The Failed Promise of Workplace Health Regulation

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THE FAILED PROMISE OF WORKPLACE HEALTH REGULATION

David C. Vladeck*

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I. INTRODUCTION

The genesis for this symposium is the tragedy at the Sago mine, in West Virginia, which took the lives of twelve miners, and left a thirteenth miner fighting for his life. Mine disasters, like the one at Sago and those that preceded and followed it, rivet public attention. For a few fleeting days, the public is captivated as rescue crews work around the clock, flailing against rock as they inch towards the trapped miners. Too often, their efforts are in vain, with rescue crews reaching trapped miners after the miners have perished. This happened

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1 The federal Mine Safety and Health Administration (MSHA) has dedicated a website page to Sago-related material, including the agency's reports on the tragedy. See http://www.msha.gov/sagomine/sagomine.asp.
not just in the Sago mine, but also, just two weeks later, when two miners died in the Aracoma Alma mine,\(^2\) also in West Virginia, and a year after that, when the Crandall Canyon mine in Utah claimed the lives of six miners and three would-be rescuers.\(^3\) The deaths of these miners stand as a stark testament to the dangers of mining.\(^4\)

Perhaps because of the drama of heroic rescuers putting their own lives on the line to save their fellow miners, or perhaps because of our empathy with miners trapped far below ground, the focus of mine safety efforts has long been on preventing the upheavals, cave-ins, and explosions that trap and kill miners. And notwithstanding the recent tragedies at Sago, Aracoma Alma and Crandall Canyon, progress has been made. At least in the United States, mining is less hazardous than it once was. There are fewer catastrophic accidents, the fatality and injury rate of miners has dropped steadily over time, and we press forward with efforts to make mines safer.\(^5\)

But the fact that some progress has been made in reducing risk should not be seen as a warrant that mining is now “safe” or that the risks to miners of injury or death on the job has been reduced to an acceptable level. That is not the case. Miners still face inordinately high risks and these risks must be reduced.\(^6\)

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\(^3\) Dan Frosch & Jennifer 8. Lee, Rescue Halted at Mine After 3 Deaths and 6 Injuries, N.Y. TIMES, Aug. 17, 2007, at A0.

\(^4\) The statistics are sobering. Between 1900 and 2007, MSHA reports that 104,659 miners died in coal mine accidents. MSHA, Coal Fatalities for 1900 through 2007, http://www.msha.gov/stats/centurystats/coalstats.asp (last visited Apr. 19, 2008). But that number, as large as it is, is dwarfed more than four-to-one by the number of deaths due to black lung. National Institute of Occupational Safety and Health, Number of Deaths of U.S. Residents Aged 15 or Older with Pneumoconiosis Recorded as an Underlying or Contributing Cause on the Death Certificate, 1968–1999, http://www.cdc.gov/docs/2004-146/detail/imagedetail.asp@imgid214.htm (last visited Apr. 19, 2008). Public health experts have determined that by 1969, there were at least 365,000 deaths due to black lung, with an additional 120,000 — totaling nearly one-half million — deaths over the following thirty years. See Christopher W. Shaw, Center for the Study of Responsive Law, Undermining Safety: A Report on Coal Mine Safety, at 7–8, available at http://www.csr1.org/reports/UnderminingSafety.pdf [hereinafter Undermining Safety].


