

Joint Poultry Industry Safety & Health Council



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OSHA Docket Office
U.S. Department of Labor
Room N-2625
200 Constitution Ave., N.W.
Washington, D.C. 20210

RE: Docket No. OSHA-2010-0032
Proposed Official Interpretation of Workplace Noise Exposure Controls
75 Fed. Reg. 64216-64221 (October 19, 2010)

To the Occupational Safety and Health Administration Office of Communications:

The U. S. Poultry & Egg Association, the National Chicken Council and the National Turkey Federation are non-profit trade associations representing the producers and processors of chickens, turkeys, other poultry, eggs and affiliated industry suppliers. Our associations appreciate the opportunity to submit these comments on the proposed, revised interpretation of workplace noise exposure controls published in the Federal Register on October 19, 2010.

The proposed "official interpretation" marks a substantial departure from longstanding OSHA enforcement positions, will impose substantial additional costs on employers without producing a commensurate benefit to employees, and will have a disparate impact on employers based solely on their economic health, not the hazards to which their workers are exposed. We urge the Administrator to withdraw it permanently.

The Occupational Safety and Health Review Commission (OSHRC) has long held that the costs associated with engineering controls were relevant to deciding whether such controls were "feasible" or not. However, in 1991 the Supreme Court held that Courts should defer to the Secretary's interpretation of the Department's rules, and not the Review Commission's position. Despite that ruling, through both Democratic and Republican administrations OSHA continued to apply the standards set by OSHRC and all of the Court of Appeals that had ruled on this issue. Now OSHA proposes to change the position it has held for 28 years, on the strength of a Supreme Court decision that is 19 years old. OSHA has repeatedly argued in cases that its

positions in its Field Operations Manual and Field Inspection Reference Manual were entitled to deference. The proposed official interpretation is inconsistent with that longstanding position.

This new “interpretation” is more stringent than OSHA’s earlier interpretations. In its early days, OSHA was willing to consider some factors other than the overall economic health of the employer, such as the potential benefit to the employees. See, e.g., *Castle & Cooke Foods*, 5 O.S.H. Cas. (BNA) * 1435 (O.S.H.R.C. May 19, 1977) (“[I]f the increment of employee protection by the use of engineering controls is insignificant and does not approach permissible limits while the cost of the controls is so great as not to justify the imposition of controls of marginal utility,” the engineering controls are not feasible.).

The “cost-benefit” analysis as it has been conducted by the OSHRC and the Courts is far different from a simple comparison between engineering costs and personal protective equipment (PPE) costs. It is better described as a common-sense assessment of weighing engineering costs versus the benefits to the employees. See *International Harvester Co. v. Occupational Safety and Health Review Com'n*, 628 F.2d 982 (7th Cir. 1980) (“cost-benefit” analysis weighs costs of engineering controls against benefit to the employee). This understanding of “cost-benefit” analysis has been adopted by each Court of Appeals that ruled on this issue. See *Donovan v. Castle & Cooke Foods, a Div. of Castle and Cooke, Inc.*, 692 F.2d 641, 649 (9th Cir. 1982); *International Harvester Co. v. Occupational Safety and Health Review Com'n*, 628 F.2d 982 (7th Cir. 1980); *RMI Co. v. Secretary of Labor, U. S. Dept. of Labor*, 594 F.2d 566, 573 (6th Cir. 1979); *Turner Co., Div. of Olin Corp. v. Secretary of Labor*, 561 F.2d 82, 83 (7th Cir. 1977).

The Courts have insisted that the Secretary analyze the facts in each case. However, with this “interpretation” the Secretary apparently proposes to make broad assumptions which may be true in some cases but false in others. OSHA assumes, for example, that the OSH Act rarely requires “administrative and engineering controls *even though these controls are affordable and generally more effective than hearing protectors* in reducing noise exposure.” 75 Fed. Reg. 64216 – 7 (emphasis added). OSHA further assumes for all cases that “hearing protectors are less reliable than administrative and engineering controls in reducing noise levels and maintaining such reductions over time.”

