In Search of OSHA

Philip J. Harter

SINCE its creation in 1970, the Occupational Safety and Health Administration (OSHA) has managed to alienate almost everyone. Employers find its regulations confusing and frequently unrelated to occupational safety or health, and its inspectors rude, arbitrary, and not conversant with the applicable regulations. The unions, arguing that the incidence of occupational disease and injury has not decreased since OSHA began operations, fault the agency for not promulgating the tough standards that would help to reduce the toll. *Business Week* has awarded OSHA the distinction of being the agency "hardest to live with," and members of Congress report more complaints about OSHA than about any other agency. OSHA even has internal troubles, reflected in low staff morale. Only the raconteurs are pleased—for the agency has provided them with a seemingly endless source of "OSHA stories," absurd examples of well-intentioned regulation gone amuck.

Much, if not all, of this dissatisfaction stems from a single source: OSHA's failure to develop an intellectually sound philosophy for its operations. Unless such a philosophy is developed, OSHA will continue to be *the* example of faulty government regulation and could face substantial statutory revision or even extinction.

The premise of this article is that there is now, as there was in 1970 when OSHA was established, a need for some sort of intervention to ensure that workers do not unduly subsidize industry with their personal safety and health. Though I recognize the importance of achieving efficient regulation in which marginal costs equal marginal benefits and recognize also the *theoretical* attractiveness of a regulatory program based exclusively on financial incentives, these matters are beyond the scope of this article. My purpose here is to explore some of the practical reasons for OSHA's problems in meeting its objectives through the use of mandatory standards. In my view, mandatory standards for occupational safety and health should not be abandoned simply because our first attempt with them has been so badly bungled: present difficulties could be avoided if there were sufficient determination on the part of the agency's policy-makers.

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The Beginnings

By way of background, the reported injury rate of American workers climbed sharply in the 1960s, making it evident to many that the diverse state safety programs, based on consultation and voluntary compliance with existing standards, were inadequate. Concern also developed about the adverse consequences of rapid technological change. Moreover, the economy was buoyant, which meant that Congress felt freer than it might have otherwise to create a new regulatory program that imposed costs on U.S. industry. Congress considered the question of how to regulate the work place for several years but most of the

debate, unfortunately, centered on the appropriate structure for setting and enforcing standards and for judging violations. Little attention was given to the hard questions necessary to establish a policy on which future standards could be based.

For this and other reasons, OSHA's problems begin with the act that created it, the Occupational Safety and Health Act of 1970. Congress wanted OSHA to start life on the run, so it required the agency to

> promulgate all national consensus standards and . . . established Federal standards unless [it] determines that a standard would not result in improved safety or health for all or some of the affected employees. . . . The purpose of this procedure is to establish as rapidly as possible national occupational safety and health standards with which industry is familiar [Senate Report 91-1282].

The agency thus spent its earliest days searching for standards, making "quick and dirty" determinations of whether they would increase safety in the work place, and hastily editing them into regulatory language. Most of the standards came from two sources: (1) the Walsh-Healy Act minimum requirements for firms that seek to do business with the government and, more important, (2) consensus standards that had been worked out over the years by industry standard-setting committees for industry's voluntary use.[1]

OSHA's editors converted consensus standards into mandatory safety rules by doing two things. First, the exhortatory "shoulds" were changed to "shalls" (indeed, a few "shoulds" escaped the editing), so that standards that were never intended to be mandatory were made so. The ladder standard, for example—covering twenty-two pages of fine print in the *Code of Federal Regulations*—was a manufacturing specification, not a safety regulation, and therefore contains much that is irrelevant to safety. Second, in many cases the editors simply cut out the words that defined the circumstances to which the standards applied, so that a standard that might have been perfectly appropriate in a limited situation was imposed across the board. This explains the OSHA regulation that solemnly prohibited employees from putting ice in drinking water. The industry standard from which that rule came was designed to keep workmen who were cutting ice on ponds from using that ice in their drinks because of the likelihood of contamination. With one sweep of a pen, a reasonable precaution was rendered ludicrous.

Perhaps OSHA could have been more careful than it was in deciding whether a standard would enhance safety. Certainly it would thereby have avoided some of its larger embarrassments. Perhaps, also, it could have been a little more careful in its editing. But the act directed that this work be done "as soon as practicable" and gave OSHA little flexibility to modify existing standards (though it did give the agency two years to adopt or reject existing standards). In any case, within six months of its creation, OSHA occupied an entire volume in the *Code of Federal Regulations* and hundreds of additional standards were incorporated by reference into the code.

