

January 1982

American Textile Manufacturers Institute v. Donovan

Beth Karpf

Follow this and additional works at: <http://scholarship.law.berkeley.edu/elq>

Recommended Citation

Beth Karpf, *American Textile Manufacturers Institute v. Donovan*, 10 *ECOLOGY L. Q.* 87 (1982).
Available at: <http://scholarship.law.berkeley.edu/elq/vol10/iss1/6>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38QJ92>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in *Ecology Law Quarterly* by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

American Textile Manufacturers Institute v. Donovan

101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981).

INTRODUCTION

The Occupational Safety and Health Act of 1970¹ (the Act) directs the Secretary of Labor to promulgate rules for the workplace that are designed to reduce both safety and health hazards.² With respect to health hazards, the Act provides that:

The Secretary . . . shall 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.³

Twice in the past two years, the Supreme Court has reviewed Occupational Safety and Health Administration (OSHA) standards for harmful substances.⁴ In both instances, the Court's decision has turned on its interpretation of the guidelines provided in section 6(b)(5).⁵ This Note concerns the second of these two cases, *American Textile Manufacturers Institute v. Donovan*.⁶ *American Textile* may be better understood, however, in conjunction with the companion decision, *Industrial Union Department, AFL-CIO v. American Petroleum Institute* ("the benzene case"),⁷ in which the Court first considered section 6(b)(5).

In *Industrial Union*, the Court considered a challenge to OSHA standards that set maximum worker exposure levels for benzene. A plurality of the Court held that before the Secretary may promulgate any health or safety standards under section 6(b)(5), the Secretary is

Copyright © 1982 by ECOLOGY LAW QUARTERLY

1. 29 U.S.C. §§ 651-678 (1976 & Supp. III, 1979).

2. *Id.* §§ 651(b)(1), 655(b)(5).

3. *Id.* § 655(b)(5). There is no comparable provision guiding the Secretary in the promulgation of safety standards, although there is a general provision that defines an "occupational safety and health standard" as one "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," *id.* § 652(8), and a provision that empowers the Secretary to promulgate rules "to serve the objectives" of the Act. *Id.* § 655(b)(1).

4. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (benzene standards); *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981) (cotton dust standards).

5. 29 U.S.C. § 655(b)(5) (1976).

6. 101 S. Ct. 2478 (1981).

7. 448 U.S. 607 (1980).

required to make a threshold finding that a place of employment is unsafe—i.e. significant risks are present and the risks can be eliminated or lessened by a change in practices.⁸ The Court explicitly left open the question of whether section 6(b)(5) or any other portion of the Act requires that the anticipated benefits of a harmful substance standard balance the expected costs of the standard.⁹ The question was raised again in *American Textile*, and the Court held such a cost benefit analysis was not required under section 6(b)(5).¹⁰

American Textile involved a challenge by the cotton industry to an OSHA standard that set maximum permissible exposure levels for airborne concentrations of cotton dust.¹¹ The industry sought review of a decision by the District of Columbia Court of Appeals that upheld the OSHA standard.¹² The Court of Appeals had rejected the industry's argument that cost-benefit analysis was required by the Act prior to promulgation of workplace standards for toxic materials or harmful physical agents.¹³ The Supreme Court took jurisdiction to decide whether the language of section 6(b)(5) required that OSHA do a cost-benefit analysis before promulgating a health standard.¹⁴

The cotton dust standard was based on the risk that workers in cotton mills might contract byssinosis, a progressive respiratory disease.¹⁵ The Supreme Court noted that cotton dust is a known cause of byssinosis.¹⁶ Byssinosis ranges from a mild, possibly reversible form characterized by occasional chest tightness, shortness of breath, and

8. *Id.* at 642. The requirement of a threshold finding of significant risk poses difficulties in setting standards for some toxic substances, particularly carcinogens such as benzene, because it is not always possible to obtain "definitive information" on the amount of risk presented by various levels of exposure. 448 U.S. at 693 (Marshall, J. dissenting). This threshold finding was not a threat to the cotton dust standard in *American Textile* because OSHA had ample evidence to support a finding of significant risk of respiratory disease at exposure levels in excess of those allowed by the standard. 101 S. Ct. at 2488-89 n.25.

