DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

Obtaining Warrants on an Ex Parte Basis and Prior to Attempting Entry

AGENCY: Occupational Safety and Health Administration (OSHA); U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: This document amends 29 CFR 1903.4 to authorize the Secretary of Labor ("Secretary") to seek inspection warrants on an *ex parte* basis. In addition, the amended rule authorizes the Secretary to seek warrants prior to attempting entry of an employer's premises and also authorizes regional agency non-legal personnel to seek process with the approval of the Regional Administrator and Regional Solicitor. The amended rule is intended to provide the agency with effective and efficient procedures and policies for the conduct of inspections and investigations in order to carry out its responsibilities under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the "Act").

EFFECTIVE DATE: November 3, 1980.

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SUPPLEMENTARY INFORMATION:

A. Background

On May 20, 1980, the Occupational Safety and Health Administration ("OSHA" and the "agency") published in the **Federal Register** proposed amendments to 29 CFR 1903.4 regarding the obtaining of inspection warrants on an *ex parte* basis and prior to attempting entry of an employer's premises (45 FR 33652). The agency invited the public to submit written data, views and arguments with respect to the proposal and all issues involved therein. Comments were to be postmarked on or before July 21, 1980.

The agency has received numerous comments from businesses, unions, trade associations, law firms and others. All submissions were made part of the official record and were duly considered.

Several commentors requested public hearings on the proposed amendments. Exhibits 2–29, 2–39, 2–47, 2–58, 2–74,4–13. The agency reviewed these requests and determined that public hearings would not be held. Since the regulation at 29 CFR 1903.4 is not an occupational safety and health standard as defined by Section 3(8) of the Act, 29 U.S.C. 652(8), the provisions of section 6(b) of the Act, 29 U.S.C. 655(b), do not apply. Additionally, hearings are not required by the Administrative Procedure Act ("APA") when, as here, an agency is engaged in informal rulemaking. 5 U.S.C. 553; *Vermont Yankee Nuclear Power* v. *National Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Furthermore, no commentor claimed an inability to adequately present its views through written submissions, and a review of the comments received tended to reinforce our view that hearings would only result in the addition to the record of information which would at most duplicate or corroborate the written comments without providing further insight into or elucidation of the issues involved. Accordingly, the agency determined that public hearings, with their concomitant costs and delay, would not be held. However, in order to avoid prejudicing any commentor who might have relied to his or her detriment on the availability of public hearings to present comments, each commentor who had timely requested public hearings was given additional time beyond the July 21, 1980 deadline in which to submit those comments.

One commentor requested that the comment period be extended an additional sixty days but did not claim an inability to timely file his submission. Exhibit 2–39. In view of the above and the fact that the agency had already provided more than sixty days in which to submit comments, it was decided that the comment period would not be extended. Again, an additional period was offered to the commentor who had requested an extension, in order to avoid any possible prejudice.

One commentor suggested that the proposed rule does not comply with Executive Order 12044 (43 FR 12661) relating to preparation of a regulatory analysis. However, no regulatory analysis is required in this instance since the proposed regulation does not meet the Executive order's or the agency's criteria for a major action. See 44 FR 5570 *et seq.*

B. General Information

The Fourth Amendment to the United States Constitution states in pertinent part that "The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause. . . ."

In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the Supreme Court held that the Fourth Amendment requires a warrant for a non-consensual OSHA inspection. The Court noted the almost unbridled discretion devolved upon executive and administrative officers by the authority to make warrantless searches and concluded that a warrant issued by a neutral officer safeguards employers' rights to be free from unreasonable intrusions. 436 U.S. at 323–24. The Court recognized that "the Act . . . regulates a myriad of safety details that may be amenable to speedy alteration or disguise" and that there is a risk "that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this . . . type could be corrected and thus escape the inspector's notice." *Id.* at 316. However, the Court was not convinced that this risk sufficiently justified warrantless inspections, noting that "the advantages of surprise would [not] be lost, if after being refused entry, procedures were available for the Secretary to seek an *ex parte* warrant and to reappear at the premises without further notice to the establishment being inspected." *Id.* at 320. Additionally, the Court noted that "[i]nsofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for 'compulsory process.' " *Id.* at 320, n. 15. Finally, the Court recognized that *ex parte* warrants issued in advance of an inspection might become necessary in order to carry out the surprise inspections specifically contemplated by the Act. *Id.* at 316.

Six months after the *Barlow's* decision, a federal district court, ruling that the Secretary lacked authority under 29 CFR 1903.4 to seek *ex parte* warrants, entered a preliminary injunction prohibiting the Secretary from seeking warrants on an *ex parte* basis. *Cerro Metal Products* v. *Marshall*, 467 F.Supp. 869 (E.D. Pa. 1979), *aff'd*, 620 F.2d 964 (3d Cir. 1980). One month later, in December 1978, the Secretary amended 29 CFR 1903.4 in order to clarify that regulation and to make clear his authority to seek *ex parte* warrants. 43 FR 59839. The amendment also made clear that compulsory process may be sought in advance of an inspection under appropriate circumstances and that process may be sought by the Area Director or his designee. 43 FR 59839. Because the amendments were considered "an interpretive rule, general statement of policy and rule of agency procedures and practice," 43 FR 59839,

public participation and delay in effective date were not provided, in accordance with the provisions of the APA. 5 U.S.C. 553.

In March 1979, the district court which had entered the above-mentioned preliminary injunction refused to dissolve it. The court acknowledged that *ex parte* warrants are proper under the Fourth Amendment but found the December 1978 amendment of § 1903.4 invalid for failure to use notice and comment rulemaking. *Cerro Metal Products* v. *Marshall, supra,* 467 F.Supp. at 882–83. The court acknowledged, however, that the authority to seek *ex parte* warrants could be obtained through rulemaking and that "[t]he Secretary already is armed with the extensive language of Mr. Justice White for a majority of the [Supreme] Court in *Marshall* v. *Barlow's, Inc.,* with assurance that a revised regulation setting out a procedure for *ex parte* warrants would be within the statute and *a fortiori* within the Constitution." *Id.* In April, 1980, a divided panel of the U.S. Court of Appeals for the Third Circuit, while recognizing that the authority to seek warrants *ex parte* could be established by amending 29 CFR 1903.4 after notice and comment rulemaking, upheld the district court's decision. During the interim period, the Tenth Circuit, *Marshall* v. *W and W Steel Co., Inc.,* 604 F.2d 1322 (1979) and the majority of district courts that considered the issue rejected challenges to the Secretary's authority under 29 CFR 1903.4 to obtain *ex parte* warrants.

