The authors argue that Congress intended the general duty clause of the Occupational Safety and Health Act of 1970 to be a limited means of advancing the purposes of the Act. In a review of the legislative history, the authors assert that Congress carefully restricted the scope of the general duty clause to satisfy certain congressional concerns, such as giving fair notice to employers of their legal obligations. The authors examine OSHA's use of the general duty clause and contend that the agency attempted to expand the scope of the clause beyond that intended by Congress, although it has recently moved closer to the congressional conception of the clause as a limited tool. The article concludes with recommendations for use of the general duty clause and its alternatives.

The Occupational Safety and Health Act (OSH Act)\(^1\) took effect in 1971. After more than a decade of administration of this wide-reaching statute, a tentative assessment and review is appropriate.\(^2\)

This article focuses on the interpretation and enforcement of a central provision of the Act, the so-called "general duty clause." Section 5(a)(1)\(^3\) provides:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.\(^4\)
The general language of this clause contrasts with the specific requirements of the hundreds of individual standards adopted by the Occupational Safety and Health Administration (OSHA). Since 1971, OSHA has used the general duty clause extensively, citing employers thousands of times in some years. Proposed penalties in one year exceeded 2.5 million dollars. Under the Carter Administration OSHA cited employers more often under the general duty clause than under any single standard. Yet, during the past decade, OSHA, the Occupational Safety and Health Review Commission (OSHRC or the Review Commission), and the courts have at times held sharply divergent views on the meaning and scope of the general duty clause.

This article argues that Congress adopted the particular language of the general duty clause primarily to (1) establish a broad employer obligation to protect the safety and health of employees; (2) insulate employers from responsibility for absolute safety in the workplace; (3) provide employers and OSHA inspectors with adequate notice of employers’ legal obligations; and (4) subordinate the general duty clause to the promulgation and enforcement of specific standards. In attempting to accommodate all four objectives, Congress substantially narrowed the scope of the employer obligation from that originally proposed. The article submits that the agency charged with enforcing the Act, OSHA, at first construed the general duty clause in accordance with the legislative intent, but later inappropriately attempted to expand the scope of the clause beyond the limits carefully prescribed by Congress. Recently, however, OSHA has again come to regard the general duty clause more as Congress had intended: as a limited tool for advancing the purposes of the OSH Act.

The article begins with an overview of the OSH Act. It then reviews in detail the legislative history of the general duty clause. Following is an analysis of how OSHA’s use of the general duty clause has changed over the years. The article concludes with recommendations for improving OSHA’s use of the general duty clause and suggestions for some alternatives to its use.


6. See infra Table I, accompanying note 80.
7. See infra text accompanying note 87.
8. The Review Commission is an independent administrative tribunal established under § 12 of the OSH Act, 29 U.S.C. § 661 (1976), to adjudicate contested enforcement cases brought by the Secretary of Labor for alleged violations of the general duty clause and OSHA standards.
I

OVERVIEW OF THE ACT

The OSH Act covers virtually every business affecting commerce, in the United States, except for federal, state, and local governments. Its objectives are “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” In brief, it requires employers to comply with two mandatory duties. One is imposed by the general duty clause; the other by what is sometimes called the “specific duty clause.” The latter provision states that each employer “shall comply with occupational safety and health standards promulgated under this chapter.” Violations of both clauses are punishable by fines. While willful violations of standards or regulations resulting in a worker’s death are also punishable by imprisonment, there is no such provision for violations of the general duty clause.

The Secretary of Labor (the Secretary) prosecute violations of both the general duty clause and the specific duty clause on behalf of OSHA. The cases are presented before the administrative law judges (ALJs) of the Review Commission. Their decisions are subject to discretionary de novo review by the three members of the Review Commission, chosen for their expertise in the area. Final decisions of the Commissioners and unreviewed ALJ decisions are subject to judicial review in an appropriate court of appeals.

Despite the general duty clause, the OSH Act relies on rulemaking as the primary means of effectuating the Act’s objectives. Rather than prescribe standards itself, Congress gave OSHA the responsibility under the specific duty clause to determine appropriate means for preventing particular occupational hazards. To assist OSHA in formulating standards, Congress provided the agency with a scientific advi-

13. Although the Secretary is technically the prosecutor under the OSH Act, and attorneys from the Office of the Solicitor of Labor represent the Secretary before the Review Commission, OSHA administers the Act, subject to review by the Secretary. Accordingly, this paper generally refers to OSHA as the prosecutor.
16. See infra text accompanying notes 54-55 and 78-79; see also Brennan v. OSHRC (Underhill Constr. Corp.), 513 F.2d 1032, 1038 (2d Cir. 1975) (“The standards are intended to be the primary method of achieving the policies of the Act.”); Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340, 1343 (2d Cir. 1974).
The National Institute for Occupational Safety and Health (NIOSH).\textsuperscript{17} Congress also authorized OSHA to adopt any “national consensus standard”\textsuperscript{18} or “established Federal standard”\textsuperscript{19} without resort to notice and comment rulemaking procedures for two years following enactment.\textsuperscript{20} Since that authority expired in 1973, OSHA has had to adopt permanent standards through a prescribed form of hybrid rulemaking.\textsuperscript{21} Congress specified the degree of employee protection the standards should provide,\textsuperscript{22} the form of the standards,\textsuperscript{23} the magnitude of risks to be addressed by standards,\textsuperscript{24} and other practical considerations.\textsuperscript{25}

Generally, OSHA standards provide employers with clear and

\textsuperscript{17} Sections 20-22, 29 U.S.C. §§ 669-671 (1976). NIOSH’s responsibilities include conducting research, developing criteria which recommend safe levels of exposure to toxic materials and harmful physical agents, publishing a list of known toxic substances, and performing health hazard evaluations in places of employment. Section 22, 29 U.S.C. § 671 (1976).

\textsuperscript{18} Section 3(9), 29 U.S.C. § 652(9) (1976), defines “national consensus standard” to mean 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 of provisions of the standard have reached 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.

\textsuperscript{19} Section 3(10), 29 U.S.C. § 652(10) (1976), defines “established Federal standard” to mean “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.”

\textsuperscript{20} Section 6(a), 29 U.S.C. § 655(a) (1976).

\textsuperscript{21} Section 6(b), 29 U.S.C. § 655(b) (1976). Among other things, this section requires OSHA to conduct a hearing on a proposed standard if any interested person so requests. OSHA may, however, adopt an emergency temporary standard without full notice and comment procedures where employees are exposed to grave danger from workplace hazards and an emergency standard is necessary to protect employees from such danger. Section 6(c), 29 U.S.C. § 655(c) (1976).

\textsuperscript{22} For standards adopted under § 6(b) dealing with toxic materials or harmful physical agents, OSHA is required to “set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.” Section 6(b)(5), 29 U.S.C. § 655(b)(5) (1976). Similarly, in § 6(a), 29 U.S.C. § 655(a) (1976), Congress directed OSHA, in the event of a conflict among national consensus standards or established federal standards available for adoption, to adopt “the standard which assures the greatest protection of the safety or health of the affected employees.”

\textsuperscript{23} Section 6(b)(5), 29 U.S.C. § 655(b)(5) (1976): “Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.”

\textsuperscript{24} See Industrial Union Dept. AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980) [hereinafter cited as Benzene]. After reviewing the legislative history, the Court declared that Congress intended that “before he can promulgate any permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices.” Id. at 642 (emphasis in original).

\textsuperscript{25} Section 6(b)(5), 29 U.S.C. § 655(b)(5) (1976) (“In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under
often detailed notice of their legal obligations to protect employee safety and health. The general duty clause, in contrast, is subject to varying interpretations. Where several interpretations are possible, an employer might not know the extent of its legal obligations until those obligations are determined in enforcement proceedings. This danger can be largely averted by construing the general duty clause in light of its legislative history.

II

LEGISLATIVE HISTORY OF THE GENERAL DUTY CLAUSE

The legislative history of the general duty clause cannot, of course, provide a precise guide to the proper construction of its various provisions. The congressional debates often involved provisions different from those finally adopted, while some adopted provisions were never explicitly discussed. Nevertheless, this history does supply some meaning to the phrases finally included in the general duty clause.

A. Legislative Chronology

The Ninety-First Congress considered occupational safety and health legislation during its first session in 1969, but did not pass a bill until its second session in 1970. Of the bills introduced in 1969 only one, the Perkins bill, contained a general duty provision. The Administration-sponsored bills introduced that year used general duty

26. OSHA has sometimes been criticized, however, for attempting to enforce vague standards. See, e.g., Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 650 (5th Cir. 1976); Cape & Vineyard Div. of New Bedford Gas & Edison Light Co. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975).


28. The authors find the legislative history of the general duty clause to be more clear than have other commentators. See, e.g., Morey, supra note 4, at 990.

29. The Ninetieth Congress had also considered comprehensive safety and health legislation. See Legis. Hist., supra note 27, at 325, 444, 510 (remarks of Senator Yarborough). In the House, a general duty requirement had been proposed but was stricken in committee. See House Report, supra note 27, at 50 (Minority Views on H.R. 16785), reprinted in Legis. Hist., supra note 27, at 880.

30. H.R. 4294, 91st Cong., 1st Sess. § 3(a) (1969), Legis. Hist., supra note 27, at 661, provided: "Any employer engaged in a business affecting commerce shall furnish employment and a place of employment which are safe and healthful and shall comply with the standards prescribed from time to time by the Secretary. . . ."
language but provided that an employer could fulfill its general duty by complying with standards. None of the other bills introduced that year contained general duty language.

In testimony before the House and Senate Select Subcommittees on Labor in late 1969, Governor Howard Pyle, President of the National Safety Council, complained of the absence of a general duty clause in the bills then being considered. This testimony apparently influenced both subcommittees, since it appears in both the House and Senate Reports which accompanied the respective committee bills reported in 1970.

During the second session of the Ninety-First Congress, Representative Daniels introduced an Administration-backed bill which contained a general duty clause similar to that of the Perkins bill in the previous session. This bill was reported out of committee, but failed to win the support of the full House. Representative Steiger introduced his own bill, whose provisions the House substituted for those of the rejected Daniels bill. Among other differences from the Daniels bill, the Steiger bill contained a much narrower general duty clause.

In the Senate, Senator Dominick introduced a bill incorporating

31. H.R. 13373, 91st Cong., 1st Sess., § 4(a) (1969), reprinted in LEGIS. Hist., supra note 27, at 684-85; S. 2788, 91st Cong., 1st Sess., § 4(a) (1969), reprinted in LEGIS. Hist., supra note 27, at 36-37, provided that “each employer engaged in a business affecting commerce shall furnish employment and a place of employment which are safe and healthful as prescribed by occupational safety and health standards promulgated by the National Occupational Safety and Health Board . . . .”


