



July 22, 2024

The Honorable Doug Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
Washington, DC 20210

Submitted electronically: www.regulations.gov

Re: Proposed Rule, Emergency Response Standard, Docket No. OSHA–2007–0073; RIN 1218–AC91; 89 Fed. Reg. 7774 (February 5, 2024)

Dear Assistant Secretary Parker:

The U.S. Chamber of Commerce (Chamber) submits these comments on OSHA’s proposed Emergency Response Standard (proposal, standard) to highlight concerns with the proposal related to OSHA’s heavy reliance on standards issued by the National Fire Protection Association (NFPA) and other outside organizations to provide the content of this proposed standard. Doing so goes beyond the authority provided by the Occupational Safety and Health Act (OSH Act).

Many of the entities affected by this proposal are not members of the Chamber, e.g., small municipal fire departments and volunteer fire departments. Extensive comments were submitted by these entities to the Small Business Regulatory Flexibility Act review panel OSHA convened. While OSHA responded to many of these comments, very few meaningful changes were made to reduce the impact of this proposal. See, 89 Fed. Reg. 7988-7993. To the extent these providers of emergency response services are negatively impacted by this new standard and unable to maintain their services because of the costs and burdens imposed by it, Chamber members will be impacted because they rely on these services. Many of the affected entities rely on local tax receipts or fundraisers to maintain their operations and therefore operate on extremely limited budgets. As many described in their comments to the SBREFA panel, the costs imposed by this new standard could easily jeopardize their ability to continue providing the very emergency response services OSHA is seeking to upgrade. The Chamber urges OSHA to reconsider the burdens of this proposal in light of the concerns raised by these providers of emergency response services.

OSHA’s Wholesale Incorporation by Reference of NFPA Standards Is Inconsistent with the Agency’s Statutory Authority.

OSHA’s proposed Emergency Response Standard is a comprehensive revision to the current Fire Brigades Standard. As OSHA claims, it would “modernize the standard to align with the current industry consensus standards issued by the National Fire Protection Association (NFPA) on the safe conduct of emergency response activities.” 89 Fed. Reg. 7775.

In fact, OSHA's proposal would incorporate by reference (IBR) 22 NFPA standards.¹ OSHA concedes that the new standard would require compliance with various NFPA and other outside standards. "In certain provisions of the proposed rule, OSHA would require compliance with the relevant portions of the NFPA and ANSI/ISEA standards incorporated by reference." 89 Fed. Reg. 7792. And even where OSHA claims that "Workplace Emergency Response Employers (WEREs) and Emergency Service Organizations (ESOs) [may] provide protections at least equivalent to various aspects of some of the NFPA standards" the point is that these parties must meet the requirements of the NFPA standards. 89 Fed. Reg. 7793.

OSHA's wholesale incorporation by reference of these NFPA standards goes well beyond the limited authority the Occupational Safety and Health Act (OSH Act) gave to the agency to adopt outside "consensus" standards through IBR. The OSH Act gave OSHA a limited window during the initial period after it was enacted for OSHA to adopt outside standards to build out the agency's regulations and create the regulatory regime employers would be required to follow:

Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. See, 29 U.S.C. 655(a).

While OSHA discusses the OSH Act's requirement (89 Fed. Reg. 7801) that "Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the

¹ NFPA 1001, Standard for Structural Fire Fighter Professional Qualifications; NFPA 1002, Standard for Fire Apparatus Driver/Operator Professional Qualifications; NFPA 1005, Standard for Professional Qualifications for Marine Fire Fighting for Land-Based Fire Fighters; NFPA 1006, Standard for Technical Rescue Personnel Professional Qualifications; NFPA 1021, Standard for Fire Officer Professional Qualifications; NFPA 1081, Standard for Facility Fire Brigade Member Professional Qualifications; NFPA 1140, Standard for Wildland Fire Protection; NFPA 1407, Standard for Training Fire Service Rapid Intervention Crews; NFPA 1582, Standard on Comprehensive Occupational Medical Program for Fire Departments; NFPA 1910, Standard for the Inspection, Maintenance, Refurbishment, Testing, and Retirement of In-Service Emergency Vehicles and Marine Firefighting Vessels edition; NFPA 1951, Standard on Protective Ensembles for Technical Rescue Incidents; NFPA 1952, Standard on Surface Water Operations Protective Clothing and Equipment; NFPA 1953, Standard on Protective Ensembles for Contaminated Water Diving; NFPA 1971, Standard on Protective Ensembles for Structural Fire Fighting and Proximity Fire Fighting; NFPA 1977, Standard on Protective Clothing and Equipment for Wildland Fire Fighting and Urban Interface Fire Fighting; NFPA 1981, Standard on Open-Circuit Self-Contained Breathing Apparatus (SCBA) for Emergency Services; NFPA 1982, Standard on Personal Alert Safety Systems (PASS); NFPA 1984, Standards on Respirators for Wildland Fire-Fighting Operations and Wildland Urban Interface Operations; NFPA 1986, Standard on Respiratory Protection for Tactical and technical Operations; NFPA 1987, Standard on Combination Unit Respirator Systems for Tactical and Technical Operations; NFPA 1990, Standard on Protective Ensembles for Hazardous Materials and CBRN Operations; NFPA 1999, Standard on Protective Clothing and Ensembles for Emergency Medical Operations. 89 Fed. Reg. 8010.

national consensus standard,” 29 U.S.C. 655 (b)(8), OSHA misconstrues this requirement to mean the agency is obligated to adopt consensus standards. The more appropriate understanding of this provision is that OSHA must justify why the content of their regulations will differ from such national consensus standards, not that this gives OSHA permission to adopt those national consensus standards. Although OSHA has adopted national consensus standards, they are technical specifications, while the consensus standards proposed to be incorporated by reference in this proposal are substantive programmatic requirements.