C. Summary of Proposed Amendments

On May 20, 1980, the Secretary, without conceding the necessity for doing so, proposed to repromulgate the December 1978 amendments to 29 CFR 1903.4. Paragraph (a) of the proposed regulation is the same as the former § 1903.4(a) and authorizes the Secretary to obtain compulsory process in those cases in which an employer refuses to permit an OSHA inspection. Paragraph (b) of the proposed regulation permits the Secretary to seek a warrant or other process before attempting an inspection in those cases in which it is desirable or necessary for any one of a number of reasons to do so. Paragraph (c) of the proposed regulation authorizes regional agency non-legal personnel to seek process with the approval of the Regional Administrator and Regional Solicitor. Paragraph (d) of the proposed regulation defines the term "compulsory process" to mean the institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent.

The agency received 116 timely comments and 14 comments filed after the July 21, 1980 deadline. As noted earlier, all comments were made part of the official record and were duly considered. Following is a discussion of the major comments received and the agency's responses.

Discussion of Major Comments, Ex Parte Warrants and the Constitution

Several commentors expressed the view that an *ex parte* warrant procedure compromises employers' Fourth Amendment rights. See, e.g., Exhibits 2–1, 2–16, 2–30, 2–58, 2–78, 2–96, 4–8. As noted earlier, the Fourth Amendment guarantees people the right to be free from unreasonable searches. This right is safeguarded by interposing between the employer and OSHA a neutral officer whose duty is to ascertain whether there is probable cause to inspect. Probable cause renders the attempted search reasonable by definition and *ipso facto* protects employers' privacy interests. That the warrant is sought *ex parte* does not compromise Fourth Amendment rights. The Supreme Court in *Barlow's,* 436 U.S. at 320, and the Tenth Circuit in *W & W Steel Co., Inc., supra,* 604 F.2d at 1325, have recognized that OSHA could obtain *ex parte* warrants without violating employers' Fourth Amendment rights. The district court in *Cerro,* 467 F. Supp. at 882–83, also conceded that *ex parte* warrants are proper under the Fourth Amendment.

Some commentors expressed concern that *ex parte* proceedings deny due process and that employers' rights are not adequately protected at an *ex parte* proceeding. See, e.g., Exhibits 2–13, 2–27, 2–43, 2–69, 2–96, 2–109, 2–112. However, the fact that warrants are typically granted *ex parte* and, in the area of criminal law, are "necessarily *ex parte,*" *Franks* v. *Delaware,* 438 U.S. 154, 169 (1978), indicates that *ex parte* warrants are not violative of Fifth Amendment due process rights. See also *Matter of Carlson,* 580 F.2d 1365, 1373–74 (10th Cir. 1978). Additionally, the agency believes that employers' rights are competently protected by the magistrate at an *ex parte* proceeding, and the availability of subsequent review of the issuance of a warrant provides further safeguards for employers' rights. The agency disagrees with the concerns expressed by some commentors that, when a warrant is sought in the absence of the employer, magistrates "rubber stamp" requests for warrants and routinely issue warrants of unlimited scope. See, e.g., Exhibits 2–93, 2–96. The agency is unwilling, along with the Third Circuit, to indulge in a presumption that magistrates do not perform their duties properly. See *Babcock & Wilcox Co.* v. *Marshall,* 610 F.2d 1128, 1135 (3d Cir. 1979). Indeed, the agency's experience indicates that magistrates have denied requests for inspection warrants and have issued warrants of more limited scope than requested.

Several commentors suggested that the proposed rules be revised to include standards of probable cause under which issuance of a warrant would be proper. See, e.g., Exhibits 2–27, 2–59, 2–66, 2–76, 4–3. In *Barlow's, supra,* the Supreme Court enunciated the standard of probable cause which would justify the issuance of a warrant:

> Whether the Secretary proceeds to secure a warrant or other process, with or without notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]. . . ."A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

436 U.S. at 320–21 (citations and footnotes omitted). In view of the fact that the Supreme Court has articulated the standards of probable cause which justify issuance of OSHA inspection warrants, it is not necessary for the agency to include such standards in § 1903.4.

Some commentors argued that a preponderance of complaints about hazardous conditions are groundless and that the employer's presence at an adversary hearing is therefore necessary. In support of their position, some commentors rely on an April 9, 1979 General Accounting Office ("GAO") report on OSHA's complaint procedures. See, e.g., Exhibits 2–32, 2–41, 2–64, 2–68, 2–79, 4–2, 4–12, 4–14.

These comments are predicated on the assertion that in many cases no violations are found as a result of complaint inspections. However, the issue to be resolved when a warrant is requested is not whether the alleged violation in fact exists but whether there is probable cause to believe that it does. Whether or not the alleged condition

ultimately is found to exist is not relevant to the correctness of the probable cause finding. Moreover, even if employers may provide some additional information at adversary hearings, other considerations, discussed below, i.e., necessity for surprise and consumption of enforcement resources, outweigh the limited benefit derived from such adversary hearings. With respect to the GAO study, the agency notes that the report deals with the issue of whether violations were ultimately found and that the procedures outlined in OSHA Instruction CPL 2.12A, September 1, 1979 were adopted in part as a result of the GAO findings and in order to establish an efficient and expeditious system for evaluating complaints.

Statutory Authority

Some commentors stated that the Act does not authorize, explicitly or implicitly, the agency to seek *ex parte* warrants. See, e.g., Exhibits 2–76, 2–78, 2–82. The agency disagrees with this view. Section 8(g)(2) of the Act authorizes the Secretary to "prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment." 29 U.S.C. 657(g)(2). This provisions, described in *Barlow's* as a grant of "broad authority" to the Secretary, 436 U.S. at 317, n. 12, clearly authorizes rulemaking for these amendments. Furthermore, the Supreme Court in *Barlow's* made clear that the Secretary is authorized by the Act to seek the authority to obtain inspection warrants on an *ex parte* basis.

