

COMBUSTIBLE DUST EXPLOSION AND FIRE PREVENTION
ACT OF 2008

APRIL 22, 2008.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on
Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5522]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 5522) to require the Secretary of Labor to issue interim and final occupational safety and health standards regarding worker exposure to combustible dust, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Combustible Dust Explosion and Fire Prevention Act of 2008”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) An emergency exists concerning worker exposure to combustible dust explosions and fires.

(2) 13 workers were killed and more than 60 seriously injured in a catastrophic combustible dust explosion at Imperial Sugar in Port Wentworth, Georgia on February 7, 2008.

(3) Following 3 catastrophic dust explosions that killed 14 workers in 2003, the Chemical Safety and Hazard Investigation Board (CSB) issued a report in November 2006, which identified 281 combustible dust incidents between 1980 and 2005 that killed 119 workers and injured 718. The CSB concluded that “combustible dust explosions are a serious hazard in American industry”.

(4) A quarter of the explosions occurred at food industry facilities, including sugar plants. Seventy additional combustible dust explosions have occurred since 2005.

(5) Material Safety Data Sheets (MSDSs) often do not adequately address the hazards of combustible dusts, and the OSHA Hazard Communication Standard (HCS) inadequately addresses dust explosion hazards and fails to ensure that safe work practices and guidance documents are included in MSDSs.

(6) The CSB recommended that OSHA issue a standard designed to prevent combustible dust fires and explosions in general industry, based on current National Fire Protection Association (NFPA) dust explosion standards.

(7) The CSB also recommended that OSHA revise the Hazard Communication Standard (HCS) (1910.1200) to clarify that combustible dusts are covered and that Material Safety Data Sheets contain information about the hazards and physical properties of combustible dusts.

(8) OSHA has not initiated rulemaking in response to the CSB's recommendation.

(9) OSHA issued a grain handling facilities standard (29 C.F.R. 1910.272), in 1987 that has proven highly effective in reducing the risk of combustible grain dust explosions, according to an OSHA evaluation.

(10) No Occupational Safety and Health Administration standard comprehensively addresses combustible dust explosion hazards in general industry.

(11) Voluntary National Fire Protection Association standards exist which, when implemented, effectively reduce the likelihood and impact of combustible dust explosions.

SEC. 3. ISSUANCE OF STANDARD ON COMBUSTIBLE DUST.

(a) INTERIM STANDARD.—

(1) APPLICATION AND RULEMAKING.—Notwithstanding any other provision of law, not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate an interim final standard regulating combustible dusts. The interim final standard shall, at a minimum, apply to manufacturing, processing, blending, conveying, repackaging, and handling of combustible particulate solids and their dusts, including organic dusts (such as sugar, candy, paper, soap, and dried blood), plastics, sulfur, wood, rubber, furniture, textiles, pesticides, pharmaceuticals, fibers, dyes, coal, metals (such as aluminum, chromium, iron, magnesium, and zinc), fossil fuels, and others determined by the Secretary, but shall not apply to processes already covered by OSHA's standard on grain facilities (29 C.F.R. 1910.272).

(2) REQUIREMENTS.—The interim final standard required under this subsection shall include the following:

(A) Requirements for hazard assessment to identify, evaluate, and control combustible dust hazards.

(B) Requirements for a written program that includes provisions for hazardous dust inspection, testing, hot work, ignition control, and housekeeping, including the frequency and method or methods used to minimize accumulations of combustible dust on ledges, floors, equipment, and other exposed surfaces.

(C) Requirements for engineering, administrative controls, and operating procedures, such as means to control fugitive dust emissions and ignition sources, the safe use and maintenance of dust producing and dust collection systems and filters, minimizing horizontal surfaces where dust can accumulate, and sealing of areas inaccessible to housekeeping.

(D) Requirements for housekeeping to prevent accumulation of combustible dust in places of employment in such depths that it can present explosion, deflagration, or other fire hazards, including safe methods of dust removal.

(E) Requirements for employee participation in hazard assessment, development of and compliance with the written program, and other elements of hazard management.

(F) Requirements to provide written safety and health information and annual training to employees, including housekeeping procedures, hot work procedures, preventive maintenance procedures, common ignition sources, and lock-out, tag-out procedures.

(3) PROCEDURE.—The requirements in this subsection shall take effect without regard to the procedural requirements applicable to regulations promulgated under section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)) or the procedural requirements of chapter 5 of title 5, United States Code.

(4) **EFFECTIVE DATE OF INTERIM STANDARD.**—The interim final standard shall take effect 30 days after issuance. The interim final standard shall have the legal effect of an occupational safety and health standard, and shall apply until a final standard becomes effective under section 6 of the Occupational Safety and Health Act (29 U.S.C. 655).

(b) **FINAL STANDARD.**—

(1) **RULEMAKING.**—Not later than 18 months after the date of enactment of this Act, the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act (29 U.S.C. 655), promulgate a final standard regulating combustible dust explosions.

(2) **REQUIREMENTS.**—The final standard required under this subsection shall include the following:

(A) The scope described in subsection (a)(1).

(B) The worker protection provisions in subsection (a)(2).

(C) Requirements for managing change of dust producing materials, technology, equipment, staffing, and procedures.

(D) Requirements for building design such as explosion venting, ducting, and sprinklers.

(E) Requirements for explosion protection, including separation and segregation of the hazard.

(F) Relevant and appropriate provisions of National Fire Protection Association combustible dust standards, including the “Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids” (NFPA 654), “Standard for Combustible Metals” (NFPA 484), and “Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities” (NFPA 61).

SEC. 4. REVISION OF THE HAZARD COMMUNICATION STANDARD.

(a) **REVISION REQUIRED.**—Notwithstanding any other provision of law, not later than 6 months after the date of enactment of this Act, the Secretary of Labor shall revise the hazard communication standard in section 1910.1200 of title 29, Code of Federal Regulations, by amending the definition of “physical hazard” in subsection (c) of such section to include “a combustible dust” as an additional example of such a hazard.

(b) **EFFECT OF MODIFICATIONS.**—The modification under this section shall be in force until superseded in whole or in part by regulations promulgated by the Secretary of Labor under section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)) and shall be enforced in the same manner and to the same extent as any rule or regulation promulgated under section 6(b).

(c) **EFFECTIVE DATE.**—The modification to the hazard communication standard required shall take effect within 30 days after the publication of the revised rule.

I. PURPOSE

The purpose of this legislation is to direct the Occupational Safety and Health Administration to issue a standard regulating worker exposure to combustible dust explosion and fire hazards. Although the hazards of combustible dust explosions and fires and how to prevent them have been well recognized for many decades, and despite the recent sugar dust explosion and fire at Imperial Sugar in Port Wentworth, Georgia, the Occupational Safety and Health Administration has not taken any significant regulatory action to prevent worker exposure to combustible dust explosions and fires.

II. COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

Action in previous Congresses

There was no action on combustible dust in previous Congresses.

110th Congress

Hearing on “Have OSHA standards kept up with workplace hazards?”

On April 24, 2007, the Workforce Protections Subcommittee, led by chairwoman Lynn Woolsey (D-CA), conducted an oversight hearing titled “Have OSHA Standards Kept up With Workplace Hazards?” in order to address the lack of OSHA standards issued over the past six years. The witnesses discussed the obstacles to issuing OSHA standards, opportunities to speed up the process and the human cost of failing to issue needed protective standards. Witnesses included Assistant Secretary of Labor Edwin Foulke, Scott Schneider, Director of Occupational Safety and Health for the Laborers’ Health and Safety Fund of North America, Frank Mirer, PhD, Professor of Environmental and Occupational Health Sciences, Hunter School of Urban Public Health, New York, Baruch Fellner an attorney at Gibson, Dunn and Crutcher, and Eric Peoples, a former employee of Glister-Mary Lee popcorn factory, victim of bronchiolitis obliterans (popcorn lung).

Introduction of H.R. 5522, the “Combustible Dust Fire and Explosion Prevention Act of 2008”

On March 4, 2008, the “Combustible Dust Fire and Explosion Prevention Act of 2008,” as H.R. 5522, was introduced in the 110th Congress by Chairman George Miller, joined by Representative John Barrow (D-GA) as a lead co-sponsor.

Full Committee hearing on H.R. 5522

On March 12, 2008, the full Education and Labor Committee, led by Chairman George Miller, held a hearing on H.R. 5522, the “Combustible Dust Fire and Explosion Prevention Act of 2008”. The witnesses discussed the need for an enforceable standard that prevents combustible dust explosions and the existence of effective, well-recognized voluntary standards that could form the basis of an OSHA standard. The witnesses included Acting Chair of the Chemical Safety Board, William Wright, Assistant Secretary of Labor Edwin Foulke, Tammy Miser whose brother was killed in a combustible dust explosion, David Sarvadi, representing the U.S. Chamber of Commerce, and Amy Spencer, representing the National Fire Protection Association.

Full Committee markup of H.R. 5522

On April 9, 2009 the Committee on Education and Labor met to markup H.R. 5522, Combustible Dust Fire and Explosion Prevention Act of 2008. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Mrs. Woolsey which moved some requirements originally in the Interim Standard to the Full Standard. The substitute also removed the requirement to add a specific definition of “combustible dust” to the Hazard Communication Standard, but left the requirement that combustible dust be included as a “physical hazard.”

Mr. Wilson offered an amendment in the nature of a substitute that would have delayed a decision about the necessity of a combustible dust standard until completion of the Department of Labor’s investigation of the February 7, 2008 explosion that occurred

at Imperial Sugar, and based on data gathered from the Combustible Dust National Emphasis program. The amendment was defeated by a voice vote.

The Committee voted to favorably report H.R. 5522 by a voice vote.

III. SUMMARY OF THE BILL

H.R. 5522 requires OSHA to issue an Interim Final combustible dust standard within 90 days and a permanent standard within 18 months.

The bill lays out a number of specific items that would be required under the Interim Final Standard. While many of these items are currently being enforced by OSHA as part of its National Emphasis Program, the Interim Standard would spell out detailed requirements for preventing combustible dust explosions and fires instead of forcing businesses to “interpret” safe practices from current OSHA standards that are not directly related to this hazard. OSHA would be relieved of normal procedural requirements for the Interim Standard.

