



# INSIGHTS

Resource for Safety, Health, & Environmental Law and Crisis Management

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## 1. CONGRESSMAN TAKES ON DOL OVER ACGIH STANDARDS

"It's war!" declared Congressman Charlie Norwood (R-Ga), Chairman of the House Subcommittee on Workforce Protections, at the conclusion of an April 27 hearing on the use of non-consensus standards by the Department of Labor (e.g. OSHA and MSHA).

Dr. Norwood, who ran for Congress on a government reform platform, was clearly frustrated by the lack of progress in curbing the incorporation by reference of standards set by organizations whose decisions are not forged by consensus and open, transparent procedures. Asked by Dr. Norwood if any progress had been made since his 2002 hearing on the subject, witness Henry Chajet of Patton Boggs LLP said: "it's gotten worse." Citing a "substantial deterioration of the process," agencies illegally delegate their rulemaking authority to organizations that have no public accountability, he told Dr. Norwood: "You have given power to OSHA and they have given it away."

A flashpoint for Dr. Norwood is OSHA's Hazard Communication (HazCom) Standard. Among other provisions, HazCom requires manufacturers, importers and suppliers of chemicals to change material safety data sheets (MSDS) each time the American Conference of Governmental Industrial Hygienists (ACGIH) revises its exposure limit for the substance and retrain employees on the hazards alleged by the ACGIH.

Norwood believes OSHA's requirement to use ACGIH's TLVs<sup>®</sup> in HazCom is illegal because ACGIH does not use consensus procedures in establishing its occupational exposure limits, called threshold limit values (TLVs<sup>®</sup>). Congressional statutes require agencies to consider consensus standards in rulemaking, but confer no authority to use non-consensus standards. A provision in the Occupational Safety and Health Act defines a consensus organization and to make the point, Norwood read the provision during his opening remarks and had it displayed in the hearing room and on video monitors.

Speaking directly to the DOL representatives in attendance, Norwood called the provision to their attention: "You've got to pay attention to this hearing and take a lot of notes...you're next," meaning they would be called as witnesses at the next hearing to explain their actions.

Chajet said ACGIH is a secret organization that does not divulge the authors of its TLVs<sup>®</sup> or their credentials, and does not reveal the bias and conflicts of interests that result in their exposure limits. He added that ACGIH no longer even permits its full membership to vote on proposed changes to its TLVs<sup>®</sup>. While ACGIH TLVs<sup>®</sup> are claimed to be "voluntary" and non-binding, nonetheless, they are adopted automatically by federal and state regulations and foreign regulatory authorities.

"This is a deceptive process," he testified in describing how ACGIH sets TLVs<sup>®</sup>. "They pursue junk science. It is very difficult to see any science at all in the six TLVs<sup>®</sup> we've looked at."

Patton Boggs represents clients that have sued the Cincinnati-based ACGIH over revised TLVs<sup>®</sup> on crystalline silica, copper and diesel particulate matter. Filed in 2004, the litigation is expected to go to trial this year. About five years ago, Patton Boggs successfully sued ACGIH over its proposal to set a TLV<sup>®</sup> for trona, which ACGIH withdrew after it admitted that the trona TLV<sup>®</sup> was not based on health effects.

Also appearing as witnesses were Elizabeth Marcucci, Corporate Safety Director for Gonnella Baking Co., who testified on behalf of the American Bakers Association in opposition to ACGIH's TLV<sup>®</sup> for flour dust, and Jim Ruddell, environment and safety director for a crushed stone producer, who testified for the National Stone, Sand & Gravel Association in opposition to ACGIH's reductions in their TLV<sup>®</sup> for calcium carbonate and crystalline silica.

Dr. Franklin E. Mirer, of the United Autoworkers union, testified that OSHA needed to promulgate more standards and suggested actions Congress could take to facilitate the process. His remarks drew support from Rep. Major Owens (D-NY), the ranking minority member on the Subcommittee.

Besides ACGIH, Chajet also cited the International Agency for Research on Cancer (IARC) as a foreign organization whose non-consensus and often controversial carcinogen findings are adopted by reference in U.S. regulatory provisions. IARC is a division of the World Health Organization, based in Lyon, France, that is heavily funded by U.S. agencies.

Chajet also charged that the federal government supports ACGIH by allowing DOL representatives to serve on ACGIH committees on government time and supported by taxpayer-funded expense accounts. He said he had found evidence of federal purchases of ACGIH products amounting to more than \$500,000 over a three-year period and an invoice showing purchases from ACGIH of more than \$54,000 by just one OSHA regional office in one year. "I'm going to find out how much the federal government is paying this non-government agency," Norwood responded.

