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Void Where Prohibited Revisited

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**The
Trickle-
Down
Effect
of
OSHA's
At-
Will
Bathroom-
Break
Regulation**

Marc Linder

**Fānpìhuà Press
Iowa City
2003**

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Part II

An Historical-Exclusionary Interlude

Toilet facilities are an essential part of the worker's everyday life. They are as important to him or her during working hours as they are at home. It is management's responsibility to supply toilet facilities in sufficient number for the size of the employee group and in locations convenient for those using them.¹

¹Arkansas Department of Labor, Safety Code # 6: Safety Code for Industrial Sanitation, sect. 6, at 10 ("Explanatory Comments"), on http://www.state.ar.us/labor/pdf/code6_industrial_sanitation.pdf.

How OSHA Almost Revoked Its Toilet Standard in 1978

To develop the correct attitude among employees in respecting the management's investment in sanitation facilities, responsibility...rests with the employer. Not only should he seek actively and constantly the worker's cooperation in maintaining the facilities in a sanitary condition, he must also demonstrate regular and thorough upkeep in the toilets.... When the employer does this then a share of the responsibility for adequate sanitation also belongs to the employee. It should be his obligation to use rather than abuse toilet...facilities. Adequate toilets and lavatories are provided for his use because they are essential to his well being and health while at work as they are at home. By the same token, the facilities should be used by him and left usable for the person who follows him just as he would wish it done in his home.¹

With the narrative having reached April 6, 1998, the date on which OSHA, animated by the combined impact of the UFCW's lobbying campaign and the adverse publicity surrounding the publication of *Void Where Prohibited*, finally issued its long-awaited interpretation of its toilet standard, it is time to exhume the astounding irony and long-forgotten fact that 20 years earlier OSHA had proposed and come very close to revoking that toilet standard altogether. Had OSHA succeeded in deleting the standard in 1978, the agency would have been very hard pressed to identify a basis on which to construct employers' obligation to let workers stop work to use the toilet in 1998.

Since OSHA's spokesman barely a week prior to April 6 had admitted that "a clarification that merely providing restrooms is not enough will be a big change,"² and since it is implausible that OSHA had received no complaints about access during the preceding 27 years, its claim that it had always viewed

¹Arkansas Department of Labor, Safety Code # 6: Safety Code for Industrial Sanitation, sect. 6, at 10 (Explanatory Comment) (n.d. [after 1951]), on http://www.access.arkansas.org/labor/pdf/code6_industrial_sanitation.pdf.

²Simon Nadel, "Restricting Regular Bathroom Access Can Spur Negative Workplace Repercussions," *U.S. Law Week* 66(37):2579-80 at 2579 (Mar. 31, 1998) (quoting OSHA communications director Stephen Gaskill).

the requirement as implicit³ lacks credibility.

Such skepticism is reinforced by the declaration of George Guenther, OSHA's first administrator, in 1972 that standards dealing with restroom facilities "have 'little direct relationship to occupational safety and health.'"⁴ Guenther's view was in no way idiosyncratic. The fact that in 1977-78 the Carter administration OSHA under Eula Bingham, a self-professed "advocate of worker rights to health and safety,"⁵ could have contemplated destroying the hinge that implicitly anchored workers' right to void when they need to may seem preposterous; yet the only plausible alternative interpretation is that OSHA never considered the link at all.

The course of this obscure development can be traced back to efforts by the Carter administration to propitiate employers that had been vigorously complaining during the Ford interregnum that OSHA had "forced business to make unjustified profit-reducing changes in factories."⁶ In 1975 a conference committee of the Democratic-controlled Congress issued a fiscal year 1976 appropriations bill report directing the Labor Department to undertake "[r]eview and simplification of existing OSHA standards and elimination of so-called 'nuisance standards' or standards which do not deal with workplace conditions that are clearly hazardous to the health or safety of workers or are more properly under the jurisdiction of State Departments of Public Health."⁷ Pressed for the Republican nomination by the even more openly pro-employer Ronald Reagan,⁸ President Ford had told a group of businessmen in 1976 that "they would like 'to throw OSHA into the ocean.'"⁹

By 1978, Douglas Soutar, vice president for industrial relations at the American Smelting and Refining Company and for many years a central figure in articulating big business's national labor law and labor relations agenda, who had lobbied against the enactment of OSHA, still feared that it would become "a Trojan Horse, useful in accelerating the eventual nationalization of our business system." The passage of eight years had vindicated his initial opposition to what

³See below ch. 6.

⁴"Easing of New Job-Safety Law Provision for Small Firms Backed by Labor Agency," *Wall Street Journal*, June 23, 1972, at 2, col. 3-4.

⁵Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* 188 (1986).

⁶David Burnham, "Ford Termed Cool to 3 Key Agencies," *N.Y. Times*, Jan. 16, 1976, at 1, col. 1, at 30, col. 6 (Proquest).

⁷*Department of HEW and Related Agencies Appropriation Bill, Fiscal Year 1976*, 94th Cong., 1st Sess. 9 (1975).

⁸On Reagan's view of OSHA during that presidential campaign, see "Why Nobody Wants to Listen to OSHA," *Business Week*, June 14, 1976, at 64 (Lexis).