Surprise

In proposing the amendments to § 1903.4, the Secretary noted that the structure and fundamental policies of the Act mandate that inspection warrants be obtained *ex parte*. The remarks of Congressman Daniels, sponsor of the House Bill, reflect the fundamental importance of unannounced inspections:

> Essential to the effective enforcement of this Act is the premise that employers will not be forewarned of inspections of their plants. Experience under the Walsh-Healey Act has indicated that the practice of advance notice to an employer has been a prime cause of the breakdown in that statute's enforcement provisions.

Legislative History of the Occupational Safety and Health Act of 1970, 856–57 (Comm. Print 1971)

In furtherance of the Congressional intent to preserve the element of surprise in workplace inspections is the provision of the Act that imposes criminal sanctions against any person who gives unauthorized advance notice of an OSHA inspection. 29 U.S.C. 666(f). The Supreme Court recognized in *Barlow's*, 436 U.S. at 317, that the penalty provisions for giving advance notice and the Secretary's own regulations at 29 CFR 1903.6 (1977) "indicate that surprise searches are indeed contemplated." Furthermore, Section 8(a) of the Act directs the Secretary to "enter without delay" onto an employer's worksite. One court has concluded that the words "without delay" were inserted by Congress "to preserve the element of surprise deemed essential to inspection" which would be lost in an adversary proceeding. *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1371–72 and n. 5 (5th Cir. 1979); *Marshall* v. *Gibson's Products, Inc. of Plano*, 584 F.2d 668, 672–73 and n. 6 (5th Cir. 1978), *citing* 116 Cong. Rec. 38709 (1970). The Fifth Circuit concluded that "Congress, desiring an enforcement scheme based on surprise and undelayed searches, would vary much prefer immediate execution of duly issued *ex parte* warrants to the litigation-laden delays [resulting from any procedures that provides notice to employers]." *Marshall* v. *Shellcast Corp., supra*, 592 F.2d at 1372. Accordingly, the agency believes that the statutory scheme mandates that inspection warrants be obtained *ex parte*.

In addition to the above, the agency believes that surprise inspections are necessary for effective enforcement of the Act and that *ex parte* warrants are necessary in preserving the surprise element. The Supreme Court has recognized that the Act regulates "a myriad of details amenable to speedy alteration and disguise." *Barlow's, supra*, 436 U.S. at 316. The Secretary has noted his experience that often "compliance" which occurs following advance notice of an inspection in many cases does not fully or permanently abate the underlying hazard. 45 FR 33655. Several commentors have corroborated the Secretary's experience. Some commentors described how some employers shut down equipment when an OSHA inspector arrives, only to restart the equipment after the inspector leaves. See, e.g. Exhibits 2–87, 3–17. Some commentors expressed concern that advance notice is particularly destructive to industrial hygiene inspections because dust and fumes can be manipulated by temporary reductions in production. See, e.g., Exhibits 2–87,2–105. Other commentors stated that advance notice of an inspection permits temporary clean-ups, temporary repairs, modification of operations and sanitization of work areas by interim measures that temporarily disguise the true extent of an existing hazard. See, e.g., Exhibits 2–86, 2–87, 2–89, 2–92, 3–17. Some commentors noted that, when inspections take place over an extended period of time, employers have an opportunity to work ahead of the inspector to modify operations or apply temporary corrective action. See, e.g., Exhibit 2–108. One commentor submitted a company memo which stated "Next week OSHA will be [inspecting certain locations]. You have the advantage of time. . . ." Exhibit>2–108. In fact, several employers in their comments have admitted that during the time between the inspector's presentation of his credentials and the walkaround inspection, it is "inevitable that the company and its loyal workforce will be looking to their workplace hazards. To do less would be against human nature." See, e.g., Exhibits 2–11, 2–23, 2–32, 2–42. In view of the above, the agency believes that surprise is necessary in order to examine working conditions as they exist, without the benefit of special alteration.

In opposition to the agency's reliance on the need for surprise inspections, many commentors stated that the surprise element may be eliminated or diminished by OSHA's own procedures or by certain options which in any event would be available to the employer. See, e.g., Exhibits 2–11, 2–23, 2–29, 2–41, 2–68. Commentors have noted that, when voluntary entry is attempted, an employer can obtain advance notice by demanding a warrant. See, e.g., Exhibits 2–68, 4–6. Moreover, an employer can obtain knowledge of the specific complaint area by examining a copy of the complaint which the inspector is required to provide at the opening conference. Some commentors noted that the surprise element can be defeated even when a warrant has been obtained since the employer can examine the warrant application and then refuse to honor the warrant. See, e.g., Exhibits 2–29, 2–104. These commentors also noted that under OSHA instruction CPL 2.12A, a letter written to the employer in response to a complaint eliminates the element of surprise.

The agency acknowledges that absolute surprise is not possible in every case. However, the surprise element of every inspection must be preserved to the extent allowable in view of the fact that surprise inspections

are both mandated by the Act and necessary for effective enforcement of the Act. Furthermore, the fact that employers have indicated that the surprise element of OSHA inspections can be lessened underscores rather than weakens the need for *ex parte* warrants and, in some instances, the need to obtain such warrants prior to attempting entry.

With respect to OSHA Instruction CPL 2.12A, the agency notes that these procedures do not indicate a willingness to forego the element of surprise. The agency has implemented the letter-writing procedures only in cases of informal complaints. There is no statutory requirement that the agency conduct an inspection in response to informal complaints, and because of backlogs of complaints and limited resources, OSHA would be unable in many cases to conduct any inspection in such circumstances. The letter-writing procedure, therefore, is an attempt to obtain abatement without conducting an inspection. It is not an undermining of the statutory policy of surprise inspections. All formal complaints meeting the requirements of Section 8(f)(1) of the Act and 29 CFR 1903.11 still result in workplace inspections with the element of surprise preserved.

