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Key Takeaways from the Inaugural Process Safety Summit in Washington, DC

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By the [*national OSHA Practice at Conn Maciel Carey LLP*](#)

The [Inaugural Process Safety Summit in Washington, DC](#) on October 23, 2018 was a huge success. The event allowed more than 160 safety and legal representatives from the petroleum refining, chemical manufacturing, paper manufacturing, and fertilizer industries to hear from and share with senior federal government officials from OSHA, EPA and the Chemical Safety Board, both through interactive panel discussions and breakout discussions. The agency panels and facilitated discussions covered topics ranging from enforcement under the Trump Administration, to the status of OSHA's PSM and RMP Rulemakings, candid debates about major issues in dispute in recent PSM and RMP cases, and practical discussions about how to prepare for the next round of inspections under OSHA's new PSM National Emphasis Program and comply with RMP in the wake of the new Amendments and the imminent Rescission Rule.

[Introduction](#)

The day began with welcome remarks from [Eric J. Conn](#), Chair of [Conn Maciel Carey's national OSHA Practice](#). Eric set two themes for the Summit:

1. the importance of candid discussions between regulators and the regulated community; and



2. the near-term risk of agencies possibly revisiting and revising the historical performance-oriented paradigm of the process safety regulatory framework.

Too often, OSHA and EPA representatives complain that Industry “can make up the rules as it goes along.” – Tweet from a former Senior OSHA Official.

Statements like that imply a haphazard approach to process safety that it is not reflected by the diligent work of refiners and manufacturers across the country. Our experience shows a much different take on process safety. We hear about all of the ways that process safety is evolving, we watch how lessons are being learned and applied from incidents and experience, and we see how much time is spent anticipating the kinds of issues that could cause a process safety incident. More importantly, remarks about Industry “making up the rules as it goes along” also reflect a flawed view that the performance-oriented nature of the PSM Standard and the RMP Rule is not working.

The trend in the regulatory environment seems to be a departure from the performance-nature of the process safety regulatory schemes. That is seen most clearly in the EPA Rulemakings on RMP. Indeed, the RMP Amendments that we talked about a lot at this Process Safety Summit, endeavor to flip that performance-based paradigm on its head, setting out far more prescriptive, one-size-fits-all requirements (e.g., here’s who shall conduct your compliance audits, here’s precisely how often you must conduct drills, and who needs to participate, or here’s the specific methodology you must follow for your incident investigations, and so on) than is appropriate for the diverse types of operations covered by RMP.

The big takeaway from this is that there is too big of a gap between the world views of regulators and the

regulated, leaving both sides talking past one another. This can lead regulators to distrust industry to the point they feel a need to dictate how a business should be run, and to industry distrusting regulators to the point we cannot effectively collaborate with the agencies to improve process safety and the regulatory framework. That seems to be happening in the world of process safety in important ways. The tension between these viewpoints explains a great deal of the controversy over the RMP Amendments and the proposed RMP Reconsideration Rule. There is a gap there that needs to be bridged, and that is the reason events like this Process Safety Summit are so important – to create a forum to help bridge that gap, and start important conversations between Industry and OSHA and EPA.

OSHA Panel

We were honored to be joined by an OSHA panel including Jeff Wanko, the Director of the Office of Chemical Process Safety and Enforcement Initiatives in OSHA’s Directorate of Enforcement (the head of OSHA’s PSM Program), Pete Vassalo, a Senior Attorney and Process Safety Management Coordinator in the Division of Occupational Safety & Health in the Department of Labor’s Office of the Solicitor (the head PSM attorney at the Dept. of Labor), and Lisa Long, the Director of the Office of Engineering Safety in OSHA’s Directorate of Standards and Guidance (OSHA’s lead for the ongoing PSM Rulemaking).



The panel covered a broad range of major PSM-related issues, from the ongoing PSM Rulemaking, the new ChemRef PSM National Emphasis Program, and learnings from recent PSM cases litigated through the OSH Review Commission appeal process.

PSM Rulemaking

After the West, TX explosion, President Obama issued an Executive Order directing OSHA, EPA, DHS and others to take action to modernize the regulatory landscape for chemical process safety. OSHA and EPA both initiated rulemakings to amend their process safety rules (PSM and RMP). OSHA began looking at changes to the PSM Standard, completing a Request for Information with public comments, and then a Small Business Regulatory review panel. Ms. Long updated the Summit on the status of the PSM Rulemaking, which is at a much earlier stage in development than the parallel RMP Rulemaking undertaken by EPA.

