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. WYNNEWOOD REFINING CO., LLC, and its successors, Respondent.	OSHRC Docket Nos. 13-0644 & 13-0791

ON BRIEFS:

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For the Complainant

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For the Respondent

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For Amici Curiae American Fuel & Petrochemical Manufacturers and American Petroleum Institute

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration cited Wynnewood Refining Company, LLC, for—as relevant here—twelve violations of various provisions of OSHA's Process Safety Management standard, 29 C.F.R. § 1910.119. Eleven of these violations involve the "Wickes" steam boiler at the company's oil refinery in Wynnewood, Oklahoma, and four of those violations are characterized as repeat. The twelfth citation item alleges an additional repeat PSM violation related to the company's alleged failure to develop and implement safe work practices for

contractors. Following a hearing, Administrative Law Judge Brian A. Duncan affirmed all twelve violations as serious and assessed a total penalty of $58,000 for them.

Both parties petitioned for review of the judge's decision. Wynnewood LLC contends that the Wickes boiler-related items should be vacated because the PSM standard does not apply to the boiler.[1] The Secretary contends that the judge erred in rejecting his repeat characterization of five of the PSM items because, although the predicate violations were committed by a different corporate entity when it was owned by a different parent corporation, substantial continuity existed between Wynnewood LLC and the prior entity. For the following reasons, we affirm the judge's decision.[2]

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[1] Wynnewood LLC's petition for discretionary review also asserts that the Secretary's serious characterization of some of the PSM citation items at issue "shows the overreach of the PSM standard." The Commission requested briefing on this issue as well as the applicability of the PSM standard, as a whole, to the Wickes boiler. The company, however, does not address the serious characterization issue in its review brief; so we consider that issue abandoned. *See Am. Sterilizer Co.*, 18 BNA OSHC 1082, 1089 n.15 (No. 91-2494, 1997) ("Under Commission precedent, an issue raised in a petition for review or direction for review but not addressed in the party's brief is treated as abandoned."). The company did, though, include in its review brief challenges to the merits of each of the Wickes boiler-related items that go beyond the issue of applicability and were not raised in its petition. We decline to address these additional issues. *See Charles A. Gaetano Constr. Corp.*, 6 BNA OSHC 1463, 1468 n.7 (No. 14886, 1978) ("[Where a] respondent did not raise [an] argument in its petition for review[,] . . . the . . . issue is not before [the Commission]."); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2204 (No. 87-2059, 1993) ("It is well-settled that the Commission has discretion to decline to entertain arguments by a party dealing with matters on which we did not request briefs.").

[2] Two motions remain pending before the Commission. The American Fuel & Petrochemical Manufacturers and American Petroleum Institute moved for leave to file an amicus brief. *See* Commission Rule 24, 29 C.F.R. § 2200.24 ("The brief of an amicus curiae may be filed only by leave of the Judge or Commission . . . [and] may be conditionally filed with the motion for leave."). That motion is granted.

Wynnewood LLC moved for leave to file a sur-reply to the Secretary's reply brief. *See* Commission Rule 93(b)(3), 29 C.F.R. § 2200.93(b)(3) ("Additional briefs [other than opening and reply briefs] are otherwise not allowed except by leave of the Commission."). The company's counsel, however, included the sur-reply brief within the motion, which violates Commission Rule 40(a), *see* 29 C.F.R. § 2200.40(a) ("A motion shall not be included in another document, such as a brief . . . , but shall be made in a separate document."). In addition, the motion initially failed to "state . . . if [the Secretary] opposes or does not oppose the motion." *Id.* Finally, the motion was filed almost six weeks after the Secretary filed his reply brief. *Cf.* Commission Rule 93(b)(1), 29 C.F.R. § 2200.93(b)(1) ("Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served."). Accordingly, this motion is denied.

BACKGROUND

Wynnewood LLC's refinery in Oklahoma processes crude oil and on a daily basis produces 70,000 barrels of gasoline, propane, propylene, butane, fuel oils, and solvents. Prior to December 2011, the refinery was owned and operated by Wynnewood Refining Company, a subsidiary of Gary-Williams Energy Corporation. On December 15, 2011, CVR Energy, Inc., acquired all the stock of Gary-Williams Energy Corporation and its subsidiaries, including Wynnewood Inc., which then registered with the State of Delaware as a limited liability corporation—Wynnewood LLC, the respondent here—on February 21, 2012.[3]

The Wickes boiler, located about 100 feet from the reactor column in the refinery's Fluid Catalytic Cracking Unit (FCCU), is one of four boilers in the refinery providing steam to the 225-pound "steam header," which then routes steam for use in various processes throughout the facility. In hearing testimony, the Wickes boiler was described as "a major contributor into that steam header," and "by far the workhorse of the plant for steam," as it provides steam for, among other things, powering turbines and pumps, putting out small fires, "stripping" crude oil of certain substances during the refining process, and clearing the "FCCU riser" of hydrocarbons during emergency shutdowns.

The Wickes boiler is powered by two types of fuel—natural gas, which the refinery purchases, and refinery fuel gas (RFG), which is made from non-condensable, unsaleable, and flammable gas byproducts of the refining process. Natural gas and RFG are mixed in a fuel gas drum and the resulting fuel is then routed through a 4.1-mile-long pipeline network, including through a trunk line to the Wickes boiler. During times when no RFG is produced—such as when the refinery is shut down for maintenance, a period known as a "turnaround"—only natural gas is provided to the drum. On September 28, 2012, the refinery was in the middle of a turnaround, so the Wickes boiler was to be started up using only natural gas. During this start-up, however, too much natural gas was allowed into the boiler's "firebox"—where fuel is burned to produce a flame—and shortly thereafter the boiler exploded, immediately killing one Wynnewood LLC employee and critically injuring another, who died twenty-eight days later.

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[3] While it appears that Wynnewood Refining Company, when it was owned by Gary-Williams Energy Corporation, was a Delaware corporation, the record in this case is not entirely clear on this point. Nevertheless, we will refer to the entity that existed before February 2012 as "Wynnewood Inc.," to distinguish it from Wynnewood LLC, the respondent here.

The day after the explosion, OSHA began an inspection of the refinery, which resulted in the issuance of three citations to Wynnewood LLC (Docket No. 13-0791), with all items relating to the Wickes boiler—twelve of these citation items allege violations of the PSM standard; five of which are alleged as repeat violations. One month after the start of this first inspection, OSHA initiated a second inspection of the refinery, which resulted in the issuance of three more citations to Wynnewood LLC (Docket No. 13-0644), addressing various conditions in the refinery; one of the citation items is alleged as a repeat violation of the PSM standard.

