

811(a). The Act also authorizes the Secretary to promulgate emergency temporary standards (“ETS”), which take effect immediately upon publication in the Federal Register and which serve as proposed rules for the rulemaking proceedings authorized for the promulgation of mandatory safety and health standards. 30 U.S.C. § 811(b).¹

The Mine Act provides for judicial review of the Secretary’s rulemaking actions. 30 U.S.C. § 811(d). Within sixty days of the promulgation of a mandatory standard, a person aggrieved by it may file a petition for review with the United States Court of Appeals for the District of Columbia Circuit or the Circuit where the person resides or has his principal place of business. *Id.* This procedure is “the exclusive means of challenging the validity of a mandatory health or safety standard.” *Id.*²

The present respirable dust standard for coal mines, which the plaintiff seeks to replace, is two milligrams per cubic meter of air (2 mg/m³). 30 C.F.R. §§ 70.100(a) (underground coal mines), 71.100 (surface coal mines and surface areas of underground coal mines). (For certain areas in underground coal mines, *i.e.*, those “within 200 feet outby the working faces of each section in the intake airways,” the present standard is 1.0 mg/m³. 30 C.F.R. § 70.100(b).) The present standard for respirable silica is (as the plaintiff recognizes, Complaint, ¶¶ 9-10, 16) determined by a formula based on the percentage of quartz present in the respirable dust in a mine’s atmosphere: when the percentage of quartz in the respirable dust exceeds 5%, the

¹ To promulgate an ETS, the Secretary must determine that: (i) miners face grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (ii) an ETS is necessary to protect miners from the danger. 30 U.S.C. § 811(b)(1). Within nine months of the promulgation of an ETS, the Secretary must promulgate a mandatory standard. 30 U.S.C. § 811(b)(3).

² There is no provision separately addressing judicial review of an ETS. Rather, promulgation of an ETS is the first step in a process that leads to the promulgation of a mandatory standard, 30 U.S.C. § 811(b)(3), which is reviewable under § 811(d).

standard for respirable dust is computed by dividing the percentage of quartz by ten. 30 C.F.R. §§ 70.101 (underground coal mines), 71.101 (surface coal mines and surface areas of underground coal mines).³

B. The Factual Background

The plaintiff filed his complaint on March 20, 2008. The sole basis for jurisdiction cited in the complaint is the mandamus statute, 28 U.S.C. § 1361. *Complaint*, unnumbered introductory paragraph, at 1. The plaintiff alleges that the Secretary is obligated, but has failed, to promulgate new mandatory standards for respirable dust and silica in coal mines. *Complaint*, ¶¶ 7-16. As a result, the plaintiff alleges, he “continues to work regularly in an environment that the [Secretary] has failed to properly regulate for respirable dust, contrary to the [Secretary’s] duties under the Mine Act.” *Complaint*, ¶ 19. Plaintiff asks this Court to order the Secretary to issue both an ETS and a mandatory standard setting specific exposure levels for both dust (1.0 mg/m³) and silica (.05 mg/m³). *Complaint*, unnumbered final paragraph, at 6.

ARGUMENT

The Mine Act vests exclusive jurisdiction over challenges to the Secretary’s allegedly improper inaction in rulemaking in an appropriate U.S. Court of Appeals.

The Mine Act vests exclusive jurisdiction over review of the Secretary’s promulgation of a mandatory standard in a U.S. Court of Appeals: either the D.C. Circuit or the Circuit in which the petitioner resides or has his principal place of business. 30 U.S.C. § 811(d). Here, the plaintiff does not challenge the Secretary’s promulgation of a mandatory standard, but rather challenges the Secretary’s allegedly improper failure to promulgate certain standards. Judicial review of such claims is not explicitly addressed by the Mine Act.

³ For example, where the respirable dust in the mine atmosphere contains 20% quartz, the respirable dust standard is .5 mg/m³ (10 / 20 = .5).

