

Stakeholders can locate and download the TSD Chapter 8 as well as the newly posted supplemental Appendix 8E on the Distribution Transformers ANOPR TSD page: [http://www.eere.energy.gov/buildings/appliance\\_standards/commercial/dist\\_trans\\_tsd\\_061404.html](http://www.eere.energy.gov/buildings/appliance_standards/commercial/dist_trans_tsd_061404.html).

**FOR FURTHER INFORMATION CONTACT:** Sam Johnson, Project Manager, Energy Conservation Standards for Distribution Transformers; Docket No. EE-RM/STD-00-550; U.S. Department of Energy, Office of Building Technologies, EE-2J, 1000 Independence Avenue, SW., Washington, DC 20585-0121; (202) 586-0854. E-mail: [Sam.Johnson@ee.doe.gov](mailto:Sam.Johnson@ee.doe.gov).

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Issued in Washington, DC on November 8, 2004.

**David K. Garman,**

*Assistant Secretary, Office of Energy Efficiency and Renewable Energy.*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-152549-03]

**RIN 1545-BC69**

#### Section 179 Elections; Hearing Cancellation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document provides notice of cancellation of public hearing relating to the election to expense the cost of property subject to section 179.

**DATES:** The public hearing originally scheduled for November 30, 2004, at 10 a.m., is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Robin R. Jones of the Publications and Regulations Branch, Legal Processing Division at (202) 622-7180 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking and notice of public hearing that appeared in the *Federal Register* on Wednesday, August 4, 2004 (69 FR 47043), announced that a public hearing was scheduled for November 30, 2004, at 10 a.m., in the

auditorium. The subject of the public hearing is proposed regulations under section 179 of the Internal Revenue Code. The public comment period for these regulations expired on November 2, 2004. Outlines of oral testimony was due on November 9, 2004.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Monday, November 15, 2004, no one has requested to speak. Therefore, the public hearing scheduled for November 30, 2004, is cancelled.

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 04-25650 Filed 11-18-04; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### 30 CFR Parts 56, 57, 58, 70, 71, 72, 75 and 90

**RIN 1219-AA48**

#### Air Quality, Chemical Substances, and Respiratory Protection Standards

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Withdrawal of proposed rule.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is withdrawing the remaining phases of its 1989 "Air Quality, Chemical Substances, and Respiratory Protection" proposed rule, and is providing further explanation of its September 26, 2002, *Federal Register* document regarding withdrawal of the proposed rule. MSHA's 2002 decision to withdraw the remaining phases of the proposed rule was based on adverse case law, a change in Agency priorities, and the staleness of the rulemaking record. Although the September 26, 2002, document was intended to withdraw the rule as of that date, the U.S. Court of Appeals for the District of Columbia Circuit found that the document provided inadequate explanation of the Agency's decision to terminate the rulemaking. The court ordered MSHA to either proceed with the Air Quality rulemaking or give a reasoned account of its decision not to do so. This document provides a reasoned account of MSHA's decision to terminate the rulemaking and to withdraw the remaining phases of the Air Quality rule.

**DATES:** The proposed rule published on August 29, 1989 (54 FR 35760) is withdrawn as of November 19, 2004.

#### FOR FURTHER INFORMATION CONTACT:

Marvin W. Nichols, Jr., Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2313, Arlington, Virginia 22209-3939, [Nichols.Marvin@dol.gov](mailto:Nichols.Marvin@dol.gov), (202) 693-9440 (telephone), or (202) 693-9441 (facsimile). This document is available in alternative formats, such as large print and electronic format, and can be accessed on MSHA's Internet site, <http://www.msha.gov>, at the "Statutory and Regulatory Information" link.

#### SUPPLEMENTARY INFORMATION:

##### A. Rulemaking Background

On August 29, 1989, MSHA proposed a rule, 54 FR 35760, that would have, among other things, established permissible exposure limits (PELs) for substances that the Agency believed might adversely affect the health of miners; required control of exposure to such substances; prescribed methods and frequency of monitoring to evaluate exposure; and revised requirements for respiratory protection programs for metal and nonmetal mines and established similar requirements for coal mines. 54 FR 35760, 35761 (August 29, 1989). Additionally, the proposed rule included provisions addressing carcinogens, asbestos construction work, dangerous atmospheres, medical surveillance, prohibited areas for food and beverages, and abrasive blasting and drill dust control. Of the more than 600 chemical substances for which MSHA sought to establish PELs, 165 of those substances would have been regulated for the first time. Because of the scope and complexity of the Air Quality rule, MSHA divided the rulemaking provisions into three groups or "phases." The Agency set separate comment periods for each of the three groups and announced that it would hold three sets of public hearings, with each set addressing one group of the proposed rule's provisions.

The first group of provisions included abrasive blasting and drill dust control; dangerous atmospheres; exposure monitoring; prohibited areas for food and beverages; and PELs for nitrogen dioxide, nitric oxide, carbon monoxide, and sulfur dioxide. Two public hearings were held for this group of provisions, the first on June 4, 1990, in Denver, Colorado, and the second on June 7, 1990, in Coraopolis, Pennsylvania. The comment period for this group of provisions closed on March 2, 1990.

The second group of provisions included carcinogens; asbestos construction work; means of controlling exposure to hazardous substances; respiratory protection; and medical surveillance. Two public hearings were held on this group of provisions, the first on October 12, 1990, in Washington, DC and the second on October 19, 1990, in San Francisco, California. The comment period for the second group of provisions closed on June 29, 1990.

The third and final group of provisions included all permissible exposure limits other than nitrogen dioxide, nitric oxide, carbon monoxide, and sulfur dioxide. Two public hearings were held on these PELs, the first on March 19, 1991, in Denver, Colorado, and the second on March 26–27, 1991, in Washington, DC. The comment period for this group of provisions closed on December 14, 1990. Following the public hearings, the rulemaking record remained open until August 30, 1991, to permit interested persons to submit additional statements, data, and information on any provision of the proposed rule.

In 1994, MSHA adopted one provision of the proposed rule as a final rule. “Air Quality: Health Standards for Abrasive Blasting and Drill Dust Control,” 59 FR 8318 (February 18, 1994). For the reasons set forth in this document, the amount of additional work performed on the remainder of the proposed rule between 1994 and 2002 was somewhat limited.

In September 2002, MSHA decided to withdraw the remainder of its Air Quality proposed rule from the Regulatory Agenda. 67 FR 60611 (September 26, 2002). By way of explanation, the Agency said that its decision to withdraw the proposed rule “was the result of changes in Agency priorities and the possible adverse effect \* \* \* of the decision in *AFL-CIO et al. v. OSHA*,” 965 F.2d 962 (11th Cir. 1992), in which the U.S. Court of Appeals for the Eleventh Circuit invalidated an OSHA rule that set new PELs for 428 toxic substances. MSHA also noted that it had been “more than 13 years since the proposal was published and more than 12 years since the comments were received.” 67 FR at 60611.

The United Mine Workers of America (UMWA) petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Agency’s decision to withdraw its proposed Air Quality rule. The Court concluded that the Agency’s action was arbitrary and capricious because it failed to provide an adequate explanation for its decision.

*Int’l Union, UMWA v. MSHA*, 358 F.3d 40 (D.C. Cir. 2004). The Court remanded the matter to MSHA and ordered that the Agency “either proceed with the Air Quality rulemaking or give a reasoned account of its decision not to do so.” *Id.* at 45. This notice provides further explanation of the Agency’s 2002 decision to withdraw the proposed rule. The notice also withdraws the remaining phases of the Air Quality proposed rule and provides MSHA’s continuing rationale for doing so.

This notice discusses the reasons for withdrawal of the proposed rule in relation to two distinct periods of time. Section B of this notice, “Reasons for the 2002 Decision to Withdraw the Proposed Rule,” discusses the reasons underlying MSHA’s September 2002 decision to withdraw the Air Quality proposed rule. Section C of this notice, “Continuing Reasons for the Withdrawal of the Proposed Rule,” discusses the reasons that continue to support MSHA’s decision to withdraw the proposed rule. The reasons set forth in Section C relate to the period of time following publication of the September 2002 notice.

## B. Reasons for the 2002 Decision To Withdraw the Proposed Rule

MSHA’s decision to withdraw the remaining phases of its Air Quality rulemaking in September 2002 was premised on three reasons:

- The adverse effect of *AFL-CIO et al. v. OSHA*, 965 F.2d 962 (11th Cir. 1992),
- Changes in the Agency’s priorities, and
- The staleness of the rulemaking record.

Though the foregoing reasons represent the specific grounds upon which the decision was made, the limits of the Agency’s resources were an inherent element of those reasons and necessarily contributed to MSHA’s decision.

