

PUBLIC SUBMISSION

As of: June 22, 2011
Received: June 20, 2011
Status: Posted
Posted: June 21, 2011
Tracking No. 80e68ed6
Comments Due: June 20, 2011
Submission Type: Web

Docket: MSHA-2010-0007

Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors

Comment On: MSHA-2010-0007-0001

Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors

Document: MSHA-2010-0007-0359

Comment from Robert Murray, Murray Energy Corporation

Submitter Information

Name: Robert E. Murray

Address:

56854 Pleasant Ridge Road
Alledonia, OH, 43902

Email: bobmurray@coalsource.com

Phone: 740-9261351

Organization: Murray Energy Corporation

General Comment

Comments attached.

Attachments

2011.06.20 MEC Comments Respirable Dust Rule with Attachments

AB64-COMM-92



MURRAY ENERGY CORPORATION

SUITE 300, 29325 CHAGRIN BOULEVARD
PEPPER PIKE, OHIO 44122

ROBERT E. MURRAY
Chairman, President & Chief Executive Officer

PHONE (216) 765-1240
FAX (216) 765-2654

June 20, 2011

Mr. Joseph A. Main
Assistant Secretary of Labor for Mine Safety and Health
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, Virginia 22209-3939

Re: Comments of Murray Energy Corporation on MSHA's Proposed Rule Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors: RIN 1219-AB64

Dear Assistant Secretary Main:

Murray Energy Corporation ("Murray Energy") hereby offers the following comments to the Mine Safety and Health Administration ("MSHA") concerning its Proposed Rule "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors," ("Proposed Rule" or "Rule"), published in 75 Fed. Reg. 64,412 on October 19, 2010.

Murray Energy is dedicated to providing safe and healthful working conditions for the coal miners who work at our coal mine operations, including the prevention of coal workers' pneumoconiosis ("CWP") and other occupationally caused lung diseases. In that regard, Murray Energy believes that the current rules of MSHA and the National Institute for Occupational Safety and Health ("NIOSH") are in need of reform based on experience gained under the implementation of the Federal Mine Safety and Health Act of 1977, as amended, (the "Mine Act") and other health and safety laws.

Murray Energy was hopeful that after two failed efforts to reform these rules during the Administrations of Presidents Bill Clinton and George W. Bush (*See* proposals at 65 Fed. Reg. 42,068 (July, 7, 2000) and 68 Fed. Reg. 10,784 (Mar. 6, 2003)), this third proposal might provide the framework for success. After careful examination of the Rule and

consultation with numerous scientific and industry experts, we are deeply disappointed to conclude that the Proposed Rule fails in every respect.

The Proposed Rule is so economically and technologically infeasible, arbitrary and capricious, and unsupported by the best available evidence that Murray Energy urges, in the strongest terms possible, that MSHA withdraw the Rule in its entirety. Simply put, if the Proposed Rule is finalized and implemented by MSHA, as written, its enforcement will present an existential threat to the underground segment of the coal mining industry. That threat, combined with the activities of this Administration's Environmental Protection Agency ("EPA") to sharply and unnecessarily restrict coal mining and the use of coal to generate electricity, has the potential to cripple the ability of the United States to power an economic recovery.

I. Overview of Murray Energy

Murray Energy Corporation is the largest privately owned coal company in the United States, based on annual bituminous coal production. We employ over 2,800 hard working Americans at eight underground and surface coal mining operations and support over 30,000 secondary jobs nationwide. We provide high-paying, stable employment in some of the most economically disadvantaged areas of the country. We are a low-cost producer of bituminous coal, helping to provide the safe, reliable, and affordable energy that our nation needs.

II. Expert Reports Demonstrate That the Rule is Arbitrary and Not Based on the Best Available Evidence

Murray Energy was so disappointed and dismayed by the Proposed Rule that we commissioned numerous scientific and industry experts to examine the Proposed Rule and to independently provide their objective analysis of the impact of the Rule in the following areas:

- A. MSHA's Preliminary Regulatory Economic Analysis ("PREA") of the costs of the Proposed Rule;
- B. MSHA's quantitative risk assessment of the Proposed Rule;
- C. Industrial hygiene underpinnings of the Proposed Rule;
- D. Laboratory testing of continuous personal dust monitors ("CPDMs");
- E. Medical monitoring and epidemiologic studies relevant to the Proposed Rule; and
- F. Unintended ergonomics problems associated with the mandatory wearing and use of CPDMs.

