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U.S. Department of Labor  
Occupational Safety and Health Administration  
200 Constitution Avenue  
Washington, DC 20210

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF MANUFACTURERS  
BEFORE THE  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION  
Docket No. OSHA–2010–0032  
INTERPRETATION OF OSHA’S PROVISIONS FOR  
FEASIBLE ADMINISTRATIVE OR ENGINEERING  
CONTROLS OF OCCUPATIONAL NOISE  
75 Fed. Reg. 64,216 (Oct. 19, 2010)**

The National Association of Manufacturers (The NAM) appreciates the opportunity to submit these comments to the Occupational Safety and Health Administration (OSHA) in response to the now withdrawn Notice of Proposed Interpretation (NPI) in Docket OSHA–2010–0032.<sup>1</sup> The NAM appreciated OSHA’s willingness to work with industry in first extending the comment period deadline to March 21, 2011, and in subsequently recognizing that approach of

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<sup>1</sup> Notice of Proposed Interpretation, Interpretation Of OSHA’s Provisions For Feasible Administrative Or Engineering Controls Of Occupational Noise, 75 Fed. Reg. 64,216 (Oct. 19, 2010).

the NPI was inappropriate and that OSHA needed to work with its stakeholders to pursue more cost-effective approaches to address workplace noise hazards <sup>2</sup>

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM's comments are based on input from its members and its longstanding experience in working with OSHA to develop flexible regulatory approaches that target significant workplace risks and promote safe and healthful working conditions through the most cost-effective measures available. In this matter, we believe the current interpretation of the OSHA Noise Standards provides the most cost-effective approach for controlling workplace exposure to noise.

## **I. STATEMENT OF INTEREST**

On October 19, 2010, OSHA published the now withdrawn NPI announcing that it intended to re-interpret the provisions of 29 C.F.R. §§ 1910.95(b)(1) and 1926.52, which establish when engineering and administrative controls must be implemented, or personal hearing protection must be used, to control workplace exposure to noise ("the Controls Provisions of the OSHA Noise Standards"). The NAM's members had a significant interest in the outcome of that proposal and continue to have a significant interest in any further pursuit of that or any other OSHA initiative that would address the control of exposures to noise in the workplace.

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<sup>2</sup> U.S. Department of Labor New Release Number: 11-74-NAT, Jan. 19, 2011.

Most manufacturing employers operate facilities that are subject to OSHA's Noise Standard for General Industry, 29 C.F.R. § 1910.95. We estimate that implementation of the NPI would have directly imposed billions of dollars of additional compliance costs on the manufacturing sector. Furthermore, virtually every manufacturing employer hires one or more contractors, subject to OSHA's Noise Standard for Construction, 29 C.F.R. § 1926.52, to perform construction work at its manufacturing site. Some manufacturers do this infrequently; others do it on an almost continuous basis. We estimate that implementation of the NPI in the construction sector would have imposed huge additional compliance costs on the construction sector for work performed at manufacturing sites, which would have been passed on to the manufacturing sector.

Particularly in light of the severe adverse economic impact that the NPI would have inflicted on the US manufacturing sector, the NAM was deeply concerned by the manner in which OSHA initially planned to adopt the proposed re-interpretation of its Noise Standards. While we strongly disagree with the underlying legal rationale offered by OSHA for the proposed change, we were disturbed that OSHA planned to implement a change of this magnitude, on a retroactive basis, without first conducting a comprehensive economic analysis and then initiating notice-and-comment rulemaking.

## **II. OVERVIEW**

The Control Provisions of OSHA's General Industry and Construction Occupational Noise Standards state:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be

provided and used to reduce sound levels within the levels of the table.<sup>3</sup>

The current interpretation of the Control Provisions was adopted by OSHA in 1983 to reflect the applicable case law, and has remained in effect since then. Under that interpretation, employers must implement feasible engineering and administrative controls to control workplace exposure to noise “when hearing protectors are ineffective or the costs of such [engineering and administrative] controls are *less* than the cost of an effective hearing conservation program.” 75 Fed. Reg. 64,216 (emphasis therein). In other words, OSHA has adopted a cost-effectiveness approach to this issue, and not an approach based on a cost-benefit analysis.

Under the NPI, OSHA generally proposed to redefine the term *feasible* in the context of the noise standard to mean “capable of being done,” without regard to huge difference in the costs of engineering or administrative controls in comparison to the costs of a hearing conservation program (HCP), which includes the use of personal hearing protection (PHP). Under that interpretation, OSHA would have required the use of engineering or administrative controls that would reduce ambient noise exposures by some unstated (non-zero) amount as long as those controls would not threaten the employer’s ability to stay in business. *Id.* at 64,219. Under the NPI, OSHA would have adopted this position regardless of the fact that the employer’s HCP and PHP were effective in controlling exposure to noise, and regardless of whether PHP would still be technically necessary, and legally required, to maintain exposure levels at or below the maximum permissible dose (MPD). Furthermore, if OSHA were to determine that the risk to the employer’s economic viability resulted from the employer’s failure to keep up with industry safety and health standards, even economic infeasibility would not have excused compliance with this planned revised interpretation of the Control Provisions.

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<sup>3</sup> The language of Sections 1910.95(b)(1) and 1926.52(b) are substantively identical.

In the withdrawn NPI, OSHA asserted that the current interpretation of the Control Provisions was inconsistent with “the plain meaning of the standard[s]” and that the revised interpretation was required by case law and would conform interpretation of the Control Provisions to that of similar language found in other health-related OSHA standards. We believe that assertion is based on an erroneous interpretation of the applicable law. In reaching for that conclusion, OSHA would:

(1) Discount the case law directly on point;

(2) Simply ignore the fact that OSHA has adhered to the current interpretation of the Control Provisions for 28 years;

(3) Simplistically apply the case law developed in connection with the judicial review of chemical-specific OSHA health standards adopted by OSHA under Section 6(b)(5) of the OSH Act to the Noise Standards adopted under Section 6(a) of the OSH Act;

(4) Ignore the principle that OSHA standards must provide the most cost-effective<sup>4</sup> means for achieving compliance with an OSHA exposure limit;

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<sup>4</sup> According to OSHA (see Occupational Exposure to Hexavalent Chromium; Proposed Rule 69 FR 59305, 59312, October 4, 2004):

A safety or health standard is a standard “which requires conditions or the adoption of or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) if it substantially reduces or eliminates significant risk, and is economically feasible, technologically feasible, cost effective, consistent with prior Agency action or supported by a reasoned justification for departing from prior Agency actions, supported by substantial evidence, and is better able to effectuate the Act’s purpose than any national consensus standard it supersedes. See 58 Fed. Reg. 16612–16616 (March 30, 1993).

