

A Statutory and Case Law Survey of the Proposed OSHA Emergency Response Standard

A Report to the Public Record
Docket No. OSHA-2007-0073
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July 19, 2024

THE BOUNDARY LINE FOUNDATION

"Helping Administrative Government Understand and Respect its Limits"

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EXECUTIVE SUMMARY

In 1970, the U.S. Congress enacted the Occupational Safety and Health Act (OSH Act), and in the process created the Occupational Safety and Health Administration (OSHA). OSHA is a subagency of the Department of Labor (DOL), with the DOL Secretary being responsible to administrate occupational safety and health standards that ensure “*safe and healthful working conditions.*”

The OSH Act and longstanding case law requires that OSHA rules be “*reasonably necessary or appropriate,*” a doctrine that the Boundary Line Foundation (BLF) applied to assess compliance of the proposed Emergency Response Standard (ERS) with the organic OSH Act.

This survey demonstrates that OSHA’s expansion of the Fire Brigades Standard to incorporate performance-based and prescriptive standards is neither reasonable nor appropriate. Implications arising from the imposition of unfunded mandates, omission of procedural federalistic requirements, and preemption of state police power introduces questions of a vast and transformative nature that have national implications.

Emergency response activities have always fallen within the scope of police powers of the individual states, their geopolitical jurisdictions, or sovereign native American tribal governments. Neither the ERS proposal nor the administrative record contains any discernable pathway of OSHA’s reasoning and statutory interpretation, justifying how it can legitimately preempt state and local police power.

This survey demonstrates that the majority of employers and employees in the emergency response system fall under the jurisdiction of state and local governments,¹ and we conclude that OSHA’s proposal to regulate public sector employees in plan states through a series of complex bureaucratic tests to be an inappropriate expansion of specific authority delegated to the agency under the OSH Act.

In its cost-benefit analysis, OSHA claims \$2.6 billion in annualized **benefits** and \$600 million **in cost impacts**² to emergency responders impacted by the proposed ER Standard. We demonstrate that the OSHA cost/benefit analysis is **irreparably flawed** because the majority of emergency response costs are accrued by state and local governments, **which are statutorily exempt** from regulation under the OSHA proposed ERS. Because state and local jurisdictions are exempt from regulation under the proposed OSHA ERS, the benefits quantified in the Federal Register notice are significantly overstated and the cost/benefit analysis is irreparably flawed.

¹ Conservative estimates would have to place the percentage of covered employers and employees for such a regulation at 75-90% state and local government jurisdiction.

² FR Vol. 89. No. 24 at 7994.

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1 **INTRODUCTION**

2 *Description of the National Emergency Response System*

3 The emergency response system of the United States is organized at the State and local
4 level and is principally divided into three general sectors: firefighting, emergency
5 medical services, and search and rescue (SAR) operations. Emergency response
6 actions are authorized under the general police power possessed by the States and not
7 the Federal government. The States and local governments employ their police power
8 to regulate public health, safety, and welfare within their jurisdictions.

9 Sovereign Native American Tribal governments also possess general police powers
10 over emergency response actions within their borders, and tribes often collaborate with
11 State and local governments for emergency response activities.

12 The personnel who perform emergency response services consist of service providers,
13 paid professionals, and volunteers, with volunteers significantly outnumbering the
14 professionals. Most emergency response organizations are governmental in structure
15 and function; a small percentage are private businesses, fire brigades, or dedicated
16 emergency services that also serve in industrial settings.

17 Emergency medical response is typically integrated with fire department/fire district
18 operations. There are some private emergency medical response companies, a portion
19 of which are part of larger healthcare organizations. Air ambulance services are also
20 part of the emergency response sector but are separate from dedicated SAR air
21 resources.

22 The majority of rural and wilderness SAR actions are conducted under the authority
23 of the office of the County Sheriff. Some of the largest Sheriff Department-affiliated
24 search and rescue operations, such as Los Angeles County, have responders that are
25 professionally employed in their positions, but most search and rescue organizations
26 are volunteer-based.

27 On February 5, 2024, OSHA issued its notice of proposed rulemaking (NPRM) to
28 update the existing Fire Brigades Standard. The proposed rule would vastly expand
29 the scope of the Fire Brigades Standard to include responders from the three types of
30 emergency response, and would foreseeably nationalize the emergency response
31 actions, creating consistency with the Federal Emergency Management Agency
32 (FEMA) National Response Framework. It also proposes to align with the current
33 industry consensus standards issued by the National Fire Protection Association
34 (NFPA).

35 On June 28, 2024, the United States Supreme Court decision No. 22-451 *Loper Bright*
36 *Enterprises et al. v. Raimundo, Secretary of Commerce, et al. (Loper Bright)* together
37 with No. 22-1219, *Relentless, Inc., et al. v. Department of Commerce et al.*, overruled
38 *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837. From
39 the slip opinion syllabus:

40 *“The Court granted certiorari in these cases limited to the*
41 *question whether Chevron U. S. A. Inc. v. Natural Resources*
42 *Defense Council, Inc., 467 U. S. 837, should be overruled or*
43 *clarified. Under the Chevron doctrine, courts have*
44 *sometimes been required to defer to “permissible” agency*

45 *interpretations of the statutes those agencies administer—*
46 *even when a reviewing court reads the statute differently, Id.,*
47 *at 843. In each case below, the reviewing courts applied*
48 *Chevron’s framework to resolve in favor of the Government*
49 *challenges by petitioners to a rule promulgated by the*
50 *National Marine Fisheries Service pursuant to the*
51 *Magnuson-Stevenson Act, 16 U.S.C. §1801 et seq., which*
52 *incorporates the Administrative Procedure Act (APA), 5*
53 *U.S.C. §551 et seq.“*

54 The Court held:

55 *“The Administrative Procedure Act requires courts to*
56 *exercise their independent judgement in deciding whether an*
57 *agency has acted within its statutory authority, and courts*
58 *may not defer to an agency interpretation of the law simply*
59 *because a statute is ambiguous. Chevron is overruled.”*

60 The Opinion of the Supreme Court closes with this statement:

61 *“The dissent ends by quoting Chevron: “Judges are not*
62 *experts in the field.” Post. at 31 (quoting 467 U. S., at 865).*
63 *That depends, of course, on what the “field” is. If it is legal*
64 *interpretation, that has been, “emphatically” “the province*
65 *and duty of the judicial department” for at least 221 years.*
66 *Marbury, 1 Cranch, at 177. The rest of the dissent’s selected*
67 *epigraph is that judges “are not part of either political*
68 *branch.” Post, at 31 (quoting Chevron, 467 U. S., at 865).*
69 *Indeed. Judges have always been expected to apply their*
70 *“judgment” independent of the political branches when*
71 *interpreting the laws those branches enact. The Federalist*
72 *No. 78, at 523. And one of those laws, the APA, bars judges*
73 *from disregarding their responsibility just because an*
74 *Executive Branch agency views a statute differently.*

75 *Chevron is overruled. Courts must exercise their*
76 *independent judgment in deciding whether an agency has*
77 *acted within its statutory authority, as the APA requires.*
78 *Careful attention to the judgment of the Executive Branch*
79 *may help inform that inquiry. But courts need not and under*
80 *the APA may not defer to an agency interpretation of the law*
81 *simply because a statute is ambiguous.*

82 *Because the D. C. and First Circuits relied on Chevron in*
83 *deciding whether to uphold the Rule, their judgments are*
84 *vacated, and the cases remanded for further proceedings*
85 *consistent with this opinion.*

86 *It is so ordered.”*

87 This survey evaluates the OSHA ERS in a post *Loper Bright* legal context to examine
88 if the programmatic framework proposed by OSHA impermissibly preempts state and
89 local police prerogatives. Specifically, it appears that the administrative record for the
90 OSHA ERS was prepared with a Chevron Deference in mind, a legal condition that no
91 longer exists.

92 **I. BACKGROUND**

93 *Historical overview of the development of Fire Brigades and the state emergency*
94 *response system.*

95 Philadelphia is the birthplace of the first volunteer fire companies. In 1736,
96 Benjamin Franklin founded the Union Fire Company, Philadelphia’s first.
97 Firefighting was developed in Philadelphia with fire companies becoming an
98 integrated part of local culture through freedom of expression. America’s
99 emergency response system evolved from this era to the mature, locale-based
100 system we know today.

101 The nation’s emergency response system represents federalism in action.
102 Emergency response is an exercise of State, local government, and tribal
103 government police powers over public health, safety, and welfare. Because the
104 Federal government does not possess police powers over emergency response,
105 Federal agencies have limited jurisdictional authority over State, local, or tribal
106 emergency response actions.³

107 Most emergency response organizations are affiliated with units of government.
108 They are focused on fire protection, EMS, law enforcement, or other more
109 specialized response activities. States typically provide funding and standards for
110 training, certification, operations, reporting, and other regulatory requirements.
111 Emergency responder occupational safety and health requirements are typically
112 assured and regulated by the individual States and their jurisdictions.

113 Some State National Guard units provide significant levels of participation in
114 emergency response operations. For example, the Colorado Army National Guard
115 provides helicopter support for wilderness technical search and rescue (WSAR)
116 operations, partnering with volunteer search and rescue (SAR) technicians
117 operating under the authority of county sheriffs.⁴

118 Several Federal agencies operate fire departments and other emergency response
119 functions distinct from those operated by the states and their political subdivisions.
120 Each operates occupational safety and health programs. These resources are often
121 made available to civilian authorities throughout the regions in which they are
122 located.

³ The Supreme Court uses the term “police power” to refer to the states’ general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g.*, [Nat’l Fed’n of Indep. Bus. V. Sebelius](#), 567 U.S. 519, 536 (2012).

⁴ The Colorado Army National Guard is currently engaged in developing advanced high-altitude hoist-based technical rescue operations at the upper boundary of helicopter performance capabilities.

123 *History of the Fire Brigades Standard Rule*

124 The standard described in 29 CFR § 1910.156 applies to fire brigades established
125 in a workplace by an employer, such as chemical refiners and large manufacturing
126 workplaces, or internal contractual fire response entities. The Fire Brigades
127 Standard was never intended to regulate local, State or national emergency
128 response entities.

129 The term “Fire Brigade” is not defined in 29 CFR 1910.156 or in the proposed
130 rulemaking. That definition is important to understanding of the intent of the Fire
131 Brigades function:

- 132 • **fire brigade (n)**⁵
133 :a body of firefighters: such as
134 **a:** a usually private or temporary firefighting organization
135 **b:** *British:* FIRE DEPARTMENT
136 **First Known Use:** 1832 in the [British usage] meaning defined
137 above.
- 138 • Depending on the large or industrial facility for which a fire
139 brigade has been established, most employees involved in the fire
140 brigade participate in training, equipment and PPE inspection, and
141 emergency response as additional duties beyond those they
142 perform day-to-day for the business.

143 29 CFR 1910.156(e) describes two groups of employer fire brigade personnel:

- 144 • Employees who use fire extinguishers of standpipe systems to
145 control or extinguish fires only in the incipient phase.
- 146 • Employees who perform interior structural firefighting.

147 The presumption is made that employees who perform interior structural
148 firefighting can also perform some exterior firefighting work as necessitated by
149 the conditions required for response. This could have been explicitly included in
150 the standard but was not.

⁵ Merriam-Webster, 2024.

151 *Context of the OSHA Emergency Response Standard; The Fire Brigades*
152 *Standard*

153 Page 15 of the September 9, 2015, NACOSH Subcommittee transcript of the
154 Emergency Response and Preparedness Meeting states:

155 *“...we’re concerned that our fire brigade standard, which*
156 *was passed in the 1970s, is not up to the task of protecting*
157 *emergency responders.”⁶*

158 Because of advances in technology and best practices, the existing Fire Brigades
159 Standard should have been iteratively updated throughout its use. OSHA’s lack of
160 keeping pace with advancements does not speak well of the agency’s capacity to
161 effectively manage a standard for protecting the entirety of the nation’s emergency
162 response organizations and responders.

163 There is consensus that the Fire Brigades Standard is outdated. That standard is
164 specific to an emergency response category about which the public is largely
165 unaware. There is an acute need for a standard that is distinct from the larger
166 emergency response community. The disparity among entity types is substantial
167 enough to justify that the Fire Brigades Standard remain as a stand-alone.

168 Emergency response standards *must* be left to State, local, and tribal governments
169 because they are an outworking of State, local, and tribal police power that the
170 Federal government does not possess. Congress did not intend for the OSH Act to
171 preempt the longstanding police powers of the States. Thus, OSHA is not able to
172 demonstrate it has delegated authority to regulate a significant majority of the
173 nation’s emergency response entities.^{7, 8} For regulatory consistency the
174 commercial emergency response organizations should be regulated by the States
175 where there is a need for any government oversight of their operations.

⁶ National Advisory Committee on Occupational Safety and Health Administration (OSHA) NACOSH [Subcommittee Meeting, September 9, 2015](#), Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Reported by Janet Evans-Watkins, Capital Reporting Company.

