
From: Thomas O. McGarity [tmcgarity@mail.law.utexas.edu]
Sent: Friday, November 22, 2002 2:59 PM
To: comments@msha.gov
Subject: Diesel Particulate Rulemaking



CPR_Comments.doc



CPR_Comments.rtf

Dear sirs:

The Center for Progressive Regulation submits the attached comments on the Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, Advance Notice of Proposed Rulemaking, 67 Fed. Reg. 60199 (2002).

I have attached versions in both Word for Windows and Rich Text Format. Please let me know if you have any trouble opening the documents.

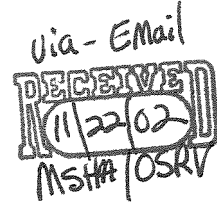
Thomas O. McGarity

Via-Email
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Center for Progressive Regulation

FILED BY ELECTRONIC MAIL

November 22, 2002
Mine Safety and Health Administration
Office of Standards, Regulations and Variances
Room 2352
1100 Wilson Boulevard
Arlington, VA 22209-3939



Re: Comments on Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, Advance Notice of Proposed Rulemaking, 67 Fed. Reg. 60199 (2002).

Dear Sir/Madam:

These comments are submitted by the Center for Progressive Regulation (CPR or the Center), a newly created organization of academics specializing in the legal, economic, and scientific issues that surround health, safety, and environmental regulation. CPR's mission is to advance the public's understanding of the issues addressed by the country's health, safety and environmental laws and to make the nation's response to health, safety, and environmental threats as effective as possible.

The Center is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. One component of the Center's mission is to circulate academic papers, studies, and other analyses that promote public policy based on the multiple social values that motivated the enactment of our nation's health, safety and environmental laws. The Center seeks to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. We reject the idea that government's only function is to increase the economic efficiency of private markets.

The Center also seeks to provoke debate on how the government's authority and resources may best be used to preserve collective values and to hold accountable those who ignore or trivialize them. The Center seeks to inform the public about ideas to expand and strengthen public decision-making by facilitating the participation of groups representing the public interest that must struggle with limited information and access to technical expertise.

On September 25, 2002, the Mine Safety and Health Administration (MSHA) published an Advance Notice of Proposed Rulemaking in which it proposed to implement the terms of a settlement that the agency had reached with representatives of some of the

mining companies that were subject to the agency's recently promulgated Diesel Particulate Rule. 67 Fed. Reg. 60199 (2002). The regulation was promulgated pursuant to the Mine Safety and Health Act of 1977 to protect miners from the clearly documented health hazards of exhaust from diesel engines running in the close quarters of an underground mine. After years of compiling information and soliciting and considering public comment, the agency published the final Diesel Particulate Rule on January 18, 2001. 66 Fed. Reg. 5706 (2001). The promulgation of this regulation for the first time offered workers relief from the exceedingly large and varied health risks posed by diesel exhaust in mines.

The agency has now proposed to amend the Diesel Particulate Rule by postponing the effective date until July 19, 2003 and by changing the substance in accordance with a settlement negotiated between representatives of several regulated companies and representatives of the Bush Administration. This clearly unlawful action is an affront to the workers who depend upon MSHA for protection against the exceedingly high health risks that they face on a day-to-day basis in one of the most dangerous workplaces in the country.

In postponing the effective date of the Diesel Particulate rule to allow the agency time to amend it to decrease its stringency is a transparent attempt to avoid section 101(a)(9) of the Federal Mine Safety & Health Act, which explicitly provides that "[n]o mandatory health or safety standard promulgated under this title shall reduce the protections afforded miners by an existing mandatory health or safety standard." The purpose of this provision is to prevent precisely what the agency is attempting to accomplish through the implementation of the settlement agreement with the regulatees in this proceeding. Many of the workers who will suffer from the postponement and evisceration of this rule do not belong to any labor organization and therefore depend upon MSHA to protect them from workplace hazards. By capitulating to the demands of a few mining companies that it gut the existing Diesel Particulate Rule, the agency is shirking its statutory duty to protect workers who are helpless to protect themselves.

I. General unlawfulness of suspending the effective date of a final rule without notice and comment.

The effective date of a final rule is a substantive aspect of the rule that becomes law on the date that the rule is promulgated. The effective date can, of course, be changed, but that change can only come about through the same notice-and-comment procedures that the agency employed in promulgating the rule in the first instance. See Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. Rev. 645, 653 (1987).

