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Marshall J. Breger, Recent Developments in OSHA Litigation, 43 LAB. L. J. 687 (1992).

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Recent Developments in OSHA Litigation¹

By Marshall J. Breger²

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After almost a year serving as the Solicitor of Labor, I can attest to the difficult challenges the Department of Labor will face and must overcome in the years ahead if it is to continue to be a dynamic and positive force in setting our Nation's labor policy. Indeed, I believe that current rulemaking and enforcement litigation on behalf of the Occupational Safety and Health Administration foreshadows significant issues the Department must resolve in the near future. This article focuses on two such OSH Act³ issues of current prominence: one, litigation challenges to OSHA rulemaking; and two, the use of voluntary health and safety audits in OSHA enforcement proceedings.

Rule Making Litigation

With respect to OSHA rulemaking, there is growing concern over the trend by the federal courts reviewing OSHA stan-

dards to demand from OSHA increasingly rigorous and exhaustive justifications of its rulemaking choices.⁴ Together with the apparently inevitable legal challenge that seems to follow the issuance of any OSHA standard, that trend, if unchecked, may lead to a future where OSHA's ability to regulate health and safety standards in our changing workplace is severely impaired. If OSHA and its lawyers do not find the elixir that causes federal judges to accept the agency's defense of its standards, to fulfill its statutory mandate, OSHA will likely have to change the way it approaches the standard setting function. It is time for OSHA to reflect deeply on its administrative rulemaking processes, and it is time as well for the private sector to reflect on what kind of rulemaking litigation it chooses to initiate.⁵

¹ Drawn from remarks at the Occupational Safety and Health Review Commission Annual Meeting in Scottsdale, Arizona, September 1, 1992. This article contains the personal views of the author and nothing herein should be construed as stating the position of the U.S. Government, the U.S. Department of Labor, or the Office of the Solicitor of Labor.

² I would like to thank for their insightful editorial assistance in the preparation of this article Ann Rosenthal and Barbara Werthmann, Counsels for Appellate Litigation, Sue Wolff, Senior Trial Attorney, and Nicholas Levintow and Bruce Justh, Staff Attorneys, Occupational Safety and Health Division, Office of the Solicitor of Labor.

³ Occupational Safety and Health Act of 1970, 29 USC 651-678 (1988 and Supp. H 1990).

⁴ *AFL-CIO v. OSHA*, 965 F2d 962 (11th Cir 1992), 1992 OSHD ¶ 29,735 (air contaminants); *UAW v. OSHA*, 938 F2d 1310 (DC Cir 1991), 1991 OSHD ¶ 29,399 (lockout/tagout); *UAW v. Pendergrass*, 878 F2d 389 (DC Cir 1989), 1989 OSHD ¶ 28,564 (formaldehyde); Building & Construction Trades Dept., *AFL-CIO v. Brock*, 838 F2d 1258 (DC Cir 1988), 1988 OSHD ¶ 28,134 (asbestos); National Grain

& Feed Ass'n v. OSHA, 858 F2d 1019 (5th Cir 1988), 1988 OSHD ¶ 28,337 (grain dust).

⁵ This dilemma is by no means unique to OSHA. Recent commentary is replete with references to the "ossification of rulemaking" [Peter L. Strauss, "Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community," 39 *UCLA L. Rev.* 1251 (1992)] and even to the "abandonment" by agencies of regulatory efforts to improve safety [Jerry Mashaw & David Harfst, "Regulation and Legal Culture: The Case of Motor Vehicle Safety," 4 *Yale J. on Reg.* 257, 316 (1987), ascribing significant responsibility for the National Highway Transportation Safety Administration's shift in emphasis from "technology-forcing" safety regulation to recall adjudications to the inability of the agency to defend its rules successfully against pre-enforcement challenges]. But the application of the "substantial evidence" test, rather than the relatively less stringent "arbitrary and capricious" test, to OSHA rulemaking review proceedings places the agency in a particularly unenviable position. See Shapiro & McGarity, "Reorienting OSHA: Regulatory Alternatives and Legislative Reform," 6 *Yale J. on Reg.* 1, 9-10 (1989).

Since 1971, OSHA has conducted about 70 notice-and-comment safety or health rule makings. Most of them addressed specific safety hazards like fire, vehicle roll-over, or excavation hazards.⁶ Some were "generic" in the sense they addressed health and safety hazards that are found in virtually any workplace—examples would be the Hazard Communication Standard that requiring that workers be informed of the hazards of chemicals present at their workplaces and the Lockout/Tagout Standard requiring that power sources be de-energized whenever equipment that could accidentally be started up is being serviced or repaired.⁷ Twenty-five of those rule makings focused in a very comprehensive way on specific air contaminants like lead, asbestos, coke oven emissions, benzene, formaldehyde, vinyl chloride, and cotton dust.⁸ Most of these comprehensive air contaminant rulemakings set permissible exposure limits—the PELs. But in addition, they also included a range of supporting ancillary provisions such as medical monitoring, training, housekeeping, hygiene, respirator use and maintenance, and medical removal protection.

Three judicial decisions have provided the framework for much of the litigation that has shaped OSHA's rulemaking efforts: the Supreme Court decisions in the benzene⁹ and cotton dust¹⁰ cases and the D.C. Circuit's first lead decision.¹¹ Briefly summarized, the benzene decision held that section 3(8) of the OSH Act¹² required OSHA to establish that a hazard it chose to regulate posed a significant risk

absent regulation and that the risk would be ameliorated by the new standard. The cotton dust ruling held that section 6(b)(5)¹³ required that health standards "assure," to the extent "feasible," that no employee suffers material impairment of health. The lead case included a remand so that OSHA could consider the standard's feasibility for each affected industry sector.

