

The Senate Governmental Affairs Subcommittee on Intergovernmental Relations held the hearing to investigate allegations of undue influence by OMB on rulemaking in general. It also focused on three instances of alleged OMB interference, including events surrounding the development of the Occupational Safety and Health Administration's proposed grain elevator safety standard.

Former OMB Director David Stockman for two years "derailed OSHA's effort to control grain dust explosions," for which a notice of proposed rulemaking was published in 1980, Deborah Berkowitz, safety and health director, Food and Allied Service Trades Department, AFL-CIO, testified.

The National Academy of Sciences released a report in 1982 advising that dust levels be kept to one sixty-fourth of an inch to minimize the possibility of an explosion. OSHA in 1983 released a compromise proposal recommending levels be kept to one-eighth of an inch, she related. "OMB extended its 60 day review period of this standard to 8 months — finally forcing OSHA to significantly alter this proposal in order to get it published," she asserted. During this time, private meetings were held between OMB "and certain parties interested in maintaining the status quo," she stated.

In addition, major exchanges between OSHA and OMB were held verbally, on the insistence of the budget agency, Berkowitz continued. "In one instance, rather than present a 27 page written rebuttal from OSHA to OMB," then-Deputy Labor Solicitor Francis Lilly "orally transmitted the information to OMB at OMB's insistence," she added. In another instance, a hand-written summary of OMB's objections to OSHA's proposals was exchanged in a men's rest room, she said. Among OMB's objections were that the one-eighth inch level is unsupported, and that there is no acceptable way to measure dust. The regulation would also disproportionately affect small businesses, the summary added. Berkowitz said she herself placed the summary in the rulemaking file.

OMB attempted to make it appear "as though OSHA is making these decisions," Sen. Carl Levin (D-Mich) remarked. "We should make sure that the decision-maker is held accountable for the decisions," according to Levin, who introduced a bill to ensure that the public is made aware of OMB's actions in the rulemaking process (see related article in this issue).

Miller said that, assuming that the reported exchanges between OMB and OSHA were true, they were "inefficient" and "inappropriate" ways to transmit information. But he said he speculated that the actions occurred because of a "paranoia that was beginning to develop" among OMB employees that their comments could be "held up to public light," although the remarks may be only an official's informal position.

Inclined to Modify

Miller told the subcommittee that he was "inclined to make modifications" in OMB procedures, but said he would not give any specific commitments at the hearing. "I have no list of changes," he said.

Levin told Miller that he "doesn't have to wait for a law" to change policy at OMB.

Discussing OMB's opinion of OSHA's grain elevator rule, Miller asserted that the estimated cost of compliance exceeded the profits of some of the elevator operators. The risk stated in the proposal was "grossly overstated," he added.

OSHA announced in its latest regulatory agenda that it intended to issue the final rule in December 1985, he noted. "Obviously they were not able to meet that timetable," he said.

But Sen. Albert Gore Jr. (D-Tenn) contended that if OSHA feels that OMB "gutted" the proposal, there would be "no point" in continuing the rulemaking. OMB controls agencies' budgets, he noted.

If OMB "had stayed out" of the rulemaking process, "there would have been a federal standard in time to prevent" the September 1984 grain explosions in Knoxville, Tenn., which killed three persons and injured 11, Gore declared (Current Report, Oct. 4, 1984, p. 363).

"Though OMB had no safety engineers, health professionals or occupational health specialists working on this review, they succeeded in getting OSHA to significantly alter the proposal," Berkowitz said. A draft of the final standard would exempt 10,415 elevators out of a total 11,200 from dust control provisions because of their size, although half of all explosions are in smaller facilities, she noted.

During questioning, Gore asked Miller if, after the Tennessee disaster, he still believed that the risk OSHA gave in its rule was "grossly overstated." Miller stated that he wanted to check the facts before answering. "I will respond to you later," he said, adding that the OMB actions on the OSHA standard occurred before he was in his present position. Miller also responded that he did not know if OMB met only with industry representatives before completing its review of OSHA's rule. "My preparation time for the hearing was very short," he commented.

Asbestos

FINAL ASBESTOS RULES NEAR COMPLETION; PUBLICATION EXPECTED IN FOUR TO SIX WEEKS

Final rules for occupational exposure to asbestos in general industry, the maritime industry, and the construction industry are near completion, according to sources at the Occupational Safety and Health Administration.

The formal draft of the standards "is finished or in the final stages of completion," Chris Winston, special assistant to the assistant secretary of labor for occupational safety and health, told BNA Jan. 20. After internal agency review, she said, the draft should be ready to go to the Office of Management and Budget in "seven to 10 days, two weeks at the most."

An informal draft is already at OMB, according to Winston, who said she did not anticipate any problems with the budget office review. She estimated that the standards — one covering general industry and maritime establishments together and the other covering construction — would be published in four to six weeks.

The asbestos standards are high on the list of priorities for Labor Secretary William Brock, Winston indicated. "The secretary wanted the regulatory process to be accelerated, if possible, allowing for due consideration and public comment," she said. "Asbestos has been around for a long time and has been the subject of a great deal of controversy," Winston continued. "We would like to get [the standards] out."

The agency proposed in April 1984 to lower the current permissible exposure limit of two fibers per cubic centimeter of air to, alternatively, 0.2 f/cc or 0.5 f/cc as an eight-hour time-weighted average (Current Report, April 12, 1984, p. 1195).

The proposal would have required the use of engineering controls only to reach the current two f/cc level, thus permitting the use of respirators as the primary means of controlling exposure to asbestos.

