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

SECRETARY OF LABOR, Complainant, v. SANDERSON FARMS, INC. – Processing Division, Respondent.	OSHRC Docket No. 17-1246

DECISION AND ORDER

COUNSEL:

John M. Bradley, Attorney, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Complainant.

Darren S. Harrington, Attorney, Key Harrington Barnes, P.C., Dallas, TX, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

On January 11, 2017, the Secretary, through the Department of Labor's Occupational Safety and Health Administration (OSHA), began a Process Safety Management (PSM) inspection of a Sanderson Farms, Inc. – Processing Division (Sanderson Farms) facility in Waco, Texas, pursuant to OSHA's National Emphasis Program. As a result of alleged deficiencies discovered during the inspection, OSHA issued[1] a six-item citation on June 16, 2017, under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-678, alleging violations of OSHA's

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. See 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

Process Safety Management of Highly Hazardous Chemicals ("PSM") standard, 29 C.F.R. §1910.119, with proposed penalties totaling $70,618.00. The action is now before the Court on the Secretary's complaint seeking an order affirming the citation and proposed penalty and Sanderson Farms' answer denying the alleged violations and appropriateness of the penalties and abatement and asserting the affirmative defense of unpreventable employee misconduct.[2]

Item 1 alleged five instances, referenced as (a) through (e) in the citation, of serious violations of subsection (d)(3)(ii) of §1910.119 for failing to document that equipment complied with recognized and generally accepted good engineering practices (RAGAGEP). The Secretary withdrew Instances (b) and (c) prior to trial. Remaining at issue under Item 1 are Instance (a), regarding the lack of ammonia detectors in the refrigeration machinery room; Instance (d), regarding a door to the engine room that was not tight fitting; and Instance (e), regarding an engine room door that did not open outward.[3] The Secretary proposed a penalty of $12,675.00 for Item 1.

Item 2 alleges a serious violation of subsection (d)(3)(i)(B) of §1910.119 for failing to ensure its piping and instrument diagrams were accurate and represented equipment that was existing and was part of the process, with a proposed penalty of $12,675.00. Item 3 alleges a serious violation of subsection (d)(3)(i)(E) of §1910.119 for failing to provide and maintain an accurate and updated compilation of the ventilation system design for the engine room, with a proposed penalty of $12,675.00. The Secretary withdrew Item 4 prior to trial.

Item 5a and Item 5b are grouped Items with a proposed total penalty of $12,675.00. Item 5a alleges three instances, referenced as (a) through (c) in the citation, of serious violations of subsection (j)(2) of §1910.119 for failing to establish written procedures to maintain the on-going integrity of process equipment, with regard to safety cutouts (Instance (a)), E-stop testing procedures (Instance (b)), and level control pressure vessel test procedure (Instance (c)). Instance 5b alleges five instances, referenced as (a) through (e) in the citation, of serious violations of subsection (j)(4)(i) of §1910.119 for failing to perform inspection and tests on process equipment with regard to three compressor cutouts (Instances (a) through (c)), a Liquid King Valve (Instance

[2] Attached to the complaint and adopted by reference was the citation at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. 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).

[3] The terms *machinery room* and *engine room* are used interchangeably in the record (*See e.g.*, Tr. 33, 342).

(d)), and emergency stop buttons inside and outside the engine room (Instance (e)). The Secretary withdrew Item 6 prior to trial.

The parties stipulated jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), and that Sanderson Farms 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) (*Jt. Prehearing State.*, ¶¶ E.1 & 2). The Court held a bench trial in this matter in Waco, Texas. 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.[4] For the reasons indicated *infra*, the Court **VACATES** Items 1, 2, and 3. The Court **AFFIRMS** Item 5a in its entirety, **AFFIRMS** Item 5b with regard to Instances (a), (b), (c), and (e), and **VACATES** Instance (d). The Court assesses a grouped penalty of $9,054.00 for Items 5a and 5b.

II. BACKGROUND

Sanderson Farms operates a chicken processing plant in Waco, Texas, that was built in 2006 (Tr. 96, 368). The plant uses anhydrous ammonia as a refrigerant to freeze the processed chickens. On January 11, 2017, Compliance Safety and Health Officer Willis Rogers began an inspection of the Waco plant. He held an opening conference with management officials from Sanderson Farms and presented them with a document request for PSM documents and the employer's OSHA 300 injury log. He conducted a walkaround inspection, interviewed employees, and took photographs (Tr. 31-33, 67). Rogers returned to the plant in February of 2017 with Tin Vo, a chemical engineer who had more experience with PSM inspections, presented Sanderson Farms with a second document request and conducted another walkaround inspection, interviewing more employees and taking more photographs (Tr. 36-37, 63-67). As a result of the inspection, Rogers and Vo recommended the Secretary issue a citation for serious violations of the PSM standard and the citation was subsequently issued on June 16, 2017.

Three expert witnesses testified at trial—Eduardo Ford for the Secretary—and Henry Bonar and Walter Teeter for Sanderson Farms. Their education, work experience, and professional associations were comparable.[5] The Court qualified Ford as an expert in "ammonia system

[4] 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

[5] Eduardo Ford is a registered professional engineer. He holds a Bachelor of Science degree in mechanical engineering from California Polytechnics State University. He is a life member of both the International Institute of Ammonia Refrigeration (IIAR) and of the American Society of Heating, Refrigerating and Air-

construction, safety, design, and installation." (Tr. 239, 240). The Court qualified Bonar and Teeter as experts "in the field of ammonia refrigeration systems and process safety management." (Tr. 367, 368, 415, 417-18).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Commission serves as a "neutral arbiter" between the Secretary and cited employers. *Cuyahoga Valley Ry. Co. v. United Transp. Union* 474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 151, 154 (1991).

The Court of Appeals for the Fifth Circuit, where the action arose,[6] has held the Secretary "must show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016).

Conditioning Engineers (ASHRAE), as well as a member of the Refrigeration Engineers Technician Association (RETA) (Tr. 230-31). Since 1970, he has gained extensive experience in the refrigeration industry, working for Carrier Machinery, the Campbell Soup Company, and Tyson Foods, among other businesses (Tr. 232-33). In 2005, Ford started Coldworks Engineering, a consulting firm (Tr. 233). Henry Bonar is a registered professional engineer who holds a Bachelor of Science degree in mechanical engineering from the University of Florida (Tr. 363). He is a charter member and former president of IIAR and a life member of ASHRAE (Tr. 364-65). Since 1975, Bonar has worked for Bonar Engineering and Construction, which designs and constructs "refrigeration systems on an industrial scale," that are "primarily ammonia based." (Tr. 361.) He designed the refrigeration system for the facility (Tr. 361). Bonar also helped develop Sanderson Farms' PSM program for the facility (Tr. 362). Walter Teeter is a registered professional engineer and holds Bachelor of Science degrees in mechanical engineering and in economics from North Carolina State University (Tr. 413). He has served with the IIAR since 1995 and is "currently the ammonia refrigeration foundation chairman and immediate past chairman of IIAR." (Tr. 414-15.) He is the CEO of Republic Refrigeration, an industrial refrigeration contractor, which he started in 1989. He has worked with Sanderson Farms since 1991, installing and maintaining refrigeration systems (Tr. 411-12).

