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Newer Protections Offer Safer Protocol for Federal Whistleblowers

By Steven J. Storts
Dublin, Ohio

AS a cornerstone of their professional responsibility, engineers that witness alleged violations of ethical conduct or illegal practice are obligated to present such information to proper authorities for action. Oftentimes, too, engineers that "blow the whistle" must cooperate in all investigations by furnishing additional information or assistance as necessary. For those engaged in public service, though, whistleblowing can sometimes seem like an endless enigma because of the numerous bureaucracies of government, particularly at the federal level.

To offer a safer harbor for whistleblowers, S. 743 — the Whistleblower Protection Enhancement Act of 2012 — was signed into law in November 2012, amending and clarifying certain provisions of the Whistleblower Protection Act of 1989 (WPA) to further protect federal employees who report government fraud, illegality, waste, and corruption. WPEA's most significant benefits include expanded protection for disclosures of government wrongdoing, expanded coverage and fair processes, added prevention of reprisals, and better streamlining of administrative authorities.

Specifically, WPEA closes loopholes that had removed protection for the most common whistleblowing scenarios, which left only "token rights" or protection for whistleblowers who were the first to report misconduct. Under the new statute, whistleblower protection is no longer limited to the first individual who makes a disclosure. Those who subsequently come forward also receive protection. Additionally, disclosures to coworkers or supervisors will be covered, as well as disclosures made during the normal course of duties.

WPEA defines "disclosure" as a formal or informal communication or transmission, excluding information concerning policy decisions lawfully exercising discretionary authority — unless the employee or applicant making the disclosure reasonably believes there is evidence of violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.

Perhaps equally important, the amended law clarifies that whistleblowers are safeguarded when challenging the consequences of government policy decisions, and that protection of critical infrastructure information does not override WPA protection. In fact, a whistleblower cannot be deprived of WPA coverage unless the president removes the whistleblower's agency from coverage prior to a challenged personnel action taken against the whistleblower.

Of particular interest to the engineering and science communities, protections have been extended to any current or prospective federal employee challenging censorship or making disclosures related to the integrity of the scientific process. Censorship is broadly defined to include "any effort to distort, misrepresent, or suppress research, analysis, or technical information."

Another significant provision is the extension of whistleblower and other anti-discrimination protections to employees (and applicants for employment) of the Transportation Security Administration. Also considered a major improvement, the statute overturns an unusual Merit Systems Protection Board practice that previously allowed agencies in some cases to present their defense first, allowing MSPB to rule on the case *prior* to whistleblowers presenting their evidence of retaliation. Furthermore, WPEA provides for payment of reasonable attorney fees and compensatory damages for whistleblowers that prevail after an administrative hearing, including the costs for retaliatory investigations.

According to the internationally recognized law firm of WilmerHale, WPEA builds on anti-retaliation rights afforded to federal workers under the parent WPA statute. That law prohibits supervisors from taking or failing to take personnel actions against an employee because the employee disclosed evidence of abuse, waste, or the violation of a law, rule, or regulation. Personnel actions may include promotions, disciplinary actions, transfers and reassignments, performance evaluations, and decisions concerning pay, benefits, or awards.

"The new act makes small adjustments, rather than radical changes, to these protections," the law firm notes. "Taken together, however, these changes will likely increase the willingness of at least some would-be whistleblowers to come forward."

WilmerHale also points out that WPEA seeks to further discourage retaliation against whistleblowers in the federal workplace by expanding

the penalties for retaliating. For instance, MSPB is now explicitly permitted to impose any combination of previously available penalties, which include removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, and a civil penalty of up to $1,000. The statute also makes it easier to discipline supervisors who retaliate by adjusting the burdens of proof in disciplinary actions.

Under the new federal provisions, agencies must continue to ensure that their employees are informed of their whistleblower rights, in addition to other prohibited personnel practices. Agency heads must inform employees how to lawfully make a protected disclosure of classified information to the Office of Special Counsel, Congress, an inspector general, or any other designated agency official authorized to receive classified information. Additionally, the new statute codifies a requirement that agencies notify their employees that their nondisclosure policies are superseded by whistleblower and other statutory rights.

To help enhance the understanding of whistleblower rights, each agency is required to designate a "whistleblower protection ombudsman" to educate employees about prohibitions on retaliation for protected disclosures, including rights and remedies against retaliation. The ombudsman, however, cannot act as a legal representative, agent, or advocate of the whistleblower.

More recently on Capitol Hill, a 10-member bipartisan Senate Whistleblower Protection Caucus was established as a resource for promoting greater whistleblower protections. Among other activities, it will help draw attention to the need for whistleblower protections, offer training and consultation on how Senate offices can effectively respond to whistleblower disclosures or retaliation allegations, and serve as a clearinghouse for information on whistleblower issues of interest to Congress.

Tom Devine, legal director for the Government Accountability Project — a leading whistleblower protection organization — emphasizes, "Whistleblower protection may be the only issue in Congress with bipartisan, trans-ideological support. Thanks to this group's leadership, all senators will have access to the latest research, case studies and developments. This is an invaluable base for legislation, hearings, training, and constituent support."

April 2015

Courts Curb Labor Agency Rulings Amid Further Federal PLA Expansion

By Steven J. Storts
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RIGHT-to-work advocates within the construction industry recently received a federal court reprieve, in fact, several court reprieves, from some standing labor regulations and impending changes to the unionizing process proposed by the National Labor Relations Board.

On April 11, a federal district court judge in South Carolina ruled that NLRB had exceeded its authority requiring employers to post notices explaining workers' rights to form a union. In his decision, U.S. District Judge David Norton said the agency lacked the legal authority to issue the notice in 2011, and thus the rule was not lawful. "Based on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of other federal labor statutes, the court finds that Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to . . . [NLRB] to regulate employers in this manner," Norton stated.

Less than a month later on May 6, a three-judge appellate court panel upheld the district court decision, noting that NLRB's poster rule violated employers' free speech rights in forcing them to display the posters or face charges of committing an unfair labor practice. Opponents to the NLRB regulation had claimed that it forced employers to display labor laws in a way that some believed was too skewed in favor of unionization. The court panel agreed, ruling that the National Labor Relations Act protects the First Amendment free speech rights of employers not to publish or display NLRB's poster if they find objectionable language within it. Judge A. Raymond Randolph, one of the panelists, emphasized, "First Amendment law acknowledges this apparent truth: all speech inherently involves choices of what to say and what to leave unsaid."

Finally, in a third setback for organized labor, one that could impact earlier NLRB rule-making, the U.S. Supreme Court issued a unanimous decision on June 26 limiting a president's power to fill high-level administration posts with temporary recess appointments. Consequently, the court's ruling renders illegal President Obama's three NLRB appointments in January 2012 because the Senate had not officially declared itself in recess, nor had it confirmed the administration's temporary appointments.

In addition to requiring the Senate and House of Representatives to obtain each other's consent for any break lasting longer than three days, a congressional break has to last at least 10 days to be considered a sanctioned recess. Of significant importance, the administration's illegal appointments now call into question NLRB's recently proposed changes to the unionization election process due to lack of a legitimate quorum of voting authority.

Closely aligned with the NLRB controversies is the contentious issue regarding project labor agreements. In its simplest form, a PLA is a collective bargaining agreement that applies to a specific construction project, lasting only for the duration of the project. One of the key points is that a PLA guarantees the project will employ union labor, usually through one of two approaches, by hiring workers through a local union organization such as an area trade union council, or by requiring employees to become union members after being hired. Other PLA provisions generally specify the prevailing wages and fringe benefits to be paid on a project, in addition to establishing binding procedures for resolving labor disputes.

Under the Obama administration, these labor agreements have become highly contested. In February 2009, the president issued Executive Order 13502, encouraging federal agencies to require PLAs on federal construction projects costing more than $25 million and allowing (but not mandating) state and local governments to require PLAs on federally assisted projects. On May 13, 2010, the Federal Acquisition Regulatory Council's final rule became effective, implementing the president's directive into federal procurement regulations.

Not surprising, the debate is constant between PLA opponents and proponents, with the former claiming that the labor agreements are anticompetitive and increase costs. Proponents contend that PLAs ensure fair wages, a quality workforce, safer working conditions, and timely completion of projects within budget. In a nonpartisan Congressional Research Service report that was issued in 2010, proponents noted that the positive impact of creating career paths for women, minorities, veterans, and other underrepresented populations may not be easily measured in the short term. However, they opined that developing qualified workers in the construction trades, and including those who historically were underrepresented in the

trades, has a positive long-term economic benefit for those receiving the jobs and for the construction industry as a whole.

Interestingly, the CRS *Project Labor Agreements* report pointed out that opposition to PLAs is not an indication that they are always detrimental. Critics argue that simply having the labor agreement is not conclusive proof of an improved project environment. For example, available evidence does not show that PLA construction projects are safer than non-PLA projects.

The report also indicated that empirical evidence is inconclusive regarding the cost of PLAs on construction projects because different project studies yielded varying results. "To some extent, projects that use PLAs may be different from projects that do not use them, which can make it difficult to isolate the effects of PLAs," the report stated. As part of its research, CRS cited several studies by the General Accounting Office, the Beacon Hill Institute (Suffolk University), and additional new school construction projects in Connecticut, Massachusetts, and Rhode Island.

The summarized results showed both positive and negative influences of PLAs relative to project costs and the quality of construction. CRS research further concluded that "quantitative analyses of the effects of the PLAs often do not include variables that account for the quality of the work performed, or whether the projects were finished on time."

