IME
institute of makers of explosives

The safety and security institute of the commercial explosives industry since 1913

March 30, 2010

Technical Data Center,
Room N-2625
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210

Transmitted via Electronic Mail [stakeholder.meeting@dol.gov]

Re: Docket No. OSHA-2010-0004; "OSHA Listens" Issues 2, 6, 7.

The Institute of Makers of Explosives ("IME") welcomes that opportunity to participate in the "OSHA Listens" forum. These comments are in addition to those offered at the open meeting that was held March 4, 2010. Those recommendations specifically recommended that the agency eliminate its out-dated transportation-related requirements in deference to those promulgated by the US Department of Transportation. A written copy of those comments is attached for your convenience.

Introduction

IME is the safety and security institute of the commercial explosives industry. IME is a nonprofit association founded in 1913 to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations.

The IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as other companies that provide related services. Over 3.4 million metric tons of high explosives, blasting agents, and oxidizers are consumed annually in the United States. Of this, IME member companies produce over ninety-eight percent of the high explosives and a great majority of the blasting agents and oxidizers. These products are used in every state of the Union and are distributed worldwide.

Commercial explosives are the backbone of our industrial society. Metals, minerals, oil, power, construction activities and supplies, and consumer products are available today because of commercial explosives. The ability to manufacture, use, transport and distribute commercial explosives safely and securely is critical to all industries.

Accordingly, IME is concerned that workplace regulations that impact commercial explosives products are up to date, accurate, and reflective of current technology and professional best practices.

Background

On July 29, 2002 IME submitted a Petition for Rulemaking to OSHA requesting that the agency's regulations at 29 CFR 1910.109 be updated.[1] The regulations were originally promulgated in 1971 and have not been substantively updated since that time. IME sought to have all OSHA provisions applicable to explosives included in one regulatory section that would reflect the many advances in explosives technology and safety that have evolved since the 1971 promulgation. Specific examples of the requested revisions included (but are not limited to):

- correct regulations that overlap or conflict with requirements in the jurisdiction of other federal agencies, e.g., the proposed rule would remove requirements governing magazine construction and storage which are governed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). In addition, the IME proposal would eliminate provisions applicable to transportation of explosives regulated by the Department of Transportation ("DOT");

- incorporate the American Table of Distances ("ATD") in its entirety. Current OSHA regulations include an incomplete version of the ATD. The inclusion of the incomplete Table infringes on IME's copyright in the ATD and poses potential safety issues resulting from provision of incomplete information;

- include more precise rules to guard against accidental initiation by sources of extraneous electricity. The proposal references IME Safety Library Publications ("SLP") that address this issue;

- include specific restrictions regarding the types of explosive materials that may be used in congested areas, near highways open to traffic, or in areas where extraneous electricity is present above certain levels;

- include provisions governing intra-plant transportation of explosive materials;

- include specific, detailed provisions regulating the use of nonelectric detonation systems. No similar provision is included in the current rule;

- revise regulations regarding the crimping of detonators to safety fuse. The current regulation requires that "standard-ring type cap crimpers" be used. Such crimpers may not be appropriate for use with all products;

- include more detailed requirements for clearing and securing the blast site of unauthorized personnel;

[1] The Petition was filed jointly by IME and the Small Arms Ammunition Manufacturers Institute ("SAAMI"). Even though the two industries are completely distinct, this cooperative arrangement was entered into because the Standard at 1910.109 contains provisions applicable to explosives and small arms ammunition manufacturing. This submission addresses only those sections of 1910.109 applicable to commercial explosives.

- prescribe more detailed design criteria for mixing equipment, e.g., all bearings and drive assemblies would be mounted outside the mixer and protected against the accumulation of dust. The proposal also would require that means be provided to prevent the flow of fuel to a mixer in the event of a fire. An automatic spring-loaded shut-off valve with a fusible link would be required for gravity flow systems;

- include a section on incident investigation that would require preparation of a report, evaluation of the report's findings, and resolution of the report's recommendations either by implementation or justified rejection.