\(^6\) According to the most current statistics compiled by the Centers for Disease Control, as of 2005, coal miners faced a risk five to six times higher than other employees in suffering a fatal accident on the job, with a risk of nearly 27 per 100,000 compared with the national average of under 5 per 100,000. CDC, Fatality Rate in Mining Occupations and All Industry (Private) (2005), http://www.cdc.gov/niosh/mining/statistics/pdfs/pp3.pdf (last visited Mar. 4, 2008). U.S. miners, however, are at far higher risk than their international counterparts. For example, in China—the world’s major coal producer—miners face far higher risks. See CHINA LABOUR BUREAU, DECONSTRUCTING DEADLY DETAILS FROM CHINA’S COAL MINE SAFETY STATISTICS (2006), http://www.clb.org.hk/en/node/19316 (reporting nearly 6,000 coal miner deaths in China in 2005).
My submission is that, although much more work lies ahead to make mines safer, and although the instinct to put the prevention of catastrophic events above all other priorities is understandable, the singular focus on mine safety has obscured an equally compelling need to protect miners' health. Preventing catastrophic explosions, fires, and cave-ins is unquestionably important. But so too is preventing miners from suffering painful and premature death due to the slow-acting poisons that permeate mines, including coal dust, radon, silica, asbestos, arsenic, and other air contaminants. Indeed, over the past ten years, black lung alone has claimed the lives of over 1,000 miners each year - a number that vastly overshadows the annual death toll from safety hazards. And the trend line is only getting worse. According to a recent study by the National Institute of Occupational Safety and Health (NIOSH), black lung rates are skyrocketing, to the point where, in 2007, NIOSH tests revealed that ten percent of miners with twenty-five or more years of experience show black lung symptoms - an incidence rate twice as high as a decade ago. It is time to worry about the health of miners and not just their safety.

In fairness to MSHA, it probably bears noting that Congress too has responded to mining disasters, but has otherwise not shown substantial interest in the health and safety of miners. The 1968 Farmington mine explosion, which claimed the lives of seventy-eight miners, galvanized Congress to enact the 1969 Federal Coal Mine Health and Safety Act. MSHA, MINING DISASTERS-AN EXHIBITION, http://www.msha.gov/disaster/disaster.htm (last visited Sept. 8, 2008). Congress also rushed through the passage of the 2006 MINER Act in the aftermath of the Sago mine tragedy.

See MSHA, CONTROLLING RESPIRABLE COAL MINE DUST IN UNDERGROUND MINES: INTRODUCTORY REMARKS, at Slide 4, http://www.msha.gov/s&mshinfo/BlackLung/ControlDust2007/CTD2007.asp (follow "Introductory Remarks" hyperlink) (last visited Sept. 8, 2008) (mortality chart of coal miner deaths attributable to black lung from 1968 to 2004). In 1998, the Louisville Courier-Journal reported that every year, black lung disease kills almost 1,500 people who have worked in the nation's coal mines. It's as if the Titanic sank every year, and no ships came to the rescue. While that long-ago disaster continues to fascinate the nation, the miners slip into cold, early graves almost unnoticed.


The statistics drive this point home. NIOSH's Dr. Petsonk, in his presentation on black lung, pointed out that, according to NIOSH statistics, in 2002, twenty-seven coal miners died in mining-related accidents while 854 former miners died due to black lung. See id. at Slide 32. According to a report from the University of Texas, coal mining reduces a miner's life expectancy by 1,100 days — a reduction that is less than smoking one pack of cigarettes a day (1,600 lost days) but more than having cancer (980 days) or being 30 pounds overweight (900 days).
This is not just my view. It was also Congress’s position forty years ago when it amended the mine safety laws to make mine health regulation a priority. After all, the federal statute that governs working conditions in mines is entitled the Mine Safety and Health Act (MSHA Act),\(^\text{11}\) and the agency that Congress has assigned the responsibility of improving working conditions in mines is called the Mine Safety and Health Administration (MSHA). When Congress passed the Federal Coal Mine Health and Safety Act of 1969,\(^\text{12}\) the forerunner of the MSHA Act, it directed the agency to place a premium on health regulation and set an interim coal dust standard with the clear-cut expectation that MSHA would expeditiously establish lower, more miner-protective standards for coal dust and other air contaminants. Forty years later the “interim” standard is, astonishingly, still in effect, with no revision to the standard in sight.