9. 448 U.S. at 615.

10. 101 S. Ct. at 2491-92.

11. Prior to the passage of the Act, the Secretary had promulgated a standard for public contractors that limited total cotton dust to 1000 $\mu\text{g}/\text{m}^3$. 34 Fed. Reg. 7953 (1969). Following passage of the Act in 1970, the 1000 $\mu\text{g}/\text{m}^3$ standard was adopted as an "established federal standard" under section 6(a) of the Act, 29 U.S.C. § 655(a), a provision allowing protection of workers for the period between enactment of the statute and promulgation of permanent standards. The standard at issue in *American Textile* was promulgated in June, 1978 after a comment period and public hearings. 101 S. Ct. at 2486. The new standard limits respirable cotton dust to 200 $\mu\text{g}/\text{m}^3$ for yarn manufacturing, 750 $\mu\text{g}/\text{m}^3$ for slashing and weaving operations and 500 $\mu\text{g}/\text{m}^3$ for all other processes in the cotton industry. *Id.* at 2486-87.

12. *American Fed'n of Labor & Congress of Indus. Organizations v. Marshall*, 617 F.2d 636 (D.C. Cir. 1979), *aff'd in part, rev'd in part sub nom American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981).

13. *Id.* at 663.

14. 101 S. Ct. at 2483.

15. *Id.* at 2482.

16. *Id.* at 2483.

coughing¹⁷ to a serious form known as "brown lung" disease, which is irreversible, frequently severely disabling, and may lead to death from heart failure.¹⁸ The prevalence of brown lung disease among cotton mill workers¹⁹ was a specific concern that Congress sought to address with the passage of the Occupational Safety and Health Act.²⁰

In *American Textile*, the Supreme Court construed section 6(b)(5) of the Act, which it had also construed in *Industrial Union*, and concluded that the Secretary of Labor is not required to perform a cost-benefit analysis before promulgating permissible exposure levels for toxic materials and harmful physical agents.²¹ Indeed, the Court implied that the Secretary may not limit the stringency of such standards solely because the anticipated costs exceed the anticipated benefits.²² The result of *Industrial Union* and *American Textile* is that once the *Industrial Union* threshold finding of a significant risk of material health impairment has been made, a standard will generally be limited only by technological and economic feasibility.

This Note traces the Court's reasoning in *American Textile* as to the necessity of a cost-benefit analysis by the Secretary, and analyzes as well the Court's discussion of the economic feasibility of the cotton dust

17. *Id.* at 2484.

18. *Id.* at 2483-84.

19. *Id.* at 2485. Estimates indicate that at least 35,000 employed and retired cotton mill workers, one in twelve such workers, suffer from the most disabling form of byssinosis. *Id.*

20. *Id.* at 2482.

21. *Id.* at 2490-97. The case was decided by a five to three vote with Justice Brennan writing for the majority. Justice Rehnquist, joined by Chief Justice Burger, dissented on the ground that in enacting section 6(b)(5) Congress failed to give adequate guidelines for setting standards and the section thus constitutes an unconstitutional delegation of legislative authority to the Executive Branch. *Id.* at 2507 (Rehnquist, J. dissenting). Justice Rehnquist had previously expressed the same opinion in his concurrence in *Industrial Union*, 448 U.S. at 671. Justice Stewart would not have upheld the cotton dust standard because he believed that OSHA failed to justify its estimate of compliance costs on the basis of substantial evidence. 101 S. Ct. at 2506. Justice Powell took no part in the decision. *Id.* at 2506-07. In *Industrial Union*, however, Stewart concurred, because he believed that the Act required cost-benefit balancing. 448 U.S. at 664.

