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Mr. William Perry
Director, Directorate of Standards and Guidance OSHA/DOL
200 Constitution Avenue, N.W.
Room N-3718
FP Building
Washington, D.C. 20210

Re: Comments on “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness,” published July 29, 2015 (Docket No. OSHA-2015-0006)

Dear Mr. Perry:

We are pleased to submit these comments on behalf of American Fuel & Petrochemical Manufacturers (“AFPM”) and the American Petroleum Institute (“API”). Our comments address the Occupational Safety and Health Administration’s (“OSHA”) proposed “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness,” published in the Federal Register on July 29, 2015 (Docket No. OSHA-2015-0006).

As more fully detailed below, AFPM and API have serious concerns about the proposed “clarification” to 29 CFR Part 1904, which, if adopted, would impermissibly circumvent the United States Court of Appeals for the District of Columbia’s (“D.C. Circuit”) decision in *AKM LLC v. Secretary of Labor* (“*Volks*”),¹ and would also impair other legal and public policy objectives of the Occupational Safety and Health Act of 1970 (“OSH Act”).²

I. About American Fuel & Petrochemical Manufacturers

American Fuel & Petrochemical Manufacturers is a trade association whose members include more than 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity.

II. About the American Petroleum Institute

American Petroleum Institute is the national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API has more than 625 members that include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. Collectively, they provide most of the nation’s energy and many will be directly impacted by OSHA’s proposed “clarification” to 29 CFR Part 1904.

III. Background

OSHA’s Injury and Illness Recordkeeping regulations require employers to record certain injuries and illnesses within one calendar week of the injury, and require employers to preserve a copy of those records for five years.³ Separately, the Occupational Safety and Health Act of 1970 (“OSH Act”) authorizes the Secretary of Labor to issue

¹ 675 F.3d 752 (D.C. Cir. 2012).

² 29 U.S.C. §§ 651-678.

³ 29 C.F.R. Part 1904 *et seq.*

citations alleging violations of regulations adopted under the Act.⁴ The statute of limitations in the OSH Act states, however, that “[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.”⁵

Historically, OSHA failed to limit its enforcement of injury and illness recordkeeping violations to unrecorded or improperly recorded injuries that occurred only during the six months prior to the issuance of a citation. Rather, OSHA took a broader interpretation of Part 1904’s five-year record retention policy, and concluded that the duty to first record an injury or to ensure that the record of the injury was accurate continued for the entire five-year retention period. Consequently, OSHA routinely cited injury-recording deficiencies at any time during the five-year retention period. In sum, OSHA interpreted the five-year record retention provision of Part 1904 to create a continuing obligation to record certain illnesses and injuries within the five-year retention period.

Based on OSHA’s historical interpretation and enforcement policy, in 2006, OSHA issued more than sixty citations alleging that an employer, AKM LLC doing business as Volks Constructors, violated Part 1904 for failing to record certain injuries on its OSHA 300 Log. All the alleged violations related to injuries that occurred more than six months before OSHA issued the citations, and many were two or more years old. Volks Constructors challenged the citations, which were affirmed by an administrative law judge and upheld by the OSH Review Commission. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit ruled that OSHA’s reliance on its interpretation of Part 1904 to issue recordkeeping citations for five years was impermissible and violated the OSH Act’s six-month statute of limitations.

In light of the D.C. Circuit’s decision in *Volks*, OSHA is prohibited from bringing enforcement actions against employers for not recording injuries that occur more than six months and seven days prior to the date of the citation. OSHA’s proposed “clarification” of Part 1904 is an unlawful attempt to circumvent the statute of limitations provision in the OSH Act and side step the D.C. Circuit’s decision in *Volks*.