My claim is that MSHA has focused on safety concerns to the exclusion of health concerns. The agency’s failure to address coal dust is the most visible, and inexplicable, manifestation of the agency’s single-mindedness. Whether that focus has been myopic or justified is, at this juncture, beside the point. What is now undeniable is that health hazards pose as much of a threat, if not more of one, to the lives and well-being of miners than do the safety hazards they face. The time has now come for MSHA to recognize this imperative and to fulfill its statutory mandate to protect the health of miners as well as their safety.\(^\text{13}\)


\(^{12}\) Federal Mine Safety and Health Act of 1977, Pub. L. No. 91-173, 83 Stat. 760 (establishing the respirable dust standard now codified at 30 U.S.C. § 842(b)(2) (2000) (providing that “each [mine] operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.”)).

\(^{13}\) As best as I can tell, MSHA has only issued three health standards during its nearly forty years of existence. The first one, air quality standards for abrasive blasting and drill dust control, was issued in 1994 as the first step in a comprehensive air quality control standard-setting process that was abandoned in 2002. See Air Quality: Health Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (Feb. 18, 1994) (to be codified at 30 C.F.R. pts. 56, 57, 58, 70 & 72); see also Int’l Union, United Mine Workers of Am. v. U.S. Dep’t of Labor, 358 F.3d 40 (D.C. Cir. 2004) (remanding MSHA’s decision to abandon its air quality standard). The second one, a standard for diesel particulate matter protection for both coal miners and metal and non-metal miners, was issued on the last day of the Clinton Administration. See Diesel Particulate Matter Exposure of Underground Miners, 66 Fed. Reg. 5526 (Jan. 19, 2001) (to be codified at 30 C.F.R. pt. 72); Diesel Particulate Matter Exposure of Underground Material and Nonmetal Miners, 66 Fed. Reg. 5706 (Jan. 19, 2001) (to be codified at 30 C.F.R. pt. 57). This standard was developed as a result of a court order compelling its issuance. See In re United Mine Workers of Am. Int’l Union, 190 F.3d 545 (D.C. Cir. 1999). The third, one for asbestosis, was issued on February 29, 2008, seven years after the agency’s Inspector General urged a reduction of the agency’s outdated standard which was twenty-times that of OSHA’s level, which had been set twenty years ago. After three years of standard-setting, MSHA has finally reduced its exposure level from two fibers per cubic centimeter (f/cc) to 0.1 f/cc, which is the same as OSHA’s, and lowered the excursion limit for brief exposures to higher levels from ten f/cc (for 15 minutes) to one f/cc (for 30 min-
Having thrown down the gauntlet to MSHA, I hasten to acknowledge that my challenge is made with a full appreciation of the road-blocks in the agency’s path. It is hard enough to issue safety regulations. Mine owners often resist the imposition of tougher safety regulations, arguing that the benefits do not justify the costs. The Bush Administration generally supports deregulation, and thus any regulatory proposal is certain to be greeted with suspicion by the Administration’s regulatory overseers at the Office of Management and Budget’s Office of Information and Regulatory Affairs. And even if a safety regulation surmounts these hurdles and musters the Administration’s backing, there awaits the judgment of an often skeptical panel of Court of Appeals’ judges.

As formidable as are these obstacles to safety regulation, they become all the more forbidding for health regulations. By definition, health standards address risks that are not immediate, that often have long latency periods, that are difficult to measure accurately, and that often have no immediate, discernable effect. It is, I acknowledge, harder to make the case to protect workers from slow-acting poisons like respirable dust, silica, radon and asbestos than it is to protect them from catastrophic explosions and cave-ins. Protecting workers from health risks can be costly. On the other hand, the benefits of future-looking regulations designed to save lives and to avoid debilitating illnesses like black lung accrue in the future, and thus are subject to heavy discounting, making them more difficult to justify on economic grounds.14 But the fact that the bar to health regulations is set high does not mean that the hard work to promulgate them should go undone. Health risks like black lung claim far more miners’ lives than do catastrophic cave-ins and explosions. Perhaps even worse, diseases like black lung condemn thousands of miners to live out their days crippled by the devastating effects of progressive, chronic lung disease.15 The time has come for MSHA to pay attention to the health side of its statutory mandate.