33. Governor Pyle testified before the House and Senate Select Subcommittees on Labor:

If national policy finally declares that all employees are entitled to safe and healthful working conditions, then all employers would be obligated to provide a safe and healthful workplace rather than only complying with a set of promulgated standards. The absence of such a “general obligation” provision would mean the absence of authority to cope with a hazardous condition which is obvious and admitted by all concerned for which no standard has been promulgated.

SENATE REPORT, supra note 27, at 10, reprinted in LEGIS. Hist., supra note 27, at 150; HOUSE REPORT, supra note 27, at 21, reprinted in LEGIS. Hist. supra note 27, at 851.

34. H.R. 16785, 91st Cong., 2d Sess., § 5(1) (1970), reprinted in LEGIS. Hist., supra note 27, at 726. Representative Perkins was one of 19 sponsors of the bill in addition to Representative Daniels. Section 5 provided:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which is safe and healthful, and

(2) shall, except as provided in section 17, comply with occupational safety and health standards and with interim standards which are promulgated under this Act.

35. HOUSE REPORT, supra note 27, at 1, reprinted in LEGIS. Hist., supra note 27, at 831.

36. LEGIS Hist., supra note 27, at 1092, 1112.

37. H.R. 19200, 91st Cong., 2d Sess., § 5(a) (1970), reprinted in LEGIS. Hist., supra note 27, at 769. The provision read:

Each employer—

(a) shall furnish to each of his employees employment and a place of employment
the narrower Steiger general duty clause. As an alternative, a safety and health bill introduced by Senator Williams in the first session was amended by the addition of a general duty clause borrowed from the Daniels-Administration bill, with the qualification that employers would only be responsible for ridding the workplace of "recognized hazards." This amended Williams bill was approved by a majority of the Committee on Labor and Public Welfare and, after debate, was passed by the Senate.

The Conference Committee reached a compromise between the versions of the general duty clause passed by the House and Senate. The Conference Committee version was then passed by each House. It provided that:

Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

B. Establishment of a Broad Employer Obligation to Protect the Safety and Health of Employees

The Administration-backed bill introduced in the first session of the Ninety-First Congress apparently contemplated no more than an hortatory general duty clause. As noted earlier, it defined an employer's obligation to "furnish employment and a place of employment which are safe and healthful" in terms of compliance with the occupational safety and health standards to be promulgated. This approach was consistent with earlier federal safety and health legislation, which was limited in scope. Some of the early statutes were merely compensatory, relying on the assessment of damages for deaths and injuries to encourage employers to protect employee safety and health. Others applied only to federal contractors. None was enforced in the absence of

which are free from any hazards which are readily apparent and are causing or are likely to cause death or serious physical harm to his employees.


Section 5(a)(1) provided:

Each employer—

(1) shall furnish to each of his employees employment and a place of employment free from recognized hazards so as to provide safe and healthful working conditions.

The "free from recognized hazards" qualification was offered as an amendment by Senator Javits. See also SENATE REPORT, supra note 27, at 58, reprinted in LEGIS. HIST., supra note 27, at 197 (individual views of Mr. Javits).

40. SENATE REPORT, supra note 27, at 1, reprinted in LEGIS. HIST., supra note 27, at 141.
41. LEGIS. HIST., supra note 27, at 527-28.
42. CONFERENCE REPORT, supra note 27, at 33, reprinted in LEGIS. HIST., supra note 27, at 1186.
43. LEGIS. HIST., supra note 27, at 1150, 1225.

In the second session, however, the general duty provision of the Daniels bill distinguished between, on the one hand, an employer's obligation to provide employment and places of employment which are safe and healthful and, on the other, an employer's obligation to comply with standards. The Daniels provision created two distinct duties. The House Report which accompanied the Daniels bill referred to the first obligation as the "general and common duty to bring no adverse effects to the life and health of . . . employees throughout the course of their employment."\footnote{\textit{House Report, supra} note 27, at 50-51, \textit{reprinted in Legis. Hist., supra} note 27, at 880-81 (contrasting those statutes with the Daniels provision).} While it was incorrect for the House and Senate Reports to refer to the general duty clause as a mere restatement of the common law,\footnote{\textit{Senate Report, supra} note 27, at 9, \textit{reprinted in Legis. Hist., supra} note 27, at 149.} this general duty provision was similar in scope to the broad common law duty of care.

An example of the breadth of the Daniels provision appears in the phrase "employment and places of employment." In contrast to statutes such as the Longshoremen's and Harborworkers' Act which are limited to particular kinds or places of employment, the Daniels provision had no such limitation. It applied to all occupations and workplaces in commerce, other than federal, state, and local governments.\footnote{\textit{See Legis. Hist., supra} note 27, at 992 (remarks of Representative Steiger). Among other distinctions, the general duty clause does not recognize common law defenses to claims of negligence. \textit{See REA Express, Inc. v. Brennan}, 495 F.2d 822, 825 (2d Cir. 1975); \textit{National Realty & Constr. Co. v. OSHRC}, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973).}

The Daniels provision firmly established the need for inclusion of a general duty clause in whatever occupational safety and health legislation was to be enacted. Following approval of the Daniels bill by the House Education and Labor Committee, the appropriate limits of the clause were hotly debated, but the idea of including some kind of a general duty was no longer questioned.

\footnote{\textit{Id. See Legis. Hist., supra} note 27, at 992 (remarks of Representative Steiger). Among other distinctions, the general duty clause does not recognize common law defenses to claims of negligence. \textit{See REA Express, Inc. v. Brennan}, 495 F.2d 822, 825 (2d Cir. 1975); \textit{National Realty & Constr. Co. v. OSHRC}, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973).}
C. The Need to Limit an Overly Broad General Duty Clause

The Daniels provision stated that each employer “shall furnish to each of his employees employment and a place of employment which is safe and healthful.”\(^8\) Even supporters of the Daniels provision recognized, however, that “safe” and “healthful” should not be regarded as absolutes.\(^9\) Requiring absolute health and safety would have converted employers into insurers. While such a requirement may have been appropriate for a compensatory statute, it should not have been included in legislation designed to prevent injuries and deaths.\(^5\) Despite the disclaimer in the House Report, critics of the Daniels provision argued that it could be read to require absolute safety and health,\(^5\) a burden employers could not realistically be expected to bear.

Recognizing that the Daniels provision was in fact intended to require something less than absolute safety and health, its opponents directed their primary criticism to the provision’s failure to indicate what level of safety would be required. The major concern was with providing employers fair notice of their legal obligations under the statute. Several critics suggested that the sweeping Daniels provision would not provide fair notice and that this lack of notice could amount to an un-

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9. The House Report which accompanied the Daniels bill explained: An employer's duty under Section 5(1) is not an absolute one. It is the Committee's intent that an employer exercise care to furnish a safe and healthful place of work and to provide safe tools and equipment. This is not a vague duty, but is protection of the worker from preventable dangers. HOUSE REPORT, supra note 27, at 21, reprinted in LEGIS. HIST., supra note 27, at 851.
50. Id. Section 2(b)(1) of the Daniels bill, carried over intact into § 2(b)(1) of the OSH Act, 29 U.S.C. § 651(b)(1) (1976), proposed to assure safe and healthful working conditions by "encouraging employers and employees in their efforts to reduce the occupational safety and health hazards at their places of employment . . . ." Moreover, the OSH Act explicitly does not affect the common law, worker's compensation laws, or other statutes concerning compensation. See § 4(b)(4), 29 U.S.C. § 653(b)(4) (1976). The courts have repeatedly held that the OSH Act does not create a cause of action for employees injured or killed in the course of their employment. See Taylor v. Brighton Corp., 616 F.2d 256, 258-64 (6th Cir. 1980); Jeter Corp. v. St. Regis Paper Co., 507 F.2d 973, 976-77 (5th Cir. 1975); Byrd v. Fieldcrest Mills, Inc., 496 F.2d 1323 (4th Cir. 1974) (per curiam); Russell v. Bartley, 494 F.2d 334, 335 (6th Cir. 1974) (per curiam); Federal Employees for Non-Smokers’ Rights v. United States, 466 F. Supp. 181, 183 (D.D.C. 1978), aff'd mem. 598 F.2d 310 (D.C. Cir. 1979).
51. For example, Senator Javits favored the Williams bill's general duty clause over "the Daniels bill which embraces all hazards." SENATE REPORT, supra note 27, at 58, reprinted in LEGIS. HIST., supra note 27, at 197. According to Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth: "It seems inconceivable for anyone to suggest that we pass a law prohibiting the doing of wrong to anyone. Yet, in effect, that is what Congress has been asked to do by the sponsors of H.R. 16785." HOUSE REPORT, supra note 27, at 54, reprinted in LEGIS. HIST., supra note 27, at 884. Representative Steiger remarked: "It is patently unfair to require employers to supply every conceivable safety and health need for which no specific standards exist to guide them." LEGIS. HIST., supra note 27, at 992.
constitutional denial of due process. Others noted the potential unfairness of a broad and vague clause that would not adequately alert employers to their precise responsibilities, regardless of whether that unfairness would amount to a constitutional violation. There was also fear that the inspectors' ignorance of the limits of employers' responsibilities could lead to the application of ad hoc standards.

Opponents of the Daniels provision complained further that its unlimited scope would undermine the incentive to adopt standards. While critics could accept the premise of a general duty with force and meaning independent of the content of particular standards, they were more concerned about the adoption and enforcement of standards. Standards, the primary means to effectuate the purpose of the legislation, would give employers and inspectors notice of employer obligations. Critics of the Daniels provision argued that if the

52. For example, the Additional Minority Views in the House Report cited due process cases in criticizing the Daniels provision:

The Supreme Court has ruled that statutes must designate the standard of conduct expected so that affected parties can govern their actions in order to avoid violations. (See: International Harvester v. Kentucky, 243 U.S. 216; U.S. v. Pennsylvania Railroad Company 242 US 208) . . . The ruling of the Supreme Court makes good sense. We should heed its wisdom here.

53. For example, the Minority Views on H.R. 16785 in the House Report argued:

The offensive feature of such a provision is that it is essentially unfair to employers to require compliance with a vague mandate applied to highly complex industrial circumstances. Under such a mandate, the employer will simply have no way of knowing whether he is complying with the law or not, nor will the inspector have any concrete criteria, either statutory or administrative, to guide him in finding a violation.