The sad fact is that whenever the agency regulators sent the final rule to the Federal Register, thinking they had finished the job, they had to curtail their celebrations, because the inevitable petition for review arrived before the congratulatory speeches were finished. These legal challenges typically came from both sides—industry claiming the standard was over-protective and too costly; labor and public interest groups arguing that the standard was not protective enough.¹⁴ Thus, in almost every case, a rulemaking—3 or 4 years in the making—became little more than the opening volley for a lawsuit. And then another year, two, or three was taken up by the inevitable court challenge.

The net effect of all this was two-fold. First, OSHA's resources were concentrated on a relatively small pool of health hazard rule makings—even though one of Congress' overriding purposes in creating OSHA was to establish an agency that could evaluate and if necessary limit exposures to what was already, in the 1960s, a burgeoning universe of air contaminants

⁶ See 29 CFR 1910.37(n), .38, .108, .156, .57, .57(b)(1), .58, .58(b)(3) and (4), .159, .160(b)(1) and (c)(1)(iv), .160-.165 (fire); 29 CFR 1928.51, .52, .53 (vehicle roll over); 29 CFR 1926.650-.652 (excavation).

⁷ 29 CFR 1910.1200 (hazard communication), 29 CFR 1910.147 (Lockout/Tagout).

⁸ 29 CFR 1910.1025 (lead), 1910.1001 (asbestos), 1910.1029 (coke oven emissions), 1910.1028 (benzene), 1910.1048 (formaldehyde), 1910.1017 (vinyl chloride), and 1910.1043 (cotton dust).

⁹ *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 US 607 (1980), 1980 OSHD ¶ 24,570.

¹⁰ *American Textile Mfrs. Institute v. Donovan*, 452 US 490 (1981), 1981 OSHD ¶ 25,457.

¹¹ *United Steelworkers v. Marshall*, 647 F2d 1189 (DC Cir 1980), 1980 OSHD ¶ 24,717, cert denied 453 US 913 (1981).

¹² 29 USC 652(8) (1988 and Supp. H 1990).

¹³ 29 USC 655(b)(5) (1988 and Supp. H 1990).

¹⁴ See, e.g., *Building and Construction Trades Dept. v. Brock*, 838 F2d 1258 (DC Cir 1988), 1988 OSHD ¶ 28,134, involving challenges by both unions and industry groups to OSHA's 1986 asbestos rule.

in need of control.¹⁵ Second, OSHA rulemaking moved at a near glacial pace; as the number of issues and the level of evidentiary detail for each rulemaking expanded, so did the time and resource investment and the amount of time from the Notice of Proposed Rulemaking to final rule grew¹⁶—only 27 health standards were promulgated between 1971 and 1988.

In 1988, therefore, OSHA attempted to address the problem of lengthy, comprehensive, single-substance rule makings by regulating hundreds of air contaminants in a single rulemaking—the PEL update project.¹⁷ The concept was that OSHA would limit the rulemaking to setting exposure limits only. There would be no ancillary provisions like training, medical removal protection, or medical monitoring. In selecting exposure limits, OSHA would rely heavily on the scientific consensus on health effect issues of groups like the American Conference of Governmental Industrial Hygienists and the National Institute on Occupational Safety and Health. Finally, the standard would reflect practical realities of industrial life, especially the facts that workplaces typically have more than one contaminant in the air and that the ventilation, house-keeping, and isolation techniques that can control one contaminant can probably control several.

After a refreshingly expedited rulemaking—18 months—OSHA issued PELs for 428 air contaminants;¹⁸ it set lower limits for 212 previously regulated substances and new limits for 164 previously unregu-

lated substances. The inevitable petitions for review were filed by both labor and employer interests, and in July 1992, the Eleventh Circuit issued a decision that accepted many of the policies and strategies OSHA applied, including OSHA's right to address multiple substances in a single rulemaking, its right to defer ancillary measures to another day, and its determination that some of the less dramatic health effects of air contaminants, like sensory irritation, are material enough to justify regulation.¹⁹ Unfortunately, and quite unexpectedly, the court also decided to vacate the *entire* standard, even though the vast majority of the PELs were not specifically challenged by anybody at any time—not in the rulemaking and not in the litigation.

The court thought vacatur was necessary because of what it perceived as "shortcomings" in OSHA's analysis supporting the PELs. First, OSHA adopted the new PELs based on findings that they substantially reduced significant risk of harm and were feasible to implement. OSHA did not, however, attempt to quantify the precise risks presented by exposure to each of the substances regulated,²⁰ nor did it necessarily search for the most protective PEL feasible. The court held that OSHA was compelled by sections 3(8) and 6(b)(5) of the statute to do both. It also held that OSHA's decision to assess feasibility overall within large industry groupings rather than for each substance in each industry sub-sector where it may be found was incompatible with a statutory obligation to make specific feasibility

¹⁵ Legislative History of the Occupational Safety and Health Act of 1970, 91st Cong. 2d Sess. 142-143 (Comm. Print).

