



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.

SUTTLES TRUCK LEASING, INC.,

Respondent.

OSHRC Docket Nos. 97-0545
& 97-0546

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

This case arises out of an inspection conducted by the Occupational Safety and Health Administration (“OSHA”) at a tank truck washing facility owned by Suttles Truck Leasing, Inc. (“Suttles”) in Creola, Alabama. As a result of that inspection, the Secretary of Labor (“the Secretary”) issued citations alleging that Suttles had violated various safety and health standards. Suttles contested the citations, and a hearing was held before Commission administrative law judge Nancy Spies. In her decision, the judge affirmed the eight items on review in Docket Number 97-546 and vacated the rest.¹ Suttles petitioned for review of the judge’s decision on the eight items that she affirmed, and review of these items was directed pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. § 661(j). For the reasons that follow, we affirm the judge’s disposition as to seven of the items and reverse her as to the remaining item, which we vacate. We also change the characterization of five items and adjust the penalties accordingly.

¹The citation items in Docket Number 97-545 are not on review.

Suttles owns approximately 425 tank trailers, which are used for transporting various liquids, many of them hazardous chemicals. The trailers are leased to carriers and returned to Suttles. Although a few of the tankers are “dedicated,” meaning that they always carry the same chemical, most of them carry different liquids each load and must be cleaned between loads to prevent interaction between chemicals. Suttles operates five tank-washing stations around the country for this purpose, including the one in Creola, Alabama, where it washes the interiors of tank truck trailers that have carried various chemicals, so that the tanks may then carry a different cargo without contaminating the new cargo with residue from the previous one. It also washes the exteriors of the tanks. Of the eight items on review, six of them involve allegations that Suttles violated OSHA’s permit-required confined space (PRCS) standard, which governs employee entry into confined spaces that have the potential to present certain hazards. The other two items allege violations of the standard requiring the use of personal protective equipment and of the hazard communication standard, respectively. These two items do not implicate the trailers as PRCSs.

The Commission affirms the personal protective equipment item and the hazard communication item. Although the Commissioners differ in their reasoning, all three Commissioners vote to affirm five of the PRCS items; at least a majority votes to characterize each of them as other-than-serious violations; and all vote to reduce the penalties assessed by the judge. The Commission vacates the remaining PRCS item.

THE PERMIT-REQUIRED CONFINED SPACE ITEMS:

Citation 1, item 4; citation 2, items 1a, 1b, 1c, 2a, and 3.

The six PRCS items allege one serious and five repeated violations of provisions of the permit-required confined space standard at 29 C.F.R. § 1910.146. The Secretary has alleged that, because the tanks contain or have the potential to contain a hazardous atmosphere, particularly before washing, the tanks must be treated as permit-required confined spaces.² Suttles takes the position that, because the washed tanks do

²Under section 1910.146(b):

not have the potential to contain a hazardous atmosphere, they are not permit-required confined spaces.³ These competing legal arguments reflect a different view of the

Confined space means a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry and exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and
- (3) Is not designed for continuous employee occupancy.

Permit-required confined space (permit space) means a confined space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- (2) Contains a material that has the potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) Contains any other recognized serious safety or health hazard. Under section 1910.146(b):

³Under section 1910.146(b):

Hazardous atmosphere means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury or acute illness from one or more of the following causes:

- (1) Flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit (LFL);
- (2) Airborne combustible dust at a concentration that meets or exceeds its LFL; (note omitted)
- (3) Atmospheric oxygen concentration below 19.5 percent or above 23.5 percent;
- (4) Atmospheric concentration of any substance for which a dose or a permissible exposure limit is published in Subpart G, *Occupational Health and Environmental Control*, or in Subpart Z, *Toxic and Hazardous Substances*, if this part and which could result in employee exposure in excess of its dose or permissible exposure limit;

NOTE: An atmospheric concentration of any substance that is not capable of causing death, incapacitation, impairment of ability to self-rescue, injury, or acute illness due to its health effects is not covered by this provision.

- (5) Any other atmospheric condition that is immediately dangerous to life or health.

framework of the standard, specifically when the “snapshot” must be taken to determine whether the tanks are PRCSS. The Secretary contends the snapshot must be taken before the tanks are washed while Suttles argues it can also be taken after washing. We agree with the Secretary, whose views are more consistent with the language, structure and purpose of the standard. The two parties also dispute various factual issues regarding the thoroughness of Suttles’ tank washing process, where we agree with Suttles. We discuss the factual issues surrounding the washing process first, then turn to the legal issues involving the tanks’ status as PRCSS.

The tanks and the washing process

Although the tanks vary a bit in size and shape, a typical tank is approximately 35 feet long and 6 feet 5 inches high, measuring to the lowest point in the floor. They are not round, but are slightly higher than they are wide. The tanks have a dome at the approximate center of the top, which has a lid that can be opened to permit visual inspection and, if necessary, entry. To facilitate drainage, the floor slopes about 8 inches from each end to a central drain.

When a tank arrives at a Suttles facility, it is parked in a lot designated for unwashed tanks, and employees are instructed not to enter a tank in this area. Suttles treats an empty, unwashed tank that had previously carried hazardous cargo as a PRCSS. The driver of each tanker must complete a wash rack request, naming the last cargo carried. He also must attach the bill of lading for the cargo and a material data safety sheet (MSDS) for the chemical or chemicals carried, or else Suttles will not wash the tank. Before the tank is washed, it is drained and any residue returned to the customer. An employee would then check the pressure gauge, and, if necessary, release the pressure valve, open the dome lid, and look in to make sure that there is no excess liquid in the tank. Usually, only about two cups of liquid remain.

The employee next inserts three “spinners” into the tank through ports in the top of the tank. One port is in the dome lid, which is closed, and the other two are approximately 106 inches from each end. Some cargoes which may have dried on the inside of the tank may need to be “presolved,” that is, treated with a solvent which is

sprayed in through the spinners and allowed to soak, before they are washed. According to Suttles' director of safety and environmental compliance, John C. "Clarence" Bean, the solvent is "self-cleaning" and mixes well with water.

If the trailer has carried a chemical that has been designated as hazardous under RCRA (the Resource Conservation and Recovery Act), it must be rinsed and evacuated three times with approximately 150 gallons of water before the actual wash is performed. That rinse water is drained into a special "haz tank," and the standard wash is performed. Although Suttles uses different washing procedures for different chemicals, the record establishes that the normal tank wash uses 300 gallons of wash water and detergent heated to 175°. The tank then undergoes a final rinse, which uses approximately 100-150 gallons of water. The drain is left open during the washing and rinsing so that the water can drain out. The Kelton machine used in the wash process includes a high-pressure pump that sends 50 gallons of water per minute to all three rotating spinners, which expel the water at 300 miles per hour. According to Bean, because of the locations of the ports and the way the spinners operate, "every square inch" of the tank is sprayed by jets of water under 625 pounds of pressure every ninety seconds during the wash, and the detergent used gets out all caustics. Once the wash and rinse are completed, the tank is "blow-dried," using a 6-inch diameter ventilation tube, which blows approximately 2700 cubic feet of air per minute for 15 to 20 minutes. The drying process was described by one witness as a "purging." During the drying, approximately 57 air changes take place, removing any steam and vapors that may be present. Only after this process has been completed and the atmosphere in the tank has been tested for oxygen levels and explosive atmospheres would an employee enter. It is the entry into the washed and dried tanks by Suttles' employees that are the subject of the six PRCS items before us.

Employees enter about 10% of the tanks that are washed. Normally, they enter only to perform the annual inspection required by the Department of Transportation or to remove debris or residue from the cargo. Of those trailers entered, approximately 10% contain a thin residual film of the product that had been carried that adheres to the inside of the tank. After the wash process, these substances are chemically inert solids.

Occasionally, debris such as rust or dirt will get into a tank. Any debris or residue that remains after the wash process has to be removed by hand.

If an employee needs to enter a tank to inspect it or to remove foreign matter, Suttles tests the blow-dried tank for the oxygen level and the lower explosive level (LEL) of the chemicals most recently carried. Suttles does not test for toxic atmospheres because it has determined that the wash has removed all toxic hazards and the tanks have been thoroughly ventilated. An employee who enters a tank is required to wear eye protection, chemical-resistant gloves, steel-toed rubber boots, and a retrieval harness.

The evidence on the washing process

The Secretary argues that the tanks are permit-required confined spaces because they contain or have the potential to contain a hazardous atmosphere and that the tanks could be reclassified as non-permit spaces after washing by following the appropriate procedures in the standard. The Secretary also contends that the tanks could pose hazards if an employee's skin came into contact with any chemical in the tank. Suttles claims that, as a result of the washing process, the washed tanks contained no actual or potential hazards and thus the washed tanks are not PRCs. Suttles introduced evidence about the method used to clean the tanks at both Creola and its Columbus, Ohio facility. It claims that atmospheric testing that it conducted in tanks at its Columbus, Ohio facility prove that the washing and blow-drying process eliminates the possibility that there will be a toxic atmosphere in a washed tank, and that this evidence was accepted by the Secretary in the Columbus, Ohio office.

The Secretary presented two witnesses who testified about these six items, the industrial hygienist ("the IH") who conducted the inspection and recommended issuing the citation, and a senior industrial hygienist from OSHA's facility in Salt Lake City, who was accepted as an expert in the field of industrial hygiene, including sampling, but was not an expert in chemistry. The IH, who had bachelors degrees in animal science and in geology, concluded that the washed tanks (which she erroneously estimated to be eleven feet deep) could contain pockets of gases that could be hazardous to anyone who entered them. She believed that a stratified atmosphere could occur, and that testing of the

atmosphere should be performed at several locations throughout the tanks, including at the bottom of the tanks, because the vapors from some chemicals are heavier than air. She did not perform any testing herself, however, and could not present any evidence to substantiate her opinion. Because the MSDSs of some of the chemicals that had been carried in the tanks at Creola stated that contact with the chemical could cause injury to the skin, she believed that Suttles' employees should wear chemical-impervious suits. She could not say, however, whether there was any substance at the Creola facility present at levels above OSHA's permissible exposure limit ("PEL"), and did not know whether, if there were, any engineering controls used by Suttles reduced them below their PEL.

The IH learned that Suttles had been cited for similar violations at its facility in Columbus, Ohio, and that atmospheric testing had been performed subsequent to the date of the alleged violations in Columbus as part of settlement negotiations. Because some of the chemicals carried by the tanks washed at Creola were different from the chemicals involved in the Columbus testing, the IH discounted the impact of that testing on her inspection.

The senior industrial hygienist who testified for the Secretary as an expert, Emil Golias, held two masters degrees, one in environmental science and industrial hygiene, and the other in occupational health. He testified that industrial hygienists rely on a chemical's MSDS to determine the hazards posed by that chemical, and that he had reviewed the MSDSs for the chemicals transported in the tanks that were washed at Creola. He noted that the chemicals were not the same ones involved in the testing in Columbus and expressed his belief that some of the Creola chemicals were more dangerous than the ones in Columbus and had very low OSHA PELs. Consequently, a small amount of that chemical in a tank could create a potentially hazardous atmosphere. He testified that, because the Columbus testing was performed in only one location in the tank, it might not have detected a pocket of chemical near one end of the tank. Consequently, he was of the opinion that the testing performed in Columbus was inadequate to determine whether any of those tanks contained a hazardous atmosphere,

much less to generalize the results to other tanks. He admitted, however, that he did not know whether any chemical was left in the tanks after they had been washed, and he agreed that, if there was no hazardous substance left in them, there could be no stratified atmosphere. Golias conceded that he had never performed any testing in a stratified atmosphere himself and conceded that he was not an expert in chemistry or in the grouping of chemicals according to their physical properties, and he could not fault the grouping method used by the people who performed the testing in Columbus. When asked, Golias could not say which of the groups various chemicals from Creola belonged in. Although Golias adhered to his position that more than one sample should have been taken in each tank, he agreed that he would defer to OSHA's personnel in Columbus if they had determined that the testing was adequate.

Suttles presented three witnesses who had been involved in testing the atmospheres of the washed tanks at its Columbus, Ohio tank washing facility. One was former OSHA safety supervisor, now a safety and health consultant, Richard Hayes, president of Hayes Environmental Services, an accredited training organization for the Department of Energy, the Coast Guard, and the Ohio Board of Construction Operations. Hayes had been hired to review the citations issued to Suttles at its Columbus washing facility that alleged violations similar to those alleged here. Hayes' assignment was to establish a protocol for testing that would be acceptable to OSHA, and to determine whether the washing process eliminated potential dangers to Suttles' employees from the chemicals in the tanks.

Hayes worked with OSHA and with Dr. John Ball, who had served as a consultant to Suttles for several years, to come up with a testing protocol. They examined the MSDSs of every chemical washed during a two-month period and concluded that the appropriate approach was to group all the chemicals by their physical characteristics for testing purposes, because they believed that it was not feasible to test every tank, since they believed the sampled tanks would have to be taken out of service for several days after they had been tested, until the lab results came back. Hayes stated that the OSHA industrial hygienist who had conducted the Columbus inspection; his

supervisor, who is also an industrial hygienist; the OSHA Columbus area director; and an attorney from the Solicitor of Labor's office had all accepted the testing protocols before any testing was done. Hayes added that Suttles would not have committed the money for the testing without OSHA's prior approval. The testing showed that, after the tanks had been washed and blown dry, the levels of the chemical in the atmosphere had been reduced by as much as 20,000 times. All levels were well below the OSHA PELs. Hayes said that the washed tanks did not have the potential to contain a hazardous atmosphere, so they were not permit-required confined spaces, and that, on the basis of the test results, OSHA's Columbus office agreed that Suttles did not have to test the washed tanks for toxic atmospheres.

The certified industrial hygienist whose company was asked to develop the sampling protocol to determine the level of efficiency for Suttles' tank-washing and drying process, Edward Foley, has a bachelor's degree in microbiology and a master's degree in industrial hygiene. Foley described the washing and drying as engineering controls (as opposed to protective equipment or administrative controls) to limit employee exposure. Foley concluded that, because of the large number of different chemicals, the best approach was to group the chemicals by their physical rather than chemical characteristics. He considered characteristics such as specific gravity, solubility, percent volatiles, boiling point, vapor density, and vapor pressure, and arrived at four categories that he believed would permit effective representative sampling: caustics and acids; alcohols; pesticides and herbicides; and organic chemicals. Foley had not encountered any substances handled in Suttles' system that could not be placed in one of the four groups, and stated that, because the tank truck industry transports only viscous liquids, it would not carry chemicals that fell outside the four groups, and these groups were accepted by OSHA's Columbus office.

Along with another certified hygienist from his company, Foley sampled thirteen tanks, including at least two chemicals from each group, placing the sampling device in the geometric center of the tank where it would measure a representative concentration. He used different kinds of tests for each of the groups and the tests were

specific to the chemical last hauled in the tank. The tests were sensitive to one part per million or better. Based on that testing, Foley concluded that the washing-drying process significantly reduced the levels of chemicals. All levels were below OSHA's PELs, which Foley described as the level to which an employee may be exposed without harm over his lifetime on a time-weighted average over an 8-hour workday and a 40-hour week. Foley disputed Golias' view that several samples from different areas in a tank were necessary, because he insisted that there could not be a stratified atmosphere in a tank after the washing and blow-drying process. The temperature of the wash water would cause anything that will evaporate to do so, and the cooling during drying would then stop the evaporation process, so that there could be no possibility of stratification after the drying, which purges the atmosphere with fifty-seven air changes.

Suttles' primary expert, Dr. John Ball, who was accepted as an expert in chemistry and physics as they pertain to the tank industry, has a Ph.D. in civil engineering, with emphasis in environmental engineering and a minor in chemical engineering. While he was on the faculty at Texas A&M from 1972-75, one of his projects was to design facilities to treat the wash- and rinse-water from petroleum barge-cleaning operations very similar to the tank truck washing operations in question. From 1975 to 1996; he taught graduate and doctorate level courses at the University of Alabama. He now has his own company, Ball Engineering, Inc., specializing in environmental engineering, and environmental pollution control, including water pollution, air pollution, solid waste, and hazardous waste, drinking water, and underground water. Dr. Ball first consulted for Suttles about 1983-85 and has regularly worked with them since on environmental compliance, including designing treatment facilities, and designing and constructing their terminals. He was involved in the design of both the Columbus and the Creola facilities and had been to both a number of times. Dr. Ball was familiar with Suttles' washing protocols and had observed first-hand the tank washing at both locations. In his opinion, there was no material difference between the washing process at the two sites, because Columbus and Creola have the same equipment: the same spinners, and the same Kelton machine, a high pressure pump that

pumps 50 gallons per minute to all three spinners, which rotate, shooting the water out at 300 mph. Before the wash, Dr. Ball said, there is a very small amount of the chemical in the tank, perhaps two cupfuls, and it is washed with 300 gallons of water, then rinsed. Suttles almost always uses hot water for the wash, he noted, but even without hot water, the spray would reduce the concentration of the chemical well below 1%.

Dr. Ball said that it was not necessary to test for every chemical hauled by the trucks washed at the Columbus facility because the chemicals all act according to their physical properties, since there is no chemical change during the wash, only, perhaps, a physical change. Therefore, Mr. Foley grouped the chemicals according to their physical rather than chemical properties. According to Dr. Ball, it was important to group acids/caustics separately from inorganics because acids and caustics do not vaporize into the atmosphere but may be present as droplets, so they cannot be tested the same way as gases. Dr. Ball reviewed the MSDSs for the chemicals that had been hauled in the tanks washed at Creola and placed each chemical in one of Mr. Foley's four groups. His expert opinion was that the testing in Columbus could be used to draw reliable conclusions about the tanks washed in Creola, because the chemicals in each group behave similarly if the same wash protocol is used, and he knows that both locations use the same one.

Dr. Ball stated that, before the testing was performed, he had not expected that there would ever be a hazardous atmosphere in a washed tank, and the test results confirmed his expectation. Noting that some of the test results were below OSHA's toxicity level before the tanks were washed, he gave his expert opinion that the atmosphere in the tanks after they have been washed is safe. Dr. Ball stated that there was no need to test multiple locations in each tank as Mr. Goliias had suggested, because the wash/blow-dry process eliminates any possibility of stratification. Based on his knowledge of how chemicals behave, he knew that it would take a high concentration of a volatile organic to cause stratification. The chemical would have to saturate the atmosphere, and he could not imagine a stratified atmosphere in a washed tank. He also stated that, because the wash removes organics to a level of only a few parts per million, his opinion was that the post-wash concentration of any chemical at Creola would never

even approach 10% of the LEL. He believes that the Columbus testing was appropriate for the task and that it was perfectly adequate.

Dr. Ball noted that any product residues found in the tanks would be from substances that left a slight film, such as latex, or wood pulp from a load of “black liquor,” which he identified as a caustic solution used by paper mills to turn wood pulp into cellulose. Ball stated that the wood pulp is inert – it is wood, and that the other residues are also inert solids, although the latex and paint primer might have to be rubbed off the inside of the tank. The other possible residue would be foreign matter such as rust or dirt that had gotten into the tank, which he described as “trash,” but there should not be trash in a tank because the chemicals are supposed to be pure. Dr. Ball testified that he is very familiar with how soils and materials absorb and release contaminants because he works in that field “all the time,” and that once the washing has leached out any chemical that might have been absorbed into the trash, any chemical that might remain would be “tied up” in the solid and would not vaporize into the air.

The administrative law judge found that the tanks were permit-required confined spaces. Although the judge noted that the washing process in Columbus left the tanks “sterile,” she found that the Columbus testing was not applicable to the Creola facility because different chemicals were involved and the wash process at the two locations was different. The judge based her conclusion that the washing was not the same at both terminals on two findings, that the tanks in Columbus did not contain any residue while those at Creola did, and that the length of time for the wash at Creola was not uniform but was left to the washers.

Discussion on washing process

Having carefully considered the evidence, we agree with the judge and the Secretary that the tanks – both pre-wash and post-wash – were PRCSSs, as we explain in a later section of this decision. But we disagree with the judge’s conclusion and the Secretary’s arguments with respect to the lack of similarity between the washing process at Columbus and Creola. First, the judge erred in finding that none of the tanks tested in Columbus had contained any residue. Mr. Foley, who conducted the testing, testified that

he had seen “a minor amount” of inert residue in the tank that had carried latex.⁴ Even if the judge had been correct, however, we are not convinced that fact would prove that the results of the washing process were different at Columbus and Creola. The record establishes that only about 10% of the tanks washed are entered, and that only about 10% of those are entered because they contain residue that must be removed. That means that only about 1% of all washed tanks contain residue. Because the Columbus testing involved a total of thirteen tanks, including one top-emptying dedicated tank that would never be entered by a Suttles employee, the absence of residue would not, by itself, support a finding that the wash processes at the two locations produced different results.