Under Docket No. 13-0791, as relevant here, the judge affirmed eleven of the twelve citation items alleging violations of the PSM standard; four of which he characterized as serious instead of repeat.[4] Under Docket No. 13-0644, as relevant here, the judge affirmed the one citation item alleging a violation of the PSM standard but characterized it as serious instead of repeat.[5] In rejecting the Secretary's repeat characterization of these affirmed items, the judge concluded that, because the predicate PSM violations were committed by Wynnewood Inc. while it was a subsidiary of Gary-Williams Energy Corporation, those violations could not be attributed to Wynnewood LLC.

For the following reasons, we agree with the judge that the PSM standard applies to the Wickes boiler and therefore affirm the eleven items at issue on review that allege PSM violations

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[4] Under Docket No. 13-0791, the seven PSM items in Serious Citation 1 at issue on review allege violations of: § 1910.119(d)(3)(i)(F), asserting that the Wickes boiler's process safety information did not include design codes and standards (Item 1); § 1910.119(e)(3)(i), (e)(3)(iii), and (e)(3)(iv), based on two allegedly deficient process hazard analyses (Items 2a, 2b, and 2c); § 1910.119(f)(1)(i)(A) and (f)(3), for having inadequate operating procedures and failing to review such procedures (Items 3a and 3b); and § 1910.119(ℓ)(3), for failing to inform employees of a process change related to the Wickes boiler (Item 4). The four items in Repeat Citation 2 at issue on review allege violations of: § 1910.119(f)(1)(ii), in that the operating procedures for the Wickes boiler did not address the operating limits of the equipment (Item 2); § 1910.119(g)(2), for failing to provide refresher training to employees on operation of the Wickes boiler (Item 3); § 1910.119(j)(2), for failing to implement written procedures related to the Wickes boiler (Item 4); and § 1910.119(ℓ)(1), for failing to implement procedures to manage changes related to the Wickes boiler (Item 5).

[5] The additional PSM item that was cited as a repeat violation under Docket No. 13-0644 alleges a violation of § 1910.119(h)(2)(iv), for failing to implement safe work practices to control the entrance, presence, and exit of contract employers and employees near the Wickes boiler (Repeat Citation 2, Item 1).

relating to the boiler. We also agree that a repeat characterization is unwarranted for the five items on review.

DISCUSSION

I. Applicability of the PSM Standard

The PSM standard "applies to . . . [a] process which involves a Category 1 flammable gas . . . or a flammable liquid with a flashpoint below 100 °F . . . on site in one location, in a quantity of 10,000 pounds . . . or more." 29 C.F.R. § 1910.119(a)(1)(ii). "Process" is defined as "any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities," and "[f]or purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process." 29 C.F.R. § 1910.119(b). As such, the definition of "process" has two prongs—a vessel may be part of a covered "process" via interconnection or location.

The Secretary asserts that the Wickes boiler fits both prongs, alleging that the FCCU is a covered process and the boiler is both interconnected with it and located such that a catastrophic event could affect it. The judge agreed, finding that the Wickes boiler is interconnected with the Alkylation Unit and FCCU through the RFG pipeline, as well as interconnected with virtually all the refinery's processes through the steam header, and concluding that the boiler was centrally located in the FCCU such that an event like the explosion in this case could result in a catastrophic release of a highly hazardous chemical (HHC). The judge also rejected Wynnewood LLC's contention that the Wickes boiler qualifies for the PSM standard's workplace fuel exemption, which provides that "[h]ydrocarbon fuels used solely for workplace consumption as a fuel" are exempted from coverage "if such fuels are not a part of a process containing another [HHC] covered by this standard." 29 C.F.R. § 1910.119(a)(1)(ii)(A).

Wynnewood LLC asserts that the judge erred in several ways, arguing that: (1) a mere physical connection between vessels is insufficient to make them a single process absent evidence that the cited vessel could cause a catastrophic HHC release—a showing the company contends the Secretary failed to make; (2) in any event, the Wickes boiler was not in fact "interconnected" to a PSM-covered process because neither the RFG pipeline nor the steam header are sufficient connections under the standard; (3) the Wickes boiler was not situated such that it could cause a

catastrophic release from nearby covered processes; and (4) the Wickes boiler's use of RFG falls within the workplace fuel exemption because the only HHC or flammable gas that contacts the boiler is a small quantity of refinery and/or natural gas, all of which the boiler uses only as a fuel. We begin with the company's first contention, which raises an interpretation issue.

"Interconnected" Vessels and Proof of Risk of Catastrophic Release

Wynnewood LLC contends that interconnected vessels do not form a single "process" unless each vessel is shown to pose a risk of catastrophic HHC release. The company argues that because there are no commas on either side of the following phrase in the standard's definition of "process"—"and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release"—the "such that" phrase in the definition modifies "interconnected" as well as "located." 29 C.F.R. § 1910.119(b) (defining "process" as "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 company therefore asserts that to prove interconnection, the Secretary must show that the cited vessel is connected to a covered process *and* could cause or contribute to a catastrophic release of HHCs.

Even without the commas, the definition's repeated use of the word "which" sets up a parallel structure that on its face indicates two separate and complete conditions. This meaning is reinforced by the fact that while the phrase "which are located" cannot stand alone as a complete concept—to be meaningful, it needs the modifying phrase "such that a highly hazardous chemical could be involved in a potential release"—the phrase "which are interconnected" can stand alone. Accordingly, we find that the plain meaning of the definition is that a single process consists of either "any group of vessels which are interconnected" or "separate vessels which are located such that a highly hazardous chemical could be involved in a potential release."[6] *See, e.g., Cent. Fla.*

[6] Wynnewood LLC argues that the purpose of the standard—"to prevent or mitigate against the consequences of a catastrophic release of HHCs," 29 C.F.R. § 1910.119 ("Purpose" statement)—would not be served by what the company characterizes as an "expansive" reading of the "process" definition. Courts, however, "cannot use . . . general statements of . . . purpose to override the plain meaning of specific provisions . . . ." *Reeves v. Astrue*, 526 F.3d 732, 737 (11th Cir. 2008). In addition, as the judge noted, "[t]here is nothing patently . . . unreasonable about considering vessels that are physically connected by pipeline to be part of the same process, nor is it

Equip. Rentals, Inc., 25 BNA OSHC 2147, 2150 (No. 08-1656, 2016) ("Most OSHA standards regulate a particular condition and, therefore, presume the existence of a hazard."); *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1330 (No. 97-0469, 2003) (consolidated) (29 C.F.R. § 1910.219(c)(2)(i) "presumes a hazard" where "horizontal shafting [is] no more than 7 feet . . . from the floor," so "the Secretary is not obligated to show that the conditions in question are themselves hazardous in order to prove a violation").[7]

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unreasonable to presume that vessels connected in such a way could be involved in a potential release of HHCs."

