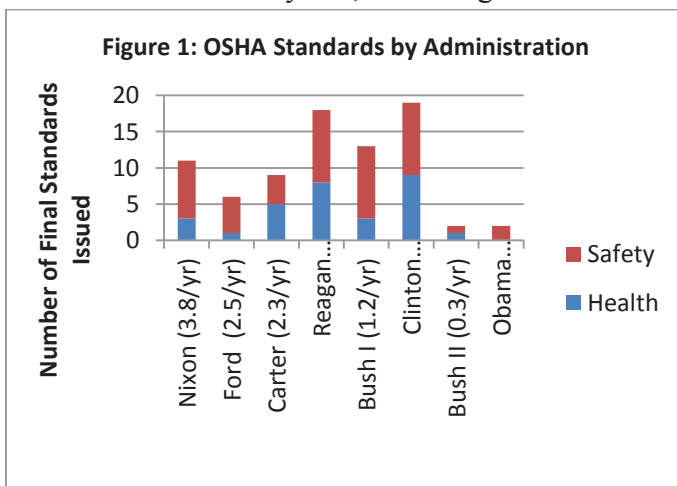


VII. OSHA INACTION: ONEROUS REQUIREMENTS PREVENT AND DELAY LIFESAVING RULES

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Just as the cranes rule languished, so too have myriad other worker safety protections. The Occupational Safety and Health Administration has been far slower to produce regulations during the George W. Bush and Barack Obama administrations than in any other period in the agency's history.³ [See Figure 1] While OSHA was once able to develop a major rule in less than a year, the process now exceeds six years, on average.



Source: Public Citizen Analysis of Code of Federal Regulations. For methodology, see Endnote 3

Five pending OSHA standards discussed here would have prevented more than 100,000 serious injuries, more than 30,000 cases of occupational illness and hundreds of worker fatalities.

Additionally, there are hundreds of chemicals to which workers are exposed to levels known to be unsafe that OSHA has not yet begun to address. Protections also are lacking for common hazards such as heat stroke, repetitive motion injuries and workplace violence.

Several laws have imposed onerous steps for the agency to complete rules. Additionally, a particular Supreme Court decision has prevented the agency from responding quickly to new hazards.

About 55,000 people still die every year from work-related injuries and illnesses.⁴ Millions more workers suffer non-fatal occupational injuries.⁵

The 1970 law that created OSHA requires each employer to provide a workplace that is free of known hazards. The authorizing law gave the agency a two-year window to bypass the rulemaking process and adopt “consensus standards” based on health and safety guidelines developed by non-governmental organizations. The agency adopted hundreds of regulations in this manner. After the window closed, OSHA was supposed to update its standards through the rulemaking process as new hazards entered the workplace or new scientific data on health risks emerged.

In the 1970s, OSHA issued new regulations fairly quickly. Its rulemakings for asbestos (1972), vinyl chloride (1974) and the pesticide DBCP (1978) each took less than one year. But the rulemaking process has grown longer ever since. Since the 1980s, it has taken OSHA an average of six years to move from deciding to regulate a hazard to issuing a final rule. Rulemaking has slowed to a crawl during the administrations of George W. Bush and Barack Obama.

Faced with a broken regulatory system, OSHA cannot issue rules in a timely and efficient manner. Inadequate regulation imposes tremendous costs on workers, who may be forced to pay with their health or even their lives.

Delays in Protections Have Caused More Than 100,000 Avoidable Cases of Illness and Injury

As of September 2011, five major proposed OSHA standards were delayed from 4 to 31 years.⁶ According to OSHA's data, eliminating the delays would have prevented more than 100,000 serious injuries, more than 30,000 cases of occupational illness and hundreds of worker fatalities. [See Table 1]

