From: Thomas McGarity [mailto:tmcgarity@mail.law.utexas.edu]
Sent: Wednesday, September 24, 2003 6:07 PM
To: comments@msha.gov
Subject: RIN 1219-AB29

Dear sirs:

Please consider the attached letter as comments in response to your Notice of Proposed Rulemaking issues on August 14, 2003, RIN 1219-AB29.

Thank you.

Thomas O. McGarity
Center for Progressive Regulation
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CPR CENTER FOR PROGRESSIVE REGULATION

August 26, 2003

The Honorable Edward M. Kennedy
Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C. 20510

The Honorable Joseph Lieberman
Ranking Member
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senators Kennedy and Lieberman:

The Center for Progressive Regulation (CPR) is a 501(c)(3) nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny.

CPR is writing to bring to your attention a serious and ongoing dereliction of duty by senior officials of the U.S. Department of Labor (DOL) and the Mine Safety and Health Administration (MSHA) and its adverse effects on the health of thousands of workers. Nine months ago, CPR wrote to MSHA criticizing its decision to suspend the requirements of a legally promulgated health standard to protect underground miners from diesel particulate matter. A copy of that letter is attached. CPR warned the agency that its action was unlawful in that it violated the Administrative Procedure Act (APA) and the Federal Mine Safety and Health Act (Mine Act). The DOL and MSHA have nevertheless continued to ignore these laws, and they are now attempting to codify their unlawful actions in a recently issued compliance guide.

In January 2001, MSHA issued a health standard to protect underground metal and nonmetal miners from the emissions generated by diesel-powered engines. These miners are exposed to very high concentrations of diesel exhaust, including diesel particulate matter (DPM), a potential human carcinogen. The risks to miners' health from DPM include diminished pulmonary function, cardiovascular and cardiopulmonary disease and lung cancer.[1] The

[1] MSHA's Quantitative Risk Assessment published with the final rule in January 2001 shows overwhelming evidence for the significant risk to workers' health from exposure to high levels of

regulation was designed to reduce workers' exposure to DPM through a phase-in of requirements with a limit on DPM exposure beginning in July 2002. As enforcement of the rule was scheduled to commence in July 2002, however, the agency announced that it would delay implementation of the rule's key requirements. This action was unlawful. As the attached letter painstakingly details, the law is clear that the effective date of a final rule is a substantive aspect of the rule that becomes legally binding 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: Suspension of Agency Rules*, 65 N.C. L. Rev. 645, 653 (1987).

The agency's recently issued "Metal and Nonmetal Interim Diesel Particulate Matter Standard Compliance Guide Q&As" demonstrates its willingness to substitute less protective provisions for the lawfully promulgated requirements. For example, the rule requires mine operators to:

> "limit the concentration of DPM to which miners are exposed in underground areas of a mine by restricting the average eight-hour equivalent full-shift airborne concentration…to 400_{TC} ug/m^3."

This provision of the legally promulgated health standard is unambiguous---all mine operators must limit miners' workshift exposure to DPM. MSHA's compliance guide, however, provides the following instruction to a mine operator:

> Question 14: Can I apply for an extension of time to comply with the interim limit [400_{TC} ug/m^3]?
>
> Answer: You will not need to apply for an extension. MSHA recognizes that in some cases, individual mine operators, particularly some small operators may have difficulty in achieving full compliance with the interim limit immediately due to feasibility constraints. Mine operators may indicate these circumstances to the MSHA inspector during regular inspections of the mine.

Nothing in the final rule allows a mine operator to "opt-out" of the rule's requirements, and DOL and MSHA have no legal basis for making these *de facto* "adjustments" to the rule. The only lawful way to change the explicit language of a regulation is to promulgate a new regulation following the rulemaking procedures set out in section 553 of the APA.

The compliance guide also effectively vacates another part of the legally promulgated health standard. This provision reads:

> "In the event of a violation by the operator of an underground metal or nonmetal mine of the applicable concentration limit…the operator must establish a DPM control plan…[which] describes the controls the operator will utilize to maintain the concentration of DPM to the applicable limit."

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diesel particulate matter: the estimates of excess lung cancer deaths are substantial (i.e., they range from 15 deaths per 1000 workers up to 830 deaths per 1000 workers.)

This provision is also unambiguous. When an MSHA inspector documents an overexposure to the DPM limit, the mine operator must develop a plan to control miners' exposure to DPM. MSHA's new compliance guide, however, reads as follows:

> Question 24: Will I need to implement a DPM control plan when I am cited for a miner's overexposure?
> Answer: No. MSHA has stayed the effectiveness of §57.5062 addressing the DPM control plan pending completion of the ongoing rulemaking to revise the 2001 existing rule.

DOL and MSHA do not have the authority to stay a legally promulgated rule while they pursue a new rulemaking. The attached letter specifically addresses this issue and provides citations to the applicable legal authorities. Yet, the agency continues to pursue this unlawful action.

CPR has attempted to communicate its concerns to DoL and MSHA, but to no avail. We would ask you to investigate this unlawful activity on the part of an agency that has sadly decided to bend the law and compromise the health of workers in the service of the narrow economic interests of a powerful industry.

Sincerely,

_____
Thomas O. McGarity
President

Enclosure: CPR Letter, November 2002

cc: Marvin W. Nichols, Jr., Director
MSHA Office of Standards, Regulations and Variances
1100 Wilson Blvd., Room 2313
Arlington, VA 22209-3939
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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 818. 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/m^3 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,

Thomas McGarity, President
Center for Progressive Regulation,
W. James Kronzer Chair in Law
University of Texas Law School