Deficiencies in Standards and Approach

Deficient standards, along with some of the requirements of the Occupational Safety and Health Act, meant that the politics of OSHA's beginnings were very different from the norm. Usually the political momentum that moves a proposal for a new agency through the Congress spills over into the agency itself, so that its staff goes about the task of figuring out how to attack the problem at hand with youthful zeal. In OSHA's case, however, this zeal was spent on establishing a code that then had to be torn down and rebuilt. Like Sisyphus, the agency had to roll a rock uphill that promptly rolled back down on top of it. The adverse

[1]A "national consensus standard," as defined in Section 3(9) of the Occupational Safety and Health Act, is an "occupational safety and health standard . . . which has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby . . . persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption [and which] was formulated in a manner which afforded an opportunity for diverse views to be considered."

Most of the consensus standards that OSHA adopted initially were developed under the auspices of the American National Standards Institute. That institute has revised most of the standards that form the basis of OSHA's regulation and has also developed new standards for situations covered in OSHA's code only by the general clauses.

reactions of the business community to the standards—and to their administration at the hands of OSHA's officials—were translated into protests to Congress. This in turn rapidly chilled OSHA's already tepid support, making its task all the more difficult.

What are the major problems with OSHA's standards and its approach to regulation?

Four Levels of Regulation. One problem is that four separate levels of regulation are superimposed on each other. The first is the statutory general-duty clause of the 1970 act, which requires employers to provide a work place "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees (Section 5). The second is a slightly more specific general clause applicable to a broad category of situations. For example, the clause covering machine guarding—the sixth most frequently cited OSHA regulation, from which stems 39 percent of all serious machinery violations—provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc. [29 *Code of Federal Regulations* § 1910.212(a)].

This standard is general, performance-oriented and vague: terms like "such as," "examples," and "etc." indicate that only a partial list is provided, and no guidance is given on what must be done to comply. The third level of regulation concerns performance requirements applicable to a particular machine or situation.

The final level is the one most frequently complained of—the detailed specifications. They specify such things as the number of rivets required in a guard. They require, for example, that there must be a work-rest one-eighth inch from a grinding wheel, regardless of the size of the work-piece. (But when large pieces are being worked on, a work-rest that close to the wheel can interfere with the operation while not providing any more safety than a work-rest adjusted specifically for the task at hand. It should be noted in the last year alone, 6,400 citations were issued for violating this standard.) And a most famous example is the ladder standard, which includes such helpful details as the Latin names of the woods that are acceptable for constructing ladders and a requirement that extension ladders must be erected "so that the upper section is resting on the bottom section."

Gaps among the Minutiae. Because of the origin of its standards, many of the detailed standards that OSHA adopted were contrary to accepted industry practices at the time and some were hopelessly antiquated. Moreover, among all the minutiae and specificity, there were—and still are—significant gaps. This is especially true in the health area where there were no voluntary standards to be taken over. But it is also true in the safety area where the standards available for adoption neither specified details for nearly all of the operations that should be covered nor set forth broad policies—and certainly did not reflect a coherent philosophy.

For example, the section on machine guarding contains detailed standards on only seven different types of machines: woodworking, cooperage, abrasive wheels, mills and calendars in the rubber and plastics industries, mechanical power presses, forging, and mechanical power transmissions. In the opinion of professional safety engineers, these standards reach at most only 15 percent of the kinds of machines now in general use and are so narrowly drawn that a machine similar to one that is described in the regulation might not be covered by it. Machines not covered by a specific standard include printing presses, steel mills, metal cutting saws, compactors, shears, and conveyors. These and many others are governed only by the general-duty clauses. Neither the statutory general-duty clause nor the one generally applicable to machinery gives the employer, the employee, or the compliance officer guidance as to what is required. Moreover, even in those instances where the standards do cover a particular machine, the coverage may be inadequate. For example, although the safety of an abrasive wheel is critically dependent on the speed at which the wheel is operated, there is no standard limiting excessive speed. Finally, some outright contradictions appear in the detailed standards.

Congress was aware of the deficiencies in the existing standards when it required OSHA to adopt them. As Senate Report 91-1282 stated:

> . . . a large proportion of the voluntary standards are seriously out of date [and] many represent merely the lowest common denominator of acceptance by interested private groups. Accordingly, it is essential that such standards be constantly improved and replaced as new knowledge and techniques are developed. In addition, there are many occupational hazards—particularly those affecting health—which are not covered by any standards at all.

