REACHING A CONSENSUS TO UPDATE OSHA'S PERMISSIBLE EXPOSURE LEVELS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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HEARING ON REACHING A CONSENSUS TO UPDATE

OSHA'S PERMISSIBLE EXPOSURE LEVELS

Tuesday, July 16, 2002

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:00 p.m., in Room 2175, Rayburn House Office Building, Hon. Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Representatives Norwood, Owens, Kucinich, Woolsey, and Sanchez.

Staff present: Stephen Settle, Professional Staff Member; Loren Sweatt, Professional Staff Member; Travis McCoy, Legislative Assistant; Molly Salmi, Professional Staff Member; Scott Galupo, Communications Specialist; Patrick Lyden, Professional Staff Member; Allison Dembeck, Executive Assistant; Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Maria Cuprill, Minority Legislative Associate/Labor; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Norwood. The Subcommittee on Workforce Protections of the Committee on Education and the Workforce will come to order.

We're meeting today to hear testimony on permissible exposure levels standards set by OSHA. Under Committee rule 12(b), opening statements are limited to the Chairman and Ranking Minority Member of the Subcommittee. Therefore, if other Members have statements, they will be included in the hearing record.

With that, I ask unanimous consent for the hearing record to remain open for 14 days to allow Member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Without objection, so ordered.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Good afternoon to all. Thank you, witnesses, for taking your time and coming today to testify before us.

The title of my opening statement is “Can A Consensus Be Reached To Update OSHA's Permissible Exposure Levels (PELs)?" I'd like to keep our hearing on that subject. Today, the Subcommittee will begin a dialogue intended to test three preliminary findings from our previous hearings and the research undertaken by the Subcommittee on OSHA rulemaking. The following preliminary findings frame our inquiry for today:

Preliminary finding # 1, OSHA standards covering workplace air contaminants, or what are commonly referred to as PELs, or permissible exposure levels, are simply out of date. Based upon what we have been advised to date, evidence suggests that these standards are out of date because PELs were established in 1971. The original OSH Act permitted the Secretary of Labor to incorporate, without change, certain existing national consensus standards. These were established as the federal standards during the first two years of OSHA's operation. Because this means that most of these PELs are based upon scientific data and research conducted before 1970, it is argued that those PELs are out of date in the face of industrial experience, new developments in technology, and more recent scientific studies.

Our second finding was because of the rigorous statutory rulemaking requirements of the Act, OSHA has not been able to update these PELs. This preliminary finding is based in large part on the obvious. Despite attempts to do so, OSHA has simply failed in efforts to update these PELs. This may be due to the extensive nature of the Secretary's current rulemaking burdens. For example, in 1988, OSHA attempted to undertake a “generic” rulemaking for more than 300 substances. The 11th Circuit Court of Appeals, however, vacated the standard on the grounds that OSHA had not properly made the statutorily required determinations of “significant risk” or “feasibility” for each individual chemical.

Preliminary Finding # 3 is, as a result of this failure to update standards there is arguably inadequate protection for many workers in terms of their exposure to hazardous airborne contaminants.

Now, I intend to have a dialogue that addresses the merits and/or shortcomings of these preliminary findings. As the announced title for this hearing suggests, the ultimate goal is to

determine whether or not it is possible to develop a widespread consensus that something should be or can be done. It is obvious to me that our challenge is to garner the approval of most stakeholders. That, in essence, is what a consensus is all about. It is also obvious to me that, without developing this consensus, we probably cannot avoid the litigation that could negate any effort in this area, despite the best of all of our intentions. The recipe for achieving this, I suggest, is for us to begin with this dialogue and earn the trust of the stakeholders.

Now, let me make it clear that I am on record as having stated that if we truly seek to develop a widespread consensus to update the PELs, I support that effort. I meant that, and I strongly believe that, but I want to underline, widespread consensus.

I think we all understand going into this, however, that the devil will be in the details necessary to facilitate and guarantee the development of any consensus. At the outset, then, I simply want to share my vision of the necessary ground rules for developing a genuine consensus.

First and foremost, wherever this dialogue leads the Subcommittee, the Minority and the Majority Members must journey together, in partnership and in full agreement. We will accomplish this through mutual respect, honesty, and a promise to listen as well as talk.

Eventually, after we have the support of our colleagues on the Full Committee, I hope we can invite Senate Republicans and Democrats to join this partnership. Without their willingness to partner with us, there really can be no final agreement.

Second, there are three general criteria, in my mind, at least, that must guide this consensus-building process. This process must be inclusive. The participation of all stakeholders, large and small, across all affected industries, must be encouraged, and that participation must be made meaningful and possible for all.

The process must be transparent. There must be no hidden agendas, no secret meetings, and no mysterious outcomes. The key to success is trust, and this means that all meetings must be open, noticed well in advanced, and that all decision-making must be well documented, with such rationales available to all stakeholders. Finally, the process must respect individual due process rights. No one should be divested of the procedural protections currently available, without their approval, and even then, we should ensure adequate and effective alternative protections.

With that said, I honestly look forward to working with my colleague from New York, Mr. Owens, and each of the Members on his side, and I want to thank Mr. Owens for the constructive cooperation and courtesy that he and his staff have exhibited to this point. It is greatly appreciated.

I now yield to the distinguished Ranking Minority Member from New York, Mr. Owens, for whatever opening statement he wishes to make.

WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Mr. Owens. Thank you, Mr. Chairman.

At the outset, I'd like to apologize to you and to the witnesses for the probability that I'm going to have to be absent for a little while, due to the fact that I am scheduled to manage a bill on the floor that may come up in the next 30 minutes.

OPENING STATEMENT OF RANKING MEMBER MAJOR OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

OSHA has 470 permissible exposure limits, PELs as we call them, for various forms of approximately 300 chemical substances. I'm going to be repeating some of the things you've said already, but I think that, for a subject as complex as this with such serious consequences based on our actions, some repetition is in order.

The potential health effects of exposure to these chemicals are extremely varied, but taken altogether, include chronic and acute effects on virtually every part of the body, including sensory irritation, metabolic disturbances, reproductive dysfunctions, cardiovascular, neurological, respiratory, liver, and kidney diseases, as well as cancer. Exposure limits, such as OSHA's PELs, are a primary tool in preventing occupationally related diseases.

However, the OSHA PELs were established in 1971 and have not been updated since. Since then, much new information has become available indicating that in most cases, OSHA's PELs are outdated and do not adequately protect workers.

In 1989, OSHA issued a final rule that sought to update the PELs for 428 toxic substances. That rule was vacated in a decision by the 11th Circuit Court of Appeals, AFL-CIO v. OSHA, in 1992, because the agency had failed with regard to each separate PEL to adequately support its determination that the existing exposure limits posed a significant risk of material health impairment, or that the new standard eliminated or reduced the risk to the extent feasible.

At the time, the court stated, and I quote: “We have no doubt that the agency acted with the best of intentions. It may well be, as OSHA claims, that this was the only practical way of accomplishing a much-needed revision of the existing standards and of making strides toward improving worker health and safety.

Given OSHA's history of slow progress in issuing standards, we can easily believe OSHA's claim that going through detailed analysis for each of the 428 different substances regulated was not possible.

Unfortunately, OSHA's approach to this rulemaking is not consistent with the requirements of the Occupational Safety and Health Act. Before OSHA uses such an approach, it must get

authorization from Congress by way of an amendment."

The issue before us today is whether this Congress can find a means that will permit OSHA to update its obsolete and ineffective PELs. Last Congress, your predecessor, Mr. Ballenger, and I worked together to craft bipartisan legislation to improve OSHA's blood borne pathogen standard by requiring the use of safe needles. Last year, at a hearing on OSHA's rulemaking process, I committed to work with you, Mr. Chairman, to try to improve other OSHA standards, and I reiterate that commitment today.

Before concluding, I do want to express my appreciation to Peg Seminario and Frank White for the efforts to try to find common ground between labor and management on this issue. Thank you, Mr. Chairman, and I yield back the balance of my time.

Chairman Norwood. Thank you very much, Mr. Owens.

The lights in front of you, ladies and gentlemen, are timed in such a way that you will be given five minutes for your testimony. The red light means time is up which is rather important, but I'm not going to be a stickler on it. Just try not to take too much advantage of that.

I can think of no better panel of experts than the panel that's with us to lead us in this discussion we are assembled here to begin today. Working with the Minority, I think we have chosen a balanced panel that will address all sides of this issue. I welcome each of our panelists, and thank you for joining us today. We really mean it, and we're appreciative.

First, we have Mr. Edwin G. Foulke, Jr., from the law firm of Jackson, Lewis, Schnitzler & Krupman from Greenville, South Carolina, right up the road from me. Mr. Foulke is former Chairman of the Occupational Safety and Health Review Commission, and is with us today representing the United States Chamber of Commerce, and we're glad you're here. Thank you.

Next, we want to welcome back Ms. Margaret Seminario. Ms. Seminario represents the AFL-CIO here in Washington, D.C., where she serves as the Director of Occupational Safety and Health.

And then, Mr. White, we're glad you're here. Mr. Frank White is Vice President of Organizational Resource Counselors, Inc., also located here in Washington, D.C. Mr. White, like Ms. Seminario, has appeared before this Committee before, and we thank you.

Lastly, we have Mr. Richard Schwartz of the law firm of Crowell and Moring here in Washington, D.C. Mr. Schwartz represents the American Iron and Steel Institute today.

We welcome you all, and with that Mr. Foulke we would like to begin with you.

STATEMENT OF THE HONORABLE EDWIN G. FOULKE, JR., JACKSON, LEWIS, SCHNITZLER & KRUPMAN, LLP, GREENVILLE, SC, TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE, WASHINGTON, D.C.

Thank you very much, Mr. Chairman, and Members of the Subcommittee. I'd like to thank you for allowing me this opportunity and privilege to present my views on this important issue involving permissible exposure levels. I have provided some written testimony for the Committee, and I would like to have that moved into the record. Thank you.

I'm here today on behalf of the United States Chamber of Commerce. As you're aware, the Chamber is the world's largest business federation, representing more than 3 million businesses and organizations of every size throughout the entire country.

I would like to start out by thanking the entire Subcommittee, first for their interest in and commitment to improving the workplace safety and health for all employees in this country, but even more importantly, I thank them for their willingness to look at the current status of permissible exposure limits on hazardous chemicals in the workplace, and to examine possible options that could be instituted to assist making possible updates in those levels.

This brings me to the first point that I would very much like to make to this Subcommittee, specifically, that the Chamber is very much in favor of a serious review of the PELs issue. They think that this is something that deserves serious consideration; but, while we may be in agreement on this issue for the review, there seems to be no universal agreement on the procedures to get us there.

The Chamber is not, at this meeting, recommending any specific proposal for how the change or update, if any, should be made. However, we are identifying specific considerations that we feel need to be addressed if some form of expedited PELs review procedure is to be considered and/or implemented.

Unfortunately, as you will see from my written testimony, we've raised more issues and questions than we've probably provided answers for, but we felt it was important that the Congress and the Committee be aware of these issues in determining what type of legislation should be crafted.

The second major point I'd like to make is that when the Act was passed in 1970, Congress clearly recognized and clearly intended that the rulemaking process for the new standards, especially health standards, dealing with toxic materials and harmful physical agents, under Section 6(b)(5) of the Act, would and probably should be more difficult; and it was this Congressional intent that was actually demonstrated in the context of the Act.

If you look in Section 6(a), Congress gave OSHA a two-year period when the Act was enacted, which amounted to an expedited rulemaking, to allow the adoption by OSHA of any and all national consensus standards that had been published at the time. Clearly, Congress intended this to be kind of a one-time exception to the rulemaking requirements.

Another indication of the Congressional intent is found in Section 6(b)(5) of the Act, which outlines what OSHA is required to do in developing standards involving toxic materials and hazardous physical substances.

Finally, Congress intended for a more detailed rulemaking for toxic materials, as is demonstrated from the fact that the Secretary specifically required, in making rulemaking, under Section 6(f), that the records show that there is substantial evidence, when considered as a whole, for the standard that's being promulgated.

While there are other sections of the Act that demonstrate this intent for requiring a more detailed rulemaking process in this area, these three sections, I think, provide sufficient evidence to substantiate this position.

The next logical point to raise is that yes, detailed rulemaking was obviously the intent of the Congress, but Congress probably could not envision the court challenges and the judicial roadblocks that would arise under the OSHA rulemaking process. The response, I think, is that Congress did envision the court challenges being made to OSHA rulemaking, in fact provided for it in the Act, because once again, in Section 6(f) of the Act, Congress specifically allowed court challenges.

Section 6(f) specifically states, any person who is adversely affected by the standard issued under this section may, at any time prior to the 60th day of such standard being promulgated, file a challenge to the validity of such standard. It is clear from this section that Congress, in the Act, realized that court challenges would be made to OSHA rulemaking.

Turning to the claim about the judicial roadblocks being raised to rulemaking, I would argue that clearly they are manageable and have been managed by OSHA in the past. I believe that if you did a careful analysis of the case law involving challenges to the OSHA standards over the years, to OSHA standard rulemaking, it would show that OSHA is victorious in most cases that are brought. While, in general, the courts have held to that substantial evidence rule, the courts generally give substantial deference to OSHA in providing evidence, throughout most of the cases.

Even in those cases where OSHA has lost, the courts were, in part, sympathetic to OSHA. I will point to the case Industrial Union Department v. the American Petroleum Institute, also known as the Benzene standard, or the “Benzene”' case, where the U.S. Supreme Court vacated OSHA's Benzene standard in a plurality decision. However, in that plurality opinion, written by Justice Stevens, the Court held that a reviewing court must provide OSHA some freedom in promulgating standards where the evidence is on the cutting edge of scientific knowledge; clearly once again, OSHA receiving deference in this area.

Finally, in the case that has arguably brought us here today, the 11th Circuit, which vacated the PELs decision in AFL-CIO v. OSHA, if you read the decision there, I think you can see that specifically the court has determined that OSHA failed to meet its rulemaking responsibilities, and basically is saying, “OSHA, we will not allow you to take these shortcuts. You need to do your homework, or at least demonstrate to us that you have done your homework."

The next point I would like to make with respect to legislative action regarding the PELs is there is much if not more agreement than there is disagreement.

In examining the points made in the written testimony on this issue, we have much to agree on. Specifically, we agree that any PELs legislation must minimize the potential for amendment to the Act. Such action would cause, I think, the different parties to call out their troops on both sides for fear that they may somehow be put at a disadvantage. But we also agree that any procedure for updating PELs must include all interested parties and have full disclosure. We further agree that any updating procedures must include all the best evidence, available data, and information, both pro and con, in order to fairly evaluate any new PELs. Finally, we agree with the contention this process is critical, that the potential on small businesses be given special attention.

Specifically, in my written testimony, I talk about the importance of the Small Business Regulatory Enforcement Fairness Act, that they be incorporated in any type of change that would be contemplated by the Committee. Finally, my written testimony ends up by stating our belief that probably the most logical solution to this issue is to direct OSHA to do its job and make the necessary PELs updates and provide additional funding to be able to meet this in an expedited manner.

As I mentioned earlier about the case law, it is clear that OSHA can be successful in handling standard rulemaking, especially health standards. The question, I guess, to be asked is why little has been done with the PELs since the court decision in 1992.

In conclusion, again I'd like to thank the Committee for its interest in this important area, and especially in giving me this opportunity to speak.

WRITTEN STATEMENT OF THE HONORABLE EDWIN G. FOULKE, JR., JACKSON, LEWIS, SCHNITZLER & KRUPMAN, LLP, GREENVILLE, SC, TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE, WASHINGTON, D.C. – SEE APPENDIX B

Chairman Norwood. Thank you very much, Mr. Foulke.

Ms. Seminario, you're next.

STATEMENT OF MARGARET M. SEMINARIO, DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH, AFL-CIO, WASHINGTON, D.C.

Thank you very much, Mr. Chairman and Representative Owens. Thank you for the opportunity to testify, and I just wanted to say that we appreciate your interest in and particularly your leadership on this issue.

I'd just like to make a couple of summary points of my written statement. First, that exposure to toxic chemicals is a major problem for workers in this country. There are estimates of 50,000 to 60,000 deaths every year from occupational diseases. This compares to 6,000 deaths from traumatic injuries, so this is a big problem.