⁷ The Supreme Court uses the term “police power” to refer to the states’ general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g.*, [Nat’l Fed’n of Indep. Bus. V. Sebelius](#), 567 U.S. 519, 536 (2012) (“Our cases refer to this general power of governing, possessed by the States, as the ‘police power.’”)

⁸ [Rice v. Santa Fe Elevator Corp.](#), 331 U.S. 218, 230 (1947); *see also, e.g.*, [Wyeth](#), 555 U.S. at 565 (“([I]n all preemption cases, and particularly in those which Congress has legislated ... in a field where States have traditionally occupied ... we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations and internal quotation marks omitted); [N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.](#), 514 U.S. 645, 654 (1995) (“[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not supplant state law.”); [Puerto Rico Dep’t of Consumer Affs. V. Isla Petroleum Corp.](#), 485 U.S. 465, 500 (1998) (“As we have repeatedly stated, we start with the assumption that historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations and internal quotation marks omitted).

176 *The Proposed Emergency Response Standard as Amending the Fire*
177 *Brigades Standard*

178 Though OSHA began the development of a proposed Emergency Response
179 Standard with the assertion that the Fire Brigades Standard is outdated, the
180 proposal as 89 FR 7774 would amend the following standards as actions of the
181 proposed ER Standard:

- 182 • Amending 29 CFR 1910.120 Hazardous waste operations and
183 emergency response.
- 184 • 29 CFR 1910.134 Respiratory protection.
- 185 • Amending Subpart L—Fire Protection 29 CFR 1910.155 scope,
186 application, and definitions applicable to this subpart.
- 187 • Changing 29 CFR 1910.156 from “Fire Brigades” to “Emergency
188 Response” and amending the section. This is where most
189 extensive amending takes place. (As noted above, we believe that
190 the Fire Brigades Standard must be updated and kept current
191 because it is a distinct class of emergency response organizations.)
- 192 • Amending 29 CFR 1910.157 Portable fire extinguishers.
- 193 • Amending 29 CFR 1910.158 Standpipe and hose systems.
- 194 • Amending 19 CFR 1910.159 Automatic sprinkler systems.

195 **II. SITUATION APPRAISAL**

196 The existing national emergency response system is consistent with the federalistic
197 principles embodied in the Constitutional separation of powers doctrine; the Tenth
198 Amendment; and subsequent authorities. A practical outworking of federalism is
199 found in the mandates of Executive Orders 13132 and 13175. Those presidential
200 orders are focused on State and local government prerogatives. The emergency
201 response system is supported in its outworking by a framework of interstate and
202 intrastate⁹ emergency response agreements that are locally pertinent as to time,
203 places, range, and scale of potential emergency response incidents.¹⁰

204 The national emergency response system is directed, regulated, and operated at the
205 State, local, and tribal level through general police powers. The **presumption**
206 **against preemption canon of statutory construction instructs that federal law**
207 **must not be read to preempt laws involving the States’ historic police powers**
208 **unless that is a clear and manifest purpose of Congress.** In adopting the OSH
209 Act of 1970, Congress was silent on the delegation of authority to OSHA to
210 regulate the emergency response system. Instead, Congress codified a state plan

⁹ One example is the [Montana Code Annotated 2023 Title 10. Military Affairs and Disaster and Emergency Services Chapter 3. Disaster and Emergency Services Part 9. Intrastate Mutual Aid System](#)

¹⁰ [Montana Code Annotated 2023 Title 10. Military Affairs and Disaster and Emergency Services Chapter 3. Disaster and Emergency Services](#)

211 system that provides individual states with the option to develop their own plans
212 to achieve “*safe and healthful working conditions*” for employees.

213 If adopted as proposed, the OSHA ERS rule would foreseeably result in a vast and
214 transformative reworking of the nation’s emergency response system. The
215 necessary implementation process would fragment resources, result in extended
216 emergency response times in rural communities, and result in reduced service for
217 those who have been injured, which could lead to unnecessary deaths. The
218 proposed standard would diminish system capacity by causing smaller response
219 entities operating on thin margins to go out of business and would lead to responder
220 attrition through volunteer burnout as a result of increased requirements and higher
221 expenses to volunteers who purchase their own equipment.

222 **III. PUBLIC HEALTH AND SAFETY ARE THE PROVINCE OF** 223 **STATE AND LOCAL GOVERNMENT.**

224 Public health and safety falls under the police powers of State, local, and tribal
225 governments. “*Statutes,*” Justice Frankfurter wrote, “*cannot be read intelligently*
226 *if the eye is closed to considerations evidenced in affiliated statutes.*”¹¹

227 “*State governments have the authority and*
228 *responsibility to protect the public health, safety, and*
229 *welfare. This authority is an inherent attribute of State*
230 *governmental sovereignty and is shared with local*
231 *governments” “... Substantive due process is the*
232 *constitutional doctrine that legislation must be fair and*
233 *reasonable in content and designed so that it furthers a*
234 *legitimate governmental objective. The doctrine of*
235 *substantive due process is based on the recognition that*
236 *the social compact upon which our government is*
237 *founded provides protections beyond those that are*
238 *expressly stated in the U.S. Constitution against the*
239 *flagrant abuse of government power. Calder v Bull, 3 U.S.*
240 *386 (1798).*”¹²

241 Longstanding federal statutes¹³ reinforce the principle that police power is reserved
242 to State and local governments. Title 7 of the Federal Land Policy and Management
243 Act (FLPMA)¹⁴ at 43 U.S.C. § 1701, note(g)(6) states that:

244 “*Nothing in this Act shall be construed as limiting or*
245 *restricting the power and authority of the United States or*
246 *- (6) as a limitation upon any State criminal statute or*

¹¹ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, St. Paul MN Thomas/West 2012 p. 252; Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (per Marshal, J.); *State v. French*, 460 N.W.2d 2 (Minn. 1990); *United States v. Stewart*, 311 U.S. 60, 64 (1940); *State v. Hormann*, 805 N.W.2d 883, 893 (Minn. Ct. App. 2011)

¹² WA Office of Attorney General - Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property. (September 2018).

¹³ 43 U.S.C. § 315n., 33 U.S.C. § 1251(b).

¹⁴ 43 U.S.C. § 1701 note (g)(6).

247 *upon the police power of the respective States, or as*
248 *derogating the authority of a local police officer in the*
249 *performance of his duties ... on the national resource*
250 *lands.”^{15,16}*

251 The arguments posed in the Federalist Papers to persuade the original states to
252 ratify the Constitution explicitly declare that the powers delegated to the Federal
253 government are few and defined, while those that remain to the States are
254 numerous and indefinite.¹⁷

255 *“In our federal system, the National Government*
256 *possesses only limited powers; the States and the people*
257 *retain the remainder. The States have broad authority to*
258 *enact legislation for the public good—what we have often*
259 *called a “police power.”* *United States v. Lopez*, 514 U.S.
260 *549, 567 (1995).* *Bond v. United States*, 572 U.S. 844,
261 *854 (2014).*

262 and,

263 *“Among those retained powers is the power of a State to*
264 *“order the processes of its own governance.”* *Alden v.*
265 *Maine*, 527 U.S. 706, 752 (1999).¹⁸

266 The outworking of prescriptive federalism is the central theme of Clinton
267 [Executive Order 13132](#), which directs OSHA to consult with affected states and
268 U.S. territories and possessions of the United States; perform detailed impact
269 analysis; and, provide **procedural reporting to the Office of Management and**
270 **Budget**, and equip the public record through publication in the Federal Register:

271 *Sec. 6. Consultation -*

272 *(a) “Each agency shall have an accountable process*
273 *to ensure meaningful and timely input by State and*
274 *local officials in the development of regulatory*
275 *policies that have federalism implications. Within 90*
276 *days after the effective date of this order, the head of*

¹⁵ *NFIB et. al. v. Sebelius* 567 U.S. 519 (2012) “The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’” “...Our cases refer to this **general power of governing, possessed by the States but not by the Federal Government**, as the ‘**police power**.’”” ... “The Framers thus ensured that **powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.**”

¹⁶ For nearly two centuries it has been “clear” that, **lacking a police power**, “Congress cannot punish felonies generally.” *Cohens v. Virginia*, 6 Wheat. 264, 428 (1821).; “Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. *United States v. Morrison*, 529 U. S. 598, 618 (2000). Thus, “we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.” *Bass*, 404 U. S., at 349.” *Bond v. United States* 572 U. S. ____ (2014).

¹⁷ [Madison, J. Federalist No. 46.](#)

¹⁸ ...the Guarantee Clause, Art. IV, §4, which “presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights,” *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938), also see, *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869).

277 *each agency shall designate an official with principal*
278 *responsibility for the agency's implementation of this*
279 *order and that designated official shall submit to the*
280 *Office of Management and Budget a description of*
281 *the agency's consultation process.”*

282 and,

283 *(b) “To the extent practicable and permitted by law, no*
284 *agency shall promulgate any regulation that has*
285 *federalism implications, that imposes substantial direct*
286 *compliance costs on State and local governments, and*
287 *that is not required by statute, unless:*

288 *(1) funds necessary to pay the direct costs incurred by*
289 *the State and local governments in complying with the*
290 *regulation are provided by the Federal Government; or,*

291 *(2) the agency, prior to the formal promulgation of the*
292 *regulation,*

293 *(A) consulted with State and local officials early in the*
294 *process of developing the proposed regulation;*

295 *(B) in a separately identified portion of the preamble*
296 *to the regulation as it is to be issued in the Federal*
297 *Register, provides to the Director of the Office of*
298 *Management and Budget a federalism summary im-*
299 *pact statement, which consists of a description of the*
300 *extent of the agency's prior consultation with State and*
301 *local officials, a summary of the nature of their*
302 *concerns and the agency's position supporting the*
303 *need to issue the regulation, and a statement of the*
304 *extent to which the concerns of State and local officials*
305 *have been met; and,*

306 *(C) makes available to the Director of the Office of*
307 *Management and Budget any written communications*
308 *submitted to the agency by State and local officials.”*

309 On March 13, 2024, the Budd-Falen Law Offices filed a Freedom of Information
310 Act (FOIA) request with OSHA on behalf of the Boundary Line Foundation
311 (BLF). The FOIA requested results of OSHA’s consultation with State and local
312 officials, including the nature of their concerns, and the required OSHA response
313 regarding the proposed OSHA ER Standard:¹⁹

314 *“All documents, records, notices, electronic mail or other*
315 *documentation related to the Federalism consultation*
316 *activities required under Executive Order 13132,²⁰*
317 *including descriptions from State and Local government*
318 *contacts, their response, and documentation of state and*
319 *local governmental concerns reported to the Office of*
320 *Management and Budget by OSHA showing compliance.”*

¹⁹ [Freedom of Information Act Request: Proposed Emergency Response Standard FR Vol. 89, No. 24 Proposed Rule Docket No. OSHA-2007-0073.](#)

²⁰ [Executive Order 13132, August 4, 1999, Federalism.](#)

321 After weeks of delay, status requests, and prompting, on May 13, 2024, OSHA
322 provided an incomplete response to the Budd-Falen FOIA request. Notably,
323 OSHA is on record as not attempting **any** consultation with state and local
324 governments on the OSH ERS as required by EO 13132:

325 *“On Federalism consultation – As noted in the Notice of*
326 *Proposed Rulemaking for the Emergency Response*
327 *proposed rule, OSHA did not conduct any consultative*
328 *services pursuant to Executive Order No. 13132. See [89](#)*
329 *[FR 7774](#), 7998 (Feb. 5, 2024). Therefore, OSHA has*
330 *located no responsive records. As such, we are issuing to*
331 *you a no record response on this item.²¹”*

332 and,

333 *“...it is likely that a search for any potentially responsive*
334 *records would be time consuming and costly and would*
335 *significantly exceed the payment amount you have*
336 *authorized (\$350) for processing this request.”*

337 Executive Order 13132 was developed to brightline governmental distinctions
338 between the national government and the States, and to further the policies of the
339 Unfunded Mandates Reform Act of 1995. E.O. 13132 is prescriptive in ensuring
340 that principles of federalism constrain the executive agencies during
341 policymaking. Executive Order 13132, Section 1 defines ‘Policies that have
342 federalism implications’ and refers to:

343 *“Regulations, legislative comments or proposed*
344 *legislation, and other policy statements or actions **that***
345 ***have substantial direct effects on the States, on the***
346 ***relationship between the national government and the***
347 ***States, or on the distribution of power and***
348 ***responsibilities among the various levels of***
349 ***government.”²²***

350 Localized emergency response utilizes substantial numbers of highly qualified
351 volunteer responders. It is impossible for OSHA or the Secretary of Labor to
352 quantify or regulate the American value of “freedom of association”²³ without

²¹ [Correspondence. U.S. Department of Labor to Attorney Karen Budd-Falen](#). Andrew Levinson, Director. Directorate of Standards and Guidance. May 13, 2024. (Attachment B)

²² [Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association](#) 505 U. S. 88 (1992) JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE THOMAS join, dissenting p. 115; “it is fully appropriate to apply the background assumption that Congress normally preserves “the constitutional balance between the National Government and the States.” *Bond I*, 564 U. S., at ___ (slip op., at 10). That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, “[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power” - *Bond v. United States* 572 U. S. ___ (2014) p. 17.

