



## **Recommendation 87-1:**

### **Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration**

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(Adopted June 11, 1987)

The Administrative Conference has undertaken a study of the rulemaking process at the Occupational Safety and Health Administration. It is recognized that OSHA's mandate to regulate any substance or hazard that poses a significant risk to workers and, to the extent feasible, make every workplace safe is daunting, and that alternative approaches to substance-by-substance regulation may be necessary. The Conference plans to address this larger issue in its continuing study. In this recommendation, the Conference suggests procedures that OSHA can institute administratively to improve two aspects of its current process for developing health and safety standards.

In Part 1, the Conference recommends to OSHA a procedure for systematically setting long-term priorities for promulgating standards for regulating health and safety hazards. Once established, the recommended regulatory priorities lists will serve as a baseline against which additions or modifications of the lists can be considered. The task of developing the priority lists would be assigned to a permanent, internal agency committee, with additional representation from the National Institute for Occupational Safety and Health (NIOSH). The committee would work closely with other health and environmental agencies in developing initial priority lists which would be submitted for decision to the Assistant Secretary for Occupational Safety and Health, Department of Labor.<sup>1</sup>

Although these regulatory priorities lists should generally govern when OSHA initiates rulemaking, the Conference does not intend that this priority-setting process should in any way diminish the Assistant Secretary's authority to promulgate rules on an expedited basis under the Occupational Safety and Health Act or the Administrative Procedure Act. Moreover, the recommendation (in paragraph 1.d.) takes account of the need for an expedited priority decision process in certain situations, such as referral by the Environmental Protection Agency

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<sup>1</sup> In 1982 the Conference addressed the importance of interagency cooperation in identifying and ranking potentially cancer-causing chemicals for regulation and recognized the important role played by the National Toxicology Program in fostering such cooperation, see ACUS Recommendation 82-5, Federal Regulation of Cancer-Causing Chemicals, Part II, 1 CFR 305.82-5.



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of rulemaking topics under the Toxic Substances Control Act or the filing of rulemaking petitions.

The Conference believes that the procedures suggested in Part 1 would be infeasible if OSHA's regulatory priority rankings could be challenged in suits for judicial review. Therefore, the Conference urges that the regulatory priorities lists not be treated as rules for which judicial review would be appropriate.<sup>2</sup> Nonetheless, public participation is desirable, and the Conference sets forth specific steps OSHA should take to involve the public in its priority-setting process.

Part 2 of the recommendation suggests procedures for OSHA's management of rulemaking. The Conference's study revealed the need for systematic monitoring of the progress of individual rulemakings and for greater coordination at the staff and policy levels. Thus, the recommendation suggests that OSHA adopt a computer-based tracking system, a team approach to rulemaking, and an options review process to involve high-level agency policymaking officials in designated major rulemakings.

The Conference does not intend either the priority-setting or management procedures in this recommendation to affect OSHA's compliance with any other procedural requirements to which it is subject pursuant to statute or executive order.

### **Recommendation**

#### **1. Setting of Priorities for Rulemaking**

This part recommends procedures that the Occupational Safety and Health Administration should follow in establishing priorities for promulgating standards for regulating health and safety hazards.

a. *Regulatory Priorities Committee.* OSHA should establish a permanent committee charged with developing regulatory priorities which, once they are approved by the Assistant Secretary for Occupational Safety and Health, Department of Labor, will presumptively apply when the agency undertakes rulemaking to establish health and safety standards.

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<sup>2</sup> The tentative nature of agency rankings and the need for flexibility were previously recognized by the Conference in considering priority-setting for the regulation of cancer-causing chemicals. See ACUS Recommendation 82-5, *id.*, Part I, ¶5.



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(1) This committee should include high-level management officials and experienced professionals from OSHA and a representative from the National Institute for Occupational Safety and Health (NIOSH). To provide continuity, committee members should be appointed for staggered terms and be eligible for reappointment. The committee should otherwise be no larger than necessary to discharge its duties.

