

to CC:PA:LPD:PR (REG-138176-02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at <http://www.irs.gov/regs>. or via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS-REG-138176-02).

FOR FURTHER INFORMATION CONTACT:

Concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing Sonya M. Cruse, (202) 622-4693 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the notice of proposed rulemaking (REG-138176-02) that was published in the **Federal Register** on September 21, 2004 (69 FR 56377).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who have submitted written comments and wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies) by December 28, 2004.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing. Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedures and Administration).

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S-023]

RIN 1218-AC08

Updating OSHA Standards Based on National Consensus Standards

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Proposed rule; notice of project to update OSHA standards that are based on National Consensus Standards.

SUMMARY: OSHA is engaging in an overall effort to update OSHA standards that reference, or that include language taken directly from, outdated consensus standards. The Agency adopted many of these standards over 30 years ago under Section 6(a) of the Occupational Safety and Health Act of 1970. Most of the referenced documents have been either superseded by later versions or withdrawn by the issuing Standards Development Organization (SDO). Many are no longer in print or available to the public through the issuing SDO. The outdated versions in the OSHA standards do not reflect advances in technologies that have changed workplace safety over the last 30 years. OSHA will use a variety of regulatory approaches to update these standards, including notice and comment rulemaking, direct final rulemaking, and technical amendments.

DATES: Comments to this notice must be submitted by the following dates:

- *Hard copy:* Your comments must be submitted (postmarked or sent) by December 27, 2004.
- *Electronic transmission and facsimile:* Your comments must be sent by December 27, 2004.

ADDRESSES: You may submit written comments on this notice—identified by docket number S-023 or RIN number 1218-AC08—by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *OSHA Web Site:* <http://ecommments.osha.gov>. Follow the instructions for submitting comments on OSHA's Web page.
- *Fax:* If your written comments are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693-1648.
- *Regular mail, express delivery, hand delivery, and courier service:* Submit three copies to the OSHA

Docket Office, Docket No. S-023, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2625, Washington, DC 20210; telephone (202) 693-2350. (OSHA's TTY number is (877) 889-5627.) OSHA Docket Office hours of operation are 8:15 a.m. to 4:45 p.m., EST.

Instructions: All comments received will be posted without change to <http://dockets.osha.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to <http://dockets.osha.gov>.

FOR FURTHER INFORMATION CONTACT: For general information and press inquiries contact George Shaw, Acting Director, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-1999. For technical inquiries, contact Ted Twardowski, Directorate of Standards and Guidance, Room N-3609, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-2070 or fax (202) 693-1663. Copies of this **Federal Register** notice are available from the OSHA Office of Publications, Room N-3101, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-1888. Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available at OSHA's Web page at <http://www.osha.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

OSHA has used consensus standards extensively as a basis for its mandatory safety and health standards since the earliest days of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.* Under Section 6(a) of the OSH Act, OSHA was given the authority for a period of 2 years to adopt both national consensus standards and established Federal standards as OSHA standards without following notice and comment rulemaking procedures. 29 U.S.C. 655(a). Congress provided this authority so that OSHA would have a mechanism to begin immediately protecting the Nation's workers through mandatory standards. Using Section 6(a), the Agency adopted many consensus standards as OSHA standards.¹ OSHA adopted some of the

¹ OSHA also adopted under Section 6(a) a number of industry standards that were established Federal Standards or that were referenced in national consensus standards. For convenience only, this

consensus standards through "incorporation by reference." When it incorporates a consensus standard by reference, OSHA requires employers to follow a consensus standard—identified by name and date in the Code of Federal Regulations—made available for inspection at the Office of the Federal Register, the OSHA Docket Office, and OSHA's Regional Offices. See 29 CFR 1910.6. OSHA adopted other consensus standards by importing relevant language from them directly into the regulatory text of OSHA standards.

Under Section 6(b) of the OSH Act, which authorizes OSHA to promulgate safety and health standards through notice and comment rulemaking, OSHA has since promulgated a number of rules that reference, or are based in large measure on, consensus standards. Some of these Section 6(b) rulemakings involved updating OSHA standards that were originally adopted from consensus standards under Section 6(a), as discussed above.

Today, there are about 200 consensus standards referenced throughout the OSHA standards for general industry and maritime. The references appear in hundreds of requirements and range from informational references to mandatory requirements.

