



AmericanCoatings
ASSOCIATIONSM

July 22, 2024

Douglas Parker
Assistant Secretary of Labor
Occupational Safety and Health Administration
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

*Re: Proposed Rulemaking regarding OSHA's Emergency Response Standard
Docket No. OSHA-2007-0073*

Submitted via web portal: www.regulations.gov

Dear Assistant Secretary Parker:

The American Coatings Association (“ACA”)¹ appreciates the opportunity to provide comment regarding OSHA’s proposed Emergency Response Standard. We are committed to working with OSHA to help ensure an effective standard. The Association’s membership represents 90% of the paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paint, coatings, sealants and adhesives who will be directly affected by changes to the standard.

ACA is submitting comment related to WEREs (Workplace Emergency Response Employers) only. Our members remain concerned that covered emergency activities are unnecessarily broad, covering relatively minor emergency responses. The definition of covered “emergencies” requires further refinement. ACA further recommends changes to

¹ ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA’s membership represents over 90 percent of the total domestic production of paints and coatings in the country.

terminology referenced in the rule to avoid confusion. ACA also notes that requirements for emergency team member participation potentially go beyond team members' designated areas of expertise. ACA recommends further consideration of compliance costs. Compliance costs do not accurately reflect compliance activities and costs for general industry, especially for small businesses. ACA supports exemptions for activities covered by other OSHA emergency response standards, while suggesting an additional exemption for activities covered by EPA's hazardous waste contingency plan requirements.

ACA and its members submit the following comment:

I. ACA recommends establishing threshold activities and/or amounts of chemicals stored that would trigger requirements for a WERE.

The proposal imposes a variety of requirements that may impose unnecessary costs and disproportionate requirements on small scale operations or operations with low-risk potential. ACA members commonly designate and train individuals in emergency response capabilities. These could include small-scale responses, such as operating a fire extinguisher and clean-up of minor spills to more complex fire suppression, evacuation, etc. The current proposal indicates a broad set of requirements that would apply to any company regardless of scale of operations and scale of emergency response, where an employer maintains a WERT (Workplace Emergency Response Team) whose members "respond to emergency incidents to provide service such as firefighting, emergency medical service, and technical search and rescue," . . . "as a collateral duty to their regular daily work assignments."²

Requirements could also apply regardless of the number of employees involved in emergency response. This could include situations where only one employee has designated emergency duties. The proposed definition of WERT does not exempt companies based on size of a WERT, which may be interpreted as one or two or more employees. A WERT is defined as,

*a group of WERE employees (known as team members) who, as a collateral duty, prepare and respond to emergency incidents in the WERE workplace.*³

Regardless of scale of operations or required response, a company would have to implement complex planning and systems for emergency response that include and/or address:

² Proposed rule, Section 1910.156(b), defining "Workplace Emergency Response Employer." (89 Fed. Reg. 7774, 8014, Feb. 5, 2024).

³ Proposed rule, Section 1910.156(b), defining "Workplace Emergency Response Team." (89 Fed. Reg. 7774, 8014, Feb. 5, 2024).

- Organization of the WERT, establishment of the ERP (Sub-section (c)).
- Team Member Participation (sub-section (e))
- Risk Management Plan (sub-section (f))
- Medical and Physical Requirements (sub-section (g))
- Training (sub-section (h))
- Equipment and PPE (sub-section (k))
- Pre-incident Planning (sub-section (m))
- Incident Management System Development (sub-section (o))
- Emergency Incident Operations – Incident Command and Management (sub-section (p))
- Standard Operating Procedures (sub-section (q))
- Post-Incident Analysis (sub-section (r))
- Program Evaluation (sub-section (s))

OSHA proposes detailed requirements for each issue.

ACA recommends conducting further stakeholder engagement and/or evaluation of lower-level thresholds that would alleviate addressing all issues identified above. This may include short-form documentation and/or exemptions from requirements that are better suited for companies above certain threshold chemical storage amounts or a threshold level of risk. ACA would welcome the opportunity to work with the agency to identify an appropriate threshold for ERS requirements.