### 1. MSHA’s Statutory Responsibility

The Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, sets forth MSHA’s statutory responsibility when promulgating mandatory standards dealing with toxic materials or harmful physical agents. Section 101(a)(6)(A) of the Mine Act, 30 U.S.C. 811(a)(6)(A), states that the Secretary of Labor:

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 dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection

shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

Accordingly, the Mine Act imposes a threshold that the Agency must satisfy in promulgating mandatory health standards. Specifically, MSHA must ensure that it establishes standards based on the best available evidence, including a consideration of the latest available scientific data; it must ensure that a significant risk of “material impairment” of health or functional capacity will ensue if it fails to act (*i.e.*, the existing exposure limit poses a significant risk of material impairment or functional capacity); and it must ensure that the standard is both economically and technologically feasible. 30 U.S.C. 811(a)(6)(A).

### 2. Effect of the Eleventh Circuit’s Decision Vacating OSHA’s Air Contaminants Standard

In *AFL-CIO*, the U.S. Court of Appeals for the Eleventh Circuit vacated the Occupational Safety and Health Administration’s (OSHA’s) final omnibus Air Contaminants standard, 54 FR 2332 (January 19, 1989), in which OSHA sought to establish PELs for 428 toxic substances. Although *AFL-CIO* was decided under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, a statute with rulemaking provisions that differ in some ways from those of the Mine Act, the major holding of the Eleventh Circuit’s decision appears on its face to apply to both OSHA and MSHA: that the Agency must make specific findings for each substance and each proposed PEL. The similarities between the Air Quality and Air Contaminants standards, and the Agencies’ statutory provisions, each weighed heavily in favor of MSHA assuming a regulatory approach that was consistent with the holding of *AFL-CIO*.

Like OSHA’s Air Contaminants standard, MSHA’s Air Quality proposed rule was intended to be a “generic rulemaking” in which the Agency would set exposure limits for hundreds of substances in a single rulemaking. Unlike the OSHA Air Contaminants standard, however, MSHA’s Air Quality rule included proposed standards on eight substantive components in addition to the hundreds of proposed

PELs. The eight additional components that the Air Quality proposed rule addressed were: (1) Revision of existing standards on means of control of harmful airborne substances in mines; (2) control of dust generated by abrasive blasting and drilling; (3) exposure monitoring by mine operators; (4) hazards posed by dangerous atmospheres, including areas underground, silos, vats, tanks, and other confined spaces; (5) carcinogens; (6) asbestos construction work at mines; (7) medical surveillance of miners exposed to carcinogens; and (8) a respiratory protection program.

Although OSHA also has standards addressing many of the above components, it did not attempt to promulgate those standards as part of its Air Contaminants rule. 29 CFR 1910.94 (abrasive blasting); 29 CFR 1910.134 (respiratory protection); 29 CFR 1910.146 (confined space); 29 CFR 1926.1101 (asbestos construction work); and 29 CFR part 1990 (carcinogens policy). OSHA specifically noted in the preamble to its final Air Contaminants rule that:

The final regulation is limited to consideration of revising the PELs. There is no consideration of the ancillary requirements which are typically developed as part of individual substance rulemaking but were not included in the original § 1910.1000 standard. OSHA has published ANPRs for Exposure Monitoring (53 FR 32591–32595), and Medical Surveillance (53 FR 32595–32598), and is developing a proposal covering revision to the respirator provisions of the OSHA Standards. OSHA has issued a final rule expanding the Hazard Communication Standard.

While medical surveillance, exposure monitoring and other industrial hygiene practices are important, OSHA is not in a position to develop these requirements while at the same time developing PELs for several hundred substances. OSHA has determined that lowering exposures through the development of reduced PELs is of higher priority because it is more effective in reducing occupational diseases and material impairment of health. These ancillary requirements will be addressed as priorities dictate. 54 FR at 2335. MSHA has similarly recognized a hierarchy of controls in promulgating its rules such that miners' exposure to harmful airborne contaminants is controlled principally by removal or dilution of the contaminant, with such ancillary protections as personal protective equipment, industrial hygiene practices and medical transfer used to augment

the principal means of protection—removal of the contaminant.

MSHA's Air Quality proposed rule included some 200 (approximately 50%) more PELs than did OSHA's Air Contaminants standard, as well as the eight substantive components listed above, which OSHA's standard did not include. Accordingly, the scope and complexity of the Air Quality proposal was significantly more comprehensive and ambitious than was OSHA's already groundbreaking approach to addressing potential chemical hazards that may be found or introduced in the workplace.

As discussed in more detail in this section, the *AFL-CIO* holdings effectively gave MSHA two choices: either ignore the decision and accept the likely risk that a final rule would be vacated, or try to comply with *AFL-CIO* and tie up all of the Agency's resources for years to come. Neither of these options was suitable to MSHA, so the Agency decided to withdraw the proposed rule, a reasonable course of action in light of the case.<sup>1</sup>

The *AFL-CIO* court held that “the PEL for each substance must be able to stand independently, *i.e.*, that each PEL must be supported by substantial evidence in the record considered as a whole and accompanied by adequate explanation.” 965 F.2d at 972. The court continued by stating that “OSHA may not, by using such multi-substance rulemaking, ignore the requirements of the OSH Act.” *Ibid.* Though generic rulemaking is permissible, the court noted that generic rulemakings are required to demonstrate the existence of something “common to or characteristic of a whole group or class.” *Id.* at 971 (quoting Webster's Third New International Dictionary 945 (1966)). The court was not persuaded that OSHA's Air Contaminants standard represented generic rulemaking because the rule did not address substances with common characteristics or impose common requirements on classes of substances. Instead, the court deemed the standard to be nothing more than “an amalgamation of 428 unrelated substance exposure limits.” *Id.* at 972.

MSHA's Air Quality proposed rule was comparable to OSHA's Air

Contaminants rule in that it did not demonstrate the existence of common characteristics between, or impose common requirements on, the hundreds of substances listed in the PEL table. Under the *AFL-CIO* holding, MSHA's Air Quality rule could be categorized by a reviewing court as nothing more than an amalgamation of 600+ unrelated substance exposure limits.

*AFL-CIO* also held that the OSH Act does not permit OSHA to regulate any risk that it chooses. *Id.* at 973. Rather, the Agency may only regulate those risks that present a “significant” risk of material health impairment. *Ibid.* Thus, the court held that for each substance OSHA seeks to regulate, the Agency must present individual findings that “a significant risk of material health impairment exists at the current levels of exposure to the toxic substance in question,” *id.*, and that the proposed PEL would “prevent material impairment of health.” *Ibid.* Finally, the Eleventh Circuit held that “OSHA has a responsibility to quantify or explain, at least to some reasonable degree, the risk posed by *each* toxic substance regulated.” *Id.* at 975 (emphasis in original). Although the preamble to OSHA's Air Contaminants rule individually discussed each of the 428 toxic substances for which PELs were established, the court ultimately found that those discussions, and mere conclusory statements regarding risk reduction, fell short of the statutorily required risk assessment that the Agency was required to perform. *Id.* at 975–976.

The holding of *AFL-CIO* presented MSHA with challenges it had not contemplated at the time the Agency proposed the Air Quality rule. Of the more than 600 substances for which MSHA sought to establish PELs, it individually discussed only about two dozen. *See* 54 FR 35760, 35767–35770 (August 29, 1989). Of the two dozen or so substances that were discussed individually, the Agency did not present evidence that it believed the substances might pose a significant risk of material impairment of health or functional capacity, findings it would be required to make in order to finalize the rule. At the time the Air Quality rule was proposed, MSHA had not determined that each of the substances in the proposed rule was found on mine property, much less that those substances were found at levels sufficient to cause significant risk to miners. In this regard, the Air Quality preamble stated that “[s]ome commenters objected and favored listing only substances found on mining property and which present a risk of a

<sup>1</sup> MSHA notes that even absent the holdings of *AFL-CIO*, promulgation of a final Air Quality rule would have been extremely costly in terms of available resources. At the time that the Agency proposed the rule and for some time thereafter, MSHA believed those costs to be manageable. In retrospect, MSHA realizes that it did not fully appreciate the resources needed to promulgate a rule as comprehensive and complex as the Air Quality rule. The demanding requirements imposed by the holdings of *AFL-CIO*, however, exponentially increased the demand on its resources.

material impairment of health or functional capacity. This proposed rule includes those substances which the Agency has reason to believe, based upon the Agency's knowledge thus far, *could* pose this type of health risk *if found on mine property.*" *Id.* at 35765 (emphases added). The preamble further stated that although "the majority of substances in the 'TLV® Booklet'<sup>2</sup> *do not naturally occur in mining, they may be brought on mine property* in the course of day-to-day operations. For this reason, MSHA is proposing to include most of the TLV® list in a table of permissible exposure limits." *Id.* at 35766 (emphasis added.)