IME was concerned not only that the current regulations include outdated and/or nonexistent references and obsolete operational practices, but that strict adherence to some of the current requirements could pose an unacceptable risk to workers and the public. IME was and remains concerned, also, that while the current regulations remain extant employers in the commercial explosives industry are exposed to potential liability under a standard where compliance may be either technologically infeasible or inadvisable from a safety perspective.

In response to IME's Petition, on April 13, 2007 OSHA published a notice of proposed rulemaking to update 1910.109. While the proposal still contained some problematic requirements, it did represent a significant improvement over the current regulations. IME submitted comments on the proposal and remained optimistic that an acceptable final rule could be developed.

Nevertheless, on July 17, 2007, OSHA closed the comment period, explaining that the agency needed to further clarify the intent of the rulemaking. OSHA stated that it planned to issue a new proposal at a later date. On February 3, 2010, however, OSHA published a notice formally terminating the rulemaking to amend the Explosives and Blasting Agents Standard. Specifically, the agency stated that; "[c]ontinuing this rulemaking would have a limited safety and health benefit, while diverting OSHA resources from regulatory projects with a much more substantial hazard reduction potential." 75 Fed. Reg. 5545.

It is not the purpose of this submission to take issue with OSHA's conclusions in the notice of termination. It may well be that revision of the standard would have limited utility in improving safety in an industry that already has a demonstrated, long-standing, and exceptional safety record. We understand that OSHA, particularly in the prevailing economy, has limited resources and "deservedly higher-priority projects" involving more serious safety concerns. Were there no such practical constraints on the agency, we are confident that OSHA would readily undertake to ensure that all its standards were regularly and comprehensively updated. As it stands, the industry's own safety record appears to work against it when it comes to pursuing regulatory reform.

That said, however, in our view, simply retaining the current status quo without any change at all is unacceptable. Accordingly, we offer the following recommendations.

Regulations at 29 CFR 1910.109 Should Be Withdrawn in Favor of PSM and GDC Compliance and Enforcement

IME continues to maintain that the current Explosives and Blasting Agents Standard is largely obsolete.[2] Accordingly, significant portions of the standard are impracticable to implement and concomitantly unenforceable. Given this situation, it makes no sense to leave the standard in place. Retaining outdated and inconsistent requirements in federal regulations will only perpetuate the confusion that currently characterizes the regulatory arena, and will engender disagreement between regulated entities and enforcement personnel who do not have a sophisticated knowledge of explosives technology and application.

We believe that OSHA has adequate enforcement tools to ensure that the current high level of safety in the commercial explosives industry is maintained. Both the Process Safety Management Standard ("PSM") at 29 CFR 1910.119 and the General Duty Clause ("GDC") at 29 CFR §1903.1 provide OSHA with comprehensive enforcement capabilities that are regularly and effectively used by the agency to address safety concerns in many industries, including commercial explosives.

OSHA recognizes this fact in the February 3 withdrawal notice when it states; "[m]oreover, employers engaged in the manufacture of explosives (other than blasting agents) . . . must already meet the requirements contained in OSHA's [PSM] Standard . . . which covers working conditions during the manufacture of highly hazardous chemicals . . . . The PSM Standard addresses many of the hazards associated with the manufacture of explosives . . . ." 75 Fed. Reg. at 5546.

The manufacture and use of blasting agents, similarly, can be adequately overseen by reliance on the GDC and the recommendations and standards published in the IME SLPs and by National Consensus Standard Organizations such as the National Fire Protection Association and the American National Standards Institute ("ANSI").[3] IME understands that this already is the

[2] For example, emulsion explosives products are one of the most commonly used products in the commercial explosives industry. The current 1910.109 makes no mention of emulsion products in any section of the Standard. Nor does the current Standard include any provisions regarding the use of nonelectric and electronic detonators, technologies developed many years subsequent to the 1971 promulgation of the Standard but now frequently used throughout the industry.

[3] See, NFPA 495 *Explosive Materials Code* (2010), and American National Standard A10.7-1998 (R2005), *Safety Requirements for Transportation, Storage, Handling and Use of Commercial Explosives and Blasting Agents.* See also, IME SLP 3, *Suggested Code of Regulations for the Manufacture, Transportation, Storage, Sale, Possession and Use of Explosive Materials* (2003), and IME SLP 17, *Safety in the Transportation, Storage, Handling and Use of Explosive Materials* (2007).

