



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

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 17-2144

TAMPA ELECTRIC COMPANY,

Respondent.

**ON BRIEFS:**

Louise McGauley Betts, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Acting Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.

For the Complainant

Arthur G. Sapper, Esq.; Melissa A. Bailey, Esq.; Phillip B. Russell, Esq.; Dee Anna Hays, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC and Tampa, FL

For the Respondent

**DECISION**

Before: ATTWOOD, Chairman; SULLIVAN and LAIHOW, Commissioners.

**BY THE COMMISSION:**

In May 2017, there was a release of anhydrous ammonia on the grounds of a power plant operated by Tampa Electric Company (TECO). Subsequently, the Occupational Safety and Health Administration conducted an inspection of the worksite and issued TECO a two-item serious citation alleging violations of the Hazardous Waste Operations and Emergency Response ("HAZWOPER") standard, 29 C.F.R. § 1910.120. Only Item 2 of that citation is at issue on review—it alleges a violation of 29 C.F.R. § 1910.120(q)(3)(iv) and proposes a \$9,054 penalty, because TECO employees who responded to the ammonia release did not wear positive pressure self-contained breathing apparatus (SCBA). Following a hearing, Administrative Law Judge John

B. Gatto vacated the item.<sup>1</sup> For the reasons discussed below, we also vacate but on different grounds than the judge.<sup>2</sup>

### **BACKGROUND**

TECO operates a coal-fired power plant in Apollo Beach, Florida. During the power-generation process, the plant uses anhydrous ammonia, which is delivered by pipeline to a “skid”—an elevated above-ground platform containing pipes that process the ammonia—located outdoors on the plant’s grounds. The skid contains safety relief valves that, in the event a pipe becomes over-pressurized, divert ammonia into an underground sump filled with water, which neutralizes ammonia. Because the sump is able to absorb only a certain amount of ammonia, any excess ammonia is directed to the atmosphere through a release vent.

The skid is equipped with eight sensors in various locations that detect and display the concentration of ammonia in the air. The sensors sound an audible alarm and emit a flashing light if the concentration of ammonia reaches 50 parts per million (ppm).<sup>3</sup> The sensor readings are also displayed inside the plant’s control center, where another audible alarm and overhead light alerts control center personnel that a sensor has detected an ammonia concentration of at least 50 ppm. The skid contains five emergency “fogging” stations that can be activated by personnel at the skid or inside the control center to spray water into the air to neutralize released ammonia, as well as several “ten-minute escape respirators” in various locations.

On May 23, 2017, a pipe on the skid became over-pressurized, causing its safety relief valve to open and divert ammonia to the sump, which subsequently became oversaturated and began releasing ammonia into the air through its release vent. After about 30 minutes, the ammonia sensor closest to the sump’s release vent activated its audible alarm and flashing light. Inside the control center, the sensor’s display light illuminated but the audible alarm did not sound because a new “sound card” for the alarm had not yet been installed. About an hour after the

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<sup>1</sup> The judge also vacated Item 1, which alleged that TECO violated 29 C.F.R. § 1910.120(q)(2) (requiring that employers develop an emergency response plan meeting certain requirements). This item is not before us on review.

<sup>2</sup> Both parties filed motions on review requesting leave to file additional briefs—those motions are denied.

<sup>3</sup> OSHA’s permissible exposure limit (PEL) for ammonia is an eight-hour time weighted average of 50 ppm. 29 C.F.R. § 1910.1000, Table Z-1.

ammonia initially began releasing into the air, the concentration detected by the sensor reached 100 ppm, but no other sensor on the skid alarmed.

At some point after the alarm began sounding, a security guard employed by Critical Intervention Services (CIS), the company hired by TECO to protect the power plant, heard the alarm and went to the skid to investigate. Once at the skid, the guard smelled ammonia in the air and called another guard to say that he may have been exposed to ammonia. The second guard went to the skid to assist him and notified TECO's head of plant security that there was an ammonia release. TECO's head of plant security instructed the second guard to have two other guards who were stationed at the plant's main entrance gate shelter in place. One of the guards at the gate was starting to feel sick from ammonia inhalation at this time. The plant's main entrance gate is about 500 feet north of the skid, and the wind had been blowing in that direction from the sump area where the ammonia was released. Three of the four guards experienced adverse health effects due to inhaling ammonia during the release; two were hospitalized as a result.

After the control center was notified there was an ammonia release, a TECO employee known as a "rover" was dispatched to investigate the situation. The rover drove to the skid where he was soon joined by two additional rovers. The rovers approached the skid from its south side because they observed that a windsock, which they could see once they were within about 100 yards of the skid, indicated the wind was blowing north. Upon arriving at the skid, the rovers ascended a set of stairs on the west side of the skid where they saw that a safety relief valve was white with frost, indicating that ammonia had flowed through it. The rovers then called the control center and instructed personnel there to remotely close an air-operated valve to cut off the flow of ammonia to the section of pipe that was over-pressurized. One rover began pumping water from a hose into the sump to allow it to absorb more ammonia. Two of the rovers remained in the skid area for approximately 40 minutes to ensure the situation was fully controlled. None of the rovers experienced any ill effects from working at the skid.

### **DISCUSSION**

In order to prove a violation, the Secretary must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) at least one employee had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). The cited provision here states:

Employees engaged in emergency response and exposed to hazardous substances presenting an inhalation hazard or potential inhalation hazard shall wear positive pressure self-contained breathing apparatus [SCBA] while engaged in emergency response, until such time that the individual in charge of the ICS [Incident Command System] determines through the use of air monitoring that a decreased level of respiratory protection will not result in hazardous exposure to employees.

29 C.F.R. § 1910.120(q)(3)(iv). The judge vacated the alleged violation on the ground that the Secretary did not prove the rovers were exposed to an amount of ammonia above the PEL. On review, the Secretary does not claim that he proved the rovers were exposed to an amount of ammonia above the PEL; rather, he argues that such proof is not required.

We need not determine whether proof of exposure above the PEL is required because we find, in either case, that the Secretary has failed to establish the cited standard's applicability. The SCBA requirement in the cited HAZWOPER standard applies only when employees are engaged in an "emergency response," which is defined as:

[A] response effort by employees from outside the immediate release area or by other designated responders (i.e., mutual aid groups, local fire departments, etc.) to an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance. Responses to incidental releases of hazardous substances where the substance can be absorbed, neutralized, or otherwise controlled at the time of release by employees in the immediate release area, or by maintenance personnel are not considered to be emergency responses within the scope of this standard. Responses to releases of hazardous substances where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure) are not considered to be emergency responses.

29 C.F.R. § 1910.120(a)(3).

This definition distinguishes between incidental releases that can be controlled by employees in the immediate release area and those that cannot, and between releases that pose a potential safety or health hazard and those that do not. Here, TECO's response to the ammonia release was not an "emergency response" because the release (1) was incidental and controlled by rovers located in the immediate release area, and (2) posed no potential safety or health hazard to the rovers during the response.

#### **1. Incidental Controlled Release**

The judge concluded that the ammonia release at the skid was "uncontrolled" because TECO conceded that some of the ammonia discharged through the safety relief valve was not absorbed by the water in the sump and was released into the atmosphere. Thus, according to the judge, the release was "uncontrolled" because it was not completely "absorbed, neutralized, or

otherwise controlled at the time of release.” 29 C.F.R. § 1910.120(a)(3). On review, the Secretary defends the judge’s finding on this issue and contends that the amount of time that passed while the ammonia was being released, together with the ppm concentration detected by one of the skid’s sensors, proves the release was “uncontrolled.”

We disagree. On the day of the release, TECO’s system operated exactly as designed—the safety relief valve diverted ammonia into the sump and only after it became oversaturated was ammonia released into the air through the release vent. The fact that some amount of ammonia was released into the air does not by itself establish that the release was “uncontrolled.” If that were the case, virtually every release of a hazardous substance would be “uncontrolled,” rendering the inclusion of that language in the definition of “emergency response” meaningless. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (“[O]ne of the most basic interpretive canons, [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .”); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (A “cardinal principle” of interpretation is that courts “must give effect, if possible, to every clause and word . . . .”). Indeed, as commonly defined, “controlled” means “restrained [or] managed.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 497 (1986).<sup>4</sup> *See Bunge Corp.*, 12 BNA OSHC 1785, 1785 (No. 77-1622, 1986) (Commission must apply the “natural and plain meaning” of the language in a standard). Thus, regardless of the amount, a release is only “uncontrolled” if it is not “restrained” or “managed.”

Here, the evidence shows the release of ammonia was first restrained and managed by the skid’s numerous safety mechanisms. At the time of the release, only one of the skid’s sensors was alarming, indicating that the level of ammonia being released into the air was limited.<sup>5</sup> Then, upon their arrival at the skid, TECO’s rovers confirmed the release was incidental and took prompt

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<sup>4</sup> The contrasting references to “uncontrolled release[s]” and “releases that can be absorbed, neutralized, or otherwise controlled” were added to the emergency response definition in 1987. Corrections to Interim Final Rule on Hazardous Waste Operations and Emergency Response, 52 Fed. Reg. 16,241, 16,242 (May 4, 1987) (to be codified at 29 C.F.R. Part 1910). *See, e.g.*, No. 14-0948, *Fl. Gas Contractors, Inc.*, 2019 WL 995716, at \*3 (O.S.H.R.C., Feb. 21, 2019) (quoting dictionary published contemporaneously with the adoption of the language in a standard to show the common meaning of that language).

