

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW**



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. :
:
DELEK REFINING, LTD., :
:
Respondent. :

OSHRC DOCKET NO. 08-1386

Appearances: Sheryl L. Vieyra, Esquire
Delores G. Wolfe, Esquire
Michael Schoen, Esquire
U.S. Department of Labor
Dallas, Texas
For the Complainant.

Mark S. Dreux, Esquire
Micah R. Smith, Esquire
Arent Fox, LLP
Washington, D.C.
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On February 19, 2008, the Occupational Safety and Health Administration (“OSHA”) began an inspection of Respondent’s facility, located in Tyler, Texas. As a result, on August 18, 2008, OSHA issued to Respondent a 15-item “serious” citation and a one-item “other” citation. Respondent contested the citations. On August 24, 2009, the parties filed a Joint Notice of

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Partial Withdrawal of Certain Citation Items. This left for resolution Items 4, 6, 8, 9(b), 12, 13 and 15 of Serious Citation 1. The hearing in this matter was held in Dallas, Texas, on September 1-4, 2009, November 2-6, 2009, and March 1-4, 2010.¹ Both of the parties have submitted post-hearing briefs and reply briefs.

Background

Respondent Delek Refining, LTD. (“Delek”) purchased the refinery located in Tyler, Texas, on April 29, 2005. The prior owner was Crown Central (“Crown”), and the refinery was called “La Gloria” when Crown owned it. OSHA initiated the inspection of Delek under its national emphasis program focusing on process safety management (“PSM”) in refineries. The main objective of the PSM standard is to prevent unwanted releases of hazardous chemicals, especially in locations that could expose employees and others to serious hazards. *See* 29 C.F.R. § 1910.119. The purpose of the inspection was to audit Delek’s PSM program, review its documentation, and inspect the various units in the facility. The inspection began February 19, 2008 and continued at the refinery for about four months. Ronald Watkins, the Assistant Area Director (“AAD”) of the Dallas OSHA office, was

¹The hearing transcript exceeded 3,100 pages.

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the team leader.² He oversaw the inspection and the four other OSHA compliance officers (“CO’s”) assisting in the inspection.³ (Tr. 92-93, 100-04, 1854-55, 2762).

As a result of the inspection, OSHA cited Delek for various alleged violations of the PSM standard. Two items were issued for not promptly addressing and correcting deficiencies found during PSM process hazard analyses and compliance audits. Another was for not having a current, properly-certified set of operating procedures for the refinery’s Fluid Catalytic Cracking Unit, also known as the “FCC Unit” or the “Cat Unit.” A further condition cited under the PSM standard was the failure to inspect and test the positive pressure unit in the FCC Unit’s control room. (Tr. 290-325). Another item issued under the PSM standard was for not having a management of change (“MOC”) procedure for using a “steam lance” to cool a hot spot on the outside of a vessel in the FCC Unit called the “regenerator.” (Tr. 119-21, 124-28, 131-40, 145-55, 160, 274-90, 291-99, 325-59).

Two other citation items were issued under standards other than the PSM standard. One item alleged that unguarded horizontal rotating shafts in the Boiler Unit were hazardous. Another cited condition was the refinery’s failure to label certain of its vessels that held hazardous chemicals to show what the vessels contained. (Tr. 361-69, 468-72).

Jurisdiction

²AAD Watkins earned a Bachelor of Science degree in industrial technology from Texas A&M in 1985. He has been an ADD since about 2004, and before that he served as an OSHA safety specialist. (Tr. 92-94).

³The four other COs were Theresa Salazar, Wanda Murray, Jorge DeLucca and Craig Webber. (Tr. 100).

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The parties have stipulated that jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act. They have also stipulated that Respondent Delek is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. *See* Answer, pp. 1-2; Joint Prehearing Statement, p. 27, submitted August 7, 2009. I find that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary's Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends she has met her burden as to all of the remaining items. Delek contends she has not met her burden as to any of the items.

Item 4 – Alleged Violation of 29 C.F.R. 1910.119(e)(5)

Item 4 alleges a violation of 29 C.F.R. 1910.119(e)(5), a provision of OSHA's PSM standard.

The cited provision states that:

The employer shall establish a system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.

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The citation alleges that Delek “did not establish a system to promptly address process hazard analysis team’s finding[s] and recommendations.” It also alleges that the process hazard analysis team’s findings and recommendations for 1994, 1998, 1999, 2004 and 2005 were still unresolved and/or incomplete at the time of the OSHA inspection.⁴

Under the PSM standard, a refinery must conduct a process hazard analysis (“PHA”) of its equipment every five years. Under Crown, a number of PHAs had been done between 1994 and April 2005. On December 10, 2007, Delek hired Dewana Tarpley as its PSM coordinator.⁵ Her job was to oversee and manage the PSM program and to head up the PHA that was to occur in May 2008.⁶ Ms. Tarpley had some difficulty finding the information from the previous PHAs. This was due to its storage in various areas on the refinery’s premises. She ultimately found both hard copies and electronic copies of La Gloria’s previous PHAs. She found the electronic copies by accessing the safety administration portion of Delek’s network system. As she began going through the information, she realized that confirming the status of the prior PHA items was going to be a big job. She also realized that, despite being told when she was hired that all of the items from La Gloria’s PHAs had been completed, that was not the case. Ms. Tarpley took her concerns to management. During the last

⁴There is insufficient evidence showing that any PHA team’s findings and recommendations for 1998 and 2005 were unresolved, with status unknown, or not complete as of March 6, 2008.

⁵Delek had no PSM coordinator at the refinery prior to December, 2007. (Tr. 755).

⁶As Ms. Tarpley explained, PHAs are done on a five-year cycle, such that only certain of a facility’s equipment and units are due for a PHA in any given year. (Tr. 2763).

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quarter of 2007, Delek contracted with Process Safety Reliability Group (“PSRG”) to organize the information, verify the status of the PHA items, and provide that information to management. Under Ms. Tarpley’s supervision, PSRG took several weeks to develop C-19, a PHA “tracker” consisting of three lists. The first list showed the PHA items that La Gloria had closed prior to the refinery’s sale. The second list showed the PHA items that had been closed since the sale. The third list showed the PHA items that were still open. The second and third lists were updated as new information about PHA items was learned.⁷ (Tr. 736-38, 789-90, 1789-93, 1824-28, 2761-78, 2886-99).

Ms. Tarpley was the main contact for OSHA to request documents from Delek. On March 11, 2008, pursuant to a document request, Ms. Tarpley provided OSHA with C-19, the PHA tracker. Upon reviewing C-19, AAD Watkins noted there were many items still open and that a number of those were shown as high-priority items. Some items in C-19 had been open since the nineties. The AAD discussed C-19 with Ms. Tarpley and her supervisor, Donald Whaley, the environmental health and safety (“EHS”) manager. Both indicated that some items marked as closed might not in fact be closed. The AAD also spoke to Robert Martin, Delek’s emergency response coordinator. He went over a number of items on C-19 with Mr. Martin that were shown as his responsibility and as having been closed a day or two after OSHA’s arrival. The AAD learned that less than half of those items were actually closed. The AAD concluded Delek had violated the PSM standard as it had not promptly addressed and resolved the prior PHA items. (Tr. 131-40, 145-55, 160, 736-38, 1789).

⁷Ms. Tarpley testified that she did not perform any work on the first list, as it represented items that La Gloria had closed before the sale of the refinery on April 29, 2005. (Tr. 2770).

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There is no dispute that the cited standard applies to Delek. Ms. Tarpley, the PSM coordinator, testified that the standard applies due to the nature of Delek's processes and the quantity of chemicals at the facility. (Tr. 755-56, 781). *See also* C-24. The parties do dispute the number of PHA items that were still unresolved at the time of the OSHA inspection. The parts of C-19 at issue are those captioned "PHA Items Open" ("open items") and "PHA Items Closed Since Sale" ("closed items"). The open items in C-19 are two pages, numbered 11508 and 11509. The closed items in C-19 are six pages, numbered 11510 through 11515.⁸ The Secretary contends there are 30 items on these pages that were not resolved at the time of the OSHA inspection.⁹ S. Brief, pp. 17-21.

As a preliminary matter, I note that many of the items the Secretary lists in her brief as being incomplete at the time of the inspection are shown as "INS," or insurance items, on C-19. S. Brief, pp. 17-21. Ben Frank Simmons, Delek's refinery manager, explained the notations on C-19. For example, for Item 6, the first item on C-19, the "00-PHA" refers to the year the PHA was done (2000), the "ALK" refers to the unit involved, etc. (Tr. 2277-89). He noted that the "TYPE" column refers to whether the item was an insurance ("INS"), a safety ("S"), or a regulatory ("REG") item. (Tr.

⁸These numbers are the Bates Numbers Delek put on the documents it provided to OSHA.

⁹The Secretary also contends there are 26 items on pages 11510 through 11512 that, although shown as being closed on February 20, 2008, with Mr. Martin being the responsible person, were not in fact closed. S. Brief, pp. 15-16. However, 21 of the 26 items are insurance items, which, for the reasons set out below, will not be considered PHA items. Of the five items that remain, only one, Item 42, is on the Secretary's list in her brief. That item is addressed *infra*. Mr. Simmons indicated the four remaining items were not among the ones that remained open at the time of the inspection. (Tr. 2301-03). For this reason, and as the Secretary cites to no specific testimony in regard to these four items, they are not considered unresolved PHA items here.

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2284-85). He also noted that the insurance items were recommendations of Delek's property insurer in order to protect the equipment. (Tr. 1286-87). Ms. Tarpley testified that she understood that the insurance items were included in C-19 for tracking purposes. (Tr. 2911-12). Mr. Martin verified that the insurance items were recommendations of Delek's property insurer and were put on C-19 to keep track of them. (Tr. 1664-65). He stated that when Delek's insurer visited annually to look at the fire water system, he encouraged the representative to "write up" anything that would help him get equipment that would enhance Delek's fire protection system. He believed that many of the insurance recommendations were not items a PHA team would include in a PHA. (Tr. 1765-67).

Delek contends that, in view of the record, the insurance items were not actually PHA items and were put on C-19 solely as a means of tracking them. R. Brief, p. 5; R. Reply Brief, p. 9. I agree, and I find that the Secretary has not shown that the insurance items on C-19 were in fact PHA items. Thus, items on the Secretary's list in her brief that are shown as insurance items on C-19 will not be considered PHA items. Taking this into account, there are 18 items left to resolve.¹⁰ These items are summarized as follows, in the order in which they appear on the Secretary's list:

Item 93, p. 11508 – 2004 PHA recommendation for eng'g review as to use of fiber cast material for Fluor specifications was not done as of 11/4/09 per Heraeio Alex Juarez, Delek's inspection supervisor. (Tr. 1306-07, 1312, 1474-78).

Item 89, p. 11508 – 2003 PHA recommendation for eng'g review as to relief protection for certain equipment was open as of March 11, 2008 per Mr. Simmons;

¹⁰Delek has presented no evidence, and makes no claim, that the regulatory items should not be considered PHA items. In addition, the Secretary's list contains five items which, on the basis of C-19, have no type indicated. These five items will also be considered PHA items.

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eng'g review was done "fairly recent[ly]" as of 11/4/09 per Mr. Juarez.¹¹ (Tr. 1503-05, 2290-91).

Item 90, p. 11508 – 2003 PHA recommendation for eng'g review as to pipe specifications and potential piping failure still open as of 3/11/08 per Mr. Simmons. (Tr. 2290-91).

Item 69, p. 11508 – 1997 PHA recommendation for eng'g review as to emergency isolation valves remotely located was open on 3/11/08 per Mr. Simmons. (Tr. 2301-04).

Item 4, p. 11508 – 2000 PHA recommendation (high-priority safety item) to install emergency isolation valve was not installed until the 2009 turnaround. Per Mr. Simmons, open on 3/11/08; valve was ordered for 2005 turnaround but not received in time. He admitted valve could have been installed before 2009 by shutting unit down. (Tr. 147, 2291, 2301-06).

Item 25, p. 11508 – 2003 PHA recommendation to install air-actuated valve on certain equipment was open as of 3/11/08 and not addressed until 2009 per Mr. Simmons. (Tr. 2291, 2302, 2379-80).

Item 13, p. 11508 – 1997 PHA recommendation (high-priority safety item) for eng'g review concerning installation of unit isolation valves was open and still under review as of 3/3/10 per Ms. Tarpley. (Tr. 148, 2794-95).

Item 8, p. 11509 – 1994 PHA recommendation, to consider labeling production and utility lines with "water," "steam" and "cooling" still not completed as of 11/4/09. Per Mr. Martin, an employee had grabbed a steam line and been burned. (Tr. 1602-08).

¹¹The evidence fails to support a finding that the condition concerning the placement of the 60-V-15 into a mechanical integrity program presented a hazard at the work site since it was already there and no further relief was necessary. Accordingly, Item 89 is not considered a PHA item. *See Akzo Nobel Chemicals Inc.*, 18 BNA OSHC 1643, 1645 (No. 96-0062, 1998)(item alleging a violation of 29 C.F.R. § 1910.119(e)(5) vacated where record fails to support a finding that the condition "presented a reasonable probability that a hazard was present at the worksite,").

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Item 42, p. 11511 – 1994 PHA recommendation (high-priority safety item), to install remote valve actuator on FCC Unit reactor, due to fire, still open on 11/5/09, per Mr. Martin.¹² (Tr. 1755-65). *See also* Mr. Simmons’ testimony. (Tr. 2294-95, 2303).