²³ In general, members of an association do not fall under the jurisdiction of local, state, and federal governments and corresponding laws and regulations. The exception to this general rule is when the activities of the private membership association “present a clear and present danger of substantive evil”. *Thomas v. Collins*, 323 U.S. 516 (1945).

353 impacting the rural culture of the United States. The public record is silent as to
354 how OSHA explored impacts to the custom and culture of rural communities as a
355 result of the ERS rule. It is foreseeable the proposed rule would have an unintended
356 effect by impeding and complicating spontaneous activities of local governments
357 and the volunteers who mutually respond to one another’s interests in a free culture
358 of association by burdening them with redundant administrative requirements.

359 **IV. MAJOR QUESTIONS ADDRESSED BY THIS ANALYSIS**

- 360 1. Does the OSH Act give OSHA the express statutory authority to
361 regulate volunteers as employees in the absence of state action?
- 362 2. Does the administrative record for the proposed ERS rule
363 demonstrate that OSHA has engaged in reasoned decision making
364 within the boundaries, confines, and authorities delegated by
365 Congress in the OSH Act?
- 366 3. Does OSHA possess the broad preemptive power as claimed at 89
367 FR 7998?
- 368 4. Can the intent and delegated authority of 29 U.S.C. Chapter 15,
369 *Occupational Safety and Health*, be reasonably construed to
370 preempt States’ historic police powers?
- 371 5. Has OSHA reasonably demonstrated, as asserted at 89 FR 7845,
372 that the proposed ERS corrects market failures in which private
373 and public labor markets are not adequately protecting human
374 health?
- 375 6. In the context of State Plans and rulemaking, is it legitimate to
376 read the congressional intent “*at least as effective as*” as being
377 synonymous with “*at least as stringent as*” or “*more stringent*
378 *than*” as OSHA does at 29 CFR 1953.5?²⁴
- 379 7. Does the cost/benefit analysis of the proposed OSHA ERS satisfy
380 the minimum “*reasonably necessary or appropriate*” and legal
381 tests to justify the vast and transformative nature of the ERS?

²⁴ **effective** *adj.* (14c) ... 2. Performing within the range of normal and expected standards. *Black’s Law Dictionary*, Tenth Edition.

382 **V. UNDERGIRDING AUTHORITY and APPLICATION CANONS**

- 383 • Foundational authorities to this rulemaking process include the
384 Tenth Amendment to the United States Constitution²⁵ and the
385 Guarantee Clause of Article IV, Section 4.²⁶
- 386 • The statutes comprising United States Law are codified into a
387 single unitary body of law as the United States Code (U.S.C.).
388 These statutes are to be read and construed *in pari materia*²⁷
389 through the related statutes canon²⁸ with their underlying statutory
390 authorities understood as cognate acts.²⁹

391 *Statutory authorities:*

392 Authority Congress delegated to OSHA through the Occupational Safety and
393 Health Act (Act) of 1970:

- 394 • 29 U.S.C. § 651(b): “*The Congress declares it to be its purpose and*
395 *policy, through the exercise of its powers to regulate commerce among*
396 *the several states and with foreign nations and to provide for the general*
397 *welfare, to assure so far as possible every working man and woman in*
398 *the Nation safe and healthful working conditions and to preserve our*
399 *human resources-*”
- 400 • 29 U.S.C. § 651(b)(3): “*by authorizing the Secretary of Labor to set*
401 *mandatory occupational safety and health standards applicable to*
402 *businesses affecting interstate commerce...*”
- 403 • 29 U.S.C. § 652(3): “*The term ‘commerce’ means trade, traffic,*
404 *commerce, transportation, or communication among the several States,*
405 *or between a State and any place outside thereof, or within the District*
406 *of Columbia, or a possession of the United States (other than the Trust*
407 *Territory of the Pacific Islands), or between points in the same State but*
408 *through a point outside thereof.*”

409 Congress did not delegate authority to OSHA to adopt mandatory occupational
410 safety and health standards that **apply to government entities:**

²⁵ [The Tenth Amendment to the United States Constitution](#): “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

²⁶ Essay Art IV.S4.3. [Meaning of a Republican Form of Government](#). *Constitution Annotated*.

²⁷ *in pari materia* — [Latin “in the same matter”] **1. adj.** On the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. *Black’s Law Dictionary*, Tenth Edition.

²⁸ *related-statutes canon* — The doctrine that statutes *in pari materia* are to be interpreted together, as though they were one law. *Ibid.*

²⁹ *cognate act* — (1852) A statute whose subject matter is related to that of another, esp. when the two statutes were enacted at about the same time. *Ibid.*

- 411 • 29 U.S.C. § 654(a)(2): “(a) Each employer- ... (2) shall comply with
412 occupational Safety and Health standards promulgated under this
413 chapter.”
- 414 • 29 U.S.C. § 654(b): “Each employee shall comply with occupational
415 safety and health standards and rules, regulations, and orders issued
416 pursuant to this chapter which are applicable to his own actions and
417 conduct.”
- 418 • 29 U.S.C. § 652(5): “The term “employer” means a person engaged in
419 business affecting commerce who has employees, **but does not include**
420 **the United States (not including the United States Postal Service) or**
421 **any State or political subdivision of a State.”**
- 422 • 29 U.S.C. § 652(6): “The term “employee” means an employee of the
423 employer who is employed in a business of his employer which affects
424 commerce.”
- 425 • At 29 U.S.C. § 651(b)(6) Congress found “...the fact that occupational
426 health standards present problems often different from those involved
427 in occupational safety.”

428 *Major questions doctrine issues raised:*

- 429 • Controlling statutes do not delegate authority to OSHA to
430 dismantle or control the nature of the existing [volunteer and
431 professional responder] emergency response system. Imposition
432 of the proposed OSHA ERS would foreseeably and negatively
433 impact rural emergency response custom, culture, and freedom of
434 association.
- 435 • OSHA has not explicitly been delegated the authority to “resolve”
436 the issues identified in the proposed ERS.
- 437 • Volunteers are volunteers, not employees.

438 **VI. THE REGULATORY FLEXIBILITY ACT**

439 The Regulatory Flexibility Act, Public Law 96—354, 5 U.S.C. § 601 was enacted
440 to:

441 *“... improve Federal rulemaking by creating procedures*
442 *to analyze the availability of more flexible regulatory*
443 *approaches for small entities, and for other purposes.”*

444 Section 2(b) *“It is the purpose of this Act to establish as*
445 *a principle of regulatory issuance that agencies shall*
446 *endeavor, consistent with the objectives of the rule and of*
447 *applicable statutes, to fit regulatory and informational*
448 *requirements to the scale of the businesses organizations,*
449 *and governmental jurisdictions subject to regulation. To*
450 *achieve this principle agencies are required to solicit and*
451 *consider flexible regulatory proposals and to explain the*
452 *rationale for their actions to assure that such proposals*
453 *are given serious consideration.”*

454 At 89 FR 7997 OSHA states that whenever a federal agency is required to publish
455 a general notice of proposed rulemaking for any proposed rule, it must prepare and
456 make available for public comment an initial regulatory flexibility analysis
457 (IRFA). In lieu of an IRFA, **the head of agency may certify that the proposed**
458 **rule will not have a significant economic impact on a substantial number of**
459 **small entities.**

460 OSHA performed a screening analysis and determined that the agency **is unable**
461 **to certify that the proposed ERS will not have a significant economic impact**
462 **on a substantial number of small entities** and has therefore prepared an IRFA to
463 further examine issues related to small entities and the proposed rule. The IFRA
464 begins at 89 FR 7980.

465 OSHA presents an overview of the context for its proposed emergency response
466 standard at 89 FR 7775:

467 *“Elements of emergency responder (firefighters,*
468 *emergency medical service providers, and technical*
469 *search and rescue rescuers) health and safety are*
470 *currently regulated by OSHA primarily under a*
471 *patchwork of hazard-specific standards, and by state*
472 *regulations in states with OSHA-approved State plan*
473 *programs. (While OSHA standards do not apply to*
474 *volunteers, some volunteers are covered in states with*
475 *OSHA-approved State plan programs.) All of the OSHA*
476 *standards referred to above were promulgated decades*
477 *ago, and none was designed as a comprehensive*
478 *emergency response standard. Consequently, they do not*
479 *address the full range of hazards currently facing*
480 *emergency responders, nor do they reflect major changes*
481 *in performance specifications for protective clothing and*
482 *equipment or major improvements in safety and health*
483 *practices that have already been accepted by the*
484 *emergency response community and incorporated*
485 *industry consensus standards. ...”*

486 The statement at 89 FR 7775 contains inaccuracies and omissions:

- 487 • OSHA does not mention that the existing national emergency
488 response system evolved in the context of a federal policy
489 vacuum. OSHA also does not mention that the States have
490 developed, operate, and continue to improve the emergency
491 response systems within their respective jurisdictions, regardless
492 of whether individual States have opted to become state plan
493 program states or remain non-plan states.
- 494 • OSHA fails to note that the States are regulating emergency
495 response through their general power of governing using police
496 power to regulate public health, safety, and welfare. The Federal
497 government does not possess the police power to implement the
498 proposed ERS, because the presumption against presumption

499 canon of construction provides that Federal law should not be read
500 to preempt laws involving the states' historic police powers.³⁰

501 In its *Description of the Reasons Why Action by the Agency Is Being Considered*
502 section at 89 FR 7980 OSHA states:

503 *“Emergency response workers in America face*
504 *considerable occupational health and safety hazards in*
505 *dynamic and often unpredictable work environments.*
506 *Current OSHA emergency response and preparedness*
507 *standards are outdated and incomplete. Specifically, the*
508 *standards do not address the full range of hazards facing*
509 *emergency responders, lag behind changes in protective*
510 *equipment performance and industry practices, and*
511 *conflict with current industry consensus standards.*
512 *OSHA’s current fire brigade standard, 29 CFR 1910.156*
513 *was promulgated in 1980 and has only had minor*
514 *revisions since then.”³¹*

515 State and local governments have filled the Federal regulatory vacuum with mature
516 emergency response systems. They continue to improve their regulatory and policy
517 frameworks to accommodate technological advances, protocols, and best practices
518 using industry consensus standards.

519 In its *Statement of the Objectives and Legal Basis for the Proposed Rule OSHA*
520 *begins:*

521 *“The objective of the proposed rule is to reduce the*
522 *number of injuries, illnesses, and fatalities occurring*
523 *among emergency responders in the course of their work.*
524 *This objective will be achieved by requiring employers to*
525 *establish risk management plans, provide training and*
526 *medical surveillance, establish medical and physical*
527 *requirements, develop standard operating procedures,*
528 *and provide other protective measures enabling*
529 *emergency responders to perform their duties safely.”³²*

530 This objective makes the presumption that the response community is doing little
531 to reduce the number of injuries, illnesses, and fatalities among responders in the
532 course of their ongoing work. It also appears that OSHA believes that the response
533 organizations may be remiss in preparing risk management plans, providing
534 training, or satisfactorily taking basic steps to ensure a safe working environment
535 for their employees and volunteers. The reality is that the states already require
536 what OSHA says it intends to do, all within a localized context.

537 The States have long provided regulation of the public health, safety, and welfare
538 needs through their general power of governing police powers.

³⁰ [Nat'l Fed'n of Indep. Bus. V. Sebelius](#), 567 U.S. 519, 539 (2012).

³¹ [Federal Register/Vol. 89, No. 24. Proposed Rule](#) pg.7981.

³² *Ibid.*

539 OSHA states that it welcomes comments on their analysis. In particular, the agency
540 acknowledges there may be unique circumstances that would warrant additional
541 analyses that the agency should develop.

542 OSHA cannot complete a valid regulatory flexibility analysis without first defining
543 the scope of its authority and clarifying those entities OSHA can legitimately
544 regulate. This means that before regulating, OSHA must evaluate the emergency
545 response statutory, regulatory, and policy framework for each of the 50 states, plus
546 the territorial and other possessions of the United States, and the Tribal
547 reservations that operate emergency response organizations to assess gaps that
548 OSHA could possibly address. This should be fully compliant with E.O. 13132
549 and 13175 consultation processes.

550 Given the effectiveness with which the States and their local governments regulate,
551 operate, and improve their emergency response systems, and the statutory
552 construct of the OSH Act, it appears OSHA's most effective role may be to provide
553 research, development, and publication of best practices and consensus standards,
554 not enforceable regulatory performance-based standards.

555 **VII. OTHER AUTHORITIES - 89 FR 7997–7999**

556 As applicable to the proposed OSHA ERS rulemaking, there are seven areas of
557 agency compliance mandates, three of which are closely related: the Unfunded
558 Mandates Reform Act, Executive Order 13132 on Federalism, and Executive
559 Order 13175 on Consultation and Coordination with Native American Tribal
560 Governments.

