

Micki Jay ("Jay")
 Kenneth Jensen ("Jensen")
 Paul Johnson ("Johnson")
 Tacie Jones ("Jones")
 Joy ("Joy")
 John Kaercher ("Kaercher")
 Kas Kas ("Kas")
 Kipp ("Kipp")
 Paola Kipp ("P. Kipp")
 Jerry LeCompte ("LeCompte")
 Kurt Lennert ("Lennert")
 Loucks ("Loucks")
 Robert Love ("Love")
 R. Matthews ("Matthews")
 Catherine May ("May")
 Mike Mazur ("Mazur")
 Sean McGill ("McGill")
 Kathy Meadows ("Meadows")
 Managed Funds Association; Futures
 Industries Association; New York
 Mercantile Exchange; and CME Group Inc.
 ("MFA")
 Bret Morris ("Morris")
 Theresa Morris-Ramos ("Morris-Ramos")
 Scott Morosini ("Morosini")
 Timothy J. Muris and J. Howard Beales, III
 ("Muris")
 Navajo Nation Resolute Natural Resources
 Company and Navajo Nation Oil and Gas
 Company ("Navajo Nation")
 Laurie Nenortas ("Nenortas")
 James Nichols ("Nichols")
 Virgil Noffsinger ("Noffsinger")
 Noga ("Noga")
 Richard Nordland ("Nordland")
 National Propane Gas Association ("NPGA")
 Kerry O'Shea, ("O'Shea")
 Jeffery Parker ("Parker")
 Pamela Parzynski ("Parzynski")
 Brook Paschkes ("Paschkes")
 Brijesh Patel ("Patel")
 Stefanie Patsiavos ("Patsiavos")
 P D ("PD")
 Guillermo Pereira ("Pereira")
 James Persinger ("Persinger")
 Mary Phillips ("Phillips")
 Plains All American Pipeline, LLP ("Plains")
 Platts ("Platts")
 Betty Pike ("Pike")
 Petroleum Marketers Association of America
 ("PMAA")
 Joel Poston ("Poston")
 Radzicki ("Radzicki")
 Gary Reinecke ("Reinecke")
 Steve Roberson ("Roberson")
 Shawn Roberts ("Roberts")
 Linda Rooney ("Rooney")
 Mel Rubinstein ("Rubinstein")
 secret ("secret")
 Joel Sharkey ("Sharkey")
 Society of Independent Gasoline Marketers of
 America ("SIGMA")
 Daryl Simon ("Simon")
 David Smith ("D. Smith")
 Donald Smith ("Do. Smith")
 Mary Smith ("M. Smith")
 Donna Spader ("Spader")
 Stabila ("Stabila")
 Alan Stark ("A. Stark")
 Gary Stark ("G. Stark")
 Robert Stevenson ("Stevenson")
 Ryan Stine ("Stine")
 Maurice Strickland ("Strickland")
 Sutherland, Asbill, and Brennan, LLP
 ("Sutherland")
 L.D. Tanner ("Tanner")

Dennis Tapalaga ("Tapalaga")
 Tennessee Oil Marketers Association
 ("TOMA")
 Theisen ("Theisen")
 Greg Turner ("Turner")
 U.S. citizen ("U.S. citizen")
 U.S. Department of Justice, Criminal Fraud
 Section ("USDOJ")
 Jeff Van Hecke ("Van Hecke")
 Louis Vera ("Vera")
 Thomas Walker ("Walker")
 Victoria Warner ("Warner")
 Lisa Wathen ("Wathen")
 Watson ("Watson")
 Gary Watson ("G. Watson")
 Joseph Weaver ("Weaver")
 Webb ("Webb")
 Douglas Willis ("Willis")
 [FR Doc. E8-19154 Filed 8-18-08; 8:45 am]
 BILLING CODE 6750-01-S

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA-2008-0031]

RIN 1218-AC42

Clarification of Remedy For Violation of Requirements To Provide Personal Protective Equipment and Train Employees

AGENCY: Occupational Safety and Health
Administration (OSHA), U.S.
Department of Labor.

ACTION: Proposed rule.

SUMMARY: In this rulemaking, OSHA is proposing to amend its regulations to add language clarifying that noncompliance with the personal protective equipment (PPE) and training requirements in safety and health standards in these parts may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is proposed in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or

training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify the remedy for violations of these requirements.

DATES: *Written comments:* Comments must be submitted (postmarked, sent or received) by September 18, 2008.

Hearing Requests: Any request for a hearing must also be submitted by September 18, 2008. See **ADDRESSES** section below for special procedures for submitting hearing requests.

ADDRESSES: *Written comments:* You may submit comments, identified by docket number OSHA-2008-0031, or regulatory information number (RIN) 1290-AA23, by any of the following methods:

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

Fax: If your comments, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket Number OSHA-2008-0031, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.-4:45 p.m., e.t.

Hearing Requests: A hearing request may only be submitted by one of the following methods: Electronically, fax, express mail, hand delivery, messenger or courier service. OSHA will not consider hearing requests sent by regular mail.

Instructions: All submissions must include the docket number [OSHA-2008-0031] or the regulatory information number (RIN) 1290-AA23, for this rulemaking. All comments, including any personal information you provide, are placed in the public without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, plus additional information on the

rulemaking process, see the "Public Participation" heading in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read or download comments and materials submitted in response to this **Federal Register** notice, go to docket number OSHA-2008-0031, at <http://regulations.gov> or the OSHA Docket Office at the address above. All comments and submissions are listed in the <http://regulations.gov> index, however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web page. All comments and submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

For information on reading or downloading exhibits referenced in this **Federal Register** notice, see the "References and exhibits" and "Public Participation" headings in the **SUPPLEMENTARY INFORMATION** section of this document.

Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information, also is available at OSHA's Web page at <http://www.osha.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Ashley, OSHA Office of Communications, Room N-3647; U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693-1999.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Table of Contents
- II. Background
- III. Legal Authority
- IV. Summary and Explanation of the Proposed Rule
- V. Advisory Committee on Construction Safety and Health
- VI. Preliminary Economic Analysis
- VII. Regulatory Flexibility Certificate
- VIII. Environmental Impact Assessment
- IX. Federalism
- X. Unfunded Mandates
- XI. OMB Review Under the Paperwork Reduction Act
- XII. State Plan States
- XIII. Public Participation

II. Background

A. Personal Protective Equipment (PPE)

The use of personal protective equipment, including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards in Parts 1910 through 1926 require employers to provide PPE to

their employees and ensure the use of PPE. Some general standards require the employer to provide appropriate PPE wherever necessary to protect employees from hazards. *See, e.g.*, §§ 1910.132(a); 1915.152(a); 1926.95(a). Other standards require the employer to provide specific types of PPE or to provide PPE in specific circumstances. For example, the logging standard requires employers to provide cut-resistant leg protection to employees operating a chainsaw, 29 CFR 1910.266(d)(1)(iv); the coke oven emissions standard requires the employer to provide flame-resistant clothing and other specialized protective equipment, § 1910.1029(h); and the methylene chloride standard requires the employer to provide protective clothing and equipment which is resistant to methylene chloride, § 1910.1052(h).