NFPA Standards Have Not Been Subject to Any of the Requirements of OSHA Standards and therefore IBR is Inappropriate.

While NFPA has a public comment process for its standards, knowledge of a standard open for comment is dependent on an interested party being in the NFPA “loop”, not broad dissemination through the Federal Register or other mainstream outlets. NFPA standards are developed by NFPA selected committees and represent a consensus of only those involved in the drafting not of those who would be subject to them.

NFPA standards have been subject to none of the rulemaking analyses, procedures, or protections associated with OSHA rulemakings. As OSHA acknowledges: “The OSH Act imposes a number of requirements OSHA must satisfy before adopting a safety standard. Among other things, the standard must be highly protective, materially reduce a significant risk to workers, be technologically feasible, and be economically feasible. A standard is technologically feasible if the protective measures it requires already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be expected to be developed. In determining economic feasibility, OSHA must consider the cost of compliance on an industry rather than on individual employers. In the preliminary and final economic analyses, OSHA follows the advice of the U.S. Court of Appeals for the D.C. Circuit to “construct a reasonable estimate of compliance costs and demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry.” 89 Fed Reg. 7981 (citations omitted). In addition, OSHA must assess the impact of its standards on small businesses under the Regulatory Flexibility Act as amended by the Small Business Regulatory Flexibility Act, determine whether a regulation is a major regulation as defined by E.O. 12866, and conduct an analysis of the burdens a regulation would impose to satisfy the Paperwork Reduction Act.

OSHA’s incorporation by reference of these NFPA standards creates new compliance obligations while bypassing all of the statutory and other protections built into the OSHA rulemaking process to ensure that OSHA’s standards and regulations are well supported by data and impose justifiable burdens. If OSHA believes the *content* of the NFPA standards establishes the appropriate procedures and requirements, the agency must provide that content as part of its proposed text so that it is subject to all of the requirements of an OSHA rulemaking.

Chamber Members Believe the Proposal Lacks Clarity in Key Areas.

Many large Chamber members maintain emergency response teams at their workplaces to provide the most immediate response in the critical moments after an emergency happens. They will also be subject to the new standard and believe it needs to be revised to provide them with a better understanding of how they will need to comply.

Clarify scope of rule: Several material terms are not defined or are poorly defined or vague, resulting in varying interpretations of when and to whom the rule would apply.

- The proposal is not clear on what types of events would trigger the requirements of the new standard. Under the draft important terms such as “known and suspected toxic products”, and other terms that seem similar such as “toxic substances”, “toxic chemicals” and “toxic gases” are not well defined. The former example also includes subjectivity, creating even further confusion. The Chamber recommends that important terms that trigger the new standard’s applicability be clearly defined within the text of the standard or cross-referenced to other, existing regulations that use the term such as using “hazardous substances”, which is defined by EPA’s CERCLA statute and regulations, see <https://www.epa.gov/epcra/cercla-hazardous-substances-defined>).
- Also, in an emergency, roles for company emergency responders must be crystal clear so emergency response actions can be executed swiftly and as intended and necessary to respond to the emergency at issue. The proposal creates confusion on who is part of that emergency response team, and thus which employees are covered, by using vague and broad definitions. For example, the definition of “workplace emergency response team” includes “team members”, and “team members” is defined to include employees who have “a collateral duty to their regular daily work assignments, respond to emergency incidents ...”. Which employees fit within that term is not clear; would it include anyone asked by an emergency responder to perform a non-life threatening action during the emergency event; would it include an employee who has an administrative role but has taken the OSHA-required fire extinguisher training? The Chamber recommends that the definition of that term be limited to employees who are required to engage in emergency response as part of their job code.
- In a unionized workplace, employees have very specific job descriptions that proscribe what they can and cannot do. How would the new standard apply to these union members, and would adding emergency response duties require reopening the contract for negotiations?
- Employers need flexibility to voluntarily provide assistance in an emergency without risk of being in non-compliance. In an emergency, seconds count and flexibility is critical. The Chamber recommends that the standard allow for such flexibility without triggering non-compliance.

- In the current environment, companies are able to have voluntary emergency response teams without specific compliance burdens. This facilitates companies being able to design their emergency response programs to fit their specific workplaces. OSHA's proposed standard would impose a more rigid and burdensome structure that could result in companies not being able to maintain their present emergency response capabilities. OSHA should recognize that its desire to upgrade emergency responses to what some have called the "gold standard" may result in fewer locations maintaining onsite emergency response programs.

Conclusion

OSHA's sweeping proposed new standard on emergency response would result in many changes to how such situations are handled. OSHA relies extensively on outside consensus standards, principally from the NFPA, to provide the content of this proposal through incorporating such standards by reference. Such IBR is inconsistent with OSHA's statutory authority and results in many provisions of this proposal bypassing critical regulatory requirements contained in the OSH Act and elsewhere. If OSHA believes the content of these NFPA standards is appropriate, that content must be included in the regulatory text and subjected to the various requirements of an OSHA rulemaking.

Key provisions of the new standard lack clarity and will leave employers who maintain their own emergency response teams uncertain about their requirements and how to comply.

Sincerely,



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