Item 3, p. 11512 – 2000 PHA recommendation (high-priority safety item) to install emergency isolation valves on certain equipment was not completed until 2009 per Mr. Simmons. (Tr. 2300, 2303, 2396).

Item 5, p. 11512 – 2000 PHA recommendation, identical to Item 3, *supra*, except that Item 3 was a “Phase I” recommendation, while Item 5 was a “Phase II” recommendation. Completed in 2009 per Mr. Simmons. (Tr. 2300, 2303, 2396).

Item 39, p. 11512 – 1994 PHA recommendation for eng’g review of “liquid leg problem” between flare drum and flare stack was open as of 3/11/08 per Ms. Tarpley. (Tr. 2799).

Item 78, p. 11513 – 1997 PHA recommendation for eng’g review of certain equipment was still open on 3/11/08 per Ms. Tarpley. (Tr. 2803).

Item 87, p. 11513 – 2003 PHA recommendation for eng’g review of relief protection on certain equipment still open on 3/11/08. Per Ms. Tarpley, review determined relief protection was adequate, but vessel to be replaced in late 2010 or in 2011 due to environmental regulatory requirements. (Tr. 2804-05).

Item 51, p. 11513 – 1998 PHA recommendation for eng’g review as to pipe specifications for certain equipment was still open on 3/11/08.¹³ (Tr. 2806-07).

Item 59, p. 11514 – 1999 PHA recommendation (high-priority safety item) for eng’g review as to possible installation of emergency isolation valves on certain equipment still open as of 3/11/08. Per Mr. Simmons, item still in eng’g and development phase, to determine proper course of action, as of 3/2/10. (Tr. 2301-03, 2397-98).

¹²Item 9(b), *infra*, addresses a “hot spot” on the FCC Unit’s regenerator.

¹³The evidence fails to support a finding that the condition concerning the pipe specification of the discharge piping on PSV-213 in regard to the 500° Fahrenheit (“F”) oil temperature presented a hazard at the work site. Accordingly, Item 51 is not considered a PHA item. *See Akzo Nobel Chemicals Inc.*, cited in footnote 11, *supra*.

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Item 37, p. 11514 – 1999 PHA recommendation to paint exterior and channels of certain equipment was still open on 3/11/08 per Mr. Simmons. (Tr. 2301-03).

Item 67, p. 11514 – 2000 PHA recommendation to paint piping on certain equipment was still open as of 3/11/08 per Mr. Simmons. (Tr. 2301-03).

Excluding Items 51 and 89, the foregoing shows that all of the remaining items were still open and not resolved as of March 11, 2008, when Ms. Tarpley provided C-19 to OSHA.¹⁴ Delek nonetheless asserts it was not in violation of the cited standard. First, it suggests that it did have a system within the meaning of the standard, based on C-19. R. Brief, p. 25. I agree with the Secretary, however, that Delek did not have a system within the meaning of the standard. The standard required Delek to have a system in place to “promptly address the [PHA] team’s findings and recommendations,” to “assure that the recommendations are resolved in a timely manner,” and to “complete actions as soon as possible.” (Tr. 773-74; S. Reply Brief, pp. 1-2) It is clear from the record that Delek had no such system in place from the time it bought the refinery in April 2005 until almost three years later in early 2008.

Second, Delek contends it was not aware that the prior PHA items had not been resolved and that the Secretary has not shown it had knowledge of the cited condition. Delek asserts it had asked La Gloria to ensure that any outstanding PHA findings were addressed prior to the sale, so that Delek could focus on complying with the Clean Fuels Initiative, and that La Gloria had advised it this had

¹⁴Delek asserts that eight of these 16 items (excluding items 93, 90, 13, 8, 5, 39, 78 and 87) have been either “addressed in some way” or are “in progress,” pursuant to witnesses Simmons, Tarpley, and Martin. *See* R. Brief, p. 26, n. 256-57. Delek provides no transcript cites for this testimony, however, and the testimony the Secretary has cited, as set out above, shows that all of these 16 items were not completed as of March 11, 2008.

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been done. Delek claims it reasonably relied on La Gloria's representation and believed no action was needed until the next PHA, which according to Mr. Simmons was due in 2008.¹⁵ (Tr. 2109; R. Brief, pp. 15-16, 27). Mr. Whaley, Delek's EHS manager, also testified to this effect. (Tr. 1815). Mr. Whaley, however, did not begin working at the facility until July 30, 2007, and his knowledge was based on what other persons, like Mr. Simmons, told him. (Tr. 1789, 1815-17). Mr. Simmons testified that Crown directed its employees to complete all the PHAs they could before the sale. (Tr. 2108, 2271-72). Mr. Simmons admitted, however, that "We knew that there were PHA items that were outstanding..." (Tr. 2272). In any case, I find that it was not reasonable for Delek, as the new owner, to simply rely on Crown's representation and to not even look at the prior PHAs for nearly three years. I also agree with the Secretary that, if Delek had exercised reasonable diligence, it would have become

¹⁵In a related argument, Delek asserts that the PSM standard does not impose a duty on a company that buys a facility to review and recompile all of the process safety information that the previous owner had a duty to compile. R. Reply Brief, pp. 2-3, citing to *Copperhead Chem. Co. ("Copperhead")*, No. 99-2198, 2000 WL 1708284 (O.S.H.R.C. A.L.J. Nov. 15, 2000). That case involved a different matter under the PSM standard; *i.e.*, an alleged violation of 29 C.F.R. § 1910.11(d) for not completing a compilation of written process safety information ("PSI") before conducting a PHA. Although the ALJ found that Copperhead had no interest, control, or duty in compiling the PSI, Judge Schoenfeld acknowledged that the Act "generally holds a Respondent responsible for safety and health hazards within its control arising from an earlier owner's failure to comply with applicable standards..." (*Id.*, at *2). Here, Delek had by March, 2008 control over: establishing a system to promptly address the PHA team's findings and recommendations; assuring that the recommendations were resolved in a timely manner and that the resolution was documented; documenting what actions are to be taken; completing actions as soon as possible; developing a written schedule of when these actions are to be completed; and communicating the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions. The Court finds that Delek had a continuing duty to comply with the requirements of 29 C.F.R. § 1910(e)(5). Respondent failed to satisfy its duty in this regard as of March 6, 2008, nearly three years after it purchased the refinery.

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aware much earlier that there were still outstanding PHA items. S. Reply Brief, pp. 2-5. As Mr. Whaley's testimony indicates, Delek was involved with many other matters at that time and PHAs were simply not a priority. (Tr. 1818-19). The Secretary has demonstrated the knowledge element as to this citation item.

Third, Delek contends that the many improvements it has made to the facility are much more important and have had a much greater impact on safety than the PHA items. These improvements are set out in detail in Delek's brief. R. Brief, pp. 5-14, 16-24. Delek also asserts it has spent millions of dollars on these improvements. R. Brief, pp. 14-15, 24. The Secretary counters that many of the improvements have been profit-enhancing projects, based on Mr. Simmons' testimony, and that a relatively small amount was spent on safety. S. Brief, pp. 8-9. Regardless, I agree with the Secretary that Delek may not excuse its failure to comply with the standard by arguing that other projects it has completed were more important. S. Reply Brief, pp. 2-3. Delek's contention is rejected.

As to the employee exposure element, the Secretary notes that the unresolved PHA items include most of the units in the refinery. *See* S. Brief, pp. 17-21, and C-19. As she also notes, the employees who work in those units would be exposed to the hazards posed by the cited conditions. One specific example she notes is Item 42, on page 11511 of C-19. This item is a "high priority" safety item, and the recommended action is to "install remote valve actuator on FCC Unit reactor, due to fire." This item was still open on 11/5/09, in view of Mr. Martin's testimony. He also testified that

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without the valve, employees were exposed to a fire and explosion hazard.¹⁶ (Tr. 1759-64). The Secretary points out that 16 employees work in the FCC Unit, which operates on a 24-hour basis 365 days a year. Four employees work in the unit on each 12-hour shift. S. Brief, pp. 22-23. The Secretary has demonstrated the employee exposure element, and, as she has shown all four elements of her burden of proof, this citation item is affirmed. It is affirmed as serious, based on the AAD's testimony that various items, some of which were high-hazard items, were still open and presented explosion and fire hazards. (Tr. 273). *See* section 17(k) of the Act (a violation is serious if there is a substantial probability that the cited condition could result in death or serious physical harm).

The Secretary has proposed a penalty of \$6,300.00 for this item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation and to the employer's size, history and good faith. *See* section 17(j) of the Act. The AAD testified that the violation had high gravity, due to the outstanding PHA items that posed an explosion and fire hazard. He further testified that a 10 percent credit was given for Delek's history. No credit was given for size, due to Delek's 270 employees, or for good faith, due to the deficiencies in Delek's safety program. (Tr. 272-73).

There are other factors to consider in determining an appropriate penalty for this item. First, I note that of the 101 PHA items contained in C-19, the record, as set out *supra*, shows that there were 16 outstanding PHA items at the time of the OSHA inspection. I have also considered the improvements that Delek has made to the facility, as discussed above. The Secretary, however, asserts

¹⁶The Court notes that of the 16 cited items addressed above, five are high-priority safety items. Further, three of these were still outstanding at the time of the hearing in this matter.

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the amounts spent on safety were relatively small. Further, as found above, Delek did not address the pending PHA items for nearly three years, some of the items still have not been resolved, and three of these are high-priority safety items. And, as the Secretary points out, the refinery has had a number of accidents since Delek bought it. There have been eight to ten fires, some of which were caused by the unexpected release of hydrocarbons. (Tr. 1608-09, 1628-29). The worst of these, by far, was a fire and explosion in November 2008 in the SAT Gas Unit, which killed two employees and injured several more. (Tr. 1629, 2332, 2396-97). Another incident occurred about six months before the OSHA inspection began. A compressor tripped, forcing the DHT Unit into a hot shutdown and causing two fires. (Tr. 1631-38; C-60). Other reported accidents are set out elsewhere in this decision.¹⁷ *See also* S. Brief, pp. 6-8.

On balance, and upon considering all of the foregoing, the Court finds the proposed penalty of \$6,300.00 to be appropriate for this item. That penalty is assessed.

Item 6 – Alleged Violation of 29 C.F.R. 1910.119(f)(3)

The cited standard provides as follows:

The operating procedures shall be reviewed as often as necessary to assure that they reflect current operating practice, including changes that result from changes in process chemicals, technology, and equipment, and changes to facilities. The employer shall certify annually that these operating procedures are current and accurate.

¹⁷*See also* C-59, at p. 02124, where Mr. Martin complained when looking into a tank overflow occurring on September 24, 2007 about an ongoing attitude at Delek to not want to document incidents. (Tr. 1573, 1610; C-59).

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Item 6 alleges that Delek did not ensure that the operating procedures for the FCC Unit (“FCCU”) were current, accurate and certified annually as of April 24, 2008.

The FCCU’s process contains 397,500 pounds of flammable mixtures. *See* C-24, p. 767. The process involves gas oil and catalyst entering the reactor. There, the gas oil is “cracked” into smaller hydrocarbons. The resulting vapors go to the fractionator, another vessel in the FCCU. After further processing, the products and vapors become gasoline. Sixteen employees work in the FCCU, which operates 365 days a year. There are four employees on each of the two 12-hour daily shifts. (Tr. 169-72, 420-21).

The AAD visited the FCCU’s control room on February 28, 2008. He requested the operating procedures (“OPs”) for the unit and was shown OPs dated 1999. OSHA then requested the unit’s OPs by subpoena. The OPs received, JX-X, were not the same, having different dates.¹⁸ The AAD returned to the FCCU and asked for the OPs the operators were actually using. He was handed a third set of OPs that showed La Gloria’s name and a date of September 14, 1992. This third set showed it had been prepared by Isaac Johnson and signed by Jimmy Jones. Messrs. Martin and Whaley were present at the time, and the AAD asked them for a copy of the 1992 OPs. No such copy was ever provided. The AAD later reviewed JX-X. He noted that the OPs in JX-X were not signed to certify they were correct and accurate. The AAD concluded that the failure to have one current set of OPs for the FCCU that was properly certified was a violation of the standard. (Tr. 274-90; C-27).

¹⁸The AAD testified that Ms. Tarpley provided OSHA with JX-X. (Tr. 278).

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Jeffrey Gaddis is an “A” operator in the FCCU. He has worked at the refinery for about 30 years. For most of that time, he has worked in the FCCU. He is responsible for operating the unit and overseeing the three other employees on his shift. Mr. Gaddis testified there were three sets of OPs in the FCCU control room at the time of the inspection. One was an old set, and the other two were drafts that were being updated. At the time of OSHA’s investigation, he used the old set because he felt comfortable with it. Also, he had not been told that the drafts were finished. Mr. Gaddis said the old set of OPs had been in place in the unit for a long time. He did not know whether Delek, in 2008, had a procedure to ensure the OPs in his unit were current, accurate and certified on an annual basis. He also had never seen any type of a paper certification by anyone representing that the OPs were accurate or current. (Tr. 169-77).

Patrick Todd is also an “A” operator in the FCCU. He has worked in the FCCU for 25 years. His duties are the same as those of Mr. Gaddis. Mr. Todd testified there were three sets of OPs in the FCCU’s control room in March 2008. He said there were draft OPs being worked on at that time and that the OPs were updated after the OSHA inspection. He believed he had been using La Gloria’s OPs at the time of the OSHA inspection. (Tr. 417-20, 423-28).

