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REASONABLE RULEMAKING UNDER OSHA: IS IT FEASIBLE?

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At its inception, the Occupational Safety and Health Act (OSHA) of 1970[1] was hailed as the most promising labor legislation since the National Labor Relations Act. The purpose of OSHA, as stated in the preamble, is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[2] OSHA authorizes the Secretary of Labor to promulgate and enforce occupational safety and health standards.[3] Congress has extended the federal regulatory power of the Act to apply to all business affecting interstate commerce.[4] Penalties are assessed against employers who fail to comply with the established standards. The severity of the penalty depends upon the degree of danger involved and whether the violation was willful or repeated.[5] A quasi-judicial review commission, independent of the Department of Labor, adjudicates contested violations at a hearing similar to a civil trial.[6]

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1. 29 U.S.C. §§ 651-678 (1970).

2. *Id.* § 651. For a general discussion of the impact and scope of the Act, see Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788 (1972); Gross, *The Occupational Safety & Health Act: Much Ado About Something*, 3 LOYOLA CHI. L.J. 247 (1972); Spann, *The New Occupational Safety and Health Act*, 58 A.B.A.J. 255 (1972); White and Carney, *OSHA Comes of Age: The Law of Work Place Environment*, 28 BUS. LAW. 1309 (1973); Comment, *The Occupational Safety and Health Act of 1970: An Overview*, 4 CUM.-SAM. L. REV. 525 (1974).

3. 29 U.S.C. §§ 651(3), (10), 654(2) (1970).

4. *Id.* § 651(3). It is estimated that the Act currently applies to four million businesses and fifty-seven million employees. The only workers excluded are those covered by other "specialized" federal job safety programs. *See* Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788 (1972). One such specialized job safety program is the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1970 & Supp. V 1975).

5. 29 U.S.C. § 666(e). Monetary penalties of as much as $20,000 may be assessed. A willful violation resulting in the death of an employee may be punished by a fine and as much as six months imprisonment. *Id.* § 666(e). An employer who is cited for violation may either pay the fine or contest the citation. If he chooses to contest the citation, however, he must give notice of his intent to do so within fifteen working days from the time of issuance. *Id.* § 659(a).

6. *See id.* § 661. The employer is given a neutral forum in which to litigate an alleged violation. The Occupational Safety and Health Review Commission, which presides over the enforcement trial, consists of three members appointed by the President for six year terms. *Id.* § 661(a), (b) (1970). The Secretary of Labor is cast in the role of prosecutor before the

Since 1970, the Department of Labor has vigorously regulated the American working environment by promulgating and enforcing thousands of OSHA standards.[7] Consequently, the Act has gained the reputation among businessmen as the epitome of insensitive bureaucracy and excessive governmental regulation.[8] Enforcement of the Act is meeting stiff resistance and there have been numerous challenges to the Secretary of Labor's rulemaking authority.[9] This article will discuss the development by the federal courts of substantive limitations on this rulemaking authority.

OVERVIEW OF THE PROMULGATION PROCESS

National Consensus Standards

During the first two years under the Act, the Secretary of Labor was given the authority to promulgate "national consensus standards" without any public hearings or comment.[10] The American

Commission. In practice, however, a hearing examiner appointed by the Chairman of the Commission hears the case first. The hearing is very much like a civil trial. *See* Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788, 797 (1972). The proceeding is on the record, and the Federal Rules of Civil Procedure are applicable unless other rules are adopted by the Commission. 29 U.S.C. § 661(f) (1970). If the employer is denied review by the Commission or is adversely affected by the result which was reached by the Commission, he must give notice of appeal within 60 days. *Id.* § 660(a). The Secretary may also appeal an order of the Commission by giving notice in the same manner. *Id.* § 660(b).

7. Over 5,000 highly technical standards have been promulgated to date. 315 EMPL. SAFETY & HEALTH GUIDE (CCH) 1 (May 26, 1977).

8. President Carter in a recent speech to employees of the Labor Department stated: "Of all the beneficial legislation that has been passed by Congress in recent years the one that has the best prospect of improving the lives of American workers and the one that had the most adverse acceptance, has been the OSHA program." 301 EMPL. SAFETY & HEALTH GUIDE (CCH) 1 (Feb. 17, 1977). In a May 19, 1977 press conference Secretary of Labor Ray Marshall stated that OSHA had been "everyone's favorite whipping boy" because of the implementation of overly specific and insignificant regulations. 315 EMPL. SAFETY & HEALTH GUIDE (CCH) 1 (May 26, 1977).

9. The Secretary of Labor enforces the Act through compliance officers who make unscheduled inspections of businesses and may issue citations for alleged violations. 29 U.S.C. § 658(a) (1970). The authority of the Secretary to make inspections without a search warrant has been challenged. *See* Marshall v. Barlow's, Inc., ___U.S. ___, 97 S. Ct. 776, 50 L. Ed. 2d 739 (1977), where the Supreme Court granted a stay pending appeal from a lower court decision which held warrantless searches under OSHA to be illegal.

10. 29 U.S.C. § 655(a) (1970). A "national consensus standard" is defined as a standard which: (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered, and (3) has been designated as such a standard, after consultation with other appropriate federal agencies. *Id.* § 652(9).

National Standards Institute (ANSI), a private organization which operates as a clearinghouse and coordinating agency for voluntary standardization in the United States, was principally responsible for the development of many of these standards. Through the appointment of committees representing all of the interests affected, ANSI formulates voluntary safety standards.[11] In order to give OSHA an immediate impact, the Secretary of Labor adopted *in toto* a large number of the ANSI standards, thereby making them mandatory.[12] Some of these standards have proven to be unworkable since they were never intended to be either mandatory or universally enforced.[13] The Secretary no longer has the authority to promulgate nationally recognized standards without utilizing regular promulgation procedures.[14]

Formulating Proposed Standards: NIOSH and the Advisory Committee

Two institutions are integral parts of the OSHA rulemaking process: the National Institute for Occupational Safety and Health (NIOSH) and the Advisory Committees. While OSHA authorizes the Secretary of Labor to promulgate and enforce standards, it also authorizes the Secretary of Health, Education, and Welfare to research, develop, and recommend such standards to the Secretary of Labor.[15] NIOSH is a division of the Department of Health, Educa-

11. A consensus must be reached of those having substantial concern with a standard's scope and provisions. In standardization practice a consensus is achieved when substantial agreement is reached by concerned interests according to the judgment of a duly appointed authority. Consensus implies much more than the concept of a simple majority but not necessarily unanimity.

AMERICAN NATIONAL STANDARDS INSTITUTE, GUIDE FOR THE DEVELOPMENT OF AMERICAN NATIONAL STANDARDS (1972).

12. 36 Fed. Reg. 10,466-10,714 (1971). The legislative history of § 655(a) states:

The purpose of this procedure is to establish as rapidly as possible national occupational safety and health standards with which industry is familiar. These standards may not be as effective or as up-to-date as is desirable, but they will be useful for immediately providing a nationwide minimum level of health and safety.

[1970] U.S. CODE CONG. & AD. NEWS 5182.

13. *See* AFL-CIO v. Brennan, 530 F.2d 109, 115 n.15 (3d Cir. 1975), where the court stated, "[t]he speed with which the federal standards were adopted precluded mature consideration of their merits by OSHA." Approximately 25% of all previously promulgated national consensus standards are now being revised because of their deficiencies. *See* 316 EMPL. SAFETY & HEALTH GUIDE (CCH) 3 (June 1, 1977).

14. 29 U.S.C. § 655(a) (1970).

15. *Id.* § 669(a)(2). NIOSH and the Secretary cooperate in such areas as research, record keeping, and the setting of priorities. *See id.* §§ 655(g), 657(c).

tion, and Welfare and operates independently from OSHA, which is within the Department of Labor.

An example of the work performed by NIOSH is the development of exposure standards for toxic chemicals and carcinogenic materials. With each chemical or material in question, NIOSH conducts animal experiments, medically monitors workers exposed to toxic substances, and suggests regulatory standards.[16] It then prepares a "criteria document" which summarizes the physical or chemical properties of the hazard, describes environmental measuring techniques and recommends a safe level of exposure. The Act does not require NIOSH to consider the economic consequences of the proposed standard on the affected industry when developing a criteria document.[17] Instead, NIOSH must give a strictly scientific evaluation to the Secretary of Labor.[18] The political choice of balancing safety against cost is left solely to the Secretary of Labor.[19]

The Secretary of Labor may, at his discretion, appoint an advi-

16. Section 669(a)(3) of the Act provides that:

> The Secretary of Health, Education, and Welfare, on the basis of such research, demonstrations, and experiments, and any other information available to him, shall develop criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are safe for various periods of employment, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy as a result of his work experience.

