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**Re: Docket No. OSHA-2015-0006; Clarification of Employer's Continuing Obligation
To Make and Maintain an Accurate Record of Each Recordable Injury and Illness**

Dear Sir or Madam:

These comments are submitted in response to the proposed regulations published at 80 Fed. Reg. 45116 (July 29, 2015) and on behalf of the National Federation of Independent Business; the Dewberry Companies; the United States Beet Sugar Association; the North American Meat Institute; and AKM LLC dba Volks Constructors.

The commenters respectfully urge that the proposed amendments not be adopted. As we explain more fully below, they will be legally ineffective because OSHA has no authority to by regulation extend a statute of limitations. A regulation cannot merely decree that a case involves the "occurrence" of a violation (*i.e.*, a happening, incident or event) within the limitations period if there was not, *in fact*, a violative happening, incident or event; a duty-triggering happening, incident or event, within the limitations period.

In addition to being legally ineffective, the proposed amendments will confuse employers, cause avoidable litigation around the Nation, and impose enormous compliance burdens on American industry—all in return for what OSHA estimates to be a one percent improvement in the compliance rate. See our comments in full beginning on page 7 below.

Furthermore, the manner in which OSHA is proceeding—adopting regulations interpreting the OSH Act’s statute of limitations in a manner inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *AKM LLC dba Volks Constructors v. Sec’y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012), and reflective of only a minority, concurring opinion there—shows disrespect for that court and the rule of law. See our comments in full beginning on page 6 below.

The Proposed Regulation Would Be Legally Ineffective, and Will Sow Confusion and Litigation.

One problem with the proposed regulatory amendments is that they would be legally irrelevant because, under the statute of limitations as written, whether an obligation or a violation is “continuing” (as the regulations would provide) is not the issue. The issue under section 9(c) is whether a violation “occurred” or, more precisely, whether there is the “occurrence” of a violation, within the limitations period. That is why the term “continuing” did not appear in the first substantive and dispositive paragraph of the *Volks* opinion, the second full paragraph on page 755.

“Occurrence” is not ambiguous. As the Supreme Court held about the word “occurred” in *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and as the D.C. Circuit held in *Volks*, “the word ‘occurrence’ clearly refers to a discrete antecedent event—something that ‘happened’ or ‘came to pass’ ‘in the past.’” 675 F.3d at 755 (emphasis added), quoting *Morgan*, 536 U.S. 109–10 & n.5 (citing dictionaries) and also citing “Black’s Law Dictionary 1080 (6th ed. 1990) (defining ‘occurrence’ as ‘a coming or happening[;] [a]ny incident or event’); Webster’s Third New Int’l Dictionary 1561 (1981) (defining ‘occurrence’ as ‘something that takes place’ and noting that it is a term that ‘lacks much connotational range’ for which synonyms are ‘incident, episode, [or] event’).” Even the definition mentioned in the preamble—“the existence or presence of something” (http://dictionary.cambridge.org/dictionary/american-english/occurrence_2)—requires there be *something* within the limitations period (as indicated by the usage example given, “The tests can detect the occurrence of certain cancers.”).

The next question—whether there *was* a happening, incident or event within the limitations period—is a question of fact, as to which the regulations would be irrelevant, for the Secretary cannot by regulation declare that there was an occurrence within the limitations period when there was not. And the Secretary has already told us what that finding of fact would be: No happening, incident or event would have occurred within the limitations period. In an appearance before the Advisory Committee on Construction Safety and Health, attorneys for the Secretary responded as follows to a series of questions by a committee member:

MR. CANNON: ... [T]his continuing duty would apply even if an employer had not received any new information that a recordable injury or illness had occurred, right?

MS. GOODMAN: That’s correct.

MR. CANNON: And so the continuing duty would be triggered by the same information that would have triggered the original duty to record, correct?

MS. GOODMAN: Right. Ultimately, the employer has a duty to assess each case and determine whether it's recordable, and if they don't do that on day one, then the obligation continues.

MR. CANNON: And so, say, for instance --I'm going to use a hypothetical situation here. Say an employer mistakenly fails to record an injury or illness within the seven-day period, as required. They don't get any new information that would suggest that this was a recordable injury or illness, and nothing else ever happens with that particular case. So, based on what you're saying, is that they could be cited ... during that five-year retention period ... for ... missing that initial seven-day period.