Full reports on these topics, prepared by renowned and recognized experts, including their curriculum vitae, are attached to this letter as a part of Murray Energy's comments.

The comments of these experts clearly demonstrate that the Proposed Rule is deeply flawed, arbitrary, and not based upon the best available evidence, specifically:

A. Economic Analysis

MSHA has vastly underestimated the costs and grossly exaggerated the supposed benefits of the Proposed Rule. MSHA negligently structured its PREA to capture “proposed benefits” up front and to obfuscate the recognition of large and near-term compliance costs, while ignoring the true substantial costs of lost revenues and injury to miners. The cost of work stoppages alone, caused by the Proposed Rule, will be approximately \$1.6 billion for underground mining. Expert analysis reveals that the costs of the Proposed Rule far exceed any alleged benefits. (See “Specific Comments on: Preliminary Regulatory Economic Analysis for the Coal Dust Rule,” prepared by Robin Cantor, PhD, Attachment A hereto).

B. Quantitative Risk Assessment

Expert quantitative risk assessment reveals the Proposed Rule requires longwall tailgate operators to reduce the level of respirable coal mine dust to a mean of 0.11 mg/m³. This is technologically and economically infeasible. MSHA failed to perform a quantitative uncertainty analysis, leaving the public with insufficient basis for assessing the uncertainty of MSHA’s estimates. Further, MSHA overly complicated its quantitative risk assessment, creating calculations that are convoluted and inaccurate, and hiding those inaccuracies in an opaque document. Simply stated: the proposed rule sets a standard that is unachievable. (See “Specific Comments on: Quantitative Risk Assessment for the Coal Mine Dust Rule,” prepared by Richard Reiss, ScD, MS. and Kenneth Borgen, DrPH, MPH, DABT, Attachment B hereto).

C. Industrial Hygiene

CPDMs are unproven, unreliable, subject to tampering, and fail to protect miners. The high error rates and technical issues with the CPDMs lead to the conclusion that they should not be relied upon for compliance purposes. Further, CPDMs distract miners and fail to immediately correlate miner work practices with exposure. CPDMs are complicated, if not impossible, to maintain, particularly with the increased sampling that is proposed. Additionally, they are difficult to wear in certain mining conditions. In proposing this Rule, MSHA has completely ignored relevant contributing factors to CWP, including coal rank and type, silica content, mine region, effect of miner age, smoking history, and exposure to certain chemicals. The Proposed Rule fails to protect miners by omitting a mandate for administrative controls and personal protective equipment. (See “Comments Specific to: Industrial Hygiene and Medical Surveillance Issues,” prepared by Michael N. Cooper, MPH, CIH, and Sheila McCarthy, MHS, CIH, Attachment C hereto; and see comments filed by Dr. John F. Gamble, Dr. Robert B. Reger, and Robert E. Glenn, filed separately for

Murray Energy, Alliance Coal, Alpha Natural Resources, Arch Coal, BHP Billiton New Mexico Coal, and Peabody Energy, and incorporated herein by reference). In addition, and very importantly, Murray Energy urges MSHA to pay especially close attention to a new study published online by NIOSH scientists on May 19, 2011, entitled "Coal Workers' Pneumoconiosis in the United States; Regional Differences 40 Years After Implementation of the 1969 Federal Coal Mine Health and Safety Act."¹ A critical review of the new NIOSH study has been prepared by Mr. Glenn and will also be filed separately for Murray Energy, Alliance Coal, Alpha Natural Resources, Arch Coal, BHP Billiton New Mexico Coal, and Peabody Energy.