54. See, e.g., LEGIS. HIST., supra note 27, at 991 (remarks of Representative Steiger) ("With specific standards it will be apparent to the employer what is expected and required of him: and
administering agency believed it could enforce the OSH Act through use of an open-ended general duty clause, the agency would be deterred from promulgating standards.55

The modifications to the Daniels provision which the Congress considered and ultimately adopted should be construed in light of these objections: (1) that employers should not be required to ensure absolute safety and health; (2) that employers and inspectors should receive adequate notice of employers' legal obligations; and (3) that the administering agency should not rely on the general duty clause other than as a supplement to the promulgation and enforcement of standards. As demonstrated below, the proposed modifications of the Daniels provision do reflect these concerns.

D. Specific Limitations on the Scope of the General Duty Clause

The House and Senate considered a variety of ways to address concerns about the over-breadth of the general duty clause. Their debates help illuminate the meaning of the limitations ultimately approved.

I. A no-penalty provision for initial violations

The Daniels bill itself proposed one limitation on the general duty clause: a penalty would not automatically be assessed for an initial violation.56 With this feature, an employer could, without penalty, receive authoritative notice that a workplace condition violated the gen-

55. See, e.g., House Report, supra note 27, at 51 (Minority Views on H.R. 16785), reprinted in Legis. Hist., supra note 27, at 881 ("there would be no incentive to develop any standards where [there is] such a broad mandate"); Legis. Hist., supra note 27, at 1017 (remarks of Representative Erlenborn) (the Daniels provision "makes the standard-setting process a joke and a farce"); id. at 1052 (remarks of Representative Broomfield) ("a general standard like [the Daniels provision] only discourages the formulation of specific standards, which is, after all, the basic purpose of the bill"). Senate critics of the Williams provision, which was derived from the Daniels provision, made similar comments. See, e.g., id. at 380 (statement of Senator Dominick): "The major thrust of the Act contemplates the establishment of specific standards. The existence of a vague general requirement increases the risk that its enforcement will form the basis for the law's enforcement to the detriment of the setting of specified standards." In response to such statements, the Senate Report which accompanied the Williams bill declared that "[t]he general duty clause in this bill would not be a general substitute for reliance on standards but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted." Senate Report, supra note 27, at 10, reprinted in Legis. Hist., supra note 27, at 150.

56. House Report, supra note 27, at 21, reprinted in Legis. Hist., supra note 27, at 851. Under §§ 10(b) and 15(b) of the Daniels bill, the Secretary would have had discretion to assess a penalty of up to $1000 per violation of the general duty clause; under §§ 10(a) and 15(a) the Secretary would have been required to assess a penalty of up to $1000 per violation of the specific duty clause, a standard, or a regulation. House Report, supra note 27, at 23, reprinted in Legis. Hist., supra note 27, at 853.
eral duty clause. The Williams bill went further and prohibited any penalties for initial violations. To Senator Williams, this no-penalty provision met the concern that the provision "might impose too sweeping a duty on employers." The no-penalty provision for initial violations, however, failed to satisfy the critics of the Daniels provision in the House.

2. **Freedom from hazards**

Critics of the Daniels bill supported a substitute bill, introduced by Representative Steiger and others, which deleted all reference to an affirmative employer duty to provide "safe and healthful" working conditions. The Steiger provision introduced instead the negative requirement that employment and places of employment be "free from" particular kinds of hazards. Specifically, the Steiger provision required that workplaces be "free from any hazards which are readily apparent and are causing or are likely to cause death or serious physical harm" to employees.

The discussion of these phrases did not elaborate on the meaning of "free." It seems reasonable, however, to interpret it in light of the concerns identified above. Since Representative Steiger and his supporters opposed any requirement of absolute safety and health, "free" should not be viewed as requiring the complete absence at all times of all hazards. Because the general duty clause and the rest of the legislation were intended to encourage prevention of injuries and death, an employer should not be held responsible for the presence of hazards which it is unable to prevent. Employers, for instance, should not be held responsible for hazardous employee conduct that is so idiosyncratic and implausible in motive or means that a conscientious safety expert would not take it into account. Abatement of the hazard must be feasible.

3. **"Readily apparent" and "recognized" hazards**

The phrase "readily apparent" in the Steiger bill responded to the feeling that the Daniels provision provided employers with inadequate

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57. Under §§ 9(a) and 14(a) of the Williams bill, as reported, an employer could receive a penalty for violation of the general duty clause only if the employer failed to correct a violation for which a citation had been issued within the time permitted for its correction. The time permitted for correction would not begin until the termination of any review proceedings initiated by the employer in good faith. LEGIS. HIST., supra note 27, at 254-55, 265-66.

58. LEGIS. HIST., supra note 27, at 416 (remarks of Senator Williams).

59. See supra note 37.

60. See supra note 50.

notice of their responsibilities. The Williams bill adopted the phrase "recognized hazards" for the same reason. Both phrases were intended to establish the minimum degree of notice of a hazard required before an employer could be charged with a violation of the general duty clause. Actual notice was not mandatory; constructive notice would do if certain criteria were met. "Readily apparent" was defined by a supporter of that phrase to mean "that the hazard must be easily discoverable by a reasonably prudent man under similar circumstances." The phrase "recognized hazards" was also defined by one of its supporters:

A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a standard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it.

Since "recognized hazards" looked to the standard of knowledge in the employer's industry, it implied that if the industry as a whole did not regard a substance or physical condition as a hazard, the employer could not be charged with constructive knowledge of the hazard, even though experts outside the industry might regard the substance or condition as a hazard.

Advocates of the "readily apparent" language regarded "recognized hazard" as too vague. In turn, advocates of "recognized hazard" considered "readily apparent" to be too narrow. The
Conference Committee ultimately decided to accept the "recognized hazards" language, suggesting that the phrase encompasses conditions which are regarded as hazards by the employer or by a member of its industry upon reasonable investigation.

4. "Are causing or are likely to cause death or serious physical harm"

The legislative history does not directly address the meaning of the phrase "are causing or are likely to cause death or serious physical harm." Yet clues to its meaning may be drawn from the general congressional intent.

First, it is clear that the reference to "death or serious physical harm" was intended to limit the scope of the general duty clause. This aspect of the requirement distinguishes the Steiger provision from the Daniels and Williams provisions, which arguably prohibited even non-serious harm.

Second, the phrase "are causing," taken literally, would apparently embrace all instances of actual injury or death, no matter how freakish and uncontrollable the circumstances. This reading is inconsistent with the notion expressed throughout the debates of limiting employer responsibility to those hazards which are preventable. An employer cannot reasonably guard against freakish accidents. Accordingly, incidents of actual harm should be regarded as evidence, though not as conclusive evidence, that a hazard is likely to cause that harm. No violation should be found unless reasonable precautions (reasonable in relation to the magnitude of risk involved) could have prevented the harm.

"Likely to cause" obviously relates to risks. While the phrase can be read to refer only to the risk that death or serious physical harm will result if a hazardous incident should occur, this reading seems inconsis-

investigation, even though a prudent employer would investigate under the circumstances. A danger, in other words, may be recognized as such in the industry, but may not be apparent to an employer who is ill-informed and does not choose to investigate the danger of the situation. That is not sufficient protection for employees.

Legis. Hist., supra note 27, at 1007. See also Senate Report, supra note 27, at 58, reprinted in Legis. Hist., supra note 27, at 197, (Individual Views of Mr. Javits) (the "readily apparent" language "would not cover non-obvious hazards discovered in the course of an inspection").


70. Commenting on the Conference Committee's "recognized hazards" provision, Representative Steiger asserted: "Such hazards are the type that can readily be detected on the basis of the basic human senses. Hazards which require technical or testing devices to detect them are not intended to be within the scope of the general duty requirement." Legis. Hist., supra note 27, at 1217. In light of the preceding legislative history, Steiger's comments on this point apparently refer to the rejected "readily apparent" language and accordingly should be disregarded. See American Smelting & Refining Co. v. OSHRC, 501 F.2d 504, 511 (8th Cir. 1974).

71. See supra notes 34 and 39.

72. See supra note 50.
tent with the congressional objections to the Daniels provision.\footnote{See supra text accompanying notes 48-55.} The phrase can also be considered to refer to the risk that an incident capable of causing serious harm to employees will occur at all. Because the general duty clause does not require an employer to eliminate all risk, even of serious harm, to its employees,\footnote{See supra text accompanying notes 48-51.} some risks of harm would not violate the general duty clause. The clause covers only those risks which are of sufficient magnitude to qualify as "likely."

Determining what degree of risk of harm should be considered "likely" is difficult. Requiring more than fifty percent probability would be inconsistent with the clause's original purpose: protecting employees from preventable hazards.\footnote{See National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973); Morey, supra note 4, at 997-98.} More than a bare showing of possibility, however, should be required. Otherwise, an employer would be responsible for every occurrence of serious harm, no matter how unlikely, since the occurrence of serious harm would be irrebutable proof of the possibility of such harm. But opponents of the Daniels bill did not intend that employers become insurers of the safety and health of employees.\footnote{See supra note 50 and accompanying text.} Again, the OSH Act was aimed only at preventable hazards.\footnote{See supra notes 49-51 and accompanying text.} Accordingly, "likely to cause" should be read to refer to a risk of serious harm which is significant, i.e., more than merely possible, but not necessarily probable.

5. **Subordination of the general duty clause to standards**

Congress chose two ways to deter the administering agency from using the general duty clause as a substitute for promulgating standards. First, it narrowed the scope of the general duty clause in the ways discussed above to make it a much less attractive means to enforce the Act than the Daniels provision.\footnote{See supra text accompanying notes 56-77.} Second, it made clear that the general duty clause was intended only as a stopgap measure to protect employees until standards could be adopted. Once a standard applicable to a hazard had been promulgated, the general duty clause would not apply. Since Congress expected the administering agency to adopt standards to cover almost all hazards, it indicated that the general duty clause would eventually be used infrequently.\footnote{House Report, supra note 27, at 22, reprinted in Legis. Hist., supra note 27, at 852 (the general duty clause was intended to protect "employees who are working under such unique circumstances that no standard has yet been enacted to cover this situation") (emphasis in original); Senate Report, supra note 27, at 10, reprinted in Legis. Hist., supra note 27, at 150 ("[t]he general duty clause . . . would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted");}
E. Conclusions From the Legislative History

The legislative history shows that the general duty requirement was originally conceived in extremely broad terms, and then was narrowed in response to the concerns of opponents of a broad formulation. Accordingly, the various limitations adopted should be interpreted consistently with the concerns they reflect. To be consistent with the congressional intent, the general duty clause should apply only to conditions which present employees with a significant risk of serious harm or death, where the employer or its industry regards such conditions as a hazard, where there are feasible means of abating the hazardous conditions, and where no standard applies to those conditions. In short, Congress intended the general duty clause to be a limited means of advancing the purposes of the OSH Act.

