No. 08-5799

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: SCOTT HOWARD,

Petitioner.

Petition for Writ of Mandmaus

On Transfer from the United States District Court
for the Eastern District of Kentucky

BRIEF OF PETITIONER SCOTT HOWARD

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _______________ Case Name: _________________________________

Name of counsel: ____

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Pursuant to 6th Cir. R. 26.1, ____
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES…………………………………………………v

STATEMENT IN SUPPORT OF ORAL ARGUMENT……………………….1

JURISDICTIONAL STATEMENT……………………………………………..1

STATEMENT OF THE ISSUE………………………………………………..2

STATEMENT OF THE CASE………………………………………………..3

STATEMENT OF THE FACTS………………………………………………4

SUMMARY OF THE ARGUMENT…………………………………………...11

STANDARD OF REVIEW…………………………………………………...13

ARGUMENT

I. The Mine Act Imposes a Plain Duty Upon the Secretary to Promulgate Emergency Temporary Standards and Final Health and Safety Regulations That Will Prevent Material Impairment of a Miner's Health, Especially as to Respiratory Illness..15

A. Final Mandatory Standards…………...………………...15

B. Emergency Temporary Standards……………….........20

II. Mr. Howard Has a Plain Right to Have the Secretary Promulgate More Protective Respirable Dust Limits, and There Is No Other Adequate Remedy for Him to Pursue Other Than Mandamus...………………………………………….…22

III. Mandamus Requiring the Secretary to Promulgate Lower Respirable Dust Limits Is Necessary Because of the Secretary's Intolerable Failure to Address the Harm to Miners Caused by Excessive Respirable Dust…………………………………..….…25

CONCLUSION……………………………………………………..…………29

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Ass'n of Flight Attendants-CWA v. Chao, 493 F.3d 155 (D.C. Cir. 2007)…....24, 25

Campbell v. Consolidation Coal Co., 811 F2d 302 (6th Cir. 1987)……………..4, 5

Conservation Law Foundation, Inc. v. Clark, 590 F. Supp. 1467
(D. Mass. 1984)………………………………………………………...14

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999)……………………19

Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607
(1980)…………………………………………………………………...16

In re Am. Rivers & Idaho Rivers United, 372 F.3d 413 (D.C. Cir. 2004)………...15

In re Int'l Union, United Mineworkers of America, 231 F.3d 51 (D.C. Cir.
2000)……………………………………………………………….…………14, 18

In re United Mine Workers of America, Int'l Union, 190 F.3d 545 (D.C. Cir.
1999)…………………………………………………………1, 13, 14, 15, 16, 18

La Voz Radio de la Communidad v. F.C.C., 223 F.3d 313(6th Cir. 2000)……...…2

Matthews v. United States, 810 F.2d 109 (6th Cir. 1987)………………………...13

Public Citizen Health Research Group v. Auchter, 702 F.2d 1150
(D.C. Cir. 1983)……………………………………………………..…………21

Public Citizen Health Research Group v. Brock, 823 F.2d 626
(D.C. Cir. 1987)……………………………………………………..…………27

Public Citizen Health Research Group v. Chao, 314 F.3d 143
(3rd Cir. 2002)………………………………………………………….……..18, 27

Telecommunications Research and Action Center (TRAC) v. F.C.C.,
750 F.2d 70 (D.C. Cir. 1984)…………………………………………….……2, 14, 25

Usery v. Turner-Elkhorn Coal Co., 428 U.S. 1 (1976)…………………………4, 5

STATUTES

5 U.S.C. § 706(1)………………………………………………………….…13
28 U.S.C. § 1361………………………………………………………..…13
28 U.S.C. § 1631……………………………………………………...…3, 4
29 U.S.C. § 671………………………………………………………….6, 7
30 U.S.C. § 801……………………………………………………...5, 15
30 U.S.C. § 811(a)……………………………………........................…1, 5
30 U.S.C. § 811(a)(6)…………………………………………..12, 15, 16
30 U.S.C. § 811(b)………………………………………………….....20, 21
30 U.S.C. § 811(d)…………………………………………..……1, 23, 24
30 U.S.C. § 841…………………………………………………………….5
30 U.S.C. § 841(a)………………………………………………...…16
30 U.S.C. § 841(b)……………………………………………….……11, 16
30 U.S.C. § 842(b)…………………………………………………….…6
30 U.S.C. § 842(d)…………………………………………………...7, 11
30 U.S.C. § 842-846……………………………………………………16
30 U.S.C. § 845….………………………………………………………6
MINER Act of 2006, Pub. L No. 109-236; 120 Stat. 493……………….………5

REGULATIONS

30 C.F.R. § 70.100(a)………………………………………………..…..6
30 C.F.R. § 70.101…………………………………………….………....6
30 C.F.R. § 71.100…………………………………………………………6
30 C.F.R. § 71.101……………………………………………………..…6
30 C.F.R. § 90…………………………………….…………………….24

