National Advisory Committee on Occupational Safety & Health

Minutes of January 18-19, 2000, Meeting

U.S. Department of Labor
Room N3437 A-D
Washington, D.C.

The meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH) was opened by **Acting Chair Hank Lick** at 1:05 pm on Tuesday, January 18. He announced that **Chair Byron Orton** was unable to attend the meeting because of a family medical emergency. He added that members **Peg Seminario** and **Dave Heller** were also unable to attend, and that **Bonnie Rogers** was snowbound in North Carolina. About 70 members of the public were in attendance.

The following members were present:

Nancy Lessin	Public	Sr. Staff for Strategy & Policy Coord., Natl. COSH Network Project
Daniel Hryhorczuk	Public	Dir., Great Lakes Center for Occ. & Env. Safety and Health
Henry B. Lick	Mgt.	Mgr., Occ. & Env. Health Sciences Ford Motor Co.
Dennis W. Scullion, Sr.	Mgt.	Scullion and Associates
Michael J. Wright	Labor	Dir., Health, Safety & Environment Steelworkers
Margaret M. Carroll	Safety	Mgr., Safety Engineering Sandia National Labs
LaMont Byrd	Health	Dir., Safety & Health Dept. Intl. Brotherhood of Teamsters

After having the members introduce themselves, and accepting the minutes of the previous meeting, the Chair turned the meeting over to **OSHA Assistant Secretary Charles Jeffress** and **NIOSH Director Linda Rosenstock** who made a joint presentation of a plaque to former NACOSH Chair **Kathy Rest**, now a senior staff member at NIOSH, thanking her for her outstanding service to the committee and both agencies during the three-year period she served as Chair.

In her overview of NIOSH activities, **Director Linda Rosenstock** commented that NIOSH had received a budget of $215.5 million for FY 2000 as part of the Omnibus Spending Bill that was signed November 29. This represented an 8% increase over last year's budget and was $3.5 million over the President's budget request. She said that the new funds will be devoted largely to intramural and extramural research under NORA, which means

that 75% goes to research conducted outside the federal government. Other projects will include the establishment of a new education and research center, and a new partnership initiative in Alaska which involves working with the FAA, the National Transportation Safety Board, and the weather folks to deal with high risks in the aviation industry. NIOSH will partner with six other NIH institutes to study factors causing health disparities among the poor and minority working populations. Rosenstock commented that NIOSH had expanded its efforts at leveraging its own resources by signing up a total of nine NIH institutes to work cooperatively on NORA projects. Two of the awards they funded last year look at state-based regulatory interventions to see if they can assess where they make a difference and have the intended effect. Rosenstock mentioned that an internal reorganization was under development in their Cincinnati research divisions which would combine the Division of Biomedical and Behavior Sciences (DBBS) and the Division of Physical Sciences and Engineering (DPSE) into a new division -- the Division of Applied Research and Technology (DART). One point of focus is likely to be on intervention research related to work organization. Another focus will be on health services research dealing with how workers get their health care access, how it is payed for, what the quality and outcome effectiveness are. They will also focus intervention effectiveness and technology on their noise control program. In December NIOSH hosted a 10-year progress review of the Healthy People 2000 occupational safety and health objectives. Rosenstock said that the review had been videotaped and would be available for viewing in a month or two on website *www.health.gov/healthypeople.* They are now moving forward on Healthy People 2010. Rosenstock said that the Chartbook had been completed and was out on external review after which it would be sent to the printer and be available by the end of March. She also said that the National Conference on Workplace Safety and Health Training, held in St. Louis and attended by 700 in October, had been very successful. She concluded by saying that NIOSH's Needlestick Alert, which was released in November with strong support from OSHA and FDA, had gotten a lot of public attention and had become part of a larger NIOSH initiative focused on health care workers.

OSHA Assistant Secretary Charles Jeffress said that "last fall was a good fall". The budget came through at $382 million which allowed for 34 additional compliance assistance specialists to work out of area offices across the country and 5 additional positions for 11(c) investigators. There was also an increase in money for training grants for people who are doing outreach to workers plus a significant amount of money for replacement of OSHA's 20-year old computer system. Jeffress said he was pleased with the budget and thought it would allow OSHA to expand the education and outreach efforts and increase its capacity to undertake whistleblower investigations. He commented on the release of OSHA's proposed ergonomics standard on November 22 and acknowledged that, although OSHA had allowed 70 days for public comment on the proposal, there had been many requests for extensions of time. He added that the proposal issued was very similar to the draft which was circulated last February and that in addition to the official comment period, there would be an additional 8 weeks of hearings and a posthearing comment period, making the total comment time period for those who wish to participate around 274 days. He clarified that the rule itself is just 11 pages, not the 1,000 pages you hear about in the press. He said that he had no doubt that there would be some modifications in the final proposal based on the hearings, but that his goal was to complete the post-hearing comment period and get a final rule out before the end of the year. Jeffress mentioned two partnerships that he was especially proud of: (1) one with the Joint Commission on Accreditation of Health Care Organizations which was aimed at getting the commission to include employee safety and health issues in the accreditation process for hospitals, nursing homes and health care groups; and (2) one with Green Mountain Coffee in Vermont aimed at finding better ways of lifting coffee bags off trucks. The Vermont Consultation Office assisted in the latter partnership by designing equipment to do the task. The company was so satisfied that they wanted to encourage others to use the consultation service. They have announced the formation of a training center, called Java University, which will provide seminars on safety and health issues tied in with the Small Business Development Center and the Vermont Consultation Program. Jeffress said that for the third year in a row, the BLS injury/illness rates had been down and that there was also a clear downward trend in three of OSHA's target industries: shipyards, food processing and construction. However, although there has been some success in the other two target industries -- logging and nursing homes -- there had not yet been a clear trend downward. "Then came January," Jeffress said and with it the storm centered around

