A Statutory and Case Law Survey of the Proposed OSHA Emergency Response Standard

A Report to the Public Record
Docket No. OSHA-2007-0073
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July 19, 2024

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EXECUTIVE SUMMARY

In 1970, the U.S. Congress enacted the Occupational Safety and Health Act (OSH Act), and in the process created the Occupational Safety and Health Administration (OSHA). OSHA is a subagency of the Department of Labor (DOL), with the DOL Secretary being responsible to administrate occupational safety and health standards that ensure "*safe and healthful working conditions*."

The OSH Act and longstanding case law requires that OSHA rules be "*reasonably necessary or appropriate,*" a doctrine that the Boundary Line Foundation (BLF) applied to assess compliance of the proposed Emergency Response Standard (ERS) with the organic OSH Act.

This survey demonstrates that OSHA's expansion of the Fire Brigades Standard to incorporate performance-based and prescriptive standards is neither reasonable nor appropriate. Implications arising from the imposition of unfunded mandates, omission of procedural federalistic requirements, and preemption of state police power introduces questions of a vast and transformative nature that have national implications.

Emergency response activities have always fallen within the scope of police powers of the individual states, their geopolitical jurisdictions, or sovereign native American tribal governments. Neither the ERS proposal nor the administrative record contains any discernable pathway of OSHA's reasoning and statutory interpretation, justifying how it can legitimately preempt state and local police power.

This survey demonstrates that the majority of employers and employees in the emergency response system fall under the jurisdiction of state and local governments,[1] and we conclude that OSHA's proposal to regulate public sector employees in plan states through a series of complex bureaucratic tests to be an inappropriate expansion of specific authority delegated to the agency under the OSH Act.

In its cost-benefit analysis, OSHA claims $2.6 billion in annualized **benefits** and $600 million **in cost impacts**[2] to emergency responders impacted by the proposed ER Standard. We demonstrate that the OSHA cost/benefit analysis is **irreparably flawed** because the majority of emergency response costs are accrued by state and local governments, **which are statutorily exempt** from regulation under the OSHA proposed ERS. Because state and local jurisdictions are exempt from regulation under the proposed OSHA ERS, the benefits quantified in the Federal Register notice are significantly overstated and the cost/benefit analysis is irreparably flawed.

[1] Conservative estimates would have to place the percentage of covered employers and employees for such a regulation at 75-90% state and local government jurisdiction.

[2] FR Vol. 89. No. 24 at 7994.

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ATTACHMENTS

INTRODUCTION

Description of the National Emergency Response System

The emergency response system of the United States is organized at the State and local level and is principally divided into three general sectors: firefighting, emergency medical services, and search and rescue (SAR) operations. Emergency response actions are authorized under the general police power possessed by the States and not the Federal government. The States and local governments employ their police power to regulate public health, safety, and welfare within their jurisdictions.

Sovereign Native American Tribal governments also possess general police powers over emergency response actions within their borders, and tribes often collaborate with State and local governments for emergency response activities.

The personnel who perform emergency response services consist of service providers, paid professionals, and volunteers, with volunteers significantly outnumbering the professionals. Most emergency response organizations are governmental in structure and function; a small percentage are private businesses, fire brigades, or dedicated emergency services that also serve in industrial settings.

Emergency medical response is typically integrated with fire department/fire district operations. There are some private emergency medical response companies, a portion of which are part of larger healthcare organizations. Air ambulance services are also part of the emergency response sector but are separate from dedicated SAR air resources.

The majority of rural and wilderness SAR actions are conducted under the authority of the office of the County Sheriff. Some of the largest Sheriff Department-affiliated search and rescue operations, such as Los Angeles County, have responders that are professionally employed in their positions, but most search and rescue organizations are volunteer-based.

On February 5, 2024, OSHA issued its notice of proposed rulemaking (NPRM) to update the existing Fire Brigades Standard. The proposed rule would vastly expand the scope of the Fire Brigades Standard to include responders from the three types of emergency response, and would foreseeably nationalize the emergency response actions, creating consistency with the Federal Emergency Management Agency (FEMA) National Response Framework. It also proposes to align with the current industry consensus standards issued by the National Fire Protection Association (NFPA).

On June 28, 2024, the United States Supreme Court decision No. 22-451 *Loper Bright Enterprises et al. v. Raimundo, Secretary of Commerce, et al.* (*Loper Bright*) together with No. 22-1219, *Relentless, Inc., et al. v. Department of Commerce et al.*, overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837. From the slip opinion syllabus:

> *"The Court granted certiorari in these cases limited to the question whether Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, should be overruled or clarified. Under the Chevron doctrine, courts have sometimes been required to defer to "permissible" agency*

> *interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently, Id., at 843. In each case below, the reviewing courts applied Chevron's framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevenson Act, 16 U.S.C. §1801 et seq., which incorporates the Administrative Procedure Act (APA), 5 U.S.C. §551 et seq."*

The Court held:

> *"The Administrative Procedure Act requires courts to exercise their independent judgement in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous. Chevron is overruled."*

The Opinion of the Supreme Court closes with this statement:

> *"The dissent ends by quoting Chevron: "'Judges are not experts in the field.'" Post. at 31 (quoting 467 U. S., at 865). That depends, of course, on what the "field" is. If it is legal interpretation, that has been, "emphatically" "the province and duty of the judicial department" for at least 221 years. Marbury, 1 Cranch, at 177. The rest of the dissent's selected epigraph is that judges "are not part of either political branch.'" Post, at 31 (quoting Chevron, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" independent of the political branches when interpreting the laws those branches enact. The Federalist No. 78, at 523. And one of those laws, the APA, bars judges from disregarding their responsibility just because an Executive Branch agency views a statute differently.*
>
> *Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.*
>
> *Because the D. C. and First Circuits relied on Chevron in deciding whether to uphold the Rule, their judgments are vacated, and the cases remanded for further proceedings consistent with this opinion.*
>
> *It is so ordered."*

This survey evaluates the OSHA ERS in a post *Loper Bright* legal context to examine if the programmatic framework proposed by OSHA impermissibly preempts state and local police prerogatives. Specifically, it appears that the administrative record for the OSHA ERS was prepared with a Chevron Deference in mind, a legal condition that no longer exists.

I. BACKGROUND

Historical overview of the development of Fire Brigades and the state emergency response system.

Philadelphia is the birthplace of the first volunteer fire companies. In 1736, Benjamin Franklin founded the Union Fire Company, Philadelphia's first. Firefighting was developed in Philadelphia with fire companies becoming an integrated part of local culture through freedom of expression. America's emergency response system evolved from this era to the mature, locale-based system we know today.

The nation's emergency response system represents federalism in action. Emergency response is an exercise of State, local government, and tribal government police powers over public health, safety, and welfare. Because the Federal government does not possess police powers over emergency response, Federal agencies have limited jurisdictional authority over State, local, or tribal emergency response actions.[3]

Most emergency response organizations are affiliated with units of government. They are focused on fire protection, EMS, law enforcement, or other more specialized response activities. States typically provide funding and standards for training, certification, operations, reporting, and other regulatory requirements. Emergency responder occupational safety and health requirements are typically assured and regulated by the individual States and their jurisdictions.

Some State National Guard units provide significant levels of participation in emergency response operations. For example, the Colorado Army National Guard provides helicopter support for wilderness technical search and rescue (WSAR) operations, partnering with volunteer search and rescue (SAR) technicians operating under the authority of county sheriffs.[4]

Several Federal agencies operate fire departments and other emergency response functions distinct from those operated by the states and their political subdivisions. Each operates occupational safety and health programs. These resources are often made available to civilian authorities throughout the regions in which they are located.

[3] The Supreme Court uses the term "police power" to refer to the states' general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g.*, Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 536 (2012).

[4] The Colorado Army National Guard is currently engaged in developing advanced high-altitude hoist-based technical rescue operations at the upper boundary of helicopter performance capabilities.

History of the Fire Brigades Standard Rule

The standard described in 29 CFR § 1910.156 applies to fire brigades established in a workplace by an employer, such as chemical refiners and large manufacturing workplaces, or internal contractual fire response entities. The Fire Brigades Standard was never intended to regulate local, State or national emergency response entities.

The term "Fire Brigade" is not defined in 29 CFR 1910.156 or in the proposed rulemaking. That definition is important to understanding of the intent of the Fire Brigades function:

- **fire brigade (n)**[5]
  :a body of firefighters: such as
  a: a usually private or temporary firefighting organization
  b: *British*: FIRE DEPARTMENT
  First Known Use: 1832 in the [British usage] meaning defined above.
- Depending on the large or industrial facility for which a fire brigade has been established, most employees involved in the fire brigade participate in training, equipment and PPE inspection, and emergency response as additional duties beyond those they perform day-to-day for the business.

29 CFR 1910.156(e) describes two groups of employer fire brigade personnel:

- Employees who use fire extinguishers of standpipe systems to control or extinguish fires only in the incipient phase.
- Employees who perform interior structural firefighting.

The presumption is made that employees who perform interior structural firefighting can also perform some exterior firefighting work as necessitated by the conditions required for response. This could have been explicitly included in the standard but was not.

[5] Merriam-Webster, 2024.

Context of the OSHA Emergency Response Standard; The Fire Brigades Standard

Page 15 of the September 9, 2015, NACOSH Subcommittee transcript of the Emergency Response and Preparedness Meeting states:

> *"…we're concerned that our fire brigade standard, which was passed in the 1970s, is not up to the task of protecting emergency responders."*[6]

Because of advances in technology and best practices, the existing Fire Brigades Standard should have been iteratively updated throughout its use. OSHA's lack of keeping pace with advancements does not speak well of the agency's capacity to effectively manage a standard for protecting the entirety of the nation's emergency response organizations and responders.

There is consensus that the Fire Brigades Standard is outdated. That standard is specific to an emergency response category about which the public is largely unaware. There is an acute need for a standard that is distinct from the larger emergency response community. The disparity among entity types is substantial enough to justify that the Fire Brigades Standard remain as a stand-alone.

Emergency response standards ***must*** be left to State, local, and tribal governments because they are an outworking of State, local, and tribal police power that the Federal government does not possess. Congress did not intend for the OSH Act to preempt the longstanding police powers of the States. Thus, OSHA is not able to demonstrate it has delegated authority to regulate a significant majority of the nation's emergency response entities.[7, 8] For regulatory consistency the commercial emergency response organizations should be regulated by the States where there is a need for any government oversight of their operations.

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[6] National Advisory Committee on Occupational Safety and Health Administration (OSHA) NACOSH Subcommittee Meeting, September 9, 2015, Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Reported by Janet Evans-Watkins, Capital Reporting Company.

[7] The Supreme Court uses the term "police power" to refer to the states' general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g.*, Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 536 (2012) ("Our cases refer to this general power of governing, possessed by the States, as the 'police power.'")

