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**OSHA RULEMAKING PROCEDURES\***

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## EXECUTIVE SUMMARY

Regulatory reform at OSHA has been considered by each successive administration at the agency. This report explains why such reform is so difficult, explores some realistic opportunities for reform, examines the advantages and disadvantages of each, and suggests steps OSHA might take to improve its efficiency and productivity.

### I. The Difficult Environment of Regulation

The productivity of health and safety agencies, such as OSHA, is limited by substantive, managerial, legal, and political factors. The necessity to undertake the complex scientific and policy judgments required by Congress and the White House are important substantive constraints. The small size of agency staffs, the difficulty of attracting and retaining good scientists, managers and policy analysts, and the rapid turnover of agency administrators are important managerial constraints. Legal constraints include a public hearing process and other court-imposed procedural and substantive requirements. Finally, political constraints include the necessity of accommodating various interest groups, Congress and the White House as the agency makes difficult moral and philosophical choices.

OSHA shares with other health and safety regulatory agencies the foregoing constraints, but it faces unique additional difficulties that increase their impact. OSHA is not a licensing agency (which would encourage industry cooperation), it often has less accurate risk and feasibility evidence (because industry is not required to supply the necessary information), and it has more difficult priority-setting responsibilities (because it must choose which hazards to regulate from a large agenda). Moreover, although it has as many or more regulatory responsibilities as any other agency, special problems with scientific and administrative resources and management capability limit its ability to meet that challenge. Some of these problems are inherent in the structural organization of OSHA, and the others are caused by the agency. Further, unlike some other agencies, OSHA engages in hybrid rulemaking to promulgate standards, and it bears the burden of proving by "substantial evidence" that regulation is necessary. Finally, OSHA is guaranteed an unusual amount of political controversy because of the long history of antagonism between business and labor.

In light of the previous difficulties, it is remarkable that OSHA has accomplished as much as it has. Nevertheless, it is also clear that much remains to be done. Knowledgeable observers are generally pessimistic that OSHA can effectively fulfill its statutory mandate, and even those who are optimistic are rather guarded in their hopes.

A high degree of caution is certainly appropriate. The problems at any health and safety agency, and especially at OSHA, are complex. Moreover, reform of an ongoing agency is

difficult, because it upsets the expectations of both supporters and opponents of agency action. Finally, groups representing labor, management, physicians, other health professions, and public interest organizations perceive the need for change according to their professional orientations. Because each group differs in orientation, OSHA reform is "contested terrain." With these realities in mind, this Report proposes two kinds of reforms--OSHA should establish a better priority setting system, and it should implement new management tools to enhance accountability.

## II. Prioritization.

With current resources, OSHA can pursue no more than 15-20 major rulemaking efforts at any given moment, and it can take on only about 2-5 new projects in any single year. There are presently at least nine sources of rulemaking initiatives that vie for OSHA's attention as it attempts to establish a rulemaking agenda: OSHA's own (but largely abandoned) systematic prioritization efforts; worker and consumer group petitions; congressional demands for action; pressure from the White House or OMB; referrals from EPA pursuant to The Toxic Substances Control Act; NIOSH criteria documents; private standard-setting agencies; information collected from the field; and developments in the states and other countries.

Ideally, OSHA should channel all of these sources into its own comprehensive agenda-setting mechanism to establish a realistic set of priorities for the near term. Although OSHA comes close to achieving this ideal for safety standards, it has no agenda-setting process at all for health standards. In reality, its priorities for health standards are determined in an ad hoc fashion by outsiders. Virtually every knowledgeable observer of the OSHA rulemaking process agrees that this is a sorry state of affairs that is badly in need of correction. There is less agreement, however, on how OSHA should go about regaining control over its own agenda.

### A. The Need for a Prioritization Process.

An appropriate metaphor for the current OSHA standard setting process is that of a business establishment with a front door, a side window, and a back door. The owner expects most business to come through the front door, but it reserves the back door for dealing with complaints about previous transactions. Especially demanding and impatient customers come in through the side window and thereby avoid the crowd that is pressing at the front door. In the OSHA context, criteria documents, recent petitions, information from the field, and recently amended recommendations from private standard setting organizations are all pressing at the front door. OMB and the White House are pushing some previously promulgated rules in through the back door, and Congress and the courts are forcing some rulemaking petitions and other "hot" topics through the side window. At present, the press of



business for OSHA's reduced staff from the back door and side window is so great that it cannot accept any business through the front door. Instead of an orderly queue at the front door, there is a great crowd of potential topics, each of which is probably deserving of OSHA's attention. Occasionally, an interest group becomes impatient with waiting in line and moves over to the side window. The time is near at hand when there will also be a disorderly crowd at the side window, petitioning Congress or the courts to demand that OSHA take up additional topics. OSHA long ago lost control over its front-door agenda; it now risks total paralysis as its limited capacity to produce rules becomes overwhelmed by the press at the side window.

The current process does not necessarily result in greater worker protection, because no one of the outside parties driving the current process is concerned with the broad question whether the agency is addressing those topics for which it can be most effective in reducing the most serious workplace risks. OSHA's inability to set its own priorities also affects the regulated industry's ability to make future investment decisions. An explicit and open prioritization procedure would allow OSHA to regain to some extent control over its own agenda, and it would make regulatees and beneficiary groups aware of OSHA's plans for the future. An explicit prioritization mechanism would also be useful to OSHA in its internal management and in managing outside contracts for economic and technical analysis. A commitment to establishing an explicit prioritization process will, however, force the agency to come up with a rational scheme for ranking priorities, and it will force upper level decisionmakers to make hard decisions about which subjects warrant attention. Although OSHA can expect resistance from those with an economic interest in the hazards that wind up on the list, OSHA must assume control over its own rulemaking agenda.

RECOMMENDATION: OSHA should as rapidly as possible establish an entity to determine an explicit list of agency priorities to which OSHA will presumptively adhere in undertaking future rulemaking initiatives.

#### B. Alternative Prioritization Schemes.

Although the question of prioritization is never an easy one for an agency charged with writing high-stakes regulations in an area dominated by poor information and huge uncertainties, there are several broad models from which OSHA may choose in selecting an approach to prioritization, including ad hoc management choices, systematic selection by committee, numerical scoring systems, and quantitative risk assessment. The advantages and disadvantages of each broad approach are discussed in detail in the Report.

We strongly recommend that OSHA establish a procedure for priority-setting for its rulemaking activities. Since OSHA does not currently have a priority-setting mechanism in place, this will require additional resources or a reprogramming of existing resources.

RECOMMENDATION: OSHA should make priority-setting a high priority. The agency should consider devoting at least one full-time staff person to the task, and the priority setting unit should be given sufficient resources to gather information on candidates for priority lists and to perform risk assessments and megascoring exercises.

The Committee approach seems the most promising of the three approaches discussed in the Report.

RECOMMENDATION: OSHA should establish a permanent prioritization committee charged with drafting an initial ranked list of agency priorities from the 47 topics that resulted from the standards improvement project and from pending rulemaking petitions. The committee should be further charged with meeting on a continuing and periodic basis to re-examine the existing list, add items to it, and remove items from it. To preserve badly needed continuity, committee membership should not turn over any more rapidly than once every three years, and committee members should be eligible for reappointment.

The membership of the committee should reflect both technical expertise and political sensitivity. One way to ensure this would be to make the Committee a formal advisory committee composed of nonemployees consisting of technical experts and representatives of a broad range of constituency groups. Such a committee could not, however, be an actual decisionmaking entity; it could only make recommendations to agency management. Alternatively, the committee could be composed of agency employees from various offices in the agency and chaired by a very high level agency employee, such as one of the Deputy Assistant Secretaries.

RECOMMENDATION: OSHA should establish a prioritization committee made up of OSHA employees with nonvoting representatives from NIOSH and EPA. The committee should be composed of high level management staffers at at least the Deputy Director level and highly regarded health professionals from the agency's technical

staff. The Committee should meet regularly (at least quarterly and perhaps monthly) to establish an initial prioritization list and to consider amendments to the list. The meetings, which would discuss policy as well as technical considerations, should be closed to the public, but the results of the meetings should be made public, after the Assistant Secretary has had an opportunity to consider and overrule any decision made by the committee.

If the committee is established in accordance with the above recommendation, its first task of drafting an initial ranked list will be quite burdensome and no doubt controversial. OSHA could reduce some of the controversy surrounding its initial list by subjecting it to public comment and by assigning substances to ranked categories, rather than attempting to rank each topic individually.

RECOMMENDATION: The entity that establishes agency priorities should publish and allow public comment on a proposed list of 50-75 rulemaking topics. The list should either rank the topics individually or assign them to classes. OSHA should take the position that the list is not a final rule for which judicial review would be appropriate.

One possible device to aid the committee in this initial task would be to hold one or more "consensus workshops" that all committee members would attend and during which all of the relevant interest groups would attempt to agree on a consensus list of priorities.

RECOMMENDATION: Prior to establishing an initial priority list, OSHA should hold one or more consensus workshops at which relevant interest groups would be asked to agree upon a consensus list of priorities.

The Committee should use existing risk assessments in establishing its initial prioritization list and in undertaking subsequent modifications, but it should be aware of the drawbacks of risk assessments, and it should not allow risk assessments alone to determine priorities. Existing "megascoring" schemes are so laden with pitfalls that the Committee should devote little attention to them. If the Committee is to perform its ambitious task expeditiously, it must resist the temptation to develop its own megascoring device and proceed ahead with whatever information is conveniently available. The Committee should likewise resist the temptation to incorporate by reference lists of toxic chemicals that have been developed for other purposes.

RECOMMENDATION: The entity that establishes agency priorities (subject to approval of the Assistant Secretary) should use existing risk assessments, as well as other technical and policy considerations, in carrying



out its task. It should not commission full-blown risk assessments in setting the initial priorities list, but it should decide to develop more sophisticated risk assessments in modifying the list. The entity should not develop its own megascoring device for setting priorities, and it should not incorporate by reference lists prepared by other agencies for other purposes.

The committee and its staff should begin with a relatively long list of potential candidates for its priority list and it should at the end of a relatively short period of time (perhaps six months) produce a ranked or graded list for circulation and comment. After the first list has been completed, the committee should continue to monitor scientific reports and other developments for information that might cause the agency to change the list. In particular, the committee should have systematic access to reports from the field for indications that topics not on the list deserve greater agency attention. OSHA should therefore continue its efforts to make information from the field more accessible to agency decisionmakers.

To preserve needed flexibility, OSHA should establish an additional "side window" process for workplace hazards that are identified after the list is promulgated or for which important policy considerations warrant rapid treatment. The "side window" process would be used for rulemaking petitions and TSCA referrals, which would be treated as petitions to amend the current priorities list. OSHA would respond within a definite time period (perhaps 120 days). The agency must not, however, allow the side window to become the dominant source of rulemaking initiatives. To prevent this, OSHA should promulgate procedural regulations governing petitions and TSCA referrals, specifying criteria for giving expeditious treatment to a topic. Such criteria should include: (1) the degree of hazard; (2) the quality of the data indicating hazard; (3) the administrative resources required to undertake the new project; (4) the match between the expertise required for the project and the expertise available to the agency; (5) whether the proposed project would result in greater protection for workers than projects currently at the top of the list; and (6) other important public policies. In the final analysis, the agency must demonstrate to the public that the more rational front-door process does in fact work. And this means that OSHA must bring rulemaking initiatives to completion on a regular basis.

**RECOMMENDATION:** OSHA should establish a process for expediting prioritization decisions for topics that are the subject of TSCA referrals, rulemaking petitions, and intense pressure from Congress, OMB and the White House. Although this expeditious process should be separate from the agency's routine prioritization process, it should be closely integrated with the routine

process. The outcome of the expedited process should be the placement of the topic on the priority list or a determination not to proceed ahead with the project and a public explanation for the action.

Once OSHA establishes a workable process for prioritizing future projects that is sufficiently flexible to address legitimate requests for priority changes, it should have little to fear from a lawsuit requesting a court to order it, in effect, to move a project to the top of the list.

Since Congress intended that OSHA rely upon NIOSH for technical advice in setting priorities, OSHA should solicit NIOSH's input in assembling the initial prioritization list. OSHA should also communicate changes in its priorities to NIOSH at a very early stage, so that NIOSH may schedule its projects to complement OSHA's rulemaking efforts. More importantly, OSHA should attempt to adhere to its original prioritization plan as closely as possible to avoid schedule conflicts and wasted resources. Since OSHA will never be able to adhere completely to any pre-established priority list, it should work with NIOSH to add some flexibility to NIOSH's schedule. In particular, NIOSH should maintain a capacity to respond on a "fast track" to OSHA requests for technical help on projects that come through the "side window."

RECOMMENDATION: OSHA should include NIOSH in drafting its initial priority list and it should make NIOSH aware of all changes to that list. OSHA should work with NIOSH to establish a capacity in NIOSH to respond rapidly with information on projects that are assigned to move on a fast track through OSHA.

Finally, OSHA should also coordinate carefully with the National Toxicology Program (NTP) and EPA concerning OSHA's future information needs. Both NTP and EPA have the capability of generating new information on suspect chemicals, a capacity that OSHA lacks. If OSHA could arrive at a priorities list that extended three or four years in the future, it could approach NTP or EPA to initiate studies on the chemicals that would be the subjects of future rulemaking initiatives. OSHA should also coordinate with EPA to take advantage of any authorities that EPA has to protect employees more effectively than OSHA can under its own authorities.

RECOMMENDATION: OSHA should attempt to enter into a formal interagency agreement with EPA and NTP for making EPA and NTP aware of OSHA's needs for testing toxic substances to which workers

are exposed. OSHA should also attempt to enter into a formal interagency agreement for coordinating the exercise of the authorities of the two agencies in way that most effectively protects employees from workplace risks.

Although OSHA has undertaken some modest informal efforts in the last six years to coordinate with other agencies, there is no formal institutional entity with the capability of ensuring appropriate communication and forcing necessary cooperation. The interaction that does occur is at lower levels where bureaucratic "turf" considerations overwhelm the current meager incentives to cooperate. During the Carter Administration, the Interagency Regulatory Liaison Group, which was composed of the heads of OSHA, EPA, FDA, CPSC, and FSIS, provided the institutional impetus to cooperation. OSHA should pursue the possibility of reviving the IRLG or of creating a similar entity to perform the coordination function suggested here.

Establishing an IRLG-like coordinating institution would require some additional resources in resource-scarce times, but the savings in avoided duplication alone should be worth the cost. The most foreboding obstacle to setting up such an institution is likely to be the Office of Management and Budget, which perceives itself as playing this coordinating role. The short answer to this objection is that OMB has had since the abolition of the old IRLG in 1981 to fill the gap, and it has not done so. The coordination function for OSHA standard setting must be initiated and operated by the agencies themselves, and it must have the support and active participation of officials at the very highest levels of those agencies.

**RECOMMENDATION:** OSHA and other health and environmental agencies, such as EPA, the Food and Drug Administration, the Food Safety and Inspection Service and the Consumer Product Safety Commission, should form a high level group charged with coordinating agency policies and information relevant to regulating health and environmental hazards.

### III. Management and Accountability.

Although the extraordinarily lengthy interval between initiation and publication of OSHA rules has been the subject of negative commentary for years, the agency seems no closer to a solution than it was in the mid-1970's. While some of OSHA's problems may be systematic or externally imposed, OSHA can significantly improve its internal management, and such improvements should substantially reduce the incidence of grossly delayed rulemaking initiatives.

#### A. Evaluation of the Current Rulemaking Management System.

OSHA has traditionally been organized along functional lines, maintaining separate Directorships for Health Standards, Safety Standards, Technical Support, Field Operations, Policy and Administrative Programs. OSHA is only one of many agencies in the Department of Labor, and it must clear important rulemaking actions at the Departmental level. The Department has always maintained a separate Solicitor's Office, apart from the individual operating agencies, to provide legal advice to all of the agencies within the Department.

In its early years, OSHA was a very loosely run organization, and especially so in its rulemaking functions. In 1982 OSHA implemented extremely complicated internal procedures that are best described as "byzantine." Their excessive documentation requirements and repetitive review procedures provided almost insuperable barriers to the production of rules, and in fact only one rule of any consequence was produced during the 3-4 years that those procedures were in place. After a time, the intricate rules were observed mostly in their breach, and in late 1985 they were abandoned. The 1982 procedures have not been replaced with any particular management regime.

Despite the elimination of the burdensome 1982 paperwork requirements, the agency's internal production has speeded up only slightly. OSHA still needs a management and accountability system to ensure that upper level management's priorities are communicated to lower level staff, to ensure that bottlenecks do not develop, and to ensure that responsible agency officials are held accountable for inexcusable delays. To accomplish this result, OSHA management must seriously address at least six severe management problems that currently plague OSHA's internal rule management process: (1) the absence of effective mechanism for establishing and monitoring deadlines for achieving internal milestones; (2) inadequate incentives to meet established deadlines; (3) the absence of a mechanism for facilitating policy interchange between upper level management and lower level staff; (4) the lack of coordination among essential institutional actors; (5) the inability or unwillingness of upper level management to make difficult substantive decisions in a timely fashion; and (6) inadequate resources.



## B. Establishing and Monitoring Deadlines.

At present, OSHA has in place only the most rudimentary system for setting deadlines for its regulatory activities. The Work Plan that some project officers prepare at the outset of a project and the Options Memorandum that is prepared for Departmental review contain proposed timetables, but these deadlines are never formally affirmed and they are rarely enforced. Upper level management meets twice a year to prepare the agency's proposed regulatory agenda for submission to Departmental officials and OMB. But the deadlines in the agenda are not regarded seriously by most agency employees, and they are only very rarely met in practice. The deadlines taken most seriously by agency staff are unpublished deadlines set in informal status meetings. These meetings, however, occur after various milestones are met, and not at specific pre-arranged time intervals. Time projections are continually subject to informal adjustment without explanation as priorities change due to outside pressures or other resource needs. The meetings are therefore not effective as "action-forcing" devices.

OSHA does not have any systematic approach for tracking the progress of its rulemaking initiatives. The project officer from the Health or Safety Standards Directorate is responsible for keeping the action on schedule, and the Director maintains close enough contact with the staff to know which actions are on track and which actions are slipping. The Office of the Assistant Secretary does not currently have a formal way of ascertaining on a periodic basis the status of OSHA's rulemaking. As one official explained: "We keep it in our heads." While such informal tracking devices may be appropriate for an institution with a small number of responsibilities that are of limited societal importance, they are entirely inappropriate for a modern federal agency of OSHA's status.

OSHA must establish a system for establishing and monitoring progress toward the attainment of realistic deadlines for its rulemaking initiatives. It is critical that these deadlines be attainable and not pie-in-the-sky projections. Yet once realistic deadlines are established, they should not be easily avoided. Since rulemaking initiatives are invariably prolonged affairs, the system should be capable of setting and tracking both major milestones such as the Assistant Administrator's approval of rulemaking projects, and less visible minor milestones, such as the time that all relevant offices must assign a staff member to the project. The Environmental Protection Agency has established a computerized "Action Tracking System," described in detail in the Report, that could serve as a useful model for a similar system of establishing and tracking deadlines in OSHA.

Effective implementation of an Action Tracking System could greatly improve the internal rulemaking process in OSHA. Rules could no longer disappear into the bowels of the agency, never to be seen again, because all approved rulemaking initiatives would be in the tracking system. The system would



also be useful in uncovering bottlenecks. Finally, the Action Tracking System could identify resource conflicts and point to programs that need more resources.

The Action Tracking System is not, however, without its disadvantages. First, its heavy emphasis on meeting production deadlines may sacrifice quality. Second, it will require additional staff. Third, a high degree of upper level attention is absolutely critical to the successful operation of the system, and this is necessarily quite demanding of very high level officials. Fourth, the information in the action tracking system can become public, putting the agency in an embarrassing position before courts and congressional committees.

In the final analysis, however, the advantages of the action tracking system far outweigh its disadvantages. Quality need not be sacrificed for "bean counting," if the agency is conscious of the problem, plans its resource needs in advance, matches those needs to realistic projections of resource availability, and allows deadline slippage for genuine quality concerns. Because the system would rely heavily upon computers, its personnel demands would be slight, and computer resource needs would not be large. Revealing slippage to the world may be embarrassing, but it also renders the agency accountable to the public.

RECOMMENDATION: OSHA should immediately establish an Action Tracking System, modeled on the system in effect at the Environmental Protection Agency, to document the progress of rulemaking initiatives. The system should contain deadlines for meeting standardized major milestones and additional intermediate minor milestones in the progress of a rule's development. The Assistant Secretary or one of the Deputy Assistant Secretaries should meet on a biweekly basis with the Directors and Deputy Directors of the OSHA Directorates, the Deputy Assistant Solicitors for OSHA Health and Safety Standards, and perhaps a representative from the Departmental Policy Office to discuss progress toward designated milestones and reasons for any missed deadlines. OSHA should appoint a staff of one or two employees, which might be lodged in the Policy Office, to manage the Action Tracking System.

### C. Inadequate Incentives.

There is a general sense among agency staff that agency management does not reward production and does not penalize lethargy. Management has very few tools available for providing incentives. The agency has a very limited budget available for cash awards and merit bonuses, and penalties for nonproduction are very difficult to administer.

Given the large salary differentials between the public and private sectors, a sense of mission may be the most significant tool that OSHA has to attract and retain energetic professional staff. But symbols are fragile--if they are not backed up with resources, they will appear hypocritical and

quickly be ignored. The Action Tracking System described earlier has the built-in incentive of avoiding embarrassment, which is usually effective for professionals in bureaucracies. But there should also be financial incentives to reward good and speedy work.

RECOMMENDATION: Upper level management in OSHA should attempt to convey to OSHA professionals the message that OSHA's task is an important one that requires commitment to the expeditious implementation of the agency's statutory mandate. OSHA management should reinforce such symbolic messages with real rewards for expeditious work and penalties for unwarranted delays.

#### D. Coordination Among Institutional Actors.

Developing a rule requires the input of several institutional entities within OSHA and the Department of Labor. The Policy Office in OSHA is responsible for gathering cost and feasibility information. The Solicitor's Office, which is not part of OSHA, must review documents to be published in the federal register, draft certain parts of those documents, and prepare expert witnesses for testimony at the hearings. Since the project officer has no direct control over these other crucial actors, the project officer must either induce them to do their jobs in an expeditious fashion, do their jobs for them, or elevate matters to mid-level management. But even at higher levels, the three offices have encountered problems in coordinating their priorities.

The Directors of the Health and Safety Standards Directorates have traditionally attempted to coordinate informally with their counterparts in the other Offices on an ad hoc basis, but this has not generally proved satisfactory. First, the need for coordination too often becomes apparent only after problems have already arisen. Second, the ad hoc approach deals with only those problems that are of sufficient magnitude that the project officer brings them to the attention of the Office Director. Third, the informal approach will not resolve genuine disagreements over what the priorities should be. Finally, the informal approach will not prevent the other offices from using delay to advance particular substantive agendas. A more formalized procedure is needed to force coordination among the relevant institutional actors and to obtain upper level resolution of differences on a regularized basis.

The Action Tracking System described previously is an ideal vehicle for this purpose. With such a system in place, the Health or Safety Standards Directorate would enter a proposed schedule into the system at the time the project was approved by upper level management. The other relevant offices would have an opportunity to comment upon the proposed schedule before it became final. Any disputes over the proposed schedule could be resolved in one of the periodic high level meetings. If a deadline was missed, the responsible offices would be obliged to explain the slippage at one of the

meetings. The location of the bottleneck or delaying activity would become immediately apparent, and resource needs could be identified. Conflicts in priorities would also be revealed to upper level management who would then be in a position to resolve such conflicts on-the-spot.

In addition, the team concept, which OSHA formally abandoned in 1985, can help avoid schedule conflicts at the lower levels in the agency. At the most basic level of interaction between the essential institutional actors, there is in fact a good deal of coordination. The problems with the team concept that the agency encountered in the early 1980s can be overcome. Although the team leader does not have line authority over other members of the team, an Action Tracking System should provide some inducement to team members to perform expeditiously. The team approach does raise the possibility of "renegade teams" that form their own opinions on issues and inform the press when those opinions differ from those of agency policymakers. While this may be a problem during a time of weak management and very low agency morale, the fear that lower level staff will gang up on upper level decisionmakers is not a good reason to abandon a vital decisionmaking tool. Finally, when a team that works well together is established, there is every reason to keep it together to work on other projects.

RECOMMENDATION: OSHA should formally reinstate the team concept to perform the basic tasks of gathering or analyzing information, drafting documents, responding to comments and advising the Assistant Secretary. OSHA should attempt to coordinate rulemaking initiatives through the Action Tracking System previously recommended. OSHA should consider allowing successfully functioning teams to work on more than a single rulemaking initiative.

#### E. Lack of Policy Interchange.

OSHA lacks a procedure for communicating policy from upper level management to the low level professionals who draft rules. Typically, once a rule is assigned to a project officer, he or she is allowed to develop the rule, with the help of other employees drawn from OSHA and the Solicitor's Office, without much upper level supervision until there is a draft of a notice of proposed rulemaking. While this maximizes the freedom of lower level staff to incorporate technical data and scientific and engineering judgments into the final rulemaking product, it minimizes upper level policy input. Purely technical considerations may cause lower level staff to eliminate alternatives that might be attractive from a policy perspective, thereby depriving upper level management of an opportunity to chose from among a full range of options.

This hierarchical approach to developing a proposed rule has a vast potential for unnecessary delay. If the upper level managers are dissatisfied with the staff's output, they may either send the staff back to the drawing board or return the



project to the staff for time-consuming patch and repair. In the absence of written accounts of important decisionmaking meetings, agency staffers are obliged to decide many issues anew in future proceedings.

OSHA could reduce this large potential for duplicative and time-consuming remands to the staff by establishing an "Options Review" process for periodically elevating issues from the staff level to very high levels in the agency. Under this approach, which has been effectively implemented at the Environmental Protection Agency, Options Review meetings are held at critical junctures to choose which regulatory options the agency will actively pursue throughout the remainder of the rulemaking process. The participants in the Options Review meetings are a very high level official (at least a Deputy Assistant Secretary) and other high level agency employees representing offices with an interest in the proceeding. The Options Review meeting, which is memorialized in a closure memorandum, occurs after the team has devoted some study to the relevant issues but before it has narrowed down the options to the two or three to which it will devote the bulk of its attention. The Options Review process gives upper level management a large role in the subtle policymaking that goes on at low levels in the bureaucracy when options are examined and rejected as the staff attempts to reach consensus. Low level staff are also attracted by its potential to force high level resolution of difficult policy issues. By giving the lower level professionals a "day in court" before a high level agency decisionmaker early in the process, the process interjects a "creative" adversarial note into internal agency deliberations.

The chief disadvantage to the Options Review process is that it consumes a great deal of the time of very high level officials. Second, the process demands that very high level officials narrow options on the basis of a relatively brief debate. Third, it requires upper level decisionmakers to take direct responsibility for difficult decisions. On balance, however, the advantages of the Options Review mechanism outweigh its disadvantages.

**RECOMMENDATION:** OSHA should implement an Options Review process for important health and safety rulemaking initiatives. At least once in the early development of such rules the staff should identify and analyze several options for consideration in an Options Review meeting chaired by the Assistant Secretary or one of the Deputy Assistant Secretaries. The goal of Options Review meetings should be to discuss and debate broad alternatives for approaching a rulemaking initiative and to narrow the range of options to be considered in the future. The meeting should be memorialized in a closure memorandum that would be made available to staff involved in other rulemaking initiatives.

OSHA could conceivably fold an Options Review Process into the implementation of an Action Tracking System, should it choose to adopt that system. The key to a successful Action

Tracking System is the periodic (biweekly in EPA) meetings of the Deputy Administrator with mid-level management to report on the status of pending projects. Similarly, the key to the Options Review Process is the meetings of the Deputy Administrator with upper and mid-level management to narrow options. In a small agency like OSHA, it may be possible to combine these two functions in to a single two-part "Status Review and Options Selection/Rejection" meeting of the Assistant Secretary or one of his Deputies with mid-level management.

#### G. Inability to Make Difficult Decisions.

Since delay is always in the interest of some interested party, OSHA decisionmakers often face strong pressures not to decide difficult questions. Decisionmakers may also have technical reasons for not deciding, such as the desire to await the completion of one more study that has the potential to reduce some very large uncertainties. Sometimes there is a legitimate need to do further work to avoid the possibility of reversal in the courts of appeals, but sometimes the desire for more information is a convenient excuse not to decide difficult questions.

OSHA has shown an increasing tendency to rely upon Advance Notices of Proposed Rulemaking (ANPRs) to solicit information for regulated industries and other interested parties. The ANPR can be an effective tool for gathering information early in the development of a rule. But there is a general feeling among agency staff and among outside practitioners that the ANPR rarely results in the production of useful information. Most observers of the process believe that the ANPR at best serves the function of putting companies on notice that the agency is seriously considering promulgating a standard for them; it rarely induces them to share useful information with the agency. Since it can delay the rulemaking schedule by six months to a year, the ANPR can be used to avoid hard decisions.

**RECOMMENDATION:** OSHA should not routinely use the Advance Notice of Proposed Rulemaking as an information gathering technique. Only when information that is not available through other vehicles is very likely to be forthcoming in response to an Advance Notice of Proposed Rulemaking should that tool be used.

There is a generally shared belief among the lower level staff that past Assistant Secretaries, for whatever reasons, took too long to make policy decisions and communicate them to the staff. A related complaint is that upper level decisionmakers sometimes return controversial rules to the staff for further work on particular issues knowing full well that the additional work is not likely to be outcome-determinative.

It is difficult to determine how much of this perception is attributable to an unwillingness of upper level management to decide hard questions and how much is due to the impatience



of agency staff and beneficiary groups. Some rules have been put off indefinitely out of upper level management fears of stirring up political controversy. But upper level management, which is ultimately responsible for the agency's output, has every right to demand further analysis of critical issues, even when it is not obvious to the staff that further analysis will change the ultimate outcome. Part of the problem is probably the lapse of "management memory" that accompanies the rapid turnover rate in OSHA's upper level management.

There is no easy way to address these potential sources of delay. Clearly, management should attempt to alleviate staff concerns that their efforts will be placed on the back burner for political reasons. But the staff must be sensitive to the realities of the political world in which upper level decisionmakers must deal. To some extent the problem may be alleviated by better communication between staff and upper level officials. If lower level staff professionals were allowed to attend the Options Review meetings proposed in this Report, better communication might result. Of course, as a quid pro quo, lower level professional staff cannot feel free to leak the contents of such discussions to the media.

#### H. Inadequate Resources.

If OSHA is serious about increasing its ponderous rule-generating pace, it must demand a substantial infusion of resources. The Health Standards Directorate is seriously understaffed. Individual health professionals in that Directorate are responsible for multiple projects. At the same time they are attempting to manage the rule generation process, they must answer correspondence for projects that they are assigned, answer petitions for new rulemaking initiatives, draft responses to TSCA referrals, meet with other agencies, and meet other professionals. In addition, OSHA badly needs the infusion of fresh blood. The creation of new positions in the Health Standards Directorate would allow the agency to hire new staffers.

**RECOMMENDATION:** OSHA should seek additional resources for the Health Standards Directorate. It should attempt to fill any new slots for occupational health specialists with highly motivated young professionals.

The recommendation that the agency seek additional resources in a time of severe monetary constraints on social programs that provide long-term benefits may well fall on deaf ears, but that makes the need no less critical. It is hypocritical for Congress and OMB to criticize OSHA for poor work if they are unwilling to provide sufficient resources for the agency to do a good job. Whether or not OSHA gets new resources for expanding the size of the Health Standards Directorate, it can make some management improvements that should result in more efficient use of existing resources.

## I. The Difficult Environment of OSHA Regulation

Health and safety agencies, such as OSHA, have significant constraints that limit productivity. No health and safety agency has been able to promulgate regulations for more than two or three controversial chemicals in any year.<sup>1</sup> During its entire sixteen year history, OSHA has completed only eighteen health<sup>2</sup> and twenty-six safety regulations.<sup>3</sup> That record, however, should not be denigrated. Not only does OSHA labor under the same constraints as other health and safety agencies, but it has additional, serious limitations not faced by most of its counterparts. When these additional limitations are taken into account, it is surprising OSHA has been able to regulate at all.

Any proposal for reform of OSHA must therefore be made in light of the various constraints that limit regulatory productivity. Both constraints that affect regulation in general and OSHA in particular are considered.

### A. General Constraints Affecting Regulation

The productivity of health and safety agencies is limited by four types of constraints. Agencies face substantive, managerial, legal, and political limitations.

#### 1. Substantive Constraints

Agency productivity is limited as a substantive matter by the necessity to undertake the complex scientific and policy judgments required by Congress and the White House. Agencies must engage in the type of risk, benefit, and cost or feasibility

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1. R. MERRILL, FEDERAL REGULATION OF CANCER-CAUSING CHEMICALS, 1982 ACUS 113; see also Toxic Substances: EPA and OSHA Are Reluctant Regulators, 203 SCIENCE 28 (1979) (EPA and OSHA take "years" to complete a rulemaking proceeding).

2. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 363 (1985) (cited hereinafter as PREVENTING INJURY); see, also Schroeder & Shapiro, Responses to Occupational Disease: The Role of Markets, Regulation, and Information, 72 GEO. L.J. 1231, 1257 (1984) (cited hereinafter as Responses To Occupational Disease).

3. PREVENTING INJURY, supra note 2, at 364.

determinations required by their statute.<sup>4</sup> In most cases, they must also calculate the benefits and costs of any proposed regulations to satisfy Executive Order 12291.<sup>5</sup>

Risk assessment requires that the reliability of safety data be evaluated and that its relevance for human exposure, use, or consumption be determined.<sup>6</sup> These assessments require both scientific judgments, to determine such matters as the statistical validity of an animal experiment,<sup>7</sup> and policy judgments, to determine such matters as how to predict the consequences of human exposure from animal studies.<sup>8</sup> Policy judgments like the prediction of human risk are especially complex because animal test data is often limited, because humans may be more or less susceptible to toxic effects than the animals studied, and because human exposure or use may occur under

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4. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136d (1982); Consumer Product Safety Act, 15 U.S.C. § 1262(i) (1982); Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(d) (1982); Food Drug & Cosmetic Act, 21 U.S.C. § 348(c) (1982) (food additives); id. at § 355 (new drugs); Clean Air Act, 42 U.S.C. § 7408 (1982); see generally Cross, Beyond Benzene: Establishing Principles For a Significance Threshold On Regulatable Risks of Cancer, 35 EMORY L.J. 1, 5-12 (1986).

5. Exec. Order 12291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601, at 431 (1982); see note 113 infra & accompanying text (OMB oversight of OSHA).

6. See, Shapiro, Scientific Issues and The Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry, 1986 DUKE L.J. 288, 291-92 (cited hereinafter as Scientific Issues). Relevant data usually consist of experiments conducted to evaluate the effect of a substance on animals and epidemiological studies evaluating the effect of prolonged exposure to a substance. Id. at 292. In a few cases, there will be data from clinical experiments performed on humans. Id.; see Shapiro, Divorcing Profit Motivation From New Drug Research: A Consideration of Proposals To Provide FDA With Reliable Test Data, 1978 DUKE L.J. 155, 157-58 (human evidence is used by FDA); see generally NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS (1983) (cited hereinafter as RISK ASSESSMENT IN THE FEDERAL GOVERNMENT).

7. Scientific Issues, supra note 6, at 295.

8. Id. at 294; McGarity, Substantive and Procedural Discretion in Administrative Resolution of Scientific Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 GEO. L.J. 729, 731-49 (1979 (cited hereinafter as Resolution of Scientific Policy Questions)).

different conditions which impose different degrees of risk.<sup>9</sup>

Benefit assessment requires an estimate of how many lives might be saved by a proposed regulation and a calculation of the economic value of those lives.<sup>10</sup> The first estimate is based on a risk assessment which, as explained above, in itself is difficult to derive.<sup>11</sup> The second estimate is hampered by the inability to quantify the value of human life, the inability to price reduced risks to persons not yet in existence, and the tendency to ignore other variables that are difficult to quantify in monetary terms (such as psychological costs).<sup>12</sup>

Cost and feasibility analysis requires an agency to sum the forecasted costs of implementing various levels of protection for consumers or workers.<sup>13</sup> Agencies have difficulty acquiring reliable cost information and, when the information exists, it can produce uncertain predictions.<sup>14</sup> Agencies also have difficulty evaluating the costs of secondary economic effects, such as anticompetitive and employment effects, because of their amorphous nature.<sup>15</sup>

The previous determinations are necessarily time-consuming because an agency must find the required information and undertake the relevant assessments. Although OSHA is subject to that problem, it also has several additional problems as compared to other health and safety agencies. For example, because the Food and Drug Administration (FDA) is a licensing agency, it generally enjoys more cooperation from its regulated industries. Since industry must obtain FDA's approval to market a product, it is in its economic interest to cooperate with the

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9. Responses To Occupational Disease, supra note 2, at 1231-37; McGarity, Media Quality, Technology, and the Utilitarian Ideal: Alternative Strategies for Health and Environmental Regulation of the Chemical Industry, 46 LAW & CONTEMP. P. 159, 185 (1984) (cited hereinafter as Alternative Strategies).

10. Alternative Strategies, supra note 9, at 188.

11. See supra note 9 and accompanying text.

12. Alternative Strategies, supra note 9, at 188-89.

13. Id. at 181-82.

14. Id. at 181.

15. Id. at 183.



agency.<sup>16</sup> By comparison, industry's economic incentive at OSHA is to delay regulation. Even if OSHA eventually orders an industry to undertake expensive changes, considerable savings can be generated if those costs can be postponed.<sup>17</sup>

Another and related advantage of FDA is that it has the legal authority to require drug manufacturers to test the safety of new drugs in both animals and humans.<sup>18</sup> By comparison, OSHA, which lacks similar authority, has a more difficult time acquiring the safety information necessary to make a decision.<sup>19</sup> Moreover, OSHA has the more difficult task of normally having only animal data to predict the consequences of human exposure.<sup>20</sup> Finally, because it acts on any application it receives, FDA does not have to set priorities concerning what chemicals it will regulate. OSHA, however, must spend some of its scarce resources to resolve difficult questions concerning what chemicals should be regulated before others.<sup>21</sup>

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16. Interview with Ben Mintz, Professor of Law, Catholic University, in Washington D.C. (September 25, 1986) (former head of OSHA Division, Office of Solicitor, Department of Labor).

17. Interview with David Vladeck, Public Citizen, in Washington, D.C. (Sept. 25, 1986); Interview with Ben Mintz, *supra*, note 16; see Huber, The Old-New Risk Division in Regulation, 69 VA. L. REV. 1025, 1035 (1983) (under licensing regulation, the regulatee bears the risk and cost of delay, but under standard setting the regulatee derives economic benefits from delay).

18. See McGarity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 HARV. L. REV. 837, 868-69 (1980); Shapiro, Limiting Physician Freedom To Prescribed A Drug For Any Purpose: The Need for FDA Regulation, 73 NW. U.L. REV., 801, 803 (1978) [cited hereinafter as Need for FDA Regulation].

19. See Part IIIG *infra* (OSHA lacks information necessary to reach decisions); see generally Huber, *supra* note 17, at 1034 (licensing regulation places cost of acquiring necessary information on the regulatee, while standard setting places that cost on the agency.).

20. See Responses To Occupational Disease, *supra* note 2, at 1258.

21. See Part II *infra*.



The Environmental Protection Agency (EPA) also has several advantages over OSHA. When EPA acts as a licensing agency,<sup>22</sup> it enjoys the same advantages as FDA that result from that function.<sup>23</sup> Furthermore, EPA did not engage in the past in both risk and feasibility analysis to determine national ambient air quality standards, although lately it has undertaken both responsibilities to submit data to OMB. EPA did not feel compelled to undertake risk analysis because Congress mandated the agency to regulate, giving it the discretion to determine only what level of regulation was appropriate.<sup>24</sup> EPA also can assess cost data more easily than OSHA because the technology used to control exposure is often sold by vendors which are independent of the regulated industry.<sup>25</sup> Finally, feasibility analysis in some of EPA's programs does not involve the difficult value choices that cause OSHA so much trouble. For example, OSHA must choose whether to implement its standards through expensive engineering controls, such as ventilation systems, or through less expensive personal protective devices, such as respirators.<sup>26</sup> As a result, OSHA feasibility analysis is usually bitterly contested between unions, which favor engineering controls, and the regulated industry, which favors personal protective devices.<sup>27</sup>

Because of the previous disadvantages, OSHA faces evaluation problems that are more complicated, its access to information is more limited, and it has more responsibility to choose which chemicals to regulate. These difficulties are compounded by the common and unique managerial constraints under which OSHA operates.

## 2. Managerial Constraints

Because government has difficulty attracting and retaining

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22. See 7 U.S.C. § 136 (1984) (FIFRA); see also, 15 U.S.C. § 2603(a) (1982) (TSCA).

23. See notes 17-18, 21 supra and accompanying text.

24. See T. MCGARITY, REGULATORY ANALYSIS IN THE FEDERAL GOVERNMENT, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES III-389 (1985).

25. See, e.g., D. McCAFFREY, OSHA AND THE POLITICS OF HEALTH REGULATION 87 (1982) (Society of the Plastic Industry claimed vinyl chloride standard would shut down the industry, but firms manufacturing or using the chemical subsequently had little difficulty complying with the regulation.).

26. Responses To Occupational Disease, supra note 2, at 1259.

27. Id.

good scientists and policy experts,<sup>28</sup> agencies become dependent on advisory committees and consultants to carry out their regulatory missions.<sup>29</sup> This dependence, however, creates problems of accountability and coordination for these agencies.<sup>30</sup>

Health and safety agencies are also constrained by the size of their staffs. Because agencies have a relatively small number of scientists to undertake rigorous scientific and policy analysis, only a few chemicals or products can be considered for regulation at any one time.<sup>31</sup> Budget and staffing constraints have increased this concern. The growth in government spending on regulatory activities has slowed considerably in the first five years of the Reagan Administration (increasing by only eleven percent in nominal dollars from FY 1981-85). And overall staffing by regulatory agencies has fallen by eleven percent in

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28. See DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, FINAL REPORT 45 (1977) (cited hereinafter as HEW FINAL REPORT). Scientists and policy analysts are discouraged from government work because salaries are often noncompetitive, there are fewer opportunities for esteem and personal satisfaction, and they regard the regulatory function to be bureaucratic and uninteresting from a scientific perspective. Id. at 45-46.

29. Scientific Issues, supra note 6, at 302-303.

30. Id.

31. See Mendeloff, Does Overregulation Cause Underregulation? The Case of Toxic Substances, REGULATION, Sept./Oct., 1981, at 50 (cited hereinafter as Does Overregulation Cause Underregulation?) (Shortage of personnel restricts scope of EPA and OSHA activities and increases burdens on executive scientific staff); Levin, Politics & Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 37 (Since its inception, OSHA has been "drastically underfunded for its mission of assuring 'every working man . . . in the nation safe and healthful working conditions.'"); see also Interview with Debra Jacobson, Counsel, Subcomm. on Investigations of the House Comm. on Energy and Commerce, in Washington, D.C. (October 16, 1986) (funding levels for NIOSH are inadequate to undertake new research); Occupational Safety and Health Improvements Act of 1980: Hearings on S. 2153, S. 1486, & S. 1572 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 231 (1980) (Statement of Elmer Chatak, AFL-CIO) (NIOSH lacks the research capabilities to function effectively as scientific advisor for OSHA).

the same period.<sup>32</sup>

A final managerial constraint is that agency administrators often quickly come and go. OSHA is a good example of this phenomenon. In its fifteen years of existence, no Assistant Secretary has served longer than about two years, with the exceptions of Eula Bingham (almost four years) and Thorne Auchter (three years).<sup>33</sup> It is probably not an accident that much of the agency's regulatory activity occurred during the Bingham and Auchter regimes.<sup>34</sup>

Staffing and leadership problems are permanent features of administrative government. OSHA, however, has three additional disadvantages in terms of management constraints as compared to FDA and EPA. It has more regulatory responsibilities, less scientific expertise, and more organizational burdens.

#### a. More regulatory responsibilities

OSHA has been given the responsibility to regulate any chemical that poses a significant hazard to workers and, to the

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32. Washington Post, June 4, 1984, at D11, reprinted at R. PIERCE, S. SHAPIRO, P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, § 4.3.3, at 94 (1985) (citing a study by the Center for the Study of American Business of Washington University); see R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 127-28 (1983) (Reagan Administration has used "severe" budget cuts to restrain government regulation).

33. The chronology of service is:

John Pendergast	May 86 - present	8 mos.
Vacant	July 85 - May 86	10 mos.
Robert Rowland	July 84 - July 85	1 yr.
Vacant	Mar. 84 - July 84	4 mos.
Thorne Auchter	Mar. 81 - Mar. 84	3 yrs.
Vacant	Dec. 80 - Mar. 81	3 mos.
Eula Bingham	Mar. 77 - Dec. 80	3 yrs. 9 mos.
Vacant	Jan. 77 - Mar. 77	3 mos.
Morton Corn	Dec. 75 - Jan. 77	1 yr. 1 mo.
Vacant	July 75 - Dec. 75	5 mos.
John Stender	Apr. 73 - July 75	2 yrs. 3 mos.
Vacant	Jan. 73 - Apr. 73	3 mos.
George Guenther	Apr. 71 - Jan. 73	1 yr. 9 mos.

34. Compare PREVENTING INJURY, supra note 2, at 363-64 (chart of when regulatory standards were issued) with note 33, supra (chart of time of service of Assistant Secretaries.)

extent feasible, make every workplace safe.<sup>35</sup> Since there are thousands of chemicals used in industry, many of which may be dangerous, this responsibility is overwhelming.<sup>36</sup> Cognizant of this problem, Congress required OSHA in 1971 to adopt and enforce voluntary, consensus industry health and safety codes, including some 400 exposure ceilings for toxic substances set by the American Conference of Governmental Industrial Hygienists (ACGIH).<sup>37</sup> Congress also established a National Institute for Occupational Safety and Health (NIOSH), located in the Department of Health and Human Services, to develop recommendations, called criteria documents, for exposure limits for toxic materials.<sup>38</sup> Congress intended that OSHA would update the 1971 standards as it received recommendations from NIOSH; in the meantime workers would be protected under those standards.<sup>39</sup> This system, however, has not worked as intended.

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35. 29 U.S.C. § 655(b)(5) (1982).

36. See Responses To Occupational Disease, supra note 2, at 1232.

37. Id. at 1257, see Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health, 56 TEX. L. REV. 1329, 1388-91 (1978) (description of OSHA adoption of consensus standards). Safety codes were derived from the national consensus standards of the American National Standards Institute, the National Fire Protection Association, and some existing federal standards for maritime safety. Viscusi, Reforming OSHA Regulation of Workplace Risks, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 248 (L. Weiss & M. Klass eds. 1986) (cited hereinafter as Reforming OSHA). For a description of how voluntary consensus standards are created, see Hamilton, supra at 1338-68; Stokinger, Modus Operandi of Threshold Committee of ACGIH, 9 ANN. AM. CONF. OF IND. HYG. 133 (1984).

38. Id. at 1257.

39. See Interview with Bob Gombar, Venable, Baetjer, Howard & Civiletti, in Washington, D.C. (Oct. 30, 1986) (Congress erroneously expected that OSHA could quickly adopt new standards).



Because the system is so resource intensive, OSHA has been largely unable to update or supplement the 1971 standards.<sup>40</sup> In the meantime, industry groups, such as the ACGIH, have made hundreds of changes.<sup>41</sup> At the same time, NIOSH has recommended that OSHA change the 1971 exposure standards or create new standards for over a hundred chemicals.<sup>42</sup> Because OSHA has not been able to act on these recommendations, millions of workers face exposures that are in compliance with the 1971 OSHA standards, but which are considered dangerous by the newer ACGIH and NIOSH recommendations.<sup>43</sup>

OSHA has been ambivalent about admitting that its agenda of regulation is unmanageable. In 1983, an OSHA staff memorandum recommended that the agency stop working on the development of revised exposure level standards for 115 substances because of OSHA's limited staff and resources.<sup>44</sup> OSHA publicly denied it had any intention of abandoning that work, but it has taken no

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40. Since 1971 OSHA has completed only eighteen rulemaking proceedings which adopted health standards for only twenty-five substances. See note 2 *supra*. It has also issued health standards for a cancer policy, for employee access to medical and exposure records, for occupational noise, and for hazard communications. *Id.* Since 1971, it has issued twenty-six safety standards. *Id.*

41. For example, since publication of its 1968 recommendations, which were the ones adopted by OSHA in 1971, the ACGIH has lowered exposure limits for over 100 of the chemicals on the 1968 list, and it has established exposure limits for about 200 additional chemicals. Mendeloff, Regulatory Reform and OSHA, 5 J. POLICY ANALYSIS & MANAGEMENT 440, 442 (1986) (cited hereinafter as Regulatory Reform & OSHA); see, also, PREVENTING INJURY, *supra* note 2, at 257-260. Similar discrepancies exist for safety standards. For example, a 1976 Presidential Task Force estimated that the OSHA machine-guarding standards (which had been adopted in 1971) covered only fifteen percent of the types of machines in use. OSHA SAFETY REGULATION: REPORT OF THE PRESIDENTIAL TASK FORCE 14 (P. MacAvoy ed. 1977) [hereinafter cited as OSHA SAFETY REGULATION]. As of 1984, that standard had not yet been revised or expanded. PREVENTING INJURY, *supra* note 2, at 226.

42. PREVENTING INJURY, *supra* note 2, at 258; Responses To Occupational Disease, *supra* note 2, at 1257.

43. Regulatory Reform & OSHA, *supra* note 41, at 442.

44. See Peterson, OSHA May Drop Standard-Setting Efforts, Washington Post, September 21, 1983, at A2.



actions to finish it.<sup>45</sup>

With the breakdown of the congressional system to manage its workload, OSHA faces the difficult task of addressing a regulatory agenda perhaps larger and more complex than any other agency. Its efforts to do so are seriously constrained by the fact that OSHA has less access to scientific expertise than most agencies.

**b. Less scientific expertise**

OSHA is unique in its inability to manage many of the scientists doing work relevant to its regulatory process. NIOSH, which researches what chemicals and substances should be regulated,<sup>46</sup> is located in the Department of Health and Human Services,<sup>47</sup> a situation which creates serious coordination problems.<sup>47</sup> For example, the most ambitious attempt by OSHA and NIOSH to cooperate to increase the effectiveness of OSHA regulation has ended in failure.<sup>48</sup> Further, OSHA officials have complained in the past that NIOSH criteria documents, which summarize the need for a regulation, contained insufficient information to allow OSHA to announce a rulemaking for the

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45. PREVENTING INJURY, supra note 2, at 261. The last public hearing concerning any of the 115 substances, beryllium, was in 1977, and there has been no public activity on any of the others since 1975. Id.

46. Responses To Occupational Disease, supra note 2, at 1256-57.

47. See Occupational Diseases, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 83 (1977) (Statement of Gregory Ahard, GAO) (Standards delayed because OSHA and NIOSH have limited teamwork, different priorities, and lack joint efforts at data collection).

48. See F. THOMPSON, HEALTH POLICY AND THE BUREAUCRACY: POLITICS AND IMPLEMENTATION 235 (1981). In the mid-1970s OSHA and NIOSH started actions to add requirements for exposure monitoring, medical surveillance, employee training and education, recordkeeping, or warning labels and signs for the consensus standard OSHA adopted in 1971. PREVENTING INJURY, supra note 2, at 227. No regulatory actions were ever completed under that project. Id.

regulation.<sup>49</sup>

Because NIOSH is not located within OSHA, the agency's access to scientific expertise, other than that of its own staff, is through consultants.<sup>50</sup> Other agencies, by comparison, can rely on an advisory committee system. FDA, for example, uses a large number of standing advisory committees to solicit advice concerning approval of new drugs.<sup>51</sup> This system gives FDA access to some of the leading scientists in the country.<sup>52</sup>

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49. Telephone Interview with Grover Wrenn, President, Environ Corp. (Oct. 23, 1986) (former Director, Directorate of Health Standards, OSHA); F. THOMPSON, supra note 48, at 235; PREVENTING INJURY, supra note 2, at 261; T. GREENWOOD, KNOWLEDGE & DISCRETION IN GOVERNMENT REGULATION 118 (1984); COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, DELAYS IN SETTING WORKPLACE STANDARDS FOR CANCER-CAUSING AND OTHER DANGEROUS SUBSTANCES 32 (1977) (cited hereinafter as DELAYS IN SETTING STANDARDS).

50. B. MINTZ, OSHA: HISTORY, LAW & POLICY 65 (1984); Interview with Ben Mintz, supra note 16 (OSHA currently relies "heavily" on consultants).

51. See DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT: THE USE OF STANDING ADVISORY COMMITTEES BY THE BUREAU OF DRUGS OF FDA (1977) (cited hereinafter as USE OF STANDING ADVISORY COMMITTEES).

52. HEW FINAL REPORT, supra note 28, at 52. The report stated:

Experts provide valuable advice on complex technical issues and assist the agency in deciding critical questions of scientific judgment . . . . [A]dvisory committees [also] offer FDA a dialogue with the nation's foremost experts in drug therapy. The Committees are thus an important source of peer review for proposed FDA decisions. For these reasons, use of advisory committees increases public and industry acceptance of FDA decisions and improves the credibility of the agency.

Id.

OSHA has the legal authority to appoint advisory committees,<sup>53</sup> but none have been appointed since 1976.<sup>54</sup> OSHA apparently has abandoned the committees because they imposed some administrative burdens,<sup>55</sup> because they have an unwieldy structure,<sup>56</sup> and because they did not give useful advice.<sup>57</sup> This decision, however, appears in retrospect to have been unwarranted. Although none of the previous problems are insurmountable,<sup>58</sup> the agency has forgone one type of scientific advice that has proven useful to other agencies.

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53. 29 U.S.C. at § 565(b); see generally Ashford, The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and EPA, in LAW AND SCIENCE IN COLLABORATION 169 (J. Nyhart & M. Carrow eds. 1983). The agency also has a permanent, balanced advisory committee, known as the National Advisory Committee of Occupational Safety and Health (NACOSH). 29 U.S.C. at § 656(a).

54. B. MINTZ, supra note 50, at 65; PREVENTING INJURY, supra note 2, at 353-64.

55. Professor Mintz reports that no advisory committees were appointed in part because OSHA was bothered by the requirements for federal advisory committees established by OMB during the Carter Administration and by the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. § 7 (1982). B. MINTZ, supra note 50, at 65.

56. Advisory committees are to have no more than fifteen persons and are to be balanced between "persons qualified by experience and affiliation to present the viewpoint of employers involved" and "persons similarly qualified to present the viewpoint of the workers involved." 29 U.S.C. at § 656(b). In addition, a committee must include at least one representative of a state health and safety agency and may include other persons "who are qualified by knowledge and experience to make a useful contribution," so long as the number of such persons does not exceed the number of representatives of federal and state agencies. Id.

57. See T. GREENWOOD, supra note 49, at 130 (advisory meeting "did little more than provide a forum for the contending parties -- labor and employers -- to argue with each other."); Risk Assessment Research, 1984: Hearings on H.R. 4192 Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science and Technology, 98th Cong., 2d Sess. 145 (1985) (Statement of Nicholas Ashford, MIT Center for Policy Alternatives) (OSHA advisory committees became tools for political manipulation).

58. Methods to resolve OSHA's problems with advisory committees will be addressed in a forthcoming report for ACUS.

### c. Additional organizational burdens

OSHA's proposed regulations must be reviewed by the Solicitor's Office and other officials of the Department of Labor (DOL). Since these offices are part of DOL, OSHA has no organizational authority to set deadlines or other management guidelines for them. Both agency employees<sup>59</sup> and others<sup>60</sup> report that decisionmaking delays in the Solicitor's Office and other DOL departments are difficult for OSHA to manage.<sup>61</sup>

Another type of management burden is created for OSHA by its own internal organization.<sup>62</sup> The promulgating of a standard requires input from a variety of disciplines including economists, industrial hygienists, and others.<sup>63</sup> These various professionals, however, are located in different departments, called "Directorates," in OSHA. Thus, the Directorate of Health Standards Programs performs risk assessment, the Directorate of Policy performs economic and feasibility analysis, and the Directorate of Technical Support assists in those functions.<sup>64</sup> Because the administrators of these Directorates are co-equal, no single Director has the authority to set deadlines or other

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59. See, e.g., Interview with Frank White, Deputy Assistant Secretary, OSHA, in Washington, D.C. (Sept. 26, 1986) (coordination with offices in DOL presents problems); Interview with Barry White, Director, Directorate of Safety Standards Programs, in Washington, D.C. (September 26, 1986) (Solicitors Office can be "slowest link" in OSHA decisionmaking); Interview with John Martonik, Directorate of Health Standards, OSHA, in Washington, D.C. (September 26, 1986) (slippages in decisionmaking caused in DOL).

60. See Occupational Safety and Health Improvements Act of 1980, supra note 31, at 1230 (Statement of Lane Kirkland, AFL-CIO) (timely progress in health standard development hampered by delays in Solicitor's office of DOL); Harter, In Search of OSHA, REGULATION, Sept./Oct., 1977, at 36 (It is "at best difficult" for OSHA to act because DOL officials "adopt their own schedules and priorities . . .").

61. See Part IIID infra (how Solicitor's Office slows OSHA regulation).

62. Harter, supra note 60, at 38 (organizational structure at OSHA is a "nightmare"); Interview with Steven Bokas, United States Chamber of Commerce, in Washington, D.C. (Sept. 9, 1986) (OSHA is "bureaucratically ponderous").

63. See IA 1 supra (health and safety regulation requires risk, benefit, cost and feasibility analysis).

64. T. McGARITY, supra note 24, at III 192-93.



management guidelines for the others. Unless the Assistant Secretary, or that person's staff, directly supervises day-to-day operations, no suitable mechanism exists to ensure accountability and dispute resolution. By comparison, FDA does not depend on the agency's Administrator to supervise day-to-day operations: a staff person is in charge of coordinating the efforts of the various disciplines.<sup>65</sup> Both agency employees<sup>66</sup> and others<sup>67</sup> report that the failure of previous OSHA administrators to address this problem has slowed decisionmaking for health standards.<sup>68</sup>

The effects of the previous problems are cumulative. At the same time OSHA has a larger regulatory agenda than almost any other agency, it lacks scientific and administrative resources and management capability. OSHA's ability to regulate has also been constrained by its common and unique legal procedures.

### 3. Legal Constraints

All health and safety agencies must use some type of public process before a regulation can be promulgated. Although a few

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65. See DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT, FDA'S REVIEW OF INITIAL IND SUBMISSIONS: A STUDY OF THE PROCESS FOR RESOLVING INTERNAL DIFFERENCES AND AN EVALUATION OF SCIENTIFIC JUDGMENTS 14-15 (1977) (interdisciplinary team, under the control of a supervising medical officer, evaluates the safety and efficacy of new drugs).

66. See, e.g., Interview with John Martonik, supra note 59 (slippage is "inevitable" because of need "to coordinate with other units that may have their own problems"); Interview with Frank Frodyma, Director, Directorate of Policy, OSHA, in Washington, D.C. (Sept. 26, 1986) (No mechanism exists to force a "consensus" between those persons who must participate to promulgate a standard).

67. DELAYS IN SETTING STANDARDS, supra note 49, at 23.

68. See Part IIID infra (failure of OSHA Administrator to coordinate Directorates is a source of delay).

decisions are made through informal rulemaking,<sup>69</sup> many others are made by the more cumbersome hybrid rulemaking,<sup>70</sup> or, in a few cases, by the extremely cumbersome formal rulemaking.<sup>71</sup> In complicated cases, formal hearings can take months since parties have the opportunity to present evidence and cross-examine witnesses.<sup>72</sup> The use of such extensive procedures has been challenged on the ground they are unnecessary for the type of scientific and policy judgments made by health and safety agencies.<sup>73</sup> Nevertheless, the time spent during a hearing often is only a small part of the total time consumed by agency decisionmaking.<sup>74</sup>

Agencies are also constrained by procedural and substantive requirements imposed by the courts. As a procedural matter, agencies have been given additional responsibilities concerning

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69. See, e.g., 15 U.S.C. § 2605 (1982) (Toxic Substances Control Act); 42 U.S.C. § 6924 (1982) (Resource Conservation and Recovery Act).

70. See, e.g., 33 U.S.C. § 1317(b)(1) (1982) (Clean Water Act); 42 U.S.C. § 7607(d) (1982) (Clean Air Act); 29 U.S.C. § 655(f) (1982) (OSHA). For a discussion of hybrid rulemaking, see ACUS, A Guide to Federal Agency Rulemaking (1983).

71. See, e.g., 21 U.S.C. § 348(f), 355 (c)(1)(B) (Supp. II 1984) (FDA regulation of food additives and human drugs).

72. Hamilton, Rulemaking On A Record by the Food and Drug Administration, 50 TEX. L. REV. 1132 (1972).

73. See, e.g., Resolution of Scientific Policy Questions, supra note 8, at 750.

74. This is the case at OSHA. See notes 84-85 infra and accompanying text.

how they conduct a rulemaking proceeding.<sup>75</sup> As a substantive matter, agencies have been given additional responsibilities concerning how they justify any rules that they adopt.<sup>76</sup> Although whether these requirements produce better decisions is the subject of a lively debate,<sup>77</sup> there can be no dispute that agencies must now devote additional time and resources to the

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75. The obligation to give "adequate notice", 5 U.S.C. § 553(b)(3) (1982), requires agencies to disclose fully their basis and purpose for a rule when it is proposed, and to hold a second hearing if that basis and purpose changes. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d cir. 1977) (agency must give new notice if it significantly changes the data or methodology on which it will base a rule); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (agency must reveal in notice of rulemaking the data and methodologies on which it intends to rely). The obligation to give a "concise statement of basis and purpose" when the rule is promulgated, 5 U.S.C. § 553(c) (1982), requires agencies to respond to "cogent" comments made by during the hearing process. See *A GUIDE TO FEDERAL AGENCY RULEMAKING*, supra note 70, at 138-54; see, also, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 493 (D.C. Cir. 1973) (agency's failure to respond to public comments in its statement of basis and purpose ground for reversal); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (statement of basis and purpose must allow court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

76. In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Supreme Court held that agencies must have "adequate reasons" for their actions. An agency does not meet that requirement if it relied on factors that Congress did not intend it to consider, if it failed to consider "entirely" an important aspect of the problem it was resolving, or if it offered an explanation for its decision that ran counter to the evidence, or which was so implausible that it could not be explained as a product of a difference in view or of agency expertise. *Id.* at 43.

77. Compare *Shapiro & Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and The Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (favoring judicial review to enforce new requirements) with *Pierce, The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985) (not favoring judicial review to enforce new requirements).

hearing process.<sup>78</sup> Moreover, because a few courts have misinterpreted these changes as inviting a highly critical scope of review,<sup>79</sup> agencies may take additional time to try to avoid reversal in those courts.<sup>80</sup>

OSHA must engage in hybrid rulemaking in order to promulgate a health and safety standard.<sup>81</sup> By comparison, some agencies, like EPA, can promulgate some health standards by use of informal rulemaking.<sup>82</sup> Other agencies, like FDA, use a summary judgment procedure to avoid holding a formal hearing in many cases.<sup>83</sup> Nevertheless, the time OSHA spends in hybrid hearings is not the primary cause of delay. The time elapsed during hearings is only a small portion of the time elapsed during OSHA decisionmaking

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78. The first few OSHA health standards, for example, occupied only a few pages in the federal register, while recent standards have occupied hundreds of pages. Compare Standard For Exposure to Asbestos Dust, 37 Fed. Reg. 11,318 (1972); Standard For Carcinogens, 39 Fed. Reg. 3756 (1974); Standard for Exposure to Vinyl Chloride, 39 Fed. Reg. 35, 890 (1974) with Cotton Dust Fiber Standard, 43 Fed. Reg. 27,350 (1978); Standard for Lead, 43 Fed. Reg. 52,952 (1978); Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5002 (1980).

79. See, e.g., Forging Industry Assoc. v. Secretary of Labor, 748 F.2d 210 (4th Cir. 1984) (OSHA's hearing conservation rule exceeds its statutory authority).

80. This appears to be the situation at OSHA. See Part IIIG infra.

81. 29 U.S.C. at § 655(b); see generally B. MINTZ, supra note 50, at 61-62.

82. See note 69 supra.

83. See 21 C.F.R. § 12.93 (1985); see also 10 C.F.R. § 2.749 (Nuclear Regulatory Commission's summary judgment rule); see resolution of Scientific Policy Questions, supra note 8, at 759-66 (discussing FDA summary judgment procedures).



and judicial review.<sup>84</sup> For that reason, while streamlining the hearings would enhance OSHA's efficiency somewhat, it is not likely to aid the agency greatly in increasing its regulatory output.<sup>85</sup>

A more serious problem is that the type of evidentiary burden imposed on OSHA appears to be greater than that of other agencies. The Administrative Procedure Act (APA) generally places the burden of proof on "the proponent of a rule."<sup>86</sup> At FDA and other licensing agencies, the proponent is the prospective licensee and that entity must establish that its product is acceptable. By comparison, at OSHA and other standard-setting agencies, the proponent is the agency and it must establish that a regulation is necessary.<sup>87</sup> This allocation has three important ramifications for OSHA. First, FDA can keep a product off the market in cases of scientific uncertainty, but

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84. The following chart indicates the time elapsed for the various components of the process:

<u>Standards</u>	<u>Hearing</u>	<u>Agency Decision- Making</u>	<u>Judicial Review</u>	<u>Entire Process</u>
Asbestos	3 days	4 mos.	21 mos.	25 mos.
14 Carcinogens	3 days	11 mos.	10 mos.	21 mos.
Vinyl Chloride	6 days	5 mos.	2 mos.	7 mos.
Coke Oven Emissions	75 days	63 mos.	16 mos.	79 mos.
Benzene	22 days	61 mos.	28 mos.	49 mos.
DBCP	2 days	6 mos.	none	6 mos.
Arsenic	12 days	51 mos.	34 mos.	85 mos.
Lead	49 days	69 mos.	20 mos.	89 mos.
Cotton Fiber Dust	7 days	44 mos.	35 mos.	79 mos.
Acrylonitrile	11 days	18 mos.	none	18 mos.
Noise	24 days	100 mos.	46 mos.	146 mos.

