

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner, Minnesota
Department of Labor and Industry,

Complainant,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

vs.

Ever Cat Fuels, LLC,

Respondent.

This matter came on for hearing before Administrative Law Judge Allan W. Klein on October 7, 2014, pursuant to a Notice of and Order for Hearing issued by the Commissioner of the Department of Labor and Industry (Commissioner) on February 12, 2014. The hearing record closed on November 14, 2014, upon receipt of briefs from the parties.

Jackson Evans, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Lindsay G. Arthur, Arthur, Chapman, Kettering, Smetak & Pikala appeared on behalf of Ever Cat Fuels, LLC (Respondent).

STATEMENT OF THE ISSUE

The ultimate issue is whether Respondent must comply with the Process Safety Management (PSM) requirements of 29 C.F.R. § 1910.119 (2014) at its biodiesel plant in Isanti, Minnesota. The answer to that question turns on whether the liquid methanol contained in Tank 407 (T-407) at Respondent's plant qualifies for the exemption contained in 29 C.F.R. § 1910.119(a)(1)(ii)(B) for "flammable liquids stored in atmospheric tanks or transferred."

Prior to the start of the hearing, the parties stipulated that if the materials in T-407 do not qualify for the exemption and are included in the calculation to determine whether the flammable liquid threshold amount has been reached under 29 C.F.R. § 1910.119(a)(1)(ii), then MN OSHA has proven that Citation 1, Items 2-7 apply and were violated, but if the materials in T-407 do qualify for the exemption and are not counted toward the threshold, then MN OSHA cannot prove that Citation 1, Items 2-7 apply, and those Items should be vacated. MN OSHA stipulated that T-407 met the definition of an atmospheric tank, thereby removing that issue from dispute. Thus, the

remaining issue to be resolved is whether the methanol in T-407 is stored in that tank, or transferred to or from it, thus placing it within the scope of the regulation's exemption.

SUMMARY OF DECISION

Based on the record in this matter, and for the reasons set forth in the Memorandum, the Administrative Law Judge concludes that the liquid methanol in T-407 does not qualify for the exemption. It is not being stored or transferred while it is in the tank. Instead, its temperature is being manipulated to avoid solidifying the lipid feedstock that it is mixed with in the next step in the production process. In addition, the majority of the methanol in T-407 has already been involved in the production process and is cycling through T-407 to be re-used in the production process. For the reasons set forth in the Memorandum, that is enough to defeat the exemption.

FINDINGS OF FACT

1. In 2008, Respondent built a biodiesel production plant near Isanti, Minnesota. The plant uses a new proprietary process,¹ named the Mcgyan process, that blends methanol and a lipid feedstock (such as vegetable oil or animal tallow or lard) to produce biodiesel fuel. The Mcgyan process is a continuous process, as opposed to a batch process. The production process runs 24 hours per day, 365 days per year, with interruptions only for maintenance or unplanned events.² The plant occupies an area of roughly 9,000 square feet and produces approximately 3 million gallons of biodiesel annually.³

2. The two primary components of the biodiesel are methanol and lipid. The plant uses approximately 3 million gallons of lipid annually, but only 450,000 gallons of methanol annually.⁴

3. For purposes of this decision, the production process can best be understood as mixing hot liquid methanol and a lipid feedstock, further heating and pressurizing the blend, and then pumping it through a reactor with a catalyst so as to induce a chemical reaction that produces biodiesel fuel and "waste" products.⁵ One of the waste products is unused methanol, now in a gaseous state. The gaseous methanol is distilled into a liquid form, and returned to a tank, labeled in the record as T-407, for reuse in the production process.⁶

¹ The word "process" is a defined term in the OSHA standards at issue in this case. It will generally be used in its common meaning throughout this decision. In places where it is being used in its defined sense, that usage will be noted.

² Testimony of Clayton McNeff, Tr. Vol. 1 at 112.

³ Exs. 1 and 15.

⁴ Test. of C. McNeff, Tr. Vol. 1 at 102

⁵ Test. of C. McNeff, Tr. Vol. 1 at 96.

⁶ Test. of C. McNeff, Tr. Vol. 1 at 96-100.

4. Roughly 90 percent of the methanol introduced into the reactor is returned to T-407 for reuse. Only 10 percent of the methanol ends up in the biodiesel fuel.⁷

5. All of the methanol used at the plant is initially delivered to, and stored in, T-101. T-101 is a 75,000 gallon tank located approximately 50 yards away from T-407.⁸ Both parties agree that the methanol in T-101 is not included in calculating the amount of flammable liquid for purposes of OSHA's Process Safety Management standard because it is stored in that tank.⁹

6. T-101 is connected to T-407 by a permanent pipe.¹⁰ As methanol is needed for the biodiesel production process, it is pumped (or gravity fed) from T-101 to T-407. Inside T-407, the methanol from T-101 is mixed with methanol that has been recovered from the production process.¹¹

7. T-407 is a 2,000-gallon tank. T-407 is normally kept about half full, holding between 800 and 1,000 gallons of methanol.¹² During production, methanol is pumped from T-407 at the rate of about 8 gallons per minute. (gpm)¹³ In order to keep the level in the tank at a constant amount, 8.0 gpm must be added to T-407.¹⁴ If 90 percent of the methanol leaving T-407 is recovered and returned to T-407, that return flow would be roughly 7.2 gpm. Since the goal is to maintain the level, then roughly .8 gpm must be added to T-407 from T-101.