FEDERAL REGISTER NOTICES

62 Fed. Reg. 3717, 3717 (Jan. 24, 1997)…………………...……………………9
63 Fed. Reg. 61968, 62000 (Nov. 9, 1998)…………………………………...9
64 Fed. Reg. 21486, 21519 (April 26, 1999)……………………………...…9, 19
65 Fed. Reg. 42068, 42069 (July 7, 2000)………………...……………………18
67 Fed. Reg. 74749, 74771 (Dec. 9, 2002)..……………………………..…..9, 10
68 Fed. Reg. 10784, 10787 (March 6, 2003)…………………………………….6

LEGISLATIVE HISTORY

H.R. Rpt. 91-563 (Oct. 13, 1969) (reprinted in 1969 U.S.C.C.A.N. 2503)……..….5

Sen. Rept. 95-181 (May 16, 1977) (reprinted in 1977 U.S.C.C.A.N. 3401)…..….17

OTHER SOURCES

National Institute for Occupational Safety and Health, NIOSH Publication No. 95-106, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust*………..……………………………………………7

National Institute for Occupational Safety and Health, Enhanced Coal Workers' Health Surveillance Program…………………………..………..10, 11

U.S. Dept. of Labor, Mine Safety and Health Administration, *Report of the Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers* (October 1996)……………………...8

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Howard requests that oral argument be scheduled so as to further clarify his request for mandamus relief. Oral argument will help to understand the issues and will contribute to fair resolution of the case.

JURISDICTIONAL STATEMENT

Scott Howard, an underground coal miner from eastern Kentucky, asks the Court to order the Secretary of Labor to comply with her statutory duty to regulate the amount of respirable dust in coal mines. This Court has jurisdiction under 30 U.S.C. § 811(d) and caselaw interpreting similar provisions vesting exclusive jurisdiction in a federal court of appeals.

Under the Mine Safety and Health Act of 1977 (the "Mine Act"), the Secretary of Labor, via the Mine Safety and Health Administration (MSHA), must promulgate safety and health regulations for the Nation's mines. 30 U.S.C. § 811(a). Once the Secretary promulgates any such regulation, a person may, within 60 days of the regulation's promulgation, challenge the standard in either the United States Court of Appeals for the District of Columbia or the Circuit where that person resides or has his principal place of business. 30 U.S.C. § 811(d).

This is a challenge not "about what the agency has done but rather about what the agency has yet to do. . .", *In re United Mine Workers of America, Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999), which the Mine Act itself does not

address. Thus, the 60-day deadline for challenging a new regulation is inapplicable.

Nevertheless, caselaw holds that, if the court of appeals has exclusive jurisdiction under a statutory scheme to hear a challenge of a newly-promulgated standard then the court of appeals also has exclusive jurisdiction in a case challenging an agency's failure to promulgate regulations. *Telecommunications Research and Action Center(TRAC) v. F.C.C.*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (cited by *La Voz Radio de la Communidad v. F.C.C.*, 223 F.3d 313, 318 (6th Cir. 2000)).

STATEMENT OF THE ISSUE

Whether the Secretary's Mine Safety and Health Administration (MSHA) must promulgate an emergency temporary standard and a final regulation for respirable coal mine dust and silica which prevents black lung disease by reducing current exposure limits, where the Mine Act directs the elimination of pneumoconiosis and other respiratory diseases, where the National Institute for Occupational Safety and Health (NIOSH) in 1995 urged MSHA to halve its respirable dust limits, where MSHA's own expert advisory committee in 1996 urged that the agency may need to revise those limits, and where in 1999 the agency declared that the current exposure limits present an unacceptable risk to miners' health.

STATEMENT OF THE CASE

Mr. Howard, a coal miner from eastern Kentucky, asks the Court to order the Secretary of Labor to comply with her statutory duty to protect miners from black lung disease by setting limits to reduce the amount of respirable dust in coal mines. He filed his petition for writ of mandamus on March 20, 2008 in the U.S. District Court for the Eastern District of Kentucky. He filed an amended petition for writ of mandamus on May 29, 2008.

Mr. Howard asked the district court to compel MSHA to promulgate both an emergency temporary mandatory standard and final standard for respirable dust that requires each operator to continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed at or below 1.0 milligrams per cubic meter of air (1.0 mg/m^3) and which also requires each operator to continuously maintain the average concentration of respirable silica in the mine atmosphere at or below 50 micrograms per cubic meter of air (50 $\mu g/m^3$).

The Secretary of Labor moved the district court to dismiss the action for lack of subject matter jurisdiction on May 16, 2008, arguing that the court of appeals has exclusive jurisdiction. Mr. Howard's response, on May 29, 2008, requested that the district court, if it found subject matter jurisdiction lacking, transfer the matter to the United States Court of Appeals for the Sixth Circuit pursuant to 28

U.S.C. § 1631. On June 23, 2008, the district court entered an order transferring the matter and the entire record thereof to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE FACTS

Mr. Howard lives and works as a coal miner in Letcher County, Kentucky. Record Entry No. 9, amended pet'n for writ of mandamus, p.1; ROA p. 4. He has been a coal miner throughout his working life. *Id*. He is regularly exposed to respirable coal mine dust.