Specifically, OSHA shared that the PSM Rulemaking has been moved to the “Long Term Action” category on the agency’s regulatory agenda. When asked to help translate that from inside-the-beltway lingo and forecast what further action on the rulemaking Industry might expect, and by when, Ms. Long explained that while a formal action, like publishing a proposed rule for comment, was unlikely in the next couple of years, that does not mean the rulemaking record is sitting on a shelf. Rather, OSHA’s Standards and Guidance team is processing the many comments received during the RFI and SBREFA processes, and evaluating how those comments will impact a proposed rule. In the meantime, the OSHA panelists indicated that OSHA is actively collaborating with EPA about the RMP Amendments, as well as enforcement of the two related regulations.

Chem/Ref PSM National Emphasis Program

Over the last decade, OSHA has implemented two PSM-focused enforcement National Emphasis Programs (NEP). First, in 2007, OSHA conducted in-depth, comprehensive, inspections, with teams of inspectors, lasting several months, covering all elements of the PSM standard at every U.S. Petroleum Refinery under the Refinery PSM NEP. Then, a Chemical Facility PSM NEP was developed in 2009, first as a pilot, and then rolled-out nationally in 2011. The Chem NEP involved less invasive inspections, using smaller teams of inspectors (or even a single inspector), auditing a subset of PSM elements, reviewing smaller samples of written programs, and the like.

The OSHA panel shed light on the emergence in 2017 of a new combo chemical facility and refinery PSM NEP. Mr. Wanko explained that the Chem NEP was renewed and retooled to now also cover petroleum refineries. Based on [the NEP Directive](#), OSHA’s outreach about it before inspections began, and our own experience with the two prior PSM NEPs, this blended Chem/Ref PSM NEP was designed to look less like the “final exam” style of the Refinery PSM NEP inspections, and more like the “pop quiz” style of the Chem NEP inspections, with a 15-question model to test PSM element implementation at a facility.



In terms of the likely areas of focus for the new PSM NEP, OSHA reiterated several times that the NEP would focus on the “Big 5” PSM elements that made up nearly 80% of the citations issued from the two predecessor PSM emphasis programs:

1. Mechanical Integrity
2. Process Safety Information

3. Process Hazard Analysis
4. Standard Operating Procedures
5. Management of Change

OSHA issued an extensive [lessons-learned document from the historical PSM NEPs](#). Although we have a very small sample size so far under the new ChemRef PSM NEP, after a few months of the retooled NEP, OSHA is seeing different results than what the agency reported in the those lessons learned. While violations in that same list of the Big 5 are still the most common, at least in the early returns, the overall instances of violations are down, suggesting to OSHA that Industry has improved its PSM efforts and consistency of application of their PSM programs since the prior round of inspections.

Interconnected and Co-Located Vessels

The last couple of years have been interesting for disputed cases in the PSM context. The key issue in one case that is now fully briefed before the OSH Review Commission, is what constitutes interconnected and co-located for purposes of determining PSM-coverage. In this case, OSHA asserted and the ALJ agreed that a boiler in a utility unit was part of a covered process because it was interconnected to that process through piping and a header for the plant's fuel gas. Based on that interpretation, that connection through plant piping makes something interconnected and therefore PSM-covered, it is hard to see how everything within the fence line would not be considered interconnected, and therefore PSM-covered.

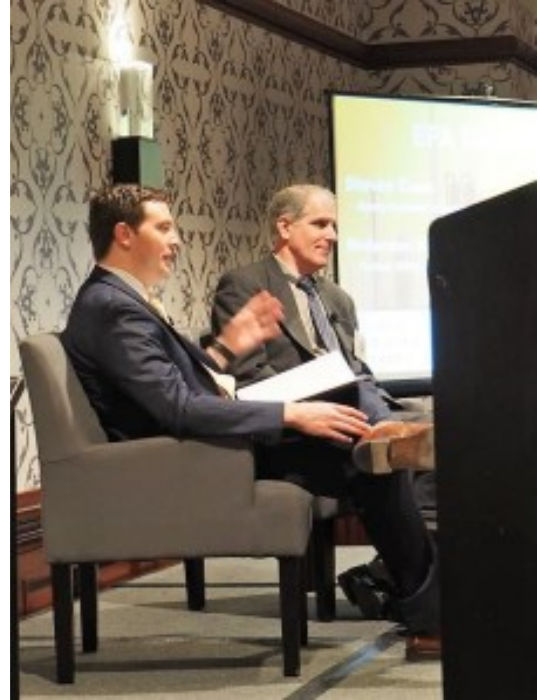
OSHA indicated that the concept of inter-connected does not reach quite that far, but provided little else to encourage Industry that a more reasonable interpretation is coming without a favorable ruling from the OSH Review Commission in this case. To the contrary, the OSHA panelists suggested the agency would go even further, and use other lines in the facility that do not even move flammable liquids, to find vessels interconnected and covered; e.g., since loss of steam could lead to a loss of containment, connections through piping for steam systems could be enough to make an otherwise non-covered vessel now PSM-covered. The guidepost, the Solicitor indicated, was to look to the PHA – if the PHA identifies the vessel or system as a potential cause of a process safety consequence, regardless of the controls in place to ensure there is no or acceptable risk, then its link in interconnected vessels can trigger PSM coverage.

