

# CLIENT ALERT

## The MSHA Regulatory Agenda—an Active Year Ahead in 2014

### Winter 2014

As we enter into the second year of President Obama's last term, he is faced with a divided Congress that remains inhospitable to many of his Administration's objectives. With crucial mid-term elections capping the year, many observers (including the author) predict that there will be a heightened emphasis on executive branch action, unencumbered—to the extent possible—by the Congress.

With regard to mine safety and health regulations, the seeds for increased activity can be found in the MSHA portion of a list of all the Department of Labor (DOL) rulemakings as described in the Fall 2013 Executive Branch-wide Regulatory Agenda (RA). This RA was released on November 26. However, the White House Office of Management and Budget (OMB) directive seeking information for the RA is dated August 7, and the mandated deadline for submissions by MSHA and other agencies was August 29. Thus, information in the RA may be dated. Nevertheless, it provides a snapshot in time and is a useful overview of MSHA's docket of pending rulemakings. In addition to the November 26 publication of the Fall 2013 RA, in the Federal Register for January 7, 2014, the General Services Administration's Regulatory Information Services Center published a lengthy "Introduction to the United Agenda of Federal Regulatory and Deregulatory Actions." With regard to MSHA rulemakings, this document essentially repeated the information of the Fall 2013 RA. Finally, as will be described below, on January 8, MSHA's long-pending rules on proximity detection systems for mobile machines in underground mines disappeared from the RA—the first regulatory movement of the new year. No official reason was given for this action.

The Spring 2014 RA should be released around the Memorial Day Holiday. By that time, it is likely that some of the rulemakings described and summarized below will have advanced on the road toward completion.

### Description of the Rules

Although the rationale is unclear, some of these rulemakings are viewed as more important than others. Thus, the RA lists the DOL MSHA-related regulatory priorities, divided into the following somewhat artificial and bureaucratically described categories:

#### 1) MSHA/Plan/Prevent/Protect Initiatives—

- a. Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines;

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b. Proximity Detection Systems for Mobile Machines in Underground Mines;

2) MSHA Risk Reduction Initiatives—

a. Lowering Miners' Exposure to Coal Mine Dust, including Continuous Personal Dust Monitors;

b. Regulatory Actions in Response to Recommendations Resulting From the Investigation of the Upper Big Branch Explosion;

c. Respirable Crystalline Silica Standard; and

3) MSHA Regulatory Review and Burden Reduction Initiative—

a. Criteria and Procedures for Proposed Assessment of Civil Penalties (Part 100).

Summary of DOL-MSHA Regulatory Priorities—The Hidden Hand of OIRA

Set forth below is a summary of the status of these key rulemakings. At the center of all of these proceedings (as well as all executive branch agencies' rulemakings) is a relatively little known, small, and secretive organization in OMB called the Office of Information & Regulatory Affairs (OIRA). Virtually all rules developed by agencies like MSHA must be sent for review and approval by OIRA before the agency can send them to the Federal Register for publication as either proposed or final regulations. Theoretically, OIRA is supposed to examine rulemakings to determine their adherence to and harmonization with a variety of executive orders (EO), such as EO 12,866, "Regulatory Planning and Review." From a policy perspective, OIRA appears to this long-time observer to effectively carry out that mission; but it also serves as a political clearing house for the Obama Administration (and previous Administrations, going back to that of President Ronald Reagan). For example, prior to the 2012 presidential election, there is little doubt that OIRA simply held up most politically controversial "hot potato" rulemakings from further activity, including some of the MSHA regulations described below. Furthermore, the workings of OIRA are so opaque that any outside examination of its analyses and the timing of completion of its work on any given rulemaking is no more than educated guesswork of the movements of this "hidden hand." These summaries, therefore, include the publicly posted date when (if applicable) the rule was sent to OIRA for review. Once sent, however, the hidden hand controls movement. Thus, this author's best judgment as to the accuracy of any projected Federal Register publication date is included.

