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California **LABOR** Federation



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November 10, 2016

Christine Baker, Director
California Department of Industrial Relations
1515 Clay St. 17th Floor
Oakland, CA 94612
Submitted electronically to cbaker@dir.ca.gov

RE: Meeting Request with DIR Staff

Dear Director Baker:

Thank you for the conference call on October 13 and for providing us with the follow-up October 25 DIR "Crosswalk" document in response to our comments on the proposed *Process Safety Management for Petroleum Refineries* regulation (GISO §5189.1), which we submitted to the Cal/OSHA Standards Board on September 2, 2016.

As we discussed on the call, our comments capture our concern that the most recent July 2016 version of the proposed regulation is weaker than previous versions, notably the September 2015 version.⁽¹⁾ Our 40 recommendations for changes to the July text were our good faith effort to clarify and strengthen the regulation by—in most cases—reinstating existing language from the September 2015 version. In a few cases, we pointed out the need for additional changes to the text; in all cases, however, we have sought to support DIR in producing a regulation that is unambiguous, practical and meaningful for process safety, and enforceable by the Division.

¹ See General Industry Safety Order §5189.1, July 2016,
(<http://www.dir.ca.gov/OSHSB/documents/Process-Safety-Management-for-Petroleum->

So we are disappointed that the Crosswalk document does not appear to accept a single one of our recommendations. Instead, we are being provided a rationale for why half of our recommendations should be dismissed while the other 20 recommendations are simply ignored.

On the October 13 call, DIR suggested that the July 2016 version simply moves text around in the document but does not alter its meaning. While this is correct in a small number of cases, we've found that many of the changes made by DIR in fact weaken the proposal; they would undermine the efforts of the industry's own engineers to make process safety improvements, and they would blunt the effectiveness of Cal/OSHA's enforcement actions.

In many cases, DIR has introduced text in the July draft that would allow refineries to continue certain types of practices that contributed to the Chevron, Richmond fire of 2012 and the ExxonMobil, Torrance explosion of 2015.

For example, against the recommendations of its own engineers (over a period of several years), Chevron did not adequately inspect for and replace corroded sections of pipe in the plant's crude unit. This eventually led to the catastrophic failure that endangered the lives of 19 workers and caused thousands of residents to seek medical attention. DIR's text under *Mechanical Integrity* (subsection j) would allow these practices to continue: it allows the refinery to develop its own *internal* inspection and repair methodologies, rather than requiring plants to adhere to "Recognized and Generally Accepted Good Engineering Practices," or RAGAGEP. DIR's text places the burden on Cal/OSHA to demonstrate that a plant's internal practices do not meet RAGAGEP; this highly technical standard of evidence will be difficult for the Division to meet.

In the attached Addendum, we have provided a partial list of 13 examples of text in the July 2016 draft that would allow refineries to continue the types of practices that resulted in the Chevron and ExxonMobil incidents.

In several cases, we found that DIR's July language is at odds with the report of the Governor's Interagency Working Group on Refinery Safety. For example, the intended *Scope and Purpose* of the regulation in the September 2015 draft (subsection a) is *to reduce risks by preventing major incidents*.⁽²⁾ This is consistent with the key point of the Working Group report, which is "...to prevent refinery incidents that threaten the health and safety of workers, communities and the environment."⁽³⁾ However, in DIR's July version, the *Purpose* is now simply *to reduce the risk of major incidents*.

We found that DIR's definition of 'feasible' continues to be at odds with the interpretation of this term as applied under the federal OSH Act. The phrase "to the extent feasible" appears in section

² See General Industry Safety Order §5189.1, September 2015, page 3, subsection (a), *Scope and Purpose* (<http://www.dir.ca.gov/dosh/DoshReg/Process-Safety-Management-for-Refineries/PSM-Draft-Regulation.2015-09-24.pdf>).

³ Edmond Brown, Governor (February 2014). *Improving Public and Worker Safety at Oil Refineries. Report of the Interagency Working Group on Refinery Safety*. See page 4, "Safety and Prevention of Hazardous Events." (<http://www.calepa.ca.gov/Publications/Reports/2014/RefineryRpt.pdf>).