See Responses to Occupational Disease, supra note 2, at 1305-09 (time elapsed for agency and judicial review except for noise standard); PREVENTING INJURY, supra note 2, at 363 (time elapsed for agency and judicial review for noise standard); McGarity, OSHA's Generic Carcinogen Policy: Rulemaking Unclear Scientific and Legal Uncertainty, in LAW AND SCIENCE IN COLLABORATION 78 (J. Nyhart & M. Carrow eds. 1983) (time elapsed for hearings).

85. McGarity, supra note 84, at 77.

86. 5 U.S.C. § 556(d) (1982).

87. Huber, supra note 17, at 1033.

OSHA cannot regulate that risk until additional evidence is forthcoming.<sup>88</sup> Second, FDA requires the regulatee to develop the scientific information necessary for a decision, but OSHA has that responsibility.<sup>89</sup> Finally, firms regulated by FDA are harmed by regulatory delay, but firms regulated by OSHA benefit. Thus, OSHA enjoys less cooperation than it would if firms were required to obtain a license from the agency before they could act.<sup>90</sup>

Although the APA applies an "arbitrary and capricious" standard of review for most agencies, OSHA is required to support its rules with "substantial evidence."<sup>91</sup> As a result, it may have to produce more convincing evidence before it can regulate.<sup>92</sup> Because Congress assigned that burden of proof, OSHA decided to engage in hybrid rulemaking, rather than the more expeditious informal rulemaking used by other agencies.<sup>93</sup>

OSHA has also been affected by the manner in which the courts have defined its burden of proof. In 1980, OSHA undertook a bold move to speed regulation of carcinogens, but the Supreme Court in effect blocked this effort. The agency had adopted a generic cancer policy to avoid having to resolve the same scientific issues in every rulemaking proceeding.<sup>94</sup> The centerpiece of the policy was a decision to seek the lowest exposure feasible for any chemical that was carcinogenic in either animals or humans and to limit participants to certain types of evidence in their attempts to convince OSHA not to

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88. Id. at 1034.

89. See note 18 supra and accompanying text.

90. See notes 16-17 supra and accompanying text.

91. Compare 5 U.S.C. § 706(2)(A) with 29 U.S.C. § 655(f) (1982).

92. See R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 32, at § 7.3. Some argue, however, there is little or no difference between how courts administer the two standards of review. Id.

93. B. MINTZ, supra note 50, at 62.

94. Final Rule, Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5002 (1980) codified at 29 C.F.R. §§ 1990.101 - .152 (1982) (as amended). OSHA's rationale was that the "existing case-by-case approach, with its constant re-examination of already resolved scientific and policy issues, does not permit regulation of such substances in a timely and efficient manner." Id. at 5002.

follow that generic policy.<sup>95</sup> The agency, however, withdrew these rules after the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute (frequently referred to as the Benzene case).<sup>96</sup>

In the Benzene case, the Court held that Congress had not delegated to OSHA the authority to decide how the proceed if sufficient information about how dangerous a chemical might be did not exist.<sup>97</sup> A plurality of the Court held that OSHA could promulgate a standard only if the agency first had proven that the change was "necessary and appropriate to remedy a significant risk of material health impairment." For the benzene standard under review, the plurality concluded that OSHA did not have any evidence to support a finding of "significant risk." They rejected OSHA's explanation that since no safe level of benzene exposure could be calculated, the only prudent course was to seek the lowest exposure level that was feasible.<sup>98</sup> In a later case, the entire Court confirmed that OSHA was required to prove that workers face a "significant risk" before it can promulgate a regulation limiting exposure to a chemical.<sup>99</sup>

After the Benzene case, it is unclear whether OSHA can use generic regulations that would avoid the time-consuming, case-by-case adversarial confrontations which have slowed agency rulemaking. If OSHA must hold a separate hearing on significant risk for every chemical that it regulates, the agency is unlikely to be able to act on very many of the hundreds of chemicals that may require regulation.<sup>100</sup>

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95. 45 Fed. Reg. at 5283-84, 5286-87.

96. 448 U.S. 607 (1980); see Final Rule, Identification, Classification and Regulation Of Potential Occupational Carcinogens, Conforming Deletions, 46 Fed. Reg. 4889 (1981) (codified at 29 C.F.R. § 1990) (deletion of inconsistent provision).

97. 448 U.S. at 652-53 (Act authorizes OSHA to promulgate health and safety standards only when agency can show, on the basis of substantial evidence, that significant risk of harm exists).

98. Id. at 631-32, 635 n.38, 639-40, 667.

99. See American Textile Mfgs. v. Donovan, 452 U.S. 490, 505 n.25 (1981) (OSHA determined that exposure to cotton dust presented a significant health hazard).

100. The question of whether OSHA must hold a separate hearing will be addressed in a forthcoming reports for ACUS.

#### 4. Political Constraints

One final constraint on agencies is the political nature of their work. Regulatory decisions are normally controversial because they affect Congress, the White House, and various interest groups.<sup>101</sup> Interest groups are affected because decisions cause a redistribution of wealth, often millions of dollars, from the regulated industry to consumers or other beneficiaries of regulation.<sup>102</sup> Congress and the White House are affected because agencies make choices about economic and social priorities in which elected officials have a great interest.<sup>103</sup> Agencies interact with these parties because each can influence the agency's ultimate success or failure.<sup>104</sup>

Regulatory decisions are also controversial because they involve difficult moral and philosophical choices. No society has sufficient resources to protect its citizens from all dangers. As a result, agencies inevitably are faced with "tragic choices" concerning which persons will be protected and which will not.<sup>105</sup> These choices must be informed by social values and they will affect the maintenance of those values.<sup>106</sup> Wide disagreement over which values should control these decisions makes them all the more difficult.<sup>107</sup>

During most of OSHA's existence, it has been embroiled in political controversy with industry, labor, the White House and Congress. Although all agencies have their share of such

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101. See Pierce & Shapiro, Political and Judicial Review of Agency Action, 59 TEX. L. REV. 1175 (1981).

102. See Wilson, The Politics of Regulation, in THE POLITICS OF REGULATION 358-72 (J. Wilson, ed. 1980).

103. See Pierce & Shapiro, supra note 102, at 1195-1200, 1211-13.

104. See J. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY; THE POLITICS OF ENERGY 18-57 (1983).

105. See G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978).

106. See M. DOUGLAS & A. WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS (1982).

107. See Schroeder, Rights Against Risk, 86 COLUM. L. REV. 495 (1985).



controversy, OSHA has more than the others.<sup>108</sup>

OSHA is guaranteed an unusual amount of political controversy because its actions significantly affect both business and labor and most decisions favoring one group will disfavor the other. Attempts to reconcile business and labor are hampered by the long history of antagonism between those groups.<sup>109</sup> Thus, OSHA has almost continually been attacked by

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108. See G. WILSON, THE POLITICS OF SAFETY AND HEALTH: OCCUPATIONAL SAFETY & HEALTH IN THE UNITED STATES & BRITAIN 151 (1986) (The "dominant feature of the politics of safety and health in the USA has been conflict."); Interview with Dorothy Strunk, Counsel, House Comm. on Education and Labor, in Washington, D.C. (Oct. 31, 1986) (OSHA is the "most politicized agency in Washington").

109. Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec. 1979, at 34 ("[T]he whole bitter nature of U.S. labor history -- the mutual distrust, management's desire to run its business with minimal interference, labor's belief that employers cannot be trusted to do 'right things' without a gun at their heads -- has been loaded on OSHA."); Thompson, Deregulation by the Bureaucracy: OSHA and the Augean Quest For Error Correction, 42 PUBLIC ADMIN. REV. 202, 205 (1982) (cited hereinafter as Augean Quest) (conflict between business and labor is particularly bitter because each group views agency decisions as "addressing values of the most fundamental importance" and each sees the other as "a long-term enemy of many of its most basic value commitments"); see S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL HEALTH AND SAFETY POLICY (1981) (American history of labor strife affects how OSHA can regulate).

business for overregulation<sup>110</sup> and by labor and public interest groups for underregulation.<sup>111</sup> Because business and labor are affected, their allies in Congress are critical of the agency.<sup>112</sup> Finally, OSHA has been the subject of White House

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110. OSHA was attacked in its early years for "Mickey Mouse standards" such as specifying split toilet seats or forbidding ice in drinking water. Kelman, Occupational Safety & Health, in THE POLITICS OF REGULATION 258 (J. Wilson ed. 1980). Most of these regulations were adopted pursuant to a Congressional order that the agency adopt as its own regulations existing, voluntary industry health and safety standards. See note 37 supra and accompanying text. OSHA adopted these regulations without culling out those that were silly thereby opening itself for political attack by business and their political allies. F. THOMPSON, supra note 48, at 231-35; Kelman, supra, at 259. In later years, business criticism focused on the high compliance costs imposed by OSHA health regulations. Kelman, supra note 89, at 259; see generally Szasz, Industrial Resistance to Occupational Safety and Health Legislation: 1971-1981, 32 SOCIAL PROBLEMS 104 (1984) (industry has resisted OSHA initiatives by seizing on popular support for deregulation of costly regulatory problems).

111. See, e.g., J. CLAYBROOK, RETREAT FROM SAFETY: REAGAN'S ATTACK ON AMERICA'S HEALTH 113 (1984) (report by staff of Public Citizen) (OSHA has "diligently rolled back what health and safety protections it could on behalf of its business allies" by "backdoor administrative ploys and evasive rhetoric."); Bargmann, OSHA: The Urgency For Revival, AFL-CIO AMERICAN FEDERATION, June, 1977 ("urgent reform" of OSHA necessary for it to reach its "full potential").

112. F. THOMPSON, supra note 48, at 229; Jones & Keiser, U.S. Senate Voting of Health and Safety Regulation; The Effects of Ideology and Interest-Group Orientations, 6 HEALTH POLICY 33 (1986); see Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 33 (from 1973-76 Congress held over one hundred oversight hearings concerning OSHA); but see Telephone interview with Richard Lawson, Counsel, Senate Comm. on Labor (October 22, 1986) (No Senate oversight of OSHA from 1980 - 1986 to allow agency to solve its programs without interference).

efforts to have agencies become more cost conscious.<sup>113</sup>

The high level of controversy has had several debilitating effects on OSHA. First, Congress made so many political compromises when it passed legislation to establish OSHA that the agency lacked the organizational coherence, power, and resources necessary to do an effective job.<sup>114</sup> A good example of this problem, discussed earlier, was the decision to locate NIOSH in a different executive department.<sup>115</sup> Another example is that Congress subjected OSHA to a "substantial evidence" scope of review, rather than the "arbitrary and capricious" standard used under the APA to review agency rulemaking.<sup>116</sup> Second, almost every health decision has been challenged in the courts.<sup>117</sup> As a result, OSHA engages in a lengthy preparation process in order to

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113. F. THOMPSON, supra note 48, at 225-26. Some have claimed that health regulations have been a particular target of the Reagan Administration. See, e.g., HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, OMB REVIEW OF CDC RESEARCH: IMPACT OF THE PAPERWORK REDUCTION ACT, H. Rep. No. 99-MM, 99th Cong., 2d Sess. (1986) (OMB has discriminated against the collection of data for environmental and health regulations.) Other Presidents, however, have also failed to support OSHA or have attempted to limit its actions. See G. WILSON, supra note 108, at 161 (description of anti-OSHA efforts of Presidents Nixon, Ford and Carter). Whether or not OSHA has been singled out, OMB review of regulations have become highly controversial. See Morrison, OMB Interference With Agency Rulemaking: The Wrong Way To Write Regulations, 99 HARV. L. REV. 1059 (1986).

114. Levin, supra note 112, at 36-37; Telephone Interview with Sy Holtzman, Deputy Staff Director, Subcomm. on Health of the House Comm. on Education & Labor (Oct. 21, 1986).

115. See notes 46-48 supra and accompanying text.

116. See Associated Industries v. Department of Labor, 487 F.2d 342, 347-50 (2d Cir. 1973) ("substantial evidence" standard result of Congressional compromise).

117. Business has sought review for all but four of OSHA's eighteen health standards. See PREVENTING INJURY, supra note 2, at 363; Responses To Occupational Disease, supra note 2, at 1305-09. Moreover, labor and public interest groups have continually sued OSHA for failure to issue regulations. See Part IIA2 infra; Responses To Occupational Disease, supra note 2, at 1263.

defend itself.<sup>118</sup> Third, the agency has lacked sufficient legitimacy to gain popular support for its actions. As a result, it has very little political protection from its critics.<sup>119</sup> Finally, industry and labor have vigorously blocked consideration of legislative reforms that might make OSHA's job easier. Each has been too fearful that the other could obtain congressional approval of reforms disadvantageous to itself.<sup>120</sup>

#### B. The Possibility of Reform

In light of the previously discussed difficulties, it is remarkable that OSHA has accomplished as much as it has. Nevertheless, it is clear that much remains to be done. Knowledgeable observers are generally pessimistic about the possibility of reform at OSHA and even optimists are rather guarded in their hopes.

Great caution is certainly appropriate. The previous discussion reveals the complexity of problems faced by OSHA. Moreover, reform of an ongoing agency is actually more difficult than building a regulatory system from the ground up. Revisions will be opposed not only by those who perceive they will be disadvantaged, but even by those who might benefit because they

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118. See Part III *infra* and accompanying text. Moreover, in the late 1970s all OSHA decisionmaking was brought to a halt while OSHA awaited the outcome of a series of important court cases. Viscusi, The Status of OSHA Reform: A Comment on Mendelhoff's Proposals, 5 J. POLICY ANALYSIS & MANAGEMENT 469, 471 (1986).

119. See Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 39 (public's commitment to job safety and health does not run deep and wide enough to make the subject a top national priority); Harter, *supra* note 60, at 34 (OSHA has little political support). By comparison, agencies like FDA enjoy broad popular support because they resolved years ago the type of intense political problems that currently plague OSHA. Telephone Interview with Donald McLearn, Special Asst. to the Director, Bureau of Drugs, FDA (Oct. 16, 1986).

120. See Interview with Dorothy Strunk, *supra* note 108 (No constituency for legislative reform because both labor and industry perceive they would be worse off); Telephone interview with Sy Holtzman, *supra* note 114 (Oct. 21, 1986) (OSHA supporters "afraid" that if new legislation was considered, the agency would be "substantially weakened").



prefer the "devil they know" to any future uncertainty.<sup>121</sup> Finally, groups representing labor, management, physicians, other health professions, and public interest organizations perceive the need for change according to their professional orientations. Because each group differs in orientation, OSHA reform is "contested terrain" between them.<sup>122</sup>

With these realities in mind, this report examines two types of possible reforms. Part II considers the importance and advantages of a better priority-setting system at OSHA. Part III evaluates new methods of management.

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121. See Harter, supra note 60, at 38 ("largest obstacle" to reform at OSHA is the opposition of those with a vested interest in the status quo); Levin, supra note 112, at 39 (Those who have learned to use present system may prefer "the devil they know").

122. Interview with Karl Kronenbush, Office of Technology Assessment, in Washington, D.C. (Oct. 31, 1986).

## II. Prioritization.

If OSHA continues to do business as it has in the past, it has sufficient resources to pursue actively about 15-20 major rulemaking efforts at any given moment.<sup>123/</sup> Further, given current resource constraints and a 4-8 year gestation period for most rules, OSHA has the capacity to take on only about 2-5 new projects in any single year. How OSHA chooses new projects from among the thousands of conditions that create potentially hazardous workplaces is a matter of no small importance to the agency, the regulated industries, and workers. Each new Administration at OSHA seems to revisit this question at least once.<sup>124/</sup>

In 1983, then-Assistant Secretary Auchter told a House subcommittee that OSHA rulemaking had been "a random process" in which "priorities were constantly re-juggled and whoever screamed the loudest got the action."<sup>125/</sup> That characterization applies equally well in 1987. There are presently at least nine sources of rulemaking initiatives that vie for OSHA's attention as it attempts to establish a rulemaking agenda: OSHA's own systematic prioritization efforts; worker and consumer group petitions; congressional demands for action; pressure from the White House and OMB; referrals from EPA pursuant to The Toxic Substances Control Act; NIOSH criteria documents; private standard-setting

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<sup>123/</sup> The Health Standards Directorate has approximately 33 professionals to devote to rulemaking activities. Martonik Interview, supra note 59. That Directorate is currently working on about 17-18 projects, but many of these are small and some are winding down. The Safety Standards Directorate has approximately 20 effective professionals. B. White Interview, supra note 59. One long-time health scientist in the Health Standards Directorate estimates that at current staffing levels, OSHA is only capable of working effectively on six or seven standards at any one time. Telephone interview with Edward Stein, Directorate of Health Standards Programs, OSHA (October 21, 1986). A member of the Policy Directorate put the number at 9-10 health standards. Telephone Interview with Larry Braslow, Supervising Economist, Directorate of Policy, OSHA (October 24, 1986).

<sup>124/</sup> Wrenn Interview, supra note 49.

<sup>125/</sup> BNA Occupational Safety and Health Reporter, May 5, 1983, at 1043. See Delays in Setting Standards, supra note 49 (relating inability of NIOSH and OSHA to set priorities).

agencies like ACGIH and ANSI; information collected from the field; and developments in the states and other countries.

Ideally, OSHA should channel all of these sources into its own agenda-setting mechanism to establish a realistic set of priorities for the near term. In prioritizing projects related to safety standards, OSHA comes close to achieving this ideal. Most of OSHA's safety standard work consists of reviewing and updating existing standards.<sup>126/</sup> The agency agreed several years ago to review all of its existing safety standards within ten years and to set new standards where the old ones were out of date. The Safety Standards Directorate has been methodically proceeding down a list of existing standards. When a need for a new standard arises, as in the case of grain elevators and Bhopal-like chemical leaks, the Directorate simply amends its priorities sub silentio to allow the new project to take the place of some pending project.<sup>127/</sup>

The situation is starkly different for health standards. There are literally thousands of substances in American workplaces that are regulated, if at all, only by the consensus standards that OSHA promulgated in 1971. Most experts agree that the old consensus standards, without more, are not adequate to provide safe and healthful workplaces, and OSHA acknowledges that it has much work to do in the health area. But OSHA has no agenda-setting process at all for health standards. In reality, its priorities are determined in an ad hoc fashion by outsiders. Virtually every knowledgeable observer of the OSHA rulemaking process, from both inside and outside the agency, agrees that this is a sorry state of affairs that is badly in need of correction. There is less agreement, however, on how OSHA should go about regaining control over its own agenda.<sup>128/</sup>

#### A. Sources of agency priorities.

##### 1. Systematic Agency Priority-Setting.

OSHA's one attempt to rank priorities systematically was its 1979 carcinogen policy, which contained a scheme for ranking substances that showed indications of carcinogenicity. The agency screened about 200 substances and attempted to rank

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<sup>126/</sup> B. White Interview, supra note 59.

<sup>127/</sup> B. White Interview, supra note 59; Telephone interview with George Henshel, Department of Labor, Office of the Solicitor (October 28, 1986).

<sup>128/</sup> Because prioritization is largely a problem for health standards, the following discussion will focus on those standards and generally ignore safety standards.

them according to exposure, quality of data, and potency.<sup>129/</sup> This effort generated a great deal of controversy among regulatees, and it was abandoned after the Fifth Circuit stayed the Carcinogen Policy. According to one observer of this effort, its candid, highly public nature spelled its doom. Once the agency placed individual substances on the list, employers who used those substances were willing to expend substantial resources challenging the prioritization effort. Given the large uncertainties in setting priorities for carcinogens, it was relatively easy to make plausible arguments that OSHA had misranked the chemicals on the list. OSHA ultimately abandoned the attempt.

The carcinogen policy experience should not, however, cause OSHA to abandon systematic priority-setting; nor is it a reason to hide it behind closed doors. As we shall see later in this section of the Report, the agency can systematically set priorities if the reviewing courts are educated about the difficulties of setting priorities in areas of great uncertainty and if the agency adopts a process that will allow it to make prioritization decisions without becoming paralyzed by the predictable complaints of economically interested

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<sup>129/</sup> 26 C.F.R. §§1990, 131-33, 45 Fed. Reg. 5002 (1980). Telephone Interview with Charles Gordon, Department of Labor, Office of the Solicitor (October 23, 1986); Stein Interview, supra note 123. According to the policy OSHA was to take the following factors into account in ranking candidates for regulation:

- (1) The estimated number of workers exposed;
- (2) The estimated levels of human exposure;
- (3) The levels of exposure to the substance which have been reported to cause an increased incidence of neoplasms in exposed humans, animals or both;
- (4) The extent to which regulatory action could reduce not only risks of contracting cancer but also other occupational and environmental health hazards;
- (5) Whether the molecular structure of the substance is similar to the molecular structure of another substance which meets the definition of a potential occupational carcinogen;
- (6) Whether there are substitutes that pose a lower risk of cancer or other serious human health problems, or available evidence otherwise suggests that the social and economic costs of regulation would be small; and
- (7) OSHA will also consider its responsibilities for dealing with other health and safety hazards and will consider the actions being taken or planned by other governmental agencies in dealing with the same or similar health and safety hazards.

26 C.F.R. § 1990.132 (1986).



entities. Nevertheless, the vehemence with which employers rejected OSHA's first attempt to draft a priorities list has made the agency chary of public priority-setting, and it has not in the intervening years attempted any similar projects.

## 2. Rulemaking Petitions.

The most frequent source of OSHA rulemaking initiatives during the last five years has been petitions from unions and public interest groups. In the typical pattern, a new scientific study indicating that a common workplace substance may be hazardous is reported widely in the press.<sup>130/</sup> An agency spokesman says that the agency is concerned and is looking into the matter. The Assistant Secretary instructs the Health Standards Directorate to study the issue, and the matter quickly loses its previous visibility.

Months or years pass without a formal agency response until a union or public interest group petitions the agency (usually with great fanfare) to set an emergency temporary standard and promulgate a notice of proposed rulemaking (NPRM). The agency agrees to consider the matter by a certain date, and the petition is referred to the staffer who was originally assigned the issue. The matter then assumes a much higher priority for that staffer, who now pulls together an ad hoc work group to prepare the agency's response to the petition.

The deadline passes. After several months, the petitioner (again with much fanfare) files suit in a district court demanding that the agency respond to the petition within a reasonable time. The agency responds by denying the allegation that it has unreasonably delayed things, but since it has only promulgated approximately two major rules in the last six years, it recognizes that it will have a difficult time demonstrating that it is really too busy. It therefore attaches to its response a proposed schedule for completing its consideration of the petition. In deference to the agency, the court accepts the agency's response, but retains jurisdiction with a warning that the court will not hesitate to intervene to correct any further delays.

Further delays occur, and the agency slips from the court-adopted schedule. The petitioner returns to court and secures a court order requiring OSHA to promulgate the proposed rule by a certain date or risk being held in contempt of court.

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<sup>130/</sup> The following description is intended to raise the general problems of OSHA's response to petitions. Although it may not precisely describe the process of responding to any particular petition, it is a fairly accurate composite description of several petitions, including asbestos, benzene, ethylene oxide, field sanitation, and formaldehyde.

Finally, the agency rushes out with a rule just before the final court-ordered deadline.

Perhaps the greatest advantage of the outside petition as an agenda-setting device is its potential to hold the agency accountable to its beneficiaries. Absent the petition tool, the agency feels greater pressure from regulatees. Since virtually every OSHA health standard is challenged in court, the agency is understandably reluctant to initiate a rulemaking action until it is very certain that it can create an administrative record capable of withstanding careful judicial scrutiny. Without some pressure emanating from regulatory beneficiaries, the agency will be very selective in choosing rulemaking topics. The petition device with the underlying threat of a "bureaucracy forcing" lawsuit reminds the agency that delay in initiating rulemaking also has its costs, not the least of which is the agency's loss of control over its own agenda. Many representatives of beneficiary groups firmly believe that if it were not for the threat of a lawsuit, OSHA would never decide to take up difficult and controversial projects.<sup>131/</sup> And a surprising number of health professionals in the Health Standards Directorate agree with this assessment.

Another argument favoring the petition device is that workers may be in a better position to understand workplace risks than the agency professionals and contractors. Adhering to the principle that the squeaky wheel is most in need of oil, some agency officials are content to let beneficiaries play a very large role in setting the agency's agenda. The necessary corollary is that workplaces about which the agency does not receive petitions must be reasonably safe.

Finally, as a practical matter, in our pluralistic participatory democracy, it is not politically realistic to maintain that beneficiary groups should not play a strong role in agency agenda-setting.<sup>132/</sup> The traditional argument that the agency is the best representative of beneficiary interests is no longer tenable in a post-Nader era. The agency may be in the best position to balance the competing interests of industry and worker, but OSHA is clearly not an agent for labor alone.

To maintain that beneficiary groups should play a role in agency agenda-setting through the petition process is not, however, to conclude that beneficiary groups should dominate

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<sup>131/</sup> Telephone Interview with Margaret Seminario, Assistant Director, Department of Occupational Safety, Health, and Social Security, AFL-CIO (November 4, 1986).

<sup>132/</sup> See generally, Luneburg, Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement, Report to the Administrative Conference of the United States (1986).

that process. Although few would argue that past petitions have addressed unimportant issues, it is in many cases debatable whether beneficiaries understand workplace hazards better than agency professionals, especially when those hazards are subtle and chronic in nature. No individual petitioner is likely to have the expertise necessary to assess comparative risks across a broad spectrum of occupations to determine which workers are most in need of protection. Pitting beneficiary groups against one another for access to limited agency rulemaking resources will not necessarily result in a set of priorities that has the potential to provide the greatest degree of protection to workers in general. Indeed, relying exclusively on petitions to set agency priorities would probably force the agency to give less attention to the workplace conditions of unorganized workers.<sup>133/</sup>

In sum, while it is obvious that any agenda-setting mechanism that OSHA develops should be capable of seriously addressing outside petitions, that device should also be capable of rejecting such petitions. Yet OSHA cannot credibly reject a petition until it is in a position to say to the petitioner: "Your petition has merits, and we will fully investigate the hazards that you bring to our attention. But for now other higher priority matters command our full attention." And the agency cannot credibly make this statement until it can point to some consistent system for ranking potential agency initiatives and until it can demonstrate that it is expeditiously addressing projects on its current agenda.<sup>134/</sup> OSHA presently lacks a prioritization plan, and it tends to study petitions interminably for lack of any way to decide whether the topic the petition addresses is more important than projects that it is currently pursuing. This paralysis persists until the agency is forced to respond to a judicial challenge to its indecision. Lacking a priority-setting process, OSHA does not have a credible response to ad hoc petitioners in such challenges.

It is only the good sense and self-restraint of petitioners that has prevented OSHA from becoming overwhelmed with petitions, each of which appears meritorious when considered in a vacuum. But a recent increase in the frequency

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<sup>133/</sup> Telephone interview with Dr. Imogene E. Sevin, Directorate of Health Standards Programs, OSHA (November 3/5, 1986); Henshel Interview, supra note 127. The history of the efforts of relatively poorly organized agricultural workers over the last ten years to persuade OSHA to promulgate a field sanitation standard, however, argues against the conclusion that less organized workers will have less access to the agenda setting process.

<sup>134/</sup> Telephone interview with Arthur Sampson, Kirkland & Ellis (October 24, 1986).

of petitions and the recent surge in referrals from EPA suggest that the agency must act quickly to protect its limited rulemaking resources.<sup>133</sup> OSHA badly needs a process for setting priorities that is responsive to outside petitions, but not driven by them.

### 3. Congressional Pressure

While the threat of being held in contempt of court is an undoubted spur to administrative activity, the threat of being on the receiving end of a critical congressional investigation can prove equally motivating. For example, OSHA's efforts to regulate ethylene dibromide (EDB) were in large part a result of congressional pressure. The studies showing that EDB caused cancer in laboratory animals had been around for years when state officials began to detect EDB residues in food. Although residues in food were not directly relevant to worker health, investigations soon revealed that some workers were being exposed to much higher levels of EDB than consumers of food. Congressional pressure soon mounted for OSHA to do something about worker exposure to EDB, and OSHA reacted by giving EDB a much higher priority.

Congressional pressure can also motivate the agency to give a rulemaking initiative less priority than it might otherwise have. For example, a safety initiative for the oil and gas industry has been percolating within OSHA for several years, and many safety experts agree that it could yield significant health benefits. Most agency officials, however, believe that as long as the oil and gas industry continues its current decline, it will not be politically feasible to promulgate an oil and gas safety standard.

Like court action, congressional interest usually originates from complaints of beneficiary groups about agency inaction. In some cases, however, congressional committees are more successful at probing the reasons for agency inaction than courts. Because they often have access to disgruntled agency staff, congressional committees may not accept agency excuses

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<sup>133</sup> The experience of the Consumer Product Safety Commission (CPSC) under a now-defunct provision of the Consumer Product Safety Act suggests that inundation is a very real possibility. Section 10(e) of the Act, 15 U.S.C. §2059(e) (repealed 1981), required CPSC to respond to petitions within 120 days. Failure to respond could result in a bureaucracy-forcing lawsuit in district court in which the question whether the product's risks crossed the statutory threshold was tried *de novo*. In its first three years CPSC was inundated with two hundred petitions. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 *Geo. Wash. L. Rev.* 32, 47 (1982).



at face value. In addition, a congressional committee is not as likely as a district court to be persuaded by the agency's good faith claims and its offer to set itself on a mandatory schedule. Congressional investigations may attract more media attention than judicial actions. Finally, unlike the interest groups that ask courts to set the agency's agenda, Congress can legitimately claim to represent the broad public interest.<sup>136/</sup>

One significant disadvantage of congressional pressure as an agenda-setting mechanism is its highly political nature. Some congressmen may not be as concerned with inducing OSHA to action as they are with attracting media attention to themselves and in criticizing the opposing party. Most knowledgeable congressmen and staff know that scientific rulemaking is an arduous process that should not lightly be undertaken. But sometimes the opportunity to score easy political points at the agency's expense proves irresistible.

Congress also lacks sufficient technical expertise to be able to divine which rulemaking topics should have precedence over others. More than most institutions, Congress is susceptible to the "chemical-of-the-month syndrome," under which the agency is forced to undertake intense scrutiny of new topics on an ad hoc basis as new evidence reaches the media. While this faddish approach to prioritization may satisfy the press and particular interest groups, it is not likely to meet a neutral scientist's worst-first test. The agency may find itself chasing after high-visibility, low-risk subjects, while low-visibility, high-risk topics go unaddressed.<sup>137/</sup>

In the highly political atmosphere in which a modern regulatory agency finds itself, political considerations must necessarily play a role in setting its priorities. But OSHA's statutory goals are not best advanced by an agency that is blown by the political winds without any moorings of its own. OSHA will always face strong congressional pressure to undertake particular rulemaking activities and to resist others, and in a democratic society the agency should be responsive to those pressures. But this does not imply that OSHA should not have its own agenda. While the agency might

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<sup>136/</sup> This argument in favor of congressional pressure must, however, be qualified by the observation that a single subcommittee is not necessarily representative of a broad public consensus. Indeed, congressmen often select committees because of the interests of particular constituent groups. Nevertheless, congressional investigations probably do represent a broader constituency than the interest groups that file bureaucracy-forcing lawsuits.

<sup>137/</sup> Pierce and Shapiro, *supra* note 35, at 1201; Vladeck Interview, *supra* note 17.

well craft a device for elevating particularly "hot" issues to the top of its agenda, it must also have a mechanism for resisting congressional pressure when sound analysis reveals that OSHA's severely limited resources could better be used in other efforts.

