



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 08-1386

DELEK REFINING, LTD.,

Respondent.

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Charles F. James and Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Mark S. Dreux, Esq.; Carol Connor Cohen, Esq.; Valerie N. Webb, Esq.; Micah R. Smith, Esq.; Arent Fox, LLP, Washington, DC
For the Respondent

Donald D. Evans, Deputy General Counsel, American Chemistry Council, Washington, DC; Harry M. Ng, Vice President and General Counsel, American Petroleum Institute, Washington, DC; Gregory M. Scott, Executive Vice President and General Counsel, National Petrochemical and Refiners Association, Washington, DC
For the Amici Curiae

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration inspected an oil refinery in Tyler, Texas, owned and operated by Delek Refining, Ltd. At issue on review are six serious citation items issued as a result of the inspection, all of which were affirmed by Administrative Law Judge Dennis L. Phillips, and for which he assessed a total penalty of \$30,600. Four of these items allege violations of various provisions of OSHA's process safety management ("PSM") standard, 29 C.F.R. § 1910.119, one item alleges a violation of the machine guarding standard at

29 C.F.R. § 1910.219(c)(2)(i), and one item alleges a violation of the hazard communication standard at 29 C.F.R. § 1910.1200(f)(5)(i).¹

For the reasons set forth below, we vacate two citation items—the machine guarding item and one of the PSM items, and affirm four citation items—the three remaining PSM items and the hazard communication item, for which we assess a total penalty of \$21,150.

I. Serious Citation 1, Item 4: 29 C.F.R. § 1910.119(e)(5)—Process Hazard Analyses of Highly Hazardous Chemicals, and Item 12: 29 C.F.R. § 1910.119(o)(4)—Compliance Audits

The PSM standard, which applies to certain enumerated processes, is aimed at “preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals.” 29 C.F.R. § 1910.119 (“Purpose”). To that end, paragraph (e) of the standard requires an employer to have “a team with expertise in engineering and process operations” conduct “an initial process hazard analysis . . . on processes covered by this standard,” and then, “[a]t least every five (5) years after the completion of the initial process hazard analysis,” update and revalidate the analysis. 29 C.F.R. § 1910.119(e)(1), (4), (6). In response to the process hazard analysis (“PHA”), the employer must:

establish a system to promptly address the team’s findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.

29 C.F.R. § 1910.119(e)(5). Under Item 4, the Secretary alleges that Delek violated § 1910.119(e)(5) by failing to address the findings and recommendations from several PHAs conducted by the refinery’s prior owner.

Item 12 relates to paragraph (o) of the PSM standard, entitled “Compliance Audits,” which requires employers to “certify that they have evaluated compliance with the provisions of [the PSM standard] at least every three years,” and to “promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that

¹ At the time of the alleged violation, this provision was codified at § 1910.1200(f)(5)(i). The substance of the provision now appears at 29 C.F.R. § 1910.1200(f)(6), although the language has been amended. *See* Hazard Communication, 77 Fed. Reg. 17,574, 17,586, 17,785-86, 17,788 (Mar. 26, 2012) (final rule). We will refer to § 1910.1200(f)(5)(i) because that is the provision applicable here.

deficiencies have been corrected.” 29 C.F.R. § 1910.119(o)(1), (4). Under this Item, the Secretary alleges that Delek violated § 1910.119(o)(4) by failing to properly respond to findings from a PSM compliance audit conducted by the prior owner.

The judge affirmed both citation items, finding a total of sixteen unaddressed items from six PHAs, and ten unresolved items from the compliance audit.² On review, Delek makes two arguments challenging the judge’s decision. First, the company claims that the judge erred in rejecting its pre-hearing argument that both citation items are time-barred by the Occupational Safety and Health Act’s statute of limitations. OSH Act § 9(c), 29 U.S.C. § 658(c). Second, the company claims that the judge erred in concluding that it was obligated to address the findings and recommendations of the refinery’s prior owner, and the Secretary therefore failed to establish noncompliance with either of the cited provisions. Like the judge, we reject both of Delek’s arguments and affirm Items 4 and 12.³

A. Statute of Limitations

Section 9(c) of the OSH Act provides that “[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). Delek contends that Items 4 and 12 relate to PHAs and compliance audits conducted before the company’s acquisition of the refinery, and center on inadequate recordkeeping that preceded the citation’s issuance by several years. The judge rejected this argument, but Delek

² In affirming Item 4, the judge essentially amended the citation by “delet[ing]” factual allegations related to two of the PHAs upon which the Secretary originally relied. The Secretary raises no objection to the judge’s amendment.

³ With respect to these items, we note that Delek does not dispute that the PSM standard applies to the process equipment at its Tyler, Texas, facility. Delek does, however, argue that the Secretary failed to establish the company’s knowledge of the violative conditions. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (“[T]he Secretary must show . . . that . . . the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.”), *aff’d in pertinent part*, 681 F.2d 69 (1st Cir. 1982). We disagree. The record shows that Delek retained several of the prior owner’s supervisors when it assumed ownership of the refinery—their actual knowledge of the violative conditions at issue, therefore, became Delek’s knowledge. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999) (“[K]nowledge can be imputed to the cited employer through its supervisory employee.”). In any event, the record also supports the judge’s finding of constructive knowledge here, because “it was not reasonable for [the company] . . . to simply rely on [the prior owner’s] representation[s]” regarding the PHA and compliance audit items, and so Delek “did not exercise reasonable diligence” in this regard. *Delek Refining, Ltd.*, No. 08-1386, slip op. at 11, 42 (OSHRC May 9, 2011) (ALJ).

contends that *AKM, LLC v. OSHRC*, 675 F.3d 752 (D.C. Cir. 2012), issued after the judge's decision on this issue, supports vacating both items. We disagree.

In *AKM*, the D.C. Circuit ruled that employers cannot be cited for failing to record work-related injuries more than six months after the initial obligation to record the injuries attached. The *AKM* court was addressing two of OSHA's recordkeeping provisions: 29 C.F.R. § 1904.29(b)(2), which requires completion of "an OSHA 301 Incident Report form, or an equivalent form, for each recordable injury or illness entered on the OSHA 300 Log," and 29 C.F.R. § 1904.29(b)(3), which requires injuries and illnesses to be recorded "within seven (7) calendar days of receiving information that a recordable injury or illness has occurred." The citation at issue in *AKM* alleged violations of both provisions and was issued "at least six months after the last unrecorded injury occurred." *AKM*, 675 F.3d at 753. In explaining how § 9(c) applies to OSHA's recordkeeping regulations, the court noted that the statutory provision's use of the term "'occurrence' . . . clearly refers to a discrete antecedent event," and analyzed its effect as follows:

[E]mployers must make records of workplace injuries in whatever form the Secretary requires within the time period established by the Secretary—here, seven days after the injury. If they fail to do so, that is a violation. Pursuant to Section 658(c), OSHA may cite employers for violations within six months of the violation's occurrence. If an injury is reported on May 1, OSHA can cite an employer for the failure to create a record beginning on May 8, and a citation issued within the following six months, and only the following six months, would be valid.

Id. at 755-56. Simply put, under *AKM*, the statute of limitations period begins to run when the violation—the failure to record a recordable injury—inures. The court rejected the Secretary's contention that there was a "continuing violation"—that is, that the employer's continued failure to make the required record constituted a daily renewal of the violation that effectively tolled the statute of limitations period.

Delek contends that this holding applies to the violations alleged in Items 4 and 12, but the company overlooks the distinction the *AKM* court drew between "discrete record-making violation[s]," *id.* at 759, which qualify as "occurrence[s]" that trigger the statute of limitations, and instances where "a company continues to subject its employees to unsafe . . . situations," which "toll the statute of limitations on a continuing violations theory since the dangers created

by the violations persist.”⁴ *Id.* at 758. Here, neither Item 4 nor Item 12 alleges a “discrete record-making violation” that is a breach of a duty that occurred only once, at a specific time. Thus, we conclude that both of the alleged violations fall into the second category identified by the court—that is, they can be considered under a continuing violations theory.

The PSM provisions cited here do contain some documentation requirements. *See* 29 C.F.R. § 1910.119(e)(5) (“The employer shall . . . assure . . . that the resolution is documented[;] . . . document what actions are to be taken; [and] . . . develop a written schedule of when these actions are to be completed”); 29 C.F.R. § 1910.119(o)(4) (“The employer shall promptly . . . document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.”). But these provisions require action beyond mere recordkeeping—the employer must take corrective actions as well. *See* 29 C.F.R. § 1910.119(e)(5) (“The employer shall establish a system to promptly address the team’s findings and recommendations,” and “assure that the recommendations are resolved in a timely manner.”); 29 C.F.R. § 1910.119(o)(4) (“The employer shall promptly determine . . . an appropriate response to each of the findings of the compliance audit.”). Accordingly, the violations alleged here were not one-time failures to perform a task at a specified time.⁵ Rather,

⁴ Like *Delek*, our dissenting colleague overlooks this explicit distinction, as she reads the *AKM* decision as “not limited to the recordkeeping context.” This is curious, considering that the *AKM* court “simply conclude[d] that the statutory language in Section 657(c) which deals with recordkeeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure.” 675 F.3d at 758. Perhaps this is why our colleague asserts in the alternative that “[w]hile the [*AKM*] court . . . speculated that there might be cases in which the Secretary might prevail on a continuing violations theory, outside of the context of recordkeeping violations, the court’s examples were limited” and distinguishable from the circumstances here. This suggestion is simply wrong. There is no difference between the *AKM* court’s examples and the circumstances here. Whether an employer continues to expose employees to identified, yet unaddressed, process hazards, “continues to subject . . . employees to unsafe machines,” or “continues to send . . . employees into dangerous situations without appropriate training,” the employer perpetuates a hazardous condition. *Id.* Indeed, five of the PHA items *Delek* did not address were marked “high priority,” one of which, as the judge found, exposed *Delek*’s employees to potential fire and explosion hazards.

⁵ The dissent asserts that the statute of limitations begins to run five years after completion of a PHA and three years after completion of a compliance audit (based on the PHA and compliance audit schedules in the standard), but nothing in the standard indicates that the obligation to conduct a new PHA or compliance audit erases the obligation to address previous findings and/or recommendations. Additionally, the dissent posits that the statute of limitations “may [begin] run[ning] much sooner based on the specific facts adduced by the parties,” because the Secretary

because the corrective actions required by the cited provisions directly address “preventing or minimizing the consequences of catastrophic [chemical] releases,” 29 C.F.R. § 1910.119 (“Purpose”), and because the failure to take those actions means the dangers described in the PHAs and compliance audits at issue persisted, each day that passed without the recommendations being addressed meant the violative conditions continued, and could be cited by OSHA. We therefore reject Delek’s argument that Items 4 and 12 are time-barred under § 9(c) of the OSH Act.

B. Noncompliance

As it did before the judge, Delek contends that the Secretary failed to establish the company’s noncompliance with the cited provisions because the refinery’s prior owner performed the PHAs and compliance audits at issue, so only the prior owner was responsible for addressing the resulting findings and recommendations. According to Delek, an employer purchasing a facility is not “required to investigate and satisfy obligations created by a prior employer, especially where, as here, the new employer was led to believe that no obligations remained outstanding.” The judge rejected this argument, concluding that Items 4 and 12 were based on Delek’s own conduct (or lack thereof), and the fact that responsibility for these items originated under previous ownership did not absolve Delek of its own OSH Act obligations. We agree.

The PSM standard expressly applies to “[a] *process* which involves a chemical at or above [certain] specified threshold quantities” and “[a] *process* which involves [certain] flammable gas[es] . . . or . . . flammable liquid[s].” 29 C.F.R. § 1910.119(a)(1)(i)-(ii) (emphasis added). The process at the refinery before Delek purchased it was the refining of crude oil into usable fuels, and that same process continued after the acquisition, as did the hazards and PSM

has contradicted his position by arguing in a later case that “[t]imely [under § 1910.119(e)(5)] means . . . at most one to two years depending on the scope and complexity of the issue . . . and the risk posed by the hazard.” *BP Prods. N. Am., Inc.*, No. 10-0637, 2013 WL 9850777, at *37 (OSHRC Aug. 12, 2013) (ALJ), *review pending*, No. 10-0637 (OSHRC Sept. 16, 2013). Contrary to the dissent’s claim, the Secretary in the instant case has not suggested that the duty to correct the identified problems did not arise until the completion of the PHA or compliance audit schedule—he has repeatedly noted that the problems must be corrected “promptly.” In any event, the issue is not when the duty to correct a problem identified in a PHA or compliance audit *first arises*, but whether that duty is *continuing*. The Secretary here, as he did in the case the dissent references, asserts that the citation is timely not because of when the duty first arose, but because the violation—along with employee exposure to identified hazards—persists.

compliance items identified in the subject PHAs and compliance audits. Of course, the cited provisions of the PSM standard require action by “[t]he employer,” but the standard’s focus remains the “process”—there is no language in the standard limiting its obligations to a particular employer, let alone the one that conducted the required PHAs and compliance audits. *Compare, e.g.,* 29 C.F.R. § 1910.146(c)(8) (“host employer” requirements); 29 C.F.R. § 1910.147(f)(2) (“on-site employer” and “outside employer” requirements); 29 C.F.R. § 1926.1402(c) (“controlling entity” requirements); 29 C.F.R. § 1926.1407(e) (“utility owner/operator” requirement); 29 C.F.R. § 1926.752(a) (“controlling contractor” requirements). In other words, under the PSM standard, any shortcomings involved in the “process” at the refinery that continued after the transfer of ownership were Delek’s responsibility to investigate and remedy.⁶

The PSM standard also sets a schedule for auditing and abating potential process hazards and PSM compliance issues, and there is nothing in the standard to suggest that this schedule is reset or altered by the sale of the facility in which the process takes place. The PSM standard requires PHAs and compliance audits to be completed on prescribed schedules—five and three years, respectively—and requires certain follow-up actions after completion. 29 C.F.R. § 1910.119(e)(5)-(6), (o)(1), (o)(4). The last of the PHAs and compliance audits at issue here were completed in the year of Delek’s acquisition of the refinery, so the next ones were due to be completed five years and three years, respectively, after the acquisition. But nothing in the standard indicates that this schedule was intended to terminate the obligation to follow up on already-completed PHA and compliance audit findings in the interim (or, as the judge found, the still-open items from the earlier PHAs and compliance audits). *See* 29 C.F.R. § 1910.119(e)(5), (o)(4).

Indeed, reaching a contrary conclusion here would lead to the absurd result of permitting deficiencies identified by a previous owner to go unaddressed for more than the entire PHA/compliance audit schedule’s time period—that is, in excess of five and three years, respectively. Such a result makes little sense in light of the PSM standard’s goal of “preventing . . . the . . . catastrophic releases of . . . chemicals;” neither the transfer of ownership nor the

⁶ This is not to say that Delek was bound by the findings and recommendations in the PHAs and compliance audits conducted by the prior owner—Delek could have conducted its own review and developed its own response plan. But it did not, so its failure to respond violated § 1910.119(e)(5) and (o)(4).

cycling of the PHA/audit schedule diminishes the *need* to correct a deficiency. 29 C.F.R. § 1910.119 (“Purpose”). In short, nothing in the PSM standard indicates that an employer’s purchase of a facility nullifies obligations stemming from prior findings and recommendations. Because the PSM standard applies to the process itself and sets a specific schedule for compliance, the standard’s obligations, including the compliance schedule, survive a transfer of the process’s ownership. Accordingly, we reject Delek’s challenge to the noncompliance element of the Secretary’s *prima facie* case and affirm both citation items.

In so ruling, we disagree with our dissenting colleague that these violations are grounded on successor liability. Our colleague views successor liability as the determinative issue with respect to Items 4 and 12 because she misapprehends the PSM standard. As discussed above, the standard does not limit the obligation to address PHA and compliance audit items to the employer that conducts the PHAs and compliance audits. Indeed, as the Secretary alleges, Delek *itself* violated the PSM standard by failing to address outstanding PHA and compliance audit items. Thus, the judge did not—as the dissent puts it—“simply presume[] that Delek is a successor,” nor is our decision a “summary affirmance of the judge’s presumption.” Rather, successor liability is patently irrelevant here and has absolutely no bearing on our holding.

II. Serious Citation 1, Item 8: 29 C.F.R. § 1910.119(j)(4)(i)—Inspection and Testing of Process Equipment

Paragraph (j) of the PSM standard—addressing “[m]echanical integrity”—provides that “[i]nspections and tests shall be performed on process equipment.” 29 C.F.R. § 1910.119(j)(4)(i). Under Item 8, the Secretary alleges that Delek violated this provision by failing to inspect and test its positive pressurization unit (“PPU”) in the control room for the refinery’s fluid catalytic cracking unit. The judge affirmed this item, concluding that: (1) the PPU is subject to the PSM standard; (2) Delek failed to inspect and test the PPU; (3) the company had knowledge of this failure; and (4) employee exposure was established. On review, Delek argues only that the judge erred in finding that § 1910.119(j)(4)(i) applies to the PPU. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (“[T]he Secretary must show . . . that . . . the cited standard applies.”). We disagree and therefore affirm Item 8.

Fluid catalytic cracking (“FCC”) involves converting crude oil into usable fuels, such as gasoline, by a process that could release hazardous vapors. The FCC unit’s control room, from which Delek employees manage this refining process, is pressurized by the PPU to keep any

such vapors from entering. As the judge noted, the vapors can be toxic to the employees and could pose an explosion hazard, given that the wiring in the control room is a potential ignition source. The PPU consists of an intake stack that draws in outside air, a fan that pulls the air into the control room, and heating and cooling elements that regulate the temperature inside the room. The PPU also has two sensors—one connected to an alarm that indicates whether the control room is indeed pressurized, and another that detects the presence of combustible gas and shuts down the intake stack to keep the gas from entering the room if vapor levels reach 50 percent.

Delek contends that § 1910.119(j)(4)(i) does not apply here because the PPU is not “process equipment.” The PSM standard defines “process” as:

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. 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.

29 C.F.R. § 1910.119(b). Not all equipment involved in any such activity, however, is subject to the inspection and testing requirements of the cited standard. Section 1910.119(j)(4)(i) only applies to certain types of equipment, such as “[c]ontrols (including monitoring devices and sensors, alarms, and interlocks)” and “[p]umps.” 29 C.F.R. § 1910.119(j)(1). Thus, to be subject to § 1910.119(j)(4)(i), a piece of equipment must first be “process equipment,” and then must qualify as one of the types of such equipment enumerated in § 1910.119(j)(1).

Delek contends that the PPU is not “process equipment” because it is not directly involved in converting crude oil to usable fuels.⁷ The standard’s focus, however, is not that narrow. Delek’s refining process includes operating the FCC unit as a whole, and this is done from the FCC unit’s control room, which is kept in safe working order by the PPU. Without the

⁷ In making this argument, Delek relies in part on the testimony of its two experts, who stated that, in their opinion, the PPU is not subject to the PSM standard. We decline to consider this testimony as it amounts to a legal opinion. See *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009) (noting that under Federal Rule of Evidence 704, “an expert may never render conclusions of law”); *Estate of Mixon v. United States*, 464 F.2d 394, 406 (5th Cir. 1972) (“Although this legal opinion by the examiners recognized as experts in their particular field[] are quite interesting, we do not find them the least bit controlling.”); *Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001, at *3 n.7, 2009-12 CCH OSHD ¶ 33,199, p. 55,760 n.7 (OSHRC Mar. 2, 2012) (finding judge properly excluded expert testimony consisting of legal opinion).

PPU providing positive pressure, hydrocarbon vapors could leak into the control room and—because of the wiring there—cause the type of catastrophic explosion that the PSM standard was intended to prevent. And short of such an explosion, the toxic vapors could harm the employees inside the control room, compromising the management of the refining process. We find, therefore, that the PPU is an integral part of the overall FCC unit “process.” After all, the PSM standard does not require that every part of a “process” come into contact with hazardous chemicals. 29 C.F.R. § 1910.119(b) (defining “process” as “any activity *involving* a highly hazardous chemical”) (emphasis added). Here, viewing the “activity” involving the FCC unit in its entirety, the PPU is part of a “process” covered by the PSM standard because it is an integral part of the “manufacturing, handling [and] on-site movement of [highly hazardous chemicals].”⁸ *Id.*

Delek next argues that, even if the PPU is part of the refining process, it is not one of the types of “process equipment” subject to § 1910.119(j)(4)(i), such as a control or a pump. We find, however, that the PPU is a “control” for two reasons. First, the PPU has sensors to monitor air pressurization and combustible gas levels, thus satisfying examples of a “control” in the standard’s text. *See* 29 C.F.R. § 1910.119(j)(1) (specifying that “[c]ontrols . . . *includ[e]* monitoring devices and sensors, alarms, and interlocks”) (emphasis added). Second, the PPU is an integral part of the FCC unit control room, which itself is a “mechanism used to regulate or guide the operation of a machine or an apparatus or system,” *Webster’s Third New Int’l Dictionary* 496-97 (1986), as the control room regulates the internal workings of the vessels that handle the chemicals involved in the refining process. The PPU’s regulation of the control room’s positive-pressure atmosphere makes the PPU integral to that “control”—and thus a

⁸ Delek’s overly-narrow view of the “process” at issue here is perhaps most clearly demonstrated by its argument that in order to qualify as “process equipment,” the PPU must by itself handle hydrocarbon vapors in the requisite quantity under the standard. The PSM standard indeed “applies to . . . [a] process which involves a . . . flammable gas . . . or a flammable liquid . . . in a quantity of 10,000 pounds (4535.9 kg) or more” 29 C.F.R. § 1910.119(a)(1)(ii). The standard, though, does not require that each piece of equipment involved in the process handle the requisite 10,000 pounds. The record shows that the FCC process as a whole contains about 397,000 pounds of flammable mixtures. The amount, then, that actually comes into contact with the PPU, or any other constituent part of the process, is immaterial to the applicability issue.

“control” itself—because, as discussed above, entry of hazardous hydrocarbon vapors into the room could prevent the control room from managing the refining process.⁹

Finally, Delek argues that deeming the PPU “process equipment” is inconsistent with prior statements from OSHA, placing particular reliance on an OSHA Interpretation Letter from Director of Enforcement Programs Richard E. Fairfax to Howard J. Feldman (Jan. 31, 2008). Delek points to language in the letter stating that “[t]he boundaries of the covered process are based on the equipment which contain [highly hazardous chemicals].” Delek maintains that this language supports a narrower view of the FCC “process” here. We disagree.¹⁰ The part of the letter in which this language appears is entitled “PSM Coverage of Utility Systems,” and it clearly indicates that machinery not containing chemicals, such as the PPU, can nonetheless be part of a “process”:

OSHA does not agree that utility systems are categorically outside the scope and application of the PSM standard. It is OSHA’s long-standing position that utility systems *are* part of the PSM-covered process when employers use them to control/prevent and mitigate catastrophic releases

* * *

[T]he proper safe functioning of all aspects of a process, whether they contain [highly hazardous chemicals] or not, are important for the prevention and mitigation of catastrophic releases of [highly hazardous chemicals], due to their direct involvement in the overall functioning of the process.