MS. GOODMAN: That's correct.

Amended Transcript, Advisory Comm. on Constr. Safety and Health, at pp. 110-111 (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). So, according to the Secretary, one could be cited even if no new information would be received, and nothing else had happened within the limitations period. There would be only same facts known and the same mistake made, perhaps years before, during the original seven-day period.

On those facts—and those are the core facts upon which the proposal would operate—no administrative law judge would hold that there was an “occurrence” during the limitations period, for it would be contrary to fact: There would have been no violative happening, incident or event or, as the *Volks* decision made clear, no duty-triggering happening, incident or event, within the limitations period—so there could not have been an “occurrence” of a violation. The proposed amendments could not change that. They cannot create a happening, incident or event that did not otherwise exist.

This is the central error of the proposal. A declaration in a regulation that an obligation continues will not suspend the running of a limitations period that runs from the “occurrence” of a violation unless there is, in fact, a violative “occurrence” (*i.e.*, a violative happening, incident or event) or a duty-triggering “occurrence” (*i.e.*, a duty-triggering happening, incident or event) within the limitations period. Any other rule would permit agencies to, by regulation, artificially extend statutes of limitations without regard to their words and without regard to the facts.

Thus, the proposed amendments will be irrelevant, no matter what they say about “continuing” obligations or violations. Instead of clarifying the law, the proposed amendments will only sow confusion and cause pointless litigation.

OSHA May Not By Regulation Suspend the Running of a Statute of Limitations.

The proposal assumes that a declaration in a regulation that a violation “continues” will suffice to suspend the running of a statute of limitation. In addition to the reason stated above, there are additional reasons why this is not so.

Some courts will likely observe that the effect of calling a violation “continuing” is to suspend the running of a statute of limitations until the violation ends. Such a suspension would

constitute a departure from the “standard rule” stated by the Supreme Court in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)—that a limitations period is triggered by the existence of a complete cause of action. The Court there also told us of both an exception to that standard rule and who may make it. It applies when “Congress has told us otherwise in the legislation at issue.” (Emphasis added.) An agency will not do. This principle was also stated in *Toussie v. United States*, 397 U.S. 112, 121-122 (1970), which held that “questions of limitations are fundamentally matters of legislative not administrative decision” and that “the statute itself, apart from the regulation, [must] justif[y]” any continuing violation holding. Although *Toussie* was a criminal case, its statements on this point reflected administrative law, not criminal law, precepts. The courts may also observe that, Congress in the Administrative Procedure Act (APA), 5 U.S.C. § 558(b), stated that, “a substantive rule or order [may not be] issued except within jurisdiction delegated to the agency and as authorized by law.” Such courts may observe that nothing in the OSH Act even hints that OSHA may, in effect, manipulate statutes of limitations by stating that their duties continue to run even in the absence of duty-triggering facts within the limitations period.

None of the cases cited in the preamble (from page 45119 cols. 1 & 2) deal with whether, or suggests that, an agency may define a limitations period by regulation. They are cases in which Congress wrote both the limitations period and the substantive duty. The proposal, therefore, conflicts with Supreme Court precedent in *Bay Area Laundry*.

The preamble attempts to derive such an exception from section 8(c). Although the preamble’s discussion of section 8(e) is long and gives several supposed reasons for extracting from that section the idea that recordkeeping failures continue until corrected, it never mentions or comes to grips with the principal reasons given by the *Volks* court for holding that that section provides insufficient ground for departing from the “standard rule” in *Bay Area Laundry* that a limitations period is triggered by the existence of a complete cause of action. Without repeating all of the *Volks* court’s reasons, we observe that they continue to stand in good stead, particularly the idea that OSHA’s view “leaves little room for [the statute of limitations], and we must be ‘hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law,’” citing *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2330 (2011). As the Court stated, “At best, the Secretary’s approach diminishes Section 658(c) to a mere six-month addition to whatever retention/limitations period she desires. We do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it.” The preamble ignores all these points.

