
SECRETARY OF LABOR,

Complainant,

v.

MCNALLY CONSTRUCTION AND
TUNNELING COMPANY,

Respondent.

OSHRC Docket No. 90-2337

DECISION

BEFORE: FOULKE and MONTROYA, Commissioners.*

BY THE COMMISSION:

At issue is whether the portions of the underground construction standard, 29 C.F.R. § 1926.800, that deal with electrical hazards preempt the general electrical standard for construction, 29 C.F.R. § 1926.407(b), cited here by the Secretary.¹ Administrative Law Judge Paul L. Brady held that section 1926.800 did preempt section 1926.407(b) and vacated a citation alleging that McNally Constr. & Tunneling Co. ("McNally") failed to comply with section 1926.407(b). For the reasons stated below, we affirm his holding.

* This case was voted upon before Chairman Weisberg joined the Commission. Accordingly, Chairman Weisberg did not participate in this case in order not to further delay the issuance of this decision.

¹ That standard provides:

§ 1926.407 Hazardous (classified) locations.

(b) *Electrical installations.* Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be approved as intrinsically safe or approved for the hazardous (classified) location or safe for the hazardous (classified) location.

The cited tunnel, a part of the Southwest Interceptor sewage project in Cleveland, Ohio,² was dug in Cleveland shale, a geological formation in which methane gas can be encountered. The Secretary alleges that McNally committed a serious violation of section 1926.407(b) because "lighting equipment and wiring methods of lighting equipment in hazardous (classified) locations [in that tunnel] were not approved as intrinsically safe," and that one method of abatement would be the installation of electrical equipment required for Class I, Division 2 locations as defined at section 1926.449.

There is little dispute over the potential hazard that gave rise to the citation. If the methane level in a tunnel reaches 100 percent of the lower explosive limit ("LEL")³ and a spark is generated at that location by electrical equipment, then the methane can ignite. If the ignited quantity of methane in the tunnel is great enough, an explosion can result, leading to serious injuries to exposed employees. The underground construction standard, section 1926.800, as well as the cited general electrical standard, section 1926.407(b), address the elimination of the hazard of the potential electrical ignition of flammable gases.

I. Analysis

Section 1910.5(c) governs the question of which standard applies here. That section provides, in pertinent part:

§ 1910.5 Applicability of standards.

(c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies.

It is well settled that a general standard prescribing compliance action is not preempted by a specific standard unless both address the same particular hazard. *See Brock v. Williams Enterp. of Georgia,*

² K M & M, A Joint Venture, was also engaged in tunneling operations for the Southwest Interceptor project and was cited under section 1926.407(b). K M & M contested the citation, and Judge James D. Burroughs found in their favor. We also decide that case today. *K M & M, A Joint Venture*, Docket No. 89-3403 (July 13, 1994).

³ The LEL is the minimum concentration of vapor in air or oxygen below which propagation of flame does not occur on contact with a source of ignition. A mixture below the LEL is too lean to burn or explode. Five percent methane in the air is 100 percent of methane's LEL. *See NFPA No. 325M-1969, Fire-Hazard Properties of Flammable Liquids, Gases and Volatile Solids* (1969), published by the National Fire Protection Association.

Inc., 832 F.2d 567, 570 (11th Cir. 1987) (citing *L.R. Willson & Sons v. Donovan*, 685 F.2d 664, 670 (D.C. Cir. 1982)). In this case, it is clear that both sections 1926.800 and 1926.407(b) address the same hazard. We must then determine whether, as applied in this case, the specific standard, section 1926.800, preempts the application of the general standard, section 1926.407(b). We make that inquiry here in the context urged by the Secretary in his brief:

[T]he test for applicability of any statutory provision must look first to the text and structure of the statute or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation.

See also *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1993 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993); *Securities Indus. Ass'n. v. Board of Governors of the Federal Reserve Sys.*, 847 F.2d 890 (D.C. Cir. 1988) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984)).