Similarly, the judge’s finding that the wash process, including the length of time spent washing, was left to the individual washer is not supported by the preponderance of the credible evidence. The judge stated that Dr. Ball “assumed” that the test results from Columbus would be valid for Creola “based on his understanding” that the procedures were the same. This mischaracterizes Dr. Ball’s testimony. He stated that he had been to both locations and had observed the washing being performed. He had designed both locations, selected the equipment to be used, and was familiar with the wash process as it was performed at both locations. Bean, who had trained the wash rack employees at both locations, testified that the training was the same, the procedures used were the same, and that the actual washing was performed the same way in both locations. The Secretary, by contrast, offered no witness who was familiar with both locations, and her expert had not seen either one. Furthermore, the evidence that was offered by the Secretary was apparently not credited by the judge (the relevant portion of the testimony of its industrial hygienist) or was incorrectly interpreted by the judge (the testimony of a leadman at Creola). Thus, considered as a whole, the record does not bear out the differences in the conditions of the tanks or in the washing and drying procedures

⁴Foley also stated that, to the extent that any residues remained in a tank following washing and drying, such residues were “inert” because the washing and purging had flushed and exhausted the volatile components of the hauled material. His opinion was that there was not enough of any residue to create a potential atmospheric hazard.

as described by the judge. *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1417-18, 1993-95 CCH OSHD ¶ 30,232, p. 41,634 (No. 89-1206, 1993); *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975)(“the Commission itself is charged with findings of fact”).

Although the IH testified that some of the tank wash employees had told her that it was left to their discretion how long to wash a tank, the judge did not mention that testimony as support for her conclusion. The judge relied instead on testimony of the leadman on the day shift at Creola that the amount of time that an employee who enters a tank to clean it spends inside that tank is determined by the employee. The testimony relied on by the judge does not address the wash process, however, but the length of time an employee who entered the tank to remove residue or debris would take to accomplish that task. It does not support the conclusion that the interior washing process was not the same at both locations. Nor does the leadman’s testimony regarding the book he consulted to determine the kind of wash to use for each chemical suggest that the book did not specify the length of that wash. It appears on this record that the length of the wash would be determined by the amount of water used and by the rate at which the spinners eject it. In light of the testimony that both locations use the same amount of wash water – 300 gallons – and that the Kelton machines and spinners used in Creola are identical to those used in Columbus, the Commission finds that the length of the wash is approximately the same at both locations and is not determined by the whim of the employee.

In this regard, the Commission gives greater weight to the testimony of Dr. Ball and Mr. Bean, which was based on their personal observations, that the wash process in Creola was the same as that in Columbus, where - the judge found - the washed tanks were “sterile.” We therefore find that there would be no material difference in the effect of the wash on a chemical in Creola from the effect of the wash in Columbus, which renders the tanks “sterile.”

The judge also concluded that the testing in Columbus did not control the situation in Creola because the tanks in Creola had carried chemicals that had not been

tested in Columbus. Even given that the specific chemicals were not exactly the same, this conclusion does not follow from the evidence. Dr. Ball testified without contradiction that, because they were grouped by physical properties, the chemicals in each group would react to the wash process the same as the other chemicals in their group, and that the testing of a few chemicals in each group would give results that could be extrapolated to the other chemicals in their group. The expert presented by the Secretary did not contradict, much less rebut, this testimony. In light of Dr. Ball's testimony placing every chemical carried in Creola during the period relied on by the Secretary into one of the four groups created by Mr. Foley, we find that the wash process in Creola made each of the tanks involved as "sterile" as the process in Columbus, and that the washed tanks, while still PRCs, have been purged of their toxic contents. We therefore find on the record compiled by the parties here, that the results of the sampling done in Columbus would accurately predict the results of testing for other chemicals in the same groups in Creola because the Secretary has given us no basis for finding otherwise.

Given the similarity of the chemical properties of the substances carried in the tanks, the similarity of the hazardous conditions posed by the cargo tanks, the similarity of the washing and cleaning processes, and the similarity of the respondent's permit entry program in Columbus and Creola, we find that the results of the Columbus testing were plainly relevant and probative in evaluating the hazards and procedures at the Creola facility. That finding does not resolve this case, however. We find that Suttles did commit the violations alleged in five of the PRCs items. We vacate the sixth.

A threshold legal issue – are the tanks PRCs?

Before turning to the six specific PRCs items, we address Suttles' general arguments concerning the record evidence and the interpretation of §1910.146. At trial, Suttles broadly insisted that the Columbus testing confirmed that, as a result of the washing and drying process, the tanks posed no actual or potential hazards, and that the Secretary had therefore failed to meet her burden to establish that the washed-and-dried tanks contained actual or potential atmospheric hazards. Without this element, Suttles

contended, the Secretary failed to establish that the tanks as confined spaces were permit-required.⁵ There are several difficulties with Suttles' claim.

First, Suttles is wrong to take the snapshot after washing and ignore the pre-washed condition of the tanks and to imply that the acts of washing and drying the tanks entitled the company to bypass the detailed procedures that an employer must follow under 29 C.F.R. §§1910.146(d)-(k) to render what are clearly permit-required spaces safe for employees to enter. Suttles' witnesses plainly acknowledged that, after delivery of a hazardous cargo load, the empty tanks were treated as permit-required confined spaces and subject to the requirements of §1910.146.⁶ As such, the tanks had to undergo a washing and drying procedure that served two purposes – not just to decontaminate and clean a tank in preparation for its next delivery assignment but also to purge the hazards created by the prior cargo that might pose a risk of harm to employees who occasionally must enter the tank to perform additional cleaning, service, inspection, or repair work. Under Suttles' entry permit program, developed to comply with §1910.146, employees were not permitted to enter a tank until the tank had been properly cleaned and tested and an entry permit form had been completed. This conclusion was established by not only the testimony of Suttles' personnel but also the exhibits, among which were the company's employee handbook (Ex. C-5) and its training manual (Ex. C-4), explaining the elements of the company's tank entry permit program. A series of entry permits that had been issued to authorize entry of washed-and-dried tanks in particular instances is

⁵See paragraph (1) of the definition of "permit-required confined space" in §1910.146(b), note 2, *supra*.

⁶Tr. 1146, 1212-13. In his separate concurrence, the Chairman disputes the conclusion that the tanks were PRCS *prior* to being washed. In his view, the pre-washed tanks did not qualify as confined space as defined in §1910.146(b)(1) because they "were not entered and no work was performed in them." That issue is currently before the Commission in another case, *Cagle's, Inc.*, No. 98-485. It is not necessary to address the issue here, since Suttles has not raised this interpretative issue on review. In fact, Suttles conceded that upon return from a delivery, the pre-washed chemical tanks were treated as PRCS (Tr. 1213).

also in the record. As the testimony confirms,⁷ these permits were obviously designed with §1910.146 in mind, since they closely mirror the sample permit forms that the Secretary has included in Appendix D to the regulation.⁸ A Suttles witness even acknowledged that, if the alarm on the gas meter sounded during the oxygen/flammability test of a washed-and-dried tank, the tank would be immediately rewashed.⁹ Thus, Suttles' own confined space practices totally belie the notion that it was not subject to the provisions of §1910.146 for which it was cited. The washing and drying process was an integral part of the permit-required confined space program, not a means to shield against its application.

Second, the purpose of the Columbus testing was more narrowly tailored than Suttles claims. The testing was designed solely to obviate the need for Suttles to run a pre-entry test for *toxic* atmospheres on each and every washed-and-dried tank, which it claimed was both unnecessary and infeasible. Suttles was not relying upon the Columbus testing to eliminate testing for any other type of atmospheric hazards, such as those associated with oxygen deficiency and flammability.¹⁰ The company continued to conduct atmospheric testing for oxygen deficiency and flammability hazards on the washed-and-dried tanks, a step that would not have been necessary if such tanks were indeed non-permit confined spaces. Likewise, even after it received the report on the

⁷Tr. 1159.

⁸A blank copy of the form, Exhibit C-11, appears to be a composite of two sample forms contained in Appendix D of the standard. The front of the form appears to be modeled on the form in Appendix D-1, while the back of the form appears to be taken from Appendix D-2. Twenty-nine copies of the permit with information filled in were entered into evidence, as described in note 30, *infra*.

⁹Tr. 1198.

¹⁰*See* paragraphs (1) and (3) of the definition of "hazardous atmosphere" in §1910.146(b), note 3, *supra*, which define as a causal element flammable gases in excess of 10% of its lower flammability limit and atmospheric oxygen concentration below 19.5% or above 23.5%.

Columbus testing from its consultants, the company continued to fill out entry permits as a prerequisite to employees entering a cleaned tank.

Third, Suttles relies upon an unreviewed, judge's decision in *Superior Tank & Trailer Co.*, 17 BNA OSHC 2116, 1995-97 CCH OSHD ¶ 31,127 (digest), 1995-97 CCH OSHD ¶ 31,127 (digest), 1996 OSAHRC LEXIS 80 (No. 95-870, 1996), for the proposition that the Secretary should have introduced expert opinion that the cleaned tanks were permit-required. Although an unreviewed administrative law judge's decision may be considered for its persuasive value, it does not constitute precedent binding on the Commission. *Mosser Constr., Co.*, 15 BNA OSHC 1408, 1411 n.3, 1991-93 CCH OSHD ¶ 29,546, p. 39,902 n.3 (No. 89-1027, 1991). In our view, the reasoning of the judge in *Superior* is not persuasive in the context of this case. It is true that the case involved a somewhat similar fact pattern— an employer repaired commercial tanks and trailers owned by third parties and used to carry milk, eggs, meat, gasoline, soap, acids and concrete mix. Before employees undertook to service or repair the tanks and trailers including, their interiors, the employer retained a contractor to wash and clean them. Prior to its employees entering the cleaned tanks, the employer tested the oxygen levels and ventilated each unit with a fan. While employees were in a tank, there was continuous ventilation and repeated testing for oxygen content and flammability. The Secretary cited the employer for not properly evaluating whether the spaces in its workplace were permit-required confined spaces in accordance with §1910.146(c)(1) and for not developing a written permit space entry program in accordance with §1910.146(c)(4). The judge vacated those items for several reasons.

First, the judge concluded that §1910.146(c)(1) was not violated because the employer had adequately evaluated the confined spaces and determined that they were not permit-required. The judge faulted the Secretary for not countering the employer's evidence with any expert opinion evidence that actual or potential hazardous atmospheres still remained following cleaning. Second, the judge concluded that if the cleaned tanks were not permit-required spaces, then it logically followed that §1910.146(c)(4), which required the establishment of a written permit space program, was not applicable.

Without passing on the validity of the judge's analysis,¹¹ we distinguish *Superior Tank* on several grounds. First, Suttles is not being cited under the subsections of §1910.146 for which the employer in *Superior Tank* was cited. Here, the focus went beyond the preliminary step of evaluating whether the workplace contained permit-required confined spaces and instead centered on whether the employer - having developed a written permit space program - had undertaken the implementing steps required by the various provisions of §1910.146, including (d)(2), (d)(4), (d)(5), (j)(2), and (f). Second, unlike *Superior*, Suttles as much as conceded that its unwashed tanks were permit-required spaces and continued to treat them as such following washing and drying. Thus, considering the record as a whole, the absence of expert testimony as to the presence of actual or potential atmospheric hazards in the washed-and-dried tanks is not fatal to the Secretary's case with respect to the tanks' status as PRCs.

Finally, Suttles suggests for the first time on review that the reclassification procedures outlined in 29 C.F.R. §1910.146(c)(7) afford an independent basis for excusing its alleged failure to comply with the various permit-required provisions.¹²

¹¹*Compare Drexel Chemical Co.*, 17 BNA OSHC 1908, 1995-97 CCH OSHD ¶ 31,260 (No. 94-1460, 1997), decided subsequent to the judge's decision in *Superior Tank*, in which the Commission interpreted an employer's evaluation obligations under §1910.146(c)(1). See page 12 of the judge's decision in the instant case citing *Drexel*.

¹²Section 1910.146(c)(7) provides:

§ 1910.146 Permit-required confined spaces.

.....
 (c) *General requirements.*

(7) A space classified by the employer as a permit-required confined space may be reclassified as a non-permit confined space under the following procedures:

- (i) If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space, the permit space may be reclassified as a non-permit confined space for as long as the non-atmospheric hazards remain eliminated.
- (ii) If it is necessary to enter the permit space to eliminate the hazards, such entry shall be performed under paragraphs (d) through (k) of this

Respondent contends that under this provision the tanks upon completion of the washing and drying process were immediately eligible to be treated as reclassified, non-permit required confined spaces. This argument is without merit. First, as noted above, even after a tank had undergone washing and drying, Suttles followed its permit entry program in testing for oxygen levels and explosive atmospheres. Second, Suttles did not attempt to demonstrate before the judge by way of evidence or argue in its post-hearing brief that it acted in accordance with the reclassification procedures set forth in 1910.146 (c)(7). It did not introduce the documentation that (c)(7)(iii) requires to prove that it had properly reclassified the tanks, nor did it argue the applicability of subparagraph 1910.147(c)(7) (i) or subparagraph 1910.147(c)(7) (ii).¹³

section. If testing and inspection during that entry demonstrate that the hazards within the permit space have been eliminated, the permit space may be reclassified as a non-permit confined space for as long as the hazards remain eliminated.

(iii) The employer shall document the basis for determining that all hazards in a permit space have been eliminated, through certification that contains the date, the location of the space, and the signature of the person making the determination. The certification shall be made available to each employee entering the space.

¹³The documentation required under (c)(7)(iii) consists of a certification that contains the date, the location of the space, and the signature of the person making the determination that all hazards in the permit space have been eliminated. Suttles has made no reference to this provision throughout these proceedings, nor does it suggest that the entry permits that it did issue under §1910.146(f) constituted such documentation.

Respondent passingly suggests on review to us that its tanks qualified for reclassification under (c)(7)(ii), which the preamble to the Notice of Final Rule (NFR) explained could cover “[c]hemical tanks [that] can frequently be made safe by draining them of their contents, purging any residual chemicals with water, and ventilating the space after purging is complete.” Permit-Required Confined Spaces, 58 Fed. Reg. 4,462, 4,491 (Jan. 14, 1993)(codified at 29 C.F.R. §1910.146). The difficulty with this argument is that subparagraph (ii) by its terms posits a situation where hazards are present in a confined space and that it is necessary to enter the confined space in order to eliminate the hazards. As a precondition to entry, an employer must still comply with the panoply of requirements set forth in §1910.146(d)-(k). Only *after* an employer has fulfilled the requirements of subsections (d)-(k) and *after* testing and inspection during entry has

With that preface, we address the six PRCS items before us on review. For the sake of convenience, we address the six items in three parts: (I) items 1a and 2a of citation 2, which we affirm respectively as an other than serious violation and as a

demonstrated that the hazards have been eliminated, does the confined space qualify for reclassification as non-permit space. However, the focus of the alleged violations here is not what the employer did or did not do after the tanks qualified for reclassification as non-permit space. Rather, the focus of the alleged violations was on the antecedent steps that must be taken in accordance with (d)-(k) to eliminate the hazards including those residual and atmospheric hazards that the viscous cargos left behind.

Suttles does not even cite subparagraph (i) of (c)(7) as a possible alternative ground for reclassifying its washed-and-dried tanks as non-permit spaces. However, a review of the explanation of the provision in the NFR preamble raises serious doubt whether this provision was intended to cover confined spaces such as cargo tanks that in the normal course of use have atmospheric hazards. As the NFR preamble states, “OSHA expects that this provision will apply primarily to spaces containing hazardous energy sources or containing engulfment hazards.” *Id.* at 4,491. The preamble further explains:

The reclassification of permit spaces allowed under paragraph (c)(7)(i) of the final rule recognizes that spaces such as mixers and material bins can have their hazards removed before entry, so that entrants are fully protected without the need for permits, attendants, or other features required by the full permit space program requirements given in paragraphs (d) through (k). Mixers can be locked out before it is [sic] entered for servicing or maintenance, removing the mechanical hazards. A material bin posing an engulfment hazard can be emptied before entry, thus removing that hazard.

Id.

This discussion suggests that subparagraph (c)(7)(i) is available for confined spaces whose hazards are non-atmospheric, that is, those of a mechanical or physically solid nature that create electrical energy or engulfment hazards, which can be eliminated without employee entry. Given their atmospheric hazards, Suttles’ cargo tanks do not fall within that category. However, it is not necessary to resolve this interpretative issue, since it is clear from the record below and its briefs to the Commission that Suttles never conducted its operations in a manner designed to qualify for reclassification under subparagraph (c)(7)(i), nor does it rely upon this provision on review.

The Chairman reads the above analysis as literally requiring “the conclusion that the tanks in this case can never be reclassified under the subsection [(c)(7)(i) and (ii)].” Plainly, that is an exaggeration of the import of the discussion.

repeated other than serious violation, meriting a substantially reduced penalty; (II) items 4 of citation 1 and items 1c and 3 of citation 2, which we affirm as nonserious violations; and (III) item 1b of citation 2, which we vacate.

Part I.

Citation 2, items 1a and 2a:

Failure to evaluate hazards and failure to test for toxic atmosphere

Item 1a of citation 2 alleged a repeated violation of the requirement that employers identify and evaluate the hazards of permit-required confined spaces before an employee enters the space, as set out in 29 C.F.R. § 1910.146(d)(2).¹⁴ As issued, the citation alleged that Suttles had failed to evaluate the corrosive, contact, or skin absorption hazards of the chemicals that had been hauled. During the hearing, the Secretary moved to amend the citation to add the allegation that Suttles had failed to evaluate the atmospheric hazards in the washed tanks. In her decision, the judge granted the amendment and affirmed this item, because Suttles had not performed any testing for toxic atmospheres. The judge reasoned that Suttles' reliance on existing testing records and on the expertise of Dr. Ball was not specific enough to satisfy the requirements of the standard. The judge also found that the results of the Columbus testing were inapplicable to the Creola facility.

As originally cited, item 2a alleged a repeated violation of the standard at 29 C.F.R. § 1910.146(d)(5)(iii). That allegation was later amended to allege a violation of

¹⁴That standard provides:

§ 1910.146 Permit-required confined spaces.

.....
 (d) *Permit-required confined space program* (permit space program).
 Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

.....
 (2) Identify and evaluate the hazards of permit spaces before employees enter them;

section 1910.146(d)(5)(i)¹⁵ for failure to test for toxic atmospheres after it had tested for oxygen and combustible gases. The administrative law judge affirmed the amended citation on the basis of Suttles' stipulation that it did not test for toxic atmospheres in a tank after it was cleaned.

At the outset, we find for the reasons given above that the evidence does not support the judge's finding that the results of the Columbus testing were "inapplicable" to the Creola terminal, the judge's conclusion that, at Columbus, the cleaned tanks were left "sterile" whereas the tanks at Creola left a visible residue, or the judge's finding that the length of time for the wash at Creola was not uniform but was left to the discretion of the washers.

In explaining what was envisioned by the term "testing" (§1910.146(b)), which was added in the final rule, the preamble to the final rule stated, "OSHA intends the term to cover the evaluation of permit space conditions both at the time an employer initially identifies the hazards and devised control measures and at the time entry would actually take place." 58 Fed. Reg. 4,462, at 4,480 (Jan. 14, 1993). This two-phase evaluation corresponds to the obligations set forth in §1910.146(d)(2) and (d)(5), respectively, which Suttles allegedly violated in these items. The preamble's explanation also referred to the

¹⁵Section §1910.146(d)(5)(i) provides:

§ 1910.146 Permit-required confined spaces.

....

(d) *Permit-required confined space program* (permit space program).

Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

....