OSHA's policies and regulations related to working at home. He emphasized that the letter sent out in November in response to one employer's specific questions had never been intended as a policy statement and had since been withdrawn because it was felt that it overstated OSHA's responsibilities. He said that OSHA does not inspect home offices and has no intention of doing so, but that to say that the OSH Act does not apply to the home environment in any circumstance would be incorrect because there have been documented cases where OSHA has been called in to investigate hazardous operations involving hazardous materials. He emphasized that these were very different issues than the current focus on telecommuting. He told the committee that he was very interested in their reaction and any observations or suggestions that they might have.

Nancy Lessin said that the COSH groups around the country were very concerned about the adverse publicity that OSHA had gotten and the implication that OSHA was applying 19th century rules to the 21st century. She emphasized that they were well aware that there were many dangerous operations taking place in home locations. She said that she thought that how OSHA deals with "temporary workers" could serve as a good guideline, including reporting injuries and illnesses and providing certain types of training. On a separate issue, Lessin expressed her concern to A/S Jeffress that, although she and the committee staff had been trying since last September, they had been unable to obtain a copy of the new Form 33 and the validation study which was going to be presented the following day. She said that, if there was any possibility of getting that material to the committee before the day was over, she would be very appreciative. Back on the subject of home workplaces, **LaMont Byrd** suggested that both OSHA and NIOSH could be helpful to workers by providing information perhaps on websites about work station design and other related safety and health issues. **Margaret Carroll** added that the many news articles had failed to mention that when an employer allows employees to work at home, the greater liability is certainly not OSHA walking in the door, but the liability of workers' compensation and all sorts of third party negligence liability considerations. She asked if there was something that NACOSH might do to give some focus and perspective to the upcoming Congressional hearings. A/S Jeffress responded that he wasn't asking the committee to take a position but that there wouldn't be time enough anyway. **Hank Lick** said that it was important to get past the cartoons and that this was not simply an OSHA issue, but a major change in the way work is done. He applauded the decision of the Secretary of Labor to convene a national group to discuss all of the issues related to the changing workplace. **Mike Wright** cautioned that such a national dialogue should make a clear distinction between telecommuting and home manufacturing operations and pointed out that the Secretary's statement had not made this clear. He added that he hoped that this unfortunate experience had triggered a close look at OSHA's internal review process which A/S Jeffress assured him it had. On another subject, **Nancy Lessin** said that she had been disappointed to learn in her review of the recordkeeping audit, and specifically her review of the questionnaire used to interview employees, that there were no questions about injury discipline programs/policies or safety incentive games. She said that she felt this in all likelihood gave a distorted picture of the accuracy of the data. She encouraged OSHA to make an effort in the future to try to capture the extent to which such policies discourage the reporting of injuries and illnesses. **Mike Wright** echoed these concerns adding that it was not accurate to say that the survey validated that 90% of employers reported accidents accurately at the 95% confidence level unless there is a sound and unthreatening way to ask employees if they have ever had an injury which did not appear on the OSHA log. He said that they had conducted such surveys and had never gotten over 80%

Panel Discussion on the Regulatory Process in Other Federal Agencies

Panel members had been furnished a list of 11 questions (attached) to serve as a focus for the discussion. **Marthe Kent,** Director of Safety Standards and Acting Director of Health Standards for **OSHA,** opened the panel presentations by describing briefly OSHA's regulatory process and her role in it. She said that the most time consuming and troublesome part of the process was the development of the proposal which requires all sorts of in-depth research into economic issues, technological feasibility, risk analyses and many other technical/scientific issues. She added that some of the simplifications or innovations they are studying include the use of multidisciplinary teams and the development of a regulatory handbook. Emphasis is being placed on

demonstrating that, for each standard, the hazard being addressed poses a significant risk to workers right now and that the approach being taken will in fact substantially reduce that risk and is economically and technologically feasible. She added that, although OSHA does not do a cost-benefit analysis, they do provide both cost data and benefit data but do not tie the two together, and that this is a very time-consuming process. She said that OSHA usually does a lot of on-site data gathering by looking at all the places where a particular rule will have an impact and actually measuring what people are currently doing at those sites and what kind of controls they are using. Kent added that, although OSHA was not required to do peer review, they had chosen to do an ever increasing amount of it on both risk assessment and economic analysis. She acknowledged that some of the regulatory reform measures recently introduced in Congress would have significantly increased the burden in this area. In answer to the question of whether or not the use of peer review had increased public acceptance of either OSHA's risk assessments or economic analyses, she said she had seen no such indication. She said that internal reviews represented one of the most troublesome and time consuming parts of the process but that she was sure that no one in the room would recommend shortening this process. She added that the external reviews, such as that done by OMB, were very rigorous and that the addition of the SBREFA review had added significantly to the burden. She said that OSHA often had extremely large dockets to deal with and was increasingly making use of electronic processing. She concluded by saying that OSHA's "informal" hearing process was quite unusual since it allowed OSHA to question participants, and participants to question both OSHA and each other.