The standard-setting apparatus of OSHA has not kept pace with the need to protect workers. We've had 31 years of experience under the statute, and as of today, OSHA has set standards to address 29 toxic substances, so that's been the track record in 31 years.

In 1988, at the time when they considered updating PELs, a colleague from industry said that the situation at that point was an embarrassment to industry and OSHA, and I would say it was an embarrassment to the country, so addressing this issue indeed is important. As everyone has noted, OSHA did try to update these limits in 1988 and 1989, and was unsuccessful, due to a court challenge and the regulation being overturned. At this point in time, we believe that legislation is indeed needed from the Congress, direction from Congress, and authorization to provide for an expeditious process for updating the permissible exposure limits.

Ideally, we would like to see legislation that updates the existing limits, and which would provide for keeping them up to date on an ongoing basis, but we understand and recognize that doing all of this at once is a fairly heavy lift. So what we have discussed with colleagues, the safety and health professionals with different industry groups, is looking at this as a staged process, trying to go at this in stages, gain some experience, build some trust, and then see if we can move on.

What we have talked about is a process that as a starting point recommended standards of various standard-setting organizations, possibly the ACGIH, AIHA, and recommended standards by NIOSH. We would start there, but we certainly wouldn't stop there, because, as has been pointed out, if this process is going to be successful, it is one in which there's got to be broad agreements reached in the comfort level with the standards that are, indeed, adopted.

So what we have talked about is the establishment of an advisory committee under the Federal Advisory Committee Act, that would essentially serve as a review and screen of these various recommended levels to look at the data that had been relied upon in setting these levels, to look at additional data evidence submitted by interested parties, and to determine, based upon a review of that evidence, whether or not these limits were ones that indeed should be supported, but that the process would still end up going through a rulemaking for further public comment and input. We are continuing to have these discussions, and reaching out to a broader group to get input

on this particular proposal.

As Mr. Foulke said, there are a lot of very knotty issues that I think need to be dealt with here, but I think that we have to set certain goals and proceed with certain principles, and those goals should be trying to come up with a process, as you said, Mr. Chairman, that tries to bring the protection we are providing to workers up to date, but to do so in a way that provides interested parties, all interested parties, a real right to participate that is fully open and maintains people's legal rights.

Again, we have been engaged in these discussions organized by the AIHA for the last year. We think that they have been quite constructive, and we hope that these discussions can continue with others, with yourselves, with Mr. Owens, to see if, indeed, we can reach a consensus on a process to update the standards and provide workers much-needed protection.

Thank you very much.

WRITTEN STATEMENT OF MARGARET M. SEMINARIO, DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH, AFL-CIO, WASHINGTON, D.C. - SEE APPENDIX C

Chairman Norwood. Thank you, Peg.

Mr. White, you're now recognized.

STATEMENT OF FRANK A. WHITE, ESQ., VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC., WASHINGTON, D.C.

Thank you, Mr. Chairman. I want to thank you and Mr. Owens for your willingness to discuss this issue and for your leadership, as well.

For the past six years or so, ORC has been part of an inter-industry group that's been tilting at this windmill of updating the PELs, which are now, we agree, seriously antiquated. As the Chairman knows, ORC members comprise about 160 large, sophisticated companies that are pretty progressive in their commitment to superior safety and health, and we sort of tested your first assumption, that the PELs are out of date, by doing a short survey of our members, and we got about 80 responses, and I'll just tell you what the results were. I think they're fairly interesting,

although maybe not surprising.

The first question was: “Where your employees are exposed to substances that are covered by OSHA's PELs and are also covered by lower alternative limits, non-mandatory, consensus, or other standards, what exposure limits does your company generally apply?” Only about a quarter of ORC members used the PELs. Three-quarters of ORC companies use some alternative, lower limit.

When we asked, secondly, “Well, what are your sources for those alternative limits?” we found that about half of them rely on consensus or other voluntary standard organization limits like ACGIH and AIHA, about 30 percent set their own internal limits with their own data and information, and about 20 percent rely on other sources, for example, international limits.

Finally we asked, “Well, what if there is no PEL? What do you do for substances where there is no PEL, but your employees are exposed?” We specifically asked them, “Do you rely on ACGIH limits?” and virtually every company who responded said, “Yes, we do to some extent at least rely on ACGIH limits.”

I guess I'd note that one of the bases for challenging the 1989 PELs was that people were uncomfortable with the ACGIH limits, and you're familiar with some of those reasons. I think it's sort of ironic that we're in a situation now where maybe companies are relying on the ACGIH limits more than ever. I think it is clear that companies are searching for credible, more protective limits, and I think updating the PELs is certainly one way to do that. So that's one reason why ORC, along with American Chemistry Council and American Petroleum Institute and others, have sought to advocate for OSHA to re-engage, as Mr. Foulke has suggested, and work on and tackle this issue again.

Unfortunately, up to this point, we've had little success. We've had some resistance for a variety of reasons, and so when AIHA convened a small group to talk once again about what the options are, we eagerly participated in those discussions. While our initial expectations weren't very high, I must say, like Ms. Seminario, that I think we've had a productive series of conversations, and I think there are some possible areas of consensus on an approach to updating the PELs.

So I think there may be a limited role for Congress in setting up a process that would help us update PELs. I'd like to discuss, as you did at the outset Mr. Chairman, some of our own suggested ground rules or principles that any legislative or administrative process could adopt.

First, we agree with Mr. Foulke that any PEL legislation must minimize the possibility of “opening up” the Act. Maybe some freestanding legislation using the needlestick legislation as a model might be an appropriate way to go.

Second, we totally agree that any process for updating the PELs must be open and transparent and inclusive of all the parties. It's absolutely essential that there be no barriers to active participation in the process.

Third, any updating process must encourage the submission of the best available data. We've got to look at the data and have a process that fairly evaluates both scientific and technological data and economic data.

Then we believe the PEL process should be consensus-driven. We believe that, at this point, if you're going to have a one-time update to raise the bar that the process needs to be consensus-driven. For example, an advisory committee is one approach to doing that.

Next I think, and this is a difficult one and we all acknowledge it, that somehow the legal standards for determining whether a proposed PEL is scientifically supported and capable of being achieved must be somewhat less stringent than those in the current Act, because I think you're right. As you said at the outset, there are barriers in the Occupational Safety and Health Act to doing other than a case-by-case or substance-by-substance evaluation, which isn't going to get us where we want to be.

Next, I think any updating process must strike a balance, on the one hand, between the need to look at science and evaluate the science on one side, and at the same time expedite the process. We can't have an open-ended, interminable process for updating these PELs. There has got to be some time limits placed on it, so that balance has to be struck.

I think also and I agree again with Mr. Foulke, that the potential burdens on small business really must be given special consideration, and we've had some discussions about how to do that. But we've got to assure that businesses of all sizes and all types can achieve whatever new PELs this process comes forward with.

Finally, I think you hinted at this, there must be due process rights preserved. To us, that means ultimately there must be some right to challenge a limit through the judicial process. Those are some of the ground rules we would suggest.

We thank you and look forward to continuing to work with you and other stakeholders on this, and would be happy to answer any questions.

WRITTEN STATEMENT OF FRANK A. WHITE, ESQ., VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC., WASHINGTON, D.C. – SEE APPENDIX D

Chairman Norwood. Thank you very much, Mr. White.

Mr. Schwartz, you're now recognized.

STATEMENT OF RICHARD SCHWARTZ, PARTNER, CROWELL & MORING, LLP, TESTIFYING ON BEHALF OF THE AMERICAN IRON AND STEEL INSTITUTE, WASHINGTON, D.C.

Thank you, Mr. Chairman and Members of the Subcommittee. My name is Richard Schwartz. I'm here on behalf of the American Iron and Steel Institute, and I know that I'm here because I argued the industry position that prevailed in AFL-CIO v. OSHA. I think there are certain lessons we can get from that case, and I'm going to try to describe those to you this afternoon. I also want to note that when I argued it I had 15 minutes and today I have only five, but I didn't have the benefit of the court's opinion when I argued it, so I may be able to do this.

I want to talk first about the rulemaking procedures that were used in that case; second, the court's findings; third, the role of judicial review in developing OSHA standards; and finally, the leeway that OSHA has under the current law.

Now, with respect to the procedures that were followed in that rulemaking, those were procedures that gave AISI a lot of trouble. On June 7, 1988, OSHA issued 428 standards at one time. The proposal covered 400 pages of the Federal Register, and on top of those 400 pages, there were thousands of studies that were cited and relied upon for the standard.

We had 30 days to develop comments, write them up, and submit them to OSHA. The 30 days were followed by a two-week period to prepare for hearings on these 428 substances. As a result, although the steel industry was affected by scores of these substances, they only had time to comment on nine, and barely time enough to do that.

So a lot has been said about the fact that, well, these are really non-controversial substances and so many of these standards were just ones that nobody cared about, but in fact, it was really the time constraints of the hearing that prevented parties like AISI from commenting on all of the standards that affected them.

I think, from our perspective, we felt that OSHA was time-driven. They wanted to get these done quickly, and parties' participation simply got in the way, and they didn't do that. They didn't allow enough time for meaningful public participation.

One interesting sidelight of that is that the law is very favorable to agencies with respect to procedures. There's a case called “Vermont Yankee” that the Supreme Court decided, that said that the courts cannot require the agencies to allow more procedural safeguards than the statute required, which meant that OSHA, in fact, could allow 30 days for 428 standards and probably be upheld by the courts, because that's what the statute provided.

The second thing I'd like to talk about is what the 11th Circuit found. What it found was that OSHA said all the right things. They have to make three findings related to significant risk, technological feasibility, and economic feasibility, and OSHA made all of those findings, but the court looked behind what OSHA said and found that it really didn't do the analysis that was

required.

With respect to significant risk, the court found that OSHA cited some studies at very high levels of exposure and then, without explanation, issued a much more stringent PEL without explaining how the high exposure in the studies justified the low number that was in the PEL.

With respect to technological feasibility, OSHA cited generally available engineering controls such as ventilation, isolation of workers, and substitution of products and said, “Oh, these things are available for all these substances,” but what they didn't do is any analysis to determine whether these generalized controls would actually meet the specific PELs that they had issued in the specific industries that would have to meet them, and the court found that that was lacking.

With respect to economic feasibility, what OSHA did was analyze costs of compliance on what it called an industry sector basis, which is much broader than individual industries, and the court cited the most egregious example, which was for perchloroethylene, which is used as dry-cleaning fluid.

They spread the cost of complying with the perchloroethylene standard over the entire sector, which was personal services, when all the costs would be borne only by the dry-cleaning industry, and the court pointed out that averaging the costs masks hardships to individual industries, and so it rejected that method, as well.

The one last sidelight comment I want to make relating to the court's decision is, I'm not an industrial hygienist, but in developing the case, I looked at a lot of the studies, and I actually read the evidence that OSHA had cited for many of the PELs. What we found was that, in many instances, although the number was lower, the studies they were relying on were the same studies that were used to develop the 1971 PELs. In other words, the evidence hadn't changed, only the judgments about how protective we should be had changed.

The lesson from that for me was that, while the PELs are old and some of them may be outdated, it's wrong to say that they're all outdated simply because they're old. In many cases, the underlying evidence really is no different from what it was before.

So from that, I wanted to comment briefly on the role of judicial review, and from our standpoint, the active judicial review provided by the court was very helpful. The court looked behind the formal findings that OSHA made. Even though OSHA had hampered public participation, from our viewpoint, and the court allowed that to happen, it did not allow the agency simply to pay lip service to the findings that had to be made, and we found it was an important safeguard for us with respect to that rule.

Lastly, I want to talk about the leeway that's left to OSHA under the current law. From the 11th Circuit decision, you can see that the courts will defer to OSHA's priorities in terms of what it wants to address and how many substances at one time. For example, it said OSHA is perfectly free to issue standards for groups of substances at one time. That's up to the agency.

What it did require was some explanation of what OSHA was doing, which goes to the issue of transparency that you mentioned as one of the requirements for a consensus standard. We think that's very important, too.

What the court found in this case was that OSHA did not have that transparency, not only in development of the rule, but even after it issued the rule. The court couldn't tell how OSHA got to the numbers that it actually chose. What the court did find was that OSHA simply didn't follow the law. It invented shortcuts, and the court found that those shortcuts didn't comply with the Occupational Safety and Health Act.

But the conclusion that you can get from reading the opinion is that, in fact, the law does give OSHA a lot of leeway. The standards of review are deferential, and given OSHA's discretion to group substances, there's a lot of room between 428 and one at a time, and AISI feels that OSHA could issue a lot more PELs by using that leeway and grouping PELs, but not simply 428 at once. In fact, 428 in six months, we figured is about one every 12 hours. We figure they could give them a day. They may be able to do a lot better.

Thank you very much.

WRITTEN STATEMENT OF RICHARD SCHWARTZ, PARTNER, CROWELL & MORING, LLP, TESTIFYING ON BEHALF OF THE AMERICAN IRON AND STEEL INSTITUTE, WASHINGTON, D.C. – SEE APPENDIX E

Chairman Norwood. Thank you, Mr. Schwartz.

Let me ask you something right up front, Mr. White, to get it straight in my mind. You were at DOL, I think, at one time, were you not?

Mr. White. I'll admit that, Mr. Chairman.

Chairman Norwood. Other than the PELs standards that were incorporated under Section 6(f), how many PELs standards has OSHA actually promulgated in its history, do you know?

Mr. White. I think Ms. Seminario addressed that, and as a matter of fact I sat with her and went over the list, and I think she's correct. I think it is 29 that deal with specific substances. There are other, more generic rules, but 29 is a pretty good number.

Chairman Norwood. And there are approximately 450 existing PELs?

Mr. White. Roughly.

Chairman Norwood. The staff keeps telling me that out of 450 PELs, as you pointed out Mr. Schwartz, some are not outdated and it should not be that difficult to come to some reasonable

percent of those on a consensus basis.

I'm not saying that there won't be plenty of them over which we will have a real dogfight, but each of you talk to me a minute about that. Is the staff right? Do you think there is a possibility to come to a consensus on half of them, on a third of them, or some idea of consensus fairly easily?

Mr. White. I'm willing to start because I've sort of taken on the task of trying to assess just that question, and I think it's incumbent on all of us who want to participate in this process to try to make that assessment. The short answer is, I don't know how many there are. I would have to guess and surmise.

Let me say first that my understanding is at the time OSHA issued its 1989 PELs, there were about 200 that received no comment at all from the public. Not only weren't they sued over them, but also they received no comment.

Now, part of that might be a reflection, as Mr. Schwartz says, on people not having time to assess what the problems were. But if you begin with that number of 200 nobody commented on, there's probably some subset of that. Maybe it's 25, maybe it's 250, in some range like that, where there's probably a group of substances on which there may be some possibility of consensus.

I'd be interested to see what others have to say.

Chairman Norwood. Mr. Foulke, do you have an opinion about that?

Mr. Foulke. Yes, Mr. Chairman. I would say that probably some of the chemicals that you could look at there would be some consensus that could be worked out. But unfortunately there are certain problems that come into play in getting to that consensus, because there are some industries, as has been stated in some of the testimony, that already are actually below and have a stricter limit for employee exposure. So there is no impact on them if we do go to a lower PEL, or if we went to the ACGIH, they would be able to meet those. So that would be no problem.

Part of my concern really is with the small businessperson, because you have a lot of people out there that are probably complying with the current PELs. There's some concern that if we go to a lower PEL that they will be able to meet whatever is going to be required of them. Usually for most employers to reach that PEL, there's normally engineering controls that are instituted. That means new equipment, whatever, new type of ventilation.

So those are some of the concerns I think I have with getting consensus. How are we going to make sure that the small businessperson is not left out in this whole process?

Chairman Norwood. Do you plan to be at the table when we do this?

Mr. Foulke. I'll be there.

Chairman Norwood. Mr. White, are you going to be there?

Mr. White. Yes, sir.

Chairman Norwood. I encourage you both. That's a very, very important part of this, and that ought to be built into the process of us coming to some type of consensus here, because we're not going to get anything done if we don't reach consensus.

But Mr. Foulke I'd like you to give me your best guess. Out of 450 some of these have got to be easy.

Mr. Foulke. I'm sure there are some PELs where the NIOSH PELs are all the same, so I assume we can check those off the list.

Chairman Norwood. I'm a big checker of lists. You know, let's cut this baby in half, and then we've got some real work in front of us.

Mr. Foulke. That's correct. Then the question is the opposite. There's probably some that have some really large differences from the PEL to the other different limits, and I think you would have a lot of conflict there.