In *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d. Cir. 1982) the EPA indefinitely postponed final regulatory amendments that had been published, but were not yet in effect. After the plaintiffs filed suit against the agency for not providing

notice and comment as required under the APA, the EPA terminated the indefinite postponement of the amendments and made them prospectively effective. The agency simultaneously proposed to further suspend the effective date and invited comment on that proposal. Thus, the agency “treated the *further* Postponement of the amendments as a rule subject to the rulemaking provisions of the APA, despite the fact that it did not treat the *initial* postponement as a rule.” 683 F.2d at 757. Several months later, the EPA effectuated its previous prospective effective dates for some of the amendments, but indefinitely postponed four “highly controversial” amendments. *Id.* at 757-58. The court found that the agency, without notice and comment, had

abrogated rules which had been proposed, which had undergone years of notice and comment procedures, and which had been promulgated, with an effective date, in final form. By postponing the effective date of the amendments, EPA reversed its course of action up to the postponement. That reversal itself constitutes a danger signal. Where the reversal was accomplished without notice and an opportunity for comment, and without any statement by EPA on the impact of that postponement . . . the reviewing court must scrutinize that action all the more closely to ensure that the APA was not violated.

Id. at 760-61. The court held that the postponement did in fact violate the Administrative Procedure Act.

The court held that the indefinite postponement of the amendment’s effective date was a “rule” within the meaning of the APA. The court reasoned that the effective date is a substantive component and essential element of the rule itself: “without an effective date a rule would be a nullity because it would never require adherence.” *Id.* at 762. Holding otherwise would permit “an agency [to] guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date.” *Id.* Since the repeal of a rule is subject to rulemaking under the APA, the court reasoned, so should the postponement of the effective date.

In Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983), EPA promulgated standards pursuant to the Resource Conservation and Recovery Act (RCRA) in January 1981 with an effective date of July 1981. A few days after the effective date of the regulation, the EPA published a notice in the Federal Register proposing to withdraw or suspend the regulations and proposing not to require the submission of at-issue permit applications from industry. *Id.* at 808. Approximately five months later, EPA published its proposed rule to suspend the effective dates for the regulations, and announced a new interim policy that it would not call in permit applications required under the regulations. The agency reasoned that it would not be a prudent allocation of resources to begin processing permits under regulatory standards which might be suspended in the near future. The court held that this, too, violated the Administrative Procedure Act.

Although the agency’s refusal to call in permit applications was technically not a suspension of previously promulgated regulations, the court recognized that “the effect

was exactly that." *Id.* at §18. Hence, the agency's action "was in substance the promulgation of a regulation." *Id.* Accordingly, the agency's decision to forego notice and comment violated the APA. See also *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 716 F.2d 915 (D.C. Cir. 1983).

Even the Department of Justice, in a February 1981 opinion on the subject justifying suspensions of very limited duration, noted that a decision to proceed with further rulemaking was tantamount to an admission that the delay would be so substantial as to undermine the justification for a suspension: "...once a decision to begin the process of amending a rule is made, there is no longer a plausible argument that a rule was to take effect is merely to be delayed for a brief period." (5 U.S. Op. Off. Legal Counsel 59, 66.).

II. The applicability of 5 U.S.C. § 705 to the stay of the effective date of "certain provisions" of the MSHA Diesel Particulate Rule.

MSHA apparently does not contest the proposition that the postponement of the effective date of a regulation must be accomplished through notice-and-comment rulemaking. Thus, the agency does not claim that its action postponing the effective date for "certain portions" of the Diesel Particulate Rule comes within one of the exceptions to notice-and-comment rulemaking procedures set out in 5 U.S.C. § 553(b). Instead, the agency relies on the fact that it was long ago sued by companies challenging the substance of the rule in various courts of appeals. first sentence of 5 U.S.C. 705 that reads:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

The purpose of the first sentence of section 705 is to allow an agency, in fairness to a party seeking to challenge agency action, to postpone the effective date of agency action in situations in which compliance with the rule would effectively preclude the right to appeal. For example, if compliance with the rule required a regulatee to make large and irreversible capital investments and if the penalties for failure to comply were high, the only effective option available to a regulatee would be to comply with the rule. The looming effective date would effectively preclude judicial review because the regulatee could not afford to risk the possibility that judicial review would not be completed prior to the effective date. In such cases, section 705 invites agencies to postpone effective dates pending judicial review.

