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Mine Safety & Health Administration
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Filed via email: zzMSHA-comments@dol.gov

Dear Sir or Madam:

The Center for Progressive Reform (CPR) is a 501(c) (3) nonprofit research and educational organization dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information.

CPR appreciates the opportunity to comment on the proposed rule on “Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Mines.” In summary, we have the following comments:

- Because the Mine Act requires technology-forcing when MSHA promulgates health standards, the agency cannot delay implementation of the 2001 DPM standard because mine operators may have problems immediately complying with the standard.

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- MSHA’s concern seems to be that the industry will find it more expensive to come into compliance with the 2001 DPM standard if it requires immediate compliance than it phases in the standard over a long period of time. A health standard, however, is not economically infeasible simply because it is financially burdensome. Since MSHA lacks any data suggesting the expense of immediate compliance would threaten the industry or cause massive dislocations, the 2001 DPM standard is economically feasible.
- The lack of established distribution networks for alternative fuels, assuming this is a problem, does not justify a delay in implementation of the 2001 DPM standard. Elementary economic theory establishes that sellers will establish the necessary distribution networks once mine owners seek to purchase such fuels. While alternative fuels may cost more than conventional fuels, MSHA lacks any evidence the cost difference will threaten the viability of the industry, which is the test of economic feasibility.
- Likewise, MSHA’s concern that mine owners may have equipment problems in using alternative fuels does not make the 2001 DPM standard infeasible. MSHA concedes that such problems can be overcome, which makes the standard technologically feasible under applicable case law.
- The MARG Coalition contends MSHA must “correct” conclusions it has reached in its risk assessment and in its conclusion the 2001 DPM standard is feasible because of the Information Quality Act (IQA). All of the Coalition’s arguments, however, assume that Congress intended to alter or amend the statutory standards under which MSHA regulates when it passed the IQA, but there is absolutely no evidence whatsoever for this assumption. The IQA did not change MSHA’s evidentiary burden for promulgating health standards, and the agency must therefore reject the Coalition’s arguments.

Feasibility

In its NPRM, MSHA proposes giving mine operators additional time to come into compliance with the final DPM rule because mine operators may have various problems immediately complying with the rule. Because of these difficulties, MSHA suggests that a staggered phase-in approach may be necessary to make the rule “feasible.”¹ An extension of time on this basis, however, violates MSHA’s mandate to engage in technology-forcing.

The Mine Act is a technology forcing statute.² Like OSHA’s mandate, the Mine Act requires MSHA to adopt the health standards “which most adequately assures” the worker will not “suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with such

¹ DOL, Diesel Particular Matter Exposure of Underground Metal and Nonmetal Mines: Proposed Rule, 70 Fed. Reg. 53280, 53283 (2005).

² National Min. Ass'n v. MSHA, 116 F.3d 520, 535 n. 5 (D.C. Cir. 1997).

standard for the period of his working life.”³ Congress’ endorsement of technology forcing is evident from the commitment to provide the most protection for miners that can be achieved.⁴

Under its mandate, MSHA “can force industry to develop and diffuse new technology,”⁵ which means MSHA can require the mining industry to attain exposure limits never achieved before.⁶ A standard is technologically feasible even if a mine operator cannot meet the final DPM limit in all areas of the mine, for all occupations, at all times. The test for feasibility requires only that MSHA show “modern technology has at least conceived some industrial strategies or devices which are likely to be capable of meeting the PEL and which the industries are generally capable of adopting.”⁷

MSHA’s NPRM makes it clear that several technologies are available which, alone or in combination, would permit mines to meet the final limit. Doubts about whether all mines can do so in all operations, or doubts about whether current distribution networks for alternative fuels are as complete as may be necessary under the final rule, do not detract from the conclusion that the final limit is feasible. MSHA’s search for certainty that all mines can comply at all time in all circumstances is a violation of its technology-forcing mandate.

MSHA’s concern seems to be that some mine operators will find it somewhat more expensive if they are required to come into immediate compliance with the final rule than if MSHA phases in the rule over some period of years. A health standard, however, is economically feasible unless it “threatens massive dislocations to, or imperils the existence of, the industry.”⁸ A standard is not infeasible simply because it is financially burdensome, or even because it threatens the survival of some companies within an industry.⁹

MSHA estimated that the annual cost of the final rule was \$25.1 million or \$128,000 annually for an average underground metal and nonmetal mine.¹⁰ The NPRM does not contain any data suggesting that these minimal costs would be significantly greater than originally estimated, let alone that costs would be so high to threaten the economic viability of the industry. Since MSHA cannot prove immediate compliance will threaten massive dislocations in the industry, it has no legal basis to phase-in the regulation.