We also reject the company's contention that OSHA failed to give the company notice that the Wickes boiler was to be treated as a PSM-covered process. The plain meaning of the provision provided sufficient notice of OSHA's position in this case. *See Ohio Cast Prods., Inc.*, 18 BNA OSHC 1912, 1915 (No. 96-0774, 1999) ("[I]n view of our conclusion that the standard's . . . plain meaning would be 'ascertainably certain' to an employer[,] . . . we conclude that [the employer] had fair notice of the means by which the cited standard provides for determining silica overexposure."). In addition, we note that OSHA published an interpretation of the PSM standard in 2007, more than five years prior to the inspections at issue here, stating that "the definition establishes two distinct burdens of proof when considering the applicability of PSM to an interconnected or a co-located process," with OSHA "presum[ing] that all aspects of a physically connected process can be expected to participate in a catastrophic release." Interpretation of OSHA's Standard for Process Safety Management of Highly Hazardous Chemicals, 72 Fed. Reg. 31,453, 31,456-57 (June 7, 2007).

[7] Chairman MacDougall does not join her colleagues in finding a plain meaning of the "process" definition, due to the definition's grammatically incorrect use of "which." When "which" is properly used, it is preceded by a comma and introduces a "nonrestrictive relative clause"; that clause "contains extra information that could be left out of the sentence without affecting the meaning." Oxford Living Dictionaries, *"That" or "which"?*, Oxford University Press, https://en.oxforddictionaries.com/usage/that-or-which (last visited Mar. 21, 2019). By contrast, "that" introduces, without a comma preceding it, a "restrictive relative clause" containing "essential information about the noun that comes before it." *Id.* Here, the "process" definition uses "which" without a comma, so any attempt to interpret the definition based on its plain language is guesswork at best, and impossible at worst.

To illustrate the confusion created by the drafters' construction of this provision, if the sentence is read as a true "which"—i.e., unnecessary, extra information—it nullifies most of the words of the sentence:

> [A]ny 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.

Interconnection of Vessels

We turn next to whether the Secretary has shown that the Wickes boiler is interconnected with other vessels such that it is part of a PSM-covered process. It is undisputed that the FCCU and Alkylation Unit are PSM-covered processes by virtue of the flammables contained in each and as the judge found, the Wickes boiler is physically connected to both units through the RFG pipeline and to virtually all the refinery's processes via the steam header. Indeed, Wynnewood LLC acknowledges that the Wickes boiler was, at least indirectly, physically connected to the FCCU and Alkylation Unit. Nevertheless, the company argues that interconnection may be established only where multiple *vessels* are involved, and that the Secretary has failed to show that the boiler's firebox is a "vessel" covered by the standard because it does not contain an amount of HHCs that exceeds the threshold quantity specified in § 1910.119(a)(1)(ii).

Wynnewood LLC is correct that there is no evidence in the record that RFG—the only hydrocarbon handled by the Wickes boiler—exists anywhere in the refinery in an amount that exceeds the PSM standard's threshold quantity, but the company's focus on the boiler's firebox and fuel is misplaced. The PSM standard does not require that an interconnected vessel itself contain the threshold quantity of HHCs—indeed, it does not even require that each vessel in an interconnected group contain HHCs at all. *See* 29 C.F.R. § 1910.119(b) (defining "process" as "any activity involving a highly hazardous chemical"). Thus, because the record shows that the Wickes boiler held water, it constitutes a "vessel," and the status of the firebox has no bearing on the issue here. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2547 (3d ed. 1986) (defining "vessel" as "a hollow and usu[ally] cylindrical or concave utensil . . . for holding something and esp[ecially] a liquid"); *United States*

However, if the sentence is read as using a "that"—i.e., essential information—then the statutory interpretation would be that of her colleagues. Unfortunately, the drafters chose "which" and thus, Chairman MacDougall would conclude that, due to poor drafting, the definition is ambiguous.

Nevertheless, Chairman MacDougall finds that the Secretary's interpretation of the "process" definition is reasonable and entitled to weight based on the entirety of the circumstances, including the consistency of the Secretary's interpretation. *See, e.g.*, 72 Fed. Reg. at 31,456-57. *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001) ("turn[ing] to the dictionary for guidance" in absence of statutory definition).

Wynnewood LLC also argues that the two, indirect connections between the Wickes boiler and the FCCU and Alkylation Unit—namely, the RFG and steam systems—are insufficient to constitute interconnection under the standard because neither played a direct role in these processes. The judge, citing the Commission's decision in *Delek Refining, Ltd.*, 25 BNA OSHC 1365 (No. 08-1386, 2015), *aff'd in relevant part*, 845 F.3d 170 (5th Cir. 2016), rejected this argument, concluding that the link between the Wickes boiler and the FCCU is even more concrete than the equipment found to be part of the single process in *Delek*. The company contends that the judge's reliance on *Delek* was error, and we agree—*Delek* is inapposite to the "interconnection" issue here. In *Delek*, the issue was whether the positive pressurization unit, which kept hazardous vapors from entering the FCCU control room at Delek's refinery, was "process equipment" under § 1910.119(j)(4)(i). *Delek Refining*, 25 BNA OSHC at 1370. Thus, while *Delek* did address the PSM standard's "process" definition, it focused on the first sentence and whether the positive pressurization unit was involved in the "manufacturing, handling [and] on-site movement" of HHCs, *id.* at 1371, not whether vessels were interconnected pursuant to the definition's second sentence.

We find, however, that the indirect, physical link between the Wickes boiler and the FCCU and Alkylation unit is sufficient for PSM coverage. "Interconnect," which the standard does not define, commonly means "to connect mutually or with one another," and "interconnection" means "connection between two or more." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1177 (3d ed. 1986); *see Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"). These definitions contemplate the linking together of multiple objects, which necessarily includes an indirect link between some of them. This is in contrast with the word "connect," a term the standard does not use, which describes a direct link—"to join, fasten, or link together usu[ally] by means of something intervening," for example, "a bus line connects the two towns," or "connect a garden hose to the faucet." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 480 (3d ed. 1986). In short, the PSM standard's use of the term "interconnected" makes it irrelevant whether the Wickes boiler is directly connected to, or involved with, the processes of the FCCU and Alkylation Unit. The main point is that RFG

generated by the FCCU and the Alkylation Unit is piped to the Wickes boiler, and steam from the boiler is piped to the FCCU and Alkylation Unit; the Wickes boiler is therefore one of a "group of vessels which are interconnected," 29 C.F.R. § 1910.119(b), and therefore covered as part of a "process" by the PSM standard. 29 C.F.R. § 1910.119(a)(1)(ii).

