

OSHA AND THE CURRENT CONGRESS

At the time of this report's completion (late August 1995), various committees of the current (104th) Congress are actively considering a number of bills that could directly affect OSHA's procedures and regulatory activities. Many of the initiatives now under debate represent substantial reconsiderations of the agency's procedures and capabilities.

"Regulatory reform" continues to be a major topic of attention—with principal themes including the conduct of scientific risk assessments, the analysis of benefits and costs, the consideration of benefit-cost balancing in rule promulgation, and expansions in the scope of judicial review of regulatory analyses. This broad area of issues has been the subject of numerous bills since the beginning of the session. Most such proposals, if enacted, would affect OSHA along with many other federal regulatory agencies.

Early last March, the House passed H.R. 9 (the Job Creation and Wage Enhancement Act of 1995), which rolled together several existing bills, including H.R. 1022 (addressing risk assessments), H.R. 926 (benefit-cost analysis, regulatory flexibility), H.R. 925 (private property rights), and H.R. 830 (paper work reduc-

tion). Among the numerous provisions, H.R. 9 specifies guidelines for the conduct of scientific risk assessments and benefit/cost analyses and commands the use of these findings in "major" rulemakings (i.e., for risk assessments, a rule imposing \$25 million annual effect on the economy; and for benefit-cost analyses, a rule imposing \$50 million annually). It also mandates consideration of the expected balance of benefits and costs (or cost-effectiveness) to be realized in setting standards and removes the long standing restriction against judicial review of small business regulatory impact analyses prepared in accordance with requirements of the 1980 Regulatory Flexibility Act.

In the Senate, S. 343 (the Comprehensive Regulatory Reform Act of 1995) has received greatest attention in the last several months. S.343 also requires extensive risk assessment and benefit/cost studies for: "major" regulations (i.e. a gross annual economic effect of \$50 million). In addition, the bill mandates a showing that the benefits of a proposed regulation justify the costs imposed on society, widens the scope of judicial review to encompass nearly all such analyses, expands the opportunities for regulated parties to sue federal agencies over their adherence to administrative procedures, and allows individu-

als to petition agencies to modify or revoke regulations. Competing bills exist in the form of S. 291, S. 333, and S. 1001—which, in most respects, would institute less extensive reforms in existing regulatory procedures than S. 343 has proposed.

In another initiative, the House Government Reform and Oversight Committee, in mid-July, approved H.R. 994 (the Regulatory Sunset and Review Act of 1995), which would require agencies to review many existing regulations over a seven year period and modify or revoke those determined to be unnecessary, outdated, or overly burdensome. A similar proposal has been introduced in the Senate (S. 511).

There are also a number of bills focused more narrowly on OSHA, with some proposing substantial revisions of OSHA's regulatory mission and procedures. H.R. 707 (the OSHA Reform Act of 1995) proposes broad reforms in the agency's practices, including establishing benefit-cost balancing as a formal basis for standard setting, mandating that an increased share of the agency's budget be devoted to technical assistance and other consultive services for industry, increasing the incentives for voluntary compliance, and revising the basis for the agency's conduct of on-site inspections. A similar bill in the Senate, S. 592 (the Occupational Safety and Health Reform Act of 1995), also contains far-reaching proposals, including those for increasing the influence of scientific risk assessments and benefit-cost balancing in standard setting, transferring NIOSH to the Department of Labor, mandating the conduct of comprehensive evaluations of the costs and benefits of existing OSHA standards every several years, and promoting the formation of employer-employee safety committees to deal with workplace hazard reduction. H.R. 1433 (the Occupational Safety and Health Administration Consultation Services Authorization Act) proposes that the Secretary of Labor

establish cooperative programs to allow businesses to consult with state officials on OSH Act compliance matters. S. 917 (the Small Business Advocacy Act) would create new mechanisms for small businesses to become involved in OSHA's (and EPA's) regulatory development efforts. Several other current bills deal with specific aspects of workplace hazard protections.¹

Finally, as discussed in the previous chapter, OSHA's budget appropriation for the coming fiscal year is currently a major topic of debate. The President's proposal (of February 1995) specified FY96 funding for OSHA of around \$347 million, about 11 percent above the \$313 million level in the current year. Nonetheless, in recent action (August 1995), the House approved an FY96 Labor-Health and Human Services-Education appropriations bill that allocated only \$264 million to OSHA, a 16 percent decrease over the current year's level. The corresponding Senate bill remains in progress at this time.