As to the court decisions cited by OSHA on page 45121 cols. 1-2, all but two pre-dated. *Bd. of Trs. of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S.Ct. 2188, 2197, 180 L.Ed.2d 1 (2011), which held that “retain” means “to hold or continue to hold in possession or use,” and thus “[y]ou cannot retain something unless you already have it”—a Supreme Court decision not cited anywhere in the preamble but cited in *Volks*. The two Tax Court exceptions (*Park v. Comm’r of Internal Revenue*, 136 T.C. 569, 574 (U.S. Tax Ct. 2011), *rev’d and remanded on other grounds*, 722 F.3d 384 (D.C. Cir. 2013); and *Powerstein v. Comm’r of*

Internal Revenue, T.C. Memo 2011–271, 2011 WL 5572600, at *13 (U.S. Tax Ct. Nov. 16, 2011) did not discuss or note that Supreme Court decision.

We also observe that the preamble never explains what section 8(c) has to do with the wording of the proposed regulations. If section 8(c) has the effect OSHA posits, it will have it no matter what the regulations say, and so there is no point to the proposal.

Other courts may observe that, to call a violation “continuing” is to carve an exception into a statute of limitations passed by Congress. *Volks*, quoting *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003) (“exception”), as well as *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977) (“exception”) and *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (“judicial exception”); *Nat’l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503 (D.C. Cir. 1984) (“‘continuing violation’ exception”); *Conn. Light & Power Co. v. Sec’y of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (“exception”); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir. 2002) (“equitable exception”); *Burzynski v. Cohen*, 264 F.3d 611, 617 (6th Cir. 2001) (same); *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001) (same); *Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999) (“exception”); *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) (“equitable exception”). The courts will likely hold that any such exception must be derived from legislation, not regulation.

OSHA also fails to explain why the “absurdity” and “madness” pointed out in *Volks* would not be realized here—that OSHA could by mere regulation expand the limitations period “for as long as [OSHA] would like to be able to bring an action....” (Indeed, during the rulemaking leading to the 2001 amendments to Part 1904, “[t]he American Industrial Hygiene Association recommended a retention period of up to 30 years for the OSHA 301 form to accommodate occupational diseases with long latency periods....” 66 Fed. Reg. at 6049 col. 2.) Although the *Volks* court expressly condemned a slightly different regulatory change—a change in or elimination¹ of the retention period rather than a declaration of a continuing duty—the

¹ The following exchange occurred before the court of appeals during oral argument in *Volks* (Oral Arg. Recording at 23:23 to 24:35):

Judge Garland: What about opposing counsel’s argument that, if taken to the extreme, this would ... effectively mean no statute of limitations?

Ms. Phillips: ... I assume Your Honor is referring to the regulations that he cites that have 30 year record retention.

Judge Garland: ... [F]orgetting about those, but if we were to accept your position you could write a regulation that says ... instead of a five-year retention, ... you just always have to retain the records. ... Effectively it would mean no statute of limitations. ... [E]ffectively there would be no limitations on ability to sue. Is that right?

Ms. Phillips: I think you have to look at 8(c), which is the statutory provision that grants the Secretary the authority to issue these regulations. And if you look at that provision, it’s very broad. In fact, the only restriction—it requires the Secretary ...

Judge Garland: The answer is yes?

Ms. Phillips: Pardon me, oh...

Judge Garland: The answer is yes?

Ms. Phillips: Well ultimately yes, but I wanted to explain a little further.

point remains the same: “Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years....”

OSHA’s Discussion of Whether a Violation “Continues” Is Illogical.

OSHA attempts, beginning on page 45122, to show the relevance of the concept of “continuing” violations to the limitations period in the OSH Act. The discussion is, however, illogical. There is no point in calling something a “continuing” violation if it occurs within the limitations period anyway. Yet, in all the cases and examples mentioned there, such as the exposure of employees to machines without guards and to chemicals without training, are events (“affirmative acts” OSHA calls them on page 45124) and thus “occurrences” within the limitations period. It is therefore unnecessary and confusing to also claim that they are “continuing” violations.

The preamble is similarly confused and illogical with respect to failures to act and continuing violations. If a duty-triggering fact occurs, then a failure to act would, for six months, be citable, without need to resort to a continuing violation theory. If thereafter that duty-triggering fact does not occur, there would be only the “lingering effect of an unlawful act” and “mere failure to right a wrong,” which the *Volks* court observed, “cannot be a continuing wrong which tolls the statute of limitations,” for if it were, “the exception would obliterate the rule,” quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977), and also citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908 (1989); *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 422 (1960); *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 730 (D.C. Cir. 2008); and *Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438, 448 (D.C. Cir. 1989). It is again telling that the preamble does not mention a single one of these cases or the principle for which they stand.