<sup>5</sup> Although two other sensors on the skid failed a functionality test about a month later, this does not prove, as the dissent speculatively suggests, that those sensors were not functional on the day of the release. Even if they were not, TECO’s personnel would not have known that at the time.

action.<sup>6</sup> They looked for an ammonia cloud and saw none. They also monitored for the smell of ammonia, which has a distinct and strong odor, and detected almost none. With knowledge that only one sensor out of eight was alarming, seeing no ammonia cloud in sight, and with only one rover detecting a faint smell of ammonia, the rovers reasonably determined that it was safe to approach the skid and checked the windsock to ensure they did so from the safest side. All of these steps are consistent with the training TECO provides its rovers, which allows them to quickly evaluate and end a release without putting themselves in danger.<sup>7</sup>

After ascending the skid, the rovers immediately identified the safety relief valve that had released ammonia into the sump and called the control center to instruct personnel there to remotely cut off the flow of ammonia to that section of pipe. This action—executed within minutes of the only alarming sensor’s 100 ppm reading—successfully stopped the release of ammonia into the sump and as a result, into the air. Within one hour, the amount of ammonia detected by the

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<sup>6</sup> There is no question that the rovers’ undisputed efforts to control the ammonia release at the skid took place “in the immediate area” such that those efforts are relevant to determining whether the release was, in fact, “uncontrolled.” 29 C.F.R. § 1910.120(a)(3) (“uncontrolled release” must be responded to by “employees from outside the immediate release area” or “by other designated responders (i.e., mutual aid groups, local fire departments, etc.)” to be an emergency response) (“incidental release . . . controlled at the time of release by employees in the immediate area” not an emergency response). The judge did not address this issue, but on review the Secretary argues that the rovers who responded to the ammonia release were not within the “immediate release area” because they were not working right next to the sump’s vent at the time it began releasing ammonia. But nothing in the definition demands such a narrow reading of this phrase. The evidence here shows that the rovers were dispatched at the time of the release from a location only about one-quarter mile away from the skid, and the air-operated valve was closed on their instructions within 12 minutes of the sensor’s 100 ppm reading. Given that the wind blew the ammonia at least 500 feet away, the release zone clearly was not limited to right next to the sump. In addition, the employees testified that the job of “rover” can be assigned on any given day and such an assignment means that your “duties” cover the “whole plant,” one of which is to investigate ammonia releases if called to do so. In other words, unlike police officers or firefighters who must rush to the site of an incident wherever it is taking place, the rovers were already standing by on the scene to resolve any incidents that might arise at the skid. Additionally, the fact that the rovers made use of motorized vehicles to travel to the skid, while definitely an aspect to be considered, does not automatically mean that they were not in the “immediate” area. In any event, even if the Secretary were correct in viewing the rovers’ location as “outside” the immediate release area, he has not proven that the release was otherwise “uncontrolled” for the reasons discussed above.

<sup>7</sup> Our dissenting colleague claims we confuse whether the *release* was controlled with whether the rovers’ *response* was controlled. We do no such thing. Determining whether a release is controlled obviously depends on a variety of factors—and we find these factors include measures an employer has in place, such as the rovers’ training here, to control it.

sensor dropped below 50 ppm. Notably, there is no evidence in the record that the rovers experienced any ill effects from the ammonia. There was also no explosion, no need to trigger the skid's fogging equipment, no need to evacuate the area, and no need to bring in assistance from outside the facility to control the release. Given these circumstances, we cannot conclude the release was at any point "uncontrolled."

The Secretary points to *Wiley Organics*, 17 BNA OSHC 1586 (No. 91-3275, 1996), *aff'd*, 124 F.3d 201 (6th Cir. 1997), in which the Commission affirmed a violation of the provision cited here, and argues that the Commission's reasoning in that case suggests a different result. But the facts in *Wiley* could not be more different from those present in this case. In *Wiley*, a reactor vessel explosion at a chemical manufacturing facility required outside responders (firefighters) to contain the resulting fire. *Id.* at 1587, 1595. In contrast, as noted, there was no explosion or fire here, and no need for such outside responders as demonstrated by the fact that the rovers were able to quickly control and contain the release. Indeed, the cited provision gives employers discretion to reasonably determine whether a release can be controlled by local employees or requires an "emergency response" from outside responders donning SCBA.

We thus reject the Secretary's argument that the cited provision applies here simply because some amount of ammonia escaped to the air and TECO did not know the precise amount released. Accepting this argument would effectively eliminate the flexibility granted to employers under the HAZWOPER standard and would convert every response into an "emergency response." If OSHA intended SCBA to be mandatory for every response to a release of a hazardous substance, it should have said as much in the standard.<sup>8</sup>

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<sup>8</sup> Our analysis accords with testimony from OSHA's own compliance officer, who acknowledged that a decision to evacuate is an "employer call." Likewise, an OSHA directive that provides inspection procedures for paragraph (q) of the HAZWOPER standard indicates that the standard contemplates three types of situations: clear emergencies, clear incidental releases, and releases that may be one or the other "depending on the circumstances." See OSHA Instruction, "Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases", CPL 02-02-073, A-1-A-4 (Aug. 27, 2007). Although the directive does identify anhydrous ammonia as an example of a chemical that would "generally" necessitate an emergency response if released, "generally" does not mean "always," meaning that there are circumstances that exist (like those here) where its release would not trigger an emergency response. *Id.* at A-3. Our dissenting colleague appears to believe we are not aware of the hazards associated with an ammonia release. We are. But that does not change that the standard is designed to allow employees trained to deal with this type of hazard—the rovers and

For all these reasons, we conclude the Secretary has failed to establish that the release was “uncontrolled” or that TECO’s determination of the same was unreasonable under the circumstances.

## **2. No Potential Safety or Health Hazard**

The “emergency response” definition also excludes responses to a release where “there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure).” 29 C.F.R. § 1910.120(a)(3). As we have concluded above, the release of ammonia here was an incidental, controlled release. That alone stands as a strong indication there was no potential hazard to the rovers at the time of the response.<sup>9</sup> But the evidence also shows that a hazardous amount of ammonia was not present at the skid at the time the rovers were there. Indeed, only one out of the eight sensors in proximity to the skid was sounding an alarm. Moreover, the rovers testified that they did not observe an ammonia cloud and only one of them detected a faint smell of ammonia.

TECO’s director of engineering and project management testified that there are numerous systems in place at the skid to mitigate the potential release of a hazardous level of ammonia into the air, including the fogging system that could have been activated either onsite or remotely from the control center to saturate the air with water and neutralize the ammonia. He also testified that TECO trains its personnel to consider the number of sensors that have alarmed, as well as the ammonia levels detected—had more alarms sounded, TECO would have activated the foggers remotely even without any employees being present. In addition, the rovers could have donned

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control center operator in this case—to quickly assess a situation and make reasoned judgments about how to proceed. Here, the judgment was that resort to full protective equipment, which could have added as much as twenty minutes to the response, was unnecessary.

<sup>9</sup> Our dissenting colleague adopts wholesale the Secretary’s argument on review that evidence relating to the injuries sustained by the CIS guards shows there was “enough ammonia in the air in the release zone, as far as 500 feet from the source . . . to make a human being seriously ill,” including the rovers. Although we too are troubled by the guards’ injuries, they are simply not relevant to the inquiry here, which is whether *the rovers* were exposed to a potential safety or health hazard. And, to the extent these injuries are somehow relevant, we find they more persuasively demonstrate the lack of a potential hazard for the rovers given that they visited the location where those injuries occurred—just “minutes before” in our dissenting colleague’s view—yet suffered no ill effects. Put simply, the rovers receive specialized response training and therefore the conditions that might pose a potential hazard for them are not the same as those that might pose a potential hazard for individuals without such training. Nothing in our dissenting colleague’s opinion addresses that fact.

the skid's "escape-pack" respirators in the event they became concerned that a potentially hazardous amount of ammonia had been released.<sup>10</sup>

Without acknowledging the various methods TECO has in place to eliminate any potential hazard resulting from a release, the Secretary asserts that a potential hazard nonetheless existed because it was theoretically *possible* for the rovers to have been exposed to a harmful amount of ammonia at the skid. As an initial matter, we agree with the Secretary that a "potential hazard" encompasses not only those hazards that are actually present but also those that "hav[e] the capacity or a strong possibility for development into actuality."<sup>11</sup> But for the reasons stated above, we find that, in fact, there was not a "strong possibility" that the ammonia release at issue here would develop into a safety or health hazard. To the extent the Secretary is arguing that a "potential hazard" exists no matter how remote or theoretical the possibility of harm, we reject any such claim. To adopt that reading of the standard would render *every* response an "emergency response" given that there is always some possibility of harm when workers respond to any release of a hazardous substance. The undisputed facts here show that TECO had methods in place to determine whether a potential hazard existed before the rovers approached the skid to address a situation that they were trained to handle. Because TECO reasonably determined no potential hazard existed, the rovers were not engaged in an "emergency response."<sup>12</sup>

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<sup>10</sup> Our dissenting colleague makes much of the fact that the control center operator called 911 at the time he dispatched a rover to the skid. Though not expressly stated, her implication seems to be that his action shows recognition on the part of the company that this was an emergency release that put the responding rovers in danger. But as the operator explained, he placed the 911 call in response to a guard's request for assistance at the main entrance gate where guards were experiencing health problems. In this regard, as we previously noted, this call has little bearing on the inquiry before us—whether the rovers were engaged in an emergency response that exposed them to a potential safety or health hazard at the skid.

<sup>11</sup> The Secretary quoted WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) for this definition.

<sup>12</sup> Our dissenting colleague maintains that we are required to defer to the Secretary's contrary position. This is not so. A recent Supreme Court decision emphasized that deference should only be considered if a regulation is "genuinely ambiguous" *and* the Secretary's interpretation is "reasonable." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). Neither of those prerequisites exist here. The Secretary's position in this case is essentially that the HAZWOPER standard requires power plant operators to mandate that employees take the time to don SCBA (something that can take twenty minutes to do) *every time* a single sensor detects 50 ppm of ammonia (an amount that is *far* below OSHA's own PEL, which is 50 ppm *on average over the course of 8 hours*), even

## CONCLUSION

For all these reasons, we find that the cited provision does not apply because the rovers were not engaged in an “emergency response.” 29 C.F.R. § 1910.120(q)(3)(iv). Accordingly, we vacate Item 2.

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James J. Sullivan, Jr.

Commissioner

/s/

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Amanda Wood Laihow

Commissioner

Dated: March 19, 2021

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when those employees are trained and fully capable, as they were here, of easily determining the cause of the release and resolving it within minutes without being harmed. Not only that, but the Secretary interprets the standard to mean that no power plant operator could ever make a reasonable judgment to the contrary (and such judgment, as discussed above, is clearly contemplated by the standard). This interpretation is simply unreasonable, and we therefore cannot defer to it.

ATTWOOD, Chairman, dissenting:

Because my colleagues ignore the relevant and largely undisputed facts of this case, and because they fail to meaningfully explain why deference to the Secretary's reasonable interpretation of the Hazardous Waste Operations and Emergency Response ("HAZWOPER") standard, 29 C.F.R. § 1910.120, is unwarranted, I dissent. And, as the facts are critical to an appropriate application of the standard's provisions, it is important to recite them here.