8. Methanol passes from T-407 to a series of pumps which deliver the methanol to a "T junction" where it mixes with the lipid feedstock, which can be vegetable oil or animal fat. Some types of the lipid feedstock can congeal or become solid at room temperature. If the methanol were too cold, it could cause the lipid feedstock to congeal when mixed, and interfere with the production process. The methanol should be above about 80 degrees Fahrenheit when it mixes with the lipid feedstock in order to prevent the methanol from congealing the lipid feedstock.¹⁵

9. The vast majority of the methanol in T-407 comes from the distillation tower, and it arrives at T-407 at a very warm temperature. The small percentage that comes from T-101 arrives at whatever the outdoor temperature happens to be, as T-101 is unheated.¹⁶ A chart of the tank temperature of T-407 for a particular day (July 1, 2013) shows that the tank temperature varied from a low of about 116° F. to a high of

⁷ Tr. 102:11-15.

⁸ T-101 is larger than T-407, but T-101's precise size is not clear. See Ex. 1 at 3 and Test. of Doug Poeschl, Tr. Vol. 1 at 29.

⁹ Test. of D. Poeschl, Tr. Vol. 1 at 29.

¹⁰ Test. of D. Poeschl, Tr. Vol. 1 at 29-30.

¹¹ Test. of D. Poeschl, Tr. Vol. 1 at 29-33. See Ex. 23.

¹² Test. of C. McNeff, Tr. Vol. 1 at 97.

¹³ Test. of C. McNeff, Tr. Vol. 98 – 99.

¹⁴ Test. of C. McNeff, Tr. Vol. 1 at 98-99.

¹⁵ Test. of C. McNeff, Tr. Vol.1 at 96, 109, 111.

¹⁶ Test. of C. McNeff, Tr. Vol. 1 at 112.

about 130° F.¹⁷ T-407 does have a heater, but the heater is only rarely used. The heater is used, for example, on a cold day when the production process is being restarted after a maintenance event. The heater is not used during normal operations.¹⁸

10. The plant became operational in September of 2009, and has been in virtually constant operation since that time. At the time of the inspection (October 9, 2012) there were 21 people employed at the establishment.¹⁹

11. On October 9, 2012, Department inspectors made an inspection of the plant. A follow-up inspection took place on October 18, 2012, in order to gather more information on the issue of whether the facility was covered under the PSM standard at issue in this proceeding. A number of conversations and correspondences took place between the Department and the Respondent, and a final closing conference by telephone call took place on September 26, 2013.²⁰

12. On September 27, 2013, the Department issued its Citation and Notification of Penalty.²¹ The Citation included 11 separate Items. Items 2-7 depend on the resolution of the T-407 matter. The remaining items are resolved in a variety of ways by the Pre-Trial Stipulation described below.

13. On October 17, 2013, Respondent filed its Notice of Contest and Service to Affected Employees.

14. On December 9, 2013, the Department filed its Summons and Notice to Respondent.

15. On December 26, 2013, Respondent filed its Answer.

16. On February 12, 2014, the Department issued the Notice and Order for Hearing and Pre-hearing Conference. A prehearing conference was held on Monday, March 3, 2014 before Administrative Law Judge Eric L. Lipman, who issued the First Prehearing Order on March 10, 2014. The Order set forth a schedule for discovery and other prehearing activities, and set a hearing date for October 7, 2014.

17. On September 30, 2014, the parties filed a Pre-Trial Stipulation, narrowing the issues to be resolved at the hearing and stipulating to a number of issue resolutions, including the withdrawal of contested items, the amount of penalties, the classification of violations and, most importantly, narrowing the key issue regarding whether the methanol in T-407 was properly included in the threshold calculation of flammable liquids or whether it should have been exempted from that calculation. The Department stipulated that T-407 meets the definition of an atmospheric tank.

¹⁷ Ex. 61.

¹⁸ Test. of C. McNeff, Tr. Vol. 1 at 111-112.

¹⁹ Ex. 1 at.1.

²⁰ Ex. 1, generally.

²¹ Ex. 59.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction to consider this matter under Minn. Stat. §§ 14.50; 182.661, subd. 3 (2014).

2. The Department gave Respondent proper notice of the hearing and has fulfilled all relevant procedural requirements of statute and rule.

