

Submitted by
Mr. McKeon



8 APR 2008

The Honorable George Miller
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Miller:

I am writing with regard to your bill, H.R. 5522, the Combustible Dust Explosion and Fire Prevention Act of 2008.

We share your goal of protecting employees from hazards in the workplace. As I stated in my testimony before your committee on March 12, 2008, combustible dust is a recognized workplace hazard, and we agree about the need to protect employees from this hazard. The Administration believes that OSHA's approach to this problem holds the greatest long-term promise of success in protecting employees. The regulatory approach you have put forward in H.R. 5522, while well intentioned, has several problems which leads the Administration, reluctantly, to oppose this bill in its current form.

First and foremost, Section 3(a)(1) requires OSHA to promulgate an interim final rule (IFR) to regulate combustible dusts within 90 days of enactment. The time frame for enacting the IFR is unrealistic, will not allow time for feasibility and economic analyses or stakeholder review, and will likely cause additional problems for OSHA and for those who have to comply with this new standard.

The time constraints of this legislation would give OSHA no choice but to ignore other statutory and regulatory requirements for rulemaking under the Occupational Safety and Health Act, the Regulatory Flexibility Act, the Administrative Procedures Act (APA), numerous executive orders, and Office of Management and Budget (OMB) bulletins and guidelines. These procedures exist, in part, to provide stakeholders with the opportunity to participate in the rulemaking and to ensure that the Agency fairly assesses the feasibility, costs and benefits, and potential impacts of proposed and final rules. In addition, these processes help the Agency produce strong and thorough standards that effectively protect employees, *i.e.*, rules that are clear, effective, and enforceable.

Directing OSHA to issue an IFR that provides "no less protection than afforded by" the National Fire Protection Association (NFPA) general combustible dust standard (NFPA 654 -2006) and metals dust standard (NFPA 484-2006) in such a short period would make it difficult, if not impossible, for the Agency to do anything other than incorporate by reference applicable NFPA standards as final OSHA standards. OSHA recognizes the value of national consensus standards such as those from NFPA, and has used them as the basis for many of its safety standards. Over the years, however, we have found that taking this approach can lead to compliance and enforcement issues that result in a less effective and enforceable standard. We have spent many years working through these problems and are still working out difficulties posed by the early adoption of consensus standards through our consensus standards update project. In more recent rulemakings, OSHA has incorporated such standards by reference only after careful consideration of how effective they will be in all affected industry sectors, their potential impacts, and their enforceability. Typically, OSHA finds that it must depart from the language contained in consensus standards to ensure that the resulting rule will be effective, feasible, and enforceable.

In addition, adopting NFPA standards to fully address all combustible dust hazards requires more than just adopting the two specific NFPA standards referenced in the bill. For example, combustible agricultural dusts, such as sugar, are covered by NFPA 61. NFPA standards 654, 484, and 61, as well as other NFPA standards dealing with combustible dust, each refer to other NFPA rules covering electrical hazards, ventilation systems, fire protection systems, and other topics, creating a complex web of applicable standards that would be incorporated into the required IFR. Inclusion of all of these NFPA standards by reference into a single IFR and applying them across the board to all affected industries may be confusing for employers and employees. Indeed, the broad new mandates in the bill may require employers to implement combustible dust consensus standards at a significant expense with no actual benefit to American employees.

Moreover, because NFPA standards are written as voluntary standards, they may not be appropriate as enforceable OSHA standards and may be difficult to interpret in an enforcement situation. For example, in some cases, they offer suggestions or best practices using the word "should," thus making them difficult to enforce legally. Some of the standards appear to offer compliance alternatives based on the judgment of a qualified individual selected at the discretion of the employer, which may provide an unintended "safe harbor" for employers and lead to unnecessary litigation that reduces the clarity of the obligations that employers have to their employees. Additionally, our analytical laboratory currently conducts combustible dust tests appropriate for our evidentiary burden in enforcing worker protections, while the NFPA tests

represent a "worst case" scenario. OSHA needs to carefully evaluate these issues before adopting the NFPA standards as enforceable OSHA standards, otherwise we may be unable to hold employers effectively accountable.

The section requiring OSHA to amend the Hazard Communication standard (29 CFR 1910.1200) to add combustible dust to the definition of "physical hazard" and to add language that defines "combustible dust" may undermine OSHA's current rulemaking to revise the standard to adopt the Globally Harmonized System for Hazard Communication (GHS). OSHA has already received and is evaluating public comment on the need to include a specific definition for combustible dust in the standard, and we will be addressing this issue when we propose the rule later this year. A legislative requirement to amend the Hazard Communication standard now to include a combustible dust definition would effectively cut off any further consideration of this issue as the rulemaking to adopt the GHS proceeds.

On April 3, your staff forwarded a revised draft of H.R. 5522 that appears to address some of these concerns. While we are still reviewing the revised version, we can offer some very preliminary comments. The revised draft gives employers thirty days to comply with the IFR. OSHA is concerned that this time period does not provide employers sufficient time to implement the new requirements that would be contained in the IFR. This is particularly true for new engineering and administrative controls, and operating procedures. Thirty days also does not provide enough time for OSHA to adequately train its compliance officers on the content of the IFR and develop inspection procedures. In addition, OSHA is concerned that requiring the Agency to promulgate a final standard within 18 months from enactment still does not provide enough time to consider the difficult issues related to combustible dust and fulfill all of the procedural and statutory obligations for OSHA rulemakings, particularly given the diversity of the industries being regulated.

Accordingly, we do not believe the deadlines in either version of your bill will allow for a clear, effective, and enforceable standard that is economically and technologically feasible for as many as 200,000 facilities that will likely be affected in widely different industries throughout the entire country. Moreover, the IFR deadline is particularly problematic given that it will go into force without the opportunity for input from employees, employee representatives, scientific experts, small businesses and the rest of the regulated community.

Currently, there are 17 OSHA standards that are relevant to worksites with combustible dust. One of the goals of OSHA's National Emphasis Program (NEP) for combustible dust is to learn if gaps in current regulations exist that could be addressed through rulemaking. If the findings of our compliance

officers in the NEP inspections, as well as in our investigation of the tragedy at Imperial Sugar, show that current safety and health standards are not providing adequate protection to employees, I will not hesitate to initiate rulemaking. A rulemaking initiated by OSHA will avoid many of the problems that are likely to occur under H.R. 5522, by maintaining the legal and regulatory requirements of OSHA rulemaking and ensuring that employees will be effectively protected by any new standard.

We share the same goal of protecting employees from workplace hazards. These efforts take the active participation of all affected parties - employers, employees, OSHA, and policymakers. The Administration strongly opposes H.R. 5522, as introduced, because it denies citizens their right to participate in the rulemaking process and because the efficacy of a new comprehensive standard has not yet been established.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's programs.

Sincerely,



Edwin G. Foulke, Jr.

cc: The Honorable Howard P. (Buck) McKeon, Ranking Member