Several commentors expressed concern that surprise inspections disrupt business or create dangers at the worksite by distracting personnel. See, e.g., Exhibits 2–7, 2–8, 2–22, 2–46, 2–88, 4–10. The agency acknowledges that some inconvenience is inevitable in view of the requirement and need for surprise inspections. However, Section 8(a) of the Act dictates that entry onto an employer's worksite must be at reasonable times and that an inspection and investigation must be within reasonable limits and in a reasonable manner. Additionally, the Secretary's regulation at 29 CFR 1903.7(d) states that "[t]he conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment." See also Field Operations Manual, Chapter V, General Inspection Procedures. These provisions adequately protect employers from unreasonable burdens.

Some commentors stated that surprise is not a necessary element of an inspection since a citation may be affirmed even though the inspector did not actually observe the violation. See, e.g., Exhibits 2–29, 2–39. These commentors ignore the Congressional intent that inspections be conducted without advance notice. Moreover, though a violation may be sustained on the basis of employee testimony, such evidence often lacks the probative value of the direct, visual observation by the inspector of a hazardous condition. The inspectors are specially trained to recognize safety and health hazards, and as a result their assessment of a condition, as well as the photographic and documentary evidence they gather, is generally more valuable than employee testimony. Indeed, the agency's experience in cases involving fatalities illustrates the difficulties encountered when testimony based on direct observation of worksite conditions is unavailable. In such instances, the agency often finds it difficult to obtain probative information pertaining to the hazardous conditions. Furthermore, the value of employee testimony to establish a violation is lessened by the natural reluctance of employees to testify against their employers. Indeed, it was in recognition of these fears that Congress enacted Section 11(c) of the Act, prohibiting the discharge of or discrimination against any employee because such employee has, *inter alia*, testified in any proceeding under or related to the Act. It has been the Secretary's experience that, despite the protections afforded by Section 11(c), some employees are wary of testifying against their employer.

Several commentors expressed the view that surprise is unnecessary since it is difficult to remedy or conceal certain serious violations even with advance notice of an inspection. See, e.g., Exhibits 2–10, 2–109, 2–115. In addition to the fact that Congress requires surprise inspections, the agency believes, and the record and agency experience substantiate, that violations may be concealed by modifications of operations, interim measures that temporarily disguise the true extent of the hazard, or other means. While the agency believes that most employers refrain from these practices and are concerned for employee safety and health, the comments confirm that violations may be concealed if an employer desires to do so. Indeed, the Supreme Court in *Barlow's*, 436 U.S. at 316, recognized that "the Act . . . regulates a myriad of safety details that may be amenable to speedy alteration or disguise."

Resource Consumption and Delay

The record substantiates the agency's experience that obtaining warrants after an adversary hearing delays the Secretary's entry onto an employer's worksite. Significant delays in obtaining warrants after adversary hearings have been experienced by various Regional Solicitor offices. The New York Regional Solicitor's Office reports that, of fifteen post-*Barlow's* adversary proceedings involving warrants, three cases took three months to resolve, one case took four months, three cases awaiting the court's decision have already taken four months, and one case that is awaiting the court's decision has already consumed eight months. Exhibit 3–6. The Dallas Regional Solicitor's Office reports that adversary hearings delay the inspection from ten to sixty days. Exhibit 3–7. The Philadelphia Regional Solicitor's Office lists one case in which a warrant was issued five months after an adversary hearing and one case in which no decision has been issued even though six months have elapsed since an adversary hearing was held. Exhibit 3–9. Indeed, adversary warrant proceedings delayed the inspection of the Cerro Metal Products worksite for 42 days following the filing of the adversary application. *Cerro, supra*, 620 F.2d at 968 n.4.

Various Regional Solicitor's Offices provided details that corroborated the Secretary's experience that the adversary hearing is likely to consume several days trial time. One office reported a three-day hearing and another office reported a five-day hearing. Exhibits 3–7, 3–9. Subsequent to the decision by a magistrate to issue a warrant, hearings have been held regarding the proper scope and form of the warrant. Additionally, some offices reported that warrant requests have been turned into full-blown hearings, thus realizing the concerns expressed in a related context by the Court in *Marshall* v. *Chromalloy American Corp.*, 589 F.2d 1335, 1342 (7th Cir.) *cert. denied*, 100 S. Ct. 174 (1979) ("simple warrant requests would be turned into full-blown hearings"). See, e.g., Exhibits 3–9, 3–10. And, in some cases, courts have gone beyond the issue of whether the agency had reasonable grounds to *believe* that a violation exists to the issue of whether the violation *in fact* exists, thus assuming a function more properly left to the Occupational Safety and Health Review Commission. See, e.g., *West Point Pepperell, Inc.* v. *Marshall*, No. C80–160R (N.D. Ga. 1980).

In addition to the delay created by adversary hearings, obtaining warrants only after such hearings would severely drain the agency's scarce enforcement resources since OSHA compliance personnel would be required to be present in order to testify. Additionally, Regional Solicitors have expressed concern that there will be a substantial impact on attorney resources if warrants were to be issued only after an adversary hearing. The projected resource drain created by the added

time for preparation, travel, hearings and paperwork has been characterized by Regional Solicitors as "severe," "gross" and "significant." See Exhibits 3–9, 3–11, 3–15. One office estimates that it would be required to double at a minimum the number of attorneys assigned to warrant cases; another office would anticipate a 25–30 percent increase in its workload. See Exhibits 3–3, 3–7. Offices have indicated their inability to adequately handle the projected increase in workload. Notably, these concerns and projections are based on the assumption that the rate of referrals will remain constant. However, at least one office would expect a significant increase in the refusal rate if adversary hearings were required. See Exhibit 3–15.

Some commentors expressed the view that the agency's concerns regarding consumption of resources are exaggerated in light of the fact that less than 3% of employers demand warrants. See, e.g., Exhibits 2–4, 2–18, 2–20, 2–73, 2–78, 2–104. The agency acknowledges that the current rate of refusal is approximately 2½ percent. However, the 2½ percent refusal rate produces almost 1400 refusals annually. The time and resource expenditures required to evaluate and act upon these cases are significant, particularly in view of the facts that OSHA and the Solicitor's Office operate within a limited budget. Additional time spent on adversary hearings on OSHA warrants would also decrease the amount of attorney time available for other enforcement activity, both for OSHA and for the other laws enforced by the Department of Labor.