Right-to-work advocates, including the Associated Builders and Contractors, hold a differing point of view. They contend that state RTW laws protect the right of freedom of association and can be an attractive incentive for private business because project owners and developers are not required to negotiate with a union, allowing more open competition for services. More specifically, an RTW law secures the right for most private sector employees to decide for themselves whether or not to join or financially support a union.

Since 2011, according to ABC statistics, 17 states have responded to the threat of discriminatory PLA mandates and preferences by adopting legislation or executive orders banning government-mandated PLAs on state, local, and publicly funded projects, bringing the total number of states with RTW provisions to 24. Alabama, Mississippi, and South Dakota are the latest additions in 2014 to the non-PLA list.

On the opposite side, though, eight states have enacted legislation or executive orders encouraging the use of PLAs, including California, Connecticut, Hawaii, Illinois, Maryland, New Jersey, New York, and Washington. The growing state trend, however, still leans more toward open competition on construction projects.

July 2014

Proposed NLRB Rule Draws Wide Criticism from Construction Industry

By Steven J. Storts
Dublin, Ohio

AMID the extended media coverage on a missing Malaysian airliner and contested Affordable Care Act enrollment figures, a deadline pertinent to the construction industry escaped closer scrutiny by the press — the April 7 filing date for comments regarding proposed changes to the unionizing election process by the National Labor Relations Board. For most sources reporting NLRB's action, the proposed rulemaking has been labeled as nothing less than controversial.

Published in the February 6 *Federal Register* following a 3-2 split decision along political lines, NLRB stated that it is "again proposing the same changes" that were included in a 2011 proposal. According to the Construction Industry Round Table, the rule was invalidated in 2012 on procedural grounds when the U.S. District Court for the District of Columbia held that the amendments were not properly adopted by the board because of a lack of a quorum.

CIRT notes, however, that the court did not address the substance of the rulemaking, so NLRB has returned with essentially the same proposal but more comprehensive. It is touted by labor as furthering the goals of the National Labor Relations Act (NLRA) by "modernizing processes, enhancing transparency, and eliminating unnecessary litigation and delay."

"These proposals are intended to improve the process for all parties, in all cases, whether nonunion employees are seeking a union to represent them or unionized employees are seeking to decertify a union," says NLRB Chairman Mark Gaston Pearce in a statement to The Hill.com. Labor unions advocate that the NLRB rule is necessary to limit delays and obstacles for workers wanting to organize, with AFL-CIO Chairman Richard Trumka claiming that current election rules allow employers to "manipulate and drag out the process through costly and unnecessary litigation."

Stating her perspective in The Hill, Sarita Gupta, executive director of Jobs With Justice, a labor rights advocacy group, says the current union election system is a "senseless" system that discourages workers from organizing. "Currently, workers who petition for a union election encounter delays of months and even years before an election is held, and some never get a vote at all," she points out. "This rule would cut back on senseless procedural delays, closing the loopholes employers have exploited for decades."

At the heart of the controversy are the proposal's critics, who firmly denounce the rulemaking as undercutting the very purpose of the NLRA, referring to the amendments as promoting *ambush* or *quickie* elections. Among other things, opponents to NLRB's proposed changes contend that employees would be denied the opportunity to fully understand the ramifications and potential impacts of unionizing — all in the name of efficiency and rapid decision-making. Under the new proposal, the period of a standard union election process would be reduced from 42 days to a range of 10 to 21 days. In practice, according to reported election periods, the median duration has been 38 days.

"This proposal is a solution in search of a problem," says Geoff Burr, vice president of government affairs for the Associated Builders and Contractors. "Unions already are winning 64 percent of elections, and more than 94 percent of those elections occur within 56 days — exceeding NLRB's own goals related to election timeframes." With more than 70,000 public comments already issued against the proposal, Burr says it is "disappointing that NLRB has doubled down on this failed ambush elections rule," emphasizing that "it's absolutely bad policy."

ABC and numerous other construction and business groups have rebuked NLRB for reviving the rules, promising they would respond with a forceful legal challenge. "That's why we sued them on this the first time," Burr explains. "We do plan to challenge this in the courts again, and we do plan to pursue a legislative solution." ABC, the Associated General Contractors of America (AGC), the American Council of Engineering Companies, the National Association of Home Builders, and the U.S. Chamber of Commerce are just some of the major players in a larger advocacy organization — the Coalition for a Democratic Workplace — which successfully challenged the original NLRB rule in court.

Other provisions in NLRB's proposed rule are drawing equal skepticism, too. For instance, in addition to eliminating the required 25-day waiting period prior to holding an

election, employers would be required to file a formal position statement regarding a unionizing petition within seven days or forfeit the right to pursue any issues. Moreover, an employer's automatic right to a post-election NLRB review of contested issues would be eliminated.

The proposed rule would also require targeted nonunion employers to turn over personal employee information such as home addresses, e-mail addresses, home phone numbers, and cell phone numbers to the union to facilitate contact. Finally, workers at a given site would be allowed to cast ballots even if their eligibility is contested, deferring any legal action until after the election.

Commenting on the earlier 2011 proposed rule, AGC contended that the amendments would be particularly difficult to apply in the construction industry due to a number of unique aspects of the industry, including the complexity of bargaining unit and voter eligibility determination, and the decentralized nature of the workplace. Regarding the mandatory disclosure of personal employee data, AGC notes that recent cases have illustrated how construction unions might misuse such information. The organization is also concerned that the proposed rule might lead to unintended consequences, including increased litigation and protracted legislative fights at both the federal and state levels.

The National Legal and Policy Center, in its published online article "NLRB Revives 'Ambush Election' Rule to Thwart Opposition to Union Campaigns," states, "In effect, where a union would have months and even years to build support at a given work site before approaching the NLRB to supervise an election, an employer would have at most a few weeks to offer any responses. This rule change especially would hurt small businesses, which typically do not employ a labor issues counsel. The result would *not* be a level playing field. Election campaigns would be rigged in favor of unions."

CIRT further cites Brian Hayes, a former NLRB member, who claims that ". . . by administrative fiat in lieu of congressional action, the Board [NLRB] will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

April 2014

EPA Compliance Programs Require Strict Awareness, Information, Action

By Steven J. Storts
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AS reported earlier this year, the construction industry was under advisement that aggressive enforcement tactics of the Occupational Safety and Health Administration would continue in 2013, but what about other regulatory bodies? For instance, how are construction stakeholders faring this year with the U.S. Environmental Protection Agency?

Recent EPA notifications of enforcement activities point toward more cooperative efforts in regulating construction site stormwater runoff, dredge and fill activities in U.S. waters and wetlands, oil and chemical spills, air emissions, asbestos handling, and solid/hazardous waste storage and disposal. Still, some notable violations persist.

In June, a construction company under contract with the Massachusetts Department of Transportation was cited with $55,000 in penalties for violations of the Clean Water Act (CWA) at a road construction project in Bellingham. The company has agreed to pay the fine for failing to install and maintain "best management practices" sufficient to minimize discharge of muddy stormwater and residual pollutants to the Peters River and Arnolds Brook.

A little farther south, two companies consented in March to pay civil penalties of $130,000 and $56,000, respectively, in separate compliance settlements with the EPA resolving CWA violations at construction sites in Maryland and Virginia. Both companies allegedly failed to take precautions as their permits required to prevent discharging sediment to nearby surface waters, including Oak Creek, Accotink Creek, and Piscataway Creek. The latter two waterways, now identified as impaired for aquatic life, are tributaries of the Potomac River, in addition to Chesapeake Bay.

In the Midwest, a Kansas-based enterprise agreed in June to pay a $27,286 penalty for failure to use proper lead-safe work practices during the renovation of a multifamily property built in Kansas City — a violation of EPA's Lead Renovation, Repair, and Painting (RRP) rule. Moreover, the property owners were not notified in advance about any lead-based paint risks prior to the construction company or its subcontractors performing renovation work at the site.

Aside from this recent settlement, 17 other enforcement actions for serious RRP violations are on record earlier this year in Florida, Indiana, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, and Tennessee. The enforcement activity included 14 administrative settlements assessing civil penalties as much as $23,000 and requiring RRP certification compliance. Additionally, the EPA filed three administrative complaints seeking civil penalties ranging upward toward the statutory maximum of $37,500 per violation.

The RRP rule requires general contractors and subcontractors that work on pre-1978 dwellings and child-occupied facilities to be trained and certified to use lead-safe work practices. This ensures that common renovation and repair activities such as sanding, cutting, and replacing windows minimize the creation and dispersion of dangerous lead dust. EPA finalized the RRP regulation in 2008, with it taking effect in April 2010.

With more than 90 percent of construction companies having fewer than 20 employees, today's construction interests need to develop a regular business practice of staying ahead in the regulatory game, which means expanding information sources and utilization. To that end, Martindale-Hubbell, a legal marketing affiliate of LexisNexis based in New Providence, N.J., notes that May 31 was the deadline for submitting comments regarding proposed changes to EPA's 2009 Effluent Limitations Guidelines and Standards for the Construction and Development (C&D rule) Point Source Category.

Authorized under CWA's National Pollutant Discharge Elimination System program, the C&D rule's proposed revisions include: a definition of "infeasible" requirements; language changes regarding control of stormwater discharges, reduced pollutant discharges, and site erosion stabilization; alteration of regulations covering soil compaction; reorganization of the 14-day stabilization requirement; addition of a provision addressing exposure of trash and other potential pollutants to precipitation and stormwater; and removal of the numeric turbidity discharge standard and related monitoring requirements.