[8] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also, e.g.*, *Wyeth*, 555 U.S. at 565 ("([I]n all preemption cases, and particularly in those which Congress has legislated ... in a field where States have traditionally occupied … we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations and internal quotation marks omitted); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not supplant state law."); Puerto Rico Dep't of Consumer Affs. V. Isla Petroleum Corp., 485 U.S. 465, 500 (1998) ("As we have repeatedly stated, we start with the assumption that historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations and internal quotation marks omitted).

The Proposed Emergency Response Standard as Amending the Fire Brigades Standard

Though OSHA began the development of a proposed Emergency Response Standard with the assertion that the Fire Brigades Standard is outdated, the proposal as 89 FR 7774 would amend the following standards as actions of the proposed ER Standard:

- Amending 29 CFR 1910.120 Hazardous waste operations and emergency response.
- 29 CFR 1910.134 Respiratory protection.
- Amending Subpart L—Fire Protection 29 CFR 1910.155 scope, application, and definitions applicable to this subpart.
- Changing 29 CFR 1910.156 from "Fire Brigades" to "Emergency Response" and amending the section. This is where most extensive amending takes place. (As noted above, we believe that the Fire Brigades Standard must be updated and kept current because it is a distinct class of emergency response organizations.)
- Amending 29 CFR 1910.157 Portable fire extinguishers.
- Amending 29 CFR 1910.158 Standpipe and hose systems.
- Amending 19 CFR 1910.159 Automatic sprinkler systems.

II. SITUATION APPRAISAL

The existing national emergency response system is consistent with the federalistic principles embodied in the Constitutional separation of powers doctrine; the Tenth Amendment; and subsequent authorities. A practical outworking of federalism is found in the mandates of Executive Orders 13132 and 13175. Those presidential orders are focused on State and local government prerogatives. The emergency response system is supported in its outworking by a framework of interstate and intrastate[9] emergency response agreements that are locally pertinent as to time, places, range, and scale of potential emergency response incidents.[10]

The national emergency response system is directed, regulated, and operated at the State, local, and tribal level through general police powers. The **presumption against preemption canon of statutory construction instructs that federal law must not be read to preempt laws involving the States' historic police powers unless that is a clear and manifest purpose of Congress**. In adopting the OSH Act of 1970, Congress was silent on the delegation of authority to OSHA to regulate the emergency response system. Instead, Congress codified a state plan

[9] One example is the Montana Code Annotated 2023 Title 10. Military Affairs and Disaster and Emergency Services Chapter 3. Disaster and Emergency Services Part 9. Intrastate Mutual Aid System

[10] Montana Code Annotated 2023 Title 10. Military Affairs and Disaster and Emergency Services Chapter 3. Disaster and Emergency Services

system that provides individual states with the option to develop their own plans to achieve "*safe and healthful working conditions*" for employees.

If adopted as proposed, the OSHA ERS rule would foreseeably result in a vast and transformative reworking of the nation's emergency response system. The necessary implementation process would fragment resources, result in extended emergency response times in rural communities, and result in reduced service for those who have been injured, which could lead to unnecessary deaths. The proposed standard would diminish system capacity by causing smaller response entities operating on thin margins to go out of business and would lead to responder attrition through volunteer burnout as a result of increased requirements and higher expenses to volunteers who purchase their own equipment.

III. PUBLIC HEALTH AND SAFETY ARE THE PROVINCE OF STATE AND LOCAL GOVERNMENT.

Public health and safety falls under the police powers of State, local, and tribal governments. *"Statutes,"* Justice Frankfurter wrote, "*cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes."*[11]

> *"State* ***governments have the authority and responsibility*** *to protect the* ***public health, safety, and welfare****. This authority is an* ***inherent attribute of State governmental sovereignty and is shared with local governments"*** *"… Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective.* ***The doctrine of substantive due process is based on the recognition that the social compact upon which our government is founded provides protections beyond those that are expressly stated in the U.S. Constitution*** *against the flagrant abuse of government power. Calder v Bull, 3 U.S. 386 (1798)."*[12]

Longstanding federal statutes[13] reinforce the principle that police power is reserved to State and local governments. Title 7 of the Federal Land Policy and Management Act (FLPMA)[14] at 43 U.S.C. § 1701, note(g)(6) states that:

> "*Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or* - (6) *as a limitation upon any State criminal statute* ***or***

[11] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, St. Paul MN Thomas/West 2012 p. 252; Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (per Marshal, J.); *State v. French*, 460 N.W.2d 2 (Minn. 1990); *United States v. Stewart*, 311 U.S. 60, 64 (1940); *State v. Hormann*, 805 N.W.2d 883, 893 (Minn. Ct. App. 2011)

[12] WA Office of Attorney General - Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property. (September 2018).

[13] 43 U.S.C. § 315n., 33 U.S.C. § 1251(b).

[14] 43 U.S.C. § 1701 note (g)(6).

> ***upon the police power of the respective States**, or as derogating the authority of a local police officer in the performance of his duties ... **on the national resource lands**."*[15,16]

The arguments posed in the Federalist Papers to persuade the original states to ratify the Constitution explicitly declare that the powers delegated to the Federal government are few and defined, while those that remain to the States are numerous and indefinite.[17]

> *"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." United States v. Lopez, 514 U.S. 549, 567 (1995)." Bond v. United States, 572 U.S. 844, 854 (2014).*

and,

> *"Among those retained powers is the power of a State to "order the processes of its own governance." Alden v. Maine, 527 U.S. 706, 752 (1999).*[18]

The outworking of prescriptive federalism is the central theme of Clinton Executive Order 13132, **which directs OSHA to consult with affected states** and U.S. territories and possessions of the United States; perform detailed impact analysis; and, provide **procedural reporting to the Office of Management and Budget,** and equip the public record through publication in the Federal Register:

> *Sec. 6. Consultation -*
>
> *(a) "Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. Within 90 days after the effective date of this order, **the head of***

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[15] *NFIB et. al. v. Sebelius* 567 U.S. 519 (2012) "The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'" "…Our cases refer to this **general power of governing, possessed by the States but not by the Federal Government**, as the '**police power**.'"" … "The Framers thus ensured that **powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy."**

[16] For nearly two centuries it has been "clear" that, **lacking a police power**, "Congress cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 428 (1821).; "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity. *United States v. Morrison*, 529 U. S. 598, 618 (2000). Thus, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U. S., at 349." *Bond v. United States* 572 U. S. ____ (2014).

[17] Madison, J. Federalist No. 46.

[18] ...the Guarantee Clause, Art. IV, §4, which "presupposes the continued existence of the states and … those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938), also see, *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869).

> ***each agency shall designate an official with principal responsibility for the agency's implementation of this order and that designated official shall submit to the Office of Management and Budget a description of the agency's consultation process.****"*

and,

> *(b) "To the extent practicable and permitted by law,* ***no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments****, and that is not required by statute, unless:*
>
> *(1)* ***funds necessary to pay the direct costs*** *incurred by the State and local governments in complying with the regulation* ***are provided by the Federal Government****;* ***or****,*
>
> *(2) the agency,* ***prior to the formal promulgation of the regulation,***
>
> *(A)* ***consulted with State and local officials early*** *in the process of developing the proposed regulation;*
>
> *(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register,* ***provides to the Director of the Office of Management and Budget a federalism summary impact*** *statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and,*
>
> *(C)* ***makes available to the Director*** *of the Office of Management and Budget* ***any written communications submitted to the agency by State and local officials****."*

On March 13, 2024, the Budd-Falen Law Offices filed a Freedom of Information Act (FOIA) request with OSHA on behalf of the Boundary Line Foundation (BLF). The FOIA requested results of OSHA's consultation with State and local officials, including the nature of their concerns, and the required OSHA response regarding the proposed OSHA ER Standard: [19]

> *"All documents, records, notices, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132,*[20] *including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance.*"

[19] Freedom of Information Act Request: Proposed Emergency Response Standard FR Vol. 89, No. 24 Proposed Rule Docket No. OSHA-2007-0073.

[20] Executive Order 13132, August 4, 1999, Federalism**.**

After weeks of delay, status requests, and prompting, on May 13, 2024, OSHA provided an incomplete response to the Budd-Falen FOIA request. Notably, OSHA is on record as not attempting **any** consultation with state and local governments on the OSH ERS as required by EO 13132:

> *"On Federalism consultation – As noted in the Notice of Proposed Rulemaking for the Emergency Response proposed rule, OSHA did not conduct any consultative services pursuant to Executive Order No. 13132. See 89 FR 7774, 7998 (Feb. 5, 2024). Therefore, OSHA has located no responsive records. As such, we are issuing to you a no record response on this item.[21]"*

and,

> "*…it is likely that a search for any potentially responsive records would be time consuming and costly and would significantly exceed the payment amount you have authorized ($350) for processing this request.*"

Executive Order 13132 was developed to brightline governmental distinctions between the national government and the States, and to further the policies of the Unfunded Mandates Reform Act of 1995. E.O. 13132 is prescriptive in ensuring that principles of federalism constrain the executive agencies during policymaking. Executive Order 13132, Section 1 defines 'Policies that have federalism implications' and refers to:

> "*Regulations, legislative comments or proposed legislation, and other policy statements or actions* ***that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.***"[22]

Localized emergency response utilizes substantial numbers of highly qualified volunteer responders. It is impossible for OSHA or the Secretary of Labor to quantify or regulate the American value of "freedom of association"[23] without

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[21] Correspondence. U.S. Department of Labor to Attorney Karen Budd-Falen. Andrew Levinson, Director. Directorate of Standards and Guidance. May 13, 2024. (Attachment B)

[22] *Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association* 505 U. S. 88 (1992) JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE THOMAS join, dissenting p. 115; "it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the States." *Bond* I, 564 U. S., at ___ (slip op., at 10). That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power" - *Bond v. United States* 572 U. S. ____ (2014) p. 17.

[23] In general, members of an association do not fall under the jurisdiction of local, state, and federal governments and corresponding laws and regulations. The exception to this general rule is when the activities of the private membership association "present a clear and present danger of substantive evil". *Thomas v. Collins*, 323 U.S. 516 (1945).

impacting the rural culture of the United States. The public record is silent as to how OSHA explored impacts to the custom and culture of rural communities as a result of the ERS rule. It is foreseeable the proposed rule would have an unintended effect by impeding and complicating spontaneous activities of local governments and the volunteers who mutually respond to one another's interests in a free culture of association by burdening them with redundant administrative requirements.

IV. MAJOR QUESTIONS ADDRESSED BY THIS ANALYSIS

1. Does the OSH Act give OSHA the express statutory authority to regulate volunteers as employees in the absence of state action?
2. Does the administrative record for the proposed ERS rule demonstrate that OSHA has engaged in reasoned decision making within the boundaries, confines, and authorities delegated by Congress in the OSH Act?
3. Does OSHA possess the broad preemptive power as claimed at 89 FR 7998?
4. Can the intent and delegated authority of 29 U.S.C. Chapter 15, *Occupational Safety and Health*, be reasonably construed to preempt States' historic police powers?
5. Has OSHA reasonably demonstrated, as asserted at 89 FR 7845, that the proposed ERS corrects market failures in which private and public labor markets are not adequately protecting human health?
6. In the context of State Plans and rulemaking, is it legitimate to read the congressional intent "*at least as effective as*" as being synonymous with "*at least as stringent as*" or "*more stringent than*" as OSHA does at 29 CFR 1953.5?[24]
7. Does the cost/benefit analysis of the proposed OSHA ERS satisfy the minimum "*reasonably necessary or appropriate*" and legal tests to justify the vast and transformative nature of the ERS?

