# No. 09-2319

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**STEEL ERECTORS ASSOCIATION OF AMERICA, INC.,**

Petitioner,

**v.**

**OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION**

**and**

**HILDA L. SOLIS, SECRETARY OF LABOR,**

Respondents.

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# BRIEF OF RESPONDENTS

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## STATEMENT REGARDING LACK OF JURISDICTION

The Steel Erectors Association of America, Inc. ("SEAA") petitions this Court for review of the Occupational Safety and Health Administration's ("OSHA") Directive No. 02-01-048 (April 30, 2010), *Clarification of OSHA's de minimis policy relating to floors/nets and shear connectors* ("2010 Directive").[1] SEAA asserts that the 2010 Directive is an "occupational safety and health standard" within the meaning of 29 U.S.C. § 652(8) that is reviewable by this Court under section 6(f) of the Occupational Safety and Health Act, 29 U.S.C. § 655(f) ("OSH Act"). Petitioner's Brief ("Pet. Brf.") at 1-2. SEAA is wrong. An occupational safety and health standard is a substantive rule that imposes new rights and obligations on parties. The 2010 Directive binds neither the

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1 The original petition for review, filed on November 25, 2009, challenged an earlier OSHA Directive, CPL 02-01-046 (Sept. 30, 2009), *Rescission of OSHA's de minimis policy relating to floors/nets and shear connectors* ("2009 Directive"). Joint Appendix ("J.A.") 101-108. On April 30, 2010, however, OSHA issued the 2010 Directive, which cancelled and replaced the 2009 Directive because the 2009 Directive had incorrectly stated OSHA's enforcement policy. *See* Joint Motion to Supplement Record and Deem Petition for Review to be Amended (May 27, 2010) ("Joint Motion") and attached 2010 Directive. The parties have stipulated that all references to the 2009 Directive in both the petition for review and in SEAA's brief shall be deemed to refer to the 2010 Directive. Joint Motion at 3.

steel erectors nor OSHA itself; any obligations relating to steel erection derive from Subpart R of 29 C.F.R. § 1926 ("Steel Erection Standards"), and not the 2010 Directive. The 2010 Directive merely clarifies the manner in which OSHA will use its prosecutorial discretion in enforcing the requirements of the Steel Erection Standards. Consequently, the 2010 Directive is not an "occupational safety and health standard," section 6(f) of the OSH Act does not apply, and the Court lacks jurisdiction over the petition for review. 29 U.S.C. § 655(f) (limiting Court's jurisdiction to challenges to OSHA standards).

## STATEMENT OF THE ISSUE

Whether OSHA's 2010 Directive is an occupational safety and health standard subject to the Court's review and the procedural rulemaking requirements of 29 U.S.C. § 655(b) where the 2010 Directive is not a binding norm that imposes new safety requirements on employers but instead is a general statement of policy that clarifies OSHA's enforcement of 29 C.F.R. §§ 1926.754(b)(3) and 1926.754(c) pertaining to the use of fully planked or decked floors and nets and the use of pre-installed shear connectors during steel erection.

## STATEMENT OF THE CASE

OSHA promulgated the current version of the Steel Erection Standards in 2001 after a lengthy negotiated rulemaking process involving the input of a wide range of stakeholders. The 2001 Steel Erection Standards contain two provisions relevant to this case: 29 C.F.R. § 1926.754(b)(3), which requires that employers constructing multi-story buildings provide fully planked or decked floors or nets every two stories or thirty feet (whichever is less) directly beneath any steel erection work being performed; and 29 C.F.R. § 1926.754(c), which precludes the use of shear connectors until after the installation of a walking/working surface.[2]

On March 22, 2002, OSHA issued Directive No. 2-1.34, entitled *Inspection policy and procedures for OSHA's steel erection standards for construction* ("2002 Directive"). J.A. 109-205. The 2002 Directive advised the public of OSHA's enforcement policies for several aspects of the 2001 Steel Erection Standards. Related to this case, Questions and Answers #23 and #25 of the 2002

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2 Shear connectors are "headed steel studs, steel bars, steel lugs, and similar devices which are attached to a structural member for the purpose of achieving composite action with concrete." 29 C.F.R. § 1926.751.

Directive stated that OSHA would treat violations of 29 C.F.R. §§ 1926.754(b)(3) and (c) as *de minimis* where, in lieu of complying with the provisions, employers instead required all employees to use personal fall arrest systems. J.A. 159-60. On April 30, 2010, OSHA issued the 2010 Directive, cancelling Questions and Answers #23 and #25 of the 2002 Directive, and clarifying that while violations of §§ 1926.754(b)(3) and (c) ordinarily will not be considered *de minimis* just because all employees use personal fall protection systems, OSHA compliance staff retain their normal discretion to determine whether the conditions at a particular worksite render violations of §§ 1926.754(b)(3) and (c) *de minimis*. SEAA now seeks review of OSHA's 2010 Directive.

## STATEMENT OF FACTS

A. *Statutory Background*

Congress enacted the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The OSH Act's goal is to prevent occupational injuries and deaths. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). To achieve that goal, the OSH Act authorizes the Secretary of Labor to promulgate and enforce

mandatory occupational safety and health standards. 29 U.S.C. §§ 652-66. The Secretary has delegated the bulk of these statutory responsibilities and authorities to OSHA. OSHA's promulgation of standards is governed by the notice-and-comment procedure set forth at 29 U.S.C. § 655(b). *See also* 29 C.F.R. § 1911.11. Adversely affected parties can obtain pre-enforcement review of an occupational safety and health standard by filing a petition for review in the appropriate court of appeals prior to the sixtieth day after promulgation of the standard.[3] 29 U.S.C. § 655(f); *see also AFL-CIO v. OSHA*, 905 F.2d 1568, 1571 (D.C. Cir. 1990).