In fact, MSHA summarized commenters' general dissatisfaction with the sufficiency of the evidence the Agency provided in proposing the rule by stating:

Commenters generally criticized the Agency for limiting its discussion of specific substances on the PEL table to less than two dozen of the several hundred substances listed. They requested that MSHA give a rationale for each substance in the proposed rule, evidence that all are present in the mining environment, and how these chemicals are used. For those substances for which the Agency proposed to lower the PEL, commenters generally wanted MSHA to: Prove that the present PEL presents a significant risk to miners; quantify the extent of the risk; prove that risk represents a "material impairment of health;" and prove that any change in the standard is economically and technologically capable of being achieved.

These commenters also requested that MSHA discuss epidemiological data establishing that these substances are present in concentrations that cause a material impairment of health or functional capacity to miners. They also requested MSHA to provide evidence on the feasibility of controlling these substances with either engineering or administrative controls. 56 FR 8168, 8169 (February 27, 1991).

Like OSHA, MSHA is not statutorily authorized to regulate *any* risk it chooses; rather, section 101(a)(6)(A) of the Mine Act, 30 U.S.C. 811(a)(6)(A),

authorizes the Agency to regulate those risks which present a risk of material impairment of health or functional capacity. Because MSHA could not have reasonably promulgated a final rule which made a determination that each substance the Agency sought to regulate presented a significant risk of material impairment of health or functional capacity at the existing PEL, the PELs would not have been able to "stand independently," as was required by *AFL-CIO*. In other words, if MSHA had engaged in separate rulemakings for each of the 600+ substances, it would have been obligated to, among other things, estimate or quantify the risk posed by exposure to the substance at the existing PEL and explain why such exposure presented a significant risk of material impairment to health or functional capacity. Under the logic of *AFL-CIO*, MSHA is required to make the same findings and explanations in its omnibus rulemakings. A persuasive argument could be made that like OSHA, MSHA "is not entitled to take short-cuts with statutory requirements simply because it chose to combine multiple substances in a single rulemaking." 965 F.2d at 975.

Under *AFL-CIO*, MSHA could not have finalized the Air Quality rule in the form in which it was proposed without an unanticipated and enormous expenditure of Agency resources. Providing a quantitative risk assessment for each of the more than 600 substances would have been a lengthy, complex, and costly process requiring MSHA to conduct a significant amount of additional scientific work. In fact, MSHA's completion of rulemaking on even one substance would have required a significant commitment of Agency resources. The Agency's failure to promulgate the Air Quality rule in accordance with *AFL-CIO*, however, would have left MSHA vulnerable to a potentially formidable legal challenge to the rule.

The UMWA suggested in *Int'l Union, UMWA* that the availability of information recommending exposure limits—namely Threshold Limit Values (TLVs®—adopted by the American Conference of Governmental Industrial Hygienists (ACGIH® might enable MSHA to complete the Air Quality rulemaking despite the *AFL-CIO* decision. In fact, the availability of information related to ACGIH's TLVs would not necessarily have made the task of promulgating the Air Quality standard much less complex or arduous. While current TLVs would provide MSHA with a basis for assessing potential PELs, the Agency would still have been required to make an

independent evaluation of whether each TLV would be an appropriate PEL. MSHA could not have adopted the ACGIH's TLVs wholesale without an independent assessment of the evidence supporting a PEL consistent with each TLV. This is particularly true because TLVs are established based exclusively on health considerations. ACGIH's establishment of any given TLV does not account for such considerations as economic or technological feasibility, both of which MSHA is statutorily required to consider in establishing its exposure standards. Therefore, an independent assessment of each of the 600-odd substances would have to be made regardless of the TLV recommendations made by ACGIH. The *AFL-CIO* court specifically addressed this issue and found that although OSHA could rely on the ACGIH's recommendations, the Agency was not relieved of its responsibility to make "detailed findings, with adequate explanations, for all statutory criteria." 965 F.2d at 984. Ultimately, MSHA bears the burden of proving that it has met its statutory obligation, and as such, it must be prepared to set forth the analysis used in its determination that a given PEL is based on the best available and latest scientific evidence, *id.*, and that the chosen PEL is economically and technologically feasible.

In 2002, when MSHA made the decision to withdraw the Air Quality proposed rule, it recognized that the unfavorable holding of *AFL-CIO* did not compel the Agency to withdraw the rule. Nonetheless, *AFL-CIO* left MSHA with two equally unappealing alternatives: ignore the decision and risk that a final rule would be vacated, or comply with the holdings of the decision and encumber the Agency's resources for the foreseeable future. MSHA recognized that had it ignored the *AFL-CIO* court decision, a circuit other than the Eleventh Circuit may have been disinclined to follow the holding in that case. Nevertheless, MSHA also knew that it could have been, and likely would have been, challenged in the U.S. Court of Appeals for the Eleventh Circuit, and that litigation in that circuit would very likely have proven fatal to the Air Quality rule unless MSHA made substance-specific assessments for each of the 600+ PELs. There are numerous mine operators in the Eleventh Circuit and MSHA has had to defend its actions in that circuit on previous occasions. See *Nat'l Mining Ass'n, Alabama Coal Ass'n v. U.S. Department of Labor*, 153 F.3d 1264 (11th Cir. 1998). Even if

<sup>2</sup> TLV® is the acronym for Threshold Limit Value. Threshold Limit Values are exposure guidelines recommended by the American Conference of Governmental Industrial Hygienists (ACGIH®). The ACGIH's Web site, <http://www.acgih.org/TLV>, describes Threshold Limit Values as being "designed for use by industrial hygienists in making decisions regarding safe levels of exposure to various chemical substances and physical agents found in the workplace." MSHA's existing air quality standards incorporate by reference the ACGIH's 1972 (coal) and 1973 (metal and nonmetal) Threshold Limit Values.

MSHA was not challenged in the Eleventh Circuit, the Agency could have been challenged in a circuit that would have been persuaded by the reasoning in *AFL-CIO*. Thus, while *AFL-CIO* did not compel the Agency to terminate the Air Quality rulemaking, it compelled MSHA to take into account the *AFL-CIO* holding and to make a decision about the fate of the rulemaking accordingly. MSHA's decision to withdraw the Air Quality proposed rule simply acknowledged that after the Eleventh Circuit's decision, it would be difficult and expensive to finalize and defend broad omnibus health rulemakings covering multiple substances. The Agency's decision also reflected its belief that the inordinate resources that would have been required to craft a judicially sustainable final rule would not have been a prudent use of Agency resources.

In *Int'l Union, UMWA*, the UMWA mentioned that another federal agency had successfully promulgated a rule updating a list of toxic chemicals in a single rulemaking, implying that MSHA should be encouraged despite the holdings of *AFL-CIO*. In *Troy Corporation v. Browner*, 120 F.3d 277 (D.C. Cir. 1997), the U.S. Court of Appeals for the District of Columbia Circuit upheld an Environmental Protection Agency (EPA) rule adding 286 chemicals to its Toxic Release Inventory (TRI) pursuant to the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.* MSHA believes that *Troy* is distinguishable on at least two significant bases, thus making it less pertinent to MSHA's Air Quality rulemaking than *AFL-CIO*. First, and most importantly, the rulemaking provisions of the Mine Act more closely resemble those of the OSH Act than those of the EPCRA. The statutory threshold that EPA must satisfy in order to include a chemical on the TRI list is much lower than MSHA's and OSHA's statutory threshold for establishing PELs for toxic materials and harmful physical agents. The *Troy* court held that EPCRA does not obligate the EPA to demonstrate any "likelihood of contact between humans and the chemical." 120 F.3d at 285–286. Conversely, MSHA's and OSHA's rulemaking provisions require the agencies to demonstrate, among other things, that the agent or contaminant at issue poses a significant risk of "material impairment of health or functional capacity," an exceedingly more demanding threshold than that of the EPCRA.

Second, the substance of the Air Quality rule more closely resembles

OSHA's Air Contaminants rule than it does the EPA rulemaking adding chemicals to the TRI list. The requirements imposed on owners of facilities covered by section 11023 of EPCRA are more akin to the requirements imposed on mine operators and employers by MSHA's and OSHA's Hazard Communication standards than the proposed Air Quality standards. In that regard, the relevant EPCRA section requires dissemination of information only, not compliance with substantive exposure limits. The Air Quality proposed rule, unlike the TRI list and MSHA's Hazard Communication rule, included provisions requiring use of engineering and administrative controls to limit exposure to the substance, exposure monitoring, medical surveillance and transfer, and the use of personal protective equipment. Promulgation of comprehensive health rules, such as the Air Quality rule, requires a degree of scientific evidence and feasibility analysis that is not generally associated with notification or informational standards. For this reason, the TRI list addressed in *Troy* and MSHA's Air Quality rule are not substantively similar enough to make *Troy* the most appropriate case for comparison. Given the foregoing, MSHA believes that the grounds for comparing its Air Quality rulemaking to the EPA rulemaking at issue in *Troy* are unsound. MSHA's rulemaking provisions and the content of its Air Quality proposed rule more closely resemble those of the OSH Act and the Air Contaminants rulemaking, thereby making *AFL-CIO* a more germane case than *Troy*.