¹⁶ Compare OSHA's first asbestos standard, 37 Fed. Reg. 11,318 (June 7, 1972), a preamble covering two Federal Register pages promulgated six months after the proposal, the current rule, 51 Fed. Reg. 22,612 (June 20, 1986), and a 120-page preamble, promulgated 31 months after the proposal. The first standard was upheld in its entirety on appellate review, *IUD v. Hodgson*, 499 F2d 467 (DC Cir 1974), while the more recent one generally survived, but has been remanded for further consideration that has so far resulted in two amendments, with 15-page and eight-page preambles, and a new round of notice and comment rulemaking

that has already consumed more than five years. Building and Construction Trades Dept., AFL-CIO, 838 F2d 1258 (DC Cir 1988), 1988 OSHD ¶ 28,134.

¹⁷ 53 Fed. Reg. 20,980 (June 7, 1988); 54 Fed. Reg. 2363, 2372, 2374 (Jan. 19, 1989).

¹⁸ 54 Fed. Reg. 2332 et seq. (Jan. 1989) (codified at 29 CFR 1910.1000 (1991)).

¹⁹ 965 F2d 962, 972, 985, 975.

²⁰ OSHA in this case utilized primarily direct evidence of the harm caused by exposure to reported levels of the regulated substances, rather than relying on mathematical models to reach more precise-seeming significant risk assessments. 54 Fed. Reg. 2364 (Jan. 1989).

findings. Because, in the court's view, these conceptual mistakes permeated the entire rulemaking, the entire standard had to be vacated.

In vacating the entire standard, the panel appeared to violate the basic principle that injunctive relief should be no more burdensome than is necessary to provide complete relief to the plaintiff.²¹ No court has a roving charter to correct supposedly invalid action wherever it may occur; courts are limited to taking steps to provide full relief to those who invoked its jurisdiction.²² In this case, none of the industry parties had standing to object to *all* of the PELs, and the AFL-CIO, which might have had standing to do so, was arguing for stricter limits for some substances and for inclusion of ancillary provisions, not for rescission of the entire standard.²³

There are, of course, many ironies here. The court found vacatur necessary because it believed that OSHA exceeded its legislative mandate—the statutory requirements to find significant risk and to set feasible standards. Thus, the court eliminated a standard estimated to prevent 700 deaths and 55,000 illnesses a year in the name of legislative mandate. If this decision stands,²⁴ OSHA air contaminant standards will revert to the original 400 or so ACGIH threshold limits from 1968 (adopted by OSHA in 1971) as well as 25 comprehensive substance-specific standards promulgated by OSHA since 1971. The ACGIH, however, has long since moved beyond its 1968 findings and issued over 600 threshold limits, many based on more recent evidence and stricter than the original 1968 limits.²⁵

And it is not only the judicial perception that the Act imposes rigorous demands for specific findings to justify *health* standards that has made it more difficult for OSHA to promulgate standards. The D.C. Circuit's lockout/tagout decision²⁶ could also have a significant impact on the agency's ability to issue *safety* standards.

Historically, safety rulemaking has been relatively noncontroversial. The major judicial decisions reviewing OSHA rules involved health standards. Most safety standards were not even challenged in court, and only one—grain dust—was seriously claimed by industry to be unduly burdensome.²⁷ One reason for this is that safety standards are generally much less expensive than health standards. Moreover, the benefits of safety rules—the elimination of *immediate* deaths and injuries—are more tangible than the benefits of health rules, which are usually designed to prevent exposures that will lead to illness and death in the *future*.

It, therefore, came as a surprise when the D.C. Circuit, in the lockout/tagout decision, suggested that OSHA's *safety* rulemaking authority might be so unrestrained as to create a constitutional problem. Since section 6(b)(5) applies only to *health* standards, there is no statutory requirement that OSHA set the most protective standard that is feasible when issuing *safety* standards. The lockout/tagout court was concerned that, without 6(b)(5) as a constraint, OSHA was interpreting its safety rulemaking authority as giving it unbridled discretion, once "significant risk" is found, to make whatever choice it wished: setting safety standards so rigorous that they take industry to the verge of economic ruin, doing nothing at

²¹ *Califano v. Yamasaki*, 442 US 682, 702 (1979).

²² *Marbury v. Madison*, 5 US (1 Cranch) 137, 175-176 (1803).

²³ *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 US 59, 78-80 (1978).

²⁴ Petitions for reconsideration of the decision have been filed by the Secretary of Labor and the Inter-Industry Wood Dust Coordinating Committee.

²⁵ 54 Fed. Reg. 2372 (Jan. 19, 1989); 53 Fed. Reg. 20,963, 20,967 (June 7, 1988).

²⁶ *United Automobile Workers v. OSHA*, 938 F2d 1310 (DC Cir 1991).

²⁷ *National Grain & Feed Ass'n v. OSHA*, 858 F2d 1019 (5th Cir 1988).

all, or doing anything in between. This vast range in which OSHA could operate, unrestrained, the court thought, by either statutory criteria or by self-imposed restraints, led to its concern that Congress's delegation of authority to OSHA was over broad unless OSHA adopted a narrower view of its safety rulemaking authority. The court went on to suggest that cost-benefit analysis would be one narrowing criterion that could cabin OSHA safety rulemaking authority, but it did not *mandate* that OSHA take any particular cost benefit route. Instead, it remanded for the agency to identify "intelligible principles" that control its safety rulemaking discretion.

