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JUDICIAL REVIEW OF OSHA STANDARDS: THE EFFECT OF THE RIGHT TO PRE-ENFORCEMENT REVIEW OF OSHA STANDARDS ON SUBSEQUENT CHALLENGES

INTRODUCTION

The Occupational Safety and Health Act (Act)¹ authorizes the Secretary of Labor to promulgate legally enforceable work safety standards.² Section 6³ of the Act sets forth the requisite procedures for promulgating such standards.⁴ This provision includes a summary procedure⁵ that permits⁶ the Secretary to implement without formal rulemaking procedures national consensus⁷ and established Federal work safety standards⁸

1. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § § 651-678 (1982)). The purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b) (1982).

2. See 29 U.S.C. § 651(b)(3) (1982). Section 17 of the Act provides for both civil and criminal sanctions for noncompliance with Occupational Safety and Health Administration (OSHA) standards. See *id.* § 666.

3. Occupational Safety and Health Act § 6, 29 U.S.C. § 655 (1982).

4. Section 6(b) sets forth the rulemaking procedure necessary for the issuance, modification or revocation of an OSHA standard. See 29 U.S.C. § 655(b)(1)-(5) (1982). The Secretary of Labor must initiate the proceeding. He may do so either on his own volition or on petition from interested parties or recommendation of another government agency. *Id.* § 655(b)(1). OSHA may establish an advisory committee to make recommendations regarding the proposal of standards. *Id.* § 656(b). Section 7(b) of the Act governs the personnel for the advisory committee. *Id.* Timetables for the entire adoption procedure are contained in § 6(b). *Id.* § 655(b)(2)-(4). OSHA must publish each proposed standard and allow thirty days for comment. *Id.* § 655(b)(2). A hearing must be held if objections to a proposal are filed and a hearing is requested. *Id.* § 655(b)(3). OSHA must either issue the standard or make a determination that the standard should not be issued within sixty days after the expiration of the comment period or after the hearing date. *Id.* § 655(b)(4). If the standard is adopted, a statement of reasons for that action must be published. *Id.* § 655(e). The main institution for recommending such action is the National Institute for Occupational Safety and Health, which is the research arm of OSHA. *Id.* § 671(a).

OSHA is authorized to issue emergency temporary standards (ETS) pursuant to § 6(c), if it determines that an ETS is necessary to protect employees from exposure to substances or agents that are physically harmful. See *id.* § 655(c)(1). No rulemaking procedure is necessary for the issuance of an ETS. *Id.* The ETS takes immediate effect and remains effective until it is superseded by a permanent standard issued pursuant to § 6(b). *Id.* § 655(c)(2). See generally 1 W. Connolly & D. Crowell, A Practical Guide to the Occupational Safety and Health Act: Law, Principles & Practices 398-99 (1977) (discussing the requirements for an ETS). A permanent standard must be issued no later than six months after publication of the ETS. 29 U.S.C. § 655(c)(3) (1982).

5. See 29 U.S.C. § 655(a) (1982). See *infra* notes 48-52 and accompanying text.

6. The summary procedure expired two years after the effective date of the Act. See 29 U.S.C. § 655(a) (1982).

7. The term "national consensus standard" means any occupational safety and health standard or modification thereof which, (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached

that existed at the time of the Act's adoption.⁹ The Secretary established the Occupational Safety and Health Administration (OSHA) to carry out the safety and health functions of the Act.¹⁰ OSHA then promulgated numerous standards pursuant to the summary procedure.¹¹

Prior to enforcement of a new OSHA standard and within sixty days of its publication, any person who will be "adversely affected" by its enforcement may, pursuant to section 6(f), petition the court of appeals to review that standard's substantive and procedural validity.¹² Section 6(f) is the exclusive vehicle for such pre-enforcement review.¹³ The Act also provides in section 10(c)¹⁴ that upon enforcement,¹⁵ citations and penalties for alleged violations may be contested before the Occupational

substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

29 U.S.C. § 652(9) (1982).

Two organizations expressly mentioned in the legislative history of the Act as "national consensus organizations" are the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA). B. Mintz, *OSHA: History, Law and Policy* 40 & n.20 (1984); see S. Rep. No. 1282, 91st Cong., 2d Sess. 6 [hereinafter cited as Senate Report No. 1282], reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5182, and in Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, at 141, 146 (1971) [hereinafter cited as Legislative History].