(5) Evaluate permit space conditions as follows when entry operations are conducted:

(i) Test conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin, except that, if isolation of the space is infeasible because the space is large or is part of a continuous system (such as a sewer), pre-entry testing shall be performed to the extent feasible before entry is authorized and, if entry is authorized, entry conditions shall be continuously monitored in the areas where authorized entrants are working;

non-mandatory Appendix B, which was appended to the final rule for the purpose of providing guidance for employers who perform atmospheric testing. *Id.* Paragraph (1) of that Appendix describes the initial testing as “evaluation testing,” the purpose of which is to identify the existence of any hazardous atmospheres “so that appropriate permit entry procedures can be developed and acceptable entry conditions stipulated for that space.” Significantly, at this initial phase, an employer is encouraged to consult with qualified professionals, including certified industrial hygienists and safety engineers, both to evaluate the testing data and to develop entry procedures. Paragraph (2) of the appendix in turn designates the testing that precedes a specific entry as “verification testing,” which must be undertaken prior to any given entry by an employee into permit-required confined space.

It is reasonable to conclude from these explanations that the nature and scope of the verification testing undertaken pursuant to (d)(5) will be governed by the results of the evaluation testing required by (d)(2).¹⁶ Accordingly, if evaluation testing demonstrates that certain hazards (such as toxic atmospheres) are eliminated by a cleaning procedure, then the pre-entry verification testing need not include a test for those hazards. This view of the relationship between (d)(2) and (d)(5) is entirely consistent with the performance-oriented nature of the §1910.146: “The basic performance-oriented nature of OSHA’s permit space standard forces employers to develop whatever procedures are necessary to eliminate or control hazards in permit-required confined spaces. Spaces posing the least risk (above the threshold set by the definition of permit-required confined space) will necessitate the fewest procedures to ensure safe entry. Spaces containing severe or multiple hazards require more detailed and comprehensive

¹⁶*See id.* (“the testing process includes specifying the tests to be performed so that OSHA can determine if the tests performed *correspond to the identified permit space hazards*”) (emphasis added).

procedures.”¹⁷ Echoing this approach, on the question of verification testing prior to entry of a permit-required space, the preamble stressed that “[t]he type of testing that needs to be performed is dependent on the hazards that are present within the space. . . . Paragraph (d)(5)(i) requires the employer to conduct whatever tests are necessary to ensure that acceptable entry conditions are present.” 58 Fed. Reg. at 4,498.¹⁸

Suttles’ decision to retain consultants for the purpose of evaluating the cleaned tanks was not self-initiated, but was actually in response to an earlier citation for similar violations at the Columbus facility.¹⁹ On February 28, 1996 – approximately 7 months before the inspection at Creola, OSHA issued this citation charging Suttles with a repeat violation of §1910.146(d)(5)(iii) for failing to test for toxic gases and vapors. It was in the course of attempting to negotiate a settlement of the Columbus citation that Suttles retained the services of the three experts to develop a testing protocol and to conduct the evaluation of whether hazardous toxic atmospheres remained in the tanks after washing and drying. As Mr. Hayes testified, the goal of the testing protocol was to demonstrate to OSHA’s satisfaction that the washing procedure eliminated the basis for the citation.²⁰ This evidence was corroborated by the deposition testimony of Mr. Anthony Lowe, an industrial hygienist in OSHA’s Columbus area office who was involved in the inspection

¹⁷58 Fed. Reg. at 4,486. *See also id.* at 4,535 (“OSHA believes that the final rule is written in terms of performance to be achieved rather than in terms of how to achieve the desired performance . . .”).

¹⁸*See also* Appendix B, paragraph (5) – *Order of testing*, which in explaining the order of testing prescribed by §1910.146(d)(5)(iii) stated in pertinent part: “*If* tests for toxic gasses and vapors are *necessary*, they are performed last.” (emphasis added).

¹⁹That citation (Inspection #121913461) was actually the second one issued against that facility. A previous citation (Inspection #122056690), issued on October 12, 1995, was settled without being contested (Ex. C-70) and became the basis for the repeat characterization of the second citation issued against the Columbus facility as well as the basis here for the repeat characterization of Items 1a and 2b, of Citation 2, against the Creola facility.

²⁰Tr. 830-40.

of Suttles' Columbus facility and familiar with the settlement negotiations.²¹ Following the submission of the experts' test results to the OSHA's area office, a settlement of the Columbus citation was finalized on November 26, 1996 – approximately 6 weeks after the Creola inspection. While Suttles admitted to the violation of §1910.146(d)(5)(iii) for purposes of the settlement, the characterization was amended from “repeat” to “repeat other than serious” and the penalty was reduced from a proposed amount of \$10,000 to \$1,500.²²

In the context of the instant case, we conclude that the Columbus testing was undertaken by qualified professionals to evaluate the presence of hazards – in particular hazardous toxic atmospheres –in the clean-and-dried tanks, exactly as contemplated by paragraph (1) of Appendix B of the regulation. The results of this evaluation confirmed that any toxic atmosphere in the tanks was purged during the cleaning process. It was therefore appropriate in designing the verification testing procedures for purposes of fulfilling its obligations under (d)(5) for Suttles to eliminate the atmospheric test for toxicity since it was found unnecessary, a conclusion that accords with the explanation in paragraph (2) of Appendix B. Were it not for a timing issue described below, we would find that the Columbus testing constituted the kind of identification and evaluation of

²¹Ex. R-28, at 26, 46, 48.

²²Ex. C-71. Suttles contends that OSHA's agreement to the Columbus settlement was tantamount to a concession that washed tanks were not permit-required confined spaces. A review of the settlement agreement, together with the parole testimony, does not support this assertion. At most, the evidence shows that the respondent and OSHA reached a common understanding that when the tanks were washed and dried in accordance with the procedures devised by Suttles' safety and health consultants, Suttles in conducting verification testing of a cleaned tank could forego testing for hazardous toxic atmospheres. However, there is nothing to suggest that Suttles could forego testing for oxygen abnormalities, for example. See paragraph (3) of the definition of “hazardous atmosphere” as atmospheric oxygen concentration below 19.5 percent or above 23.5 percent, and paragraph (1) of the definition of permit-required confined space as having a hazardous atmosphere. *See* §1910.146(b), note 3, *supra*. As noted previously, Suttles continued to monitor oxygen, as well as flammability, hazards as part of its verification testing prior to employee entry.

hazards contemplated by subsection (d)(2). Based on the results of those tests, we further find that, in fulfilling its obligations under subsection (d)(5) to test permit space conditions prior to specific employee entries, Suttles was warranted in dispensing with the testing for *toxic* atmospheres so long as the tanks were washed, dried and ventilated in accordance with the operating procedures developed in consultation with Dr. Ball.²³

However, the timing question precludes exonerating Suttles on these two items. The record shows that Suttles' evaluation of hazards posed by the cleaned tanks was not

²³Because resolving the question of whether "representative" testing like that performed in Columbus could suffice for evaluation testing under § 1910.146(d)(2) and potentially eliminate the need for verification testing under § 1910.146(d)(5) (even accepting the premise - which the record supports - that there were no significant differences between the washing and ventilation processes at Columbus and Creola) is not necessary for the decision and is thus *dicta*, Commissioner Rogers reserves judgment on the matter.

On the one hand, the standard's preamble, particularly the discussion about the cited provision, 1910.146(d)(2), seems to focus on the importance of conducting the evaluation prior to entry. While there is some imprecision about how much before entry, the preamble cites comments discussing the dynamic nature of confined space hazards and the notion that "[t]he nature and severity of the potential hazard can only be determined just prior to actual entry into the confined space." 58 Fed. Reg. at 4496. The preamble also suggests that the evaluation could be conducted when the entry permit is being prepared. *Id.*

With respect to the entry permit, OSHA originally proposed that an entry permit could be valid for up to a year. That proposal was criticized, and in the final rule, OSHA decided that the validity of the permit could not exceed the time required to perform the assigned job or task. 58 Fed. Reg. at 4505. This would suggest that the entry permit, as with the evaluation testing, is specific to a particular confined space and entry. On the other hand, example 3.B. in Appendix C to the PRCS standard, involving the repair or servicing of "used" tanks, suggests an entry permit could be valid for up to one year.

At the same time, OSHA's settlement of the Columbus citation seems to suggest that such "representative" air sampling tests could suffice under the standard. *See* note 22 *supra*. In the absence of a cogent explanation from OSHA of its position on this issue and in light of the fact that any resolution would constitute *dicta*, Commissioner Rogers sees no need to decide this issue here. Commissioner Rogers also notes that OSHA's actions in settling the citation in Columbus while seeking significant penalties here (over \$100,000) raise questions about OSHA's seeming inconsistent behavior in the two cases.

concluded until after the OSHA inspection that resulted in the citations here. OSHA initiated its inspection of the Creola facility on October 2, 1996, and extended it through October 4, but the consultants conducting the evaluation for Suttles had not finished their work at the Columbus facility by those dates. Although the testing and taking of samples was completed on September 26, test samples still had to undergo laboratory analysis, which was scheduled to take ten business days, and, based on the evidence of record, we find the results were not available to Suttles before the inspection. Thus, Suttles was not justified in dispensing with its obligation under §1910.146(d)(2) and (d)(5), to test for hazardous toxic atmospheres in its cleaned tanks at any of its facilities until its consultants had completed their evaluation and Suttles had their report in hand.²⁴ We therefore affirm items 1a and 2a of citation 2.

The Secretary alleged these items were repeated. A violation is a repeated violation under section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979) (“*Potlatch*”). The Secretary may establish a prima facie case of substantial similarity by showing that the employer has received a prior citation for failing to comply with the same standard and that the citation has become a final order of the Commission, and the burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). The Commission has held that similarity of abatement is not the criterion, that the test is whether the two violations resulted in substantially

²⁴Suttles argued to the judge that apart from the testing by Hayes, its reliance on “existing records, knowledge of the process, and Dr. Ball’s expertise” together fulfilled its obligation under §1910.146(d)(2). The judge concluded that this was “too general to constitute the identification and evaluation contemplated by” the rule. Suttles does not adequately demonstrate the error in that conclusion, and we are not prepared to disturb it. We therefore deem the timing of the Hayes report a relevant consideration.

similar hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990).²⁵

Suttles had received two prior citations from OSHA, both at its Columbus, Ohio facility. The first was issued in 1995. It was settled and had become a final order before the inspection in this case. The second citation, which was issued in 1996, led to the atmospheric testing by Foley Environmental Services described above. That citation was the subject of a settlement agreement approved on November 26, 1996, which became a final order of the Commission on January 6, 1997. In that agreement, many of the items were affirmed, but it did not become a final order until after the October 2-4, 1996 inspection at the Creola facility took place, the time of the violation alleged here. It therefore cannot form the basis for a repeated characterization.

The 1995 citation alleged a violation of 29 C.F.R. § 1910.146(d) because Suttles' permit-space program did not comply with all the requirements of sections 1910.146(d)(1) through (14). Specifically, it alleged that the confined spaces were not tested for oxygen, flammable gases, and toxic air contaminants. The factual underpinnings of that citation, that Suttles failed to test the tanks, are substantially similar to the facts alleged in the two items before us, that Suttles failed to evaluate the hazards in the washed tanks and that it failed to test for toxic atmospheres before employees entered the tanks. The violations here are therefore substantially similar to the existing final order, and the repeated characterization has been established under the 1995 citation.

We conclude that the unusual circumstances here warrant that the violations be affirmed but that their characterization and the penalty be reduced. Based on the similarity of working conditions and practices between the Columbus and the Creola

²⁵ This case arose in Alabama, which is in the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit has stated that a violation is repeated if the same standard has been violated more than once and there is "substantial similarity of violative elements" between the two violations; the burden of proving the requisite substantial similarity is on the Secretary. *D & S Grading Co. v. Secretary*, 899 F. 2d 1145, 1147-48 (11th Cir. 1990).

facilities, the similarity of the citation allegations, the overlap of the two proceedings, the successful efforts by the employer to develop a testing protocol that persuaded OSHA's Columbus area office that its tank cleaning procedures resolved the disputed compliance issues, and the reduction of the characterization of the citations in the settlement with the Columbus area office, we find that the violations in Item 1a and Item 2a are of a repeat but other than serious nature.²⁶

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving "due consideration" to the size of the employer, the gravity of the violation, the employer's good faith, and its history of previous violations. Although the IH believed that Suttles had over 400 employees nationwide, the company presented evidence that it had no more than 200, and the judge based her assessment on that number. The judge also noted that Suttles had demonstrated good faith during the inspection, although the IH had given no credit for good faith. We have considered the two prior citations and the gravity of the violations, as well as the penalty assessed in the Columbus proceeding. We assess a total penalty of \$500 for the two items.

²⁶Commissioner Rogers would find these violations to be serious. She notes that, under Commission precedent, a violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558, 1995-97 CCH OSHD ¶ 30,986, p. 43,176 (No. 93-2535, 1996). She notes further that this language does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur. *Id.* In her view, the record establishes that the possibility of an employee encountering a hazardous atmosphere in a washed tank is very low. She concludes, however, that, if such an event did occur, the likely result would be serious physical harm.

Part II.

Citation 1, item 4, and citation 2, items 1c and 3

**Failure to verify entry permit information, failure to have required equipment,
and failure to complete entry permits.**

A.

Item 4 of citation 1 alleged that Suttles had committed a serious violation of the standard at 29 C.F.R. § 1910.146(j)(2)²⁷ because a supervisor did not verify that the entry permits had been completed, evaluate the confined spaces for toxic atmospheres, assess the chemical and physical properties of the residues in the tanks, correctly compute the LEL, ensure that operational retrieval systems were available, or ensure that employees entering the confined spaces used the correct personal protective equipment (PPE).

The record establishes that Suttles did not consider the washed tanks to be permit-required confined spaces and was, consequently, not observing the requirements of the standard. The administrative law judge affirmed this item. She found that Suttles had acknowledged that the unwashed tanks were permit-required confined spaces, and she held that the washed tanks were permit-required spaces because Suttles had not followed the procedures set out in the standard to reclassify the washed tanks to non-permit spaces. The judge noted that Suttles' Wash Rack Employee Handbook stated that employees must have a permit to enter a confined space, that a supervisor must test the atmosphere and sign the permit, and that all signatures must be on the permit before entry is made. She based her finding of a violation on the fact that some of the entry permits did not

²⁷That standard provides:

§ 1910.146 Permit-required confined spaces.

...

(j) *Duties of entry supervisors.* The employer shall ensure that each entry supervisor:

...

(2) Verifies by checking that the appropriate entries have been made on the permit, that all tests specified by the permit have been conducted and that all procedures and equipment specified by the permit are in place before endorsing the permit and allowing entry to begin;

contain the ventilation history of the tank, so that there was no record that the necessary ventilation had been performed. The judge concluded that this was a serious violation for which a \$3,500 penalty should be assessed.

Section §1910.146(j)(2) requires, among other tasks, that the entry supervisor verify, by checking the entries on the entry permit, that all tests specified on the permit have been conducted. From several of the entry permits introduced into evidence (Exs. C-34, C-36, C-38), the judge found that the Suttles supervisor who had filled out such permits had failed to make sure that the entry permits were complete.²⁸ In particular, the line for ventilation history was not checked off.

On review, Suttles argues that it was not required to fill out the entry permits because, after the tanks were washed, they were no longer permit-required spaces. Contrary to Suttles' contention, we find for the reasons set out above that the washed-and-dried tanks remained permit-required spaces and that Suttles must comply with the requirements of its entry program, including the documentation of the steps taken to ready the tanks for entry. The second page of the exhibits noted by the judge as well as the others permits introduced at trial were modeled closely after one of the sample entry permits that are included in Appendix D of §1901.146. The fact that Suttles utilized those permits in connection with entries of cleaned tanks undeniably evidences its own understanding that the written permit must be completed as a precondition to entry. Thus, it was appropriate for the Secretary to cite Suttles for what, at a minimum, were recordkeeping deficiencies.

In assessing the character and gravity of the violation, however, we take into account other salient facts in the record: First, an integral part of Suttles' cleaning procedures was the ventilation phase. After a tank was "spun" washed, the dome lid was

²⁸These exhibits are somewhat confusing because they combine two separate business records – a one-page document entitled "Tank Cleaning and Inspection Report" and the front page of the two-sided document constituting Suttles' permit entry form. The back pages of the permit form were not included in these specific exhibits, apparently because they had not been completed by the supervisors. *See also* notes 30 & 41, *infra*.

opened, a plastic hose was inserted, and air was forced through the tank at 2,700 cubic feet per minute for a 15-to-20 minute period.²⁹ Second, the three permits cited by the judge as incomplete were filled out by the same entry supervisor, Richard “Lyn” Boggs, who was the evening shift leadman. Yet, as evidenced by other permits filled out during the same timeframe, which were introduced into evidence, another supervisor of the cleaning operations, Wes Burton, the day shift leadman, did check off the ventilation line in the permits.³⁰ Third, it is noteworthy that each permit introduced into evidence was accompanied by a separate report entitled, “Tank Cleaning and Inspection Report,” which was signed by the same supervisor verifying what material had been in the tank and that the tank had been cleaned. Thus, this appears not to be a case of an employer completely foregoing ventilation as a precondition to entry nor a case where a supervisor of tank washing operations either failed to do the ventilation step or failed to verify its completion by someone else, since Boggs himself had overseen the cleaning and drying of the tank. Finally, several entry permits generated following the OSHA inspection create an inference that Suttles took immediate steps to correct the recordkeeping deficiencies.³¹ Taking these mitigating circumstances into account, it appears that any derelictions here were limited and isolated in nature, involving a single leadman who failed to adequately record events on the company’s forms after overseeing the washing

²⁹Tr. 254, 341, 434, 1129.

³⁰A total of 29 entry permits were introduced, covering the period from October 1, 1996, to January 23, 1997. The permits upon which the judge relied, Exhibits C-34, C-36, C-38, were dated October 2, the first day of the inspection that gave rise to the citations before us. Among the completed permits in which the ventilation history was checked off by Wes Burton were C-18, dated October 2, 1996; C-29, dated October 1, 1996; C-30, dated October 1, 1996; C-32, dated October 2, 1996; C-45, dated November 27, 1996. Other permits filled out by Richard Boggs were similar to C-34, C-36, and C-38 in not having the ventilation history line checked off, *e.g.*, C-21, dated October 2; 1996; and, C-27, dated October 2, 1996.

³¹See Ex. C-40, dated October 14, 1996 (Boggs); Ex. C-42, dated November 8, 1996 (Boggs); Ex. C-45, dated November 27, 1996 (Burton); Ex. C-46, dated January 23, 1997 (Boggs). The ventilation history was completed on each of these entry permits.

and drying of a tank. Because the record establishes that the ventilation did occur, and the violation consists simply of failing to record it on the entry permit form, we cannot find that death or serious physical harm could result from this violation. We therefore modify the judge's disposition and hold that the violation alleged in Item 4 was non-serious and that a penalty of \$250 is appropriate.

B.

Item 1c of citation 2 alleged a repeated violation for three instances in which Suttles violated the standard at 29 C.F.R. § 1910.146(d)(4).³² Two of those instances are

³²That standard provides:

§ 1910.146 Permit-required confined spaces.

....
 (d) *Permit-required confined space program* (permit space program).
 Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

-
 (4) Provide the following equipment (specified in paragraphs (d)(4)(i) through (d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly:
- (i) Testing and monitoring equipment needed to comply with paragraph (d)(5) of this section;
 - (ii) Ventilating equipment needed to obtain acceptable entry conditions;
 - (iii) Communications equipment necessary for compliance with paragraphs (h)(3) and (i)(5) of this section;
 - (iv) Personal protective equipment insofar as feasible engineering and work practice controls do not adequately protect employees;
 - (v) Lighting equipment needed to enable employees to see well enough to work safely and to exit the space quickly in an emergency;
 - (vi) Barriers and shields as required by paragraph (d)(3)(iv) of this section;
 - (vii) Equipment, such as ladders, needed for safe ingress and egress by authorized entrants;
 - (viii) Rescue and emergency equipment needed to comply with paragraph (d)(9) of this section, except to the extent that the equipment is provided by rescue services; and
 - (ix) Any other equipment necessary for safe entry into and rescue from permit spaces.

before the Commission: one alleged that Suttles failed to provide a calibration kit for the combustible gas meter used to test the atmosphere in the tanks before employees entered, the other alleged that Suttles did not ensure that employees inside the tanks wore impervious suits to protect them against several enumerated chemicals. The record is clear that Suttles did not have a calibration kit for its Safe T Mate 200 combustible gas meter used to test the atmosphere in the tanks before employees entered.