Id. § 669(a)(3).

17. Although NIOSH does not wholly disregard practical considerations, it is the Secretary's ultimate responsibility to balance the economic consequences of a standard with the degree of safety to be afforded workers. *See* 29 U.S.C. § 655(b)(5) (1970).

18. In Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), the union challenged the asbestos exposure standard issued by the Secretary because it did not set a level of exposure as low as NIOSH had recommended in its criteria document. *Id.* at 472. The union argued that the criteria for determining a safe level of asbestos exposure used by NIOSH were binding on the Secretary and that no deviation would be allowed unless the Secretary found the level to be economically or technologically unfeasible. *Id.* at 476. That interpretation of the Act would have bound the Secretary of Labor to the findings of fact made by NIOSH, and permitted him to consider only economic and technological factors. The court of appeals rejected this interpretation and held that criteria determined by NIOSH are advisory rather than mandatory. *Id.* at 477.

19. It is the Secretary rather than NIOSH who conducts hearings and receives the comments of interested persons. The Secretary may also appoint a special advisory committee to assist him in his standard-setting functions, and receive recommendations from it, as he did here.

> The Act, or so it seems to us, must be taken as contemplating that the Secretary may consider all of this information as well as that received from NIOSH.

Id. at 477. Congress has made the NIOSH recommendations binding as to mine safety standards. Under the Coal Mine Health and Safety Act, NIOSH actually sets the lawful standard protecting the health of coal miners. *See* 30 U.S.C. §§ 801-960 (1970 & Supp. V 1975).

sory committee to recommend a specific standard on a safety or health problem.[20] The committee must be balanced with members from labor, industry, and government and the committee may hold public hearings and receive written comments before voting to recommend a standard to the Secretary of Labor.[21] In *National Roofing Contractors Association v. Brennen,*[22] the plaintiffs contended that a standard directed toward preventing construction workers from falling off roofs was invalid because the composition of the advisory committee included only general contractors, not roofing contractors. The plaintiff roofing contractors contended this was insufficient to insure their representation. The court denied this contention, holding that the roofing contractors were not *ipso facto* prejudiced by the fact that no member of the committee specifically represented them, because the economic interests of the general contractors and the roofing contractors were sufficiently similar to insure that the roofing industry was not prejudiced.[23] The court also indicated that the advisory committee, as constituted, was competent to determine suitable safety standards.[24] The purpose of an advisory committee, however, is not merely to insure that competent representatives are allowed to develop a standard (NIOSH serves that purpose); rather, its purpose should be to develop standards that are workable in light of the competing economic forces. Unless an advisory committee is balanced according to the statutory

20. 29 U.S.C. § 656(b) (1970). The Act also provides for a National Advisory Committee of 12 members selected "upon the basis of their experience in the field of occupational safety and health." *Id.* § 656(a). Their duty is to advise, consult, and make recommendations to the Secretary concerning matters of occupational safety and health. *Compare id.* § 656(a) *with id.* § 656(b). The National Advisory Committee, which can make any general recommendation to the Secretary, should not be confused with the discretionary advisory committees which may be appointed to examine particular health or safety problems. *See id.* §§ 656(a), (b) (1970).

21. The statute provides that:

> An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 655 of this title. Each such committee shall consist of not more than fifteen members and shall include as a member one or more designees of the Secretary of Health, Education, and Welfare, and shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved, as well as one or more representatives of health and safety agencies of the States.

Id. § 656(b).

22. 495 F.2d 1294 (7th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).

23. *Id.* at 1296.

24. *Id.* at 1296.

mandate, the courts should remand the standard to the Secretary for lack of proper compliance with the Act.[25]

Promulgation Procedures

After receiving advisory committee recommendations, the Secretary may proceed to promulgate a standard.[26] A proposed standard must be published in the Federal Register to give notice to interested parties. Written comments or data concerning a standard are received for thirty days following publication and a public hearing may be requested during this thirty day period.[27] Unlike the trial-type hearing used for litigating an alleged violation, the promulgation hearing gives interested parties an opportunity to present their positions, and thus affect the outcome of an essentially legislative process. Although the promulgation hearing is legislative in character, it does have some of the features of a trial-type hearing: an administrative judge presides, there is a limited right of cross-examination, and a verbatim record is made.[28] The Secretary added these trial-type procedures because the judicial review standard requires that there be some form of evidentiary record.[29] Within 60

25. *See* Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 506 F.2d 385 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975). In that case, the court viewed the role of the advisory committee as being more significant. The Secretary had appointed an advisory committee to recommend a safe exposure level for the carcinogen methlene bis(2-chloroani-line) (MOCA). *Id.* at 388. He then published the proposed MOCA standard a month before the committee made its recommendation. The court held this error was sufficient to require a remand of the standard. *Id.* at 389-90. The Secretary is not permitted to publish his proposed rule until after the advisory committee has made its recommendations. *See* 29 U.S.C. § 655(b) (1970).

26. 29 U.S.C. § 655(b)(1) (1970).

27. *Id.* § 655(b)(3).

28. 29 C.F.R. § 1911.15 (1976) provides that:

> The oral hearing shall be legislative in type. However, fairness may require an opportunity for cross-examination on crucial issues. The presiding officer is empowered to permit cross-examination under such circumstances. . . .
>
> Although any hearing shall be informal and legislative in type, this part is intended to provide more than the bare essentials of informal rulemaking under 5 U.S.C. 553 [Administrative Procedure Act]. The additional requirements are the following: (1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105. (2) The presiding officer shall provide an opportunity for cross-examination on crucial issues. (3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

29. The Secretary stated in relevant part that:

> [S]ection 6(b)(3) provides an opportunity for a hearing on objections to proposed rule making, and section 6(f) provides in connection with the judicial review of standards, that determinations of the Secretary shall be conclusive if supported by substantial evidence in the record as a whole. Although these sections are not read as requiring a

days after the expiration of the period provided for the submission of written data, or within 60 days after the oral hearing if one is requested, the Secretary must issue his standard or make a determination that a rule should not issue.[30] The Secretary must state the reasons for the action taken when a standard is adopted as well as when it is determined that the standard should not issue.[31]

The procedural requirements are relaxed for the promulgation of emergency temporary standards. Although the Secretary may issue such a standard without notice or a hearing, he can only do so in cases where grave danger exists and where a standard is necessary to protect the worker from the danger.[32] The Secretary must promulgate a permanent standard within six months of the publication of the emergency standard.[33]

SUBSTANTIVE JUDICIAL REVIEW

Applicable Standard for Review

The United States courts of appeal may review the validity of any OSHA standard prior to its enforcement.[34] The Act specifically provides that the Secretary's findings must be upheld if "supported by substantial evidence in the record as a whole."[35] Applying the substantial evidence standard to OSHA regulations has proven to be frustrating for the federal circuit courts because it is difficult to apply such a reviewing standard to legislative policy choices. A rule

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rulemaking proceeding within the meaning of the last sentence of 5 U.S.C. 533(c) requiring the application of the formal requirements of 5 U.S.C. 556 and 557, they do suggest a Congressional expectation that the rulemaking would be on the basis of a record to which a substantial evidence test, where pertinent, may be applied in the event an informal hearing is held.

29 C.F.R. § 1911.15 (1976).

30. 29 U.S.C. § 655(b)(4) (1970).

31. *Id.* § 655(e).

32. The U.S. Code provides that:

The Secretary shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the *Federal Register* if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

Id. § 655(c)(1).

33. *Id.* § 655(c)(3).

34. *Id.* § 655(f). It has also been held that the validity of a standard may be attacked for the first time in an enforcement proceeding. *See* I.T.O. Corp. v. Occupational Safety & Health Review Comm'n, 540 F.2d 543, 545, 547 (1st Cir. 1976); Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n, 534 F.2d 541, 550 (3d Cir. 1976).