8. 29 U.S.C. § 652(10) (1982) defines an established Federal standard as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970." *Id.* See *infra* notes 53-55 and accompanying text.

9. Further rulemaking procedure was deemed unnecessary, see B. Mintz, *supra* note 7, at 40, because both national consensus standards and established Federal standards as defined by the Act must have been originally adopted under procedures that ensured that parties of diverse views were heard. See Senate Report No. 1282, *supra* note 7, at 6, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5182, and in Legislative History, *supra* note 7, at 146; M. Rothstein, *Occupational Safety and Health Law* § 51, at 49 (2d ed. 1983). But see J. Mendeloff, *Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy* 36-41 (1979) (criticizing this method of promulgating standards).

10. See 36 Fed. Reg. 8754 (1971). OSHA operates under the auspices of the Assistant Secretary for Occupational Safety and Health. See *id.*

11. See *infra* notes 53-55 and accompanying text.

12. See 29 U.S.C. § 655(f) (1982).

13. *RSR Corp. v. Donovan*, 747 F.2d 294, 299 (5th Cir. 1984); Senate Report No. 1282, *supra* note 7, at 8, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5184, and in Legislative History, *supra* note 7, at 148.

14. 29 U.S.C. § 659(c) (1982).

15. Section 8(a) authorizes the Secretary's inspectors to conduct occupational safety and health inspections at reasonable times and in a reasonable manner. See 29 U.S.C. § 657(a) (1982). Section 17(f) provides that OSHA may bring criminal charges against any person who gives unauthorized advance notice of an inspection. See *id.* § 666(f). When the Secretary or his authorized representative believes, following the inspection or investigation, that an employer has violated his duties under the Act, the inspector "shall with reasonable promptness issue a citation to the employer." *Id.* § 658(a). The citation must describe with particularity the nature of the violation. *Id.*

Safety and Health Review Commission (Commission).¹⁶ Final orders of the Commission are subject to review by the court of appeals under section 11(a).¹⁷

Although the Commission regularly entertains challenges to the procedural sufficiency of OSHA standards,¹⁸ courts disagree as to whether the Act permits such challenges to be made in enforcement proceedings.¹⁹

16. Section 12(a) of the Act established the Commission to adjudicate proceedings arising under the Act. See 29 U.S.C. §§ 651(b)(3), 661(a) (1982). The Commission is composed of three members appointed by the President with the consent of the Senate. *Id.* § 661(a). The members must be persons who by reason of training, education or experience are qualified to carry out the functions of the Commission. *Id.* The President designates one of the members as Chairman of the Commission. *Id.* The Chairman is responsible for the administration of the Commission, including the appointment of administrative law judges and other employees necessary to carry out the Commission's functions. *Id.* § 661(b). Official action can be taken only by the affirmative vote of two members, who constitute a quorum. *Id.* § 661(f). The Commission is an autonomous, independent body, free of any control by the Secretary of Labor. See Occupational Safety and Health Administration, Guidebook to Occupational Safety and Health (CCH) ¶ 107, at 13-14 (1974) [hereinafter cited as Guidebook]; B. Mintz, *supra* note 7, at 335; M. Rothstein, *supra* note 9, § 351, at 341.

If an employer files notice that it is contesting a citation, the case is transferred to the Commission for adjudication pursuant to § 10(c). 29 U.S.C. § 659(c) (1982). The case is then assigned to a Commission administrative law judge who is responsible for all pre-hearing and hearing matters and the issuance of a decision. *Id.* § 661(j). The administrative law judge's decision becomes a final order of the Commission 30 days after its issuance, unless a Commission member directs Commission review of the decision within that 30-day period. *Id.* Because of this deadline, the Commission requires parties seeking this discretionary review to file a petition within 25 days after the decision is issued. See Guidebook, *supra*, ¶ 637. See generally 1 W. Connolly & D. Crowell, *supra* note 4, at 285-304 (discussing procedure for Commission review of citations); M. Rothstein, *supra* note 9, §§ 441-453 (same).