"Controlling stormwater at construction sites can be a very costly component for any development

project," Martindale-Hubbell emphasizes. "It is important that those involved in construction activities understand how proposed regulations may affect their operations and provide EPA with feedback on any areas of concern."

The Construction Industry Compliance Assistance Center, hosted online at www.cicacenter.org, is also a valuable information source for keeping abreast of EPA construction regulatory activity. Recently, the organization announced that EPA intends to further strengthen its national stormwater program through a series of proposed performance standards aimed at newly developed and redeveloped sites, in addition to making other regulatory improvements regarding municipal stormwater sewer system protections and enhanced operations.

Of course, hands-on construction information resources are always the most useful tools. EPA's Office of Compliance publishes and regularly updates *Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development*. Known simply as the *MYER Guide*, this 255-page document reflects significant input from stakeholders and is a product of joint cooperation among the construction industry, states, other federal agencies, nongovernmental organizations, and EPA sources.

Another publication of interest, EPA's 2009 report *Potential for Reducing Greenhouse Gas Emissions in the Construction Sector*, documents the industry's emissions and examines ways to reduce them. A related document, *Cleaner Diesels: Low-Cost Ways to Reduce Emissions from Construction Equipment*, discusses a research project designed to study and identify low-cost ways to reduce emissions from nonroad construction equipment.

For construction organizations seeking a general overview of environmental stewardship, the 2007 EPA report *Measuring Construction Industry Environmental Performance* recommends ways to chart the industry's progress in green construction, debris management, diesel air emissions, stormwater permit coverage, energy use, and greenhouse gas emissions. A closely aligned publication, *Environmental Management Systems: Systematically Improving Your Performance*, highlights the benefits of EMS implementation at construction facilities and was developed with assistance from the Associated General Contractors of America. The content provides expert guidance on maintaining compliance with environmental requirements, satisfying owner demands for green construction, and achieving environmental certifications.

July 2013

Aggressive OSHA Enforcement Activity On Job Sites to Continue in 2013

By Steven J. Storts
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AS the federal government begins tallying construction safety statistics for 2012, the Construction Safety Council says continued aggressive enforcement tactics by the Occupational Safety and Health Administration will continue in 2013. The organization contends that OSHA has become increasingly more assertive in its enforcement activities, pulling back on collaborative safety partnerships with employers and favoring higher citation classifications and enhanced penalties.

Labor and employment law attorneys at the Chicago firm of Seyfarth Shaw L.L.P. substantiate CSC's forecast. They note that OSHA's findings of "serious" violations, which carry steeper monetary penalties, have been on a steady rise during the last four years of the Obama administration. Even more noteworthy, between 2010 and 2011, the last year for which penalty information is on record, the citation penalties for serious classifications more than doubled. Between OSHA issuing more citations and increasing the penalty assessments for serious citations, an employer could easily find itself facing monetary liability well into six figures, without any accident or employee injury in the workplace, according to Seyfarth Shaw.

In its brief report titled *Goodbye Carrot, Hello Stick: OSHA to Continue Aggressive Enforcement in 2013*, Seyfarth Shaw says OSHA has also become more aggressive in placing employers into the Severe Violators Enforcement Program. SVEP was developed to focus on and heavily penalize employers whom the agency believes have shown indifference to its safety and health obligations. The firm warns that an employer under SVEP can expect increased and more comprehensive inspections, the results of which can be substantial penalties and other enhanced abatement practices if violations are found. Between July 2011 and July 2012, the number of employers placed within SVEP doubled, and OSHA has showed no signs of reducing the pace, the report states.

The U.S. Bureau of Labor Statistics recorded 4,609 on-the-job worker fatalities in 2011 (3.5 deaths per 100,000 full-time equivalent workers), almost 90 a week or nearly 13 deaths every day. This is a slight increase from the 4,551 fatal work injuries in 2009, but the second lowest annual total since the fatal injury census was first conducted in 1992. Of those fatalities documented by BLS in 2011, 4,114 were in private industry, including 721 in construction.

The leading causes of worker deaths on construction sites were falls from heights (35%), followed by electrocution (9%), impact by falling or moving objects, (10%), and caught-in/between objects, primarily in excavations (3%). These four causes alone were responsible for nearly 60 percent of construction worker deaths in 2011, BLS reports, and workers between the ages of 25 and 34 were the most likely to be injured in a construction site accident.

It is also estimated that the construction industry experiences nearly 500,000 nonfatal injuries and illnesses annually. Aside from potential physical injuries, the main health hazards on a construction site that are responsible for causing illness include solvents, excessive noise, asbestos, and other abatement activities requiring the handling of invasive chemicals.

As a result of potential threats to injury and other implied dangers at construction sites, safety remains a contested issue. OSHA Assistant Secretary of Labor David Michaels recently reflected, "Passed with bipartisan support, the creation of OSHA was a historic moment of cooperative national reform. Forty years of common-sense standards and strong enforcement, training, outreach, and compliance assistance have saved thousands of lives and prevented countless injuries. Just look at the difference. In 1970, 38 workers were killed on the job every day in America; now it's 13 a day. This is a great improvement, but it's still 13 too many."

Because falls from heights are still the most common cause for injury in the construction industry, OSHA continues to require and enforce fall protection in areas and activities that include ramps, walkways, excavations, runways, hoist areas, holes, formwork, leading-edge work, work on unprotected edges, overhand bricklaying and related work, roofing, precast erection, residential construction, and wall openings. When implemented to prevent injuries from falls, construction safety practices must provide a project site

with guardrail systems, personal fall arrest systems, safety net systems, warning line systems, and positioning device systems.

In addition to utilizing OSHA's educational resources, construction companies and project owners interested in bolstering their safety campaigns can access eLCOSH: the Electronic Library of Construction Occupational Safety and Health. Hosted at the Web site www.eLOSH.org, this online tool offers more than 2,000 reliable documents, videos, images, and podcasts related to worker safety and health that have been generated by researchers, unions, trainers, trade organizations, equipment manufacturers, government agencies, and other industry stakeholders. Developed by The Center for Construction Research and Training — known widely as CPWR — this information repository is endorsed by both the National Institute for Occupational Safety and Health and the AFL-CIO's Building and Construction Trades Department.

CPWR also offers a comprehensive construction hazard awareness training program called "Smart Mark," which satisfies the guidelines and requirements of OSHA's Construction Outreach Program. Since its inception in 1998, hundreds of thousands of construction workers have been trained using Smart Mark, and many contractors and facility owners now specify that employees complete the Smart Mark program, which is instructed in 10- or 30-hour training modules.

Another online resource, www.ConstructionSafety.org, provides news on construction safety, products and services focused on construction safety, and organizational resources for safety training.

To prepare for OSHA's stepped-up enforcement activity for 2013 and beyond, Seyfarth Shaw advises that employers should revisit their safety policies and procedures to ensure their comprehensiveness, and that all employees have been properly trained and that safety policies are being enforced, with disciplinary actions for infractions fully documented. In particular, the legal firm recommends close attention to job hazard analyses, maintenance and retention of all OSHA compliance records, and the establishment or review of policies regarding workplace violence and whistleblower protection.

January 2013

Overhaul of U.S. Patent System Creates Better Path for Innovation

By Steven J. Storts
Dublin, Ohio

THE America Invents Act, recently signed into law by President Obama, ends a nearly 60-year drought for enacting major reforms to the nation's patent system. Moreover, the new statute ends six consecutive years of congressional debate aimed at streamlining operations at the U.S. Patent and Trademark Office (USPTO) and improving the overall quality of patents that are granted.

The U.S. House of Representatives' version of the legislation (H.R. 1249) passed last June, which was identical to the Senate's measure (S. 23) adopted a few months earlier in March, was approved by the Senate in September. "We cannot stand on a 1950s patent system and expect our innovators to flourish in a 21st century world," says Sen. Patrick Leahy (D-Vt.), the bill's main Senate sponsor. "The America Invents Act will keep the nation in its longstanding position at the pinnacle of innovation."

In terms of the broad expectations for the new law, Rep. Lamar Smith (R-Texas), the legislation's main House sponsor, notes, "It is impossible for any one group to get everything it wants. Inventors, businesses, and other groups interested in patent reform don't agree on every issue that we've debated for the past six years. But our patent system doesn't affect an individual or company in the same way because each one uses the patent system in many different ways."

The recent legislation represents a fair compromise and creates a better patent system than exists today for inventors and innovative industries, says Smith, pointing out that frivolous lawsuits and uncertainty regarding patent ownership have dragged down the nation's outdated patent system. He also says that unwarranted lawsuits, some costing as much as $5 million for defense litigation, prevent legitimate inventors and industries from creating new products and generating jobs.

Leahy emphasizes that the patent system reforms will "improve patent quality and limit unnecessary and counterproductive litigation costs, while making sure no party's access to court is denied." Perhaps most significant, the new legislation will convert the nation's patent system to a first-inventor-to-file operation and provide USPTO with the necessary financial resources to improve quality and efficiency by providing the agency with fee-setting authority, subject to congressional oversight.

"The patent system envisioned by our founders focused on granting a patent to be awarded to the first inventor to register an invention, as long as it was not in public use when the inventor conceived of the invention," Smith explains.