The Interim Standard would also require additional items not now required by OSHA, such as a written dust control program, hazard assessment, worker training and employee participation in the development and conduct of the dust control program.

In the Final Standard, OSHA would be required to “review and adopt appropriate and relevant provisions of National Fire Protection Association combustible dust standards” and add several specific items not included in the Interim Standard such as “building design,” and “management of change requirements.” OSHA would go through the normal rulemaking procedures for the final standard, including feasibility analyses, public comment and public hearings.

The bill would also require OSHA to include “combustible dust” in the definition of physical hazards in OSHA’s Hazard Communication Standard, (CFR 1910.1200).

IV. STATEMENT AND COMMITTEE VIEWS

The Committee on Education and Labor of the 110th Congress is committed to ensuring that the federal government does everything within its power to ensure that workplaces are safe and that the health and safety of American workers is protected, consistent with the goals of the Occupational Safety and Health Act of 1970.

H.R. 5522 addresses the protection of workers from combustible dust explosions and fires. The committee considers combustible dust hazards to be an emergency. On February 7, 2008, a massive explosion ripped through the Imperial Sugar Refinery in Port Wentworth, Georgia. Thirteen workers have died. More than 60 others were injured, many critically. Many of those who survive face life-long disability and disfigurement from severe burns resulting from the explosion and fire. The U.S. Chemical Safety and Hazard Investigation Board (CSB) and the Occupational Safety and Health Administration have launched major investigations into the

causes of the explosion and have preliminarily concluded that the explosion was caused by combustible sugar dust.¹

The hazards of combustible dusts are nothing new. In 2006, following a series of fatal combustible dust explosions in 2003, the CSB conducted a major study of combustible dust hazards.² The CSB identified 281 combustible dust incidents between 1980 and 2005 that killed 119 workers and injured 718, and extensively damaged industrial facilities. A total of 24% of the explosions occurred in the food industry, including several at sugar plants. The CSB report concluded that “combustible dust explosions are a serious hazard in American industry, and that existing efforts inadequately address this hazard.”

The CSB found that there is no comprehensive federal Occupational Safety and Health Administration standard that effectively controls the risk of dust explosions in general industry. The Board therefore recommended that OSHA issue a mandatory standard. Yet, to this date, more than a year after the CSB report was issued, OSHA has no plans to develop a mandatory combustible dust standard.

OSHA has failed to act to protect workers even though effective measures to protect workers from combustible dust explosions are well recognized. Voluntary standards issued by the National Fire Protection Association (NFPA) provide effective and detailed measures that can be taken to prevent these tragic explosions. And OSHA’s Grain Facilities Handling Standard, issued in 1987, partially in response to a number of catastrophic grain dust explosions, has effectively reduced the number of fatalities in this industry.

As the Imperial Sugar explosion tragically made clear, however, voluntary standards are not enough. Without an OSHA standard, many employers are unaware of the hazards of combustible dusts and control methods, and others have failed to comply with voluntary standards.

Combustible dust hazards

Dust from any organic material or metal that can burn, can also explode if the particles are fine enough, and if they are mixed with air in a confined area. As little as $\frac{1}{32}$ nd of an inch of dust (the width of a paperclip), spread over just 5% of a room surface presents a significant explosion hazard, according to the National Fire Protection Association.³

Typically, a small event or “primary” explosion occurs which then suspends significant amounts of nearby dust from floor or rafters in the air, causing a much larger “secondary” explosion, which may then cause even larger cascading secondary explosions. Because of the scale of destruction, the initiating event is often never identified.

Preliminary findings of the CSB indicate that the Imperial explosion falls into this pattern:

¹ Statement of CSB Investigations Manager Stephen Selk, P.E., Updating the Public on the Investigation of the Imperial Sugar Company Explosion and Fire, Savannah, Georgia, February 18, 2008.

² US Chemical Safety and Hazard Investigation Report, Combustible Dust Hazard Study, Report No. 2006-H-1, November 2006.

³ NFPA 654, Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids.

Like many catastrophic dust explosions, this was a multi-stage event. There was a primary event, the nature of which remains unknown. The primary event most likely dislodged sugar dust that had accumulated over a long period on surfaces around the facility. This dislodged dust was the fuel for additional explosions. Devastating explosions propagated through a large section of the refinery, destroying the sugar packaging plant and causing catastrophic injuries to multiple employees and contractors.

This facility was decades old and had many horizontal surfaces where dust could collect. These included overhead floor joists, rafters, ductwork, piping, and equipment. Witnesses have described substantial, snow-like accumulations of sugar dust on these surfaces.

Most employees and contractors had received little training on the explosion hazard from the accumulated dust.

No witnesses have indicated that the facility had a program to fully implement NFPA standards for combustible dust.⁴

The hazards of combustible dusts have been known for centuries. In 1923, the National Fire Protection Association issued its first combustible dust standard. Today, NFPA has seven separate combustible dust standards which are generally updated every five years.

When the Occupational Safety and Health Act was passed in 1970, Congress authorized the newly formed Occupational Safety and Health Administration to adopt any national consensus standards “unless [the Secretary of Labor] determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.” Although OSHA adopted a number of consensus standards, including NFPA standards, the agency chose not to adopt any NFPA combustible dust standards.

Combustible dust hazards were the subject of a major Chemical Safety Board (CSB) study issued in 2006. The study concluded that combustible dust explosions were a major problem in American industry and that there was no mandatory OSHA standard to prevent them in General Industry. (There is a grain handling standard which addresses grain dust in grain silos, issued in 1987, that has been highly effective in preventing explosions and saving lives, according to an OSHA evaluation.)

In its 2006 study, the CSB found that the voluntary standard issued by the National Fire Protection Association was effective if employers complied, but that there was no government entity except for OSHA that could require facilities to comply with the safe work practices detailed in the NFPA standard.

Based on the results of its investigation, the CSB made five recommendations to OSHA:⁵

1. Issue a standard designed to prevent combustible dust fires and explosions in general industry. Base the standard on current National Fire Protection Association (NFPA) dust explosion standards.

⁴H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

⁵U.S. Chemical Safety and Hazard Investigation Report, Combustible Dust Hazard Study, Report No. 2006-H-1, November 2006.

2. Revise the Hazard Communication Standard (HCS) (1910.1200) to clarify that the HCS covers combustible dusts, and that Material Safety Data Sheets (MSDSs) must include important information about combustible dusts.

3. Communicate to the United Nations Economic Commission for Europe (UNECE) the need to amend the Globally Harmonized System (GHS) to address combustible dust hazards.

4. Provide training through the OSHA Training Institute (OTI) on recognizing and preventing combustible dust explosions.

5. While a standard is being developed, identify manufacturing industries at risk and develop and implement a national Special Emphasis Program (SEP) on combustible dust hazards in general industry.

OSHA has not proceeded aggressively to prevent worker exposure to combustible dust fires and explosions

In 2005, in response to three fatal dust explosions in 2003, OSHA issued a Safety and Health Information Bulletin, *Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions*. No public announcement was made at the time the SHIB was issued and the SHIB was not distributed to companies at risk.

In October 2007, almost a year after the release of the CSB report, OSHA launched a combustible dust National Emphasis Program (NEP).⁶ Under the NEP, each of OSHA's 90 Area Offices received a list of locations that may have dust hazards and were required to randomly choose one to inspect in the coming year. The 21 states that run their own OSHA programs are not required to participate in the NEP. On March 11, 2008, OSHA reissued the NEP, raising the total number of annual inspections to around 300.⁷

On February 8, 2008, immediately following the Imperial Sugar explosion, Representatives George Miller and Lynn Woolsey sent a letter to OSHA asking that the agency "take immediate steps to issue a standard to prevent combustible dust explosions as recommended to your agency by the Chemical Safety Board (CSB) in November 2006."⁸

And on February 19, 2008, the United Food and Commercial Workers union and the International Brotherhood of Teamsters petitioned OSHA for a combustible dust standard.

In early March 2008, OSHA created a new Web page and sent letters and fact sheets to 30,000 employers with combustible dust hazards warning them to "take necessary steps" to prevent such explosions. OSHA also offers free training from state consultation programs although there is little evidence that sufficient numbers of consultants have been trained in the causes and prevention of combustible dust hazards.⁹

It was not until March 27, 2008—almost a year and a half after the CSB recommendations were released, almost two months after

⁶Occupational Safety and Health Administration, CPL 03-00-006—Combustible Dust National Emphasis Program, October 18, 2007.

⁷Occupational Safety and Health Administration, CPL 03-00-008—Combustible Dust National Emphasis Program (Reissued), March 11, 2008.

⁸Letter from Reps. George Miller and Lynn Woolsey to Secretary of Labor Elaine Chao, February 8, 2008.

⁹Letter from Assistant Secretary Edwin Foulke to Rep. George Miller, March 27, 2008.

the Imperial explosion and three weeks after the introduction of H.R. 5522—that the CSB received its first substantive response from OSHA regarding its 2006 combustible dust recommendations.

OSHA informed the CSB that the agency had not yet decided on whether to issue a standard:

OSHA continues to consider this recommendation. In general, OSHA has learned that a multi-pronged approach, which encompasses ways to educate employers and employees about existing standards and best practices, combined with outreach, training and, of course, effective enforcement efforts, is the best way to address most Occupational safety and health hazards, including those arising from combustible dust.¹⁰

Unfortunately, OSHA’s responses to the combustible dust hazard—educational materials and the National Emphasis Program—have not been adequate. OSHA’s combustible dust SHIB and other informational publications are useful for employers who want information about combustible dust hazards, but as with other OSHA compliance assistance documents, these guidelines cannot be used for enforcement. Tammy Miser pointed out the confusion this may cause:

At the very beginning, the first things that [the SHIB] says, it says, this safety and health information bulletin is not a standard or a regulation. It creates no legal obligations.

I do not see how this can be expected to be taken seriously, when they are sitting there telling them, right off the bat, that there is really no legal obligation for this.¹¹

According to CSB Acting Chairman William Wright:

I am encouraged that OSHA has sent out 30,000 letters, advising and apprising people in various industries of the potential hazards, and to raise their awareness.