17. See 29 U.S.C. § 660(a) (1982). Pursuant to this section a party must file a petition for review within sixty days in the court of appeals for the circuit in which the alleged violation occurred, or in the circuit in which the aggrieved party has his principal place of business. See *id.* Furthermore, no objection that has not been urged before the Commission will be considered by the court unless failure or neglect to urge an objection is excused because of extraordinary circumstances. *Id.*

18. Rockwell Int'l Corp., 9 O.S.H. Cas. (BNA) 1092, 1095 (1980); see, e.g., S & H Riggers & Erectors, Inc., 7 O.S.H. Cas. (BNA) 1260, 1260 (1979), *rev'd on other grounds*, 659 F.2d 1273 (5th Cir. 1981); Deering Milliken, Inc., 6 O.S.H. Cas. (BNA) 2143, 2145 (1978), *aff'd*, 630 F.2d 1094 (5th Cir. 1980); Kennecott Copper Corp., 4 O.S.H. Cas. (BNA) 1400, 1400 & n.3 (1976), *aff'd*, 577 F.2d 1113 (10th Cir. 1977); Noblecraft Indus., 3 O.S.H. Cas. (BNA) 1727, 1730 (1975), *vacated in part on other grounds*, 614 F.2d 199 (9th Cir. 1980).

19. Compare *Madison Foods, Inc. v. Marshall*, 630 F.2d 628, 629 n.2 (8th Cir. 1980) (per curiam) (challenges to OSHA regulations based on failure of Secretary to comply with procedural requirements may be raised only in pre-enforcement proceedings) and *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052-53 (8th Cir. 1978) (same) with *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 582-83 n.2 (D.C. Cir. 1985) (pre-enforcement review provisions of the Act do not bar petitioner's subsequent procedural attack) and *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1099 (5th Cir. 1980) (same) and *Marshall v. Union Oil Co.*, 616 F.2d 1113, 1118 (9th Cir. 1980) (same) and *Noblecraft Indus. v. Secretary of Labor*, 614 F.2d 199, 202 (9th Cir. 1980) (same) and *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1116-19 (10th Cir. 1977) (reviewing Commission's decision on a procedural challenge, thereby implicitly stating that the Commission had authority to make such a ruling). The Fourth Circuit

Because procedural infirmities are immediately discernible when a standard is promulgated and therefore can be raised within the sixty-day pre-enforcement review period, the Eighth Circuit has held that the right to pre-enforcement review precludes the Commission from hearing procedural challenges in enforcement proceedings.²⁰ Consequently, that court does not review Commission decisions regarding such challenges.²¹ Other circuits, however, have reached the contrary conclusion, reasoning that the sixty-day period is not sufficient time to mount a successful challenge.²²

This Note contends that the plain language of section 6(f) and its legislative history support the conclusion that the section should not be read narrowly in precluding review of procedural validity in enforcement proceedings. In addition, because the Commission promulgated numerous standards under the summary procedure, many employers who were incapable of ascertaining each standard's procedural validity during the pre-enforcement period will be forever barred from bringing a procedural challenge unless section 6(f) is interpreted broadly. This Note concludes that the right to pre-enforcement review does not foreclose an employer from challenging in an enforcement proceeding the procedural validity of an OSHA standard.

I. LEGISLATIVE INTENT

Section 6(f) provides that "[a]ny person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals."²³ The plain meaning of the section does not preclude subsequent review of standards for procedural infirmities.²⁴ Moreover, the legislative history of the Act indicates that Congress intended to provide for judicial review of OSHA standards in both pre-enforcement and enforcement proceed-

has attempted to reconcile this split by permitting an employer who has been prejudiced by the procedural infirmity to raise the infirmity upon enforcement. See *Daniel Int'l Corp. v. OSHRC*, 656 F.2d 925, 928-31 (4th Cir. 1981).

20. See *Madison Foods, Inc. v. Marshall*, 630 F.2d 628, 629 n.2 (8th Cir. 1980) (per curiam); *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052-53 (8th Cir. 1978). The Eighth Circuit reasoned that OSHA's interest in the finality of its standards and the burden of defending continuous procedural challenges dictate against providing a perpetual forum in which OSHA's procedural irregularities may be raised. *Id.* at 1052.

21. See *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052-53 (8th Cir. 1978).

22. See, e.g., *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 582-83 n.2 (D.C. Cir. 1985); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1099 (5th Cir. 1980); *Marshall v. Union Oil Co.*, 616 F.2d 1113, 1118 (9th Cir. 1980).

