

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1228

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL OILSEED PROCESSORS ASSOCIATION, et al.
Petitioners,

v.

**OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION
and U.S. DEPARTMENT OF LABOR,**

Respondents.

On Petition for Review of a Final Rule of the
Occupational Safety and Health Administration

FINAL BRIEF FOR OSHA AND THE U.S. DEPARTMENT OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Intervenors

The parties in this case are (1) National Oilseed Processors Association, Corn Refiners Association, and National Grain and Feed Association as Petitioners; (2) Occupational Safety and Health Administration (OSHA), United States Department of Labor, and Thomas E. Perez, Secretary of Labor, as Respondents.

The intervenors in this case are (1) for Petitioners, American Feed Industry Association for Petitioners and (2) for Respondents, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO; and Change to Win.

No individual or entity has sought leave to appear as an *amicus curiae* in this proceeding.

B. Ruling Under Review

The ruling under review is OSHA's final rule entitled "Hazard Communication" (Docket No. OSHA-H022k-2006-0062), published in the Federal Register on March 26, 2012 at 77 Fed. Reg. 17,575. The final rule amended certain provisions of OSHA's Hazard Communication standard, 29 C.F.R. § 1910.1200.

C. Related Cases

The case on review was not previously on review before this or any other court.

There were three other petitions for review to this Court challenging the amended Hazard Communication standard. These are *American Petroleum Institute v. Secretary of Labor*, No. 12-1227, *American Tort Reform Association v. OSHA*, No. 12-1229, and *CropLife America v. Secretary of Labor*, No. 12-1231. This Court dismissed *CropLife America* on the petitioner's own motion by order dated June 19, 2012. After briefing and argument on the merits, this court dismissed the petition for review in *American Tort Reform Association v. OSHA*, 738 F.3d 387 (D.C. Cir. 2013). This court dismissed the *American Petroleum Institute* petition after the parties settled by order dated February 25, 2014.

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Term
APA	Administrative Procedure Act
ATRA	American Tort Reform Association
Br.	Petitioners' Brief
Doc.	Record Document Number
HazCom	Hazard Communication
NFPA	National Fire Protection Association
OSH Act	Occupational Safety and Health Act
OSHA	Occupational Safety and Health Administration
UN Sub-Committee	United Nations Sub-Committee of Experts on the Globally Harmonized System of Classification and Labelling of Chemicals.

JURISDICTIONAL STATEMENT

The National Oilseed Processors Association, Corn Refiners Association, and National Grain and Feed Association (Grain Associations), challenge a final rule issued by the Occupational Safety and Health Administration (OSHA) revising the agency's hazard communication (HazCom) standard, 29 C.F.R. § 1910.1200. The revisions were published in the Federal Register on March 26, 2012. The Grain Associations filed their petition for review on May 24, 2012. This Court therefore has jurisdiction over the appeal under section 6(f) of the Occupational Safety and Health Act (OSH Act). 29 U.S.C. § 655(f) (granting courts of appeals jurisdiction over challenges by “[a]ny person who may be adversely affected by a standard” filed “at any time prior to the sixtieth day after such standard is promulgated”).

STATEMENT OF ISSUES

1. Whether OSHA provided fair notice that the 2012 HazCom standard would cover grain dust, a chemical presenting a combustible dust hazard, where OSHA stated in its proposed rule that the final rule would require manufacturers to disclose the combustible dust hazards of their chemicals and the preamble for the 1994 HazCom standard and other public

statements previously issued by OSHA expressly noted that the HazCom standard covered combustible grain dust.

2. Whether substantial evidence supports OSHA's determination that a regulatory definition of combustible dust was not necessary for the 2012 HazCom standard where the meaning of the term combustible dust is well-understood by the regulated community, including the Grain Associations, and where adequate guidance on the term was otherwise available and expressly referenced and accepted by OSHA.

3. Whether the Grain Associations' vagueness challenge is ripe where the Grain Associations concede that grain dust can present a combustible dust hazard, acknowledge that they have easily and readily complied with another OSHA standard regulating combustible grain dust, OSHA has issued guidance expressly allowing the Grain Associations to use existing definitions of the term, and the Grain Associations allege no concrete hardship from waiting to raise the issue in a future enforcement challenge.

4. Whether the 2012 HazCom standard's use of the term combustible dust is unconstitutionally vague where the record shows that the regulated community, including the Grain Associations, knows what

combustible dust is, and OSHA has issued additional guidance on applying the term.

STATUTES AND REGULATIONS

The appendix to the Grain Associations' brief contains the text of all statutes and regulations relevant to this case.

STATEMENT OF FACTS

1. The OSH Act and OSH Act Standards

Congress enacted the OSH Act to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). To achieve this goal, Congress gave the Secretary of Labor¹ the authority to promulgate mandatory occupational safety and health standards “on the basis of information developed by the Secretary or otherwise available to him.” *Id.* § 655(b)(1). An OSH Act standard “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” *Id.* § 652(8). The OSH Act also requires OSHA to “prescribe the use of labels or other appropriate forms of warning as are

¹ The Secretary has delegated his responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms Secretary and OSHA are used interchangeably in this brief.

necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.” *Id.* § 655(b)(7). Employers who fail to comply with OSH Act standards are subject to citations and penalties. *Id.* §§ 658, 666.

2. The HazCom Standard²

The HazCom standard, 29 C.F.R. § 1910.1200, is an information transmittal standard. OSHA promulgated the HazCom standard to ensure that both employers and employees understood the hazards of dangerous chemicals used in the workplace. [J.A. 379] (48 Fed. Reg. 53,280 (Nov. 25, 1983)). The standard requires chemical manufacturers and importers to determine the hazards (a process referred to as “classification”) of each “chemical” they produce or import to determine whether it should be classified as a “hazardous chemical.” 29 C.F.R. § 1910.1200(d). If so, the manufacturer or importer must communicate the hazards to downstream users by providing labels and safety data sheets. 29 C.F.R. § 1910.1200(f), (g). Labels provide summary information on a chemical’s hazards and

² As explained in the text, since OSHA first promulgated the HazCom standard in 1983, it has undergone various revisions and amendments; the Grain Associations challenge the 2012 revisions to the HazCom standard. Unless otherwise noted, this brief refers to OSHA’s March 26, 2012 final rule as the 2012 HazCom standard.

recommended safe handling techniques; safety data sheets contain more detailed information about the chemical’s hazards, physical characteristics, recommended storage and handling, and emergency procedures. [See J.A. 55, 205, 210] (77 Fed. Reg. 17,574, 17,724, 17,729 (Mar. 26, 2012)). The HazCom standard also requires employers with hazardous chemicals in their workplaces to develop a hazard communication program, maintain safety data sheets and labels in the workplace, and provide training to employees on the hazards of the chemicals to which they are exposed. § 1910.1200 (e), (h).

The HazCom standard defines “chemical” very expansively as “any substance, or mixture of substances.” *Id.* § 1910.1200(c). A “hazardous chemical” presents physical hazards (such as explosion or flammability) and/or health hazards (such as acute toxicity or carcinogenicity).³ *Id.* To determine whether a chemical should be classified as a hazardous chemical, the HazCom standard requires manufacturers or importers to “identify the relevant data regarding the hazards of a chemical; review those data to ascertain the hazards associated with the chemical; and decide whether the

³ The HazCom standard as originally adopted in 1983 included only physical and health hazards in the definition of “hazardous chemical.” 29 C.F.R. § 1910.1200(c) (1984). The 2012 revisions to the HazCom standard added the terms “simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified” to the definition. See *infra* p. 21 and J.A. 183-87.

chemical will be classified as hazardous according to the definition of hazardous chemical in this section.” *Id.* § 1910.1200(c), (d). Manufacturers and importers must “identify and consider the full range of available scientific literature and other evidence concerning the potential hazards,” however, “[t]here is no requirement to test the chemical to determine how to classify its hazards.” *Id.* § 1910.1200(d)(2).

Additionally, in classifying their chemicals, manufacturers and importers must consider not only the hazards of the chemicals in the form shipped, but also the potential hazards to employees “under normal conditions of use or in a foreseeable emergency.” *Id.* § 1910.1200(b)(2). This latter concept encompasses “anticipat[ing] the full range of downstream uses of [] products and account[ing] for any hazardous by-products which may be formed.” [J.A. 1416, 1427] (OSHA, CPL 02-02-038, *Inspection Procedures for the Hazard Communication Standard*, App. A, Scope and Application, paragraph (b)(2) (1998)).⁴

When OSHA first adopted the HazCom standard in 1983, it applied only to manufacturers; in 1987 OSHA amended the standard to cover all employers. [J.A. 448] (52 Fed. Reg. 31,852 (Aug. 24, 1987)). OSHA

⁴Available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1551.

subsequently adopted a number of minor revisions to the standard in 1994, [J.A. 525] (59 Fed. Reg. 6126 (Feb. 9, 1994)), and then substantially revised the standard in 2012 to incorporate much of the Globally Harmonized System for Classification and Labelling of Chemicals (Globally Harmonized System).⁵ [J.A. 55].

OSHA made the 2012 revisions because it found adoption of the Globally Harmonized System will “substantially improve the quality and consistency of the required [hazard] information” provided to downstream users. [J.A. 65]. This is because the Globally Harmonized System has detailed requirements for labels (including uniform warning language and graphical elements for each hazard) and a uniform safety data sheet format; the previous version of the HazCom standard left these decisions to the manufacturer’s or importer’s discretion. [J.A. 205-206, 209-210]. In addition, the Globally Harmonized System provides better criteria for manufacturers and importers to use in deciding whether their chemicals present particular hazards. [J.A. 67]. The prior version of the standard used

⁵ The Globally Harmonized System is “an internationally harmonized system for classifying chemical hazards and developing labels and safety data sheets.” [J.A. 61]. It was developed under UN auspices by a “coordinating group comprised of countries, stakeholder representatives and international organizations [including OSHA],” and is overseen by the UN Sub-Committee of Experts on the Globally Harmonized System (UN Sub-Committee). [J.A. 59, 66].

very general, broad language to define hazards; in contrast, the Globally Harmonized System has very detailed criteria for hazards that “help ensure that multiple evaluators produce similar results when classifying hazards.” [J.A. 188; *see also* J.A. 183, 190].

