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# MINE SAFETY & HEALTH LAW

## Bulletin

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### MSHA'S SPRING 2009 UNIFIED AGENDA

The Mine Safety and Health Administration's Spring 2009 Unified Agenda ("the Agenda") was published on May 11, 2009. See <http://www.reginfo.gov/public/do/eAgendaMain>. The Agenda lists all regulations that are expected to be under review or development between April 2009 and April 2010. 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Completed actions are actions or reviews that MSHA has completed or withdrawn since publishing its last unified agenda.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. **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 published its final rule for refuge alternatives in underground coal mines. See 73 Fed. Reg. 80656 (Dec. 31, 2008). The final rule includes requirements for the testing and approval of refuge alternatives and components of refuge alternatives; requirements for assuring that refuge alternatives are readily available, capable of sustaining trapped miners for 96 hours, and maintained in operating condition; and requirements for training miners to locate, deploy and use, maintain, and transport refuge alternatives. This action, which became effective on March 2, 2009, implements Section 13 of the MINER Act of 2006.

On January 13, 2009, the United Mine Workers of America ("UMWA") filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") challenging MSHA's final rule regarding refuge alternatives for underground coal mines. The UMWA contends that the final rule does not provide enough protection to miners soon enough. On March 12<sup>th</sup>, the Court granted the National Mining Association's motion for leave to intervene in the case. The Court's most recent order, issued on May 5<sup>th</sup>, holds the case in abeyance "pending settlement."

2. **Flame Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air from the Belt Entry.** In accordance with the Congressional mandate contained in Section 112(b) of the Consolidated Appropriations Act of 2008, MSHA published its final rule implementing 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. See 73 Fed. Reg. 80580 (Dec. 31, 2008). The final rule contains new standards for conveyor belt flammability, qualifying Atmospheric Monitoring System operators, levels of respirable dust in belt entries, airlocks between air courses, minimum and maximum air velocities, approval for the use of air from the belt entry to ventilate working sections, smoke sensors, standardized tactile signals on lifelines, replacing point-type heat sensors with carbon monoxide sensors, and belt conveyor and belt entry maintenance. This final rule, which became effective upon its publication, implements Section 11 of the MINER Act of 2006.

On January 13, 2009, the UMWA filed a petition for review in the D.C. Circuit challenging MSHA's rule regarding flame-resistant conveyor belt, fire prevention and detection, and use of air from the belt entry. The UMWA has long opposed the use of the belt entry to ventilate working sections. On February 23<sup>rd</sup>, the Court granted the National Mining Association's motion for leave to intervene in the case. The Court's most recent order, issued on May 5<sup>th</sup>, holds the case in abeyance "pending settlement."

## 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. **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 Notice of Proposed Rulemaking (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 the types of training cables that can be used with high-voltage continuous mining machines, and 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 now expects to take final action on this rulemaking in November 2009.
2. **Use of or Impairment from Alcohol and Other Drugs on Mine Property.** On September 8, 2008, MSHA published an NPRM 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. 52135. The proposal would require all mine operators to implement a drug-free workplace program that, among other things, includes random drug and alcohol testing, pre-employment testing, reasonable suspicion testing, and post-accident testing. The proposal also would require operators to refer miners violating the requirements to a substance abuse professional for evaluation and treatment recommendations. During the comment period for the NPRM, which ended on November 10, 2008, MSHA accepted written comments and conducted public hearings.

The proposed rule has drawn sharp criticism from mine operators and trade associations representing the mining industry because, among other things, it would prohibit a mine operator from terminating the employment of a miner for a first-time violation of the mine's drug-free workplace program. This particular provision is highly controversial because many mines already have a zero tolerance drug policy in place. In its Fall 2008 Unified Agenda, MSHA projected that it would publish a final rule in January 2009; however, the agency now states that the date of final action is "to be determined."

3. **Criteria and Procedures for Proposed Assessment of Civil Penalties/Recordkeeping and Reporting: Immediate Notification.** Consistent with the MINER Act, MSHA's civil penalty regulations require a specified penalty for failure to report certain types of accidents. Under the existing regulations, MSHA must review all violations of 30 C.F.R. §§ 50.10 and 100.5(f) for special assessment. MSHA states that it will publish a final rule to make "nonsubstantive organizational changes to improve the efficiency and effectiveness of the agency's procedures for processing civil penalties." Final action is expected in August 2009.
4. **Mine Rescue Teams.** As a result of litigation initiated by the UMWA, the D.C. Circuit has invalidated a portion of MSHA's Mine Rescue Teams final rule, applicable to underground coal mines. The Court's

ruling requires state employees on state-sponsored teams to train at small mines semi-annually instead of annually and to participate in two mine rescue contests annually instead of one. In addition, mine-site teams at small mines will have to train semi-annually instead of annually. MSHA states that it will publish a final rule in May 2009 to conform the existing rule to the Court's decision. MSHA's existing rule, which was published on February 8, 2008, is now codified in 30 C.F.R. Part 49. *See* 73 Fed. Reg. 7635.