Provisions of the 152-page America Invents Act were also crafted to address "true patent certainty and ensure that small businesses are able to compete with the larger companies on a global scale," which the current patent system does not encompass. Specifically, USPTO will establish a Patent Ombudsman Program to provide services to small business concerns and independent inventors on matters regarding patent filings.

Of interest to manufacturing and technology industries, the new law addresses preissuance submissions by third parties, introduces enhanced post-grant review procedures within USPTO, establishes special post-grant review for business method patents, and extends the deadlines for filing post-grant opposition. The threshold for instituting inter partes reexamination will also be modified, according to intellectual property attorneys Finnegan, Henderson, Farabow, Garrett & Dunner L.L.P., headquartered in Washington, D.C., with offices in California, Georgia, Massachusetts, and Virginia, and in Europe and Asia.

The new threshold, Finnegan notes, calls for a finding "that there is a reasonable likelihood that the requester would prevail with respect to at least one of the claims challenged in the request." Equally notable, the U.S. Court of Appeals for the Federal Circuit will serve as the only appeal route for ex parte reexamination decisions.

Although the America Invents Act was enacted September 16 of last year, numerous provisions will not be effective for as long as 18 months after enactment, requiring USPTO to promulgate regulations for implementation. However, already in effect is a 15 percent increase of all USPTO fees, but the agency does have some discretion in offering a new "micro entity" discount of up to 75 percent.

Finally, under the patent system reforms, Finnegan cites "substantial changes to the false marking statute," but also says patent holders may now use virtual marking via a Web site.

Also noteworthy, patent challengers who file proceedings may no longer rely on "best mode" as a defense to infringement.

How the new legislation will mesh with the intellectual property perspectives of NSPE's Professional Engineers in Industry interest group remains to be seen. PEI's past policies primarily have addressed intellectual property agreements or relationships between an employee and his or her employer (company). In summary, the following have become basic tenets for professional practice:

- The professional employee should cooperate fully with the employer in obtaining patent protection for any inventions.
- The professional employee should not divulge proprietary information.
- The employer should clearly identify proprietary information and should release those inventions and information generated by the employee, which are not useful to the employer.
- The employer should have an established method and formula for compensation over and above salary and fringe benefits for the professional employee who generates inventions, patents, and other proprietary information for the employer.
- The employer should provide for accelerated promotion and extra compensation for superior performance and/or special accomplishments, including generation of proprietary information and patents.

March 2012

Contract Documents Take Rural Route

By Steven J. Storts
Dublin, Ohio

A RECENT policy change formulated by the U.S. Department of Agriculture's Rural Development Agency is moving the group's engineering and construction contract document practices more into the current mainstream of industry standards.

Effective December 31, USDA Rural Development ended the use of its *Agreement for Engineering Services* (RD Form 1942-19) and the Rural Utilities Service's *Construction Contract Documents* (RUS Bulletins 1780-13 and 1780-14) for projects financed under the Rural Development Water and Waste Disposal Program, with the exception of small contracts.

For most new projects, Rural Development is now using a funding agency edition of the contract documents issued by the Engineers Joint Contract Documents Committee. However, construction projects with a cost threshold under $100,000 are exempted from the use of EJCDC documents and can continue using RD Form 1942-19.

The Rural Development Utilities Programs, a mission area of USDA Rural Development, provides financial and technical assistance to rural areas for the development of electricity, telecommunications, water, sanitary sewer, storm drainage, and solid waste disposal services and facilities. In addition to these basic programs, RDUP helps rural communities to expand and update their technologies through establishing new services such as distance learning and telemedicine.

According to Benjamin Shuman, P.E., an environmental engineer at Rural Development's national headquarters in Washington, D.C., the shift toward using EJCDC documents came about because there was "concern that our existing documents were significantly outdated, and that working cooperatively with the industry made more sense than updating our 1970s-era standard documents."

However, Shuman emphasizes that, technically, only the policy has changed, not the administrative rule. For engineering agreements, the agency's program regulation states, "Contracts or other forms of agreement between the applicant and its professional and technical representatives are required and are subject to RUS concurrence."

In regard to construction contracts, the regulation says that if the documents in use are not in the format previously approved by the agency, the Office of General Counsel must review the construction contract documents before their use.

Shuman, who is responsible for development of training, policy, and oversight for engineering issues for both the RDUP Water and Waste Program and the agency's state offices, notes, "There are other sets of model documents out there, of course. But we felt that EJCDC showed the best representative cross-section of the industry."

He points out that EJCDC documents clarify the roles and responsibilities of the engineer, owner, and construction contractor, which, he contends, "should reduce conflicts and improve service on all sides."

"When we first began meeting with EJCDC in the 1990s, NSPE, the American Society of Civil Engineers, and the American Consulting Engineers Council were the group's only sponsoring members," Shuman explains. "Now, the addition of the Associated General Contractors of America has solidified our determination that EJCDC documents are representative of the industry. EJCDC documents also receive input from a number of other groups that participate as observers at the meetings, including USDA Rural Development."

The Rural Development Mission of USDA, which manages an $8 billion dollar portfolio of loans, administers nearly $1.5 billion in program loans, loan guarantees, and grants through its initiatives and directives related to water and environmental projects.

The agency supports staff engineers in state offices that interface with rural applicants, the consulting engineering community, construction organizations, and other regulatory groups. In the interest of developing the best possible projects, the state engineers are responsible for reviewing, advising, or approving the technical aspects of the projects funded by the agency.

Whether the move by Rural Development to use EJCDC documents indicates a trend for other federal agencies to follow remains to be seen. Shuman says, probably not. "Our use of EJCDC documents shows that we are improving the standard documents that we work with, but I do not see a trend as far as other federal agencies are concerned," he adds.

Shuman also points out that his agency is probably neither ahead nor behind on the contract documents curve. He explains, "Consider the fact that few federal agencies are directly involved in assisting communities with projects in the water and wastewater field the way Rural Development is. Most typically, they work through the state or local governments, like HUD's Community Development Block Grant program or the State Revolving Fund loan programs. Because they don't review or concur in contracts on a project level, they may not

be as interested in which standard contracts are used."

Nevertheless, some of Rural Development's state offices have worked with state governments to adopt EJCDC documents for projects funded individually or cooperatively by several agencies, says Shuman, who cites Montana's program as an example of this level of cooperation.

To date, the feedback on the agency's policy change has been positive. "Top officials have been supportive from the beginning," Shuman emphasizes, "including the assistant administrator for Rural Development's Water and Environmental Programs, who has attended some of the EJCDC meetings."

The response from the agency's state offices, though, varied at first, Shuman reports. A few staff members were nervous about using larger documents they were unfamiliar with, while others had already implemented the use of EJCDC documents on their own a few years ago.

Shuman, who worked for five years at Rural Development's Ohio office before going to Washington, D.C., in 2003, notes, "We held a training session last April to help the state offices become more familiar with the documents. Since that time, I have had engineers calling with questions about specific clauses, but the changes are being made."

February 2006

Minnesota's Prevailing Wage Calculation Increases Construction Costs, Study Finds

By Steven J. Storts
Dublin, Ohio

A NEW study conducted by the Minnesota Taxpayers Association has found that the state's method for calculating prevailing wage rates on public construction increases project costs between 7% and 10%.

In its research, which was funded by the Associated Builders and Contractors of Minnesota, MTA examined 34 school district construction projects, 57 state building projects, and 247 state transportation projects—totaling more than $1.7 billion. Founded in 1926, MTA advocates the adoption of sound state fiscal policies through its research efforts, publications, and meetings.

As part of the study, Minnesota ABC surveyed states to update the national organization's 1995 prevailing wage study. The findings indicate that 32 states and the federal government currently have prevailing wage laws, although nine other states have had prevailing wage laws in the past that have been repealed.

The report *Prevailing Wage Rates in Minnesota: An Examination of Alternative Calculation Methods and Their Effects on Public Construction Wages* concludes that "Minnesota would have experienced estimated savings of $126 million to $171 million . . . of total project costs in 2002 if the state had substituted . . . median wage rates for the current state prevailing wage rates."

Prevailing wage determinations in states are made in one of four ways:

- Adopting the federal prevailing wage determinations;
- Empowering a state official or officials to determine the rates;
- Adopting collectively bargained rates; or
- Surveying to set prevailing wage rates, which is the method used by the federal government.

Minnesota employs the fourth option using survey information. Both Minnesota and California statutes differ from the Davis-Bacon Act—and from other state prevailing wage laws that average survey data—in one major respect, the report notes. Most states and the federal government use two approaches to calculate the prevailing wage. If more than half of the workers in a survey are paid the same wage, then that wage is used. If no majority emerges, then an average is used.

Minnesota and California, however, use a "modal" calculation, where the wage rate that is most frequently reported in a survey is designated as the "prevailing" wage. For example, given a class of workers with five survey responses of hourly wages of $7, $9, $12, $12, and $13, Minnesota would set the prevailing wage at $12—the wage that is most frequently reported. Many other states, though, and the federal government, would set the prevailing wage at $10.60—the average of the five salaries—which is considered the median wage.

"The use of the modal method for determining prevailing wage increases the likelihood that large-scale, collectively bargained wage rates become the prevailing wage, because these rates tend to be uniform within a specific job class," MTA researchers point out. The study found that in 26 of the 32 couies where state building projects were located, federal prevailing wage rates were set entirely from union rates. And in 17 of the 82 counties where state transportation projects were located, federal prevailing wage rates were set entirely from union rates.

