

(d) of this section to another interest crediting rate (the new rate) that satisfies the requirements of paragraph (d) of this section, the plan's effective interest crediting rate is not in excess of a market rate of return for purposes of paragraph (d) of this section merely because the plan provides for the benefit of any participant who is benefiting under the plan (within the meaning of § 1.410(b)-3(a)) on the applicable amendment date to never be less than what it would be if the old rate had continued but without taking into account any principal credits (as defined in paragraph (d)(1)(ii)(D) of this section) after the applicable amendment date.

(B) *Multiple amendments.* A pattern of repeated plan amendments each of which provides for a prospective change in the plan's interest crediting rate with respect to the benefit as of the applicable amendment date will be treated as resulting in the ongoing plan terms providing that the interest crediting rate equals the greater of each of the interest crediting rates, so that the rule in paragraph (e)(3)(iii)(A) of this section would not apply. See § 1.411(d)-4, A-1(c)(1).

(4) *Actuarial increases after normal retirement age.* A statutory hybrid plan is not treated as providing an effective interest crediting rate that is in excess of a market rate of return for purposes of paragraph (d) of this section merely because the plan provides that the participant's benefit, as of each annuity starting date after normal retirement age, is equal to the greater of—

(i) The benefit determined using an interest crediting rate that is not in excess of a market rate of return under paragraph (d) of this section; and

(ii) The benefit that satisfies the requirements of section 411(a)(2).

* * * * *

(f) * * *

(2) * * *

(i) * * *

(B) *Special effective date.* Paragraphs (c)(3)(iii), (d)(1)(iii), (d)(1)(iv)(D), (d)(1)(vi), (d)(2)(ii), (d)(4)(iv), (d)(5)(iv), (d)(6), (e)(2), (e)(3)(iii), and (e)(4) of this section apply to plan years that begin on or after January 1, 2012.

* * * * *

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

[FR Doc. 2010-25942 Filed 10-18-10; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2010-0032]

29 CFR Parts 1910 and 1926

Interpretation of OSHA's Provisions for Feasible Administrative or Engineering Controls of Occupational Noise

AGENCY: Occupational Safety and Health Administration (OSHA)

ACTION: Proposed interpretation.

SUMMARY: This document constitutes OSHA's official interpretation of the term *feasible administrative or engineering controls* as used in the applicable sections of OSHA's General Industry and Construction Occupational Noise Exposure standards. Under the standard, employers must use administrative or engineering controls rather than personal protective equipment (PPE) to reduce noise exposures that are above acceptable levels when such controls are feasible. OSHA proposes to clarify that *feasible* as used in the standard has its ordinary meaning of capable of being done. The Agency intends to revise its current enforcement policy to reflect this interpretation. The Agency solicits comments from interested parties on this interpretation.

DATES: Submit comments on or before December 20, 2010.

ADDRESSES: You may submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions;

Fax: You may fax submissions not longer than 10 pages, including attachments, to the OSHA Docket Office at 202-693-1648.

Mail, hand delivery, express mail, messenger and courier service: If you use this option, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2010-0032, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted from 8:15 a.m.-4:45 p.m., e.t.

Instructions: All submissions must include the agency name and the OSHA docket number for this interpretation (OSHA-2010-0032). Submissions are placed in the public docket without

change and may be accessed online <http://www.regulations.gov>. Be careful about submitting personal information such as social security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index; some information (e.g., copyrighted material), however, can not be read or downloaded at the website. All submissions, including copyrighted material, can be examined or copied at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT:
General information or press inquiries: MaryAnn Garrahan, Acting Director, Office of Communications, Room N-3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone 202-693-1999.

For Technical Inquiries: Audrey Proffitt, Senior Industrial Hygienist, Directorate of Enforcement Programs, Room N-3119, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: 202-693-2190, or fax: 202-693-1681.

SUPPLEMENTARY INFORMATION: This **Federal Register** document sets out OSHA's proposed interpretation of *feasible administrative or engineering controls* in 29 CFR 1910.95(b)(1) and 1926.52(b) for the purpose of enforcing compliance with these standards. This document does not address feasibility in any other context. Sections 1910.95(b)(1) and 1926.52(b), which are substantively identical, require that when employees are exposed to sound exceeding the permissible level, feasible administrative or engineering controls must be utilized to reduce the sound to within that level, and if such controls are ineffective, personal protective equipment must be provided and used. *Feasibility* encompasses both economic and technological considerations, but this document addresses only economic feasibility. Under OSHA's current enforcement policy, the agency issues citations for failure to use engineering and administrative controls only when hearing protectors are ineffective or the costs of such controls are *less* than the cost of an effective hearing conservation program.