OSHA enforces the OSH Act by inspecting workplaces and issuing a citation when it believes that an employer has violated a standard. 29 U.S.C. § 658. OSHA has the discretionary authority "to prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a).

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3 Not all substantive rules that OSHA issues are standards; some are regulations. *Workplace Heath & Safety Council v. Reich*, 56 F.3d 1465, 1467-69 (D.C. Cir. 1995) (a standard "reasonably purports to correct a particular 'significant risk,'" whereas a regulation "is merely a general enforcement or detection procedure") (internal citations omitted). This Court does not have jurisdiction to review initial challenges to regulations. *Id.* at 1467.

*De minimis* violations do not require abatement and do not carry a penalty. *Donovan v. Daniel Constr. Co.*, 692 F.2d 818, 821 (1st Cir. 1982).

Employers may contest citations before the Occupational Safety and Health Review Commission ("Commission"). 29 U.S.C. §§ 659, 661. The Commission is an independent tribunal not within the Department of Labor or otherwise under the direction of the Secretary. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 147-48 (1991). If the applicability or meaning of a standard is at issue, the Commission will rule on such issues, giving due deference to the Secretary's reasonable interpretations of OSHA standards. *Id.* at 154-55. Any party may petition the appropriate court of appeals for review of a Commission decision. 29 U.S.C. § 660(a). The courts of appeals must defer to the Secretary's reasonable interpretations of the OSH Act and occupational safety and health standards. *Am. Bridge/Lashcon v. Reich*, 70 F.3d 131, 133 (D.C. Cir. 1995).

B. *OSHA's Steel Erection Standards*

1. *Early Regulation of the Construction Industry and the Promulgation of the First Steel Erection Standards*

Regulation of the construction industry (which includes steel erectors) predates the passage of the OSH Act in 1970. 63 Fed. Reg. 43452 (Aug. 13, 1998). In 1969, Congress enacted the Construction Safety Act (CSA), Pub. L. 91-54 (Aug. 9, 1969), which authorized the Secretary to issue occupational safety and health standards for employees of the building trades and construction industry working on federal or federally-assisted construction projects. 63 Fed. Reg. at 43452. After passage of the OSH Act in 1970, and in accordance with section 6(a) of the OSH Act, 29 U.S.C. § 655(a), in 1971 the Secretary adopted the construction standards that had been issued under the CSA as Subpart R of 29 C.F.R. § 1926. *Id.* The original Subpart R served as the basis for the current version of the Steel Erection Standards. *Id.*

With respect to fall hazards, the original Subpart R contained a requirement that on tiered buildings where "erection is being done by means of a crane operating on the ground, a tight and substantial floor shall be maintained within two stories or 25 feet,

whichever is less, below and directly under that portion of each tier of beams on which bolting, riveting, welding, or painting is being done." 29 C.F.R. § 1926.750(b)(2) (1972). On buildings or structures "not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet." 29 C.F.R. § 1926.750(b)(1)(ii) (1972).

In 1974, OSHA amended the temporary flooring requirements then found at 29 C.F.R. § 1926.750(b)(2) of Subpart R to protect employees regardless of the type of equipment being used or work activity involved. *See* 39 Fed. Reg. 24360 (July 2, 1974). The amendment required that on tiered buildings "[w]here skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less . . . ." 39 Fed. Reg. at 24361; 29 C.F.R. § 1926.750(b)(2)(i) (1975). Where maintaining such a floor was not practicable, the standard required that safety nets "be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet." 39 Fed. Reg. at 24361; 29 C.F.R. § 1926.750(b)(1)(ii) (1975).

In the years following the promulgation of the temporary flooring or netting requirements, OSHA received several requests for clarification regarding the relative scopes of Subpart R (the Steel Erection Standards) and Subpart M (which governs fall protection for general construction). 63 Fed. Reg. at 43452. OSHA announced in 1988 that it intended to regulate fall hazards and other hazards associated with steel erection exclusively through its planned revision of Subpart R. 53 Fed. Reg. 2048 (Jan. 26, 1988). In 1992, after receiving several petitions to undertake this revision with input from various stakeholders, OSHA announced its intent to establish a negotiated rulemaking committee.[4] 57 Fed. Reg. 61860 (Dec. 29, 1992).

2. *The Steel Erection Negotiated Rulemaking Advisory Committee's (SENRAC) Consensus Agreement and Proposed Rule*

On May 11, 1994, OSHA established SENRAC in accordance with the Federal Advisory Committee Act, the Negotiated

4 Negotiated rulemaking is a "process by which a proposed rule is developed through negotiation of differing viewpoints by a committee that is intended to be composed of representatives of all the interests that will be significantly affected by the rule." 63 Fed. Reg. at 43453.

Rulemaking Act, and section 7(b) of the OSH Act. 63 Fed. Reg. at 43453.

The purpose of SENRAC was to arrive at a consensus document that would include a proposed revision of the regulatory text for the Steel Erection Standards and an explanatory preamble. 63 Fed. Reg. at 43455. SENRAC began negotiations in mid-June of 1994, and met eleven times as a full committee over the course of its negotiations. 63 Fed. Reg. at 43454.

