



# INSIGHTS

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

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### 1. SAFETY ENFORCEMENT INCREASES EXPECTED

In 2007, enforcement took center stage at MSHA and OSHA. Speaking at a symposium recently, MSHA chief Richard Stickler discussed the agency's new penalty assessment rules and indicated that 2007 total penalties totaled \$74.6 million, up from \$35 million in 2006. The new MSHA penalties rules also include a provision for "flagrant" violations, a new infraction mandated by the 2006 MINER Act that carries a maximum penalty of up to \$220,000. However, MSHA's more than doubling of penalties from 2006 to 2007 included only 15 flagrant violations, with another 22 in the pipeline, and only four were assessed at the maximum \$220,000 penalty. Patton Boggs suspects that MSHA's leadership and its district managers will be pressured by continued Congressional inquiries to increase the use of flagrant violations in 2008, resulting in even higher fines.

MSHA also initiated a new interpretation of its pattern of violations (POV) enforcement tool, threatening mines with incessant closure orders if they are identified as accumulating a pattern of "significant and substantial" violations. During 2007, 28 mine sites received potential POV letters following an MSHA announcement that it would screen all mines using new regulatory interpretations and data calculations. The agency's new interpretation is fraught with uncertainty and legal questions about its validity – it moves away from published regulations developed to reserve pattern closure orders for recalcitrant mines and places main stream mine operators at risk of unremitting closure orders, threatening their economic viability. Like the continued increase in penalties, expanded pattern enforcement is expected in 2008 as part of MSHA's reaction to Congressional pressure.

Enforcement was also the message in a year-end release from OSHA. Noting "that the agency's enforcement programs are producing positive results for the benefit of American workers," OSHA reported a 6% increase in total violations in fiscal year (FY) '07 compared to FY '06. Of the 88,846 violations handed out, 67,176 (76%) were written as serious violations.

That, the agency stressed, was a 9% increase over FY '06 and a more than 12% jump over the past four years. The number of repeat violations also rose during the fiscal year. The agency said it also exceeded its goal of 37,700 total inspections by 4.3%.

“The fact that OSHA surpassed its inspection goal for FY 2007 proves our enforcement commitment remains strong,” said OSHA chief Ed Foulke, Jr. “The significant increase in citations for serious and repeat violations documents OSHA’s focus on identifying and eliminating severe hazards in the workplace.” While OSHA did not have the same media focus as MSHA received following recent coal mine disasters, OSHA too has received Congressional attention that is expected to produce continued enforcement increases in 2008.

Patton Boggs’ health and safety team has decades of experience in providing counsel, audits, management training, acquisition diligence, and compliance assistance to help clients minimize OSHA and MSHA risks. The team has attorneys throughout the U.S. that provide not only routine counsel and enforcement defense, but also emergency response to reduce liability resulting from accidents and disasters. Contact Henry Chajet (202-457-6511, [hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com)) or Mark Savit (303-894-6117, [msavit@pattonboggs.com](mailto:msavit@pattonboggs.com)).

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## **2. PARTISAN POLITICS IMPACT AGENCY LEADERSHIP AND SAFETY**

In a move severely criticized by unions and Senate Democrats, President Bush named Richard Stickler “Acting” Assistant Secretary for MSHA on Jan. 4, after the Senate declined to confirm him as Assistant Secretary of Labor. Stickler has held the Assistant Secretary position since October 2006, on a recess appointment, which expired with the close of the first session of the 110<sup>th</sup> Congress on Dec. 31.

Despite the fact that Stickler led the largest increase in enforcement in the history of either OSHA or MSHA in 2007, Sen. Ted Kennedy (D-MA) stated:

The White House has again gone behind the Senate’s back to install Mr. Stickler as head of the agency that is supposed to protect our nation’s miners. After almost a year and a half of Mr. Stickler’s stewardship, MSHA remains an agency in crisis and in need of strong leadership. I urge the President to send us a nominee who will give our brave miners and their families the kind of effective safety enforcement they deserve.