Location of Wickes Boiler

Alternatively, the Secretary asserts that the Wickes boiler was covered by the PSM standard because it was "located such that a highly hazardous chemical could be involved in a potential release." 29 C.F.R. § 1910.119(b). Before the judge, Wynnewood LLC argued that the Secretary failed to make this showing because the Wickes boiler's 100-foot distance from the FCCU reactor column, the closest part of the process containing HHCs, has not been shown to have been close enough to cause a catastrophic release of HHCs. In this regard the company asserted that there was no damage to any process equipment as a result of the explosion in this case, the nearby exhaust line carrying combustion byproducts does not contain any HHCs, and the testimony of the compliance officer and the Secretary's expert is speculative regarding the explosion hazard. The judge rejected the company's arguments as too heavily based on the particular explosion here and found that the boiler's central location in the FCCU, coupled with the fact that debris from the boiler (such as a ladder, a platform, and pieces of the boiler's brick-like lining) was propelled across the street toward an operator shelter, was sufficient to establish that the boiler's location made it such that an HHC could be involved in a potential release. On review, the company contends that the judge's ruling is based on speculation. We disagree.

Wynnewood LLC asserts that to establish the location prong of the definition, the Secretary must prove that the potential for a catastrophic release was probable, but this is not the test. The standard itself states that vessels must be "located such that a highly hazardous chemical *could be involved* in a potential release." 29 C.F.R. § 1910.119(b). The record here shows that the Wickes boiler was located centrally in the FCCU and confirms that the explosion in this case was strong enough to propel a ladder and platform forty feet into an operator shelter.[8] Also, the Secretary's

[8] The parties argue over what this operator shelter was, as well as the significance of it. The Secretary—citing the testimony of the refinery's process safety manager—asserts that the operator shelter was another name for the FCCU control room. Wynnewood LLC contends that there is a distinction between the control room and the operator shelter, the latter of which was within 40 feet of the Wickes boiler but housed no controls related to the Wickes boiler, FCCU, or any other PSM-covered process. The precise identification of the operator shelter, however, is immaterial

expert testified that the explosion could have been worse—"if they would have been producing steam [at that time], and if that boiler would have been under pressure, not only would you have had the firebox explode, as we saw, with shrapnel and walkways and all sorts of stuff flying all over the place, but you would have had a steam boiler explosion." As such, the explosion here was not the worst-case scenario, and in the expert's opinion, "an incident here at the boiler could definitely cause damage to other equipment, whether it be pipes or vessels in that facility." Wynnewood LLC points out that the Secretary did not proffer evidence concerning the construction specifications of the FCCU, but the FCCU's structural integrity is of no relevance, especially in light of testimony from Wynnewood's own expert that he was "surprised maybe that the [fuel] lines [to the Wickes boiler] weren't on fire" after the explosion. This acknowledgement that a fire hazard was present, along with the evidence discussed above, is sufficient to show that the Wickes boiler was "located such that a highly hazardous chemical could be involved in a potential release." 29 C.F.R. § 1910.119(b).

Workplace Fuel Consumption Exemption

The final issue with regard to applicability of the PSM standard to the Wickes boiler concerns Wynnewood LLC's contention that the boiler qualifies for the standard's workplace fuel consumption exemption. The PSM standard does not apply to "[h]ydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by this standard." 29 C.F.R. § 1910.119(a)(1)(ii)(A). The company argues that the Wickes boiler qualifies for this exemption because the only HHC that contacts the boiler is RFG produced at the refinery, which is used solely for fueling purposes. In rejecting this argument, the judge concluded that the exemption has a very limited scope and was not intended to cover process-related applications such as the Wickes boiler.[9] We agree.

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to the issue at hand. Given the testimony of the Secretary's expert regarding the potential for damage to equipment, vessels, and piping resulting from a boiler explosion, the significance of the operator shelter was to show the strength of the blast (given that the shelter was 40 feet away), not that damage to the shelter, in particular, would compromise FCCU processes.

[9] While the judge did not address which party bears the burden of proof with regard to the exemption, it is phrased as an exception, *see* § 1910.119(a)(1)(ii) ("This section applies to . . . [a] process which involves a Category 1 flammable gas . . . *except for* . . . ."), so Wynnewood LLC must show that it applies. *See C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-

The plain language of the exemption makes clear that fuels used for non-process-related uses—like "comfort heating" and for "vehicle[s]"—are not covered by the PSM standard. 29 C.F.R. § 1910.119(a)(1)(ii)(A). Put another way, the Secretary cannot base PSM coverage on the mere presence of such a fuel in a workplace. Here, however, the PSM standard's applicability is not based on either the RFG or the natural gas that is used to fuel the boiler; rather, it is based on the boiler itself, and its interconnection and location, as discussed above. Therefore, whether the RFG and natural gas used to fire the boiler could independently serve as a basis for applying the PSM standard—that is, whether this fuel is "used solely for workplace consumption"—is irrelevant in this case.[10] For these reasons, we conclude that the PSM standard applies to the Wickes boiler.

II. Repeat Characterization

The Secretary contends that the judge erred in rejecting his repeat characterization of five items—Docket No. 13-0791, Citation 2, Items 2 through 5, and Docket No. 13-0644, Citation 2, Item 1. The citations for the prior violations underlying these repeat items were issued to Wynnewood Inc.; they became final orders of the Commission in the fall of 2008, when the refinery was owned and operated by Wynnewood Inc., then a subsidiary of Gary-Williams Energy Corporation. The judge rejected the Secretary's repeat characterization based on his finding that "holding [Wynnewood LLC], a separate and distinct . . . entity, responsible for what [Wynnewood Inc.] did in the past . . . expands repeat liability beyond what the Commission envisioned in" *Sharon & Walter Construction, Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010). We agree.[11]

3177, 1996) ("A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.").

