



VIA ELECTRONIC FILING

May 5, 2016

Mark J. Langer, Clerk
United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re. 28(j) Letter – Agricultural Retailers Association, et al. v. United States Department of Labor, et al., Nos. 15-1326 and 15-1340

Dear Mr. Langer:

Respondents write to advise the Court that earlier today OSHA initiated Small Business Regulatory Enforcement Fairness Act proceedings, the first step in a comprehensive rulemaking to update its 20-year-old Process Safety Management (PSM) Standard (see attached representative letter to Mr. Auger). As part of this rulemaking, OSHA is considering whether to codify its current interpretation of the term “retail,” *i.e.*, the interpretation contained in the July 22, 2015 memorandum that is the subject of this litigation, in the text of the PSM Standard.

For the reasons explained in Respondents’ Brief, the interpretation of “retail” adopted in the challenged memorandum is an interpretive rule (not an OSHA standard), so it is not subject to pre-enforcement judicial review in this Court and need not be issued in accordance with the rulemaking requirements of the Administrative Procedure Act or the OSH Act. Nothing, however, precludes OSHA from codifying its interpretation through rulemaking, *cf.* 80 Fed. Reg. 25365, 25420 (May 4, 2015) (adopting interpretation of Confined Spaces Standard for General Industry in analogous provision of Confined Spaces in Construction Standard); 79 Fed. Reg. 20315, 20506-07 (April 11, 2014) (codifying longstanding enforcement policy in text of electrical standard), nor does the commencement of rulemaking moot the present proceedings.

OSHA is proposing to address the retail interpretation as part of the comprehensive PSM rulemaking for reasons unrelated to the legal validity of the current interpretive memorandum. This action is consistent with Congressional report language indicating a preference for rulemaking on this interpretation.¹ Also, by codifying its interpretation of “retail” in the standard, OSHA can ensure that it has the force and effect of law and cannot be challenged on reasonableness grounds in individual enforcement proceedings.

The memorandum at issue in this case will remain in effect (subject to an enforcement delay through September 30, 2016) while OSHA proceeds with the PSM rulemaking, which may take more than five years to complete. The memorandum serves the important function of advising the public of how OSHA will enforce the standard in the interim period before the Agency completes rulemaking.

Respectfully submitted,

/s/ Lauren Goodman

Lauren Goodman

Attorney, SOL/OSH

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cc: All Counsel of Record

¹ Available at <https://www.congress.gov/congressional-record/2015/12/17/house-section/article/H10161-1>.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2016, I caused the foregoing Rule 28(j) Letter to be electronically filed, and served on the following counsel of record, via the Court's CM/ECF system:

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/s/ Lauren Goodman
Lauren Goodman

U.S. Department of LaborOccupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

John Auger
Vice President, Engineering & Regulatory Compliance
Brook Warehousing Corporation
P.O. Box 928
Manville, NJ 08835

Dear John Auger:

Thank you for agreeing to participate as a small entity representative (SER), as part of the Small Business Advocacy Review (SBAR) Panel process, to review OSHA's regulatory plans to examine possible changes to OSHA's PSM standard. I am the Chair of this SBAR Panel, composed of government officials from OSHA, the Office of Advocacy within the U.S. Small Business Administration (SBA Office of Advocacy), and the Office of Management and Budget (OMB). We very much appreciate your willingness to take the time to help us in this important work.

This SBAR Panel is being formed in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Congress enacted SBREFA to ensure that small businesses potentially affected by an OSHA standard have the opportunity to provide input on OSHA's proposed rules before they are published in the Federal Register for public comment. As a SER, we want you to provide comments and recommendations on the potential revisions to the PSM Standard that OSHA is considering, including comments on the potential impacts of the elements of this conceptual framework on your business.

Attached are several documents for your review. There is the SER Issues Document, which provides an overview of the issues on which the Panel is particularly interested in receiving your input. However, the Panel welcomes comment on any aspect of this potential rulemaking. Then there is the longer and more in depth SER Background document which further explains the possible changes as well as provides cost information and regulatory options/alternatives for consideration. Finally there is a brief PowerPoint document with a slide for each issue as a convenient summary. A complete list of enclosed materials is provided at the end of this letter; the materials have also been placed in the public docket of this rulemaking (Docket No. OSHA-2013-0020, available at <http://www.regulations.gov/#!docketDetail;D=OSHA-2013-0020>), the Federal eRulemaking portal. You are free to share these materials with other individuals and organizations, or you may direct them to the Federal eRulemaking portal to view and download the materials.

About a month after this letter is mailed, each SER will have the opportunity to provide comments to the SBAR Panel during a teleconference call. The SBAR Panel will schedule several teleconference calls. Each teleconference call will be open to the public, but only the SERs and the members of the SBAR Panel will be permitted to participate in

the discussion. We will notify you shortly of the exact date and time of your teleconference. (Alternatively, if you prefer, you may attend the teleconference in person in Washington, DC.) Following the teleconference, you will have an opportunity to provide written comments if you wish.

The SBAR Panel will prepare a report, based on your and the other SERs' comments, to present to David Michaels, the Assistant Secretary of Labor for Occupational Safety and Health. The report, including your written comments, will then become part of the public record of this rulemaking.

In order to include the substance of your written comments in the SBAR Panel's report, we request that you provide them within two weeks after the teleconference call (or earlier, if possible). This deadline is necessary so that the Panel can complete its report within the time limits specified by SBREFA. Your written comments may address any of the issues or concerns you have with the conceptual framework or any of the materials provided. Your written comments can be sent by e-mail to LaJuane Paige at Paige.LaJuane@dol.gov or by fax to (202) 693-1678. Ms. Paige is organizing much of the work of the SBAR Panel, including the teleconference calls, so please direct any administrative questions to her at (202) 693-1778. She can also assure that any technical questions you may have are directed to the correct person.

Please feel free to telephone or e-mail us before the teleconference calls with any questions regarding this process or the enclosed materials. You may also contact Bruce Lundegren from SBA's Office of Advocacy, whose office represents the views of small business in the SBREFA process. Mr. Lundegren's telephone number is (202) 205-6144 and his e-mail address is Burce.Lundegren@sba.gov. At OSHA, you may contact Ms. Paige, at the above phone number or email address, or me at (202) 693-1952 (email address, Burt.Robert@dol.gov).

Thank you again for agreeing to participate in this important review. We appreciate your efforts and look forward to working with you.

Sincerely yours,



Robert Burt
Chair, Small Business Advocacy Review Panel
Occupational Safety and Health Administration

cc: Bruce Lundegren, SBA Office of Advocacy
Cortney Higgins, OMB

Enclosures:

Tab 1 List of SERs and contact numbers for all, including OSHA, SBA, and OMB

Tab 2 SER Issues Document

Tab 3 SER Background Document

Tab 4 PSM SBREFA Powerpoint Presentation