Table 1. Health Effects of Delayed OSHA Rulemakings

Delayed Standard	Start Date	Delay ^{7*}	Estimated Health Effects of Delay
Beryllium	11/2002	8 yr. 10 mo.	<i>Beryllium sensitization</i> : 5,413 excess cases <i>Chronic beryllium disease</i> : 4,194 excess cases <i>Lung cancer</i> : 216 excess cases
Diacetyl	10/2007	3 yr. 11 mo.	<i>Bronchiolitis obliterans</i> : 6,405 excess cases
Silica Dust	10/2003	7 yr. 11 mo.	<i>Fatal silicosis</i> : 325 excess cases <i>Fatal lung cancer</i> : 150 excess cases <i>Non-fatal silicosis</i> : 19,919 excess cases
Confined Spaces in Construction	3/1980	31 yr. 6 mo.	<i>Fatal injuries</i> : 189 excess cases <i>Non-fatal injuries</i> : 18,900 excess cases
Fall Prevention (Walking Working Surfaces)	4/1990	21 yr. 5 mo.	<i>Fatal injuries</i> : 320 excess cases <i>Serious non-fatal injuries</i> : 104,026 excess cases

Sources: See footnotes to paragraphs below. * As of September 2011.

- OSHA's beryllium standard has been delayed for nearly nine years. Beryllium is a toxic substance to which workers in the electronics, nuclear, and metalwork sectors are exposed. The current OSHA beryllium standard, based on science from the 1950s, allows workers to be exposed at levels that are 10 times higher than those allowed by Department of Energy for nuclear power plant workers. Public Citizen petitioned OSHA to update the standard in 2001.⁸ The agency began a rulemaking in November 2002.

OSHA's estimates show that if a beryllium standard were enacted in 2002, it would have prevented 4,194 cases of chronic beryllium disease (a potentially fatal respiratory ailment), 5,413 cases of beryllium sensitization (which often leads to chronic beryllium disease) and 216 cases of lung cancer.⁹

- OSHA's diacetyl standard has been delayed since 2007. Diacetyl is a chemical used to add artificial butter flavor to popcorn. Exposed workers can develop bronchiolitis obliterans, a debilitating and sometimes fatal respiratory disease. OSHA has known about health risks from diacetyl since 2002, but has not developed a regulation for the chemical. A rulemaking for the chemical began in 2007. If enacted then, the standard would have already prevented an estimated 6,405 cases of bronchiolitis obliterans.¹⁰
- OSHA's silica dust standard has been delayed for nearly eight years. More than two million workers in the United States are exposed to silica dust. Inhaling the dust causes a variety of harmful effects, including lung cancer, tuberculosis, and silicosis (a potentially fatal respiratory disease). Most at risk are construction, foundry and metal workers. OSHA acknowledges that its current silica dust standard is obsolete.¹¹ The first concrete action it took to update the standard was in October 2003, when it convened a small business panel to review its proposed rule. Over the next eight years, a standard would have prevented an estimated 150 cases of lung cancer, 325 cases of fatal silicosis, and 19,919 cases of non-fatal silicosis.¹²
- OSHA's confined spaces standard for the construction industry has been delayed for more than 31 years. Confined spaces include tanks, silos, vessels, or any other areas with limited means of exit. Workers in confined spaces may be placed at a high risk of electrocution, suffocation, or drowning. In 1980, OSHA issued an advanced notice of proposed rulemaking to solicit information for a confined

spaces standard protecting construction workers. But the agency soon abandoned the rulemaking effort. In 1993, OSHA issued a standard requiring training, monitoring, and warning signs for confined spaces, but exempted the construction industry from the rule. The United Steel Workers union sued OSHA that year, demanding that the construction industry be included. OSHA agreed to work on the regulation as part of a settlement. But the agency did not propose a standard until 2003. Had the rule been in place when OSHA first proposed it, it would have already prevented an estimated 189 deaths and 18,900 non-fatal injuries.¹³

- OSHA's fall protection standard for "walking/working surfaces" has been delayed for more than 21 years. In 1990, OSHA proposed a rule that would protect workers on scaffolds, towers, and ladders by providing them with harnesses or other fall protection equipment. The rule was abandoned shortly after OSHA held initial hearings. In 2003, OSHA again invited the public to comment on the rule. In 2010, OSHA proposed a revised rule incorporating changes in fall protection technologies that had occurred over the previous two decades. If issued in 1990, the rule would already have prevented an estimated 320 deaths and 104,026 injuries.¹⁴