23. 29 U.S.C. § 655(f) (1982).

24. See 2A N. Singer, *Sutherland Statutory Construction* § 46.01, at 73-74 (C. Sands 4th rev. ed. 1984) (a provision of an act must be applied according to the customary purport of its language unless it is shown that some other section of the act expands or restricts its meaning or it is repugnant to the general purview of the act or the legislative history implies a different meaning).

ings.²⁵ The Senate Report explains that section 6(f) does not prevent "an employer from challenging the validity of a standard during an enforcement proceeding."²⁶ In fact, Congress rejected a proposal that explicitly stated that "the [pre-enforcement review] provided by this subsection for reviewing a standard or rule shall be exclusive."²⁷ Nothing in the Act²⁸ or its legislative history distinguishes between substantive²⁹ and procedural³⁰ challenges. In *Yakus v. United States*³¹ the Supreme Court con-

25. See *RSR Corp. v. Donovan*, 747 F.2d 294, 300 n.25 (5th Cir. 1984). The intent of the legislature is the criterion most often used for the interpretation of statutes. 2A N. Singer, *supra* note 24, § 45.05, at 20-21. It is assumed that courts have an obligation to carry out the will of the legislature. See *id.* § 45.05, at 21. This assumption is mandated by the principles of separation of powers. See *id.*

26. Senate Report No. 1282, *supra* note 7, at 8, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5184, and in Legislative History, *supra* note 7, at 148. One analysis of S. 2193, which contains § 6(f) as ultimately passed, is that "[j]udicial review of standards would also be possible in enforcement proceedings." Comparative Analysis of Significant Provisions of the Occupational Safety and Health Bill, S. 2193 Reported by the Senate Comm. on Labor and Public Welfare, and S. 4404, the Substitute Occupational Safety and Health Bill, reprinted in 116 Cong. Rec. 35,725 (1970), and in Legislative History, *supra* note 7, at 302, 304.

27. S. 4404, 91st Cong., 2d Sess. 39 (1970), reprinted in Legislative History, *supra* note 7, at 73,111. Statements made during debates clarify that a "standard may also be challenged during an enforcement proceeding. . . . On the other hand, the substitute bill provides for exclusive judicial review within 30 days of the promulgation of a standard, and forecloses any possibility of obtaining judicial review of a standard in an enforcement proceeding." 116 Cong. Rec. 37,340 (1970) (statement of Sen. Williams), reprinted in Legislative History, *supra* note 7, at 431-32.

28. See 29 U.S.C. § 655(f), 659(c) (1982). See *supra* notes 24-27 and accompanying text.

29. Substantive infirmities generally cannot be detected until employers attempt to implement a new standard. Substantive defenses include, among others: impossibility of compliance (employer must show that the standard is functionally impossible or would preclude performance of required work, and that alternative means of protection are either in use or unavailable), see M. Rothstein, *supra* note 9, § 119; greater hazard (employer must show that compliance creates a greater hazard than noncompliance, that alternative means of protection are unavailable and that a variance application, which is granted when an employer practices an alternative safety procedure that does not comply exactly with the standard but provides a comparable degree of safety, is inappropriate), see M. Rothstein, *supra* note 9, § 121; see also Weiner, *Variance Under OSHA: An Update*, 28 Lab. L.J. 161, 161 (1977) (discussing availability of variances under the Act); technological infeasibility (Secretary has burden upon enforcement of showing that specific, technically feasible means exist to abate the violation), see M. Rothstein, *supra* note 9, § 122; and economic infeasibility (employer must show that compliance is extremely costly and that the employer cannot absorb or pass on such cost), see M. Rothstein, *supra* note 9, § 123. These problems do not arise until an employer makes a good faith effort to comply with the standard, at which time the pre-enforcement period will most likely have expired. See *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052 (8th Cir. 1978) (quoting *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 549-50 (3d Cir. 1976)); see also *RSR Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984) ("some issues of validity will not gain sufficient definition before actual enforcement").

30. Procedural irregularities are immediately discernible and "need not await the test of time." *RSR Corp. v. Donovan*, 747 F.2d 294, 299 (5th Cir. 1984) (quoting *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052 (8th Cir. 1978)). See *supra* notes 4, 20 and accompanying text.