OSHA's respirator standards follow a similar pattern. Section 1910.134, revised in 1998, requires employers to provide respirators "when such equipment is necessary to protect the health of the employee." § 1910.134(a)(2). The section includes additional paragraphs requiring employers to establish a respiratory protection program, select an appropriate respirator based upon the hazard(s) to which the employee is exposed, provide a medical examination to determine the employee's ability to use a respirator, fit-test the respirator to the individual employee and take other actions to ensure that respirators are properly selected, used and maintained. *E.g.*, § 1910.134 (c) through (m); 63 FR 1152-1300 January 8, 1998 (Respiratory Protection rule). A variety of other standards require the employer to provide respirators when employees are or may be exposed to specific hazardous substances. *See, e.g.*, § 1910.1101(g)(asbestos); § 1910.1027(g)(cadmium). The 1998 Respiratory Protection rule revised the substance-specific standards then in existence to simplify and consolidate their respiratory protection provisions. 63 FR 1265-68. Except for a limited number of respirator provisions unique to each substance-specific standard, the regulatory text on respirators for these standards is virtually the same. The construction industry asbestos standard's initial respirator paragraph, which is virtually identical to the initial respirator paragraphs in most substance-specific standards, states as follows:

§ 1926.1101 Asbestos

* * * * *

(h) *Respirator protection.* (1) *General.* For employees who use respirators required by this section, the employer must provide

respirators that comply with the requirements of this paragraph. Respirators must be used during: [specific work operations involving exposure to asbestos]. (2) *Respirator program.* (i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii), and (f) through (m).

B. Training

Training is also an important component of many OSHA standards. Training is necessary to enable employees to recognize the hazards posed by toxic substances and dangerous work practices and protect themselves from these hazards. Virtually all of OSHA's toxic-substance standards, such as the asbestos, vinyl chloride, lead, chromium, cadmium and benzene standards, require the employer to train or provide training to employees who may be exposed to the substance. Many safety standards also contain training requirements. The lockout/tagout standard, for example, requires the employer to provide training on the purpose and function of the energy control program, § 1910.147(c)(7), and the electric power generation standard requires that employees be trained in and familiar with pertinent safety requirements and procedures. § 1910.269(a)(2).

The regulatory text on training varies from standard to standard. Some standards explicitly state that "each employee shall be trained" or "each employee shall receive training" or contain similar language that makes clear that the training must be provided to each individual employee covered by the requirement. *E.g.*, Process safety management, § 1910.119(g)(i) (each employee shall be trained); Lockout/tagout, § 1910.147(c)(7)(A) (each employee shall receive training); Vinyl chloride, § 1910.1017(j) (each employee shall be provided training); General safety and health provisions, § 1926.20(b) (instruct each employee); Fall protection, § 1926.503(a) (provide a training program for each employee).

Other standards contain a slight variation; they state that "employees shall be trained" or that the employer must "provide employees with information and training." *E.g.*, Electric power generation, § 1910.269(a)(2) (employees shall be trained); Benzene, § 1910.1028(j)(3)(i) (provide employees with information and training); Hazard communication, § 1910.1200(h) (same).

Finally, some standards state that the employer must "institute a training program [for exposed employees] and ensure their participation in the program" or contain similar language.

For example, the asbestos standard's initial training section states that "[t]he employer shall institute a training program for all employees who are exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit and ensure their participation in the program." § 1910.1001(j)(7). See also, e.g., § 1926.1101(k)(9) (Construction asbestos); § 1910.1025(l) (Lead); § 1910.1027(m)(4) (Cadmium).

The Agency interprets its respirator and training provisions to impose a duty upon the employer to comply for each and every employee subject to the requirement regardless of whether the provision expressly states that respirators or training must be provided to "each employee." Neither the Commission nor any court has ever suggested that an employer can comply with the respirator and training provisions in safety and health standards by providing respirators to some employees covered by the requirement but not others, or that the employer can train some employees covered by the training requirement but not others. The basic nature of the employer's obligation is the same in all of these provisions; each and every employee must receive the required protection.

The agency therefore believes that a separate violation occurs for each employee who is not provided required PPE or training, and that a separate citation item and proposed penalty may be issued for each. However, as discussed in the Legal Authority section, a recent decision of the Review Commission in the *Ho* case suggests that minor variations in the wording of the provisions affect the Secretary's authority to cite and penalize separate violations. *Secretary of Labor v. Erik K. Ho, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (Rev. Comm'n 2003), *aff'd*, *Chao v. OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). The agency is proposing to amend its standards to make it unmistakably clear that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation.

Where an employer commits multiple violations of a single standard or regulation, OSHA either groups the violations and proposes a single penalty, or cites and proposes a penalty for each discrete violation. Although "grouping" is the more common method, OSHA proposes separate "per-instance" penalties in cases where the resulting heightened aggregate penalty is appropriate to deter flagrant violators

and increase the impact of OSHA's limited resources. Per-employee penalties for violations of PPE and training requirements are no different in kind than other types of per-instance penalties the agency has proposed under this policy.

Accordingly, OSHA has preliminarily determined to amend the respirator and training provisions in the standards in parts 1910 through 1926 to: (1) Revise the language of the initial respirator paragraphs adopted in the 1998 respiratory protection rule to explicitly state that the employer must provide each employee an appropriate respirator and implement a respiratory protection program for each employee, (2) revise the language of those initial training paragraphs that require the employer to institute or provide a training program to explicitly state that the employer must train each employee, and (3) add a new section to the introductory subparts of each part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each employee who does not receive the required PPE or training may be considered a separate violation.

III. Legal Authority

A. Introduction

Section 6(b) of the Act sets forth the procedures the Secretary must follow in promulgating, modifying or revoking an occupational safety or health standard. 29 U.S.C. 655(b). These procedures include publication of a proposed rule and an opportunity for notice and comment prior to promulgation of a final rule. Although the proposed amendments involved here are remedial and interpretive in that they merely clarify pre-existing obligations under safety and health standards, the agency is according the public a full opportunity to comment before taking final action.

The proposed amendments do not impose any new substantive requirements. The proposed language clarifies that the duty to provide personal protective equipment, including respirators, and training to employees is a duty owed to each employee covered by the requirement. This adds no new compliance burden; the nature of the employer's duty to protect each employee is inherent in the existing provisions. To comply with existing respirator and training provisions the employer must provide a respirator to each employee who needs respiratory protection and train each

employee who must be informed of job hazards. The employer cannot comply by leaving some employees without respiratory protection or leaving some employees untrained. The agency is proposing the new language to achieve greater consistency in the regulatory text of the various respirator and training provisions in parts 1910 through 1926, provide clearer notice of the nature of the employer's duty under existing respirator and training provisions, and address the Commission's interpretation that the language of some respirator and training provisions does not support per-employee citations and penalties.¹

B. General Principles Governing Per-Instance Penalties

Section 9(a) of the Act authorizes the Secretary to issue a citation when "an employer has violated a requirement of * * * any standard." 29 U.S.C. 658(a). A separate penalty may be assessed for "each violation." *Id.* at 666(a), (b), (c). "The plain language of the Act could hardly be clearer" in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (D.C. Cir. 2001).

What constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue. If the standard "prohibits individual acts rather than a single course of action," each prohibited act constitutes a violation for which a penalty may be assessed. *Secretary of Labor v. General Motors Corp., CPGC Oklahoma City Plant*, 2007 WL 4350896, 35 (GM) (Rev. Comm'n 2007); *Sanders Lead Co.* 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995). Applying this test, the Commission has held that the recordkeeping regulation's requirement to record each injury or illness is violated each time the employer failed to record an injury or illness, *Secretary*

¹ Before OSHA can issue a new more protective standard, the agency must find that the hazard being regulated poses a significant risk of material health impairment and that the new standard is reasonably necessary and appropriate to reduce that risk. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). OSHA must also show that the new standard is technologically and economically feasible, and cost effective. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1980). These requirements are not implicated in this rulemaking because the amendments merely clarify the obligations and remedies under the existing PPE and training provisions and add no additional requirements. See sections V. and VI. *infra*. The agency met its burden of showing significant risk, feasibility and cost effectiveness in promulgating the existing PPE and training requirements.

of *Labor v. Caterpillar Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2172–73 (Rev. Comm'n 1993); the machine guarding standard's requirement for point-of-operation guards on machine parts that could injure employees is violated at each unguarded machine, *Hoffman Constr. Co. v. Secretary of Labor*, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1975); the fall protection standard's requirement to guard floor and wall openings is violated at each location on a construction site where appropriate fall protection is lacking, *Secretary of Labor v. J.A. Jones Constr. Co.*, 15 O.S.H. Cas. (BNA) 2201, 2212 (Rev. Comm'n 1993); the trenching standard's shoring or shielding requirement is violated at each unprotected trench, *Secretary of Labor v. Andrew Catapano Enters., Inc.* 17 O.S.H. Cas. (BNA) 1776, 1778 (Rev. Comm'n 1996) and the electrical safety standard is violated at each location where non-complying electrical equipment is installed. *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1343 (D.C. Cir. 2002).

