



National Grain and Feed Association

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June 1, 2012

BY ELECTRONIC MAIL

Michael L. White

Acting Director, Office of the Federal Register

National Archives and Records Administration

800 North Capitol Street, NW, Suite 700

Washington, DC 20001

Electronic Address: <http://www.regulations.gov> (Docket ID NARA 12-0002)

RE: Comments on Petition for Rulemaking on “Incorporation by Reference” and “Reasonably Available”

Dear Acting Director White:

The National Grain and Feed Association (NGFA) appreciates the opportunity to submit this statement in response to the notice published in the March 22, 2012 issue of ***Federal Register*** by the Office of the Federal Register (OFR). The notice requests comments on how the OFR could amend its regulations governing the approval of agency requests to incorporate material by reference into the Code of Federal Regulations.

The NGFA is comprised of 1,050 member companies that operate more than 7,000 facilities and handle more than 70 percent of the U.S. grain and oilseed crop. NGFA membership encompasses all sectors of the industry, including country, terminal and export grain elevators; commercial feed operations; biofuel producers; cash grain and feed merchants; end-users of grain and grain products, including processors, flour millers, and livestock and poultry integrators; commodity futures brokers and commission merchants; and allied industries.

In general, the NGFA opposes allowing any federal agency to adopt a standard outside of its statutory authority through normal notice-and-comment rulemaking; in particular, due to the risk of incorporation by reference. The primary risk is that many voluntary standards do not calculate the potential economic impact of applying the requirements. NGFA is particularly concerned about the potential adoption of voluntary standard(s) by a federal agency to either replace an existing standard that has proven to be effective or establish a new standard.

The NGFA, as the principal representative of the grain handling, feed manufacturing and processing industry, has been in the forefront of research and developments designed to enhance safety. The industry is dedicated to pursuing and promoting technological innovations, new

practices and safety training and education programs that contribute to safe and efficient grain handling operations. These programs are vital, first and foremost, to safeguard human resources. The industry has demonstrated its commitment to safety, prior to and after the promulgation of the OSHA grain handling standard.

NGFA worked with the Occupational Safety and Health Administration (OSHA) to develop the grain handling standard, 29 CFR 1910.272, which was promulgated in 1988, to address hazards associated with fires and explosions. Since the standard was implemented, NGFA has worked with OSHA officials to clarify compliance requirements, convey this information to industry, and provide safety education and training to industry members. In addition, OSHA has published compliance information, including a booklet explaining the standard's requirements and enforcement guidance for compliance officers, clarifying regulatory obligations under the standard.

NGFA's experience in dealing with the development of consensus standards has come through its lengthy and extensive involvement in activities of the National Fire Protection Association (NFPA)¹, including specifically important memberships on the NFPA 61 - *Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities*. In addition to OSHA standards, several NFPA consensus standards have been developed by industry stakeholders, including those in the grain handling industry to augment existing OSHA standards. These standards address general and specific hazards associated with 1910.272.

On October 21, 2009 OSHA published an Advanced Notice of Proposed Rulemaking that requested comments on issues related to combustible dust hazards in the workplace that the agency could potentially use in developing a proposed standard for combustible dust. In particular, one of the questions posed by OSHA was how the agency should make use of NFPA standards concerning combustible dust in the rulemaking process.

NFPA standards offer a far more complex, stringent protocol that may be adopted in whole or in part by industry participants, voluntarily. These guidelines play an important role as voluntary practices that can enhance safety efforts. **But they are entirely inappropriate as a replacement for effective rulemaking.**

For example, NFPA 61 is more comprehensive than 1910.272 and does not consider the economic impact of its recommendations, if utilized. A review and comparison of 1910.272 and NFPA 61 reveals that there are more than 146 additional provisions addressing design, construction and operation of its affected grain handling facilities. Neither the NFPA 61 technical committee, nor any other NFPA committee, conducts an economic impact study on their proposed standards before they are formally approved. As a result, the NFPA also does not consider the impact of the feasibility or cost of its detailed recommendations on industry and small businesses, in particular.

¹ The National Fire Protection Association (NFPA) is an organization that creates and maintains private, copyrighted, standards and codes for usage and adoption by local governments. This includes publications from model building codes to the many on equipment utilized by firefighters while engaging in hazmat response, rescue response, and some firefighting.

Further, NFPA consensus standards are not available for traditional broad-based public comment that is a feature of the Administrative Procedure Act. Only NFPA participants, who are required to pay to play, have the ability to comment in the development of consensus standards.

In addition, even to have access to the voluntary standards developed by NFPA, parties need to be a member of NFPA or purchase a copy of the standard. Even NFPA members can only view NFPA consensus standards online; and are not able to “cut and paste” the language.

In response to OFR’s question on how to define the term “reasonably available,” NGFA believes that “reasonably available” means that the consensus material should be made available free-of-charge to anyone who has access to the internet. In addition, hard copies should be made available to those without internet access. The costs for access to such materials should be covered by the voluntary standard organization, the federal agency or both. Further, free access to the voluntary standards should not be limited solely to being incorporated by reference. On that note, voluntary standards should be always be available free of charge since they could already apply to existing local and state laws before being adopted by a federal agency.

In conclusion, the NGFA believes it is inappropriate generally to incorporate consensus standards that have not gone through the necessary steps as defined in the Administrative Procedure Act e.g., economic analysis and opportunity for broad public comment. Doing otherwise risks giving federal agencies a backdoor opportunity to circumvent the public rulemaking process without fully evaluating the feasibility and costs of such consensus standards.

The NGFA appreciates OFR’s consideration of these viewpoints on incorporation of material by reference in *Federal Register*, and would be pleased to respond to any questions the agency may have.

Sincerely,

A handwritten signature in cursive script that reads "Jas McCluer".

NGFA,
Director of Safety and Regulatory Affairs