

Regulatory Updates
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SAFETY

Judge's Decision Makes OSHA Heat Illness Violations Tougher to Prove - OSHA just lost one of its favorite tools for prosecuting heat stress cases thanks to an Occupational Safety and Health Review Commission judge's decision. The judge ruled July 15 that OSHA's use of the National Weather Service's [heat index chart](#) in heat stress case lacks a scientific basis. OSHA used the heat index chart as evidence of heat-related [General Duty Clause violations many times in the past](#), so this ruling is expected to have a big impact on future cases.

The National Weather Service chart has two layers of information:

1. One layer consisting of numbers, indicating how hot human beings feel when exposed to certain combinations of temperature and humidity. This information reflects a scientific paper published in 1979, and its validity is not in question.
2. A second layer based on "a 1981 article in a popular magazine on weather and climate" which involves color coding for caution, extreme caution, danger and extreme danger.

This second layer is the one the judge found lacked a scientific basis while hearing a case involving five citations issued in 2016 and 2017 against the United States Postal Service. USPS also had an expert who rebutted the idea the chart had any scientific validity. OSHRC Judge Sharon Calhoun agreed with USPS, finding OSHA failed to provide supporting data for why the levels of risk indicated by the chart's color coding are attributed to the respective temperatures. The agency hasn't asked for a full commission review yet, and unless a review is granted – and Calhoun's decision is adopted as the commission's own – this decision will not be binding on any other judge or the full commission. Should OSHA get a review, Calhoun's findings "are highly unlikely to be challenged, let alone overturned." The bottom line is, even if the decision remains non-binding, it will still be influential and likely spells "the end of OSHA's ability to rely on the NWS heat index chart." (Safety News Alert, Merriell Moyer, July 27, 2020)

OSHA Issues Revised Final Beryllium Standards for Construction and Shipyards -

OSHA today published a final rule revising the beryllium standards for construction and shipyards. The final rule includes changes designed to clarify the standards and simplify or improve compliance. These changes maintain protection for workers while ensuring that the standard is well understood and compliance is simple and straightforward. The [final rule](#) amends the following paragraphs in the beryllium standards for construction and shipyards: Definitions, Methods of Compliance, Respiratory Protection, Personal Protective Clothing and Equipment, Housekeeping, Hazard Communication, Medical Surveillance, and Recordkeeping. OSHA has removed the Hygiene Areas and Practices paragraph from the final standards because the necessary protections are provided by existing OSHA standards for sanitation.

The effective date of the revisions in this final rule is September 30, 2020. OSHA began enforcing the new permissible exposure limits in the 2017 beryllium standards for construction and shipyards in May 2018. OSHA will begin enforcing the remaining provisions of the standards on September 30, 2020. The final standard will affect approximately 12,000 workers employed in nearly 2,800 establishments in the construction and shipyard industries. The final standards are estimated to yield \$2.5 million in total annualized cost savings to employers.

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Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. (OSHA website, 8/28/2020).

Hydrogen Sulfide Deaths Linked to Faulty Alarm - The US Chemical Safety and Hazard Investigation Board (CSB), released a [factual update](#) detailing the events surrounding an October 26, 2019 hydrogen sulfide release at a water flood station in Odessa, Texas. Hydrogen sulfide is present in the area's oil and gas reservoirs. The site is operated by Aghorn Operating, Inc. (Aghorn). The release resulted in two fatalities – an Aghorn employee and his wife. The CSB's investigation is ongoing – to date the investigative team has determined the following details related to the fatal incident:

- During the evening of October 26, 2019, a component of a pump inside the waterflood station failed, resulting in the release of water containing hydrogen sulfide.
- Likely after the pump component failure, at 6:38 p.m. a control board within the station registered an oil level alarm for the failed pump.
- Five minutes later, at 6:43 p.m., the alarm system triggered an automatic phone notification to an Aghorn employee. As part of the normal job duties, the employee drove to the facility to determine the cause of the alarm. While the employee was in the pump house, the employee was overcome by hydrogen sulfide gas.
- Around 9:30 p.m., having not heard back from her husband for a few hours, the employee's wife and their two children drove to the waterflood station in her personal vehicle to check on him. After arriving at the facility, it appears she entered the pump house to look for her husband and was also overcome by hydrogen sulfide gas.
- Just after 10:00 p.m. first responders arrived at the scene and were able to rescue the two children who were still in the wife's vehicle. Later that night both the employee and his wife were found deceased inside the pump house.