The study concludes that Minnesota's modal method results in wage rates significantly higher than those reported by the Minnesota Department of Employment and Economic Development (DEED) in its median wage survey. "Using the federal method for calculating prevailing wage rates would add even more cost to public construction projects, apparently because of the limited number of federal projects and limited federal survey data in Minnesota," researchers add.

MTA emphasizes that any claims by prevailing wage proponents that buildings are constructed more quickly and with better quality cannot be evaluated in its study of such limited scope. "However, our underlying assumption is that contract specifications, penalty provisions for delays, and aggressive construction management can provide at the very least an equally effective alternative method for addressing timing and quality issues for public construction projects," the association contends.

As a result of its findings, MTA recommends that the DEED survey for median wages be used as an alternative definition of prevailing wage for public construction projects in Minnesota. MTA also suggests that DEED develop a survey comparable to the median wage survey for employee benefits to be used for the benefits portion of the prevailing wage rates as an alternative to current practices.

Moreover, MTA says this alternate method should be tested and evaluated on comparable public construction projects in Minnesota in order to compare the costs of such projects with those using the modal method for calculating prevailing wage rates.

"Such a comparison would allow an empirical test of the claims of both proponents and opponents of Minnesota's current prevailing wage law," the report states. "Should the test demonstrate that using the median wage rates . . . results in lowered costs for public construction projects, those median wage rates . . . should replace Minnesota's current method of determining prevailing wage rates."

October 2005

Economic Study Quantifies Benefits Of Asbestos Litigation Reform

By Steven J. Storts
Dublin, Ohio

A NEW study by NERA Economic Consulting estimates that asbestos litigation has cost the U.S. economy $343 billion to date and that Senate-proposed trust fund legislation would save $71 billion in future administrative and legal costs alone, providing compensation to asbestos victims without litigation.

Congress is considering S. 852, a bill sponsored by Sen. Arlen Specter (R-Pa.), chairman of the Senate Judiciary Committee, which would remove asbestos claims from the court system and establish a $140 billion trust fund privately financed by defendants and insurers. The trust fund, administered by the U.S. Department of Labor, would be available to claimants who meet the medical criteria for mesothelioma or other asbestos-related diseases.

Authors of the study *Costs of Asbestos Litigation* report that the costs to the domestic economy have been nearly 10 times as great as the compensation paid to claimants historically. According to the research, productivity of the manufacturing sector would be improved by eliminating the uncertainty and inefficiency of asbestos litigation. Industries heavily affected by asbestos litigation included about half the manufacturing sector in 2000 and currently represent 13% of the gross domestic product.

Additionally, the study points out that administrative and legal costs represent "deadweight losses," monies siphoned away from both defendants and plaintiffs. Of total past payments, the authors conclude that less than half have gone to claimants. They also note the following:

- A trust fund could save an additional $13.7 billion in bankruptcy costs, yielding a total cost savings of $85 billion.
- With up to $140 billion in funding available for compensation, it is estimated that claimants could receive as much as $65 billion more than if the status quo continued.
- As a lower bound estimate, the stock market valuation of reform to defendant companies is between $60 billion and $137 billion, which translates into improved cash flows, reduced uncertainty, and lowered capital costs.

The Senate's proposal, however, does not provide compensation to individuals who do not have markers from asbestos, with a clear line that their cancer was caused by asbestos. If the fund is unable to pay all legitimate claims, victims will also have the option to return to the tort system to seek compensation. If there is a reversion to the tort system, suits may be filed in federal court, the state court in which the plaintiff resides, or in the state court where the asbestos exposure occurred.

Specter emphasizes, "There is a will in the Senate to enact legislation that should put an end to the ongoing rash of bankruptcies, which are diverting resources from those who are truly sick, endangering jobs and pensions, and creating the worst litigation crisis in the history of the American judicial system. The Senate plainly wants a more rational asbestos claims system, and I believe this legislation offers a realistic prospect of accomplishing that result."

Advocates and cosponsors of S. 852 contend that it provides substantial assurances of acceptable compensation to asbestos victims and substantial assurances to manufacturers and insurers to finally resolve asbestos claims.

"For more than two decades, a solution to the asbestos crisis has eluded Congress and the courts," Specter adds. "More than 75 companies have gone bankrupt, and thousands of individuals who have been exposed to asbestos have deadly diseases—mesothelioma and other such ailments—and are not being compensated."

NERA, founded in 1961 as National Economic Research Associates, is an international firm that provides economic analysis and advice to corporations, governments, law firms, regulatory agencies, trade associations, and international organizations. The company's staff of more than 500 professionals operates in 18 offices across North America, South America, Europe, Asia, and Australia.

June 2005

Class-Action Reform Becomes Reality

By Steven J. Storts
Dublin, Ohio

BACKED by strong bipartisan support in Congress, President Bush signed the Class-Action Fairness Act of 2005 into law in February. Responding favorably as expected, the industrial community and tort reform advocates are hailing the move as a significant start toward restoring common sense, fairness, and balance to the court system.

The new law, aimed at curbing class-action lawsuit abuse in state courts and reducing the number of frivolous actions, will allow greater scrutiny of settlements and deter the practice of "venue shopping" by allowing federal courts to hear more national class-action lawsuits involving plaintiffs and defendants from multiple states.

In signing the law, the president said it "marks a critical step toward ending the lawsuit culture in our country. It will ease the needless burden of litigation on every American worker, business, and family. By beginning the important work of legal reform, we are meeting our duty to solve problems now, and not to pass them on to future generations."

Class-actions can serve a valuable purpose in the American legal system, Bush explains, allowing numerous victims of the same wrongdoing to merge their claims into a single lawsuit. "When used properly, class-actions make the legal system more efficient and help guarantee that injured people receive proper compensation," he adds. "That's an important principle of justice."

However, the president also emphasizes that "class-actions can be manipulated for personal gain," pointing out that lawyers who represent plaintiffs from multiple states "can shop around for the state court where they expect to win the most money."

Responding to the administration's move toward legal reform, John Engler, president and CEO of the National Association of Manufacturers (NAM), says the new law targets "the jackpot justice that plagues our legal system. Most class-action cases will now be heard in federal courts, ending the practice of venue shopping for state courts predisposed to trial lawyers' interests."

In addition to moving most large, interstate class-actions into federal courts, the Class-Action Fairness Act provides new safeguards to ensure that plaintiffs and class-action lawsuits are treated fairly. The law now requires judges to consider the real monetary value of coupons and discounts, so that victims can count on true compensation for their injuries. It also mandates that settlements and rulings be explained in plain terms, so that class members understand their full rights.

The U.S. Chamber of Commerce Institute for Legal Reform applauds both Congress and the White House for their recent actions. "The speed with which the Class-Action Fairness Act passed both houses of Congress this session is a testament to the glaring need for class-action reform," notes Chamber President and CEO Tom Donohue.

"America's employers and consumers are the big winners today," he emphasizes. "Reform of the class-action lawsuit system will reduce frivolous lawsuits, spur business investment, and help restore sanity to our nation's legal system."

Not stopping there, however, the administration says there's still more to do. "Small business owners across America fear that one junk lawsuit could force them to close their doors for good, and medical liability lawsuits are driving up the cost for doctors and patients and entrepreneurs around the country," Bush points out. "Asbestos litigation, alone, has led to the bankruptcy of dozens of companies and cost tens of thousands of jobs, even though many asbestos claims are filed on behalf of people who aren't actually sick."

Overall, junk lawsuits have driven up the total cost of America's tort system to more than $240 billion a year, greater than any other major industrialized nation, the president points out. "It creates a needless disadvantage for American workers and businesses in a global economy, imposes unfair costs on job creators, and raises prices to consumers."

Enactment of the legal reform measure closely follows the release of the latest annual report by the American Tort Reform Association, *Judicial Hellholes 2004*, which ranks the "worst" state and county courthouses and legal jurisdictions in the U.S. and provides details on the extent of alleged lawsuit abuse.

Expressing NAM's support for the conclusions cited in the ATRA report, Engler contends, "Abusive manipulation of the legal system has fueled an explosion of class-action and outrageous individual lawsuits that costs the U.S. economy billions of dollars each year. Those who enrich themselves by willfully undermining the fairness and efficacy of our civil justice system must be exposed and, where necessary, the rules and laws they've corrupted must be reformed."

The NAM executive claims that the "legal system today has, in many ways, devolved into a lottery that all Americans are forced to play, whether they buy a ticket or not. And as with

any lottery, all the nonwinners invariably end up paying for those very lucky few who hit the jackpot."

"Make no mistake, every time an excessive judgment based on a specious claim is rendered against a company or a government agency, we all pay the price," Engler adds. "Whether through higher insurance premiums, consumer prices or taxes, the money to pay those judgments has to come from somewhere."

The fact that the plaintiffs' bar repeatedly "comes up with new, ever shameless theories to exploit our legal system should surprise no one," Engler observes. "But many say there are judges, even jurors, involved in these schemes, and that ought to be seen by everyone as an affront to the rule of law. It's impossible to overreact to this kind of alleged corruption. Governors, legislators, and appellate courts everywhere should do everything they can to end such abuses. The ATRA report provides several good places to start."

April 2005

Builders, Developers Settle Claims For Storm Water Runoff Violations

By Steven J. Storts
Dublin, Ohio

REGIONAL offices of the U.S. Environmental Protection Agency continue to actively pursue violators of storm water runoff and wetlands regulations at construction sites, particularly in the Northeast and Northwest.