35. 29 U.S.C. § 655(f) (1970).

or decision of an administrative agency is normally subject to either of two standards of judicial review: the substantial evidence test[36] or the arbitrary and capricious test.[37] The substantial evidence test is a standard which requires that the agency base its decision upon an evidentiary record. It is this "on the record" limitation which gives the test its real meaning. The reviewing court is obliged to take the record compiled by the agency and decide if the record as a whole supports the rule or adjudication. *Post hoc* rationalizations will not support a rule under this test.[38] The Administrative Procedure Act applies the substantial evidence test to formal rulemaking or adjudication. Under formal rulemaking or adjudication procedures, the agency is required to have an evidentiary hearing in which affected parties may participate.[39] Adjudicatory hearings are adversary in nature. For example the Occupational Safety & Health Review Commission conducts a factual inquiry to determine if there was a violation of the Act by a particular employer. The finding of "guilt or innocence" by the Commission is tested by the appellate court upon the basis of an evidentiary record.[40]

The arbitrary and capricious standard, on the other hand, is normally applied to informal agency rulemaking.[41] Pursuant to the informal rulemaking model of the Administrative Procedure Act, a rule is promulgated after notice in the Federal Register and after all interested parties have had an opportunity to comment. The informal rulemaking procedure is similar to a legislative hearing.[42] The arbitrary and capricious standard requires only that the agency have a reasonable basis for its decision. Although the test is difficult to define, it is similar to the standard applied by the courts in reviewing the constitutionality of an act of Congress.[43] It is clear,

36. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1970).

37. *See id.* § 706(2)(A).

38. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).

39. Administrative Procedure Act, 5 U.S.C. § 553(c) (1970 & Supp. V 1975) and § 556 (1970).

40. 29 U.S.C. § 660(b) (1970).

41. Administrative Procedure Act, 5 U.S.C. § 706 (1970).

42. In Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), the court described the promulgation hearing: "The testimonial pattern generally was for the witnesses to read long statements, at the close of which they were subject to cross-examination. The questions actually asked tended to be few, sporadic, and perfunctory, and the record resembles nothing so much as that of a typical legislative committee hearing." *Id.* at 471 n.9.

43. For a discussion of the application of the arbitrary and capricious standard and the substantial evidence test to informal rulemaking, see Verkuil, *Judicial Review of Informal*

however, that the courts do not give a regulatory agency the kind of deference accorded Congress. Recently the United States Supreme Court stated that regardless of the reviewing standard applied, the courts should engage in a substantial inquiry and that an agency's judgments are not shielded "from thorough, probing, in-depth review."[44]

Although the substantial evidence test and the arbitrary and capricious test are sometimes regarded as different by the courts, the standards are often hard to distinguish in their practical application.[45] A court applying the arbitrary and capricious test will generally look to the evidentiary record, if any, for guidance. The "on the record" limitation of the substantial evidence standard does limit an agency's power to some degree. When a regulation is challenged, the agency must support it from the record; and although not theoretically distinct, the two standards do reflect judicial attitudes which may affect the outcome of a case. The substantial evidence test has been called active judicial review because the reviewing court is allowed more involvement in actually digesting and weighing the evidence, while the arbitrary and capricious standard has been characterized as "soft" judicial review.[46] The Secretary's rulemaking procedures are a mixture of the informal and formal type. A rule may be promulgated without a hearing if one is not requested. If a hearing is held, it is not adjudicatory in nature but legislative. Yet the Act requires that the reviewing court apply the substantial evidence test to the Secretary's standards.[47] The requirement to apply the substantial evidence test to the legislative type rulemaking of the Secretary resulted from a compromise in the

Rulemaking, 60 VA. L. REV. 185 (1974); Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975); 10 LOY. L.A.L. REV. 270 (1976).

44. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). It has been suggested that this decision puts more "bite" into judicial review under the arbitrary and capricious test and that the courts do not regard agency rulemaking with traditional deference. *See* Note, *Judicial Review of the Facts in Formal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1755 (1975).

45. *See* Associated Indus., Inc. v. United States Dep't of Labor, 487 F.2d 342, 350 (2d Cir. 1973). As one commentator noted, "[i]t is difficult to imagine a decision having no substantial evidence to support it which is not also arbitrary." Note, *Judicial Review Under the Occupational Safety and Health Act: The Substantial Evidence Test As Applied to Informal Rulemaking*, 1974 DUKE L.J. 459.

46. *See* Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1751-52 (1975).

47. *See* 29 U.S.C. § 655(f) (1970).

joint House-Senate OSHA conference committee.[48]

There has been some difficulty in determining what items should comprise the record which the reviewing court should consider. This issue was raised in *Dry Color Manufacturers' Association, Inc. v. Department of Labor,*[49] a case in which the Secretary had set standards for levels of exposure to fourteen chemicals. The employers who challenged these standards sought to strike some documents from the record which had been certified by OSHA, on the ground that the Department of Labor did not consider them in formulating the standards.[50] The Secretary argued that he should be entitled to certify any document which NIOSH had considered. Since NIOSH was meant to be his scientific advisor, the Secretary felt that he could rely on summaries and recommendations from NIOSH and certify as part of the record any item considered by NIOSH.[51] The court, which reversed the case on other grounds, declined to strike the documents, but the Secretary was admonished for failing to read documents which were put into the record.[52]

This case indicates that the Secretary must read all the studies, experiments, and references considered by NIOSH in preparing its criteria document, before such materials can be considered as evidence by the court. It seems NIOSH personnel should read the materials relied upon in preparing criteria documents, but that the Secretary of Labor should not have to repeat this task. The purpose of NIOSH is to advise the Secretary on technical scientific matters, and not merely to compile a bibliography. NIOSH's criteria documents, as well as the material relied upon and included therein, should be a part of the record. Interested parties have an opportunity to contest the materials which form the basis of the criteria

48. According to legislative history the substantial evidence test was demanded by the Senate as a trade for accepting the informal rulemaking procedures of the House version. *See* Associated Indus., Inc. v. United States Dep't of Labor, 487 F.2d 342, 347-48 (2d Cir. 1973).

49. 486 F.2d 98 (3d Cir. 1973).

50. *Id.* at 108.

51. *Id.* at 108.

52. *Id.* The court stated:

> By "considered" we take it is meant "read;" a document merely included on a bibliography sent by NIOSH to OSHA and not actually read by anyone in either agency would clearly not belong in the record.

Id. at 108 n.16.

> [I]t would be the better practice, in the absence of unusual circumstances, for OSHA, in certifying the record on any petition filed with this court, to designate specifically any items certified which have not been read by it prior to its publication of standards, such as those where it relies on summaries prepared by NIOSH.

Id. at 108.

document by offering their own studies as evidence at the hearing or by simply making written comments. Despite the rather restrictive view taken in *Dry Color* each of the following has been considered on appeal by the reviewing courts: advisory committee recommendations, NIOSH criteria documents, testimony at oral hearings, comments of interested parties, and a report to the United States Senate.[53]

The first case in which the substantial evidence test was applied to one of the Secretary's standards was *Associated Industries of New York State, Inc. v. United States Department of Labor.*[54] In that case, the employers challenged the Secretary's standard which set minimum lavatory requirements for non-industrial places of business. The Secretary had promulgated this revised standard to reduce the number of lavatories required for office and non-industrial businesses. The initial regulation adopted by the Secretary was based on an ANSI standard which required more lavatories than did the standard being attacked. A hearing was held at which there was testimony by industrial representatives and also by representatives of labor and health organizations. The court held that the testimony supported a finding that a standard on lavatories was a legitimate health concern, but that there was no support for the exact numerical requirements of the OSHA standard.[55] The Secretary contended that the Act only required that the underlying factual determinations be supported by substantial evidence in the record and that when the Secretary makes a policy decision, that decision should be upheld unless arbitrary or capricious. As applied to this case, the court would require substantial evidence to support the finding that some minimum lavatory requirement was needed, but the ultimate determination of the required number would not have to be supported by an evidentiary record. Judge Friendly, writing for the Second Circuit, went to great length to explain the difficulties involved in applying the substantial evidence test to legislative-type decisions. Nevertheless, the court held that all of the Secretary's

53. Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1306 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975) (testimony at oral hearings and comments of interested parties); Industrial Union Dep't. AFL-CIO v. Hodgson, 499 F.2d 467, 476 (D.C. Cir. 1974) (NIOSH criteria documents); National Roofing Contractors Ass'n v. Brennan, 495 F.2d 1294, 1295-96 (7th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (advisory committee recommendations); Florida Peach Growers Ass'n, Inc. v. United States Dep't of Labor, 489 F.2d 120, 125 (5th Cir. 1974) (comments of interested parties and senate report).

