Top Regulatory Issues Facing the Grain Handling Industry in 2013

Jess McCluer
National Grain and Feed Association
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Overview of OSHA and Grain Industry Prior to 2012 Election
OSHA – Bush and Obama

- Bush Administration – 2001 -2008
  - Emphasis on Outreach/Compliance Assistance
  - Focus on bad actors not industries

- Obama Administration – 2009 – Present
  - Increased spending on enforcement and regulation
  - Held spending on compliance assistance
  - Increased number of inspections and violations
Regional and Local Emphasis Programs

- **Local Emphasis Programs**
  - Region V (IL, IN, WI, MI, OH) 11/01/2011
  - Region VI (AR, LA, NM, OK, TX) 10/01/2011
  - Region VII (IA, KS, MO, NE) 10/01/2011
  - Region VIII (CO, MT, ND, SD, UT, WY) 10/05/2011
  - Region IX LEP (AZ, CA, HI, NV) 1/20/2012
  - Region X (AK, ID, OR, WA) 2/20/13

- **State Emphasis Programs**
  - Iowa and Indiana

- Combustible Dust NEP has been reissued
Enforcement Reaches Historic Heights

- Total number of inspections are up 6.2%
- Programmed inspections are up 15.1%
- Complaint inspections are up 8.8%
- Violations are up 15.3%
  - Serious violations are up 22.1%
  - Willfull violations re up 217.1%
  - Repeat violations are up 8.1%
  - Other than serious violations are down 10.4%
What Does This Mean in the Field

- Increased Pressure on Area Directors
  - Produce more significant cases using the press for deterrence effect
  - Focus resources on cases with more press appeal

- Decreased discretion in the field
  - Concern about the bottom line
  - Power centralized in the National Office

- In settlement OSHA wants more...for less

- Sequestration has not impacted OSHA inspectors
## Proactive Targeting Philosophy

<table>
<thead>
<tr>
<th>OSHA Inspection Statistics (Federal and State)</th>
<th>FY09</th>
<th>FY10</th>
<th>FY11</th>
<th>FY12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Inspection</td>
<td>238</td>
<td>296</td>
<td>380</td>
<td>629</td>
</tr>
<tr>
<td>Percent Programmed Inspections</td>
<td>42%</td>
<td>49%</td>
<td>55%</td>
<td>54%</td>
</tr>
<tr>
<td>Total Violations Issued</td>
<td>858</td>
<td>1,289</td>
<td>1,552</td>
<td>1,343</td>
</tr>
</tbody>
</table>
Most Frequently Cited OSHA Standards in Grain Handling Industry

Most Frequently cited standards for LEP Grain Inspections:

- 1910.272 – Grain handling facilities
- 1910.219 – Mechanical power-transmission apparatus
- 1910.023 – Guarding floor and wall openings and holes
- 1910.305 – Wiring methods, components, and equipment for general use
- 1910.303 – Electrical, general use
- 1910.1200 – Hazard Communication
- 1910.134 – Respiratory Protection
- 1910.146 – Permit-required confined spaces
- 1910.027 – Fixed ladders
- 1910.132 – Personal protective equipment
Most Frequently Cited OSHA Standards in Grain Handling Industry

Most frequently cited standards in 1910.272 include:

- 1910.272 J01 – failure to implement a written housekeeping program for fugitive dust.
- 1910.272 E02 – failure to train employees for special tasks, such as bin entry.
- 1910.272 G02 – failure to provide lifelines and harnesses for employees entering the bin at or above the level of the grain.
- 1910.272 G01 I – failure to issue a permit prior to entering the bin.
- 1910.272 G04 – failure to provide rescue equipment suitable for the bin being entered.
- 1910.272 G01 III – failure to test the atmosphere within a bin before employees enter.
- 1910.272 M03 – failure to maintain a certification record of performed preventative maintenance inspections.
- 1910.272 E01 II – failure to provide specific procedures and safety practices applicable to job tasks.
- 1910.272 D – failure to implement an emergency action plan.
- 1910.272 G01 II – failure to deenergize and disconnect all equipment in a grain storage
OSHA Needs to Monitor Effectiveness of Enforcement

- In January 2013, the General Accounting Office (GAO) issued a report regarding the effectiveness of OSHA’s enforcement programs.

- The report concluded that OSHA “knows little” about which of its enforcement related activities is ensuring compliance.
  - Which compliance assistance efforts are effective

- Enhancing monitoring of enforcement activities and determining which works best is key for Agency to achieve mission.
Recent Actions OSHA Enforcement Actions

- Enforcement Focus on Temp Workers
  - Memo outlines new checks inspectors should make during worksite inspections, including determining whether any temporary workers are employed, whether the workers are exposed to conditions in violation of OSHA rules, and whether the workers received safety and health training “in a language and vocabulary they understand.”