⁹David Burnham, "Worker Safety Agency, Under Fire, Has Little Impact But Big Potential," *N.Y. Times*, Dec. 20, 1976, at A1, at B6, col. 2 (Proquest).

he had foreseen “as a super agency which would drastically impair industry’s prerogatives and freedom to manage, its ability to generate capital, to borrow, to earn an adequate return on investment.” By displacing labor-management law, OSHA was enabling workers to attain what they could not through collective bargaining.¹⁰ Nevertheless, not even a tough, cynical, and realistic capitalist spokesman like Soutar would have predicted in 1978 that 20 years later OSHA’s Trojan Horse would insinuate itself into the workplace via the bathroom through the agency’s interpretation of what had been an American National Standards Institute (ANSI) voluntary toilet standard and impose at-will voiding breaks on employers. After all, employers had favored such “national consensus” standards¹¹ of ANSI, whose committees were “composed primarily of corporate safety engineers, with a light sprinkling of labor and government representatives.”¹²

Bingham’s predecessor in the Ford Administration, Morton Corn, had testified before both congressional appropriations committees in 1976 that OSHA was busy eliminating “unessential regulations”; the majority of those “cited as trivial” having been derived from the national consensus standards that had been adopted during the agency’s “formative months as a baseline for its compliance actions. ... Under those consensus standards, a large number of irrelevant ingredients got on our books.”¹³ In rushing to assure House members eager to learn whether OSHA had followed their directions to eliminate “nuisance standards,”¹⁴ Corn insisted that he did not “think the agency should be concerned with the esthetic qualities of the work environment” such as prohibiting compounds with “a horrible odor.”¹⁵

¹⁰Douglas Soutar, “A Management Viewpoint,” *Labor Law Journal* 29(8):492-98 at 493 (Aug. 1978).

¹¹*Occupational Safety and Health Act, 1970: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate*, 91st Cong., 1st and 1d Sess. 328 (1970) (statement of J. Sharpe Queener, Safety Director, Du Pont Co. and representing U.S. Chamber of Commerce).

¹²John Mendeloff, *Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy* 36 (1979).

¹³*Departments of Labor and Health, Education, and Welfare Appropriations for 1977: Hearings Before a Subcommittee of the Committee on Appropriations House of Representatives: Part 1: Department of Labor Related Agencies*, 94th Cong., 2d Sess. 551, 562 (1976).

¹⁴*Departments of Labor and Health, Education, and Welfare Appropriations for 1977: Hearings Before a Subcommittee of the Committee on Appropriations House of Representatives* at 538, 563. See also *Departments of Labor and Health, Education, and Welfare Appropriations for 1977: Hearings Before a Subcommittee of the Committee on Appropriations United States Senate: Part 7*, 94th Cong., 2d Sess. 4336 (1976).

¹⁵*Departments of Labor and Health, Education, and Welfare Appropriations for*

In February 1977, just two weeks after having become president, Carter, in a “Report to the American People,” declared that his administration would remove unnecessary regulations.¹⁶ By midyear he was expressing the radical anti-prevention belief that “the Federal Government ought to get out of those kinds of detailed safety precautions when the worker can observe with his or her own eyes that a danger exists, and then have the safety regulations covered perhaps by increases in the payment of workmen’s compensation if an employer does have a dangerous place for the employees to work. ... In the safety area, I don’t think many of them [i.e. regulations] are necessary. But we are doing what we can to now to simplify the whole system....”¹⁷

Bingham and Secretary of Labor Ray Marshall, who was closely identified with the labor movement,

developed a good idea of the themes that would be the basis of their OSHA policy. One of the initial concerns that Bingham had expressed was that “OSHA was about some silly things” and was widely perceived as being preoccupied with “frivolous, irrelevant rules and regulations.” President Carter and Ray Marshall shared this concern, and all three knew that OSHA was in deep trouble with Congress, with the small business community, and with organized labor. ... These ideas formed the basis of a bold public relations stroke engineered by Bingham’s public affairs officer Frank Greer which tied together OSHA’s new programs and policies under the rubric of “common sense.” At a press conference on May 19, 1977, Marshall and Bingham announced with great fanfare that OSHA was being redirected to follow new “Common Sense Priorities” and that from now on it would focus its energies on the really serious problems of the workplace. There were three main parts to the program: to “get serious about serious dangers”; to help the small businesses comply with OSHA rules; and to clarify and simplify safety rules. ... Under its third priority—simplifying safety rules—OSHA had already begun combing through over a thousand consensus standards to revise unclear ones and eliminate unnecessary or irrelevant ones.¹⁸

1977: Hearings Before a Subcommittee of the Committee on Appropriations House of Representatives at 557.

¹⁶James Carter, “Report to the American People,” in *Public Papers of the Presidents of the United States: James Carter: 1977*, Book I, at 69-77 at 74 (1977 [Feb. 2, 1977]).

¹⁷“Remarks and a Question-and-Answer Session at a Public Meeting in Yazoo City, MS,” in *Public Papers of the Presidents of the United States: James Carter: 1977*, Book II, at 1316-34 at 1331 (1978 [July 21, 1977]).

¹⁸Judson MacLaury, “The Occupational Safety and Health Administration: A History of its First Thirteen Years, 1971-1984: 4. Eula Bingham Administration, 1977-1981: Of minnows, whales and ‘common sense’” on <http://www.dol.gov/asp/programs/history/osha13bingham.htm> (quotations from interview with Bingham). For the text of the Marshall-Bingham announcements, see *Congressional Record* 123:15926 (1977).

Bingham, who declared that “OSHA does not exist to mediate between labor and management on health and safety issues.... We exist to limit human suffering and to protect working men and women,”¹⁹ agreed in March 1978 with employers’ criticism of OSHA for “over-enforcement of nuisance standards.” Of the more than 5,000 safety standards that OSHA had adopted at its inception, “many of them trivial and unrelated to actual workplace hazards,” Bingham mentioned those that had been issued by ANSI (such as the toilet standard) as “never” having been “intended to be enforceable.” It was for that very reason that she had proposed revoking more than 1,100 standards that were out of date and/or not related to safety or health.²⁰

In September 1977 BNA’s *Occupational Safety & Health Reporter* reported that a draft list of standards to be revoked was being compiled by two different OSHA work groups that had been formed in June: one from OSHA’s safety standards office and the other from the Labor Department’s solicitor’s office and other OSHA divisions. The career civil servant in charge of the project, John Proctor,²¹ the deputy director of safety standards, stated that there was not full agreement between the two groups about the deletion of 1910.141(c)(1)(i) and (ii). Proctor shed considerable light on what may have been the opportunistic rather than principled reason underlying the drive to eliminate government supervision of workplace bathrooms: “These deletions were included tentatively however, ‘as means for OSHA to clearly indicate that its future enforcement efforts will be directed at high hazard industries.... Proctor also noted that the revocation of 1910.141(c) and table J-1 [which specifies how many toilets must be provided] would remove OSHA regulation of toilets which has ‘subjected our compliance safety and health officers and other officials to ridicule and much criticism.’”²²

¹⁹Eula Bingham, “The Responsibilities of OSHA,” *Labor Law Journal* 29(8):487-92 at 487 (Aug. 1978). See also Bingham’s congressional testimony in *Oversight Hearings on the Occupational Safety and Health Act: Hearings Before the Subcommittee on Compensation, Health and Safety of the Committee on Labor of the House of Representatives*, 95th Cong., 1st Sess. 294-320 (1977).