Ron Medford, Assistant Executive Director for Hazard Identification and Reduction, **CPSC,** pointed out that the Consumer Product Safety Commission was somewhat unique in that they were an independent regulatory agency made up of three commissioners appointed by the President and that all rulemaking activities were decided by the majority vote of the commission (which must have members from both political parties). They administer four statutes that cover about 15,000 products. All of the statutes except for the Poison Prevention Packaging Act require cost-benefit analysis which means that they must first establish technical feasibility. They also have a requirement under the Federal Hazard Substances Act to follow the first stage of rulemaking (for example an ANPR) within twelve months with the second stage (a proposal), and again within twelve months to the third stage (final rule). They have great difficulty keeping these timeframes, which can be extended "for good cause" by the commission. Medford said that one of the most difficult challenges was defining the product and then describing the scope of the standard and issues to be addressed by the rule. He said that technical feasibility could also be very difficult depending on how the performance requirements are written and whether a new technology or new application of an existing technology is required. Since CPSC is an independent agency, their rules are not subject to OMB review nor are they required to do risk assessments. Chronic chemical hazards require an additional step in that a chronic hazard advisory panel of scientists nominated by the National Academy of Sciences must first be formed, and their report reviewed by the commission, before the first regulatory step can be taken. They do peer reviews selectively, primarily when they feel that the information they are relying on may be controversial. To speed up their internal review process, they do as many concurrent reviews as possible. He said that one thing they consider very important is that there be no surprises at any stage in their regulatory process. All study designs and protocol tests are generally reviewed by stakeholders who are invited to comment on them. Their public hearings take place between the Advance Notice of Proposed Rulemaking (ANPR) and the proposed rule when any company can come in and give testimony before the commission. Their statutes also prohibit the commission from issuing a federal safety regulation if there is a voluntary consensus standard in place that is believed to be adequate to address the risk and there is significant compliance by the specific industry to which it applies. They also use multidisciplinary teams headed by a technical expert.

Joe Fitzgerald, Deputy Assistant Secretary for Worker Safety, **DOE**, said that they were in a rather unique situation because they function as owner, operator and regulator all at the same time. He noted that some of their regulations date back to the fifties with the advent of the nuclear energy industry, but that rulemaking didn't happen in a big way at DOE until ten years ago when Congress directed DOE to set up an enforcement program which required that DOE develop the necessary rules to be enforced. He cited their recent experience in developing a beryllium standard which actually goes back about 20 years and included attempted rulemaking about six or seven

years ago. Fitzgerald said that DOE's earlier lack of success in rulemaking was due largely to failure to develop constituencies with stakeholders and other agencies. In the case of beryllium they set a specific goal to make a real difference at the working level. They then enlisted the support of the Secretary of Energy and set about developing a solid constituency. When they went to OMB with their proposed rule supported by other agencies such as OSHA and NIOSH, as well as the laboratories and contractors who were involved, they met with success.

Ed Mazzullo, Director of Hazardous Materials Standards for **DOT**, said that his office issues hazardous materials regulations covering all modes of transportation that address classification, risk categorization, packaging, and hazard communication in transportation. They also regulate people who manufacture packagings intended for use in transporting hazardous materials. He said that it was a time consuming, troublesome task to develop sound regulations, flush out all of the alternatives and do the cost benefit analysis. He said that they had recently developed a 3-page checklist on the statutory authorities that have to be complied with before they issue a final rule. He said that he had been involved in this process for a long time but that he and others were becoming increasingly confused about how to comply with the continually changing mandates. They have no requirement to do risk assessments but do them with increasing frequency as justification for issuing rules where the cost benefit data is scarce. In one recent instance, the technology to comply with a particular rule was said not to exist. So they gave the industry time to come up with the technology as a sort of negotiated rulemaking effort. They also use a multidisciplinary team approach to rulemaking. Their internal review process involves concurrent reviews and does not significantly delay the process. Their external reviews are becoming increasingly complex with new requirements for federalism, consultation with state and local elected officials, consultation with Indian tribes and, of course, OMB which they said they had fairly good luck with. He said that they did find an increasing amount of attention coming from their inspector general's office and the Government Accounting Office (GAO) in relation to documenting delays. He said that they had a very good docket system and that all comments are processed electronically. Because over 90% of the people they regulate are small businesses, they make special efforts to reach this audience. They have used electronic public meetings to encourage small businesses to participate by making electronic comments on proposed rules. Their hearings are informal and they question participants if they are willing to be questioned and they allow the audience to question participants also if they are willing.