Chairman Norwood. And we may not get there on those.

Mr. Foulke. We may never get to that point.

Chairman Norwood. I'm not saying we're going to get all 450 done, but when I look back at what OSHA's done, I bet we can do better than 29.

Mr. Foulke. I think probably the best way to start would be looking at the new chemicals that have come into deployment at the workplace that had no PELs at all. That, to me, probably would be the best starting point.

Chairman Norwood. Well, that's going to be part of this solution, too, which ones are not there.

Ms. Seminario and then Mr. Schwartz, if you will both just give me a feel for how you think this thing could go.

Ms. Seminario. The best sense that I can give you, again, is based upon the experience from 1988-1989. Looking at those chemicals that are high-volume chemicals in widespread use there's lots of different potential exposure context. Those are going to be the most difficult ones to get agreement on most likely.

Ironically, for us those are probably the most important to deal with, and we said so back in 1988-1989. We're now taking a somewhat different approach to this. Just to be clear on this, we're saying, let's try and go at those where we can reach some agreement. Maybe they're not the most important ones, but the approach that we're looking at now is trying to come to agreement on as many as we can through some expedited process, get some experience, build some trust and hopefully focus most of our energy on the ones that really do matter. Those are going to be a

tougher lift, and those, at least in my view, probably get put off to some other process. So we do this in bits and we do it in stages.

We had some discussions earlier, and there's really a couple of ways you can come at this. You can come at it by focusing on the ones that are the most difficult first and have the most widespread exposures, and probably make the most difference to workers, as well as employers, and limit it to that and forget the ones that everybody can reach agreement on. Or you can try to focus on the ones that are the easier lift and try and get those done, and get them out of the way so you can really focus the agency's efforts and resources on the ones that really do matter.

Chairman Norwood. Well, let's practice on the easy ones. You know, 450 is a heavy load to lift. All of you help me. Let's get it down to 200, and work through the other 250. Maybe we will have learned to trust each other enough to work through the hard ones you're talking about.

Mr. Schwartz.

Mr. Schwartz. I have a couple of observations.

One is that Mr. White was correct about the fact that even if a PEL didn't receive a comment during that period it did not mean that there wasn't concern about it. The time constraints were, in fact, too severe to use that as a reliable indicator.

Secondly, AISI has been advocating probably for about 10 years that the PELs that would be easiest to do are the ones for substances that right now have no PEL, because those are ones where industries look around for control references so that the references will be some sort of consensus standard. It will probably be a lot easier to develop a consensus around developing a PEL for a substance that doesn't have one at all than it will be to try to change a PEL when industry has been controlling to meet that level. So to lower it will cause the industry to incur greater control costs, and that makes the industry people look at those things very carefully. The recommendation that we would have would be to look first at the substances that have no PEL.

Chairman Norwood. Well, if we've got 450 now, how many more are you going to add on to my shoulders? How many more don't have a PEL, for Pete's sakes?

Mr. Schwartz. I don't know. Mr. White might know.

Mr. White. At the time, in 1989, the 450 included approximately 160 for which there were no PELs. Now, that has changed since then. There may only be 100-plus. But there is some substantial number now, where there is no PEL but there is some other consensus limit.

Chairman Norwood. Well, part of this consensus means process, too, and we'll figure out how all of us want to work through this.

I'd like to yield my time now to Ms. Sanchez for questions.

Ms. Sanchez. Thank you, Mr. Chairman.

I want to begin by asking to insert in the record a statement by Mr. Kucinich, who is not here currently.

Chairman Norwood. So ordered.

Ms. Sanchez. Let's see. First of all, I want to thank the panel for being here. I missed some of your testimony, although I have read some of it. I want to ask Mr. Foulke a question, and then have Ms. Seminario comment on the same question.

Mr. Foulke, you suggested that one method of addressing the PEL problem is for Congress to allocate additional resources to OSHA so that OSHA could form a specific task force and develop these new PELs within the existing statutory framework that we have. The universe of possible PELs is, I gather, around 500 or more given these new ones.

How many staff do you think this task force would have to have in order to review the existing PELs, compare them to other existing consensus standards, analyze new chemicals that might require new PELs, identify significant risk, and develop the safest, most feasible standards possible? Realistically, how many PELs do you think OSHA could be expected to issue a year and still meet all the other things that it's supposed to do, considering I think it's an under funded agency at this point?

Mr. Foulke. Well, I would first note that OSHA has lost 10 or 11 years since 1992 when the case by the 11th Circuit put out the original PELs standard, where they could have been working on them. Even if they had been working on 40 a year, they would have had over the 400. So that's the first point, I'd say.

I haven't done any type of cost analysis as to how much staffing, but what I'm saying in my testimony is that first of all, when it's all said and done, this is OSHA's job. I mean you can't get around that. That's what they were supposed to be doing. They had the opportunity. If you look at the case law, they don't lose that many cases on standard rulemaking, or on health standards. They get a tremendous amount of deference.

They could have been doing this. I don't know why they haven't been doing this, to tell you the truth.

Ms. Sanchez. Well, the truth is, they haven't been doing that, because they've had a cut in OSHA funding, and they haven't had any increases. I mean, during the six years I've been here, I've seen nothing but trying to eliminate OSHA in my first few years here.

So I'm not arguing about what they could have done in the past. I think they've updated 29 PELs, maybe, over the last 30 or 31 years. I'm asking what you realistically think in your mind, if you've taken a look at this. I haven't. How many a year do you think they could do?

Mr. Foulke. With the work that they're doing, to a certain degree, I think they've had a little tunnel vision with respect to ergonomics. They've focused strictly in that area, and I think that was a mistake. We now have some form of rulemaking, and are attempting to deal with the ergonomics issue, so hopefully they could focus on these other issues and start working on them.

The other thing is, with respect to even the proposal that we're making, or the proposal that's been kind of formulated here, you're still going to have a series of PELs that is going to have to take some serious rulemaking. There are just a lot of issues. There's a lot of the cost analysis and those types of things that only OSHA is going to be able to do. The Committee won't be able to get into cost analysis, or feasibility studies. They're just not going to be able to do it. So those cases, I think, still need pushing.

We're here because I think there is agreement that we need to look at the PELs, and we need to do something. I just am saddened in a way that OSHA has let this area drop. I have actually no reasoning to explain why that happened, because like I said, if you look at the case law, most lawyers would be happy to have their record of wins/losses when it comes to the standard rule makers in the courts.

Ms. Sanchez. Well, again, I think if you fund an agency, maybe they can do some of the work that's designated under their workload.

Ms. Seminario?

Ms. Seminario. I think the question becomes one that has to be answered, and it has to be answered whether it's done through new legislation or under the existing statute, and that is, what are the evidentiary requirements that have to be met with respect to setting these limits? What are the evidentiary requirements with respect to risk and with respect to feasibility?

I don't think that there's necessarily agreement or consensus on that point, and so that's still an open question, after the 11th Circuit's decision. Some people might argue they've got to make exactly the same showings they have to in a comprehensive 6(b)(5) standard for one chemical in doing group rulemaking. We wouldn't make that argument, but I think that's really the open question.

So the discussions that we've had have focused on reaching some consensus, both sort of a technical consensus and a political consensus around some of these rules. Can that consensus help support, and not substitute, but form some of the basis for agreement on significant risk and feasibility, and maybe even get away from those terms for this particular group of chemicals?

We're not talking about changing the statutory requirements for all 6(b)(5) standards in the future, because the other thing that we've talked about is that the statute not only requires the agency to make these findings of significant risk and feasibility. It also requires that when OSHA sets a standard, it sets the standard that most adequately assures the greatest protection of workers to the extent feasible; so it's a very, very high level of protection. It's also a high burden.

What we have been willing to discuss is reducing the level of protection in exchange for a reduction in the burden, so we believe that we're being open and compromising in trying to get something established here as a baseline of protection from which we can work.

Ms. Sanchez. So would it be your opinion, Ms. Seminario, that additional staff would have to be hired at OSHA in order to try to attempt to start working on this list of PELs?

Ms. Seminario. Well, what they would have to do is devote some resources to it, and right now, they're not. It was removed from their regulatory agenda. So yes, it would need resources, and I think, again, depending upon the evidentiary burden, it might be a whole lot of resources that would be needed.

Ms. Sanchez. And if the Chairman would indulge me just one more question, isn't it also true that this Administration has removed updating PELs from its regulatory agenda?

Ms. Seminario. That's exactly right, they did. They removed it back in December of last year. It was on there. Some work was going forward on a few permissible exposure limits, and now it has been removed from the regulatory agenda, and to my knowledge, it's not being worked on.

Mr. White. Ms. Sanchez, if I could address that?

Ms. Sanchez. Yes.

Mr. White. Yes, they have removed it. The reason given, or the reason I've heard is that they don't know how to tackle the issue, either, just like we're discussing how to tackle the issue, and Mr. Henshaw is not willing to put something on the agenda that he doesn't know how to address.

I think there's some legitimacy to that. However, going back to the prior question and having been at the agency for a while, I think primarily it's a question of priorities. What are OSHA's priorities? What are its standard-setting priorities?

It has a fair number of resources that it could devote to this issue. Could it do 20 a year or 40 a year? I'm not sure there's an answer to that right off the top of anybody's head. But it certainly could do more than it's doing, if it were a top priority, and if it were willing to tackle the issue of setting up a process to do it.

Ms. Sanchez. Thank you, Mr. Chairman. I might have some other questions if we have another round.

Chairman Norwood. Yes, we will.

Ms. Woolsey, you are now recognized for five minutes.

Ms. Woolsey. Thank you very much, and I'm sorry I missed your testimony, but I've heard it before, and I think I have the same questions I always have. But I can answer one of your questions, Congresswoman, as to why doesn't this happen? It doesn't happen because every time

OSHA comes forward with standards that meet a need, the Administration and the Majority party say, “We can't afford it.”

Well, I'm sorry. Ergonomics has to be afforded. We can't afford not to do these things. It's costing us more in the long run. As a former human resources professional for 20 years during the 1970s and the 1980s, I know absolutely that it pays to keep employees healthy. They miss less time due to illness; there are fewer workers’ comp claims, which is very expensive for organizations; and healthy employees produce a better service or product. There's no question that morale is improved when an employee knows for a fact that their company cares about them.

So I ask you, isn't it just good, plain business sense to invest in employee health plans coverage and good OSHA programs? I mean, if as soon as we get a PEL that's going to meet needs, but then we come out and say, “Well, we've got to cut that in half, we have to cut the baby in half,” excuse me, Mr. Chairman, a half a baby is worth nothing. So we need to put our energy and our funding where we can do something, and not just a bunch of compromises.

So I ask you, isn't it good business sense to invest in employee health and protection? I'll start down here, Richard.

Mr. Schwartz. The answer is clearly yes, and the issue is at what level do you need to control to reach that protection?

The way standards are generally set is that there are studies where there are known effects from exposure at very high levels, and of course you wouldn't set a standard at that level, because you want to set a standard at a level where employees will not show health effects. The debates have been how far down do you go in order to ensure that there will be no health effects from the particular level, and that's where the debates are centered.

Ms. Woolsey. Right, and, then, excuse me, isn't it true that then we have scientific studies, and when we get scientific results over and over again about a particular standard, then because the majority doesn't like the results, then we have to throw it out and start all over? I mean, what a waste of time.

Mr. Schwartz. I don't think, actually, that's quite the way they're set.

Ms. Woolsey. Well, it's happening with ergonomics.

Mr. Schwartz. But when you have lots of studies that show health effects at a certain level, what will happen is the standard will be set tighter than that, and everyone agrees that it should be. So the question is, how much tighter?

In the case of occupational safety and health standards, there are consensus standard-setting organizations, and some are not technically consensus organizations, but individual companies will set standards for exposure; ACGIH will set standards; the AIHA will set standards; there are European standards.

Ms. Woolsey. We're looking at OSHA standards.

Mr. White?

Mr. White. I think there's a fair percentage of business that really does believe that occupational health and safety standards are necessary, are important, are useful, are valuable, are economically important, and we support the setting of standards.

I think what we're trying to do here, in fact, is figure out a way to set more standards, not fewer, because there are some in business, believe it or not, who think that OSHA should have been more productive in the last several years, in setting reasonable health protections for workers, and there are a variety of reasons why that hasn't happened. We're here at the table, I think, to try to figure out a way to enhance OSHA's ability to set standards.

Ms. Woolsey. But, Peg, as soon as a standard is set we start tearing it apart. How are we ever going to get there?

Ms. Seminario. Well, I think you raise a good point, and I think that's one of the reasons why, in coming at this particular issue, we are starting with discussions to try and get some broader agreements at the get-go, and see if we can reach some agreements, and not an agreement on the lowest common denominator.

Let me say, we're not interested in a process that might change some limits in the Code of Federal Regulations but really have no impact in the workplace because the chemicals aren't really used. We want to deal with things that are real issues, real hazards, where we can get some real agreements for real protection. So that's our interest in proceeding with this.

Maybe, on this particular set of issues, because there has been support from different folks in the industry on trying to do this over the years, we can start with a base of agreement from which we can work. Will we be successful? I was saying to Frank, you get tired of working on things over and over again, and after 10 years, 20 years, you have nothing to show for it. But we're willing once again to try, and to work with you, and work with Mr. Norwood and Mr. Owens, to see if we can come to agreements on a process that will improve protection for workers and improve legal protections, as well.

Chairman Norwood. And part of our job is to make sure we keep politics out of this.

Ms. Seminario. Absolutely.

Chairman Norwood. Ms. Woolsey missed the opening, but you know we don't need to have this be political.

Ms. Woolsey. Oh. Well, I certainly haven't seen any of that.

Chairman Norwood. What this is about is really making an honest effort to have consensus and try to make improvements, and the less politics. I know that's hard, with an election coming up. But if we're serious about this, then people at the table have to leave politics at home, and let's see if we actually can change these.

Ms. Woolsey, your time has expired. Do you wish to respond, Peg?

Ms. Seminario. I just wanted to respond to what you just said. You know, obviously there are a lot of issues in which there have been very, very strong disagreements, and there will be issues in the future.

Chairman Norwood. Right.

Ms. Seminario. But as I pointed out in my testimony, and you pointed out in your opening statement, there have been some areas where we have been able to come together, reach some agreements on the needle stick legislation; we reached agreements on legislation to expand health and safety protections to postal workers; some agreements on codifying certain aspects of the OSHA consultation program and providing workers more rights in that process.

So, you know, we have, working together, been able to do that, and we're willing to try, on this particular issue, to see if that's possible to do again.

Chairman Norwood. Well, let the record show I'm not going to respond to Ms. Woolsey, in an effort to have a bipartisan, non-partisan meeting here.

I wanted to ask all of you a different question just out of curiosity, and I don't know the answer. If OSHA has been able to incorporate only 29 PELs, have they done any since 1988?

Ms. Seminario. Just to be clear, there is a difference between PELs, which are simply an exposure limit, and the comprehensive 6(b)(5) health standards.

What they've been able to do is put out standards that deal with 29 toxic chemicals through comprehensive standards, so it's more than a PEL. They have done major chemicals, major hazards, major rulemakings, and so they have been able to do that. What they haven't done and been successful at is just updating the permissible exposure limits.

The last 6(b)(5) toxic chemical standard they issued was in 1997, and that was on methylene chloride; and the one before that was 1996 on 1(3) butadyne, and 1(3) butadyne was a standard that came about as a result of agreements between the industry and the unions on that particular standard.

Chairman Norwood. Agreements, consensus got that done?

Ms. Seminario. On that one. But on most of them, there's been a lot of contention.

Chairman Norwood. So you're talking about two or three. Other than the rulemaking process, what is the difficulty? Anybody want to expound on that?

I mean the rulemaking process at OSHA is what makes it so difficult for us to deal with these 450 chemicals and not get very much done. I heard you mention 29 total. What else is the problem besides simply the rulemaking process?

Mr. White. I'll take one stab at that.

There was a trend that began, oh, I guess in the early 1980s, to move away from substance by substance rulemakings, and hat what we ought to be looking at are so-called generic rules, because we could do more in a single rulemaking, if we had a mega-rulemaking.

That was one of the things that led to the PEL update. “Let's tackle a big issue.” And then along came issues like safety and health programs. “Let's establish a requirement that every employer in the country adopt a safety and health program.” Well, that's sort of a mega-rulemaking, and that and ergonomics is a similar type of issue.