> PSM does not cover the manufacture of blasting agents. The insensitivity of blasting agents renders them highly unlikely to mass-detonate during manufacturing, storage, and transportation. DOT in particular acknowledges that the insensitivity of the material is such that transportation is allowed without the safety precautions employed for the transportation of Division 1.1 or 1.4 explosives. Accordingly, OSHA has concluded that imposition of PSM to blasting agent manufacturing is unnecessary. While safety is always the first concern when working with any product manufactured by the commercial explosives industry, OSHA has agreed that the imposition of a requirement as complex as PSM to the manufacture of a stable, insensitive substance would be superfluous and would be unlikely to provide any increased margin of safety.

custom in actual practice. Whether it is the result of an official enforcement policy decision, or "institutional knowledge" on the part of OSHA inspectors that the 1910.109 Standard is unenforceable, agency inspectors regularly reference industry and/or national standards under the GDC in lieu of 1910.109. In fact, we are not aware of any citations having been written on the 1910.109 Standard in nearly two decades.

Additionally, OSHA explained at length in the February Notice of Withdrawal that the commercial explosives industry is pervasively regulated by a number of other federal agencies. The agency points to this fact as the principal reason for withdrawing the explosives proposed rule:

> The proposed rule would not result in a major safety or health improvement for workers. First, other Federal agencies already regulate explosives hazards in many situations . . . a number of Federal agencies other than OSHA exercise broad authority over explosives safety [including MSHA (mining), DOT (transportation and activity incidental to transportation), ATF (storage), USCG (maritime), and EPA (environmental)] . . . [T]he breadth of existing Federal protections necessarily constrained the relative safety benefits of the rulemaking, especially when compared with OSHA's higher priority rulemaking activities.

75 Fed. Reg. at 5545,6. The industry is also subject to regulations promulgated by the Department of Homeland Security ("DHS").

OSHA does state in the withdrawal notice that "the existing standard already addresses many of the hazards associated with explosives and much of the proposal involved clarifying the terms and scope of that standard." OSHA is correct in its observation that portions of the proposal were devoted to regulatory clarifications and the elimination of duplicative federal requirements. We do, however, respectfully disagree with the intimation that such clarifications are unnecessary and that existing requirements are adequately protective. Without certain of the clarifications proposed for the definitions section, the existing standard is essentially incomprehensible. For example, the existing standard defines explosives and blasting agents – the very materials the standard is intended to regulate - by reference to a DOT classification scheme that was changed nineteen years ago, in 1991. Similarly, the standard contains antiquated references to magazine types. The magazine provisions contained in 1910.109 directly conflict with ATF regulations and fail to even recognize a commonly used magazine, the IME 22 box (ATF, type 3 "day-box" magazine).

Moreover, certain practices mandated in the existing standard, if followed, would actually *increase* hazards, e.g., the requirement that "standard-ring type cap crimpers" be used to crimp

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Specifically, OSHA correctly determined in the (now withdrawn) proposed rule:

> The PSM standard was developed to safeguard employees from catastrophic releases of toxic, reactive, flammable, or explosive chemicals (see § 1910.119 *Purpose*). Blasting agents, as Class 1 Division 1.5 explosives, are very insensitive and have a very low probability of causing an unintended mass explosion. For this reason, OSHA has concluded that blasting agents, unlike Division 1.1 to 1.4 explosives, do not pose the potential catastrophic consequences to employees required of chemicals subject to § 1910.119 and should be excluded from the PSM standard.

72 Fed. Reg. at 18799.

detonators to safety fuse is an inappropriate practice for use with many contemporary explosives products. The regulation at 1910.109 (e)(3)(v) that requires that "butts of old holes [be] examined with a wooden stick for unexploded charges," is a singularly imprudent practice that could be disastrous if used in the wrong circumstances. The fact that the current regulations prescriptively *mandate* the practice is unconscionable.