22. The Court did not explicitly state that OSHA may not set toxic materials standards based on a cost-benefit analysis, but the Court stated that "[a]ny standard based on a balancing of costs and benefits by the Secretary [of Labor] that strikes a different balance than that struck by Congress [i.e. worker health versus economic or technological feasibility] would be inconsistent with the command set forth in § 6(b)(5)." 101 S. Ct. at 2490. President Reagan has ordered that "in promulgating new regulation . . . all agencies, to the extent permitted by law, shall adhere to the following requirements: . . . (b) Regulatory action shall not be undertaken unless the potential benefits to society outweigh the potential costs to society . . ." Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). Yet, *Industrial Union* would require that OSHA interpret this Executive order within the Congressional determination that toxic materials standards are beneficial to society regardless of cost, within the limits of feasibility. Thus despite President Reagan's attempt to require cost-benefit justification for any new regulations, *Industrial Union* implicitly forbids cost-benefit analysis for OSHA toxic standards.

standard.²³

I

COST-BENEFIT ANALYSIS

The Court's analysis of the cost-benefit issue focused on three areas: the language of section 6(b)(5); the possible impact of section 3(8) of the Act;²⁴ and the legislative history of section 6(b)(5). Section 6(b)(5) directs the Secretary to set the standard which "most adequately assures, *to the extent feasible*, . . . that no employee will suffer material impairment of health. . . ."²⁵ According to the Court, the plain meaning of the word *feasible* is "capable of being done."²⁶ Thus, the Secretary is to set the standard the "most adequately assures . . . that no employee will suffer material impairment of health' limited only by the extent to which this is 'capable of being done.'"²⁷ The Court noted that when Congress wished an agency to engage in cost-benefit analysis, it indicated that intent on the face of the statute.²⁸ Congress also has used the phrase "unreasonable risk," accompanied by an explanation in the legislative history, to signify a general balancing of costs and benefits.²⁹ With respect to the prevention of material impairment of worker health by harmful substances, however, Congress apparently decided that *feasibility* rather than cost-benefit balancing would be the

23. In the portion of the opinion that discusses economic feasibility, the Court struck down the wage guarantee portion of an interim provision which would have given employees the opportunity to transfer, without loss in earnings, rights, or benefits, to another position within a workplace that did not yet meet the cotton dust standard, if available, where the dust levels did not exceed the standard when the employee was unable to wear a respirator, 101 S. Ct. at 2504-06. The Court did not hold that the wage guarantee requirement was inherently beyond the scope of OSHA's authority but merely held that the provision exceeded OSHA's authority because OSHA had failed to make the required determination or statement of reasons that the provision was related to the achievement of a safe and healthful work environment. 101 S. Ct. at 2505.

24. 29 U.S.C. § 652(8) (1976). Section 3(8) provides that an occupational safety and health standard is one "reasonably necessary or appropriate to provide safe or healthful employment or places of employment." *Id.*

25. 16 U.S.C. § 655(b)(5) (1976) (emphasis added).

26. 101 S. Ct. at 2490.

27. *Id.*

28. *Id.* at 2491. *See, e.g.*, Flood Control Act of 1936, 36 U.S.C. § 710a (1976) ("if the benefits to whomsoever they may accrue are in excess of the estimated costs"); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347(b) (Supp. III 1979) (safest technologies to be used unless "the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies").

29. *See, e.g.*, the Consumer Product Safety Act of 1972, 15 U.S.C. § 2056(a) (1976) ("unreasonable risk of injury"). In its brief, the government explained that Congress might, on grounds of equity, require cost-benefit balancing in such areas as product safety but not in the area of employee health; the risks and benefits of a consumer product accrue to the same party, the consumer, but employees must bear the risk of occupational health hazards while benefits accrue largely to employers and consumers. Brief for Appellees at 57, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981).

limiting factor.³⁰

In *Industrial Union*, the Court construed section 6(b)(5) with reference to section 3(8), which defines an occupational safety and health standard as one "reasonably necessary or appropriate" to provide safe or healthful employment.³¹ The Court held that "safe" does not mean completely risk-free and that a workplace is not "unsafe" (and therefore in need of remedial action by the Secretary) unless it poses a *significant* risk of harm.³² Thus, despite the fact that section 6(b)(5)'s stated goal is that "no employee shall suffer material impairment of health,"³³ the *Industrial Union* Court held that the Secretary's mandate to promote worker safety under section 6(b)(5) was limited by section 3(8) to situations involving a "significant risk" of material harm.³⁴