The judge affirmed the instance alleging failure to provide a calibration kit because she concluded that the atmospheric testing required by the standard was inadequate unless the meter was properly calibrated. She joined the instance involving chemical-impervious suits with an item from citation 1 which had alleged a failure to use supplied-air respirators. Citing section 1910.146(d)(4)(iv), she stated that an employer is permitted to dispense with the use of protective equipment to the extent that its engineering and work practice controls protect employees from exposure to hazardous substances; but she found that Suttles had not performed any testing on the washed tanks to verify that the suits and respirators were not necessary. The judge found that the results of the Columbus testing were “inconclusive” for the Creola tanks.

We find a violation, but only on the ground that Suttles did not have calibration equipment for its gas meter. As noted before, even after the tanks had been washed and blown dry, Suttles did test for oxygen levels and explosive levels. Because it is clear from the standard that testing equipment must be properly calibrated, we find that Suttles violated the standard by not having the capability to calibrate its meter. We do not affirm that instance alleging a failure to require employees to wear chemical suits and respirators, however. Section 1910.146(d)(4)(iv) requires that the employer provide personal protective equipment and ensure that its proper use “insofar as feasible engineering and work practice controls do not adequately protect employees.” The compliance officer conceded, however, that she did not do any testing at Creola to determine whether personal protective equipment was needed in light of the engineering

controls utilized by Suttles.³³ The judge noted that employees who entered the cleaned tanks wore gloves and boots, which, according to the Wash Rack Employee Handbook, must be worn at all times.³⁴ The Secretary introduced no evidence, expert or otherwise, to prove the inadequacy of such protective equipment in light of the controls.

On the record before us, we find that the Secretary has not established that this violation was serious. We therefore affirm it as other-than-serious.³⁵ The Secretary cited this item as a repeated violation. The judge found it to be repeated based on a prior citation issued on February 28, 1996, for a violation of the same regulation at the Columbus, Ohio facility.³⁶ The judge noted that prior citation item had been affirmed in a settlement agreement approved on November 26, 1996 and became a final Commission order on January 6, 1997. In order to establish that a violation is repeated, the Secretary must show that there was a final order for a substantially similar violation. *Potlatch*. The Columbus citation on which the judge relied did not become a final order until after the October 2-4, 1996 inspection at the Creola facility took place. Because it was not a final order at the time of the violation, it cannot serve as a basis for finding a repeat violation. The 1995 citation, which had become a final order at the time of this inspection, alleged a violation of §1910.146(d). Because the facts alleged in that citation were very different from the allegation here, we find that the hazards posed by the violations were not substantially similar. We therefore find that the Secretary has not proved that this violation was repeated.³⁷

³³Tr. 383.

³⁴Exhibit C-5 at 10-11.

³⁵Commissioner Rogers disagrees with the majority's finding that this item was not proved to be serious. In her view, the potential consequences of Suttles' failure to have the equipment to calibrate its meter would include an employee's entering a confined space with an atmosphere that could cause serious harm.

³⁶See note 19 *supra*.

³⁷We agree that, under the precedent of the Eleventh Circuit, *see* note 25, *supra*, the Secretary has not carried her burden of showing the violations to be substantially similar.

The judge grouped this item for penalty purposes with items 1a and 1b of citation 2. With only the failure to have the necessary calibration equipment to support a violation under this citation item, we assess a penalty of \$250 for Item 1c.

C.

Item 3 of citation 2 alleged a repeated violation of section 1910.1910.146(f).³⁸ Specifically, it alleged three instances in which Suttles' confined space entry permit did

³⁸That standard provides:

§ 1910.146 Permit-required confined spaces.

.....

(f) *Entry permit.* The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:

- (1) The permit space to be entered;
- (2) The purpose of the entry;
- (3) The date and the authorized duration of the entry permit;
- (4) The authorized entrants within the permit space, by name or by such other means (for example, through the use of rosters or tracking systems) as will enable the attendant to determine quickly and accurately, for the duration of the permit, which authorized entrants are inside the permit space;

NOTE: This requirement may be met by inserting a reference on the entry permit as to the means used, such as a roster or tracking system, to keep track of the authorized entrants within the permit space.

- (5) The personnel, by name, currently serving as attendants;
- (6) The individual, by name, currently serving as entry supervisor, with a space for the signature or initials of the entry supervisor who originally authorized entry;

- (7) The hazards of the permit space to be entered;
- (8) The measures used to isolate the permit space and to eliminate or control permit space hazards before entry;

NOTE: Those measures can include the lockout or tagging of equipment and procedures for purging, inerting, ventilating, and flushing permit spaces.

- (9) The acceptable entry conditions;
- (10) The results of initial and periodic tests performed under paragraph (d)(5) of this section, accompanied by the names or initials of the testers and by an indication of when the tests were performed;
- (11) The rescue and emergency services that can be summoned and the means (such as the equipment to use and the numbers to call) for summoning those services;
- (12) The communication procedures used by authorized entrants and attendants to maintain contact during the entry;

not contain information required by the standard. The judge affirmed this item because she found that the Secretary's exhibits showed that Suttles had not entered the required information onto the entry permits. The judge noted that Suttles had added a paragraph on its form giving the person who filled out the form the discretion to leave out certain information under certain circumstances. In addition to finding that the permits were incomplete, the judge faulted Suttles for including these instructions on the form, which she interpreted as authorizing an entry supervisor to forego completing the remaining portions of the permit form under certain conditions.

To support this item, the Secretary introduced two allegedly incomplete entry permits, which leadmen Wes Burton and Lyn Boggs respectively had filled out.³⁹ The Secretary claimed that the leadmen had completed only the front side of the permit form, while ignoring the reverse side of the form, thus omitting critical information. For purposes of comparison, the Secretary's introduced a blank version of the permit form showing what information must be filled in on the backside.⁴⁰

Section 1910.146(f) requires that the issued entry permits specify certain information documenting compliance with the regulation. The preamble to the standard explained that, with the inclusion of all of the information required by paragraphs (1)-(15) of the regulation, "the permit itself will provide a concise summary of the permit space program requirements for a particular entry that will be useful to the personnel who are conducting the entry operations and to any personnel who need to review the conduct

(13) Equipment, such as personal protective equipment, testing equipment, communications equipment, alarm systems, and rescue equipment, to be provided for compliance with this section;

(14) Any other information whose inclusion is necessary, given the circumstances of the particular confined space, in order to ensure employee safety; and

(15) Any additional permits, such as for hot work, that have been issued to authorize work in the permit space.

³⁹Exhibits C-18 & C-21, both dated October 2, 1996.

⁴⁰Exhibit C-11, described in note 8, *supra*.

of entry operations after the operations have been terminated.” 58 Fed. Reg. at 4,506. If both sides of the entry permit form were to be filled out, as the Secretary’s compliance officer asserted (Tr. 277-79) and as Suttles apparently intended, then the partially completed permits placed in evidence establish a prima facie violation of §1910.146(f). For example, the backside of the permit form provided a space for identifying (by signature) the employee who was authorized to enter the cleaned tank, as required not only by the Suttles but also §1910.146(f)(4). Filling out only the front side, as was the case with Exhibits. C-18 and C-21, would omit that important information.

We therefore find a violation. We do not, however, find that the repeat characterization of the violation has been proved. The chronology of events shows that the Columbus citation alleging a violation of §1910.146(f) had not become a final order until after the October 2-4, 1996, inspection took place at the Creola facility. It therefore cannot serve as a basis for finding a repeat violation. We also find that the Secretary has not proved that this paperwork violation was serious. We find no evidence in this record that Suttles’ failure to record the information was likely to cause serious physical harm.

Having rejected the repeat characterization, we must reevaluate the judge’s assessment of a \$9,000 penalty, which exceeds the statutory maximum for a violation that is not repeated or willful. *See* sections 17(a)-(c) of the Act, 29 U.S.C. §§ 666(a)-(c). In addition, we note that immediately after the October 2-4 inspection at Creola, and before the entry of the final Commission order in the Columbus case, Messrs. Boggs and Burton as the leadmen responsible for filling out the permit forms were completing both the front side and the backside of the permit forms.⁴¹ Taking into account this fact, together with

⁴¹A number of filled-out forms were introduced into evidence as exhibits, listed in note 30, *supra*. One of the curious aspects of Suttles’ entry permit form (see, e.g., Exhibit C-11, a blank copy of the form), is that it is a combination of two sample forms that the Secretary has included as examples of permits whose elements are considered to comply with requirements of §1910.146. Clarence Bean, Suttles’ safety and environmental compliance official, testified that the permit forms in question had been “pirated” from Appendix D of §1910.146. (Tr. 1160-62.) Thus, the front side of the permit form closely mirrored the format of “Confined Space Entry Permit” appearing at Appendix D-1 and the backside of the permit form closely tracked the format of the “Entry Permit”

the fact that Suttles had been working with OSHA’s Columbus area office to develop and utilize a permit form system that conforms to §1910.146(f), we assess a penalty of \$250 for Item 3.

Part III.

Citation 2, item 1b:

Failure to use mechanical ventilation

Item 1b of citation 2 alleged a repeated violation of various requirements of the permit-required confined space program standard at 29 C.F.R. § 1910.146(d)(3).⁴² The

appearing at Appendix D-2. Bean indicated that in developing this new permit form, he had consulted with Anthony Lowe, an industrial hygienist in OSHA’s Columbus, Ohio, area office who was involved in investigating and settling the citation issued against Suttles’ Columbus tank wash facility, including the citation item under §1910.146(f) involving deficiencies in Suttles’ previous permit forms. According to Bean, Lowe had recommended the new form and even had suggested a modification in an initial version of the new forms. It is clear from the preamble to the final rule, however, that Appendix D contains not one but two *separate* prototypes showing what elements a proper permit form should include. (Note the use of the plural: “Appendix D contains sample permits. OSHA, responding to comments concerning proposed Appendix C, which also contained sample permits, has improved and upgraded the examples from the proposal.” 58 Fed. Reg. at 4,533; *accord*, NOTE, following section 1910.146(e)(1)(“Appendix D . . . presents examples”). The clear implication from the preamble discussion is that an employer could model its permit entry forms after one or the other of the samples. By conflating into one form what were published as two examples of proper permit forms, Suttles, possibly with the acquiescence of OSHA’s Columbus area office, seems to have created a confusing situation for its workers. If nothing else, an entry supervisor is required to enter duplicative information on the front and the back. Since, on review, Suttles has not addressed the legal implications of this aspect of the permit forms or the role of the OSHA area office in devising such forms, there is no need to explore the matter further. Suttles argues only that the washed tanks were not permit-required confined spaces, so there was no legal obligation to complete the forms. We have found above, however, that the washed tanks were permit-required confined spaces. Suttles was therefore required to complete the entry forms.

⁴²That standard provides:

§ 1910.146 Permit-required confined spaces.

.....

citation alleged five specific instances in which “the employer did not develop and implement the means, procedures, and practices necessary for safe permit space entry operations.” The judge affirmed only one instance, however, instance e, which alleged, “Mechanical ventilation was not used when necessary to remove potential atmospheric hazards in tank trucks.” Only that instance is on review. The Commissioners are unanimous in voting to vacate this item.

The judge reasoned that §1910.146(c)(5)(ii)(E), which requires the use of continuous forced air ventilation, was applicable under the circumstances, although that section was not cited here. We vacate this item on narrow ground that §1910.146(c)(5)(ii)(E) has no application here. As described in several places in the preamble to the standard, subsection (c)(5) is an alternative procedure governing the entry of permit-required confined spaces:

Paragraph (c)(5) of the final rule sets provisions that employers can follow *in lieu of complying* with paragraphs (d) through (f) and (h) through (k), if the employer can demonstrate that the permit space contains only atmospheric hazards and that continuous forced air ventilation will maintain those permit spaces safe for entry.

...

(d) *Permit-required confined space program* (permit space program). Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

.....

(3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following:

- (i) Specifying acceptable entry conditions;
- (ii) Isolating the permit space;
- (iii) Purging, inerting, flushing, or ventilating the permit space as necessary to eliminate or control atmospheric hazards;
- (iv) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards; and
- (v) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry.

“...OSHA has determined that there are circumstances in which employers can control atmospheric hazards without following the full permit procedures outlined in paragraphs (d) through (k) of the final rule.

Paragraph (c)(5)(i) of the final rule sets forth the conditions that must be met before a permit space may be entered under the *alternative procedures*, which are specified in paragraph (c)(5)(ii).”

58 Fed. Reg. at 4,485, 4,487 (emphasis added). The evidence plainly shows that respondent here was not attempting to utilize the (c)(5) procedures, including continuous forced air ventilation, as an alternative to the full permit procedures set forth in paragraphs (d) through (k). Nor do the briefs of either party in anyway support the notion that any of the (c)(5) procedures had any bearing on the citation items under review. Moreover, except for a passing reference to section 1910.146(c)(5)(ii)(E) in a string citation, the Secretary’s brief is utterly devoid of any discussion as to the relevance of (c)(5). We therefore conclude that, on this record, Item 1b of Citation 1 should be vacated.

Commissioner Rogers agrees that this item should be vacated, but for reasons different from her colleagues. She notes that the cited standard requires employers to “Develop and implement the means, procedures, and practices *necessary for safe permit space entry operations*,” (emphasis added) and finds the Secretary has not met her burden to show that mechanical ventilation was not used when it was necessary.

PERSONAL PROTECTIVE EQUIPMENT ITEM:

Citation 1, item 1a

Item 1a alleges a serious violation of the personal protective equipment (“PPE”) requirements of section 29 C.F.R. § 1910.132(d)(2)(i) because employees working outside the tanks were not wearing the PPE that Suttles had designated as necessary for the tasks being performed.⁴³

⁴³The cited standard provides in pertinent part:

§ 1910.132 General requirements.

The Secretary's representative, the IH, observed Suttles employees cleaning the exteriors of the tanks without eye protection. Suttles uses a chemical described as an "aluminum brightener" to clean the exteriors of the tanks. The material safety data sheet (MSDS) for that substance states that it contains ammonium bifluoride and sulfuric acid and that it is corrosive to skin and eyes, and that it may cause corneal damage. The IH reviewed Suttles' Wash Rack Employee Handbook and concluded that it constituted a workplace assessment in which the company identified hazards and designated the kind of PPE necessary to protect against each. That handbook, which is in evidence, states, "Goggles are to be worn when cleaning hoses, cleaning with caustic, brightener or presolve or when mixing chemicals or replacing drums that contained chemicals."

The IH testified that she observed employees cleaning the exteriors of trucks without eye protection, and that they had told her that it was optional for them to wear goggles when they cleaned the exteriors of the truck. Suttles has presented evidence that wearing eye protection was not optional and that a number of employees, including a leadman, were disciplined for failing to wear the necessary eye protection. The judge found a violation. She credited the testimony of the IH over what she characterized as the "more general" testimony from Suttles' tank wash supervisor that he enforced the requirement to wear eye protection. The IH's personal observation of employees cleaning the exterior of tanks without eye protection is sufficient to establish the violation. Her testimony as to what she saw is not contradicted. Based on this testimony, we find that Suttles did not "have each affected employee use" the necessary PPE and that Suttles did not comply with the requirements of section 1910.132(d)(2)(i).

. . .

(d) *Hazard assessment and equipment selection.* (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall: (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

Suttles argues that the Secretary did not prove that a reasonable employer would recognize that there was a hazard requiring the use of eye protection, but the company's handbook and the testimony of its tank wash supervisor establish that Suttles did, in fact, recognize such a hazard. *See Florida Machine & Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120 (11th Cir. 1982).

The Secretary combined item 1a for penalty purposes with item 1b, which alleged a violation of the standard requiring eye and face protection, and proposed a penalty of \$3,500. The judge vacated item 1b as duplicative and assessed a penalty of \$2,500 for item 1a. Having considered the four factors set out in section 17(j) of the Act, we deem the penalty assessed by the judge to be appropriate in the circumstances. Accordingly, we affirm her assessment of a \$2,500 penalty for this violation.

HAZARDOUS COMMUNICATION ITEM:

Citation 1, item 5a

Item 5a alleges a serious violation of the labeling requirements of the hazard communication standard at 29 C.F.R. 1910.1200(f)(5).⁴⁴ The citation alleged four separate instances in which that standard had been violated, but two of them were withdrawn by the Secretary, and one was vacated by the judge. Only one of them

⁴⁴That standard provides:

§ 1910.1200 Hazard communication.

· · ·
 (f) *Labels and other forms of warning.*

· · ·
 (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 hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

remains, instance a, which alleged that a caustic tank in the tank wash area was not labeled. Suttles asserts that the violation did not occur. We disagree.

The IH testified that the tank in question was in the Kelton room. During her walkaround inspection, she was accompanied by Suttles' tank wash supervisor and one of its leadmen. When the IH observed that the tank had no label, she asked what was in the tank and was told that it contained a caustic called "ALGO 2." In affirming this item, the judge noted that both Suttles employees who were present in the Kelton room during the inspection testified at the hearing, and that neither contradicted the IH's statement as to the contents of the unlabeled tank. In the absence of contradictory evidence, the IH's testimony is un rebutted. We therefore find that the tank did not have the required warning label giving the identity of the chemical it contained.

A violation of section 1910.1200(f)(5) has therefore been proven. Suttles' arguments on review do not address instance a of this item. The arguments made go to instance b, which was withdrawn by the Secretary while this case was on review. Under these circumstances, we affirm the judge's disposition of instance a of this item.

The Secretary proposed a penalty of \$3,500 for this item, which originally alleged four separate instances. The judge affirmed two instances and assessed a penalty of \$1,000. While this case was on review, the Secretary withdrew one of the instances that had been affirmed by the judge. Having considered the four factors specified by section 17(j) of the Act, we find a penalty of \$1,000 to be appropriate.

VACATING CITATIONS AS A SANCTION

Suttles asserts that all the citation items should be vacated on the grounds that the industrial hygienist ("the HI") who conducted the inspection engaged in overzealous conduct as also evidenced by allegations of prior misconduct that had led to disciplinary action. Suttles additionally claims that the area office in which she worked improperly evaluated inspector performance based on the number of citations issued and on the amounts of the penalty totals involved in citations. The judge addressed these arguments as a vindictive prosecution defense and disposed of them in that context.

We find no basis for overturning the judge's ruling on this issue. The area

director for the Mobile area where the IH is based testified by deposition that the issuance of multiple-item citations with large penalties was considered only as evidence of the employee's ability to handle complex inspections. However, after the issuance of the citations in this case, Congress amended the Act to add section 8(h), 29 U.S.C. § 657(h),⁴⁵ which prohibits the Secretary from using the results of enforcement activities to evaluate enforcement personnel. Nevertheless, even if we were to apply the amendment retroactively, we find no basis for vacating all items cited as Suttles asks. In view of the area director's testimony, we find no contravention of Congress' mandate.

Suttles further argues that the IH's prior misconduct undermines her credibility as a witness. We have reviewed the Federal Rules of Evidence, particularly Rule 608, and do not find that a single instance of misconduct, for which discipline has been administered, warrants the rejection of all her testimony. Suttles has raised legitimate credibility issues, however, and we have weighed the evidence and considered the credibility of all witnesses for those items where the IH's testimony is contradicted.

CONCLUSION

We find that Suttles violated the personal protection requirements of 29 C.F.R. § 1910.132(d)(2)(i) and therefore affirm item 1a of citation 1. We assess a penalty of \$2,500 for that violation. We also find that Suttles violated the standard at 29 C.F.R. § 1910.1200(f)(5). Consequently, we affirm item 5a of citation 1 and assess a penalty of \$1,000 for that item. We also affirm item 4 of citation 1 as nonserious and assess a penalty of \$250. We affirm items 1a and 2a of citation 2 as nonserious repeated and

⁴⁵New section 8(h) provides, "The Secretary shall not use the results of enforcement activities, such as the number of citations issued or penalties assessed, to evaluate employees directly involved in enforcement activities under this Act or to impose quotas or goals with regard to the results of such activities."

items 1c and 3 of citation 2 as nonserious and non-repeated violations. We assess a total penalty of \$500 for items 1a and 2a, and penalties of \$250 each for items 1c and 3. We vacate item 1b of citation 2.

SO ORDERED.

/s/
James M. Stephens
Commissioner

Dated: September 30, 2004

/s/
Thomasina V. Rogers
Commissioner

Railton, Chairman, concurring:

I concur in the judgment in order to form a two-member majority for the purpose of disposing of this matter. I also agree, however, with much of the rationale for the decision on the assumption that the Permit Required Confined Space Standard (PRCS) applied to the tanks after they were washed. My difficulty with the lead opinion, however, lies in its conclusion that the tanks were permit required confined spaces prior to being washed.¹ They are not working spaces before they are washed and therefore they are not subject to the regulation and perhaps the Act.