As discussed below, this policy is contrary to the plain meaning of the standard and thwarts the safety and health purposes of the OSH Act by rarely requiring administrative and engineering controls even though these

controls are affordable and generally more effective than hearing protectors in reducing noise exposure. Accordingly, OSHA now proposes to consider administrative or engineering controls economically feasible when the cost of implementing such controls will not threaten the employer's ability to remain in business, or if such a threat to viability results from the employer's failure to meet industry safety and health standards.

I. Regulatory Background

Section 6(a) of the OSH Act required the Secretary, during the two-year period following the Act's effective date, to promulgate as an OSHA standard any national consensus standard and established Federal standard unless she determined that the promulgation of such a standard would not result in improved safety or health. 29 U.S.C. 655(a). Pursuant to section 6(a), OSHA promulgated the general industry noise standard as an "established federal standard" in 1971. 36 FR 10466, 10518, May 29, 1971 (codified as § 1910.95). Section 1910.95(b)(1) is derived from 41 CFR 50-204.10, an occupational noise exposure standard promulgated under the Walsh-Healey Government Contracts Act, 41 U.S.C. 35-45, which requires that federal government contracts for materials over \$10,000 must provide that the work be done under sanitary and safe working conditions, 41 U.S.C. 35(d). The requirements of the Walsh-Healey Act noise standard are the same as those of the OSH Act noise standard. Compare 41 CFR 50-204.10(b) with 29 CFR 1910.95(b)(1).

Section 1910.95(b)(1) states as follows:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

§ 1910.95(b)(1).

OSHA also promulgated the construction noise standard, originally codified at 29 CFR 1518.52, as an "established federal standard" in 1971. 36 FR 10466, 10469, May 29, 1971. Before being adopted unchanged as an OSH Act standard, section 1518.52(b) was issued under the Construction Safety Act, 40 U.S.C. 333 (1969), which requires that federal construction contracts for over \$100,000 must provide that the work be done under sanitary and safe working conditions. 40 U.S.C. 3704(a)(1) (formerly cited as 40 U.S.C. 333(a)(1)); 36 FR 7340, 7348, April 17, 1971. At the end of 1971,

§ 1518.52(b) was redesignated as § 1926.52(b), 36 FR 25232, Dec. 30, 1971, its current codification.

Section 1926.52(b) is almost verbatim identical to § 1910.95(b)(1) and provides:

When employees are subjected to sound exceeding those listed in Table D-2 of this section, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of the table, personal protective equipment as required in subpart E, shall be provided and used to reduce sound levels within the levels of the table.

§ 1926.52(b).¹

Engineering controls involve modifications to plant, equipment, processes or materials that reduce the sound intensity at the source, by substituting quieter machines and processes, or by isolating the machine or its operator. See *Forging Indus. Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1440 n.3 (4th Cir. 1985) (*en banc*); *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 643 n.2 (9th Cir. 1982). *Administrative controls* involve modifications of work assignments to reduce employees' exposure to noise, such as rotating employees so that they work in noisy areas for a short time. *Forging Indus.*, 773 F.2d at 1440 n.3. *Personal protective equipment* (PPE) includes hearing protectors such as ear plugs and ear muffs fitted to individual employees. *Castle & Cooke*, 692 F.2d at 643 n.2.

II. Interpretive History of Economically Feasible Administrative or Engineering Controls

A. Current Enforcement Policy

OSHA's early interpretive guidance on 29 CFR 1910.95(b)(1) indicated that feasible engineering or administrative controls must be used to reduce noise to acceptable levels and that PPE must be used as a supplement when such controls are not completely effective in achieving this objective. Letter from Barry J. White, OSHA Assistant Secretary for Regional Programs, to Leslie Anderson (March 19, 1975). In the following decade, OSHA issued citations to employers for failure to use affordable engineering and administrative controls to reduce noise levels. The Occupational Safety and Health Review Commission issued a series of decisions swinging back and forth between a cost-benefit interpretation of economically *feasible* controls and a broader, plain-meaning definition of the term as "capable of

being done." The Commission ultimately settled on the cost-benefit interpretation.² Although OSHA has not changed its interpretation of the standard, its enforcement policy since 1983 has allowed employers to rely on a hearing conservation program based on PPE if such a program reduces noise exposures to acceptable levels and is less costly than administrative and engineering controls. The development of the case law in this area is described below.³