But this is basic knowledge. It does not set the bar with respect to a standard.

And that is why we still hold with our recommendation that a formal standard should be adopted that everybody will abide by. And that will also increase the awareness of inspectors, as well as employers, with respect to the dust hazard.¹²

Indeed, preliminary findings of the CSB show that OSHA’s compliance assistance efforts had little apparent effect on Imperial Sugar’s adoption of safe combustible dust procedures.

This facility was decades old and had many horizontal surfaces where dust could collect. These included overhead floor joists, rafters, ductwork, piping, and equipment. Wit-

¹⁰Letter from Assistant Secretary Edwin Foulke to Chairman John Bresland, March 27, 2008.

¹¹H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of Tammy Miser) [Hereinafter Miser Testimony].

¹²H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

nesses have described substantial, snow-like accumulations of sugar dust on these surfaces.

Most employees and contractors had received little training on the explosion hazard from the accumulated dust.

No witnesses have indicated that the facility had a program to fully implement NFPA standards for combustible dust.¹³

Nor are the enforcement efforts being conducted under the NEP adequate. Under the NEP, OSHA plans to cite employers for combustible dust hazards using a variety of existing general standards, such as housekeeping (which requires employers to clean up the dust), electrical standards (which control some ignition sources) and the General Duty Clause, that requires employers to address “recognized” hazards even where there is no OSHA standard. The General Duty Clause is difficult to enforce and is mostly used after an incident.

In the debate over whether an OSHA combustible dust standard is needed, Assistant Secretary Ed Foulke has argued that existing OSHA are adequate to address combustible dust issues:

OSHA already has tough and effective standards and policies on the books that address combustible dust hazards, including the standards—and general requirements for housekeeping, electrical safety, ventilation, hazardous location, hazard communication and emergency action plans.¹⁴

Enforcement of these standards is, according to Foulke, being used successfully to address combustible dust safety under a Combustible Dust National Emphasis Program announced in October 2007 and revised in March 2008.

Under the Combustible Dust NEP, OSHA will conduct around 90 combustible dust inspections over the next year from a list of possible at-risk worksites supplied by the national office. OSHA issued a Compliance Directive¹⁵ to provide instructions to OSHA inspectors on which existing OSHA standards can be used to enforce combustible dust precautions.

Under the NEP, each of OSHA’s 90 Area Offices received a list of locations, which may have dust hazards and must randomly choose one to inspect in the coming year. The 26 State Plan States (such as California, Maryland, Michigan, Arizona, Iowa, Oregon, Hawaii and Virginia) are not required to participate. (The CSB had recommended that OSHA establish a Combustible Dust National Emphasis Program while it was working on a standard, not instead of a standard.)

OSHA will attempt to cite employers under the NEP using a variety of related standards such as housekeeping (which requires employers to clean up the dust), electrical standards (which control some ignition sources) and the General Duty Clause (which re-

¹³H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

¹⁴H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of Edwin Foulke) [Hereinafter Foulke Testimony].

¹⁵Occupational Safety and Health Administration, CPL 03-00-006—Combustible Dust National Emphasis Program, October 18, 2007.

quires employers to address “recognized” hazards even where there is no OSHA standard).

These existing standards cannot be used as effectively as a dedicated combustible dust standard. As CSB Acting Chairman William Wright testified:

OSHA’s existing requirements, including the general duty clause and the housekeeping standard, apply to combustible dust hazards. However, a comprehensive dust standard would be more effective, by focusing both employers’ and inspectors’ attention on this hazard and the steps that should be taken to prevent dust explosions and fires.¹⁶

OSHA standards have two purposes: to educate the employer about what needs to be done to prevent the hazard and comply with the law. And second, to indicate to the OSHA inspector which standards can be used to cite an employer when hazardous conditions exist.

Although there are a variety of existing OSHA standards that inspectors can interpret to apply to combustible dust hazards (which satisfies the need to provide a legal basis for inspectors to enforce safe working conditions), most of the existing standards (e.g. housekeeping and General Duty) do nothing to educate or inform employers about how to prevent combustible dust explosions.

For example, the often-cited “housekeeping standard,” (29 CFR 1910.22(a)), originally written to ensure that puddles and refuse don’t cause slipping and tripping hazards, is now used for combustible dust violations. The relevant parts of this standard simply state that “(1) All places of employment, passageways . . . and service rooms shall be kept clean . . . (2) The floor of every workroom shall be maintained in a clean . . . condition.” It contains nothing about what levels of dust are safe, how to clean dust safely or how to prevent dust from accumulating to unsafe levels.

An example of the importance of dedicated dust standards that contain specific information about how to prevent combustible dust explosions was demonstrated during the March 12 hearing in which David Sarvadi, an attorney and industrial hygienist, noted the difficulty involved in preventing a 2003 dust explosion at West Pharmaceuticals in which fugitive dust had gathered above the suspended ceiling. Sarvadi noted that:

Without getting into any great detail—I can certainly talk about this at length—but I can tell you that, given the way that the plant was designed, given the materials that were involved, I do not think it was knowable in advance that this dust would accumulate above the ceiling, because of the nature of the chemicals that were involved, and the nature of the processes.

And that is one of the difficulties that we have. People are fallible. They make mistakes.¹⁷

¹⁶H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

¹⁷H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Oral testimony of David Sarvadi) [Hereinafter Sarvadi Testimony].

In fact, however, NFPA 654 specifically states that “Spaces inaccessible to housekeeping shall be sealed to prevent dust accumulation.”¹⁸ Nowhere does OSHA’s housekeeping standard warn about concealed dust in accessible areas. The CSB concluded that if NFPA standards had been followed, the West explosion would probably have been prevented.¹⁹

A second reason that existing OSHA standards are inadequate to prevent combustible dust explosions is that it is overly burdensome for both employers OSHA inspectors to use numerous existing standards to cite employers for unsafe combustible dust conditions.

The compliance directive that lays out OSHA’s combustible dust National Emphasis Program lists more than 25 separate OSHA standards that inspectors may use to cite combustible dust hazards, depending on the circumstances.

For example, in order to cite under OSHA’s General Duty Clause (which simply requires employers to keep the workplace safe from “recognized hazards”) inspectors are told to familiarize themselves with NFPA standards and the employer’s safety manuals. They are instructed to “search for articles dealing with the combustible dust hazard in publications dealing with the employer’s industry.” This is much more burdensome for inspectors and employers than simply citing clear, obvious violations of a standard. The CSB also noted that General Duty Clause citations occur primarily after an incident has occurred and are therefore not generally useful in preventing such incidents.²⁰

In conclusion, the general nature and lack of specificity accompanying current OSHA standards make them a poor substitute for a dedicated OSHA combustible dust standard. As CSB Acting Chair Wright testified:

Absent a comprehensive OSHA standard for combustible dust, no one can be confident that dust hazards will be cited and corrected prior to the occurrence of additional accidents.²¹

Workers are paying the price for OSHA inaction

The CSB identified 281 combustible dust incidents between 1980 and 2005 that killed 119 workers and injured 718, and extensively damaged industrial facilities. A total of 24% of the explosions occurred in the food industry, including several at sugar plants.

The CSB report concluded that “combustible dust explosions are a serious hazard in American industry, and that existing efforts inadequately address this hazard.”

Tammy Miser, whose brother, Shawn Boone, was killed in a 2003 combustible dust explosion at Hays Lemmerz, described the suffering that her brother and her family endured:

¹⁸National Fire Protection Association, NFPA 654, Standard for the Prevention of Fire and Dust Explosion from the Manufacturing, Processing, and Handling of Combustible Particulate Solids, 2006.

¹⁹U.S. Chemical Safety and Hazard Investigation Report, Combustible Dust Hazard Study, Report No. 2006-H-1, November 2006.

²⁰U.S. Chemical Safety and Hazard Investigation Report, Combustible Dust Hazard Study, Report No. 2006-H-1, November 2006.

²¹H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

Shawn did not die instantly. He laid on the building floor while the aluminum dust burnt through his flesh and muscle tissue. The breaths that he took burnt his internal organs, and the blast took his eyesight.²²

Because of the horrific burns that Shawn Boone suffered, his family soon had to decide to withdraw life support.

And even though we were not to blame, we were still making that decision. And we did. We watched the machines stopped, and we watched my brother die before our eyes. We watched him take his last breath.

And the two things that I can always remember, and it never leaves, are his last words—"I am in a world of hurt"—and his last breath.²³

Even the survivors endure terrible suffering. Paul Seckinger, a survivor of the Imperial Sugar explosion, was burned over 80 percent of his body.

Three weeks after the explosion, Paul Seckinger opened his eyes for the first time in his hospital bed, looked up and smiled weakly at his mother.

Two days later, his mother says, doctors had to halt surgery as they worked to repair the second- and third-degree burns over 80 percent of Seckinger's body because his lungs had filled with fluid and his blood pressure plummeted. When his mother got back in to see him, she saw terror in the eyes that held so much hope the days before.

"His eyes were open real big and he was just looking at me like, 'Mom, help me.' It was very scary," says Karen Seckinger, still shaken by her son's sudden turn.²⁴

But severe burn victims often never completely recover. Although not the result of a combustible dust explosion, a recent New York Times story about burn victims five years after the Station Nightclub fire in Warwick, RI, illustrates the life-long suffering that burn victims must endure:

Savagely burned in the fire that incinerated the Station nightclub here five years ago next Wednesday, Linda Fisher has endured a dozen surgeries to salvage her arms, her hands, her face.

Ms. Fisher inhaled so much smoke that anguishing night that even now, she gets winded carrying a basket of laundry. Her thick scars keep her from sweating normally, and she has trouble distinguishing hot from cold.

Ms. Fisher feels lucky.

²²H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of Tammy Miser) [Hereinafter Miser Testimony].

²³H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of Tammy Miser) [Hereinafter Miser Testimony].

²⁴Russ Bynum, "Burn victims in Georgia face long recovery," Statesboro Herald, March 6, 2008.

“There are survivors who have no ears, eyes, nose, hair,” she said.²⁵

Workers can be protected against combustible dust fires and explosions

The hazards of combustible dust explosions and how to prevent them have been known for many decades. The National Fire Protection Association currently has seven combustible dust standards covering a variety of specific workplace and methods of prevention. The first NFPA combustible dust standard was issued in 1923.