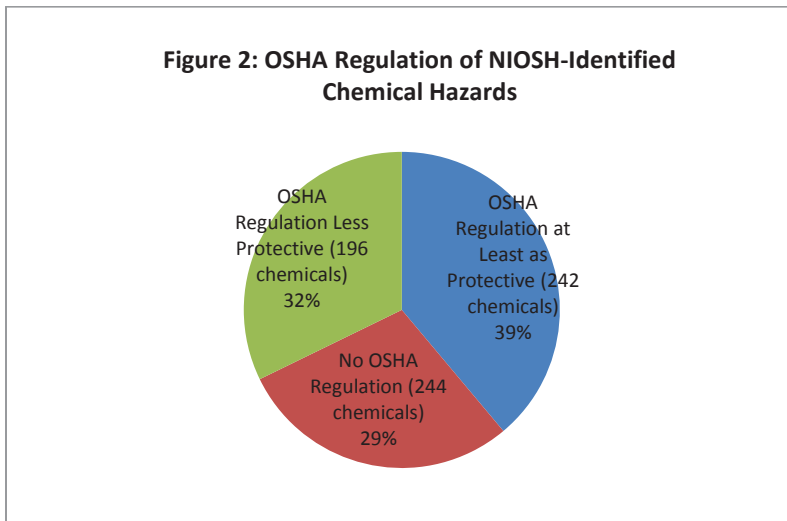
Burdens Placed on OSHA Leave Many Hazards Unaddressed

OSHA's delayed regulations represent a fraction of unaddressed dangers. After adopting hundreds of consensus standards between 1970 and 1972, OSHA's regulations were nearly in line with the scientific research that was available at the time. Since then, a tremendous chasm has developed between what researchers know and what OSHA regulates.

OSHA's failure to keep pace with changing workplace hazards is best illustrated by its inability to protect workers from toxic chemicals. While OSHA has only regulated two chemicals since 1997, industry develops two new chemicals every day.¹⁵

The National Institute for Occupational Safety and Health, or NIOSH, has identified 682 toxic chemicals to which workers are exposed.¹⁶ While some chemicals cause relatively minor health problems such as skin or eye irritation, others can result in serious respiratory diseases or fatal cancers.

OSHA has no existing regulations for 244 of the toxic NIOSH chemicals. [See Figure 2]



Source: Public Citizen analysis of NIOSH, Pocket Guide to Chemical Hazards (2011)

For another 196 chemicals, OSHA’s standards offer less protection than NIOSH’s recommendation. In some cases, OSHA rules allow for exposures at levels that are hundreds of times higher than NIOSH guidelines. Only 35 percent of the NIOSH-identified chemicals are regulated by OSHA at recommended levels.

In addition to toxic chemicals, OSHA has failed to regulate many other basic occupational hazards. Homicide is a leading cause of worker fatalities, but OSHA has never developed a standard for workplace violence prevention.¹⁷ Despite a large body of scientific knowledge on heat stress prevention, OSHA has no standard to ensure workers do not suffer heat stroke.¹⁸

A Contrast of Cases: OSHA Loses Its Ability to Respond Quickly

In February 1974, the Center for Disease Control (now Centers for Disease Control and Prevention) reported the death of four tire plant workers who were employed at the same B.F. Goodrich factory in Kentucky.¹⁹ Each of the four men succumbed to an extremely rare form of liver cancer known as hepatic angiosarcoma. The company's medical staff identified vinyl chloride, a chemical used in the production of polyvinyl chloride, or PVC, as the cause of the cancer.