### **I. Relevant Facts**

At 11:18 a.m. on the day in question, a pipe carrying ammonia on the plant's skid over-pressurized, causing a pressure relief valve to open so that the excess ammonia could be diverted to a sump containing water.<sup>1</sup> Ammonia continued to be diverted to the sump for about 30 minutes, until the water had absorbed the maximum amount of ammonia, at which point the ammonia that could not be absorbed began releasing into the air through the sump's release vent. Shortly after, a sensor located very close to that vent began to detect the ammonia. By 12:05 p.m. the sensor registered an ammonia concentration of 50 ppm ("parts per million"), and the sensor's alarm began to sound at the skid.<sup>2</sup> The amount of ammonia being registered at the sensor also should have

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<sup>1</sup> Because ammonia has an affinity to water, it can be absorbed and neutralized by it. Thus, the water-filled sump was designed to absorb and neutralize the excess ammonia.

<sup>2</sup> The record shows that ammonia is immediately dangerous to life or health when its concentration reaches 300 ppm. The ammonia sensors at the skid where the release occurred cannot record levels that high; the maximum concentration of ammonia they are calibrated to detect is 100 ppm. The ammonia sensor that alarmed reached its 100 ppm maximum reading (with the actual levels thus possibly even higher) six separate times—at 12:28, 12:36, 12:40, 12:44, 12:48, and 12:52 p.m.—over a period of about 25 minutes. In emphasizing that only this one sensor alarmed, my colleagues bizarrely downplay the important fact that shortly after the incident TECO determined that two sensors *downwind* of the source of the ammonia release were *not functional*. TECO tests these sensors about every six months. When the ammonia release incident occurred, the two downwind sensors had not been tested in more than five months, and their next scheduled test date was less than a month away. Both failed that test, with one yielding "FAIL," "NEED TO REPLACE SENSOR," and the other, "WONT SEE GAS," "NEED TO REPLACE SENSOR." On the day of the release, these two sensors did not record any ammonia other than a couple of tiny "blips," despite being downwind from the sump's release vent and despite the undisputed fact (discussed in detail below) that a sufficient amount of ammonia was blown more than 500 feet downwind from the skid to cause individuals there to become extremely sick. Although the test results from a month later do not conclusively prove the two downwind sensors were not functioning on the day of the incident, they raise an obvious inference that they were not (we know they stopped working *at some point* during the six-month period following their last test), especially given the facts that I just described. While we also do not know (because, for example,

triggered an alarm in the plant's control center, but new computer equipment in the control center did not yet have an audio card installed, so no alarm sounded there.

A passing security guard ("BA") employed by TECO's security contractor heard the alarm and stopped to investigate its source. As he was climbing up the stairs to the raised skid, he smelled ammonia, retreated because he started having trouble breathing, and contacted another guard ("CT") to report the ammonia smell. CT then traveled to the skid, conferred with BA, and contacted TECO's head of security to report a possible ammonia release. TECO's head of security instructed CT to direct the security guards at the plant's main entrance gate to shelter in place and also to contact TECO's superintendent of plant operations to let him know about the release so he could send rovers to investigate.

Because the audible alarm failed to sound in the control center, TECO's control center operator—who organized and directed the response efforts—only learned of the release after he was directly contacted, apparently by one of the guards (he did not recall who). The operator testified that he then made two calls in quick succession but could not recall the order in which he made them. One was to dispatch a rover to the skid to investigate. The operator testified that at the time he dispatched the rover, he did not have "any idea" how much ammonia was in the air at the skid, that he knew there could have been "a lot," and said that it was the rover's job to find out "what was going on." Despite not having any idea how much ammonia was present, he did not instruct the rover to don SCBA before going to the skid. The other call the operator made *was to 911* to obtain emergency assistance because at least one of the guards had already fallen ill.

Three rovers—CG, GC, and RH—traveled to the skid to investigate the release. Because they were stationed about one-quarter mile away from the skid in a different area of the power plant's large campus and were not in the immediate area where the ammonia was being released, all three rovers drove to the skid in motor vehicles. RH agreed that none of them knew "anything about the amount of ammonia" that they would encounter at the skid, and that as far as they knew, it could have been a "false alarm, a small leak, [or] a big release." He said they did not put on SCBA before going to the skid because TECO had not trained them to do so but added that their training had changed since the incident and now rovers "don't go in the area [of a release] if we

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there were no sensors at the main entrance gate) what the ammonia concentration levels were in locations other than at the sensor that alarmed, these facts suggest that in some locations those concentration levels could have been even higher than the 100 ppm recorded at the sensor.

don't have the proper PPE on." GC, who was tasked with pumping additional water into the sump in order to improve the ability of the sump to absorb and neutralize the ammonia during the response, testified that while doing so, he did not have "any idea" how much ammonia was present. The rovers determined the cause of the release, and, at 12:40 p.m., instructed a control center operator to shut off the source of the ammonia so that the system could return to normal pressure. Notably, the concentration detected by the alarming sensor did not finally stay below 50 ppm for another hour, at 1:38 p.m. All told, an unknown quantity of ammonia was wafting freely in the air for more than three hours after the initial release, with concentrations at the alarming sensor mostly remaining over 50 ppm between 12:05 and 1:38 p.m., and frequently reaching levels at least as high as 100 ppm.<sup>3</sup>

Although TECO's head of security directed the security guards at the main entrance gate to shelter in place after he learned of the ammonia release, that instruction came too late. Guard MP was already dry heaving and struggling to breathe and stand; he was even unable to answer his phone to get the shelter-in-place instruction. In his words, the effects of his exposure to the released ammonia came on strongly and suddenly:

I hit the floor. . . . I couldn't breathe. Everything was just burning. . . . I guess the wind was blowing towards [the main entrance gate]. And it just like smacked me in the face. And I was just like "whoa." It took me like a second and I was, like, "whoa" and I hit the ground. . . . I was trying to gasp my breath and I went right into the bathroom dry heaving. It was very hard to breathe. . . . I was just coughing up a storm and my face was red and very hard to breathe. . . . [My] chest and throat and my eyes burned . . . .

A second guard—CT—arrived at the main entrance gate and physically helped MP into his truck, then drove him to another location that was easier for an ambulance to reach, leaving the main entrance to the power plant unguarded. With the main entrance unstaffed, vehicles attempting to leave and enter the plant began lining up on both sides of the gate (it was around lunch hour). Guard CT then returned to the gate and began ordering people to leave, but he also began feeling sick from ammonia inhalation. Because he was unable to fully close the gate to ensure the plant's security, he parked his truck in front of the opening "as a makeshift gate at that point." He then "prepped the truck for as safe a haven as [he] could" by turning off the air conditioning and closing the windows and laid in the driver's seat fully reclined while struggling to breathe.

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<sup>3</sup> By 2:28 p.m., the sensor readings had dropped below 20 ppm.

At that point, rover CG—one of the three rovers tasked with responding to the release—arrived at the main entrance gate and testified that he found guard CT “having a hard time” and “kind of rocking back and forth.” CG was wearing some type of respiratory protection at that time—not SCBA, but described as a “mask that covered his face and had filters on it”—signaling that he personally considered the conditions hazardous. After guard BA arrived at the main entrance gate moments later to assist, CG immediately left the area because, he testified, he did not have “any idea” how much ammonia was present and was nervous about his health.<sup>4</sup> BA, who himself had trouble breathing when he first heard the alarm at the skid where the release occurred, came to the main entrance gate “as the decision was made that [they] were going to leave [CT’s] truck there blocking the gate and [BA] was going to evacuate [CT] from the area.” At the time BA arrived at the main entrance gate, the skid’s ammonia sensor had been alarming for about an hour.<sup>5</sup>

MP and CT—the two guards who were experiencing the most severe inhalation effects—were taken by ambulance to a hospital, where they were put through a “decontamination shower” and “spent the next 6 to 8 hours doing breathing treatments.” At the hearing, which was held a year after his exposure, CT testified that he had inhaled so much ammonia during the incident that he continued to have lasting problems. He explained:

I have trouble breathing. I have trouble sleeping. My voice cracks after prolonged conversations. I’ll have bronchitis-like coughs out of nowhere. And I’ve been treated for that pretty much since the accident.

CT testified that his lung function had “deteriorated down into the 30 percentile,” and that he was under “strict orders” to refrain from cardiovascular exercise, which would cause asthma-like attacks. He also said that a week after his exposure, he had to drive himself back to the hospital because he was having an asthma-like attack and could not catch his breath.

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<sup>4</sup> Both rover CG and guard MP testified that they had smelled ammonia fumes while at the main entrance gate.

<sup>5</sup> Time-stamped security video footage establishes that guard BA arrived at the main entrance gate at 1:06 p.m. The ammonia began releasing through the sump’s vent at the skid at 11:36 a.m., and the sensor alarm first activated at 12:05 p.m.

## II. The Majority Opinion

My colleagues find that the cited provision does not apply because the rovers were not engaged in an “emergency response,” as that term is defined in the HAZWOPER standard.<sup>6</sup> More specifically, they find that the response was not an “emergency response” because: (1) the release was “incidental” and could be “absorbed, neutralized, or otherwise controlled” by employees in the “immediate release area” at the time of the release; and (2) the release did not present a “potential safety or health hazard.”<sup>7</sup> 29 C.F.R. § 1910.120(a)(3).

To reach these conclusions, my colleagues cherry-pick the record evidence in a flawed attempt to bolster their analysis. First, they make factual findings that are directly contrary to, or wholly ignore, large swaths of undisputed record evidence. And second, they proffer twisted interpretations of key terms and phrases in the standard’s “emergency response” definition—such as “uncontrolled release,” “incidental,” “immediate release area,” and “potential safety or health hazard”—that are contrary to the Secretary’s own reasonable interpretations of these terms. In doing so, they fail to coherently explain why their interpretations are unambiguously plain and the

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<sup>6</sup> The Commission directed the parties to brief the judge’s ruling on employee exposure but did not direct the parties to brief the issue of the standard’s applicability. Although the Commission has discretion to review the entire judge’s decision once it directs review, it ordinarily does not reach issues that it did not instruct the parties to brief. *GEM Indus.*, 17 BNA OSHC 1861, 1862 (No. 93-1122, 1996), *aff’d per curiam*, 149 F.3d 1183 (6th Cir. 1996); *Trumid Constr.*, 14 BNA OSHC 1784 (No. 86-1139, 1990); 29 C.F.R. § 2200.92(a). Both parties ultimately briefed the applicability issue after it was introduced by TECO in its response brief, however, so I do not object to the majority’s decision to reach it.

