2046395330

EX. 169

LAW OFFICES
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
PROFESSIONAL ASSOCIATION

151 MEETING STREET, SUITE 600
POST OFFICE BOX 1137
CHARLESTON, SOUTH CAROLINA 29402
803-577-6747 FAX # 803-577-7513

2202 JACKSON STREET
POST OFFICE BOX 365
BARNWELL, SOUTH CAROLINA 29812
803-259-9900 FAX # 803-259-7048

TWO CHARLES STREET
PROVIDENCE, RHODE ISLAND 02904-2269
401-521-9400 FAX # 401-521-9408

638 EAST WASHINGTON STREET
POST OFFICE BOX 10735
GREENVILLE, SOUTH CAROLINA 29603-0735
803-233-9070 FAX # 803-370-9918

J.B. NESS (1916 - 1991)
MILES LOADHOLT
J. TERRY POOLE
RONALD L. MOTLEY
TERRY E. RICHARDSON, JR.
THOMAS W. WEEKS
JOSEPH F. RICE
CHARLES W. PATRICK, JR.
EDWARD J. WESTBROOK (DC & SC)
MICHAEL J. BRICKMAN
PAUL H. HULSEY (KS & SC)
THOMAS D. ROGERS
JAMES H. RION, JR. (GA & SC)
JOSEPH B. COX, JR. (NC & VA ONLY)
A. HOYT ROWELL, III
DAVID L. LYLE, JR.
TIMOTHY E. EBLE (KY, OH & SC)
ANN K. RITTER (TN & SC)
J. ANDERSON BERLY, III (SC, NC & DC)
JOHN J. McCONNELL, JR. (RI, MA & SC)
DESA A. BALLARD
JEFFREY T. EDDY
SUSAN NIAL (NY, CT & SC)
L. JOEL CHASTAIN
KENNETH J. WILSON (FL, GA & SC)

ALLARD A. ALLSTON, III
JOHN E. HERRICK
KARL E. NOVAK
L. DAVID CONDON
ROBERT M. TURKEWITZ (SC & NY)
EDWARD B. COTTINGHAM, JR.
M. ERIC BOITER
CYNTHIA A. O'DELL
ROBERT J. McCONNELL (MA & RI ONLY)
WILLIAM M. CONNELLY (IL, WI & AZ ONLY)
P. JAY CONE, II (SC & NC)
CAMERON WADDELL
THOMAS J. LAMB (NC, DC & CA ONLY)
ROB R. ANDERSON
J. DAVID FLOWERS (SC & NC)
SHERYL MOORE INGRAM (SC & VA)
HOWARD M. VROON JR. (CA & TX ONLY)
H. BLAIR HAHN
ROBIN CROSS KOLBERG (MA ONLY)
V. BRIAN BEVON
JAMES M. HUGHES
D. SCOTT BEARD
J. DAVID BUTLER
FREDERICK J. JEKEL
KIMBERLY S. VROON
JODI W. FLOWERS
FREDERICK C. BAKER (SC & NY)

December 12, 1994

Honorable John Vittone
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, DC 20021-8002

RE: **Hearing on OSHA's Proposed Rulemaking on Indoor Air Quality -- Philip Morris USA (Docket #51)**

Dear Judge Vittone,

This letter is written in response to the allegations of unfairness made by Philip Morris in its' letter to you of November 22, 1994, in which they cancelled their scheduled appearance at the Indoor Air Quality Hearings.

It is particularly ironic that Philip Morris, the largest domestic cigarette manufacturer, a billion dollar per year industrial giant who has until recently dominated the submissions to OSHA and the questioning of witnesses at the hearings, now feigns concern over the objectivity and fairness of the OSHA process. Philip Morris has spent millions in opposing this rule, both through an extensive advertising campaign, the massive written submissions and letter writing campaign which have flooded OSHA's docket office, and through the active and lengthy cross-examinations of those who spoke in favor of the proposed rule. Now, ostensibly because they want fairness and a full and complete record, they have chosen not to testify because they don't want to be submitted to the same rigors they inflicted on others. (See, testimony of Dr. Stan Glantz-09/21/94, Dr. Jonathan Samet-09/22/94, James Dinegar-09/30/94) Because of Philip Morris' hasty retreat from full disclosure at the hearings while flapping the banner of concern about objectivity, serious

2046395331

questions are raised as to the weight Philip Morris submissions should be given absent an opportunity to question the presenters.

Particularly interesting are the recent charges that Philip Morris and other members of the industry falsified research presented to this panel. (See, Exhibit 1 and 2.) I suggest that a reluctance to answer questions about this development is the true reason for Philip Morris' purported withdrawal from the hearings. This issue will be raised more fully in a separate submission, but I suspect that the desire to skirt this issue plays a far greater role in Philip Morris' cancellation than any true concerns about the participation of outside counsel or concerns about the fairness or objectivity of this process.

Evidently, because of my involvement in products liability suits, Philip Morris feels it is justified in not answering any questions about their proposed testimony. Naturally, I had many such questions. As support for their withdrawal, Philip Morris lists the cases in which I am involved. The Court was informed of the clients I represent early on in an attempt at full disclosure. What Philip Morris failed to point out is the fact that for purposes of these hearings, I am not representing my dead, dying, or addicted clients.

As was clearly stated at this hearing on October 28, 1994, I (and others who have engaged in questioning) represent the ETS victims who have testified or will testify at OSHA and felt that they needed assistance in protecting their rights and in developing the record and in a more balanced manner. We also represent various health organizations such as the American Medical Association, various unions of workers such as the Association of Flight Attendants, the Service Employees International Union, and various groups who spoke in favor of the rule. In essence we represent the millions of unwitting and unwilling Americans exposed to the products of Philip Morris on a daily basis in the workplace, who are not represented at these hearings. We represent the OSHA witnesses who, prior to our arrival, had no representation at all. It is ironic that Philip Morris complains about the involvement of outside lawyers in support of the proposed rule: evidently only their throngs of lawyers in opposition to the rule should be allowed to participate. They want to ask questions but not answer them. This one-sided arrangement is intolerable. If this informational hearing was truly to be held in a non-litigious manner, why did the industry lawyers become so heavily and actively involved from the inception? Do they honestly expect OSHA or the American public to believe that their activities are only designed to promote a full and fair hearing? The suggestion that Plaintiffs counsel have somehow frightened off industry witnesses is particularly ludicrous in light of the

2049395332

questioning techniques undertaken by the industry. (See, OSHA hearing transcript of Anne Donley-10/28/94, James Dinegar-09/30/94)[1]

If Philip Morris wanted a purely informational, objective setting, they should have kept their lawyers out of this hearing, and not engaged in the extensive and aggressive cross-examination they conducted. They chose not to and now should not be allowed to complain because their witnesses are being asked questions as well. Apparently Philip Morris thought that ETS victims and the non-smoking nation would simply sit passively by, as they must do in the workplace while being victimized by exposure to ETS. This is no longer the reality, and that both sides of the story should be aired in these hearings. They will be aired in the courtroom as well, but these cases are peripheral to the present issue and hearing. What is at stake before OSHA is greater than any individual lawsuit: the public health is at issue, and for this reason we intend to engage in questioning those who testify on behalf of the industry and expose the one-sided nature of the testimony they attempt to present.

Most respectfully,

Ronald L Motley

Ronald L. Motley

RLM/crb
Enclosures

[1]Equally outrageous is the objection to our use of a press release--Philip Morris has engaged not only in extensive advertising on this issue (See, Exhibit 3) but also did a corresponding releases through the National Smokers' Alliance (See, Exhibit 4)).

2046395333

2046393334

4 208 Vittone

ASH

ACTION ON SMOKING AND HEALTH

2013 H St., N.W. • Washington D.C. 20006 • (202) 659-4310

December 23, 1994

U.S. DEPT. OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
RECEIVED
DEC 28 94

The Honorable John Vittone
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
TechWorld Building
800 K Street, N.W.
Washington DC 20001-8002

Dear Judge Vittone:

Re: Notice of Proposed Rulemaking
dated April 5, 1994.Indoor Air Quality
Docket Nos. H 122, 51, 74

Enclosed herewith is a Notice of Objection of Action on Smoking and Health (ASH) in response to the letter to you dated November 22, 1994 from Mr. Anthony J. Andrade and Mr. Patrick R. Tyson representing the Philip Morris Management Corporation.

Yours truly,

John F. Banzhaf III
Executive Director
and Chief Counsel

2046395335

UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

Notice of Proposed Rulemaking
dated April 5, 1994
INDOOR AIR QUALITY
29 CFR PARTS 1910, 1915,
1926, 1928

Docket Nos. H 122, 51, 74

NOTICE OF OBJECTION OF ACTION ON SMOKING AND HEALTH (ASH) TO THE WITHDRAWAL OF PHILIP MORRIS MANAGEMENT CORPORATION FROM CONTINUING INVOLVEMENT IN THE ABOVE MENTIONED PROCEEDINGS

PLEASE TAKE NOTICE that Action on Smoking and Health (ASH) being a party interested in the above-mentioned proceeding HEREBY OBJECTS to the withdrawal of Philip Morris Management Corporation "Philip Morris" from these proceedings for reasons set forth in a letter (copy attached as "Exhibit A" with Exhibits 1 and 2) dated November 22, 1994, and addressed to the Honorable John Vittone, Administrative Law Judge. The reasons for ASH's objection are as follows:

I. In general

A. OSHA issued a Proposed Rule for Indoor Air Quality on April 5, 1994 (59 F.R. 15968). Subsequently public hearings have been held, and are continuing, pursuant to 29 CFR Part 1911, the rules of procedure for promulgating Occupational Safety or Health Standards (a copy is attached as Exhibit B).

2046395336

B. Throughout these proceedings various tobacco industry officers or attorneys including representatives of Philip Morris, attended the hearing where they cross- examined OSHA and other government officials and various members of anti-smoking organizations. Allowance of such cross-examination was properly permitted by the hearing examiner pursuant to 29 CFR § 1911.15 (b) (2). Under that paragraph the "presiding officer shall provide an opportunity for cross-examination on crucial issues." (emphasis added)

C. After having exercised to the full the opportunity to cross-examine other participants, Philip Morris has now announced in Exhibit A, page 13 that "for reasons outlined in this letter, it is clear that our oral testimony would neither be received nor examined by OSHA with the requisite impartiality, and as such will not be given."

II. Right to Cross-examine

A. In Rulemaking

As mentioned above, the applicable regulations (Exhibit B) give a mandatory right of cross-examination "on crucial issues" (29 CFR § 1911.15 (b) (2)) in relation to rulemaking proceedings.

OSHA officials and representatives of national anti-smoking organizations (such as ASH) wish to cross-examine Philip Morris representatives on a variety of "crucial issues" including their knowledge of the lethal and health destroying effects of exposure to environmental tobacco smoke. If cross-examination can elicit particulars to the effect that Philip Morris was aware for several years, or

2046395337

admitted, such effect their opposition to the proposed rulemaking -- insofar as they would have to agree to the lethal and injurious health effects of ETS -- would collapse.

Cross examination "on crucial issues would therefore be involved and should be ordered by the presiding officer."

B. In Adjudicatory proceedings

Questions relating to cross-examination naturally arise more frequently in administrative adjudicatory proceedings where similar standards of due process are likewise applied.

In cases where, unlike cases under 29 CFR Part 1911, cross-examination is not mandatory, it should be permitted where the matters sought to be cross-examined bear significantly upon an agency's "fact finding and drawing of conclusions." Cellular Mobile Systems of Pennsylvania v. FCC 782 F.2d 182 (D.C. Cir. 1985). In the instant case the matters in relation to which cross-examination is sought do bear significantly upon OSHA's fact finding and drawing of conclusions.

Conversely, where a party had identified no way in which the failure to cross-examine had prejudiced him, and had not established that cross-examination might have helped his case, the Administrative Law Judge's decision denying relief was upheld, although the party should have been informed of his right to cross-examine adverse witnesses. Wasson v. Securities and Exchange Commission 558 F.2d 879 (8th Cir., 1977). As has been mentioned

20463953338

above, OSHA, ASH and other anti-smoking activists will be prejudiced if no opportunity is given to cross-examine Philip Morris representatives. Additionally, the opportunity to cross-examine Philip Morris and other tobacco company representatives as to their knowledge of, and suppression of, information as to the health effects of exposure to ETS would be helpful in establishing the need for banning workplace smoking.

The courts have been especially willing to recognize the existence of a need for cross-examination where large written documents have been the basis for a decision. Thus an agency exhibit in a large record was made the basis for decision without benefit of cross-examination, rebuttal or argument. The court accordingly found that the complainant was discharged in violation of the relevant statute. ABC Air Freight Company, Inc. v. CAB 391 F.2d 295 (2nd Cir. 1968).

The court similarly held in Damenech v. Secretary of DHHS 913 F. 2d 882 (11th Cir. 1990) that it violates a claimant's right to procedural due process for the administrative law judge to abuse his discretion and deprive a disability claimant of the opportunity to cross-examine the post-hearing physician who wrote a report upon which the Administrative Law Judge substantially relied in finding that claimant's medical condition had sufficiently improved that he could return to his previous employment; it was insufficient that the claimant was given the opportunity to object to the report by way of affidavit.

2046395339

In the instant case, procedural due process would demand cross-examination of Philip Morris representatives who have subjected U.S. Government and anti-smoking advocates to cross-examination which they now seek to evade for themselves.

III. Considerations of fairness

Finally, it violates general considerations of fairness that tobacco interests in general and Philip Morris in particular should have availed themselves of the right to cross-examine while denying opponents a similar right.

In cases where an agency has a discretion to order cross-examination -- which is not the case here where the right to cross-examine is mandatory -- an agency's discretion is not unlimited and may be abused. Even substantial discretion does not immunize an agency decision from considerations of fairness. Tennessee Cable Television Association et al. v. Tennessee Public Service Commission et al. 844 S.W. 2d 151 (Tenn. App. 1992).

In the instant case it is obviously unfair that tobacco interests should have the benefit of cross-examining opposing witnesses, while seeming to avoid cross-examination themselves.

WHEREFORE ASH hereby respectfully requests in the interest of fairness that (1) the presiding officer requests Philip Morris and other tobacco industry representatives to submit, pursuant to 29 CFR Part 1911, to cross-examination in respect of their testimony; or (2) that all records of cross examination conducted by Philip Morris or other tobacco industry interests should be struck

2049395340

from the record unless such parties are themselves willing to submit to cross-examination in respect of their own testimony.

Respectfully submitted,

Action on Smoking and Health (ASH)

December 23, 1994

By John F. Banzhaf III
Executive Director and
Chief Counsel of
Action on Smoking and Health (ASH)
2013 H Street N.W.
Washington DC 20006
Telephone: 202 659-4310

2046395341

CERTIFICATE OF SERVICE

I, JOHN F. BANZHAF III, HEREBY CERTIFY that copies of the attached Notice of Objection, with Exhibits, were today, December 23, 1994, served by prepaid certified mail, return receipt requested, upon the persons whose names and addresses are listed below.

(1) Anthony J. Andrade
Philip Morris U.S.A.

Patrick R. Tyson
Constangy, Brooks and Smith

Philip Morris Management Corp.
120 Park Avenue
New York NY 10017-5592

(2) The Honorable Joseph A. Dear
Assistant Secretary of Labor
Occupational Safety and Health Administration
Frances Perkins Building, Room S 2315
200 Constitution Avenue N.W.
Washington DC 20210

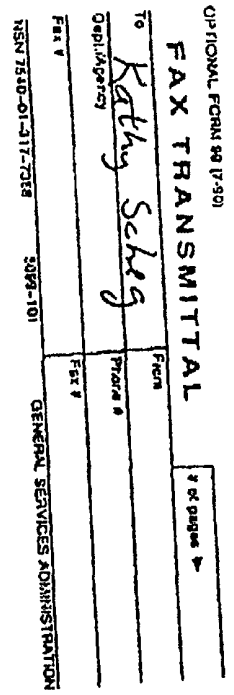
(3) Susan Sherman, Esq.
Office of Solicitor/OSH
Department of Labor
Frances Perkins Building, Room 4004
200 Constitution Avenue N.W.
Washington DC 20210

(4) OSHA Docket Office
Department of Labor
Francis Perkins Building, Room N2625
200 Constitution Avenue N.W.
Washington DC 20210

John F. Banzhaf III

2046395342

Exhibit A



PHILIP MORRIS
MANAGEMENT CORP.
120 PARK AVENUE, NEW YORK, N.Y. 10017-5592 · TELEPHONE (212) 880-5000

November 22, 1994

Honorable John Vittone
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20021-8002

Re: Hearing on OSHA's Proposed Rulemaking on Indoor Air Quality -- Philip Morris USA (Docket #51); Constangy, Brooks & Smith (Docket #74)

Dear Judge Vittone:

We are writing on behalf of Philip Morris USA ("Philip Morris") and its above-retained OSHA counsel concerning the administrative hearings on OSHA's Proposed Rule on Indoor Air Quality ("Proposed Rule"), 59 F.R. 15968, April 5, 1994. Based upon the concerns addressed in this letter, we have made the decision not to testify at the hearings, and therefore, will not appear as scheduled on December 1, 1994.

Our two primary concerns are as follows: (1) the participation of plaintiffs' product liability counsel to further their personal and financial interests has distorted a legitimate administrative hearing (Section I infra); and (2) the inclusion of two well-known anti-tobacco activists who are not OSHA employees but serve in an "official" capacity on the OSHA panel (Section II infra) makes it clear that the proceedings are anything but objective and fair -- despite the Secretary of Labor's and OSHA officials' pledges at the outset of the hearing.

I.

On September 20, 1991, OSHA promulgated a Request for Information ("RFI") on Indoor Air Quality, 56 F.R. 47892. At the time this RFI was published, Philip Morris dedicated its best efforts to work within the administrative framework of OSHA's regulatory process to develop a full and complete factual record regarding indoor air quality and indoor smoking. Philip Morris

2046395343

followed through on its commitment, filing an extensive written submission in response to the RFI and again filing an exhaustive written submission and summaries of proposed testimony in response to OSHA's Notice of Proposed Rulemaking on Indoor Air Quality.

We were pleased when Secretary of Labor Robert M. Reich and Assistant Secretary of Labor Joseph A. Dear both spoke of the need to develop a sound factual basis for the Proposed Rule on Indoor Air Quality.[1] Similarly, OSHA's Acting Director of Health Standards, John Martonik, emphasized OSHA's interest, and indeed the public's interest, in developing a fair, accurate, objective and complete administrative record regarding the indoor air rulemaking.[2] Dr. Michael Silverstein, OSHA's Director of Policy, further embraced these sentiments on behalf of OSHA.[3]

---

[1] "Let me emphasize that this proposed regulation is a starting point, and not a fixed position. We enter these hearings with no rigid preconceptions . . ." Assistant Secretary of Labor Joseph Dear, OSHA Press Release, September 19, 1994. "We are going to invite comment on this rule and we will take these comments into full consideration in drafting a final rule." Secretary of Labor Robert Reich, Department of Labor Press Conference, March 25, 1994.

[2] "The purpose of this public hearing is to fully develop a clear, accurate and complete rulemaking record upon which the final standard will be based."

"The importance of the public participation phase of this rulemaking proceeding cannot be over-emphasized. The regulation which we will be discussing over the next several weeks is still in the proposal stage. It should not be considered to be OSHA's 'final' determination or position on the issues involved." OSHA's Opening Statement, September 20, 1994.

[3] "Let me emphasize that this proposed regulation is a starting point, and not a fixed position. We enter these hearings with no rigid preconceptions. . . ."

"We are determined to keep an open mind during these hearings, to listen to testimony carefully, and to consider whether there are better ways to proceed than are in our initial proposal." Testimony presented by Michael Silverstein, M.D., M.P.H., Director of Policy, Occupational Safety and Health Administration, Indoor Air Quality Proposed Rule, Public Hearing, September 20, 1994, Washington, D.C.

20463953444

We believe Your Honor has made a sincere and diligent effort to conduct a fair and impartial hearing, which we acknowledge and appreciate. However, given the lack of rules of evidence and other procedural safeguards under administrative law, plaintiffs' product liability counsel[4] who have lawsuits for monetary damages pending against Philip Morris and other entities within the tobacco industry[5] have undertaken efforts to misuse the

---

[4] Mr. Ron Motley, of Ness, Motley, Loadholt, Richardson & Poole, Charleston, South Carolina, first appeared at the hearings on October 28 (Trans. 4203); Richard Daynard, Tobacco Products Liability Project, Boston, Massachusetts, first appeared at the hearings on November 3 (Trans. 5147); J.D. Lee, of the Offices of J.D. Lee, Knoxville, Tennessee, first appeared at the hearings on November 3 (Trans. 5342); Marcia Finkelstein and Michael Gertler, of Gertler, Gertler & Vincent, New Orleans, Louisiana, first appeared at the hearings on November 16 (Trans. 6398).

[5] Cases in which Mr. Ron Motley is appearing as counsel for plaintiffs include:

- Butler v. Philip Morris Incorporated, et al., Case No. 94-5-53, Circuit Court, Second Judicial District, Jones County, Mississippi. Environmental tobacco smoke case.
- Castano v. The American Tobacco Company, et al., Case No. 94-1044, United States District Court, Eastern District, Louisiana. Purported class action addiction case.
- Dunn v. RJR Nabisco Holdings Corporation, et al., Case No. 18D01-9305-CT-06, Superior Court, Delaware County, Indiana. Environmental tobacco smoke case.
- Haines v. Liggett Group, et al., Case No. 84-678, United States District Court, District of New Jersey. Cigarette smoking and health case.
- McGraw v. The American Tobacco Company, et al., Case No. 94-1707, Circuit Court, Kanawha County, West Virginia. Attorney General case.
- Moore v. The American Tobacco Company, et al., Case No. 94-1429, Chancery Court, Jackson County, Mississippi. Attorney General case.

Mr. J.D. Lee is also counsel of record in:

2046395345

hearing process for purposes of advancing their own personal and monetary interests -- interests which are wholly unrelated to this rulemaking. Plaintiffs' counsel's lack of interest in this rulemaking has consistently been demonstrated by the fact that they have routinely pursued lines of examination that are totally unrelated to this rulemaking. Their clear objective is the development of information that may be of use in their lawsuits.

We would normally welcome the opportunity to discuss the issues underlying OSHA's Proposed Rule and respond to any questions from OSHA or other interested parties regarding our submissions. However, the distortion of a legitimate administrative hearing by plaintiffs' product liability counsel, solely in furtherance of their personal and financial interests, argues against our presenting oral testimony in this rulemaking. Philip Morris remains fully prepared to meet these plaintiffs, in the courts they have selected, to litigate the claims they have alleged, pursuant to the applicable rules of civil procedure and the rules of evidence. It is not, however, appropriate for plaintiffs' counsel to attempt to litigate their product liability claims in an informal administrative hearing.

Recent events leave little doubt that plaintiffs' counsel have no intention of pursuing the development of a relevant factual record concerning this rulemaking and that their appearance at the hearings is motivated by interests wholly unrelated to these proceedings.[6]

• Huggins v. Philip Morris, et al., Case No. 1-400-94, Circuit Court, Knox County, Knoxville, Tennessee. Cigarette smoking and health case.

Mr. Daynard is listed as a counsel in Castano.

[6] OSHA Hearing, October 28, 1994, pp. 4204-4205. When asked at the OSHA hearing what kind of cases he is involved with, Mr. Motley responded:

> I am on the executive committee of the case called Castano v. American Tobacco Company. It's a proposed class action for persons addicted to tobacco pending in the federal court in New Orleans. I represent the states of West Virginia and Mississippi in cases brought to recover Medicaid costs and other costs attendant to treating those smokers who have developed illnesses. I represent two

2049395346

For example, subsequent to Mr. Ron Motley's first appearance at the OSHA hearings, his statements to the media were reported in an article in the York, Pennsylvania, York Daily Record, on October 29, 1994. That article provided in part:

> 'We ruined your mayor,' crowed Ron Motley, a South Carolina lawyer who represents anti-smoking groups.
>
> He was speaking of William Althaus, who ran City Hall for 12 years and now heads a national smokers' rights group. Althaus endured a long morning of cross-examination Friday during a hearing on whether the government should restrict workplace smoking.
>
> * * *
>
> But for two months, Motley said, well-meaning opponents of smoking have been beaten up by slick tobacco industry lawyers during the OSHA hearings. Fed up, they called Motley, a plaintiff's lawyer who has a lead role in several important suits against tobacco companies.
>
> 'They decided they wanted some of our junk yard dogs, and we had a lot,' Motley said.
>
> Aware that Althaus would be a key witness, Motley hired a former state trooper from the York barracks, Ken Grossman, to dig up dirt on

---

> alleged victims of lung cancer who never smoked. That's the Butler case pending in Mississippi and the Wiley case pending in Indiana. And I represent the state [sic] of Mr. Rossi, who is deceased. He was a smoker. The case is called Hanes v. Liget Myers [sic]. It's pending in the federal court in New Jersey. And I represent several other attorneys general in a consulting role who have not brought lawsuits at this time.

[7] Plaintiffs' counsel have also issued at least one press release which discusses some of their non-rulemaking objectives (see Exhibit 1 attached).

2046395347

> the former mayor. Grossman said he went through years of newspapers at the library and talked to Althaus' detractors, particularly Democrats.
>
> * * *
>
> 'The purpose was to reveal NSA for what it is,' Motley said. 'It's a group of shills for the tobacco companies.'

In addition, presumably in furtherance of their litigation objectives, plaintiffs' counsel have attempted to contact and question expert witnesses who have been requested by Philip Morris to review OSHA's Proposed Rule and to testify at OSHA's public hearings. Dr. Anthony Springall, who testified at the OSHA hearings on November 16, 1994, explained on the record that he had been contacted by telephone the week prior to his OSHA testimony by Marcia Finkelstein.[1]

Despite the fact that Dr. Springall has never testified, researched or published on the subject of asbestos, Ms. Finkelstein claimed that she was interested in employing Dr. Springall as a consultant in the area of asbestos epidemiology, and she was insistent that Dr. Springall provide a curriculum vitae immediately. At no time did Ms. Finkelstein disclose that she was preparing for the cross-examination of Dr. Springall at the OSHA hearing, or that another member of her law firm, Mr. Michael Gertler, would be cross-examining Dr. Springall. Ms. Finkelstein and Mr. Gertler are members of the Gertler, Gertler & Vincent firm in New Orleans, which has been active in tobacco product liability litigation. Dr. Springall testified that he also received a second suspicious inquiry requesting a C.V. from a "Ms. Allen" who purported to be considering writing a "British tobacco newsletter." Dr. Springall felt that these calls were attempts to gather information under false pretenses and indicated that they were of considerable concern to him.

It is a serious matter and quite troubling that product liability plaintiffs' counsel would misrepresent themselves in contacting individuals who are scheduled to testify before OSHA in an attempt to obtain information. This conduct could certainly be perceived as an attempt to harass and intimidate witnesses with the intended result that witnesses would be reluctant to appear at the hearings and offer important testimony necessary to the development

---

[1] OSHA Hearing Transcript, November 16, 1994, pp. 6424-6426.

2046395348

of a complete record. These attempts to obtain information from Dr. Springall under false pretenses are of particular concern in that Dr. Springall clearly identified himself in all previous written comments to the record as having undertaken a review of the Proposed Rule at the request of Philip Morris.[9]

In at least one other instance, of which Your Honor is aware, ultra vires contacts by or on behalf of plaintiffs' counsel have contributed to the withdrawal of a witness scheduled to testify in these hearings.

II.

We are also deeply concerned about the participation of individuals with known anti-smoking views as "official" representatives of OSHA. We of course recognize the right and value of individuals' differing views on OSHA's Proposed Rule, but we question the legitimacy of having individuals with a demonstrated bias participating on the OSHA panel as "official" representatives of the agency. The agency has an obligation to conduct a fair and impartial hearing. The participation of anti-tobacco advocates on the OSHA panel is no more appropriate than if tobacco industry representatives served in an "official" capacity on that panel.

For reasons that are not disclosed by OSHA on the record, OSHA obtained the services of Mr. James Repace "on detail" from the U.S. Environmental Protection Agency. OSHA is well aware that Mr. Repace has been one of the most strident, outspoken anti-tobacco activists in the United States. Mr. Repace's "loan" from the EPA, and Mr. Repace's ongoing involvement in OSHA's rulemaking process, call into question the Department's precepts of a fair and impartial hearing.

Mr. Repace, who is now actively serving as a member of the OSHA panel present at these hearings, has an anti-tobacco involvement that is long-standing and well-documented. However, it is Mr. Repace's involvement on the OSHA panel, not his views as an individual, that is of great concern. Consider the following summary of some of Mr. Repace's activities in light of the Assistant Secretary of Labor's admonition on Monday, September 19, 1994, that "we enter these hearings with no rigid preconceptions." (OSHA Press Release, September 19, 1994):

---

[9] See OSHA Hearing Transcript, November 16, 1994, at 6424-6426.