As a result, it is OSHA’s position that if an employer determines that a utility system or any aspect or part of a process which does not contain a [highly hazardous chemical] but can affect or cause a release . . . then, relevant elements of PSM could apply to these aspects. OSHA’s position is that any engineering

⁹ Nor do we find merit in Delek’s claim that if the PPU qualifies as a “control”—and as “process equipment” more generally—then “any air conditioner in any workplace in the country” would be covered by the PSM standard. The PPU was designed to protect the FCC unit’s control room and, therefore, it was designed to be part of the refining process. Delek’s own Mechanical Integrity Manual virtually concedes this point, stating that “[t]he frequency of inspection and testing of process piping and equipment shall be consistent with” several standards, and then including “[c]ontrol room pressurization” as one of the pieces of equipment to be regularly inspected. In this regard, the PSM standard does not apply to any piece of random equipment that happens to be present—it applies to *necessary* parts of the “process.”

¹⁰ Our dissenting colleague inexplicably accuses us of “rel[ying] primarily” on this letter as somehow “expand[ing] the term ‘process,’ ” when our treatment of this letter is obviously limited to rejecting Delek’s assertion of inconsistent interpretations of “process” on the part of the Secretary.

control, including utility systems, which meets the above criteria must be . . . inspected/tested/maintained per OSHA PSM requirements.

Id. Delek makes much of the letter’s “if an employer determines” language, and argues, in effect, that equipment is not part of a process unless an employer deems it as such. But there is no indication in the language of the PSM standard or its regulatory history that OSHA meant to give employers, at their sole discretion, the option of excluding equipment from the standard’s coverage. In this context, it is evident that the letter was just written in the vernacular.¹¹ Therefore, we conclude that the PPU qualifies as a “control” under § 1910.119(j)(1)(v), and that it was subject to the inspection and testing requirement of § 1910.119(j)(4)(i). Accordingly, we affirm Item 8.

III. Serious Citation 1, Item 9(b): 29 C.F.R. § 1910.119(i)(4)—Management of Change (MOC)

Paragraph (i) of the PSM standard addresses the management of changes to process chemicals, technology, equipment, and procedures. Subsection (i)(4) provides that, “[i]f a change covered by this paragraph results in a change in the process safety information required by paragraph (d) of this section, such information shall be updated accordingly.” Under Item 9(b), the Secretary alleges that Delek violated this provision by failing to “ensure that a[n] MOC [was] documented and on file when steam lances [were] applied to identified ‘hot spots’ on the exterior of processing equipment in the FCC Unit.” The judge affirmed this item, finding that Delek was required to have an MOC procedure on file regarding the company’s use of the steam lance, but failed to do so. On review, Delek argues that the judge erred in concluding that § 1910.119(i)(4) applies here, because use of the steam lance was not a “change” under the standard. We agree and therefore vacate Item 9(b).

A vessel in the FCC unit—the regenerator—stands about 50 feet high and 20 feet wide, and is covered by a carbon steel shell. Just inside the shell is a 4-inch-thick liner called the refractory, which is designed to keep the shell’s exterior at a safe temperature and protect it from

¹¹ As further support for its position, Delek relies on another OSHA interpretation letter, which states that “[t]he employer is required to determine the extent of the process used” in deciding “[w]hat types of hardware that see contact with explosives are covered by the PSM rule.” OSHA Interpretation Letter from Deputy Director of Compliance Programs H. Berrien Zettler to Sam Mannan (May 25, 1994). This language cannot reasonably be construed as giving the employer final say regarding what is covered by the standard. Rather, it only explains how an employer might go about discovering what is and is not covered.

the erosive effect of the refining process occurring inside, where temperatures are routinely in excess of 1,200° F. Over time, though, the refractory can deteriorate, leaving the shell vulnerable to damage. For this reason, Delek conducts routine infrared inspections of the shell.

Shortly before the OSHA inspection at issue here, Delek detected a “hot spot” on the outside of the regenerator, an indication that the refractory was thinning in that area. As it routinely does whenever hot spots occur, the company used a “steam lance” to cool this part of the shell. The steam lance is a 6- to 8-foot pipe connected to a steam hose that is in turn connected to the refinery’s boiler system. The pipe, which has holes in the end of it, is situated so that the steam from the boiler, which is no hotter than 250° F, is directed at the hot spot, cooling the outside of the shell to within a safe operating temperature. The steam lance is used continuously on the hot spot, and maintained by the FCC unit operators, until the refractory can be repaired during the next “turnaround,” the period when Delek shuts down the reactor/regenerator for maintenance.

Delek contends that its use of the steam lance was not a covered change because it was part of a regular and recurring maintenance cycle. We agree. While the PSM standard does not define “change,” OSHA has explained that the term “includes all modifications to equipment, procedures, raw materials, and processing conditions” OSHA Publication No. 3133, *Process Safety Management Guidelines for Compliance*, at 16 (1994). Other provisions of the standard also shed light on what is meant by “change.” Subsection (2) of the MOC provision states that the “written procedures to manage changes . . . shall assure that [several] considerations are addressed prior to any change,” including “[t]he technical basis for the proposed change,” “[m]odifications to operating procedures,” and the “[n]ecessary time period for the change.” 29 C.F.R. § 1910.119(ℓ)(1)-(2). Subsection (ℓ)(3) provides that “[e]mployees involved in operating a process and maintenance and contract employees whose job tasks will be affected by a change in the process shall be informed of, and trained in, the change prior to start-up of the process or affected part of the process.” 29 C.F.R. § 1910.119(ℓ)(3). Taken together, we view this language as contemplating that a “change” covered by the standard is something new, different, and unfamiliar, as opposed to a regular and recurring event.

Here, there was nothing new and different about Delek’s use of the steam lance. Indeed, the record shows that its use was part of the refinery’s standard operating procedure. One FCC

unit employee testified that in his thirty years at the refinery, hot spots had occurred many times, and “steam [was] applied to all of them.” Another employee in the FCC unit similarly stated that in his thirty years on the job, “putting steam on a hot spot . . . we’ve done it since I’ve been out there,” and “it’s a very common practice.”¹² Moreover, a Delek supervisor testified that “apply[ing] the steam at the location” of the hot spot was “a common theme at Delek,” and the refinery manager stated that the practice was so common that “a steam hose . . . was . . . continually out there [near the regenerator] . . . [and] attached to the steam header.” Finally, one of the Secretary’s expert witnesses, a licensed engineer and certified fire and explosion investigator, testified that it “is a very common practice in the refining industry . . . to use steam as a cooling agent.” Based on this evidence, there is nothing in the record to show that Delek’s use of the steam lance was a deviation from the baseline workings of the refinery. On the contrary, the record supports Delek’s position that its use of the steam lance was part of the company’s regular operation of the regenerator.

Nor do we consider Delek’s use of the steam lance to be a temporary change, which would be “subject to the [MOC] provisions.” OSHA Publication No. 3133, Process Safety Management Guidelines for Compliance, at 16. OSHA has stated that “[i]t is important that a time limit for temporary changes be established and monitored since otherwise, without control, these changes may tend to become permanent.” In addition, OSHA has made clear that the MOC “procedures are used to ensure that the equipment and procedures are returned to their original or designed conditions at the end of the temporary change.” *Id.* As these statements show, the standard contemplates that an employer will roll back new and discrete modifications after a defined period of time. Delek’s use of the steam lance, in contrast, was a regular and recurring phenomenon, such that it was a routine part of the company’s operations. Additionally, the steam lance was routinely used until the next turnaround, at which point the refractory would be repaired and the steam lance would be rendered unnecessary until another hot spot developed. In light of the foregoing, we conclude that Delek’s use of the steam lance was not a change contemplated by the cited standard, and we therefore vacate Item 9(b).¹³

¹² For most of these employees’ thirty years in the FCC unit, the refinery was not owned by Delek. The record reflects, however, that Delek used the steam lance in this manner after acquiring the refinery.

¹³ We note that another provision of the PSM standard, which the Secretary did not cite here, may be implicated by the conduct alleged in Item 9(b). Section 1910.119(f)(1) requires an

IV. Serious Citation 1, Item 13: 29 C.F.R. § 1910.219(c)(2)(i)—Guarding Horizontal Shafting

Under this item, the Secretary alleges that Delek violated 29 C.F.R. § 1910.219(c)(2)(i), which provides that “[a]ll exposed parts of horizontal shafting seven (7) feet or less from floor or working platform . . . shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.” According to the Secretary, Delek failed to ensure that exposed rotating shafts were guarded on two pieces of machinery in the refinery—an air fan and a cooling tower pump motor. In affirming this item, the judge concluded that the Secretary established the exposure element of his prima facie case by showing that it was reasonably predictable employees would be in the zone of danger created by the fan and motor. *See Astra Pharm. Prods.*, 9 BNA OSHC at 2129, 1981 CCH OSHD at pp. 31,899-900 (“[T]he Secretary must show . . . that . . . employees had access to the violative condition.”). On review, Delek challenges the judge’s ruling on exposure. We agree that the judge erred in this regard, and we therefore vacate Item 13.

To establish exposure, “the Secretary . . . must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074, 1997-99 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997). “[T]o meet this burden, the Secretary must do more than show that it may be physically possible for an employee to come into contact with the unguarded machinery in question.” *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421, 1992 CCH OSHD ¶ 29,551, p. 39,953 (No. 89-553, 1991). Rather, “the

employer to “develop and implement written operating procedures that provide clear instructions for safely conducting activities involved in each covered process consistent with the process safety information.” 29 C.F.R. § 1910.119(f)(1). Specifically, operating procedures must address, among other considerations, “[n]ormal operations,” “[c]onsequences of deviation [from operating limits],” and “[s]teps required to correct or avoid deviation [from operating limits].” 29 C.F.R. § 1910.119(f)(1)(i)-(ii). Because Delek’s use of the steam lance was a regular and recurring practice at the refinery, it would appear to qualify as a “[n]ormal operation[.]” for which an operating procedure should have been, but the record shows was not, developed and implemented. 29 C.F.R. § 1910.119(f)(1)(i)(B). The lance could be considered a “[s]tep[.] required to correct or avoid deviation” in operating limits, 29 C.F.R. § 1910.119(f)(1)(ii)(B), given that the lance was used to keep the regenerator’s shell at a safe operating temperature after a hot spot developed. Use of the steam lance might also qualify as an “[e]mergency operation[.]” 29 C.F.R. § 1910.119(f)(1)(i)(E), given that it was used when a problem with the refractory arose. Nonetheless, this provision of the PSM standard was not cited by the Secretary and so any potential violation is not before the Commission.

Secretary must establish that employees are exposed to a hazard as a result of the manner in which the machine functions and the way it is operated.” *Id.*

As Delek contends on review, the record here fails to establish its employees were exposed to the unguarded rotating shafts. There is no evidence that any employees were stationed at or near either piece of machinery. In fact, one Delek employee testified that no one worked at the fan or pump motor and no one had any duties near these machines. Additionally, the only other testimony regarding employee exposure to the zone of danger created by the unguarded fan and pump motor was mere speculation. One FCC unit employee testified that “you could stand” next to the fan and “walk up that close and actually just touch it,” and “you could get as close to [the pump motor] where I could touch on the back there.” Although this testimony shows how close an employee *could* get to these machines, it does not establish how close any employee *actually came* to the zone of danger, either as their work required or through inadvertence. Moreover, the record shows that the back of the pump motor was fully encased and does not move. Another witness testified that employees stay between 5 and 10 feet from the fan and pump motor, which is not close enough for reasonably predictable inadvertent contact. *See, e.g., Fabricated Metal Prods.*, 18 BNA OSHC at 1075, 1997-99 CCH OSHD at p. 44,508 (finding no exposure where “employees stood no closer than 18 to 24 inches away from the presses in the course of their work,” and those “walking by . . . were farther away”). Finally, although OSHA’s Assistant Area Director testified that, while walking through the refinery during the inspection he “could have come within five feet of the equipment” at issue, and that “someone . . . passing by . . . could accidentally trip and fall onto the rotating shaft,” his testimony does not show how close employees actually came to the equipment, and no evidence was adduced regarding conditions on the floor that would make a trip-and-fall reasonably predictable. *See Buffets, Inc.*, 21 BNA OSHA 1065, 1067, 2004-09 CCH OSHD ¶ 32,806, p. 52,535 (No. 03-2097, 2005) (rejecting exposure claim based on “potential slip hazards” near unguarded machines where the “CO never mentioned slip hazards as a basis for exposure . . . [and] “employees wore slip-resistant shoes and kept the floors swept and cleaned”). In short, none of this testimony establishes that it was reasonably predictable for employees to be in the zone of danger created by the unguarded rotating shafts of the fan and pump motor.

In light of the foregoing, we find the Secretary has shown only that it was “physically possible for an employee to come into contact with” the cited machinery, which is insufficient to

establish employee exposure. *Jefferson Smurfit*, 15 BNA OSHC at 1421, 1992 CCH OSHD at p. 39,953. Accordingly, we vacate Item 13.

V. Serious Citation 1, Item 15: 29 C.F.R. § 1910.1200(f)(5)(i)—Labeling of Hazardous Chemical Containers

Under this item, the Secretary alleges that Delek violated a provision of the hazard communication standard providing that, with limited exceptions, “the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the . . . [i]dentity of the hazardous chemical(s) contained therein.” 29 C.F.R. § 1910.1200(f)(5)(i). According to the Secretary, Delek failed to comply with respect to three vessels in the FCC Unit—a flare knockout drum, the regenerator, and an exchanger—and one vessel in the refinery’s alkylation unit. In affirming this item, the judge found that none of these vessels was labeled, tagged, or marked as required by the standard. Delek, however, argued that it had complied by alternative means—that several of the company’s documents gave employees the requisite information. The judge rejected this argument, concluding that these written materials were insufficient, particularly because an employee would have to access a number of documents to obtain the necessary information. Delek challenges this ruling. Although we disagree with the judge’s rationale, we affirm the violation for the following reasons.

The cited standard states that containers of hazardous chemicals must be labeled, tagged, or marked, “[e]xcept as provided in paragraphs (f)(6) and (f)(7) of this section.” 29 C.F.R. § 1910.1200(f)(5). Paragraph (f)(6) provides that employees may be informed of chemical hazards by way of written materials other than labels, but only if the materials convey the requisite information and are “readily accessible” to the employees:

The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

29 C.F.R. § 1910.1200(f)(6). Because this alternative means of compliance is phrased in terms of an exception, Delek has the burden of establishing that its documentation: (1) identifies the chemicals contained in each of the four vessels listed in the citation; and (2) provides information about the potential hazards of those chemicals. *See Peavey Grain Co.*, 15 BNA OSHC 1354, 1359, 1991 CCH OSHD ¶ 29,533, p. 39,875 (No. 89-3046, 1991) (party claiming

exception has burden of proving inclusion within it); 29 C.F.R. § 1910.1200(f)(5)(i)-(ii) (stating that vessels must be marked with the “[i]dentity of the hazardous chemical(s) contained therein,” and “[a]ppropriate hazard warnings . . . which provide at least general information regarding the hazards of the chemicals, and which . . . will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical”). We find that Delek has failed to make this showing.

Delek maintains that its employees can identify the chemicals with which they work by using the company’s piping and instrument diagrams (“P&IDs”), along with several other documents. Employees can then, according to Delek, consult the material safety data sheets (“MSDSs”) for those chemicals, which contain information on their hazards. However, the record shows that this documentation is insufficient to convey the requisite information. To begin, the P&ID for the alkylation unit, which contains one of the four cited vessels, does not show the chemicals this vessel contained, nor does any other document of record. And while it is true that the P&IDs show the hazardous chemicals in the other three cited vessels—the flare knockout drum contained vapor, hydrocarbon vapors, and purge gas; the regenerator contained flue gas; and the exchanger contained slurry and cold/raw oil—the record shows that there were no MSDSs for these named substances, despite the refinery manager’s general statement that “there [was] a full set of” MSDSs at the refinery.

Specifically, an FCC unit operator gave undisputed testimony regarding the availability of MSDSs for these particular substances. He testified that employees could not “find an MSDS on something called, in and of itself, vapor,” and that “there is [no] MSDS for something called purge gas.” He also stated that “there [is no] MSDS that would refer to, quote/unquote, flue gas”—rather, to learn of the hazards of flue gas, employees would “need to know that [carbon monoxide] was in it,” and then find the carbon monoxide MSDS. As for slurry, he stated that an employee would need to know that “carbon black might be another name for it,” and look for the MSDS for that named chemical. In other words, there were no MSDSs—which purportedly identify the chemical hazard warnings—for the hazardous chemicals contained in the cited vessels. The same is true for Delek’s operating procedures and training materials—two other sets of documents Delek claims contain the requisite information. The section of the operating procedures entitled “Properties and Hazards of Chemicals Used in the Process” contains information about the hazards of hydrocarbon vapors, but it contains nothing about purge gas,

flue gas, or slurry. And the training materials contain no information regarding the hazards of any chemical. Due to this mismatch, Delek's written materials failed to "provide employees with the specific information regarding the physical and health hazards of the hazardous chemical[s]" inside the flare knockout drum, regenerator, and exchanger. 29 C.F.R. § 1910.1200(f)(5)(ii).

In reaching this conclusion, our analysis departs from that of the judge, whose primary concern appears to have been that to determine a cited vessel's contents, an employee would have had to access a number of documents. We do not consider a hazard communication program that requires employees to consult more than one document necessarily noncompliant with § 1910.1200(f)(5). Under the standard, an employer is required to communicate with employees regarding chemical hazards by means that are effective, and any hazard communication program must meet that test. *See* 29 C.F.R. § 1910.1200(f)(5)(ii) (requiring "[a]ppropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards . . . , and which, in conjunction with the other information immediately available . . . will provide . . . specific information regarding the . . . hazards"); *see also* Hazard Communication, 59 Fed. Reg. 6126, 6159 (Feb. 9, 1994) (final rule) ("[E]mployers may, as an alternative to specific hazard warnings, provide more general hazard information on the labels as long as the specific physical and health hazards of the chemicals are effectively conveyed through implementation of the other aspects of the hazard communication program"). Accordingly, because the documents on which Delek relies, taken together, fail to convey the requisite information for all four of the cited vessels, we affirm Item 15.

ORDER

We vacate Citation 1, Items 9(b) and 13, and we affirm Citation 1, Items 4, 8, 12, and 15. The parties challenge neither the judge’s characterization of the violations we affirm, nor the penalties he assessed for them. Therefore, we characterize each violation as serious, and assess a total penalty of \$21,150—a \$6,300 penalty for Item 4, a \$6,300 penalty for Item 8, a \$6,300 penalty for Item 12, and a \$2,250 penalty for Item 15. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming characterization and penalty where neither was in dispute).

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 23, 2015

MACDOUGALL, Commissioner, concurring in part and dissenting in part:

I join in the majority's decision to vacate Citation 1, Items 9(b) and 13, and to affirm Citation 1, Item 15, for the reasons stated in the majority opinion. However, I dissent from my colleagues' determinations regarding Citation 1, Item 4; Citation 1, Item 8; and Citation 1, Item 12. For the reasons detailed below, I would remand Item 4 to the judge for further proceedings, and I would vacate Items 8 and 12.

DISCUSSION

I. Citation 1, Item 4 (29 C.F.R. § 1910.119(e)(5))

The Process Safety Management of Highly Hazardous Chemicals standard ("PSM Standard"), 29 C.F.R. § 1910.119, contains requirements for the management of hazards associated with processes using highly hazardous chemicals. Subsection (e) of the PSM standard requires each covered employer to conduct an initial process hazard analysis ("PHA") on processes covered by the standard and, at least every five years thereafter, to update and revalidate that PHA to assure that it is consistent with the current process.¹ See 29 C.F.R. § 1910.119(e)(1), (e)(6). In Citation 1, Item 4, Delek was cited under § 1910.119(e)(5) for failing to "promptly address" findings from PHAs performed in 2004 and earlier,² even though it is undisputed that Delek did not own or operate the facility in question until April 29, 2005, and that the PHAs from the years covered by the citation were performed not by Delek but by the facility's prior owner, Crown Central ("Crown"). Against this backdrop, I conclude that the judge's decision to affirm this item was in error for two reasons. I respectfully cannot join my colleague's decision affirming this item, which appears to be an act of *jugaad*.³

¹ The cited provision requires that each covered employer then "promptly address the team's findings and recommendations [from the PHA]; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; [and] develop a written schedule of when these actions are to be completed" 29 C.F.R. § 1910.119(e)(5).

² While the original citation also addressed findings from a 2005 PHA, the judge concluded that the Secretary failed to bear his burden regarding all items relating to the 2005 PHA. The 2005 PHA is not at issue before the Commission.

³ *Jugaad* is a colloquial Hindi word that can mean an innovative fix, or ensuring that things happen with minimal or inadequate resources, even if they must happen "by hook or by crook." ELLA FRANCES SANDERS, *LOST IN TRANSLATION* (2014).

A. In Finding Successor Liability, the Judge Erred in Failing to Apply the Substantial Continuity Test

Citation 1, Item 4, alleges that Delek violated § 1910.119(e)(5) when it “did not promptly address the team’s findings and recommendations.” The citation further states: “For example, the PHA team’s findings and recommendations from the 1994, 1998, 1999, [and] 2004 [PHAs] . . . are still unresolved or status is unknown and/or not complete.” The judge, in affirming Item 4, and based on the evidence presented at the hearing, found unresolved items from the 1994, 1997, 1999, 2000, 2003, and 2004 PHAs.⁴ The Secretary and the judge either assume that Delek was the same entity that performed the PHAs at issue from 1994 through 2004 (and there is no dispute that it was not) or that, as a purchaser of the facility in question, Delek became responsible for Crown’s alleged violations. My colleagues appear to misunderstand both the jurisprudence regarding successor liability and the governing precedents in claiming that these violations are not grounded on successor liability and in stating that the concept is “patently irrelevant here.” Despite the hyperbole in the majority opinion, a successor finding is necessary before we can impose liability upon Delek for PHAs conducted by Crown.

While my colleagues decline to address whether Delek has successor liability for Crown’s alleged violations, they do so on the basis that the PSM “standard does not limit the obligation[s] . . . to the employer that conducts the PHAs and compliance audits.” What my colleagues fail to recognize is that no matter what word-smithing in which they choose to engage, they seek to have Delek “step in the shoes” of Crown and to place liability upon Delek for PHAs initially conducted by Crown—the very concept of successor liability—without undergoing the required analysis to find that there is “substantial continuity” between the two enterprises. In my view, the standard’s plain language does not apply to a subsequent purchaser like Delek because the standard presumes that the respondent employer is the same entity that performed the PHA in question. Indeed, it would be problematic to require a respondent employer to *promptly address findings* from an investigation in which the respondent employer played no role whatsoever. This is especially true where, as here, uncontroverted evidence establishes that the respondent employer in completing the corporate asset transaction had been

⁴ The judge found no unresolved items from the 1998 PHA. Additionally, although the judge’s decision to affirm this violation was based on unresolved items from PHAs not specified as examples in the citation, Delek never objected to the admission of evidence relating to the non-specified PHAs and does not dispute on review the judge’s decision in this regard.

assured by the facility's seller that all findings of all prior PHAs had been addressed.⁵ Under the standard's plain language, Delek had no obligations under (e)(5) with respect to the PHAs performed in 1994, 1997, 1998, 1999, 2000, 2003, and 2004. Hence, despite the majority's efforts to place a square peg in a round hole, only if Delek is deemed to have successor liability can it be in violation for its predecessor's violation of the Occupational Safety and Health Act.