B. Commission and Court of Appeals Interpretations of Feasible

The Commission first addressed section 1910.95(b)(1) in *Continental Can Co.*, 4 BNA OSHC 1541, 1547 (Nos. 3973, 4397, 4501, 4853, 5327, 7122, 7910 & 7920, 1976). There, the Commission rejected the Secretary's argument that the costs of noise-reducing engineering controls are not relevant unless they would seriously jeopardize the financial health of the company. The Commission held that, in determining whether controls are economically feasible, all the relevant costs and benefit factors must be weighed. *Ibid.* The Commission refined this cost-benefit interpretation in *Castle & Cooke Foods*, 5 BNA OSHC 1435, 1438 (No. 10925, 1977), *aff'd*, 692 F.2d 641 (9th Cir. 1982), holding that engineering controls are economically feasible only if the health benefits to employees from noise reduction justify the cost to the employer. Applying this test, the Commission found that, although engineering controls would reduce ambient noise in *Castle & Cooke's* plants to within the limits of Table G-16, the hearing loss avoided by such a reduction would not be life-threatening or, in most cases, seriously debilitating. *Id.* at 1440. Rejecting the Secretary's position that engineering controls were affordable, that the health benefits of such controls would be significant, and that hearing protectors were less effective, the Commission concluded that the health benefits did not justify the cost of implementing engineering controls. *Ibid.* The Secretary

² To an economist, cost-benefit analysis contemplates an actual quantitative comparison of costs and benefits, typically through the conversion of all benefits and costs to monetary values. In the *Castle & Cooke Foods* case, discussed below, the Commission found that the health benefits of engineering controls did not justify their costs without monetizing the benefits and without explaining its valuation method. Although this approach would not constitute cost-benefit analysis in the sense used by economists, this document will refer to it as a cost-benefit test because that is the terminology used by the Commission.

³ OSHA has not interpreted, and the Commission has not construed, the virtually identical language of § 1926.52(b).

¹ Table D-2 of § 1926.52(b) is identical to Table G-16 of § 1910.95(b)(1).

appealed *Castle & Cooke* to the Ninth Circuit, and while that case was pending, the Supreme Court decided *American Textile Mfgs. Institute, Inc. v. Donovan* (ATM), 452 U.S. 490, 508–11 (1981). In *ATMI*, the Court held that *feasible* in section 6(b)(5) of the OSH Act, which requires that the Secretary promulgate standards for toxic substances at the most protective level, “to the extent feasible,” means “capable of being done,” and therefore rules out balancing costs and benefits. *ATMI*, 452 U.S. at 508–09. The Ninth Circuit rejected the Secretary’s argument that the Supreme Court’s interpretation of *feasible* in section 6(b)(5) was controlling as to the meaning of the same term in § 1910.95(b)(1). Believing itself bound to defer to the Commission’s expertise in interpreting the standard, the Ninth Circuit distinguished *ATMI* on the ground that the Court’s holding was limited to section 6(b)(5) standards and left open whether the general requirement in section 3(8) of the Act that OSHA standards be “reasonably necessary” might support cost-benefit analysis for standards issued under provisions other than section 6(b)(5).⁴ *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 648–49 (9th Cir. 1982). On this basis, the Ninth Circuit concluded that the Commission was “free to exercise its authority to interpret the [standard]” and the Commission’s cost-benefit interpretation was neither unreasonable nor arbitrary. *Id.* at 649

In December 1982, a month after the Ninth Circuit affirmed *Castle & Cooke*, the Commission reinterpreted the word *feasible* in section 1910.95(b)(1) in light of *ATMI*. *Sun Ship, Inc.*, 11 BNA OSHC 1028 (No. 16118, 1982). Rejecting the Ninth Circuit’s analysis as “divergent,” two Commissioners agreed that the Supreme Court’s interpretation of *feasible* in section 6(b)(5) controls the meaning of the same term in the noise standard, and precludes balancing the health benefits of engineering controls against their costs. *Sun Ship*, 11 BNA OSHC at 1031–32. Administrative and engineering controls are economically feasible, the Commission held, if their cost does not threaten the cited employer’s long-term profitability and competitiveness, or if the employer’s inability to afford these controls results from having lagged behind the industry in providing safety or health protection

⁴ Section 3(8) of the Act defines an *occupational safety and health standard* as one “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.” 29 U.S.C. 652(8).

for employees. *Id.* at 1033. Chairman Rowland dissented, arguing that the fact that the Commission had previously been unable to agree on the meaning of *feasible*, indicated that § 1910.95(b)(1) lacked ascertainable criteria for its enforcement and was therefore unenforceable as written. *Id.* at 1037–43.