SENRAC reached consensus on a proposed revision to the regulatory text for Subpart R, signed a consensus agreement on July 17, 1997, and presented OSHA with the proposed regulatory text on July 24, 1997. *See* J.A. 212-215; *see also* 66 Fed. Reg. 5196, 5197 (Jan. 18, 2001). On August 13, 1998, OSHA issued a Notice of Proposed Rulemaking for Subpart R, using SENRAC's proposed regulatory text as the basis for the proposed rule. 63 Fed. Reg. at 43452.

The proposed rule preserved the pre-existing Subpart R requirement that employers maintain a floor every two stories or thirty feet directly under steel erection work being performed. 63 Fed. Reg. at 43466. The proposal, however, also allowed for the use

of nets instead of temporary floors without requiring a showing that the installation of temporary floors was impracticable. *See id.* (describing proposed § 1926.754(b)(3) as "essentially the same provision as existing § 1926.750(b)(2)(i)"). The proposed rule also added a new provision prohibiting the installation of shear connectors until after decking, or another walking/working surface, had been installed. 63 Fed. Reg. at 43466-67.

3. *The Public's Response to OSHA's August 1998 Proposal*

Consistent with section 6(b) of the OSH Act, 29 U.S.C. § 655(b), OSHA received public comment between August 13, 1998, and November 12, 1998, and held an informal public hearing on the proposed rule from December 1-11, 1998. 66 Fed. Reg. at 5197. That the proposed rule maintained the existing requirement for decking/planking every two stories or thirty feet did not generate controversy. 66 Fed. Reg. at 5213. In fact, during the comment period, OSHA received no comments from the public on the proposed § 1926.754(b)(3), and the provision was "promulgated as proposed." *Id.* This was unsurprising, as the paragraph "retain[ed] many of the requirements of OSHA's existing steel erection rule,"

and was actually more permissive for employers in that it allowed for the use of nets in addition to temporary floors. *Id.*

OSHA received several comments regarding proposed § 1926.754(c)(1), which prohibits the use of shear connectors until after the installation of decking or another walking/working surface. 66 Fed. Reg. at 5213. Those opposed to the provision were concerned about technical problems with field welding due to atmospheric conditions, increased exposure to fall hazards, back injuries from field installation, an increased risk of falling objects, and increased costs. *Id.* After assessing each of these potential concerns in light of the record evidence, OSHA concluded that the "use of shop installed shear connectors poses a significant safety hazard, and that the use of field-installed connectors is a feasible means of reducing that hazard." *Id.* Accordingly, the provision was "promulgated as proposed with only minor wording changes." 66 Fed. Reg. at 5214.

After analyzing the rulemaking record, OSHA developed draft regulatory text for the final rule. In accordance with SENRAC's ground rules, OSHA convened a public meeting with SENRAC on

December 16, 1999, to consult with the committee on OSHA's draft final rule. 66 Fed. Reg. at 5197.

4. *The December 16, 1999, SENRAC Meeting*

The purpose of OSHA's public meeting with SENRAC on December 16, 1999, was "to obtain comments and feedback from [SENRAC] on OSHA's proposed revisions [to the 1998 proposal], prior to the issuance of a final standard." 66 Fed. Reg. at 5197. The purpose was not, however, to reopen the negotiation process, as the committee members had already bound themselves to a written consensus agreement in July of 1997. *See* J.A. 212-215.

During the December meeting, participants discussed some of OSHA's revisions to the 1998 proposal, especially in the areas of the scope of the Steel Erection Standards, exceptions to certain fall protection requirements for workers designated as "connectors," and the use of anchor bolts. 66 Fed. Reg. at 5197. What was *not* discussed among the full SENRAC committee at this meeting, however, was altering or abandoning the proposed requirements of §§ 1926.754(b)(3) and (c). *See generally* OSHA Docket S775, Ex. No. 82-10, SENRAC Meeting Transcript (Dec. 16, 1999) ("SENRAC

Meeting Transcript").[5] The idea that the use of 100 percent personal fall protection could substitute for temporary floors or nets and allow for the use of pre-installed shear connectors was not on the table as a topic of negotiation. The sole reference to the notion of using personal fall protection in lieu of temporary floors or nets came from Alan Simmons of the International Association of Bridge, Structural & Ornamental Iron Workers, and he was critical of the concept. *See id.* at 249-50.

SEAA member C. Rockwell Turner, who was also a SENRAC member and representative of L.P.R. Construction, was present at the December 1999 meeting, and he did not suggest to the full committee that violations of §§ 1926.754(b)(3) or (c) be considered *de minimis* if 100 percent personal fall protection was used. Nor did he mention to the full committee any reservations he may have had about supporting the standards as proposed to OSHA (and as he had agreed to on July 17, 1997). *See* J.A. 212-215. On the contrary, he stated that he wished to see the standards promulgated "as written." SENRAC Meeting Transcript at 59. Even

5 This document is publicly available online at http://dockets.osha.gov by clicking on "easy search page" and searching for Docket Number S775, Exhibit Number 82-10.

so, on January 11, 2000, he sent a letter to OSHA requesting that OSHA confirm that the use of 100 percent personal fall protection would be an adequate substitute for a floor or net being maintained every two stories or thirty feet. J.A. 206. OSHA responded in a letter dated February 23, 2000, that it would consider the use of personal fall protection in lieu of a floor or net to be a *de minimis* violation. J.A. 207. No similar correspondence exists in the record requesting *de minimis* treatment for violations of § 1926.754(c) (prohibiting pre-installed shear connectors) where employees used 100 percent fall protection.