561 Importantly, the preambles of both Executive Order 13132³³ and Executive Order
562 13175³⁴ incorporate statements **that further the policies of the Unfunded**
563 **Mandates Reform Act:**

564 The preamble of Executive Order 13132 reads:

565 *“By the authority vested in me as President by the*
566 *Constitution and the laws of the United States of America,*
567 *and in order to guarantee the division of governmental*
568 *responsibilities between the national government and the*
569 *States that was intended by the Framers of the*
570 *Constitution, to ensure that the principles of federalism*
571 *established by the Framers guide the executive*
572 *departments and agencies in the formulation and*
573 *implementation of policies, and to further the policies of*
574 *the Unfunded Mandates Reform Act, it is hereby ordered*
575 *as follows:...*”

³³ [Executive Order 13132](#) of August 4, 1999. Federalism.

³⁴ [Executive Order 13175](#) of November 6, 2000. Consultation and Coordination with Indian Tribal Governments.

576 The Executive Order 13175 preamble reads:

577 *“By the authority vested in me as President by the*
578 *Constitution and the laws of the United States of America,*
579 *and in order to establish regular and meaningful*
580 *consultation and collaboration with tribal officials in the*
581 *development of Federal policies that have tribal*
582 *implications, to strengthen the United States government-*
583 *to-government relationships with Indian tribes, and to*
584 *reduce the imposition of unfunded mandates upon Indian*
585 *tribes; it is hereby ordered as follows:...”*

586 Both Executive Orders serve as prescriptive extensions of the Unfunded Mandates
587 Reform Act. Executive branch agencies engaged in rulemaking are required to
588 comply with the statutory authorities governing rulemaking and authority during
589 the rulemaking process.

590 *Unfunded Mandates Reform Act*³⁵

591 The unfunded Mandates Reform Act (UMRA) states the Congressional intent for
592 the statute at 2 U.S.C. § 1501. Purposes:

593 *The purposes of this chapter are—*

594 *§ 1501(1) to strengthen the partnership between the*
595 *Federal Government and State, local, and tribal*
596 *governments;*

597 *§ 1501(2) to end the imposition, in the absence of full*
598 *consideration by Congress, of Federal mandates on*
599 *State, local, and tribal governments without adequate*
600 *Federal funding, in a manner that may displace other*
601 *essential State, local, and tribal governmental priorities;*

602 *§ 1501(7) to assist Federal agencies in their*
603 *consideration of proposed regulations affecting State,*
604 *local, and tribal governments by—*

605 *§ 1501(7)(A) requiring that Federal agencies develop a*
606 *process to enable the elected and other officials of State,*
607 *local, and tribal governments to provide input when*
608 *Federal agencies are developing regulations; and*

609 *§ 1501(7)(B) requiring that Federal agencies prepare*
610 *and consider estimates of the budgetary impact of*
611 *regulations containing Federal mandates upon State,*
612 *local, and tribal governments and the private sector*
613 *before adopting such regulations, and ensuring that small*
614 *governments are given special consideration in that*
615 *process; and*

³⁵ 2 U.S.C. § 1501 et seq., [Unfunded Mandates Reform Act](#).

616 § 1501(8) to begin consideration of the effect of
617 previously imposed Federal mandates, including the
618 impact on State, local, and tribal governments of Federal
619 court interpretations of Federal statutes and regulations
620 that impose Federal intergovernmental mandates.

621 At 89 FR 7997 OSHA states:

622 “This proposed rule does not place a mandate on State or
623 local government, for purposes of the UMRA, because the
624 agency’s standards do not apply to State and local
625 governments (29 U.S.C. 652(5)).”³⁶

626 OSHA continues the paragraph stating:

627 “States that have elected voluntarily to adopt a State Plan
628 approved by the agency must adopt a standard at least as
629 effective as the Federal standard, which must apply to
630 State and local government agencies (29 U.S.C. § 667(b),
631 (c)(2) and (6)).”³⁷

632 As previously discussed, emergency response actions are an exercise of police
633 powers which promote public health, safety, and welfare.³⁸ As a Federal agency,
634 OSHA does not have the discretion to interfere with State, local, or tribal
635 government prerogatives on the exercise of police powers because the OSHA does
636 not possess police power over emergency response.

637 Because the OSH Act provides the *option* for states to decide to adopt a state plan,
638 the “presumption against preemption” canon is triggered. This instructs that
639 federal law should not be read to preempt laws involving the non-federal
640 governments’ historic police powers unless that was the clear and manifest purpose
641 of Congress.³⁹ Congress is silent as to whether OSHA has preemption authority
642 over state and local governments, and given the recent *Loper Bright* decision,
643 OSHA may impermissibly be delegating to itself preemption authority.

³⁶ [Federal Register/Vol. 89, No. 24, Proposed Rule](#) Pg.7997.

³⁷ *Ibid.*

³⁸ The Supreme Court uses the term “police power” to refer to the states’ general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g., Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 536 (2012) (“Our cases refer to this general power of governing, possessed by the States **but not by the Federal Government**, as the ‘police power.’”).

³⁹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also, e.g., Wyeth*, 555 U.S. at 565 (“[I]n all preemption cases, and particularly in those which Congress has legislated ... in a field where States have traditionally occupied ... we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations and internal quotation marks omitted); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (“[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not supplant state law.”); *Puerto Rico Dep’t of Consumer Affs. V. Isla Petroleum Corp.*, 485 U.S. 465, 500 (1998) (“As we have repeatedly stated, we start with the assumption that historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citations and internal quotation marks omitted).

644 The current national emergency response system is an effective expression of
645 State, local, and tribal government exercise of police powers for public health,
646 safety, and welfare within their respective jurisdictions. OSHA does not have
647 jurisdictional authority over State, local, and Tribal exercise of police powers, and
648 the presumption against preemption applies.

649 In the following paragraph OSHA states that:

650 *“The OSH Act does not cover tribal governments in the*
651 *performance of traditional government functions, such as*
652 *firefighting, EMS, and search and rescue for the tribe in*
653 *general, Reich v. Mashantucket Sand & Gravel, 95 F.3d*
654 *174, 180 (2nd Cir. 1996) (traditional governmental*
655 *activities are excepted from the rule that general Federal*
656 *statutes apply to tribes); cf. Snyder v. Navajo Nation, 382*
657 *F.3d 892, 895 (9th Cir 204) (Fair Labor Standards Act*
658 *does not apply to tribal police because maintenance of*
659 *law and order is a traditional governmental function).”*

660 This is followed by an inexplicable statement that:

661 *“However, when tribes engage in activities of commercial*
662 *or service character, such as firefighting, EMS, and*
663 *search and rescue for particular commercial enterprises,*
664 *like casinos and sawmills, they are subject to general*
665 *Federal statutes, including the OSH Act.”*

666 Boundary Line Foundation assessed OSHA’s proposal to regulate native American
667 tribal governments by reviewing the case law OSHA referenced in its assertion of
668 jurisdiction over emergency response actions at tribal enterprise business
669 locations.^{40,41,42} The plain language of the court decisions for two of the three cases
670 indicate that emergency responders are not subject to the OSH Act because they
671 **are tribal government emergency responders** and not employees of the tribal
672 businesses they may be responding to. The agency inappropriately intends to
673 subject Native American responders to regulation under the OSH Act if they
674 respond to tribal enterprise business locations such as casinos or sawmills.

⁴⁰ [*Menominee Tribal Enters. V. Solis*, 601 F.3d 669 \(7th Cir. 2010\).](#)

⁴¹ [*Reich v. Mashantucket Sand & Gravel*, 95 F.3d at 180 \(2d Cir. 1996\).](#)

⁴² [*Smart v. State Farm Ins. Co.*, 868 F.2d 929 \(7th Cir. 1989\).](#)

675 **VIII. UNFUNDED MANDATE CONCERNS - PLAN STATES**

676 Many Plan States are represented at the national level by the Occupational Safety
677 and Health State Plan Association (OSHSPA). On February 22, 2016, the
678 OSHPSA Chair sent a letter to the United States Department of Labor Assistant
679 Secretary for Occupational Safety and Health.⁴³ In part the letter states:

680 *“If there ever was a regulatory undertaking that fit the*
681 *definition of an unfunded mandate placed on States, it*
682 *would be an OSHA rulemaking in the area of emergency*
683 *response and preparedness.”*

684 and,

685 *“OSHSPA believes that it is particularly inappropriate*
686 *for OSHA to attempt to regulate an area — state and local*
687 *government emergency response, including the coverage*
688 *of volunteers in some State Plans — in which it neither*
689 *has jurisdiction, experience nor expertise.”*

690 OSHPSA’s position is both legitimate and accurate. There remains a presumption
691 that historic police powers of the States are not to be preempted by a Federal Action
692 and OSHPSA is affirming this position in the administrative record. Congress did
693 not delegate a clear and manifest purpose for OSHA to adopt an emergency
694 response standard that would preempt the police powers of the State or local
695 governments. Under the [Loper Bright decision](#), OSHA lacks discretion to interpret
696 the Act to mean that Congress intended judicial deference to any agency
697 interpretation otherwise.

698 In the eight years since OSHSPA entered their letter into the administrative record,
699 OSHA has made no clear progress on addressing the impact that unfunded
700 compliance costs associated with the OSHA ERS could have on OSHA plan and
701 non-plan states. This situation is causing uncertainty in the regulated community,
702 especially in context of OSHA’s failure to consult with state, local, and tribal
703 governments as required by Executive Orders 13132 and 13175.

704 If the proposed ERS is adopted, OSHA Plan States will be required to adopt
705 standards *“at least as effective”* as those in the new enforceable standard. This
706 would be extraordinarily disruptive to the existing national emergency response
707 system, individual service providers within each OSHA Plan State, and emergency
708 response services located within sovereign Native American nations.

709 The Regulatory Flexibility Act, Executive Order 13132, and Executive Order
710 13175 provide for agencies to develop alternatives to regulation that do not usurp
711 State, local, or tribal governmental authority or police powers.

⁴³ Occupational Safety and Health State Plan Association [Letter of February 22, 2016](#), to the Department of Labor Assistant Secretary for Occupational Safety and Health titled *Emergency Response and Preparedness Rulemaking* (RIN: 1218-AC91).

712 • In its February 2016 letter,⁴⁴ OSHSPA provided a
713 recommendation for **an alternative to OSHA rulemaking that**
714 **was dismissed** during the proposed OSHA ERS rulemaking
715 process:

716 *“OSHSPA strongly believes that, just as it is doing with*
717 *Safety and Health Management Systems, OSHA should*
718 *focus their emergency response and preparedness efforts*
719 *at gathering information on hazards, consensus*
720 *standards, best practices, costs and benefits. OSHA could*
721 *then use that information in a nationwide outreach effort*
722 *— coordinated with OSHSPA — and make the*
723 *information available to State Plans that want to*
724 *undertake rulemaking.”*

725 **IX. PRESUMPTION AGAINST FEDERAL PREEMPTION OF** 726 **STATE PREOGITIVES**

727 A review of the historical authorities behind the doctrine of federal preemption of
728 State prerogatives for OSH ERS yields the following administrative record:

729 Presumption against federal preemption is defined as:

730 *“The doctrine that a federal statute is presumed to*
731 *supplement rather than displace state law.”⁴⁵*

732 This legal canon instructs that federal law should not be read to preempt laws
733 involving the state’s historic police powers *“unless that was the clear and manifest*
734 *purpose of Congress.”⁴⁶* The presumption doctrine is rooted in principles of
735 federalism and longstanding respect for state sovereignty.⁴⁷

736 The use of the term *“clear and manifest purpose”* means that Congressional
737 mandates to the agencies must be constructed using the directive *“shall.”* By way
738 of application, 29 U.S.C. § 667(b) begins by stating:

739 *“Any State which, at any time, desires to assume*
740 *responsibility ...”⁴⁸*

⁴⁴ Occupational Safety and Health State Plan Association [Letter of February 22, 2016](#), to the Department of Labor Assistant Secretary for Occupational Safety and Health titled *Emergency Response and Preparedness Rulemaking* (RIN: 1218-AC91).

⁴⁵ *Black’s Law Dictionary*, Tenth Edition.

⁴⁶ The Supreme Court uses the term “police power” to refer to the states’ general power of governing, such as regulating to promote public health, safety, and welfare. *See, e.g., Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 539 (2012) (“Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).

⁴⁷ *See Tarrant Reg’l Water Dist. V. Herrmann*, 596 U.S. 614, 631 n.10 (2013); [Cipollone v. Liggett Grp., Inc.](#), 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part. Concurring in the judgment in part and dissenting in part). Also to note: Explicit preemption by Congress can only be performed under constitutionally enumerated powers.