(2) OSHA should provide adequate staff support for the committee and additional resources as necessary to enable it to gather information on potential rulemaking topics and, where appropriate, to perform risk assessments and priority-setting.

(3) The committee should establish initial priority lists for health and safety regulation and, thereafter, meet regularly to consider additions, deletions or revisions of the lists and to conduct periodic reviews.

(i) In developing an *initial* priority list, the committee should use existing information, including risk assessments and other technical and policy considerations. The committee should avoid elaborate risk assessments or weighting systems, and it should not incorporate by reference lists prepared by other agencies for other purposes.

(ii) It may be appropriate, however, for the committee to utilize more sophisticated risk assessments or weighting systems when it conducts a periodic review of, or considers modifications to, a priority list.

(4) OSHA should work closely with NIOSH, other relevant health and environmental agencies, and the National Toxicology Program in developing its initial priority lists and in revising these lists. In addition, OSHA and NIOSH should establish procedures that will permit rapid exchanges of information on projects that OSHA assigns to the expedited decision process (*see* paragraph d. below).

b. *Judicial Review.* The Assistant Secretary's decision to place a topic on a regulatory priorities list, the ranking of a topic on a list, and subsequent modification of a topic's priority on a list should not be treated as rules for which judicial review would be appropriate. However, the Assistant Secretary should allow public participation in the priority-setting process (in accordance with paragraph c. below) and provide an explanation of priority decisions.

c. *Public Participation.* OSHA should take the following steps to involve the public in its regulatory priority-setting process:



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(1) Before establishing the initial priority lists, OSHA should hold public workshops at which interested persons are invited to comment on regulatory priorities.

(2) The results of meetings of the regulatory priorities committee should be made public after the Secretary has had an opportunity to review any proposed decisions of the committee.

(3) The Assistant Secretary should publish for public comment the proposed initial priority lists of rulemaking topics and, thereafter, any proposed modifications to the lists. The topics on the lists should either be ranked individually or assigned to classes.

d. *Expedited action.* Once the initial priority lists are developed, OSHA should establish a procedure for expediting priority decisions on additional topics or modifications that are presented by referrals from EPA under the Toxic Substances Control Act, rulemaking petitions, or requests from Congress, the President, or other agencies. While separate from the agency's routine priority-setting process, this expedited process should be coordinated with it. The outcome of the expedited process should be the placement of the topic on the appropriate list, modification of a list (*e.g.*, deletion or changed ranking of a topic), or a determination not to place, or modify the placement of the topic, on the list, together with a public explanation for the action.

### **2. Management of the Rulemaking Process**

This part recommends procedures that OSHA should adopt for the management of its rulemaking process.

a. *Action Tracking System.* OSHA should establish a computer status system to set deadlines for meeting established milestones in rulemaking and to provide for systematic review of the progress of ongoing rulemaking. Under this system, management officials, representing all interested agency components, should meet at regular intervals with the Assistant Secretary or a Deputy Assistant Secretary to discuss progress toward designated milestones.

b. *The Team Approach.* OSHA should establish a team concept in rulemaking. A team for each individual rulemaking, consisting of representatives of all potentially interested components of OSHA and the Department of Labor (*e.g.*, the Office of the Solicitor), should be appointed early in the rulemaking process to gather and analyze information, draft documents, respond to comments and advise the Assistant Secretary. Successfully functioning teams should be assigned to additional rulemakings where feasible.



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c. *Options Review Process.* OSHA should implement an "options review" process to provide policy guidance to teams working on designated health and safety standard rulemaking. This process<sup>3</sup> would provide that at least once in the early development of such rules (and perhaps again at later stages of rulemaking), the rulemaking team will identify and analyze regulatory options for consideration by a high-level agency policymaking official in an options review meeting. This meeting should produce discussion of alternative approaches for rulemaking and a narrowing of the range of options to be considered in the future; any decisions should be recorded in a memorandum that is available to the team. The options review meeting could be held in conjunction with the regular action tracking meetings recommended above (paragraph 2.a.).

### **Citations:**

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<sup>3</sup> The options review process herein recommended is currently employed successfully by the Environmental Protection Agency.