In December, three companies involved in developing a 244-acre parcel in Taunton, Massachusetts, agreed to jointly pay $137,500 to settle claims for violations of the Clean Water Act (CWA). The Taunton Development Corporation and Condyne L.L.C., which are developing the property, and G. Lopes Construction Inc., the site contractor, were ordered by EPA's New England office to pay penalties for filling in nine acres of wetlands and failing to obtain proper permits.

In January, EPA's Northwest office reached a settlement with Premier Homes Inc. and Scott Hedrick Construction Inc. for their failure to control storm water runoff from their projects at the Hampton Inn and Comfort Inn sites, respectively, in Meridian, Idaho.

Premier Homes will pay $6,000 and Scott Hedrick Construction will pay $4,000 for violating CWA statutes requiring construction sites larger than one acre to apply for a National Pollution Discharge Elimination System (NPDES) permit and to prevent runoff from polluting local lakes and streams. Uncontrolled and sediment-laden storm water from the two sites polluted nearby Five Mile Creek.

"It's no secret that storm water runoff from construction sites can harm water quality," says Kim Ogle, EPA's waste water enforcement manager in Seattle. "The rules changed last year to require these construction sites to obtain permits and do what's necessary to prevent runoff from their sites from entering nearby streams and creeks. We did extensive outreach to educate the regulated community about the new requirements."

Ogle calls the violations "troubling," especially after more than a year of education and compliance assistance in the Boise area.

The violations in Massachusetts occurred in late 2002 and early 2003 while land was being cleared and the site prepared for a one million-square-foot warehouse. EPA charged the developers and contractor with discharging fill material to nearby waterways without a U.S. Army Corps of Engineers wetlands permit and discharging pollutants without a storm water NPDES permit.

In addition, the developers had failed to submit a notice of intent to be covered by EPA's Construction General Permit, which authorizes storm water discharges from large and small construction activities.

"Filling wetlands can exacerbate flooding and has already damaged wildlife habitat in the area of the development," notes Robert Varney, regional administrator of EPA's New England office. "Restoring the land will help protect the natural resources of this area. And in addition to penalizing the three parties for their involvement in the unauthorized work, the fine will serve as a warning to other developers that the federal government takes wetland and storm water laws seriously."

EPA issued an order in October 2003 to Taunton Development requiring compliance with CWA regulations. In response, the developers restored 6.5 of the nine acres that had been filled. Consistent with EPA's order, a permit was obtained from the Corps to keep 2.5 acres of wetlands fill in place for roadway access to upland areas at the site. The developers also prepared a storm water pollution prevention plan and obtained coverage under EPA's construction permit process.

Corps and EPA officials point out that in addition to providing valuable wildlife habitat, wetlands help to protect the health and safety of people and their communities by filtering clean water through trapping sediments and removing pollutants. Wetlands also provide buffers against floods as they store large amounts of flood water, slowly releasing it over time to help maintain water flow in streams, especially during dry periods.

March 2005

Agencies Negotiate Landmark Agreement To Mitigate Los Angeles Sewage Spills

By Steven J. Storts
Dublin, Ohio

IN ONE of the largest sewage abatement cases in U.S. history, the federal government, and several municipal water quality agencies and community coalition groups have reached a $2 billion settlement with the city of Los Angeles over years of unabated sewage spills.

The historic agreement was negotiated between the U.S. Department of Justice, the federal Environmental Protection Agency (EPA), the Los Angeles Regional Water Quality Control Board, the Santa Monica Baykeeper, and citizens' coalitions.

The U.S. and the regional board are settling their civil penalty claims against Los Angeles for a total of $1.6 million, which they will share equally. The city will pay $800,000 to the U.S. Treasury. The regional board is directing its $800,000 to local environmental improvement projects that the city will perform.

"The joint enforcement action will bring long-term significant improvement to Los Angeles's sewer system," says Tom Sansonetti, assistant attorney general for the Justice Department's Environment and Natural Resources Division. "This demonstrates that federal and state agencies and local organizations can work together to achieve compliance with environmental regulations."

With about 6,500 miles of sewer lines serving almost four million residents, Los Angeles operates the largest sewage collection system in the U.S. Since 1994, the city has experienced more than 4,500 sewage spills. The settlement is a groundbreaking effort to address all causes of sewage spills and odors in Los Angeles.

Under terms of the agreement, the city will rebuild at least 488 miles of sewer lines, clean 2,800 miles of sewers annually, enhance its program to control restaurant grease discharges, increase the sewage system's capacity, and plan for future expansion. In total, the city will perform $8.5 million in environmental projects in addition to the work required to improve its sewer system. The improvement projects will help restore streams and wetlands and capture and treat polluted storm drain flows.

"Sewage overflows are a major problem across the country, and bringing systems into compliance is one of EPA's top enforcement priorities," notes Tom Skinner, acting assistant administrator for the agency's Office of Enforcement and Compliance Assurance. "The Los Angeles sewer system is one of the largest, making this settlement significant both in Southern California and nationally."

The Santa Monica Baykeeper filed its action against Los Angeles in 1998. EPA, the regional board, and the community groups filed their suit in 2001. The community groups include Baldwin Hills Estates Homeowner's Association, Baldwin Hills Village Garden Homes Association, United Homeowners Association, Village Green Owners Association, and Concerned Citizens of South Central Los Angeles.

"This settlement agreement is well worth the hard work that went into it," says Francine Diamond, chairman of the regional board. "Soon it will not be commonplace to have spills resulting in raw sewage flowing down our streets and polluting our waterways. The agreement is a great victory for community members, as well as everyone concerned about public health and clean water."

October 2004

Federal Agencies Move to Resolve Issues Facing Missouri River Ecosystem

By Steven J. Storts
Dublin, Ohio

COOPERATION among federal government agencies is not all that uncommon; it's just not reported as often. Regardless of perception, in a consensus agreement reached in July, the U.S. Army Corps of Engineers and the Fish and Wildlife Service announced steps to resolve environmental management issues on the Missouri River.

As part of the agreement, both agencies will cooperate in the recovery of federally protected Missouri River species—including the least tern, piping plover, and pallid sturgeon—and the surrounding aquatic ecosystem. To aid the effort, the Bush administration says it will add $42 million to the 2004 budget for ecosystem restoration.

More specifically, the agencies will formally develop a new biological assessment under the Endangered Species Act (ESA). According to government sources, both agencies have made substantial progress during the informal consultation period in resolving complex and controversial issues relating to endangered species, and they expect this spirit of cooperation to continue through the next, more formal phase.

Pursuant to the understanding between the Corps and the Fish and Wildlife Service reached in informal consultation, the updated *Missouri River Master Control Manual* will be completed this year and implemented next spring, with a final environmental impact statement to include a "preferred alternative" available for public review and comment this fall.

The Corps plans to serve all congressionally authorized purposes of the system of dams and reservoirs while complying with ESA. Moreover, the agency's biological assessment does not contemplate the need to employ a spring rise or lower summer release from the Gavins Point Dam on the Missouri River to provide for the recovery of any federally protected aquatic species.

Corps officials point out that a restoration effort of this scale is unprecedented and will require a long-term commitment. The Missouri River, the longest river in the U.S., drains one-sixth of the land mass, including all or part of nine states. The six dams and reservoirs that serve the watershed comprise the largest reservoir system in North America. As part of its congressionally authorized mission, the Corps oversees all Missouri River operations pertaining to flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife.

Currently, the Corps is under two conflicting court orders concerning operation of the river that are irreconcilable. One order, issued by the U.S. District Court in Nebraska in May 2002 and affirmed a year later by a federal appeals court, requires the Corps to maintain sufficient flows for navigation as called for under the existing *Missouri River Master Control Manual* and the current annual operating plan.

However, an injunction recently issued in July by the U. S. District Court for the District of Columbia prohibits the Corps from implementing the summer flows set forth in the current annual operating plan and the 2003 Supplemental Biological Opinion. The Corps contends that the latter is legally and scientifically valid, reporting that operation of the Missouri River system has not resulted in any loss of the endangered tern or plover this year.

The U.S. Department of Justice has filed a request for a stay of the injunction pending appeal with the U.S. Circuit Court of Appeals for the District of Columbia. Until an appellate court ruling is obtained in the matter, the Corps plans to continue operating under the 2003 Supplemental Biological Opinion, in compliance with the earlier court order in Nebraska.

September 2003

White House, Merit Contractors Victorious in Labor Case Decisions

By Steven J. Storts
Dublin, Ohio

THE White House executive order prohibiting mandatory project labor agreements on federally funded or assisted construction projects will now stand as originally issued. Overturning a lower court's earlier ruling from July of last year, the U.S. Circuit Court of Appeals for the District of Columbia upheld President Bush's Executive Order 13202 regarding mandated PLAs.

"This is a major victory for the U.S. construction industry as it ensures a neutral government position and restores full and open competition in the federal contracting process," says Ken Adams, national chairman of the Associated Builders and Contractors.

The president of Pace Electric Inc., New Castle, Delaware, further contends, "Not only do union-only PLAs discriminate against the four out of five U.S. construction workers who choose not to join a labor union, but they also create a costly burden on taxpayers."

In April 2001, the AFL-CIO Building and Construction Trades Department and other labor interests sued to bar enforcement of the executive order. Four months later, the District of Columbia ruled in favor of the AFL-CIO's position. In November, the U.S. Department of Justice appealed the decision, which was further supported by a friend-of-the-court brief filed in opposition to the AFL-CIO by ABC and a broad coalition of business organizations.