⁴⁸ [29 U.S.C. 667](#)

741 This is a clear indication that individual participation of States as a Plan States is
742 optional and at the discretion of that state. Once a state has become a plan state,
743 the “clear and manifest purpose” of Congress is that its emergency response
744 program would be up to that state, whether or not it chose to be bound by the
745 OSHA plan framework. The U.S. Supreme Court has described the presumption
746 against preemption as one of the cornerstones of its preemption jurisprudence.⁴⁹

747 Here, we observe that 29 U.S.C. § 667(b) contains the **only** reference to preemption
748 in the OSH Act of 1970. Congress stated its intent for that preemption in the title
749 of 29 U.S.C. § 667(b):

750 § 667, *State Jurisdiction and Plans*

751 “(b) *Submission of State plan for development and*
752 *enforcement of State standards to preempt applicable*
753 *Federal standards.*”

754 Congress was unambiguous in its intent that ***the purpose of a state plan is for***
755 ***preemption of a federal standard.*** There is no explicit delegation of authority in
756 the OSH Act that allows OSHA to preempt State law or standards through
757 regulatory, administrative, or policy making processes. Agency interpretation
758 otherwise is now barred by the recent *Loper Bright* decision, which holds that
759 agencies do not have authority to resolve statutory ambiguities.⁵⁰

760 The term “*at least as effective as*” is not defined in the 29 U.S.C. § 652 definitions
761 or elsewhere in statute, nor is it defined in the proposed ERS as published in the
762 89 FR 7774 notice. Left undefined, affected entities cannot reasonably be expected
763 to understand how OSHA is applying the term within the regulatory framework.

764 We note that “*at least as effective as*” is manifestly **not** synonymous with “*at least*
765 *as stringent as*” for the purposes of regulatory interpretation.

766 Furthermore, this interpretation of presumption against preemption is strengthened
767 because regulation of the emergency response system is a police power of the
768 States and their subordinate governmental entities.

⁴⁹ Also to note: Express preemption by Congress can only be performed under constitutionally enumerated powers. “It is in this sense that the Tenth Amendment “states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U. S. 100, 124 (1941) As Justice Story put it, “[t]his amendment (10th amendment) is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.” 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833).” - See: *New York v United States* 505 U. S. 144 (1992); “Whichever the doctrine is (non-delegation or major questions), the point is the same. Both serve to prevent “government by bureaucracy supplanting government by the people.” A. Scalia, *A Note on the Benzene Case, American Enterprise Institute*, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today’s case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.” - *NFIB v. OSHA* 595 U. S. ____ (2022)

⁵⁰ *Ibid.* *Loper Bright Enterprises et al. v. Raimundo, Secretary of Commerce, et al.* Syllabus. Pg. 4.

769 Section 2 of Executive Order 13132 clarifies that the Framers of the Republic
770 recognized that the States possess unique authorities, qualities, and abilities to
771 meet the needs of the people.⁵¹ One of those authorities is that the States, local
772 governments, and tribal nations all possess some measure of police power. The
773 State, local, and tribal general power governing the regulation of public health,
774 safety, and welfare is a manifestation of that power.⁵² OSHA does not have the
775 authority to regulate emergency response (public health, safety, and welfare)
776 because the agency does not possess the requisite police power to do so.

777 Section 4 of Executive Order 13132 mandates special requirements for
778 preemption. As mentioned, in considering this proposed OSHA ERS, the agency
779 has not complied with the Section 4 process, **even though adoption of the**
780 **standard as proposed would necessitate preemption of significant portions of**
781 **the emergency response regulatory frameworks** in all of the State, local, and
782 tribal governments.

783 OSHA errantly limits its Executive Order 13132 compliance evaluation to only a
784 few limited portions of that order. The President mandated that all executive
785 branch agencies are responsible for compliance with the entirety of the order, not
786 just those that would bolster justification for a single action. The order is rich with
787 directives that agencies become and remain full participants across the full
788 spectrum of federalism principles, including meaningful government-to-
789 government consultation and participation in decision-making for all levels of
790 government.

791 OSHA simply and blatantly has chosen not to fully comply with the entirety of
792 E.O 13132 in conducting the mandated federalism impact analysis.

793 *Executive Order 13175 – OSHA Consultation with Native American Tribal*
794 *Governments*

- 795 • We consider [Executive Order 13175](#) in chronological order with
796 Executive Order 13132 because it is derivative from that
797 Executive Order on federalism, and because it was signed by
798 President Clinton more than a year later.
- 799 • OSHA did not comply with its consultation and coordination
800 mandates with Indian tribal governments.

⁵¹ “Among those retained powers is the power of a State to “order the processes of its own governance.” *Alden v. Maine*, 527 U. S. 706, 752 (1999); The Constitution instead “leaves to the several States a residuary and inviolable sovereignty,” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)

⁵² The Supreme Court uses the term “police power” to refer to the states’ general power of governing, such as regulating to promote public health, safety, and welfare. *See, e.g., Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 539 (2012) (“Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).

801 • The extent of OSHA’s “*consultation and coordination*” with
802 tribal governments as reported at 89 FR 7998 was one [listening](#)
803 [session on June 20, 2023](#). The three-page memorandum for the
804 record indicates the meeting was an afterthought and was attended
805 by **22 Department of Labor officials and 9 tribal officials**.

806 One tribal official asked OSHA to clarify what the NACOSH subcommittee was
807 and its role in developing the proposed standard. The OSHA representative
808 responded that the agency created a NACOSH subcommittee to advise and
809 develop a draft standard and listed several of the organizations on the
810 subcommittee. **The official then noted that there was no tribal representation**
811 **on the NACOSH subcommittee**. This is not consultation.

812 The only other official tribal participation in development of the OSHA ERS was
813 recorded in the memorandum to the administrative record as a tribal official
814 expressing his commitment to resource sharing to support the proposed rule and
815 emphasizing a best practice approach for the rulemaking.

816 A single “**listening session**” occurring so late in the administrative process for
817 developing the proposed standard does not rise to equivalency with the meaningful
818 consultation and coordination government-to-government processes mandated by
819 Executive Order 13175.

820 OSHA states that the agency determined that the proposed emergency response
821 standard does not have tribal implications as defined in Executive Order 13175.
822 The EO required process mandates consultation be structured to occur “*to the*
823 *extent practicable*.” The actual standard in Executive Order 13175 is “***to the extent***
824 ***practicable and permitted by law***,” which sets an even higher regulatory bar than
825 OSHA afforded to the tribes.

826 Section 3, *Policymaking Criteria* requires agencies to “*adhere to the extent*
827 *permitted by law*” to the criteria when formulating and implementing policies that
828 have tribal implications. The listening session memorandum in the record fails to
829 include evidence of OSHA Section 3 compliance.

830 In its Unfunded Mandates Reform Act statement at 89 FR 7997, OSHA was
831 accurate in stating “*The OSH Act does not cover tribal governments in the*
832 *performance of traditional governmental functions such as firefighting, EMS, and*
833 *search and rescue ...*” OSHA then goes on to **illegitimately propose imposition**
834 **of a regulatory restriction within the border of sovereign Native American**
835 **jurisdictions**: “... *for the tribe in general*.”

836 and,

837 “*However, when tribes engage in activities of a*
838 *commercial nature, such as firefighting, EMS, and search*
839 *and rescue for particular commercial enterprises, like*
840 *casinos and sawmills, they are subject to general Federal*
841 *statutes, including the OSH Act.*”

842 For this and other reasons, we conclude OSHA failed to comply with the
843 prescriptive requirements of Executive Orders 13171 and 13175.

844 **X ADOPTION OF A PERFORMANCE-BASED STANDARD**
845 **IS A MAJOR SHIFT IN AGENCY POLICY**⁵³

846 The expansive OSHA “*performance based*” standard appears difficult to measure
847 accountability without imposition of a top-down, Federal hierarchy characteristic
848 of centralized statism. Any attempt to do so would impair the existing training,
849 reporting, and data management systems already in place at State and local levels,
850 foreseeably impacting emergency responders and those who volunteer at the local
851 level.⁵⁴

852 **XI DISCUSSION OF SAFETY V. HEALTH STATUTORY**
853 **REQUIREMENTS**

854 There are two general categories of standards under which the Congress mandates
855 OSHA to adopt throughout the history of the OSHA Act: “*Safety Standards*,” and
856 “*Health Standards*.” For safety standards the record shows a focus on
857 **“particular” industries, particular machinery, and particular operations;** for
858 health standards, the record demonstrates **a focus on individual hazards to**
859 **human health**, including particular toxic substances, and particular bodily health,
860 i.e. (hearing, respiratory health). The history of OSHA standards demonstrates a
861 focus on particular hazards which could result in an “*unsafe*” workplace. Plan
862 States also develop plans that address particular standards. Both plan and non-plan
863 States have laws and standards in place regarding emergency response situations
864 which are inextricably woven into general power of governing police powers.

865 The proposed Emergency Response Standard (ERS) is being promoted as a “safety
866 and health performance-based standard” across a wide variety of emergency
867 response conditions and situations. This approach has the foreseeable potential to
868 pose significant economic harm to **both** plan and non-plan states. For plan states,
869 the ERS would require amendment of state plans in order to be “*at least as*
870 *effective*”⁵⁵ as the Federal standard, **which foreseeably will have the effect of**
871 **imposing a Federal regulatory program on local units of government within**
872 **plan states.**⁵⁶ For non-plan states, there is a significant concern that the proposed
873 ERS would, over time and through bureaucratic processes, be used to illegitimately
874 preempt⁵⁷ state laws regulating emergency response.

⁵³ [National Federation of Independent Business V. OSHA](#) 595 U. S. ____ (2022) GORSUCH, J., concurring p. 4 - “As the agency itself explained to a federal court less than two years ago, the statute does “not authorize OSHA to issue sweeping health standards” that affect workers’ lives outside the workplace. *Brief for Department of Labor*, In re: AFL–CIO, No. 20–1158, pp. 3, 33 (CADDC 2020).”

⁵⁴ [Federal Register/Vol. 89, No. 24, Proposed Rule](#) pg.7981. F. II. E. - Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.

⁵⁵ *Ibid.* pg. 7997.

⁵⁶ *Ibid.*; [New York v United States](#) 505 U. S. 144 (1992) - “Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.”

⁵⁷ [Federal Register/Vol. 89, No. 24, Proposed Rule](#). Pg. 7997; [National Federation of Independent Business v. OSHA](#) 595 U. S. __ (2022) GORSUCH, J., concurring – “There is no question that state

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XII AUTHORITY TO ADOPT PERFORMANCE BASED STANDARDS; ECONOMIC CONSIDERATIONS

The proposed ERS represents a top-down, performance-based framework that would regulate states and local units of government outside the congressionally delegated authority of the OSH Act of 1970. **Because units of local government cannot be classified as employers⁵⁸ OSHA authority to adopt a nationwide performance-based standard for emergency response.**

The Federal Register notice acknowledges that the standard does not apply to state and local governments:

89 FR 7997 - “This proposed rule does not place a mandate on State or local government, for purposes of the UMRA, because the agency’s standards do not apply to State and local governments (29 U.S.C. 652(5))”

In its *Federal Register* notice OSHA claims **\$2.6 billion in annualized benefits** associated with implementation of the proposed ERS. In conducting its cost/benefit analysis, OSHA uses data from the saving of lives, avoiding injuries, and mitigation of cancer associated with emergency response hazards. Importantly, the base presuppositions used by OSHA to quantify the benefit savings are errant, yielding wildly exaggerated projected benefits. In preparing the analysis, OSHA incorrectly assumes that it has jurisdiction over States and units of local governments, and **those savings were calculated using the flawed assumption of benefits to emergency responders at the local level.** Because OSHA lacks jurisdiction over state and local governments, the input data is skewed and results benefit results are flawed and overstated.⁵⁹

and local authorities possess considerable power to regulate public health. They enjoy the “general power of governing,” including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. *National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 536 (2012) (opinion of ROBERTS, C. J.); U. S. Const., Amdt. 10.

⁵⁸ Public Law 91-596 Sec. 3 (5) – [29 U.S.C. § 652\(5\)](#) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

⁵⁹ See, e. g., [García v. San Antonio Metropolitan Transit Authority](#), 469 U. S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869).

899 **XIII THE PROPOSED EMERGENCY RESPONSE**
900 **STANDARD DOES NOT MEET THE REASONABLY**
901 **NECESSARY OR APPROPRIATE REQUIREMENTS OF**
902 **THE OSH ACT OF 1970**⁶⁰

903 Congress enacted the Occupational Safety and Health Act in 1970.⁶¹ The Act
904 created the Occupational Safety and Health Administration (OSHA), which is part
905 of the Department of Labor and under the supervision of its Secretary. The
906 Secretary is responsible to adopt and cause to be enforced occupational safety and
907 health standards that ensure “*safe and healthful working conditions.*”⁶² The Act
908 requires that such standards are to be “*reasonably necessary or appropriate.*”⁶³

909 In 1980 the U.S. Supreme Court, when addressing an OSHA standard to reduce
910 exposure to benzene, ruled that the DOL Secretary failed to meet the *reasonably*
911 *necessary and appropriate* requirement of the Act, and rejected the application of
912 general policy as a basis for rulemaking even when addressing a **particular**
913 hazard. The Court rejected the proposition that such a general policy may serve as
914 the basis for any rule and held that OSHA **must make an actual finding that the**
915 **workplace is unsafe** before it adopts a new standard.