Many commentors suggested that the most efficient manner in which to seek a warrant is to do so after an adversary hearing, a process which, the commentors stated, tests the validity of the warrant at the outset and forecloses subsequent actions to quash the warrant or enjoin the inspection. See, e.g., Exhibits 2–27, 2–45, 2–55, 2–56, 2–57, 2–77, 2–100, 4–4. The agency disagrees. It is the agency's experience that, in cases in which a warrant has been obtained, most employers appear to be satisfied that the magistrate has protected their rights and they do not institute actions to quash the warrant or enjoin the inspection. Quite apart from the agency's experience that most employers permit the inspection after a warrant is obtained, the views expressed by these commentors would require the agency to assume that magistrates do not perform their jobs properly, and, as indicated above, the agency is unwilling to indulge in this presumption. Moreover, even in cases in which a warrant had been issued after an adversary hearing, employers have pursued challenges to the warrant. See, *e.g., Cerro Metal Products, supra,* 620 F.2d at 968 n. 4; *Marshall* v. *Milwaukee Boiler Manufacturing Co., Inc.* No. 79–2164 (7th Cir. 1980); *American Chain & Cable Co.* v. *Marshall,* No. 80–0749 (W.D. Pa. 1980), *appeal docketed,* 80–2041 (3d. Cir. July 18, 1980).

Several commentors expressed the view that resources are needlessly consumed in cases in which a court of appeals, after Review Commission proceedings, rules that the warrant was improperly issued and that the evidence obtained under the warrant must be suppressed. See, e.g., Exhibits 2–29, 2–45, 2–104. These commentors indicated that employer participation at the time the warrant is sought would eliminate or minimize the needless consumption of litigation energies.

While recognizing that enforcement resources are consumed in those cases in which employers challenge the validity of inspection warrants, regardless of the outcome, the agency believes that *ex parte* proceedings best conserve litigation resources. As noted above, it is the agency's experience that most employers do not challenge the issuance of *ex parte* inspection warrants. Additionally, employer participation at a hearing when a warrant is sought will not necessarily eliminate or reduce the consumption of litigation resources since the Secretary may appeal the denial of a warrant request and the employer may appeal the granting of a warrant request. And, since the applicability of the exclusionary rule in OSHA proceedings is unresolved, it is not clear that citations will be dismissed if a reviewing court determines that a warrant was issued improperly.

Some commentors suggested that adversary hearings would force the agency to give priority to genuine hazards. See, e.g., Exhibits 2–49, 2–61,2–70, 2–114, 4–9. The agency has already adopted procedures to assign priorities. See, e.g., OSHA Instruction CPL 2.12A, September 1, 1979; see also Field Operations Manual, Chapter IV. Even with these new procedures, the agency believes that adversary hearings would drain enforcement resources and severely hamper the Act's effectiveness. Moreover, these commentors appear to assume that the agency is inspecting for hazards that are not "genuine." The agency disagrees with this assumption and notes that the fact that a requirement of adversary hearings would potentially limit the number of cases which can be pursued does not mean that those cases not pursued involve hazards any less genuine.

One commentor argued that adversary hearings would place less of a burden on courts than do *ex parte* hearings since in an adversary hearing more information is elicited, thereby making easier the decision of whether or not a warrant should issue. Exhibit 2–50. The commentor misconstrues the nature of the burden adversary hearings place on courts. The issue is not the difficulty of the decision but rather the burden imposed by the significant amounts of time and energies that would be consumed by adversary hearings. The geometric increase of cases within the jurisdiction of the Federal courts, the increasingly burdensome volume of motions and the already severely rationed time of judges have already been noted by the Third Circuit. See *Kushner* v. *Winterthur Swiss Insurance Company,* 620 F.2d 404, 406 (3d Cir. 1980). The added strain on court dockets which would result from adversary hearings each time the agency seeks a warrant is an additional factor which, when considered with the reasons discussed herein, justify adoption of the proposed rules.

Seeking Warrants Prior to Attempted Entry

Many commentors opposed that portion of the proposed rule that would permit the Secretary to seek inspection warrants prior to attempting entry of an employer's workplace. Some of these commentors stated that the authority is unnecessary in view of the fact that most employers consent to a warrantless inspection. See, e.g., Exhibits 2–4, 2–21, 2–60, 2–63. The agency agrees that a substantial majority of employers presently consent to a warrantless inspection and expects that this practice will continue. Nonetheless, the agency believes that in some circumstances it is necessary or desirable to seek a warrant prior to attempting entry. In these instances, employers' rights are protected by the magistrate from whom a warrant is sought. However, in response to a number of commentors who expressed the view that there are no guidelines in the proposed rule as to when such preinspection warrants may be sought, the agency is revising proposed 1903.4(b) by inserting the following language:

Some examples of circumstances in which it may be desirable or necessary to seek compulsory process in advance of an attempt to inspect or investigate include (but are not limited to): (1) when the employer's past practice either implicitly or explicitly puts the Secretary on notice that a warrantless inspection will not be allowed; (2) when an

inspection is scheduled far from the local office and procuring a warrant prior to leaving to conduct the inspection would avoid, in case of refusal of entry, the expenditure of significant time and resources to return to the office, obtain a warrant and return to the worksite; (3) when an inspection includes the use of special equipment or when the presence of an expert or experts is needed in order to properly conduct the inspection, and procuring a warrant prior to an attempt to inspect would alleviate the difficulties or costs encountered in coordinating the availability of such equipment or expert.