Other Presidential appointments and Senate confirmation delays may be due to similar partisan disagreements or perhaps simply the government’s inefficiency. The OSHA and MSHA Review commissions’ ability to function and to review enforcement actions have been adversely impacted, which concerns both industry and labor. The Federal Mine Safety & Health Review Commission (FMSHRC) lacks a quorum after chairman Michael F. Duffy’s recess appointment expired at the end of last year. Duffy has been re-nominated, but the Senate has not acted. Moreover, two other nominees to the Commission – Arlene Holen and Robert Cohen, Jr. – remain on hold as well, even though they and the Chairman were “packaged” as a bipartisan set of appointments. Lacking a quorum, the Commission cannot render decisions. The Occupational Safety & Health Review Commission is also understaffed. With just two members, no decisions can be made unless both commissioners agree.

The recess appointment of Susan Dudley as head of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget also has expired. OIRA is the

Administration's watchdog on regulations, including those promulgated by MSHA and OSHA. Dudley, a free market advocate, has been opposed by labor and public health interests. Stanley C. Suboleski, a former industry executive, academic, and Mine Safety Review Commissioner, was nominated as Assistant Secretary for Fossil Energy at the Department of Energy, but he immediately drew fire from environmental groups, leaving his confirmation in doubt as well.

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### **3. MSHA, OSHA SET 2008 REGULATORY PRIORITIES**

Mine operators should expect at least four final rules from MSHA during the first quarter of 2008. They are an asbestos rule, regulations on mine rescue teams and mine rescue technology, and seals in underground coal mines.

As proposed, the asbestos rule would cut MSHA's permissible exposure limit for asbestos to 0.1 fibers per cubic centimeter (f/cc) from 2 f/cc. Based on MSHA sample results, it is unlikely the change would have much impact on mine operations.

MSHA is not expected to tinker with the definition of asbestos, which means the rule will be limited to the six commercial varieties of the mineral. Nor is the regulation expected to take a stand on "cleavage fragments," which are chemically similar to asbestos but have different physical characteristics. The crushed stone sector had hoped MSHA's asbestos rule would include a strong statement excluding cleavage fragments.

As proposed, MSHA's mine rescue team rule would require two mine rescue stations within one hour ground travel time to each mine they serve, up from two hours now. Operations considered small (i.e., under 36 employees total underground) and remote may seek alternative rescue capability through the MSHA District Manager. Among other provisions, the rule would also increase the annual training requirement to 64 hours from 40.

A companion proposal would amend MSHA's existing standard regarding mine rescue team equipment at mine rescue stations serving both underground coal and underground metal/non-metal (M/NM) mines to reflect technological advances. Both proposals were sparked by requirements in the MINER Act of 2006.

Another MSHA mandate, also driven by the MINER Act, is to release a final rule on mine seals. It is expected in February.

The agency is also committed to release a proposal addressing the factor for converting total carbon to elemental carbon in calculating exposure to diesel particulate matter (DPM). The factor would affect the final PEL for DPM of 160 micrograms per cubic meter, which goes into effect in May. The action affects underground M/NM mines. The agency issued a final rule on fire extinguishers in underground coal mines last month.

On the agency's longer-term regulatory horizon are likely to be rules on belt air, belt flammability, and refuge chambers. Studies of these issues were completed last year, and MSHA has six months under the MINER Act to review the recommendations and decide whether or not a regulatory response is appropriate.

MSHA also announced that it would issue a request for information this month on the respirable dust monitor. The device represents breakthrough technology in that it can supposedly report coal dust levels instantaneously.

As for OSHA, that agency said it would propose a rule on cranes and derricks this month. January is also the latest target for completion of a peer review of the health effects and risk assessment on crystalline silica. OSHA has missed several deadlines on this project in the past. OSHA said a peer review of an economic analysis on a proposed update to its Hazard Communication Standard (HCS) was to have been completed in November. However, this analysis has not been released, and the agency gave no date for issuing a proposed HCS rule.

OSHA issued a proposal last month to amend its respirator standard at 29 CFR 1910.134 to include a protocol for an abbreviated Bitrex<sup>®</sup> qualitative fit-testing protocol. Comments are due by Feb. 25. The proposal applies to general industry, shipyards, and construction.

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#### **4. FINAL DIESEL PARTICULATE LIMIT EFFECTIVE MAY 2008**

After years of rulemaking, criticism, and litigation, MSHA's final PEL for diesel particulate matter exposure in underground metal/non-metal (M/NM) mines goes into effect on May 20, 2008. Contrary to industry's repeated requests and concerns, the rule will take effect before NIOSH releases its long term study determining whether DPM poses a health risk to miners, and if so, at what levels of exposure. Based on MSHA sampling results, some operators will experience significant compliance problems.