5. *The 2001 Steel Erection Standards*

OSHA promulgated the current version of the Steel Erection Standards, 29 C.F.R. §§ 1926.750-1926.761, on January 18, 2001. *See* 66 Fed. Reg. 5196-5280. The 2001 Steel Erection Standards adopted the proposed requirement, substantially similar to a requirement in the pre-existing standard, that in multi-story buildings "[a] fully planked or decked floor or nets shall be maintained within two stories or 30 feet (9.1 m), whichever is less, directly under any erection work being performed." 29 C.F.R. § 1926.754(b)(3); 66 Fed. Reg. at 5268. The 2001 Steel Erection

Standards also adopted the proposed requirement that shear connectors "not be attached to the top flanges of beams, joists, or beam attachments so that they project vertically from or horizontally . . . until after the metal decking, or other walking/working surface, has been installed."[6] 29 C.F.R. § 1926.754(c)(1); 66 Fed. Reg. at 5268.

Absent from the 2001 Steel Erection Standards are provisions that allow an employer to substitute 100 percent personal fall protection for the requirements of §§ 1926.754(b)(3) and (c).

C. *OSHA Compliance Directives Related to the 2001 Steel Erection Standards*

1. *The 2002 Directive*

One year after promulgating the 2001 Steel Erection Standards, on March 22, 2002, OSHA issued the 2002 Directive.

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6 Other fall protection provisions in the 2001 Steel Erection Standards include the requirement that any employee "engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level" be protected from fall hazards by the use of "guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems." 29 C.F.R. § 1926.760(a)(1). This provision does not apply to: (1) "connectors," defined as an employee who works "placing and connecting structural members and/or components," 29 C.F.R. § 1926.751; and (2) employees working in a "controlled decking zone," as defined in 29 C.F.R. § 760(c). *See* 29 C.F.R. § 1926.760(a)(3).

J.A. 109-205. The purpose of the 2002 Directive was to "describe[ ] OSHA's inspection policy and procedures and provide[ ] clarification to ensure uniform enforcement by field enforcement personnel of the steel erection standards for construction." *Id.* To achieve this objective, OSHA included a list of anticipated questions and answers to advise the regulated community and OSHA compliance staff regarding OSHA's enforcement policy on particular provisions of the 2001 Steel Erection Standards.

Question and Answer #23 stated that OSHA would consider an employer's failure to comply with § 1926.754(b)(3) (requiring flooring or nets every two stories or thirty feet) to be a *de minimis* violation so long as employees were protected by personal fall protection systems at all times. J.A. 159. Question and Answer #25 similarly stated that OSHA would consider violations of § 1926.754(c) (prohibiting pre-installed shear connectors) to be *de minimis* so long as personal fall protection systems were used by all employees. J.A. 160.

2. *The 2010 Directive*

On April 30, 2010, OSHA issued the 2010 Directive. *See* Joint Motion and attached 2010 Directive. The purpose of the 2010

Directive was "to clarify [OSHA's] enforcement policy" for §§ 1926.754(b)(3) and (c) that had been announced in the 2002 Directive. 2010 Directive at 1. The 2010 Directive noted that §§ 1926.754(b)(3) and (c) were promulgated to provide certain safety benefits. *Id.* at 2. Employers may comply with § 1926.754(b)(3) by installing either nets or floors every two stories or 30 feet. *Id.* Nets provide back-up fall protection (in the event, for example, that a worker improperly ties off), whereas floors limit the potential fall distance, provide a staging area for emergency rescues, and protect employees from falling objects. *Id.* Compliance with § 1926.754(c) reduces the risk that a worker will trip on a shear connector and either impale himself on the shear connector or fall from the structure. *Id.*

OSHA concluded in the 2010 Directive that "in light of the safety benefits accorded by sections 1926.754(b)(3) and 1926.754(c)," it would "ordinarily [be] inappropriate to consider the violation of these provisions as de minimis on the basis that personal protective systems are in use." *Id.* at 2. The 2010 Directive clarified that while "the use of 100 percent fall protection is not ordinarily a basis for considering a failure to comply with

[§§ 1926.754(b)(3) and (c)] as de minimis," compliance staff "retain their normal discretion to determine, on a case by case basis, that violations are de minimis where there is no direct or immediate relationship to safety or health." *Id.* The 2010 Directive further noted that an "employer's use of personal fall protection systems at all times may be a factor in such a determination." *Id.* at 2-4.

## SUMMARY OF ARGUMENT

Pre-enforcement review by the Court of OSHA rules is limited to occupational safety and health standards issued under section 6 of the OSH Act. 29 U.S.C. § 655(f); *see also Edison Elec. Inst. v. OSHA (EEI)*, 411 F.3d 272, 277 (D.C. Cir. 2005). The 2010 Directive is not an occupational safety and health standard, nor does it modify an occupational safety or health standard. It has no binding effect and imposes no requirements or obligations on the regulated community. Instead, the 2010 Directive is a general statement of policy that clarifies OSHA's enforcement of 29 C.F.R. §§ 1926.754(b)(3) and (c). Moreover, OSHA's enforcement policy for these provisions is in strict accordance with the express terms of the 2001 Steel Erection Standards, which contain no *de minimis* violation rule for 29 C.F.R. §§ 1926.754(b)(3) and (c). Accordingly,

the Court lacks jurisdiction over SEAA's challenge to the 2010 Directive, SEAA cannot circumvent the comprehensive review procedure set forth in the OSH Act by preempting administrative enforcement, and SEAA's disagreement with OSHA's enforcement of the 2001 Steel Erection Standards must be raised in the first instance in a review proceeding before the Commission.