[6] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). "[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 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 Fifth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

Further, the Fifth Circuit has held "hazard is generally presumed in safety standards unless the regulation requires the Secretary to prove it." *Id.* [7]

The PSM standard took effect in May 1992 as a performance standard. Process Safety Management of Highly Hazardous Chemicals, 57 Fed. Reg. 6356, 6356, 6360 (Feb. 24, 1992). As the Commission has recently noted in *BP Products North America, Inc.*, one significant aspect of the PSM standard is the requirement that employers compile information about their process equipment and use this information to self-assess the equipment for hazards, and then, if necessary, to implement corrective safeguards. *BP Prod. N. Am., Inc.,* 2018 WL 5314836, at *1 (No. 10-0637, 2018).

The PSM provision cited in Items 1, 2, and 3 required Sanderson Farms to "document that equipment complies with recognized and generally accepted good engineering practices" as part of its process safety information under § 1910.119(d). The PSM provision cited in Item 5a required Sanderson Farms to "establish and implement written procedures to maintain the on-going integrity of process equipment." The PSM provision cited in Item 5b required Sanderson Farms to perform "inspections and tests" on "process equipment." 29 C.F.R. § 1910.119(d)(3)(ii), (d)(3)(i)(B), (d)(3)(i)(E), (j)(2), (j)(4)(i).

RAGAGEP is not defined in either the text of the PSM standard, its preamble, or the non-mandatory Appendix C. However, Appendix C provides some examples of what could be used to "establish" RAGAGEP, such as requirements contained in published consensus standards and codes and "technically recognized report[s]" from engineering societies. 29 C.F.R. § 1910.119, App. C.3.[8] At issue in this case is whether the Secretary has met his burden to establish that

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[7] An occupational safety and health standard may only be promulgated if "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Thus, the Fifth Circuit has noted "[s]ince OSHA is required to determine that there is a hazard before issuing a standard, the Secretary is not ordinarily required to prove the existence of a hazard each time a standard is enforced." *Sanderson Farms*, 811 F.3d at 735.

[8] In 2013, OSHA also published a request for information that cited to a source definition for RAGAGEP from the Center for Chemical Process Safety, which "is not an official OSHA definition, [but] is consistent with OSHA's intent when it promulgated the [PSM] standard":

> Recognized And Generally Accepted Good Engineering Practices ... are the basis for engineering, operation, or maintenance activities and are themselves based on established codes, standards, published technical reports or recommended practices (RP) or similar documents. RAGAGEPs detail generally approved ways to perform specific engineering, inspection or mechanical integrity activities, such as fabricating a vessel, inspecting a storage tank, or servicing a relief valve.

Process Safety Management and Prevention of Major Chemical Accidents, 78 Fed. Reg. 73,756, 73,761 (Dec. 9, 2013).

Sanderson Farms was obligated under the PSM standard to comply with the specific engineering practices that he asserts is RAGAGEP.

A. Item 1

The parties stipulated "Sanderson Farms chose to follow as its RAGAGEP ASHRAE 15-2004."[9] (*Jt. Prehearing State.*, ¶ D.2.) This stipulation is supported by an August 6, 2015 revised Sanderson Farms document prepared as part of its PSM program, which stated in relevant part, "[t]he standard used in this PSM program to meet RAGAGEP requirements is ANSI-ASHRAE 15." (Ex. C-2) (emphasis added).

Each disputed instance in Item 1 asserts Sanderson Farms "did not document compliance with its chosen" RAGAGEP and alleges employees were exposed "to inhalation of ammonia vapors." Specifically, the Secretary contends Sanderson Farms failed to comply with its chosen RAGAGEP, and therefore violated § 1910.119(d)(3)(ii) with regard to Instances (a), (d), and (e). Sanderson Farms defends itself against this charge, stating,

> ASHRAE is not the ultimate authority for Sanderson Farms which [is] obligated to first comply with the International Mechanical Code (IMC). The IMC is the governing code and therefore qualifies as law, whereas the IIAR-2 1999 and ASHRAE-15 2004 are industry standards that are, in some instances, incorporated into the IMC by reference. In those instances, the Company has chosen to follow ASHRAE-15 instead of IIAR-2. In this case, the IMC dictates whether an ammonia detector is required, and ASHRAE is relied upon by the Company in determining [the] type and construction of doors used for its machinery room.

(*Resp't's Br.,* pp. 29-30.)

1. Instance (a)

Instance (a) of Item 1 of the citation alleges Sanderson Farms did not document compliance with its chosen RAGAGEP, "ANSI/ASHRAE-15 2004, Section 8.11.2.1, as the refrigeration machinery room did not contain ammonia detectors."

(1) The Cited Standard Applies to the Cited Condition

Section 1910.119 is found in *Subpart H—Hazardous Materials* of OSHA's general industry standards and addresses process safety management of highly hazardous chemicals. The *Purpose* statement of § 1910.119 provides, "This section contains requirements for preventing or

[9] The parties also agreed "Sanderson Farms is obligated by law to follow the International Mechanical Code." (Jt. Prehearing State., ¶ D. 3.)

minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. These releases may result in toxic, fire or explosion hazards."

The standard applies to a process "which involves a chemical at or above the specified threshold quantities listed in appendix A to this section[.]" Appendix A lists 10,000 pounds as the threshold quantity for anhydrous ammonia. The parties stipulated, "[t]he refrigeration system located in the Sanderson Farms Waco facility contains over 10,000 pounds of anhydrous ammonia." (*Jt. Prehearing State.*, ¶ D.1) Therefore, the cited subsection of the PSM standard applies to the cited condition in Instance (a) of Item 1.

(2) The Secretary Failed to Prove Noncompliance with the Terms of the Standard

Section 8.11.2.1 of ANSI/ASHRAE 15-2004 provides in relevant part that "[e]ach refrigerating machinery room shall contain a detector, located in an area where refrigerant from a leak will concentrate, that actuates an alarm and mechanical ventilation[.]" (Ex. C-3, p. 12.) Section 8.11.2.1 further provides "[t]he alarm shall annunciate visual and audible alarms inside the refrigerating machinery room and outside each entrance to the refrigerating machinery room." (*Id.*) The parties stipulated "the machinery room in the Sanderson Farms Waco facility contained no ammonia detectors." (*Jt. Prehearing State.*, ¶ D(5)). According to the Secretary, his expert, Mr. Ford, opined "that ammonia detectors are required in the machinery room." (*Sec'y's Br.*, p. 19) (*citing* Tr. 243:22-24). The Court does not agree with the Secretary or his expert.

Section 8.11.2.1 provides for an exception,[10] which indicates "[f]or ammonia, refer to 8.12(g)." (Ex. C-3, p. 12.) Since the refrigerating machinery room at issue used ammonia, the Secretary's reliance on Section 8.11.2.1 is misplaced. Rather, the Secretary was required to refer to Section 8.12(g) to determine compliance, which provides that "[w]hen refrigerants of Groups A2, A3, B2, and B3 are used, the machinery room shall conform to Class 1, Division 2, of the National Electrical Code." (*Id.* at 13.) Ammonia falls into Group B2 (*see id.* at 9), and therefore,

[10] As the party seeking the benefit of the exception(s), Sanderson Farms has the burden of proving it meets the criteria. "[T]he Commission has long held that the party claiming the benefit of an exception bears the burden of proof. *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)." *Houston Aquarium, Inc.,* 27 BNA OSHC 1761, 1765, n. 13 (No. 12-1617, 2019).

unless another exception applies, Sanderson Farms' machinery room was required to conform to Class 1, Division 2, of the National Electrical Code.