### 3. Changes in Agency Priorities

Given the additional burden of following the Eleventh Circuit's requirements to finalize the Air Quality rule, MSHA believed that promulgating the rule would detrimentally affect its other ongoing rulemakings. Consequently, the Agency reassessed its rulemaking priorities, and ultimately decided to withdraw the Air Quality proposed rule. The Mine Act provides the Secretary of Labor broad discretion to set and change rulemaking priorities as she deems appropriate. Specifically, section 101(a) of the Mine Act provides the Secretary the discretion to "develop, promulgate, and revise as may be appropriate improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. 811(a). Likewise, the Mine Act provides the Secretary with the authority to "promulgate, modify, or revoke" a proposed rule. 30 U.S.C. 811(a)(4)(A).

"In the event the Secretary determines that a proposed mandatory health or safety standard should not be promulgated," she must "publish h[er] reasons for h[er] determination." 30 U.S.C. 811(a)(4)(C). *Int'l Union, UMWA*, 358 F.3d at 43.

MSHA sets and changes its rulemaking priorities based, in part, on the resources available to it. Based on the reasoning of the 1992 *AFL-CIO* decision, the Agency ultimately concluded that promulgation of even a significant portion of the Air Quality standard would have consumed all of the Agency's rulemaking resources. Prior to the demanding requirements imposed by the *AFL-CIO* decision, MSHA believed that the resources necessary to promulgate the Air Quality rule were manageable. However, the resources required to complete the standard in a manner that would withstand judicial scrutiny following *AFL-CIO* were unanticipated at the time that the rule was proposed.

Even a phased approach to promulgating the more than 600 PELs, and the seven substantive components of the rule that remained following promulgation of the abrasive blasting and drill dust control rule, would have exhausted MSHA's rulemaking resources. This would have required MSHA to ignore or neglect many of its other regulatory responsibilities for the foreseeable future. In retrospect, MSHA realized that even a phased approach to promulgating the Air Quality rule would have overwhelmed the Agency, particularly in light of its other rulemaking objectives. MSHA initially grouped the rulemaking provisions simply to facilitate more orderly and organized public comment, and to more easily focus the discussions at the public hearings. The fact that MSHA divided the rulemaking provisions into three distinct groups should not have suggested that the Agency could more easily promulgate judicially sustainable components of the rule than it could promulgate a judicially sustainable rule at once in its entirety. Whether MSHA promulgated the rule as divided, or in its entirety, *AFL-CIO* demanded that MSHA make the same scientifically difficult and exacting findings.

For several years following *AFL-CIO* and the 1994 promulgation of the abrasive blasting and drill dust control rule, MSHA continued to work on various provisions of the Air Quality rule. MSHA anticipated publishing new proposed rules for several of the provisions contained in the Air Quality rule, such as those addressing carcinogens and respiratory protection. The Agency performed work

accordingly. Ultimately, however, because of the changes in MSHA's priorities, the Agency was not able to develop drafts for either component. By 2002, the Agency realized the enormity and breadth of the rule, and the resources that it would have had to devote to finalize any one provision. For example, the abrasive blasting and drill dust control provision of the rule was only one of eight contained in the first group of provisions, and it took nearly five years to complete. As compared to the other provisions, promulgation of the abrasive blasting and drill dust control standard was less complicated than many of the other provisions would have been. Because the Agency determined that even a phased approach to promulgating the remainder of the Air Quality rule was infeasible, it decided to withdraw the rule and pursue other, more narrowly focused and achievable priorities.

The Regulatory Flexibility Act, 5 U.S.C. 601–612, and Executive Order 12866, 58 FR 51735 (September 30, 1993), require semiannual publication in the **Federal Register** of an agenda of regulations. The Regulatory Flexibility Act requires the Department of Labor to publish a regulatory agenda in October and April of each year, listing all of the regulations that the Department expects to propose or promulgate that are likely to have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. 602. In addition to a summary of the nature of such regulations, the Regulatory Flexibility Act also requires the Department to include the objectives and the legal basis for the issuance of the rule, and an approximate schedule for completing action on the rule. *Id.* Executive Order 12866 supplements the above obligations and, in substance, requires agencies to publish an agenda listing all the regulations it expects to have under active consideration for promulgation, proposal, or review during the coming 1-year period. Executive Order 12866 also requires each agency, as part of the regulatory agenda, to prepare a regulatory plan of the most important “significant” regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. In essence, the regulatory plan sets forth an agency's highest priority regulatory actions. The Air Quality rule has not been included on MSHA's regulatory plan since 1994 and was not a priority in recent years.

The regulatory agendas of previous Administrations were seldom limited to only those agenda items that the Agency could realistically complete within a reasonable time. These voluminous

agendas promoted the notion that MSHA could advance scores of complicated rulemakings concurrently. This, however, was never the case and is not the case now. For example, MSHA health standards were, and still are, developed by “committees” of employees consisting of scientists, economists, industrial hygienists, technical support staff, enforcement/field personnel with expertise in the given area, regulatory specialist, and lawyers. Safety standards were (and still are) developed similarly, requiring many of the same people who worked on health standards. Thus, the number of MSHA employees who were, and are, available to work on a rulemaking project at any given time is limited. Because there were limited numbers of these personnel, an Air Quality rulemaking could not have been developed without transferring personnel from other rulemakings that the Secretary had determined were priorities. At the very least, economists, regulatory specialists, and lawyers would have been required to transfer from other projects, and some field personnel would have been required to put aside their enforcement duties while assisting with rulemaking. Despite the fact that Agency resources were directed to other, higher priority rulemaking projects, previous Administrations continued to list the Air Quality rule on the Department's regulatory agenda as an ongoing rulemaking.

As stated above, the extensive regulatory agendas of the past were not only unrealistic, but fueled misconceptions about the ability of the Department's agencies to simultaneously develop or further vast numbers of concurrent rulemakings. Recognizing that this established practice was outdated and that it undermined the basic function of the Agenda, the Secretary introduced a new approach to the regulatory agenda, limiting it to “only those rules for which [agencies] could complete the next step in the regulatory process within a 12-month period.” BNA Daily Labor Report April 22, 2002 (quoting Deputy Secretary of Labor Cameron Findlay). Consequently, a number of regulations were removed from the Department's Agenda. In the fall of 2000, for example, the Department's regulatory agenda contained some 145 rulemaking projects. By comparison, the fall 2003 Agenda contained 79 rules, and the spring 2004 Agenda contained 81 rulemakings. The Secretary's review and reprioritization of each agency's Agenda items was not an occurrence unique to the Department; rather, it was consistent

with a federal agency-wide initiative intended to maintain sound regulatory practice. Memorandum from Andrew H. Card, Jr., Assistant to the President and Chief of Staff, to Heads and Acting Heads of Executive Departments and Agencies, January 20, 2001 (66 FR 7702 (January 24, 2001)). The concurring opinion in *Int'l Union v. Chao*, 361 F.3d 249 (3d Cir. 2004), candidly addressed this phenomenon by noting that “there is nothing obscure, and nothing suspect about regulatory policy changes coincident with changes in administration.” *Id.* at 256. As the concurring opinion observed, each administration embraces its own priority-setting process and regulatory philosophy such that items considered priority by one administration may not be so by another administration. *Id.* Though MSHA has only withdrawn one other proposed rule from its regulatory agenda, Requirements for Approval of Flame-Resistant Conveyor Belts, 67 FR 46431 (July 15, 2002), the Agency routinely removes pre-proposal rulemakings from the Agenda. *See, e.g.*, Bloodborne Pathogens, Department of Labor Unified Agenda, 60 FR 23567 (May 8, 1995); Roof Bolting Machines, Department of Labor Unified Agenda, 65 FR 23056 (April 24, 2000).

In the 13 years between proposal of the Air Quality rule in August 1989 and the September 2002 withdrawal notice, MSHA promulgated approximately 50 final rules. The rules were of varying complexity. Though the majority of these rules were safety standards, several of the standards MSHA promulgated during that period either directly or indirectly addressed some of the health hazards which the Air Quality rule sought to prevent. In any event, the rules listed below consumed much of the Agency's rulemaking resources and constituted the Agency's highest rulemaking priorities as determined by the Secretary for the period in question.

In 1994, MSHA promulgated the abrasive blasting and drill dust control provisions of the proposed Air Quality rule. 59 FR 8318 (February 18, 1994). These standards remain effective in spite of the withdrawal of the remaining phases of the proposed Air Quality rule. The abrasive blasting and drill dust control standards are applicable to all metal, nonmetal, and coal mines. 30 CFR 58.610, 58.620, 72.610, 72.620, 72.630.