The OSH Act itself and its legislative history are silent with regard to whether corporations that purchase the assets of a company that has violated the OSH Act should also acquire that company's OSH Act liabilities. Thus, the general rule that a purchasing entity does not have successor liability applies, such that a corporation that purchases another corporation "is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability."⁶ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n.5 (1973). The judge correctly noted—in an order denying Delek's motion for summary judgment—that an acquirer of a facility may still be subject to liability for actions by the facility's prior owner *if* the acquirer is deemed a *successor*,⁷

⁵ My colleagues seek to impose the PSM obligations at issue here on Delek on the basis that it hired many of Crown's managers and supervisors. They state: "The record shows that Delek retained several of the prior owner's supervisors when it assumed ownership of the refinery—their actual knowledge of the violative conditions at issue, therefore, became Delek's knowledge." However, this analysis confuses the *prima facie* element of "applicability" with the *prima facie* element of "knowledge." Such a fact does not in these circumstances address the applicability of the cited standard to a particular employer. See *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-0531, 1991) (Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation).

⁶ The Supreme Court has referred to the "free transfer of capital" and the concern of placing restrictions on successor employers, which might reduce the incentives purchasers have to take over failing businesses, as factors to be considered in shaping successorship doctrine. See *Howard Johnson Co. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union*, 417 U.S. 249, 255 (1974); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287-89 (1972).

⁷ See Order Denying Respondent's Motion for Summary Judgment at 5 ("[T]he Court agrees with the Complainant that under the 'substantial continuity' and 'successor liability' doctrines, a successor employer that substantially continues its predecessors [sic] business may be attributed certain labor and employment obligations of the old employer; such as obligations under the OSH Act."). Notably, the Order Denying Respondent's Motion for Summary Judgment did not

he—in his final order—neither considered the question of successor liability as a matter of fact or law, nor made any findings relating to this question. Instead, the judge’s final order simply presumed that Delek is a successor. I dissent from my colleague’s summary affirmance of the judge’s presumption that fails to apply Commission precedent on this issue and our “substantial continuity” test for finding successor liability.

The Commission first considered the issue of a successor entity’s liability under the OSH Act for violations committed by a predecessor in *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 2009-12 CCH OSHD ¶ 33,103 (No. 00-1402, 2010). In *Sharon & Walter*, the Commission addressed this issue and adopted a long-standing multi-factor test used by the National Labor Relations Board (“NLRB”) and the courts to determine when, under the National Labor Relations Act, a successor entity must satisfy the obligations of a predecessor. 23 BNA OSHC at 1294, 2009-12 CCH OSHD at p. 54,901 (citing *Burns Int’l Sec. Servs., Inc.*, 406 U.S. at 280-81; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550-52 (1964)). As the Supreme Court observed, the focus of the NLRB test is whether there is “substantial continuity” between the two enterprises. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

Pursuant to *Sharon & Walter*, the factors the Commission considers to determine “substantial continuity” under a successorship theory are: (1) whether the business of both employers is essentially the same; (2) whether the work and working conditions of both companies is basically the same; and (3) whether there is a continuity of personnel who control decisions related to safety and health. In affirming the violation as “repeat,” the Commission found that all three elements were met.⁸ *Sharon & Walter*, 23 BNA OSHC at 1294-96; 2009-12 CCH OSHD at p. 54,902 (citing *Fall River*, 482 U.S. at 43). In adopting the “substantial continuity” test, the Commission noted in *Sharon & Walter* that “this test enables us to fully

resolve the successorship question in the Secretary’s favor; rather, it simply denied summary judgment to Delek based on questions of fact regarding successorship. In other words, the judge merely concluded that the successorship question was entitled to proceed to trial.

⁸ In that decision, in utilizing the NLRB’s “substantial continuity” test, the Commission found that it was appropriate to rely on two prior violations committed by a predecessor business as the basis for affirming as “repeat” a violation committed by the successor, *Sharon & Walter*. As to the third factor, the Commission specifically noted that the same principal was in charge of both companies and ran their operations on a daily basis. He was the sole owner and supervisor of both businesses, and he had control over decision-making in both companies, including that related to employee safety and health. *Sharon & Walter*, 23 BNA OSHC at 1295-96, 2009-12 CCH OSHD at p. 54,902.

assess the nature and extent of the distinctions and similarities between a successor and predecessor based on criteria that are well-suited to the OSH Act and the facts of each case before us.” 23 BNA OSHC at 1294-95, 2009-12 CCH OSHD at 54,901.

Upon review of the judge’s decision in the instant case, it is evident that the judge failed to apply the substantial continuity test as set forth in *Sharon & Walter*. Indeed, the judge’s decision is completely devoid of a discussion or the application of the substantial continuity factors.⁹ Thus, I would remand this case to the judge to apply the Commission’s precedent in *Sharon & Walter*, and the substantial continuity test, to determine if Delek may be liable as a successor for any alleged violations of § 1910.119(e)(5) committed by its predecessor, Crown.¹⁰

⁹ The judge’s Order Denying Respondent’s Motion for Summary Judgment contains one conclusory sentence with no analysis or evaluation of the facts necessary to conclude that Delek is a successor to Crown: “In this case, the Secretary asserts that Respondent bought the Tyler facility in April, 2005 and has continued the business of the predecessor company.” The judge’s final order makes no finding regarding successor liability, and in any case the judge’s earlier statement regarding the Secretary’s theory, contained in the order denying summary judgment, is insufficient to support a finding of successor liability.

¹⁰ My colleagues’ analysis suggests that Delek had notice of the standard’s applicability to it, irrespective of successor liability, because “Delek could have conducted its own review and developed its own response plan. But it did not, so its failure to respond violated § 1910.119(e)(5) and (o)(4).” The majority offers no discussion of at what time Delek failed to promptly conduct its own review in light of the three-year and five-year time frames provided in § 1910.119(e)(5) and (o)(4). This failure, coupled with the fact that the Secretary’s inspection of Delek occurred less than three years after its purchase of the facility, leads to the conclusion that the company had not yet failed to meet either provision’s time frame. Moreover, despite the majority’s theory, this is not the violation alleged in the Secretary’s citation. Clearly, the citation alleges violations with regard to the PHA findings and compliance audits conducted by Crown. Further, any failure to conduct an “initial process hazard analysis” on processes covered by the PSM Standard would require a citation to § 1910.119(e)(1), which was not cited. My colleagues’ contrary construction of the standard is fundamentally unfair and cannot be expected to guide employers in their conduct. *Lisbon Contractors, Inc.*, 11 BNA OSHC 1971, 1974, 1984-85 CCH OSHD ¶ 26,924, p. 34,500 (No. 80-97, 1984) (“A construction of a standard that bears no reasonable relationship to the standard’s plain words cannot be expected to guide employers in their conduct.”); *see also S.G. Loewendick & Sons, Inc. v. Sec’y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) (“Congress and the courts require that agency action reflect clear, rational decision making that gives regulated members of the public adequate notice of their obligations.”); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-39 (6th Cir. 1978); *Cardinal Indus.*, 14 BNA OSHC 1008, 1011, 1987-89 CCH OSHD ¶ 28,510, p. 37,801 (No. 82-427, 1989). To the extent that the Secretary’s choice of language does not effectuate what the Secretary may have intended, the remedy lies in further rulemaking by the Secretary rather than the adoption by this Commission of an interpretation that is not supported by the standard and its preamble as promulgated. *See Diamond Roofing v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976)

B. The Court’s *AKM* Decision, Which Held That the OSH Act’s Six-Month Statute of Limitations for Issuing OSHA Citations Applies Where an Employer Has Merely Failed to Correct a Prior Violation and Rejected the Secretary’s Continuing Violations Theory, Is Applicable

On April 6, 2012 (hence, after the judge’s decision in this case), the D.C. Circuit held in *AKM LLC v. OSHRC*, 675 F.3d 752 (D.C. Cir. 2012), that the statute of limitations for issuing OSHA citations means precisely what it says—that “[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.” *Id.* at 755 (citing 29 U.S.C. § 658(c)). Thus, even if the judge had properly applied Commission precedent regarding the substantial continuity test and determined Delek to be a successor to Crown, we must determine upon review whether *AKM* supports vacating this item (as well as Citation 1, Item 12). My colleagues try to divert attention from the clear holding in *AKM* by concluding that the court could not possibly mean what it said and that its holding is limited to recordkeeping violations. I disagree with the majority decision and find that the court’s holding in *AKM* may require vacating Item 4; consequently, I would remand this citation item to the judge for further consideration.¹¹

In *AKM*, the D.C. Circuit, in interpreting 29 U.S.C. § 658(c), held that there is no ambiguity in the statute, and “the word ‘occurrence’ clearly refers to a discrete antecedent event—something that ‘happened’ or ‘came to pass’ ‘in the past.’ ” 675 F.3d at 755 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 & n.5 (2002)). Thus, the court rejected the Secretary’s theory, which had been accepted by the Commission, that Congress intended a violation of recordmaking requirements to be treated as a continuing violation. The

(regulations cannot be construed to mean what an agency intended but did not adequately express). The Secretary asserted that Delek failed to resolve Crown’s PHAs, and not limited to Crown’s most recent PHA, which was conducted in 2005 (although the judge found no unresolved items from this one), but the 1994, 1997, 1998, 1999, 2000, 2003, and 2004 PHAs as well. The Secretary does not allege how Delek failed to promptly resolve PHAs conducted by a prior owner more than ten years before it had control or possession of the facility. Further, for the Commission to impose liability upon Delek to encourage abatement of on-going obligations of a predecessor would usurp the legislative function.

¹¹ See *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (“Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission’s precedent.”) (citing 29 U.S.C. §§ 660(a) and (b)).

court explained that the Secretary’s theory “runs afoul of our precedents,” which state that the “lingering effect of an unlawful act is not itself an unlawful act,” and that the “mere failure to right a wrong . . . cannot be a continuing wrong which tolls the statute of limitations, for if it were, the exception would obliterate the rule.” *Id.* at 757 (quoting *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007); *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977)). This explanation is just as true for the PSM Standard on review before the Commission as it was for the recordkeeping standard in *AKM*.

AKM recognizes that the continuing violations doctrine is an exception to the “standard rule that the limitations period is triggered by the existence of a complete cause of action, [u]nless Congress has told us otherwise in the legislation at issue.” *Id.* at 758 (citations and internal quotation marks omitted). Hence, a complete cause of action exists under § 1910.119(e)(5) at the time when the employer becomes delinquent in its obligations to promptly address and document items relating to a particular PHA. Congress has not told us otherwise.

Perhaps most notably, the *AKM* court recognized that “the mere failure to right a wrong . . . cannot be a continuing wrong which tolls the statute of limitations.” *Id.* at 757. Indeed, “the lingering effect of an unlawful act” is not itself an unlawful act. *Id.* Consequently, where a violation amounts to “inaction” rather than “continued actions,” the continuing violations theory is wholly inapplicable. *Id.* at 758 (“While we [have] held that continued actions may extend the statute of limitations, nothing . . . suggests that *inaction* has the same effect, and this case is about inactions”) (emphasis in original). Here, as in *AKM*, “the Secretary’s continuing violations theory would transform the failure to right a past wrong into a reason not to start the limitations clock—a result our precedents plainly proscribe.”¹² *Id.* at 758.

AKM also recognizes that certain violative conduct—like the § 1910.119(e)(5) violation here or the record-keeping violation in *AKM*—is “not even the sort of conduct we generally view as giving rise to a continuing violation” because “continuing violations are those whose character

¹² In concluding that the time bar is not dispositive here, the majority asserts that no statute of limitations ever accrued (much less ran) because a violation of § 1910.119(e)(5) continues indefinitely unless and until an employer satisfies its subsection (e)(5) obligations. The majority’s conclusion improperly converts inaction into action, and I conclude that this theory would transform the failure to right a past wrong into a reason not to start the limitation clock—a result in contravention of *AKM*.

as a violation did not become clear until [they] w[ere] repeated during the limitations period, typically because it is only [the] cumulative impact . . . that reveals [their] illegality.” *Id.* at 757 (alterations in original) (internal quotation marks omitted). Moreover, a continuing violation *does not exist* where the violation in question “would be immediately apparent to an OSHA administrator.” *Id.* at 757. Delek’s (or its predecessor’s) alleged failure to comply with § 1910.119(e)(5) would have been immediately clear after Delek (or its predecessor) failed to act within a reasonable time; subsequent, cumulative violations were unnecessary to reveal the (alleged) illegality of the conduct in question. Moreover, as in *AKM*, Delek’s alleged failure to comply with the standard in the required time period would have been immediately apparent to an OSHA administrator. Both considerations dictate that the continuing violations doctrine has no application here.

While the majority attempts to distinguish *AKM* as applicable only to recordkeeping violations, I do not read *AKM* as being so limited. The court’s holding was not limited to the recordkeeping context but, rather, applied to the text of this statute, 29 U.S.C. § 658(c), “*which expressly applies to ‘any [OSHA] regulations prescribed pursuant to this chapter.’*”¹³ *Id.* at 755 (quoting 29 U.S.C. § 658(c)) (emphasis added). The *AKM* court held that the continuing violations theory should not (and could not) be applied to contravene the plain language of the operative statute of limitations by unreasonably extending the time period in question. Indeed, the *AKM* court noted, the Secretary’s proposed continuing violations rule would have had “absurd consequences” by expanding the operative statute of limitations *ad infinitum*. *Id.* at 758. Hence, the *AKM* court observed:

Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years, and then cite the employer long after the opportunity to actually improve the workplace has passed. An interpretation of a statute purporting to set a definite

¹³ The *AKM* court concluded that the Secretary’s proposed construction of the statute of limitations (i.e., the application of the continuing violations doctrine) was not entitled to deference because the statute was clear and the Secretary’s proposed construction was unreasonable. 675 F.3d at 754. Accordingly, the *AKM* court did not reach the question of whether the interpretation of a statute of limitations is the *type* of question which triggers deference, and did not decide whether “deference to agency interpretations of statutes of limitations is warranted as a rule.” *Id.* I reach the same conclusion here. I conclude that the statute is clear on its face and the Secretary’s proposed construction is unreasonable because it would extend the statute *ad infinitum*. Hence, I do not reach the question of whether the Secretary could ever be entitled to deference in construing a statute of limitations.

limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done would . . . we think, defeat its obvious purpose.

Id. at 759 (citations omitted). The same reasoning supports the conclusion that the continuing violations theory is inapplicable here.¹⁴

Accordingly, based on *AKM*, I conclude that the OSH Act's six-month statute of limitations set forth in 29 U.S.C. § 658(c) applies to the PSM Standard, that the continuing violations theory does not permit the Secretary to avoid an otherwise applicable time bar, and that my colleagues' contentions to the contrary rely upon a strained interpretation of *AKM*. However, the OSH Act's six-month statute of limitations set forth in 29 U.S.C. § 658(c), as interpreted by the *AKM* court, must be construed against the backdrop of the specific requirement that an employer's obligations under § 1910.119(e)(5) must be addressed within five years of the PHA in question before the obligation under (e)(5) is supplanted with a new substantial obligation to update and revalidate the PHA. *See* 29 C.F.R. § 1910.119(e)(6). That is to say, an employer's obligations under § 1910.119(e)(5) become delinquent and, hence, a cause of action accrues, at the outer limit, five years after the completion of the PHA. Thus, any statute of limitations must run—at the very latest—coupling the five year span of time between PHAs with the OSH Act's six-month statute of limitations. *See BP Prod. N. Am., Inc.*, No. 10-0637, 2013 WL 9850777, at *37 (OSHRC Aug. 12, 2013) (ALJ) (“In light of the context and the standard's purpose to prevent catastrophes, resolution of the PHA recommendations and hazard control [under § 1910.119(e)(5)] must be completed within the five-year PHA-revalidation cycle”).¹⁵

¹⁴ While the court itself speculated that there might be cases in which the Secretary might prevail on a continuing violations theory, outside of the context of recordkeeping violations, the court's examples were limited. It mentioned current failures to place guards on machines and the current presence of untrained employees in dangerous situations. 675 F.3d at 758. It is possible, however, that a continuing violations argument is unnecessary in both those cases. In both, cited physically violative conditions actively persist into, and thus “occur” during, the limitations period. While setting the limits of such examples is not necessary for the disposition of this case before the Commission, clearly, the alleged violation here is not the type of exception to the six-month statute of limitations contemplated by the court in *AKM*.

¹⁵ Interestingly, the Secretary's current enforcement position represents a departure from his position on the same cited standard in another case before the Commission, *BP*. This disregard may be because the Secretary's position in *BP* is inconvenient for the current position taken by him.

However, that does not end the Commission's analysis because the Secretary has previously gone one step further, recognizing that *the five-year revalidation cycle marks the outer limit and, in most cases, an employer's obligations under (e)(5) become delinquent much sooner.* *Id.* at *37 (“[T]he Secretary asserts, ‘Timely [under (e)(5)] means in this context, **at most one to two years** depending on the scope and complexity of the issue analyze [sic], and the risk posed by the hazard’ ”) (emphasis added). Hence, it is possible that the statute of limitations here ran even sooner.

As noted by the Supreme Court in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991):

The Secretary's interpretation of OSH Act regulations in an administrative adjudication . . . is agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. *See* 29 U.S.C. § 658. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.

Id. at 157 (emphasis and citations in original). *See also* Commission EAJA Rule 106(a), 29 C.F.R. § 2204.106(a) (position of Secretary includes his litigation position as well as his action or inaction prior to the litigation); *Mazza v. Sec'y, Dep't of HHS*, 903 F.2d 953, 959 (3d Cir. 1990) (revision in agency interpretation not accepted when it flatly contradicted agency's previous position, stated closer to enactment of governing statute). *Compare Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976) (finding that unreviewed administrative law judge's decision does not constitute binding precedent for the Commission).

In addition, consistent with the Secretary's position taken in other litigation before the Commission, the Preamble to the PSM Standard concludes regarding § 1910.119(e)(5):

[W]hen an employer decides that a recommendation requires action, then an employer should develop a written schedule of the actions which are to be completed. It is OSHA's intention that the actions to be taken as a result of the process hazard analysis recommendations be completed as soon as possible. In most cases, OSHA believes that employers will be able to complete these actions *within a one to two year timeframe*, but notes that in unusual circumstances longer completion periods may be necessary.

Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6379 (Feb. 24, 1991) (final rule) (emphasis added). Thus, it has been the

Secretary's position that a violation of § 1910.119(e)(5) is established in most cases in one to two years, within the five-year PHA revalidation cycle at issue. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (“[A]n agency’s interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view.”) (citation and internal quotation marks omitted); *CF&I Steel*, 499 U.S. at 157 (Secretary’s consistency in applying the interpretation embodied in a citation is a factor bearing on the reasonableness of the Secretary’s position).

The citation here was issued on August 18, 2008. Hence, pursuant to the Secretary’s position in other litigation, any item relating to any PHA completed prior to February 18, 2003 (in other words, 5 years, 6 months earlier) is absolutely time-barred—thus, the 1994, 1997, 1998, 1999, and 2000 PHAs.¹⁶ Any alleged failures relating to findings and recommendations from any later PHA—in other words, the 2004 PHA and, perhaps, the 2003 PHA¹⁷—may still be time-barred based on the general one-to-two-year rule announced by the Secretary in *BP* and the standard’s preamble. The application of this shorter time period would depend upon the specific facts adduced by the parties—whether the employer should reasonably have addressed its § 1910.119(e)(5) obligations in a *shorter* time period.¹⁸ Thus, I would remand this item to the judge to consider not only whether Delek can properly be deemed the successor of the prior owner, Crown, but also, based on the evidence presented as to the scope and complexity of the issue analyzed and the risk posed by the hazard, when Delek’s obligations became delinquent under § 1910.119(e)(5), and thus whether any alleged violation from the 2003 or 2004 PHA remains timely.

II. Citation 1, Item 12 (29 C.F.R. § 1910.119(o)(4))

Citation 1, Item 12, requires an analysis similar to Item 4. Section 1910.119(o)(1) provides: “*Compliance Audits*. (1) Employers shall certify that they have evaluated compliance with the provisions of this section *at least every three years* to verify that the procedures and

¹⁶ As previously noted, the judge found no unresolved items from the 1998 PHA.

¹⁷ It is unclear from the record when, exactly, the 2003 PHA was completed.

¹⁸ The language of the cited standard would guide the judge in assessing whether a shorter time should apply because Delek’s actions were delinquent—for example, whether the findings were “resolved in timely manner;” whether the employer “complete[d] actions as soon as possible;” and whether the employer followed any “written schedule of when these actions [were] to be completed.” 29 C.F.R. § 1910.119(e)(5).

practices developed under the standard are adequate and are being followed.” 29 C.F.R. § 1910.119(o)(1) (emphasis added). The cited standard then requires employers to “promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.” 29 C.F.R. § 1910.119(o)(4). The judge concluded that Delek failed to determine and document an appropriate response to each finding from the 2005 PSM audit. However, again it is undisputed that the 2005 PSM audit was performed in early 2005, prior to Delek’s acquisition of the facility in question, and that it was performed not by Delek but, rather, by the facility’s prior owner, Crown. I conclude that the judge erred in affirming this item for the same reasons discussed above with respect to Item 4.

As discussed with respect to Item 4 above, the judge not only failed to determine whether there is successor liability, but whether 29 U.S.C. § 658(c) time-bars the allegations. Since § 1910.119(o)(1) requires that a new compliance audit be performed at least every three years, an employer’s obligation under (o)(4)—to *determine and document a response* to each compliance audit—is supplanted every three years with a new obligation: the obligation to replace the compliance audit with a brand new compliance audit. As a result, any cause of action under § 1910.119(o)(4), for failure to determine and document a response to a given audit, accrues—*at the very latest*—three years after the audit in question. Further, in accordance with the Secretary’s litigation position in *BP* and the standard’s preamble, it may run much sooner based on the specific facts adduced by the parties.

Here, the 2005 compliance audit appears to have concluded on February 12, 2005. Thus, if successor liability is established, Delek failed to meet its obligations under § 1910.119(o)(4) on February 11, 2008, *at the very latest*. The operative statute of limitations therefore ran six months later, on August 11, 2008, *at the very latest*. Thus, the Secretary’s citation, issued seven days later, on August 18, 2008, is untimely. In accordance with *AKM*, as discussed *supra*, the continuing violations theory is insufficient to avoid the time-bar where Delek failed to correct a previous violation. Thus, because the Secretary’s citation was issued more than 3 years and 6 months after the completion of the 2005 audit, even if Delek is deemed to be a successor to Crown, there is no possible basis to conclude that the citation is timely. For these reasons, no remand is necessary, and I would vacate Item 12.