After the lockout/tagout decision, OSHA issued the Process Safety Management Standard (PSM). In the preamble to the PSM standard, OSHA explained why it believed its safety rulemaking authority was already sufficiently constrained to avoid an over broad delegation problem. For example, OSHA explained that it does not view the requirement that standards be feasible as permitting it to push industries to the "verge of economic ruin . . . It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting employees and is consequently unable to comply with new standards as quickly as other employers." Since OSHA's rule making actions must be consistent with the rulemaking record, including the evidence and arguments presented by the proponents of a standard, a decision to do nothing in the face of a rulemaking record that compels action would invite reversal by a reviewing

court. A petitioner in the lockout/tagout case recently filed a motion claiming that OSHA had been dilatory in responding to the court's remand to identify "intelligible principles" that control its safety rulemaking discretion and asked for a whole or partial stay of the lockout/tagout standard to give OSHA an incentive to comply. OSHA opposed and filed a motion asking the court to dissolve the remand on the basis that OSHA had adequately addressed the remand issues: the over broad delegation issue had been answered in the PSM preamble, and all other issues had been addressed in a supplemental brief. The court denied both motions, stating with respect to the over broad delegation issue that OSHA's actions on the separate PSM rule cannot be used to decide whether the lockout/tagout standard conformed to law.²⁸

These recent decisions are best seen as the culmination of the past twenty years of litigation. Over the years, the relatively general terms of the Act—that standards be reasonably necessary or appropriate; that health standards eliminate significant risk to the extent feasible; that OSHA findings be conclusive if supported by substantial evidence in the record as a whole²⁹—have come to be construed with extraordinary elaboration and exactitude. Thus, although the Eleventh Circuit's decision to vacate the entire PELs standard was drastic and unforeseeable, its insistence on the same level of rigor for each of the 428 risk and feasibility determinations normally provided in a substance-specific standard is less surprising.³⁰ There have certainly been other appellate court decisions calling for a very high level of specificity in the record and the

²⁸ Process Safety Management Standard, 57 Fed. Reg. 6356 (to be codified at 29 CFR 1910.119). See *IUD v. Hodgson*, 499 F2d 467, 478 (DC Cir 1974) 1973-74 OSHD ¶ 17,618; 29 USC 655(f) (1988 & Supp. II 1990); 5 USC 553 (1988 & Supp. II 1990); *United Automobile Workers v. OSHA*, Nos. 89-1559, 89-1657, 90-1533 (DC Cir October 6, 1992) per curiam opinion denying petitioner's motion to enforce judgment and OSHA's motion to dissolve remand.

²⁹ 29 USC 652(8), 655(b)(5), 655(f) (1988 and Supp. II 1990).

³⁰ See John M. Mendeloff, *The Dilemma of Toxic Substance Regulation: How Over Regulation Causes Under Regulation at OSHA* (1988), 237, urging the necessity of a process similar to OSHA's PELs project but expressing concern that "changing the exposure limits for a hundred substances and adopting limits for two-hundred new ones would be impossible given current rule-making requirements."

agency's analysis. Thus, while the D.C. Circuit's first lead decision upheld OSHA's significant risk and other health related findings, it stayed the standard's engineering control requirement during a remand for the agency to make specific feasibility determinations for 47 industries where OSHA had determined that, because exposures were generally low, compliance would require "very simple" engineering controls. The stay for 41 of those industries was finally lifted in 1990. The remaining six industries challenged OSHA's determinations that the standard was feasible for them, and the agency was forced into another round of litigation in which it defended—successfully in five out of the six cases—its conclusion that compliance with the standard is feasible for industry sectors as small as two companies in one case. The court, however, remanded yet again so that OSHA could reconsider its finding that compliance with the standard is also feasible for the 16-company brass and bronze ingot manufacturing industry.³¹

This judicial tendency to undertake an extremely rigorous analysis—indeed what some may call a "hard look" analysis" when it comes to OSHA cases—even while engaging in *Chevron*³² deference in other areas of administrative law—raises serious questions for the future of the OSHA regulatory process, as well as that of other agencies. Professor Richard Pierce uses the example of Federal Energy Regulatory Commission rulemaking to illustrate the contention that "judicial demands that agencies employ a synoptic approach to the fact-finding and reasoning process leading to a policy decision have so increased the resources that agencies must devote to a rulemaking, the years required to complete a rulemaking, and the probability of judicial reversal at the end

of that long and expensive process, that many agencies have abandoned their prior efforts at systematic policy making." Professor Pierce argues that the Supreme Court should "reduc[e] the degree of discretion reviewing courts now enjoy" by reducing the permissible scope of the adequate consideration doctrine as at least a partial solution to this problem.³³

While one may stand in awe of OSHA's good faith efforts to elaborate in excruciating detail every subtle nuance of its ratiocination process—every twist and turn of the rulemaking record—in order to satisfy judicial commands for "reasoned" decision-making, from a litigation perspective, the more detail provided, the more grist for a lawyer to find possible flaws. Professor Pierce has argued that recent rulemaking decisions "seem to send the message that the price of judicial acquiescence in an agency policy decision is detailed consideration of every alternative that might strike the fancy of a particular judge."³⁴ From a policy perspective, 600-page rule makings may mean better analyses, or they can merely confuse the forest with the trees (using up, one might add, a lot of forests). It is not clear that this green eye shade approach always leads to better regulations, or even ensures "searching and careful" review.

Given this troubling background, where does OSHA go from here? The plain fact is that appellate courts have increasingly disregarded the Supreme Court's admonition in the cotton dust case "not [to] impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."³⁵ As one noted commentator on administrative law has stated in an analogous context: "the court displayed a remarkable ability to sever the aorta of [a Congressionally mandated national policy] in order to repair a per-

³¹ 647 F2d at 1301, 1311. *American Iron and Steel Institute v. OSHA*, 939 F2d 975, 993 (DC Cir 1991), 1991 OSHD ¶ 29,406.