- Unions May Represent Nonunion Workplaces During Inspections
  - Released an interpretation letter April 5, 2013, clarifying that nonunion employees can select anyone, including nonemployee union representatives, to accompany OSHA officials during safety inspections of their employer’s worksite.
Increased Penalties and Contest Rate

New penalty system (FY 2011)

- More difficult to get reduction for good safety history and size

- Many more significant cases
  - In 2005, $21 million was highest penalty vs. $87 million in 2009
  - OSHRC considering raising the mandatory threshold amount for mandatory settlement (currently $100,000)

- Higher contest rate
  - 62% increase from 2008 (last year of Bush Administration)
OSHA’s in the Press

- Using the press for deterrence effect
  - Many more press releases
  - Greater access to information – hyperlink to citations, FOIA
  - Publicizing OSHA’s Top 10 standards violated

- Publicizing bad actors through the Severe Violator Enforcement Program
Overview of OSHA and Grain Industry Post 2012 Election
OSHA: Democratic Party Platform

- “Continue to adopt and enforce comprehensive safety standards.”
- “Rules should be simpler and more flexible, and regulations should be based on sound Science and secure Americans’ freedom of choice.”
- “There's no question that some regulations are outdated, unnecessary, or too costly.”
Secretary Solis recently resigned. Thomas Perez, current director of Civil Rights Division of Dept. of Justice has been nominated. Openly opposed by many Republicans.

Assistant Secretary Dr. David Michaels and senior OSHA staff will stay during second term.
OSHA – Second Term

Rulemaking
- Injury and Illness Prevention Program
- Silica
- Combustible Dust
- MSD Column on OSHA 300 Log
- Walking/Working Surfaces e.g. rolling stock fall protection
- HAZCOM

Enforcement
- Reallocation of budget
- Appointments to OSH Review Commission
- Emphasis Programs
- Press Releases
- Severe Violator Enforcement Program
- State Oversight
- Whistleblower actions
In FY 2014, OSHA proposes to continue its aggressive enforcement posture. OSHA states in the Justification that “the average employer saved $355,000 (in 2011 dollars) as a result of an OSHA inspection.”

OSHA is working with DOL policy office to “test the impact of inspections on injury and illness rates and overall compliance with OSHA standards and regulations for establishments on OSHA’s targeted inspection lists.”
OSHA also seeks an increase in funding for its standard setting activities, including an increase in $2 million dollars for “contract support for the agency’s rulemaking efforts to protect workers from complex and dangerous hazards.” OSHA projects that it will issue four Final Rules, seven Notices of Proposed Rulemaking (including Combustible Dust and Injury and Illness Prevention Programs) and initiate SBREFA reviews for five rules (Combustible Dust).

OSHA is requesting a significant decrease in funding for its Federal Compliance Assistance programs e.g. Alliances and VPP. State OSHA-program support and State compliance assistance would remain the same under OSHA’s 2014 Budget request. However, the Budget Justification includes an increase of $5.9 million to bolster OSHA's enforcement of several whistleblower laws that the Agency monitors, including the Affordable Care Act.
Top Grain Handling Issues for 2013

• Continued Increased Enforcement Upon Grain Handling Industry
  • Permit Required Confined Space/Boot Pit

• Sweep Auger Letter of Interpretation

• Combustible Dust Rulemaking
  • Globally Harmonized System for Labeling
  • Industry Consensus Standards e.g. NFPA

• Rolling Stock Fall Protection
Confined Space/Boot Pit
Confined Space/Boot Pit

• Recently OSHA has issued numerous citations where “boot pits” are considered confined spaces.

• OSHA does not have a specific definition for “boot pit;” similar to “guarded/unguarded auger” issue

• Are they considering certain depth, level of moisture, configuration in relationship to the facility, etc?

• NGFA Safety, Health and Environmental Quality Committee has created a task group to develop safety principles similar to the sweep auger principles
Despite losing sweep auger cases in litigation, OSHA continued issuing citations, leaving employers with the following options:

- Accept citation and face risk of Repeat violations (w/ penalties of $70,000+ per violation)
- Challenge citations and incur legal fees
- Not empty bins in economical or efficient manner
Sweep Auger Settlements

Illinois company cited despite using both administrative & engineering controls to keep employees out of danger zone

- Area Director had personal knowledge of sweep auger operations
- OSHA withdrew citation and agreed to settlement terms that provided guidance re: acceptable alternative sweep auger operations
Sweep Auger Settlements

- Settlement incorporated **10 Sweep Auger Safety Principles** that permit employees inside grain bins w/ energized sweep augers

