OSHA'S REGULATORY AGENDA: CHANGING LONG-STANDING POLICIES OUTSIDE THE PUBLIC RULEMAKING PROCESS

BEFORE THE

EDUCATION AND THE WORKFORCE COMMITTEE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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TESTIMONY OF

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on "OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process." My name is Randy Rabinowitz. I appear here this morning as an expert on Occupational Safety and Health law and not on behalf of any client. I have practiced OSHA law, representing the interests of workers, for several decades. I have served as co-chair of the ABA's OSH Law Committee; as the Editor-in-Chief of the American Bar Association's (ABA) treatise on OSHA Law and author of the section on standard-setting; and as an adjunct professor teaching OSHA law. I have been lead counsel for labor unions on close to a dozen challenges to OSHA rules, served as counsel to this Committee, and have worked for or advised OSHA and state health and safety agencies on regulatory issues. Shortly, I expect to be named the founding Co-Director of a new public interest organization called the Occupational Safety and Health Law Project. I have also served as Director of Regulatory Policy for the Center for Effective Government formerly OMB Watch.

Passage of the Occupational Safety & Health Act in 1970 has improved workplace safety and health significantly over the past 40 years. Unfortunately, too many workers still die on the job or are made ill by work. Federal and state OSHA programs have approximately 2000 inspectors to monitor the health and safety performance of more than 7-8 million workplaces. With these resources, federal OSHA can only inspect each workplace once every 131 years.

OSHA's rulemaking process is now saddled by so many procedural requirements that OSHA is incapable of issuing standards to protect workers in a timely manner. Requiring OSHA to also conduct notice and comment rulemaking for every policy statement or enforcement directive would make an already slow process grind to a halt. Contrary to industry rhetoric, the problem is not that OSHA regulates too much, but that it regulates too few health and safety hazards. Between 1981-2010, OSHA issued 58 health and safety standards, only 16 of which regulate health hazards, according to GAO. [1] It took OSHA an average of more than 7 years to complete each rulemaking. These facts leave me dismayed that the focus of this hearing is on placing even more procedural burdens on OSHA before it can issue either letters of interpretation or policy guidance. Such a requirement would do nothing to protect workers and would make an already slow regulatory process even slower.

OSHA Policies Meet the Requirements of the Administrative Procedure Act

[1] http://www.gao.gov/products/GAO-12-330

The premise of this hearing -- that OSHA has changed long standing policies and that it may do so only after notice and comment rulemaking –has no basis in law. OSHA routinely issues interpretations of its regulations. In addition, it often issues policy statements to alert its inspectors and others about enforcement policies. Many are requested and applauded by business. None are the subject of rulemaking. If rulemaking were required for every interpretation, OSHA would lose the ability to clarify its rules.

My testimony this morning addresses three OSHA policies that members of the business community claim OSHA has recently changed. They include:

- A web "tool" published by OSHA listing exposure limits recommended by the National Institute for Occupational Safety and Health (NIOSH), the American Conference of Government Industrial Hygienists (ACGIH) or the California OSH Program;
- A letter responding to Steve Sallman of the Steelworkers (the "Sallman letter") dated February 21, 2013 reaffirming OSHA's policy that an employee walk-around representative need not be an employee of the employer whose facility is being inspected;
- A memo to OSHA's field staff from Thomas Galassi dated June 28, 2011 entitled "OSHA's Authority to Perform Enforcement Activities at Small Farms with Grain Storage Structures Involved in Postharvest Crop Activities."

These policies either represent long-standing interpretations by OSHA of statutory language, clarify ambiguous regulatory provisions, or announce how OSHA will exercise its enforcement discretion. The policies impose no new legal burdens. There is no legal requirement for notice and comment rulemaking. The issuance of each policy is consistent with the requirements of the Administrative Procedure Act (APA). Any employer who believes otherwise can challenge the policies before the Occupational Review Commission or the courts.