<sup>7</sup> The Secretary argues that these two components of the “emergency response” definition are exemptions and therefore, it is TECO’s burden to prove they applied. *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) (“A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.”); *see also Stephenson Enters., Inc.*, 4 BNA OSHC 1702, 1705 (No. 5873, 1976) (“We have consistently held . . . that it is the burden of the party who is claiming an exemption to prove its applicability.”), *aff’d*, 578 F.2d 1021 (5th Cir. 1978); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) (noting the “familiar principle” and “longstanding convention” that when a “proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it.”) (internal citation omitted). TECO argues otherwise, but the Secretary may be correct—the definition first describes what an emergency response is, and then proceeds to carve-out two situations that would not constitute such a response. However, I find it unnecessary to address this argument as, irrespective of the allocation of the burden of proof, the record establishes that this was an “emergency response” and not a response from within the “immediate release area” to an “incidental release,” or a response to a release posing no potential hazard, as defined by the HAZWOPER standard. 29 C.F.R. § 1910.120(a)(3).

Secretary's interpretations are unreasonable or otherwise not owed deference. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2413 (2019) (noting that “[a]gencies (unlike courts) have ‘unique expertise,’ often of a scientific or technical nature, relevant to applying a regulation to ‘complex or changing circumstances.’”) (quoting *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 149 (1991)); *see also Kiewit Power Constructors Co. v. Sec’y of Labor*, 959 F.3d 381, 394-95 (D.C. Cir. 2020) (explaining that “the Secretary, not the Commission, is the policymaker,” and thus when the two adopt “conflicting interpretations of the OSH Act and its implementing regulations,” it is “the Secretary rather than the Commission who is entitled to deference”) (internal citations omitted). For the reasons discussed below, I would find that the release was certainly not “incidental” or “otherwise controlled,” and the rovers were engaged in an “emergency response” effort as defined by the HAZWOPER standard. Moreover, there can be no serious dispute that the release posed a potential inhalation hazard to the responding rovers. Because there is no dispute that the rovers did not wear SCBA during their response, I would also find TECO failed to comply with the terms of the cited provision’s requirement that the responding rovers don SCBA. 29 C.F.R. § 1910.120(q)(3)(iv).<sup>8</sup>

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<sup>8</sup> Lest we forget, this paragraph provides:

Employees engaged in emergency response and exposed to hazardous substances presenting an inhalation hazard or potential inhalation hazard shall wear [SCBA] while engaged in emergency response, until such time that the individual in charge of the [Incident Command System] determines through the use of air monitoring that a decreased level of respiratory protection will not result in hazardous exposures to employees.

29 C.F.R. § 1910.120(q)(3)(iv). As defined in the HAZWOPER standard, “emergency response”

means a response effort by employees from outside the immediate release area or by other designated responders (i.e., mutual aid groups, local fire departments, etc.) to an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance. Responses to incidental releases of hazardous substances where the substance can be absorbed, neutralized, or otherwise controlled at the time of release by employees in the immediate release area, or by maintenance personnel are not considered to be emergency responses within the scope of this standard. Responses to releases of hazardous substances where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure) are not considered to be emergency responses.

29 C.F.R. § 1910.120(a)(3).

**A. Responses to “Incidental” Releases of Substances that can be “Controlled” by Employees in the “Immediate Release Area”**

As relevant here, the key elements that define an emergency response are: (1) the “response effort [is made] by employees from outside the immediate release area or by other designated responders (i.e., mutual aid groups, local fire departments, etc.)”; and (2) the occurrence is one “which results, or is likely to result, in an uncontrolled release of a hazardous substance.” 29 C.F.R. § 1910.120(a)(3). As noted, however, the definition contains two carve-outs. First, “[r]esponses to incidental releases of hazardous substances where the substance can be absorbed, neutralized, or otherwise controlled at the time of release by employees in the immediate release area, or by maintenance personnel” are not considered to be emergency responses. *Id.* Second, “[r]esponses to releases of hazardous substances where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure) are not considered to be emergency responses.” *Id.* My colleagues find the ammonia release was “incidental” and “controlled” because TECO’s skid “system operated exactly as designed” and “restrained” the release by first diverting ammonia into the sump instead of releasing it directly into the air, and because TECO’s rovers were trained to respond to such releases safely.

This conclusion borders on the absurd. As the largely undisputed facts set forth above make clear, the events surrounding the release can only be described as chaotic. Indeed, because the skid’s sensor was not audibly sounding in the control center, the ammonia release only became known to the control center operator sometime after a contract plant security guard reported it to TECO’s head of security. And, at the time the operator dispatched the rovers, one of the guards at the skid (BA) was already having trouble breathing. In fact, so much ammonia was released into the air during the incident that two guards (MP and CT) located at the main entrance gate more than 500 feet away from the skid became severely sick and needed to be rushed to the hospital by ambulance. Guard CT inhaled so much ammonia that he continued to have significant breathing problems a year later. This was exactly the opposite of a “controlled” release; the ammonia venting from the sump was at the mercy of the wind, which carried it to the main entrance gate where it harmed the guards who happened to be in its path. Luckily for the rovers, the wind did not change direction and continued pushing the ammonia away from the skid area where they were primarily engaged during the release. Unluckily for the guards, the wind carried the ammonia to the main entrance gate where two of them were sickened.

Regarding training, my colleagues argue that the steps taken by the rovers meant that the release was “restrained and managed” and therefore was not “uncontrolled.” My colleagues thus assert that the fact that only one sensor alarmed means a limited level of ammonia was being released.<sup>9</sup> They also point out that the rovers *upon their arrival* at the skid “confirmed the release was incidental” and took prompt action—they looked for an ammonia cloud and saw none, and “monitored for the smell of ammonia, which has a distinct and strong odor, and detected almost none.” (emphasis added). Finally, my colleagues approvingly note that the “rovers could have donned the skid’s ‘escape-pack’ respirators in the event they became concerned that a potentially hazardous amount of ammonia had been released.”<sup>10</sup> In relying on these facts, my colleagues confuse whether the *release* was controlled with whether the rovers’ *response* was controlled. But it is irrelevant that the rovers may have responded in a methodical, controlled manner—for purposes of determining whether there was an “emergency response,” all that matters is whether the release itself was, or was likely to be, uncontrolled. Given the events described above, this release was far from controlled.

In concluding the release was “incidental,” moreover, my colleagues make the baseless finding that the rovers were in the “immediate release area” when they responded and therefore, they could not have been engaged in an “emergency response” as defined by the HAZWOPER standard. This finding rests on a shocking misinterpretation of the standard’s definition of “emergency response.” An “emergency response” effort is defined as one carried out by employees “*from outside the immediate release area* or by other designated responders (i.e., mutual aid groups, local fire departments, etc.) . . . .” 29 C.F.R. § 1910.120(a)(3) (emphasis added). My colleagues ignore the clear import of this phrase—that emergency responders, whether employees or “other designated responders,” must come from *outside the immediate release area*. Instead, they conclude that although the rovers traveled (while carrying their tools) more than a quarter-mile by motor vehicle to the skid where the release was occurring, their undisputed efforts

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<sup>9</sup> Because none of the three rovers even looked at the alarming sensor, however, they had no idea about the concentration of the releasing ammonia.

<sup>10</sup> These “escape pack” respirators are not SCBA. They consist of a hood attached to a cannister containing enough compressed air to last 10 minutes.

to control the ammonia release *after arriving at the skid* took place “in the immediate area” of the release, and therefore the release could not be classified as “uncontrolled.”<sup>11</sup>

This conclusion is based on an interpretation of the term “immediate” that bears no relationship to its commonly understood meaning. As defined, “immediate” means “being near at hand” or “not far apart or distant.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1129 (1986). The rovers were not responding from a location in the “*immediate* release area” but instead, as the definition provides, “from outside the immediate release area,” in other words, from a location that was hardly “near at hand.” The reason for this distinction is obvious: employees coming from outside the immediate release area may have little or no idea what to expect and therefore need the maximum protection that SCBA provides until a determination is made that lesser protection, or even no protection, will be sufficient, whereas employees located in an immediate release area at the time of an “incidental” release (i.e., one that “can be absorbed, neutralized, or otherwise controlled *at the time of release*”) in all likelihood know exactly what they are dealing with and can protect themselves accordingly if need be. In any event, even if the meaning of the term “immediate” is somehow ambiguous here, the Secretary’s interpretation—which itself accords with the term’s plain meaning—is indisputably reasonable and at a minimum, the majority should closely consider whether it is entitled to deference.<sup>12</sup> *See Kisor*, 139 S.Ct. at 2416.

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<sup>11</sup> In reaching this conclusion, my colleagues maintain that the rovers were “already *standing by on the scene* to resolve any incidents that might arise at the skid,” and that it is irrelevant that they traveled by motor vehicle. (emphasis added). But there is no evidence whatsoever in the record that the rovers were “at the scene” (i.e., at the skid) and were “standing by.” Indeed, at the time of dispatch, they were at their office in a plant building, one-quarter mile away.

<sup>12</sup> Putting aside that this release was manifestly not “incidental,” my colleagues also fail to confront the obvious temporal component involved in determining whether SCBA is required by the standard. Although it is not crystal clear at what point that determination must be made, the cited provision makes the timing fairly obvious: “[E]mployees engaged in emergency response and exposed to hazardous substances presenting an inhalation hazard or a potential inhalation hazard *shall wear* [SCBA] *while engaged in emergency response until such time* that the individual in charge of the [response] determines through the use of air monitoring that a decreased level of respiratory protection will not result in hazardous exposures to employees.” 29 C.F.R. §1910.120(q)(3)(iv) (emphasis added). Thus, such a determination must be made *before* employees embark on a response to a release, not after they have already responded, because they “shall wear” SCBA *until such time* as the person in charge of the response determines—through the use of “air monitoring”—that it is no longer necessary to protect the responders. *Id.* Here,

Finally, for a release to be “incidental,” the definition of emergency response requires that the hazardous substance be “absorbed, neutralized, or otherwise controlled *at the time of the release . . .*” 29 C.F.R. § 1910.120(a)(3) (emphasis added). Here, the release of ammonia into the atmosphere began at 11:36 a.m. and the concentration of ammonia at the skid sensor did not finally stay below 50 ppm until 1:38 p.m. Put simply, the ammonia was not absorbed, neutralized, or otherwise controlled “at the time of the release.”