54. 487 F.2d 342 (2d Cir. 1973).

55. *Id.* at 352.

findings, both as to facts and policy, must be supported by substantial evidence.[56] Since the exact numerical requirements of the lavatory standard were not supported in the evidence, the court invalidated the standard.[57]

The District of Columbia Circuit took a different view as to the way in which the substantial evidence test should be applied to informal rulemaking. In *Industrial Union Department, AFL-CIO v. Hodgson,*[58] the union attacked the Secretary's standard which set the maximum exposure level to asbestos dust. The union contended that the Secretary did not set the most protective level of exposure feasible. The court recognized that it was helpful to make a distinction between purely factual findings and legislative policy judgments and held that the substantial evidence rule must be applied to the factual basis of a standard if possible, but policy choices will be upheld if not arbitrary or capricious. The court found that:

> [I]n a statute like OSHA where the decision making vested in the Secretary is legislative in character, there are areas where explicit factual findings are not possible, and the act of decision is essentially a prediction based upon pure legislative judgment, as when a Congressman decides to vote for or against a particular bill. . . . [S]ome of the questions involved in the promulgation of these standards are on the frontiers of scientific knowledge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.[59]

The court recognized that the primary purpose of judicial review of administrative action is to assure that the decision was not made arbitrarily or irrationally.[60]

The *Hodgson* opinion, however, does not delineate between factual determinations and policy choices. In *Society of Plastics Industries, Inc. v. OSHA*[61] the plastics industry challenged the Secretary's standard for exposure to vinyl chloride. The record clearly indicated that vinyl chloride was a health hazard, a fact which the industry conceded. In the *Plastics Industries* case, thirteen vinyl chloride

56. *Id.* at 354.
57. *Id.* at 347-50.
58. 499 F.2d 467 (D.C. Cir. 1974).
59. *Id.* at 474-75.
60. *Id.* at 474-75.
61. 509 F.2d 1301 (2d Cir.), *cert. denied,* 421 U.S. 992 (1975).

workers had died from an extremely rare liver disease, but there was little or no evidence as to the exact level of exposure which would be safe for man.[62] The court agreed with the analysis of the *Hodgson* court as to the nature of judicial review and held that where policy determinations are not susceptible to evidentiary development, they will be upheld unless arbitrary or capricious.[63] If the Secretary were required to show evidence in the record which clearly supported the exact level of exposure permitted, it would reduce judicial review of a standard to a morbid body-count analysis. As OSHA is preventative in nature, the Secretary must have the power to set a standard with a margin of safety, even when no firm evidence can be marshalled to show that such margin is absolutely necessary.

The power of the Secretary to set a standard with a margin of safety was also considered in *Synthetic Organic Chemical Manufacturers Association v. Brennan.*[64] This was yet another case dealing with a standard which regulated exposure to an expected carcinogenic chemical, ethyleneimine. Unlike vinyl chloride in the *Plastics Industries* case, however, there was no evidence that this chemical had ever caused cancer in man. The Secretary's standard rested solely upon two scientific studies which showed that ethyleneimine caused cancer in rats. The court again recognized the difficulty in applying the substantial evidence test to this kind of record and held that the Secretary's evidence of the danger of ethyleneimine to man was "not really a factual matter . . . but in the nature of a recommendation for prudent legislative action."[65] The Third Circuit also followed the standard for judicial review set forth in *Hodgson* but articulated it somewhat differently.[66]

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62. The evidence did show that an exposure level of fifty parts per million caused cancer in rats. *Id.* at 1305.

63. *See id.* at 1308.

64. 503 F.2d 1155 (3d Cir. 1974), *cert. denied,* 420 U.S. 973 (1975).

65. *Id.* at 1159. The court stated:

> If the issue to be reviewed were merely whether EI [ethyleneimine] was carcinogenic in rats and mice, we believe that we could point to the Walpole and Innes studies and safely conclude that the Secretary's determination of animal carcinogenicity was supported by substantial evidence. But the extrapolation of that determination from animals to humans is not really a factual matter. . . . It seems to us that what the Secretary has done in extrapolating from animal studies to humans is to make a legal rather than a factual determination. He has said in effect that if carcinogenicity in two animal species is established, as a matter of law §§ 6(a) and 6(b)(5) [of OSHA] require that they be treated as carcinogenic in man. This is in the nature of a recommendation for prudent legislative action.

Id. at 1159.

66. *Id.* at 1160. The Court set forth a five step procedure for reviewing OSHA standards:

In *Society of Plastics Industry, Inc. v. OSHA*,[67] the initial determination of whether vinyl chloride was hazardous to man was viewed as a factual issue, as there was evidence of that chemical's danger to man. The substantial evidence test can be applied to such a determination. However, the ultimate decision on the margin of safety needed to protect workers exposed to the hazard was viewed as a legislative-type policy determination to which the arbitrary and capricious standard must be applied.[68] The court in *Synthetic Organic Chemical Manufacturers Association,* made the distinction between "factual determinations" and "policy-choices" at a more basic level than in the *Plastics Industries* case. Because there was no evidence that the chemical in question was harmful to man, the Secretary's conclusion that this substance was dangerous to man, was a leap of faith not susceptible to evidentiary justification.[69] The ability to apply the substantial evidence rule obviously depends upon the degree to which a particular decision is susceptible to evidentiary development.

Industrial Union Department, AFL-CIO v. Hodgson[70] has emerged as the leading decision on judicial review of the Secretary's standards. The approach taken by Judge Friendly in *Associated Industries, Inc. v. United States Department of Labor*[71] proved itself to be unworkable in these later cases dealing with carcinogens and it appears that perhaps an incorrect result was reached in that case. Compared to the cases dealing with carcinogens, there was overwhelming evidence to uphold the exact numerical requirement for the lavatory standard. ANSI, the National Plumbing Code, the Basic Plumbing Code, and the health codes of five states all recom-

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(1) determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the action taken;

(2) determining whether the Secretary's promulgation adequately sets forth reasons for his action;

(3) determining whether the statement of reasons reflects consideration of factors relevant under the statute;

(4) determining whether presently available alternatives were at least considered; and

(5) if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

Id. at 1160.

67. 509 F.2d 1301 (2d Cir.), *cert. denied,* 421 U.S. 992 (1975).

68. *Id.* at 1304.

69. *See id.* at 1308.

70. 499 F.2d 467 (D.C. Cir. 1974).

71. 487 F.2d 342, 352 (2d Cir. 1973).

mended standards as stringent as the one promulgated by the Secretary.[72] To the extent that a policy choice may be supported by evidence, this record indicated that several reasonable decision-making bodies had reached the same conclusion as did the Secretary. In view of this support, it is difficult to see how the Secretary's lavatory standard would have been held to be arbitrary or capricious, had that test been applied. Although twelve states had lavatory requirements less stringent than that promulgated by the Secretary, a federal agency operating under a broad remedial mandate should have the authority to go beyond what a majority of the states have decided is an appropriate health regulation. Indeed, one reason for the passage of the Act was that state occupational safety and health regulations were thought to be inadequate.[73]

Review of Emergency Standards

Emergency temporary standards are also reviewed under the substantial evidence test, but since emergency standards may be promulgated without any notice, hearing, or opportunity to comment, the reviewing court will probably be presented with a severely abbreviated record.[74] This, of course, will accentuate the problem of applying the substantial evidence test to emergency standards. Furthermore, an emergency standard can be issued only where there is a showing of "grave danger" to the worker. This has caused the courts to require more evidence to support the issuance of a temporary emergency standard.[75]

In *Dry Color,* the Secretary had issued emergency standards covering fourteen chemicals thought to be carcinogens, the plaintiffs challenged the standard with regard to two chemicals: ethyleneimine (EI) and dichlorobenzedine (DCB). Just as in the *Synthetic*

72. *Id.* at 352. In comparison, there was no evidence that asbestos was per se a carcinogen in the sense of being an initiator of cancer. The asbestos standard in Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 479 n.27 (D.C. Cir. 1974), was upheld upon the assumption that exposure should be minimized.