The APA exempts "interpretive rules" and "general statements of policy" from the requirement for notice and comment rulemaking. "An interpretive rule interprets or clarifies the nature of the duties previously established by the OSH Act or by an OSHA rule."[2] The interpretation is not binding and litigants may challenge it. OSHA's interpretive rule is likely to be upheld if "OSHA is describing with greater clarity or precision a duty that the OSH Act or an OSHA rule has already established." [3] A policy statement, does not interpret existing duties. Instead, OSHA uses policy statements to "alert employers and

[2] Dale and Schudtz, OCCUPATIONAL SAFETY & HEALTH LAW 3rd Edition (BNA 2014) at 603.
[3] Id.

employees (or others) prospectively of its future plans regarding some new duty that it would like to see established."[4] The duty only becomes binding if the Occupational Safety and Health Review Commission affirms OSHA's citations. In both cases, notice and comment rulemaking is not required. Indeed, the D.C. Circuit recently reaffirmed that OSHA may revise its interpretation of the OSH Act without notice and comment rulemaking in a case challenging OSHA's Hazard Communication standard. [5]

In limited instances, when an agency changes a long-standing, definitive interpretation, notice and comment may be required. [6] But, even this rule would allow OSHA to publish one interpretation without notice and comment. "Any second interpretative rule that significantly changes the first interpretation would be invalid if the first interpretation is definitive."[7] In none of the instances discussed at this hearing has OSHA tried to replace one definitive interpretation with another, so the rule in *Alaska Hunters* requiring notice and comment for a second interpretation would not apply.

Usually, "[t]here is general agreement that the public interest is served by prompt dissemination of agency interpretations and policy statements. Moreover, such statements often are indispensable to agency administration because they guide the staff in its day-to-day tasks and structure the exercise of agency discretion." [8]

OSHA issues more than 100 interpretations each year. Most are requested by, and benefit, business. If, as a result of this hearing, OSHA must employ procedures beyond those already required by the APA and the OSH Act before adopting an interpretation, this informal process of clarifying OSHA rules would grind to a halt. .

Reliance on the General Duty Clause To Protect Workers From Toxic Exposures

OSHA permissible exposure limits (PELs) for toxic substances are widely recognized by both labor and industry to be woefully out of date. Hundreds were adopted in the early 1970s based on consensus standards first published in the 1960s or earlier. OSHA's efforts to update these exposure limits have been stymied for decades. Fewer workers would get sick or die if OSHA could snap its fingers, adopt a new "interpretation," and rely on the general duty clause to mandate reductions in toxic exposures. It cannot. There is simply no legal basis for industry's concern that OSHA is trying to expand the reach of the general

[4] Id. At 606.
[5] American Tort Reform Ass'n v. OSHA, No. 12-1229 (D.C. Cir Dec. 27, 2013).
[6] Alaska Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).
[7] OCCUPATIONAL SAFETY & HEALTH LAW 3rd Edition at 605.
[8] Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING (ABA 2006) at 74.

duty clause by posting public information about recommended exposure limits on its website.

OSHA's interpretation of the general duty clause has not changed in more than 20 years. After a UAW member died in 1983 while cleaning the inside of a tank with Freon, OSHA cited General Dynamics for a violation of the general duty clause. General Dynamics objected, claiming that it could not be cited under the general duty clause when it was in compliance with OSHA's Freon standard.

The D.C. Circuit rejected this claim. The court held that "if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard. " *UAW v. General Dynamics*, 815 F.2d 1570 (D.C. Cir. 1987). OSHA changed its Field Operations Manual in 1994 to instruct its staff to cite a general duty clause violation under the circumstances described in the *General Dynamics* case. This has been OSHA's consistent policy for more than 20 years.