A. Text and Structure

1. Section 1926.800

The underground construction standard, section 1926.800, is a comprehensive standard that addresses virtually all safety and health hazards encountered in tunneling. It includes requirements for ventilation, monitoring of flammable gases, and electrical equipment for tunneling operations. As a threshold matter, it requires that the atmosphere in all underground work areas must be tested for methane and other flammable gases. 29 C.F.R. § 1926.800(j)(1)(iii)(B). If 5 percent of the LEL is detected, steps must be taken to increase ventilation air volume or otherwise control the gas concentration. 29 C.F.R. § 1926.800(j)(1)(vii). If the gas concentration should rise to 10 percent of the LEL in the vicinity of welding, cutting, or other hot work, such work must be suspended until the gas is reduced to less than 10 percent of the LEL. 29 C.F.R. § 1926.800(j)(1)(viii). Should the gas concentration still increase to 20 percent of the LEL in any underground work area or in the air return, then employers are required to withdraw employees to a safe location above ground, except those necessary to eliminate the hazard, and to cut off electrical power, except to "acceptable"⁴

⁴ Section 1926.800(u) defines "accept[able]" as "[a]ny device, equipment, or appliance that is either approved by [the Mine Safety and Health Administration ("MSHA")] and maintained in permissible condition, or is listed or labeled for the class and location under Subpart K of this part."

pumping and ventilation equipment, until the concentration of gas is reduced to less than 20 percent of the LEL.⁵

If (i) air monitoring discloses 10 percent or more of the LEL for methane or other flammable gases in any underground work area for more than a 24-hour period, or (ii) if the history of the geographical area or geological formation indicates that 10 percent or more of the LEL for methane or other flammable gases is likely to be encountered in such underground operations, the tunneling operation is classified as "potentially gassy," 29 C.F.R. § 1926.800(h)(1), and is required to have "acceptable electrical systems, including fan motors" in its ventilation system. 29 C.F.R. § 1926.800(k)(11)(ii).⁶

A tunneling operation is classified as "gassy" under section 1926.800(h)(2) if (i) air monitoring discloses 10 percent or more of the LEL for methane or other flammable gases in any underground work area for three consecutive days, or if (ii) there has been an ignition indicating the presence of gases, or if (iii) "[t]he underground construction operation is both connected to an underground work area which is currently classified as gassy and is also subject to a continuous course of air containing the flammable gas concentration." Section 1926.800(i)(1) requires "gassy" operations to use only "acceptable" equipment. Should a tunneling operation warrant a "gassy" classification, all operations in the affected area must stop until the operation is brought into compliance with all of the requirements for a "gassy" operation, or until the tunneling operation has been declassified to "potentially gassy." 29 C.F.R. § 1926.800(i)(6).⁷ "Gassy" operations may be declassified to "potentially gassy" when air monitoring results remain under 10 percent of the LEL for methane or other flammable gases for three consecutive days. 29 C.F.R. § 1926.800(h)(3).

⁵ Section 1926.800 also requires all tunnels to have: adequate ventilation (29 C.F.R. § 1926.800(k)(1)-(3)), monitors for flammable gases such as methane (29 C.F.R. § 1926.800(j)(1)(iii)(B)), a continuous flammable gas monitor at the front of rapid excavation machines (29 C.F.R. § 1926.800(j)(1)(iv)), use of mobile diesel equipment approved by MSHA (29 C.F.R. § 1926.800(k)(10)(ii)), and the ability to reverse the direction of mechanical air flow (29 C.F.R. § 1926.800(k)(4)).

⁶ "Potentially gassy" operations are also subject to additional gas monitoring requirements, (29 C.F.R. § 1926.800(j)(2)(i)-(v)) including provision for manual electrical shut-down control near the heading (29 C.F.R. § 1926.800(j)(2)(iii)), as well as ventilation systems constructed of fire-resistant materials (29 C.F.R. § 1926.800(k)(11)(i)).