## ARGUMENT

### A. *The Court Lacks Jurisdiction over SEAA's Challenge to the 2010 Directive Because it is Neither an OSHA Standard nor Modifies an OSHA Standard.*[7]

#### 1. *Standard of Review*

Under 29 U.S.C. § 655(f), the Court's jurisdiction is limited to review of a "standard issued under this section." *Id.*; *Workplace Health & Safety Council*, 56 F.3d at 1467-69. Whether the 2010 Directive is a standard reviewable under section 6(f) of the OSH Act, 29 U.S.C. § 655(f), is therefore a jurisdictional question. *See EEI*, 411 F.3d at 277. The Court determines jurisdictional questions *de*

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7 As previously noted, *supra* p. 1 n. 1, all references to the 2009 Directive contained in SEAA's brief and the petition for review are deemed replaced by references to the 2010 Directive. Joint Motion at 3; s*ee also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1113 (10th Cir. 2010) (superseded agency rule is "no longer . . . operational – for all material purposes, [it] no longer exist[s]").

*novo*. *See Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871 (D.C. Cir. 2002).

*2. The 2010 Directive is Not an OSHA Standard as it Imposes No Requirements or Obligations on the Regulated Community and Merely Restates the Requirements of §§ 1926.754(b)(3) and (c).*

An occupational safety and health standard is a substantive rule that "*requires* conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8) (emphasis added). Compliance with OSHA standards is mandatory; employers who do not comply are subject to citations and penalties. 29 U.S.C. §§ 654(a)(2), 658(a), 659(a). The 2010 Directive is not an OSHA standard because it does not "require" any conditions or practices.

That the 2010 Directive merely restates the unchanged requirements of the 2001 Steel Erection Standards confirms that it is not an OSHA standard reviewable under section 6(f) of the OSH Act. The duty to provide a floor or net every two stories or thirty feet and the prohibition against using shear connectors prior to the installation of a walking/working surface derive from the 2001 Steel

Erection Standards themselves. 29 C.F.R. §§ 1926.754(b)(3) and (c). The 2010 Directive requires no additional duties beyond those imposed by the 2001 Steel Erection Standards. *Cf. Chamber of Commerce v. U.S. Dept. of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) ("a standard within the meaning of § 652(8) . . . obligates employers . . . and thereby imposes upon the employers new safety standards more demanding than those required by the Act or by any pre-existing regulation implementing the Act").

Thus, to be reviewable by the Court under section 6(f), a challenged rule must be "new" and not the mere reiteration of an existing standard. *EEI*, 411 F.3d at 278. This is because it would be a "textual stretch" to say that a rule that merely restates an existing standard "*requires* conditions, or the adoption or use of one or more practices . . . ." 29 U.S.C. § 652(8) (emphasis added); *EEI*, 411 F.3d at 277. Yet, restatement of an existing standard is all the 2010 Directive does. The 2010 Directive informed the public that OSHA will enforce §§ 1926.754(b)(3) and (c) as promulgated, while continuing to recognize the ordinary discretion afforded to compliance staff to deem certain violations as *de minimis* under section 9(a) of the OSH Act, 29 U.S.C. § 658(a). 2010 Directive at 3-

4. As such, it is "the existing standard, not the reiteration, that compels employer practices." *EEI*, 411 F.3d at 277.

Because the 2010 Directive merely states that employers must comply with the requirements set forth in the 2001 Steel Erection Standards as promulgated, SEAA's "true quarrel is not with the [2010] Directive, but with the [2001] Standard and its preamble." *EEI*, 411 F.3d at 282. As the 2010 Directive cannot be said to "require" any practices, it is not a standard, and this Court does not have jurisdiction to review it.[8] 29 U.S.C. §§ 652(8), 655(f).

8 SEAA argues that the 2010 Directive should be vacated because OSHA failed to follow section 6(b)'s notice and comment procedures. Pet. Brf. at 19. Only OSHA standards, however, are subject to these notice and comment procedures. 29 U.S.C. § 655(b). And, because the 2010 Directive is not a standard, the Court does not have jurisdiction to review SEAA's claim, Pet. Brf. at 24, that OSHA did not provide the statement of reasons SEAA argues is required under 29 U.S.C. § 655(e). SEAA also argues that OSHA failed to demonstrate that the 2010 Directive was "reasonably necessary or appropriate" to reduce a significant workplace safety or health risk, Pet. Brf. at 25-26, and failed to determine "whether the benefits from the standard bear a reasonable relationship to the costs imposed by the standard," Pet. Brf. at 26-27. Again, because the 2010 Directive is not a standard, OSHA was not required to make either of these showings.

3. *The 2010 Directive is Not an OSHA Standard Because Under APA Case Law it is a Non-Binding General Policy Statement.*

A review of case law construing the general policy statement exception to the Administrative Procedures Act's ("APA") notice-and-comment requirements, 5 U.S.C. § 553(b), supports the argument that the 2010 Directive is not a standard subject to the Court's review. While standards are substantive rules affecting individual rights and obligations, *see supra* pp. 21-23, non-legislative rules, such as general statements of policy, do not have the force of law. *U.S. Dept. of Labor v. Kast*, 744 F.2d 1145, 1152 (5th Cir. 1984); *see also Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). Because the 2010 Directive is a general statement of OSHA's enforcement policy for §§ 1926.754(b)(3) and (c), it lacks the force of law and is therefore not a standard reviewable under section 29 U.S.C. § 655(f). *See Nat'l Mining Ass'n v. MSHA*, 589 F.3d 1368, 1371 (11th Cir. 2009) (court lacked jurisdiction over pre-enforcement challenge to Mine Safety and Health Administration's general statement of agency policy).