Some commentors object to the use of an employer's past practice of demanding warrants as a basis for seeking warrants prior to attempting a consensual entry. See, e.g., Exhibits 2–39, 2–44, 2–45, 2–54. However, the agency believes that prior refusals or interference with an inspection on the part of an employer is a valid criterion for seeking compulsory process in advance of an attempt to inspect. The agency is in no way contending that an employer's past practice of refusing entry or interfering with an inspection constitutes sufficient probable cause for the issuance of a warrant; even in instances in which a warrant is sought prior to an attempted consensual entry, the agency must establish probable cause to inspect. Rather, the agency believes that, in view of the reasons for obtaining warrants *ex parte*, the Secretary should be authorized to seek warrants prior to an attempted consensual entry when it is reasonably clear that an attempt to perform a warrantless inspection would be futile. The seeking of a warrant in advance of the inspection does not deprive employers of any constitutional right or chill the exercise thereof. As noted earlier, the right of employers is to be free from unreasonable searches, a right which is safeguarded by the neutral officer from whom a warrant is sought. Those commentors who stated that the use of prior refusals chills the exercise of employers' rights have miscontrued those rights. Although it is unclear to the agency what right employers believe they have, it appears that some employers want the right to confront the OSHA inspector face-to-face with a demand for a warrant. Such a right, which inherently includes advance notice of an inspection, is not contemplated by the Constitution, Congress or the courts.

Some commentors object to the use of travel time and expenditure of resources as criteria for obtaining warrants prior to attempting entry. See, e.g., Exhibits 2–63, 2–75. However, the agency believes that these considerations are important to its enforcement activities. In cases in which an inspection is scheduled far from the local office, the compliance officer may desire to procure a warrant prior to leaving to conduct the inspection in order to avoid, in case of refusal, the expenditure of significant time and resources to return to the office, obtain a warrant and return to the worksite. In addition to the expenditure of time and resources by the inspector, the use of sophisticated monitoring devices and the presence of experts are often required during inspections. The difficulties and costs encountered in coordinating the availability of the necessary equipment and personnel may weigh heavily in favor of seeking warrants prior to attempting entry. The agency acknowledges that, as with a history of prior refusals, the expenditure of time and resources does not constitute probable cause to inspect and believes that the right of employers to be free from unreasonable searches is not violated if the agency obtains a warrant prior to attempting entry.

Obtaining of Process by Regional Agency Nonlegal Personnel

Many commentors expressed the view that proposed 1903.4(c) permits delegation of excessive authority to persons not qualified or trained in legal proceedings. See, e.g., Exhibits 2–17, 2–54, 2–97, 2–111, 2–116, 4–11. Concerned that a person untrained in the law might make incorrect representations to a magistrate and adversely affect employers' rights, some commentors suggested that this provision be deleted and that all court appearances be made through counsel. The agency does not believe that the appearance of the Area Director or his designee before a magistrate will adversely affect employers' rights. In this regard, it should be noted that, when applying for a warrant, police officers routinely appear without counsel before a magistrate. Furthermore, any application for an OSHA inspection warrant must be made to a neutral and detached judicial officer who must ascertain whether the legal prerequisities have been satisfied prior to the issuance of a warrant. In addition, the ongoing participation of the Regional Solicitor's office alleviates the concerns that employers' rights will be adversely affected. The attorneys work closely with agency personnel to determine when it is appropriate to seek a warrant and in which cases the Area Director or his designee can appear without counsel before the magistrate. In view of the above and the fact that this procedure, where instituted, will result in the conservation of Regional Solicitor resources, the agency declines to delete § 1903.4(c).

One commentor suggested deletion from proposed § 1903.4(c) of the requirement that the Regional Solicitor's approval be sought before the Area Director or his designee seeks compulsory process. Exhibit 2–101. The agency believes that the Regional Solicitor's approval is a desirable element in OSHA's internal screening procedures to assure protection of employers' rights. Accordingly, the agency declines to modify § 1903.4(c).

General Comments

Some commentors expressed the view that the instant rulemaking is of a spurious nature and that the agency is already committed to adopting the proposed rule. See, e.g., Exhibits 2–75, 2–100, 2–115. The agency acknowledges that, consistent with its prior practice, OSHA continued to seek warrants *ex parte* during the rulemaking period in jurisdictions in which no contrary ruling precluded it from doing so. However, this policy predilection is in no way inconsistent with the purposes of notice and comment rulemaking. The agency has carefully evaluated all comments and the proposed rule was subject at all times to revision. Indeed, the rule issued below in final form reflects changes made in response to questions and suggestions raised by commentors.

Several commentors expressed the view that the proposed rule establishes a harmful precedent for other governmental agencies. See, e.g., Exhibits 2–12, 2–27, 2–71. The agency notes that this rule does not make it the first agency to establish or confirm authority to seek warrants *ex parte*. The Consumer Products Safety Commission, after recent rulemaking proceedings, concluded that it should have authority to obtain warrants *ex parte*. 44 FR 34923 *et seq*. Additionally, the authorty of NIOSH to obtain *ex parte* warrants has been affirmed by two courts. *In re Establishment Inspection of Pfister & Vogel Tanning Company*, 1980 CCH OSHD ¶24,671 (E.D. Wisconsin 1980); *In re Establishment Inspection of Keokuk Steel Castings*, 1980 CCH OSHD ¶24,672 (S.D. Iowa 1980). Moreover, even if the proposed rule would establish a precedent, the agency does not believe and there is no evidence to show that the precedent would be harmful.

Several commentors argued that the authority to seek *ex parte* warrants leaves employers with inadequate remedies to challenge the validity of the warrant. See, e.g., Exhibits 2–102, 2–104, 2–115. The issue of whether the remedy is adequate assumes the invalidity of the warrant, and the agency is not

willing to assume that there is not probable cause in most cases. See *Babcock & Wilcox, supra,* 610 F.2d at 1136. Additionally, courts have afforded judicial review to an employer who resists entry, expeditiously moves to quash and, if necessary, expeditiously files an appeal. *Babcock & Wilcox, supra,* 610 F.2d at 1135–36. Although the employer may be risking contempt in pursuing this course of conduct, the possibility of being held in contempt will deter frivolous challenges to the warrant. Subsequent to execution of the warrant, the employer may raise constitutional challenges during Review Commission proceedings and appeal to a court of appeals as a matter of right from an adverse Review Commission decision. *Id.* The foregoing procedures have been characterized by one court as "more than adequate to protect the employer's right to be free from unreasonable searches." *Matter of Worksite Inspection of S.D. Warren, Division of Scott Paper,* 481 F. Supp. 491, 495 (D. Maine 1979).