III

OSHA's Use of the General Duty Clause

OSHA has not always regarded the general duty clause as the limited means for protecting the safety and health of employees that Congress intended. Initially, OSHA properly resorted to the clause on a limited basis. But as the difficulty of promulgating comprehensive standards became apparent over time, OSHA attempted to expand the scope of the general duty clause, at times improperly, to make it a more flexible enforcement tool. Particularly during the Carter Administration, OSHA's interpretation of the clause undermined the restrictions Congress had placed on its use. Under the Reagan Administration OSHA has returned to using the general duty clause as Congress intended. Statistics illustrating these changes appear in Table I.

This section provides a short history of OSHA's enforcement of the general duty clause and examines how OSHA's interpretation of each of the restrictions on the scope of the clause has changed over the years.

LEGIS. HIST., supra note 27, at 1217 (remarks of Representative Steiger) ("[i]t is expected that the general duty requirement will be relied upon infrequently and that primary reliance will be placed on specific standards which will be promulgated under the act").
<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Number of General Duty Clause Citations Issued</th>
<th>Ranking of General Duty Clause Among Provisions Most Frequently Cited by OSHA (1=most frequently cited provision)</th>
<th>Total Proposed Penalties for General Duty Clause Citations</th>
<th>Contest Rate for General Duty Clause Citations (%)</th>
<th>Contest Rate for All Citations (%)</th>
<th>Total Number Of Citations</th>
<th>Proportion of Total Citations Which are General Duty Clause Citations (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>n.a. 81</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
</tr>
<tr>
<td>1973</td>
<td>157</td>
<td>175</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>170,051</td>
<td>0.09</td>
</tr>
<tr>
<td>1974</td>
<td>186</td>
<td>246</td>
<td>n.a.</td>
<td>n.a.</td>
<td>n.a.</td>
<td>280,582</td>
<td>0.07</td>
</tr>
<tr>
<td>1975</td>
<td>309</td>
<td>150</td>
<td>$251,300</td>
<td>n.a.</td>
<td>n.a.</td>
<td>345,082</td>
<td>0.09</td>
</tr>
<tr>
<td>1976</td>
<td>720</td>
<td>105</td>
<td>$572,315</td>
<td>n.a.</td>
<td>n.a.</td>
<td>436,615</td>
<td>0.16</td>
</tr>
<tr>
<td>1977</td>
<td>1,427</td>
<td>25</td>
<td>$907,386</td>
<td>n.a.</td>
<td>n.a.</td>
<td>189,194</td>
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<td>1978</td>
<td>3,566</td>
<td>2</td>
<td>$703,849</td>
<td>n.a.</td>
<td>n.a.</td>
<td>155,670</td>
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<tr>
<td>1979</td>
<td>3,816</td>
<td>1</td>
<td>$769,637</td>
<td>n.a.</td>
<td>n.a.</td>
<td>140,004</td>
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</tr>
<tr>
<td>1980</td>
<td>3,691</td>
<td>1</td>
<td>$2,560,824</td>
<td>51.7</td>
<td>23.8</td>
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<tr>
<td>1981</td>
<td>1,852</td>
<td>7</td>
<td>$969,306</td>
<td>32.9</td>
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<td>130,970</td>
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<tr>
<td>1982</td>
<td>533</td>
<td>43</td>
<td>$336,151</td>
<td>26.1</td>
<td>5.0</td>
<td>113,184</td>
<td>0.47</td>
</tr>
</tbody>
</table>

80. The statistics are derived from tables published by OSHA. OSHA, OFFICE OF MANAGEMENT SYSTEMS, OSHA STANDARDS CITED...BY FREQUENCY. For some years, the title of the tables differed slightly. Fiscal years prior to 1977 run through June of the respective calendar year. Fiscal years 1977 and thereafter run through September of the respective calendar year.

81. Figures not available.
A. History of OSHA Enforcement of the General Duty Clause

In its early years, OSHA relied on the general duty clause as Congress had envisioned, as a stopgap means of protecting the safety and health of employees until standards could be adopted. In its first year, before it had adopted any standards, the agency used the general duty clause extensively. Once it had adopted hundreds of standards pursuant to its authority under section 6(a) of the Act, OSHA reduced its reliance on the general duty clause. During fiscal years 1973 and 1974, the last two years of the Nixon Administration, OSHA cited the general duty clause fewer than two hundred times per year. The agency's official policy focused on compliance with standards rather than on compliance with the general duty clause.

During the Ford Administration, when Morton Corn headed the agency, OSHA increased the frequency of general duty citations. By fiscal year 1976, OSHA charged 720 general duty violations, making that provision the 105th most frequently cited provision.

Two years later during the Carter Administration, OSHA had expanded its use of the general duty clause five-fold. Under Eula Bingham's direction, the agency cited the general duty clause 3566 times in fiscal year 1978, making it the second most cited provision. By the next year the general duty clause had become the most cited provision. In the last full year of the Carter Administration, fiscal year 1980, OSHA citations under the clause fell slightly, though it remained the most cited provision. Proposed penalties, however, more than tripled those

82. The OSH Act took effect on April 28, 1971. OSHA published its first national consensus standards and established federal standards on May 29, 1971. See supra notes 18-19. Except for employers previously subject to the established federal standards, these standards generally became effective 90 days later, on August 27, 1971. 36 Fed. Reg. 10,466 (1971). An example of OSHA's employment of the general duty clause prior to the effective date of these standards is found in Americansmelting & Ref. Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974). In a citation issued July 7, 1971, OSHA charged a violation of a nationally recognized standard for airborne exposure to lead which took effect as a national consensus standard less than two months later. The Review Commission and the Eighth Circuit affirmed OSHA's use of the general duty clause in this circumstance. Accord Dale M. Madden Constr., Inc., 1 O.S.H. Cas. (BNA) 1030 (Rev. Comm'n 1972), petition for review dismissed, 502 F.2d 278 (9th Cir. 1974); Hidden Valley Corp. of Virginia, 1 O.S.H. Cas. (BNA) 1005 (Rev. Comm'n 1972).

83. See supra Table 1, accompanying note 80. Statistics derived from tables entitled "OSHA Standards Cited . . . By Frequency" for the fiscal years indicated, Office of Management Data Systems, OSHA, Washington, D.C. (For some years the title of the tables differed slightly.)

84. In its Compliance Operations Manual, OSHA provided this advice to its Compliance Safety and Health Officers (CSHOs): "During the course of an inspection, the CSHO's primary concern will be determining whether the employer is complying with safety and health standards promulgated under the Act. However, attention should also be directed to whether the employer is complying with the general duty clause." OSHA Compliance Operations Manual [hereinafter cited as Compliance Operations Manual], ch. VIII, § A.2.a (1972).

85. See supra Table 1, accompanying note 80.
of the previous year.\textsuperscript{87}

OSHA’s growing reliance on the general duty clause during the Ford and Carter Administrations was reflected in a more adventurous use of the section. These excursions, discussed below,\textsuperscript{88} sometimes went beyond the legislative intent. Aggressive use of the clause contributed to a high rate of contest for general duty citations: fifty-two percent in fiscal year 1980. This was more than twice the overall contest rate of twenty-four percent for that year.\textsuperscript{89}

Several factors help explain this increased use of the general duty clause. One was OSHA’s experience with rulemaking. The agency’s authority under section 6(a) of the Act to adopt national consensus standards and established federal standards expired in 1973. Using its section 6(b) authority, involving detailed notice and comment procedures,\textsuperscript{90} OSHA has to date produced final standards for only twenty-four health hazards.\textsuperscript{91} This has occurred in spite of a shift in the allocation of rulemaking resources from safety to health hazards, beginning in 1974.\textsuperscript{92} With the growing realization that it could produce at most a few health standards a year, OSHA came to regard the general duty clause as a more effective tool to enforce the Act, particularly with respect to health hazards.\textsuperscript{93}

In 1976 the agency, under Director Morton Corn, increased its compliance activities with respect to health hazards.\textsuperscript{94} Since OSHA lacked standards for many health hazards, this too made for an in-

\textsuperscript{87} Id.

\textsuperscript{88} See infra text accompanying notes 97-163.

\textsuperscript{89} See supra Table I, accompanying note 80. The contest rate is the percentage of all citations issued that are contested by employers or employees before the Review Commission.

\textsuperscript{90} See supra note 20.


\textsuperscript{92} See 4 O.S.H. REP. (BNA) 35 (1974) (reporting remarks of Associate Assistant Secretary for National Programs Alexander Reis).

\textsuperscript{93} In 1979 the chief ALJ of the Review Commission asserted that, through OSHA’s use of the general duty clause, the Secretary of Labor was trying to do “what he has been unable to do through rulemaking proceedings.” These remarks were confirmed by a Department of Labor associate counsel for regional litigation who said that practical considerations forced OSHA to rely on the general duty clause in lieu of setting standards. 9 O.S.H. REP. (BNA) 495 (1979).

creased dependence on the general duty clause. Still another impetus was the influence of organized labor. Particularly during the Carter Administration, OSHA responded to union demands that the general duty clause be used more aggressively and innovatively.

During the Reagan Administration, OSHA, under Thorne Auchter, has reversed the trend of the Ford and Carter years. In fiscal year 1981, which included most of the first year of the Reagan Administration, the number of general duty citations fell fifty percent from the year before, from 3691 to 1852. In the same period, all OSHA citations fell, but only by sixteen percent. In fiscal year 1982 there was an even steeper decline in the number of general duty citations issued. What had been the most frequently cited provision in fiscal year 1980 dropped to the seventh most frequently cited in 1981, and only the forty-third most frequently cited provision in fiscal year 1982. In two years the contest rate for general duty citations was halved, from fifty-two percent in 1980 to twenty-six percent in 1982. These statistical changes suggest a major shift away from the use of the general duty clause.

Statistics, however, do not fully reveal the extent of OSHA's departure from and recent return to the congressional conception of the general duty clause as a limited enforcement tool. The following sections discuss some of the specific ways in which OSHA sought to circumvent the restrictions on the scope of the clause.

B. The "Recognized Hazard" Element

OSHA's initial interpretation of the phrase "recognized hazard" reflected an awareness of the legislative history. The definition in the 1972 OSHA Compliance Operations Manual tied "recognition" to the standard of knowledge in the industry. It also indicated that a hazard could be "recognized" even if it could be detected only upon investigation; the hazard need not be "readily apparent."