In 1996, MSHA issued final “Safety Standards for Underground Coal Mine Ventilation.” 48 FR 9764 (March 11, 1996). As noted in the preamble to the ventilation standard, “the primary function of a mine ventilation system is



twofold, to remove hazardous gases such as methane, and to provide miners with an [sic] respirable environment in areas where they are required to work or travel." *Id.* at 9775. Moreover, the preamble to the ventilation final rule states in regard to air quantity, "[i]t is essential for miners' health and safety that each working face be ventilated by sufficient quantity of air to dilute, render harmless, and carry away flammable and harmful dusts and gases produced during mining." *Id.* at 9780. Maintaining adequate ventilation in underground coal mines helps to ensure that miners are not exposed to accumulations of hazardous gases and dusts. MSHA's ventilation standard established a mandatory oxygen content of 19.5% by volume in bleeder entries, and in areas where persons work or travel. 30 CFR 75.321. Sections 58/72.300 of the Air Quality proposal, entitled "Dangerous Atmospheres," proposed an equivalent mandatory oxygen content by volume for all work areas. 54 FR at 35817, 35840 (August 29, 1989). During the period from August 1989 to September 2002, MSHA also promulgated final standards for "Diesel Powered Equipment." 61 FR 55412 (October 25, 1996). The diesel equipment rule requires monitoring and control of gaseous diesel emissions—specifically, carbon monoxide (CO) and nitrogen dioxide (NO<sub>2</sub>)—so that miners are protected from exposure to harmful levels of gaseous contaminants. 30 CFR 70.1900. In addition, the diesel equipment rule limits miners' exposure to harmful diesel exhaust contaminants by requiring Agency approval of most diesel engines (30 CFR part 7); minimum ventilating air quantities in areas where diesel equipment is operated (30 CFR 75.325); the use of low-sulfur fuel (30 CFR 75.1901); and the use of clean-burning engines (30 CFR part 7).

The Air Quality rule proposed lowering the PELs for many of the gases found in diesel exhaust, including CO and NO<sub>2</sub>. Because the proposed Air Quality rule was to lower these PELs, the diesel equipment rule did not do so. Despite the fact that the CO and NO<sub>2</sub> PELs were not reduced, the diesel equipment rule provides coal miners with a degree of protection from diesel exhaust gases by reducing emissions of those gases, and thereby coal miners' exposure to them. It should also be noted that following publication of the diesel equipment final rule in 1996, MSHA surveyed 23 of 26 mines using diesel equipment in underground coal mines, collecting over 500 samples. MSHA determined that coal miners

were not exposed to levels of CO and NO<sub>2</sub> that would have exceeded the standards proposed by the Air Quality rule.

Nonetheless, in March 1997, the UMWA petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus compelling MSHA to issue standards governing emissions in diesel exhaust. *In re United Mine Workers of America Int'l Union*, 190 F.3d 545 (D.C. Cir. 1999). Specifically, the UMWA sought regulation of two components of diesel exhaust: gases and particulate matter. Following negotiations between MSHA and the UMWA, the parties were able to dispose of the particulate matter portion of the petition, as discussed in further detail in the paragraph below, leaving before the court only the portion of the petition dealing with regulation of exhaust gases. In this regard, the UMWA wanted final standards lowering the PELs for CO and NO<sub>2</sub>. With the prospect of court-ordered rulemaking impending, MSHA and the UMWA were able to settle the matter so as to avoid hindrance of Agency action on diesel particulate matter and respirable coal mine dust, both of which the UMWA asserted were of higher priority than diesel exhaust gases. *Id.* at 553. Consequently, the parties ultimately agreed to dismiss the case and to address the UMWA's concerns about gaseous emissions by establishing a diesel exhaust monitoring protocol. These procedures were incorporated into the Agency's directives system and are carried out by coal mine health inspectors during inspections. Coal Mine Health Inspection Procedures Handbook, Chapter 5 "Diesel Exhaust Gas Monitoring," PH89-V-1(14) (December 2000).

As mentioned above, the UMWA also sought regulation of diesel particulate matter through its mandamus petition. During the pendency of the suit, MSHA published a proposed rule for the regulation of diesel particulate matter, 63 FR 17492 (April 9, 1998), and the court dismissed this portion of the UMWA's petition as moot. Consequently, the coal and metal/nonmetal diesel particulate matter rules became priority rulemakings in the years between the Air Quality proposed rule and the September 2002 withdrawal notice.

The final coal diesel particulate matter rule, 66 FR 5526 (January 19, 2001), requires mine operators to restrict diesel particulate matter emissions from certain pieces of equipment to prescribed levels (30 CFR 72.500 to 72.502), and requires underground coal mine operators to train miners about the

hazards of diesel particulate matter exposure (30 CFR 72.510). Most of the provisions of the final coal diesel particulate matter rule became effective in March 2001. Three provisions, however, were subject to later effective dates, two of which have already passed. The final provision will become effective in January 2005.

Like the coal diesel particulate matter rule, the final metal/nonmetal diesel particulate matter rule was published on January 19, 2001. 66 FR 5706. The final rule established new health standards for underground metal and nonmetal miners by requiring use of approved equipment and low sulfur fuel, and by setting interim and final concentration limits for diesel particulate matter in the underground mining environment. Several parties, including mine operators and industry associations, filed petitions for review of the final rule, and the United Steelworkers of America intervened. The petitions were consolidated and are pending in the U.S. Court of Appeals for the District of Columbia Circuit. *AngloGold (Jerritt Canyon) Corp. et al. v. U.S. Department of Labor*, Nos. 01–1046, 01–1124, 01–1146 (D.C. Cir. filed Jan. 29, 2001). Pursuant to a first partial settlement agreement reached in response to legal challenges to the 2001 metal/nonmetal diesel particulate matter rule, MSHA amended portions of the final rule on February 27, 2002 (67 FR 9180). The revisions addressed the evidence and tagging provisions of the Maintenance standard, as well as the definition of "introduced" in the Engine standard. On August 14, 2003 (68 FR 48668), pursuant to a second partial settlement agreement, MSHA initiated additional rulemaking to further amend the final rule. These revisions would revise the interim concentration limit; designate elemental carbon as the surrogate for measuring diesel particulate matter for the interim limit; apply MSHA's longstanding hierarchy of controls used for other exposure-based health standards, including engineering and administrative controls supplemented by respiratory protection, but prohibiting rotation of miners; and revise the requirements for the diesel particulate matter control plan. The legal challenge has been stayed pending completion of additional rulemaking actions.

MSHA's final "Occupational Exposure to Noise" rule, 64 FR 49548 (September 13, 1999) was another rulemaking that MSHA determined was a priority and to which the Agency committed considerable rulemaking resources. Once promulgated, the Noise rule replaced standards that provided

inadequate protection of miners' hearing and were more than 20 years old. MSHA estimated that under its previous noise rule, 13.4% of the mining population in the United States would have developed a material hearing impairment during their working lifetime. MSHA concluded that approximately 13,000 coal miners and 24,000 metal and nonmetal miners would have experienced noise-induced hearing loss under the prior standard, and that those miners would substantially benefit from the final rule's effect of improving miners' health and lessening the personal and social hardships resulting from noise-induced hearing loss. As will be explained in further detail in this notice, MSHA continues to commit resources to the implementation of this rule.

On March 11, 2002, MSHA published safety standards for "Electric Motor-Driven Mine Equipment and Accessories and High-Voltage Longwall Equipment Standards for Underground Coal Mines." 67 FR 10972. The final high-voltage longwall rule allows mine operators to use high-voltage longwall systems without having to obtain a mine-specific petition for modification from MSHA. MSHA considered this rule a priority because the Agency concluded that high-voltage longwalls could be used safely, provided that certain conditions were met. The high-voltage longwall rule accounted for new and improved longwall technology, and established increased protection from electrical hazards, while reducing the paperwork requirements associated with petitions for modification.

During the period in question, MSHA also devoted considerable resources to its "Hazard Communication" (HazCom) rule, 67 FR 42314 (June 21, 2002). Similar to the Toxic Release Inventory list that was at issue in *Troy Corporation v. Browner*, 120 F.3d 277 (D.C. Cir. 1997), MSHA's HazCom rule is an information dissemination rule that does not contain provisions that require use of engineering and administrative controls to limit exposure to chemicals, exposure monitoring, medical surveillance and transfer, or the use of personal protective equipment. However, the HazCom rule requires mine operators to evaluate the hazards of chemicals they produce or use and provide information to miners concerning chemical hazards; label containers of hazardous chemicals; provide access to material safety data sheets; and train miners about hazardous chemicals to which they might be exposed. Chemicals for which MSHA proposed PELs under the Air

Quality proposed rule are subject to the HazCom requirements.