However, another exception does apply. Section 8.12(g)'s exception indicates "[w]hen ammonia is used, the requirements of Class 1, Division 2, of the National Electrical Code shall not apply providing the requirements of 8.12(h) are met." (*Id.* at 13.) Therefore, Sanderson Farms' machinery room was not required to conform to Class 1, Division 2, of the National Electrical Code *if* it met the requirements of Section 8.12(h). Section 8.12(h) mandates "[w]hen ammonia is used, the machinery room is not required to meet Class 1, Division 2, of the National Electrical Code providing (1) the mechanical ventilation system in the machinery room is run continuously and failure of the mechanical ventilation system actuates an alarm or (2) the machinery room is equipped with a detector, conforming to 8.11.2.1, except the detector shall alarm at 1,000 ppm." (*Id.*)

It is undisputed that Sanderson Farms runs the mechanical ventilation system in the machinery room continuously (Tr. 146, 372). The parties also stipulated "were the ventilation system in the machinery room to fail, a visual-only alarm would trigger in the control room." (Jt. Prehearing State., ¶ D(7)). Therefore, Sanderson Farms contends it has met the series of exceptions to sections 8.11.2.1 and 8.12 and is not required to have ammonia detectors in its machinery room.

The Secretary's expert, Eduardo Ford, disagrees, opining both visual and audible alarms inside the refrigeration machinery room and outside each entry to the refrigeration machinery room were required. (Tr. 243.) Ford appears to confuse the requirement in section 8.11.2.1 for the alarm tripped by the ammonia detector with the alarm required in section 8.12(h) that is tripped by failure of the mechanical ventilation system. Ron Snyder, the maintenance manager for Sanderson Farms, testified if the mechanical ventilation system in the machinery room failed, an LED strobe light in the refrigeration office will start flashing (Tr. 303-04.) This flashing light meets the requirement set out in section 8.12(h) that failure of the ventilation system "actuates an alarm." The Court agrees with Snyder and concludes, *infra*, there is no requirement in section 8.12(h) that the alarm be visual and audible and be located in certain areas.[11]

[11] The numerous references to the *National Electrical Code* in the cited sections of the ASHRAE standard caused much of the confusion between the parties regarding this item and is something of a red herring. The Secretary argues the exception in section 8.11.2.1(a) "refers to the *National Electrical Code*, not the requirement to install an ammonia detector." (Sec'y's Br., p. 23). If the references to the Class 1, Division 2, locations are omitted (which is appropriate because Sanderson Farms has established it is not required to

The Secretary believes he has found a similar flaw in the Sanderson Farms interpretation of section 8.11.2.1 with regard to the exception for water.

> Sanderson Farms ostensibly relies on the word "exception" in Section 8.11.2.1, asking the Court to interpret this as removing the requirement to equip the machinery room with an ammonia detector, full stop, without context. However, Sanderson Farms' argument is undercut by the second exception in 8.11.2.1, which explicitly states, "Detectors not required when only stems using R-718 (water) are located in the refrigerating machinery room." . . . The first exception points to and refers to the National Electrical Code. The second exception explicitly removes the requirement to use a detector. If the exception in 8.11.2.1 were meant to remove the requirement to use a detector when using ammonia as a refrigerant, ASHRAE 15-2004 could have explicitly stated so, as it does with water. Any confusion that the term "exception" may cause is mitigated by the explicit language of the provision to which the exception points.

(Sec'y's Br., p. 24.)

The Secretary's argument is not sound. The purpose of the exception is not "to remove the requirement to use a detector when using ammonia as a refrigerant," but rather, it is to provide the employer with the option of either running continuous ventilation *or* using a detector that alarms at 1,000 ppm of ammonia. Sanderson Farms has met the exceptions set out in sections 8.11 and 8.12 by demonstrating it runs continuous ventilation in its machinery room. The Secretary has failed to establish Sanderson Farms was not in compliance with the ASHRAE standard.

Furthermore, the Secretary's reliance on the ASHRAE standard as the only applicable RAGAGEP is misplaced. As indicated *supra*, the parties stipulated "Sanderson Farms is obligated by law to follow the International Mechanical Code." (*Jt. Prehearing State.*, ¶ D.3) Sanderson

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meet Class 1, Division 2, of the *National Electrical Code* as set out in section 8.12(h)(1)), the aim of the exceptions becomes clearer: Section 8.11.2.1(a) requires employers to maintain a refrigerant detector in each machinery room that activates visual and audible alarms except "[f]or ammonia," and directs the reader to 8.12(g) when ammonia is used. Section 8.12(g) directs the reader to 8.12(h) "[w]hen ammonia is used." Section 8.12(h) provides in relevant part "[w]hen ammonia is used" the employer does not need to comply with requirements set out in the *National Electrical Code* if "(1) the mechanical ventilation system in the machinery room is run continuously and failure of the mechanical ventilation system actuates an alarm[.]" If this sequence is read as the Secretary interprets it, then either section 8.11.2.1, requiring a detector (whose absence is the alleged violative condition here), or section 8.12(h)(2), requiring a detector "conforming to 8.11.2.1, except the detector shall alarm at 1,000 ppm," is superfluous. If section 8.11.2.1 requires the use of a detector without exception, section 8.12(h) could not logically provide for the option of continuous ventilation *or* a detector. Such an interpretation is not permissible. *See Ryder Truck Lines, Inc.*, 1 BNA OSHC 1326, 1328 (No. 391, 1973) (refusing to construe one part of standard in a way that would "render [another] meaningless or superfluous," because "[b]y so doing we would act in contravention of well settled principles of statutory construction")." *BP Prod. N. Am., Inc.,* 2018 WL 5314836, at *8, n. 8.

Farms lists the IMC in its PSM document as one of the codes used in designing and constructing the closed ammonia refrigeration system at its Waco Facility (Ex. C-2). Bonar testified the IMC is "the primary mechanical code that serves mechanical systems including ammonia. And it's the one you would go to for whatever you needed in a mechanical system." (Tr. 368.) In the event the IMC conflicts with the ASHRAE standard, the IMC takes precedence (Tr. 370).[12] Ford acknowledged the IMC is RAGAGEP (Tr. 267). Vo also acknowledged the IMC is RAGAGEP. Looking at Exhibit C-2, he stated, "In here it lists several RAGAGEPs. It's IIAR/ANSI-2, 1999, International Mechanical Code. National Electrical Code, 2005 edition. It goes on and item number 6 is the ASHRAE 15-2004, Refrigeration Code." (Tr. 70.)

Section 1106.3 of the IMC provides,

> **1106.3 Ammonia room ventilation.** Ventilation systems in ammonia machinery rooms shall be operated continuously.
>
> **Exceptions:**
> 1. Machinery rooms equipped with a vapor detector that will automatically start the ventilation system and actuate an alarm at a detection level not to exceed 1,000 ppm; or
> 2. Machinery rooms conforming to the Class1, Division 2, hazardous location classification requirements of NFPA 70.