For all these reasons, I would find the ammonia release was not “incidental,” was not able to be “absorbed, neutralized, or otherwise controlled at the time of release,” and was not responded to by TECO employees from the “immediate release area.”

### **B. Responses Where there is No “Potential Safety or Health Hazard”**

I am also mystified by my colleagues’ finding that this was not an “emergency response” because there was no “potential safety or health hazard.” 29 C.F.R. § 1910.120(a)(3). In reaching this conclusion, they note that although *two guards* suffered significant injuries, they were not the TECO employees tasked with *responding* to the release and were not trained to do so. In other words, the majority appears to concede a safety or health hazard existed, just not with respect to the rovers. In support, my colleagues point to the training TECO provided its rovers and the fact that they may have been able to retreat or, if necessary, to activate the fogging system or put on one of the “escape-pack respirators” available at the skid.

Contrary to my colleagues’ conclusion, I find the preponderance of the evidence establishes that the rovers were exposed to “a potential safety or health hazard”—that there was a meaningful possibility or significant risk of inhaling a dangerous amount of ammonia (not merely a theoretical possibility)—during the response. *See Quick Transport of Ark., LLC*, No. 14-0844, 2019 WL 1466256, at \*3 (O.S.H.R.C., Mar. 27, 2019) (hazard exists when there is a significant risk or “meaningful possibility” of harm). First, as noted above, at the time the rovers were dispatched, the control center operator and the rovers themselves acknowledged that they did not have “any

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contrary to my colleagues’ assertions, there is absolutely no evidence in the record that *anyone ever* considered whether the rovers were required to don SCBA before they responded to the release. And, unless one views breathing the air as some form of “air monitoring” (as my colleagues seem to do), no one ever monitored the air at the skid to determine whether SCBA was or was not needed. Finally, although there is testimony from a rover that it might have taken 20 minutes to don SCBA, the use of that equipment is required by the HAZWOPER standard to prevent needless exposure to a hazardous chemical, which is the standard’s unmistakable purpose.

idea” how much ammonia would be in the air at the skid and that there could have been a very large amount. Second, rover CG went to the very same location near the sump where guard BA had experienced difficulty breathing just minutes before, and the guard was still at the skid when CG arrived. And, as discussed above, CG also went to the main entrance gate (where apparently a greater concentration of ammonia was present since it was being blown that way), and once he smelled ammonia, he immediately left out of concern for his health. Third, when CG arrived at the main entrance gate, he had put on some kind of respirator, which shows that, as one of the “trained” responders, he believed the released ammonia posed a potential safety or health hazard.

My colleagues elect to ignore the undisputed facts surrounding the guards’ injuries, finding that they are irrelevant because the guards were not the responding employees.<sup>13</sup> But as the Secretary correctly argues on review: “[A]mmonia-related health effects experienced by individuals in the release zone, whether or not they were engaged in [the] emergency response, demonstrate[] the existence of potential hazards in the release zone and [are] therefore clearly relevant . . . .” To reach their contrary conclusion, my colleagues offer a dictionary definition for “potential”—“hav[e] the capacity *or* a strong possibility for development into actuality” (emphasis added)—and then completely ignore it by concluding there was not a “strong possibility” that the release could develop into a safety or health hazard. And in doing so, they substitute their own interpretation of “potential” for the Secretary’s reasonable interpretation without explanation or analysis, something that is not permitted under the Supreme Court’s decision in *Kisor*. 139 S.Ct. at 2415-18. For all the reasons discussed above, the facts of this case make clear that there was far more than a “strong possibility” that the ammonia release could develop into a safety or health hazard given that it caused serious harm to the guards, and the rovers visited the exact locations where the guards’ inhalation injuries occurred. For all these reasons, I find a potential safety and health hazard was proven here.

In sum, I would find that the Secretary established the rovers were engaged in “a response effort from outside the immediate release area” to an “occurrence which results, or is likely to

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<sup>13</sup> Remarkably, my colleagues find that the guards’ injuries—a direct result of ammonia inhalation during the release—somehow indicate there was *no* hazard, potential or otherwise, for the rovers. Yet they also find that the “immediate release area” encompasses the exact location where the guards were injured. If, as my colleagues assert, the ammonia “release zone” encompasses the spot 500 feet away where the guards were injured, why aren’t their injuries relevant to determining whether there was a potential hazard for the rovers?

result, in an uncontrolled release of a hazardous substance,” and that poses a “potential safety or health hazard.” I would therefore conclude that the rovers were engaged in an “emergency response.” 29 C.F.R. § 1910.120(a)(3).

Because I find, for these same reasons, that the emergency response more specifically involved a “potential inhalation hazard,” I would conclude that the SCBA requirement applied (at least assuming “notice” was also established—see discussion below). 29 C.F.R. § 1910.120(q)(3)(iv) (requiring SCBA when the “emergency response” involves a substance presenting an “inhalation hazard or potential inhalation hazard.”). As previously noted, because there is no dispute that the rovers did not wear SCBA during their response, I would also find that the terms of the standard were violated.

### **III. Employee Exposure**

The judge found that the rovers were engaged in an emergency response and that the standard applied, but vacated on the ground that the Secretary failed to establish that they had access to a violative condition. To establish this element of his *prima facie* case, the Secretary must either show “actual exposure or that access to the hazard was reasonably predictable.” *Nuprecon Lp*, 23 BNA OSHC 1817, 1818 (No. 08-1037, 2012) (quoting *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff’d*, 79 F.3d 1146 (5th Cir. 1996) (unpublished)). Here, the cited standard protects employees who are engaged in an emergency response by requiring that they wear SCBA when they are “exposed to hazardous substances presenting an inhalation hazard or potential inhalation hazard . . . .” 29 C.F.R. § 1910.120(q)(3)(iv). The exposure question in this case thus overlaps with the applicability question discussed above, given that § 1910.120(q)(3)(iv) requires finding that employees were exposed to a potential inhalation hazard in order for the SCBA requirement to apply in the first place.

In cases where the applicability of a PPE requirement turns on the presence of a hazard, Commission precedent indicates that once applicability has been fully established—i.e., that circumstances necessitating the PPE were present—the exposure question need not be separately addressed except to simply confirm that the employees were not in fact wearing the required PPE<sup>14</sup>

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<sup>14</sup> I reserve judgment on whether the Secretary could alternatively meet this requirement by showing that it was reasonably predictable the employees would not wear the PPE (such as, for instance, if a supervisor expressly ordered them not to).

(an inquiry that also overlaps with the question whether the terms of the standard were violated<sup>15</sup>). See *Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1596-97 (No. 91-3275, 1996), *aff'd*, 124 F.3d 201 (6th Cir. 1997) (affirming § 1910.120(q)(3)(iv) violation based on evidence that workers failed to wear SCBA while engaged in an emergency response that required the use of such equipment, without separately addressing the exposure element); *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1258-61 (No. 98-0701, 2003) (affirming violation of PPE standard requiring workers to use respiratory protection based on evidence the requirement applied and workers failed to use such protection, without separately analyzing exposure). Here, there is no dispute that the rovers did not wear SCBA during their response, and therefore I would find that the employee exposure element was established.<sup>16</sup>

#### **IV. Remaining Elements of Secretary's Prima Facie Case**

The majority states that the cited provision gives employers “discretion” and “flexibility” to reasonably determine whether to initiate an emergency response, and without that flexibility they would have to treat every response as an emergency response. This is simply not correct. To achieve its purpose of preventing exposure to potential inhalation hazards, the provision requires an employer to make a *prospective* determination as to whether a given release is an incidental one that can be controlled by employees in the immediate area (or is one that cannot be) and whether

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<sup>15</sup> The elements of the Secretary's prima facie case are not inherently separate, atomistic categories; the analyses involved in each sometimes overlap.

<sup>16</sup> The judge concluded that employee exposure to a potential inhalation hazard was not established because the Secretary failed to prove that employees were exposed to an amount of ammonia above the permissible exposure limit (PEL). But a lack of such *actual* exposure, whether above the PEL or otherwise, does not establish that the employees were never in danger or that there was never a significant risk that they would suffer adverse health effects due to ammonia inhalation. It is well-established that the Secretary is not required to prove employees actually encountered harmful physical conditions to establish that a condition or practice posed a hazard. See *Wiley Organics*, 17 BNA OSHC at 1596-97 (expressly holding that the Secretary is not required to prove that emergency responders actually encountered a harmful substance to prove a violation of § 1910.120(q)(3)(iv)); *Quick Transport*, 2019 WL 1466256, at \*3 (evidence that there was a significant risk of flammable material being present where torch was used was sufficient to establish that using the torch was hazardous; evidence that such material was actually present at the time was not required) (and cases cited therein); *Bomac Drilling*, 9 BNA OSHC 1681, 1691-92 (No. 76-450, 1981) (drilling well in location where there was a significant risk of encountering a dangerous gas was hazardous; fact that such gas was not actually encountered did not show there was no hazard), *overruled on other grounds by United States Steel Corp.*, 10 BNA OSHC 1752 (No. 77-1796, 1982).

the release poses a potential inhalation hazard. If the latter, the standard *requires* the employer to mandate that responding employees wear SCBA. This is no different than other PPE standards that require employers to determine whether a hazard necessitating the relevant PPE is present. *E.g.*, 29 C.F.R. §§ 1910.133(a)(1) (requiring eye or face protection when employees are exposed to eye or face hazards); 1910.136(a) (requiring foot protection when “there is a danger of foot injuries”); 1910.138(a) (requiring hand protection when employees are exposed to hand hazards).