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A standard is cost effective if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection. ATMI, 453, U.S, at 514 n. 32; International Union, UAW v. OSHA, 37 F.3d 665, 668 (D.C., Cir 1994)(“LOTO III”).

(5) Simply ignore the two contrary precedents set by the Secretary of Labor when the Mine Safety and Health Administration (MSHA) addressed the issue in question with respect to coal mines. (First, recognizing that the contemplated change in interpretation on this very issue constituted a substantive amendment to the then-existing MSHA rule, the Secretary proceeded through notice and comment rulemaking.<sup>5</sup> Second, consistent with the then-existing MSHA case law, the Secretary determined that engineering and administrative controls would not be required if they did not reduce workplace noise exposure levels by at least 3 dB.<sup>6</sup>); and

(6) Ignore the basic principle that compliance with a standard must be shown to be technically and economically feasible for the affected industrial sectors before it may be adopted.

Engineering controls are those changes to the physical environment that mitigate or reduce noise levels such that exposures to people in that environment are reduced. They include changes to equipment in both design and operation, as well as the use of sound absorbing barriers that enclose the machinery and equipment or provide a haven of lower noise levels in an otherwise high noise environment. Administrative controls include the use of policies such as rotation of employees from jobs with higher noise exposure profiles to jobs with lower exposure profiles, limiting time in high noise areas or limiting the duration of operation of especially noisy equipment.

NAM members protect their employees from the harmful effects of noise through a combination of methods. Virtually all members rely heavily on HCPs, which include the PHP, in addition to engineering and administrative controls. Many members, in determining the adequacy of PHPs, reduce the NRR by 50% to ensure that more protection is provided than is

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<sup>5</sup> Health Standards for Occupational Noise Exposure; Final Rule, 64 FR 49547, 49549 (September 13, 1999).

<sup>6</sup> Id. at 49549, col. 2.

currently required under the standard. In addition, many have programs that offer or even require the use of hearing protection at noise levels below the current OSHA PEL because they believe it provides their employees with an additional degree of protection.

As a general matter, the efficacy of such controls in lowering noise levels is recognized, but the specific impact on noise levels in individual workplaces depends on the facts specific to those operations. In a large majority of the cases, the noise levels would not be sufficiently reduced by engineering and administrative controls to eliminate the requirement for a HCP, a fact that OSHA acknowledges. Hence, adoption of the NPI would have required employers to expend enormous resources to identify and implement engineering and administrative controls that would reduce ambient noise exposures, and to experiment continuously with the evolving technology. All the while, employers would be forced to continue to expend substantial resources on the same effective HCPs that they already have in place to protect employees' hearing, with no expectation that this redundant control of workplace noise would significantly reduce the actual level of noise to which an affected employee's auditory system is exposed.

OSHA made no attempt in the Hearing Conservation Amendment rulemaking to analyze and compare the efficacy of HCPs and engineering controls. Rather, it simply asserted that "Engineering controls provide more consistent and dependable protection to employee hearing than personal hearing protectors and are still preferred by OSHA."<sup>7</sup> A simple and practical real-world analysis strongly suggests this line of thinking is fallacious.

Consider, for example, a situation in which employees are exposed to a noise level of 92 dB(A) for an 8-hour day. If implemented, the NPI would have required the employer to implement all administrative or engineering controls necessary to reduce noise levels to less than 90 dB(A) for an 8-hour day, unless it could be shown that the employer would be driven

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<sup>7</sup> 46 FR 4076 January 16, 1981, at 4114

out of business and that was not due to a failure to keep up with the current workplace safety and health practices in the industry. That would be an absurd requirement where the employees were part of a hearing conservation program and wore hearing protection. If the employer were to provide the employees with hearing protectors with a noise reduction rating (NRR) of 25 dB, the estimated A-weighted TWA under the ear protector would be just 74 dB(A) in accordance with mandatory Appendix B. Then theoretically, unless an employee suffered from a STS, the employee would not be required to wear hearing protection and would be exposed to higher noise levels than if they would be in the hearing conservation program with noise levels at 92. In this case, by implementing a much less costly element of an HCP, the employee would actually be afforded much greater protection than would be provided by the “required” engineering or administrative controls.

### **III. OSHA’S CURRENT INTERPRETATION OF THE CONTROL PROVISIONS IS SUPPORTED BY THE DIRECTLY APPLICABLE CASE LAW**

OSHA acknowledges that its current enforcement policy is based on a 1982 decision issued by the Ninth Circuit in *Castle & Cook*<sup>8</sup> and a 1984 decision by the Review Commission in *Sherwin-Williams Co.*, which remain the law of the land<sup>9</sup>. Accordingly, at this point, the only appropriate approach for seeking a change in the law, especially one of this magnitude, would be notice-and-comment rulemaking by OSHA or legislative action by Congress. Rather than pursuing either of those approaches, OSHA instead chose the deeply disturbing strategy of critiquing those decisions, rationalizing that they were erroneously decided, and announcing that it planned to proceed by administrative fiat.

### **IV. OSHA’S ATTEMPT TO DISCOUNT THE DIRECTLY APPLICABLE CASE LAW ON THE BASIS THAT IT SHOULD BE VIEWED AS EFFECTIVELY OVERRULED BY CF&I STEEL MISCONSTRUES THE IMPACT OF CF&I STEEL**

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<sup>8</sup> 692 F.2d 641 (9<sup>th</sup> Cir. 1982), affirming *Castle & Cooke Foods*, 5 BNA OSHC 1435, 1438 (No. 10925, 1977).

<sup>9</sup> *Sherwin-Williams Co.*, 11 BNA OSHC 2105, 2110-11 (No. 14131, 1984).

The reasoning OSHA employs in the NPI is seriously flawed. OSHA relies on *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 150-55 (1991) for the proposition that the courts and the Review Commission must defer to the Secretary's reasonable interpretation of an ambiguous OSHA standard adopted by OSHA through a traditional rulemaking. Under OSHA's simplistic analysis, the Ninth Circuit (in *Castle & Cook*) and the Review Commission (in *Sherwin-Williams Co.*) erroneously deferred to the Review Commission's interpretation rather than OSHA's interpretation of the Control Provisions and now that determination should be retroactively reversed.