⁷ Employers with "gassy" operations are also required to: post signs warning of the "gassy" classification (29 C.F.R. § 1926.800(i)(3)), prohibit smoking and collect all personal sources of ignition (29 C.F.R. § 1926.800(i)(4)), provide fire watches during hot work (29 C.F.R. § 1926.800(i)(5)), and provide above-ground controls for reversing the air flow (29 C.F.R. § 1926.800(k)(12)).

Section 1926.800(s) of the underground construction standard also refers to Subpart K, which includes sections 1926.407 and 1926.449, as follows:

(s) *Electrical safety.* This paragraph applies in addition to the general requirements for electrical safety which are found in Subpart K of this part.

Sections 1926.800(s)(1) through (3) discuss the requirements for electric power lines, lighting circuits, and oil-filled transformers.

2. Section 1926.407

Section 1926.407, entitled "Hazardous (classified) locations," sets forth the requirements for electric equipment and wiring in locations which are classified based on the properties of the flammable materials present and the likelihood that a flammable or combustible quantity is present. 29 C.F.R. § 1926.407(a). It is part of Subpart K, which sets general electrical standards for employers involved in construction work. It is not specifically directed at tunnels.⁸ There are six hazardous (classified) locations, comprised of Classes I through III, each with Divisions 1 and 2. The Secretary alleges that the cited tunnel is a Class I location because "flammable gases and vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures." 29 C.F.R. § 1926.449. He alleges that it is a Division 2 location because it meets one of the criteria for a Division 2 location:

⁸The specific examples noted in Subpart K for hazardous (classified) locations involve industrial processes where combustible gas is either used or created:

§ 1926.449 Definitions applicable to this subpart.

.....
Class I locations. . . .
 (a) *Class I, Division 1. . . .*

.....
 NOTE: This classification usually includes locations where volatile flammable liquids or liquefied flammable gases are transferred from one container to another; interiors of spray booths and areas in the vicinity of spraying and painting operations where volatile flammable solvents are used; locations containing open tanks or vats of volatile flammable liquids; drying rooms or compartments for the evaporation of flammable solvents; inadequately ventilated pump rooms for flammable gas or for volatile flammable liquids; and all other locations where ignitable concentrations of flammable vapors or gases are likely to occur in the course of normal operations.
 (b) *Class I, Division 2. . . .*

.....
 NOTE: This classification usually includes locations where volatile flammable liquids or flammable gases or vapors are used, but which would become hazardous only in case of an accident or of some unusual operating condition.

[Areas] [i]n which ignitable concentrations of gases or vapors are normally prevented by positive mechanical ventilation, and which might become hazardous through failure or abnormal operations of the ventilating equipment

29 C.F.R. § 1926.449. Here, the Secretary claims that the tunnel is Class I, Division 2 because test borings⁹ indicated the possibility that ignitable concentrations of methane could accumulate in the tunnel which might then become hazardous if the tunnel ventilation failed. Sections 1926.407 and 1926.449 require that such locations have “approved”¹⁰ equipment if combustible levels of gas, which is 100 percent of the LEL, *might* accumulate. If section 1926.800 did not exist, it appears that these provisions would govern here.

3. Preemption of Section 1926.407 by 1926.800

Having examined the text and structure of the two standards, we hold that the provision of sections 1926.407 and 1926.449 are preempted by the provisions of section 1926.800. We reach this conclusion not only because section 1926.800 addresses the same hazard as section 1926.407 but also because these two standards set forth conflicting requirements, rather than complementary ones, as the Secretary contends. We recognize that general safety standards can complement specific standards by filling in the interstices necessarily remaining after the promulgation of the specific standards. *See generally, Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1234 (3d Cir. 1980); *International Union, UAW v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987). Here, however, there is no gap left unregulated by the specific standard, section 1926.800. If an employer simultaneously complied with the two standards at issue here, it would not only be taking different steps to abate the same hazard, but section 1926.407 would effectively preempt section 1926.800.