In 1984, the Commission overruled *Sun Ship* in a split decision in which the two majority commissioners presented different rationales. *Sherwin-Williams Co.*, 11 BNA OSHC 2105, 2110–11 (No. 14131, 1984). In the majority opinion, Commissioner Buckley resurrected the Ninth Circuit’s *Castle & Cooke* analysis that the majority in *Sun Ship* had expressly rejected. Citing the Ninth Circuit’s holding that the Commission was not required by *ATMI* to abandon cost-benefit analysis under § 1910.95(b)(1), and the fact that the Secretary had revised her enforcement policy in 1983 to accept a cost-benefit approach, Commissioner Buckley concluded that *Sun Ship* should be reexamined. *Sherwin-Williams Co.*, 11 BNA OSHC at 2108–09. He also found that it was reasonable to believe that the

government contractors bidding on Walsh-Healey Act contracts would have understood “feasible administrative and engineering controls” to mean those controls that were practical and cost-effective. *Id.* at 2110. For these reasons, Commissioner Buckley concluded that cost-benefit analysis was incorporated into the noise standard upon its adoption under section 6(a) of the OSH Act. *Ibid.* Under this approach, if the employer produces evidence of the cost of controls, the Secretary must prove that “the benefit of the proposed engineering controls justifies their relative cost in comparison to other abatement methods.” *Ibid.*

Chairman Rowland concurred in overruling *Sun Ship*, but for a different reason. Chairman Rowland restated the position he had taken in his dissent in *Sun Ship* that § 1910.95(b)(1) was unenforceable as written because it provided no ascertainable criteria for determining what administrative and engineering controls were “feasible” and impermissibly delegated authority to the Commission to decide what the standard meant. *Sherwin-Williams*, 11 BNA OSHC at 2111 (Rowland, Ch., concurring). Chairman Rowland noted, however, that absent agreement by two commissioners on the standard’s interpretation, the parties and administrative law judges would have no clear guidance on what principles to apply. *Ibid.* He concluded that “as between the test set forth in *Sun Ship* and the cost-benefit approach adopted

by Commissioner Buckley, I believe the later test represents the more reasoned result.” *Ibid.* Thus Chairman Rowland joined in adopting Commissioner Buckley’s cost-benefit test for determining the feasibility of engineering controls. *Id.* at 2112.

Commissioner Cleary dissented, finding no grounds to overrule *Sun Ship*. *Sherwin-Williams*, 11 BNA OSHC at 2112–14 (Cleary, C., dissenting). He argued that the Court in *ATMI* determined that the plain meaning of *feasible* is “capable of being done,” and that the term therefore cannot be understood to incorporate a cost-benefit analysis. *Id.* at 2112. The fact that *ATMI* dealt with section 6(b)(5), rather than section 6(a), of the OSH Act was unimportant, in Commissioner Cleary’s view, because there is nothing in the Act to support giving the term *feasible* in the noise standard anything other than its plain, ordinary meaning. *Id.* at 2112–13. He also noted that acceptance of the majority’s cost-benefit approach would virtually eliminate engineering controls from the noise standard since earplugs or earmuffs will almost always cost less than effective engineering controls. *Id.* at 2113–14. In Commissioner Cleary’s view, the majority’s adoption of a cost-benefit test amounted to an unauthorized amendment of the standard. *Id.* at 2114.

In response to the Ninth Circuit’s *Castle & Cooke* decision, OSHA adopted enforcement guidelines allowing employers to use PPE and a hearing conservation program, rather than engineering or administrative controls, when hearing protectors are less costly than such controls, unless noise levels are especially elevated CPL 2–2.35A, § G (Dec. 19, 1983). A hearing conservation program is one that meets the standard’s requirements for protecting employees from the harmful effects of noise at or above 85 decibels. See § 1910.95(c)–(o); *Forging Indus.*, 773 F.2d at 1440. Such a program includes monitoring, periodic audiometric testing, provision of hearing protectors, training and other elements. *Forging Indus.*, 773 F.2d at 1440–41.