Delek presented the testimony of Mr. Simmons, the refinery manager, to rebut the Secretary’s evidence. According to Mr. Simmons, Delek, after purchasing the refinery in 2005, hired procedure writers who, together with an operator from each unit, updated all of the OPs for all of the units. Drafts of the updated OPs were provided to the units for review and comment by the other operators. The OPs were finalized in 2006, and further updates were made to Delek’s OPs in 2007 and 2008. Mr.

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Simmons testified that he and Alan Clover certified JX-X as being current and accurate on July 22, 2008. He noted that the procedures in JX-X had multiple revision dates. He said that was Delek's process for showing the last time that a procedure was actually revised. (Tr. 2057-66).

Delek also elicited testimony from Mr. Todd as to this item. Mr. Todd testified he was a "major writer" of the OPs shown in JX-X. He said that most of the OPs written in 2005 were accurate and were left as they were. He also said that, to the best of his knowledge, as of February or March of 2008, JX-X was an accurate and complete copy of the FCCU's OPs. (Tr. 438-41).

Based on the foregoing, the Court finds the Secretary has shown the alleged violation. As the Secretary indicates, Delek overlooks the testimony of Messrs. Gaddis and Todd. S. Reply Brief, pp. 7-9. That testimony shows that they were using the old procedures of La Gloria at the time of the inspection. (Tr. 174, 425-28). Those procedures were over 15 years old in February 2008, and the draft OPs in the unit were not being used. Mr. Gaddis testified he had never been told that the drafts had been finished. (Tr. 174). The record establishes there were no current, accurate and certified OPs in the unit at the time of the inspection.¹⁹ While Mr. Todd believed the OPs in JX-X were correct and accurate at that time, they were not certified.²⁰ *See Akzo Nobel Chemicals, Inc.*, No. 96-0062, 1998

¹⁹Mr. Simmons testified that the OPs in JX-X were certified on July 22, 2008. That date, however, is several months after the date when OSHA discovered the violation.

²⁰The Court agrees with the AAD that a certificate under this PSM standard must be in writing. The Court also finds that a properly executed written certificate under this PSM standard must be dated and signed by the person who is attesting that the OPs are current and accurate. (Tr. 577-78). The signature must also be identifiable. This requirement to certify in writing is at least implicit in the language of 29 C.F.R. § 1910.119(f)(4). *See Albemarle Corp.*, 18 BNA OSHC 1730, 1732, (Nos. 93-0848, 93-1715, 1999). *See also* Process Safety Management of

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WL 799135, at *12 (O.S.H.R.C.A.L.J., Nov. 13, 1998)(violation of 29 C.F.R. § 1910.119(f)(3) affirmed when compliance officer “did not observe any certificates on the documents.”) JX-X shows the OPs were revised on multiple dates in 2005 and 2007. The “Approved by” box at the top of each procedure, however, is blank.

As an example of employee exposure, the Secretary states that “start-up procedures ... have changed over the years in response to new equipment,” citing to Mr. Todd’s testimony. S. Brief, p. 29. Delek asserts the Secretary “misstates the record” here and in other respects. R. Reply Brief, p. 13. I disagree. Delek’s question to Mr. Todd and Mr. Todd’s answer are as follows:

Q. The basic procedure has stayed the same, has it not?

A. On most equipment, yes. The start-up procedure – the overall start-up procedures have changed accordingly with new equipment and stuff that we would get in, and then you just update your procedures as the equipment comes in.

(Tr. 441-42). A reasonable inference from the above is that there were changes to the FCCU’s OPs that were required to be put in writing and certified. A further reasonable inference, in light of the 15-year-old OPs in use at the time of the inspection, is that those changes were not being put in writing and certified. In view of the record, I find the Secretary has established all the elements of her burden

Highly Hazardous Chemicals; Explosives and Blasting Agents, 57 Fed. Reg. 6356, 6380 (February 24, 1991)(“Since it is extremely important to the safe operation of covered processes that operating procedures remain current and accurate, OSHA has added a precaution to guard against the use of outdated or inaccurate operating procedures by requiring that an employer verify annually that the operating procedures are current and accurate.”).

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of proof. The knowledge element is shown by Mr. Simmons' testimony. (Tr. 1987-90, 2057-66).²¹

This item is affirmed as serious. I agree with the Secretary that not having current, accurate and certified OPs exposed employees to the hazards of uncontrolled hydrocarbon and other chemical releases.²²

The Secretary has proposed a penalty of \$2,250.00 for this item. The AAD testified that the cited condition was a hazard in that employees in the FCCU would not have proper OPs in the case of an emergency or other events such as startup or shutdown of the unit. At least 16 employees (four per shift) were exposed to the hazard. Delek received no reduction for size or good faith as to this item, but it did receive a 10 percent reduction for history. (Tr. 288-90). The Court finds the proposed penalty of \$2,250.00 appropriate. That penalty is accordingly assessed.

Item 8 – Alleged Violation of 29 C.F.R. 1910.119(j)(4)(i)

²¹From 2002 through April, 2005, Mr. Simmons was the Area Manager who oversaw the FCCU. From April, 2005 through May, 2007, he was the operations manager whose area of responsibility included the FCCU. (Tr. 1987, 1989-90).

²²To support her position that the violation was serious, the Secretary notes an accident that injured an employee who was working on a power feed to the FCCU's flare in 2007. The flare malfunctioned, causing burning hydrocarbons to spew out. There was a flash fire, resulting in radiation burns to the employees's face and eyes, and the employee required hospitalization. Gary Baldwin, the employee's supervisor, agreed that a contributing cause of the accident was not having a procedure for the work being done. (Tr. 1199, 1236, 1250-54, 1289-91, 1297-98).

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The cited standard requires inspections and tests to “be performed on process equipment.” Item 8 alleges that all safety/mitigation systems supporting process equipment were not inspected and tested under a formal preventive maintenance program. It also alleges that as of March 6, 2008 Delek did not establish, implement and document a system to ensure the operability, function and effectiveness of the positive pressurization unit (“PPU”) in the control room of the FCCU.

According to Delek’s Mechanical Integrity Manual (“Manual”), the purpose of a PPU is to keep “harmful or hazardous vapors from entering” a control room by means of positive pressure. *See* C-51, p. 750. C-51 required weekly checks of the cited PPU to ensure that it was working. Documented inspections were to be done biannually and were to be kept on file. *Id.* When the AAD asked about this matter, he learned there was no documentation of testing or inspections of the PPU. Also, one FCCU operator told him the PPU had been down for years. The AAD saw a number of electrical appliances in the FCCU control room. He concluded that they were a hazard because, if flammable vapors entered the room, the appliances would be an ignition source. (Tr. 290-306, 434-36; C-4, C-6).

The cited PPU has been in place in the FCCU’s control room since 1978 or 1979. It consists of an intake stack that draws in outside air and a fan that pulls the air into the control room. The PPU contains heating and cooling elements. As air is blown through the PPU, it passes over the heating and cooling elements. Without these elements the control room could still be pressurized, but would be

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uncomfortable.²³ The PPU has two sensors. One connects to an alarm that indicates whether the control room is pressurized. The other detects the presence of combustible gas. This sensor, an “LEL gas monitor,” has an alarm set at 20 percent. If it reaches 50 percent, the PPU shuts down to keep vapors from entering the control room.²⁴ This protects the operator and equipment in the room in the case of an uncontrolled release of hydrocarbon vapors, so the operator can continue to operate the equipment in the control room. (Tr. 177-80, 189, 230-31, 236-37, 259-60, 383, 404-05, 409-10, 1244, 1269-70, 1282-83, 1287-88, 1336-37, 2084-85).

At the time of the OSHA inspection, the control room was not pressurized. The blower function of the PPU could be used to pressurize the room, but the heating and cooling elements were not working. When the PPU was turned on, it brought in outside air that was not temperature controlled. This made it unpleasant to work in the control room. The operators were thus not using the PPU as a matter of course because it was not fully functional. (Tr. 177-80, 190, 230-31, 389-91, 1241-43). Mr. Gaddis, an FCCU operator, testified that this had been the situation for eight to ten years before the inspection. He had submitted a work order during that period requesting that the PPU

²³The FCCU control room also has an air conditioner that is not related to the PPU. The record shows, however, that the air conditioner cycles on and off, unlike the PPU. The record further shows that the air conditioner frequently did not operate properly. It broke at least ten times between 2005 and 2008 and had to be repaired. (Tr. 383, 414-415, 1283, 1299-1301; R-N).

²⁴Mr. Simmons, the refinery manager, testified the PPU shuts off when the gas monitor detects vapors at 20 percent. (Tr. 2361-62). Gary Baldwin, the electrical and instrumentation (“E&I”) supervisor, testified this occurs when vapors at 50 percent are detected. (Tr. 1199, 1236, 1287-88). Mr. Baldwin is the second-highest-ranking employee at Delek with respect to electrical matters. (Tr. 1199, 1296). His testimony in this regard is thus credited over that of Mr. Simmons.

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be repaired, but no repairs were undertaken. (Tr. 177-80). Mr. Baldwin testified he became aware of the PPU not working properly in 2006.²⁵ He began looking for a company that could repair it. In September 2008, Delek engaged Air Cybernetics. It took Air Cybernetics some time to locate the heating and cooling parts needed for the repairs. The repairs were made in March of 2009. The repairs took around two weeks, required three to four Air Cybernetics employees, and cost about \$25,000.²⁶ (Tr. 387-93, 1199, 1236, 1241-44).

C-51 states that “[o]perators should check the lights, horn and test/acknowledge buttons at least weekly for proper operation. If a problem is found a work order should be written.” C-51, p. 750. Mr. Gaddis testified he had never seen this requirement before the hearing. He indicated the operators in the FCCU did not check the PPU before March 2008 and that he knew of no rules or procedures that required them to do so. He said that before the repairs, the alarm light indicating there was no pressurization was on all the time because the PPU was turned off. He also said that since the repairs, he checks the PPU’s alarms on a regular basis. (Tr. 180-81, 190, 256-60). C-51 further states that “[d]ocumented inspection[s] should be done biannually.” *Id.* Mr. Baldwin testified he received a quarterly e-mail from the inspection department to test the LEL gas alarms on the PPUs in the various units. Upon receiving the e-mail, he would send an employee to test and calibrate the PPU alarms and

²⁵Mr. Baldwin at first thought the PPU was not working at all. He later learned that only the heating and cooling elements were faulty and that the blower itself worked. (Tr. 1242-43).

²⁶Another problem for many years was that the refrigeration system used to cool the PPU’s air utilized water from the refinery’s cooling water tower. This resulted in the tubes to the PPU’s cooling element condensers being clogged. This issue was finally resolved in March 2009, when the refinery put in lines to use city water. (Tr. 385-86, 395-99, 402-44).

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to inspect the belts on the motors of the PPU blowers. He received no feedback as to this testing, and no records in this regard were kept.²⁷ (Tr. 1244-47, 1261-64).

The record shows that the cited PPU was not operating properly at the time of the OSHA inspection and had not been for many years. While the blower part of the PPU was functional, the operators kept it turned off as it was uncomfortable to be in the control room without the heating and cooling elements working. The record also shows that before the OSHA inspection, operators were not checking the PPU alarms as required by C-51. And, while E&I employees reportedly did quarterly tests and inspections of the LEL gas alarms on the PPU, no records of these quarterly tests were being maintained as set out in C-51. Moreover, the Manual stated that a “Documented [PPU] inspection should be done biannually.” It also called for these PPU inspections to be documented and “kept on file.” (C-51, p. 750).²⁸ Delek contends that the cited standard does not apply because the PPU is not

²⁷Mr. Juarez, the inspection supervisor, agreed his office sent the e-mails to the E&I department quarterly. He had seen PPU inspection records before, but not for a long time and well before Mr. Baldwin’s tenure as the E&I supervisor. (Tr. 1312, 1352-53, 1359-63). Mr. Baldwin testified that has served as an electrical instrumentation supervisor since Delek bought the refinery in April, 2005. (Tr. 1199-1200).

²⁸The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur. *U.S. ex rel. Compton v. Midwest Specialities, Inc.*, No. 96-4374, 1998 WL 30811, at * 7, n. 6 (6th Cir. Jan. 22, 1998). There is no documentation in the record that shows that the biannual PPU inspection had ever been performed by Delek. Accordingly, the Court finds that the biannual PPU inspections were not performed by Delek as required. The Court further finds that Delek failed to test and inspect the PPU in the FCCU Control Room to ensure it was in operation, was functioning properly and was effective in its function.

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process equipment. The Secretary, however, contends that the PPU is process equipment within the context of the PSM standard.

As the Secretary notes, the PSM standard states that subsection (j)(4) applies 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.” *See* 29 C.F.R. 1910.119(j)(1). The Secretary asserts that the PPU is process equipment under (j)(1)(v) because it has controls, including monitoring devices, sensors and alarms. She also asserts the PPU is a safety system, under 29 C.F.R. 1910.119(d)(3)(i)(D) and (H). S. Brief, p. 34.