II. Costs will have a disproportionate impact on small business.

Because of the expansion of emergency planning and documentation under the proposal, compliance costs are significant for any industry, but particularly small businesses, who have trained and coordinated with local emergency service organizations under current standards. ACA small business members note that staff trained in emergency operations according to current OSHA requirements are a valuable resource. The imposition of additional compliance burden of this rule is a disincentive to maintain staff who provide emergency services “as a collateral duty to their regular daily work assignments.” The high compliance costs of this rule encourage small businesses not to maintain staff who provide these services in addition to regular duties, to rely on external emergency service organizations instead.

ACA supports providing a lower-level threshold triggering the proposed emergency response standard while more clearly articulating exemptions for operations covered by current general industry emergency response requirements. These are first steps towards addressing the impact on small businesses. ACA recommends further analysis and stakeholder engagement regarding the effect on small businesses of the proposed rule

with these additional exemptions. ACA anticipates a disproportionate effect on small businesses even with these exemptions, although exemptions will provide some cost mitigation.

OSHA also has not provided cost estimates that reflect reality faced by industry. Cost estimate tables at page 7894, *et. seq.* of the proposal are not accurate. For example, OSHA estimates a mere 2 hours for rule familiarization. Personnel must review the rule, consider explanatory notes and seek advice from external organizations or counsel to understand their compliance obligations. Two hours to complete these activities is an underestimate.

Other undervalued time commitments include the following list. These are especially true for small businesses, estimated at the lower end of the time estimates. Small businesses have pronounced compliance costs due to having limited staff and resources for compliance activities. Underestimated times include:

- Developing ERP (WERE): 20-60 hours
- Updating and revising the ERP: 4-12 hours
- Preparing a written RMP: 12-36 hours
- Updating a written RMP: 5-15 hours.

III. ACA suggests modifying terminology referenced in the proposal.

The phrases "SOP" and "RMP" have different meanings when used outside of the context of this proposal and could cause confusion when implementing the ERS at industrial facilities. ACA suggests changing these phrases in the proposal.

OSHA proposes developing a Risk Management Plan or RMP as one element of the Emergency Response Plan. EPA also uses the phrase "RMP" for Risk Management Programs related to chemical storage and safety under Section 112 (r) of the 1990 Clean Air Act Amendments, applying to industrial facilities storing chemicals above certain thresholds. Using the phrase "RMP" to denote both OSHA's and EPA's requirements can cause confusion when referencing those documents in a facility. This could have an impact on emergency management and response times. ACA suggests the phrase Risk Due Diligence or RDD instead of RMP in the ERS.

Similarly, use of the phrase "SOP" can cause confusion with industrial operations. OSHA proposes that, "The WERE must establish SOPs for emergency events that it will likely encounter." For several ACA members, the phrase "SOP" triggers operational review and implementation requirements that may not necessarily align with OSHA's proposal. EPA suggests using the phrase "workplan" instead of "SOP" to more clearly reflect the context of operations within the ERS.

IV. Requirements mandating participation of WERTs in emergency planning and review are overly broad and unnecessary.

At proposed Section 1910.156(e), OSHA proposes involvement of WERTs in reviewing and updating the ERP (Emergency Response Plan). Not all activities listed under this section would be relevant to all WERT members. Indeed, some activities are beyond the expertise of individual team members, whose engagement in review and updates may prove counterproductive. Instead, ACA recommends that this section be re-written to allow flexibility so the WERE can determine which team members can provide the necessary level of support.

Currently, the section is written to indicate that all team members must be involved with “developing and updating the ERP.” This includes engaging all members in implementing and evaluating the ERP, modifications, walk-around inspections, etc. Not all team members need to be engaged at this level. Rather, employers must be allowed to leverage each team member’s expertise in an appropriate manner, as determined by the employer.