In *American Textile*, the Court declined to use section 3(8) to further reduce the stringency of standards required by section 6(b)(5), perhaps because such an interpretation would not only reduce the impact of section 6(b)(5) but would "effectively write [it] out of the act."³⁵ Without deciding whether section 3(8), standing alone, contemplates some form of cost-benefit analysis, the Court decided that Congress could reasonably have concluded that health standards under 6(b)(5) would be subject to stricter criteria than other parts of the act, such as safety standards.³⁶ Thus the separate and additional requirements which Congress specifically imposed in section 6(b)(5) on toxic materials and harmful physical agents are not negated by the imposition of a cost-benefit analysis possibly contemplated in section 3(8) or in another section.³⁷

The Court found no "indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard."³⁸ Furthermore, the Court concluded that the legislative history of section 6(b)(5) supports an interpretation of that section as imposing a limitation of feasibility, rather than cost-benefit balancing, on measures by the Secretary to address significant risks of material harm.³⁹ Finally,

30. 101 S. Ct. at 2495-96.

31. Section 3(8) of OSHA, 29 U.S.C. § 652(8) (1976), provides: "the term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

32. 448 U.S. at 642.

33. *Id.*

34. *Id.*

35. 101 S. Ct. at 2492.

36. *Id.*

37. *Id.*

38. *Id.* at 2493.

39. *Id.* at 2495. The Court noted that the substance of section 6(b)(5) first appeared as an amendment offered by the House and Senate Committees that reported out the bills. *Id.*

the Court noted that statements by members of Congress indicated a clear awareness "that the Act would create substantial costs"⁴⁰ and a recognition that such costs should properly be borne by employers as a cost of doing business or by consumers in the cost of goods.⁴¹

The textile industry pressed the theme that failure to impose cost-benefit balancing could lead to inefficient use of resources, since OSHA might issue a standard for one hazardous substance that imposed costs to the limits of industry affordability and then be unable to impose any additional standards on that same industry, even for other more harmful substances, because the industry would have no resources left to deal with the other substances.⁴² The Court skirted this argument by stating, in a footnote, that this case deals with the need for cost-benefit analysis in the promulgation of a "single" standard under Section 6(b)(5).⁴³ However, the Court did allude to Section 6(g) of the Act, which provides that "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, . . . or work environments."⁴⁴ As the Government argued, this section obligates the Secretary to "address hazards in the order of their severity [and thus] provides substantial assurance that resources will be applied in a rational manner."⁴⁵

at 2493. The original House version of section 6(b)(5), which was addressed to preventing "any impairment of health or functional capacity, or diminished life expectancy" (rather than *material* impairment of health or functional capacity), contained no feasibility limitation, and was not limited to harmful substances. *Id.* (emphasis added). The Senate version was virtually identical except that it mandated selection of the standard "which most adequately and feasibly assures . . . that no employee will suffer any impairment of health." *Id.* (emphasis added). Senator Javitz, who offered the original feasibility language, said that it was an improvement over the House version, "which might be interpreted to require *absolute* health and safety in all cases, regardless of feasibility." *Id.* at 2494 (emphasis added). The final changes in the section, including limitation of the section to *material* health impairments and rephrasing of the feasibility language, were introduced by Senator Dominick, who had expressed concern that the earlier draft might "be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy" and that "the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." *Id.* Thus, the evolution of the bill shows that Congress considered the question of limitations on OSHA standards and settled on the feasibility requirement presently contained in section 6(b)(5). *Id.* at 2493.

40. *Id.* at 2496.

41. *Id.*

42. Brief for Appellants at 38-39, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981).

43. 101 S. Ct. at 2490 n.29.

44. 29 U.S.C. § 655(g) (1976).

