)(3)(i)	Process safety information pertaining to the equipment in the process did not include the elements specified in 29 CFR 1910.119(d)(3)(i)(A) through (H)

6	29 CFR 1910.119(d)(3)(ii)	The employer did not document that the equipment in the process complied with recognized and generally accepted good engineering practices.
7	29 CFR 1910.119(e)(1)	The employer did not perform an initial process hazard analysis (hazard evaluation) on processes covered by 29 CFR 1910.119
8	29 CFR 1910.119(f)(1)	The employer did not develop and implement written operating procedures that provided clear instructions for safety conducting activities in each covered process consistent with the process safety information and which addressed the elements listed in 29 CFR 1910.119(f)(1)(i) through (f)(1)(iv)
9	29CFR 910.119(g)(1)(i)14	The employer did not initially train each employee, presently involved in operating process, in an overview of the process and in the operating procedures as specified in 29 CFR 1910.119(f)
10a	29 CFR 1910.119(h)(2)(ii)	The employer did not inform contract employers of the known potential fire, explosion, or toxic release hazards related to the contractor's work and the process
10b	29 CFR 1910.119(h)(2)(iii)	The employer did not explain to contract employers the applicable provisions of the emergency action plan required by 29 CFR 1910.119(n)
11	29 CFR 1910.119(i)(1)	The employer did not perform a pre-startup safety review for modified facilities when the modification was significant enough to require a change in the process safety information
12	29 CFR 1910.119(j)(2)	The employer did not establish and implement written procedures to maintain the on-going mechanical integrity of process equipment
13	29 CFR 1910.119(j)(3)	The employer did not train each employee involved in maintaining the on-going mechanical integrity of process equipment in an overview of that process and its hazards and in the procedures applicable to the employee's job tasks to assure that the employee can perform the job tasks in a safe manner
14	29 CFR 1910.119(j)(4)(i)	Inspections and tests were not performed on process equipment to maintain the mechanical integrity
15	29 CFR 1910.119(k)(2)	Hot work permits did not identify the object on which hot work was to be performed
16	29 CFR 1910.119(l)(1)	The employer did not establish and implement written procedures to manage changes to process chemicals, technology, equipment, and procedures; and, changes to facilities that affect a covered process
17	29 CFR 1910.119(n)	The employer did not establish and implement an emergency action plan for the entire plant in accordance with the provisions of 29 CFR 1010.38(a)

Each alleged PSM Item had a stated Abatement Date of August, 17, 2012 and each Item Number had a Penalty of \$2,100.00, with Item Number 10a and 10b being grouped for penalty purposes for a single penalty of \$2,100. The total penalty asserted for the PSM Items was \$31,500.00.

For each alleged PSM Item Complainant stated, among other things, the following:

“The facility was covered under the PSM standard as a result of the following amounts of flammable materials present in process equipment during the production of flammable products, such as windshield washer antifreeze (-30, -20), de-icer windshield washer fluid (-25), and winter de-icer bug remover windshield washer fluid (-25): 14,645 pounds of flammable chemicals in the Blending Tanks, 10,799

pounds of flammable chemicals in the Re-Work Totes, a maximum of 68,399 pounds of flammable finished product, and 79,200 pounds of flammable raw materials in the Bulk Storage Tanks.”

Issue 1: Whether the PSM Standard applies to Southwin’s operation and, if so, whether the exemption set forth in 29 CFR 1910.119 (a)(1)(ii)(B) also applies to exempt Southwin’s facility or controverted operations.

Ruling: Based on the Position Documents, the PSM Standard does apply to Southwin’s operation; however, the Atmospheric Bulk Storage Tanks would be exempt under the PSM Exemption in accordance with the Miles Memorandum; additional evidence is required in order to determine whether other components of the process would also be exempt.

Discussion:

The Complainant cited the PSM Items based on Respondent’s manufacturing operation containing a ‘process’ covered by the PSM Standard.

The ‘application’ section of the PSM Standard, 29 CFR 1910.119(a)(1), states in relevant part that the PSM Standard applies to “A process which involves ... a flammable liquid with a flashpoint below 100° F (37.8° C) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more” As set forth in 29 CFR 1910.119(b) a ‘process’ is “any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities.” 29 CFR 1910.119(b) defines a ‘highly hazardous chemical’ as “a substance possessing toxic, reactive, flammable, or explosive properties and specified by paragraph (a)(1) of this section.” According a flammable liquid is a highly hazardous chemical.