III. Citation 1, Item 8 (29 C.F.R. § 1910.119(j)(4)(i))

Section 1910.119(j)(4)(i) requires that specified inspections and tests must be performed on all “process equipment.” The Secretary contends under Item 8 that Delek violated § 1910.119(j)(4)(i) by failing to perform the requisite inspections and tests on its positive pressurization unit (“PPU”), which is a device that takes air from the atmosphere and moves it into the facility’s control room. In essence, the PPU system is a ventilation control system that ensures that no hazardous vapors reach individuals working within the control room in the event of an unexpected release of hazardous chemicals elsewhere in the refinery. On review, Delek argues that the judge erred in finding that § 1910.119(j)(4)(i) applies to the PPU. I agree that § 1910.119(j)(4)(i) does not apply to the PPU because, in my view, it is not part of a “process” covered by the PSM Standard and is not “process equipment” as defined by the cited standard; therefore, I would vacate Item 8.

A. The PPU Is Not Part of a “Process” Covered by the PSM Standard

The PSM Standard applies only to a “process” that involves a chemical at or above specified threshold quantities or a flammable liquid or gas in a quantity of 10,000 pounds or more. 29 C.F.R. § 1910.119(a)(1). The term “process” is defined in pertinent part as: “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 C.F.R. § 1910.119(b). The PPU system is not a covered process under the PSM Standard because it is not an activity involving hazardous chemicals. It does not involve the *use* of hazardous chemicals; or the *storage* of hazardous chemicals; or the *manufacturing, handling, or on-site movement* of hazardous chemicals. At most, the PPU is simply a tool to prevent the spread of chemicals to a specific area if and when an unexpected release has occurred; however, this is not sufficient to bring it within the definition of process as defined by § 1910.119(b). Hence, I conclude that the standard cited in Item 8 does not apply to the PPU.

In finding that the cited standard applies to the PPU, which does not contain, much less even contact, a hazardous chemical, the majority notes that the definition of the term “process” has been expanded by the Secretary beyond the plain language of the definition. Accordingly, to the Secretary, the term “process” now includes those components which mitigate the release of hazardous chemicals. In support of this construction, the majority relies primarily on an

interpretive letter from the Secretary dated January 31, 2008. I question whether the Secretary expanded the term “process” through the January 31, 2008 interpretative letter; and even if he has, I question whether such expansion is entitled to deference. *See CF&I Steel*, 499 U.S. at 158 (Secretary’s interpretation, first asserted in a citation, is entitled to deference only if reasonable); *AKM*, 675 F.3d at 754 (finding that an unreasonable interpretation by Secretary not entitled to deference). However, I conclude that we need not reach this question upon our review because the January 31, 2008, letter is distinguishable and inapplicable to the facts presented here.

Unlike the system at issue in the Secretary’s January 31, 2008, letter, the PPU system here does not mitigate against the release of hazardous chemicals; rather, it merely interrupts the spread of those chemicals from one room into the next after the release has already occurred. In this regard, the PPU is even further removed from the definition of “process” than the system in the Secretary’s interpretive letter. I conclude that the PPU is akin to a door, window, wall, or any other structural or mechanical device that interrupts the circulation of already-released hazardous chemicals—while such devices may be part of and connected to a facility dealing with hazardous chemicals, they are too far removed from the definition of “process” to give rise to a violation of § 1910.119(j)(4)(i).

B. The PPU Is Not “Process Equipment” Under the PSM Standard

The majority claims that Delek bases its defense regarding this item on the contention that the PPU is not process equipment because it is not directly involved in converting crude oil to usable fuel. Delek’s contention is not so limited. Rather, Delek contends that the PPU neither meets the PSM Standard’s definition of a “process” nor is it “process equipment” within the standard’s specific list of covered equipment. In order to affirm this citation item, not only must the PPU be a part of a “process” covered by the PSM Standard, but it must be “process equipment” as defined by § 1910.119(j)(4). It is not. Paragraph (j)(4)(i) of the PSM Standard, which is at issue in this item, applies only to a very specific list of “process equipment.” I find, in disagreement with my colleagues, that not one of the items on that list includes or describes the PPU: it is not a pressure vessel or a storage tank; it is not a piping system; it is not a relief vent system or device; it is not an emergency shutdown system; it is not a control; and it is not a pump. *See* 29 C.F.R. § 1910.119(j)(1)(i)-(vi). Further, I find persuasive the collective testimony of Delek’s expert witnesses, who have more than 30 and 35 years, respectively, of experience with industry standards on process equipment and who opined that a PPU is not process

equipment.¹⁹ At most, the PPU is simply a tool to prevent the spread of chemicals to a specific area if and when an unexpected release has occurred; however, this is not sufficient to bring it within the definition of process equipment as defined by § 1910.119(j)(4)(i).

The majority's discussion of the various forms of process equipment is insufficient to support Item 8. While the majority found that the PPU is a type of control and therefore qualifies as "process equipment" under § 1910.119(j)(1), the majority misconstrues the dispositive issue before the Commission—which is, while § 1910.119(j)(1) recognizes that a control may be a form of process equipment, the threshold question in assessing whether a control (or any other process equipment) falls under (j)(1) is still *whether it is a part of a*

¹⁹ The majority ignores the expert opinion presented by Delek on the issue of whether the PPU is "process equipment" within the meaning of the standard. In doing so, the majority reasons that the expert testimony in question involves a legal conclusion. I disagree with my colleagues' characterization of the testimony. I find it is relevant to industry custom and how industry views the PPU at issue. *See Cormier Well Serv.*, 4 BNA OSHC 1085, 1087, 1975-76 CCH OSHD ¶ 20,583, p. 24,620 (No. 8123, 1976) (testimony of compliance officer of industry safety practices used to show industry recognition). Such testimony bears upon the ultimate factual question of whether the Secretary has proven a violation of the cited standard. *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997) (holding that while an expert may not "testify as to whether a legal standard has been satisfied," he can "offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied"). Indeed, "the testimony of an expert witness is particularly appropriate where . . . the trier of fact is presented with evidence of a highly technical nature." *Gisriel v. Uniroyal, Inc.*, 517 F.2d 699, 702 (8th Cir. 1975) (citing *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856, 857-858 (8th Cir. 1975)); *Hoppe v. Midwest Conveyor Co.*, 485 F.2d 1196, 1202 (8th Cir. 1973). My colleagues' suggestion that this issue is a legal question about which expert legal opinion is improper is contradicted by the Secretary's presentation of evidence to show that the PPU falls within the PSM standard as a matter of fact. It is fundamental that, provided all other Rules of Evidence are satisfied, a qualified expert "may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . ." Fed. R. Evid. 702(a). "An opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). *United States v. Van Dyke*, 14 F. 3d 415, 422 (8th Cir. 1994) (court committed reversible error by failing to admit expert testimony that would have assisted factfinder "in understanding the regulation and defendant's reasons for asserting that he had not violated the provision"). I find that the expert testimony is entitled to substantial weight.

process. Where a particular control is not part of a “process,” the fact that the term “control” appears in subsection (j)(1) is of no consequence—there is simply not the required nexus.

The majority concludes that even if equipment is not part of the process itself, the FCC unit, in which the PPU works, “regulates the internal workings of the vessels that handle the chemicals involved in the refining process;” thus, the PPU too becomes “process equipment.” Under the majority’s definition of a control, there is virtually no limit to what constitutes “process equipment.” According to the majority’s reading of the standard, every item in the workplace with a control switch is process equipment, *regardless of whether it directly contributes to a process*, as long as it is somehow connected to the refining process at the facility. An interpretation that departs so far from the purpose of the standard is clearly not reasonable and fails to provide the regulated community with adequate notice as to their compliance obligations. *See Lisbon Contractors, Inc.*, 11 BNA OSHC 1971, 1974, 1984-85 CCH OSHD ¶ 26,924, p. 34,500 (No. 80-97, 1984); *S.G. Loewendick & Sons, Inc. v. Sec’y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir. 1995). I reject such a reading of the standard and conclude that the cited standard does not apply to the PPU; thus, I would vacate Item 8.

CONCLUSION

I am concerned that the majority’s holding here has increased the compliance burdens and costs for employers—particularly those acquiring new facilities. Under the majority’s decision, acquiring employers are now required to ignore the cycles set forth in § 1910.119(e) and (o) and to investigate, with no statute of limitations to create a guide as to how far back to go, the extent to which predecessors complied with the PSM Standard. Such an expansive burden may lead employers to prioritize PHAs and audits over other safety concerns, something that could actually reduce workplace safety. In addition, by broadening the PSM Standard’s definition of “process,” my colleagues have brought a host of other equipment in a facility that is not in contact with a highly hazardous chemical within the coverage of the standard—the bounds of which are unclear and place new uncertain compliance obligations (though certain to be time-consuming and costly ones) upon employers.

In conclusion, I dissent from my colleagues' determinations regarding Citation 1, Item 4; Citation 1, Item 8; and Citation 1, Item 12; as I would remand Item 4 to the judge for further proceedings; I would vacate Item 8; and I would vacate Item 12.

Dated: April 23, 2015

/s/ _____
Heather L. MacDougall
Commissioner



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
: :
Complainant, :
: :
v. :
: :
DELEK REFINING, LTD., :
: :
Respondent. :

OSHRC DOCKET NO. 08-1386

Appearances: Sheryl L. Vieyra, Esquire
Delores G. Wolfe, Esquire
Michael Schoen, Esquire
U.S. Department of Labor
Dallas, Texas
For the Complainant.

Mark S. Dreux, Esquire
Micah R. Smith, Esquire
Arent Fox, LLP
Washington, D.C.
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On February 19, 2008, the Occupational Safety and Health Administration (“OSHA”) began an inspection of Respondent’s facility, located in Tyler, Texas. As a result, on August 18, 2008, OSHA issued to Respondent a 15-item “serious” citation and a one-item “other” citation. Respondent contested the citations. On August 24, 2009, the parties filed a Joint Notice of Partial Withdrawal of Certain Citation Items. This left for resolution Items 4, 6, 8, 9(b), 12, 13 and 15 of Serious Citation 1. The hearing in this matter was held in Dallas, Texas, on September 1-4,

2009, November 2-6, 2009, and March 1-4, 2010.¹ Both of the parties have submitted post-hearing briefs and reply briefs.

Background

Respondent Delek Refining, LTD. (“Delek”) purchased the refinery located in Tyler, Texas, on April 29, 2005. The prior owner was Crown Central (“Crown”), and the refinery was called “La Gloria” when Crown owned it. OSHA initiated the inspection of Delek under its national emphasis program focusing on process safety management (“PSM”) in refineries. The main objective of the PSM standard is to prevent unwanted releases of hazardous chemicals, especially in locations that could expose employees and others to serious hazards. *See* 29 C.F.R. § 1910.119. The purpose of the inspection was to audit Delek’s PSM program, review its documentation, and inspect the various units in the facility. The inspection began February 19, 2008 and continued at the refinery for about four months. Ronald Watkins, the Assistant Area Director (“AAD”) of the Dallas OSHA office, was the team leader.² He oversaw the inspection and the four other OSHA compliance officers (“CO’s”) assisting in the inspection.³ (Tr. 92-93, 100-04, 1854-55, 2762).

As a result of the inspection, OSHA cited Delek for various alleged violations of the PSM standard. Two items were issued for not promptly addressing and correcting deficiencies found during PSM process hazard analyses and compliance audits. Another was for not having a current, properly-

¹The hearing transcript exceeded 3,100 pages.

²AAD Watkins earned a Bachelor of Science degree in industrial technology from Texas A&M in 1985. He has been an ADD since about 2004, and before that he served as an OSHA safety specialist. (Tr. 92-94).

³The four other COs were Theresa Salazar, Wanda Murray, Jorge DeLucca and Craig Webber. (Tr. 100).

certified set of operating procedures for the refinery's Fluid Catalytic Cracking Unit, also known as the "FCC Unit" or the "Cat Unit." A further condition cited under the PSM standard was the failure to inspect and test the positive pressure unit in the FCC Unit's control room. (Tr. 290-325). Another item issued under the PSM standard was for not having a management of change ("MOC") procedure for using a "steam lance" to cool a hot spot on the outside of a vessel in the FCC Unit called the "regenerator." (Tr. 119-21, 124-28, 131-40, 145-55, 160, 274-90, 291-99, 325-59).

Two other citation items were issued under standards other than the PSM standard. One item alleged that unguarded horizontal rotating shafts in the Boiler Unit were hazardous. Another cited condition was the refinery's failure to label certain of its vessels that held hazardous chemicals to show what the vessels contained. (Tr. 361-69, 468-72).

Jurisdiction

The parties have stipulated that jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act. They have also stipulated that Respondent Delek is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. *See Answer*, pp. 1-2; *Joint Prehearing Statement*, p. 27, submitted August 7, 2009. I find that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*,

9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends she has met her burden as to all of the remaining items. Delek contends she has not met her burden as to any of the items.

Item 4 – Alleged Violation of 29 C.F.R. 1910.119(e)(5)

Item 4 alleges a violation of 29 C.F.R. 1910.119(e)(5), a provision of OSHA’s PSM standard.

The cited provision states that:

The employer shall establish a system to promptly address the team’s findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.

The citation alleges that Delek “did not establish a system to promptly address process hazard analysis team’s finding[s] and recommendations.” It also alleges that the process hazard analysis team’s findings and recommendations for 1994, 1998, 1999, 2004 and 2005 were still unresolved and/or incomplete at the time of the OSHA inspection.⁴

Under the PSM standard, a refinery must conduct a process hazard analysis (“PHA”) of its equipment every five years. Under Crown, a number of PHAs had been done between 1994 and April 2005. On December 10, 2007, Delek hired Dewana Tarpley as its PSM coordinator.⁵ Her job was to oversee and manage the PSM program and to head up the PHA that was to occur in May 2008.⁶ Ms.

⁴There is insufficient evidence showing that any PHA team’s findings and recommendations for 1998 and 2005 were unresolved, with status unknown, or not complete as of March 6, 2008.

⁵Delek had no PSM coordinator at the refinery prior to December, 2007. (Tr. 755).

⁶As Ms. Tarpley explained, PHAs are done on a five-year cycle, such that only certain of a facility’s equipment and units are due for a PHA in any given year. (Tr. 2763).

Tarpley had some difficulty finding the information from the previous PHAs. This was due to its storage in various areas on the refinery's premises. She ultimately found both hard copies and electronic copies of La Gloria's previous PHAs. She found the electronic copies by accessing the safety administration portion of Delek's network system. As she began going through the information, she realized that confirming the status of the prior PHA items was going to be a big job. She also realized that, despite being told when she was hired that all of the items from La Gloria's PHAs had been completed, that was not the case. Ms. Tarpley took her concerns to management. During the last quarter of 2007, Delek contracted with Process Safety Reliability Group ("PSRG") to organize the information, verify the status of the PHA items, and provide that information to management. Under Ms. Tarpley's supervision, PSRG took several weeks to develop C-19, a PHA "tracker" consisting of three lists. The first list showed the PHA items that La Gloria had closed prior to the refinery's sale. The second list showed the PHA items that had been closed since the sale. The third list showed the PHA items that were still open. The second and third lists were updated as new information about PHA items was learned.⁷ (Tr. 736-38, 789-90, 1789-93, 1824-28, 2761-78, 2886-99).

Ms. Tarpley was the main contact for OSHA to request documents from Delek. On March 11, 2008, pursuant to a document request, Ms. Tarpley provided OSHA with C-19, the PHA tracker. Upon reviewing C-19, AAD Watkins noted there were many items still open and that a number of those were shown as high-priority items. Some items in C-19 had been open since the nineties. The AAD discussed C-19 with Ms. Tarpley and her supervisor, Donald Whaley, the environmental health and safety ("EHS") manager. Both indicated that some items marked as closed might not in fact be

⁷Ms. Tarpley testified that she did not perform any work on the first list, as it represented items that La Gloria had closed before the sale of the refinery on April 29, 2005. (Tr. 2770).

closed. The AAD also spoke to Robert Martin, Delek's emergency response coordinator. He went over a number of items on C-19 with Mr. Martin that were shown as his responsibility and as having been closed a day or two after OSHA's arrival. The AAD learned that less than half of those items were actually closed. The AAD concluded Delek had violated the PSM standard as it had not promptly addressed and resolved the prior PHA items. (Tr. 131-40, 145-55, 160, 736-38, 1789).

There is no dispute that the cited standard applies to Delek. Ms. Tarpley, the PSM coordinator, testified that the standard applies due to the nature of Delek's processes and the quantity of chemicals at the facility. (Tr. 755-56, 781). *See also* C-24. The parties do dispute the number of PHA items that were still unresolved at the time of the OSHA inspection. The parts of C-19 at issue are those captioned "PHA Items Open" ("open items") and "PHA Items Closed Since Sale" ("closed items"). The open items in C-19 are two pages, numbered 11508 and 11509. The closed items in C-19 are six pages, numbered 11510 through 11515.⁸ The Secretary contends there are 30 items on these pages that were not resolved at the time of the OSHA inspection.⁹ S. Brief, pp. 17-21.

As a preliminary matter, I note that many of the items the Secretary lists in her brief as being incomplete at the time of the inspection are shown as "INS," or insurance items, on C-19. S. Brief, pp. 17-21. Ben Frank Simmons, Delek's refinery manager, explained the notations on C-19. For

⁸These numbers are the Bates Numbers Delek put on the documents it provided to OSHA.

⁹The Secretary also contends there are 26 items on pages 11510 through 11512 that, although shown as being closed on February 20, 2008, with Mr. Martin being the responsible person, were not in fact closed. S. Brief, pp. 15-16. However, 21 of the 26 items are insurance items, which, for the reasons set out below, will not be considered PHA items. Of the five items that remain, only one, Item 42, is on the Secretary's list in her brief. That item is addressed *infra*. Mr. Simmons indicated the four remaining items were not among the ones that remained open at the time of the inspection. (Tr. 2301-03). For this reason, and as the Secretary cites to no specific testimony in regard to these four items, they are not considered unresolved PHA items here.

example, for Item 6, the first item on C-19, the “00-PHA” refers to the year the PHA was done (2000), the “ALK” refers to the unit involved, etc. (Tr. 2277-89). He noted that the “TYPE” column refers to whether the item was an insurance (“INS”), a safety (“S”), or a regulatory (“REG”) item. (Tr. 2284-85). He also noted that the insurance items were recommendations of Delek’s property insurer in order to protect the equipment. (Tr. 1286-87). Ms. Tarpley testified that she understood that the insurance items were included in C-19 for tracking purposes. (Tr. 2911-12). Mr. Martin verified that the insurance items were recommendations of Delek’s property insurer and were put on C-19 to keep track of them. (Tr. 1664-65). He stated that when Delek’s insurer visited annually to look at the fire water system, he encouraged the representative to “write up” anything that would help him get equipment that would enhance Delek’s fire protection system. He believed that many of the insurance recommendations were not items a PHA team would include in a PHA. (Tr. 1765-67).

Delek contends that, in view of the record, the insurance items were not actually PHA items and were put on C-19 solely as a means of tracking them. R. Brief, p. 5; R. Reply Brief, p. 9. I agree, and I find that the Secretary has not shown that the insurance items on C-19 were in fact PHA items. Thus, items on the Secretary’s list in her brief that are shown as insurance items on C-19 will not be considered PHA items. Taking this into account, there are 18 items left to resolve.¹⁰ These items are summarized as follows, in the order in which they appear on the Secretary’s list:

Item 93, p. 11508 – 2004 PHA recommendation for eng’g review as to use of fiber cast material for Fluor specifications was not done as of 11/4/09 per Heraeio Alex Juarez, Delek’s inspection supervisor. (Tr. 1306-07, 1312, 1474-78).

¹⁰Delek has presented no evidence, and makes no claim, that the regulatory items should not be considered PHA items. In addition, the Secretary’s list contains five items which, on the basis of C-19, have no type indicated. These five items will also be considered PHA items.

Item 89, p. 11508 – 2003 PHA recommendation for eng’g review as to relief protection for certain equipment was open as of March 11, 2008 per Mr. Simmons; eng’g review was done “fairly recent[ly]” as of 11/4/09 per Mr. Juarez.¹¹ (Tr. 1503-05, 2290-91).

Item 90, p. 11508 – 2003 PHA recommendation for eng’g review as to pipe specifications and potential piping failure still open as of 3/11/08 per Mr. Simmons. (Tr. 2290-91).

Item 69, p. 11508 – 1997 PHA recommendation for eng’g review as to emergency isolation valves remotely located was open on 3/11/08 per Mr. Simmons. (Tr. 2301-04).

Item 4, p. 11508 – 2000 PHA recommendation (high-priority safety item) to install emergency isolation valve was not installed until the 2009 turnaround. Per Mr. Simmons, open on 3/11/08; valve was ordered for 2005 turnaround but not received in time. He admitted valve could have been installed before 2009 by shutting unit down. (Tr. 147, 2291, 2301-06).

Item 25, p. 11508 – 2003 PHA recommendation to install air-actuated valve on certain equipment was open as of 3/11/08 and not addressed until 2009 per Mr. Simmons. (Tr. 2291, 2302, 2379-80).

Item 13, p. 11508 – 1997 PHA recommendation (high-priority safety item) for eng’g review concerning installation of unit isolation valves was open and still under review as of 3/3/10 per Ms. Tarpley. (Tr. 148, 2794-95).

Item 8, p. 11509 – 1994 PHA recommendation, to consider labeling production and utility lines with “water,” “steam” and “cooling” still not completed as of 11/4/09. Per Mr. Martin, an employee had grabbed a steam line and been burned. (Tr. 1602-08).

¹¹The evidence fails to support a finding that the condition concerning the placement of the 60-V-15 into a mechanical integrity program presented a hazard at the work site since it was already there and no further relief was necessary. Accordingly, Item 89 is not considered a PHA item. *See Akzo Nobel Chemicals Inc.*, 18 BNA OSHC 1643, 1645 (No. 96-0062, 1998)(item alleging a violation of 29 C.F.R. § 1910.119(e)(5) vacated where record fails to support a finding that the condition “presented a reasonable probability that a hazard was present at the worksite,”).

Item 42, p. 11511 – 1994 PHA recommendation (high-priority safety item), to install remote valve actuator on FCC Unit reactor, due to fire, still open on 11/5/09, per Mr. Martin.¹² (Tr. 1755-65). *See also* Mr. Simmons’ testimony. (Tr. 2294-95, 2303).

Item 3, p. 11512 – 2000 PHA recommendation (high-priority safety item) to install emergency isolation valves on certain equipment was not completed until 2009 per Mr. Simmons. (Tr. 2300, 2303, 2396).

Item 5, p. 11512 – 2000 PHA recommendation, identical to Item 3, *supra*, except that Item 3 was a “Phase I” recommendation, while Item 5 was a “Phase II” recommendation. Completed in 2009 per Mr. Simmons. (Tr. 2300, 2303, 2396).