Frankly, OSHA hasn't had a lot of success in hazard communications, which is a similar kind of mega-rulemaking, or generic rulemaking. OSHA hasn't had much success in tackling these very large issues.

So now, maybe we need to re-think whether that's the way to go, and maybe we ought to be looking more at the traditional OSHA rule of looking at difficult specific issues and substances and tackling them again. I think that's one reason why OSHA hasn't made much progress.

Chairman Norwood. Peg, do you want to comment?

Ms. Seminario. I would agree with that. I think the other thing that enters into it is not just the process itself. It really is the level of contention and opposition, and when you end up with a lot of opposition to a rule, it's just harder to set. The evidentiary burdens are higher as a practical matter, because the agency knows that it's going to be in court having to defend that rule.

So when you deal with some of these chemicals that I listed although they're major hazards, it's a limited group of employers who are affected. It's not the whole shebang; it's not every employer in the country.

When you deal with these larger rulemakings, whether it's on safety and health programs or ergonomics or a generic rulemaking on permissible exposure limits, there's a lot more people affected, and therefore, there's more contention, and there's potentially more impact, both with respect to protection, but also with respect to economic costs on employers.

Mr. Foulke. And also part of the problem is, if you look at any of the rulemakings, the amount of information that is provided even as part of the public hearings. If you go back to the indoor air quality standard, the hearings on that lasted over four months, day in and day out, and then they went out on the road and did more hearings. Just the amount of time taken to digest that much

information takes the staff a fairly significant long time.

Then, on top of that, is doing the economic feasibility analysis. OSHA probably is the only one that really has the wherewithal and the staffing and the money to be able to do that type of an analysis.

Chairman Norwood. Can anybody give me some idea what it costs to update a PEL? What might OSHA spend for such an effort?

Mr. White. My recollection is, and I'm determined not to look over my shoulder and ask some OSHA staff about this, but my recollection is that on the 1989 PELs, OSHA spent a couple of million bucks just to do the economic analyses and some of the risk assessments. And that was a big rulemaking, obviously, in a very compressed period of time. But that's not counting the OSHA staff time, and those kinds of costs. That's just counting out-of-pocket money to pay for consultants, essentially, contractors, to do a lot of work.

So if you look at one substance, a lead rulemaking or a benzene rulemaking, you're talking about a lot of money, particularly if you take into account staff time and out-of-pocket costs. You know I suspect you could be talking about a half a million dollars or more if it's a difficult substance. That's why I think we're looking at some kind of consensus approach, where we can reduce some of that burden.

Mr. Schwartz. If I can add a little bit to the history of this, the trend of OSHA trying to find ways of shortcutting the process goes back at least before 1980, when OSHA spent an immense amount of time developing a carcinogen standard that the courts would not let it use as a default for all the carcinogen aspects of a rule.

And since the AFL-CIO - OSHA case, OSHA has looked at ways of prioritizing chemicals, and they've looked at ways of making a sort of a generic risk assessment procedure, which was something akin to what they tried to do with the carcinogen standard.

So the agency seems to have spent an immense amount of resources finding or looking for shortcut procedures, or looking for group ways of doing this as opposed to tackling particular substances at a time.

Of course, since the agency has limited resources, you know, every dollar it spends on a quixotic venture with respect to a carcinogen standard or other thing is a dollar that can't be spent in developing a PEL. So I think that's part of what's going on.

Chairman Norwood. Is it possible that a federal agency actually wouldn't prioritize its spending correctly?

Mr. Schwartz. We hope, Mr. Chairman. It could be a triumph of hope over experience.

Chairman Norwood. Ms. Seminario?

Ms. Seminario. One other point is that the process, as we've discussed, often takes very long. In this case, it was a shorter process, but for any one of the 6(b)(5) standards that have been set on a chemical, the process has generally taken anywhere from let's say three to eight years, depending on when they were set. In the early years of the Act, they were developing these standards in a more timely fashion.

But the result of that has been that there have been changes in leadership, and as Mr. White said, changes in priorities. So what may be a priority for one administration, what they start and they spend a lot of resources on another administration changes. There's a new head of OSHA who has different priorities, and so it goes, and gets pushed to the back burner.

So that's been another problem, that the time frame in standard setting doesn't allow these standards to be dealt with in any real time, in a way that maintains the prioritization, the leadership, and the consensus. People move on to other things.

Chairman Norwood. Which is basically what this Committee is trying to figure out.

Ms. Seminario. Right.

Chairman Norwood. I don't know that we can. I don't know that we will. But I know what's been going on hasn't worked.

My time is way past due. Ms. Sanchez, it's your turn.

Ms. Sanchez. Thank you, Mr. Chairman. Your time was well spent.

Maybe, Mr. Chairman, what we need to do is get your side to go over and talk to that Administration and get this back on priority, if in fact we can, and make some consensus happen and get all of these players to give a little and get to the table and try to do a little of this.

Chairman Norwood. Would you yield just for a second?

Ms. Sanchez. Yes, yes.

Chairman Norwood. This is my Administration. I'm very fond of them and get along with them real well.

Ms. Sanchez. So that's why I'm saying, you can help.

Chairman Norwood. And it seems to me this is a priority of this Committee.

Ms. Sanchez. I know it is, Mr. Chairman.

Chairman Norwood. Well, that's the only thing I'm in charge of right now.

Ms. Sanchez. I just suggested you might walk over to that White House on a not-so-hot day, and try to get that Administration to put it back on priority so we could all start to get this to work.

Mr. Foulke, I've read your testimony, and you did a good job of explaining the requirements of the current law, but you didn't include any way in which we might waive or modify the rulemaking provisions.

I'm a little worried that as we move forward with the weight of this Committee to try to get some of this done, that we do need consensus. I gather because of your paper, that you're representing the Chamber of Commerce here today.

Mr. Foulke. That's correct.

Ms. Sanchez. Are we going to hear suggestions about what we might take a look at, because your testimony didn't have any of that? It just sort of laid out where we have been. I'm trying to find out and gauge, since I'm going to be asked to cast a vote at some point on this, whether the players involved are really going to come to the table ready to make suggestions and take a look at things. I'm assuming that our Chairman here would have the Chamber involved in some way.

Mr. Foulke. Well, I think the points that I tried to make in my written testimony, and also in my oral testimony are to examine some of the issues I think that the Committee needs to examine, specifically with respect to issues involving evidentiary procedures, or how that's going to be handled. Probably one of my biggest concerns, and I mentioned it a little bit earlier, is about dealing with small businesses.

You know, if we're going to have a process here, are we still going to keep the SBREFA requirements or the SBREFA test? I gather that's kind of where we are, and from our earlier discussions among ourselves, I gather we had somewhat of an understanding that we weren't going to really change the significant evidence test, and those type of things. It was more focused maybe at the consensus level of identifying which chemicals.

My concern is that I want to make sure of the procedural safeguards that were set up in the original Act, and then the subsequent safeguards that have been added by the Congress. A lot of this stuff is pretty much in the SBREFA Act. The OSHA Act itself set forth things that were telling OSHA, “This is what you're going to have to do. You have to provide significant evidence to this standard.” Are we going to throw that out the door?

If that would become the case, I think that makes it more difficult to achieve consensus. I think having these safeguards in place probably drives it, and makes it easier to get a consensus on some of these PELs.

Ms. Sanchez. This is a question for any of you who want to answer, or maybe to all of you.

Thirty years ago, the Congress felt it was necessary to permit OSHA to adopt existing consensus standards in order to establish a regulatory base to protect safety and health. In the case of PELs, those standards have not been updated since then. Given this, for the same reasons it did

so 30 years ago, why shouldn't the Congress provide OSHA a one-time opportunity to once again update its regulatory base?

Ms. Seminario. I'll take a crack at that.

I think the Congress should. Whether it should be identical to what was done in 1970 or not, we know a lot more than we knew then. There's a lot of experience, and I think we need to draw on that experience.

That, I think, is what we've been attempting to do. We've been attempting to look at experience, look at what we know, and look at the political realities of today, and see if we can come up with some agreements on a proposal that would be another one-time update of the baseline. We would gain some experience from that, and then see what we could do to come to some agreements about keeping these limits up to date, because we believe there will be some changes that will be needed to make that work. But it makes sense to deal with this in two different stages.

Ms. Sanchez. Mr. White, why shouldn't the Congress take a look at this and get this done?

Mr. White. Well, I think that's exactly what we're suggesting as I said in my testimony, that Congress may well have a role to play in attempting once again to update, on a one-time basis, the PELs.

What we would strongly oppose, and I think anybody in business would oppose, is doing it in the same way it was done in 1970, and that's just taking some group of consensus limits or voluntary standards and plopping them in place in OSHA as mandatory standards. That's why we're suggesting some kind of middle ground that would use some current set of consensus or voluntary standards as a starting point and then have a consensus process for evaluating the science and the feasibility issues a little more thoroughly before we proceed to put those in place.

So we are looking at a modified version of what was done in 1970.

Mr. Schwartz. If I may, I think the answer to your question, why shouldn't it be done, is that the genius of our administrative system is that it involves the public in making decisions that affect the public. What Congress did on a one-time basis was the exception to the way our administrative system usually operates, and would be an exception to the ideas behind consensus and transparency that have been suggested as being the way to actually develop the standards.

One thing I wanted to add is that others have mentioned that we met prior to this hearing to talk about how we would actually do this, which itself was an unusual step for us. One of the things that came out of it was that developing a consensus that people will rely on means that you really have to involve the people who are affected, which again, in the case of AISI, would be the employers and unions. Plus, it would point out that there are downstream users and sometimes upstream users of all the substances that affect companies like others and ours.

To have a successful consensus standard, you need to involve those people. You need to involve the little businesses that don't usually have time to send people to participate in meetings in a centralized place and spend the hours that it will take to understand what the issues are, and what is at stake.

So it's not an easy process, but I think that the generally accepted method of proceeding in a matter like this would be, in fact, to involve the public to the maximum extent, rather than minimum.

Ms. Sanchez. Mr. Foulke didn't get a chance to answer that. Do you have any comment?

Mr. Foulke. Well, I would just say, obviously doing this one more time would kind of be appealing, and it would be a quick fix. But generally, it's been my experience that when you do quick fixes it doesn't necessarily work.

It kind of goes back to my other point about the small business people, because at the time the Act was promulgated in 1970, and enacted in 1971-1972 when we allowed the incorporation of the national consensus standards, we did not have a lot of the other things that were in place, like I said, about the SBREFA Act, and all those type of things, where it took that into consideration.

Also, I think at the time most of the consensus standards that were adopted were already probably being met, whereas now a lot of small businesses are attempting to meet the current PEL. But to go to a more strict PEL would entail most likely engineering controls which would basically incorporate more/new equipment to meet the new levels, and could be a significant burden, especially on the small businesses.

Ms. Sanchez. Well, I don't think this whole issue is supposed to be anti-small business, but its main purpose is to protect workers, protect their safety and their lives.

Mr. Foulke. And I think that's part of what the whole rulemaking process does. It really gathers and examines that issue. It kind of goes back to what Mr. Schwartz was saying about what is the level that we have to have? What is the level? How strict do we have to have the PEL in order to provide the protection necessary so that there won't be any health hazards to employees? I think that's part of what the whole rulemaking process does.

Ms. Sanchez. Well, I hope we can find some sort of consensus and do better than 28 standards over 30 years, Mr. Chairman. Thank you.

Chairman Norwood. There is no such thing as a quick fix. You can go home and not worry about that anymore. It’s not going to be a quick fix. We might fix some of it quickly, but to do all 450 plus whatever new ones are out there, it isn't going to happen quickly, and this is about consensus. There has to be consensus.

I'd like to yield to Ms. Woolsey. You said you had another question?

Ms. Woolsey. Well, Mr. Chairman, I'm going to move from being partisan to being sexist, so I'll fill all the roles today.

Women have been disproportionately affected by ergonomic injuries, so now, are there any of the PELs that we're looking at that affect women to a greater degree than their male counterparts, and what are we doing about it?

Okay, Peg?

Ms. Seminario. I'm sure there are. I don't think any of us have looked at all the data behind all of these, but there are a number of these limits that deal with chemicals that are particularly reproductive toxins, particularly affecting women, and those effects were looked at in the, I think in the 1989 update. So there are some, but I couldn't tell you how many chemicals that we're talking about.

Ms. Woolsey. Well, so, in your review, would you recommend that you push those to the top? Because we're not just talking about the individual, we're talking about their reproductive future and the babies, if they're pregnant, and things like that.

Ms. Seminario. Those have gotten attention by the agency, and I would expect that they would get attention in this process, as well. Whether they would move to the top or not, I don't know, but clearly, those effects would be looked at as a set of effects that need to be dealt with and addressed in setting these limits.

Ms. Woolsey. Okay. Mr. Chairman. I'm through. Thanks.

Chairman Norwood. Mr. Owens, I yield to you for a closing statement.

Mr. Owens. Yes, Mr. Chairman.

I did come back, because I wanted to reiterate my commitment to work closely with you to move this problem closer to solution. I too think we all are aware enough to know that it will require resources, and I look forward to you taking the leadership and getting the appropriate appropriations and moving it beyond the cheerleading stage to the actual working stage, and I'll be there, I assure you, to help.

Chairman Norwood. Thank you very much, Mr. Owens, and I'm glad that you returned, because Ms. Woolsey really didn't believe we were going to try to work together on this. Now that you've confirmed it, that will be helpful for the next hearing.

This is of interest to me in a number of ways. It partly is going to allow me to look at something that I've always believed that, when the Federal Government has a problem, the first solution always is, we need more money. Now, this type of thing does cost money, but that doesn't necessarily mean it needs new money. It may well mean that some of the wasteful money that goes on in OSHA could be reprioritized into an issue that is very important to the health and well-being

of the citizens of this country.

Since I'm not being partisan at all, I'm not going to list all the ways I know they've wasted money. I'm simply going to say we need to use the dollars we have a lot smarter.

I thank all of you very much. I think you're pre-hearing meeting is of interest, and is of value. I appreciate the Members being here. I think we really will have Members on both sides of the aisle interested in trying to see if we can't actually come to consensus on one thing.

Mr. Owens. Mr. Chairman, I assume that the record will remain open for two weeks?

Chairman Norwood. So ordered.

Mr. Owens. And I want to thank my learned colleagues for joining us.

Chairman Norwood. Amen. I think we made progress today. We had a good dialogue. I have some additional questions that I hope you will consider answering in writing for me, writing back to us. We don't have time to ask them all.

But we can work together, I believe, on updating these PELs, and we'll find out if we can. I don't see how we can do any worse than what's already been done. So if everybody will pitch in and understand that everybody's opinions are going to be very, very important in this, I think we've got some real grown-ups who want to sit down and work it out. I think we can do that.

If there is no further business, the Subcommittee is now adjourned.

Whereupon, at 3:44 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Opening Statement of Congressman Charlie Norwood (GA-10)
Chairman, Subcommittee on Workforce Protections
House Education and the Workforce Committee
Hearing on
"CAN A CONSENSUS BE REACHED TO UPDATE OSHA's PERMISSIBLE EXPOSURE LEVELS (PEL)"

July 16, 2002

Good Afternoon.

Today the Subcommittee will begin a dialog intended to test three preliminary findings from our previous hearings and the research undertaken by the Subcommittee on OSHA rulemaking.

The following preliminary findings frame our inquiry for today:

Preliminary finding #1

OSHA standards covering workplace air contaminants, or what are commonly referred to as PELs, or permissible exposure levels, are out of date. Based upon what we have been advised to date, evidence suggests that these standards are out of date because PELs were established in 1971. The original OSH Act permitted the Secretary of Labor to incorporate, without change, certain existing national consensus standards. These were established as the Federal standards during the first two years of OSHA's operation. Because this means that most of these PELs are based upon scientific data and research conducted before 1970, it is argued that those PELs are out of date in the face of industrial experience, new developments in technology, and more recent scientific studies

Preliminary finding #2

Because of the rigorous statutory rulemaking requirements of the Act, OSHA has not been able to update these PELs. This preliminary finding is based in large part on the obvious. Despite attempts to do so, OSHA has simply failed in efforts to update these PELs. This may be due to the extensive nature of the Secretary's current rulemaking burdens. For example, in 1988, OSHA attempted to undertake a "generic" rulemaking for more than 300 substances. The 11th Circuit Court of Appeals, however, vacated the standard on the grounds that OSHA had not properly made the statutorily required determinations of "significant risk" or "feasibility" for each individual chemical.