One commentor expressed the view that the available remedies are expensive and that it costs less to be represented at an adversary hearing. Exhibit 2–39. The commentor has not provided any supporting evidence for his claim. Furthermore, resolution of an adversary warrant hearing in favor of the employer does not necessarily reduce the employer's litigation costs since the Secretary may appeal the decision.

Some commentors argued that the remedies available are inadequate in view of the agency's position that the exclusionary rule should not apply in OSHA proceedings. See, e.g., Exhibits 2–29, 2–112, 2–115. The agency notes again that neither the courts nor the Review Commission has held that the exclusionary rule is inapplicable in OSHA proceedings. Furthermore, the exclusionary rule is not a personal remedy and even those courts that have applied the rule have done so not to vindicate the individual employer's right but to deter future unlawful conduct by government officials. Even if the exclusionary rule is inapplicable, remedies are available in some circumstances to vindicate employers' rights.

Many commentors expressed concern that adoption of the proposed amendments would exacerbate relations between OSHA and employers. See, e.g., Exhibits 2–72, 2–82, 2–93, 2–94, 2–109, 4–7. The agency continues to recognize that cooperation and voluntary compliance form the cornerstone of effectiveness of the Act. While the agency does not desire to strain relations with employers, the agency remains convinced that the authority to seek warrants *ex parte* and, in some instances, prior to attempting entry is essential to proper enforcement of the Act. However, in view of some of the concerns expressed by some commentors, the agency will direct Compliance Safety and Health Officers to seek the consent of the employer prior to presentation of compulsory process in those cases in which process is obtained in advance of an attempt to inspect or investigate. This procedure will give employers the opportunity to assess the basis for the inspection and to voluntarily consent to the inspection when they believe that the attempted inspection is reasonable. In addition, compliance officers will be directed to inform the magistrate who issued the warrant that a consensual entry will be attempted prior to presentation of the warrant to the employer.

Several commentors expressed concern that the employer's absence at the *ex parte* warrant proceeding increases the opporuntity for unions, disgruntled employees or business competitors to harass an employer. See, e.g., Exhibits 2–3, 2–25, 2–40, 2–65, 2–67. The agency is not unmindful of this potential. Indeed, Congress recognized that the employee complaint provisions of the Act could be used to harass industry, but nevertheless the provisions were enacted. See *Legislative History of the Occupational Safety and Health Act of 1970,* 348, 399 (Comm. Print 1971). The agency of course does not intend to be used as a harassment device. Toward that end, the agency has developed internal procedures designed to identify frivolous complaints and reduce the possibilities of harassment. See generally Field Operations Manual, Chapter VI, Safety and Health Complaints; OSHA Instruction CPL 2.12A, *supra.* However, the agency notes that the Occupational Safety and Health Review Commission has held that the motive of a complainant is not relevant to a determination of whether there is probable cause to inspect. *Quality Stamping Products Co.,* No. 78–235, 1979 CCH OSHD § 23,520 (R.C. 1979); *Aluminum Coil Anodizing Corp.,* No. 829, 1977–78 *CCH OSHD ¶21,789 (R.C. 1977). Moreover, the agency's duty is to determine whether or not there is cause to inspect the employer's workplace rather than to attempt to discern the complainant's motive.*

Some commentors expressed concern over the potential use of force by an inspector to carry out an inspection. See, e.g., Exhibits 2–81, 4–10. The agency notes that its compliance officers are instructed not to use force either to seek entry or to complete an inspection. See Field Operations Manual, Chapter V. Despite the fact that the Fifth Circuit has indicated that physical force is available for the execution of a warrant, *Marshall v. Shellcast Corp., supra,* 592 F.2d at 1372 n. 7, the Secretary's general policy is to initiate contempt proceedings when confronted with an employer's refusal to honor a warrant.

One commentor suggested that the word "promptly" be inserted in the last sentence in § 1903.4(a) so that the sentence would read "The Area Director shall consult with the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary." Exhibit 2–92. The agency reiterates that although it continues to be OSHA's policy to minimize delay in entering onto the worksite, the Regional Solicitor must be given discretion in assigning priorities to these cases. Thus, the agency declines to revise the sentence as suggested.

One commentor argued that adversary warrant hearings are appropriate in view of the fact that mine operators who are covered by the Mine Safety Act and who object to inspections have the opportunity without risk of contempt to present evidence before the District Court when the Secretary seeks an order to compel entry. Exhibit 2–104. This analogy is not appropriate. In a proceeding analogous to a contempt proceeding, the mine operator who does not permit an inspection is subject to possible civil penalties under the Mine Safety Act. Moreover, whereas employers covered by the OSH Act have a privacy expectation, mine operators covered by the Mine Safety Act are not entitled to require search warrants because of the highly regulated nature of the mining industry. See *Marshall v. Stoudt's Ferry Preparation Company,* 602 F. 2d 589 (3d Cir. 1979). Accordingly, in enforcing the Mine Safety Act, the Secretary need not establish probable cause in order to secure an order compelling entry.

Some commentors suggested that § 1903.4(b) be revised by substituting the word "shall" for the word "may" in order to make mandatory the seeking of *ex parte* warrants prior to an attempted consensual entry when the Area Director and Regional Solicitor find such warrants to be desirable or necessary. Exhibit 2–92, 2–108. In view of the earlier discussions regarding the necessity for surprise and the effects on enforcement energies, and in order to make clear that *ex parte* warrants shall be sought when, in the judgment of the Area Director and

the Regional Solicitor, such preinspection process is necessary or desirable, the agency has modified the language of § 1903.4(b) as suggested. Furthermore, the agency has, on its own initiative, inserted the word "attempted" in the first sentence of § 1903.4(b) in order to make clear that the paragraph authorizes the seeking of compulsory process, in certain instances, prior to an attempted consensual entry. In addition, the agency has added the word "such" to the first sentence for purposes of clarification. As amended, the first sentence of § 1903.4(b) now reads as follows:

> Compulsory process shall be sought in advance of an attempted inspection or investigation if, in the judgment of the Area Director and the Regional Solicitor, circumstances exist which make such preinspection process desirable or necessary.