[24] **effective** *adj.* (14c) … 2. Performing within the range of normal and expected standards. *Black's Law Dictionary*, Tenth Edition.

V. UNDERGIRDING AUTHORITY and APPLICATION CANONS

- Foundational authorities to this rulemaking process include the Tenth Amendment to the United States Constitution[25] and the Guarantee Clause of Article IV, Section 4.[26]

- The statutes comprising United States Law are codified into a single unitary body of law as the United States Code (U.S.C.). These statutes are to be read and construed *in pari materia*[27] through the related statutes canon[28] with their underlying statutory authorities understood as cognate acts.[29]

Statutory authorities:

Authority Congress delegated to OSHA through the Occupational Safety and Health Act (Act) of 1970:

- 29 U.S.C. § 651(b): *"The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several states and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources-"*

- 29 U.S.C. § 651(b)(3): *"by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce…"*

- 29 U.S.C. § 652(3): *"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof."*

Congress did not delegate authority to OSHA to adopt mandatory occupational safety and health standards that **apply to government entities**:

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[25] The Tenth Amendment to the United States Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the Sates, are reserved to the States respectively, or to the people.

[26] Essay Art lV.S4.3. *Meaning of a Republican Form of Government*. *Constitution Annotated.*

[27] ***in pari materia*** — [Latin "in the same matter"] **1.** *adj.* On the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. *Black's Law Dictionary*, Tenth Edition.

[28] ***related-statutes canon*** — The doctrine that statutes *in pari materia* are to be interpreted together, as though they were one law. *Ibid.*

[29] ***cognate act*** — (1852) A statute whose subject matter is related to that of another, esp. when the two statutes were enacted at about the same time. *Ibid.*

- 29 U.S.C. § 654(a)(2): *"(a) Each employer- … (2) shall comply with occupational Safety and Health standards promulgated under this chapter."*
- 29 U.S.C. § 654(b): *"Each employee shall comply with occupational safety and health standards and rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."*
- 29 U.S.C. § 652(5): "*The term "employer" means a person engaged in business affecting commerce who has employees,* ***but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State***."
- 29 U.S.C. § 652(6): *"The term "employee" means an employee of the employer who is employed in a business of his employer which affects commerce."*
- At 29 U.S.C. § 651(b)(6) Congress found *"…the fact that occupational health standards present problems often different from those involved in occupational safety."*

Major questions doctrine issues raised:

- Controlling statutes do not delegate authority to OSHA to dismantle or control the nature of the existing [volunteer and professional responder] emergency response system. Imposition of the proposed OSHA ERS would foreseeably and negatively impact rural emergency response custom, culture, and freedom of association.
- OSHA has not explicitly been delegated the authority to "resolve" the issues identified in the proposed ERS.
- Volunteers are volunteers, not employees.

VI. THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act, Public Law 96—354, 5 U.S.C. § 601 was enacted to:

> *"… improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes."*
>
> Section 2(b) *"It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses organizations, and governmental jurisdictions subject to regulation. To achieve this principle agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."*

At 89 FR 7997 OSHA states that whenever a federal agency is required to publish a general notice of proposed rulemaking for any proposed rule, it must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). In lieu of an IRFA, **the head of agency may certify that the proposed rule will not have a significant economic impact on a substantial number of small entities**.

OSHA performed a screening analysis and determined that the agency **is unable to certify that the proposed ERS will not have a significant economic impact on a substantial number of small entities** and has therefore prepared an IRFA to further examine issues related to small entities and the proposed rule. The IFRA begins at 89 FR 7980.

OSHA presents an overview of the context for its proposed emergency response standard at 89 FR 7775:

> *"Elements of emergency responder (firefighters, emergency medical service providers, and technical search and rescue rescuers) health and safety are currently regulated by OSHA primarily under a patchwork of hazard-specific standards, and by state regulations in states with OSHA-approved State plan programs. (While OSHA standards do not apply to volunteers, some volunteers are covered in states with OSHA-approved State plan programs.) All of the OSHA standards referred to above were promulgated decades ago, and none was designed as a comprehensive emergency response standard. Consequently, they do not address the full range of hazards currently facing emergency responders, nor do they reflect major changes in performance specifications for protective clothing and equipment or major improvements in safety and health practices that have already been accepted by the emergency response community and incorporated industry consensus standards. …"*

The statement at 89 FR 7775 contains inaccuracies and omissions:

- OSHA does not mention that the existing national emergency response system evolved in the context of a federal policy vacuum. OSHA also does not mention that the States have developed, operate, and continue to improve the emergency response systems within their respective jurisdictions, regardless of whether individual States have opted to become state plan program states or remain non-plan states.
- OSHA fails to note that the States are regulating emergency response through their general power of governing using police power to regulate public health, safety, and welfare. The Federal government does not possess the police power to implement the proposed ERS, because the presumption against presumption

canon of construction provides that Federal law should not be read to preempt laws involving the states' historic police powers.[30]

In its *Description of the Reasons Why Action by the Agency Is Being Considered* section at 89 FR 7980 OSHA states:

> *"Emergency response workers in America face considerable occupational health and safety hazards in dynamic and often unpredictable work environments. Current OSHA emergency response and preparedness standards are outdated and incomplete. Specifically, the standards do not address the full range of hazards facing emergency responders, lag behind changes in protective equipment performance and industry practices, and conflict with current industry consensus standards. OSHA's current fire brigade standard, 29 CFR 1910.156 was promulgated in 1980 and has only had minor revisions since then."*[31]

State and local governments have filled the Federal regulatory vacuum with mature emergency response systems. They continue to improve their regulatory and policy frameworks to accommodate technological advances, protocols, and best practices using industry consensus standards.

In its *Statement of the Objectives and Legal Basis for the Proposed Rule* OHSA begins:

> *"The objective of the proposed rule is to reduce the number of injuries, illnesses, and fatalities occurring among emergency responders in the course of their work. This objective will be achieved by requiring employers to establish risk management plans, provide training and medical surveillance, establish medical and physical requirements, develop standard operating procedures, and provide other protective measures enabling emergency responders to perform their duties safely."*[32]

This objective makes the presumption that the response community is doing little to reduce the number of injuries, illnesses, and fatalities among responders in the course of their ongoing work. It also appears that OSHA believes that the response organizations may be remiss in preparing risk management plans, providing training, or satisfactorily taking basic steps to ensure a safe working environment for their employees and volunteers. The reality is that the states already require what OSHA says it intends to do, all within a localized context.

The States have long provided regulation of the public health, safety, and welfare needs through their general power of governing police powers.

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30 Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 539 (2012).

31 Federal Register/Vol. 89, No. 24. Proposed Rule pg.7981.

32 Ibid.

OSHA states that it welcomes comments on their analysis. In particular, the agency acknowledges there may be unique circumstances that would warrant additional analyses that the agency should develop.

OSHA cannot complete a valid regulatory flexibility analysis without first defining the scope of its authority and clarifying those entities OSHA can legitimately regulate. This means that before regulating, OSHA must evaluate the emergency response statutory, regulatory, and policy framework for each of the 50 states, plus the territorial and other possessions of the United States, and the Tribal reservations that operate emergency response organizations to assess gaps that OHSA could possibly address. This should be fully compliant with E.O. 13132 and 13175 consultation processes.

Given the effectiveness with which the States and their local governments regulate, operate, and improve their emergency response systems, and the statutory construct of the OSH Act, it appears OSHA's most effective role may be to provide research, development, and publication of best practices and consensus standards, not enforceable regulatory performance-based standards.

VII. OTHER AUTHORITIES - 89 FR 7997–7999

As applicable to the proposed OSHA ERS rulemaking, there are seven areas of agency compliance mandates, three of which are closely related: the Unfunded Mandates Reform Act, Executive Order 13132 on Federalism, and Executive Order 13175 on Consultation and Coordination with Native American Tribal Governments.

Importantly, the preambles of both Executive Order 13132[33] and Executive Order 13175[34] incorporate statements **that further the policies of the Unfunded Mandates Reform Act**:

The preamble of Executive Order 13132 reads:

> *"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act, it is hereby ordered as follows:…"*

[33] Executive Order 13132 of August 4, 1999. Federalism.

[34] Executive Order 13175 of November 6, 2000. Consultation and Coordination with Indian Tribal Governments.

The Executive Order 13175 preamble reads:

> *"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:…"*

Both Executive Orders serve as prescriptive extensions of the Unfunded Mandates Reform Act. Executive branch agencies engaged in rulemaking are required to comply with the statutory authorities governing rulemaking and authority during the rulemaking process.

Unfunded Mandates Reform Act[35]

The unfunded Mandates Reform Act (UMRA) states the Congressional intent for the statute at 2 U.S.C. § 1501. Purposes:

> *The purposes of this chapter are—*
>
> *§ 1501(1) to strengthen the partnership between the Federal Government and State, local, and tribal governments;*
>
> *§ 1501(2)* ***to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments*** *without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities;*
>
> *§ 1501(7) to assist Federal agencies in their consideration of proposed regulations affecting State, local, and tribal governments by—*
>
> *§ 1501(7)(A)* ***requiring that Federal agencies develop a process to enable the elected and other officials of State, local, and tribal governments to provide input*** *when Federal agencies are developing regulations; and*
>
> *§ 1501(7)(B)* ***requiring that Federal agencies prepare and consider estimates of the budgetary impact of regulations containing Federal mandates upon State, local, and tribal governments*** *and the private sector before adopting such regulations, and ensuring that small governments are given special consideration in that process; and*

[35] 2 U.S.C. § 1501 et seq., Unfunded Mandates Reform Act.

> *§ 1501(8) to begin consideration of the effect of previously imposed Federal mandates, including the impact on State, local, and tribal governments of Federal court interpretations of Federal statutes and regulations that impose Federal intergovernmental mandates.*

At 89 FR 7997 OSHA states:

> *"This proposed rule does not place a mandate on State or local government, for purposes of the UMRA, because the agency's standards do not apply to State and local governments (29 U.S.C. 652(5)).*"[36]

OSHA continues the paragraph stating:

> *"States that have elected voluntarily to adopt a State Plan approved by the agency must adopt a standard at least as effective as the Federal standard, which must apply to State and local government agencies (29 U.S.C. § 667(b), (c)(2) and (6).*"[37]

As previously discussed, emergency response actions are an exercise of police powers which promote public health, safety, and welfare.[38] As a Federal agency, OSHA does not have the discretion to interfere with State, local, or tribal government prerogatives on the exercise of police powers because the OSHA does not possess police power over emergency response.