IV. Comments

A. The Secretary’s proposed rule conflicts with the D.C. Circuit’s interpretation of the OSH Act

The Secretary’s purported “clarification” of Part 1904, if implemented, will be overturned by a reviewing court for the same reason that the Secretary’s prior interpretation of Part 1904 was overturned; *i.e.*, it is an impermissible attempt to alter the plain language of the OSH Act. The *Volks* opinion merely confirmed the obvious, that recordkeeping violations are subject to the OSH Act’s six-month statute of limitations provision, which is unambiguous and not subject to agency interpretation. Thus, any attempt to modify, clarify, or interpret Part 1904 in a way that would allow a citation outside the six-month statute of limitations will be invalidated by any reviewing court pursuant to the Administrative Procedure Act.⁶ Nothing short of a change to the OSH Act’s statute of limitations provision will change the period of time by when OSHA must cite an employer for the duty to record injuries under Part 1904.

After failing to petition for rehearing *en banc* before the D.C. Circuit or petition for a writ of *certiorari* to the Supreme Court following the D.C. Circuit’s decision, the Secretary cannot now promulgate “clarified” regulations to

⁴ 29 U.S.C. §§ 651-678.

⁵ 29 U.S.C. § 658(c).

⁶ 5 U.S.C. §706(2)(C) (A “reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – hold unlawful and set aside agency action, findings, and conclusions found to be – in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”).

reverse the outcome imposed by the *Volks* decision.⁷ To do so, would violate the Constitutional principle separating the legislative, executive, and judicial branches of the federal government. The Constitution declares that “[t]he *judicial power* of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,”⁸ and it is axiomatic in American law that it is the prerogative of the courts “to say what the law is.”⁹ The D.C. Circuit’s *Volks* decision addressed the very issue that the Secretary proposes to “clarify,” putting the judiciary, legislative, and executive branches on a Constitutional collision course.

B. The Secretary chose not to appeal the *Volks* decision making it binding in the D.C. Circuit where all OSHRC decisions can be reviewed.

The D.C. Circuit’s opinion in *Volks* provides a clear and unequivocal statement of the law under the OSH Act as to the statute of limitations for record-making and recordkeeping. The court’s opinion makes plain that the question to be decided in the *Volks* case was “whether the [OSH] Act’s record-keeping requirement, in conjunction with the five-year regulatory retention period, permits OSHA to subvert the Act’s six-month statute of limitations.”¹⁰ And the court in summarizing its decision stated: “[w]e thus begin with the text of the statute. If Congress has clearly expressed its will, our inquiry is at an end. We think the statute is clear; the citations are untimely.”¹¹ Significantly, the court’s majority opinion rests upon the text of the OSH Act and not upon the implementing regulations promulgated by the Secretary. While a concurring opinion filed in *Volks* and relied upon by the Secretary in this rulemaking record expresses the view that different regulations may have led to a different result, the concurring opinion is not the law.¹²

Furthermore, the OSH Act provides for review of a Commission order “in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, *or in the Court of Appeals for the District of Columbia Circuit*,” and that the court’s “judgment and decree *shall be final*, except that the same shall be subject to review by the Supreme Court of the United States”¹³ A step the Secretary chose not to take.¹⁴ A Commission order, therefore, always can be subject to review in the D.C. Circuit where the *Volks* decision is binding law.

The *Volks* opinion states that it “do[es] not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it.”¹⁵ It further emphasized that “the statutory language in Section 657(c), which requires employer record-making, is not authorization for OSHA to cite the employer for a record-making violation more than six months after that recording failure.”¹⁶ The court concluded, “[i]t is not for us or the Secretary to unsettle Congress’s chosen means of ensuring [that discrete record-making violations are held over

⁷ See *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (“When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court.”).

⁸ U.S. CONST. ART. III § 1 (emphasis added).

⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

¹⁰ *Volks*, 675 F.2d at 754.

¹¹ *Id.* (citation omitted).

¹² See *Maryland v. Wilson*, 519 U.S. 408, 412-13 (U.S. 1997) (Noting that statements in a concurring opinion are not binding precedent.).

¹³ See 29 USC § 660(a) (emphasis added).

¹⁴ See *Johnson*, 969 F.2d at 1092 (Rejecting an agency’s “national uniformity” argument for nonacquiescence of a federal appeals court decision where it had not sought clarification from Congress or review by the Supreme Court.).