NFPA Combustible Dust Standards:

NFPA 654, Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids

NFPA 484 Standard for Combustible Metals

NFPA 61, Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities

NFPA 664, Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities 2007 Edition

NFPA 91, Standard for Exhaust Systems for Air Conveying of Vapors, Gases, Mists, and Noncombustible Particulate Solids 2004 Edition

NFPA 655, Standard for Prevention of Sulfur Fires and Explosions 2007 Edition

NFPA 120, Standard for Fire Prevention and Control in Coal Mines 2004 Edition

The NFPA standards all have certain features in common:

- Control and minimizing of fugitive dust emissions: Minimizing the amount of dust that is allowed to escape into the general environment is the best way to ensure that dangerous amounts of dust do not accumulate. NFPA standards include maintenance and operation of equipment in a manner that minimizes the escape of dust.

They also include measures to minimize the accumulation of dust, such as requirements that window ledges, girders, beams, and other horizontal projections or surfaces have the tops that are sharply sloped, or other provisions to minimize the deposit of dust. NFPA 654 requires that “Spaces inaccessible to housekeeping shall be sealed to prevent dust accumulation.” NFPA 484 has similar requirements.²⁶

- Housekeeping and safe clean-up of fugitive dust: Ensuring that dust accumulations do not build up to dangerous levels and that dust accumulations are cleaned up safely are key to preventing explosions. Standards include, for example, limits of dust accumulations to 1/32nd of inch, control of ignition sources, and prohibition of any measures that may create dust clouds, such as “vigorous sweeping or blowing down with steam or compressed air” unless all ignition sources are completely eliminated.

- Mitigation and minimization of the effect of explosions: The human and material effects of explosions can be minimized by ensuring that if small explosions do occur, they are vented to reduce their intensity and that they are confined so as not to cause more

²⁵ Abby Goodnough, “5 Years After a Nightclub Fire, Survivors Struggle to Remake Their Lives,” *New York Times*, February 17, 2008.

²⁶ According to the CSB investigation, dust accumulation above an unsealed suspended ceiling was a major factor in the 2003 West Pharmaceuticals explosion that killed 6 workers.

destructive secondary explosions. Requirements include, for example, location of dust collectors outside of occupied parts of the building, wide separation of occupied parts of the plant, and explosion venting to minimize the power of explosions.

- Specific process or machinery-related precautions: Although ignition sources are difficult to eliminate, measures can be taken. Depending on the type of operation, standards include specific instructions regarding foreign (sparking) materials, belts, bearings, electrical equipment, static electricity, hot work, hot surfaces, industrial trucks.
- Management of Change: These standards require measures to ensure that any change in process or materials do not introduce new or increased hazards into the working environment.
- Worker Training: These standards address the need for workers to be trained about operating and maintenance procedures and emergency plans.

NFPA standards have proven to be highly effective in preventing combustible dust explosions according to the Chemical Safety Board.²⁷ Compliance with the standards, according to the CSB would have prevented the fatal explosions that the CSB investigated in 2003:

The CSB found that if the requirements of NFPA 654 had been applied at West and CTA, the incidents would have been prevented or significantly mitigated. Specifically, CTA and West had not implemented NFPA recommended practices, including analyzing their processes for hazards, controlling fugitive dust emissions and ignition sources, constructing buildings to address dust hazards, and training employees. NFPA 654 requires, for example, that “spaces inaccessible to housekeeping shall be sealed to prevent dust accumulation” and that “interior surfaces where dust accumulations can occur shall be sealed and constructed so as to facilitate cleaning and to minimize combustible dust accumulations.” However, at West dust that accumulated above a suspended ceiling was difficult to detect and remove.

Similarly, the CSB investigation revealed that the CTA facility did not conform to NFPA 654, which requires that facilities minimize horizontal surfaces where dust can accumulate, equip buildings with explosion venting, and clean surfaces “in a manner that minimizes the generation of dust clouds.”²⁸

In addition to the NFPA standards, in 1987, OSHA issued a Grain Handling Facilities standard, part of which addressed combustible dust hazards. That standard, which only applies to Grain handling facilities also contains many of the elements found in the NFPA standards, including:

- Housekeeping specifications
- Location of dust collectors outside the building

²⁷U.S. Chemical Safety and Hazard Investigation Board, Investigation Report Report No. 2006-H-1, Combustible Dust Hazard Study, November 2006.

²⁸H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008, Hearing before the Committee on Education and Labor, 110th Congress, 2nd Session (2008) (Written testimony of William Wright) [Hereinafter Wright Testimony].

- Inspections and maintenance of operating equipment to reduce sparks and heat
- Minimization of accumulated grain dust
- Worker training

In 2003, OSHA published an evaluation of that standard. OSHA found that not only had the standard saved lives, but had also earned industry support. According to the Chemical Safety Board's review of the evaluation:

[S]ince the standard had been instituted, grain explosions were down 42 percent, injuries 60 percent, and fatalities from grain explosions 60 percent. On average, OSHA estimates that the Grain Handling Facilities Standard has prevented five deaths per year. The National Grain and Feed Association (NGFA) stated that its industry had experienced "an unprecedented decline in explosions, injuries and fatalities at grain handling facilities" since 1980. Further, the NGFA credited the standard with stimulating technological advances in the design, layout, and construction of grain handling facilities.

The OSHA standard-making process is not protecting workers

The Bureau of Labor Statistics reported that in the year 2005 there were over 5,700 workers, or 16 workers a day, killed in the workplace. NIOSH estimates that almost 60,000 workers die each year of occupational disease, many of which are caused by exposure to toxic chemicals.²⁹

OSHA's standard-making process has broken down in recent years. Dr. Frank Mirer of Hunter College, testifying at the Workforce Protections Subcommittee hearing on April 24, 2007, discussed the breakdown of OSHA's standard making process:

OSHA, since 2001, has checked out of the standards business. Slow progress in earlier years has ground to a halt and may even be moving stealthily backward. OSHA has staff and other resources to set standards, but that staff has not been permitted to operate. Since 2001, this Administration set one new chemical standard, for carcinogenic chromium, under court order. That standard actually permits employers to increase exposure levels under some circumstances. Unions were forced to sue to get improvements, and that litigation still pends. Regarding employers' responsibility to pay for required protective equipment like respirators and wire mesh gloves, Labor Secretary Elaine Chao finally committed to issuing a final rule in response to a union lawsuit and a court ordered deadline. That rule was promised by November 2007. The rule-making record was completed in 1999.³⁰

Part of the problem is the administrative burden put on OSHA. In order to issue standards, the agency must comply with the Administrative Procedures Act which requires significant public

²⁹"Workers' Memorial Day—April 28, 2007," *Morbidity and Mortality Weekly Report*, 56(16) (Apr. 27, 2007) at 389–393.

³⁰Have OSHA Standards Kept up With Workplace Hazards? Hearing before the Subcommittee on Workforce Protections, 110th Congress, 1st Session (2007) (written testimony of Frank Mirer, at 3) [Hereinafter Mirer testimony].

input. In addition, since the OSH Act was passed, laws have been passed and Executive Orders have been issued adding additional requirements to OSHA rulemaking. Executive Orders, most particularly EO 12866 requires review by the White House Office of Management and Budget. The Regulatory Flexibility Act requires OSHA to address the potential impact of regulations on small businesses. The Small Business Regulatory Enforcement Fairness Act of 1996 which requires OSHA to convene a Small Business Advocacy Review Panel which hears comments from small entity representatives and reviews the draft proposed prepares a written report. OSHA must review the report and make any appropriate revisions to the rule.

All of these requirements add considerable time to the development of OSHA standards. But experts in this area, including Scott Schneider and Frank Mirer who testified in the Subcommittee's April 24 OSHA standards hearing, have also pointed out that one of the most important factors in the slowdown of OSHA rulemaking is lack of political will. Frank Mirer expanded on the political obstacles:

The first barrier to setting a new standard is getting the Labor Department to recognize that something needs to be done about a hazard. That's a political leadership decision. Once there's a decision to move forward, the task that causes the most delay is gathering business data to estimate costs. But, OSHA staff have figured out how to get that cost information. After that, the barriers, and sources of delay, are getting approval from the Office of Management and Budget to put a standard on the agenda, complete the small business (SBREFA) review, to release a proposed standard, and to finally promulgate the final standard. But, OMB is not a free agent. The same President who appointed the Secretary of Labor and Assistant Secretary of Labor for OSHA also appointed the heads of OMB and the Small Business Administration.³¹

Scott Schneider, testifying at the Workforce Protections subcommittee hearing on April 24, 2007, also cited lack of political will as a major cause of the failure of OSHA to issue standards for the past six years.³²

OSHA standards protect workers from occupational disease and injury

One of the most important responsibilities that Congress gave OSHA under the Occupational Safety and Health Act is the issuance of safety and health standards. Congress declared in passage of the Act that its "purpose and policy" was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . by providing for the development and promulgation of occupational safety and health standards."

³¹Have OSHA Standards Kept up With Workplace Hazards? Hearing before the Subcommittee on Workforce Protections, 110th Congress, 1st Session (2007) (written testimony of Frank Mirer) [Hereinafter Mirer testimony].

³²Have OSHA Standards Kept up With Workplace Hazards? Hearing before the Subcommittee on Workforce Protections, 110th Congress, 1st Session (2007) (written testimony of Scott Schneider) [Hereinafter Schneider Testimony].

The need for an interim standard

The Committee has determined that exposure to the hazards of combustible dust explosions and fires presents the sort of grave danger to workers that warrants immediate action. The Chemical Safety Board combustible dust study found that “combustible dust explosions are a serious hazard in American industry, and that existing efforts inadequately address this hazard.” The CSB identified 281 combustible dust incidents between 1980 and 2005 that killed 119 workers and injured 718, and an addition 67 combustible dust explosions since 2005, including the Imperial Sugar explosion that killed 13 workers. Combustible dust hazards have long been recognized. The first NFPA combustible dust standard was issued in 1923, 85 years ago. Despite this grave and well recognized hazard, OSHA has failed to develop a comprehensive standard that would protect workers.