The failure to protect an employee is a discrete act for which a separate penalty may be assessed when the standard imposes a specific duty on the employer to protect individual employees:

Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

Secretary of Labor v. Hartford Roofing Co., 17 O.S.H. Cas. (BNA) 1361, 1365 (Rev. Comm'n 1995). In *Hartford Roofing*, the Commission held that abatement of an unguarded roof edge required the single action of installing a motion stopping system or line that would constitute compliance for all employees exposed to a fall. *Id.* at 1367. Accordingly, the failure to abate the hazard could be cited only once regardless of the number of exposed employees. *Ibid.* However, where the employer fails to protect employees from falls at several different locations in the same building, a violation exists at each such location. *J.A. Jones*, 15 O.S.H. Cas. (BNA) at 2212. Thus, what constitutes an "instance" of a violation varies depending upon the standard. "Per-instance" can mean per-machine, or per-injury, or per-location depending upon the nature of the employer's compliance obligation.

Per-employee violations are no different from other types of per-

instance violations. Just as the employer must ensure that electrical equipment is safe in each location where it is installed, *Staley*, 295 F.3d at 1343, the employer must ensure that each employee who requires a respirator or training receives it. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1366. The failure to provide an individual employee with an appropriate respirator is a discrete instance of a violation of the general respirator standard, 29 CFR 1910.134, because the standard requires an individual act for each employee:

As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violation. * * * [T]he condition or practice to which the standard is directed * * * [is] the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator.

17 O.S.H. Cas. (BNA) at 1366. *Hartford Roofing* reflects the guiding principle that provisions requiring the employer to "provide" respirators to employees because of environmental or other hazards to which they are exposed are intrinsically employee-specific because such provisions require protection for employees as individuals. The Commission reaffirmed this principle in subsequent cases. In *Secretary of Labor v. Sanders Lead Co.*, 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995), the Commission held that the lead standard's requirement for semiannual respirator fit-tests could be cited on a per-employee basis because it involved evaluation of individual employees' respirators under certain conditions peculiar to each employee. Furthermore, in *Catapano*, 17 O.S.H. Cas. (BNA) at 1780, the Commission indicated that the general construction training standard, § 1926.21(b)(2), clearly supported per-employee citations for each individual employee not trained. However, the Commission in *Catapano* found that the Secretary had not cited training violations on a per-employee basis, but rather, had impermissibly cited the employer for each inspection in which employees were found not to have been trained. Thus, the Commission affirmed only a single violation of the standard. *Ibid.*

In the *Ho* decision, the Commission veered from these principles and adopted an analysis focused on the presence or absence of certain specific words in the respirator or training provision at issue. 20 O.S.H. Cas. (BNA) at 1369–1380. Under this approach, the agency's ability to enforce respirator and training violations by per-employee citations in appropriate cases turns on

minor variations in the wording of the requirements.

Erik Ho, a Texas businessman, was cited for multiple violations of the construction asbestos respirator and training provisions. Ho's conduct was particularly flagrant. He hired eleven undocumented Mexican employees to remove asbestos from a vacant building without providing any of them with appropriate protective equipment, including respirators, and without training them on the hazards of asbestos. Ho persisted in exposing the unprotected, untrained employees to asbestos even after a city building inspector shut down the worksite, at which point Ho began operating secretly at night behind locked gates. The citations charged Ho with separate violations for each of the eleven employees not provided a respirator. The respirator provision then in effect stated, in relevant part, that "[t]he employer shall provide respirators and ensure that they are used * * * [d]uring all Class I asbestos jobs."

§ 1926.1101(h)(1)(i). Ho was also charged with separate violations for each of the eleven employees not trained in accordance with § 1926.1101(k)(9)(i) and (k)(9)(viii). Paragraph (k)(9)(i) requires the employer to "institute a training program for all [exposed] employees and * * * ensure their participation in the program;" paragraph (k)(9)(viii) states that "[t]he training program shall be conducted in a manner that the employee is able to understand * * * [and] the employer shall ensure that each such employee is informed of [specific hazard information]."

A divided Occupational Safety and Health Review Commission vacated all but one of the respirator and one of the training violations. According to the majority, the requirement to provide respirators and ensure their use involves the single act of providing respirators to the employees in the group performing the specified asbestos work. 17 O.S.H. Cas. (BNA) at 1372. Thus, the majority concluded, "the plain language of the standard addresses employees in the aggregate, not individually." *Ibid.* The majority reached this conclusion despite acknowledging that various subparagraphs immediately following the cited provision required particularly employee-specific actions, such as fit-testing individual employees. *Ibid.* n. 12.

The majority adopted an equally narrow interpretation of the requirement in § 1926.1101(k)(9)(i) to "institute a training program" for all [exposed] employees and ensure their participation in the program."

According to the majority, this language requires the employer to have a single training program for all exposed employees and imposes a single duty to train employees generally. *Id.* at 1374. Although paragraph (k)(9)(viii) explicitly states that, “the employer shall ensure that each such employee is informed of [specific hazard information],” the majority found that “the mere use of the terminology ‘each such employee’ under (k)(9)(viii) does not demonstrate that these [training] provisions define the relevant workplace exposure in terms of exposure of individual employees.” *Ibid.* One Commissioner dissented, arguing that the plain wording of the respirator and training provisions authorizes OSHA to treat as a discrete violation each employee not provided and required to use an appropriate respirator, and each employee not trained in asbestos hazards. *Id.* at 1380–86 (Rodgers, Comm’r dissenting).

A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the result reached by the Commission, in part on different grounds than those articulated by the Commission majority. 401 F.3d at 368–376. The majority agreed with the Commission that the language of the respirator provision did not support per-employee penalties for Ho’s failure to provide a respirator to each employee who performed covered asbestos work. *Id.* at 373–74. Disagreeing with the Commission, the majority found that the language of the training provision permits per-employee citations. *Id.* at 372. However, the majority concluded that the agency’s decision to cite and penalize Ho for each untrained employee was unreasonable absent circumstances showing that different training actions would have been required because of uniquely employee-specific factors. *Id.* at 373. Judge Garza dissented. He read the respirator provision to require action on a per-employee basis. *Id.* at 379 (Garza J. dissenting). He also found no support for the majority’s “employee-specific unique circumstances” requirement under the training provision and concluded that, in any event, the requirement was met by Ho’s failure to train the employees and ensure that they understood the training. *Id.* at 379–80.

In two subsequent decisions, the Commission stated that respirator and training requirements worded slightly differently from those at issue in *Ho* may be cited on a per-employee basis. In *Secretary of Labor v. Manganas Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1998–99 (Rev. Comm’n 2007), the Commission indicated that the initial

respiratory protection paragraph of the 1993 construction lead standard, § 1926.62(f)(1), authorizes per-employee citations. That paragraph states, in relevant part, “[w]here the use of respirators is required under this section the employer shall provide * * * and assure the use of respirators which comply with the requirements of this paragraph.” The Commission distinguished *Ho* on the ground that the language in the cited provision requiring the employer to provide respirators “which comply with the requirements of this paragraph” means that compliance with paragraph (f)(1) is predicated upon compliance with all of the requirements in paragraph (f), including fit-testing requirements in another section of the paragraph that are uniquely employee-specific.² *Ibid.* In contrast, in *Ho* the language requiring compliance with such provisions immediately followed the cited initial provision, and the Commission declined to read the initial provision in light of the subsequent requirements. However, the Commission’s interpretation in *Manganas* that the lead standard authorizes per-employee violations may not be part of the holding of the case. After stating that the standard could be cited on a per-employee basis, the Commission then stated that it declined to determine whether *Manganas*’s failure to provide respirators to multiple employees constituted a single violation or multiple violations on the ground that the amount of the total penalty would not be affected under the circumstances of that case. *Id.* at 1999.

