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# MINE SAFETY & HEALTH LAW

## Bulletin

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### MSHA'S SPRING 2008 UNIFIED AGENDA

The Mine Safety and Health Administration's Spring 2008 Unified Agenda ("the Agenda") was published on May 8, 2008. See <http://www.msha.gov/regsinf1.htm>. The Agenda lists all regulations that are expected to be under review or development between April 2008 and April 2009. The Agenda also lists all rulemaking actions that were completed by MSHA in the six-month period preceding the publication of the Agenda. The following is a summary of the rulemaking actions addressed in the Agenda:

#### COMPLETED ACTIONS

Completed actions are actions or reviews that MSHA has completed or withdrawn since publishing its last unified agenda. Completed actions also include items that MSHA began and completed between issues of the unified agenda. The following actions are listed as complete in the Agenda:

1. **Diesel Particulate Matter in Underground Metal and Nonmetal Mines.** MSHA announced its intention to enforce the diesel particulate matter (DPM) final limit of 160 micrograms of total carbon (TC) per cubic meter of air ( $160_{TC} \mu\text{g}/\text{m}^3$ ) effective May 20, 2008. See 30 C.F.R. § 57.5060(b)(3). Significantly, MSHA also announced that it no longer intends to issue a proposed rule to convert the final DPM permissible exposure limit (PEL) from  $160_{TC} \mu\text{g}/\text{m}^3$  to a comparable elemental carbon (EC) PEL. MSHA states that it has insufficient evidence suggesting an appropriate conversion factor, and the National Institute for Occupational Safety and Health (NIOSH) has determined that further study would be needed to convert the final 160 TC PEL to a comparable EC PEL.

Subsequent to the publication of the Agenda, MSHA issued Program Policy Letter No. P08-IV-1 describing how the agency intends to enforce the final 160 TC PEL. See <http://www.msha.gov/regs/complian/ppls/2008/PPL08-IV-1.asp>. Additionally, MSHA published a document entitled "Error Factors for Enforcing a  $160 \mu\text{g}/\text{m}^3$  Total Carbon (EC+OC) Personal Exposure Limit, which explains how the agency will address uncertainty due to potential sampling and analytical errors. See <http://www.msha.gov/01-995/TotalCarbonPersonalExposureLimit.pdf>.

2. **Mine Rescue Teams.** On February 8, 2008, MSHA published its final rule revising its existing standards for mine rescue teams for underground coal mines. See 73 Fed. Reg. 7635. The final rule implements Section 4 of the Mine Improvement and New Emergency Response (MINER) Act of 2006. Although the final rule was effective upon its publication, MSHA has provided delayed compliance dates for some sections to give mine operators the time needed to comply with the stated requirements. Specifically:
  - a. By May 8, 2008, each mine operator must send the District Manager a statement describing the mine's method of providing mine rescue coverage in accordance with 30 C.F.R. § 49.12(h).
  - b. By August 8, 2008, each mine must have a mine rescue station located no more than 1 hour ground travel time from the mine in accordance with 30 C.F.R. § 49.12(f). If equipment is not readily available, the operator must have purchase orders for the required equipment. Additionally, the mine operator must have a responsible person knowledgeable about mine

emergency response who has completed the course of instruction in mine emergency response prescribed by MSHA in accordance with 30 C.F.R. § 75.1501(a)(2).