916 The Supreme Court also concluded that the congressional intent in adopting
917 standards under the OSH Act was **not absolute safety, but instead cost-effective**
918 **reduction of significant harm in the workplace.**⁶⁴

919 The proposed OSHA ERS lacks adequate information to justify a transformative
920 and expansive policy that **supplants the existing fire brigade standard to**
921 **encompass all emergency response activities.**

922 *“A standard is neither “reasonably necessary” nor*
923 *“feasible,” as required by the Act, if it calls for*
924 *expenditures wholly disproportionate to the expected*
925 *health and safety benefits.”*⁶⁵

⁶⁰ [Indus. Union Dept. v. Amer. Petroleum Inst.](#), 448 U.S. 607 (1980) “A standard is neither “reasonably necessary” nor “feasible,” as required by the Act, if it calls for expenditures wholly disproportionate to the expected health and safety benefits... For we think it is clear that § 3(8) does apply to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment.”

⁶¹ [29 U.S.C. § 651 et seq.](#)

⁶² [29 U.S.C. §651\(b\)](#)

⁶³ [29 U.S.C. §652\(8\)](#)

⁶⁴ [Indus. Union Dept. v. Amer. Petroleum Inst.](#), 448 U.S. 607 (1980) Pp. 646-652 “... the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. **But “safe” is not the equivalent of “risk-free.”** ... “Therefore, before the Secretary can promulgate any permanent health or safety standard, he must make a threshold finding that the place of employment is unsafe in the sense that **significant risks are present and can be eliminated or lessened by a change in practices.** This requirement applies to permanent standards promulgated pursuant to § 6(b)(5), as well as to other types of permanent standards...” (emphasis added)

⁶⁵ Ibid.

926 If the OSHA ERS is implemented, OSHA projects an annualized benefit of \$2.6
927 billion and annualized costs at \$661 million. OSHA arrived at these values by
928 incorporating both local governmental organizations and volunteers who make up
929 the emergency response sector in its calculations. As example, according to Table
930 VIII-B-5 at FR 89, page 7855 “Summary Statistics by Fire Department Operator
931 for All Fire Department.” **95.7% of the departments are local governments**
932 **(including volunteers) and about 1.5% are private.** As stated, the results of the
933 cost/benefit analysis are irreparably flawed **because local governments are not**
934 **subject to OSHA standards or enforcement.** The Federal Register states:

935 *89 FR 7981 – “The objective of the proposed rule is to*
936 *reduce the number of injuries, illnesses, and fatalities*
937 *occurring among emergency responders in the course of*
938 *their work. This objective will be achieved by requiring*
939 *employers to establish risk management plans, provide*
940 *training and medical surveillance, establish medical and*
941 *physical requirements, develop standard operating*
942 *procedures, and provide other protective measures*
943 *enabling emergency responders to perform their duties*
944 *safely.”*

945 OSHA appears to be projecting annualized fiscal benefits based on the
946 implementation of a regulatory standard across the entire emergency response
947 sector, most of which is outside the scope of OSHA jurisdiction, dismissing the
948 fact that the States are already effectively regulating the emergency response
949 sector.⁶⁶

950 OSHA’s objective to achieve a safety standard for emergency responders **would**
951 **require direct regulation of local governmental departments and volunteers**
952 **as employers.** OSHA cannot legitimately achieve the necessary and feasible test
953 because the projected health and safety benefits require the Secretary to regulate
954 local governments as employers, and require units of local governments to report
955 directly to a federal agency regarding their internal affairs.⁶⁷

956 *“States are not mere political subdivisions of the United*
957 *States. State governments are neither regional offices nor*
958 *administrative agencies of the Federal Government. The*
959 *positions occupied by state officials appear nowhere on*
960 *the Federal Government’s most detailed organizational*
961 *chart. The Constitution instead “leaves to the several*
962 *States a residuary and inviolable sovereignty,” The*
963 *Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved*
964 *explicitly to the States by the Tenth Amendment.”*⁶⁸

⁶⁶ “Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.” - [National Federation of Independent Business v. OSHA](#) 595 U. S. ____ (2022).

⁶⁷ [Federal Register/Vol. 89, No. 24. Proposed Rule](#). Pg. 7981 E. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.

⁶⁸ [New York v United States](#) 505 U.S. 144 (1992).

965 Past court decisions on preemption of state law with the OSH Act focus on the use
966 of the commerce clause of Article I of the U.S. Constitution. Even in cases of
967 express statutory preemption, Congress is limited to the enumeration of Article I
968 powers. In this case OSHA may be seeking to preempt state prerogatives in an area
969 that even Congress itself cannot preempt. **The majority of emergency response**
970 **situations at the local level are internal operations of State police powers and**
971 **have no connection with interstate commerce** and therefore are likely outside of
972 Federal jurisdiction.⁶⁹ OSHA is attempting to quantify fiscal benefits from a
973 regulatory program that intrudes directly into an area that is the particular province
974 of state law and sovereignty.

975 *“When a regulation attempts to override statutory text,*
976 *the regulation loses every time—regulations can’t punch*
977 *holes in the rules Congress has laid down.”⁷⁰*

978 It appears impossible for OSHA to regulate emergency response activities without
979 illegitimately intruding into the domain of State and local police powers.

980 **XIV PLAN AND NON-PLAN STATES**

981 29 U.S.C. § 667 concerns State jurisdiction and preparation of State plans. We
982 believe that there is need for Congressional clarification of what the section directs,
983 and the degree to which Congress delegated authority to OSHA.

984 BLF is concerned that OSHA’s interpretation of the statute at 29 U.S.C. § 667 has
985 resulted in a national program that is seriously out of touch with the intent of
986 Congress in the OSH Act. While OSHA may historically have relied upon the
987 *Chevron* doctrine for deference to its technical expertise, if adopted and challenged
988 OSHA’s interpretation of 29 U.S.C. § 667 will be scrutinized under the permissive
989 standard in *Loper Bright Enterprises et al., v. Raimundo, Secretary of Commerce,*
990 *et al.* together with *Relentless, Inc., et al., v. Department of Commerce, et al.*
991 Further, and more importantly, the entire OSHA Emergency Response Standard
992 administrative record assumes a deference to the Agency’s interpretation of the
993 OSH Act that has been overruled, leaving OSHA responsible to defend the
994 reasonableness and statutory authority behind the ERS rule.

995 29 U.S.C. § 667(a) plainly states that any State agency or court can formally assert
996 jurisdiction over any occupational safety or health issue in the absence of an
997 applicable Federal standard:

⁶⁹ “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” United States v. Butler, 297 U. S. 1, 63 (1936); “State laws of general applicability, such as traffic and fire safety laws, would generally not be pre-empted, because they regulate workers simply as members of the general public. Pp. 104-108.”. Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association 505 U. S. 88 (1992)

⁷⁰ *Djie v. Garland*, 39 F.4th 280, 285 (5th Cir. 2022).

998 *“Nothing in this chapter shall prevent any State agency*
999 *or court from asserting jurisdiction under State law over*
1000 *any occupational safety or health issue with respect to*
1001 *which no standard is in effect under section 655 of this*
1002 *title.”*

1003 Each State, territory, or possession of the United States already regulates all
1004 aspects of emergency response within its jurisdiction through its police power,
1005 which refers to the States’ general power of governing.⁷¹

1006 Currently, there is no Federal emergency response standard under 29 U.S.C. § 655.
1007 (The fire brigade standard is not equivalent to the proposed emergency response
1008 standard). We recommend that the fire brigade standard be retained and made
1009 current as reported in these comments. As a result, as intended by Congress under
1010 the organic OSH Act, any State, regardless of whether it is a Non-Plan State or a
1011 Plan State, can assert its jurisdiction under State law over all aspects of emergency
1012 response. Indeed, the national emergency resposhspa

1013 Oshspa

1014 onse system is already regulated and conducted under State, Local, and Tribal law
1015 in exercise of their respective police powers. Federal department emergency
1016 response resources may be called upon to assist in emergency responses within
1017 their areas of operation on a non-interference basis through implementation of
1018 existing interlocal and mutual aid agreements as available and coordinated through
1019 applicable coordination centers.

⁷¹ [National Federation of Business v. Sebelius](#), 567 U.S. 519, 536 (2012). — “The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See e.g., [United States v. Comstock](#), 560 U.S. 126, 130 S.Ct. (1949), 176 L.Ed.2d 878 (2010). The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act.” ... “Our cases refer to this general power of governing, possessed by the States but not by the Federal Government as the “police power.” See e.g. [United States v. Morrison](#), 529 U.S. 598, 618—619, 120 S.Ct. 1740, 146 L.Ed..2d 658 (2000)”. ... “State sovereignty is not just and end in itself; Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” [New York v. United States](#), 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. [The Federalist No. 45](#), at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: “By denying any one government complete jurisdiction over all concerns of public life, federalism protects the liberty of the individual from arbitrary power.” [Bond v. United States](#), 564 U.S. 211, 22, 131 S.Ct. 2355, 2364, 180 L.Ed.2d. 269 (2011). ... “Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.”

1020 OSHA proposes to adopt an emergency response standard but has not yet
1021 published a final rule. The proposed ERS, if adopted, would be in immediate and
1022 material conflict with the emergency response standards and regulatory
1023 frameworks long-established and managed by the States. Such an action would be
1024 extraordinarily disruptive and would be an illegitimate intrusion into the States'
1025 police powers promoting public health, safety, and welfare. The States have
1026 jurisdiction. OSHA does not.

1027 The *Loper Bright* decision encourages emphasis on the plain reading of statutes
1028 with its insistence that it is up to the judiciary to interpret the statutes - not
1029 executive branch agencies. We remain confused as to why any State would
1030 relinquish its sovereignty to Federal OSHA by becoming a Plan State, and notably
1031 any plan state can withdraw from the OSHA program. **Reading 29 U.S.C. § 667**
1032 **without the *Chevron* doctrine renders it clear that Congress never intended**
1033 **for States to potentially surrender their sovereignty to the agency.** Instead, it
1034 affords each State an opportunity to formally assert jurisdiction for issues of
1035 occupational safety and health that OSHA had not already regulated under 29
1036 U.S.C. § 655.

1037 *29 U.S.C. § 667(b) Submission of State plan for development and enforcement of*
1038 *State standards to preempt applicable Federal standards.*

1039 This section's title represents the intent of Congress for section in 29 U.S.C. §
1040 667(b). That section mandates the process by which a State can preempt a standard
1041 that OSHA has already adopted. The process is for use by a State that did not assert
1042 its jurisdiction under State law prior to the date OSHA adopted a standard.

1043 Congress did not delegate authority for more than a single occupational safety or
1044 health issue to be included in a state plan that would be submitted to the Secretary
1045 for approval. Specifically, Congress did not require that if a State opts to enter into
1046 a state plan to preempt an OSHA standard that that same state must also adopt all
1047 subsequent standards that OSHA may promulgate within six months of those
1048 standards being adopted.

1049 OSHA has interpreted the section as authority for the creation of State-plan States
1050 which can be, in effect, regulated differently than States who do not choose to
1051 become Plan States. To do so, OSHA interpreted the Occupational Safety and
1052 Health Act as delegating that authority to the agency at 29 U.S.C. § 667(b). The
1053 *Loper Bright* decision overturned *Chevron* for the purpose of determining whether
1054 an agency has acted within its statutory authority during the rulemaking process,
1055 and courts no longer *must* defer to an agency's interpretation simply because a
1056 statute may be ambiguous. *Loper Bright* places responsibility for interpreting
1057 statutory ambiguities squarely where it belongs: In the judiciary.

1058 In this instance the statute at 29 U.S.C. § 667(b) is not ambiguous because it clearly
1059 states that the purpose of submitting a state plan is to facilitate State preemption of
1060 Federal standards. In fact, it is the *only* mention of preemption in the entire statute.
1061 The statute simply does not delegate authority to Federal OSHA to preempt state
1062 law. Nevertheless, OSHA has been using its interpretation of the State plan section

1063 in its proposal to achieve de facto⁷² preemption of existing State emergency
1064 response frameworks and standards, despite the fact the agency does not possess
1065 police power to regulate the States’ public health, safety, or welfare.

1066 Preemption is mentioned only twice in the regulations at 29 CFR Chapter XVII:⁷³
1067 once at 29 CFR § 1903.21, in reference to “*Nothing in this part 1903 shall preempt*
1068 *the authority of any State to conduct inspections, to initiate enforcement*
1069 *proceedings or otherwise to implement applicable provisions of State law...*”; and
1070 again at 29 CFR § 1953.3: “*Federal OSHA approval of a State plan under section*
1071 *18(b) of the OSH Act in effect removes the barrier of Federal preemption, and*
1072 *permits the State to adopt and enforce State standards and other requirements*
1073 *regarding occupational safety or health issues regulated by OSHA.*”

1074 Neither the Occupational Safety and Health Act nor 29 CFR Chapter XVII offer a
1075 statutory or regulatory definition for the term “*barrier of Federal preemption.*”

1076 It is noteworthy that OSHA **must** approve any State plan that preempts the
1077 agency’s standard if that plan meets the approval conditions at 29 U.S.C. § 667(c).
1078 The use of the word “*shall*” **makes approval a non-discretionary action** on the
1079 part of OSHA. Should OSHA reject or withdraw the State’s plan, the State has
1080 opportunity for judicial remedies.

