Date: **Tuesday, May 28,2002**

To: **Office of Information and Regulatory Affairs**
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Pages: **6**

Subject: **ORC Comments to OMB**

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May 28.2002

John Morrall
Office of Information and
Regulatory Affairs
Office of Management and Budget
Room 10235
New Executive Office Building
725 17th Street, NW
Washington, DC 20503

Re: Draft Report to Congress on the Costs and Benefits of Federal Regulations (67 FR 15014)

Dear Mr. Morrall:

ORC is an international management consulting firm specializing in providing assistance in all aspects of human resources counseling. For 30 years ORC has sponsored Occupational Safety and Health Groups, now comprising more than 170 large companies in diverse industries. including manufacturing, services, and health care. Senior health and safety managers from these companies work with ORC staff and member company colleagues to improve workplace health and safety program management systems and participate in the development of sound public policy in the area of occupational safety and health. Although ORC member company representatives may work with ORC staff to develop comments on federal and state rulemaking activities, the views expressed in the following comments are solely those of ORC and may not reflect those of every member company.

This letter provides comments regarding issues raised in the Draft Report to Congress on the Costs and Benefits of Federal Regulations that was published in the Federal Register on March 28, 2002 (67 FR 15014). In particular, ORC wishes to comment on the issue of "Problematic Agency Guidance" as discussed in Chapter IV. Recommendations for Reform as it applies to some of the guidance documents issued by the Occupational Safety and Health Administration (OSHA).

OSHA has made a practice over the years of issuing guidance documents, generally in the form of "Compliance Directives" to its field enforcement staff. that amplify the meaning and intent of the standard. In fact, parts of the regulated and otherwise affected public often demand such guidance from OSHA, particularly for "performance"

standards whose explicit requirements are, by definition, not specific. Unfortunately, **OSHA has** generally considered these guidance documents to be "internal" in nature and rarely involves the affected public in their devclopinent or review **prior** to issuance. In fact, OSHA routinely refuses to allow stakeholders a meaningful role in shaping these critical documents even when they request to participate.

This policy is wrong both as a public policy matter and because the resulting "guidance" frequently supplements the original standard with what amount to substantive new requirements that materially alter the original standard and that were never contemplated in the original rulemaking. For purposes of illustration, ORC will focus these comments on two examples. ORC requests that OMB **look** into these two particular matters, but more importantly, that it consider what steps it might take, in its capacity as the agency responsible for assuring that agencies act consistently with administration regulatory policy, to encourage OSHA to adopt a policy of subjecting Compliance Directives, in particular, to public input during their development.

The two examples of this activity are the compliance directive on the agency's standard for Permit-Required Confined Spaces: 29 CFR 1910.146, **and** its compliance directives and interpretation letters on the standard for Control of Hazardous Energy (Lockout/Tagout). Both of the rulemaking proceedings on these standards were lengthy and highly contentious. Both of these guidance documents were developed and published at least several months to two years following the promulgation and effective dates of the standards themselves. **In** addition, interpretive letters are issued periodically as employers and others **ask** questions about the requirements of these rules.

With the exception of the directive on the Lockout/Tagout standard (which was developed to settle issues raised by various parties who filed motions for rcvicw ***of*** *the* final standard following its promulgation) there has been little to no public input into these documents. Even the Lockout/Tagout directive had only limited input (that of the parties who had filed suit) even though all employers who must comply with the standard are affected.

The following is an outline of some of the issues associated with the guidance documents that OSHA has issued with regard to the standards cited above.

CPL 2.100: Application *of the* Permit-Required Confined Spaces (PRCS) Standards, 29 CFR 1910.146.

Standard published: January 14, 1993
Guidance document published: May **5**, 1995

BACKGROUND: The standard to which the guidance applies (29 CFR 1910.146) requires employers to ensure that confined spaces are inspected and classified as to their potential to contain hazard,; tliat would make entry by employees dangerous. Those spaces that contain hazardous substances, hazardous atmospheres, other physical hazards such as moving or electrified parts. or are configured in **a** way in which employees can become trapped must bc identified as permit-required confined spaces and entry of employees prohibited without a permit. Permits document tlic hazards of the spacc and the means the employer has taken to eliminate those hazards or to protect the employees who are to enter the space. Only employees who have been trained to enter permit spaces are permitted to enter, and a variety of other protective measures are required. Employers must also test or monitor tlic atmosphere in the confined space "as neccssary" to determine that "acceptable entry conditions are maintained." The results of these periodic tests are often recorded on the permit or attached to the permit.

Authorized employees arc only permitted to enter **a** confined space during the period allowed in the permit. When the period expires or the work is completed, the permit is canceled. Employers are required to

> "retain each canceled entry permit for at least 1 year to facilitate the review of the permit-required confined space program required by paragraph (d)(14) of this section. Any problems encountered during an entry operation shall be noted on the pertinent permit so that appropriate revisions to the per nit space program can bc madc." [1910.146(e)(6)]

ISSUE: The issue of the permit and its one-year retention period were addressed in *the* rulemaking and OSHA has obtained OMB clearance to impose the paperwork burdens required by the one-year retention periods.