²⁰Eula Bingham, “OSHA: Only Beginning,” *Labor Law Journal* 29(3):131-36 at 131, 133 (Mar. 1978).

²¹When asked 24 years later, Proctor had no recall of the details of the toilet standard, which was a health standard, whereas he had been in charge of safety standards. Telephone interview with Barbara Belaski, OSHA Standards Office (Nov. 21, 2002). Belaski, who worked for Proctor in 1978, spoke to Proctor and transmitted this message from him. Belaski herself stressed that many of the standards had been revoked because they should never have been adopted in the first place as part of national consensus standards since they were covered by other agencies or dealt with public health issues.

²²“Revocation of Laundry, Bakery Rules Among Suggestions by OSHA Work Groups,” *Occupational Safety & Health Reporter* 7(14):420 (Sept. 1, 1977).

Finally, on December 5, 1977, Bingham formally announced OSHA's proposal to eliminate a large number of general industry health and safety standards and gave the public the opportunity to comment on it. Secretary of Labor Marshall called the initiative "'another significant step' in the redirection of OSHA enforcement toward serious workplace hazards."²³ Using the open-front toilet seat requirement as an example of the unnecessary regulations being eliminated, Marshall declared that of the thousands of accidents and illnesses suffered by workers annually, "'to the best of our knowledge, none...has been caused by the shape of a toilet seat...'"²⁴ In support of the plan to revoke the national consensus standards derived chiefly from ANSI standards, Bingham stressed that

Congressional committees in the exercise of their oversight authority, have recommended that OSHA review its standards and revise those which are unclear or irrelevant to employee safety and health. [I]n the appropriations bill for fiscal year 1977 Congress directed OSHA to eliminate "so-called nuisance standards" or standards which do not deal with workplace conditions that are clearly hazardous to the health or safety of workers or are more properly under the jurisdiction of State Departments of Public Health."

Both the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health have indicated their commitment...to redirect its enforcement efforts towards more significant safety and health hazards. To initially implement this commitment, OSHA proposes to revoke, as expeditiously as possible under the Act, those regulations which most clearly have no direct or immediate relationship to the safety or health of employees.²⁵

Among the criteria for selecting regulations meriting revocation mentioned by OSHA were: obsolete or inconsequential; concerned with comfort or convenience; directed toward public safety or property protection; subject to enforcement by other regulatory agencies; encumbered by unnecessary detail; and adequately covered by other general standards. In particular the penultimate deletion criterion, on which OSHA would draw in revoking part of the toilet standard, was justified as "permit[ting] employers greater flexibility in selecting the specific methods to abate these workplace hazards, including the development of new technology."²⁶ In addition, OSHA, exercising its power under the statute to issue de minimis notices rather than citations where a violation of a standard has "no

²³"Revocation of 'Irrelevant' Standards Proposed by OSHA: Comment Period Set," *Occupational Safety and Health Reporter* 7(28):947 (Dec. 8, 1977).

²⁴Richard Madden, "Safety Unit Would Drop 1,100 Rules," *N.Y. Times*, Dec. 6, 1977, at 20, col. 1 (Proquest).

²⁵*Federal Register* 42:62734 (Dec. 13, 1977).

²⁶*Federal Register* 42:62735.

direct or immediate relationship to safety or health,”²⁷ announced that for the duration of the rulemaking proceedings it would not cite employers for violations of standards proposed for revocation.²⁸ As OSHA’s Program Directive to field and national offices explained, “this policy will significantly relieve the concerns of the regulated employers with regard to those trivial workplace conditions which have no direct or immediate impact on safety or health.”²⁹

OSHA then proposed revoking the entire toilet standard, including the provision of toilet paper,³⁰ with the exception of: (1) the mandate that “toilet facilities...shall be provided in all places of employment,” but stripped of its specification of how many toilets were required;³¹ and (2) the injunction that “[t]he sewage disposal method shall not endanger the health of employees.”³² Significantly, this radically stripped-down provision would have conferred on employers more discretion than some had dared suggest in 1972 at the time of public hearings and comment on an earlier major revision of the sanitation standard, when no employer even raised the issue of sloughing off the obligation to furnish toilet paper.³³ At that time, for example, the National Association of Manufacturers, denying “that it was the intent of Congress to include the general sanitation standards in” OSHA, had argued that because they “are more appropriately matters of public health and, as such, have been traditionally regulated and controlled by local, municipal and state laws,...there is no desirability for pre-emption by the Federal Government.”³⁴ Even more far-reaching had been the testimony of another employers association that one of its members’ medical doctor had taken the position that: “We do not know of any health or safety justification or basis for specifying the...number of toilet facilities....”³⁵ To be

²⁷29 USC sect 658(a).

²⁸*Federal Register* 42:62735. See also OSHA Program Directive #200-68 (Dec. 2, 1977), in *Employment Safety and Health Guide*, ¶11,132 at 12,137-38 (Transfer Binder: Developments 1977-1978).

²⁹OSHA Program Directive #200-67 (Dec. 1, 1977), in *Employment Safety and Health Guide*, ¶11,133 at 12,138-40 at 12,139 (Transfer Binder: Developments 1977-1978).