Complainant and Respondent each stipulated that (i) the definition of a ‘flammable liquid’ is set forth in 29 CFR 1910.106(a)(19) as “any liquid having a flashpoint at or below 199.4° F (93° C)” ; (ii) the flashpoint of pure methanol is approximately 52° F and the flashpoints of the Winter Products range from 90° F to 93° F; (iii) pure methanol and the Winter Products are flammable liquids ; (iv) at one point during the Inspection (a) the quantity of flammable liquid in the Atmospheric Bulk Storage Tanks was in excess of 10,000 pounds; (b) the quantity of flammable liquid in the Blending Tanks was in excess of 10,000 pounds; and (c) the quantity of flammable liquid in Finished Product was in excess of 10,000 pounds; and (v) certain areas of the Reidsville Facility (the Atmospheric Bulk Storage Tanks and the Blending Tanks; the Blending Tanks and the filler bowl) were connected using a combination of petroleum methanol rated flexible hoses, that could be disconnected, and hard piping systems. In summary, Respondent was using a flammable liquid to manufacture other flammable liquids, with such activity taking place entirely on its Reidsville Facility with certain areas of the Reidsville Facility at times being interconnected with flexible hoses or hard piping systems, and the quantity of flammable liquid exceeded 10,000 pounds.

Based on the Stipulations and the language of the PSM Standard, it was reasonable for Complainant to conclude that Respondent's activity constituted a process as described in the PSM Standard for which a citation can be issued.

The gravamen of applicability of the PSM Standard is whether or not there is a process.¹ If a process has been determined to exist, the applicability of the PSM Exemption is evaluated. Exemptions are narrowly construed² and the party claiming the benefit of an exemption bears the burden of proof on the issue.³

The 'application' section of the PSM Standard sets forth certain express exemptions to the applicability of the PSM Standard. 29 CFR 1910.119(a) provides in relevant part the following:

“(a) Application.

(1) This section applies to the following: ...

(ii) A process which involves ... a flammable liquid with a flashpoint below 100° F (37.8° C) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more except for...

(B) Flammable liquids with a flashpoint below 100° F (37.8° C) stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.”

The PSM Standard does not define 'stored' or 'transferred', but does define 'atmospheric tank' in 29 CFR 1910.119(b) to mean “a storage tank which has been designed to operate at pressures from atmospheric through 0.5 p.s.i.g. (pounds per square inch gauge, 3.45 Kpa).” The PSM Standard also does not define 'storage' or 'storage tank'.

¹ Respondent asserts that a determination of whether a 'process' was involved is irrelevant since the determinative point is whether Respondent's Operation at Respondent's Facility comes within the scope of the PSM Exemption. Respondent states that the key issue is whether the flammable liquids were always either being "stored in atmospheric tanks" or "transferred", and while being so stored or transferred, were kept below their normal boiling point without the benefit of chilling or refrigeration.

² See Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

³ ConAgra Flour Milling, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992; Secretary of Labor v. Brooks Well Servicing, Inc., 20 O.S.H. Cas. (BNA) 1286, 2002 O.S.H. Dec. (CCH) P 32675, 2003 WL 22020493 (O.S.H.R.C. 2003); Secretary of Labor v. Kaspar Wire Works, Inc., 18 O.S.H. Cas. (BNA) 2178, 2000 O.S.H. Dec (CCH) P 32134, 2000 WL 1182904 (O.S.H.R.C. 2000); See, e.g. Secretary of Labor v. Dayton Tire, 23 O.S.H. cas. (BNA)1247, 2010 O.S. H. DEC. (CCH) P 33098 2010 WL 3701876 (O.S.H.R.C. 2010); Secretary of Labor v. Durant Elevator, 8 O.S.H. Cas. (BNA) 2187, 1980 O.S.H. Dec. (CCH) P 24873, 1980 WL 10678 (O.S.H.R.C. 1980).

The provision of 29 CFR 1910.119(a)(1)(ii)(B) is herein sometimes referred to as the “PSM Exemption”.