Speaking at an underground stone safety seminar last month, MSHA industrial hygienist Bill Pomroy said the average exposure level of MSHA compliance samples collected during the 10-month period ending in November 2007 was 181 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) measured as total carbon (TC). While this number falls below the existing PEL of  $350 \mu\text{g}/\text{m}^3$  as TC, it will be out of compliance with the final PEL of  $160 \mu\text{g}/\text{m}^3$  TC. In fact, Pomroy said, some mines cannot even meet the interim  $350 \mu\text{g}$  PEL, as 28 of 128 mines were cited for noncompliance during the period.

Pomroy indicated that the average DPM level actually went up in the last half of 2006 compared to the June 2005-May 2006 period, even though neither exceeded the existing PEL. Based on MSHA's data, nearly 4 in 10 overexposures since the end of 2005 have been experienced by blasters, with another 3 in 10 overexposures to drillers and bolters. Mobile equipment operators and scalers followed at 17% and 4% overexposures, respectively.

Because the organic carbon component of TC is potentially affected by carbonaceous sources underground such as mineral ore and oil mist, MSHA changed its original rules to convert the TC limit and sampling result to elemental carbon (EC), and applies an error factor to supposedly make up for the uncertainty in the results of its self-invented regulatory/scientific scheme, not followed by any other agency in the United States or the world. While MSHA already has converted its interim limit of 350 TC, it has not completed its promised rulemaking to convert the final 160 TC limit, because the science and NIOSH do not support any conversion as accurate at this low level of particulate.

Patton Boggs, as counsel to the Mining Awareness Resource Group, engaged the nation's leading scientific experts on diesel exhaust and urged MSHA to recognize the reality of its flawed system, and retain the 350 ug limit until after NIOSH completes its DPM health effects study, expected later this year. In the interim, the sampling and analytical errors lead Patton Boggs to

believe that MSHA cannot carry its legal burden of proving a violation of the regulation, should an operator challenge a citation for exceeding the PEL.

Under the DPM rule, operators who cannot meet the limit with engineering or administrative controls may request an extension of time to comply, not to exceed one year. Additional one-year extensions, if justified, may be approved. Pomroy said one mine site, the Stillwater platinum operation in Montana, has received an extension, while requests from two others were pending. MSHA requires considerable documentation to justify a request, and, in approving a request, may set additional requirements.

Patton Boggs stands ready to assist operators in their cooperative efforts with NIOSH and MSHA to explore engineering controls, and file extension requests, as it did for Stillwater, a MARG coalition member. The firm also has the scientific and legal capabilities to assist operators in challenging improper violations or MSHA abatement demands, should that become necessary.

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## **5. MSHA REOPENS RECORD ON UNDERGROUND COAL MINE SEALS**

MSHA was forced to reopen the rulemaking record on seals in underground coal mines after a report surfaced that suggested explosive forces on seals at the Sago mine may have been more powerful than MSHA reported. Twelve miners died after a methane explosion in 2006 blew out 10 seals separating active from abandoned workings in the West Virginia mine.

The study by the U.S. Army Corps of Engineers, *CFD Study and Structural Analysis of the Sago Mine Accident*, also raised eyebrows because MSHA failed to disclose its existence during the public comment period. It came to light only after media inquiries.

The Corps' study is alleged to confirm NIOSH's "worst-case" calculation that overpressures on the Sago seals may have been higher than 600 pounds per square inch (psi). However, in a memo last month, Linda Zeiler, Acting Director of Tech Support, wrote that results of the Corps' effort "could not be relied upon for decision-making" because "the critical information necessary to develop an accurate simulation was not available."

The study involved computer modeling of three possible explosion scenarios but, Zeiler said, results depended on information, including the concentration and distribution of methane in the sealed area, that was not known. In three simulations the Corps ran, researchers estimated overpressures ranged from 51 psi to 1,300 psi. MSHA's estimate was that they exceeded 93 psi.

MSHA reopened the rulemaking record through Jan. 18 to take comment exclusively on the Corps' report. A public hearing is scheduled for Jan. 15 at MSHA headquarters.