In another labor-related court decision handed down in June, the U.S. Supreme Court ruled in favor of ABC member firm BE&K Construction, Birmingham, Alabama, in a major case that affects the rights of employers to file lawsuits against labor unions. The court found that filing a reasonably based but unsuccessful suit is not unlawful retaliation under the National Labor Relations Act (NLRA).

The high court's ruling overturns an April 2001 finding by the U.S. Court of Appeals for the Sixth Circuit that required BE&K to pay attorneys' fees to California construction unions against which BE&K had filed a lawsuit. The recent court decision was unanimous in BE&K's favor, with a 5–4 split on what the standard should be in future cases.

ABC officials consider the court's finding to be of vital importance to construction companies that are being targeted by labor unions, ensuring that the National Labor Relations Board (NLRB) will respect the constitutionally protected right of any firm to file a lawsuit against labor unions, thus allowing employers to proactively defend themselves in court.

"The U.S. Supreme Court . . . [has] held that the right of employers to sue unions is protected under the NLRA, as properly interpreted under the First Amendment, so long as the suit is reasonably based and is not filed solely with the motive of imposing the costs of litigation on the unions," says ABC General Counsel Maurice Baskin of Venable, Baetjer, Howard & Civiletti L.L.P.

Baskin had argued the case on behalf of BE&K, claiming that the NLRB had applied an incorrect legal standard against BE&K and had violated the company's constitutionally protected rights. The case dates back to 1987 when BE&K sued the Contra Costa Building Trades Council, which represents several unions in Contra Costa County, California, for seeking to delay construction on a $350 million project through a campaign that included picketing and seeking an environmental ordinance that would delay the construction process.

The U.S. Court of Appeals for the Ninth Circuit, though "troubled" by some of the unions' actions, ultimately found no violation of the antitrust laws. BE&K's suit did, however, halt any further action by the unions, allowing the company to complete the project.

NLRB subsequently ruled that BE&K's lawsuit was retaliatory because the company lost the underlying case, regardless of its good faith belief in the merits of its suit. The board ordered the firm to pay the unions' legal fees. BE&K then appealed NLRB's decision to the Sixth Circuit, but that court upheld the board's policy. However, the Supreme Court's ruling overturns the decision by the Sixth Circuit and declares the NLRB policy invalid.

September 2002

Welcome Mat Not Exactly Coming Out For New Federal Contracting Rules

By Steven J. Storts
Dublin, Ohio

DESPITE the objections from business organizations, the construction community, and some federal agencies, new acquisition rules became effective in January that allow federal contracting officials to deny government business to contractors that have repeatedly broken procurement, environmental, labor, or other specific laws.

Issued in December by the Clinton administration's Office of Management and Budget, the new regulations have been called "blacklisting rules" by numerous contractor organizations because federal agencies could block government contracts on the basis of factors unrelated to a prospective contractor's ability to perform the services. Companies further contend that they could be disqualified from government contract awards based on any violations of federal law without final adjudication.

However, Joshua Gotbaum, the administration's OMB controller, explained that the new regulations are aimed at reducing fraud and ensuring that the federal government procures services only from companies that have satisfactory records of integrity and ethics. "We've proposed this regulation and installed it because we believe it will save taxpayer money," he said. "There are no businesses that would want to do business with a company that engaged in fraud."

The major reasons that a company can be disqualified from securing a federal contract include being found guilty of a felony violation of tax, antitrust, employment, environmental, or consumer protection laws; or losing a court judgment in a case brought by the government.

Under the new rules, companies will have to inform federal procurement officers whether they have violated federal laws within the last three years. If the companies are likely to be awarded contracts, then procurement officials have the discretion to request more specific information regarding the violations.

Moreover, contracting officers are directed to look for a pattern of abuse and give more weight to criminal, rather than civil, violations. For example, if a company had only a single violation of tax, labor, environmental, antitrust, or consumer protection law in the past three years, more than likely, no disciplinary action would be taken against the company. But if a company repeatedly made significant violations of the law, it could be eliminated from consideration for the contract.

However, Gotbaum emphasized that procurement agencies and contracting officers should also consider whether companies are taking corrective actions before eliminating them from competition for a contract.

Before formally barring a company from federal contract consideration, the contracting officer is required to consult with the agency's legal counsel. The agency also must give the company time to appeal the decision to the agency itself, the General Accounting Office, or the courts.

Ironically, even before the new OMB rules were issued late last year, several Clinton administration agencies had voiced opposition. Both the General Services Administration and the U.S. Environmental Protection Agency registered objections to the revised procurement regulations when they were first proposed.

In their formal comments submitted to the Federal Acquisition Regulatory Council, GSA and EPA stated that the proposal would threaten the public contracting system by increasing costs to contractors and the government and yielding inconsistent results. Both agencies further noted that mere allegations of violations should not be enough to block a federal contract. They said that while ambitious, the proposed regulations were vague and unnecessary.

GSA contended that implementing the proposed rule would be extremely difficult and would "undermine the progress the government has made in acquisition reform and streamlining" and "discourage commercial companies from selling to the government." Finally, GSA said that "the proposed rule appears punitive, rather than designed to protect the government."

EPA stated that "the proposed rule is duplicative of the existing debarment remedy and less efficient in application." In fact, the agency expressed concern that this rule could lead to "claims of de facto debarment."

Supporting the opposition, the House of Representatives voted last July to block the federal government from issuing the new regulations, but the Senate failed to act accordingly. Toward the end of the year, the Clinton administration was further criticized for giving just a 30-day notice before implementing the program, rather than the generally prescribed 90 or 120 days.

Business coalitions have already vowed to challenge the controversial new regulations in court and also hope

to persuade President Bush to rescind them. The National Alliance Against Blacklisting has a lawsuit pending in federal district court to overturn the blacklisting rule on the basis that it would create arbitrary and subjective standards for the awarding of federal contracts, which would be applied inconsistently by contacting officers among the government agencies.

The plaintiffs in the suit, filed in the U.S. District Court for the District of Columbia, are the following NAAB members: U.S. Chamber of Commerce, The Business Roundtable, National Association of Manufacturers, Associated Builders and Contractors, and Associated General Contractors of America.

The Bush administration is currently reviewing the new federal acquisition rules and other last-minute regulations and executive orders issued by President Clinton. The U.S. Supreme Court has formerly ruled, however, that a new government administration cannot simply overturn or rescind existing regulations without substantial reason.

March 2001

Final Ergonomics Rule Could Impact More Than 102 Million U.S. Workers

By Steven J. Storts
Dublin, Ohio

WITH its goal of reducing by half the 600,000 annual repetitive stress injuries in the workplace, the Occupational Safety and Health Administration recently released its final rule on ergonomics for general industry, which becomes effective January 16.

OSHA's new regulation—to be phased in over four years—requires employers to be more conscientious in matching the physical requirements of jobs to the physical capabilities of employees, with the intention of preventing repetitive stress injuries and musculoskeletal disorders (MSDs) such as carpal tunnel syndrome, sciatica, tendinitis, and lower back pain.

More specifically, the ergonomics standard requires employers in general industry to advise employees about possible injury risks and the importance of reporting signs and symptoms of MSDs promptly to avoid serious injury. Businesses will also have to establish job-based ergonomics programs—triggered only when an employee experiences a work-related injury or persistent signs or symptoms of injury in a job that includes one or more of a defined set of risk factors.

Further, employers must analyze all jobs and job functions to determine if any are "problem jobs" that need to be fixed. Additionally, businesses must ensure medical attention for injured workers and continue their pay and benefits for up to 90 days, if necessary. The final rule, however, does not address injuries caused by slips, trips, falls, vehicle accidents, or similar accidents.

The new standard has a potential impact on 6.1 million jobs and more than 102 million workers. About 60 million of these workers are employed at workplaces that have yet to address ergonomics, placing them at risk for potentially disabling MSDs, according to OSHA officials, who predict that the regulation will most affect the hospital, restaurant, grocery, trucking, and courier industries. However, also included in the final rule are millions of workers in the high-tech and information industries that spend all day at computer workstations.

"Work-related musculoskeletal disorders are the No. 1 workplace injury in America," says OSHA Administrator Charles Jeffress. "It is critical that we move forward to put in place real solutions to the real problems that real people are experiencing every day. Our final standard establishes concrete, objective guidance for employers to help them determine when they need to take further action and when they've fulfilled their obligation to resolve problems in their workplaces."

Companies will have to advise their workers of possible injury risks and the importance of prompt reporting of symptoms, Jeffress points out, but employers are not required to actually change the way work is done unless an employee is hurt on the job or has symptoms of a work-related injury.

OSHA contends that its standard will help reduce repetitive stress injuries that result in lost work, saving employers $9.1 billion annually or about $27,700 in direct costs for each MSD prevented. The agency calculates the cost to employers of implementing the regulation to be about $4.5 billion annually, but this figure is considered too low by some industry groups. They project that workplace alterations, setting up ergonomics programs, and paying worker benefits would cost from $18 billion to $125.6 billion annually.

Although the rule does not cover workers and workplaces in construction, maritime, agriculture, and railroads, many construction industry and professional engineering organizations have voiced criticism regarding the regulation, including NSPE and the American Society of Professional Engineers. In fact, representatives of the construction community, such as the Associated General Contractors of America and the Associated Builders and Contractors, claim that the construction industry will soon be targeted by a federal ergonomics regulation.