³² *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 US 837 (1984).

³³ Richard J. Pierce, Jr., "Unruly Judicial Review of Rulemaking," *Nat. Resources & Environment* (Fall 1990), 23.

³⁴ Pierce, *supra*, at 49.

³⁵ 452 US at 513 (internal quotes and citations omitted.)

ceived defect in a capillary."³⁶ It is possible, of course, that the judicial pendulum could swing back to more deference to agency expertise and policy discretion than has been accorded in recent years.³⁷ On the other hand, the pendulum might simply come to rest, with neither increase nor decrease in judicial scrutiny. And, at least theoretically, the courts could narrow even more their deference to agency expertise and policy discretion, since all expertise and policy issues are heavily freighted with factual aspects suitable for judicial review.³⁸

The regulated community also has a great deal to say about the future course of OSHA rulemaking simply by the litigation it initiates. On that score, industry needs to decide whether employers are really better off by precipitating litigation leading to a PELs-type decision. After all, in the OSHA context, unlike the situation facing other regulatory agencies, when there is no standard in place, the general duty clause applies.³⁹ By its nature the general duty clause is less consistent in its effects on industry than are standards.⁴⁰ From the employer perspective, uniformity is desirable for many reasons. Indeed, many employers supported the OSH Act in the first place out of a desire for nationwide uniformity that would eliminate competitive and other disadvantages among employers subject

to varying state and local health and safety laws. And a court order vacating a standard not only removes that standard from the scene, it diverts OSHA resources from the development of other unifying regulations when OSHA shifts resources to comply with a remand or to salvage litigated standards with supplemental or corrective rulemaking.

In the same vein, on the labor and public interest side, one cannot help but think of two adages: Be careful what you wish for, you may get it; do not let the best be the enemy of the good. Labor and public interest groups have challenged virtually every health standard OSHA has issued in recent years—even though I assume they would have agreed that the standards in question provided significant protection. The purpose of these labor and public interest lawsuits appeared to be fine-tuning, to add protections, and it may be that these additional protections were significant. But, by any realistic measure, they were only add-ons to the major health benefits of the standard under attack. Further, petitions that succeed in eliciting an order to the agency to consider additional measures all too often also succeed in generating satellite litigation about the pace of the remand, or whether OSHA's remand activity is good enough.⁴¹ We must endeavor to ensure that the fine-tuning of a handful of stan-

³⁶ Pierce, supra., at 23, 25. The article argues that damage was done by overzealous judicial reviewers to the Federal Energy Regulatory Commission's efforts to establish national natural gas pricing policies, and notes similar impediments faced by other agencies, including OSHA.

³⁷ Several commentators have urged that the Supreme Court or Congress require such a shift. See Ashley C. Brown, "The Over judicialization of Regulatory Decision Making," *Nat. Resources & Environment* (Fall 1990), 20; Ronald M. Levin, "Understanding Unreviewability in Administrative Law", 74 *Minn. L. Rev.* 689 (1990); Peter L. Strauss, "Considering Political Alternatives to Hard Look Review," 1989 *Duke L. J.* 538. But see Cass R. Sunstein, "On the Costs and Benefits of Aggressive Judicial Review of Agency Action," 1989 *Duke L. J.* 522 (concluding that aggressive judicial review is beneficial).

³⁸ Without commenting here on the merit of this view, it is interesting to note that the PELs court stated that legislative amendment might be the only practical way for OSHA to make major strides towards more efficient rulemaking, *AFL-CIO v. OSHA*, 965 F2d 962, 987 (11th Cir

1992), and OSHA reform legislation was an issue in the last congress. See H.R. 3160, 102d Cong., 1st Sess. (1991) and H.Rep. No. 663 (Part I), 102d Cong., 2d Sess. (1992); S. 1622, 102d Cong., 1st Sess. (1991) and S.Rep. No. 453, 102d Cong., 2d Sess. (1992).

³⁹ 29 USC 654(a)(1) (1988) (Supp. II 1990).

⁴⁰ *International Union UAW v. General Dynamics Land Sys. Div.*, 815 F2d 1570 (DC Cir), 1986-87 OSHD ¶ 27,873, cert. denied, 484 US 976 (1987).

⁴¹ Between the time the D.C. Circuit remanded the ethylene oxide standard to OSHA to consider adoption of a short term exposure limit, *Public Citizen Health Research Group v. Tyson*, 796 F2d 1479 (DC Cir 1986), 1986-87 OSHD ¶ 27,640, and promulgation of such a limit two years later, 53 Fed. Reg. 11,414 (April 6, 1988), petitioners complained repeatedly to the court that OSHA's remand activity was not proceeding quickly enough. See, e.g., *Public Citizen Health Research Group v. Brock*, 823 F2d 626 (DC Cir 1987), 1987 OSHD ¶ 27,985. Other interim orders were unreported.

dards does not end up occupying vast tracts of OSHA resources and displacing rulemaking initiatives for other serious hazards.

Voluntary Compliance Audits

An area of growing legal and policy concern is the question of OSHA's access to and use of internal safety and health audits performed by an employer. During the course of an agency investigation of the International Paper Company's plant in Selma, Alabama, the OSHA compliance officer uncovered evidence of numerous possible violations of several safety standards. In pursuing that evidence, OSHA also learned of a company-wide Safety Compliance Audit Program, and the Department delivered a written request to the company seeking any safety compliance audits and accident investigation reports for the three previous years and also requested the safety and maintenance work orders for a one-month period in the current year. The company refused to provide any of the requested documents.