That is not to say that the reasonableness of an employer’s actions based on the information it has available at the time of a response is of no consequence. To prove the applicability of a PPE standard that by its terms only applies when a hazard is present, in addition to showing that the relevant hazard was indeed present, the Secretary also must prove that “the employer had actual notice of a need for PPE” or that “the protective equipment sought by the Secretary is what the employer’s industry would deem appropriate under the circumstances.” *Mid-South Waffles, Inc.*, No. 23-1022, 2019 WL 990226, at \*7 (O.S.H.R.C., Feb. 15, 2019) (quoting *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794-95 (No. 90-998, 1992), citing *Fl. Mach. & Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120 (11th Cir. 1982)); *see also Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015) (Secretary must prove actual notice of need for PPE or that “reasonable person familiar with the circumstances surrounding the hazardous condition would recognize that such a hazard exists”), *aff’d in relevant part*, 819 F.3d 200 (5th Cir. 2016).

The judge did not reach this question, however, and the parties have not briefed it on review (nor were they asked to). The judge also did not reach the knowledge element of the Secretary’s prima facie case, which requires proof that TECO knew or should have known of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff’d in relevant part*, 681 F.2d 69 (1st Cir. 1982). Under these circumstances, the Commission’s usual practice would be to remand the case to the judge to address the unresolved issues in the first instance, and I would follow that practice here.<sup>17</sup> *See, e.g., A.E.Y. Enters.*, 21 BNA OSHC 1658,

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<sup>17</sup> Although I do not decide the issue here, I note that significant evidence weighs against the majority’s finding that TECO’s response was reasonable based on the information available to it. That evidence includes: (1) consistent testimony from the control center operator and rovers that none of them had “any idea” how much ammonia would be present at the skid; (2) the control center operator calling 911 for medical assistance at the same time he dispatched the rovers; and

1659 (No. 06-0224, 2006) (remanding to judge to resolve remaining factual issues because “the judge ordinarily resolves the factual issues first,” which “allows the Commission to exercise its review function and is particularly beneficial in cases involving close questions of fact.”).

**V. Conclusion**

For all of these reasons, I would find that TECO was engaged in an emergency response requiring the use of SCBA, and that its employees were exposed to the violative condition (i.e., they did not wear SCBA) during that response, and so I would remand to the judge to address the remaining elements of the Secretary’s case. I therefore dissent.

Dated: March 19, 2021

/s/  
\_\_\_\_\_  
Cynthia L. Attwood  
Chairman

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(3) overall record evidence suggesting that TECO personnel never made a considered evaluation of the circumstances and never reached a conscious judgment that SCBA was unnecessary, as required by the standard. In claiming that the Secretary’s interpretation of the standard is unreasonable, the majority offers a paper tiger version of both the Secretary’s position and the facts—i.e., that the rovers were required to don SCBA before responding to the release merely because a single sensor detected 50 ppm of ammonia—a regrettable caricature that omits these critical other facts surrounding the circumstances.

Some personal identifiers have been redacted for privacy purposes.

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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Washington, DC 20036-3457

SECRETARY OF LABOR,  
Complainant,

v.

TAMPA ELECTRIC COMPANY,  
Respondent.

OSHRC Docket No. 17-2144

**DECISION AND ORDER**

**COUNSEL:**

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Phillip B. Russell, Melissa A. Bailey, Aaron Morris Wilensky, Dee Anna D. Hays, Attorneys, Ogletree, Deakins, Nash, Smoak & Stewart, PC, Tampa, FL, for Respondent.

**JUDGE:** John B. Gatto, United States Administrative Law Judge.

**I. INTRODUCTION**

This case arose from an anhydrous ammonia release that occurred on May 23, 2017, at the Big Bend Power Plant (“Big Bend”) in Tampa, Florida (“the worksite”), operated by Tampa Electric Company (“TECO”). The Department of Labor’s Occupational Safety and Health Administration (“OSHA”) conducted an investigation and subsequently issued a two-item citation to TECO for alleged violations of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651–678, with proposed penalties of \$18,108.00.<sup>1</sup> After TECO timely contested the

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<sup>1</sup> The Secretary of Labor has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and has delegated exclusively to the Solicitor of Labor the responsibility for bringing legal proceedings under the Act and the determination of whether such proceedings are appropriate in a given case. *See* Order No. 1–2012 (77 FR 3912). The terms “Secretary” and “OSHA” are used interchangeably herein. The Assistant Secretary has authorized OSHA’s Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

citation, the Secretary of Labor (“Secretary”) filed a formal complaint<sup>2</sup> with the Commission charging TECO with violating the Act and seeking an order affirming the citation and proposed penalties. A bench trial was held in Tampa, Florida.

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), that TECO is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), or that TECO’s principal place of business is in Tampa, Florida (Compl. ¶¶ I-III; Answer ¶¶ I-III; *see also* Jt. Prehearing State. ¶¶ V(A) and V(E)). After hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.<sup>3</sup> For the reasons indicated *infra*, the Court **VACATES** both Items 1 and 2 of the citation.

## II. BACKGROUND<sup>4</sup>

TECO operates a coal-fired power plant located in Apollo Beach, Florida. TECO uses anhydrous ammonia in its Selective Catalytic Reduction (“SCR”) system to lower the amount of NOx emitted from its boilers. Instead of storing large quantities of anhydrous ammonia onsite, they receive it on an as-needed basis via a pipeline from the Tampa Bay Pipeline Company. The ammonia skid is the portion of the site where the pipeline comes above ground and the anhydrous ammonia is reduced in pressure and then heated to form a vapor to be used in the SCR. The skid consists of two identical ‘trains’ (A train and B train). Typically, only one train is in use at a time. All of the pressure relief devices associated with the ammonia skid have their discharge sides hard-piped into a water-filled sump. The ammonia system is continuously monitored and remotely controlled by the distributed control system (“DCS”). Its displays/interfaces are seen by the operators in the control room. The entire skid rests on expanded metal decking and is several feet above ground. There are atmospheric ammonia detectors installed in several locations on the skid. There are emergency breathers located at the top of each of the three sets of stairs leading up to the skid. There is also a windsock at the northwest corner of the skid. The water-filled sump is located below ground level and beside the southwest stairs. There is a remotely-operated

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<sup>2</sup> The citation at issue was attached to the complaint as an exhibit. Commission Rule 30(d) provides that “[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” 29 C.F.R. § 2200.30(d).

<sup>3</sup> If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

<sup>4</sup> The facts are based on the expert report of Jennifer T. Morningstar and the parties’ stipulations. (*See* Ex. R-34; Jt. Prehearing State. ¶¶ IV(A) - IV(X)).

emergency shutoff valve located just after the piping emerges from underground to the north of the raised skid. There is another emergency stop station across the street from the south side of the skid.

The anhydrous ammonia supplied by the pipeline is in liquid form and at a pressure too high for the TECO SCR system to use. The purpose of the ammonia skid is to first reduce the pressure of the liquid ammonia and then heat up the liquid to form an ammonia vapor suitable for the SCR system. Each train on the skid has two pressure relief valves (“PRV”). The purpose of a PRV is to provide a controlled outflow of process material during a high-pressure surge event. Instead of rupturing the pipe resulting in an uncontrolled release, the seat of the PRV will lift until the system pressure falls below its setpoint and then it will reseal. In this case, the outlet of each vent is hard-piped to a water-filled sump. Since ammonia is soluble in water, this system design will capture ammonia coming from the PRVs.

On the morning of May 23, 2017, the ammonia pipeline supply pressure was fluctuating. The B train was in service but was having problems maintaining appropriate supply pressure for the SCR's. The A train was also brought on-line at approximately 5 a.m., to help control the system pressure. According to TECO process data, at approximately 11:18 a.m. the supply pressure jumped from 250 psig to 375 psig and then settled out at about 350 psig. During this spike, a pressure relief valve in B train lifted and ammonia was discharged through the piping into the sump.

At approximately 12:06 p.m. the overhead alarm came in on the common alarm screen in the control room from point OAAHG 108A, indicating the atmospheric ammonia detector on the southwest corner of the skid, beside the sump vent had detected ammonia. The common DCS system had just been upgraded and the audible alarm was not yet in service, therefore, the control room operators did not immediately recognize the alarm had triggered. When this alarm tripped at the skid, a local, audible horn sounds, as well. [redacted], a Critical Intervention Services (“CIS”) employee assigned to Gate 50, heard the alarm at approximately 12:30 p.m.

Instead of returning to Gate 50 to notify TECO, [redacted] drove his vehicle to the south side of the ammonia skid and parked it. [redacted] incorrectly assumed the audible alarm was for a door to the small building on the skid. [redacted] left his vehicle to investigate and walked up the southwest stairs right beside the sump vent. [redacted] inhaled the ammonia vapors present in the sump vent gases and immediately returned to his truck. [redacted] then notified his supervisor.

[redacted], his supervisor and another CIS employee made several trips to and from the skid, Gate 50 and Gate 32. A CIS employee called the local fire department.

TECO's control room was notified of the alarm. The control room operator, William Bruegger, determined the pressure control valve on B train had lifted and vented ammonia into the sump. (*Id.*) He radioed to Curtis Garland, plant operator (a rover) to go to the skid, assess the situation, and stop the leak. (*Id.*) Ronnie Howard, George Cantrell, and Garland helped close a relief valve located at Train B at the ammonia skid even though none of them had any ammonia detection equipment on them and were not wearing positive pressure respirators.

### III. ANALYSIS

Section 1910.120(q) of the Hazardous Waste Operations and Emergency Response ("HAZWOPER") standard "covers employers whose employees are engaged in emergency response no matter where it occurs" and requires employers to develop and implement an emergency response plan "to handle anticipated emergencies prior to the commencement of emergency response operations." 29 C.F.R. § 1910.120(q)(1). TECO admits the HAZWOPER standard applies to its facility since its rovers are designated to engage in emergency responses (Resp't's Br. at 34). TECO was cited with two separate violations of § 1910.120(q). Item 1 alleges a serious violation of § 1910.120(q)(2), which establishes the minimum required elements of an emergency response plan, which TECO calls an "Integrated Contingency Plan" ("ICP").<sup>5</sup> Item 2 alleges a serious violation of § 1910.120 (q)(3)(iv), which requires the use of positive pressure self-contained breathing apparatus while engaged in an emergency response involving an inhalation hazard.