That is to say, Congress contemplated that OSHA would speedily revamp the standards. However, it burdened the agency with an organization and approach that did not make that task easy.

Diffusion of Responsibilities. The act creating OSHA assumes that, in general, the agency will consult with the National Advisory Committee on Occupational Safety and Health (NACOSH) about the administration of the act. If relations with NACOSH are to remain harmonious, the group must be kept apprised of major developments, especially if a major policy is to be adopted. Research for the establishment of standards, however, is not within the control of OSHA or NACOSH, nor even the Department of Labor. Rather it is conducted by the National Institute for Occupational Safety and Health (NIOSH), which is part of the Department of Health, Education, and Welfare. Once the research is completed, the assistant secretary of labor for occupational safety and health, who is OSHA's chief executive officer, may either appoint an ad hoc advisory committee to recommend a proposed standard or have the standard drafted within OSHA. Because of the structure of the Department of Labor, the lawyers who serve OSHA, and who are necessary to draft a standard, report not to the head of OSHA but to the solicitor of labor, who in turn reports directly to the secretary of labor. And because of the recent requirement for economic impact statements on new regulations, OSHA must also coordinate standards with the assistant secretary of labor for policy, evaluation, and research. Finally, when a citation for the violation of a standard is issued, a company may contest it in a proceeding before the Occupational Safety and Health Review Commission (OSHRC), an independent agency created by the Occupational Safety and Health Act.[2] While it is not the purpose of this commission to second-guess OSHA on the wisdom or philosophy of a particular standard, its interpretations of the statute and OSHA's standards can have important and unsettling effects on the final determination of policy. For example, OSHRC determined, contrary to the view of OSHA, that the term "feasible" (which limits the stringency of health standards) includes economic considerations and that a firm therefore need not comply with an OSHA requirement if it would be unduly costly to do so. Until the controversy over the meaning of the word "feasible" is resolved by the courts, OSHA's enforcement of that particular standard is made far more difficult than it was ever thought it would be.

To be sure, NIOSH has provided valuable information to OSHA, the Labor Department's lawyers have made up for some deficiencies within OSHA, and the separation of OSHRC from OSHA can be viewed as an embodiment of the Madisonian theory of separation of powers.[3] But given the normal tendency of government agencies to adopt their own schedules and priorities and to be unresponsive to other agencies, it is at best difficult for OSHA to generate the momentum necessary to adopt a new standard or change an existing one.

Problems of Compliance. Not only were many of the detailed standards seriously out of date, but some were inconsistent with other regulatory requirements. Under the regime of advisory consensus standards, companies could choose not to follow one that was technologically obsolete or in conflict with others—but no longer. On top of this, company managements have worried that if OSHA should revise its standards at an early date, they

[2] A citation includes both the allegation that the standard was violated and a proposed time period within which the company must correct the violation.

[3] One of the benefits that might be expected from a Madisonian separation of powers would be that the legislative side (OSHA) would issue clearly defined rules in order to limit the power of the judicial side (OSHRC). Madison was also aware that separation would cause inefficiency—an inefficiency that would protect us from despotism—but only that part of the theory has materialized thus far. (See *The Federalist,* nos. 48 and 51.)

would have to abandon investments made to meet the first batch of standards in order to comply with still newer obligations. And the standards themselves are often so technical that it is difficult for anyone other than a professional engineer to understand them even when the ultimate concept is relatively simple.

What is perhaps a more serious difficulty stems from the great number of situations for which there is no specific, applicable standard. In these instances, a company has difficulty in knowing whether it is complying with the law or what it should do to comply. Before investing large sums of money, many firms have wanted some sort of assurance that their efforts would meet with OSHA's approval. The natural inclination was to seek advice from OSHA on what must be done or on whether a proposed approach would be satisfactory. Unfortunately OSHA is statutorily prohibited from providing on-site consultation.

The agency came into being partly because of union dissatisfaction with state safety programs in which the relevant state agency would advise companies on how to meet their obligations. Charging that the follow-up on the advice was inadequate, the unions insisted that, with OSHA, each inspection of a work place must result in a citation if a violation was discovered. As a result, OSHA is not permitted to issue warnings or to provide specific advice on how to comply with its requirements, since if it were to consult with a company on its premises it might become aware of a violation and would be required to issue a citation.[4] To be sure, general advice is provided by OSHA (in off-site discussions) and by state programs, but the inability to secure firsthand advice has produced frustration and considerable friction between the business community and OSHA.