Following the incident, the CSB has completed the following activities:

- Examination of the failed pump revealed that the component of the pump that most likely led to the release was a piece of equipment referred to as a "plunger."
- The site was equipped with a hydrogen sulfide alarm system – following the incident testing of the system suggested the alarm system may not have been performing as expected.

The CSB's investigation is still ongoing – currently the board plans to release its final report in 2020. (csb.gov, 7/27/2020).

Rules Revised for OSHA Access of Employee Medical Records - OSHA has revised the [Rules of Agency Practice and Procedure Concerning Occupational Safety and Health Administration Access to Employee Medical Records](#). The rule describes internal procedures that OSHA personnel must follow when obtaining and using personally-identifiable employee medical information.

OSHA has identified and amended several provisions of the regulation in order to improve efficiency in implementing these internal procedures. The final rule:

- Transfers the approval of written medical access orders (MAOs) from the Assistant Secretary of Occupational Safety and Health to the OSHA Medical Records Officer

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(MRO). The MRO is responsible for determining the transfer and public disclosure of personally-identifiable employee medical information in OSHA's possession;

- Clarifies that a written MAO does not constitute an administrative subpoena; and
- Establishes new procedures for the access and safeguarding of personally-identifiable employee medical information maintained in electronic form.

(OSHA website, 7/29/2020).

OSHA Releases Work Related Injury Data after FOIA Ruling - OSHA has released work-related [injury and illness data](#) electronically submitted by employers. The agency has posted Form 300A data for calendar years 2016, 2017 and 2018, as well as a data dictionary. The release follows two rulings in Freedom of Information Act (FOIA) cases. See *Center for Investigative Reporting v. Department of Labor*, No. 4:18-cv-02414-DMR, 2020 WL 2995209 (N.D. Cal. June 4, 2020); *Public Citizen Foundation v. United States Department of Labor*, No. 1:18-cv-00117 (D.D.C. June 23, 2020). Electronic submissions are required of establishments with 250 or more employees that are currently required to keep OSHA injury and illness records, and establishments with 20-249 employees that are classified in [specific industries](#) with historically high rates of occupational injuries and illnesses. For more information, and a link to the Injury Tracking Application, visit the [Injury Tracking Application Electronic Submission of Injury and Illness Records to OSHA](#). (OSHA website, 9/4/2020)

Toxic Gas Release from Inadvertent Chemical Mixing - More than two years after a toxic chemical fog surrounded Atchison and sent about 140 seeking medical help, two Kansas companies have been indicted on federal charges of safety violations, the U.S. Attorney's Office announced. Midwest Grain Products, Inc., of Atchison, Kan., and Harcros Chemicals, Inc., of Kansas City, Kan., are charged with Clean Air Act violations that federal prosecutors say caused the poisonous cloud and put the public in danger. The toxic gas was released on the morning of Oct. 21, 2016 at MGPI's Atchison facility. Court records say [4,000 gallons of sulfuric acid delivered by Harcros was mistakenly combined with 5,800 gallons of sodium hypochlorite](#) to form a toxic chlorine gas cloud that covered a large part of the city for 45 minutes until emergency personnel arrived to turn off the flow. Residents outside the area of the fog were asked to evacuate while others living north of the MGPI plant were told to stay inside their homes. Witnesses who were outside at the time [described a chlorine smell](#) and said it was difficult to breathe. The indictment filed Wednesday alleges two men, a driver for Harcros and an operator for MGPI, "violated safety rules by failing to verify that the connection was correct and failing to monitor the transfer" of the sulfuric acid. A statement from MGPI sent to The Star Wednesday afternoon said the company was "reviewing this claim." "The company has been focused on the Atchison community, our employees and cooperating fully with safety officials since this incident. In fact, the federal government agency responsible for chemical safety complimented MGPI's response," MGPI said in its statement, including a link to [recommendations made by the U.S. Chemical Safety and Hazard Investigation Board](#). The board's report said MGPI implemented the recommendations in less than 90 days. (Kansas City Star, Katie Moore, 5/27/2020)

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Plant Applicability Limit (PAL) Guidance Issued by EPA - EPA is offering a less burdensome option than New Source Review (NSR) permitting for major sources of air pollutants called Plantwide Applicability Limits (PALs). They've been around since 2002 as part of an NSR reform rule. A PAL is an optional flexible permitting mechanism available to major stationary sources that involves the establishment of a plantwide emissions limit, in tons per year, for a regulated NSR pollutant. A PAL represents a simplified NSR applicability approach that provides a source with the ability to manage physical and operational changes, and the impacts of those changes on facility-wide emissions, without triggering major NSR or the need to conduct project-by-project basis. But very few are taking advantage of PAL's flexibility, says EPA. EPA hopes to reverse that trend with a new [PAL guidance document](#). EPA stresses the main requirement for PAL permit holders is to monitor, record and report actual emissions of PAL pollutants on a 12-month rolling basis, something most sources have to do anyway. "As long as actual emissions remain below the PAL, a source can implement timely projects, including modifications to existing emissions units and construction of new emissions ... [and avoid NSR] which can take up to 18 months to apply for and obtain." (Environmental Compliance Alert, 9/15/2020 and EPA website).