In the Eleventh Circuit, the jurisdiction in which this case arose,<sup>6</sup> "[t]o make a prima facie showing that an employer violated an OSHA standard, the Secretary must show: "(1) that the

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<sup>5</sup> Facilities that must comply with both EPA's Risk Management Plan rule and OSHA's emergency response requirements under the HAZWOPER standard may prepare an ICP according to guidance published by the National Response Team in order to comply with both regulations. (*See* Ex. R-5.) The National Response Team's ICP Guidance was published in the Federal Register on June 5, 1996. (*See* 61 FR 28641.) TECO has a 326-page document titled, "Tampa Electric Company Big Bend Station Integrated Contingency Plan (ICP)" (*see* Ex. R-4). "The ICP consolidates, into a single functional plan, several plans that Big Bend needs to comply with Federal and State of Florida contingency planning requirements regarding chemical spills," and "preparation of the ICP was accomplished using the National Response Team's (NRT's) [ICP] Guidance." (Ex. R-4, § 1.1.)

<sup>6</sup> Under the Act, both parties may seek review in the court of appeals in the circuit in which the violation occurred and the circuit in which the employer's principal office is located, and in addition, the employer may seek review in the District of Columbia Circuit. 29 U.S.C. §§ 660(a), (b). The citation was issued in Tampa, Florida, where TECO's principal place of business is also located, both in the Eleventh Circuit. "[I]n general, '[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of

regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer ‘knowingly disregarded’ the Act’s requirements.” *Eller-Ito Stevedoring Co., LLC v. Sec’y of Labor*, 567 F. App’x 801, 803 (11<sup>th</sup> Cir. 2014) (citation omitted). “If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct.” *Id.*, 567 F. App’x at 803 (citation omitted). However, “[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented.” *Central of Ga. R.R. Co. v. Occupational Safety and Health Review Comm’n*, 576 F.2d 620, 623 (5th Cir.1978).<sup>7</sup> The Court addresses *infra*, each citation item separately.

### A. Item 1

Section 1910.120(q)(2) requires the employer to develop an emergency response plan for emergencies that address, as a minimum, the following elements to the extent that they are not addressed elsewhere:

- (i) Pre-emergency planning and coordination with outside parties.
- (ii) Personnel roles, lines of authority, training, and communication.
- (iii) Emergency recognition and prevention.
- (iv) Safe distances and places of refuge.
- (v) Site security and control.
- (vi) Evacuation routes and procedures.
- (vii) Decontamination.
- (viii) Emergency medical treatment and first aid.
- (ix) Emergency alerting and response procedures.
- (x) Critique of response and follow-up.
- (xi) PPE and emergency equipment.
- (xii) Emergency response organizations may use the local emergency response plan or the state emergency response plan or both, as part of their emergency response plan to avoid duplication. Those items of the emergency response plan that are being properly addressed by the SARA Title III plans may be substituted into their emergency plan or otherwise kept together for the employer and employee's use.

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that circuit in deciding the case—even though it may differ from the Commission's precedent.” *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09-1184, 2015), *aff’d*, 847 F.3d 495 (7th Cir. 2017) (citation omitted). Therefore, the Court applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

<sup>7</sup> The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit. Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

29 C.F.R. § 1910.120(q)(2). As amended, the Secretary alleges in Item 1 TECO's ICP did not have all of the following minimum requirements:

- iv. Safety distances and places of refuge;
- vi. Evacuation routes and procedures;
- vii. Decontamination;
- xi. PPE and emergency equipment.

### **Whether Cited Standard Applied**

TECO admits the requirements of § 1910.120(q)(2) applied to its operations and its ICP was required to meet § 1910.120(q)(2). (*See* Jt. Prehearing State. ¶ V(D).) Therefore, § 1910.120(q)(2) applied to the cited conditions.

### **Whether Requirements of Standard Met**

To determine the meaning of a standard, the Commission and the courts consider the language of the standard, the legislative history, and, if the drafter's intent remains unclear, the reasonableness of the agency's interpretation. *Arcadian Corporation*, 17 BNA OSHC 1345, 1346 (No. 93-3270, 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152-55 (1991).

Citing to OSHA Instruction CPL-02-02-073 ("Directive"),<sup>8</sup> the Secretary asserts "TECO did not comply with four of the twelve subparts listed by § 1910.120(q)(2)." (Compl't's Br. at 9) (*citing* Ex. R-5). Assuming, *arguendo*, this Directive is OSHA's construction of its own regulations,<sup>9</sup> the Secretary must first show the meaning of the standard is ambiguous, that is, the meaning of the standard "is not free from doubt." (*Id.*) He has made no such showing and his brief makes no mention of any ambiguity in the cited portions of the HAZWOPER standard. Further,

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<sup>8</sup> CPL-02-02-073, *Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases* (Aug. 27, 2007). (*See* Ex. R-5).

<sup>9</sup> Not all agency publications are of binding force. *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The cited Directive is not one of OSHA's Standard Interpretation letters, and it is OSHA's Standard Interpretation letters that constitute OSHA's interpretation of the requirements discussed in the associated standards. *See* <https://www.osha.gov/laws-regs/standardinterpretations/standardnumber/1910/1910.120%20-%20Index/result>.

even if the standard is ambiguous, the Secretary's interpretation must “sensibly conform[] to the purpose and wording of the regulations,” *Martin*, 499 U.S. at 150–51, which, as indicated *infra*, it does not.

There is no question that § 1910.120(q)(2) is a “performance” standard. It identifies an objective—the development of an emergency response plan for emergencies that addresses the minimum requirements related to the four cited elements—but does not specify the means for accomplishing it. *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016). “Such broad standards may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry.” *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196 (No. 00-1052, 2005). “Because performance standards ... do not identify specific obligations, they are interpreted in light of what is reasonable.” *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007); *see also McGraw Constr. Co.*, 15 BNA OSHC 2144, 2148 (No. 89-2220, 1993) (applying reasonable person test); *Siemens*, 20 BNA OSHC at n. 8 (employer's exercise of discretion is judged by reasonable person or “reasonably prudent employer” standard).

In promulgating this performance standard, the Secretary clearly recognized that a “one size fits all” approach would not work. He cannot come back now and say he put in the Directive what he affirmatively chose not to put in this performance standard, which by its nature provides TECO “with a certain degree of discretion in determining what ... is appropriate to ensure that its program meets the standard's stated objective.” *Cent. Fla. Equip.*, 25 BNA OSHC at 2150 (quoting *Siemens*, 20 BNA OSHC at 2198). To the extent the Secretary now seeks to identify specific obligations vis- à-vis the Directive, he is attempting to improperly convert this performance standard to a specification standard. Therefore, the Court concludes since the Directive imposes specific obligations, it is an unreasonable interpretation of § 1910.120(q)(2) since it does not “sensibly conform” to the purpose of that provision, which is to be a performance standard.

Under Commission precedent, the Secretary can prove a violation of a broadly-worded standard by showing that a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazardous condition requiring the use of protective measures. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992). The Commission has held that evidence as to current industry practice is relevant but is not dispositive. *Brooks Well Servicing, Inc.*, 20 BNA OSHC 1286, 1291 (No. 99-0849, 2003) (*citing Baker Tank*

Co., 17 BNA OSHC 1177, 1179 (No. 90-1786-S, 1995)). However, binding Fifth Circuit precedent differs from that of the Commission's reasonable person test. While Commission precedent holds that industry custom and practice are useful points of reference but are not controlling, the Fifth Circuit has stated that, when a reasonable person test is used to determine what is required under a general standard, there should be a close identification between the projected behavior of the reasonable person and the customary practice of employers in the industry. *B & B Insulation v. Occupational Safety and Health Review Comm'n*, 583 F.2d 1364, 1370 (5th Cir. 1978).<sup>10</sup> See also *S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273 (5th Cir. Unit B 1981) (in the absence of a clear articulation by Commission of circumstances when industry practice is not controlling, due process requires showing that employer failed to provide what is customarily required in its industry).

With respect to §§ 1910.120(q)(2)(iv), 1910.120(q)(2)(vi), and 1910.120(q)(2)(xi), the Secretary proffered no evidence that employers in TECO's industry would customarily include in their emergency response plans the specific obligations imposed by OSHA in the Directive. Likewise, the Secretary proffered no evidence TECO's emergency response plan was not "reasonable" under the circumstances. Instead, the only evidence the Secretary offered was that TECO did not implement the specific obligations imposed in OSHA's Directive.<sup>11</sup> Thus, the Court concludes the Secretary has failed to establish TECO violated §§ 1910.120(q)(2)(iv), 1910.120(q)(2)(vi), and 1910.120(q)(2)(xi).

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<sup>10</sup> In *B&B*, the Fifth Circuit noted that although the "reasonable person" standard is borrowed from tort law and industry custom is not dispositive on the issue of the standard of care in negligence actions, rigid application of the tort law concept would be inconsistent with the preventive goals of OSHA and Congress's expressed preference for specific rather than general standards. 583 F.2d at 1370, 71.

<sup>11</sup> For example, pursuant to the Directive, to satisfy § 1910.120(q)(2)(iv), the Secretary asserts TECO's ICP must "include a map with identified places of refuge." If shelter-in-place is an available emergency response, the ICP "should discuss the method of alerting employees that a shelter-in-place is underway and explain how the shelter-in-place alarm can be distinguished from an alarm to evacuate." TECO's ICP "should also identify the person responsible for initiating a shelter-in-place, state what situations will require employees to shelter-in-place and explain what actions employees should take to ensure shelter-in-place locations are safe (e.g. turn off the HVAC air exchange)." (Compl't's Br. at 9-10) (*citing* Ex. R-5, p.22-23). Under § 1910.120(q)(2)(vi), the Secretary asserts TECO was required to comply with 29 CFR § 1910.38, which "sets forth several minimum requirements" that TECO's ICP "must cover, including: emergency procedures that explain emergency evacuation (i.e. evacuation and exit route assignments), and an explanation of how the employer will account for employees after the evacuation." According to the Secretary, TECO's ICP "does not contain these elements." (*Id.*) (*citing* Tr. 325-326; Ex. R-3, R-4). Under § 1910.120(q)(2)(xi), the Secretary asserts "[a]ccording to the OSHA Directive, an [ICP] that complies with subpart xi will list a company's inventory of personal protective equipment (PPE) and emergency response equipment that responders will need in an emergency." (Compl't's Br. at 12) (*citing* Ex. R-5, pp.27-28).