Perhaps the most striking example of the standards' collision is found in examining section 1926.800's requirements for “potentially gassy” operations against those of the requirements of sections 1926.407(b) and 1926.449. Under section 1926.800, if 10 percent of the LEL of a flammable gas is either monitored for more than a 24-hour period, or is likely to be encountered based on geological history, the tunnel is classified “potentially gassy,” and the *ventilation* equipment must be “acceptable” (*See supra* note 4). If the gas persists at 10 percent of the LEL for three days, the tunnel is classified “gassy,” and *all* equipment throughout the tunneling operation must be “acceptable.” At 20 percent of the LEL, the tunnel is evacuated until gas levels are brought

⁹ Bore holes were drilled along the tunnel route prior to tunnel construction to determine whether methane might be encountered during construction. Methane was detected in 9 of the 20 test bore holes drilled.

¹⁰ While section 1926.407 describes spark-proof equipment as “approved,” section 1926.800 refers to such equipment as “acceptable.”

down below 20 percent of the LEL. The Secretary admits that McNally's tunnelling operation is at most a "potentially gassy" one. Yet, it is clear that all operations defined as "potentially gassy" under section 1926.800 would be Class I areas under section 1926.449 because they are areas in which "flammable gases . . . are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures," and which might become hazardous if the ventilation failed. This classification requires that *all* equipment be "approved." Applying section 1926.407's requirements to McNally's at most "potentially gassy" tunneling operation along with section 1926.800 would require that the tunnel be equipped with the same type of electrical equipment as if it were a "gassy" tunneling operation under section 1926.800.¹¹

The conflict between the standards is also highlighted by analyzing the Secretary's comparison of the interaction of the two standards to a "two-story house," with the first story occupied by section 1926.800 with an initial threshold action level of 5 percent¹² for a "potentially gassy" operation, and the second story occupied by section 1926.407, which he describes as having a higher action level of 100 percent. However, this analogy does not describe the standards' relationship. As we have seen, section 1926.800 requires an employer to take certain steps, from increasing the tunnel ventilation when 5 percent of the LEL is reached up to evacuating the tunnel when 20 percent of the LEL is reached. It also requires gas measurement over time to determine the proper classification of the tunneling operation with such classifications as "potentially gassy" or

¹¹ At oral argument, the Secretary was given the opportunity to describe circumstances under which an employer would be expected to implement the requirements of section 1926.800 for a "potentially gassy" operation independently of the requirements of section 1926.407. The response of the Secretary's counsel was that such a situation could occur if:

the employer knows [the tunnel] . . . can reasonably be expected to have the 10 percent [of the LEL, but] . . . the employer also, for some magic reason, knows for sure that it will never go over 50 percent [of the] LEL. Then that employer wouldn't be subject to approved equipment requirements [of sections 1926.407(b) and 1926.449].

This response suggests that if an employer could only know by "magic" whether a tunnelling operation will never go above 50 percent of the LEL, it is impossible for the employer to know that the tunnelling operation could *never* reach 100 percent of the LEL. It does not affect our conclusion that under section 1926.407, the employer would have to treat every tunneling operation that normally would be classified as "potentially gassy" as if it were a "gassy" tunneling operation under section 1926.800. Of course, at 20 percent of the LEL, long before the Secretary's 50 percent figure is reached, section 1926.800 would have required that electrical power be cut off and the tunnel evacuated.

¹² During oral argument, the Secretary argued that section 1926.800 "starts by requiring the employer to take actions if he detects just 10 percent of the LEL." However, the actual starting point at which the employer must take action is 5 percent of the LEL (*see* section 1926.800(j)(1)(vii)).

``gassy," with each classification noting the types of electrical equipment to be used. Into this full house of provisions designed to prevent methane ignition, the Secretary also would have the employer speculate whether there is a potential for 100 percent of the LEL. If there is, the employer would be required to install approved electrical equipment throughout the tunneling operation regardless of what section 1926.800 would have required.