³⁰29 CFR sect. 1910.141(c)(1)(v).

³¹29 CFR sect. 1910.141(c)(1)(i).

³²29 CFR 1910.141(c)(1)(iii); *Federal Register* 42:62737, 62801.

³³On the hearing and comments, see Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and The Right to Urinate on Company Times* 57-61 (1998).

³⁴United States Department of Labor, Occupational Safety and Health Administration, “Hearing on Proposed Revision of Sanitation Standards” at 39-40 (Nov. 8, 1972, Washington, D.C.) (testimony of Kenneth Schweiger, Director, Employee Relations, NAM).

³⁵United States Department of Labor, Occupational Safety and Health Administration, “Hearing on Proposed Revision of Sanitation Standards” at 19 (testimony of Alvin

sure, other employers that had suggested that “no specific numbers...be used with reference to number of toilet facilities required,” added the constraint “that the standard should require only ‘adequate’ or ‘sufficient’ toilet facilities.”³⁶ And in 1972 the medical director of Eastman Kodak Company had advocated adoption of the following “performance standard,” which many employers today might find uncongenial: “Every place of employment shall be provided with a sufficient number of toilet facilities which shall be readily accessible to employees without unreasonable delay that would create an unsanitary condition or health hazard.”³⁷ The fact of overriding significance about the 1972 hearings is that, despite these calls by some employers for elimination of OSHA’s regulation of the number of toilets, no employer argued that firms were not obligated to let workers go to the bathroom; on the contrary, many of them detailed practices and proposals that seem downright pro-labor three decades later.³⁸

After an extension, the public comment period ran until May 1978. Before the period expired, OSHA had received requests from labor organizations to discuss the revocations, and the agency did hold such meetings between March 13 and 23;³⁹ it offered the same opportunity to other interested groups, but none made such a request. OSHA officials presented its position on specific proposals for revocation at the meetings and a summary of them was entered into the public record on April 11. OSHA received a total of 230 comments, including 58 from trade associations, 89 from management, 22 from labor unions, 40 from government, and 21 from other interested persons. Based on these comments, OSHA decided to revoke 607 of about 700 general industry standards proposed for revocation.⁴⁰

Mardon, Director, Public Affairs and Public Relations, Associated Industries of New York State, Inc.). To be sure, “without unreasonable delay” could also be interpreted as meaning that the number of toilets must be adequate to enable workers in fact to get to use them during scheduled mass breaks rather than requiring employers to let workers go individually whenever they need to.

³⁶*Federal Register* 38:10931 (1973).

³⁷United States Department of Labor, Occupational Safety and Health Administration, “Hearing on Proposed Revision of Sanitation Standards” at 228 (testimony of Norman Ashenburg).

³⁸For a detailed exposition, see Linder and Nygaard, *Void Where Prohibited* at 57-61.

³⁹Unfortunately, the very brief account in “OSHA, Unions Meet on Project: Final Decision to Be Based on Record,” *Occupational Safety & Health Reporter* 7(4):1638 (Mar. 30, 1978), was skimpy, lacking any useful detail.

⁴⁰*Federal Register* 43:49726-28 (Oct. 24, 1978). After considerable searching, OSHA’s Docket Office located Docket No. S250 (containing the records of the standards deletion project including the hearings) at the National Archives in Suitland, MD. Unfortunately the materials there are stored in 67 boxes labelled only with arbitrary accession

While the distinctly pro-labor Representative George Miller (Democrat of California) was praising Bingham at a congressional OSHA oversight hearing for having “made a dramatic start in getting rid of frivolous regulation,”⁴¹ labor unions, unsurprisingly, opposed the revocation initiative, AFL-CIO President George Meany even urging withdrawal of the whole project.⁴² The UAW considered it “‘something of an overreaction to a well-orchestrated attack by industry on the enforcement activities of OSHA.’”⁴³ Unassailable was the union’s critique of OSHA’s suggestion that the Act’s general duty clause could be the basis for citing hazards no longer covered by individual standards: since the general duty clause applies only to hazards “that are causing or are likely to cause death or serious physical harm,”⁴⁴ the standard of proof would be “much higher.” The United Paperworkers International Union objected that failure to retain the sanitation standards “would result in ‘a very unhealthy condition for thousands of workers.’” The outgoing director of the National Institute for Occupational Safety and Health, Dr. John Finklea, stated the obvious in explaining NIOSH’s opposition to the elimination of the sanitation standards in section 1910.141 on the grounds that they were “‘designed to promote personal hygiene and to prevent the spread of communicable disease.’”⁴⁵ The director of industrial safety of the District of Columbia Minimum Wage and Industrial Safety Board echoed the sentiments of labor unions in arguing that the revocations were “‘an arbitrary decision to offer to opponents a sign that OSHA intends to deregulate and be less offensive.’” Despite being recipients of these alleged deregulatory gifts, employers downplayed the revocations as “‘essentially cosmetic.’” The Motor Vehicle Manufacturers Association, for example, urged a more comprehensive revision of Part 1910, recommending “the development of performance rather than specification standards.”⁴⁶

Why and how a performance standard would have been superior to specifying

numbers; Vanessa Reeves of the Docket Office and a co-worker travelled to Suitland and made a heroic effort to identify the materials on 1910.141(c), but discovered that the papers in the individual boxes lack any order, appearing as if they had been dumped into the boxes at random. Telephone interview with Vanessa Reeves, OSHA Docket Office (Nov. 18 and 21 and Dec. 13, 2002).

⁴¹*Congressional Record* 124:16672 (1978).

⁴²“Meany Urges OSH to Withdraw Proposal: Unions Question Criteria Used by Agency,” *Occupational Safety & Health Reporter* 7(51):1893 (May 18, 1978).

⁴³“Auto Workers Union Urges Retention of Standards, Use of De Minimis Notice,” *Occupational Safety & Health Reporter* 7(38):1393 (Feb. 16, 1978).

⁴⁴29 USC sect. 654(a)(1).