Once news of vinyl chloride's risks surfaced, OSHA sprang into action. Less than three months after the publication of the CDC article, the agency issued an emergency temporary standard lowering the permissible exposure level for vinyl chloride from 500 parts per million (ppm) to 50 ppm.²⁰ OSHA's final standard allowed manufacturers to maintain no more than a 1 ppm air concentration of vinyl chloride. The entire rulemaking process took nine months. Manufacturers were easily able to comply with the rule after B.F. Goodrich developed a system to sequester the chemical and prevent worker exposure.²¹

In May 2002, 28 years later, the CDC reported another cluster of work-related deaths.²² This time the culprit was diacetyl, a chemical used to flavor microwave popcorn. Eight employees at a Missouri popcorn factory died after developing a debilitating respiratory disease known as bronchiolitis obliterans. A physician who treated several of the workers urged OSHA to inspect the factory. The agency sent inspectors, but they were unable to take any action because there was no applicable regulation to enforce.²³

This time around, OSHA did not spring into action—it crawled. In April 2007, five years after the CDC published the diacetyl report, a popcorn factory worker named Eric Peoples testified to a congressional subcommittee that exposure to diacetyl had all but destroyed his lungs.²⁴ As the 35-year-old father of two young daughters described, contracting a case of pneumonia would require him to receive a lung transplant. If that were to happen, he would likely survive just another five years.²⁵

The U.S. House of Representatives passed the Popcorn Workers Lung Disease Prevention Act in September 2007 with strong bipartisan support.²⁶ The bill would have required OSHA to regulate diacetyl. Apparently in response to this legislation, OSHA held an informal meeting of stakeholders to discuss diacetyl regulation the month after the House vote.²⁷ But the Senate never took up the diacetyl issue, so OSHA was not compelled to regulate the chemical. OSHA took no further action on diacetyl during the remainder of the administration of George W. Bush.

In January 2009, OSHA issued an outline of a proposed diacetyl regulation and asked interested parties to submit comments. It seemed as though the regulatory process were moving forward under the new administration. But in March 2009, OSHA withdrew its proposal. Before the agency could continue, the Small Business Regulatory Enforcement Fairness Act, or SBREFA, required it to convene a panel of small business representatives to comment on the rule.²⁸ The panel met in May 2009. In July, OSHA published a 259-page report summarizing the panel's comments, which largely sought greater clarity on the rule's provisions and to whom it applied.²⁹

By April 2009, OSHA had completed a draft of a required document outlining the costs and benefits of the diacetyl regulation. The report relied on figures from a private contractor. To ensure that its analysis would be strong enough to survive any future lawsuits from industry, OSHA continued to analyze the regulation's prospective costs and benefits after publishing the draft. The agency planned to enlist a group of academics to review its work by June 2011. But agency resources were stretched thin. OSHA was working on several other rules and was also required by an executive order to conduct reviews of existing regulations to see which ones might be "streamlined."³⁰ As of September 2011, the review of diacetyl's health effects still had not begun. OSHA began collaborating with NIOSH in an attempt to expedite the risk assessment process.³¹

Nine years have passed since the dangers of diacetyl first came to light. Yet OSHA may still be years away from regulating it.

Based on OSHA's estimate, a diacetyl regulation could have prevented about 15,000 workers from developing bronchiolitis obliterans over the first nine years after the CDC report.³² OSHA's failure to regulate harms businesses as well as workers. Some popcorn companies have been forced to pay millions of dollars after losing lawsuits brought against them by sick employees.³³

Why Do OSHA Rulemakings Take So Long?

A confluence of factors prevents OSHA from issuing regulations in a timely and efficient manner. Most of these impediments are external to the agency. A Supreme Court decision has prevented OSHA from responding quickly to new hazards or addressing multiple hazards at once. Several laws add onerous steps to the rulemaking process. Finally, Congress and presidential administrations have become more directly involved in OSHA rulemakings, slowing the agency's pursuit of its objectives.

The Benzene Decision

In 1980, the Supreme Court struck down OSHA's updated standard regulating Benzene, a carcinogenic component of petroleum.³⁴ In this case, referred to here as the Benzene decision, the court ruled that the Occupational Safety and Health Act requires OSHA to prove "significant risk" for any hazard that the agency chooses to regulate. OSHA had not sufficiently proven that the existing Benzene standard left workers at risk, the court ruled. The decision created ambiguity as to how extensive OSHA's risk analyses needed to be.