In adopting the 2012 HazCom standard, OSHA took special care to ensure that incorporation of the Globally Harmonized System did not diminish worker protection. [See J.A. 184]. Because the Globally Harmonized System’s criteria were much more specific than the general definitions used in the previous version of the HazCom standard, OSHA was concerned that chemicals classified as hazardous under the previous standard might not be captured in the revisions. [J.A. 183-84]. To guard against this possibility, OSHA included a catch-all hazard category “as an interim matter, [to be] used until harmonized criteria for [the] hazard can be adopted at the UN Sub-committee level.” [J.A. 184]. The catch-all category was called “unclassified hazard” in the proposed rule and “hazard not otherwise classified” in the final rule. [J.A. 184].

3. The HazCom Standard’s Coverage of Combustible Dust, Including Combustible Grain Dust, and OSHA Guidance on Combustible Dust

One of the hazardous chemicals explicitly covered by the 2012 HazCom standard is combustible dust. 29 C.F.R. § 1910.1200(c) (definition

of “hazardous chemical”). Combustible dust is small particles that present a fire or explosion hazard when suspended at a sufficient concentration in air and exposed to an ignition source. [J.A. 904] (2006 Investigation Report – Combustible Dust Hazard Study); [J.A. 866] (74 Fed. Reg. 54,334 (Oct. 21, 2009) (advance notice of proposed rulemaking for combustible dust)).

When the dust is ignited, a deflagration can occur, “which is [a] violent combustion accompanied by a pressure wave.” [J.A. 866]. “Dust explosions can be very energetic, creating powerful waves of pressure that can destroy buildings and hurl people across a room.” [J.A. 906]. Persons caught in deflagrations are “often burned by the intense heat within the burning dust cloud or injured by flying objects or falling structures.” [J.A. 906].

Many organic materials, plastics, and metals present a combustible dust hazard when reduced to dust form. [J.A. 904; J.A. 1047] (U.S. Chemical Safety and Hazard Investigation Board Report)]. Some manufactured products, such as aluminum powdered coatings or corn starch, also present combustible dust hazards. [J.A. 904]. Combustible dust hazards are present in a wide range of industries including agriculture, food manufacturing, chemical manufacturing, furniture manufacturing, metal processing, fabricated metal product processing, pharmaceutical

manufacturing, the production of rubber and plastics, and rubber and plastic product manufacturing. [J.A. 867].

The U.S. Chemical Safety and Hazard Investigation Board (Chemical Safety Board) found that between 1980 and 2005 there were at least 281 combustible dust incidents that killed at least 119 workers and injured at least 718. [J.A. 895]; [J.A. 1357] (Dust Incident Data). These statistics do not include grain handling facilities, but in adopting its grain handling standard⁶ in 1987, OSHA found that between 1974 and 1984 there were at least 229 explosions in grain elevators and mills, causing at least 159 deaths and 477 injuries. [J.A. 483, 489-90] (52 Fed. Reg. 49,592, 49,597-98 (Dec. 31, 1987)). Statistics compiled by OSHA in 2009 showed the annual rate of grain dust explosions had substantially decreased, but there had still been over 160 explosions since that standard had been adopted. [J.A. 868-69].

⁶ OSHA's grain handling standard requires employers in certain industries to adopt measures to prevent combustible dust explosions in their workplaces. 29 C.F.R. § 1910.272. These include housekeeping measures to prevent the accumulation of dust, prohibitions on ignition sources in dusty areas, requirements for dust filtration systems near grain processing equipment, and employee training. *Id.* § 1910.272(e), (f), (j), (l), and (n). The standard applies to "grain elevators, feed mills, flour mills, rice mills, dust pelletizing plants, dry corn mills, soybean flaking operations, and the dry grinding operations of soycake." *Id.* § 1910.272 (b). The grain handling standard requires employers to control "fugitive grain dust," which is defined as "combustible dust particulates, emitted from the stock handling system, of such size as will pass through a U.S. Standard 40 mesh sieve (425 microns or less)." *Id.* § 1910.272(c).

The HazCom standard has always covered combustible dust, including combustible *grain* dust. Although the HazCom standard did not explicitly reference the term combustible dust prior to the 2012 revisions, in 1986 and 1987 OSHA issued two letters of interpretation that confirmed the standard covered combustible dust hazards.⁷ In the 1986 letter, OSHA noted that classifiers should consider whether dusts pose explosion hazards, and cited corn starch and powdered sugar as examples of products that pose combustible dust hazards. [J.A. 1413] (January 16, 1986 Letter to Sen. Mattingly (1986 Letter)).⁸ Similarly, in 1987 OSHA stated that the HazCom standard covers “grain dust” and noted its “physical hazard potential (i.e., explosions in grain elevators).” [J.A. 1415] (November 20, 1987 Letter to Hon. Glenn English (1987 Letter)).⁹

Notably, when the National Grain and Feed Association challenged the 1987 revisions to the HazCom standard, arguing that OSHA had not

⁷ Before the 2012 revisions, the HazCom standard covered combustible dust hazards because they fell within the definitions for flammable solid and explosive hazards. [See J.A. 186].

⁸ Available at:
http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=19368.

⁹ Available at:
http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=19615.

established a significant risk of combustible dust hazards in the grain processing and storage industry, the Third Circuit dismissed the challenge noting that “the propensity of grain elevators to blow up has been well documented.” *Assoc. Builders & Contractors, Inc. v. Brock*, 862 F.2d 63, 68 (3d Cir. 1988). And, in adopting some minor amendments to the HazCom standard in 1994, OSHA rejected arguments by agricultural interests that grain dust was not covered under the standard. OSHA found that grain dust “presents both a *physical hazard (potential for explosion)* and a health hazard (there is evidence that respiratory effects result from exposure)” and thus met the definition of “hazardous chemical” under the standard.¹⁰ [J.A. 553-54] (emphasis added).

¹⁰ The 1994 amendments to the HazCom standard partially exempted grain from the standard’s labeling requirements because insufficient dust would be generated during transportation to create a hazard. [J.A. 559]; *see* 29 C.F.R. § 1910.1200(f)(2) (1994) (now codified at 29 C.F.R. § 1910.1200(f)(4)). OSHA also clarified that a grain elevator would be considered the manufacturer under the standard, and would therefore bear the burden of conducting the hazard classification, labeling with appropriate hazard warnings, and preparing safety data sheets. [J.A. 544]. Unrelated to combustible dust hazards, OSHA further noted in the 1994 preamble that it had entered into a settlement agreement with National Grain and Feed Association related to the permissible exposure limit (PEL) applicable to grain dust, and that “[i]nformation regarding this PEL must now appear on [safety data sheets] for grain.” [J.A. 553].

In 2005, OSHA issued a safety and health information bulletin alerting employers to combustible dust hazards in the workplace, and noting that “[e]mployers with hazardous chemicals (including combustible dusts) in their workplaces” are required to comply with the HazCom standard. [J.A. 1446] (OSHA, SHIB 07-31-2005, *Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions* at “Training—Employees” (2005)).¹¹ OSHA also issued a poster in 2008 listing dozens of agricultural dusts and products that presented combustible dust hazards, including dusts and flours from rice, oats, soybeans, rye, and wheat. [J.A. 1473] (OSHA, Poster, *Combustible Dust*).¹² OSHA subsequently noted in its *Hazard Communication Guidance for Combustible Dusts* that the 2008 poster “provides examples of materials from which combustible dust explosions could occur.” [J.A. 1475] (OSHA 3371-08 2009 at “Identifying and Controlling the Potential for Dust Explosions”).¹³

Following a series of catastrophic combustible dust explosions in workplaces around the nation in the early to mid-2000s, including an

¹¹ Available at: <http://www.osha.gov/dts/shib/shib073105.html>.

¹² Available at: <https://www.osha.gov/Publications/combustibledustposter.pdf>.

¹³ Available at: <https://www.osha.gov/Publications/3371combustible-dust.html>.

explosion at the Imperial Sugar facility in Port Wentworth, Georgia, that killed fourteen people, OSHA increased its focus on combustible dust hazards. [J.A. 869-70]. Specifically, OSHA adopted a Combustible Dust National Emphasis Program targeting workplaces that had combustible dust hazards. [J.A. 1455] (OSHA, CPL 03-00-008, *Combustible Dust National Emphasis Program*, (March 11, 2008)).¹⁴ The program – memorialized in a guidance document – provided guidance to OSHA inspectors on OSH Act standards applicable to combustible dust hazards. [J.A. 1463-65].

With respect to applying the HazCom standard, the National Emphasis Program stated that the standard covered chemicals if “in the course of normal conditions of use [they] could become combustible dusts.” [J.A. 1465]. The program defined combustible dust as “[a] combustible particulate solid that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape.” [J.A. 1458]. OSHA directed inspectors to initiate enforcement proceedings against manufacturers if safety data sheets did not disclose combustible dust hazards. [J.A. 1465]. Of the approximately 4900 violations issued in the first 20 months of the National

¹⁴ Available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=directives&p_id=3830.