There are at least four fundamental flaws in that argument. First, the Control Provisions were adopted by OSHA under the special rulemaking provisions contained in Section 6(a) of the OSH Act. Therefore, OSHA would be entitled to only limited deference in a case of first impression. Second, there is no finding, under the rule of *CF&I*, that OSHA's interpretation is reasonable. OSHA's attempt to fill this gap by referencing court decisions interpreting the term "feasible" as used in Section 6(b)(5) is simply an invalid leap of logic rather than the application of sound legal analysis. Third, this is not an issue of first impression for OSHA, but an issue that has been resolved for 28 years. OSHA is not entitled to any deference with respect to the reversal of an interpretation that has been in place for 28 years. Fourth, the question of whether this change in interpretation requires a rulemaking was resolved by the Secretary when she made substantially the same change in the MSHA coal mine rule through notice and comment rulemaking.<sup>10</sup>

In light of the foregoing, the Supreme Court's 1991 decision in *CF&I* is irrelevant to this matter. The Ninth Circuit decided *Castle & Cooke Foods* in 1982, upholding the Commission's decision that a cost-benefit analysis (more properly described as a cost-effectiveness analysis) was appropriate in interpreting the Control Provisions of the Noise Standards. *Castle & Cooke*

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<sup>10</sup> Health Standards for Occupational Noise Exposure; Final Rule, 61 FR 49549; Sept. 13, 1999.

*Foods*, 692 F.2d 641. OSHA adopted its current enforcement interpretation of the Control Provisions in 1983 based on that decision. 75 Fed. Reg. at 64,218. That interpretation directed OSHA compliance personnel to apply a cost effectiveness analysis and issue a citation for failure to use engineering or administrative controls only if hearing protectors were ineffective or if the cost of administrative or engineering controls was less than the cost of hearing protectors. The Supreme Court's holding that, as between the Secretary and the Commission, it was the Secretary's role to "issue authoritative interpretations of OSHA's standards" came in 1991. To whatever extent OSHA had, prior to 1991, "acquiesced . . . in the Commission's cost-benefit test" it should have been immediately clear (in 1991) that the ground rules underlying such acquiescence no longer applied. And yet OSHA did not return to its previously held position on this issue.

In short, OSHA adopted the current interpretation of the Control Provisions 28 years ago and, for the last 20 years since the CF&I decision, has continued to implement that interpretation on a daily basis while conducting approximately 40,000 worksite inspections per year. OSHA's continued adherence to that interpretation for the last 20 years must be viewed as an affirmative adoption and endorsement of that interpretation and its current enforcement policy.

**V. OSHA'S ATTEMPT TO APPLY THE INTERPRETATION OF "FEASIBLE" AS USED IN SECTION 6(b)(5) OF THE OSH ACT TO THE CONTROL PROVISIONS ADOPTED UNDER SECTION 6(a) OF THE OSH ACT IS INAPPROPRIATE AND NOT ENTITLED TO ANY DEFERENCE**

**A. Because OSHA Merely Adopted the Existing Walsh-Healy Standard Containing the Control Provisions, Rather than Developing Them Through a Traditional Rulemaking, the Reinterpretation in the NPI Would Not Be Entitled to Any Deference.**

An agency's interpretation of a regulation it has developed through a traditional rulemaking process is entitled to deference. *Martin v. OSHRC (CF&I)*, *supra*. Because OSHA did not develop the language of 29 C.F.R. §§ 1910.95(b)(1) or 1926.52(b) through the legislative

rulemaking process, but merely adopted that language from existing national consensus standards, OSHA's initial interpretation is entitled to limited deference. See, *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979). This is because OSHA did not conduct the kind of inquiry that would inform its decision such that a court can rely on OSHA's judgment to balance the factors that inevitably come into play in rulemaking. OSHA's re-interpretation, after 28 years, of a standard that it did not write is entitled to no deference.

During the first two years following passage of the OSH Act, the Secretary could promulgate regulations in one of three ways: (1) by adopting any national consensus standard or established Federal standard without formal rulemaking procedures under Section 6(a) of the OSH Act; (2) by adopting a standard through the traditional notice-and-comment procedures contained in Section 6(b) of the OSH Act; or (3) by passing emergency temporary standards under Section 6(c) of the OSH Act when necessary to protect employees from a grave danger. *Edison Electric Institute v. OSHA*, 849 F.2d 611, 614 (D.C.Cir. 1988); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 582 (D.C.Cir. 1985). The provisions of 29 C.F.R. §§ 1910.95(b)(1) or 1926.52(b) were originally Federal standards adopted by OSHA through the perfunctory provisions of Section 6(a) of the OSH Act; as such, they were never subject to notice-and-comment procedures. See 75 FR . 64,216, 64,217 (October 19, 2010).

Since then, certain US courts of appeals have held that the Secretary's interpretation of a rule is entitled to limited deference when that rule was adopted from a previously existing standard under Section 6(a) of the OSH Act. *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979). This is so because the regulation is not one based upon "[OSHA's] review of the problem and deliberate choice of a satisfactory solution." *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 160 (3d Cir. 1978). Although the D.C. Circuit, in *Edison Electric Institute, supra.*, declined to decide the appropriate amount of deference due an agency when the rule at issue was adopted from a national consensus standard, it upheld the Secretary's interpretation of a

rule originally promulgated under Section 107 of the Construction Safety Act and adopted by OSHA under Section 6(a). In reaching its decision, the court gave OSHA “[n]o deference . . . except that due to the plain meaning of the regulation.” 849 F.2d 611, 617 n.6 (D.C. Cir. 1988).

Because OSHA adopted the Control Provisions under the summary procedures of Section 6(a) of the OSH Act, rather than engaging in notice and comment under Section 6(b) of the OSH Act, the re-interpretation of the Control Provisions in the NPI, which lacks any support from an OSHA rulemaking, and would retroactively overturn 28 years of precedent, is entitled to no deference whatsoever.

OSHA’s reliance on *American Textile Manufacturers Institute, Inc. v. National Cotton Council of America*, 452 U.S. 490 (1981) (“ATMI”) to support the NPI is misplaced. In ATMI, the Supreme Court interpreted the word “feasible” in the context of OSHA Section 6(b)(5). That section provides:

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which 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 such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

OSHA argues that the Court’s interpretation of the word “feasible” in the context of this 70-word excerpt from Section 6(b)(5) applies, without distinction, to the use of the individual word “feasible” in the Control Provisions, which read as follows:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

This argument, however, ignores the distinctive purposes, legislative histories, and plain language of Section 6(b)(5), and the essential and critical differences between standards adopted under that provision as compared to those adopted under Section 6(a), pursuant to which the noise standards were drafted. A close reading of *ATMI* shows that the Court was careful to limit its holding to those rules adopted under Section 6(b)(5).

To assert that the meaning of the phrase “to the extent feasible” in the context of Section 6(b)(5) should be equated to the freestanding word “feasible” and placed upon a word in a rule adopted under an entirely different statutory provision defies the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). As the Supreme Court has stated, “[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.” *Id.* at 132. OSHA’s argument that the “plain meaning” of the term “feasible” applies no matter the statutory context is superficially attractive but lacking in persuasion as it would render much of Section 6(b)(5) superfluous.