A general statement of policy is a "statement[ ] issued by an agency to advise the public prospectively of the manner in which

the agency proposes to exercise a discretionary power." *Attorney General's Manual on the Administrative Procedure Act* 30 n. 3 (1947). Where an agency has been delegated discretionary authority over a given area, policy statements both inform the public of the agency's plans and priorities for exercising this authority, and provide direction to the agency's personnel in the field. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). Rather than seeking "to impose or elaborate or interpret a legal norm," a policy statement "merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm." *Syncor v. Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

The 2010 Directive does no more than advise the public how the Secretary (through OSHA) will exercise her enforcement discretion with respect to violations of §§ 1926.754(b)(3) and (c). Whether to prosecute a violation of the OSH Act in response to specific worksite conditions is solely within the discretion of the Secretary. *See* 29 U.S.C. 658(a); *see also Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (per curium) (Secretary has unreviewable discretion to withdraw a citation under the OSH Act). The OSH Act also grants the Secretary the discretion

to determine that a particular instance of noncompliance need not be cited or abated where the condition has no direct relationship to employee safety or health. 29 U.S.C. § 658(a) (defining *de minimis* violations). The 2002 Directive advised the public that the Secretary would, in the exercise of her discretion, view certain violations of §§ 1926.754(b)(3) and (c) as *de minimis*. J.A. 159-60. In discontinuing this policy, the 2010 Directive merely puts the public on notice that OSHA will enforce the Steel Erection Standards as written in future enforcement proceedings. *See Lincoln v. Virgil*, 508 U.S. 182, 197 (1993) (agency decision to discontinue program financed by unrestricted discretionary funding was a general statement of policy).

Like other general statements of policy, the 2010 Directive binds neither OSHA nor the public. *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-37 (D.C. Cir. 1986). The 2010 Directive clarifies that while the use of 100 percent fall protection is not ordinarily a basis for considering a failure to comply with §§ 1926.754(b)(3) and (c) as *de minimis*, OSHA compliance staff retain their "normal discretion to determine, on a case by case basis, that violations are de minimis." 2010 Directive

at 2. In determining whether a particular violation of the standard is *de minimis*, compliance staff may consider, among other factors, whether an employer requires the use of 100 percent personal fall protection. *Id.* As such, the 2010 Directive leaves OSHA officials free to exercise their discretion when determining if a particular violation warrants a citation or notice in lieu of a citation. *See Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) (an agency rule "is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion").

Nor does the 2010 Directive have a present legal effect on the regulated community, as it does not impose any new rights or obligations beyond those already in the standard. *See supra* pp. 21-23; *see also EEI*, 411 F.3d at 278. In an enforcement action, any finding of a violation would be predicated on the 2001 Standard "just as if the [2010 Directive] had never been issued." *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). The 2010 Directive also acts prospectively, because rather than "impos[ing] rights and obligations on" the public, it describes a position OSHA

will advance in future enforcement litigation. *Am. Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987).

SEAA argues that the 2010 Directive is a standard that is reviewable by this Court because it has had a material impact on steel erectors. Pet. Brf. at 22. The possibility that the 2010 Directive may have some economic impact on SEAA members, however, does not transform it from a general statement of policy to a substantive rule. *See Cabais v. Egger*, 690 F.2d 234, 237-38 (D.C. Cir. 1983) (rejecting the "substantial impact" test for determining whether a rule is substantive); *see also Friedrich v. Sec'y of Health and Human Servs.*, 894 F.2d 829, 836 (6th Cir.1990) ("[t]he extent of the impact is not an indicative factor" in characterizing the nature of a rule); *Mada-Luna*, 813 F.2d at 1016 (that the repeal and reissuance of an agency directive may have a substantial impact does not undercut conclusion that the directive is a general statement of policy).

SEAA also argues that the 2010 Directive is a standard because it is directed at the risk of falls in the steel erection industry. Pet. Brf. at 20-21. This argument, however, fails to address the necessary predicate to the Court's jurisdiction. To be a

standard subject to pre-enforcement review by the Court, the rule must first be a binding agency action, one that "requires conditions or the adoption or use of one or more practices, means, methods, operations or processes . . . ." 29 U.S.C. § 652(8); *see also Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (in determining whether an agency action constitutes a final regulation subject to judicial review, the court looks to whether the action has binding effects on private parties or the agency); *Nat'l Mining Ass'n*, 589 F.3d at 1371 (court lacked jurisdiction to review Procedural Instruction Letter (PIL) providing direction to agency officials for evaluating and approving cut plans in coal mines because PIL was a general statement of policy rather than a binding mine safety and health standard). As explained above, the 2010 Directive is not such a rule, but is instead a general statement that advises the regulated community on OSHA enforcement policy.

Finally, the language of the document itself reflects OSHA's intent that the 2010 Directive be non-binding. OSHA did not characterize the 2010 Directive as a standard but rather as an "enforcement polic[y] relating to floors/nets and shear connectors." *See Cathedral Bluffs*, 796 F.2d at 537-38 (courts give some

deference to an agency's characterization of a rule, particularly in areas "in which courts have traditionally been most reluctant to interfere," such as agency's exercise of its enforcement discretion).

4. *The Cancellation of the 2002 Directive's Questions and Answers #23 and #25 Did Not Constitute a Modification of the 2001 Steel Erection Standards.*

SEAA argues that the 2002 Directive, and the *de minimis* policy contained within it, was somehow *part* of the 2001 Steel Erection Standards, and that rescinding portions of the 2002 Directive therefore constituted a modification to the 2001 Steel Erection Standards. Pet. Brf. at 22-23. This argument is squarely rebutted by the express language of Subpart R.

