The ancient Chinese reportedly had a curse for those who prefer tranquility: “May you live in interesting times.” Whether by curse or choice, OSHA has certainly had an interesting year. The agency’s final ergonomics standard continues to generate controversy—not to mention lawsuits—and the dust has yet to fully settle over its infamous opinion letter on home offices. Although the confusion and criticism generated by OSHA’s actions have only recently gained widespread attention, safety professionals are well aware that confusion and criticism have plagued OSHA since its inception.

The agency’s existing standards can frustrate even the most-experienced safety engineer or lawyer. To further complicate matters, just when a law finally seems settled, OSHA may issue an opinion letter or adopt an enforcement policy that changes everything. Or, the agency may propose a new standard that sparks acrimonious debate and inevitably leads to court battles.

Press coverage of OSHA’s recent adventures has not answered a basic question raised by this state of affairs: How does OSHA make law and why does the agency do it that way? This article attempts to answer that question by showing that OSHA operates within a complex matrix of legal, political and historical constraints. Understanding this context will give safety practitioners insight into the creation of the laws that have such profound impact on their profession.

IN THE BEGINNING

The Occupational Safety and Health (OSH) Act of 1970 is the source of OSHA’s authority. The act created the agency itself and laid the foundation for every standard that has followed. The act itself contains no standards. Congress recognized that it would be unable to legislate effectively in such a technical field, so the act simply created the agency and gave it the authority to establish and enforce occupational safety and health standards. Unfortunately, the procedural requirements imposed by the act put the agency in an awkward situation from which it has never fully recovered.

The OSH Act was not passed in a vacuum. In 1970, Congress faced strong, conflicting pressures that found their way into the act’s procedural requirements. Congressional leaders perceived the immediate need for mandatory safety and health standards (“Senate Report No. 1282” 5182), yet business-friendly legislators opposed giving OSHA the authority to write binding standards without going through the same rigorous public-participation process used by other federal agencies to make law (Queener 328). The resulting compromise satisfied enough legislators to ensure passage of the act, but left OSHA in a precarious position.

THE FIRST TWO YEARS

Congress addressed the need for immediate action by authorizing OSHA to establish binding standards with no public participation for a period of two years. However, this sweeping power came with a major caveat—OSHA could only adopt “national consensus standards” and existing federal standards, and it had to adopt them verbatim.

A national consensus standard is one adopted and promulgated by a nationally recognized standards-producing organization, such as the American National Standards Institute (ANSI), under procedures through which interested parties have reached substantial agreement. An existing federal standard is one already created by another federal agency. Congress believed adoption of these standards without change would satisfy the business community’s concerns because this community had already influenced their content.

In addition, Congress authorized OSHA to cite employers immediately for violations of the act’s General Duty Clause, which requires employers to eliminate “recognized hazards” in the absence of a specific standard covering that particular hazard.

THE AGENCY ON ITS OWN

After the initial two-year period, OSHA had the authority to establish a new standard or modify an existing one only...
through the public-participation process—
called “notice-and-comment rulemaking,”
a process commonly used by federal agen-
cies. This compromise was designed to
make the act more palatable to employers;
in fact, however, it unexpectedly perpetu-
ated the problems created by the wholesale
adoptions of existing standards.

THE OUTCOME
In 1971, OSHA adopted the bulk of its
standards from existing consensus and
federal standards. This action achieved
Congress’s goal of immediate action, but it
saddled the agency with a problem it has
yet to overcome. Simply stated, national
consensus standards were never meant to
be law; they were created as nonbinding
suggestions that are not coordinated with
each other and, in the author’s opinion,
many were not drafted with the care and
precision given to legislation.

In 1976, Robert Moran, then chair of the
Occupational Safety and Health Review
Commission, addressed this problem:
...because of the rush in which the ini-
tial standards were adopted, we got a lot
of would-be regulations that didn’t fit
the act’s definition of what they
should be and what they should do.
The initial package (and virtually all of
it is still around) contained in profusion
standards which were:
1) not binding, not enforced and not
written in terms [that are] amenable to
enforcement;
2) not exclusively concerned with
worker safety (that is, the safety of
equipment, buildings, consumers, the
general public and workers was in-
termingled);
3) not applicable to industry as a
whole, or in some cases even to all parts
of a single segment of an industry;
4) not without conflict and [various]
inconsistencies;
5) not specific enough so that an
ordinary businessman or employee
could understand them (Moran 19-20).

Furthermore, many of the standards in
place merely stated that employers
"should"—rather than "shall"—comply.
Yet, the agency adopted these standards
verbatim per Congress’s direction, thus
leaving employers to wonder whether they
were enforceable.

As a result, OSHA was forced to begin
with an unwieldy, inconsistent and dis-
jointed body of standards to enforce.
Even Lane Kirkland, president of the
AFL-CIO in 1980 and a staunch defender
of occupational safety legislation, admit-
ted that “this hodgepodge collection of
standards and OSHA’s early efforts to
enforce them probably did more to dam-
gage the initial acceptance of the entire
program than any other single action”
(Kirkland 730-31). It must be reiterated
that this state of affairs was not entirely
the agency’s fault—Congress had left it
no choice.

That is what OSHA faced in 1971—and
still faces today. The agency cannot create,
modify or eliminate any standard without
going through the lengthy notice-and-
comment process. Given its finite re-
sources, OSHA has focused its efforts on
adopting new standards instead of revis-
ing the standards adopted during its first
two years of operation. Although the
agency was able to revoke a large number
of the more-inconsequential adopted stan-
dards via its “standards deletion project”
of 1997-98, many remain in force today
(“Preamble to Revocation Notice” 726-27).