The Department then issued a subpoena seeking the same documents. The company ultimately provided all the subpoenaed documents except for the safety compliance audits. The Secretary sought enforcement of the subpoena in United States District Court, and the company resisted partly on the legal ground that the Secretary's subpoena authority in section 8(b) of the Act does not permit the Secretary to subpoena voluntary em-

ployer self-audits.⁴² The Department pointed out that the Secretary's subpoena authority under section 8(b) is stated in the broadest terms possible, and is not qualified by any other terms in the Act. The drafters of the Act recognized the need for broad subpoena powers, since the Act represented an entry by the government "into an area of broad national responsibility, [and] corresponding authority must be delegated to the Secretary in order that he may carry out this responsibility . . . [The Act] grants the Secretary of Labor a subpoena power of books, records and witnesses—a power which is customary and necessary for the proper administration and regulation of an occupational safety and health statute."⁴³

The Department also pointed to an extensive body of case law establishing that section 8(b) is not limited by any other terms of the Act.⁴⁴

The most intriguing argument raised by the company, and one which this section of the article will focus on, was based on policy concerns: that producing these documents would have a chilling effect on its voluntary efforts to comply with the OSH Act. The district court held, clearly correctly, that such arguments were properly addressed to the policy making authority of the Secretary and were no defense to the exercise of the subpoena authority under section 8(b)⁴⁵ of the Act. It enforced the subpoena.⁴⁶

During the course of this litigation, major employer organizations expressed their

⁴² Section 8(b) authorizes the Secretary "[i]n making his inspections and investigations under this Act [to] require the attendance and testimony of witnesses and the production of evidence under oath." 29 USC 657(b).

⁴³ Sen. Comm. on Labor and Public Welfare, Occupational Safety and Health Act of 1970, H.R. Rep. No. 1291, 91st Cong., 2d Sess. 22 (report accompanying H.R. 16785), reprinted in Staff of Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 852; see *id.* at 152 (report accompanying S. 2193).

⁴⁴ See *Dole v. Trinity Industries, Inc.*, 904 F.2d 867, 871-74 (3d Cir), 1990 OSHD ¶ 28,839, cert den 111 S.Ct. 555 (1990) (subpoena authority not limited to scope of employee complaint); *Donovan v. Union Packing Co. of Omaha*, 714 F.2d 838, 839-40 (8th Cir 1983), 1983 OSHD ¶ 26,643 (sub-

poena authority not limited to comprehensive inspections, subpoena authority not dependent on warrant); *Marshall v. American Olean Tile Co.*, 489 F.Supp. 32 (ED Pa 1980), 1980 OSHD ¶ 24,337, affirmed 636 F.2d 1209 (3d Cir 1980) (subpoena authority not limited by six-month statute of limitations for issuance of citations); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 574-75 (3d Cir 1980), 1980 OSHD ¶ 24,879 (subpoena authority not limited by NIOSH regulation); *Dole v. Bailey*, No. CA3-89-2539-D (ND Tex 1990), 14 OSHC (BNA) 1534, 1536 (subpoena authority not limited but augmented by OSHA's Field Operations Manual).

⁴⁵ 29 USC 657(b) (1988 and Supp. II 1990).

⁴⁶ *Martin v. Hammermill Paper Div., International Paper Co.*, 1992 OSHD ¶ 29,800 (ED Ala July 24, 1992).

dismay over the subpoena enforcement to the Department. The legal and policy issues underlying this case will continue to be a significant source of discussion. Primarily, it needs to be emphasized that the debate is not over the Department's legal right of access to this information, which it incontrovertibly has, but over the use to which the audit information will ultimately be put.⁴⁷ In addition, it should be made clear at the outset that the debate does not directly concern records or information required to be kept by statute or regulation. Section 8(c)(1) of the Act⁴⁸ authorizes the Secretary to impose record-keeping requirements by regulation "as necessary or appropriate." This statutory authorization expressly provides that such regulations may require employers to conduct periodic inspections. As to records of self-inspection required to be maintained by regulation, therefore, it seems clear that the Secretary has a free hand to review this information.

The theoretical issues can be fairly said to fall into three categories. Most immediately, there is the question of process: how should OSHA's policy regarding internal safety and health audits be developed? Secondly, there are definitional issues: what kinds of information are involved? Finally, there are mutuality issues: what are the reasonable trade-offs among employers, employees, and OSHA to achieve voluntary compliance with the OSH Act and at the same time to preserve essential enforcement incentives? It is not my purpose to offer solutions to any of these issues, but instead to explore the major questions which must be addressed in order to reach those solutions.

Consideration of these issues must be informed by recognition that achievement of the OSH Act's goal of a safe and healthful workplace for all employees depends primarily upon employers' voluntary compliance with the Act. Unlike Agriculture's meat-inspection programs⁴⁹ or MSHA's mine-inspection program,⁵⁰ OSHA does not have and will never have compliance officers in every workplace. On the other hand, voluntary compliance with the law is a fundamental premise of our whole system of government "of laws, not of men."⁵¹ Therefore, platitudes are not likely to be helpful in reaching concrete solutions to these difficult questions.