The rule announced in *General Dynamics* is a narrow one. OSHA has relied on it only sparingly. It permits OSHA to cite an employer for a violation of the general duty clause, even though the employer has complied with an OSHA exposure limit, when the employer has actual knowledge that OSHA's standard does not protect employees from hazards in the workplace. OSHA's burden to demonstrate a violation of the general duty clause remains high under this standard. It must show that an employer **knew** either that "a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address , or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which is employees are exposed." [9]

Against this background, business representatives complain that a new "tool" published on OSHA's website somehow expands the general duty clause. This concern has no legal basis. The "tool" about which business complains compiles, in one place, chemical exposure limits recommended by the National Institute for Occupational Safety and Health and the American Conference of Government Industrial Hygienists and adopted by the California OSHA program. These exposure limits, some of which are recommended, but not required, are already public information. OSHA has a statutory responsibility to advise employers and employees about effective methods of preventing occupational injuries and illnesses.[10] It has done so in an easy to understand, readily accessible format. The

[9] 815 F.2d at 1577.
[10] 29 U.S.C. §670.

information included in the "tool" will help workers and others bargain for better working conditions and help employers understand the wide range of recommended exposures to toxins. The "tool" in many instances illustrates how out-of-date OSHA's exposure limits are. OSHA should be applauded for this effort.

The "tool" does not in any way expand or limit the circumstances under which an employer can be cited for a violation of the general duty clause. OSHA cannot meet its burden of showing that employees are exposed to a recognized hazard solely by pointing to a recommended exposure limit – whether or not that limit is on OSHA's website – without some other evidence of employer or industry awareness of the hazard. I know of no instance where OSHA has tried to do so. The "tool" has no legal effect on an employers' obligation to protect workers from recognized hazards.

Employee Representatives Who May Accompany OSHA Inspectors

Section 8(e) of the OSH Act provides that a "representative of the employer and a representative authorized by his employees" shall have a right to accompany OSHA during a workplace inspection. OSHA's regulations provide that the employee representative shall be an employee of the employer but also authorize others to serve as an employee representative if, in the opinion of the OSHA inspector, that individual is "reasonably necessary to the conduct of an effective and thorough physical inspection."[11]

This regulation has always been understood to permit non-employee representatives to accompany an inspector and to act on behalf of employees for other purposes. OSHA's Field Operations Manual (FOM) has two sections addressing who may represent employees during a walk around inspection. In facilities with a certified bargaining representative (and it does not matter whether the union has a collective bargaining agreement or not) the union selects the employee walk – around representative. Sometimes the union selects an employee as the walk-around representative. Other times, the union designates a member of the international union's staff as the walk-around representative. Sometimes, the union representative is an industrial hygienist or safety engineer; other times the union representative is a business agent. The important point here is that the employees' representative is selected by the employees -- not by the employer. That is the employees' statutory right.

OSHA's long-standing practice in non-union facilities has been to determine whether the employees have selected someone to represent their interests in an OSHA inspection. Often, the employees have not done so. But, if they have, OSHA honors that choice. The

[11] 29 C.F.R. §1903.8

FOM recognizes that when there is no union, employees may nevertheless have selected somebody to represent their interests. In facilities where there is a safety committee -- and many states require such committees –a member of the safety committee may serve as the employees' walk-around representative. But, the FOM also recognizes that employees may have "chosen or agreed to an employee representative for OSHA inspection purposes" in some other manner. Only when no employee walk-around representative can be identified by OSHA using either of these methods, is an OSHA inspector instructed to proceed without an employee walk-around representative and interview a "reasonable number of employees."

OSHA's policy on who may represent employees during an inspection is similar to its policy on who may file a complaint on an employee's behalf. OSHA's Field Operations Manual has authorized non-employee representatives to file formal complaints seeking an inspection. The FOM defines the term "representative of employees" as either: (1) an authorized representative of the employee bargaining representative; (2) an attorney representing an employee; and (3) [any] other person acting in a bona fide representative capacity including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit group and organizations.

The "Sallman letter" simply clarifies this long-standing policy. It makes clear that individual who is authorized to represent employees and who "will make a positive contribution to a thorough and effective inspection" may serve as a walk-around representative. " In 1970, when OSHA's inspection regulations were first published, employer –employee relations were much different than they are today. Then, a workplace either was unionized or it was not. There were few other options. Today, a mix of non-traditional advocacy groups may represent the interest of workers who do not belong to unions. More often than not, these groups are not seeking to become the workers collective bargaining representative, at least as that term is understood under the National Labor Relations Act. Non-employee representatives can often help OSHA understand the complex employment relationships between staffing agencies, subcontractors and employers. They can help OSHA identify past accidents and common safety hazards. And, they can help workers who do not speak English effectively or who are wary of government inspectors to communicate their concerns to OSHA. OSHA should be complimented on recognizing that the structure of the economy and the forms of workers representation have changed over the years, even though the importance of a worker's right to participate in an OSHA inspection has not. Unions are no longer the only voice that speaks on behalf of workers.