Paul Lapsley, Director of Regulatory Management for **EPA**, started by stating that they put out about 600 significant rules a year of which about 170 were what they call substantive. He said that seven major statutes authorize their regulatory activities and that the requirements under each are quite different. For example, in some cases under the Clean Air Act they are prohibited from considering the cost or the benefit whereas under the Toxic Substances Control Act a risk benefit determination is required. He added that getting the cost information is very difficult and getting the benefit information is even more difficult. They have no requirement to do peer review but during the past two years have started doing peer reviews on all regulations. He said it is too soon to tell whether this process will improve the acceptability of their rules by the public. He added that they had started using the regulatory negotiation process about ten years ago and that they felt this had the greatest potential for saving a significant amount of time in the rulemaking process, but that it can only be applied in certain limited situations. He said that their greatest success in shortening their regulatory process had come through the development of a three-tiered system, with tier three having far greater autonomy than tier one.

Linda Horton, Director of the International Agreements Staff for the Food and Drug Administration (FDA), explained that for 14 years she had served as Deputy Chief Counsel for Regulations. She said that for food and cosmetics they regulate safety, but that for pharmaceuticals and medical devices they regulate safety, effectiveness and product quality. They also regulate animal foods and drugs, as well as radiation emissions from television sets and cellular phones. She said that although the agency is over a hundred years old, the era of modern rulemaking began in 1970. The 1980s became the era of questioning regulation and deregulation in which FDA came under a lot or criticism for what was called the "drug approval lag" which has since been turned around. Horton described the 1990s as the era of leveraging in which FDA has looked everywhere for partners to help them do their job. She acknowledged that the policy formulation part of rulemaking was often the most difficult, but

that the drafting stage and the compilation of the record were also challenging, especially if the necessary research had not been done. She said that the Prescription Drug User Fee Act which had been reauthorized in 1997 imposed performance targets in exchange for the right to charge user fees. She cited FDA's recent regulation finding that "cigarettes and smokeless tobacco are drug delivery medical devices" as an example of dealing with a large volume of evidence, old and new. The comment period which ended in January 1996 produced over 700,000 comments. By using contractor help they were able to analyze all comments and produce a final rule by August 1996. With regard to peer review, Horton said that their technical advisory committees fulfill that function to some extent. She said that in general they do not balance risks and benefits in an economic sense, although in a couple of areas they were required to consider economics. She added, though, that many would interpret efficient enforcement of the Act as taking into account the cost of a regulation as well as its effectiveness. She said that they have a very active stakeholder outreach program and provide extra assistance to small businesses. She said that FDA regulations involved a wide variety of types of public hearings, including in some cases a statutory requirement for a trial-type hearing. As an alternative, they created a "public board of inquiry" to be used if the parties would agree to it. They also have public hearings that look like public meetings and other regulatory hearings that are due process hearings. She added that only in the trial-type hearings was there formal cross examination, but in the other types of hearings there was usually some amount of reasonable questioning.

Mike Wright asked the panelists if they had any data on the number of staff members devoted to the rulemaking process. **CPSC** said it was hard to determine this because many of their technical staff of 160 do other activities in addition to rulemaking. **DOT** said that within the Hazardous Materials unit 40 of the 125 person staff were devoted to the rulemaking process.* **FDA** said that it was difficult to determine but that it might be between 100 and 200 people. All agreed that it was impossible to come up with a reliable figure. **Hank Lick** asked the group what they thought the public perception of their regulatory activities was. **EPA** said that public support was probably their most valuable resource and that they were paying an increasing amount of attention to public outreach, especially with small communities and small businesses. **FDA** said that they have a lineup of people from other countries wanting to set up an FDA in their countries. **Nancy Lessin** asked how many agencies other than OSHA had gone through a "near death experience" where there was large non-support for the agency in Congress, and had had to deal with congressional riders on the agency budget which prohibited them from going forward with a regulation that the agency felt was needed. **CPSC** responded that it had actually had its budget zeroed out by the Director of OMB. Even though the Congress kept the agency alive, their staff was cut in half and additional requirements were added to their rulemaking procedures. They have also had congressional riders on controversial rulemakings. They have struggled to regain lost resources while trying to do what is required by Congress. **DOT** said they had had no near death experiences but have had appropriation language added preventing them from doing a specific regulation until a certain study or action was completed. **EPA** described a near-death experience in 1980 when their regulatory program was actually shut down. This lasted for 12-18 months during which time they lost a lot of their best staff. Public support turned things around in a big way. They have had congressional riders which require another cost benefit analysis or some specific action which they simply do since they feel there is no way to get around it. **FDA** said that although they had not had a near-death experience, they had had plenty of problems. One was the "drug lag", another was a bribery scandal in the late 1980s, and being called the "second worst" agency in 1994. Although they have not had congressional riders as such, language in the Congressional Record has created long delays on controversial issues such as whether the use of animal feed, or overuse of human medicine, promotes the growth of resistance to antibiotics. As soon as they start to make progress, Congress requires additional studies so that action is prevented. **LaMont Byrd** asked DOT and EPA how they prioritized their regulatory activities. **EPA** said that they build their budget around congressional requirements and that little of their regulatory activity was discretionary. For example, if Congress passes a Safe Drinking Water Act, then a lot of related rules have to be developed. **CPSC** said that most of their priority regulation comes from analyzing hospital emergency room data which is collected daily to see what products are injuring consumers. **DOT** said that most of their rulemaking was discretionary. Priorities are determined based on the seriousness of the need. They do not have a formal procedure for setting priorities, but if there is a major safety problem they drop everything and take