Another reason why firms have not made investments to comply with the standards is the low penalty for noncompliance. An employer who "willfully or repeatedly" violates the general-duty clause of the standards is subject to a $10,000 fine, but an employer who is guilty of a "serious" violation—one with a "substantial probability that death or serious physical harm could result"—is liable for a maximum fine of only $1,000. Curiously, the same $1,000 fine applies for a "non-serious" violation—though the imposition of any fine is discretionary for nonserious offenses but mandatory for serious ones. Indeed, in 30 percent of the citations for nonserious offenses no fine has been imposed, the employer being ordered only to bring his operations in line within a prescribed time. Overall, the average fine has been around $600 for a serious violation and around $25 for a nonserious violation. The small fines irritate businessmen while failing to provide any pressure for compliance.

Thus, a logical response for a company is to do nothing until coerced following an inspection—and the probability of being inspected is low indeed for any but the inherently dangerous operations. When the compliance officers appear, more problems arise. Many of them are ill equipped for the job, lacking either the training or necessary temperament. But even the best of them has an impossible task: If company managements cannot figure out what the standards require, how can the compliance officer do so when confronted with a new situation and required to make a quick judgment in any one of many technical disciplines? What are compliance officers to do when faced with a saw that is used to cut plastic or plywood and there is no standard applicable to either? Do they impose the standard applicable to saws used for woodworking, impose a consensus standard that was not adopted by OSHA, or try to figure out whether one of the vague general clauses might have been violated? If they choose the last option (whether for saws *or* something else), businesses complain heatedly that compliance officers are making up requirements right in the plant.

Making Haste Slowly

If these problems are so evident, why has nothing been done?

For reasons that may never be explained, Secretary of Labor James Hodgson did not appear to notice any shortcomings when the

[4] In partial response to the outcries resulting from the requirement that OSHA issue a citation whenever it became aware of a violation, Congress provided in OSHA's appropriations bill for the fiscal year 1977 that OSHA would be prohibited from issuing a citation for nonserious violations discovered during first inspections unless ten or more offenses were found.

standards were promulgated in 1971. He proudly announced that the package was "both comprehensive and comprehensible." Less than a year later, however, in the President's Report on Occupational Safety and Health (May 1972), the secretary reported that a major effort was under way to revise and extend the safety standards. Indeed, OSHA had decided that revision had to be its highest priority—that it had to eliminate unreasonable specificity, put more emphasis on performance-based standards, and fill the gaps before new standards could be developed. Many changes were made. For the most part, however, they involved weeding out the absurdities—standards such as the prohibition on putting ice cubes in drinking water—and making minor editorial alterations.

Notwithstanding the congressional directive to update and revise the original standards, notwithstanding the bitter complaints from business and labor, and notwithstanding the agency's own announced intentions, the vast bulk of OSHA's current standards are still the original ones. In fact, no comprehensive revision has taken place and only a handful of standards (mainly for health) has been added. Those that were out of date in 1970 are more out of date now, and certainly the mere passage of time has done nothing to make them easier to understand or to extend their coverage to needed areas.

Of course, with suitable resolve, OSHA might have revised the standards and improved its administration. But the Occupational Safety and Health Act, as we have noted, creates a bias in favor of the original standards, and the organizational structure is a nightmare that makes any creative action difficult. Moreover, Congress provided no guidance on the revision or future promulgation of safety standards, and only sketchy and ambiguous criteria for the promulgation of health standards. In addition, the act complicates the task of revision by requiring not that the court review rules to determine whether the agency acted "arbitrarily or capriciously" (the normal requirement) but that judicial review must be based on the "substantial evidence test" (a standard that usually applies only to the review of adversary proceedings). This means that the agency must develop a strong factual basis for any change in a rule instead of predicating it on a simple change in policy. Finally, the act, like many new statutes, requires the agency to hold a hearing on a proposed standard if anyone requests it. Many believe that this requirement prolongs the regulation-development process and diminishes any momentum that has been built up for revision.

While each of these provisions may be a little unusual, they would not have to be inhibiting—if only OSHA had known where it was going and why. For example, OSHA expeditiously developed and promulgated a standard covering vinyl chloride when it became apparent that something must be done, and quickly. The rulemaking machinery can respond when necessary.