OSHA’s enforcement policy as set forth in the Field Operations Manual (FOM) authorizes citing employers for failing to use engineering and/or administrative controls only when (1) noise levels are so high—said to border on 100 dBA when the most effective hearing protectors are used—that hearing protectors alone will not reliably reduce noise to acceptable levels; or (2) the costs of such controls are less than the cost of an effective hearing conservation program. FOM, CPL 02–00–148, Chapt. 4 § XI.B.1 (Nov.

9, 2009). Since effective engineering and administrative controls almost always cost more than a hearing conservation program based on hearing protectors, citations are rarely issued for failure to use such controls under OSHA's current policy.

III. OSHA's Interpretation of Economic Feasibility in 29 CFR 1910.95(b)(1) and 1926.52(b)

The legal landscape concerning the interpretation of § 1910.95(b)(1) (and therefore of the substantively identical § 1926.52(b)) has dramatically changed since the Ninth Circuit's *Castle & Cooke*, and the Commission's *Sherwin-Williams* decisions. In *Martin v. OSHRC (CF & I)*, 499 U.S. 144, 150–55 (1991), the Supreme Court established that the Secretary is the administrative actor responsible for issuing authoritative interpretations of OSHA standards, while the Commission's role, as neutral arbiter, is to determine whether the Secretary's interpretation is reasonable. The Commission is not, as the Ninth Circuit believed, free to exercise de novo authority to interpret a standard, and a court of appeals is to defer to the Secretary's interpretation if reasonable, not the Commission's. Although OSHA has for some time acquiesced as a matter of enforcement policy in the Commission's cost-benefit test for determining the economic feasibility of administrative and engineering controls under the noise standards, the agency has decided that this approach is inconsistent with the standards. For the reasons stated below, OSHA has concluded that engaging in cost-benefit analysis under §§ 1910.95(b)(1) and 1926.52(b) is contrary to the plain meaning of *feasibility* and thwarts the safety and health purposes of the OSH Act and the standard. Therefore, OSHA proposes to consider administrative or engineering controls economically feasible under the noise standards when the cost of these controls will not threaten the cited employer's ability to stay in business or when the threat to viability results from the employer's having lagged behind the industry in providing safety and health protection for employees.

The language of the noise standards frames the analysis. The Supreme Court has held that the word *feasible* has the plain meaning of "capable of being done" and does not permit cost-benefit analysis. The noise standards require that "feasible administrative or engineering controls" be utilized when noise is excessive. In *ATMI*, the Supreme Court considered the meaning of the word *feasible* in the context of section 6(b)(5) of the OSH Act, 29 U.S.C.

655(b)(5), which requires that the Secretary set standards for toxic substances at the level which most adequately assures, "to the extent feasible," that no employee will suffer material impairment of health. The Court found that the plain meaning of *feasible* is "capable of being done;" "[t]hus, § 6(b)(5) directs the Secretary to issue the standard that '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.'" *ATMI*, 452 U.S. at 508–09. The Court further concluded that Congress's use of the word *feasible* in section 6(b)(5) "defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." *Id.* at 509. Thus, the feasibility analysis required by section 6(b)(5) necessarily rules out a balancing of costs and benefits. "[C]ost-benefit analysis by OSHA is not required by the statute because feasibility analysis is." *Ibid.*

The Court's analysis in *ATMI* governs the interpretation of §§ 1910.95(b)(1) and 1926.52(b). By requiring *feasible administrative or engineering controls* to be utilized when noise levels exceed those specified in Table G–16, the standard directs employers to use those controls capable of reducing exposures. The cost of such controls is relevant only to the extent that it is so high as to threaten the employer's ability to stay in business. This construction is supported not only by the plain meaning of *feasible*, but also by the canon of construction that regulatory language should be given the same meaning as the same language appearing in the statute. See *Sun Ship*, 11 BNA OSHC at 1032.