[10] We note that even if the PSM standard's applicability here depended on the mere presence of RFG or natural gas, the exemption would still not be met. The preamble "clarif[ies] [OSHA's] intent not to exclude from coverage hydrocarbon fuels used for process[-]related applications such as furnaces, heat exchangers and the like," and that is exactly how the RFG and natural gas were being used here—to heat the Wickes boiler. 57 Fed. Reg. at 6367. Rather, the intent, as explained by the American Petroleum Institute in commenting on the proposed rule, was in part "to exclude the enormous number of small business locations across the nation which would not be covered by the . . . rule, except for their on-site storage of hydrocarbon fuels for low-risk applications such as heating, drying, and the like," which "are not the subject of" the standard. *Id.*

[11] On review, Wynnewood LLC renews an additional argument that was rejected by the judge—that OSHA failed to comply with its own internal citation policy given that the underlying citations became final orders more than five years prior to the ones at issue here. As we have consistently

In *Sharon & Walter*, the Commission concluded that "in appropriate circumstances, [the Secretary may apply] a 'repeat' characterization to cases where the cited employer has altered its legal identity from that of the predecessor employer whose citation history forms the basis of that characterization." *Id.* at 1293. In "consider[ing] . . . the circumstances under which a predecessor's citation history may be attributed to a cited successor employer," the "focus is on whether there is 'substantial continuity' between the two enterprises," which depends on factors falling into three categories: (1) the nature of the business, because "continuity in the type of business, products/services offered and customers served indicates that there has been no substantive change in the enterprise"; (2) the jobs and working conditions, because these have a "close correlation with particular safety and health hazards"; and (3) continuity of the personnel who specifically control decisions related to safety and health," because "the decisions of such personnel relate directly to the extent to which the employer complies with the statute's requirements." *Id.* at 1294-95.

As the judge found, the issue here comes down to the third category given that the refinery's business, products, jobs, and working conditions were the same under both entities. Indeed, the Commission recognized in *Sharon & Walter* the particular importance of continuity of personnel, stating that the same "control over decision-making in both companies . . . weighs heavily in favor of attributing . . . [the prior employer's] citation history to [the cited employer]."[12] *Id.* at 1295-96. Here, several of the day-to-day managers were in the same positions under Wynnewood Inc. and Wynnewood LLC, including the refinery's vice president of refining, safety manager, PSM manager, operations manager, and two supervisors in Zone 2, where the Wickes boiler is located. The record also shows, however, that high-level executives of Wynnewood LLC's current parent company, CVR Energy—such as the executive vice president for operations

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held, however, OSHA's citation policy is "only a guide for OSHA personnel to promote efficiency and uniformity, [is] not binding on OSHA or the Commission, and do[es] not create any substantive rights for employers." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003). In other words, "there are no statutory limitations upon the length of time that a citation may serve as the basis for a repeated violation." *Id. See also Triumph Constr. Corp. v. Sec'y of Labor*, 885 F.3d 95, 99 (2d Cir. 2018) ("[T]he Commission did not abuse its discretion by relying on previous violations more than three years old, because neither the [OSHA Field Operations] Manual nor the Commission's precedent limits OSHA to a three-year look back period.").

[12] In *Sharon & Walter*, Walter Jensen was the sole proprietor of both the predecessor and successor. 23 BNA OSHC at 1288.

and the vice president of environmental health and safety—took an increased role in day-to-day operations at the refinery, and they were present frequently to oversee the transition from Wynnewood Inc. under Gary-Williams Energy Corporation to Wynnewood LLC under CVR Energy. This new management focused on improving safety, health, and the proper implementation of PSM at the refinery. Moreover, as the judge noted: the number of refinery safety personnel was nearly doubled, including four new assistant operations supervisors responsible for occupational safety compliance; $130 million of equipment upgrades were made; more formalized training programs were developed and implemented; and there was a renewed emphasis on management of change procedures. These leadership changes resulted in a safety culture shift at the refinery.[13]

In light of the foregoing, we find these are not the appropriate circumstances to affirm a repeat characterization. This is not a case where "the cited employer has altered its legal identity

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[13] We note that our dissenting colleague lists nine individuals employed by both Wynnewood LLC and Wynnewood Inc. with titles indicating safety and health responsibilities, and she asserts that it is inappropriate to consider management changes above their level following the purchase by CVR Energy because the new parent company is a distinct corporate entity. The record, however, shows that safety *policy* at the refinery was not controlled by these managers, either before or after the purchase. Regardless of whether as a matter of corporate law the managers our colleague references had the right to refuse instructions from either of their parent entities, the record shows that these managers merely implemented the safety policies set by the previous parent company and then by CVR Energy. Consequently, after the refinery was purchased, the safety policies *at the refinery* changed significantly as a direct result of the different attitude toward safety CVR Energy brought to bear. As operations manager Darin Rains testified, "[t]he refinery went through some pretty drastic changes as a result of the purchase by CVR Energy," including increasing the number of safety personnel. Indeed, David Johnson, a safety specialist at the refinery, described how Chris Swanberg, CVR Energy's Vice President for Safety, Health, and Environment, told managers "very clearly and very emphatically that, under his watch . . . safety was the highest priority at the refinery," and that this resulted in specific safety-related changes:

> Safety training was a priority. Our budget for safety was pretty open. If there was a safety issue, it was addressed immediately. If we couldn't resolve it, then . . . it kept going up to the next level to get resolution. You know, *it was a very dramatic change*.

(Emphasis added.) In short, a rote application of the "continuity of personnel" prong that considers only the management personnel working for each Wynnewood entity paints an inaccurate picture of how safety policy was set and how safety decisions were made at the refinery. As such, unlike our dissenting colleague, we conclude that Wynnewood LLC's changeover in ownership resulted in changes in management practices, procedures, and culture significant enough to break the chain of liability stemming from Wynnewood Inc.'s previous actions.

from that of the predecessor employer . . . [simply to] avoid a repeat characterization." *Id.* at 1293. On the contrary, the record does not support the Secretary's contention that there was sufficient continuity in the safety personnel at the cited entity such that "there was a Commission final order against the *same employer* for a substantially similar violation."[14] *Hackensack Steel Corp.*, 20

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[14] While we agree that the last prong of the three-part "substantial continuity" test (continuity of personnel) was not met in this case—and that Wynnewood Inc. and Wynnewood LLC are therefore not the same employer for repeat characterization purposes under *Sharon & Walter*—in our view this may not even be the appropriate test for determining whether successor liability should be imposed for purposes of the Occupational Safety and Health Act. We are in favor of revisiting *Sharon & Walter*, because the view expressed by Commissioner Thompson in that case seems persuasive—that the substantial continuity test is not appropriate in determining whether a violation has been properly characterized as repeat. *See* 23 BNA OSHC at 1296 n.19.

In addition, we see no rationale here for imposing the OSHA violation history of Wynnewood Inc. upon Wynnewood LLC, a separate legal entity not created to avoid responsibilities under the Act. *See id.* at 1293 (repeat characterization appropriate "where the cited employer has altered its legal identity from that of the predecessor employer whose citation history forms the basis of that characterization"). This is particularly true here where the new management focused on improving safety, health, and the proper implementation of PSM at the refinery. Nonetheless, given that the Secretary's repeat characterization has been rejected pursuant to *Sharon & Walter*, and in light of the parties' failure to ask the Commission to revisit that case (and the lack of briefing on this particular issue), this question will have to wait for another day.