¹⁵ *Id.* at 755.

¹⁶ *Id.* at 758.

employers for years].”¹⁷ The court also concluded that the Secretary’s interpretation of the statute of limitations could not survive scrutiny even if it assumed that judicial deference should be accorded to the Secretary’s interpretation of the OSH Act under *Chevron* doctrine.¹⁸

C. The OSH Act’s six-month limitations and employer recordkeeping duties are separate and discrete provisions of the statute

Under its analysis, the D.C. Circuit first noted that the Secretary’s interpretation of the recordkeeping provisions of the OSH Act, which delegated to the Secretary the power to require employers to “make, keep and preserve” records in Section 657(c) of the OSH Act, “leaves little room for Section 658(c), the provision containing the six-month statute of limitations.¹⁹ “At best, the Secretary’s approach diminishes Section 658(c) to a mere six-month addition to whatever retention/limitations period she desires.”²⁰ The Secretary’s interpretation of the recordkeeping provision, therefore, advances the OSH Act’s recordkeeping provision while diminishing the power of its limitations provision, which Congress envisioned as a short, six-month period of repose for any employer violations. Second, the court concluded that “the Secretary’s interpretation incorrectly assumes that the obligation to maintain an existing record expands the scope of an otherwise discrete obligation to make that record in the first place.”²¹ This conclusion by the court rejected the Secretary’s argument that the OSH Act authorizes the imposition of a continuing obligation to make or update records beyond the “discrete” obligation to make a record upon the occurrence of a recordable illness or injury. Third, the court concluded that the Secretary was unpersuasive in overcoming the “standard rule” that a limitations period is triggered by the existence of a complete cause of action.²² Despite these conclusions rejecting the Secretary’s litigation position, the proposed rule now reasserts that employers are under a continuing obligation to make and correct their injury and illness records.

D. The Secretary must comply with the D.C. Circuit’s decision

“[T]he Secretary’s litigating position [] is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a workplace health and safety standard.”²³ Having litigated its position before the D.C. Circuit without seeking further review, the Secretary cannot now impose by rulemaking the position that was rejected by the D.C. Circuit.²⁴ “Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of the Government.”²⁵ “Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed.”²⁶

In sum, the D.C. Circuit interpreted the OSH Act to prohibit treating recordkeeping violations as continuing obligations and citing them outside of the six-month statute of limitations. Given the *Volks* decision’s construction

¹⁷ *Id.* at 759.

¹⁸ *Id.* at 754 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

¹⁹ *Id.* at 755.

²⁰ *Id.*

²¹ *Id.* at 756.

²² *Id.* at 756-57.

²³ *Martin v. OSHRC*, 499 U.S. 144, 157 (1991).

²⁴ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-3 (U.S. 2005) (A “judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

²⁵ *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948) (Jackson, J.).

²⁶ *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (citations omitted).

of the OSH Act, the Secretary is not empowered to alter the plain meaning of the statute and change its adjudicated interpretation by now “clarifying” the regulations of Part 1904.

V. Other Significant Policy Impacts

A. Congress intended a short period of repose for OSHA citations

The Secretary’s purported “clarification” to Part 1904 seeks to make the requirement to record an injury and illness a continuing obligation during that record’s retention period. This is an untenable policy for the nation’s employers who are entitled to a short, fixed period of repose in order to be able to fairly defend citations issued by OSHA after regulatory inspections. It also undermines the OSH Act’s purpose for prompt resolution of workplace safety hazards. Following the Secretary’s logic, were OSHA to extend the retention period in § 1904.33(a) for injury records from five years to ten or even thirty years, the Congressionally-mandated statute of limitations for such record-making citations would effectively be extended with it, further subverting Congress’s intent.

The legislative history of the OSH Act reveals little about any debate over the duration of the statute of limitations in section 658(c). The House proposal prohibited issuance of a citation beyond three months after the occurrence of any violation. A Senate amendment later changed the three months to six months.²⁷ What is clear from the legislative history, however, is that Congress intended a short limitations period for citations of *months*, not *years*. The proposed “clarification” of Part 1904 will effectively subvert the Congressional intent to have safety violations enforced expediently without a long tail of potential violations hanging over employers’ heads.