Respirable coal mine dust, which includes silica dust, can cause black lung disease and silicosis. As the U.S. Supreme Court has described, "[c]oal workers' pneumoconiosis – black lung disease – affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment. The disease is caused by long-term inhalation of coal dust." *Usery v. Turner-Elkhorn Coal Co.*, 428 U.S. 1, 6 (1976) (footnotes omitted) (*superseded by statute on other grounds*). Also, this court has recognized in a claim for black lung benefits that "[t]he statutory definition [of black lung] includes but is not limited to coal worker's pneumoconiosis, as that term is used in the medical profession. It also includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment. *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304 (6th Cir.

1987). Black lung is incurable and can cause disability and death. *Usery*, 428 U.S. at 20, 24.

In 1969, in response to the mine explosion at Farmington, West Virginia which caused the deaths of 78 miners, Congress enacted the Federal Coal Mine Health and Safety Act of 1969 "to provide for the protection of the health and safety of persons working in the coal mining industry." H.R. Rpt. 91-563 (Oct. 13, 1969) (reprinted in 1969 U.S.C.C.A.N. 2503, 2503). In 1977, Congress passed the more comprehensive federal Mine Safety and Health Act (the "Mine Act"), codified at 30 U.S.C. § 801 *et seq*. The Mine Improvement and New Emergency Response (MINER) Act of 2006 amended the Mine Act, but does not address respirable dust exposure limits. Pub. L No. 109-236; 120 Stat. 493 (2006).

Under the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), is charged with developing and promulgating health and safety regulations for the Nation's coal mines. 30 U.S.C. § 811(a). To protect miners from black lung disease, this responsibility includes setting limits for exposure to respirable dust. 30 U.S.C. §§ 811(a), 841.

However, black lung still is a major health threat to coal miners. Coal miners not only continue to develop new cases of respiratory illness, but also do so at sharply increased rates. Record Entry No. 9, amended petition for writ of mandamus, Attachments A and B; ROA pp. 12-18, 22-23. Plus, miners are

developing worsened forms of respiratory illness at earlier ages. Record Entry No. 9, amended petition for writ of mandamus, Attachment A; ROA pp. 12-18. Miners who have developed black lung often see their condition worsen over their working life. *Id.*

The Mine Act initially established a standard of 3.0 milligrams of respirable dust per cubic meter of air (3.0 mg/m^3), to be reduced to 2.0 mg/m^3 three years after the Act's enactment. 30 U.S.C. § 842(b). The Secretary's initial promulgation of health and safety regulations adopted the 2.0 mg/m^3 standard, which is the present standard. 30 C.F.R. § 70.100(a) (underground mines), 30 C.F.R. § 71.100 (surface mines, surface areas of underground mines).

The Mine Act also requires the Secretary to set a formula for reducing respirable dust limits when quartz/silica comprises more than five percent of the respirable dust in a mine's atmosphere. 30 U.S.C. § 845. The Secretary maintains such a formula. 30 C.F.R. § 70.101 (underground mines), 30 C.F.R. § 71.101 (surface mines, surface areas of underground mines). Practically speaking, this silica exposure formula results in a silica exposure limit of 100 micrograms per cubic meter of air (100 $\mu g/m^3$). 68 Fed. Reg. 10784, 10787 (March 6, 2003).

The National Institute for Occupational Safety and Health (NIOSH) is an agency of the federal Department of Health and Human Services (HHS). 29 U.S.C. § 671. Broadly speaking, NIOSH's role is to conduct research and make

recommendations so as to prevent injury and illness arising in the workplace. *Id*. Under the Mine Act, the Secretary of HHS recommends revisions to the respirable dust exposure limits that will prevent new cases of respiratory illness and prevent the worsening of existing cases. 30 U.S.C. § 842(d).

NIOSH uses criteria documents to provide the scientific basis for its recommendations for new occupational safety and health standards. Record Entry No. 9, amended petition for writ of mandamus, Attachment C; ROA p. 34. In 1995 NIOSH published *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust*, NIOSH Publication No. 95-106. Record Entry No. 9, amended petition for writ of mandamus, Attachment C; ROA pp. 31-38. In the Foreword NIOSH states:

> This criteria document reviews available information about the adverse health effects associated with exposure to respirable coal mine dust. Epidemiological studies have clearly demonstrated that miners have an elevated risk of developing occupational respiratory diseases when they are exposed to respirable coal mine dust over a working lifetime at the current MSHA permissible limit (PEL) of 2 mg/m^3.

Record Entry No. 9, amended petition for writ of mandamus, Attachment C; ROA p. 34. NIOSH states that the purpose of the document is to present the criteria and recommended standards necessary to reduce or eliminate health impairments from exposure to respirable coal mine dust. *Id*.

