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INSIGHTS

The Patton Boggs Safety & Health and Crisis Management Newsletter

MAY 2008

IN THIS ISSUE

[PRINT PDF](#)

[INSIGHTS HOME](#)

1. [House Passes Combustible Dust Bill](#)
2. [Miller Calls for Criminal Probe of Mine Official](#)
3. [Democratic Congress Takes Aim at OSHA](#)
4. [House Ponders Bill to Ban Asbestos](#)
5. [MSHA Finalizes \\$45 Million Seals Rule](#)
6. [Four New Rules Coming from MSHA This Year and an Expected Diesel Rule Is Abandoned](#)
7. [Companies Hit with High-Dollar Fines](#)
8. [MSHA Sets Special Assessment Criteria](#)
9. [CSB Continues Imperial Sugar Explosion Investigation](#)
10. [NIOSH Update](#)
11. [Mining Interests Sue MSHA Over Asbestos Rule](#)

[I. CONGRESSIONAL ACTION](#)

Patton Boggs LLP is not only the leading safety and health law firm in the nation, it also is well known as the country's largest and most effective lobbying firm. In this section of INSIGHTS we report on safety and health law and crisis management activities in the United States Congress, where Patton Boggs partners can help clients communicate effectively and achieve their goals. Contact Henry Chajet (hchajet@pattonboggs.com) or John Austin (jaustin@pattonboggs.com) for further information.

1. HOUSE PASSES COMBUSTIBLE DUST BILL

Following explosions at a sugar refinery in Georgia in February that left 13 people dead, the House passed sweeping new legislation to control exposure to combustible dust across a broad spectrum of U.S. industries. "The time for OSHA action is long overdue," said Rep. George Miller (D-CA), a co-sponsor of the bill and chairman of the House Committee on Education and Labor.

H.R. 5522, now pending Senate action, would require OSHA to issue an interim final standard regulating combustible dusts within 90 days and a final rule within 18 months. The regulation would have to be at least as protective as relevant NFPA standards and include requirements for a written program, controls and operating procedures, housekeeping, building design, explosion protection, employee participation, information and training, and change management.

The rule would apply to the manufacturing, processing, blending, conveying, repackaging, and handling of combustible particulate solids and their dusts, including but not limited to food, plastics, wood, rubber, furniture, textile,

pesticide, pharmaceutical, dye, fossil fuel power, and metals. It would exclude grain facilities, since they are already covered under an OSHA standard.

Supporters cited a 2006 study by the U.S. Chemical Safety Board (CSB), which called on OSHA to regulate combustible dusts. The study identified 281 industrial dust fires and explosions occurring between 1980 and 2005 that caused 119 deaths and over 718 injuries. About 67 more dust fires and explosions have occurred since then, William Wright, the CSB's interim executive, told the Congress at a hearing in March. He urged prompt action on the regulation.

Based on a CSB recommendation, OSHA put in place a national emphasis program last October that targets combustible dust facilities for enhanced enforcement activity but the agency has been reluctant to issue a regulation, in part because it says regulations on the books are sufficient. Republican lawmakers complained that the measure inappropriately is a one-size-fits-all solution, and that it short-circuits established due process mandates. The White House has threatened a veto and Senate consideration of the bill is uncertain, but there could be an attempt to focus further on safety in this election year. .

2. MILLER CALLS FOR CRIMINAL PROBE OF MINE OFFICIAL

U.S. Rep. George Miller called for a criminal investigation by the Justice Department into whether a mine manager "individually or in conspiracy with others, willfully concealed or covered a material fact or made materially false representations" to MSHA regarding conditions underground at the Crandall Canyon mine.

The California Democrat said at a press conference May 8 that Genwal Resources' official Laine Adair was singled out because he was the contact point between the mine operator and MSHA concerning Genwal's roof control plan. The plan, which was approved by MSHA, permitted Genwal to retreat mine a section of the Utah coal mine where a cave-in occurred last August, killing six miners.