This is not an isolated example of how the two standards are not additive and complementary as the Secretary alleges, but instead are directly conflicting. Section 1926.800 permits the reclassification of a ``gassy" operation to ``potentially gassy" if gas concentrations diminish, but under Subpart K a tunneling operation could never be declassified from ``gassy" to ``potentially gassy" as permitted by section 1926.800. Section 1926.800 requires ``acceptable" equipment to meet the requirements of either Subpart K or the Mine Safety and Health Administration (``MSHA"), but section 1926.407 only permits equipment approved under Subpart K. We also note that if the Secretary intended that equipment required in Class I, Division II locations also be required for ``potentially gassy" operations, he could have specifically required it in section 1926.800, as he did in section 1926.800(m)(9)(ii), which requires that ``[I]ighting fixtures in storage areas, or within 25 feet

(7.62 m) of underground areas where oil, grease, or diesel fuel are stored, shall be approved for Class I, Division 2 locations, in accordance with Subpart K of this part." Where a drafter includes particular language in one provision but omits it in another, "it is generally presumed that [the drafter] acts intentionally and purposely in the disparate inclusion or exclusion." *See Gozlon-Pertez v. United States*, 498 U.S. 395, 404-405 (1991), (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Nor is section 1926.800's preemption of section 1926.407 forestalled in any way by the language of section 1926.800(s) referring to the general requirements for electrical safety found in Subpart K. The claims that the Secretary makes for this provision might be plausible if it could be read in isolation, but they are not tenable when read together with the remainder of section 1926.800, which, as we have seen, speaks directly to electrical ignition hazards in tunnels. *See Gade v. Natural Solid Wastes*, 112 S.Ct. 2374, 2383-84 (1992)¹³; *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Section 1926.800(s) is consistent with the proposition that a provision in section 1926.800 that specifically addresses a hazard preempts a general provision in Subpart K.¹⁴ Indeed, within the context of the language of section 1926.800 in effect at the time these citations were issued, we find it difficult to read section 1926.800(s) as more than a saving clause. The Secretary's other claims that turn on how section 1926.800 limits the applicability of other standards might have been plausible as well, but for the clear language of certain provisions of section 1926.800 preempting section 1926.407. *See Gade*.

We also find no basis for the Secretary's claim that section 1926.407(b)'s spark-proof equipment requirement is the "only protective approach." Although the measures that must be taken under section 1926.407 certainly provide protection, this is not a case in which a

¹³ In *Gade*, the court quoted an earlier decision which held that the Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Pilot Life Ins. Co. V. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotation marks and citations omitted).

¹⁴ During oral argument, the Secretary agreed that "[w]hat the word 'general' really points to is the fact that [section 1926.800] is a vertical standard, and [section 1926.407] is a horizontal standard." We agree. Where the two standards overlap and conflict, the requirements for tunneling equipment required by section 1926.800 must preempt the general requirements expressed in Subpart K.

hazard is left unaddressed by the more specifically applicable standard. *See, e.g., Williams Enterprises*, 832 F.2d at 570. Section 1926.800, as we have seen, requires employers to take numerous steps to address the hazard. In addition to requiring "acceptable" equipment, the standard requires that potential sources of ignition be extinguished well before the methane reaches combustible levels. Even the presence of 20 percent of the LEL of methane requires employers to withdraw employees, except those necessary to eliminate the hazard, "to a safe location above ground." 29 C.F.R. § 1926.800(j)(1)(ix)(A). Work in the tunnel stops well before the 100 percent of the LEL is reached. In addition, electrical power, except for "acceptable" pumping and ventilation equipment, is cut off to the area endangered by the flammable gas so as to further reduce the chance of electrical ignition of the gas. 29 C.F.R. § 1926.800(j)(1)(ix)(B).

The legislative history of section 1926.800 further clarifies the preemption question.