45. Brief for Appellees at 59, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981).

II FEASIBILITY

Section 6(b)(5) requires that OSHA health standards must be "feasible."⁴⁶ After finding that this requirement was not a mandate for cost-benefit balancing, the Court considered whether the Secretary's determination that the cotton dust standard was "economically feasible" was supported by substantial evidence in the record.⁴⁷ The court applied a two step process to the question of whether OSHA's cotton dust standard of 750 $\mu\text{g}/\text{m}^3$ in the weaving operations and 200 $\mu\text{g}/\text{m}^3$ in yarn making operations complied with the feasibility limitation complied with the feasibility limitation of Section 6(b)(5). The Court first examined OSHA's findings and the evidence in the record pertaining to the cost estimate for compliance with the proposed standard⁴⁸ and next examined the findings and evidence pertaining to the feasibility of such an expenditure.⁴⁹ The Act provides that determinations of the Secretary shall be conclusive if supported by substantial evidence in the record as a whole and gives responsibility for reviewing substantial evidence questions to the Courts of Appeals.⁵⁰ In re-examining the evidence on cost and feasibility, the Court applied the "familiar rule" that the "Court will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below."⁵¹

OSHA made its cost estimate after reviewing two financial analyses, one prepared by the Research Triangle Institute (RTI), a consultant hired by OSHA, and another prepared by Hocutt-Thomas, industry representatives.⁵² The RTI study estimated a \$1.1 billion cost for engineering controls to comply with the final standard.⁵³ The Hocutt-Thomas estimate was premised on the assumption that achievement of the final standard was impossible and thus its cost estimate of \$543 million was purported to be for achievement of a less stringent standard.⁵⁴ OSHA "carefully explored the assumptions and methodologies

46. 29 U.S.C. § 655(b)(5) (1976).

47. 101 S. Ct. at 2497-504.

48. *Id.* at 2497-501.

49. *Id.* at 2501-04.

50. 29 U.S.C. § 655(f) (1976).

51. 101 S. Ct. at 2497 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

52. 101 S. Ct. at 2497.

53. *Id.* at 2498.

54. Brief for Appellees at 15, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981). Hocutt-Thomas submitted cost estimates for achieving 200 $\mu\text{g}/\text{m}^3$ in opening through roving operations, 500 $\mu\text{g}/\text{m}^3$ in spinning through warping operations and 1000 $\mu\text{g}/\text{m}^3$ in weaving operations. *Id.* The final standard is 200 $\mu\text{g}/\text{m}^3$ for yarn manufacturing (opening through warping), 101 S. Ct. at 2486 n.21, and 750 $\mu\text{g}/\text{m}^3$ for slashing and weaving. *Id.* at 2487 n.22.

underlying the conclusions of each of these studies"⁵⁵ and derived its own cost estimate. Among the reasons why OSHA found the RTI estimated cost to be grossly overstated was that the study assumed engineering controls would be applied to all mill equipment including isolated machines processing synthetic fibres for which, in fact, controls would not be required.⁵⁶ OSHA also found that RTI "may have overestimated compliance costs since some operations were already in compliance with the permissible exposure limit of the new standard."⁵⁷ OSHA also concluded that the Hocutt-Thomas estimate was overstated because it included costs of achieving the existing national standard of 1000 $\mu\text{g}/\text{m}^3$, which OSHA believed had already been partially complied with,⁵⁸ and the study relied exclusively on a strategy of retrofitting existing equipment despite the fact that in some cases purchasing newer, cleaner and more efficient equipment would be less expensive than retrofitting existing equipment.⁵⁹ However, in part because the Hocutt-Thomas estimate was based on more recent industry data than the RTI study,⁶⁰ and in part because the overstatements tended to offset understatements in cost attributable to an underlying assumption of lower dust level standards than were actually promulgated,⁶¹ OSHA adopted the Hocutt-Thomas figure of \$543 million.⁶²

The industry challenged OSHA's adoption of the Hocutt-Thomas estimate, because it was based on a standard that was less strict than the final one.⁶³ However, the Court declined to hold as a matter of law that the absence of a cost estimate based on the standard actually promulgated required the Court of Appeals to find that OSHA's determination was unsupported by substantial evidence.⁶⁴

The Court's decision to accept OSHA's cost determination is attributable to three factors. First, in light of what the Court considered to be OSHA's careful exploration of the "assumptions and methodologies" of each study,⁶⁵ the Court may have not wished to second-guess both OSHA and the Court of Appeals. Had the Court intervened, it might have been forced to become more deeply and permanently in-

55. 101 S. Ct. at 2497-98.