3. The Department has the burden of proof to establish, by a preponderance of the evidence, the occupational safety and health violation charged, and the appropriateness of the penalty proposed.²²

4. Respondent is an “employer” within the meaning of the Minnesota Occupational Safety and Health Act.²³

5. Employers covered by the Minnesota Occupational Safety and Health Act are required to comply with occupational safety and health standards and rules promulgated by the Department under Chapter 182 of the Minnesota Statutes.²⁴

6. The PSM regulation defines “process” to include “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.”²⁵

7. The “application” section of the PSM regulation applies, in part, to a process involving certain flammable gases or liquids that are on a site in one location, in a quantity of 10,000 pounds or more, unless they meet certain exemptions.²⁶

8. The exemption for flammable liquids which are “stored or transferred” is an exemption based upon what is happening to the liquids at a particular location, rather than an exemption based upon the label attached to the location.²⁷ Therefore, the fact that the manufacturer of the tank may label T-407 as a “storage tank” does not mean that the liquids in the tank are being “stored” for purposes of the exemption.

9. The methanol in T-407 is not being “stored” in that tank for purposes of the exemption contained in 29 C.F.R. § 1910.119(a)(1)(ii)(B). The methanol in T-407 is not being “transferred” for purposes of that exemption. Therefore, the methanol in T-407 was properly included in the Department’s calculation of the amount of flammable liquid at the plant, and Citation 1, items 2-7 are AFFIRMED.

²² Minn. R. 1400.7300, subp. 5 (2013).

²³ Minn. Stat. § 182.651, subd. 7 (2012).

²⁴ Minn. Stat. § 182.653 (2012).

²⁵ 29 C.F.R. § 1910.119(b) (emphasis added).

²⁶ 29 C.F.R. § 1910.119(a)(1)(ii)(B).

²⁷ *Id.*

10. Pursuant to the Pre-Trial Stipulation, Citation 1, Items 2-6 are appropriately classified as serious, and Item 7 is appropriately classified as non-serious. The appropriate penalty for each item is \$1,400.

11. Pursuant to the Pre-Trial Stipulation, Citation 1, Item 1 is classified as non-serious and the penalty is \$200. Respondent has withdrawn the Notice of Contest to this Item.

12. Pursuant to the Pre-Trial Stipulation, Citation 1, Item 8 shall carry a penalty of \$400, and Respondent has withdrawn the Notice of contest to this Item.

13. Pursuant to the Pre-Trial Stipulation, Citation 1, Item 9 shall carry a penalty of \$600, and Respondent has withdrawn the Notice of Contest to this Item.

14. Pursuant to the Pre-Trial Stipulation, Citation 1, 10 is classified as non-serious and the penalty is \$1,100. Respondent has withdrawn its Notice of Contest to this Item.

15. Pursuant to the Pre-Trial Stipulation, Citation 1, Item 11 shall carry a penalty of \$1,400. Respondent has withdrawn its Notice of Contest to this Item.

16. The attached Memorandum sets forth the reasons for these Conclusions of Law and is incorporated herein.

Based upon these Conclusions of Law, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

The Citation issued to Ever Cat Fuels, LLC, Inc., on September 27, 2013, in conjunction with Inspection Number 316737204 is hereby **AFFIRMED**, and the penalties, as amended above, are **ASSESSED**.

Dated: December 26, 2014

s/Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Court Reported: Kirby Kennedy & Associates

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3 (2014), this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3; .664, subd. 5 (2014), the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

MEMORANDUM

I. Overview and Background

Determining whether a particular quantity of methanol is in “storage,” or is being “transferred,” and how either of those states relate to the question of whether the methanol is in “process” is a challenging task, both for regulators and the regulated. Both the state and federal OSHA agencies have struggled with those distinctions, as discussed below.

In 1992, MNOSHA incorporated by reference in its occupational safety and health rules the federal OSHA standards promulgated by the U.S. Department of Labor relating to Process Safety Management (PSM) contained in 29 C.F.R. § 1910.119.²⁸

The PSM standard prescribes safety requirements for the management of dangers associated with processes using highly hazardous chemicals. The goal of the PSM standards is “preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals.”²⁹ The term “process” is defined in the standard to mean: “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.” The standard goes on to indicate that, “[f]or purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process.”³⁰

The PSM standard applies to the following: (1) a process which involves a chemical at or above specified threshold quantities identified in Appendix A to the standard;³¹ and (2) a process which involves a flammable liquid or gas on site in one location, in a quantity of 10,000 pounds or more, with certain exceptions.³² Under the atmospheric tank exception to the second provision, the PSM does not apply to “[f]lammable liquids stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.”³³ The standard defines “atmospheric tank” to mean “a storage tank which has been designed to

²⁸ See Minn. R. 5205.0010, subp. 2, item O(2), (3), (8), (17) (2013).

²⁹ 29 C.F.R. 1910.119 (introductory language regarding purpose of rule).

³⁰ 29 C.F.R. § 1910.119(b). This is the definition referenced in footnote 1, above.

