McAteer & Associates

PLLC
-Attorneys-at-Law-

Post Office Box 1050
132 West German Street
Shepherdstown, West Virginia 25443

J. Davitt McAteer, Esquire
mcateeresq@aol.com
droberts@mcateer-assoc.com

Phone: (304) 876-9447
Facsimile: (304) 876-9466

J. Marshall M. Enos, Esquire
menos@mcateer-assoc.com

September 22, 2008

Assistant Secretary Leon Sequeira
Office of the Assistant Secretary for Policy
200 Constitution Avenue, NW, S-2312
Washington, DC 20210
ATTN: Risk Assessment Policy

Re: Department of Labor Requirements for DOL Agencies'(OSHA & MSHA) Assessment of Occupational Health Risks, RIN 1290-AA23

Dear Assistant Secretary Sequeira:

I wish to submit the following objections and comments to the proposed Requirements for DOL Agencies' Assessment of Occupational Health Risks, published in the Federal Register, Vol. 73, No. 169, Friday, August 29, 2008, p. 50909, and further wish to request a public hearing to the proposed rule on such objections under 29 USC §655(b)(3) and 30 USC §801 et seq. as amended and supplemented by The Mine Improvement and New Emergency Response Act of 1977 (P. 109-236).

Sincerely,

J. Davitt McAteer

JDM/dcr
Attachment
cc: The Honorable Robert C. Byrd

OBJECTION TO THE DEPARTMENT OF LABOR'S PROPOSAL FOR REQUIREMENTS FOR THE OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION AND MINE SAFETY & HEALTH ADMININSTRATION
ASSESSMENT OF OCCUPATIONAL HEALTH RISKS
RIN 1290-AA23

Submitted By: J. Davitt McAteer

Without question, Congress has pervasive authority on agency rulemaking activities, and Congress has, in this instance, granted to the Department of Labor, specifically OSHA & MSHA authority to engage in policy making through rulemaking. However, these enabling statutes also define the scope of the agencies authority. Thus, Congress elected to mandate the Secretary to follow the mandates of the Mine Safety & Health Act, 30 USC §801 et seq. ("MSH Act") and the Occupational Safety & Health Act, 29 USC §651 et seq., ("OSH Act") rather than the APA minimum requirements found in 5 USC §553 and has established specific "hybrid" rulemaking procedures which each agency must follow in addition to and in lieu of the APA 5 USC 301 authority cited.

When Congress enacted the Mine Safety & Health Act, 30 USC §801 et seq. ("mine Act") and the Occupational Safety & Health Act, 29 USC §651 et seq., it mandated specific rulemaking procedures to supplement or supersede the minimal notice, comment, and statement of basis and purpose required by the Administration Procedures Act (APA) 5 USC §§551-59, 701-06, 1305, 3105, 3344, 5372, 7521.[1] The MSH Act, for example, requires MSHA to use a very specific detailed process to promulgate, amend or revoke substantive mandatory health and safety standard rules. That process includes specific mandated time periods in which the Secretary is to make decisions as to whether and how to engage in such rulemaking involving mandatory health and safety standards. See, 30 U.S.C. §811 (1) through (4). In addition, only OSHA and MSHA can sign proposed regulations under the OSH and MSH Acts.

The Supreme Court has recognized that, in rulemaking, administrative agencies must follow the specific mandates of their enabling statutes Thus, in *Bowers v. Georgetown University Hospital*, 488 US 204, 109 S. Ct. 468 (1988), the Court held that the Medicare Act, 42 USC §1395 X (V)(l)(1) did not authorize the Secretary of HHS to promulgate retroactive cost-limits rules. The court said: *"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the <u>authority</u> <u>delegated</u> by Congress."* 109 S.Ct. at 471 (emphasis supplied).

Here the improved proposed regulations cite 5 USC §301 as their general authority to empower the Assistant Secretary for Policy ("ASP"). In fact, §5 USC 301 does not authorize the Secretary through the ASP to issue the proposed regulation. Section 301 states:

> *The head of an Executive Department...may prescribe regulation for the government of his department, the conduct of its employees, the distribution and performance of its business...*

These proposed regulations constitute a thinly veiled attempt to expand this limited ministerial authority into an unauthorized substantive rulemaking procedure. Indeed the title of the proposed regulations "Requirements for DOL Agencies Assessment of Occupational Health Risks" clearly

[1] The agencies are bound by the Congress's limitation of rulemaking delegation of authority.

indicates that the proposal goes far beyond § 301's grant of authority and are therefore invalid, as substantive regulations which fall within the OSHA and MSHA authority.

It is important to note that the Administrative Procedure Act does not provide for the publication by an agency of an Advanced Notice of Proposal Rulemaking (ANPR) although Congress, in some instances, has passed regulatory statutes which require that rulemaking begin with ANPR. See Federal Trade Commission Improvement Act, 15 USC §57a (b)(s)(A) and the Energy Policy and Conservation Act, 42 USC §6295(i). In an enabling statute that mandates a "hybrid" rulemaking process, Congress can mandate, as it has here, specific additional rulemaking procedures such as the requirements for informal (non-adjudicatory) public hearings. For example, under both the OSH Act and the MSH Act, the agency is required to hold public hearings, if an interested person files written objections to a proposed rule and requests a public hearing "on such objections." See, 29 USC §655 (b)(3) and 30 USC §80?(a).

Here, however, the proposed regulation is contrary to the explicit enabling statute mandates relating to the promulgation of health regulations. This proposal improperly seeks to make law/policy using the authority of section 301 rather than using the specifically mandated rulemaking process set forth by Congress in both the OSH Act and the MSH Act. In proposing the instant regulation, the ASP has ignored the carefully crafted rulemaking process including specific time limits contained in the two enabling statutes (MSH Act and OSH Act) and transferred power vested in OSHA and MSHA by the enabling statutes.

If Congress had intended to require an Advanced Notice of Proposed Rules for OSHA and MSHA health regulation, Congress could and would have set out that requirement in the two enabling statutes. The agencies cannot now add requirements without Congressional direction.

Further, the rationale as set out in the proposed rule is contrary to the fundamental mandates in OSH Act and MSH Act to set standards which most adequately assure or the basis of the first available evidence that no miner will suffer impairment of health as functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for a period of his working life. This Congressionally mandated criteria is at variance with the criteria set out in the proposal "public accountability and the need for consistency, reliability and transparency in the risk assessment procedures." Congress has thus preempted the rulemaking authority "criteria" and the proposed regulations must meet the standards set by Congress not the risk assessment determined by this proposal.

Finally, the rule, as drafted, will have a negative impact on protecting the health of workers by requiring increasingly cumbersome and time consuming provisions to health proposals. Congress has acted in this instance to require agencies follow more timely and rigorous procedures in protecting workers health. Moreover, the strict mandatory time limits Congress imposed on the rulemaking process in the MSH Act, 30 U.S.C. § 811 (1) – (5) are substantially altered by the proposal's which grafts upon the Congressionally mandated hybrid rulemaking requirements set forth in the MSH Act an extensive additional time consuming process that undermines Congress's determination that time is of the essence in the promulgation of mandatory safety and health standards.

For the above stated reasons, I request that the proposal be withdrawn. If the Department of Labor refuses to withdraw the proposal, I request public hearings and an extension of the comment period.