96. See supra note 80. All of the following statistics are from that source.

97. The Compliance Operations Manual provided:

A hazard is "recognized" if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs, and (b) detectable (1) by means of the senses (sight, smell, touch, and hearing), or (2) of such wide, general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make its presence known to the employer. For example, excessive concentrations of a toxic substance in the air would be a "recognized hazard" even though they could be detected only through the use of measuring devices.

Compliance Operations Manual, supra note 85, ch. VIII, § A.2.b.(1). OSHA successfully liti-
OSHA began to stray from the legislative intent when it maintained that an employer's actual knowledge would satisfy the "recognized hazard" element. Under this view, constructive knowledge based on industry knowledge was an alternative, not exclusive, means of establishing recognition. 98 While this interpretation penalizes employers who exceed industry standards in their efforts to discover workplace hazards, it nevertheless can be viewed as an appropriate extrapolation from the legislative history. In requiring constructive notice, Congress was concerned with determining the minimal level of notice to employers compatible with notions of fairness. Actual notice is at least as fair to employers as is constructive notice. 99

During the Ford and Carter Administrations, however, OSHA sought to broaden considerably the concept of constructive notice. In some cases the agency tried to establish constructive notice by presenting evidence that an industry other than that of the cited employer recognized the conditions as hazardous. 100 This approach marked a departure from the definition of "recognized hazards" suggested by the legislative history. 101 It also attenuated the underlying rationale for constructive notice—that an employer could fairly be deemed to be aware of the alleged hazard—since the standard of knowledge in the two industries might differ substantially. OSHA, however, was frequently rebuffed in these efforts to expand constructive notice to knowledge in unrelated industries. 102

In other cases, OSHA relied on advisory industry standards to establish industry recognition. This raises two problems. First, an industry standard may be adopted without participation by the cited employer's industry. The standard may not reflect actual industry recognition. 103 Second, since an advisory standard by definition allows gated on the basis of this interpretation. See American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974) (excessive concentrations of lead in the air were a recognized hazard even though detectable only through investigation).

98. See Brennan v. OSHRC (Vy Lactos), 494 F.2d 460 (8th Cir. 1974).
99. But see Andrews & Cross, supra note 4, at 407 n.15.
100. See infra note 102.
101. See supra text accompanying notes 65-70.
102. See, e.g., R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 100-01 (5th Cir. 1980) (roofing industry, not construction industry); Magma Copper Co. v. Marshall, 608 F.2d 373, 375-76 (9th Cir. 1979) (smelting or refining industry, not hospitals); H-30, Inc. v. Marshall, 597 F.2d 234, 235 (10th Cir. 1979) (oil well drilling industry, not construction industry); P & D Trucking & Leasing Co., 7 O.S.H. Cas. (BNA) 2139, 2140 (ALJ 1979) (construction and maritime industries, not trucking industry). But see Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 910 (2d Cir. 1977) (construction industry standard plus common sense were substantial evidence of recognition in manufacturing industry).
103. The courts and the Review Commission have carefully examined industry standards offered by OSHA as evidence of industry recognition to determine whether the employer's industry participated in their adoption. See, e.g., Titanium Metals Corp. v. Usery, 579 F.2d 536, 541 (9th Cir. 1978) (noting that the employer helped draft the advisory standard); Pittston Stevedoring
deviations from its specifications, non-compliance may not be recog-
nized by the industry as hazardous at all.\footnote{104}

An even greater extension of constructive notice came when
OSHA began to use “health literature” and the recommendations of
advisory government agencies as alternatives to actual industry know-
ledge. Beginning in 1972, OSHA limited the category of “recognized”
hazards to conditions “of common knowledge or general recognition in
the particular industry.”\footnote{105} In 1979, however, OSHA revised its Industrial Hygiene Field Operations Manual to instruct its inspectors that a
hazard could be considered “recognized” simply if it had been identi-
fied as a hazard “in the health literature.”\footnote{106} Without further defining
“health literature,” OSHA permitted the inference that a single pub-
lished study would be sufficient to establish recognition, regardless of
whether the study was generally accepted as valid by the scientific com-
munity, the particular employer, or its industry. The 1979 Industrial Hygiene Field Operations Manual also asserted that characterization of
something as a hazard by either a private or a governmental scientific
body, such as NIOSH, was sufficient to satisfy the “recognized hazard”
criterion.\footnote{107}

This definition of constructive notice departed radically from the
congressional intent underlying the recognition requirement. Congress
was concerned with ensuring that employers receive sufficient notice of
their legal responsibilities under the general duty clause.\footnote{108} By allowing
scientists or the government to determine when a hazard is recognized,
OSHA eliminated the requirement that employers or their industries

\footnote{104. See, e.g., Hamilton Erection, Inc., 8 O.S.H. Cas. (BNA) 2174, 2175 (ALJ 1980); Archer Daniels Midland Co., 8 O.S.H. Cas. (BNA) 2051, 2052 (ALJ 1980); Valley Center Farmers Eleva-
tor, Inc., 8 O.S.H. Cas. (BNA) 1061, 1062 (ALJ 1979). But see Kansas City Power & Light Co., 10 O.S.H. Cas. (BNA) 1417, 1422 & n.5 (Rev. Comm’r 1982) (admitting an advisory industry stan-
dard as evidence of industry recognition of a hazard where the standard was not used to define required or prohibited conduct under the general duty clause).

105. See supra note 97.

106. “The use of Section 5(a)(1) of the Act shall be considered when the Industrial Hygienist identifies a situation involving employee exposure to a substance that does not have a standard but is believed to constitute a serious health hazard at the levels found and which is published in the health literature, or recognized by industry or the employer.” OSHA Instruction CPL 2-2.20, Industrial Hygiene Field Operations Manual [hereinafter cited as Industrial Hygiene Field Operations Manual], ch. II § A.12.a. (1979), reprinted in Empl. Safety & Health Guide (CCH) No. 419, at II-15 (1979) (emphasis added).

107. “Exposure to a substance that has been added to the ACGIH [American Conference of Governmental Industrial Hygienists] TLV [threshold limit values] list since 1968, or identified as a serious hazard by federal agencies such as NIOSH, EPA, or the National Cancer Institute, should be considered for a possible 5(a)(1) citation where an OSHA PEL [permissible exposure limit] does not exist.” Id. ch. II, § A.12.b.

108. See supra notes 52-53 and accompanying text.
actually have knowledge of a hazard. Appropriately, then, OSHA has had mixed success in relying principally on NIOSH and other governmental recommendations.

In 1982, under the Reagan Administration, OSHA rejected the extreme positions asserted in the 1979 Industrial Hygiene Field Operations Manual. For the first time OSHA issued to inspectors extensive guidelines on enforcement of the general duty clause. These guidelines cancelled earlier statements in the Field Operations Manual and the Industrial Hygiene Field Operations Manual and replaced them with detailed directions. Those guidelines concerning the “recognized hazards” criterion may be summarized as follows:

1. Recognition of a hazard by an industry other than the cited employer’s industry generally does not establish recognition, though the employer’s industry may be defined broadly.

2. Advisory industry standards may be used as direct evidence of industry recognition only if the employer’s industry participated in drafting the standards. Otherwise, the standards may be cited only as corroborating evidence. In all cases such standards may be cited only as evidence of industry recognition of a hazard, not as a set of required or prohibited actions.

3. NIOSH criteria documents; publications by EPA, the National Cancer Institute, and other agencies; and articles in medical or scientific journals by persons other than those in the employer’s industry may not be used as the principal evidence of employer recognition. These materials may only be used to supplement other evidence which more clearly establishes recognition, and then only if the materials have been widely distributed in general or in the employer’s industry.

These changes indicate a renewed sensitivity to the congressional concerns that employers receive adequate notice of their legal responsibilities under the general duty clause.

109. NIOSH criteria documents do not even necessarily represent a consensus of scientific opinion, and are thus a poor substitute for industry recognition of a hazard. See NIOSH, SUMMARY OF NIOSH RECOMMENDATIONS FOR OCCUPATIONAL HEALTH STANDARDS 2 (1978) (“The final document does not . . . necessarily offer a true consensus or coincide with the comments of all reviewers.”).


112. OSHA Instruction CPL 2.50, § H.4.a.

113. Id. § H.4.a.(7).

114. Id. § H.4.a.(8).
C. The "Likely to Cause" Element

Soon after passage of the OSH Act, OSHA strictly interpreted the requirement that a hazard must be "likely to cause" death or serious physical harm for a citation to issue. In its 1972 Compliance Operations Manual, OSHA instructed its inspectors that a "hazard is causing or likely to cause serious physical harm if it is causing or would more likely than not cause serious physical harm, as defined in Section B of this Chapter." Section B referred to here discussed the meaning of section 17(k) of the OSH Act, which defined a "serious" violation as one that involved "a substantial probability" of death or serious harm. Thus, OSHA equated the "likely to cause" language of the general duty clause with the "substantial probability" language of section 17(k).

According to the Compliance Operations Manual, determination of whether a condition in a workplace presented a "substantial probability that death or serious physical harm could result" or was "likely to cause death or serious physical harm" involved resolution of two questions. The Manual instructed inspectors to "consider both (1) the likelihood of death and serious physical harm resulting from the accident (or illness) and (2) the likelihood an accident (or illness) could take place as a result of the hazardous condition." Thus, the inspector had to take into account more than the likely consequences of an accident or exposure to a health hazard (collectively referred to as a "hazardous incident") assuming such an incident occurred. The inspector also had to consider the probability that a hazardous incident would occur at all. The Manual did state, however, that "the emphasis" should

116. Section 17(k), 29 U.S.C. § 666(j) (1976), provides:
For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
(Emphasis added).
117. Arguably, § 17(k) should not be read into § 5(a)(1). The general duty clause uses different language than does § 17(k) and has a different purpose. The purpose of § 17(k) is to assist in determining the dollar amount of a penalty once a violation has been established. In contrast, the general duty clause makes the likely occurrence of an incident which could result in death or serious physical harm a condition for establishing a violation.
119. Pratt & Whitney, 649 F.2d at 98.
120. The Compliance Operations Manual provided two illustrations of this point:
Thus, for example, in the case of the guardrail, the question would be whether there could be an accident, i.e., whether a person could fall as a result of the violation, and if so, whether death or serious physical harm could result from the fall. There is no specific requirement for mathematical probability that the hazard would lead to an accident;
be placed on the seriousness of the likely consequences of a hazardous incident, rather than on the “statistical probability” that the incident would occur.121

In 1974 OSHA modified this two-part test. In its Field Operations Manual122 OSHA continued to define “likely to cause” by referring to section 17(k).123 In defining “substantial probability,” however, the Field Operations Manual required only (1) that the violating condition “could” result in a hazardous incident, and (2) that if a hazardous incident occurred, a “real probability” existed that the result would be death or serious physical harm.124 Thus, the Field Operations Manual substituted a “possibility” test for the Compliance Operations Manual’s “probability” test in addressing the likelihood that a hazardous incident would occur.