Respondent contends that the PSM Standard does not apply because Complainant cannot show that more than 10,000 pounds of flammable liquid were present in any one location of the Respondent’s facility at any time in conjunction with either a process or activity that were not expressly excluded from coverage of the PSM Standard by the PSM Exemption. This contention appears to be based on Respondent’s assertion that the flammable liquids were always either being “stored in atmospheric tanks” or “transferred”, and while being so stored or transferred, were kept below their normal boiling point without the benefit of chilling or refrigeration. If Respondent carries its burden of proof with respect to this assertion with respect to each and every component of the alleged process then Respondent’s entire ‘process’ may fall squarely within the PSM Exemption and the PSM Citation would have to be dismissed.

Based on the Position Documents, Respondent has not carried its burden of proof. Although the parties have stipulated certain facts necessary for Respondent to prevail⁴ there were no Stipulations (i) pertaining to the boiling points of methanol or the Winter Products at the Reidsville Facility; (ii) that the Blending Tanks were ‘atmospheric tanks’; (iii) of the meaning of ‘stored’ or ‘storage’ or ‘storage tank’; (iv) that the Blending Tanks were used for storage; (v) pertaining to the timing or duration of the air agitation blending occurring in the Blending Tanks; (vi) of the meaning of ‘transferred’ or ‘on site movement’; (vii) that nature of the equipment in the Filling Area and the use of such equipment resulted in the flammables either being ‘stored in atmospheric tanks’ or being ‘transferred’; and (viii) that the one gallon plastic containers fall within the definition of an ‘atmospheric tank’. Although not an inclusive list of required additional evidence, Respondent would need to establish these facts in order to carry its burden of proof.

Effect of Meer Decision

The effect of *Meer*⁵ on the PSM Exemption was addressed by both Complainant and Respondent in the Position Documents. The *Meer* case was decided by a federal Administrative Law Judge and was not appealed. As a result of the decision in *Meer* John B. Miles, Jr., Director, Directorate of Compliance Programs, issued a Memorandum for Regional Administrators (the “Miles Memorandum”). The Miles Memorandum stated in part as follows:

“In a recent decision, the judge ruled that coverage under OSHA’s Process Safety Management Standard (1910.119) does not extend to stored flammables in

⁴ The parties stipulated (i) that there was no chilling or refrigeration involved in Respondent’s Operation which Complainant determined to be a ‘process’; (ii) that the Atmospheric Bulk Storage Tanks were ‘atmospheric tanks’; and (iii) that the Atmospheric Bulk Storage Tanks were used for storage of methanol.

⁵ Secretary of Labor v. Meer Corporation, OSHRC Docket No. 95-0341, 1997 OSAHRC Lexis 46 (Mar. 27, 1997).

“atmospheric tanks,” even if they were connected to a “process” within the definition of the standard. This is contrary to consistent OSHA interpretations of the standard. However, the decision will not be appealed because it is based on problems in the text of the standard itself, which support the judge’s decision. We have asked the Directorate of Safety Standards Program to consider developing amendments to the standard which would clearly state our intention to cover flammables stored in atmospheric tanks when they are connected to a covered process, or when they are located such that there is a reasonable probability that they could be involved in the release of a covered highly hazardous chemical.

Until the standard is revised, however, OSHA will abide by the *Meer* decision, and will not cite 1910.119 under circumstances when coverage of the process would be based partly or solely on the quantity of flammable liquid in connected atmospheric storage tanks, that would otherwise qualify for the 1910.119(a)(1)(ii)(B) exemption. Citations under 1910.119 will continue to be issued when the quantity of flammables in the process, not counting atmospheric storage, exceeds 10,000 pounds, or where the quantities in storage do not fall within the exemption for other reasons (i.e. storage not atmospheric, storage relies on refrigeration, quantities not actually in storage).”

The Miles Memorandum also expressly stated “This memorandum should be filed with CPL 2-2.45, Process Safety Management.”