#### 4. White House and OMB Pressure.

OSHA is an executive agency; its leadership serves at the pleasure of the President. Like Congress, the White House is sensitive to political constituencies, and like congressional pressure, presidential pressure can be highly motivating. For example, although OSHA had, after many years of intense effort, promulgated standards for lead and cotton dust and had successfully fended off most court challenges, the new Administration in 1981 developed a "hit list" of regulations that it wanted the agency to re-examine that included the lead and cotton dust standards. OSHA then devoted substantial resources over the next few years to an intense revisiting of the same issues that it had only very recently studied.<sup>138/</sup> The efforts did not, in the final analysis, result in any significant weakening of the existing standards.<sup>139/</sup>

White House pressure can also induce OSHA to promulgate new rules. Although OMB initially demanded that OSHA withdraw a proposed rule requiring certain employers to inform employees of workplace hazards after it was rushed to the Federal Register in the waning hours of the Carter Administration, business groups began to urge the White House to pressure OSHA to promulgate a new rule that would preempt state and local regulations that were blossoming around the country. OSHA reacted to this pressure by proposing a revised hazard identification regulation that has now become a final rule.<sup>140/</sup> Similarly, under OMB pressure, OSHA promulgated a standard that eliminated a burdensome recordkeeping requirement in a brief 12-month period.<sup>141/</sup>

OMB can also affect OSHA's priorities from the opposite direction by discouraging the agency from putting particular issues on its rulemaking agenda. Executive Order 12498

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<sup>138/</sup> Gordon Interview, supra note 129; Telephone interview with Susan Harwood, Health Scientist, Office of Risk Assessment, Directorate of Health Standards Programs, OSHA (October 21, 1986).

<sup>139/</sup> In 1985, OSHA promulgated some weakening revisions to the cotton dust standard, 50 F.R. 51120 (1985), but they did not substantially change the standard.

<sup>140/</sup> 48 Fed. Reg. 53295 (1983).

<sup>141/</sup> F. White Interview, supra note 59.

requires that virtually all significant rulemaking initiatives appear in the Administration's Regulatory Program. In practice, to place an item in the Regulatory Program, an agency must persuade OMB of the project's virtue. If OMB does not agree, the item does not appear on the Administration's agenda and, under the terms of the Executive Order, it may not be placed on the agency's own agenda. For example, one of the reasons that OSHA's recent attempt to formalize a standard to address Bhopal-like chemical leaks has not gone forward is OMB's resistance to placing the project on the Administration's agenda.<sup>142/</sup>

Presidential pressure has many of the same advantages and disadvantages of congressional pressure, and they will not be repeated here. One significant difference, however, is that White House and OMB pressure has been considerably less visible than congressional pressure. While congressmen score political points through high visibility investigations, the White House can score political points through quiet intervention into ongoing rulemaking activities.<sup>143/</sup> Moreover, there is some reason to believe that OMB and White House pressure originates outside of the government. For example, the Vice President's Task Force's "hit list" was largely based on suggestions from the regulated industries.

It is somewhat more controversial to suggest that OSHA should have a mechanism for responding to pressure from the White House, which, after all, represents the agency's ultimate boss. Yet if the agency's goal is truly to provide the most protection to workers with the least consumption of industry and administrative resources, it must be prepared to tell OMB that other matters command its full attention just as it must be prepared to give the same bad news to congressional committees. At the very least OSHA must be prepared to explain to Congress and possibly to reviewing courts why topics forced upon it by OMB or the White House should command greater attention than the topics identified by petitioners, congressional staff and EPA.

In sum, while the intensity of congressional and presidential desires should be a factor in OSHA's ranking system, it needs a system that responds to other factors, if for no other reason than the fact that congressional and presidential preferences are often quite inconsistent.

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<sup>142/</sup> Telephone Interview with Mike Wright, Director of Safety and Health, United Steelworkers (October 24, 1986).

<sup>143/</sup> See, e.g., Houck, *President X and the New (Approved) Decisionmaking*, 36 Am. U. L. Rev. 1 (1987); House Comm. on Environment and Public Works, 99th Cong., 2d Sess., Office of Management and Budget Influence on Agency Regulations (Comm. Print 1986).

## 5. TSCA Referrals.

The Toxic Substances Control Act empowers the Environmental Protection Agency to require manufactures of new and existing chemicals to test those chemicals for toxicity and to submit information concerning human exposure to those chemicals. Upon receiving information indicating that a chemical or mixture of chemicals poses an unreasonable risk to humans or the environment, EPA may issue a rule regulating the production, distribution and use of the chemical. Alternatively, under section 9 of TSCA, if there is a reasonable basis to conclude that a chemical will present an unreasonable risk and if EPA determines that "such risk may be prevented or reduced to a sufficient extent by action" taken by another agency, EPA may submit a report to that agency detailing the risk. The report must request the receiving agency to determine if the risk may be reduced to a sufficient extent by that agency and, if so, to issue an order "declaring whether or not the activity . . . presents such risk" and to respond to EPA within a deadline set by EPA that is greater than 90 days.<sup>144/</sup>

At one time EPA entertained the possibility of assuming a major role in regulating workplace hazards, because its authority to regulate specific aspects of a chemical's use in the workplace is in many ways broader than OSHA's authority.<sup>145/</sup> But under substantial prodding by OMB, EPA has decided to make greater use of its section 9 referral authority, rather than to develop a worker protection program of its own.<sup>146/</sup> As a consequence, OSHA has received during the last year-and-a-half more of these "TSCA referrals" than in the past.<sup>147/</sup> Indeed, some officials in OSHA and EPA have suggested that a TSCA referral is a convenient way for EPA,

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<sup>144/</sup> 15 U.S.C. § 2608.

<sup>145/</sup> For example, EPA can ban a chemical from a workplace. 15 U.S.C. § 2605(a)(2)(A). OSHA could ban a chemical only if that would be "feasible."

<sup>146/</sup> Seminario Interview, supra note 131.

<sup>147/</sup> During the last year-and-a-half, OSHA has received three TSCA referrals from EPA. Telephone Interview with John Martonik, Deputy Director, Health Standards Directorate, OSHA, February 5, 1987. OSHA could no doubt absorb this small number of referrals into its informal priority-setting system. However, EPA has only recently begun referring matters to OSHA, rather than dealing with them under its TSCA authority, and there is a great potential for many more referrals in the near future. Id.



which has only promulgated two substantive regulations in the ten year lifetime of TSCA, to "punt" difficult regulatory issues to OSHA.

OHSA and EPA have recently entered into a formal Memorandum of Understanding (MOU) that addresses the interaction between EPA and OSHA during TSCA referrals. The MOU requires EPA to send OSHA a list of substances being considered for TSCA referral twice per year. Within a month after OSHA's acknowledgment of receipt of the notice, EPA and OSHA employees must meet to coordinate information on the listed substances. EPA must inform OSHA within 48 hours after sending a report to the Federal Register. After the Report is published, personnel from both agencies must meet again to coordinate information on the chemical that is the subject of the report, and OSHA must give EPA 48 hours notice prior to publishing its response in the Federal Register.<sup>148/</sup> Although the MOU provides for extensive coordination between the two agencies, OSHA has no power to veto a TSCA referral if the Administrator of EPA exercises his discretion to publish a report in the Federal Register. At best, OSHA is given an opportunity to persuade EPA not to send the referral. Nowhere in the agreement is there an indication that OSHA's current workload is an appropriate factor to be considered in deciding whether or not a report should be published. While the MOU represents a commendable attempt to ensure the coordination of information relevant to the decisions of both agencies, it will stem the flow of TSCA referrals only to the extent that OSHA staff can persuade EPA staff that workplace risks are better addressed by EPA's TSCA authorities.

Despite the formal interagency arrangement with EPA, OSHA does not currently have a formal internal mechanism for responding to TSCA referrals. In practice, a project officer in the Health Standards Directorate is assigned the task of preparing a draft response, which may range from doing nothing to preparing a Notice of Proposed Rulemaking.<sup>149/</sup> As a practical matter, this job can pull the project officer away from other rulemaking responsibilities.<sup>150/</sup> Many OHSA officials are concerned that if a large number of referrals continue to flow from EPA to OSHA, EPA will soon be setting OSHA's rulemaking agenda.<sup>151/</sup>

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<sup>148/</sup> Memorandum of Understanding Between the Environmental Protection Agency and the Department of Labor, EPA Agreement No. PW 16931704-01-0 (Feb. 6, 1986).

<sup>149/</sup> Martonik Interview, supra note 59; Stein interview, supra note 123.

<sup>150/</sup> Stein interview, supra note 123.

<sup>151/</sup> Martonik interview, supra note 59.

TSCA referral has at least two distinct advantages. First, EPA is in a far better position to acquire some kinds of information on chemicals that might pose risks to workers. While both EPA and OSHA look to NIOSH for compilations of existing health effects studies on chemicals, EPA has the additional power to require manufacturers to conduct additional studies.<sup>152/</sup> Second, EPA has a much larger staff of toxicologists to evaluate epidemiological and animal studies and perform risk assessments.<sup>153/</sup>

There are, however, several disadvantages to TSCA referral. EPA is in no better position than OSHA to determine workplace exposures, and EPA can be of no help at all on the questions of the existence and feasibility of control technologies.<sup>154/</sup> Since EPA does not have special expertise in workplace exposure and in control technologies, EPA can refer to OSHA chemicals that may pose relatively trivial workplace risks.<sup>155/</sup> Even when OSHA personnel know that there is very little worker exposure to a referred chemical, the agency may still be required to prepare a formal response to EPA. This implicitly gives the referred chemical a high priority, at least for a brief time while OSHA prepares its response.

A second disadvantage is that EPA may use TSCA referral as a convenient device for avoiding hard questions. If so, then the TSCA referrals that OSHA receives are likely to be controversial and resource-intensive. Unlike rulemaking petitions, where every petition is supported by some interest group that is usually willing to gather information and provide pressure to proceed, there may be no organized constituency behind TSCA referrals. EPA can simply dump the matter in OSHA's lap and walk away. There is, in addition, some evidence to suggest that the Office of Management and Budget has sought referrals to OSHA as a vehicle for avoiding some of the more stringent regulatory tools available to EPA that are unavailable to OSHA, thus making OSHA's job all the more difficult.<sup>156/</sup>

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<sup>152/</sup> 15 U.S.C. §2603.

<sup>153/</sup> Seminario interview, supra note 131.

<sup>154/</sup> Seminario interview, supra note 131.

<sup>155/</sup> Seminario Interview, supra note 131; Martonik interview, supra note 59. The February, 1986 Memorandum of Understanding between EPA and OSHA, supra note 148, may reduce this threat to some extent.

<sup>156/</sup> EPA's Asbestos Regulations, Report on a Case Study on OMB Interference in Agency Rulemaking by the Subcommittee on

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Third, TSCA referral can duplicate OSHA's own efforts and those of NIOSH. For example, OSHA has long been examining the health effects of asbestos. EPA's activities were largely duplicative of OSHA's efforts, insofar as they related to workers, and the referral of asbestos (a referral that was later withdrawn) was not especially useful to either agency.<sup>157/</sup> Although it is too soon to tell whether the formal Memorandum of Understanding between EPA and OSHA for TSCA referrals has eliminated this potential for duplication,<sup>158/</sup> it should go a long way toward conserving the informational resources of both agencies.

While TSCA referral can be beneficial to OSHA, and ultimately to workers, the agency should not allow it to drive its own agenda. With sufficient coordination and cooperation, TSCA referral can solve problems for OSHA, rather than create them. When EPA's initial exposure analyses indicate that the workplace is a primary source of exposure to a potentially hazardous chemical, the recent Memorandum of Understanding will require it to make OSHA aware of that fact at a very early stage to allow OSHA to begin assigning a priority to the topic. And when OSHA finds that it needs more information on a chemical hazard that EPA has the authority to require, the agencies should be able to work out a procedural vehicle for putting the substance on EPA's agenda.<sup>159/</sup> Finally, EPA and OSHA should be able to coordinate regulatory activities to allow EPA to use its authority to take more protective actions when OSHA's authority is insufficient. EPA and OSHA have attempted to resolve the information duplication problem with a Memorandum of Understanding. Further interagency coordination could go a long way toward facilitating the use of TSCA in

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<sup>156/</sup> Oversight and Investigation of the House Committee on Energy and Commerce, 99th Cong., 1st Sess. (1985); Jacobson Interview, supra note 19.

<sup>157/</sup> Id.

<sup>158/</sup> See note 148, supra.

<sup>159/</sup> Congress clearly intended for the Interagency Testing Committee to play this role to some extent, but the Committee's testing recommendations have tended to stack up at EPA's front door, much as TSCA referrals are beginning to stack up at OSHA's front door. See *Delays in Setting Standards*, supra note 49. In any event, there is no apparent reason why the two agencies could not work out a bilateral arrangement to facilitate EPA's consideration of OSHA's requests for information, either from EPA's existing files or through the exercise of its authority to require testing.

requiring testing that would be useful to OSHA and in using EPA's TSCA authorities to address risks that OSHA cannot adequately address.

#### 6. Updated Private Standards.

Pursuant to statutory command, OSHA in 1971 promulgated "national consensus standards," incorporating generally accepted health and safety practices as recommended by private and governmental standard-setting organizations.<sup>160/</sup> Congress empowered OSHA to promulgate the consensus standards on a one-time basis without notice-and-comment procedures. Unfortunately, in the intervening years the consensus standards have become dated as standard-setting organizations have revised their guidelines and standards.<sup>161/</sup> As private standard-setting organizations amend their consensus standards, OSHA could conceivably work the amended private standards into its prioritization process on a case-by-case basis. The primary advantage of a systematic device for updating OSHA standards to reflect changing national consensus standards is the additional protection that it would provide to workers. Since the recommended levels would represent a consensus or near-consensus within the industry, OSHA's efforts should not be as controversial as is typically the case, and the agency might thereby conserve scarce technical and litigation resources.

Adjusting agency priorities to reflect consensus standards does, however, have some significant disadvantages. Some companies would be opposed to the government's singling out a chemical for regulation, even if that regulation was not terribly burdensome, out of concern for the public attention that an OSHA standard-setting action invariably draws.<sup>162/</sup> Once it became widely known that OSHA was relying upon the private standard setting agencies in setting OSHA priorities, companies would no doubt focus greater attention on the activities of those entities, a process that might ultimately change the entire nature of the private standard setting process into a less desirable adversarial process. Finally, it is not clear that the order in which private standard setting agencies take up particular workplace risks is necessarily the most appropriate prioritization scheme for the federal government.

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<sup>160/</sup> 29 U.S.C. §655(a).

<sup>161/</sup> Telephone interview with Arthur Gas, Industrial Hygienist, Directorate of Health Standards Programs, OSHA (October 30, 1986).

<sup>162/</sup> Telephone interview with Neil King, Wilmer, Cutler & Pickering (October 28, 1986).



In sum, while OSHA might appropriately look to the activities of private standard setting agencies in setting OSHA priorities, it cannot allow those activities to dominate its agenda. Ultimately, OSHA must establish its own priorities and allow the private organizations to set theirs.

#### 7. NIOSH Criteria Documents.

A plausible argument could be made for the proposition that Congress intended for NIOSH to drive OSHA rulemaking priorities indirectly as it submits criteria documents and recommendations. In theory, NIOSH could have developed a prioritization scheme (presumably in close conjunction with OSHA) and submitted criteria documents in accordance with that scheme. OSHA could have simply taken up the criteria documents seriatim and determined whether or not to initiate rulemaking efforts.<sup>163/</sup>

In practice, NIOSH has not been very influential in setting OSHA priorities. Responding to early criticism that it was not submitting enough documents to keep OSHA busy, NIOSH promulgated dozens of criteria documents within the space of a few years, and OSHA now faces a lengthy backlog of aging criteria documents.<sup>164/</sup> NIOSH in the early 1970s did study how it should set priorities for preparing criteria documents, but the scheme that it finally hit upon was based heavily upon the quantity of the material produced and did not reflect other judgmental factors very well.<sup>165/</sup> Production quantities, in OSHA's opinion, proved to be a poor surrogate for human exposure and toxicity. Hence OSHA was disappointed to receive early criteria documents on such unimportant substances as sulfuric acid, ammonia, sulfur dioxide and sodium hydroxide.<sup>166/</sup> In addition, OSHA officials were unimpressed

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<sup>163/</sup> Wrenn Interview, supra note 49; Holtzman Interview, supra note 114.

<sup>164/</sup> Telephone interview with Larry Mazzuzkelli, Associate Director for Policy Development, Division of Standards Development and Technology Transfer, National Institute for Occupational Safety and Health (November 5, 1986); Gas Interview, supra note 159; Stein interview, supra note 123. The General Accounting Office reported in 1977 that as of September 30, 1976, NIOSH had submitted 53 criteria documents to OSHA. Delays in Setting Standards, supra note 49. GAO Carcinogen Report, supra note 317, at 11. A decade later, OSHA had promulgated final standards

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<sup>165/</sup> Wrenn Interview, supra note 49.

<sup>166/</sup> Wrenn interview, supra note 49.

with the quality of the criteria documents. It was clearly not the case, as Congress had apparently envisioned, that OSHA had only to tear the covers off the criteria documents and place them in the rulemaking docket to support stringent standards.<sup>167/</sup>

In later years, NIOSH has attempted to work more closely with OSHA to set a combined agenda, but these efforts have been largely unsuccessful. NIOSH officials complain that OSHA officials met with them five years ago and demanded fast-track criteria documents for certain substances and then apparently forgot that they had asked NIOSH to do this.<sup>168/</sup> When presented with a document that was a high priority for OSHA officials five years ago, current OSHA officials expressed little interest.<sup>169/</sup> This experience, not surprisingly, has generated some skepticism in NIOSH about suggestions that the two agencies coordinate their priorities.

In late 1983, OSHA launched a standards completion project under which NIOSH was given a list of 113 chemicals for which OSHA had begun, but not finished, some form of rulemaking activity. By the fall of 1984, NIOSH had updated the existing criteria documents on these substances and recommended that OSHA should: (1) proceed with rulemaking efforts with respect to 49 of the 113; (2) remove temporarily 18 substances from the list pending the completion of ongoing studies; and (3) remove permanently 46 substances from the list because there was not sufficient data upon which to base a regulatory decision. OSHA agreed to "limit its consideration of further regulatory activity to the list," but it did not attempt to prioritize substances on the list.<sup>170/</sup>

The strongest argument for giving NIOSH a role in OSHA priority setting is that agency's considerable expertise in evaluating workplace risks. NIOSH has the broad mandate necessary for devoting attention to the somewhat abstract question of priority-setting criteria. On the other hand, OSHA cannot cede its priority-setting power to an agency in an entirely separate Department of the government. Clearly, governmental resources would be best utilized if OSHA and NIOSH

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<sup>164/</sup> for less than ten of those 53 topics. During that decade, NIOSH has continued to write criteria documents and in many cases to update old criteria documents.

<sup>167/</sup> Wrenn interview, supra note 49.

<sup>168/</sup> Mazzuzkelli interview, supra note 164; Stein interview, supra note 123.

<sup>169/</sup> Stein Interview, supra note 123.

<sup>170/</sup> 1986 Regulatory Agenda 253-54.

combined their resources to address the prioritization problem and adjusted their schedules accordingly.

One problem with this solution, however, is that NIOSH may not be able to maintain the flexibility necessary to deal with the rapid changes in priorities that might legitimately result from outside petitions, congressional and administration pressure, EPA referrals, and ACGIH and ANSI updates. Once NIOSH has initiated the process of preparing a criteria document and recommendations, it cannot easily switch gears and strike off in new directions. Therefore, there will probably always be some mismatch between OSHA and NIOSH priorities. Nevertheless, NIOSH could be very helpful to OSHA in suggesting objective criteria for listing hazardous substances and in assembling the information necessary to compile such a list.

#### 8. Information from the Field.

OSHA has a large cadre of inspectors who are continually observing and monitoring workplaces on a daily basis.<sup>171/</sup> Their efforts produce large amounts of information about the levels of some hazardous substances in the workplace.<sup>172/</sup> This information can be used to determine how well existing standards are being met and what aspects of the standards are not working or are unrealistic. Field reports of violations of the general duty clause and of deaths and injuries in the workplace can also be examined to ferret out especially hazardous workplaces or work practices.<sup>173/</sup> Although other health and safety agencies use reports from the field systemically in setting their priorities,<sup>174/</sup> OSHA has only recently begun to develop a system to tap this valuable information for standard-setting purposes.<sup>175/</sup>

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<sup>171/</sup> By one account, OSHA has 400 industrial hygienists in the field, who have inspected more than 100,000 workplaces. Frodyma Interview, supra note 66.

<sup>172/</sup> Field inspections reveal even more information about the validity of existing safety standards and the need for new ones. B. White Interview, supra note 59.

<sup>173/</sup> Henshel Interview, supra note 127.

<sup>174/</sup> Telephone interview with Arnold Kuzmak, Director, Office of Program Development and Evaluation, Office of Drinking Water, EPA (November 18, 1986); Telephone interview with Judy Segal, Director, Policy and Program Planning Staff,  
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<sup>175/</sup> Frodyma Interview, supra note 66; Gas Interview, supra note 159.

Field information has not been useful in setting agency priorities in the past.<sup>176/</sup> The past information system had several flaws, not the least of which is that it was limited largely to chemicals for which OSHA already had standards. While this information can be useful in evaluating existing standards,<sup>177/</sup> it may not be very helpful in setting new standards.<sup>178/</sup> In addition, the agency did not pay a great deal of attention to validating the analytical chemistry upon which the measurements for enforcing health standards were based.<sup>179/</sup> While inspectors in the field could be expected to identify new safety hazards from observations of hundreds of workplaces and investigations of deaths and serious injuries in the workplace,<sup>180/</sup> they not likely to detect many new health hazards.

Reports from the field may be a valuable source of information for priority-setting in the future. At the very least, the agency should have in place a capacity to mine field reports for indications of serious workplace hazards. As the agency's field reporting system achieves greater sophistication, it should prove of increasing value to the priority-setting process.

#### 9. Developments in States and Other Countries.

OSHA has relied very little upon developments in the states and other countries in setting priorities for occupational health standards.<sup>181/</sup> However, OSHA does at times face indirect pressure to regulate based upon what the states or other countries have done. For example, automobile workers who live in Detroit and work in Canada are better protected from some risks than workers in U.S. plants.<sup>182/</sup>

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<sup>174/</sup> Food Safety and Inspection Service, USDA (November 25, 1986); Telephone interview with Barry Felrice, Associate

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<sup>176/</sup> Frodyma interview, supra note 66; Sevin interview, supra note 133.

<sup>177/</sup> Henshel Interview, supra note 127.

<sup>178/</sup> Sevin Interview, supra note 133.

<sup>179/</sup> Sevin Interview, supra note 133.

<sup>180/</sup> Henshel Interview, supra note 127.

<sup>181/</sup> Gas Interview, supra note 159.

<sup>182/</sup> Gas Interview, supra note 159.



OSHA standards often guide other countries in setting their own standards. An examination of standards in place in the states and other developed countries may reveal cases in which existing OSHA standards are seriously out of step and may identify risks that are not addressed by OSHA standards at all. While comparative analysis cannot be the engine that drives OSHA's priority-setting process, it may have some role to play.

#### 10. Summary.

An appropriate metaphor for the current OSHA standard setting process is that of a business establishment with a front door, a side window, and a back door.<sup>183/</sup> The owner expects most business to come through the front door, but it reserves the back door for dealing with complaints about previous transactions. Especially demanding and impatient customers come in through the side window and thereby avoid the crowd that is pressing at the front door. In the OSHA context, criteria documents, recent petitions, information from the field, and recently amended ACGIH and ANSI recommendations are all pressing at the front door. OMB and the White House are pushing some previously promulgated rules in through the back door, and Congress and the courts are pushing some rulemaking petitions and other "hot" topics through the side window. At present, the press of business for OSHA's reduced staff from the back door and side window is so great that it cannot accept any business through the front door. Instead of an orderly queue at the front door, there is a great crowd of potential topics, each of which is probably deserving of OSHA's attention. At frequent intervals an interest group becomes impatient with waiting in line and moves over to the side window. The time is near at hand when there will also be a disorderly crowd at the side window. OSHA long ago lost control over its front-door agenda; it now risks total paralysis as its limited capacity to produce rules becomes overwhelmed by the press at the side window.

Although some participants and observers of the OSHA rulemaking process maintain that the petition process is alone sufficient drive OSHA toward regulating the most hazardous workplaces,<sup>184/</sup> most agree that OSHA should set its own

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<sup>174/</sup> Administrator for Rulemaking, National Highway Traffic Safety Administration (November 25, 1986).

<sup>183/</sup> Numerous interviewees inside and outside of OSHA confirmed the validity of this metaphor.

<sup>184/</sup> E.g., Frodyma interview, supra note 66; Martonik interview, supra note 59; King interview, supra note 162.

priorities.<sup>185/</sup> And, despite several failed internal attempts to establish an explicit prioritization scheme,<sup>186/</sup> virtually all observers of the process agree that OSHA currently lacks even a rudimentary prioritization process.<sup>187/</sup> During the last few years, OSHA's agenda has been set entirely by outsiders.<sup>188/</sup> There is no way of knowing whether this externally driven process results in OSHA's addressing the most important rulemaking topics. No one of the outside parties driving the process is concerned with the broad question whether the agency is addressing those topics for which it can be most effective in reducing the most serious workplace risks. While few would argue that past rulemaking petitions have addressed trivial risks, only OSHA is in a position to determine whether a particular rulemaking initiative represents the best use of the agency's severely limited resources.<sup>189/</sup> OSHA's inability to set its own priorities also affects the regulated industry's ability to make future investment decisions. Industry representatives complain of the "halting process of regulation" that results from OSHA's failure to establish definite priorities.<sup>190/</sup> An explicit and open prioritization procedure would allow OSHA to regain to some extent control over its own agenda, and it would make regulatees and beneficiary groups aware of OSHA's plans for the future.

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<sup>185/</sup> Interviews with academics, labor union officials, business officials and OSHA employees revealed virtual unanimity on the proposition that OSHA should have some process for establishing its own priorities.

<sup>186/</sup> Harwood interview, supra note 138; Stein interview, supra note 123; telephone interview with Robert Beliles, Senior Scientist, Carcinogen Assessment Group, EPA (October 21, 1986).

<sup>187/</sup> Sevin interview, supra note 133; Wrenn interview, supra note 49; Seminario interview, supra note 131; Braslow interview, supra note 123; Sampson interview, supra note 134.

<sup>188/</sup> See National Academy of Sciences, National Resource Council, Risk Assessment in the Federal Government: Managing the Process 94 (1983); Interview with Scott Railton, Reed, Smith, Shaw & McCleary, October 30, 1986.

<sup>189/</sup> Seminario interview, supra note 131; Sevin interview, supra note 133.

<sup>190/</sup> Sampson interview, supra note 134. Railton interview, supra note 188.

An explicit prioritization mechanism would also be useful to OSHA in its internal management. Without a list of priorities, members of the agency staff can never be certain that they will not be called away in the midst of a project to begin a new project with a higher priority.<sup>191/</sup> Likewise, OSHA coordination with contractors and other agencies can be arranged so that up-to-date information is available to agency decisionmakers at the time that it will be most useful.<sup>192/</sup>

There are, however, significant practical disadvantages to adopting a formal prioritization scheme. First, the agency must come up with a rational scheme for ranking priorities. Fortunately, there is near unanimity that the ideal prioritization scheme would stress risks to workers (including considerations of toxicity and extent of exposure), with perhaps some attention being paid to the practicality of controls. Unfortunately, there is rarely enough high quality information available to make quantitative comparisons. Still, as the next section of this Report reveals, there are alternatives to the "chemical of the week syndrome," and OSHA should be able to create a procedure for prioritizing chemicals, even if it is not perfect.

Another disadvantage of a prioritization scheme is that it necessarily forces upper level decisionmakers in the agency to make hard decisions about which subjects warrant attention. In addition to making difficult substantive rankings, such as the relative weight to be given to substances that pose small risks to a large number of workers versus substances that pose a very high risk to only a very few workers, the agency must make difficult political choices about which employees should be protected and which industries should be subject to new agency standards. There is an understandable desire on the part of OSHA to pressure the "mystique" that everything that comes before it has a high priority.<sup>193/</sup> Any attempt to state explicit priorities will destroy this mystique.

Similarly, explicit prioritization can make it difficult for the agency to explain why it is not proceeding ahead rapidly with a politically controversial project. For example, under the current OSHA regime, which lacks a prioritization scheme, the agency can put its efforts to promulgate a safety standard for the oil and gas industry on the "back burner" while that industry suffers through an economic

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<sup>191/</sup> Sevin interview, supra note 133; Stein interview, supra note 123; Braslow interview, supra note 123.

<sup>192/</sup> Stein interview, supra note 123.

<sup>193/</sup> F. White interview, supra note 59; Frodyma and Flowers Interview, supra note 66.

recession,<sup>194/</sup> and it can elevate to a high priority uncontroversial projects that will not necessarily produce large health or safety benefits but which will yield attractive statistics.<sup>195/</sup> With an explicit prioritization scheme in place, OSHA would at least have to explain why one standard has slipped in priority, and why another project has moved ahead, a task that might prove unpalatable to agency leaders.

Finally, to the extent that the prioritization scheme results in a public list or agenda, the agency can expect resistance from those with an economic interest in the hazards that wind up on the list. The agency will never be able to justify rationally why it placed one topic above the next lower one, because large uncertainties surround priority setting in the context of OSHA rulemaking. If interested parties may force the agency to justify any particular ranking to a reviewing court, it will probably fail. The agency will only be able to adopt an explicit prioritization scheme if the reviewing courts are educated about the difficulties of setting priorities and if they understand that priority-setting is a tentative threshold exercise that does not necessarily imply that any regulatory action will be taken in the long run. As will be discussed later in this section, the appropriate place for judicial review is after the agency takes action with respect to a workplace hazard, not after it has decided which hazards to examine.

Despite these disadvantages, there is at this point in OSHA's evolution a broad consensus around the view that OSHA must assume control over its own rulemaking agenda. The Administrative Conference has already recommended in the context of regulating carcinogens that agencies set priorities for selecting chemicals for further testing, for intensive scientific and regulatory evaluation, and for administrative action to limit or eliminate exposure.<sup>196/</sup> The advantages of preparing an explicit list for this purpose substantially outweigh the disadvantages.

RECOMMENDATION: OSHA should immediately establish a process for determining an explicit list of agency priorities to which OSHA will presumptively adhere in undertaking future rulemaking initiatives.

#### B. Alternative Prioritization Schemes.

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<sup>194/</sup> Prodyra Interview, supra note 66.

<sup>195/</sup> Interview with Daniel Jacoby, Department of Labor, Office of the Solicitor, in Washington, D.C. (September 26, 1986).

<sup>196/</sup> ACUS Recommendation No. 82-5, 1 C.F.R. §305.82-5 (1986).



Although the question of prioritization is never an easy one for an agency charged with writing high-stakes regulations in an area dominated by poor information and huge uncertainties, other agencies appear to have achieved a much greater degree of success than OSHA. The Environmental Protection Agency, for example, administers several programs that require the agency to set priorities for health and environmental regulations, and that agency still maintains a fair degree of control over its own destiny, insofar as its highly detailed statutes give it control to begin with. There are several broad models from which OSHA may choose in selecting an approach to prioritization, including ad hoc management choices, systematic selection by committee, numerical scoring systems, and quantitative risk assessment.<sup>197/</sup> This section of the report will examine the advantages and disadvantages of each of the available models and suggest a process that will allow OSHA to integrate one or more models into its own agenda-setting efforts.

#### 1. Ad Hoc Management Choices.

The current prioritization scheme at OSHA, to the extent that one can be identified at all, falls into the first category of "ad hoc management choices." Under this regime, management reacts to all potential sources of agency priorities in an unbounded fashion. Each person requesting agency action is told that the agency will get to his topic as soon as possible. Management then assigns the topic to a staff member who is already busy with many other items. The staff member receives subtle signals through his superiors from upper level management about the amount of attention that he should devote to the assigned topic, and these signals may change periodically as the topic heats up and cools off in the highly political atmosphere in which upper level management operates. Upper level management may gather with staffers and mid-level management periodically to "brainstorm" about agency priorities, especially at the time of the year when the agency must prepare its submission for the President's Regulatory Agenda.<sup>198/</sup> But these meetings do not result in firm institutional commitments. The agency "intuitively" knows that

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<sup>197/</sup> The following analysis derives much from the observations of Dr. Imogene Sevin, an OSHA health scientist, who has devoted a great deal of attention to the question of priorities as an employee of both NIOSH and OSHA.

<sup>198/</sup> The first prioritization process in NIOSH relied heavily upon brainstorming by agency staff. Sevin Interview, supra note 133.

some topics are more important than others, but it never makes the criteria by which it knows this explicit.<sup>199/</sup>

The ad hoc management approach has at least four advantages that render it especially attractive to upper level managers. First, it is fast and inexpensive. It does not require much informational input, because it relies very heavily on the informal judgment of agency management and staff.<sup>200/</sup> Since it is very hard, for example, to compare a large risk of contracting hepatitis with a small risk of contracting cancer except on an "intuitive" basis,<sup>201/</sup> an agency using the ad hoc approach can avoid expensive data gathering and analysis that would probably not make the decision any easier.