NIOSH recommended that the Secretary promulgate exposure limits for coal dust and silica that are half of the Secretary's present limits, i.e. 1.0 mg/m^3 for coal dust and 50 $\mu g/m^3$ for silica. Record Entry No. 9, amended petition for writ of mandamus, Attachment C; ROA pp. 36-38. NIOSH stated that even its recommendation to halve respirable dust limits "does not ensure that miners exposed at this concentration over a working lifetime will have a zero risk of developing occupational respiratory diseases," and explained the additional needs for medical screening, tightened "engineering and work practices" and "frequent monitoring of worker exposures." Record Entry No. 9, amended petition for writ of mandamus, Attachment C; ROA p. 34.

In January 1995, MSHA established its own expert advisory committee, comprised of two labor members, two industry members and four neutral members. Record Entry No. 9, amended petition for writ of mandamus, Attachment D; ROA pp. 39-44.[1] MSHA's advisory committee produced a document with its recommendations. U.S. Dept. of Labor, Mine Safety and Health Administration, Report of the Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers (October 1996). The

[1] For more detail about the advisory committee's composition, see http://www.msha.gov/S&HINFO/BlackLung/1996Dust%20AdvisoryReport.pdf at pp. 12-13.

advisory committee unanimously recommended that the Secretary consider lowering the respirable dust limits to an unspecified degree. Record Entry No. 9, amended petition for writ of mandamus, Attachment D; ROA pp. 42-44.

In 1997, in response to the advisory committee findings, MSHA declared its intention to critically evaluate its respirable dust and silica limits. 62 Fed. Reg. 3717, 3717 (Jan. 24, 1997). *See also* 63 Fed. Reg. 61968, 62000 (Nov. 9, 1998). Thereafter, in its semi-annual regulatory agenda, MSHA declared that it had carefully reviewed both NIOSH's and the advisory committee's reports and recommendations and found "that <u>there remains unacceptable risk to miners' health at the current exposure limit for dust in coal mines</u>." 64 Fed. Reg. 21486, 21519 (April 26, 1999) (emphasis added). MSHA also said: "Respirable coal mine dust is one of the most serious occupational hazards in the mining industry. Long-term exposure to excessive levels of respirable coal mine dust can cause black lung and silicosis, which are both potentially disabling and can cause death." *Id.*

In 2002, MSHA abandoned any efforts to lower respirable dust limits, stating:

> MSHA considered rulemaking to lower the respirable coal mine dust concentration limit because miners continue to be at risk of developing dust-induced occupational lung disease. MSHA is currently developing regulatory alternatives to issues relating to respirable coal mine dust. Therefore, we are withdrawing this item at this time.

67 Fed. Reg. 74749, 74771 (Dec. 9, 2002). Since the 2002 notice, the Secretary has not lowered the permissible exposure limits for respirable coal dust and silica.

One of NIOSH's functions is to conduct respiratory health evaluations of active underground coal miners. Record Entry No. 9, amended petition for writ of mandamus, Attachment A; ROA p. 13. Recently, NIOSH has documented not just the continued presence of black lung, but also a doubling of the incidence of black lung in recent years. Record Entry No. 9, amended petition for writ of mandamus, Attachment B; ROA p. 22-23.

As part of these evaluations, NIOSH has documented certain regions, including eastern Kentucky, which NIOSH refers to as "hot spots," where miners are developing severe forms of coal workers' pneumoconiosis and where simple forms of the disease are progressing at a rapid rate. NIOSH, Enhanced Coal Workers' Health Surveillance Program (available at http://www.cdc.gov/niosh/topics/surveillance/ords/ecwhsp.html). *See also* Record Entry No. 9, amended petition for writ of mandamus, Attachment A; ROA p. 13. For example, from its June 2006 evaluations of working miners in Letcher and Knott counties in eastern Kentucky, NIOSH reports that in Letcher County, "[o]f the 85 miners examined: 12 [percent] (10 miners) showed signs of pneumoconiosis; one [percent] (1 miner) showed signs of PMF [progressive massive fibrosis]; four [percent] (3 miners) showed signs of advanced

pneumoconiosis." *Id.* In Knott County, NIOSH reported "[o]f the 68 miners examined: 15 [percent] (10 miners) showed signs of pneumoconiosis; one [percent] (1 miner) showed signs of PMF; three [percent] (2 miners) showed signs of advanced pneumoconiosis." *Id.*

SUMMARY OF THE ARGUMENT

This is an action seeking a writ of mandamus to compel agency action unlawfully withheld or unreasonably delayed. Specifically, Mr. Howard requests that this Court compel the Secretary of Labor to promulgate both an emergency temporary standard and a final regulation reducing by half MSHA's exposure limits for respirable coal dust and silica.

The Mine Act charges the Secretary, through MSHA, to promulgate health and safety regulations for the Nation's mines. In passing this legislation, Congress particularly was concerned about respiratory illnesses – such as black lung and silicosis – caused by coal mining work. A main purpose of the Mine Act is to prevent new developments of workplace respiratory illnesses and prevent the worsening of existing respiratory illnesses. 30 U.S.C. §§ 841(b), 842(d). Moreover, the Secretary has a duty to promulgate regulations "dealing with toxic materials or harmful physical agents," and in so doing "shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has

regular exposure to the hazards dealt with by such standard for the period of his working life." 30 U.S.C. § 811(a)(6)(A).