Emphasis Program, OSHA issued 27% under the HazCom standard. [J.A. 1483] (OSHA, *Status Report on Combustible Dust—National Emphasis Program* (Oct. 2009)).¹⁵

4. Industry Consensus Standards on Combustible Dust

Various industry associations have developed voluntary consensus standards related to combustible dust hazards. For example, the National Fire Protection Association¹⁶ (NFPA) has issued voluntary standards that apply to workplaces that present combustible dust hazards. While they also require the provision of safety data sheets and labels, their focus is on various practices in the workplace to prevent or minimize the potential for dust explosions, such as cleaning up dust accumulations, eliminating ignition sources, and appropriate design of dust control equipment. For example, there are industry-specific consensus standards addressing the hazards of

¹⁵ Available at:

https://www.osha.gov/dep/combustible_dust/combustible_dust_nep_rpt_102009.html

¹⁶ The National Fire Protection Association “is an international nonprofit organization established in 1896. Its mission is to reduce the worldwide burden of fire and other hazards on the quality of life by providing and advocating consensus codes and standards, research, training, and education.” <http://www.nfpa.org/about-nfpa/overview>.

agricultural dusts (NFPA 61¹⁷), metal dusts (NFPA 484¹⁸), and wood dusts (NFPA 664¹⁹). [J.A. 871]. For workplaces where no specific NFPA dust standard applies, the general combustible dust consensus standard (NFPA 654²⁰) applies. [J.A. 871].

These various standards contain consistent definitions for combustible dust. All of the definitions generally find that combustible dust consists of small particles of combustible material that when suspended in air create a fire or explosion hazard. [J.A. 2644] (NFPA 61 § 3.3.1 (2013) (“Any finely divided solid agricultural material . . . that presents a fire or explosion hazard when dispersed and ignited in air”); [J.A. 2682] (NFPA 484 § 3.3.6.1 (2012) (“A combustible metal particulate that presents a flash fire hazard or explosion hazard when suspended in air”); [J.A. 2843] (NFPA 654 § 3.3.5 (2013) (“A finely divided combustible particulate solid that presents a flash fire hazard or explosion hazard when suspended in air”); [J.A. 2904] (NFPA

¹⁷ Available online in read-only format at: <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=61>.

¹⁸ Available online in read-only format at: <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=484>.

¹⁹ Available online in read-only format at: <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=664>.

²⁰ Available online in read-only format at: <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=654>.

664 § 3.3.27.1 (2012) (“Wood particulate that will propagate a flame front, thus presenting a fire or explosion hazard, when suspended in air”)).

The only distinction among the definitions is that some of them refer to a specific dust particle size. Two definitions state that a combustible dust particle may be of any “size or shape” (e.g. NFPA 484 § 3.3.6.1, NFPA 654 § 3.3.5), one states that particles must be of less than 420 micrometers in diameter (NFPA 61 § 3.3.1), and one uses a 500 micrometer diameter criterion (NFPA 664 § 3.3.27.1). Much of even that perceived difference between these definitions disappears, however, upon close examination. For example, the explanatory notes for NFPA 484 and 654 state that 500 micrometers is “an acceptable size criterion” to be used in determining whether a dust is combustible, and NFPA 61 acknowledges that dusts with particles greater than 420 micrometers “might be explosible.” NFPA 61 § A.3.3.1; NFPA 484 § A.3.3.6.1; NFPA 654 § A.3.3.51; NFPA 664 § A.3.3.27.1. The explanatory notes of all of these standards agree that whether a dust is combustible can ultimately be determined by testing. *Id.*

5. OSHA’s Determination to Expressly Cover Combustible Dust as a Hazardous Chemical in the 2012 HazCom Standard

OSHA started the process of incorporating the Globally Harmonized System by issuing an advanced notice of proposed rulemaking in 2006.

[J.A. 584] (71 Fed. Reg. 53,617 (Sept. 12, 2006)). Several comments to this

notice queried whether the final rule should expressly cover combustible dust. [J.A. 596, 591] (74 Fed. Reg. 50,280, 50,395 (Sept. 30, 2009) (proposed rule)).

Also in 2006, the Chemical Safety Board reported on its Combustible Dust Hazard Study. [J.A. 885]. It found that in several of the combustible dust explosions it studied, safety data sheets did not adequately describe the combustible dust hazard, and employees and managers did not know of the hazard. [J.A. 923, 931]. In addition the Chemical Safety Board reviewed safety data sheets for 140 known combustible powders, and found that only 10% mentioned the hazard in the hazard identification section of the sheet, and only 59% mentioned the hazard at all. [J.A. 932]. As a result, the Board recommended that OSHA revise the HazCom standard to explicitly state that it covers combustible dust, and to require safety data sheets to contain a clear warning of combustible dust hazards and information on safe handling practices. [J.A. 897].

In 2009 OSHA issued its proposed rule revising the HazCom standard to adopt the Globally Harmonized System. [J.A. 596]. Consistent with the comments it had received, OSHA noted that the revised HazCom standard would explicitly cover combustible dust. [J.A. 706, 711]. The proposed rule covered combustible dust through the “unclassified hazards” catch-all

category.²¹ [J.A. 706, 711]. The proposed rule required manufacturers or importers of chemicals categorized as unclassified hazards to disclose the hazard on labels and safety data sheets. [J.A. 706]. The preamble to the proposed rule also noted that OSHA had recommended that the United Nations Globally Harmonized System Sub-Committee (UN Sub-Committee) adopt formal classification criteria for combustible dust, and stated that once such criteria were adopted OSHA would add them to the HazCom standard. [J.A. 711].

OSHA requested comment on the unclassified hazard approach, and whether it would “provide sufficient interim coverage for hazards such as combustible dust.” [J.A. 598, 706, 711]. OSHA also stated that it “specifically would like to learn what stakeholders believe would be an appropriate definition for combustible dust to add to the [Globally Harmonized System] as a physical hazard.” [J.A. 711].

Many stakeholders responded to OSHA’s request for comments on combustible dust issues. Multiple commenters from industry, labor, and the public health community favorably viewed OSHA’s proposed approach covering combustible dust as an unclassified hazard. [*E.g.*, J.A. 1138 (National Paint and Coatings Association); 1152 (Ameren); 1161 (Wacker

²¹ *See supra* p. 8.

Chemical); 1171 (Troy Corp); 1247 (American Industrial Hygienists Association); 1263 (ORC Worldwide); 1330 (3M); 1343 (NIOSH); 1412 (AFL-CIO)]. Other commenters agreed with OSHA's approach, but stated that OSHA should provide criteria for classifying combustible dust in additional guidance outside of rulemaking. [J.A. 1239 (Teamsters); 1353 (International Chemical Workers Union Council)].

Some commenters, however, criticized OSHA's unclassified hazard approach entirely, stating that OSHA should either adopt specific criteria for combustible dust, or cover combustible dust hazard communication in the agency's combustible dust rulemaking. [*E.g.*, J.A. 1177 (Dow Chemical); 1259 (United Parcel Service); 1272 (Proctor and Gamble Co.)]. A few stakeholders suggested an alternative treatment of combustible dust. For example, the American Chemistry Council agreed in principle with the unclassified hazards approach, so long as OSHA adopted criteria for each included hazard. [J.A. 1305-1306]. It also asserted that the standard should only cover combustible dust where a chemical is shipped in dust form "and has the potential to explode under certain conditions." [J.A. 1306]. But even in these circumstances, the American Chemistry Council argued, OSHA should not require employers to label the chemical or to classify the chemical as hazardous. [J.A. 1306].

As in the proposed rule, the 2012 HazCom standard promulgated by OSHA expressly covered combustible dust. [*Compare* J.A. 598, 711 (proposed rule) *with* J.A. 185-87 (final rule)]. And, as in the proposed rule, under the final rule manufacturers and importers must disclose combustible dust hazards on labels and safety data sheets. [*Compare* J.A. 186-87 (final rule) *with* J.A. 711 (proposed rule)]. Although the requirements for combustible dust remained the same, in the 2012 HazCom standard OSHA created a specific category for combustible dust (and included it in the definition for “hazardous chemical”) rather than including it in the catch-all “unclassified hazard” category.²² [J.A. 185].

Noting that both the UN Sub-Committee and OSHA (in a separate combustible dust rulemaking) had ongoing efforts to adopt a definition of combustible dust, OSHA determined that it was not necessary to include a precise regulatory definition of combustible dust in the 2012 HazCom standard. [J.A. 186]. Instead, OSHA referenced its Combustible Dust National Emphasis Program, “which provides an operative definition,” and consensus standards, “particularly those of the NFPA.” [J.A. 186]. Through these preamble statements OSHA sought to maintain the status quo and

²² As noted above, *supra* p. 8, OSHA renamed “unclassified hazards” as “hazards not otherwise classified” in the final rule. [J.A. 184].

“clarif[y] its position that it will continue to regard combustible dust” as covered by the HazCom standard. [J.A. 186].

6. OSHA’s Issuance of Additional Combustible Dust Guidance in December 2013

In December 2013, OSHA’s Director of Enforcement Programs issued a memorandum to OSHA’s regional offices providing enforcement guidance on classifying combustible dust hazards under the 2012 HazCom standard. [J.A. 2594] (Memorandum from Thomas Galassi to OSHA Regional Administrators Re: Classification of Combustible Dusts Under the Revised Hazard Communication Standard (December memorandum)).²³ The memorandum confirmed and elaborated on OSHA’s approach for determining combustible dust hazards under the 2012 HazCom standard by applying existing well-known methodologies.