PLAINTIFF'S
EXHIBIT

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On March 19, 1985, OSHA announced to the Advisory Committee on Construction Safety and Health that it would develop a separate standard for construction (Current Report, March 21, 1985, p. 795). Both standards will be published simultaneously, the OSHA spokeswoman said.

Winston declined to comment on published reports that OMB approved the incorporation of the lower of the two proposed PELs and that the final standards will rely on the use of engineering controls rather than respirators for compliance.

EPA Proposed Ban

The expected completion of the OSHA drafts follows the Jan. 23 announcement by the Environmental Protection Agency that it will publish a proposal to ban five uses of asbestos and force users to find alternatives to asbestos in other products over a 10-year period.

The rule, proposed under Section 6 of the Toxic Substances Control Act, would ban five products that EPA said have effective substitutes for asbestos: roofing felts containing asbestos, flooring felts and felt-back sheet flooring with asbestos, vinyl-asbestos floor tile, asbestos clothing, and asbestos/cement pipe and fittings.

The proposal also would phase out over a 10-year period the amount of asbestos that could be imported or mined and would require all remaining asbestos-containing products to be labeled.

EPA Administrator Lee M. Thomas estimated that the final version of the rule would take a year to complete.

Although regulation of the substance by either OSHA or the Consumer Product Safety Commission is preferred by the Office of Management and Budget, EPA exerted its authority to regulate asbestos under a narrow interpretation of TSCA that allows use of the law if a residual risk would remain after outside agencies completed their regulatory action.

The EPA ban/phaseout proposal "shouldn't affect us much at all," Winston told BNA, explaining that OSHA's upcoming action is a final rule, while EPA's action is only in the proposal stage. In addition, she said, the two agencies are focusing on different segments of asbestos use: EPA's proposal addresses products, while the OSHA rule primarily is aimed at the regulation of demolition and removal. "It shouldn't have any impact on us," Winston reiterated.

Right-to-Know

OSHA DEFINITION OF MILDLY TREATED OILS CHALLENGED BY REFINERS IN DISTRICT COURT

Three small oil refiners asked the U.S. District Court for the District of Columbia Jan. 27 for a declaration that the Occupational Safety and Health Administration's notice of interpretation on lubricating oils under the hazard communication standard is "ineffective" and to enjoin that standard with regard to lubricating oils pending corrective action by OSHA.

This motion for summary judgment in *Calumet Industries, Inc., et al. v. Brock, et al.* (No. CA 85-3889) requested that OSHA be enjoined from enforcing its standard with regard to lubricating oils until the agency adequately provides definitions of the distinction between mild and severe hydrotreating and between mild and severe solvent refining.

According to the refiners' supporting brief, the hazard communication standard requires that manufacturers of chemicals, including lubricating oils, disclose whether their products are potentially or actually hazardous carcinogens

or hazardous in other ways. However, the standard does not identify the types of lubricating oils to be labeled, the brief claimed, but instead depends upon "what might be stated" in research reports to be issued by the International Agency for Research on Cancer (IARC).

An IARC monograph released six months after the OSHA standard was promulgated stated that there was sufficient evidence that lubricating oils produced by "mild hydrotreating" caused cancer in laboratory animals, but that inadequate information existed with regard to the cancer potential of oils produced by "severe hydrotreating." The federal agency's reliance upon this report, which does not contain definitions of mild hydrotreating or severe hydrotreating, resulted in the notice published by OSHA Dec. 20, 1985, which interpreted the hazard communication standard as defining mild hydrotreating by reference to the operating pressures during refining and selecting a pressure of 800 pounds per square inch as the cut-off point between mild and severe hydrotreating (Current Report, Jan. 2, p. 843).

The refiners involved in this suit do not utilize hydrotreating or solvent-refining processes, and therefore are required to label their lubricating oils as potentially hazardous. These refiners began to experience a loss in sales to refiners that did not have to label their oils under the OSHA interpretive rule and brought this suit to address the problem created by the alleged inadequacy of the agency's definitions.

'Legislative Modification' Claimed

Although the agency labeled its notice as being "interpretive" and not subject to notice and comment rulemaking, the notice must be recognized as "a legislative modification" of the standard which is invalid without the undertaking of notice and comment rulemaking, the refiners argued. Since, in this case, the agency was making a factual determination as to what oils needed to be labeled under the standard, legal obligations were created and therefore the notice was legislative in nature and not interpretive, and required notice and comment rulemaking, the refiners concluded.

Even if the court were to uphold the notice as being interpretive, the refiners asked the court to invalidate the notice on the ground that there was "no reasonable basis" for the agency to arrive at its definition of "mild hydrotreating." Proof of the lack of reasonable basis to arrive at the present definition is shown, according to the refiners, by a Dec. 17, 1985, letter from Patrick Tyson, acting assistant secretary of labor, to the IARC requesting "additional guidance" to remedy the lack of definition concerning the severity of refinery processing. In addition, there are studies that indicate that lubricating oils processed "well above 800 psi" may retain their carcinogenic properties, the refiners argued.

Inconsistency with the purpose of the hazard communication standard is also claimed by the refiners. The specific purpose of the standard is set out in 29 CFR 1910.1200(a)(1) as "to ensure that the hazards of all chemicals produced or imported by chemical manufacturers are evaluated and that the information be transmitted to affected employers and employees." However, despite the "substantial uncertainty" about the definition of "mild hydrotreating," the standard was modified "in favor of under-inclusive labeling," the refiners stated. The refiners supported their argument by reference to a recommendation to OSHA that when doubt exists, an assumption should be made that the oils are carcinogenic without regard to the pressure at which they were treated.

The refiners' brief concludes that OSHA's failure to adequately clarify the hazard communication standard with