31. 321 U.S. 414 (1944).

sidered a challenge³² to a standard promulgated under the Emergency Price Control Act of 1942 (EPCA).³³ Section 203(a)³⁴ of the EPCA explicitly limited challenges made after the expiration of the pre-enforcement period to those "based solely on grounds arising after the expiration of such sixty days."³⁵ This effectively foreclosed all procedural challenges after the pre-enforcement period.³⁶ In deciding that this section precluded a challenge to the validity of an EPCA regulation in an enforcement proceeding,³⁷ the Court relied on the express language of exclusivity and the clear legislative intent.³⁸ Neither section 6(f)³⁹ nor section 10(c)⁴⁰ of the Act contains equivalent language of exclusivity regarding either substantive or procedural challenges.

II. POLICY CONSIDERATIONS IN FAVOR OF EXPANSIVE REVIEW

Because of the wartime situation, the agency charged with administering the EPCA⁴¹ had an overriding interest in the certainty of its regulations and the conservation of its resources.⁴² The purpose of the EPCA was to further national defense and security by preventing speculative and excessive price rises, price dislocations, and inflationary tendencies.⁴³ Congress felt that this was necessary for the effective prosecution of World War II.⁴⁴ In order to protect these strong agency interests in finality, Congress explicitly provided for limitations on post-enforcement review.⁴⁵

Although OSHA has interests in the finality and certainty of its safety standards and in avoiding the expense of defending these standards against successive procedural attacks,⁴⁶ the lack of language of exclusivity in section 6(f) indicates that Congress did not consider these interests

32. *See id.* at 418.

33. Ch. 26, 56 Stat. 23 (terminated 1947).

34. Ch. 26, § 203(a), 56 Stat. 23, 31 (1942) (terminated 1947).

35. *Id.*

36. Because procedural infirmities arise during the enactment of a standard, the grounds for such a challenge arise upon the promulgation of the standard. *See supra* note 30 and accompanying text.

37. *Yakus v. United States*, 321 U.S. 414, 430-31 (1944).

38. *See id.* at 429-30.

39. *See* 29 U.S.C. § 655(f) (1982).

40. *See id.* § 659(c).

41. Ch. 26, § 201(a), 56 Stat. 23, 29 (1942) (terminated 1947).

42. *See* The Emergency Price Control Act of 1942, ch. 26, § 1, 56 Stat. 23, 23-24 (purpose clause) (terminated 1947); S. Rep. No. 931, 77th Cong., 2d Sess. 1 (1942).

43. Ch. 26, § 1, 56 Stat. 23, 23-24 (1942) (purpose clause) (terminated 1947).

44. *See id.* The price control regulations were also needed to prevent excessive disruption to the economy from abnormal market conditions and profiteering. *See Yakus v. United States*, 321 U.S. 414, 431-32 (1944); S. Rep. No. 931, 77th Cong., 2d Sess. 1-3 (1942).

45. *See* The Emergency Price Control Act of 1942, ch. 26, § 203(a), 56 Stat. 23, 31 (terminated 1947); S. Rep. No. 931, 77th Cong., 2d Sess. 1, 22 (1942).

46. *See RSR Corp. v. Donovan*, 747 F.2d 294, 299, 301 (5th Cir. 1984); *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052 (8th Cir. 1978). The Fifth Circuit refused to review the substantive or procedural challenges made by an employer

to be overriding.⁴⁷ Moreover, the statutory framework of the Act necessitates expanded judicial review. Although the Eighth Circuit has held that the sixty-day period for pre-enforcement judicial review of standards provided for in section 6(f) is sufficient for procedural challenges,⁴⁸ restriction on subsequent review would impose undue hardship on parties without the funds or political acumen to raise a challenge within sixty days of the promulgation of a standard.⁴⁹ It "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small [employers] scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register."⁵⁰

This point is best illustrated by the adoption of standards under section 6(a)'s summary procedure.⁵¹ The procedure was intended to enable OSHA to establish without delay minimum standards of health and safety for the nation's workforce.⁵² On May 29, 1971, OSHA adopted a large body of national consensus and federal safety standards as OSHA safety standards.⁵³ This hasty and wholesale procedure, which produced two hundred fifty pages of regulations in the Federal Register,⁵⁴ generated much criticism.⁵⁵ This extreme case exemplifies how burdensome it

who had participated in the rulemaking process and had no excuse for failing to assert the challenges within the pre-enforcement review period. See *RSR Corp.*, 747 F.2d at 302.