OSHA Instruction CPL 2-2.45 pertains to the Subject: 29 CFR 1910.119, Process Safety Management of Highly Hazardous Chemicals – Compliance Guidelines and Enforcement Procedure. CPL 2-2.45 expressly states “This instrument applies OSHA-wide.” It also expressly states “This instrument describes a Federal program change which affects State programs.” North Carolina is a State program state.⁶

Charles N. Jeffress, Deputy Commissioner, North Carolina Department of Labor, Division of Occupational Safety and Health, signed Field Information System Part IV, Subject “Process Safety Management of Highly Hazardous Chemicals” stating “ Compliance Directive 2-2.45A CH-1 has been adopted verbatim for use in North Carolina.” After issuance of the Miles Memorandum, by interoffice memorandum dated May 28, 1997 the Miles Memorandum was incorporated into North Carolina’s program with the directive “The North Carolina Department of Labor, Occupational Safety and Health Division, will abide by this memorandum [the Miles Memorandum] until such time that Federal OSHA revises the Process Safety Management standard.” Such revisions to the PSM Standard have not yet been made.⁷ The

⁶ As a condition of the Federal OSHA’s approval of the North Carolina State Plan North Carolina is required to adopt and enforce standards and enforcement policies that are either identical to or at least as effective as comparable federal standards. North Carolina adopted a state PSM standard identical to that of the Federal OSHA.

⁷ See Process Safety Management and Prevention of Major Chemical Accidents, 78 Red. Reg. 73756 (Dec 9, 2013). One of the rulemaking topics is “Clarifying the PSM Exemption for Atmospheric Storage Tanks”. Stating that as a

Miles Memorandum makes it clear that the language of the PSM Standard is to be revised to “clearly state our intention to cover flammables stored in atmospheric tanks when they are connected to a covered process, or when they are located such that there is a reasonable probability that they could be involved in the release of a covered highly hazardous chemical.”

Based on the Miles Memorandum there are two areas of coverage which are considered unclear: the first is flammables stored in atmospheric tanks connected to a process; the second is flammables stored in atmospheric tanks which are located such that there is a reasonable probability that they could be involved in the release of a covered highly hazardous chemical.

Because of the ‘problem in the text’ of the PSM Standard and the *Meer* decision, until amendments are made to the PSM Standard, stored flammables in atmospheric tanks are not to be used as the basis for a citation, so long as the other criteria with respect to such liquid/tank are satisfied (i.e. flashpoint below 100 °F (37.8°C); atmospheric tank; kept below normal boiling point without benefit of chilling or refrigeration).

Accordingly, to the extent that any portion of the PSM Citation is based on flammables stored in atmospheric tanks ‘connected to a process’ or ‘located such that there is a reasonable probability that they could be involved in the release of a covered highly hazardous chemical’ the PSM Citation should be evaluated to determine if an amendment is warranted.⁸

Issue 2: Whether the PSM Standard is unconstitutionally vague, either on its face or as applied.

Ruling: The constitutional issue need not be ruled upon since Respondent, under the application of the Miles Memorandum, is protected from the language in the PSM Standard which Respondent argued created the unconstitutional vagueness.

Discussion:

Respondent asserts that enforcement of the PSM Standard against Respondent would violate Respondent’s due process rights because the PSM Standard is unconstitutionally vague as applied to the use, storage and transfer of flammable liquids. Respondent further asserts that the ambiguous and uncertain nature of the exemption in the PSM Exemption vis-a-vis the conflicting

result of the *Meer* decision “employers can exclude the amount of flammable liquid contained in an atmospheric storage tank, or in transfer to or from storage, from the quantity contained in the process when determining whether a process meets the 10,000-pound threshold quantity. The *Meer* decision was contrary to OSHA’s earlier interpretation of paragraph (a)(1)(ii)(B), which was that the standard covered all stored flammables, when connected to, or in close proximity to, a process. OSHA believes that revising paragraph (a)(1)(ii)(B) to include flammable liquids in atmospheric storage tanks within or connected to a PSM covered processes would improve the safety of workers by remedying the issue in PSM enforcement that has existed since the *Meer* decision. In the questions in this RFI, the Agency requests comment on revising paragraph (a)(1)(ii)(B) to clarify that the PSM standard covers all stored flammables when connected to, or in close proximity to, a process.”

⁸ To the extent the PSM Standard is not applicable to an employer based on the *Meer* decision and the Miles Memorandum citations may be issued in North Carolina under the General Duty Clause if circumstances warrant.

definition of 'process' used in 29 CFR 1910.119(a)(1)(ii) creates an unclear regulation from which Respondent reasonably believed it was exempt.

Respondent contends that its case is similar to the *Meer* case. In *Meer* the Administrative Law Judge stated "As to the facts in this case, it is believed that the exemption language and the process definition as it applies to the exemption are so vague and unclear as to be insufficient to warn *Meer* that it was required to comply with the PSM standard."