Miller said an earlier non-fatal cave-in in another part of the mine should have been a red flag that further retreat mining was perilous. However, that cave-in was not officially reported to MSHA and, Miller alleged, representations to the agency about its severity by Adair and other Genwal officials may have been deliberately deceptive.

"It is quite possible that, had MSHA known the full severity of the March bump, MSHA would not have approved the subsequent development and retreat mining of the South Barrier," Miller said. Miller requested the Justice Department investigation in a letter to Attorney General Michael Mukasey April 29. Adair's attorney called Miller's action "deeply disappointing and utterly unjustified" and said he would be exonerated.

Miller's request marks the second time in less than two months that Democratic lawmakers have called for a criminal probe of the mine tragedy. In March, a report of a Senate committee chaired by Sen. Ted Kennedy (D-MA) made a similar request, although it stopped short of targeting specific individuals.

Rep. Howard "Buck" McKeon (R-CA) criticized Democrats for conducting investigations before the official probe is completed, saying doing so "raises serious questions." He said the complete picture of the accident would not be known until MSHA completes its investigation. Next month is the expected release date for the agency's accident investigation report and a separate report by the Department of Labor of MSHA's role in the tragedy.

Miller is a key backer of the S-MINER bill, mine safety legislation that passed the House in January. Miller used the forum provided by release of his report on Crandall Canyon to urge the Senate to act on S-MINER.

3. DEMOCRATIC CONGRESS TAKES AIM AT OSHA

OSHA is dragging its feet on workplace safety, and its penalty structure is not a deterrent to corporate health and safety misdeeds. Those conclusions were voiced at three separate congressional hearings on OSHA and workplace safety last month.

"We think OSHA can do better and that corporate America can do better," commented Rep. Lynn Woolsey (D-CA), chair of the House Workforce Protections Subcommittee, at a hearing called to examine safety behavior at multi-site employers and OSHA enforcement. A 2007 fatality at an Oklahoma facility run by national uniform supply company served as the springboard for discussion.

Woolsey is co-sponsor of a bill called Protecting America's Workers Act that would sharply increase civil penalties for workplace violations and expand to 10 years from six months the maximum sentence for a criminal prosecution.

A virtually identical bill is under consideration in the Senate, where another hearing last month examined the deterrence effect of OSHA penalties, particularly those imposed after a fatality. Sen. Ted Kennedy said the median penalty set by OSHA following a death last year was \$3,675. "Workers' lives are obviously worth more than that," he said, and added, "We need a law with teeth so that employers will be vigilant about complying with safety laws."

Two witnesses were parents who lost sons in workplace accidents. Ron Hayes, whose son died in a grain accident in 1995, urged lawmakers to write into the law "a felony charge for willfully killing an employee." Don Smith asserted that penalties are not an incentive for compliance. "If I had to change one thing that could make a profound difference in OSHA, it would be to make fines and punishment and enforcement so severe that employers would tremble at the thought of violating the code," said Smith. His son, Donald, was killed at a poultry processing plant in 2005.

David Uhlmann, a former Justice Department prosecutor, also argued for tougher penalties. He said most employees care deeply about safety, but there "always will be some employers who don't think the law applies to them. . . It is the egregious cases we need to address and right now, we can't."

At a third hearing before a Senate subcommittee, former OSHA head Gerald Scannell also raised concern about the lack of deterrence in the current penalty structure as well as OSHA's tendency to negotiate penalties downward.

"The penalty has got to be significant enough to be a deterrent for others, too, and at times I don't think we're doing that," he testified. "We're discounting and discounting and there's good reason, I'm sure, but CEOs are very concerned about criminal activities, and anything able to reach them to bring them into the Justice Department [should be considered], and I think we need to look at the entire penalty system of the OSH Act."

In other OSHA-related news, Kennedy and Sen. Patty Murray (D-WA) last month asked the Government Accountability Office (GAO) to examine if injuries and illnesses are being under-reported in general industry. "OSHA can't do its job to protect workers if it doesn't know what is really going on," Kennedy said in a press release. "That's why this GAO report is important. It will give us the information we need to hold OSHA and employers accountable." Patton Boggs, which has extensive experience conducting privileged and confidential injury and illness reporting audits, and correcting deficiencies cooperatively with the agencies, suggests that companies consider self-audits of injury and illness records required by OSHA and MSHA regulations.