2046395349

- In 1980, even before the first major ETS health claims appeared in the scientific literature, Repace co-authored an article with A.H. Lowrey reporting on particulate matter in the air of various indoor environments such as bars, restaurants and bingo parlors, without distinguishing whether those particulates were from ETS or some other substance or activity.[10,11] On the basis of these observations, the article claimed that "indoor air pollution from tobacco smoke presents a serious risk to the health of nonsmokers . . . [that] deserves as much attention as outdoor air pollution."[12]

- In 1985, Repace co-authored (again with A.H. Lowrey) an article purporting to show that ETS was riskier than "all regulated industrial emissions combined."[13] This second article by Repace and Lowrey, which represented an attempt at quantitative risk assessment, has been severely criticized by both government and private sector scientists.[14]

---

10 A.H. Lowrey and J.L. Repace, "Indoor Air Pollution, Tobacco Smoke and Public Health," Science, Vol. 208, pp. 464-472 (1980).

11 Subsequent research has arguably discredited both the methodology and conclusions of the 1980 Repace study. See, e.g., S. Turner, et al., "Measurements of Environmental Tobacco Smoke in 585 Offices," Env. Int., Vol. 18, pp. 18-28 (1992); C. Proctor, N. Warren, and M. Bevan, "Measurements of ETS in an Air-Conditioned Office Building," Env. Tech. Lett., Vol. 10, pp. 1003-1018 (1989).

12 Repace and Lowrey (1980), supra note 5, at 471.

13 J.L. Repace and A.H. Lowrey, "A Quantitative Estimate of Nonsmokers' Lung Cancer Risk From Passive Smoking," Env. Int., Vol. 11, pp. 3-22, at 12 (1985). This study was not funded or sponsored by EPA.

14 See, e.g., A. Arundel, et al., "Nonsmoker Lung Cancer Risks from Tobacco Smoke Exposure: An Evaluation of Repace and Lowrey's Phenomenological Model," J. Env. Science and Health C4(1): 93-118 (1986); A. Arundel, et al., "Never Smoker Lung Cancer Risks from Exposure to Particulate Tobacco Smoke," Env. Int. 13: 409-426 (1987); M.D. Lebowitz, "The Potential Association of Lung Cancer with Passive Smoking," Env. Int. 13: 409-426 (1987).

2046395350

- Well before he was "loaned" to OSHA to work on the Proposed Rule, Mr. Repace worked with advocacy organizations such as the Group Against Smokers' Pollution ("GASP") and Action on Smoking and Health ("ASH").[15] As a member of the OSHA panel, he now sits in judgment of their testimony.

- Since the 1970s, Mr. Repace has also appeared as a witness in grievance proceedings regarding smoking in the workplace and testified before various legislative bodies to support governmental restrictions on smoking. Consider in this regard Mr. Repace's statements to the press in reaction to the defeat of an anti-smoking legislative proposal in Maryland in 1980:

> People aren't going to stand for this. Now that the facts are clear, you're going to start seeing nonsmokers becoming a lot more violent. You're going to see fights breaking out all over. Washington Star, April 5, 1980, p. D-1.[16]

- During the late 1980s, Mr. Repace became involved with EPA's determination to classify ETS as a Group A carcinogen. He outlined plans for a handbook designed to promote the elimination of ETS. Mr. Repace was in part responsible for two long-term projects -- an "ETS literature compendium" and an "ETS workplace smoking policy guide," -- as well as a smaller project, an "ETS

---

15 Virginia Group to Alleviate Smoking in Public (Docket 10-24) and Maryland Group Against Smokers' Pollution (Docket 10-10) have both participated in this rulemaking. These are two of the organizations Mr. Motley claims to represent in these proceedings.

16 Fourteen years later Mr. Repace returned to Maryland to testify in support of smoking bans and severe restrictions. In the matter of: Prohibiting Smoking in the Workplace, Hearings Before the Occupational Safety and Health Advisory Board, Maryland Department of Licensing and Regulation, December 9, 1993, pp. 157-196 (Statement of James Repace).

2046395351

fact sheet."[17] These projects were clearly reflective of the agenda first pursued in Mr. Repace's 1980 article.

- Mr. Repace has even traveled internationally to appear at various conferences and media events to promote smoking restrictions. For example, in 1990 Mr. Repace went to New Zealand to support anti-smoking legislation in that country. Perhaps even more problematic, however, is that while Mr. Repace was actively involved as an OSHA panel member in this rulemaking, he journeyed to Paris, France, to make a presentation on environmental tobacco smoke. The abstract submitted by Mr. Repace for the October 1994 9th World Conference on Tobacco & Health states:[18]

> Passive smoking continues to be a central focus of attention for researchers, public health authorities and the general public. A very wide scientific consensus has been developing on the existence of long-term adverse effects on health (notably lung cancer) from exposure to environmental tobacco smoke (ETS); estimates of the size of these effects vary, as does the weight that different authors give to the findings from available epidemiological studies. This

---

[17] See, e.g., Environmental Tobacco Smoke: A Handbook for Assessment, Mitigation, and Prevention of Exposure, Revised draft Outline, June 1, 1987, James Repace, EPA, and Donald Shopland, Office of Smoking and Health of the Department of Health and Human Services (HHS); letter dated April 5, 1988 from John D. Spengler to James Repace enclosing "our Chapter on ETS"; "ETS Handbook," undated November 8, 1988, from Jim Repace, to Bob Axelrad, Joellen Lewtas, Bob Rosner, Don Shopland, suggesting a change in format for the ETS Manual Outline for Bob Rosner; and, finally, Jim Repace's Integration of Comments, Draft, Indoor Air Facts, No. 5, Environmental Tobacco Smoke, undated, which took out the statement ETS "has been linked to cancer" and substituted "It is a known cause of lung cancer and respiratory disease." Additionally, the draft Fact Sheet deleted the statement "This information sheet has been developed by the U.S. Environmental Protection Agency" in favor of the statement "This Fact Sheet is designed to answer the most often asked questions about ETS."

[18] Abstract SS 8, Environmental Tobacco Smoke, R. Saracci, J.L. Repace, J. Tostain, P. Dalla-Vorgia.

2046395352

OPTIONAL FORM 99 (7-90)
FAX TRANSMITTAL
# of pages ▶
To Kathy Scheg
Dept./Agency
Fax # 833-3921
From
Phone #
Fax #
NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

> consensus translates into measures, educational and regulatory, to protect people from involuntary exposure to ETS. These measures are discussed in respect to the occupational and general environment and in relation to their rationale (technical and economic), effectiveness and actual implementation, particularly within Europe and in the United States, with a view to their application in other areas of the world. [emphasis added]

Thus, before the majority of the scheduled testimony had been received on the OSHA Proposed Rule, Mr. Repace claimed a consensus on one of the very issues he is charged with reviewing objectively and fairly on behalf of an agency of the U.S. government.

- He also provided technical assistance to Dr. Stanton Glantz, another self-described anti-smoking activist (who, significantly, is now also appearing as an active member of the OSHA panel), in the preparation of two anti-smoking films on ETS.[19] In a 1991 letter to an EPA official from Thomas S. McFee of the Department of Health and Human Services, a request was made for Mr. Repace to continue testifying on behalf of smoking restrictions "as part of his official duties." The letter acknowledges such assistance by Mr. Repace[20] -- all of which occurred several years prior to OSHA's promulgation of the Proposed Rule.

- Long before his involvement at OSHA, and well before any testimony was tendered at OSHA, Mr. Repace had publicly stated that as many as 5,000 people in the U.S. die each year from exposure to ETS.[21]

---

19 Letter dated October 11, 1988 from Stanton A. Glantz to Bob Axelrad, EPA (See Exhibit 2 attached).

20 Letter dated June 5, 1991 from Thomas S. McFee, DHHS, to F. Henry Habicht, EPA.

21 Repace articles include J.L. Repace and A.H. Lowrey, "A Quantitative Estimate of Nonsmokers' Lung Cancer Risk from Passive Smoking," Environment International, Vol. 11, pp. 3-22, 1985; Correspondence, J.L. Repace and A. Lowrey, Am. Rev. Respir. Dis. 136(5) 1987; Irvin Molotsky, "E.P.A. Study Links

2046395353

Mr. Repace's long-standing, firmly-held and publicly disclosed positions on the subject of ETS demonstrate a serious conflict-of-interest in the context of his role as a member of the OSHA panel in these proceedings. Simple fairness dictates that Mr. Repace should never have been included as an official member of the OSHA panel.[22]

Subsequent to the commencement of Mr. Repace's "on loan" involvement at OSHA, OSHA selected "a number of experts"[23] to offer testimony at the OSHA hearings in support of OSHA's rule. Not surprisingly, these witnesses included long-standing and well-documented anti-tobacco advocates such as Drs. Glantz and Judson Wells. A consideration of Dr. Glantz's anti-smoking activities is also appropriate in light of the Assistant Secretary of Labor's admonition that "we enter these hearings with no rigid preconceptions":[24]

- Dr. Glantz stated in a 1984 publication: "This collection of data . . . is leading to a consensus in the biomedical community that involuntary smoking is a significant health hazard" and "[R]elatively new studies confirm what scientific common sense suggests: . . . toxins [in ETS] affect nonsmokers who breathe them."[25] Clearly, Dr. Glantz reached conclusions regarding ETS

Deaths of Nonsmokers' to Cigarettes," The New York Times, Nov. 3, 1984; C. Stevens, "Smokers' Smoke Is Risk to All-Study," USA Today, Jan. 31, 1985; J.L. Repace, "Passive Smoking Has No Place in the Workplace," Can. Med. Assoc. J. Vol. 133, Oct. 15, 1985.

22 In fact, Mr. Repace's activities have led to investigations with respect to whether his anti-smoking activities conflicted with his duties as a public employee. E. Marshall, "Tobacco Science Wars; the Industry Has Been Bullying Scientists, According to Researchers Who Lead the Campaign Against Environmental Tobacco Smoke," Science, Vol. 236, p. 250, April 17, 1987.

23 OSHA Opening Statement, September 20, 1994, at 17.

24 Assistant Secretary of Labor Joseph Dear, OSHA Press Release, September 19, 1994.

25 S.A. Glantz, "What to Do Because Evidence Links Involuntary (Passive) Smoking with Lung Cancer," West J. Med. 140: 636-637, 1987.

2046395354

exposure and disease three years before the 1986 reports of the Surgeon General and National Academy of Sciences both determined that there was insufficient evidence to support the claim that exposure to ETS presents any increased risk of heart disease. He rendered opinions on these issues almost a decade before he joined OSHA's panel in this rulemaking.

- Dr. Glantz has a long record of public statements demonstrating his commitment to the anti-smoking political agenda. While his training is in mechanical engineering rather than medicine or some other related discipline,[26] he has addressed almost every conceivable smoking-related topic, including advertising and economic issues, about which he can make no justified claim to professional expertise.

- At an April 1990 anti-smoking conference in Perth, Australia, Dr. Glantz made a series of revealing comments. First, he noted that "it's very nice to see that the same ideas that a few of us were advocating in 1983 which were viewed as so strange, radical and hopeless have now really become very mainstream."[27] A self-described "lunatic" on the issue, Dr. Glantz then excoriated the American Cancer Society for its alleged decision to terminate an employee for intemperate behavior in connection with a local smoking ordinance. "He (the employee) may be a little impolitic, which I of course view as a plus. But you know activists need (to be) rewarded(.)"[28] "I had no objection to all the people who were given awards on the first day (of the conference), but I did notice that there was not a single lunatic among them . . ."[29] He further confessed that

---

[26] OSHA Hearing Transcript, September 21, 1994, p. 384.

[27] OSHA Hearing Transcript, September 21, 1994, p. 488, line 10-13; Speech, Stanton Glantz, 7th World Conference on Tobacco and Health, Perth, Australia, April 1990, received as Exhibit 17, p. 499, lines 5-7.

[28] Speech, Stanton Glantz, 7th World Conference on Tobacco and Health, Perth, Australia, April 1990, received as Exhibit 17, p. 499.

[29] OSHA Hearing Transcript, September 20, 1994, p. 495, lines 16-19.

20463955

"[t]he main thing the science has done on the issue of ETS, in addition to help people like me pay mortgages, is it has legitimized the concerns that people have that they don't like cigarette smoke. And that is a strong emotional force that needs to be harnessed and used." Glantz concluded by stating that "we are all on a roll and the bastards are on the run and I urge you to keep chasing them."[30]

- An article published in the June 1991 issue of Trial, co-authored by Dr. Glantz and Richard Daynard, a professor at Northeastern University School of Law who chairs the anti-tobacco Tobacco Products Liability Project, unequivocally stated that "passive smoking kills about 3,700 Americans a year by inducing lung cancer" and "about 37,000 each year by inducing heart disease."[31] This demonstrates Dr. Glantz had personally reached ultimate conclusions concerning ETS and health issues long before appearing on the OSHA panel in this hearing. Mr. Daynard, as noted earlier, has appeared at the OSHA hearings on behalf of plaintiffs' product liability consortium for the purpose of examining tobacco industry witnesses.

- Dr. Glantz helped prepare a draft of the ETS Technical Compendium, an EPA project. In April 1991, before EPA had completed its own internal review of the document, EPA staff sent a draft of the compendium to several external reviewers, including Dr. Glantz. Dr. Glantz provided a copy of this internal EPA draft to an Associated Press reporter. According to the General Accounting Office, Dr. Glantz claims that his release of the report was a "mistake."[32]

- Equally disturbing was the public dissemination of the draft compendium chapter on cardiovascular disease. Dr. Glantz, one of the authors of that chapter, appeared in

---

30 Speech, Stanton Glantz, 7th World Conference on Tobacco and Health, Perth, Australia, April 1990, received as Exhibit 17, p. 499.

31 S.A. Glantz and R.A. Daynard, "Safeguarding the Workplace: Health Hazards of Secondhand Smoke," Trial, June 1991.

32 Letter dated February 8, 1993, to the Honorable John D. Dingell from Richard L. Hembra, GAO.

2046395356

Boston -- with current OSHA panelist James Repace -- at the World Conference on Lung Health in late May 1990. During that appearance, Dr. Glantz gave both a presentation and news interviews on that draft chapter. Dr. Glantz used the occasion to repeat and underscore his conclusions regarding ETS issues.

- Dr. Glantz's long-standing involvement in anti-tobacco issues is further demonstrated by the activities listed on his curriculum vitae under "Public Service."[33] These include: (i) involvement in an effort to resurrect "Death in the West," a "documentary" about smoking and health; (ii) service as President, Californians for Nonsmokers' Rights; (iii) service as President, California Nonsmokers' Rights Foundation; (iv) service as President, Americans for Nonsmokers' Rights; and (v) service as President, American Nonsmokers' Rights Foundation.

While Dr. Glantz's involvement as an official OSHA witness is of serious concern in view of his demonstrated bias, OSHA may well try to contend that, bias notwithstanding, it can ask any expert it wants to testify. However, the events that transpired commencing on November 15, 16 and 17 are far more egregious and troublesome. Beginning on November 15, Dr. Glantz actually joined the OSHA panel and openly provided extensive assistance to the panel in their questions of expert witnesses appearing on behalf of the tobacco industry. In addition, Dr. Glantz personally cross-examined tobacco industry witnesses at length. When this impropriety was noted on the record, counsel for OSHA acknowledged that Dr. Glantz was formally "representing" OSHA.[34] Although several formal objections to this practice were made, OSHA nonetheless permitted Dr. Glantz to continue to cross-examine witnesses on behalf of OSHA on November 16 and 17.

III.

In addition to concerns about the OSHA panel's bias, suggested by the active involvement of Mr. Repace and Dr. Glantz, the public should also be concerned about OSHA's creation of and reliance upon its own "private docket" in developing the Proposed Rule. In response to the Agency's RFI, OSHA received over 1,200

---

[33] C.V. of Dr. Stanton Glantz, submitted to the OSHA Docket Office, August 12, 1994.

[34] OSHA Hearing Transcript, November 15, 1994, p. 5840.

2046395357

separate submissions. Many were of a highly technical nature and pertained directly to scientific and technical issues associated with indoor air quality and, specifically, environmental tobacco smoke. OSHA also created another reference docket on smoking, which contained over 200 documents. In its Proposed Rule, however, OSHA cited to documents which were apparently obtained through sources other than the public comment process.

The Agency relied upon this information from other sources far more frequently than it relied upon documents in the Docket that the RFI generated. Specifically, OSHA cited to documents from other sources (referred to by OSHA as Exhibit 4, later changed to Exhibit 8) approximately 550 times, while referencing the public comments from the RFI (referred to by OSHA as Exhibit 3) only 322 times.

This disparity is even greater with respect to the sections of the Notice of Proposed Rulemaking that address environmental tobacco smoke. For example, in the "Health Effects" section, documents from sources other than public comments were cited 282 times as opposed to 25 times for the public comments from the RFI. In the "Exposure" section, OSHA cited to documents from other sources 60 times and to public comments from the RFI only four times. Incredibly, the "Significant Risk" section contained 94 citations to documents from OSHA's "private docket" as compared with only one cite to a public comment from the RFI.

IV.

In summary, we agree with OSHA's publicly stated position that the agency must be fair and unbiased in its regulatory process. OSHA obviously should neither be operating on, nor motivated by, private anti-smoking agendas. However, the facts, as discussed above, clearly call into question OSHA's ability to rein in special interest groups who are pursuing litigation and other anti-tobacco objectives, all to the detriment of a fair and impartial administrative hearing.

Just as it would be fundamentally unfair if two tobacco industry scientists were serving on the OSHA panel -- to the predictable outcry and condemnation of the anti-tobacco community -- it is fundamentally unfair to have non-OSHA personnel who are anti-tobacco activists operating as a part of the OSHA panel, under the full force of OSHA's regulatory authority.

Therefore, for reasons outlined in this letter, it is clear that our oral testimony would neither be received nor examined by OSHA with the requisite impartiality, and as such will

2046395358

not be given. However, it is our hope that the testimony that has and will be given by numerous independent scientists, as well as concerned businessmen and women, will be received and treated fairly so that a final rule can be properly developed.

Our decision not to testify does not diminish our commitment to assist OSHA in creating a complete and accurate record -- which is necessary for the development of a revised rule that fairly and objectively reflects the best evidence available to OSHA.

Respectfully submitted,

Anthony J. Andrade
Philip Morris U.S.A.

Patrick R. Tyson
Constangy, Brooks & Smith

cc: Honorable Joseph A. Dear
Susan Sherman, Esq.
OSHA Docket Office

10971828

2046395359

EXHIBIT 1

20463953360

TOBACCO INDUSTRY FRONT GROUP UNABLE TO PROVE MINORS NOT RECRUITED

Leading Tobacco Plaintiff Trial Attorneys Cross-Examine NSA Chairman

Althaus Uncover Lack of Knowledge, Refusal to Disclose

WASHINGTON, Oct 28 /PRNewswire/ -- Ness, Motley, Loadholt, Richardson & Poole issued the following.

Under blistering cross-examination by a leading trial attorney, National Smokers Alliance (NSA) Chairman William J. Althaus was unable to verify that his organization enforces its pledge not to recruit members who are under age 21, nor could he refute allegations that solicitation letters were sent to many minors.

Althaus also claimed he had no opinion on whether tobacco is harmful or nicotine is addictive, admitted he had not read an Environmental Protection Agency study he criticized, refused to disclose his organization's funding, and called his signing of an executive order banning smoking in York, Penna., when he was mayor "an example of bad executive action."

The cross-examination took place at hearings of the Occupational Safety and Health Administration (OSHA) on a proposal to restrict smoking in the workplace. Today's exchange represented the first time that the 62 law firms representing the plaintiffs in the national nicotine addiction class action lawsuit Castano v. American Tobacco Co. joined these hearings. They will do so for the remaining three month duration of the hearings on a pro bono basis.

Asked if NSA recruiters set up tables at Grateful Dead concerts, which are attended by many teenagers, and exchanged cigarette lighters for memberships, Althaus replied, "One common way to recruit members is with on-site tables." He described recruiters as independent contractors, and that while NSA has strict guidelines for recruiting members, he could not verify whether they are followed on-site.

Asked by attorney Ronald L. Motley about a Miami Herald article reporting that NSA sponsor Philip Morris mailed out thousands of letters to their customers -- some of whom are minors -- urging them to join NSA, Althaus replied that he didn't know about that. "Did [Philip Morris] turn over their mailing lists to you?" Motley asked. Althaus again answered that he didn't know.

Motley showed OSHA an executive order Althaus signed as mayor of York banning smoking in city offices. The official policy statement said, "In all cases, the right of the nonsmoker to protect his/her health and comfort will take precedence over an employee's desire to smoke." It continued, "the City should treat nicotine addiction like any other addiction by providing financial assistance for a substance abuse treatment program."

Asked about the wisdom of the policy he signed, Althaus said, "I wasn't paying any attention to the issue at the time. . . . Did I sign it? Yes. Do I agree with that? No." Later under cross-examination, Althaus remarked, "I didn't know anything then. The executive order is an example of bad executive action." Motley asked, "From 1989 until the end of your term in 1994, you did

2046395361

nothing to change the message that smoking is bad for you." "No, I did not," Althaus replied. After retiring as mayor, in part, he said at the time, for financial reasons, Althaus became NSA chairman.

"Have you ever declared smoking to be addictive?" Motley inquired. "I don't recall," Althaus answered. "Have you ever declared environmental tobacco smoke to cause disease?" Motley followed. Althaus again said, "I don't recall."

Asked by Motley if smokers have a right to be informed about what substances are in tobacco and the impact they may have on their health, Althaus replied, "I have no opinion on that." Asked if he believes smoking is addictive, Althaus said, "I have no idea."

Motley pressed Althaus to disclose NSA's sources of funding. While admitting that tobacco interests provide financial backing for NSA, Althaus refused to specify which companies contribute and how much. The NSA chairman also refused to indicate who formed the organization, saying that he "wasn't there at the beginning."

The OSHA hearings started in September and were recently extended through January. Addressing indoor air quality, the hearings are also taking comment on an OSHA proposal requiring workplaces either to prohibit smoking or establish a separately ventilated room for smokers.

Motley cross-examined Althaus and other NSA board members on behalf of the American Medical Association, American Cancer Society, American Lung Association, American Heart Association, Association of Flight Attendants, and victims of environmental tobacco smoke. He is with the Charleston, S.C., firm of Ness, Motley, Loadholt, Richardson & Poole, one of the 62 firms that are part of the Castano litigation group.

/CONTACT: David White, Bruce Kozarsky or Enid Doggett on behalf of the law firm of Ness, Motley, part of the Castano Litigation Group, at 202-223-8700/

Copyright (c) 1994 PR Newswire
Received by NewsEDGE/LAN: 10/28/94 2:58 PM

2046395362

EXHIBIT 2

20463953 63

The University of Vermont
COLLEGE OF MEDICINE DEPARTMENT OF MEDICINE
CARDIOLOGY UNIT MARY FLETCHER UNIT
MEDICAL CENTER HOSPITAL OF VERMONT
BURLINGTON VERMONT 05405
(802) 656-2734

11 October 1988

Bob Axelrad
Director, Indoor Air Division
United States Environmental Protection Agency
Washington, DC 20460

Dear Bob,

I have reviewed the draft "Indoor Air Facts #5: Environmental Tobacco Smoke" and have a few suggestions, which I have indicated on the draft.

Rather than listing me as an additional resource for information on ETS, I suggest that you add Americans for Nonsmokers' Rights, which has published several informational materials that I and others have written on the subject of ETS and Pyramid Film and Video, which has produced the films, "Secondhand Smoke" and "On the Air." I wrote both of these films and was provided technical assistance by Jim Repace of your office. I have asked Americans for Nonsmokers' Rights to send you samples of their current printed materials. Jim Repace already has copies of the two films that I mentioned.

I appreciate the opportunity to comment on this document and believe that it will represent a helpful contribution to public understanding of issues surrounding environmental tobacco smoke. I would be happy to continue working with you and assisting you in your efforts in any way I can.

Best Wishes,

Stanton A. Glantz
Visiting Professor of Medicine

SAG/np

2046395364

code of federal regulations

COPY 2 RESERVE

Labor Exhibit B

29

PARTS 1911 TO 1925

Revised as of July 1, 1993

20463955365

PART 1911—RULES OF PROCEDURE FOR PROMULGATING, MODIFYING, OR REVOKING OCCUPATIONAL SAFETY OR HEALTH STANDARDS

Sec.

AUTHORITY: Secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); secs. 1, 4, Walsh-Healey Public Contracts Act (41 U.S.C. 35, 38); secs. 2, 4, Service Contracts Act of 1965 (41 U.S.C. 351, 353); sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); sec. 41, Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 941); sec. 5(j)(2), National Foundation on Arts and Humanities Act (20 U.S.C. 954(j)(2)); 5 U.S.C. 553; Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (48 FR 35736), as applicable. Sections 1911.12 and 1911.18 also issued under 29 CFR Part 1911.

SOURCE: 36 FR 17507, Sept. 1, 1971, unless otherwise noted.

§ 1911.1 Purpose and scope.

This part sets forth rules of procedure for promulgating, modifying, or revoking occupational safety or health standards under section 6(b) (1), (2), (3), and (4) of the Williams-Steiger Occupational Safety and Health Act of 1970 and under any of the particular statutes listed in § 1911.2(d) which may also cover the employments affected by the standards. The purpose of the rules is to provide for single proceedings in the setting of standards under the several statutes, in order to assure uniformity of the standards to be enforced under the several statutes and in order to avoid needless multiplicity of rulemaking proceedings dealing with the same subjects and issues relating to occupational safety and health standards.

§ 1911.2 Definitions.

As used in this part, unless the context clearly requires otherwise—

(a) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health.

(b) *Act* means the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590; 29 U.S.C. 650).

(c) *Standard* means an occupational safety and health standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment, and which is to be promulgated, modified, or revoked in accordance with section 6(b) (1), (2), (3), and (4) of the Act.

(d) *Particular statute* means any of the following statutes of particular application: The Act of June 30, 1936, commonly known as the Walsh-Healey Public Contracts Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), the Construction Safety Act (40 U.S.C. 333), the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 941), or the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.).

§ 1911.3 Petition for the promulgation, modification, or revocation of a standard.

Any interested person may file with the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, D.C. 20210, a written petition for the promulgation, modification, or revocation of a standard. The petition should include, or be accompanied by, the proposed rule desired and a statement of the reasons therefor and intended effect thereof.

§ 1911.4 Additional or alternative procedural requirements.

Upon reasonable notice to interested persons, the Assistant Secretary may in any particular proceeding prescribe additional or alternative procedural requirements:

20463936

(a) In order to expedite the conduct of the proceeding; (b) in order to provide greater procedural protection to interested persons whenever it is found necessary or appropriate to do so; or (c) for any other good cause which may be consistent with the applicable laws.

§1911.5 Minor changes in standards.

Section 6(b), when construed in light of the rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 553), is read as permitting the making of minor rules or amendments in which the public is not particularly interested without the notice and public procedure which is otherwise required. Whenever such a minor rule or amendment is adopted, it shall incorporate a finding of good cause to this effect for not providing notice and public procedure.

[37 FR 8664, Apr. 29, 1972]

COMMENCEMENT OF RULEMAKING

§1911.10 Construction standards.

The Assistant Secretary may promulgate, modify, or revoke a standard applicable to employments in construction work, as defined in §1910.12(b) of this chapter, in the following manner:

(a) The Assistant Secretary shall consult with the Advisory Committee on Construction Safety and Health, established pursuant to section 107 of the Contract Work Hours and Safety Standards Act, in the formulation of a rule to promulgate, modify, or revoke a standard. The Assistant Secretary shall provide the committee with any proposal of his own or the Secretary of Health, Education, and Welfare, together with all pertinent factual information available to him, including the results of research, demonstrations, and experiments. The committee shall submit to the Assistant Secretary its recommendations regarding the rule to be promulgated within the period prescribed by the Assistant Secretary, which in no event shall be longer than 270 days from the date of initial consultation.

(b) Within 60 days after the submission of the committee's recommendations or after the expiration of the period prescribed for such submissions, whichever date is earlier, the Assistant Secretary, if he determines that a rule should be issued, shall publish in the FEDERAL REGISTER a notice of proposed rulemaking. The notice shall include:

(1) The terms of the proposed rule;

(2) A reference to section 6(b) of the Act and to section 107 of the Contract Work Hours and Safety Standards Act;

(3) An invitation to interested persons to submit within 30 days after publication of the notice written data, views, and arguments, which shall be available for public inspection and copying, except as to matters the disclosure of which is prohibited by law;

(4) The time and place for an informal hearing to be commenced not earlier than 10 days following the end of the period for written comments;

(5) A requirement for the filing of an intention to appear at the hearing, together with a statement of the position to be taken with regard to the proposed rule and of the evidence to be adduced in support of the position;

(6) Designation of a presiding officer to conduct the hearing; and

(7) Any other appropriate provisions pertinent to the proceeding.

(c) Any interested person who files an intention to appear in accordance with paragraph (b) of this section shall have a right to participate at the informal hearing.