There are any number of situations in which a well-known word, despite its “plain meaning,” is ambiguous when read in context. In *Secretary of Labor, MSHA v. National Cement Co. of California, Inc.*, the D.C. Circuit found the terms “private” and “appurtenant” to be

ambiguous, and therefore the statute to have no plain meaning in light of the conflicting dictionary definitions of the words. 194 F.3d 1066, 1074 (D.C. Cir. 2007). The word “feasible” also has conflicting meanings. Webster’s Third New World College Dictionary, 495 (1988)(Webster’s). Context is key.

The recognition that the word “feasible” has a range of meanings was acknowledged by Commissioner Buckley in *his analysis of the Control Provisions in Sherwin-William Co.*, 11 BNA OSHC 2105, 2108-9. The meaning of the term “feasible,” as used in Section 6(b)(5) the OSH Act, was determined by the U.S. Supreme Court in the context of an analysis of Section 6(b)(5). That analysis cannot be simplistically applied to the language of the Control Provisions, which originated in Walsh-Healey Act requirements that pre-dated the OSH Act.

In *ATMI*, the Supreme Court analyzed whether the word “feasible” in Section 6(b)(5) required the Secretary to conduct a cost-benefit analysis prior to adopting a PEL under that provision. As noted above, Section 6(b)(5), in pertinent part, provides:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which 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 such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

29 U.S.C. § 655(b)(5).

The Court’s analysis focused largely on the legislative history of Section 6(b)(5). The Court held that OSHA was not required to conduct a cost-benefit analysis for regulations issued under Section 6(b)(5), in part, because in drafting this section, Congress had itself engaged in a cost-benefit analysis “by placing the ‘benefit’ of employee health above all other considerations save those making attainment of this ‘benefit’ unachievable.” See *ATMI*, 452 U.S. at 509.

In addition, the preceding phrase, “most adequately assures” puts a framework on the language “to the extent feasible” in Section 6(b)(5) that the Court had to consider and attempt to give meaning under the rule of statutory construction that all of the words in a provision must be considered, and are presumed to have been included to impart meaning, in divining the intent of Congress. In this context, the Court’s conclusion that Congress elevated health protection over cost is understandable. And the phrases “most adequately assures” and “to the extent” convey a Congressional intent that OSHA push the envelope in seeking the highest level of protection. However, the language of the standard at issue does not include the phrases “most adequately ensures” or “to the extent,” or any of the additional language in Section 6(b)(5) that sets the context for the Court’s decision.

Furthermore, in the *Benzene* and *Cotton Dust* decisions, the focus of the feasibility analysis was on how much the exposure levels (for toxic substances and harmful physical agents) could be reduced, not the methods by which the exposures were to be controlled. The decision on whether to adopt feasible engineering or administrative controls over an HCP is based on a comparative cost or cost-effectiveness analysis. That analysis must reflect the conclusion OSHA reached when the Hearing Conservation Amendment (HCA)<sup>11</sup> was adopted – i.e., that HCPs are effective in significantly reducing the actual level of noise exposure experienced by an affected employee and in significantly reducing the incidence of workplace noise-induced hearing loss.

At the time it adopted the HCA, OSHA provided estimates of the numbers and percentages of employees who would be protected by its adoption. OSHA estimated that up to nearly 85% of employees would “at equilibrium” be protected not only from the loss of hearing

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<sup>11</sup> Occupational Noise Exposure; Hearing Conservation Amendment. Final Rule. 46 FR 4078 (Jan. 16, 1981).

but also from other physiological effects that OSHA believed presented a significant risk of material impairment of health. *Id. at* 4112.

OSHA noted that compliance by employees as well as employers would not be perfect, but perfect compliance with the obligation to install and maintain engineering controls also would not be realistic. In adopting the HCA, OSHA concluded that a substantial number of employees would derive significant benefits from the adoption of the standard. In contrast, the benefit, if any, of adopting the NPI would be based on unfounded and overly optimistic speculation. There is no basis in the current record for concluding that the NPI would have significantly improved the protection against hazardous noise exposure afforded to employees because the noise levels are already controlled by HCPs, ambient noise levels will remain above the maximum permissible dose, and employers will be required to continue their existing HCPs, or employees will not be required to wear hearing protection unless an STS occurs, which will result in less protection.

The noise standards, 29 C.F.R. §§ 1910.95(b)(1) and 1926.52(b), were not promulgated under Section 6(b)(5). Rather, they were adopted under Section 6(a), a provision with completely different language, passed for a wholly different purpose, than Section 6(b)(5). In pertinent part, Section 6(a) provides:

Without regard to [the Administrative Procedure Act] . . . the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. . . .

29 U.S.C. § 655(a).<sup>12</sup> The legislative history of Section 6(a) shows that, in 1971, when the OSH Act was passed, Congress was impatient for regulations to be quickly promulgated and their standards enforced throughout industry.

Aware that such speedy action would be hampered by the notice and comment requirements of the Administrative Procedure Act, Congress sought, in Section 6(a), to achieve a balance. For a limited period of two years, OSHA could adopt already extant national consensus or Federal standards without having to engage in notice and comment proceedings. See *Marshall*, 596 F.2d at 371-72. Once those two years had passed, the authority provided by Section 6(a) lapsed and OSHA's authority to promulgate or amend regulations would come only from provisions such as Section 6(b)(5), which required notice and comment proceedings. Thus, the noise standards were summarily adopted under Section 6(a) from previously existing Walsh-Healy standards, unlike the cotton dust standard which received extensive notice and comment prior to promulgation under Section 6(b)(5). See *ATMI*, 452 U.S. at 498, 500-501. There was no opportunity for the public, or its representatives, to consider the meaning of the word "feasible" therein. There was no opportunity for OSHA to examine the premise that engineering controls are more effective than HCP in protecting employees from excessive noise. Thus, the definition of feasible as articulated in the *ATMI* decision, based as it was on the stated intent of Congress in drafting Section 6(b)(5), is inapplicable to regulations summarily adopted under Section 6(a).

No less than six times, the Court limited its holding to Section 6(b)(5). See *e.g.*, *id.* at n.29, 512-514, 518. Most tellingly, the Court specifically declined to apply its holding to "other provisions of the Act which may authorize OSHA to explore costs and benefits for promulgating

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<sup>12</sup> Notably, the term "feasible" does not appear at all in Section 6(a). Rather, it appears in the noise standards at 29 C.F.R. §§ 1910.95(b)(1) and 1926.52(b). These standards were adopted from prior Federal statutes, the Walsh-Healy Government Contracts Act and the Construction Safety Act. Therefore, Congress never had the opportunity to debate the meaning of the term "feasible" either in the language of Section 6(a) or in the context of regulations to be promulgated thereunder. Thus, the Supreme Court's discussion of the legislative history of the meaning of the term "feasible" in Section 6(b)(5) is inapplicable to Section 6(a).

other types of standards not issued under § 6(b)(5).” *Id.* at 509 n.29. Moreover, the Court expressly acknowledged that cost-benefit analysis might be appropriate under provisions “other than Section 6(b)(5) of the Act” through application of Section 3(8). *Id.* at 513.