A video of the hearing can be viewed at:

<http://mfile.akamai.com/10528/wmv/houseofrep.download.akamai.com/10528/wp/wp042706.asx>

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## 2. THE US SENATE EYES MINE SAFETY AMENDMENTS

Several different proposals to amend the Mine Safety Act have been "floated" by Senate Democrats and Republicans following the Sago Mine disaster. The one with the highest likelihood of passing is undergoing bi-partisan negotiations and covers:

1. penalty increases up to \$220,000 per violation for all mines;
2. notification to MSHA of accidents within 15 minutes;
3. new emergency equipment and procedures for underground coal mines; and
4. other technical amendments.

Other bills under consideration have higher penalty provisions or more regulatory mandates. With very limited time left for this year for consideration and passage by the House and Senate, and many other topics competing for attention, it appears that only a bipartisan approach has a real chance of becoming law.

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## 3. OTHER SAFETY LAW AMENDMENTS STALLED

Broad-based safety law reform, introduced and considered in the Senate, and OSHA reform bills passed by the House, seem stalled at this time and taking a back seat to the focus on mine safety resulting from the Sago Mine tragedy. However, both the Senate and House Subcommittee chairmen have committed to reform bills at the earliest possible time and it is difficult to predict what legislative movement will take place following the November elections.

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## 4. SILICA: EUROPEANS AGREE TO BEST PRACTICES TO REDUCE EXPOSURES; OSHA ASKED TO SUSPEND HAZCOM FOR THE NEW ACGIH SILICA TLV.

European employer organizations joined with employee federations, representing mine, chemical, energy and metal workers, in an April 25, 2006 pact signed in Brussels to follow best practices in the workplace to reduce the exposures of more than two million workers to crystalline silica. According to a [press release](#), the groups agreed to a monitoring committee that will settle questions on the application and interpretation of the agreement.

The American Chemistry Council (ACC) asked the Secretary of Labor to suspend her interpretation of the Hazard Communication Rule that would require employers to amend material safety data sheets (MSDS) to list new ACGIH silica TLV<sup>®</sup> that ACC believes is not sound scientific evidence. Patton Boggs provided the Secretary with documentation to support the ACC report.

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## 5. OSHA LAWSUIT MAY AFFECT YOUR OPERATIONS

If OSHA has collected samples at any of your facilities between 1979 and last June 1, you may be affected by a lawsuit filed in U.S. District Court in New Jersey against the Agency last November by former OSHA official Adam Finkel.

In the event you do not want information disclosed because it involves confidential or trade secret information, then you should let OSHA know this by May 22, according to an April 21 announcement in the [Federal Register](#).

OSHA said the information to be released from its Salt Lake City Technical Center includes, for each sample, the name and address of the business location, identity of the substances sampled, sample type (bulk, air, wipe, personal, etc.), sample result and "other information."

Comments are to be submitted to Kevin Ropp, Director, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210. Submittals of 10 pages or less, including attachments, may be faxed to Ropp at 202-693-1635. Electronic submittals may be sent to <http://ecomments.osha.gov>. Ropp can be reached at 202-693-1999.

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## 6. OSHA CAN DO MORE TO BOOST FEDERAL AGENCIES' SAFETY

"OSHA's oversight of federal agencies' safety programs is not as effective as it could be because the agency does not use its enforcement and compliance assistance resources in a strategic manner," concluded the GAO in a [report](#) released last month.

OSHA conducts few inspections of federal worksites and has no national strategy for targeting federal worksites with high injury and illness rates for inspection. Moreover, GAO said, while OSHA is responsible for tracking disputed violations and reporting unresolved complaints to the President, the agency does not do so. Nor does it satisfy its mandate to review federal agency safety programs annually and submit a report on them to the President each year. Neither is OSHA fully using its array of compliance assistance programs to support federal agency safety programs.

In a 3 ½-page response letter, OSHA largely agreed with GAO: "OSHA is aware of the need for the Agency to continue the activities recommended in the [GAO] report."

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## 7. DIESEL UPDATE: MSHA DEFERS DQA PETITION; THE DC CIRCUIT COURT REFUSES TO EXPEDITE REVIEW OF DPM LIMITS; MSHA RULEMAKING CONTINUES WHILE NIOSH REMAINS SILENT

The MARG Diesel Coalition continues to be frustrated in its attempts to obtain expedited resolution of the issues related to diesel exhaust health allegations and regulations. Repeated requests by Congress and MARG for NIOSH to release its health effect study data to MARG experts for review have been met with delays, claimed necessary for a NIOSH internal review. In the interim, misguided MSHA regulations, issued without the benefit of the NIOSH study results, have required repeated corrections since 2001, and resulted in MSHA acknowledgements of regulatory errors and continued rulemaking.