(Ex. R-1, p. 19.)[13]

Thus, under the IMC, an acknowledged RAGAGEP, an ammonia detector is not required in machinery rooms where the ventilation system is operated continuously. The Secretary contends Sanderson Farms must comply with its chosen RAGAGEP, the ASHRAE standard. In

[12] The Secretary states, without citation to any authority, "the IMC does not supersede or contradict the ammonia detector requirement in ASHRAE 15-2004." (Sec'y's Br., p. 22.) However, the Secretary's own expert acknowledges in his testimony and in his Technical Opinion Report that the IMC supersedes the ASHRAE. (Tr. 249; Ex. C-9, p.4.)

[13] The Secretary points to "a contradictory IMC provision" he believes undercuts Sanderson Farms' reliance on the IMC, that refrigerant detectors in machinery rooms "shall be provided as required by the *International Fire Code*." (Sec'y's Br., p. 22) (Ex. R-1, p. 87). However, the version cited by the Secretary is the 2003 version and the version that applied at the time of the citations at issue was the 2006 version, which mandated refrigerant detectors in machinery rooms "shall be provided as required by Section 606.8 of the *International Fire Code*." (Ex. R-1, p. 91). Surprisingly, neither party listed the *International Fire Code* as an exhibit in the *Joint Prehearing Statement* and there is no copy of it in the record (Tr. 79-85). As the Court noted at trial, it is "not sure how anybody is supposed to make a determination as to whether or not you complied with the RAGAGEP if it references the *International Code -- Fire Code* and neither one of you have offered it as an exhibit in the record." (Tr. 84-85.) Nothing in the record indicates what either version of the *International Fire Code* requires for refrigerant detectors in machinery rooms. However, expert witness Teeter testified the *International Fire Code* does not require ammonia detectors in machinery rooms (Tr. 439).) The Secretary's argument on this point is rejected.

his opening statement, the Secretary's counsel claimed, "OSHA does not require Sanderson Farms to choose a specific RAGAGEP, we leave that up to the employer as a performance standard. However, OSHA does mandate that once chosen, an employer must adhere to its RAGAGEP." (Tr. 16.) Sanderson Farms states in its PSM documentation that is designating the ASHRAE standard as its RAGAGEP because, "[a]s advised by the Washington, DC office of OSHA (Directorate of Enforcement Programs, Office of Chemical Process Safety & Enforcement Initiatives), we need to clearly indicate that we are using ANSI-ASHRAE 15, so inspectors will know the basis of the safety program." (Ex. C-2.)

Section 1910.119(d)(3)(ii) does not, however, require the employer to choose and adhere to one designated RAGAGEP, nor does any other section of the Code of Federal Regulations. The Secretary's policy is, therefore, not binding. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (noting that the "real dividing point between regulations [with binding legal effect] and general statements of policy [that are not binding] is publication in the Code of Federal Regulations.").

> The Supreme Court has held agency interpretations are not legally enforceable. [T]he critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted). The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Ibid.*

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

Section 1910.1119(d)(3)(ii) requires the employer to "document that equipment complies with recognized and generally accepted good engineering practices." The Commission has held, "[a]s the PSM standard is a performance oriented standard [,] . . . the most relevant source of RAGAGEP is the one on which the employer relied." *BP Prod. N. Am., Inc*, 2018 WL 5314836, at *4. However, "given the very nature of RAGAGEP, multiple RAGAGEPs could exist for a single matter, either through consensus standards that take diverging approaches, or through an internal standard that, although different from a consensus standard's requirements, still constitutes RAGAGEP." *Id.* at *20, n. 16.

The IMC is a RAGAGEP and Sanderson Farms complied with it by operating its ventilation system in the machinery room continuously. The Court concludes the Secretary has failed to establish Sanderson Farms was not in compliance with § 1910.119(d)(3)(ii). Therefore, Instance (a) of the citation must be vacated.

2. Instances (d) and (e)

Instances (d) and (e) allege Sanderson Farms did not document compliance with its chosen RAGAGEP, "ANSI/ASHRAE-15 2004, Section 8.11.2 and ANSI IIAR-2 1999, Section 6.3.1.5 when the engine room was not constructed with tight-sealing doors and when the engine room was not provided with outward opening doors." The parties stipulated "Rogers discovered a door with a malfunctioning hinge that prevented the door from tightly fitting into its frame during his initial inspection[;] . . . the machinery room has three exit doors, two to the outside and one to the interior of the building[;] . . . the door to the interior of the building opens into the machinery room [; and] . . . Sanderson Farms knew of the orientation of the doors exiting from the machinery room." (*Jt. Prehearing State.,* ¶ D.8-11.)

Exhibit C-4 comprises photographs showing a door that is not flush with the door frame. Rogers testified a maintenance crew arrived during the inspection and adjusted the hinge plate on the door frame, so the door would close properly (Tr. 34, 307). He stated maintenance manager Ron Snyder told him "the door had been in that condition for a while." (Tr. 35, 50-51.) Snyder denied he had noticed the faulty condition of the door prior to the day of the OSHA inspection (Tr. 306-07). The Court credits Wilson's testimony on this point. He spoke confidently and exhibited no uncertainty regarding the identity of the person who informed him the door had not been self-closing "for a while."[14]

The Cited Standard Does Not Apply to the Cited Conditions

The Secretary contends Sanderson Farms failed to comply with section 8.11.2 of the ASHRAE standard, its chosen RAGAGEP:

> Each refrigerating machinery room shall have a tight-fitting door or doors opening outward, self-closing if they open into the building, and adequate to ensure freedom for persons to escape in an emergency.

[14] Vo testified that when he arrived at the facility approximately a month later, his "observation was the door could not close completely." (Tr. 68.)

The Secretary argues that since section 8.11.2 of the ASHRAE standard requires doors to be tight-fitting and outward opening, Sanderson Farms should be required to comply with it since the ASHRAE standard is its chosen RAGAGEP. "If section 1910.119(d)(3)(ii) requires compliance with RAGAGEP, then the provisions listed in the chosen ASHRAE-15 2004 must be followed. Sanderson Farms cannot pick and choose the provisions of its chosen RAGAGEP with which the company will comply." (Sec'y's Br., pp. 30-31.) Sanderson Farms argues § 1910.119(d)(3)(ii) does not apply to the doors at issue. Section 1910.119(d)(3) is captioned *Information pertaining to the equipment in the process.* The Court agrees with Sanderson Farms.

Acceptance of the Secretary's position essentially would eliminate the first element of his burden of proving the cited violation, which the Court declines to do. Section 1910.119(d)(3)(ii) requires the employer to document that *equipment* complies with recognized and generally accepted good engineering practices. The threshold element for proving a violation is that the cited standard applies to the cited condition. Here, the cited conditions are two *doors* to the engine room. The cited standard addresses the compliance of *equipment* with RAGAGEP.

Section 1910.119(b) of the PSM standard does not define equipment, but it does define *process*. "Process" means "any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities." 29 CFR § § 1910.119(b). Section 1910.119(b) defines facility as "the buildings, containers or equipment which contain a process." (*Id.*) Thus, the cited standard clearly distinguishes between "buildings" (of which doors are a part) and "equipment." Further, two experts in ammonia refrigeration systems and process safety management, one of whom was called by the Secretary, opined doors are not process equipment. Vo testified the doors to the engine room were not considered "equipment in the process." (Tr. 155-56.) Bonar also stated doors are not process equipment (Tr. 381). Ford, the Secretary's expert witness, eventually also conceded they are not. (Tr. 284-86.)