⁴⁵“Auto Workers Union Urges Retention of Standards” at 1393, 1394.

⁴⁶“OSHA Should Appoint Advisory Group on Revisions, Steelworkers Union Says,” *Occupational Safety & Health Reporter* 7(4):1639-40 (Mar. 30, 1978).

the appropriate number of toilets, the employers organization did not explain. But the fact that two decades later employers complained that the OSHA Memorandum's performance (or reasonableness) standard was too vague suggests that the objection was and remains opportunistically fungible.

Without any substantive public explanation of its reasons, OSHA, "[u]pon reexamination of the evidence...determined that, in the best interest of worker protection," the following provisions "should not be revoked": section 1910.141(c)(1)(i) (toilet facilities—general); Table J-1 (minimum number of water closets); 1910.141(c)(1)(ii) (mobile crews); and 1910.141(c)(2)(i) (requirement of doors, walls, or partitions high enough "to assure privacy").⁴⁷ The remaining provisions slated for revocation were revoked, including 1910.141(c)(1)(iv), which required an increase in the number of toilets according to the number of non-employees allowed to use them:

Although a number of commentators opposed revocation of this provision, OSHA has concluded that agency authority in this area should extend only to requiring minimum numbers of facilities for employees [sic]. Use of such facilities in a place of employment by the public would be more generally a problem of public health, and any additional requirements for such shared facilities beyond the OSHA provisions would appropriately fall under the purview of local or state building codes or public safety and health authorities. Further, this particular provision is in large part inconsequential in that the provision lacks substantive requirements appropriate for mandatory enforcement by this agency with respect to determining the relative usage of the facilities by the public and the number of additional water closets that would there be necessary.⁴⁸

The subsections requiring toilet paper and covered receptacles (for feminine hygiene products in women's bathrooms) were revoked without further explanation because OSHA "as a matter of policy has adjudged them to encumber this section with unnecessary detail"⁴⁹—the revocation criterion most frequently used by OSHA.⁵⁰ Finally, OSHA revoked the provision that had prompted the greatest clamor and media comment⁵¹—the requirement of a split (open-front) toilet seat in all toilets installed or replaced after June 4, 1973.⁵² The proliferation of toilet seats with an opening in the front had begun in the 1960s in an effort to prevent

⁴⁷*Federal Register* 43:49737.

⁴⁸*Federal Register* 43:49736.

⁴⁹*Federal Register* 43:49736.

⁵⁰*Federal Register* 43:49728.

⁵¹E.g., "OSHA Drops 928 'Nuisance' Rules," *Facts on File World News Digest*, Nov. 3, 1978, at 833 C3 (Lexis), "Why It's So Hard to End Regulations," *U.S. News & World Report*, Nov. 6, 1978, at 72 (Lexis).

⁵²1910.141(c)(3)(ii); *Federal Register* 43:49736.

a gonorrhea epidemic that had spread from this source. This “concern seems somewhat warranted” from a biological standpoint because the gonococcal bacterium can remain viable in secretions on wood for more than three days, but several studies cast doubt on toilet seats as a source of infection.⁵³ In this context the seat mandate was neither one of OSHA’s “absurdities” nor “meant only to promote comfort and convenience....”⁵⁴ Moreover, the source of the OSHA standard, the ANSI national consensus standard (the *American Standard Safety Code for Industrial Sanitation in Manufacturing Establishments*), had included it since at least 1935.⁵⁵

A partial explanation of OSHA’s revocation of the toilet standard came from a long-time OSHA industrial hygienist, Robert Manware, who worked on the revocation project in 1977-78. Within the larger framework of the regulatory deletions, he observed that, although toilet paper was “a nice thing to have,” OSHA officials believed that providing it “was going to happen without federal intervention.”⁵⁶ To be sure, Manware conceded that if OSHA had subsequently discovered that empirically significant numbers of employers were not providing toilet paper, perhaps it would have re-regulated the subject. Alternatively, he speculated that OSHA, even without a standard, might still be able to cite employers on the basis of the statutory general duty clause. Since he was willing to go so far as to conjecture that lack of toilet paper might cause the “serious physical harm”⁵⁷ required to trigger the application of the general duty clause, it would be ironic that OSHA had revoked such a standard as part of a campaign designed to eliminate regulations having no immediate relationship to safety or health.

Manware could not recall what labor unions must have said at the public meetings to persuade OSHA to rescind the revocation of section 1910.141 (c)(1)(i), but he suspected that one reason underlying the original revocation was the agency’s belief that, in the light of a 1973 federal appeals court decision invalidating Table J-2, which specified the number of lavatories employers were

⁵³Ingrid Nygaard and Jeffrey Lynch, “Public Restrooms: Past, Present and Future” 7-8 (unpub. MS, University of Iowa, College of Medicine, Environmental Health 175:197 (Fall 2001)).

⁵⁴Timothy Clark, “The ‘Facts’ About OSHA’s 1,100 Revoked Regulations,” *National Journal* 10(32):1298 (Aug. 12, 1978) (Lexis).

⁵⁵American Standards Association, *American Standard Safety Code for Industrial Sanitation in Manufacturing Establishments* sect. 3.13(c) (ASA Z4.1-1935, Apr. 1, 1935).

⁵⁶Telephone interview with Robert Manware, OSHA, Washington, D.C. (Nov. 22, 2002).