Also of note in this discussion about expanding PSM coverage was OSHA's very narrow view of storage, for purposes of the atmospheric storage tank exemption. OSHA's hostility about the exemption was apparent during the Summit, and as a way to limit its application, the OSHA panelists described OSHA's view that for the exemption to apply, the tank can perform no function at all other than purely storage. For example, if chemicals are blended inside the tank, or if the chemicals are heated or cooled while inside the tank, the contents of the tank are not excluded from the PSM coverage calculation.

EPA Panel

To discuss EPA's current role in process safety, we were joined by Steven Cook, the Deputy Assistant Administrator for EPA's Office of Land and Emergency Management, the division with oversight over EPA's Risk Management Program Rule. We covered the workings of the EPA in the Trump Administration, the prognosis for the forthcoming final version of the RMP Reconsideration Rule, the possible future effects of current RMP litigation, and the future of process safety.

Responding to the commentators who have criticized EPA during the Trump Administration for abandoning its mission and reversing certain significant new positions taken by the Obama Administration, Mr. Cook noted that the agency remains incredibly busy and is committed to its mission of protecting the environment. He said that, while the framing of the conversation may have changed somewhat, that change is intended to result in better, more effective environmental regulations designed to protect the environment without causing undue regulatory burdens. Despite the lack of a replacement for Scott Pruitt in the job of Administrator so far, the pace at the agency has not slowed at all, with work on rulemaking and enforcement initiatives moving ahead at full speed.



Right now, the process safety community's main focus with EPA is what will happen with the RMP Amendments that were issued in the final days of the Obama Administration. Although the Effective Date for those amendments was delayed via rulemaking, the D.C. Circuit recently struck down that Stay, making some parts of the RMP Amendments effective immediately. Meanwhile the EPA collected comments on a proposed "Reconsideration" Rule earlier this year, and that proposal would rescind most of the new provisions in the RMP Amendments.

Mr. Cook was not able to comment on the specific direction EPA plans to take in the final version of the Reconsideration Rule, but he was able to discuss at some length the comments received from the public. He said that, although there were the typical disagreements between industry and advocacy groups, there was some alignment on issues like emergency response and the benefits that can come from coordination between RMP-covered sites and the local emergency response providers. He also noted that rulemaking is particularly difficult for agencies when a proposed rule is issued (typically after the agency submits a request for information from the public), and the regulated industry submits a significant amount of new information following the issuance of the proposed rule. Given the regulatory structure and the limits for rulemaking imposed by the Administrative Procedure Act, Mr. Cook said it is important for the agency to receive relevant data and information from all interested parties as early in the process as possible; ideally before a rule is proposed. Once a proposed rule is issued, it is more difficult to incorporate into the final rule new data or information received from the public because making significant changes to a rule at the late stage opens the door for more effective legal challenges against the final rule based on a lack of fair notice. Industry representatives were strongly encouraged to get involved in the rulemaking process as early as possible, rather than first waiting to see what

the agency will propose before providing relevant data.

The concern over the future of the RMP Amendments has been heightened by [recent court decisions on a number of EPA rules](#), not just the RMP Amendments. In those cases, the courts often reached deep into the rulemaking record to find evidence that contradicted conclusions in the rules that had been finalized by EPA in order to strike down an agency action. This is a particular concern as EPA works to rescind much of the RMP Amendments, and Mr. Cook commented that the agency was working hard to ensure that whatever it includes in the final RMP Reconsideration Rule will be supported by evidence in the rulemaking record. The recent decisions in the Courts of Appeals have been interpreted by some as a significant weakening of the *Chevron* doctrine that calls for judicial deference to agency decisions. And in a potentially stunning plot twist, it could be that, if a rule like the RMP Reconsideration Rule is challenged and reaches the Supreme Court, the Supreme Court justices recently appointed by President Trump could be key votes in a landmark decision that would afford agencies far less deference in interpreting the directives of Congress. Although EPA does not take a position on such issues absent an active case, it was clear from discussions at the Summit that EPA is well aware of these potential challenges.