The 1984 *Sherwin-Williams* decision adopting a cost-benefit requirement for the general industry noise standard despite *ATMI* is plainly wrong and cannot stand. The Commission was unable to agree on a rationale for overruling *Sun Ship*, in which the majority had held that the Supreme Court's interpretation of *feasible* in section 6(b)(5) controlled the meaning of same term in § 1910.95(b)(1). Moreover, neither Commissioner Buckley's majority opinion nor Chairman Rowland's separate concurrence is persuasive.

Commissioner Buckley identified two factors which he believed supported rejecting the plain meaning of "feasible" in favor of a cost-benefit approach. The first factor, taken from the Ninth Circuit's *Castle & Cooke* decision, is that

ATMI did not address whether section 3(8) of the OSH Act, which defines an occupational safety or health standard, in part, as one requiring "reasonably necessary" measures, requires a cost-benefit analysis for standards issued under provisions other than section 6(b)(5). The Ninth Circuit inferred from the Court's failure to address this issue that *ATMI* did not require the Commission to abandon a cost-benefit approach to a noise standard issued under section 6(a). *Donovan v. Castle & Cooke Foods*, 692 F.2d at 649. The Ninth Circuit's reasoning, however, is seriously flawed.

As a threshold matter, the Secretary has rejected the notion that section 3(8)'s "reasonably necessary" language imposes a requirement for cost-benefit analysis even for standards not subject to section 6(b)(5)'s feasibility constraint. In response to litigation arising under the lockout/tagout standard, the Secretary concluded that section 3(8) does not require a formal cost-benefit analysis—in which all the costs and benefits of a particular action are identified, quantified and compared—for safety standards, which are issued under section 6(b) but are not subject to section 6(b)(5). 58 FR 16612, 16622, Mar. 30, 1993 (Supplemental Statement of Reasons); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 37 F.3d 665, 669–70 (D.C. Cir. 1994). The Secretary's interpretation of section 3(8), as published in her **Federal Register** supplemental statement, is entitled to deference as long as it is reasonable. *United States v. Mead Corp.*, 553 U.S. 218, 226–27 (2001).

Moreover, cost-benefit analysis is inconsistent with the text of § 1910.95(b)(1). Section 6(a) required the Secretary to promulgate the existing Walsh-Healey noise standard as an OSHA standard unless it would not result in improved safety or health. OSH Act, 29 U.S.C. 655(a). The statutorily mandated standard requires *feasible* controls to be used to reduce exposure. To read section 3(8) as imposing a requirement that controls be used only if the benefits justify the cost would eviscerate the *feasible* controls requirement that section 6(a) required the Secretary to promulgate. The standard makes administrative and engineering controls the primary means of compliance; only if such controls are *infeasible*, *i.e.*, so costly as to imperil the employer's long-term viability, may employers use hearing protectors. Section 1910.95(b)(1); *Forging Indus.*, 773 F.2d at 1440.

Yet the Commission's cost-benefit approach completely reverses this

priority; hearing protectors may be used unless they cost more than the engineering controls necessary to achieve an equivalent noise reduction. *Castle & Cooke*, 5 BNA OSHC at 1441. Under the Commission's interpretation, hearing protectors are presumptively appropriate, even if administrative and engineering controls are affordable and effective. Just as Congress could not have intended the general language of section 3(8) to countermand the specific feasibility requirement of section 6(b)(5), *ATMI*, 452 U.S. at 513, Congress could not have understood that section 3(8) would eviscerate the specific requirements of the existing federal standards that the Secretary was required by section 6(a) to adopt during the two-year period following the OSH Act's effective date. For § 1910.95(b)(1), no less than standards promulgated under section 6(b)(5), the term "feasible" defines "the basic relationship between costs and benefits by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable * * *. Thus, cost-benefit analysis * * * is not required by the statute because feasibility analysis is." *ATMI*, 452 U.S. at 509.

The second factor identified by Commissioner Buckley for departing from the plain meaning of "feasible" in § 1910.95(b)(1) is even less persuasive. Although the Commissioner found no regulatory or adjudicative history indicating how the standard was interpreted under the Walsh-Healey Act, he assumed that government contractors bidding on Walsh-Healey Act contracts would not have construed the term "feasible" in accordance with the dictionary definition, but rather would have understood the term to allow for cost-benefit analysis. *Sherwin-Williams*, 11 BNA OSHC at 2109–10.