6(b)(5) of the federal OSH Act.⁽⁴⁾ The Supreme Court has held that this phrase means “capable of being done.”⁵ The Court rejected the argument that “to the extent feasible” involves a weighing of costs against benefit.⁶ By adding qualifiers to the term ‘feasible,’ DIR’s text may be inconsistent with, and less protective than, this interpretation under the federal OSH Act.

On our October 13 call, DIR suggested that revising the July 2016 version would lead to significant delays. We didn’t understand that what you meant was that DIR would make *no changes*, despite the open public comment period. Doesn’t the comment period exist so the final version of the proposed regulation can incorporate some of the concerns of stakeholders? Given that DIR already has an earlier, vetted version of the regulation (from September 2015) that has most of the language we are seeking, we do not believe we are asking for significant delays when we propose re-invoking that language.

In addition, because RAND conducted its economic analysis of the regulation based on the September 2015 version, we do not understand how the changes we are recommending would trigger the need for another comprehensive analysis, which DIR suggested to us on the call.

We certainly want this proposal to move forward as quickly as possible. As you know, at the Standards Board hearing on September 15, 2016, Board Chair Dave Thomas and Board members Stock, Harrison and Quinlan called on DIR to make the changes recommended in the written comments of the BGA, USW and state Labor Federation. To that end, we are requesting a meeting with DIR staff as soon as possible in order to clarify our recommendations, which we believe are essential to ensuring that the regulation is successful in (1) preventing major incidents, and (2) meeting the charge of the Governor’s Interagency Working Group on Refinery Safety.

We would very much appreciate your office contacting Charlotte Brody of the BlueGreen Alliance as soon as possible to discuss availability of your staff.

Thank you very much for your attention to our concerns.

Sincerely,

Charlotte Brody
BlueGreen Alliance

Kim Nibarger
United Steelworkers

⁴ See 29 U.S.C. § 655(b)(5) (“The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, **to the extent feasible**, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”) (emphasis added).

⁵ American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 508-09 (1981).

⁶ Id., 452 U.S. at 509 (“cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is”).

*Lena Moffitt
Sierra Club*

*Mitch Seaman
California Labor Federation*

*Jeremy Smith
State Building and Construction Trades Council*

cc. Standards Board Chair and Members, via Marlee Hart
David Lanier, Secretary, Labor and Workforce Development Agency
Cliff Rechtschaffen, Office of Governor Jerry Brown

Addendum Attached

Addendum

This table provides examples of DIR text changes in the July PSM draft that would allow refineries to continue certain types of practices that contributed to the major incidents at Chevron, Richmond (2012) and ExxonMobil, Torrance (2015).

Item	Recommended Text ⁽⁷⁾	DIR's July Revision	Explanation
1	Subsection (b) Application "This section shall apply to processes within petroleum refineries, <u>including processes under partial or complete turnaround.</u> "	See page 1 ⁽⁸⁾ "This section shall apply to processes within petroleum refineries."	The ExxonMobil, Torrance explosion occurred during a turnaround, as have other major refinery incidents, including the BP Texas City, TX isomerization unit explosion, which killed 15 contractors and injured more than 170 other workers. Our recommended text addresses this gap. DIR's text, together with DIR's definition of <i>turnaround</i> , could exempt turnarounds from the new regulation.
2	Subsection (c) Definition of RAGAGEP: <u>"RAGAGEP does not include standards, guidelines or practices developed for internal use by the employer."</u> ⁽⁹⁾	See page 4 Sentence removed by DIR.	The Chevron fire resulted from weaknesses in Chevron's internal engineering and management practices. Our recommended text requires employers to abide by established, peer-reviewed standards, or RAGAGEP. DIR's text would allow an employer's <i>internal practices</i> to be recognized as RAGAGEP and would place the burden on Cal/OSHA to make the case that these internal practices <i>do not</i> meet or exceed RAGAGEP. This is a complicated and difficult standard of evidence to meet.
3	Subsection (c) Definition of Turnaround: "A planned total or partial shutdown of a petroleum refinery process unit or plant to perform maintenance,	See page 5 <u>"Turnaround does not include unplanned shutdowns that occur due to emergencies or other unexpected</u>	The ExxonMobil explosion occurred during a turnaround, as did the BP Texas City, TX catastrophe, noted above. Our recommended text allows the PSM regulation to be applied