1081 The term “*at least as effective*” is not defined in the Occupational Safety and
1082 Health Act, nor is it defined anywhere in 29 CFR Chapter XVII. *Black’s Law*
1083 *Dictionary, Tenth Edition* defines “*effective*” as:

1084 **effective** *adj.* (14c) ... **2.** Performing within the range
1085 of normal and expected standards.

1086 OSHA’s use of the term “*effective*” in its regulatory frameworks imply that it is
1087 not using the term as defined because performance “*within the range of normal*
1088 *and expected standards*” means that the performance could be better than what
1089 OSHA is putting forward, or that it could be less restrictive and still be within the
1090 range of expectation. Instead, OSHA says that a state’s standard must be “*at least*
1091 *as effective as*” OSHA’s.

1092 At 29 CFR § 1953.5(a)(1) OSHA inserts the word “*stringent*” as an alternative
1093 term being synonymous with “*effective*.”

1094 29 CFR §1953.5(a)(1) “*Where a Federal program change*
1095 *is a new permanent standard, or a more **stringent***
1096 *amendment to an existing permanent standard, the State*
1097 *shall promulgate a State standard adopting such a new*
1098 *standard, or more **stringent** amendment to an existing*
1099 *Federal standard, or an at least as effective equivalent*

⁷² **de facto** *adj.* [Law Latin “in point of fact”] (17c) **1.** Actual; existing in fact; having effect even though not formally or legally recognized. **2.** Illegitimate but in effect. *Black’s Law Dictionary, Tenth Edition.*

⁷³ [29 C.F.R. 1902.1 – 1987.110](#). State Plans for the Development and Enforcement of State Standards. Federal Regulations. 2024.

1141 OSHA states that a federal standard is necessary because, “... *based on evidence*
1142 *in the record, there is a compelling public need for a stricter, comprehensive*
1143 *standard under OSH Act legal standards.*”⁷⁴ We disagree. OSHA has not
1144 incorporated empirical evidence that is reviewable as required by the Data Quality
1145 Act.

1146 Without the inclusion of data, information, and evidence in a public record that
1147 documents the inadequacy of each State emergency response program, the
1148 administrative record is incomplete. Proceeding with the OSHA ERS will
1149 foreseeably disenfranchise the public in both plan and non-plan states. The purpose
1150 of the federalistic government-to-government consultation process prescribed in
1151 Executive Orders 13132 and 13175 is to receive input and not issue regulations in
1152 an administrative vacuum.

1153 On February 22, 2016, the Chairman of the Occupational Safety and Health State
1154 Plan Association (OSHSPA) sent a letter to the U.S. Department of Labor,
1155 Assistant Secretary for Occupational Safety and Health in response to discussions
1156 at the winter 2015 OSHSPA’s meeting.⁷⁵ That letter transmitted the results from a
1157 unanimous vote of the OSHSPA’s member states that directed the board to convey
1158 OSHSPA’s opposition to the proposed OSHA ERS and administrative process.

1159 The OSHAPA board stated its concerns as:

1160 “... *we have obvious and significant concerns about*
1161 *OHSA’s stated intent to adopt a regulation that would*
1162 *have a substantially disparate impact on employers and*
1163 *employees that fall primarily on under the jurisdiction of*
1164 *State Plans and not Federal OSHA.”*

1165 OSHSPA went on to articulate that it is inappropriate for OSHA to propose to
1166 regulate in the emergency response realm:

1167 “*OSHSPA believes that it is particularly inappropriate*
1168 *for OSHA to attempt to regulate an area — state and local*
1169 *government emergency response, including the coverage*
1170 *of volunteers in some State Plans — **in which it neither***
1171 ***has jurisdiction, experience nor expertise.**”*

1172 The OSHSPA board then addressed a significant unfunded mandates issue:

1173 “*If there ever was a regulatory undertaking that fit the*
1174 *definition of an unfunded mandate placed on States, it*
1175 *would be an OSHA rulemaking in the area of emergency*
1176 *response and preparedness.”*

⁷⁴ [89 FR 7845](#)

⁷⁵ [OSHSPA letter to the U.S. Department of Labor Assistant Secretary of Occupational Safety and Health](#), Subject: Emergency Response and Preparedness Rulemaking (RIN: 1218-AC91), February 22, 2016.

1177 The OSHSPA letter, contained in the administrative record, documented on-the-
1178 ground, Plan State financial concerns, and provided OSHA with the foreseeable
1179 consequences of continuing its trajectory of the OSHA ERS Rulemaking:

1180 *“State Plans with experience in such matters can foresee*
1181 *regulatory burdens posing a serious fiscal risk that could*
1182 *drive small paid and volunteer departments in primarily*
1183 *rural areas out of business. This would expose the general*
1184 *public to drastically increased response times waiting for*
1185 *a unit to be deployed from a larger municipality, and*
1186 *corresponding increases in serious and even fatal*
1187 *consequences for those who the emergency responders*
1188 *live to serve.”*

1189 The OSHSPA board then offered an alternative to the regulatory approach that
1190 OSHA was taking:

1191 *“OSHSPA strongly believes that, just as it is doing with*
1192 *Safety and Health Management Systems, OSHA should*
1193 *focus their emergency response and preparedness efforts*
1194 *at gathering information on hazards, consensus*
1195 *standards, best practices, costs and benefits. OSHA could*
1196 *then use that information in a nationwide outreach effort*
1197 *— coordinated with OSHSPA — and make the*
1198 *information available to those State Plans that want to*
1199 *undertake rulemaking.”*

1200 OSHSPA’s concerns clearly recommended a course correction that would be
1201 helpful to the regulated community in terms of improving the nation’s emergency
1202 response system in a non-prescriptive fashion. Astonishingly, the OSHSPA
1203 positions, articulated as a professional association that represents Plan States with
1204 subject matter expertise, were not even mentioned in the 250-page proposed
1205 OSHA ERS FR notice.

1206 On September 9, 2015, as part of the first meeting of the National Advisory
1207 Committee on Occupational Safety and Health Administration Subcommittee on
1208 Emergency Response and Preparedness, the Deputy Director of the OSHA
1209 Directorate of Standards and Guidance said:

1210 *“We also want to make sure that we do not ever come*
1211 *between an emergency and a rescue.”*

1212 As pointed out in the OSHSPA letter, the prescriptive ERS would do just that in
1213 its form, timing, and substance. As documented here, the approach used by OSHA
1214 for the proposed ERS will continue to exhibit downstream, readily foreseeable
1215 consequences.

1216 As reported in Table VII-B-5 *Summary Statistics by Fire Department Operator for*
1217 *all Fire Department[s]*⁷⁶ and BLF’s discussion on federalism, absent the “shared
1218 federalism” system of Plan States, OSHA has jurisdiction over approximately
1219 1.5% of all fire departments in the nation, representing only 1.3% of the individual
1220 responders (13,775 of 1,019,599 responders as reported by USFA in 2022). OSHA
1221 seeks to bring Plan State emergency responders under its regulatory framework
1222 through the requirement that State Plans over which it exercises programmatic
1223 approval authority be “at least as effective” as the OSHA standard. As noted,
1224 Congress has not defined the phrase “*at least as effective*”, nor has OSHA included
1225 a definition for its proposed ERS.

1226 The NACOSH Subcommittee on Emergency Response and Preparedness Meeting
1227 Transcript from the September 9, 2015, meeting states: “*We also want to make*
1228 *sure that we do not ever come between and emergency responder and a rescue[.]*”
1229 However, on page 148 at line 9 one of the people developing the proposed standard
1230 states “*So one of the things that I think we want to be specific about is ensuring*
1231 *that we do everything we can to discourage self-deployers ... and that people*
1232 *understand that as self-deployers, they will not enjoy the protections of an ESO*
1233 *[emergency services organization] umbrella ...*” Another participant clarifies at
1234 line 19 “*Those would be, if I may, individuals or companies responding to an*
1235 *incident outside the direction of an ESO.*” This directly conflicts with the
1236 imperative stated on page 16 at line 1.

1237 In the administrative record for its proposed ERS, OSHA has clearly not
1238 articulated the need for intervention in the structure and operation of the nation’s
1239 mature emergency response structure that is integral to state and local emergency
1240 response systems.

1241 The proposed OSHA ERS appears to be founded on a business-centric OSHA
1242 platform. Emergency response systems do not fit into business-centric models.
1243 Emergency response is the capability to address emergency disruptions of
1244 normalcy and not the ability to comply with business standards. As a result, the
1245 proposed OSHA ERS is not congruent with business standards.

1246 In its FR notice for the proposed ERS OSHA **incorporates by reference**
1247 **thousands of pages of other documents**, requiring regulated emergency
1248 responders and their organizations to review and consider them. OSHA itself does
1249 not appear to be familiar with those documents to sufficiently respond to the
1250 regulated community.

1251 The proposed OSHA ERS also would create conflicts with policies of other
1252 Federal agencies who have emergency response responsibilities. An example of
1253 this is potential conflict with Department of Transportation vehicle requirements.

⁷⁶ Table VII-B-5, 89 FR 7855.

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XVI CONCLUSIONS AND RECOMMENDATIONS

The proposed OSHA ERS is not workable in its present form and must be withdrawn:

- In proposing its ERS, OSHA has not adequately documented the impact to the long-standing national emergency response system controlled by the States and their political subdivisions through their general police power to regulate public health, safety, and welfare.
- The Federal government does not possess the necessary police power to impose a national programmatic emergency response standard that would be at least as effective as those managed by the States and their local governments.
- Imposition of OSHA’s proposed emergency response standard would be disruptive to the existing emergency response system. The prescriptive ERS appears to not have a value-added outcome, but instead would cause degradation in the timeliness, quality, and effectiveness of emergency response nationally.
- The administrative record is silent as to how - or if - OSHA reviewed non-regulatory approaches to the ERS that could provide value-added components to the management and operation of the national response system.
- The data presented at 89 FR 7774 does not provide a clear picture of the range of emergency response characteristics necessary for supporting revisions to the national emergency response system.
- OSHA should improve its awareness of the existing national response system and how various component entities interact to provide emergency response services across the nation. A nuanced understanding of how each element of the national response system interacts with the rest of the system is a prerequisite for either any prescriptive or non-regulatory alternatives.
- The cost-benefit analysis published in the Federal Register is irreparably flawed as OSHA errantly assumes that it has jurisdiction over States and units of local governments when making its cost-benefit calculations. As a result, the Secretary cannot reasonably represent that she has met the “*economically feasible*” or “*cost-effective*” factors^{77,78,79} required to conclude that the safety benefits of the OSHA ERS Rule have met the *appropriateness* standard.

⁷⁷ Int’l Union v. OSHA, 37 F3rd 665 (DC Cir 1994).

⁷⁸ [58 FR 16,612 and 16,614. March 30,1993.](#)

⁷⁹ Michigan v. EPA, 135 S. Ct 2699 (2015).

Attachment A

Freedom of Information Act Request

Proposed Emergency Response Standard FR Vol.89, No. 24 Proposed Rule

Budd-Falen Law Offices, L.L.C.

March 13, 2024

https://documents.boundarylinefoundation.org/OSHA_ERS/KBF-FOIA-Request-20240313.pdf


BUDD-FALEN LAW OFFICES
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TERESA L. SLATTERY ⁴
CONNER G. NICKLAS ⁵
RACHAEL L. BUZANOWSKI ⁶

¹ ALSO LICENSED IN ID & NM
² ALSO LICENSED IN NE, SD & ND
³ ALSO LICENSED IN CO & NM

⁴ ALSO LICENSED IN IL & TX
⁵ ALSO LICENSED IN CO & MT
⁶ ALSO LICENSED IN NE & KS

March 13, 2024

Mr. Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
200 Constitution Avenue NW, Rm S-2315
Washington, DC 20210
CERTIFIED RETURN RECEIPT # 9171 9690 0935 0285 1409 62

Ms. Seema Nanda
Solicitor
United States Department of Labor
Division of Management/Legal Services
200 Constitution Avenue NW, Rm S-2420
Washington, DC 20210
CERTIFIED RETURN RECEIPT # 9171 9690 0935 0285 1409 55

VIA: EMAIL AT foiarequests@dol.gov
FACSIMILE AT (202) 693-5389
CERTIFIED RETURN RECEIPT

**RE: Freedom of Information Act Request: Proposed Emergency Response
Standard FR VOL.89, No. 24 Proposed Rule Docket No. OSHA-2007-0073**

Dear Mr. Parker and Ms. Nanda:

On behalf of the Boundary Line Foundation and pursuant to the Freedom of Information Act (FOIA) at 5 U.S.C. § 552 and the Federal Advisory Committee Act at 5 U.S.C. § App., this letter requests that you transmit to this office within 20 business days all documents, letters, electronic mail correspondence, telephone logs or notes, and any related documentation pertaining to:

- 1. The establishment, conduct, attendees, charter, and procedural record of the subject matter expert subcommittee convened by OSHA for the Proposed Rule:**

“representing labor and management, career and volunteer emergency service management associates, other federal agencies, and State Plans, a national consensus standard organization, and general industry skilled support workers.”^{1,2}

2. **Electronic copies of the charter, all meeting agenda(s) and minute(s), attendee list(s), records-of-proceedings and findings from the Small Business Advocacy Review Panel that was convened in the fall of 2021 described as:^{3,4}**

“The Panel, comprising members from the Small Business Administration’s (SBA) Office of Advocacy, OSHA, and OMB’s Office of Information and Regulatory Affairs, listened to and reported on what Small Entity Representatives (SERs) from entities that would potentially be affected by the proposed rule had to say. OSHA provided SERs with the draft regulatory language developed by the NACOSH subcommittee for their review and comment. The Panel received advice and recommendations from the SERs and reported its findings and recommendations to OSHA.