"An agency's interpretation of its standards is entitled to deference when it is reasonable and consistent with the language of the standard." *Brand Energy Sols. LLC*, 25 BNA OSHC 1386, 1390 (No. 09-1048, 2015). Here, the Secretary's interpretation of *equipment* is not reasonable and is at odds with the language of the standard. The Secretary is asking the Court to strain the common meaning of *equipment* to cover a door, a part of a building's structure. "In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words...."

Bethlehem Steel Corp. v. Occupational Safety & Health Rev. Comm'n, 573 F.2d 157, 161 (3d Cir.1978). Doors are not equipment, either in the plain and natural meaning of the words. Section 1910.119(d)(3)(ii), therefore, does not apply to the cited conditions. Therefore, the Secretary has failed to establish Sanderson Farms violated § 1910.119(d)(3)(ii) with regard to Instances (d) and (e) of Item 1, which must both be vacated.

B. Item 2

Alleged Violation

In Item 2 of the Citation, the Secretary alleges Sanderson Farms violated 29 CFR § 1910.119(d)(3)(i)(B), which mandates information pertaining to the equipment in the process shall include piping and instrument diagrams (P&ID's). The Secretary argues a violation occurred when Sanderson Farms "failed to ensure that the P&IDs were accurate and reflected the current process in that the P&ID-9 for the HTRL liquid line out and the HPL liquid line out does not show were it comes from and where it goes out to."

Cited Standard Applies to the Cited Condition

Section 1910.119(d)(3)(i)(B) requires employers to include information pertaining to the equipment in the process for P&IDs. The cited condition is P&ID-9 for the HTRL liquid line out and the HPL liquid line out. The cited subsection of the PSM standard applies to the cited condition in Item 2.

The Secretary Failed to Prove Noncompliance with The Cited Standard

Section 1910.119(d) provides:

> *Process safety information*. In accordance with the schedule set forth in paragraph (e)(1) of this section, the employer shall complete a compilation of written process safety information before conducting any process hazard analysis required by the standard. The compilation of written process safety information is to enable the employer and the employees involved in operating the process to identify and understand the hazards posed by those processes involving highly hazardous chemicals. This process safety information shall include information pertaining to the hazards of the highly hazardous chemicals used or produced by the process, information pertaining to the technology of the process, and information pertaining to the equipment in the process.

Vo testified he believed Sanderson Farms P&ID-9 was not accurate. Looking at it, he could not determine where the relief valve or the gas out line went from the main vessel. He could not determine where a line leading into the vessel came from. There were three other lines coming

into or going out from the vessel and he could not determine by looking at the diagram where the lines were coming from or where they were going. If a P&ID does not show the origin or the destination of the material, employees may turn the wrong valve when locking out the vessel or diverting the flow of ammonia, leading to an ammonia release. The P&ID does not allow employees to see where different lines carrying ammonia go to in the Waco facility (Tr. 105-110; *see also* Ex. C-5).

However, Vo testified he was not aware of any RAGAGEP that required employers to include lines on P&IDs showing where they came from and went to (Tr. 110). Vo conceded Sanderson Farms' block and process flow diagrams properly tracked the lines in and out from the vessels (Tr. 181-82; *see also* Ex. R-6). Maintenance manager Ron Snyder testified the block and process flow diagrams presented an overview of the system. Those diagrams were what the refrigeration technicians looked at to determine where the lines came from and went to. They would not consult the P&IDs (Tr. 319).

OSHA's *Process Safety Management Guidelines for Compliance* provides:

> Employers are *encouraged* to use diagrams that will help users understand the process.
>
> A block flow diagram is used to show that the major process equipment and interconnecting process flow lines and flow rates, stream composition, temperatures, and pressures when necessary for clarity. The block flow diagram is a simplified diagram.

(Ex. R-14, p. 3) (emphasis added).

> Piping and instrument diagrams (P&IDs) *may* be the more appropriate type diagrams to show some of the above details as well as display the information for the piping designer and engineering staff.

(Ex. R-14, p. 5) (emphasis added).

The *Process Guide* does not *require* employers to use P&IDs to provide the necessary information—it states it *may* use them. Vo conceded the use of P&IDs to provide information is not mandatory (Tr. 182-83). Ford testified, "At this point I am unaware of a document that exists right now that would be mandatory that says [P&IDs including lines to and from the vessels are] required. I would have to answer the question to the extent that it is recommended generally accepted good engineering practice, nothing is required by any standard, any normative standard that I am aware of at this point." (Tr. 264.) He conceded he was unaware if Sanderson Farms

employees used P&IDs to determine the origins or destination of lines. "I don't know that they—maybe they don't use it." (Tr. 277.)

Expert witness Walter Teeter opined, when asked if there is a RAGAGEP requiring the inclusion of the lines, "there's no mandatory document I'm aware of that requires that." (Tr. 419.) He further opined if someone needed to find out from where a line originated or where it went to, they "would look at the refrigeration design drawings" because the "information was more complete." (Tr. 419).

It is undisputed there is no documented requirement that P&IDs must include the lines and information the Secretary asserts is necessary to comply with § 1910.119(d)(3)(i)(B). The Secretary nonetheless argues, "general industry dictates the requirements [Ford] referenced. . . . Indeed, in the industry-at-large, P&IDs commonly show to and from where certain lines go. . . . In the absence of a formal definition, Mr. Ford turned to general industry and good engineering practices." (Sec'y's Br., p. 41.) Ford testified, however, that to be considered RAGAGEP, the engineering practices needed to be documented.

> Ford: [RAGAGEP] is what it says it is, recognized generally accepted good engineering practice. It is something that has met the test of a consensus in the industry.
> Q.: Does it have to be a published document by an industry organization?
>
> Ford: Does it have to be a published document?
> Q.: Yes.
> Ford: Yes, my opinion would be "yes," it would have to be a published document.

(Tr. 269.)

As noted earlier, OSHA endorsed a definition of RAGAEP provided by the CCPS, which contemplates that, in order to be deemed RAGAGEP, the practices at issue must be detailed in published documents:

> Recognized And Generally Accepted Good Engineering Practices . . . are the basis for engineering, operation, or maintenance activities and are themselves based on established codes, standards, published technical reports or recommended practices (RP) or *similar documents*.

Process Safety Management and Prevention of Major Chemical Accidents, 78 Fed. Reg. at 73,761 (emphasis added). Likewise, Appendix C.3 to § 1910.119 provides examples of RAGAGEP, which states the employer must document the

> codes and standards [the employer] relied on to establish good engineering practice. These codes and standards *are published* by such organizations as the American Society of Mechanical Engineers, American Petroleum Institute, American National Standards Institute, National Fire Protection Association, American Society for Testing and Materials, National Board of Boiler and Pressure Vessel Inspectors, National Association of Corrosion Engineers, American Society of Exchange Manufacturers Association, and model building code groups.

(emphasis added.)

No evidence was adduced at trial showing the refrigeration industry had a mandatory written requirement that P&IDS detail the lines going into and out of vessels. No published code or standard with this requirement was shown to exist. The Court concludes the Secretary has failed to establish Sanderson Farms was not in compliance with § 1910.119(d)(3)(i)(B). Therefore, Item 2 must be vacated.