Second, its flexibility enhances the discretion of upper level management. Management is not bound by ironclad agendas that reflect technical input but do not consider political realities. Management decisions are not implicitly driven by the hidden agendas of lower level staff. Management may put items on the "back burner" when there is no apparent pressure to force them through the process and, by contrast, management can accelerate "side-window" items rather rapidly through the process when outside pressures grow.

Third, the ad hoc management approach allows politically accountable upper level management to avoid making definitive decisions that are certain to annoy one or more constituencies. It reinforces the natural desire of politically accountable decisionmakers to have good news for everyone. The agency is never in the position of telling a constituency group that its vital topic is not very important to the agency.

Finally, the ad hoc approach minimizes the amount of explaining that the agency has to do. It does not have to come up with seemingly rational arguments for the essentially arational task of placing one topic higher on its agenda than another. Only when a petitioner is sufficiently put off by the agency's lack of resolve that it is willing to file a bureaucracy-forcing action in court is the agency called upon to explain itself, and even then it can often satisfy the reviewing court by producing an optimistic schedule and assuring the court that the agency has adjusted its priorities so as to make a good faith effort to meet the now-explicit deadlines.

The primary advantages of the ad hoc management approach are also its chief disadvantages. Because it requires less

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<sup>199/</sup> Frodyma interview, supra note 66. See also Delays in Setting Standards, supra note 49, at 19-21 (relating ad hoc prioritization in NIOSH and OSHA in the mid-1970s).

<sup>200/</sup> Sevin interview, supra note 133.

<sup>201/</sup> Frodyma interview, supra note 66.

information and relies so heavily upon political judgment, it is likely to do a poor job of ranking hazards according to true relative risks.<sup>202/</sup> Because of its extreme sensitivity to political pressures, the ad hoc approach will not necessarily address the worst occupational hazards first. For example, there is fairly broad agreement within the agency that an oil and gas industry safety standard would provide very large safety benefits, but political considerations have essentially eliminated that topic from the agency's agenda. Conversely, the political furor that erupted over the discovery of ethylene dibromide in citrus and food grains sent OSHA scurrying to promulgate an EDB standard that will protect only a relatively few workers from a substance that is almost certainly doomed to extinction in the near future.<sup>203/</sup>

There is still some vitality left to the theory that Congress created regulatory agencies to bring expertise to bear on social problems. When technical considerations are capable of identifying topics that should be high on OSHA's agenda, it should use its expertise to find them, rather than blowing with the political winds. Although technical considerations could be more relevant to ad hoc management decisions than political considerations, OSHA's technical staff is in practice seldom consulted when management makes the inexplicit decisions that subtly drive agency priorities.

A second disadvantage of the ad hoc management approach is that outsiders generally do not know the real status of topics of interest to them. They are simply told that the agency is working on it, without any indication of how high the matter is on the agency's agenda. Indeed, even agency staff are often at a loss as to the status of the topics assigned to them when they receive only inexplicit signals from upper level management filtered through mid-level management. Low level staffers sometimes express a sense of frustration at working very hard on a topic only to discover that it is a low priority item when it languishes on the desk of an upper level decisionmaker.

Third, when combined with a high turnover rate at upper management levels, the ad hoc management approach can breed

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<sup>202/</sup> This was, for example, one of the real failures of the original NIOSH hazard ranking approach, which relied heavily upon staff brainstorming sessions. Sevin interview, supra note 133; Wrenn interview, supra note 49.

<sup>203/</sup> Vladeck Interview, supra note 17. Another frequently cited example of a politically inspired rulemaking initiative that had the potential to achieve relatively few health and safety benefits is the never-completed "walkaround pay" initiative. See B. Mintz, supra note 69, at 546-56; Bokot Interview, supra note 60.

inconsistency. Under the current ad hoc prioritization approach, priorities changes as one leader replaces another.<sup>204/</sup> Even if one Assistant Secretary is succeeded by a like-minded person, he or she must still be educated about why certain items had low priority and others high priority.<sup>205/</sup>

Fourth, the vacillation that typifies the ad hoc management approach can also be wasteful of agency resources. A lot of the work that goes into a project is wasted when that project is mothballed until the next time that it becomes controversial. When it finds its way back onto the agency's agenda, much of the previous work must be repeated. For example, much of the work that the agency had done on cadmium in the late 1970s, before it was implicitly shelved in the early 1980s must be repeated now that a petition has once again forced it to near the top of the agency's agenda. In short, the ad hoc management approach lacks a vehicle for making final decisions to drop topics from the agency's agenda. Issues tend to wallow around the agency for years without any direction. The ad hoc management approach lacks a mechanism for putting old semi-abandoned projects out of their misery.

## 2. Quantitative listing.

At the opposite extreme from ad hoc management choices is the quantitative listing approach to setting agency priorities. Under this approach quantitative analysis of technical considerations determines a ranked list of agency priorities. All of the existing quantitative approaches are founded on the rather uncontroversial assumption that the agency should give its highest priority to those workplace conditions that pose the greatest risks to employees. The prioritization process is then determined by a technical evaluation of the relative risks of the relevant universe of rulemaking subjects, with some allowance made for administrative and (perhaps) technological and economic feasibility.

### a. Risk Assessment.

The most technically precise quantitative listing approach relies on strict quantitative risk assessment. Based upon information on the toxicity of various compounds and the extent of worker exposure, the agency technical staff undertakes quantitative risk assessments and ranks substances according to

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<sup>204/</sup> Sevin interview, supra note 133.

<sup>205/</sup> Sevin interview, supra note 133.



their relative risk to workers.<sup>206/</sup> For example, EPA has developed some fairly sophisticated risk assessment tools that rely upon a combination of data bases on health effects and exposure routes.<sup>207/</sup> By focusing on actual exposure, rather than allowable exposure, the risk assessment approach keeps the agency from initiating rulemaking efforts on substances for which actual exposures are far lower than current public or private standards.<sup>208/</sup> If the risk assessments could be performed accurately, the agency could rest assured that it was addressing the worst risks first.<sup>209/</sup>

Risk assessments are available for many chemicals. NIOSH criteria documents often contain risk assessments or contain sufficient information on toxicity and exposure to allow OSHA to produce a rudimentary risk assessment with minimal resource expenditure. EPA has also performed risk assessments on a large number of chemicals in connection with its many regulatory programs. After modifying such risk assessments to reflect workplace exposure, OSHA could use them to establish agency priorities. In addition, EPA's Office of Toxic Substances has written numerous chemical hazard identification profiles (CHIPS) summarizing available information on chemicals that could be helpful in drafting rudimentary risk assessments. Finally, the published literature contains an increasing amount of risk assessment work, although this is generally limited to well-known hazards for which other risk assessments are often available.

One disadvantage of risk assessment-based listing is the unsettled state of the risk assessment art. Risk assessment tools are only available for a very few health effects, such as carcinogenesis.<sup>210/</sup> Good quantitative tools for other subtle

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<sup>206/</sup> See Peat, Marwick, Mitchell & Co., *The Role of Risk Assessment in Setting Federal Regulatory Priorities*, Report Prepared for the Chemical Manufacturers' Ass'n. I.V.C. (1984) [hereinafter cited as Peat, Marwick Report].

<sup>207/</sup> Environmental Protection Agency, *TSCA Priorities and Progress* (1983).

<sup>208/</sup> Harwood interview, *supra* note 138.

<sup>209/</sup> See generally, D. Pedersen, R. Young, D. Sundin, *A Model for the Identification of High Risk Occupational Groups Using RTECS and NOHS Data* (NIOSH Technical Report 1983) (Describing computer program for combining risk data from  
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<sup>210/</sup> Sevin interview, *supra* note 133; Mazzuzkelli interview, *supra* note 164; Stein interview, *supra* note 123; Beliles interview, *supra* note 186.

health effects, such as neurological effects and reproductive effects, do not exist exist. Even those quantitative tools that are available are always controversial.<sup>2.11/</sup> For example, the outputs of quantitative risk assessment models for carcinogenesis can vary over ten orders of magnitude.<sup>2.12/</sup> With this degree of sophistication, such models cannot be expected to yield accurate predictions of real-world risks. On the other hand, precise predictions are not necessary for the prioritization function. The list need only reflect the risks that various chemicals pose relative to one another. The predictions need not be accurate in absolute terms. As long as the same model is used to evaluate all of the chemicals, the ranking should be appropriate, absent some fundamental flaw in the model.

Another severe drawback to risk assessment-based listing is the poor state of the information that is typically available to the agency at the prioritization stage. Unless the agency is prepared to do a substantial part of the standard setting job while it is setting priorities, it cannot produce an accurate risk assessment-based prioritization list. Since OSHA lacks authority to force manufacturers to test chemicals, it may not even have rudimentary toxicological data on chemicals for which there are high workplace exposures. Conversely, the agency at this early stage often lacks accurate information on worker exposure to highly toxic chemicals. The agency must take advantage of whatever information it can conveniently locate. Unfortunately, this information is often of disturbingly low quality.<sup>2.13/</sup> The agency then faces the dilemma of comparing risks assessed on the basis of high quality studies with risks assessed on the basis of poor or invalid studies. The risk assessment-based listing approach does not provide a convenient way to adjust priorities based on the quality of the available data. Since the assessments that

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<sup>2.09/</sup> the Registry of Toxic Effects of Chemical Substances with exposure information from the National Occupational Hazard Survey).

<sup>2.11/</sup> Mazzuzkelli interview, supra note 164; Stein interview, supra note 123.

<sup>2.12/</sup> Comment, The Significant Risk Requirement in OSHA Regulation of Carcinogens: Industrial Union Department, AFL-CIO v. American Petroleum Institute, 33 Stan. L. Rev. 551, 564 n. 68 (1981).

<sup>2.13/</sup> Seminario interview, supra note 131. For example, the priority list that OSHA promulgated as part of its carcinogen policy was based upon some studies of very dubious quality. Sevin interview, supra note 133.

the model produces are of dubious validity, the prioritization list that it yields is of doubtful utility.

A third disadvantage of the risk-assessment based listing approach is the fact that it implicitly requires a comparison of different health effects end-points. Should a chemical that causes three cancers per year be given a higher priority than a chemical that causes three thousand cases of contact dermatitis? Should a standard addressing reproductive effects be giving higher priority than a standard addressing foot injuries? Quantitative risk assessment, as such, does not answer these difficult questions.<sup>214/</sup> At the very least, then, the risk assessment-based listing approach can only yield several different lists based on different end points or a single list that reflects an implicitly determined weighting factors for various end points.

Finally, the risk assessment-based listing approach does not incorporate administrative, economic and technological feasibility considerations. For example, OSHA might possibly reduce a large number of relatively minor risks by an easily complied with rule that it could enact without much controversy and at minimal administrative expense. In the overall scheme of things, that rule might be more effective than a high-stakes effort aimed at a very important chemical that will require a burdensome public hearing, controversy with OMB, and judicial review that might result in no standard at all.

b. Megascoreing Devices.

Megascoreing prioritization devices attach quantitative scores to identifiable aspects of potentially hazardous workplace conditions and then total the scores to achieve a "megascore" by which the hazards are ranked.<sup>215/</sup> The

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<sup>214/</sup> Sevin interview, supra note 133.

<sup>215/</sup> Sevin interview, supra note 133. See United States Environmental Protection Agency, Hazardous Air Pollution Prioritization System (1982) (megascoreing system for ranking hazardous air pollutants); 45 Fed. Reg. 75488 (1980) (relatively unsophisticated megascoreing system for ranking pesticides relying entirely on production volumes and projected exposures to humans and fish); 47 Fed. Reg. 31219 (1982) (Hazard Ranking System for cleanup of hazardous waste sites); 42 Fed. Reg. 55026 (sophisticated megascoreing system for determining testing priorities for chemicals); Final Report of the OSW Regulatory Priorities Workshop (1985) (subjective scoring of regulatory activities required by recent amendments to Resource Conservation and Recovery Act); Schwartz, supra note 135, at 48 (Consumer Product Safety Commission's Consumer Product Hazard Index).

Interagency Testing Committee, which is charged by statute with recommending chemicals to EPA for further health and environmental testing, relies heavily on such a scoring device to rank chemicals.<sup>216/</sup> Megascoring devices can use information that is more easily available than the information that is necessary for quantitative risk assessment. For example, production quantities might be used as a rough surrogate for actual worker exposure. Because they are less resource-intensive than risk assessment-based listing approaches, megascoring devices can be applied to a larger universe of workplace hazards.

The scores that are attached to various aspects of workplaces are expressed quantitatively, but they may be qualitative in origin. For example, scores can be adjusted to reflect the degree of confidence that the agency has in the quality of the available evidence. Similarly, subjective considerations like the relative weight to be given to different health effects end points can be incorporated by assigning different scores to different end points. Finally, megascoring devices can incorporate administrative, economic and technological feasibility considerations into the ranking scheme by attaching scores to those aspects of rulemaking topics.

The greatest disadvantage of megascoring devices is their inaccuracy. Since they are based upon surrogates for real data and since they rely heavily upon subjective considerations, the user of a megascoring device cannot be confident that the device has listed workplace hazards in the order of decreasing hazard. For example, it is difficult for megascoring devices to take into account the extent to which workers are protected by existing standards. Scores based solely upon toxicity might indicate a large hazard, even though current standards or practices reduce that hazard considerably.<sup>217/</sup> Much of the information needed for even a rudimentary scoring exercise is in the hands of EPA and NIOSH and is not easily accessible to OSHA; nor does OSHA have the control over the details of producing the data necessary for putting it in an easily usable form.<sup>218/</sup>

Like the risk assessment approach, megascoring does not leave room for overt political considerations. Although subjective factors play a role, they are all relevant to the primary task of locating the worst actors in a technical sense. The megascoring device does not address the political needs of the agency leadership. The device could rather easily be

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<sup>216/</sup> Sevin interview, supra note 133. See also Peat, Marwick Report, supra note 206.

<sup>217/</sup> Wright interview, supra note 142.

<sup>218/</sup> Sevin interview, supra note 133.



adjusted to incorporate political concerns, such as the intensity of congressional, OMB and beneficiary group interest, by assigning additional scores to those factors, but the very statement of this possibility suggests its impracticality. The fact that the agency explicitly factored the reactions of congressional subcommittees and the White House into a prioritization model would at some point become a matter of public record, inviting inquiries into how the agency derived the quantitative measures of displeasure.

### 3. Prioritization by Committee.

Much government work is done by committees specially charged with accomplishing certain tasks. Following this pattern, OSHA could establish a committee to set its priorities, subject to review by the Assistant Secretary. There are several variations of the committee approach, ranging from a committee of upper level management making ad hoc decisions (which would be virtually indistinguishable from the ad hoc management approach) to a committee of outside experts assigned to draw up a priority list for the agency (which would in many ways be indistinguishable from the numerical scoring and risk assessment approaches). The discussion that follows will assume that the committee is composed of persons with technical competence and persons who are sensitive to political considerations. The committee would meet regularly to establish agency priorities on the basis of past priorities and new considerations that arise in the interim between meetings. Agency staff would provide the committee with profiles of various chemicals summarizing the existing information on chemical risks and if available ease of avoiding those risks.

The committee approach has been adopted in numerous regulatory settings that are very similar to OSHA standard-setting. For example, Congress established an Interagency Testing Committee to prioritize and chemicals for required testing under the Toxic Substances Control Act.<sup>219/</sup> The Office of Toxic Substances uses the committee approach in prioritizing candidate chemicals in the premanufacture notification process under the Toxic Substances Control Act.<sup>220/</sup> NIOSH is currently adopting a committee approach toward setting its own priorities.<sup>221/</sup>

The committee approach preserves much of the flexibility of the ad hoc management approach while at the same time

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<sup>219/</sup> TSCA 4.

<sup>220/</sup> Peat, Marwick Report, supra note 206, at IV.11.

<sup>221/</sup> Sevin Interview, supra note 133; The NIOSH Priority Topic System (Briefing Paper prepared by NIOSH for OSHA's Health Standards Directorate.)

incorporating technical expertise into the priority setting process. The committee could change priorities, based on new information, new assessments of old information, judicially imposed deadlines, and changed political circumstances. At the same time the agency's priorities would be stated explicitly at the end of each meeting, so that beneficiaries and regulatees would be aware on a continuing basis of the status of relevant topics.

The committee approach gives upper level management the chance to relay some good news to petitioners -- viz. that the petition has been referred to the prioritization committee which will determine where the matter ranks among the agency's overall priorities. The agency would also have a response to judicial actions. It could say that a committee has been appointed to set priorities, the committee has considered the petition, and the committee has for the time being ranked it as a low priority. In other words, the committee approach would allow activities in through the side window, but it would concentrate primarily on the front door items. Finally, the continuity that could be expected from the committee approach would also reduce the risk of wasting agency resources on reinvigorating previously moribund projects. The Committee could be charged with terminating old projects as well as with initiating new ones.

Technical input could be ensured by appointing knowledgeable technical people to the committee and by requiring the committee to focus closely on chemical hazard profiles. The committee could likewise use the results of available risk assessments and multiscoreing exercises in its deliberations. For example the Office of Solid Waste in EPA has adopted a committee approach to prioritizing the regulatory activities over which the agency has some control. Agency analysts recently had the members of the committee engage in a megascoring exercise in which members of the committee were asked to assign relative weights ranging from one-to-five for various aspects of hazardous waste regulation, including the hazard of the particular waste, number of operators, probability of human exposure, ease of implementation, administrative resource requirements, overall societal resource requirements, and interprogram effects. The committee's responses were averaged to provide a team weighted average, which was then applied to quantitative information that the staff possessed about 37 potential rulemaking activities to come up with a ranked list of the 37 activities.<sup>222/</sup>

The committee approach does have some disadvantages. By turning priority setting over to a committee, upper level management loses some control over the agency's agenda. Less

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<sup>222/</sup> Telephone Interview with Dale Ruhter, Branch Chief, Economic Analysis Branch, Waste Management and Economics Division, Office of Solid Waste, EPA (November 20, 1986).

politically accountable members of the committee will make decisions that in practical effect bind the agency, even though upper level management has the final say. The agency has in the past experienced some difficulties with "renegade teams" that seek to implement policy preferences of lower level staff that differ from those of the politically accountable senior staff. Sometimes members of renegade teams feel so strongly about policy issues that they take their case to the press, rather than keeping the policy debate within the confines of the agency. This potential is reduced, however, if the committee contains agency employees who are likely to be responsive to upper level management's wishes or if upper level management is included in the committee. Finally, the Assistant Secretary would, of course, have the power to amend the committee's priority list, but that amendment would be a matter of public record.

Other disadvantages of the committee approach are the problems that afflict any group decisionmaking device. For example, committees can become afflicted with the vision-narrowing disease referred to in the public policy literature as "groupthink." The committee must have a chairman who is willing to bring matters to closure. Since the committee would be more in the nature of a decisionmaking entity than a study committee, it would have to decide how it would address the absence of consensus and whether dissenting opinions would be allowed or encouraged.<sup>223/</sup>

#### C. Recommendations.

We strongly recommend that OSHA establish a procedure for priority-setting for its rulemaking activities. Since OSHA does not currently have a priority-setting mechanism in place, this will require additional resources or a reprogramming of existing resources. The agency's resources (particularly in the Health Standards Directorate) are so thinly stretched that it would be better to secure additional resources for a priority-setting entity,<sup>224/</sup> which might be lodged in the Policy Directorate. In the past, OSHA has on occasion assigned to a single staff employee the job of coming up with a

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<sup>223/</sup> Consensus would no doubt be impossible on the controversial and policy-dominated questions that the committee would have to decide. There probably should not be a requirement that the committee reach consensus. Seminario Interview, supra note 131.

<sup>224/</sup> Harwood Interview, supra note 138; B. White Interview, supra note 59; Telephone interview with Jennifer Silk, Directorate of Health Standards Programs, OSHA (October 24, 1986); Stein Interview, supra note 123.

prioritization scheme, but this has always been one of many jobs for which that staff person had responsibility.<sup>225/</sup>

RECOMMENDATION: OSHA should make priority-setting a high priority. The agency should consider devoting at least one full-time staff person to the task, and the priority setting unit should be given sufficient resources to gather information on candidates for priority lists and to perform risk assessments and megascoring exercises.

The Committee approach seems the most promising of the three approaches discussed above. It has many of the advantages of the other two approaches and fewer of the disadvantages. Therefore,

RECOMMENDATION: OSHA should establish a permanent prioritization committee charged with drafting an initial ranked list of agency priorities from the 47 topics that resulted from the standards improvement project and the pending rulemaking petitions. The committee should be further charged with meeting on a continuing and periodic basis to re-examine the existing list, add items to it, and remove items from it. To preserve badly needed continuity, committee membership should not turn over any more rapidly than once every three years, and committee members should be eligible for reappointment.

The membership of the committee should reflect both technical expertise and political sensitivity. One way to ensure this would be to make the Committee a formal advisory committee composed of nonemployees consisting of technical experts and representatives of a broad range of constituency groups. Such a committee could not, however, be an actual decisionmaking entity; it could only make recommendations to agency management. Alternatively, the committee could be composed of agency employees from various offices in the agency and chaired by a very high level agency employee, such as one of the Deputy Assistant Secretaries.

One variety of the committee approach that has often been attractive to agencies engaged in scientific rulemaking is the outside committee of experts appointed by the National Research Council of the National Academy of Sciences (NAS).<sup>226/</sup> NAS committees have helped set priorities for drug regulation, pesticide regulation, drinking water standards, and numerous

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<sup>225/</sup> Harwood Interview, supra note 138.

<sup>226/</sup> See generally Grobstein, The Role of the National Academy of Sciences in Public Policy and Regulatory Decision Making, in Law and Science in Collaboration 115 (Nyhart & Carrow eds. 1983).



other governmental activities. The primary advantages of this approach are that it brings very high quality expertise to bear on the problem and that it can diffuse political heat. When the agency's prioritization decisions are challenged, it can simply point to the committee of experts and suggest that no single challenger (who usually has some kind of economic interest in the outcome) is qualified to second guess the highly expert and objective committee.

The chief drawback of the NAS committee is the fact that these policy-laden decisions cannot be made on a purely scientific or technical basis. There is no good reason for the agency to cede control over (and responsibility for) its priorities to a panel of outside experts. The experts may have their own policy agendas, which may differ from those of the agency. Other disadvantages are the expense of assembling and maintaining a semi-permanent committee and the time that would inevitably pass before the committee, which would be composed of persons working on a very intermittent basis, could report back to the agency. A scientific committee would want to deliberate very carefully before writing a list that might have grave economic consequences. Many members of the committee would have to be educated on the specifics of the information on particular workplace hazards. As a realistic matter, it would probably take at least 3-4 years for an NAS committee to come up with an initial list. OSHA may not have the time or resources to support that endeavor.

RECOMMENDATION: OSHA should establish a prioritization committee made up of OSHA employees with nonvoting representatives from NIOSH and EPA. The committee should be composed of high level management staffers at at least the Deputy Director level and highly regarded health professionals from the agency's technical staff. The meetings, which would discuss policy as well as technical considerations, should be closed to the public, but the results of the meetings should be made public, after the Assistant Secretary has had an opportunity to consider and overrule any decision made by the committee.

If the committee is established in accordance with the above recommendation, its first task of drafting an initial ranked list will be quite burdensome and no doubt controversial. One possible device to aid the committee in this initial task would be to hold one or more "consensus workshops" that all committee members would attend and during which all of the relevant interest groups would attempt to agree on a consensus list of priorities.<sup>227/</sup> For example, NIOSH recently held a national strategy workshop to help that

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<sup>227/</sup> Seminario Interview, supra note 131.

agency set its top ten priorities.<sup>228/</sup> Similarly, the Keystone Center has been successful in conducting consensus workshops on technical issues relevant to questions of public policy concerning natural resources. The consensus may fall apart as the group proceeds down the list, but there may well be a fair degree of consensus about what topics should be at or near the top of the list.

RECOMMENDATION: Prior to establishing an initial priority list, OSHA should hold one or more consensus workshops at which relevant interest groups would be asked to agree upon a consensus list of priorities.

The Committee should use existing risk assessments in establishing its initial prioritization list and in undertaking subsequent modifications, but it should be aware of the drawbacks of risk assessments, and it should not allow risk assessments alone to determine priorities. Existing megascoring schemes are so laden with pitfalls that the Committee should devote little attention to them. If the Committee is to perform its ambitious task expeditiously, it must resist the temptation to develop its own megascoring device and proceed ahead with whatever information is conveniently available on the application of existing megascoring devices to relevant chemicals. The Committee should likewise resist the temptation to incorporate by reference lists of toxic chemicals that have been developed for other purposes. While such lists may be helpful in defining the universe of hazards upon which the agency will draw in promulgating its own priorities list, the entity should do its own work.

RECOMMENDATION: The entity that establishes agency priorities should use existing risk assessments, as well as other technical and policy considerations, in carrying out its task. It should not commission full-blown risk assessments in setting the initial priorities list, but it may decide to develop more sophisticated risk assessments in modifying the list. The entity should not develop its own megascoring device for setting priorities, and it should not incorporate by reference lists prepared by other agencies for other purposes.

OSHA can expect resistance to any explicit priority list from the regulated industry for reasons other than a company's natural reluctance to be the subject of an OSHA standard. No company is happy to see a chemical that it deals with labeled a "bad actor," even if regulatory consequences never flow from

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<sup>228/</sup> Seminario Interview, supra note 131.

that determination.<sup>229/</sup> For example, an OSHA priority list might trigger products liability lawsuits.<sup>230/</sup> In addition, industry lawyers sometimes refer to the "tyranny of lists," pointing out that one agency's list prepared for a limited purpose may get adopted by another agency for an entirely different purpose.<sup>231/</sup> OSHA might also anticipate opposition from beneficiary groups that believe that hazards relevant to their interests are too far down the priority list.

The agency can reduce the opposition of outside groups to an explicit list somewhat by grading chemicals and other hazards, rather than ranking them in numerical order. For example, rather than ranking 50 potentially hazardous chemicals on a scale of 1 to 50, the committee could divide the 50 into 10 "top priority" chemicals, 10 additional "very high priority" chemicals, 10 additional "high priority" chemicals, 10 additional "middle priority" chemicals, and 10 additional "low priority" chemicals. New chemicals that come to the agency's attention through new studies or petitions could be assigned one of the five priority rankings, and the rankings of chemicals on the list could change as new information became available to the agency and as it completed rulemaking with respect to its top priority chemicals.

The agency should take the firm position that the Committee's priority ranking lists are merely internal aids to setting the agency's rulemaking agenda and are not themselves rules subject to notice and comment procedures. The agency should strongly avoid creating the impression that the list is in any way a "declaration of hazard;"<sup>232/</sup> rather, OSHA should stress the tentative nature of the list, pointing out that placing a chemical or workplace on the list in no way obligates the agency to take regulatory action.

Because outside parties may have information that could be important to the agency's ranking decision, the committee should invite public comment on the committee's work, and the committee should be open to changing the ranking in light of the comments. But the agency should take the position that informal rulemaking procedures are not required, and it should strongly resist judicial review of the prioritization

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<sup>229/</sup> Kronenbush Interview, supra note 122.

<sup>230/</sup> King Interview, supra note 162.

<sup>231/</sup> For example, Section 101 of CERCLA defines as a "hazardous substance" any substance that is listed on one of several lists of substances prepared pursuant to several other statutes.

<sup>232/</sup> Sampson Interview, supra note 134.

list.<sup>233/</sup> If the evolving list is subject to judicial review upon initial promulgation or upon amendment, then the attendant delays may defeat the purpose of the entire exercise.

There is a sound legal basis for this position. A challenge to the list would probably not be ripe for review until the list is applied in an individual case to initiate a rulemaking action, in which case judicial review would only be appropriate at the end of the rulemaking activity. In applying the judicial doctrine of ripeness, the courts evaluate the fitness of the relevant issue for judicial decision at the time that it is raised and the hardship to the parties of withholding judicial consideration.<sup>234/</sup> The relative position of a particular hazardous substance on the list proposed here is not generally appropriate for judicial consideration. The list would be based on a combination of technical and policy considerations for which there is little statutory guidance other than a general statutory preference for addressing the most hazardous workplaces first.<sup>235/</sup> Like the decision not to prosecute a law violator,<sup>236/</sup> the decision where to rank a substance on a priorities list is highly discretionary and not generally amenable to judicial second-guessing. In addition, since the list would be subject to change by the proposed committee in light of new information and changed policy considerations, there is no particularly appropriate time for evaluating the "correctness" of the list. Rather than seeking judicial review of the list, a party with an interest in the list should petition the agency to change it. Finally, it is difficult to see how a party with an interest in a substance on the list can suffer much hardship from the mere presence of that substance on the list, especially if the agency is careful to maintain the position that the presence of a substance on the list in no way commits the agency to take any regulatory action.<sup>237/</sup> On the other hand, review of the

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<sup>233/</sup> The Administrative Conference has recommended that agencies consider rulemaking procedures for priority-setting systems, but "more informal methods are appropriate for ranking individual chemicals for  
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<sup>234/</sup> *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967). See 4 K. Davis, *Administrative Law Treatise* § 25:6 (1983).

<sup>235/</sup> 29 U.S.C. § 655(g).

<sup>236/</sup> See *Heckler v. Chaney*, 105 S.Ct. 1649 (1985).

<sup>237/</sup> See *State of Texas v. United States Dept. of Energy*, 764 F.2d 279 (5th Cir. 1985) (designation of two sites as  
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list itself would pose a great hardship to OSHA and affected workers, because the workers would be exposed to hazards for the full period of judicial review of the list before OSHA could begin to undertake protective action.<sup>238/</sup>

RECOMMENDATION: The entity that establishes agency priorities should publish and allow public comment upon a proposed list of 50-75 rulemaking topics. The list should either rank the topics individually or assign them to classes. OSHA should take the position that the list is not a final rule for which judicial review would be appropriate.

Assuming that a court did decide to review the list in isolation, it is highly unlikely that it would overturn a reasonable scheme, even if OSHA could not support it with hard

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<sup>233/</sup> evaluation and regulation. ACUS Recommendation No. 82-5, 1 C.F.R. §305.82-5.

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<sup>237/</sup> potentially acceptable sites for a nuclear waste repository not ripe for judicial review).

<sup>238/</sup> See *J.V. Peters & Co. v. EPA*, 767 F.2d 263 (6th Cir. 1985) (EPA action to clean up hazardous waste dump not ripe for review at request of party who might later be sued for response costs; court stresses harm that lengthy judicial review would pose to the environment). The recent D.C. Circuit opinion in *Eagle-Pitcher Industries, Inc. v. EPA*, 759 F.2d 906 (D.C. Cir. 1985) is not to the contrary. In that case the petitioners did not file a challenge to the EPA's Hazard Ranking System for hazardous waste dumps until after the 90-day statutory period for seeking judicial review had run. Petitioners claimed that the challenge to the system was not ripe when EPA promulgated regulations implementing the system and that it did not become ripe until EPA used the system to promulgate a National Priorities List. The court rejected this argument, but at the same time implicitly held that arguments concerning the list were ripe at the time that the suit was finally filed. The agency's statute specifically required that the agency promulgate the list by regulation, the statute specified rather specific criteria for creating the list, and the statute provided for judicial review of regulations. The priorities list proposed here is not required by statute, and it would not be a regulation. Rather, it would be an internal aid to guide the agency staff in allocating resources.

data and analysis. Perhaps the closest case in point is Eagle-Pitcher Industries, Inc. v. EPA,<sup>239/</sup> in which the D.C. Circuit upheld EPA's hazard ranking system and national priorities list for prioritizing waste sites for action under the Comprehensive Environmental Response, Compensation and Liability Act. Pursuant to statute, EPA prepared a list of 400 sites that were contaminated by hazardous substances. To accomplish this job, EPA, after notice-and-comment, promulgated a Hazard Ranking System (HRS), which was designed to estimate the potential risks of hazardous substances releases. The HRS was a megascoring device that relied fairly heavily upon risk assessment. Analyzing three pathways for release of hazardous substances, the HRS took account of three factors (likelihood of release, toxic characteristics of the substances, and the population or sensitive environments that were threatened) that in turn incorporated other factors. EPA acknowledged that the HRS contained many imperfections and that the resulting National Priorities List incorporated those infirmities. Nevertheless, the court rejected attacks on the system and held that it was not arbitrary and capricious.

The court first rejected the contention that the list had to contain the 400 most hazardous sites. The court agreed with the agency that the statute permitted it "to establish a lower minimum level of certainty that a release or potential release poses a threat for purposes of listing on the NPL than for actually taking government action."<sup>240/</sup> The court further agreed with the agency that the standards for placing a site on the list and the standards for ordering cleanup of a site were not identical. The court recognized that in deciding whether to list a site, EPA would have to rely upon the little information that was available at the time: "Clearly, the EPA's decision to reconcile the need for certainty before action with the need for inexpensive, expeditious procedures to identify potentially hazardous sites by establishing different threshold criteria for action and for listing is reasonable and fully in accord with congressional intent."<sup>241/</sup>

The court also rejected petitioners' argument that the HRS was arbitrary and capricious. In particular, the court was unimpressed with petitioners' argument that because the HRS was designed primarily with chemical substances in mind, it could not be applied to releases of mining wastes. The court did not delve deeply into EPA's detailed responses to the challenges to the HRS. Stressing the fact that the agency must be prepared to explain the assumptions and methodology of its models, the court stated that it must ultimately "defer to the agency's

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<sup>239/</sup> 759 F.2d 905 (D.C. Cir. 1985).