Based on the foregoing, we believe it is clear that OSHA’s reliance on *CF&I* and *ATMI* is misplaced. Those cases do not support the conclusions of the NPI. The change in the interpretation of the Control Provisions contemplated by the NPI is one that can be adopted only through a rulemaking in which OSHA carries its burden of proof with respect to the applicable legal criteria for adoption of an OSHA standard.

**VI. EVEN IF THE SECTION 6(b)(5) FEASIBILITY INTERPRETATION WAS APPLICABLE, OSHA’S CURRENT INTERPRETATION OF THE CONTROL PROVISIONS IS CONSISTENT WITH THE CASE LAW INTERPRETING THAT CLAUSE AND THE APPLICABLE EXECUTIVE ORDERS ON REGULATORY REVIEW**

**A. OSHA’s Current Interpretation Of The Control Provisions Is Consistent With The Case Law Interpreting The Feasibility Clause Of Section 6(b)(5) of the OSH Act**

As OSHA readily admitted in the NPI, under its then-existing and current enforcement policy, employers were and are deemed to be in compliance with the Control Provisions if they implement an effective hearing protection program, “unless the cost of administrative or engineering controls was *less* than the cost of an effective hearing conservation program. 75 FR. at 64,216. In other words, the word “feasible” in the context of this standard was interpreted to mean the most cost-effective of the measures capable of being done (technically and economically).

This is not the type of cost-benefit analysis that the Court examined in the *Cotton Dust* and *Benzene* cases and found impermissible under the language of Section 6(b)(5) of the OSH Act, if those cases were applicable. The language of the OSH Act directs OSHA to adopt a

standard 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 such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”

The Control Provisions, as currently interpreted, meet this standard. They reflect a decision by OSHA to allow employers to use a comparative cost model, also known as a cost-effectiveness model, to decide which control method to use. The employer is required to protect employees to the same degree regardless of whether a hearing conservation program or engineering and administrative controls are used.

Under the NPI, OSHA would create an entirely new regime that would foreclose a means of compliance that is equally effective at a substantially lower cost. Collectively, whether or not they currently utilize an effective HCP, employers would be forced to spend billions of dollars retrofitting their workplaces with new engineering controls or pursuing highly inefficient administrative controls. Such an approach is contrary to OSHA’s recognition that its standards must adopt the most cost-effective measure available to control the hazard of concern.

#### B. OSHA’S Current Interpretation Of The Control Provisions Is Consistent With The Applicable Executive Orders on Regulatory Review

On January 18, 2011, President Obama issued an Executive Order (EO) entitled "Improving Regulation and Regulatory Review." This EO "supplements and reaffirms" the longstanding principles governing regulatory review that were established in Executive Order 12866 of September 30, 1993. Section 1 of the EO states "[O]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." Additionally the EO requires that the regulatory system "identify and use the best, most innovative, and *least burdensome* tools for achieving regulatory ends." Emphasis Added. Further, section 4 of the EO requires that each agency

consider regulatory approaches that "reduce burdens and maintain flexibility and freedom of choice for the public" where consistent with regulatory objectives and to the extent permitted by law.

The current enforcement interpretation of the Control Provisions meets the intent of the EO; the NPI would not. The term "feasible" is interpreted in such a way as to provide the employer with both flexibility and freedom of choice in determining the most efficient and cost-effective means of protecting its employees by keeping their noise exposures below the maximum permissible dose. Conversely, mandating the use of administrative or engineering controls, which are likely to be redundant with existing hearing conservation programs, and often less protective, as long as their costs will not threaten the employer's ability to remain in business, certainly is not within the spirit and intent of the EO. To comply with the EO, OSHA must maintain the current interpretation of "feasible," which allows employers to protect their employees with an effective hearing conservation program where hearing protectors are effective and the costs of engineering and administrative controls exceed the cost of the HCP.

**VII. OSHA'S NPI WOULD HAVE MATERIALLY AMENDED A SUBSTANTIVE RULE, REQUIRING THAT OSHA COMPLY WITH THE REQUIREMENTS GOVERNING OSHA RULEMAKING**

**A. OSHA's NPI was a Substantive Rule and Therefore Would Have Required Notice and Comment Rulemaking.**

Agencies are required to engage in notice and comment before formulating or changing substantive rules. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586

(D.C.Cir. 1997) (citing 5 U.S.C. § 551(5)). A substantive rule is a rule

other than [one that is] organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement[s] the statute as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n). Such rules have the force and effect of law.

*American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C.Cir. 1993) (quoting *Attorney General's Manual on the Administrative Procedure Act*, 30 n.3 (1947)).

“[A]n agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C.Cir. 2000)(citing *Paralyzed Veterans*, 117 F.3d at 588; *American Mining*, 995 F.2d at 1109-10). An agency’s characterization of the rule as either substantive or interpretive is therefore not determinative. See *Paralyzed Veterans*, 117 F.3d at 588. If a purported interpretive rule has legal effect, that is, the “force and effect of law,” it will be deemed substantive and therefore subject to notice and comment requirements. Whether a purported interpretive rule has legal effect is best ascertained by asking:

- (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

*American Mining*, 117 F.3d at 1112. “If the answer to any of these questions is affirmative, we have a legislative, not interpretive rule.” *Id.*

A subsequent rule effectively amends a prior legislative rule when it “work[s] a substantive change” upon or adds a “major substantive legal addition” to the prior legislative rule. See *Sprint Corp. v. Federal Communications Comm’n*, 315 F.3d 369, 374 (D.C.Cir. 2003); *Appalachian Power*, 208 F.3d at 1024. Moreover, “[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 995 F.2d 1106, 1109 (D.C.Cir. 1993). Indeed, the Supreme Court has stated that “if an agency adopts ‘a new position *inconsistent with*’ an

existing regulation, or effects 'a *substantive change in the regulation*,' notice and comment are required." *U.S. Telecom Ass'n v. Federal Communications Comm'n*, 400 F.3d 29, 35 (D.C.Cir. 2005)(emphasis therein)(quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).

Once an agency gives a regulation a definitive interpretation, "it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586. See also *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033 (D.C.Cir. 1999). Moreover, "a modification of an interpretative rule construing an agency's substantive regulation will . . . 'likely require a notice and comment procedure.'" *Alaska Professional Hunters*, 177 F.3d at 1033 (quoting *Syncor Int'l Corp v. Shalala*, 127 F.3d 90, 94-95 (D.C.Cir. 1997)). Were it otherwise, an agency would be able to escape the strictures of notice-and-comment rulemaking merely by titling its fundamental change an "interpretation," thereby undermining the purpose and requirements of the Administrative Procedure Act. *Paralyzed Veterans*, 117 F.3d at 586. Thus, in the D.C. Circuit, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Professional Hunters*, 177 F.3d at 1034 (holding that a Notice to Operators was invalid when it amended, without notice and comment, FAA's past policy, held for almost thirty years, that Alaskan operators need only comply with certain FAA regulations).