Preliminary finding #3

As a result of this failure to update standards there is arguably inadequate protection for many workers in terms of their exposure to hazardous airborne contaminants.

Now, I intend to have a dialog that addresses the merits and/or short-comings of these preliminary findings. As the announced title for this hearing suggests, the ultimate goal is to determine whether or not it is possible to develop a widespread consensus that something should be or can be done. It is obvious to me that our challenge is to garner the approval of most stakeholders. That, in essence, is what a consensus is all about. It is also obvious to me that without developing this consensus, we probably cannot avoid the litigation that could negate any effort in this area, despite the best of intentions. The recipe for achieving this, I suggest, is for us to begin this dialog and earn the trust of stakeholders.

Now, let me make it clear that I am on record as havingstated that if we truly seek to develop a widespread consensus to update the PELs, I support that effort. I meant that and I strongly believe that.

I think we all understand going into this, however, that the "devil" will be in the details necessary to facilitate and guarantee

the development of any consensus. At the outset, then, I simply want to share my vision of the necessary ground rules for developing a genuine consensus.

First and foremost, wherever this dialog leads the Subcommittee, the Minority and Majority Members must journey together, in partnership and full agreement. We will accomplish this through mutual respect, honesty and a promise to listen as well as talk.

Eventually, after we have the support of our colleagues on the Full Committee, I hope we can invite Senate Republicans and Democrats to join this partnership. Without their willingness to partner with us, there can be no final agreement.

Second, there are three general criteria in my mind that must guide this consensus building process. This process must be inclusive –the participation of all stakeholders, large and small, across all affected industries, must be encouraged. And that participation must be made meaningful, and possible for all.

The process must be transparent – there must be no hidden agendas, no secret meetings, and no mysterious outcomes. The key to success is trust and this means that all meetings must be open, noticed well in advance and that all decision-making must be well documented with such rationales available to all stakeholders; and finally the process must respect individual due process rights –no one should be divested of the procedural protections currently available without their approval. And even then, we should ensure adequate and effective alternative protections.

With that said, I honestly look forward to working with my colleague from New York, Mr. Owens, and each of the Members on his side. I want to thank Mr. Owens

for the constructive cooperation and courtesy that he and his staff have exhibited to this point –it is greatly appreciated.

I now yield to the distinguished Ranking Minority Member from New York, Mr. Owens, for whatever opening statement he wishes to make.

APPENDIX B - WRITTEN STATEMENT OF THE HONORABLE EDWIN G. FOULKE, JR., JACKSON, LEWIS, SCHNITZLER & KRUPMAN, LLP, GREENVILLE, SC, TESTIFYING ON BEHALF OF THE UNITED STATES CHAMBER OF COMMERCE, WASHINGTON, D.C.

STATEMENT OF EDWIN G. FOULKE, JR.
PARTNER, JACKSON LEWIS LLP
ON BEHALF OF
THE UNITED STATES CHAMBER OF COMMERCE
ON ISSUES CONCERNING
OSHA'S PERMISSIBLE EXPOSURE LIMITS AND POSSIBLE APPROACHES
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
JULY 16, 2002

Good afternoon Mr. Chairman and members of the Subcommittee. Thank you for allowing me this opportunity to present my views to Subcommittee. My name is Edwin G. Foulke, Jr. I am a partner in the law firm of Jackson Lewis LLP in its Greenville, S.C. office. Jackson Lewis is a large national law firm with twenty offices in the United States. We specialize in the defense of management in cases involving labor and employment law. From 1990 to 1994, I served as the Chairman of the Occupational Safety and Health Review Commission (OSHRC), and from 1994 to 1995 as a Commissioner. I am co-chair of our firm's OSHA practice group.

I am here to testify on behalf of the U.S. Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of all sizes, from every sector of business, and from all regions of the country.

I have served for several years as a member of the Chamber's Occupational Safety and Health Subcommittee of its Labor Relations Committee.

I have been asked to address the question of whether Congress should consider special legislation that would provide for expedited review and likely changes in permissible exposure limits (PELs) regarding many chemicals now regulated by OSHA and many others in use by industry since the PELs were developed. While, conceptually, the concerns underlying this hearing are clearly worth exploring, much depends on what process would be put in place to accomplish the proposed "expedited" review.

For example, would the important and usual rulemaking procedures and protections, described in detail below and provided under the Occupational Safety and Health Act of 1970 (herein the OSH Act or the Act), be retained? If not, which ones would be dropped or modified? How would the individuals who might serve on a special panel to review the current PEL's be appointed? How would they analyze such difficult questions as risk and technological and economic feasibility? Indeed, would those individuals even have to determine whether "significant risk" exists, as

currently required under the Act, or would some other level of risk be considered adequate to set a new PEL? What kind of judicial review if any would be provided for determinations under this new process? Specifically, would the substantial evidence test provided in the Act be retained, or would a lower-level test, such as arbitrary and capricious, be utilized? Would the PEL levels set have to be the lowest level feasible so long as significant risk remains, or would a new process allow a higher standard to be set, albeit one less protective of employees? What number of levels would be considered appropriate to be set under a new process, a number that could range from tens to the hundreds? What quantity and what quality of science would be necessary to justify the conclusions of decision-makers under this new process?

Other questions to be resolved include: how would laws other than the OSH Act that have been deemed applicable to rulemaking be handled, such as the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. § 601, et seq., which protects the interests of small business? Also, how will the Congress ensure that a new process (expressly approved by Congress) be constrained only to the PEL issue and not be used as a precedent to undermine the usual rulemaking procedures simply because OSHA finds it difficult to comply with those procedures in achieving a certain regulatory goal?

In order to put these questions into context, I thought it would be useful if I reviewed the rulemaking procedures under the OSH Act and focused on the history which brought us to where we are today on permissible exposure limits.

Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C.

§§ 651, et seq., in response to a growing realization that most American workplaces contained multiple physical and chemical hazards that could seriously injure employees and/or cause debilitating or even fatal diseases. The Act created within the Department of Labor, the Occupational Safety and Health Administration (OSHA) to identify those workplace hazards, develop ways to prevent or remove those hazards, devise regulations (standards) to require employers to address those hazards, and to enforce its requirements.

Now that OSHA is addressing ergonomics, one of the more controversial workplace safety and health issues, it is time to ask what other "important" issues OSHA should address. Mr. Chairman, I applaud your insight and willingness to take on those issues – especially the PEL issue.

Congress provided in the Act a means by which the standard creation and promulgation process could be circumvented in order to quickly establish a foundation of enforceable standards. Section 6(a), 29 U.S.C. § 655(a), authorizes the Secretary of Labor to adopt "any national consensus standard, and any established Federal standard" during the two years following passage of the Act. Accordingly, OSHA adopted in May of 1971, 400 exposure limits ("Threshold Limit Values" or TLVs) recommended by the American Conference of

Governmental Industrial Hygienists (ACGIH) and previously adopted by the DOL as health standards applicable to government contractors. An additional 25 air contaminant standards recommended by the American National Standards Institute or ANSI (then known as the American Standards Association) were also adopted. The exposure limits were set out in Tables Z-1, Z-2, and Z-3 (known as the "Z Tables").

OSHA first promulgated the air contaminant standards set forth in the Z tables as standards in the early 1970s. During the Carter Administration, OSHA initiated development of an alternative standard-setting approach to address an entire class of substances in a single rulemaking. This process, called "generic" or "process oriented," was intended to expedite the cumbersome standard-setting process laid out in the OSH Act, thus allowing OSHA quickly to address many dangerous substances simultaneously. One of the first uses of this method of promulgation was the Hazard Communication Standard in 1982. 47 Fed. Reg. 12091 (requiring employee access to information about the dangers of chemicals in the employee's workplace; upheld in United Steelworkers v. Auchter, 763 F.2d 728 (3rd. Cir. 1985)).

OSHA and some members of the regulated community believed that the 1971 PELs were based on increasingly out-dated scientific and human exposure information, and needed to reflect recent findings and related information about the exposure levels applicable to harmful substances. Accordingly, after the requisite minimum notice, proposal, comment and hearing steps under the Act's rulemaking requirements, OSHA issued its Air Contaminants Standard on Jan 19, 1989, 54 Fed. Reg. 2332, covering 428 toxic substances.

In response, 29 employers, unions and trade associations filed petitions for review of the new standard, or petitions to intervene, with various federal circuit courts. Those cases were consolidated in the Eleventh Circuit Court in Atlanta in AFL-CIO, et al. v. Occupational Safety and Health Administration, 965 F.2d 962 (11th Cir. 1992). That court concluded, in a well-reasoned opinion, that OSHA simply had not adhered to the rule-making mandates of the OSH Act and:

> 1) Had not met its burden of proving that the existing permissible exposure limits presented a significant risk of material health impairment;
>
> 2) Had not explained whether and how the new limits would substantially reduce risk;
>
> 3) Had not demonstrated that the new PELs were economically or technologically feasible;

This decision provides a comprehensive list of factors relative to OSHA standard-setting. It and other court cases involving OSHA's standards are discussed herein.

The Eleventh Circuit held:

> [O]SHA must provide at least an estimate of the actual risk associated with a particular toxic substance [citation omitted] and explain in an understandable way why that risk is significant.

AFL-CIO v. OSHA, at 973. In a footnote to this statement, the court cited the Supreme Court's decision in Industrial Union Department, AFL-CIO v. American Petroleum Institute, et al., 448 U.S. 607, 646 (commonly referred to as the "Benzene" case) which provided,

> If the Government were correct in arguing that neither § 3(8) nor § 6 (b)(5) [of the OSH Act] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539, and Panama Refining Co. v. Ryan, 293 U.S 388.

AFL-CIO v. OSHA, at 973.

In Schechter the Court said,

> To facilitate the application of the standards prescribed by the [Interstate Commerce] Act, Congress has provided an expert body. That **administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by**

evidence.

Schecter, at 539. [Emphasis added.]

Section 6(f) of the Act sets forth the level of judicial review for OSHA's standards,

"the determinations of the Secretary shall be conclusive if supported by **substantial evidence** in the record considered as a whole." (Emphasis added.) The Supreme Court defined substantial evidence as "enough evidence that a reasonable mind might assume is sufficient to sustain a conclusion". American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1951).

Additional statutory guidance includes Sec. 6(e) of which provides,

> whenever the Secretary promulgates any standard...he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

The D.C. Circuit Court explained this section as follows:

> [T]he agency must pinpoint the factual evidence and the policy considerations upon which it relied. This requires explication of the assumptions underlying predictions or extrapolations, and of the basis for its resolution of conflicts and ambiguities. In enforcing these requirements, the court does not reach out to resolve controversies over technical data. Instead it seeks to ensure public accountability.

AFL-CIO v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979).

Status Quo of PELs

The inability of OSHA to institute updates of its PELs is arguably in part the direct result of the decision by the Eleventh Circuit Court of Appeals that rejected OSHA's attempt to strengthen the exposure levels. The court in AFL-CIO v. OSHA discussed in detail the relevant Supreme Court and federal appellate court case law

concerning OSHA's standard-setting requirements pursuant to the Act. Discussed here are some of the holdings and supporting rationale of the court in AFL-CIO v. OSHA. This decision provides a useful summation of the statutory and constitutional requirements the courts have imposed on rulemaking based on the language of the Act. The central issue is the courts' review of OSHA's standards (which have the force of law).

It should be remembered that in reviewing an OSHA standard, the courts are mandated by the specific language of the Act to use the relatively higher substantial evidence test than the more deferential arbitrary and capricious standard used to assess many federal agency actions under the Administrative Procedure Act. This standard, according to the Eleventh Circuit, requires the court to take a "harder look" at OSHA's action in rulemaking.

There are approximately 9 basic elements that the agency must examine before promulgating a new or amended standard. These elements include:

1) Finding the existence of **significant risk** of material health impairment

2) Standard is based on **substantial evidence**after the agency considers the best available evidence

3) Standard must be **economically feasible** and **technologically feasible**

4) Where practicable, the standard must be expressed in **terms of objective criteria and performance expected**

5) It attains the highest degree of health and safety protection,

6) OSHA considered the **latest available scientific data,**

7) OSHA must have considered **experience under other health and safety laws,**

8) Standard may be based on research, demonstrations, experiments, and other appropriate information,

9) Standard is **reasonably necessary and appropriate**.

Significant Risk and Feasibility Requirements

As part of its examination of any proposed standard, OSHA is required to determine that a significant risk is present and that abatement of the risk is feasible. The Eleventh Circuit stated:

> [O]SHA has a responsibility to quantify or explain, at least to some reasonable degree, the risk posed by each toxic substance regulated. See [Intl. Union, UAW v. Pendergrass, 878 F.2d 389, 392 (D.C. Cir. 1989)] ("OSHA necessarily seeks to quantify the risk exposed by each toxic threat." (Emphasis added.)); see also Benzene, 448 U.S. at 614-15 ("We agree ... that § 3(8) requires the Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk..." (Emphasis added.)). Otherwise, OSHA has not demonstrated, and this court cannot evaluate, how serious the risk is for any particular substance, or whether any workers will in fact benefit from the new standard for a particular substance. If each of these 428 toxic substances had been addressed in separate rulemakings, OSH would clearly have been required to estimate in some fashion the risk of harm for each substance. OSHA is not entitled to take short-cuts with statutory requirements simply because it chose to combine multiple substances in a single rulemaking...
>
> While our deference to the agency is at a peak for its choices among scientific predictions, we must still look for some articulation of

> reasons for those choices." Pendergrass, 878 F.2d at 392 (emphasis added)...
>
> Mere conclusory statements, such as those made throughout the Air Contaminants Standard, are simply inadequate to support a finding of significant risk of material health impairment.

AFL-CIO v. OSHA, at 976.

> The lesson of Benzene is clearly that OSHA may use assumptions, but only to the extent that those assumptions have some basis in reputable scientific evidence... [O]SHA [may not] base a finding of significant risk at lower levels of exposure on unsupported assumptions using evidence of health impairments at significantly higher level or exposure. Benzene, 448 U.S. 607, at 656-58.

AFL-CIO v. OSHA, at 979.

The court in its decision also made it abundantly clear that feasibility played an important role in the rulemaking process.

> [I]t is clear that the concept of "a general presumption of feasibility" does not grant OSHA a license to make overbroad generalities as to feasibility or to group large categories of industries together without some explanation of why findings for the group adequately represent the different industries in that group.

AFL-CIO v. OSHA, at 981.

The caution articulated in this conclusion of the appellate court simply must be observed and followed. It is axiomatic that Congress did not, and may not, grant

OSHA or any other federal agency authority to promulgate enforceable regulations unless there is some rationale or connection to the statutory purpose or mission of the agency. Otherwise, the agency would be granted virtually unbridled legislative authority that even Congress does not possess under the Constitution. (See Schecter discussion supra, p. 5.)

> The OSH Act mandates that OSHA promulgate the standards that "most adequately" assure that workers will not be exposed to significant risks of material health impairment "to the extent feasible" for the affected industries. Further, section 6(e) and **caselaw** require OSHA to adequately explain its determinations. Section 6(b) of the Act does not provide an exception to these requirements for administrative convenience.

AFL-CIO v. OSHA, at 988. (emphasis added).

This portion of the Eleventh Circuit's decision is applicable to addressing PEL updates because it emphasizes the importance that over thirty years of case law has in ascertaining OSHA's current statutory and constitutional obligations when it promulgates standards. That body of case law interprets and applies the procedures the agency must follow – after it has accumulated and assessed detailed scientific and medical evidence that may often be subject to divergent valid interpretations.

A significant statutory change to the Act, and its now reasonably well-defined regulatory promulgation process, would invite many years of judicial reconsideration. That process will further delay effective application and enforcement of employee protections in the new standards. As to the PELs, and in light of the potential dangers they address, time may be of the essence. In considering what, if any, Congressional action may be appropriate, the role of the courts under the Act, other federal laws and regulations, and the Constitution must be carefully considered.