Item 39, p. 11512 – 1994 PHA recommendation for eng’g review of “liquid leg problem” between flare drum and flare stack was open as of 3/11/08 per Ms. Tarpley. (Tr. 2799).

Item 78, p. 11513 – 1997 PHA recommendation for eng’g review of certain equipment was still open on 3/11/08 per Ms. Tarpley. (Tr. 2803).

Item 87, p. 11513 – 2003 PHA recommendation for eng’g review of relief protection on certain equipment still open on 3/11/08. Per Ms. Tarpley, review determined relief protection was adequate, but vessel to be replaced in late 2010 or in 2011 due to environmental regulatory requirements. (Tr. 2804-05).

Item 51, p. 11513 – 1998 PHA recommendation for eng’g review as to pipe specifications for certain equipment was still open on 3/11/08.¹³ (Tr. 2806-07).

Item 59, p. 11514 – 1999 PHA recommendation (high-priority safety item) for eng’g review as to possible installation of emergency isolation valves on certain equipment still open as of 3/11/08. Per Mr. Simmons, item still in eng’g and development phase, to determine proper course of action, as of 3/2/10. (Tr. 2301-03, 2397-98).

Item 37, p. 11514 – 1999 PHA recommendation to paint exterior and channels of certain equipment was still open on 3/11/08 per Mr. Simmons. (Tr. 2301-03).

¹²Item 9(b), *infra*, addresses a “hot spot” on the FCC Unit’s regenerator.

¹³The evidence fails to support a finding that the condition concerning the pipe specification of the discharge piping on PSV-213 in regard to the 500° Fahrenheit (“F”) oil temperature presented a hazard at the work site. Accordingly, Item 51 is not considered a PHA item. *See Akzo Nobel Chemicals Inc.*, cited in footnote 11, *supra*.

Item 67, p. 11514 – 2000 PHA recommendation to paint piping on certain equipment was still open as of 3/11/08 per Mr. Simmons. (Tr. 2301-03).

Excluding Items 51 and 89, the foregoing shows that all of the remaining items were still open and not resolved as of March 11, 2008, when Ms. Tarpley provided C-19 to OSHA.¹⁴ Delek nonetheless asserts it was not in violation of the cited standard. First, it suggests that it did have a system within the meaning of the standard, based on C-19. R. Brief, p. 25. I agree with the Secretary, however, that Delek did not have a system within the meaning of the standard. The standard required Delek to have a system in place to “promptly address the [PHA] team’s findings and recommendations,” to “assure that the recommendations are resolved in a timely manner,” and to “complete actions as soon as possible.” (Tr. 773-74; S. Reply Brief, pp. 1-2) It is clear from the record that Delek had no such system in place from the time it bought the refinery in April 2005 until almost three years later in early 2008.

Second, Delek contends it was not aware that the prior PHA items had not been resolved and that the Secretary has not shown it had knowledge of the cited condition. Delek asserts it had asked La Gloria to ensure that any outstanding PHA findings were addressed prior to the sale, so that Delek could focus on complying with the Clean Fuels Initiative, and that La Gloria had advised it this had been done. Delek claims it reasonably relied on La Gloria’s representation and believed no action was needed until the next PHA, which according to Mr. Simmons was due in 2008.¹⁵ (Tr. 2109; R. Brief,

¹⁴Delek asserts that eight of these 16 items (excluding items 93, 90, 13, 8, 5, 39, 78 and 87) have been either “addressed in some way” or are “in progress,” pursuant to witnesses Simmons, Tarpley, and Martin. *See* R. Brief, p. 26, n. 256-57. Delek provides no transcript cites for this testimony, however, and the testimony the Secretary has cited, as set out above, shows that all of these 16 items were not completed as of March 11, 2008.

¹⁵In a related argument, Delek asserts that the PSM standard does not impose a duty on a company that buys a facility to review and recompile all of the process safety information that the

pp. 15-16, 27). Mr. Whaley, Delek's EHS manager, also testified to this effect. (Tr. 1815). Mr. Whaley, however, did not begin working at the facility until July 30, 2007, and his knowledge was based on what other persons, like Mr. Simmons, told him. (Tr. 1789, 1815-17). Mr. Simmons testified that Crown directed its employees to complete all the PHAs they could before the sale. (Tr. 2108, 2271-72). Mr. Simmons admitted, however, that "We knew that there were PHA items that were outstanding..." (Tr. 2272). In any case, I find that it was not reasonable for Delek, as the new owner, to simply rely on Crown's representation and to not even look at the prior PHAs for nearly three years. I also agree with the Secretary that, if Delek had exercised reasonable diligence, it would have become aware much earlier that there were still outstanding PHA items. S. Reply Brief, pp. 2-5. As Mr. Whaley's testimony indicates, Delek was involved with many other matters at that time and PHAs were simply not a priority. (Tr. 1818-19). The Secretary has demonstrated the knowledge element as to this citation item.

previous owner had a duty to compile. R. Reply Brief, pp. 2-3, citing to *Copperhead Chem. Co.* ("*Copperhead*"), No. 99-2198, 2000 WL 1708284 (O.S.H.R.C. A.L.J. Nov. 15, 2000). That case involved a different matter under the PSM standard; *i.e.*, an alleged violation of 29 C.F.R. § 1910.11(d) for not completing a compilation of written process safety information ("PSI") before conducting a PHA. Although the ALJ found that Copperhead had no interest, control, or duty in compiling the PSI, Judge Schoenfeld acknowledged that the Act "generally holds a Respondent responsible for safety and health hazards within its control arising from an earlier owner's failure to comply with applicable standards...." (*Id.*, at *2). Here, Delek had by March, 2008 control over: establishing a system to promptly address the PHA team's findings and recommendations; assuring that the recommendations were resolved in a timely manner and that the resolution was documented; documenting what actions are to be taken; completing actions as soon as possible; developing a written schedule of when these actions are to be completed; and communicating the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions. The Court finds that Delek had a continuing duty to comply with the requirements of 29 C.F.R. § 1910(e)(5). Respondent failed to satisfy its duty in this regard as of March 6, 2008, nearly three years after it purchased the refinery.

Third, Delek contends that the many improvements it has made to the facility are much more important and have had a much greater impact on safety than the PHA items. These improvements are set out in detail in Delek's brief. R. Brief, pp. 5-14, 16-24. Delek also asserts it has spent millions of dollars on these improvements. R. Brief, pp. 14-15, 24. The Secretary counters that many of the improvements have been profit-enhancing projects, based on Mr. Simmons' testimony, and that a relatively small amount was spent on safety. S. Brief, pp. 8-9. Regardless, I agree with the Secretary that Delek may not excuse its failure to comply with the standard by arguing that other projects it has completed were more important. S. Reply Brief, pp. 2-3. Delek's contention is rejected.

As to the employee exposure element, the Secretary notes that the unresolved PHA items include most of the units in the refinery. *See* S. Brief, pp. 17-21, and C-19. As she also notes, the employees who work in those units would be exposed to the hazards posed by the cited conditions. One specific example she notes is Item 42, on page 11511 of C-19. This item is a "high priority" safety item, and the recommended action is to "install remote valve actuator on FCC Unit reactor, due to fire." This item was still open on 11/5/09, in view of Mr. Martin's testimony. He also testified that without the valve, employees were exposed to a fire and explosion hazard.¹⁶ (Tr. 1759-64). The Secretary points out that 16 employees work in the FCC Unit, which operates on a 24-hour basis 365 days a year. Four employees work in the unit on each 12-hour shift. S. Brief, pp. 22-23. The Secretary has demonstrated the employee exposure element, and, as she has shown all four elements of her burden of proof, this citation item is affirmed. It is affirmed as serious, based on the AAD's testimony that various items, some of which were high-hazard items, were still open and presented explosion

¹⁶The Court notes that of the 16 cited items addressed above, five are high-priority safety items. Further, three of these were still outstanding at the time of the hearing in this matter.

and fire hazards. (Tr. 273). *See* section 17(k) of the Act (a violation is serious if there is a substantial probability that the cited condition could result in death or serious physical harm).

The Secretary has proposed a penalty of \$6,300.00 for this item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* section 17(j) of the Act. The AAD testified that the violation had high gravity, due to the outstanding PHA items that posed an explosion and fire hazard. He further testified that a 10 percent credit was given for Delek's history. No credit was given for size, due to Delek's 270 employees, or for good faith, due to the deficiencies in Delek's safety program. (Tr. 272-73).

There are other factors to consider in determining an appropriate penalty for this item. First, I note that of the 101 PHA items contained in C-19, the record, as set out *supra*, shows that there were 16 outstanding PHA items at the time of the OSHA inspection. I have also considered the improvements that Delek has made to the facility, as discussed above. The Secretary, however, asserts the amounts spent on safety were relatively small. Further, as found above, Delek did not address the pending PHA items for nearly three years, some of the items still have not been resolved, and three of these are high-priority safety items. And, as the Secretary points out, the refinery has had a number of accidents since Delek bought it. There have been eight to ten fires, some of which were caused by the unexpected release of hydrocarbons. (Tr. 1608-09, 1628-29). The worst of these, by far, was a fire and explosion in November 2008 in the SAT Gas Unit, which killed two employees and injured several more. (Tr. 1629, 2332, 2396-97). Another incident occurred about six months before the OSHA inspection began. A compressor tripped, forcing the DHT Unit into a hot shutdown and

causing two fires. (Tr. 1631-38; C-60). Other reported accidents are set out elsewhere in this decision.¹⁷ *See also* S. Brief, pp. 6-8.

On balance, and upon considering all of the foregoing, the Court finds the proposed penalty of \$6,300.00 to be appropriate for this item. That penalty is assessed.

Item 6 – Alleged Violation of 29 C.F.R. 1910.119(f)(3)

The cited standard provides as follows:

The operating procedures shall be reviewed as often as necessary to assure that they reflect current operating practice, including changes that result from changes in process chemicals, technology, and equipment, and changes to facilities. The employer shall certify annually that these operating procedures are current and accurate.

Item 6 alleges that Delek did not ensure that the operating procedures for the FCC Unit (“FCCU”) were current, accurate and certified annually as of April 24, 2008.

The FCCU’s process contains 397,500 pounds of flammable mixtures. *See* C-24, p. 767. The process involves gas oil and catalyst entering the reactor. There, the gas oil is “cracked” into smaller hydrocarbons. The resulting vapors go to the fractionator, another vessel in the FCCU. After further processing, the products and vapors become gasoline. Sixteen employees work in the FCCU, which operates 365 days a year. There are four employees on each of the two 12-hour daily shifts. (Tr. 169-72, 420-21).

The AAD visited the FCCU’s control room on February 28, 2008. He requested the operating procedures (“OPs”) for the unit and was shown OPs dated 1999. OSHA then requested the unit’s OPs

¹⁷*See also* C-59, at p. 02124, where Mr. Martin complained when looking into a tank overflow occurring on September 24, 2007 about an ongoing attitude at Delek to not want to document incidents. (Tr. 1573, 1610; C-59).

by subpoena. The OPs received, JX-X, were not the same, having different dates.¹⁸ The AAD returned to the FCCU and asked for the OPs the operators were actually using. He was handed a third set of OPs that showed La Gloria's name and a date of September 14, 1992. This third set showed it had been prepared by Isaac Johnson and signed by Jimmy Jones. Messrs. Martin and Whaley were present at the time, and the AAD asked them for a copy of the 1992 OPs. No such copy was ever provided. The AAD later reviewed JX-X. He noted that the OPs in JX-X were not signed to certify they were correct and accurate. The AAD concluded that the failure to have one current set of OPs for the FCCU that was properly certified was a violation of the standard. (Tr. 274-90; C-27).

Jeffrey Gaddis is an "A" operator in the FCCU. He has worked at the refinery for about 30 years. For most of that time, he has worked in the FCCU. He is responsible for operating the unit and overseeing the three other employees on his shift. Mr. Gaddis testified there were three sets of OPs in the FCCU control room at the time of the inspection. One was an old set, and the other two were drafts that were being updated. At the time of OSHA's investigation, he used the old set because he felt comfortable with it. Also, he had not been told that the drafts were finished. Mr. Gaddis said the old set of OPs had been in place in the unit for a long time. He did not know whether Delek, in 2008, had a procedure to ensure the OPs in his unit were current, accurate and certified on an annual basis. He also had never seen any type of a paper certification by anyone representing that the OPs were accurate or current. (Tr. 169-77).

Patrick Todd is also an "A" operator in the FCCU. He has worked in the FCCU for 25 years. His duties are the same as those of Mr. Gaddis. Mr. Todd testified there were three sets of OPs in the FCCU's control room in March 2008. He said there were draft OPs being worked on at that time and

¹⁸The AAD testified that Ms. Tarpley provided OSHA with JX-X. (Tr. 278).

that the OPs were updated after the OSHA inspection. He believed he had been using La Gloria's OPs at the time of the OSHA inspection. (Tr. 417-20, 423-28).

Delek presented the testimony of Mr. Simmons, the refinery manager, to rebut the Secretary's evidence. According to Mr. Simmons, Delek, after purchasing the refinery in 2005, hired procedure writers who, together with an operator from each unit, updated all of the OPs for all of the units. Drafts of the updated OPs were provided to the units for review and comment by the other operators. The OPs were finalized in 2006, and further updates were made to Delek's OPs in 2007 and 2008. Mr. Simmons testified that he and Alan Clover certified JX-X as being current and accurate on July 22, 2008. He noted that the procedures in JX-X had multiple revision dates. He said that was Delek's process for showing the last time that a procedure was actually revised. (Tr. 2057-66).

Delek also elicited testimony from Mr. Todd as to this item. Mr. Todd testified he was a "major writer" of the OPs shown in JX-X. He said that most of the OPs written in 2005 were accurate and were left as they were. He also said that, to the best of his knowledge, as of February or March of 2008, JX-X was an accurate and complete copy of the FCCU's OPs. (Tr. 438-41).

Based on the foregoing, the Court finds the Secretary has shown the alleged violation. As the Secretary indicates, Delek overlooks the testimony of Messrs. Gaddis and Todd. S. Reply Brief, pp. 7-9. That testimony shows that they were using the old procedures of La Gloria at the time of the inspection. (Tr. 174, 425-28). Those procedures were over 15 years old in February 2008, and the draft OPs in the unit were not being used. Mr. Gaddis testified he had never been told that the drafts had been finished. (Tr. 174). The record establishes there were no current, accurate and certified OPs

in the unit at the time of the inspection.¹⁹ While Mr. Todd believed the OPs in JX-X were correct and accurate at that time, they were not certified.²⁰ *See Akzo Nobel Chemicals, Inc.*, No. 96-0062, 1998 WL 799135, at *12 (O.S.H.R.C.A.L.J., Nov. 13, 1998)(violation of 29 C.F.R. § 1910.119(f)(3) affirmed when compliance officer “did not observe any certificates on the documents.”) JX-X shows the OPs were revised on multiple dates in 2005 and 2007. The “Approved by” box at the top of each procedure, however, is blank.

As an example of employee exposure, the Secretary states that “start-up procedures ... have changed over the years in response to new equipment,” citing to Mr. Todd’s testimony. S. Brief, p. 29. Delek asserts the Secretary “misstates the record” here and in other respects. R. Reply Brief, p. 13. I disagree. Delek’s question to Mr. Todd and Mr. Todd’s answer are as follows:

Q. The basic procedure has stayed the same, has it not?

A. On most equipment, yes. The start-up procedure – the overall start-up procedures have changed accordingly with new equipment and stuff that we would get in, and then you just update your procedures as the equipment comes in.

¹⁹Mr. Simmons testified that the OPs in JX-X were certified on July 22, 2008. That date, however, is several months after the date when OSHA discovered the violation.

²⁰The Court agrees with the AAD that a certificate under this PSM standard must be in writing. The Court also finds that a properly executed written certificate under this PSM standard must be dated and signed by the person who is attesting that the OPs are current and accurate. (Tr. 577-78). The signature must also be identifiable. This requirement to certify in writing is at least implicit in the language of 29 C.F.R. § 1910.119(f)(4). *See Albemarle Corp.*, 18 BNA OSHC 1730, 1732, (Nos. 93-0848, 93-1715, 1999). *See also* Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6380 (February 24, 1991)(“Since it is extremely important to the safe operation of covered processes that operating procedures remain current and accurate, OSHA has added a precaution to guard against the use of outdated or inaccurate operating procedures by requiring that an employer verify annually that the operating procedures are current and accurate.”).

(Tr. 441-42). A reasonable inference from the above is that there were changes to the FCCU's OPs that were required to be put in writing and certified. A further reasonable inference, in light of the 15-year-old OPs in use at the time of the inspection, is that those changes were not being put in writing and certified. In view of the record, I find the Secretary has established all the elements of her burden of proof. The knowledge element is shown by Mr. Simmons' testimony. (Tr. 1987-90, 2057-66).²¹ This item is affirmed as serious. I agree with the Secretary that not having current, accurate and certified OPs exposed employees to the hazards of uncontrolled hydrocarbon and other chemical releases.²²

The Secretary has proposed a penalty of \$2,250.00 for this item. The AAD testified that the cited condition was a hazard in that employees in the FCCU would not have proper OPs in the case of an emergency or other events such as startup or shutdown of the unit. At least 16 employees (four per shift) were exposed to the hazard. Delek received no reduction for size or good faith as to this item, but it did receive a 10 percent reduction for history. (Tr. 288-90). The Court finds the proposed penalty of \$2,250.00 appropriate. That penalty is accordingly assessed.

²¹From 2002 through April, 2005, Mr. Simmons was the Area Manager who oversaw the FCCU. From April, 2005 through May, 2007, he was the operations manager whose area of responsibility included the FCCU. (Tr. 1987, 1989-90).

²²To support her position that the violation was serious, the Secretary notes an accident that injured an employee who was working on a power feed to the FCCU's flare in 2007. The flare malfunctioned, causing burning hydrocarbons to spew out. There was a flash fire, resulting in radiation burns to the employees' face and eyes, and the employee required hospitalization. Gary Baldwin, the employee's supervisor, agreed that a contributing cause of the accident was not having a procedure for the work being done. (Tr. 1199, 1236, 1250-54, 1289-91, 1297-98).

Item 8 – Alleged Violation of 29 C.F.R. 1910.119(j)(4)(i)

The cited standard requires inspections and tests to “be performed on process equipment.” Item 8 alleges that all safety/mitigation systems supporting process equipment were not inspected and tested under a formal preventive maintenance program. It also alleges that as of March 6, 2008 Delek did not establish, implement and document a system to ensure the operability, function and effectiveness of the positive pressurization unit (“PPU”) in the control room of the FCCU.

According to Delek’s Mechanical Integrity Manual (“Manual”), the purpose of a PPU is to keep “harmful or hazardous vapors from entering” a control room by means of positive pressure. *See* C-51, p. 750. C-51 required weekly checks of the cited PPU to ensure that it was working. Documented inspections were to be done biannually and were to be kept on file. *Id.* When the AAD asked about this matter, he learned there was no documentation of testing or inspections of the PPU. Also, one FCCU operator told him the PPU had been down for years. The AAD saw a number of electrical appliances in the FCCU control room. He concluded that they were a hazard because, if flammable vapors entered the room, the appliances would be an ignition source. (Tr. 290-306, 434-36; C-4, C-6).

The cited PPU has been in place in the FCCU’s control room since 1978 or 1979. It consists of an intake stack that draws in outside air and a fan that pulls the air into the control room. The PPU contains heating and cooling elements. As air is blown through the PPU, it passes over the heating and cooling elements. Without these elements the control room could still be pressurized, but would be uncomfortable.²³ The PPU has two sensors. One connects to an alarm that indicates whether the

²³The FCCU control room also has an air conditioner that is not related to the PPU. The record shows, however, that the air conditioner cycles on and off, unlike the PPU. The record further shows that the air conditioner frequently did not operate properly. It broke at least ten

control room is pressurized. The other detects the presence of combustible gas. This sensor, an “LEL gas monitor,” has an alarm set at 20 percent. If it reaches 50 percent, the PPU shuts down to keep vapors from entering the control room.²⁴ This protects the operator and equipment in the room in the case of an uncontrolled release of hydrocarbon vapors, so the operator can continue to operate the equipment in the control room. (Tr. 177-80, 189, 230-31, 236-37, 259-60, 383, 404-05, 409-10, 1244, 1269-70, 1282-83, 1287-88, 1336-37, 2084-85).

At the time of the OSHA inspection, the control room was not pressurized. The blower function of the PPU could be used to pressurize the room, but the heating and cooling elements were not working. When the PPU was turned on, it brought in outside air that was not temperature controlled. This made it unpleasant to work in the control room. The operators were thus not using the PPU as a matter of course because it was not fully functional. (Tr. 177-80, 190, 230-31, 389-91, 1241-43). Mr. Gaddis, an FCCU operator, testified that this had been the situation for eight to ten years before the inspection. He had submitted a work order during that period requesting that the PPU be repaired, but no repairs were undertaken. (Tr. 177-80). Mr. Baldwin testified he became aware of the PPU not working properly in 2006.²⁵ He began looking for a company that could repair it. In September 2008, Delek engaged Air Cybernetics. It took Air Cybernetics some time to locate the

times between 2005 and 2008 and had to be repaired. (Tr. 383, 414-415, 1283, 1299-1301; R-N).

²⁴Mr. Simmons, the refinery manager, testified the PPU shuts off when the gas monitor detects vapors at 20 percent. (Tr. 2361-62). Gary Baldwin, the electrical and instrumentation (“E&I”) supervisor, testified this occurs when vapors at 50 percent are detected. (Tr. 1199, 1236, 1287-88). Mr. Baldwin is the second-highest-ranking employee at Delek with respect to electrical matters. (Tr. 1199, 1296). His testimony in this regard is thus credited over that of Mr. Simmons.

²⁵Mr. Baldwin at first thought the PPU was not working at all. He later learned that only the heating and cooling elements were faulty and that the blower itself worked. (Tr. 1242-43).

heating and cooling parts needed for the repairs. The repairs were made in March of 2009. The repairs took around two weeks, required three to four Air Cybernetics employees, and cost about \$25,000.²⁶ (Tr. 387-93, 1199, 1236, 1241-44).

C-51 states that “[o]perators should check the lights, horn and test/acknowledge buttons at least weekly for proper operation. If a problem is found a work order should be written.” C-51, p. 750. Mr. Gaddis testified he had never seen this requirement before the hearing. He indicated the operators in the FCCU did not check the PPU before March 2008 and that he knew of no rules or procedures that required them to do so. He said that before the repairs, the alarm light indicating there was no pressurization was on all the time because the PPU was turned off. He also said that since the repairs, he checks the PPU’s alarms on a regular basis. (Tr. 180-81, 190, 256-60). C-51 further states that “[d]ocumented inspection[s] should be done biannually.” *Id.* Mr. Baldwin testified he received a quarterly e-mail from the inspection department to test the LEL gas alarms on the PPUs in the various units. Upon receiving the e-mail, he would send an employee to test and calibrate the PPU alarms and to inspect the belts on the motors of the PPU blowers. He received no feedback as to this testing, and no records in this regard were kept.²⁷ (Tr. 1244-47, 1261-64).