*\* Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines*

Proposed in the Federal Register of August 31, 2011, the comment period closed on November 14, 2011. Even though the issue is a favorite of MSHA Assistant Secretary Joe Main, for over two years, finalization of these rules languished. However, the RA now projects publication of a final rule in February 2014. With posting to OIRA having taken place on January 8 (as noted above), it's likely that the February 2014 projection for a final rule is realistic. As for what the rules will require, that remains to be seen since the specific contents of the final regulations will not be known until they appear in the Federal Register. We do know that one of the major flaws in the 2011 proposal was that available proximity detection systems did not have the precision to stop within the very specific distance from a miner in the "red zone," as was mandated by the proposed rule. That is not to say these available systems could not otherwise perform effectively. Indeed, since the 2011

proposal, a number of underground coal mine operators have voluntarily equipped their continuous miners with proximity detection systems. Whether such voluntary efforts will conform to the final regulation is unknown. Public statements from Assistant Secretary Main have shed little, if any, light on the issue. On the one hand, in his end-of-year summary of mining fatalities for 2013, Assistant Secretary Main said that of the 20 coal mine fatalities that occurred last year, four fatalities could have been prevented with proximity detection systems. On the other hand, he also said that as of December 2013, more than 380 proximity detection systems had been installed on continuous mining machines (287) and on other mobile equipment (100). Thus, once published as a final rule, its requirements will have to be studied very carefully.

*\* Proximity Detection Systems for Mobile Machines in Underground Mines*

Related to the above, a request for information (RFI) on proximity detection systems for *mobile machines* in underground mines was published in the Federal Register on February 1, 2010, and the comment period on that RFI closed on April 2, 2010. A proposed rule had been under review at OIRA since September 16, 2011 (two weeks after the continuous mining machine rule was published in the Federal Register). The scope of this mobile machine proposal was confusing. At various times, MSHA described its coverage as mobile machines in all underground mines—both coal and metal-nonmetal mining. At other times, the scope seemed to be limited to underground coal mines. Whatever may have been the coverage of these to-be-proposed rules, the reasons for delay by the hidden hand of OIRA were unknown. The RA projected publication of this rule as a proposal in May 2014. That date has now been made moot by the above-noted January 8 disappearance of this item from the RA. No official explanation has been given for the disappearance of this rulemaking from the current postings; however, at least one trade press report stated that MSHA will revise this package "to make refinements consistent with technological advances." It will be most interesting to see whether these "technological advances" also show up in the continuous mining machine proximity detection system final rules.

*\* Lowering Miners' Exposure to Coal Mine Dust, including Continuous Personal Dust Monitors*

Proposed in the Federal Register on October 19, 2010, the comment period on the rulemaking closed on June 20, 2011. Certainly the most complex and controversial rulemaking of Joe Main's tenure as MSHA chief (as evidenced by a thirteen-hour public hearing at MSHA headquarters in February 2011), the proposal is founded on the notion that a nationwide epidemic of new cases of coal workers' pneumoconiosis (CWP) exists in younger coal miners, despite the fact that mandatory health standards for exposure of coal miners to respirable coal mine dust have been in effect since 1971.

Central to the proposal would be: (1) imposition of a 1.0 mg./m.<sup>3</sup> respirable coal mine dust standard (in lieu of the current 2.0 mg./m.<sup>3</sup> standard); (2) as measured over a single full shift (as opposed to the current system of averaging measurements taken over a series of shifts); and (3) use of new technology to measure exposure (the continuous personal dust monitor), as opposed to the current gravimetric sampler. The proposal has been roundly and exhaustively opposed by the industry on the grounds (among others) that no nationwide epidemic of CWP exists, and that only some "hot spots" of chronic lung disease (most likely silicosis) have been identified in the Southern Appalachian Region. Further, the industry maintains that it would be technologically and economically infeasible for mine operators to comply with the proposed rule. Concerns about feasibility have also led to quiet opposition by the United Mineworkers' of America (UMWA).