Data Quality

The Data Quality Act, Section 515(a) of the F.Y. 2001 Treasury and General Government Appropriations Act, requires OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." On February 22, 2002, OMB issued its guidelines that required all federal agencies,

including the Department of Labor and its constituent agencies (e.g., OSHA) to issue their own data quality guidelines. The DOL's proposed guidelines required submission of comments by June 30, 2002. Although not yet final, those guidelines will almost certainly include provisions complying with the OMB guidelines, which provide:

> As a matter of good and effective agency information resources management, agencies shall develop a process for reviewing the quality (including the objectivity, utility, and integrity) of information before it is disseminated. Agencies shall treat information quality as integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination. This process shall enable the agency to substantiate the quality of the information it has disseminated through documentation or other means appropriate to the information.

67 Fed. Reg. 8452, 8559 (Feb. 22, 2002).

The Congressionally-authorized data quality mandates clearly require DOL and OSHA to undertake an unprecedented level of care and precision before it "disseminates" information which will necessarily form the foundation of its regulations and standards. The information contained in such disseminations must also reflect the requisite quality, objectivity, utility and integrity.

In light of these requirements, efforts to expedite the development and promulgation of new or revised PELs should not allow OSHA to bypass the Data Quality Act requirements, and must be designed to provide the agency, and its delegatees, ample time, resources and staff to devise acceptable standards. In essence, procedures and programs duplicative of those the DOL and/or OSHA already utilize or manage must be carefully considered.

SBREFA

Agency rulemaking is required to go through a detailed review as part of the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),

5 U.S.C. § 601, et seq. SBREFA provides in its Congressional Findings clause:

> (3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
>
> (6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to action inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;
>
> (b) It is the purpose of this Act … to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

SBREFA goes on to require the rulemaking agency to perform a regulatory flexibility analysis, to establish a small business review panel, and to perform a

periodic review of regulations which have a significant economic impact on a substantial number of small entities.

The provisions of SBREFA have been utilized on many occasions since its passage. For example, the business community provided input for the SBREFA review of OSHA's standard on musculoskeletal disorders (ergonomics). The Chamber joined other business organizations, as well as individual businesses, in presenting evidence on the proposed standard's substantial impact on small businesses and their employees. It was the SBREFA findings that played a role in the decision by Congress to invoke the provisions of the Congressional Review Act to reject the standard.

New Approach to Judicial Review

I have discussed the statutory elements of judicial review of OSHA standard promulgation and the federal courts' application of those elements. Relatively recent judicial trends may portend application of additional elements.

In Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the Supreme Court vacated a Ninth Circuit decision affirming summary judgment. The lower courts' decisions were based on their determination that an expert's testimony was unreliable unless the expert's work had been published and subjected to peer review. The Court concluded, citing the Federal Rules of Evidence, that the trial court should preliminarily assess whether the reasoning or methodology underlying the expert witness's testimony is scientifically valid and whether it can be properly applied to the facts at issue.

The Court held that the following factors should guide the trial court's assessment:

> 1) whether the expert's scientific theory has been tested;
>
> 2) whether his theory has been subjected to peer review;
>
> 3) what is the theory's potential rate of error;
>
> 4) whether the scientific theory is generally accepted in relevant scientific community.

The Daubert principles have not been applied by federal courts in reviewing agency rulemaking and, to date, the Daubert factors apply only to trial court consideration expert testimony and evidence presented at trial. Because the Supreme Court has adopted those principles for court assessment of scientific evidence, it seems only logical, indeed almost inevitable, that the federal circuit courts will utilize the Daubert principles to assess the adequacy of the scientific and experts' evidence or conclusions federal agencies' rely upon in their rulemaking. Certainly, these

principles are not inconsistent with the substantial evidence requirement of the Act, nor do they seem inconsistent with a lower standard of review (e.g., arbitrary and capricious). Virginia Growers Association, Inc. v. Donovan, 774 F.2d 89 (4th Cir. 1985)(court inquiry into facts is to be searching and careful but ultimate standard of review is narrow. Agency is obligated to examine the available evidence and articulate a "rational connection" between evidence and rule). In any event, Congress may wish to consider whether the Daubert principles should apply to a specifically authorized expedited PEL update process.

PEL Issue

The PELs should be reconsidered and updated based on the most recent scientific and medical information, and created from scratch for substances and chemicals that have been discovered or developed since the original PELs were issued. It appears there are several potentially viable ways to address the "PEL Issue."

The most direct would be for OSHA to begin a streamlined, ongoing PEL process under current law, publishing new PELs for currently unregulated chemicals and subjecting the PELs that need updating to OSH Act Sections 3(8) and 6(b) rulemaking based on a worst-first priority.

Another approach, which which is conceptually before this Subcommittee, would be for the Congress to establish some special statutory mechanism by which the PELs could be updated. The Chamber does not necessarily oppose such a proposal but much depends on the details. At this time, we are unable to say which, if any, of the several important rulemaking protections under the Act should be waived under any such legislation. We would also strongly urge that the requirements of the Data Quality Act and SBREFA be retained. The latter is particularly important because in reality often the interests of the small business community become lost in any expedited process in which much depends on the conclusions of appointees sitting on one type of a panel or the other meeting here in Washington. It is also hard to envision any process that would eliminate the requirements that significant risk be demonstrated or that levels be technologically and economically feasible or that would change the well-established body of judicial review under OSHA. Obviously any new process must also retain adequate procedures for public input in any conclusions reached by a panel. Finally, we do feel it is important that any special legislation which might be enacted would be limited in scope, contain a sunset date, and not set a precedent for other areas.

We recognize these are difficult questions. Perhaps another, relatively simpler, approach is for Congress to allocate substantial financial resources to OSHA so the agency could properly staff and equip a large task force, under the direction of the Assistant Secretary for OSHA, which would be devoted soley to promulgation of new PELs within the statutory framework of the Act. The intense and specialized focus of a task force would allow it to formulate new PELs while adhering to the multiple regulatory mandates of various federal statutes and regulations (e.g., OSH Act, SBREFA, Data Quality Act) as well as the expectations of the courts. After all,

if a problem exists here that is important enough for the Congress to consider enacting special legislation, it is surely important enough, arguably, for the Congress to consider urging the specific agency created by the Congress to address these types of issues to move forward on its own. Perhaps additional, dedicated funding is a necessary part of this equation.

Conclusion

Under any circumstances, OSHA must be encouraged and enabled to address the PEL issue with all deliberate speed and in a manner that will protect working men and women from air contaminants that pose a significant risk of material impairment and whose risk would be substantially reduced by enactment of technically and economically feasible PELs.

There is no reason for this PEL issue not to be addressed through an appropriate action plan, although no matter what approach is taken, any substantive updates will take several years. The Chamber appreciates your interest in examining this important issue.

Thank you for this opportunity to address the Subcommittee. I would be pleased to answer any questions.

APPENDIX C - WRITTEN STATEMENT OF MARGARET M. SEMINARIO, DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH, AFL-CIO, WASHINGTON, D.C.

Testimony of Margaret M. Seminario
Director, Department of Occupational Safety and Health
American Federation of Labor and Congress of Industrial Organizations
Before the House Committee on Education and the Workforce
Subcommittee on Workforce Protections on
Updating OSHA Permissible Exposure Limits
July 16, 2002

Mr. Chairman, members of the Committee, thank you for the opportunity to testify today on the subject of updating OSHA Permissible Exposure Limits (PELs). The AFL-CIO appreciates your interest in, and leadership on this issue.

The issue of permissible exposure limits governing toxic chemicals is an important safety and health matter for workers in this country. The production and use of chemicals is a major economic activity. In 1996, the Environmental Protection Agency estimated that there were more than 75,000 chemical substances in commercial use; 3,000 – 4,000 of these substances produced in annual volumes of more than 1 million pounds.

As we are all well aware, many of these chemicals are toxic and hazardous with over exposures leading to serious disease and death among workers. NIOSH has estimated that each year 50,000 to 60,000 workers die as a result of occupational diseases. This compares to approximately 6,000 annual job-related deaths from traumatic injuries.

In 1970, when Congress passed the Occupational Safety and Health Act, protection of workers from toxic chemicals was one of its main concerns and goals. The legislative history of the statute is replete with testimony, discussion and statements about the serious problems of chemical exposures and occupational diseases.

For example, the Senate Committee Report on the legislation described the problem as follows:

> "Occupational diseases which first commanded attention at the beginning of the Industrial Revolution are still undermining the health of workers. Substantial numbers, even today, fall victim to ancient industrial poisons such as lead and mercury. Workers in dusty trades still contract various respiratory diseases. Other materials long in industrial use are only now being discovered to have toxic effects. In addition, technological advances and new processes in American industry have brought new hazards to the workplace. Carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins,

> pesticides, among others all present incipient threats to the health of workers. Indeed new materials and processes are being introduced into industry at a much faster rate than the present meager resources of occupational health can keep up with." (Legislative History of the Occupational Safety and Health Act of 1970, S. 2193, P.L. 91-596, p. 41).

To provide workers protection during the start-up period of the law and the OSHA program, Congress provided for, on a one time basis, the adoption of existing national consensus standards and established Federal Standards without notice and comment rulemaking. Through this streamlined process, OSHA adopted existing permissible exposure limits for several hundred toxic chemicals from the Walsh-Healy Act. These Walsh- Healy standards were based upon the 1968 Threshold Limit Values (TLVs) recommended by the American Conference of Government Industrial Hygienists (ACGIH), with many of these limits set during the 1940's and 1950's.

Congress, however, recognized that many of these standards were out of date and did not adequately protect workers. Moreover, Congress found problems with the way that many of these private and consensus standards were set, particularly with respect to undue industry influence. Therefore, provisions were included in the OSHAct for NIOSH to develop recommended criteria for standards, and for OSHA to develop and issue standards that were reasonably necessary and appropriate to protect workers, based upon the best available evidence, through a public process involving notice and comment rulemaking and at the Secretary's discretion the convening of a standard's advisory committee to review evidence and provide recommendations.

Reflecting the concern about toxic chemicals and occupational disease, the OSHAct included special provisions for the development of standards for toxic chemicals and harmful physical agents. Section 6(b) (5) of the OSHAct directed the Secretary of Labor to set standards for such hazards that "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 exposed over a working lifetime. The Act also provided that where appropriate, that these and others standards include provisions for labels and warnings, exposure monitoring and medical exams, and control procedures and/or suitable protective equipment.

Over the years OSHA has issued a number of standards under Section 6(b) (5) to protect workers from serious hazards, including standards on asbestos, vinyl chloride, benzene, cotton dust, lead and arsenic. These standards have been extremely effective, significantly reducing exposures and disease.

However, over the years the process for setting these standards has become more complicated, difficult and lengthy. It now can take 10 years or more for OSHA to develop and issue a comprehensive 6(b) (5) standard for a major hazard. Much of

this delay is a result of lack of OSHA leadership and commitment, industry opposition or political interference. But even under the best of circumstances, standard setting is a long and complex process.

The net result is that in the 31 years since the OSHAct was enacted OSHA has set 6 (b) standards for only 29 toxic chemicals.

This means that for the vast numbers of toxic chemicals and toxic chemicals exposures, there are no OSHA standards, and the permissible exposure limits that do exist are woefully out of date, in many cases originally set more than 50 years ago. Hundreds of thousands, if not millions of workers are exposed to levels of toxic chemicals that put them at serious risk of diseases or even death.

The deficiency of the existing OSHA PELs has been widely recognized by safety and health professionals, industry and labor. At the time OSHA proposed to revise its PELs in 1988, the head of safety and health for Dow Chemical put it very succinctly when he testified,

"Over the past few years, it has become obvious how out of date the OSHA PEL Z-Tables, or what ever you wish to call them, have become. In some cases, the disparity has been an embarrassment to both OSHA and industry."

The situation has only gotten worse during the past 14 years. The disparity in protection provided by OSHA PELS and that provided by recommended limits has become greater as new evidence has identified hazards that need to be addressed. So too has the disparity in legal protections afforded workers.

A number of government agencies in the United States and other countries have successfully taken action to reduce toxic chemical exposure limits. Several state plan states have established permissible exposure limits at levels that are lower than those limits currently in effect by OSHA. For example, the states of California, Washington, and Minnesota all have exposure limits for the commonly found chemicals ammonia, carbon monoxide, and toluene that are lower and more protective than that of OSHA. In addition, each of these three states has existing PELs for very common worker exposure situations involving gasoline, welding fumes, wood dust, and potassium that OSHA does not regulate at all. Indeed, California has gone so far as to adopt some exposure limits at the levels set by the 2002 TLVs which are far lower than OSHA's. (For example, California has exposure limits, the same as contained in the 2002 TLVs, of 25 ppm for acetaldehyde, 5 ppm for ethyl bromide and 0.01 ppm fpr hydrazine while the OSHA PELs remain at 200, 200, and 1 ppm, respectively). Around the world, other countries are also moving well beyond the OSHA PELs. Canada's federal occupational safety and health regulations set chemical exposure limits from the ACGIH's TLVs "...dated 1994-1995, as amended from time to time." And the European Union is now in the process of adopting exposure limit values that follow the 2002 TLV recommendations instead of the out-of-date OSHA PELs. (For instance, the European Communities have established exposure limits for

chloroform at 2 ppm, chlorobenzene at 10 ppm and 2-butoxyethanol at 20 ppm while the OSHA PELs remain at 50, 75, and 50 ppm, respectively).

In 1988-1989 federal OSHA did undertake a rulemaking that attempted to update permissible exposure limits on toxic chemicals through a generic process that reduced PELs for 212 substances and added 164 new PELs for substances that were previously unregulated. This update process in large measure attempted to adopt the 1986 Threshold Limit Values (TLVs) recommended by the ACGIH. While there was broad consensus at the time that OSHA PELs were out of date, and agreement that many of the promulgated levels were appropriate, both labor and industry groups had concerns about the process and some of the specific levels.

The AFL-CIO believed that the foundation of the 1989 process, the adoption of ACGIH levels, was flawed since a number of the levels failed to meet the statutory requirement to protect workers from significant risk to the extent feasible. We filed suit challenging a number of specific limits and the failure to include provisions for exposures monitoring and medical surveillance. A number of industry groups believed that specific limits were too stringent, with there being inadequate evidence to support significant risk and feasibility determinations.

In 1992, the U.S. Court of Appeals for the 11th Circuit overturned the regulation. While the court found that a generic rulemaking was permissible and that the health effects OSHA was addressing constituted material impairment, the court ruled that the agency had failed to adequately justify why the particular limits chosen were appropriate to protect against significant risk. The court also found that the agency had failed to adequately justify the feasibility of the chosen levels at a sufficient level of industry specificity. Unfortunately, rather than setting aside only those levels specifically challenged, the court invalidated the entire standard, finding OSHA's overall approach to the rulemaking so flawed that the entire revised Air Contaminants Standard must be vacated.

In concluding its decision, the court observed that it was indeed possible that the only practical way to accomplish "a much needed revision of existing standards and of making major strides towards improving on worker health and safety" was through a process that relied heavily on recommended limits. But the court went on to point out that such an approach is not consistent with the requirements of the OSHAct, and that OSHA must get authorization from Congress, through new legislation before utilizing such an approach.

As noted earlier, the AFL-CIO had deep concerns about and objections to the 1989 process used by OSHA which placed such a heavy reliance on ACGIH TLVs. That being said, it was not our desire or goal to have the entire rulemaking overturned, but to have limits conform with the requirements of the OSHAct to protect workers against significant risk to the extent feasible based on the best available evidence.

We continue to believe that protecting workers against significant risk of harm to the extent feasible, through the promulgation of comprehensive standards under

section 6(b) (5) must remain the primary goal and focus of OSHA's health standards activity. However, 10 years after the court's decision vacating the Air Contaminants standard and no successful action by OSHA to adopt a new set of revised limits, a new approach to updating permissible exposure limits for toxic chemicals must be devised.

The current statutory processes have failed to provide timely protection to workers. Just as the Congress recognized in 1970 that special procedures were needed to put in place a body of baseline regulations utilizing recognized standards and practices, we believe that it is time again for Congress to enact legislation to provide new procedures to update exposure limits for toxic chemicals.

Ideally, we would like to see legislation provide for: 1) an immediate update of permissible exposure limits based upon recommended standards of recognized standards producing groups; 2) new procedures to keep permissible exposure limits up to date; and 3) changes to speed up and streamline the process for establishing comprehensive 6(b) (5) standards for toxic chemicals. The AFL-CIO recognizes however, that moving on all these fronts at once is not likely to be possible at this point in time.