## PROPOSED RULE STAGE

Actions for which MSHA plans to publish an 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. **Verification of Underground Coal Mine Operators' Dust Control Plans and Compliance Sampling for Respirable Dust.** On March 6, 2003, MSHA published an 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 Continuous Personal Dust Monitors ("CPDMs") being tested by NIOSH. *See* 68 Fed. Reg. 39881. NIOSH issued a report on CPDMs in September 2006 and another report concerning test results in June 2007. MSHA states that it will publish a notice in October 2009 soliciting additional comments.
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. Since then, MSHA has collaborated with NIOSH, miners' representatives, industry, and the manufacturer to test the production prototype CPDM unit. MSHA states that it will publish a notice in October 2009 soliciting additional comments.
3. **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. The agency is addressing this rulemaking in phases. The first phase, which concerns flame-resistance testing of mining materials, was completed on December 31, 2008, with the publication of a final rule that amended 30 C.F.R. §§ 18.1, 18.2, 18.6, 18.9, and 18.65. *See* 73 Fed. Reg. 80580. The second phase of the rulemaking, concerning intrinsic safety requirements, will be the subject of an NPRM that MSHA expects to publish in March 2010.
4. **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. MSHA states that it will publish an NPRM in February 2010.

5. **Coal Mine Dust Personal Monitors.** This proposed rule, which was published on January 16, 2009, would revise requirements that MSHA and NIOSH apply to approve sampling devices that monitor miner exposure to respirable coal mine dust. *See* 74 Fed. Reg. 2915. The proposal would establish criteria for the approval of CPDMs, which would be worn by miners and would report exposure to dust levels continuously during the shift. In addition, the proposal would update application requirements for the existing “coal mine dust personal sampler unit” to reflect improvements in this sampler over the past 15 years. The comment period for the NPRM ended on March 17, 2009, and MSHA expects to take final action in April 2010.

## 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 an NPRM and may include an Advanced Notice of Proposed Rulemaking (“ANPRM”), a Request for Information (“RFI”), and a review of existing regulations. The Agenda lists the following actions as being at the prerule stage:

1. **Explosives and Blasting.** MSHA will review the existing coal and metal and nonmetal standards for explosives and blasting in view of advances in technology and consistency. MSHA expects to publish an ANPRM in July 2009.
2. **Proximity Detection Systems for Underground Mines.** MSHA intends to issue an RFI in January 2010 that would seek information on the use of proximity detection systems to address crushing and pinning hazards associated with the operation of machinery underground. There are no existing 30 C.F.R. regulations that mandate the use of a proximity detection system.

## 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. **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  $\mu\text{g}/\text{m}^3$  of silica. NIOSH recommends a 50  $\mu\text{g}/\text{m}^3$  exposure limit for respirable crystalline silica, and the American Conference of Governmental Industrial Hygienists recommends a 25  $\mu\text{g}/\text{m}^3$  exposure limit. MSHA states that it will publish an NPRM in April 2011 to reduce the exposure limit for respirable crystalline silica.
2. **Occupational Exposure to Coal Mine Dust.** In February 1996, the Secretary of Labor convened a Federal Advisory Committee on the Elimination of Pneumoconiosis Among Coal Miners (“Committee”) to assess the adequacy of MSHA’s current program and standards to control respirable dust in underground and surface coal mines, as well as other ways to eliminate black lung and silicosis among coal miners. The Committee represented the labor, industry, and academic communities. The Committee submitted its report to the Secretary of Labor in November 1996, with the majority of the recommendations unanimously supported by the Committee members. The Committee recommended that MSHA consider lowering the coal dust PEL. NIOSH data indicates increased prevalence of coal workers pneumoconiosis “clusters” in several geographical areas; particularly in the Southern Appalachian Region. MSHA states that it will publish an NPRM in April 2011 to lower the coal mine dust permissible exposure limit.

3. **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. MSHA provides no further information in the Agenda on this subject.
  
4. **Smoke Density and Toxicity.** On June 19, 2008, MSHA published an RFI to solicit public input on the criteria for testing density and toxicity of smoke from burning conveyor belts or similar materials. *See* Fed. Reg. 35057. The extended comment period closed on September 8, 2008. MSHA provides no further information in the Agenda on this subject.

***If you would like any further information or assistance regarding this Mine Safety and Health Law 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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