73. *See* Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview,* 33 OHIO ST. L.J. 788, 789 (1972).

74. *See* 29 U.S.C. § 655(c)(1) (1970).

75. Several emergency standards have been remanded by judicial order. *See* Florida Peach Growers Ass'n, Inc. v. United States Dep't of Labor, 489 F.2d 120 (5th Cir. 1974); Dry Color Mfrs.' Ass'n, Inc. v. Department of Labor, 486 F.2d 98 (3d Cir. 1973). Enforcement of another emergency standard was stayed on appeal because the court believed that the petitioner had a likelihood of success on the merits. Taylor Diving & Salvage Co. v. Department of Labor, 537 F.2d 819 (5th Cir. 1976).

Organic Chemical case, the Secretary relied on two scientific studies which showed that these chemicals caused cancer in rats. Unpersuaded that these chemicals were carcinogenic to man the court stated: "[W]hile the Act does not require an absolute certainty as to the deleterious effect of a substance on man, an emergency temporary standard must be supported by evidence that shows more than some possibility that a substance may cause cancer in man."[76] The court held that the record contained insufficient proof of the danger which these chemicals pose to man. The standard was remanded to the Secretary because his statement of reasons was insufficient, but there is little doubt that the court felt that these two animal studies alone were insufficient evidence to uphold an emergency standard.[77] An interesting aspect of this case is that less than one year later the Third Circuit was again presented the same standard for ethyleneimine, only this time it had been promulgated as a permanent standard.[78] The court upheld the permanent standard upon the same two animal studies which were presented to the court in the *Dry Color* emergency case. In the later opinion, the court obliquely noted that it had not invalidated the ethyleneimine emergency standard in *Dry Color* for lack of substantial evidence.[79]

The Fifth Circuit invalidated an emergency temporary standard covering the use of insecticides in *Florida Peach Growers Association, Inc. v. United States Department of Labor.*[80] The regulations in that case prohibited fruit growers from allowing farm workers to re-enter the fields sprayed with insecticides until a minimum number of days had passed. There was persuasive evidence in the record

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76. Dry Color Mfrs.' Ass'n, Inc. v. Department of Labor, 486 F.2d 98, 104-05 (3d Cir. 1973).

77. *See id.* at 105. The court found that:

> [A] showing of mere speculative possibility that a substance is harmful to man is sufficient to call into effect the summary procedure of subsection 6(c). It is clear from the Act that Congress considered that the ordinary process of rulemaking would be that provided for in subsection 6(b), dealing with permanent standards; emergency temporary standards should be considered an unusual response to exceptional circumstances. The courts should not permit temporary emergency standards to be used as a technique for avoiding the procedural safeguards of public comment and hearings required by subsection 6(b). Especially where the effects of a substance are in sharp dispute, the promulgation of standards under subsection 6(b) is preferable since the procedure for permanent standards is specifically designed to bring out the relevant facts.

Id. at 104-05 n. 9a.

78. Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1156 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

79. *Id.* at 1156.

80. 489 F.2d 120 (5th Cir. 1974).

to support some kind of standard regulating these pesticides: an advisory committee recommendation, documented cases of adverse human reactions, and several scientific studies. Recognizing that there was sufficient evidence to support a finding that these insecticides are harmful to man, the court nevertheless held that there was insufficient evidence to support a finding of grave danger.[81] Whether exposure to these pesticides is merely dangerous or gravely dangerous falls squarely within the category of a policy determination discussed earlier.[82] As the dissent noted in *Dry Color,* "[t]o decide whether Congress empowered the Secretary to regulate a substance or agent because it is possibly harmful, probably harmful, or actually harmful is to engage in a futile exercise in semantics."[83] The same thing can be said for deciding whether or not something is merely dangerous or gravely dangerous. Had the arbitrary and capricious test been applied to the emergency insecticide standard, it seems likely that the court would have upheld it.[84] The standard of review may be the same for emergency and permanent standards, but the emergency standards are viewed as an unusual response to exceptional circumstances. Interested parties lose their opportunity of full participation in the promulgation process when the Secretary invokes his emergency standard-making power. Thus, in fact if not in theory, the courts are going to require more evidentiary support for emergency standards because of the loss of procedural safeguards.

Statement of Reasons

Although the courts invalidated the Secretary's standards in both *Dry Color* and *Florida Peach Growers* there is a significant difference in their procedural disposition. The Fifth Circuit in *Florida Peach Growers* vacated the insecticide standard for lack of substantial evidence.[85] Under this disposition the Secretary would have to

81. *Id.* at 132.

82. See text accompanying note 56 *supra.*

83. Dry Color Mfrs.'Ass'n, Inc. v. Department of Labor, 486 F.2d 98, 109-10 (3d Cir. 1973) (dissenting opinion). Judge McLaughlin further stated, "I would hold that even a scintilla of evidence which tends to prove a substance carcinogenic in man or animal justifies the issuance of an Emergency Temporary Standard." *Id.* at 110.

84. *See* Florida Peach Growers Ass'n, Inc. v. United States Dep't of Labor, 489 F.2d 120, 131 (5th Cir. 1974). One factor which seemed to have strongly influenced the court was that the advisory committee recommended that no emergency standard issue, even though they recommended a permanent standard.

85. *Id.* at 132.

issue a different standard and reinstitute the promulgation procedure from the beginning. The Third Circuit in *Dry Color,* however, vacated and remanded the ethyleneimine (EI) standard because the Secretary's statement of reasons was insufficient.[86] Under this latter disposition the Secretary may be able to preserve the standard if he can supply the court with a sufficient rationale. The Act provides that the Secretary must publish a statement of his reasons for promulgating a standard.[87] This requirement is standard procedure for administrative agencies. According to some commentators, the original intent in requiring a statement was merely to assure that the acting agency advised the public of the general basis and purpose of the rule.[88] Whatever the original intent, reviewing courts are now prone to require that the agency give a logical, articulate statement explaining its action. Although the statement of reason requirement may technically be imposed for the benefit of interested parties, the courts view it as a means for substantive review of agency rulemaking.[89]

The statement of reasons issued with the Secretary's ethyleneimine (EI) standard viewed in *Dry Color* was a brief preamble to the emergency standard itself, which recited that EI was a carcinogen and that conditions necessary for the issuance of an emergency standard had been met. As noted earlier, the Third Circuit rejected this as an inadequate explanation and remanded the standard to the Secretary. However, the Secretary issued a much more articu-

86. Dry Color Mfrs.'Ass'n Inc. v. Department of Labor, 486 F.2d 98, 108 (3d Cir. 1973).

87. 29 U.S.C. § 655(e) (1970). Section 6(b)(8) of the Act requires that whenever a promulgated standard differs substantially from an existing national concensus standard, the Secretary must give an explanation of this deviation in the Federal Register. It was argued that this section places a more stringent burden of proof upon the Secretary to justify a standard on appeal where such standard differs from an existing national consensus standard. In AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975), the court held that section 6(b)(8) does not change the standard for judicial review, but the court carefully scrutinized the Secretary's rationale and remanded the standard in question for an inadequate statement of reasons.

88. *See* Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 240 (1974).

89. In Automotive Parts & Accessories Ass'n, Inc. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) the court explained its expectation:

> We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by Section 4 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Id. at 338. *See also* Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 240 (1974).

late statement when he established the permanent standard. The critical issue in the permanent ethyleneimine standard case was the degree to which the Secretary can extrapolate a determination of danger to man from animal studies. The required statement of reasons given by the Secretary faced this critical issue and it apparently satisfied the court.[90]

It is clear that the courts have utilized the statement of reason requirement to bolster the inadequacy of judicial review under the traditional arbitrary and capricious test, because of the difficulty of applying the substantial evidence test to policy choices. A written statement of reasons gives the reviewing court some basis on which to apply the arbitrary and capricious standard to policy choices. If the Secretary cannot give a reasonable explanation for his standard then his decision is suspect. The statement must set forth reasons which are relevant to the purpose of the Act. When a standard is remanded because of an inadequate statement of reasons, the Secretary should not have to hold another public hearing, but should be allowed to correct the deficiency by further explanation.[91] Gathering more evidence will seldom illuminate the Secretary's choice of one particular method of protection over another. As a procedural device, remanding for a more developed statement is a less drastic remedy than vacating a standard for lack of substantial evidence and provides the appellate court with a safe middle of the road approach in a case where the court realizes that the main dispute is over a legislative determination like the margin of safety.