(d) In lieu of the procedure prescribed in paragraph (b) of this section, the Assistant Secretary may follow the procedure prescribed in paragraph (b) of §1911.11 providing an opportunity for informal hearing.

[36 FR 17507, Sept. 1, 1971, as amended at 37 FR 12231, June 21, 1972]

§1911.11 Other standards.

The Assistant Secretary may promulgate, modify, or revoke a standard applicable to employments other than those in construction work, as defined in §1910.12(b) of this chapter, in the following manner:

(a) The Assistant Secretary may request the recommendations of an advisory committee appointed under section 7 of the Act. In such event, the Assistant Secretary shall submit to the committee any proposal of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information available to

20463953367

him, including the results of research, demonstrations, and experiments. The committee shall submit to the Assistant Secretary its recommendations regarding the rule to be promulgated within the period prescribed by the Assistant Secretary, which in no event shall be longer than 270 days.

(b) The Assistant Secretary shall publish in the FEDERAL REGISTER a notice of proposed rulemaking. Where an advisory committee has been consulted and the Assistant Secretary determines that a rule should be issued, the notice shall be published within 60 days after the submission of the committee's recommendations or the expiration of the period prescribed for such submissions, whichever date is earlier. The notice shall include:

(1) The terms of the proposed rule;

(2) A reference to section 6(b) of the Act and to the appropriate section of any particular statute applicable to the employments affected by the rule;

(3) An invitation to interested persons to submit within 30 days after publication of the notice written data, views, and arguments, which shall be available for public inspection and copying, except as to matters the disclosure of which is prohibited by law;

(4) Either the time and place of an informal hearing on the proposed rule to be held not earlier than 10 days from the last day of the period for written comments, or information to interested persons that they may file on or before the 30th day after publication of the notice written objections to the proposed rule meeting the requirements of paragraph (c) of this section and request an informal hearing on the objections; and

(5) Any other appropriate provisions with regard to the proceeding.

(c) Objections to be submitted pursuant to paragraph (b) of this section shall comply with the following conditions:

(1) The objections must include the name and address of the objector;

(2) The objections must be postmarked on or before the 30th day after the date of publication of the notice of proposed rulemaking;

(3) The objections must specify with particularity the provision of the proposed rule to which objection is taken, and must state the grounds therefor;

(4) Each objection must be separately stated and numbered; and

(5) The objections must be accompanied by a summary of the evidence proposed to be adduced at the requested hearing.

(d) Within 30 days after the last day for filing objections, if objections are filed in substantial compliance with paragraph (c) of this section, the Assistant Secretary shall, and in any other case may, publish in the FEDERAL REGISTER a notice of informal hearing. The notice shall contain:

(1) A statement of the time, place, and nature of the hearing;

(2) A reference to the authority under which the hearing is to be held;

(3) A specification of the provisions of the proposed rule which have been objected to, and on which an informal hearing has been requested;

(4) A specification of the issues on which the hearing is to be had, which shall include at least all the issues raised by any objections properly filed, on which a hearing has been requested;

(5) The requirement for the filing of an intention to appear at the hearing together with a statement of the position to be taken with regard to the issues specified and of the evidence to be adduced in support of the position;

(6) The designation of a presiding officer to conduct the hearing; and

(7) Any other appropriate provisions with regard to the proceeding.

(e) Any objector requesting a hearing on proposed rule, and any interested person who files a proper intention to appear shall be entitled to participate at a hearing.

§ 1911.12 Emergency standards.

(a)(1) Whenever an emergency standard is published pursuant to section 6(c) of the Act, the Assistant Secretary must commence a proceeding under section 6(b) of the Act, and the standard as published must serve as a proposed rule. Any notice of proposed rulemaking shall also give notice of any appropriate subsidiary proposals.

(2) An emergency standard promulgated pursuant to section 6(c) of the Act shall be considered issued at the time when the standard is officially

20463953 68

filed in the Office of the Federal Register. The time of official filing in the Office of the Federal Register is established for the purpose of determining the prematurity, timeliness, or lateness of petitions for judicial review.

(b) If the Assistant Secretary wishes to consult an advisory committee on any of the proposals as permitted by section 7(b) of the Act, he shall afford interested persons an opportunity to inspect and copy any recommendations of the advisory committee within a reasonable time before the commencement of any informal hearing which may be held under this part, or before the termination of the period for the submission of written comments whenever an informal hearing is not initially noticed under §1910.11(b)(4) of this chapter.

(c) Section 6(c) requires that any standard must be promulgated following the rulemaking proceeding within 6 months after the publication of the emergency standard. Because of the shortness of this period, the conduct of the proceeding shall be expedited to the extent practicable.

[37 FR 8664, Apr. 29, 1972, as amended at 42 FR 65166, Dec. 30, 1977]

Hearings

§1911.15 Nature of hearing.

(a)(1) The legislative history of section 6 indicates that Congress intended informal rather than formal rulemaking procedures to apply. See the Conference Report, H. Rept. No. 91-1765, 91st Cong., second sess., 34 (1970). The informality of the proceedings is also suggested by the fact that section 6(b) permits the making of a decision on the basis of written comments alone (unless an objection to a rule is made and a hearing is requested), the use of advisory committees, and the inherent legislative nature of the tasks involved. For these reasons, the proceedings pursuant to §1911.10 or §1911.11 shall be informal.

(2) Section 6(b)(3) provides an opportunity for a hearing on objections to proposed rulemaking, and section 6(f) provides in connection with the judicial review of standards, that determinations of the Secretary shall be conclusive if supported by substantial evidence in the record as a whole. Although these sections are not read as requiring a rulemaking proceeding within the meaning of the last sentence of 5 U.S.C. 553(c) requiring the application of the formal requirements of 5 U.S.C. 556 and 557, they do suggest a congressional expectation that the rulemaking would be on the basis of a record to which a substantial evidence test, where pertinent, may be applied in the event an informal hearing is held.

(3) The oral hearing shall be legislative in type. However, fairness may require an opportunity for cross-examination on crucial issues. The presiding officer is empowered to permit cross-examination under such circumstances. The essential intent is to provide an opportunity for effective oral presentation by interested persons which can be carried out with expedition and in the absence of rigid procedures which might unduly impede or protract the rulemaking process.

(b) Although any hearing shall be informal and legislative in type, this part is intended to provide more than the bare essentials of informal rulemaking under 5 U.S.C. 553. The additional requirements are the following:

(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

(2) The presiding officer shall provide an opportunity for cross-examination on crucial issues.

(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

[37 FR 8664, Apr. 29, 1972, as amended at 37 FR 12231, June 21, 1972]

§1911.16 Powers of presiding officer.

The officer presiding at a hearing shall have all the powers necessary or appropriate to conduct a fair and full hearing, including the powers:

(a) To regulate the course of the proceedings;

(b) To dispose of procedural requests, objections, and comparable matters;

(c) To confine the presentations to the issues specified in the notice of hearing, or, where no issues are speci-

20463953369

fied, to matters pertinent to the proposed rule;

(d) To regulate the conduct of those present at the hearing by appropriate means;

(e) In his discretion, to permit cross-examination of any witness;

(f) To take official notice of material facts not appearing in the evidence in the record, so long as parties are entitled, on timely request, to an opportunity to show the contrary; and

(g) In his discretion, to keep the record open for a reasonable, stated time to receive written recommendations, and supporting reasons, and additional data, views, and arguments from any person who has participated in the oral proceeding.

§ 1911.17 Certification of the record of a hearing.

Upon completion of the oral presentations, the transcript thereof, together with written submissions on the proposed rule, exhibits filed during the hearing, and all posthearing comments, recommendations, and supporting reasons shall be certified by the officer presiding at the hearing to the Assistant Secretary.

§ 1911.18 Decision.

(a)(1) Within 60 days after the expiration of the period provided for the submission of written data, views, and arguments on a proposed rule on which no hearing is held, or within 60 days after the certification of the record of a hearing, the Assistant Secretary shall publish in the FEDERAL REGISTER either an appropriate rule promulgating, modifying, or revoking a standard, or a determination that such a rule should not be issued. The action of the Assistant Secretary shall be taken after consideration of all relevant matter presented in written submissions and in any hearings held under this part.

(2) A determination that a rule should not be issued on the basis of existing relevant matter may be accompanied by an invitation for the submission of additional data, views, or arguments from interested persons on the issue or issues involved. In which event, an appropriate rule or other determination shall be made within 60 days following the end of the period allowed for the submission of the additional comments.

(b) Any rule or standard adopted under paragraph (a) of this section shall incorporate a concise general statement of its basis and purpose. The statement is not required to include specific and detailed findings and conclusions of the kind customarily associated with formal proceedings. However, the statement will show the significant issues which have been faced, and will articulate the rationale for their solution.

(c) Where an advisory committee has been consulted in the formulation of a proposed rule, the Assistant Secretary may seek the advice of the advisory committee as to the disposition of the proceeding. In giving advice to the Assistant Secretary, an advisory committee shall consider all matter presented to the Assistant Secretary. The advice of an advisory committee shall take the form of written recommendations to be submitted to the Assistant Secretary within a period to be prescribed by him. When the recommendations are contained in the transcript of the meeting of an advisory committee, they shall be summary in form. See §§ 1912.33 and 1912.34 of this chapter.

(d) A rule promulgating, modifying, or revoking a standard, or a determination that a rule should not be promulgated, shall be considered issued at the time when the rule or determination is officially filed in the Office of the Federal Register. The time of official filing in the Office of the Federal Register is established for the purpose of determining the prematurity, timeliness, or lateness of petitions for judicial review.

[37 FR 3665, Apr. 29, 1972, as amended at 42 FR 65166, Dec. 30, 1977]

PART 1912—ADVISORY COMMITTEES ON STANDARDS

Sec.

20463953370

2046395371

64209

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

January 6, 1995

John F. Banzhaf III
Executive Director and Chief Counsel
Action on Smoking and Health
2013 H Street, N.W.
Washington, DC 20006

Re: Notice of Proposed Rulemaking
Docket No. H 122

Dear Mr. Banzhaf:

This letter responds to your December 23, 1994 correspondence regarding the above referenced rulemaking proceeding.

Your request to strike from the record of the proceeding "all records of cross examination conducted by Philip Morris or other tobacco industry interests" is denied. The Prehearing Guidelines for this proceeding make it clear that the hearing is to be informal and favor the inclusion of all relevant testimony and evidence.[1] I agree that it would have been preferable for Philip Morris to provide its witnesses for cross examination. However, to grant your requests would also fail to promote the development of a complete record. The fact finding body will, at the appropriate time, decide how much weight to give all testimony and evidence in light of the events that have transpired throughout the entire proceeding.

I will place your requests in the record at the hearing.

Sincerely,

John M. Vittone

John M. Vittone,
Deputy Chief Judge

JMV/eca

cc: Anthony Andrade, Esq.
Patrick Tyson, Esq.
The Honorable Joseph A. Dear
Susan Sherman, Esq.

---

[1] The Prehearing Guidelines state, in relevant part:

> Since the hearing is primarily for information gathering and clarification, it is an informal administrative proceeding, rather than an adjudicative one. The technical rules of evidence, for example, do not apply. The procedural rules that govern the hearing and these guidelines are intended to assure fairness and due process and also to facilitate the development of a clear, accurate and complete record. These rules and guidelines will not be interpreted in a manner that might thwart that development. Thus, questions of relevance generally will be decided liberally, in favor of inclusion.

2046396372

20463953 73

473

Virginia Group to Alleviate Smoking in Public, Inc. GASP®

4856 Haygood Road, Virginia Beach, Virginia 23455
804/490-2905 or 1-800-DR GASP 1 (1-800-374-2771) FAX 804/795-2447

"... to know that even one life has breathed easier because you have lived - this is to have succeeded." R. W Emerson

---

August 31, 1995

Regarding United States Occupational Safety and Health Administration.
Indoor Air Quality Standard Proposal
MOTION ONE: A motion to disqualify the Philip Morris USA written testimony

Copies to:

The Honorable Judge John M. Vittone, Acting Chief Administrative Law Judge,
800 K St., N.W., Washington, D.C. 20001-8002
The Honorable Assistant Secretary of Labor Joseph Dear,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W , Washington, D.C. 20210
Susan Sherman, Solicitor's Office, OSHA, Department of Labor, Room S 4004,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W , Washington, D.C. 20210
Deborah James, OSHA Health Standards, Department of Labor, N 3718,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W , Washington, D.C. 20210
Docket Office, Docket No. H-122, Room N-2624, Post Hearing Comments,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, D.C. 20210
Philip Morris USA, Philip Morris Co., Dr. Richard A. Carchman, Director of Scientific Affairs;
Dr. George J. Patskan, Senior Research Scientist, [4201 Commerce Road, Richmond, VA 23234]; Dr. Thomas J. Borelli, Director of Science and Environmental Policy, Philip Morris Management Corp., 120 Park Ave. 24th Floor, New York, NY 10017.
Attorneys for Philip Morris USA, Tobacco Institute
John Rupp of Covington & Burling
1201 Pennsylvania Ave. N.W. Washington, D.C. 20044
Pat Tyson of Constangy, Brooks, & Smith
230 Peachtree St. N.W. Suite 2400, Atlanta, GA 30303-1557

Greetings:

This is a motion to disqualify the written Philip Morris USA testimony submitted to OSHA in 1994. It is my understanding that it is not necessary for an attorney to file this motion.

Background and Reasons to disqualify and remove the written comments:

Each person/company who filed a Notice of Intention to Appear was required to (1) submit written testimony, (2) testify in person, (3) be cross examined by anyone wishing to do so, (4) have the option of cross examining other witnesses, (5) have the option of preparing post hearing comments, and (6) have the option of responding to post hearing comments.

On August 4, 1994, Philip Morris USA filed the Notice of Intention to Appear. They filed written testimony. They did not, however, testify before the public. Certainly we each were given the rules, and asked to abide by them. Only Philip Morris refused to abide by those rules. They filed a Notice of Intention to Appear, were scheduled to testify publicly in September, and that was rescheduled to December 1. They did not testify. This meant that they could actually have their cake and eat it too.

2046395374

Certainly there might be personal circumstances preventing some people from being able to attend and testify, such as illness. This is clearly not the case for a company such as Philip Morris USA with thousands of employees and numerous attorneys hired by the company.

The tobacco industry including Philip Morris had hired attorneys to represent them at the hearings, and to cross examine the witnesses. In fact considerable time was consumed with those questions, delaying action by OSHA on the standard.

It became apparent to myself that it was essential to have attorneys representing the health advocates, although my organization had no funds, unlike the tobacco industry. Late in the fall attorneys were engaged by health advocates to cross examine witnesses

It was after these attorneys were engaged, and the majority of the witnesses supporting the OSHA standard regarding the smoke-free workplace had testified and been cross examined by Philip Morris and Tobacco Institute attorneys, that Philip Morris USA withdrew and did not testify. It could reasonably be assumed that Philip Morris changed its mind about testifying because it did not wish to face cross examination by these attorneys.

Nonetheless, the rest of the witnesses appeared in good faith, and were cross examined by tobacco industry attorneys and representatives. Some were questioned for almost an entire day. I myself was questioned for over an hour.

Although Philip Morris used the opportunity to question me, I was denied the right to question, or to have my representatives question, Philip Morris USA about its testimony.

The appearance of preferential treatment is given when a massive, wealthy, and powerful company which is one of the main opponents of the OSHA standard is permitted to suddenly "change its mind" about testifying, while everyone else is expected to play by the rules.

As noted, while many of the witnesses supporting the indoor air quality standard were cross examined by Philip Morris and Tobacco Institute attorneys, those same witnesses were denied the right to cross examine Philip Morris. In a recent advertisement sponsored by Philip Morris in which they say that they accept the apology of ABC, they make a plea:

"The tobacco industry is subject to relentless attacks. And our response to accusations like 'spiking' are often disregarded by the media and our critics. Here's all we ask: When charges are leveled against us, don't take them at face value. Instead, consider the information we provide, and then - just as importantly - subject the charges themselves to the scrutiny and skepticism they deserve. Fairness and a sincere interest in the truth demand no less."

But when Virginia GASP was ready to "*consider the information*" which Philip Morris provided, or have our representatives do so, Philip Morris did not permit that to happen, and we were denied our rights under the OSHA rules. Is it not arrogant for the major industry which opposes the OSHA indoor air quality standard to refuse to be questioned by OSHA, and by other witnesses? **Thus they were permitted to "hit and run".** They could level all sorts of charges, make insinuations, try to trash the science used by OSHA, and no one could ask them to explain their reasons, their research, their background, etc.

Philip Morris had ample opportunity to testify publicly, and be cross examined. The hearings continued from September of 1994 to the spring of 1995. They were delayed in part because of much cross examination from the tobacco industry.

2049395375

If their written testimony is permitted to remain in the record and is given any weight whatsoever by OSHA, then it will be obvious that there is a double standard at the Administrative Law Judge and the OSHA levels. There would be one standard for Philip Morris, and there would be another standard for everyone else. This would set a precedent for industries in future regulatory processes.

The media and others are predicting that Philip Morris probably will sue OSHA. But the decision on disqualifying the Philip Morris written testimony would of course be based on its own merits, and not on threat of a suit which may well come no matter what.

Consider also that Geoffrey Bible, the chief executive officer of Philip Morris, and a smoker (unlike the previous CEO), told the shareholders in April of 1995 that OSHA would not be issuing the prohibition on smoking in the workplace. Instead, he said, the regulation would be significantly reduced. I hold one share of stock in Philip Morris, which gives me a vote at the meetings, and I was present and heard Mr. Bible's remarks to the shareholders. This statement was being made while the regulatory process was and is still in progress. He did not state his as a prediction, but as a flat assurance.

Please remove the Philip Morris written testimony from the record, disqualify it, and place no value whatsoever on their written testimony.

In their own words, "Fairness and a sincere interest in the truth demand no less."

I am filing a second motion to disqualify all cross examination questions by any attorney hired by Philip Morris or the Tobacco Institute [which counts Philip Morris as a member], and their subsequent answers, and to disqualify any post comment hearing text or responses thereto from Philip Morris and their attorneys.

-- END --

2049393376

473

Virginia Group to Alleviate Smoking in Public, Inc. GASP[R]

4856 Haygood Road, Virginia Beach, Virginia 23455
804/490-2905 or 1-800-DR GASP 1 (1-800-374-2771) FAX 804/795-2447
Hilton Oliver, Executive Director
Anne Morrow Donley, National Issues Liaison

"... to know that even one life has breathed easier because you have lived - this is to have succeeded." R. W. Emerson

---

August 31, 1995

Post Hearing Comments submitted by Anne Morrow Donley, on behalf of Virginia GASP
United States Occupational Safety and Health Administration
Proposed Regulations on indoor air quality standard

Docket Office
Docket No. H-122, Room N-2624, Post Hearing Comments
U.S. Dept. of Labor
OSHA
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Thank you for the opportunity to have post hearing comments.

Please note the change of address: 4856 Haygood Drive, Virginia Beach Virginia 23455

Included as additional materials are the following:

General Statement
Letter from Steve Amos
Information regarding the Diamond Stadium in Richmond, Virginia
Synopsis of papers by Joseph R. DiFranza, M.D. and Robert A. Law, Ph.D.
Copy of Affidavit of Jeffrey Wigand, Ph.D.
Motion One and Motion Two regarding the written testimony of Philip Morris
Advertisement sponsored by Philip Morris

1995

20463953877

General Statement (pages 2-4):

Virginia Group to Alleviate Smoking in Public, Inc. continues to support a national regulation by OSHA to prohibit smoking in the workplace, unless a separately ventilated smoking lounge is provided, as noted in the regulation information.

Steve Amos

In the testimony already presented, and in the video which was part of that testimony, Suzanne Bennett was mentioned. She is an employee of the Virginia Department of Taxation. Her employer gave her a respirator to wear rather than ask the smokers to stop smoking in the workplace. Later, following much publicity and a workers compensation case, smoking was prohibited in the immediate room where Ms. Bennett works. It is still permitted in other parts of the building.

We want to add to the record the letter and information sent in by Steve Amos from Danville, Virginia. Mr. Amos notes that a no-smoking break area was established near his work space. It was later changed to a smoking break area. Then the majority of the workers on all three shifts asked that it be a no-smoking area. But two smokers filed a grievance to have it be a smoking area, and the union supported them. Mr. Amos details and provides information about his effort to have it be a no-smoking break area. Mr. Amos works in a part of Virginia which is considered to be a tobacco city. Mr. Amos sought help from his union, but he notes that they are smokers and supported the smoking in the break area. Mr. Amos reports that his health was made worse by the environmental tobacco smoke, and he was fitted with a respirator.

It is also important to note that not only did his employer, Goodyear Tire Co., get him the respirator to wear, instead of declaring the area no-smoking, but when Mr. Amos went to the arbitration, the company had R.J. Reynolds as a witness. Mr. Amos went through all the normal procedures of his company, receiving no help from the company or the union which is supposed to represent the workers.

Although Virginia state law in section 40.1-51.1 states that every employee has the right to a workplace safe from recognized hazards, Mr. Amos was not protected by the state either.

The Diamond, a stadium in Richmond, Virginia

Here is an example of a tobacco industry helping to make a health policy for an area which is a workplace for many, a place of recreation for others, and where little children as well as adults attend.

Attached is correspondence which states that out of 10 International League Club Stadiums, only two have no policy on no-smoking at all. One of these is a large sports stadium in Richmond, Virginia. The public relations manager of The Richmond Braves Baseball Club notes that, "***The club is corresponding with Philip Morris, a Virginia-based cigarette manufacturer, in order to enact smoking policies within the stadium for the 1996 baseball season.***"

This is reminiscent of the Virginia Employment Commission which in the 1980's sent its policy to Philip Morris for their comments. Philip Morris approved it; the policy prohibited smoking only around volatile chemicals.

2049395378

The writer obviously is unaware of a 1994 amendment to the Virginia Indoor Clean Air Act which requires him (as a large recreational facility) to provide at least some non-smoking areas.

Joseph R. DiFranza, M.D. and Robert A. Lew, Ph.D.

A synopsis of two papers, one published in 1995 and the other in press, is included. One deals with smoking and pregnancy. This is attached because if smoking is prohibited in the workplace, pregnant women and the unborn would be protected from environmental tobacco smoke. The other paper deals with children and environmental tobacco smoke. Although it is looking at household smoking, it is understandable that workplace smoking would present similar problems for children and adults. Also, children are present in many workplaces such as restaurants, family events at hotels and casinos, retail stores, recreational facilities, etc. A regulation making the workplace smoke-free would protect the pregnant women, the unborn, and the children, as well as everyone else.

Firesafe Cigarette

Attached also is a copy of the affidavit, signed July 21, 1995, of Jeffrey Wigand, Ph.D., a biochemist/endocrinologist who was Vice President of Research, Development and Environmental for Brown and Williamson Tobacco Company. He states that "The technology to develop a cigarette with a significantly reduced ignition propensity by reducing tobacco packing density and/or paper porosity and/or circumference has been available for at least 30 years." He notes that a firesafe cigarette "need not change the tobacco blend in any respect." He also states that it would be "a simple matter" to produce such a cigarette.

While health is the primary concern regarding environmental tobacco smoke, safety is also a concern. Keeping the fires outdoors would reduce the safety hazard indoors from smoking. That the tobacco industry has known for 30 years how to produce a firesafe cigarette, and apparently not yet done so is important to note when considering their comments on science.

Disqualify the Philip Morris written testimony

Two motions are included which ask that the written testimony of Philip Morris be disqualified. One motion asks further that any cross examination of witnesses and the answers to that cross examination be disqualified when the cross examination was conducted by attorneys hired by Philip Morris or The Tobacco Institute, which has Philip Morris as a member.

Certainly we each were given the rules, and asked to abide by them. Only Philip Morris refused to abide by those rules. They filed a Notice of Intention to Appear, were scheduled to testify publicly in September, and that was rescheduled to December 1. They did not testify. This meant that they could actually have their cake and eat it too.

2046395379

While many of the witnesses supporting the indoor air quality standard were cross examined by Philip Morris and Tobacco Institute attorneys, those same witnesses were denied the right to cross examine Philip Morris. In a recent advertisement sponsored by Philip Morris in which they say that they accept the apology of ABC, they make a plea:

"The tobacco industry is subject to relentless attacks. And our responses to accusations like 'spiking' are often disregarded by the media and our critics. Here's all we ask. When charges are leveled against us, don't take them at face value. Instead, consider the information we provide, and then - just as importantly - subject the charges themselves to the scrutiny and skepticism they deserve. Fairness and a sincere interest in the truth demand no less."

But when Virginia GASP was ready to "*consider the information*" which Philip Morris provided, or have our representatives do so, Philip Morris did not permit that to happen, and we **were denied our rights under the OSHA rules**. Is it not arrogant for the major industry which opposes the OSHA indoor air quality standard to refuse to be questioned by OSHA, and by other witnesses? **Thus they were permitted to "hit and run".** They could level all sorts of charges, make insinuations, try to trash the science used by OSHA, and no one could ask them to explain their reasons, their research, their background, etc.

Philip Morris had ample opportunity to testify publicly, and be cross examined. The hearings continued from September of 1994 to the spring of 1995. They were delayed in part because of much cross examination from the tobacco industry.

If their written testimony is permitted to remain in the record and is given any weight whatsoever by OSHA, then it will be obvious that there is a **double standard** at the Administrative Law Judge and the OSHA levels. There would be one standard for Philip Morris, and there would be another standard for everyone else. This would set a precedent for industries in future regulatory processes.

The media and others are predicting that Philip Morris probably will sue OSHA. But the decision on disqualifying the Philip Morris written testimony would of course be based on its own merits, and not on threat of a suit which may well come no matter what.

Consider also that Geoffrey Bible, the chief executive officer of Philip Morris, and a smoker (unlike the previous CEO), told the shareholders in April of 1995 that OSHA would not be issuing the prohibition on smoking in the workplace. Instead, he said, the regulation would be significantly reduced. Arrogance from the seat of power, proclaiming what OSHA will do even before the process is completed. I hold one share of stock in Philip Morris which gives me a vote at the meetings, and I was present and heard Mr. Bible's remarks to the shareholders.

Please remove the Philip Morris written testimony from the record disqualify it, and place no value whatsoever on their written testimony. We further ask that any cross examination and the answers thereto be disqualified when the cross examination was conducted by attorneys hired by Philip Morris or by The Tobacco Institute of which Philip Morris is a member.

In their own words, "Fairness and a sincere interest in the truth demand no less."

Thank you for your consideration.

2046395380

487A

Virginia Group to Alleviate Smoking in Public, Inc. GASP[R]

4856 Haygood Road, Virginia Beach, Virginia 23455
804/490-2905 or 1-800-DR GASP 1 (1-800-374-2771) **FAX** 804/795-2447

"... to know that even one life has breathed easier because you have lived - this is to have succeeded." R. W. Emerson

---

August 31, 1995

Regarding United States Occupational Safety and Health Administration,
Indoor Air Quality Standard Proposal
MOTION TWO: A motion to disqualify all cross examination questions by any attorney hired by Philip Morris or the Tobacco Institute [which counts Philip Morris as a member], and the subsequent answers to those questions, and to disqualify any post comment hearing text or responses thereto from Philip Morris and their attorneys.

Copies to:

The Honorable Judge John M. Vittone, Acting Chief Administrative Law Judge,
800 K St., N.W., Washington, D.C. 20001-8002
The Honorable Assistant Secretary of Labor Joseph Dear,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, D.C. 20210
Susan Sherman, Solicitor's Office, OSHA, Department of Labor, Room S 4004,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, D.C. 20210
Deborah James, OSHA Health Standards, Department of Labor, N 3718,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, D.C. 20210
Docket Office, Docket No. H-122, Room N-2624, Post Hearing Comments,
U.S. Dept. of Labor, OSHA, 200 Constitution Avenue, N.W., Washington, D.C. 20210
Philip Morris USA, Philip Morris Co., Dr. Richard A. Carchman, Director of Scientific Affairs;
Dr. George J. Patskan, Senior Research Scientist, [4201 Commerce Road, Richmond, VA 23234]; Dr. Thomas J. Borelli, Director of Science and Environmental Policy, Philip Morris Management Corp., 120 Park Ave. 24th Floor, New York, NY 10017.
Attorneys for Philip Morris USA, Tobacco Institute
John Rupp of Covington & Burling
1201 Pennsylvania Ave. N.W. Washington, D.C. 20044
Pat Tyson of Constangy, Brooks, & Smith
230 Peachtree St. N.W. Suite 2400, Atlanta, GA 30303-1557

Greetings:

This is a motion in regard to the OSHA Indoor Air Quality Standard hearings to disqualify all cross examination questions by any attorney hired by Philip Morris or the Tobacco Institute [which counts Philip Morris as a member], and the subsequent answers to those questions, and to disqualify any post comment hearing text or responses thereto from Philip Morris and their attorneys.

It is my understanding that it is not necessary for an attorney to file this motion.