MSHA's seals ETS, released last May, calls for new seals to meet either a 50 psi or a 120 psi standard. If 50, operators must monitor the area behind the seals and maintain it inert; i.e., in a non-explosive state. At the higher strength, monitoring and inerting are not necessary. Sago mine seals were built to withstand a 20 psi requirement. However, after the accident and another methane explosion that destroyed seals at a mine in Kentucky that claimed five lives, MSHA issued a directive upping the strength for new seals to 50 psi. The ETS, which under the law must be completed by Feb. 22, codifies the new requirements.

## 6. CONGRESS AGAIN SCHEDULES THE S-MINER ACT FOR A VOTE

The S-MINER bill, a massive set of new mandates for mining and enforcement largely rejected by previous attempts to change U.S. law and regulations, is a legislative priority for California Democratic Congressman George Miller. The S-MINER Act includes massive additional penalty increases, automatic reductions in chemical and dust air limits (previously rejected as lacking a scientific or feasible basis), new closure orders, mandates to change conveyor belts, and an array of other Congressionally engineered changes, is expected to be taken up by the House of Representatives in January 2008. Recent cost estimates by the Congressional Budget Office of more than \$1 billion (for those few provisions amenable of an economic estimate) have not seemed to slow down the bill's sponsors. Opponents hope to gain enough votes to demonstrate that its sponsors cannot override the President's veto, should the legislation also pass the Senate.

Meanwhile, in the Senate, where a nearly identical bill is pending, the chairman of the committee with jurisdiction has indicated that group's focus this year will be on mine safety issues. The comments of Sen. Kennedy, who chairs the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP Committee), likely refer both to S-MINER Act and the Crandall Canyon coal mine tragedy, the focus of an ongoing Senate investigation. At the Crandall Canyon Mine in Utah, six miners were trapped and never recovered, and three rescuers died trying to reach them.

While the legislation has the backing of organized labor, it received a hostile reception from the mining industry and a broad spectrum of coalition members. Industry trade associations, joined by the MARG coalition, the National Association of Manufacturers, and the Chamber of Commerce, oppose the bill, as do the directors and experts of six mining universities.

In a letter to Congressman Miller, MSHA head Richard Stickler said the legislation would mandate 10 regulatory changes, impose at least 16 new mandates, create unneeded offices within MSHA, and markedly change MSHA's accident investigation process. Nonetheless, MSHA's opposition is not universal. The agency likes the clause that would give it additional enforcement authority to issue a withdrawal order if a mine operator fails to pay a civil penalty. It also favors synchronizing its penalty assessment system with the independent Review Commission's review of assessments and restricting the ability of the Commission to significantly reduce penalties. Further, the agency supports giving government attorneys the ability to pursue investigative sources by contacting a miner or non-managerial employee of a mine operator, directly without fear of adverse action by any state court or bar association, and broadening the definition of "mine operator" beyond the already expansive definition, so MSHA could reach all parties involved.

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## 7. COAL BELT AIR PANEL PROPOSES NEW REQUIREMENTS

A technical study panel mandated by the 2006 MINER Act has recommended improved standards to minimize hazardous conditions caused by belt fires in underground coal mines. If implemented, many of the panel's recommendations would require rulemaking.

Belt air refers to the practice of using an intake air course for transporting coal out of a mine on a conveyor belt. Combustible coal dust may collect around belt parts. In addition, because belts are friction sources and may contain flammable materials, there is a potentially increased risk of belt-related fires that concern MSHA. The panel was commissioned after a belt fire at the Alma mine in West Virginia tragically killed two miners in January 2006.

The panel said that belt air mines must be held to a higher standard than non-belt air mines. Those standards would include use of an atmospheric monitoring system (AMS) or other suitable monitoring instruments to detect smoke, carbon monoxide, and other signs of a belt fire early and reliably. In addition, more rigorous MSHA inspection procedures are required, as well as use of belt conveyor materials that meet specified flame resistance requirements.

The panel also called on MSHA to evaluate the use of belt entry air coursed to working faces for ventilation air as part of the process for approving the mine's ventilation plan. The determining criterion, the panel said, is whether allowing belt air would be at least as safe as not allowing it.

Calling it "perhaps its most important safety recommendation," the panel suggested that rigorous standards in the NIOSH/MSHA-developed Belt Evaluation Laboratory Test (BELT) and other test standards be applied to belt materials to prevent fires, not just to suppress them.