B. Legislative History

The version of section 1926.800 in effect prior to August 1, 1989, entitled "Tunnels and shafts," expressly required electrical equipment used in tunnel construction to conform to the requirements of Subpart K of Part 1926, which includes section 1926.407.¹⁵ On June 2, 1989, OSHA promulgated the version of section 1926.800 McNally relies on here. Now entitled "Underground construction," it became effective on August 1, 1989. 54 Fed. Reg. 23,824 (1989). In the preamble to the new standard, OSHA stated that "[t]he revised standard clarifies the existing 17-year old standard, covers hazards not effectively addressed previously, and reflects the current technology and methods used in underground construction." *Id.* It classifies tunnels into "gassy" and "potentially gassy" operations and sets out specific requirements for both. OSHA also "recognize[d] that the substantial costs associated with graduating immediately from a non-gassy to a gassy classification [were] not necessary to protect employees where intermediate, less costly measures suffice to abate the hazard." *Id.* at 23,833. This permitted the retention of "protection for employees while relieving the economic burden on employers." *Id.*

The Secretary argues that the legislative history of section 1926.800 demonstrates that the hazardous location classification of section 1926.407 and the underground construction standard are not mutually exclusive. Noting that the former version of the underground construction standard expressly provided that the electrical requirements for construction set forth in Subpart K must be

¹⁵ Paragraph I of the prior version of 29 C.F.R. § 1926.800, in effect until August 1, 1989, stated as follows:

(1) *Electrical equipment.* (1) Electrical equipment shall conform to the requirements of Subpart K of this part.

observed in underground construction, the Secretary claims that he never considered deleting the provision making Subpart K requirements binding on tunnels. He insists that neither the 1974 nor 1983 Notices of Proposed Rulemaking concerning underground construction proposed deleting this relationship between section 1926.800 and Subpart K.¹⁶ He argues that the preamble makes clear that the use of the "potentially gassy" classification was not intended to substantively reduce the obligations of the tunneling industry except to the extent that it permitted the use of "intermediate, less costly measures" where they would "suffice to abate the hazard." *Id.* at 23,831-33.¹⁷

We find no basis in the preamble to the new version of section 1926.800 for the Secretary's claim that the effect of the reference in section 1926.800 to Subpart K did not change. After receiving comments on its proposed rule, OSHA decided to establish an intermediate classification:

OSHA has adjusted the Final Rule so that an underground construction operation where gassy conditions are anticipated would initially be classified as "potentially gassy." Only after the presence of 10 percent of the LEL had continued for three consecutive days would the more stringent classification of "gassy" be required. This phased-in approach allows an assessment to be made of the duration and extent of the flammable gas concentration while providing the opportunity to control or dilute the gas before "gassy" conditions are achieved.

Id. at 23,833. OSHA thus introduced the classification of "potentially gassy" as a middle ground between "gassy" operations and "non-gassy" operations. "Gassy" operations were to have approved electrical equipment. "Potentially gassy" operations were to have approved ventilation equipment only. The "phased-in" approach described in the preamble passage above would be illusory if section 1926.407(b) applied; it requires approved electrical equipment in tunnels that are only "potentially gassy."

The discussion of the costs of implementing the standard in the preamble to the final rule, as well as OSHA's Office of Regulatory Analysis report, *Regulatory Impact and Regulatory Flexibility Analysis of the Underground Construction Standard* (April 5, 1989), also demonstrates that section 1926.800 was intended to preempt section 1926.407. In the preamble, the Secretary lists separately the cost estimates for operations classified as "gassy" and "potentially gassy." 54 Fed. Reg. at 23,848. We cannot imagine why OSHA would have gone to the trouble of noting the costs

¹⁶ The Secretary did not present any witnesses to support this position because as the Secretary's counsel stated during oral argument: "We are the agency. We do not have to call witnesses in our cases to testify as to our intentions as an agency."

¹⁷ The Secretary claimed that McNally would have had its employees use cap lamps instead of meeting the expense of approved equipment throughout the tunnel. Actually, McNally's operations manager Lawrence Lenihan testified that there would not necessarily be a greater cost associated with using Class I electrical equipment in the tunnel because McNally would not have put any lighting in but instead "could have just put everybody in cap lamps like they do in the mines. It would have provided a lot less light and a lot less safe working area."

of employing "acceptable" equipment in the costs of classifying a tunnel as "gassy" if it believed that the equipment was already required by section 1926.407(b). Nor would OSHA have included the costs of employing "acceptable" equipment only in the ventilation systems of "potentially gassy" tunnels if such tunnels were already required to employ "acceptable" equipment throughout the entire tunnel under section 1926.407(b).