The text of this motion is similar to that of Motion One, differing primarily in the last few paragraphs.

2046395381

Background and Reasons to disqualify:

Each person/company who filed a Notice of Intention to Appear was required to: (1) submit written testimony, (2) testify in person, (3) be cross examined by anyone wishing to do so, (4) have the option of cross examining other witnesses, (5) have the option of preparing post hearing comments, and (6) have the option of responding to post hearing comments.

On August 4, 1994, Philip Morris USA filed the Notice of Intention to Appear. They filed written testimony. They did not, however, testify before the public. Certainly we each were given the rules, and asked to abide by them. Only Philip Morris refused to abide by those rules. They filed a Notice of Intention to Appear, were scheduled to testify publicly in September, and that was rescheduled to December 1. They did not testify. This meant that they could actually have their cake and eat it too.

Certainly there might be personal circumstances preventing some people from being able to attend and testify, such as illness. This is clearly not the case for a company such as Philip Morris USA with thousands of employees and numerous attorneys hired by the company.

The tobacco industry including Philip Morris had hired attorneys to represent them at the hearings, and to cross examine the witnesses. In fact considerable time was consumed with those questions, delaying action by OSHA on the standard.

It became apparent to myself that it was essential to have attorneys representing the health advocates, although my organization had no funds, unlike the tobacco industry. Late in the fall attorneys were engaged by health advocates to cross examine witnesses.

It was after these attorneys were engaged, and the majority of the witnesses supporting the OSHA standard regarding the smoke-free workplace had testified and been cross examined by Philip Morris and Tobacco Institute attorneys, that Philip Morris USA withdrew and did not testify. It could reasonably be assumed that Philip Morris changed its mind about testifying because it did not wish to face cross examination by these attorneys.

Nonetheless, the rest of the witnesses appeared in good faith, and were cross examined by tobacco industry attorneys and representatives. Some were questioned for almost an entire day. I myself was questioned for over an hour.

Although Philip Morris used the opportunity to question me, I was denied the right to question, or to have my representatives question, Philip Morris USA about its testimony.

The appearance of preferential treatment is given when a massive, wealthy, and powerful company which is one of the main opponents of the OSHA standard is permitted to suddenly "change its mind" about testifying, while everyone else is expected to play by the rules.

As noted, while many of the witnesses supporting the indoor air quality standard were cross examined by Philip Morris and Tobacco Institute attorneys, those same witnesses were denied the right to cross examine Philip Morris. In a recent advertisement sponsored by Philip Morris in which they say that they accept the apology of ABC, they make a plea:

"The tobacco industry is subject to relentless attacks. And our responses to accusations like 'spiking' are often disregarded by the media and our critics. Here's all we ask: When charges are leveled against us, don't take them at face value. Instead, consider the information we provide, and then - just as importantly - subject the charges themselves to the scrutiny and skepticism they deserve. Fairness and a sincere interest in the truth demand no less."

2046395382

But when Virginia GASP was ready to "*consider the information*" which Philip Morris provided, or have our representatives do so, Philip Morris did not permit that to happen, and we **were denied our rights under the OSHA rules.** Is it not arrogant for the major industry which opposes the OSHA indoor air quality standard to refuse to be questioned by OSHA, and by other witnesses? **Thus they were permitted to "hit and run".** They could level all sorts of charges, make insinuations, try to trash the science used by OSHA, and no one could ask them to explain their reasons, their research, their background, etc.

Philip Morris had ample opportunity to testify publicly, and be cross examined. The hearings continued from September of 1994 to the spring of 1995. They were delayed in part because of much cross examination from the tobacco industry.

If their written testimony is permitted to remain in the record and is given any weight whatsoever by OSHA, then it will be obvious that there is a **double standard** at the Administrative Law Judge and the OSHA levels. There would be one standard for Philip Morris, and there would be another standard for everyone else. This would set a precedent for industries in future regulatory processes.

The media and others are predicting that Philip Morris probably will sue OSHA. But the decision on disqualifying the Philip Morris written testimony would of course be based on its own merits, and not on threat of a suit which may well come no matter what.

Consider also that Geoffrey Bible, the chief executive officer of Philip Morris, and a smoker (unlike the previous CEO), told the shareholders in April of 1995 that OSHA would not be issuing the prohibition on smoking in the workplace. Instead, he said, the regulation would be significantly reduced. I hold one share of stock in Philip Morris, which gives me a vote at the meetings, and I was present and heard Mr. Bible's remarks to the shareholders. This statement was being made while the regulatory process was and is still in progress. He did not state this as a prediction, but as a flat assurance.

Please disqualify all cross examination questions by any attorney hired by Philip Morris or the Tobacco Institute [which counts Philip Morris as a member], and the subsequent answers to those questions from the record and from any consideration by OSHA, and disqualify any post comment hearing text or responses thereto from Philip Morris and their scientists or attorneys.

In their own words, "Fairness and a sincere interest in the truth demand no less."

-- END --

2046395383

20463953384

CONSTANGY, BROOKS & SMITH
ATTORNEYS AT LAW
SUITE 2400
230 PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30303-1557
TELEPHONE (404) 525-8622
FACSIMILE (404) 525-6955

489

September 20, 1995

OSHA
DOCKET OFFICER
DATE SEP 21 1995
TIME SEP 21 1995

VIA FACSIMILE

Honorable John Vittone
Acting Chief Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Re: OSHA Docket No. H-122

Dear Judge Vittone:

I am enclosing Philip Morris' and Constangy, Brooks & Smith's Opposition to Virginia GASP's Motions to Disqualify Certain Evidence from the above-referenced record. Also, I am sending hard copies to you, Sue Sherman, Virginia GASP and the OSHA Docket Office via overnight service.

Thank you for your consideration of this Opposition. Please call me if you have any questions.

Respectfully,

Patrick R. Tyson
Attorney for Philip Morris
Companies, Inc.

cc: Susan Sherman, Esq.
Virginia Group to Alleviate
Smoking in Public, Inc. (GASP)
OSHA Docket Office

SUITE 1410
1801 SIXTH AVENUE NORTH
BIRMINGHAM, AL 35203-2602
TELEPHONE (205) 252-9321
FACSIMILE (205) 250-6350

SUITE 810
1301 GERVAIS STREET
COLUMBIA, SC 29201-3326
TELEPHONE (803) 256-3200
FACSIMILE (803) 256-8277

SUITE 1080
2100 WEST END AVENUE
NASHVILLE, TN 37203-5231
TELEPHONE (615) 320-5200
FACSIMILE (615) 321-3891

SUITE 1200
1015 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-2605
TELEPHONE (202) 789-8676
FACSIMILE (202) 789-1708

SUITE 300
101 SOUTH STRATFORD ROAD
WINSTON-SALEM, NC 27104-4213
TELEPHONE (910) 721-1001
FACSIMILE (910) 748-9112

20463953385

UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

IN RE:	)	DOCKET No. H-122
	)	
OSHA HEARINGS ON	)	PHILIP MORRIS' AND CONSTANGY,
NOTICE OF PROPOSED RULEMAKING	)	BROOKS & SMITH'S OPPOSITION
ON INDOOR AIR QUALITY	)	TO GASP'S MOTIONS TO DISQUALIFY
59 F.R. 15968 (APRIL 5, 1994)	)	CERTAIN EVIDENCE

Philip Morris Companies, Inc. (Philip Morris) (Hearing Participant No. 51) and Constangy, Brooks & Smith (Hearing Participant No. 74), attorneys for Philip Morris, submit this Opposition to the August 31, 1995 motions of the Virginia Group to Alleviate Smoking in Public, Inc. (GASP) to disqualify: (1) Philip Morris' written testimony submitted to OSHA in 1994; (2) all cross-examination questions conducted by any attorney hired by Philip Morris or the Tobacco Institute, and the subsequent answers to those questions; and (3) any post-hearing comment text or responses from Philip Morris and their attorneys, on the ground that Philip Morris chose not to present oral testimony during the public hearings on OSHA's proposed Indoor Air Quality (IAQ) Standard. For the reasons discussed more fully below, Philip Morris and Constangy, Brooks & Smith respectfully assert that GASP's motions should be denied.

ORALLY TESTIFYING IS NOT A LEGAL PREREQUISITE TO PARTICIPATING IN THE PROCEEDING

Chief Administrative Law Judge Nahum Litt's September 2, 1994 Prehearing Guidelines for the hearing on OSHA's proposed IAQ Standard make clear that the proceeding is informal and that all relevant testimony and evidence is to be included. Specifically, the Prehearing Guidelines state:

> Since the hearing is primarily for information gathering and clarification, it is an informal administrative proceeding, rather than an adjudicative one. The technical rules of evidence, for example, do not apply. The procedural rules that govern the hearing and these guidelines are intended to assure fairness and due process and also to facilitate the development of a clear, accurate and complete record. These rules and guidelines will not be interpreted in a manner to thwart that development. Thus, questions of relevance generally will be decided liberally, in favor of inclusion.

2046395389

Prehearing Guidelines at 1-2. Although permitting cross-examination of those participants who elect to orally testify, the Prehearing Guidelines contain no mandate that those participants who choose to submit written evidence or cross-examine witnesses also choose to orally testify.

OSHA's regulations on the rulemaking proceedings (29 C.F.R. § 1911) do not support a requirement that hearing participants orally testify. Both OSHA and the courts have effectively interpreted those regulations to mean that only if a participant in the hearing elects to give oral testimony must that person face cross-examination. United Steelworkers of America, Etc. v. Marshall, 647 F.2d 1189, 1227-1228 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981). This interpretation is consistent with the explanation in the regulation that "[t]he essential intent is to provide an opportunity for effective oral presentation by interested persons which can be carried out with expedition and in the absence of rigid procedures which might unduly impede or protract the rulemaking process. 29 C.F.R. § 1911.15(a)(3)." Id.

THE ISSUE HAS ALREADY BEEN DECIDED IN THIS CASE

At the January 5, 1995 public hearing on the proposed IAQ Standard, an attorney representing certain anti-smoking groups orally objected to Philip Morris' continued participation in the hearing after having declined to testify orally at the proceeding. Tr. at 10046. In response, Administrative Law Judge John M. Vittone overruled the objection, stating that "Philip Morris will have the right to participate as any other party to this proceeding has participated up to this time." Tr. at 10055.

In responding to the attorney's objection, Judge Vittone referred to and ruled upon a December 23, 1994 Notice of Objection filed with OSHA by the lobbying group Action on Smoking and Health (ASH) raising the same objection. Tr. at 10049-10050, 10052-10055. The Judge denied the ASH request to strike from the record the Philip Morris cross-examination, stating, "I think under the guidelines of the proceeding, I cannot do that." Tr. at 10055. The next day, January 6, 1995, Judge Vittone denied the ASH Notice of Objection in writing, on the ground that "the Prehearing Guidelines for this proceeding make it clear that the hearing is to be informal and favor the inclusion of all relevant testimony and evidence." Letter from Judge Vittone to ASH (attached as Exhibit A).

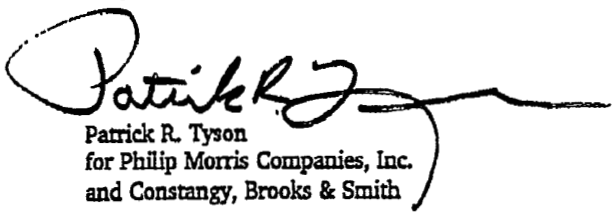
2046395387

GASP HAS A FAIR OPPORTUNITY TO RESPOND TO PHILIP MORRIS' AND THEIR ATTORNEYS' WRITTEN EVIDENCE AND CROSS-EXAMINATION

Public notice requirements and an opportunity for all interested parties to participate in submitting information about the proposed subject of regulation assure due process guarantees of fairness in rulemaking proceedings. GASP has had a full opportunity to submit whatever information they believe is pertinent and useful to the consideration of a new standard on indoor air quality. They have had, and will continue to have during the post-hearing comment and briefing period a full opportunity to respond to Philip Morris' and their attorneys' written evidence and cross-examination questions and responses. Providing GASP, as well as all other participants in the rulemaking, this opportunity to respond is all that the law and general fairness require.

For the reasons stated above, Philip Morris and Constangy, Brooks & Smith respectfully submit that GASP's Motions to Disqualify are without merit and should be denied.

Respectfully Submitted,



Patrick R. Tyson
for Philip Morris Companies, Inc.
and Constangy, Brooks & Smith

Constangy, Brooks & Smith
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303
(404) 525-8622

2046395388

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

January 6, 1995

John F. Banzhaf III
Executive Director and Chief Counsel
Action on Smoking and Health
2013 H Street, N.W.
Washington, DC 20006

Re: Notice of Proposed Rulemaking
Docket No. H 122

Dear Mr. Banzhaf:

This letter responds to your December 23, 1994 correspondence regarding the above referenced rulemaking proceeding.

Your request to strike from the record of the proceeding "all records of cross examination conducted by Philip Morris or other tobacco industry interests" is denied. The Prehearing Guidelines for this proceeding make it clear that the hearing is to be informal and favor the inclusion of all relevant testimony and evidence.[1] I agree that it would have been preferable for Philip Morris to provide its witnesses for cross examination. However, to grant your requests would also fail to promote the development of a complete record. The fact finding body will, at the appropriate time, decide how much weight to give all testimony and evidence in light of the events that have transpired throughout the entire proceeding.

I will place your requests in the record at the hearing.

Sincerely,

John M. Vittone

John M. Vittone,
Deputy Chief Judge

JMV/eca

cc: Anthony Andrade, Esq.
Patrick Tyson, Esq.
The Honorable Joseph A. Dear
Susan Sherman, Esq.

---

[1] The Prehearing Guidelines state, in relevant part:

> Since the hearing is primarily for information gathering and clarification, it is an informal administrative proceeding, rather than an adjudicative one. The technical rules of evidence, for example, do not apply. The procedural rules that govern the hearing and these guidelines are intended to assure fairness and due process and also to facilitate the development of a clear, accurate and complete record. These rules and guidelines will not be interpreted in a manner that might thwart that development. Thus, questions of relevance generally will be decided liberally, in favor of inclusion.

EXHIBIT A

2046395389

20463390

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

TELEFAX (202) 662-6291
TELEX 89-593 (COVLING WSH)
CABLE: COVLING

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 44-171-495-5655
TELEFAX 44-171-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE 32-2-512-9890
TELEFAX 32-2-502-1598

MICHAEL D. GRANSTON
DIRECT DIAL NUMBER
(202) 662-5553
DIRECT TELEFAX NUMBER
(202) 778-5553

September 20, 1995

VIA MESSENGER

490

Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street, N.W.
Washington, D.C. 20001

OSHA
DOCKET OFFICER
DATE SEP 20 1995

Dear Judge Vittone:

Enclosed please find The Tobacco Institute's Opposition to GASP's Motion to Disqualify Cross-Examination Questions and Post-Hearing Comments.

Sincerely,

Michael D. Granston

Michael D. Granston

Enclosure

cc: GASP
OSHA Docket Office (Docket No. H-122)
Ms. Sherman

20463953 91

In the Matter of:	:	
THE OSHA HEARINGS ON THE PROPOSED STANDARD ON INDOOR AIR QUALITY	:	Docket No. H-122

THE TOBACCO INSTITUTE'S OPPOSITION TO GASP'S MOTION TO DISQUALIFY CROSS-EXAMINATION QUESTIONS AND POST-HEARING COMMENTS

The Tobacco Institute submits this Opposition to the Motion of the Virginia Group to Alleviate Smoking in Public ("GASP") to disqualify all cross-examination questions, and answers thereto, by any attorney hired by Philip Morris or the Tobacco Institute, and any post hearing comments or responses filed by Philip Morris, on the ground that Philip Morris failed to present oral testimony during the public hearings on OSHA's proposed Standard on Indoor Air Quality. Because Judge Vittone has previously ruled on two occasions that Philip Morris was under no obligation to present oral testimony at the public hearings, and cannot be disqualified from participating in the hearings for declining to do so, GASP's motion should be denied.

On January 5, 1995, Mr. McNeely made an oral motion to disqualify Philip Morris from questioning witnesses at the public hearings on the ground that they declined to present oral testimony. Judge Vittone denied the motion, ruling that the presentation of oral testimony was not a prerequisite to Philip Morris' participation in the hearings:

> The fact that they [Philip Morris] have withdrawn their testimony does not prevent them from participating in the proceeding and I do not believe prevents them from engaging in examination of witnesses.
> . . .

2046395392

> Just to be clear, my ruling is that they can participate. If they have examination, I am going to allow them as long as it's relevant and material to this proceeding.

Tr. at 10049, 10052 (Jan. 5, 1995) [attached as Exhibit A].

The next day, Judge Vittone sent a letter to Mr. Banzhaf denying the written request of Action on Smoking and Health to strike from the record all cross-examination conducted by Philip Morris or other tobacco industry interests. Judge Vittone reasoned that the request for disqualification was inconsistent with the "Prehearing Guidelines for this proceeding [which] make it clear that the hearing is to be informal and favor the inclusion of all relevant testimony and evidence." Letter from Judge Vittone to John Banzhaf, dated January 6, 1995 [attached as Exhibit B].

These rulings make clear that the absence of oral testimony by Philip Morris does not permit the disqualification of its cross-examination questions and post-hearing comments or, by extension, those of The Tobacco Institute. In light of these rulings, we submit that GASP's motion to disqualify is without merit and should be denied.

Respectfully submitted,

Michael D. Granston

Clausen Ely, Jr.
Michael D. Granston

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington D.C. 20044

September 20, 1995

2046395393

meritorious argument to be made. So I respond but I don't think it's necessary.

MR. McNEELY: Judge Vittone?

JUDGE VITTONE: Yes.

MR. McNEELY: I'm aware of your preliminary statement on how these hearings were supposed to be conducted and I believe in order to engage in questioning of witnesses they had to participate in the proceedings and answer questions from the panel.

And if there hasn't been a motion been made as far as Philip Morris, I certainly do not disagree -- as long as they're in a representative capacity for somebody else besides Philip Morris, I don't see that there's a problem. But with regard to Philip Morris, I would certainly make the motion that they not participate on behalf of Philip Morris after having withdrawn their witnesses.

JUDGE VITTONE: Well, Mr. McNeely, my understanding and the way these proceedings have been conducted and Ms. Sherman can comment if she likes, even if Philip Morris had never submitted one witness statement or offered one witness, if they had identified themselves as a participant and somebody who was going to participate in the proceeding, they still would have been able to attend these hearings and to engage in examination.

The fact that you represent somebody who has

2046395395

submitted testimony is not dependent upon your ability to question a witness or to participate in the proceeding. I mean, John Q. Public, forget Philip Morris, if you as a private citizen had submit a notice of intention back in July that you wanted to participate in this proceeding and even if you hadn't submitted anything but you came to the proceeding, you would have just representing yourself at least ten minutes to question any witness who got up on this podium and testified.

So the fact that they have withdrawn their testimony does not prevent them from participating in the proceeding and I do not believe prevents them from engaging in examination of witnesses.

Now, I should add to this that the other day I received a motion from an organization called Action on Smoking and Health signed by Mr. John Banzaf objecting to Philip Morris' participation and questioning their right to cross-examine. Well, let me see. I'm trying to remember. Basically, they were requesting that in the interests of fairness that Philip Morris put their people back in the proceeding to be examined and that all records of cross-examination conducted by Philip Morris or other tobacco industry interests should be struck from the record unless such parties are themselves willing to submit to cross-examination.

2046395396

ASH, as I understand it, is not a participant in this proceeding. They have not officially filed the way everybody else has a notice of intention to participate.

Is that true, Ms. Sherman?

MS. SHERMAN: That is true.

JUDGE VITTONE: Under the rules, as I understand the rules, there is a question about whether they have standing to file the motion.

MS. SHERMAN: I have that very question myself. It would seem to me that at most, ASH's motion could be construed to be a late comment. But as far as I understand it, ASH is not a participant at this hearing.

JUDGE VITTONE: I haven't taken it up because, one, I just got it the other day and I wanted to give everybody an opportunity.

But with respect to your motion, I'm not going to rule on this thing right now, but with respect to your motion, if you're asking me to strike them from questioning; I think the way -- not I think, I know the way these proceedings have always been conducted and the interest of the agency is to have maximum public participation and it's not dependent upon submitting testimony and then withdrawing.

My understanding is the fact that they withdrew their testimony, I do not believe, stops them from

20463953397

continuing to be an active participant in the proceeding.

I've been talking a long time. Do you understand what I'm saying?

MR. McNEELY: I understand what you're saying. I wanted to have that on the record so that the record would know. And I agree as a matter of fundamental fairness -- I do not understand that ruling but if that's the way it's going to go --

JUDGE VITTONE: Well, it's simply the fact that in these kinds of proceedings, the agency wishes to have as many people participate as possible at whatever -- almost at whatever level they want to. And we have people who have come here, submitted testimony, been on the stand for five minutes and then left. We have had people who have been here every day.

The participation is varied and it's not required that you actually have to submit testimony in order to be an active participant in this proceeding.

As I said, I think any individual, any citizen, could file a statement and come to these proceedings and just as a private citizen participate in cross-examining witnesses as they come to the podium.

MR. McNEELY: All right. But, like I said, I wanted to put our objection on the record and we have your holding. Thank you.

20463953398

JUDGE VITTONE: Okay. Just to be clear, my holding is that they can participate. If they have examination, I am going to allow them as long as it's relevant and material to this proceeding.

MR. McNEELY: That's very clear. And I will not withdraw from the proceedings.

MR. ANDRADE: Your Honor, so we are clear, Philip Morris will fully participate with respect to its own docket number and also be continuing to represent a number of other entities, scientists, individual businesspeople, who have authorized Philip Morris and/or Philip Morris' designee to cross-examine on their behalf.

JUDGE VITTONE: Okay. Let me just -- since I brought up this thing, are you going to respond to this thing from Action on Smoking and Health?

MR. ANDRADE: Well, I think I can respond right now. I share Your Honor's view that there's a serious question of standing. Quite frankly, I find it incredible that this motion or this objection was filed by an entity that's filed no written comments in the whole process, no written testimony, no notice of intent to appear and testify. Indeed, Mr. Banzaf has never set foot in the hearing room for these several months, or perhaps one day, Ms. Sherman --

MS. SHERMAN: I saw him one day.

2046395399

MR. ANDRADE: He certainly has not participated. Does not have a docket number for ASH or himself individually, and in the objection doesn't purport to be representing anyone who does have a legitimate docket number.

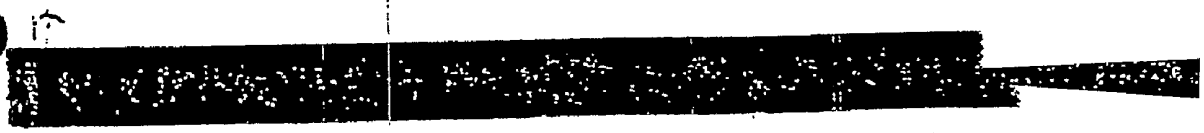
I think that, again, the prehearing guidelines, the way Your Honor has conducted the hearing makes it abundantly clear that those people who file legitimate notices of intent to testify and who have been participating, who have been making serious efforts to help OSHA develop an extensive record, as I believe we have, through witnesses, through our own extensive written comments and written testimony, that if anyone has a right to continue to participate, it would be Philip Morris. And, as I said, I just see no merit whatsoever in this motion.

JUDGE VITTONE: Ms. Sherman, do you have any comments that you want to add?

MR. TYSON: While she's gathering her thoughts, Your Honor, because the letter was addressed to me, may I also just second the objections and response made by Mr. Andrade and Philip Morris?

JUDGE VITTONE: Thank you, Mr. Tyson.

MS. SHERMAN: I guess that my personal position would be that as long as somebody is representing somebody at the hearing they have the right to go on and I don't



2046395400

B

E4209

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

January 6, 1995

John F. Banzhaf III
Executive Director and Chief Counsel
Action on Smoking and Health
2013 H Street, N.W.
Washington, DC 20006

Re: Notice of Proposed Rulemaking
Docket No. H 122

Dear Mr. Banzhaf:

This letter responds to your December 23, 1994 correspondence regarding the above referenced rulemaking proceeding.

Your request to strike from the record of the proceeding "all records of cross examination conducted by Philip Morris or other tobacco industry interests" is denied. The Prehearing Guidelines for this proceeding make it clear that the hearing is to be informal and favor the inclusion of all relevant testimony and evidence.[1] I agree that it would have been preferable for Philip Morris to provide its witnesses for cross examination. However, to grant your requests would also fail to promote the development of a complete record. The fact finding body will, at the appropriate time, decide how much weight to give all testimony and evidence in light of the events that have transpired throughout the entire proceeding.

I will place your requests in the record at the hearing.

Sincerely,

John M. Vittone

John M. Vittone,
Deputy Chief Judge

JMV/eca

cc: Anthony Andrade, Esq.
Patrick Tyson, Esq.
The Honorable Joseph A. Dear
Susan Sherman, Esq.

---

[1] The Prehearing Guidelines state, in relevant part:

> Since the hearing is primarily for information gathering and clarification, it is an informal administrative proceeding, rather than an adjudicative one. The technical rules of evidence, for example, do not apply. The procedural rules that govern the hearing and these guidelines are intended to assure fairness and due process and also to facilitate the development of a clear, accurate and complete record. These rules and guidelines will not be interpreted in a manner that might thwart that development. Thus, questions of relevance generally will be decided liberally, in favor of inclusion.

2049395402

2046395403

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

487

September 14, 1995

In the Matter of:

PARTICIPANTS IN THE OSHA HEARING ON THE PROPOSED STANDARD ON INDOOR AIR QUALITY
(Docket No. H-122)

OSHA
DOCKET OFFICER
DATE SEP 21 1995
TIME

ORDER DENYING MOTIONS TO DISQUALIFY THE WRITTEN PHILLIP MORRIS TESTIMONY AND ALL CROSS EXAMINATION PERFORMED BY PHILLIP MORRIS'S REPRESENTATIVES

On September 1, 1995, I received two motions from the Virginia Group to Alleviate Smoking in Public, Inc. (GASP). The first motion requests that I exclude all written testimony submitted by Phillip Morris USA because Phillip Morris did not testify publicly and, therefore, other parties participating in the hearings were not given the opportunity to cross examine their witnesses.

The second motion requests that I exclude from the record all cross examination questions propounded by any attorney hired by Phillip Morris or the Tobacco Institute and the answers thereto as well as any post hearing comment and responses from Phillip Morris and their attorneys. In support of this motion, GASP states that although Phillip Morris cross examined other witnesses who appeared at the hearing, they did not produce witnesses themselves at the public hearing. Accordingly, other parties were denied the opportunity to cross examine Phillip Morris.

At the public hearing in this matter, Phillip Morris did not produce its witnesses to testify and be cross examined. At least on two occasions, similar motions were made at the hearing to exclude Phillip Morris's written materials and the examination by its attorneys of other witness participants. I denied those motions at the time they were proposed.

2046395404

As stated in the Pre-Hearing Guidelines, the public hearing is primarily for information gathering and clarification and is not an adjudicative proceeding. It was stated in the guidelines that questions of relevance, procedural questions and questions of participation would be decided liberally, in favor of inclusion and development of the record. With these principles in mind, the failure of Phillip Morris to testify and be cross examined is a relevant factor in what weight OSHA may give the written testimony and cross examination of Phillip Morris, but it does not warrant the exclusion of the testimony and cross examination.

Accordingly, the Motions to disqualify the written testimony, cross examination and written comments of Phillip Morris are hereby **DENIED**.