care of it immediately. Many of their other priorities are of a regulatory reform nature, in an effort to make regulations easier to understand and less burdensome on industry. **Mike Wright** added that it was clear from the panel discussion that OSHA could benefit from discussions with other agencies and he expressed his hope that OSHA would discuss how to use the negotiated rulemaking process with EPA because of its highly refined use of the system. However, he added that although there were always improvements which could be made, OSHA had nothing to be ashamed of in its rulemaking process. He said that it was the only agency, other than EPA, that spent a significant portion of its time working on economically significant rules and that EPA had literally 80 times the resources devoted to rulemaking that OSHA had. Moreover, most of the other agencies have the entire general public as its constituency including groups like children which are certainly a political help in getting rules past Congress. He cited OSHA's proposed standards on ergonomics and safety and health programs as examples of regulations with a very broad base of potential opposition in virtually every business in the country. He added that "given the resources OSHA has and the forces arrayed against it, given the political realities that its mission is only protecting workers and not the general public, I think OSHA people do a pretty good job of working through this problem."

The meeting resumed on **January 19** with an update on OSHA's Audit Policy by **OSHA Policy Director Ross Eisenbrey**. He explained that they were in the middle of the process and had published a proposed policy statement last October that resulted in 81 comments. He said that the policy had three parts: OSHA would not routinely request employer voluntary self audits; employers who had conducted a voluntary self audit and responded to deficiencies in a timely manner would not be held liable for a willful violation even if they were still in violation as long as interim protective measures had been provided; and the self audit would become evidence of good faith and could be used to establish a penalty reduction of up to 25%. Eisenbrey said that, although he thought the policy statement was quite clear, it was remarkable how differently the 81 commentors read it. He said that most commentors praised the effort and, even if they felt there were shortcomings, they said that it was a step in the right direction. Most businesses wanted OSHA to have no access to self audits, whereas a few commentors thought OSHA had gone too far in restricting the use of self audits. There were even some who thought it was just right. A working group is reviewing all of the comments and preparing recommendations for the Assistant Secretary with the hope of publishing a final policy statement in the Federal Register by the end of February. Eisenbrey mentioned a survey of 492 establishments that OSHA had conducted which found that 85% of these employers did conduct voluntary self audits. Of those that did not, the reason was not fear of OSHA use but, generally, their workplaces were so low hazard that they did not feel it was worth doing. This led to the belief that the problem has been very much overblown by employers who say that OSHA is discouraging self audit activity. **Hank Lick** agreed with him to some extent but said that there was a great deal of paranoia about old documents being used against a company in the future, like the Manville experience. **Dennis Scullion** added that he had seen safety committees do an outstanding job of self audits, but that it was also beneficial to have an outside third party look at the operation. **Nancy Lessin** asked for clarification of the policy related to voluntary vs. mandatory audits, and the how OSHA would handle those audits which include both types. Eisenbrey said that OSHA's use of the audit was supposed to be directed at the issue that brought it up and they would refrain from using the entire audit as a road map. **Margaret Carroll** added that it was likely that when the safety and health programs standard is issued, all audits will be mandatory audits and therefore subject to OSHA perusal. Eisenbrey said his guess was that they would not end up with an interpretation that broad. **Mike Wright** asked whether an audit required by another agency would be viewed as voluntary or mandatory by OSHA. Eisenbrey said that the policy wording indicated that an audit required by another agency's statute would be viewed as mandatory, whereas one conducted as part of a collective bargaining agreement would be considered voluntary. There was a discussion involving **Dennis Scullion, Mike Wright** and **Nancy Lessin** about the sharing of audit results with employees. Scullion thought a summary of the results should be shared whereas Wright and Lessin felt that employees should have access to the entire document. **Margaret Carroll** expressed concern that it is very important how such audits

are shared because of the potential liability problems for safety and health professionals especially when best practices are cited as a reason for fixing a potential problem but where no standard exists so a low priority is given. **Hank Lick** said that he worried that all CSHOs would not understand the employers action plan.