Given NIOSH's and MSHA's earlier conclusions that present dust limits are unacceptable to prevent lung disease and permanent injury, and given NIOSH's recent findings that black lung continues to afflict working miners – and afflict them at sharply increased rates – the Secretary's failure to lower respirable dust limits is a breach of her statutory duty to promulgate final mandatory standards that will stop the progression of existing cases of miners' respiratory illnesses and eliminate the development of new cases of respiratory illness. Also, given the necessity for lowered respirable dust limits, and the undisputed grave danger that respirable dust poses, the Secretary also has abdicated her responsibility to promulgate an emergency temporary health standard for respirable dust.

Accordingly, Mr. Howard respectfully requests that this Court issue a writ of mandamus ordering the Secretary to promulgate (a) final mandatory standards for respirable dust that halves the current exposure limits for coal dust and silica and (b) an emergency temporary health standard for respirable dust accomplishing the same.

ARGUMENT

Standard of Review

Mr. Howard brings this petition for writ of mandamus to "compel agency action unlawfully withheld or unreasonably delayed," as provided in the Administrative Procedure Act. 5 U.S.C. § 706(1). The federal mandamus statute contemplates mandamus relief "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

This Court has articulated a three-part test for mandamus relief:

> In order to demonstrate a right to the issuance of the writ, the plaintiff must show: (1) that a public official has a plain duty to perform certain acts; (2) that the plaintiff has a plain right to have those acts performed; and (3) that there exists no other adequate remedy by which the plaintiff's rights can be vindicated.

Matthews v. United States, 810 F.2d 109, 113 (6th Cir. 1987).

Courts adjudicating such claims for mandamus relief because of agency action unlawfully withheld or unreasonably delayed generally have treated mandamus relief and APA relief as co-extensive.[2] *E.g. In re United Mineworkers*

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[2] In his Amended Petition for Writ of Mandamus, Mr. Howard pled alternative forms of mandamus and APA relief. Record Entry No. 9, amended pet'n for writ of mandamus, pp.1, 6-7; ROA pp. 4, 9-10. Upon briefing the merits of his claim, Mr. Howard proffers that, in matters such as the one at bar, mandamus and APA relief are coextensive.

of Am., Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999); *TRAC*, 750 F.2d at 79-80; *In re Int'l Union, United Mineworkers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) (union's request for mandamus relief on basis that "MSHA has unreasonably delayed rulemaking"); *Conservation Law Foundation, Inc. v. Clark*, 590 F. Supp. 1467, 1472 (D. Mass. 1984) (describing how "[c]ourts and commentators have found the scope of relief provided by [APA § 706(1)] to be the equivalent of that available under mandamus.")

Courts addressing requests for mandamus relief as to claims of agency action unlawfully withheld or unreasonably delayed have been guided by a six-part inquiry set forth in *TRAC,* 750 F.2d at 80[3]:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

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[3] In Mr. Howard's Response to the Secretary of Labor's Motion to Dismiss Petition for Writ of Mandamus, he agreed with the Secretary's recitation of this Court's elements for mandamus relief under *Matthews*. Resp. at 11. Mr. Howard cites additional authority pertaining to mandamus relief only to add context to this particular type of mandamus relief arising under the APA.

In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations omitted). *See also In re United Mine Workers of Am., Int'l Union*, 190 F.3d at 549.

I. The Mine Act Imposes a Plain Duty Upon the Secretary to Promulgate Emergency Temporary Standards and Final Health and Safety Regulations That Will Prevent Material Impairment of a Miner's Health, Especially as to Respiratory Illness.

Under the first prong of this Court's *Matthews* test for mandamus relief, the Secretary has a plain duty to promulgate health regulations that prevent new cases of respirable illness and prevent worsening of existing cases of respirable illness. The Mine Act begins with this sentence: "Congress declares that the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a) (emphasis added). In setting forth the health and safety protections which it determined that the Nation's miners must have, Congress paid particular attention to respiratory illnesses – and the respirable dust which causes such illnesses.

A. Final Mandatory Standards

The Mine Act requires the Secretary to "set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has

regular exposure to the hazards dealt with by such standard for the period of his working life." 30 U.S.C. § 811(a)(6) (emphasis added). *See also In re United Mine Workers of Am., Int'l Union*, 190 F.3d at 553. In construing nearly identical language in the Occupational Safety and Health Act, the Supreme Court found that "both the language and the structure of the Act, as well as its legislative history, indicated that it was intended to require the elimination, as far as feasible, of significant risks of harm." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 641 (1980).

In the Mine Act, for a variety of issues, Congress set forth interim mandatory health and safety standards. 30 U.S.C. §§ 842-846. However, paying particular attention to respirable illness, Congress also specified that the purpose of the interim health and safety standards, upon which the Secretary is to improve pursuant to 30 U.S.C. § 841(a), is "to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period." 30 U.S.C. § 841(b) (emphasis added).