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90. The Secretary put forth this rationale for the permanent standard:

> The objections raise the much broader issue of human exposure to a chemical which is only known to have caused cancers in experimental animals.
>
> . . . .
>
> We think it improper to afford less protection to workers when exposed to substances found to be carcinogenic only in experimental animals. Once the carcinogenicity of a substance has been demonstrated in animal experiments, the practical regulatory alternatives are to consider them either non-carcinogenic or carcinogenic to humans, until evidence to the contrary is produced. The first alternative would logically require, not relaxed controls on exposure, but exclusion from regulation. The other alternative logically leads to the treatment of a substance as if it was known to be carcinogenic in man.
>
> We agree with the director of NIOSH and the report of the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens to the Surgeon General, U.S. Public Health Service, April 22, 1970 that the second alternative is the responsible and correct one.

Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1159 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

91. *See* Wright, *The Courts and The Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 396 (1974).

STATUTORY LIMITATIONS ON THE SECRETARY'S RULEMAKING AUTHORITY—FEASIBILITY

Certain Congressmen were afraid that the Secretary's broad mandate to protect workers might be interpreted to require absolute safety in all cases, regardless of the economic or technological difficulties encountered.[92] Because of this concern, the Act was amended to provide that in promulgating standards, the Secretary "shall set the standard which most adequately assures, *to the extent feasible* . . . that no employee will suffer material impairment of health. . . ."[93] This language operates as a substantive limitation on the Secretary's rulemaking authority since he is required, in setting standards, to consider and give weight to economic and technological factors.

Technological Feasibility

Reducing the danger of exposure to toxic and carcinogenic substances presents difficult technological problems. Exposure to asbestos dust, for example, is known to be hazardous, but the harmful effects of exposure may not appear for twenty years after the initial contact.[94] Furthermore, the variables involved in determining a safe level of exposure to carcinogens are numerous and complicated. Workers will respond differently to the same amount of exposure and the causal connection between any disease and the exposure must be inferred from complex and sometimes conflicting scientific studies.[95] As a consequence of these uncertainties and the potential

92. Senator Jacob Javits offered an amendment to the Act which subsequently became 29 U.S.C. § 655(b)(5). *Compare* 116 CONG. REC. 18,252 (1970) *with* 116 CONG. REC. 18,365 (1970).

93. 29 U.S.C. § 655(b)(5) (1970). The section further provides:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, *shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Id. (emphasis added).

94. *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477 (D.C. Cir. 1974).

95. *Id.* at 487. *See also* Dry Color Mfrs.' Ass'n, Inc. v. Department of Labor, 486 F.2d

danger involved, expensive engineering and other controls must reduce exposure to a very low level.

In the highly publicized case of *Society of Plastics Industry, Inc. v. OSHA*,[96] it was revealed that exposure to vinyl chloride gas caused some workers to contract a rare liver disease.[97] The Secretary promulgated a standard which adopted a "no detectable level" of exposure. Both the government and the industry conceded that at the present time no vinyl chloride manufacturer or distributor could meet such a level of exposure with existing engineering control technology.[98] The standard placed an obligation on the industry either to meet the no detectable level of exposure or to provide respirators and implement a program "to reduce exposures to at or below the permissible exposure limit, or to the greatest extent feasible, solely by means of engineering and work practice controls, as soon as feasible."[99] This part of the standard placed an obligation upon the industry to develop new control technology. One rubber company spokesman testified that it would cost them fifty to fifty-five million dollars even to attempt to meet the Secretary's standard. The industry argued that the Secretary's power to set a feasible standard was limited to presently available technology. Since no technology existed which could reduce free air exposure of vinyl chloride to the required level, the plastics industry contended that the Secretary had exceeded his authority. The court rejected this argument, holding that the Secretary could lawfully enact standards which require improvements in existing technology or the development of new technology.[100]

98, 103 (3d Cir. 1973); Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1159 (3d Cir. 1974), *cert. denied*, 420 U.S. 973 (1975).

96. 509 F.2d 1301 (2d Cir. 1975), *cert. denied*, 421 U.S. 992 (1975).

97. *Id.* at 1306.

98. Engineering controls prevent the harmful vapor from escaping into the free air and are preferable to the use of respiratory equipment which is bulky and difficult for the worker to wear.

99. 29 C.F.R. § 1910.1017(f)(2) (1976). *See also* 40 Fed. Reg. 13, 211 (1975).

100. Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1305 (2d Cir.), *cert. denied*, 421 U.S. 992 (1975). The court stated:

> We cannot agree with petitioners that the standard is so clearly impossible of attainment. It appears that they simply need more faith in their own technological potentialities, since the record reveals that, despite similar predictions of impossibility regarding [another standard] vast improvements were made in a matter of weeks, and a variety of useful engineering and work practice controls have yet to be instituted. In the area of safety, we wish to emphasize, the Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology, and he is not limited to issuing

In another case concerning technological feasibility, the Secretary revoked a "no hands in die"[101] standard which had been promulgated as a national consensus standard, and then issued a less stringent standard covering the same risk. The reason for this action was that the Secretary found that the national consensus standard was not technologically and economically feasible.[102] The AFL-CIO contested the revocation on the ground that the Secretary may not consider technological feasibility. The evidence showed that forty-seven percent of all power press operations could not be brought into compliance with the "no hands in die" requirement utilizing available technology. In this case, the court recognized that OSHA is "technologically forcing," but held that the revocation was valid since the Secretary could properly consider the economic effect on an industry by enacting a technologically impossible standard.[103] Interpreting OSHA as forcing technological development comports with its Congressional statement of purpose: "To stimulate employers . . . to institute new programs for providing safe and healthful working conditions [and to develop] innovative methods, techniques, and approaches for dealing with occupational safety and health problems."[104] The creation of NIOSH to do research also shows that Congress was not satisfied with merely making existing safety standards widely applicable. OSHA cannot be viewed in isolation but must be examined in the context of other safety and environmental legislation enacted by Congress in the last decade. The Clean Air Act[105] has been interpreted to require technological innovation by industry, as have the National Environmental Policy Act[106] and the Automobile Safety Act.[107]

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standards based solely on devices already fully developed.

Id. at 1309.

101. "No Hands in Dies" is a standard which seeks to prevent the quite frequent injuries to power press operators.

> The incidence of power press-related injuries has reached intolerable levels. The American Metal Stamping Association, a trade association of employers who use power presses, has estimated that 3 out of every 500 workers who operate power presses will suffer a point of operation injury (caused by the *die*, the tooling used in a press for cutting or forming material). It is further estimated that over a 30-year period 1 in every 5 power press operators will suffer a debilitating injury, often amputation of a hand or a portion of a hand.

AFL-CIO v. Brennan, 530 F.2d 109, 112 n.3 (3d Cir. 1975).

102. *Id.* at 117-18 n.26.

103. *Id.* at 120.

104. 29 U.S.C. § 651(b) (1970).

105. 42 U.S.C. § 1857 (1970); *see* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

106. 42 U.S.C. §§ 4331, 4332 (1970); *see* Calvert Cliffs' Coordinating Comm., Inc. v.

Economic Feasibility

Even if it is technologically possible to remove a hazard from the working environment, it is may still be economically unfeasible to do so. Some of the Secretary's standards have had a dramatic economic impact on the affected industries and a few cases have considered the degree to which the Secretary can balance the safety of the employee against the possible costs to the employer. The appropriateness of considering the economic consequence of a proposed standard was first considered in *Industrial Union Department, AFL-CIO v. Hodgson,*[108] where it was argued that the Secretary improperly considered the economic effect of the asbestos standard in setting the exposure level. The court rejected this contention and held that a standard which is "prohibitively expensive is not feasible."[109] The economic feasibility requirement, however, was qualified by the court:

> Standards may be economically feasible even though from the standpoint of employers they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers.[110]

The purpose of OSHA is not the attainment of absolute safety and health for employees.[111] The determination of economic feasibility requires that the Secretary and the courts consider a wide variety of social and economic factors such as the effects on unemployment, inflation, anti-competitive effect, and profit margins.[112]

United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

107. 15 U.S.C. §§ 1392, 1394 (1970); *see* Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972).