MSHA's July 18, 2002 postponement of the effective date of its Diesel Particulate Rule, however, does not come within section 705 for several reasons. First, the parties challenging the Rule could easily have secured judicial review by now if they had expeditiously pressed their appeals. All three lawsuits described in the July 18, 2002 notice staying the effective date of the regulations were filed in the first three months of 2001. More than enough time has elapsed since the filing of those suits for a successful completion of the litigation. If the only reason for the stay was to provide the regulated entities a fair opportunity to litigate their challenge in a court of appeals, that rationale cannot possibly support an extension of the effective date of the regulations until July 19, 2003. Yet the July 18, 2002 "stay of effectiveness" does precisely that.

More importantly, the rationale that the agency has provided for the postponement does not come within the terms of section 705. That section permits an agency to stay the effective date of a rule for the narrow and limited purpose of permitting the expeditious completion of a petition in a court to review the agency action. The rationale that MSHA offered for the postponement was "to prevent confusion while MSHA carries out" an enforcement policy that resulted from "the parties' settlement negotiations." 67 Fed. Reg. at 47299. In the September 25, 2002 ANPRM, MSHA further explained that it was "staying the effectiveness of the following provisions pending completion of further rulemaking to address" certain issues. 67 Fed. Reg. at 60200. Neither of these reasons has anything whatsoever to do with the expeditious completion of judicial review.

It is perfectly clear from the agency's explanations that the real purpose of the stay is to allow the agency an opportunity to amend the existing duly promulgated rule before the regulatees are required to comply with that legally binding rule. This is precisely what the courts in *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) and *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d. Cir. 1982) said agencies cannot accomplish without notice and comment rulemaking. In an unpublished opinion addressing a similar situation in which EPA sought to use section 705 to facilitate the repeal of an existing rule, the D.C. Circuit warned that section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule." The court noted that "If the agency determines the rule is invalid, it may be able to take advantage of the good cause exception, 5 U.S.C. § 553(b)." *Safety-Clean Corp. v. EPA*, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996).

MSHA has not proposed to postpone the effective date of the Diesel Particulate Rule and it has not elicited public comment on that action. Until it does so, the rule as promulgated on January 19, 2001 remains in effect, except insofar as it was amended by the notice-and-comment rulemaking completed on February 27, 2002. 67 Fed. Reg. 9180 (2002). If the agency has concluded that the rule that it promulgated almost two years ago is no longer valid, then it may repeal that rule or it may amend or revise that rule, but it must accomplish such action through notice-and-comment rulemaking.

Finally, even if the agency decides to use notice-and-comment procedures to consider promulgating a rule postponing the effective date of the Diesel Particulate Rule, it should decline to do so on the merits. In considering a petition for a judicial stay under 5 U.S.C. § 705, the courts apply the same test that they apply in considering a motion for a temporary injunction. See *Cronin v. USDA*, 919 F.2d 439,446 (7th Cir. 1990); *Ohio v. Nuclear Regulatory Commission*, 812 F.2d 288,290 (6th Cir. 1987); *Branstad v. Glickman*, 118 F. Supp. 2d 925 (N.D. Iowa 2000). Although there are no decided cases on the considerations that apply to an agency in postponing an effective date under section 705, the same considerations that guide the courts should guide the agency. Thus, in considering a petition for a postponement of an effective date of a rule under section 705, MSHA should answer the following questions:

- (1) Has the party requesting the stay made a strong showing that it is likely to prevail on the merits of the litigation?
- (2) Has the petitioner shown that without such relief, it will be irreparably harmed?
- (3) Would the issuance of a stay substantially harm others, in particular those who are not parties to the litigation?
- (4) Where does the public interest lie?

In the case of the Diesel particulate rule, the petitioners have not demonstrated how the agency should answer any of these questions.

In particular, the risk assessment that MSHA prepared to accompany the rule strongly suggests that the answer to the third question is clearly "Yes." That risk assessment explicitly described the significant risk of material impairment of health to miners exposed to the dpm levels currently found in U.S. mines. The estimates of risk are staggering. A suggestion that miners will not be adversely affected directly contradicts the findings in MSHA's quantitative risk assessment. The risk assessment explores a full range of health effects related to dpm exposure including: bronchitis, eye and throat irritation, nausea, headaches, diminished pulmonary function, cardiovascular and cardiopulmonary disease and lung cancer. If dpm exposure limits are allowed to exceed 400 ug/m³ for at least one additional year, miners will clearly be adversely affected.

Rather than acquiescing in the complaints of the mining industry that protecting workers from the clearly documented adverse effects of exposure to diesel emissions in mines, the Mine Safety and Health Administration should be enforcing the rules that it promulgated almost two years ago. If some companies believe that protecting the health of their workers is too expensive, they can make that case in a petition to amend the rules after they have had a chance to work in the real world.

Sincerely,

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