For 28 years, consistent with the case law that is directly on point, OSHA has interpreted the Control Provisions to require employers to use engineering and administrative controls to control workplace noise exposures "only when hearing protectors are ineffective or the costs of such controls are *less* than the cost of an effective hearing conservation program." 75 Fed. Reg. 64,216 (emphasis therein). Under the NPI, OSHA would have reinterpreted the Control Provisions to require the use of administrative or engineering controls rather than hearing

protection as long as the engineering and administrative controls would not threaten the employer's ability to stay in business. *Id.* at 64,219.

Although OSHA's NPI would not have changed the text of the Control Provisions, the NPI would have created substantial new legal obligations and exposed affected employers to substantial additional liabilities for failure to comply with those new obligations. The NPI was not merely a change in policy, but would have effected a material change in the applicable legal requirements. After following a particular interpretation of the law in a manner that is consistent with the directly applicable case law for 28 years, it is far too late to suddenly stand before the regulated community in the image of Archimedes and proclaim "Eureka," meaning "I have found the true meaning of the Control Provisions." Such a change could only be adopted through the rulemaking requirements of the OSH Act, which generally parallel the rulemaking provisions of the Administrative Procedure Act.

**B. OSHA Must First Demonstrate That Compliance with the NPI Generally Would be Technically and Economically Feasible for the Employers in Each Affected Industrial Sector**

In proceeding via the NPI, OSHA would have circumvented not only the procedural aspects of the rulemaking process, but avoided the fundamental question as to whether such a rule is generally technically and economically feasible for the affected industry sectors and tasks/activities. In the rulemaking that led to the adoption of the OSHA Chromium Standards, OSHA did not establish the lowest PEL that might be achieved by at least one employer as the applicable PEL and then leave itself an out by including a feasibility requirement in the text of the rule. Rather, OSHA was required to first demonstrate that compliance with the rule was generally feasible for the affected industry sectors and tasks/activities. In that rulemaking, OSHA determined that welders, as a group, could not comply with the proposed PEL of 1 ug/m<sup>3</sup> and instead set the PEL at 5 ug/m<sup>3</sup> on the basis of a finding that most employers in the

affected industries and activities, outside of the aerospace industry, would be able to meet that PEL.

OSHA has not yet demonstrated that the rule, as amended by the NPI, would be technically and economically feasible. A rule does not become technically and economically feasible by inserting a feasibility condition into its text. It would be circular and impermissible for OSHA to adopt a rule in which the obligation to implement its requirements is limited by feasibility and then assert, on that basis, that the rule is feasible because OSHA would not require compliance where it was infeasible.

Such an approach represents a denial of due process. That is not a rule that lays out a standard of behavior that can reasonably be determined in advance of an enforcement action, or that applies equally to all employers. In the same industry, with employers of comparable size, there are differences in profitability and, therefore, under OSHA's proposed standard, in ability to pay. But that approach would penalize the efficient operator and give a pass to the inefficient operator. Compliance obligations would rise and fall with the economy and the economic success of an individual business. As a result, similarly situated employers would not be treated equally. Indeed, OSHA's NPI would appear to have required OSHA to treat similar employers differently based on its assessment of each individual employer's ability to adopt engineering or administrative controls that would reduce ambient noise exposure levels to the maximum permissible dose. OSHA is often encouraged by industry to "level the playing field" by adopting standards that apply uniformly to all participants in an industry. In this case, OSHA is going in exactly the opposite direction by making the determination of compliance dependent on ability to pay. Surely Congress did not intend this outcome.

As we believe we have made clear, we do not believe the agency's unsupported, abstract, academic assertions that engineering controls are more effective than hearing

conservation programs has any validity in the context of 8-hour TWA noise levels of 100 dB(A) and below. For purposes of discussion, even if one were to make that assumption, that would not provide the necessary framework for a feasibility analysis. In assessing the feasibility of an approach based on the NPI, it would have been necessary for OSHA to first determine whether a particular control would have to achieve a minimum threshold noise reduction before it would be required and, if so, what that threshold would be. We believe it is clear that a measure would not be considered feasible if the costs were wholly out of proportion to the expected results so as to make the requirement irrational. See, *American Dental Association v. Martin*, 984 F.2d 823 (7<sup>th</sup> Cir. 1993) (“The rule’s implicit valuation of a life is high--about \$4 million--but not so astronomical, certainly by regulatory standards, Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 239 (1990) (App. B), as to call the rationality of the rule seriously into question, especially when we consider that neither Hepatitis B nor AIDS is a disease of old people.”)

For example, it would be absurd for an employer to spend \$100 million to reduce the ambient exposure level in one small area of a facility by 1 dB, even if the expenditure would not threaten the economic viability of that employer. Furthermore, it is possible that the criteria would vary depending on the ambient noise levels or the particular frequencies involved. These fundamental issues are simply some of the critical issues that OSHA apparently did not even consider in issuing the NPI. These are the kinds of issues that can only be properly addressed in a rulemaking. It would be both legally improper, as a matter of due process, and irresponsible, for OSHA to simply leave these determinations to the uncertainties of the enforcement process.

**C. OSHA Must Conduct a Regulatory Flexibility Analysis and Determine Whether the NPI Would Have A Significant Impact on Small Business that Would Require a SBREFA Review**

Pursuant to the Regulatory Flexibility Act, an agency must determine whether a new rule would have a significant impact on a significant number of small businesses, and conduct a Regulatory Flexibility Analysis when it promulgates a rule. 5 U.S.C. §§ 603 & 604. This requirement applies when the agency promulgates the rule, or should have promulgated the rule, pursuant to the notice-and-comment procedures of 5 U.S.C. § 553. See *id*; *U.S. Telecom Ass'n. v. Federal Communications Comm'n*, 400 F.3d 29 (D.C.Cir. 2005).

In promulgating a rule, an agency must publish both an initial and a final Regulatory Flexibility Analysis. 5 U.S.C. §§ 603-604. The initial Regulatory Flexibility Analysis must include “a description of any significant alternatives to the proposed rule which accomplish the stated objectives . . . and which minimize any significant economic impact of the proposed rule on small entities.” *Id.* at § 603(c). This “analysis shall discuss significant alternatives such as . . . the use of performance rather than design standards.” *Id.* at § 603(c)(3). The final Regulatory Flexibility Analysis must include “a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis.” 5 U.S.C. § 604(a)(2). The final analysis must also include “an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities.” *U.S. Telecom Ass'n.*, 400 F.3d at 42. Additionally, the final analysis must include “a description of the steps the agency has taken to minimize the significant economic impact on small entities. . . .” 5 U.S.C. § 604(a)(5).