Commissioner Buckley's assumptions about the competitive bidding process under the Walsh-Healey Act are both irrelevant and unfounded. They are irrelevant because § 1910.95(b)(1), was promulgated under § 6(a) of the OSH Act as an "occupational safety and health standard." 29 U.S.C. 655(a). The Secretary is responsible for issuing authoritative interpretations of OSHA standards, and she is not bound by the perspective of a hypothetical government contractor bidding on a Walsh-Healey contract. *CF & I*, 499 U.S. at 150–55. The Secretary's interpretation of § 1910.95(b)(1) must be given effect if it is reasonable, "that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Id.* at 150–51. Construing the standard to require that

administrative or engineering controls be used as long as they do not threaten the employer's ability to stay in business is consistent with the standard's plain meaning and its purpose of protecting employee health by achieving reductions in noise exposure. It is the Secretary's reasonable construction of the standard, which constitutes an exercise of delegated law-making authority when embodied in an OSHA citation, that is entitled to deference, not the Commission's interpretation. *Id.* at 150–55. Speculation about how government contractors might have interpreted the standard in bidding on a Walsh-Healey contract is wholly irrelevant.

In any event, Commissioner Buckley's assumption as to how the "feasible" controls requirement would have been interpreted in the federal procurement context is entirely unfounded. First, as the commissioner himself admitted, there is nothing in the regulatory or adjudicatory history of the Walsh-Healey noise standard to support an assumption that *feasible* was not understood by government contractors to have its plain, ordinary meaning. Commissioner Buckley's interpretation thus violated the fundamental canon of construction that words are to be interpreted in accordance with their normal meaning unless there is specific evidence to the contrary. Furthermore, the notion that prospective contractors would have understood that they should include the costs of engineering controls only if they determined that the benefits outweighed the costs is completely contrary to basic principles of government procurement. *Sherwin-Williams*, 11 BNA OSHC at 2109–10. The competitive process requires that all prospective contractors bid on the same requirements; the process cannot possibly permit some bidders to decide for themselves whether engineering controls are required, or not required. Thus, *feasible* controls must have been understood—by both the government and its contractors—in accordance with its plain meaning.

OSHA's current enforcement policy on § 1910.95(b)(1) closely tracks the Commission's cost-benefit approach. Where PPE and a hearing conservation program are cheaper, the current enforcement policy allows employers to rely on them, rather than administrative or engineering controls, unless noise levels are so high that PPE will not reduce noise exposure to acceptable levels.⁵ FOM, CPL 02–00–148, § XI.B.

⁵ In the terminology economists normally employ, the current enforcement policy would be better

The policy provides, moreover, that PPE may be used up to 100 dBA. *Ibid.* As discussed above, this policy is inconsistent with the noise standards' explicit requirement that *feasible* administrative and engineering controls be used to reduce noise exposures to the level set by the standard and that PPE be used if administrative and engineering controls are unable to reduce noise to permitted levels. The standards' reliance on feasible engineering and administrative controls as the primary means of reducing noise exposures is consistent with OSHA's traditional adherence to a hierarchy of preferred controls, and is supported by good industrial hygiene practice and OSHA's experience in assuring that workers have a healthy workplace. *See, e.g.*, OSHA, 29 CFR parts 1915, 1917–18 & 1926, "Occupational Exposure to Hexavalent Chromium," Final Rule, 71 FR 10100, 10345, Feb. 28, 2006 (discussing methods of compliance for reducing exposures to hexavalent chromium). Hearing protectors are less reliable than administrative and engineering controls in reducing noise levels and maintaining such reductions over time. OSHA's current enforcement policy virtually eliminates the requirement to use administrative or engineering controls since such controls almost always cost more than hearing protectors. Furthermore, the current policy thwarts the safety and health purposes of the OSH Act by rarely requiring administrative and engineering controls even though these controls are generally more effective than hearing protectors in reducing noise exposure.

Accordingly, OSHA now proposes to interpret §§ 1910.95(b)(1) and 1926.52(b) in conformity with the plain meaning of these provisions and with the safety and health purposes of the OSH Act. OSHA proposes to interpret the term *feasible* in these provisions as having the same meaning that the term has in section 6(b)(5) of the Act, *i.e.*, "capable of being done," or "achievable." OSHA also proposes to consider administrative or engineering controls economically feasible if they will not threaten the employer's ability to remain in business or if the threat to viability results from the employer's having failed to keep up with industry safety and health standards. OSHA further intends to change its enforcement policy to authorize the issuance of citations requiring the use of administrative or engineering controls when these controls are feasible in

characterized as a least-cost, rather than a benefit-cost, approach.

accordance with this interpretation. OSHA welcomes comments from interested parties on this proposed interpretation.