D. CPDM Laboratory Testing

Independent testing of the CPDMs indicates that the devices are not reliable in typical underground coal mine conditions. When tested under the same environmental conditions, multiple CPDMs report a wide range of airborne dust concentrations, particularly when operating in elevated temperatures and humidity levels. The variation between dust readings among the CPDM units, and between the CPDM units and gravimetric samplers, has even exceeded the proposed regulatory limit of 1.0 mg/m³. This is in direct conflict with accepted sampling and analytical methods. Additionally, the CPDM units fail when exposed to certain radiofrequency signals. These failures are often unrecorded by the instrument which leads to false readings with no means of knowing that an error occurred. It is clear that the Proposed Rule would impose severe penalties and costs upon the coal industry based on the mandated adoption of CPDM units which are unproven and unreliable. (See "Laboratory Testing of Continuous Personal Dust Monitor," prepared by Michael Cooper, MPH, CIH, Sheila McCarthy, MHS, CIH, Attachment D.1 hereto; and E-Labs, Inc., Final Test Report No. 2341-B, Attachment D.2 hereto).

E. Epidemiology

MSHA relies upon incomplete and unreliable data in examining CWP in coal miners. MSHA used disease prevalence data from the NIOSH Coal Workers Health Surveillance Program ("CWHSP"). The CWHSP was not designed to provide disease prevalence data but rather to provide medical monitoring for individual miners. The CWHSP is deeply flawed and unreliable because it suffers from low miner participation. MSHA inappropriately generalized findings from this narrow group of CWHSP participants to the entire coal miner population. Further, in proposing this Rule, MSHA has not properly addressed relevant contributing factors to CWP, including coal rank and type, silica content, mine region, effect of miner age, smoking history, and other tobacco use. MSHA has proposed a nationwide rule to address an alleged problem that is clearly regional in nature. By contrast, for example, Australia has no reported CWP cases and has

¹ Suarathana E., Laney AS, Storey E., et al., *Occup. Environ. Med.*, published online, May 19, 2011.

an exposure threshold of 2.5 mg/m³, one hundred and fifty percent (150%) higher than MSHA's proposed standard. Clearly, in drafting this Rule, MSHA has relied upon incomplete, inaccurate and biased information. This is an inappropriate basis for promulgation of a nationwide mandatory health standard. (See "Specific Comments on the MSHA Review of Medical Monitoring and Epidemiologic Studies," prepared by Michael Kelsh, PhD, MPH, and Martha L. Doemland, PhD, MS, Attachment E hereto).

F. Ergonomics

The Proposed Rule is very likely to drastically increase the incidence of musculoskeletal disorders among miners required to frequently wear CPDMs. Further, there have been no completed studies examining the physiological and biomechanical impact of carrying a CPDM. MSHA has utterly failed to consider the ergonomic implications of the Proposed Rule and, therefore, completely ignored the very real dangers to the health and safety of miners caused by this Proposed Rule. MSHA must carefully examine this issue in light of the agency's obligation not to promulgate any mandatory health or safety standard that reduces the protection afforded miners by an existing standard. (See §101 (a)(9) of the Mine Act (30 U.S.C. §§ 801, 811(a)(9)); and See Comments by Janet Torma-Krajewski, Ph.D., CIH, CPE, Industrial Ergonomics, Inc., Attachment F hereto).²

III. MSHA Acted Arbitrarily and Irrationally

All of these comments show overwhelming evidence that MSHA has acted arbitrarily and capriciously in proposing the Rule, demonstrating a lack of rational connection between the facts and the choices MSHA made. Specifically, MSHA has done the following:

A. Failed to Provide Transparent Data

MSHA and NIOSH have failed to produce data from the CWHSP and the NIOSH Criteria Document for independent analysis.³ As such, the assessments of health risks and supposed exposure-response relationships in these data cannot be independently verified. This lack of transparency violates the Office of Management and Budget ("OMB") and the Department of Labor ("DOL") Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information (the "Guidelines").⁴ This lack of

² With regard to all of the aforementioned reports and studies, Murray Energy reminds MSHA that §101(a)(6)(A) of the Federal Mine Safety and Health Act of 1977, as amended, requires MSHA to "consider the latest available scientific evidence in the field." 30 U.S.C. §§801, 811(a)(6)(A).

³ DHHS (NIOSH) Criteria Document, Publication No. 95-106 (September 1995).