In general, the Globally Harmonized System requires that hazard classifications be made on the basis of all available data. 29 C.F.R. § 1910.1200(d)(2); [J.A. 188]. The December memorandum draws on this principle to articulate a straightforward approach to classification depending on the information or data that is available. Because “often the best information is actual experience,” the December memorandum states that

²³ Available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTEGRATIONS&p_id=28880.

where the classifier knows its product has been involved in a deflagration or dust explosion, the product should be classified as a combustible dust unless the conditions surrounding the event are not expected in normal conditions of use or foreseeable emergencies. [J.A. 2595]. The HazCom standard does not require testing, and the December memorandum does not either. [J.A. 2594-95]. However, where testing data are available, such data should be used to classify, except where the classifier can show that the data do not represent the hazards of the product. [J.A. 2594-95]. In the absence of test data, the classifier may either rely on published data or particle size. [J.A. 2594-95]. Given the differences in size criteria in the various consensus standards, either the 420 or 500 micrometer size may be used. [J.A. 2594-95]. The memorandum also notes that its guidance is not exclusive, and classifiers may use “other reliable methods to establish whether their product does or does not present a combustible dust hazard.” [J.A. 2595].

SUMMARY OF ARGUMENT

The Grain Associations had fair notice that the 2012 HazCom standard would cover combustible grain dust. The questions OSHA asked in the rulemaking proposal, the proposal’s preamble text, and the comments submitted by participants in the rulemaking process all expressly referenced combustible dust. And, OSHA had previously stated on numerous occasions

that the HazCom standard covers grain dust because it may pose a combustible dust hazard.

Furthermore, substantial evidence supports OSHA's determination that it was not necessary to include a regulatory definition for combustible dust in the 2012 HazCom standard. The regulated community well-understands what combustible dust is: small particles of dust that are suspended in air and that can combust. The small technical differences among industry definitions do not undermine this basic general level of understanding. As OSHA explained in the preamble to the final rule, both the UN Sub-Committee and OSHA in a separate combustible dust rulemaking were in the process of developing a definition of combustible dust. OSHA had also long interpreted the previous HazCom standard (which had never contained a definition of combustible dust) as covering combustible dust hazards. OSHA therefore properly determined that the guidance contained in its Combustible Dust National Emphasis Program along with national consensus standard definitions adequately advised employers on classifying combustible dust.

The Grain Associations' claim that the term combustible dust is unconstitutionally vague is meritless. As an initial matter, the argument is not ripe. In a facial challenge like this one, the Grain Associations must

show that the term is impermissibly vague in all of its applications. But there are accepted consensus standards that define the term, and OSHA has issued guidance permitting manufacturers and importers to use any of the accepted definitions in performing classification of their products.

Additionally, the Grain Associations' vagueness claim is not ripe because they have not provided any concrete evidence demonstrating hardship from waiting to resolve their claim in a future enforcement proceeding.

The Grain Associations' vagueness claim also fails on the merits. The record evidence establishes that the regulated community, including the Grain Associations, knows what combustible dust is, and OSHA has provided additional guidance on the meaning of the term in the preamble to the 2012 HazCom standard and in separate enforcement guidance. The Grain Associations' assertions that the guidance is confusing are unconvincing. The petition for review should therefore be dismissed.

STANDARD OF REVIEW

Under section 6(b)(2) of the OSH Act, before adopting an occupational safety and health standard, OSHA must “publish a proposed rule . . . in the Federal Register.” 29 U.S.C. § 655(b)(2). This “implicitly incorporates the general requirement for informal rulemaking in 5 U.S.C. § 553(b)(3) (1976): notice of ‘the terms or substance of the proposed rule or a

description of the subjects and issues involved.” *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (quoting 5 U.S.C. § 553(b)(3)). Notice is adequate when an interested party could have reasonably anticipated the final rulemaking from the draft rule. *Nat’l Mining Ass’n v. MSHA*, 116 F.3d 520, 531 (D.C. Cir. 1997). Called the “logical outgrowth test,” courts consider whether adequate notice was given by comparing the final and proposed rules, as well as “the comments, statements and proposals made during the notice-and-comment period.” *Nat’l Mining Ass’n v. MSHA*, 512 F.3d 696, 699 (D.C. Cir. 2008). “The object, in short, is fair notice.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

The OSH Act further provides that the Secretary’s rulemaking determinations “shall be conclusive” if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 655(f); *United Steelworkers*, 647 F.2d at 1206. OSH Act standards are “essentially legislative and rooted in inferences from complex scientific and factual data.” *Nat’l Maritime Safety Ass’n v. OSHA*, 649 F.3d 743, 751 (D.C. Cir. 2011). This means that the Court’s function is to “ensure public accountability” by requiring OSHA to identify relevant factual evidence, explain the logic and the policies underlying any legislative choice, state candidly any assumptions on which

it relies, and present its reasons for rejecting significant contrary evidence and argument. *Id.* at 752; *see also Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1264 (D.C. Cir. 1988). The Court's basic task is not to second-guess OSHA but to determine whether its decision falls within a "zone of reasonableness." *Nat'l Maritime Safety Ass'n*, 649 F.3d at 751-52 (quoting *United Steelworkers*, 647 F.2d at 1206-07).

ARGUMENT

I. The Grain Associations Had Fair Notice that the 2012 HazCom Standard Would Cover Combustible Grain Dust Hazards.

OSHA's proposed rule for the 2012 HazCom standard explicitly discussed the coverage of combustible dust. And, OSHA has long expressed its position that grain dust presents a combustible dust hazard covered by the HazCom standard. Nothing required OSHA to specifically enumerate each and every type of chemical that may pose a combustible dust hazard; instead OSHA properly chose to regulate by hazard category. The Grain Associations' claim that they lacked fair notice that combustible grain dust would be covered by the 2012 HazCom standard therefore lacks merit.

A. The Proposed Rule Clearly Indicated that the 2012 HazCom Standard Would Expressly Cover Combustible Dust Hazards.

The Grain Associations concede that the regulated community had fair notice that the 2012 HazCom standard would cover combustible dust

hazards.²⁴ Br. 29 (noting the proposed rule “introduced the concept of including ‘combustible dust’ in the Final Rule”). Indeed, in the preamble to the proposed rule OSHA expressly stated that it intended to cover combustible dust under the “unclassified hazard” classification. [J.A. 598, 706, 711]; see *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 621 (D.C. Cir. 1988) (finding agency had explained scope of exclusion adopted in final rule adequately in preamble of proposal).

OSHA highlighted the standard’s coverage of combustible dust by asking in the proposed rule whether the proposed unclassified hazard definition would provide “sufficient interim coverage for hazards such as combustible dust?” [J.A. 598]. This Court has frequently found that such queries provide sufficient notice. See *Ass’n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000) (question in preamble about how EPA should account for lack of state oversight gave adequate notice that EPA might limit alternative treatment methods to operations subject to regulatory

²⁴ The Grain Associations attempt to cloud the notice issue by arguing that OSHA’s advanced notice of proposed rulemaking for the 2012 revisions did not mention combustible dust. Br. 38-39. But the notice inquiry focuses on whether the regulated community could have anticipated the final rule from the proposed rule, and not on any advance notice (which is not required under the OSH Act or the Administrative Procedure Act) the agency may voluntarily elect to give. See *Nat’l Mining Ass’n*, 512 F.3d at 699 (logical outgrowth compares “final rule to the proposed one” along with comments, statements, and proposals made during the “notice and comment period”).

oversight); *Ass'n of Am. Railroads v. DOT*, 38 F.3d 582, 589 (D.C. Cir. 1994) (preamble query on whether the Federal Railroad Administration should preempt all OSHA jurisdiction for bridge work provided sufficient notice that bridge workers might remain subject to OSHA jurisdiction); *United Steelworkers*, 647 F.2d at 1221 (question in preamble about whether proposed permissible exposure limit (PEL) is appropriate and incorporates a sufficient margin of safety provides notice of the lower PEL adopted in the final rule).

Additionally, the regulated community plainly understood that OSHA intended to cover combustible dust in the final rule, as stakeholders submitted comments on both sides of the question on the coverage of combustible dust.²⁵ [*See, e.g.*, J.A. 1138 (National Paint and Coatings Association); 1152 (Ameren); 1161 (Wacker Chemical); 1171 (Troy Corp); 1177 (Dow Chemical); 1239 (Teamsters); 1247 (American Industrial Hygienists Association); 1259 (United Parcel Service); 1272 (Proctor and

²⁵ Both the proposed and final rules covered the hazard of combustible dust. OSHA did, however, change the nomenclature from “unclassified hazard” to “hazardous chemical.” [*Compare* J.A. 598, 711 (proposed rule) *with* J.A. 185-87 (final rule)]. But the result is the same. An “unclassified hazard” was a type of “hazardous chemical” under the proposed rule, [J.A. 756], and both the proposed rule and the 2012 HazCom standard require manufacturers and importers to disclose combustible dust hazards on labels and safety data sheets. [*Compare* J.A. 186-87 (final rule) *with* J.A. 711 (proposed rule) (“combustible dust would be covered as other hazardous chemicals are...”).]

Gamble Co.); 1305-1306 (American Chemistry Council); 1353 (International Chemical Workers Union Council)]. This too establishes that OSHA provided adequate notice on the issue. *See Northeast Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (comments received on both sides of an issue showed adequate notice); *Int'l Union, United Automobile Workers v. OSHA*, 938 F.2d 1310, 1324 (D.C. Cir. 1991) (finding adequate notice where commenters “clearly detected some play on the issue, and addressed remarks to OSHA both favoring and opposing employer choice”).