The PPU is located in the FCCU’s control room. Mr. Juarez, Delek’s inspection supervisor, testified the control room is necessary to operate the FCCU’s process and that it is an essential part of the process. (Tr. 1347-50). Mr. Juarez also testified, as did Mr. Todd, an FCCU operator, that the control room has controls, alarms and monitoring devices needed to run the process.²⁹ (Tr. 419-20, 1351). It is clear from the record the PPU also has sensors and alarms. (Tr. 189-90, 257-59, 1269). Mr. Juarez testified that any work order pertaining to a defect that impacted the PPU’s safe operation would be of very high importance and rated a two, on a scale of one to ten with one being the most important. (Tr. 1354-56). The Secretary concludes that subsection 119 (j) applies to the PPU because it has controls, including monitoring devices, sensors and alarms. S. Brief, pp. 34-35.

²⁹Mr. Todd also testified that a portion of the PPU was not working in the FCCU’s control room in March, 2008 and confirmed that it had not been working for a number of years. (Tr. 428, 459-60).

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As to the PPU also being a safety system, the Secretary notes that C-51, Delek's Manual, states that the purpose of the PPU is to keep "harmful or hazardous vapors from entering" the control room. She points out that the record shows the PPU is intended to protect the operators in the control room. It is thus an important element in the safety of employees. She further points out that the PPU is also intended to protect the process in the case of an upset. That is, the PPU keeps harmful vapors out of the control room so the process can continue to be handled and brought under control. The Secretary notes the Delek managers who testified to this effect and acknowledged the critical safety function of the PPU. These include E&I Supervisor Baldwin, Inspection Supervisor Juarez, Refinery Manager Simmons and Emergency Response Coordinator Martin. (Tr. 1239-40, 1354-59, 2359-60, 3067-68). Toby Cubine, a co-owner of Air Cybernetics with 21 years of experience with PPUs, also testified as to the safety functions of the PPU. (Tr. 379-81, 404). The Secretary concludes the record shows the PPU is a safety system under the standard. S. Brief, p. 35.

The Secretary contends that the PPU's operation also falls under the definition of "process." The PSM standard, at 29 C.F.R. 1910.119(b), defines "process" as:

[A]ny 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. For 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. (Emphasis added).

The Secretary asserts that utilizing a PPU constitutes "any use" as well as "handling" of vapors in the event of a release. She notes the testimony of Mr. Cubine that the pressurized air inside the

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control room presses against the air on the outside and pushes it back. (Tr. 404-05). The PPU thus “handles” the highly hazardous chemicals in a process in the case of an upset and is covered by the standard. The Secretary also notes OSHA interpretation letters in the record that establish that process equipment can include equipment that does not come in direct contact with the process chemicals. In one such letter dated May 25, 1994, a writer asks about whether hardware that contacts explosives is covered by the PSM standard. *See* C-56, p. 1 (Ques. 1). OSHA’s response, in relevant part, is:

The employer is required to determine the extent of the process used to manufacture the explosive device described above. A covered process may include equipment within the facility which may or may not contact the explosive, or explosive device components, during the manufacturing activity.

In this same letter, another writer asks about the limit of process equipment that must be included in a mechanical integrity program, which is subsection 119(j) of the standard. *See* C-56, p. 2 (Ques. 2). OSHA’s response is as follows:

OSHA believes that certain equipment is critical to process safety. At least the equipment specified in (j)(1) must be subject to the requirements of 1910.119(j). However, if an employer deems additional equipment to be critical to the safety of a particular process, the employer should consider that equipment to be covered by 1910.119(j) and treat it accordingly. (Emphasis added).

In another letter dated January 31, 2008, a writer asks if utility systems like steam, nitrogen, electricity, plant air and process water are part of the PSM covered process, especially since they do not contain a highly hazardous chemical. *See* C-57, pp. 1-2. OSHA’s response is on page 3 of C-57:

It is OSHA’s long-standing position that utility systems *are* part of the PSM-covered process when employers use them to control/prevent and mitigate catastrophic releases of HHC. A process is defined in 29 CFR 1910.119(b) as any activity **involving** a highly hazardous chemical ... if an employer determines that a utility system or any

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aspect or part of a process which does not contain an HHC but can affect or cause a release of HHC or interfere in the mitigation of the consequences of a release, then, relevant elements of PSM could apply to these aspects. (Emphases in original).

The Secretary notes that, based on the foregoing, OSHA's position is that a covered process under the PSM standard may include equipment in a facility that is not in contact with a highly hazardous chemical. She further notes that this interpretation comports with the purpose and meaning of the standard, as set out in Appendix C to the standard. *See* C-3, App. C. The Secretary contends that OSHA's interpretations and opinions regarding the standard, as set forth in C-56, C-57 and Appendix C, are entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). S. Brief, pp. 35-37.

I agree with the Secretary that OSHA's interpretation is entitled to deference. *See Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991) (an agency's interpretation is entitled to deference so long as it is "reasonable" and "sensibly conforms to the purpose and wording of the regulations") (citations omitted). I find that OSHA's interpretation here meets this test. The PPU has monitors, or sensors, and alarms. Its purpose is to prevent hazardous vapors from entering the control room, so as to protect employees and equipment. It is not involved in any actual processing of hazardous chemicals. C-56 and C-57, however, noted above, make it clear that a covered process under the PSM standard may include equipment that is not in contact with a highly hazardous chemical. They also make it clear that equipment that is "critical to the safety of a particular process" or that "can affect ... a release of HHC" may be included. As set out *supra*, four Delek managers acknowledged the critical safety

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function of the PPU. (Tr. 1239-40, 1354-56, 1359, 2359-60, 3067-68). And, as already noted, the PPU can affect a release, in that it prevents hazardous vapors from entering the control room.

Appendix C, part of C-3, also supports OSHA's interpretation. The "Mechanical Integrity" provisions of Appendix C state in relevant part as follows:

The first line of defense an employer has available is to operate and maintain the process as designed, and to keep the chemicals contained. This line of defense is backed up by the next line of defense which is the controlled release of chemicals through venting to scrubbers or flares, or to surge or overflow tanks which are designed to receive such chemicals, etc. These lines of defense are the primary lines of defense or means to prevent unwanted releases. The secondary lines of defense would include fixed fire protection systems like sprinklers, water spray, or deluge systems, monitor guns, etc., dikes, designed drainage systems, and other systems which would control or mitigate hazardous chemicals once an unwanted release occurs. These primary and secondary lines of defense are what the mechanical integrity program needs to protect and strengthen these primary and secondary lines of defenses where appropriate. The first step of an effective mechanical integrity program is to compile and categorize a list of process equipment and instrumentation for inclusion in the program. This list would include pressure vessels, storage tanks, process piping, relief and vent systems, fire protection system components, emergency shutdown systems and alarms and interlocks and pumps.

Based on all of the foregoing, I find that the PPU is process equipment within the meaning of 29 C.F.R. 1910.119(j)(1). In so finding, the Court has considered all of Delek's arguments. For example, Delek urges the standard does not apply since PSM-covered equipment must contain or be connected to equipment containing more than a threshold quantity of a highly hazardous chemical. It also urges that the standard does not apply as the PPU does not qualify as a process, *i.e.*, it does not store, manufacture, move, handle or otherwise have an impact on the process. Finally, Delek urges the standard does not apply as the PPU is not process equipment meeting any of the specific terms under

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29 C.F.R. 1910.119(j)(1). R. Brief, pp. 37-45; R. Reply Brief, pp. 15-21. Delek's arguments, however, are not supported by the record, especially the OSHA interpretation letters and Appendix C. The Court has also considered the testimony of John Reynolds, an engineer and Delek's expert for this item.³⁰ The Court has noted Mr. Reynolds' education and qualifications and his extensive experience in the refinery business. (Tr. 2929-67). Like Delek's arguments, however, Mr. Reynolds' opinions are simply not supported by OSHA's interpretation letters and Appendix C.³¹ I do not find his opinions persuasive. I find, accordingly, that the cited standard applies to the PPU.

There are several arguments of Delek that, despite the above, must be addressed. Delek urges that, beyond the equipment explicitly set out in 29 C.F.R. 1910.119(j)(1), it is the employer's decision to determine that any other equipment is also covered. It also asserts that it has evaluated its facility and determined the PPU is not part of the covered process. R. Brief, p. 41; R. Reply Brief, pp. 16-18. In support of this argument, Delek points to OSHA's statements in C-56 and C-57, as follows:

³⁰The Court has additionally considered the testimony of Frederick Brooks, the Secretary's expert for this item, and has noted his education, qualifications and experience. (Tr. 801-31, 893). In view of the Court's findings above, his opinions need not be set out in this decision.

³¹At the end of her cross-examination, the Secretary's counsel asked Mr. Reynolds whether it was true that a covered process under the standard may include equipment that does not come into contact with a highly hazardous chemical if that equipment is critical to the safety of the process. Mr. Reynolds responded that, if "OSHA believes it is true, and [OSHA] has issued that in an interpretation letter, it must be true." (Tr. 3012-13).

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However, if an employer deems additional equipment to be critical to a particular process, that employer should consider that equipment to be covered by [paragraph (j)(1)] and treat it accordingly.³²

Delek also points to certain testimony of Mr. Simmons. Mr. Simmons, however, stated only that he did not consider the PPU process equipment. He did not state he had made any evaluation in that regard. (Tr. 2087, 2124). In any case, I have already noted the testimony of four Delek managers, including Mr. Simmons, indicating that they considered the PPU critical to the safety of the process. (Tr. 1239-40, 1354-56, 1359, 2359-60, 3067-68). Delek's argument is rejected.

Delek next notes the testimony of Mr. Baldwin indicating that he believed the air conditioner in the control room also provided positive pressure and did the same job the PPU did. R. Brief, pp. 52-53. Mr. Baldwin did, in fact, testify to that effect. (Tr. 1283-85, 1299). As noted *supra*, the record shows the air conditioner cycled on and off, unlike the PPU. The record also shows the air conditioner frequently did not operate properly and had to be repaired at least ten times between 2005 and 2008. (Tr. 383, 414-415, 1300-01; R-N). Finally, Mr. Juarez testified that, to keep the control room safe, the PPU had to be on continuously to keep any fumes or hazardous vapors out. (Tr. 1259). Delek's suggestion that the air conditioner served the same purpose as the PPU is rejected.

Delek further urges that the Secretary did not prove that the FCCU's control room was a classified area, such that the unclassified electrical equipment in the room posed a hazard. R. Reply Brief, pp. 21-24. I find, however, that the testimony of Mr. Baldwin establishes that the entire FCCU,

³²See C-56, p. 2, and C-57, p. 5, n.4.

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including the control room, was a Class I, Division (“Div.”) 2 area.³³ The AAD testified that during the inspection, Mr. Baldwin told him the control room was a Class I, Div. 2 area. He also testified that both Messrs. Baldwin and Martin told him that they were aware that the control room should be pressurized and that the pressurization for the room was not working.³⁴ (Tr. 294-95, 315, 323). The AAD further testified that due to the control room’s classification, it had to have either Class I, Div. 2 electrical equipment or a properly-operating PPU. The AAD stated that because the room had neither, an explosion could have resulted if hazardous vapors had entered the room. (Tr. 295).

At the hearing, Mr. Baldwin denied telling the AAD that the control room was a Class I, Div. 2 area. He agreed that he had told the AAD that the FCCU was a Class I, Div. 2 area. (C-28). He stated that while he himself was not qualified to make such a determination, he knew the FCCU was a Class I, Div. 2 area because of his 34 years at the facility and other professionals at the refinery informing him of the classification. He stated that the purpose of having a PPU in the FCCU’s control room was to help maintain positive pressure in the room. When asked the benefit of that, he said:

Because inside control rooms, there’s not Class I, Div. 2 instrumentation or whatnot. You maintain positive pressure so that you can use that instrumentation within the confines of that room. (Tr. 1239-40).

³³A Class I, Division 2 area includes a location “to which ignitable concentrations of gases or vapors might occasionally be communicated unless such communication is prevented by adequate positive-pressure ventilation from a source of clean air, and effective safeguards against ventilation failure are provided.” *See* 29 C.F.R. 1910.399(2)(iii).

³⁴C-21 is the AAD’s OSHA 1-B for this item. It contains basically the same information, but states that Mr. Baldwin told the AAD that the entire refinery was a Class I, Div. 2, area.

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Mr. Baldwin then agreed that if the PPU was on and functional, classified electric lines were not needed. He also agreed that the PPU's purpose is to protect both the occupants and any equipment in the control room from hazardous vapors in the case of a release. (Tr. 1240). Mr. Baldwin's testimony was thus in agreement with that of the AAD. That is, the control room either had to have a properly-functioning PPU to keep hazardous vapors out or it had to have Class I, Div. 2 electrical equipment in it, so that, if hazardous vapors entered the room, there would be no ignition sources. Mr. Baldwin's testimony, along with the rest of the record, plainly supports a finding that the control room, like the rest of the FCCU, was a Class I, Div. 2 area. Delek's argument is rejected.

The foregoing establishes Delek violated the terms of the cited standard. It also establishes that control room operators such as Messrs. Gaddis and Todd were exposed to the cited condition. Finally, it establishes that Delek managers, including Messrs. Baldwin and Martin, had knowledge of the condition. This item is affirmed as a serious violation, as it is clear that an explosion in the control room could result in death or serious injuries.