³¹ 29 C.F.R. § 1910.119(A)(1)(i).

³² 29 C.F.R. § 1910.119(a)(1)(ii).

³³ 29 C.F.R. § 1910.119(a)(1)(ii)(B).

operate at pressures from atmospheric through 0.5 p.s.i.g. (pounds per square inch gauge, 3.45 Kpa).”³⁴

In the current case, both parties agree that Respondent is not subject to the PSM under the first provision because it does not have highly hazardous chemicals at or above the threshold quantities set forth in Appendix A. The Department alleges that the Respondent is subject to the PSM under the second provision; the Respondent argues that it does not meet the 10,000-pound threshold required under the second provision because the quantities of flammable liquids stored in T-407 must be excluded from consideration under the “storage or transfer” exception to that provision.

If the methanol in T-407 is excluded from consideration, the quantity of methanol used in the Respondent’s process does not exceed the PSM’s 10,000-pound threshold.

II. Meer Corporation Decision and Subsequent Actions by Federal OSHA and MNOSHA

The portion of the PSM standard relevant to this case states that the standard applies to:

- (a) a “process” which involves a flammable liquid or gas;
- (b) which is “on site in one location”;
- (c) and the flammable liquid or gas is present “in a quantity of 10,000 pounds (4535.9 kg) or more *except for* . . . [f]lammable liquids stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.”³⁵

In order to evaluate the arguments of the parties, it is helpful to first consider the decision that was issued in *Secretary of Labor v. Meer Corporation*³⁶ and the actions of federal OSHA and MNOSHA in response to that decision.

Meer Decision

In the *Meer* case, federal OSHA inspectors cited Meer Corporation for various violations of the PSM standard. Meer Corporation used flammable liquids in the manufacture and processing of natural botanical products. It acknowledged that it stored flammable liquids in the form of methanol and ethanol in a quantity that exceeded 10,000 pounds. However, it challenged the citations because it contended that its usage of the flammable liquids fell within the PSM’s atmospheric tank

³⁴ 29 C.F.R. § 1910.119(b). The parties agree that T-407 is an atmospheric tank, and that it is not chilled or refrigerated.

³⁵ Emphasis added.

³⁶ 18 O.S.H. Cas. (BNA) 1154, 1997 WL 235621 (O.S.H.R.C.A.L.J.), in the record as Ex. 65.

exemption. There was no dispute that the liquids were stored in atmospheric tanks (as well as transferred) and kept below normal boiling point without chilling or refrigeration. Federal OSHA representatives argued, based on the PSM's definition of "process," that the storage tanks were interconnected to blending vessels for batch processing and, as a result, the atmospheric tank exemption was inapplicable. During the hearing, OSHA introduced guidelines and a fact sheet reflecting its interpretation that the atmospheric tank exemption applied only to flammable liquids that were kept below their normal boiling point without chilling or refrigeration in tanks, containers, and pipes used only for storage and transfer (to storage) and *were not* connected to a process or a process vessel. Meer asserted that the PSM-related charges should be dismissed because OSHA had failed to establish facts necessary to show that the flammable liquids stored in the atmospheric tanks were connected to a "process," and also contended that the definition of "process" in the PSM, when read in conjunction with the atmospheric tank exemption, is unconstitutionally vague and unenforceable.³⁷

Judge DeBenedetto (the federal Administrative Law Judge) concluded that OSHA had failed to show that Meer's storage tanks were connected to a process within the meaning of the PSM standard. He stressed that one of the OSHA inspectors testified that the facility merely used a temporary hose attachment to transfer the alcohol from the atmospheric tanks to the process vessel, and found that this did not establish that the storage tanks were connected to a process or a process vessel after the alcohol was transferred from the tanks.

After discussing case law requiring that an occupational safety and health standard "must give an employer fair warning of the conduct it prohibits or requires" and "provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents,"³⁸ the judge examined the language used in the atmospheric tank exemption and in the definition of "process." He noted that the language of the exemption merely indicates that flammable liquids either stored in or transferred from atmospheric tanks are exempt from the PSM standard, regardless of the quantity involved, and does not inform the reader of any transfer restriction. He further found:

There is nothing in the language of the exemption and the process definition that warns Meer about the delimitation of the exemption as conceived by the Secretary [of Labor]. In her guidelines and interpretation letter, the Secretary altered the exemption by adding such qualifying phrases as "and not connected to a process or a process vessel," or "unless the atmospheric tank is connected to a process." These restrictive

³⁷ In its opening statement at the hearing in the present matter, the Respondent raised the question of whether 29 C.F.R. § 1910.119 is impermissibly vague. The Complainant objected to consideration of that argument based on the parties' pre-hearing stipulation concerning the issue for decision in this case (which did not include whether the regulation is impermissibly vague as applied); and on the Respondent's failure to raise the vagueness argument as an affirmative defense in its Answer. The Administrative Law Judge sustained the objection, ruling that the issue of vagueness was not properly before him in this proceeding. Tr. Vol. 1 at 17-20.