B. The Proposed Rule Covered All Combustible Dust Hazards, Including Those Presented by Grain Dust.

Although the Grain Associations concede that the proposed rule provided fair notice that the 2012 HazCom standard would cover combustible dust, they claim that they lacked notice that the final rule would cover combustible *grain* dust. Br. 39. This contention has no merit. Over the years and on multiple occasions OSHA has publically stated that the HazCom standard covers the combustible dust hazards associated with agricultural products, including grain, and the proposed rule gave no indication that OSHA intended to reverse this longstanding policy. OSHA’s grain handling standard and the ongoing combustible dust rulemaking do not alter this analysis. Nor do notice requirements obligate OSHA to list in its

notice of proposed rulemaking each and every possible chemical that may pose a combustible dust hazard. Instead, OSHA properly chose to regulate by hazard category.

1. *OSHA Has Long Covered Combustible Grain Dust Under the HazCom Standard.*

There can be no dispute that OSHA has frequently and publically stated its position that the HazCom standard covers combustible grain dust. For example, in 1986 and 1987, OSHA issued letters of interpretation confirming that the HazCom standard covered agricultural products presenting grain dust explosion hazards. [J.A. 1415] (1987 Letter stating “Grain Dust is a hazardous material under the definition of the [HazCom] rule.”); [J.A. 1413] (1986 Letter noting that corn starch and powdered sugar may present physical hazards covered under the HazCom standard, such as the potential for fire and explosion).

OSHA also issued a poster in 2008 listing dozens of agricultural dusts and products that presented combustible dust hazards, including dusts and flours from rice, oats, soybeans, rye, and wheat. [J.A. 1473]. OSHA subsequently noted in its *Hazard Communication Guidance for Combustible Dusts* that the 2008 poster “provides examples of materials from which combustible dust explosions could occur.” [J.A. 1475] (OSHA 3371-08 2009 at “Identifying and Controlling the Potential for Dust Explosions”).

In adopting amendments to the HazCom standard in 1994, OSHA also expressly rejected the grain industry’s contention that the standard should not cover grain dust. [J.A. 553-54]. In the 1994 preamble, OSHA cited evidence that grain dust “presents both a *physical hazard (potential for explosion)* and a health hazard (there is evidence that respiratory effects result from exposure)” and therefore was dust “covered under the rule.” [J.A. 554] (emphasis added). Indeed, the Third Circuit explicitly rejected the National Feed and Grain Association’s argument that the HazCom standard did not cover the grain handling industry because “[a]s to the risks of grain dust, the propensity of grain elevators to blow up has been well documented.” *Assoc. Builders*, 862 F.2d at 68.

The Grain Associations claim that OSHA stated in the 1994 preamble that the HazCom standard only covered grain dust because the American Council of Governmental Industrial Hygienists (American Council) had adopted a Threshold Limit Value for grain.²⁶ Br. 40. But the preamble in fact says the opposite. OSHA explained that whether grain dust has a Threshold Limit Value was “immaterial” to the HazCom standard’s

²⁶ The pre-2012 HazCom standard required a manufacturer or importer to treat a chemical as hazardous if the American Council had adopted a Threshold Limit Value for it. 29 C.F.R. § 1910.1200(d)(3)(ii) (1994). A Threshold Limit Value is an airborne concentration of a chemical that the American Council has determined that a worker may be exposed to without “unreasonable risk of disease or injury.” <https://www.acgih.org/TLV/>.

coverage of grain dust because of the evidence that such dust presented an explosion and other hazards. [J.A. 553].

In sum, there is ample evidence that OSHA repeatedly informed the regulated community that the HazCom standard covered combustible grain dust. And, nothing in the proposed rule for the 2012 amendments to the HazCom standard provided any indication that OSHA intended to reverse this longstanding policy and exclude grain dust or any other type of dust from the combustible dust hazard category. The Grain Associations therefore had fair notice that the 2012 HazCom Standard covered combustible grain dust.²⁷

2. *The Grain Handling Standard and the Ongoing Combustible Dust Rulemaking Have No Impact on the 2012 HazCom Standard's Coverage of Combustible Grain Dust.*

The Grain Associations also claim that because OSHA's grain handling standard regulates dust explosion hazards for certain grain-related

²⁷ The Grain Associations also argue that the coverage of combustible grain dust is not a logical outgrowth of the proposed rule. Br. 44-47. But as explained above, the scope of the final and proposed rules are the same: they both included combustible dust, which included combustible grain dust (and every other kind of combustible dust). But even if the scopes were different, the final rule would still be a logical outgrowth of the proposal. Because grain dust is a combustible dust (OSHA historically considered it as such) and the proposed rule clearly signaled OSHA's intent to cover combustible dust, "interested parties could . . . reasonably have anticipated" the coverage of grain dust from OSHA's discussion and treatment of combustible dust in the proposed rule. *Nat'l Mining Ass'n*, 116 F.3d at 531 (internal quotation marks omitted).

industries, “they had no notice or reason to suspect that [grain dust] might be covered by the combustible dust provisions of the Final Rule.” Br. 40. This argument does not withstand scrutiny. This is because the grain handling standard and the HazCom standard impose separate and distinct obligations.

OSHA’s grain handling standard imposes workplace practices and training requirements to mitigate dust explosion hazards in specified grain handling operations. 29 C.F.R. § 1910.272(e), (f), (j)-(q); *see generally id.* at App. A. It does not proscribe rules for communicating combustible dust hazards. Indeed, in the 1994 preamble for amendments made to the HazCom standard, OSHA squarely rejected the contention made by some commenters that the grain handling standard rendered the HazCom standard’s coverage of grain dust superfluous. [J.A. 553] (“Some indicated that OSHA’s rule on grain handling already adequately covers training of workers [citation omitted]. OSHA’s position on this issue remains the same—grain dust meets the definition of a hazardous chemical under the HCS, and is fully covered by the rule. To the extent that workers are already trained, this merely minimizes the burden of compliance.”).²⁸ The existence

²⁸ The 2012 HazCom standard requires all employers with hazardous chemicals in their facilities to train their employees on the new safety data sheet format and new label elements used by the Globally Harmonized System no later than December 1, 2013. 29 C.F.R. § 1910.1200(j)(1). The Grain Associations complain that they do not know whether their members

of the grain handling standard therefore did not give the Grain Associations any reason to believe that the 2012 HazCom standard would not cover combustible grain dust.

The Grain Associations also assert that “OSHA led [the Grain Associations] to believe that the combustible dust rulemaking, in conjunction with the Grain Handling Standard, not the [2012 HazCom standard], would be the vehicle through which OSHA would develop a definition for ‘combustible dust’ and for determining whether the products of the associations’ members met that definition.” Br. 23. The Grain Associations, however, point to no evidence in support of this contention. And, OSHA’s longstanding position that the HazCom standard covered combustible grain dust, *supra* pp. 31-33, renders unreasonable any belief to the contrary. The Grain Associations therefore had fair notice that the 2012 HazCom standard would continue to cover combustible grain dust.

should have complied with this requirement because they do not know whether grain dust is a hazardous chemical. Br. 30, 56. But putting aside their claims of confusion about whether grain dust is covered, their members were required to comply with this requirement if they had *any* hazardous chemical in their workplaces (*e.g.*, lubricating oils, cleaning agents, etc.). There is nothing in the training requirements that depends on the nature of the hazardous chemicals present in the workplace. Rather, their purpose is to familiarize employees with the elements of the Globally Harmonized System generally. *See* OSHA Fact Sheet, December 1, 2013 Training Requirements for the Revised Hazard Communication Standard (available at: <https://www.osha.gov/Publications/OSHA3642.pdf>).

3. *OSHA Properly Chose to Regulate by Hazard Category, and Fair Notice Does Not Require the Listing of Each and Every Possible Chemical that May Pose a Combustible Dust Hazard.*

As discussed above, OSHA gave clear notice that the 2012 HazCom standard would cover combustible dust, and OSHA's longstanding position is that the HazCom standard covers combustible grain dust. *Supra* pp. 31-33. The Grain Associations nevertheless also contend that OSHA failed to give them adequate notice because the proposed rule did not specifically list grain dust as a type of combustible dust that would be covered by the 2012 HazCom standard. *See* Br. 39, 45-46. But it is simply not the case that OSHA must enumerate in its proposal (or final rule) every chemical that may possibly create a hazard covered by the HazCom standard. Instead, this Court has squarely upheld OSHA's decision to regulate under the HazCom standard on a hazard-by-hazard, rather than chemical-by-chemical basis. *Nat'l Ass'n of Mfrs. v. OSHA*, 485 F.3d 1201, 1204 (D.C. Cir. 2007) ("NAM's argument for a more specific level of generality would make sense only if the statutory definition of a 'standard' required the regulation of particular chemicals. But . . . we afford agencies broad deference when choosing the level of generality at which to articulate rules.") (citation and internal quotation marks omitted); *see also* 29 C.F.R. § 1910.1200(d)

(requiring manufacturers and importers to use available information about their products to determine hazard classification).

Moreover, accepting the Grain Associations' contention would lead to absurd results. For example, the proposed rule did not list gasoline in its discussion of flammable liquids. Following the Grain Associations' logic, gasoline producers could therefore argue that they are not required to label their products as flammable because they did not have notice that the 2012 HazCom standard's flammable liquids classification covered gasoline. This sort of nonsensical result, however, is one that the Third Circuit has already rejected. *Assoc. Builders*, 862 F.2d at 68. In *Associated Builders*, the court expressly held that OSHA need not establish significant risk for each chemical covered by the HazCom standard because:

A requirement that the Secretary assess risk to workers and need for disclosure with respect to each substance in each industry would effectively cripple OSHA's performance of the duty imposed on it by 29 U.S.C. § 655(b)(5); a duty to protect all employees, to the maximum extent feasible.

Id.; *cf. Pub. Citizen Health Research Group v. Dep't of Labor*, 557 F.3d 165, 178-79 (3d Cir. 2009) (rejecting contention that OSH Act required OSHA to research all workplace operations involving hexavalent chromium exposure to prove feasibility as that would "severely hinder OSHA's ability to regulate exposure to common toxins").