²⁶Another problem for many years was that the refrigeration system used to cool the PPU’s air utilized water from the refinery’s cooling water tower. This resulted in the tubes to the PPU’s cooling element condensers being clogged. This issue was finally resolved in March 2009, when the refinery put in lines to use city water. (Tr. 385-86, 395-99, 402-44).

²⁷Mr. Juarez, the inspection supervisor, agreed his office sent the e-mails to the E&I department quarterly. He had seen PPU inspection records before, but not for a long time and well before Mr. Baldwin’s tenure as the E&I supervisor. (Tr. 1312, 1352-53, 1359-63). Mr. Baldwin testified that has served as an electrical instrumentation supervisor since Delek bought the refinery in April, 2005. (Tr. 1199-1200).

The record shows that the cited PPU was not operating properly at the time of the OSHA inspection and had not been for many years. While the blower part of the PPU was functional, the operators kept it turned off as it was uncomfortable to be in the control room without the heating and cooling elements working. The record also shows that before the OSHA inspection, operators were not checking the PPU alarms as required by C-51. And, while E&I employees reportedly did quarterly tests and inspections of the LEL gas alarms on the PPU, no records of these quarterly tests were being maintained as set out in C-51. Moreover, the Manual stated that a “Documented [PPU] inspection should be done biannually.” It also called for these PPU inspections to be documented and “kept on file.” (C-51, p. 750).²⁸ Delek contends that the cited standard does not apply because the PPU is not process equipment. The Secretary, however, contends that the PPU is process equipment within the context of the PSM standard.

As the Secretary notes, the PSM standard states that subsection (j)(4) applies to the “following process equipment: (i) Pressure vessels and storage tanks; (ii) Piping systems (including piping components such as valves); (iii) Relief and vent systems and devices; (iv) Emergency shutdown systems; (v) Controls (including monitoring devices and sensors, alarms, and interlocks) and, (vi) Pumps.” *See* 29 C.F.R. 1910.119(j)(1). The Secretary asserts that the PPU is process equipment under

²⁸The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur. *U.S. ex rel. Compton v. Midwest Specialities, Inc.*, No. 96-4374, 1998 WL 30811, at * 7, n. 6 (6th Cir. Jan. 22, 1998). There is no documentation in the record that shows that the biannual PPU inspection had ever been performed by Delek. Accordingly, the Court finds that the biannual PPU inspections were not performed by Delek as required. The Court further finds that Delek failed to test and inspect the PPU in the FCCU Control Room to ensure it was in operation, was functioning properly and was effective in its function.

(j)(1)(v) because it has controls, including monitoring devices, sensors and alarms. She also asserts the PPU is a safety system, under 29 C.F.R. 1910.119(d)(3)(i)(D) and (H). S. Brief, p. 34.

The PPU is located in the FCCU's control room. Mr. Juarez, Delek's inspection supervisor, testified the control room is necessary to operate the FCCU's process and that it is an essential part of the process. (Tr. 1347-50). Mr. Juarez also testified, as did Mr. Todd, an FCCU operator, that the control room has controls, alarms and monitoring devices needed to run the process.²⁹ (Tr. 419-20, 1351). It is clear from the record the PPU also has sensors and alarms. (Tr. 189-90, 257-59, 1269). Mr. Juarez testified that any work order pertaining to a defect that impacted the PPU's safe operation would be of very high importance and rated a two, on a scale of one to ten with one being the most important. (Tr. 1354-56). The Secretary concludes that subsection 119 (j) applies to the PPU because it has controls, including monitoring devices, sensors and alarms. S. Brief, pp. 34-35.

As to the PPU also being a safety system, the Secretary notes that C-51, Delek's Manual, states that the purpose of the PPU is to keep "harmful or hazardous vapors from entering" the control room. She points out that the record shows the PPU is intended to protect the operators in the control room. It is thus an important element in the safety of employees. She further points out that the PPU is also intended to protect the process in the case of an upset. That is, the PPU keeps harmful vapors out of the control room so the process can continue to be handled and brought under control. The Secretary notes the Delek managers who testified to this effect and acknowledged the critical safety function of the PPU. These include E&I Supervisor Baldwin, Inspection Supervisor Juarez, Refinery Manager Simmons and Emergency Response Coordinator Martin. (Tr. 1239-40, 1354-59, 2359-60,

²⁹Mr. Todd also testified that a portion of the PPU was not working in the FCCU's control room in March, 2008 and confirmed that it had not been working for a number of years. (Tr. 428, 459-60).

3067-68). Toby Cubine, a co-owner of Air Cybernetics with 21 years of experience with PPU's, also testified as to the safety functions of the PPU. (Tr. 379-81, 404). The Secretary concludes the record shows the PPU is a safety system under the standard. S. Brief, p. 35.

The Secretary contends that the PPU's operation also falls under the definition of "process." The PSM standard, at 29 C.F.R. 1910.119(b), defines "process" as:

[A]ny 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. 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. (Emphasis added).

The Secretary asserts that utilizing a PPU constitutes "any use" as well as "handling" of vapors in the event of a release. She notes the testimony of Mr. Cubine that the pressurized air inside the control room presses against the air on the outside and pushes it back. (Tr. 404-05). The PPU thus "handles" the highly hazardous chemicals in a process in the case of an upset and is covered by the standard. The Secretary also notes OSHA interpretation letters in the record that establish that process equipment can include equipment that does not come in direct contact with the process chemicals. In one such letter dated May 25, 1994, a writer asks about whether hardware that contacts explosives is covered by the PSM standard. *See* C-56, p. 1 (Ques. 1). OSHA's response, in relevant part, is:

The employer is required to determine the extent of the process used to manufacture the explosive device described above. A covered process may include equipment within the facility which may or may not contact the explosive, or explosive device components, during the manufacturing activity.

In this same letter, another writer asks about the limit of process equipment that must be included in a mechanical integrity program, which is subsection 119(j) of the standard. *See* C-56, p. 2 (Ques. 2). OSHA's response is as follows:

OSHA believes that certain equipment is critical to process safety. At least the equipment specified in (j)(1) must be subject to the requirements of 1910.119(j). However, if an employer deems additional equipment to be critical to the safety of a particular process, the employer should consider that equipment to be covered by 1910.119(j) and treat it accordingly. (Emphasis added).

In another letter dated January 31, 2008, a writer asks if utility systems like steam, nitrogen, electricity, plant air and process water are part of the PSM covered process, especially since they do not contain a highly hazardous chemical. *See C-57*, pp. 1-2. OSHA's response is on page 3 of C-57:

It is OSHA's long-standing position that utility systems *are* part of the PSM-covered process when employers use them to control/prevent and mitigate catastrophic releases of HHC. A process is defined in 29 CFR 1910.119(b) as any activity **involving** a highly hazardous chemical ... if an employer determines that a utility system or any aspect or part of a process which does not contain an HHC but can affect or cause a release of HHC or interfere in the mitigation of the consequences of a release, then, relevant elements of PSM could apply to these aspects. (Emphases in original).

The Secretary notes that, based on the foregoing, OSHA's position is that a covered process under the PSM standard may include equipment in a facility that is not in contact with a highly hazardous chemical. She further notes that this interpretation comports with the purpose and meaning of the standard, as set out in Appendix C to the standard. *See C-3*, App. C. The Secretary contends that OSHA's interpretations and opinions regarding the standard, as set forth in C-56, C-57 and Appendix C, are entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). S. Brief, pp. 35-37.

I agree with the Secretary that OSHA's interpretation is entitled to deference. *See Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991) (an agency's interpretation is entitled to deference so long as it is "reasonable" and "sensibly conforms to the purpose and wording of the regulations") (citations omitted). I find that OSHA's interpretation here meets this test. The PPU has monitors, or sensors, and alarms. Its purpose is to prevent hazardous vapors from entering the control room, so as to protect

employees and equipment. It is not involved in any actual processing of hazardous chemicals. C-56 and C-57, however, noted above, make it clear that a covered process under the PSM standard may include equipment that is not in contact with a highly hazardous chemical. They also make it clear that equipment that is “critical to the safety of a particular process” or that “can affect ... a release of HHC” may be included. As set out *supra*, four Delek managers acknowledged the critical safety function of the PPU. (Tr. 1239-40, 1354-56, 1359, 2359-60, 3067-68). And, as already noted, the PPU can affect a release, in that it prevents hazardous vapors from entering the control room.

Appendix C, part of C-3, also supports OSHA’s interpretation. The “Mechanical Integrity” provisions of Appendix C state in relevant part as follows:

The first line of defense an employer has available is to operate and maintain the process as designed, and to keep the chemicals contained. This line of defense is backed up by the next line of defense which is the controlled release of chemicals through venting to scrubbers or flares, or to surge or overflow tanks which are designed to receive such chemicals, etc. These lines of defense are the primary lines of defense or means to prevent unwanted releases. The secondary lines of defense would include fixed fire protection systems like sprinklers, water spray, or deluge systems, monitor guns, etc., dikes, designed drainage systems, and other systems which would control or mitigate hazardous chemicals once an unwanted release occurs. These primary and secondary lines of defense are what the mechanical integrity program needs to protect and strengthen these primary and secondary lines of defenses where appropriate. The first step of an effective mechanical integrity program is to compile and categorize a list of process equipment and instrumentation for inclusion in the program. This list would include pressure vessels, storage tanks, process piping, relief and vent systems, fire protection system components, emergency shutdown systems and alarms and interlocks and pumps.

Based on all of the foregoing, I find that the PPU is process equipment within the meaning of 29 C.F.R. 1910.119(j)(1). In so finding, the Court has considered all of Delek’s arguments. For example, Delek urges the standard does not apply since PSM-covered equipment must contain or be connected to equipment containing more than a threshold quantity of a highly hazardous chemical.

It also urges that the standard does not apply as the PPU does not qualify as a process, *i.e.*, it does not store, manufacture, move, handle or otherwise have an impact on the process. Finally, Delek urges the standard does not apply as the PPU is not process equipment meeting any of the specific terms under 29 C.F.R. 1910.119(j)(1). R. Brief, pp. 37-45; R. Reply Brief, pp. 15-21. Delek's arguments, however, are not supported by the record, especially the OSHA interpretation letters and Appendix C. The Court has also considered the testimony of John Reynolds, an engineer and Delek's expert for this item.³⁰ The Court has noted Mr. Reynolds' education and qualifications and his extensive experience in the refinery business. (Tr. 2929-67). Like Delek's arguments, however, Mr. Reynolds' opinions are simply not supported by OSHA's interpretation letters and Appendix C.³¹ I do not find his opinions persuasive. I find, accordingly, that the cited standard applies to the PPU.

There are several arguments of Delek that, despite the above, must be addressed. Delek urges that, beyond the equipment explicitly set out in 29 C.F.R. 1910.119(j)(1), it is the employer's decision to determine that any other equipment is also covered. It also asserts that it has evaluated its facility and determined the PPU is not part of the covered process. R. Brief, p. 41; R. Reply Brief, pp. 16-18. In support of this argument, Delek points to OSHA's statements in C-56 and C-57, as follows:

³⁰The Court has additionally considered the testimony of Frederick Brooks, the Secretary's expert for this item, and has noted his education, qualifications and experience. (Tr. 801-31, 893). In view of the Court's findings above, his opinions need not be set out in this decision.

³¹At the end of her cross-examination, the Secretary's counsel asked Mr. Reynolds whether it was true that a covered process under the standard may include equipment that does not come into contact with a highly hazardous chemical if that equipment is critical to the safety of the process. Mr. Reynolds responded that, if "OSHA believes it is true, and [OSHA] has issued that in an interpretation letter, it must be true." (Tr. 3012-13).

However, if an employer deems additional equipment to be critical to a particular process, that employer should consider that equipment to be covered by [paragraph (j)(1)] and treat it accordingly.³²

Delek also points to certain testimony of Mr. Simmons. Mr. Simmons, however, stated only that he did not consider the PPU process equipment. He did not state he had made any evaluation in that regard. (Tr. 2087, 2124). In any case, I have already noted the testimony of four Delek managers, including Mr. Simmons, indicating that they considered the PPU critical to the safety of the process. (Tr. 1239-40, 1354-56, 1359, 2359-60, 3067-68). Delek's argument is rejected.

Delek next notes the testimony of Mr. Baldwin indicating that he believed the air conditioner in the control room also provided positive pressure and did the same job the PPU did. R. Brief, pp. 52-53. Mr. Baldwin did, in fact, testify to that effect. (Tr. 1283-85, 1299). As noted *supra*, the record shows the air conditioner cycled on and off, unlike the PPU. The record also shows the air conditioner frequently did not operate properly and had to be repaired at least ten times between 2005 and 2008. (Tr. 383, 414-415, 1300-01; R-N). Finally, Mr. Juarez testified that, to keep the control room safe, the PPU had to be on continuously to keep any fumes or hazardous vapors out. (Tr. 1259). Delek's suggestion that the air conditioner served the same purpose as the PPU is rejected.

Delek further urges that the Secretary did not prove that the FCCU's control room was a classified area, such that the unclassified electrical equipment in the room posed a hazard. R. Reply Brief, pp. 21-24. I find, however, that the testimony of Mr. Baldwin establishes that the entire FCCU, including the control room, was a Class I, Division ("Div.") 2 area.³³ The AAD testified that during

³²See C-56, p. 2, and C-57, p. 5, n.4.

³³A Class I, Division 2 area includes a location "to which ignitable concentrations of gases or vapors might occasionally be communicated unless such communication is prevented by adequate positive-pressure ventilation from a source of clean air, and effective safeguards against

the inspection, Mr. Baldwin told him the control room was a Class I, Div. 2 area. He also testified that both Messrs. Baldwin and Martin told him that they were aware that the control room should be pressurized and that the pressurization for the room was not working.³⁴ (Tr. 294-95, 315, 323). The AAD further testified that due to the control room's classification, it had to have either Class I, Div. 2 electrical equipment or a properly-operating PPU. The AAD stated that because the room had neither, an explosion could have resulted if hazardous vapors had entered the room. (Tr. 295).

At the hearing, Mr. Baldwin denied telling the AAD that the control room was a Class I, Div. 2 area. He agreed that he had told the AAD that the FCCU was a Class I, Div. 2 area. (C-28). He stated that while he himself was not qualified to make such a determination, he knew the FCCU was a Class I, Div. 2 area because of his 34 years at the facility and other professionals at the refinery informing him of the classification. He stated that the purpose of having a PPU in the FCCU's control room was to help maintain positive pressure in the room. When asked the benefit of that, he said:

Because inside control rooms, there's not Class I, Div. 2 instrumentation or whatnot. You maintain positive pressure so that you can use that instrumentation within the confines of that room. (Tr. 1239-40).

Mr. Baldwin then agreed that if the PPU was on and functional, classified electric lines were not needed. He also agreed that the PPU's purpose is to protect both the occupants and any equipment in the control room from hazardous vapors in the case of a release. (Tr. 1240). Mr. Baldwin's testimony was thus in agreement with that of the AAD. That is, the control room either had to have a properly-functioning PPU to keep hazardous vapors out or it had to have Class I, Div. 2 electrical

ventilation failure are provided." *See* 29 C.F.R. 1910.399(2)(iii).

³⁴C-21 is the AAD's OSHA 1-B for this item. It contains basically the same information, but states that Mr. Baldwin told the AAD that the entire refinery was a Class I, Div. 2, area.

equipment in it, so that, if hazardous vapors entered the room, there would be no ignition sources. Mr. Baldwin's testimony, along with the rest of the record, plainly supports a finding that the control room, like the rest of the FCCU, was a Class I, Div. 2 area. Delek's argument is rejected.

The foregoing establishes Delek violated the terms of the cited standard. It also establishes that control room operators such as Messrs. Gaddis and Todd were exposed to the cited condition. Finally, it establishes that Delek managers, including Messrs. Baldwin and Martin, had knowledge of the condition. This item is affirmed as a serious violation, as it is clear that an explosion in the control room could result in death or serious injuries.

The Secretary has proposed a penalty of \$6,300.00 for this item. The AAD testified that this item had high gravity because of the hazard of explosion. The PPU was not working properly and the operators kept it turned off. The condition had existed for many years, Delek managers were aware of it, and the PPU was not repaired until a year after OSHA discovered the condition. No reductions were given for good faith or size, but a reduction for history was given. (Tr. 323-24, 271-74). The Court finds the proposed penalty appropriate. A penalty of \$6,300.00 is therefore assessed.

Item 9(b) – Alleged Violation of 29 C.F.R. 1910.119(l)(4)

Item 9(b) alleges a violation of 29 C.F.R. 1910.119(l)(4), which provides as follows:

If a change covered by this paragraph results in a change in the process safety information required by paragraph (d) of this section, such information shall be updated accordingly.

This item alleges that Delek did not ensure that a MOC was documented and on file when steam lances were applied to identified "hot spots" on the exterior of processing equipment in the FCCU. The cited equipment is the regenerator, which is one of the main vessels in the FCCU. It is

about 50 feet high and 20 feet wide, and another vessel, the reactor, sits on top of it. The regenerator's shell is made of carbon steel. Inside the shell is a 4-inch liner of gunite, a cement material, called the refractory. The refractory's purpose is to protect the shell from the heat and the erosive effect of the process that takes place in the vessel.³⁵ This erosion affects the refractory, however, causing it to thin, crack and otherwise deteriorate over time. The regenerator's manway is an area that is regularly monitored for hot spots due to the refractory's tendency to thin there. The subject hot spot was detected in early 2008 during a routine infrared inspection by All Tech. All Tech is the contractor Delek uses to make such inspections. The hot spot was just above the regenerator's manway. It was about 2 feet by 1 foot.³⁶ After it was detected, a steam lance was used to cool the hot spot. The steam lance was a 6 to 8-foot pipe that was connected to a steam hose. The hose was connected to a steam header, which provided steam from the refinery's boiler system. The pipe had holes in the end of it, and it was welded to legs that were set up at the manway. The pipe was directed at the hot spot so that the steam continuously leaving it would cool the spot. The steam lance was used on the hot spot until the 2009 turnaround, when the refractory was repaired.³⁷ (Tr. 171-72, 181-88, 213-14, 222, 233-36, 325-27, 421-23, 429-32, 1365-67, 1370-74, 1383, 1394-95, 2144-45, 2147-50; C-34, pp. 2-3).

The AAD became aware of the hot spot while he was inspecting the FCCU on February 28, 2008 when he noticed steam on the regenerator during his initial walk around the facility. He

³⁵The regenerator's interior temperature is 1220° to 1280° F. (Tr. 182-84, 219-21, 2223).

³⁶Messrs. Gaddis and Juarez testified the hot spot was about 2 feet by 1 foot, while Mr. Simmons indicated it was about 14 inches by 8 inches. (Tr. 234, 1394-95, 2147).

³⁷This same area had a similar hot spot from early February to mid-August of 2005. A steam lance was applied to the hot spot, until the refractory was repaired sometime after mid-August when a turnaround took place. The record indicates that the refractory is inspected and repaired at every turnaround. (Tr. 1374-75, 1387-92, 1407-08; C-34, p. 3).

concluded the steam lance was a change in operation that required an MOC procedure, especially since the vessel would require more frequent inspections due to the hot spot. He believed that if the heat continued on the vessel wall, the metal's composition would change and the wall could become brittle and rupture. He also believed that there would be a problem keeping the hot spot cool if the boiler supplying the steam went down for some reason. The AAD learned that there were no written procedures in regard to using the steam lance on the hot spot. (Tr. 325-32, 592).

Because of the AAD's concern about the hot spot, Delek had Aptech Engineering Services ("Aptech"), a consulting company it contracts with as needed, evaluate the regenerator and prepare a report. The report, C-34, dated June 2, 2008, states it is a common industry practice to apply steam to a hot spot on the exterior of a vessel wall to keep the temperature below about 600° F. It also states that, upon considering the maximum allowable temperature for the regenerator's exterior wall (802° F) and assuming the hot spot in 2005 had not been cooled and had had a "steady state temperature" of 850° F, there was "substantial remaining life" in that area. According to the report, if no steam was applied to the subject hot spot and the spot ran at 900° F, the vessel had a minimum of 12,248 hours (about a year and a half) before it should be shut down for inspection and maintenance. And, if the hot spot was cooled continuously with steam and kept below 650° F, then it had "essentially infinite life" and operation in that mode was safe. (Tr. 1368-69, 1494-96, 1525-28; C-34, pp. 2-4).

Delek contends the Secretary has not shown that the PSM standard applies to the regenerator as it does not process a flammable liquid or gas in a quantity of 10,000 pounds or more. I do not agree. As the Secretary points out, the PSM standard applies to a process involving a flammable

liquid or gas on site in one location in a quantity of 10,000 pounds or more. *See* 29 C.F.R. 1910.119(a)(1)(ii). S. Brief, p. 9. Further, 29 C.F.R. 1910.119(b) defines “process” as follows:

[A]ny 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. 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.

The FCCU’s process contains 397,500 pounds of flammable mixtures, with 7,500 of that total being in the reactor at any one time. *See* C-24, p. 767. The process starts by gas oil and catalyst entering the reactor. There, the gas oil is “cracked” into smaller hydrocarbons. The resulting vapors go to the fractionator, another vessel in the FCCU. After further processing, the vapors ultimately become gasoline. At the bottom of the reactor, the catalyst is stripped of hydrocarbons. The catalyst then goes into the regenerator. The regenerator uses heat and air to separate any remaining carbon from the catalyst. After regeneration, the catalyst is reused. (Tr. 171-72, 1865-67, 2142-46, 2695-97).

Delek’s contention is premised on its claim that the reactor/regenerator is separate from the rest of the FCCU. It also notes that only 7,500 pounds of gas oil are in the reactor at any one time and that the only materials in the regenerator are spent catalyst, air, and trace amounts of hydrocarbons. R. Brief, pp. 60-62. Delek, however, overlooks the testimony of its own expert, John Arendt, an engineer with extensive experience in process safety, risk analysis and the PSM standard. Much of his experience has involved refineries. (Tr. 2574-87, 2683-84). Mr. Arendt testified that the reactor and the regenerator are connected and that the reactor is connected to “a lot of the components in the FCCU.” He also testified that “[v]essels that are interconnected that contain a threshold quantity of the hazardous material would be considered to be a part of the boundary of the process.” (Tr. 2693). Finally, Mr. Arendt testified that the regenerator is “process equipment, as it operates in the process

of the unit.” (Tr. 2732, 2758-59). Based on the evidence of record and the definition of “process,” set out *supra*, I find that the PSM standard applies to the regenerator. Delek’s contention is rejected.

Delek next contends that the Secretary has not shown that the “change” here was one within the meaning of 29 C.F.R. 1910.119(l)(1). R. Brief, pp. 62-66. That provision states that:

The employer shall establish and implement written procedures to manage changes (except for “replacements in kind”) to process chemicals, technology, equipment, and procedures; and, changes to facilities that affect a covered process.