In December 2007, the Commission decided *GM*. 2007 WL 4350896. The case involved citations issued in 1991 charging *GM*, *inter alia*, with separate violations for each of six employees not trained in accordance with the lockout/tagout (LOTO) standard’s initial training paragraph, § 1910.147 (c)(7)(i). This paragraph states, in relevant part, that “[t]he employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees . . . (A) Each authorized employee shall receive training” The citation also charged *GM* with separate violations for each of twelve employees not retrained in accordance with the standard’s retraining provision, § 1910.147(c)(7)(iii)(B), which requires retraining whenever the employer is aware of inadequacies in the employee’s

²The current version of § 1926.62(f)(1) is virtually identical to the 1993 version at issue in *Manganas*. The provision now states in relevant part, “[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph.”

knowledge or use of the energy control procedures.

The Commission affirmed all of these per-employee violations. It held that the LOTO training paragraph, unlike the initial paragraph at issue in *Ho*, states that “each employee” is to be trained and therefore “imposes a specific duty on the employer to train each individual employee.” 2007 WL 4350896 at 36. The Commission also noted that other requirements in paragraph (c)(7) clarify the individualized nature of the training duty, such as the requirement to record the employees’ names and dates of training; that the preamble indicates that training involves consideration of employee-specific factors, and that “the core concept of lockout/tagout is *personal protection*.” *Id.* at 37 (emphasis added). The Commission did not refer to the portion of its *Ho* decision that rejected reliance on “each employee” language in the training requirement at issue there or that refused to consider any requirements in the standard other than the cited initial provision in deciding the nature of the employer’s duty.

For similar reasons, the Commission affirmed separate violations of the requirement to retrain whenever the employer becomes aware of deviations from or inadequacies in the employee’s knowledge or use of the energy control procedures. 29 CFR 1910.147 (c)(7)(iii)(B). This provision, the Commission found, “specifically targets deviations from or inadequacies in the employee’s knowledge or use of the energy control procedures, an occurrence that would trigger an employer’s obligation to retrain only that particular employee.” *Ibid.* (internal quotations omitted).

The Commission held that because the training provisions impose a specific duty on the employer to train each employee, it is irrelevant whether the employer may choose to provide the required training collectively, such as holding a single training session for all employees. *Id.* at 36. Under the wording of the standard, the Commission concluded, “any failure to train would be a separate abrogation of the employer’s duty to train each untrained employee.” *Ibid.* The Commission distinguished the *Ho* decision on the ground that the language at issue there, requiring “a training program for all employees,” pertained to a single group of employees collectively exposed to identical hazards. *Ibid.*

C. The Agency’s Interpretation

The Agency’s position is that despite minor differences in their wording, all respirator and training provisions in

safety and health standards authorize the assessment of a separate penalty for each employee not protected or trained. All of these provisions impose the same basic duty on the employer to protect employees individually—by providing personal protective equipment, such as a respirator, or by communicating hazard information through training. The individualized nature of the duty to comply does not change because of the presence or absence of the words “each employee,” or other words explicitly stating that the employer’s duty runs to each individual employee.

The employee-specific nature of the employer’s duty to provide PPE and training may be demonstrated in several different ways. First, the employer must take a separate abatement action for each individual employee. Where respirators are required, the employer must give a separate respirator to each individual employee. Where training is required, the employer must impart specific hazard information to each individual employee. The employee-specific nature of the training requirements is not altered because the employer may choose to conduct training in a group session. As the Commission held in *GM*, the duty to provide training is specific to each individual employee subject to the requirement. 2007 WL 4350896. See also *Ho*, 401 F.3d at 380 (Garza, J. dissenting). Thus regardless of how the training is conducted, the employer must ensure that each individual employee receives the required information at the appropriate time.

Second, unlike standards that do not permit per-employee citations, the PPE and training requirements logically permit the employer to comply for one employee and not another. In *Hartford Roofing*, the Commission found that installation of a motion stopping system at a roof edge was a single discrete action unaffected by the number of employees on the roof, and therefore could not be cited on a per-employee basis. 17 O.S.H. Cas. (BNA) at 1368–69. The employer could not have complied for one employee without also complying for all other employees exposed to the hazard.

By contrast, the actions necessary to comply with PPE and training requirements for one employee do not constitute compliance for any other employee. To fully comply with these requirements the employer must take as many abatement actions as there are employees to be protected. The fact that the employer may comply for one or a few employees, while leaving many others unprotected, strongly supports the availability of per-employee

citations. *Ho*, 401 F.3d at 379 (Garza, J. dissenting).

Finally, compliance with the PPE and training provisions requires the employer to account for differences among individual employees. To comply with the respirator requirements, the employer must, among other things, select respirators based on the specific respiratory hazards to which the employee is exposed and perform individual face-fit tests. *E.g.*, § 1910.134(d), (f). To comply with training requirements, the employer must ensure that each employee receives the required information. *E.g.*, § 1910.1001(j)(7)(iii) (asbestos). The employer must therefore account for factors such as when individual employees commence work subject to the training requirement and when they are available for training. Individual language differences also play a role. For example, if one employee understands only English, and another employee understands only Spanish, training must account for this difference. The actions necessary to fit a respirator to an individual employee’s face and to ensure that hazard information is received by an employee entail consideration of individual factors.

1. The *Ho* Decision

The Secretary believes that the Commission majority’s analysis in *Ho* is fundamentally flawed for several reasons discussed below. We discuss this issue because it is important to an understanding of the Secretary’s interpretation of her standards and of the proposed clarifying amendments to the PPE and training provisions. This rulemaking is intended to confirm the interpretation the Secretary intends when she promulgates standards of this kind.

a. The *Ho* majority’s analysis is inconsistent with the proper analytical framework outlined above. The requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1367. Eric *Ho* had eleven employees performing Class I asbestos work; therefore he had to provide eleven separate respirators and ensure that each of the eleven employees used the devices. *Ho* also had to ensure that each employee received training on asbestos hazards. The cited asbestos respirator and training provisions required analytically distinct acts for each employee, and therefore permitted per-employee citations.

b. The majority’s analysis does not reflect Commission precedent preceding *Ho*, or more recent Commission caselaw. *Hartford Roofing* reflects the guiding principle distinguishing between requirements that apply individually to each employee, such as respirator provisions, and those that address hazardous conditions affecting employees as a group. 17 O.S.H. Cas. (BNA) at 1366–67. *Manganas*, recognizes the principle that a requirement to provide respirators should be read in light of the associated provisions requiring individualized actions such as individual fit-testing. 21 O.S.H. Cas. (BNA) at 1998. And *GM* holds that a training requirement containing “each employee” language, which was also contained in the standard cited in *Ho*, imposes a specific duty to train each individual employee and may be cited on a per-employee basis. 2007 WL 4350896 at 24. *Ibid.*

c. The majority’s analysis amounts to a “magic words” test for determining the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary’s intention and does not make practical sense. There is only a minor difference between the respirator standard in *Manganas* and that in *Ho*. In *Manganas* the requirement to comply with the provisions of the standard as whole is stated explicitly in the standard’s first sentence, while in *Ho* the requirement was implicit in that sentence and was explicitly stated by the remaining provisions of the standard. Similarly, in *GM* the “each employee” language was in the first enumerated subsection of the training standard, while in *Ho* it was in a later subsection. As the preceding discussion makes clear, the agency did not intend that minor wording variations among various PPE and training provisions affect the agency’s ability to cite on a per-employee basis. Furthermore, there is no sound reason for distinguishing among the various PPE and training requirements based on minor differences in wording when all such requirements impose the same basic duty—provision of appropriate respirators and training to each employee covered by the requirements. The requirements at issue in *Ho* were not substantively different than those in *Manganas* and *GM*, and there should be no difference in the availability of per-employee citations under these requirements. Moreover, applying the *Ho* majority’s analysis creates perverse incentives in that an employer who provides no respirators at all is eligible for only a single citation under the respirator provision at issue in *Ho*,

while the employer who provides respirators, but fails to comply with the specific fit-test requirements is liable for per-employee violations.