56. Brief for Appellees at 17, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981). See 101 S. Ct. at 2498.

57. 101 S. Ct. at 2498.

58. *Id.* at 2499.

59. Brief for Appellees at 16 n.23, 18, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981). See 101 S. Ct. at 2498.

60. 101 S. Ct. at 2498.

61. Brief for Appellees at 19, *American Textile Mfrs. Inst. v. Donovan*, 101 S. Ct. 2478 (1981). See note 54 *supra*.

62. 101 S. Ct. at 2498.

63. *Id.* at 2499. See note 54 *supra*.

64. 101 S. Ct. at 2500.

65. *Id.* at 2497-98.

volved in the administrative standard setting process. Second, the Court noted that section 6(b)(5) requires promulgation of standards "on the basis of the best available evidence"⁶⁶ and that, in this instance, OSHA "found itself limited in the precision of its estimates by the industry's refusal to make more of its own data available."⁶⁷ The Court may not have wanted to allow a substantial evidence challenge where any lack of evidence might be attributable to the challenging party. Third, as the Court noted in the second step of its feasibility review, there was evidence in the record to suggest that a much higher cost than \$543 million could be absorbed by the textile industry.⁶⁸ Thus, the ultimate determination of feasibility would not have been changed by even a moderate error in the compliance cost calculation.⁶⁹

The Court carefully reviewed OSHA's feasibility determination⁷⁰ and concluded that OSHA presented a "responsible prediction" of what its standard would cost and the standard's impact on production, employment, competition and prices.⁷¹ While the Court did not adopt a comprehensive definition of feasibility, it did agree with the Secretary's determination that the industry will maintain long-term profitability and competitiveness, and this determination was "consistent with the plain meaning of the word 'feasible.'"⁷² The Court specifically noted, however, that it was not deciding whether a standard that threatens the long-term profitability and competitiveness of an industry is "feasible" within the meaning of Section 6(b)(5).⁷³ OSHA's finding that although the industry as a whole will not be threatened by the regulation's capital requirements, "some marginal employers may shut down rather than comply"⁷⁴ did not disturb the Court enough for it to declare the standard infeasible.⁷⁵

66. 29 U.S.C. § 655(b)(5) (1976).

67. 101 S. Ct. at 2499-500.

68. *Id.* at 2503-04.

69. *See id.* at 2504.

70. *See id.* at 2501-04.

71. 101 S. Ct. at 2501 n.55.

72. *Id.*

73. *Id.*

74. 43 Fed. Reg. 27378 (1978).

75. The Court noted, but did not comment on, OSHA's finding that some marginal employers might shut down rather than comply with the standard. 101 S. Ct. at 2501. However, the District of Columbia Court of Appeals, in its review of the cotton dust standard, observed that "[i]t would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers." *American Federation of Labor & Congress of Industrial Organizations v. Marshall*, 617 F.2d at 655 n.94 (quoting *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974)).

The Act, however, does protect small businesses. Section 28 of the Act added 15 U.S.C. § 636 to the Small Business Act making small businesses eligible for economic assistance through the Small Business Administration in order to achieve compliance with standards

CONCLUSION

OSHA may promulgate standards for toxic materials and harmful physical agents under section 6(b)(5) without balancing costs against benefits. OSHA may continue to protect employee health against industry profits within the limitations that there must be a threshold finding of a significant risk of material health impairment and that the standard must be feasible. *Industrial Union* and *American Textile* should help prevent any substantial court-imposed barriers to OSHA's mandate "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ."⁷⁶

Beth Karpf

promulgated by the Secretary. This provision evidences Congress' recognition of the particularly heavy impact that the Act might have on small business. 101 S. Ct. at 2496 n.37.

76. 29 U.S.C. § 651(b) (1976).