Perhaps the largest obstacle to reform is that it is always more difficult to revise a regulatory system than to build one from the ground up. When a program is being initiated, all interested parties can participate in the dialogue, and the agency will be able to explain why a particular approach best suits its needs. But when the agency wants to make a change, those who benefit from the status quo will defend it, arguing that change represents an abdication of responsibility to a competing interest group. This charge carries great political weight, because one of the parties is now losing something it already has rather than not getting something it seeks.

Steps toward Reform

Responding to intense criticism, OSHA has taken several steps toward comprehensive reform. On April 23, 1976, the agency published a notice in the *Federal Register* announcing "a new procedure to obtain data necessary for possible revision of certain standards regulating workplace safety hazards." The announcement requested public comment on several general matters that had to be considered, the agency said, in any comprehensive reform of its safety standards—matters such as how to simplify and clarify the standards, which standards are irrelevant to work-place safety, where coverage is incomplete, and what are the relative merits of performance or design standards. These matters are nearly identical to those OSHA had raised in its abortive effort at revision back in 1972.

Moreover, OSHA did not present any position or discussion of its own. Thus in its first leap forward, OSHA begged all the questions. And, as of August 1977, not one proposed revision has been issued.

Shortly after the April 1976 notice was published, President Ford created a task force to aid OSHA in its revision process. The task force developed a model for safety standards that could be used to increase safety in the work place while alleviating the difficulties inherent in the complex, detailed, but narrowly prescribed, current standards.[5] The approach taken by this model is to specify the types of hazards associated with the use of machinery and then to require all machines to be "installed, safeguarded, operated, and maintained at all times in a manner which protects all employees from traumatic injury or death resulting from the hazards enumerated." Should this approach be adopted, an employer would have flexibility in choosing which methods or what equipment to use to safeguard employees, but would be given an explicit and illustrative guide on *a way* to comply with the standard, should he or she desire to use it. OSHA requested public comment on the task force's approach, the first time since its birth that the agency had sought to establish a guiding philosophy for its safety regulation.

Late this spring (May 19), Secretary of Labor Ray Marshall and Assistant Secretary Eula Bingham announced a new policy for OSHA. The agency would concentrate, they said, on developing health standards and on eliminating the "needlessly detailed, complicated or unclear" safety standards—Secretary Marshall remarking (according to the *Washington Post*) that the "worst thing about wasting time and money on nitpicking regulations is that you shortchange the fight against the most serious dangers to human life and limb in high-risk workplaces." The response was immediate and highly positive. But the same theme had been stressed in each of the last five years by a succession of Labor Department officials—without result. More recently (August 5, 1977), the White House announced the formation of a new high-level task force to examine the feasibility of supplementing OSHA's mandatory safety standards with a regulatory system based on financial incentives.[6]

Concluding Remarks

Clearly, OSHA faces a monumental task if it is to reach its statutory goal of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." And, just as clearly, the agency will not be able to win the cooperation necessary to do this so long as its safety regulations are a source of irritation and ridicule throughout the United States. Only time will tell whether the Carter administration will follow through and make it possible for OSHA to do what it was set up to do. If there is follow-through, it might well be directed at solving the specific practical problems listed here. It is at least arguable that there is a baby (if not yet a very prepossessing one) in the bathwater and that we do not yet have to throw both of them out. ■

[5] For a detailed exposition of this model, see *OSHA Safety Regulation: Report of the Presidential Task Force,* Paul W. MacAvoy, ed., Ford Administration Papers on Regulatory Reform (Washington, D.C.: American Enterprise Institute, 1977).

[6] Apparently, the original concept was that this task force would find ways of *replacing* the safety standards with financial incentives. In response to objections from organized labor and Congress, the concept was changed to one of *supplementing* the standards with such incentives. (Compare *Wall Street Journal,* July 18, 1977, page 14, with the President's August 5 statement.)

Waterway User Charges

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tation mix. But they would also produce politically unpopular side effects, such as higher costs to ship by barge, resulting in higher prices for those goods. Both the Senate and the House have tried to minimize these, the Senate by stipulating that waterway user charges amount to no more than 1 percent of the value of the commodity shipment (including transportation charges), and the House by setting low user charges.

H.R. 8309 faces a serious floor fight—with opposition from the barge operators, who seek, at most, a token fuel tax, and from others, like the Carter administration, who have supported more substantial users' fees as the price of replacing Locks and Dam 26.