The required Regulatory Flexibility Analysis would get to the heart of the critical economic issues raised by the NPI. In this instance, going beyond the fact that OSHA has not

published either the initial or final Regulatory Flexibility Analysis required by the RFA, it is clear that OSHA had not even given serious consideration to the underlying economic issues.

The NAM believes the economic impact of the NPI on both small and large business would have been enormous. It would have forced small and large businesses to expend an enormous amount of funds on the investigation, design, construction and implementation of redundant and unnecessary administrative and technical controls, even though existing and far less costly HCPs with PHP provide employees with substantially the same or a greater level of protection against hearing loss resulting from excessive exposure to workplace noise.

The only limitation on the obligation to first implement engineering and administrative controls would be an exception for those situations in which the employer could persuade OSHA or the Review Commission that further engineering or administrative measures would put the employer out of business. For many small employers, the costs of hiring an expert consultant and challenging an OSHA citation on this issue would be prohibitive. OSHA finds it quite challenging just to provide its compliance personnel with adequate training on the technical issues they must address in conducting inspections. Small employers simply do not have the resources to investigate redundant or less protective measures and to determine the point at which implementation of those redundant or less protective measures would put them out of business. OSHA personnel would rarely have the expertise to engage in the type of economic analysis of a business required to determine the applicability of the exception.

It is unclear whether the economic feasibility determination would be based on the ability of a production line within a site to bear the costs, the site to bear the costs, the multi-site product line to bear the costs, or the company to bear the costs. If OSHA makes an academic determination that the costs of a measure would not put the economic unit it chooses to analyze (i.e., the production line, site, product line or company) out of business, but the company uses a

real-world economic analysis and decides to cease that operation rather than incur the costs, we believe that demonstrates that OSHA performed a fallacious economic analysis. Clearly, OSHA would not have the resources to conduct that type of economic analysis with respect to the control of a hazard that is found in virtually every manufacturing and construction site in the US.

OSHA has suggested that an increased focus on workplace safety and health creates jobs for people who provide the types of engineering and administrative controls in issue. OSHA's suggestion is another variant of the broken window fallacy discredited by economist Frédéric Bastiat in 1850. "Job creation" based on a demand for technical experts to develop and implement redundant and unnecessary control measures and economic experts to perform economic analyses that demonstrate that redundant and unnecessary controls would put an employer out of business create the types of gross inefficiencies that lead to overseas relocation of manufacturing facilities and the jobs that go with them.

**VIII. The NPI is Not Supported by Any Scientific Evidence, Much Less the Substantial Evidence that OSHA Must Have to Sustain a Rulemaking**

**A. OSHA's Assertion That Hearing Conservation Programs and Adequate Hearing Protection Are Less Effective Than Engineering and Administrative Controls Is Not Supported By Any Evidence**

OSHA's standard-making authority is limited to adopting those standards that are "reasonably necessary and appropriate" to achieve the public policy articulated by Congress. Thus, OSHA must demonstrate, in its justification of a standard and its specific requirements, that any less effort is insufficient to protect a significant portion of the affected employees from material impairment of health or functional capacity. To the extent that multiple approaches or methods of protection of employees from workplace hazards provide substantially the same protection, OSHA must allow compliance under the most cost-effective approach available.

OSHA offered no new evidence for the assertion that engineering controls are more effective than a hearing conservation program. The assumption that engineering and administrative controls are more effective than an effective hearing conservation program in preventing work-related hearing loss is not supported by any scientific evaluation or evidence. The technical basis for the NPI was the often-stated, but unsubstantiated academic assumption referred to as the “hierarchy of controls.” The argument is that engineering controls are more effective than PHP because they do not require the individual employee to do anything to achieve compliance whereas the individual employee must follow certain practices if the PHP is to be effective. As we believe our practical analysis in Section II made clear, this academic assertion erroneously attempts to compare apples with oranges. The appropriate comparison is not between engineering/administrative controls and hearing conservation programs that would both reduce 8-hour TWA exposures to 90 db(A). Rather, it is between engineering/administrative controls that, at tremendous cost, may reduce 8-hour TWA exposures to 90 db(A), and hearing conservation programs that will reliably reduce 8-hour TWA exposures to well below 90 dB(A), quite possibly as low as 75 dB(A).

Furthermore, the assertion as to the superiority of engineering controls overlooks other important considerations. Engineering controls require maintenance and upkeep and human intervention. It also ignores the fact that the affected employee is the person with the greatest incentive to effectively implement self-protective measures.

In addition to the additional costs associated with the increased maintenance required to ensure the effectiveness of engineering controls, the use of various kinds of such controls leads to shorter service lives for the equipment that is modified to reduce noise. This means that engineering controls will create a significant added cost, against which OSHA has assumed, without evidence, that there will be an increase in benefits.

Because OSHA has not conducted a proper technical or economic analysis, much less initiated a rulemaking, the costs of compliance with the NPI have not been developed and the impact on employers in various industries is unknown to OSHA. Nor is it clear what means of engineering controls are effective at reducing noise levels and to what degree they are effective.

The result is not, as OSHA propounds, a question of adopting the most feasible standard to reduce noise exposures, but whether the costs of engineering controls that will not reduce noise exposures to a safe level should be imposed on employers who are already providing an effective level of protection through HCPs and will be required to continue those programs. It will be simply an added cost with no benefit. The NAM does not believe that either Congress or the courts intended such a result.

**B. There Are Published Reports on The Relative Efficacy of Hearing Conservation Programs And There are Numerous New Devices Available To Provide Adequate Hearing Protection That OSHA Must Evaluate Under The Standard Requiring That OSHA Rely On The Best Available Evidence**

The OSH Act requires that OSHA rely on the “best available scientific evidence” when establishing standards regulating exposure to toxic substances and harmful physical agents. OSHA’s NPI summarily invokes the so-called hierarchy of controls as the basis for its preference that engineering controls be adopted regardless of the level of protection obtained and regardless of cost so long as the employer not be threatened with extinction.