In sum, the legal theory at the heart of the proposal is fatally flawed. OSHA has no authority to adopt the amendments. Only Congress or the courts can act here.

OSHA’s Manner of Proceeding Is Disrespectful of the Rule of Law.

The manner in which OSHA is proceeding shows open disrespect for the United States Court of Appeals for the District of Columbia Circuit and for the rule of law.

Although the preamble states that the proposed amendments would “clarify” the duty imposed by Part 1904, the preamble never points to any place in *Volks* where the court misapprehended or was confused by the requirements of Part 1904 or by the OSH Act. Instead, OSHA just disagrees with the court or, more accurately, its majority opinion. OSHA’s proposal to amend the regulations rests on a minority view—the concurring opinion of Judge Garland, which held that Part 1904 as currently worded did not create continuing obligations. The majority, by contrast, rested its holding on the wording of the statute, and made it plain that Congress did not permit OSHA to create a different result by merely amending its regulations.

Subordinate federal judges seek to avoid “the embarrassing, insubordinate error of ignoring the majority opinion and embracing the dissent.”² Federal agencies subject to judicial review, such as OSHA, should do the same. The proper course for OSHA to take is to bring its arguments to the D.C. Circuit *en banc*, to another court of appeals, to the Supreme Court of the United States, or to the Congress of the United States. It is not to conduct a rulemaking.

The Proposal, If Adopted, Would Violate Section 8(d) of the OSH Act, and Be Invalid as Arbitrary and Capricious.

The proposal would also be invalid because it would violate Section 8(d) of the OSH Act, and would be arbitrary and capricious with respect to the burdens it would impose on employers.

OSHA’s “Preliminary Economic Analysis” (80 Fed. Reg. at 45128-45129) states that, “The proposed revisions impose no new cost burden” for “OSHA estimated the costs to employers of these requirements when the existing regulations were promulgated in 2001, see 66 FR 6081-6120, January 19, 2001.” 80 Fed. Reg. at 45128 cols. 2-3. OSHA says that this is so because the proposal is merely a “clarification” (*id.*; *see also id.* at 45120).

But if this current proposal were truly a “clarification” of the duty originally imposed in 2001, then we should find on those cited pages from 2001 estimates of the labor costs of every day reconsidering past decisions (a) to not record certain injuries entirely; and (b) to only partially record others, *i.e.*, to not record them as, say, days away from work or as work restrictions but only as medical treatment. After all, if the duty to record continues every day for five years, and if one must think about recordability before one can undo a previous decision to not record or not fully record, then there necessarily must be a duty to every day reconsider a decision to not record or not fully record an injury. And without a duty of daily reconsideration, there will be no duty-triggering fact within the limitations period.

No such cost estimates can be found, however, in either the 2001 preamble (or the preamble to the current proposal). The 2001 preamble states only the one-time cost of recording a case. The current proposal’s preamble adds the costs, as a result of the proposal, of recording additional cases that were erroneously not previously recorded—but also as a one-time cost. Both preambles ignore the main burden imposed by the proposal—the cost of reconsidering every day whether one should have recorded unrecorded injuries, or should have more fully recorded partially-recorded injuries. Nowhere does OSHA acknowledge or estimate this burden, let alone its enormity, or consider whether it is worth bearing.

That cost to the economy would be huge. Let us assume that each covered establishment experiences one unrecorded or not fully recorded injury a year (whether recordable or not), a conservative assumption. OSHA estimates that it takes an average of 14 minutes per case to

² *United States v. McGoff*, 831 F.2d 1071, 1079 (D.C. Cir. 1987) (“we have not fallen into the embarrassing, insubordinate error of ignoring the majority opinion and embracing the dissent.”).

decide on recordability.³ Assuming that daily reconsideration would take one minute per unrecorded or partially-recorded injury (another conservative assumption), then repeating that effort every day for five years would require every establishment in the Nation to devote up to 30.3 man-hours to the task [$((365 \times 4) + (365 - 7) = 1818 \text{ days}) \times 1/60 \text{ man-hrs/case/day} = 30.3 \text{ man-hours/case}$]. Factoring in what OSHA estimated in 2001 as the 1,365,985 establishments covered by Part 1904, and the \$46.72/man-hr. labor-time cost used in the current proposal, then the cost to the economy of daily reconsideration over the five-year retention period of a *single* unrecorded or partially-recorded injury per establishment would be up to 41,389,346 man-hours (1,365,985 establishments \times 30.3 man-hours/case \times 1 case/establishment) \times \$46.72/man-hr. = \$1,933,710,222, *i.e.*, almost two billion dollars. Yet, the benefit that OSHA estimates from this enormous burden would be only a one percent improvement in the compliance rate. 80 Fed. Reg. at 45128 col. 3.