The Secretary has proposed a penalty of \$6,300.00 for this item. The AAD testified that this item had high gravity because of the hazard of explosion. The PPU was not working properly and the operators kept it turned off. The condition had existed for many years, Delek managers were aware of it, and the PPU was not repaired until a year after OSHA discovered the condition. No reductions were given for good faith or size, but a reduction for history was given. (Tr. 323-24, 271-74). The Court finds the proposed penalty appropriate. A penalty of \$6,300.00 is therefore assessed.

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Item 9(b) – Alleged Violation of 29 C.F.R. 1910.119(l)(4)

Item 9(b) alleges a violation of 29 C.F.R. 1910.119(l)(4), which provides as follows:

If a change covered by this paragraph results in a change in the process safety information required by paragraph (d) of this section, such information shall be updated accordingly.

This item alleges that Delek did not ensure that a MOC was documented and on file when steam lances were applied to identified “hot spots” on the exterior of processing equipment in the FCCU. The cited equipment is the regenerator, which is one of the main vessels in the FCCU. It is about 50 feet high and 20 feet wide, and another vessel, the reactor, sits on top of it. The regenerator’s shell is made of carbon steel. Inside the shell is a 4-inch liner of gunite, a cement material, called the refractory. The refractory’s purpose is to protect the shell from the heat and the erosive effect of the process that takes place in the vessel.³⁵ This erosion affects the refractory, however, causing it to thin, crack and otherwise deteriorate over time. The regenerator’s manway is an area that is regularly monitored for hot spots due to the refractory’s tendency to thin there. The subject hot spot was detected in early 2008 during a routine infrared inspection by All Tech. All Tech is the contractor Delek uses to make such inspections. The hot spot was just above the regenerator’s manway. It was about 2 feet by 1 foot.³⁶ After it was detected, a steam lance was used to cool the hot spot. The steam lance was a 6 to 8-foot pipe that was connected to a steam hose. The hose was connected to a steam

³⁵The regenerator’s interior temperature is 1220° to 1280° F. (Tr. 182-84, 219-21, 2223).

³⁶Messrs. Gaddis and Juarez testified the hot spot was about 2 feet by 1 foot, while Mr. Simmons indicated it was about 14 inches by 8 inches. (Tr. 234, 1394-95, 2147).

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header, which provided steam from the refinery's boiler system. The pipe had holes in the end of it, and it was welded to legs that were set up at the manway. The pipe was directed at the hot spot so that the steam continuously leaving it would cool the spot. The steam lance was used on the hot spot until the 2009 turnaround, when the refractory was repaired.³⁷ (Tr. 171-72, 181-88, 213-14, 222, 233-36, 325-27, 421-23, 429-32, 1365-67, 1370-74, 1383, 1394-95, 2144-45, 2147-50; C-34, pp. 2-3).

The AAD became aware of the hot spot while he was inspecting the FCCU on February 28, 2008 when he noticed steam on the regenerator during his initial walk around the facility. He concluded the steam lance was a change in operation that required an MOC procedure, especially since the vessel would require more frequent inspections due to the hot spot. He believed that if the heat continued on the vessel wall, the metal's composition would change and the wall could become brittle and rupture. He also believed that there would be a problem keeping the hot spot cool if the boiler supplying the steam went down for some reason. The AAD learned that there were no written procedures in regard to using the steam lance on the hot spot. (Tr. 325-32, 592).

Because of the AAD's concern about the hot spot, Delek had Aptech Engineering Services ("Aptech"), a consulting company it contracts with as needed, evaluate the regenerator and prepare a report. The report, C-34, dated June 2, 2008, states it is a common industry practice to apply steam to a hot spot on the exterior of a vessel wall to keep the temperature below about 600° F. It also

³⁷This same area had a similar hot spot from early February to mid-August of 2005. A steam lance was applied to the hot spot, until the refractory was repaired sometime after mid-August when a turnaround took place. The record indicates that the refractory is inspected and repaired at every turnaround. (Tr. 1374-75, 1387-92, 1407-08; C-34, p. 3).

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states that, upon considering the maximum allowable temperature for the regenerator's exterior wall (802° F) and assuming the hot spot in 2005 had not been cooled and had had a "steady state temperature" of 850° F, there was "substantial remaining life" in that area. According to the report, if no steam was applied to the subject hot spot and the spot ran at 900° F, the vessel had a minimum of 12,248 hours (about a year and a half) before it should be shut down for inspection and maintenance. And, if the hot spot was cooled continuously with steam and kept below 650° F, then it had "essentially infinite life" and operation in that mode was safe. (Tr. 1368-69, 1494-96, 1525-28; C-34, pp. 2-4).

Delek contends the Secretary has not shown that the PSM standard applies to the regenerator as it does not process a flammable liquid or gas in a quantity of 10,000 pounds or more. I do not agree. As the Secretary points out, the PSM standard applies to a process involving a flammable liquid or gas on site in one location in a quantity of 10,000 pounds or more. *See* 29 C.F.R. 1910.119(a)(1)(ii). S. Brief, p. 9. Further, 29 C.F.R. 1910.119(b) defines "process" as follows:

[A]ny 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. For 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.

The FCCU's process contains 397,500 pounds of flammable mixtures, with 7,500 of that total being in the reactor at any one time. *See* C-24, p. 767. The process starts by gas oil and catalyst entering the reactor. There, the gas oil is "cracked" into smaller hydrocarbons. The resulting vapors go to the fractionator, another vessel in the FCCU. After further processing, the vapors ultimately

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become gasoline. At the bottom of the reactor, the catalyst is stripped of hydrocarbons. The catalyst then goes into the regenerator. The regenerator uses heat and air to separate any remaining carbon from the catalyst. After regeneration, the catalyst is reused. (Tr. 171-72, 1865-67, 2142-46, 2695-97).

Delek's contention is premised on its claim that the reactor/regenerator is separate from the rest of the FCCU. It also notes that only 7,500 pounds of gas oil are in the reactor at any one time and that the only materials in the regenerator are spent catalyst, air, and trace amounts of hydrocarbons. R. Brief, pp. 60-62. Delek, however, overlooks the testimony of its own expert, John Arendt, an engineer with extensive experience in process safety, risk analysis and the PSM standard. Much of his experience has involved refineries. (Tr. 2574-87, 2683-84). Mr. Arendt testified that the reactor and the regenerator are connected and that the reactor is connected to "a lot of the components in the FCCU." He also testified that "[v]essels that are interconnected that contain a threshold quantity of the hazardous material would be considered to be a part of the boundary of the process." (Tr. 2693). Finally, Mr. Arendt testified that the regenerator is "process equipment, as it operates in the process of the unit." (Tr. 2732, 2758-59). Based on the evidence of record and the definition of "process," set out *supra*, I find that the PSM standard applies to the regenerator. Delek's contention is rejected.

Delek next contends that the Secretary has not shown that the "change" here was one within the meaning of 29 C.F.R. 1910.119(l)(1). R. Brief, pp. 62-66. That provision states that:

The employer shall establish and implement written procedures to manage changes (except for "replacements in kind") to process chemicals, technology, equipment, and procedures; and, changes to facilities that affect a covered process.

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Messrs. Arendt, Gaddis, Juarez and Simmons all testified as to their belief that using the steam lance was not a change to the regenerator's process chemicals, technology, equipment or procedures. (Tr. 237, 1443, 2152-55, 2701-09). This belief was based on the fact that there were no changes to the internal process in the regenerator. The chemicals and technology were the same, as were the procedures and equipment. The Secretary, however, contends there were changes to the regenerator's technology, equipment and procedures. She notes that due to the refractory's condition, the exterior vessel wall was a higher temperature than normal.³⁸ She also notes that the steam lance was used to do what the regenerator was designed to do, *i.e.*, to keep the vessel's exterior at an acceptable temperature. Messrs. Arendt, Gaddis, Juarez and Simmons all agreed this was so. (Tr. 186-87, 1442, 1557-58, 2154, 2329-30, 2750-51). The Secretary further notes the exterior of the vessel was changed due to the hot spot. Messrs. Arendt, Juarez and Simmons all testified that increased heat could cause the metal to change color. (Tr. 1553-55, 2322, 2749). Mr. Juarez indicated that had actually occurred and that the hot spot area was darker in color. (Tr. 1553-55). Messrs. Arendt, Gaddis, Juarez and Todd all agreed that, with time, excessive heat in the hot spot area could cause the metal to deteriorate and make the regenerator unsafe to run. (Tr. 234-35, 423, 1483-41, 2756-57). Finally, the Secretary notes that the hot spot had resulted in a change to the procedures for the regenerator. The record shows that once the steam lance was in use, All Tech inspected the hot spot area much more often. (Tr. 185, 1376-77, 1385, 1418-19, 1429-30, 2151-52, 2321-22). S. Brief, pp. 49-51.

³⁸The normal temperature of the vessel's wall is about 350° F. The hot spot's temperature rose to 850° F in 2005; with a steam lance, it was kept to about 600° F. (Tr. 1387; C-34, pp. 2-3).

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The Secretary further contends that the steam lance was a change that required the PSI for the regenerator to be updated.³⁹ S. Brief, p. 51. She notes that paragraph (d)(2)(i) of the standard requires information concerning the technology of the process to include, *inter alia*, the following:

- (D) Safe upper and lower limits for such items as temperatures, pressures, flows or compositions; and,
- (E) An evaluation of the consequences of deviations, including those affecting the safety and health of employees.

The Aptech report, C-34, shows that the maximum allowable temperature of the vessel's wall was 802° F. It also shows the hot spot's temperature in 2005 was 850° F for an unspecified period. Aptech performed a remaining life evaluation, by using 850° F as the steady state temperature for the entire time the hot spot existed in 2005. Aptech also assumed 900° F as the "worst case operating condition" for the remaining period of operation, presumably until the next shutdown. Aptech's report concluded the regenerator could run safely at 900° F for a minimum of 12,248 hours (about a year and a half) before it should be shut down for inspection and maintenance. Mr. Arendt testified he had relied on the information in C-34 in reaching some of his opinions in this matter.⁴⁰ He agreed that the 900° F temperature in C-34 was a presumption, as there was no analysis and conclusion that the vessel would not exceed 900° F. He also agreed that in a worst-case scenario, if a high enough temperature was maintained for a sufficient period, the vessel could degrade and fail and the materials inside could be released. These would include hot spent catalyst, hot air, water vapor, carbon monoxide, carbon

³⁹Delek disagrees with this contention. R. Brief, pp. 66-67.

⁴⁰Mr. Arendt did not rely on C-34 to conclude that no change within the meaning of the standard had occurred. (Tr. 2735).

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dioxide and trace amounts of hydrocarbons. Mr. Arendt stated that all the materials would go up into the air and dissipate, except for the hot catalyst, although he noted that the hydrocarbons could cause a fire. As to the hot catalyst, he said that “[y]ou wouldn’t want to come into contact with items that were, you know, a thousand degrees.” (Tr. 2756-58).

Based on the foregoing, I find that the Secretary has shown that Delek was required to have an MOC procedure documented and on file as to the use of the steam lance. I have considered the testimony of Delek’s witnesses, especially Mr. Arendt, that the changes in this case were not changes to the process chemicals, technology, equipment or procedures. I have also considered Mr. Arendt’s qualifications and experience in the PSM standard. My reading of the standard, however, together with the evidence in this case, persuades me the Secretary’s interpretation of the standard is correct. I further find that Delek was required to update the PSI for the regenerator due to the use of the steam lance, in view of paragraphs (d)(2)(i)(D) and (E), set out above. I have noted the Aptech report and its conclusion the regenerator could have run safely for some time with the hot spot’s temperature at 900° F. However, Mr. Arendt agreed there was no analysis in C-34 to show the hot spot would not have exceeded that temperature. Also, Delek did not have C-34 before use of the steam lance on the hot spot began and had no real basis for concluding its use was safe. And, without further evidence to support the claims in C-34, I am simply unwilling to accept those claims at face value.

I have noted the testimony of Delek employees that steam lance use is routine in the industry and is considered a safe work practice. (Tr. 235-37, 436-37, 1429, 2155-60). The Aptech report also makes this claim, as does Mr. Arendt. (Tr. 2709-11; C-34, p. 2; R-D, p. 5). Mr. Arendt, however,

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essentially admitted that there was no support in the PSM standard for his opinion that the use of the steam lance here was a safe work practice such that an MOC was not required. He agreed that the term “safe work practice” does not appear anywhere in paragraph (l) of the standard. He also agreed that, while the term does appear in paragraph (f), neither paragraph states that use of a “safe work practice” provides an exemption from the MOC requirements. (Tr. 2730-31).

The Secretary has also shown employee exposure to the cited condition. Sixteen employees work in the FCCU, which operates 365 days a year. There are four employees on each of the two 12-hour daily shifts. FCCU employees make rounds on their shifts. These include going up on the regenerator’s walkway that is at the manway level. Supervisors and maintenance employees also enter the FCCU as needed. (Tr. 169-70, 420-21, 460-61, 1392-93, 1406, 1415-20, 1429, 1548).

Finally, the Secretary has shown that Delek had knowledge of the cited condition. Inspection Supervisor Juarez was aware of the hot spot in 2005. He was also aware of its recurrence in early 2008. He testified that after meetings with supervisors were held, maintenance workers fabricated the lance and set it up at the regenerator’s manway. (Tr. 184, 1383, 1387-92, 1408, 1415-20, 1429).