Turning now to the first issue of process, namely, how should OSHA's voluntary compliance policy be developed, the fundamental question is whether "case-by-case" or "step-by-step" development is preferable to a systematic articulation. Reflecting our historical bias towards "common law" issue development, for the first 22 years of OSHA history, a step-by-step process has been utilized. Its policies regarding self-audits have run the gamut from mandated self-audits in such cases as the lead and process safety management standards to agreed audits in citation settlement agreements to the voluntary audits in the formal Voluntary Protection Program (VPP).⁵² This step-by-step process has the distinct benefit of building on prior experience in formulating the evolution of legal policy.

There are at least three affected constituencies. There is the employer community, which ranges from large corporations with substantial resources devoted to safety and health programs to small em-

⁴⁷ The subpoena power of Section 8(b), in addition to supporting the Secretary's enforcement program, is used to obtain data for future OSHA standards, see *Marshall v. Olean Tile Co.*, 489 FSupp 32 (ED Pa), affirmed 636 F2d 1209 (3d Cir 1980), and to assist the Secretary of Health and Human Services and NIOSH in carrying out research investigations. See *General Motors Corp. v. NIOSH*, 636 F2d 163 (6th Cir 1980), 1981 OSHD ¶ 25,027; *United States v. Allis-Chalmers Corp.*, 498 FSupp 1027 (ED Wis 1980), 1980 OSHD ¶ 24,666.

⁴⁸ 29 USC 657(c)(1) (1988 and Supp. II 1990).

⁴⁹ 21 USC 603 (1988 and Supp. II 1990).

⁵⁰ 30 USC 813 (1988 and Supp. II 1990).

⁵¹ *Marbury v. Madison*, 5 US (1 Cranch) 137, 163 (1803).

⁵² 29 CFR 1910.1025(n)(1)(lead); 29 CFR 1910.119(o)(PSM); 47 Fed. Reg. 29,025 (1982) (VPP program).

employers who have far less intensive programs, if any at all. The employees who are the protected class under the statute may be represented by knowledgeable and active unions, more indirectly by public interest groups, or not at all. Finally, the Department's various enforcement agencies have a responsibility to protect the integrity of the statutes they implement and promote compliance with the agency's regulatory policies. Providing adequate opportunity for input to all these interested groups is not an easy task.

Turning now to the constellation of "definitional" issues, the general question is what kind of employer-generated information should be included in any OSHA policy on self-audits? Does any kind of employer inquiry into its safety and health practices qualify or should some standards be articulated? For example, in 1989, OSHA published Safety and Health Program Management Guidelines.⁵³ The guidelines call for a comprehensive program of work site analysis, including (1) baseline and update surveys of working conditions, operations, and job hazards, (2) periodic self-inspections, (3) accident and "near-miss" investigations, and (4) an analysis of injury and illness trends over time. Should OSHA policy vary according to whether an employer's audit complies with these guidelines? Are the inquiries of safety and health committees covered? Insurance company investigations? Consultant's reports? Should the policy vary according to whether employees participate in or have access to the audits? Should employees and employee representatives participate in some fashion in the decision on release of the audits? Should OSHA's definitions be consistent with those of other agencies?

One agency that has adopted a general policy on self-audits, the Environmental Protection Agency (EPA), has chosen to define these issues narrowly to exclude

from the policy any activities required by law or regulation. Further caveats limit the covered self audits to those that are "systematic, documented, periodic, and objective" reviews of facility operations related to meeting environmental requirements. All monitoring requirements or results required by law, regulation, or permit fall out of the definition. The self-audits covered by the policy will be requested only if deemed necessary to accomplish EPA's statutory mission, and the policy does not apply at all to any documents or information deemed relevant to any administrative or judicial proceedings.⁵⁴

Another definitional issue involves how such a policy would relate to information which employers are independently required to maintain. For example, the lead standard requires that employers perform a number of self-audits directed at specific issues, such as air lead levels, respirator usage, and engineering controls. Is the information gathered during these audits to be treated as though it is all mandated by the standard or can it be segregated into information required by law and information voluntarily acquired? Certain employers, such as those covered by the process safety management standard, are required by law to conduct comprehensive safety and health audits: Should these employers be excluded from the policy altogether?

Finally, there are the "mutuality" issue: that is the bargain that may be struck between OSHA and employers in order to encourage active voluntary compliance with the Act. The obvious encouragement is that if the employer discovers a problem and corrects it before OSHA ever shows up, it will not be cited or penalized for violations. That in itself is a significant incentive for voluntary audits, despite the contrary claims of some who have argued that without the promise of a safe harbor no employer will conduct a

⁵³ 54 Fed. Reg. 3904-3916 (Jan. 26, 1989).

⁵⁴ 51 Fed. Reg. 25,004 (July 9, 1986).

voluntary audit, and no lawyer will allow his client to undertake one. These predictions, however, are based on the assumption that businessmen in the ordinary course of their business have no economic or social interest in the health and safety of their employees, and that absent the promise of a safe harbor, employers will not seek to learn what they must know to protect their employees and go about the business of securing such protection. That is simply not the case. Such an argument fails to acknowledge that the regulated community is aware that OSHA has insisted on obtaining such information. In addition to the caselaw, longstanding provisions of OSHA's Field Operations Manual (FOM) and several agency Directives and Instructions give notice that OSHA will seek voluntary audits.⁵⁵