C. Item 3

Alleged Violation Description

Item 3 of the Citation alleges Sanderson Farms violated section 1910.119(d)(3)(i)(E) when it "failed to provide and maintain an accurate and updated compilation of the ventilation design and design basis for the ammonia refrigeration engine room."

Cited Standard

The cited standard mandates information pertaining to the equipment in the process shall include "[v]entilation system design[.]" 29 CFR § 1910.119(d)(3)(i)(E).

The Cited Standard Applies to the Cited Condition

Section 1910.119(d)(3)(i)(E) requires employers to include information pertaining to its ventilation system design. The cited condition is ventilation design and design basis for the ammonia refrigeration engine room. The cited subsection of the PSM standard applies to the cited condition in Item 3.

Noncompliance with The Cited Standard

The cited standard is a subsection of § 1910.119(d), which as indicated *supra*, is designed to provide the employer and employees with crucial process safety information "to enable the employer and the employees involved in operating the process to identify and understand the hazards posed by those processes involving highly hazardous chemicals." 29 CFR § 1910.119(d). In its *Document Request* #1 to Sanderson Farms, OSHA requested

> Document(s) exhibiting the maximum intended chemical (anhydrous Ammonia) inventories in pounds (lbs.) in the facility, the method used for determining the maximum intended inventory amount, and procedures/methods used to ensure that the maximum intended inventory is not exceeded.

(Ex. C-1, p. 2, RQ1-008.)

In response, Sanderson Farms provided a document titled *Summary of Ammonia (Pounds)*, stating the "Total Pounds of Ammonia" to be 71,700.18 pounds (Ex. C-6). Sanderson Farms produced a different document in response to a request for documents "exhibiting the ammonia refrigeration engine room ventilation system design." (Ex. C-1, p. 4, RQ1-026). In a document titled *Calculations for Machinery Room,* the amount of ammonia is listed as 81,000 pounds (Ex. C-7). It is the discrepancy of approximately 9,300 pounds that resulted in OSHA's citation for this item.

The Secretary contends 81,000 pounds of ammonia is "well over Sanderson Farms stated maximum inventory. OSHA could not determine which number represented the amount of ammonia Sanderson Farms system was designed to tolerate. . . . So too would employees be unable to identify and understand the hazards posed by those processes. As Sanderson Farms failed to explain the discrepancy between the two documents, OSHA could not verify the accuracy of the company's ventilation system design." (Sec'y's Br., p. 44.)

The Secretary argues serious hazards could result from an employee relying on one of the documents, depending on which amount on which document is accurate.

> Were an employee to rely on the "Calculations for Machinery Room" document for the proposition that the system may hold 82,000 pounds of ammonia, the employee risks overloading the system, as Sanderson Farms only intended the system to hold 71,700.18. In the reverse, were the system designed to hold a far greater amount of ammonia, then Sanderson Farms has no calculations that accurately reflect the efficacy of its ventilation system. If the system could hold far more than 82,000, the ventilation system calculations are also inaccurate. Sanderson Farms was unable to point to any safeguards that would prevent its employees from using the 82,000 number as the system's maximum inventory.

(Sec'y's Br., p. 45.)

Expert witness Bonar testified the two different figures given by Sanderson Farms were not accurate, nor were they intended to be.

> Bonar: [T]he term "maximum" is one created by OSHA. This is the expected amount of refrigerant that would be in the system.

> Q.: Is this the number above which Sanderson Farms pledges not to go in its ammonia system?
> Bonar: No. It's an amount at the time and that amount may vary in the winter and summer, when the refrigerant moves around a little bit.
> Q.: So, is this number always accurate then?
> Bonar: Well, exactly at one time. But obviously it's going to move up and down. . . . [E]very refrigeration system that use ammonia, it might lose two percent of discharge every year. So obviously it's not constant. So to say that it's constant is not accurate. But we can estimate what it would be normally and that's what we've done here.
> . . .
> Q.: How much ammonia could you add to this system before the system might have mechanical integrity issues?
> Bonar: I don't know that I could tell you that exact but probably 10,000 pounds or something.
> Q.: And that's 10,000 pounds above the 71,000 number?
> Bonar: Could be.

(Tr. 403-04.)

Sanderson Farms production of two documents listing two widely different total amounts of ammonia in the ventilation system demonstrates the company's "information pertaining to the equipment in the process" is inaccurate. Bonar confirms the inaccuracy in his above-quoted testimony. This inaccuracy does not comport with the requirement of § 1910.119(d) that the "compilation of written process safety information . . shall include . . . information pertaining to the equipment in the process." The Court concludes the Secretary has established Sanderson Farms failed to comply with § 1910.119(d)(3)(i)(E).[15]

The Secretary Did Not Establish Access or Exposure to The Violative Condition

The alleged violation description for Item 3 does not identify the hazard created by noncompliance with the cited standard. Vo testified, "a potential [hazard] is the system cannot handle that . . . amount and ammonia will release outside. So employees [will be] able to inhale [that] exposure. . . . That can be fatal, depend[ing] on [the] concentration of ammonia. " (Tr. 114.) Ford did not testify regarding this item. The Secretary argues "using [82,000 pounds as the amount] in its ventilation system calculations . . . to over-engineer its system could potentially cause confusion. . . . [T]he employee risks overloading the system. . . . Should an employee add

[15] Sanderson Farms claims the Secretary appears to argue for a violation under § 1910.119(d)(2)(i)(C), which requires the employer to include information pertaining to maximum intended inventory (Resp't's Br., pp. 56-57). The Court disagrees. The alleged violation description of Item 3 and the Secretary's evidence relating to it are relevant to the cited standard.

this extra 10,000 pounds on top of 82,000 pounds, the system may not tolerate this amount." (Sec'y's Br., p. 45-46.)

> To establish exposure, the Secretary must show that an employee was actually exposed to the cited condition or that access to the cited condition was reasonably predictable. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). . . . Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) ... employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (citations omitted). Employees may come within the zone of danger "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("'access,' not exposure to danger is the proper test"). The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001)

Calpine Corp., & Its Successors, 27 BNA OSHC 1014, 1016-17 (No. 11-1734, 2018).

The Secretary does not allege employees of Sanderson Farms were actually exposed to ammonia in this case. Sanderson Farms argues it was not reasonably predictable that its employees would have access to the zone of danger created by ammonia.

Sanderson Farms asserts it does not rely on its pre-construction design document when recharging the refrigeration system with ammonia. Maintenance manager Snyder testified when the system needs recharging, the engineering department verifies how much ammonia is needed. Engineering employees monitor the flow of ammonia into the system by observing a computer measuring the amount. No one refers to the two documents at issue here listing the amounts of ammonia when recharging the system (Tr. 319-22).

Francisco Ramos is a refrigeration operator for Sanderson Farms (Tr. 342). He is the employee tasked with checking the pressure vessels of the refrigeration system to see if more ammonia is needed and notifying his supervisor of the need (Tr. 344). He explained that each pressure vessel is equipped with a sight glass which shows the level of ammonia. When the level is low, his supervisor orders more ammonia. The ammonia is brought to the facility in a truck. As

the ammonia is added to the refrigeration system, Ramos and other employees are looking at the sight glasses of the pressure vessels. When the appropriate level is reached, the charging process is stopped. Ramos stated he never looks at the calculations for the ventilation design when determining how much ammonia to add to the refrigeration system (Tr. 345-46).