DISCUSSION OF SALIENT ISSUES

The present study has, for the most part, concentrated on several particular aspects of the agency's policy analysis activities and has not taken on the full range of issues encompassed by the wide breadth of Congress's current legislative agenda on OSHA. Nonetheless, there are a number of matters on which this study's main areas of inquiry intersect with current congressional concerns. A number of observations on these issues follow below.

■ Consideration of Regulatory Impacts in Rulemakings

It is apparent from the many rulemaking records examined in this study that OSHA already devotes a good deal of attention to the assessment of regulatory impacts (i.e., compliance costs, expected benefits, feasibility of economic

¹ H.R. 750 (the Worker Protection Warnings Act) would require the establishment of uniform labels addressing the proper procedures and effectiveness limits for personal protective equipment. H.R. 1783 (To Require Changes in Regulations Under the OSH Act) would modify the prevailing procedures governing the use of respirators in oxygen deficient or hazardous chemical containing environments.

burden imposed, ripple-through effects to directly affected industries and the larger economy) in its standard setting activities. The substantial body of case law interpreting the agency's procedural burdens, the various executive orders (commanding the preparation of "regulatory impact analyses"), and subsequent legislation (particularly, the Regulatory Flexibility Act) arising since promulgation of the OSH Act in 1970 have erected a comprehensive set of mandates for preparing such analyses as a routine feature of rulemakings. Since the later 1970s the agency has implemented a set of analytical procedures intended to be responsive to these requirements. Rulemaking records since that time have generally accorded substantial attention to regulatory impact matters—and in this respect vastly "outweigh" the records of earlier rulemakings.

OSHA standards are not formally established on the basis of explicit benefit-cost comparisons—largely because of the way Congress originally wrote the OSH Act and the subsequent interpretations of the courts. Nonetheless, the agency has, for some time, routinely prepared and submitted to the record considerable information on both the estimated costs and the more easily quantified benefits of intended standards. In part, this has been done to comply with the aforementioned, externally imposed requirements for preparation of regulatory analyses. But it is also apparent that stakeholders' (often competing) estimates and perceptions about the balance between incremental costs and benefits to result from a new regulation often become a prime consideration in the usual administrative flow of rulemakings.

Elevating the role of benefit-cost considerations in rulemakings is one of the major objectives of many of the "regulatory reform" bills now before Congress. In view of the substantial

benefit and cost information OSHA already routinely assembles for its rulemakings, it is apparent that the enactment of new laws in this vein would not usher the agency into some vastly new rulemaking landscape.² Although, it would certainly drive the agency to devote greater attention on the record to showing how the expected costs of an intended new regulation would be "balanced" by the benefits of the hazard reductions to be realized. In addition, stakeholders unsatisfied with such findings and their rationale will, no doubt, have received another possible basis for challenging OSHA's regulatory actions in the courts.

It appears that, under such a revised rulemaking regime, OSHA would have strong incentive to seek to quantify more comprehensively than it now does the full range of benefits expected to result from a new standard, and to revise its feasibility analysis procedures to more nearly provide "most likely" forecasts of industry control responses and compliance spending. These actions would represent a significant and methodologically appropriate deepening of the "feasibility" analyses the agency already prepares, but both are resource intensive additions and would surely require a greater level of resources that OSHA now normally devotes to its regulatory analysis efforts.

The effects of such revisions of the agency's decision framework on the content of future standards would probably not be uniform, and, depending on the hazard at issue, might support the promulgation of either more *or* less stringent compliance requirements than are produced under the present policy decision logic.

■ Knowledge about Regulatory Outcomes

Adequate workplace health and safety protections are too important a public policy matter and OSHA's rulemaking activities so long heatedly

² A second major element of many of the "regulatory reform" bills Congress is now considering consists of provisions to expand the role of *risk assessments* in rulemakings. This analytic area has not been a focus of this project, but it is apparent from the numerous rulemaking records examined that the consideration of scientific risk assessment findings is already a major and routine aspect of OSHA's decision logic.

debated for there to be as little systematic information as there is that characterizes the actual regulatory outcomes in affected industries.