Because the OSH Act provides the *option* for states to decide to adopt a state plan, the "presumption against preemption" canon is triggered. This instructs that federal law should not be read to preempt laws involving the non-federal governments' historic police powers unless that was the clear and manifest purpose of Congress.[39] Congress is silent as to whether OSHA has preemption authority over state and local governments, and given the recent *Loper Bright* decision, OSHA may impermissibly be delegating to itself preemption authority.

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[36] Federal Register/Vol. 89, No. 24. Proposed Rule Pg.7997.

[37] Ibid.

[38] The Supreme Court uses the term "police power" to refer to the states' general power of governing, such as regulating to promote public health, safety, and welfare. *See e.g.*, Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 536 (2012) ("Our cases refer to this general power of governing, possessed by the States **but not by the Federal Government**, as the 'police power.'").

[39] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also, e.g., Wyeth*, 555 U.S. at 565 ("([I]n all preemption cases, and particularly in those which Congress has legislated ... in a field where States have traditionally occupied ... we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations and internal quotation marks omitted); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not supplant state law."); Puerto Rico Dep't of Consumer Affs. V. Isla Petroleum Corp., 485 U.S. 465, 500 (1998) ("As we have repeatedly stated, we start with the assumption that historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations and internal quotation marks omitted).

The current national emergency response system is an effective expression of State, local, and tribal government exercise of police powers for public health, safety, and welfare within their respective jurisdictions. OSHA does not have jurisdictional authority over State, local, and Tribal exercise of police powers, and the presumption against preemption applies.

In the following paragraph OSHA states that:

> *"The OSH Act does not cover tribal governments in the performance of traditional government functions, such as firefighting, EMS, and search and rescue for the tribe in general, Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2nd Cir. 1996) (traditional governmental activities are excepted from the rule that general Federal statutes apply to tribes); cf. Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir 204) (Fair Labor Standards Act does not apply to tribal police because maintenance of law and order is a traditional governmental function)."*

This is followed by an inexplicable statement that:

> *"However, when tribes engage in activities of commercial or service character, such as firefighting, EMS, and search and rescue for particular commercial enterprises, like casinos and sawmills, they are subject to general Federal statutes, including the OSH Act."*

Boundary Line Foundation assessed OSHA's proposal to regulate native American tribal governments by reviewing the case law OSHA referenced in its assertion of jurisdiction over emergency response actions at tribal enterprise business locations.[40,41,42] The plain language of the court decisions for two of the three cases indicate that emergency responders are not subject to the OSH Act because they **are tribal government emergency responders** and not employees of the tribal businesses they may be responding to. The agency inappropriately intends to subject Native American responders to regulation under the OSH Act if they respond to tribal enterprise business locations such as casinos or sawmills.

[40] *Menominee Tribal Enters. V. Solis*, 601 F.3d 669 (7th Cir. 2010).

[41] *Reich v. Mashantucket Sand & Gravel*, 95 F.3d at 180 (2d Cir. 1996).

[42] *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989).

VIII. UNFUNDED MANDATE CONCERNS - PLAN STATES

Many Plan States are represented at the national level by the Occupational Safety and Health State Plan Association (OSHSPA). On February 22, 2016, the OSHPSA Chair sent a letter to the United States Department of Labor Assistant Secretary for Occupational Safety and Health.[43] In part the letter states:

> *"If there ever was a regulatory undertaking that fit the definition of an unfunded mandate placed on States, it would be an OSHA rulemaking in the area of emergency response and preparedness."*

and,

> *"OSHSPA believes that it is particularly inappropriate for OSHA to attempt to regulate an area — state and local government emergency response, including the coverage of volunteers in some State Plans — in which it neither has jurisdiction, experience nor expertise."*

OSHPSA's position is both legitimate and accurate. There remains a presumption that historic police powers of the States are not to be preempted by a Federal Action and OSHPSA is affirming this position in the administrative record. Congress did not delegate a clear and manifest purpose for OSHA to adopt an emergency response standard that would preempt the police powers of the State or local governments. Under the *Loper Bright* decision, OSHA lacks discretion to interpret the Act to mean that Congress intended judicial deference to any agency interpretation otherwise.

In the eight years since OSHSPA entered their letter into the administrative record, OSHA has made no clear progress on addressing the impact that unfunded compliance costs associated with the OSHA ERS could have on OSHA plan and non-plan states. This situation is causing uncertainty in the regulated community, especially in context of OSHA's failure to consult with state, local, and tribal governments as required by Executive Orders 13132 and 13175.

If the proposed ERS is adopted, OSHA Plan States will be required to adopt standards "*at least as effective*" as those in the new enforceable standard. This would be extraordinarily disruptive to the existing national emergency response system, individual service providers within each OSHA Plan State, and emergency response services located within sovereign Native American nations.

The Regulatory Flexibility Act, Executive Order 13132, and Executive Order 13175 provide for agencies to develop alternatives to regulation that do not usurp State, local, or tribal governmental authority or police powers.

[43] Occupational Safety and Health State Plan Association Letter of February 22, 2016, to the Department of Labor Assistant Secretary for Occupational Safety and Health titled *Emergency Response and Preparedness Rulemaking* (RIN: 1218-AC91).

- In its February 2016 letter,[44] OSHSPA provided a recommendation for **an alternative to OSHA rulemaking that was dismissed** during the proposed OSHA ERS rulemaking process:

> *"OSHSPA strongly believes that, just as it is doing with Safety and Health Management Systems, OSHA should focus their emergency response and preparedness efforts at gathering information on hazards, consensus standards, best practices, costs and benefits. OSHA could then use that information in a nationwide outreach effort — coordinated with OSHSPA — and make the information available to State Plans that want to undertake rulemaking."*

IX. PRESUMPTION AGAINST FEDERAL PREEMPTION OF STATE PREOGITIVES

A review of the historical authorities behind the doctrine of federal preemption of State prerogatives for OSH ERS yields the following administrative record:

Presumption against federal preemption is defined as:

> *"The doctrine that a federal statute is presumed to supplement rather than displace state law."*[45]

This legal canon instructs that federal law should not be read to preempt laws involving the state's historic police powers "*unless that was the clear and manifest purpose of Congress.*"[46] The presumption doctrine is rooted in principles of federalism and longstanding respect for state sovereignty.[47]

The use of the term "*clear and manifest purpose*" means that Congressional mandates to the agencies must be constructed using the directive "*shall.*" By way of application, 29 U.S.C. § 667(b) begins by stating:

> "*Any State which, at any time, desires to assume responsibility …*"[48]

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[44] Occupational Safety and Health State Plan Association Letter of February 22, 2016, to the Department of Labor Assistant Secretary for Occupational Safety and Health titled *Emergency Response and Preparedness Rulemaking* (RIN: 1218-AC91).

[45] *Black's Law Dictionary*, Tenth Edition.

[46] The Supreme Court uses the term "police power" to refer to the states' general power of governing, such as regulating to promote public health, safety, and welfare. *See, e.g.*, **Nat'l Fed'n of Indep. Bus. V. Sebelius,** 567 U.S. 519, 539 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'").

[47] *See* Tarrant Reg'l Water Dist. V. Herrmann, 596 U.S. 614, 631 n.10 (2013); **Cipollone v. Liggett Grp., Inc**., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part. Concurring in the judgment in part and dissenting in part). Also to note: Explicit preemption by Congress can only be performed under constitutionally enumerated powers.

[48] 29 U.S.C. 667

This is a clear indication that individual participation of States as a Plan States is optional and at the discretion of that state. Once a state has become a plan state, the "clear and manifest purpose" of Congress is that its emergency response program would be up to that state, whether or not it chose to be bound by the OSHA plan framework. The U.S. Supreme Court has described the presumption against preemption as one of the cornerstones of its preemption jurisprudence.[49]

Here, we observe that 29 U.S.C. § 667(b) contains the ***only*** reference to preemption in the OSH Act of 1970. Congress stated its intent for that preemption in the title of 29 U.S.C. § 667(b):

> *§ 667, State Jurisdiction and Plans*
>
> *"(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards."*

Congress was unambiguous in its intent that ***the purpose of a state plan is for preemption of a federal standard***. There is no explicit delegation of authority in the OSH Act that allows OSHA to preempt State law or standards through regulatory, administrative, or policy making processes. Agency interpretation otherwise is now barred by the recent *Loper Bright* decision, which holds that agencies do not have authority to resolve statutory ambiguities.[50]

The term "*at least as effective as*" is not defined in the 29 U.S.C. § 652 definitions or elsewhere in statute, nor is it defined in the proposed ERS as published in the 89 FR 7774 notice. Left undefined, affected entities cannot reasonably be expected to understand how OSHA is applying the term within the regulatory framework.

We note that "*at least as effective as*" is manifestly ***not*** synonymous with "*at least as stringent as*" for the purposes of regulatory interpretation.

Furthermore, this interpretation of presumption against preemption is strengthened because regulation of the emergency response system is a police power of the States and their subordinate governmental entities.

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[49] Also to note: Express preemption by Congress can only be performed under constitutionally enumerated powers. "It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U. S. 100, 124 (1941) As Justice Story put it, "[t]his amendment (10th amendment) is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)." - See: *New York v United States* 505 U. S. 144 (1992); "Whichever the doctrine is (non-delegation or major questions), the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, *A Note on the Benzene Case, American Enterprise Institute*, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." - *NFIB v. OSHA* 595 U. S. ____ (2022)

[50] Ibid. Loper Bright Enterprises et al. v. Raimundo, Secretary of Commerce, et al. Syllabus. Pg. 4.

Section 2 of Executive Order 13132 clarifies that the Framers of the Republic recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people.[51] One of those authorities is that the States, local governments, and tribal nations all possess some measure of police power. The State, local, and tribal general power governing the regulation of public health, safety, and welfare is a manifestation of that power.[52] OSHA does not have the authority to regulate emergency response (public health, safety, and welfare) because the agency does not possess the requisite police power to do so.

Section 4 of Executive Order 13132 mandates special requirements for preemption. As mentioned, in considering this proposed OSHA ERS, the agency has not complied with the Section 4 process, **even though adoption of the standard as proposed would necessitate preemption of significant portions of the emergency response regulatory frameworks** in all of the State, local, and tribal governments.

OSHA errantly limits its Executive Order 13132 compliance evaluation to only a few limited portions of that order. The President mandated that all executive branch agencies are responsible for compliance with the entirety of the order, not just those that would bolster justification for a single action. The order is rich with directives that agencies become and remain full participants across the full spectrum of federalism principles, including meaningful government-to-government consultation and participation in decision-making for all levels of government.

OSHA simply and blatantly has chosen not to fully comply with the entirety of E.O 13132 in conducting the mandated federalism impact analysis.