While OSHA has updated some of its Section 6(a) standards through notice and comment rulemaking, the vast majority have not been updated since they were originally adopted. Some of the consensus standards "incorporated by reference" were issued over 60 years ago. Most of the referenced consensus documents have been either superseded by later versions or withdrawn by the issuing Standards Development Organization (SDO). Many are no longer in print or available to the public through the issuing SDO. These outdated standards do not reflect advances in technologies that have changed workplace safety over the last 30 years. The OSHA versions also have not been updated to address new equipment and machinery that have become available since they were originally promulgated.

OSHA has a policy of issuing "de minimis" notices to employers who comply with more current versions of consensus standards, to the extent that the more current versions are at least as protective as the older versions. See OSHA Instruction CPL 2.45B, p. IV-31. The "de minimis" policy does not address all of the difficulties for employers, employees, and OSHA enforcement personnel created by

OSHA referencing outdated consensus standards. For example, referencing outdated consensus standards adds time-consuming administrative burdens on employers seeking to comply with OSHA standards. Employers need to research the referenced consensus standards, identify and analyze any updates to the standards, and determine how they apply to their workplaces. This task is made more difficult because many of the referenced consensus standards are no longer available through the issuing SDOs. Referencing outdated consensus standards also places heavy administrative burdens on OSHA. In applying the "de minimis" policy, OSHA must currently analyze later versions of the referenced consensus standards, and determine whether they are as protective as the referenced versions. OSHA believes that it would be far more productive for the Agency to use its time and resources to update its standards to reflect advances in consensus standard development and to address more effectively the new technologies and equipment that are found in today's workplaces.

II. Consensus Standards Update Project

OSHA recognizes the value of consensus standards and the widespread preference for OSHA rules to reflect the latest versions of these standards. SDOs rely upon the expertise of individuals with diverse backgrounds to produce consensus standards that consider the latest developments in workplace safety. As mentioned above, Congress placed such a high value on national consensus standards that it authorized the Agency to adopt them as OSHA standards, without notice and comment rulemaking, during the first two years of the OSH Act under Section 6(a). In addition, Section 6(b)(8) of the OSH Act states: "Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the **Federal Register** a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard." 29 U.S.C. 655(b)(8).

In the National Technology Transfer and Advancement Act (NTTAA), 15 U.S.C. 272, Congress directed Federal agencies to use voluntary consensus standards "to the extent practicable" and to participate in the development of voluntary consensus standards. The Office of Management and Budget has issued Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment*

Activities, to guide agencies in implementing the NTTAA. While the NTTAA does not expand the obligations OSHA already has under Section 6(b)(8) of the OSH Act (to consider consensus standards during rulemaking), it demonstrates the importance Congress continues to place on the use of consensus standards by administrative agencies.

Consensus standards often attempt to reconcile diverse global standards and eliminate barriers to trade by finding areas of agreement on the safety aspects of machinery and equipment. In addition, Federal agencies can make use of the expertise of the developers of these standards and participate with them in the development process.

Recognizing the importance of consensus standards, and the difficulties presented by OSHA's continued reliance on outdated consensus standards, we are beginning an effort to (1) update or revoke outdated consensus standards referenced in OSHA standards, and (2) update standards that incorporate language directly from outdated consensus standards. OSHA anticipates that this will be an extended and ongoing process. The OSH Act does not provide a quick way to update mandatory safety and health standards. OSHA is not able to adopt the latest versions of national consensus standards without notice and comment, as it was authorized to do for 2 years under Section 6(a). Instead, OSHA must conduct rulemaking under Section 6(b) to accomplish this task.

OSHA has previously solicited information and suggestions from the American National Standards Institute (ANSI) and other SDOs on how to proceed with this project. See Ex. 2-1, Letter from OSHA to ANSI and SDOs dated April 23, 2002. OSHA explained in that solicitation that the references to outdated consensus standards created difficulties for employers in a number of respects. OSHA noted that many of the outdated versions are no longer available from the issuing SDO and that there are often questions about the degree of protection and the lack of currency with technological developments in various areas. OSHA specifically asked SDOs to identify which referenced standards had been updated by the SDOs since their adoption by OSHA, and to provide input on the following questions:

- Whether material changes have been made to the referenced consensus standards so that the current versions are substantially different from the versions in the CFR;

notice also refers to such standards promulgated under Section 6(a) as "consensus standards."

- Whether the adoption of the current versions would be controversial; and
- Whether the latest versions reduce risk more than the versions that are currently incorporated in OSHA standards.

