A regulatory time bomb now ticks away in Washington that may saddle contractors with billions of dollars in unnecessary costs.

This latest display of governmental insanity comes from the Occupational Safety and Health Administration (OSHA) which seeks to impose its Manufacturing Hazard Communication Standard (HCS) on the construction industry.

The staggering training costs employers must absorb if OSHA has its way is just one unnerving aspect of the HCS story. Our behind-the-scenes investigation into this OSHA monstrosity also exposes bureaucratic bungling and buck-passing at its “best”—as well as what Associated General Contractors’ (AGC) president Dana Huestis aptly labels “a serious mistake which mocks the Administration’s many pledges to reduce regulatory overkill.”

Before we get into the meat of the matter, some brief history which led to the present mess. In 1982 OSHA developed its Hazard Communication Standard (HCS) for manufacturing. Subsequently, the Steelworkers Union sued to force the agency to extend a hazard standard to all industries.

The U.S. Third Circuit Court of Appeals ordered OSHA to adopt a hazard standard for non-manufacturing industries “where feasible” (emphasis added). The agency petitioned the court for reconsideration of its order but was turned down. At this point, OSHA had several options. It could have appealed to a higher court; it could have told the court implementation was not feasible; or it could have tailored HCS specifically to construction.

Unbelievably, given the White House’s repeated promises to reduce regulatory overkill, the Administration quashed any appeal. No one we contacted in Washington knows who made that decision. But one knowledgeable Republican lobbyist told us: “The way I understand it, the White House felt it had enough headaches already without being viewed as opposed to worker health standards—no matter how onerous such standards may be. This is just another example of a weakened White House.”

The appeal issue aside, the court’s order clearly gave OSHA flexibility to adopt standards to conform with construction’s unique needs. Instead, in yet another sorry bureaucratic display of irresponsibility, the agency took the easy and lazy way out. It dumped its manufacturing standard right square in construction’s lap—almost word-for-word.

**OSHA ingores own claim that its standard won’t work in construction**

That a government agency took an easy cop out isn’t all that surprising.
What’s mind-boggling is the fact that OSHA is well aware that its manufacturing HCS is not workable in construction. Proof of this is found in the agency’s own court testimony mentioned earlier. OSHA said:

“The assumptions on which HCS was based and the requirements imposed reflect the prototypical manufacturing workplace—a generally stationary worksite with a relatively stable workforce. In construction, on the other hand, there is no stationary worksite to regulate and the workforce is not stable.

“Indeed, the numerous construction employers frequently hire for one project only. Subcontractors move through the project at different work stages, often on a short-term basis. (Therefore,) each contractor is a potential source of hazardous chemicals that can affect not only his own employees, over whose training he has no control, but also the employees of other contractors whose training must be managed by others.

“Such differences may well bear on HCS implementation—particularly the requirement that all employees be trained regarding all hazardous chemicals to which they are exposed.”

Having made this point which, ironically, is the crux of many contractor groups’ arguments against HCS, OSHA did an abrupt flip flop and crammed the same manufacturing standard it said was impractical for construction right down this industry’s throat! As it presently stands, all contractors must be in compliance by May 23, 1988.

OSHA’s order requires all employers, generals and specialties, to
• Develop, implement and maintain a written Hazard Communication Program for each jobsite or workplace.
• Train employees to handle all chemicals, including by-products and common consumer products used anywhere on the jobsite—even by other employees—or those that may be used in what OSHA ambiguously terms “foreseeable emergencies.”
• Maintain a list of all hazardous chemicals present in the workplace; compile Material Safety Data Sheets for each and every substance and make them available to all employees; and determine the degree of hazard for each product.
• Provide copies of the chemical lists and Material Safety Data Sheets to state and local officials, including local fire departments.

To fully grasp the enormity of the compliance effort employers now face, we contacted the American Subcontractors’ Association (ASA), a specialty contractor group, and the AGC which represents generals. Officials at both organizations estimate that, except for the smallest jobsites, thousands of what OSHA defines as “hazardous chemicals” are present on any medium-to-larger type project.

This fact alone explains why the new standards have created the most deafening uproar over a proposed government regulation in recent memory.

HCS is ‘a multibillion dollar square peg in a round hole,’ AGC charges

General and specialty contractor associations have attacked OSHA’s proposal on many grounds. But the standard’s staggering costs is the main reason it is so objectionable. First off, the agency’s average cost per employer estimate of $181 for general contractors and $169 for subcontractors is fatally flawed.

This paltry per employer sum, OSHA claims, will cover costs to develop, implement and maintain a written program plus first year training. The “bumblicrats” at OSHA estimate subsequent yearly costs of $20.

“The absurd $181 estimate for general contractors,” bristles the AGC, “does not accurately reflect the true cost to develop a hazard communication program. Moreover, it does not even cover the price to purchase a prepackaged HCS program.

“OSHA’s economic analysis of the manufacturing standard being imposed on construction ignores the unique nature of construction with multi-employer worksites and a transient workforce with an average annual turnover rate of 230 percent. It also ignores the fact that each NEW employee must be trained for every jobsite—regardless of whether the
Pilot program under OSHA grant revealed $10,667 cost per contractor!

That OSHA officials who dreamed up the HCS cost estimates live in the land-of-make-believe was dramatically exposed by AGC of California Chapter’s experience with the kind of program all employers must develop under new OSHA mandates. The California prototype, “Health Hazards Associated with the Use of Concrete and Mortar,” was financed via a grant from the friendly folks at OSHA.

This type of program involves 2½ hours of instruction, plus a 1½ hour competency test and a $35 manual for each trainee. Utilizing this data and the $21.64 national wage-fringe average, the minimum cost to train each employee comes to $99.92 (3 x $21.64 + $35.00).