4. HOUSE PONDERES BILL TO BAN ASBESTOS

Mining industry trade associations are among a coalition of corporate interests opposed to a House bill that would ban most uses of asbestos in commerce. H.R. 3339 defines an asbestos-containing product, in part, as one where asbestos is present in any concentration. In a letter to the Subcommittee on Environment and Hazardous Materials,

which is considering the measure, the coalition wrote that the bill would not only encompass mined material, but also farmlands, public or private property, as well as soils and all other materials not otherwise exempted.

The group said it favors an asbestos ban, but under terms spelled out in a Senate version of the bill. That legislation, which limits the ban to materials containing more than 1% asbestos by weight, was approved unanimously by the Senate last fall.

The House bill contains limited exemptions for asbestos-containing aggregate prepared for use in asphalt concrete, Portland Cement concrete, or similarly cemented materials. However, producers must certify through testing that the material contains less than 0.25 percent asbestos. Critics contend the provision is impractical and expensive, since it would potentially require every load of material to be analyzed. It is also technically infeasible, according to Dr. Roger McClellan, who told the subcommittee at a hearing that no methodology exists today to reliably and consistently detect asbestos at the specified level.

The bill faces an uncertain future, not only due to opposition, but also because subcommittee chairman Albert R. Wynn (D-MD), a strong supporter, was defeated for re-election in the primary and has resigned from Congress, effective next month.

II. REGULATORY UPDATE

Patton Boggs partners have represented clients successfully in dozens of safety and health rulemaking proceedings, in challenging invalid rules in the courts, and by counseling clients on health and safety research aimed at supporting regulatory and enforcement actions. In this section of INSIGHTS we report on regulatory developments at OSHA and MSHA, and related activities at NIOSH, their research agency, that also has authority to conduct Health Hazard Evaluations (HHE) and long-term research at employment sites. For further information, contact Mark Savit (msavit@pattonboggs.com) or Henry Chajet (hchajet@pattonboggs.com).

5. MSHA FINALIZES \$45 MILLION SEALS RULE

MSHA issued a final rule on seals in underground coal mines last month that it estimates will cost the industry \$45 million a year. Seals are intended to close off abandoned areas for safety and ventilation reasons. However, methane can build up in sealed areas, potentially increasing the risk of explosion. The regulation requires that new seals constructed beginning this coming October 20 be substantially more pressure resistant than current seals, and that seals meeting minimum regulatory mandates be continuously monitored with appropriate corrective action mandated if methane begins to approach its explosive range.

The rule also imposes requirements for new seal design and installation; sampling; seal construction, maintenance, and repair; training; and recordkeeping. The rule prohibits welding, cutting, or soldering with an arc or flame within 150 feet of a seal. The regulation reflects most of the provisions contained in an emergency temporary standard MSHA released last May.

The agency estimated total annual costs at approximately \$45.4 million. The bulk of that cost, some \$37.8 million, will fall on operators of the 279 mines that employ from 20 to 500 employees. Based on a 2006 survey, MSHA estimated that 372 of the nation's 624 underground coal mines have seals.

Concern focused on seals after methane explosions in sealed areas claimed the lives of 17 miners in separate incidents in West Virginia and Kentucky in 2006. Seal strength requirements are based on recommendations from NIOSH.

Regarding existing seals, MSHA issued a program information bulletin in July 2006 that, among other measures, required operators to evaluate the integrity of existing seals, sample the atmosphere behind them, and take remedial action as necessary.

6. FOUR NEW RULES COMING FROM MSHA THIS YEAR AND AN EXPECTED DIESEL RULE IS ABANDONED

Continuing a regulatory frenzy that began in response to coal tragedies in 2006, MSHA is committed to issuing four new regulations before the end of this year. In its semi-annual regulatory agenda released just days ago, MSHA said it soon would propose new rules for the coal sector on refuge alternatives and belt air. Under a mandate inserted into the 2008 appropriations legislation, those rules must be finalized by the end of this year. In addition, the agency said it would issue final rules on mine rescue team equipment, which would be applicable throughout the industry, as well as a coal-only rule on fire extinguishers underground. MSHA also said it was considering whether or not to propose a rule on substance abuse and set June as its target release date.