Although the Secretary does not acquiesce in the *Ho* majority's interpretation of the asbestos respirator and training requirements at issue, the agency is proposing to modify the language of most of the initial respirator provisions adopted in the 1998 rule to expressly state that the employer must provide each employee an appropriate respirator. There are several reasons for this. First, although the Secretary believes that the respirator requirements clearly support per-employee citations, employers may have some uncertainty in light of the *Ho* decision. Second, although the Commission indicated in *Manganas* that language similar to that in the 1998 rule permits per-employee penalties, that aspect of the decision could be viewed as dicta. Finally, the 1998 respirator language is virtually the same in all standards with respirator requirements, and the same wording can be used to amend all of the standards. The agency intends the proposed new language to clearly convey that the respirator provisions in all OSHA standards impose a duty to provide an appropriate respirator to each individual employee that requires respiratory protection. The failure to provide an appropriate respirator to each such employee may expose the employer to per-employee citations.

OSHA also believes that the existing language of the training provisions in safety and health standards makes reasonably clear that the training obligation extends to each individual employee. Some of these provisions explicitly state that "each employee" must be trained. For example, the process safety management standard states that "each employee presently involved in operating a process * * * must be trained." 29 CFR 1910.119(g)(i); 29 CFR 1926.64(g) (construction); the logging standard states that "[t]he employer shall provide training for each employee," § 1910.266(i); the vinyl chloride standard states that "[e]ach employee engaged in vinyl chloride or polyvinyl chloride operations shall be provided training," § 1910.1017(j); and the chromium standard states that "[t]he employer shall ensure that each employee can demonstrate knowledge of [the § 1926.1126(j)(2) (construction)]. The Commission in *GM* held that provisions that explicitly require training for "each employee" may be cited separately for each employee not trained. *GM*, 2007 WL 4350896 at 36. Accordingly, these provisions require no amendatory action.

Some standards contain provisions stating that the employer must train "employees" exposed to the hazard addressed by the standard. For example, the hazardous waste operations standard states that "[a]ll employees [exposed to hazardous substances] shall receive training," § 1910.120 (e)(1); while the benzene standard states that "the employer shall provide employees with information and training at the time of their initial assignment to a work area where benzene is present." § 1910.1028(j)(3)(i). There is no substantive difference between the requirement to train "employees" exposed to a hazard and the requirement to train "each employee" exposed to the hazard. Under both formulations, the exposed employee is the subject of the training requirement, and compliance cannot be achieved unless and until each such employee receives the required training. Therefore provisions requiring the employer to provide training to employees exposed to a hazard, or ensure that employees receive training, or contain similar language, are plainly susceptible to per-employee citations in appropriate cases. *GM*, 2007 WL 4350896 at 36. No additional language is needed to clarify the intent of these provisions.

A minority of training provisions state that the employer must "institute a training program for all [exposed] employees and ensure their participation in the program" or contain similar language. *See e.g.*, § 1910.1001(j)(7)(i) (asbestos); § 1910.1018(o)(1)(i) (inorganic arsenic); § 1910.1025(l)(1)(iii) (lead); § 1910.1027(m)(4)(i) (cadmium). The Agency disagrees with the *Ho* majority's conclusion that this language requires the employer to have a training program, but does not impose a specific duty to train each exposed employee. The requirement that the employer "institute" the training program and ensure employee "participation" indicates that the focus of the provision is on the communication of hazard information to each employee. Furthermore, virtually all of the provisions requiring a training program also contain language explicitly stating that "each employee" must be informed of specific hazard information. *See* § 1910.1001(j)(7)(iii) (asbestos); § 1910.1018(o)(1)(ii) (inorganic arsenic); § 1910.1025(l)(1)(v) (lead); § 1910.1027(m)(4)(iii) (cadmium). Accordingly, the duty to "institute a training program" runs to each individual employee subject to the training requirement, and a discrete

violation occurs for each such employee who does not receive training.

Ho, however, states the Commission's current interpretation as to the meaning of the construction asbestos standard's training provision. The *Ho* majority considered the language in § 1926.1101(k)(9)(i) to impose a duty to have a training program for employees collectively. The failure to train each of a number of individual employees on asbestos hazards was therefore considered a single violation. Although the Secretary does not accept the *Ho* majority's interpretation, the decision may be a significant impediment to the consistent and effective enforcement of the asbestos standard and other standards that contain similar wording. Accordingly, OSHA preliminarily believes it is appropriate to amend those standards that require the employer to "institute a training program" to clarify that the employer's duty is to train each employee in accordance with the training program. The revised language expressly identifies the subject of the training requirement as "each employee" and therefore imposes a "specific duty on the employer to train each individual employee." *GM*, 2007 WL 430896 at 36. The agency intends the revision to clarify without question that the failure to train each individual employee covered by the training requirement may be considered a separate violation with a separate penalty.

IV. Summary and Explanation of the Proposed Rule

OSHA proposes to amend the standards in Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency as to the individualized nature of the employer's duty to provide personal protective equipment, including respirators, and training under standards in these parts. The proposed amendments include revisions to existing language as well as new sections to be added to the introductory subparts to Parts 1910 through 1926. The agency's reasons for proposing to clarify the intent of the personal protective equipment and training requirements are discussed in the preceding sections. The following discussion addresses the actual proposed language and how it is to be interpreted.

New Sections Added to Subpart A of Parts 1910 Through 1918, and Subpart C of Part 1926

OSHA proposes to add a new section to subpart A of parts 1910, 1915, 1917 and 1918, and to subpart C of part 1926. These subparts contain general

information about the scope and applicability of the standards in each part. The proposed new sections contain two paragraphs, which are identical for each new section. The first paragraph expressly states that standards in the part requiring employers to provide PPE, including respirators, impose a separate compliance duty to each employee required to use the PPE, and that each failure to provide PPE to an employee may be considered a separate violation. The new paragraph applies to all standards in the part that require provision of PPE, regardless of their wording. For example, § 1910.132 requires employers to provide PPE when needed, and also recognizes that an employer may allow an employee who voluntarily provides appropriate PPE he or she owns to use that PPE in place of the employer-provided equipment. See § 1910.132 (h)(6). The underlying obligation is the employer's, and each employee who lacks required PPE may be considered a separate violation. The second paragraph expressly states that standards in the part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. Each failure to train an employee may be considered a separate violation.

The new sections reflect the agency's intent, as discussed in the preceding sections of this preamble, that standards requiring the employer to protect employees by providing personal protective equipment or imparting hazard information through training impose a specific duty to protect each individual employee covered by the requirement. The new sections are placed in the introductory subparts of each part because the principle expressed in each section applies generally to all PPE and training standards in the part. OSHA intends the new sections to apply regardless of differences in wording between the PPE and training provisions in the various parts. The new sections provide unmistakable notice to employers that they are responsible for protecting each employee covered by the PPE and training standards, and consequently, that they may be subject to per-employee penalties for violations.

Revisions to Specific Respirator Paragraphs

OSHA proposes to revise the initial respiratory protection paragraph in a

number of standards in parts 1910, 1915 and 1926 to add language explicitly stating that the employer must provide an appropriate respirator to each employee required to use a respirator and implement a respiratory protection program for each such employee. The affected standards include the general respirator standard, § 1910.134, most general industry toxic-substance health standards in Subpart Z of part 1910, the shipyard employment asbestos standard, § 1915.1101, and the construction industry methylenedianiline, lead, asbestos, and cadmium standards, §§ 1926.60, 62, 1101, and 1127.