⁴ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication; Office of Management and Budget, 67 Fed. Reg. 8452-8260 (February

transparency is legally flawed in two respects: first, the public is denied the ability to fully comment on the health science which is the linchpin for the Proposed Rule; and, second, an agency's failure to follow its own guidance and rules is, on its face, arbitrary and capricious.⁵

B. Ignored Data Bias in the "B Reader Program"

The "NIOSH B Reader Program," the diagnostic program utilized to evaluate chest X-rays relied upon by MSHA, has been documented by NIOSH to be imprecise, inaccurate, and biased. Expert analysis reveals that the B Reader Program tends to yield roughly twice as many false positives than false negatives. This exaggerates the diagnosis of CWP and other diseases. MSHA and NIOSH have failed to quantify or account for this clear study bias. Reliance on such biased data violates the Guidelines and is arbitrary and capricious.

C. Arbitrarily and Capriciously Use an Unreliable Instrument (CPDM) as an Enforcement Tool

CPDM data collected by our experts and industry experts at Alliance Coal, LLC, indicates that CPDMs have significant problems with maintenance, repair, reliability and accuracy, and most significantly, fail to meet the NIOSH Accuracy Definition. Data from the CPDMs is not reproducible, consistent, or precise. Further, CPDMs are prone to inaccurate readings under conditions that exist in underground coal mines. NIOSH recently issued a Current Intelligence Bulletin⁶ which described the literature research in coal mine dust protection since 1995. The bulletin did not, however, address the significant issues with the reliability, cost, and accuracy of the CPDM units. The use of CPDMs in making compliance determinations is arbitrary and fails to meet the requirements of Mine Act § 202(f) which requires that single shift sampling be "accurate." 30 U.S.C. § 842(f).

D. Failed to Quantify Error

Our experts outline significant concerns with the CWHSP study design. As discussed above, NIOSH's decision to allow self-selection of participants biases the resulting data. This mistake is compounded by the fact that MSHA and NIOSH failed to attempt to qualify or correct the bias, violating the Guidelines as well as the Administrative

22, 2002). See also, Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009, "Transparency and Open Government." 74 Fed. Reg. 4685.

⁵ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (stating that notice and the ability to comment are an essential component of "fairness to affected parties.") *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency's failure to consider the "relevant factors" is a rulemaking is arbitrary and capricious)

⁶ NIOSH Current Intelligence Bulletin 64, April 2011

Procedure Act (“APA”) requirements for reasoned decision making. 5 U.S.C. §§ 551-559.⁷ Given the multiple issues underlying the health data in the NIOSH Criteria Document and subsequent studies, MSHA has failed to properly justify that the current rulemaking is necessary based on the facts outlined in the record.

E. Ignored Hot Spots of CWP

MSHA noted that it observed an increase in CWP, but failed to highlight the fact that these purported increases are focused in certain “hot spots.” This glaring omission in the Proposed Rule demonstrates that MSHA failed to evaluate an important portion of the data, which would drastically alter its conclusions. This omission is further highlighted by MSHA’s internally inconsistent statements related to dust levels and the prevalence of disease. Thus, while MSHA notes that dust levels have been steadily decreasing in coal mine operations, the incidence of disease has purportedly increased. This gap in MSHA’s logic renders meaningless its conclusions that further reductions in respirable coal dust will lower health risk to miners. Further, evidence suggests that silica and quartz content is a factor in determining health outcomes. NIOSH recently issued a Current Intelligence Bulletin⁸ which described the literature research in coal mine dust protection since 1995. This NIOSH bulletin acknowledges that there are other factors which may play a pivotal role in protecting coal miners from disease:

These include: 1) free radicals, in which particles from freshly-fractured siliceous rock have been found to be more fibrogenic than aged particles (48); 2) particle occlusion, in which clay present in the rock strata can surround the silica particles and render them less toxic (49); and 3) bioavailable iron, which has been found. MSHA has not taken these factors into account with the Proposed Rule.

See comments filed by Dr. John F. Gamble, Dr. Robert B. Reger, and Robert E. Glenn, incorporated herein by reference. MSHA must reevaluate the data to determine whether levels of protection differ in CWP hot spots.

F. Promulgated an Infeasible Rule

The actual reductions in dust concentrations needed to meet the Proposed Rule and to ensure compliance with substantially increased sampling are not technologically feasible, particularly for certain types of mining operations. MSHA admits, at 75 Fed. Reg. 64220, that its qualitative risk assessment does not account for the additional reductions in dust concentrations resulting from portions of the Proposed Rule, other than the reduction to a 1

⁷ Cf. *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1108 (D.C. Cir. 1998) (“There is a false sense of security that comes from the use of numbers, which in this context can appear much like scientific data. But any useful scientific measurement must be accompanied by an estimate of its uncertainty”).