A recent example, one that occurred prior to OSHA's letter to Mr. Sallman, illustrates the point. During a 2011 inspection of the Exel/Hershey warehouse in Hershey, PA, the

National Guestworkers' Alliance (NGA) served as the walk-around representative for employees. The employees represented by NGA were young foreign exchange students participating in a summer work program and subject to abusive working conditions. NGA aided OSHA in identifying many instances of unrecorded injuries among temporary workers at the facility and other safety and health violations. The foreign students could not have effectively identied health and safety hazards to OSHA without NGA's help.

Even under the "Sallman" letter the right of employees to select a non-employee as their walk-around representative is narrow. First, the person who serves as a walk around representative must have been selected by employees to serve in that role. Second, the representative must aid in the conduct of the inspection. OSHA inspectors can refuse to allow an individual to serve as an employee representative when, in the OSHA inspector's opinion, it would not further the inspection. And, an employer who believes that a non-employee has been improperly selected as the walk-around representative can refuse voluntarily to permit the inspection and insist that OSHA obtain a warrant before proceeding.

OSHA's long-standing policy permitting non-employees to serve as an employee representative during a walk-around inspection when doing so will aid OSHA in identifying health and safety hazards is consistent with the OSH Act, its legislative history and the few court cases to look at this issue. Senator Harrison Williams (D-NJ), the Senate sponsor of the OSH Act, made clear that "the opportunity to have the working man himself and a representative of other working men accompany inspectors is manifestly wise and fair." The Mine Safety and Health Administration has for years allowed non-employee representatives of miners to accompany its inspectors, even in non-union mines. Courts have approved this policy. [12] The Seventh Circuit has recognized the right of a union representative to accompany an OSHA inspector even when the union's members were on strike and had been temporarily replaced by other workers. [13] In a related context, the First Circuit recognized that a union organizer who was not an employee of the employer could serve as the representative of employees before OSHRC, holding that "any outside union activity [by the organizer] is absolutely irrelevant to his ability to represent the employees."[14] Nothing in the legislative history of the OSH Act or any court decisions suggests that statutory right of employees to accompany OSHA during a workplace inspection is confined to unions certified as the employees' bargaining representative under the National Labor Relations Act.

OSHA Inspections of Farming Operations

[12] See 30 U.S.C. §813(f); Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1277 (10th Cir. 1995).
[1313] In re: Establishment Inspection of Caterpillar, 55 F.3d 334 (7th Cir. 1995).
[14] In re: Perry, 859 F.2d 1043 (1st Cir. 1988).

Too many employees die in grain handling facilities. When grain dust becomes airborne, it often explodes killing workers inside. When employees walk on moving grain in an attempt to clear grain built up on a bin, they may get buried in it. Too often those killed or injured are teenagers working at their first job. These injuries occur at grain facilities owned by agribusinesses and by those owned by small farmers. After a series of deadly explosions, and more than 10 years of public debate, in 1987, OSHA adopted a standard regulating grain handling facilities. [15] An analysis shows the grain standard has been remarkably effective in reducing explosions and deaths in the industry.[16]

Unfortunately, in 2010 there were a series of fatalities at grain handling facilities. For example, two workers – one 19 and the other 14 – were engulfed in corn at an Illinois grain bin owned by Haasbach, LLC. The tragedy occurred when one worker fell into the bin and four went in to rescue him.