Use of Alternative Fuels

MSHA’s discussion of the use of alternative fuels as a means of complying with the final limit illustrates the flaws in its approach to technological feasibility.

³ 30 U.S.C. §811(a)(6)(a).

⁴ See *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1264 (1979) (“The oft-stated view of technological feasibility under the OSH Act is that congress meant the statute to be ‘technology-forcing.’”).

⁵ *Id.*

⁶ *Id.* at 1265.

⁷ *Id.* at 1266.

⁸ *Industrial Union Department v. Hodgson*, 499 F.2d 467, 477 (D.C. Cir. 1974).

⁹ *Id.*

¹⁰ 70 Fed. Reg. at 53282.

MSHA recognizes “promising advances in alternative fuel technology since the 2001 fine rule was adopted,” and it found that “[t]hese fuels can be extremely effective in reducing DPM emissions,”¹¹ reducing the exposure of miners to DPM by as much as 50 to 80 percent.¹² MSHA nevertheless questions whether reliance on alternative fuels is feasible because of the lack of geographical proximity of most mines to a fuel distributor and because the use of alternative fuels can cause equipment problems for some mine operators.¹³

As the earlier statement of CPR’s mission indicates, CPR supports doing the “best we can to prevent harm to people and the environment ...and protecting the earth for future generations.” The development and use of alternative fuels is central to both of these goals.¹⁴ As MSHA recognizes, the use of alternative fuels by mine operators “would be in tune with recent U.S. initiatives towards greater energy independence.”¹⁵ We recognize, of course, that MSHA is bound by provisions of the Mine Act in evaluating the use of alternative fuels by mine operators. The problems identified by MSHA, however, do not make the final rule infeasible under the Mine Act. Neither of MSHA’s hesitations about the use of alternative fuels is valid under its statutory mandate.

Distribution Networks: Under a technology-forcing statute, the lack of distribution networks cannot be a reason for delaying the final rule. As the courts have ruled, an agency under a technology-forcing mandate can impose a standard “looming on today’s horizon.”¹⁶ As MSHA itself acknowledges, alternative fuels are looming on today’s horizon. Use of biodiesel has grown exponentially in the past few years and is expected, independent of MSHA’s actions, to grow even more in the years to come. Only 500,000 gallons of biodiesel fuel was produced in 2000, but by 2004, production soared to 25 million gallons. Just one year later, in 2005, production tripled, topping out at 75 million gallons.¹⁷ There are 45 active biodiesel production plants located in 23 States, and 54 plants are proposed in another 10 states.¹⁸ Of the 7,000 petroleum distributors in the country, more than 2,000 are routinely transporting and delivering biodiesel fuels.¹⁹

Moreover, since substitution of biodiesel fuels requires no capital investment in controls by mines, elementary economic theory establishes that mine operators will aggressively seek sources of supply to avoid spending substantially larger sums on ventilation or other controls, and that suppliers will meet this demand by establishing the necessary methods of distribution. This aggressive pursuit of diesel substitutes, however, will occur only when MSHA fully implements in

¹¹ 70 Fed. Reg. at 53284.

¹² *Id.* at 53286.

¹³ *Id.*

¹⁴ See Sidney A. Shapiro & Joseph P. Tomain, *Rethinking Reform of Electricity Markets*, 40 Wake Forest L. Rev. 497 (2005).

¹⁵ 70 Fed. Reg. at 53284.

¹⁶ *American Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 838 (3d Cir. 1978).

¹⁷ National Biodiesel Board, News Release: Biodiesel production soars,” November 8, 2005; K. Allen, *Biodiesel’s time is coming as gas prices rise*, THE EXAMINER, October 31, 2005, at 24.

¹⁸ National Biodiesel Board. “Current and Proposed Biodiesel Production Plants, September 2005, available at: http://www.biodiesel.org/buyingbiodiesel/producers_mapeters/ProducersMap-existingandpotential.pdf

¹⁹ Personal interview with Tom Verry, Director of Outreach and Development, National Biodiesel Board, January 6, 2006.

final limit. Substantial delay and phase-in of lower limits make incremental retrofit of old equipment more attractive in the short term.²⁰

Thus, MSHA's decision to delay implementation of the final limit has the effect of postponing the very development of biodiesel distribution networks about which MSHA is so worried.