The **Chair** discussed the schedule of the development of the committee's report and recommendations on the Standards Development Process, saying that a summary report of all of the panel presentations would be sent to the committee within the next 4-6 weeks and that all members were to submit proposed recommendations to Joanne Goodell. A NACOSH task force (Margaret Carroll, Peg Seminario, Mike Wright and Hank Lick) was named to work on combining these suggestions into a draft report to be reviewed by the entire committee in depth at the April 12-13 meeting. He acknowledged the tightness of the schedule but said it could be done with everyone's cooperation. **Hank Lick** reported for both workgroup meetings. He said both meetings were essentially a discussion of recent developments related to the development of the safety and health program standard and the ergonomics standard. The **Safety and Health Programs Workgroup** submitted a suggested recommendation that stated "Recognizing that the rapid promulgation of the Ergonomics Standard is OSHA's most immediate priority, NACOSH nevertheless urges the Department of Labor to complete its initial work on the draft of the Safety and Health Programs Standard and submit it to the Office of Management and Budget no later than February 1, 2000." After later discussion with OSHA Assistant Secretary Jeffress, "no later than February 1, 2000" was changed to "without delay" and adopted unanimously by the members present. The **Ergonomics Workgroup** submitted a suggested recommendation that stated "NACOSH recommends that OSHA continue its priority effort on the Ergonomics Standard, while continuing to emphasize outreach activities and the provision of ergonomics training for compliance officers." This was also adopted unanimously by the members present (copies of both recommendations attached).

Nancy Lessin expressed her concern about the agenda item for that afternoon related to the evaluation of OSHA's Form 33. She reiterated that the committee had asked for a copy of the form and the recent evaluation last September and still did not have the information. She questioned the usefulness of a presentation that the committee had no chance to prepare for. **Mike Wright** echoed these concerns. **Dennis Scullion** offered a compromise whereby the committee would listen to the presentation but delay discussion until a later date after they had a chance to review the material. **Mike Wright** volunteered to stay during lunch to read the documents if they could be obtained. **Margaret Carroll** wondered what the purpose was behind the delaying tactic that had gone on meeting after meeting and emphasized the importance of minimizing public distrust of how OSHA would evaluate safety and health programs under the soon to be proposed standard, and what tools compliance officers would be provided to do this. At this point **Linda Rosenstock** and **Charles Jeffress** joined the group for the meeting planning session. The Chair reviewed the workgroup reports and presented the two recommendations. In addition, he brought to the attention of Jeffress the letter submitted by NACOSH member **Dave Heller** requesting a 90-day extension in the comment period for the ergonomics standard. During this discussion two reports on the Form 33 had been obtained and provided to the committee: Consultation Evaluation Tool Final Report, June 1998, 12 pages; and Consultation Evaluation Tool Prediction Report, January 2000, 22 pages. In a discussion of whether or not to go forward with the presentation that afternoon, **Charles Jeffress** assured the committee that if they decided to go forward with the presentation he would have no hesitation about asking the presenters to come back again to answer questions at a future time. Because the material received was not voluminous, the committee voted to proceed with the presentation on the condition that they be provided with a copy of the book containing the Appendices to look at during lunch. In a discussion of **plans for the next meeting**, the **Chair** said that, in addition to the OSHA and NIOSH overviews, the group would want to have a continuing discussion on how OSHA will evaluate safety and health programs and what tools they will use, whether it is the Form 33 or some other device, and more specific information on how CSHOs will be trained to use whatever tools are provided to them to evaluate safety and health programs. Other items discussed for future meetings included: role of the Solicitor's Office; training of health professionals (NIOSH), report from the Institute of Medicine on workforce needs in

occupational safety and health which is due out this spring (NIOSH) and Healthy People 2010 (NIOSH). The date of a **second meeting** to work on the committee's report on the standards development process was set for **June 6** with the only other agenda items being agency overviews.

In the afternoon session **Paula White, OSHA Director of Federal-State Operations,** apologized to the committee for the misunderstanding regarding background materials and said that they had decided to eliminate the presentation on the **Training Institute** and simply introduce the **Director**, **Henry Payne** in order to allow more time for the presentation and discussion of the validation of Form 33. A discussion ensued during which NACOSH members **Nancy Lessin, Mike Wright** and **Dennis Scullion** expressed their displeasure at not having the presentation on training and said that for many months the committee had expressed its interest in having an in-depth presentation on training, especially as it pertains to compliance officers. They specified that they wanted to discuss the extent of current training of compliance officers: where we are now, what courses the average compliance officer has taken, what OSHA has done to validate those courses, and any kind of summary statistics that are available. **Paula White** agreed to discuss such a future presentation with **A/S Jeffress** but added that the presentation planned for that day was not going to discuss CSHO training but just briefly describe the activities of the Training Institute. The **Chair** added that he had discussed the possibility with **Dr. Payne** of holding a future NACOSH meeting at the Institute. **Lessin** added that she was still hoping to get a more thorough course outline of the new course developed to help CSHOs evaluate safety and health programs. **White** explained that the course had been given three times and that the course had been changed three times and that much of the material was "experiential exercises" and that the course was again being changed for the next presentation. **Lessin** said she would like to see any materials they had, including the experiential exercises they had used, and **White** agreed to send them to her.