<sup>240/</sup> Id. at 919.

<sup>241/</sup> Id. at 921.

decision on how to balance the cost and complexity of a more elaborate model against the oversimplification of a simpler model."<sup>242/</sup>

The committee and its staff should begin with a relatively long list of potential candidates for its priority list and it should at the end of a relatively short period of time (perhaps six months) produce a ranked or graded list for circulation and comment. After the first list has been completed, the committee should continue to monitor scientific reports and other developments for information that might cause the agency to change the list. In particular, the committee should have systematic access to reports from the field for indications that issues not on the list deserve greater agency attention. OSHA should therefore continue its efforts to make information from the field more accessible to agency decisionmakers.

To preserve needed flexibility, OSHA should establish an additional "side window" for workplace hazards for which important policy considerations warrant rapid treatment.<sup>243/</sup> Petitions for rulemaking and TSCA referrals would then be treated as petitions to amend the current priorities list to which OSHA would respond within a definite time period (perhaps 120 days).<sup>244/</sup> OSHA could promulgate procedural regulations governing petitions and TSCA referrals specifying criteria for giving expeditious treatment to a topic rather than proceedings through the normal (and presumably slower) process of regular committee deliberations on the status of the priorities list. Such criteria might include: (1) the degree of hazard; (2) the quality of the data indicating hazard; (3) the administrative resources required to undertake the new project; (4) the match between the expertise required for the project and the expertise available to the agency;<sup>245/</sup> (5) whether the proposed project would result in greater protection for workers

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<sup>242/</sup> Id. at 921, quoting Small Refiner Lead Phasedown Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983).

<sup>243/</sup> Seminario Interview, supra note 131; Sampson Interview, supra note 134. For a description of a "fast track" system for addressing rulemaking petitions at the Nuclear Regulatory Commission, see Luneberg, supra note , at 86-88. Petitions on the "fast track" must be answered within 90 days, and a favorable response results in a notice of proposed rulemaking, rather than the typical notice of receipt of petition.

<sup>244/</sup> The ability of EPA to specify a response time for TSCA referrals might confound OSHA's attempt to establish a definite deadline, but EPA and OSHA should be able to agree to a sensible limit such as 120 days.

<sup>245/</sup> Mazzuzkelli Interview, supra note 164.

than projects currently at the top of the list; and (6) other important public policies (allowing room for delicate political considerations).

The side-window process could rely heavily upon the committee suggested earlier. The appropriate side-window vehicle might be a petition to amend the list. OSHA could, for example, promulgate regulations governing petitions for rulemaking that would require a showing from the petitioner that the subject of the petition warranted more rapid treatment than the other projects on the priorities list. The committee could then examine the reasons and any other outside comments on the petition in deciding whether to amend the priorities list.

Since policy considerations weigh very heavily in decisions whether to change agency priorities, OSHA may prefer to have a side-window vehicle available that does not rely upon a committee, especially if the original prioritization committee includes outsiders. Petitions could, for example, be directed to the Assistant Secretary or some high level entity composed of a Deputy Assistant Secretary, the Directors of the relevant Directorates and other relevant support staff. This alternative would allow the persons most directly accountable for the use of agency resources and those most sensitive to the political process outside the agency to make the decision whether a topic is sufficiently "hot" to leapfrog other topics.

Whether OSHA allows a quasi-expert committee or a high level internal entity to implement the side-window procedure, it should provide explicit public responses to petitions to change priorities, and these responses should give the reasons for accepting or rejecting such petitions. The side window must not become the dominant source of rulemaking initiatives. Its very nature means that the agency's responses to side window petitions will be less easily explained than the more quantitative "front door." In the final analysis, this means that the agency must show the public, and especially beneficiaries, that the more rational "front door" process does in fact work, bringing rulemaking initiatives to completion on a regular basis. In other words, OSHA must manage the rulemaking process in such a way that the front door is not perceived to be a "black hole" into which rulemaking efforts enter, never to be heard from again.

RECOMMENDATION: OSHA should establish a process for expediting prioritization decisions for topics that are the subject of TSCA referrals, rulemaking petitions, and intense pressure from Congress, OMB, and the White House. Although this expeditious process should be separate from the agency's routine prioritization process, it should be closely integrated with the routine process. The outcome of the expedited process should be the placement of the topic on the priority list or a determination not to proceed ahead with the project and a public explanation



for the action.

Once OSHA establishes a workable process for prioritizing future projects that is sufficiently flexible to address legitimate requests for priority changes and once OSHA begins to implement that process consistently, it should have little to fear from a lawsuit requesting a court to order it, in effect, to move a project to the top of the list. The agency can simply reply that it has an orderly process for ranking projects and a flexible way to hurry up individual projects when speed is necessary, and the petitioner's project has been assigned a place on the agency's agenda. The burden should then be on the petitioner to demonstrate why its proposed project warrants special treatment.

OSHA should attempt to coordinate its priority-setting activities with NIOSH.<sup>2.4.6/</sup> Congress clearly intended in section 6(g) of the Occupational Safety and Health Act that NIOSH play a role in providing the technical basis for OSHA priority setting.<sup>2.4.7/</sup> OSHA should solicit NIOSH's input in assembling an initial prioritization list. If, for example, OSHA decides to establish a committee to set priorities, it should appoint an official from NIOSH to a position on the committee. OSHA should communicate its priorities at a very early stage, so that NIOSH may schedule its projects to complement OSHA's rulemaking efforts. More importantly, OSHA should attempt to adhere to its original prioritization plan as closely as possible to avoid the frustration that NIOSH staffers feel when they prepare a criteria document for a substance only to be told that it is no longer a high OSHA priority.<sup>2.4.8/</sup> OSHA will never be able to adhere completely to any set prioritization scheme. Changes in priorities will be necessary to meet changed political conditions and crises brought on by new information. Therefore, OSHA should work with NIOSH to add some flexibility to NIOSH's schedule. In particular, NIOSH should maintain a capacity to respond on a "fast track" to OSHA requests for technical help on projects that come through the "side window." Most importantly, OSHA and NIOSH should be in constant communication so that NIOSH may adapt to changes in OSHA's priorities.<sup>2.4.9/</sup>

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<sup>2.4.6/</sup> See *Delays in Setting Standards*, supra note 49, at 21 (recommending that OSHA and NIOSH work together in establishing priorities).

<sup>2.4.7/</sup> 29 U.S.C. §655(g).

<sup>2.4.8/</sup> Mazzuzkelli Interview, supra note 164; Sevin Interview, supra note 133.

<sup>2.4.9/</sup> Mazzuzkelli Interview, supra note 164.

RECOMMENDATION: OSHA should include NIOSH in drafting its initial priority list and it should make NIOSH aware of all changes to that list. OSHA should work with NIOSH to establish a capacity in NIOSH to respond rapidly with information on projects that are assigned to move on a fast track through OSHA.

OSHA should also coordinate carefully with the National Toxicology Program (NTP)<sup>250/</sup> and EPA concerning OSHA's future information needs. Both NTP and EPA have the capability of generating new information on suspect chemicals, a capacity that OSHA lacks.<sup>251/</sup> If OSHA could arrive at a priorities list that extended three or four years in the future, it could approach NTP or EPA to initiate studies on the chemicals that would be the subjects of future rulemaking initiatives. OSHA should also coordinate with EPA on regulatory matters when OSHA's authority to protect works may not be as effective as EPA's authority to regulate chemicals.<sup>252/</sup>

RECOMMENDATION: OSHA should attempt to enter into a formal interagency agreement with EPA and NTP for making EPA and NTP aware of OSHA's needs for testing toxic substances to which workers are exposed. OSHA should also attempt to enter into a formal interagency agreement for coordinating the exercise of the authorities of the two agencies in a way that most effectively protects employees from workplace risks.

Although OSHA has undertaken some modest informal efforts in the last six years to coordinate with other agencies, there is no formal institutional entity with the capability of ensuring appropriate communication and forcing necessary cooperation. The interaction that does occur is often at lower levels where bureaucratic turf considerations overwhelm the current meager incentives to cooperate. For example, EPA employees are inclined to regard OSHA scientists as less competent than EPA scientists, and OSHA personnel generally believe that EPA scientists and engineers do not know much

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<sup>250/</sup> The National Toxicology Program is a multi-agency chemical testing program housed in the Department of Health and Human Services. It accepts nominees from regulatory agencies for testing chemicals for health effects. The purpose of the program, which was established in the late 1970s, was to coordinate governmental needs for health and safety testing of potentially dangerous chemicals.

<sup>251/</sup> Seminario Interview, supra note 131.

<sup>252/</sup> Seminario Interview, supra note 131.

about the workplace.<sup>253/</sup> A 1982 Recommendation of the Administrative Conference encouraged interagency coordination in identifying, evaluating and regulating potential human carcinogens, stressing that "[e]ffective coordination can reduce governmental costs, minimize inconsistency among the agencies, and better illuminate the economic costs of alternative control options."<sup>254/</sup> During the Carter Administration, an Interagency Regulatory Liaison Group, which was composed of the heads of OSHA, EPA, FDA, CPSC, FSIS, provided the institutional impetus to cooperate. OSHA should pursue the possibility of reviving the IRLG or of creating a similar entity to perform the coordination function suggested here.

Establishing an IRLG-like coordinating institution would require some additional resources in resource-scarce times, but the savings in avoided duplication alone should be worth the cost. The most foreboding obstacle to setting up such an institution is likely to be the Office of Management and Budget, which believes that it currently plays this coordinating role. The short answer to this objection is that OMB has had since the abolition of the old IRLG in 1981 to fill the gap, and it has not done so. Nor have other White House efforts to generate coordinated policies in the areas of regulating carcinogens and biotechnology met with great success. The coordination function for OSHA standard setting must be initiated and operated by the agencies themselves, and it must have the support and active participation of officials at the very highest levels of those agencies.

RECOMMENDATION: OSHA and other health and environmental agencies, such as EPA, the Food and Drug Administration, the Food Safety and Inspection Service and the Consumer Product Safety Commission, should form a high level group charged with coordinating agency policies and information relevant to regulating health and environmental hazards.

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<sup>253/</sup> Seminario Interview, supra note 131.

<sup>254/</sup> Recommendation No. 82-5, 1 C.F.R. §305.82-5 (1986).

### III. Management and Accountability.

OSHA has always struggled with managing its rulemaking process expeditiously.<sup>255/</sup> Although the extraordinarily lengthy interval between initiation and publication of OSHA rules has been the subject of negative commentary for years, the agency seems no closer to a solution than it was in the mid-1970's. Table III sets out in time-line form some of OSHA's important rulemaking efforts. The table strongly suggests that OSHA has a very difficult time meeting its own commitments for completing rulemaking efforts. The Generic Carcinogen Policy, described in Part II of this Report, had the potential to speed up the process for chemicals that demonstrated carcinogenic potential, but the Benzene case<sup>256/</sup> significantly reduced the impact of that approach when it imposed a requirement that OSHA demonstrate that workplace risks pose a "significant risk" before regulating.

Although OSHA's management style has varied over the years, no single approach has successfully speeded up the agency's rulemaking efforts. This suggests that some of OSHA's problems may be systematic or externally imposed. However, OSHA can significantly improve its internal management, and such improvements should substantially reduce the incidence of grossly delayed rulemaking initiatives. This section of the Report will critically examine management and accountability problems in OSHA and explore some options for improvement.

TABLE III  
SIGNIFICANT MILESTONES IN FIVE RECENT OSHA RULEMAKINGS

Asbestos--Revision of 1972 Standard

early 4/83: OSHA (Auchter) promises to issue NPRM in summer of 1983 (update of a 1975 proposal) and publish final rule in fall 1983 (as opposed to team's targets of June, 1984 and September, 1985)

11/2/83: Emergency Temporary Standard (0.5 standard) issued for 6 months

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<sup>255/</sup> See Delays in Setting Standards, supra note 49, at 23 ("The Occupational Safety and Health Administration did not have an adequate management information system and controls to identify and resolve the problems which delayed completion of standards.")

<sup>256/</sup> 448 U.S. 607 (1980).



- 3/7/84: Fifth Circuit invalidates Emergency Temporary Standard
- 3/29/84: OSHA (Strobel) promises NPRM within a week
- 4/10/84: NPRM published (still undecided between 0.5 or 0.2 fibers/cm<sup>3</sup>)
- 10/2/84: New Emergency Temporary Standard issues (0.2 to 0.5)
- 9/26/85: OSHA (Tyson) promises final standard by end of October, 1985
- 10/17/85: OSHA advisory committee recommends 0.1 standard for construction industry
- 6/13/86: Final standard promulgated (0.2 fibers/cm<sup>3</sup>).

Benzene

- 4/1/83: Report of OSHA intent to announce proposal for stiffer standards on 5/1/83
- 4/14/83: Petition for an emergency temporary standard
- 5/3/83: OSHA (Auchter) announces plans to promulgate standard by summer, 1984 (and to decide on emergency temporary standard within 3 or 4 weeks)
- 5/2/83: OSHA promises ANPR within 2 weeks

- 7/1/83: OSHA rejects emergency standard request
- 7/8/83: OSHA (Auchter) proposes expedited rulemaking program, i.e., proposal by 11/83, hearings in 2/84, final rule by 6/84
- 3/84: OSHA says NPRM should be submitted to OMB within a few weeks
- 4/12/84: OSHA predicts that it will take "another couple of months" before publishing NPRM.
- 7/84: OSHA says that the preamble to proposed standard is being changed
- 12/10/84: Suit filed in U.S. Court of Appeals, D.C. to compel OSHA to issue NPRM.
- 3/19/85: Draft NPRM submitted to OMB
- 4/22/85: OSHA files response to suit
- 5/20/85: OMB extends review of standard 'indefinitely'
- 2/25/86: Court of Appeals, D.C. refuses to put OSHA on timetable: 14 month timetable contemplated by OSHA not "facially unreasonable"

Ethylene Oxide

- 1/5/83: District Court orders OSHA to promulgate Emergency Temporary Standard
- 3/15/83: D.C. Circuit gives OSHA 30 days to propose tighter ethylene oxide standard. No firm timetable established, but court expects final rule within a year
- 3/30/83: Draft NPRM (1 ppm) completed

- 4/15/83: OSHA issues NPRM in response to court order
- 4/17/84: OSHA agrees (and court approves) to promulgate new standard by 6/15/84
- 6/18/84: OSHA issues final rule

Ethylene Dibromide

- fall/81: OSHA denies petition for Emergency Temporary Standard
- 12/1/81: OSHA issues ANPR
- 5/19/83: Risk assessment recommends reduction from 20 ppm to 0.1 ppm/STEL = 0.5 ppm
- 6/22/83: Auchter letter promises NPRM rule to be issued by mid-summer, 1983
- 9/13/83: Auchter testifies OSHA moving with all deliberate speed
- 9/29/83: OSHA issues NPRM
- 8/7/84: OSHA spokeswoman promises final rule in late fall, 1984

Formaldehyde

- 5/13/82: OSHA response to NIOSH concludes that there is insufficient evidence to support a more stringent standard
- 8/25/82: UAW files complaint in D.C. Cir. seeking emergency

regulation and charging OSHA with excluding necessary data from public record.

- 8/15/83: UAW files motion for summary judgment in its action to force OSHA to promulgate emergency temporary standard
- 5/84: EPA risk assessment indicates exposure would result in additional cancer cases
- 7/2/84: Court orders OSHA to reconsider need for Emergency Temporary Standard
- 7/2/84: OSHA tells court it needs until 12/15/84 for ETS reconsideration and until 4/15/85 for permanent rule reconsideration
- 10/30/84: OSHA tells court it is 'behind schedule,' but will get decision on ETS made by 12/15/84
- 11/84: OSHA releases "preliminary assessment"
- 12/15/84: OSHA fails to meet deadline
- 1/12/85: OSHA announces it will not issue ETS
- 4/15/85: OSHA announces it is considering new rules
- 5/7/85: OSHA says no justification for court ordered acceleration of rulemaking
- 6/3/85: D.C. Circuit orders OSHA to take 'appropriate further action' toward issuing permanent standard by 10/1/85
- 10/1/85: OSHA tells D.C. Circuit it needs extension til



12/1/85

- 10/18/85: OSHA tells court it is not delaying unduly
- 11/8/85: D.C. Circuit orders OSHA to promulgate NPRM by 12/1/85
- 12/3/85: OSHA issues NPRM (1.5 ppm)
- 1/24/86: OSHA asks D.C. Circuit to deny UAW motion for final rule by 9/10/86

A. Evaluation of the Current Rulemaking Management System.

OSHA has traditionally been organized along functional lines, maintaining separate Directorships for Health Standards, Safety Standards, Technical Support, Field Operations, and Administrative Programs. Although OSHA has always had a separate office for "Administration," that office has generally been responsible for preparing agency budgets, maintaining agency facilities and operations, and administering the financial aspects of agency contracts. It has never played a role in managing rulemaking initiatives. In the late 1970s, OSHA created a separate Directorate for Policy and charged it with preparing economic feasibility studies and regulatory impact assessments. While this office plays a large role in agency rulemaking initiatives, it does not attempt to manage the process.

OSHA is only one of many agencies in the Department of Labor, and it must clear important rulemaking actions at the Departmental level. The Department has always maintained a separate Solicitor's Office, apart from the individual operating agencies, to provide legal advice to all of the agencies within the Department.<sup>257/</sup> The agencies do not have their own lawyers, and they are entirely dependent on the Solicitor's Office for legal advice.

In its early years, OSHA was a very loosely run organization, and especially so in its rulemaking functions.

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<sup>257/</sup> The Solicitor's Office is also the designated contact with OMB for all agencies in the Department.

Unlike other health and environmental agencies created in the early 1970s, OSHA faced few congressionally mandated deadlines.<sup>258/</sup> Rulemaking initiatives were generated internally in an ad hoc fashion. The Directors for Health and Safety Standards assumed control of rulemaking initiatives with substantial and continuing input from the Assistant Secretary. Loose internal work groups were assembled to draft rulemaking documents with the aid of consultants.<sup>259/</sup> On at least one occasion (the original hazard identification regulation) an outside consultant (a university professor) was the de facto head of the work group. Since the agency undertook few major projects at any given time, the Directors themselves played a very substantial role in the drafting process, even to the point of typing the final version of a rule at 4:00 AM on the morning that it was due.<sup>260/</sup> Clearly a process that devoted such large amounts of upper management time to individual rules was incapable of managing more than five or six major rules at any one time. As a practical matter, the tendency was for the entire agency to "gear up" for a single rulemaking effort, putting aside most other initiatives until the current effort reached a clear stopping point.<sup>261/</sup> The result was a fairly low production of rules. Even during the Carter Administration, when an activist Assistant Secretary headed a more activist agency, it completed very few rules in any given year.

The change of Administrations in 1981 brought three significant organizational changes to OSHA. First, the Secretary of Labor took a much more active interest in OSHA rulemaking, and Departmental procedures were established for reviewing OSHA activities. Second, OSHA's new management hired a management consultant to prepare standardized written procedures for OSHA rulemaking that stressed documentation and upper level management input. Third, Executive Order 12291 (and later Executive Order 12498) gave the Office of Management and Budget a significant review role that in some cases superceded the agency's own judgment and that in many cases significantly delayed the publication of proposed rules.

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<sup>258/</sup> OSHA was required to promulgate national consensus standards within two years from the date of the statute's enactment. 29 U.S.C. §6(a).

<sup>259/</sup> Wrenn Interview, supra note 49; Gordon Interview, supra note 129.

<sup>260/</sup> Wrenn Interview, supra note 49.

<sup>261/</sup> Wrenn Interview, supra note 49; Gordon Interview, supra note 129.

The new Secretary of Labor in 1981 also revised Departmental procedures to establish a Department-wide Policy Review Board to review all policy and regulatory initiatives and to facilitate upper level Departmental input into the regulatory process.<sup>262/</sup> The Secretary of Labor chairs the Policy Review Board and the Assistant Secretary for Policy serves as its Executive Director.<sup>263/</sup> At the time that OSHA begins to devote staff or other resources to a rulemaking effort, current Departmental procedures require it to prepare a "Concept Analysis Paper" to inform Departmental officials and to aid in Departmental tracking of pending regulatory issues.<sup>264/</sup> After the agency has decided to initiate a rulemaking effort, it must prepare an Options Memorandum for the Policy Review Board.<sup>265/</sup> Based upon the Options Memorandum, the Policy Review Board must provide policy guidance before the agency may publish a Notice of Proposed Rulemaking.<sup>266/</sup>

1. The 1982 Regulation Management System.

In 1982, OSHA developed its own Regulation Management System to complement the Departmental procedures for generating rules.<sup>267/</sup> The Procedural Directive that established the

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<sup>262/</sup> See, Memorandum from Raymond J. Donovan to the Executive Staff on Improving the Management and Policy Processes Within the Department, November 17, 1982 [hereinafter cited as Improving Management Memo]; Memorandum from John Cogan to Members of the Secretariat of the Policy Review and Coordinating Committee on PRCC Operating Procedures, November 29, 1982 [hereinafter cited as PRCC Procedures Memo].

<sup>263/</sup> Its other members include the Secretary's Chief of Staff (who chairs the meetings in the Secretary's absence), the Under Secretary, the Solicitor, the Assistant Secretary for Administration and Management, the Assistant

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<sup>264/</sup> Memorandum from Raymond Donovan to Executive Staff on Departmental Decision Making Procedures -- Overall

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<sup>265/</sup> Departmental Procedures Memo, supra note 456, at 1.

<sup>266/</sup> PRCC Procedures, supra note 454, at 2.

<sup>267/</sup> OSHA Instruction RUL.1, March 1, 1982 [hereinafter cited as OSHA Instruction RUL.1].

Regulation Management System strongly endorsed the position that rules should not be initiated or completed unless they addressed demonstrable significant risks, were based upon documented facts, and were cost effective. The Directive established a Regulation Review Committee composed of high level OSHA officials and charged it with "coordinating issues among the directorates and reviewing documents and issues resulting from the standards development process prior to the Assistant Secretary's review."<sup>268/</sup> The Committee was supposed to recommend to the Assistant Secretary whether the agency should go forward with a rulemaking initiative. The Committee did not, however, always come to closure, and some ideas were effectively tabled indefinitely.

If the Assistant Secretary decided to go forward with a rulemaking effort, the Regulation Review Committee was supposed to appoint a "Preliminary Team," composed of a technical person from the Health or Safety Directorate, an attorney from the Solicitor's Office, an analyst from the Policy Directorate, and other employees with particular expertise, to prepare a "Research and Analysis Plan" and "Part I of the Assistant Secretary's Summary."<sup>269/</sup> The Research and Analysis Plan was meant to be "an outline of the facts to be documented and analyses to be made to justify a standard,"<sup>270/</sup> and was to be "be based on available or easily attainable information and an outline of the factual bases and issues which need to be addressed."<sup>271/</sup> The Assistant Secretary's Summary was intended to provide the Assistant Secretary with a concise summary of the crucial information and issues being developed in the rulemaking process. Part I of the Summary set out the nature of the proposed action, the justification for that action, alternatives to the action, and groups with an interest

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<sup>263/</sup> Secretary for Employment and Training Administration, and the Deputy Under Secretary for Intergovernmental Affairs. Improving Management Memo, supra note 454, at 1.

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<sup>264/</sup> Policies, October 23, 1981 [hereinafter cited as Departmental Procedures Memo].

<sup>268/</sup> OSHA Instruction RUL.1, supra note 267, at III-2.

<sup>269/</sup> OSHA Instruction RUL.1 supra note 267, at III-4, III-8.

<sup>270/</sup> OSHA Instruction RUL.1, supra note 267, at V-7.

<sup>271/</sup> OSHA Instruction RUL.1, supra note 267, at V-7.



in it.<sup>272/</sup> The Rulemaking Directive allowed 5 to 10 staff days for this effort,<sup>273/</sup> but it usually took approximately two months.<sup>274/</sup>

If the Assistant Secretary decided to pursue the rulemaking effort further, the Regulation Review Committee would assemble a new "Regulation Team" to complete the agency's standard-setting process. Team leaders could come from any of the Offices within the Health or Safety Directorates.<sup>275/</sup> Although the team leader was responsible for the rule, he or she did not have direct authority over any of the individual team members.<sup>276/</sup> It was not unusual for one of the members of a team to outrank the team leader in the bureaucratic hierarchy.<sup>277/</sup> Thus, while the team leader gave assignments to various team members, he or she had no authority to ensure that the assignments were completed on time.

The team's first task was to prepare a "Workplan" and Part II of the Assistant Secretary's Summary. The Workplan described the resources that would be required to complete the rulemaking project and provided a schedule of activities. It was subject to amendment as resource requirements and deadlines changed. The Workplan in theory committed the Regulation Team to a definite schedule with which upper level management could measure progress against time and resource commitments.

After the Regulation Review Committee and the Assistant Secretary approved the Workplan and Part II of the Assistant Secretary's Summary, the Team was required to undertake a risk

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<sup>272/</sup> The Preliminary team was also assigned the job of preparing the Concept Analysis Paper for Departmental review.

<sup>273/</sup> OSHA Instruction RUL.1, supra note 267, at V-7.

<sup>274/</sup> Telephone interview with Robert Beliles, Office of Risk Assessment, Directorate of Health Standards Programs, OSHA (July 23, 1984).

<sup>275/</sup> The remainder of the Regulation Team was composed of representatives from the Solicitor of Labor, the Policy Directorate, the Office of Regulatory Analysis in the Policy Directorate, the Technical Directorate, the Training Directorate, and the Information Office. OSHA Instruction RUL.1, supra note 267, at V-6.

<sup>276/</sup> Telephone interview with Arthur Gas, Office of Risk Reduction Technology, Directorate of Health Standards Programs, OSHA (July 23, 1984).

<sup>277/</sup> Gas Interview, supra note 276.

analysis and an alternatives analysis. The Team summarized these analyses and recommended a course of action in an Action Recommendation for the Regulation Review Committee and the Assistant Secretary. If necessary, a revised Workplan was also submitted and approved.<sup>278/</sup> The Action Recommendation was intended to be the primary decision document within the agency.<sup>279/</sup> Following approval of the Action Recommendation, the Regulation Team proceeded in accordance with the (possibly amended) Workplan to draft the Notice of Proposed Rulemaking under the direction of the relevant Standards Director. The team leader would assign to a member or members of the Team the task of incorporating all of the information that the Team had considered into a Preamble for the Notice of Proposed Rulemaking. How the task of drafting the Notice of Proposed Rulemaking was assigned varied from team to team. Sometimes the team leader would draft the notice, and sometimes the task would be divided among members with particular expertise.<sup>280/</sup> During the same time period that the Regulation Team was deliberating over the contents of the proposed rule, the representative from the Office of Regulatory Analysis in the Policy Directorate would draft the preliminary regulatory analysis documents.<sup>281/</sup>

Finally, the Team had to draft a second Options Memorandum to accompany the rulemaking package through Departmental Review.<sup>282/</sup> Since the Policy Review Board had by now already had one opportunity to examine the rulemaking effort and since the agency's effort was virtually complete, only minor changes to the rulemaking documents were usually necessary at this

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<sup>278/</sup> OSHA Instruction RUL.1, supra note 267, at III-13.

<sup>279/</sup> Telephone interview with Gary Strobel, Special Assistant to the Assistant Secretary for Regulatory Affairs, OSHA (July 23, 1984). The team also drew upon the Risk Analysis and the Alternatives Analysis in preparing an Options Memorandum for Departmental review. Since the contents of the Options Memorandum was almost identical to the contents of the Action Recommendation, this task was not especially burdensome. Although it no longer prepares an Action Recommendation, OSHA staff must still prepare an Options Memorandum for Departmental review. So the same analytical work is performed, but it need not fit the precise contours of the Action Recommendation.

<sup>280/</sup> Beliles Interview, supra note 274.

<sup>281/</sup> Beliles Interview, supra note 274.

<sup>282/</sup> OSHA Instruction RUL.1, supra note 267, at III-15.

point. The Notice of Proposed Rulemaking Package and these related documents were then reviewed by the Regulation Review Committee, the Assistant Secretary, the Policy Review Board and sent to OMB for further review.<sup>283/</sup>

## 2. The Current System.

The above-described 1982 internal procedures for OSHA rulemaking are best described as "byzantine." In the opinions of several OSHA employees, it must have reflected a strong desire on the part of upper level management to slow down the agency's already ponderous internal rulemaking process. Its excessive documentation requirements and its repetitive review procedures provided almost insuperable barriers to the production of rules, and in fact only one rule of any consequence was produced during the 3-4 years that those procedures were in place.<sup>284/</sup> The internal procedural rules also represented a more subtle effort to take authority from the Health and Safety Directors and shift it to the Assistant Secretary's Office.<sup>285/</sup> They also gave the Assistant Secretary's Office greater power to control the direction of a rulemaking effort through the ability to appoint team leaders.<sup>286/</sup>

In any event, the intricate rules were after a time observed mostly in their breach. In practice, these formal preliminary procedures were largely ignored.<sup>287/</sup> The Regulation Review Committee was often bypassed as the Assistant Secretary directly ordered the Directorates to begin rulemaking initiatives.<sup>288/</sup> The Research and Analysis Plan, the

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<sup>283/</sup> OSHA Instruction RUL.1, supra note 267, at III-15.

<sup>284/</sup> The only major rule to be promulgated during the period was the Hazard Identification Standard, 48 Fed. Reg. 53280 (1983).

<sup>285/</sup> Stein Interview, supra note 123; Silk Interview, supra note 224; B. White Interview, supra note 59.

<sup>286/</sup> Stein Interview, supra note 123.

<sup>287/</sup> The procedures were never observed for safety standards, which proceeded sequentially from the Safety Directorate (which drafted the bulk of the standard) to the Policy Office, to the Solicitor's Office and back to the Safety Directorate. Gordon Interview, supra note 321; B. White Interview, supra note 59.

<sup>288/</sup> Prodyra Interview, supra note 66.

Assistant Secretary's Summaries and the Concept Analysis Papers were either ignored or treated in a very cursory fashion, and in many cases no Preliminary Team was ever appointed. High level input was secured through informal meetings with the Assistant Secretary for which the members of the team prepared memoranda and charts to lay out the issues and options, and the Assistant Secretary often decided the important issues on the spot.

By late 1985, the procedures were as a practical matter irrelevant to the real world rulemaking process. Not only had they effectively stymied rules aimed at enhancing workplace safety, they had also sidetracked efforts aimed at repealing or amending existing rules to make them less burdensome. In addition, OSHA was by 1985 receiving a great deal of congressional pressure to begin promulgating rules, and it had received several court orders to complete internal decision making by specified dates. With rulemaking projects increasingly subject to court-ordered deadlines, the agency was forced to abandon the 1982 procedures or face the threat of being held in contempt of court.<sup>289/</sup> One of Assistant Secretary Rowland's last official acts was to abolish the intricate internal procedures described above.<sup>290/</sup> However, the Departmental procedures, establishing the Policy Review Board and requiring the preparation of a Concept Analysis Paper and Options Memoranda still remain in effect.

The 1982 procedures have not been replaced with any particular management regime.<sup>291/</sup> Although the "team" concept was abolished and although responsibility for rulemaking was returned to the Health and Safety Standards Directorates, the project officers who are responsible for particular rulemaking efforts often establish de facto teams made up of representatives from the Policy Office, the Solicitor's Office and other persons from the Health and Safety Standards Directorates with expertise in the subject area.<sup>292/</sup> While many of the subsidiary documentation

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<sup>289/</sup> Sevin Interview, supra note 133.

<sup>290/</sup> Silk Interview, supra note 224; F. White Interview, supra note 59; Martonik Interview, supra note 59. Memorandum entitled "Management Responsibility for Standards," dated July 24, 1985; OSHA Instruction RUL. 1, supra note 267, Chapter 2.

<sup>291/</sup> F. White Interview, supra note 59.