Worse, there would likely be many more than one unrecorded case per establishment per year, for employers commonly misunderstand the recordability of injuries and there is no reason to believe that they will not repeat their original errors when they briefly re-examine past cases. For example, work-relatedness is widely misunderstood, even by OSHA. Shortly after the current version of Part 1904 was adopted in 2001, OSHA conducted a public education session at which two knowledgeable OSHA officials answered questions from the public on what the new regulations meant. They were asked about the work-relatedness of an employee pulling a muscle while walking normally down a normal workplace hallway. One OSHA official stated that the case would not be recordable—a view that OSHA later had to disavow.⁴ Work restriction cases are likewise widely misunderstood. The 1989 OSHA-commissioned Keystone Report stated the consensus of knowledgeable persons from OSHA, industry and unions that “the recording of restricted work is perhaps the least understood and least accepted concept in the recordkeeping system.” Keystone Center, “Keystone National Policy Dialogue on Work-Related Illness and Injury Recording” (1989). Furthermore, employers often misunderstand other restriction concepts, such as the need to determine the frequency of a restricted task (§ 1904.7(b)(4)(ii)), and to determine the import of a physician’s vague notation “take it easy” (see § 1904.7(b)(3)(vii)). Similarly, employers often confuse the rule for tetanus injection (not recordable; § 1904.7(b)(5)(ii)(B)) with that for gamma globulin shots (recordable “medical treatment”), and confuse the work-relatedness rule regarding the contraction of hepatitis with that for influenza (§ 1904.5(b)(2)(viii)). They often confuse the rules for using medical glue to close a wound with the rule for covering a wound (§ 1904.7(b)(5)(ii)(D)). Other common mistakes include a failure to determine how an eye cinder was treated or why an x-ray was taken. A requirement to daily re-think these decisions is highly unlikely to result in a marked improvement in compliance.

³ The OSHA Form 300 Log states: “Public reporting burden for this collection of information is estimated to average 14 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information.”

⁴ Letter from F. Frodyma (OSHA) to B. Fellner (Nov. 19, 2002), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24329.

Adopting the proposal would therefore be arbitrary and capricious, and thus invalid, for it would impose massive costs that OSHA has ignored, costs that OSHA has not weighed against their benefits, and costs that could not be justified by any benefits, let alone by the minor benefits OSHA does estimate.

Furthermore, the daily reconsideration duty imposed by the proposal would violate section 8(d) of the OSH Act, which states that, "Any information obtained by the Secretary ... under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." The daily reconsideration required by the proposal is not a "minimum burden" and it would result in "unnecessary duplication of efforts in obtaining information." Thus, the proposal would be invalid and subject to challenge on this ground.

It is possible that OSHA might argue in response to the above that, if an employer once considers recordability, the employer need not consider it again. OSHA's attorneys attempted to give this impression to the Advisory Committee on Construction Safety and Health. See Tr. 116-117.⁵ The wording of the proposed amendments draws no such distinction, however. They unequivocally state that one must "record" and that this obligation continues to the end of the retention period, unless one records—not unless one records or has *considered* whether the case is recordable. See, e.g., proposed § 1904.29(b)(3). More precisely, they do not distinguish between unrecorded cases that the employer previously examined but erroneously omitted from the log (as to which the employer would, if the comments at ACCSH by OSHA's attorneys are to be credited, hypothetically have no continuing duty to record), and unrecorded cases that the employer failed to examine for recordability at all (as to which it would).

If, however, OSHA truly means that recordability or partial recordability once considered (even erroneously) need not be re-considered, then the regulations must be amended to state that an employer has no further obligation to consider recordability after considering it once. That would presumably mean that if an employer considered recordability but wrongly decided not to record, OSHA would not issue a citation for violations more than six months thereafter. If that is what OSHA means, and especially if this is the reason why there is no daily duty of re-

⁵ Tr. 116-117 states:

MR. PRATT [ACCSH committee member]: Okay. ... Let's say that there is a recordable case by the employer and he reaches the wrong conclusion about the recordability of that particular case, and he did not record by the eighth day.... You're saying that the employer would have to consider re-recordability again, let's say, on the ninth day.