However, some industry trades groups are pleased with OSHA's finalized standard. One of them, the Union of Needletrades, Industrial and Textile Employees, which represents 250,000 workers in the apparel, textile, laundry, distribution, and auto parts industries in the U.S. and Canada, has been an innovator in the development of ergonomics programs and a leading proponent of strong workplace safety rules.

UNITE President Jay Mazur points out that many companies have already worked with the union locally to establish ergonomics programs, because "it saves them money, too." Mazur adds, "Both large and small companies have relied on UNITE's training and technical assistance to identify key job hazards and purchase discounted equipment that will help reduce repetitive stress injuries."

Both the United Auto Workers and the AFL-CIO have also strongly endorsed OSHA's new standard. "Ergonomics problems caused by repetitive motion and overexertion lead to the majority of work injuries among UAW members," says UAW President Stephen Yokich. "Our union has negotiated extensive ergonomics programs with many employers, and we greatly improved our agreements with the auto companies in the most recent industry negotiations."

Yokich emphasizes the necessity of an enforceable standard because, although responsible employers all see the need for ergonomics, negotiations are still somewhat limiting in promoting worker safety and preventing workplace injury.

"This standard, while a necessary first step, reflects some compromises in the face of the fierce industry and political opposition to any rule protecting workers," Yokich notes. "It appears to allow employers to defer action until workers are hurt, rather than requiring a more proactive approach." The UAW leader says that his union not only vows to defend the new rule, but "will work to implement and strengthen these protections."

The AFL-CIO touts OSHA's new ergonomics rule as "the most important worker safety action developed in the agency's history. Ten years in the making, the new standard will prevent hundreds of thousands of crippling repetitive strain injuries each year." The union's officials contend that there is strong evidence that supports an even stronger standard—one that requires action when hazardous exposures are present, instead of delaying action until an injury occurs.

More information on OSHA's finalized ergonomics standard can be found at the Web site, www.osha-slc.gov/ergonomics-standard.

January 2001

New Airbag Safety Design Standards Pose Greater Challenges for Engineers

By Steven J. Storts
Dublin, Ohio

ENGINEERS in the U.S. automobile industry will soon face new challenges as the federal government develops, tests, and evaluates new safety standards for the next generation of advanced air bags.

Culminating a comprehensive series of actions to improve air bag safety, the U.S. Department of Transportation has mandated that future air bags must pose less risk of serious air bag-induced injuries than current air bags—particularly for small women and young children—and provide improved frontal crash protection for all occupants.

The new rule issued by the National Highway Traffic Safety Administration (NHTSA) imposes performance requirements to ensure that future air bags will not pose an unreasonable risk of serious injury to vehicle occupants who are very near the air bag when it deploys. However, the agency also emphasizes that vehicle manufacturers will have options available in their research and development to use various combinations of advanced air bag technologies.

With this flexibility, for example, manufacturers could use technologies like dual stage inflators and weight sensors, which control or prevent air bag deployment in appropriate circumstances. Some new vehicles are already equipped with these types of devices.

Future tests will incorporate a new family of crash-test dummies—an infant, two small children, a small adult female, and an average-size adult male—with improved injury criteria better representing human injury tolerances. Currently, only an average-size adult male dummy is required in developing air bag standards from crash tests.

"The new requirements . . . for improving protection and minimizing risk are very comprehensive and will require vehicle manufacturers to innovate to make air bags of the future even better than today's," says NHTSA Administrator Rosalyn Millman.

During the first stage of the new safety standards, September 1, 2003, to August 31, 2006, increasing percentages of motor vehicles will have to satisfy criteria for reducing air bag risks, either by automatically turning off the air bag in the presence of young children or deploying the air bag in a manner much less likely to cause serious or fatal injury to out-of-position occupants.

For manufacturers that decide to design their passenger air bags to deploy in a low-risk manner, the final rule specifies that unbelted child dummies be placed against the instrument panel. This is because precrash braking can move unrestrained children and small adults forward into or near that position before the air bag deploys. The ability of driver air bags to deploy in a low-risk manner will be tested by placing the adult female dummy against the steering wheel and then deploying the air bag.

In addition, vehicle manufacturers will have to pass a rigid-barrier crash test with unbelted adult female and male dummies. The unbelted rigid-barrier test better replicates what happens to motor vehicles and their occupants in actual crashes in comparison to the sled test that is currently used. The maximum speed for unbelted dummy testing will be 25 miles per hour.

During the second stage phase-in of the safety standards, September 1, 2007, to August 31, 2010, the maximum test speed for the belted rigid-barrier test will be increased to 35 miles per hour (an increase of 5 miles per hour from earlier requirements) in tests with the adult male dummy. As in the case of the first-stage criteria, the second-stage requirements will be phased in for increasing percentages of motor vehicles.

Millman points out that the rigid-barrier crash test specified in this new rule establishes updated, improved requirements that differ fundamentally from those specified in the past. For example, she says, the previous rule specified only an unbelted and a belted rigid-barrier test and used only one dummy—an average-size adult male dummy. She also notes that the previous rule specified no other criteria that had the effect of limiting the methods and designs used to achieve compliance with the unbelted rigid-barrier test.

Through the new safety standards, NHTSA expects to adopt improved injury criteria to assure greater protection by air bags, adding a new neck injury measure and making the existing chest injury measures more stringent. Additionally, manufacturers will have to meet or surpass a 25-mile-per-hour offset deformable-barrier test using belted adult female dummies to prevent late air bag deployments in certain crashes. A late air bag deployment would allow enough time for an unrestrained occupant to move forward into the steering wheel or

instrument panel during a crash before the air bag deploys.

Millman emphasizes that advanced air bags will never eliminate the need for vehicle occupants to use seat belts. Moreover, she adds, even in vehicles with advanced air bags, the back seat remains the safest seating position for infants and young children, and both should still be transported in safety seats or booster seats appropriate for their age.

October 2000

OSHA Unveils Plan to Curb Noise Pollution at Construction Sites

By Steven J. Storts
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AS the construction industry prepares for the impending issuance of a federal ergonomics standard, another regulatory issue has now surfaced—the reduction of noise pollution, more commonly referred to as "hearing conservation."

Although the ergonomics standard, expected to be finalized by the Occupational Safety and Health Administration later this year, primarily targets general industry, business coalitions caution that many small businesses, including construction firms, could still be affected by the new federally mandated rule, depending upon the final provisions.

In contrast, OSHA's latest initiative aimed at preventing hearing loss will directly impact construction companies of all sizes. Before year's end, the agency plans to release a draft proposal that would expand similar provisions of the 1983 hearing conservation standard for general industry to specifically include construction employers, employees, and job-site operations.

The general industry standard includes provisions for noise monitoring and audiometric testing and requires employers to notify employees of overexposures and train them about the hazards of excessive noise. The standard also details requirements for hearing protection devices, includes an action level and a permissible exposure limit, and requires employers to keep records so that hearing loss can be measured.

OSHA Administrator Charles Jeffress cites recent studies showing that a large number of construction workers experience work-related hearing loss. "In fact, we estimate that 750,000 construction workers are currently exposed to hazardous levels of noise on the job," he says. "That's about 15% of all construction workers."

To preserve worker hearing, Jeffress points out, more is needed than just a simple exposure standard and a brief notice that employers need a hearing conservation program. "That's just not enough," he emphasizes. "Employers need more guidance, and workers need more protection."

Last year, OSHA conducted more than 18,000 construction inspections, the majority of which focused on safety issues, according to Jeffress. "We only cited the construction noise standard 45 times and the hearing conservation requirements 19 times," he notes, adding that enforcement of the current standard poses additional problems because the construction job site changes on a day-to-day basis.

"We may not inspect on a day when the noise levels exceed the standard," he says. "But that doesn't mean that noise isn't a problem at that site." Jeffress also explains that part of the enforcement difficulty is because the standard itself is too general, making violations tough to prove.

However, the OSHA administrator also emphasizes that enforcement alone is not the answer. "We need to consider alternatives as well," he says. "Just the possibility of an inspection is not going to motivate stronger hearing protection."

The highest exposures are most likely to occur during the structural stage of construction work, during concrete placement and forming, and when workers are using heavy equipment, Jeffress explains. Finding ways to reduce noise during these activities could significantly reduce noise levels for all workers at the site, he contends.

"Engineering controls are certainly the best way to go," he says. "Reducing noise at the source is so much more effective than personal protective equipment, even though it's difficult. But we know that it's possible, thanks to noise control research on mining equipment. Mufflers and insulation can reduce noise significantly for operators.

Jeffress also points out that low-noise equipment also sells. "Europe is ahead of us in this regard," he says. "Germany's Blue Angel program is one example of ranking equipment according to noise levels, much like we evaluate fuel efficiency for cars or electricity consumption for household appliances. The program further encourages manufacturers to market and contractors to buy the quiet equipment."

Following OSHA's notice of proposed rule-making, the agency will begin querying construction stakeholders to determine the best way to proceed with a hearing conservation standard for the industry. Questions will include: How much hearing loss is a part of getting older? How can noise exposures and hearing loss be tracked in an industry where the average worker stays on the job three to five years? What about the fact that many workers are employed by very small firms? How can workers hear backup alarms or warning signals at the job site if they're wearing hearing protection equipment?

"Excessive noise is a problem that affects more Americans than any other occupational injury," Jeffress says, noting that the problem is also "harder to address than almost any other hazard on construction sites."

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