Testimony of Peg Seminario
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Before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Workforce Protections
Hearing on "The Secret Rule:
Impact of the Department of Labor's Worker Health Risk Assessment Proposal"
September 17, 2008

Chairwoman Woolsey, Ranking Member Wilson, and members of the committee: Thank you for the opportunity to testify today on the Department of Labor's proposed rule on occupational risk assessment. My name is Peg Seminario, and I am Safety and Health Director for the AFL-CIO. In my more than 30 years working on safety and health issues, I have been involved in dozens of rulemakings on safety and health standards and regulations promulgated under the Occupational Safety and Health Act.

On Friday, August 29, 2008, just before Labor Day, the Department of Labor (DOL) published a proposed rule in the ***Federal Register*** imposing new requirements on the Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) for conducting occupational risk assessments in developing workplace health rules. This new rule, developed in secret by political appointees in the Office of the Assistant Secretary of Policy (OASP) during the last months of the Bush Administration, would significantly delay and potentially weaken future occupational health protections.

This new rule is being pushed through by an Administration that for the past seven and one-half years has refused and failed to set any new OSHA health rules to protect workers, except for one rule that was issued pursuant to court order. Now, the Administration is rushing to lock in place requirements to make it more difficult for the next administration to protect workers from known health risks. This cynical measure is unfounded, unsound, and harmful to workers. We fully support HR 6660, legislation that would stop the adoption or implementation of this rule.

The risk assessment rule proposed by DOL would do the following:

- Add a new step to the rulemaking process for setting occupational health standards by requiring both OSHA and MSHA to issue an advanced notice of proposed rulemaking (ANPR) for every occupational health standard to solicit scientific studies and other information on health risks and exposures. This would add years of delay to an already glacial process and result in unnecessary death and disease for workers.

- Require OSHA and MSHA to respond to every public comment submitted on the risk assessment issues, regardless of the validity or merit of the comment, before issuing a proposed or final rule.

- Require the agencies to gather and analyze available industry-by-industry evidence related to working life exposures, which neither OSHA nor MSHA now do, which will add significant time to the rulemaking process and which could result in weaker protections for workers.

- Codify existing Office of Management and Budget (OMB) and DOL informational quality and peer review guidelines, locking into place by rule controversial regulatory policies of the Bush Administration, many of which have been criticized or rejected by the National Academy of Sciences.
- Require OSHA and MSHA to post all relevant documents related to an occupational health standard, including all underlying studies and analyses, on www.regulations.gov within 14 days after the conclusion of the relevant step in the rulemaking process. On this point, it is worth noting that 16 days after the DOL risk assessment rule was published in the ***Federal Register***, DOL had failed to make any of the underlying documents related to ***this*** rulemaking part of the public docket.

The DOL Risk Assessment Rule is Unnecessary and Unsound.

According to DOL, the purpose of this rule is "to compile its existing best practices related to risk assessment into a single, easy to reference regulation." But as noted above, and explained in greater detail below, the rule does more than codify existing practices – it changes existing practices and imposes new burdens on OSHA and MSHA.

The rule is unnecessary. OSHA has conducted risk assessments for its occupational health rules for decades, and recently MSHA has done so as well. OSHA's risk assessments have withstood court challenges and have been found to be sound.

And the rule is inappropriate. The Department of Labor already has risk assessment guidelines that were adopted in 2002 as part of DOL's information quality guidelines to implement Bush Administration policies on peer review and data quality. (Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor, October 1, 2002.) Guidance is meant to be just that – non-mandatory, flexible directives that reflect the views, policies and practices of an agency, department or administration, and that can be changed. By proposing to codify these risk assessment practices into a formal rule, the Bush Administration is attempting to impose its policies and practices on the next administration.

The Rule Will Add Years of Delay to OSHA and MSHA Rulemaking and Delay Needed Protections.

The DOL rule would require OSHA and MSHA to issue an ANPR for every occupational health rule, except for emergency rules. This new mandatory step for every rulemaking is not needed and will delay needed protections.

The OSHA and MSHA standard setting processes already provide for much more extensive public input and participation than virtually all other government agencies. Both agencies routinely cast a wide net, soliciting information using a variety of mechanisms such as Requests for Information published in the ***Federal Register***, public meetings, stakeholder meetings, workshops, advisory committees, and negotiated rulemaking committees, in addition to publishing a formal ANPR in the ***Federal Register***. ANPRs may be appropriate for some rules, but rules vary in their complexity and approach, and it is unsound to impose a one-size fits all process and methodology on all rules.

Mandating an additional formal step in the rulemaking process for every occupational health rule, and requiring OSHA and MSHA to respond to all comments on the risk assessment issues before even issuing a proposed rule, will add approximately two years to a process that already takes eight or more years to complete. For this reason, in 1987 the Administrative Conference of the United States recommended that OSHA ***not*** routinely use ANPRs. ACUS Recommendation 87-10, *Regulation by the Occupational Safety and Health Administration*, 52 Fed. Reg. 49,147 (1987).