In light of the evidence of record, the alleged violation is affirmed. It is affirmed as serious due to the testimony of Mr. Arendt, *supra*, as to what the consequences of a failure of the regenerator wall could be. (Tr. 2756-58). Specifically, a fire on the regenerator or hot catalyst being released could cause serious injury or death. This is particularly true since, as set out above, FCCU employees go up

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on the regenerator's walkway that is at the manway level.⁴¹ The finding of a serious violation is supported by evidence that the reactor has caught fire before. (Tr. 188). The reactor sits on top of the regenerator and is connected to it. A fire on the reactor could affect not only the reactor itself but also the regenerator. The finding of a serious violation is also supported by evidence that the boiler system has failed on several occasions and that there has been an explosion in one of the facility's boilers. (Tr. 183, 1255). If the boiler system failed, the steam lance would also fail.

The penalty proposed for this item is \$6,300.00. The AAD testified this item was a serious hazard. There were changes to the vessel's operation and no written procedures to indicate, for example, how often the lance should be inspected, how long it was to be used, and what to do if the boiler system supplying the steam failed. (Tr. 329-32). OSHA gave a reduction in the penalty for history, but no reductions were given for good faith or size. (Tr. 271-74, 331-32). The Court finds the proposed penalty appropriate. That penalty is assessed.

Item 12 – Alleged Violation of 29 C.F.R. 1910.119(o)(4)

Item 12 alleges a violation of 29 C.F.R. 1910.119(o)(4), which provides that:

The employer shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

The citation alleges as follows:

⁴¹As the Secretary notes, besides inspecting the regenerator from the walkway, FCCU employees must also go up on the regenerator to manually shut the valve that "blocks in" the vessel. To do so, they must go past the hot spot. (Tr. 1759-60, 1763-64). S. Brief, p. 53.

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The employer did not ensure that an appropriate response to each of the findings of the compliance audit required by 29 CFR 1910.119(o)(1), has been determined and documented and does not document that the deficiencies have been corrected. The violation was observed on or about February 29, 2008, at 1702 Commerce St., Tyler, Texas where the employer did not determine and document an appropriate response to each finding from the 2005 PSM audit.

Employers are required to “certify that they have evaluated compliance with the provisions of this section to verify that the procedures and practices developed under the standard are adequate and are being followed.” 29 C.F.R. 1910.119(o)(1). Employers must develop a report of the audit findings and must retain the two most recent audit reports. 29 C.F.R. 1910.119(o)(4)-(5). Upon OSHA’s request, Ms. Tarpley gave the AAD C-38 and C-39, the refinery’s audit reports for 2004/2005 and 2001, respectively. The AAD noted that C-38 showed numerous deficiencies that had not been addressed or corrected.⁴² He noted the same problem with C-39, and he observed that some of the deficiencies in C-39 had been carried over to C-38. When he asked Ms. Tarpley about what corrections or responses to deficiencies had been made to the 2001 and 2004/2005 PSM audits, she was unable to provide him with anything. She told him that she could not give him what she did not have. (Tr. 333-57; R-R).

Ms. Tarpley testified she was unaware of the audit reports until February or March of 2008. She found them in hard copy and electronic format at the time of the OSHA inspection. She also testified she could not find any documentation for the closure of the items in the audits, despite the fact that she conducted a thorough search for about two weeks. She said there were about 50 deficiencies in C-38,

⁴²See C-37, OSHA 1-B. (Tr. 642-45; C-37).

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that she discussed with management her inability to find any documents showing the corrections for C-38, and that she was told to get the information that was required. R-R, dated August 29, 2008, is her report showing responses for the C-38 items. (Tr. 785-87, 2835, 2838-40, 2899-2902).

The Secretary contends there are 14 items contained in R-R that, based on the testimony of Ms. Tarpley about her investigating these items in 2008, were not corrected as of February 29, 2008. The Secretary lists these items on pages 57-59 in her brief. The items are summarized as follows:

Item 2, p. 1 – Info. concerning safe lower limits was reportedly not provided for Crude/Vac Unit or DHT Unit. Ms. Tarpley testified she learned the safe upper and lower limits were available and evidently had been since before Delek bought refinery. Accordingly, the Court finds that no deficiency existed with regard to this item. Item 2 is not a violation of the standard. (Tr. 2847-48).

Item 4, p. 1 – Info. was not available for flare systems protecting units. Ms. Tarpley testified that a flare study for the flare systems began in 2006 and was completed at the end of 2008. (Tr. 2845-46, 2905-09).

Item 5, p. 1 – Some of the process technology info. requiring updating had reportedly not been revised and needed to be updated. Ms. Tarpley testified that in response to this item, the information was reviewed, found to be complete, and not in need of updating. Accordingly, the Court finds that no deficiency existed with regard to this item. Item 5 is not a violation of the standard. (Tr. 2848-50).

Item 6, p. 1 – There was no electrical classification info. for the DHT Unit and the electrical classification drawings for the Crude Vacuum Unit were not updated or reviewed since 1979. New drawings for the entire refinery were done as of March 4, 2010, but they had not been done as of February 29, 2008. (Tr. 2843-45, 2905-09).

Item 7, p. 2 – No study for flare systems. Ms. Tarpley testified that a flare study was begun in 2006 and completed in late 2008. (Tr. 2845-46, 2905-09).

Item 10, p. 2 – Not all areas of the [PHA] recommendations have been implemented, further review is necessary. Ms. Tarpley testified that the PHA tracker was created in February 2008. (Tr. 2851-52).

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Item 36, p. 7 – “Contract Employee injury/illness log. The PSM Coordinator maintains a log, but is not advised of all injuries/illnesses by La Gloria supervisors. A system should be implemented to catch all required reporting incidents.” Ms. Tarpley testified that a PSM Coordinator has been maintaining a log since January 2008 and now there is a system to ensure injuries/illnesses reported. (Tr. 2863-64).

Item 38, p. 7 – Some contractors perform audits of their personnel, while some do not. Ms. Tarpley testified that the self-audit requirement did not start until 2008. (Tr. 2866).

Item 43, p. 8 – Maintenance materials and spare parts. Some work has been done in this area, but additional work should be done. Ms. Tarpley testified a Positive Material Identification (“PMI”) machine was purchased in 2008. (Tr. 2872-73, 2905-09).

Item 45, p. 9 – “Incident investigation.... There is a recommendation backlog that we are still working on. Because of that this item will be listed as deficient.” Ms. Tarpley testified that process changed in 2008 to track incident investigations. (Tr. 2875-76).

Item 46, p. 9 – “Incident investigation....System is currently being modified.” Ms. Tarpley testified that while incident reports were being reviewed with affected personnel, there was no report sign-off requirement to show this had occurred. She also testified the system was updated in 2008 to enhance incident report formatting and that other improvements are still being worked on. (Tr. 2876-79, 2905-09).

Item 47, p. 9 – “Documentation of response for compliance audit findings.... For this audit, the deficiencies will be brought to the attention of upper management, ... The correction of the deficiencies will also be documented.” Ms. Tarpley testified that a new compliance audit procedure was developed in 2008 to address this item. (Tr. 2879-80).

Item 48, p. 9 – “Documentation of deficiency correction.... deficiencies will be brought to the attention of upper management....correction of the deficiencies will also be documented.” Ms. Tarpley testified the new procedure, developed in 2008, addresses this item. (Tr. 2879-80, 2905-09).

Item 49, p. 10 – “[E]mergency action plan should be evaluated ... and should be revised as necessary.” Ms. Tarpley testified that the plan was revised in 2008. (Tr. 2881).

Items 4 and 7 both relate to the flare study, and Items 47 and 48 both relate to the documenting of audit deficiency corrections. Accordingly, the Court finds that Items 4 and 7 are one finding and one

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correction, as are Items 47 and 48. Based on the foregoing, I find that Delek did not determine and document an appropriate response to ten of the above audit findings before February 29, 2008.⁴³ Ms. Tarpley specifically admitted this was true as to Items 4, 6, 7, 43, 46 and 48. (Tr. 2905-09). I find this was also true as to the other items listed above, except Items 2 and 5. Ms. Tarpley was unaware of the audit reports until February or March of 2008. After learning of them, she searched for two weeks before determining that no documentation for the items existed. In light of her testimony, and the fact that R-R is dated August 29, 2008, it is clear the items were addressed after February 29, 2008. The Court concludes, therefore, that there were ten unresolved audit items at the time that OSHA discovered the violative condition.

Delek claims it had no reason to believe that any La Gloria audit items were outstanding. As Delek notes, Mr. Whaley, the EHS manager, and Ms. Tarpley both testified to their understanding that La Gloria had addressed all the audit items before Delek bought the facility. (Tr. 1830, 2835-38). R. Brief, p. 76; R. Reply Brief, pp. 38-39. As the Secretary points out, however, Delek had C-38 and C-39 in its possession, in hard copy and in electronic format, from the time it purchased the facility. S. Brief, pp. 56, 59, 61. Further, C-38, La Gloria's audit report for 2004 /2005, shows a date of May 5, 2005. Ms. Tarpley testified this was the "print date" of the report, based on her contacting Sage Environmental, the contractor that conducted the audit. (Tr. 2836, 2902-04). In view of this date, which was after Delek purchased the refinery, it is reasonable to conclude that Delek, as the new owner, received C-38

⁴³Ms. Tarpley agreed that under the standard Delek was responsible for promptly determining and documenting an appropriate response to each of the compliance audit's findings. (Tr. 782).

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at the time it was issued. In any case, as the Secretary points out, Delek had the 2001 and 2004/2005 reports in its possession for three years and did nothing to confirm that the audit items had been addressed and corrected.⁴⁴ S. Brief, p. 62; S. Reply Brief, p. 26. The Court concludes that Delek did not exercise reasonable diligence to promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected.

Delek also claims that it complied with the standard. It notes it had the previous two audit reports, as required by 29 C.F.R. 1910.119(o)(5). It also notes that the basis of this citation item was its failure to retain documentation showing the actions it had taken to address issues identified in past audits. Delek urges that paragraph 1910.119(o)(5) has no requirement to retain such documentation. It points out that when OSHA published the proposed PSM standard, there was such a requirement in the standard. Specifically, the proposed subsection (o)(5) read as follows:

Employers shall retain the two (2) most recent compliance safety audit reports, as well as the documentation described in paragraph (o)(4) of this section.

Delek concludes that, because the requirement was contemplated in drafting but was not included in the final standard, it must be assumed that the exclusion was purposeful. Delek also notes that since the standard became final in May 1992, OSHA has issued no interpretation letters in regard to the requirement to retain the documents. R. Brief, pp. 75-76; R. Reply Brief, pp. 37-38.

I disagree with Delek's argument. As the Secretary points out, the citation alleges Delek violated 29 C.F.R. 1910.119(o)(4). That subsection required Delek to promptly determine and document an

⁴⁴Mr. Whaley admitted that Delek, to his knowledge, did not do anything to determine and document appropriate responses to the findings in C-38. (Tr. 1832).

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appropriate response to each audit finding and to document that deficiencies had been corrected. The issue is not whether Delek failed to maintain documentation but, rather, the fact that Delek did not document in any way that the audit deficiencies had been corrected as of the violation date of February 29, 2008. Even assuming Delek had addressed some of the deficiencies before the inspection, the record clearly shows that not all of them had been corrected. (Tr. 2905- 09). I agree with the Secretary that the failure to respond to the deficiencies for almost three years was neither prompt nor reasonable under the standard. And, even the deficiencies that Delek had addressed before the inspection had not been documented. S. Reply Brief, pp. 26-27. Delek’s argument is rejected.⁴⁵

The foregoing establishes all elements of the Secretary’s burden other than employee exposure. I agree with the Secretary that she has met that element. Item 10 of the above audit findings states that “not all areas of the [PHA] recommendations have been implemented, further review is necessary.” Item 4 of this decision, set out *supra*, shows that 16 PHA items, some of which were high-priority safety items, had not been implemented. These conditions exposed employees to hazards. One specific example discussed earlier herein was PHA Item 42, which involves the failure to install a remote valve actuator on the FCCU’s reactor. The 16 FCCU employees were all exposed to the hazard of fire that could have resulted from that condition. Item 46 of the audit findings also showed employee exposure. That item stated that incident reports “appear to be reviewed with affected personnel, however, there

⁴⁵Delek also argues that the PSM standard does not impose a duty on a company that buys a facility to review and recompile all of the process safety information that the prior owner had a duty to compile. R. Reply Brief, pp. 39-40. That argument was considered and rejected *supra*, in footnote 15. It is rejected here for the same reasons.

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is no documentation or sign-offs to demonstrate that affected personnel are being informed and/or review incident investigation reports.”⁴⁶ ®-R, p. 9). Finally, Item 6 of the audit findings was that there was no electrical classification information for one unit and that the electrical classification for another unit had not been updated or reviewed since 1979. As the Secretary notes, Item 8 of this decision, set out above, demonstrates that electrical classification of units in the refinery is critically important. *See* S. Brief, pp. 60-61. I find that the Secretary has shown employee exposure to the hazards of the cited condition. This item is affirmed as a serious violation.

The Secretary has proposed a penalty of \$6,300.00 for this item. The AAD testified that Delek failed to audit its PSM program, which is the employer’s process for containing highly hazardous chemicals. He also testified that Delek is in a high-hazard industry, that a release could lead to an explosion, and that Delek has had an explosion at its refinery. OSHA thus considered the cited condition a high-gravity item. The AAD further testified that while a reduction for history was applied, no reductions for size or good faith were given. (Tr. 271-74, 359-61).

