

RIN 1219-AB65

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To: Mine Safety and Health Administration
RE: Notice of Intended Rule-making: Proximity Detection Systems for Underground Mines
February 22, 2010

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I. Preliminary Concerns

From the outset, the primary concern in any decision regarding underground mining is the safety of the miners. Thus concern over striking, pinning and crushing accidents warrants safety measures to prevent injuries resulting from accidents or misuse of remote control continuous mining machines (RCCMs). Promulgating a rule that mandates the use of proximity detection systems, however, raises competing concerns regarding appropriate procedural approach.

II. Procedural Problems

The Mine Safety and Health Administration (MSHA) fails to specify at the very least whether it actually intends to promulgate a rule regarding this safety concern. Instead of issuing notice of intent to make a rule, MSHA has issued notice “to determine if the Agency should consider regulatory action.” Proximity Detection Systems for Underground Mines, 75 Fed. Reg. 5009 (proposed Feb. 1, 2010). Such a fleeting thought towards rulemaking discourages interested parties from commenting and giving valuable advice. Why would a party respond to this notice when it can simply wait for a more concrete rule and provide a more definitive response? Commenting on this notice is at best perplexing because there is no indication what a proposed rule might include. The only clue is that a possible rule would include requirements for using proximity detection systems.

The Administrative Procedure Act (APA) requires “either the terms or substance of a proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). Based

on that wording and the perception that a final rule is a logical outgrowth of the proposed rule, the modern assumption is that “notice of proposed rulemaking will generally propose rules for adoption.” Gary Lawson, *Federal Administrative Law* 289 (5th ed. 2009). Here the notice is left wide open to potential challenges when a rule is finally made. While the background information is well-addressed, the proposed proposal of a rule itself is too vague to support a logical outgrowth. The only options are withdrawal of this notice in lieu of a more detailed proposed rule or having another notice and comment period at a later time on a more substantial rule.

III. Suggested Procedural Approach

Issuing a blanket rule requiring proximity detection systems fails to solve the problems of crushing and pinning accidents because the rule would be overbroad. What this rule would create is a presumption that the use of RCCMs is inherently unsafe. That is not the case. The agency has at its disposal a much more effective tool to craft the agency’s desired increase in safety.

In *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), the Supreme Court encouraged the agency to promulgate a quasi-legislative rule. The Court further noted, however, a requirement to do so was too rigid and would “make the administrative process inflexible and incapable of dealing with many of the specialized problems that arise.” Crushing and pinning accidents are just such a specialized problem. By MSHA’s own facts there have been only thirty-one deaths in twenty-seven years. See 75 Fed. Reg. 5009. This statistic belies any claim that there is a widespread problem with crushing and pinning fatalities in underground mining.

The agency could simply devise a policy statement based on 30 CFR 57 that provides for *ad hoc* adjudication of the claims of crushing and pinning accidents. See *United States Telephone Ass’n v. FCC*, 28 F.3d 1232 (providing for determination and use of policy statements). *Ad hoc* adjudication that targets unsafe mines with fines and mandated use of

proximity detection systems is a very precise and effective way to deal with these accidents. Instead of a blanket presumption that the underground mines are unsafe, *ad hoc* adjudication would precisely pinpoint the unsafe companies.

Furthermore this method of dealing with crushing and pinning accidents encourages companies that are safety conscious to have the freedom to innovatively and rigorously pursue methods of ensuring the safety of miners. These companies deal directly with the day to day safety concerns and are best equipped to use that intimate experience to create a safe working environment. For those companies who choose not to emphasize and strive for a safe working environment, there is the looming threat of agency action to mandate safety.