

Comments of the International Union, United Automobile Aerospace and Agricultural
Implement Workers of America (UAW) on

29 CFR Part 2 RIN 1290-AA23:

Requirements for DOL Agencies' Assessment of Occupational Health Risks

The UAW opposes this rule. We think it is shameful that after refusing to take action to protect workers from serious well recognized health hazards for 7 ½ years, the Bush Administration is spending its last months and taxpayer money to prevent the next administration from taking prompt action. DOL's proposed risk assessment rule is unsound, unnecessary and will result in death and disease.

We oppose the risk assessment rule proposed by DOL because it would do the following:

- Delay the rulemaking process for setting occupational health standards by requiring both OSHA and MSHA to issue an advanced notice of proposed rulemaking (ANPR) for every single rule.
- Further delay an already glacial process by requiring OSHA and MSHA to respond to every public comment submitted on the risk assessment issues, regardless of validity or merit.
- Add even more delay to the rulemaking process by requiring the agencies to gather and analyze available industry-by-industry evidence related to working life exposures, which could result in weaker protections for workers.

If it ain't broke don't fix it. Since the 1980's, when OSHA and MSHA began preparing quantitative risk assessments to support health standards for toxic substances, the agencies' assessments have consistently withstood vigorous scientific scrutiny and legal challenges. The assessments have been based on the best available evidence. They have determined, with little room for doubt, that the levels of exposure experienced by workers placed them at significant risk of "material impairment of health or functional capacity." Since OSHA and MSHA risk assessments already meet scientific and judicial standards, there is no need for a new risk assessment rule.

DOL's Proposed Rule is the Problem not the Solution.

In 2007, the National Research Council recommended that any risk assessment guidance documents "outline goals and general principles of risk assessment designed to enhance the quality, efficiency, and consistency of risk assessment...[that would] be consistent with each agency's legislative mandates and missions, and draw on the expertise that exists in federal agencies and other organizations." In addition the, Council indicated that the guidance should be peer-reviewed and contain procedures for ensuring agency compliance. (National Research Council of the National Academies. "Scientific Review of the Proposed Risk Assessment Bulletin from the Office of Management and Budget," 2007.)

In the present rulemaking, the DOL has failed to:

- outline goals and general principles of risk assessment;
- develop guidelines that would enhance the quality, efficiency and consistency of risk assessment;
- draw on the expertise in federal agencies and other organizations; and
- subject the proposed rule to peer review.

In addition to the above flaws, the process by which this rule is being promulgated is inconsistent with its stated goals. The short public participation period discourages the input that the Department claims to value. The proposed rule says the Department is seeking public comment "...in order to gain valuable public input and in the interests of full transparency and accountability." Yet, the time allowed to submit written comments is only 30 days (the deadline is September 29) and there is no public hearing scheduled. Moreover, the Department failed to follow its own proposal requiring MSHA and OSHA to post all relevant documents at www.Regulations.gov within 14 days of each key step in the rulemaking process. DOL's entire process for developing and issuing the proposal has disregarded recent reports and decades of MSHA and OSHA practices, while ignoring the standards of openness and transparency that the Department claims to value.

The Rule Will Add Years of Delay to OSHA and MSHA Rulemaking and Delay Needed Protections. The DOL rule would require OSHA and MSHA to issue an ANPR for each non-emergency occupational health rule. This new mandatory step is not needed for every rulemaking and will delay needed protections. OSHA and MSHA already provide for much more extensive public input and participation in standard setting than virtually all other government agencies. Both routinely solicit information using mechanisms such as public meetings, stakeholder meetings, workshops, advisory committees, negotiated rulemaking committees, *Requests for Information* published in the Federal Register and ANPRs in the Federal Register. While ANPRs may be appropriate for some rules, it is unsound to impose a one-size fits all process and methodology on all rules because rules vary in their complexity and approach. Mandating an additional formal step in the rulemaking process for every occupational health rule, and requiring OSHA and MSHA to respond to all comments on the risk assessment issues before even issuing a proposed rule, will add additional delay to a process that already takes eight or more years to complete.