The Wilson Amendment in the nature of a substitute that was defeated by a voice vote would have allowed OSHA to wait for the outcome of the Imperial Sugar investigation and findings from the combustible dust NEP before deciding on whether to move forward with a standard. Given all that is known about the causation and prevention of combustible dust explosions, however, the Committee believes that it is highly unlikely that anything profoundly new about the nature, causation or prevention of combustible dust explosion would be gained by further delay.

The Committee also believes that evidence from recent incidents and the CSB reports show that compliance assistance efforts such as OSHA’s Safety and Health Information Bulletin, website and other materials developed by OSHA are useful tools, but are not sufficient to protect workers from the threat of combustible dust explosions.

Furthermore, the Committee also does not feel that the 17 existing OSHA standards being used by OSHA to enforce combustible dust safety violations are adequate to effectively address the prevention of combustible dust explosions and fires in American industry. H.R. 5522 therefore requires OSHA to issue an Interim Final Standard within 90 days of enactment to be followed by a final standard that would be promulgated within 18 months.

The interim standard would be required to include hazard assessment, a written program, engineering and administrative controls, specifications for housekeeping and control of ignition sources, worker participation and worker training. These requirements would codify many of the measures that OSHA is now undertaking under its combustible dust NEP. It would apply to all workplaces where there is a potential for combustible dust explosions except those workplaces already covered under OSHA’s Grain Handling Facilities Standard (29 CFR 1910.272.)

The interim regulation is not an occupational safety and health standard as that term is defined in section 3(8) of the Occupational Safety and Health Act of 1970 and must be adopted notwithstanding any other provision of law. The Secretary of Labor has previously recognized in promulgating a standard regulating hazardous waste operations the distinction between an interim regulation and an occupational safety and health standard is legally significant because it means that the procedural requirements of section 6 of the OSH Act do not apply to the promulgation of the in-

terim final regulation. Nor, as the Secretary has previously recognized in publishing an interim final regulation governing hazardous waste operations, do the notice and comment provisions of the Administrative Procedures Act apply.

The Committee relied upon these precedents when it directed the Secretary of Labor to publish an interim final regulation governing lead exposure in the construction industry.

The Committee intends that the Secretary rely on similar procedures to publish an interim final regulation governing combustible dust explosions within three months. These procedures have recently been upheld by OSHRC the Occupational Safety and Health Review Commission (OSHRC) in the *Manganas Painting Co, Inc* decision. OSHRC agreed with the Secretary of Labor's assessment of Congressional intent which cited:

The preamble to the lead in construction standard that "Congress . . . did not impose any procedural requirements that must be followed" and that Congress intended that "the Secretary need not follow the procedural requirements of the OSH Act or the APA [Administrative Procedure Act, 5 U.S.C. § 553]." 58 Fed. Reg. at 26,591.³³

While the Secretary is authorized to publish the interim regulation without the notice and comment procedures required by section 6 of the OSH Act, it is the Committee's expectation that OSHA will work closely with the National Fire Protection Association, the International Code Council, affected industry and labor representatives and other experts in developing the interim final combustible dust standard.

The final standard

H.R. 5522 requires OSHA, within 18 months of enactment, to issue a permanent standard regulating worker exposure to combustible dust explosion and fire hazards in compliance with section 6(b) of the Occupational Safety and Health Act (OSH Act). The Committee is confident that this standard can be issued within the timeframe allotted.

H.R. 5522 does not exempt OSHA from the requirements of section 6 of the OSH Act that Congress and the courts have established to ensure that OSHA standards reflect the best science available, or that the standards are technologically and economically feasible. In addition, regulatory oversight laws, including the Administrative Procedures Act, the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Regulatory Flexibility Act, the Paperwork Reduction Act, or Executive Order 12866 are flexible enough to provide for expedited action in emergency situations like these.

Eighteen months provides adequate time for OSHA to develop the evidence and findings necessary to issue a final standard. Extensive studies, consensus standards and investigations exist to provide OSHA core information needed to develop a standard.

In order to issue a standard under Section 6(b) of the Act, OSHA also has a number of procedural requirements that must be satisfied. Again, because of the emergency nature of this problem,

³³*Secretary of Labor v. Manganas Painting Company Inc*, OSHRC Docket No. 94-0588 (March 23, 2007).

OSHA will be able to meet those requirements within the 18 month timeframe. SBREFA,³⁴ the Regulatory Flexibility Act,³⁵ Executive Order 12866 and the Paperwork Reduction Act contain flexible provisions for waivers, delay or acceleration of their requirements under emergency conditions or other special circumstances. The Committee expects OSHA, the Small Business Administration, the Office of Management and Budget, and other agencies involved in the regulatory process to fully utilize whatever actions are necessary and permitted within relevant laws and executive orders affecting the regulatory process to ensure that this mandated Congressional deadline is met.

Experts confirm that OSHA can issue standards much faster than the agency has acted over the past several years. Frank Mirer expressed confidence that OSHA should be capable of issuing standards much faster than it currently does, even starting from scratch.³⁶

Adam Finkel, Sc.D., CIH, Professor of Environmental and Occupational Health at the UMDNJ School of Public Health, and a visiting professor of public affairs at the Woodrow Wilson School at Princeton University, submitted testimony for the record following the April 24 hearing on OSHA standards, stating that despite the many requirements for OSHA to invite participation by stakeholders and respond substantively to their comments, standards can be completed “cleanly and rather quickly.” Finkel is the former Director of Health Standards for OSHA.

In one 18-month period of activity (late 1996 to early 1998)—OSHA promulgated three major final health standards—those for 1,3-butadiene, methylene chloride, and generic respiratory protection—and defended them in Congressional oversight hearings and court challenges, without a single provision being substantively weakened following any of this scrutiny.³⁷

History of Congressional intervention in OSHA rulemaking

Congress has a long history of mandating OSHA regulation to protect workers when the Agency fails to act on its own. HR 5522 continues the Congress’s tradition of ensuring that OSHA acts promptly when faced with evidence that American workers face grave dangers and delay will result in needless illness and death. In 1986, as part of the Superfund Amendments and Reauthorization Act (SARA), Congress mandated the issuance an “interim” standard for Hazardous Waste Operations and Emergency Response within 60 days and a final standard within one year of SARA’s enactment.³⁸ In 1990, as part of the Clean Air Act Amendments, Congress required OSHA to issue the Process Safety Management standard within one year. Congress also included directions on the content of the standard.³⁹ In 1991, Congress ordered

³⁴ P.L. 104–121. Small Business Regulatory Enforcement Fairness Act of 1996.

³⁵ P.L. 96–354. Regulatory Flexibility Act of 1980, as amended.

³⁶ Mirer Testimony at 5.

³⁷ Have OSHA Standards Kept up With Workplace Hazards? Hearing before the Subcommittee on Workforce Protections, 110th Congress, 1st Session (2007), Letter from Dr. Adam Finkel to Rep. Lynn Woolsey (May 8, 2007).

³⁸ P.L. 99–499. Superfund Amendments and Reauthorization Act of 1986, Title I Sec. 126 a–f (Oct. 26, 1986).

³⁹ P.L. 101–549. Title III, Sec. 304 (Nov. 15, 1990).

OSHA to issue the final Bloodborne Pathogens Standard by a certain date, and stated that if that deadline was not met, the previously published proposed standard would take effect.⁴⁰ In 1992, Congress mandated OSHA to issue the Lead in Construction standard and required the new standard to be “as protective” as the U.S. Department of Housing and Urban Development’s worker protection guidelines for identification and abatement of lead based paint in certain housing. The standard was issued in 1993.⁴¹ Finally, in 2000, Congress required OSHA issue an update to the Bloodborne Pathogens standard, requiring safer syringes and sharps.⁴² That standard was issued in 2001.

Some OSHA experts feel that Congress must take a much more active role in encouraging OSHA to issue standards that protect workers’ health and safety; Scott Schneider, who testified at the April 2007 standards hearing argued in favor of Congress setting strict time limits for OSHA to issue standards:

Congress can set time limits for OSHA to consider and then issue proposals and final rules. In the past Congress has mandated that OSHA issue rules within a six-month period and the agency has done so (e.g. lead, hazardous waste). Congress should give OSHA a limited time, say four months, to consider any petition for new standards and require the agency to publish a response in the Federal Register as to its reasons for accepting or denying the petition. The burden should be on the agency to show why a standard should not be issued. Once committed to a rule making, the agency would be given additional deadlines to meet to ensure that rules are issued in a timely manner, say no more than three years. Congress would have to provide additional funding for OSHA dedicated to standard setting in order for it to meet these deadlines.⁴³

Due to the high number of deaths and serious injuries caused by combustible dust explosions and the ready availability of means to prevent worker exposure, HR 5522 requires OSHA to take swift action to protect workers.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Provides that the Short Title is the “Combustible Dust Explosion and Fire Prevention Act of 2008.”

Section 2. Findings

This section declares that an emergency exists concerning worker exposure to combustible dust explosions and fires and that a standard is urgently needed to protect workers. This section establishes that there is strong evidence documenting the hazards of combustible dust explosions as well as the feasibility and effectiveness of measures to prevent combustible dust explosions. Additionally,

⁴⁰ P.L. 102-170. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Sec. 100 (1992).

⁴¹ P.L. 102-550. This interim final rule was mandated by, and issued under the exclusive authority of, title X, subtitle C, sections 1031 and 1032, Worker Protection, of the Housing and Community Development Act of 1992.

⁴² P.L. 106-430. Needlestick Safety and Prevention Act.

⁴³ Schneider Testimony at 5.

OSHA has taken no action to begin the development of a standard and has not taken other significant action to protect workers.

Section 3. Issuance of standard on combustible dust

Section 3(a)(1). Requires the Secretary of Labor to issue an interim final standard regulating combustible dusts within not later than 90 days after enactment. Defines the scope of the interim standard and states that it shall not apply to processes already covered by OSHA's standard on grain handling facilities.

Section 3(a)(2)(A). States that the interim final standard must require hazard assessments to identify, evaluate and control combustible dust hazards.