It is important to point out that this delay in protection has real impacts on worker health. Every month or year of delay results in unnecessary exposure by workers to harmful substances, and results in deaths and illnesses that could have been prevented. For example, according to OSHA's risk assessment on hexavalent chromium, every year of delay in the adoption of the new 5.0 ug/m3 standard resulted in 40 to 145 lung cancer deaths. Similarly, OSHA's preliminary risk assessment on silica estimates that reducing the permissible exposure limit to 50 ug/m3 will prevent 41 silicosis deaths and 19 lung cancer deaths annually. Every year of delay in setting a silica rule results in 60 unnecessary deaths.

The proposed new risk assessment rule includes rules currently under development within its reach. This means that for rules that have been under development for years, OSHA will have to go back to square one and start anew under the new risk assessment rules. So, for example, an OSHA rule on silica that has been under development since 1997 will be delayed even further. It is worth noting that the silica rule has been designated by the Bush Administration as a priority for action on the Regulatory Agenda since 2002, and that OSHA completed the required small business review on the draft silica rule in 2003. But for the past 4 years the OMB required peer review of the silica risk assessment has been repeatedly delayed. It is our understanding that this rule, like other pending OSHA rules, has been held up by the Office of the Secretary. And now, with this new rule the Department would require OSHA to start all over and issue an ANPR for silica, delaying this important standard for many more years.

The risk assessment rule would also delay action on an OSHA standard to protect workers from diacetyl, a food flavoring chemical that causes a disabling deadly lung disease. As you know, last year the House of Representatives passed legislation requiring OSHA to issue a final standard on diacetyl within two years of enactment. The Bush Administration opposed the legislation and refused to issue an emergency rule, but promised to move expeditiously to develop a diacetyl standard through normal rulemaking procedures. But there has been no such action. A small business review on a draft diacetyl rule, scheduled to be initiated in January, has yet to happen, and there is no sign that the Administration has any intention of acting. If the next Administration decides to move quickly on diacetyl, they can't. The new DOL risk assessment rule would require OSHA to issue an ANPR and respond to all comments before moving forward with a proposed rule.

It is shameful that after refusing to take action to protect workers from serious well-recognized health hazards for 7 ½ years, that the Bush Administration is spending its lasts months and taxpayer money to lock in place rules that would prevent the next administration from taking prompt action.

The DOL Rule Would Change the Way OSHA and MSHA Assess Worker Health Risks and Could Result in Weaker Protections.

The new DOL rule would require OSHA and MSHA to gather and analyze available industry-by-industry evidence related to working life exposures in evaluating risk, which neither OSHA nor MSHA now do. Changing OSHA and MSHA's risk assessment practice in this manner is inappropriate and could lead to weaker protections for workers.

The current practice of both agencies is to evaluate the risk of exposure posed to the overall population of workers exposed to the hazard in question at the level of exposure under an existing rule or conditions, and to assess how a reduction in exposure to lower levels would reduce that risk. Both the OSHAct and the MSHAct require that the agencies protect workers against health risks even if they are exposed over the course of a working lifetime. In keeping with this statutory requirement, both agencies have adopted a practice of assessing workplace health risks based upon exposure over 45 years.

In regulating occupational health risks, both agencies usually set a single permissible exposure level for all workers exposed to the hazard. This limit applies to all industries covered by the rule. The agencies appropriately assume that exposure to similar levels of a chemical pose the same risk to workers, regardless of the sector where the exposures occur. Thus, the proposed industry-by-industry assessment of health risks – and the idea that different exposure limits could be set for workers in different sectors – makes no sense for rules that cover many groups of workers.

In addition, the proposal appears to potentially open the door to changing OSHA and MSHA's longstanding assumption of a 45 year working lifetime exposure. An earlier version of the proposal explicitly made this change, and the new proposal is murky on this point. Such a change would be unsound. In many industries such as coal mining and construction, a large number of workers are employed in the industry or the occupation over their entire working life. These long-term workers are at the greatest risk and deserve to be protected. Basing risk determinations and exposure levels on the average time in an occupation or industry will reduce the level of protection and leave all workers at greater risk. For example, if OSHA's hexavalent chromium standard was based on the assumption that workers were on average employed for 10 years, the permissible exposure level would be 4.5 times higher than that set by OSHA, creating a greater risk for all workers, and allowing much greater cumulative exposures and risk for long-term workers. This approach is unsound and contrary to the directive in the Occupational Safety and Health Act and Mine Safety and Health Act that protections be set at a level that will protect workers who are exposed for a "working lifetime."