For the past year the AFL-CIO has been engaged in discussions, convened by the American Industrial Hygiene Association (AIHA) on updating OSHA permissible exposure limits. Those discussions have involved a number of unions, employer groups and safety and health professionals who share the view that current exposure limits are out of date and need improvement and that new approaches are needed to provide timely protection to workers. We have had an open, honest and frank dialogue focused on developing an approach to updating limits that is meaningful as well as practical and realistic, that has broad support from the safety and health community, unions, employers and Congress. Our initial discussion considered proposals for both updating current PELs and keeping them updated on an ongoing basis. However, it appears that a staged approach to this process is more realistic and therefore have focused our efforts on developing a proposal for updating the baseline of PELs on which there is consensus, and using the experience gained in this process to craft a more permanent approach for keeping limits up to date.

While the discussions of this group are still on-going and we are reaching out to other employer and union groups, the AFL-CIO believes that the approach under consideration is sound. I am not here today to represent the position of this group or to speak for other participants in the effort. As a representative of the AFL-CIO I would like to set forth our views on the principles that should be the foundation for the update of PELs, the broad outlines of the proposal under discussion in the AIHA group and the AFL-CIO's recommendation for action by the Congress.

Principles for Updating Permissible Exposure Limits:

1. Over the past 30 years OSHA has been unable to update existing PELs or set new limits in a timely fashion.

Existing OSHA permissible exposure limits are out of date and fail to provide adequate protection to workers.

2. While the goal of the statute and focus of OSHA's standard activity should remain the promulgation of comprehensive standards to protect workers against significant risk to the extent feasible, permissible exposure limits should also be updated and kept current to protect workers from unnecessary disease and death.

3. A new approach is needed to provide for the updating of OSHA PELs. The approach should provide for updating of limits on a large number of chemicals through an expedited process. To accomplish this, the burdens placed on OSHA in rulemaking must be reduced. Legislation is needed to authorize and support a new approach.

4. The approach to updating PELs should provide for the establishment of limits that are reasonably necessary and appropriate to protect workers. The approach should be one that works towards consensus, that provides for meaningful input and involvement of interested parties, and maintains their right to seek legal review.

5. The approach should recognize that the establishment of comprehensive 6(b) (5) standards remains important and for certain chemicals is more appropriate. OSHA should be urged to move forward to develop comprehensive 6(b)(5) standards on major hazards including hexavalent chromium, beryllium, silica and metal working fluids.

As noted earlier, at the present time it appears to be more realistic to approach the revision and update of PELs in stages, first addressing those substances for which there is broad consensus on limits, then tackling those which are more contentious, and developing a process which will keep limits up to date. Even though a staged approach is likely to postpone needed action on some chemicals which pose serious hazards at current permissible limits, the AFL-CIO believes that dealing first with chemicals on which there is agreement will have some real benefits. First it will update the baseline of limits for many chemicals, allowing more time and attention to be focused on those which pose serious hazards and need greater attention and consideration. Based upon the experience with the 1988-1989 air contaminants rulemaking there may be hundreds of chemicals where ready agreement can be reached on appropriate limits. Second, we believe such an approach can help build trust among labor, employers, safety and health professionals and other interested parties upon which further work on PELs and other issues can be based. I would now like to turn to the outlines of the approach that is currently under discussion by the group convened by the AIHA.

The approach deals with the first stage of updating permissible exposure limits on which there is broad consensus. It would authorize and direct the Secretary of Labor to update OSHA permissible exposure limits – both the revision of existing limits and addition of new limits through an expedited process using current recognized published occupational limits as the basis for such an update. Such limits could include ACGIH TLVs, AIHA WEELs, NIOSH RELs and other published limits.

It places responsibility on the Secretary of Labor to develop a candidate list, to compile the supporting documentation used by standards organization to develop these lists, and to seek public comment on the appropriations of these limits.

The heart of the proposal is the establishment of an advisory committee which is balanced and includes representatives from management, labor, standard groups, state agencies experts and others that would be responsible for reviewing candidate limits, related documentation, other evidence compiled or submitted, seeking comments and input from interested parties and recommending to the Secretary which of the recommended limits are reasonably necessary and appropriate, achievable and should be adopted as legally binding standards. The committee could also recommend which chemicals need further evaluation or work or should be handled through the regular 6(b) process.

Those chemicals and related limits for which a consensus is reached would be forwarded to the Secretary for publication in the Federal Register as a proposed rule, for public comment. If after receiving public comment and reviewing the evidence in the record the Secretary determined that based on the record evidence that a proposed limit was reasonably necessary and appropriate, the limit would be published as a final rule.

Affected parties would retain their right to challenge the limits in court but the individual limits would be severable. That is if a limit was overturned, the other limits would stand. We believe that this approach strikes a reasonable balance between expediting the process of updating PELs, by utilizing the work of standards organizations reviewed by a balanced representative group, and maintaining the rights of affected groups to participate, have real input and seek legal review.

The AFL-CIO recognizes that there are concerns about some of the recommended standards developed by standards organizations, and whether they are appropriate to be adopted as legal standards. We also have concerns, and do not recommend that subsequent stages of updating PELs be limited to or based solely or primarily upon review of limits recommended by these groups. As a practical matter, however, we believe that expeditious updating of large numbers of PELs can only be accomplished initially by using published standards as the basis for the initiative, subject to comment, and review and screening. Updating PELs through this consensus approach will help build a foundation for other work.

As stated earlier, it is our view that legislation is needed to authorize OSHA to update PELs through an expedited process. Based upon discussions and efforts to

date, we are hopeful that it will be possible to reach broad bi-partisan agreement on legislation to authorize and mandate a new approach to updating PELs, just as agreement was reached on legislation preventing needlestick injuries, providing OSHA coverage to postal workers and codifying aspects of OSHA's state consultation program.

We look forward to working with members of the committee, employer groups and safety and health professional organizations on efforts to update OSHA permissible exposure limits to protect workers from harmful exposures and unnecessary disease and death.

Thank you.

APPENDIX D - WRITTEN STATEMENT OF FRANK A. WHITE, ESQ., VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC., WASHINGTON, D.C.

STATEMENT OF FRANK A. WHITE
VICE PRESIDENT
ORGANIZATION RESOURCES COUNSELORS, INC.
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
July 16, 2002

On behalf of Organization Resources Counselors, Inc. (ORC), I would like to thank the Subcommittee for this opportunity to discuss options for improving the process for developing national occupational exposure limits for air contaminants and to thank the Chairman for his willingness to exercise a leadership role on this important but too long neglected area of worker protection.

ORC is an international management and human resources consulting firm whose Washington, D.C., office has for 30 years specialized in providing a wide array of occupational safety and health consulting services to American businesses. Currently, more than 170 large (mostly *Fortune 500*) companies in diverse industries are members of ORC's Occupational Safety and Health Groups. The focus of these groups is to promote effective occupational safety and health programs and practices in business, to facilitate constructive communications between business and government agencies responsible for establishing national occupational safety and health policy, and to advocate responsible business positions to the regulators.

The activities of ORC's Occupational Safety and Health Groups are based on the premise that providing safe and healthful working conditions is the mutual concern of employers, employees and government agencies. The Groups provide a valuable link between member companies and government agencies including the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH).

I appear today not only to provide a business perspective on behalf of ORC, but as someone who was an OSHA official intimately involved in the agency's attempt to update the permissible exposure limits (PELs) in the late 1980's, an attempt that the U.S. Court of Appeals for the Eleventh Circuit ultimately struck down in its entirety in 1992.

Was that overturned 1989 rule a noble but flawed effort or just another case of bureaucrats run amok? Even the disapproving court was sympathetic to OSHA's attempt to update the now 30 year-old PELs, remarking that it had "no doubt that the agency acted with the best of intentions," and commenting further that "it may well be, as OSHA claims, that this was the only practical way of accomplishing a

much needed revision of existing standards and of making major strides toward improving worker health and safety." Nevertheless, the court concluded that "before OSHA uses such an approach, it must get authorization from Congress . . . ." And so here we are today, almost exactly 13 years after the court's decision, to discuss whether Congress might play a constructive, but limited, role in a renewed effort to develop updated workplace exposure limits.

To be candid, ORC and other business groups, such as the American Chemistry Council (ACC) and the American Petroleum Institute (API) that have favored and fostered attempts to update the PELs in the years since the 1992 court decision, have not up to this point supported congressional intervention. The business supporters of a PEL update have believed that, while the court decision restricted OSHA's options in some crucial regards, it also left the door open to at least a few opportunities for expediting the process. In short, and with due respect, we opted to try to reform the "devil we knew" – the existing OSHA rulemaking process – rather than accept the court's suggestion of enlisting Congress to step in.

So for much of the past six years, an inter-industry group that has included ORC, ACC and API has advocated a new administrative approach to updating the limits, one that would have as its centerpiece an open and transparent forum for the collaborative collection and evaluation of scientific, technological and economic data and information by OSHA and all affected stakeholders. We have believed strongly, and continue to believe, that to be successful, any new process for the development of exposure limits must be based on collaboration among the affected interests. We also understand that *any* new effort, including our recommendation, would be resource intensive and require a long-term commitment by OSHA and its stakeholders to be successful. A copy of that industry proposal and some of the correspondence with OSHA are attached to this testimony.

For a variety of reasons, this inter-industry group has not been successful in generating sufficient support for this new approach or some alternative administrative process. When the American Industrial Hygiene Association (AIHA) stepped forward a year or so ago to facilitate a new round of discussions among interested stakeholders and others about the subject of updating OSHA's PELs, ORC was eager to participate, although our expectations were not initially high. The resulting discussions that have taken place over the past year among a diverse but limited group of stakeholders have revealed important areas of possible consensus on an approach to updating the PELs.

With this background, ORC now believes that there may be an appropriate limited role for Congress in shaping a process for at least an initial update of some of OSHA's PELs. We reach this conclusion because it is unlikely, at least in the near term, that the Department of Labor will give this issue the priority attention that it deserves or will devote sufficient resources to an update effort. We have also concluded that it may be possible to craft limited legislation to provide an appropriate structure for an initial update. AIHA has provided the subcommittee with a draft of some of the key concepts that might be contained in such legislation

and we are extremely appreciative of the time and effort you and committee staff have devoted to considering this issue and input from a wide range of stakeholder interests.

Rather than discuss possible specifics of a legislative approach, I would like to offer for the subcommittee's consideration a list of key issues that ORC believes must be addressed in any legislative effort to update OSHA's PELs – these issues include a mix of legal, policy and political considerations.

> *PEL legislation must minimize the possibility of "opening up" the Occupational Safety and Health Act of 1970 (Act) for amendment.* Creating "stand alone" legislation focused solely on the updating of PELs is the "cleanest" way to assure that the basic provisions of the Act, including sections 3(8) and 6, are to remain intact. The recent needlestick legislation is a useful model in this regard.
>
> *A process for updating PELs must be open, transparent and inclusive of all affected interests.* The key to the success of any process to update PELs is for all affected interests to be "partners" in the process. This requires that the ground rules for decision-making be clear, that all deliberations be open to affected parties, and that there be no barriers to active participation in all aspects of the process.
>
> *An updating process must encourage the submission of, and must evaluate, the best available data and information.* The credibility of any PEL update process depends in large measure on the ability to collect and fairly evaluate, using well-understood criteria, the scientific, technological and economic information relevant to determining whether a candidate PEL is well-supported.
>
> *The PEL update process should be consensus driven.* The establishment of an advisory committee under the Federal Advisory Committee Act, with clear definitions of what constitutes consensus, is a well-understood, formal mechanism for achieving this objective.
>
> *The legal standards for determining whether a proposed PEL is scientifically supported and capable of being achieved by affected industry sectors must be less stringent than those in the Act.* The current standards-setting criteria contained in sections 3(8) and 6(b)(5) of the Act, as construed in numerous court decisions, including the 1992 Eleventh Circuit decision, call for determinations of

"significant risk" and "feasibility" that are quite rigorous. It was for taking too many "short cuts" with these legal standards and with the evaluation of the evidence that OSHA failed to sustain its 1989 PEL update. For the limited purposes of updating the PELs under this special legislative effort, Congress and all of the affected interests must be willing to reduce the evidentiary burden of establishing the validity of the new PELS.

An updating process must strike a balance between the need for sound scientific, technological and economic determinations and the need to expedite and simplify decision-making. This may be the trickiest issue to resolve from a practical perspective but is the essential element in reconciling the tension between the two previous points – the need to base determinations on sound scientific and other evidence and at the same time to expedite and simplify the decision-making process.

The updating process should be capable of screening out potential limits where the science is weak, inconsistent or otherwise controversial and where the evidence does not clearly demonstrate that affected industries can readily achieve the limits through the use of currently available technology and practices. One key way to achieve the above-referenced balance is to focus the effort of the update process on those contaminants where the supporting evidence is the strongest, most consistent and least controversial. Proposed limits that do not meet these general criteria should be set aside with either no recommendation or a recommendation for appropriate action under the Act. In addition, the PEL update process should be limited to an "up" or "down" recommendation for action on whatever the proposed PEL under consideration is – the process should not attempt to modify the candidate limit.

The potential burdens on small business must be given special attention. To be successful, any PEL update process must assure that affected businesses of all sizes will be able to readily achieve the recommended PELs with currently available and affordable technology requiring a minimum of capital investment. The process must make a special effort to include representatives and perspectives of small business.

Once a PEL is recommended for issuance, there should be

> *opportunity for further limited public input and, once issued in final form, a PEL should be subject to judicial review if challenged by adversely affected parties that have participated in the process.* Although the update process should be a collaborative process that strives for consensus among all affected interests, a final round of public input and ultimately judicial review should be available to assure every possible opportunity for a fair result.

Mr. Chairman, ORC would like to assure the subcommittee that we will continue to work with you, with others in industry and with the broader safety and health community to find an acceptable approach to establishing updated PELs that are scientifically sound and achievable.

APPENDIX E - WRITTEN STATEMENT OF RICHARD SCHWARTZ, PARTNER, CROWELL & MORING, LLP, TESTIFYING ON BEHALF OF THE AMERICAN IRON AND STEEL INSTITUTE, WASHINGTON, D.C.

Testimony of Richard Schwartz

Before the Committee on Education and the Workforce

Tuesday, July 16, 2002

Introduction

Mr. Chairman and members of the Committee on Education and the Workforce, my name is Richard Schwartz. I am a partner in the law firm of Crowell & Moring LLP. Thank you for inviting me to testify before you today. I am appearing on behalf of the American Iron and Steel Institute ("AISI"), which I have represented in OSHA matters on many occasions over the past 25 years. AISI is a trade association whose members manufacture approximately 68% of the raw steel produced in the United States. They employ approximately 63,000 persons in steel-related operations. AISI's member companies have extensive occupational safety and health programs headed by experienced professionals.

More pertinent to today's hearing, AISI was an active participant in the 1988-89 Air Contaminants rulemaking in which OSHA adopted new permissible exposure limits ("PELs") for 428 substances in a single proceeding. On behalf of AISI, I was the lawyer in charge of the joint industry brief, and I argued the joint industry position before the Eleventh Circuit in the successful industry challenge to that rule. *AFL-CIO v. OSHA*, 965 F. 2d 962 (11th Cir. 1992).

My principal reason for being here today is to talk to you about that decision, and the lessons we can learn from it.

AFL-CIO v. OSHA (The PEL Decision): LESSONS LEARNED AND LEGAL IMPLICATIONS

I. SUMMARY OF AFL-CIO v. OSHA

A. The Rulemaking

1. Procedures.

On June 7, 1988, OSHA announced that it was proposing to issue PELs for 428 substances in a single rulemaking proceeding. The announcement covered over 400 pages in the Federal Register. OSHA gave the public 30 days to comment, which is the minimum amount of time required by Section 6(b) of the Occupational

Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, under which these PELs were being issued. The hearings were scheduled to start two weeks later.

In response to numerous requests by the public for more time, OSHA extended the comment period by 17 days, and postponed the hearing by one week. The hearing took 13 days. The Secretary of Labor overruled the post-hearing schedule established by the administrative law judge as allowing too much "delay," and established the deadline for post-hearing evidence of October 7 and for post-hearing briefs of October 31. The final rule was issued on January 18, 1989. An agency that had previously issued 24 PELs in about 17 years had just issued 428 PELs in a little over six months, or about one every 12 hours.