As the definitions to the PRCS make plain only spaces which are entered for the purpose of performing work are classified as confined spaces. *See* 29 C.F.R. §1910.146(b)(1). Indeed, the preamble for the final standard makes this point repeatedly. *See, e.g.*, 58 Fed. Reg. 4462, 4467 (January 14, 1993). This point was also made throughout the entirety of the rulemaking proceedings. *See, e.g.*, Notice of Proposed Rulemaking, 54 Fed. Reg. 24080 (June 5, 1989), and the advance notices of proposed rulemaking, 40 Fed. Reg. 30980 (July 24, 1975), and 44 Fed. Reg. 60334 (November 27, 1979). The record in this case makes it clear that the pre-washed tanks were not entered and no work was performed in them. Accordingly they are not subject to regulation by the PRCS. The question then arises, are the washed tanks permit required confined spaces?

It seems clear that Suttles treated them as such but in the same fashion as the employer treated tanks cleaned by contractors in *Superior Tank & Trailer Co.*, 17 BNA OSHC 2116 (digest), 1995-97 CCH OSHD ¶ 31,127 (digest) 1996 OSAHRC LEXIS 80 (No. 95-870, 1996). That employer, like Suttles, tested the atmosphere of the tanks prior to entry and it ventilated the tanks as well. The employer here has a point when it argues that the Secretary should have provided objective or expert testimony demonstrating that

¹While it is true that Suttles characterized the pre-washed tanks as permit spaces, I do not agree that this action is a concession of the legal issue. As I see it, the issue between the parties was whether the post-washed tanks were confined spaces.

the washed tanks are subject to regulation under the PRCS. The Secretary did not provide any evidence of either kind. On that basis I could find that the Secretary failed to prove her case.

However, as the lead opinion points out, the testing Suttles performed in Ohio was for a limited purpose. That purpose was to prove that the wash process in fact makes the tanks sterile with regard to the potential for a toxic atmosphere. It was not performed for the purpose of proving the tanks were sterile for all potential atmospheric hazards. Moreover, the results were not available at the time OSHA commenced its inspection of the Creola facility. Suttles cannot rely on them for the purpose of avoiding these citations. Suttles treated the washed spaces as regulated spaces as stated in the lead opinion, and I concur with the disposition of the confined space items essentially for the reasons given insofar as they are consistent with this opinion.

Similarly, Suttles is not entitled to relief under the reclassification provisions of subsection (c) (7) of the PRCS. That provision was not seriously advanced before the ALJ as an alternative to Suttles theory that the post-washed tanks were not permit spaces and is referred to almost as an afterthought on review. Importantly, Suttles failed to present any argument concerning its failure to comply with the requirements of subparagraph (iii) of the reclassification provisions. Accordingly, reclassification is a subject best left to some future case.

Unfortunately my colleagues present *dicta* in footnote 14 of the lead opinion which may be seen as an interpretation of subsection (c) (7)(i) and (ii). I do not join in that *dicta*. Taken literally, the *dicta* seems to require the conclusion that the tanks involved in this case can never be reclassified under the subsection. The Secretary did not go that far in her brief to the Commission; she held open the possibility for reclassification and argues that Suttles is not so entitled on the record in this case. I agree.

Dated: September 30, 2004

/s/
W. Scott Railton
Chairman

Secretary of Labor,
Complainant,

v.

Suttles Truck Leasing, Inc.,
Respondent.

OSHRC Docket Nos.
97-0545 & 97-0546

Appearances:

Marsha L. Semon, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

John J. Coleman, Esq.
Marcel L. DeBruge, Esq.
Balch & Bingham
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Suttles Truck Leasing, Inc., contests citations and penalties issued to it by the Secretary on March 27, 1997. The citations resulted from two separate Occupational Safety and Health Administration (OSHA) inspections, docketed as cases under nos. 97-546 (the health inspection conducted by OSHA industrial hygienist Leigh Jackson) and 97-545 (the safety inspection conducted by OSHA compliance officer Johnny Burroughs). The inspections took place at Suttles's truck terminal located in Creola, Alabama. The cases were consolidated for hearing.

Jackson's health inspection (no. 97-546) resulted in the following citations being issued:

Citation No. 1(Alleged Serious Violations)

Item 1a: Section 1910.132(d)(1)(i)--use of personal protective equipment

Item 1b: Section 1910.133(a)(1)--use of eye and face protection

Item 3: Section 1910.146(c)(i)¹--confined space entry

¹ The undersigned granted the Secretary's motion to amend the citation so that the violations alleged in items 2a and 2b of citation no. 1 are, in the alternative, instances of violations of item 1c of citation no. 2. In her post-hearing brief, the Secretary argues these alleged violations exclusively under item 1c of citation no. 2. Accordingly, the items initially cited as items 2a and 2b of citation no. 1 will be considered only as instances of violation of item 1c of
(continued...)

- Item 4: Section 1910.146(j)(2)--confined space entry
- Item 5a: Section 1910.1200(f)(5)²--hazard communication warnings
- Item 5b: Section 1910.1200(g)(8)--maintenance of material safety data sheets
- Item 5c: Section 1910.1200(h)(1)--training regarding new chemicals in work area

Citation No. 2 (Alleged Repeat Violations)

- Item 1a: Section 1910.146(d)(2)--confined space entry program
 - Item 1b: Section 1910.146(d)(3)--confined space entry program
 - Item 1c: Section 1910.146(d)(4)--confined space entry equipment
 - Item 1d: Section 1910.146(d)(14)--review of confined space entry program
 - Item 2a: Section 1910.146(d)(5)(i)³--confined space atmospheric testing
 - Item 2b: Section 1910.146(d)(5)(ii)--confined space evaluation
 - Item 3: Section 1910.146(f)--confined space entry permit requirements
 - Item 4: Section 1910.146(k)(3)(ii)--mechanical retrieval device for confined space entries
- Burroughs's safety inspection (no. 97-545) resulted in the following citation:

Citation No. 1(Alleged Serious Violations)

- Item 2b: Section 1910.177(c)(2)⁴--servicing of rim wheels
- Item 2c: Section 1910.177(d)(4)--air line assembly for inflating tires on wheel rims
- Item 2d: Section 1910.177(d)(5)--charts for rim wheels
- Item 2e: Section 1910.177(g)--safe operating procedure for servicing rim wheels
- Item 3: Section 1910.307(b)⁵--electrical wiring in hazardous locations

¹(...continued)
citation no. 2.

² The Secretary withdrew instance c of this item at the hearing (Tr. 15-16).

³ The undersigned granted the Secretary's pre-hearing motion to amend this item from §1910.146(d)(5)(iii).

⁴ The Secretary withdrew items 1 and 2a prior to the hearing.

⁵ The Secretary originally cited this item as item 1 of citation no. 2, alleging a repeat violation. The undersigned granted the Secretary's pre-hearing motion to amend this item to allege a serious violation and renumber it as item 3 of citation no. 1.

The hearing of these consolidated cases was heard from November 3 through November 10, 1997. The parties have filed post-hearing briefs. Suttles argues that the Secretary has failed to establish the alleged violations. Suttles also contends that it was unfairly targeted by OSHA and that it was unfairly treated by OSHA, its witnesses, and the undersigned. For the reasons stated below, the Secretary prevails on twelve of the items and sub-items and Suttles prevails on seven.

Background

Suttles's primary business is the transportation of liquid chemicals via tank trailers. Suttles owns and leases out approximately 425 stainless steel tanks used for this purpose. The company employs truck drivers and other employees at its fourteen truck terminals located throughout the United States. Five of these truck terminals include tank wash facilities where, after hauling a load, the tanks are washed inside and out before being dispatched to haul another load (Tr. 1104-1107, 1257).

The tanks are 35 feet long and 6 feet, 5 inches deep (Tr. 242, 1110-1111). The top of the tank has a walkway with a hatch in the middle and caps on both ends (Tr. 1125). The hatch is secured by "dog ears" and has a "Christmas tree" pressure gauge (Tr. 1120).

The tanks are single compartment tanks, without walls, baffles, or other interior structures (Tr. 40-41, 43). Inside, the tank is smooth stainless steel with a gradual 8-inch drop from the ends of the tank toward the middle, so that any liquid or heavier-than-air gas inside the tank will drain toward the middle and out through a bottom hatch located slightly off-center (Tr. 1029, 1113, 1122).

Suttles washes out the empty tanks between each load. Suttles operates wastewater treatment plants in Columbus, Ohio, and Demopolis, Alabama. Water used to clean trucks and tank trailers at Suttles's outlying truck terminals is brought to one of these wastewater plants (Tr. 1106-1107). Suttles washes approximately 24,000 tanks each year (Tr. 1142).

Suttles's terminal in Creola, Alabama, consists of a yard where the tanks are parked; the tank wash area, consisting of three large covered bays; a maintenance shop; and offices. In the tank wash area, the first and second bays are used for washing the tanks. The third bay is used for fueling the trucks. Tank wash employees gain access to the top of the tanks from an elevated

platform, known as a wash rack, located between the first and middle bays. Tank wash employees are also referred to as wash rack employees (Exh. C-5; Tr. 40, 298, 1312).

Henry Hollinghead was the tank wash supervisor (Tr. 38, 1283). The wash rack employees work on either the day shift (6:00 a.m. to 3:00 p.m.) or the evening shift (3:00 p.m. to 11:00 or midnight). A lead man assigned to each shift is responsible for directly supervising the “washers” (the wash rack employees who are assigned to clean the interior and exterior of the tanks). Wes Burton was the day shift lead man and Richard (Lynn) Boggs was the night shift lead man. The tank washers were Jim Spence, Donald Williams, Chris Kiker, and brothers Terrance and Zerrick Gaines. Kiker and the Gaines brothers primarily cleaned the interior of the tanks while Spence and Williams primarily cleaned the exterior (Tr. 57-58, 1256, 1323).

Each truck driver who delivers a tank to the facility fills out a wash rack request form identifying the last product hauled in the tank. The material safety data sheet (MSDS) for the identified product is attached to the wash request slip, and the bill of lading for the product is turned in to the office (Tr. 1114).

The completed wash request form is given to the tank wash lead man who then prepares form STL-14, the wash ticket (also referred to at the hearing as a “wash rack slip,” “wash rack form,” and “tank wash slip”) which identifies the last product hauled (Exh. C-6; Tr. 60-61, 73, 145, 1116). Form STL-14 is also used to record the type of wash solution used to clean the tank, and whether or not the tank was treated with Xylene prior to being washed, as well as the time spent washing the tank (Tr. 61, 150-151, 1117).

Once a tank is pulled into a wash bay, the tractor is removed and the tank is hooked to a ground plant to prevent any sparking and ignition of flammable vapors (Tr. 1251-1252). Before the interior of the tank is washed, the dome lid, along with certain other valves, is opened; and the lead man visually inspects the tank for retained product, known as “heel” (Tr. 56, 63). In the event the tank contains excessive heel (that is, 10 gallons or more), the heel is drained from the tank prior to the washing process (Tr. 63).

Depending on the product last hauled in the tank, the tank may be pre-rinsed with cold water or it may be “presolved” with Xylene in order to loosen the product residue and facilitate

washing (Tr. 66, 71-72, 1225). The Xylene is pumped into a hose via a pneumatic pump and delivered to the tanks through a wand inserted in an opening in the dome lid (Tr. 66, 1206-1207).

The lead man selects the wash medium for the interiors of the tanks. He may choose cold water, hot water, steam, or a caustic solution. A presolved tank is first rinsed with hot water and then washed with a caustic solution (Tr. 63, 66-67, 1078, 1338).

The wash medium is applied to the interior of the tank using devices known as “spinners.” A spinner is a wand-like device with rotating nozzles (spinners) approximately 4 to 5 inches in length with openings on each end (Tr. 64). The end of the wand outside the tank is attached to a hose which is attached to a machine called the Kelton machine (Tr. 1258). The spinners are placed into the tank openings on either end of the tank at the top, and into an opening in the dome (Tr. 64). The Kelton machine delivers the wash medium under pressure to the spinners, via overhead hoses in the wash bays (Tr. 1087-1089, 1258). During the spinning process, wash water from the spinners continuously flows out of the tank through the bottom of the tank, and is directed through a hose either to a sump pit between the first and middle bays, or to a hazardous waste tank. Wash water from tanks which have been pre-solved with Xylene and from tanks washed with a caustic wash solution flow into the sump pit (Tr. 129, 131-132, 137, 1101, 1245).

Once the interior of the tank has been washed, the dome lid and the previously capped openings are opened and a corrugated ventilation tube, approximately 6 to 9 inches in diameter, is inserted into the tank. The tank is ventilated for 15 to 20 minutes (Tr. 80-81). After the tank is ventilated, the lead man visually inspects the interior from the top of the tank in order to determine whether the automated wash process has adequately cleaned the tank (Tr. 56).

Vindictive Prosecution

Unfairness towards Suttles is the leitmotif that runs through the company’s post-hearing brief. Suttles believes it was unfairly targeted by OSHA’s area director and compliance officers, and that its persecution continued at the hands of the Secretary and her expert witness, Emil Golias. At the hearing, Suttles made various offers of proof aimed at denigrating OSHA’s

compliance officers. Portions of the record were placed under seal.⁶ In its brief, Suttles continues its sweeping ad hominem attacks upon the compliance officers, Golias, and the employee whose complaint gave rise to the initial inspection. Its brief contains headings stating that the Secretary's three witnesses are "not Worthy of Belief" (pp. 34, 36, 38) and that "OSHA Had Ulterior Motives" (p. 38). Suttles also takes the undersigned to task for imposing "tight evidentiary reins uncharacteristic of administrative litigation" (p. 38) and raises the specter of reversible error (pp. 36, 38-39).

On the subject of the witnesses' credibility, the undersigned declines Suttles's suggestion to dismiss wholesale the testimony of compliance officers Jackson and Burroughs and of Golias. As will be seen, the Secretary has problems of proof on a number of issues, but the proof will be examined on an item-by-item basis. The witnesses' testimony will not be disregarded based on Suttles's ill-advised sensationalistic personal attacks.

In its section of the brief dealing with OSHA's purported ulterior motives, Suttles argues that the evidence (pp. 38-39):

establishes prosecutorial misconduct by the Mobile Area Office, and confining the scope of this evidence would constitute reversible error. Put differently, contrary to the ALJ's observation (T 818), the OSHRC DOES care what OSHA did; what OSHA did compels vacating the citations.

Suttles cites a 25 year old Review Commission decision, which the company argues, incorrectly, holds that evidence of a compliance officer's motives is relevant to his or her credibility. In the cited case, *Fort Hill Lumber Co.*, 2 BNA OSHC 1013 (No. 509, 1974), the Review Commission's decision takes up less than a page. It states that three issues were raised by the direction for review (none of which relate to the issue of the compliance officer's credibility) and that, due to the Secretary's withdrawal of the relevant items, the Review Commission "need not reach any of the issues raised by the direction for review." *Id.* at 1014.

⁶ Having again considered the extent of the sealed portion of the record, it is determined that the Order placed on the record at Tr. 357, Ln. 12 through 359, Ln. 6, should not be sealed. Accordingly, no correction to the transcript is required.

The administrative law judge's decision below (which has no precedential value) also fails to provide bedrock support for the proposition asserted by Suttles. Out of a 21-page decision, Judge Kennedy devotes one sentence, *obiter dictum*, to the compliance officer's motives in investigating the respondent (*Fort Hill Lumber Co.*, 1974 OSAHRC LEXIS 436, *19):

There is also very strong evidence, likewise not contradicted, that this was initiated by a state inspector, whose motives in this instance are subject to question as a result of a dispute with the Respondent which grew out of that gentleman's practice of soliciting employment on the weekends from employers whom he inspected during the week.

Judge Kennedy does not mention this subject again and bases no conclusions upon it. *Fort Hill* is hardly the keystone that Suttles purports.

More recent, and more apposite to Suttles's argument, is *National Engineering & Contracting Co.*, 18 BNA OSHC 1075 (No. 94-2787, 1997). In this case the Review Commission addresses the issue of vindictive prosecution (*Id.* at 1077-78):

Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right. If governmental misconduct is found, the court can dismiss the vindictively motivated charge or the entire action. *United States v. Meyer*, 810 F.2d 1242, 1249 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

National Engineering claimed that it was subjected to vindictive prosecution based on a number of factors, including its discovery "through the compliance officer's deposition that the agency allegedly had an improper motivation for pursuing the inspection." *Id.* at 1078. The Review Commission concluded that National Engineering failed to establish the threshold showing required to make a case for vindictive prosecution. The Commission noted that while the company

appears to receive a good deal of attention from OSHA, it has not identified any protected right it exercised that caused the Secretary to initiate this inspection or prosecution . . . In addition to evidence of animus or retaliatory motive, National

must produce evidence tending to show that it would not have been cited absent that motive.

Id.

In the present case, Suttles has failed to identify, during the hearing, in its various offers of proof, or in its post-hearing brief, any protected right it exercised that caused the Secretary to initiate the inspection or prosecution. Instead, it claims that the Secretary's "inexplicable and unwarranted hostility toward Suttles" (Suttles's brief, p. 20) drove this prosecution. Such allegations are insufficient to support a finding of vindictive prosecution. Suttles's argument to the contrary is without merit.

Docket No. 97-546

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Citation No. 1

Item 1a: Alleged Serious Violation of §1910.132(d)(1)(i)

The Secretary alleges that Suttles committed a serious violation of §1910.132(d)(1)(i), which provides:

The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective

equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment[.]

The citation states that employees working in the wash tank area “were not required to wear the PPE designated by the employer.” The citation does not specify what PPE is appropriate. The Secretary alleges that the wash rack employees were exposed to chemical hazards while accessing the top of the tanks, cleaning truck hoses, cleaning the exterior of the tanks, and cleaning sump pits. The hazards were caused both by the residue of the chemicals which were hauled as product in the tanks and by the chemicals used in the tank washing process.

Suttles’s Wash Rack Employee Handbook states, “Goggles are to be worn when cleaning hoses, cleaning with caustic, brightener or presolve or when mixing chemicals or replacing drums that contained chemicals;” and “A face shield must be worn over goggles, when cleaning hoses, mixing chemicals or the replacement of chemical drums” (Exh. C-5, p. 11). Compliance officer Jackson testified that the hazards created by exposure to the chemicals were “skin corrosion, skin absorption, contact type hazards” (Tr. 92). She based this assessment on a review of the MSDSs for the chemicals hauled in, or used to clean, the tanks (See Exhs. C-31 [isopropyl amine]; C-35 [monochloroacetic acid]; C-39 [acetone]; C-43 [aniline]; C-47 [toluidine]; C-59 [sulfonate]; C-67 [sodium hydroxide]; Tr. 92-93, 97).

Compliance officer Jackson testified that she was told by wash rack employees Chris Kiker, Terence Gaines, and Zerrick Gaines that “they normally did not wear the safety glasses that were available” while working in the tank wash area (Tr. 101). Kelly Brown, who cleaned the truck hoses, told Jackson that he did not wear eye and face protection while performing that task (Tr. 99). Jackson observed employees cleaning the exteriors of several tanks during her inspection who were not wearing goggles or face shields (Tr. 102-103).

Suttles argues that because Jackson did not conduct tests to determine whether hazardous concentrations of any of the substances listed in item 1a existed at the time of her inspection, the Secretary failed to establish a violation of cited standard (Tr. 464-465). Such testing is not required to prove a violation of §1910.132(d)(1)(i). The standard requires that an employer

assess whether hazards are present, “or are likely to be present.” Concentrations of the various chemicals hauled and used by Suttles could be expected to vary. The MSDSs establish that, while the presence of a hazard may not exist at a given time, the likelihood of the presence of a hazard remains. For example, Suttles uses a product called Aluminum Brightener, which contains ammonium bifluoride and sulfuric acid, to clean the exterior of the tanks. The MSDS for Aluminum Bright warns that it “CAUSES BURNS TO SKIN & EYES,” and is “CORROSIVE TO SKIN & EYES. MAY CAUSE CORNEAL DAMAGE” (Exh. C-12). A reasonable employer aware of this MSDS would make the assessment that the use of Aluminum Brightener constitutes, at a minimum, the likelihood of a hazard to the skin and eyes of employees required to use it. Having made this assessment, the employer is required to select face and eye protection for its affected employees and ensure that they use the designated PPE. In fact, Suttles did determine that a hazard existed and designated appropriate eye and face PPE to be worn while working with chemicals in the tank wash area, including while washing the hoses and the outside of the tank cars. Suttles failed, however, to “have each affected employee use” the appropriate PPE.