4. *The Grain Associations' Remaining Notice Arguments With Respect to Grain Dust Lack Merit.*

The Grain Associations' remaining arguments in support of their notice claim are not well-founded. They claim that the 2012 HazCom standard's limited exemption for food (as defined by the Federal Food, Drug and Cosmetic Act) somehow caused them to believe the standard did not cover their products. Br. 9. This contention is perplexing for several reasons. First, the food exemption applies only where a product is labeled in accordance with FDA regulations, and it only exempts the product from the requirement of affixing a second label. *See* 29 C.F.R. § 1910.1200(b)(5)(iii). Other 2012 HazCom standard requirements, including the provision of safety data sheets, still apply. Second, the Grain Associations nowhere establish that their products are "food" within FDA law, or that they are labeled in accordance with FDA requirements so that the 2012 HazCom standard's exemption would apply. Third, the Grain Associations otherwise concede that the 2012 HazCom standard covers the respiratory hazards posed by grain dust, Br. 22, 39-40, 45, undermining their contention that the food exemption led them to believe the standard did not cover their products. The 2012 HazCom standard's food exemption therefore does not support the Grain Associations' argument that they lacked notice that the standard covered combustible grain dust.

Similarly unavailing is the Grain Associations' claim that they had no reason to suspect that the final rule would require them to provide safety data sheets and labels addressing combustible grain dust hazards to downstream users. Br. 41, 46. The proposed rule plainly would have required manufacturers of chemicals with unclassified hazards (which in the proposed rule included combustible dust) to prepare labels and safety data sheets. Proposed § 1910.1200(f)(2) contained labeling requirements for unclassified hazards, [J.A. 727], and proposed mandatory Appendix D required inclusion of unclassified hazards, including "combustible dust or dust explosion hazard" in section 2 of the safety data sheet. [J.A. 856]. These requirements were discussed as well in the preamble to the proposed rule. [J.A. 706].

Moreover, that manufacturers and importers must consider downstream use in preparing their labels and safety data sheets is not a new concept. *See* 29 C.F.R. § 1910.1200(b)(2); *Holly Springs Brick & Tile*, 16 BNA OSHC 1856 (No. 90-3312, 1994) (bricks covered by HazCom standard and manufacturer properly cited because cutting of bricks is a normal condition of use that can expose employees to silica dust); [J.A. 1465] (National Emphasis Program, IX.E.9.m, stating HazCom standard covers chemicals which in the normal conditions of use could become

combustible dusts); [J.A. 1427] (CPL 02-02-038, App. A, Scope and Application, paragraph (b)(2), stating “A manufacturer’s or importer’s hazard determination procedures must anticipate the full range of downstream uses of their products and account for any hazardous by-products which may be formed.”); [J.A. 1413] (1986 Letter stating “The manufacturer must evaluate whether use of their product will result in exposure under normal conditions or in a foreseeable emergency.”). And, even if it were a novel concept, OSHA’s discussion in the preamble to the proposed rule on providing hazard information to downstream users provided the Grain Associations with ample notice of downstream requirements for combustible dust. *See Edison Elec. Inst.*, 849 F.2d at 621 (noting that discussion of OSHA’s interpretation in the proposal’s preamble provided adequate notice); *see also supra* pp. 31-33 (noting OSHA’s longstanding position that combustible dust includes grain dust).

II. OSHA Reasonably Determined that Because the Regulated Community, Including the Grain Associations, Knows What Combustible Dust Is, It Was Not Necessary to Include a Regulatory Definition in the 2012 HazCom Standard.

When it promulgated the 2012 HazCom standard, OSHA reasonably determined that it was not necessary to include a regulatory definition for combustible dust. This is because there is broad general agreement in the regulated community – including the Grain Associations – about what

combustible dust is: fine dust that can cause deflagrations and explosions when suspended in air. To the extent that there are disagreements about definitions for combustible dust, they are on technical details about dust particle size (*e.g.*, 420 vs. 500 microns), and OSHA properly determined that it was not necessary to resolve these differences in the 2012 HazCom standard in light of ongoing efforts to develop a definition by the UN Sub-Committee, and by OSHA in a separate rulemaking on combustible dust. And, until OSHA adopts a definition, OSHA has provided guidance allowing the regulated community to use any recognized size criteria in determining whether their chemicals present combustible dust hazards. OSHA’s regulatory choices are reasonable and supported by substantial evidence, and the Court should therefore dismiss the petition for review.²⁹

A. There is Broad General Agreement on the Meaning of the Term Combustible Dust.

OSHA thoroughly articulated its reasons for explicitly covering combustible dust and ensuring continued coverage of the hazard by the 2012

²⁹ The Grain Associations ask the Court to “vacate the combustible dust-related provisions of the Final Rule,” Br. 59; however, they only have standing to challenge, and only present argument in their brief on, combustible *grain* dust. As the record shows, there are many other materials, including plastics and metals, that present a combustible dust hazard when reduced to dust form. *Supra* p. 9. The 2012 HazCom standard’s application to those types of combustible dust is not before the Court.

HazCom standard. It specifically found that combustible dust incidents were “clearly a concern in the workplace,” and that OSHA had long covered the hazard under the HazCom standard.³⁰ [J.A. 185-86]. OSHA properly determined, however, that it was not necessary to include a definition in the 2012 HazCom standard for combustible dust. This is because the term is commonly understood by the regulated community.

The record demonstrates that the regulated community, including the Grain Associations, knows what combustible dust is. Many commenters discussed the need for the 2012 HazCom standard to cover combustible dust hazards, and approvingly noted OSHA’s proposed inclusion of combustible dust as an unclassified hazard (*i.e.*, something that presents an “adverse physical effect,” [J.A. 756]). [J.A. 1138 (National Paint and Coatings

³⁰ In their Statement of Issues, the Grain Associations appear to attack the inclusion of “combustible dust in the Final Rule as a hazardous chemical.” Br. 1. Nowhere else in their brief, however, do the Grain Associations specifically argue that OSHA failed to comply with the OSH Act in determining that the 2012 HazCom standard should expressly cover combustible dust. Any such argument is therefore waived. *See LeShawn A. by Moore v. Barry*, 144 F.3d 847, 852 n.6 (D.C. Cir. 1998) (argument must be adequately developed to be considered by the court). In any event, the record is replete with evidence supporting OSHA’s decision to expressly cover combustible dust in the 2012 HazCom standard. *See supra* pp. 8-14, 17-21. And, as previously mentioned, OSHA’s categorization of combustible dust as a hazardous chemical (final rule), rather than an unclassified hazard (proposed rule), was a change in name only; the communication obligations (on labels and safety data sheets) remained identical. *Supra* p. 29 n.25.

Association); 1152 (Ameren); 1161 (Wacker Chemical); 1171 (Troy Corp); 1247 (American Industrial Hygienists Association); 1263 (ORC Worldwide); 1330 (3M); 1343 (NIOSH); 1412 (AFL-CIO)]. None of these commenters expressed confusion over the term.

Likewise, the Third Circuit did not need a definition to recognize the “propensity of grain elevators to blow up” because of grain dust. *Assoc. Builders*, 862 F.2d at 68. Further, and as explained above, *supra* pp. 31-33, OSHA has long covered combustible dust under the HazCom standard, even though the pre-2012 HazCom standard neither explicitly mentioned combustible dust nor contained a definition of the term.

The Grain Associations also concede that they know what combustible dust is – at least for purposes of complying with the grain handling standard. Br. 18; *id.* at 19 (“No additional users of grain will be informed of anything noteworthy [by the 2012 HazCom standard] *because they already have knowledge of the implications of dust.*”) (emphasis added). And, they admit to knowledge of OSHA’s advanced notice of proposed rulemaking on combustible dust, which expressly informed the Grain Associations that “combustible dust hazards result from a wide variety of materials . . . [including] flour, feed, grain.” Br. 14-15. According to the Grain Associations, they are “mindful of the risk inherent in products that

produce dust that, under certain circumstances, can result in fire and explosions,” and “are already aware of the potential dangers of certain grain dust.” Br. 17, 18. All of this evidence demonstrates that the regulated community, including the Grain Associations, knows what combustible dust is and has had no difficulty in the past complying with OSHA requirements for combustible dust even without a specific regulatory definition for combustible dust.

Furthermore, in making its policy determination, OSHA fully reviewed comments on the issue and explained its actions. OSHA noted that some commenters had asked it to adopt specific criteria for classifying combustible dust. [J.A. 186; *see also* J.A. 1239 (Teamsters); 1305-1306 (American Chemistry Council); 1353 (International Chemical Workers Union Council)]. OSHA explained that while it had raised the issue with the UN Sub-Committee, that organization’s consideration of the issue could take years longer.³¹ [J.A. 186]. OSHA also noted that although it was “in the preliminary stages of developing a proposed rule to address combustible dust,” a final rule was not expected “for some time.” [J.A. 186]. Indeed, two years later, OSHA still has not even proposed a standard.

³¹ The UN Sub-Committee continues to work on the issue of combustible dust, but has not yet reached a decision about whether to adopt a definition of the term.

Given the ongoing activity by the UN Sub-Committee and in OSHA's separate combustible dust rulemaking, OSHA decided not to include a definition for combustible dust in the 2012 HazCom standard. [J.A. 186]. Instead, until criteria for the term have been adopted in one of the other proceedings and incorporated into the HazCom standard, OSHA determined that classifiers could rely on the definition of combustible dust provided in OSHA's Combustible Dust National Emphasis Program. [J.A. 186]. OSHA also noted that existing voluntary standards "provide additional guidance in the area." [J.A. 186].