The Secretary has not shown that either by operational necessity or otherwise, the failure of Sanderson Farms to comply with the terms of § 1910.119(d)(3)(i)(E) caused employees to be within the zone of danger of exposure to ammonia. Employees who initiated and monitored the recharging process did not refer to the violative documents. The process for recharging described by Snyder and Ramos (monitoring the addition of ammonia to the refrigeration system by observing a computer and sight glasses of the pressure vessels) did not cause employees to be within the zone of danger to ammonia. Therefore, the Court concludes the Secretary has failed to establish employee access to an ammonia hazard was reasonably predictable. Therefore, Item 3 must be vacated**.**

D. Items 5a and b

Alleged Violation Descriptions

Item 5a

Item 5a of the Citation alleges Sanderson Farms violated section 1910.119(j)(2) when it did not establish and implement written procedures to maintain the on-going mechanical integrity of the process including but not limited to:

a. Safety cutouts.
b. E-stop testing procedures.
c. Level control [for] pressure vessel test procedure.

Item 5b

Item 5b of the Citation alleges Sanderson Farms violated section 1910.119(j)(4)(i) in the ammonia refrigeration engine room when it failed to perform the inspection and tests on process equipment such as, but not limited to:

a) Compressor 8 oil pressure differential cutout (high & low).
b) Compressor 9 high- and low-pressure cutout.
c) Compressor 10 high temperature cutout.
d) Liquid King Valve.
e) Emergency stop buttons inside and outside the engine room.

Cited Standards

Section 1910.119(j)(2) mandates the employer "shall establish and implement written procedures to maintain the on-going integrity of process equipment." 29 CFR § 1910.119(j)(2). Section 1910.119(j)(4)(i) mandates inspections and tests "shall be performed on process equipment." 29 CFR § 1910.119(j)(4)(i).

The Cited Standards Apply to the Cited Instances in Items 5a and 5b

Unlike the previous items, §§ 1910.119(j)(2) and (4)(i), do not invoke RAGAGEP. Section 1910.119(j)(1) lists specific pieces of process equipment for which the employer must establish written procedures (under § 1910.119(j)(2)) and perform inspections and tests (under § 1910.119(j)(4)(i)). Section 1910.119(j)(1) provides:

> Paragraphs (j)(2) through (j)(6) of this section apply to the following process equipment:
> (i) Pressure vessels and storage tanks;
> (ii) Piping systems (including piping components such as valves;
> (iii) Relief and vent systems and devices;
> (iv) Emergency shutdown systems;
> (v) Controls (including monitoring devices and sensors, alarms, and interlocks), and
> (vi) Pumps.

Instance (a) of Item 5a cites "safety cutouts" as process equipment. Vo testified the safety cutouts (which are not listed by that name in § 1910.119(j)(1)) are interlocks, which are included as examples of controls under § 1910.119(J)(1)(v) (Tr. 121-22). Vo clarified the Instance (a) refers to safety cutouts of compressors. A safety cutout is calibrated to low- and high-pressure settings at which the compressor starts and stops. The compressor will stop when it reaches the cutout pressure (Tr. 123-24). Instances (a), (b), and (c) of Item 5b cite cutouts on compressors 8, 9, and 10.

Sanderson Farms argues compressors are not considered process equipment under the ASHRAE standard, which defines a "compressor" as "a machine used to compress refrigerant vapor." (Ex. C-3, § 3 at p. 6.) The ASHRAE standard also defines a "pressure vessel" as "any refrigerant-containing receptacle in a refrigerating system. . . . This also does not include . . . compressors[.]" (*Id.* at 7.)

Expert Teeter stated the cutouts protect the mechanical function of the individual compressors, but they do not impact the mechanical integrity of the compressors. "It will lock the

compressor up but it's not going to damage the parts of the compressor." (Tr. 432.) He conceded, however, the cutout on a compressor is a control "[f]or that piece of equipment" (Tr. 431.) By its terms, § 1910.119(J)(1) does not consider pressure vessels to be the only form of process equipment. It specifically lists controls as process equipment. § 1910.119(J)(1)(v). The Court concludes compressor cutouts are controls within the meaning of § 1910.119(j)(1).

The other cited Instances are process equipment under the standard: Instance (b) of Item 5a ("E-stop testing procedures") and Instance (e) of Item 5b ("Emergency stop buttons inside and outside the engine room") are covered by § 1910.119(J)(1)(iv) ("Emergency shutdown systems"). Instance (c) of Item 5a ("Level control [for] pressure vessel test procedure") is covered by § 1910.119(J)(1)(v) ("Controls (including monitoring devices and sensors, alarms, and interlocks)"). Instance (d) of Item 5b ("Liquid King Valve") is covered by § 1910.119(j)(1)(ii) ("Piping systems (including piping components such as valves"). The Court concludes the standards cited in Items 5a and 5b apply to the cited Instances.

Noncompliance with The Cited Standards

Item 5a

Vo requested Sanderson Farms' written procedures for testing its safety cutouts, E-stops, and level controls for its pressure vessels (Tr. 116). Sanderson Farms provided a nonresponsive document that does nothing to demonstrate it established written procedures to maintain the on-going integrity of process equipment.

> The standards used for instrumented controls for compressors are generally determined by the manufacturer. The refrigeration designer can vary functionality of these controls depending on its application to the refrigeration system. The safety controls are inspected monthly for functionality on each compressor. In addition, there are two system High Pressure Cut Outs as well as the safety relief valve. The closed ammonia refrigeration system was tested at startup. The high reliability of these controls and redundancy do not require "testing" per se of the entire refrigeration system, as it could create greater hazards in having a system pressure to go to its max, than having duplication of functions for High Pressure Cut Out (HPCO). Each compressor has an on-board HPCO, and in addition, there are also two independent system HPCOs. In addition to HPCOs, the system also has safety relief valves to relieve pressure. If it becomes necessary to shut down the entire system down, i.e., in case of fire, etc., the system also has equalizing lines between various pressures to relieve high pressure.

(Ex. C-8.)

At trial, Sanderson Farms proffered documents it claimed fulfill the requirements of § 1910.119(J)(2) by establishing written procedures for maintaining the on-going integrity of safety cutouts, E-stops, and level controls of pressure vessels (Exs. R-11, R-11A, R-11B, R-11C, R-11D(1) through (3)). Instead, the documents consist of a general *Mechanical Integrity Inspection Policy* (Ex. R-11A), daily inspection forms (Ex. R-11B), monthly inspection forms (Ex. R-11C), and annual inspection forms (Ex. R-11D(1) through (3)). The daily, monthly, and annual inspection forms are checklists, with no instructions for performing the required procedures. Maintenance manager Snyder conceded the inspection forms provide no instruction on how to proceed (Tr. 335-38). Refrigeration operator Ramos detailed a series of specific procedures he performed when inspecting various pieces of process equipment (Tr. 347-59). None of the procedures he performed appears in written form in the R-11 exhibits. The Court concludes Sanderson Farms failed to comply with § 1910.119(J)(2) with regard to Instances (a), (b), and (c).