⁵⁷According to 29 USC sect 654(a)(1): “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

required to provide, on the grounds that OSHA had failed to provide substantial evidence supporting the proposal,⁵⁸ it would also not be able to persuade a court that it could empirically justify specifying a specific number of toilets.⁵⁹ However, such apprehension would have been inapposite in 1978 since the time period within which an employer could have judicially challenged the validity of the toilet standard had already expired in 1973.⁶⁰

At the March 1978 hearings considerable opposition was voiced to the toilet standard, in particular, the requirement of a split seat, on the grounds that such matters were questions of public health, which state and local health agencies were competent to regulate. Many in OSHA perceived such complaints as pretexts for dismantling the agency altogether, just as they viewed the revocation project as an effort to blunt that attack. Indeed, at the time some officials at OSHA who were concerned about the revocations suspected that employers might try to contest citations by state or local health agencies on the grounds of federal preemption.⁶¹

Even before the revocation had gone into effect, an immensely amused President Carter could not refrain from praising the action: “In 1 day this year Eula Bingham terminated the application of 1,100 OSHA regulations. And although a few of those are still on the books—she has to go through a procedure to eliminate them—they are not being enforced. And I know Billy [Carter], at his service station, says that the OSHA inspections and regulations are much less onerous than they were before. [Laughter]”⁶²

Jerry Purswell, who came to OSHA in June 1978 as the Director of the Directorate of Safety Standards Programs, found on his arrival a “tense mood” surrounding the deletion of “nitpicking” standards, which had “stalled” as a result of the opposition of industrial unions, which did not want standards revoked for which the unions would then have to bargain collectively with employers. Once this “impasse” had been reached, OSHA Administrator Bingham “dropped” the

⁵⁸Associated Industries of New York State, Inc. v. United States Department of Labor, 487 F.2d 342 (2d Cir. 1973).

⁵⁹Telephone interview with Manware.

⁶⁰“Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals....” 29 USC sect. 655(f). Rob Swain, OSHA Counsel U.S. Dept. of Labor Solicitor’s Office, Washington, D.C., agreed with the view expressed in the text concerning the time-barred preclusion of a challenge to the validity of the standard. Telephone interview with Rob Swain (Jan. 6, 2003).

⁶¹Telephone interview with Tom Seymour, former OSHA official (Nov. 18, 2002).

⁶²“Interview,” in *Public Papers of the Presidents of the United States: James Carter: 1978*, Book II, at 1588-96 at 1594 (1978 [Sept. 23, 1978]).

project in Purswell's "lap" and left it to him to "move it along." Purswell then met privately with the unions and explained to them that after all the swipes that the business press such as the *Wall Street Journal* and *Business Week* had made at OSHA, eliminating the standards with detailed specifications had become politically very important to Bingham. Purswell then succeeded in negotiating a settlement with the unions, which surprised Bingham.⁶³ (Bingham did "remember that Purswell sat with the unions and they were in agreement with what was published.")⁶⁴ Although he had no specific recall of how the negotiations with the unions over the toilet standard proceeded, Purswell did remember that it was one of the standards discussed and that if the provision prescribing the number of toilets was ultimately restored in the final rule, the reason was the unions' complaint that otherwise they would be forced to negotiate with employers over the subject as well as their fear that if the general industry standard were deleted, it would become that much more difficult to induce OSHA ever to promulgate a field sanitation standard for migrant farmworkers (which in fact took 14 years to issue). When asked how OSHA viewed future enforcement of such requirements as the provision of toilet paper following their revocation, Purswell—after mentioning, like Manware, the general duty clause and then quickly retracting the thought on realizing that it could not meet the "serious physical harm" standard—emphasized that Secretary of Labor Ray Marshall, not foreseeing unions' precipitous decline, had strongly insisted at the time that these sorts of standards were really part of labor relations and collective bargaining and not safety and health issues for OSHA to regulate.⁶⁵

Sheldon Samuels, the director of safety and health at the Industrial Union Department of the AFL-CIO—whom Purswell identified as the coordinator of union representatives negotiating with him—while vehemently rejecting Purswell's characterization of unions' approach as trying to avoid having to bargain collectively over terms and conditions that OSHA had imposed by means of standards, did confirm that unions advocated adoption by OSHA of commonplace, community standards, such as those that a county health department would enforce, which would have included a specified number of toilets, toilet paper, and the other elements of the ANSI-OSHA standard. He also maintained that the unions and OSHA had an implicit understanding that, in spite of the revocation, the agency would continue to cite employers that failed, for example, to provide

⁶³Telephone interview with Jerry Purswell (Nov. 23, 2002).

⁶⁴Email from Eula Bingham to Marc Linder (Nov. 25, 2002).

⁶⁵Telephone interview with Purswell. Though private, Purswell's "quiet talks with unions that have been offended by [OSHA's] deletion project," were not secret. Timothy Clark, "What's All the Uproar over OSHA's 'Nit-Picking' Rules?" *National Journal* 10(40):1594 (Oct. 7, 1978) (Lexis).

toilet paper. To be sure, Samuels could offer no legal basis for a regulatory agency's continuing enforcement of a regulation that it had expressly revoked,⁶⁶ let alone a real-world explanation as to how inspectors and supervisors in the twenty-first century who never knew that OSHA had briefly mandated toilet paper from 1971 to 1978 might become executors of this implicit understanding. Samuels, who, in addition to joining ranks with Manware and Purswell in suggesting the general duty clause as a proper vehicle for enforcing the revoked standard, found a silver lining even in an OSHA inspector's concluding that he or she lacked the power to cite an employer for failing to furnish toilet paper: somehow the fact of the firm's omission would find its way into the public domain and embarrass the employer.⁶⁷

Peg Seminario, who is today the head of occupational safety and health at the AFL-CIO and worked on the standards deletion project in 1978, was able to "recall that our main approach to dealing with the standard' [sic] deletion project was to assess each of the proposed changes to determine if they would remove important safety and health protections, or were simply redundant or unnecessary requirements. The toilet standard would have been one that we would have argued should be kept."⁶⁸

It is true that state and local governments have adopted the Uniform Plumbing Code and Uniform Building Code, which mandate various minimum numbers of water closets for many types of buildings, including some where people are employed.⁶⁹ How stringent enforcement of these requirements would be is another matter. In Iowa City, for example, the Building Inspection Division noted that its enforcement activities with regard to the number of toilets were focused on new construction and renovation; when asked about toilets in existing buildings, an official at first stated that the agency had no such jurisdiction, but then, after reflection, recalled that on one occasion the city had written a letter to a restaurant requiring that the toilets be unlocked following a complaint that, in order to prevent vandalism, it had locked its toilets at night while it was still

⁶⁶Nevertheless, in 2002 OSHA in North Carolina, where the state legislature has adopted all Federal OSHA standards for the state's OSHA, N.C. Gen. Stat. sect. 95-131(a) (2002), cited an employer for having violated 1910.141(c)(1)(i)—"Toilet facilities were not provided in accordance with TABLE J-1"—because "no toilet paper was provided for the men's rest room." Asheville Metal Finishing, Inc., Insp. No. 305186124 (issued May 10, 2002).