Every delay results in unnecessary exposure by workers to harmful substances, causing deaths and illnesses that could have been prevented. For example, OSHA's risk assessment on hexavalent chromium indicates that every year of delay in adopting the new 5.0 µg/m³ standard resulted in 40 to 145 lung cancer deaths. Similarly, OSHA's preliminary risk assessment on silica estimates that every year of delay in reducing the permissible exposure limit to 50 µg/m³ results in 60 unnecessary deaths.

The proposed new risk assessment rule applies to standards currently under development. This means that OSHA will have to go back to square one and issue an ANPR for rules that have been under development for years, such as the silica standard whose

development began in 1997. The risk assessment rule would also delay action on an OSHA standard to protect workers from diacetyl, a food flavoring chemical that causes a disabling deadly lung disease. This is a rule that the Bush administration promised to expedite through normal rulemaking procedures in response to legislation passed by the House. Unfortunately, there has been no such action. If the next Administration were to decide to move quickly on diacetyl, the new DOL risk assessment rule would delay that action by requiring OSHA to issue an ANPR and respond to all comments.

The DOL Rule Would Change the Way OSHA and MSHA Assess Worker Health Risks and Could Result in Weaker Protections. The new DOL rule would require OSHA and MSHA to gather and analyze available industry-by-industry evidence related to working life exposures in evaluating risk. In contrast, the current practice of both agencies is to evaluate the risk of disease posed to the overall population of workers exposed to the hazard in question at the level of exposure under an existing rule or conditions, and to assess how a reduction in exposure to lower levels would reduce that risk. Both the OSH Act and the MSH Act require that the agencies protect workers against health risks even if they are exposed over the course of a working lifetime. In keeping with this statutory requirement, both agencies have adopted a practice of assessing workplace health risks based upon exposure over 45 years. In regulating occupational health risks, both agencies usually set a single permissible exposure level for all workers exposed to the hazard. This limit applies to all industries covered by the rule. The agencies appropriately assume that exposure to similar levels of a chemical pose the same risk to workers, regardless of the sector where the exposures occur. Thus, the proposed industry-by-industry assessment of health risks – and the idea that different exposure limits could be set for workers in different sectors – makes no sense for rules that cover many groups of workers.

In addition, the proposal appears to potentially open the door to changing OSHA and MSHA's longstanding assumption of a 45 year working lifetime exposure. An earlier version of the proposal explicitly made this change, and the new proposal is murky on this point. Such a change would be unsound. In many industries such as coal mining and construction, a large number of workers are employed in the industry or the occupation over their entire working life. These long-term workers are at the greatest risk and deserve to be protected. Basing risk determinations and exposure levels on the average time in an occupation or industry will reduce the level of protection and leave all workers at greater risk. For example, if OSHA's hexavalent chromium standard was based on the assumption that workers were on average employed for 10 years, the permissible exposure level would be 4.5 times higher than that set by OSHA, creating a greater risk for all workers, and allowing much greater cumulative exposures and risk for longterm workers. This approach is unsound and contrary to the directive in the Occupational Safety and Health Act and Mine Safety and Health Act that protections be set at a level that will protect workers who are exposed for a "working lifetime."

The Process by Which DOL Has Developed the Risk Assessment Rule is Highly Irregular and Flawed.

The risk assessment rule was not included in the Department of Labor's semi-annual regulatory agenda published in April 2008, despite a requirement under Executive Order 12866 that all rules under development be listed on the agenda.

The draft proposal was published in the Federal Register on August 29, 2008, in violation of the policy announced by White House Chief of Staff Josh Bolten on May 9, 2008, which stated that except for "extraordinary circumstances," agencies were to issue proposed rules no later than June 1, 2008. No "extraordinary circumstances" exist to justify DOL's last-minute rule.

Because the proposed risk assessment rule will affect the substance and process of standard-setting under the Occupational Safety and Health Act and the Mine Safety and Health Act, it is the UAW's view that the Department of Labor must hold a public hearing on the proposal if requested. The UAW and others have requested such a hearing, but the Department has given no indication that it intends to schedule one.

In conclusion, the UAW believes that this rule is unsound and should be withdrawn because it will delay and weaken future OSHA and MSHA health standards, leading to unnecessary illness and death.