Tank wash supervisor Henry Hollinghead generally disputed Jackson’s conclusion that the tank wash employees failed to wear the required PPE, stating that tank wash employees were required to wear face and eye protection and that employees who did not do so were disciplined (Exhs. R-17, R-19; Tr. 1284-1285). Suttles argues that Jackson’s testimony that several employees told her they did not wear face and eye protection while exposed to hazardous chemicals was disputed by “the testimony of every witness on whom Jackson relied” (Suttles’s brief, p. 48). None of the employees identified by Jackson testified at the hearing; her testimony regarding what they told her is uncontradicted and is credited above Hollinghead’s more general testimony.

The record establishes that Suttles was in violation of §1910.132(d)(1)(i). Suttles had made the required hazard assessment and had required the appropriate PPE. Suttles failed to ensure that each of the affected employees used the PPE. There is evidence that Suttles disciplined employees on occasion for failing to wear the PPE, but enforcement of the rule requiring the PPE became lax to the point where at least four employees thought that the use of

face and eye protection was discretionary (Tr. 117). The failure to wear the face and eye protection was not isolated. Jackson observed for herself on the first day of her inspection that the tank wash employees were not wearing face and eye protection (Tr. 98, 102-103).

The Secretary has established a violation of §1910.132(d)(1)(i). The hazard created by not enforcing the requirement of the use of face and eye protection when working with hazardous chemicals is corrosive burns to the skin and eyes. The violation is serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Suttles employed approximately 200 employees at the time of the inspection (Tr.1105). Suttles demonstrated good faith during the inspection (Tr. 730-731). Suttles has a history of prior violations (Tr. 244).

The gravity of the violation is high. Employees routinely ignored the requirement for face and eye protection while working with caustic and corrosive substances on a daily basis. A penalty of \$2,500.00 is appropriate.

Item 1b: Alleged Serious Violation of §1910.133(a)(1)

The Secretary charges Suttles with a violation of §1910.133(a)(1), which provides:

The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

The citation alleges that employees working in the tank wash area “were not required to wear safety glasses and/or face shields to protect their eyes or face when working with chemicals. . .” Items 1a and 1b involve the same hazard to the same affected employees, and require the same abatement. The identical violative conduct brought Suttles into noncompliance with both standards. It is determined that items 1a and 1b are duplicative, and that it is appropriate to find

only one violation. *Cleveland Consolidated Inc.*, 13 BNA OSHC 1114 (No. 84-696, 1987), *Capform Inc.*, 13 BNA OSHC 2219 (No. 84-556, 1989). Therefore, item 1b is vacated.

Item 3: Alleged Serious Violation of §1910.146(c)(i)

The Secretary alleges a violation of §1910.146(c)(i), which provides:

The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.

The Secretary charges that Suttles failed to evaluate the sump pit located outside the lead man's office. The sump pit is approximately 10 feet long, 5 feet wide, and 9 feet deep (Tr. 128-129). The sump pit at issue is one of three located at the Creola terminal (Tr. 129, 353). One sump pit is located in the grease pit in the maintenance area, one is located in the tank wash area between the first and middle wash bays, and the sump pit in question is outside the lead man's office. The three sump pits connect to one another by underground pipes. Wastewater and residue from interior and exterior tank washing from the sump pit between the bays flows into the cited sump pit, where the solids settle out from the liquids (Exh. C-72; Tr. 302, 352-353).

Employees were required to enter the cited sump pit periodically to remove accumulated solids, or "sludge," by scooping it with buckets (Tr. 130, 133, 136). Before the employees enter it, the pit is drained of excess liquid by using an electric pump connected to a hose. The pit is cleaned approximately every 6 weeks (Tr. 478).

Suttles did not consider the sump pit outside the lead man's office to be a permit-required confined space (PRCS), but did consider the grease sump pit to be a PRCS (Tr. 352-353). Jackson testified that Suttles's safety and environmental manager John (Clarence) Bean told her that Suttles had not evaluated the sump pit as required by §1910.146(c)(1) (Tr. 141). However, since Suttles classified one of the sump pits as a PRCS, it must have made some evaluation on which to base its differentiation between the two pits.

Section 1910.146(b) defines "permit-required confined space" as a confined space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- ...
- (4) Contains any other recognized serious safety or health hazard.

The cited standard does not require that the employer determine that a PRCS exists, only that it make an evaluation. *Drexel Chemical Co.*, 17 BNA OSHC 1908, 1910 (No. 94-1460, 1997). Bean testified that Suttles periodically uses a “T clip” test to test the contents of the cited sump pump. The T clip has approximately “40 different chemicals that it tests for. It even tests for metals and those types of things. And, in fact, it tested below detectable limits on all of those” (Tr. 1260).

The Secretary has failed to establish a violation of §1910.146(c)(1). She faults Suttles for failing to classify the cited sump pit as a PRCS, but the focus of the cited standard is evaluation, not classification. The fact that the Secretary disagrees with Suttles’s evaluation, or that Suttles may have drawn the incorrect conclusion from its evaluation, is not proof of noncompliance with §1910.146(c)(1). Item 3 is vacated.

Item 4: Alleged Serious Violation of §1910.146(j)(2)

Section 1910.146(j)(2) provides:

The employer shall ensure that each entry supervisor:

...

- (2) Verifies, by checking that the appropriate entries have been made on the permit that all tests have been conducted and that all procedures and equipment specified by the permit are in place before endorsing the permit and allowing entry to begin.

Suttles had a written procedure for verification of the entry permit. Its “Wash Rack Employee Handbook” states in pertinent part (Exh. C-5, pp. 18-19):

CONFINED SPACE ENTRY PROCEDURE

...

DEFINITION OF A CONFINED SPACE:

A “confined space” is any space open or closed where poisonous gases for flammable vapors have been present or might accumulate or where a deficiency of oxygen might occur. These spaces include, but are not limited to, Tanks, Vats, Hoppers or Bins, that are 5 feet or more in depth from which egress is or may become restricted.

...

PERMIT

1. No employee can enter any confined space without a confined space entry permit having been properly executed by the Supervisor responsible for the area.
2. The permit must be signed by the Supervisor in charge of mechanics or wash men entering the confined space. The supervisor will conduct the atmosphere test per prescribed instructions.
- ...
4. All required signatures must be on the permit. No initials. The employee(s) entering the confined space are the last to sign the permit, after completion of all rules have been met.

Exhibits C-34 and C-35 show that the entry permit for a tank that had previously hauled “Acid MCAA,” a highly corrosive substance, does not indicate the tank’s ventilation history. The ventilation history should include the procedures used to ventilate the tank. The same defect appears on the entry permit for a tank that had hauled “petroleum distillates,” a substance whose vapors can attack the respiratory tract and central nervous system if inhaled (Exhs. C-36, C-37). An entry permit for a tank that had hauled acetone, whose vapors can cause eye and skin irritation, also showed no ventilation history (Exhs. C-38, C-39). All three entry permits were signed by supervisor Richard (Lynn) Boggs.

Suttles argues that the tanks were not PRCs and therefore it was unnecessary to complete the entry permit. If the tanks were PRCs, Suttles argues that any violations of the cited standard were the result of unpreventable employee misconduct. Both of these arguments are without merit.

Section 1910.146(b) defines a “confined space” as a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous employee occupancy.

Suttles’s tanks meet all of these criteria, and the company does not dispute that the tanks are confined spaces. Suttles argues, however, that after its tanks are washed, they are not PRCs.

Section 1910.146(b) defines “permit-required confined space” as a space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- (2) Contains a material that has the potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross section; or
- (4) Contains any other recognized serious safety or health hazard.

The only one of these characteristics that is applicable to Suttles’s tanks is the containment or the potential to contain a hazardous atmosphere. Section 1910.146(b) defines “hazardous atmosphere” as “an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness. . .”

Suttles acknowledges that, pre-wash, its tanks are PRCs (Tr. 1211-1213). It established at the hearing that its employees do not enter the tanks in their pre-washed state. Once the tanks are washed, Suttles contends, the tanks no longer have the potential to contain a hazardous atmosphere. It is only in the tanks’ post-wash state that employees are allowed to enter them.

The purpose of entry permits is to prevent employees from inadvertently entering confined spaces which may be hazardous. Although employees were not required to enter pre-wash tanks, they have access to them.

In *Mobile Premix Concrete*, 18 BNA OSHC 1010, 1012, footnote 4 (No. 95-1192, 1997), respondent’s employees were required to enter hoppers when they were empty or when the hopper gates were closed. They were generally not required to enter full hoppers with open gates, which created a restricted means of exit. Respondent conceded that the full hoppers were PRCs, but argued that the empty hoppers were not. The Review Commission declined to differentiate between full and empty hoppers, citing employee access to the space as the key to its classification as a PRC.

Had Suttles wished to reclassify Creola’s PRCs into non-permit spaces, there were procedures it could have, but did not, follow. Section 1910.146(c)(7) sets forth the requirements for reclassifying a PRC to a non-PRC, including the documentation and certification process.

In the present case, the wash rack employees had access to the tanks both before and after they were washed. The tanks must be considered PRCs in both states. The supervisor was required to verify the completed entry permit.

Suttles argues that any failure to comply with §1910.146(j)(2) resulted from unpreventable employee misconduct. To establish the affirmative defense of unpreventable employee misconduct, the employer must show that “it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules when they were violated.” *Pride Oil Well Service*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992).

Suttles had a written work rule requiring the supervisor to verify that the entry permit was completed before he signed it, authorizing entry into a tank. Suttles contends that Boggs’s failure to make sure that the entry permits were complete before he signed them constituted unpreventable employee misconduct on his part. The record makes clear, however, that Suttles did not consider the tanks to be PRCs after they were washed. Boggs was following company policy when he ignored the requirements for PRCs with regard to the entry permits. Suttles did not enforce its entry permit work rule with regard to post-wash tanks. The violation did not result from unpreventable employee misconduct.

The Secretary has established a violation of the cited standard. Failure to verify that the appropriate ventilation had been done before an employee entered a tank could result in serious physical harm. The violation was serious.

Penalty Determination

The gravity of the violation was moderate. Employees were not required to enter the tanks prior to their being washed, when the potential for a hazardous atmosphere was strongest. A penalty of \$3,500.00 is assessed.

Item 5(a): Alleged Serious Violation of §1910.1200(f)(5)

The Secretary alleges that Suttles committed a serious violation of §1910.1200(f)(5), which provides:

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[.]

The citation alleges three instances of violation:

- (a) Tank Wash Area-- The caustic tank was not labeled.
- (b) Tank Wash Area-- The hose wash tank did not have a label identifying the chemical inside as caustic.
- ...
- (c) Tank Wash Area-- The 55 gallon drums containing sludge from the sump pit were not labeled with the chemical identity and did not have hazard warning labels.

Instance (a)

Jackson testified that she observed a tank in the tank wash area, which Hollinghead and Suttles's lead man Wes Burton told her contained ALGO 2, a caustic substance. There was no hazardous warning label on the tank (Exh. C-7; Tr. 226-227). Suttles contends that the tank did not contain a caustic substance, based on Bean's testimony that it was a washwater tank (Tr. 1134-1135).⁷ However, both Hollinghead and Burton appeared as witnesses for Suttles and neither one disputed Jackson's statement that they had informed her that the tank contained AGOL 2 (Tr. 1283-1342). Their statements made at the time of the event are credited over Bean's general recollection of what he believed the substances should have been.

Instance (b)

Jackson observed the hose washing tank and was told by Burton that it also contained AGOL 2. The tank was labeled with a placard indicating that it contained a corrosive, but did not indicate the specific chemical that was used in the tank (Tr. 227, 323, 1125-1126).

Instance (d)

Jackson noted several 55-gallon drums near the fueling bay. Burton told Jackson that the drums contained the residue (sludge) from the sump pit. The drums were unlabeled (Tr. 227-228). Suttles contends the sump pit from which the sludge is taken contains no hazardous

⁷ In its brief, Suttles contends that the cited tank was not a caustic tank, "but was made to look like one by Ms. Jackson's manipulation of the video camera" (p. 52). This statement is typical of the inflammatory style favored by Suttles throughout this proceeding.

substances. The sump pit is used for non-hazardous materials, while hazardous materials are transferred directly into a “haz/tank” (Tr. 1072-1073, 1133-1134).

The Secretary has established a violation with regard to instances (a) and (b). It is undisputed that Hollinghead and Burton told Jackson that the unlabeled tank in instance (a) contained ALGO 2, a hazardous substance. The placard warning of a corrosive substance that labeled the hose wash tank that is the subject of instance (b) does not meet the requirements of the cited standard. Section 1910.1200(f)(5)(i) requires that the label on a container specify the “[i]dentity of the hazardous chemical(s) contained therein.”

The Secretary failed to establish a violation of the standard with regard to instance (d). She did not prove that the sludge contained in the drums was hazardous.

The violation is serious. Failure to properly label containers of hazardous substances exposes employees to the possibility of injurious contact with the substances.

Items 5b and 5c: Alleged Serious Violations of §§1910.1200(g)(8) and (h)(1)

Section 1910.1200(g)(8) provides:

The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

Section 1910.1200(h)(1) provides:

Employers shall provide employee with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical specific information must always be available through labels and material safety data sheets.

The first day of Jackson’s inspection at the Creola terminal, October 2, she learned that an employee had entered a tank at approximately 10:15 that morning. The tank had previously hauled primer. Jackson asked Hollinghead for the MSDS for the primer. Hollinghead could not

provide the MSDS at that time. Hollinghead and Bean provided her with the MSDS either the second or third day of her inspection, although they had it in their possession earlier. Jackson stated that employee Chris Kiker, who entered the tank, told her that the MSDS was not available at that time (Exhs. C-18, C-19; Tr. 229-232).

Hollinghead testified Suttles will not wash a tank before it has possession of the appropriate MSDS for the last hauled product. He stated that when the driver dropped off the tank in question, the driver did not have the MSDS for the primer. Hollinghead called Matlack, the carrier, and requested the MSDS. Hollinghead stated that after three or four days Matlack provided the MSDS and Suttles washed the tank. Hollinghead testified that the MSDS for the primer was located at the tank wash facility immediately before and during the time that the tank was entered on October 2. He acknowledged that he could not locate the MSDS when Jackson requested it. Suttles implies that the MSDS was taken as part of an attempt by certain employees to sabotage Suttles during the OSHA inspection. After Jackson's request, Hollinghead again contacted Matlack, who faxed a copy of the MSDS to Suttles at 4:24 p.m. on October 2 (Exh. C-19; Tr. 488-490, 1295-1296, 1309-1310).

The Secretary uses the missing MSDS as the basis for both items 5b and 5c. She has failed to prove these violations by a preponderance of the evidence. Hollinghead testified credibly that the MSDS was on hand at the time Kiker entered the tank. Jackson stated that Kiker told her it was not available, but she gave no details regarding any attempt Kiker made to locate the MSDS. The Secretary has failed to show that Suttles knew or, with reasonable diligence, could have known that the MSDS was missing following the tank entry.

Also of significance is the fact that a replacement MSDS was available at the worksite the day of the tank entry. Jackson does not state at what time she asked about the MSDS, but it was after 10:15 a.m. Matlack faxed the MSDS to Suttles at 4:25 that afternoon. Section 1910.1200(g)(8) specifically provides for electronic access to the MSDSs "as long as no barriers to immediate employee access in each workplace are created by such options." Presumably, had Kiker wanted to consult the MSDS prior to entering the tank, he could have requested a copy via fax. The Secretary has not shown that Kiker or any other affected employee would encounter any barriers to accessing the appropriate MSDS in this way. Items 5b and 5c are vacated.

Penalty Determination

The gravity of the violation cited in item 5a is high. Failure to properly label the containers deprived exposed employees of crucial information. Knowledge of the specific contents of a container enables employees to seek appropriate treatment should they become overexposed to the contents. A penalty of \$1000.00 is assessed.

Citation No. 2

The Columbus Settlement

Previously, OSHA compliance officer Tony Lowe had inspected Suttles's Columbus, Ohio, terminal and the Secretary subsequently issued two citations to Suttles on February 28, 1996. The Secretary and Suttles entered into a settlement agreement on November 14, 1996, which was approved by Judge Paul Brady on November 26, 1996 (Exh. C-71). The Secretary uses the Columbus citations as the basis for alleging the repeat violations found in citation No. 2 of Docket No. 97-546.

Upon receipt of the February 1996 citations, Suttles hired Richard Hayes, a former OSHA safety supervisor who now operates a consulting firm, Hayes Environmental Services, Inc. Suttles asked Hayes to accomplish three objectives with regard to its Columbus terminal: (1) determine whether employees were put at risk by entering the tanks after completion of the wash process, (2) determine whether the wash process eliminated any potential danger to these employees, and (3) establish a working protocol that would be acceptable to OSHA's Columbus area office (Exh. R-2, p. 9; Tr. 830).

Hayes selected Ed Foley, a certified industrial hygienist, to conduct the required testing (Tr. 834). Hayes and Foley worked with chemist Dr. John Ball to group the chemicals most commonly hauled in tanks washed at the Columbus terminal. They examined MSDSs for products that had been hauled in tanks washed at the Columbus facility during March and June 1996 (Exh. R-2, p. 10; Tr. 852, 878-879).

Hayes, Foley, and Dr. Ball grouped the selected chemicals according to their physical properties so that testing for representative chemicals in each group would produce results representative of the presence of each substance in the group. The chemicals were grouped into four categories: (1) miscellaneous organics, (2) alcohols, (3) acids/caustics/inorganics, and (4)

herbicides. The Columbus testing protocol called for pre- and post-wash and ventilation atmospheric testing of at least two tanks for each of the four categories of chemicals (Exh. R-2; Tr. 1047).

Foley tested each selected tank with the dome lid opened for atmospheric oxygen, carbon monoxide, and flammable vapors and gases. The atmosphere was tested at a point approximately 3 feet vertical from the dome lid in the approximate horizontal center of each tank (Exh. R-2). After the initial testing for oxygen, the dome lid was closed and all openings on the tank were completely sealed (Tr. 889). Then all the tanks were tested to detect the atmospheric concentrations of specific chemicals comprising the particular product that had last been hauled in the tank and the levels of volatile organic compounds (Exhs. R-2; Tr. 889, 1003).

Foley and his assistant took approximately 40 samples of the tanks (one per tank) for the levels of toxicities according to the groups. The samples were submitted to an accredited lab. The post-wash results were all below OSHA's permissible exposure limit (PEL), with the exception of a result for tank ST86. Foley concluded that this exception was the result of a lab error, because the post-wash reading was higher than the pre-wash reading. When resampled, tank ST86 yielded a result below the PEL. Hayes concluded from these tests that the post-wash tanks at the Columbus terminal were not PRCs (Exh. R-2; Tr. 888-901, 842-843, 867-868).

OSHA's Columbus area office approved Suttles's testing protocol and accepted the results of the testing. At the time of the hearing, OSHA no longer required toxicity testing or additional PPE at Suttles's Columbus terminal (Tr. 988-989, 1008, 1351-1356).

The Secretary notes that the Creola tanks were used to haul some chemicals that were not tested for in Columbus (Tr. 600, 604). Suttles concedes this point but contends that any chemical hauled in a tank to the Creola terminal will fall into one of the four groupings created by Hayes, Foley, and Dr. Ball, and that the washing procedures in both terminals are essentially the same. Suttles argues that the testing performed in Columbus establishes that its post-wash tanks company-wide are not PRCs and, therefore, there is no need to comply with §1910.146 regarding testing in Creola.

The Secretary maintains that, in order for the test results obtained in Columbus to be relevant to the Creola terminal, the engineering controls used to minimize or eliminate the

atmospheric hazards must be the same at both terminals. “Otherwise,” OSHA industrial hygienist Emil Golias testified, “the tests are invalid” (Tr. 603).

Dr. Ball was a witness at the hearing. He assumed that the test results obtained in Columbus were valid for the Creola plant based on his understanding that Suttles used a specific procedure for both terminals regarding how long the tanks were spun, how much wash solution was used, and how long the tanks were ventilated (Tr. 851, 1086-1088). The record establishes, however, that the washing procedures varied between the two terminals.