John M. Vittone

JOHN M. VITTONE
Acting Chief Administrative Law
Judge

JMV/sls

2046395405

SERVICE SHEET

Case Name: Participants in the OSHA Hearing on the Proposed Standard on Indoor Air Quality

Case No.: 94-OSH-1

Title of Document: ORDER DENYING MOTIONS TO DISQUALIFY THE WRITTEN PHILLIP MORRIS TESTIMONY AND ALL CROSS EXAMINATION PERFORMED BY PHILLIP MORRIS'S REPRESENTATIVES

A copy of the above document was mailed to the following individuals on SEP 15 1995

Joseph A. Dear
Assistant Secretary of Labor
U.S. Department of Labor
OSHA
Room S2315, FPB
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Susan Sherman
Solicitor's Office
U.S. Department of Labor
OSHA
Room S-4004, FPB
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Deborah James
OSHA Health Standards
U.S. Department of Labor
OSHA
Room N-3718, FPB
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Docket Office
Docket No. H-122
U.S. Department of Labor
OSHA
Post Hearing Comments
Room N-2624, FPB
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Philip Morris USA
Philip Morris Co.
Dr. Richard A. Carchman
Director of Scientific Affairs
4201 Commerce Road
Richmond, VA 23234

Dr. George J. Patskan
Senior Research Scientist
4201 Commerce Road
Richmond, VA 23234

Dr. Thomas J. Borelli
Director of Science and
Environmental Policy
Philip Morris Management Corp.
120 Park Avenue
24th Floor
New York, New York 10017

John Rupp, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Pat Tyson, Esq.
Constangy, Brooks & Smith
230 Peachtree Street, N.W.
Suite 2400
Atlanta, GA 30303-1557

2046395406

Virginia Group to Alleviate
Smoking in Public, Inc.
GASP
4856 Haygood Road
Virginia Beach, VA 23455

Tom Hall
Division of Consumer Affairs
Occupational Safety and Health Administration
200 Constitution Avenue, N.W.
Room N-3649, FPB
Washington, D.C. 20210

Karen A. Tanavage
Karen A. Tanavage
Secretary

2046395407

2046395408

CONSTANGY, BROOKS & SMITH
ATTORNEYS AT LAW
SUITE 2400
230 PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30303-1557
TELEPHONE (404) 525-8622
FACSIMILE (404) 525-6955

492-1

September 26, 1995

The Honorable John Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20021-8002

Re: OSHA's Proposed Rulemaking on Indoor Air Quality, 59 F.R. 15968, April 5, 1994 OSHA Docket No. H-122

Dear Judge Vittone:

We are writing on behalf of Philip Morris [Docket No. 10-74] and Constangy, Brooks & Smith [Docket No. 10-51] to request an extension of the November 13, 1995 deadline established in your order of June 14, 1995, a copy of which is attached for ease of reference. (See Attachment A)

I. OSHA's "Sub-Docket" of Continuing Submissions of Data and Information.

Although the period for the filing of additional data and information closed on September 1, 1995, OSHA is still systematically filing additional data and information in Docket H-122. After "reserving" Exhibit 340 for its ongoing submission, OSHA has filed over 2,000 individual documents throughout the month of September (it is now at Exhibit 340-2078) and is still filing. Moreover, although OSHA has designated these almost 2,100 new items for the public record, approximately 50% of the materials so designated by OSHA for inclusion in Docket H-122 are not available for public examination and copying as of this writing. Thus, not only is OSHA systematically adding items to the docket on a daily basis, but significant portions of the material OSHA has designated for late addition to the docket are simply unavailable to the public for review.

OSHA's untimely docketing of approximately 2,100 items (all of which appear to have been available to OSHA for some time well in advance of the September 1 deadline) will effectively thwart any opportunity for parties to consider OSHA's submissions in the context of rebuttal in post-hearing briefs. Even more problematic, however, until OSHA actually makes all filings

SUITE 1410
1901 SIXTH AVENUE NORTH
BIRMINGHAM, AL 35203-2602
TELEPHONE (205) 252 9321
FACSIMILE (205) 250-6350

SUITE 810
1301 GERVAIS STREET
COLUMBIA, SC 29201-3326
TELEPHONE (803) 256-3200
FACSIMILE (803) 256-6277

SUITE 1080
2100 WEST END AVENUE
NASHVILLE, TN 37203-5231
TELEPHONE (615) 320-5200
FACSIMILE (615) 321-5691

SUITE 1200
1015 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-2605
TELEPHONE (202) 789-8676
FACSIMILE (202) 789-1708

SUITE 300
101 SOUTH STRATFORD ROAD
WINSTON-SALEM, NC 27104-4213
TELEPHONE (910) 721-1001
FACSIMILE (910) 748-9112

2046395409

available to the public, we will have no opportunity whatsoever to review, analyze and comment upon these documents in our briefing.

II. OSHA's Requests For Witness Information.

In questioning witnesses, OSHA tendered at least 104 pages of oral requests for data and information during the public hearings on the proposed rule. (See Attachment B) Because OSHA has created its own "sub-docket" under Exhibit 340, there is no way to determine whether some of this material has been or will be submitted directly to OSHA, and hence to the docket.[1] Because the public has no method for determining the source of the material OSHA is filing under Exhibit 340, OSHA could receive requested material and simply docket the information.[2] Interestingly, it appears that OSHA is treating all 2,078 documents filed under its Exhibit 340 "sub-docket" as filed on September 1, 1995 because that is the date OSHA appended to underlying Exhibit Number 340.

III. Anonymous Submissions.

Many of the post-hearing docket submissions have been made without accompanying correspondence or transmittal.[3] Thus, for all intents and purposes it appears as if these submissions are not from individuals or entities with docket numbers, but rather are truly anonymous. Therefore, it is not possible to determine who sponsored these materials or how they came to the docket. Accordingly, they may have been docketed in violation of your order.

IV. The "1995 Meridian Report" to OSHA.

---

1 If the material requested by OSHA has not been submitted to the docket, at least two questions arise: whether the material was really necessary in the first place; or if the data were necessary, whether OSHA's record is complete?

2 The generic problem with promised additional data is highlighted by the NHANES material. Originally promised for January 1995 (See Attachment C), the complete package of six diskettes of data was made available to the docket by OSHA in the third week in September, 1995 -- roughly three weeks after the close of the period for filing of additional data and information.

3 See for example Exhibit Numbers 309, 310, 311, 312, 358, 359, 360, 361, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 383, 384, 386, 387, 388, 390, 391, 392 and 460.

20463954110

On September 14, 1993 the Department of Labor approved a set of contracts to conduct reviews to assess the scientific data on workplace exposure to environmental tobacco smoke and lung cancer and heart disease risk. The contracts required reports to be submitted to OSHA by September 1994.

Following the close of the September 1, 1995 comment period for the submission of additional data and information, OSHA submitted to the public docket deliverables from the September 1993 contracts concerning alleged health effects in nonsmokers exposed to environmental tobacco smoke in the workplace.[4]

Although more than 400 witnesses appeared at the public hearing on OSHA's proposed rule, none will have the opportunity to provide additional data and information in response to either the "1995 Meridian Report" contracted for by OSHA, or the claims asserted therein.

From the standpoint of our client, although Philip Morris was present every day of the hearing, and although the Company has filed extensive comments and post-hearing submissions, it obviously will not have the opportunity to thoroughly review the "1995 Meridian Report" under the existing deadlines, because of OSHA's untimely filing of the document (which OSHA must believe is relevant to indoor smoking issues). In addition, no one will have the opportunity to docket additional data and information in response to OSHA's "1995 Meridian Report," because the report was not submitted to the docket until after the September 1, 1995 deadline had passed.

V. Extension of the Existing Deadline is Justified.

In these circumstances, we respectfully urge (i) that OSHA should be directed to file all additional data and information by a specific date and, upon doing so, expressly advise Your Honor that all such information designated for the docket is in fact available in the docket and available to the public; (ii) that additional time, in the amount of 120 days, should be granted for participants in the public hearing to review and evaluate OSHA's untimely, ongoing submissions to OSHA's "sub-docket" (including the "1995 Meridian Report") and to file rebuttal briefing, as may be

---

4. The deliverables, authored by Kenneth Brown, will be referred to as the "1995 Meridian Report." The official report rendered under OSHA contract No. J-9-F-1-0065 is titled "Epidemiologic Studies of the Association Between Environmental Tobacco Smoke and Disease: Lung Cancer and Heart Disease." The report (which runs hundreds of pages) contains eleven chapters and three appendices.

2046395411

appropriate; and (iii) that in carrying out the provisions of the prior orders of your Honor and Judge Litt, OSHA should ensure that each post hearing comment that is filed in the docket can be attributed to a person or entity with a docket number. In no event should materials be filed anonymously.

It is clearly prejudicial to the public interest for OSHA to actively and intentionally[5] withhold information from the public docket until the comment phase has closed, and then to file material in support of OSHA's rule in a manner that essentially makes public review or response within the allotted time frame for the filing of additional data and information impossible.[6] Consequently, OSHA's tactics deprive those with docket numbers of the entire post-hearing briefing period to analyze OSHA's voluminous submissions and to address them in the post-hearing briefing period presently scheduled to close on November 13, 1995.

We respectfully request that Your Honor grant OSHA a specified period of time within which to enter into the docket all documentation in support of its proposed rulemaking. When OSHA verifies to Your Honor that all OSHA submissions have been made; that all of OSHA's documents are in fact physically in the docket; and that all material is available to the public, we respectfully request that the date for filing post-hearing briefing be established to run 120 days from the date of the OSHA verification.

Thank you for your attention to and consideration of the foregoing.

---

5. Of the 2,078 separate items which OSHA is docketing in an untimely manner, any and all significant portions could have been filed by OSHA months ago. As for the contractual documents, either OSHA has had them for two months or OSHA did not have them when OSHA's extension of the prior deadlines was discussed. In the latter event, OSHA should have agreed to further extend the then-existing comment period deadlines to allow for submission of the contractual documents well in advance of the close of the public comment period.

6. This prejudicial effect is particularly evident when it is noted that many commentors filed data and information early, or filed multiple filings over time to get the material in the record as soon as possible. If private parties can file in a manner reasonably intended to get materials in the docket as soon as possible (but in all cases at least on time), there is no valid, logical explanation for OSHA's untimely, bulk filing of materials.

Respectfully submitted,

CONSTANGY, BROOKS & SMITH

s/ Patrick R. Tyson

Patrick R. Tyson

Neil H. Wasser

Neil H. Wasser

cc: The Honorable Joseph A. Dear
Assistant Secretary of Labor
for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Ms. Sue Sherman
Office of the Solicitor
Department of Labor - OSHA
Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

20463954 13

ATTACHMENT A

20463954 14

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

June 14, 1995

****
In the Matter of: *
*
PARTICIPANTS IN THE OSHA HEARING *
ON THE PROPOSED STANDARD ON INDOOR *
AIR QUALITY *
(Docket No. H-122) *
*
****

Order Extending Post Hearing Comment Period

Pursuant to the provisions of 29 CFR Section 1911.16, at the end of the public hearing on OSHA's proposed indoor air quality standard, I set a two part post hearing comment period. The first part of the comment period was to be until July 3, 1995, followed by the second part wherein the record would remain open until September 11, 1995.

The Occupational Safety and Health Administration and other parties have requested that I extend the post hearing comment period, believing that such extension will positively contribute to the building of a more complete record in this proceeding. This request is granted.

Accordingly, the first part of the post hearing comment period is hereby extended until September 1, 1995. In view of this extension, it is necessary to also extend the second part of the post hearing comment period. The second part of the post hearing comment period is hereby extended until November 13, 1995.

Anyone who has filed a timely Notice of Intention to Appear is eligible to file post hearing comments and briefs. During the first part of the post hearing comment period the record remains open for the receipt of written information and additional data. Such information would include answers to questions you were asked at the hearing by the OSHA panel or by others in the audience, additional scientific evidence, and recommendations and supporting reasons which you believe to be relevant to the subject of the hearing.

During the post hearing brief period, which will close on November 13, 1995, the record will remain open for the receipt of position statements, briefs, recommendations and rebuttal of material that has been submitted during the post hearing comment period.

2046395415

It is neither necessary nor desirable to submit information as a post hearing comment which is already in the record.

Post hearing comments and briefs should be labelled as such and sent in quadruplicate to the Docket Office, Docket No. H-122, Room N-2624, U. S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N. W., Washington, D.C. 20210.

Transcript Corrections

I have also decided to extend the period for filing motions to correct the transcript.

The Rules of Procedure for Promulgating . . . Occupational Safety and Health Standards (29 CFR 1911.15(b)(3)) require that the hearing shall be reported verbatim. Those testifying at the hearing should examine a transcript of their own testimony (or cross examination, as the case may be) for reporting errors. Any errors shall be called to my attention, with a motion to correct.

Copies of motions to correct shall be sent by the party wishing to correct the transcript to: Judge Vittone, Susan Sherman, the Docket Office, and the person with whom the dialogue containing the error took place. These motions must be made by the close of the first post hearing comment period, September 1, 1995. Replies to motions to correct must be filed by October 6, 1995 and sent to those listed in the previous sentence.

This procedure shall only be used when there is a reporting mistake, such as wrongly identifying the speaker, inadvertently deleting the word "not" from a sentence, etc. Inartfully phrased or erroneous answers may not be corrected using the procedure outlined here--these things were actually said and therefore it would be improper to claim they were a typographical error. While inartfully phrased or erroneous answers cannot be remedied by correcting the transcript, they may be addressed in post hearing comments.

John M. Vittone

JOHN M. VITTONE
Acting Chief Administrative
Law Judge

20463954 16

2046395417

R. J. Reynolds Tobacco Company

492-4

MARY E. WARD
Senior Counsel
Research and Development

Winston-Salem, NC 27102
910-741-5376
Fax 910-741-3763

September 27, 1995

VIA HAND DELIVERY

The Honorable John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

Re: Request for Extension of Post-Hearing Briefing Period, OSHA Proposed Rulemaking on Indoor Air Quality, Docket H-122

Dear Judge Vittone:

By this letter, R. J. Reynolds requests a 120-day extension of the briefing period for the above-referenced docket. The requirement that good cause be shown for an extension of the briefing period is met by R. J. Reynolds' lack of a fair and sufficient opportunity to review the extensive post-hearing comments entered into the record since the conclusion of the first stage of the comment period.

At the end of the public hearing in this matter, Your Honor set a two part post hearing comment period, wherein new information was to be submitted by July 3, 1995, and post-hearing briefs, including responses to any new information, were to be submitted by September 11, 1995. At the request of the Occupational Safety and Health Administration [OSHA] and by Order dated June 14, 1995, Your Honor granted an extension of the first part of the comment period until September 1, 1995, and extended the second part of the comment period until November 13, 1995.

During the first comment period, Your Honor received five requests for an additional extension of the comment period. By Order dated August 29, 1995, Your Honor denied the requests for extension of the comment period and stated that further extensions would be granted only for good cause shown. The Order stated also that:

> One of the purposes of the second portion of the comment period is to provide interested parties with the opportunity to rebut the information contained in submissions by others.

2046395418

> [Parties] will have the second portion of the comment period to respond to anything new in the findings ... . (Emphasis added.)

R. J. Reynolds seeks an extension of the briefing period to provide it (and other parties) an adequate "opportunity to rebut the information contained in the submissions by others" and to respond to "anything new" in the post-hearing comments, including those of OSHA.

Since conclusion of the public hearing on March 13, 1995, R. J. Reynolds has received over 170 exhibits in the above-referenced matter, including a substantial number of documents which were received after the September 1, 1995, submission deadline for the first stage of the comment period. Many, if not most, of these exhibits are lengthy documents with numerous attachments. Each document requires separate analysis to determine what, if any, information requires rebuttal in the briefing phase. OSHA's submission alone originally consisted of over 1650 documents. Moreover, OSHA continues to add additional exhibits. Each additional submission by OSHA necessitates further review by R. J. Reynolds to determine whether there is "anything new" which requires rebuttal in the briefing period. At present, OSHA's submission totals over 2000 documents, and it is unclear when OSHA will cease submitting additional documents to the record. Approximately 50% of the documents submitted by OSHA are listed on the docket but currently unavailable to the public.

In addition, delays in the docketing office are depriving R. J. Reynolds of a fair opportunity to review the comments of other parties to this rulemaking. As recently as Monday, September 18, 1995, an additional six diskettes from the Centers for Disease Control and the National Center for Health Statistics ("NCHS") were first made available by the OSHA docket office. Originally, NCHS submitted one diskette in its post-hearing comments. That diskette contained the data analyzed and reported on in ChemRisk's post-hearing comments. Analysis of the previously submitted diskette was a lengthy process. Now, in addition to reanalyzing the adjusted diskette, R. J. Reynolds is faced with the task of analyzing five additional diskettes in less than two months. The briefing period is simply insufficient for this task and, unless the briefing period is extended, R. J. Reynolds will be deprived of an opportunity to comment on this large amount of new information.

R. J. Reynolds has been confronted with a mountain of new information from OSHA and other interested parties which has continued to grow each day. Without an extension of 120 days or more from the date on which the docketing of new information is closed, R. J. Reynolds will not have "an opportunity to rebut the information contained in the submissions by others," as provided for by the August 29, 1995, Order. We respectfully request that the briefing period be extended by

2046395419

an additional 120 days to enable us to adequately respond to the post-hearing comments submitted by OSHA and other parties in this matter.

Your consideration of this request is greatly appreciated.

Sincerely,

Mary E. Ward

MEW:kc

cc: Susan J. Sherman, Esquire

20463954 20

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

TELEFAX (202) 662-6291
TELEX 89-593 ICOVLING WSHI
CABLE COVLING

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 44-171-495-5655
TELEFAX 44-171-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE 32-2-512-9890
TELEFAX 32-2-502-1598

CLAUSEN ELY, JR.
DIRECT DIAL NUMBER
(202) 662-5152

492-3

October 3, 1995

VIA MESSENGER

OSHA
DOCKET OFFICER
DATE
TIME

Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street, N.W.
Washington, D.C. 20001-8002

Re: OSHA Proposed Rulemaking on Indoor Air Quality; Docket H-122

Dear Judge Vittone:

We write on behalf of the scientific consultants who testified at the request of the Tobacco Institute[1/] to ask for an extension of the post-hearing briefing period in the above referenced matter. Such an extension is required to provide these consultants and other interested parties with a full and fair opportunity to review and respond to the information in the administrative record.

Administrative agencies have a responsibility "to allow [interested parties] a sufficient time to raise issues" during an administrative proceeding. Exhibit A, Al Tech Specialty Steel Corp. v. United States, 661 F. Supp. 1206, 1210 (Ct. Int'l Trade, 1987) (refusing to apply exhaustion doctrine where agency failed to provide sufficient time for submission of post-hearing brief). This principle is expressly incorporated in the OSH Act's implementing regulations, which provide for a "reasonable" time for the submission of post-hearing data, views and arguments

---

1/ These scientific consultants are: Dr. Gio Gori (181), Dr. Larry Holcomb (82), Dr. Maxwell Layard (219), Dr. Maurice LeVois (135), Price Waterhouse (164), Gray Robertson (84), Dr. Paul Switzer (193), Dr. Kip Viscusi (70), Dr. Phil Witorsch (120), Dr. Raphael Witorsch (126), and Dr. John Todhunter (96).

20463954 22

concerning a proposed safety and health standard. Exhibit B, 29 CFR § 1911.16.

In the instant proceeding, Your Honor initially provided for a post-hearing comment period ending July 3, 1995 for the receipt of written information and additional data, and a post-hearing briefing period ending September 13, 1995 for the receipt of briefs and rebuttal of new information submitted during the post-hearing comment period. See Exhibit C, Order dated April 25, 1995. At OSHA's request, Your Honor subsequently extended the post-hearing comment and briefing periods until September 1, and November 13, 1995, respectively,[2/] see Exhibit D, Order dated June 14, 1995, and stated that an additional extension of the post-hearing submission periods would be granted only upon a showing of good cause. See Exhibit E, Order dated August 29, 1995.

In the four weeks since September 1, 1995, the deadline for the submission of post-hearing comments, OSHA has added a large amount of new material to the already vast docket. Much of that material remains inaccessible to the public. Moreover, OSHA has not indicated that it has completed its submissions or that it intends to do so by a certain date. Under these circumstances, we submit that the November 13, 1995 deadline fails to provide a "reasonable" time for the submission of briefs and rebuttal of post-hearing comments and, therefore, that good cause exists to extend that deadline.

By any measure, the size of the administrative record in the instant proceeding is unprecedented. The oral hearing, which lasted more than six months and involved in excess of 500 witnesses, fills approximately 15,000 transcript pages. Furthermore, the record currently contains more than 480 pre-hearing submissions and more than 2,200 post-hearing submissions. Most of the post-hearing submissions were filed after Your Honor's extension of the post-hearing comment and briefing periods, and the volume of these submissions was likely not contemplated at the time Your Honor determined the appropriate length of that extension.

The staggering amount of material in the administrative record cannot be reviewed and addressed in any

---

2/ Although Your Honor extended the deadline for the post-hearing briefing period, Your Honor did not extend the length of the post-hearing briefing period, which remained only ten weeks.

2046395423

meaningful fashion within the time constraints imposed by the current ten-week briefing schedule. That schedule simply does not afford a sufficient opportunity for appropriate experts to review and rebut all of the new information submitted during the post-hearing comment period, much less the large amount of additional information submitted by OSHA after the post-hearing comment period was to have concluded.

That the current briefing schedule is unreasonable given the size of the administrative record is highlighted by the briefing periods provided in other OSHA proceedings. More than nine weeks were permitted for post-hearing briefs in connection with OSHA's Final Rule on Occupational Exposure to Hazardous Chemicals in Laboratories, 55 Fed. Reg. 3300 (Jan. 31, 1990), even though there were only 25 witnesses and 466 pages of transcript testimony in that proceeding. Similarly, more than eight weeks were permitted for post-hearing briefs in connection with OSHA's Final Rule on Personal Protective Equipment For General Industry, 59 Fed. Reg. 16334 (Apr. 6, 1994), even though the proceeding involved only 20 witnesses and 577 pages of transcript testimony. As these examples demonstrate, the instant briefing period is nearly the same as those deemed reasonable and appropriate in proceedings with 20- to 25-fold fewer witnesses and 26- to 32-fold fewer pages of transcript testimony.[1/] This disparity suggests that the sheer size of the administrative record, separate and apart from OSHA's untimely submission of its post-hearing comments, would constitute good cause for extending the November 13, 1995 deadline.

As has been noted, however, difficulties engendered by the size of the administrative record have been compounded by OSHA's failure to comply with the post-hearing comment deadline. Since the close of the post-hearing comment period on September 1, 1995, OSHA has docketed more than 2,000 documents and continues to do so on a daily basis. Nearly 50% of the docketed items are not yet available to the public. Among the documents belatedly submitted by OSHA is a 300-page report authored by Kenneth Brown at the agency's request (the "Meridian Report") that purports to be a comprehensive review of the health effects associated with workplace exposure to environmental tobacco smoke. This is but one example of the large amount of new material that has been docketed by OSHA since September 1, 1995.

1/ A list of additional proceedings with comparable briefing periods, and the scope of the administrative record in those proceedings, is attached as Exhibit H.

20463954 24

Because of OSHA's untimely filing of its post-hearing comments, interested parties will effectively be precluded from considering and responding to these comments. Even if all of OSHA's post-hearing comments were submitted and made available to the public today, parties would have little more than half of the original ten-week briefing period to review and respond to these submissions. This is simply not enough time to address all of the new information contained in these thousands of documents. Furthermore, there is no indication at present when OSHA will complete its submissions and make them all available to the public. Conceivably, this might not occur before the end of the current post-hearing briefing period.

For the foregoing reasons, we request that the post-hearing briefing deadline of November 13, 1995 be extended by at least 120 days. We further request that Your Honor establish a specified date by which OSHA must complete its post-hearing submissions and make them available to the public, and that the 120 day extension begin to run from that date, or from November 13, 1995, whichever is later.

Thank you for your consideration of our request.

Sincerely,

Clausen Ely, Jr.
Michael G. Michaelson
Michael D. Granston

Attachments

cc: OSHA Docket Office (Docket No. H-122)
Ms. Sherman

20463954425

Exhibit A

2046395426

3RD CASE of Level 2 printed in FULL format.

Al Tech Specialty Steel Corp.: Armco Stainless Steel Division. Armco. Inc.: Carpenter Technology Corp.: Colt Industries. Inc.. Crucible Materials Group: Guterl Special Steel Corp.: Joslyn Stainless Steel: Republic Steel Corp.; Universal-Cyclops Specialty Steel Division. Cyclops Corp.. Plaintiffs v. United States. Defendant

Al Tech Specialty Steel Corp. v. United States

Consolidated Court No. 83-1-00107

UNITED STATES COURT OF INTERNATIONAL TRADE

11 C.I.T. 372; 661 F. Supp. 1206; 1987 Ct. Intl. Trade LEXIS 94; SLIP OP. 87-59

May 22. 1987

DISPOSITION: [***1]

ITA's final determination affirmed in part and remanded in part.

COUNSEL: Collier. Shannon. Rill & Scott (David A. Hartquist and Lawrence J. Lasoff) for plaintiffs.

Richard K. Willard. Assistant Attorney General; David M. Cohen. Director. Commercial Litigation Branch. Civil Division. United States Department of Justice (Sheila N. Ziff) for defendant; Linda Concannon. Office of Deputy Chief Counsel for Import Administration. Department of Commerce. of counsel.

JUDGES: Tsoucalas. Judge.

OPINIONBY: TSOUCALAS

OPINION: [*373] [**1207] Opinion and Order

Tsoucalas. Judge: Plaintiffs. domestic stainless steel bar producers. have filed an appeal contesting the final affirmative countervailing duty determinations of the International Trade Administration of the Department of Commerce (ITA or Commerce) in Certain Stainless Steel Products from Spain. *47 Fed. Reg. 51,453 (1982).* This action is presently before the Court on plaintiffs' motion for judgment on the agency record pursuant to USCIT R. 56.1. n1

n1 The International Trade Commission (ITC) has determined that an industry in the United States is not materially injured nor threatened with material injury by reason of imports of hot-rolled stainless steel bars and cold-formed stainless steel bars from Spain. *48 Fed. Reg. 540 (1983).* Plaintiffs' actions challenging the ITC's final negative determination and the ITA's final affirmative determination were consolidated by court order. Additionally, it was ordered that plaintiffs' challenge to the ITA's determination be resolved prior to the challenge to the ITC's determination. Order of Feb. 27. 1984 (Ford. J.).

[***2]

Background

The ITA began a countervailing duty investigation in response to a petition filed on behalf of domestic manufacturers concerning hot-rolled stainless steel bars. cold-formed stainless steel bars and stainless steel wire rod imported from Spain. *47 Fed. Reg. 10,268 (1982).* On August 31. 1982. the ITA published a preliminary determination that, with respect to various Spanish steel producers. short-. medium-. and long-term loan programs conferred benefits which constituted subsidies within the meaning of *19 U.S.C. § 1677(5)* (1982). *47 Fed. Reg. 38,375 (1982).* After verification. the ITA published. on November 15. 1982. its final affirmative countervailing duty determination. *47 Fed. Reg. 51,453 (1982).* The ad valorem estimated net subsidy for Olarra. S.A. (Olarra), a Spanish steel producer subject to investigation. was zero percent. *Id. at 51,459.*

Olarra received short-term working capital loans in 1979 pursuant to the Privileged Circuit Exporter Credit Program. This Spanish Government program mandates that commercial banks [***3] make available funds to exporters under preferential terms. On July 5. 1979. Olarra declared voluntary bankruptcy. and in June. 1981. a Spanish court approved a receivership plan for the firm. This plan provided for the aggregation of all pre-bankruptcy debt including various short- and long-

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

2046395427

term commercial credits as well as the privileged circuit working capital loans. The ITA had preliminarily determined that the ad valorem subsidy for medium- and long-term loans to Olarra was zero percent. *47 Fed. Reg. at 38,377.* At that time, the ITA noted that before issuing a final determination, it would seek further details concerning Olarra's pre-bankruptcy [*374] loans. Id. In verifying the data supplied by Olarra, the ITA uncovered new information concerning the details of Olarra's bankruptcy, purchases of Olarra's stock by the Bank of Spain, and the terms of repayment of Olarra's loans. Administrative Record at 1272-77 (hereinafter "A.R. at "). The ITA learned that the pre-receivership debt was payable, unless extended to 1989, in monthly installments for the seven years following Olarra's declaration of bankruptcy, without further accrual [***4] of interest. A.R. at 1273. In accordance with Spanish law, no payments were made on Olarra's debt between the declaration of bankruptcy and the formal approval of the receivership [**1208] plan. In its final determination, the ITA concluded that while Olarra had received benefits from the working capital loans, these benefits ceased to exist when the loans were incorporated in the receivership plan. *47 Fed. Reg. at 51,455.* Moreover, these loans were of short duration -- no longer than one year -- and would have been repaid but for Olarra's bankruptcy. Id. Despite these conclusions, the ITA did not exclude Olarra from the final determination since Olarra had "received benefits in the past and may qualify for and obtain preferential loans under the Privileged Circuit Program in the future." *Id. at 51,458.*

The Parties' Claims

Plaintiffs contest both the substance of, and the adequacy of the explanation for, the ITA's determination that certain benefits conferred on Olarra do not constitute countervailable subsidies. In particular, plaintiffs object to the ITA's treatment of information concerning (a) short-term working [***5] capital loans made to Olarra in 1979 (b) the terms of the receivership plan allowing repayment of Olarra's debt without interest and (c) the Bank of Spain's purchases of an equity interest in Olarra. See Plaintiffs' Motion for Judgment Upon the Agency Record at 6 (hereinafter "Plaintiffs' Motion").

Plaintiffs view the benefits associated with the operating capital loans as extending beyond the year of receipt into the year of the ITA's investigation, 1981, since the loans were not repaid as originally scheduled. Plaintiffs' Reply to Defendant's Response to Motion for Judgment Upon the Agency Record at 5-6 (hereinafter "Plaintiffs' Reply"). They also dispute, Plaintiffs' Reply at 9-11, Commerce's contentions that the relief afforded Olarra under the bankruptcy law is a "generally available" benefit that is noncountervailable and which terminates any benefit flowing from the preferential loans made *prior to Olarra's voluntary declaration of bankruptcy.* Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 17 (hereinafter "Defendant's Opposition"). Finally, plaintiffs reject, Plaintiffs' Motion at 18-20, defendant's [***6] argument that Commerce considered, and properly discounted, information discovered at verification that the Bank of Spain's equity investment in Olarra may have provided a subsidy to the firm. Defendant's Opposition at 20. Defendant contends [*375] that this Court is barred from reviewing plaintiffs' objections, and in any case, those objections are legally irrelevant since government stock purchases from private shareholders on the open market cannot amount to a countervailable subsidy. Defendant's Opposition at 20, 37.