The requirements of the 2001 Steel Erection Standards are contained at Subpart R of 29 C.F.R. § 1926, published in the Federal Register on January 18, 2001. J.A. 17-100. Neither the preamble to the final rule nor the regulatory text provide an exception to the requirements of §§ 1926.754(b)(3) and (c) where 100 percent of an employer's workers use personal fall protection. Instead, the requirements of §§ 1926.754(b)(3) and (c) are clear on their face: (1) employers must provide flooring or nets every two stories or thirty feet on multi-story buildings; and (2) shear

connectors may be installed only after the installation of a walking/working surface. 66 Fed. Reg. at 5268. Both provisions were adopted as proposed on August 13, 1998. *Id.*; *see also* 63 Fed. Reg. at 43504.

SEAA relies heavily on the fact that, prior to the promulgation of the 2001 Steel Erection Standards, Russell Swanson of OSHA and SEAA member C. Rockwell Turner of L.P.R. Construction exchanged letters that referenced a *de minimis* policy with respect to the decking/netting requirement. Pet. Brf. at 14-16. SEAA argues that this exchange demonstrates OSHA's "recognition" that certain violations of § 1926.754(b)(3) are *de minimis* and illuminates OSHA's intent with respect to this provision. *Id.* However, a letter from a single OSHA official to a single SENRAC member, completely outside of the official SENRAC negotiations, fails to demonstrate an intent by OSHA to create a binding *de minimis* exception to § 1926.754(b)(3). Instead, the fact that OSHA opted to *exclude* any reference to such a policy in the final rule is evidence that OSHA did *not* intend such a policy to be binding. "The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to

contain only documents 'having general applicability *and legal effect*.' " *Cathedral Bluffs*, 796 F.2d at 539 (citing 44 U.S.C. § 1510) (emphasis in original). Even if a *de minimis* policy existed before promulgation of the final rule, "it is noteworthy that the Secretary took pain to exclude the enforcement guidelines from the final rule." *Id.*

Moreover, SEAA's characterization of the letter exchange between Russell Swanson and C. Rockwell Turner that took place in 2000 as "necessary to reach a consensus," Pet. Brf. at 23, is neither accurate nor relevant. SENRAC had come to a binding consensus agreement by July 17, 1997. J.A. 212-215. This agreement included a proposed regulatory text, which became the basis for OSHA's Notice of Proposed Rulemaking, published August 13, 1998. 63 Fed. Reg. at 43455, 43483. The letter exchange occurred in 2000, several years after SENRAC consensus had been achieved, and after the proposal had been published in the Federal Register. *Cf. EEI*, 411 F.3d at 281 ("[R]egardless of whether negotiation history is ever useful in explaining the meaning of a regulation that is clear on its face, irresolvably disputed history can be of no help at all.").

Because the neither the letter exchange nor the 2002 Directive constituted part of the 2001 Steel Erection Standards, the 2010 Directive (which cancelled Questions and Answers #23 and #25 of the 2002 Directive) did not modify the 2001 Steel Erection Standards, and the Court lacks jurisdiction over SEAA's petition for review.

5. *The 2002 Directive Was Not an OSHA Standard and Therefore Its Rescission Absent Notice and Comment Was Proper.*

Elsewhere in its brief, SEAA implies that, rather than being part of the 2001 Steel Erection Standards, the 2002 Directive was itself an occupational safety and health standard that could not be rescinded without notice and comment. *See* Pet. Brf. at 1-2, 4. To the extent SEAA makes this claim, SEAA is wrong. There is absolutely no indication in the record that OSHA intended the 2002 Directive to be a standard or a modification to the duly promulgated 2001 Steel Erection Standards. OSHA did not characterize the 2002 Directive as a standard, subject the document to notice and comment rulemaking or the other procedural requirements of 29 U.S.C. § 655(b), or codify it in the Code of Federal Regulations. *See Cathedral Bluffs*, 796 F.2d at 539. And yet OSHA was obviously

aware of these required procedures, as it had fully complied with them in promulgating the 2001 Steel Erection Standards just one year earlier. The 2002 Directive therefore could not have been a binding occupational safety and health standard because OSHA did not follow the procedural requirements mandated by 29 U.S.C. § 655(b) and 5 U.S.C. § 553(b). *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (a rule promulgated without notice and comment procedures lacks the "force and effect of law").

Additionally, the language used in the 2002 Directive confirms that it was not an OSHA standard that imposed substantive requirements, but instead was a general statement of OSHA's enforcement policy. The 2002 Directive described its purpose to be a "descri[ption of] OSHA's inspection policy and procedures," and the provision of "clarification to ensure uniform enforcement by field enforcement personnel of the steel erection standards for construction." J.A. 109. As with the 2010 Directive, the 2002 Directive merely advised the public prospectively of the manner in which OSHA proposed to exercise its discretion with respect to violations of the governing legal norm, §§ 1926.754(b)(3) and (c). *See Attorney General's Manual on the Administrative Procedure Act*

30 n. 3 (1947); *Syncor*, 127 F.3d at 94. And, as a general statement of OSHA policy, the 2002 Directive was subject to modification based on OSHA's enforcement experiences and priorities.