The Mine Act's legislative history shows that Congress, dismayed by agency delay in addressing dire health and safety problems, envisioned an improved regulatory scheme by which the Secretary could more quickly promulgate health and safety regulations:

> The standards are the key element in the statutory scheme to afford safe and healthful working conditions for our nation's miners. To do this, the mechanism by which standards are made and revised must be efficient. Standards must be generated on demonstrated needs of miners. This has not, in the past, been the case. Although the need for standards on impoundments and refuse piles was graphically illustrated by the Buffalo Creek tragedy in February, 1972, such standards were not proposed under the Coal Act [of 1969] until January 1974, and were not finally promulgated and effective until November 1975, forty-five months after the Buffalo Creek flood. Standards for lighting required the Secretary to propose within nine months of enactment, were not finally promulgated [sic] until October of 1976 and will not be finally effective until April of 1978. The nearly non-existent rate of promulgation of improved health standards under the Coal Act has been a great disappointment to the Committee, and demonstrates that the procedure for promulgating health standards is of the basic flaws in the standard making mechanism of that Act.

Sen. Rept. 95-181, at 15 (May 16, 1977) (reprinted in 1977 U.S.C.C.A.N. 3401, 3415).

As for respirable dust in particular, MSHA itself over the years has found it to be a serious health hazard in need of vigilant regulation. For example, in undertaking rulemaking to better determine the amounts of respirable dust to which miners are exposed, MSHA once observed that "Congress was convinced that the only way each miner could be protected from black lung disease or other

occupational dust diseases was by limiting the amount of respirable coal mine dust allowed in the air that miners breathe." 65 Fed. Reg. 42068, 42069 (July 7, 2000).

In fact, in response to another mandamus challenge for unreasonable delay (as to rulemaking for diesel exhaust), MSHA cited the need to undertake rulemaking pertaining to respirable dust as a more urgent regulatory priority demanding the agency's attention and resources. *In re United Mine Workers of Am., Int'l Union*, 190 F.3d at 553. Even in the instant case, the Secretary concedes that "respirable dust and silica pose serious occupational hazards to coal miners." Reply to Pet'r. Resp. to Mot. Dismiss at 10 (citing *In re Int'l Union, UMWA*, 231 F.3d at 54). Indeed, much like the threat which the Third Circuit found with respect to hexavalent chromium, the threat from respirable dust is best illustrated by "the principal evidence [being] actual human body counts." *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 146 (3rd Cir. 2002).

Given the Secretary's failure to act, a discussion from the Tenth Circuit about agency duty is instructive:

> Even in mandamus cases, which inherently involve court discretion, we have often spoken in strong, and occasionally even absolute, language with regard to the court's duty to enforce agency action mandated by Congress. "If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court *should* compel performance, thus effectuating the congressional purpose." *Estate of Smith v. Heckler,* 747 F.2d 583, 591 (10th Cir.1984) (emphasis added); *see Mt. Emmons Mining Co.,* 117

> F.3d at 1170 ("[A]s a reviewing court, we *must* 'compel agency action unlawfully withheld or unreasonably delayed.' " (emphasis added)); *Marathon Oil Co. v. Lujan,* 937 F.2d 498, 500 (10th Cir.1991) ("Mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty. Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." (citations omitted)); *Health Sys. Agency of Oklahoma v. Norman,* 589 F.2d 486, 492 (10th Cir.1978) ("trial court *must* 'compel' " agency action unlawfully withheld (emphasis added)).

Forest Guardians v. Babbitt, 174 F.3d 1178, 1187-1188 (10th Cir. 1999).

In spite of the duty to tackle respirable illness by revisiting – and lowering, as necessary – its dust exposure limits, the agency has failed to act. The agency has failed to act despite its knowledge that since 1995, NIOSH has urged that these exposure limits be cut in half and that MSHA's own expert advisory committee urged that the agency may need to re-examine exposure limits. The agency's failure also comes <u>in spite of MSHA's own finding</u> in light of these reports "that <u>there remains unacceptable risk to miners' health at the current exposure limit for dust in coal mines</u>." 64 Fed. Reg. at 21519 (emphasis added). The agency has failed to act even as NIOSH documents increased rates of black lung. Plus, the agency itself has not disputed the need to lower the respirable dust limits, yet it has failed to carry out its statutory duty to reduce the amount of respirable dust to which miners are exposed.

Accordingly, as to the first prong of *Matthews* and as to final regulations for respirable dust, the Secretary has had a duty to lower respirable dust limits, has known of the need to do so, and has stated agreement with the need to do so, but has failed to act.

B. Emergency temporary standards

In addition, as to the first prong of the *Matthews* test, the Secretary has a plain duty to promulgate emergency temporary standards (ETS) in response to continuing threats to miners' health from respirable dust. Under the Mine Act, the Secretary must issue an ETS:

> to take immediate effect upon publication in the Federal Register if he determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.

