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Comment On: MSHA-2008-0008-0001

Safety Standards Regarding the Recommendations of the Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining

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General Comment

Attached are CRE's Paperwork Reduction Act comments on RIN 1219-AB59.

Attachments

MSHA-2008-0008-DRAFT-0006.1: Comment from Jim Tozzi, The Center for Regulatory Effectiveness

AB59-COMM-5

**Before the
Office of Management and Budget
and
Mine Safety and Health Administration**

**PAPERWORK REDUCTION ACT COMMENTS:
The PRA Requires MSHA and OMB to Protect
Miner Safety and American Competitiveness**

In the Matter of)	
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Safety Standards Regarding the)	
Recommendations of the Technical)	
Study Panel on the Utilization of Belt)	
Air and the Composition and Fire)	
Retardant Properties of Belt Materials)	
in Underground Coal Mining)	RIN 1219-AB59
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Center for Regulatory Effectiveness

**PAPERWORK REDUCTION ACT COMMENTS:
The PRA Requires MSHA and OMB to Protect
Miner Safety and American Competitiveness**

The Center for Regulatory Effectiveness (CRE) is submitting these comments to the Office of Management and Budget (OMB) and to the Mine Safety and Health Administration (MSHA) with respect to OMB Control Number 1219-0066 - Testing, Evaluation, and Approval of Mining Equipment (conveyor belt flame-resistance) and OMB Control Number 1219-0088 – Ventilation Plans, Tests, and Examinations in Underground Coal Mines.

MSHA's proposed revisions to the above-cited ICRs have specific Paperwork Reduction Act (PRA) deficiencies as detailed below.

MSHA's PRA Deficiencies

There are two primary deficiencies in MSHA's PRA submission to OMB:

1. **Proposed Changes to Existing Belt Composition Information Collection Requirements Lack Practical Utility.** MSHA has not demonstrated the practical utility for the proposed expansion of the information collected on the composition of conveyor belts used in underground coal mines. Any determination on the need for an expanded information collection should be made in a separate rulemaking.
 2. **The Ventilation Plan Information Collection Needs to be Expanded.** The ventilation plan information collection needs to be expanded to encompass the data MSHA requires for making the statutorily required determination on whether or not use of belt air, "at all times affords at least the same measure of protection" as not using belt air to ventilate the working areas. The expanded data in the ventilation plan should include certification that the mine will use low-smoke belt for all belt air applications – essential information for the agency's belt air safety determination (smoke limitation for elastomers as specified in the Code of Federal Regulations, an optical density (D_s) \leq 100 after 1.5 minutes and a (D_s) \leq 200 after four minutes as measure by ASTM E662).
- I. MSHA's Proposed Collection of More Detailed Formulation Data Is Not Justified and Could Jeopardize Competitively Sensitive Information**

The proposed revision to the ICR with Control Number 1219-0066 would require that conveyor belt manufacturers submit more detailed information on the chemical formulation of belts than is currently required; the additional information lacks practical utility. Specifically, the ICR calls for "formulation

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information about the compounds in the conveyor belt.”¹ The proposed rule states that, in addition to a detailed “technical description of the conveyor belt” manufacturers would also be required to submit,

*Formulation information on the compounds in the conveyor belt indicated by either: (i) Specifying each ingredient by its chemical name along with its percentage (weight) and tolerance or percentage range; or (ii) Specifying each flame-retardant ingredient by its chemical or generic name with its percentage and tolerance or percentage range or its minimum percent. List each flammable ingredient by chemical, generic, or trade name along with the total percentage of all flammable ingredients. List each inert ingredient by chemical, generic, or trade name along with the total percentage of all inert ingredients.*²

While the NPRM states that the agency “intends to treat information on product material, specifications, and processes as *potentially* protectable under exemption 4 of the Freedom of Information Act (FOIA)” they, of course, cannot guarantee that such competitively sensitive information will actually be protected.

Currently, MSHA only requires more general information about the type(s) of material used in the conveyor belts as well as the chemicals used as flame-retardants and their minimum percentage by weight.

In their paperwork package sent to OMB, MSHA states that,

*Applications would consist of specifications describing the belt or proposed changes to the belt and formulation information about the compounds in the conveyor belt. This information and the test results would be evaluated by MSHA staff to determine if the conveyor belt met the flame resistant requirements and whether or not an approval should be granted.*³

MSHA’s Supporting Statement contradicts their NPRM in which they set passing a laboratory-scale flame resistance test (the Belt Evaluation Laboratory Test also known as BELT) as the only technical requirement for determining whether or not to grant approval to a conveyor belt. Of specific relevance to the PRA, the agency has not provided for public comment a plan for using the requested information.

The PRA defines “practical utility” as “the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion.”⁴

In their regulations implementing the PRA, OMB determined that,

¹ MSHA, “1219-AB59, Supporting Statement,” p. 3.