The MSHA semi-annual agenda included an announcement that the agency was abandoning its promised diesel particulate matter (DPM) rulemaking to convert its final total carbon permissible exposure limit for non-coal underground mines to elemental carbon, to prevent interferences that cause false readings. Instead, the agency apparently intends to enforce the May 20, 2008 160 TC limit using a guidance policy that it believes will prevent false reading.

No new final regulations are scheduled for release by OSHA before the end of the year. However, that agency said it would propose a rule on cranes and derricks by August, and would hold a public hearing July 22 on its previously released proposal concerning confined spaces in construction. In the current agenda, the agency made no mention of a plan it had published earlier to update its Hazard Communication rule.

III. ENFORCEMENT

Patton Boggs LLP safety and health attorneys – together with retained, world-class scientific, medical, and engineering experts when needed – have successfully conducted thousands of privileged and confidential investigations throughout the United States and in other countries and defended clients against alleged violations and fines. By providing counsel immediately following an accident or disaster, or during a government investigation or inspection, the firm's safety and health attorneys minimize penalty, prosecution, and abatement risks and help clients assure that their safety and health resources are used properly and not diverted to unjustified agency actions. Patton Boggs attorneys conduct privileged and confidential audits and training on reducing the risks of enforcement, penalties, and civil lawsuits that use enforcement actions as evidence. In this section of INSIGHTS we report on safety and health enforcement actions of interest. For further information contact Mark Savit (msavit@pattonboggs.com) or Henry Chajet (hchajet@pattonboggs.com).

7. COMPANIES HIT WITH HIGH-DOLLAR FINES

Continuing its get-tough policy, MSHA recently announced a number of high-dollar fines against mine operators, including those for flagrant violations, which carry a maximum price tag of \$220,000 per occurrence.

Murray Energy subsidiary Andalex Resources was cited in March for two alleged flagrant violations at its Aberdeen mine in Utah, and assessed \$420,300 in penalties. Last month, Genesis Inc. was hit with \$417,400 in fines for four alleged flagrant violations at its Troy copper mine in Montana.

MSHA has issued approximately 50 flagrant violations since it was handed the new penalty option under the 2006 MINER Act. MSHA is also using its pattern of violation enforcement tool. To date, 28 operators have received letters informing them they are potential pattern violators. The agency is expected to release a new round of pattern letters within the next month.

Those fines pale, however, in comparison to a \$20 million settlement reached this spring between Massey Energy and the federal government after the EPA charged the nation's fourth-largest coal producer with thousands of water violations throughout the Appalachian coalfields. The Massey fine, in turn, is but a fraction of the \$250 million W. R.

Grace has agreed to pay to cover Superfund investigation and cleanup costs at an old Grace vermiculite mine in Libby, Montana. Grace had previously agreed to pay \$34 million to clean up 32 vermiculite processing sites throughout North America.

OSHA has issued at least four six-figure fines so far this month for alleged violations at work sites throughout the nation. Sunoco was fined \$330,000 for alleged violations at its oil refinery in Oregon; United Airlines, Chicago, \$215,500; John Moriarty & Associates of Florida, Inc., Miami, \$115,000; and Trans-Acc, Inc., Cincinnati, \$121,800.

Patton Boggs EHS team has decades of experience in helping companies minimize EPA, OSHA, and MSHA risks. Contact Henry Chajet (hchajet@pattonboggs.com) or Mark Savit at 303-894-6117 (msavit@pattonboggs.com).

8. MSHA SETS SPECIAL ASSESSMENT CRITERIA

Special assessment is the process MSHA goes through to determine an appropriate penalty outside its penalty tables, and last month the agency released new guidance on the subject. In reality, special assessment by MSHA almost always means fines far in excess of penalties calculated using the MSHA penalty point system.