The Process by Which DOL Has Developed the Risk Assessment Rule is Highly Irregular and Flawed.

The proposed risk assessment rule has been developed in secret by political appointees in the Department of Labor's Office of Assistant Secretary for Policy (OASP), with little involvement by OSHA and MSHA and with no public notice prior to its publication. OASP has no expertise in risk assessment and no authority under the Occupational Safety and Health Act or Mine Safety and Health Act for the development or issuance of occupational safety and health rules. It is our understanding that the background for the rule was developed by an outside

contractor, not by the agencies or OSHA or MSHA experts on risk assessment and occupational health standards.

This is in direct contradiction to the recommendation by the National Academy of Sciences that risk assessment guidelines be developed by the individual agencies with the technical expertise and knowledge of legislative requirements. (National Academy of Sciences, Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget, 2007).

The risk assessment rule was not included in the Department of Labor's semi-annual regulatory agenda published in April 2008, despite a requirement under Executive Order 12866 that all rules under development be listed on the agenda. The first public indication that this rule was even under consideration came on July 7, when a notice was posted on www.reginfo.gov, that the draft proposed rule was at OMB for review under Executive Order 12866. No explanation or information about the rule was posted, and the Department refused to provide any information to the Congress, the press or public when asked. Information about the content of the rule only became public when the ***Washington Post*** obtained an earlier draft and published a story on July 23. Subsequently, the ***Post*** and other media outlets obtained a copy of the draft that had been submitted to OMB for review, and posted the document on their respective websites.

Many in the scientific, labor, and occupational safety and health communities objected to the Department of Labor's draft proposal and the process by which it was developed. The American College of Occupational and Environmental Medicine, the American Industrial Hygiene Association, the American Public Health Association and a group of over 75 scientists all wrote to Secretary of Labor Elaine Chao urging her to withdraw the draft rule.

Despite these objections, the Department forged ahead. The draft proposal was cleared by OMB on August 25th, and published in the ***Federal Register*** on August 29, 2008, the Friday before Labor Day.

The proposed rule violates the policy announced by White House Chief of Staff Josh Bolten on May 9, 2008, which states that except for "extraordinary circumstances," agencies were supposed to issue any new proposed rules by no later than June 1, 2008. No "extraordinary circumstances" exist to justify DOL's last-minute rule.

The Department is trying to rush the proposal through and is depriving the public of an opportunity to meaningfully participate in this rulemaking process. DOL is giving the public only ***30 days*** to comment on the proposed rule – an unusually short comment period that started on the Friday before a three-day holiday weekend.

The 30 day time period for comment on a rule with such significant impact is unusual and inadequate. OSHA and MSHA typically provide a far longer comment period on their proposed rules, and Executive Order 12866, under which the proposal was supposedly reviewed, says that agencies should ordinarily provide at least 60 days' notice.

For example, in 1996, when OSHA was adopting new rules on Recording and Reporting Occupational Injuries and Illnesses, the agency initially provided 90 days for comments and

extended the comment period twice for a total comment period of 150 days. In addition, six days of public meetings were held to provide full opportunity for public input.

Even for non-mandatory guidance, agencies have generally provided much longer comment periods than 30 days. When OMB proposed its Bulletin on Peer Review and Information Quality in 2003, an initial 90-day comment period was provided and a public workshop was convened at the National Academy of Sciences. In response to comments, in 2004, a revised draft bulletin was re-proposed and an additional 30 days were provided for comments. Recently, OSHA published Proposed Guidance on Workplace Stockpiling of Respirators and Facemasks for Pandemic Influenza and provided 60 days for public comments. Prior to this in 2007, OSHA had circulated a draft for public comment and with CDC convened a series of public meetings soliciting input from interested stakeholders.

Moreover, while the proposed DOL risk assessment rule requires OSHA and MSHA to post documents in the public docket within 14 days, as of September 15, 2008, 16 days after the proposal was published, the Department had failed to post any of the background documents and analyses related to this rule.

Finally, and importantly, because the proposed risk assessment rule will affect the substance and process of standard-setting under the Occupational Safety and Health Act and the Mine Safety and Health Act, it is the AFL-CIO's view that the Department of Labor must hold a public hearing on the proposal if requested. The AFL-CIO and others have requested such a hearing, but the Department has given no indication that it intends to schedule one.

Conclusion

The Bush Administration started its tenure in 2001 by repealing OSHA's ergonomics standard, and for the past 7 ½ years it has refused to take action to issue new safety and health protections unless under court order or in response to Congressional mandates. Now in its waning days, the Administration is attempting to put in place new regulatory requirements that would make it much more difficult for the next administration to take action to protect workers. DOL's proposed risk assessment rule is unsound, unnecessary and will result in unnecessary deaths and disease among workers. If the Department of Labor does not withdraw this harmful measure, we urge the Congress to enact legislation to stop it.