Section 1910.134 contains general respiratory protection requirements for General Industry (part 1910), Shipyards (part 1915), Marine Terminals (part 1917), Longshoring (part 1918), and Construction (part 1926). The existing section 1910.134(a)(2) states:

[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purposes intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which shall include the requirements outlined in paragraph (c) of this section.

OSHA proposes to revise the first and last sentences of paragraph (a)(2) of section § 1910.134. As proposed, the first sentence will read, "[r]espirators shall be provided by the employer to each employee when such equipment is necessary to protect the health of such employee" (emphasis added). As proposed, the last sentence will read, "[t]he employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section, for each employee required by this section to use a respirator" (emphasis added). Section 1910.134, as revised in this rulemaking, will apply to construction under section 1926.103.

OSHA proposes similar revisions to the initial respirator paragraphs of toxic substance standards in parts 1910, 1915 and 1926. The initial respiratory protection paragraph of the construction asbestos standard, which is virtually identical to all respirator sections proposed for revision in this rule, states, in relevant part:

Section 1926.1101 Asbestos

* * * * *

(h) *Respiratory protection.* (1) *General.* For employees who use respirators required by this section, the employer must provide respirators that

comply with the requirements of this paragraph. Respirators must be used during:

* * *

(2) *Respirator program.* (i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

OSHA proposes to revise the first sentence of paragraph (h)(1) of section 1926.1101 to state, "[f]or employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph" (emphasis added). The Agency proposes to revise paragraph (h)(2)(i) to state, "[t]he employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator" (emphasis added). Identical language revisions are proposed for the initial respirator paragraphs in other toxic-substance health standards; only the section and paragraph numbers are different.

OSHA preliminarily believes that these revisions are appropriate in light of the *Ho* majority's narrow interpretation of the asbestos respirator provision. OSHA is adding explicit "each employee" language to section 1910.134 and to the initial respirator paragraphs of toxic-substance health standards to address the Commission's concern that this language is necessary to inform employers of their specific duty to provide a respirator to each individual employee required to use a respirator. The revisions will improve these standards by conforming them to each other and to the revised § 1910.134, and contribute to a greater awareness of the importance of full compliance with these important requirements.

Revisions to Specific Training Paragraphs

OSHA proposes to revise those training provisions in safety and health standards that require the employer to institute or provide a training program for employees exposed to hazards. The Commission has indicated that the requirement in section 1926.1101(k)(9)(i) to "institute a training program for all employees who are likely to be exposed in excess of a PEL and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program" is not sufficiently explicit as to the employer's duty to train each employee. A number of other standards

include similarly worded training provisions. Accordingly, this proposed rule would revise section 1926.1101(k)(9)(i) to state, in relevant part, “[t]he employer shall train *each employee* who is likely to be exposed in excess of a PEL, and *each employee* who performs Class I through IV asbestos operations, in accordance with the requirements of this section” (emphasis added). Similar revised language is proposed for training sections in other standards that contain similar wording to section 1926.1101(k)(9)(i). The amended training provisions will conform to the training provision that the Commission in *GM* interpreted to permit per-employee citations.

V. Advisory Committee on Construction Safety and Health

The Advisory Committee on Construction Safety and Health (ACCSH) assists OSHA by providing comments and recommendations on proposed construction standards. Accordingly, OSHA provided ACCSH with a copy of the draft proposed construction amendments. ACCSH considered the proposed amendments on May 15, 2008 and made the following recommendation: “ACCSH recommends that OSHA adopt the proposed standard on Clarification of Remedy for Violation of Requirements To Provide Personal Protective Equipment and Training.”

VI. Preliminary Economic Analysis

OSHA has determined that the proposed standard is not an economically significant regulatory action under Executive Order (E.O.) 12866. E.O. 12866 requires regulatory agencies to conduct an economic analysis for rules that meet certain criteria. The most frequently used criterion under E.O. 12866 is that the rule will impose annual costs on the economy of \$100 million or more. Neither the benefits nor the costs of this rule exceed \$100 million.

OSHA has also determined that the proposed standard is not a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act. The Regulatory Flexibility Act of 1980 (RFA), as amended in 1996, requires OSHA to determine whether the Agency’s regulatory actions will have a significant impact on a substantial number of small entities. OSHA’s analysis, based on the analysis in this section of the Preamble as well as the later section “OMB Review Under the Paperwork Reduction Act” below, indicates that the proposed rule will not

have significant impacts on a substantial number of small entities.

The proposal inserts two new paragraphs in the general industry health and safety standards (Part 1910), the shipyard employment standards (Part 1915), the marine terminal standards (Part 1917), the longshoring standards (Part 1918), and the construction standards (Part 1926). The new provisions, identical in each part, are as follows:

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

These provisions do not require employers to provide any new or additional PPE, respiratory equipment, or training that is not already required in existing standards. (When the existing standards were promulgated, OSHA estimated the costs to employers of the PPE and respiratory equipment that would be required.) The proposed provisions therefore impose no new cost burden. It has, however, been OSHA’s enforcement policy in appropriate cases to cite employers for each separate violation regarding PPE, respiratory protection, and training. These provisions will serve to make explicit the Agency’s policy and warn employers of the potential cost and penalties of violations. The Agency’s economic analyses of its occupational and health standards assume employers’ full compliance for estimating the cost, or employer burden, of the standards it promulgates. For this reason, although the revisions may change the frequency or number of violations and amount of fines assessed, these are not material for estimating new costs to comply with a standard.

The Agency has also editorially revised provisions for respiratory protection, respiratory programs, and employee training across many existing standards. These editorial revisions

emphasize the employer’s responsibility to provide protection to *each* employee. For example, the existing language of § 1910.134(a)(2) “Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee” is replaced in the proposal by: “A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee.” These changes again do not impose any additional employer responsibility for providing respiratory protection, respiratory programs, or training for employees. And therefore there are no costs attributed to these proposed revisions. The existing standards and paragraphs that are affected by the new, substitute language are identified above in the Summary and Explanation part of this Preamble as well as the regulatory text following the Preamble.

The proposed rule is technologically feasible because it does not require employers to provide any additional equipment, such as respirators, or training not already required in existing standards. The Agency considered regulatory and non-regulatory alternatives to the proposed rule. Because the newly proposed paragraphs and proposed revisions to existing paragraphs merely clarify employer responsibilities, especially in regard to the Agency’s policy of issuing violations, non-regulatory alternatives are not an appropriate or relevant way to affect those changes and better inform employers. Finally, because the proposed rule does not impose new costs on employers, it is economically feasible.

VII. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (as amended), OSHA examined the regulatory requirements of the proposed rule to determine if they would have a significant economic impact on a substantial number of small entities. As indicated in section VI (“Preliminary Economic Analysis”) of this preamble, the proposed rule is expected to have no effect on compliance costs and regulatory burden for all employers, large and small. Accordingly, the Agency certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

VIII. Environmental Impact Assessment

OSHA has reviewed the proposed rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.), the regulations of the Council on

Environmental Quality (40 U.S.C. part 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). The Agency finds that the revisions included in the proposal would have no major negative impact on air, water or soil quality, plant or animal life, the use of land or other aspects of the environment.

IX. Federalism

OSHA has reviewed this proposed rule in accordance with E.O. 13132 regarding Federalism. E.O. 13132 requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. Additionally, E.O. 13132 provides for preemption of State law only if there is a clear Congressional intent for the Agency to do so. Any such preemption is to be limited to the extent possible.