MS. GOODMAN: That is not what we're saying.

* * *

MR. PRATT: Well, then what you saying?

MS. GOODMAN: We are saying, if you do not do the assessment, if you do not evaluate the recordability of the case on day one, you have an ongoing duty to evaluate the recordability of that case and make a determination. We are not saying that determination needs to remade on every day during the retention period.

examination, then the regulations must so state. We suggest that OSHA adopt the following regulatory language in proposed § 1904.29(b)(3), and other such provisions:

This obligation continues throughout the entire record retention period described in § 1904.33 until the case is correctly recorded or until the employer has once considered whether the case is recordable, whichever occurs first. See §§ 1904.4(a); 1904.32(a)(1); 1904.33(b)(1); and 1904.40(a).

Such language would prevent the “burden” and “[u]nnecessary duplication” barred by section 8(d), and insulate the proposal from an invalidity challenge on that ground.

The Proposal Requires OSHA to Comply With SBREFA, the Regulatory Flexibility Act, Executive Order 12866, and the Paperwork Reduction Act.

OSHA’s “Preliminary Economic Analysis,” 80 Fed. Reg. at 45128-129, caused OSHA to—

- “[D]etermine[] that this proposal does not meet the definition of a major rule under the Congressional Review provisions of” the Small Business Regulatory Enforcement Fairness Act amendments (SBREFA) to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, evidently because OSHA determined that it will not have “an annual effect on the economy of \$100,000,000 or more” within the meaning of 5 U.S.C. § 804(2)(A).
- “[C]ertif[y] that the proposed rule would not have a significant economic impact on a substantial number of small entities” under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended) (RFA). OSHA stated that, the proposed rule will “have no effect, or at most a nominal effect, on compliance costs and regulatory burden for employers, whether large or small.”
- State that the proposed rule would not be economically significant under Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), because it will not have an annual effect on the economy of \$100 million or more.
- State that “there are no increases or decreases to the Recording and Reporting Occupational Injuries and Illnesses burden hour and cost estimates” made under the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521. Under that statute, the Secretary and the Office of Management and Budget must determine that a recordkeeping requirement will have practical utility and will not be unduly burdensome. 44 U.S.C. § 3506(c)(3).

OSHA invited the public to comment on “[t]he accuracy of OSHA’s estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used....”

We therefore submit that, as shown on pages 7 to 9 above, OSHA's "Preliminary Economic Analysis" omits so many burdens of compliance—indeed, omits the principal burden of compliance—and is so flawed in its reasoning as to make its preliminary analysis entirely unreliable. We showed on pages 7 to 9 above that the cost of daily reconsideration over the entire economy over the five-year retention period of a *single* unrecorded or partially-recorded injury per establishment would be up to \$1,933,710,222, *i.e.*, almost two billion dollars. And that figure assumes just one unrecorded or partially recorded case per establishment annually—an unrealistically low figure. OSHA's preliminary analysis is therefore so flawed as to make its conclusions not merely wrong, not merely arbitrary and capricious, but faithless to the words and purposes of the governing laws and executive order.

OSHA must therefore reconsider the reasoning of its "Preliminary Economic Analysis" and conclude that the proposal will, as written, vastly exceed the threshold of \$100 million, and that it will be unduly burdensome and unjustifiably so. OSHA must determine that the proposal meets the definition of a "major rule" under SBREFA's Congressional Review provisions, and notify Congress and the U.S. Small Business Administration's (SBA) Office of Advocacy accordingly. It must certify that the proposed rule would be economically significant under Executive Order 12866 and conduct the economic analysis required by Executive Order 12866. It must conclude that the proposal will cause increases to the Recording and Reporting Occupational Injuries and Illnesses burden hour and cost estimates previously made to OMB under the Paperwork Reduction Act. It must conclude that the proposal will have a significant economic impact on a substantial number of small entities" under the RFA and SBREFA, and convene a SBREFA panel.