In December 1976, at the end of the Ford Administration, OSHA amended the Field Operations Manual’s discussion of the “substantial probability” element.125 OSHA refined the “possibility” test by establishing a three-step procedure.126 In the first two steps—determination of the hazard and determination of the kind of harm which could result from exposure to the hazard—OSHA virtually instructed its inspectors to ignore the likelihood that any harm would occur.127 The third

however, consideration must be given as to whether there is a remote possibility that an accident could result from the hazard. For example, in the case of failure to provide fire exits and fire extinguishers, the CSHO, although concluding that it is more probable than not that death or serious injury could result if a fire took place, might decide that because of the nature of the building, the materials used and other factors, there is little likelihood that a fire will take place. In this situation, it would be appropriate to decide that no serious violation has occurred [and, by implication, that the “likely to cause” criterion of the general duty clause has not been satisfied].


121. Id. ch. VIII, § B.l.c.(l)(d).
123. Id. ch. VIII, § A.2.b.(2).
124. Id. ch. VIII, § B.l.c.(l)(a):
To determine if a violation creates a substantial probability of death or serious physical harm, two factors must first be determined:
(i) That the violating condition could result in accident or illness; and
(ii) If the accident or illness occurred, there is a real probability, in light of experience gained by general observation of similar work situations in industry, that the result would be death or serious physical harm.

(Emphasis in original).

126. Step (1) Determine the type of accident or health hazard exposure which the [general duty clause] is designed to prevent in relation to the hazardous condition identified.
Step (2) Determine the types of injury or illness which it is reasonably predictable could result from the type of accident or health hazard exposure identified in step (1).
Step (3) Determine that the types of injury or illness identified in step (2) include death or a form of serious physical harm.

Id. ch. VIII, § B.1.b.
127. With respect to step 1, inspectors were told that “the exposure or potential exposure of an
step—determining whether the harm could include serious physical harm or death—similarly involved no consideration of the likelihood that a hazard would result in any harm at all. Thus, OSHA seemed to assume that a hazardous incident would occur. It limited all real consideration of probability to the risk that serious physical harm or death would result from the hazardous incident assumed to occur. This was a major shift from the Compliance Operations Manual's concern that the inspector consider "the likelihood an accident (or illness) could take place."

During the Carter Administration, OSHA further strained the "likely to cause" element. For example, as noted earlier, OSHA encouraged its inspectors to issue general duty clause citations on the basis of NIOSH criteria documents. Yet employee exposures to hazardous substances at moderate levels above those recommended in NIOSH criteria documents are not necessarily "likely to cause" serious harm. These documents, like many advisory standards, aspire to extremely high degrees of protection and extremely low risks of even minor harm or inconvenience. In fact, Congress directed NIOSH to propose levels of exposure which carry no risk of serious harm.

By ignoring the risk of a hazardous incident occurring, OSHA made the same error as it did in the Benzene case: it assumed that the OSH Act requires the elimination of all risks of serious harm, no matter how infinitesimal those risks might be. The result is strict liability for all incidents of death or serious physical harm resulting from recognized hazards. Indeed, since actual harm is not required to establish a violation of the general duty clause, a bare possibility of harm could sustain a citation under this interpretation.

The plurality in the Benzene case explicitly rejected the proposition that the purpose of the OSH Act was "to eliminate completely and
with absolute certainty any risk of serious harm.” Instead, it found that “both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm.”

The teachings of the Benzene case should not be limited to standards, but should also apply to the general duty clause. The legislative history establishes that Congress drafted the general duty clause as it did partly to avoid any implication that the provision required absolutely safe and healthful workplaces. By rejecting the “safe and healthful” language of the Daniels and Williams provisions and substituting for that language the “likely to cause” criterion of the Steiger provision, Congress intimated that the general duty clause would not require employers to protect employees from all risks of harm, even insignificant risks. Yet by eliminating any consideration of the likelihood that harm would occur, OSHA in effect required employers to maintain risk-free workplaces. In light of Benzene, the general duty clause should be read to require employers to eliminate only those recognized hazards which pose a significant risk of harm which, if it occurs, is likely to be serious.

OSHA’s position that it may ignore the probability of a hazardous incident occurring has gained the acceptance of a majority of the Review Commission and of some courts. At least a minority of the Review Commission and most of the circuit courts, however, have


133. 448 U.S. at 641. In reaching this conclusion, the plurality in Benzene focused on the legislative history of §§ 6(b)(5) and 3(8). Section 3(8) defines the term “occupational safety and health standard” to refer to standards “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 29 U.S.C. § 652(8) (1976) (emphasis added). The plurality concluded that “‘safe’ is not the equivalent of ‘risk-free,’” and that “a workplace can hardly be considered ‘unsafe’ unless it threatens the workers.” 448 U.S. at 642.


135. See supra text accompanying notes 48-51, 59-77.

136. See, e.g., Illinois Power Co. of America v. OSHRC, 632 F.2d 25, 28 (7th Cir. 1980). See also Titanium Metals Corp. v. Usery, 579 F.2d 536, 543 (9th Cir. 1978) (“substantial probability” does not refer to the probability that an accident will occur).

137. See R.L. Sanders Roofing Co. In Sanders, the minority commented with respect to the majority’s characterization of the “likely to cause” criterion:
maintained that to trigger the general duty clause a hazard must at least be "reasonably foreseeable."

The 1982 OSHA instruction on the general duty clause\textsuperscript{140} states that a hazard is "likely to cause" serious harm only if such harm is a "reasonably foreseeable" consequence of the presence of the hazard in the workplace.\textsuperscript{141} In an illustration of the application of the "recognizable foreseeability" requirement, the instruction appears to return to the original two-part test of likelihood presented by the \textit{Compliance Operations Manual}, which considered both the likelihood of any harm and the likelihood of any harm that did occur being serious.\textsuperscript{142}

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This does not mean, however, that the likelihood of an accident is totally irrelevant in determining whether a § 5(a)(1) violation occurred. An employer is not responsible for hazards that it lacks the ability to prevent. If an accident can only result from a chain of events that is of such a low likelihood as to not be reasonably foreseeable, then the hazard is unpreventable and the employer cannot be held responsible for it.

7 O.S.H. Cas. (BNA) at 1571 n.5 (citations omitted).


139. The First, Second, Third, Sixth, Eighth, and Ninth Circuits have referred to a requirement of "reasonable foreseeability." See, e.g., Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor, 649 F.2d 96, 101 n.2 (2d Cir. 1981); Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160, 1164 (3d Cir. 1980); Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871, 874 (3d Cir. 1979); General Dynamics Corp., Quincy Shipbldg. Div. v. OSHRC, 599 F.2d 453, 459 (1st Cir. 1979); Titanium Metals Corp. v. Usery, 579 F.2d 536, 543 (9th Cir. 1978); Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC, 579 F.2d 378, 384 (6th Cir. 1978); American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 515 (8th Cir. 1974); Brennan v. OSHRC (Vy Lactos), 494 F.2d 460, 463 (8th Cir. 1974).

Recently, the Second Circuit found both the "reasonable foreseeability" test and OSHA's "possibility" test to be overlapping with but not determinative of the "recognized hazard" element. Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor, 649 F.2d at 99-101. Unfortunately, the opinion failed to relate the tests to the "likely to cause" element, where probabilities clearly are relevant. The failure is somewhat ironic, since in the part of the opinion discussing an alleged violation of a standard, the court held that the standard must be interpreted to require proof of at least a "significant risk" that harm of some kind would occur. \textit{Id}. at 104. See also Morey, supra note 4, at 997-98.

140. OSHA Instruction CPL 2.50, \textit{supra} note 110.

141. The instruction still maintains that the "likely to cause" element is satisfied by showing that "if an accident occurred, the likely result would be death or serious physical harm." \textit{Id}. § H.5.b. In applying this interpretation to the health context, however, the instruction requires that "[i]llness reasonably could result" from employee exposure to a health hazard. \textit{Id}. § H.5.c.(2) (emphasis added). In other words, OSHA no longer assumes that illnesses will result from such exposure. Further, in discussing the term "hazard" the instruction requires that "[t]he recognized hazard for which a citation is issued must be reasonably foreseeable." \textit{Id}. § H.2.c.

142. The section of the instruction discussing reasonable foreseeability states:

For example, if combustible gas and oxygen exist in sufficient quantities in a confined area to cause an explosion if ignited, but no ignition source is present or could be present because of an effective training and a safety program, no Section 5(a)(1) violation would exist. If an ignition source (such as sparking tools) is available at the workplace, however, and the employer has not taken sufficient safety precautions to preclude their use in the confined area, then a recognized and foreseeable hazard may exist.
It is not clear, however, that “reasonably foreseeable” means the same thing as “likely to cause” in the context of the probability that harm will result from employee exposure to a recognized hazard. Indeed, the Review Commission has asserted that the “reasonably foreseeable” standard sets a lower threshold than does the term “likely.” For example, an incidence of cancer could be a reasonably foreseeable consequence of exposure to a suspected carcinogen at a very low level, in the sense that a reasonable employer might know that any exposure may present some risk of harm. At the same time, an incidence of cancer may not be “likely,” because the risk of cancer from low-level exposure may be very small.

A better interpretation of the “likely to cause” criterion is the one made above: that there be at least a significant risk that hazards present in the workplace will result in death or serious harm to employees. The implications of this “significant risk” interpretation are discussed further in the recommendations portion of this article.

D. Subordination of the General Duty Clause to Standards

Congress was particularly concerned that the agency charged with enforcing the OSH Act would rely excessively on a broad general duty clause instead of promulgating and enforcing standards which would give employers superior notice of their legal obligations. Yet during the Ford and Carter Administrations, OSHA did rely on the general duty clause as a substitute for standards.

Immediately after the OSH Act took effect, OSHA promulgated hundreds of standards and regulations. One of the regulations adopted declared that compliance with a standard would be deemed to be compliance with the general duty clause with respect to those aspects of the hazard covered by the standard. The Compliance Operations Manual further specified that the general duty clause should be used “only where there are no specific standards applicable to the particular hazard involved.” Thus, OSHA acknowledged early that the

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143. See supra text accompanying notes 135-37.
145. See infra notes 164-174.
146. See supra text accompanying notes 54-55 and 78-79.
148. 29 C.F.R. § 1910.5(f) (1982) provides:
An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirements of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.
149. Compliance Operations Manual, supra note 85, ch. VIII, § A.2.c. This position has
general duty clause should be subordinated to standards.