⁷ Many, but not all, of our comments reinstate language that existed in DIR's September 2015 version of the PSM proposal.

⁸ Pages refer to the July 2016 version of the PSM proposal:

<http://www.dir.ca.gov/OSHSB/documents/Process-Safety-Management-for-Petroleum-Refineriess-proptxt.pdf>

⁹ RAGAGEP is "Recognized and Generally Accepted Good Engineering Practices."

	overhaul or repair of a process and process equipment, and to inspect, test and replace process materials and equipment."	<u><i>maintenance matters in a process unit or plant. Turnaround also does not include routine maintenance, where routine maintenance consists of regular, periodic maintenance on one or more pieces of equipment at a refinery process unit or plant that may require shutdown of such equipment."</i></u>	during turnarounds. DIR's text, together with DIR's <i>Application</i> language, could exempt turnarounds from the regulation.
4	Subsection (e)(6) "The employer <u>shall complete the HCA within six (6) months of completion of the PHA recommendations</u> and shall append the HCA report to the PHA report."	See page 9 "The employer shall append the HCA report to the PHA report."	Chevron did not follow the recommendations of its own engineers to properly inspect and replace pipes in the crude unit, which were subject to the effects of sulfidation corrosion. Our recommended text gives engineers and union representatives the authority to call for critical process safety improvements like this within a specified timeframe. DIR's text would allow managers to continue to push these improvements off to the future, and it would place the burden on Cal/OSHA to make the case that more immediate safety improvements are needed. This is a complicated and difficult standard of evidence to meet.
5	Subsection (h)(2)(B) "The refinery employer shall inform the contractor, and shall <u>ensure</u> that the contractor has <u>effectively</u> informed each of its employees, of the following:" (hazards, safety rule, emergency plan).	See page 13 "The refinery employer shall inform the contractor, and shall require that the contractor has informed each of its employees, of the following:" (hazards, safety rule, emergency plan).	Contractors often perform the most hazardous jobs at a refinery. In the 2005 Texas City explosion, for example, all of the 15 workers killed were contractors. Our recommended text increases the responsibility of refineries for the safety of contractor employees. DIR's text is essentially a "paper requirement" that would allow refineries to simply obtain the signature of a contractor on a document which states that the contractor has informed his or her employees of refinery hazards.