As for the status of this rulemaking, after over two years of being hidden in the workings of the bureaucracy (including in the run-up to the 2012 presidential election), a final rule was sent over to OIRA on August 21, 2013. Previously projected to be published in the Federal Register as final in December, that goal was missed. With both industry and the UMWA opposed to

the rule as proposed, and in spite of the fact it is central to Joe Main's legacy as the key part of his campaign to "STOP BLACK LUNG NOW," whether it will be finalized anytime soon is uncertain. Previous efforts to reform the respirable coal dust rules—by Davitt McAteer in the waning days of the Clinton Administration, and by Dave Lauriski in the first term of President George W. Bush—foundered in the face of industry and UMWA opposition. One would have thought the third time would have been the charm, but the current proposal managed to garner intense opposition from both coal mine operators and miners, despite the fact of consensus among all stakeholders that the current rules are outmoded and in need of reform—and even a consensus among the UMWA and some coal mine operators on a framework for reform (a framework largely ignored by MSHA).

*\* Regulatory Actions in Response to Recommendations Resulting From Investigation of the Upper Big Branch Explosion*

Based on MSHA's accident report of the April 2010 Upper Big Branch Mine Explosion, MSHA's recommendations for regulatory actions would appear to be in line for a Request For Information (RFI) to be published in the Federal Register seeking data, comments, and information on issues relating to rock dusting, ventilation, mine examinations, certified persons, and MSHA-approved instructors. Publication in the Federal Register is projected for March 2014. This date would appear to be in the ballpark.

*\* Respirable Crystalline Silica*

Projected to be published in the Federal Register as a proposed rule in June 2014, we can expect a proposed permissible exposure limit (PEL) of 50  $\mu\text{g}/\text{m}^3$ , identical to the new silica standard proposed by OSHA on September 12, 2013 (after years of review by OIRA). Demonstrating intra-departmental collaboration, MSHA maintains it will use OSHA's work on the health effects of occupational exposure to crystalline silica and OSHA's risk assessment—a dubious foundation in this author's view. The MSHA rule will cover both surface and underground coal and metal-nonmetal mines. However, it is unlikely to be proposed in the Federal Register in 2014. It may not even reach OIRA review next year because it appears to be so strongly reliant on the OSHA proposed silica rulemaking, which is very controversial and is likely to remain open for comment until at least mid-2014.

*\* Criteria and Procedures for Proposed Assessment of Civil Penalties*

Also projected for publication in the Federal Register this past December as a proposed rule, it has been under review at OIRA since December 2, 2011. Touted as a rulemaking to improve the efficiencies of MSHA's efforts to assess civil penalties and facilitate resolution of enforcement issues, it remains to be seen as to whether those purposes can be achieved. The last revision of Part 100 in March 2007 was similarly touted by then-MSHA chief Richard Stickler, but proved to be a wolf in sheep's clothing. This proposal could be on track for publication before the end of the year.

**A Word about Refuge Alternatives**

Although not listed as a regulatory priority, the RFI for Refuge Alternatives is included as an entry in the MSHA RA. Mindful, as noted at the outset, that the information in the RA may be dated, in the case of this RFI that is certainly the case. With the publication in the Federal Register this past December 6 of an extension of the RFI's comment period until June 2, 2014, to allow interested parties time to review new NIOSH research raising significant questions about the effectiveness of the

currently deployed fleet of inby portable refuge alternatives in underground coal mines, the stage is set for a very important and controversial effort, likely to be front and center in 2014, and for some time thereafter.

This complex issue will be addressed more fully in a future issue of *The Mining Law Monitor*, but by way of brief background, among the provisions of the MINER Act, enacted in June 2006, following the January 6, 2006 Sago Mine Explosion, was a congressional mandate that MSHA conduct a refuge alternative rulemaking. The resulting regulations, promulgated on December 31, 2008, require the deployment of underground coal mine refuge alternatives for use by miners who might be trapped and unable to escape in an emergency.

