United Mine Workers of America

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Leon R. Sequeira
Assistant Secretary for Policy
U.S. Department of Labor
200 Constitution Avenue, NW, S-2312
Washington, DC 20210

SUBJECT: Risk Assessment Policy
RIN: 1290-AA23

Dear Assistant Secretary Sequeira:

Attached you will find the comments of The United Mine Workers of America (UMWA), which supplement our prior submission objecting to the above-referenced proposal on both procedural and substantive issues. We continue to urge withdrawal of the proposed rulemaking; in the alternative we still seek hearings and an extension of the comment period.

The UMWA also joins in the comments of the AFL-CIO on this proposed rulemaking, which are being submitted separately.

Sincerely,

Judith Rivlin

Attachment

cc: Cecil E. Roberts, President, UMWA
Dan Kane, Secretary-Treasurer, UMWA
Pat Silvey, Director of Standards, Regulations & Variances for MSHA
Dennis O'Dell, UMWA Department of Occupational Health and Safety

Comments of United Mine Workers of America
On DOL's
Risk Assessment Policy
RIN: 1290-AA23

The United Mine Workers of America vehemently opposes both the procedures used to promulgate this proposed rule, and the substance of the proposed rule. These comments address some matters that plague the entire rule, though we focus on several issues that are unique to MSHA rendering the proposal even more offensive and unlawful as applied to the Mine Act.

Insofar as the proposed rule would require an Advanced Notice of Proposed Rulemaking prior to the promulgation of any health standards, and risk assessments before health standards could be promulgated, the proposed rule exceeds both the protective intent of the Mine Act and the rulemaking procedures Congress delegated specifically to MSHA, *not* to the DOL Policy Office.

We also object to the process used to promulgate this rule. Having attempted to review the underlying documents cited in the Notice of Proposed Rulemaking - the "existing best practices relating to risk assessment" - we remain uncertain of what is included: these materials cannot be found on the "regulations.gov" site. Not having ready access to these materials has prejudiced our efforts to consider and respond further. To the extent the rule indicates "the Department shall post together in an easily accessible and well organized format on http://www.regulations.gov, all relevant documents related..." this example establishes that the Department does not do what it promises to do. This extraordinary lack of transparency in the process is especially ironic given the Agency's stated purpose in this rulemaking is to promote transparency.

Not only would this proposed rule significantly delay desperately needed protections for workers, but it contradicts explicit time limits Congress specified in the Mine Act. In particular, Congress anticipated that the Secretary of Labor would sometimes appoint an advisory committee to make recommendations regarding a rule to be promulgated in order to serve the objectives of the Mine Act. 30 U.S.C. Sec. 101(a)(1). The Secretary may appoint an advisory committee based on information submitted "by an interested person, a representative of an organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of [Health and Human Services], the National Institute for Occupational Safety and Health [NIOSH], or a State or political subdivision..." Id. Congress thus intended the Secretary to accept and pursue suggestions about needed rules from a wide array of sources. Congress did not burden the Secretary with procedural hoops such as this proposed rule would impose before the Secretary could take action to "develop, promulgate...improved mandatory health and safety standards for the protection of life...in coal or other mines" 30 U.S.C. Sec 101 (a).

Whenever the Secretary receives a recommendation from an advisory committee, the Secretary must quickly take action, within 60 days or the alternative - but specific - time prescribed. 30 U.S.C. Sec. 101(a)(2). Likewise, whenever NIOSH submits a recommendation that a rule be promulgated, modified or revoked, and the recommendation is accompanied by appropriate criteria, the Secretary

must appoint an advisory committee or immediately proceed to publish a proposed rule (or the reasons not to propose such a rule). 30 U.S.C. Sec. 101(a)(1). Mandating a prior ANPR is incompatible with this rulemaking process that Congress specified.

The proposed rule also provides that "evidence relating to working life exposures" is to be considered when performing its risk assessment. Yet, the Mine Act expressly directs MSHA to develop standards that will protect miners "even if such miner has regular exposure to the hazards...for the period of his working life." 30 U.S.C. 101(a)(6)(A). Insofar as this proposed rule suggests it would be relevant to consider how long different miners may work in the industry, that contradicts the directive from Congress that standards under MSHA are to be promulgated so that any miners who spend an entire working career in the mines - as many, many miners certainly do- will be protected for the duration of his or her working life.

Further, in the Mine Act, Congress intended the Secretary to be aggressive in promulgating health and safety standards to protect miners. There is no doubt that the statutory goal of MSHA (and OSHA) is to ensure that workers are provided with a safe and healthful workplace. Insofar as the proposed risk assessment scheme would consider individual substances, this contradicts MSHA's legislative history which establishes that the rulemaking authority includes:

> not only the promulgation of standards covering individual substances, but also standards covering classes of substances. The [Senate Committee on Human Resources] believes that "generic" standards of this kind may often provide more effective protection to miners. In addition, the Committee believes that the overriding consideration in setting health standards dealing with toxic substances and harmful physical agents must be the protection of the miner.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 21 (1977). This language demonstrates Congress did not expect or want the Secretary to perform any kind of prior risk analysis before taking action to protect miners, whether from individual substances or entire classes of substances.