OSHA responded to this and other incidents with an outreach, compliance assistance, and education program. It sent a letter to all grain handling facilities urging them to comply with the standard. [17] One part of its effort was a local emphasis program focusing on enforcement. The program has been effective. In 2010, there were 57 entrapments and 31 fatalities at grain facilities. In 2012, there were only 19 entrapments and 8 fatalities. While that is still too many fatalities, it represents a 74% reduction in fatalities. OSHA's ability to further reduce fatalities from entrapments in grain handling facilities is limited because, historically, 70% of entrapments occur on farms exempt from OSHA's grain handling standard. [18]

OSHA selects workplaces for inspection by relying on the SIC or NAIC code for that workplace. Beginning in FY 1977, when OSHA's annual appropriations first included a rider prohibiting the agency from enforcing any standard "which is applicable to any person who is engaged in a farming operation and employs 10 or fewer employees, " OSHA has instructed its staff **not** to inspect certain farming operations with 10 or fewer employees. It identifies the farming operations exempted from inspection according to the businesses' self-reported SIC or NAIC code; certain codes fall under the rider and others do not. Since 1977, OSHA has implemented the rider in the exact same way and exempted the same SIC codes from inspection. The memo that has been characterized as a policy change merely reiterates to the field, in advance of beginning the emphasis program, which facilities OSHA can inspect and which it is prohibited from inspecting under the rider.

[15] 29 C.F.R. §1910.272
[16] https://www.osha.gov/dea/lookback/grainhandlingfinalreport.html
[17] https://www.osha.gov/asst-sec/Grain_letter.html
[18] http://extension.entm.purdue.edu/grainlab/content/pdf/2012GrainEntrapments.pdf

OSHA has indicated a willingness to clear up any confusion among farmers created by the memo.

OSHA does not schedule small facilities within the SIC codes covered by the rider for inspections. But, SIC code designations do not always accurately describe the operations at a facility and the size of the facility's workforce may vary. If OSHA arrives at a small facility with farming operations either because it had inaccurate information, because it receives a complaint about conditions at that facility, or because a death or serious injury occurred, its' inspector should leave upon learning that the facility is covered by the rider. OSHA depends on farmers to provide the information needed to make that determination. In some cases, OSHA has left without inspecting the facility even though a fatality had occurred. If a facility is covered by the rider, and OSHA nevertheless insists on an inspection, the owner has a legal right to refuse OSHA entry and insist that OSHA get a warrant to conduct the inspection. To obtain that warrant, OSHA would have to convince a federal magistrate that the facility was not covered by the rider. If an inspection occurs, and OSHA issues citations, an employer can request an informal conference with OSHA to present evidence that the citations were issued improperly. OSHA often withdraws the citations under such circumstances. Finally, citations will be vacated by OSHRC if an employer demonstrates that OSHA was not authorized to inspect and cite its facility. In such a case, OSHA can be ordered to pay the small farmer's attorney fees under the Equal Access to Justice Act. Farmers thus have several opportunities to ensure that OSHA does not inadvertently inspect or cite facilities covered by the rider.

The memo reflects OSHA's consistent, 20 year old interpretation of the rider. Until recently, OSHA has gotten **no** complaints about how it has implemented the rider. Nothing has changed. OSHA issues and revises inspection instructions to its staff regularly. OSHA does not conduct public rulemaking on enforcement directives. Public rulemaking is not required. Here, OSHA is implementing an appropriations rider renewed annually by Congress. If Congress disagrees with OSHA' s interpretation of the rider, Congress can make its intention clear. If OSHA made a factual error in citing a farm it should not have inspected -- and that question is currently being litigated -- those employers have adequate legal redress if they were cited improperly.

Conclusion

Congress should not interfere with OSHA's long-standing practice of issuing interpretive letters and policy statements that conform to the requirements of the APA. The interpretive letters and policy documents benefit business more often than they benefit labor. They are a necessary and useful administrative tool. The process OSHA follows conforms to the requirements of the APA. Any business who believes otherwise has the

right to challenge OSHA's policies if they are applied to it. This Committee should strive to identify more effective ways that OSHA can meet its statutory responsibility to protect workers. Increasing the procedural burdens OSHA must meet to do its job will not improve worker safety and health.

Thank you for the opportunity to testify.