Item 5b

Sanderson Farms argues it is required under § 1910.119(J)(4)(ii) ("Inspection and testing procedures shall follow recognized and generally accepted good engineering practices.") to comply with RAGAGEP when testing its process equipment and contends no such RAGAGEP exists for the cited Instances. However, Sanderson Farms was not cited under that subsection, it was cited under § 1910.119(J)(4)(i) —which does not refer to RAGAGEP—it requires only that process equipment be inspected and tested. Sanderson Farms employees conceded they did not test compressor cutouts or emergency stop buttons. Instances (a), (b), and (c) allege Sanderson Farms failed to test compressor 8's oil pressure differential cutout (high & low); compressor 9's high- and low-pressure cutout; and compressor 10's high temperature cutout. Maintenance manager Snyder admitted Sanderson Farms does not test them. (Tr. 334.) Refrigeration operator Ramos also testified Sanderson Farms does not test the emergency stop buttons inside and outside the engine room cite in Instance (e). (Tr.359.) Teeter confirmed Sanderson Farms does not test the emergency stop buttons. (Tr. 441.) With regard to Instance (d), however, Sanderson Farms established it tested the liquid king valve. Snyder testified employees test the liquid king valve by turning it off and on (Tr. 330). Ramos testified he tested the valve "[b]y turning it on and off and make sure it's working correctly" (Tr. 358.)

The Court concludes Sanderson Farms failed to comply with § 1910.119(J)(4)(i) with regard to Instances (a), (b), (c), and (e). However, the Secretary failed to establish Sanderson

Farms was in noncompliance with the standard with regard to Instance (d), for the liquid king valve.[16]

Access or Exposure to The Violative Conditions

Failure to have written procedures and to use those procedures to inspect and test equipment increases the probability the process equipment will fail, potentially leading to a release of ammonia (Tr. 123-26). If a safety cutout were to fail, the pressure in a compressor could rise to a dangerous level (Tr. 124). A lack of written procedures for emergency stop buttons could lead to them not working in the event of an emergency (Tr. 125). A pressure vessel could overflow if the level control were to fail, potentially releasing ammonia, which can kill if inhaled (Tr. 126).

The Secretary has established Sanderson Farms failure to establish written procedures and to inspect and test the cited process equipment resulted in employee access to the zone of danger of a potential ammonia release.

Employer Knowledge

Exhibit C-8, Sanderson Farms response to the Secretary's request for written procedures pursuant to § 1910.119(J)(2), manifests its actual knowledge it did not have the required documentation. Maintenance manager Snyder, a supervisory employee, testified Sanderson Farms did not perform the required tests. His knowledge is imputed to Sanderson Farms. *See W.G. Yates & Sons Construction Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir.2006) ("[W]hen a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive [,] of non-complying conduct of a subordinate.").

[16] In its brief, Sanderson Farms argues testing the process equipment is infeasible and would create greater hazards. These are affirmative defenses that Sanderson Farms did not assert in its Answer. Sanderson Farms only asserted unpreventable employee misconduct as a defense, which it did not pursue at the trial. Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer. 29 C.F.R. § 1910.5(c)(1); *see* Commission Rules 34(b)(3) and(4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway*, *Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp*., 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923,1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense). See also, *Spirit AeroSystems, Inc*., 25 BNA OSHC 1093, 1097, n. 7 (No. 10-1697, 2014) ("despite the Secretary's reference in the citation to a lack of specificity and similar testimony elicited at the hearing, Spirit neither raised this issue as a defense in its answer nor sought to amend its answer to add it. Therefore, we find that the argument was waived."). The Court finds these arguments were waived.

The Court concludes Sanderson Farms had actual knowledge of the violative conditions cited in Items 5a and 5b. The Secretary has established Sanderson Farms violated §§ 1910.119(J)(2) and (4) with regard to all cited Instances, except for Instance (d) of Item 5b.

IV. CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the violations of § 1910.119(J)(2) and (4)(i) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp*., 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996). Failure to have written procedures for testing and inspecting, and failure to test and inspect process equipment, could result in an ammonia release. Exposure to ammonia inhalation could result in serious injury or death. The violations were properly characterized as serious.

V. PENALTY DETERMINATION

"The Commission has the exclusive authority to assess penalties once a proposed penalty is contested." *Chao v. Occupational Safety & Health Review Comm'n*, 401 F.3d 355, 376 (5th Cir. 2005) (citation omitted). "The Commission is to 'giv[e] due consideration to the appropriateness of the penalty with respect to [1] the size of the business of the employer being charged, [2] the gravity of the violation, [3] the good faith of the employer, and [4] the history of previous violations.'" (*Id.*) (*quoting* 29 U.S.C. § 666(j)). "Gravity of violation is the key factor." (*Id.*) "Gravity . . . is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "The other factors are concerned with the employer generally and are considered as modifying factors.'" *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).

Since Sanderson Farms employs over 1,000 employees, size is not a modifying factor. Likewise, since OSHA had previously cited Sanderson Farms for safety violations, a reduction for

its previous violation history is not appropriate.[17] The Court also does not credit Sanderson Farms with a good faith reduction since it had knowledge that it did not have any written procedures for inspecting and testing its process equipment. *Gen. Motors Corp., Cpcg Oklahoma City Plant,* 22 BNA OSHC 1019, 1048 (Nos. 91- 2834E & 91-2950, 2007) ("Where GM's supervisory and managerial personnel knew of widespread noncompliance with the requirements of the LOTO standard by servicing and maintenance employees, and tolerated as well as encouraged such hazardous work practices, we see no basis on which to accord GM any good faith penalty credit.").

As to the gravity of the violations, the parties stipulated "that at least three Sanderson Farms employees worked in the machinery room." (*Jt. Prehearing State.,* ¶ D.4.) The daily shift is eight hours (Tr. 35, 43). The likelihood of injury is decreased due to the precautions Sanderson Farms took. Teeter testified the process equipment is equipped with pressure relief valves that "prevent over pressurization that would lead to catastrophic failure." (Tr. 433.) The Court concludes although the violations were "high" in severity, the probability was less likely, and therefore, the gravity was moderate. Based on these factors, the Court concludes a civil penalty of $9,054.00 is appropriate. Accordingly,

VI. ORDER

IT IS HEREBY ORDERED THAT:

1. Item 1 of the Citation, alleging a serious violation of § 1910.119(d)(3)(ii) with regard to Instances (a), (d), and (e), is **VACATED**, and no penalty is assessed;
2. Item 2 of the Citation, alleging a serious violation of § 1910.119(d)(3)(i)(B), is **VACATED**, and no penalty is assessed;
3. Item 3 of the Citation, alleging a serious violation of § 1910.119(d)(3)(i)(E), is **VACATED**, and no penalty is assessed;
4. Item 5a of the Citation, alleging serious violations of § 1910.119(j)(2), is **AFFIRMED** with regard to Instances (a), (b), and(c), and
5. Item 5b of the Citation, alleging serious violations of § 1910.119(j)(4)(i), is **AFFIRMED** with regard to Instances (a), (b), (c) and (e), and **VACATED** with regard to Instance (d), and a grouped penalty of $9,054.00 is assessed.

[17] While the record reflects previous violations (Tr. 46-48), the Secretary proffered no specific evidence as to the nature, type, year, or severity of those previous violations. Therefore, a penalty enhancement is also not warranted.

SO ORDERED.

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

Dated: May 30, 2019
Atlanta, GA