The tanks in Columbus were spun with 300 gallons of water and then ventilated prior to testing. The estimates for the amount of ventilation time ranged from 5 to 25 minutes (Exh. R-2, p. 26; Tr. 851). At the Creola plant, the decision regarding how long to spin the tanks was left to the individual tank washers (Tr. 1338, 1341). The Creola tanks were ventilated for 15 to 20 minutes (Tr. 64). The washing process used at the Columbus terminal left the tanks “sterile,” with no visible residue on the tank walls (Tr. 948-951, 965). Many of the tanks at the Creola terminal contained residue which required scouring and scrubbing to remove (Exhs. C-18, -21, -32, -40, -48, -50; Tr. 1317). The fact that the Columbus washing process left the tanks “sterile,” while the Creola washing process left many tanks with visible residue that required entry for scrubbing indicates that the washing processes for the two terminals differed substantially.

The record does not support Suttles’s assertion that the tanks at the Creola terminal were not PRCs. The test results that established the Columbus tanks were not PRCs have no direct applicability to the Creola terminal.

Suttles makes a number of arguments as to why the Secretary cannot cite it for repeat violations of §1910.146, all of which are based on the presumption that the Columbus testing applied to the Creola tanks. Suttles contends OSHA cannot cite as a repeat violation the employer’s adherence to an OSHA approved abatement method; that Suttles lacked knowledge of the alleged violations; that equitable, judicial, and collateral estoppel preclude the repeat citation; that classifying the tanks as PRCs violates Suttles’s due process rights; and that compliance with the cited standards is infeasible. All of these arguments are without merit and are rejected.

Suttles's arguments are valid only if OSHA represented to the company that the Columbus testing applied to the Creola terminal or if it were reasonable for Suttles to assume that the Columbus testing applied. The record is clear, however, that neither of these conditions obtained.

OSHA compliance officer Tony Lowe explained the terms of the Columbus settlement agreement between the Secretary and Suttles (Tr. 1354-1355)(emphasis added):

My understanding of it was that the trailers that were involved in the sampling to show that the company did have to show there was no potential for exposures to certain chemicals that they deal with regularly on the trailers. My understanding was that OSHA *here in Columbus* was not going to require initial monitoring for entry into those trailers for *those specific toxins that the company sampled for*.

Now, for any new trailer or new chemical that may be involved, then there was going to have to be some additional monitoring done either to know there was no potential exposure or to do initial monitoring every time they entered the trailer.

...

[Additional testing would be appropriate] if conditions would have changed in any way where the trailers were not being cleaned as efficiently or the same format, that there was a probability of exposure to injury to the employee.

Lowe states manifestly that the waiving of the monitoring requirement applies only in the Columbus terminal and only to those chemicals that were actually tested. Hayes, who was hired by Suttles, was asked at the hearing whether he believed the test results for the Columbus terminal were applicable to the Creola terminal. Hayes responded, "I can't comment because, again, I don't know anything about Suttles Creola. I only know about the Columbus process" (Tr. 864).

OSHA did not represent to Suttles that the monitoring requirement could be waived in any terminal other than the Columbus terminal. Suttles received no written or verbal indication that the testing done in Columbus applied to any of the company's other terminals. The executed settlement agreement between the parties makes no mention of a company-wide waiver (Exh. C-71).

It was not reasonable for Suttles to assume that compliance with §1910.146 was not required in the Creola plant. Suttles's citation to *Miami Industries*, 15 BNA OSHC 1258 (No. 88-671, 1991), is inapposite here. In *Miami*, OSHA compliance officer Barrett inspected the

company's steel tubing manufacturing plant. The Secretary subsequently cited Miami for failing to adequately guard a tube mill machine, thus exposing employees to hand injuries. Miami devised its own guard, to which Barrett gave his express approval. Ten years and eight OSHA inspections later, the Secretary again cited Miami for failing to adequately guard the tube mill machine after another compliance officer found that the guard Miami had devised did not meet the requirements of the machine-guarding standard. Miami cried foul and the Review Commission agreed, vacating the citation based on its finding "that OSHA's enforcement actions deprived Miami of fair notice that OSHA considered its existing guarding device to be inadequate and further find[ing] that, under the circumstances in this case, the Secretary is estopped from enforcing the citation to the extent the citation alleges that" the guard designed by Miami did not protect the affected employees. *Id. at 1261.*

The Review Commission in *Miami* emphasized that the company was entitled to rely upon OSHA's "regular and consistent pattern of conduct over a 10-year period" in which OSHA first approved and then never cited the guard designed in response to OSHA's initial inspection. *Id. at 1264.* The abatement at issue consisted of one guarding mechanism on one machine in one facility. Once the guard was installed, the working conditions stayed constant for a decade. The guard that Barrett approved in 1978 was the same guard that the Secretary cited in 1988.

The situation in the present case is distinguishable from that in *Miami*. The present case involves two separate facilities in which the chemicals handled and the washing procedures used differ in significant ways. OSHA's approval of the testing protocol devised by Hayes and Foley was specific to the Columbus terminal. Compliance officer Lowe stated that if any changes were made in the chemicals hauled or the washing procedure used within the Columbus facility, Suttles would have to start monitoring again. There was no "pattern of conduct" by OSHA that would give rise to a reasonable belief on Suttles's part that OSHA's narrow approval of the Columbus testing translated into a company-wide release from compliance with the confined space standard for its post-wash tank cars.

The Columbus testing did not eliminate the possibility that the Creola tanks were PRCs. The citations issued to Suttles for violations of §1910.146 at its Columbus terminal may be used as a basis for a repeat classification for the items contained in citation No. 2.

Item 1a: Alleged Repeat Violation of §1910.146(d)(2)

The Secretary alleges that Suttles committed a repeat violation of §1910.146(d)(2), which provides:

Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

...

(2) Identify and evaluate the hazards of permit spaces before employees enter them[.]

The citation alleges:

For employees entering truck tanks, the employer did not evaluate the corrosive contact, or skin absorption hazards of chemicals such as, but not limited to: stoddard solvent, sodium hydroxide, sulfuric acid, calcium carbonate, ethylene glycol, Atrazine, Metolachlor, xylene, acrylic latex, formaldehyde, isopropylamine, phenol, sodium bisulfite, nitrobenzene, methanol, and resin before employees entered confined spaces.

At the hearing, the Secretary moved to amend this item to allege that Suttles had also failed to evaluate the atmospheric hazards of the tanks entered (Tr. 1363). The undersigned held the Secretary's motion in abeyance and asked that the parties address this issue in their post-hearing briefs, which they have done (Tr. 1364).

The Secretary argues that amending the citation will not prejudice Suttles. She claims that the parties fully litigated the two factual contentions that are the basis for the proposed amendment: (1) that the only pre-entry evaluation of hazards that Suttles conducted for toxic vapors and gases was the Columbus testing, and (2) the Secretary believes that the pre-testing for flammable vapors and gases and for oxygen at Creola was not adequate to evaluate the hazards inside the tanks prior to entry.

Suttles argues that it would be unduly prejudiced by amending item 1a. The company cites many cases holding that amendments which would unduly prejudice the respondent should be denied, but offers no specific reason why Suttles would be prejudiced by the amendment. Suttles does not argue that the issue of atmospheric testing was not litigated, only that the Secretary should not have waited until the hearing to move to amend the citation.

Under Federal Rule of Civil Procedure 15, amendments are to “freely” given in circumstances such as these. The Secretary’s motion to amend the citation to allege that Suttles failed to evaluate the atmospheric hazards of the tanks is granted.

Jackson testified that she reviewed Suttles’s tank entry permits and determined that they did not show the appropriate pre-entry identification and evaluation of the skin contact and absorption hazards that potentially existed in the tanks (Tr. 232-240). No testing for toxic vapors was done on any of the Creola tanks (Tr. 213). The Secretary alleges that the testing Suttles conducted for oxygen content and flammable vapors was not properly done, but that allegation, as determined in the next section, was not proven.

Suttles argues that it identified and evaluated the hazards of the tanks prior to employee entry using “existing records, knowledge of the process, Dr. Ball’s expertise, and testing in Columbus” (brief, p. 40). This decision has already addressed the nonapplicability of the Columbus testing to the Creola terminal. Suttles’s reliance on existing records, knowledge of the process and Dr. Ball’s expertise is too general to constitute the identification and evaluation contemplated by §1910.146(d)(2).

The Secretary identified a number of instances where Suttles’s employees entered tanks that had last hauled hazardous substances but for which the tank entry permits indicate that adequate evaluations of the hazards were not done. In each instance, the employees were not required to wear PPE appropriate to the hazards listed in the MSDSs for the hazardous substances. Summarized, the instances were as follows:

	Tank Entry Permit	Date of Entry	Tank Entered	Last Product Hauled	MSDS	Hazard(s)
1.	C-18	10/2/96	Matlack #1769	ArmorChem 2000 Gray Primer	C-19	inhalation injuries
2.	C-21	10/1/96	Suttles #ST108	Plastic Liquid	C-28	inhalation injuries
3.	C-30	10/1/96	McKenzie #5073040	Isopropylamine	C-31	inhalation injuries - corrosive to skin & eyes

	Tank Entry Permit	Date of Entry	Tank Entered	Last Product Hauled	MSDS	Hazard(s)
4.	C-32	10/2/96	Superior #1534	Methyl Isobutyl Ketone	C-33	inhalation injuries
5.	C-34	10/2/96	Suttles #ST440	Acid MCAA	C-35	inhalation injuries - chemical burns to eyes
6.	C-36	10/3/96	Suttles #ST313	Petroleum Distallates	C-37	inhalation injuries
7.	C-38	10/4/96	Suttles #ST465	Acetone	C-39	inhalation injuries - chemical burns to eyes
8.	C-40	10/14/96	Suttles #ST115	Bicep II Lite	C-41	skin & eye irritation
9.	C-42	11/8/96	First Chem #543001-0	Mixture of Toluene, Aniline, and Nitrobenzene	C-43 (Aniline) C-44 (Toluene)	inhalation injuries inhalation injuries
10.	C-46	1/23/97	Suttles #ST429	PTOL Paratoluidine	C047	inhalation injuries - toxic if absorbed through skin
11.	C-48	2/14/97	Suttles #ST117	Toluene Diisocyanate	C-49	inhalation injuries - skin contact injuries
12.	C-50	3/7/97	Suttles #ST76	Acetonitrile	C-51	inhalation injuries - skin absorption injuries
13.	C-52	10/1/96	Suttles #ST395	Heptane	C-53	skin absorption injuries
14.	C-54 C-55 C-56 C-57 C-58	10/3/96 10/3/96 10/3/96 10/4/96 10/6/96	Suttles #ST217 Suttles #ST86 Suttles #ST458 Suttles #ST69 Suttles #ST52	Black Liquor	C-59	can cause burning to skin and eyes

	Tank Entry Permit	Date of Entry	Tank Entered	Last Product Hauled	MSDS	Hazard(s)
15.	C-60 C-61 C-62 C-63 C-64 C-65 C-66	9/27/96 10/1/96 10/1/96 10/1/96 10/2/96 10/2/96 10/3/96	Slay #1279 TRI #48-1462 MTL #67159 ST #25 ST #243 Slay #1639 Suttles #ST341	Caustic	C-67	inhalation injuries - skin & eye injuries
16.	C-68	10/1/96	McKenzie S073313	Isophorone	C-69	inhalation injuries - skin & eye injuries

The Secretary has established a violation of §1910.146(d)(2) with regard to testing for skin contact and absorption and for toxic vapors. Suttles did not identify and evaluate the hazards presented by the products last hauled in the tanks its employees were required to enter.

The Secretary alleges that the violation was a repeat. The Secretary issued a citation to Suttles on October 12, 1995, for violating §1910.146(d) at its Columbus terminal (Exh. C-70, item 2 of citation No. 1). Suttles did not contest the citation and entered into an informal settlement agreement on October 27, 1995, in which it agreed to pay a reduced penalty for the violation (Exh. C-70, p. 1).

Under §10(a) of the Occupational Safety and Health Act of 1970 (Act), an uncontested citation becomes a final order of the Commission within 15 days of its receipt by the employer. A violation is considered a repeat violation “if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183, 1979). “A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard.” *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

The Secretary has established that Suttles committed a repeat violation of §1910.147(d)(2).

Item 1b: Alleged repeat violation of §1910.146(d)(3)

Section 1910.146(d)(3) provides:

Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

- (3) Develop and implement the means, procedures, and practices necessary for safe permit safe entry operations, including, but not limited to, the following:
 - (i) Specifying acceptable entry conditions;
 - (ii) Isolating the permit space;
 - (iii) Purging, inerting, flushing, or ventilating the permit space as necessary to eliminate or control atmospheric hazards;
 - (iv) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards; and
 - (v) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry.

Instance (a) of the citation alleges that Suttles violated the cited standard by allowing employees to enter tanks in which “[o]nly pre-entry testing (using an uncalibrated combustible gas meter) was conducted to verify conditions were acceptable throughout the duration of authorized entry.”

Suttles used a Safe T Mate 200 gas meter to test for oxygen and flammable vapors. The company had been using the Safe T Mate meter for approximately one year prior to Jackson’s inspection. The Safe T Mate meter had not been calibrated in that time and Suttles did not have a calibration kit on site (Tr. 245-246). The Safe T Mate 200 owner’s manual provides that the meter should be calibrated once every three months (Exh. C-20, p. 6-3).

Jackson assumed from these facts that the Safe T Mate meter was not calibrated. Her position was, “If there was no calibration kit on site, it would not be properly calibrated” (Tr. 400).

The cited standard refers to paragraph (c)(4) of §1910.146. That paragraph provides that the PRCS program that the employer develops and implements shall comply with “this section.”

Section 1910.146(c)(5)(ii)(C) provides:

Before an employee enters the space, the internal atmosphere shall be tested, with a calibrated direct-reading instrument . . .

Approximately one week after Jackson's inspection, a representative from Safe T Mate came to the Creola terminal and checked the calibration of the Safe T Mate 200 meter. He found the calibration to be accurate (Tr. 1198, 1247-1248, 1262).

Based on the fact that Suttles had failed to recalibrate the gas meter in accordance with its owner's manual there is a presumption the the gas meter was not properly calibrated at the time of the inspection. However, Suttles rebutted that presumption with the results of the Safe T Mate representative's test of the gas meter following the OSHA inspection. The record does not establish that Suttles violated the cited standard in instance (a).

Instance (b) of the citation alleges that Suttles violated §1910.146(d)(3) by allowing employees to enter tanks in which:

Testing for oxygen and the LEL was only conducted at one location (the dome lid) in the tank trucks prior to entry. The employer did not have a probe or other suitable device to measure the atmospheric environment of other locations within the tank trucks to ensure employees were not entering into a stratified atmosphere.

Suttles tested the atmosphere of a tank by lowering the gas detector through the dome lid. Suttles did not use a probe (Tr. 247). Jackson was concerned that the atmosphere in the tank could become stratified, with pockets of heavier-than-air gas going undetected because the atmosphere was tested only at the dome lid (Tr. 248-249). Industrial hygienist Golias recommended testing at several locations within a single tank (Tr. 596).

APPENDIX B TO §1910.146--PROCEDURES FOR ATMOSPHERIC TESTING provides:

(4) *Testing stratified atmospheres.* When monitoring for entries involving a descent into atmospheres that may be stratified, the atmospheric envelope should be tested a distance of approximately 4 feet (1.22 m) in the direction of travel and to each side. If a sampling probe is used, the entrant's rate of progress should be slowed to accommodate the sampling speed and detector response.

Testing with a probe in more than one location is not required for every PRCS, only those with "atmospheres that may be stratified." Suttles's experts Foley and Dr. Ball testified that the atmospheres in the tanks were not stratified due to Suttles's ventilation procedure (Tr. 985-986, 994-996, 1036-1038, 1058). While Golias stated that he believed the tanks' atmospheres could

be stratified, he conceded that he did not know whether or not “there is any stratified atmosphere in any tank at Suttles” (Tr. 676).

The Secretary has failed to establish that the atmospheres of the tanks at the Creola terminal might have been stratified. Without such proof, the Secretary cannot impose an additional requirement to test with a probe in several locations within the tanks. Suttles did not violate the standard as described in instance (b).

Instance (c) alleges that “[t]esting for the LEL was not correctly performed. Employees were allowed to enter the confined spaces if the combustible gas meter gave a reading of less than or equal to 10% of the LEL of the chemical being evaluated.”

Jackson testified that Hollinghead and the leadman responsible for using the Safe T Mate gas meter were unable to determine what the acceptable LEL should be when referring to an MSDS. She believed that to determine whether the level of flammable vapors that exist inside a tank are in excess of the LEL of a product, the employee should refer to the MSDS for that product, determine the LEL, and then determine whether one-tenth or less of that concentration of flammable vapor exists in the tank. According to Jackson, Suttles allowed employees to enter PRCs when the gas meter indicated a reading of 10% or less, regardless of the product (Tr. 250-251). Suttles established at the hearing that Jackson’s procedure for ascertaining the LEL applies when using the older model of gas meters. The Safe T Mate meter does not need to be recalibrated for each new substance tested. The Safe T Mate 200 gas meter is designed to test for the LEL of the atmosphere regardless of the substance (Tr. 1062-1066).

The Secretary has failed to establish that its testing in the tanks for the LEL was incorrectly performed as alleged in instance (c). Suttles demonstrated that the Safe T Mate gas meter tested correctly for the LEL.

Instance (d) alleges that Suttles “did not ensure/enforce that the attendant and the entrant wore the personal protective equipment designated in the company’s confined space program during permit required confined space entry.”

Jackson testified that Suttles did not require employees entering the tanks to wear chemically impervious suits. Suttles had rain suits and Tyvek suits available at the site, but did not require employees to wear them (Tr. 252-253).

Neither §1910.146(d)(3) nor the section it references, §1910.146(c)(4), directly addresses PPE. That issue is explicitly addressed in §1910.146(d)(4), which the Secretary also charges Suttles with violating under item 1c of citation no. 2. The issue of PPE will be discussed in the next section under the more specific standard. The Secretary established no violation under instance (d) of item 1b.

Instance (e) alleges that “[m]echanical ventilation was not used when necessary to remove potential atmospheric hazards in tank trucks.”

Suttles ventilated the tanks for 15 to 20 minutes after the spinning process by opening the dome lids and the capped openings and inserting a corrugated ventilation tube. No mechanical means of ventilation was used (Tr. 80-81, 254).

Section 1910.146(c)(5)(ii)(E) requires “continuous forced air ventilation.” Suttles relies upon its testing in Columbus to establish that mechanical ventilation was not required in its Creola tanks. As previously noted, the Columbus test results are inapplicable to the Creola tanks. The Secretary has established a repeat violation with respect to instance (e) of item 1b (Exh. C-70).

Item 1c: Alleged Repeat Violation of §1910.146(d)(4)

The Secretary alleges that Suttles committed a repeat violation of §1910.146(d)(4), which provides:

Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

...

- (4) Provide the following equipment (specified in paragraphs (d)(4)(i) through (d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly:
 - (i) Testing and monitoring equipment needed to comply with paragraph (d)(5) of this section;
 - (ii) Ventilating equipment needed to obtain acceptable entry conditions;
 - (iii) Communications equipment necessary for compliance with paragraphs (h)(3) and (i)(5) of this section;
 - (iv) Personal protective equipment insofar as feasible engineering and work practice controls do not adequately protect employees;

- (v) Lighting equipment needed to enable employees to see well enough to work safely and to exit the space quickly in an emergency;
- (vi) Barriers and shields as required by paragraph (d)(3)(iv) of this section;
- (vii) Equipment, such as ladders, needed for safe ingress and egress by authorized entrants;
- (viii) Rescue and emergency equipment needed to comply with paragraphs (d)(9) of this section, except to the extent that the equipment is provided by rescue services; and
- (ix) Any other equipment necessary for safe entry into and rescue from permit spaces.

The Secretary charges Suttles with failing to provide its tank wash employees with four types of equipment: a gas meter calibration kit (instance (a)), air horns (instance (b)), impervious suits (instance (d)), and respirators (alternative instances from items 2a and 2b of citation no 1).

The facts relevant to instance (a), regarding the calibration kit for the Safe T Mate 200 gas meter, are set out in the previous section. It is undisputed that Suttles did not have a calibration kit for its gas meter on site and that it had not calibrated the meter within the year prior to Jackson's inspection.

Section 1910.146(d)(4)(i) requires the employer to provide its employees with "[t]esting and monitoring equipment needed to comply with paragraph (d)(5) of this section." Paragraph (d)(5)(i) requires employers to "[t]est conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin. . ." To perform the required testing, the employees must have equipment that will give accurate readings. Equipment must be maintained according to the manufacturer's specifications in order to ensure accurate results.