Various SDOs and other organizations responded and indicated their desire to assist OSHA in its effort to update its standards. Among the SDOs providing input were ANSI, the National Fire Protection Association (NFPA), the American Society of Mechanical Engineers (ASME), and the American Society for Testing and Materials. Other organizations such as Underwriters Laboratories, the American Petroleum Institute, the Compressed Gas Association, and the Abrasive Wheel Institute also responded. Many of the SDOs and other organizations provided OSHA with copies of the most recent versions of their referenced standard(s) and offered to provide technical assistance to the Agency in its analysis of the older and new standards. OSHA appreciates the willingness of these organizations to help us implement this project.

Nearly all of the SDOs said that OSHA's standards needed updating to reflect current versions of the consensus standards and that the current versions provided a higher level of safety to workers. In addition, many of the SDOs believe that OSHA's efforts to update its standards to reflect current versions of the consensus standards will not elicit controversy. For example, the ASME said:

[We] believe that adoption of the current version of each of these standards by the Federal Government with the changes identified would be non-controversial. Similarly, it is our opinion that the current versions of ASME standards will provide a reduction in the risk of accidents and injuries as compared to earlier versions presently referenced in the CFR and will alleviate some of the confusion in the regulated industry. Moreover, in addition to the technological advances incorporated into updated standards, many of the products described in the older versions of standards are no longer available, or are very difficult to obtain. Ex. 2-2, p. 2.

The NFPA noted that each of their documents has been updated "to reflect up-to-date terminology and current industry practices." Ex. 2-3, App. B. The updated documents often cover technology that has been developed since the OSHA standard was promulgated. "Providing a state-of-the-art document reflecting business practices of today promotes more of an understanding, appreciation and the much-necessary buy-in by the users of the regulations, thereby reducing risk." Ex. 2-3, App. B.

The NFPA also thought the updated references "would be largely non-controversial since the documents are ANSI consensus standards." Ex. 2-3, App. B. In addition, the NFPA said that "[w]ith the interested parties participating in the process to write documents, and with the respective affected industries and their insurance companies currently using NFPA documents, there is little controversy with OSHA referencing the most updated NFPA codes and standards." Ex. 2-3, App. B. The NFPA also said that for those OSHA standards that contain word-for-word text from NFPA codes and standards, OSHA should consider replacing the text "with a simple reference to the applicable primary NFPA document." Ex. 2-3, App. B.

OSHA is undertaking a series of regulatory projects to update its standards to reflect the current versions of consensus standards. These regulatory projects will include updating or revoking outdated consensus standards incorporated by reference, and updating regulatory text of current OSHA rules that were adopted directly from the language of outdated consensus standards. OSHA will use a variety of regulatory approaches in this effort, including:

1. *Notice and comment rulemaking.* OSHA intends to initiate formal (notice and comment) rulemaking to update or revoke references to outdated consensus standards in instances where OSHA anticipates that the action would either impose compliance costs or raise significant issues. OSHA will also use traditional notice and comment rulemaking to update OSHA provisions that were derived directly from the text of outdated consensus standards. OSHA is already using this technique to update its electrical installation standards in Subpart S of Part 1910 (proposed rule published April 5, 2004, 69 FR 17774) and expects to publish a proposed rule in the near future for Subpart V (power transmission and distribution lines and equipment) of Part 1926.

2. *Direct final rulemaking.* OSHA will use direct final rulemaking to update or revoke, as appropriate, references to outdated consensus standards where the regulatory change is non-controversial, equally protective, and does not impose significant new compliance costs.

3. *Technical amendments.* Where appropriate, OSHA intends to issue technical amendments to update references that are currently incorporated into OSHA standards and that only provide information to the regulated community. Such references impose no compliance obligations and

can be updated without notice and comment procedures.

OSHA welcomes comments on this update effort generally, as well as specific suggestions on which projects OSHA should pursue first.

Authority and Signature

This document was prepared under the direction of John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), Secretary of Labor's Order 5-2002 (67 FR 65008), and 29 CFR part 1911.

Signed at Washington, DC, this 17 day of November 2004.

John L. Henshaw,

Assistant Secretary of Labor.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-124-FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: We are reopening the public comment period on a proposed amendment to the Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Since the close of the comment period, Pennsylvania has provided explanatory information in response to two letters, as amended, we sent requesting clarification with regard to its proposed amendment. Pennsylvania has also withdrawn portions of its original amendment and has requested that we consider some existing statutes and regulatory provisions as part of the amendment. Pennsylvania has also indicated its intent to further revise portions of the amendment. We are accepting comments on the specific changes noted below only.

DATES: We will accept written comments on this proposal until 4 p.m., (local time) December 9, 2004.