108. 499 F.2d 467 (D.C. Cir. 1974).

109. *Id.* at 477.

110. *Id.* at 478.

111. As the court stated in AFL-CIO v. Brennan, 530 F.2d 109, 121 (3d Cir. 1975): "Undoubtedly the most certain way to eliminate industrial hazards is to eliminate industry. But the congressional statement of findings and declaration of purpose and policy in § 2 of the Act shows that the upgrading of working conditions, not the complete elimination of hazardous occupations, was the dominant intention." *Id.* at 121.

112. *See* Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974), where the court stated:

[I]f the standard requires changes that only a few leading firms could quickly achieve,

The potential danger of the hazard involved should be weighed against the economic costs of protection. Higher economic costs can obviously be better justified for eliminating a known cancer-producing hazard than for the expansion of restroom facilities. As the courts noted in both *Hodgson* and *AFL-CIO v. Brennan,*[113] a particular occupational risk, such as exposure to carcinogens, may be so serious that the economic demise of an employer would be justified.[114] On the other hand, OSHA standards may be promulgated for a wide variety of health or safety reasons, including psychological reasons.[115] It seems entirely reasonable to require the Secretary to balance economic factors against this latter type of health or safety problem. It may very well be true that workers would suffer fewer heart attacks and have a prolonged life expectancy if the Secretary required that every business adopt a three-day work week. However, the obvious economic consequences of such a standard make it clear that economic feasibility must be balanced against the health advantage. Where the potential hazard is not life threatening, economic factors have been given more weight.[116]

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delay might be necessary to avoid increasing the concentration of that industry. Similarly, if the competitive structure or posture of the industry would be otherwise adversely affected—perhaps rendered unable to compete with imports or with substitute products—the Secretary could properly consider that factor. These tentative examples are offered not to illustrate concrete instances of economic unfeasibility but rather to suggest the complex elements that may be relevant to such a determination.

Id. at 478. Executive Order 11821 requires all proposed major federal regulations be accompanied by an inflationary impact statement. Exec. Order No. 11,821,39 Fed. Reg. 41,502 (1974).

113. 530 F.2d 109 (3d Cir. 1975).

114. AFL-CIO v. Brennan, 530 F.2d 109, 122 (3d Cir. 1975) (quoting the *Hodgson* court's language); Industrial Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974).

115. *See id.* § 651. NIOSH is now studying the psychological stress of certain occupations. *See* 309 EMPL. SAFETY & HEALTH GUIDE (CCH) 3, 4 (April 13, 1977).

116. Where the hazard is not life threatening, there is more flexibility to weigh the potential benefits against the cost. *See* Continental Can Co., [1976-1977] Occup'l Saf. & Health Dec. ¶ 21,009, at 25,254 (Occ. Saf. & Health Rev. Comm'n, August 24, 1976). In two recent cases the review commission used a cost-benefit approach in determining the economic feasibility of the noise level standard. Castle & Cooke Foods, [1977-1978] Occup'l Saf. & Health Dec. ¶ 21,854 at 26,325 (Occ. Saf. & Health Rev. Comm'n, May 19, 1977). Great Falls Tribune Co., [1977-1978] Occup'l Saf. & Health Dec. ¶ 21,844 at 26,303. (Occ. Saf. & Health Rev. Comm'n, May 19, 1977). In *Castle & Cooke Foods,* the commission found that it would cost $3,100.00 per employee for implementation of the noise controls plus $1,100.00 per employee maintenance cost per year. The benefits from this program would be a slight reduction of hearing loss by some 12 employees. The commission held that: "On balance we think that the benefits to be gained do not justify the cost of the controls and that engineering controls are therefore not economically feasible." Castle & Cooke Foods, [1977-1978] Occup'l Saf. & Health Dec. ¶ 21,844 at 26,331 (Occ. Saf. & Health Rev. Comm'n, May 19, 1977).

Economic Feasibility as a Defense

Normally economic feasibility is considered by the courts in pre-enforcement judicial review pursuant to section 655(f) of the Act.[117] Economic feasibility, however, has curiously appeared as a defense in enforcement proceedings. It may be defensively asserted in some instances where the standard in question expressly requires compliance in terms of feasibility.[118] In *Continental Can Co.*[119] the Review Commission considered the validity of a noise standard which required sound levels to be lowered by "feasible administrative or engineering control." Compliance with this standard required that Continental build enclosures around its machines to absorb noise. At the time of the hearing, Continental had spent $400,000.00 on an enclosure development program; nevertheless, the Secretary issued a citation against Continental for failing to institute "feasible engineering controls to reduce noise levels."[120] Continental asserted that total compliance with the standard was not economically feasible, estimating that compliance would cost some $32 million with annual maintenance cost of $175 thousand.[121] The Review Commission held that compliance by engineering controls was not feasible and therefore, the Secretary had not sustained his burden of proving a violation.

As the dissenting commissioner pointed out in *Continental Can,* allowing a defense of economic feasibility presents some difficult problems in the context of an enforcement proceeding. The majority opinion placed the burden of proving economic feasibility on the Secretary of Labor, which will require that he "master virtually every aspect of an employer's financial condition and physical operation before being able to require literal compliance."[122] Since determination of economic feasibility requires a balancing of many economic and social factors, the determination is much more appropriate for the informal rulemaking of a promulgation hearing. If economic feasibility may be asserted on a case-by-case basis in enforce-

117. 29 U.S.C. § 655(f) (1970) provides for judicial review of a standard prior to implementation.

118. *See* Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1309 (2d Cir.), *cert. denied,* 421 U.S. 992 (1975).

119. [1976-1977] Occup'l Saf. & Health Dec. ¶ 21,009 (Occ. Saf. & Health Rev. Comm'n, August 24, 1976).

120. *Id.* at 25,251; 25,253.

121. *Id.* at 25,253.

122. *Id.* at 25,262.

ment proceedings, one who delays in adopting better safety and health programs may be rewarded while the conscientious employer is punished. The Review Commission can give relief from severe economic hardship to the deserving employer by fashioning an appropriate abatement period without granting a total exemption from enforcement.[123] Economic feasibility should be a function of what the *entire industry* can afford, considering the risks involved, inflationary impact, cost of compliance and other broad economic and social factors. The economic feasibility requirement should not be interpreted so as to permit an individual employer to escape liability on the basis of what he can afford.[124] The economic effect of a particular standard can be more thoroughly considered at the promulgation stage where all interested parties of the entire industry may appear and give evidence on this point.[125]

The most peculiar application of the economic feasibility requirement has been in defense of the enforcement of an unequivocal standard requiring longshoremen to wear hard hats.[126] In *Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Commission,*[127] the Secretary had issued citations to the stevedoring company because its employees had concertedly refused to wear hard hats. The review commission affirmed the citation and the employer appealed. The evidence clearly showed that the employer had used every reasonable effort to induce compliance by its employees. The company had furnished the required hats, encouraged their use at safety meetings, posted signs, stuffed notices in payroll envelopes, and placed recorded messages on tapes, all to no avail. The evidence also supported the employer's position that enforcement of the hard hat standard would provoke a work stoppage.[128]

123. *See* 29 U.S.C. § 659(c) (1970).

124. Consideration of economic feasibility as a defense, case by case, is contrary to the meaning ascribed to that term in Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974). Employers who have complied with the standards are prejudiced because of the economic advantage gained by the employer who has avoided enforcements. *Cf.* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973).

125. In Union Elec. Co. v. Environmental Protection Agency, ___U.S. ___, 96 S.Ct. 2518, 49 L. Ed. 2d 474 (1976), the Supreme Court stated that "[p]erhaps the most important forum for consideration of claims of economic and technological infeasibility is before the . . . agency formulating the . . . plan." *Id.* at ___, 96 S. Ct. at 2529, 49 L. Ed. 2d at 488. The Court acknowledged that some lower courts had recognized a defense of economic or technological infeasibility but declined to approve the procedure. *Id.* at ___, 96 S. Ct. at 2529, 49 L. Ed. 2d at 488.

126. 29 C.F.R. § 1918.105(a) (1976).

127. 534 F.2d 541 (3d Cir. 1976).