The Grain Associations assert that "these definitions [from voluntary standards] have not gone through OSHA's rulemaking process" and therefore fail the rigor of "OSHA's substantial evidence and best evidence available determinations." Br. 21, 55. But contrary to the Grain Associations' implication, OSHA did not adopt these definitions; they appear only in the preamble as guidance, and not in the regulatory text. And, as OSHA has informed the regulated community, the definitions are not binding, and classifiers may use "other reliable methods to establish whether their product does or does not present a combustible dust hazard." [J.A. 2594-95] (December memorandum). Thus, OSH Act requirements for occupational safety and health standards did not apply. *See Nat'l Env't'l*

Dev. Ass'n Clean Air Project v. EPA, 686 F.3d 803, 808 (D.C. Cir. 2012) (preamble statements discussing potential air modeling approach to be used in future EPA determinations did not need notice and comment where the statements did not place “definite requirements” on states or regulated industries); *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997) (statements in preamble that clarified the way the agency would exercise its enforcement discretion, but did not impose rights or obligations or bind the agency to a particular result, not subject to rulemaking requirements). For the same reasons, the OSH Act did not require OSHA to perform the economic and technological feasibility findings suggested by the Grain Associations. Br. 55 n.12.

The Grain Associations also appear to argue that OSHA is somehow precluded from regulating combustible dust in the 2012 HazCom standard until it concludes its separate combustible dust rulemaking. *See* Br. 47-52. As they point out, OSHA asked questions related to defining combustible dust in its advanced notice of proposed rulemaking on combustible dust, and OSHA may ultimately include a definition in proposed and final rules. Br. 48-52. But that does not mean that OSHA cannot require manufacturers and producers to communicate the combustible dust hazards of their products in the interim. OSHA has provided ample guidance to assist manufacturers

and producers in classifying combustible dust hazards until it conducts additional rulemaking, and proceeding in this fashion is well within the agency's discretion. *See* 29 U.S.C. § 655(g) (stating that the Secretary must give priority to adopting standards according to the urgency of the need); *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998) (noting the Secretary's "quintessential discretion . . . to allocate OSHA's resources and set its priorities"); *cf. Nat'l Ass'n of Mfrs.*, 485 F.3d at 1204 (noting that agencies have broad deference when choosing the level of generality at which to articulate rules).

In sum, OSHA amply explained the reasons behind its policy decisions and fully addressed the contrary comments it received. It reasonably determined that it was not necessary to include a regulatory definition of combustible dust in the 2012 HazCom standard given that the regulated community is well-aware of the hazards of combustible dust and given existing guidance on the term and the ongoing efforts in other proceedings specifically directed to developing a definition of combustible dust. OSHA's determination is supported by substantial evidence, and the Court should therefore decline to disturb it. *Nat'l Maritime Safety Ass'n*, 649 F.3d at 751-52.

B. The Minor Technical Variations Among Industry Definitions for Combustible Dust Do Not Undermine OSHA’s Use of the Term in the 2012 HazCom Standard.

The Grain Associations heavily rely on statements in OSHA’s advanced notice of proposed rulemaking for combustible dust in claiming that existing consensus standards have definitions of combustible dust that “vary significantly” because some use a particle size criterion, and others do not. Br. 51. Most of these so-called dissimilarities disappear upon closer examination; none of them undermines OSHA’s use of the term in the 2012 HazCom standard, or impacts the regulated community’s ability to comply with its hazard communication obligations.

For example, the two consensus standards discussed by the Grain Associations, NFPA 61 (which covers agricultural dusts), and NFPA 654 (which applies to combustible dust generally) are not as dissimilar as the Grain Associations claim. *See* Br. 50-51. NFPA 61’s definition of agricultural dust contains a size criterion of 420 micrometers, but the NFPA 61 further notes that dusts with particles larger than that size might also present explosion hazards. [J.A. 2644] (NFPA 61 §§ 3.3.1, A.3.3.1 (2013)). And, while NFPA 654’s definition of combustible dust contains no size criterion, the document contains additional guidance noting that 500 micrometers is “an appropriate size criterion,” and that it is also possible,

though unlikely, that dusts of larger particles may present a deflagration hazard. [J.A. 2843] (NFPA 654 §§ 3.3.5, A3.3.5 (2013)).

Both consensus standards recommend the testing of dust to determine whether it presents an explosion hazard, and both recommend the same test methods—ASTM E 1515³² and ASTM E 1226.³³ [J.A. 2644] (NFPA 61 § A.3.3.1); [J.A. 2843] (NFPA 654 § A.3.3.5). Thus, both consensus standards use a size criterion to create a presumption of explosibility in the absence of testing, and the only real difference is that one uses a 420 micrometer measure while the other uses 500 micrometers. OSHA, however, has stated that a classifier may use either measure. [J.A. 2594-95] (December memorandum).

In sum, the regulated community is well versed in the hazards of combustible dust. Moreover, the 2012 HazCom standard preamble tells the regulated community how to apply combustible dust requirements. And,

³² ASTM E 1515 is the Standard Test Method for Minimum Explosible Concentration of Combustible Dusts, published by ASTM International, Inc. “ASTM International, known until 2001 as the American Society for Testing and Materials (ASTM), is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.” http://en.wikipedia.org/wiki/ASTM_International.

³³ ASTM E 1226 is the Standard Test Method for Explosibility of Dust Clouds, published by ASTM International.

OSHA has issued supplemental guidance (the December memorandum) that assists classifiers in determining whether their chemical poses a combustible dust hazard covered by the standard. *See infra* pp. 56-60. Therefore, the minor, technical differences among industry definitions neither affect the regulated community's broad understanding of the hazards of combustible dust nor interfere with the ability of manufacturers and importers to comply with their hazard communication obligations under the 2012 HazCom standard.

III. The Term Combustible Dust Is Not Unconstitutionally Vague.

The Grain Associations also assert that the term combustible dust is unconstitutionally vague and that without a regulatory definition they are unable to comply with the 2012 HazCom standard's requirements. Br. 55-59. The Court should reject this argument. As an initial matter, the Grain Associations' claim is not ripe because they have not shown that the term combustible dust is impermissibly vague in all of its applications, and they have not shown in any concrete way how they would suffer hardship in waiting to challenge the application of the standard in a future enforcement proceeding. In any event, the record shows that the regulated community, including the Grain Associations, knows what combustible dust is, and OSHA has also issued additional guidance to assist in applying the term.

Consequently, OSHA's use of the term combustible dust in the 2012 HazCom standard raises no due process concerns.

A. The Grain Associations' Vagueness Claim Is Not Ripe.

The Grain Associations' claim that the term combustible dust is unconstitutionally vague is not ripe for judicial resolution. The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 538 U.S. 803, 807 (2003). The ripeness inquiry arises from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims. *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 396 (D.C. Cir. 2013). A "ripeness issue normally arises in cases in which a regulated party faces the threat of future agency enforcement action." *Id.*

In evaluating ripeness, the courts undertake a two-fold analysis, evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Under the first prong, the Court considers "whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's

decision is sufficiently final.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 440 F.3d 459, 464 (D.C. Cir. 2006). Under the second prong, the Court considers “whether postponement [of judicial review] will impose an undue burden on the claimant or would benefit the court.” *Id.* at 464.

On the first prong, the issues raised by the Grain Associations would benefit from a more concrete setting. This is because their facial vagueness claim requires the Grain Associations to demonstrate that the term combustible dust is unconstitutionally vague in all of its applications. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Natural Res. Def. Council, Inc. v. EPA*, 194 F.3d 130, 138 (D.C. Cir. 1999). This, the Grain Associations cannot do.

The essence of the Grain Associations’ vagueness claim is that there are varying definitions of combustible dust, and they are uncertain which applies to them. Br. 56-57. But the Grain Associations concede that grain dust presents an explosion hazard, and that their members readily comply with the requirements of the grain handling standard. Br. 17-18. The grain handling standard prevents combustible dust explosions by requiring employers to use workplace controls to minimize “fugitive grain dust,” which is defined as “*combustible dust* particulates” 29 C.F.R. §

1910.272(c) (emphasis added); *id.* at § 1910.272(i); [*see also* J.A. 869]. The Grain Associations make no claim that they are unable to determine what combustible dust is for purposes of complying with the grain handling standard. Thus, to the extent the 2012 HazCom standard applies to products covered by the grain handling standard, the Grain Associations have failed to demonstrate that the term combustible dust is unconstitutionally vague, and their claim before this Court is not ripe.

The Grain Associations also complain that the industry consensus standards referenced by OSHA contain varying definitions, but as explained below, *infra* pp. 57-58, OSHA has issued guidance (the December memorandum) permitting manufacturers and importers to classify their chemicals using any applicable consensus standard. And, the Grain Associations have failed to show that they are unable to determine whether their products create “agricultural dust,” which is the specific type of combustible dust addressed by the National Fire Protection Agency in its guidance applicable to the agricultural industry. [*See* J.A. 2644] (NFPA 61).

The Grain Associations have therefore failed to demonstrate that the term combustible dust is vague in every circumstance, and their “facial challenge collapses and it must wait until there is an actual enforcement proceeding to make a specific challenge that will be ripe.” *Natural Res. Def.*

Council, Inc., 194 F.3d at 138 (rejecting vagueness challenge to requirement that permit applications contain “other material information” to prevent them from being misleading because petitioners had not shown the requirement was vague in every circumstance); *see also Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163 (1967) (“[J]udicial appraisal [of petitioners’ argument] is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge.”).