V. ACA supports the proposed exemptions for compliance with HAZWOPER, Permit Required Confined Spaces in General Industry and standards related to general industry emergency management.

ACA supports proposed exclusions for operations conducted under the HAZWOPER standard, the standard for permit-required confined spaces and the emergency operations under the general industry standard. These exemptions are necessary to avoid duplicative and confusing requirements, while minimizing compliance burden, particularly on small businesses.

OSHA explains that it intends to exempt activities covered by several other general industry standards, but OSHA has not clearly articulated this exemption in the language of the proposal. Proposed section (a)⁴ does not include a general exemption for emergency-type activities covered by other standards, and it does not specify standards triggering an exemptions except for the HAZWOPER standard and the confined spaces standard.

General industry standards that should trigger an exemption include:

- Emergency Action Plans (29 CFR 1910.38)
- Portable fire extinguishers (29 CFR 1910.157)
- Medical services and first aid (29 CFR 1910.151)

⁴ 29 CFR §1910.156(a), as proposed in 89 Fed. Reg. 7774 (Feb. 5, 2024).

- Process safety management of highly hazardous chemicals (29 CFR 1910.119)
- Grain handling facilities (29 CFR 1910.272)⁵

ACA recommends clearly articulating exclusions for compliance with existing emergency standards for general industry in the text of section (a).⁶

VI. ACA recommends an exemption for hazardous waste operations covered by EPA’s Contingency Plan and Emergency Procedures

EPA’s contingency plan and emergency procedures for hazardous waste operations, required under RCRA (*Resource Conservation and Recovery Act*) provide overlapping requirements with OSHA’s proposed ERS. OSHA should exempt covered operations to avoid unnecessary requirements while avoiding confusion from overlapping programs during emergency response. RCRA contingency requirements at 40 CFR Part 265, Subpart D, are “designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water” through implementation of a contingency plan that dictates emergency operations, “in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.”

Requirements for the contingency plan overlap with OSHA’s proposed ERS including identification of emergency personnel, equipment, evacuation plans, etc. EPA also requires descriptions of “arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services.”⁷ Considering the significant overlap and potential for confusion in implementing multiple plans during a hazardous waste related emergency, ACA strongly recommends exempting hazardous waste related operations covered by the RCRA contingency plan requirements from scope of OSHA’s ERS.

VII. Conclusion

ACA appreciates the opportunity to provide comment regarding OSHA’s proposed Emergency Response Standard. ACA suggests the following:

- Establish minimum threshold requirements for “emergency” activities subject to this rule for WEREs that would exempt certain industrial activities as being too minor for the extensive requirements of the Emergency Response Standard.

⁵ 89 Fed. Reg. 7774, 7804 (Feb. 5, 2024)

⁶ 29 CFR §1910.156(a), as proposed in 89 Fed. Reg. 7774 (Feb. 5, 2024).

⁷ 40 CFR Part 265, Subpart D

- Reevaluate cost impacts to more realistically reflect compliance costs, especially related to small businesses.
- Modify the terms “SOP” and “RMP” so as not to cause confusion with how these terms are typically used outside of the context of the Emergency Response Standard.
- Modify WERT participation requirements to more realistically reflect expertise of the WERTs while allowing WEREs flexibility in leveraging WERTs’ expertise.
- Finalize exclusions for operations conducted under the HAZWOPER standard, the standard for permit-required confined spaces and standards for emergency operations for general industry.
- Add text to section (a) explaining that operations covered by other emergency standards for general industry are excluded from the Emergency Response Standard.
- Exempt hazardous waste related operations covered by the RCRA contingency plan requirements from scope of OSHA’s ERS, by adding the exemption to section (a).

ACA would welcome the opportunity to supplement this comment with any additional supporting data. Please feel free to contact me if I can provide any additional information or further explanation.

Sincerely,

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