Further, MSHA is not justified in delaying the 2001 rule because alternative fuels may be more costly than regular diesel fuel. According to a recent price survey, the average price of biodiesel was \$3.19 per gallon while regular diesel was \$2.79 as of December, 2005.²¹ We recognize that the price difference may vary in areas of the county and times of the year, and it will be affected by the length and complexity of distribution networks. At the end of the day, however, MSHA will not be able to establish that the additional costs make immediate implementation of the 2001 rule economically infeasible because of the cost of alternative fuels. The difference in price hardly threatens "massive dislocation" or "imperil the existence" of the industry, which is the test of economic feasibility.²²

Finally, the NPRM does not discuss the potential of using ultra-low sulfur diesel fuel. In its 2001 final rule, however, MSHA mandated the use of such fuel.²³ MSHA found that because it cost only slight more than regular diesel fuel, it was readily available throughout the country, it was already being used in coal mines and the availability of the fuel in remote areas was not a problem.²⁴ Given this additional option, there is even less reason for MSHA to claim that the 2001 rule is somehow not feasible if implemented immediately.

Adjustment of Machinery: MSHA also questions whether reliance on alternative fuels is feasible because the use of alternative fuels can cause equipment problems for some mine operators. At the same time, MSHA has found that "these operational issues could be overcome ... on a case-by-case basis."²⁵ In light of this finding, MSHA has no legal basis for finding that the 2001 rule is infeasible. Under a technology forcing standard, these problems are to be anticipated. If MSHA makes them a reason not to implement the 2001 rule, the Mine Act will no longer be a technology forcing statute. A standard meets the requirement of technological feasibility as long as "modern technology has at least conceived some industrial strategies or devices which are likely to be capable of meeting the PEL and which the industries are generally capable of adopting."²⁶ As MSHA concedes, this test is met because operational issues can be overcome by individual mine operators.

²⁰ See Nicholas Ashford, Christine Ayers, & Robert F. Stone, *Using Regulation to Change the Market for Innovation*, 9 HARV. ENV. L. REV. 419, 464 (1985) (finding a "standard not stringent enough may inhibit innovation").

²¹ SEATTLE WEEKLY, December 14, 2005.

²² United Steelworkers, 647 F.2d at 1265.

²³ Department of Labor, Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Minders, 66 Fed. Reg. 5706, 5707 (2001).

²⁴ *Id.* at 5874.

²⁵ 70 Fed. Reg. at 53286.

²⁶ Color Pigments Mfg. Ass'n v. OSHA, 16 F.3d 1157, 1161 (11th Cir. 1994).

Information Quality Act

On August 10, 2005, the MARG Diesel Coalition filed an Information Quality Act (IQA) complaint for the correction of information contained in the Notice of Proposed Rulemaking.²⁷ On January 3, 2006, MSHA indicated that it would consider the issues in the complaint in the context of this rulemaking process.²⁸ CPR would like therefore to respond to the Coalition letter.

The Coalition makes two claims in their letter. The Coalition contends that “corrections” are needed concerning MSHA’s risk assessment²⁹ and concerning MSHA’s conclusions regarding technological³⁰ and economic³¹ feasibility. For some time CPR has been concerned about the misuse of the IQA in the rulemaking process.³² The Coalition’s claims constitute the very type of misuse of the statute about which we have been concerned. All of the Coalition’s claims assume that Congress intended to alter the statutory standards under which MSHA regulates when it passed the IQA. There is simply no evidence whatsoever to support this assumption, as we will develop.

Risk Assessment: Concerning risk assessment, the Coalition claims that “MSHA has *adopted* the standards for performing risk assessment that are contained in the Safe Water Drinking Act (SWDA).”³³ This claim is factually incorrect. MSHA follows the Information Quality Guidelines of the Department of Labor.³⁴ According to the DOL Guidelines:

With regard to analysis of risks to human health, safety, and the environment maintained or disseminated by agencies, the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA), in performing risk analysis, are hereby *adapting* the standards contained in the Safe Drinking Water Act.³⁵

The distinction is important. When Congress passed the Mine Act, it indicated the nature of the evidence on MSHA can rely, and this mandate is different, and less prescriptive, than the one Congress used under the SDWA.³⁶

²⁷ Letter to Elaine L. Chao, U.S. Department of Labor from Henry Chajet, Counsel to the MARG Coalition (August 10, 2005)

²⁸ Letter to Henry Chajet, Patton Boggs from George M. Fesak, Director, Evaluation & Program Resources, MSHA (January 3, 2006).

²⁹ *Id.* at 17.

³⁰ *Id.* at 7.

³¹ *Id.* at 15.

³² See Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform By Appropriations Rider*, 28 WM. & MARY ENVTL L. & POL. REV. 339, 363-367 (2004); Thomas O. McGarity, Sidney A. Shapiro, Rena I. Steinzor, Joanna Goger and Margaret Clune, *Truth and Science Betrayed: The Case Against the Information Quality Act* (March 2005), available at <http://www.progressiveregulation.org/articles/iqa.pdf>.

