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Testing, Evaluation, and Approval of Electric Motor-Driven Mine Equipment and Accessories. (PARTS 18 & 74)

Comment On: MSHA-2020-0018-0001

Testing, Evaluation, and Approval of Electric Motor-Driven Mine Equipment and Accessories

Document: MSHA-2020-0018-0016

Comment from Mark Ellis, Industrial Minerals Association - North America

Submitter Information

Name: Mark Ellis

Organization: Industrial Minerals Association - North America

General Comment

Please see the attached.

Attachments

IMA-NA Comments on MSHA NPRM on Electric Motor-Driven Equipment



December 20, 2020

Ms. Roslyn B. Fontaine
Deputy Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
201 12th Street South, Suite 4E401
Arlington, Virginia 22202-5452

Re: RIN 1219-AB93; Docket No. MSHA-2020-0018, Testing, Evaluation, and Approval of Electric Motor-Driven Equipment and Accessories, Proposed Rule, Comments of the Industrial Minerals Association - North America

Filed via the Federal eRulemaking Portal: <http://www.regulations.gov>

Dear Ms. Fontaine:

Please find below the comments of the Industrial Minerals Association-North America (IMA-NA) on the Mine Safety and Health Administration's (MSHA) proposed rule on Testing, Evaluation, and Approval of Electric Motor-Driven Mine Equipment and Accessories (NPRM). IMA-NA is the representative voice of companies that extract and process a vital and beneficial group of raw materials known as industrial minerals. Industrial minerals are the ingredients for many of the products used in everyday life such as glass, ceramics, paper, plastics, paints and coatings, cosmetics, pharmaceuticals and laundry detergent. IMA-NA's companies and the people they employ are proud of their industry and the socially responsible methods they use to deliver these beneficial products. Industrial minerals include ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, perlite, salt, soda ash (trona), talc and wollastonite, among others. IMA-NA also represents associate member companies that support the producers of industrial minerals. The safety and health of our employees, and workers in general, are of paramount importance to IMA-NA members. IMA-NA and its member companies welcome the opportunity to submit these comments on the NPRM.

IMA-NA commends MSHA for issuing this NPRM on the testing, evaluation and approval of electric motor-driven equipment and accessories intended for use in gassy mines to prevent a fire or explosion. IMA-NA supports the NPRM. However, given MSHA's need to establish a procedural framework to finalize the rule, IMA-NA offers the following specific comments.

IMA-NA appreciates the challenge presented to MSHA in maintaining regulations that keep pace with technological advances. Voluntary Consensus Standards (VCS) can assist in this regard if the VCS body, itself, is capable of keeping pace with technological advances and is able to do so with appropriate procedural safeguards. In the preamble to the NPRM, MSHA states:

This proposal is consistent with the Office of Management and Budget’s (OMB) Circular A-119 (Jan. 27, 2016 (81 FR 4673)), which establishes policy guidance for Federal agencies. Circular A-119, based on the National Technology Transfer and Advancement Act of 1995 (15 U.S.C 3701 *et seq.*)(Transfer Act), section 12(d), directs Federal agencies to use technical standards developed or adopted by VCS bodies to carry out policies or activities. Additionally, Circular A-119 directs agencies to use VCS in lieu of government-unique standards, except where inconsistent with law or otherwise impractical. The intent of the policy guidance in Circular A-119 is to minimize agency reliance on government-unique standards to decrease the burden of complying with agency regulations and promote efficiency and economic competition through harmonization of standards. (See <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf>).

85 FR 73656 *et seq.* at 73658 (November 19, 2020). IMA-NA supports this statement of intent in the current NPRM and its application in other regulations proposed by MSHA. MSHA also states it would:

... use the appropriate rulemaking process with solicitation of public comment to adopt VCS developed by standard-setting bodies that plan, develop, establish, or coordinate standards through agreed-upon, transparent, and deliberate procedures. MSHA further agrees that continuing to adopt VCS[,] as they are maintained and updated through the agreed-upon, transparent, and deliberate procedures, can promote the availability of technologically advanced equipment for use in U.S. mines, thus improving mine safety and health.

Id. IMA-NA likewise supports this statement of intent in the current NPRM and its application in other regulations proposed by MSHA.

As MSHA also states in the section-by-section analysis in the preamble to the NPRM:

Under Circular A-119, a voluntary consensus standards body is recognized if it develops VCS in accordance with the following attributes: Openness, balance of interest, due process, an appeals process, and consensus. This standards body also must adopt, publish, and make available to the public the VCS it adopts. Lastly, the voluntary consensus standards body must maintain each voluntary consensus standard through a schedule of review. As a Federal agency, MSHA relies upon OMB guidance in determining whether to incorporate by reference a voluntary consensus standard.

Id. at 73660. IMA-NA supports this statement of intent in the current NPRM and in other regulations proposed by MSHA. IMA-NA notes with approval that proposed §18.2. Definitions, defines “*Voluntary consensus standards body*” consistent with these precepts, specifically citing the Transfer Act and OMB Circular A-119. These qualities and procedural protections are necessary to assure that the VCS body is capable of keeping pace with technological advances and is able to do so with appropriate procedural safeguards.

