

OSHA'S BIG DUST-UP

What's Next for OSHA's Combustible Dust Rulemaking?

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Combustible dusts are solids ground into fine particles that present a fire or explosion hazard when suspended in air. Combustible dust comes in many forms, including wood, plastics, rubber, metals, grain, sugar, and many others. Over the past 30 years, there have been nearly 300 reported dust fires and explosions in the U.S., resulting in hundreds of workplace injuries and fatalities. Until recently, the Occupational Safety and Health Administration (OSHA) has regulated the hazards of combustible dust through various general industry standards (e.g., housekeeping and electrical standards) and OSHA's General Duty Clause, which requires employers to protect employees from serious "recognized" hazards. However, OSHA published an Advance Notice of Proposed Rulemaking (ANPR) in the October 21, 2009, Federal Register, announcing the intent to develop a comprehensive combustible dust standard.

Combustible dust explosions are not a new phenomenon, and OSHA has regulated industries susceptible to hazards of combustible dust for decades. So what is motivating OSHA to promulgate a combustible dust standard now? There are three reasons OSHA has kicked off this combustible dust rulemaking:

- Following a 2008 catastrophic explosion at a sugar plant, which took the lives of 14 workers, OSHA has been under pressure from the public, legislators, and the U.S. Chemical Safety and Hazard Investigation Board to develop a combustible dust standard.
- OSHA's inspections conducted under its combustible dust National Emphasis Program generated a high percentage of violations cited under the General Duty Clause rather than a specific safety standard, which led OSHA to conclude that it needed a comprehensive combustible dust standard.
- OSHA under President George W. Bush emphasized voluntary

compliance programs, whereas President Obama's OSHA has switched focus to enforcement and rulemaking.

THE U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD AND IMPERIAL SUGAR

In 2006, after several high-profile combustible dust incidents, the U.S. Chemical Safety and Hazard Investigation Board (CSB) conducted a study and reported that, over the previous 25 years, there had been more than 275 dust incidents in U.S. industrial facilities, resulting in nearly 1,000 injuries or fatalities. The CSB concluded that industry and safety professionals lacked awareness of combustible dust hazards, National Fire Protection Association (NFPA) and other national consensus standards were not widely followed, state and local fire codes were not effectively addressing combustible dust hazards, and OSHA's focus had been on reactive enforcement rather than proactive development of a standard to regulate combustible dust.

On February 7, 2008, a catastrophic combustible dust explosion struck an Imperial Sugar plant in Port Wentworth, Georgia, claiming the lives of 14 workers and injuring three dozen more. The CSB investigated the incident and formally recommended that OSHA "proceed expeditiously . . . to conduct rulemaking, to promulgate a comprehensive standard to reduce or eliminate hazards from fire and explosion from combustible powders and dust." In addition to the CSB's recommendation, OSHA was also pressured to develop a combustible dust standard by the public, industry and labor organizations, and legislators. Senators Isakson and Chambliss of Georgia, home to the devastated Imperial Sugar plant, publicly urged OSHA to "embrace the findings of the Chemical Safety Board, including the recommendation that OSHA establish mandatory standards modeled after the NFPA guidelines."

ABOUT the AUTHOR

Eric J. Conn, Esq. is a partner in the Washington, D.C. office of McDermott Will & Emery LLP, where, as a member of the Firm's OSHA & Catastrophe Response Practice Group, he focuses his practice on occupational safety and health law, including representation of clients in all manner of dealings with OSHA and the CSB. Eric has extensive experience responding to workplace accidents, including combustible dust explosions and chemical releases. Contact Eric Conn at 202.756.8248 or econn@mwe.com to inquire how McDermott's OSHA & Catastrophe Response Group can assist your company or industry association in making sure your concerns are addressed during the important combustible dust rulemaking process.

OSHA'S COMBUSTIBLE DUST PROGRAM

In October 2007, OSHA initiated a combustible dust National Emphasis Program (NEP) to increase OSHA's enforcement in industries generating and handling combustible dust. Two years into the NEP, OSHA reported that it had conducted more than 1,000 combustible dust NEP inspections at workplaces in 64 industries and issued nearly 5,000 citations. The most noteworthy statistic, however, was the high percentage of citations issued under OSHA's General Duty Clause. Roughly 25 percent of the citations from the NEP was issued under the General Duty Clause as compared to a rate of less than 4 percent from other OSHA inspections. Accordingly, OSHA concluded that its existing standards do not provide a sufficiently comprehensive set of requirements to address the hazards of combustible dust.

OSHA RULEMAKING – A RENEWED EFFORT

For 8 years, OSHA under President George W. Bush emphasized voluntary compliance programs more than enforcement and rulemaking. During the Bush presidency, OSHA promulgated fewer new safety standards than it did during each of the Clinton, George H.W. Bush and Reagan administrations. OSHA, under the Obama administration, stated that rulemaking will be a priority. Upon taking the reins of the Department of Labor, Secretary of Labor, Hilda Solis, announced that "OSHA is reinvigorating the regulatory process." All industries should expect significant increases in rulemaking activity, including development of the Global Harmonization standard for hazard communication, the revised walking/working surfaces standard, another attempt at an ergonomics standard, an effort to revise many chemical permissible exposure limits, a safety and health programs standard, and the combustible dust standard introduced in OSHA's recent ANPR.

WHAT'S NEXT FOR THE COMBUSTIBLE DUST RULEMAKING?

As part of the rulemaking process, OSHA asked for written comments on the ANPR by January 19, 2010, and then conducted six stakeholder meetings between February and April 2010, in Washington, DC, Atlanta, and Chicago, to gather data and information about the industries likely affected by a combustible dust standard, the economic effects of a mandatory regulation, and the possible forms the regulation may take. The informal meetings were chaired by OSHA's Director of Standards and Guidance, with participation by members of OSHA's dust project, an attorney from its Solicitor's office and an economist, and by attorneys, consultants, and representatives from trade associations and employers. The industry representatives offered comments on the numerous questions and subjects raised in OSHA's combustible dust ANPR, including the scope of the standard, the economic impact, how closely the standard should track the NFPA standards.

The next step in the process is the start of the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, which allows representatives of small businesses, with 500 or fewer employees, to review the proposed standard and suggest changes to the rule or to OSHA's preliminary economic analysis. However, the SBREFA process is not likely to begin until the spring 2011.

If a contractor's company operates one of the nearly one million workplaces or employs any of the approximately 22 million workers in the industries that generate or handle combustible dust, now is the time to actively participate in the process that will determine the form and content of this important new standard. ■