- 10 Sweep Auger Safety Principles were reviewed and approved by OSHA’s National Office in Washington, DC

- Area Director, Regional Administrator, and Deputy Assistant Sec’y of Labor indicated OSHA’s intent for 10 Sweep Auger Safety Principles to become federal OSHA policy
10 Sweep Auger Safety Principles

1. Follow 1910.272 permit requirements
2. De-energized & LO/TO sweep and sub-floor augers before setting-up/digging-out
3. Install and secure grates over sub-floor auger
4. Sweep auger must be guarded as designed by manufacturer
5. No walking on grain at depths presenting an engulfment hazard
6. Rescue trained & equipped observer posted outside the bin
10 Sweep Auger Safety Principles

7. Use engineering controls to prevent contact with auger (use of administrative controls alone is insufficient)

8. Use speed control mechanism or bin stop device to prevent uncontrolled rotation of the sweep auger

9. No hands, legs, or other similar means to manipulate an operating auger

10. To adjust auger, it must be unplugged (w/ plug controlled by adjuster) or locked out
Acceptable Engineering Controls

- Auger equipped with Attached Guard Rail to prevent contact with unguarded front portion of the sweep auger.

- A Portable Guard Rail maintained at least 7’ behind the sweep auger while the operator is in the enclosure.
Acceptable Engineering Controls

- **Safety Handle** w/ dead-man switch located at least 7’ behind auger that allows operation only when operator is in contact w/ handle

- A portable **Operator Guard Rail Enclosure** equipped with a dead-man switch, which only allows operation while operator is in the enclosure
Sweep Auger Memorandum

- On May 3 OSHA issued a memorandum to its Regional Administrators providing “guidance” on sweep auger operations. The document was based on the aforementioned settlement and addresses key issues such as definition of “guarded” and if an employee can be in a bin with energized equipment.

- There are subtle differences between the settlement and the memorandum. For example, the settlement allows for both administrative and engineering controls. The memorandum does not include administrative controls. NGFA will meet with OSHA to further discuss.

- Iowa OSHA currently has a zero-bin entry policy and does not intend to change it based on the new memo.
Combustible Dust Regulations and Compliance

- Advance Notice of Proposed Rulemaking (ANPRM) issued on Oct. 21, 2009 outlined agency’s intent to develop a comprehensive combustible dust standard that would apply across different industry sectors:
  - ANPRM posed various 69 questions on which OSHA is soliciting public comment.
  - Stakeholder meeting conducted on Dec. 14, Feb. 17 and April 21; NGFA testified at each one.
  - NGFA participated in June 28 Web-based forum.
  - OSHA originally had the CD standard on a fast track to be done in 2 to 3 years (from 2009). According to the current agenda, OSHA will convene a Small Business Advocacy Review panel in Fall 2013.
OSHA’s Acknowledges Complexity of Combustible Dust Rule

- Wide variety of materials, processes and equipment
- Truly defining combustible dust
- Retrofitting facilities
- Additional performance based consensus standards e.g. NFPA
Combustible Dust Regulations and Compliance

OSHA is looking at other ways to address combustible dust hazards, such as, using other standards to cover the hazard.

- Housekeeping Section of Proposed Walking and Working Surface proposed rule
- “Chemical Hazard” Category in Proposed Amendment to Globally Harmonized Communication standard
- Injury and Illness Prevention Program
- NFPA’s New Standard Covering the Fundamentals of Combustible Dust
Combustible Dust Regulation

- GHS Amendment to OSHA Hazard Communication Standard
  
  - Final Rule: 3/26/2012; Effective Date – 5/25/2012 – 60 Days after publication

  - Combustible Dust is classified as “chemical hazard” and is undefined
    - Shipments of products that could produce combustible dusts e.g. whole grain when used in processing or where dust is produced is subject to new rule

- New requirements mean new SDS’ and labels for manufacturers, distributors and importers. The key questions are what is combustible dust and who is the manufacturer, distributor and importer
• NGFA along with several other agribusiness organizations has filed a legal petition to review in order to challenge combustible dust requirements

• This could set potential precedent for “backdoor” rulemaking. That is, topics added to a final rule that were not available for public comment during the rulemaking process.