Messrs. Arendt, Gaddis, Juarez and Simmons all testified as to their belief that using the steam lance was not a change to the regenerator’s process chemicals, technology, equipment or procedures. (Tr. 237, 1443, 2152-55, 2701-09). This belief was based on the fact that there were no changes to the internal process in the regenerator. The chemicals and technology were the same, as were the procedures and equipment. The Secretary, however, contends there were changes to the regenerator’s technology, equipment and procedures. She notes that due to the refractory’s condition, the exterior vessel wall was a higher temperature than normal.³⁸ She also notes that the steam lance was used to do what the regenerator was designed to do, *i.e.*, to keep the vessel’s exterior at an acceptable temperature. Messrs. Arendt, Gaddis, Juarez and Simmons all agreed this was so. (Tr. 186-87, 1442, 1557-58, 2154, 2329-30, 2750-51). The Secretary further notes the exterior of the vessel was changed due to the hot spot. Messrs. Arendt, Juarez and Simmons all testified that increased heat could cause the metal to change color. (Tr. 1553-55, 2322, 2749). Mr. Juarez indicated that had actually occurred and that the hot spot area was darker in color. (Tr. 1553-55). Messrs. Arendt, Gaddis, Juarez and Todd all agreed that, with time, excessive heat in the hot spot area could cause the metal to deteriorate

³⁸The normal temperature of the vessel’s wall is about 350° F. The hot spot’s temperature rose to 850° F in 2005; with a steam lance, it was kept to about 600° F. (Tr. 1387; C-34, pp. 2-3).

and make the regenerator unsafe to run. (Tr. 234-35, 423, 1483-41, 2756-57). Finally, the Secretary notes that the hot spot had resulted in a change to the procedures for the regenerator. The record shows that once the steam lance was in use, All Tech inspected the hot spot area much more often. (Tr. 185, 1376-77, 1385, 1418-19, 1429-30, 2151-52, 2321-22). S. Brief, pp. 49-51.

The Secretary further contends that the steam lance was a change that required the PSI for the regenerator to be updated.³⁹ S. Brief, p. 51. She notes that paragraph (d)(2)(i) of the standard requires information concerning the technology of the process to include, *inter alia*, the following:

- (D) Safe upper and lower limits for such items as temperatures, pressures, flows or compositions; and,
- (E) An evaluation of the consequences of deviations, including those affecting the safety and health of employees.

The Aptech report, C-34, shows that the maximum allowable temperature of the vessel's wall was 802° F. It also shows the hot spot's temperature in 2005 was 850° F for an unspecified period. Aptech performed a remaining life evaluation, by using 850° F as the steady state temperature for the entire time the hot spot existed in 2005. Aptech also assumed 900° F as the "worst case operating condition" for the remaining period of operation, presumably until the next shutdown. Aptech's report concluded the regenerator could run safely at 900° F for a minimum of 12,248 hours (about a year and a half) before it should be shut down for inspection and maintenance. Mr. Arendt testified he had relied on the information in C-34 in reaching some of his opinions in this matter.⁴⁰ He agreed that the 900° F temperature in C-34 was a presumption, as there was no analysis and conclusion that the vessel would not exceed 900° F. He also agreed that in a worst-case scenario, if a high enough

³⁹Delek disagrees with this contention. R. Brief, pp. 66-67.

⁴⁰Mr. Arendt did not rely on C-34 to conclude that no change within the meaning of the standard had occurred. (Tr. 2735).

temperature was maintained for a sufficient period, the vessel could degrade and fail and the materials inside could be released. These would include hot spent catalyst, hot air, water vapor, carbon monoxide, carbon dioxide and trace amounts of hydrocarbons. Mr. Arendt stated that all the materials would go up into the air and dissipate, except for the hot catalyst, although he noted that the hydrocarbons could cause a fire. As to the hot catalyst, he said that “[y]ou wouldn’t want to come into contact with items that were, you know, a thousand degrees.” (Tr. 2756-58).

Based on the foregoing, I find that the Secretary has shown that Delek was required to have an MOC procedure documented and on file as to the use of the steam lance. I have considered the testimony of Delek’s witnesses, especially Mr. Arendt, that the changes in this case were not changes to the process chemicals, technology, equipment or procedures. I have also considered Mr. Arendt’s qualifications and experience in the PSM standard. My reading of the standard, however, together with the evidence in this case, persuades me the Secretary’s interpretation of the standard is correct. I further find that Delek was required to update the PSI for the regenerator due to the use of the steam lance, in view of paragraphs (d)(2)(i)(D) and (E), set out above. I have noted the Aptech report and its conclusion the regenerator could have run safely for some time with the hot spot’s temperature at 900° F. However, Mr. Arendt agreed there was no analysis in C-34 to show the hot spot would not have exceeded that temperature. Also, Delek did not have C-34 before use of the steam lance on the hot spot began and had no real basis for concluding its use was safe. And, without further evidence to support the claims in C-34, I am simply unwilling to accept those claims at face value.

I have noted the testimony of Delek employees that steam lance use is routine in the industry and is considered a safe work practice. (Tr. 235-37, 436-37, 1429, 2155-60). The Aptech report also makes this claim, as does Mr. Arendt. (Tr. 2709-11; C-34, p. 2; R-D, p. 5). Mr. Arendt, however,

essentially admitted that there was no support in the PSM standard for his opinion that the use of the steam lance here was a safe work practice such that an MOC was not required. He agreed that the term “safe work practice” does not appear anywhere in paragraph (l) of the standard. He also agreed that, while the term does appear in paragraph (f), neither paragraph states that use of a “safe work practice” provides an exemption from the MOC requirements. (Tr. 2730-31).

The Secretary has also shown employee exposure to the cited condition. Sixteen employees work in the FCCU, which operates 365 days a year. There are four employees on each of the two 12-hour daily shifts. FCCU employees make rounds on their shifts. These include going up on the regenerator’s walkway that is at the manway level. Supervisors and maintenance employees also enter the FCCU as needed. (Tr. 169-70, 420-21, 460-61, 1392-93, 1406, 1415-20, 1429, 1548).

Finally, the Secretary has shown that Delek had knowledge of the cited condition. Inspection Supervisor Juarez was aware of the hot spot in 2005. He was also aware of its recurrence in early 2008. He testified that after meetings with supervisors were held, maintenance workers fabricated the lance and set it up at the regenerator’s manway. (Tr. 184, 1383, 1387-92, 1408, 1415-20, 1429).

In light of the evidence of record, the alleged violation is affirmed. It is affirmed as serious due to the testimony of Mr. Arendt, *supra*, as to what the consequences of a failure of the regenerator wall could be. (Tr. 2756-58). Specifically, a fire on the regenerator or hot catalyst being released could cause serious injury or death. This is particularly true since, as set out above, FCCU employees go up on the regenerator’s walkway that is at the manway level.⁴¹ The finding of a serious violation is supported by evidence that the reactor has caught fire before. (Tr. 188). The reactor sits on top of

⁴¹As the Secretary notes, besides inspecting the regenerator from the walkway, FCCU employees must also go up on the regenerator to manually shut the valve that “blocks in” the vessel. To do so, they must go past the hot spot. (Tr. 1759-60, 1763-64). S. Brief, p. 53.

the regenerator and is connected to it. A fire on the reactor could affect not only the reactor itself but also the regenerator. The finding of a serious violation is also supported by evidence that the boiler system has failed on several occasions and that there has been an explosion in one of the facility's boilers. (Tr. 183, 1255). If the boiler system failed, the steam lance would also fail.

The penalty proposed for this item is \$6,300.00. The AAD testified this item was a serious hazard. There were changes to the vessel's operation and no written procedures to indicate, for example, how often the lance should be inspected, how long it was to be used, and what to do if the boiler system supplying the steam failed. (Tr. 329-32). OSHA gave a reduction in the penalty for history, but no reductions were given for good faith or size. (Tr. 271-74, 331-32). The Court finds the proposed penalty appropriate. That penalty is assessed.

Item 12 – Alleged Violation of 29 C.F.R. 1910.119(o)(4)

Item 12 alleges a violation of 29 C.F.R. 1910.119(o)(4), which provides that:

The employer shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

The citation alleges as follows:

The employer did not ensure that an appropriate response to each of the findings of the compliance audit required by 29 CFR 1910.119(o)(1), has been determined and documented and does not document that the deficiencies have been corrected. The violation was observed on or about February 29, 2008, at 1702 Commerce St., Tyler, Texas where the employer did not determine and document an appropriate response to each finding from the 2005 PSM audit.

Employers are required to “certify that they have evaluated compliance with the provisions of this section to verify that the procedures and practices developed under the standard are adequate and are being followed.” 29 C.F.R. 1910.119(o)(1). Employers must develop a report of the audit findings

and must retain the two most recent audit reports. 29 C.F.R. 1910.119(o)(4)-(5). Upon OSHA's request, Ms. Tarpley gave the AAD C-38 and C-39, the refinery's audit reports for 2004/2005 and 2001, respectively. The AAD noted that C-38 showed numerous deficiencies that had not been addressed or corrected.⁴² He noted the same problem with C-39, and he observed that some of the deficiencies in C-39 had been carried over to C-38. When he asked Ms. Tarpley about what corrections or responses to deficiencies had been made to the 2001 and 2004/2005 PSM audits, she was unable to provide him with anything. She told him that she could not give him what she did not have. (Tr. 333-57; R-R).

Ms. Tarpley testified she was unaware of the audit reports until February or March of 2008. She found them in hard copy and electronic format at the time of the OSHA inspection. She also testified she could not find any documentation for the closure of the items in the audits, despite the fact that she conducted a thorough search for about two weeks. She said there were about 50 deficiencies in C-38, that she discussed with management her inability to find any documents showing the corrections for C-38, and that she was told to get the information that was required. R-R, dated August 29, 2008, is her report showing responses for the C-38 items. (Tr. 785-87, 2835, 2838-40, 2899-2902).

The Secretary contends there are 14 items contained in R-R that, based on the testimony of Ms. Tarpley about her investigating these items in 2008, were not corrected as of February 29, 2008. The Secretary lists these items on pages 57-59 in her brief. The items are summarized as follows:

Item 2, p. 1 – Info. concerning safe lower limits was reportedly not provided for Crude/Vac Unit or DHT Unit. Ms. Tarpley testified she learned the safe upper and lower limits were available and evidently had been since before Delek bought refinery. Accordingly, the Court finds that no deficiency existed with regard to this item. Item 2 is not a violation of the standard. (Tr. 2847-48).

⁴²See C-37, OSHA 1-B. (Tr. 642-45; C-37).

Item 4, p. 1 – Info. was not available for flare systems protecting units. Ms. Tarpley testified that a flare study for the flare systems began in 2006 and was completed at the end of 2008. (Tr. 2845-46, 2905-09).

Item 5, p. 1 – Some of the process technology info. requiring updating had reportedly not been revised and needed to be updated. Ms. Tarpley testified that in response to this item, the information was reviewed, found to be complete, and not in need of updating. Accordingly, the Court finds that no deficiency existed with regard to this item. Item 5 is not a violation of the standard. (Tr. 2848-50).

Item 6, p. 1 – There was no electrical classification info. for the DHT Unit and the electrical classification drawings for the Crude Vacuum Unit were not updated or reviewed since 1979. New drawings for the entire refinery were done as of March 4, 2010, but they had not been done as of February 29, 2008. (Tr. 2843-45, 2905-09).

Item 7, p. 2 – No study for flare systems. Ms. Tarpley testified that a flare study was begun in 2006 and completed in late 2008. (Tr. 2845-46, 2905-09).

Item 10, p. 2 – Not all areas of the [PHA] recommendations have been implemented, further review is necessary. Ms. Tarpley testified that the PHA tracker was created in February 2008. (Tr. 2851-52).

Item 36, p. 7 – “Contract Employee injury/illness log. The PSM Coordinator maintains a log, but is not advised of all injuries/illnesses by La Gloria supervisors. A system should be implemented to catch all required reporting incidents.” Ms. Tarpley testified that a PSM Coordinator has been maintaining a log since January 2008 and now there is a system to ensure injuries/illnesses reported. (Tr. 2863-64).

Item 38, p. 7 – Some contractors perform audits of their personnel, while some do not. Ms. Tarpley testified that the self-audit requirement did not start until 2008. (Tr. 2866).

Item 43, p. 8 – Maintenance materials and spare parts. Some work has been done in this area, but additional work should be done. Ms. Tarpley testified a Positive Material Identification (“PMI”) machine was purchased in 2008. (Tr. 2872-73, 2905-09).

Item 45, p. 9 – “Incident investigation.... There is a recommendation backlog that we are still working on. Because of that this item will be listed as deficient.” Ms. Tarpley testified that process changed in 2008 to track incident investigations. (Tr. 2875-76).

Item 46, p. 9 – “Incident investigation....System is currently being modified.” Ms. Tarpley testified that while incident reports were being reviewed with affected personnel, there was no report sign-off requirement to show this had occurred. She also

testified the system was updated in 2008 to enhance incident report formatting and that other improvements are still being worked on. (Tr. 2876-79, 2905-09).

Item 47, p. 9 – “Documentation of response for compliance audit findings.... For this audit, the deficiencies will be brought to the attention of upper management, ... The correction of the deficiencies will also be documented.” Ms. Tarpley testified that a new compliance audit procedure was developed in 2008 to address this item. (Tr. 2879-80).

Item 48, p. 9 – “Documentation of deficiency correction.... deficiencies will be brought to the attention of upper management....correction of the deficiencies will also be documented.” Ms. Tarpley testified the new procedure, developed in 2008, addresses this item. (Tr. 2879-80, 2905-09).

Item 49, p. 10 – “[E]mergency action plan should be evaluated ... and should be revised as necessary.” Ms. Tarpley testified that the plan was revised in 2008. (Tr. 2881).

Items 4 and 7 both relate to the flare study, and Items 47 and 48 both relate to the documenting of audit deficiency corrections. Accordingly, the Court finds that Items 4 and 7 are one finding and one correction, as are Items 47 and 48. Based on the foregoing, I find that Delek did not determine and document an appropriate response to ten of the above audit findings before February 29, 2008.⁴³ Ms. Tarpley specifically admitted this was true as to Items 4, 6, 7, 43, 46 and 48. (Tr. 2905-09). I find this was also true as to the other items listed above, except Items 2 and 5. Ms. Tarpley was unaware of the audit reports until February or March of 2008. After learning of them, she searched for two weeks before determining that no documentation for the items existed. In light of her testimony, and the fact that R-R is dated August 29, 2008, it is clear the items were addressed after February 29, 2008. The Court concludes, therefore, that there were ten unresolved audit items at the time that OSHA discovered the violative condition.

⁴³Ms. Tarpley agreed that under the standard Delek was responsible for promptly determining and documenting an appropriate response to each of the compliance audit’s findings. (Tr. 782).

Delek claims it had no reason to believe that any La Gloria audit items were outstanding. As Delek notes, Mr. Whaley, the EHS manager, and Ms. Tarpley both testified to their understanding that La Gloria had addressed all the audit items before Delek bought the facility. (Tr. 1830, 2835-38). R. Brief, p. 76; R. Reply Brief, pp. 38-39. As the Secretary points out, however, Delek had C-38 and C-39 in its possession, in hard copy and in electronic format, from the time it purchased the facility. S. Brief, pp. 56, 59, 61. Further, C-38, La Gloria's audit report for 2004 /2005, shows a date of May 5, 2005. Ms. Tarpley testified this was the "print date" of the report, based on her contacting Sage Environmental, the contractor that conducted the audit. (Tr. 2836, 2902-04). In view of this date, which was after Delek purchased the refinery, it is reasonable to conclude that Delek, as the new owner, received C-38 at the time it was issued. In any case, as the Secretary points out, Delek had the 2001 and 2004/2005 reports in its possession for three years and did nothing to confirm that the audit items had been addressed and corrected.⁴⁴ S. Brief, p. 62; S. Reply Brief, p. 26. The Court concludes that Delek did not exercise reasonable diligence to promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

Delek also claims that it complied with the standard. It notes it had the previous two audit reports, as required by 29 C.F.R. 1910.119(o)(5). It also notes that the basis of this citation item was its failure to retain documentation showing the actions it had taken to address issues identified in past audits. Delek urges that paragraph 1910.119(o)(5) has no requirement to retain such documentation. It point outs that when OSHA published the proposed PSM standard, there was such a requirement in the standard. Specifically, the proposed subsection (o)(5) read as follows:

⁴⁴Mr. Whaley admitted that Delek, to his knowledge, did not do anything to determine and document appropriate responses to the findings in C-38. (Tr. 1832).

Employers shall retain the two (2) most recent compliance safety audit reports, as well as the documentation described in paragraph (o)(4) of this section.

Delek concludes that, because the requirement was contemplated in drafting but was not included in the final standard, it must be assumed that the exclusion was purposeful. Delek also notes that since the standard became final in May 1992, OSHA has issued no interpretation letters in regard to the requirement to retain the documents. R. Brief, pp. 75-76; R. Reply Brief, pp. 37-38.

I disagree with Delek's argument. As the Secretary points out, the citation alleges Delek violated 29 C.F.R. 1910.119(o)(4). That subsection required Delek to promptly determine and document an appropriate response to each audit finding and to document that deficiencies had been corrected. The issue is not whether Delek failed to maintain documentation but, rather, the fact that Delek did not document in any way that the audit deficiencies had been corrected as of the violation date of February 29, 2008. Even assuming Delek had addressed some of the deficiencies before the inspection, the record clearly shows that not all of them had been corrected. (Tr. 2905-09). I agree with the Secretary that the failure to respond to the deficiencies for almost three years was neither prompt nor reasonable under the standard. And, even the deficiencies that Delek had addressed before the inspection had not been documented. S. Reply Brief, pp. 26-27. Delek's argument is rejected.⁴⁵

The foregoing establishes all elements of the Secretary's burden other than employee exposure. I agree with the Secretary that she has met that element. Item 10 of the above audit findings states that "not all areas of the [PHA] recommendations have been implemented, further review is necessary." Item 4 of this decision, set out *supra*, shows that 16 PHA items, some of which were high-priority

⁴⁵Delek also argues that the PSM standard does not impose a duty on a company that buys a facility to review and recompile all of the process safety information that the prior owner had a duty to compile. R. Reply Brief, pp. 39-40. That argument was considered and rejected *supra*, in footnote 15. It is rejected here for the same reasons.

safety items, had not been implemented. These conditions exposed employees to hazards. One specific example discussed earlier herein was PHA Item 42, which involves the failure to install a remote valve actuator on the FCCU's reactor. The 16 FCCU employees were all exposed to the hazard of fire that could have resulted from that condition. Item 46 of the audit findings also showed employee exposure. That item stated that incident reports "appear to be reviewed with affected personnel, however, there is no documentation or sign-offs to demonstrate that affected personnel are being informed and/or review incident investigation reports."⁴⁶ ®-R, p. 9). Finally, Item 6 of the audit findings was that there was no electrical classification information for one unit and that the electrical classification for another unit had not been updated or reviewed since 1979. As the Secretary notes, Item 8 of this decision, set out above, demonstrates that electrical classification of units in the refinery is critically important. *See* S. Brief, pp. 60-61. I find that the Secretary has shown employee exposure to the hazards of the cited condition. This item is affirmed as a serious violation.

The Secretary has proposed a penalty of \$6,300.00 for this item. The AAD testified that Delek failed to audit its PSM program, which is the employer's process for containing highly hazardous chemicals. He also testified that Delek is in a high-hazard industry, that a release could lead to an explosion, and that Delek has had an explosion at its refinery. OSHA thus considered the cited

⁴⁶The Secretary notes an incident in which there was a "hot oil blowback" in the Coker Unit in April 2008. Three workers were burned with oil of 300° F near the end of a process in which the hot oil went down a drain. This incident resulted in a written procedure that required more protective equipment for employees doing this work and a requirement that the oil be less than 180° F. The Secretary states that without ensuring the report was reviewed with affected personnel, further injury could result if not all factors were considered. (Tr. 360; C-60; S. Brief, pp. 60-61). *See U.S. ex rel. Compton v. Midwest Specialities, Inc.*, 1998 WL 30811, at *7, n.6 (The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur.).

condition a high-gravity item. The AAD further testified that while a reduction for history was applied, no reductions for size or good faith were given. (Tr. 271-74, 359-61).

In assessing a penalty for this item, I have considered the fact that, of the 50 audit items set out in R-R, ten items have been found to violate the standard. OSHA, however, has determined this item to have high gravity, for the reasons stated above. And, Delek did not address the audit items for three years, even though it had the audit reports in its possession the entire time. I also note the number and types of accidents Delek has had, as set out in the Court's prior discussion of Item 4, *supra*. On balance, the Court finds that the proposed penalty of \$6,300.00 is appropriate. That penalty is assessed.

Item 13 – Alleged Violation of 29 C.F.R. 1910.219(c)(2)(i)

Item 13 alleges a violation of 29 C.F.R. 1910.219(c)(2)(i), which states that:

All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform ... shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

This item alleges that rotating shafts were not guarded on the following equipment:

- a) Sealing air fan to ignition air fan #9, model B0252FLG3UL, Type TIKK (“the fan”)
- b) General Electric motor of #6 cooling tower pump #X115460 (“the motor”)

The cited fan and motor are located in the Boiler Unit. The fan turns on and provides air in order to create more pressure when the differential pressure inside the boiler compared to outside the boiler gets close to being equal. The motor takes water out of the cooling tower and delivers it to the overhead condenser or elsewhere for the main boiler feed-water pump. The AAD testified that he and an operator, Kevin Payne, walked by the shafts in the unit. Both shafts were rotating at the time. The AAD described the shafts as being in the main aisle way of the unit.⁴⁷ He said the shafts should have

⁴⁷C-40, the AAD's OSHA 1-B for this item, states that the shafts were about 29 inches high and that the unguarded parts of the fan and motor shafts were 12 and 8 inches, respectively.

been enclosed. He believed that the operators and technicians in the unit, while walking by the equipment, could trip and fall onto the rotating shafts. (Tr. 201, 361-69, 2419-21; C-40). Operator Kevin Payne was exposed to the hazard for 12 hours per day and three days per week. (C-40). The fan's shaft is shown in C-41(d) and (e). The motor's shaft is shown in C-41(a), (b) and (c). The photographs are telling and help establish that the two shafts were not guarded and constituted a hazard.⁴⁸ (C-41(a)-(e)). The motor and fan were observed by OSHA in operation and there was nothing to warn employees of the hazard. (C-40).