In sum, the general policy statement contained in the 2002 Directive was not somehow transformed into a standard under the OSH Act simply because SEAA disagrees with OSHA's recent cancellation of portions of the 2002 Directive. And, because the 2002 Directive was not a standard, any quarrel SEAA has with respect to how OSHA rescinded Questions and Answers #23 and #25 of the 2002 Directive must be raised in the first instance before the Commission. *Infra* pp. 35-40; *Northeast Erectors Ass'n of BTEA v. OSHA*, 62 F.3d 37 (1st Cir. 1995) (OSH Act's comprehensive administrative review scheme precluded the district court from exercising jurisdiction over pre-enforcement estoppel-based challenge to OSHA's decision to enforce certain provisions of its Steel Erection Standards).

B. *SEAA's Objection to OSHA's Enforcement of the 2001 Steel Erection Standards Must be Resolved in the First Instance in an Enforcement Proceeding Before the Commission.*

This case is essentially a challenge to the way in which OSHA enforces two provisions of the 2001 Steel Erection Standards.

SEAA disagrees with the Secretary's decision to enforce §§ 1926.754(b)(3) and (c) as written, while retaining her authority under the statute to treat certain types of violations as *de minimis*.

Such pre-enforcement challenges to OSHA's enforcement practices may only be raised in enforcement proceedings. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994); *Sturm, Ruger*, 300 F.3d at 871-76. The OSH Act contains a comprehensive administrative enforcement structure, consisting of initial review by the Commission of citations, followed by review in the federal courts of appeals. *Sturm, Ruger*, 300 F.3d at 872-73. Congress intended this structure to be the exclusive method of challenging OSHA enforcement decisions. *Id.* at 872 (an action requiring interpretation of the parties' rights and duties under the OSH Act and its regulations falls squarely within the Commission's expertise, and adhering to the statutory review structure allows for meaningful judicial review).

Whether violations of §§ 1926.754(b)(3) and (c) have a direct or immediate effect on employee safety where all employees use personal fall protection, and whether such violations should be deemed *de minimis*, would be at issue in a proceeding challenging a

citation issued in accord with the 2010 Directive. Such a claim "at root require[s] an interpretation of [employers'] rights and duties" under both the OSH Act and the 2001 Steel Erection Standards and thus "fall[s] squarely within the expertise of the Commission." *Thunder Basin*, 510 U.S. at 214.

The Commission regularly determines whether violations of an OSHA standard have an immediate or direct relationship to safety and health such that a citation is warranted, or are instead *de minimis*. *Chao v. Symms Fruit Ranch*, 242 F.3d 894, 898 (9th Cir. 2001) (Commission has the authority to re-characterize a non-serious violation as *de minimis*); *see also Reich v. OSHRC*, 998 F.2d 134, 135 (3rd Cir. 1993) (same); *Daniel Constr. Co.*, 692 F.2d at 821 (same); *but see Caterpillar, Inc. v. Herman*, 131 F.3d 666, 668 (7th Cir. 1997) (Commission cannot re-label a violation *de minimis*, as doing so would invade the Secretary's prosecutorial discretion). In a contested citation for violations of §§ 1926.754(b)(3) and (c), the Commission and, eventually, a court of appeals, can rule on whether OSHA's enforcement strategy regarding §§ 1926.754(b)(3) and (c) is, in a particular case, permissible. *Sturm, Ruger*, 300 F.3d at 876.

At its core, the facts of this case are almost identical to those presented in *Northeast Erectors*. 62 F.3d at 38. There, an association of steel erection contractors challenged an OSHA memorandum that reversed OSHA's enforcement policy with respect to the netting requirements contained in a prior version of Subpart R. *Id.* The contractors alleged that in October of 1989, regional OSHA representatives had orally agreed not to cite employers for certain violations of 29 C.F.R. § 1926.750(b)(1)(ii) (1995) (requiring, where temporary floors are impracticable, the installation of safety nets when employees are exposed to potential falls of two stories or 25 feet) or 29 C.F.R. § 1926.105(a) (1995) (requiring safety nets or equivalent protection for workplaces 25 feet above ground). *Id.* "From 1989 to April of 1994, allegedly in compliance with this 'agreement,' regional OSHA representatives did not cite local steel erection contractors for noncompliance with the fall protection standards for 'connectors.'" *Id.* In 1994, however, OSHA's National Office issued a memorandum to its regional offices, directing them to cite employers for violations of 29 C.F.R. § 105(a). *Id.* The steel erection contractors sued in federal district court, seeking a declaration as to their rights under the alleged 1989 oral agreement

as well as an injunction restraining OSHA from issuing citations in accordance with the 1994 memorandum. *Id.*

The First Circuit held that the district court lacked subject matter jurisdiction over the claim. *Id.* at 39. Citing the OSH Act's "extensive administrative process for review of OSHA enforcement actions," as well as the Supreme Court's reasoning in *Thunder Basin*, 510 U.S. at 216, the court held that this comprehensive administrative review scheme "precluded the district court from exercising subject-matter jurisdiction over the present estoppel-based pre-enforcement challenge." *Id.* at 39, 40. Allowing such claims to be raised initially in district court "would circumvent Congress's intent to have such claims reviewed through the OSH Act's detailed administrative procedure." *Id.* at 40. The First Circuit concluded that "there is no reason for the employer not to raise [its estoppel-based claim] as a defense during a challenge to a citation under the ordinary administrative review procedure." *Id.* at 40.

Just like the plaintiffs' claim in *Northeast Erectors*, SEAA's challenge must be raised before the Commission. SEAA is not entitled to circumvent Congress's carefully constructed review

procedures by seeking pre-enforcement review of the 2010 Directive by the Court.

## CONCLUSION

For the foregoing reasons, the Court should dismiss this petition for review.

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