Executive Order 13175 – OSHA Consultation with Native American Tribal Governments

- We consider Executive Order 13175 in chronological order with Executive Order 13132 because it is derivative from that Executive Order on federalism, and because it was signed by President Clinton more than a year later.
- OSHA did not comply with its consultation and coordination mandates with Indian tribal governments.

[51] "Among those retained powers is the power of a State to "order the processes of its own governance." *Alden v. Maine*, 527 U. S. 706, 752 (1999); The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961)

[52] The Supreme Court uses the term "police power" to refer to the states' general power of governing, such as regulating to promote public health, safety, and welfare. *See, e.g.*, Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 539 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'").

- The extent of OSHA's "*consultation and coordination*" with tribal governments as reported at 89 FR 7998 was one listening session on June 20, 2023. The three-page memorandum for the record indicates the meeting was an afterthought and was attended by **22 Department of Labor officials and 9 tribal officials**.

One tribal official asked OSHA to clarify what the NACOSH subcommittee was and its role in developing the proposed standard. The OSHA representative responded that the agency created a NACOSH subcommittee to advise and develop a draft standard and listed several of the organizations on the subcommittee. **The official then noted that there was no tribal representation on the NACOSH subcommittee**. This is not consultation.

The only other official tribal participation in development of the OSHA ERS was recorded in the memorandum to the administrative record as a tribal official expressing his commitment to resource sharing to support the proposed rule and emphasizing a best practice approach for the rulemaking.

A single "**listening session"** occurring so late in the administrative process for developing the proposed standard does not rise to equivalency with the meaningful consultation and coordination government-to-government processes mandated by Executive Order 13175.

OSHA states that the agency determined that the proposed emergency response standard does not have tribal implications as defined in Executive Order 13175. The EO required process mandates consultation be structured to occur "*to the extent practicable*." The actual standard in Executive Order 13175 is "***to the extent practicable and permitted by law***," which sets an even higher regulatory bar than OSHA afforded to the tribes.

Section 3, *Policymaking Criteria* requires agencies to "*adhere to the extent permitted by law*" to the criteria when formulating and implementing policies that have tribal implications. The listening session memorandum in the record fails to include evidence of OSHA Section 3 compliance.

In its Unfunded Mandates Reform Act statement at 89 FR 7997, OSHA was accurate in stating "*The OSH Act does not cover tribal governments in the performance of traditional governmental functions such as firefighting, EMS, and search and rescue …*" OSHA then goes on to **illegitimately propose imposition of a regulatory restriction within the border of sovereign Native American jurisdictions**: "*… for the tribe in general*."

and,

> "*However, when tribes engage in activities of a commercial nature, such as firefighting, EMS, and search and rescue for particular commercial enterprises, like casinos and sawmills, they are subject to general Federal statutes, including the OSH Act.*"

For this and other reasons, we conclude OSHA failed to comply with the prescriptive requirements of Executive Orders 13171 and 13175.

X ADOPTION OF A PERFORMANCE-BASED STANDARD IS A MAJOR SHIFT IN AGENCY POLICY[53]

The expansive OSHA "*performance based*" standard appears difficult to measure accountability without imposition of a top-down, Federal hierarchy characteristic of centralized statism. Any attempt to do so would impair the existing training, reporting, and data management systems already in place at State and local levels, foreseeably impacting emergency responders and those who volunteer at the local level.[54]

XI DISCUSSION OF SAFETY V. HEALTH STATUTORY REQUIREMENTS

There are two general categories of standards under which the Congress mandates OSHA to adopt throughout the history of the OSHA Act: "*Safety Standards*," and "*Health Standards*." For safety standards the record shows a focus on **"particular" industries, particular machinery, and particular operations**; for health standards, the record demonstrates **a focus on individual hazards to human health,** including particular toxic substances, and particular bodily health, i.e. (hearing, respiratory health). The history of OSHA standards demonstrates a focus on particular hazards which could result in an "*unsafe"* workplace. Plan States also develop plans that address particular standards. Both plan and non-plan States have laws and standards in place regarding emergency response situations which are inextricably woven into general power of governing police powers.

The proposed Emergency Response Standard (ERS) is being promoted as a "safety and health performance-based standard" across a wide variety of emergency response conditions and situations. This approach has the foreseeable potential to pose significant economic harm to **both** plan and non-plan states. For plan states, the ERS would require amendment of state plans in order to be "*at least as effective*"[55] as the Federal standard, **which foreseeably will have the effect of imposing a Federal regulatory program on local units of government within plan states.**[56] For non-plan states, there is a significant concern that the proposed ERS would, over time and through bureaucratic processes, be used to illegitimately preempt[57] state laws regulating emergency response.

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[53] *National Federation of Independent Business V. OSHA* 595 U. S. ____ (2022) GORSUCH, J., concurring p. 4 - "As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. *Brief for Department of Labor*, In re: AFL–CIO, No. 20–1158, pp. 3, 33 (CADC 2020)."

[54] Federal Register/Vol. 89, No. 24. Proposed Rule pg.7981. F. II. E. - Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.

[55] Ibid. pg. 7997.

[56] Ibid.; New York v United States 505 U. S. 144 (1992) - "Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."

[57] Federal Register/Vol. 89, No. 24. Proposed Rule. Pg. 7997; National Federation of Independent Business v. OSHA 595 U. S. __ (2022) GORSUCH, J., concurring – "There is no question that state

XII AUTHORITY TO ADOPT PERFORMANCE BASED STANDARDS; ECONOMIC CONSIDERATIONS

The proposed ERS represents a top-down, performance-based framework that would regulate states and local units of government outside the congressionally delegated authority of the OSH Act of 1970. **Because units of local government cannot be classified as *employers*[58] OSHA authority to adopt a nationwide performance-based standard for emergency response**.

The Federal Register notice acknowledges that the standard does not apply to state and local governments:

> *89 FR 7997 - "**This proposed rule does not place a mandate on State or local government**, for purposes of the UMRA, because the **agency's standards do not apply to State and local governments** (29 U.S.C. 652(5))"*

In its *Federal Register* notice OSHA claims **$2.6 billion in annualized benefits** associated with implementation of the proposed ERS. In conducting its cost/benefit analysis, OSHA uses data from the saving of lives, avoiding injuries, and mitigation of cancer associated with emergency response hazards. Importantly, the base presuppositions used by OSHA to quantify the benefit savings are errant, yielding wildly exaggerated projected benefits. In preparing the analysis, OSHA incorrectly assumes that it has jurisdiction over States and units of local governments, and **those savings were calculated using the flawed assumption of benefits to emergency responders at the local level.** Because OSHA lacks jurisdiction over state and local governments, the input data is skewed and results benefit results are flawed and overstated.[59]

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and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. National Federation of Independent Business v. Sebelius, 567 U. S. 519, 536 (2012) (opinion of ROBERTS, C. J.); U. S. Const., Amdt. 10.

[58] Public Law 91-596 Sec. 3 (5) – 29 U.S.C. § 652(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

[59] See, e. g., García v. San Antonio Metropolitan Transit Authority, 469 U. S. 528 (1985); Lane County v. Oregon, 7 Wall. 71 (1869).

XIII THE PROPOSED EMERGENCY RESPONSE STANDARD DOES NOT MEET THE REASONABLY NECESSARY OR APPROPRIATE REQUIREMENTS OF THE OSH ACT OF 1970[60]

Congress enacted the Occupational Safety and Health Act in 1970.[61] The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. The Secretary is responsible to adopt and cause to be enforced occupational safety and health standards that ensure "*safe and healthful working conditions*."[62] The Act requires that such standards are to be "*reasonably necessary or appropriate*."[63]

In 1980 the U.S. Supreme Court, when addressing an OSHA standard to reduce exposure to benzene, ruled that the DOL Secretary failed to meet the *reasonably necessary and appropriate* requirement of the Act, and rejected the application of general policy as a basis for rulemaking even when addressing a **particular** hazard. The Court rejected the proposition that such a general policy may serve as the basis for any rule and held that OSHA **must make an actual finding that the workplace is unsafe** before it adopts a new standard.

The Supreme Court also concluded that the congressional intent in adopting standards under the OSH Act was **not absolute safety, but instead cost-effective reduction of significant harm in the workplace**.[64]

The proposed OSHA ERS lacks adequate information to justify a transformative and expansive policy that **supplants the existing fire brigade standard to encompass all emergency response activities**.

> "*A standard is neither "reasonably necessary" nor "feasible," as required by the Act, if it calls for expenditures wholly disproportionate to the expected health and safety benefits*."[65]

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60 Indus. Union Dept. v. Amer. Petroleum Inst., 448 U.S. 607 (1980) "A standard is neither "reasonably necessary" nor "feasible," as required by the Act, if it calls for expenditures wholly disproportionate to the expected health and safety benefits... For we think it is clear that § 3(8) does apply to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment."

61 29 U.S.C. § 651 et seq.

62 29 U.S.C. §651(b)

63 29 U.S.C. §652(8)

64 Indus. Union Dept. v. Amer. Petroleum Inst., 448 U.S. 607 (1980) Pp. 646-652 " … *the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe.* ***But "safe" is not the equivalent of "risk-free.***" ... "*Therefore, before the Secretary can promulgate any permanent health or safety standard, he must make a threshold finding that the place of employment is unsafe in the sense that* ***significant risks are present and can be eliminated or lessened by a change in practices****. This requirement applies to permanent standards promulgated pursuant to § 6(b)(5), as well as to other types of permanent standards...*" (emphasis added)

65 Ibid.

If the OSHA ERS is implemented, OSHA projects an annualized benefit of $2.6 billion and annualized costs at $661 million. OSHA arrived at these values by incorporating both local governmental organizations and volunteers who make up the emergency response sector in its calculations. As example, according to Table VIII-B-5 at FR 89, page 7855 "Summary Statistics by Fire Department Operator for All Fire Department," **95.7% of the departments are local governments (including volunteers) and about 1.5% are private**. As stated, the results of the cost/benefit analysis are irreparably flawed **because local governments are not subject to OSHA standards or enforcement.** The Federal Register states:

> 89 FR 7981 – "*The objective of the proposed rule is to reduce the number of injuries, illnesses, and fatalities occurring among emergency responders in the course of their work. This objective will be achieved by requiring employers to establish risk management plans, provide training and medical surveillance, establish medical and physical requirements, develop standard operating procedures, and provide other protective measures enabling emergency responders to perform their duties safely*."

OSHA appears to be projecting annualized fiscal benefits based on the implementation of a regulatory standard across the entire emergency response sector, most of which is outside the scope of OSHA jurisdiction, dismissing the fact that the States are already effectively regulating the emergency response sector.[66]

OSHA's objective to achieve a safety standard for emergency responders **would require direct regulation of local governmental departments and volunteers as employers**. OSHA cannot legitimately achieve the necessary and feasible test because the projected health and safety benefits require the Secretary to regulate local governments as employers, and require units of local governments to report directly to a federal agency regarding their internal affairs.[67]

> *"States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment."*[68]

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[66] "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." - National Federation of Independent Business v. OSHA 595 U. S. ____ (2022).