Although the *Meer* decision was not appealed, the Miles Memorandum was issued. The Miles Memorandum stated in relevant part that "...OSHA will abide by the *Meer* decision, and will not cite 1910.119 under circumstances when coverage of the process would be based partly or solely on the quantity of flammable liquid in connected atmospheric storage tanks, that would otherwise qualify for the 1910.119(a)(1)(ii)(B) exemption..." The Miles Memorandum controls the citing of alleged violations of the PSM Standard in North Carolina. Compliance with the Miles Memorandum effectively removes the issue of whether "the exemption language and the process definition as it applies to the exemption are so vague and unclear as to be insufficient to warn" an employer that the employer must comply with the PSM Standard.

Since Respondent is protected from the language in the PSM Standard which Respondent argues is unconstitutional, it is not incumbent on the Undersigned to make an independent holding concerning the constitutionality of the portions of the PSM Standard raised by Respondent.

Issue 3: Whether the NCDOL's Field Operation Manual mandates that NCDOL combine or group all PSM items for penalty purposes.

Ruling: There is no requirement that all PSM items be combined or grouped for penalty purposes.

Discussion:

OSHA Instruction CPL 2-2.45 pertains to the Subject: 29 CFR 1910.119, Process Safety Management of Highly Hazardous Chemicals – Compliance Guidelines and Enforcement Procedure. The stated purpose is to establish "uniform policies, procedures, standard clarifications, and compliance guidance for enforcement" of the PSM Standard. It applies OSHA-wide, and is binding on State programs. North Carolina is a state program subject to compliance with OSHA Instruction CPL 2-2.45.

Part N of the OSHA Instruction CPL 2-2.45 pertains to citations of the PSM Standard. "Citations for violation of the PSM standard shall be issued in accordance with the FOM, Chapters IV and V..." with certain additional directions. Section 2 of Part N contains additional directions; it provides that Appendix A captioned "PSM Audit Guidelines" sets forth a series of

questions “relating to each of the pertinent provisions” of the PSM Standard. It expressly provides the following:

- “a. The questions are designed to elicit a determination of “Yes” or “No” by the CSHO as to whether compliance with the provision has been met.
- b. A determination of “No” for any provision indicates noncompliance; thus, any “No” shall normally result in a citation for a violation of that provision.”

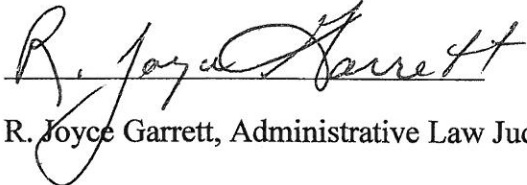
The 29 CRF 1910.119 provisions cited in the PSM Citation appear to all be subject to separate questions in Appendix A. Accordingly, if the compliance officer found that there was a violation of such provision per OSHA Instruction CPL 2-2.45 a separate citation would normally be issued for each violation.

SUMMARY AND ORDER:

The issues presented by the Complainant and Respondent have been addressed to the extent feasible based on the undisputed facts set forth in the Position Documents. In the Stipulations the parties anticipated that upon the rendering of this Opinion the parties may be able to reach a settlement, with both parties reserving the right “to appeal, at the Review Commission and then the General Court of Justice levels, the determination reached as the applicability or inapplicability of the PSM Standard to Southwin’s Reidsville facility and the constitutionality of the Standard.”

As stated in this Opinion there are not sufficient stipulations of fact to reach a conclusive decision on all of the issues presented. Accordingly, it is hereby **Ordered** that in the event the parties have not reach a final settlement (with waiver of rights to appeal) of this case on or before March 6, 2014, then an evidentiary hearing will be held as already scheduled on **March 11 and 12, 2014** at which time each party may present evidence as to disputed facts and objections with respect to the rulings in this Order.

This the 18th day of February, 2014.



R. Joyce Garrett, Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER, upon:

JOHN W ORMAND III
BROOKS PIERCE McLENDON HUMPHREY & LEONARD LLP
PO BOX 1800
RALEIGH NC 27602

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

LARISSA WILLIAMSON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 21st DAY OF February 2014.

OSCAR A. KELLER, JR.
CHAIRMAN


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