30 U.S.C. § 811(b)(1). Then, the ETS is in effect until the Secretary promulgates a mandatory standard. 30 U.S.C. § 811(b)(2). Once the Secretary publishes the ETS in the Federal Register, the ETS serves as the proposed final mandatory rule. 30 U.S.C. § 811(b)(3). The Secretary must publish the final rule within nine months of publishing the ETS. *Id*.

In deciding whether to require an ETS to issue, the D.C. Circuit, in the context of a similar challenge regarding exposure to a chemical regulated by the Occupational Safety and Health Administration (a sister agency to MSHA), found

that an ETS is "an unusual response to exceptional circumstances." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983) (citations omitted) (per curiam). Nevertheless, the *Public Citizen* court looked to "the fact that 'the interests at stake are not merely economic interests. . .but personal interests in life and health." *Id.* at 1156 (citations omitted). That court ultimately did not require the issuance of an ETS, yet it directed OSHA to "proceed on a priority, expedited basis and to issue a permanent standard as promptly as possible." *Id.* at 1159. The court was dismayed because the agency proposed to take three years – from its announced intent to regulate the chemical to final promulgation of a regulation – to address the problem at hand. The court found such delay, with human welfare in the balance, to be particularly egregious "when the very purpose of the governing Act is to protect those lives." *Id.* at 1157-1158.

As for the case at bar, Congress has directed the Secretary to promulgate protective dust regulations. The data and expert recommendations before MSHA, and the agency's own 1999 conclusion that dust limits are inadequate, show a clear problem. In addition, NIOSH's more recent findings show that black lung disease continues to persist among miners, that the prevalence of disease is increasing, and that miners are developing very severe and rapidly progressing black lung. Thus, pursuant to the test set forth at 30 U.S.C. § 811(b)(1), there is no dispute that

respirable dust poses a grave danger to which miners are continuously exposed. Moreover, given this continuous exposure to such a grave danger – and given that miners have been exposed to the danger for many years under dangerously high dust limits – an emergency standard is necessary to protect miners from black lung and silicosis.

II. Mr. Howard Has a Plain Right to Have The Secretary Promulgate More Protective Respirable Dust Limits, and There Is No Other Adequate Remedy For Him To Pursue Other Than Mandamus.

Under the second prong of *Matthews*, Mr. Howard has a plain right to have the Secretary provide the relief he seeks, in the form of both an ETS and final mandatory standards. Mr. Howard is an active coal miner. MSHA exists to protect miners from injury and health hazards in their workplace. Congress directed the Secretary to regulate to protect the health and safety of miners like Mr. Howard. The respirable dust limits, in their present form, are compromising Mr. Howard's respiratory health, which Congress prohibited as explained, *supra*. Thus, his right to this relief is plain.

Under the third prong of *Matthews*, the only adequate remedy for Mr. Howard is a writ of mandamus directing the Secretary to promulgate lowered respirable dust limits in the form of an ETS and final mandatory standards. There is no other avenue under the Mine Act to bring the instant challenge, and certainly

no other vehicle to compel mine operators themselves to lower dust exposures. Thus, the Secretary's failure to reduce the permissible level of respirable dust demonstrates that mandamus is the only available relief for Mr. Howard.

The Secretary raised the issue of adequate remedy in her previously-filed Motion to Dismiss for failure to exhaust administrative remedies. Specifically, the Secretary argued that Mr. Howard first should have brought a petition for rulemaking to MSHA before filing suit. Mr. Howard responded that the Mine Act itself does not clearly require a petition for rulemaking before a party brings a claim to compel MSHA to undertake rulemaking, so this Court may waive any requirement that Mr. Howard first bring a petition for rulemaking. Mr. Howard further argued that exceptions to the exhaustion doctrine apply here. Specifically, a petition for rulemaking would have been futile, and Mr. Howard would suffer irreparable harm in resorting first to a petition for rulemaking.[4]

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[4] On a related note, in her Reply brief as to her motion to dismiss, the Secretary stresses that Mr. Howard has not shown "good cause" for not first bringing a petition for rulemaking. The Secretary apparently relies on the Mine Act's requirement that "No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused for good cause shown." 30 U.S.C. § 811(d). However, the Secretary misapprehends this requirement.

The first sentence of this provision makes clear that it applies to challenges of newly-promulgated standards, not to challenges, such as the one at bar, to the Secretary's inaction in revising a regulation. "Any person who may be adversely

Additionally, as to the third prong of *Matthews*, Mr. Howard must respond to an issue which the Secretary first raised in her reply regarding exhaustion of administrative remedies: that Mr. Howard should have filed for status as a "Part 90" miner under 30 C.F.R. § 90, *et seq*. instead of bringing suit. Part 90 miners are those with evidence of development of respiratory illness who can be placed in a working atmosphere with respirable dust levels no higher than those which Mr. Howard seeks for all mine atmospheres in the instant case.

Requiring Mr. Howard to file for Part 90 status serves no purpose behind the exhaustion doctrine. As the Secretary points out in her Motion to Dismiss and Reply, there are several purposes for the exhaustion doctrine, such as giving an agency a chance "to exercise its discretion or apply its expertise." Mot. To Dismiss at 5, *citing Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159 (D.C. Cir.