The MARG group, made up of diesel engine users, has sued MSHA over its DPM regulations and sought the help of Congress in addressing the issue. Other companies and associations have joined the litigation, as has a labor union.

MARG filed a petition under the Data Quality Act (DQA), seeking corrections of the MSHA DPM rules, but MSHA deferred the petition for inclusion in its ongoing rulemaking efforts (now eight years old). When MARG filed a request for the DC Circuit Court of Appeals to grant expedited review of the 2001 rules, and their basis, the Court refused after MSHA and other industry groups supported a delay to permit further MSHA rulemaking.

The MARG petitions requested expedited review of the MSHA exposure limits—surrogates for diesel exhaust particulate matter (2001 – 308µg/m<sup>3</sup> Total Carbon, and 2006 -- 160 µg/m<sup>3</sup> Total Carbon) that MSHA has recognized must be changed. The opposition to court review supported waiting for a new MSHA rulemaking to convert the final limit to an elemental carbon limit, following an MSHA admission that TC, the basis of the original rule, could not be measured accurately (as predicted by MARG supported scientists in 2000).

MARG scientists, however, expressed concern that new exposure limits for elemental carbon do not represent suspected health hazards in diesel exhaust, a complicated mixture of thousands of components that change from engine-to-engine and time-to-time. Moreover, the scientists demonstrated in a published study that the large variability in the makeup of DPM prevents total carbon limits from being converted accurately to elemental carbon limits, questioning the applicability of the risk predictions used to justify the 2001 rule to the amended 2006 limits.

While the 160 TC final limit was scheduled for 2006, MSHA admitted that it was not technically feasible to comply with it, and announced a proposed, five year phase in, that was pending federal register publication as a final rule, when this newsletter was being prepared. MARG supported engineering experts predicted the lack of technical feasibility in 2000, and repeatedly urged MSHA to recognize this defect in their rules.

While MARG expressed gratification that MSHA recognized the need to amend the rules, MARG sought expedited review of their validity given its view that the continued rulemaking will not correct the lack of a sound scientific basis for the rules, even when modified. Patton Boggs Partner, Henry Chajet, expressed confidence that the delay of court review will not permit the flawed rules to escape proper review and resolution. He also has suggested that the questionable basis for rules makes MSHA citations suspect, and subject to reversal by the Mine Safety Review Commission.

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## **8. TRAGEDIES PROMPT MSHA TO ISSUE EMERGENCY STANDARD**

Responding to the Sago and Alma coal mine tragedies that took the lives of 14 miners in West Virginia earlier this year, MSHA issued an emergency temporary standard (ETS) March 9 regarding accident notification, evacuation training and emergency equipment. The new accident notification requirement pertains to all mines, while the other three provisions apply only to underground coal operations.

The emergency rule amendments, which went into effect immediately, require that MSHA be notified by all mine operators within 15 minutes of an accident, as that term is defined in MSHA regulations, 30 CFR Part 50.

At least one additional self-contained, self-rescuer (SCSR), that provides one-hour or more of supplied oxygen, must be available to each coal miner underground in addition to the previously required one-hour SCSR.

Enhanced evacuation training, including more frequent hands-on training and actual drills in evacuating a mine, also are now required for coal mines. Finally, directional lifelines must be installed in both the primary and alternate escapeways of coal mines.

While the ETS is in effect now, MSHA is accepting written comment on it until May 30 ([www.msha.gov](http://www.msha.gov)), and four public hearings were held around the country in April and May.

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## **9. MSHA FOCUSING ON IMPROVING UNDERGROUND COMMUNICATIONS**

As a result of claims that better communications underground might have saved the lives of 14 miners killed in two separate accidents at coal mines in West Virginia in January, MSHA prioritized its evaluation of communication technologies. Agency representatives visited Australia in March to evaluate a personal emergency device (PED) developed by an Australian firm that permits communication using text messaging from the surface to individual miners underground. According to the manufacturer, the one-way communication devices are used by more than 165 mines in six countries, and were developed in response to mine disasters in 1986 and 1994. Some 18 mines use them here, including operations in Indiana and West Virginia. The same manufacturer produces a location tracker for underground miners, which has not been tested in the U.S.