² 73 Fed. Reg. 35051 2d col., June 19, 2008.

³ MSHA, “1219-AB59, Supporting Statement,” p. 3.

⁴ 44 USC §3502 (11). [Emphasis added.]

*Practical utility means the actual, not merely the theoretical or potential, usefulness of information to or for an agency.... In determining whether information will have "practical utility," OMB will take into account whether the agency demonstrates actual timely use for the information....*⁵

MHSA's NPRM provides no indication, let alone demonstration, of any actual, timely use for the information, in violation of both the PRA and OMB's implementing regulations. Thus, the agency's certification and "record supporting such certification" that the proposal to revise the collection of information "is necessary for the proper performance of the functions of the agency, including that the information has practical utility"⁶ is deficient.

In short, there are only two possibilities, either: 1) MSHA has a plan for evaluating the detailed chemical formulation data as part of their process for determining whether or not to approve a conveyor belt and has not provided for public comment their planned methodology for making a regulatory decision; or 2) MSHA has no plan for the actual, not merely theoretical or potential, use of the data in violation of the Paperwork Reduction Act. In either case, the proposed revision of the ICR associated with Control Number 1219-0066 should be revised by MSHA and resubmitted for public comment.

It should be noted that the NPRM states that the extensive, detailed proposed information collection requirements "are based on existing § 18.6(c)."⁷ This is an imprecise statement as the existing requirements are far less detailed and only state that,

*Applications for acceptance of a conveyor belt as fire resistant shall include the following information: Trade name of the conveyor belt, thickness of covers, friction and skim coats, number of plies, type and weight of ply material, and designation of breaker strip or floated ply. The applicant shall provide other description or specifications as may be subsequently required.*⁸

Thus, while the proposed ICR revision may, in some sense be "based on" existing requirements, the proposal is also an unjustified expansion of information collection requirements to include competitively sensitive data.

If MSHA believes that additional belt formulation data is needed, the agency should initiate a separate rulemaking to determine: 1) what specific information is required; 2) how that information will be used; and 3) how the information would be provided to the agency consistent with protection of CBI.

⁵ 5 CFR § 1320.3 (l).[Emphasis added.]

⁶ 44 USC §3506 (c)(3)(A).

⁷ 73 Fed. Reg. 35029 2d col., June 19, 2008.

⁸ 30 CFR § 18.6(c).

An additional PRA certification deficiency with respect to the proposed expansion of conveyor belt formulation data is the use of ambiguous terminology in violation of the PRA certification requirement that the ICR “is written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond.”⁹

Specifically, the NPRM calls for conveyor belt manufacturers to provide detailed information about “each flammable ingredient” and “each inert ingredient” in addition to each flame-retardant ingredient. While the use of the term flame-retardant is clear, the terms “flammable” and “inert” are ambiguous. The NPRM defines a flammable ingredient as a “material that is capable of combustion.” Since, however, almost any compound is capable of combusting depending on the amount of energy present, MSHA’s definition is ambiguous and unclear unless the agency details the specific combustion conditions to which they are referring.

II. Expansion of the Ventilation Plan Information Collection

A. MSHA’s Revised Information Collection Does Not Provide Sufficient Information to Allow the Agency to Make the Statutorily-Required Belt Air Safety Determination

MSHA’s proposed revision to the ventilation plan ICR with OMB Control Number 1219-0088 does not explicitly include the information necessary for the agency to “determine” that “at all times” each ventilation plan calling for the use of belt air to ventilate working places affords at least the same measure of protection as not using belt air, as required by P.L. 110-161. Moreover, the proposed ICR revision does not include the proposed rule’s ventilation plan “justification” that “the use of air from a belt entry would afford at least the same measure of protection where belt haulage entries are not used to ventilate working places.”¹⁰

While the proposed rule requires the above-described belt air safety justification, the Justification section of MSHA’s ICR submission to OMB does not.¹¹ Instead, with respect to the safety of belt air, the agency only states that “Proposed § 75.350(b) would permit the use of air from the belt entry to ventilate a working section only when evaluated and approved by the District Manager in the mine ventilation plan.”¹²

⁹ 44 USC § 3506 (c)(3)(D).

¹⁰ 73 Fed. Reg. 35053 3d col., June 19, 2008.

¹¹ Found on OMB’s RegInfo.gov website at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=75292&version=0>

¹² MSHA, “1219-AB59, Supporting Statement,” p. 4.

Thus, there are two deficiencies with respect to the proposed belt air ventilation plan: 1) the proposed rule does not require as the same level of safety specified in the statute; and 2) the ICR does not include information needed to make the safety decision specified in the proposed rule.