Section 3(a)(2)(B). States that the interim final standard must require employers to develop a written program which includes plans for hazardous dust inspection, testing, housekeeping, and control, with established frequency and methods.

Section 3(a)(2)(C). States that the interim final standard must require engineering, administrative controls and operating procedures.

Section 3(a)(2)(D). States that the interim final standard must require housekeeping to control accumulation of combustible dust.

Section 3(a)(2)(E). States that the interim final standard must require employee participation in hazard assessment, development of and compliance with the written program, and other elements of hazard management.

Section 3(a)(2)(F). States that the interim final standard must require the provision of written safety and health information and training to employees, including hazard communication information, labeling, and training.

Section 3(a)(3). Exempts the interim final standard from procedural requirements normally mandated for a permanent standard.

Section 3(a)(4). Requires the interim final standard to take effect 30 days after issuance, have the legal effect of an OSHA standard, and remain in effect until a final standard becomes effective.

Section 3(b)(1). Mandates OSHA to issue a final standard regulating combustible dust hazards not later than eighteen months from the date of enactment.

Section 3(b)(2)(A). Requires the final standard to include the scope described in Section 3(a)(1).

Section 3(b)(2)(B). States that the final standard must contain the worker protection provisions in Section 3(a)(2) of the interim final standard.

Section 3(b)(2)(C). States that the final standard must require procedures for managing change of dust producing materials, technology, equipment, staffing, and procedures.

Section 3(b)(2)(D). States that the final standard must require safe building design.

Section 3(b)(2)(E). States that the final standard must require provisions for explosion protection.

Section 3(b)(2)(F). Requires OSHA to review and adopt appropriate and relevant provisions of National Fire Protection Association combustible dust standards.

Section 4. Revision of the Hazard Communication Standard

Section 4(a). Requires OSHA to revise the definition of “physical hazard” in the Hazard Communication Standard to include “a combustible dust” within six months

Section 4(b). States that changes in the Hazard Communication Standard shall remain in effect until OSHA further revises the standard.

Section 4(c). States that the modification of the Hazard Communication Standard will take effect within 30 days after publication.

VI. EXPLANATION OF AMENDMENTS

None.

VII. APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. H.R. 5522 has no direct application to the legislative branch.

VIII. UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. (The attached CBO letter addresses this issue.)

IX. EARMARK STATEMENT

H.R. 5522 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

X. ROLLCALL

None.

XI. STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the body of this report.

XII. NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 5522 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 17, 2008.

Hon. GEORGE MILLER,
*Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5522, the Combustible Dust Explosion and Fire Prevention Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mindy Cohen.

Sincerely,

ROBERT A. SUNSHINE
(For Peter R. Orszag, Director).

Enclosure.

H.R. 5522—Combustible Dust Explosion and Fire Prevention Act of 2008

H.R. 5522 would require the Secretary of the Department of Labor (DOL) to issue regulations intended to protect workers from combustible dust explosions and fires. The bill would require the Secretary to issue interim standards and a final standard no later than 90 days and 18 months after enactment, respectively.

Estimated costs to the Federal Government: Based on information provided by the Occupational Safety and Health Administration (OSHA) and other safety analysts, CBO estimates that implementing H.R. 5522 would cost \$1 million in fiscal year 2009 and \$41 million over the 2009–2013 period. These costs consist of \$1 million in 2009 for economic and feasibility studies to support the development of the final standard, and \$10 million a year—about a five percent increase in OSHA's enforcement workload—beginning in 2010 for enforcement of the final standard. Enacting the bill would not affect revenues or direct spending.

Impact on state, local, and tribal governments: Under current law, state laws governing occupational and health issues are preempted if they deal with the same subject matter regulated by OSHA. At least two states have implemented or are in the process of implementing standards to prevent combustible dust explosions. The standards in those states would be preempted by regulations promulgated under H.R. 5522. In order to maintain their own standards, the states would be required to demonstrate to OSHA that the state standards will be at least as effective as the standards promulgated by OSHA. If the state standards are determined to be less effective, the federal standards would apply. Preempting such state standards would be an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). Because the preemption would simply prohibit the application of state law, CBO estimates that the costs of the mandate would not be significant and would not exceed the threshold established by UMRA (\$68 million in 2008, adjusted annually for inflation).

States may enforce federal job safety and health standards if they do so under an agreement with OSHA; currently, 26 states operate such programs. Those states might incur costs to administer and enforce the new standards that OSHA would be required to

promulgate under the bill. However, those costs would be incurred as a result of their voluntary participation in a federal program, and half of those costs would be reimbursed through matching grants from the federal government under an existing program.

Impact on the private sector: By requiring OSHA to issue rules regulating combustible dust hazards, the bill would impose private-sector mandates on employers at industrial establishments that manufacture, process, or otherwise handle materials that produce combustible dusts. The cost of those mandates is uncertain because it would depend on the rules to be established under the bill. Additionally, some employers already comply with safety requirements or voluntary industry standards that may overlap to some extent with the rules that would be developed by OSHA to address combustible dust hazards. Therefore, CBO cannot determine whether the aggregate costs of mandates in the bill would exceed the annual threshold established in UMRA for private-sector mandates (\$136 million in 2008, adjusted annually for inflation).

Estimate prepared by: Federal costs: Mindy Cohen; Impact on state, local and tribal governments: Lisa Ramirez-Branum; Impact on the private sector: MarDestinee Perez.

Estimate approved by: Keith J. Fontenot, Deputy Assistant Director for Health and Human Resources, Budget Analysis Division.

XIII. STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 5522 is to provide basic health and safety protections for workers exposed to combustible dust fires and explosions.

XIV. CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 5522. The Committee believes that the amendments made by this bill, which direct OSHA to issue an OSHA standard regulating worker exposure to combustible dust are within Congress' authority under Article I, Section 8, Clause 3 of the Constitution of the United States.

XV. COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5522. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

XVI. COMMITTEE CORRESPONDENCE

None.

XVII. MINORITY VIEWS

MINORITY VIEWS ON H.R. 5522

INTRODUCTION

Earlier this year, the community of Port Wentworth, Georgia suffered something no community should have to endure. As the result of an explosion at the Imperial Sugar Company refinery, a number of workers lost their lives, while many others sustained serious injuries. In the wake of that accident, Chairman George Miller and Representative Barrow moved quickly to propose legislation. While it is understandable, and even commendable, for Congress to respond swiftly in the aftermath of such a tragic accident, history has shown that legislating in this manner rarely produces sound policy. Committee Democrats have expedited the consideration of legislation introduced in response to the accident, without having the benefit of important information obtained as a result of the federal government's investigation of the accident. We are concerned that such haste will result in the creation of an ineffective and unenforceable safety standard that will negatively impact many of our nation's workplaces.

Committee Republicans have a strong and long held commitment to workplace safety. Key toward accomplishing that goal is ensuring that the agency with regulatory jurisdiction is able to undertake a robust rulemaking process in order to create enforceable and effective rules. The danger of combustible dust in the workplace is a serious concern, and Committee Republicans are committed to helping the Occupational Safety and Health Administration ("OSHA") achieve comprehensive safety standards that will ultimately improve worker safety and health. H.R. 5522, the Combustible Dust Explosion and Fire Prevention Act of 2008, falls far short of accomplishing that goal; and therefore, Committee Republicans must oppose the legislation in its current form.

BACKGROUND

Imperial Sugar Company refinery explosion

On February 7, 2008, an explosion occurred at an Imperial Sugar Company refinery in Port Wentworth, Georgia. As a result of the explosion, thirteen workers have died and many other workers suffered extensive burns. In the immediate aftermath of the incident, the local fire chief took command of the scene. The following day, once the fire was under control, the federal Bureau of Alcohol Tobacco and Firearms (ATF) took command of the site. Upon making an initial determination that the blast was not caused by criminal activity, the ATF turned the site over to OSHA on February 15, 2008. This sequence of authority is not unusual for an accident of this nature.

Upon taking control of the site, OSHA immediately commenced its investigation into the cause of the explosion. By law, OSHA has six months to investigate the accident and, if appropriate, assess penalties to any party determined to have violated the Occupational Safety and Health Act (“OSH Act” or the “Act”).¹ OSHA began subpoenaing documents from the company immediately after the agency took over the site, and has been actively engaged in the investigation from the outset. OSHA is the only agency with the statutory authority to penalize the company for violations of workplace safety law; if criminal behavior is found, OSHA may refer the matter to the Department of Justice for criminal prosecution.

The OSH Act and workplace safety regulation

Since its enactment in 1970, the OSH Act has fostered safe and healthy working environments through standards-setting, employer and worker education and training, and hazard elimination. The Act contains specific provisions intended to address workplace hazards through the process of rulemaking.

Throughout its history, the OSHA Act’s standard-setting processes have been governed foremost by the Administrative Procedures Act (APA). The APA generally requires a federal agency to develop and draft proposed regulations; issue proposed rules and regulations via a transparent process that allows for comment and input from affected stakeholders; and incorporate appropriate stakeholder input in the publication of a final rule.² In addition to the requirements of the APA, OSHA must ensure that its proposed regulations adhere to, *inter alia*, guidelines specified in Executive Orders, the Paperwork Reduction Act,³ the Regulatory Flexibility Act,⁴ the Small Business Regulatory Enforcement Fairness Act,⁵ and, ultimately, the Congressional intent of the underlying authorizing statute.⁶

Combustible dust and the OSH Act

In sufficient concentrations, almost any type of dust found in the workplace can explode. In order for a combustible dust explosion to occur, five conditions must be present: combustible dust, an ignition source, oxygen, a dispersion of dust particles, and confinement of the dust cloud. Industries ranging from agriculture to metal finishing have the potential to experience dust explosions. According to a U.S. Chemical Safety and Hazard Investigation Board (“CSB”) report, dust was determined to have caused 281 fires and explosions over the last 25 years.⁷

To regulate the combustible dust hazard across industries, OSHA has used seventeen general standards currently in place under the

¹29 U.S.C. § 651 et seq.

²See 5 U.S.C. 5 et seq.

³See 44 U.S.C. 3501 et seq.

⁴See 5 U.S.C. 601 et seq.

⁵See 5 U.S.C. 801 et seq.