In assessing a penalty for this item, I have considered the fact that, of the 50 audit items set out in R-R, ten items have been found to violate the standard. OSHA, however, has determined this item

⁴⁶The Secretary notes an incident in which there was a “hot oil blowback” in the Coker Unit in April 2008. Three workers were burned with oil of 300° F near the end of a process in which the hot oil went down a drain. This incident resulted in a written procedure that required more protective equipment for employees doing this work and a requirement that the oil be less than 180° F. The Secretary states that without ensuring the report was reviewed with affected personnel, further injury could result if not all factors were considered. (Tr. 360; C-60; S. Brief, pp. 60-61). *See U.S. ex rel. Compton v. Midwest Specialities, Inc.*, 1998 WL 30811, at *7, n.6 (The absence of a record of an event that would ordinarily be documented is probative of the fact that the event did not occur.).

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to have high gravity, for the reasons stated above. And, Delek did not address the audit items for three years, even though it had the audit reports in its possession the entire time. I also note the number and types of accidents Delek has had, as set out in the Court's prior discussion of Item 4, *supra*. On balance, the Court finds that the proposed penalty of \$6,300.00 is appropriate. That penalty is assessed.

Item 13 – Alleged Violation of 29 C.F.R. 1910.219(c)(2)(i)

Item 13 alleges a violation of 29 C.F.R. 1910.219(c)(2)(i), which states that:

All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform ... shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

This item alleges that rotating shafts were not guarded on the following equipment:

- a) Sealing air fan to ignition air fan #9, model B0252FLG3UL, Type TIKK (“the fan”)
- b) General Electric motor of #6 cooling tower pump #X115460 (“the motor”)

The cited fan and motor are located in the Boiler Unit. The fan turns on and provides air in order to create more pressure when the differential pressure inside the boiler compared to outside the boiler gets close to being equal. The motor takes water out of the cooling tower and delivers it to the overhead condenser or elsewhere for the main boiler feed-water pump. The AAD testified that he and an operator, Kevin Payne, walked by the shafts in the unit. Both shafts were rotating at the time. The AAD described the shafts as being in the main aisle way of the unit.⁴⁷ He said the shafts should have been enclosed. He believed that the operators and technicians in the unit, while walking by the equipment, could trip and fall onto the rotating shafts. (Tr. 201, 361-69, 2419-21; C-40). Operator

⁴⁷C-40, the AAD's OSHA 1-B for this item, states that the shafts were about 29 inches high and that the unguarded parts of the fan and motor shafts were 12 and 8 inches, respectively.

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Kevin Payne was exposed to the hazard for 12 hours per day and three days per week. (C-40). The fan's shaft is shown in C-41(d) and (e). The motor's shaft is shown in C-41(a), (b) and (c). The photographs are telling and help establish that the two shafts were not guarded and constituted a hazard.⁴⁸ (C-41(a)-(e)). The motor and fan were observed by OSHA in operation and there was nothing to warn employees of the hazard. (C-40).

Mr. Gaddis testified that he was close enough to touch the back of the motor when he passed the equipment. (Tr. 196-97; C-41(c), at letter "C"). He also testified there was a walkway and place to stand where an employee could "walk up that close and actually just touch" the fan. (Tr. 195-96; C-41(e), at letter "A"). Operations technicians inspect these units daily and the unguarded shafts were within hands reach of employees walking or working around them. John Yost, Jr., has been a boiler tech in the Boiler Unit for three years. He testified he walked by the cited shafts several times per shift while making his rounds.⁴⁹ He also testified that when performing their rounds employees should walk by the motor. He further testified that he got within 5 feet of the shafts. According to Mr. Yost, the fan operates automatically, and there is no on/off button or other means to run it. The motor operates constantly, and its shaft rotates at about 3,600 rpm's. The button to turn on the motor is 7 to 8 feet away from the shaft. When operating, the fan turns on a slow rolling basis. Mr. Yost said there

⁴⁸The existence of a hazard is not negated by the absence of an injury tied to the hazard. See *A.E. Burgess Leather Co., Inc.*, 5 BNA OSHC 1096, 1097 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978).

⁴⁹Mr. Yost said he and an operator are the only two workers in the Boiler Unit on their 12-hour shift. There are three more two-man crews who also work in that unit. (Tr. 2427-28).

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were times other employees might be in the Boiler Unit, *i.e.*, maintenance employees sometimes had to fix equipment, or employees from other units might be invited in to see, for example, where their lines terminated. He also said he had worked on special projects in the Boiler Unit and had seen other boiler technicians make their rounds. When they did, he observed that they got within 5 feet of the cited shafts. (Tr. 2417-38; C-40).

I agree with the Secretary that based on the foregoing, “employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger,” in that they come within a few feet of the unguarded machinery on a regular basis. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). *See also Phoenix Roofing*, 17 BNA OSHC 1076 (No. 90-2148, 1995); *Dover Elevator*, 16 BNA OSHC 1281 (No. 91-862, 1993); *Clement Food Co.*, 11 BNA OSHC 2120 (No. 80-607, 1984). On the basis of the record, the Court finds that the Secretary has shown employee access to the cited hazard.

The Court also finds Delek knew of the cited condition. The two unguarded shafts are in plain view on a major walkway in the Boiler Unit. (C-40, C-41). The unguarded shafts are inspected daily, and management, including Mr. Simmons, is aware of these inspections. (Tr. 1987, 1989-90; C-40).

The evidence of record establishes a violation of the cited standard as to both the fan and motor. The evidence shows that the standard applies, that its terms were not met, that employees were exposed

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to the cited condition, and that the employer knew or should have known of the condition.⁵⁰ Both instances in Item 13 are affirmed as serious. Delek exposed its employees to the hazard of being caught in these unguarded parts while they were rotating, which could have caused serious hand or finger injuries, including broken bones. The fan rotated at about 3,600 rpms. The violative condition created the possibility of an accident involving a substantial probability of serious physical harm to employees. *Flintco Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993).

A penalty of \$3,150.00 has been proposed for Item 13. The AAD testified about the hazards of the condition and the number of employees exposed. The only reduction for Item 13 was a 10 percent reduction for history. (Tr. 271-74, 358-69; C-40). The Court finds the proposed penalty reasonable and appropriate. A penalty of \$3,150.00 is assessed.

Item 15 – Alleged Violation of 29 C.F.R. 1910.1200(f)(5)

This item alleges that Delek was in violation of 29 C.F.R. 1910.1200(f)(5), a provision of the Hazard Communication (“HAZCOM”) standard. The cited standard states that:

- (5) Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked with the following information:
- (i) Identity of the hazardous chemical(s) contained therein; and,
 - (ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the [HAZCOM] program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

⁵⁰The Court finds that the cited standard applies to Respondent since § 1910 applies to any employment and place of employment in any industry.

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The specific vessels cited were the following:

- a. FCC Unit, GV-154 Flare Knockout Drum, not marked⁵¹
- b. FCC Unit, Regenerator, not marked
- c. FCC Unit, E-9-A Exchanger, not marked
- d. Alkylation Unit, 86-E-501, not marked correctly on equipment summary list

The AAD testified that as he was walking through the different units at the facility, he noted that a number of the vessels were not tagged or marked to show their contents. The four cited vessels, three in the FCCU and one in the Alkylation (“Alky”) Unit, were examples of what he saw. He further testified that under the HAZCOM standard, vessels must be marked to identify their contents. While he saw equipment lists that showed the vessels with their identifying numbers, the lists did not identify the vessels’ contents. Further, the 86-E-501 vessel in the Alky Unit, besides not identifying its contents, also was not identified properly on the Alky Unit’s equipment list. The AAD said that if someone had to go out into a unit in an emergency, to turn a valve to shut off a vessel, for example, a vessel that was not properly marked could be a hazard. (Tr. 468-72, 649-53; C-40).

The HAZCOM standard applies to any chemical known to be present in the workplace such that “employees may be exposed under normal conditions of use or in a foreseeable emergency.” The standard requires employers to provide information to their employees about the hazardous chemicals to which they are exposed. *See* 29 C.F.R. 1910.1200(b)(1) and (2). A “hazardous chemical” is “any chemical which is a physical hazard or a health hazard.” 29 C.F.R. 1910.1200(c).

⁵¹The Secretary’s motion at the hearing to amend Instance a to read “Flare Knockout Drum” rather than “Flash Knockout Drum” was granted. (Tr. 238, 1921-22).

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There is no dispute that there are hazardous chemicals at Delek's refinery. (Tr. 2309). In the FCCU, these include gas oil, heavy cycle oil, light cycle oil, naphtha, gasoline and hydrocarbon vapors. (Tr. 171). JX-X, Delek's operating procedures for the FCCU, states that benzene, a suspected cancer-causing hydrocarbon, is found in all "gasoline, naphtha, and full range of hydrocarbon mixtures." It notes that hydrogen sulfide ("H₂S") "is also present in the gases produced in the Cat Unit." JX-X sets out the properties and physical and health hazards of chemicals in the FCCU, including benzene, H₂S, hydrocarbon vapors, and heavy and light cracked oils. *See* JX-X, pp. 12803-04.

The FCCU vessel GV-154, called the flare knockout drum, contains gasoline, naphtha products, propane, butane and hydrocarbon vapors such as relief gas. (Tr. 207-08, 242-43). These are chemicals that can pose health or physical hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis is an operator who has worked in the FCCU for 30 years. He testified that in 2008, the flare knockout drum did not have a label on it to identify its contents or the hazards of those contents. (Tr. 207-08). Mr. Simmons, the refinery manager, confirmed the testimony of Mr. Gaddis. Mr. Simmons also confirmed that the flare knockout drum had no notations on it to warn that its contents were, for example, flammable, dangerous to inhale, and capable of causing burns on skin. (Tr. 2310-14).

The regenerator in the FCCU contains catalyst, a combustion promoter, and additives called LO-SOX and Super Z. It also contains hydrocarbon vapors, which may contain H₂S or "other lethal substances." (Tr. 205-06; JX-X, pp. 12803-04). The catalyst and hydrocarbon vapors are hazardous chemicals that can be physical and/or health hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis testified that in 2008, the regenerator did not have a label on it that identified its contents. (Tr. 205-06). Mr.

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Simmons confirmed this testimony. Mr. Simmons also testified that there were no notations on the regenerator to inform employees of the hazards of the contents. (Tr. 2310-14).

The FCCU's E-9-A Exchanger is a slurry-oil exchanger that has slurry on one side and raw oil on the other side.⁵² "Slurry" is the term used to refer to carbon black circulating bottoms. (Tr. 207-08, 239-40, 2310-11; R-U). In light of its contents, the E-9-A Exchanger contains chemicals that can represent health or physical hazards. *See* JX-X, pp. 12803-04. Mr. Gaddis testified that in 2008, the E-9-A Exchanger did not have a label identifying its contents or their hazards. (Tr. 207-08).

Mr. Simmons testified that in April 2008, the Alky Unit vessel 86-E-501 had no markings on it to identify what it contained. He also testified that the vessel contained sulfuric acid, caustic and "several different chemicals that would be hazards in the unit." He admitted there were no warnings on the vessel to indicate whether the contents were flammable, dangerous to inhale, or capable of causing burns on skin. (Tr. 2312-14, 2372-73).

The foregoing shows that none of the cited vessels was labeled, tagged or marked to identify its contents or to warn of the hazards of the contents. Delek, however, contends it complied with the alternative method set out in subsection (f)(6) of the standard. That subsection states as follows:

The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

⁵²Mr. Gaddis indicated the full and correct number of the equipment is "85-1-E-9A." (Tr. 239-40). This decision will refer to the number as "E-9-A," as set out in the citation. (Tr. 661).

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Delek asserts it informs employees of the contents of vessels in many ways. One is through piping and instruments drawings (“P&ID’s”). P&ID’s show the vessels in the refinery, the process flows, and the process chemicals.⁵³ Another is through drawings used for training. Mr. Todd, another FCCU operator, testified about drawings he utilizes when training new employees in his unit. These are color-coded to indicate vessel contents in the FCCU. The process flow diagram for the refinery also shows what materials flow into and out of each unit. Finally, the OPs for the refinery’s units set out the chemicals that move into the various vessels. In the FCCU, for example, the startup procedures indicate the regenerator’s contents. R. Brief, pp. 86-87, 94-97; JX-X.

Delek further asserts that the FCCU’s OPs also set out the hazards of chemicals in the unit. One section, entitled “Properties and Hazards of Chemicals Used in the Process,” discusses the hazards of various chemicals in the process, particularly hydrocarbons and hydrocarbon mixtures. It also notes other hazardous substances, such as benzene, catalyst and H₂S, and the PPE to use for these substances. R. Brief, pp. 88, 98-99; JX-X, pp. 12803-04.

Delek notes that its material safety data sheets (“MSDS”) have the most detailed hazard information about the hazardous chemicals in the refinery. The MSDS are available in the control rooms (in books and electronically), and employees may access them at any time. R. Brief, pp. 89, 99.

Delek also discusses the training it provides all new employees. This includes books covering refinery operations, a course on the hazardous chemicals in the process, and computer-based training

⁵³Similarly, Delek states that the names of the vessels and equipment in the refinery also inform employees of their contents. R. Brief, pp. 87-88, 96-97.