If OSHA does not acknowledge that a daily-reconsideration duty is the logical consequence of the proposal as currently, or refuses to amend the proposal to state that an employer has no further obligation to consider recordability after considering it once, or to correct its economic analysis and, *inter alia*, convene a SBREFA panel, then the proposal is a sham—an attempt, through an insincere form of words, to effectively extend a statute of limitations without the agency owning up to the words' consequences. Courts will have no difficulty seeing through that pretense.

The Proposal, If Adopted, Would Be Invalid as Arbitrary and Capricious Because It Would Permit Prosecution of Cases That Are Stale by Years.

The proposal would also be invalid as arbitrary and capricious because, contrary to the purpose of section 9(c) of the OSHA, it would permit employers to be prosecuted on the basis of facts that are stale by years.

The preamble states that "concerns about stale claims have little bearing on OSHA recordkeeping cases," for "[o]ne can ordinarily ascertain whether an injury or illness occurred, and what treatment was necessary, by looking at medical reports, workers' compensation documents, and other relevant records, even if the affected employee or other witnesses are no longer available." This view is so demonstrably wrong as to further make the proposal arbitrary and capricious.

- *Restrictions.* OSHA's assertion is always untrue in restriction cases, for medical records are never sufficient on that issue. To determine whether an employee was "restricted," the employer must know details of the employee's duties, such as how often certain tasks are performed. § 1904.7(b)(4)(ii). Those details are never stated in medical records and they are often impossible to reconstruct nearly five years later; for example, rare is the welder who can recall nearly five years before how often he had climbed a ladder on a particular project. As shown above, restriction cases are among the most poorly understood among employers. OSHA's statement is therefore always untrue in this common situation.
- *Work-relatedness.* OSHA does not mention work relatedness with regard to staleness. That is understandable for, as OSHA is well aware, medical records often say nothing about work-relatedness, and what they do say is often unreliable, because medical professionals both commonly receive sketchy information about work-relatedness and commonly misunderstand the concepts of work-relatedness in Part 1904, often confusing them with work-relatedness concepts used in their states' workers' compensation laws. Establishing work-relatedness can be doubly difficult when, as OSHA acknowledges is common, recordkeepers leave their employment or, as occurred in the *Volks* case, the recordkeeper dies. In such cases, the ability to reconstruct why a case was not recorded will often be nil. OSHA's statement is therefore untrue in this common situation.
- *"Light duty" cases.* As OSHA must concede, it is common for physicians to write "light duty" on medical records—common enough that Part 1904 has a provision about it, § 1904.7(b)(4)(vii). The provision calls these statements "vague" and states that, to determine recordability, clarification from the physician will be needed. But even if such a clarification had been obtained, medical records will nearly always fail to memorialize it, and physicians cannot be expected to remember it years later. OSHA's statement is therefore untrue in this common situation.
- *X-rays.* OSHA's statement about staleness is untrue when trying to determine whether x-rays were taken solely for diagnosis (§1904.7(b)(5)(i)(B)), because such statements are almost never made in medical records. OSHA's statement is therefore untrue in these common situations.

The proposal should, therefore, not be adopted.

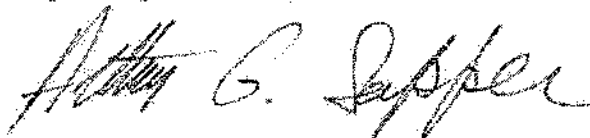
Request for Official Notice; Request for Inclusion of Document in Rulemaking Record

1. We request that the Secretary take official notice under the APA of the Amended Transcript, Advisory Comm. on Constr. Safety and Health (Dec. 4, 2014) (www.osha.gov/doc/accsh/transcripts/accsh_20141203_amended.pdf). For the agency's convenience, we have attached the transcript.

2. We further request that the Secretary formally enter this transcript into the rulemaking record here. We are mystified as to why this has not already been done here, as it had been done in numerous previous rulemakings affecting the construction industry.

The discussion above demonstrates that the proposed regulations are not founded in law or fact. For the reasons stated there, the commenters respectfully request that the proposed regulations be withdrawn.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Arthur G. Sapper". The signature is written in a cursive, somewhat stylized font.

On behalf of the National Federation of Independent
Business; the Dewberry Companies; the United States Beet
Sugar Association; the North American Meat Institute; and
AKM LLC dba Volks Constructors

Enclosure: Amended Transcript, Advisory Comm. on Constr. Safety and Health (Dec. 4, 2014)