The Secretary’s proposed amendments state that “this proposal is not meant to impose new or additional obligations on employers covered by Part 1904.”²⁸ But the Secretary’s proposed language inserts the terms “maintain” and “accurate” throughout the proposed amendments in an effort to reassert a continuing obligation on employers throughout the record-preservation period. Regardless of the new language proposed for Part 1904, the amendments do nothing to address the D.C. Circuit Court’s conclusion that “[t]o the extent Congress delegated authority to the Secretary to require employers to ‘make, keep and preserve,’ records in Section 657(c), it did so only within the ambit set by the statutory scheme, including the limitations period in Section 658(c)—which expressly applies to ‘any regulations prescribed pursuant to this chapter,’ such as those promulgated pursuant to Section 657(c).”²⁹ The Secretary’s amendments cannot modify the underlying statutory scheme imposed by Congress. The proposed “clarifications” at their core, modify the statutory scheme, and therefore, do create new obligations for employers. Indeed, it creates an obligation to take an action 700% longer than the law previously required.

B. Physical hazards and recordkeeping are distinguishable obligations for imposing a continuing duty

Although the OSH Act does contemplate continuing obligations that may be cited by OSHA beyond six months from the initial occurrence of a violation, such continuing obligations have been reserved by Congress for physical hazards that continuously endanger workers until they are abated, which is not the case with paperwork violations. The proposed rule would pave the way for OSHA to cite other paperwork violations long after six months as an “ongoing obligation,” which would reset the six-month statute of limitations each day the underlying paperwork violation remains uncorrected, for as long OSHA may decide such records should be retained. That was not Congress’s intent.

²⁷ See H.R. REP. NO. 91-1765, at 38 (1970) (Conf. Rep.), reprinted in 1970 U.S.C.C.A.N. 5228, 5234, and in S. COMM. ON LABOR AND PUB. WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 1154, 1191 (Comm. Print 1971).

²⁸ See 80 Fed. Reg. 45116, 45125 (July 29, 2015).

²⁹ 675 F.3d at 755.

C. Long preservation periods create staleness problems

The proposed rule creates the issue of staleness of claims, where the Secretary would impose long record-preservation periods. The Secretary downplays the issue of staleness and states that it works only to the prejudice of OSHA, which has the burden of proving the occurrence of each injury or illness occurred.³⁰ Staleness of claims, however, works to the significant detriment of employers who would be forced to defend against OSHA claims years or decades after their occurrence. The gathering of evidence and the location of witnesses to defend against claims and present rebuttal evidence would be more difficult for employers that may have constantly changing workforces, retirement of employees in the ordinary course, or other limitations that foreclose access to evidence, other records, and the memories of witnesses. This very issue arose in *Volks* where one of the employer's record-keepers was dead by the time of OSHA's inspection.³¹

VI. Conclusion

AFPM and API are of the view that the Secretary should achieve the objective of enforcing employers' compliance with the injury and illness recordkeeping regulations by means other than imposing a new continuing obligation and circumventing the OSH Act limitations period for record-making violations. Specifically, OSHA already has at its disposal a wide array of enforcement tools that it can use to identify and cite compliance violations within the six-month statute of limitations, from its new injury and fatality report rule, to a long list of national, regional and local emphasis programs, and an expansive whistleblower program.

For the foregoing reasons, AFPM and API respectfully request that the Secretary withdraw the proposed rule.

AFPM and API appreciate the opportunity to provide these comments and we look forward to discussing these issues further with OSHA. Feel free to contact me with any questions at Lara Swett at 202-552-8476 or Heidi Keller at 202-682-8060.

Respectfully submitted,



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³⁰ See 80 Fed. Reg. at 45124.

³¹ See AKM LLC, 2011 BNA OSHC 1414 (No. 06-1990, 2011).