Mr. Gaddis testified that he was close enough to touch the back of the motor when he passed the equipment. (Tr. 196-97; C-41(c), at letter "C"). He also testified there was a walkway and place to stand where an employee could "walk up that close and actually just touch" the fan. (Tr. 195-96; C-41(e), at letter "A"). Operations technicians inspect these units daily and the unguarded shafts were within hands reach of employees walking or working around them. John Yost, Jr., has been a boiler tech in the Boiler Unit for three years. He testified he walked by the cited shafts several times per shift while making his rounds.⁴⁹ He also testified that when performing their rounds employees should walk by the motor. He further testified that he got within 5 feet of the shafts. According to Mr. Yost, the fan operates automatically, and there is no on/off button or other means to run it. The motor operates constantly, and its shaft rotates at about 3,600 rpm's. The button to turn on the motor is 7 to 8 feet away from the shaft. When operating, the fan turns on a slow rolling basis. Mr. Yost said there

⁴⁸The existence of a hazard is not negated by the absence of an injury tied to the hazard. See *A.E. Burgess Leather Co., Inc.*, 5 BNA OSHC 1096, 1097 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978).

⁴⁹Mr. Yost said he and an operator are the only two workers in the Boiler Unit on their 12-hour shift. There are three more two-man crews who also work in that unit. (Tr. 2427-28).

were times other employees might be in the Boiler Unit, *i.e.*, maintenance employees sometimes had to fix equipment, or employees from other units might be invited in to see, for example, where their lines terminated. He also said he had worked on special projects in the Boiler Unit and had seen other boiler technicians make their rounds. When they did, he observed that they got within 5 feet of the cited shafts. (Tr. 2417-38; C-40).

I agree with the Secretary that based on the foregoing, “employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger,” in that they come within a few feet of the unguarded machinery on a regular basis. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). *See also Phoenix Roofing*, 17 BNA OSHC 1076 (No. 90-2148, 1995); *Dover Elevator*, 16 BNA OSHC 1281 (No. 91-862, 1993); *Clement Food Co.*, 11 BNA OSHC 2120 (No. 80-607, 1984). On the basis of the record, the Court finds that the Secretary has shown employee access to the cited hazard.

The Court also finds Delek knew of the cited condition. The two unguarded shafts are in plain view on a major walkway in the Boiler Unit. (C-40, C-41). The unguarded shafts are inspected daily, and management, including Mr. Simmons, is aware of these inspections. (Tr. 1987, 1989-90; C-40).

The evidence of record establishes a violation of the cited standard as to both the fan and motor. The evidence shows that the standard applies, that its terms were not met, that employees were exposed to the cited condition, and that the employer knew or should have known of the condition.⁵⁰ Both instances in Item 13 are affirmed as serious. Delek exposed its employees to the hazard of being

⁵⁰The Court finds that the cited standard applies to Respondent since § 1910 applies to any employment and place of employment in any industry.

caught in these unguarded parts while they were rotating, which could have caused serious hand or finger injuries, including broken bones. The fan rotated at about 3,600 rpms. The violative condition created the possibility of an accident involving a substantial probability of serious physical harm to employees. *Flintco Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

A penalty of \$3,150.00 has been proposed for Item 13. The AAD testified about the hazards of the condition and the number of employees exposed. The only reduction for Item 13 was a 10 percent reduction for history. (Tr. 271-74, 358-69; C-40). The Court finds the proposed penalty reasonable and appropriate. A penalty of \$3,150.00 is assessed.

Item 15 – Alleged Violation of 29 C.F.R. 1910.1200(f)(5)

This item alleges that Delek was in violation of 29 C.F.R. 1910.1200(f)(5), a provision of the Hazard Communication (“HAZCOM”) standard. The cited standard states that:

- (5) Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked with the following information:
- (i) Identity of the hazardous chemical(s) contained therein; and,
 - (ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the [HAZCOM] program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

The specific vessels cited were the following:

- a. FCC Unit, GV-154 Flare Knockout Drum, not marked⁵¹
- b. FCC Unit, Regenerator, not marked
- c. FCC Unit, E-9-A Exchanger, not marked
- d. Alkylation Unit, 86-E-501, not marked correctly on equipment summary list

⁵¹The Secretary’s motion at the hearing to amend Instance a to read “Flare Knockout Drum” rather than “Flash Knockout Drum” was granted. (Tr. 238, 1921-22).

The AAD testified that as he was walking through the different units at the facility, he noted that a number of the vessels were not tagged or marked to show their contents. The four cited vessels, three in the FCCU and one in the Alkylation (“Alky”) Unit, were examples of what he saw. He further testified that under the HAZCOM standard, vessels must be marked to identify their contents. While he saw equipment lists that showed the vessels with their identifying numbers, the lists did not identify the vessels’ contents. Further, the 86-E-501 vessel in the Alky Unit, besides not identifying its contents, also was not identified properly on the Alky Unit’s equipment list. The AAD said that if someone had to go out into a unit in an emergency, to turn a valve to shut off a vessel, for example, a vessel that was not properly marked could be a hazard. (Tr. 468-72, 649-53; C-40).

The HAZCOM standard applies to any chemical known to be present in the workplace such that “employees may be exposed under normal conditions of use or in a foreseeable emergency.” The standard requires employers to provide information to their employees about the hazardous chemicals to which they are exposed. *See* 29 C.F.R. 1910.1200(b)(1) and (2). A “hazardous chemical” is “any chemical which is a physical hazard or a health hazard.” 29 C.F.R. 1910.1200(c).

There is no dispute that there are hazardous chemicals at Delek’s refinery. (Tr. 2309). In the FCCU, these include gas oil, heavy cycle oil, light cycle oil, naphtha, gasoline and hydrocarbon vapors. (Tr. 171). JX-X, Delek’s operating procedures for the FCCU, states that benzene, a suspected cancer-causing hydrocarbon, is found in all “gasoline, naphtha, and full range of hydrocarbon mixtures.” It notes that hydrogen sulfide (“H₂S”) “is also present in the gases produced in the Cat Unit.” JX-X sets out the properties and physical and health hazards of chemicals in the FCCU, including benzene, H₂S, hydrocarbon vapors, and heavy and light cracked oils. *See* JX-X, pp. 12803-04.

The FCCU vessel GV-154, called the flare knockout drum, contains gasoline, naphtha products, propane, butane and hydrocarbon vapors such as relief gas. (Tr. 207-08, 242-43). These are chemicals that can pose health or physical hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis is an operator who has worked in the FCCU for 30 years. He testified that in 2008, the flare knockout drum did not have a label on it to identify its contents or the hazards of those contents. (Tr. 207-08). Mr. Simmons, the refinery manager, confirmed the testimony of Mr. Gaddis. Mr. Simmons also confirmed that the flare knockout drum had no notations on it to warn that its contents were, for example, flammable, dangerous to inhale, and capable of causing burns on skin. (Tr. 2310-14).

The regenerator in the FCCU contains catalyst, a combustion promoter, and additives called LO-SOX and Super Z. It also contains hydrocarbon vapors, which may contain H₂S or “other lethal substances.” (Tr. 205-06; JX-X, pp. 12803-04). The catalyst and hydrocarbon vapors are hazardous chemicals that can be physical and/or health hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis testified that in 2008, the regenerator did not have a label on it that identified its contents. (Tr. 205-06). Mr. Simmons confirmed this testimony. Mr. Simmons also testified that there were no notations on the regenerator to inform employees of the hazards of the contents. (Tr. 2310-14).

The FCCU’s E-9-A Exchanger is a slurry-oil exchanger that has slurry on one side and raw oil on the other side.⁵² “Slurry” is the term used to refer to carbon black circulating bottoms. (Tr. 207-08, 239-40, 2310-11; R-U). In light of its contents, the E-9-A Exchanger contains chemicals that can represent health or physical hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis testified that in 2008, the E-9-A Exchanger did not have a label identifying its contents or their hazards. (Tr. 207-08).

⁵²Mr. Gaddis indicated the full and correct number of the equipment is “85-1-E-9A.” (Tr. 239-40). This decision will refer to the number as “E-9-A,” as set out in the citation. (Tr. 661).

Mr. Simmons testified that in April 2008, the Alky Unit vessel 86-E-501 had no markings on it to identify what it contained. He also testified that the vessel contained sulfuric acid, caustic and “several different chemicals that would be hazards in the unit.” He admitted there were no warnings on the vessel to indicate whether the contents were flammable, dangerous to inhale, or capable of causing burns on skin. (Tr. 2312-14, 2372-73).

The foregoing shows that none of the cited vessels was labeled, tagged or marked to identify its contents or to warn of the hazards of the contents. Delek, however, contends it complied with the alternative method set out in subsection (f)(6) of the standard. That subsection states as follows:

The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

Delek asserts it informs employees of the contents of vessels in many ways. One is through piping and instruments drawings (“P&ID’s”). P&ID’s show the vessels in the refinery, the process flows, and the process chemicals.⁵³ Another is through drawings used for training. Mr. Todd, another FCCU operator, testified about drawings he utilizes when training new employees in his unit. These are color-coded to indicate vessel contents in the FCCU. The process flow diagram for the refinery also shows what materials flow into and out of each unit. Finally, the OPs for the refinery’s units set out the chemicals that move into the various vessels. In the FCCU, for example, the startup procedures indicate the regenerator’s contents. R. Brief, pp. 86-87, 94-97; JX-X.

⁵³Similarly, Delek states that the names of the vessels and equipment in the refinery also inform employees of their contents. R. Brief, pp. 87-88, 96-97.

Delek further asserts that the FCCU's OPs also set out the hazards of chemicals in the unit. One section, entitled "Properties and Hazards of Chemicals Used in the Process," discusses the hazards of various chemicals in the process, particularly hydrocarbons and hydrocarbon mixtures. It also notes other hazardous substances, such as benzene, catalyst and H₂S, and the PPE to use for these substances. R. Brief, pp. 88, 98-99; JX-X, pp. 12803-04.

Delek notes that its material safety data sheets ("MSDS") have the most detailed hazard information about the hazardous chemicals in the refinery. The MSDS are available in the control rooms (in books and electronically), and employees may access them at any time. R. Brief, pp. 89, 99.

Delek also discusses the training it provides all new employees. This includes books covering refinery operations, a course on the hazardous chemicals in the process, and computer-based training ("CBT") and tests on topics such as HAZMAT and HAZOP. The CBT also has an MSDS module, which addresses, *inter alia*, how to read MSDS. Employees next have unit-specific training where they learn about the operations where they will be working. They learn the locations of vessels in the unit and the chemicals that are in the vessels, and they are tested in this regard. They also learn about the hazardous chemicals in their units and what PPE is required. The new employees then work with an experienced operator in the unit who trains them in their job duties. All employees in the facility also receive fire protection training. R. Brief, pp. 89-92, 100-02.

Delek states that maintenance workers receive the same training that all new hires do. Also, before they do any work in a unit, a work permit and job safety analysis are completed. The worker then goes to the assigned area of the unit, where the hazards of the job are discussed. Delek indicates that its contract employees receive similar but more limited training. R. Brief, pp. 92-93, 102-04.

Despite the foregoing, I agree with the Secretary that Delek did not comply with the standard. The P&ID's show general process information but do not always show the chemicals in a particular line or vessel.⁵⁴ (Tr. 2205; R-U, R-V, R-W (large)). They contain no information about the hazards of the chemicals involved. (Tr. 2314, 2535). There are also multiple P&ID's for a single vessel, and a single vessel can have multiple names in the refinery. For example, the cited GV-154 vessel, called the "relief gas knockout drum" on its P&ID, is also called the "flare knockout drum," "knockout drum," and "knockout pot."⁵⁵ (Tr. 2224-25). Further, terms on one P&ID can have different meanings in other parts of the refinery. The term "circulating bottoms exchanger" set out on one P&ID would refer to different products in different units. (Tr. 253-54; R-U (large)). Finally, while operators use the P&ID's in their jobs, they are not trained in how to read them. (Tr. 241, 253). S. Brief, pp. 73-74.

As to the OPs, the Secretary notes that while they contain some required information, they are insufficient to inform employees where particular chemicals may be encountered in a unit. I agree. The "Properties and Hazards" section in the FCCU OPs does contain information about hydrocarbons and hydrocarbon mixtures all being flammable. It also notes some other hazardous chemicals like benzene, catalyst and H₂S. It does not, however, state where these chemicals may be located in the FCCU. Mr. Simmons basically admitted that was not the purpose of this section. (Tr. 2318; JX-X, pp. 12803-04). S. Brief, p. 74. Further, my review of the FCCU OPs persuades me they do not meet the standard. That is, they do not enable an employee to readily and easily learn what chemicals are in a particular vessel and what the hazards of the chemicals are. First, the OPs are over 400 pages long. Second, some of

⁵⁴The process flow diagram also shows only general process information. *See* R-T (large).

⁵⁵This evidence, in my view, refutes Delek's contention that the very name of a vessel informs employees of what its contents are.

the individual OPs are quite lengthy, and expecting an employee to read through a complex and detailed OP to learn what a vessel contains is clearly unreasonable. *See, e.g.*, JX-X, pp. 12948-62, 12963-78. Third, while JX-X has a table of contents that sets out a number of pieces of equipment separately, two of the cited vessels do not appear in that table of contents.⁵⁶ Finally, while the OPs do identify various chemicals in the FCCU's process, they do not necessarily define the chemicals or state their hazards. *See, e.g.*, JX-X, pp. 12956, 12971 (identifying, but not defining, "slurry" and "flue gas"). I find that, while the OPs contain detailed instructions for operating the FCCU, they are not, as Delek claims, a means of complying with the cited standard.

I further agree with the Secretary that the drawings Mr. Todd uses to train new employees in the FCCU are insufficient to meet the standard. As noted above, the drawings are color-coded to indicate the contents of the vessels in the FCCU. As the Secretary points out, however, there is no legend to explain the meaning of the colors. Thus, even though the employees are given copies of the drawings to keep, they may not recall what the different colors represent. Also, the record shows that the colors on Mr. Todd's computer print differently and are a different color on the drawings he actually gives the employees. The drawings Mr. Todd uses in his training do not contain information about the hazards of the chemicals in the FCCU. And, refresher training for long-term employees is only provided if it is requested.⁵⁷ (Tr. 2469-70, 2487-91, 2530-35, 2569-70). S. Brief, p. 75.

⁵⁶One of these is the GV-154 vessel, called the 85-G-V-154 or relief gas knockout drum on its P&ID. *See* R-W (large). The other is the E-9-A Exchanger, called the 85-1-E-9A or raw oil/circulating bottoms exchanger on its P&ID. *See* R-U (large). Although these vessels may be mentioned elsewhere in the OPs, that they are not set out in the table of contents is significant.

⁵⁷Mr. Todd indicated that although maintenance and contract employees are provided information about the hazards of the job they will be doing, he does not train them like he does new employees in the FCCU. Thus, they are provided only general information, *i.e.*, that vessels in the work area contain hydrocarbons, benzene and H₂S. (Tr. 2530-31, 2567-69).

As to MSDS, the Secretary agrees that Delek has books in its control rooms that contain the MSDS for the chemicals in the refinery. The MSDS, however, do not tell the reader where to find the referenced chemicals in the refinery. (Tr. 203-04, 2314-15). MSDS training is given to some but not all employees in the FCCU, and, when a new MSDS comes out, it is put in the MSDS book in the control room. Employees review the MSDS book on their own. (Tr. 2531-32). The MSDS book in each unit is 3 to 4 inches thick. (Tr. 2316). Mr. Todd indicated there were no MSDS for chemicals such as flue gas, purge gas or slurry. For flue gas, an employee would need to know that it contains carbon monoxide (“CO”) and then look up the MSDS for CO. Similarly, for slurry, an employee would need to know it is called carbon black and then look up that MSDS. (Tr. 2534). S. Brief, p. 74.

The Secretary notes that when Mr. Martin, Delek’s emergency response coordinator, was shown C-46, the equipment list for the Alky Unit, he had not seen it before.⁵⁸ C-46 does not show the contents of the vessels. When asked what documents he would look at to identify the vessels in a unit, Mr. Martin referred to the P&ID’s and the OPs. When asked what documents he would look at to determine the contents of vessels in a unit, Mr. Martin could identify no such documents. Instead, he stated that the unit operators were the source of information as to the chemicals in vessels and the hazards of those chemicals. (Tr. 3071-72, 3075-81). S. Brief, p. 75-76.

Based on the above, the Court finds that Delek has not shown it met the procedures set out in subsection (f)(6) of the standard. I agree with the Secretary that, to determine a vessel’s contents, an employee would have to access a number of documents, including P&ID’s, OPs and possibly training documents. Even accessing all of those documents might not provide the employee with all the vessel

⁵⁸Mr. Martin indicated there was a list of all of the refinery’s equipment, although he did not have it in his office. There was no evidence that list showed vessel contents. (Tr. 3075-78).

contents, and the OPs might not contain the necessary hazard information. The employee would then need to go to the MSDS book in the unit's control room to learn specific information about the hazards of the chemicals in the vessel. Such a system clearly does not meet paragraph (f)(6) of the standard, particularly in the case of an upset or emergency when employees would need to have ready and easy access to the required information.⁵⁹

In its reply brief, Delek urges its system is "quite similar" to one the Commission approved of long ago.⁶⁰ It refers to a 1987 decision of a Commission Judge that found the employer's system met the paragraph (f)(6) requirements. In particular, the employer labeled each piece of equipment in the refinery to show the type of equipment and an identifying number. Before working on equipment, an employee reviewed an equipment list book in the unit's control room. The book had the number and name of the equipment and referenced the appropriate MSDS for that equipment. The employee then reviewed the referenced MSDS, which were kept in another book. Employees were trained in the labeling system and in how to read and interpret MSDS. They were tested after the training. *Fina Oil & Chem. Co.*, No. 86-0904, 1987 WL 89097 (O.S.H.R.C. A.L.J., Feb. 3, 1987). R. Reply Brief, pp. 46-48. I disagree that Delek's system is "quite similar" to the one described in that case, for all of the reasons given above. Delek's argument is rejected.

⁵⁹In this regard, I note Mr. Todd's testimony that, while operators are supposed to refer to the OPs, they do not always have time to do so if something is happening with the process. The operators instead will go back and review the OPs later, when they have the time to do so. (Tr. 440-41). As the Secretary points out, as Mr. Todd is responsible for training new operators, it is likely that all of the FCCU operators would act in a similar manner. S. Brief, p. 76-77.

⁶⁰While Delek represents the case to be a Commission decision, it is a Judge's decision. A copy of the decision is an exhibit to Delek's reply brief.

Delek makes a number of other arguments in its reply brief. For example, it urges that the cited pieces of equipment are not “containers” under the standard, that employees were not exposed to a hazard because the cited equipment is self-contained, and that the Secretary’s position as to Delek’s system is inconsistent with a recent OSHA compliance directive. R. Reply Brief, pp. 49-51. I have considered these arguments, and they are rejected.

One final argument of Delek is that Item 15d is incorrect. Item 15d alleges that Alky Unit vessel 86-E-501 was not marked correctly on the equipment summary list. C-46, the equipment list for the Alky Unit, shows that equipment as a “depropanizer tower.” The record shows the 86-E-501 vessel, built in 1979 as a depropanizer tower, was converted to act as a propylene stripper in the early 1980’s. Since then, it has functioned as a propylene stripper. The operators now refer to it as the “new depropanizer,” the “propylene stripper,” and other terms. C-44, a screen shot of the computer control screen for the vessel, shows it as “propylene stripper.” C-45, a screen shot for another Alky Unit vessel, 86-E-101, shows it as “depropanizer.” Mr. Simmons testified that C-46 is used as an equipment inspection list and that the inspectors who use C-46 know the 86-E-501 vessel as a depropanizer. C-47, a pressure vessel list for the Alky Unit, shows both the 86-E-501 vessel and the 86-E-101 vessel as depropanizers. Mr. Simmons said that for inspection and work order purposes, a vessel is referred to by its number. (Tr. 2167-75). Delek contends that since C-46 and C-47 both accurately refer to the cited vessel as a depropanizer, Item 15d is incorrect. R. Brief, pp. 105-08; R. Reply Brief, p. 46.

I agree with the Secretary that a vessel having various names among operators and between operators and inspectors is a hazard. In an emergency, several names for a vessel could be confusing and could prevent an employee from identifying the chemicals in a vessel and the hazards of those chemicals. S. Reply Brief, pp. 33-34. Similarly, showing the cited vessel as a “depropanizer” on

equipment lists might lead to the same kind of confusion in an emergency. In this regard, I note that while the 86-E-501 vessel is shown as a depropanizer on both C-46 and C-47, the 86-E-101 does not appear on C-46 at all and is shown as a depropanizer on C-47. The Court finds that the Secretary's allegation as set out in Item 15d of the citation is correct.

The evidence of record establishes a violation of the cited standard as to all four of the vessels set out in Item 15. That is, the evidence shows the standard applies, that its terms were not met, that employees were exposed to the cited condition, and that the employer knew or should have known of the condition.⁶¹ All four of the instances in Item 15 are affirmed as serious. As the Secretary states, Delek employees were at risk of coming into contact with hazardous chemicals and not being aware that was the case. She notes a 2007 incident in which acid overflowed from a tank. The exposed employees did not know if the material was acid or not until Mr. Martin arrived and confirmed it was acid. The only sign posted on the tank said "acid." *See* C-59. She notes another 2007 incident in which an employee was working on a power feed to the FCCU's flare. The flare malfunctioned, burning hydrocarbons spewed out, and a flash fire resulted. The employee suffered radiation burns to his eyes and face. The incident was caused, in part, by a failure to label and warn employees of the hazards of the procedure. (Tr. 1250-59, 1290-91). S. Brief, p. 78.

A penalty of \$2,250.00 has been proposed for Item 15. The AAD testified about the hazards of the condition, the number of employees exposed, and the fact that several vessels were involved. The only reduction for Item 15 was a 10 percent reduction for history. (Tr. 271-74, 468-72. The Court finds the proposed penalty appropriate. A penalty of \$2,250.00 is assessed.

⁶¹The employees exposed to the conditions in the FCCU are set out in Item 9b, *supra*. I find that employees with similar jobs would be exposed to the cited condition in the Alky Unit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. 1910.119(e)(5), is modified to the extent that allegations relating to the PHA team's findings and recommendations from 1998 and 2005 are deleted from the citation; the remainder of the citation item is otherwise AFFIRMED, and a penalty of \$6,300.00 is assessed.⁶²

2. Citation 1, Item 6, alleging a serious violation of 29 C.F.R. 1910.119(f)(3), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

3. Citation 1, Item 8, alleging a serious violation of 29 C.F.R. 1910.119(j)(4)(i), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

4. Citation 1, Item 9(b), alleging a serious violation of 29 C.F.R. 1910.119(l)(4), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

5. Citation 1, Item 12, alleging a serious violation of 29 C.F.R. 1910.119(o)(4), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

6. Citation 1, Item 13, alleging a serious violation of 29 C.F.R. 1910.219(c)(2)(i), is AFFIRMED and a penalty of \$3,150.00 is assessed.

⁶²See 29 C.F.R. § 2200.90(a) ("The decision shall include an order affirming, modifying or vacating each contested citation item and each proposed penalty, or directing other appropriate relief.").

7. Citation 1, Item 15, alleging a serious violation of 29 C.F.R. 1910.1200(f)(5)(i), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

_____/s/_____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: April 27, 2011
Washington, D.C.