As to § 1910.120(q)(2)(vii), “decontamination” is defined in the HAZWOPER standard as “the removal of hazardous substances from employees and their equipment to the extent necessary to preclude the occurrence of foreseeable adverse health [e]ffects.” 29 C.F.R. § 1910.120(a)(4). Appendix C, the Compliance Guidelines to § 1910.120, indicates:

Decontamination procedures should be tailored to the specific hazards of the site, and may vary in complexity and number of steps, depending on the level of hazard and the employee's exposure to the hazard. Decontamination procedures and PPE decontamination methods will vary depending upon the specific substance, since one procedure or method may not work for all substances. Evaluation of decontamination methods and procedures should be performed, as necessary, to assure that employees are not exposed to hazards by re-using PPE.

29 C.F.R. § 1910.120, App. C.

The Secretary argues TECO’s emergency response plan “has no provisions for decontaminating emergency responders” and “discusses decontamination of equipment in only the broadest of terms—that equipment should be refitted for its intended use and contaminated consumables will be ‘disposed of as hazardous wastes.’ There is no explanation of how equipment should be cleaned or what equipment should be decontaminated rather than disposed of.” (Compl’t’s Br. at 11) (*citing* Tr. 327:10-15, 22-328:6; *see also* Ex. R-5, p. 24-25). TECO’s asserts its emergency response plan addresses decontamination of people and equipment, since it provides 8-hour HAZWOPER Refresher Training, its ICP contains first aid measures, and it has a safety data sheet for anhydrous ammonia, all of which TECO asserts, cover decontamination. (Resp’t’s Br. at 38) (*citing* Tr. 546; Ex. R-11 at TECO\_000025; Ex. R-4 at SEC000791; Ex. R-9 at TECO 000561).

TECO’s ICP provides:

In the affected area(s) of the facility, the cleanup response team must ensure that no material and/or waste that may be incompatible with the released material are brought onsite until cleanup procedures are completed. Confirmatory testing may be required to determine the area is safe for direct human contact. The fire protection system, secondary containment, and emergency equipment must be cleaned or otherwise fit for its intended use before operations are resumed to normal. The determination that the facility can be safely reoccupied will be made by the Incident Commander. All equipment will be decontaminated after its use.

(Ex. R-4 § 2.2.) Further it provides,

The environmental coordinator will ensure that all TEC-owned equipment listed in the contingency plan is cleaned and fit for its intended use before being placed back

into inventory. Consumables will be restocked. Contaminated consumables will be handled and disposed as solid or hazardous wastes, depending on the nature and extent of contamination. The contractor is responsible for ensuring that the equipment used in recovery and cleanup is decontaminated before being moved to unaffected locations.

(Ex. R-4 Annex 3 § A.3-4.6.) TECO’s Checklist CP-18 Chemical Specific Response: Anhydrous Ammonia in its ICP also has a first aid provision indicating:

Substance	PPE	Response
Anhydrous Ammonia	Refer to MSDS sheet(s) for appropriate respiratory protection and personal protective equipment (PPE) requirements or contact #E for technical assistance	<p style="text-align: center;"><b>FIRST AID</b></p> <p><b>Eye Contact:</b> Flush eyes with water for at least 15 minutes and seek medical attention.</p> <p><b>Skin Contact:</b> Flush with large quantities of water and seek medical aid.</p> <p><b>Inhalation:</b> Remove from exposure. If breathing has stopped or is difficult, administer artificial respiration and oxygen as needed . Seek medical attention.</p> <p><b>Ingestion: DO NOT INDUCE VOMITING.</b> Drink large amounts of water and seek medical attention.</p>

(Ex. R-4 p. 65) Without any supporting authority, the Secretary argues, “first aid procedures are not the same as decontamination procedures. An emergency responder who wears appropriate personal protective equipment may never need first aid but could still need decontamination. Conversely, a responder receiving first aid could unintentionally harm those trying to assist him if he is not properly decontaminated.” (Compl’t’s Br. at 11 n. 8.)

TECO’s also maintains a Safety Data Sheet on ammonia (referenced in the ICP), which states:

**Section 4. First-aid measures**

**Eye contact:** Immediately flush eyes with excess, low-pressure potable water for at least 15 minutes; lift eyelids in process. Remove contacts ASAP. Seek immediate medical aid. Symptoms: Redness, severe burning & watering of the eyes. Liquid ammonia may cause frost bite. Effects: Possible permanent damage or even blindness.

**Inhalation:** Remove from exposure. If breathing is difficult or has stopped, provide oxygen or artificial respiration as appropriate. Seek immediate medical aid. **Symptoms:** Severe burning of nose & other parts of respiratory system. **Effects:** Possible permanent damage to respiratory system (including lungs) or even death.

**Skin contact:** Immediately flush body with excess, low-pressure potable water for at least 15 minutes while removing all contaminated clothing and shoes. Seek immediate medical aid. **Symptoms:** Burning sensation or even blistering. Liquid exposure may cause frostbite. Wash clothing & shoes before reuse. **Effects:** Potential severe blistering.

**Ingestion:** Do not induce vomiting. Have victim drink large amount of potable water if conscious. Seek immediate medical aid. **Symptoms/Effects:** May burn mouth, throat & stomach.

**Summary:** Potable water is preferred in all cases; but, any water is likely to be much better than no water.

(Ex. R-9 at TECO 000561). TECO's HAZWOPER Refresher Training also contains two slides providing a definition for decontamination and indicating it shall have a decontamination plan. (See Ex. R-11 at TECO\_000025.)

The Court concludes the Secretary has not established TECO's decontamination procedures were not reasonable under the circumstances, especially since the Secretary acknowledged in the Compliance Guidelines that decontamination procedures and PPE decontamination methods will vary depending upon the specific substance. Further, to the extent TECO's ICP incorporates by reference information from other documents, such as its safety data sheet for anhydrous ammonia, the Secretary has failed to establish the incorporation was not reasonable under the circumstances. Again, the Secretary proffered no evidence that employers in TECO's industry would customarily include in their emergency response plans anything more than what TECO has included in its plan. Therefore, the Secretary has not established TECO's emergency response plan was not "reasonable" under the circumstances and thus, has failed to establish TECO violated § 1910.120(q)(2)(vii). Accordingly, Item 1 must be vacated.

### **B. Item 2**

Item 2 alleges a violation of § 1910.120(q)(3)(iv) related to procedures for handling emergency response, which requires "[e]mployees engaged in emergency response and exposed to hazardous substances presenting an inhalation hazard or potential inhalation hazard shall wear positive pressure self-contained breathing apparatus while engaged in emergency response, until such time that the individual in charge of the [Incident Command System] determines through the use of air monitoring that a decreased level of respiratory protection will not result in hazardous exposures to employees." 29 C.F.R. § 1910.120(q)(3)(iv). The Secretary alleges in Item 2:

[E]mployees responded to an emergency, caused by the release of an unknown quantity of anhydrous ammonia, to the atmosphere. Employees were exposed to levels at or above 50.0 parts per million, on or about 05/23/2017. No positive pressure respirator and monitoring was available and/or provided during response.

### **Whether Cited Standard Applied**

Under the HAZWOPER standard, an "emergency response" is "a response effort by employees ... to an occurrence which results, or is likely to result, in an uncontrolled release of a hazardous substance." 29 C.F.R. § 1910.120(a)(3). TECO argues on the day of the release, the rovers did not engage in an "emergency response" within the scope of the HAZWOPER standard as "the incident did not result and was not likely to result in an uncontrolled release of anhydrous

ammonia.” (Resp’t’s Br. at 14.) Instead, TECO argues the release was an “incidental release,” which was “absorbed, neutralized, and otherwise controlled at the time of release with no actual or potential inhalation hazards.” (Resp’t’s Br. at 15.) The Court finds no merit in TECO’s argument.

When an incidental release of a hazardous substance is involved, the HAZWOPER standard provides such responses are not considered to be emergency responses within the scope of this standard “where the substance can be *absorbed, neutralized, or otherwise controlled* at the time of release by employees in the immediate release area ....” 29 C.F.R. § 1910.120(a)(3) (emphasis added). Assuming, *arguendo*, the release was an “incidental release,” TECO nonetheless admits “[s]ome of the ammonia discharged through the pressure relief valve did not get absorbed into the water in the sump and was released into the atmosphere. (Parties State. Admitted Facts ¶ (IV)(P)). Therefore, the release was within the scope of this standard since it was not completely “absorbed, neutralized, or otherwise controlled at the time of release.” Therefore, § 1910.120(q)(3)(iv) applied to the cited condition.

#### **Whether Employees had Access to Hazardous Condition**

Responses to releases of hazardous substances are *not* considered to be emergency responses “where there is no potential safety or health hazard (i.e., fire, explosion, or chemical exposure)[.]” 29 C.F.R. § 1910.120(a)(3) (emphasis added). TECO argues “[t]he Secretary presented no evidence that TECO’s rovers were exposed to any safety or health hazard[.]” (Resp’t’s Br. at 15.)

The “permissible exposure limit” or “PEL” means “the exposure, inhalation or dermal permissible exposure limit specified in 29 CFR part 1910, subparts G and Z.” 29 C.F.R. § 1910.120(a)(3). As indicated *supra*, the parties stipulated OSHA’s PEL for ammonia is 50 ppm averaged over an 8-hour workday. (*See* Jt. Prehearing State. ¶ IV(S)). TECO’s expert opined the exposure level was 18.2 ppm over a time-weighted average of eight hours, which is significantly less than the PEL for anhydrous ammonia. (Tr. 617-18.) She also opined the exposure level at the other ammonia sensors were close to zero given the small amount of anhydrous ammonia released. (Tr. 618.) The Secretary presented no evidence to rebut this expert testimony.

As the Secretary acknowledged in his preamble to the interim final rule adopting the first version of § 1910.120, the established PEL term “is defined to give direction as to the appropriate degree of protection needed to be achieved by personal protective equipment and other similar

purposes.” Hazardous Waste Operations and Emergency Response, 51 FR 45654-01. The Court concludes the Secretary has failed to establish TECO employees had access to a hazardous condition since he failed to establish TECO’s employees were exposed to any safety or health hazard, i.e., exposure above the established PEL for ammonia. Accordingly, Item 2 must be vacated.

#### **IV. ORDER**

**IT IS HEREBY ORDERED THAT** Items 1 and 2 of the Citation 1 are **VACATED** and no penalty is assessed.

**SO ORDERED.**

/s/ John B. Gatto  
First Judge John B. Gatto

Dated: March 15, 2019  
Atlanta, GA