- c. By November 10, 2008, each operator of a large mine must have either an individual mine-site team or a composite team as one of the mine's certified mine rescue teams in accordance with 30 C.F.R. § 49.40.
- d. By February 9, 2009:
  - Mine rescue team members must have completed 96 hours of annual training, including participation in two local mine rescue contests and training at each covered mine in accordance with 30 C.F.R. § 49.18(b).
  - Each mine operator must make available two certified mine rescue teams whose members are familiar with the operations of the mine and have participated in two local mine rescue contests in accordance with 30 C.F.R. § 49.20(a).
  - Each team providing coverage to a mine must be knowledgeable about the operations and ventilation of the mine in accordance with 30 C.F.R. §§ 49.20(b) and 49.30.
  - Each mine operator must certify to the District Manager that each team designated to provide mine rescue coverage to the mine meets the requirements for certification in accordance with 30 C.F.R. § 49.50.
3. **Asbestos Exposure Limit.** On February 29, 2008, MSHA issued a final rule revising its existing health standards for asbestos exposure at metal and nonmetal mines, surface coal mines, and surface areas of underground coal mines. *See* 73 Fed. Reg. 11284. Effective April 29, 2008, MSHA's asbestos PEL was lowered to an 8-hour time-weighted average of 0.1 fiber per cubic centimeter (f/cc) of air and the excursion limit was lowered to 1.0 f/cc of air as averaged over a 30-minute sampling period. The National Mining Association, the National Stone, Sand & Gravel Association, and others have petitioned for review of the final rule in the 11<sup>th</sup> Circuit Court of Appeals.
4. **Sealing of Abandoned Areas.** On April 18, 2008, MSHA published its final rule on the sealing of abandoned areas. *See* 73 Fed. Reg. 21182. The final rule, which revises MSHA's Emergency Temporary Standard (ETS), includes requirements for seal strengths; design applications and installation; sampling and monitoring of sealed atmospheres; construction and repair of seals; training for persons conducting sampling and persons constructing seals, and recordkeeping to protect miners from hazards of sealed areas. While the final rule was effective upon its publication, seal manufacturers and mine operators have until October 20, 2008 to submit revised seal applications and ventilation plans, respectively.
5. **Criteria and Procedures for Proposed Assessment of Civil Penalties.** On February 7, 2008, MSHA issued a final rule revising three types of civil penalties to adjust for inflation. *See* 73 Fed. Reg. 7206. First, the maximum civil penalty for a non-flagrant violation of the Mine Act was raised from \$60,000 to \$70,000. Second, the maximum daily penalty for failing to correct a violation for which a citation has been issued under Section 104(a) of the Mine Act was raised from \$6,500 to \$7,500. Third and finally, for any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters, the maximum civil penalty was raised from \$275 to \$375.

## FINAL RULE STAGE

Actions for which MSHA plans to publish a final rule or an interim final rule or to take other final action as the next step are considered to be at the "final rule stage." The Agenda lists the following actions as being at the final rule stage:

1. **Mine Rescue Team Equipment.** On September 6, 2007, MSHA published a Notice of Proposed Rulemaking (NPRM) concerning its equipment standard for underground coal and metal and nonmetal

mine rescue teams. *See* 72 Fed. Reg. 51338. The final rule would update the requirement for self-contained breathing apparatus (SCBA) from 2-hour to 4-hour apparatus; increase the required oxygen and chemical reserves to maintain mine rescue teams from 6 hours to 8 hours; increase the required number of full charged oxygen bottles from one extra to two extra; and require mine rescue stations to be equipped with four approved, hand-held multi-gas detectors or four gas detectors for each gas which may be at the mine served. The comment period for the NPRM closed on November 9, 2007. MSHA expects to publish its final rule in June 2008.

2. **Fire Extinguishers in Underground Coal Mines.** On December 20, 2007, MSHA published a NPRM proposing to amend the current standard (30 C.F.R. § 75.1100-2) for the quantity and location of firefighting equipment and materials in underground coal mines. *See* 72 Fed. Reg. 72301. In lieu of the current requirements for rock dust and other firefighting materials, the proposed rule would allow the use of portable fire extinguishers in working sections of underground anthracite coal mines that have no electrical equipment at the face and produce less than 300 tons of coal per shift. The rule also would require an additional fire extinguisher in lieu of rock dust at temporary electrical installations in all underground coal mines. The comment period for the NPRM closed on February 4, 2008. MSHA expects to publish its final rule in July 2008.