MSHA said special assessment is mandatory when the daily penalty is invoked for failure to abate a 104(a) citation, for citations to miners for smoking or carrying smoking materials underground, flagrant violations, violations involving personal liability under 110(c), and violations for discrimination under 105(c). In addition, a special assessment will be applied for violations under Part 50.10 for failure to provide immediate notification to MSHA of (1) a death of an individual at a mine or (2) an injury or entrapment of an individual which has reasonable potential to cause death.

MSHA said special assessment review is required for all violations that contribute to a fatality or serious injury. However, special assessment is not mandatory for those violations, since they may involve circumstances for which MSHA determines, in its discretion, special assessment is not warranted.

District managers may recommend any violation for special assessment if circumstances warrant. After the issuing inspector and the inspector's supervisor review a violation, the district manager has full discretion to recommend a special assessment.

MSHA spelled out the new criteria after doing away with a previous set of criteria when it revised its civil penalty structure last year.

IV. CHEMICAL SAFETY BOARD/NIOSH

9. CSB CONTINUES IMPERIAL SUGAR EXPLOSION INVESTIGATION

The Chemical Safety Board (CSB) continues its investigation into a series of explosions at the Imperial Sugar plant in Georgia in February that killed 13 workers and prompted legislation approved recently by the House. Some 35 others were injured in the February blasts, and seven remain seriously ill in a burn treatment facility.

Interim executive William Wright testified before a House subcommittee in March that several more months of work are needed to dismantle and examine heavily damaged sections of the refinery. He said sugar dust had accumulated over a long period on surfaces throughout the facility; however, investigators have yet to determine what set off the series of explosions.

In other CSB news, the board said it planned a public hearing for May 13 to review findings from its investigation of a 2006 explosion at the CAI/Arnel chemical plant in Massachusetts. CSB also issued a case study report last month of a hazardous waste fire in North Carolina. The report calls for a new national fire code for hazardous waste facilities and improved information flow to community emergency planners about chemicals stored at such facilities.

Besides Imperial Sugar and CAI/Arnel, ongoing investigations include accidents at two Texas refineries, an explosion and fire in Florida, a fire in Colorado, a chemical plant explosion and fire in Kansas, and a propane explosion at a store in West Virginia.

In March, the Senate confirmed former CSB member John Bresland as the investigative board's chairman and CEO.

10. NIOSH UPDATE

Last month, NIOSH Director John Howard reported that a decade-long diesel exposure and health effects study involving miners would be released before the end of this year. NIOSH and the National Cancer Institute conducted the study. The MARG Coalition, represented by Patton Boggs, expects to review the study for the Congress 90 days prior to its public release (along with the United Steelworkers). The unusual review process is the result of a lawsuit won by MARG seeking to insure sound and unbiased scientific interpretation of the data following a NIOSH violation of the Federal Advisory Committee Act in developing the study protocol.

May 12 was the last day to comment on a NIOSH alert dealing with exposure and sensitization to beryllium. The metal is under consideration by OSHA for rulemaking. The agency set November 2008 as the date for completion of a peer review of health effects and risk assessment documents.

NIOSH recently released four new Health Hazard Evaluations. One deals with the evaluation of potential ergonomic hazards in manufacturing, while the three others address exposure to respirable silica and noise in construction.

NIOSH at Your Work Site

NIOSH authority to enter employment sites and conduct HHE of workers and conditions in response to complaints or requests, or for research to assist OSHA and MSHA, is established and restrained by the Mine Act, the OSH Act, court cases interpreting their authority, and related laws. Procedures used by NIOSH in these efforts are codified in agency regulations published on its web site (www.niosh.gov), along with its excellent director's newsletter announcing their current initiatives and discussing their activities.