This figure does not include a cost factor for down time, lost productivity, training materials and employee turnover per year, nor the instructor who, in addition to the 2½ hours instruction time, needed ½ hours for setup and administration.

Using OSHA’s own estimate that the average contractor has 19 employees, that construction has an average 230 percent turnover rate, and the data cited above, AGC breaks down the yearly employer training costs for concrete and mortar—just one of many sectors the new OSHA standard covers:

The previous data indicates that OSHA’s HCS compliance costs for this one group of chemicals come to a minimum of $169.32 per employee ($10,667.31 divided by 63). Worse, the $10,667.31 per contractor cost does not include administrative overhead and other indirect expenses.

More to the point, the $10,667 yearly employer tab is a far cry from OSHA’s ludicrous estimate of $169 per subcontractor and $181 per general contractor. And don’t forget the $10,667 yearly cost was derived from an OSHA-sponsored program.

These estimates, which AGC calls “conservative,” add up to an unnecessarily economic burden for construction. Anyone who doubts this need only do some simple math. Just take OSHA’s estimate that there are 530,922 construction employers and multiply that figure by the $10,667 per contractor compliance cost. The average minimum annual economic burden to construction totals more than $5.66 billion dollars.

The staggering cost is reason enough to kill this insane proposal. There are many others as well, but if you’re not convinced by now that OSHA has dished out its own brand of “hazardous waste,” it’s doubtful you’d be persuaded by additional arguments.

Now we realize that there are those in government and the Congress who will scoff at economic arguments against HCS implementation. Those who feed at the public trough and those who never have met a payroll reach into taxpayers’ pockets for any ill-advised venture.

Others may argue that dollars shouldn’t stand in the way of worker safety. That’s true. But hazardous substances in construction are already regulated by federal standards under 29 CFR 1926.21-(b) (2) (3) (5). Also, OSHA never has demonstrated that construction workers were inadequately protected under the existing standard. If this were so, all it had to do was modify the existing regulations—not impose a manufacturing standard which is unworkable and unreasonable.

Two government agencies also have problems with OSHA’s proposed standards. Among other points made in a 35-page letter on October 23, the Small Business Administration’s (SBA) Frank Swain warns: “The current rule will prove to be impractical and costly.

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1) 19 employees x 3 hours x 21.64 = $ 1,233.48
2) 230% employee turnover ($1,233.48 x 230%) = 2,837.00
3) 4½ hour instructor time (4½ x $21.64) = 97.38
4) turnover rate ($97.38 x 230%) = 223.97
5) lost productivity, employee hours only (1+2) = 4,070.48
6) manuals or materials cost @ $35 per employee (19 +230% [44] x $35) = 2,205.00

Total cost per contractor = $10,667.31

(Editor’s Note: AWCI has achieved a margin of victory in defending contractor interests which are being assailed by OSHA’s arbitrary and burdensome HCS. AWCI member Tom Donnelly flew in from Minneapolis and joined with Gene Fisher, AWCI’s Technical Director, in testifying before an Office of Management and Budget (OMB) hearing in Washington on the effects of the HCS under the Paperwork Reduction Act of 1980. Based upon the testimony and written statements received from numerous segments of the construction industry, OMB has disapproved the OSHA requirement that material safety data sheets (MSDS) be provided on multi-employer work sites. Had the requirement not been struck down, each contractor would have been required to maintain not only his MSDS’s, but also those of every other contractor on the job-site! According to OMB’s letter to OSHA, October 28, 1987, “Section 3512 of the (Paperwork Reduction) Act protects the public from penalties resulting from the failure to comply with collection of information requirements that are not approved under the Act.” OMB has directed OSHA to announce proposed rulemaking to reconsider certain paperwork provisions of the HCS, and to invite public comment.

AWCI is not content to accept the additional requirements leveled on our members by the HCS. Our association has joined with the American Subcontractors Association (ASA) and 16 other construction industry organizations in forming the Hazard Communication Legal Action Group coalition to bring suit against OSHA to redress the problem. AWCI’s contribution to the legal fees can be $5000 or more. If you have not contributed to the AWCI Legislative Fund (or even if you have made a contribution this year), your donation of any amount to the Fund would be most helpful at this time. Please think of the thousands and thousands of dollars and the untold lost time this regulation will cost your company if it becomes effective, and then make a decision on sending a check to the AWCI Legislative Fund.)
...The Office of Management and Budget’s 14-page October 28 letter flatly states it “disapproves” OSHA’s HCS construction dictates.

Reasoning that legal action offers the best way to derail HCS implementation, several general and specialty associations have filed federal court suits. The lead case was brought by Venable, Baetjer & Howard on behalf of the Associated Builders & Contractors (ABC). The main reason for a legal challenge, the ASA’s president Tommy Parker explains, is that “as now written, HCS will be next to impossible to comply with.” The AGC’s president, Dana Huestis agrees but quickly adds:

“It is a sad commentary that contractors are forced to sue their own government to redress a problem that was so readily avoidable.” That statement sums up the sorry OSHA mess quite well.

This article was reprinted from the November, 1987 issue of COCKSHAW’s CLN+O with special permission by its author, respected national labor analyst and publisher Peter A. Cockshaw.

Cockshaw’s policy prohibits the reprinting of any of his newsletters in their entirety. However, Cockshaw told AWCI “I am making an exception in your case to alert as many employers as possible to the dangers of OSHA’s HCS proposal.”

Cockshaw publishes three separate national newsletters each month. AWCI members may obtain a FREE sample package with all three labor advisory letters by writing or calling Cockshaw Publications, P.O. Box 427, Newtown Square, Pennsylvania 19073, (215) 353-0123.