3. **All documents, records, notices, minutes, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132,⁵ including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance with the following:**

(b) *“...no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless:*
(2) *...the agency, prior to the formal promulgation of the regulation:*

¹ See FR Vol. 89, No. 24 at 7775.

² 5 U.S.C. App. § 9. **Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy.**

³ Ibid. FR Vol. 89, No. 24 at 7775.

⁴ 5 U.S.C. App. § 10. **Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance.**

⁵ Section 6 (c)(1),(2), Consultation. Executive Order 13132. August 4, 1999. **Federalism.**

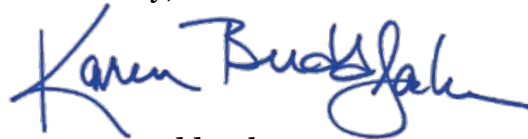
- (A) consulted with State and local officials early in the process of developing the proposed regulation;
- (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and,
- (C) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.”

I also request that if you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that I be provided with all non-exempt portions that can reasonably be segregated.

If your agency encounters problems in providing this information, please let this office know so that appropriate arrangements can be made before the statutory deadline. I can be reached at the phone number above or via email at karen@buddfalen.com. In addition, please contact me if the estimated cost of responding to this request for information exceeds three hundred and fifty dollars (\$350.00).

Thank you in advance for your cooperation.

Sincerely,



Karen Budd-Falen
Budd-Falen Law Offices, LLC

KBF/sw

xc via email: Jim Carlson, Boundary Line Foundation

Attachment B

Freedom of Information Act Request Response

From Andrew Levinson, Director

Directorate of Standards and Guidance

U.S. Department of Labor, Occupational Safety and Health Administration

May 13, 2024

https://documents.boundarylinefoundation.org/OSHA_ERS/OSHA-FOIA-Response-20240513.pdf



May 13, 2024

Karen Budd-Falen
Budd-Falen Law Offices, LLC
300 East 18th Street, Post Office Box 346
Cheyenne, WY 82003-0346
Email: karen@buddfalen.com

Dear Ms. Budd-Falen:

This letter is in response to your March 13, 2024, request under the Freedom of Information Act (FOIA) to the Department of Labor (FOIA 2024-F-07885). You requested documents pertaining to the Emergency Response proposed rule. Specifically, you requested “all documents, letters, electronic mail correspondence, telephone logs or notes, and any related documentation pertaining to”:

1. “The establishment, conduct, attendees, charter, and procedural record of the subject matter expert subcommittee convened by OSHA for the Proposed Rule” or the National Advisory Committee on Occupational Safety and Health (NACOSH) subcommittee for the emergency response proposed rule,
2. “Electronic copies of the charter, all meeting agenda(s) and minute(s), attendee list(s), records-of-proceedings and findings from the Small Business Advocacy Review Panel that was convened in the fall of 2021”, and
3. “All documents, records, notices, minutes, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132, including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance with [sections 6(b)(2) and (c) of E.O. 13132].”

During its search, OSHA located the following publicly available records that are responsive to your request:

1. NACOSH subcommittee – Documents related to the NACOSH subcommittee work is publicly available in Docket #OSHA-2015-0019 and can be accessed here [Regulations.gov](https://www.regulations.gov). The materials include the charge to the subcommittee, meeting agendas, meeting transcripts, subcommittee members, and exhibit lists. NACOSH documents related to the Emergency Response report are available in Docket #OSHA-2016-0001 and can be accessed here [Regulations.gov](https://www.regulations.gov). The materials include the final NACOSH

Emergency Response and Preparedness (ERP) Subcommittee report to the full NACOSH committee. [Document ID OSHA-2016-0001-0111](#).

2. SBAR Panel – Documents related to the work of the SBAR panel are publicly available on OSHA’s Emergency Response Small Business Regulatory Enforcement Fairness Act (SBREFA) proposed rule webpage here [Emergency Response SBREFA | Occupational Safety and Health Administration \(osha.gov\)](#) and in Docket #OSHA-2007-0073 on [Regulations.gov](#). The materials include the documents for the Small Entity Representative (SER) review (Document IDs [OSHA-2007-0073-0096](#), [0097](#), [0100](#)) and the final report of the of the Emergency Response SBAR panel (Document ID [OSHA-2007-0073-0115](#)).
3. Federalism consultation – As noted in the Notice of Proposed Rulemaking for the Emergency Response proposed rule, OSHA did not conduct any consultative services pursuant to Executive Order No. 13132. See [89 FR 7774](#), 7998 (Feb. 5, 2024). Therefore, OSHA has located no responsive records. As such, we are issuing to you a no record response on this item.

In the event that you are seeking non-public records related to the NACOSH subcommittee, the SBREFA SBAR panel and OSHA’s Federalism activity related to the emergency response rule beyond the public records noted above, it is likely that a search for any potentially responsive records would be time consuming and costly and would significantly exceed the payment amount you have authorized (\$350) for the processing of this request. We have determined that you are a commercial requester for fee purposes under FOIA and the hourly rate, in accordance with the regulations published under 29 CFR 70.40, would be as follows:

Search Fee @ \$40.00 per hour
Review Fee @ \$40.00 per hour

In addition, if the Department needs to conduct a search of the agency’s server by a computer programmer, there is an additional charge of \$105 per hour. Please note that there may be additional costs for the reproduction of any responsive records found. Also, until OSHA has reviewed any responsive records, it cannot determine whether such records will be subject to any of the FOIA exemptions and therefore not subject to reproduction. 5 U.S.C. § 552(b).

If you have questions about OSHA’s response to your request or would like for OSHA to provide a cost estimate for a broad search of potentially responsive records, please contact the Directorate of Standards and Guidance at 202-693-1950 or osha.dsg@dol.gov.

You have the right to appeal OSHA’s determination regarding the public records found in this search and your status as a commercial requester with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statements or arguments. The appeal should also include a copy of your initial request and a copy of this letter. If you appeal, you may mail your appeal to: Solicitor of Labor, U.S. Department of Labor, Room N-2420, 200 Constitution Avenue, NW, Washington, DC 20210 or fax your appeal to (202) 693-5538. Alternatively, you may email your appeal to

foiaappeal@dol.gov; appeals submitted to any other email address will not be accepted. The envelope (if mailed), subject line (if emailed), or fax cover sheet (if faxed), and the letter indicating the grounds for appeal, should be clearly marked: "Freedom of Information Act Appeal.

In addition to filing an Appeal, you may contact the Department's FOIA Public Liaison, Thomas G. Hicks, Sr. at (202) 693-5427 or hicks.thomas@dol.gov for assistance in resolving disputes. You also may contact the Office of Government Information Services (OGIS) for assistance. OGIS offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may mail OGIS at the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001. Alternatively, you may email or contact OGIS through its website at: ogis@nara.gov; Web: <https://ogis.archives.gov>. Finally, you can call or fax OGIS at: telephone: (202) 741-5770; fax: (202) 741-5769; toll-free: 1-877-684-6448.

It is also important to note that the services offered by OGIS are not an alternative to filing an administrative FOIA appeal.

Sincerely,

Andrew Levinson, Director
Directorate of Standards and Guidance

Attachment C

Letter: February 22, 2016 Occupational Safety
and

Health State Plan Association,

James Krueger, Chair

To:

David Michaels, Assistant Secretary for Occupational Safety and Health
United States Department of Labor

https://documents.boundarylinefoundation.org/OSHA_ERS/State-Plan-Association-Letter-to-OSHA-Asst-Sec-20160222.pdf



Occupational Safety & Health State Plan Association

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651.284.5741 Fax

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Directors

Janet Kenney
Washington

Ken Tucker
Connecticut

Steve Hawkins
Tennessee

Dan Bulkley
Wyoming

Treasurer

Resty Malicdem
Nevada

February 22, 2016

David Michaels, PHD, MPH
Asst. Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

SUBJECT: Emergency Response and Preparedness Rulemaking (RIN:
1218-AC91)

Dear Assistant Secretary Michaels:

Thank you for attending last week's Occupational Safety and Health State Plan Association's (OSHSPA) winter meeting in Phoenix, AZ, and taking the time to discuss occupational safety and health issues important to all of us. OSHSPA greatly values the partnership that has developed between OSHA and the State Plans through many years of open and honest interaction supported by you and other Assistant Secretaries and numerous State Plan representatives.

In that spirit of openness and honesty, I wanted to take this opportunity to reiterate OSHSPA's position regarding OSHA's current Request for Information regarding Emergency Response and Preparedness.

Although we understand that OSHA's rulemaking efforts are in its early stages, the efforts of the Emergency Response and Preparedness subcommittee of the National Advisory Committee on Occupational Safety and Health (NACOSH) were discussed at length by OSHSPA members last week. Our membership is greatly concerned about the direction that the subcommittee is taking and a motion was passed unanimously directing the OSHSPA Chair and Board of Directors to express OSHSPA's opposition to the proposed rulemaking in its current iteration for the reasons outlined below.

While OSHSPA fully supports OSHA's efforts to gather information about the many and serious hazards faced by emergency response personnel in such tragic episodes as the 2013 explosion in the city of West, Texas, we have obvious and significant concerns about OSHA's stated intent to adopt a regulation that would have a substantially disparate impact on employers and employees that fall primarily under the jurisdiction of State Plans and not Federal OSHA.

While it is clearly appropriate for OSHA to consider using its regulatory authority to address emergency response hazards that are faced by federal employers and employees working on exclusive federal enclaves, OSHSPA believes that it is particularly inappropriate for OSHA to attempt to regulate an area – state and local government emergency response, including the coverage of volunteers in some State Plans – in which it neither has jurisdiction, experience nor expertise.

If there ever was a regulatory undertaking that fit the definition of an unfunded mandate placed on States, it would be an OSHA rulemaking in the area of emergency response and preparedness. Conservative estimates would have to place the percentage of covered employers and employees for such a regulation at 75-90% state and local government jurisdiction. Since the rules would not apply to state and local government agencies in states under federal jurisdiction, the proposed rules would result in a patchwork of coverage with no protection for many of the nation's emergency responders. OSHSPA believes that OSHA could use its resources to gain greater protection across the nation if focused instead on developing consensus standards and building partnerships with emergency responders in states where OSHA has jurisdiction.

State Plans with experience in such matters can foresee regulatory burdens posing a serious fiscal risk that could drive small paid fire departments and volunteer departments in primarily rural areas out of business. This would expose the general public to drastically increased response times waiting for a unit to be deployed from a larger municipality, and corresponding increases in serious and even fatal consequences for those who the emergency responders live to serve.

It appears that six State Plans currently have standards that address emergency responders and/or firefighters to some degree, and there may be others that would consider rulemaking if they had sufficient information and resources for the undertaking. OSHSPA strongly believes that, just as it is doing with Safety and Health Management Systems, OSHA should focus their emergency response and preparedness efforts at gathering information on hazards, consensus standards, best practices, costs and benefits. OSHA could then use that information in a nationwide outreach effort – coordinated with OSHSPA - and make the information available to those State Plans that want to undertake rulemaking.

OSHSPA feels that such an approach – a major national outreach effort combined with encouraging State Plans to undertake rulemaking – would be the most effective, timely and appropriate approach to improve the safety and health of our emergency responders and assure the continued protection of the general public.

Thank you for your dedication to the safety and health of America's employees and employers.

Sincerely,



James Krueger, Chair
Occupational Safety and Health State Plan Association

cc: OSHSPA Membership

Attachment D

Federal Register Notice, Vol. 89, No. 24

Monday, February 5, 2024

Emergency Response Standard

https://documents.boundarylinefoundation.org/OSHA_ERS/FR-Proposed-Emergency-Response-Standard-20240205-pg.7774-Highlighted.pdf