[67] Federal Register/Vol. 89, No. 24. Proposed Rule. Pg. 7981 E. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule.

[68] New York v United States 505 U.S. 144 (1992).

Past court decisions on preemption of state law with the OSH Act focus on the use of the commerce clause of Article I of the U.S. Constitution. Even in cases of express statutory preemption, Congress is limited to the enumeration of Article I powers. In this case OSHA may be seeking to preempt state prerogatives in an area that even Congress itself cannot preempt. **The majority of emergency response situations at the local level are internal operations of State police powers and have no connection with interstate commerce** and therefore are likely outside of Federal jurisdiction.[69] OSHA is attempting to quantify fiscal benefits from a regulatory program that intrudes directly into an area that is the particular province of state law and sovereignty.

> *"When a regulation attempts to override statutory text, the regulation loses every time—regulations can't punch holes in the rules Congress has laid down."*[70]

It appears impossible for OSHA to regulate emergency response activities without illegitimately intruding into the domain of State and local police powers.

XIV PLAN AND NON-PLAN STATES

29 U.S.C. § 667 concerns State jurisdiction and preparation of State plans. We believe that there is need for Congressional clarification of what the section directs, and the degree to which Congress delegated authority to OSHA.

BLF is concerned that OSHA's interpretation of the statute at 29 U.S.C. § 667 has resulted in a national program that is seriously out of touch with the intent of Congress in the OSH Act. While OSHA may historically have relied upon the *Chevron* doctrine for deference to its technical expertise, if adopted and challenged OSHAs interpretation of 29 U.S.C. § 667 will be scrutinized under the permissive standard in *Loper Bright Enterprises et al., v. Raimundo, Secretary of Commerce, et al.* together with *Relentless, Inc., et al., v. Department of Commerce, et al.* Further, and more importantly, the entire OSHA Emergency Response Standard administrative record assumes a deference to the Agency's interpretation of the OSH Act that has been overruled, leaving OSHA responsible to defend the reasonableness and statutory authority behind the ERS rule.

29 U.S.C. § 667(a) plainly states that any State agency or court can formally assert jurisdiction over any occupational safety or health issue in the absence of an applicable Federal standard:

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[69] "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." United States v. Butler, 297 U. S. 1, 63 (1936); "State laws of general applicability, such as traffic and fire safety laws, would generally not be pre-empted, because they regulate workers simply as members of the general public. Pp. 104-108.". Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association 505 U. S. 88 (1992)

[70] Djie v. Garland, 39 F.4th 280, 285 (5th Cir. 2022).

> "*Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.*"

Each State, territory, or possession of the United States already regulates all aspects of emergency response within its jurisdiction through its police power, which refers to the States' general power of governing.[71]

Currently, there is no Federal emergency response standard under 29 U.S.C. § 655. (The fire brigade standard is not equivalent to the proposed emergency response standard). We recommend that the fire brigade standard be retained and made current as reported in these comments. As a result, as intended by Congress under the organic OSH Act, any State, regardless of whether it is a Non-Plan State or a Plan State, can assert its jurisdiction under State law over all aspects of emergency response. Indeed, the national emergency resposhspa

Oshspa

onse system is already regulated and conducted under State, Local, and Tribal law in exercise of their respective police powers. Federal department emergency response resources may be called upon to assist in emergency responses within their areas of operation on a non-interference basis through implementation of existing interlocal and mutual aid agreements as available and coordinated through applicable coordination centers.

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[71] National Federation of Business v. Sebelius. 567 U.S. 519, 536 (2012). — "The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See e.g., United States v. Comstock, 560 U.S. 126, 130 S.Ct. (1949), 176 L.Ed.2d 878 (2010). The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act." … "Our cases refer to this general power of governing, possessed by the States but not by the Federal Government as the "police power." See e.g. United States v. Morrison, 529 U.S. 598, 618—619, 120 S.Ct. 1740, 146 L.Ed..2d 658 (2000)". … "State sovereignty is not just and end in itself; Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." New York v. United States, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all concerns of public life, federalism protects the liberty of the individual from arbitrary power." Bond v. United States, 564 U.S. 211, 22, 131 S.Ct. 2355, 2364, 180 L.Ed.2d. 269 (2011). … "Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."

OSHA proposes to adopt an emergency response standard but has not yet published a final rule. The proposed ERS, if adopted, would be in immediate and material conflict with the emergency response standards and regulatory frameworks long-established and managed by the States. Such an action would be extraordinarily disruptive and would be an illegitimate intrusion into the States' police powers promoting public health, safety, and welfare. The States have jurisdiction. OSHA does not.

The *Loper Bright* decision encourages emphasis on the plain reading of statutes with its insistence that it is up to the judiciary to interpret the statutes - not executive branch agencies. We remain confused as to why any State would relinquish its sovereignty to Federal OSHA by becoming a Plan State, and notably any plan state can withdraw from the OSHA program. **Reading 29 U.S.C. § 667 without the *Chevron* doctrine renders it clear that Congress never intended for States to potentially surrender their sovereignty to the agency.** Instead, it affords each State an opportunity to formally assert jurisdiction for issues of occupational safety and health that OSHA had not already regulated under 29 U.S.C. § 655.

29 U.S.C. § 667(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.

This section's title represents the intent of Congress for section in 29 U.S.C. § 667(b). That section mandates the process by which a State can preempt a standard that OSHA has already adopted. The process is for use by a State that did not assert its jurisdiction under State law prior to the date OSHA adopted a standard.

Congress did not delegate authority for more than a single occupational safety or health issue to be included in a state plan that would be submitted to the Secretary for approval. Specifically, Congress did not require that if a State opts to enter into a state plan to preempt an OSHA standard that that same state must also adopt all subsequent standards that OSHA may promulgate within six months of those standards being adopted.

OSHA has interpreted the section as authority for the creation of State-plan States which can be, in effect, regulated differently than States who do not choose to become Plan States. To do so, OSHA interpreted the Occupational Safety and Health Act as delegating that authority to the agency at 29 U.S.C. § 667(b). The Loper *Bright* decision overturned *Chevron* for the purpose of determining whether an agency has acted within its statutory authority during the rulemaking process, and courts no longer *must* defer to an agency's interpretation simply because a statute may be ambiguous. *Loper Bright* places responsibility for interpreting statutory ambiguities squarely where it belongs: In the judiciary.

In this instance the statute at 29 U.S.C. § 667(b) is not ambiguous because it clearly states that the purpose of submitting a state plan is to facilitate State preemption of Federal standards. In fact, it is the ***only*** mention of preemption in the entire statute. The statute simply does not delegate authority to Federal OSHA to preempt state law. Nevertheless, OSHA has been using its interpretation of the State plan section

in its proposal to achieve de facto[72] preemption of existing State emergency response frameworks and standards, despite the fact the agency does not possess police power to regulate the States' public health, safety, or welfare.

Preemption is mentioned only twice in the regulations at 29 CFR Chapter XVII:[73] once at 29 CFR § 1903.21, in reference to "*Nothing in this part 1903 shall preempt the authority of any State to conduct inspections, to initiate enforcement proceedings or otherwise to implement applicable provisions of State law…*"; and again at 29 CFR § 1953.3: "*Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA.*"

Neither the Occupational Safety and Health Act nor 29 CFR Chapter XVII offer a statutory or regulatory definition for the term "*barrier of Federal preemption.*"

It is noteworthy that OSHA ***must*** approve any State plan that preempts the agency's standard if that plan meets the approval conditions at 29 U.S.C. § 667(c). The use of the word "*shall*" **makes approval a non-discretionary action** on the part of OSHA. Should OSHA reject or withdraw the State's plan, the State has opportunity for judicial remedies.

The term "*at least as effective*" is not defined in the Occupational Safety and Health Act, nor is it defined anywhere in 29 CFR Chapter XVII. *Black's Law Dictionary, Tenth Edition* defines "*effective*" as:

> **effective** *adj*. (14c) … **2.** Performing within the range of normal and expected standards.

OSHA's use of the term "*effective*" in its regulatory frameworks imply that it is not using the term as defined because performance "*within the range of normal and expected standards*" means that the performance could be better than what OSHA is putting forward, or that it could be less restrictive and still be within the range of expectation. Instead, OSHA says that a state's standard must be "*at least as effective as*" OSHA's.

At 29 CFR § 1953.5(a)(1) OSHA inserts the word "*stringent*" as an alternative term being synonymous with "*effective*:"

> 29 CFR §1953.5(a)(1) "*Where a Federal program change is a new permanent standard, or a more **stringent** amendment to an existing permanent standard, the State shall promulgate a State standard adopting such a new standard, or more **stringent** amendment to an existing Federal standard, or an at least as effective equivalent*

[72] **de facto** *adj*. [Law Latin "in point of fact"] (17c) **1.** Actual; existing in fact; having effect even though not formally of legally recognized. **2.** Illegitimate but in effect. *Black's Law Dictionary*, Tenth Edition.

[73] 29 C.F.R. 1902.1 – 1987.110. State Plans for the Development and Enforcement of State Standards. Federal Regulations. 2024.

> *thereof, within six months of the date of promulgation of the new Federal standard or more **stringent** amendment*."

OSHA is using the phrase "*at least as effective as*" to mean "*at least as stringent as*" in its regulatory framework for Plan States. This does not comport with the statute and leads to uncertainty for the regulated community. There is no advantage for an individual State to become an OSHA Plan State when that State is administratively required to surrender its sovereignty to the Federal government.

This fact pattern places OSHA's interpretation(s) of 29 U.S.C. § 667 in a position of uncertainty, particularly in a *Loper Bright* context. The agency's adoption of its state plan program exceeds the plain authority stated in the statutory construction at 29 U.S.C. § 667(b) and interferes with the states' exercise of their historic police powers.

XV ANALYSIS AND DISCUSSION

Because the Federal government and its agencies do not possess police power, and because the nation's emergency response system is constructed upon the longstanding State police powers to regulate public health, safety, and welfare, OSHA does not have jurisdiction or authority to adopt prescriptive, programmatic emergency response standards that foreseeably will abrogate State, Local, or Tribal government exercise of their police powers over public health, safety, and welfare.

OSHA proposes to replace its existing Fire Brigades Standard at 29 CFR §1910.156 with a new standard to fully address the workplace hazards faced by firefighters and other emergency responders.

The existing Fire Brigades Standard might be sufficient for its original purpose of protecting employees whose workplace "*additional duties as assigned*" are those of being trained and equipped for response to workplace fires for those businesses large enough to warrant having a fire brigade. **The Fire Brigades Standard was adopted to protect workers assigned to workplace fire brigades**, which are distinct from those activities associated with governmental fire departments or emergency responders.