Given Mr. Cook's background as a chemical engineer, his work in the industry as in-house counsel to a large multi-national chemical company, and his current work as a regulator, we asked for his unique perspective on the future of process safety, asking what issues and developments may come to the forefront in the near future. Mr. Cook discussed the difficulty that regulatory agencies face in writing rules to cover hazards and concerns of which we are only now becoming aware. Without the ability to predict the future, agencies are always playing catch-up and responding to the last significant event or accident. He encouraged the industry representatives in attendance to continue working with each other and with the regulatory agencies to identify opportunities for improvement, particularly as they relate to reducing the likelihood of low-probability/high-consequence incidents. To this end, we discussed the recent focus on incident response, driven in part by recent accidents (including West, TX) that demonstrated the lack of capacity of local first responders dealing with serious chemical incidents. Citing examples of past successes working with local emergency responders along the corridors where oil trains run, Mr. Cook noted the important safety improvements made in those areas even without the issuance of new rules. He discussed the possibility of beneficial collaboration between EPA and the regulated industry on issues not easily dealt with by a new rule, but which may be better addressed by cooperation and information-sharing.

CSB Panel

Our third government panel at the Process Safety Summit was a group of senior leaders from the U.S. Chemical Safety and Hazard Investigation Board (CSB) – Chuck Barbee, the Director of Recommendations, Stephen Klejst, Executive Director of Investigations and Recommendations, and Tom Zoeller, the Senior Advisor and Acting General Counsel.

The panel opened with questions about how the agency has managed President Trump's multiple proposals to eliminate the CSB, and how the agency has changed now that there are two empty Board seats and no

permanent Chairperson. We learned that the agency is taking the fact that it is no longer on the list of agencies proposed for elimination as a (slightly) positive sign, but even with that in the background it is still focusing on its mission of investigating catastrophic chemical incidents. In this environment, the agency is taking the approach of “fighting the alligators closest to the canoe.” The panelists said that the transition of authority between administrations went seamlessly, and that business is operating as usual since only three Board members are required for a quorum. But unless a new board member is appointed by the President and confirmed by the Senate, that will soon change as two of the remaining three Board members are nearing the end of their fixed five-year terms.



We also found out about upcoming changes to the structure and content of CSB work products. After polling members of the audience on the most popular CSB resources, the panelists stated that the agency would be eliminating certain work products and repackaging them as investigation reports. Rather than publishing materials such as case studies and safety bulletins, the agency will release investigation reports of varying lengths, with key findings, lessons learned, and recommendations as appropriate. The length of a report and number of recommendations will depend on the complexity of the case at hand, and we expect a continued high level of complexity for incidents involving process safety management systems. We also learned that the agency is striving to complete investigation reports that are more causally linked. The agency’s new Advocacy Program will highlight those broader good industry practices that the agency uncovers during its investigations and that it urges industry follow, but that are not directly linked to an incident. These could be published as “lessons learned” in safety digests, fact sheets, and other forms of guidance. In this regard, the agency seems to be taking on a slightly different approach – targeting industry through broad outreach, rather than by issuing more forceful recipient-specific recommendations.

In asking about an issue discussed during all three panels – that is, how OSHA, EPA, and the CSB share information with each other and other agencies – the CSB said that it was taking a proactive approach. Rather than taking a day or two to deploy a team of investigators to the site of an incident, we learned that the CSB has initiated its more recent investigations in a timelier manner, with the goal of arriving onsite within 24 hours. This, the CSB said, will allow it to establish parameters with other enforcement agencies earlier, thereby possibly reducing the need to request information from the other agencies after investigators return from the field. In considering the reverse, the agency said that it strives to protect information from disclosure to other agencies to the greatest extent possible through tools like MOUs. But that when it comes to some agencies, such as DOJ, the case may be harder to defend. The CSB stated that it has been most successful in protecting employer information in state civil litigation, keeping its records out of the hands of private litigants.

In discussing the CSB’s PSM-related investigations and recommendations, the agency echoed many of the same

issues identified by OSHA. Though the CSB assured the audience that it does not conduct its investigations with an eye out for violations, it stated that, like OSHA, it too has seen numerous deficiencies with respect to the following PSM elements:

1. process safety information;
2. process hazard analyses;
3. operating procedures;
4. mechanical integrity; and
5. management of change.

The CSB specifically called out MOC deficiencies, emphasizing the fact that things tend to go wrong when systems are in transition. In part because of the prevalence of PSM-related incidents, "[PSM for the 21st Century](#)" is an item on the agency's Drivers of Critical Chemical Safety Change list. The agency made clear, however, that it does not conduct investigations of companies that are PSM-covered differently just because PSM is a topic on the list. Rather, it is meant to underscore an area of concern for which the agency is advocating broader chemical safety change. In speaking about recommendations, the agency revealed that it is beginning to more publicly recognize companies for exceeding expectations in responding to the CSB's recommendations by publishing safety spotlights. As can be seen, while the foundation of the agency's work remains largely the same, many changes are also underway. The agency closed by saying that it looks forward to continuing to drive chemical safety change.