Admittedly, the evaluation task is a challenging one. Safety and health standards change hazard circumstances and impact industry behaviors, production costs, and profitability amidst or in conjunction with myriad other economic influences that must be sorted out. In addition, OSHA's regulatory scope is often quite wide, spanning many separate industries and various classes of establishments.

Nonetheless, OTA's findings from the case research conducted for this study strongly suggest that the regulatory impacts analyses prepared in rulemakings often do not well reflect the compliance paths chosen by affected industries or the costs and economic burdens that actually result. The regulatory analyses OSHA prepares for rulemakings are specifically intended to demonstrate the feasibility of proposed rules, and are not necessarily the outcomes most likely to arise. They cannot be considered a reasonable substitute for evaluative findings on actual post-promulgation outcomes.

OSHA, principal stakeholders, and the public generally would, no doubt, be well served by a more routine effort to collect and analyze information on outcomes (including control measures adopted, compliance spending incurred, other production and economic impacts sustained, workforce effects, hazard reductions achieved) as a normal part of implementing a standard. Such a program would need to be designed and implemented with care, to avoid becoming an overly vast, expensive, and intrusive data collection activity. But reasonably developed, such information and findings would provide valuable feedback to the policymaking process and provide a more solid basis for critically examining the various competing claims put forward by stakeholders and other observers.

Such an effort is clearly in line with some of the aforementioned "regulatory review" and "sunset" legislation presently being considered by Congress. And indeed, as discussed in the previous chapter, OSHA has already begun to

consider the issues involved in mounting this kind of analytic activity on a more routine basis.

Nevertheless, it needs to be recognized that such research, even at a fairly modest level of effort, will be time and resource-intensive. Furthermore, access to and cooperation with industry for data collection purposes must be adequate—historically, a sensitive public policy issue. Should Congress seek to encourage OSHA's deeper involvement in such outcomes research, it should take some pains to carefully outline its expectations and assure that a satisfactory level of funding is available in the agency's budget to support the effort. Additionally, it should consider reviewing existing statutes governing OSHA's access to industry for data collection purposes (particularly Paperwork Reduction Act requirements) to assure that an appropriate balance between access for data collection and protection for industry from intrusive and overly burdensome data collection will exist.

■ Understanding the Potential of New Technology in Hazard Reduction

The most critical aspects of this report's appraisal of OSHA's current analytic procedures relate to the comparatively little attention typically devoted to considering the role of advanced technologies and production innovations in achieving hazard reductions. The historical record provides ample evidence that intelligently directed research and development (R&D) efforts can yield hazard control options that are technologically or economically superior to the conventional control measures (more ventilation, more enclosure) that usually receive the preponderance of attention in the agency's rulemakings. Such measures may also provide avenues to achieve "win-win" outcomes for industry and workers, yielding increased protection in a more cost-effective manner and perhaps in conjunction with other production benefits, such as productivity increases or improved product quality.

Nonetheless, the evidence indicates that OSHA has not routinely focused its thinking and information gathering in this area. Tracking

emerging technologies and identifying opportunities for R&D investments (including the strategic use of experimental variances or new technology demonstration projects) do not play a sizable role in the agency's current policy planning efforts. Most consideration of control technology options occurs in the context of ongoing rulemakings. But here, the realpolitik of the rule-making process and the agency's often tightly limited resources for analysis usually work to narrow the scope of consideration chiefly to applications of existing, conventional control measures.

Fixing this shortcoming would appear to have a variety of components. OSHA needs to devote more time and effort, independent of particular rulemakings, to tracking and staying abreast of new technological developments in major application areas with relevance to industrial hazard control needs. Furthermore, the new technology perspective needs to be more explicitly engaged in the course of rulemaking analyses and debates—and OSHA needs to exercise more leadership in making this widening of the dialogue on control options happen. In addition, it appears that OSHA could benefit substantially from closer cooperation with NIOSH and EPA on new technology development and transfer. NIOSH represents an important resource for staying abreast of and conducting substantive research on new control technology options. EPA's current efforts in promoting the development and adoption of "pollution prevention" process technologies represents one area where linkages with workplace hazard reduction efforts could be particularly fertile.