⁸ NIOSH Current Intelligence Bulletin 64, April 2011

mg/m³ standard. MSHA further failed to account for this infeasibility in its PREA. This failure to consider the results of major elements of the rulemaking demonstrates a lack of rational connection between the facts found by the agency and the Proposed Rule.

G. Proposed a Rule which Harms the Health and Safety of Miners

MSHA has failed to consider the ergonomic hazards to which miners will be subjected by the mandatory use of CPDMs. Should MSHA insist on the use of CPDMs as it has proposed, the agency will violate Mine Act § 101 (a) (9), which provides that no mandatory health or safety standard promulgated under Mine Act § 101 (the Mine Act section relied upon by MSHA as its authority for the Proposal) shall reduce the protection afforded miners by an existing mandatory health or safety standard—in this instance MSHA's existing mandatory health standards for protection of miners against respirable coal mine dust (30 C.F.R. Parts. 70 and 71). Expert reports clearly indicate that the mandatory use of CPDMs pose an unstudied and very real risk to the health and safety of miners.

H. Inadequately Analyzed Compliance Costs

MSHA's cost analysis fails to consider substantial, relevant factors, including: the number of mechanized mining units ("MMUs") affected by proposed 30 CFR § 75.332; the costs to purchase CPDMs; costs to maintain and repair CPDMs; costs due to production work delays; work stoppages; additional personnel; health and safety costs associated with increased use of CPDMs; and possible elimination of the super section system of mining. MSHA has utterly failed to address these potential costs in the Proposed Rule. The deficiencies in MSHA's economic analysis are so glaring that relying on the PREA would be arbitrary. Our experts have concluded that the Proposed Rule fails a cost-benefit test based on a corrected benefits analysis and the compliance costs reviewed in the PREA. Once work stoppages in underground mining are considered, the true costs of complying with the Proposed Rule would exceed \$1.6 billion. Therefore, MSHA must submit the Proposed Rule for OMB review pursuant to Executive Order 12866 (58 Fed. Reg. 51735, Oct. 4, 1993) because the annual effect of the Proposed Rule on the economy exceeds \$100 million.

IV. Murray Energy Demands That MSHA Withdraw the Proposed Rule

For all of the reasons discussed above and in the comments contained in Attachments A through F (summarized in Section II above), as well as the additional comments contained in Attachment G of this letter, Murray Energy insists that the Proposed Rule is inherently flawed in numerous, irreparable ways and must be entirely withdrawn. MSHA has misused the authority granted to it by Congress in §§ 201 and 202(f) of the Mine Act, and failed to carry its burden under Mine Act § 101(a)(6)(A). Further, MSHA ignored its own guidelines and the mandates of other governing statutes,

Mr. Main
RIN 1219-AB64
June 20, 2011
Page 9

failed to rationally analyze the factual bases for the Proposed Rule, and arbitrarily proposed a Rule which is economically and technologically infeasible, irrational, and which will destroy the underground coal mining industry's attempts to provide and preserve the jobs of hard-working Americans and to promote this nation's economic recovery.

In addition to these comments, we hereby endorse the comments of the National Mining Association and incorporate them by reference as if they were fully set forth herein. We also note that Murray Energy has filed additional comments on the Proposed Rule jointly with Alpha Natural Resources, Alliance Coal, LLC, Arch Coal, Inc., BHP Billiton New Mexico Coal Operations, and Peabody Energy, incorporated herein by reference. These comments, in totality, demonstrate an industry and expert consensus that the Proposed Rule is deeply flawed, arbitrary, infeasible, and not based upon the best available evidence.

For all the reasons enumerated above and in the attached supporting documentation, Murray Energy hereby demands that MSHA withdraw the Proposed Rule in its entirety.

Sincerely,

MURRAY ENERGY CORPORATION

A handwritten signature in blue ink that reads "Robert E. Murray". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Robert E. Murray
Chairman, President & Chief Executive Officer

Attachments