Section 18 of the OSH Act, 29 U.S.C. 667, expresses Congress' clear intent to preempt State laws relating to issues on which Federal OSHA has promulgated occupational safety and health standards. A state can avoid preemption by obtaining Federal approval of a State plan for the development of such standards and their enforcement. Occupational safety and health standards developed by such State Plan States must, among other things, be at least as effective in providing safe and healthful employment and places of employment as the Federal standards.

The Agency concludes that this proposed rule complies with E.O. 13132. In States without State Plans, Congress has expressly provided for Federal preemption on issues addressed by an occupational safety and health standard. The final rule would preempt State law in the same manner as any OSHA standard. States with State Plans are free to develop their own policy options on the issues addressed by this proposed rule, provided their standards are at least as effective as the final rule. State comments are invited on this proposal and will be fully considered prior to promulgation of a final rule.

X. Unfunded Mandates

For the purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, et seq., as well as E.O. 12875, this proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than \$100 million.

XI. OMB Review Under the Paperwork Reduction Act of 1995

This proposed rule does not contain collection-of-information requirements subject to review by OMB under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. and OMB regulations at 5 CFR part 1320.

XII. State Plan States

Those States and Territories with OSHA-approved State Plans must revise their existing standards within six months of the publication date of the final rule or show OSHA why there is no need for action, e.g., because an existing State standard covering this area is "at least as effective as" the revised Federal standard.

XIII. Public Participation

Submission of Comments and Access to Docket

OSHA invites comment on all aspects of the proposed rule. The Agency will carefully review and evaluate these comments, information and data, as well as all other information in the rulemaking record, to determine how to proceed. You may submit comments in response to this document (1) electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments and other material must identify the Agency name and the OSHA docket number [OSHA-2008-0031] for this rulemaking. You may supplement electronic submissions by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit three copies to the OSHA Docket Office (see **ADDRESSES** section). The additional materials must clearly identify your electronic comments by name, date, and docket number [OSHA-2008-0031], so OSHA can attach them to your comments.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693-2350 (TTY (877) 889-5627).

Comments and submissions in response to this **Federal Register** notice are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth.

Exhibits referenced in this **Federal Register** document are posted at <http://www.regulations.gov>. Although all submissions in response to this **Federal Register** notice and exhibits referenced in this **Federal Register** notice are listed in the <http://www.regulations.gov> indexes, some information (e.g., copyrighted material) is not publicly available to read or download through those Web pages. All submissions and exhibits, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using <http://www.regulations.gov> to submit comments and access dockets is available at the Web page's User Tips link. Contact the OSHA Docket Office for information about materials not available through the Web page and for assistance in using the Internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information, also is available at OSHA's Web page at <http://www.osha.gov>.

Requests for Informal Public Hearings

Under section 6(b)(3) of the OSH Act (29 U.S.C. 655) and § 1911.11, interested parties may request an informal public hearing. If a timely hearing request is made, OSHA tentatively intends to schedule the hearing to commence in Washington, DC on October 3, 2008. Hearing requests must be submitted to the OSHA Docket Office by September 18, 2008, and must comply with the following:

1. Hearing requests may only be submitted by one of the following methods: electronically, fax, express mail, hand delivery, messenger or courier service (see **ADDRESSES** section above).
2. Hearing requests must include the name and address of the person submitting them;
3. The hearing requests must specify with particularity the provision of the proposed rule to which each objection is taken and the basis for the objection;
4. Each hearing request must be separately stated and numbered; and
5. The hearing requests must be accompanied by a detailed summary of the evidence proposed to be presented at the requested hearing.

If a hearing is held, OSHA will allow an additional 30-day period for submission of post-hearing comments before closing the public comment period.

List of Subjects**29 CFR Part 1910**

Chemicals, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

29 CFR Part 1915

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1917

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1918

Chemicals, Gases, Hazardous substances, Longshore and harbor workers, Occupational safety and health, Protective equipment.

29 CFR Part 1926

Chemicals, Construction industry, Gases, Hazardous substances, Occupational safety and health, Protective equipment.

Authority and Signature

This document was prepared under the direction of Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 941 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*), Secretary of Labor's Order No. 5-2007, and 29 CFR part 1911.

Signed at Washington, DC this 12th day of August, 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

The Proposed Standard

Parts 1910, 1915, 1917, 1918 and 1926 of Title 29 of the Code of Federal Regulations are hereby proposed to be amended as follows:

PART 1910—[AMENDED]**Subpart A—[Amended]**

1. The authority citation for subpart A of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of

Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), and 5-2007 (72 FR 31159), as applicable.

Sections 1910.7, 1910.8, and 1910.9 also issued under 29 CFR Part 1911. Section 1910.7(f) also issued under 31 U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106-113 (113 Stat. 1501A-222); and OMB Circular A-25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

2. A new section 1910.9 is added to read as follows:

§ 1910.9 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart G—[Amended]

3. The authority citation for subpart G of 29 CFR part 1910 is revised to read as follows:

Authority: Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 50017), or 5-2007 (72 FR 31159) as applicable; and 29 CFR part 1911.

4. In section 1910.95, paragraph (k)(1) is revised to read as follows:

§ 1910.95 Occupational noise exposure.

* * * * *

(k) * * *

(1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The

employer shall institute a training program and ensure employee participation in the program.

* * * * *

Subpart I—[Amended]

5. The authority citation for subpart I of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

6. In section 1910.134, paragraph (a)(2) is revised to read as follows:

§ 1910.134 Respiratory protection.

* * * * *

(a) * * *

(2) A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program, which shall include the requirements outlined in paragraph (c) of this section, for each employee required by this section to use a respirator.

* * * * *

Subpart L—[Amended]

7. The authority citation for subpart L of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160), as applicable, and 29 CFR Part 1911.

8. In section 1910.156, paragraph (f)(1)(i) is revised to read as follows:

§ 1910.156 Fire brigades.

* * * * *

(f) * * *

(1) * * *

(i) The employer must ensure that respirators are provided to, and used by, each fire brigade member, and that the respirators meet the requirements of 29 CFR 1910.134 for each employee required by this section to use a respirator.

* * * * *

Subpart Z—[Amended]

9. The authority citation for subpart Z of 29 CFR part 1910 is revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160), as applicable.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act, except those substances that have exposure limits listed in Tables Z-1, Z-2, and Z-3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z-1, Z-2, and Z-3 also issued under 5 U.S.C. 553, Section 1910.1000 Tables Z-1, Z-2, and Z-3 but not under 29 CFR part 1911 except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553 but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029 and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106-430, 114 Stat. 1901.

10. In section 1910.1001, paragraphs (g)(1), and (g)(2)(i), and (j)(7)(i) are revised to read as follows:

§ 1910.1001 Asbestos.

* * * * *

(g) Respiratory protection.

* * *

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with 29 CFR 134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(j) * * *

(7) * * *

(i) The employer shall train each employee who is exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

11. In section 1910.1003, paragraphs (c)(4)(iv) and (d)(1) are revised to read as follows:

§ 1910.1003 13 Carcinogens (4-Nitrophenyl, etc.).

* * * * *

(c) * * *

(4) * * *

(iv) Each employee engaged in handling operations involving the carcinogens addressed by this section must be provided with, and required to wear and use, a half-face filter type respirator for dusts, mists, and fumes. A respirator affording higher levels of protection than this respirator may be substituted.

* * * * *

(d) * * *

(1) Respiratory program. The employer must implement a respiratory protection program in accordance with § 1910.134(b), (c), (d) (except (d)(1)(iii) and (iv)), and (d)(3), and (e) through (m) for each employee required by this section to use a respirator.

* * * * *

12. In section 1910.1017, paragraphs (g)(1) and (g)(2) are revised to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(g) Respiratory protection. (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) Respirator program. The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), and (d)(3)(iii)(B)(1) and (2)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

13. In section 1910.1018, paragraphs (h)(1) introductory text, (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1018 Inorganic arsenic.