Fortunately, as far as we are aware, the commercial explosives industry has not yet experienced any accidents resulting from strict adherence to the OSHA Standard. That said, the existing standard remains the law and any employer deviating from its requirements in the interest of safety is exposed to potential liability. In our view, it is untenable that employers in the commercial explosives industry are forced to cope with a binding federal "safety" standard that could actually jeopardize the safety of their workers. In effect, we are in the absurd position of having to protect our workers from OSHA.

Given this regulatory environment, leaving the existing, outdated Explosives and Blasting Agents Standard in place would irresponsible and indefensible. It its current form, the standard is likely to do considerably more harm than good. It must either be comprehensively revised or withdrawn from the Code of Federal Regulations.

Alternatively, Regulations at 29 CFR 1910.109 Should Be Withdrawn and Replaced With Reference to a More Appropriate Set of Requirements

IME Safety Library Publications

Alternatively, IME believes that if the Explosives and Blasting Agents Standard at 29 CFR 1910.109 is not to be revised or withdrawn in favor of PSM and the GDC, then the existing archaic standard should be withdrawn in favor of a more suitable set(s) of requirements. Specifically, IME recommends replacing the standard with reference to IME Safety Library Publications ("SLPs").

IME SLPs are a comprehensive collection of standard-like recommendations that represent professional best practices in the commercial explosives industry. SLPs are regularly updated to reflect changes in explosives technology and recommended safety practices and are relied upon throughout the industry as an authoritative source of critical information on the manufacture, transportation, storage, and use of explosive materials. IME's SLPs have been incorporated into a number of state regulations governing explosives, and are relied upon as a valued source of information in Canada, South America, Australia, Europe, Asia, and other regions internationally.

As noted in the introductory paragraph, IME members produce over 98 percent of the high explosives and a great majority of the blasting agents and oxidizers consumed in the U.S. Representatives of all our member companies serve on the IME standing committees that produce the SLPs, ensuring that the recommendations in the SLPs represent the collective expertise and experience of virtually the entire domestic commercial explosives industry. In addition, IME's SLPs are available to industry, responders, and the public, free of charge, via direct download from IME's website. It is part of IME's mission to ensure that the critical information contained in the SLPs is readily accessible to any entity contemplating

manufacturing, managing, or using explosives products. For these reasons, we believe workplace safety in the commercial explosives arena would benefit if OSHA were to incorporate by reference appropriate sections of IME SLPs into the CFR.

National Consensus Standards

As a third, least favorable option, IME could support a decision by OSHA to incorporate by reference into its regulations, relevant and applicable sections of the explosives and blasting agents standards developed by National Consensus Standards Organizations such as those previously mentioned in footnote 3 herein. [4] We appreciate that under PL 104-113, the referencing of national consensus standards is an option for the agency.

This would, however, be a fall-back position for IME. The various committees working within national consensus standard setting organizations, including those committees tasked with developing explosives and blasting agents standards, often include representatives from industries outside the commercial explosives industry (e.g., pyrotechnics, aerospace, ammunition, munitions, etc.). As such, the resultant standards, because they must be consensus standards, are susceptible to compromises in terminology, nuance, and scope that might not be made were the committees comprised solely of experts in the commercial explosives field and were the standards intended to address only commercial explosives. This is not to suggest that the consensus standards are inadequate or that they include inappropriate or unsafe recommendations. IME representatives participate on all of the relevant committees and help to ensure that all recommendations respecting commercial explosives are sound. That said, the consensus standards may not, in all cases, include the same degree of detail, precise industry-recognized and accepted terminology, or comprehensive scope of coverage that is included in the IME SLPs.

As OSHA mentions in the Notice of Withdrawal, the existing 1910.109 is directly based on "two national consensus standards promulgated by the [NFPA – NFPA 495-1970] and [NFPA 490-1970]." 75 Fed. Reg. 5545. The agency's withdrawn proposed standard also drew heavily on existing national consensus standards. Naturally, both of the above standards have been significantly revised since the original 1910.109 Standard was promulgated. While not our first preferred option, we would have no objection if OSHA were to replace the current, flawed 1910.109 Standard with references to the appropriate consensus standards, and ensure that the agency's regulations are regularly amended to incorporate subsequent revisions of those consensus standards.

