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MSHA'S FALL 2009 UNIFIED AGENDA

The Mine Safety and Health Administration's Fall 2009 Unified Agenda ("the Agenda") was published on December 7, 2009. See <http://www.reginfo.gov/public/do/eAgendaMain>. The Agenda lists all regulations that are expected to be under review or development between October 2009 and October 2010. The Agenda also lists all rulemaking actions that were completed by MSHA in the six-month period preceding the publication of the Agenda.

All of the rulemaking actions addressed in the Agenda are summarized below; however, the following developments are particularly noteworthy:

- MSHA's highly controversial Notice of Proposed Rulemaking (NPRM) concerning the use of or impairment from alcohol and other drugs on mine property was formally withdrawn effective November 9, 2009.
- MSHA previously stated that it would publish an NPRM in April 2011 to lower the coal mine dust permissible exposure limit; however, MSHA has accelerated its projected date for the NPRM to September 2010.
- MSHA previously announced that it would publish an Advanced Notice of Proposed Rulemaking (ANPRM) concerning explosives and blasting in July 2009; however, this rulemaking was formally withdrawn effective September 3, 2009.
- MSHA expects to issue an ANPRM concerning impoundments at metal and nonmetal mines in June 2010.
- MSHA expects to issue a Request for Information (RFI) in January 2010 that will seek information on the use of proximity detection systems to address crushing and pinning hazards associated with the operation of machinery underground.

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Completed actions are actions or reviews that MSHA has completed or withdrawn since publishing its last unified agenda.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. **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 now states that it will incorporate aspects of this rulemaking into its rulemaking on Occupational Exposure to Coal Mine Dust (Lowering Exposure), RIN 1219-AB64.*
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 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 now states that it will incorporate aspects of this rulemaking into its rulemaking on Occupational Exposure to Coal Mine Dust (Lowering Exposure), RIN 1219-AB64.*
3. **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 previously stated that it would publish an NPRM in February 2010; however, MSHA now states that it does not anticipate doing further work on this rule at this time. *This rulemaking action was withdrawn effective July 27, 2009.*
4. **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. MSHA previously projected that it would publish a final rule in January 2009; however, the agency now states that it will continue to collect data to determine the extent to which the use of alcohol or drugs contributes to mine accidents, and will continue to consider options to address alcohol and drugs at all mines. *This rulemaking action was withdrawn effective November 9, 2009.*
5. **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 was

intended to 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 was 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 now states that it does not anticipate doing further work on this rule at this time. *This rulemaking action was withdrawn effective July 27, 2009.*

6. **Explosives and Blasting.** MSHA initiated this action to review the existing coal and metal and nonmetal standards for explosives and blasting in view of advances in technology and consistency. *MSHA previously announced that it would publish an ANPRM in July 2009; however, this rulemaking was withdrawn effective September 3, 2009.*
7. **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 published a final rule on June 17, 2009, to conform the existing rule to the Court's decision. See 74 Fed. Reg. 28606.*

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 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 expects to take final action on this rulemaking in April 2010.*
2. **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 August 14, 2009, and MSHA expects to take final action in April 2010.*
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 January 2010.*

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. **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. **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 September 2010.*
3. **Occupational Exposure to Coal Mine Dust (Lowering Exposure).** 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 September 2010 to lower the coal mine dust permissible exposure limit.*

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 ANPRM, an RFI, and a review of existing regulations. The Agenda lists the following actions as being at the prerule stage:

1. **Coal Mine Respirable Dust; Continuous Personal Dust Monitor (CPDMs).** On June 24, 2003, MSHA announced that all work on its Plan Verification and Single-Sample Respirable Coal Mine Dust final rules would cease and the rulemaking record would remain open in order to obtain information concerning CPDMs being tested by NIOSH. A Federal Register notice was published on July 3, 2003, extending the comment periods indefinitely. NIOSH issued a report on the CPDM in September 2006,

and another report concerning test results in June 2007. MSHA issued an RFI on October 14, 2009. *See 74 Fed. Reg. 52708. The comment period for the RFI, which solicits public input on potential applications of this new monitoring technology in coal mines, will end December 14, 2009.*

2. **Proximity Detection Systems for Underground Mines.** There are no existing 30 C.F.R. regulations that mandate the use of a proximity detection system. *MSHA intends to issue an RFI in January 2010 that will seek information on the use of proximity detection systems to address crushing and pinning hazards associated with the operation of machinery underground.*
3. **Metal and Nonmetal Impoundments.** In biennial reports prepared by the Federal Emergency Management Agency (FEMA), MSHA has been criticized for its lack of regulation of metal and nonmetal dams. MSHA will issue an ANPRM to solicit information relative to the proper design, construction, operation, maintenance, and other safety issues for impoundments at metal nonmetal mines whose failure could cause loss of life or significant property damage. *The expected publication date of the ANPRM is June 2010.*

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. **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 73 Fed. Reg. 35057. The extended comment period closed on September 8, 2008. MSHA provides no further information in the Agenda on this rulemaking.*
2. **Notification of Legal Identity.** MSHA believes that currently required information does not provide sufficient information for the agency to identify all of the mine “operators” responsible for operator safety and health obligations under the Mine Act. This new regulation would expand the information required to be submitted to MSHA and allow the agency to “better target the most egregious and persistent violators and more effectively deter future violations by imposing penalties and other remedies on those violators.” *MSHA expects to publish a NPRM in January 2011.*

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.

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