⁶⁷Telephone interview with Sheldon Samuels, Solomons, MD (Nov. 23, 2002).

⁶⁸Email from Peg Seminario to Marc Linder (Nov. 26, 2002).

⁶⁹International Association of Plumbing and Mechanical Officials, *Uniform Plumbing Code: 2000 Edition*, table 4-1 at 31-33 (2000); International Conference of Building Officials, *Uniform Building Code*, vol. 1: *Administrative, Fire- and Life-Safety, and Field Inspection Provisions* table A-29-A at 1-397-98 (1994).

open. With regard to the non-functioning of toilets (or even of the only toilet), the official observed that such a condition would have to have persisted for a considerable period of time (at least weeks) before the agency would intervene, and even then only on a case by case basis.⁷⁰

Had this regulatory function been vacated by OSHA, it is difficult to imagine that any such public health agencies would ever have required an employer that maintained toilets in compliance with the codes to let workers (outside of the food-service industry and other public-health-related employments) stop working and use those toilets whenever they needed to void. Enforcing such rules at the intersection of health and employment is uniquely the province of an occupational safety and health agency. Under the headline, “U.S. Agency on Job Safety and Health Discards 928 ‘Nuisance’ Rules,” *The New York Times* ran an Associated Press article in 1978 alleging that OSHA “was glad to see the rules go. They never saved any lives or warded off any injuries or illnesses, as far as agency officials know.” Although the paper quoted Purswell as stating that OSHA “had been unable to find a single case ‘in which a woman became ill because of exposure to a sanitary napkin,’”⁷¹ it apparently did not seek confirmation of the health-neutral consequences of non-use of toilet paper after defecation.

To be sure, some jurisdictions also require that toilet paper be provided for toilets,⁷² which OSHA ceased to mandate in 1978. But, again, for example, in Iowa City, Inspection Services stated that it had no jurisdiction over the matter, while the Johnson County Public Health Department declared that it could require the provision of toilet paper only in the businesses it licenses—restaurants, bars, grocery stores, motels and hotels; in other buildings or workplaces it lacks jurisdiction.⁷³ When asked whether the agency would tell an employee who com-

⁷⁰Telephone interview with Jan Ream, Inspection Services, Iowa City (Dec. 3, 2002).

⁷¹*N. Y. Times*, Nov. 25, 1978, at 24, col. 1 (Proquest).

⁷²E.g., Connecticut Public Health Code, Regulations of Connecticut State Agencies 19-13-B108 (1985), requires toilet paper in public buildings, restaurants, large stores, and shopping centers. Similarly, in Alaska toilet paper must be provided in public facilities and facilities open to the public. Alaska Adm. Code 18:30.640 (2002).

⁷³Telephone interview with Albert Moonsammy, environmental health specialist, Johnson County Department of Public Health, Iowa City (Dec. 3, 2002); telephone interview with Ralph Wilmer, Director, Johnson County Iowa Public Health Dept., Iowa City (Dec. 4, 2002). The director identified the Food and Drug Administration’s Model Food Code, which the Iowa legislature had adopted, as the source of this authority. The Model Food Code does state: “A supply of toilet tissue shall be available at each toilet.” FDA, 2001 Food Code, sect. 6-302.11, on <http://vm.cfsan.fda.gov/~dms/fc01-toc.html>. The Illinois Food Safety Sanitation Code adopted this provision; 77 Ill. Adm. Code sect. 750.1110(d) (2002). However, neither the Iowa Code nor the regulations issued pursuant to them adopted this provision. Iowa Code sect. 137F.14 (1999); Iowa Adm. Code sect.

plained that he had himself been turned into a public health hazard by virtue of his employer's failure to provide toilet paper that unfortunately there was nothing the Public Health Department could do to correct the problem, its director acknowledged that the county general health nuisances regulation might be available for that purpose, but hastened to add that he was certain that the county attorney would refuse to prosecute on the grounds that the nuisance was too petty. He also strongly suspected that a similar gap in public health enforcement was typical throughout the United States.⁷⁴ The Peoria (Illinois) City/County Health Department confirmed that suspicion, adding that when it receives such "labor-management" complaints, it refers workers to OSHA.⁷⁵

Failure to provide toilet paper in workplace bathrooms is not some hypothetical fabrication of a playful academic mind, though *The New York Times* seems to suspect that it is peculiar to one of the cheapest and "most dangerous employers in America...."⁷⁶ OSHA itself issued employers (including numerous large and nationally recognized firms) well over 1,100 citations for violating this standard between 1972 and 1978, when it was revoked.⁷⁷ Some state-plan OSHA

481.31.9 (1999). Informed of the absence of express statutory or regulatory authority for the toilet paper requirement, the surprised director looked up the codes himself and confirmed this fact, insisting commonsensically, however, that regardless of whether toilet paper was expressly required by the statute or regulation, it was part and parcel of providing a toilet. Telephone interview with Wilmer.