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(“CBT”) and tests on topics such as HAZMAT and HAZOP. The CBT also has an MSDS module, which addresses, *inter alia*, how to read MSDS. Employees next have unit-specific training where they learn about the operations where they will be working. They learn the locations of vessels in the unit and the chemicals that are in the vessels, and they are tested in this regard. They also learn about the hazardous chemicals in their units and what PPE is required. The new employees then work with an experienced operator in the unit who trains them in their job duties. All employees in the facility also receive fire protection training. R. Brief, pp. 89-92, 100-02.

Delek states that maintenance workers receive the same training that all new hires do. Also, before they do any work in a unit, a work permit and job safety analysis are completed. The worker then goes to the assigned area of the unit, where the hazards of the job are discussed. Delek indicates that its contract employees receive similar but more limited training. R. Brief, pp. 92-93, 102-04.

Despite the foregoing, I agree with the Secretary that Delek did not comply with the standard. The P&ID’s show general process information but do not always show the chemicals in a particular line or vessel.⁵⁴ (Tr. 2205; R-U, R-V, R-W (large)). They contain no information about the hazards of the chemicals involved. (Tr. 2314, 2535). There are also multiple P&ID’s for a single vessel, and a single vessel can have multiple names in the refinery. For example, the cited GV-154 vessel, called the “relief gas knockout drum” on its P&ID, is also called the “flare knockout drum,” “knockout drum,” and

⁵⁴The process flow diagram also shows only general process information. *See* R-T (large).

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“knockout pot.”⁵⁵ (Tr. 2224-25). Further, terms on one P&ID can have different meanings in other parts of the refinery. The term “circulating bottoms exchanger” set out on one P&ID would refer to different products in different units. (Tr. 253-54; R-U (large)). Finally, while operators use the P&ID’s in their jobs, they are not trained in how to read them. (Tr. 241, 253). S. Brief, pp. 73-74.

As to the OPs, the Secretary notes that while they contain some required information, they are insufficient to inform employees where particular chemicals may be encountered in a unit. I agree. The “Properties and Hazards” section in the FCCU OPs does contain information about hydrocarbons and hydrocarbon mixtures all being flammable. It also notes some other hazardous chemicals like benzene, catalyst and H₂S. It does not, however, state where these chemicals may be located in the FCCU. Mr. Simmons basically admitted that was not the purpose of this section. (Tr. 2318; JX-X, pp. 12803-04). S. Brief, p. 74. Further, my review of the FCCU OPs persuades me they do not meet the standard. That is, they do not enable an employee to readily and easily learn what chemicals are in a particular vessel and what the hazards of the chemicals are. First, the OPs are over 400 pages long. Second, some of the individual OPs are quite lengthy, and expecting an employee to read through a complex and detailed OP to learn what a vessel contains is clearly unreasonable. *See, e.g.*, JX-X, pp. 12948-62, 12963-78. Third, while JX-X has a table of contents that sets out a number of pieces of equipment separately, two of the cited vessels do not appear in that table of contents.⁵⁶ Finally, while the OPs do identify various

⁵⁵This evidence, in my view, refutes Delek’s contention that the very name of a vessel informs employees of what its contents are.

⁵⁶One of these is the GV-154 vessel, called the 85-G-V-154 or relief gas knockout drum on its P&ID. *See* R-W (large). The other is the E-9-A Exchanger, called the 85-1-E-9A or raw

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chemicals in the FCCU's process, they do not necessarily define the chemicals or state their hazards. *See, e.g.*, JX-X, pp. 12956, 12971 (identifying, but not defining, "slurry" and "flue gas"). I find that, while the OPs contain detailed instructions for operating the FCCU, they are not, as Delek claims, a means of complying with the cited standard.

I further agree with the Secretary that the drawings Mr. Todd uses to train new employees in the FCCU are insufficient to meet the standard. As noted above, the drawings are color-coded to indicate the contents of the vessels in the FCCU. As the Secretary points out, however, there is no legend to explain the meaning of the colors. Thus, even though the employees are given copies of the drawings to keep, they may not recall what the different colors represent. Also, the record shows that the colors on Mr. Todd's computer print differently and are a different color on the drawings he actually gives the employees. The drawings Mr. Todd uses in his training do not contain information about the hazards of the chemicals in the FCCU. And, refresher training for long-term employees is only provided if it is requested.⁵⁷ (Tr. 2469-70, 2487-91, 2530-35, 2569-70). S. Brief, p. 75.

As to MSDS, the Secretary agrees that Delek has books in its control rooms that contain the MSDS for the chemicals in the refinery. The MSDS, however, do not tell the reader where to find the referenced chemicals in the refinery. (Tr. 203-04, 2314-15). MSDS training is given to some but not

oil/circulating bottoms exchanger on its P&ID. *See* R-U (large). Although these vessels may be mentioned elsewhere in the OPs, that they are not set out in the table of contents is significant.

⁵⁷Mr. Todd indicated that although maintenance and contract employees are provided information about the hazards of the job they will be doing, he does not train them like he does new employees in the FCCU. Thus, they are provided only general information, *i.e.*, that vessels in the work area contain hydrocarbons, benzene and H₂S. (Tr. 2530-31, 2567-69).

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all employees in the FCCU, and, when a new MSDS comes out, it is put in the MSDS book in the control room. Employees review the MSDS book on their own. (Tr. 2531-32). The MSDS book in each unit is 3 to 4 inches thick. (Tr. 2316). Mr. Todd indicated there were no MSDS for chemicals such as flue gas, purge gas or slurry. For flue gas, an employee would need to know that it contains carbon monoxide (“CO”) and then look up the MSDS for CO. Similarly, for slurry, an employee would need to know it is called carbon black and then look up that MSDS. (Tr. 2534). S. Brief, p. 74.

The Secretary notes that when Mr. Martin, Delek’s emergency response coordinator, was shown C-46, the equipment list for the Alky Unit, he had not seen it before.⁵⁸ C-46 does not show the contents of the vessels. When asked what documents he would look at to identify the vessels in a unit, Mr. Martin referred to the P&ID’s and the OPs. When asked what documents he would look at to determine the contents of vessels in a unit, Mr. Martin could identify no such documents. Instead, he stated that the unit operators were the source of information as to the chemicals in vessels and the hazards of those chemicals. (Tr. 3071-72, 3075-81). S. Brief, p. 75-76.

Based on the above, the Court finds that Delek has not shown it met the procedures set out in subsection (f)(6) of the standard. I agree with the Secretary that, to determine a vessel’s contents, an employee would have to access a number of documents, including P&ID’s, OPs and possibly training documents. Even accessing all of those documents might not provide the employee with all the vessel contents, and the OPs might not contain the necessary hazard information. The employee would then

⁵⁸Mr. Martin indicated there was a list of all of the refinery’s equipment, although he did not have it in his office. There was no evidence that list showed vessel contents. (Tr. 3075-78).

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need to go to the MSDS book in the unit's control room to learn specific information about the hazards of the chemicals in the vessel. Such a system clearly does not meet paragraph (f)(6) of the standard, particularly in the case of an upset or emergency when employees would need to have ready and easy access to the required information.⁵⁹

In its reply brief, Delek urges its system is "quite similar" to one the Commission approved of long ago.⁶⁰ It refers to a 1987 decision of a Commission Judge that found the employer's system met the paragraph (f)(6) requirements. In particular, the employer labeled each piece of equipment in the refinery to show the type of equipment and an identifying number. Before working on equipment, an employee reviewed an equipment list book in the unit's control room. The book had the number and name of the equipment and referenced the appropriate MSDS for that equipment. The employee then reviewed the referenced MSDS, which were kept in another book. Employees were trained in the labeling system and in how to read and interpret MSDS. They were tested after the training. *Fina Oil & Chem. Co.*, No. 86-0904, 1987 WL 89097 (O.S.H.R.C. A.L.J., Feb. 3, 1987). R. Reply Brief, pp. 46-48. I disagree that Delek's system is "quite similar" to the one described in that case, for all of the reasons given above. Delek's argument is rejected.

⁵⁹In this regard, I note Mr. Todd's testimony that, while operators are supposed to refer to the OPs, they do not always have time to do so if something is happening with the process. The operators instead will go back and review the OPs later, when they have the time to do so. (Tr. 440-41). As the Secretary points out, as Mr. Todd is responsible for training new operators, it is likely that all of the FCCU operators would act in a similar manner. S. Brief, p. 76-77.

⁶⁰While Delek represents the case to be a Commission decision, it is a Judge's decision. A copy of the decision is an exhibit to Delek's reply brief.

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Delek makes a number of other arguments in its reply brief. For example, it urges that the cited pieces of equipment are not “containers” under the standard, that employees were not exposed to a hazard because the cited equipment is self-contained, and that the Secretary’s position as to Delek’s system is inconsistent with a recent OSHA compliance directive. R. Reply Brief, pp. 49-51. I have considered these arguments, and they are rejected.

One final argument of Delek is that Item 15d is incorrect. Item 15d alleges that Alky Unit vessel 86-E-501 was not marked correctly on the equipment summary list. C-46, the equipment list for the Alky Unit, shows that equipment as a “depropanizer tower.” The record shows the 86-E-501 vessel, built in 1979 as a depropanizer tower, was converted to act as a propylene stripper in the early 1980’s. Since then, it has functioned as a propylene stripper. The operators now refer to it as the “new depropanizer,” the “propylene stripper,” and other terms. C-44, a screen shot of the computer control screen for the vessel, shows it as “propylene stripper.” C-45, a screen shot for another Alky Unit vessel, 86-E-101, shows it as “depropanizer.” Mr. Simmons testified that C-46 is used as an equipment inspection list and that the inspectors who use C-46 know the 86-E-501 vessel as a depropanizer. C-47, a pressure vessel list for the Alky Unit, shows both the 86-E-501 vessel and the 86-E-101 vessel as depropanizers. Mr. Simmons said that for inspection and work order purposes, a vessel is referred to by its number. (Tr. 2167-75). Delek contends that since C-46 and C-47 both accurately refer to the cited vessel as a depropanizer, Item 15d is incorrect. R. Brief, pp. 105-08; R. Reply Brief, p. 46.

I agree with the Secretary that a vessel having various names among operators and between operators and inspectors is a hazard. In an emergency, several names for a vessel could be confusing

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and could prevent an employee from identifying the chemicals in a vessel and the hazards of those chemicals. S. Reply Brief, pp. 33-34. Similarly, showing the cited vessel as a “depropanizer” on equipment lists might lead to the same kind of confusion in an emergency. In this regard, I note that while the 86-E-501 vessel is shown as a depropanizer on both C-46 and C-47, the 86-E-101 does not appear on C-46 at all and is shown as a depropanizer on C-47. The Court finds that the Secretary’s allegation as set out in Item 15d of the citation is correct.

The evidence of record establishes a violation of the cited standard as to all four of the vessels set out in Item 15. That is, the evidence shows the standard applies, that its terms were not met, that employees were exposed to the cited condition, and that the employer knew or should have known of the condition.⁶¹ All four of the instances in Item 15 are affirmed as serious. As the Secretary states, Delek employees were at risk of coming into contact with hazardous chemicals and not being aware that was the case. She notes a 2007 incident in which acid overflowed from a tank. The exposed employees did not know if the material was acid or not until Mr. Martin arrived and confirmed it was acid. The only sign posted on the tank said “acid.” *See* C-59. She notes another 2007 incident in which an employee was working on a power feed to the FCCU’s flare. The flare malfunctioned, burning hydrocarbons spewed out, and a flash fire resulted. The employee suffered radiation burns to his eyes and face. The incident was caused, in part, by a failure to label and warn employees of the hazards of the procedure. (Tr. 1250-59, 1290-91). S. Brief, p. 78.

⁶¹The employees exposed to the conditions in the FCCU are set out in Item 9b, *supra*. I find that employees with similar jobs would be exposed to the cited condition in the Alky Unit.

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A penalty of \$2,250.00 has been proposed for Item 15. The AAD testified about the hazards of the condition, the number of employees exposed, and the fact that several vessels were involved. The only reduction for Item 15 was a 10 percent reduction for history. (Tr. 271-74, 468-72. The Court finds the proposed penalty appropriate. A penalty of \$2,250.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. 1910.119(e)(5), is modified to the extent that allegations relating to the PHA team's findings and recommendations from 1998 and 2005 are deleted from the citation; the remainder of the citation item is otherwise AFFIRMED, and a penalty of \$6,300.00 is assessed.⁶²

2. Citation 1, Item 6, alleging a serious violation of 29 C.F.R. 1910.119(f)(3), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

3. Citation 1, Item 8, alleging a serious violation of 29 C.F.R. 1910.119(j)(4)(i), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

⁶²See 29 C.F.R. § 2200.90(a) ("The decision shall include an order affirming, modifying or vacating each contested citation item and each proposed penalty, or directing other appropriate relief.").

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4. Citation 1, Item 9(b), alleging a serious violation of 29 C.F.R. 1910.119(l)(4), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

5. Citation 1, Item 12, alleging a serious violation of 29 C.F.R. 1910.119(o)(4), is AFFIRMED, and a penalty of \$6,300.00 is assessed.

6. Citation 1, Item 13, alleging a serious violation of 29 C.F.R. 1910.219(c)(2)(i), is AFFIRMED and a penalty of \$3,150.00 is assessed.

7. Citation 1, Item 15, alleging a serious violation of 29 C.F.R. 1910.1200(f)(5)(i), is AFFIRMED, and a penalty of \$2,250.00 is assessed.

_____/s/_____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: April 27, 2011
Washington, D.C.