OSHA Should Take Action to Affirmatively Ensure That 29 CFR 1910.109 is not Enforced

We have already explained in this submission why we believe the current Explosives and Blasting Agents Standard is unenforceable. Nevertheless, in the absence of some definitive action by OSHA, the standard is susceptible to being cited. We have the additional, related

[4] The standards developed by these organizations are comprehensive in nature, and contain many provisions that are outside OSHA's jurisdiction, e.g., NFPA 495 Chapter 9, *Aboveground Storage of Explosive Materials*, NFPA 495 Chapter 8, *Transportation of Explosive Materials on Highways*, NFPA 495 Chapter 12, *Explosive Materials at Piers and Railway, Truck, and Air Terminals*. Accordingly, in adopting national consensus standards we would expect OSHA to limit its references to those provisions within its regulatory purview.

concern that while 1910.109 remains unaltered, states and/or localities could and do look to it in devising their own requirements impacting commercial explosives.

Accordingly, we respectfully request that OSHA take immediate action to inform its regions and the public that the current standard will not be cited and/or enforced by the agency.

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We appreciate the opportunity to present these comments and suggestions on workplace safety issues important to our industry. We look forward to receiving the agency's response.

Respectfully submitted,

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Attachment

STATEMENT
Before

The United States Department of Labor
Occupational Safety and Health Administration

Public Meeting on

"OSHA Listens"

Presented by

Cynthia Hilton
Executive Vice President
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1120 Nineteenth St., NW, Suite 310
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March 4, 2010

I am Cynthia Hilton, Executive Vice President, of the Institute of Makers of Explosives (IME). I appreciate the opportunity to present comments and suggestions on workplace safety issues important to our industry.

Interest of the IME

The IME is a non-profit association founded in 1913 to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. The IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as companies providing related services. The majority of IME members are small businesses as defined by the Small Business Administration. Commercial explosives products are used in every state of the Union and are distributed worldwide. Our products contribute positively to the US balance of trade. These products, the backbone of our industrial society, are essential to energy production, metals and minerals mining, construction activities and supplies, and consumer products, and the jobs related to these activities.

Comments and Suggestions

This forum is meant to solicit input from stakeholders about a variety of health and safety public policy questions. Among them is a request to point out areas where OSHA engagement is no longer necessary. I would like to address this point.

- Background

  Last month, OSHA terminated a rulemaking to amend its Explosives and Blasting Agents Standard at 29 CFR 1910.109.[5] The rulemaking was based, in part, on a petition filed by IME. OSHA's Explosives and Blasting Agents rules have not been substantively updated since they were promulgated in 1974, and now they contain a number of outdated references, classifications, and jurisdiction-related provisions that do not accurately represent the current regulatory environment or industry best practice. One of the major objectives of IME's rulemaking petition was to update and streamline these regulations with particular attention to avoiding rules that duplicate rules of other federal agencies. Regrettably, our concerns about overlapping regulations are not resolved simply by withdrawing this rulemaking.

- Areas Where OSHA Regulation Is Not Necessary

  One of the main issues that frustrated the Explosives and Blasting Agents rulemaking was opposition to OSHA's determination to regulate the commercial transportation of explosives, and the broader announcement that OSHA has "statutory authority to regulate working conditions during the actual movement of hazardous materials [of which explosives is one type of such materials] in commerce, as well as during the preparation of hazardous materials prior to movement, and the loading, unloading, and temporary storage of hazardous material incidental to movement."[6] This rulemaking and policy statement marked the first time that OSHA had expounded on its interpretation of authority granted the agency through a drafting error made in 1990 to legislation reauthorizing the Hazardous Materials Transportation Act (HMTA).

  The drafting error created duplicative authority between OSHA and DOT over hazardous materials regulations arising from section 5106 of the Act. Prior to 1990, the Occupational Safety and Health Act (OSH Act) limited OSHA's authority to regulate employee health and safety when another federal agency exercised its authority over the same subject matter. This so-called "reverse

5 75 FR 5545 (February 3, 2010).
6 72 FR 18798 (April 13, 2007).

preemption" provision was designed to ensure that important areas of federal regulatory authority are exercised, while avoiding duplicative or conflicting regulatory requirements.