6	Subsection (j)(2)(B) “The frequency of inspections and tests shall be consistent with the applicable manufacturer’s recommendations, or RAGAGEP.”	See page 15 “The frequency of inspections and tests shall be consistent with the applicable manufacturer’s recommendations, or RAGAGEP, <u>or other equally or more protective internal standards.</u> ”	Against the recommendations of its own engineers, Chevron did not adequately <i>inspect or test</i> its pipes for sulfidation corrosion, which led to the catastrophic failure in the crude unit. Our recommended text closes this gap. DIR’s text would allow these practices to continue and would place the burden on Cal/OSHA to make the case that the plant’s internal practices do not meet RAGAGEP. This is a complicated and difficult standard of evidence to meet.
7	Subsection (j)(3)(A) “The employer shall correct deficiencies to ensure safe operation of process equipment. Repair methodologies shall be consistent with RAGAGEP.”	See page 15 “The employer shall correct deficiencies to ensure safe operation of process equipment. Repair methodologies shall be consistent with RAGAGEP <u>or other equally or more protective internal standards.</u> ”	Against the recommendations of its own engineers, Chevron did not adequately <i>address deficiencies</i> (caused by corrosion) in its piping systems, which led to the catastrophic failure in the crude unit. Our recommended text closes this gap. DIR’s text would allow these practices to continue and would place the burden on Cal/OSHA to make the case that the plant’s internal practices do not meet RAGAGEP. This is a complicated and difficult standard of evidence to meet.
8	Subsection (k)(5) “If a DMR has not been performed on the processes that are relevant to the investigation, <u>a DMR shall be completed as part of the incident investigation.</u> ”	See page 17 “If a DMR has not been performed on the processes that are relevant to the investigation, <u>the incident investigation team shall recommend that a DMR be conducted and completed within a specified timeframe.</u> ”	The Chevron fire occurred as a result of sulfidation corrosion, a damage mechanism. At the time of the incident, it wasn’t clear if other parts of the crude unit were similarly at immediate risk of failure; an immediate Damage Mechanism Review (DMR) was therefore needed. Our proposed text requires this. DIR’s text would allow the refinery <i>not</i> to conduct a DMR under these conditions (per the provisions of subsection x) or to put it off to an unspecified time in the future.
9	Subsection (l)(3)(D) “The team’s <u>analysis and documentation shall include</u> the following: All relevant,	See page 19 “The employer shall develop an effective <u>review protocol</u> to	Chevron did not integrate industry best-practices into the decisions that led up to the crude unit pipe failure.

	publically available information on inherent safety measures and safeguards..."	ensure that relevant, publically available information on inherent safety measure and safeguards is analyzed documented by the team."	Our proposed text requires employers to do so. DIR's text would allow employers to develop a <i>protocol</i> to consider best-practices but would not require employers to actually integrate those practices into team decision-making and action.
10	Subsection (q)(5) "The employer, in consultation with employees and employee representatives, <u>shall develop, implement and maintain</u> effective stop-work procedures..." (refuse work procedures, shut-down procedures, anonymous reporting of hazards).	See page 24 "Within 90 calendar days of the effective date of this section, the employer <u>shall develop</u> , in consultation with employee and employee representatives, <u>a system to implement the following</u> :" (refuse work procedures, shut-down procedures, anonymous reporting of hazards).	Chevron's stop-work authority was ambiguous, leading to reluctance by workers to shut-down the process that was leaking. A drip therefore developed into a catastrophic failure. Our proposed text requires effective procedures for employees to stop work, shut down processes, and anonymously report hazards. DIR's text would allow employers to develop a <i>system</i> for these activities, but would not require employer to actually implement them in practice.
11	Subsection (x)(6) "Each recommendation that is changed or rejected by the employer <u>shall be communicated to all</u> team members for comment."	See page 30 "Each recommendation that is changed or rejected by the employer <u>shall be made available to</u> team members for comment."	Six times over a period of 10 years, Chevron's engineers called for greater inspection and replacement of corroding pipes in the crude unit. Chevron managers chose to disregard these warnings. Our proposed text requires direct accountability of managers to the engineers and union representatives who make up process safety teams. DIR's text would break this link and would require team members to actively seek out information on the actions managers take in response to their process safety recommendations.
12	Subsection (x)(6) "The employer shall document a final decision for each recommendation and <u>shall report the decision to all</u> team members."	See page 30 "The employer shall document a final decision for each recommendation and shall <u>make it available to</u> team members."	This is the same problem as described in Item 11, above.
13	Subsection (x)(13) "...corrective actions addressing process safety	See page 30 "...corrective actions address process safety	Process safety hazards are defined as those with the "potential for causing a

	hazards shall be <u>corrected immediately...</u> "	hazards shall be <u>prioritized and promptly corrected...</u> "	major incident or death or serious physical harm." Chevron knowingly allowed corroding pipes with flammable material to remain in place for several years; this resulted in a catastrophic failure. Paragraph C-2(C)(4)(b)(1) of the Cal/OSHA P&P manual requires employers to correct such hazards within 7 days. DIR's text would allow a refinery to set its own mitigation timeline for serious refinery safety hazards.

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