75 Fed. Reg. 64220.

The problem with these generalizations is that in some situations, engineering controls simply cannot adequately reduce the noise levels below those prescribed in Table G-16, which means that some employers would still have to require their employees to use PPE no matter how much money they spent on engineering controls. Further, in some industrial settings, engineering controls are very difficult to maintain effectively. Particular to the poultry industry, for example, regulatory sanitation requirements for poultry processing, as found 9 CFR §416, may make such engineering controls technically infeasible, since sound dampening materials used to reduce noise exposure are not suited to, nor designed for, such sanitation procedures. This proposed reinterpretation would create a conflict with sanitation requirements from USDA. This conflict

with another federal agency's standards and work practices creates greater risks to employees and the public.

These are some of the issues that the Courts examine in the common-sense balancing of costs to the employer versus benefits to the employee. OSHA's novel interpretation is predicated on assumptions that are simply not true in all situations. It goes beyond interpretation and improperly imposes non-rebuttable presumptions. Additionally, OSHA proposes to adopt the findings of one particular case for use as an industry-wide standard. This one-size-fits-all approach is highly inappropriate where industry conditions vary tremendously.

OSHA's proposed interpretation does not achieve the Act's goals for a number of reasons.

The proposal subordinates the protection of the employees to the particular economic impact on a single employer. For example, consider one employer who runs a profitable business while one of his competitors is barely hanging on financially. Both have similar noise problems: their employees are exposed to 97dbA TWA; and both have effective hearing conservation programs and effective enforcement of PPE. Engineering controls can reduce the noise levels 3 dbA, but only at a cost well in excess of a million dollars. Under OSHA's proposed interpretation, the financially-sound employer must expend the money while continuing to require employees to wear PPE, while the faltering competitor does not have to expend the money because that would put it out of business. Under the common-sense approach used by the courts, if the costs exceed the benefits or if the benefits exceed the costs, the result would be the same for both employers.

Since 1982, OSHA has had great success with a requirement that employers whose employees are exposed to 85 dbA TWA must implement a hearing conservation program. Decades of experience show that the combination of the hearing conservation program with effective hearing protection provides a large measure of protection to employees. The proposed "interpretation" inexplicably fails to take this successful program into account.

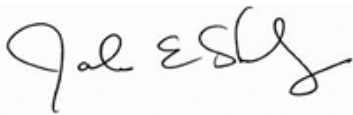
OSHA's policy of favoring engineering controls over personal protective equipment is laudable in cases where engineering controls can effectively eliminate a hazard and, thereby eliminate the dependence on employees properly using PPE. That consideration does not justify a policy of mandating engineering controls when they do not render the use of PPE unnecessary. In that situation, no matter what engineering controls are implemented (at any cost), the protection of the employees remains dependent on the employee properly using PPE. In such situations large expenditures on engineering controls are unjustified. For example, if the employees are exposed to 97 dbA TWA and implementation of technical feasible controls would reduce the level to 94 dbA, the employees would still be required to control the noise with PPE. If the cost were \$100,000 and the attenuation of the PPE was 25 db, the net effect would be that the level reaching the employee would be reduced from 72 db (97db - 25 db) to 69 db (94 db - 25 db) - both safe limits. The employer would have been required to spend \$100,000 plus numerous hours implementing and maintaining the engineering controls, but the noise level still would require PPE to be used in conjunction with the engineering controls to bring the noise exposure down to an acceptable level.

Employers do not have unlimited resources, people, or money, so it is important for the economic health of the country that limited resources be allocated to maximize benefits to employers and employees alike. Compelling employers to spend large amounts of money without producing any significant improvement for employees makes no sense. While OSHA's policy of favoring engineering controls over personal protective equipment makes a certain amount of sense because the former abates a hazard at its source while the latter depends on the employees properly using the PPE, noise abatement can be a situation where the best is the enemy of the good.

Surely, OSHA does not want employers to expend limited resources for measures that provide little benefit to the employee. This is the problem that confronted the Ninth Circuit in *Castle & Cook, A*[The Complainant's expert] noted that the proposed engineering controls might not reduce the noise within the can plant to levels required by Table G-16. *A Donovan v. Castle & Cooke Foods, a Div. of Castle and Cooke, Inc., 692 F.2d 641, 644 (9th Cir.,1982)*. In a "cost-benefit" analysis, the fact whether the employees no longer have to rely on PPE would be an important factor.

OSHA's proposed interpretation does not further its stated goals, will impose an unwarranted burden based on un rebuttable presumptions that are not universally true, and compels employers to make substantial expenditures without providing a corresponding benefit to employees. It should not be adopted as proposed.

Sincerely,



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