⁶Moreover, as a matter of practice, in recent years it has become a near-certainty that one or more stakeholders affected by a rule will pursue a legal challenge to OSHA’s final regulation. These challenges may result in a rule being upheld in its entirety; modified in some form or fashion by the courts; or struck down in its entirety. Once the final disposition of any legal challenges have been reached, a final rule is either implemented or revised according to court direction and subsequently administered by the Secretary of Labor through OSHA.

⁷See U.S. Chemical Safety and Hazard Investigation Board, Investigation Report: Combustible Dust Hazard Study, Report No. 2006–H–1 (November 2006).

OSH Act. During his testimony before the Committee, Assistant Secretary for Occupational Safety and Health Edwin G. Foulke stated that the standards in place provide appropriate and adequate regulatory protection against combustible dust accidents, including the fire protection, ventilation and electrical standards.⁸

These standards also include the OSH Act's "General Duty" Clause; its housekeeping standard, and its hazard communication regulation. The following three standards are of particular note:

- **General Duty Clause.** The General Duty Clause (section 5(a)(1) of the OSH Act) requires that an employer must abate any hazard in the workplace which a reasonable employer in that industry knows or should know about, including those related to dust.

- **Housekeeping Standard.** The OSHA Housekeeping Standard requires that employers maintain facilities in a clean, orderly, and sanitary condition.⁹ While the standard does not refer to dust specifically, it can form the basis for citation when dust accumulation leads to an explosion.

- **The Hazard Communication ("HazCom") Standard.** OSHA's HazCom Standard requires that businesses monitor and inform employees of the hazards associated with certain materials in the workplace. The HazCom standard requires that every affected employer establish a program to inform employees of these hazards. The program must have five main components: (1) Written Hazard Communication Program documentation; (2) identification and inventory of hazardous chemicals; (3) maintenance of material safety data sheets (MSDS) on the identified hazards; (4) labeling of hazardous materials with their name and hazard; and (5) training of employees on the standard, safety information, labeling and protective measures.

OSHA points specifically to the HazCom standard to demonstrate how employers should be aware of dust issues. Within the HazCom standard, employers are required to maintain MSDSs that list the hazards, including the combustibility, of materials brought onto a worksite. Moreover, OSHA has the authority to cite employers for failing to comply with these standards. In many cases, the agency does so after a combustible dust accident investigation concludes that the HazCom standard was, in fact, violated.

The Chemical Safety and Hazard Investigation Board (CSB)

The CSB is an independent federal agency charged with investigating industrial chemical accidents and their causes. While the CSB does not have the authority to issue fines or citations, it does make recommendations to businesses, regulatory agencies such as OSHA and the Environmental Protection Agency (EPA), industry organizations, and labor representatives. According to its mission statement, the CSB was designed by Congress to be non-regulatory and independent of other agencies so that its investigations may, where appropriate, review the effectiveness of regulations and regulatory enforcement.

⁸See Appendix A, Testimony of The Honorable Edwin G. Foulke, Jr., Committee on Education and Labor, "H.R. 5522, The Combustible Dust Explosion and Fire Prevention Act of 2008," Wednesday, March 12, 2008.

⁹29 CFR 1910.22.

In November 2006, the CSB completed an investigative report of combustible dust.¹⁰ The report outlined the history of industrial dust explosions, citing 119 fatalities over a 25-year period. One key finding of the report noted OSHA's success in dramatically reducing the risk of grain dust explosions by promulgating a grain standard in 1986.

OSHA ACTIVITY RELATING TO COMBUSTIBLE DUST

Contrary to assertions made by the Majority, OSHA has not ignored the potential hazards related to combustible dust. Indeed, OSHA recognized the need to address combustible dust in a July 2005 Safety and Health Information Bulletin (SHIB) that emphasized the hazards of combustible dust, controlling dust in the workplace, and the need for appropriate training. Additionally, in October 2007 OSHA responded to the November 2006 CSB report by implementing a National Emphasis Program (NEP) regarding combustible dust. The NEP includes the identification of facilities for awareness of dust hazards along with comprehensive compliance inspections.¹¹ More recently, in the wake of the Port Wentworth, Georgia incident, OSHA sent a "high hazard" alert to 30,000 employers focusing on the issue of combustible dust and outlining measures that should be taken to maintain clean workplaces.

OSHA continued to highlight the dangers related to combustible dust when it reissued the NEP on March 12, 2008, and consolidated the regulatory and educational information regarding dust into a user-friendly webpage.¹² During testimony provided at the Full Committee hearing on H.R. 5522, Assistant Secretary Foulke further outlined the activities OSHA has taken to address combustible dust hazards:

First, all Compliance Safety and Health Officers (CSHOs) receive training on OSHA safety standards, including those related to combustible dust. Additionally, for the past three years, the OSHA Training Institute has included a half day of training on the hazards of combustible dust in its course on Process Safety management. To date, 323 compliance officers have received this additional half-day of training on combustible dust hazards.

A three and a half day course, Combustible Dust Hazards and Controls, which is based upon the NEP, has also been developed. Forty compliance officers were trained during the first session of this course held the week of December 3, 2007. This training is ongoing, with the next session scheduled in spring 2008, and at least one session is planned annually thereafter.

National Office staff has provided training and education on the subject of combustible dust in other venues. In June 2006, we delivered a presentation to an inter-

¹⁰ See U.S. Chemical Safety and Hazard Investigation Board, Investigation Report: Combustible Dust Hazard Study, Report No. 2006-H-1 (November 2006).

¹¹ The Imperial Sugar Company would have eventually received an inspection under the site-specific-targeting of the NEP, but had not received an OSHA inspection in the prior seven years. Prior to the accident, the company's low injury and illness rate made it a facility that did not qualify as a high hazard.

¹² See <http://www.osha.gov/dsg/combustibledust/index.html>.

national audience of fire production professionals at the National Fire Protection Association's World Safety conference and Expo. In April 2007, OSHA staff provided training sessions to its consultation staff from throughout the country at the annual consultation conference. In January 2008, OSHA provided assistance to Maryland Occupational Safety and Health (MOSH) in training 70 MOSH compliance personnel in combustible dust hazards. Our Regional Offices have either retrained, or are planning to train, CSHOs in the Regions on combustible dust hazards. For example, OSHA's Region I conducted training on the NEP in its Area Offices early this year.¹³

H.R. 5522, THE COMBUSTIBLE DUST EXPLOSION AND FIRE PREVENTION ACT OF 2008

In the wake of the Imperial Sugar Company refinery accident, Chairman George Miller and Representative John Barrow introduced H.R. 5522. The bill would direct OSHA to immediately undertake a rulemaking regulating all forms of combustible dust, and to expedite the formulation of final regulations in what amounts to an unusually compressed timeframe. More specifically, H.R. 5522 would require OSHA to:

- Issue an interim final combustible dust standard within 90 days that would include measures to minimize hazards associated with dust through improved housekeeping, engineering controls, building design, explosion protection and worker training;
- Issue a final standard relating to combustible dust within eighteen months. The interim standard would remain in effect until the final standard is issued; and
- Revise the Hazard Communication Standard to include combustible dust.

COMMITTEE CONSIDERATION OF H.R. 5522

The Committee on Education and Labor held a legislative hearing on H.R. 5522 on March 12, 2008. At the hearing, several technical and policy concerns with the legislation were noted in testimony provided by the Republican witness and Assistant Secretary Foulke.

The Committee held a markup of H.R. 5522 on Wednesday April 9, 2008 during which an amendment in the Nature of a Substitute, offered by Representative Woolsey, was adopted by voice vote. Representative Joe Wilson offered an amendment in the Nature of a Substitute that was rejected by voice vote. The Committee then favorably reported H.R. 5522, as amended, by voice vote.

REPUBLICAN VIEWS

H.R. 5522 was introduced in direct response to the accident at the Imperial Sugar Company refinery in Port Wentworth, Georgia; the bill's sponsors have made that abundantly clear. It seems ludicrous, therefore, that Congress would not wait for the findings of

¹³ Letter from Edwin G. Foulke, Jr. responding to questions for the record from Workforce Protections Subcommittee Chair Woolsey, March 27, 2008.

OSHA's investigation prior to taking legislative action. Committee Republicans believe that Congress, at a minimum, should allow for OSHA to complete its investigation of the accident before enacting legislation, taking into consideration all of the variables related to the accident. This view is embodied in the substitute amendment offered during the Committee's consideration of the bill by Representative Joe Wilson. Unfortunately, the Majority defeated Representative Wilson's common-sense amendment and instead, insisted on proceeding with hastily-written legislation that would likely result in an ineffective and unenforceable regulation.

OSHA's response to the CSB report

To support its calls for a combustible dust regulation, the Majority cites OSHA's, so-called "failure" to implement the recommendations of the CSB's report on combustible dust. In the report, the CSB recommended that OSHA:

- Issue a standard designed to prevent combustible dust fires and explosions in general industry;
- Revise the Hazard Communication Standard;
- Communicate to the United Nations Economic Commission for Europe (UNECE) the need to amend the Globally Harmonized System (GHS);
- Provide training to inspectors through the OSHA Training Institute (OTI) on recognizing and preventing combustible dust explosions;
- Conduct a National Special Emphasis Program (SEP) on combustible dust hazards in general industry;
- Include in the SEP an outreach program focused on the information in the Safety and Health Information Bulletin (SHIB), "Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions."

As evidenced through testimony and letters submitted for the record for the Full Committee hearing on March 12, 2008, OSHA already has implemented the majority of the CSB recommendations in a variety of ways.

In addition, OSHA continues to examine the CSB's recommendation of the need for a combustible dust standard. To be clear, OSHA has not dismissed the idea of a regulation. Indeed, in his response to questions posed during the hearing, Assistant Secretary Foulke stated:

Mr. Sarbanes, I would say, as I mentioned earlier in my testimony, we are—we have instituted this national emphasis program, and we are gathering information from that to determine whether or not, are the standards that we have in place now and sufficient to meet the hazards that we are dealing with.

And we have not ruled out the possibility of doing rule-making. So we are looking. And that is an option for us still.