* * * * *

(h) * * *

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through

(d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(o) * * *

(1) * * *

(i) The employer shall train each employee who is subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is the possibility of skin or eye irritation from inorganic arsenic, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

14. In section 1910.1025, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1910.1025 Lead.

* * * * *

(f) * * *

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(l) * * *

(1) * * *

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level, or for whom the possibility of skin or eye irritation exists, in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

15. In section 1910.1026, paragraphs (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1026 Chromium (VI).

* * * * *

(g) * * *

(1) General. Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

* * * * *

(2) Respiratory protection program.

Where respirator use is required by this

section, the employer shall institute a respiratory protection program in accordance with § 1910.134 for each employee required to use a respirator.

* * * * *

16. In section 1910.1027, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1910.1027 Cadmium.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(m) * * *

(4) * * *

(i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of such program.

* * * * *

17. In section 1910.1028, paragraph (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1028 Benzene.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1) and (2)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

18. In section 1910.1029, paragraphs (g)(1) introductory text, (g)(2)(i), and (k)(1)(i) are revised to read as follows:

§ 1910.1029 Coke oven emissions.

* * * * *

(g) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator program.* The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(k) * * *

(1) * * *

(i) The employer shall train each employee who is employed in a regulated area in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

19. In section 1910.1030, paragraph (g)(2)(i) is revised to read as follows:

§ 1910.1030 Bloodborne pathogens.

* * * * *

(g) * * *

(2) * * *

(i) The employer shall train each employee with occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

20. In section 1910.1043, paragraphs (f)(1) introductory text, (f)(2)(i), and (i)(1)(i) are revised to read as follows:

§ 1910.1043 Cotton dust.

* * * * *

(f) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator

* * * * *

(i) * * *

(1) * * *

(i) The employer shall train each employee exposed to cotton dust in

accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

21. In section 1910.1044, paragraphs (h)(1) introductory text, (h)(2), and (n)(1)(i) are revised to read as follows:

§ 1910.1044 1,2-Dibromo-3-chloropropane.

* * * * *

(h) * * *

(1) *General.* For employees who are required to use respirators by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) *Respirator Program.* The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(n) * * *

(1) * * *

(i) The employer shall train each employee who may be exposed to DBCP in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

* * * * *

22. In section 1910.1045, paragraphs (h)(1) introductory text, (h)(2)(i), and (o)(1)(i) are revised to read as follows:

§ 1910.1045 Acrylonitrile.

* * * * *

(h) * * *

(1) *General.* For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

* * * * *

(2) * * *

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m) for each employee required by this section to use a respirator.

* * * * *

(o) * * *

(1) * * *

(i) The employer shall train each employee exposed to AN above the action level, each employee whose exposures are maintained below the action level by engineering and work practice controls, and each employee

subject to potential skin or eye contact with liquid AN in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

23. In section 1910.1047, paragraph (g)(1) introductory text and (g)(2) are revised to read as follows:

§ 1910.1047 Ethylene oxide.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(2) Respirator program. The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(i)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

24. In section 1910.1048, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1048 Formaldehyde.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii), (d)(3)(iii)(b)(1), and (2)), and (f) through (m) for each employee required by this section to use a respirator.

25. In section 1910.1050, paragraphs (h)(1) introductory text and (h)(2) are revised to read as follows:

§ 1910.1050 Methylenedianiline.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(2) Respirator program. The employer must implement a respiratory protection program in accordance with § 1910.134

(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

26. In section 1910.1051, paragraphs (h)(1) introductory text, (h)(2)(i), and (l)(2)(ii) are revised to read as follows:

§ 1910.1051 Butadiene.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (d) (except (d)(1)(iii), (d)(3)(iii), (B)(1), and (2)), and (f) through (m) for each employee required by this section to use a respirator.

(ii) The employer shall train each employee who is potentially exposed to BD at or above the action level or the STEL in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents such program.

27. In section 1910.1052, paragraphs (g)(1) introductory text and (g)(2)(i) are revised to read as follows:

§ 1910.1052 Methylene chloride.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134 (b) through (m) (except (d)(1)(iii)), for each employee required by this section to use a respirator.

PART 1915—[AMENDED]

28. The authority citation for part 1915 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33

U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

29. A new section 1915.9 is added, to read as follows:

§ 1915.9 Compliance duties owed to each employee.

(a) Personal protective equipment. Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) Training. Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart Z—[Amended]

30. In section 1915.1001, paragraphs (h)(1) introductory text, (h)(3)(i), and (k)(9)(i), are revised to read as follows:

§ 1915.1001 Asbestos.

(1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used in the following circumstances:

(i) Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134(b), (d), (e), and (f) for each employee required by this section to use a respirator.

(k) * * *
(9) * * *

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL and each employee who performs Class I through IV asbestos operations in accordance with the requirements of this section. Training shall be provided at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

31. In section 1915.1026, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1915.1026 Chromium (IV).

(f) * * *

(1) *General.* Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

(2) *Respiratory Protection Program.* Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134 for each employee required to use a respirator.

PART 1917—[AMENDED]

32. The authority citation for part 1917 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

33. A new section 1917.5 is added, to read as follows:

§ 1917.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and

related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1918—[AMENDED]

34. The authority citation for part 1918 is revised to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (72 FR 31160) as applicable; 29 CFR Part 1911.

Subpart A—[Amended]

35. A new section 1918.5 is added, to read as follows:

§ 1918.5 Compliance duties owed to each employee.

(a) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(b) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

PART 1926—[AMENDED]

Subpart C—[Amended]

36. The authority citation for subpart C of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 6-96 (62 FR 111), or 5-2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

37. In section 1926.20, a new paragraph (f) is added to read as follows:

§ 1926.20 General safety and health provisions.

* * * * *

(f) *Compliance duties owed to each employee.* (1) *Personal protective equipment.* Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) *Training.* Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

Subpart D—[Amended]

38. The authority citation for subpart D of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (62 FR 50017), 5-2002 (67 FR 65008); or 5-2007 (72 FR 31160) as applicable; and 29 CFR part 11.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

39. In section 1926.60, paragraph (i)(1) introductory text and (i)(2) are revised to read as follows:

§ 1926.60 Methyleneedianiline.

(i) * * * (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(2) Respirator program. The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

40. In section 1926.62, paragraphs (f)(1) introductory text, (f)(2)(i), and (l)(1)(ii) are revised to read as follows:

§ 1926.62 Lead.

(f) * * * (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

(l) * * * (ii) The employer shall train each employee who is subject to exposure to lead at or above the action level on any day, or who is subject to exposure to lead compounds which may cause skin or eye irritation (e.g., lead arsenate, lead azide), in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

Subpart R—[Amended]

41. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

Authority: Sec. 3704, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Sec. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3-2000 (65 FR 50017), No. 5-2002

(67 FR 65008), or No. 5-2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

42. In section 1926.761, paragraph (b) is revised to read as follows:

§ 1926.761 Training.

(b) Fall hazard training. The employer shall train each employee exposed to a fall hazard in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

Subpart Z—[Amended]

43. The authority citation for subpart Z of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (62 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (71 FR 31160), as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

44. In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2), and (k)(9)(i) are revised to read as follows:

§ 1926.1101 Asbestos.

(h) * * * (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

(i) The employer shall train each employee who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section. Such training shall be conducted at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

45. In section 1926.1126, paragraphs (f)(1) introductory text and (f)(2) are revised to read as follows:

§ 1926.1126 Chromium (IV).

(f) * * * (1) General. Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

(2) Respiratory protection program. Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with § 1910.134 for each employee required to use a respirator.

46. In section 1926.1127, paragraphs (g)(1) introductory text, (g)(2)(i), and (m)(4)(i) are revised to read as follows:

§ 1926.1127 Cadmium.

(g) * * * (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

(i) The employer must implement a respiratory protection program in accordance with § 1910.134(b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

(m) * * * (4) * * * (i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of the training program.

[FR Doc. E8-18991 Filed 8-18-08; 8:45 am]

BILLING CODE 4510-26-P