³⁸ Ex. 65 at *10, quoting *Diamond Roofing v. OSHRC*, 528F.2d 645, 649 (5th Cir. 1976).

words obfuscate the meaning of “process” as defined by § 1910.119(b), which as we have noted, instructs us that storage is considered to be a process, as is “on-site movement” (i.e., transfer), or a combination of these activities. . . . It is recognized that defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judicial or administrative interpretations which clarify obscurities or resolve ambiguities. . . . On the other hand, an agency's interpretation of a regulation is valid only if that interpretation complies with the actual language of the regulation. An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation.³⁹

Judge DeBenedetto ultimately determined that, “[a]s to the facts in this case, it is believed that the [atmospheric tank] exemption language and the process definition as it applies to the exemption are so vague and uncertain as to be insufficient to warn Meer that it was required to comply with PSM standard.”⁴⁰

May 12, 1997, Federal OSHA Memorandum

One week after the *Meer* decision was issued, federal OSHA issued a memorandum to its regional administrators regarding “Coverage of Stored Flammables Under the Process Safety Management Standard.”⁴¹ In the memorandum, OSHA indicated that the judge’s ruling in *Meer* that coverage under the PSM standard “does not extend to stored flammables in ‘atmospheric tanks,’ even if they were connected to a ‘process’ within the definition of the standard” was contrary to consistent OSHA interpretations of the PSM standard. However, OSHA indicated that the judge's decision “will not be appealed because it is based on problems in the text of the standard itself, which support the judge’s decision.” With respect to OSHA's ongoing enforcement of the PSM, the Memorandum stated:

Until the standard is revised, however, OSHA will abide by the *Meer* decision, and will not cite 1910.119 under circumstances when coverage of the process would be based partly or solely on the quantity of flammable liquid in connected atmospheric storage tanks, that would otherwise qualify for the 1910.119(a)(1)(ii)(B) exemption. Citations under 1910.119 will continue to be issued when the quantity of flammables in the process, not counting atmospheric storage, exceeds 10,000 pounds, or where the quantities in storage do not fall within the exception for other reasons (i.e. storage not atmospheric, storage relies on refrigeration, **quantities not actually in storage**). (Emphasis added).

³⁹ *Id.* at 11 (citations omitted).

⁴⁰ *Id.*

⁴¹ Ex. 66. This Memorandum was sometimes called the “Miles Memorandum” during the Ever Cat hearing.

There is no evidence that OSHA has amended the PSM standard since 1997 or that there has been any fundamental change in its enforcement policy as announced in the 1997 Memorandum.

MNOSHA's Policy Statement and Instructions following the Meer Decision

For a number of years, MNOSHA did not adopt OSHA's policy change following the *Meer* decision.⁴² In July 2000, MNOSHA amended MNOSHA Instruction CPL 2-2.45, which had originally been issued in 1995, to specifically address coverage of flammable liquids under the PSM. MNOSHA published a number of appendices, including Appendix B, which contained a series of questions and answers that reflected MNOSHA's position that the atmospheric tank exemption did not apply to flammable liquids in tanks connected to a process or a process vessel.⁴³

⁴² In July 2000, MNOSHA amended MNOSHA Instruction CPL 2-2.45, which had originally been issued in 1995, to specifically address coverage of flammable liquids under the PSM. CPL 2-2.45 was also updated by MNOSHA in 2005 and 2009. As amended, by 2010 CPL 2-2.45 stated:

PSM coverage of flammable liquids:

For purposes of the exemption set out in 1910.119(a)(1)(ii)(B), (exemption of flammable liquids in storage), flammable liquids shall only be considered to be stored if all of the following conditions are present:

- a. While the flammable liquid is being held in the tank, there is no other activity or operation done to change the properties of the liquid (mixing, blending, for example);
- b. The tank holding the flammable liquid is not connected to a process such that the flammable liquid could move, or be moved through that connection between the tank and other processes except as provided in d;
- c. the tank holding the flammable liquid is located so that it could not be involved in an incident involving another process; and
- d. the flammable liquid is only transferred to other tanks or transportation and shipping vessels which are kept below their normal boiling point without benefit of chilling or refrigeration.⁴²

Six appendices are attached to MNOSHA CPL 2-2.45. Appendix B includes the following note:

NOTE: MNOSHA plans to include additional clarifications and interpretations in this appendix through future page changes to this instruction. The federal OSHA webpage should be checked for current Clarifications and Interpretations except for the definition of chemicals in "storage" as Minnesota OSHA has not adopted the current Federal Memo to Enforcement on "storage."

See Ex. 70 at 86. This was superseded by the change following the *Interplastic* decision, as discussed below.

⁴³ Ex. 70 at 87-90.