Nor have the Grain Associations met the second prong for establishing the ripeness of their claim by demonstrating hardship. *Abbott Labs*, 387 U.S. at 149. Though they point to differing potential definitions of combustible dust contained in industry standards, they have not shown that their products would be treated differently under any of them. The Grain Associations offer only generalized statements that “they are unable to ascertain whether they are subject to the rule,” *e.g.*, Bode Dec. ¶ 4, and conclusory assertions that compliance with the 2012 HazCom standard will impose “enormous costs and administrative burdens,” *e.g.*, Bode Dec. ¶ 8. However, mere uncertainty as to the validity of a legal rule is insufficient to establish hardship for ripeness purposes, *Nat’l Park Hospitality Ass’n*, 538 U.S. at 811, and conclusory assertions of hardship are similarly unavailing.

See United States v. Lazarenko, 476 F.3d 642, 652 (9th Cir. 2006) (without “supporting facts,” conclusory claims of ripeness insufficient). The Court should therefore dismiss the Grain Association’s vagueness claims as unripe. *See Edison Elec. Inst.*, 849 F.2d at 624 (stating that EEI’s claims that OSHA will adopt an unreasonable interpretation of its regulation in the future or apply it in a manner inconsistent with past practice should be resolved in a future enforcement proceeding rather than in pre-enforcement review).

B. OSHA’s Use of the Term Combustible Dust in the 2012 HazCom Standard Satisfies Due Process.

The Grain Associations claim that the 2012 HazCom standard’s use of the term combustible dust without an associated regulatory definition violates due process. Br. 55-59. Constitutional due process requires regulations to be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir.1995); *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir.1986). Economic regulation—as opposed to the regulation of speech—is subject to a less strict vagueness test, *Village of Hoffman Estates*, 455 U.S. at 498, and such regulations need not achieve “mathematical certainty” or “meticulous specificity”; they may instead embody “flexibility

and reasonable breadth.” *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm’n*, 108 F.3d 358, 362 (D.C. Cir. 1997).

“[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Id.* “If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.” *AJP Const., Inc. v. Sec’y of Labor*, 357 F.3d 70, 76 (D.C. Cir. 2004) (quoting *Gen. Elec. Co.*, 53 F.3d at 1329).

OSHA’s use of the term combustible dust in the 2012 HazCom standard easily defeats the Grain Associations’ due process claims. This is because the term’s meaning is well understood by the regulated community, including the Grain Associations. *See supra* pp. 40-47. Furthermore, OSHA has provided detailed guidance both in the preamble to the final rule, and in the December memorandum, clarifying how manufacturers and importers may classify combustible dusts.

Classifiers' first resource for applying the 2012 HazCom standard's requirements for combustible dust is found in the preamble. There, OSHA stated that its Combustible Dust National Emphasis Program "provides an operative definition" of the term. [J.A. 186]. In turn, the National Emphasis Program defines a combustible dust as:

A combustible particulate material that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of size or shape.

[J.A. 1458]. It defines "combustible particulate solid" as any "combustible solid material composed of distinct particles or pieces, regardless of size, shape, or chemical composition." [J.A. 1458]. Additionally, OSHA stated in the preamble that existing consensus standards provided further guidance about combustible dust hazards. [J.A. 186].

In December 2013, the OSHA national office issued a memorandum to all OSHA regional offices providing enforcement guidance to compliance safety and health officers on classifying combustible dust hazards under the 2012 HazCom standard. [J.A. 2594-95]. The guidance memorandum confirmed and elaborated on the 2012 HazCom standard's approach for determining combustible dust hazards by applying existing well-known methodologies. The December memorandum's straightforward approach to classification depends on the information or data that is available. Sensibly,

it first informs manufacturers and importers that where they have actual knowledge that their product has been involved in a deflagration or dust explosion event, it should be classified as combustible dust. [J.A. 2594]. “Similarly, where results of accepted tests on the product are available, the dust should be classified in accordance with those results.” [J.A. 2595]. The memorandum then notes that “in the absence of actual events or test data on the product, the classifier may either rely on the published test data on similar materials or use the available information about particle size to determine the combustible dust hazard of the product. [J.A. 2595].

Because some consensus standards use a 420 micrometer particle diameter in defining combustible dust, and others use a 500 micrometer diameter, OSHA’s guidance says that classifiers may use either. [J.A. 2595]. Moreover, OSHA expressly confirmed that the guidance “is not intended to be exclusive, and classifiers may have other reliable methods to establish whether their product does or does not present a combustible dust hazard in normal conditions of use and foreseeable emergencies.” [J.A. 2595].

In effect, the December memorandum allows a classifier to use the definition and guidance in any applicable consensus standard, or any other reasonable method, in determining whether its product presents a

combustible dust hazard. *See Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1387 (D.C. Cir. 1985) (noting that industry custom and practice may be used to construe general regulatory commands). This evidence completely undermines the Grain Associations' claim that the 2012 HazCom standard is impermissibly vague and that they do not know how to comply with the standard's combustible dust requirements. *See AJP Const.*, 357 F.3d at 76 (noting that courts consider the "public statements of the agency" in evaluating vagueness claims).

The Grain Associations are unable to muster an adequate explanation of why OSHA's statements on combustible dust do not provide adequate guidance for the classification of their products. The main reason they advance is that the December memorandum does not specify what dust particle size OSHA will use to enforce the standard. Br. 56, 58-59. But this is unconvincing because OSHA squarely addressed particle size in the enforcement guidance: OSHA will accept classifications using either the 420 or 500 micrometer particle criterion, since existing consensus standards do not agree on the question. [J.A. 2595]. Rather than vest unbridled discretion in OSHA inspectors, as the Grain Associations claim, Br. 57-59, the guidance in fact provides more flexibility for regulated parties. Consequently, the differences between consensus standards noted by the

Grain Associations do not render the 2012 HazCom standard's use of the term combustible dust impermissibly vague.

The Grain Associations also claim that the first paragraph of the December memorandum is “practically indecipherable.” Br. 43. That paragraph states that the memorandum provides guidance for OSHA inspectors to use “in determining whether manufacturers or importers have properly classified their products for combustible dust hazards under the revised Hazard Communication Standard.” [J.A. 2594]. Additionally, “[u]ntil OSHA addresses these issues in rulemaking” OSHA inspectors should use the memorandum in determining whether manufacturers “are in compliance with the obligations of 1910.1200(d) for combustible dust.” [J.A. 2594].

The Grain Associations contend that this language could be read “as instructing enforcement now for provisions of the Final Rule that do not go into effect until 2015 or 2016,” or “instructing some further undefined rulemaking is necessary to interpret the combustible dust provisions of the Final Rule, or both.” Br. 43-44. The Grain Associations' claims of confusion are implausible. First, the December memorandum clearly states that its purpose is to provide guidance on classifying combustible dust hazards until some later date when OSHA adopts a regulatory definition of

combustible dust. It therefore makes no sense to read the guidance as deferring enforcement until additional rulemaking takes place. Second, while the 2012 HazCom standard does not go into effect until June 1, 2015, the standard gives manufacturers and importers the option of complying now with the revised provisions rather than with the previous version of the standard. 29 C.F.R. § 1910.1200(j)(3). In such cases, the December memorandum states that its guidance will apply.

The cases on which the Grain Associations rely in support of their vagueness claims do not help them. Br. 57. Both cases arise in enforcement proceedings, and in both cases the regulatory language could be interpreted as consistent with the regulated party's actions. In *General Electric*, at issue was whether EPA regulations allowed distillation of PCB-laden liquid before its disposal. 53 F.3d at 1326. Accepting EPA's position that the regulations did not allow distillation, this Court found that EPA had nonetheless not provided fair notice of this interpretation. *Id.* at 1328, 1330. The parties were unable to agree what regulatory provisions governed the situation, different EPA offices had offered differing interpretations, EPA's own enforcement position had "subtly changed" in the course of the proceedings, and the regulations could plausibly be interpreted to allow distillation. *Id.* at 1331-33.

Similarly, in *Gates & Fox Co.*, an employer challenged OSHA’s position that under the applicable standard, employees working in a tunnel had to be supplied with “self-rescuers” (portable oxygen supplies) if they were not working near an excavation face. 790 F.2d at 155. Expressing no opinion on the interpretative issue, this Court found that that the standard’s operative language could be reasonably read either to support OSHA’s or the employer’s position, and that OSHA had not given fair notice of its interpretation. *Id.* at 156.

Thus, neither *General Electric* nor *Gates & Fox* help the Grain Associations. This is not an enforcement case, and there have been no conflicting interpretations by OSHA, as in the *General Electric* case. The Grain Associations have not advanced any reasonable interpretation of OSHA’s combustible dust guidance that might cause them confusion about their obligations under the 2012 HazCom standard. Their vagueness claim is therefore without merit, and should be dismissed.³⁴

³⁴ The Grain Associations also complain that they do not know whether they were required to provide training by December 1, 2013 [as required by §1910.1200(j)(1)], and that they do not know “the measure to use to determine whether any of their products could create a combustible dust hazard, the conditions that could create such a hazard, and what their responsibilities are with respect to such products.” Br. 56-57. The Secretary views these assertions as restatements of the Grain Associations’ principal argument that the term combustible dust is unconstitutionally vague because it is not defined in the 2012 HazCom standard. To the extent the Grain

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

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Associations are also claiming that other of the standard's requirements are also unconstitutionally vague, they have failed to brief this issue and have therefore waived it. *LeShawn A. by Moore*, 144 F.3d at 852 n.6.

CERTIFICATE OF COMPLIANCE

This brief was composed in Microsoft Word using Times New Roman 14-point typeface, and complies with the type-volume limitation prescribed in Fed. R. App. P. 31(a)(7)(B) it because it contains 13,399 words, excluding the sections referenced in Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2014, a copy of the foregoing Final Brief of the Secretary of Labor was filed electronically through the Court's CM/ECF filing system on the attorneys in Case No. 12-1228.

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