The All Writs Act, however, provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651. The Mine Act, in conjunction with the All Writs Act, vests exclusive jurisdiction in the Courts of Appeals over claims that the Secretary has improperly withheld or unreasonably delayed promulgation of a mandatory standard. *See, e.g., La Voz Radio de la Comunidad v. F.C.C.*, 223 F.3d 313, 318 (6th Cir. 2000) (where a statute commits review of agency action to an appellate court, any suit seeking relief that might affect the appellate court’s future jurisdiction is subject to the exclusive jurisdiction of the appellate court); *Telecommunications Research and Action Center v. F.C.C.*, [TRAC] 750 F.2d 70, 75 (D.C. Cir. 1984) (same). The D.C. Circuit reasoned in *TRAC* that, “[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.” 750 F.2d at 76.⁴ The Court emphasized that, when Congress lodged review of an agency’s actions in the Court of Appeals, “Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of authority.” 750 F.2d at 77.

The *TRAC* reasoning applies here: because the Courts of Appeals would have exclusive jurisdiction to review new mandatory standards for respirable dust and silica if such standards are promulgated, the Courts of Appeals also have exclusive jurisdiction to review claims that the promulgation of new standards for respirable dust or silica has been improperly withheld or unreasonably delayed. The D.C. Circuit applied precisely this reasoning in holding that it had exclusive jurisdiction to review a claim that the Secretary had unreasonably delayed the

⁴ The Court found additional support in the Administrative Procedure Act, which directs agencies to conclude matters “within a reasonable time,” 5 U.S.C. § 555(b), and stipulates that the “reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1). 750 F.2d at 76-77.

promulgation of a standard reducing the permissible levels of radon daughters to which underground miners may be exposed. *Oil, Chemical and Atomic Workers Int'l Union v. Zeeger*, 768 F.2d 1480, 1485-87 (D.C. Cir. 1985).

Similarly, in *In re: United Mine Workers of America*, 231 F.3d 51, 54-55 (D.C. Cir. 2000), the D.C. Circuit exercised jurisdiction over claims that the Secretary improperly withheld promulgation of an ETS, and unreasonably delayed promulgation of mandatory standards, concerning coal mine dust sampling. Additionally, in *United Mine Workers of America v. U.S. Dep't. of Labor*, 358 F.3d 40, 42-42 (D.C. Cir. 2004), the D.C. Circuit held that it had jurisdiction to consider a claim that the Secretary improperly withdrew a proposed rule to establish air quality standards for mines. It would be anomalous for district courts to exercise jurisdiction over challenges to the Secretary's allegedly improper withholding or unreasonable delaying of the promulgation of mandatory standards while Courts of Appeals exercise jurisdiction over challenges to the Secretary's promulgation of mandatory standards. *Id.* at 43.

Plaintiff improperly invokes the mandamus statute, 28 U.S.C. § 1361, as a basis for this Court's jurisdiction. Mandamus is an extraordinary remedy for which the plaintiff must show that: (i) a public official has a plain duty to perform the act sought; (ii) the plaintiff has a plain right to have that act performed; and (iii) there exists no other adequate remedy. *Matthews v. United States*, 810 F.2d 109, 113 (6th Cir. 1987). The Mine Act, in conjunction with the All Writs Act, 28 U.S.C. § 1651, provides another adequate remedy (discussed above): review by an appropriate U.S. Court of Appeals. Mandamus jurisdiction does not obtain where an exclusive statutory method of reviewing administrative action exists. *Louisville & Nashville R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983).

Accordingly, this Court lacks subject matter jurisdiction over the plaintiff's complaint. The Secretary therefore urges the Court to dismiss this matter pursuant to Federal Rule of Civil Procedure 12(b)(1).

CONCLUSION

WHEREFORE, for the reasons described above, the Secretary respectfully requests that this Court dismiss the plaintiff's complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing into the Court's record of this action on May 16, 2008 by using the Court's CM/ECF Electronic Filing System which will send notice to:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

SCOTT HOWARD,

)

FILED ELECTRONICALLY

Petitioner,

)

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Civil Action No. 08-57 KKC

v.

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ELAINE CHAO,
Secretary, United States Department
of Labor,

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Respondent.

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DEFENDANT’S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

The defendant, the Secretary of Labor, pursuant to Fed. R. Civ. P. 12(b)(1), moves to dismiss the complaint for lack of subject-matter jurisdiction. In support of this motion, the defendant respectfully refers the Court to the accompanying memorandum of points and authorities. A proposed Order consistent with this motion is attached.

Respectfully submitted,

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