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MSHA/OSRV

-----Original Message-----

From: Peter Galvin [mailto:pd.galvin@verizon.net]
Sent: Sunday, March 14, 2004 6:30 PM
To: comments@msha.gov
Subject: RIN 1219-AB29, comments for the record

To: Marvin Nichols, Director OSRV, MSHA - by e-mail

Dear Mr. Nichols:

My name is Peter Galvin, and this is a comment for the record on the February 20, 2004 public notice by MSHA concerning the metal and nonmetal diesel particular rulemaking. As already indicated in the record of this rulemaking, I am the former co-counsel for Administrative Law for the Department of Labor, and have received explicit permission from the Department to submit comments on these proceedings pursuant to the applicable regulations.

I believe the request for comment is legally deficient due to vagueness. Vagueness in a notice is a significant procedural flaw, because the public needs to clearly understand the range of comments that it may make in time to formulate those comments.

The problem in the notice concerns the portion soliting comments on an "analysis" by a Mr. Gerald Chase of slides used by NIOSH in a presentation concerning their on-going study of the possible relationship between dpm and lung cancer. The notice fails to clearly state whether the agency is in fact reopening all or portions of its risk assessment for further public comment, is asking the public whether it should reopen that risk assessment based on the Chase "analysis", or is it doing something else. Clearly the answer to this question significantly impacts scope of the notice and the range of matters which commenters need to consider in the remaining time available for comment.

The lack of clarity in this notice arises from the fact that in the most recent prior notices in this ongoing rulemaking, MSHA has been extraordinarily clear about its intentions with respect to comments on risk. In collecting comments on a proposal to amend the current rule last year, MSHA stated very clearly that it was not reopening the analysis of risk, and would not take comments on that issue. It did note new studies of which it was aware and asked commenters to submit any others of which they were aware, but did not take comments on any of these new studies nor agree to consider them. Accordingly, seeking comment now on an "analysis" of a study in progress which concerns risk is, on its face, a change from the agency's prior approach.

As has been noted for the record by myself and other experts in administrative law, this Administration has violated the law by failing to timely and fully implement the duly promulgated interim standards for the metal and nonmetal sector. The agency is compounding this violation with another if it ultimately decides to alter its risk analysis based on information collected since the risk assessment was compiled and the agency failed to provide the public with proper notice it may use the information for that purpose.

I urge the agency to either withdraw its notice or issue a new notice and request for comment that clarifies its intent.

Thank you.

Peter Galvin
9633 Parkwood Drive
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March 14, 2003

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