<sup>292/</sup> Sevin Interview, supra note 133; Stein Interview, supra note 123; Silk Interview, supra note 224; Harwood

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requirements, such as the Research and Analysis Plan, the Assistant Secretary's Summary and the Action Recommendation, have disappeared as formal documents, a good deal of communication still occurs on a less formal basis between the Assistant Secretary's Office and the staff person with responsibility for the initiative through the Health and Safety Directors. An Options Memorandum is still prepared for the Assistant Secretary and for review by the Departmental Policy Review Board.<sup>293/</sup> Deadlines still get established informally, but they are less often reduced to writing in formal documentation such as the Work Plan. Project officers in the Health Standards Directorate usually prepare Work Plans, which contain proposed deadlines, and these are updated regularly (usually in a monthly basis).<sup>294/</sup> Still, these internally set deadlines usually slip without serious penalty.<sup>295/</sup> The time interval between when OSHA receives a rulemaking petition or otherwise decides to examine a possible rulemaking topic and the time that it writes the Options Memorandum depends almost entirely upon the amount of outside pressure the agency receives,<sup>296/</sup> even though there is no apparent reason why a deadline for preparing a Notice of Proposed Rulemaking could not be established at the time that the Assistant Secretary decides to go forward with a rulemaking project.<sup>297/</sup>

Despite the elimination of the burdensome 1982 paperwork requirements, the agency's internal production has speeded up only slightly. While it is very clear that the 1982 procedures failed utterly to achieve expeditious rulemaking, OSHA still

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- <sup>292/</sup> Interview, supra note 138; F. White Interview, supra note 59; B. White Interview, supra note 59; Martonik Interview, supra note 59; Gordon Interview, supra note 129.
- <sup>293/</sup> Stein Interview, supra note 123; Harwood Interview, supra note 138; Martonik Interview, supra note 59.
- <sup>294/</sup> Martonik Interview, supra note 59. In addition, the office of the Director of the Health Standards Directorate keeps a running account of who is responsible for which projects. Martonik Interview, supra note 59.
- <sup>295/</sup> Martonik Interview, supra note 59; Sevin Interview, supra note 133; Harwood Interview, supra note 138.
- <sup>296/</sup> See also text accompanying notes 130-135, supra.
- <sup>297/</sup> Gordon Interview, supra note 129.

needs a management and accountability system to ensure that upper level management's priorities are communicated to lower level staff, to ensure that bottlenecks do not develop, and to ensure that responsible agency officials are held accountable for inexcusable delays. Whether or not OSHA ever seizes control of its own agenda, it must invent an internal management system that makes the trains run on schedule.

To accomplish this result, OSHA management must seriously address at least six severe management problems that currently plague OSHA's internal rulemaking management process: (1) the absence of effective mechanism for establishing and monitoring deadlines for achieving internal milestones; (2) inadequate incentives to meet established deadlines; (3) the absence of a mechanism for facilitating policy interchange between upper level management and lower level staff; (4) the lack of coordination among essential institutional actors; (5) the inability or unwillingness of upper level management to make difficult substantive decisions in a timely fashion; and (6) inadequate resources.

#### B. Establishing and Monitoring Deadlines.

##### 1. The Current Absence of Deadlines

As previously discussed, OSHA's statute does not provide firm deadlines for rulemaking actions. Thus, internally generated rules need not proceed in accordance with any legally required timetable. Likewise, matters brought to OSHA's attention through NIOSH criteria documents, Congressional and White House pressure, and updated private standards need not proceed in accordance with any legally enforceable deadlines. OSHA must respond to TSCA referrals within a deadline established by EPA, but there may be no judicial relief available for missed deadlines. In any event, the agency is only required to decide whether or not it will undertake a rulemaking; it does not have to set out or adhere to a timetable for completing the action. External petitions are subject to the Administrative Procedure Act's requirement that the agency respond to rulemaking petitions within a "reasonable time."<sup>298</sup> but judicial enforcement of this flexible standard is expensive and time consuming. Judicial relief is generally available under the Administrative Procedure Act for

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<sup>298</sup> Section 555(b) of the Administrative Procedure Act requires that agencies conclude matters presented to them "within a reasonable time," and Section 706(1) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§555(b), 706(1).

agency actions "unreasonably delayed," but judicial intervention into an ongoing administrative activity that lacks a statutory deadline is easily fended off, absent egregious circumstances.<sup>299/</sup> Only in very rare instances have the courts ordered regulatory agencies to complete rulemaking activities by judicially established deadlines when the agency's own statute lacks a deadline. Interestingly, a large number of these cases involve OSHA rulemaking.

At present, OSHA has in place only the most rudimentary system for setting deadlines for its regulatory activities.<sup>300/</sup> The Work Plan that some project officers prepare at the outset of a project<sup>301/</sup> and the Options Memorandum that is prepared for Departmental review contain a proposed timetable, but these deadlines are never formally affirmed and they are rarely enforced. Upper level management meets twice a year to prepare the agency's proposed regulatory agenda for submission to Departmental officials and OMB. This document establishes proposed deadlines for actions on the agenda, but those deadlines are not regarded seriously by most agency employees, and they are in any event only very rarely met in practice.<sup>302/</sup> Some are established to meet political needs and are therefore often very unrealistic. Others are proposed solely out of the necessity for putting a date on the chart without any serious thought about whether they are realistic or about whether the agency truly intends to spend current resources in an effort to attain them.

The deadlines taken most seriously by agency staff are those set in informal status meetings with the Assistant Secretary or Deputy Assistant Secretaries and the Directors of Health and Safety Standards and Policy Directorates.<sup>303/</sup>

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<sup>299/</sup> See, e.g., *United Steelworkers of America, AFL-CIO v. Rubber Manufacturers Ass'n*, 783 F.2d 1117 (D.C. Cir. 1986) (declining to disturb agency's proposed schedule for completing rulemaking). See also *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir.

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<sup>300/</sup> Sevin Interview, *supra* note 133; Harwood Interview, *supra* note 138.

<sup>301/</sup> Silk Interview, *supra* note 224; Stein Interview, *supra* note 123; Harwood Interview, *supra* note 138.

<sup>302/</sup> Most of the lower level employees interviewed for this report put very little stock in the Regulatory Agenda deadlines.

<sup>303/</sup> Braslow Interview, *supra* note 123.

These meetings, however, occur as various milestones, such as the preparation of the Options Memorandum, are met, and not at specific pre-arranged time intervals. They are therefore not effective as "action-forcing" devices. Time projections are typically arrived at on a "when-do-you-think-you-can-get-this-done" basis and they are not always reduced to writing. In addition, they are continually subject to informal adjustment without explanation as priorities change due to outside pressures or other resource needs.<sup>304/</sup> These informal deadlines and amendments to the deadlines are communicated informally by the Office Directors to the staff members who are assigned to particular rules and who in turn communicate them to other staff members. Apart from the unobserved deadlines published in the Regulatory Agenda, the agency generally avoids publicizing its internally generated deadlines.

When the Policy Office or Health Standards Directorate contracts for outside work, as is usually the case for important projects, deadlines are imposed on agency contractors. But the realistic time requirements of the contractors are not always factored into the agency's rule generating process.<sup>305/</sup> Sometimes contractors are given indefinite extensions for jobs related to projects that wind up on the back burner, and indeed the delayed contractor's report can be cited an excuse for delaying agency action. At the other extreme, contractors are pushed to produce fairly low quality output within unrealistically short deadlines when outside pressures force the agency to act expeditiously.<sup>306/</sup> A more deliberate attempt to set and adhere to deadlines could improve the quality of the jobs that contractors perform for the agency.

The problem of the lack of deadlines is especially acute after the agency has held a hearing on a proposal and is formulating its final rule in response to the public comments.<sup>307/</sup> After a hearing date has been set (perhaps as

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<sup>299/</sup> 1984) (establishing a "rule of reason" for determining  
<sup>299/</sup> (Continued on next page)

<sup>304/</sup> Sevin Interview, supra note 133; Harwood Interview, supra note 138.

<sup>305/</sup> Gordon Interview, supra note 129.

<sup>306/</sup> Gordon Interview, supra note 129.

<sup>307/</sup> Gordon Interview, supra note 129; Stein Interview, supra note 123; Harwood Interview, supra note 138.



a result of a court order), the agency staff does have a deadline, and the prospect of a public hearing generates a good deal of excitement and activity as the staff prepares witnesses and works on its cross-examination. As the hearing draws near, agency staffers work overtime preparing the best case possible for the agency's position. But after the hearing is finished, there is a period of time during which the agency awaits post-hearing comments. Staff members working on the rule turn to other matters, like answering backed-up correspondence and initiating new rulemaking projects. After the hiatus, there is a general reluctance to return to the nitty gritty work of reading hundreds or thousands of comments and preparing agency responses to those comments for publication in the preamble to the final rule. In the absence of a firm deadline for finishing this task, it tends to drag on as staff members who excitedly worked on the rule prior to the hearing allow the project to slip in their priorities.

Without deadlines, it is always possible for lethargic staffers or professionals busy on other projects to put things off to another day. Moreover, because most of the science/policy questions that must be resolved in OSHA rulemaking are inherently unresolvable on technical grounds, it is always possible for someone on the technical staff to suggest that the project wait until more information can be developed. There is always one more criticism that bears answering.<sup>308/</sup> Similarly, it is possible for upper level management in the absence of stated deadlines to allow controversial issues to slide until further information can be developed and, perhaps more importantly, until political passions cool.

OSHA does not have any systematic approach toward tracking the progress of its rulemaking initiatives.<sup>309/</sup> The project officer from the Health or Safety Standards Directorate is responsible for keeping the action on schedule, and the Director maintains close enough contact with the staff to know which actions are on track and which actions are slipping. The Office of the Assistant Secretary does not currently have a formal way of ascertaining on a periodic basis the status of OSHA's rulemaking. Although the agency no longer focuses its

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<sup>299/</sup> the time required to make agency decisions); Schwartz, supra note 135, at 45.

<sup>308/</sup> Sevin Interview, supra note 133; Stein Interview, supra note 123; Harwood Interview, supra note 138.

<sup>309/</sup> F. White Interview, supra note 59. See also Delays in Setting Standards, supra note 49, at 23-24.

short term attention primarily on one or two big rules as it did in the late 1970s, it does not have a tracking system to keep up with the progress of rules. As one official explained: "We keep it in our heads."<sup>310/</sup>

Sometimes rules that are kept in the heads of agency officials get lost. On one occasion a project was literally lost in the Department for several months.<sup>311/</sup> Indeed, rulemaking projects are sometimes initiated but never brought to conclusion without any formal upper level decision to abandon the effort,<sup>312/</sup> and the project returns to the agency's agenda only in response to a new petition.<sup>313/</sup> While informal tracking devices may be appropriate for an institution with a limited number of responsibilities that are of limited societal importance, it is entirely inappropriate for a modern federal agency of OSHA's status.

The consequences of OSHA's failure to develop a deadline-setting and action-tracking system are painfully evident. As the agency misses its internally generated deadlines, external pressure grows. At the extreme, an affected group files a bureaucracy-forcing lawsuit and attempts to persuade a court to order deadlines. OSHA has become so accustomed to these suits that it now routinely responds to them by filing a proposed agenda for completing the action, rather than defending its failure to proceed expeditiously.<sup>314/</sup> Some cynical OSHA staffers are convinced that the only way that the institution will move forward with a rulemaking initiative in the current context is pursuant to court-ordered deadlines where there is a credible threat that failure to meet a deadline will result in imprisonment. This lesson is not lost on beneficiary groups, and they are increasingly resorting to judicial remedies for OSHA's inaction. The net result is that, to a disturbing degree, OSHA has lost control over its resources.

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<sup>310/</sup> Jacoby Interview, supra note 195.

<sup>311/</sup> Washington Post, May 12, 1983, A21 col. 2 (relating how the grain elevator standard became "mired in a bureaucratic netherworld between offices" so that no one in the agency could physically locate the rule).

<sup>312/</sup> Sevin Interview, supra note 133.

<sup>313/</sup> Stein Interview, supra note 123 (citing wood dust as an example); Sevin Interview, supra note 133 (citing cadmium as an example).

<sup>314/</sup> Sampson Interview, supra note 134.

If OSHA is to regain control over its own limited rulemaking resources, it must establish a system for establishing and monitoring progress toward the attainment of realistic deadlines for its rulemaking initiatives.<sup>315/</sup> It is critical that these deadlines be attainable and not pie-in-the-sky projections. Rulemaking in OSHA is very complex, and it requires agency staff to assimilate file drawers full of highly technical information.<sup>316/</sup> The deadlines must be established in full recognition of this fact. Yet once realistic deadlines are established, they should not be easily avoided.

Since rulemaking initiatives are invariably prolonged affairs, the system should be capable of setting and tracking major deadlines for such events as the Assistant Administrator's approval of rulemaking projects, the decision whether to continue with the rulemaking effort after the staff has reacted to responses to any Advance Notice of Proposed Rulemaking, referral of initial decisions to OMB, OMB's response to OSHA's initial decisions, publication of the Notice of Proposed Rulemaking, the beginning and completion of the hearings, and the Notice of Final Rulemaking. It should also be capable of establishing and tracking interim deadlines for less visible milestones such as the time that all involved offices must assign a staff member to the project, preparation of the required departmental documents, preparation of the first draft of the NPRM, responses from various offices (including the Office of the Solicitor) on the first draft, completion of the second draft and responses, and completion of review by the Assistant Secretary's Office and the Policy Review Board.

## 2. EPA's Action Tracking System.

The Environmental Protection Agency has established an "Action Tracking System" (ATS) that could serve as a useful model for a similar system of establishing and tracking deadlines in OSHA. The ATS is a computerized accountability system that tracks more than 200 items, approximately two-thirds of which are rulemaking actions, as they progress

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<sup>315/</sup> This is not the first time that OSHA has been urged to establish a system for establishing and monitoring progress toward deadlines. See *Delays in Setting Standards*, supra note 49, at 25.

<sup>316/</sup> Harwood Interview, supra note 138; Jacoby Interview, supra note 195.

toward completion.<sup>317/</sup> It is managed by the Planning and Accountability Branch of the Office of Standards and Regulations, which is under the Assistant Administrator for Policy, Planning and Evaluation.<sup>318/</sup> Its purpose is "to provide information on the status of the Agency's important activities in such a way as to ensure that . . . work is flowing smoothly and being completed in a timely way."<sup>319/</sup> The system was meant to "highlight delays caused by staff offices--and even the 12th floor [the Administrator's office]."<sup>320/</sup>

A program office in the agency begins the rulemaking process by preparing a "start action request." This request is forwarded to the Office of Standards and Regulations under the Assistant Administrator for Policy, Planning and Evaluation. This Office has responsibility for moving an action through the agency's complicated rulemaking management system. When the start action request is approved, the activity is placed in the Action Tracking System.

The Planning and Accountability Branch has, in conjunction with the program offices in the agency, established 13 standardized "major milestones" for most rulemaking, based on the agency's past experience with similar rules.<sup>321/</sup> Unless the program office convincingly demonstrates why a particular rule is unique in its time requirements, the Planning and Accountability Branch will place its standardized time intervals into the system for major milestones. The program officers are strongly encouraged to place additional subsidiary milestones into the system as well. Subsidiary milestones can alert management when initiatives are falling behind schedule at an early time, and they can make it much easier to point the finger at the responsible person when a major milestone is missed. But unless the Deputy Administrator of the agency

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<sup>317/</sup> Telephone Interview with Dan Fiorino, Director, Regulations and Information Management Division, Office of Standards and Regulations, OPPE, EPA (November 3, 1986).

<sup>318/</sup> Telephone Interview with Robert Curry, Branch Chief, Planning and Accountability Branch, Office of Standards and Regulations, EPA (November 20, 1986).

<sup>319/</sup> Memorandum from Alvin L. Alm to Addressees on Action Tracking System, Sept. 20, 1983 at 1 [hereinafter cited as Alm Action Tracking Memo].

<sup>320/</sup> Id.

<sup>321/</sup> Alm Action Tracking Memo, supra note 319, at 2.



requires subsidiary milestones, they are at the discretion of the program office.

Although computerized status reports are available to anyone with access to the agency's computer, the computer on a biweekly basis pulls out all of the projects for which there are milestones within the next two weeks and all the projects that are behind schedule. This "do-or-late" list is made available to upper level management and mid-level management on a biweekly basis. More importantly, it forms the basis for a report by the Office of Planning and Accountability to the Deputy Administrator for his biweekly meetings with all of the Deputy Assistant Administrators (middle management).<sup>322/</sup> The Deputy Administrator carefully peruses the biweekly memorandum, which also contains suggested questions to ask specific middle management officials concerning any failures of their offices to meet their deadlines. Whether or not the Deputy Administrator inquires about a particular project on the late list, the Deputy Assistant Administrator (DAA) responsible for that project must be prepared to explain the missed deadline at the biweekly meeting. Since all relevant Deputy Assistant Administrators are present or represented at these biweekly meetings, they also give one DAA the opportunity to point the finger at another DAA if an office under the second DAA is holding up the rule. The second DAA must also be prepared to explain the problem. The biweekly meeting, then, is a place where middle level and top management can discover bottlenecks and work to eliminate them.

If an office has a good reason for moving a milestone forward in time, it may request the Office of Planning and Accountability to amend the schedule accordingly. This has the effect of postponing the time that the next step of the project "pops up" on the due-or-late list. The requesting office must, however, explain the requested slippage and that explanation itself is entered into the Action Tracking System. The original schedule and all amended schedules, together with the slippage explanations, are retained in the system and may be called out of the computer at any time. The entire history of the project is thus available for inspection.

The analysts in the Office of Planning and Accountability are reluctant to allow amendments to the schedules, and they demand a good reason (usually external to the responsible office) before they will do so. Reasons that suggest internal management or coordination problems are generally insufficient, because those are precisely the situations that should be brought to the attention of the Deputy Administrator and the other DAAs in the biweekly meetings. If the program office insists upon amending the schedule, the matter can be elevated

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<sup>322/</sup> Alm Action Tracking Memo, supra note 319, at 2.

to the Deputy Administrator. Since the Director of the Office of Planning and Accountability acquires over time a good sense for what the Deputy Administrator regards as an acceptable excuse, however, the Director usually prevails.

During the past year, EPA has initiated an "open season" in September of each year during which program offices are required to identify additional policy guidance and regulatory activities for addition to the Action Tracking System and to update existing schedules to reflect realistic time frames for attaining remaining milestones.<sup>323/</sup> Any revisions to existing schedules made during "open season" must be explained. The purpose of the "open season" is to allow each program office to begin the new fiscal year with a clean slate. This is intended to facilitate yearly performance evaluations and budget reviews.

### 3. Advantages and Disadvantages of an Action Tracking System.

There is little doubt that the Action Tracking System in EPA has greatly enhanced accountability for rulemaking. Low- and mid-level rule managers in all of the program offices report that the Action Tracking System makes them very aware of deadlines and of the possibility that they will be missed. It is at the very least embarrassing for a Deputy Assistant Administrator to have to explain to the Deputy Administrator why a rule from his or her office is no longer on track. Even when the office has a legitimate excuse for delaying a rulemaking effort, it must still go to the trouble of convincing the Office of Planning and Accountability that delay is necessary, and this at least brings the matter to the attention of the appropriate DAA. In general, the Action Tracking System has made the agency much more deadline conscious.<sup>324/</sup>

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<sup>323/</sup> Memorandum from A. James Barnes to Addressees on Action Tracking System "Open Season," dated August 21, 1986.

<sup>324/</sup> The fact that EPA's record in meeting its own statutory and internal deadlines is far from exemplary might suggest that OSHA's implementation of a similar Action Tracking System will not appreciably improve OSHA's rulemaking management process. The most persuasive answer to this objection is that EPA's system has been in place far less than two years. Prior to implementing the Action Tracking System, EPA's rulemaking management process was very similar to OSHA's informal process, and the agency's performance reflected that. Although the

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A similar Action Tracking System in OSHA could go a long way toward improving the rule generating process at that agency, if it were effectively implemented. Rules could no longer disappear into the bowels of the agency, never to be seen again. All approved rulemaking initiatives would be in the tracking system. The fact that the Assistant Secretary (or perhaps a Deputy Assistant Secretary) would be apprised on a continuing basis of deadline slippages should serve as some inducement to the lower level staff, even if it does not provide quite the same spur to action as the threat of going to jail for contempt of court.

A second great advantage of the Action Tracking System is its potential for uncovering bottlenecks. One EPA manager pointed out that when the system picked up delays in several regional implementation programs, further examination revealed that every one of the delays was attributable to the failure of one office in Headquarters to promulgate necessary guidance documents.<sup>323/</sup> The agency had been wasting large amounts of money and losing time because of a single bottleneck that was quickly uncovered by the system.

A third advantage of an Action Tracking System is its capacity to identify programs that need more resources. A primary reason for OSHA's delays is the fact that most of the professionals in the Health Standards Directorate are constantly juggling several rulemaking actions at any given time.<sup>326/</sup> When there are no deadlines, any individual staff member can always put off one project to work on another, and it is difficult for a staffer to tell his or her boss that he or she is too busy if there is no time limit for any given job. Thus, the absence of deadlines and a tracking system can give the false impression that OSHA is capable of doing more than it

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<sup>324/</sup> Action Tracking System has not been in place long enough to yield quantifiable results, EPA's upper- and mid-management strongly believe that it has improved the rulemaking management process. EPA's ability to stay reasonably well on track in promulgating implementing regulations for the 1984 amendments to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., indicate that the process may be working in fact as well as in theory.

<sup>325/</sup> Telephone Interview with Cynthia Puskar, Office of Management Systems and Evaluation, OPPE, EPA (November 18, 1986).

<sup>326/</sup> Harwood Interview, supra note 138; Stein Interview, supra note 123.

really can with its limited resources. Rather than disappoint a beneficiary group by declining to take on its preferred project, OSHA can simply agree to undertake it without saying when it will get done. In the long run, however, this tactic leads to the agency's disappointing many beneficiary groups when very little ultimately gets accomplished. And the focus at that point is inappropriately on the presumed lethargy of OSHA bureaucrats rather than on OSHA's lack of adequate resources.

Reasonable deadlines and an action tracking system can reveal resource conflicts at a very early stage as one project officer explains that the reason that he or she missed a deadline was because he or she was working on another high priority project. Upper level decisionmakers can quickly become aware of the fact that the agency has filled its plate too full, and it can attempt to limit the number of new initiatives that it undertakes. In addition, the Action Tracking System can reveal individual branches within the agency that need more resources. If a single office is consistently behind the standardized deadlines, the problem may be that the program is lethargic, but it may be that the program needs more resources. Rather than firing the responsible official, the solution may be a quick infusion of resources into the troubled program.<sup>327/</sup>

The Action Tracking System is not, however, without its disadvantages. Perhaps the most significant disadvantage is that its heavy emphasis on meeting production deadlines may sacrifice quality. In the agency vernacular, the "bean counting" approach may result in rules that are not well considered and that are not well supported by facts and analysis. If the agency places too much emphasis on quantity and not enough on quality, it may produce a plethora of rules

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<sup>327/</sup> For example, the Solicitor's Office complains that the reason that it is very often a bottleneck is its lack of resources. Jacoby Interview, supra note 195; Gordon Interview, supra note 129; Henshel Interview, supra note 123. Even if OSHA's priorities were definitely set and clearly communicated to the Solicitor's Office, it would still be a bottleneck, because it is incapable of reviewing as many rules as OSHA is capable of producing. OSHA officials respond that the Solicitor's Office could review more rules with the same staff if it were less concerned with nitpicking details. Whatever the merits of this debate, an Action Tracking System would force the disagreement to the attention of upper level decisionmakers who could either provide greater resources to the Solicitor's Office or tell it to be less thorough in its reviews of OSHA documents.



that are later remanded to the agency by the reviewing courts for reconsideration.

A second disadvantage of the system is that it will require additional staff. Before OSHA could effectively implement a similar system, it would have to make the resource commitment to staff an office with the exclusive responsibility for managing the tracking system. For a small agency such as OSHA, the staff could be small, perhaps as small as one or two employees.<sup>328/</sup> The staff would have to interact closely with the high level manager (either the Assistant Secretary or one of his Deputies) who is positioned at the top of the system, so that it could become very familiar with the reasons for deadline slippage that were acceptable and those that were not. To avoid requiring the ultimate decisionmaker to determine the merits of deadline slippages on an individual basis, the staff would have to be delegated some de facto authority to reject proposed deadline extensions. If the deadlines could be extended without penalty, they would not really be binding.

A third related disadvantage is that a well-run action tracking system is quite demanding of high level officials. Since the time of high level agency officials is always in short supply, this added responsibility to meet with mid-level management on a biweekly (or some similarly short interval) basis can be quite burdensome. Nevertheless, this high degree of upper level attention is absolutely critical to the successful operation of the system. A system that informs lower level officials of their failures is of little value, if there is no potential for embarrassment before a high agency authority. EPA's last two Administrators have found the Action Tracking System to be sufficiently useful to warrant biweekly meetings with the agency's second in command, and there are no indications of dissatisfaction with this use of high level management resources.

A fourth disadvantage is that the information in the action tracking system can become public through discovery in a bureaucracy-forcing lawsuit, a separate suit under the Freedom of Information Act, Congressional investigation, or the omnipresent "leak." The agency can safely assume that its own evidence of its inability to keep rules running on schedule will be subject to public attention. This can be of serious tactical disadvantage to the agency in a bureaucracy forcing suit, and it can put the agency in an embarrassing position in its relationships with committees in Congress. It is always more comfortable for the agency to say: "We are doing the best

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<sup>328/</sup> By way of comparison, OSHA has a total of about 2300 employees, while EPA employs more than 9000.

that we can," without having to worry about the possibility that its action tracking system will undermine its statements.

In the final analysis, however, the advantages of the action tracking system far outweigh its disadvantages. Quality need not be sacrificed for "bean counting," if the agency is conscious of the problem, plans its resource needs in advance, matches those needs to realistic projections of resource availability, and allows deadline slippage for genuine quality concerns. Because the system would rely heavily upon computers, its personnel demands would be slight, and the simplicity of the program suggests that the computer resource needs would not be large. Revealing slippage to the world may be embarrassing, but it also renders the agency accountable to the public.

The largest hurdle in the way of implementing an effective action tracking system is the degree of upper level commitment required to make the system work. It necessarily demands a large degree of very high level management attention. Unless either the Assistant Secretary or one of his Deputy Assistant Secretaries is willing to devote at least one-half day every two weeks (and perhaps more time in some intense periods), the system will fail. Moreover, upper level management will have to demonstrate its commitment to an effective rulemaking management system by tying the agency's incentive structure to that system.

RECOMMENDATION: OSHA should immediately establish an Action Tracking System, modeled on the system in effect at the Environmental Protection Agency, to document the progress of rulemaking initiatives. The system should contain deadlines for meeting standardized major milestones and additional intermediate minor milestones in the progress of a rule's development. The Assistant Secretary or one of the Deputy Assistant Secretaries should meet on a biweekly basis with the Directors and Deputy Directors of the OSHA Directorates, the Deputy Assistant Solicitors for OSHA Health and Safety Standards, and perhaps a representative from the Departmental Policy Office to discuss progress toward designated milestones and reasons for any missed deadlines. OSHA should appoint a staff of one or two employees, which might be lodged in the Policy Office to manage the Action Tracking System.

#### C. Inadequate Incentives.

A rule management system cannot be effective if there are not adequate incentives for staff to proceed ahead with rulemaking initiatives in a timely fashion. While some agency staffers feel a keen sense of embarrassment that rulemaking efforts take so long, many have grown quite cynical about the

desire of upper level management to use government regulation as a vehicle for improving health and safety in the workplace. There is a general sense among agency staff, many of whom are past the mid-point of their careers, that agency management does not reward production and does not penalize lethargy.<sup>329/</sup> Several agency employees noted the recent apparent inability of the agency to attract and retain young and energetic professionals to the agency's standard-setting activities.<sup>330/</sup>

From management's perspective, it is apparent that it has very few tools available for providing incentives. The agency has only a very limited budget available for cash awards and merit bonuses. Penalties for nonproduction are very difficult to administer. The ultimate threat of termination is laughably unrealistic. Civil service laws and due process requirements ensure that firing a protected professional is an arduous process that is only very rarely worth the considerable institutional energy that it absorbs. Even if the agency were to take this drastic step for a single nonproductive employee (perhaps to set an example for others), there is a real possibility that externally imposed hiring restrictions would preclude hiring a replacement. A lazy employee may be better than no employee at all. Even the more realistic threat of sending an employee to "Siberia" deprives the agency of his or her services.

Although there are not easy solutions to the incentives problem, some things can be done on a practical level and much can be done on a symbolic level. Assistant Secretary Pendergrass' job resembles, to a somewhat lesser degree, the task that former Administrator William Ruckelshaus faced when he returned to EPA in 1983. Ruckelshaus returned to an agency stripped of resources, extremely low in staff morale and very low in productivity. He brought a very effective manager with him to be his Deputy Administrator, and he proceeded directly

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<sup>329/</sup> See also Railton Interview, supra note 188 (OSHA suffers from morale problems and needs leadership).

<sup>330/</sup> While this observation is no doubt accurate, attributing the relative absence of young professionals on OSHA's standard-setting staff to inadequate incentives may be unfair. In the past six years of drastically declining budgets, OSHA has had few positions to fill. Hence, the lack of vitality may be more attributable to lack of resources than to lack of management incentives. Nevertheless, the inability of upper level management to secure new positions or even to stem the loss of existing positions has not gone unobserved by agency staffers as evidence of the poor incentives within the agency.

to the largely symbolic task of bolstering staff morale and projecting a better public image of the agency. The effective management of Deputy Administrator Alm, who established the Action Tracking System described earlier, was crucial. He used the meager incentive tools available to him very effectively to reward expeditious work and to punish lack of productivity. But more importantly, Administrator Ruckelshaus, in both his internal and external statements, created a sense among agency staff that the job they were doing was important and that doing it well was a reward in-and-of-itself.

Given the large salary differentials between the public and private sectors, a sense of mission may be the most significant tool that OSHA has to attract and retain energetic professional staff. Assistant Secretary Pendergrass might likewise reinvigorate OSHA's professional staff by sending internal and external messages that the agency's mission is important and that public service is not second class citizenship.

While symbols are important, they will probably not be sufficient to reinvigorate an agency as heavy laden with cynicism as OSHA. Symbols are fragile--if they are not backed up with resources, they will appear hypocritical and quickly be ignored. The agency must develop other rewards for expeditious progress and penalties for missed deadlines. The Action Tracking System described earlier has built-in incentives. Avoiding embarrassment is usually a large incentive for professionals in bureaucracies. When effectively administered, the Action Tracking System will make high level management aware of missed deadlines and require responsible mid-level management officials to explain delays in a meeting before their peers. In EPA, the threat of such an embarrassing encounter has acted as a significant spur to get promised tasks performed on time.

Upper- and mid-level management should also have financial incentives available to reward good work. To a large extent, financial rewards should depend upon the quality of professional work, rather than its speed. But they should also be tied to performance as measured by the Action Tracking System. Nonfinancial rewards, like the "silver medals" that the Administrator of EPA personally awards in a public ceremony to outstanding agency employees, could be awarded to personnel on projects that are highly successful in meeting deadlines. Finally, upper level management can make it clear to mid-level management and staff professionals that annual leave will be cancelled for persons working on projects that are not on track.

**RECOMMENDATION:** Upper level management in OSHA should attempt to convey to OSHA professionals the message that OSHA's task is an important one that requires commitment



to the expeditious implementation of the agency's statutory mandate. OSHA management should reinforce such symbolic messages with real rewards for expeditious work and penalties for unwarranted delays.

D. Coordination Among Institutional Actors.

Developing a rule requires the input of several institutional entities within OSHA and within the Department of Labor. While the project officers in the Health and Safety Directorates do the bulk of the work of gathering background information, administering contracts for technical information, assembling the record, drafting the proposed and final rules and mining the outside comments for information and analysis, they must depend upon at least two other offices in every rulemaking effort. The Policy Office in OSHA is responsible for gathering information on the costs and economic and technological feasibility of complying with proposed rules. The Solicitor's Office, which is not part of OSHA, must review documents to be published in the federal register, draft certain parts of those documents, and prepare expert witnesses for testimony at the hearings.<sup>331/</sup>

Since the project officer has no direct control over either of these offices, he or she must either induce the representatives from these offices to do their jobs in an expeditious fashion or do their jobs for them. How the project officer proceeds is largely a matter of personal style. Most of the project officers interviewed for this Report simply did the jobs themselves if the representatives from the other offices did not perform their tasks in a timely fashion.<sup>332/</sup> At least one project officer sets firm deadlines and threatens to send the document forward without the needed work from other offices if it is lacking, seeking thereby to use the threat of embarrassment to induce the representatives from the other offices to meet the deadlines.<sup>333/</sup>

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<sup>331/</sup> In addition, before OSHA rules may be cleared at the Departmental level, the Assistant Secretary for Policy must be satisfied that the rules conform with overall Departmental policies. Like the Solicitor's Office, OSHA has no control over this office. F. White Interview, supra note 59.

<sup>332/</sup> Stein Interview, supra note 123; Silk Interview, supra note 224; Harwood Interview, supra note 138; Gordon Interview, supra note 129.

<sup>333/</sup> Sevin Interview, supra note 133.