• We began settlement negotiations with OSHA but were unable to agree with either the process that OSHA used to adopt the final rule or the substance of the rule itself. And because OSHA was unwilling to make fundamental changes in what it did, we were unable to reach a final settlement agreement.
Safety Data Sheet

1. Identification of Preparation and the Supplier
2. Composition
3. Hazards Identification
4. First Aid Measures
5. Fire Fighting Measures
6. Accidental Release Measures
7. Handling & Storage
8. Exposure Controls/Personal Protection
9. Physical and Chemical Properties
10. Stability & Reactivity
11. Toxicological Information
12. Ecological Information
13. Disposal Considerations
14. Transport Information
15. Regulatory Information
16. Other Relevant Information
# Phase-in Dates for Hazard Communication Standard

<table>
<thead>
<tr>
<th>Effective Completion Date</th>
<th>Requirement(s)</th>
<th>Who</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 1, 2013</td>
<td>Train employees on the new label elements and safety data sheet (SDS) format.</td>
<td>Employers</td>
</tr>
<tr>
<td>June 1, 2015 - December 1, 2015</td>
<td>Compliance with all modified provisions of this final rule, except: The Distributor shall not ship containers labeled by the chemical manufacturer or importer unless it is a GHS label</td>
<td>Chemical manufacturers, importers, distributors, and employers</td>
</tr>
<tr>
<td>June 1, 2016</td>
<td>Update alternative workplace labeling and hazard communication program as necessary, and provide additional employee training for newly identified physical or health hazards.</td>
<td>Employers</td>
</tr>
<tr>
<td>Transition Period to the effective completion dates noted above</td>
<td>May comply with either 29 CFR 1910.1200 (the final standard), or the current standard, or both</td>
<td>Chemical manufacturers, importers, distributors, and employers</td>
</tr>
</tbody>
</table>
Rolling Stock Fall Protection

- FGIS cited by OSHA in July 2011 for not using fall protection on top of rail car; being appealed at national level
  - Further example of “broad” interpretation of letter of interpretation
  - OSHA recently cited an FGIS designated official agency
  - Recent settlement does not provide clarification

- Since 2010 several grain-handling facilities have been issued individual “willful” citations with fines between $60-70,000
On March 2, the Occupational Safety and Health Review Commission issued a decision that reaffirmed the “Miles Memo,” particularly its determination of where fall protection is feasible (inside or contiguous to a building) and where it is not (away from such areas). Also reaffirmed administrative controls can be used to protect employees.

Notice of Proposed Rulemaking (NPRM) issued on May 24, 2010 outlined agency’s intent to significantly revise current fall protection standard.

- Specific issues related to grain and feed industry:
  - Seeks comments on whether specific regulations are needed to address rolling stock and commercial motor vehicles
  - Seeks comments on whether to include specific references to combustible dust in the housekeeping section of the standard
Recent Press on Grain Industry

- March 24 story by *Kansas City Star* on October 2011 incident at Bartlett facility in Atchison, KS

- The article didn’t raise any new issues. It simply rehashed old notions about the industry.

- National Public Radio and Center for Public Integrity produced several stories on grain bin engulfment. Industry was portrayed as uncaring. Most stories focused on farm-related incidents.
Recent Press on Grain Industry (cont.)

NPR
- Special Series Page: Buried in Grain
- (part 1) Fines Slashed In Grain Bin Entrapment Deaths (with audio from All Things Considered)
- (part 2) Enforcement of Penalties Weak in Grain Deaths (with audio from Morning Edition)
- (part 3) Simple Strategies Can Prevent Grain Bin Tragedies (with audio from All Things Considered)
- (part 4) Why Grain Storage Bin Rescues Are Risky and Complex (with audio from Morning Edition)
- Buried in Grain – database of incident reports, fines, and how much the fines got cut
- Should Grain Bins On Farms Be Regulated, Too?

Center for Public Integrity
- Worker suffocations persist as grain storage soars, employers flout safety rules
- Rethinking OSHA exemption for farms
Recent Press on Grain Industry (cont.)

Kansas City Star
- Map of grain bin entrapment deaths in Kansas & Missouri
- Charges considered in Atchison grain elevator blast
- Video: Family discusses son lost in Atchison blast, demand action
- Young lives lost in dangerous jobs
- Memories of victims evoke workplace danger reminders

PBS
- Death of 14-year-old worker due to dangerous conditions in grain storage bins (from “Newshour”)

Harvest Public Media
- (supplies content to farm country public radio stations)
- When grain elevators explode

New York Times
- Death in the Silo (video)
Education and Training

- **Education**
  - “Grain Bin Safety: Protection You and Your Family”
    - NGFA and NCGA safety training DVD
  - “Your Safety Matters”
    - NGFA and GEAPS safety training DVD
  - “Don’t Go With the Flow”
    - NGFA and Purdue University entrapment rescue training video
Education and Training

Training

- NGFA/Grain Journal Elevator Design Conference, July 30-August 1, 2013 in Omaha, NE

www.edc2013.net

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National Grain and Feed Association
1250 I Street, N.W.
Suite 1003
Washington, DC 20005

Jess McCluer
202-289-0873  |  jmccluer@ngfa.org