Authority: 29 U.S.C. 655; 29 CFR 1910.95(b)(1) & 1926.52(b); Secretary's Order 5–200, 72 FR 31160, June 5, 2007.

Signed at Washington, DC, October 12, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–26135 Filed 10–18–10; 8:45 am]

BILLING CODE 4510–29–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R09–OAR–2010–0683; FRL–9213–7]

Source Specific Federal Implementation Plan for Implementing Best Available Retrofit Technology for Four Corners Power Plant: Navajo Nation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to promulgate a source specific Federal Implementation Plan (FIP) requiring the Four Corners Power Plant (FCPP), located on the Navajo Nation, to achieve emissions reductions required by the Clean Air Act's Best Available Retrofit Technology (BART) provision. In this action, EPA is proposing to require FCPP to reduce emissions of oxides of nitrogen (NO_x) and particulate matter (PM). These pollutants are significant contributors to visibility impairment in the numerous mandatory Class I Federal areas surrounding FCPP. For NO_x emissions, EPA is proposing to require FCPP to meet an emission limit of 0.11 lb/MMBtu, representing an 80% reduction from current NO_x emissions. This NO_x limit is achievable by installing and operating Selective Catalytic Reduction (SCR) technology on Units 1–5. For PM, EPA is proposing to require FCPP to meet an emission limit of 0.012 lb/MMBtu for Units 1–3 and 0.015 lb/MMBtu for Units 4 and 5. These emissions limits are achievable by installing and operating any of several equivalent controls on Units 1–3, and through proper operation of the existing baghouse on Units 4 and 5. EPA is proposing to require FCPP to meet a 10% opacity limit on Units 1–5 to ensure proper operation of the PM controls. EPA is requesting comment on

whether APS can satisfy BART on Units 1–3 by operating the existing venturi scrubbers to meet an emission limit of 0.03 lb/MMBtu with a 20% opacity limit. EPA is also proposing to require FCPP to comply with a 20% opacity limit on its coal and material handling operations.

DATES: Comments must be submitted no later than December 20, 2010.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2010–0683, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions.

E-mail: r9air_fcpcbart@epa.gov.

Mail or deliver: Anita Lee (Air-3), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through <http://www.regulations.gov> or e-mail. <http://www.regulations.gov> is an “anonymous access” system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Hearings: EPA intends to hold public hearings in two locations in New Mexico to accept oral and written comments on the proposed rulemaking. EPA anticipates these hearings will occur in Shiprock and Farmington. EPA will provide notice and additional details at least 30 days prior to the hearings in the **Federal Register**, on our Web site, and in the docket.

Docket: The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in

either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Anita Lee, EPA Region IX, (415) 972–3958, r9air_fcpcbart@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “we”, “us”, and “our” refer to EPA.

Table of Contents

- I. Background
 - A. Statutory and Regulatory Framework for Addressing Visibility
 - B. Statutory and Regulatory Framework for Addressing Sources Located in Indian Country
 - C. Statutory and Regulatory Framework for BART Determinations
 - D. Factual Background
 - 1. Four Corners Power Plant
 - 2. Relationship of NO_x and PM to Visibility Impairment
- II. EPA's Proposed Action Based on Five Factors Test
 - A. A BART Determination for FCPP Is Necessary or Appropriate
 - B. Summary of Proposed BART Emission Limits
 - C. Available and Feasible Control Technologies and Five Factor Analysis for NO_x Emissions
 - i. Factor 1: Cost of Compliance
 - ii. Factor 2: Energy and Non-Air Quality Impacts
 - iii. Factor 3: Existing Controls at the Facility
 - iv. Factor 4: Remaining Useful Life of Facility
 - v. Factor 5: Degree of Visibility Improvement
 - D. Available and Feasible Control Technologies and Five Factor Analysis for PM Emissions
 - i. Factor 1: Cost of Compliance
 - ii. Factor 2: Energy and Non-Air Quality Impacts
 - iii. Factor 3: Existing Controls at the Facility
 - iv. Factor 4: Remaining Useful Life of Facility
 - v. Factor 5: Degree of Visibility Improvement
- III. EPA's Proposed Action on Material Handling Limits
- IV. Administrative Requirements
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use