On December 12, 2002, pursuant to its authority derived from § 101(b)(1) of the Mine Act, 30 U.S.C. 811(b)(1), MSHA issued an emergency temporary standard (ETS) addressing underground coal mine emergency evacuations, 67 FR 76658. Section 101(b)(1) of the Mine Act authorizes the Secretary to issue emergency temporary health or safety standards without regard to the mandates of the Administrative Procedure Act, 5 U.S.C. 553, when she determines that "miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and \* \* \* that such emergency standard is necessary to protect miners from such danger." 30 U.S.C. 811(b)(1). Emergency temporary standards become effective immediately upon publication in the **Federal Register**, 30 U.S.C. 811(b)(1), and must be superseded by a mandatory health or safety standard no later than nine months after publication of the emergency standard. 30 U.S.C. 811(b)(3). The issuance of an emergency standard is an extraordinary measure provided for by the Mine Act, but one which MSHA employs when it determines that such a standard is necessary to prevent grave dangers from "manifest[ing] themselves in serious or fatal injuries or illnesses." S. Rept. 181, 95th Cong., 1st Sess. 23 (1977).

Following several fatal and non-fatal coal mine emergencies, MSHA determined that miners were exposed to grave danger when they remained underground or re-entered affected mine areas during mine emergencies presenting an imminent danger due to fire, explosion, or gas or water inundation. MSHA concluded that it was imperative to immediately address proper training and emergency evacuation procedures by way of an ETS. As required by the Mine Act, MSHA had to replace the ETS with final safety standards within nine months of the ETS's publication. Hence, MSHA published its final "Emergency Evacuations" rule on September 9, 2003 (68 FR 53037). As with the rules mentioned in the preceding paragraphs, MSHA deemed these rulemakings to be priorities and devoted rulemaking resources accordingly.

The most recently published final rule which represented an MSHA rulemaking priority during the years in question is the "belt air" rule. The belt air rule was originally proposed as part of MSHA's rulemaking on ventilation of underground coal mines, but ultimately developed as an independent rulemaking following the Secretary's

decision to further review the safety factors associated with the use of belt air to ventilate working places.

On April 2, 2004, MSHA published final safety standards, "Underground Coal Mine Ventilation—Safety Standards for the Use of a Belt Entry as an Intake Air Course to Ventilate Working Sections and Areas Where Mechanized Mining Equipment is Being Installed or Removed" ("belt air" rule) (69 FR 17480). Prior to the effective date of the belt air rule, mine operators were required to obtain a petition for modification (30 CFR part 44) of various safety standards before they were allowed to use intake air passing through the belt air course to ventilate designated locations where miners work. In effect, the belt air rule incorporates the bulk of the safety requirements found in the most recently granted petitions for modification so that mine operators will no longer need to seek a mine-specific petition for modification before using belt air in sections of their mine with three or more entries. By retaining these safety requirements in the rule, miners' safety will be preserved.

Though the above standards do not address all of the hazards that the Air Quality rule was intended to address, MSHA has promulgated several rules in the recent past that directly or indirectly assist in reducing miners' exposure to airborne contaminants. Such rules include those addressing diesel particulate matter, hazard communication, and diesel equipment. MSHA has also addressed diesel exhaust gases, which was proposed as part of the Air Quality rulemaking, through detailed procedures in its Inspection Procedures Handbook. The measure of protection provided to miners from these rules was not available at the time that the Air Quality rule was proposed. In addition, these standards focused on discrete health and safety hazards and reflected an incremental approach to regulating mine safety and health that appears preferable in light of *AFL-CIO*. After the Eleventh Circuit's decision, MSHA made a reasonable and reasoned decision to direct its resources to rulemakings that could be, and were, successfully completed. The decision to reprioritize the Air Quality rule was entirely appropriate and reflects the Secretary's authority to reassess and reorder priorities as necessary and as appropriate.

#### 4. Staleness of Rulemaking Record

In addition to changes in MSHA's rulemaking priorities, the 2002 decision to withdraw the Air Quality proposed



rule was also premised on the staleness of the rulemaking record. As the D.C. Circuit observed, the staleness of the record is not a distinct reason for withdrawing the Air Quality proposed rule. *Int'l Union, UMWA v. U.S. Department of Labor*, 358 F.3d 40, 44 (February 20, 2004). However, staleness of the record is a critical concern in determining the level of resources MSHA must be prepared to commit to the project to make it a priority, to the certain exclusion of all other rulemaking priorities. At the time of publication of the September 2002 withdrawal notice, it had been more than 13 years since the rule's proposal, and some 12 years since comments had been received. In accordance with the mandates of the Mine Act, however, MSHA is to consider the latest available scientific data when promulgating mandatory standards dealing with toxic materials or harmful physical agents. Since the Air Quality rule was proposed in 1989, significant new scientific information relating to many of the proposed provisions had developed. Thus, MSHA would have had to essentially start the rulemaking process from the beginning, and evaluate the significance of the risk of material impairment of health, and all of the feasibility issues, on the latest available information.

### C. Continuing Reasons for the Withdrawal of the Proposed Rule

#### 1. Changes in Agency Priorities

As discussed previously, MSHA's rulemaking priorities in the years following the promulgation of the abrasive blasting and drill dust control standards made it impossible for the Agency to complete the Air Quality rulemaking. Moreover, since publication of the September 2002 Air Quality withdrawal notice, MSHA's rulemaking priorities have not permitted it to re-propose the rule. The Agency expects that its rulemaking resources will be consumed by other priority rulemakings such that it will not be able to promulgate the Air Quality rule for the foreseeable future. The Department of Labor's 2003–2004 regulatory plan, 68 FR 72520 (December 22, 2003), identifies three high priority initiatives for MSHA, noting that items listed in the regulatory plan are those “issues most clearly needing regulatory attention.” *Ibid.* For MSHA, the Secretary has identified asbestos, metal/nonmetal diesel particulate matter, and the two coal mine dust rules as priority rulemakings. *Ibid.*

On March 29, 2002, MSHA published an advanced notice of proposed rulemaking declaring its intent to

initiate rulemaking on “Measuring and Controlling Asbestos Exposure.” 67 FR 15134. The Agency also held six public meetings between April 2002 and June 2002 to allow for early participation in the rulemaking process by interested parties. The importance of such a rulemaking is highlighted in the Department of Labor's Office of Inspector General's (OIG) recommendations to MSHA to reduce the risk of incidents similar to those that took place in Libby, Montana. “Evaluation of MSHA's Handling of Inspections at the W.R. Grace & Company Mine in Libby, Montana.” USDOL Office of the Inspector General, Office of Analysis, Complaints and Evaluations, Report No. 2E–06–620–0002 (March 22, 2001). MSHA's Air Quality proposed rule recognized the importance of controlling asbestos exposure, and proposed a PEL consistent with then-current levels promulgated by OSHA in its Air Contaminants standard. In 1994, OSHA promulgated a revised substance-specific asbestos standard that lowered the PEL to an eight-hour time-weighted average limit of 0.1 fiber per cubic centimeter (f/cc) and lowered the short-term exposure limit to 1.0 f/cc as averaged over a sampling period of 30 minutes. 59 FR 40964 (August 10, 1994). In the wake of the illnesses and fatalities in Libby, Montana, MSHA's practice has been to encourage mine operators to comply with the current OSHA PEL, as MSHA's metal/nonmetal and coal asbestos exposure standards are some 20-fold higher than OSHA's. MSHA Program Information Bulletin No. P–0003, “Potential Exposure to Airborne Asbestos on Mining Properties” (March 2, 2000). For all of the above reasons, MSHA feels strongly that promulgating an asbestos standard must remain one of the Agency's top rulemaking priorities.

As discussed elsewhere in this document in further detail, MSHA is in the process of finalizing the metal/nonmetal diesel particulate matter rule pursuant to the litigation in *AngloGold (Jerritt Canyon) Corp. et al., supra*, and is devoting significant resources to this Agency priority. As MSHA is currently doing with the coal diesel particulate matter rule, MSHA anticipates providing training to both its inspectorate and stakeholders, providing compliance assistance, and engaging in other efforts following the promulgation of revisions to the final rule in order to ensure its smooth implementation. MSHA's implementation initiatives will require a considerable commitment of Agency resources and personnel.

Additional rulemaking priorities which will consume significant agency resources are the respirable coal mine dust rules. MSHA's proposed rule for the “Determination of Concentration of Respirable Coal Mine Dust” (Single Sample) would determine that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift. 65 FR 42068 (July 7, 2000). The related “Verification of Underground Coal Mine Operators” Dust Control Plans and Compliance Sampling for Respirable Dust” (Plan Verification) would require mine operators to verify and periodically monitor, through sampling, the effectiveness of the dust control parameters for each mechanized mining unit (MMU) specified in the mine ventilation plan. 65 FR 42122 (July 7, 2000). The Plan Verification proposed rule would significantly improve miners' health protection by ensuring that ventilation plans were verifiable and implemented, thereby limiting the exposure of individual miners to respirable coal mine dust. In combination, these rules would comprise MSHA's revised program to meet the Mine Act's § 202(b)(2) requirement that miners' exposure to respirable coal mine dust be maintained at or below the applicable standard on each shift. 30 U.S.C. 842(b)(2).