Dave Chirdon, who supervises electrical safety for MSHA, said at a recent conference that all the devices MSHA has tested have pros and cons. "I don't think one system is going to be the answer," he said, adding that all systems the Agency has tested so far have dead zones where communications with the surface cannot occur.

Chirdon said MSHA had received 108 proposals on communication technologies. The large number coupled with limited resources forced MSHA to prioritize the proposals based on specific criteria, which included precise tracking and two-way voice and text messaging; availability; survivability in the event of a fire, explosion or rock fall; and capability of meeting MSHA requirements. He said none of the systems submitted are MSHA approved. The Agency said it would wrap up testing of the technologies by the end of April and would issue a report of its findings.

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## **10. MSHA, WEST VIRGINIA HOLD SAGO HEARING**

A hearing jointly sponsored by MSHA and the State of West Virginia was held May 2 - 4 to investigate the January coal mine tragedy that claimed the lives of 12 miners at International Coal Group's Sago Mine in the Mountain State.

The hearing was unusual in a number of ways, including that families of the victims not only were permitted to testify, but also to appoint a representative to ask questions of witnesses on the hearing panel, composed of representatives from MSHA and the state. Other questioners were required to submit questions in writing to the chairperson, J. Davitt McAteer. McAteer is the former MSHA Assistant Secretary during the Clinton Administration, who is heading the state's inquiry into the tragedy.

MSHA said the purpose of the hearing was to determine the cause of the explosion, identify and develop corrective actions, collect and disseminate information related to health and safety conditions at the Sago Mine and gather information for mandatory health and safety standards.

The testimony of witnesses, including statements and responses to questions, will be part of a public record of the hearing. In addition, MSHA said, transcripts of witness interviews conducted as part of the joint MSHA-West Virginia accident investigation will be included in the record of the hearing unless otherwise subject to privilege.

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## **11. MSHA EXPANDS INDIVIDUAL PENALTIES FOR CORPORATE AGENTS TO INCLUDE LLC AGENTS**

In a May 9 Federal Register notice, MSHA seeks comments on a new Interpretive Bulletin, scheduled to take effect on July 10, 2006, expanding the applicability of Section 110(c) of the Mine Act (30 U.S.C. 820(c)), to provide for civil and criminal penalties against agents of limited liability companies (LLCs). While MSHA states that the Interpretive Bulletin is not subject to rulemaking, it seeks comments on the Bulletin by June 8, 2006.

Under Section 110(c) of the Mine Act "any director, officer or agent of [a] corporation who knowingly authorized, ordered, or carried out" a violation is subject to the same civil and criminal penalties as the corporate operator. The Interpretive Bulletin attempts to expand Section 110(c) liability to agents of LLCs, which MSHA calls "a hybrid business entity... not widely in existence when Congress enacted the Mine Act." MSHA acknowledges that agents of partnership entities are not subject to Section 110(c) under existing case law, but states that the Interpretive Bulletin does not impact that application. MSHA acknowledges that Congress did not state any intent to cover agents of LLCs by Section 110(c), but claims that its new interpretation is "permissible under the Mine Act." Moreover, MSHA states that there has been a steady increase LLCs and that the interpretation is needed to "advance the [Mine] Act's

objectives in cases involving LLCs by imposing legal liability on those individuals within the LLC who actually make the decisions with regard to safety and health of the mine."

Patton Boggs one-half day training programs offer corporate and facility personnel practical lessons on preventing violations, closure orders and penalties, and reducing liability risks from MSHA and OSHA investigations and inspections. For further information on these popular training sessions that have been used successfully by hundreds of employers, contact [Henry Chajet](mailto:hchajet@pattonboggs.com) (DC) [hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com) or [Mark Savit](mailto:msavit@pattonboggs.com) (Denver) [msavit@pattonboggs.com](mailto:msavit@pattonboggs.com).

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## 12. INSIGHTS ANNOUNCEMENTS

Our Patton Boggs EHS Newsletter is now produced by Jim Sharpe, CIH, former Vice President of Safety & Health Services for the National Stone, Sand and Gravel Association. We thank Jim for his help in communicating stories of interest to our friends and clients on a regular basis (every other month), and for his future help in organizing regional seminars which we hope will begin this fall (announcements to follow).

We ask that you send us an email, addressed to [Insights@PattonBoggs.com](mailto:Insights@PattonBoggs.com) to update your contact information with an e-card attachment, or by providing the info below, and let us know that you would like to continue to receive *INSIGHTS* and our news alerts.

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