In the *Interplastic*⁴⁴ case, a Minnesota Administrative Law Judge (ALJ) granted the Respondent Interplastic Corporation's (the Company) Motion for Summary for Disposition. *Interplastic* involved eight stand-alone tanks of flammable liquid resin and styrene at the Company's manufacturing facility. The tanks were not used for mixing, but were "hard piped" to equipment in the facility that was used for mixing. The question in *Interplastic* was whether liquids in the eight tanks in question were being stored, or whether they were part of the process, for purposes for the PSM application exemption. MNOSHA asserted that the liquid in the subject tanks in *Interplastic* was not subject to the exemption, but the Company asserted that, under *Meer*, it was. The ALJ concluded, in relevant part, that MNOSHA's refusal to implement the PSM's atmospheric tank exemption consistent with federal OSHA following the *Meer* case resulted in an constitutionally vague application of the exemption and the definition of "process."⁴⁵ The ALJ found that MNOSHA's position in *Interplastic* was indistinguishable from the federal OSHA's position in *Meer*. For the reasons discussed in *Meer*, the ALJ found that MNOSHA's interpretation of the exemption was not supported by the plain language of the PSM standard.⁴⁶

Following the *Interplastic*⁴⁷ decision, the Department again revised its internal enforcement policy, MNOSHA Instruction CPL 2-2.45. Effective sometime prior to May 4, 2012, the new policy states that "MNOSHA will follow the May 12, 1997 federal OSHA Memo which was issued following the [*Meer*] decision."⁴⁸ This refers to the so-called Miles Memorandum.⁴⁹ It also added a sentence stating that the exemption "applies only to flammable liquids which are not already in the process and which are stored in atmospheric tanks"⁵⁰

At least one of the examples in Appendix B was amended following the *Interplastic* decision to reflect MNOSHA's adoption of the Miles Memorandum. The version in effect at the time of the *Interplastic* inspection was changed by removing a prohibition against the tank or pipe not being connected to a process or process vessel. The new version merely states that the tank or pipe must be used only for storage or transfer.⁵¹

III. Summary of the Parties' Arguments

The parties do not dispute that there is a "process" at the Respondent's facility covered by the first element defined by 29 C.F.R. § 1910.119(a). There also is no

⁴⁴ *Ken B. Peterson, Commissioner, State of Minnesota, Department of Labor and Industry v. Interplastic Corp.*, OAH Docket No. 11-1901-21914-2; 2012 WL 6568328 (2012).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Ex. 75 at 1.

⁴⁹ See Ex. 66.

⁵⁰ Ex. 75 at 3.

⁵¹ *Id.* at 91. Compare Ex. 72 at 13 with Ex. 75 at 91.

dispute that the process is “on site in one location” and thus falls within the second requirement of the PSM.⁵²

It is the third element that is in dispute in this case. The Respondent contends that it does not meet the 10,000 pound threshold because the amount of methanol contained in the T-407 must be excluded from consideration under the atmospheric tank exemption set forth in 29 C.F.R. § 1910.119(a)(1)(ii)(B); the Department argues that the exemption does not apply and the amount of methanol contained in the tank is properly included in determining whether the threshold is met.

The Department reasons that the methanol is not “stored” in the T-407 tank but instead is part of the production process. The Department agrees that the T-101 tank falls within the regulation’s storage and transfer exemption. But the Department asserts that, if the T-407 tank were simply for storage and transfer as well, it would duplicate the function of T-101. The Department points out that the T-407 tank does not function in the same manner as the T-101 tank – it does something more. The T-407 tank is used to mix a combination of approximately ten percent of newly-delivered methanol (which is cooler than the tank temperature) with about 90 percent reclaimed-methanol (which is significantly warmer than the tank temperature). This mixing is necessary to prevent coagulation of the lipid feedstock when the methanol and the lipid are mixed in the next step of the process. The Department argues that the *Meer*⁵³ decision and the *Interplastic*⁵⁴ decision are irrelevant to this case, because they were interpreting a prior, different, policy position (the doctrine of interconnectedness) that is not the basis for the Respondent citation.

The Respondent contends that the citation issued by MNOSHA is contrary to the *Meer* case and the Miles Memorandum. The Respondent further contends that the reasoning of the *Interplastic* decision is applicable to this case, and must be followed here. The Respondent points out that the manufacturer of T-407 refers to it as a “storage tank,” that the MPCA claims jurisdiction over T-407 under its Above-Ground Storage Tank Program, that the tank is built to UL Standards for storage tanks, and similar designations that use the word “storage” when referring to the tank. The Respondent points out that methanol does not undergo any kind of chemical conversion while it is in the T-407 tank. Finally, the Respondent points out that the tank has a capacity of 2,000 gallons, it usually holds 1,000 gallons, and the flow into and out of it is only eight gallons per minute. Respondent argues that the vast majority of the methanol in the tank is not being moved as part of the process, but is rather just sitting in the tank – in storage.