However, the guidance document issued by the agency more than two years after the standard's promulgation contains the following requirement at Appendix E, Section (d). Question 3:

> **3. Are the results of the air sampling and esposure monitoring required by this standard considered exposure records for purposed** (sic)**of 29 C.F.R. 1910.20 (c)(5) OSHA's Record Access rule?** Those results which show the composition of an atmosphere to which an employee is actually exposed (even if the employee is using a respirator) are exposure records under 29 C.F.R. 1910.20(c)(5). Conversely, if the employer determines as the result of initial air sampling not to allow entry into a confined space until additional ventilation and purging of the

> atmosphere has occurred, the sample **would** not be considered as exposure record because no employee **would** ever have been exposed to the atmosphere sampled. Once the employer takes corrective action so that an employee can enta. however, the results of subsequent air sampling that show the atmosphere the employee actually entered **would** be considered exposure records.

As a result of this interpretation, the results of sampling done to measure tlie atmosphere that employees enter are now considered "exposure records." Exposure records must be retained for at least *30* years according to **tlie** requirements of 29 CFR 1910.20(d) [since recodified **as** 29 CFR 1910.1020(d)]. Thus, the permits upon which these measurements are recorded. arc also considered "exposure records."

The bottom line is that none of this was discussed during the rulemaking proceedings or in the preamble to the final rule where the agency explicates its requirements. In addition, we are aware of no effort made by OSHA to obtain clearance from OMB for the increase in burden on employers under either 29 CFR 1910.146 or 29 CFR 1910.1020. This issue ~ o d have been "vetted" and resolved had **OSHA** been required to obtain public input and comment into the guidance document (CPL2.100).

STD 1-7.3. - Inspection Procedures and Interpretive Guidance for *29* CFR 1910.147, Control of Hazardous Energy (Lockout/Tagout)

Standard published: September 1, I989
Guidance document published: September 11, 1990

BACKGROUND: The guidance document was prepared with input from parties who had filed petitions for review of the final standard when it was promulgated in September 1989. However, OSHA has since issucd more than 100 letters of interpretation of the standard on issues that were either not dealt with in **tlie** guidance or needed clarification despite the guidance. None of these interpretations had public input. Further, it is safe to **say** that many of the employers affected by these interpretations do not agree with OSHA's views and believe the agency has expanded the requirements of the standard through them.

OSHA conducted a review of the Lockout/Tagout (LOTO) standard during the past three years and determined that the standard was sound and did not need amendment, but also stated that the guidance issued by the agency needed improvement. **As** a result, **OSHA** is undertaking a revision of STD 1-73, and is planning to incorporate the letters of interpretation into the document.

ISSUE: Although OSHA saw the need to at least involve the parties that had filed petitions in the preparation of tlic 1990 guidance document, they apparently do not see the need to have public input into the revision process. A major issue of contention by employers, for example, is the requirement to develop, document, and provide employee training in energy control procedures for machinery, and to audit each of the procedures being performed on an annual basis. OSHA's "guidance"since the standard's promulgation has resulted in employers having to develop and document procedures for thousands of pieces of machinery. Clearly, auditing each of these procedures annually is an enormous burden. Yet the Regulatory Analysis prepared for the standard estimated that employers would need to develop only one procedure per establishment.

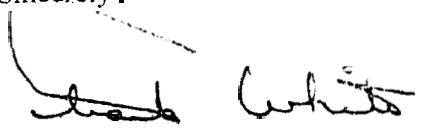
Even OSHA has acknowledged that auditing of thousands of procedures is an unreasonable burden and has issucd several letters of interpretation seeking to clarify the means to satisfy the annual review requirement. None of these has answered the question for all employers. Yet, OSHA staff who are charged with revising the guidance document do not seem aware of the ongoing issuc for employers.

ORC RECOMMENDATION:

ORC recommends that OSHA bc required to issuc its primary guidance documents and field enforcement instruction contemporaneous with the promulgation of its final rules. This would help to eliminatc many of the issues of "requirement expansion" that seem to occur when guidance is issued aficr a standard has been promulgated and become effective. We also recommend that primary guidance documents, and significant revisions thereto be required to undergo notice and comment procedures, so that the affected public has an opportunity to review and provide input to the guidance before it can become effective

Thank you for the opportunity *to* provide comment on this important issue. ORC would be pleased to work with OMB and OSHA to improve its process for issuing compliance guidance on its safety and health standards and regulations.

Sincerely.



Frank A. White
Vice President

Cc: R. Davis Layne
Deputy Assistant Secretary, OSHA