Discussion

Judicial review in the instant action, commenced pursuant to *19 U.S.C. § 1516a*(a)(3) (1982 & Supp. II 1984), is governed by the standard contained in *19 U.S.C. § 1516a*(b)(1)(B) (1982) which directs the Court to hold unlawful any determination, finding, or conclusion "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984)* [***7] (quoting *Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).* As explained in numerous decisions, and as correctly noted by defendant:

> An agency's interpretation of a statute which it is authorized to administer is "to be sustained unless unreasonable and plainly inconsistent with the statute, and [is] to be held valid unless weighty reasons require otherwise." An agency's "interpretation of the statute need not be the only reasonable interpretation or the one which the court views as the most reasonable."

ICC Indus. v. United States, 812 F.2d 694, 699 (Fed. Cir. 1987) (citations omitted). With that established, the Court turns to a consideration of the questions presented.

A. Exhaustion of Remedies

As a threshold matter, defendant insists that the Court may not properly consider plaintiffs' objections to the ITA's treatment of information, first revealed at verification, [**1209] concerning (a) the repayment terms of preferential loans to Olarra and (b) the Bank of Spain's stock purchases. Plaintiffs' alleged failure to raise these

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

20463954 28

objections "in a timely manner, or even in time to [***8] allow Commerce to address their untimeliness in the final determination, constitutes a failure to exhaust their administrative remedies, and an effective waiver of the right to contest these issues on appeal." Defendant's Opposition at 21-22. Plaintiffs counter that their claims were timely raised before the administrative agency by virtue of a letter to Mr. Gary Horlick, then the ITA's Deputy Assistant Secretary for Import Administration. More fundamentally, plaintiffs allege that the exhaustion requirement is not applicable since no new issues were raised by the comments, which "solely concern the agency's failure to give sufficient consideration to issues the agency itself uncovered." Plaintiffs' Reply at 1.

[*376] The chronology of events relevant to this issue can be summarized as follows. At the hearing concerning the ITA's preliminary determination held on September 30, 1982, the hearing examiner set October 14, 1982 as the deadline for the submission of post-hearing briefs. A.R. at 1087. Plaintiffs' counsel expressed concern at the hearing, A.R. at 1044-45, that there might be insufficient time to comment on the forthcoming report of Commerce's verification [***9] team. These concerns were reiterated, in more detailed fashion, both in a letter dated October 12, 1982 to Mr. Horlick, A.R. at 1101-03, and in the post-hearing brief submitted on October 14, 1982. A.R. at 1150-52. In the letter to Mr. Horlick, plaintiffs' counsel requested that the deadline for the submission of post-hearing briefs be extended by approximately ten days after release of the verification report. A.R. at 1102. The Court is not aware of any response to this request but notes, as stated above, that the brief was filed on October 14, 1982, which was the date of the original deadline. By telephone call on October 21, 1982, A.R. at 1312, the ITA notified several parties, including plaintiffs' counsel, that the public version of the verification report, dated October 20, 1982, was available. A.R. at 1250-91. On October 27, 1982, an ITA case handler phoned plaintiffs' counsel inquiring whether comments would be submitted concerning the verification report. A.R. at 1313. Counsel indicated, inter alia, that their consultants had comments. n2 By letter to Mr. Horlick, dated November 2, 1982, plaintiffs commented on the verification report. A.R. at 1356-59. The [***10] ITA's final determination was signed on November 8, 1982 and was published in the Federal Register on November 15, 1982. A.R. at 1508, *47 Fed. Reg. 51,453 (1982).*

n2 The full text of the memo to the file prepared by the ITA case handler is as follows:

Courtesy call re R.O.V. -- Petitioners had not expressed opinion on them -- indicated in their post hearing briefs they wanted opportunity to do so. [Petitioners' counsel] said if anything immediately struck them I would be advised -- Since they hadn't called -- this conversation was a precautionary one -- to make sure they hadn't been trying to get the team. [Petitioners' counsel] indicated consultants had comments -- Would talk to them tomorrow to determine if anything needed pursuing.
A.R. at 1313.

The usual statement of the exhaustion doctrine is that to preserve an issue for judicial review it must have been raised at the administrative level "at the time appropriate under [the agency's] practice." *United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952).* [***11] In the instant type of action, the Court is statutorily directed to apply the exhaustion requirement "where appropriate." *28 U.S.C. § 2637*(d) (1982). n3 In light of this quoted language, Congress did not intend § 2637(d) to be jurisdictional in nature. *United States v. Priority Prods., Inc., 793 F.2d 296, 300 (Fed. Cir. 1986)* (dictum); *Timken Co. v. United States, 10 CIT 86, 93, 630 F. Supp. 1327, [**1210] 1334 n.2 (1986); Philipp Bros. v. United States, 10 CIT 76, 78, 630 F. Supp. 1317, 1320,* appeal dismissed on motion of appellee, App. No. 86-1122 (Fed. Cir. July 18, 1986); *Rhone Poulenc, S.A. v. United [*377] States, 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984).* n4 While notions of the integrity of the administrative process, as embodied in the statute, suggest that exhaustion should be the "general rule," *Allen v. Regan, 9 CIT 615, 618,* Slip Op. 85-126 at 5 (Dec. 10, 1985), the courts must resist [***12] inflexible applications on the doctrine -- characteristic of jurisdictional rules -- which frustrate the ability to apply exceptions developed to cover "exceptional cases or particular circumstances * * * where injustice might otherwise result" if it were strictly applied. n5 *Rhone Poulenc, 7 CIT at 134, 583 F. Supp. at 609* (quoting *Hormel v. Helvering, 312 U.S. 552, 557 (1941));* see also *McKart v. United States, 395 U.S. 185, 201 (1969)* (exhaustion doctrine need not be "applied blindly in every case"); cf. *Kokusai Elec. Co. v. United States, 10 CIT 166, 172, 632 F. Supp. 23, 28 (1986)* (holding that neglect to raise an issue prior to the close of Commerce's investigation will not be excused absent "extraordinary circumstances").

n3 § 2637(d) provides:

In any civil action not specified in this section, the Court of International Trade shall, where appropri-

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

2046395429

ate, require the exhaustion of administrative remedies.

[***13]

n4 It should be noted that even statutes which facially admit of no exceptions to the exhaustion doctrine have been construed as codifying judicially created exceptions to that doctrine. See, e.g., *Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 681-82 & n.6 (D.C. Cir. 1983).*

n5 Given the holding with regard to this issue, I need not attempt to catalogue nor discuss the exceptions to the exhaustion rule. Therefore, I do not consider, to what extent, if any, an exception which may be recognized for issues not properly raised but in fact considered by the administrative body, see, e.g., *Natural Resources Defense Council, Inc. v. EPA, 804 F.2d 710, 714 (D.C. Cir. 1986),* is relevant to the case at bar.

Concomitant with the respect for values of judicial economy and "administrative autonomy" inherent in the application of the exhaustion doctrine, *McKart, 395 U.S. at 194* (quoting L. Jaffe, Judicial Control of Administrative Action 425 (1965)), lies a responsibility for the agency, [***14] necessarily vested with control over the administrative proceedings, to allow a sufficient opportunity to raise issues. Thus, in determining whether questions are precluded from consideration on appeal, the Court will assess the practical ability of a party to have its arguments considered by the administrative body. n6 See *American Maritime Ass'n v. United States, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985)* (exhaustion should not operate to prevent a reasonable opportunity to object to significant agency action); *Philipp Bros., 10 CIT at 76, 630 F. Supp. at 1324* (issue not precluded from judicial review where there was no opportunity to present it at the administrative level); cf. *L.A. Tucker Truck Lines, 344 U.S. at 35* ("Appellee did not offer * * * any excuse for its failure to raise the objection * * * during the administrative proceeding. Appellee does [*378] not claim to have been misled or in any way hampered in ascertaining the facts * * *.").

n6 Unlike another type of case involving the exhaustion rule, see, e.g., *United States Cane Sugar Refiners' Ass'n v. Block, 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982)* (protest remedy need not be exhausted where "manifestly inadequate"); *Springfield Indus. v. United States, 11 CIT 123, 124,* Slip. Op. 87-19 at 3 (Feb. 24, 1987) (filing of protest would be futile), there is no question here concerning a "premature resort to the courts" because all administrative remedies are now closed to plaintiffs. *McKart, 395 U.S. at 196-97.* For this reason, in the instant type of case, claims improperly raised below are generally subject to dismissal. This Court recognizes that both types of cases potentially implicate similar -- though not necessarily identical -- considerations underlying the exhaustion doctrine, and does not declare that one type of case represents a more compelling candidate for the application of that doctrine. But cf. *McKart, 395 U.S. at 197, 199* (suggesting that, in the context of a subsequent criminal prosecution, the termination of the administrative process is a factor to be considered in deciding whether to require exhaustion). The fact remains, however, that review herein is limited to the administrative record, and, as stated earlier, unexhausted claims are normally unreviewable. This underscores the need, not only for private parties to properly raise issues before the agency, but also for the agency both to allow a suitable opportunity to raise those issues and to clarify the procedures for so doing.

[***15]

[**1211] Defendant does not suggest, nor could it, that plaintiffs were delinquent in submitting the post-hearing brief. Nor does defendant specifically dispute that new information was presented in the verification report that could not have been commented on by October 14, 1982. Instead, defendant would have the Court treat the request by plaintiffs' counsel for approximately ten additional days to submit a post-hearing brief as a jurisdictional bar to consideration of comments submitted twelve days after the verification report became available.

In the instant case, judicial review of plaintiffs' claims is not barred. The Court is unwilling to transmute an apparently unanswered request for additional time into a deadline imposed by the administrative agency. n7 Commerce did not attempt to fix a deadline for the submission of comments to the verification report. n8 Furthermore, the agency's scheduling of the hearing on its preliminary determination and the timing of the release of the verification report placed plaintiffs in a position where it was exceedingly difficult to generate meaningful commentary on the report prior to a few days before the date of completion of the [***16] investigation. In any event, plaintiffs commented on information initially uncovered in the verification report before Commerce signed the final dumping determination. Cf. *Kokusai, 10 CIT at 171, 632 F. Supp. at 27* (claim first raised before publication of duty order where relevant information was available to plaintiff at initiation

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group
20463954 30

of Commerce's investigation). Plaintiffs have not "slept on [their] rights," id., and this Court may proceed to consider the arguments presented.

n7 Additionally, it works no perversion on the English language to interpret the twelve days taken by plaintiffs to comment on the report as within the ambit of their request to extend the deadline for the submission of post-hearing briefs by a "period of approximately ten (10) days." A.R. at 1102, after the release of the verification report.

n8 The Court does not view the telephone call to plaintiffs' counsel, see infra at n.2, as establishing any deadline.

B. Operating Capital [***17] Loans

Defendant concedes that the original working capital loans were subsidies but argues that its decision to expense the benefits of the working capital loans at issue herein in the year of receipt, 1979, and not in the year of investigation, 1981, is fully consistent with prior expressions of its methodology concerning the allocation of benefits of short-term loans. Defendant's Opposition at 7, 10. The Court agrees.

As a general proposition, since a loan has a readily identifiable effect on the recipient over time, Commerce allocates loan benefits over the life of the loan. Subsidies Appendix, Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina, *49 Fed. Reg. 18,016, 18,019* (Dep't Comm. 1984). With respect to short-term loans which are to be "received and repaid within a year, [the ITA] [allocates] [*379] any benefits to one year only." *Id. at 18,020.* n9 The ITA determined that the benefits from the subject short-term loans, consistent with its treatment of such loans in general, should be fully recognized in the year of receipt. Plaintiffs have not challenged Commerce's stated methodology nor [***18] demonstrated that its application here distorts the economic reality of the transaction. See *British Steel Corp. v. United States, 10 CIT 244, 236, 632 F. Supp. 59, 69-70 (1986)* (citing *Michelin Tire Corp. v. United States, 6 CIT 320, 321 (1983)*, vacated as moot based on submission of statement of agreed facts, *9 CIT 38*, Slip. Op. 85-11 (Jan. 28, 1985)) (subsidy should be expensed in a [**1212] manner that provides a basic correspondence between subsidy and benefit).

n9 This accords with a prior methodological statement by the agency:

> We continue to believe that benefits of loans are most appropriately allocated over the life of the loan. Unlike grants, loans reflect the period of time in which the company has undertaken to repay the principal plus interest. Therefore, we will allocate loan benefits over the life of the loan, even for loans given expressly to purchase costly capital equipment.
> Appendix II, Certain Carbon Steel Products from Mexico, *49 Fed. Reg. 5148, 5150* (Dep't Comm. 1984).

[***19]

The parties have directed this Court to the decision in *British Steel Corp. v. United States, 9 CIT 85, 605 F. Supp. 286 (1985).* To the extent that British Steel may be relevant at all, the Court perceives no conflict with the instant decision. The British Steel court held that subsidies, in the form of equity infusions, that are used to acquire capital assets, may be countervailed after those assets have been prematurely retired. *British Steel, 9 CIT at 98, 605 F. Supp. at 296.* n10 That court agreed with the ITA's position that "the competitive benefits of funds used to acquire assets" may continue beyond the period of actual use of those assets. Id. In contrast, the operating capital loans at issue herein did not have long-term effects and were expensed in the year of receipt. The ITA's positions in both the investigation reviewed in British Steel and in the instant investigation are consistent with its methodology.

n10 In a later decision, *British Steel Corp., 10 CIT at 236, 632 F. Supp. at 70-71*, the court determined that it was unreasonable to allocate the benefits of subsidies, not used to acquire long-lived assets, over a 15 year period (the average useful life of integrated steel-producing assets as determined by the United States Internal Revenue Service).

[***20]

Plaintiffs stress that upon Olarra's declaration of bankruptcy in 1979, it ceased to make payments on its loan obligations, Plaintiffs' Reply at 5, at least until formal adoption of the receivership plan. This does not dictate that Commerce alter its methodology in the instant case. Furthermore, the Court rejects the notion that the benefits conferred in the instant case by bankruptcy -- extended repayment of principal without interest -- may be countervailed.

The parties' contentions on this issue involve the "general availability" test. According to defendant, the general availability of the bankruptcy process to Spanish firms renders its benefits noncountervailable.

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

2046395431

Defendant's Opposition at 17. Recently, the court in *PPG Indus. v. United States, 11 CIT 344, 352,* Slip. Op. 87-57 at 13-17 (May 15, 1987), carefully considered the doctrine of general availability and concluded:

[*380] Although general availability may be a manifestation that a program has not conferred a benefit upon a specific recipient, general availability is not the statutory test. It is merely one of several relevant factors to be considered in determining [***21] whether or not a benefit or competitive advantage has been conferred upon a "specific enterprise or industry, or group of enterprises or industries." See § 1677(5).

PPG Indus., 11 CIT at 352, Slip Op. 87-57 at 15-16. n11 Applying the statutory standard, this Court believes that the benefits conferred on Olarra in the instant case by virtue of reorganization do not represent a subsidy. Bankruptcy laws, like tax laws, see *Bethlehem Steel Corp. v. United States, 7 CIT 339, 348, 590 F. Supp. 1237, 1245 (1984),* do not confer countervailable benefits so long as, in their actual operation, they do not "result in special bestowals upon specific enterprises." *Cabot Corp. v. United States, 9 CIT 489, 498, 620 F. Supp. 722, 732 (1985),* appeal dismissed on motion of appellee, *788 F.2d 1539, 1540 (Fed. Cir. 1986).*

> n11 *19 U.S.C. § 1677(5)* (1982) defines subsidy in pertinent part as follows:
>
> The term "subsidy" * * * includes, but is not limited to, the following:
>
> * * * *
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
> (ii) The provision of goods or services at preferential rates.
> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

[***22]

The ITA verified that the bankruptcy was in accordance with Spanish law and that the receivership plan was approved by [**1213] at least three-quarters of Olarra's creditors and the Spanish court. Moreover, it is not required, and may be inappropriate, for the ITA to "look behind" the actions of the Spanish tribunal in the absence of facts tending to establish the existence of "a discrete class of beneficiaries." *PPG Indus., 11 CIT at 497,* Slip. Op. 87-57 at 17, to whom benefits accrue. There is nothing to suggest that the bankruptcy provisions, designed to assist financially troubled debtors, operate in practice to benefit specific enterprises or industries. The mere fact that bankruptcy allows repayment of debt on favorable terms -- which is the essence of giving debtors a "fresh start" -- does nothing to establish that only specific recipients have access to its benefits.

In sum, based on the record with regard to the treatment of working capital loans and the benefits flowing from Olarra's declaration of bankruptcy, the Court is satisfied that the ITA's position is "sufficiently reasonable," *American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)* [***23] (quoting *Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)),* and that substantial evidence exists for its conclusion. See also *Asahi Chem. Indus. v. United States, 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982)* (methodology need not be the most reasonable one available [*381] nor the one that the court would have selected). Under the appropriate standard of review, this is all that is required of the agency.

C. Equity Investments by the Bank of Spain

Plaintiffs present the following concerns with respect to the Bank of Spain's purchases of shares of Olarra's stock:

(a) that such purchases may operate as an implied guarantee by the Spanish government allowing Olarra to obtain preferential commercial loans;

(b) that the presence of the Bank of Spain might enable and encourage the company to provide returns to its shareholders which are lower than would otherwise be acceptable;

(c) that such purchases may have occurred at a time when dividends were in arrears thus allowing Olarra to avoid its preferred stock obligations;

(d) that if the market [***24] possessed information concerning the Bank of Spain's plans to acquire stock prior to Olarra's issuance of stock in 1976, the price paid by private investors directly to the company for the stock

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

2046395433

would be greater than it otherwise would be. If so, the benefits of the purchases would then flow to Olarra, even if made several years after the 1976 stock issuance.

Plaintiffs' Motion at 17-18.

The ITA's final determination makes no mention of the information uncovered upon verification concerning the aforementioned stock purchases. Notwithstanding the efforts of defendant's counsel to explain for purposes of the instant appeal why such purchases cannot amount to a countervailable subsidy, the Court holds that it was error for the ITA not to explain, assuming it so concluded, its rationale for rejecting the possibility that the stock purchases in the instant case conferred a subsidy on Olarra.

In so holding, the Court seeks to affirm its dedication to the tenet that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).* [***25] This Court will judge "the propriety of [the administrative] action solely by the grounds invoked by the agency," *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947),* and not by "counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)* (citing *Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); Maine Potato Council v. United States, 9 CIT 293, 298, 613 F. Supp. 1237, 1245 (1985)* (counsel's explanation inadequate substitute for clear statement from agency concerning [**1214] treatment of information). The Court is aware that a "decision of less than ideal clarity [can be upheld] if the agency's path may reasonably [*382] be discerned." *Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987)* (per curiam) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974)).* The ITA's [***26] proferred explanations for its determinations as to the other issues raised in this appeal are adequate, albeit less than ideal, to illuminate the agency's decisionmaking path. In contrast, the ITA's complete failure to address the stock purchase question, which was raised by plaintiffs during the administrative proceedings, is not in accordance with law, and requires a remand to the agency to allow further consideration of the issue. See Portable Elec. Typewriters from Japan, *40 Fed. Reg. 27,079* (Int'l Trade Comm'n 1975) (final neg. injury determination), remanded sub nom., *SCM Corp. v. United States, 84 Cust. Ct. 227, 243, C.R.D. 80-2, 487 F. Supp. 96, 108 (1980),* remanded, *2 CIT 1, 7, 519 F. Supp. 911, 915-16 (1981),* decision on remand aff'd, *4 CIT 7, 16-17, 544 F. Supp. 194, 201-02 (1982)* (action remanded twice for agency to provide a more specific and explicit statement of its determinations); *Budd Co., Ry. Div. v. United States, 1 CIT 67, 76, 507 F. Supp. 997, 1004 (1980)* [***27] (action remanded where basis of agency's findings of fact unclear and no statement of reasoning offered for resulting determination).

Conclusion

This action is remanded to the ITA to allow it to consider and explain fully whether the stock purchases by the Bank of Spain amount to a countervailable subsidy. The ITA's determinations with regard to the other issues raised for the purposes of this appeal are affirmed. The agency is directed to submit the results of its decision on remand within thirty days from the date of this order. Plaintiffs will then have fifteen days to respond and defendant may reply within ten days thereafter.

LEXIS·NEXIS® LEXIS·NEXIS® LEXIS·NEXIS®
A member of the Reed Elsevier plc group

2046395433

Exhibit B

posed rule to which objection is taken, and must state the grounds therefor;

(4) Each objection must be separately stated and numbered; and

(5) The objections must be accompanied by a summary of the evidence proposed to be adduced at the requested hearing.

(d) Within 30 days after the last day for filing objections, if objections are filed in substantial compliance with paragraph (c) of this section, the Assistant Secretary shall, and in any other case may, publish in the FEDERAL REGISTER a notice of informal hearing. The notice shall contain:

(1) A statement of the time, place, and nature of the hearing;

(2) A reference to the authority under which the hearing is to be held;

(3) A specification of the provisions of the proposed rule which have been objected to, and on which an informal hearing has been requested;

(4) A specification of the issues on which the hearing is to be had, which shall include at least all the issues raised by any objections properly filed, on which a hearing has been requested;

(5) The requirement for the filing of an intention to appear at the hearing together with a statement of the position to be taken with regard to the issues specified and of the evidence to be adduced in support of the position;

(6) The designation of a presiding officer to conduct the hearing; and

(7) Any other appropriate provisions with regard to the proceeding.

(e) Any objector requesting a hearing on proposed rule, and any interested person who files a proper intention to appear shall be entitled to participate at a hearing.

§1911.12 Emergency standards.

(a)(1) Whenever an emergency standard is published pursuant to section 6(c) of the Act, the Assistant Secretary must commence a proceeding under section 6(b) of the Act, and the standard as published must serve as a proposed rule. Any notice of proposed rulemaking shall also give notice of any appropriate subsidiary proposals.

(2) An emergency standard promulgated pursuant to section 6(c) of the Act shall be considered issued at the time when the standard is officially

filed in the Office of the Federal Register. The time of official filing in the Office of the Federal Register is established for the purpose of determining the prematurity, timeliness, or lateness of petitions for judicial review.

(b) If the Assistant Secretary wishes to consult an advisory committee on any of the proposals as permitted by section 7(b) of the Act, he shall afford interested persons an opportunity to inspect and copy any recommendations of the advisory committee within a reasonable time before the commencement of any informal hearing which may be held under this part, or before the termination of the period for the submission of written comments whenever an informal hearing is not initially noticed under §1910.11(b)(4) of this chapter.

(c) Section 6(c) requires that any standard must be promulgated following the rulemaking proceeding within 6 months after the publication of the emergency standard. Because of the shortness of this period, the conduct of the proceeding shall be expedited to the extent practicable.

[37 FR 8664, Apr. 29, 1972, as amended at 42 FR 65166, Dec. 30, 1977]

HEARINGS

§1911.15 Nature of hearing.

(a)(1) The legislative history of section 6 indicates that Congress intended informal rather than formal rulemaking procedures to apply. See the Conference Report, H. Rept. No. 91-1765, 91st Cong., second sess., 34 (1970). The informality of the proceedings is also suggested by the fact that section 6(b) permits the making of a decision on the basis of written comments alone (unless an objection to a rule is made and a hearing is requested), the use of advisory committees, and the inherent legislative nature of the tasks involved. For these reasons, the proceedings pursuant to §1911.10 or §1911.11 shall be informal.

(2) Section 6(b)(3) provides an opportunity for a hearing on objections to proposed rulemaking, and section 6(f) provides in connection with the judicial review of standards, that determinations of the Secretary shall be conclusive if supported by substantial evidence in the record as a whole. Although these sections are not read as requiring a rulemaking proceeding within the meaning of the last sentence of 5 U.S.C. 553(c) requiring the application of the formal requirements of 5 U.S.C. 556 and 557, they do suggest a congressional expectation that the rulemaking would be on the basis of a record to which a substantial evidence test, where pertinent, may be applied in the event an informal hearing is held.

(3) The oral hearing shall be legislative in type. However, fairness may require an opportunity for cross-examination on crucial issues. The presiding officer is empowered to permit cross-examination under such circumstances. The essential intent is to provide an opportunity for effective oral presentation by interested persons which can be carried out with expedition and in the absence of rigid procedures which might unduly impede or protract the rulemaking process.

(b) Although any hearing shall be informal and legislative in type, this part is intended to provide more than the bare essentials of informal rulemaking under 5 U.S.C. 553. The additional requirements are the following:

(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

(2) The presiding officer shall provide an opportunity for cross-examination on crucial issues.

(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

[37 FR 8664, Apr. 29, 1972, as amended at 37 FR 12231, June 21, 1972]

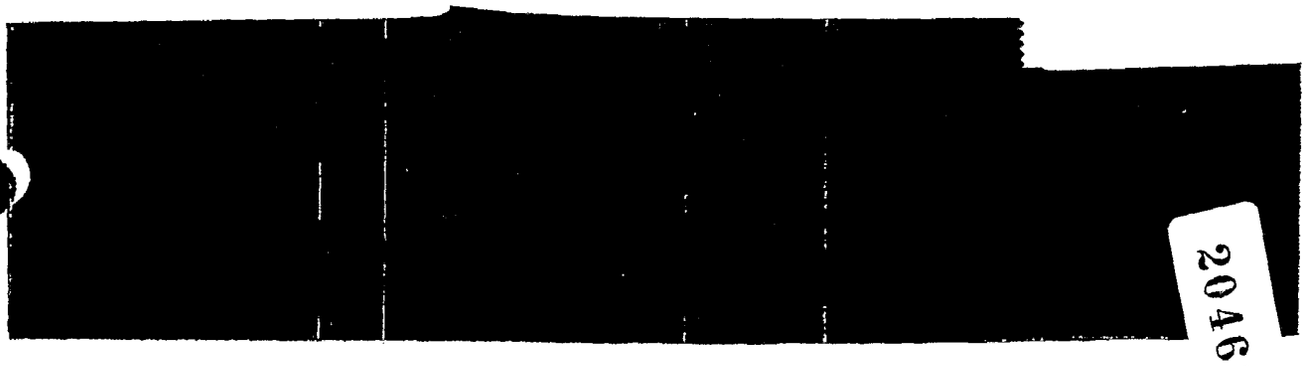
§1911.16 Powers of presiding officer.

The officer presiding at a hearing shall have all the powers necessary or appropriate to conduct a fair and full hearing, including the powers:

(a) To regulate the course of the proceedings;

(b) To dispose of procedural requests, objections, and comparable matters;

(c) To confine the presentations to the issues specified in the notice of hearing, or, where no issues are speci-



20463954

fied, to matters pertinent to the proposed rule;

(d) To regulate the conduct of those present at the hearing by appropriate means;

(e) In his discretion, to permit cross-examination of any witness;

(f) To take official notice of material facts not appearing in the evidence in the record, so long as parties are entitled, on timely request, to an opportunity to show the contrary; and

(g) In his discretion, to keep the record open for a reasonable, stated time to receive written recommendations, and supporting reasons, and additional data, views, and arguments from any person who has participated in the oral proceeding.

§ 1911.17 Certification of the record of a hearing.

Upon completion of the oral presentations, the transcript thereof, together with written submissions on the proposed rule, exhibits filed during the hearing, and all posthearing comments, recommendations, and supporting reasons shall be certified by the officer presiding at the hearing to the Assistant Secretary.

§ 1911.18 Decision.

(a)(1) Within 60 days after the expiration of the period provided for the submission of written data, views, and arguments on a proposed rule on which no hearing is held, or within 60 days after the certification of the record of a hearing, the Assistant Secretary shall publish in the FEDERAL REGISTER either an appropriate rule promulgating, modifying, or revoking a standard, or a determination that such a rule should not be issued. The action of the Assistant Secretary shall be taken after consideration of all relevant matter presented in written submissions and in any hearings held under this part.

(2) A determination that a rule should not be issued on the basis of existing relevant matter may be accompanied by an invitation for the submission of additional data, views, or arguments from interested persons on the issue or issues involved. In which event, an appropriate rule or other determination shall be made within 60 days following the end of the period allowed for the submission of the additional comments.

(b) Any rule or standard adopted under paragraph (a) of this section shall incorporate a concise general statement of its basis and purpose. The statement is not required to include specific and detailed findings and conclusions of the kind customarily associated with formal proceedings. However, the statement will show the significant issues which have been faced, and will articulate the rationale for their solution.