### PROPOSED RULE STAGE

Actions for which MSHA plans to publish a NPRM as the next step in its rulemaking process or for which the closing date of the NPRM comment period is the next step are considered to be at the “proposed rule stage.” The Agenda lists the following actions as being at the proposed rule stage:

1. **Use of or Impairment from Alcohol and Other Drugs on Mine Property.** On October 4, 2005, MSHA published an Advanced Notice of Proposed Rulemaking (ANPRM) to announce that it is considering publishing a proposed rule to address the risks and hazards to miner safety from the use of or impairment from alcohol and drugs on mine property. *See* 70 Fed. Reg. 57808. During the comment period for the ANPRM, which ended on November 27, 2005, the agency conducted a number of public meetings across the country. MSHA’s projected publication date for the NPRM is June 2008.
2. **Refuge Alternatives for Underground Coal Mines.** In accordance with the Congressional mandate contained in Section 112(b) of the Consolidated Appropriations Act of 2008, MSHA has proposed new requirements for refuge alternatives in underground coal mines and the training of miners in their use. *See* 73 Fed. Reg. 34139. The proposed rule also includes requirements for testing and approval of refuge alternatives. The proposal would implement Section 13 of the MINER Act of 2006. It includes MSHA’s response to the NIOSH Report on Refuge Alternatives. *See* [http://www.cdc.gov/niosh/mining/mineract/pdfs/Report\\_on\\_Refuge\\_Alternatives\\_Research\\_12-07.pdf](http://www.cdc.gov/niosh/mining/mineract/pdfs/Report_on_Refuge_Alternatives_Research_12-07.pdf). All comments must be received before August 19, 2008. The agency will hold public hearings on July 29 (Salt Lake City, UT), July 31 (Charleston, WV), August 5 (Lexington, KY), and August 7, 2008 (Birmingham, AL). MSHA is required by statute to publish its final rule not later than December 31, 2008.
3. **Safety Standards Regarding the Recommendations of the Belt Air Technical Study Panel.** In accordance with the Congressional mandate contained in Section 112(b) of the Consolidated Appropriations Act of 2008, MSHA must publish a proposed rule not later than June 20, 2008, that implements the recommendations of the Technical Study Panel for the Utilization of Belt Air and the Composition and Fire Retardant properties of Belt Material in Underground Coal Mines. The proposed rule must contain regulations consistent with the recommendations contained in the Technical Study Panel’s December 2007 report. *See* <http://www.msha.gov/beltair/BeltAirFinalReport122007.pdf>. MSHA is required by statute to publish its final rule not later than December 31, 2008.

### PRERULE STAGE

Actions which MSHA will undertake to determine whether or how to initiate rulemaking are considered to be at the “prerule stage.” Such actions occur prior to a NPRM and may include ANPRMs and reviews of existing regulations. The Agenda lists the following actions as being at the prerule stage:

1. **Continuous Personal Dust Monitors.** MSHA announced that it will issue a Request for Information (RFI) in July 2008 to solicit public input on potential applications of Continuous Personal Dust Monitors (CPDMs). Responses to the RFI will assist the agency in determining: (1) how to deploy the CPDM in coal mines and utilize its coal dust monitoring capability to further improve miner health; and (2) the regulatory and non-regulatory actions that would promote its use for exposure monitoring and control.
2. **Smoke Density and Toxicity.** MSHA announced that it will issue a Request for Information (RFI) in June 2008 to solicit public input on the criteria for testing density and toxicity of smoke from burning conveyor belts or similar materials.

## LONG-TERM ACTIONS

Items under development but for which MSHA does not expect to have a regulatory action within the 12 months after publication of the Agenda are considered to be long-term actions. The Agenda lists the following long-term actions:

1. **Verification of Underground Coal Mine Operators' Dust Control Plans and Compliance Sampling for Respirable Dust.** On March 6, 2003, MSHA published a NPRM that would have required underground coal mine operators to verify, through sampling, the effectiveness of the dust control parameters for each mechanized mining unit specified in the approved mine ventilation plan. *See* 68 Fed. Reg. 10784. On July 3, 2003, MSHA announced that all work on the final rule would cease and the rulemaking record would remain open in order to obtain information concerning CPDMs being tested by NIOSH. *See* 68 Fed. Reg. 39881. MSHA now states that it will determine the next course of action with regard to this rulemaking after it completes its review of all CPDM data and test results.
2. **Determination of Concentration of Respirable Coal Mine Dust.** On July 7, 2000, NIOSH and MSHA jointly proposed that a single full-shift measurement (single sample) would accurately represent the atmospheric condition to which a miner is exposed. *See* 65 Fed. Reg. 42068. In mid-2003, MSHA announced that all work on the final rule would cease, but the agency has left the comment period open indefinitely. *See* 68 Fed. Reg. 47886. MSHA continues to work with NIOSH and others to test the production prototype CPDM unit.
3. **High-Voltage Continuous Mining Machine Standard for Underground Coal Mines.** On July 16, 2004, MSHA proposed a rule to establish design requirements for approval of high-voltage continuous mining machines operating where miners work in underground mines. *See* 69 Fed. Reg. 42812. The proposed rule also would establish new mandatory electrical safety standards for the installation, use, and maintenance of the high-voltage continuous mining machines used in underground coal mines. MSHA published a supplemental NPRM on March 28, 2006 (*see* 71 Fed. Reg. 15359) that proposed and requested comments on two issues arising from oral and written comments that MSHA received during the hearing and post-hearing comment period. These issues involved: (1) the types of training cables that can be used with high-voltage continuous mining machines; and (2) a requirement to use high-voltage insulating gloves or other personal protective equipment when handling energized trailing cables. The comment period on the supplemental NPRM closed on May 30, 2006. MSHA has not projected a date for final action on this potential rulemaking.
4. **Respirable Crystalline Silica Standard.** MSHA is considering several options to reduce miners' exposure to crystalline silica. MSHA's existing standards are designed to limit miners' exposure to 100  $\mu\text{g}/\text{m}^3$ . NIOSH and the American Conference of Governmental Industrial Hygienists (ACGIH) recommend a 50  $\mu\text{g}/\text{m}^3$  exposure limit for respirable crystalline silica. MSHA has not projected a date for its next action on this potential rulemaking.
5. **Revising Electrical Product Approval Regulations.** Part 18 of 30 C.F.R. describes the approval requirements for electrically operated machines and accessories intended for use in underground gassy mines, and for related matters, such as approval procedures, certification of components, and acceptance of flame-resistant hoses and conveyor belts. MSHA is proposing revisions to improve the efficiency of

the approval process, recognize new technology, add quality assurance provisions, address existing policies through the rulemaking process, and reorganize portions of the approval regulations. MSHA will be addressing the requirements of the forthcoming NPRM in phases. The first phase will be flame-resistance testing of mining materials. This action will be published first because the MINER Act requires all lifelines to be flame-resistant by June 14, 2009.

6. **Field Modifications of Permissible Mobile Diesel-Powered Equipment.** This proposed rule would codify the field modification process for Part 36 field modification acceptances, expand the field modification process to allow mine operators to apply for field modifications, and continue to ensure that field-modified equipment operates safely in gassy underground mines. The proposed rule would also implement existing policy to reflect current procedures for processing field modifications related to mobile diesel-powered transportation equipment. Further, the proposed rule would require labeling provisions for all new field modifications accepted under Part 36. No date has been published for the forthcoming NPRM.
  
7. **Equivalency Evaluation of the U.S. Environmental Protection Agency's Non-Road Diesel Engine Standards.** On March 3, 2006, MSHA published its Notice of Intent to Review the U.S. Environmental Protection Agency's standards for non-road diesel engines. *See* 71 Fed. Reg. 15358. The review will determine if certain EPA requirements in 40 C.F.R. Part 89 (Control of Emissions From New and In-Use Non-Road Compression-Ignition Engines) provide or can be modified to provide at least the same degree of protection as existing requirements in 30 C.F.R. Part 7, Subpart E (Diesel Engines Intended for Use in Underground Coal Mines). MSHA's review is limited to the testing of Category B diesel engines as defined in 30 C.F.R. § 7.82. The comment period on this rulemaking ended on May 30, 2006. No date has been published for the agency's final action.

***If you would like any further information or assistance regarding this Safety and Health Bulletin, please feel free to contact Tim Olson at (303) 659-5040 or [tim@tro-law.com](mailto:tim@tro-law.com).***

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