Because of the significant public reaction and comment to these proposals, and while waiting for the availability of a Personal Dust Monitor, MSHA has indefinitely extended the comment period for these rules. Plan Verification, 68 FR 39881 (July 3, 2003); Single Sample, 68 FR 47886 (August 12, 2003). MSHA is awaiting the National Institute for Occupational Safety and Health's (NIOSH's) development and evaluation of a Personal Dust Monitor, which MSHA believes could be effective in helping to provide a real-time read-out of dust exposure, thus helping to prevent the development of black lung disease in miners. In-mine testing and evaluation of the devices has begun and will most likely continue into 2005.

Although not listed in the Department's Regulatory Plan, the Secretary has identified several other rulemakings for development that “advance the Department's goals” and are consistent with each agency's “available resources.” Department of Labor Unified Agenda, 68 FR 73196 (December 22, 2003). For MSHA, these rules, enumerated in the Department's most recent Agenda, include rulemakings on high voltage continuous mining machines, *id.* at 73213, shaft and slope construction worker training,

*ibid.*, and electrical product approval, *id.* at 73214.

On July 16, 2004, 69 FR 42812 (July 16, 2004) MSHA published a proposed rule, "High-Voltage Continuous Mining Machines," that would establish design requirements for approval of high-voltage continuous mining machines operating in face areas of underground mines. The proposed rule would also establish new mandatory electrical safety standards for the installation, use, and maintenance of high-voltage continuous mining machines used in underground coal mines. These provisions would enable mines to utilize high-voltage continuous mining machines with enhanced safety protection from fire, explosion, and shock hazards. Existing 30 CFR 75.1002, *Installation of electric equipment and conductors; permissibility*, does not permit the use of high-voltage continuous mining machines in certain areas of the mine. Currently, mine operators must petition MSHA for a modification of the standard, pursuant to section 101(c) of the Mine Act, 30 U.S.C. 811(c), prior to using high-voltage continuous mining machines. From January 1997 to October 2003, MSHA granted 38 petitions for the use of high-voltage continuous mining machines. Others are currently being processed. MSHA is confident that promulgation of this rule will improve miners' safety while eliminating the need to proceed through the often burdensome administrative process associated with granting a petition to permit the use of high-voltage continuous mining machines. MSHA is currently holding public hearings on this proposed rule and, as with the other rulemakings discussed above, MSHA anticipates a considerable amount of resources will be committed to promulgating the high-voltage continuous mining machine standards.

On July 16, 2004, 69 FR 42842, following a record of fatalities attributable to the lack of training received by shaft and slope construction workers, MSHA published a proposed rule entitled "Training Standard for Shaft and Slope Construction Workers at Underground Mines" that would remove existing language which exempts shaft and slope construction workers from the requirement to receive Part 48 training. Under the proposal, shaft and slope construction workers would be treated like extraction and production miners in that they would be required to receive Part 48 training. This rule will help eliminate fatalities such as the October 4, 1991, fatality at the Gary No. 50 Mine in Pineville, West Virginia; the May 17, 1996, fatality at

the Wabash Mine in Keensburg, Illinois; and the January 22, 2003, fatalities at the McElroy Mine in Marshall County, West Virginia.

Finally, MSHA has determined that updating its regulations on electrical product approval is a priority. Part 18 of 30 CFR, entitled "Electric Motor-Driven Mine Equipment and Accessories," sets forth the requirements to obtain MSHA approval of electrically operated machines and accessories intended for use in underground mines, as well as other related matters, such as approval procedures, certification of components, and acceptance of flame-resistant hoses and conveyor belts. Aside from minor modifications, Part 18 has remained unchanged since its promulgation in 1968 under the Federal Coal Mine Safety Act of 1952. MSHA's update of these outdated regulations will improve the efficiency of the approval process, recognize new technology, and add quality assurance provisions.

MSHA expects that the above rulemakings will consume the majority of its rulemaking resources for the foreseeable future. In addition to the resources that will be required to promulgate the foregoing priority rulemakings, however, MSHA is expending resources to facilitate implementation of its new final rules. For example, MSHA's implementation of the Occupational Exposure to Noise rule is consuming a fair amount of the Agency's resources, including many of the same personnel who would be required to assist in completion of an Air Quality standard. In an effort to improve understanding of and compliance with the Noise rule, MSHA has conducted numerous stakeholder meetings, developed new compliance assistance documents, updated existing compliance assistance documents, and conducted training of some of its inspectorate. MSHA is in the process of providing stakeholder training, additional training to its inspectorate, updating its procedural guides, and evaluating new noise technologies. MSHA will continue to allocate resources to implement the Noise rule until it is confident that mine operators have received sufficient compliance assistance, miners understand their rights, and MSHA inspectors have received the necessary training to properly enforce the standard.

With the January 19, 2001, promulgation of the coal diesel particulate matter rule, MSHA is taking efforts similar to those described in the preceding paragraph to ensure that its stakeholders understand the coal diesel particulate matter rule, and MSHA inspectorate are trained to properly

enforce the rule. Like the Noise implementation efforts, MSHA anticipates that implementation of the coal diesel particulate matter rule will require a considerable commitment of Agency resources and personnel for the foreseeable future.

It should also be noted that MSHA is publishing a Request for Information on respirable crystalline silica to determine an appropriate course of action in response to respirable crystalline silica exposures. A new respirable crystalline silica standard was also proposed as part of the Air Quality rule. Thus, while a comprehensive Air Quality rulemaking will no longer be pursued by MSHA, significant elements of the proposed rule continue to be addressed in incremental, more manageable portions by individual rulemakings. MSHA will continue to review information related to individual substances to determine whether there is evidence of significant risk. If so, MSHA will evaluate whether to engage in a substance-specific rulemaking.

## *2. Impact of Resuming the Air Quality Rulemaking*

The impact of resuming the Air Quality rulemaking would be detrimental to MSHA's currently designated priority rulemakings. The resources that would be required to resume the Air Quality rulemaking would be enormous and would come at the expense of the rulemakings cited in the preceding pages. MSHA's toxic substance and harmful physical agent rulemakings have historically been resource-intensive and protracted, even when not laden with the legal uncertainties that encumber the Air Quality rulemaking. Because MSHA is required to present evidence that the existing PEL for each substance or contaminant exposes miners to a significant risk of material impairment of health or functional capacity, developing a judicially sustainable final rule would be a very lengthy and complex endeavor. The scientists that would be required to gather, review and analyze the immense amount of scientific data would have to be reassigned from other health rulemakings. The Agency has also lost a considerable degree of institutional knowledge relating to the proposed rule due to retirement. As stated elsewhere in this document, MSHA employs a limited number of staff assigned exclusively to rulemaking activities, and it is nearly impossible for these employees to advance simultaneously on numerous complex rulemaking fronts. Many of the same employees, including MSHA's economists,

technical support specialists, standard and regulation drafting personnel, and lawyers are required in both health and safety rulemakings, and the orderly implementation of new rules. These employees are also engaged in assisting in the day-to-day functioning of the Agency by undertaking such tasks as replying to incoming correspondence and aiding field personnel in appropriately carrying out the mandates of the Mine Act. Thus, rulemaking on even one substance or component proposed in the Air Quality rule would require reassignment of personnel and resources, thus delaying completion of other rules and impeding implementation of new rules.

### 3. Use of a Non-Regulatory Approach

At the present time, MSHA is using non-regulatory approaches to address the hazards miners may encounter from contact with the substances or contaminants that would have been regulated by the Air Quality rule. MSHA continues to introduce and promote educational and outreach campaigns to inform stakeholders about health and safety issues of which they should be aware. One such notable educational campaign is the Agency's initiative to alert miners and mine operators about the hazards associated with asbestos exposure. In January 2000, MSHA initiated comprehensive compliance assistance related to asbestos exposure. This compliance assistance included activities such as training MSHA inspectors to recognize naturally occurring asbestos and to sample where it is suspected; assisting in the development of clean-up and monitoring procedures; discussing hazards of asbestos exposure with miners and the mine operator; providing mine operators with names of accredited laboratories that perform asbestos analysis; assisting in the implementation of a respiratory protection program; and instructing in recognition and avoidance of asbestos.

In addition to the asbestos compliance assistance activities, MSHA maintains a practice of informing mine operators by written communication when an MSHA asbestos sample taken at their facility is found to be over the OSHA PEL of 0.1 fiber per cubic centimeter (f/cc).

Another current MSHA practice is to encourage mine operators to comply with the OSHA asbestos PEL. MSHA Program Information Bulletin No. P-0003, "Potential Exposure to Airborne Asbestos on Mining Properties" (March 2, 2000). Though MSHA has no authority to enforce the OSHA 0.1 f/cc PEL, the Agency continues to take a proactive approach to educating miners

and mine operators about the health risks associated with exposure to asbestos exceeding the 0.1 f/cc limit. MSHA continues to encourage miners and mine operators to take precautionary measures to avoid asbestos exposure.