But we are just trying to collect the data through the national emphasis program, where we are look at all the—as many sites as we can, and inspecting those sites to determine, do we have a—do our standards actually cover what we need to cover? Or is there some holes in the cov-

erage that we need to address, and would a comprehensive standard address that.¹⁴

It appears, therefore, that OSHA has not ruled out the possibility of promulgating a combustible dust regulation. As such, it is our view that if a regulation is warranted, the agency should be given a reasonable amount of time to craft a credible, effective, and enforceable rule.

Another reason OSHA should not rush to write a combustible dust standard was, in fact, highlighted in the CSB report—that being the extent to which any rulemaking would affect a large number of highly diverse of industries.¹⁵ Given the inevitable impact on such a wide range of America’s industry, OSHA must have the opportunity to decide if creating a one-size-fits-all rule is the most effective approach to address this complex and important subject.

H.R. 5522 creates a one-size-fits-all regulation

As currently written, H.R. 5522 would require OSHA to create one set of regulations for a substance which has many different physical characteristics (See Table 1), explodes at different flashpoints, and is part of countless industrial processes. Committee Republicans strongly believe that H.R. 5522 fails to responsibly consider the wide variety of issues relating to the combustible dust hazard, before mandating a rulemaking.

TABLE 1.—PARTICLE SIZE OF COMMON MATERIAL ¹⁶

| Common materials | Size (microns) |
|--|----------------|
| Talcum powder, fine silt, red blood cells, cocoa | 5 to 10. |
| Pollen, milled flour, course silt | 44 to 74. |
| Table salt | 105 to 149. |
| Coarse sand | 297 to 1000. |

Abbreviated rulemaking does not equal protective rulemaking

Should it be determined that a combustible dust regulation is needed, Committee Republicans generally share the Majority’s view that the regulation be completed in a reasonable amount of time. However, previous rulemakings have shown that the expedience with which an agency promulgates a rule must be weighed with an eye to the rule’s ultimate effectiveness. For instance, OSHA worked on a regulation for hexavalent chromium for several years before a court finally ordered the regulation to be completed in three years. While the effectiveness of the hexavalent chromium regulation is generally recognized, the fact that it required several years to be completed underscores the care that must be given to the rulemaking process. The same point can be made with respect to the grain standard.¹⁷ Supporters of H.R. 5522 suggest that the grain standard implemented by OSHA had such a positive effect on

¹⁴Testimony of the Honorable Edwin G. Foulke, Jr., Committee on Education and Labor, “H.R. 5522, the Combustible Dust Explosion and Fire Prevention Act of 2008,” Wednesday, March 12, 2008.

¹⁵See Appendix D, Investigation Report: Combustible Dust Hazard Study, Report No. 2006-H-1 (November 2006).

¹⁶Ibid.

¹⁷29 CFR 1910.272.

safety that it demonstrates the need for a broader combustible dust regulation. History might guide these supporters to acknowledge that it took seven years to promulgate this narrowly targeted standard.

Moreover, the success of the grain standard should be credited, in large part, to a robust rulemaking process; one which included significant stakeholder input. Unfortunately, H.R. 5522 does not follow the rulemaking process for the grain standard; but, instead, eliminates valuable input from the interim final rule (IFR). This oversight becomes even more glaring considering the fact that a combustible dust regulation would likely reach more than sixty industries. Should not these industries have the opportunity to comment or otherwise participate in the rulemaking process? Unfortunately, the Majority's answer to this important question would appear to be no. This fact is all the more troubling considering that industry must comply with an interim final rule within 120 days. Assistant Secretary Foulke highlighted this concern in a letter opposing the bill:

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.¹⁸

H.R. 5522 could result in two conflicting standards

The bill also creates the very real possibility that OSHA's final combustible dust regulation will look dramatically different than the interim final rule. Such an outcome becomes all too likely when one considers the fact that the final rule must reflect stakeholder input, while the interim final rule will not. As noted above, such input is crucial to the rulemaking process, and its absence from the early part of the process all but guarantees that the final rule on combustible dust will be different than the interim rule. While this fact is troubling on its face, its practical implications are even more disturbing. Employers may very well be required to make costly changes to their facilities and manufacturing processes in order to comply with the interim final regulation, only to be forced to make more modifications when OSHA issues its final rule eighteen months after enactment of the bill. Forcing such inconsistent regulation upon businesses and their employees simply defies credulity, even for the Democrat Members of this Committee.

Use of National Fire Protection Association Standards is problematic

Finally, but no less important, we are concerned by the bill's retention of provisions relating to the National Fire Protection Association's (NFPA) Standards. Our concerns were illuminated by the

¹⁸ See Letter from Assistant Secretary Foulke, April 8, 2008.

testimony David Sarvadi presented at the Committee's hearing on the bill, during which he stated:

Some will suggest that OSHA should simply adopt the voluntary standards that exist. To the extent that the standards reflect actual consensus about a particular topic, those sections that are mandatory can be useful in preparing regulatory provisions.

Nevertheless, they need to be reviewed in an open process by OSHA because they are not always free of bias and may not represent true consensus among affected parties. I previously testified in 2006 at a subcommittee hearing on this issue. Congress assumed that consensus standards were the process of an open and transparent process. When they are, the standards do represent the best practices of the affected parties. But when the standards are contentious, it is more often the case that one or another group has managed to impose its will, with the result that the process in which the standard was adopted is not the equivalent of the mandatory notice and comment preceding that is typically required for government standards.

Following normal rulemaking procedures is important from another perspective. To the extent that people feel they have been fairly heard, and the decision is made on the basis of objective technical criteria, they are more likely to accept it. We need such acceptance because we need voluntary compliance with these requirements to ensure true safety in the workplace. It will do no good to impose standards that in the end lead to more disputes and contention because, again, it will distract from the principal objective. Thus, we believe that it is imperative to recognize that a process longer than 90 days will be needed for OSHA to even adopt an interim standard. The process is inherently longer the more complicated the issue. Our experience of late is replete with unintended consequences of well-meaning but misguided action, particularly on the part of government. Short-circuiting the process by mandating changes within such short time frames will lead to more unintended consequences.

An example will help. Suppose such a standard is adopted, and that it is determined that one of the NFPA standards should become mandatory. Normally, standards are forward-looking, and one critical aspect that is fleshed out in the rulemaking process is what to do about existing installations. Should they be upgraded? How long will employers be allowed to bring facilities into compliance? Should existing designs be grandfathered? How far back should such a grandfather period go? I would suggest that these questions need to be answered before a comprehensive standard is imposed on a broad and ambiguous group of employers and employees.

It is simply wrong to suggest that OSHA can reasonably adopt the NFPA standards within 90 days. The NFPA standard 654, for example, is complex, on the one hand containing detailed technical specifications for the perform-

ance of critical process equipment and components, and on the other hand, including programmatic requirements such as those contemplated in the proposed legislation. Adopting this kind of standard without the normal array of feasibility and other analyses through an accelerated process is a recipe for difficulty if not disaster.

The complexity of the NFPA standards also suggests that having standards adopted through the legislative process is not a good idea. NFPA standards, including NFPA 654, are staffed with experts with many years of experience, most of whom are engineers. Engineers are trained in assessing the competing demands that are inherent in any design process, making decisions and trade-offs that are informed by engineering judgment to achieve what are hopefully optimum results. The expedited standard adoption process contemplated by the bill would deprive interested and affected parties the opportunity to be heard, and would result in the imposition of a standard likely to be less effective.¹⁹

The complexity of these standards further demonstrates why the bill's one-size-fits-all regulatory approach may be inappropriate with regard to combustible dust.

AMENDMENTS OFFERED IN COMMITTEE

Woolsey amendment in the nature of a substitute

Representative Woolsey's amendment in the nature of a substitute would direct OSHA to issue an interim final Combustible Dust standard within 90 days, but jettisons all regulatory procedures related to the interim rule. Further, the amendment directs the Secretary of Labor to issue a final standard relating to combustible dust within eighteen months of enactment, but in this case, complying with all required rulemaking procedures. Finally, the bill requires the Secretary to revise the Hazard Communication Standard to include combustible dusts. The Woolsey amendment was adopted without objection.

Wilson amendment in the nature of a substitute

During the Full Committee's markup of the bill, Representative Joe Wilson offered an amendment in the nature of a substitute. Representative Wilson's common-sense amendment required the Secretary of Labor to determine if a combustible dust regulation was necessary, based on the conclusions of the Imperial Sugar Company investigation and data gathered from the combustible dust NEP. If the Secretary determined that a regulation is necessary, then the agency is to proceed with a rulemaking as outlined in the OSH Act. This rulemaking process must be completed within 36 months. If a regulation is deemed unnecessary, the Secretary must report to Congress as to why it is not. The Wilson amendment failed on a voice vote.

¹⁹ See Testimony of David Sarvadi, Committee on Education and Labor, "H.R. 5522, the Combustible Dust Explosion and Fire Prevention Act of 2008," Wednesday, March 12, 2008.

H.R. 5522, as amended, was favorably reported by the Full Committee to the House by voice vote.

CONCLUSION

As noted previously in these views, the Republican Members of the Committee are deeply committed to protecting the health and safety of American workers. This commitment guides our views with respect to issues surrounding combustible dust, and the question of whether the Occupational Safety and Health Administration should be compelled to issue regulations in this area, as required by H.R. 5522. We, like our Majority colleagues, were deeply moved and saddened by the tragic accident that occurred in Port Wentworth, Georgia in February of this year. And we share our colleagues desire to take all possible actions to ensure that similar accidents do not occur in the future. We must disagree, however, with the legislative manner in which the Majority would take those actions. Quite simply, we cannot be sure that H.R. 5522, as currently written, will have the results hoped for by its sponsors, however well-intended their actions may be. Moreover, we are concerned with the bill's unreasonably compressed timeframes and disregard for statutorily-required rulemaking procedures. OSHA must have the opportunity to complete its investigation of the Port Wentworth accident; and, to conclusively determine what, if any, regulatory changes are needed. To do otherwise, we fear, will result in a regulation that, at the end of the day, is both ineffective and unenforceable. That would be the least desirable result possible; as such a regulation would do little toward achieving our shared goal of protecting American workers. It is this likely result, therefore, that compels us, respectfully, to reject H.R. 5522 in its current form.

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