A number of policy and practical problems result from the agency's attempt to regulate the transportation of hazardous materials:

- First, section 5106 is limited to "criteria for handling hazardous materials." This section does not encompass the board scope of authority OSHA announced in the 2007 rulemaking.

- Second, as noted above, OSHA's hazmat transportation rules are woefully out of date. It is unfortunate that OSHA has not rectified these regulatory deficiencies in the intervening years. As it stands, the regulated community is exposed to a number of out-dated and conflicting hazmat safety standards. If these out-dated rules from the last century were enforced, they would immediately put workers and the public in harm's way.

- Third, DOT is constantly refreshing the hazardous materials regulations to cover new products and evolving international requirements. If OSHA is determined to share this jurisdictional spectrum, the agency would soon find its regulatory agenda driven by DOT as it attempts to keep pace.

- Fourth, another drawback to OSHA's assertion of duplicative regulatory authority is that the agency lacks the resources to enforce transportation-related requirements. Some 6.2 million workplaces are covered by the OSH Act. OSHA has established a system of inspection priorities to manage this workload. Still, the task is daunting, even when state resources are tapped. These facts led the National Transportation Safety Board (NTSB) to conclude, after a serious transportation-related incident, that effective oversight of hazardous materials loading and unloading operations from tank cars and other bulk containers is not provided by OSHA.[7] The NTSB recommended that DOT should remain the agency to develop safety requirements that apply to the loading and unloading of railroad tank cars, highway cargo tanks, and other bulk containers that address the inspection and maintenance of cargo transfer equipment, emergency shutdown measures, and personal protection requirements. In developing these requirements, DOT should be open to assistance from OSHA. Similar recommendations were subsequently made by the and the U.S. Chemical Safety and Hazard Investigation Board (CSB).[8]

- Finally, even if OSHA stands down its enforcement posture in deference to DOT rules, states often look to OSHA to model their worker safety requirements. OSHA encourages states to partner on worker safety and to help carry the enforcement burden. To the extent that states adopt outdated transportation-related rules, however, the problems mentioned above multiply.

In the preamble to its Explosives and Blasting Agents rulemaking proposal, OSHA stated that "it is important to avoid duplicative or conflicting regulatory requirements between federal agencies[, and that] OSHA has no current plans to expand its regulation of working conditions during the transportation of hazardous materials."[9] While we laud these statements, the agency's rulemaking proposed various requirements that duplicate, conflicted with, or exceeded those of DOT.

OSHA's withdrawal of the Explosives and Blasting Agents rulemaking does not put an end to these concerns. After acknowledging that "other Federal agencies, including DOT, already regulate explosives hazards," OSHA states,

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7 NTSB/HZM-02/01, PB2002-917002 (July 14, 2001).

8 2005-06-I-LA-1 (June 14, 2007).

9 72 FR 18708 & 18798 (April 13, 2007).

Whether or not the rulemaking continues, the [agency's] existing [rules for] transporting explosives, packing, marking, and storing explosives at piers, railway stations, and cars or vessels … and transporting blasting agents … will remain in effect.[10] (Emphasis added.)

We respectfully disagree that OSHA's continued regulatory presence in the area of transportation has "no substantive effect on the safety measures employers must take to control explosives hazards."[11] (Emphasis added.) If employers are forced to choose OSHA's antiquated standards over DOT's, safety will suffer.

Recommendation

We strongly urge OSHA to heed the concerns and objections of those that commented on the 2007 rulemaking and avoid "duplicative or conflicting" transportation-related requirements. Should OSHA determine that DOT requirements should be augmented, we would suggest that the agency work with DOT to refine that department's rules rather than impose any new or additional requirements that will adversely impact the transportation of hazardous materials in commerce.

Conclusion

Our communities, the public and workers engaged in manufacture and use of commercial explosives count on our operations to be conducted safely and securely. IME members are constantly engaged in efforts to keep their operations and workers safe. Workers in our industry are not well-served by OSHA's out-dated rules, nor is there benefit to attempt to regulate the transportation of commercial explosives given the expertise of DOT.

Thank you for your attention to these concerns. I and would be glad to answer any questions.

[10] 75 FR 5546 (February 3, 2010).

[11] 75 FR 5546 (February 3, 2010).

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