To be sure, OSHA's involvement in these various endeavors seems likely to be more nearly a matter of having adequate time and resources, than generating intrinsic interest. The tight budget constraints under which the agency's analytical efforts have generally had to operate work against the kind of widened inquiry about control options that is envisaged here. Even so, the likely long-run consequence of the slower growth of knowledge that results is unnecessarily slow progress in developing and commercializing new

generations of hazard control options that are likely to be more effective at addressing workplace hazards and better capable of providing "win-win" options for management and labor to adopt.

OSHA's increased attention to new technology in these respects would, no doubt, be encouraged by Congress's expression of interest in the topic. Nonetheless, a central consideration is assuring that adequate budget resources are available to the agency to support such efforts.

■ Alternative Process Approaches for Identifying Feasible Controls

Interest in the use of alternative policymaking procedures with greater emphasis on consensus building among stakeholders has been growing for some time. The Clinton Administration's Executive Order 12866 directs agencies "to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." In the past, Congress also has expressed interest in the applicability of such approaches.

The cross-national comparisons OTA conducted for this study indicate that other nations successfully promulgate occupational health and safety standards using consensual mechanisms (i.e., what would be called "negotiated regulation" in the United States). In most of these cases, technical and economic feasibility considerations are addressed in the context of the general dialogue among interested parties, rather than as an independent exercise in exacting quantitative analysis. The early, direct involvement of stakeholders and their vesting in the decisionmaking that typically result seems to promote various efficiencies (compared with the more combative U.S. system) in resolving feasibility debates: focusing discussion on the most salient issues, promoting interactions of a problem-solving rather than a resisting nature, and providing early warning on where problems in policy options under consideration could arise.

Admittedly, unique contextual circumstances—such as the strong orientation toward

the public conduct of public business, the broad and well-defended rights of interested parties to challenge bureaucratic decisions in court, and basic cultural differences (e.g., less trust in government and authorities)—pose barriers to the success of negotiated rulemaking approaches here in the United States. Nonetheless, many specialists in regulatory policymaking believe that some aspects of negotiated approaches may be beneficial. EPA, for example, is one of several federal regulatory agencies that has been looking for ways to increase the use of consensual processes in its regulatory activities.

In light of such developments at other regulatory agencies, this may be an appropriate time for OSHA to re-examine the possible usefulness of such processes for its own rulemaking needs. In addition to reviewing its past experiences with consensual approaches, the agency should perhaps become an active participant in some relevant “experimental” cases, to see whether these approaches could, in the current policymaking setting, foster appropriate workplace health and safety protections more efficiently. Congress may wish to encourage OSHA to embark on such an exploratory effort.

Another avenue available to OSHA is to make greater use of balanced panels of experts as a

means to identify and consider relevant control technology options.³ The OSH Act provided the agency with statutory authority to convene such panels to assist in specific rule-makings. Similarly, the National Advisory Committee on Occupational Safety and Health (NACOSH), a standing committee on occupational safety and health matters also authorized by statute, could be used as a forum for discussing compliance options.

Some observers looking at OSHA’s past use of advisory committees have concluded that they failed chiefly because the strict requirements for management and labor representation and limits on committee size mandated by statute politicized the panels and limited the number of independent experts that could be appointed.⁴ Mandatory limitations on the life of individual committees imposed by the Federal Advisory Committee Act also curtailed their usefulness.

However, Congress could ameliorate such problems by amending the existing statutes to loosen or eliminate the limitations on committee size and terms, and change strict composition requirements to the simple stipulation that advisory committees be “balanced.”⁵

³ See, for example, N.A. Ashford, “Advisory Committees in OSHA and EPA: Their Use in Regulatory Decisionmaking,” *Science, Technology, and Human Values*, 9 (1): 72–82, Winter 1984.

⁴ T.O. McGarity and S.A. Shapiro, *Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration* (Westport, CN: Praeger Press, 1993), p. 195.

⁵ See McGarity and Shapiro, 1993, p. 195.