- Boundary Line Foundation believes that OSHA should retain, review, and update the Fire Brigades Standard as a standalone regulation so that fire brigade workers do not become lost within a more complex regulatory framework not suited to their original workplace roles.
- By not keeping the Fire Brigades Standard current, OSHA has not fulfilled its statutory responsibility to workers assigned additional duties as members of their employers' fire brigades and it is OSHA's responsibility to rectify the situation. However, a vast and transformative reworking of the Fire Brigades Standard as contemplated by the OSHA ERS is not the appropriate regulatory mechanism to achieve this.

OSHA states that a federal standard is necessary because, "… *based on evidence in the record, there is a compelling public need for a stricter, comprehensive standard under OSH Act legal standards*."[74] We disagree. OSHA has not incorporated empirical evidence that is reviewable as required by the Data Quality Act.

Without the inclusion of data, information, and evidence in a public record that documents the inadequacy of each State emergency response program, the administrative record is incomplete. Proceeding with the OSHA ERS will foreseeably disenfranchise the public in both plan and non-plan states. The purpose of the federalistic government-to-government consultation process prescribed in Executive Orders 13132 and 13175 is to receive input and not issue regulations in an administrative vacuum.

On February 22, 2016, the Chairman of the Occupational Safety and Health State Plan Association (OSHSPA) sent a letter to the U.S. Department of Labor, Assistant Secretary for Occupational Safety and Health in response to discussions at the winter 2015 OSHSPA's meeting.[75] That letter transmitted the results from a unanimous vote of the OSHPSA's member states that directed the board to convey OSHSPA's opposition to the proposed OSHA ERS and administrative process.

The OSHAPA board stated its concerns as:

> "… *we have obvious and significant concerns about OHSA's stated intent to adopt a regulation that would have a substantially disparate impact on employers and employees that fall primarily on under the jurisdiction of State Plans and not Federal OSHA.*"

OSHSPA went on to articulate that it is inappropriate for OSHA to propose to regulate in the emergency response realm:

> *"OSHSPA believes that it is particularly inappropriate for OSHA to attempt to regulate an area — state and local government emergency response, including the coverage of volunteers in some State Plans —* ***in which it neither has jurisdiction, experience nor expertise.****"*

The OSHSPA board then addressed a significant unfunded mandates issue:

> *"If there ever was a regulatory undertaking that fit the definition of an unfunded mandate placed on States, it would be an OSHA rulemaking in the area of emergency response and preparedness."*

[74] 89 FR 7845

[75] OSHSPA letter to the U.S. Department of Labor Assistant Secretary of Occupational Safety and Health, Subject: Emergency Response and Preparedness Rulemaking (RIN: 1218-AC91), February 22, 2016.

The OSHSPA letter, contained in the administrative record, documented on-the-ground, Plan State financial concerns, and provided OSHA with the foreseeable consequences of continuing its trajectory of the OSHA ERS Rulemaking:

> *"State Plans with experience in such matters can foresee regulatory burdens posing a serious fiscal risk that could drive small paid and volunteer departments in primarily rural areas out of business. This would expose the general public to drastically increased response times waiting for a unit to be deployed from a larger municipality, and corresponding increases in serious and even fatal consequences for those who the emergency responders live to serve."*

The OSHSPA board then offered an alternative to the regulatory approach that OSHA was taking:

> *"OSHSPA strongly believes that, just as it is doing with Safety and Health Management Systems, OSHA should focus their emergency response and preparedness efforts at gathering information on hazards, consensus standards, best practices, costs and benefits. OSHA could then use that information in a nationwide outreach effort — coordinated with OSHSPA — and make the information available to those State Plans that want to undertake rulemaking."*

OSHSPA's concerns clearly recommended a course correction that would be helpful to the regulated community in terms of improving the nation's emergency response system in a non-prescriptive fashion. Astonishingly, the OSHSPA positions, articulated as a professional association that represents Plan States with subject matter expertise, were not even mentioned in the 250-page proposed OSHA ERS FR notice.

On September 9, 2015, as part of the first meeting of the National Advisory Committee on Occupational Safety and Health Administration Subcommittee on Emergency Response and Preparedness, the Deputy Director of the OSHA Directorate of Standards and Guidance said:

> "*We also want to make sure that we do not ever come between an emergency and a rescue*."

As pointed out in the OSHSPA letter, the prescriptive ERS would do just that in its form, timing, and substance. As documented here, the approach used by OSHA for the proposed ERS will continue to exhibit downstream, readily foreseeable consequences.

As reported in Table VII-B-5 *Summary Statistics by Fire Department Operator for all Fire Department[s]*[76] and BLF's discussion on federalism, absent the "shared federalism" system of Plan States, OSHA has jurisdiction over approximately 1.5% of all fire departments in the nation, representing only 1.3% of the individual responders (13,775 of 1,019,599 responders as reported by USFA in 2022). OSHA seeks to bring Plan State emergency responders under its regulatory framework through the requirement that State Plans over which it exercises programmatic approval authority be "at least as effective" as the OSHA standard. As noted, Congress has not defined the phrase "*at least as effective*", nor has OSHA included a definition for its proposed ERS.

The NACOSH Subcommittee on Emergency Response and Preparedness Meeting Transcript from the September 9, 2015, meeting states: "***We also want to make sure that we do not ever come between and emergency responder and a rescue*[**.**]" However, on page 148 at line 9 one of the people developing the proposed standard states "*So one of the things that I think we want to be specific about is ensuring that we do everything we can to discourage self-deployers … and that people understand that as self-deployers, they will not enjoy the protections of an ESO [emergency services organization] umbrella …"* Another participant clarifies at line 19 "*Those would be, if I may, individuals or companies responding to an incident outside the direction of an ESO."* This directly conflicts with the imperative stated on page 16 at line 1.

In the administrative record for its proposed ERS, OSHA has clearly not articulated the need for intervention in the structure and operation of the nation's mature emergency response structure that is integral to state and local emergency response systems.

The proposed OSHA ERS appears to be founded on a business-centric OSHA platform. Emergency response systems do not fit into business-centric models. Emergency response is the capability to address emergency disruptions of normalcy and not the ability to comply with business standards. As a result, the proposed OSHA ERS is not congruent with business standards.

In its FR notice for the proposed ERS OSHA **incorporates by reference thousands of pages of other documents,** requiring regulated emergency responders and their organizations to review and consider them. OSHA itself does not appear to be familiar with those documents to sufficiently respond to the regulated community.

The proposed OSHA ERS also would create conflicts with policies of other Federal agencies who have emergency response responsibilities. An example of this is potential conflict with Department of Transportation vehicle requirements.

[76] Table VII-B-5, 89 FR 7855.

XVI CONCLUSIONS AND RECOMMENDATIONS

The proposed OSHA ERS is not workable in its present form and must be withdrawn:

- In proposing its ERS, OSHA has not adequately documented the impact to the long-standing national emergency response system controlled by the States and their political subdivisions through their general police power to regulate public health, safety, and welfare.
- The Federal government does not possess the necessary police power to impose a national programmatic emergency response standard that would be at least as effective as those managed by the States and their local governments.
- Imposition of OSHA's proposed emergency response standard would be disruptive to the existing emergency response system. The prescriptive ERS appears to not have a value-added outcome, but instead would cause degradation in the timeliness, quality, and effectiveness of emergency response nationally.
- The administrative record is silent as to how - or if - OSHA reviewed non-regulatory approaches to the ERS that could provide value-added components to the management and operation of the national response system.
- The data presented at 89 FR 7774 does not provide a clear picture of the range of emergency response characteristics necessary for supporting revisions to the national emergency response system.
- OSHA should improve its awareness of the existing national response system and how various component entities interact to provide emergency response services across the nation. A nuanced understanding of how each element of the national response system interacts with the rest of the system is a prerequisite for either any prescriptive or non-regulatory alternatives.
- The cost-benefit analysis published in the Federal Register is irreparably flawed as OSHA errantly assumes that it has jurisdiction over States and units of local governments when making its cost-benefit calculations. As a result, the Secretary cannot reasonably represent that she has met the "*economically feasible*" or "*cost-effective*" factors[77,78,79] required to conclude that the safety benefits of the OSHA ERS Rule have met the *appropriateness* standard.

[77] Int'l Union v. OSHA, 37 F3rd 665 (DC Cir 1994).

[78] 58 FR 16,612 and 16,614. March 30,1993.

[79] Michigan v. EPA, 135 S. Ct 2699 (2015).

Attachment A

Freedom of Information Act Request

Proposed Emergency Response Standard FR Vol.89, No. 24 Proposed Rule

Budd-Falen Law Offices, L.L.C.
March 13, 2024

https://documents.boundarylinefoundation.org/OSHA_ERS/KBF-FOIA-Request-20240313.pdf

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March 13, 2024

Mr. Doug Parker
Assistant Secretary
Occupational Safety and Health Administration
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CERTIFIED RETURN RECEIPT # *9171 9690 0935 0285 1409 62*

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VIA: EMAIL AT foiarequests@dol.gov
FACSIMILE AT (202) 693-5389
CERTIFIED RETURN RECEIPT

RE: Freedom of Information Act Request: Proposed Emergency Response Standard FR VOL.89, No. 24 Proposed Rule Docket No. OSHA-2007-0073

Dear Mr. Parker and Ms. Nanda:

On behalf of the Boundary Line Foundation and pursuant to the Freedom of Information Act (FOIA) at 5 U.S.C. § 552 and the Federal Advisory Committee Act at 5 U.S.C. § App., this letter requests that you transmit to this office within 20 business days all documents, letters, electronic mail correspondence, telephone logs or notes, and any related documentation pertaining to:

1. **The establishment, conduct, attendees, charter, and procedural record of the subject matter expert subcommittee convened by OSHA for the Proposed Rule**:

> "*representing labor and management, career and volunteer emergency service management associates, other federal agencies, and State Plans, a national consensus standard organization, and general industry skilled support workers.*"[1,2]

2. **Electronic copies of the charter, all meeting agenda(s) and minute(s), attendee list(s), records-of-proceedings and findings from the Small Business Advocacy Review Panel that was convened in the fall of 2021 described as:**[3,4]

> *"The Panel, comprising members from the Small Business Administration's (SBA) Office of Advocacy, OSHA, and OMB's Office of Information and Regulatory Affairs, listened to and reported on what Small Entity Representatives (SERs) from entities that would potentially be affected by the proposed rule had to say. OSHA provided SERs with the draft regulatory language developed by the NACOSH subcommittee for their review and comment. The Panel received advice and recommendations from the SERs and reported its findings and recommendations to OSHA.*

3. **All documents, records, notices, minutes, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132,**[5] **including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance with the following:**

> (b) *"…no agency shall promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute, unless:*
> *(2) …the agency, prior to the formal promulgation of the regulation*:

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[1] See FR Vol. 89, No. 24 at 7775.

[2] 5 U.S.C. App. § 9. **Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy**.

[3] Ibid. FR Vol. 89, No. 24 at 7775.

[4] 5 U.S.C. App. § 10. **Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance.**

[5] Section 6 (c)(1),(2), Consultation. Executive Order 13132. August 4, 1999. **Federalism**.