IV. Analysis

The key question in this proceeding is whether the methanol in T-407 is “stored” or “transferred.” Neither term is defined for purposes of this exemption.

⁵² 29 C.F.R. § 1910.119(a).

⁵³ 18 O.S.H. Cas. (BNA) 1154, 1997 WL 235621 (O.S.H.R.C.A.L.J.), in the record as Ex. 65.

⁵⁴ *Ken B. Peterson, Commissioner, State of Minnesota, Department of Labor and Industry v. Interplastic Corp.*, OAH Docket No. 11-1901-21914-2; 2012 WL 6568328 (2012).

The rules of construction that apply to statutes also apply to administrative regulations.⁵⁵ The purpose of all such construction is to give effect to the drafters' intent.⁵⁶ To ascertain the drafters' intent, a regulation is first examined to determine whether its words, as applied to a particular situation, are plain on their face.⁵⁷ This determination is guided by the requirement that the regulation "shall be construed, if possible, to give effect to all its provisions,"⁵⁸ and therefore "no word, phrase, or sentence should be deemed superfluous, void, or insignificant."⁵⁹ Words and phrases not expressly defined in the regulation are interpreted "according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the [drafters'] manifest intent."⁶⁰

When a regulation's language is clear and capable of understanding, the plain language of the regulation is applied to the situation at hand.⁶¹ But when the language of the regulation is unclear and susceptible of different reasonable interpretations (i.e., ambiguous), the reasonable interpretation of an agency legally required to enforce and administer the regulation is afforded "considerable deference" and is "generally uph[e]ld."⁶²

A. The Methanol Is Not Stored in T-407

The PSM standard does not define "stored." Black's Law Dictionary defines "[to] store" as "[t]o keep (goods, etc.) in safekeeping for future delivery in an unchanged condition."⁶³ These definitions are consistent with and give effect to the distinction the PSM standard draws between "storage" and present "use."⁶⁴ Thus, pursuant to the natural and obvious usage of the word, whether methanol is "stored" in T-407 depends upon whether it is being kept or held there for future use or delivery in an unchanged condition. It is not, because its condition is changed in T-407, and it is *already* in use by Respondent's continuous conversion system.

The fact that the methanol does not undergo a chemical conversion in the T-407 tank does not mean that the methanol is merely in storage while in that tank. The methanol is moving through the tank at all times, and it is actively being heated and

⁵⁵ *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 708 (Minn. 2012).

⁵⁶ *See Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716 (Minn. 2013).

⁵⁷ *Indep. Sch. Dist. No. 12 v. Minnesota Dep't of Educ.*, 788 N.W.2d 907, 912 (Minn. 2010); see also Minn. Stat. § 645.16 (2012).

⁵⁸ Minn. Stat. § 645.16.

⁵⁹ *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379,384 (Minn. 1999).

⁶⁰ *Id.*; see also Minn. Stat. § 645.08(1) (2012).

⁶¹ *State Farm Mut. Auto. Ins. Co.*, A13-2176, 2014 WL 4672348 (Minn. Ct. App. Sept. 22, 2014).

⁶² *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 512, 515-16 (Minn. 2007); see also *Udall v. Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation may not be the only one permitted by the language . . . but it is quite clearly a reasonable interpretation; courts must therefore respect it.").

⁶³ Black's Law Dictionary 1460 (8th ed. 2004) (emphasis added). The American Heritage Dictionary similarly defines "[to] store" as "to reserve for future use." Am. Heritage College Dictionary 1339 (3d ed. 1993) (emphasis added).

⁶⁴ See 29 C.F.R. § 1910.119(b) (defining "process" to include "use" or "storage" or a combination of those activities).

cooled (depending on whether it is coming from the distillation tower or from T-101) for the purpose of moving on to the next step in the process. The T-407 tank even has a heater (though rarely used) to insure that the methanol leaving it reaches a certain minimum temperature. Mixing the very hot, volatile, methanol as it comes from the distillation tower into T-407 to heat the cooler methanol from T-101 is more than just maintaining a quantity of methanol, unheated and undisturbed, except for gradual movement out of its tank.

B. The Methanol In T-407 Is Not “Transferred”

For many of the same reasons that the methanol in T-407 is not “stored” within the meaning of the storage-or-transfer exemption, it is also not “transferred.” The PSM standard does not define “transferred.” Black’s Law Dictionary defines “[t]o transfer” as “[t]o convey or cause to pass from one place, person, or thing to another.”⁶⁵ The American Heritage Dictionary similarly defines “[t]o transfer” as “to convey or remove from one place or person to another; to pass or hand over from one to another, esp. to change over the possession or control of.”⁶⁶ Thus, the natural and obvious meaning of “transfer” in the PSM context is the movement of flammable liquid from one place to another that is distinct from any movement involved in the “use, storage, manufacturing, [or] handling” of the flammable liquid.⁶⁷

The 1,000 gallons of methanol in T-407 are plainly not “transferred” within the meaning of the storage-or-transfer exemption. At Respondent’s plant, methanol is “transferred” while it is moving from T-101 to T-407: it is passing from one place (T-101) to another (T-407), and it is not being used, stored, manufactured, or handled.⁶⁸ Once it arrives in T-407, however, it is no longer being “transferred.” Rather, the methanol in T-407, 90 percent of which has already cycled through the production segment and methanol loop, is being mixed and heated-i.e., it is in use by the system and thus not being “transferred.”