Subsequently, however, OSHA repeatedly used the general duty clause where, in OSHA’s view, an applicable standard was inadequate to protect employees. For example, OSHA cited employers under the general duty clause for failure to comply with the specifications in advisory standards, which by their terms did not require employers to take any action.\textsuperscript{150} OSHA also cited employers under the general duty clause for failure to comply with detailed provisions of a standard that had been judicially vacated on procedural grounds.\textsuperscript{151}


The rule that the applicability of a specific standard renders citation to section 5(a)(1) inappropriate effectuates the Congressional intent that the Act’s objective of achieving safe and healthful workplaces is best achieved through the promulgation and enforcement of specific standards. Such standards represent the considered judgment of the Secretary, after receiving input from safety experts and persons who will be affected by the standards, of the proper means to guard against particular hazards. They promote the Act’s objective by placing employers on notice of the steps they must take to provide safe and healthful workplaces to their employees.

\textit{Id.} at 2081-82 (citations omitted). The Review Commission urged OSHA to amend advisory standards through rulemaking if it believed them to be inadequate to protect employees. \textit{Id.} at 2081. Recently OSHA has initiated rulemaking proceedings to revoke hundreds of advisory standards and to repromulgate important ones as mandatory standards. See 47 Fed. Reg. 23,477 (1982) (citing \textit{Prokosch}).

In addition, OSHA attempted to supplement standards which it believed should be more comprehensive. In a 1979 amendment to its *Industrial Hygiene Field Operations Manual*, OSHA directed its inspectors to cite employers under the general duty clause where employees were exposed for short periods to allegedly excessive concentrations of certain air contaminants, the standards for which set only eight-hour time-weighted average permissible exposure limits. This interpretation in effect allowed OSHA to amend an existing standard by adding a ceiling level to it. Moreover, until revised in December 1980, the 1979 *Industrial Hygiene Field Operations Manual* allowed enforcement under the general duty clause of a recommended ceiling level where that level was below the eight-hour exposure limit set forth in a standard, even though this would mean the effective replacement of the standard by the general duty clause.

OSHA proved unsuccessful in persuading the Review Commission that it could properly use the general duty clause in such a manner. In three cases, administrative law judges vacated general duty citations on the ground that OSHA was attempting to amend a standard through use of the general duty clause instead of through the procedures set forth in section 6(b) of the Act.

OSHA has been rebuked by the courts as well for its "adventurous enforcement of the general duty clause." For example, in a case involving OSHA's attempt to apply a construction industry standard to the roofing industry through use of the general duty clause, the Fifth Circuit pointedly expressed its "preference for the Secretary's formulat-

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152. In some cases an 8-hour OSHA PEL [permissible exposure limit] exists but no OSHA ceiling standard exists. If a ceiling standard has been recommended by NIOSH or others, which is equal to or greater than the 8-hour OSHA PEL, a 5(a)(1) citation may be considered for exposures in excess of the recommended ceiling standard (even if the employer is in compliance with the 8-hour OSHA PEL). *INDUSTRIAL HYGIENE FIELD OPERATIONS MANUAL*, supra note 106, ch. II, § A.12.b.

For OSHA's methods of calculating the eight-hour time weighted averages, see 29 C.F.R. § 1910.1000(d) (1982).

153. "If the recommended ceiling standard is below the 8-hour OSHA PEL, a 5(a)(1) citation should only be issued when approved by the National Office." *INDUSTRIAL HYGIENE FIELD OPERATIONS MANUAL*, supra note 105, ch. II, § A.12.b. OSHA later deleted this sentence without explanation. OSHA Instruction CPL 2-2.20 CH-2, ch. II, § A.12.b. (1980).


155. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973). The court stated in dicta that where OSHA intended to require the adoption of precautions which "would clearly threaten the economic viability of an employer," it "should propose the precaution by way of promulgated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general duty clause."
ing standards through administrative rulemaking rather than ad hoc adjudication.” 156 And in a similar case, the Sixth Circuit declared: “Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit, the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of general standards being inappropriate to achieve such a purpose.” 157

Since 1981, OSHA has once again subordinated the general duty clause to standards. As noted above, it has cut by more than half the number of general duty clause citations issued annually during the Carter Administration, while reducing the number of other citations to a lesser degree. As a result, OSHA now relies more on standards and less on the general duty clause. 158 The present field instruction on the general duty clause quotes from the legislative history in noting that the general duty clause “would not be a general substitute for reliance on standards,” but instead would be used in “special circumstances for which no standard has yet been adopted.” 159 The instruction prohibits citation to the general duty clause to impose requirements stricter than those set by a standard, 160 to require a particular abatement measure not required by a standard, 161 or to enforce advisory standards. 162 The instruction does suggest, however, that in some circumstances inspectors may cite employers for failure to comply with a recommended ceiling level when the applicable standard sets only an eight-hour time-weighted average permissible exposure limit. 163

E. Conclusions

OSHA initially enforced the general duty clause with a sensitivity to the limitations that Congress built into it and with an appreciation of the congressional concerns underlying those limitations. Gradually, however, as OSHA encountered difficulty in promulgating standards regarded by industry as unwarranted and unreasonable, OSHA shifted its focus from the limitations embodied in the enacted provision to the broad purpose expressed in the original, rejected versions of the clause. In need of a flexible enforcement tool, OSHA sought to expand the scope of the general duty clause by diluting the restrictions governing

156. R.L. Sanders Roofing Co. v. OSHRC, 620 F.2d 97, 101 (6th Cir. 1980).
158. See supra text accompanying note 96.
159. OSHA Instruction CPL 2.50, § F.2. (quoting Senate Report, supra note 27, at 10, reprinted in Legis. Hist., supra note 27, at 150).
160. Id. § G.1.b.
161. Id. § G.1.c.
162. Id. § G.1.d.
163. Id. § G.1.b.
its use. Particularly during the activist Carter Administration, OSHA tested the limits of the clause and sometimes went beyond those limits. Since then, under the prodding of the courts and the Review Commission, OSHA has again come to respect the limitations Congress designed for the general duty clause.

IV
RECOMMENDATIONS

A. Restraint Where Scientific Uncertainty is Involved

Use of the general duty clause is most appropriate where the hazard and its capacity to harm employees are obvious.\textsuperscript{164} Generally, obvious hazards will be more common in the safety area than in the health area, because chronic health hazards are often more complex and involve greater scientific uncertainty than do safety hazards. Obvious hazards do not involve the often difficult determination of whether an employer has sufficient notice to be fairly held responsible for the hazard. Moreover, where the capacity for causing serious harm is clear, the hazard may be considered "likely to cause" that harm without elaborate analysis to determine whether the risk of harm is significant.

Appropriate use of the general duty clause, however, is not limited to obvious hazards. A hazard need only be "recognized" and "likely to cause" serious harm; it need not be "obvious." Yet the further OSHA departs from citing obvious hazards under the general duty clause, the more OSHA needs to exercise care. Any citation concerning a non-obvious hazard should be reviewed before issuance by appropriate officials to ensure that the citation alleges a hazard cognizable under the general duty clause.\textsuperscript{165}

The need for care is particularly great where the citation involves questions of scientific uncertainty, such as whether a suspected carcinogen is likely to cause cancer at the levels of exposure found in a workplace. In some of these cases, where the precise nature of the hazard has yet to be determined, OSHA should decline to cite an employer under the general duty clause. Instead, OSHA should inform the em-

\textsuperscript{164} See Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1086 (7th Cir. 1975) (the general duty clause "was included in order to cover the most flagrant of situations"); see also supra note 33 (Governor Pyle’s recommendation that Congress enact “authority to cope with a hazardous condition which is obvious and admitted by all concerned”).

\textsuperscript{165} The 1982 OSHA instruction on use of the general duty clause, supra note 110, provides for pre-citation review by the Regional Administrator of all general duty clause citations which involve complex issues or an exception to the guidelines in the instruction. The Regional Administrator may authorize the issuance of such citations only after consultation with the Regional Solicitor and, when appropriate, the Director of Field Coordination. OSHA Instruction CPL 2.50, § 1.2.a.
ployer of the hazard and its potential danger and urge the employer to take voluntary action to reduce or eliminate the hazard. OSHA should also consider taking other steps, such as initiation of rulemaking or issuance of guidelines, to further reduce the risk of harm to employees.

In cases where there is a substantial amount of scientific uncertainty whether a hazard is likely to cause death or serious physical harm at the levels of exposure found in a workplace, OSHA should be required to determine whether the risk presented is "significant" before it can issue a citation. This requirement is not a "mathematical straitjacket" requiring calculation of "the exact probability of harm." Nevertheless, it may impose a substantial burden on OSHA where the employer disputes the contention that the cited hazard is "likely to cause" serious harm at observed levels of exposure.

The presence of complex scientific questions in a general duty case means that OSHA will necessarily have to make policy determinations. For example, a general duty clause citation alleging overexposure to a suspected carcinogen may raise mixed questions of policy and fact, such as the relevance of animal studies involving high levels of exposure to the effects of human exposures at much lower levels, the level of exposure below which the hazard is not likely to cause death or serious physical harm, and the adequacy of personal protective devices to protect employees from harmful levels of exposure. As one court stated in the context of OSHA rulemaking with respect to asbestos:

'Some of the[se] questions . . . are on the frontiers of scientific knowl-

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166. The current field instruction on the general duty clause provides for such notification of employers. Id. § 1.2.b. & app. A. If an employer were to take no action in response to the notification and later be cited under the general duty clause, the notification should not necessarily establish actual employer recognition, but should only have the evidentiary weight of a government advisory statement.

167. See supra note 24 and text accompanying note 134.


169. The risk assessment for a general duty clause citation would not have to be subject to public comment, as would the risk assessment for a standard, but it would have to consider most of the same issues, and thus could take an extended period of time. For example, the Ninth Circuit, following the Benzene decision, remanded the inorganic arsenic standard to OSHA in April 1981 for a determination of significant risk. A year later, OSHA published a preliminary risk assessment for inorganic arsenic. 47 Fed. Reg. 15,358, 15,359 (1982). OSHA did not issue a final risk assessment and determination of significant risk based on that assumption until January 1983. 48 Fed. Reg. 1864 (1983). If OSHA risk assessments for contested general duty clause cases require anything like the nearly two years needed in the case of inorganic arsenic, OSHA will clearly be deterred from issuing general duty clause citations where the likelihood of serious harm is a matter of substantial scientific uncertainty.