One commentor believed that the statistical information found at Page Two of the OSHA Denial of Entry Monthly National Summary Report (Exhibit 3–18) indicates that adversary hearings should be held prior to the issuance of a warrant. Exhibit 2–29. According to the commentor, the Summary indicates that approximately 25 percent of the warrant proceedings that were concluded between October 1978 and April 1980 resulted in denial of the warrant sought by OSHA, thus demonstrating the need for the protection of the courts without requiring the employer to risk contempt. Initially, the agency notes that even if the 25 percent figure represents a proper reading of the statistical information, the data would show that magistrates are doing their jobs properly and are not "rubber stamping" agency requests for warrants. However, the commentor has misinterpreted the statistical information. Page Two of the Summary indicates the following for the time period in question: (1) warrants have been granted by a magistrate in 918 cases; (2) there have been 305 cases in which either the Solicitor's Office declined to pursue the agency's request for a warrant or the magistrate denied the request; (3) there have been 456 cases in which either the agency withdrew its request from the Solicitor's Office or the Solicitor's Office withdrew its request from the magistrate. Thus, the statistics do not support the commentor's conclusion that 25 percent of the concluded proceedings resulted in the court's denying a warrant. Rather, the statistics indicate that the agency, Solicitor's Office and magistrate operate independently to screen out cases in which a warrant is unnecessary or unjustified. The agency reviews cases in which it has requested a warrant and, if circumstances change or new facts are discovered, the request may be withdrawn. Moreover, before a warrant is sought, the Regional Solicitor's Office reviews the sufficiency of the legal and factual grounds for the agency's request. In those cases in which the Solicitor's Office has been provided with insufficient information, or in cases in which it is determined that, in terms of priorities, other enforcement activities should be pursued, a warrant is not sought. In those cases in which the Solicitor's Office seeks a warrant, the request may be withdrawn if new facts are discovered or if circumstances change. For example, a warrant request may be withdrawn if, after first refusing entry, an employer later decides to permit the inspection. Finally, the agency reiterates that the magistrate must be satisfied that probable cause exists before a warrant will issue. These procedures safeguard employers' rights to be free from unreasonable searches.

Several commentors suggested that the proposed rule is deficient in that it fails to state that *ex parte* warrants will be the major, if not sole form of compulsory process sought to gain entry onto a worksite. See, e.g., Exhibits 2–86, 2–87, 2–89, 2–92, 2–108. In view of all the factors discussed herein, the agency wishes to make clear that *ex parte* warrants are the preferred form of compulsory process under § 1903.4. Applicable sections of the Act, the Secretary's regulations and the Field Operations Manual mandate that no advance notice of an inspection shall be given to an employer, except in unusual circumstances. Accordingly, the agency has modified § 1903.4(d) to reflect a preference for *ex parte* warrants.

Promulgation

After carefully reviewing all submissions in the record, the agency finds that the authority to seek warrants on an *ex parte* basis and, in some circumstances, prior to attempting a warrantless inspection is necessary in order to carry out its responsibilities under the Act. Primary support for the agency's conclusion is found in the clear Congressional mandate, as evidenced by the structure of the Act and its legislative history, that OSHA inspections be conducted without advance notice to the employer, except in unusual circumstances. The Supreme Court in *Barlow's*, 436 U.S. at 317, has recognized that "surprise searches are indeed contemplated." And, consistent with the Congressional intent to preserve the element of surprise in workplace inspections, the Secretary has adopted a regulation prohibiting unauthorized advance notice of inspections. See 29 CFR 1903.6. In promulgating the amendments to § 1903.4, the agency recognizes that the statutory scheme mandates that inspection warrants be obtained *ex parte*.

Quite apart from the Congressional mandate that surprise inspections be conducted, the agency finds that surprise inspections are necessary for effective enforcement of the Act and that *ex parte* warrants are necessary in preserving the surprise element. The Supreme Court has noted in *Barlow's*, 436 U.S. at 316, that the Act regulates "a myriad of details amenable to speedy alteration and disguise." The agency's experience, amply corroborated by the comments in the record, demonstrates the need to examine working conditions as they truly exist, without the benefit of special alteration.

The delay and consumption of enforcement resources that often accompany adversary hearings are also important considerations which make necessary the authority to seek warrants *ex parte* and, at times, prior to attempting entry. The agency is best able to allocate its resources and, based upon its experience and the record assembled in connection with this rulemaking, the agency finds that its resources can be more efficiently utilized with the authority provided by this rule.

Accordingly, pursuant to the provisions of the Occupational Safety and Health Act of 1970, Section 8(g)(2), 84 Stat. 1590 (1970), as amended by 92 Stat. 183 (1978), 29 U.S.C. 651 *et seq.*, 29 CFR 1903.4 is amended to read as follows:

§ 1903.4 Objection to inspection.

(a) Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for

such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

(b) Compulsory process shall be sought in advance of an attempted inspection or investigation if, in the judgment of the Area Director and the Regional Solicitor, circumstances exist which make such preinspection process desirable or necessary. Some examples of circumstances in which it may be desirable or necessary to seek compulsory process in advance of an attempt to inspect or investigate include (but are not limited to):

(1) When the employer's past practice either implicitly or explicitly puts the Secretary on notice that a warrantless inspection will not be allowed;

(2) When an inspection is scheduled far from the local office and procuring a warrant prior to leaving to conduct the inspection would avoid, in case of refusal of entry, the expenditure of significant time and resources to return to the office, obtain a warrant and return to the worksite;

(3) When an inspection includes the use of special equipment or when the presence of an expert or experts is needed in order to properly conduct the inspection, and procuring a warrant prior to an attempt to inspect would alleviate the difficulties or costs encountered in coordinating the availability of such equipment or expert.

(c) With the approval of the Regional Administrator and the Regional Solicitor, compulsory process may also be obtained by the Area Director or his designee.

(d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent. *Ex parte* inspection warrants shall be the preferred form of compulsory process in all circumstances where compulsory process is relied upon to seek entry to a workplace under this section.

Signed at Washington, D.C., this 26th day of September, 1980.

Eula Bingham,

Assistant Secretary, Occupational Safety and Health.

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