Respondent argued at the hearing that any methanol in T-407 that is not “stored” must necessarily be “transferred.” This interpretation, apparently based upon the misguided belief that “stored” means any stationary flammable liquid; and “transferred” means any moving flammable liquid, renders void the PSM standard’s explicit statement that it applies to processes involving flammable liquids, with two exceptions. In other words, Respondent’s proposed interpretation of the exemption to exclude all stationary and moving flammable liquids would completely vitiate the rule. It is therefore

⁶⁵ Black’s Law Dictionary 1436 (8th ed. 2004).

⁶⁶ Am. Heritage College Dictionary 1536 (3d ed. 1993).

⁶⁷ See 29 C.F.R. § 1910.119(b) (defining “process” to include “use, storage, manufacturing, [or] handling” or “on-site movement” or a combination of those activities). Under this definition, methanol might be “transferred” when it is moved to storage after being manufactured, or when it is moved from storage to be put to use or back to storage after its use. Methanol might also be “transferred” from one place of storage to another.

⁶⁸ The Department’s witness acknowledged that before the *Interplastic* decision, MNOSHA would not have viewed T-101 as storage because of its connection to the process. But consistent with MNOSHA’s change of policy after *Interplastic*, MNOSHA recognized that T-101 came within the scope of the storage and transfer exemption. Test. of D. Poeschl, Tr. Vol. 1 at 30.

incompatible with the standard's plain language, which clearly evinces the drafters' intent to have the PSM standard apply to, among other things, processes involving flammable liquids.

C. Minnesota OSHA's Interpretation Of The Storage-Or-Transfer Exemption is Consistent with the Purpose of the Regulations

OSHA's interpretation of the exemption's language is also consistent with the intent of its drafters. The PSM standard was promulgated following a rash of catastrophic accidents in industries using toxic, reactive, flammable, or explosive chemicals that killed more than 2,050 people and injured hundreds more.⁶⁹ The standard was intended to fill a gap in existing OSHA standards, which did not adequately address the hazards posed to employees by disastrous releases of these dangerous chemicals in large quantities.⁷⁰ The standard, as proposed and adopted, requires places of employment where such hazardous (flammable, explosive, etc.) chemicals "are being used in potentially catastrophic amounts" to establish and follow a "comprehensive management program" that addresses and mitigates the hazards posed by its use of those hazardous chemicals.⁷¹

As part of its cost analysis, OSHA considered how small businesses might mitigate the hazards without coming within the purview of the PSM standard's requirements.⁷² Despite the Office of Management and Budget's concern that imposition of the PSM regulations would be overly burdensome to small businesses, OSHA determined that it was important to apply the regulation to small businesses nonetheless.⁷³ It concluded, among other things, that "they may segregate their inventory by dispersing the storage around the worksite so that the release of a highly hazardous chemical from one storage area would not cause the release of the other inventory stored on site."⁷⁴ Specifically, "if a plant exceeded the threshold quantity of a listed chemical but the chemical was used in smaller quantities around the plant and was not concentrated in one process or in one area, then OSHA believed that a catastrophic release of the threshold quantity would be remote."⁷⁵ As a result, "coverage is triggered by a specific threshold quantity ... *being used* in a single process."⁷⁶

In discussing the definition of "process" in conjunction with the application requirements of the regulation, OSHA stated:

The boundaries of a "process" would extend to quantities in storage, use, manufacturing, handling or on-site movement which are interconnected and would include separate vessels located such that there is a

⁶⁹ Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6356-57 (Feb. 24, 1992) (to be codified at 29 C.F.R. part 1910).

⁷⁰ *Id.* at 6357.

⁷¹ *Id.* at 6358, 6362.

⁷² *Id.* at 6362.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 6364.

⁷⁶ *Id.* (emphasis added).

reasonable probability that an event such as an explosion would affect interconnected and nearby unconnected vessels which contain quantities of the chemical that when added together would exceed the threshold quantity and provide a potential for a catastrophic release.⁷⁷

CONCLUSION

The interpretation urged by MNOSHA provides the kind of protection intended by the drafters of the original regulation, and is consistent with the dictionary definitions of the words in the regulation. MNOSHA is the agency that is charged with enforcing the regulation and its interpretation is a reasonable one. Therefore, the Administrative Law Judge finds that the methanol in Respondent's T-407 tank is neither stored nor transferred, and is subject to the requirements of 29 C.F.R. § 1910.119.

A. W. K.

⁷⁷ *Id.* at 6372.