Guidance Document Policies - On September 14, 2020, EPA issued a [final rule](#) intended to promote transparency and establish consistent requirements and procedures for the issuance of guidance documents. Consistent with [Executive Order 13891](#) (Promoting the Rule of Law Through Improved Agency Guidance Documents) that directs federal agencies to finalize regulations that "set forth processes and procedures for issuance of guidance documents," U.S. EPA's final rule establishes internal policies and procedures for U.S. EPA's issuance of future guidance documents and codifies the requirement that U.S. EPA maintain an internet portal that identifies all effective, active U.S. EPA guidance documents. Under this new regulation, all active "guidance documents" shall appear on the [U.S. EPA Guidance Portal](#). The regulation defines a "guidance document" as "an Agency statement of general applicability, intended to have future effect on behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issues, or an interpretation of a statute or regulation." Any guidance document that is not posted to the Guidance Portal is not an active U.S. EPA guidance document and will have no effect except to establish historical facts. However, it is important to note the Guidance Portal is only intended to identify documents meeting the definition of "guidance documents," and documents falling outside of this definition that are not posted to the Guidance Portal may still be in effect. (Lexology, Jenner & Block LLP - Steven M. Siros, 9/16/2020).

Chemical Data Reporting is Due to EPA on November 30 - Every four years, manufacturers and importers of chemicals must report to the EPA under its [Chemical Data Reporting](#) (CDR) rule, 40 C.F.R. Part 711. The CDR rule, issued under the Toxic Substances Control Act (TSCA), requires manufacturers or importers to file reports for all chemical substances they manufacture or import over certain volume thresholds — subject to some

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exemptions. The CDR rule is not limited to companies that sell chemicals; it applies to any entity that manufactures or imports chemical substances in commerce in the United States (that is, listed on the [TSCA Chemical Substance Inventory](#)). The CDR rule applies to a broad range of industries including biotechnology companies, paper and metal manufacturers, and electric utilities. Many manufacturers and importers may be unaware of this obligation, especially start-up companies and fast-growing midsize companies. CDR reports for 2020, which cover calendar years 2016 through 2019, are due to EPA by November 30. Required information includes chemical identities of substances, total annual production or import volume, volumes used onsite and exported, and risks to onsite workers. (Lexology, Sidley Austin LLP - Samuel B. Boxerman, Andrew R. Stewart, Marshall R. Morales and Nicole E. Noelliste, 9/14/2020).

Update to the MON Rule for Major Sources - On August 12, the EPA published the final “residual risk and technology” (RTR) rule for the Miscellaneous Organic Chemical Manufacturing (MON) source category ([85 Fed. Reg. 49084](#)). In doing so, EPA indefinitely delayed responding to industry comments and criticism of its controversial decision to rely on the IRIS model as the basis for its assessment of the risks posed by ethylene oxide (EO) emissions. Chemical manufacturers strongly criticized the IRIS EO assessment as scientifically indefensible, arguing that errors in the IRIS development process resulted in an IRIS value that overstated the risks of low-level EO exposure by orders of magnitude. While the Final Rule generally provides three years to comply with its provisions, the compliance schedule provides shorter periods for some requirements, including one year for equipment leak reductions and two years for process vent and storage tank modifications. ([84 Fed. Reg. 69182](#)). The Final Rule includes, among other things, the following changes to MON:

- provisions regulating emissions during startup, shutdown and malfunction (SSM);
- technology standards for heat exchange systems and equipment leaks;
- monitoring and operational requirements for flares that control emissions of olefins, polyolefins, and EO, including allowing facilities outside the source category to use MON flare requirements in lieu of their applicable flare requirements;
- provisions requiring electronic reporting and monitoring; and
- requirements for controlling EO emissions from storage tanks, process vents, and equipment leaks.

(Lexology, Beveridge & Diamond PC - Madeleine Boyer Kadas, Robert Brager, David M. Friedland, Laura K. McAfee, Evynn M. Overton and Matthew D. Schneider, August 12, 2020).

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