

D.C. Appeals Court Rejects Industry Challenge to OSHA's Hazard Communication Rule

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The D.C. Circuit Court of Appeals has dismissed grain industry claims that OSHA erred by including combustible dust in its final Hazard Communication Standard (HCS). *National Oilseed Processors Association, et al. v. Occupational Safety & Health Administration, et al.*, No. 12- 1228 (D.C. Cir. Oct. 24, 2014).

Initially issued in 1983, the HCS was revised in 2012 to bring it into alignment with a worldwide initiative to harmonize international standards for classifying, disseminating information and labelling hazardous chemicals.

The National Oilseed Processors Association (NOPA) and other industry groups, including the American Chemistry Council, the Corn Refiners Association, the National Grain and Feed Association and the Renewable Fuels Association, had sought to set aside the HCS as it pertained to combustible dust, arguing OSHA had failed to provide notice and an opportunity for comment on the possible inclusion of combustible dust from grain in its HCS.

This was so, they argued, because not only did OSHA fail to mention that combustible dust might be regulated as a hazardous chemical in its 2006 advance notice of proposed rulemaking, but it also did not explicitly indicate grain dust would be considered combustible dust in the agency's 2009 proposed rule. OSHA's HCS action on combustible dust also could not be foreseen because the industry fell under a separate 1987 grain industry standard, petitioners contended. The final HCS was promulgated in 2012.

However, the three-judge appeals panel held the proposed rule provided adequate notice because OSHA had listed combustible dust as an "unclassified hazard" subject to HCS's general labeling, information sheet, and training requirements. OSHA also had requested and received comment on that provision. The Court also was influenced by a 1994 OSHA decision rejecting the grain industry's position that the HCS should not cover grain dust.

NOPA also argued the final rule was not a logical outgrowth of the proposed rule because the proposal contemplated regulating only inhalation hazards from grain dust, while the final rule included

combustible dust as a hazardous chemical subject to the full HCS. But the Court pointed out that both the proposed and final rules subjected combustible dust to all provisions of the HCS.

Petitioners also claimed as unreasonable and unsupported by substantive evidence OSHA's decision to forgo establishing a uniform definition for combustible dust in the final rule and to incorporating a definition from the agency's ongoing combustible dust enforcement program.

The appeals panel disagreed. "Because preexisting OSHA definitions and voluntary standards reflect a general consensus on the meaning of combustible dust, OSHA could reasonably conclude that it was unnecessary to articulate a single, uniform definition in the Final Rule."

NOPA also asserted OSHA had violated due process, since the lack of a definition of combustible dust rendered the final rule constitutionally vague on its face. In addition, NOPA members lacked notice on whether and how they must comply, and there was concern the lack of a clear definition would encourage discriminatory enforcement.

Addressing those complaints, the Court stated, "The Final Rule satisfies Due Process because the term 'combustible dust' is clear enough to provide fair warning of enforcement, and OSHA has provided additional guidance on how the revised Hazard Communication Standard will be enforced."

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