³³ Letter, *supra* note 27, at 17 (emphasis added).

³⁴ MSHA, Information Quality Guidelines, available at <http://www.msha.gov/infoquality/mshainfoquality.htm>.

³⁵ DOL, Information Quality Guidelines, available at <http://www.dol.gov/cio/programs/InfoGuidelines/informationqualitytext.htm#1996%20SAFE%20DRINKING>.

³⁶ 30 U.S.C. §811(a)(6)(a).

MSHA engaged in a thorough review of the scientific evidence when it promulgated the final rule, including a thorough consideration of comments critical of its risk findings. Now, under the banner of the IQA, the Coalition seeks to re-litigate issues already considered and resolved by MSHA, and previously raised by MARG.³⁷ The Coalition’s letter argues the scientific evidence could be better – that additional study, more evidence, and better peer review would produce more and better information about the risks posed by DPM – and that these failures require MSHA to “correct” its conclusions about the degree of risk posed by DPM.

The IQA, however, does not change MSHA’s burden of proof under the Mine Act, as DOL recognized when it refused to “adopt” the SDWA risk standards. There is absolutely no evidence that when Congress passed the IQA it amended the Mine Act and established a different burden of proof for MSHA.³⁸ That Congress did not intend the IQA to serve as a kind of “uber statute” providing OMB with the overarching authority to deflect MSHA from its statutory responsibilities is overwhelmingly evident from the terse statutory language, the absence of any legislative history, the lack of any hearings, the location of the act in an appropriations rider sandwiched between two unrelated provisions in a huge appropriations bill, and from the fact that no one referred to the IQA during the debate on the larger bill.³⁹

The Mine Act requires MSHA to protect miners once it is clear that a substance poses a significant health threat to them.⁴⁰ MSHA’s exhaustive 103 page review of the scientific evidence in support of its 2001 rule establishes such a threat.⁴¹ The agency confirmed this conclusion in 2005.⁴² These reviews acknowledge limitations in the scientific evidence, but find a threat based on the totality of the evidence. The Mine Act requires no more.

Feasibility: The Coalition also raises a number of objections regarding MSHA’s findings concerning technological and economic feasibility. The gist of these objections is that MSHA made evidence inferences and conclusions that the Coalition finds objectionable. The IQA, however, does not apply to MSHA’s evidentiary inferences and conclusions.

As established earlier, there is no evidence whatsoever that Congress amended the Mine Act when it passed the IQA. As a result, the normal standards of administrative review apply. According to the APA, MSHA’s evidentiary findings and conclusions must not be “arbitrary and capricious.”⁴³ This means MSHA must take into account the quality of the information on which it relies. A court, however, will not overturn MSHA’s interpretation of the evidence unless

³⁷ See, e.g., 66 Fed. Reg. at 5822 (claiming the scientific evidence does not support a link between dpm exposures and serious illness).

³⁸ Sidney A. Shapiro, *The Case Against the IQA*, ENV. FORUM, July/August 2005, at 26.

³⁹ *Id.*

⁴⁰ See *Steelworkers v. Marshall*, 647 F.2d at 1266 (noting Congress did not intend for workers to die while OSHA awaited better scientific evidence).

⁴¹ 66 Fed. Reg. 5752-855.

⁴² DOL, Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miner, Final Rule, 70 Fed. Reg. 32868, 32888-915 (2005).

⁴³ 5 U.S.C. §707(2)(a).

its conclusions are “so implausible that [they] cannot be ascribed to a difference in view or the product of agency expertise.”⁴⁴

Rulemaking Applicability: Finally, CPR believes MSHA should ignore the arguments raised the Coalition because the IQA does to apply to rulemaking. When Congress passed the Act, it required agencies to create a process to challenge the quality of information. Such a process, however, already exists for rulemaking – the notice and comment process. With these protections in place for regulatory information used in the rulemaking process, the IQA is entirely redundant. It is difficult to believe that Congress intended agencies to hear complaints about information quality in the rulemaking process when agencies already had a process to hear complaints about information quality in the rulemaking process – the notice and comment procedures.⁴⁵

Sincerely yours,

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⁴⁴ Motor Vehicle Mfgs. Assoc. v. State Farm Mutual Automobile Insure Co., 463 U.S. 29, 43 (1983).

⁴⁵ Sidney A. Shapiro, *OMB's Dubious Peer Review Procedures*, 34 ENVIRONMENTAL LAW REPORTER 10064, 10065 (2004).