## Technical Note #4: Judicial Review of OSHA Standards

The validity of OSHA standards may be reviewed by the courts in two ways.[1] First, any party adversely affected by a standard may obtain pre-enforcement review by filing a petition for review within sixty days of a standard's promulgation. Pursuant to § 6(f), these petitions may be filed in the United States court of appeals for the circuit in which the party resides or has its principal place of business. A copy of the petition must be forwarded to the Secretary of Labor by the clerk of the court.

The second method of review, available to any person adversely affected or aggrieved by a final order of the Commission, is filing a petition for review pursuant to § n(a). Petitions for review under § 11a) must also be filed within sixty days in a United States court of appeals for the circuit in which the violation is alleged to have occurred, for the circuit in which the employer has its principal office, or in the District of Columbia Circuit.

Filing a petition for judicial review under § 6(f) does not delay the effective date of a standard, nor does a § 1 l(a) petition stay a final order of the Commission. A reviewing court, however, may grant a stay. In judicial review under either section of the Act, the Secretary's determinations in promulgating a standard are conclusive if supported by "substantial evidence" in the record considered as a whole.

Section 6(f) specifically provides for judicial review of standards in the United States courts of appeals. Section 8(g), which authorizes OSHA to promulgate necessary rules and regulations, is silent n the issue of judicial review and therefore, under the Administrative Procedure Act[2] the district courts are the proper forum for initial review of regulations. Consequently, it is important to determine whether the Secretary has promulgated a "standard" or a "regulation."

In Louisiana Chemical Association v. Bingham,[3] the Fifth Circuit held that although the promulgating agency's characterization of a rule is a relevant factor, it is not necessarily determinative. According to the court, Congress conceived § 6 of the Act to address specific and already identified hazards, not as purely administrative efforts designed to uncover violations of the Act and discover unknown dangers. Applying this test, the access to exposure and medical records rule is a regulation aimed primarily at possible detection of significant risks not yet covered by standards. Therefore, it is a regulation, reviewable in a district court, rather than a standard, reviewable in a court of appeals.

Section 6(f) permits the party challenging the standard to file for judicial review in the United States court of appeals for the circuit in which the party resides or has its principal place of business. Considering the national scope of OSHA standards and the number of parties adversely affected by a standard, there is ample opportunity for forum shopping. Indeed, the ability of affected industries to obtain judicial review in a sympathetic court is one of the major impediments to OSHA rule making according to a number of individuals interviewed. Employee representatives may also seek review in a sympathetic court.

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1. The discussion of judicial review is based largely upon M. Rothstein, Occupational Safety and Health Law 89-97 (2d ed. 1983).
2. 5 U.S.C.§ 702.
3. 657 F.2d 777 (5th Cir. 1981).

A second, related problem concerns the "race to the courthouse" that invariably occurs when two or more parties are seeking review in different circuits. Under 28 U.S.C. § 2112(a), if there are two or more filings in different courts of appeals to review the same administrative order, venue will lie in the court of the first filing.

In *Industrial Union Department v. Bingham,*[4] the D.C. Court of Appeals held that a petition to review the benzene standard was timely filed in the D.C. Circuit after the standard was disclosed to industry and labor representatives, but before the standard was filed with the Federal Register. Nevertheless, "in the interest of justice," the court ordered the case transferred to the Fifth Circuit, where "the first petition was filed subsequent to the disclosure of the agency decision to the public."[5]

After the decision in Industrial *Union Department,* OSHA promulgated a regulation that indicated that standards are "issued" when they are published in the Federal Register.[6] Although the regulation gave all parties the same starting time, it did not end the "race to the courthouse." Indeed, even with a uniform starting time, problems of varying sorts have arisen. For example, in *United Steelworkers of America v. Marshall,* a conflict developed involving two challenges to OSHA's lead standard. When OSHA "issued" its standard on November 13, 1978, the Steelworkers immediately filed a petition for judicial review in the Third Circuit at 8:45 a.m. EST. At precisely the same time, 7:45 a.m. CST, the Lead Industries Association filed a petition in the Fifth Circuit. In ruling on the venue question, the Third Circuit refused to go beyond the official notations of the time of filing to determine if one petition had been filed seconds before the other petition. The court declared that "unlike race tracks,... courts are not equipped with photoelectric timers, a d we decline the invitation to speculate which nose would show as first in a photo finish."[8] The court then ordered that the proceeding be transferred to the D.C. Circuit, which was deemed "obviously a convenient forum"[9] because a petition to review an EPA lead standard had recently been filed by the industry in that court.

Section 6(f) grants the right to seek judicial review to "any person who may be adversely affected by a standard." There have been no OSHA cases decided on the issue of how adversely affected a person must be in order to challenge a standard. In *Fire Equipment Manufacturers Association v. Marshall,*[10] however, the Seventh Circuit held that a trade association and manufacturers of fire protection equipment did not have standing to challenge an amendment to OSHA's fire protection standard. The industry petitioners claimed they were "adversely affected" because the new standard would result in a loss of profits and competitive disadvantage. In rejecting the argument, the court held that "[t]he profits of manufacturers of fire fighting equipment are not within the zone-of-interests protected or regulated by the Act."[11]

Section 6(f) provides that in judicial review of new OSHA standards "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." Thus, although the substantial evidence test is

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4. 570 F.2d 965 (D. C. Cir. 1977).
5. Id. at 972.
6. 42 Fed. Reg. 65,166 (1977).
7. 592 F.2d 693 (3d Cir. 1979).
8. Id. at 695.
9. Id. at 698.
10. 679 F.2d 679 (7th Cir. 1982), cert. denied, 103 S. Ct. 728 (1983).
11. 679 F.2d at 682.