In 1989, OSHA attempted its most ambitious rulemaking ever. Realizing that toxic chemical regulations were far out of line with available science, it issued a rule creating new protections for 376 substances at once. Industry groups challenged the new rule in court. In 1992, a federal appeals court cited the Benzene decision in throwing out the new protections.³⁵ It ruled that OSHA needed to give more thorough consideration to each chemical's risks.

Since the adverse court decisions, OSHA has adopted a very cautious approach in developing its rules. The agency never again

regulated multiple chemicals with a single rule. When it considers regulating a chemical, OSHA now reviews hundreds of studies and produces thousands of pages of analysis. The agency often recruits outside academics to review the agency's analysis of the scientific literature. This more extensive risk assessment method imposes considerable time and resource expenditures.

Increasing Review Requirements

While developing a regulation is an extensive process for any government agency, the burdens that OSHA faces are unusual because of the enormous number of workplaces it is tasked with regulating and its relatively tiny budget. Each proposed OSHA regulation must undergo numerous review processes before it can be issued. While review requirements have grown significantly since 1980, agency funding has flat lined and staffing levels have decreased.³⁶

In 1980, Congress passed the Regulatory Flexibility Act, which requires OSHA and other agencies to conduct an extensive analysis for each significant rule they propose. For analysis, OSHA must estimate compliance costs for the new rule and its effect on small businesses, as well as the projected benefits to workers' health and safety (such as the number of fatalities, injuries, and cases of illness that would be prevented annually). The agency is also required to describe alternative regulatory approaches it has considered and justify the path it has chosen. These analyses can be hundreds of pages long and involve a considerable expenditure of resources, often requiring OSHA to hire private contractors.

In 1997, Congress passed the Small Business Regulatory Flexibility Act, which requires OSHA and the Environmental Protection Agency to create a review process for business representatives. Locating eligible businesses, convening panels, and producing reports based on feedback can take considerable time. The only other agency facing these requirements, the EPA, has a budget about 18 times larger than that of OSHA.

The Regulatory Flexibility Act and Executive Order 12866 require the agency to conduct periodic reviews of regulations that

already exist, analyzing their costs and benefits and recommending modifications. OSHA has published eight of these “lookback” reviews since 2000, resulting in hundreds of pages of documents.³⁷ The agency has been forced to divert resources that could have been put towards new rulemakings to conduct these reviews.

Politicization of Rulemaking

Congress and presidential administrations have become increasingly involved in particular rulemakings, often using their influence to block standards that OSHA is attempting to issue.

In addition to imposing additional review requirements on OSHA, Congress in 1996 passed the Congressional Review Act, which allows it to repeal particular regulations by an up-or-down vote. Although the Congressional Review Act applies to a number of federal agencies, Congress has only repealed one regulation under the statute: OSHA’s ergonomics standard, which was finalized in 2000. This standard was created after an extensive rulemaking process lasting more than eight years. With the threat posed by the Congressional Review Act, OSHA must now concern itself not only with proving that its rules address risks to workers that the courts would deem significant, but also with the possibility of repeal by an unfriendly Congress.

Presidential administrations have also come to play a more hands-on role in OSHA rulemakings. Part of this role is exercised through the White House’s Office of Management and Budget, or OMB. Although OMB has limited expertise in health and safety, the office can review and modify OSHA rules. OMB is supposed to conclude its reviews within 90 days of receiving an agency’s proposal, but can delay rules indefinitely if it so chooses.

Before the George W. Bush administration, presidential influence did not seem to determine the number of OSHA rules issued. During all but one administration, OSHA produced new rules at a rate of 2.3 to 3.8 per year (the annual rate was 1.2 during the George H.W. Bush presidency). But during the Bush II presidency, the rate fell to 0.3 new rules per year. In the first three

years of the Obama presidency, OSHA produced new rules at a rate of 0.7 per year.

Conclusion

Excessive obstacles in the rulemaking process cause tragic consequences for workers, as this chapter vividly illustrates. Those harms far outweigh any benefits realized from interminable analyses of proposed safeguards. While imperfect rules can always be modified after implementation, lives lost to unsafe working conditions cannot be brought back. It violates both OSHA's mission and our values as a nation that the concerns of industry have been elevated above the safety of workers.