> *(A) consulted with State and local officials early in the process of developing the proposed regulation;*
>
> *(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and,*
>
> *(C) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials."*

I also request that if you determine that some of the information requested is exempt from FOIA, that this information be identified by document, along with the statutory basis for your claim and your reasons for not exercising your discretion to release this information. FOIA also provides that if only portions of the file are exempt from release, the remainder of the file must be released. Therefore, I request that I be provided with all non-exempt portions that can reasonably be segregated.

If your agency encounters problems in providing this information, please let this office know so that appropriate arrangements can be made before the statutory deadline. I can be reached at the phone number above or via email at karen@buddfalen.com. In addition, please contact me if the estimated cost of responding to this request for information exceeds three hundred and fifty dollars ($350.00).

Thank you in advance for your cooperation.

Sincerely,

Karen Budd-Falen
Budd-Falen Law Offices, LLC

KBF/sw

xc via email: Jim Carlson, Boundary Line Foundation

Attachment B

Freedom of Information Act Request Response

From Andrew Levinson, Director
Directorate of Standards and Guidance
U.S. Department of Labor, Occupational Safety and Health Administration

May 13, 2024

https://documents.boundarylinefoundation.org/OSHA_ERS/OSHA-FOIA-Response-20240513.pdf

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

May 13, 2024

Karen Budd-Falen
Budd-Falen Law Offices, LLC
300 East 18th Street, Post Office Box 346
Cheyenne, WY 82003-0346
Email: karen@buddfalen.com

Dear Ms. Budd-Falen:

This letter is in response to your March 13, 2024, request under the Freedom of Information Act (FOIA) to the Department of Labor (FOIA 2024-F-07885). You requested documents pertaining to the Emergency Response proposed rule. Specifically, you requested "all documents, letters, electronic mail correspondence, telephone logs or notes, and any related documentation pertaining to":

1. "The establishment, conduct, attendees, charter, and procedural record of the subject matter expert subcommittee convened by OSHA for the Proposed Rule" or the National Advisory Committee on Occupational Safety and Health (NACOSH) subcommittee for the emergency response proposed rule,

2. "Electronic copies of the charter, all meeting agenda(s) and minute(s), attendee list(s), records-of-proceedings and findings from the Small Business Advocacy Review Panel that was convened in the fall of 2021", and

3. "All documents, records, notices, minutes, electronic mail or other documentation related to the Federalism consultation activities required under Executive Order 13132, including descriptions from State and Local government contacts, their response, and documentation of state and local governmental concerns reported to the Office of Management and Budget by OSHA showing compliance with [sections 6(b)(2) and (c) of E.O. 13132]."

During its search, OSHA located the following publicly available records that are responsive to your request:

1. NACOSH subcommittee – Documents related to the NACOSH subcommittee work is publicly available in Docket #OSHA-2015-0019 and can be accessed here Regulations.gov. The materials include the charge to the subcommittee, meeting agendas, meeting transcripts, subcommittee members, and exhibit lists. NACOSH documents related to the Emergency Response report are available in Docket #OSHA-2016-0001 and can be accessed here Regulations.gov. The materials include the final NACOSH

Emergency Response and Preparedness (ERP) Subcommittee report to the full NACOSH committee. Document ID OSHA-2016-0001-0111.

2. SBAR Panel – Documents related to the work of the SBAR panel are publicly available on OHSA's Emergency Response Small Business Regulatory Enforcement Fairness Act (SBREFA) proposed rule webpage here Emergency Response SBREFA | Occupational Safety and Health Administration (osha.gov) and in Docket #OSHA-2007-0073 on Regulations.gov. The materials include the documents for the Small Entity Representative (SER) review (Document IDs OSHA-2007-0073-0096, 0097, 0100) and the final report of the of the Emergency Response SBAR panel (Document ID OSHA-2007-0073-0115).

3. Federalism consultation – As noted in the Notice of Proposed Rulemaking for the Emergency Response proposed rule, OSHA did not conduct any consultative services pursuant to Executive Order No. 13132. See 89 FR 7774, 7998 (Feb. 5, 2024). Therefore, OSHA has located no responsive records. As such, we are issuing to you a no record response on this item.

In the event that you are seeking non-public records related to the NACOSH subcommittee, the SBREFA SBAR panel and OSHA's Federalism activity related to the emergency response rule beyond the public records noted above, it is likely that a search for any potentially responsive records would be time consuming and costly and would significantly exceed the payment amount you have authorized ($350) for the processing of this request. We have determined that you are a commercial requester for fee purposes under FOIA and the hourly rate, in accordance with the regulations published under 29 CFR 70.40, would be as follows:

Search Fee @ $40.00 per hour
Review Fee @ $40.00 per hour

In addition, if the Department needs to conduct a search of the agency's server by a computer programmer, there is an additional charge of $105 per hour. Please note that there may be additional costs for the reproduction of any responsive records found. Also, until OSHA has reviewed any responsive records, it cannot determine whether such records will be subject to any of the FOIA exemptions and therefore not subject to reproduction. 5 U.S.C. § 552(b).

If you have questions about OSHA's response to your request or would like for OSHA to provide a cost estimate for a broad search of potentially responsive records, please contact the Directorate of Standards and Guidance at 202-693-1950 or osha.dsg@dol.gov.

You have the right to appeal OSHA's determination regarding the public records found in this search and your status as a commercial requester with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statements or arguments. The appeal should also include a copy of your initial request and a copy of this letter. If you appeal, you may mail your appeal to: Solicitor of Labor, U.S. Department of Labor, Room N-2420, 200 Constitution Avenue, NW, Washington, DC 20210 or fax your appeal to (202) 693-5538. Alternatively, you may email your appeal to

foiaappeal@dol.gov; appeals submitted to any other email address will not be accepted. The envelope (if mailed), subject line (if emailed), or fax cover sheet (if faxed), and the letter indicating the grounds for appeal, should be clearly marked: "Freedom of Information Act Appeal.

In addition to filing an Appeal, you may contact the Department's FOIA Public Liaison, Thomas G. Hicks, Sr. at (202) 693-5427 or hicks.thomas@dol.gov for assistance in resolving disputes. You also may contact the Office of Government Information Services (OGIS) for assistance. OGIS offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may mail OGIS at the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001. Alternatively, you may email or contact OGIS through its website at: ogis@nara.gov; Web: https://ogis.archives.gov. Finally, you can call or fax OGIS at: telephone: (202) 741-5770; fax: (202) 741-5769; toll-free: 1-877-684-6448.

It is also important to note that the services offered by OGIS are not an alternative to filing an administrative FOIA appeal.

Sincerely,

Andrew Levinson, Director
Directorate of Standards and Guidance

Attachment C

Letter: February 22, 2016 Occupational Safety
and
Health State Plan Association,
James Krueger, Chair
To:
David Michaels, Assistant Secretary for Occupational Safety and Health
United States Department of Labor

https://documents.boundarylinefoundation.org/OSHA_ERS/State-Plan-Association-Letter-to-OSHA-Asst-Sec-20160222.pdf

Occupational Safety & Health State Plan Association

February 22, 2016

David Michaels, PHD, MPH
Asst. Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

SUBJECT: Emergency Response and Preparedness Rulemaking (RIN: 1218-AC91)

Dear Assistant Secretary Michaels:

Thank you for attending last week's Occupational Safety and Health State Plan Association's (OSHSPA) winter meeting in Phoenix, AZ, and taking the time to discuss occupational safety and health issues important to all of us. OSHSPA greatly values the partnership that has developed between OSHA and the State Plans through many years of open and honest interaction supported by you and other Assistant Secretaries and numerous State Plan representatives.

In that spirit of openness and honesty, I wanted to take this opportunity to reiterate OSHSPA's position regarding OSHA's current Request for Information regarding Emergency Response and Preparedness.

Although we understand that OSHA's rulemaking efforts are in its early stages, the efforts of the Emergency Response and Preparedness subcommittee of the National Advisory Committee on Occupational Safety and Health (NACOSH) were discussed at length by OSHSPA members last week. Our membership is greatly concerned about the direction that the subcommittee is taking and a motion was passed unanimously directing the OSHSPA Chair and Board of Directors to express OSHSPA's opposition to the proposed rulemaking in its current iteration for the reasons outlined below.

While OSHSPA fully supports OSHA's efforts to gather information about the many and serious hazards faced by emergency response personnel in such tragic episodes as the 2013 explosion in the city of West, Texas, we have obvious and significant concerns about OSHA's stated intent to adopt a regulation that would have a substantially disparate impact on employers and employees that fall primarily under the jurisdiction of State Plans and not Federal OSHA.

While it is clearly appropriate for OSHA to consider using its regulatory authority to address emergency response hazards that are faced by federal employers and employees working on exclusive federal enclaves, OSHSPA believes that it is particularly inappropriate for OSHA to attempt to regulate an area – state and local government emergency response, including the coverage of volunteers in some State Plans – in which it neither has jurisdiction, experience nor expertise.

If there ever was a regulatory undertaking that fit the definition of an unfunded mandate placed on States, it would be an OSHA rulemaking in the area of emergency response and preparedness. Conservative estimates would have to place the percentage of covered employers and employees for such a regulation at 75-90% state and local government jurisdiction. Since the rules would not apply to state and local government agencies in states under federal jurisdiction, the proposed rules would result in a patchwork of coverage with no protection for many of the nation's emergency responders. OSHSPA believes that OSHA could use its resources to gain greater protection across the nation if focused instead on developing consensus standards and building partnerships with emergency responders in states where OSHA has jurisdiction.

State Plans with experience in such matters can foresee regulatory burdens posing a serious fiscal risk that could drive small paid fire departments and volunteer departments in primarily rural areas out of business. This would expose the general public to drastically increased response times waiting for a unit to be deployed from a larger municipality, and corresponding increases in serious and even fatal consequences for those who the emergency responders live to serve.

It appears that six State Plans currently have standards that address emergency responders and/or firefighters to some degree, and there may be others that would consider rulemaking if they had sufficient information and resources for the undertaking. OSHSPA strongly believes that, just as it is doing with Safety and Health Management Systems, OSHA should focus their emergency response and preparedness efforts at gathering information on hazards, consensus standards, best practices, costs and benefits. OSHA could then use that information in a nationwide outreach effort – coordinated with OSHSPA - and make the information available to those State Plans that want to undertake rulemaking.

OSHSPA feels that such an approach – a major national outreach effort combined with encouraging State Plans to undertake rulemaking – would be the most effective, timely and appropriate approach to improve the safety and health of our emergency responders and assure the continued protection of the general public.

Thank you for your dedication to the safety and health of America's employees and employers.

Sincerely,

James Krueger, Chair
Occupational Safety and Health State Plan Association

cc: OSHSPA Membership

Attachment D

Federal Register Notice, Vol. 89, No. 24
Monday, February 5, 2024
Emergency Response Standard

https://documents.boundarylinefoundation.org/OSHA_ERS/FR-Proposed-Emergency-Response-Standard-20240205-pg.7774-Highlighted.pdf