MSHA has posted valuable information addressing asbestos hazards in the mining industry on its Web site, including links to numerous outside resources. This information can be accessed at MSHA's source page for asbestos, <http://www.msha.gov/asbestos/asbestos.htm>.

Consistent with its Occupational Illness and Injury Prevention Program, MSHA's Web site also contains information related to the prevention of various other health and safety illnesses and injuries. For example, MSHA's Web site includes health alerts that address substances or topics proposed in the Air Quality rule. These alerts include: Working with Mercury; Silica Exposure of Underground Coal Miners; Silica Exposure of Surface Coal Miners; Working in Confined Spaces; and Welding Fumes Sampling. Topic-specific health documents include Arsenic; Effects of Blasting on Air Quality; Carbon Monoxide; Hazardous Chemicals at Work; and Respiratory Protection. MSHA also posts on its Web site "best practices" developed by volunteer teams of stakeholders. Best practices are intended to provide practical, effective solutions to health and safety risks that might be found in the mining environment. Recent best practice recommendations address "Reducing Silica Exposure" and "Underground Air Quality." These documents can be accessed through MSHA's Web site, <http://www.msha.gov>.

Given the current circumstances, MSHA believes that a non-regulatory approach is the most appropriate manner to address the hazards addressed in the Air Quality proposed rule. MSHA will continue to assess the risks posed by the contaminants included in the Air Quality proposed rule, and will ascertain whether rulemaking for any individual contaminant is appropriate.

### 4. Meeting With the UMWA

On May 5, 2004, at the request of the UMWA, MSHA and the Union met to discuss issues concerning Air Quality. The parties generally discussed whether there was a need for MSHA to more regularly assess and update toxic substances standards. In this regard, the parties discussed the Agency's capability of doing so, the resources that would be involved, and whether there

was a suggested process for doing so. The parties also discussed the appropriate role of NIOSH's recommended exposure levels (RELs) versus the appropriate role of the ACGIH's TLVs. Although the UMWA did not have a specific proposal for addressing the outstanding issues related to Air Quality, MSHA and the UMWA agreed to exchange information and to further explore and deliberate options available to the Agency to address those outstanding issues.

### D. Conclusion

In summary, the Mine Act grants the Secretary of Labor exclusive authority to determine that a proposed rule should be withdrawn, so long as she publishes reasons for her decision not to promulgate the rule. With the September 2002 publication of a withdrawal notice, the Secretary identified three specific reasons for her determination that the Air Quality rulemaking should not continue: the effect of *AFL-CIO*, changes in Agency priorities, and the staleness of the rulemaking record. Each of these reasons was necessarily connected to the enormous commitment of resources that resumption of the rulemaking would require. The *AFL-CIO* holding illustrates that MSHA would have had to expend a substantial amount of resources to ensure that a final rule would not result in MSHA's susceptibility to a formidable, vigorous, and possibly successful legal challenge. With respect to the Agency's change in priorities, the Mine Act affords the Secretary broad authority to set and order her rulemaking priorities. The Secretary properly exercised that discretion by determining not to proceed with the Air Quality rulemaking, particularly in light of the resources that would be consumed by such a rulemaking.

MSHA has also identified several reasons why it continues to devote its resources to current rulemaking priorities, and the determination that a non-regulatory approach is reasonable in light of existing circumstances. For the reasons stated, the Secretary has concluded that other rulemakings, most notably the metal/nonmetal diesel particulate matter, respirable coal mine dust, and asbestos rules, constitute MSHA's highest priorities and that the Agency's resources should be focused accordingly. The progress of MSHA's higher priority rulemakings would be stymied by the tremendous quantity of resources that would be redirected toward an Air Quality rulemaking.

Although there are potentially thousands of health and safety risks that

MSHA could regulate, it must focus its resources on risks that are significant, that the Agency has deemed to be the highest priorities, and that the Secretary has found to be appropriate. If data or information provides evidence of a significant risk that MSHA has not addressed, the Agency will evaluate whether rulemaking should be initiated for the individual substance or agent. This document does not preclude any Agency action that the Secretary may find appropriate in the future.

For the reasons stated herein, with the exception of provisions published at 59 FR 8318 (February 18, 1994), the proposed rule is withdrawn.

Signed at Arlington, Virginia, this 15th day of November, 2004.

**David D. Lauriski,**

*Assistant Secretary for Mine Safety and Health.*

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BILLING CODE 4510-43-P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### 36 CFR Part 1228

RIN 3095-AB43

### Federal Records Management; Media Neutral Records Schedules

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Proposed rule.

**SUMMARY:** NARA proposes to amend its regulations relating to scheduling Federal records to make existing approved records schedules and future records schedules applicable to bodies of records regardless of the medium in which the records are created and maintained. Both the agency (in submitting the schedule) and NARA (in approving the schedule) would be able to specify that certain disposition authorities are valid only for the current media/format of the records. Although agencies currently are permitted to submit "media-neutral" records schedules, most existing records schedules were developed for hard-copy (usually paper) recordkeeping systems and do not state that they apply to records in other formats. Therefore, agencies have been required to submit new schedules when they convert from a hard-copy system of records to an automated (electronic) system, including special media records (such as still pictures, aerial photography, maps, charts, drawings, motion picture film, analog videotape, and analog sound recordings). This proposed rule

would reduce the workload for both agencies and NARA, allowing both to focus resources on critical records management needs.

**DATES:** Comments are due by January 18, 2005.

**ADDRESSES:** NARA invites interested persons to submit comments on this proposed rule. Please include "Attn: RIN 3095-AB43" and your name and mailing address in your comments. Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: Send comments to [comments@nara.gov](mailto:comments@nara.gov). If you do not receive a confirmation that we have received your e-mail message, contact Nancy Allard at 301-837-1477.
- Fax: Submit comments by facsimile transmission to 301-837-0319.
- Mail: Send comments to Regulations Comments Desk (NPOL), Room 4100, Policy and Communications Staff, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.
- Hand Delivery or Courier: Deliver comments to 8601 Adelphi Road, College Park, MD.

**FOR FURTHER INFORMATION CONTACT:** Nancy Allard at 301-837-1477 or fax 301-837-0319.

**SUPPLEMENTARY INFORMATION:**

### Background

Increasingly, agencies are automating their business processes in order to better meet their business needs. In many instances, the hard-copy records that new electronic systems replace are covered by a NARA-approved records schedule. Agencies currently are required to submit a Standard Form (SF) 115, Request for Records Disposition Authority, to obtain a new disposition authority when previously scheduled hard-copy records are now being created and maintained electronically. The only exceptions to this policy have been when the agency's approved schedule is media neutral or the records are covered by the General Records Schedules or by an agency-specific schedule that relates to administrative or housekeeping matters.

### Proposed Regulatory Changes

As part of our Records Management Initiatives, we have re-examined this policy and determined that changes should be made to the regulations. This proposed rule would:

(1) Establish NARA policy that new records schedules submitted to NARA

for approval on or after the effective date of the final rule will be considered media neutral (*i.e.*, the dispositions will apply to the recordkeeping copies of the described files in all media) unless the schedule identifies a specific medium for a specific series. This policy is reflected in the proposed change to 36 CFR 1228.24(b). NARA also proposes to modify 36 CFR 1228.24(b) and 1228.28(b) to make it clear that agencies still must identify special media records (*e.g.*, still pictures, motion pictures and videos, maps, aerial photography, etc.) when they submit schedules.

(2) Require agencies to notify NARA within 45 days when converting records systems containing permanent records from hard-copy format to electronic medium, including special media records. As part of the notification, agencies would provide information about the format(s) and volume of records in the electronic system,

(3) Authorize agencies to apply existing previously approved agency records schedules that cover hard-copy temporary records to those records when they are created electronically, if *all* of the following conditions are met:

- The content and function of the records has not changed (*i.e.*, the electronic records do not contain information that is substantially different from the information included in the hard-copy series, the electronic records are used for the same purpose as the hard-copy records, the underlying business processes and the regulations or other authorities from which records stem remain the same, etc.)

- The records relate to program matters and are scheduled for disposal less than 20 years after cut-off, or relate to administrative (housekeeping) matters, and

- The records are not covered by one or more exclusions in the proposed § 1228.31(a)(3).

This authorization will apply to the vast majority of agencies' records series. NARA estimates that more than 90 percent of agency series have retention periods of less than 20 years.

(4) Require agencies to submit a new SF 115 to obtain disposition authority for electronic versions of previously scheduled hard-copy temporary records with a retention period of 20 years or longer after cut-off. We estimate that less than ten percent of an agency's record series would be subject to this requirement. (If such records are already covered by a media neutral schedule item or conversion to electronic form was approved in the current schedule, this requirement does not apply.) As described later in this **SUPPLEMENTARY INFORMATION**, NARA expects that the