170. Policy decisions may also be involved in the determination of significant risk described supra note 149. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. at 656 n.62.
edge, and consequently as to them insufficient data is presently available to make a fully informed factual determination. Decision making must in that circumstance depend to a greater extent upon policy judgments and less upon purely factual analysis.\(^\text{171}\)

Proceedings before the Review Commission are inappropriate forums for either making or reviewing scientific policy determinations. Most citations are uncontested and therefore never reach the Review Commission.\(^\text{172}\) Important policy precedents will thus be made without any hearing. Those determinations that are made by the Commission involve scant public participation. The Review Commission's Rules of Procedure allow intervention by interested persons,\(^\text{173}\) but in practice few persons other than the labor unions representing the affected employees ever intervene. If the employer lacks the resources or inclination to hire experts to testify on the technical and scientific questions, the Review Commission may have no perspective other than that presented by OSHA. The absence of broad public debate on issues of scientific policy may result in poor decision-making.

In contrast, rulemaking under section 6(b)\(^\text{174}\) of the Act can provide OSHA with access to important public comment on disputed scientific questions before it makes scientific policy decisions. If OSHA seeks to enforce its policy determinations concerning scientific issues, it should use rulemaking rather than the general duty clause.

B. Alternatives to the General Duty Clause

This article suggests that OSHA improperly attempted to expand the scope of the general duty clause in part because it thought it could not promulgate or modify sufficient numbers of standards to address all the hazards which it believed should be covered. Congress recognized that "precise standards to cover every conceivable situation will not always exist," and it was "to cover such circumstances" that Congress included a general duty clause.\(^\text{175}\) Nevertheless, since Congress in-

\(^{171}\) Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974). Of course, in resolving such questions OSHA cannot proceed entirely on policy considerations. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. at 653. However, if OSHA's findings "are supported by a body of reputable scientific thought," then OSHA "is free to use conservative assumptions in interpreting the data . . . , risking error on the side of overprotection rather than underprotection." \textit{Id.} at 656.

\(^{172}\) Section 10(c), 29 U.S.C. § 659(c) (1976).

\(^{173}\) 29 C.F.R. § 2200.21 (1982).


\(^{175}\) \textit{SENATE REPORT, supra} note 27, at 9, \textit{LEGIS. HIST., supra} note 27, at 149. \textit{See HOUSE REPORT, supra} note 27, at 51, \textit{LEGIS. HIST., supra} note 27, at 881 (Minority Views on H.R. 16785); \textit{LEGIS. HIST., supra} note 27, at 380 (statement of Senator Dominick). \textit{See also} Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 721 n.11 (4th Cir. 1979) ("It would be utterly unreasonable to expect the Secretary to promulgate specific safety standards which would protect employees from every conceivable hazardous condition.").
tended to subordinate the general duty clause to standards, OSHA should more frequently resort to the promulgation or modification of standards and the adoption of advisory guidelines as alternatives to use of the general duty clause.

I. Promulgation of performance-oriented standards

Particularly with respect to health, OSHA has proposed standards which are detailed, comprehensive, and generally very restrictive. Rulemaking proceedings have proven increasingly lengthy, complex, controversial, and demanding of OSHA’s administrative resources. But rulemaking need not be so time- or resource-consuming. OSHA could promulgate or amend standards more cost-effectively if it adopted performance-oriented standards.

Section 6(b)(5) requires that “whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.” This language expresses a clear congressional preference for performance-oriented standards. According to the U.S. Regulatory Council: “Performance standards involve regulating according to general performance criteria, rather than by detailed specification of the means of compliance. Performance standards permit more freedom of action to regulated concerns, reducing compliance costs and providing more freedom to discover new and more efficient compliance technologies.”

176. For example, in 1976 OSHA proposed to modify its existing standard for cotton dust with a standard which included provisions for exposure monitoring and measurement, means of compliance, use of respirators, work practices, medical surveillance, employee education and training, signs, recordkeeping, and observation of monitoring, along with lengthy appendices, all in addition to a revised permissible exposure level. 41 Fed. Reg. 56,498 (1976). OSHA received 263 comments on the proposal and testimony from 109 participants in the hearings. The record exceeded 105,000 pages. Much of the record concerned issues other than the appropriate permissible exposure level. For example, a proposal to require employers to transfer any employee unable to wear a respirator to another position, with no loss of earnings or other employment rights or benefits, proved especially controversial. Along with the accompanying statement of findings and reasons, the final cotton dust rule took up 69 pages in the Federal Register when published in 1978. 43 Fed. Reg. 27,350 (1978). The standard was promptly challenged in court. The case eventually reached the Supreme Court, which in 1981 upheld parts of the standard and invalidated other parts, including the controversial transfer provision. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981). Since then OSHA has published an advance notice of proposed rulemaking for the cotton dust standard in order “to reexamine new health data and alternative compliance approaches, as well as . . . to reconsider and reevaluate several issues which have created difficulties in the monitoring, medical surveillance and enforcement of the standard and to allow the agency to set a more technically accurate and cost-effective standard.” 47 Fed. Reg. 5906, 5907 (1982). OSHA expected to publish a notice of proposed rulemaking on cotton dust by January 1983. 47 Fed. Reg. 48,532, 48,549 (1982). See also 48 Fed. Reg. 5267 (Feb. 4, 1983) (staying the cotton dust standard for knitting operations pending reconsideration of the standard).


OSHA's air-contaminant standards provide an example of performance-oriented standards. They establish clear objectives in terms of permissible exposure limits. They indicate in broad terms the means by which employers are to achieve the objectives: through use of administrative or engineering controls whenever feasible, otherwise through use of protective equipment and measures. Yet they allow the employer considerable flexibility to select the means to reach the required level of protection. For example, an employer could rely primarily on employee education and enforcement of good work practices to keep exposures below the critical levels where such methods prove effective, instead of installing a costly system of engineering controls.

In promulgating a standard, OSHA must determine the appropriateness of requirements such as the use of labels, suitable protective equipment, control procedures, monitoring of employee exposure levels, and medical examinations. In the past, OSHA health standards, such as that for cotton dust, have included detailed requirements governing each of these provisions. OSHA's need to receive and evaluate comments on these specific requirements has delayed the completion of OSHA rulemaking. Once promulgated, such requirements have encouraged employers to seek more extensive judicial review and have created substantial compliance problems. With performance-oriented standards, such obstacles to efficient regulation can be greatly reduced. Performance orientation may make mandatory provisions in addition to a permissible exposure limit unnecessary. Such an approach would tend to reduce the time needed to adopt a standard, narrow the scope of judicial review, and facilitate compliance. Employees would thus receive the protection of a standard sooner, OSHA would use its rulemaking resources more efficiently, and the incentive to use the general duty clause improperly would be reduced.

2. Greater reliance on voluntary guidelines

The general duty clause and standards enforced under the specific duty clause create mandatory duties. An employer failing to comply with these duties may be subject to penalties. Mandatory duties create the need for OSHA inspections, Review Commission proceedings, and judicial review. In addition, both OSHA and employers expend re-

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180. 29 C.F.R. § 1910.1000(e) (1982).
181. These performance-oriented "Z-Tables" have other advantages over more specific and rigid standards. They permit employers to address local conditions which may not prevail elsewhere. They also allow the methods of compliance to evolve as science and technology change, rather than linking them permanently with potentially out-dated technology.
sources which might otherwise be available for providing more direct contributions to employee safety and health. Yet the OSH Act contemplates that its purpose would be promoted through voluntary as well as mandatory means.\textsuperscript{184} Non-mandatory means by which OSHA may promote the purposes of the Act include adopting voluntary guidelines, developing industry consensus, and educating employers and employees about occupational safety and health hazards and means of prevention.\textsuperscript{185} OSHA should vigorously explore these options.\textsuperscript{186}

An example of an alternative to regulation is OSHA's Standards Completion Project. The original purpose of the project was to issue completed standards for all of the toxic materials listed in Tables Z-1, Z-2, and Z-3 of 29 C.F.R. 1910.1000 . . . . The new standards \textit{would} establish requirements for monitoring employee exposure, medical surveillance, methods of compliance, handling and use of each substance, employee training, recordkeeping, sanitation, and housekeeping, among other things.\textsuperscript{187} Instead of adopting mandatory standards, however, OSHA ultimately chose, after much controversy and delay, to publish voluntary guidelines. In 1981, OSHA and NIOSH jointly published guidelines for over three hundred substances. These guidelines provided employers and others with potentially important information and recommended procedures for protecting the safety and health of employees, without requiring employers to adopt precisely the procedures recommended.\textsuperscript{188} In this manner OSHA saved a considerable amount of rulemaking resources while at the same time offering employers detailed recommendations on ways to achieve performance-oriented standards.

\textsuperscript{184} Section 2(b)(1), 29 U.S.C. § 651(b)(1) (1976), speaks of "encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to \textit{stimulate} employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions." (Emphasis added.)  
\textsuperscript{185} Section 21(c), 29 U.S.C. § 670(c) (1976), provides that OSHA shall (1) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this chapter, and (2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.  
\textsuperscript{186} In 1982, OSHA implemented voluntary protection programs to supplement enforcement. Employers with superior safety programs are eligible to participate, and participation exempts the employer from routine inspections. 47 Fed. Reg. 29,025 (1982).  
\textsuperscript{188} According to the preface of the 1981 guidelines, "[t]hese recommendations reflect good industrial hygiene and medical surveillance practices, and their implementation will assist in achieving a sound occupational health program." NIOSH/OSHA,\textit{ Occupational Health Guidelines for Chemical Hazards} 1 (1981).
OSHA'S GENERAL DUTY CLAUSE

V

Conclusion

After more than a decade of experience, OSHA has found the general duty clause to be a useful supplement to standards. Even as OSHA adopted standards, it increased the frequency with which it cited the general duty clause, so that from fiscal year 1978 through fiscal year 1981 the clause became one of the ten most frequently cited provisions under the OSH Act. But as Congress feared, the broad language of the clause made it subject to abuse by an agency confronted with a heavy regulatory responsibility. Over the years there indeed has been abuse, as OSHA shifted from regarding the general duty clause as a carefully limited provision to viewing it as a broadly applicable solution to its own inefficiencies and limited resources.

OSHA may prevent future abuse of the general duty clause by carefully adhering to the requirements for a general duty clause citation and by remaining sensitive to the congressional concerns which underlie those requirements. OSHA should be particularly cautious in citing employers under the general duty clause where the alleged hazards involve substantial scientific uncertainty. To relieve the pressure to misuse the general duty clause, OSHA should consider promulgating performance-oriented standards and adopting advisory guidelines. In these ways OSHA can make the general duty clause into the effective, though limited, tool for protecting the safety and health of employees that Congress intended it to be.