(c) Where an advisory committee has been consulted in the formulation of a proposed rule, the Assistant Secretary may seek the advice of the advisory committee as to the disposition of the proceeding. In giving advice to the Assistant Secretary, an advisory committee shall consider all matter presented to the Assistant Secretary. The advice of an advisory committee shall take the form of written recommendations to be submitted to the Assistant Secretary within a period to be prescribed by him. When the recommendations are contained in the transcript of the meeting of an advisory committee, they shall be summary in form. See §§ 1912.33 and 1912.34 of this chapter.

(d) A rule promulgating, modifying, or revoking a standard, or a determination that a rule should not be promulgated, shall be considered issued at the time when the rule or determination is officially filed in the Office of the Federal Register. The time of official filing in the Office of the Federal Register is established for the purpose of determining the prematurity, timeliness, or lateness of petitions for judicial review.

[37 FR 8655, Apr. 29, 1972, as amended at 42 FR 65166, Dec. 30, 1977]

PART 1912—ADVISORY COMMITTEES ON STANDARDS

Sec.

20463954436

Exhibit C

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In re	
PARTICIPANTS IN THE OSHA HEARING ON THE PROPOSED STANDARD ON INDOOR AIR QUALITY	Case No. 95-OSH-1
OSHA DOCKET NO. H-122 OALJ DOCKET 95-OSH-1	

NOTICE

Thank you for participating in the public hearing on OSHA's proposed standard for Indoor Air Quality. As you know, the hearing was a long and informative one, beginning on September 20, 1994 and concluding on March 13, 1995, with several short interim recesses.

Post Hearing Comments and Briefs

Some of you may not have been at the hearing on the day it concluded. Pursuant to the provisions of 29 CFR Section 1911.16, I have set the following post hearing comment and briefing periods:

The post hearing comment period will remain open until July 3, 1995 for the receipt of written information and additional data. Such information would include answers to questions you were asked at the hearing by the OSHA panel or by others in the audience, additional scientific evidence, and recommendations and supporting reasons which you believe to be relevant to the subject of the hearing.

During the post hearing brief period, which will close on September 11, 1995, the record will remain open for the receipt of position statements, briefs, recommendations and rebuttal of material that has been submitted during the post hearing comment period.

Anyone who has filed a timely Notice of Intention to Appear is eligible to file post hearing comments and briefs. It is neither necessary nor desirable to submit information as a post hearing comment which is already in the record.

Post hearing comments and briefs should be labelled as such and sent in quadruplicate to the Docket Office, Docket No. H-122, Room N-2624, U. S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N. W. , Washington, D.C. 20210.

2046395438

Transcript Corrections

A brief review of the transcripts from this proceeding indicates that there are some reporting mistakes included in the transcripts. This is inevitable in proceedings such as these.

The Rules of Procedure for Promulgating . . . Occupational Safety and Health Standards (29 CFR 1911.15(b)(3)) require that the hearing shall be reported verbatim. Those testifying at the hearing should examine a transcript of their own testimony (or cross examination, as the case may be) for reporting errors. Any errors shall be called to my attention, with a motion to correct.

Copies of motions to correct shall be sent by the party wishing to correct the transcript to: Judge Vittone, Susan Sherman, the Docket Office, and the person with whom the dialogue containing the error took place. These motions must be made by the close of the first post hearing comment period, July 3, 1995. Replies to motions to correct must be filed by July 24, 1995 and sent to those listed in the previous sentence.

This procedure shall only be used when there is a reporting mistake, such as wrongly identifying the speaker, inadvertantly deleting the word "not" from a sentence, etc. Inartfully phrased or erroneous answers may not be corrected using the procedure outlined here--these things were actually said and therefore it would be improper to claim they were a typographical error. While inartfully phrased or erroneous answers cannot be remedied by correcting the transcript, they may be addressed in post hearing comments.

JOHN M. VITTONE
Acting Chief Judge

JMV/kat

Dated: April 25, 1995

TOTAL P.02

20463954 39

Exhibit D

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

June 14, 1995

In the Matter of:	
PARTICIPANTS IN THE OSHA HEARING ON THE PROPOSED STANDARD ON INDOOR AIR QUALITY (Docket No. H-122)	

Order Extending Post Hearing Comment Period

Pursuant to the provisions of 29 CFR Section 1911.16, at the end of the public hearing on OSHA's proposed indoor air quality standard, I set a two part post hearing comment period. The first part of the comment period was to be until July 3, 1995, followed by the second part wherein the record would remain open until September 11, 1995.

The Occupational Safety and Health Administration and other parties have requested that I extend the post hearing comment period, believing that such extension will positively contribute to the building of a more complete record in this proceeding. This request is granted.

Accordingly, the first part of the post hearing comment period is hereby extended until September 1, 1995. In view of this extension, it is necessary to also extend the second part of the post hearing comment period. The second part of the post hearing comment period is hereby extended until November 13, 1995.

Anyone who has filed a timely Notice of Intention to Appear is eligible to file post hearing comments and briefs. During the first part of the post hearing comment period the record remains open for the receipt of written information and additional data. Such information would include answers to questions you were asked at the hearing by the OSHA panel or by others in the audience, additional scientific evidence, and recommendations and supporting reasons which you believe to be relevant to the subject of the hearing.

During the post hearing brief period, which will close on November 13, 1995, the record will remain open for the receipt of position statements, briefs, recommendations and rebuttal of material that has been submitted during the post hearing comment period.

204639544

It is neither necessary nor desirable to submit information as a post hearing comment which is already in the record.

Post hearing comments and briefs should be labelled as such and sent in quadruplicate to the Docket Office, Docket No. H-122, Room N-2624, U. S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N. W. , Washington, D.C. 20210.

Transcript Corrections

I have also decided to extend the period for filing motions to correct the transcript.

The Rules of Procedure for Promulgating . . . Occupational Safety and Health Standards (29 CFR 1911.15(b)(3)) require that the hearing shall be reported verbatim. Those testifying at the hearing should examine a transcript of their own testimony (or cross examination, as the case may be) for reporting errors. Any errors shall be called to my attention, with a motion to correct.

Copies of motions to correct shall be sent by the party wishing to correct the transcript to: Judge Vittone, Susan Sherman, the Docket Office, and the person with whom the dialogue containing the error took place. These motions must be made by the close of the first post hearing comment period, September 1, 1995. Replies to motions to correct must be filed by October 6, 1995 and sent to those listed in the previous sentence.

This procedure shall only be used when there is a reporting mistake, such as wrongly identifying the speaker, inadvertently deleting the word "not" from a sentence, etc. Inartfully phrased or erroneous answers may not be corrected using the procedure outlined here--these things were actually said and therefore it would be improper to claim they were a typographical error. While inartfully phrased or erroneous answers cannot be remedied by correcting the transcript, they may be addressed in post hearing comments.

John M. Vittone

JOHN M. VITTONE
Acting Chief Administrative
Law Judge

20463954442

Exhibit E

2046395443

428G-2

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

August 29, 1995

In the matter of:

PARICIPANTS IN THE OSHA HEARING ON THE PROPOSED STANDARD ON INDOOR AIR QUALITY
(Docket No. H-122)

ORDER DENYING REQUESTS FOR EXTENSION OF COMMENT PERIOD

Pursuant to the provisions of 29 C.F.R. § 1911.16, at the end of the public hearing in this matter, I set a two part post hearing comment period. The first part of the comment period was to be until July 3, 1995, followed by the second part wherein the record would remain open until September 11, 1995.

The Occupational Safety and Health Administration and other parties requested that an extension of the post hearing comment period be granted. Accordingly, on June 14, 1995, an Order was issued extending the first part of the post hearing comment period to September 1, 1995 and the second part until November 13, 1995.

Recently I have received five requests that the comment period again be extended by sixty (60) days. By filing dated August 25, 1995, the Occupational Safety and Health Administration has objected to the requested extension. Since there has already been one extension of the comment period, another will only be granted for good cause.

The Michigan Licensed Beverage Association, the Ohio Licensed Beverage Association and Chwat & Company, Inc. have all requested a sixty day extension of the public comment period without explanation. Since no cause was stated for their request, these three requests do not support granting a further extension.

The Clean Air Device Manufacturers Association statements contained in their request that they are a fairly new organization and that it is taking a long time to integrate

20493954 44

thirty member responses into one unified version are also not adequate to warrant another extension. As pointed out in OSHA's response to the motions, this organization has had close to one year to prepare its filing.

Finally, a rather lengthy request was received from ChemRisk, in which their representative, William Butler requests a sixty day extension to the comment period as well as the briefing period to finish analyses of two epidemiologic data sets from the National Health and Nutrition Examination Survey III and the National Center for Health Statistics. Dr. Butler has stated that both of these organizations will be submitting further data and information regarding their studies by the present deadline, September 1, 1995. OSHA has stated that the information to be submitted is merely an update of the prior information submitted and does not substantially alter the prior findings. As represented by both ChemRisk and OSHA, these organizations intend to submit this information in accordance with the public comment deadline. One of the purposes of the second portion of the comment period is to provide interested parties with the opportunity to rebut the information contained in submissions by others. ChemRisk will have the second portion of the comment period to respond to anything new in the findings of these two organizations. Therefore, Chemrisk also has not provided sufficient cause for the comment period to be extended.

Accordingly, the five requests for extension of the public comment period are hereby DENIED. The deadline for submissions in the first portion of the public comment period is September 1, 1995 and for the second portion is November 13, 1995.

JOHN M. VITTONE
Acting Chief Administrative Law Judge

2046395445

Exhibit F

OSHA RULEMAKINGS WITH COMPARABLE POST-HEARING BRIEFING PERIODS

Proceeding	Length of Post-Hearing Briefing Period (weeks)	# of Witnesses	# of Transcript Pages
OSHA's Final Rule on Occupational Exposure to Methylene Chloride, 59 Fed. Reg. 11567 (Mar. 11, 1994)	8½	38	2,716
OSHA's Final Rule on Occupational Exposure to Asbestos, 59 Fed. Reg. 40964 (Aug. 10, 1994)	13	53	4,578
OSHA's Final Rule on Occupational Exposure to Cotton Dust, 50 Fed. Reg. 51120 (Dec. 13, 1985)	7	70	1,500

20463954 47

2046395448

428 B

MICHIGAN LICENSED BEVERAGE ASSOCIATION

Retailers dedicated to the responsible sale and service of beverage alcohol

August 15, 1995

OFFICE OF ... 95 AUG 21 P5:00

Mr. John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, Northwest
Washington, D.C. 20001-8002

RE: Indoor Air Quality, H-122

Dear Judge Vittone:

On behalf of my clients who testified last Fall (1994) before OSHA on Docket No. H-122, the National Licensed Beverage Association, the Ohio Licensed Beverage Association, and the Michigan Licensed Beverage Association, I request a sixty day extension for the public comment period on the Indoor Air Quality Rule. Again, the docket number for this Rule is H-122. Your consideration of this matter is greatly appreciated.

Respectfully,

MICHIGAN LICENSED BEVERAGE ASSOCIATION

Louis H. Adado
C.E.O.

cc: John Chwat

20463954 49

LIMITED LIABILITY POOL

920 N. FAIRVIEW, LANSING, MICHIGAN 48912
(517) 374-9611 (800) 292-2896 FAX (517) 374-1165

428C

Vittone

94-OSH-1

OLBA

OHIO LICENSED BEVERAGE ASSOCIATION

OFFICE OF ADMINISTRATIVE LAW JUDGES
AUG 16 95

Philip A. Craig, Executive Director

An Affiliate of The National Licensed Beverage Association

August 14, 1995

Mr. John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, Northwest
Washington, D.C. 20001-8002

RE: Indoor Air Quality, H-122

Dear Judge Vittone:

On behalf of my clients who testified last Fall (1994) before OSHA on Docket No. H-122, the National Licensed Beverage Association, the Ohio Licensed Beverage Association, and the Michigan Licensed Beverage Association, I request a sixty day extension for the public comment period on the Indoor Air Quality Rule. Again, the docket number for this Rule is H-122. Your consideration of this matter is greatly appreciated.

Sincerely,

Phil Craig
Executive Director
Ohio Licensed Beverage Association

37 West Broad Street, Suite 480 • Columbus, Ohio 43215 • 1-800-678-5995 FAX (614) 241-2215

20463954 50

428D

CADM
Clean Air Device Manufacturers Association

4031 University Drive, Suite 400
Fairfax, VA 22030
Phone: 703.691.4612
Fax: 703.691.4615

OFFICE OF ... '95 AUG 21 P3:44

August 18, 1995

Honorable John M. Vittone
Acting Chief Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judge
800 K Street, N.W.
Washington, DC 20001-8002

Dear Judge Vittone,

I am writing on behalf of CADM's 30 members to respectfully request that the Occupational Safety and Health Administration (OSHA) extend the post hearing comment period.

As you may recall, CADM presented its testimony before the OSHA panel on October 14, 1994. At that time, the agency requested that CADM submit additional technical data to answer the numerous questions posed by the OSHA panel. As I stated, the group was relatively young and had been specifically formed because the proposed rule completely omitted clean air devices as an alternative for good indoor air quality. However, as you can imagine, the influx of new members, coupled with CADM's other members, added to the difficult task of coordinating an additional 24 responses, in addition to the original 6 members that testified.

Therefore, due to the laborius task of integrating 30 member responses into one unified version, CADM would be extremely grateful if the deadline was extended for an additional 30-60 days. We feel strongly that this extension will not only benefit CADM, but the agency in the long run as well.

Judge Vittone, CADM takes its responsibilities to OSHA very seriously, and is excited to be part of the process to achieve good indoor air quality. I also would like to stress that we look forward to continuing to work with the agency and will do our very best to meet the current deadline. Thank you in advance for your time and consideration. We appreciate it and look forward to hearing from you soon.

Sincerely,

W. Dennis Lauchner
Senior Legislative Director

cc: **Richard A. Allegrati, CADM Chairman**
Honeywell Environmental Air Control, Inc.

20463954 54

428E

ChemRisk®
A Division of McLaren/Hart

1135 Atlantic Avenue
Alameda, CA 94501
(510) 521-5200
FAX (510) 521-1547

August 15, 1995

The Honorable Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
600 K St. NW
Washington, DC 20001-8002

SENT VIA FAX: 202-565-5325
Original to Follow by Mail

94 054 -1

Re: Request for Extension of Post Hearing Comment and Briefing Periods, OSHA Proposed Rulemaking on Indoor Air Quality, Docket H-122

Dear Judge Vittone:

I request a sixty (60) day extension of the comment period for the above refetenced docket. I also request a sixty (60) day extension and a sixty (60) day increase for the briefing period for this docket, for a total briefing period of one hundred and twenty (120) days.

The extended time for the comment period is needed to complete analyses of data from two epidemiologic data sets that were first made public only recently and for which substantial, additional information is still being received. Part of this additional information is the anticipated submission to OSHA in the next three weeks of a new NHANES III diskette that corrects errors contained on the previously submitted diskette. The additional and extended time for the briefing period is needed to review and to respond to the analyses of these two epidemiologic data sets that are anticipated to be submitted by others to the OSHA docket.

The first epidemiologic data set to which I refer is from the National Health and Nutrition Examination Survey III (NHANES III). It was submitted on May 4, 1995 to the OSHA docket by the National Center for Health Statistics (NCHS). As presented by Drs. Niemeier, Mauer and Pirkle (all of NCHS), NHANES III provides a unique and extensive data set to examine exposure to environmental tobacco smoke (ETS) in the workplace and the correlates of that exposure.

2046395452

Specifically, NHANES III is the only statistical source to estimate the distribution of serum cotinine levels in the U.S. population. It is also the only nationally representative data source that allows the examination of the absolute and relative contributions of workplace and household ETS exposures to cotinine levels. This latter issue is central to the validity of the qualitative and quantitative extrapolation of the results of epidemiologic studies of spousal smoking to workplace ETS exposure. As such, it is central to OSHA's proposed rulemaking.

As you recall, the validity of the extrapolation of the results of spousal smoking studies to workplace ETS exposure has been hotly debated and consumed many hours during the public hearings. Much of the testimony addressed either the absence of valid statistical information to support the extrapolation or to the manner in which the extrapolation could be executed with the limited available data. The NHANES III data set can make substantial contributions to the clarification of this issue if sufficient time is allowed for its valid and complete analysis.

My request for an extended comment period is motivated by a desire i) to make full use of the unique data contained in NHANES III that was obtained at great expense to the federal government and, ultimately, the public; and ii) to reduce the time needed in the future to address the data and methods to be used for extrapolation based on limited epidemiologic data when more complete and substantial studies are available but, because of a September 1 time constraint, could not be analyzed and submitted to the OSHA record.

My request for an extended comment period is also needed because the analysis of the first diskette submitted to OSHA is taking more time than would be expected due to the limited documentation provided by NCHS. Specifically, the documentation accompanying the diskette contained only a limited description of the subset of subjects and data variables that were included on the diskette. The amount of written documentation accompanying this diskette is much, much, much less than is provided by NCHS for its other publicly available data sets. In June when I first learned that the NCHS had submitted these data to the docket, I telephoned the NHANES III data analysis staff and requested additional documentation for certain variables. The staff expressed surprise that the documentation I requested (regarding codes for occupation and industry of employment) had not been submitted. I was told that the NCHS would submit this additional documentation to the OSHA docket but, to date, they have not done so. During a subsequent phone call, NCHS told me that resources were available neither to provide additional documentation for the diskette nor to respond to inquires regarding the interpretation and use of these data. The absence of access to NCHS staff for such questions has increased the time needed to analyze these data.

2046395453

Further, I learned just this week from Dr. Mauer of errors on the NHANES III diskette submitted by NCHS in May, 1994. These errors are substantial and could affect a wide range of the statistical analyses. This data set which has now been identified as being flawed is the same data set which I and, presumably others, have been analyzing and would be the basis for our September 1 submissions to the OSHA docket. Per Dr. Maurer, the NCHS plans to submit to the OSHA docket a corrected diskette by the September 1 deadline. However, Dr. Mauer informed me that the NCHS does not now have the corrected diskette and that the corrected diskette may not be available until September 1.

It is imperative that the docket remain open so that the extensive analyses already completed by me and, presumably, others using the partially flawed diskette can be re-executed on the corrected data set. If the docket is not kept open, then some submissions will be based on the data from the partially flawed diskette while others will be based on the corrected diskette. The uncertainty in the interpretation of the submissions during the briefing period will add to the confusion because some analyses based on the partially flawed diskette may be responded to using the data from the corrected diskette. Failure to keep the docket open can only add to the uncertainty of all the findings from this unique study and, thus, add to the length of the whole rulemaking process.

Dr. Mauer also informed me that the NCHS will submit to OSHA by September 1 an additional diskette containing NHANES III data not previously available to the public. Dr. Mauer said that this diskette, which is not yet available, will include substantial additional information related to that contained on the previously submitted diskette. Based on the information provided to me by Dr. Mauer, I believe that this additional information will add greatly to the interpretation of the data contained on the first diskette submitted by NCHS. It will also provide data to address issues contained in OSHA's proposed rulemaking that could not be addressed with the data provided on the first diskette. The availability of this additional data set also requires that the comment period be extended. If not extended, then these supplemental data from NHANES III can not be properly analyzed and their full contribution not made available to OSHA.

The second epidemiologic data set to which I'm referring is the lung cancer study conducted by Brownson and others from the National Cancer Institute (NCI). This is one of the two largest epidemiologic studies of ETS and lung cancer ever conducted. Pursuant to NCI policy, the data from this study are eligible to be made public because the NCI has completed and published its planned analyses of them. Though a substantial amount of the data and information has already been transferred, additional relevant documentation has been requested from NCI and has been promised for delivery. Indeed, just this week I received substantial documentation and computer code which, when included in my submission to OSHA, will provide a greater understanding of the contribution from this important study.

20463954

Part of the information that was requested from NCI is for the purpose of specifically responding to comments from Dr. Steven Bayard of USEPA and others regarding my August 1994 submission to OSHA on the Brownson study. My earlier submission was based on a partial data set provided by NCI and allowed only certain analyses that could not address the questions raised by USEPA, OSHA and others. Now that the full data set is becoming available and the questions raised by others can be answered, it would be most unfortunate and counterproductive if time prevented a full examination of the data and response to USEPA, OSHA and others.

It is not likely that NCI will be able to provide all the relevant information in time for it to be incorporated into submissions to OSHA by September 1. Because of the importance of the Brownson study to OSHA's rulemaking and the unavoidable delays in acquiring and completing analyses, I request that the comment period be extended for sixty (60) days so that a more thorough and intensive analysis of these data can be provided.

The sixty (60) day extension of the briefing period is requested pursuant to the sixty (60) day extension of the comment period. The sixty (60) day increase in the briefing period is needed to review and to respond to the analyses of these two epidemiologic data sets that are anticipated to be executed and submitted to OSHA by others. Specifically, as more of the data become available from the NHANES III study, more time is needed to plan and to execute the multivariate analyses that are required to obtain valid statistical estimates of magnitudes of association that are as low are those reported for workplace ETS exposure. Failure to execute complete and valid statistical analyses of these data will only add to the frustration of the rulemaking process and delay OSHA in completing its stated mission.

Though you may not be aware of it, data sets as large and complex as the NHANES III usually require years of data analysis to understand and to extract all the relevant and useful information on research questions like those being addressed for indoor air quality. For example, NHANES II, completed in 1980, is still being analyzed and generating peer reviewed research reports. Thus, the request for an additional sixty (60) days (for a total of one hundred and twenty (120) days) for the briefing period is substantially less than is typically utilized for a study such as this.

In summary, an extension in the comment and briefing periods is necessary to allow the submission of new analyses regarding two epidemiologic data sets. Both data sets were collected and originally analyzed using federal funds for the purpose of examining the exact questions that are central to OSHA's proposed rulemaking. A partially flawed version of one of the data sets (NHANES III) has been submitted to OSHA and will introduce confusion and uncertainty if not corrected. An analysis of part of the other data set (Brownson) was submitted to OSHA and generated questions that can be addressed only by the full data set for which additional material promised by NCI is forthcoming. Failure to extend the time period to allow the epidemiologic

analyses described here will not only result in ignoring the information that was so costly to the federal government to collect but could also result in OSHA having to deal with the "misinformation" contained on the partially flawed data set. Further, failure to extend the comment and briefing period will add to the cost to OSHA for these rulemaking proceedings because many issues and questions will need to be revisited again when the analyses of these two epidemiologic data sets are finally allowed into the docket.

Thank you for your consideration of this request.

Sincerely,

William J. Butler

William J. Butler, Ph.D.
Managing Principal
Biostatistics & Epidemiology

cc: Ms. Sue Sherman, Esq. via FAX: 202-219-7147
OSHA Docket H-122, via mail

ChemRisk
A Division of McLaren/Hart

20463954 56

428F

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

August 25, 1995

The Honorable Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N. W.
Washington, D. C. 20001-8002

Dear Judge Vittone:

We are writing to oppose the granting of the pending petitions for extension of the first part of the post-hearing comment period in the OSHA Indoor Air Quality rulemaking, currently set to expire on September 1, 1995. This opposition is submitted in response to the four requests for further extensions of time, which you forwarded to us earlier this week[1]. Good cause has not been shown by any of the requesters as to why the post-hearing comment period, which has already been extended for 60 days, should be extended further.

At the conclusion of the public hearings on Indoor Air Quality on March 13, 1995, a two-part post-hearing comment period was established, totalling 6 months. The purpose of the first part of the post-hearing comment period (approximately 4 months) was to enable participants to submit to the docket answers to questions asked during the hearing, additional scientific evidence, and recommendations and supporting reasons relevant to issues which were the subject of the hearing. The purpose of the second part of the post-hearing comment period (approximately 2 months) was to enable participants to submit position statements, briefs, recommendations and rebuttal of material that was submitted during the first part of the post-hearing comment period.

On June 14, 1995, you granted a 60 day extension of the first part of the post-hearing comment period at the request of OSHA and others. Thus, instead of ending on July 3, 1995 as originally scheduled, the first part of the post-hearing comment period was extended until September 1, 1995, with the deadline for the second part of the post-hearing comment period being extended from September 11, 1995 until November 13, 1995.

---

[1] Requests for an extension of time in which to file post hearing comments were received from the Ohio Licensed Beverage Association (OLBA), the Clean Air Device Manufacturers Association (CADM), the Michigan Licensed Beverage Association MLBA), and William Butler, Ph.D. of ChemRisk.

20463954 52

As stated above, the Department of Labor is opposed to any further extensions of the first part of the post-hearing comment period beyond September 1, 1995. In opposing these requests, we would point out that, in addition to the fact that the comment period has already been extended once for an additional 60 days, good cause has not been shown why any further extension should be granted.

Two of the four pending motions, one from the Ohio Licensed Beverage Association and the other from the Michigan Licensed Beverage Association, request a 60 day extension, but state no justification for the request. Another, from the Clean Air Device Manufacturers Association (CADM), merely cites an influx of new members and "the laborius task of integrating 30 member responses into one unified version" [of a response] as a reason for a 30-60 day extension. Any further extensions on this basis would be unwarranted in view of the fact that the CADM gave its testimony on October 12, 1994; thus by September 1, 1995 it will have had almost a year to work on its post-hearing submission. Increased convenience to one participant to have more time to integrate its members' comments is not a sufficient reason to extend the comment period. While we are grateful for the interest that these groups have shown in this rulemaking, and the information that they have provided, in view of the already generous amount of time which has been allowed for the submission of post-hearing comments, we believe that these requests for extensions should be denied.

ChemRisk, through its representative Mr. Butler, is requesting a 120-day extension [2] in order to allow for the "submission to OSHA in the next three weeks of a new NHANES III diskette that corrects errors contained on the previously submitted diskette." The NHANES III data file was submitted to the docket by the National Center for Health Statistics (NCHS) in May. It is our understanding that in the data file submitted in May the statistical weights were calculated based on the best available data at the time. Therefore, to characterize them as containing errors is inappropriate. Since then, however, NCHS has received updated information on the adjusted 1990 census figures and has updated the sampling weights for the NHANES III data files accordingly. Other minor changes were made to this data set. These changes are not expected to have any effect on the cotinine levels or on any other environmental tobacco smoke (ETS) related variables in the file. In point of fact, it is our understanding that analyses done by NCHS staff on both versions of the file show no substantial change in results.

---

[2] The ChemRisk request focusses on the difficulties of getting material and analyzing it by the September 1 deadline; no reasons appear to be given in support of the additional 60 day extension, presumably to be added to the second post-hearing comment period.

2046395458

Mr. Butler also states that "data sets as large and complex as the NHANES III usually require years of data analysis to understand and to extract all the relevant . . . information on research questions like those being addressed for indoor air quality." He also points out that "as more data become available from the NHANES III study, more time is needed . . .". Under this rationale, there would never be a point in time when it would be appropriate for the record to close.

Mr. Butler also requests additional time in which to analyze data requested from the National Cancer Institute on the Brownson study. The data to which Mr. Butler refers has been requested not of OSHA, but from a third party over whom OSHA has no control. As Mr. Butler himself admits, he has already received "substantial documentation and computer code" from NCI. While more may have been requested, it is extremely unclear when it will be produced or how beneficial it will be to the rulemaking proceeding as a whole. It should be remembered that the Brownson study is just one of hundreds of pieces of evidence that must be considered and analyzed in this rulemaking. Science is a continually evolving process; new data will always become available.

In closing, we would note that the foregoing requests for extensions of time have been submitted by only four of the 274 participants who filed notices of intention to appear, which indicates that the time already allotted for the first part of the post-hearing comment period has been sufficient. This period of approximately 6 months is as long or longer than the amount of time normally provided in other major OSHA rulemakings; no further extension is warranted based on the submissions discussed above.

Respectfully submitted,

Susan J. Sherman
Assistant Counsel for Standards

20463954459

cc!

William J. Butler, Ph.D.
Managing Principal, Biostatistics & Epidemiology
ChemRisk
1135 Atlantic Avenue
Alameda, California 94501

Mr. Phil Craig
Executive Director
Ohio Licensed Beverage Association
37 West Broad Street, Suite 480
Columbus, Ohio 43215

Mr. W. Dennis Lauchner
Senior Legislative Director
Clean Air Device Manufacturers Association
4031 University Drive, Suite 400
Fairfax, Virginia 22030

Mr. Louis H. Adado
Chief Executive Officer
Michigan Licensed Beverage Association
920 North Fairview
Lansing, Michigan 48912

2046395460

428 H

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Centers for Disease Control and Prevention

National Center for Health Statistics
6525 Belcrest Road
Hyattsville, Maryland 20782

September 1, 1995

Ms. Demetra Collia
Department of Labor
Room N 3718
200 Constitution Avenue
Washington, D.C. 20210

Dear Ms. Collia:

Thank you for making me aware of the request for an extension of the comment period in the OSHA indoor air quality rule making proceeding which you have received from William Butler, Ph.D. of ChemRisk. As I understand it, Dr. Butler states that one of the reasons he wants the extension is in order to allow for the submission of "new NHANES III diskette that corrects errors contained on the previously submitted diskette." These errors were characterized as substantial and the data file was said to be flawed. This is a misrepresentation of the facts. The file that the National Center for Health Statistics (NCHS) submitted to the docket in May was not flawed: the statistical weights were calculated based on the best available data at the time. Since then, NCHS has received updated information on the adjusted 1990 census figures which included the latest adjustments to account for the undercount of young male minority groups in the 1990 census and has updated the sampling weights for the NHANES III data files. In addition, minor changes were made to the data set to make it easier for the public to use. These modifications to the originally submitted data set are minor and estimates made based on the revised data set will not differ in a meaningful way from those obtained from the data set submitted on May 4,1995. I personally informed Dr. Butler of this fact.