The following are other recommendations proposed unanimously by the six-member body:

- MSHA should mandate a drum friction test for two years if the test would provide additional protection beyond that provided by the BELT.
- MSHA should extend the protections provided by the BELT and other belt flammability standards to all underground coal mines.
- All AMS operators should be certified and their highest priority should be the proper operation and response of the AMS.
- Diesel-discriminating sensors should be required in mines where use of such equipment produces an excessive number of false alarms in the AMS system.
- Initiate rulemaking to (1) discontinue point-type sensors used for fire detection, (2) require smoke detectors and (3) update MSHA's fire protection standards at 30 CFR 75.1100-1103.

In all, the group proposed 20 recommendations in a 132-page report available on MSHA's website at <http://www.msha.gov/BeltAir/BeltAirFinalReport122007.pdf>.

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## **8. INSPECTOR GENERAL TAKES MSHA TO TASK**

MSHA failed to complete one in seven underground coal inspections in FY '06. The agency "misstated" the number of completed and required inspections, and inspectors failed to document completion of critical enforcement activities. At the same time, supervisors performed inadequate oversight.

These key conclusions formed the crux of a critical audit of MSHA's coal enforcement program conducted by the Labor Department's Inspector General (IG). The 62-page audit was released late last year.

Of the missed and incomplete inspections, the vast majority (83%) occurred in Southern West Virginia. This drew the attention of West Virginia Sen. Robert Byrd, and in part may have been the driving force behind a new program announced in October by MSHA, the 100 Percent Plan. It is designed to assure MSHA completes its mandatory inspections at all coal operations.

Since the August 2007 Crandall Canyon accident had only recently occurred, the IG also focused attention on MSHA enforcement records of that mine. It found that, while all mandatory safety and health inspection had been performed during the audit period at Crandall Canyon, some

paperwork had been misdated, and one inspection was found to be incomplete and unsatisfactory.

The IG also reported that from FY '02 through '06, while mining activity was increasing, MSHA's coal mine budget remained essentially flat, even though there was a demand on funds to pay a 7.7% cost-of-living increase to staff. To adjust for the shortfall, inspectors were not replaced as they left through attrition. As a result, in 2006, there were 496 coal inspectors compared to 605 in 2002. The strain on inspection resources was inevitably felt in fewer, and less comprehensive, inspections.

In its response to the audit, MSHA carped at some of the findings, but also pointed out that, besides the 100 Percent Plan, MSHA had established a new National Office of Accountability, hired 273 new inspectors, and had begun making revisions to its inspection handbooks.

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## 9. 2008 FEDERAL SAFETY BUDGET: OSHA LOSES, MSHA GAINS

After considerable back-and-forth between Congress and the White House, the FY '08 appropriations bill was approved last month. FY '08 began last Oct. 1. It included an 11% budget boost for MSHA and a slight drop in the appropriation for OSHA. The mine safety agency received \$333.9 million, up \$32.4 million from FY '07. OSHA, however, saw nearly a \$1 million decline from its \$486.9 FY '07 budget. The amounts include a 1.74% reduction for all agencies.

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The [Patton Boggs Health and Safety Law Group](#) consists of attorneys who have resolved client problems in environmental, energy, natural resource, and safety and health law since the late 1960s. With lawyers in Washington, D.C., Alaska, Colorado, Texas, New Jersey, New York, and Northern Virginia, we have experience with EPA, OSHA, MSHA, NIOSH, DOT, OPS, Coast Guard, NTSB, FAA, FDA, CSP, the Chemical Safety Board, and almost every other federal and state government environmental, health, and safety agency here and in many foreign governments around the world. We speak a variety of languages; have backgrounds in business, science, engineering, industry, and government; and combine preventive law counseling with courtroom and lobbying expertise to achieve results. For more information go to: <http://www.pattonboggs.com> or contact [Henry Chajet \(hchajet@pattonboggs.com\)](mailto:hchajet@pattonboggs.com) at 202-457-6511, [Mark Savit \(msavit@pattonboggs.com\)](mailto:msavit@pattonboggs.com) at 202-457-5269, [Cole Wist \(cwist@pattonboggs.com\)](mailto:cwist@pattonboggs.com) at 303-894-6159, [John Austin \(jaustin@pattonboggs.com\)](mailto:jaustin@pattonboggs.com) at 202-457-6167 or [Willia Perlmutter \(wperlmutter@pattonboggs.com\)](mailto:wperlmutter@pattonboggs.com) at 202-457-5223.

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