generally used in adjudicatory proceedings or formal r making, it also applies to OSHA standards promulgation, which is informal rulemaking.[12] The Act's anomalous use of the substantial evidence test resulted from a legislative compromise. The Senate bill provided for informal rulemaking, while the House version required formal rule making and the use of the substantial evidence test.[13]

The courts have had considerable difficulty in applying the substantial evidence test in viewing OSHA standards. In Associated Industries v. U.S. *Department of Labor,*[14] the Second Circuit held that the substantial evidence test must be applied to policy determinations as well as findings of fact. The court suggested, however, that the difference between the substantial evidence test and the "arbitrary and capricious" test may be largely semantic.[15] This view has been shared by the Fifth Circuit.[16]

The D.C. Circuit has taken a somewhat different approach and considers that the substantial evidence test provides for "more rigorous scrutiny" an the arbitrary and capricious test.[17] *Industrial Union Department. Hodgson,*[18] the D.C. Circuit found it "impossible" to apply the substantial evidence test to the Secretary's policy determinations. The court indicated it would analyze the Secretary's rulemaking to determine whether it had been performed "in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."[19]

Despite slightly different tests in the various courts of appeals,[20] the courts of appeals have been in agreement on the general standards of review of policy decisions. Judicial review of policy decisions will be limited to determining whether the Secretary's

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12. Formal rulemaking involves adjudicatory hearings, including the right to submit oral evidence and to conduct cross-examination. Informal rulemaking involves notice and an opportunity to submit comments. See Note, Judicial Review under the Occupational Safety and Health Act: The Substantial Evidence Test as Applied to Informal Rulemaking, 1974 Duke L.J. 459.
13. Industrial Union Dept. v. Hodgson,499F.2d 467, 473 (D.C. Cir. 1974).
14. 487 F.2d3342(2d Cir. 1973).
15. 487 F.2d at 349-50.
16. See American Petrol. Inst. v.0SHA,581 F.2d493. 497(5th Cir. 1978), aff'd sub nom. Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607 (1980); Florida Peach Growers Ass'nv. United States Dept. of Labor, 489F.2d 120, 128-29 (5th Cir. 1974). See also Texas Indep. Ginners Ass'n v. Marshall, 630 F.2d 398, 404 n.22(5th Cir. 1980) (rejecting assertion that substantial evidence test can be used only for factual determinations and noting that use of this test for policy considerations impracticable).
17. AFL-CIO v. Marshall, 617 F.2d 636, 649 & n.46(D.C. Cir. 1979), aff'd sub nom. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).
18. 499 F.2d467(D.C. Cir. 1974).
19. 499 F.2dat 475 (quoting Automotive Parts& Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C.Cir. 1968)). See Society of Plastics Indus., Inc. v. OSHA, 509 F.2d 1301, 1304 (2d Cir. 1975).
20. See AFL-CIO v. Marshall, 617 F.2d636 (D.C.Cir. 1979), aff'd sub nom. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981); Synthetic Organic Chemical Manufacturers Association v. Brennan, 503 F.2dl155, 1160 (3d Cir. 1974), cert. denied, 420 U.S. 973(1975). Accord American Iron& Steel Inst. v. OSHA, 577 F.2d 825, 830-31 (3d Cir. 1978), cert. dismissed subnom. Republic Steel Corp. v. OSHA, 448 U.S. 917(1980).

action is consistent with the statutory language and purpose,[21] whether the policy judgment is reasonably related to factual matters supported by substantial evidence,[22] and whether there are adequate explanations for the assumptions underlying predictions or extrapolations and of the bases for resolving conflicts and ambiguities. A standard will be remanded only if there are "nagging questions" about the rationale for the Secretary's particular choices.[24]

The Supreme Court also has been troubled in its search for the most appropriate standard by which to review the complex scientific and policy issues involved in OSHA rulemaking.[25] It has indicated, however, that it will give deference to the courts of appeals' determinations of whether there is substantial evidence.

In American Textile *Manufacturers Institute, Inc. v. Donovan,*[26] the Supreme Court held that, because the Act places responsibility for determining substantial evidence questions in the courts of appeals, the Supreme Court will intervene only in the rare instance when the substantial evidence standard was misapprehended or grossly misapplied by the court of appeals.

> [O]ur inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence. Instead, we turn to OSHA's findings and the record upon which they were based to decide whether the Co of Appeals "misapprehended" or grossly misapplied" the substantial evidence test.[27]

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21. American Petrol. Inst. v. OSHA, 581 F.2d 493, 497 (5th Cir. 1978), (citing Synthetic Organic Chem. Mfrs. Ass'n v. Brennan, 503 F.2d 1155, 1159 (3d Cir. 1974), aff'd sub nom. Industrial Union Dept. v. American Petro. Inst., 448 U.S. 607 (1980).
22. Texas Indep. Ginners Ass'n v. Marshall, 630 F.2d 398, 405 (5th Cir. 1980).
23. AFL-CIO v. Marshall, 617 F.2d636, 651( D. C. Cir. 1979), aff'd sub nom. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).
24. American Iron & Steel Inst. v. OSHA, 577 F.2d 825, 834 (3d Cir. 1978) (quoting Industrial Union Dept. v. Hodgson, 499 F.2d 467, 488 (D.C. Cir. 1974)), cert. dismissed sub nom. Republic Steel Corp. v. OSHA, 488 U.S. 917 (1980).
25. See Industrial Union Dept. v. American Petrol. Inst., 448 U.S. 607, 695 & n.9, 705-06 (1980 )( Marshall, J., dissenting). See generally McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Gee. L.J. 729 (1979); Rodgers, Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision, 11 Envtl. L. 301 (1981).
26. 452 U.S. 490 (1981).
27. 452 U.S. at 523.