Dr. Butler also noted that the documentation accompanying the diskette contained only a limited description of the data variables that were included on the diskette. The documentation provided to the docket is more limited than that provided for general release to the public under the NCHS Data Tape Release Program. However, the provided data set is much smaller and less complicated than that ordinarily provided to the general public and included many enhancements that would make it easier for Dr. Butler to analyze the data. Many of the variables were coded so that they could be used directly in his analyses. In addition, I and my staff have spent several hours assisting Dr. Butler. All questions posed by Dr. Butler were answered fully by me and another staff member at NCHS. It was only after several hours

20463954 61

helping Dr. Butler that I realized that he needed a level of support that we were not able to provide him. Nor was the level of support requested by him appropriate for us to provide. I told Dr. Butler that we could no longer answer his questions because it became apparent to me that he did not have substantive knowledge at the level that would allow him to analyze the data without substantial support. For example, he did not seem to understand dietary interviewing methodology and I did not think it was appropriate for staff at NCHS to train him to understand these methods. I suggested to Dr. Butler that he may want to hire consultants, e.g., a nutritionist, that understood the many complicated data collection methods used in the NHANES III.

Dr. Butler states in his letter that the staff member at NCHS that he spoke with was surprised that extensive documentation of the occupation and industry codes was not provided with the data files. The staff member that Dr. Butler spoke with was the same one that put the data files together and provided the documentation and could not have been surprised. I also personally told Dr. Butler that the occupation/industry codes were the standard codes used by the Bureau of the Census and code books were widely available to the public and could be obtained from the Bureau. These codes are used in many other studies. I never told Dr. Butler that we would provide him with the Bureau of Census code book. This code book can be purchased by Dr. Butler or any other member of the public from the Bureau of Census. While NCHS tries to assist the public in using its data, this assistance must be tempered by our available resources.

Dr. Butler also commented on my offer to make available to the Docket additional data not previously released to the public. An interim release of additional Phase 1 NHANES III data is also being submitted to the Docket and simultaneously being distributed directly to the public by the NCHS. Although many of these data will not be of relevance to the OSHA proposed rule making they are being submitted nonetheless because the files are being distributed directly to the public as part of the NCHS Data Tape Release Program and there may be some information of relevance to the proposed rule making.

20463954462

As a point of clarification, Dr. Niemeier does not work for the National Center for Health Statistics.

Sincerely yours,

Kurt R. Maurer, Ph.D.
Deputy Director,
Division of Health Examination Statistics
National Center for Health Statistics

cc: Mr. Robert S. Murphy
Mr. Jack Anderson
Dr. Jennifer Madans
Dr. Lawrence Reed

20463954 93

ChemRisk®
A Division of McLaren/Hart

1135 Atlantic Avenue
Alameda, CA 94501
(510) 521-5200
FAX (510) 521-1547

492-2

September 27, 1995

The Honorable Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K St. NW
Washington, DC 20001-8002

SENT VIA FAX: 202-565-5325
Original to Follow by Overnight Mail

Re: Request for Extension of Briefing Period, OSHA Proposed Rulemaking on Indoor Air Quality, Docket H-122

Dear Judge Vittone:

I request that the briefing period for the above referenced docket be extended by a minimum of a one hundred and twenty (120) days.

The extended time for the briefing period is needed to execute analyses of two epidemiologic databases submitted this month to the OSHA docket by the National Center for Health Statistics (NCHS). The current briefing period does not provide sufficient time to complete analyses of these two databases in the detail needed to address the complex scientific issues contained in OSHA's proposed rulemaking. Additional information on the need for more time became available after my first request for an extension (dated August 15, 1995) was denied in your Honor's Order dated August 29, 1995. The additional information is described below.

1) **New data comprise 96% of the information contained on the computer diskettes submitted by NCHS to the OSHA docket on September 1, 1995.** At the time of my first request for an extension, NCHS was not expected to submit any new data to the docket on September 1, 1995. Your Honor premised the denial of my first request (pg 2 of the Order) on the fact that "OSHA has stated that the information to be submitted (by NCHS) is merely an update of the prior information submitted and does not substantially alter the prior findings." This is, in fact, not the case. The vast majority (96%) of NCHS' submission is unanalyzed data that is new to OSHA and that has never before been released to the public. Specifically, the new data provide information on 1,528 variables in three computer files. The prior information submitted by NCHS

20463954 64

contained only 68 variables in a single computer file. The computer files for the new data are approximately 20 times larger than the files included in NCHS' earlier submission. The documentation for the contents of the three new computer files (Attachment A) files is 2 1/2 inches thick, compared to the seven pages of documentation (Attachment B) for the prior information submitted by NCHS. These data are new to the OSHA docket and not "updates" as previously presumed. Because of the complex design of the NHANES III study and the huge volume of new information in NCHS's new unexpected submission, ChemRisk requires at least one hundred and twenty (120) additional days to analyze these data.

Dr. Kurt Maurer of NCHS states (Docket # 428H, pg 2) that "there may be some information of relevance to the proposed rule making" contained in this new database. He also states that "many of these data (in the new database) will not be of relevance to the OSHA proposed rule making." Thus, per Dr. Maurer, ChemRisk will first need to examine each component of this enormous new database to determine what part or parts are relevant to OSHA's proposed rule. Only after completing this process can ChemRisk begin to examine the selected parts to prepare a submission to the docket.

Your Honor's Order denying my earlier request states (pg 2) that "(o)ne of the purposes of the second portion of the comment period is to provide interested parties with the opportunity to rebut the information contained in the submissions by others. ChemRisk will have the second portion of the comment period to respond to anything new in the findings of these two organizations." However, because of insufficient time in the briefing period, ChemRisk and others do ***not*** have the "opportunity to rebut the information" or "to respond to anything new" contained in the 1,528 variables of an entirely new database that is approximately 20 times larger than that previously submitted by OSHA. In fact, the current comment period may be insufficient for ChemRisk even to determine whether or not to respond to NCHS' new submission.

2) **The computer file containing the "updated" information of NCHS' prior submission is corrupted.** The sixth computer diskette, which contains 4% of the data submitted by NCHS on September 1, 1995, is what has been described as an "update" of NCHS' May 4, 1995 submission. The computer diskette containing these "updated" data is corrupted. The source of the error appears to be related to the use of a file-transfer command in a statistical package called "SAS" that was used by the NCHS to transfer this database between machines. I obtained two different copies of this computer diskette from OSHA. The two copies are identical, and both are corrupted. ChemRisk sent the computer diskette to the technical support personnel of software company "SAS", and SAS confirms that the data file provided by OSHA is corrupted. (Attachment C) I contacted OSHA regarding this problem. OSHA stated that they had not yet attempted to use this computer diskette though they had attempted to contact NCHS regarding my questions.

when?

20463954 65

Today, OSHA requested that I also contact NCHS to resolve this problem and to report back to OSHA. I contacted Dr. Kurt Maurer of NCHS and discussed this problem with him and his computer staff. NCHS agreed to examine the diskette submitted to OSHA and the methods used to generate it. NCHS also agreed to provide a corrected diskette if appropriate but did not provide a date by which this would be done. The computer "glitch" that is the source of the corrupted NCHS computer diskette is, I believe, minor and will be easily corrected by NCHS staff. However, the time delays required to correct this problem (which may extend to a month after submission) reduces the time available to ChemRisk and others to evaluate this "updated" database. Until NCHS provides a corrected version of this sixth computer diskette, ChemRisk can not even begin to analyze these data.

In summary, I request that the briefing period be extended by a minimum of a one hundred and twenty (120) days so that ChemRisk and others will have the opportunity to review the contents and findings of the two databases recently submitted by NCHS. Both databases were collected at substantial public expense and provide new information on the health and exposure issues addressed in OSHA's proposed rulemaking. Without the requested extension, ChemRisk will not have the opportunity to respond to this huge volume of new information as contemplated in Your Honor's previous Order.

Thank you for your consideration of this request.

Sincerely,

William J. Butler

William J. Butler, Ph.D.
Managing Principal
Biostatistics & Epidemiology

Attachments (Attachment A not included in the FAX)

cc: Ms. Sue Sherman, Esq. via FAX: 202-219-7147 and Overnight Mail
OSHA Docket H-122, via mail

ChemRisk®
A Division of McLaren/Hart
Environmental Engineering

20463954 66

recycled paper

495

LAW OFFICES
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE
PROFESSIONAL ASSOCIATION

151 MEETING STREET, SUITE 600
POST OFFICE BOX 1137
CHARLESTON, SOUTH CAROLINA 29402
803-720-9000 FAX # 803-577-7513

2301 JACKSON STREET
POST OFFICE BOX 365
BARNWELL, SOUTH CAROLINA 29812
803-259-9000 FAX # 803-259-7049

POST OFFICE BOX 6067
PROVIDENCE, RHODE ISLAND 02940
401-521-9400 FAX # 401-521-9460

136 EAST WASHINGTON STREET
POST OFFICE BOX 10788
GREENVILLE, SOUTH CAROLINA 29603-0788
803-233-0070 FAX # 803-370-0018

9 OLD JOHNSON AVENUE
RALEIGH, NORTH CAROLINA 27608
919-832-9250 FAX # 919-832-8343

TIN ROSEN CENTRE, SUITE 420
3333 RIENZI LANE
BATON ROUGE, LOUISIANA 70809
504-768-7222 FAX # 504-768-7999

J.R. NESS (1916 - 1991)
MOTLEY LOADHOLT
J. TERRY POOLE
RONALD L. MOTLEY
TERRY R. RICHARDSON, JR.
THOMAS W. WEEKS
JOSEPH F. RICE
CHARLES W. PATRICK, JR.
EDWARD J. WESTBROOK (DC & SC)
MICHAEL J. BECKMAN
PAUL H. HUDSON (KS & SC)
THOMAS D. McKIM
JAMES H. RION, JR. (VA & SC)
JOSEPH B. COX, JR. (NC & VA)
A. HOYT ROWELL, III
DAVID L. LYLE, JR.
TIMOTHY F. RILEY (KY, OH & SC)
ANN R. BITTER (TN & SC)
J. ANDERSON DUBLY, III (SC, NC & DC)
JOHN J. McCONNELL, JR. (RI, MA & SC)
DEBA A. BALLARD
JEFFREY T. RUDY
SUSAN NIAL (NY, CT & SC)
L. JOEL CHASTAIN
KENNETH J. WILSON (FL, GA & SC)
ALLARD A. ALLSTON, III
JOHN H. HEARNE

KARL M. NOVAK
L. DAVID GORDON
ROBERT M. TURKEWITZ (SC & NY)
HOWARD B. CUTTINO HAM, JR.
M. LOUIS SUTTER
CYNTHIA A. O'NEIL
ROBERT J. McCONNELL (MA & RI)
WILLIAM M. CONNELLY (IL, WI & AZ)
P. JAY CONE, II (SC & NC)
CAMERON WADDELL
THOMAS J. LAMB (NC, DC & CA)
ROB R. ANDERSON
J. DAVID FLOWERS (SC & NC)
SHERYL MOORE INGRAM (SC & VA)
J. BURTON LaBRANCH, IV (LA & TX)
H. BLAIR HAHN
ROBIN CROSS KOLLERUD (MA ONLY)
V. BRIAN BRYON
JAMES M. HOUSTON
D. SCOTT BEARD
J. DAVID BUTLER
FREDERICK J. [illegible]
KIMBERLY S. VROOM
JODI W. FLOWERS
FREDERICK C. BAKER (SC & NY)
THEODORE H. HUGH (VA ONLY)
JOHN B. GUERRY, III
CHRISTIAN H. HARTLEY

October 31, 1995

VIA FACSIMILE (202) 565-4094 AND REGULAR MAIL

Honorable John Vittone
Administrative Law Judge
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

OSHA
DOCKET OFFICER
DATE NOV 3 1995
TIME

RE: Extension of the Comment Period to OSHA's Proposed Rule-making on Indoor Air Quality

Dear Judge Vittone:

On behalf of the ETS victims, public health groups, educators, and trade unions I represented for the purposes of the Indoor Air Quality Hearings, I write to voice opposition to the extension of the comment period granted to the tobacco industry. The tobacco industry has once again succeeded in further delaying and perverting the rule-making process, at the continued expense of the health of the American worker. This is an intolerable and unjustified situation.

Every day that continues to pass, American workers are unwittingly exposed to ETS and numerous other indoor air toxins. They are forced to breathe in contaminants and passively smoke a known carcinogen. This will result in more suffering and disease, and OSHA cannot sit idly by and allow the continuation of this blatant attempt to delay the inevitable at the expense of the health of innocent workers and bystanders. Make no mistake:

20463954674

the tobacco industry will miss no opportunity to delay this process indefinitely if allowed to do so. On behalf of sick Americans everywhere, I respectfully request that you deny the tobacco industry any future delays or extensions which only serve to ensure the continued opportunity to avoid any regulation to safeguard against the ill effects of these products.

As a procedural matter, it is an outrage that no notice was given to the hearing presentors or participants that an extension of the comment period was being requested. While this may technically be an informal rule-making process, the reality is that the tobacco industry has turned this into a litigious setting. As a matter of fairness, all interested parties, especially those representing the American worker, or those commenting on their behalf, should have been notified by the tobacco industry of this request. I trust that any future requests will be treated more openly and formally, with a chance for notice, hearing, and opposition.

This is another in a series of calculated manuevers by the industry that have dominated this process. I ask that you not allow this process or this agency to be further bulldozed by an industry with no concern for the health of the American worker.

Sincerely,

Ronald L. Motley

Ronald L. Motley

RLM/crb

cc: Robert B. Reich, Secretary of Labor (via facsimile & regular mail)
Joseph A. Dear, Asst. Secretary for OSHA (via facsimile & regular mail)

2046395468

20463954 99

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210

October 20, 1995

495

The Honorable Judge John M. Vittone
Acting Chief Administrative Law Judge
Office of Administrative Law Judges
800 K Street, N. W.
Washington, D. C. 20001-8002

Dear Judge Vittone:

On behalf of the Occupational Safety and Health Administration, I am writing to oppose the granting of a 120-day extension of the second part of the post-hearing comment period in the Indoor Air Quality rulemaking, currently set to expire on November 13, 1995. Requests for at least a 120-day extension have been received on behalf of Philip Morris, "the scientific consultants who testified at the request of the Tobacco Institute", and from R. J. Reynolds Tobacco Company and Mr. Butler of ChemRisk. As we demonstrate below and in the enclosed response document, a 120-day extension is not justified by the facts in this case.

At the conclusion of the public hearings on Indoor Air Quality on March 13, 1995, a two-part post-hearing comment period was established, totalling 6 months. The purpose of the first part of the post-hearing comment period, which lasted approximately four months, was to enable participants to submit to the docket answers to questions asked during the hearing, additional scientific evidence, and recommendations and supporting reasons relevant to issues which were the subject of the hearing. The purpose of the second part of the post-hearing comment period, approximately two months, was to enable participants to submit position statements, briefs, recommendations and rebuttal of material that was submitted during the first part of the post-hearing comment period.

After reviewing the four petitions for an extension of time, it is clear that good cause has not been shown for extending the comment period an additional 120 days. Many of the assertions in the Philip Morris petition, repeated in less detail by R. J. Reynolds and the Tobacco Institute, are inaccurate or are the result of their misunderstanding of the OSHA docketing process and a miscommunication between OSHA's Health Standards section and the Docket Office. Much of the confusion could have been eliminated if Philip Morris had articulated their concern to either the Project Officer or the Project Attorney at the time these issues arose, rather than waiting to include the assertions in a petition for a 120-day extension.

2046395470

Regardless of their failure to bring this matter to our attention, it is apparent that some confusion occurred. Our investigation shows that as of October 4, 1995 the Docket Office stopped "filling in the gaps" (i.e. finding and inserting into the docket materials that were included on a diskette the entirety of which was mistakenly included in the docket list). It would appear that this confusion may have resulted in a little over a month not being used as efficiently as possible by some of the parties to this proceeding. In view of this fact, the Occupational Safety and Health Administration would not be opposed to the granting of a 41 day extension (accounting for the period from September 1 until October 12) to make up for time which may have been lost due to this misunderstanding.

As discussed in the enclosure, only about one third of the NCHS data is potentially relevant to the IAQ rulemaking. A short extension would also give Mr. Butler additional time to analyze the NCHS disks.

The Tobacco Institute argues that the size of the record as well as past history in other OSHA proceedings entitles them to at least an extra 120 days in which to file post hearing briefs. It is not always true that the length of the post hearing comment period extends in logarithmic relation to the size of the record. For example, in the Hazard Communication rulemaking, hearings were held in four cities; approximately one month was given for the first post hearing comment period, and two months was given for the second post hearing comment period. In the Cancer Policy proceeding, which had a hearing that included some 145 participants, approximately two months was given for the first post hearing comment period, and a three month period (including extensions) was given for the second post hearing comment period.

The Occupational Safety and Health Administration, in good faith and after consultation with many of the parties involved in the rulemaking proceeding, recommended a very generous period for post-hearing comments. The tobacco companies agreed to this time period last March. Certainly they knew that additional materials would be submitted to the record. There is nothing in the number or complexity of the materials submitted that would justify the granting of the requested 120-day extension. If you were to grant the full amount of time requested, 120 days, the amount of time allowed for post-hearing comments would far exceed the amount of time taken by the hearing itself! Indeed, the granting of this latest extension request would result in a post-hearing comment period of a year. This amount of time is clearly not justified by the facts of this case.

2049395474

The original amount of time allowed for the second post-hearing comment period, some two and a half months, is more than adequate in which to file post-hearing briefs, especially for participants, such as petitioners with a vast amount of substantive knowledge in the field. In view of the fact that there was some confusion in the docket, we think that, at most, a 41-day extension would be appropriate. We reach this conclusion because this is the amount of time that elapsed from the beginning of the second post-hearing comment period (September 1) until a corrected list was available in the Docket Office (October 12). Thus, if you do agree with this reasoning and grant the 41-day extension, petitioners would have almost four months in which to file their briefs.

In closing, we would note that the foregoing requests for extensions of time have been submitted by only four of the 274 participants who filed notices of intention to appear, which indicates that the time already allotted for the second part of the post-hearing comment period has been sufficient. The amount of time is as long or longer than the amount of time normally provided in other major OSHA rulemakings; no extension greater than that agreed to herein is warranted based on the submissions discussed above.

Respectfully submitted,

Susan J. Sherman
Assistant Counsel for Standards

Enclosure

20463954 72

Response to Petitioner's Motion for Extension of Time

I. OSHA's "Sub-Docket" of Continuing Submissions of Data and Information.

Philip Morris claims that "OSHA is still systematically filing additional data and information in . . . reserv[ed] Exhibit 340." This assertion is based on a miscommunication within OSHA and may also be based on a misunderstanding on the part of Philip Morris of the OSHA docketing procedure.

A. The Miscommunication Within OSHA

OSHA did a literature search for relevant articles as background for the IAQ final rule. The Project Officer submitted to the docket office two cartons of documents sometime in August. These documents were among those identified in the literature search.

Accompanying the documents was a master reference list on a diskette, which listed all of the documents revealed in the literature search. **The Directorate of Health Standards intended to submit to the docket only those articles which were in the two cartons submitted to the Docket Office in August.** The diskette was given to the docket office with the intention that it would help them avoid duplicative typing; the thought was that in logging in the documents in the carton, they would find the appropriate entry on the diskette and transfer that information from the diskette to the docket office list of exhibits.

The Docket Officer believed that the Project Officer wanted the docket office to obtain all of the articles listed on the diskette that were not in the cartons and submit them to the docket. This belief was based on the experience of the Docket Office in some other rulemakings where the project officer had expected the docket office to fill in "gaps" in materials submitted by health standards.

The Docket Office did, in fact, begin to "fill in the gaps", trying to find hard copy and place it in the docket where the diskette listed an article that had not been submitted.

B. OSHA Procedures

It is common practice to assign an exhibit number separate from that of the post hearing comments to documents put into the record by the Agency. See, for example, the rulemaking dockets in Ergonomics (Docket S-777) and Asbestos (Docket H-033E).

As a matter of procedure, the Docket Office processes submissions as follows: First, the Docket Office date stamps documents and comments when they are received. If too many materials are received at one time (as was the case when comments to the proposal were requested), the timely ones are segregated

20463954 73

and at least date stamped in as of the closing date of the comment period. Second, exhibit numbers are assigned to the documents. Third, the dated and numbered exhibits are logged in to the docket office computer system. Sometimes all three steps are done at once. However, when the Docket Office is busy the three steps are sometimes done separately (or steps one and two are combined). Therefore, there may be a hiatus between the time a document is date stamped in and the time it is logged in to the Docket Office computer system.

C. What Happened

When the Project Officer submitted the documents to the Docket Office during the end of August, the Docket Office assigned a new exhibit number, number 340, for these documents. The items on the diskette (not those in the carton) were subsequently numbered sequentially by the Docket Office. This was in accordance with their understanding that they were to "fill in the gaps".

In addition, during the last week of August 1995 and on September 1, 1995, another standards staff person also brought to the Docket Office a series of exhibits. These materials included articles, books, and reports relevant to the rulemaking. Unlike the material submitted by the Project Officer, there was no accompanying diskette with the titles already typed. The material that the OSHA staff person brought in was sequentially numbered by the Docket Office (beginning after the material on the diskette which had already been sequentially numbered).

All of the material in Exhibit 340 was date stamped to show the date it was received. Numbers were assigned sequentially. However much of the material was not logged in at the time it was date stamped. This is because there was not time. The Docket Office logged in the exhibits in number 340 on a time available basis.[1]

---

[1] The logging in of Exhibit 340 was done on a time available basis because the Docket Office was trying to respond to criticism during the beginning of the IAQ hearing that the Philip Morris comments had not been logged in. Therefore, during the post hearing comment period an attempt was made to log in all "outside" comments first.

2046395474

D. Solution

I have met with those involved to ascertain the facts, as recounted above. An attempt was made to ascertain exactly which documents had been submitted by the Project Officer in the cartons. Unfortunately the Docket Office did not keep track of them in this manner[2].

As soon as the facts were ascertained, on October 4, the Docket Office stopped adding material to fill in any more "gaps" in Exhibit 340. The Docket Office also prepared a list showing which of the items mistakenly listed as part of Exhibit 340 are not now in the Docket Office. This list will be made available as part of Exhibit 340 to avoid further confusion (see attachment). Items not presently in the Docket Office in hard copy as part of Exhibit 340 will not become part of Exhibit 340 now or ever. This seems to be the most practical way of dealing with the situation; it leaves what is there alone since it is not possible to identify which documents the Docket Office "filled in", and it does not further compound the problem by expending further time and energy putting documents into the docket that were never intended to be in the docket.

II. OSHA's Requests for Witness Information

Philip Morris appears to be concerned that "because OSHA has created its own "sub-docket" under Exhibit 340, there is no way of determining the source of the material. As stated above, Exhibit 340 is a repository for various articles and materials which OSHA felt might be germane to the proceeding. To the extent possible, submissions sent to OSHA in answer to questions raised at the hearing have been given separate exhibit numbers (see, for example, Exhibit 333 and 336).

III. Anonymous Submissions

Philip Morris also complains that many of the post hearing docket submissions have been made without accompanying correspondence or transmittal. The exhibit numbers whose origin was questioned have been examined. In a few instances, such as Exhibits 310, 311, and 312, these represent responses to

---

[2] If a list were available, the obvious solution would be to remove these materials from the docket, since they were never intended to be entered in the first place.

2046395475

questions raised at the hearing[3]. A number of others were documents sent to the project attorneys over the past year and thought to have some relevance to the proceeding; they perhaps should have been labeled as such (or made part of Exhibit 340) by the Docket Office when they were submitted. Several others, such as Exhibits 369, 370, 371, and 392 were submitted by government witnesses to the Solicitor's Office as relevant background material [4]. Another document, Exhibit 460, was apparently part of a submission by the National Restaurant Association, a participant at the hearing.[5]

IV. The "1995 Meridian Report" to OSHA.

Philip Morris implies that OSHA had the Meridian Report for over a year, sat on it and then submitted it to the docket late, in a plot to keep them from commenting on the report. The facts show otherwise.

It is true that the Meridian Report was supposed to have been completed by September 1994. The report was not finished by that time and a contract extension was obtained through June 30, 1995. A draft was received in May of 1995, but it was not complete. Further money was needed to finish the report and it was submitted to the Agency at the end of August 1995.

This report was submitted to the docket by OSHA on September 1, 1995. The only change to the report after that date was that a new cover page was submitted to the Docket Office, showing that the contractor was Toxichemica, a subcontractor of ERG, which was the successor to Meridian (which is no longer in business).

If Philip Morris believes that the report was submitted after September 1, it perhaps misunderstood the OSHA docketing procedure explained above (I.) whereby documents may be date stamped and numbered before they are actually entered into the Docket Office computer. Moreover, Philip Morris is not being denied an opportunity to comment on the report since they, as well as other hearing participants, may do so during this second

---

[3] These exhibits appear to have been material requested from Tri Data, a participant at the hearing. Whether there was a transmittal letter or not is unclear.

[4] These articles were submitted by Peggy Jenkins, an OSHA witness during the proceedings at an earlier date and thought to possibly be of some interest in the proceeding.

[5] An explanatory note has been added to the docket list, noting this fact.

2046395476

post hearing comment period, which includes a chance to rebut material submitted during the first part of the post hearing comment period.

Moreover, it should be noted that a significant part of the Meridian report, dealing with the association between passive smoking and lung cancer, is not new to the tobacco companies. The tobacco companies have demonstrated great familiarity with this material both in their written comments and in testimony at the hearing.[6] Therefore no additional time will be necessary to respond to it.

V. The Six Additional Diskettes

R. J. Reynolds claims that "as recently as September 18, 1995, an additional six diskettes" from the CDC and NCHS (National Center for Health Statistics) were first made available by the OSHA docket office. Our information indicates, and Mr. Butler of ChemRisk admits, that the additional diskettes were submitted to the Docket Office on September 1, 1995, not September 18, 1995. It is true, however, that R. J. Reynolds **only requested copies of these diskettes on or about September 18.**

VI. The Data on the Sixth Disk is "Corrupted".

Mr. Butler, in his request for an extension of the briefing period, makes much of the fact that the disk containing the updated data is "corrupted" apparently due to a file transfer command used by NCHS to transfer the database between machines. According to Mr. Butler, he contacted NCHS and discussed the problem with Dr. Maurer and his computer staff. NCHS agreed to provide a corrected diskette if appropriate. In his request for an extension which was dated September 27, 1995, Mr. Butler makes much of the fact that NCHS did not provide a date by which the correction would be done. According to NCHS, at the time of his request for more time, Mr. Butler had been told that he would have the corrected disk within a day. Dr. Maurer verifies that the corrected disk was in fact sent to Mr. Butler on September 28.

---

[6] The other half of the report deals with the association between passive smoking and heart disease.

2046395477

VII. New data comprise 96% of the information contained on the NCHS diskettes.

Mr. Butler makes much of the fact that "the vast majority . . . of NCHS' submission is unanalyzed data that is new to OSHA and that has never before been released to the public." NCHS, on their own, and without any prior knowledge of OSHA, decided to submit to the OSHA docket, in addition to the updated cotinine data, the Phase 1 NHANES III survey file[7]. This was submitted to the OSHA docket contemporaneously with it being released to the public. The relevance of the entire survey to this rulemaking is very unclear. It would appear that at most only one third of the data would be even potentially relevant to any of the issues raised in this rulemaking.

Mr. Butler has helpfully xeroxed the code book and variable dictionary for the NHANES III, Phase 1 data set and submitted it to the Department as well as to Judge Vittone. Contrary to Mr. Butler's assertion, the examination of these variables to determine what part or parts are relevant to OSHA's proposed rule is neither a complicated nor a time consuming task. It took our biostatistician one day, not weeks, to review the Butler document and determine that approximately 500 out of the 1500 of the variables (30%) in the data files might be relevant to this proceeding[8].

---

[7] Phase 1 of the NHANES III data contains the data from the first three years (1988-1991) of the survey questionnaire on overall health and nutrition of some 12,000 subjects.

[8] In the part of the questionnaire covering information collected on adults, a large number of the 975 variables (55%) are not pertinent to tobacco or ETS exposure. For example variables in this section include information on health insurance, and conditions such as diabetes and gall bladder disease. Another section of the questionnaire with some 500 variables deals with children up to sixteen; again providing information not relevant to this proceeding.

20463954 78