47. Courts should not read words of exclusivity into a statute when its meaning is plain. See 2A N. Singer, *supra* note 24, § 47.38, at 265. See *supra* note 27 and accompanying text.

48. See *Madison Foods, Inc. v. Marshall*, 630 F.2d 628, 629 n.2 (8th Cir. 1980) (per curiam); *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052-53 (8th Cir. 1978). See *supra* note 20 and accompanying text.

49. See 116 Cong. Rec. 37,340 (1971), reprinted in *Legislative History, supra* note 7, at 431 (statement of Sen. Williams in response to Senate bill proposing exclusive review) (practical effect of exclusive review would be to deny small employers and companies their day in court).

50. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

51. 29 U.S.C. § 655(a) (1982). See *supra* note 5 and accompanying text.

52. See Senate Report No. 1282, *supra* note 7, at 6, reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5182, and in *Legislative History, supra* note 7, at 146.

53. See 36 Fed. Reg. 10,466 (1971) (codified at 29 C.F.R. § § 1910.1-1500 (1985)).

54. See 36 Fed. Reg. 10,466-10,714 (1971).

55. See J. Mendeloff, *supra* note 9, at 39-41; Moran, *Cite OSHA for Violations, Occupational Safety and Health*, Mar.-Apr. 1976, at 19-20, reprinted in B. Mintz, *supra* note 7, at 43-44. Mr. Moran explains that many of these standards were not sufficiently specific for an ordinary employer to understand and implement them. See Moran, *supra* at 20, reprinted in B. Mintz, *supra* note 7, at 44. Other standards were irrelevant to workplace safety and health. See Moran, *supra*, at 20, reprinted in B. Mintz, *supra* note 7, at 44. Moreover, these standards were not subject to close scrutiny when they were first written. The national consensus standards had originally been developed as advisory standards and as such incorporated some lofty goals. See Moran, *supra*, at 20, reprinted in B. Mintz, *supra* note 7, at 44. The underlying laws from which the established Federal standards were adopted applied to a relatively small number of the employers now subject to them pursuant to the Act. See Moran, *supra*, at 20, reprinted in B. Mintz, *supra* note 7, at 44. At the time these standards were originally presented for public scrutiny, the vast majority of employers were not aware that they would eventually be subject to

is to comb through all OSHA standards and raise procedural objections within the pre-enforcement period.⁵⁶ Although OSHA has an interest in the finality of its standards and the conservation of its funds, denial of subsequent procedural challenges would impose an unfair burden on employers.

CONCLUSION

The right to pre-enforcement review afforded by section 6(f) does not foreclose subsequent procedural challenges. The language of the Act, coupled with the legislative intent, supports such a conclusion. Moreover, in light of the summary procedure for adopting standards, it is inappropriate to preclude procedural challenges for the many employers who were unable to detect a standard's procedural infirmities during the pre-enforcement period. It is also unreasonable to assume that all those affected by a newly promulgated standard will become aware of its adoption within sixty days. Employers must therefore be able to raise procedural challenges during enforcement proceedings. The Commission has properly held that it has authority to rule on the procedural validity of OSHA standards in enforcement proceedings, and courts should therefore review such decisions.

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them and were thus effectively denied a chance to comment. *See Moran, supra*, at 20, reprinted in B. Mintz, *supra* note 7, at 44.

56. *See RSR Corp. v. Donovan*, 747 F.2d 294, 300-01 (5th Cir. 1984); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1099 (5th Cir. 1980); *Marshall v. Union Oil Co.*, 616 F.2d 1113, 1118 (9th Cir. 1980). Section 6(f) should be construed to harmonize with all other sections of the Act. *See* 2A N. Singer, *supra* note 24, § 47.06 (the separate effect of each individual section of an act must be interpreted so as to make it consistent with the whole). Expansive review under this section therefore seems necessary in light of the summary procedure for promulgating standards contained in § 6(a). *See* 29 U.S.C. § 655(a) (1982). *See supra* notes 4, 53-55 and accompanying text. Moreover, the provisions of § 6(f) should be construed to encompass situations that were contemplated by the legislature. *See* 2A N. Singer, *supra* note 24, § 54.05, at 571. *See supra* notes 28-30 and accompanying text.