

Fontaine, Roslyn B - MSHA

From: Freedman, Marc [MFreedman@USChamber.com]
Sent: Monday, June 20, 2011 8:31 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: U.S. Chamber comments on MSHA respirable dust NPRM
Attachments: USCC comments to MSHA on respirable dust NPRM.pdf

Please see attached comments from the U.S. Chamber raising concerns with MSHA's proposed regulation on respirable dust exposure and monitoring requirements.

Marc Freedman
Executive Director of Labor Law Policy
U.S. Chamber of Commerce
202-463-5535--direct
202-255-5295--mobile

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448

MARC D. FREEDMAN
EXEC. DIRECTOR, LABOR LAW POLICY
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

June 20, 2011

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
Regulatory Development Division
U.S. Department of Labor
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

By electronic submission: <http://www.regulations.gov>, zzMSHA-comments@dol.gov

RE: Comments on MSHA's Proposed Rule on Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors; 75 Fed. Reg. 64,412 (October 19, 2010), RIN 1219-AB64

To the Docket:

The U.S. Chamber of Commerce, the world's largest business federation representing the interest of more than three million businesses and organizations of every size, sector, and region, including many of the leading mining and coal producing companies, submits these comments expressing grave concerns about MSHA's proposed regulation for lowering exposure to respirable dust in coal mines.

The Mine Safety and Health Administration ("MSHA") proposed rule for "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors" was published in the Federal Register on October 19, 2010. The proposed regulation would regulate miners' exposure to respirable coal mine dust through revising existing standards. MSHA's proposed regulation is extraordinarily complex, and would result in: (1) lowering the existing exposure limits for respirable coal mine dust from 2.0 milligrams per cubic meter (mg/m³) to 1.0 mg/m³; (2) providing for the use of a single full-shift sample to determine compliance under the mine operator's and MSHA's inspector sampling programs; (3) requiring the use of a new technology, the Continuous Personal Dust Monitor ("CPDM") for exposure monitoring; (4) expanding requirements for medical surveillance; and (5) dramatically changing ventilation plan processes and operating parameters in ventilation plans, including having the effect of prohibiting the use of the supersection system of mining.

The Chamber supports efforts designed to improve prevention of coal workers' pneumoconiosis ("CWP") and there are responsible calls for reform of MSHA and NIOSH rules.

However, for the reasons enumerated below, this proposed regulation is not an appropriate approach and should not move forward.

This proposed regulation suffers from the following fundamental flaws: the science and medical data on which MSHA relies does not support this rulemaking; MSHA has exceeded its legislative authority by proposing this regulation unilaterally and not jointly with the Secretary of Health and Human Services; the burdens this regulation would impose would be extraordinary and beyond MSHA's ability to handle; and the regulation would be utterly infeasible, both technologically and economically if it were it to be implemented as proposed. Accordingly, the Chamber joins with others in calling for it to be withdrawn.

The Chamber directs MSHA's attention to comments submitted on behalf of the coal companies Alliance Coal, Alpha Natural Resources, Arch Coal, BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy by the law firm of Crowell & Moring as reflecting the full array of concerns and comprehensive analyses that make the case for this proposed regulation to be withdrawn. In addition, the attachments to those comments provide detailed expert support explaining the scientific and medical data flaws in MSHA's proposal. Chief among these is the study, "A Critical Review of the Scientific Basis for MSHA's Proposal for Lowering the Coal Mine Dust Standard," by John F. Gamble, PhD, Robert B. Reger, PhD, and Robert E. Glenn, MPH, CIH. The Chamber recommends that MSHA give close attention to these attachments.

MSHA's Proposed Regulation is Inconsistent with Its Legislative Authority

The Mine Act explicitly requires that regulations on the methods, locations, intervals, and manner for taking respirable dust samples to which each miner in the active workings of underground coal mines is exposed must be proposed *jointly* by both the Secretary of Labor and the Secretary of Health and Human Services:

Such samples shall be taken by any device approved by the Secretary [of Labor] and the Secretary of Health and Human Services and in accordance with such methods, at such locations, at such intervals, and in such manner as *the Secretaries* shall prescribe in the Federal Register within sixty days from the date of enactment of this Act and from time to time thereafter. *See*, 30 U.S.C. 842 (a), emphasis added.

As this proposed regulation was published unilaterally by the Secretary of Labor (through her designee the Assistant Secretary for MSHA), it is simply not consistent with the underlying legislative authority for rulemaking.

The proposed regulation is also inconsistent with another requirement of the Mine Act that specifies how an "average concentration" can be calculated:

For the purpose of this title, the term "average concentration" means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed ... as measured thereafter, over a single shift only, *unless* the Secretary [of Labor] *and* the Secretary of Health and Human Services find, in accordance with the provisions of section 101 of this Act, that

such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. *See*, 30 U.S.C. 842 (f), emphasis added.

Once again, MSHA is attempting to act unilaterally in contravention to its authorizing legislation. As the preamble of the NPR correctly points out, the predecessors to the two Secretaries found in 1972 (and so published their finding in the Federal Register) that single shift measurement of respirable dust would not, after applying valid statistical techniques, accurately represent such atmospheric conditions during such shift.¹ That joint Secretarial finding remains in effect today, although in this proposal, MSHA “proposes to rescind the 1972 joint notice of finding.”² To maneuver around the obvious bar to MSHA doing this without support from HHS, the agency claims that a July 2000 joint MSHA-NIOSH proposal to rescind the 1972 finding is still subject to public comment.³ Relying on an eleven-year-old proposed joint rescission of the 1972 finding cannot possibly be of use in support of this proposed regulation which is such a radical departure from proposals issued during the Clinton and Bush administrations. Even if this approach were somehow acceptable, the point remains that there can be no revocation of the 1972 joint Secretarial finding without an actual proposed joint MSHA-NIOSH rescission subject to public comment and issued as a final rescission. As this proposed regulation shows no such involvement of NIOSH or the Secretary of Health and Human Services the proposed regulation fails another requirement for rulemaking under the Mine Act.