The Regulatory Analysis report provides further support for our conclusion. It states OSHA's finding that, under the proposed standard, which did not include the "potentially gassy" designation, compliance costs might have doubled for half of all tunnel projects. *Report* at V-64. The report noted that, "[c]learly, compliance costs of this magnitude would have had a serious impact on the underground construction industry." *Id.* at V-64 to -65. OSHA's report at V-66 notes its support for a gradual phase-in of the requirements based on gas concentrations encountered. The report also includes a revealing chart of requirements on page V-67 that conspicuously omits a requirement of "acceptable" equipment in "potentially gassy" tunnels, but notes they are required in "gassy" tunnels. Moreover, OSHA's 10-page long, detailed report of costs for "potentially gassy" operations does not mention the cost for "acceptable" equipment in "potentially gassy" tunnels. *Id.* at V-70 to -79.

The Secretary argues that in promulgating section 1926.800, he "did not reject the concept that the general electrical standards for construction applied to underground operations wherever gas presented a fire or explosion hazard."¹⁸ The Secretary is correct that he did not expressly reject this concept. However, as he conceded at oral argument, preemption need not be explicit. From the explanation and description in his preamble to the final rule, it is clear that he intended that the revised section 1926.800 address the same hazards that section 1926.407 formerly addressed.¹⁹

¹⁸ The preamble to the current standard expressly states that "[s]ection 1926.800 protects underground construction workers from hazards such as cave-ins, contaminated atmospheres, *fires and explosions*, haulage and hoisting operations and floods." 54 Fed. Reg. at 23,824 (emphasis added).

¹⁹ The Secretary finds fault with the judge's crediting of the testimony of McNally's expert witness Albert Mathews in finding that section 1926.800 preempted section 1926.407. Mathews claimed that "one of the reasons the tunnel standard was promulgated was to eliminate the attempt to classify tunnels under 29 C.F.R. § 1926.407." The Secretary claims that the judge's reliance on Mathews' views was unwarranted because his views were not the official view of the Secretary but those of a geotechnical engineer.

We do not accept Mathews' testimony as the official view of the Secretary. We do, however, note that Mathews' testimony is in agreement with our finding that section 1926.800 preempts the application of section 1926.407.

II. Conclusion

We therefore find that the conflicting requirements that sections 1926.407 and 1926.800 place on employers conducting ``potentially gassy'' tunneling operations preclude the coexistence of these standards. To adopt the Secretary's position here would require us, in effect, to find that section 1926.407 preempts section 1926.800 for ``potentially gassy'' tunneling operations. In these circumstances, section 1910.5(c) requires us to apply the more specific, applicable standard, section 1926.800. Section 1926.407 is hardly nullified by our conclusion. It continues to govern those aspects of electrical safety in underground construction that are not directly addressed by section 1926.800, as well as general electrical safety in all construction.²⁰

After determining that section 1926.800 preempts section 1926.407, we would ordinarily consider whether to amend the citation to allege noncompliance with § 1926.800. *Vicon Corp.*, 10 BNA OSHC 1153, 1156-7, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923, 1981), *aff'd without published opinion*, 691 F.2d 503 (8th Cir. 1982). We do not reach the amendment issue here because there is a lack of evidence to support a finding of a violation of section 1926.800. The Secretary acknowledges that the tunnel construction was at most a ``potentially gassy'' operation, and there is no evidence in the record that McNally failed to meet the requirements for a ``potentially gassy'' operation.

III. Order

For the reasons given above, the decision of the administrative law judge vacating the Secretary's citation alleging a serious violation of 29 C.F.R. § 1926.407(b) is affirmed.

/s/

 Edwin G. Foulke, Jr.
 Commissioner

/s/

 Velma Montoya
 Commissioner

Dated: July 13, 1994

²⁰ Since our examination of the language and structure of the standards settle the applicability issue, we need not consider the Secretary's deference arguments.