⁷⁴Telephone interview with Wilmer. Under the regulation: "Health nuisance means any act, omission to act or condition which injures or threatens the health and safety of one or more persons and shall include but shall not be limited to a) Any business trade, manufacture or other operation or condition of property, which gives rise to noxious gases, vapors...or fumes which injure or threaten the health or safety of individuals or the public. b) The storage, collection, discharge, or depositing of any offal, filth, refuse or contaminated material in any place...so as to threaten the health or safety of individual or public, or to be conducive to the breeding and harborage of flies, rats, or other vermin." If the person fails to abate the nuisance, the board of health can cause the abatement of the nuisance with "[a]ll expenses incurred thereby...paid by the owner...or occupant of...property and the same shall be a lien upon the property." Johnson County Board of Health Regulation of Health Nuisances, sects. 1.3 and 5 (Aug. 22, 1968; amended June 20, 1974). The abatement provision would presumably mean that the county would buy the toilet paper and charge the owner in perpetuity.

⁷⁵Telephone interview with unidentified 26-year veteran of Peoria City/County Health Department (Dec. 4, 2002).

⁷⁶David Barstow and Lowell Bergman, "At a Texas Foundry, An Indifference to Life," *N.Y. Times*, Jan. 8, 2003, at A1, col. 1-2. at A14, col. 2 (nat. ed.) (reporting on Tyler Pipe).

⁷⁷The search ("19100141 c01 v") conducted in Lexis-Nexis OSHAIR file (Dec. 25, 2002) identified 1,179 citations, which by and large ceased by September 1978; one from

agencies, in California⁷⁸ and Washington,⁷⁹ for example, have retained the toilet paper requirement in their OSHA programs; and from 1990 to 2002 Cal/OSHA issued 257 citations to employers for having failed to provide an adequate supply of toilet paper,⁸⁰ while the Washington State program issued 29 citations.⁸¹ If even Cal/OSHA-imposed penalties in the range of \$110-150⁸² are efficacious in discouraging smaller employers from repeating such an act of disrespect, it must be presumed that imposition of a \$1,200 fine in 2002 taught the offending employer a lesson.⁸³

Nor is failure to provide toilet paper a feature exclusively of workplaces in the United States. According to a recent survey, one third of teachers, nurses, call center staff, home workers, and managers in Great Britain reported that they deferred defecating at work because of the condition of the toilets; six percent specified lack of toilet paper as the reason. As the result of a vicious circle, six percent also revealed that that very act of deferring made them constipated and thus unable to go easily.⁸⁴

Nevertheless, in 1978 the *Washington Post* editorially applauded the death

1988 was presumably the result of a typo, while two from early 1979 may have been issued by inspectors who did not know that the standard had been revoked. The larger employers cited by OSHA included A&P, Albertson's, American Airlines, Armour, Chrysler, Coca Cola Bottling, Food Fair, Hartford Fire Insurance, Holiday Inn, J. C. Penney, Kroger, Levi Strauss, Newport News Shipbuilding, Penn Central Railroad, Pepsi Cola Bottling, Phillips Petroleum, Shop-Rite, Safeway (eight citations), U.S. Steel, United Parcel Service, and Youngstown Sheet and Tube.

⁷⁸Cal. Adm. Code tit. 8, sect. 3364(d) (2002).

⁷⁹Wash. Adm. Code sect. 296-24-12007(d) (2001).

⁸⁰Search ("California and 3364(d)") conducted in Lexis-Nexis OSHAIR file (Dec. 2, 2002).

⁸¹Search ("Washington and 0241200701 d") conducted in Lexis-Nexis OSHAIR file (Dec. 5, 2002).

⁸²E.g., Nice Art, Inc., Insp. No. 119944114 (Apr. 6, 2001); San Raphael Citrus Corp., Insp. No. 126213313 (Feb. 4, 1999); Sing Sing Fashion, Inc., Insp. No. 120309745 (May 4, 2001).

⁸³JLH Industries, Insp. No.120166939 (Aug. 16, 2002). The firm made wooden kitchen cabinets. Of the 29 citations issued by Washington OSHA (WISHA) only two imposed monetary penalties, but they amounted to \$540 and \$1,500; both of these companies manufactured concrete products and the latter company, which violated numerous standards, was out of business before the abatement plan had been completed. Yakima Precast, Inc. Insp. No. 111208203 (Nov. 5, 1999); Pre-Mix Products of the Northwest, Insp. No. 115471229 (June 28, 1994).

⁸⁴Christine Norton, "Loo Breaks at Work—Is There a Problem?" *European Health and Safety Magazine* 2(7):26-27 (Nov. 2002).

of “bad rules” and “nonsensical rules” “that should never have been born.”⁸⁵ Looking back in 2003, an official of the Portable Sanitation Association International, the organization designated by ANSI as the standard developer of its Minimum Requirements for Sanitation in Places of Employment standard, when informed that OSHA had dropped the provision of toilet paper in the 1970s, was not at all surprised: she speculated that it had been deemed a “frill” or an “option,” like air conditioning in an automobile.⁸⁶ That OSHA itself knew and knows better is obvious from the definition it crafted in 1987 for the field sanitation standard for farmworkers: “Toilet facility means a fixed or portable facility designed for the purpose of adequate collection and containment of the products of both defecation and urination which is supplied with toilet paper adequate to employee needs.”⁸⁷

Despite revocation of the requirement, “managements concerned about whether employees are loafing” may have developed an opportunistic interest in providing toilet paper after a “very large corporation in Manhattan” discovered that the “cylinder in the center of the plastic roller, which holds the tension spring for the roller, has a hollow space slightly more than three quarters of an inch wide and more than four inches long,” which can house a self-contained miniature microphone transmitter making it possible for a “‘security’ aide at a remote post to listen in....”⁸⁸

⁸⁵“OSHA: Cleaning Up the Rules,” *Washington Post*, Dec. 2, 1978, at A18 (Lexis).

⁸⁶Telephone interview with Millicent Carroll, Portable Sanitation Association International, Bloomington, MN (Jan 17, 2003).

⁸⁷29 CFR sect. 1928.110(b) (2002). Because the construction sanitation, which was issued in 1993, incorporated the general industry sanitation standard, from which the toilet paper provision had already been removed, it lacked the toilet paper requirement. *Federal Register* 58:35076 (1993).

⁸⁸Vance Packard, *The Naked Society* 79 (1964).