There are published reports on the efficacy of hearing conservation programs that OSHA does not mention in the NPI and presumably has not considered. There is no indication in the NPI that OSH made any effort to review the scientific literature to determine if technological changes since the 1983 interpretation was adopted support a different conclusion as to the comparative efficacy of hearing protective devices versus engineering controls. One study, *The Effectiveness of Hearing Protection Among Construction Employees*, Richard Neitzel and Noah Seixas

Journal of Occupational and Environmental Hygiene, 2: 227-238 indicates that hearing conservation programs are ineffective in the construction industry because the use of HPDs is poor among construction employees. However, for several reasons, it would be inappropriate for OSHA to rely on this study to support a conclusion that effective engineering controls are more effective than effective hearing conservation programs. First the dynamics of the typical construction site are materially different than those of a typical manufacturing environment. Second, the OSHA Noise Standard for Construction does not require any type of hearing conservation program, much less the comprehensive hearing conservation program required of manufacturing employers under the OSHA Noise Standard for General Industry. In that regard, it is appropriate to note that, in its Spring 2010 Regulatory Agenda, OSHA announced that it had withdrawn a rulemaking initiative to adopt a Hearing Conservation Program for Construction Employees, which it acknowledged was an economically significant initiative, “due to resource constraints and other priorities.”<sup>13</sup> Finally, the study concluded that “effective hearing conservation programs in the construction industry are rare.”

At the very least, OSHA should objectively survey the available literature to determine what evidence exists to support its assertion. A far more appropriate approach would be to engage with NIOSH to study the current state of the art, and to evaluate corporate programs to determine if HCP are effective. There are millions of employees throughout the nation that are covered by such programs, and many have now been in these programs for more than 30 years. That is sufficient time to determine, on a factual basis, how effective these programs are, and to identify the characteristics of effective programs. If OSHA is serious about preventing

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<sup>13</sup> <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=1218-AB89>

hearing loss rather than causing job losses, it will make the necessary investment of resources to conduct such a study.

**C. The NAM Surveyed Its Members To Develop Information On The Use And Efficacy Of Hearing Conservation Programs And The Use of Hearing Protection And Its Adequacy**

The NAM surveyed its members to develop information on the effectiveness of hearing conservation programs, and the cost and anticipated obstacles employers would face if OSHA adopted the proposed change in its enforcement interpretation. The results of the survey show that many employers rely on hearing conservation programs to protect employees from hearing loss associated with noise exposures in the workplace. The results also show that the costs of adopting the NPI would be enormous, but, because of the improper manner in which the NPI was formulated, the costs could not be definitively determined until after the fact.

The NAM's survey results show that employers have adopted hearing conservation programs even when they are not required. Over half of the employers responding do not have any employees exposed above 85 dBA as an eight-hour time-weighted-average ( $TWA_8$ ). A number of them have had the programs in place since the 1970s.

The NAM requested that members respond for the time period of 2007-2010, and include the numbers of hearing loss cases recorded on their OSHA 300 logs. The average number of individuals collectively employed per year by the approximately 280 responding companies (many with multiple establishments included in the response) was approximately 75,000. On average, approximately 18 % of those employees had ambient  $TWA_8$  exposures to noise above 90 dB(A) (which is 100 % of the permissible daily dose), and approximately 30 % of those employees had ambient  $TWA_8$  exposures to noise around 85 dB(A) (which is 50% of the daily permissible dose). All employees in both categories are included in mandatory HCPs.

Many of the respondents reported no recordable cases of work-related hearing loss for the three year period. Of the approximately 280 respondents, fewer than 45 reported any work-related hearing loss cases, and of those, 19 respondents reported only one work-related hearing loss case over the reporting period. It is clear from the data that employees are being protected from harmful exposures to noise by the HCPs implemented by our members. The low number of recordable cases is even more impressive when one considers that some employers reported that they recorded every case classified as a Standard Threshold Shift (STS) under the OSHA definition, regardless of whether the cases were actually work-related.

In contrast, the NPI provided no information as to the estimated number of OSHA-recordable hearing loss cases, the reliability of the work-related classification of hearing loss cases in the BLS data (versus the possibility that employers simply took the conservative way out and classified every STS as an OSHA-recordable hearing loss case), current trends, or the number of hearing loss cases that would be prevented by implementing the NPI. OSHA merely assumes that workplace protection against harmful exposures to noise would be improved, and that the unknown, but enormous costs of implementing those additional engineering and administrative controls can be borne by a majority of employers. For the reasons previously stated, we believe that assumption is erroneous.

While difficult to gauge costs definitively, during a hearing before the House Education and Workforce Committee, Stuart Sessions, Principal at Environomics stated the following, "The median estimate from the case studies and NAM's survey is \$2,950 per affected employee per year, while the average across the 45 companies or facilities is \$18,137 per employee per year." Indeed, the NAM did receive an estimate from one large manufacturer that indicating compliance with the NPI would have cost at least \$1 billion for that company alone. Another reported an average of \$3 million per facility.

## **IX. CONCLUSION**

This proceeding raises a number of intertwined legal and policy issues that go to the heart of constitutional due process and responsible government. If one carefully examines each of those issues, giving proper consideration to the principles of due process and responsible government, one inevitably comes to the conclusion that the Notice of Proposed Interpretation (NPI) was appropriately withdrawn. The purpose of these comments is to make it clear why that withdrawal was the only appropriate course of action and to remind the agency of the applicable procedural and substantive requirements that it must satisfy if it has any further thoughts on pursuing this initiative.

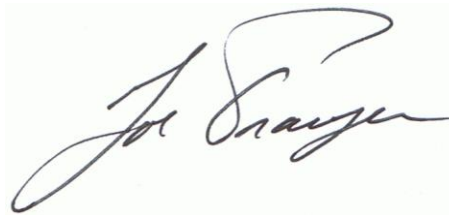
Congress delegated its legislative authority to OSHA to adopt new legal standards and amend existing standards under well-established rulemaking procedures. The NPI represented an attempt by OSHA to announce a material amendment to a substantive OSHA standard without following the only legally permissible path for effecting that amendment and the only responsible path for considering the merits of that amendment.

For the last 28 years, through both Democratic and Republican administrations, OSHA has consistently interpreted the Control Provisions of its Noise Standards using a cost-effectiveness analysis. Under that interpretation, OSHA requires an employer to implement feasible engineering and administrative controls to control workplace exposure to noise when hearing protectors are ineffective or the costs of those controls are *less* than the cost of an effective hearing conservation program. The fact that this interpretation has remained in effect for so many years suggests that it is the most practical and cost-effective way of addressing the issue when, unlike the European Union, there is no directive applicable to the manufacturers of machinery and equipment regulating the noise levels that may be generated by a piece of equipment. In any event, when OSHA makes a determination to “reinterpret” a standard in a

way that substantially increases the costs of compliance and exposes affected employers to significant enforcement actions for “noncompliance,” that reinterpretation is clearly a substantive amendment to the existing standard that can be effected only through compliance with the requirements for notice-and-comment rulemaking.

Thank you for your consideration of these comments. If you have any questions or would like to discuss this further, please let us know.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joe Trauger", is centered on a light green rectangular background.

**Joe Trauger**

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