One of the fundamental issues underlying the use of VCS in rulemaking is incorporation by reference into the agency’s regulations. Proposed §18.102 Approved voluntary consensus standards. provides:

(b) Certain material is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CRF part 51. . . .

Id. at 73666. Additionally, proposed §18.103 Review and update of applicable voluntary consensus standards. provides:

(c) Following such review and determination, MSHA will use the appropriate rulemaking process to publish a list of voluntary consensus standards that it accepts in lieu of the requirements in subparts B through E of this part.

Id. at 73667. IMA-NA's concern is that MSHA should only incorporate by reference documents in existence at the time of their incorporation and for updates of applicable VCS do so in a rulemaking process with notice and comment rulemaking procedures equivalent to the procedures utilized to implement the original incorporation by reference. Stakeholders may not have participated in the development of an updated VCS and the MSHA rulemaking procedure may be the only opportunity they have to provide input on a proposed incorporation by reference. They need to have sufficient notice and opportunity to be heard for their comments to be adequately considered by the agency.

IMA-NA recognizes that the Director of the Federal Register is bound by and has established implementing procedures for the incorporation by reference of VCS into regulations across the federal government. *See* 5 U.S.C. 552(a) and 1 CFR Part 51. IMA-NA requests that in the Final Rule MSHA reference and embrace in its "appropriate rulemaking process" Administrative Conference of the United States (ACUS) Recommendation 2011-5 on Incorporation by Reference, Adopted December 8, 2011 [Recommendation-2011-5-Incorporation-by-Reference_0.pdf \(acus.gov\)](#). Among the administrative law principles included in ACUS Recommendation 2011-5 are the following:

- Ensuring incorporated materials are reasonably available;
- Updating incorporations by reference;
- Navigating procedural requirements; and
- Improving drafting techniques.

Id. *See also* [New Information Interchange Bulletin: Incorporation By Reference | Administrative Conference of the United States \(acus.gov\)](#), [08 Incorporation by Reference Revised \(acus.gov\)](#) and [Incorporation by Reference | Administrative Conference of the United States \(acus.gov\)](#). Stakeholders require rulemaking processes equivalent to the rulemaking process employed in the original incorporation of a VCS to assure that updates of the VCS receive equal and appropriate consideration by MSHA. We urge MSHA to follow a similar course in other rulemakings incorporating documents by reference.

While IMA-NA supports MSHA's adherence to the Transfer Act and Circular A-119 in the current NPRM and in other regulations proposed by MSHA, the critical decision is identifying the appropriate VCS to apply in any given regulatory solution. To help address this issue, MSHA should participate actively in the standard-setting process at various voluntary consensus standards bodies. Doing so will permit MSHA to persuade others of the need for changes in a standard and have those proposed changes thoroughly studied by experts and adopted if justified. This will help ensure that a VCS addresses agency mine safety concerns and merits a "presumption of compliance" for

equipment constructed in accordance with the established VCS regarding the condition or practice at issue.¹

Finally, in its NPRM MSHA states:

While this proposal lists 14 VCS for MSHA to incorporate by reference, the Agency is interested in whether the proposal should be expanded to include other VCS. Please provide rationale, with definitive data and explanation of how this would improve safety for your position.

85 FR at 73658. One IMA-NA member company identified Factory Mutual (FM) as a reputable testing laboratory for electrical equipment. *See* [Commercial Property Insurance | FM Global](#). FM Global is an American mutual insurance company based in Johnston, Rhode Island, with offices worldwide, that specializes in loss prevention services primarily to large corporations throughout the world in the highly protected risk property insurance market sector. FM Global is the communicative name of the company, whereas the legal name is Factory Mutual Insurance Company. The company employs a non-traditional business model whereby risk and premiums are determined by engineering analysis as opposed to historically based actuarial calculations. This business approach is centered on the belief that property losses can be prevented or mitigated. FM employs an International Codes and Standards team that engages with government authorities, research institutions and advocacy groups to promote, codify and implement safer requirements that makes its clients more resilient by preventing costly property losses, particularly from fire. FM should be considered as a VCS, especially for the following testing standards: FM 3600, 3610, 3611, 3613 and 3615. MSHA may determine that other FM testing standards may be applicable after it conducts its own review.

An open, inclusive and transparent notice and comment rulemaking process is the best guarantee that the correct VCS will be identified and appropriately incorporated by reference in any given situation. IMA-NA commends MSHA for its adherence to these regulatory principles in the current NPRM and in other regulations proposed by MSHA.

Thank you for the opportunity to comment on the NPRM. As necessary, IMA-NA looks forward to working with you further on issues related to the testing, evaluation and approval of electric motor-driven mine equipment and accessories intended for use in gassy mines.

Sincerely,



Mark G. Ellis
President

¹ This is the approach followed by the European Union in its Machinery Directive (*see* Article 5 in 98/37/EC ([EUR-Lex - 31998L0037 - EN - EUR-Lex \(europa.eu\)](#)) and Article 7 in 2006/42/EC ([EUR-Lex - 32006L0042 - EN - EUR-Lex \(europa.eu\)](#))).