Chairman MacDougall notes on this issue, however, as she did in *Delek Refining, Ltd.*, 25 BNA OSHC 1365 (No. 08-1386, 2015), *aff'd in part*, 845 F.3d 170 (5th Cir. 2016), that the "general rule that a purchasing entity does not have successor liability applies, such that a corporation that purchases another corporation 'is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability.' " *Id.* at 1378 (MacDougall, Comm'r, concurring and dissenting) (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182 n.5 (1973)). As she observed in *Delek*, "[t]he Supreme Court has referred to the 'free transfer of capital' and the concern of placing restrictions on successor employers, which might reduce the incentives purchasers have to take over failing businesses, as factors to be considered in shaping successorship doctrine." *Id.* n.6 (citing *Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union*, 417 U.S. 249, 255 (1974); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287-89 (1972)).

Commissioner Sullivan notes, as did Commissioner Thompson in *Sharon & Walter*, that the substantial continuity test was developed and adopted from cases decided by the National Labor Relations Board in evaluating "the continuing obligations of a successor toward a majority union under the National Labor Relations Act." 23 BNA OSHC at 1296 n.19. The OSH Act does not serve this purpose, so the doctrine appears particularly inappropriate when deciding whether a predecessor entity's prior violations should be attributed to a successor. Commissioner Sullivan agrees with Commissioner Thompson that under the OSH Act, "common law master-servant

BNA OSHC 1387, 1392 (No. 97-0755, 2003) (emphasis added). Accordingly, we find that a repeat characterization is not warranted here.[15]

CONCLUSION

For all the foregoing reasons, we affirm, under Docket No. 13-0791, Citation 1, Items 1, 2a, 2b, 2c, 3a, 3b, and 4, and Citation 2, Items 2, 3, 4, and 5, as serious violations. We also affirm, under Docket No. 13-0644, Citation 2, Item 1, as a serious violation.

Given that Wynnewood LLC does not contest the penalty amounts on review, we assess the penalties for these items that the judge assessed—for Docket No. 13-0791, Citation 1, Item 1, a penalty of $7,000; for Items 2a, 2b, and 2c, a grouped penalty of $7,000; for Items 3a and 3b, a grouped penalty of $7,000; for Item 4, a penalty of $7,000; for Citation 2, Items 2, 3, 4, and 5, a penalty of $7,000 each; and for Docket No. 13-0644, Citation 2, Item 1, a penalty of $2,000—for a total penalty of $58,000. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where penalty not in dispute).

SO ORDERED.

Heather L. MacDougall
Chairman

James J. Sullivan, Jr.
Commissioner

Dated: MAR 2 8 2019

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principles apply, including the 'alter ego,' doctrine, which is reflected in the federal common law." *Id.* Further, "the Commission has the authority to apply this common law equitable remedy to examine the violation history of a predecessor because denial to the Commission of veil piercing authority in appropriate circumstances would not be consistent with *United States v. Bestfoods*, 524 U.S. 51 (1998)." *Id.* In short, Commissioner Sullivan believes the common law speaks more directly to successor liability with respect to the OSH Act and to the question of whether a violation is properly characterized as repeat. The substantial continuity test, on the other hand, while appropriate for collective bargaining agreements, creates in his view a disincentive for employers when it comes to hiring or keeping employees of the predecessor entity if applied in the repeat characterization context.

[15] Chairman MacDougall notes that, given the Commission's conclusion that Wynnewood Inc. and Wynnewood LLC are not the same employer, there is no need to reach the issue of whether there is substantial similarity between the prior and current violations; therefore, there is no reason to address Commissioner Attwood's discussion of *Angelica Textile Servs., Inc.*, No. 08-1774, 2018 WL 3655794 (OSHRC June 24, 2018), *appeal docketed*, No. 18-2831 (2d Cir. Sept. 21, 2018).

ATTWOOD, Commissioner, concurring and dissenting in part:

I agree with my colleagues' conclusions in Part I of their opinion, in which they find that the PSM standard applies to the Wickes boiler under both "interconnect[ion]" and "locat[ion]," 29 C.F.R. § 1910.119(b), and that Wynnewood LLC has failed to show that the standard's workplace fuel consumption exemption applies, *see* 29 C.F.R. § 1910.119(a)(1)(ii)(A). Accordingly, I join my colleagues in affirming the Wickes boiler-related items at issue. I do not, however, join Part II of their opinion, which rejects the Secretary's repeat characterization of five of the violations we affirm.

Longstanding Commission precedent holds that a "violation is repeated under section 17(a) of the [Occupational Safety and Health] Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). For the reasons that follow, I would conclude that under this precedent: (1) Wynnewood Inc. (the recipient of the prior citations) and Wynnewood LLC (the respondent here) are the same employer for purposes of a repeat characterization; and (2) the prior and instant violations are substantially similar and therefore must be characterized as repeat. Accordingly, I would affirm Docket No. 13-0791, Citation 2, Items 2 through 5, and Docket No. 13-0644, Citation 2, Item 1 as repeat violations.

I. Substantial Continuity of Corporate Entities

The Commission held in *Sharon & Walter Construction, Inc.*, 23 BNA OSHC 1286 (No. 00-1402, 2010), that a repeat characterization may be appropriate "where the cited employer has altered its legal identity from that of the predecessor employer whose citation history forms the basis of that characterization." *Id.* at 1293. In deciding whether "a predecessor's citation history may be attributed to a cited successor employer," the Commission must determine "whether there is 'substantial continuity' between the two enterprises," which requires the consideration of "factors that essentially fall into three categories"—(1) the nature of the business; (2) the jobs and working conditions; and (3) the continuity of personnel who "specifically control decisions related to safety and health." *Id.* at 1294-95. It is undisputed that the facts relevant to the first two categories of factors weigh in favor of substantial continuity of the two entities. My colleagues' analysis of the third category of factors, however, is problematic.