MAKING A NEW RULE
Notice-and-comment procedures are
designed to ensure that all interested stake-
holders—employers, employees (often via
unions) and safety and health profession-
als—have an opportunity to participate in
the creation of a technically accurate, bal-
anced, effective standard. This is often eas-
ier said than done.

Notice-and-comment rulemaking con-
ists of four main phases. First, OSHA
writes a standard. This can be a lengthy
process—one that continues to grow as
more layers of governmental oversight
are added. A proposed standard can be
developed internally or in cooperation
with a committee of affected parties
through a process known as “negotiated
rulemaking.”

Next, OSHA formally proposes the
standard and publishes all scientific data
used to develop it. This is a crucial step—
and mistakes can be costly. For example,
in 1991, a federal appeals court refused to
enforce part of OSHA’s lead standard
because some data used to determine
economic feasibility were not properly
disclosed to the industry (American Iron
and Steel Institute v. OSHA).

The comment period allows the public
to examine the proposal and supporting
data. Anyone may submit written com-
ments to OSHA, and the agency holds
public hearings, which allows interested
stakeholders to provide live testimony
and question agency officials and other
witnesses. The duration of these hearings
varies, depending on the proposed stan-
dard’s scope, complexity and origin.

For example, standards developed
through negotiated rulemaking and other
noncontroversial standards often generate
little hearing testimony. Conversely, the
embattled ergonomics standard required
nine weeks of public hearings. More than
700 witnesses testified, and hearing tran-
scripts totaled 18,337 pages; an additional
50,000 pages of written comments were
received after the hearings concluded
(“OSHA’s Ergonomics Chronology”).

Finally, OSHA examines all comments
received and evaluates their merit. The
magnitude of this task also varies, depend-
ing largely on the level of employer
response. For example, the agency’s 1987
standard on methylenedianiline (MDA)
was developed through negotiated rule-
making and received little public com-
ment. Public hearings took only two days.

In contrast, standards developed inter-
ally or that face stiff opposition (such as
the ergonomics standard) generate a
large volume of criticism which requires
a major evaluation effort. Based on its
review, OSHA must then amend the pro-
posed standard to reflect any legitimate
concerns raised—or offer a rational
explanation for not doing so.

Finally, OSHA publishes the final stan-
dard and explains how it addressed com-
ments received. This explanation allows
the public to see that the agency has met
its statutory mandate to evaluate and
consider all comments. Any parties
not satisfied with the outcome can mount
a legal challenge alleging that OSHA failed
to properly execute its procedural re-
sponsibilities. The final ergonomics rule
contained hundreds of pages of such
explanation—and legal challenges are
already underway.

FILLING IN THE GAPS
Clearly, creating a new standard is a
major undertaking. OSHA likely made
the correct decision when it elected to not
engage in rulemaking to fix every prob-
lem that accompanied its wholesale
adoptions of standards in 1971. Instead,
to address ambiguities and contradictions
present in many of those standards, the
agency has chosen to rely on informal
enforcement guidance and letters of
interpretation (“opinion letters”). These
documents guide compliance officers
and inform employers how the agency
might handle ambiguities. Furthermore,
OSHA simply does not enforce some of
the adopted standards. For example, no
employer has been cited for the use of
“closed front” toilet seats (former 29 CFR
1910.141(c)(3)(ii)).

GOING TOO FAR?
Few would object to OSHA’s use of dis-
cretion when the stakes are limited to toilet
seats. However, the agency’s use of infor-
mal documents and enforcement strategies
has not always been so successful when
the stakes are higher. The most notorious
example of an opinion letter gone awry is
the December 1999 letter asserting jurisdic-
tion over home offices. That letter attempt-
ed to address an ambiguity in the OSH Act
itself, not a standard. Regardless of the
legal merits of the agency’s position
(which it quickly withdrew), OSHA made
a politically unwise choice.

The political response to OSHA’s home
office letter illustrates a primary employer
concern about use of informal guidance
documents. Simply stated, critics contend
that through these documents, the agency

FEBRUARY 2001 15
OSHA’s general industry standard for personal protective equipment (PPE), which requires employers to “provide” appropriate PPE, was adopted from a national consensus standard in 1971 (29 CFR 1910.132(a)). The confusion surrounding it mirrors that surrounding the agency as a whole.

To begin, the word “provide” does not indicate who must pay for PPE. OSHA retracted its letter. Although these incidents affected only a small number of employers, they vividly illustrate the critics’ allegations.

The ergonomics standard has caused similar concerns. In the author’s opinion, the standard is one of the most-vague standards OSHA has ever adopted. It leaves the agency with tremendous discretion to shape its actual impact on industry through enforcement strategy. In other words, OSHA’s information guidance documents will likely play a large role in the practical meaning of the standard. This will allow the agency to work out details while bypassing the rigors of notice-and-comment rulemaking. However, it will also expose OSHA to more accusations of “back door” rulemaking. (Ironically, it may actually be unions making these accusations if OSHA eviscerates the standard under the Bush Administration.)

CONCLUSION

The OSH Act forced OSHA down a difficult path. The agency was forced to adopt in-place standards in the beginning and is required to use notice-and-comment rulemaking to create new standards. Many critics would contend that OSHA attempts to dodge these requirements through the use of informal guidance documents—and one can cite enough examples to make that a debatable proposition.

Regardless of how this debate is resolved, the fact remains that OSHA’s actions are often the result of the peculiar context in which the agency operates. Safety practitioners who understand this context are better able to understand how and why OSHA makes the decisions that shape the safety profession.

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