Precisely this issue was addressed in a recent decision of the Ninth Circuit⁵⁶ holding that voluntary safety audits are not protected from disclosure by a privilege of self-critical analysis or so-called "self-evaluative" privilege.⁵⁷ In that case, the first mate on a cruise ship slipped on leaking oil and injured himself. The court held that the employer was required to turn over minutes of the ship's Safety Committee meetings (which referred to the leaking mechanism), finding in part that the information failed to meet one of the tests that the claimed privilege is predicated on: that the information be of the type whose flow would be curtailed if discovery were allowed. Without actually ruling on whether a "self-critical analysis" privilege exists, the court stated that voluntary audits are rarely curtailed simply because they may be subject to discovery in litigation. Noting that companies typically conduct such audits

to avoid litigation resulting from unsafe conditions, the court found ironic the claim that such candid assessments will be inhibited by the fear that they could later be used as a weapon in the hypothetical litigation they are intended to prevent. In any event, whatever may be the status of the "self-critical analysis" privilege in private litigation, no court has applied it where the documents in question have been sought by a government agency.⁵⁸

Assuming workable solutions exist to such definitional problems as identifying which voluntary audits are worthy of special treatment, it may be possible to work out guidelines as to the conditions under which OSHA will ask for copies of the audits in its compliance investigations. It is certainly also possible for a system of citation preferences to include the situation where the company audit meets the Department's standard and the problem is being corrected, but abatement is not yet complete at the time of the inspection. For example, treating the self-audit as a mitigating factor in the penalty sought could be an important incentive to voluntary compliance.

Incentives already exist for employers to conduct and act on voluntary safety and health audits of their workplaces. The OSH Act itself provides two important motivations for an employer's voluntary compliance: (1) both history and good faith are taken into account in assessing penalties; (2) willful and repeated violations carry substantially more serious consequences than other types of violations.⁵⁹ Employers regularly defend citations and penalties on the grounds that they have implemented sound and effective safety

⁵⁵ See, e.g., *Secretary of Labor v. Samsonite Corp.*, No. 91-N-38 (DC Colo March 7 and August 20, 1991), 1991 OSHD ¶ 29,381; *Secretary of Labor v. American Mutual Ins. Co.'s*, No. 83-1029-MA (D. Mass. May 12, 1983) 1983 OSHD ¶ 26,560; OSHA Instruction CPL 2.45B; OSHA Notice CPL 2; OSHA Instruction CPL 2.80.

⁵⁶ *Dowling v. American Hawaii Cruises*, (9th Cir No. 91-15153, Aug. 4, 1992) Lexis No. 17590; Westlaw No. WO-182769.

⁵⁷ See, James F. Flanagan, "Rejecting a General Privilege for Self-Critical Analyses," 51 *Geo. Wash. L. Rev.* 551 (May 1983) (arguing against a broad-based evidentiary privilege for self-critical analyses).

⁵⁸ *FTC v. TRW*, 628 F2d 207, 210 (DC Cir 1980); *Emerson Electric Co. v. Rumsfeld*, 609 F2d 898 (8th Cir 1979); See *United States v. Noall*, 587 F2d 123 (2d Cir 1978).

⁵⁹ 29 USC 666 (1988 and Supp. H 1990).

and health programs, including self-audits.⁶⁰ OSHA may want to focus its attention on identifying ways a voluntary audit policy could work in conjunction with these existing motivations. By the same token, reports of self-inspections are often extremely pertinent to these issues, as well as to such important statutory considerations as knowledge, gravity, and exposure. Since the statute places an employer's state of mind at issue, whatever general policy may ultimately be adopted would have to be structured to be consistent with the Secretary's ability to address that issue, as well as other issues the Act makes relevant.

In addition to employer self-interest motivations built into the statutory structure, OSHA has developed an affirmative incentive program which might be a fertile source of ideas: the Voluntary Protection Program. The essential foundation for the VPP is the employer's self-inspection and correction of hazards based on the high safety and health standards OSHA has established for employers who agree to participate. A VPP application must also set out the employer's system for holding managers accountable for safety and health, describe safety and health training programs for employees (as well as demonstrate the ways employees are involved in the safety and health program), and provide for the protection of contract employees. But one of the most significant requirements is the self-inspection and hazard correction requirement. A VPP applicant must describe its hazard assessment procedures in detail, show how hazard assessment findings are incorporated in planning decisions, training programs, and operating procedures,

and agree to provide voluntarily to OSHA its self-inspection and accident investigation records, its safety committee minutes, its monitoring and sampling results, and its annual Safety and Health program evaluation. Moreover, the VPP applicant must pledge to correct in a timely manner all hazards identified through self-inspections, employee reports or accident investigations, and to provide the results of these investigations to its employees.⁶¹

In addition to other recognitions, participating employers are removed from general schedule (or programmed) inspections. VPP participation may be cost-prohibitive for many employers and, in any event, is reserved for those companies which demonstrate exemplary compliance with the OSH Act. That model, therefore, may not have a broad enough focus for the voluntary audit issue. The questions then are what rewards and incentives should be provided to employers with a commitment to voluntary audits of safety and health in the workplace that does not match the VPP level, and what is the compensating payback to OSHA.

These are some of the problems facing OSHA as it grapples with the difficult questions posed above. In searching for answers, one must remember that in the jurisprudence of OSHA, one receives salvation by works, not by faith alone. And confession—in the form of a voluntary audit—cannot in itself ensure absolution. Rather, one must engage in repentance—that is to say abatement—to avoid the strictures of the Act.

[The End]

⁶⁰ See, e.g., *Daniel International Corp. v. OSHRC*, 683 F.2d 361 (11th Cir 1982), 1982 OSHD ¶ 26,185.

⁶¹ See 47 Fed. Reg. 29,025 (1982).

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