Generally, NIOSH announces its HHE or research intention to employers in advance and will respond to employer and employee concerns and requests to cooperatively establish the time frames and parameters for a site evaluation that can last days, weeks, or months. Like any federal agency investigation, the assigned NIOSH personnel can vary in their expertise and philosophy, and their visits create risks and opportunities for employers. Knowing an employer's rights and understanding NIOSH goals and procedures are the keys to protecting a company from unwarranted regulatory or enforcement risks related to a NIOSH visit, and from expensive lawsuits resulting from incorrect NIOSH findings of health effects. Knowledge of NIOSH procedures, available resources, and the agency decision making process can also provide the company with the resources and assistance needed to maximize benefits from a NIOSH visit, if circumstances permit.

If asked, NIOSH should have and make available a research or project protocol that clearly sets forth the goals and procedures for any research it intends to conduct. An employer can submit to NIOSH comments prepared in-house or by retained experts and NIOSH should respond to insure the scientific validity of the project and its proposed procedures. For HHE, NIOSH should provide the employer with a copy of the request or complaint, and the procedures it intends to follow to investigate. The employer has the right to participate in a meaningful manner, with their own experts, and the timing should be subject to an agreement that accommodates the employer and expert's schedules. NIOSH should provide the company with any requests for records or documents in advance, and should announce in advance when sampling or testing will be conducted to permit duplicate samples to be taken by the company, with the same equipment as NIOSH, to provide comparison sample results and observations. In advance of a site visit, NIOSH should entertain discussions about a company's desire to review a draft of the NIOSH report, and submit comments and corrections for NIOSH consideration.

NIOSH personnel understand that they need company cooperation to conduct a research project or HHE efficiently and they generally work towards achieving a level of friendly cooperation but resist surrendering their independent

authority to evaluate the conditions. The discussions between the involved NIOSH staff and the company are critical negotiations for both NIOSH and the sophisticated employer that understands the need to minimize the risks of the NIOSH visit and maximize the benefits. These are some of the basic steps a company can take to achieve these goals and further information is available from Mark Savit (msavit@pattonboggs.com) or Henry Chajet (hchajet@pattonboggs.com).

V. THE COURTS

11. MINING INTERESTS SUE MSHA OVER ASBESTOS RULE

Two separate lawsuits were filed April 25 by mining organizations and their affiliates to contest provisions of MSHA's final asbestos rule.

Patton Boggs represents NYCO Minerals, Inc, Ed Simal & Associates, Inc., the Industrial Minerals Association – North America, Inc., and the National Mining Association (NMA). Petitioners in the second legal action are the Georgia Construction Aggregate Association (GCAA) and the National Stone, Sand & Gravel Association (NSSGA). The litigation was filed in the 11th Circuit Court of Appeals in Atlanta.

MSHA issued a final asbestos rule in February that reduced its permissible exposure limit. Petitioners objected to the rule's failure to set forth analytical methods to clearly differentiate the asbestiform varieties of the six regulated asbestos minerals from their non-asbestiform counterparts and other non-asbestiform minerals.

In comments to the agency during rulemaking, petitioners warned that misclassification of non-asbestiform minerals as asbestos risks the economic viability of affected mines. The mined product could be subject to MSHA citations, raise concerns with product purchasers, and expose affected operations to asbestos litigation, according to the testimony. While MSHA stated in the preamble to the rule that it had no intention of regulating non-asbestiform minerals, MSHA did not insert clarifying language to that effect in the rule, nor require the use of analytical methods that accomplish that result.

MSHA's final rule is virtually identical to one it proposed in 2005. At that time, industry commenters cautioned the agency and one of the Plaintiffs said that they were, "concerned that the proposed rule, as currently written, does not make this fiber distinction problem clear, nor does it provide adequate guidance as how to it might be avoided."

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:Henry Chajet (hchajet@pattonboggs.com)) at 202-457-6511, [Mark Savit \(msavit@pattonboggs.com\)](mailto:Mark Savit (msavit@pattonboggs.com)) at 202-457-5269, [Cole Wist \(cwist@pattonboggs.com\)](mailto:Cole Wist (cwist@pattonboggs.com)) at 303-894-6159, or [John Austin \(jaustin@pattonboggs.com\)](mailto:John Austin (jaustin@pattonboggs.com)) at 202-457-6167

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