The majority decision concedes that "several of the day-to-day managers were in the same positions under Wynnewood Inc. and Wynnewood LLC." Nevertheless, my colleagues decline to

find substantial continuity between these entities because two executives of Wynnewood LLC's new parent company— CVR Energy, Inc.—"took an increased role in day-to-day operations at the refinery." This focus on high-level executives (here, CVR Energy's executive vice president for operations and vice president of environmental health and safety) of a *different* corporate entity than the cited employer is misplaced. As noted, the issue is whether there is substantial continuity of safety and health personnel "*between the two enterprises*"—the entity that was issued the prior citation and the entity that was issued the instant one. *See id.* at 1294 (emphasis added). The executives for CVR Energy would only be relevant to this inquiry if the record established that the entity cited here (Wynnewood LLC) and CVR Energy were a "single employer," an issue that was neither alleged by either party nor litigated. *See N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993) ("[T]he corporate form will be disregarded" only "[i]n extreme circumstances," and "the corporate veil should be pierced only reluctantly and cautiously."); *see also Advance Specialty Co.*, 3 BNA OSHC 2072, 2076 (No. 2279, 1976) ("[W]hen . . . two companies share a common worksite such that the employees of both have access to the same hazardous conditions, have interrelated and integrated operations, and share a common president, management, supervision or ownership, the purposes of the [OSH] Act are best effectuated by the two being treated as one."); *C.T. Taylor Co.*, 20 BNA OSHC 1083 (No. 94-3241, 2003) (consolidated) (prohibiting Secretary from citing employers separately for willful violations where both companies were owned by the same individual, and one company was "fully in charge of [the other's] operations" and "assumed the responsibility for employee safety on the [combined] job[site]"). The issue in this case, therefore, turns on the extent of the continuity of personnel between Wynnewood LLC and Wynnewood Inc.

The record shows that most of Wynnewood LLC's supervisors, PSM managers, and safety officials responsible for OSH Act compliance held the same or similar positions for Wynnewood Inc.:

- Wayne Leiker was Vice President of Refining for both Wynnewood Inc. and Wynnewood LLC.
- Dan Looney was the refinery's safety manager for both Wynnewood Inc. and Wynnewood LLC.
- Dick Jackson was the refinery's process safety manager for both Wynnewood Inc. and Wynnewood LLC.
- Darin Rains was operations manager for both Wynnewood Inc. and Wynnewood LLC.

- Mitch Underwood and Troy Stephenson were supervisors in Zone 2 of the refinery (where the Wickes boiler was located) under both Wynnewood Inc. and Wynnewood LLC.
- Kyle McCurtain was a technician in Zone 2 for Wynnewood Inc., and he was promoted to supervisor by Wynnewood LLC.
- Paul Howard was a technician in Zone 2 and a member of the refinery's supervision for both Wynnewood Inc. and Wynnewood LLC.
- David Johnson, a safety specialist, worked for the two entities for a total of eighteen years.

Given this extensive overlap in supervisory personnel, I would find that substantial continuity has been established under *Sharon & Walter*. *Cf.* 23 BNA OSHC at 1296 ("[C]ontinuity of nonsupervisory employees among the two companies is not significant . . . because those employees are not responsible for OSH Act compliance and would not have supervised its implementation."). Indeed, the supervisors working for both Wynnewood Inc. and Wynnewood LLC were officials responsible for OSH Act and PSM compliance. Leiker and Looney headed, for both Wynnewood Inc. and Wynnewood LLC, the certification of abatement efforts in connection with prior settlements with OSHA. And Jackson managed the PSM program for both entities, in particular relating to process hazard analyses, pre-startup safety reviews, and management of change. *See* 29 C.F.R. § 1910.119(e) ("Process hazard analysis"), (i) ("Pre-startup safety review"), (ℓ) ("Management of change"). In addition, Rains was responsible for the entirety of the operations department for both Wynnewood Inc. and Wynnewood LLC, and Underwood was responsible for reviewing and updating standard operating procedures for various pieces of refinery equipment, including the Wickes boiler. *See* 29 C.F.R. § 1910.119(f) ("Operating procedures"). Finally, Howard assisted Stephenson in implementing PSM requirements for the FCCU. Thus, while parent company executives may have changed, the personnel who, as a practical matter, actually controlled refinery safety on a daily basis *for the pertinent entities* remained the same under both Wynnewood Inc. and Wynnewood LLC. As such, I would attribute the prior Wynnewood Inc. violations to Wynnewood LLC for purposes of a repeat characterization.

II. Substantial Similarity of Violations

To establish a repeat violation, the Secretary must also show that "at the time of the alleged repeated violation, there was a Commission final order . . . for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC at 1063. "[P]roof that an employer has committed a prior violation

of the same standard constitutes a prima facie showing by the Secretary of substantially similar violations." *FMC Corp.*, 7 BNA OSHC 1419, 1421 (No. 12311, 1979). Here, the Secretary has made such a showing—the repeat characterization of each of the five violations at issue is based on a prior violation of the very same standard. The Commission has recently stated, however, that "[t]his prima facie showing . . . may be rebutted by evidence of the disparate conditions and hazards associated with these violations," and "[a]lthough the principle factor in assessing repeat liability is whether the two violations resulted in substantially similar *hazards*, this assessment may also take into consideration other factors that bear on the similarity of the two violations." *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246, 1255 (No. 08-1774, 2018) (emphasis in original) (citations omitted), *appeal docketed*, No. 18-2831 (2d Cir. Sept. 21, 2018).

In *Angelica*, a Commission majority concluded that the Secretary's prima facie showing was rebutted by evidence demonstrating that the cited violations were minor compared with the prior ones. Specifically, the majority found that the prior violations involved deficiencies in the employer's confined space and lockout/tagout procedures "that were significant enough to render [them] substantially ineffective," while "the Secretary established only minimal deficiencies" with regard to the cited violations, "reflecting that after those prior violations, Angelica took affirmative steps to achieve compliance and avoid similar violations in the future." *Id.* at 1256, 1257. In short, given that the cited provisions were "performance-oriented, which means that employers have flexibility in meeting their requirements," the Commission held that Angelica's efforts and resulting substantial compliance rendered the cited violations "stark[ly] differen[t]" from the prior ones. *Id.* at 1258.

I dissented on the characterization issue in *Angelica* in part because the majority's focus on compliance efforts between the prior and instant violations injected into the repeat analysis "an element of good faith or state of mind [that] blurs the statutory distinction between a willful and repeated violation." *Id.* at 1262 (Attwood, Comm'r, concurring and dissenting in part). I reiterate my view here that *Angelica* was wrongly decided in this regard. In any event, *Angelica* is distinguishable from the present case. Wynnewood LLC frames its rebuttal argument in the context of the successor liability issue and claims that "upon Wynnewood's acquisition by CVR Energy in 2011, safety, health, and PSM protections greatly improved." In my view, this general assertion regarding Wynnewood LLC's "overall safety culture" falls short of proving that it made the type of specific improvements, relevant to the specific standards that were cited, that the

Commission deemed sufficient to rebut the Secretary's prima facie showing in *Angelica*. Even the improvements the majority cites here in the context of its successorship analysis—additional refinery safety personnel, equipment upgrades, more formalized training programs, and a "renewed emphasis" at the facility on management of change—are vague generalizations that are not specific to the particular standards cited.