Clearly, neither of these solutions is adequate. Project officers are trained in health and safety matters; they are not competent to draft the economic and legal sections of documents to be published in the Federal Register. Although the threat of moving ahead without the work of the other offices may act as some inducement to action, it is ultimately a hollow one. As a practical matter, the agency cannot publish a document that lacks the relevant sections. Even the threat of embarrassment may not be real to an attorney in the Solicitor's Office, who does not report to any upper level OSHA official.<sup>334/</sup>

Another alternative is for the project officer to elevate matters to mid-level management. The Director of the Health or Safety Directorate may informally bring delays to the attention of the Director of the Policy Directorate or the Assistant Solicitor for OSHA.<sup>335/</sup> But even at this level, there is no guarantee that the priorities of both offices are identical. In the past there have been problems of coordinating priorities.<sup>336/</sup> The Policy Office, which has even fewer professionals than the Health and Safety Standards Directorates, must know the relative priorities of those Directorates so that it can adequately manage multi-year contracts and draft documents in the proper sequence.<sup>337/</sup> In the past, poor communication of priorities between the two offices has resulted in significant bottlenecks in the Policy Office as completed technical analyses on health issues awaited the completion of analyses of the feasibility of control technologies.<sup>338/</sup>

Similar coordination problems have afflicted the relationship between the Health and Safety Standards

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<sup>334/</sup> To the extent that there is pressure from the OSHA project officer's superiors to move a rulemaking initiative along expeditiously, a staff member from one of the other offices can use delay as a lever to extract substantive concessions on the content of rules. Thus, the absence of a mechanism for making individual offices accountable for delays can result in a changed substantive output.

<sup>335/</sup> Stein Interview, supra note 123; Henshel Interview, supra note 127.

<sup>336/</sup> Martonik Interview, supra note 59.

<sup>337/</sup> Braslow Interview, supra note 123.

<sup>338/</sup> Stein Interview, supra note 123; Silk Interview, supra note 224.

Directorates and the Office of the Solicitor.<sup>339/</sup> Like the Policy Office, the Solicitor's Office sometimes lacks sufficient resources to stay abreast of all of the rulemaking activities of the Health and Safety Directorates.<sup>340/</sup> According to one OSHA project officer, "any given project officer is fighting with other project officers for the time of the economists and lawyers."<sup>341/</sup> If an item has a higher priority in OSHA than it does in the Solicitor's Office, the Solicitor's Office priority necessarily prevails.<sup>342/</sup> In addition, since middle management in the Solicitor's Office usually insists on reviewing the documents that the attorneys have produced or reviewed, documents tend to pile up on the desks of mid-level managers in the Solicitor's Office.<sup>343/</sup> OSHA project officers and mid-level managers are frequently frustrated by these bottlenecks.

Officials in the Solicitor's Office counter that they have an important quality control function.<sup>344/</sup> They must insist that preambles to proposed and final rules are written with sufficient clarity, analysis and record support that they can survive the inevitable judicial challenges.<sup>345/</sup> Too often, in the opinion of some in the Solicitor's Office, the project officers in OSHA believe that it does not matter what is in the document as long as it comes out on time.<sup>346/</sup> In addition, the attorneys have a substantive role to play in ensuring that OSHA standards are enforceable, a consideration that OSHA

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<sup>339/</sup> Stein Interview, supra note 123.

<sup>340/</sup> Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

<sup>341/</sup> Harwood Interview, supra note 138.

<sup>342/</sup> Silk Interview, supra note 224; Harwood Interview, supra note 138; B. White Interview, supra note 59; Martonik Interview, supra note 59.

<sup>343/</sup> Silk Interview, supra note 224; B. White Interview, supra note 59; Officials in the Solicitor's Office do not deny this. Jacoby interview, supra note 195; Henshel Interview, supra note 127.

<sup>344/</sup> Jacoby Interview, supra note 195; Gordon Interview, supra note 129; Henshel Interview, supra note 127.

<sup>345/</sup> Jacoby Interview, supra note 195.

<sup>346/</sup> Jacoby Interview, supra note 195.

sometimes neglects.<sup>347/</sup> They maintain that performing these quality control functions is time consuming and cannot be started until OSHA has produced a near-complete document.<sup>348/</sup> Finally, the Solicitor's Office is plagued with a high turnover rate. Each time an attorney leaves, a new one must familiarize himself with the details of several projects.<sup>349/</sup>

The problem of delays and bottlenecks is largely a problem of coordination.<sup>350/</sup> In principle, the Policy Office and the Solicitor's Office are willing to adhere to the priorities of the Health and Safety Standards Directorates.<sup>351/</sup> Problems arise when those priorities and (perhaps more frequently) changes in such priorities are not communicated to the other offices. And to the extent that the Policy and Solicitor's Offices have different priorities and are unwilling to amend them to reflect the priorities of the Health and Safety Standards Directorates, high level intervention becomes necessary.

The Directors of the Health and Safety Standards Directorates have traditionally attempted to coordinate informally with their counterparts in the other Offices, but this has not generally proved satisfactory. First, the need for coordination under such an ad hoc process all too often becomes apparent after problems have already arisen. Sometimes correcting the problem is not an easy matter; for example, the Health Standards Directorate may need today the results of a contractor's study that, under the terms of the contract, will not be ready for another six months.<sup>352/</sup> Second, the ad hoc

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<sup>347/</sup> Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

<sup>348/</sup> Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

<sup>349/</sup> Henshel Interview, supra note 127.

<sup>350/</sup> F. White Interview, supra note 59.

<sup>351/</sup> Frodyma Interview, supra note 66; Jacoby Interview, supra note 195. The Solicitor's Office has a legitimate coordination problem, because its time is not necessarily its own. Litigation schedules are not always predictable, and an attorney who is critical to a rulemaking project may be called away for weeks writing a

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<sup>352/</sup> One observer related a case in which lack of communication resulted in a regulatory impact analysis

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approach deals with only the worst problems--i.e., those that are of sufficient magnitude that the project officer brings them to the attention of the Director.<sup>353/</sup> Third, the informal approach will not resolve genuine differences in priorities when the two offices are in disagreement as to what the priorities should be. Finally, the informal approach will not prevent other offices from using delay to advance particular substantive agendas. For these reasons, a more formalized procedure is needed to force coordination among the relevant institutional actors and to obtain upper level resolution of differences on a regularized basis.

The Action Tracking System described previously is an ideal vehicle for this purpose. With such a system in place, the Health or Safety Standards Directorate would enter a proposed schedule into the system at the time the project was approved by upper level management. The other relevant offices would have an opportunity to comment upon the proposed schedule before it became final. Any disputes over the proposed schedule could be resolved in one of the periodic meetings with the Assistant Secretary or Deputy Assistant Secretary and mid-level managers, thus avoiding future bottlenecks. As a deadline approached, the relevant offices would receive reminders from the system operators. If a deadline was missed, the responsible offices would be obliged to explain the slippage at one of the meetings. The location of the bottleneck or delaying activity would become immediately apparent, and additional resource needs could be identified. Conflicts in priorities would also be revealed to upper level management who would then be in a position to resolve such conflicts on-the-spot.<sup>354/</sup>

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<sup>351/</sup> brief to support a previous standard. Henshel Interview, supra note 127. But this is not a major cause of missed deadlines in the Solicitor's Office.

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<sup>352/</sup> (based on contractor studies) that analyzed options that were not in the draft preamble or the proposed rule. The process was delayed for almost a year while the contractor studied the options that were in the preamble and the regulatory impact analysis was revised to fit the preamble. Seminario Interview, supra note 131.

<sup>353/</sup> Henshel Interview, supra note 127.

<sup>354/</sup> Conflicts between OSHA priorities and the priorities of the Solicitor's Office would be less easily resolved,

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In addition, the team concept can help avoid schedule conflicts at lower levels in the agency. At the most basic level of interaction between the essential institutional actors--the informal rulemaking teams that exist in practice, if not on paper--there is in fact a good deal of coordination. Many, though by no means all, project officers in the Health Standards Directorate expressed satisfaction with the ability and diligence of their counterparts from the Office of Regulatory Analysis and the Solicitor's Office.<sup>353/</sup>

At the time the Assistant Secretary decided initially to pursue a rulemaking initiative, the Health & Safety Directorate, the Policy Directorate, and the Solicitor's Office could formally assign a representative to a team chaired by the Health and Safety Directorate. Representatives from other parts of the agency, such as field operations, could be assigned to teams on an ad hoc basis. The timing of input from the Policy and Solicitor's offices should not be a matter within the discretion of the project officer in the Health and Safety Directorate, as it commonly is at present. The Action Tracking System could, for example, have a standardized deadline for the first team meeting to ensure that all of the relevant offices assigned members to the team in a timely fashion and to ensure input from the other offices before the project officer has foreclosed possible regulatory options.

The agency has, however, experienced problems with the team concept that may arise again if it is reinstated. First, the team leader does not have line authority over other members of the team.<sup>356/</sup> This, however, is not so much a problem with the team approach itself as it is a problem of lack of accountability in the various offices that provide representatives to the teams. Adoption of an Action Tracking System should go a long way toward eliminating this problem. Even if a project officer does not have authority to enforce deadlines, the Action Tracking System will make it clear to high level officials who is missing deadlines.

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<sup>354/</sup> because the Solicitor's Office does not serve OSHA. But they would be made apparent at a very high level within OSHA, and could be resolved in meetings between the Deputy Assistant Secretary for OSHA and the Assistant Solicitor for OSHA.

<sup>355/</sup> Silk Interview, supra note 224; Harwood Interview, supra note 138.

<sup>356/</sup> Frodyma Interview, supra note 66; Silk Interview, supra note 224.

A second problem with the team approach is the possibility of "renegade teams." According to some observers at OSHA, a primary reason for eliminating the team approach in 1985 was the fear that teams would form their own opinions on issues and inform the press when those opinions differed from those of agency policymakers.<sup>357</sup> The "renegade team" problem is particularly a problem of middle management. If the Directors of the Directorates are incapable of preventing professional staff from advancing their own agendas through the press, the Directors are not doing an adequate job of managing. While this may be a problem during a time of weak management and very low agency morale, the fear that lower level staff will gang up on upper level decisionmakers is not a good reason to abandon a vital decisionmaking tool.

When a team that works well together is established, there may be no good reason to break it up. To the contrary, there is every reason to keep a successful group together to work on other projects.<sup>358</sup> Although OSHA has made no effort in the past to keep successful teams together, it should consider doing so in the future. Cooperation at the informal work group level can eliminate much friction at higher levels.

RECOMMENDATION: OSHA should formally reinstate the team concept to perform the basic tasks of gathering or analyzing information, drafting documents, responding to comments and advising the Assistant Secretary. OSHA should attempt to coordinate rulemaking initiatives through the Action Tracking System previously recommended. OSHA should consider allowing successfully functioning teams to work on more than a single rulemaking initiative.

#### E. Lack of Policy Interchange.

OSHA lacks a procedure for communicating policy from upper level management to lower level professionals. Typically, once a rule is assigned to a project officer, he or she is allowed to develop the rule, with the help of other employees drawn from OSHA and the Solicitor's Office, without much upper level supervision until he or she has produced a draft of a notice of proposed rulemaking. While this maximizes the freedom of lower level staff to incorporate technical data and scientific and engineering judgments into the final rulemaking product, it

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<sup>357</sup> Frodyma Interview, supra note 66; Seminario Interview, supra note 131; Silk Interview, supra note 224; F. White Interview, supra note 59; B. White Interview, supra note 59; Braslow Interview, supra note 123.

<sup>358</sup> Gordon Interview, supra note 129.

minimizes upper level policy input. Since policy plays a very large role in scientific rulemaking,<sup>359/</sup> the product that ultimately emerges may not satisfy upper level management from a policy perspective. Similarly, purely technical considerations may cause lower level staff to eliminate alternatives that might be attractive from a policy perspective, thereby depriving upper level management of an opportunity to chose from among a full range of options. Too often, upper level management receives a memorandum that sandwiches the staff's preferred alternative between two red herrings, leaving the agency policymakers with no real choice.

This hierarchical approach to developing a proposed rule has a vast potential for unnecessary delay. If the upper level managers are dissatisfied with the staff's output, they may either send the staff back to the drawing board, perhaps to return only after further information has been gathered and options developed over a period of months or years, or return the project to the staff for time-consuming patch and repair.

When upper level policymakers return projects to agency staff, they rarely provide written documentation of the reasons for the action.<sup>360/</sup> Decisions may be made in meetings in which the pros and cons of various options are debated, but such meetings do not result in closure memoranda memorializing the issues discussed and the reasons that motivated policymakers. When a similar issue arises in the future at lower levels, one or more staffers or an Office Director might recall the previous meeting in which upper level decisionmakers took a position on the issue, but even when this sort of internal folklore is available to low level staffers it may be inaccurate or out of date. In the absence of written accounts of important decisionmaking meetings, agency staffers are obliged to decide many issues anew in individual proceedings. On some large issues, such as the policy preference for engineering controls over personal protective devices, the position is reasonably clear and consistent, but on other important issues, such as the weight to be afforded disease end-points other than cancer, low level staff are often at a loss.<sup>361/</sup>

Lack of policy communication can also produce "renegade teams" attempting to implement policy agendas that vary from

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<sup>359/</sup> See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L.J. 729 (1979).

<sup>360/</sup> Sevin Interview, supra note 133.

<sup>361/</sup> Sevin Interview, supra note 133.



those of upper level management. As previously noted, the "renegade team" problem was one of the reasons that the team concept for rulemaking was abandoned.<sup>3.6.2/</sup> Eliminating the team approach, however, does not necessarily prevent staff members from attempting to implement their own policy agendas through the normal rule development process. Although most members of the professional staff agree that major policy decisions should not be made at the GS-13 level, they express frustration at the failure of upper level policymakers to communicate policy to lower level staff.

OSHA could reduce this large potential for duplicative and time-consuming remands to the staff by establishing a process for elevating issues from the staff level to very high levels in the agency at periodic intervals and when otherwise needed to resolve intra-agency policy clashes. EPA has established a process that may serve as a model for OSHA. Under EPA's procedure, high level personnel in the program office may nominate important rules for a special "Options Review Process."<sup>3.6.3/</sup> The Deputy Administrator of the agency then designates 20-30 rules per year for this special review process.

At crucial junctures in the evolution of a rule, an Options Review Meeting is held to choose which regulatory options the agency will actively pursue throughout the remainder of the rulemaking process. The participants in the Options Review Meetings are the Deputy Administrator and other very high level agency employees representing offices with an interest in the proceeding. The timing of the Options Review Meeting is flexible. It is intended to occur after the team has devoted some study to the relevant issues but before it has narrowed down the options to the two or three to which it will devote the bulk of its attention. The lead office prepares an analysis of several options, and the goal of the meeting is to narrow the range of options.<sup>3.6.4/</sup>

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<sup>3.6.2/</sup> Silk Interview, supra note 224; F. White Interview, supra note 59; B. White Interview, supra note 59; Prody, supra note 66.

<sup>3.6.3/</sup> Nominations for review are based upon rule's anticipated cost, the likelihood that it will cause public controversy, its importance to the program, its precedential value, and the probability that the rule will require the agency to resolve a major policy issue that may have impacts on more than a single program.

<sup>3.6.4/</sup> Memorandum on Options Selection/ Rejection Process from Alvin L. Alm, Deputy Administrator to Assistant

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The purpose of the Options Review process is five-fold. First, upper level decisionmakers view the Options Review process as "an institutional mechanism for forcing consideration of a much broader spectrum of approaches to the regulatory problem."<sup>365/</sup> Having forced lower level staff to identify a broad range of options, a second purpose of the process is to allow high level policymakers to narrow the range of options that the lower level staff considers and, as the rulemaking process progresses toward completion, to select the option that will go forward to OMB and the Administrator as the agency's preferred option.<sup>366/</sup> Third, the process was intended to give upper level management a greater role in the subtle policymaking that goes on at low levels in the bureaucracy as the staff attempts to reach consensus. Finally, it was intended to reduce the number of occasions in which upper level decision makers in reality had only the two options--accepting the staff recommendation or sending everyone back to "square one."

Upper level managers in EPA have generally been very satisfied with the Options Review Process. There is a general perception at all levels in the agency that the process has been extremely useful in providing policy direction to lower level staff. While this is obviously attractive to very high level management, low level staff also like the potential that the process has for forcing high level resolution of difficult policy issues. The Options Review Process also provides an effective vehicle for resolving low level disputes. By giving the disputants a "day in court" before the highest level agency decisionmaker early in the process while many options are still alive, it interjects a "creative" adversarial note into the agency deliberations. The Deputy Administrator often decides issues in the presence of the staff, and not later after an opportunity for "insider" lobbying.<sup>367/</sup>

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<sup>364/</sup> Administrators and General Counsel, November 4, 1983 [hereinafter cited as Options Selection/Rejection Memo].

<sup>365/</sup> Interview with Rob Wolcott, Special Assistant to the Deputy Administrator, EPA, Washington, D.C. (June 27, 1984).

<sup>366/</sup> Memorandum on Criteria and Guidelines for Review of Agency Actions from Alvin L. Alm, Deputy Administrator to Assistant Administrators, General Counsel, Inspector General, Associate Administrators, Regional

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<sup>367/</sup> Wolcott Interview, supra note 364.

The chief disadvantage to the Options Review process is that it consumes a great deal of the time of very high level officials. High level policymakers must prepare extensively for options review meetings, which can go on for hours before coming to closure. Second, the process demands that very high level officials narrow options on the basis of a relatively brief debate. If the policymaker is not adequately prepared, this may produce snap judgments that the agency may later regret. Third, it requires upper level decisionmakers to make difficult decisions. Although doing nothing or gathering more data are usually available options, the fact that a decision is required means that the upper level decisionmakers cannot brush difficult rulemaking initiatives under the rug. Finally, closure memoranda for Options Review Meetings can result in differing interpretations of decisions reached in those meetings. On some occasions in EPA, each side to a debate has read the closure memorandum to seal a victory for its point of view.<sup>368/</sup>

On balance, however, the options review mechanism can be of great utility to an agency that has difficulty making decisions and communicating policy to lower level staff. The process is highly regarded at all levels in EPA, and it has been retained by the new administration that replaced the Ruckelshaus administration in 1985.

EPA's Options Review process is not the only alternative available for structuring upper level input into lower level decisionmaking at an early stage in the development of regulatory options. In a small agency like OSHA, it may be possible for upper level decisionmakers to participate directly in the lower level decisionmaking process on a routine basis. Early in OSHA's history, relatively high level decisionmakers participated actively in the development of individual rules. But, as we have seen, the tendency then was for the agency to concentrate all of its attention on one or two large rulemaking actions to the exclusion of other activities, such as priority setting. If OSHA is to have a regularized process for initiating rulemaking projects on a continuous basis, and if the agency leadership is to be available for other important tasks, it should probably not return to the more personalized process of the past.

An intermediate approach would be for the Assistant Secretary to pick two or three important rules per year for his

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<sup>366/</sup> Administrators, and Staff Office Directors, January 30, 1984 [hereinafter cited as Criteria and Guidelines Memo], at 5.

<sup>368/</sup> Wolcott Interview, supra note 364.

special attention. A special high level work group could be appointed with the Assistant Secretary or one of his Deputies as the chair of the workgroup. Agency employees with particular expertise could be called in as needed to provide technical expertise. The Food Safety and Inspection Service in the Department of Agriculture has adopted this model for a few very important and controversial rules.<sup>369/</sup>

The primary advantage of this approach is that it allows very high level decisionmakers to become deeply involved in the nitty gritty of a few rulemaking efforts. Those few rules that get an intense dose of high level policy input may serve as precedents for less important rules. The approach also allows upper level policymakers to see the rule-generating process in actual operation, and it may give them a more sympathetic understanding of the problems that lower level work groups face.

This high level work group approach does, however, require a decisionmaker who is not afraid to steep himself in the details of highly complex decisions. Because it requires a rather intense effort by very high level agency decisionmakers, it must be reserved for very important rules. It is better adopted to an agency, like FSIS, that writes no more than a single major rule every year or two. Virtually every rule that OSHA promulgates has large impacts on worker health and the regulated industry, and there is no natural dividing line between rules that are deserving of special treatment and rules that can adequately be handled by the ordinary rule initiation process. Thus, the high level work group approach may not be easily adapted to OSHA.

OSHA should attempt to implement an Options Review Process patterned after the EPA model, but applicable to all of its rules. Although OSHA is a small enough agency that policy coordination among upper level managers is generally not a difficult matter, the critical elements of the Options Review Process are its systematic nature and its penetration to the lowest levels of the agency. Policy need not be communicated on an ad hoc basis in a very general way; it is communicated in regulatory meetings about particular issues that arise in particular projects. Most importantly, precedents are set to guide other staffers working on other projects. Because the precedents are memorialized in closure memoranda that are available for all agency employees to read, the agency can avoid time-consuming future remands and the risk of renegade teams.

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<sup>369/</sup> See T. McGarity, Regulatory Analysis in Federal Regulatory Agencies, Report to the Administrative Conference of the U.S. (1985).



RECOMMENDATION: OSHA should implement an Options Review process for important health and safety rulemaking initiatives. At least once in the early development of such rules the staff should identify and analyze several options for consideration in an Options Review meeting chaired by the Assistant Secretary or one of the Deputy Assistant Secretaries. The goal of Options Review meetings should be to discuss and debate broad alternatives for approaching a rulemaking initiative and to narrow the range of options to be considered in the future. The meeting should be memorialized in a closure memorandum that would be made available to staff involved in other rulemaking initiatives.

OSHA could conceivably fold an Options Review Process into the implementation of an Action Tracking System, should it choose to adopt that system. The key to a successful Action Tracking System is the periodic (biweekly in EPA) meetings of a high level official with mid-level management to report on the status of pending projects. Similarly, the key to the Options Review Process is the meetings of a high level official with upper and mid-level management to narrow options. In a small agency like OSHA, it may be possible to combine these two functions in to a single two-part "Status Review and Options Selection/Rejection" meeting of the Assistant Secretary or one of his Deputies with mid-level management. The first half of the meeting would be devoted to status reports on pending activities. The second half would be devoted to any options selection/rejection items on the agenda. Any of the Directors could place a matter requiring high level policy input on the agenda for the second half of the meeting by preparing and circulating an options memorandum in advance of the meeting. The memorandum would identify the issue, place it in the context of a particular project, explain its broader significance, if any, to other pending or future projects, set out several options for resolving the issue, and briefly identify the advantages and disadvantages of each option. In order to get on the agenda for a meeting, the Office would have to circulate the memorandum sufficiently far in advance that all relevant offices in the agency could prepare responses. Since OSHA must prepare an Options Memorandum for the Departmental Policy Review Board in any event, the time spent preparing options memoranda for agency Options Review meetings would not be wasted. Those memoranda would merely be precursors for the Departmental Options Memorandum.

While any important issue in any project could be placed on the agenda for the section half of the meeting, the Action Tracking System would, in addition, schedule options review meetings at standardized critical junctures in the development of all rules. An options review session would automatically be

scheduled at these critical junctures and the Directorate responsible for the rule's development would be required to prepare an options memorandum for circulation and response prior to the meeting or be prepared to explain at the first half of the meeting why no options review is necessary for the project during the second half of the meeting.

While the options review process will not eliminate all of the problems of policy coordination in an agency that must address complex science/policy questions on a regular basis, it can bring about a significant improvement in OSHA's current ad hoc approach at very little expense. The chief ingredients are an effective Action Tracking System, conscientious mid-level managers, and an Assistant Secretary or Deputy Assistant Secretary who is willing to become immersed in important science/policy issues and make tough decisions in an expeditious fashion. The Action Tracking System adds an element of discipline to the otherwise loosely coordinated rule initiation process, and the Options Review approach interjects a crucial element of policy guidance at critical junctures. No systematic decisionmaking approach, however, will enhance OSHA's rule generation process if upper level decisionmakers are not willing to make hard decisions on the basis of very little information in an expeditious fashion, a subject to which now turn.

#### F. Inability to Make Difficult Decisions.

Virtually all health regulations and many safety regulations require extremely difficult decisions from upper level management in OSHA. Since delay is always in the interest of some interested party, OSHA decisionmakers often face strong pressures not to decide these difficult questions. When placing a "hot" political issue on the back burner is a viable option, upper level decisionmakers may elect that option, rather than stir up further controversy. Decisionmakers may also have technical reasons for not deciding, such as the desire to await the completion of one more study or survey that has the potential to reduce the very large uncertainties surrounding science/policy decisionmaking. Sometimes there is a legitimate need to do further work to avoid the possibility of reversal in the courts of appeals, but sometimes the desire for more information is a convenient excuse not to decide difficult questions.

OSHA has shown an increasing tendency to rely routinely upon Advance Notices of Proposed Rulemaking (ANPRs) to solicit information from regulated industries and other interested parties. The ANPR can be an effective tool for acquiring information and ideas at an early stage in a rule's

development.<sup>370/</sup> But there is a general feeling among agency staff and among outside practitioners that the ANPR rarely results in the production of useful information for OSHA.<sup>371/</sup> Outside parties are simply unwilling to scour their files for information at this stage, and to the extent that information that is not readily available to OSHA is available to outside parties, they are unwilling to tip their hands at this early stage and face the risk of revealing or foreclosing later strategies.<sup>372/</sup> Most observers of the process believe that the ANPR at best serves the function of putting companies on notice that the agency is seriously considering promulgating a standard for them; it rarely induces them to share useful information with the agency. Yet agency contractors understandably want to delay their reports until they have had an opportunity to assimilate any information that an ANPR produces.<sup>373/</sup> Since it can delay the rulemaking schedule by six months to a year, the ANPR can be used to avoid hard decisions.<sup>374/</sup>

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<sup>370/</sup> See ACUS Recommendation No. 76-3, 1 C.F.R. § 305.76-3 (1986) (suggesting that ANPRs are effective when: "(1) the scientific, technical or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.")

<sup>371/</sup> Harwood Interview, supra note 138; Gas Interview, supra note 159.

<sup>372/</sup> Harwood Interview, supra note 138.

<sup>373/</sup> Gordon Interview, supra note 129.

<sup>374/</sup> Stein Interview, supra note 123; Gas Interview, supra note 159. Based on a Report prepared by Professor Luneberg, The Administrative Conference has recommended that "where appropriate and feasible," agencies should publish notice of the receipt of petitions for rulemaking and provide a period of time for public comment. Luneberg, supra note 132; ACUS Recommendation No. 86-\_\_\_\_, 1 C.F.R. §305.86-\_\_\_\_ (1986). We agree that it is generally a sound practice for an agency to inform the public of a rulemaking petition and to allow public

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RECOMMENDATION: OSHA should not routinely use the Advance Notice of Proposed Rulemaking (ANPR) as an information gathering technique. The ANPR should only be used when information that is not available through other vehicles is very likely to be forthcoming in response to the ANPR.

Some agency staffers and most representatives of beneficiary groups believe that OSHA goes to extreme lengths to perfect the record to avoid reversal on appeal.<sup>373/</sup> Pointing to 100-page preambles that discuss every minor contention raised in the comments, they believe that such "overpreparation" of the record and "overexplanation" is unnecessary to meet OSHA's "substantial evidence" standard of review. Most industry representatives forcefully dispute this idea, maintaining that OSHA should always have a sound technical basis for its rules. The attorneys in the Solicitor's Office are also convinced that elaborate analysis and documentation is necessary to survive judicial review, and they explain that much of the delay caused by their office is due to its concern for the quality of the agency's analysis.<sup>376/</sup> In their opinion, it is worth spending a few extra months perfecting a Federal Register document if it will avoid an even more time consuming court remand.

There is a generally shared belief among the lower level staff that past Assistant Secretaries, for whatever reasons, took too long to make policy decisions and communicate them to the staff. Many of the lower level staff related instances in which they had worked diligently on projects only to have them languish at high levels in the agency or the Department for

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<sup>374/</sup> comment on that petition, but we do not read this recommendation to suggest that the agency use this process as a vehicle for gathering technical information. Should OSHA, in response to the ACUS recommendation, adopt a procedure for notifying the public of rulemaking petitions and soliciting public comment, we would urge the agency to put fairly strict deadlines on the response (e.g., 30 days), and we would urge the agency not to use the process as an excuse to delay in moving forward with the process of prioritizing the subject of the petition in its prioritization scheme. Our recommendation is that OSHA not routinely issue still another ANPR to gather information after it has decided to grant the petition.

<sup>375/</sup> Harwood Interview, supra note 138; B. White Interview, supra note 59.

<sup>376/</sup> Jacoby Interview, supra note 195.



weeks, months, or even years. Staff members were not given direct explanations for the delay, but usually assumed that the rules were being held up because of an inability or unwillingness on the part of upper level management to decide difficult questions. A related complaint is that upper level decisionmakers sometimes return controversial rules to the staff for further work on particular issues knowing full well that the additional work is not likely to be outcome-determinative.

It is difficult to determine how much of this perceived problem is attributable to an unwillingness or inability of upper level management to decide hard questions and how much is due to the impatience of agency staff and beneficiary groups. Without doubt some rules, like the still-germinating safety standard for the oil and gas industry, have been put off indefinitely out of upper level management fears of stirring up political controversy. But just as clearly, upper level management, which is ultimately responsible for the agency's output, has every right to demand further analysis of critical issues, even when it is not obvious to the staff that further analysis will change the ultimate outcome. Part of the problem is probably the lapse of "management memory" that accompanies the rapid turnover rate in OSHA's upper level management.<sup>377/</sup> A legitimate query by a new Assistant Secretary who is unfamiliar with the history of an issue may be perceived by long-term agency staff as a deliberate attempt to slow down a rule's progress.

There is no easy way to address these potential sources of delay. Clearly, management should attempt to alleviate staff concerns that their efforts will be placed on the back burner for political reasons. One of the reasons that the 1982 procedural reforms failed was the failure of upper level decisionmakers to respond rapidly when Regulation Teams elevated issues to the Regulation Review Committee. Rather than wait for upper level decisionmakers to resolve such issues, the teams resolved them without upper level input, thereby contributing to the "renegade team" problem.<sup>378/</sup> There is, however, a growing impression among lower level staff that the current Assistant Secretary is willing to make hard decisions within relatively brief time-frames.

To some extent the problem may be alleviated by better communication between staff and upper level officials. The staff must be sensitive to the realities of the political world in which upper level decisionmakers must deal. If lower level staff professionals were allowed to attend the Options Review

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<sup>377/</sup> See text accompanying note 21, supra.

<sup>378/</sup> See text accompanying note 361, supra.

meetings proposed in this Report,<sup>379/</sup> there might be better communication about which projects warrant the most low level attention. In addition, the staff might gain a better understanding of the reasons that upper level managers have for delaying an initiative or reworking aspects of a preamble. The options review meeting would provide an opportunity for long-time lower level staff to communicate to new management the history of an issue, perhaps avoiding a time consuming "reinvention of the wheel." Of course, if lower level professional staff are to be privy to high level options review meetings where sensitive political considerations are debated, then they cannot feel free to leak the contents of such discussions to the media.

Even in the absence of an Options Review process, upper level management should make greater efforts to keep lower level staff informed of the reasons for their actions, if only to give them guidance for next time. But beyond that, keeping staff informed of the reasons for management decisions makes the staff feel like they are part of a unified whole, rather than a neglected appendage. Greater upper level management attention to symbolic messages to lower level staff and the rest of the world, as suggested previously, may also help remedy this problem. If the staff and beneficiary groups believe that the Assistant Secretary and his top aides are genuinely trying to advance the agency's mission, they will more easily understand how outside considerations can force upper level management to lay back momentarily.

#### G. Inadequate Resources.

If OSHA is serious about increasing its ponderous rule-generating pace, it must demand a substantial infusion of resources. The Health Standards Directorate is seriously understaffed. Individual health professionals in that Directorate are responsible for multiple projects. While they are managing the rule-generation process for projects assigned to them, they must also answer petitions for new rulemaking initiatives, draft responses to TSCA referrals, meet with other agencies, and meet with other professionals from the private sector. The current professionals are, to put it bluntly, overworked. In addition, OSHA badly needs an infusion of fresh blood.<sup>380/</sup> The creation of new positions in the Health Standards Directorate would allow the agency to hire new staffers.

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<sup>379/</sup> See text accompanying notes 362-366, supra.

<sup>380/</sup> Gas Interview, supra note 159.

RECOMMENDATION: OSHA should seek additional resources for the Health Standards Directorate. It should attempt to fill any new slots for occupational health specialists with highly motivated young professionals.

The recommendation that the agency seek additional resources in a time of severe monetary constraints on regulatory programs may well fall on deaf ears, but that makes the need no less critical. It is hypocritical for Congress and OMB to criticize OSHA for poor work if they are unwilling to provide sufficient resources for the agency to do a good job.

Whether or not OSHA gets new resources for expanding the size of the Health Standards Directorate, it can make some management improvements that should result in more efficient use of existing resources and that should make the real consequences of the agency's current resource squeeze clear. Adopting the recommendations suggested here cannot give the agency more resources, and in fact some of the recommendations require additional resources or a reprogramming of existing resources. Yet some changes are absolutely necessary if OSHA is to adequately discharge its obligation to provide safe and healthful workplaces for employees.