Technology-forcing in nature, these regulations were controversial to begin with; they became even more controversial in 2013 for two reasons. First, the breathable air, air monitoring, and harmful gas removal components of grandfathered refuge alternatives were required to be upgraded to enhanced MSHA performance specifications and to be then approved by MSHA by the end of 2013. That proved to be such a formidable task that, as we begin the new year, significant portions of this mandate remain to be completed. Second, and more importantly, around mid-year, NIOSH began briefing MSHA leadership, coal mine operators, refuge alternative vendors, and the UMWA that studies NIOSH was carrying out indicated serious doubts about the efficacy of grandfathered refuge alternatives in connection with their ability to: (1) purge carbon monoxide from the ambient atmosphere of refuge alternatives; and (2) control ambient temperatures and humidity should miners have no choice but to enter a refuge alternative. These problems go to the very heart of the ability of the presently deployed fleet of portable inby refuge alternatives to allow miners who might enter them to survive for the requisite 96 hours in the current rule.

All of this came to a head just after the federal shutdown in October 2013, with the National Mining Association (NMA) seeking an emergency rulemaking to allow MSHA, NIOSH, and the private sector to work on resolution of these problems. MSHA rejected the NMA request, but it is clear that these existential refuge alternative issues will have to be addressed and resolved. Work on these problems promises to be a highlight of MSHA's regulatory agenda in 2014.

#### Déjà Vu All Over Again—Health Effects of Diesel Exhaust

Finally, although the issue is unlikely to be front and center in 2014, the question of the health effects of diesel exhaust bears mentioning as worthy of readers' attention. One of the most contentious issues of the Bill Clinton MSHA Regulatory Agenda, mandatory health standards dealing with the exposure to diesel exhaust of both underground coal miners, and underground metal-nonmetal miners were finalized by then MSHA Assistant Secretary Davitt McAteer, as "midnight rules" on January 19, 2001—the very last day of the Clinton Administration. The underground metal-nonmetal mine industry, especially, resisted imposition of these rules. Over time, however, with the introduction of emission control filter technology, increased use of low-sulfur diesel fuel, and (most importantly) a turnover of the fleet of diesel-powered equipment to newer, cleaner engines, compliance with these standards was largely achieved.

One residual of that epic struggle remained in play, however. Known as the NIOSH/National Cancer Institute Diesel Exhaust in Miners Study (the "NIOSH/NCI DEMS Study"), beginning in the early 1990s, NIOSH and the NCI undertook epidemiological and nested case-control studies of the miners working at eight underground nonmetal mines around the U.S. For reasons too lengthy to relate in this article, the results of the NIOSH/NCI DEMS Study failed to be published in peer-reviewed journals until March 2012, following which the United Nations' International Agency for Research on Cancer (IARC) found diesel

exhaust to be a known human carcinogen. The DEMS Study and the IARC finding have, in turn, renewed interest in the public health effects of diesel exhaust by the U.S. EPA, which has commissioned the Health Effects Institute (HEI) to hold a Diesel Exhaust Epidemiology Workshop this coming March in Boston. Following that Workshop, the HEI's Diesel Epidemiology Panel will begin work on a report (likely to be completed in 2015), which will serve as the basis for an EPA determination as to whether or not quantitative risk assessment of the public health effects of diesel exhaust should be carried out.

NIOSH has also alerted both MSHA and OSHA to the March 2012 DEMS peer-reviewed and published studies. As of this writing, NIOSH has also finalized a letter to the miners who participated in the DEMS to alert them to the risks of exposure to diesel exhaust. To its credit, NIOSH has worked cooperatively with interested DEMS mine operators on the substance and timing of this DEMS notification letter.

Diesel exhaust is not currently an item on the MSHA RA. The issue, however, bears very careful watching.

#### Conclusion

In short, 2014 portends to be an active year for MSHA rulemakings. We may see a bit of a lull as the mid-term elections approach; but then it can be expected the pace will quicken and pick up throughout 2015. Especially in 2015 and the presidential election year of 2016, key factors in the pace of MSHA rulemakings will be President Obama's status as an increasingly "lame duck," the political makeup and control of a new 114th Congress, and the dynamics of the 2016 presidential campaign. What "midnight rules" can be expected to be finalized on January 19, 2017 by the outgoing Obama Administration remain to be seen, but it is entirely possible that the hidden hand of OIRA will push one or more of the MSHA RA topics discussed above to the forefront.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.