Paula White then introduced **Dr. O'Neal Smitherman**, Executive Assistant to the President for Planning and Projects at the University of Memphis and **Dr. William H. Weems**, Director of Environmental and Industrial Programs for the University of Alabama. She mentioned that Dr. Weems also directed a number of programs in the College of Continuing Studies including the OSHA consultation program, the state's asbestos and lead training accreditation agency, the state's safety and health consulting service under Alabama's workers' compensation law, and a technical assistance program for hazardous waste management. **Dr. Weems** started by saying that they had entitled their presentation **"OSHA's Validation Study of Safety and Health Programs"** and that this activity had been underway for about two years at the University of Alabama and involved most of the consultation programs around the country. He said it was essentially an effort to examine the reliability, the validity, and the predictability of the items in the Form 33 which is the basic tool used by consultants to evaluate safety and health programs of small employers. He described the consultation program by saying that all states plus several territories had such state operated, federally funded (90%) consultation services involving over 600 consultants and furnished free to small businesses. Between l982-l984, a form was used for the first time to formally evaluate safety and health programs. Then in 1985, the first Form 33 was introduced based on the concept of core requirements. In 1989 the safety and health program management guidelines were issued. Version II of Form 33 came out between 1990-93 with 25 yes/no items. CSHO training on use of the form began in 1994-95 and brought to light significant confusion in use of the form. Version III came out in 1995-96 with a 0-4 rating system, with descriptors, replacing the yes/no format. In 1996-97, Phase II Advanced Safety and Health Program Training was given to 696 trainees in 20 cities. He said that over the years of working with consultation programs, they had developed some ideas of what the safety and health program was all about. First, it is more properly called an organizational safety and health system with objectives related to: articulating goals, making choices, gathering information, measuring progress and improving performance. He added that there were three components: the highest level is the cultural component; the middle level is the managerial component; and the lowest level is the operational level which is where consultants do most of their work. He emphasized that use of the Form 33, or any evaluative form, carried with it some underlying assumptions for assessment: (1) that there is intra-rater agreement, (2) that there is inter-rater agreement, (3) that the selected indicators that are on the Form 33 are actually those that are going to shape success in relation to the safety and health program, and (4) that the assessments will correlate with direct

measures of performance (i.e., that there is some realistic relationship to whether there are injuries or illnesses occurring within that facility). He said that the first validation study was done in 1991-93 just in the state of Alabama. They found a high intra-rater agreement, but decided that this might be because most consultants had picked certain things that they looked for. Inter-rater agreement was fairly low, which probably meant that the consultants were doing different things. Moreover, only nine of the indicators were found to be significant. >From this study they determined that they needed to train consultants and refine the items on the Form 33. **Nancy Lessin** asked questions about the June 1998 and January 2000 studies that the committee had been given. **Weems** explained that the 1998 report was a "validation" study and the 2000 one was a "predictability" study. Lessin said that she saw that only 7(c)(1) consultants and "business" representatives had been consulted and she wondered what role workers and labor representatives had played in the report. Weems said that they had not involved any workers or labor representatives because they were simply developing a tool for use by consultants, and that most of the companies involved were small and non-union. Lessin then asked if any worker representatives had been involved in the development of the set of "attributes" or characteristics. Weems said that no workers had been involved because they didn't know how to get any.

Dr. O'Neal Smitherman said that in psychometrics the term "validity" refers to the ability of an instrument to do what it purports to do -- the Form 33 was designed to measure the level of safety and health programs. A second part is -- does it do that reliably from one person to another and from one time to another? He said they found that in the existing Form 33 there were many different concepts being measured by one indicator, which results in a lack of uniformity. So they enlisted a team of safety and health experts to come in and break down the indicators on the existing Form 33 into component parts. **Nancy Lessin** again expressed her concern about the lack of employee involvement and said this was evidenced in the formation of the questions: for example, the form asks whether employees receive health and safety training, but does not ask about whether employees are involved in discussing and deciding on what training and how that training should be conducted; and it asks whether it covers hazards but does not ask whether it covers alternative methods of control. She added that without employee involvement there could be high statistical correlations but they would be based on fundamentally flawed concepts. Smitherman continued by saying that in order to do validity testing, they developed real-world scenarios--the kind of situations that a consultant might see in a walk-through. They asked for an independent rating of those scenarios and then produced a stratified random sample of those scenarios which they sent them out to consultants, businesses, federal safety and health people to evaluate. **Mike Wright** suggested that it might have been better to send a group into the same place at the same time and do independent evaluations rather than developing fictional scenarios. **Dr. Smitherman** said that if you want to determine whether an instrument can measure the level of a safety and health program through a wide range of differences, you have to actually present that full range. **Lessin** expressed her concern that phrases such as "individuals are rewarded for meeting safety and health responsibilities" can lead companies to institute "safety bingo" programs which encourage underreporting of injuries/illnesses, and "individuals are disciplined for not meeting safety and health responsibilities" which can lead to disastrous employee discipline programs. **Hank Lick** added that he thought Lessin had identified a terrible flaw and that worker involvement should have been a vital part of the process. He suggested that if the process was not already completed that it should not be too late to make up for this deficiency. He added that one of the basic problems with cooperative programs was worker representative distrust and that if this was done right with true worker involvement it could further the cause of cooperative programs. **Dan Hryhorczuk** said that he felt that since the process was still ongoing, it was amenable to improvement and that agencies like NIOSH had a lot of experience in helping academic institutions and government agencies interact to ensure that they got the broadest possible input. He also urged that they build in a peer review mechanism. **Wright** asked where the form was going from here, whether or not it was mandatory for all of the states to use and whether or not it would be put out on "notice and comment" after the validation was completed. **Paula White** said that the form was not yet mandatory for the states and that they did not anticipate putting it out on notice and comment. **Wright** continued that because only one type of expertise was captured the instrument would be less than valid in the natural sense; and that, as the form becomes more and more cast in concrete, its use will indicate