The Proposed Regulation Would be Both Technologically and Economically Infeasible

MSHA is required, through both statutory language and court decision to take feasibility into account when it promulgates mandatory standards.⁴ Unfortunately, MSHA’s attempt to establish the required feasibility is unpersuasive. Indeed, for such a dramatic and extensive regulation, the discussion in the preamble is best described as cursory with the entire discussion for both technological and economic feasibility taking less than one full page in the Federal Register.⁵

Industry representatives have raised serious concerns with MSHA’s calculations of economic feasibility⁶ and the agency’s assertion that the cost to the industry would be less than one percent of estimated annual revenue.⁷

Similarly, industry representatives have been using all available feasible engineering controls for years to achieve compliance with the current 2.0 mg/m³ standard and do not have

¹ *See* 75 Fed. Reg. 64,413 referencing a joint finding by the Secretaries of the Interior and Health, Education, and Welfare under section 202(f) of the Federal Coal Mine Safety and Health Act of 1969, published on February 23, 1972, at 37 Fed. Reg. 3,833.

² *Id.* at 64,449.

³ *Id.* at 64,415.

⁴ *See*, Mine Act, 30 U.S.C. 811 (a)(6)(a), and *National Mining Association v. Secretary of Labor*, 153 F.3d 1264 (11th Cir. 1998), which held that “MSHA shall consider feasibility. The language is not discretionary.” *Id.* at 1268.

⁵ 75 Fed. Reg. 64,476-64,477.

⁶ *See*, Dr. Robin Cantor, “Comments on the MSHA Preliminary Regulatory Economic Analysis for the Coal Mine Dust Rule,” submitted by Murray Energy Company as a part of its separately filed comments.

⁷ *Id.* at 64,477.

any new technology which will allow mine operators to generally comply with the proposed new 1.0 mg/m³ standard. Indeed, MSHA admits that there are only so many engineering controls available to reduce dust generation, or suppress, dilute, capture, or divert it⁸ and the 24 month phase-in period the agency proposes to allow mine operators to find ways to meet this standard is further evidence that the agency recognizes the technological infeasibility of meeting this threshold.

In addition to meeting the new exposure threshold, mine operators would have to implement new monitoring requirements which would include the use of continuous personal dust monitors (CPDMs). Notwithstanding another 24 month phase-in for this requirement, MSHA's reliance on CPDMs is at best premature since they have not yet been proven for the extensive use that MSHA envisions. Even the manufacturer of the CPDM recognizes that many details of how the device will be used remain to be worked out.⁹

The consequences of enforcing the regulation as proposed would be to generate extraordinary levels of citations. Current levels of citations for violations at the 2.0 mg/m³ are less than 200 per year while changing the threshold to 1.0 mg/m³ could result in 230,000 citations annually.¹⁰ Put simply, as MSHA does not have adequate resources to handle this level of increased citations this alone becomes a question of feasibility, albeit related to the agency's operations rather than employer operations.

Because these would be considered violations of a mandatory health standard, each of them would be treated as "significant and substantial." Under MSHA's recently proposed Pattern of Violations regulation, these "significant and substantial" violations are the trigger for being declared in Pattern of Violation status.¹¹ If over 230,000 "significant and substantial" violations annually result from this regulation keeping mines out of this category will be very difficult and this could ultimately jeopardize their ability to remain in operation.

Finally, no less than the United Mine Workers of America have commented on the difficulties this regulation would impose. At MSHA's public hearing in Beckley, WV on December 7, 2010, Dennis O'Dell, Administrator of Occupational Health and Safety for the United Mine Workers of America said, "[o]ne significant problem we see with this proposed rule is how complicated it truly is. The explanations are confusing"¹² As written, parts of the proposed rule is (sic) unintelligible.¹³ If I have done my math properly, . . . longwall miners and some section miners would be held to a 0.6 mg/m³ or possibly a 0.4 mg/m³ standard. This will be very difficult to meet [W]e strongly believe that current mining practices can be continued without jeopardizing miners' health. We want to make sure the rule doesn't make it infeasible for coal miners to work in coal mines."¹⁴

⁸ 65 Fed. Reg. 42,134 (Jul. 7, 2000).

⁹ See Kris Maher, *New Monitor Kicks Up a Dust Storm*, Wall St. J., May 3, 2011 at B6.

¹⁰ See, testimony of Alliance engineers Mark Watson and Heath Lovell (testifying for the National Mining Association) at the February 15, 2011 MSHA public hearing.

¹¹ 76 Fed. Reg. 5,719 (Feb. 2, 2011).

¹² Testimony of Dennis O'Dell at 56.

¹³ *Id.* at 58.

¹⁴ *Id.* at 56-57.

Conclusion

While every effort should be made to reduce incidences of CWP, MSHA's proposed regulation on lowering miners' exposure to respirable coal mine dust is not supported by adequate scientific and medical data, is inconsistent with its statutory rulemaking requirements, and would impose requirements that are neither technologically nor economically feasible. Accordingly, the Chamber believes this proposal should be withdrawn.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits



Marc Freedman
Executive Director, Labor Law Policy
Labor, Immigration and Employee Benefits