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affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business." *Id*. Nevertheless, even if the Court would construe this statute to require a showing of "good cause" for not first exhausting administrative remedies, Mr. Howard has shown good cause by illustrating the futility and irreparable harm were he to first bring a petition for rulemaking. Similarly, he shows in this brief that exhaustion is unnecessary as to claiming Part 90 status.

2007). The Secretary says that the exhaustion doctrine also is important to protect agency authority and promote judicial efficiency. Mot. To Dismiss at 5.

However, nowhere does the Secretary show how requiring Mr. Howard to seek Part 90 status serve the purposes of the exhaustion doctrine. The Secretary makes no showing that the exhaustion doctrine requires parties to ferret out alternative remedies that do not serve some broader administrative or judicial purpose. Nor does Mr. Howard know of legal authority to this effect.

Put another way, Part 90 status is not an administrative remedy to the problem addressed in this lawsuit. The problem is the Secretary's failure to set dust standards which prevent black lung. Accordingly, the Secretary's argument that Mr. Howard must first seek Part 90 status is inapposite, and Mr. Howard's only adequate remedy here is mandamus relief.

III. Mandamus Requiring the Secretary to Promulgate Lower Respirable Dust Limits Is Necessary Because of the Secretary's Intolerable Failure to Address the Harm to Miners Caused by Excessive Respirable Dust

As previously noted, several courts have relied on the factors set forth in *TRAC*, 750 F.2d at 80, in deciding whether to grant mandamus relief for unlawfully withheld or unreasonably delayed rulemaking. Should the Court in the instant matter rely on the *TRAC* factors in addition to or separate from the Matthews *test*, those factors weigh very much in favor of mandamus relief here.

First, the Secretary's delay is patently unreasonable. After all, the Secretary has known since the mid-1990s that its present respirable dust limits are dangerous to miners. MSHA stated in its April 26, 1999 Federal Register notice that lowering respirable dust limits is key to stem respiratory disease. Second, with the Mine Act's emphasis on respiratory illness and the need to eliminate such risks to miners, Congress intended for the Secretary to act expeditiously to promulgate regulations that eliminate black lung and silicosis by reducing respirable dust levels according to the scientific evidence available to the agency.

Third, this case pertains only to human health and welfare, not to economic regulation, making the Secretary's failure to act intolerable. Every day Mr. Howard works in dangerously unhealthy conditions where he is exposed to a greater risk of developing black lung disease simply because the Secretary has failed to perform her statutory duty of lowering the respirable dust limits.

Fourth, as to the Secretary's activities of a higher or competing priority, Mr. Howard respectfully suggests that, given Congress's emphasis on eliminating respiratory illness, the Secretary's respirable dust limits must be at the top of her rulemaking agenda. After all, while it acknowledged the Secretary's discretion to set rulemaking priorities, the Third Circuit has cautioned that "the Secretary's discretion is not unbounded" and found that the court itself had an "obligation under the APA to compel agency action unlawfully withheld or unreasonably

delayed." *Public Citizen v. Chao*, 314 F.3d at 151 (citation omitted). Moreover, the Secretary has made no demonstration that undertaking rulemaking to lower these limits will interrupt any rulemaking efforts of equal or greater importance.

Fifth, much like the preceding consideration of human health and welfare being at stake, the nature and extent of the interests prejudiced by the delay are great. Mr. Howard's claim deals with a pervasive, longstanding health threat. Moreover, breathing respirable dust is a threat which regulatory agencies, the medical community, and of course miners themselves have known <u>for generations</u> to be a direct health threat. Finally, Mr. Howard cannot speculate as to the Secretary's motivations – improper or not – in delaying action on this issue. However, the sixth *TRAC* factor instructs that even if the Secretary is operating with good intentions, her inaction as to MSHA's respirable dust limits is inexcusable.

On a final note, Mr. Howard implores this Court to find that, no matter why the Secretary's delay, a longer wait is unacceptable. As the D.C. Circuit once found, in the context of workers' exposure to a toxic substance, a six-year delay in rulemaking was "a very long time" especially "[w]ith lives hanging in the balance." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (per curiam). The Court expounded:

> We understand that an agency's limited resources may make impossible the rapid development of regulation on several fronts at once. And we understand that the agency before us has far greater medical and public health knowledge than do the lawyers who comprise this tribunal. But we also understand, because we have seen it happen time and time again, that action Congress has ordered for the protection of the public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.

Id at 627.

In the instant case, then, *a fortiori*, in light of agency inaction since the mid-1990s, the Secretary must be compelled to do the job which Congress directed her to do.

CONCLUSION

Mr. Howard requests that this Court grant his request for a writ of mandamus.

Respectfully submitted,

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Dated: November 18, 2008

Case No. 08-5799

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: SCOTT HOWARD,

Petitioner.

CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing petitioner's brief into the Court's record of this action on November 18, 2008 by using the Court's CM/ECF Electronic Filing System, which will send notice to:

Edward Waldman, Esq.
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I declare that the statements above are true to the best of my knowledge, information and belief.

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