The entire section of the proposed regulation requiring that the “mine operator must provide justification in the plan that the use of air from a belt entry would afford at least the same measure of protection where belt haulage entries are not used to ventilate working places” is missing from MSHA’s explanation of “the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.”¹³

It is important to note the failure to specify the belt air safety portion of the ventilation plan from the Justification section is not because the agency is only including brief synopses of the requirements contained in the proposed regulatory text found at the end of the Supporting Statement. Instead, the other portions of the proposed ventilation plan requirements discussed in the Justification section are quite specific. For example, the same section of MSHA’s submission to OMB that fails to mention ensuring that miners in areas ventilated by belt air have the same level of protection as if belt air were not used, does include such details as:

- ▶ “Proposed § 75.350(a)(2) would require that unless otherwise approved by the District Manager in the mine ventilation plan, the air velocity in the belt entry must be at least 50 feet per minute. The District Manager may approve different velocities under § 75.371(jj).”
- ▶ “Proposed § 75.350(b)(7) would require that the air velocity in the belt entry be at least 100 feet per minute. When requested by the mine operator, the District Manager may approve lower velocities in the ventilation plan based on specific mine conditions under § 75.371(jj).” and
- ▶ “Proposed § 75.350(b)(8) would require that the air velocity in the belt entry not exceed 1,000 feet per minute. The District Manager may approve higher velocities in the ventilation plan based on specific mine conditions under § 75.371(jj).”

Thus, not only does MSHA’s proposed rule not include the specific belt air safety requirements set in statute, but also MSHA’s proposed ICR does not even include the deficient belt air safety requirements included in the proposed regulation.

The specific ventilation plan information that needs to be collected to allow the agency to make the “determination” that the use of belt air is, as safe “at all times” as not using belt air, includes a technical explanation by the mine of how smoke would be controlled in all circumstances, such as if there is a fire involving the conveyor belt and if one or more safety controls, such as ventilation and fire suppression controls, have failed. Thus, **as the part of the belt air ventilation**

¹³ Ibid., p. 2. [Emphasis added.]

plan, the mine should be required to attest that they use low-smoke belt for all applications that involve belt air to ventilate one or more working places – information the agency must have in order to be able to make their statutory determination of whether or not to approve the plan. Specifically, in addition to meeting the BELT flame-resistance test, all underground conveyor belts used in belt air applications must be low-smoke (as measured by ASTM E662, $(D_s) \leq 100$ after 1.5 minutes and $(D_s) \leq 200$ after four minutes) if the use of belt air is to afford miners at least the same level of protection as the mine not using belt air to ventilate one or more working places.

B. The Need for MSHA’s Revised Information Collections to Adhere to the Information Quality Act and Risk Assessment Guidelines

With respect to MSHA’s use of the data collected in ventilation plans, the agency will need to adhere to the Information Quality Act (IQA) and the implementing guidelines, including OMB’s Updated Principles for Risk Analysis. As OMB’s Updated Principles for Risk Analysis explains, “This Memorandum is intended to complement and support the Information Quality Guidelines.”

Thus, the ventilation plan information collected by MSHA: 1) needs to need be expanded to encompass the data needed to make the statutory safety determination including the use of low-smoke belt; and 2) be used in a manner consistent with the risk analysis principles.

A more detailed discussion of the relevance of the risk analysis principles to MSHA’s use of the ventilation plan information is included in CRE’s comments on the NPRM. It should be noted here that one of the key principles is that,

A good risk analysis should clearly summarize the scope of the assessment, including a description of: the agent, technology and/or activity that is the subject of the analysis; the hazard of concern; the affected entities... (populations...or other) that are the subject of the assessment; the exposure/event scenarios relevant to the objectives of the assessment; and the type of event-consequence or dose-response relationship for the hazard of concern.¹⁴

Smoke from an over-heated conveyor belt or a fire involving a belt is a hazard of concern, and fires and the potential failure of ventilation controls and fire suppression systems are event scenarios. Thus, the Terms of Clearance for the ventilation plan ICR should specify that MSHA adhere to the Updated Principles for Risk Analysis in using the data collected – including information on whether low- smoke belt is used to mitigate potential hazards and the event-consequence scenarios associated with the use of belt air.

¹⁴ OMB, “Updated Principles for Risk Analysis,” M-07-24, September 19, 2007, pp. 8-9.

Recommendations

1. MSHA's proposed collection of new detailed information about the formulation of belts lacks practical utility and could endanger competitively sensitive information. Any determination to collect and use additional formulation information should be made through a separate rulemaking.
2. MSHA's proposed revision to the ventilation plan ICR should be expanded to ensure that the agency has sufficient data to make the statutorily required determination on whether or not the ventilation plan, at all times, affords at least the same measure of safety as if belt air were not used. Specifically, **belt air ventilation plans need to include a certification that the mine is using low-smoke belting for all belt air applications to provide the agency with the information they need to make the required safety determination on the plan.** MSHA needs to apply OMB's Updated Principles for Risk Analysis in reaching its required safety determination.