Wynnewood LLC further argues that the prior citations addressed equipment and processes clearly covered by the PSM standard, which the company views as distinct from the Wickes boiler. While it is true that the prior citations addressed different equipment than that at issue here, the Commission has declined to "distinguish between various subcategories of . . . equipment on the basis of its function and location" in affirming a repeat characterization—"[t]hat the equipment which was the subject of the present citation is of a different type than that previously cited is of little moment." *Potlatch Corp.*, 7 BNA OSHC at 1065; *see also Willamette Iron & Steel Co.*, 9 BNA OSHC 1128, 1131 (No. 15317, 1980) (finding substantial similarity where "the same hazard—a tripping hazard—is the subject of both violations," despite the fact that "the present violation also includes additional materials in the clutter" that caused the hazard); *FMC Corp.*, 7 BNA OSHC at 1421 (finding "that a difference in the location of violations at the same worksite is not a relevant consideration" in deciding whether the violations are substantially similar).

Finally, Wynnewood LLC argues that the hazards at issue in the prior citations were different from the hazard posed by the Wickes boiler in this case, such that the violations are not substantially similar. More specifically, the company asserts that the prior citations addressed equipment and vessels involving HHCs and/or flammables above threshold quantities, and so the hazards there included toxic fire and explosions, self-contained hazardous vapor clouds, and employee exposure to toxic chemicals. Wynnewood LLC contends that the Wickes boiler does not handle any HHCs or flammables in a threshold quantity, so the only potential hazards here are struck-by/crushing hazards as a result of a boiler explosion. A closer look at the prior and instant violations, however, shows the following substantial similarities:

- Docket No. 13-0791, Citation 2, Item 2, alleges a violation of § 1910.119(f)(1)(ii),[1] based on Wynnewood LLC's failure to "ensure the written operating procedures addressed the operating limits of the process such

[1] This provision requires "written operating procedures that provide clear instructions for safely conducting activities involved in each covered process consistent with the process safety information and shall address . . . operating limits." 29 C.F.R. § 1910.119(f)(1)(ii).

as . . . Minimum/Maximum gas pressure to the boiler burner gas train [and] Minimum and maximum pressure . . . at the fuel gas inlet to the Wickes," which "exposed [employees] to fire and explosion hazards from potential releases of fuel gas and other flammable liquids or gases." The prior violation also related to operating procedures that address excessive pressure posing an explosion hazard; it was based on a failure to "develop and implement a high limit for the Depropanizer Accumulator pressure," given that the "operations manual for the unit stated the high limit was not applicable."

- Docket No. 13-0791, Citation 2, Item 3, alleges a violation of § 1910.119(g)(2),[2] based on Wynnewood LLC's failure to "ensure refresher training was provided . . . to each employee involved in operating the Wickes." The prior violation also involved a lack of refresher training for operators, specifically a failure to "ensure that refresher training [was] provided to process operators."

- Docket No. 13-0791, Citation 2, Item 4, alleges a violation of § 1910.119(j)(2),[3] based on Wynnewood LLC's failure to "ensure that written procedures were established and implemented for the testing and inspection of the Low Combustion Air Flow Fuel Gas Shut-Off system safeguard." The prior violation also dealt with written procedures for a shutdown system; it was based on a failure to "develop written procedures to maintain the ongoing integrity of controls, pumps, and emergency shutdown systems in the HF Alkylation Unit."

- Docket No. 13-0791, Citation 2, Item 5, alleges a violation of § 1910.119(l)(1),[4] based on Wynnewood LLC's failure to "ensure management of change procedures were implemented [for] . . . [t]he amount of time the firebox is purged prior to attempting to light the pilot[,] . . . [t]he amount that the gas control valve bypass valve is to be opened[,] . . . [and] the addition of temporary power to operate the Wickes." The prior violation also related to the implementation of management of change procedures; it was based on the company's failure to "follow its own written procedures for management of change regarding changes to procedures, piping and drains in the [alkylation] unit."

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[2] This provision states that "[r]efresher training shall be provided at least every three years, and more often if necessary, to each employee involved in operating a process to assure that the employee understands and adheres to the current operating procedures of the process." 29 C.F.R. § 1910.119(g)(2).

[3] This provision states that "[t]he employer shall establish and implement written procedures to maintain the on-going integrity of process equipment." 29 C.F.R. § 1910.119(j)(2).

[4] This provision states that "[t]he 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." 29 C.F.R. § 1910.119(*l*)(1).

- Docket No. 13-0644, Citation 2, Item 1, alleges a violation of § 1910.119(h)(2)(iv),[5] based on Wynnewood LLC's failure to "develop and implement safe work practices . . . to control the entrance, presence and exit of contract employers and employees . . . [in] the FCCU [and] . . . Alkylation Unit." Specifically, the Secretary asserted in his post-hearing brief that while "WRC developed a sign[-]in sign[-]out process," there were "numerous sign-out logs where employees failed to sign out of various areas," and the sign-in/sign-out "rule was not being consistently enforced." The prior violation also related to keeping track of onsite contractor employees who were present in the same areas of WRC's facility; it was based on a failure to "ensure that individual contractor employees are accounted for . . . in the event of an emergency . . . at the FCC and Alkylation Units."

In short, each of these items addresses the same type of condition involved in the prior violation, and the hazards addressed in the prior citations were, generally, fire and explosion risks caused by a failure to comply with the same PSM standards cited here. More to the point, there is no support in the record for the company's contention that the only potential hazards associated with the Wickes boiler were struck-by and crushing hazards, particularly in light of testimony from the company's own expert acknowledging that there was a fire risk associated with the boiler. Accordingly, I would find that Wynnewood LLC has failed to rebut the Secretary's prima facie case of substantial similarity, and I would characterize the violations noted above as repeat.[6]

Dated: MAR 2 8 2019

Cynthia L. Attwood
Commissioner

[5] This provision states that "[t]he employer shall develop and implement safe work practices consistent with paragraph (f)(4) of this section, to control the entrance, presence and exit of contract employers and contract employees in covered process areas." 29 C.F.R. § 1910.119(h)(2)(iv).

[6] I agree with my colleagues' rejection of Wynnewood LLC's argument that a repeat characterization is inappropriate here because OSHA failed to comply with its internal citation policy in relying on prior violations that were more than five years old. As the majority aptly notes, "there are no statutory limitations upon the length of time that a citation may serve as the basis for a repeated violation." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003).