"OSHA says this is a good safety and health program". This requires the broadest possible participation. **White** said she would take this message back to the Assistant Secretary for reconsideration. **Lick** added that although we were reviewing this form in the context of only the Consultation Programs, because of the development of a proposed safety and health programs standard the form would end up having an omnibus kind of application which requires that others be involved in this process and that the lack of worker involvement constitutes a fatal flaw at present. **Smitherman** and **Weems** emphasized to the committee that their task had been simply to take the program elements from the 1989 Guidelines and do a systematic analysis to determine whether those elements can be appropriately measured and they felt that they had done that. **Hryhorczuk** added that the limitations inherent in their research should be clearly stated in all documents because such research can be applied unintentionally to other applications. For example, OSHA could adopt the Form 33 as the answer to everything and use it as a key component of the new safety and health program standard which would be a big mistake. The discussion ended with the committee saying they would like to see the entire study and would like to have a copy of the power point presentation. The **Chair** said that the committee had asked for a presentation on how safety and health programs would be evaluated but instead had a presentation on the use of Form 33 in Consultation Programs. He added that the subject was already on the agenda for the next meeting and that the committee wanted to discuss: what the next steps are, what the policy implications are, how we can change the process, what the agency's plans are for broadening the process so that an evaluative tool for use in all safety and health programs can be developed.

The meeting was adjourned at 2:50 pm.

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* This sentence has been modified. Due to a mistake in the transcript, the statement "and that perhaps as many as 40% of the agency's 16,000 staff might be devoted to rulemaking" had been attributed to DOT when in fact it was made by EPA. This phrase has been removed.

Attachments:

Agenda
Questions for the Federal Agency Panel
Recommendation Related to the Safety and Health Programs Standard
Recommendation Related to Ergonomics

Questions for Federal Agency Panel

Our plan is to take only **5-10 minutes for each participant** to briefly describe his/her organization and role. Please use the questions below to guide your presentation. (I know that it would take you many hours to answer these questions fully, but they are provided just as a guide to focus our discussion). The presentations will be followed by an **informal, in-depth discussion** between the committee and the panel. No formal papers are required, but if there are materials you would like to share with the committee, I would like to have them two weeks ahead of time so that members can receive and read material before the meeting.

1. Briefly describe the **regulatory functions of your agency.**
2. What is **your role** in the regulatory process (now or previously)?
3. What are the most **time consuming/troublesome tasks in developing your regulations?** Have you found any shortcuts, simplifications or new approaches?
4. What are your requirements related to **risk assessment?** How do you handle them? Have you found any shortcuts, simplifications or new approaches?
5. What are your requirements related to **technical/economic feasibility and cost/benefit analysis?** How do you handle them? Have you found any shortcuts, simplifications or new approaches?

6. Do you use **peer review**? If so, has its use increased the acceptance of either your risk assessments or economic analyses?
7. What are your most time consuming/troublesome **internal reviews?** Have you found any shortcuts, simplifications or new approaches?
8. What are your most time consuming/troublesome **external reviews?** Have you found any shortcuts, simplifications or new approaches?
9. The size of **dockets** is becoming an increasingly troublesome issue, both in receiving and analyzing, plus the use of electronic systems and the problems related to attachments. Have you developed any innovative systems to deal with these issues?
10. How do you involve **small business** in your process?
11. Describe your **hearing process**. Does it allow for questioning of participants: (1) by the agency? (2) by another participant?

Recommendation Related to the
Safety and Health Programs Standard
January 19, 2000

Recognizing that the rapid promulgation of the Ergonomics Standard is OSHA's most immediate priority, NACOSH nevertheless recognizes the urgency of a Safety and Health Programs Standard and urges the Department of Labor to complete its initial draft and submit it to the Office of Management and Budget without delay.

Adopted unanimously by members present: Nancy Lessin, Dan Hryhorczuk, Hank Lick, Dennis Scullion, Mike Wright, Margaret Carroll, and LaMont Byrd

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Recommendation Related to
Ergonomics
January 19, 2000

NACOSH recommends that OSHA continue its priority effort on the Ergonomics Standard, while continuing to emphasize outreach activities and the provision of ergonomics training for compliance officers.

Adopted unanimously by members present: Nancy Lessin, Dan Hryhorczuk, Hank Lick, Dennis Scullion, Mike Wright, Margaret Carroll, and LaMont Byrd

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