128. *Id.* at 545. In fact a strike had occurred in the Port of New York over this very issue

The Third Circuit held that the validity of any standard may be raised for the first time in enforcement proceedings.[129] In this instance, the employer challenged this standard as being economically unfeasible. Although the court recognized the validity of this defense, it affirmed the citation and held that the employer had not proved economic unfeasibility because the employer could have fired the non-complying employees and forced striking employees back to work under section 301 of the National Labor Relations Act.[130]

It is difficult to understand why the court endeavored to find a defense to the hard hat standard and then applied it in such a fashion that the employer was held liable. Must an employer precipitate a strike in order to enforce a standard which his employees do not want to obey? There was nothing economically unfeasible about the hard hat standard; in fact, it is one of the simplest and least expensive standards promulgated by the Secretary. The stevedoring employers should have been able to avoid liability from employee violations by the defense of employee misconduct. The Third Circuit had recognized this defense in *Brennan v. Occupational Safety & Health Review Commission*,[131] where it held that an employer would not be liable for violations of safety standards by his employees if the violation resulted from employees' voluntarily disregarding the exhortations of the employer and when no feasible measure was demonstrated which would prevent concerted disobedience. Nevertheless, the Third Circuit, after reviewing the cases where employee misconduct had been recognized, held that Atlantic & Gulf Stevedores could not prove that defense because:

> Those cases involved the unpredictable and unforeseeable actions of individual employees. This case involves the predictable, nearly universal actions of all the longshoremen. There is a demonstrably feasible measure which can be taken to prevent such concerted disobedience: the employer can refuse employment to those who insist on violating the standard.[132]

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in 1970.

129. *Id.* at 555.

130. *Id.* at 555. The same defense under similar facts was raised by a stevedoring company in I.T.O. Corp. v. Occupational Safety & Health Review Comm'n, 540 F.2d 543, 545 (1st Cir. 1976). The defense was also raised in Arkansas-Best Freight Systems, Inc. v. Occupational Safety & Health Review Comm'n, 529 F.2d 649 (8th Cir. 1976), but the court overruled it.

131. 502 F.2d 946 (3d Cir. 1974).

132. Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n, 534 F.2d 541, 547 (3d Cir. 1976).

It seems unduly harsh that when employee misconduct is universal and openly flagrant, the employer has no defense available to him unless he discharges his employees; but when employee misconduct is sporadic and unforeseeable, a defense is afforded. Instead of bending economic feasibility into a defense,[133] and then holding that the stevedoring companies could not prove it, the court should have held that the employers were not liable for employee misconduct because they had taken all feasible measures to insure compliance. It seems unreasonable to require an employer to terminate or discipline his employees in order to establish the defense of employee misconduct where the employee violates a standard promulgated solely for his own protection.

CONCLUSION

The Occupational Safety and Health Act is only one of many pieces of environmental and safety legislation which delegate broad regulatory authority to an administrative agency.[134] Administrative agencies have been expected to solve an increasingly large number of environmental and health problems because it was thought that an agency could rationally regulate this area in the public interest.[135] Congress imparts general objectives to the agency, but for the most part Congress has delegated to the agency the power to legislate. In today's complex society, this may be the best system for improving the environment. However, the experience of recent years indicates that the environmental and health field presents problems and conflicts in our society which are no more easily solved by scientific expertise than other difficult social problems like racial integration. How much are we willing to pay for a safe working environment? The cost of occupational safety and health standards will certainly

133. In *Atlantic & Gulf Stevedores* the court held that a standard could be invalidated by an employer proving the defense of economic infeasibility; however, the facts of that case demonstrate why this is inappropriate. The Third Circuit indicated it would have invalidated the hard hat standard if the employer had fired or disciplined its employees. Invalidation would render the standard unenforceable against other employers, whose employees might accept or even want to wear hard hats. The record indicated that the hard hat standard had been accepted by longshoremen in the Port of Norfolk. *See id.* at 545 n.4.

134. *See also* Clean Air Act, 42 U.S.C. § 1857 (1970); Federal Coal Mine Health & Safety Act, 30 U.S.C. §§ 801-960 (1970 & Supp. V 1975); National Traffic & Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1970 & Supp. V 1975); Consumer Products Safety Act, 15 U.S.C. §§ 2051-81 (Supp. V 1975); National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (1970 & Supp. V 1975); Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 307-92 (1970 & Supp. V 1975).

135. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 21-22, 45-51 (1969).

be passed on to the consumer. Can we afford to put some of the small vinyl chloride fabricators out of business in an economic recession for the sake of a slightly more protective margin of safety? Expert analysis of these problems will aid in their resolution but solving these problems requires that a preference be made for one social value over another. This is a political choice and not *ipso facto* subject to resolution by rational, expert analysis. It is unrealistic to think that every legitimate safety regulation could successfully run the congressional gauntlet where political pressure can be readily asserted. Congress can set the broad outlines of policy, but it is assumed that the administrative agency is best suited to carry out the specifics, partly because it is more isolated from political pressures.[136] Yet it is becoming more apparent that this virtue of the administrative process can also be a vice. Specific regulations promulgated by agencies often involve balancing tremendously important economic and social values; it therefore seems appropriate that these agencies be directly influenced by democratic forces. Surely part of the businessman's frustration with OSHA is the feeling that the regulations are being promulgated without due consideration of their practical application or consequences.[137]

The effectiveness and fairness of OSHA depends on providing maximum participation to the affected parties. The advisory committees afford a unique opportunity for participation in rulemaking and the Secretary should always appoint one if requested to do so.[138] Consideration should be given to amending the Act so that the Secretary is required to explain his reasons for deviating from the advisory committee recommendation. Although these suggestions are certainly not cure-alls for the administrative process, they may eliminate such absurd results as in *Atlantic & Gulf Stevedores.*[139]

136. *See* R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 19-26(1969).

137. The Building & Trade Employers and the Joint Labor-Management Construction Committee of the New York Building Industry have complained that the Secretary does not refer all standards concerning the construction industry to an advisory committee. 315 EMPL. SAFETY & HEALTH GUIDE (CCH) 1 (May 26, 1977). Members of the Agricultural Committee have suggested disbanding because they receive little support from OSHA and describe serving on the committee as "an extremely frustrating experience." 321 EMPL. SAFETY & HEALTH GUIDE (CCH) 8 (July 6, 1977).

138. Unfortunately, President Carter has recommended more limited use of advisory committees. 305 EMPL. SAFETY & HEALTH GUIDE (CCH) 6 (March 16, 1977).

139. Secretary Marshall has admitted that "OSHA has done some ridiculous things in the past." 305 EMPL. SAFETY & HEALTH GUIDE (CCH) 4 (March 16, 1977). Inspection of OSHA's own offices revealed one serious and fifteen nonserious violations. 306 EMPL. SAFETY & HEALTH GUIDE (CCH) 4 (March 22, 1977).

Why should the Secretary promulgate a standard for personal safety which is not even desired by the affected employees and for which the employer will be penalized? Labor and industry have had a long history of working out their differences by negotation; surely some compromises could be made in formulating proposed health and safety standards. The new environmental and safety legislation has been frustrating to the courts. Because of the highly technical nature of the issues involved in these cases the courts may be hesitant to substitute their judgment for that of the acting agency; yet they feel obligated to make judicial review more than a mere rubber stamping of the agency's actions. As a consequence the courts have converted the procedural requirement of a statement of reasons into a tool for substantive judicial review. Advisory committee recommendations should weigh heavily with the courts and a requirement that the Secretary explain any deviation from an advisory committee recommendation would give the courts a stronger basis on which to judge policy decisions.

Within the next few years it is anticipated that the Secretary will promulgate hundreds of new health standards.[140] The manner in which OSHA standards have been promulgated and enforced has already given the Act a bad reputation.[141] OSHA's effectiveness depends largely upon its voluntary acceptance by those who are regulated. More participation by affected parties in the regulatory process will not only make the Act more acceptable, but will hopefully produce more reasonable standards.

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140. By 1981, 4,800 substances will be covered by NIOSH criteria documents. 312 EMPL. SAFETY & HEATLH GUIDE (CCH) 2 (May 3, 1977).

141. Eight bills were introduced to repeal OSHA during the 1977 Congressional session. 320 EMPL. SAFETY & HEALTH GUIDE (CCH) 8 (June 30, 1977).