The Mine Act does not require MSHA to determine that miners face "significant risk" before promulgating health standards. Rather, it provides that in promulgating standards dealing with toxic materials and other harmful substances the Secretary "shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards...for the period of his working life." 30 U.S.C. 101(a)(6)(A). Thus, the Mine Act omits the significant risk language found in Section 3(8) of the OSH Act. Not only is there no authority for the proposition that MSHA should perform a significant risk analysis before promulgating protective health standards, but the DC Circuit has challenged that very notion. National Mining Assoc v. MSHA, 116 F. 3d 520, 528 (D.C. Cir 1997).

The Mine Act sets forth the relevant criteria the Secretary must consider when promulgating such standards: research, demonstrations, the latest scientific data, feasibility, and experience gained under the Mine Act as well as other health and safety laws. 30 U.S.C. 101(a)(6)(A). Congress did

not provide for "risk analysis" to inform the Secretary's rulemaking priorities. Rather, the Mine Act directs that any such standard represent the "highest degree of health and safety protection for the miner" based on the "best available evidence" – even if the available evidence might not meet the protocol set forth in the proposed rule.

Even under OSHA, the Supreme Court determined that DOL "need not wait until symptoms of a disease appeared, but could act to "reduce the risk" of serious material impairment." AFL-CIO v Marshall, 617 F.2d 636, 654-55 (D.C. Cir. 1979), cited with approval in United Steelworkers of America v Marshall, 647 F.2d 1189, 1252 (D.C. Cir. 1980). The legislative history makes clear that Congress "did not expect MSHA to tarry for years over its health and safety rulemakings. (cite omitted)." Oil Chemical and Atomic Workers v Zeeger and MSHA, 768 F.2d 1480, 1488 (D.C. Cir. 1985).

As it stands, miners are regularly exposed to outdated standards that have been well-documented as causing miners to suffer material impairment, including death. No ANPR is needed to establish that coal miners are getting sick and dying from toxic and other harmful materials in coal mines. Respirable dust is one glaring example but there are many others, too. As for respirable dust, some 13 years ago – in November 1995 – NIOSH determined that the respirable dust standard was too high and needed to be lowered. NIOSH issued a Criteria Document concerning occupational exposure to respirable coal mine dust. It concluded that coal miners continue to be at risk of developing black lung, and included recommendations to reduce that risk. MSHA responded by saying "it will respond to this Criteria Document by developing a proposed rule to enhance protection for miners from exposure to respirable coal mine dust ..." 61 FR 18308 (April 25, 1996). The Agency indicated it would begin working on such a proposed rule, but "defer full development ... until it can consider the broad range of recommendations expected to be issued [in the fall of 1996] by the Secretary's Advisory Committee to Eliminate Pneumoconiosis Among Coal Mine Workers. In 1996, MSHA's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers convened and conferred; in the fall of 1996, that Advisory Committee made a number of recommendations to curb miners' excess exposures to respirable coal dust. Report of the Mine Safety and Health Administration Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers (October 1996). MSHA subsequently proposed – and then withdrew – proposed rules that would have addressed the respirable dust hazards. Today there is strong and building evidence of increasing incidences of black lung disease among miners who first entered the coal industry after the current 2mg limit was established. Yet, the Secretary of Labor *still* has failed to promulgate regulations to better protect miners' from respirable dust exposure. On this record it would be absurd and offensive for DOL's Policy Office to now require MSHA to pursue an ANPR before proposing another respirable dust rule. We simply do not need any kind of risk analysis to know that miners need better protections from this coal mine killer, respirable dust.

The proposed rule would certainly cause delay in any future rulemaking on health standards. That the proposed rule suggest otherwise is disingenuous. If the purpose of the new procedure is to gather information to inform the Agency's rulemaking priorities, then the information gathered would need to be gathered and analyzed *before* any new rule would be proposed, thereby delaying the

drafting of any such rule. If the purpose is simply to gather and analyze risk information (which, as shown above, would be improper under MSHA), then it could be accomplished *during* the proposed rulemaking process itself. To suggest the work on an ANPR and a proposed rule could be performed simultaneously belies common sense. Requiring two sets of analysis before any health standard could be promulgated also conflicts with Section 101(a)(3) of the Mine Act which permits only those procedural rules that avoid "unnecessary cost and delay."

Finally, the proposed rule is confusing in several particulars, two of which we note. It uses the terms "exposure" and "dose" interchangeably. Yet there is a difference in the meaning and proper use of these terms. The proposed rule also begins by claiming through the "Purpose" that it is to apply to the development of all health standards, but then defines significant risk with regard to OSHA, leaving us uncertain about the application of significant risk to health standards developed under the Mine Act.

We further contend that this proposed rule represents poor public policy. For an outgoing administration, which itself has failed to promulgate meaningful health standards, to attempt to bind the rulemaking processes of future administrations is a bad idea. We also note that the Bush administration, through the Bolton memo, directed all agencies to desist from promulgating new regulations absent an emergency. There is no such emergency that warrants this rulemaking. This effort defies the Bolton directive.

In summary, this proposed rule would bind the Secretary in a way that contradicts the fundamental purpose as well as the plain language of the Mine Act. It would delay the promulgation of desperately needed rules, and cause a duplication of efforts insofar as the Agencies would need to respond to comments for both the ANPR and the subsequent proposed rule. It would constitute a tremendous waste of taxpayer dollars and valuable personnel resources. It should be withdrawn.