The owner's manual for the Safe T Mate 200 gas meter states (Exh. C-20, p. 7-1):

▲ WARNING

ACCURATE CALIBRATION OF THE SAFE T MATE IS ESSENTIAL TO ENSURE CORRECT READINGS OF GAS CONCENTRATION. INCORRECT CALIBRATION CAN IMPAIR THE SAFE T MATE'S PERFORMANCE AND PLACE YOU IN UNNECESSARY DANGER IF HAZARDOUS CONDITIONS EXIST.

The manual also states (Exh. C-20, p. 6-3) (emphasis in original): *Calibrate the Safe T Mate at least once every three months. Some applications may require a more frequent calibration schedule.*

Compliance with §1910.146(d)(4) requires that the employer's testing equipment be reliable. Although the Safe T Mate representative who tested the gas meter after Jackson's inspection determined that the meter was correctly calibrated, Suttles is not excused from complying with the cited standard. A year's lapse between calibrations could result in inaccurate readings that could lead unsuspecting employees into tanks with oxygen-deficient or flammable atmospheres. The Secretary has established a violation with regard to instance (a).

Instance (b) alleges that employees were not provided with air horns to communicate with each other during tank entries. Leadman Burton told Jackson that the tank wash employees who entered tanks used air horns to summon help in the event of an emergency. When Jackson asked to see the air horns, Burton was unable to locate them (Tr. 256-257).

Suttles suggests that the missing air horns were taken during Jackson's inspection as an act of sabotage by disgruntled employees. Hollinghead testified that the air horns disappeared during Jackson's inspection, that he replaced them, and the next day they had disappeared again. Several employees, whom Suttles characterizes as disgruntled, had access to the area where the air horns were kept (Tr. 1298-1299). Bean corroborated Hollinghead's testimony (Tr. 1262-1263).

The Secretary has failed to establish that Suttles knew, or with the exercise of reasonable diligence, could have known, that the air horns were not available for use.

Instance (c) and the alternative instances from item 2a and 2b of citation no. 1 allege that Suttles did not ensure that employees entering tanks wore the impervious suits or the supplied air respirators that the company provided. Employees were permitted to enter the tanks wearing only boots and gloves as PPE (Tr. 238-239, 258-259). Section 1910.146(d)(4)(iv) requires PPE "insofar as feasible engineering and work practice controls do not adequately protect employees." Employees were entering PRCSSs that had been used to haul toxic, corrosive substances. The employer is allowed to dispense with PPE to the extent that its engineering and work practice controls protect employees from exposure to the hazardous substances. Suttles claims that its

washing and ventilating procedures eliminate the need for employees to wear PPE. Suttles, however, performed no post-wash testing that would demonstrate the elimination of the toxic and corrosive hazards. The Columbus testing is not conclusive for the Creola tanks. The Secretary has established violations of §1910.146(d)(4) with regard to Suttles's failure to require its employees to wear impervious suits and supplied air respirators (Exh. C-70).

Item 1d: Alleged Repeat Violation of §1910.146(d)(14)

Section 1910.146(d)(14) provides in pertinent part:

[T]he employer shall:

...

- (14) Review the permit space program, using the canceled permits retained under paragraph (e)(6) of this section within 1 year after each entry and revise the program as necessary, to ensure that employees participating in entry operations are protected from permit space hazards.

Jackson testified that Bean told her that the canceled permits were not reviewed annually (Tr. 260). Bean testified that he had reviewed and updated the permit space program in March 1996, approximately seven months prior to Jackson's inspection (Tr. 1201). Pages 20-A and 20-B of Suttles's "Wash Rack Employee Handbook" is a sample tank entry permit. The bottom right hand corner of the sample states "Revised 3/8/96" (Exh. 5).

The standard specifically requires the employer to review the permit space program "using the canceled permits." Bean's testimony regarding his review is somewhat ambiguous as to whether he used the canceled permits (Tr. 1201):

Q.: Now, Citation 2, Item 1(d), this has to do with not comparing your program to the permits within the preceding year, that's 1910.146(d)(14). Had you updated your program recently prior to Ms. Jackson's inspection?

Bean: Yes, we had. We had updated the entry procedure.

Q.: And how recently prior to Ms. Jackson's inspection had you done that?

Bean: I believe it was the Month of March of '96.

Q.: And, whatever the date is, it would be reflected on 28, Page 20-A and B of CX-5?

Bean: Yes.

Q.: And, in doing that, did you review the program at that time?

Bean: Yes, to make those changes.

Bean never specifically stated that he used the canceled permits in his review of the permit program, but it could be argued that when he answered affirmatively to the first question quoted, which mentions the canceled permits, he implied that he used the permits in his review. The Secretary did not cross-examine Bean on this point.

It is the Secretary's burden to prove her case by a preponderance of the evidence. She has failed to establish that it was more likely than not that Suttles did not take the canceled permits into consideration in reviewing its permit space program.

Penalty Determination

The gravity of item 1a is high. Without an identification and evaluation of the hazards inside the tanks, Suttles exposed its employees to potentially toxic or corrosive chemicals. The gravity of instance (e) of item 1b is moderate. While Suttles failed to use continuous forced air ventilation, it did routinely provide some ventilation for the tanks. The gravity of the violations under item 1c involving the calibration kit, the impervious suits and the respirators is also moderate. Employees were allowed to enter the tanks only after the tanks had been washed.

In arriving at a grouped penalty for the repeat violation, it is also considered that only one of the instances of alleged violation for item 1b and two for item 1c were valid. It is determined that a total penalty of \$7,630.00 is appropriate for items 1a, 1b, and 1c.

Item 2a: Alleged Repeat Violation of §1910.146(d)(5)(i)

Section 1910.146(d)(5)(i) provides in pertinent part:

[T]he employer shall:

...

- (5) Evaluate permit space conditions as follows when entry operations are conducted:
 - (i) Test conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin[.]

Appendix B to §1910.146 refers to this testing as “verification” testing, done to verify that the hazards previously identified and evaluated in accordance with §1910.146(d)(2) have actually been eliminated or controlled. Suttles stipulated that it did not test for toxicity at its Creola terminal, either to evaluate or to verify the hazardous atmospheres inside its tanks (Tr. 213). Suttles relies, once again, on the Columbus testing as evidence it complied with the cited standard. That argument is, once again, rejected.

The Secretary has established that Suttles committed a repeat violation of §1910.146(d)(5)(i) (Exh. C-70).

Item 2b: Alleged Repeat Violation of §1910.146(d)(5)(ii)

Section 1910.146(d)(5)(ii) provides:

[T]he employer shall:

...

(5) Evaluate permit space conditions as follows when entry operations are conducted:

...

(ii) Test or monitor the permit space as necessary to determine if acceptable entry conditions are being maintained during the course of entry operations[.]

The Secretary contends that monitoring during the employee entry was necessary because of the possibility of a tank having a stratified atmosphere. As discussed under instance (b) of item 1b of this citation, the Secretary failed to prove that a stratified atmosphere was possible.

Item 2b is vacated.

Penalty Determination

The gravity of item 2a is moderate. Although Suttles conducted no verification testing, employee entry into the tanks was only allowed post-wash. A penalty of \$12,000.00 is assessed.

Item 3: Alleged Repeat Violation of §1910.146(f)

The Secretary alleges Suttles committed three instances of repeat violations of §1910.146(f), which provides:

The entry permit that documents compliance with this section and authorizes entry to a permit space shall identify:

- (1) The permit space to be entered;
- (2) The purpose of the entry;

- (3) The date and the authorized duration of the entry permit;
- (4) The authorized entrants within the permit space, by name or by such other means (for example, through the use of rosters or tracking systems) as will enable the attendant to determine quickly and accurately, for the duration of the permit, which authorized entrants are inside the permit space;

NOTE: This requirement may be met by inserting a reference on the entry permit as to the means used, such as a roster or tracking system, to keep track of the authorized entrants within the permit space.

- (5) The personnel, by name, currently serving as attendants;
- (6) The individual, by name, currently serving as entry supervisor, with a space for the signature, or initials of the entry supervisor who originally authorized entry;
- (7) The hazards of the permit space to be entered;
- (8) The measures used to isolate the permit space and to eliminate or control permit space hazards before entry;

NOTE: Those measures can include the lockout or tagging of equipment and procedures for purging, inerting, ventilating, and flushing permits.

- (9) The acceptable entry conditions;
- (10) The results of initial and periodic tests performed under paragraph (d)(5) of this section, accompanied by the names or initials of the testers and by an indication of when the tests were performed;
- (11) The rescue and emergency services that can be summoned and the means (such as the equipment to use and the numbers to call) for summoning those services;
- (12) The communication procedures used by authorized entrants and attendants to maintain contact during the entry;
- (13) Equipment, such as personal protective equipment, testing equipment, communications equipment, alarms systems, and rescue equipment, to be provided for compliance with this section;
- (14) Any other information whose inclusion is necessary, given the circumstances of the particular confined space, in order to ensure employee safety; and
- (15) any additional permits, such as for hot work, that have been issued to authorize work in the permit space.

Suttles's entry permit form has two sides (Exhs. C-5, pp. 20-A and 20-B; C-11). The citation alleges three instances in which only the front side of the form was filled out for a tank entry, resulting in the omission of the following information:

[T]he name of the authorized entrant; the current attendant; the hazards of the permit space to be entered; the measures to eliminate or control hazards before entry; the results of periodic testing; rescue and emergency services that can be summoned and the means for summoning those services; communication procedures between entrants and attendants; equipment to be provided for compliance with this section such as respiratory protection, protective clothing; and other relative information necessary to ensure employee safety during entry.

The citation alleges the entry permits were not completely filled out for entries into tank #825 on October 1, 1996 (instance (a)), tank #1769 on October 2, 1996 (instance (b)), and tank #ST108 on October 2, 1996 (instance (c)). The Secretary adduced entry permits for the tank entries referred to in instances (b) and (c) (Exhs. C-18 and C-21, respectively). No documentary evidence was presented for instance (a).

Suttles concedes that it did not fill out the back side of the form for several of its tank entries. Its form is based on Appendix D to §1910.146. Suttles added a paragraph to the front of its form not found in Appendix D (Exh. C-11):

If conditions are in compliance with the above requirements and there is no reason to believe conditions may change adversely, then proceed to the Permit Space Pre-Entry Check List. Complete and post with permit. If conditions are not in compliance with the above requirements or there is reason to believe that conditions may change adversely, proceed to the Entry-Check-List portion of this permit.

Section 1910.146(f) is clear in its requirements for the entry permits. Suttle's permit directed employees not to bother to provide information which the standard required to be included. No provision is made for the exemptions created by the added paragraph. Suttles is not at liberty to alter the requirements of the standard to suit its purposes.

The Secretary has established a violation of the cited standard. The Secretary issued a citation to Suttles on February 28, 1996, citing the company for, among other things, a violation of §1910.146(f). Suttles and the Secretary entered into a settlement agreement in which the item at issue was affirmed. Judge Paul Brady approved the settlement agreement on November 26,

1996. The citation became a final order of the Commission on January 6, 1997 (Exh. C-71, item 1 of citation No. 3). The violation is repeat.

Penalty Determination

The gravity of the violation is moderately high. The entry permits are used in the annual review performed by the company. Without complete information on all of the permits, the company cannot make an accurate appraisal of its program. A penalty of \$9,000.00 is assessed.

Item 4: Alleged Repeat Violation of §1910.146(k)(3)(ii)

Section 1910.146(k)(3)(ii) provides:

To facilitate non-entry rescue, retrieval systems or methods shall be used whenever an authorized entrant enters a permit space, unless the retrieval equipment would increase the overall risk of entry or would not contribute to the rescue of the entrant. Retrieval systems shall meet the following requirements:

...

(ii) The other end of the retrieval line shall be attached to a mechanical device or fixed point outside the permit space in such a manner that rescue can begin as soon as the rescuer becomes aware that rescue is necessary. A mechanical device shall be available to retrieve personnel from vertical type permit spaces more than 5 feet (1.52 m) deep.

Jackson asked Suttles to demonstrate the use of the winch and lifelines in the wash bay. During the demonstration the winch in the middle wash bay failed to function properly. The lifeline could not be lowered to a level where employees who had to enter a tank would be able to secure their safety harnesses. Jackson testified that Chris Kiker told her that the winch had not been functioning properly for several months and that he had told lead man Wes Burton about the malfunction (Exh. C-72; Tr. 282, 330).

Burton denied that Kiker had ever told him about the winch's failure to function or that he was aware of any problem with the winch (Tr. 1332-1333). Suttles tested the winch on the same day after Jackson's inspection and found it to be functioning properly (Tr. 1205, 1264, 1297-1298).

The Secretary has failed to prove that Suttles had either actual or constructive knowledge of the winch's malfunction. While it is undisputed that the winch malfunctioned during the demonstration, it functioned properly when Suttles took it out for repair. The Secretary bases her

claim that Suttles had prior knowledge of the winch's malfunction on the statement made to Jackson by Kiker. Kiker did not testify at the hearing, and Burton denied that Kiker had ever spoken to him regarding the winch's functioning. Suttles presented evidence that Kiker may have held a grudge against the company (Tr. 1299-1301). Kiker's attitude toward the company could have colored his statements to Jackson. Burton's live testimony at the hearing is credited over Kiker's out-of-court statement reported second hand by Jackson. Item 4 is vacated.

Docket No. 97-545

Citation No. 1

Items 2b, 2c, 2d, and 2e:

Alleged Serious Violations of §1910.177(c)(2), (d)(4), (d)(5), and (g)

The Secretary alleges that Suttles committed serious violations of the §1910.177 standard ("Servicing multi-piece and single piece rim wheels"), which provides in pertinent part:

- Item 2b (c)(2) The employer shall assure that each employee demonstrates and maintains the ability to service rim wheels safely, including performances of the following tasks:
 - (i) Demounting of tires (including deflation);
 - (ii) Inspection and identification of the rim wheel components;
 - (iii) Mounting of tires (including inflation with a restraining device or other safeguard required by this section);
 - (iv) Use of the restraining device or barrier, and other equipment required by this section;
 - (v) Handling of rim wheels;
 - (vi) Inflation of the tire when a single piece rim wheel is mounted on a vehicle;
 - (vii) An understanding of the necessity of standing outside the trajectory both during inflation of the tire and during inspection of the rim wheel following inflation; and
 - (viii) Installation and removal of rim wheels.
- Item 2c . . .
 - (d)(4) The employer shall furnish and assure that an air line assembly consisting of the following components be used for inflating tires:
 - (i) A clip-on chuck;
 - (ii) An in-line valve with a pressure gauge or a presettable regulator;

(iii) A sufficient length of hose between the clip-on chuck and the in-line valve (if one is used) to allow the employee to stand outside the trajectory.

Item 2d (d)(5) Current charts or rim manuals containing instructions for the type of wheels being serviced shall be available in the service area.

Item 2e (g) The employer shall establish a safe operating procedure for servicing single piece rim wheels and shall assure that employees are instructed in and follow that procedure.

Compliance officer Johnny Burroughs inspected Suttles' s tank wash area and maintenance shop area on November 14, 1996. While in the maintenance shop area Burroughs observed a tire rack (changing rack). The tire rack is a metal cage used to change single piece rim wheels. Maintenance shop supervisor Joel Sticher told Burroughs he used the tire rack daily. Sticher admitted to Burroughs that the maintenance shop did not have, and he was not using, rim manuals or an in-line presettable pressure gauge with a preset regulator and a clip-on chuck to pressurize tires (Tr. 715-718). The Secretary alleges that because Suttles did not have the equipment required by §§1910.177(d)(4) and (5), it violated those sections as well as §§1910.177(c)(2) and (g), which require the employer to ensure its employees know how to service the single piece rim wheels safely.

Although the Secretary's evidence adduced for items 2b through 2e is slight (based on the out-of-court statement of one employee), Suttles did nothing to rebut it. The Secretary has established violations of the §1910.177 standard with regard to items 2b, 2c, 2d, and 2e.

The hazard to which the affected employees were exposed was that the tire could separate from the rim, causing a violent explosion of air from the tire, resulting possibly in decapitation (Tr. 720, 722). The violations were serious.

Penalty Determination

The gravity of the violations is high. A total penalty of \$5,000.00 is assessed.

Item 3: Alleged Serious Violation of §1910.307(b)

The Secretary charges that Suttles committed a serious violation of §1910.307(b), which provides:

Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe or for the hazardous (classified) location.

The citation alleges two instances of violation. Instance (a) cites duplex receptacles that were allegedly located inside Class I, Division 1 and 2, locations. Instance (b) cites a waste water pump using PVC conduit whose disconnect box was not vapor tight.

Instance (a)

The duplex receptacles were located on the wash rack, one located on a pole approximately two to three feet from the top of the dome lid of a tank, and one within two to three feet from the bottom drain of the tank (Tr. 705, 707, 708).

It has been established that Suttles cleans tanks used to haul flammable liquids, including primer, liquid plastic material, isopropyl amine, MIBK, petroleum distillates, acetone, toluene, toluene diisocyanate, acetonitrile, and heptane. Suttles uses Xylene, a flammable liquid, to presolve the tanks. The Xylene is pumped from a 55-gallon drum near the wash rack (TR. 1206-1207). Burroughs determined that the proximity of the duplex receptacles to the tanks and the drums of Xylene created a hazard of fire or explosion (Tr. 708-714).

A Class I, Division 1, location is one in which “hazardous concentrations of flammable vapors and gases may exist under normal operating conditions.” §1910.399(a). A Class I, Division 2, location is one:

(a) in which volatile flammable liquids or flammable gases are handled, processed, or used, but in which the hazardous liquids, vapors, or gases will normally be confined within closed containers or closed systems from which they can escape only in case of accidental rupture or breakdown of such containers or systems, or in case of abnormal operation of equipment; or . . . (c) that is adjacent to a Class I, Division 1 location, and to which hazardous 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 ventilation failure are provided.

Suttles contends that the Secretary failed to prove that the duplex receptacles were in an area that had an actual or potential explosive atmosphere. Burroughs never tested the atmosphere surrounding the duplex receptacles (Tr. 773-776). Burroughs did not know the concentration of any substance in the air surrounding the duplex receptacles (Tr. 775-776).

The pre-washed interiors of the tanks are Class I, Division 1, locations. It is not self-evident, however, that the area outside the tanks' interiors contain or potentially contain hazardous concentrations of flammable vapors and gases. The MSDSs alone are insufficient to establish the concentrations of the products hauled in the tanks. The Secretary has failed to establish that instance (a) constituted a violation of §1910.307(b).

Instance (b)

Burroughs observed a pump located at the sump pit outside of the lead man's office, used to pump wastewater into holding tanks. Burroughs believed that the wastewater contained flammable liquids (Tr. Tr. 711-713, 780). Suttles established at the hearing that the wastewater did not contain flammable liquids. Flammable liquids are not drained into the sump pit. Suttles had the results of the T clip testing to prove that the wastewater had no flammable content (Tr. 1067-1068, 1134, 1173-1174, 1176-1177, 1205).

The Secretary has failed to establish that the sump pit pump was in a hazardous location. Item 3 is vacated.

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 decision, it is hereby ORDERED that the items of the citations be disposed of as follows:

Docket No. 97-0546

Citation No. 1

Item No.	Disposition	Penalty
Item 1a	Affirmed	\$2,500.00
Item 1b	Vacated	\$0.00
Item 3	Vacated	\$0.00
Item 4	Affirmed	\$3,500.00
Item 5a	Affirmed	\$1,000.00

Item 5b	Vacated	\$0.00
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Citation No. 2

Item No.	Disposition	Penalty
Item 1a	Affirmed	Items 1a, 1b & 1c grouped together
Item 1b	Affirmed	
Item 1c	Affirmed	
Item 1d	Vacated	\$0.00
Item 2a	Affirmed	\$12,000.00
Item 2b	Vacated	\$0.00
Item 3	Affirmed	\$9,000.00
Item 4	Vacated	\$0.00

Docket No. 97-0545

Item No.	Disposition	Penalty
Item 2b	Affirmed	Item 2b, 2c, 2d & 2e grouped together
Item 2c	Affirmed	
Item 2d	Affirmed	
Item 2e	Affirmed	\$5,000.00
Item 3	Vacated	\$0.00

/s/
NANCY J. SPIES
Judge

Date: April 22, 1999