2. The impact of the time constraints.

Steel-making involves many substances, and AISI's members determined that they used scores of these substances, far too many to comment on meaningfully in the time allotted by OSHA. AISI contacted a toxicologist and requested an analysis of the documentation supporting the proposed PELs for the substances that affected the steel industry, but the toxicologist said that there wasn't enough time. Accordingly, AISI decided to focus its comments on nine of the substances about which it had the most information, although its members would be affected by proposed PELs for many others.

3. The substances selected and the nature of "TLVs."

"To increase the pace of the regulatory process," OSHA decided "not to analyze individual substances" prior to issuing the proposed rule to determine if they should be subject to new section 6(b) standards. 54 Fed. Reg. at 2372. Instead, the substances OSHA chose for this rulemaking were those for which the American Council of Governmental Industrial Hygienists (ACGIH) had recommended "threshold limit values" ("TLVs"). The list included, among other things, sucrose, starch, and vegetable oil.

ACGIH itself had explained that its TLVs were guidelines that "are not developed for use as legal standards, and the [ACGIH] does not advocate their use as such." ACGIH, Threshold Limit Values and Biological Exposure Indices for 1988-89 at iv (1988 ed.). Prior to adoption of the OSH Act, TLVs received a lot of attention from industry and the professional community. After the OSH Act was adopted, AISI's members focused their limited resources on PELs, and paid little attention to the TLVs. Accordingly, AISI's members had little confidence in PELs that were adopted or modified after 1972.

4. OSHA's Methodology.

OSHA must make certain findings before it can establish a PEL. It must find: (a) that the substance poses a "significant risk" of material health impairment at current exposure levels; (b) that compliance with the PEL is technologically feasible; and (c) that compliance with the PEL is economically feasible. Below I will describe how OSHA made these findings for the 428 substances.

a. Significant risk.

OSHA relied on ACGIH not only for the list of substances, but also for most of the proposed numerical limits. For each PEL, OSHA declared that it found a "significant risk" of material health impairment at present exposure levels. OSHA did not, however, attempt to quantify that risk. Instead, OSHA relied on a single risk estimate for a group of 212 substances. That risk assessment used industry illness statistics *unrelated to chemical exposures* to estimate quantitatively the extent to which cases of illness might be reduced by lowering chemical exposures. 54 Fed. Reg. at 2776-78.

b. Technological feasibility

OSHA asserted that industry could meet the new PELs through existing engineering methods, including "ventilation," "isolation," and "substitution." 53 Fed. Reg. at 21355. OSHA concluded that its new exposure standards were achievable "based on the judgment of the industry experts." 53 Fed Reg. 21356. OSHA never identified those experts, however, when it issued the proposed or final rule. Id.; 54 Fed. Reg. 2790. In general, OSHA did not attempt to show that these controls could meet specific exposure limits in specific industries.

c. Economic feasibility

OSHA's analysis of economic feasibility was by industry "sector" (e.g. "primary metals" (which includes the steel industry), or "personal services" (which includes the dry cleaning industry) or "food and kindred products"). OSHA averaged the control costs among all industries in these broad sectors and then analyzed the average economic impact as if the costs would be equally proportioned among all industries within each sector. 53 Fed. Reg. at 21372-73.

B. The Court's Decision

The Eleventh Circuit "regretfully" agreed with both the industry petitioners and the Union (which had much different complaints about OSHA's action) that OSHA had used a multi-substance rulemaking to "ignore the requirements of the OSH Act."

1. "Generic" Rulemaking

The Court analyzed the Air Contaminants rule and found that it was not truly a "generic" rulemaking, but a collection of 428 separate rules. The Eleventh Circuit concluded that this distinction was not disqualifying -- OSHA may address multiple substances in a single rulemaking. The PEL for each substance, however, "must be able to stand independently." *AFL-CIO*, 965 F.2d at 972. I believe that this conclusion is indisputable. OSHA's PELs, however, could not withstand individual analysis.

2. Significant risk

Th e Eleventh Circuit followed existing precedent when it wrote that "OSHA must provide at least an estimate of the actual risk . . . and explain in an understandable way why that risk is significant." *Id.* at 973. The court's examinaion of the record revealed that OSHA provided no explanation of how it determined that the risk for a particular substance was significant. OSHA simply "cited a few studies and established a PEL without explaining why the studies mandated the particular PEL chosen." *Id.* at 976.

Although OSHA said that it applied case-by-case safety factors to determine the concentration level for each PEL, OSHA never explained the method by which its safety factors were determined. (In our briefs, we contended that OSHA's "safety factor" rationale was a sham. In virtually every instance, the purported "safety factor" was never calculated at all – it was whatever happened to be the difference between the findings of the scientific studies and the ACGIH TLVs that OSHA wanted to promulgate.) The court noted that OSHA may use conservative assumptions to establish safety factors, but those assumptions must have "some basis in reputable scientific evidence." *Id.* at 979.

3. Technological feasibility.

The Eleventh Circuit noted that technological feasibility must be demonstrated industry-by-industry, but OSHA primarily considered industry sectors: "For most of the SIC codes discussed, OSHA provided only a general description of how generic engineering controls might be used in a given sector." *Id.* at 981. The court found that "OSHA made no attempt to show the ability of technology to meet specific exposure standards in specific industries." *Id.* It concluded that OSHA does not have a "license to make overbroad generalities as to feasibility or to group large categories of industries together without some explanation of why findings for the group adequately represent the different industries in that group." *Id.* at 982.

4. Economic feasibility.

The Eleventh Circuit also found that OSHA had not demonstrated that the PELs were economically feasible. Economic feasibility must be demonstrated industry-by-industry but (as OSHA did with technological feasibility), OSHA evaluated economic feasibility for broad industry sectors "without explaining why such a broad grouping was appropriate." *Id.* at 982. The court pointed out that averaging costs across an industry sector "can be extremely misleading in assessing the impact of particular standards on individual industries." *Id.* An egregious example was the new PEL for perchloroethylene, whose costs OSHA averaged over the entire "personal services" sector, even though all of the costs would be borne only by the drycleaning industry.

(Next the court dealt with three issues raised by the union petitioners, as described below.)

5. Use of ACGIH and other consultants.

The unions argued that OSHA's use of ACGIH's recommendations was unlawful on two grounds: (a) because OSHA included only substances with more stringent TLVs than the existing PELs, and (b) because OSHA relied on ACGIH recommendations without independently analyzing the evidence. The court rejected the first contention, finding that OSHA may use multiple substances in one rulemaking, but need not include all possible substances in that proceeding. Accordingly OSHA had discretion to use the substances addressed by ACGIH as part of its authority to set priorities.

With respect to OSHA's reliance on ACGIH, the Court found that OSHA is not required to independently research all aspects of its rules. OSHA may rely on consultants, but it must make its own "detailed findings with adequate explanations, for all statutory criteria." *Id.* at 984.

6. Exclusion of monitoring and medical surveillance.

The union challenged OSHA's decision to defer issuing standards for monitoring and medical surveillance for each of the new PELs. The court concluded, however, that issuing such provisions "is purely a matter of regulatory priority," so OSHA was not required to issue such standards for the new PELs. *Id.* at 985.

7. Four-year compliance period.

The union challenged OSHA's decision to allow four years for the implementation of engineering work practice controls to bring industry into compliance. The Eleventh Circuit analyzed OSHA's rationale, in which OSHA admitted that one or two years is normally sufficient, but some employers would

need more time, so OSHA allowed four years. The court noted that OSHA's analysis was "fully consistent with OSHA's treatment of this standard as a 'generic' standard, without adequate consideration of the effect of individual substances or the effect of the new standards on individual industries." *Id.* at 985. It concluded that this compliance period was not supported by the record. If the technology exists and is already being used, four years should not be required for implementation by all industries.

The Court's Conclusion

The court concluded that OSHA's approach was "so flawed that it cannot stand. . . . The result of this approach is a set of 428 inadequately supported standards. OSHA has lumped together substances and affected industries and provided such inadequate explanation that it is virtually impossible for a reviewing court to determine if sufficient evidence supports the agency's conclusions." *Id.* at 986.

II. LESSONS FROM THE PEL DECISION.

A. OSHA has wide discretion to select PELs for rulemaking. It need not issue PELs immediately for every substance without a PEL.

B. OSHA may issue PELs for multiple substances in a single rulemaking.

C. No matter how many PELs OSHA issues at once, each one must be legally defensible on its own merits. OSHA may not issue a large group of PELs and use that large group as an excuse for inadequate analysis of each one.

D. OSHA is given wide discretion in setting PELs, but it must explain its actions sufficiently so a reviewing court can judge their reasonableness. It may apply safety factors, but must explain how it arrived at them.

E. The court did not apply the "substantial evidence" test in a manner that was overly restrictive on OSHA. It balked where OSHA failed to make *any* analysis, or provide *any* explanation for its decision.

III. RECOMMENDATIONS BY AISI

A. <u>Retain the Substantial Evidence Test</u>.

Congress adopted the "substantial evidence" standard "to provide a careful check on the agency's determinations without substituting its judgment for that of the agency" and "to check extravagant exercises of the agency's authority to regulate risk." *American Fed'n of Labor v. Marshall*, 617 F. 2d 636, 649-50 (D.C. Cir. 1979). There is no need to drop the "substantial evidence" test for new PELs in favor of an "arbitrary or capricious" standard. The "substantial evidence" standard properly requires OSHA to weigh all of the evidence, rather than simply accept an extreme position that has some support in the record, however small. The Eleventh Circuit PEL decision reflects the wide leeway that the "substantial evidence" test already gives to OSHA. Weakening that standard would only diminish the public's right to meaningful review of the agency's actions.

In fact, the "arbitrary or capricious" standard is too deferential in the context of OSHA standards that rely on careful analysis of scientific studies and often demand evaluation of competing positions by industry and labor. The 9th Circuit recently wrote that regulations governed by the APA "may be set aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The court found that its "only task is to determine whether the [responsible official] has considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002). Countless other courts have formulated the test in largely the same way.

In fact, the substantial evidence test has sometimes been applied almost as leniently. There is disagreement over the degree to which this test differs from the arbitrary or capricious standard. In *Associated Industries v. United States Department of Labor*, 487 F.2d 342 (2nd Cir. 1972), the court noted that the difference between the tests may be "semantic". *Id.* at 349. Some have even claimed that the two standards are converging.[i] It seems for some courts this may be true, although others give more meaning to the substantial evidence test.

An example where the court appeared to find little, or no, difference between the tests is the Seventh Circuit's decision in *American Dental Ass'n v. Martin*, 984 F.2d 823 (7th Cir. 1991). In upholding an OSHA standard for bloodborne-pathogens the court commented that "[the rule] may be unnecessary; it may go too far; its costs may exceed its benefits." Nevertheless the court concluded that "in the main the rule must be upheld. Which is not to say that it is a good rule. . . . but our duty as a reviewing court of generalist judges is merely to patrol the boundary of reasonableness." *Id.* at 831.

Perhaps the most useful description of the "substantial evidence" standard is provided by the PEL case discussed above -- *AFL-CIO v. OSHA*. The Eleventh Circuit provided one of the clearest explanations of the difference between the "arbitrary or capricious" and "substantial evidence" standards. The court wrote:

> Under this test, we must take a harder look at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act. Considering the record as a whole further requires that reviewing courts take into account not just evidence that supports the agency's decision, but also countervailing evidence.

Id. at 970. (Citations and internal quotations omitted). The key concept is that of "countervailing evidence," which requires the court also to evaluate the evidence that is unfavorable to OSHA's position.

The most recent case to deal with the standard of review in a meaningful way is *Color Pigments Manufacturers Association v. OSHA*, 16 F.3d 1157 (11th Cir. 1994). The *Color Pigments* court wrote that in addition to analyzing the law used by OSHA they had to "directly review the sufficiency of the evidence presented and the procedure used in promulgating the standard." *Id.* at 1160.

Recently one commenter has emphasized the need for active judicial review in the OSHA context. In *The Race to the Courthouse: Conflicting Views Toward the Judicial Review of OSHA Standards*, 1994 B.Y.U.L. Rev. 95, after examining the cases reviewing OSHA regulations, David R. Cherrington concluded that "[p]roper judicial review is the only procedural safeguard established by Congress to check excessive regulation by OSHA" *Id.* At 127. Mr. Cherrington compares the decisions in *AFL-CIO v. OSHA* and *American Dental Ass'n*, lauding the 11th Circuit's 'harder look' standard of review and encouraging the Supreme Court to grant certiorari in a similar case to resolve the apparent discrepancy between circuits in the proper level of review. He noted, for example, that under the 7th Circuit's methodology "the only remaining escape from inefficient regulation is a showing that the rule is so burdensome that it imperils the very existence of the entire industry." *Id.* at 127.

There is an inevitable tension between administrative convenience and the goal of providing a check on executive action through judicial review. Without that judicial check, however, administrative "expertise" could become the "monster" feared by the Supreme Court:

> Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion) . . . .

Motor Vehicle Mfrs. Assn. V. State Farm Auto. Ins. Co., 463 U.S. 29, 48 (1983) (quoting *Burlington truck Lines v. United States*, 371 U.S. 156, 167 (1962).

OSHA health standards should continue to be reviewed under a "substantial evidence" test, so the reviewing court can give a "harder look" at the agency's action, including a hard look at *all* of the evidence in the record.

B. Priority Should Be Given to Substances Without PELs.

If Congress wishes to set priorities for additional rulemaking, it should give the highest priority to substances that have no OSHA PEL at all, rather than making existing PELs more stringent. Entirely unregulated substances should be addressed first. Additionally, because most industries with non-PEL substances that have ACGIH TLVs are already using TLVs as a reference level, issuing PELs for those substances after appropriate review and analysis of the supporting documentation using the procedures of the OSH Act should pose a more feasible burden on industry.

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[i] See Matthew McGrath, Note, Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking, 54 Geo. Washington L. Rev. 541 (1986).

APPENDIX F – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSMAN DENNIS J. KUCINICH, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

non-partisan

SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE

Opening Statement of Dennis J. Kucinich

July 16, 2002

We are here to today to discuss the importance of setting new Permissible Exposure Limits (PELs) for the hundreds of chemical substances that present hazardous health effects to American workers.

When the agency was created in 1971, OSHA established PELs for about 300 chemical substances. It was based on research that was done in the 1950's and 1960's.

The standards that OSHA set were very effective at reducing hazardous exposures and work-related injuries, illnesses, and fatalities.

However, since 1971 we have learned a great deal about these chemicals and their effects. Some are more hazardous and harmful than previously discovered.

In the year 2000, 5.7 million workers were injured or became sick on the job. **50,000 died because of occupational illnesses. This is unacceptable.** The 1971 PELs are simply inadequate and should be changed.

In 1989, OSHA set a rule establishing new PELs for 428 toxic substances. However, the 11th Circuit Court of Appeals tossed out these standards, because OSHA has not completed a thorough study of each individual substance to assess the risk involved.

The main problem that we face here is that we do not have enough time. It now takes OSHA an average of **10 years** to set a new standard for a major hazard.

Our mission today is to determine an efficient and expedient way to set new PELs for America's workers.

I believe that Congress needs to give OSHA new direction to pursue a more efficient process for promulgating new PELs.

It is simply **unrealistic and impossible** for OSHA to set new PELs in an expedient manner if each individual substance undergoes the thorough research and rule making process that is now mandated.

Congress should allow OSHA to consult with other organizations that have the scientific expertise to set standards about workplace exposure.

A working group has made significant headway is establishing a process to compare PELs to other standards and to use to most protective value to set new PELs.

The American National Academy of Science (ANAS), the American Conference of Governmental Industrial Hygienists (ACGIH), the American Industrial Hygiene Association (AIHA), and the National Institute for Occupational Safety and Health (NIOSH) already have standards of their own for most substances that OSHA sets PELs for.

NIOSH sets RELs (Recommended Exposure Level), ACGH sets TLV (Threshold Limit Values) and AIHA sets WEEL (Workplace Environmental Exposure Level).

Through the cooperation and combined expertise of such groups, I believe updated PELs can be established that will improve occupational safety.

This is the most efficient way to update existing standards. Setting new safety standards is one of the most important things we can do for American workers. We cannot delay this any longer.

Some other proposals, such as subjecting a list of PELs for congressional approval would only serve to increase delay and politicize a scientific issue.

PELs should be updated based on new research and health findings, not the whim of Congress.

This is not a political issue! This is a health issue.

Instead, we should allow the science and research institutions to deem what is safe and what is not safe. They are the qualified judges.

I encourage the Subcommittee to work with the working group to allow a new process for updating PELs to begin.

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