II. THE FLAWED STRUCTURE OF FEDERAL REGULATION OF WORKPLACE HEALTH HAZARDS

A. The Standard-Setting Process Set Forth in the MSH Act

If one were simply to read the Mine Safety and Health Act – and nothing else – one would come away with the impression that the issuance of health standards was both routine and a matter of high priority to MSHA. To begin

with, the Act 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."16 This provision, as well as the Act’s other statements of purpose, place Congress’s concern for the health of miners on an equal footing with their safety.17 The statements of purpose go on to emphasize Congress’s aim "to establish interim mandatory health and safety standards" to serve as a stopgap while more protective standards are developed.18 Indeed, the Act “direct[s] the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation’s coal or other miners.”19

The Act also contains detailed provisions that govern the development, promulgation and revision of mandatory safety and health regulations. The Act places a high premium on protecting miners. But it does so in a way that bifurcates responsibility for the development of standards between two agencies.

On the one hand, the Secretary of Health and Human Services is given the responsibility of evaluating the constellation of scientific and technical issues that form the foundation of standard-setting, ranging from assessments about the nature and magnitude of the risk to miners to the most effective ways to protect miners from that risk. On the other hand, the Secretary of Labor is tasked with the responsibility of working with the stakeholders – mine operators, unions, other representatives of miners, and other interested parties – to fine-tune the standard, to determine how best to control the risk and protect workers, and ultimately, to get the standard issued, implemented, and enforced.

In keeping with this allocation of responsibility, the Act directs the Secretary of Health and Human Services, “as soon as possible after November 9, 1977, but in no event later than 18 months after such date and on a continuing basis thereafter” to identify “each toxic material . . . which is used or found in a mine” and to “determine whether such material . . . is potentially toxic at the concentrations in which it is used or found in a mine.”20 The Secretary of Health and Human Services is then directed to “submit to the Secretary [of Labor] all pertinent criteria regarding any such substances determined to be toxic . . . as such criteria are developed.”21 Once this information is transmitted to the Secretary of Labor, generally in the form of what is known as a "Criteria Document," the Act gives the Secretary of Labor sixty days within which to “either appoint an advisory committee to make recommendations with respect to a

17 Id. § 801(b)-(g).
18 Id. § 801(g)(1).
19 Id. (emphasis added).
20 Id. § 811(a)(6)(B) (2000).
21 Id.
mandatory health or safety standard" or "publish a proposed rule promulgating" such a standard or publish a determination not to do so.\textsuperscript{22}

The Act also makes clear that the Secretary of Labor's key mission in standard-setting is to protect miner health and safety. It directs the Secretary, when "promulgating mandatory standards dealing with toxic materials," 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."\textsuperscript{23} In addition to "the attainment of the highest degree of health and safety protection for the miner," the Secretary is also directed to consider "the latest available scientific data in the field, the feasibility of the standards, and [the] experience gained under this and other health and safety laws."\textsuperscript{24} As is evident, the only constraint on the mandate that MSHA regulates as strictly as it can to protect miner health is the requirement that MSHA consider the "feasibility of the standards" in standard-setting.\textsuperscript{25} In the Cotton Dust case, involving almost identical language in the Occupational Safety and Health Act, the Supreme Court held that "feasibility" means that which is "capable of being done."\textsuperscript{26} As the Court found, the only limitation imposed by a feasibility requirement is that the technology must be available to enable industry to implement the standard and the standard may not be so costly that it would cause serious economic dislocation to the regulated industry.\textsuperscript{27} Thus, the Act sends a strong signal that miner health is the preeminent goal of Congress and that miner health should not be traded-off to save on compliance costs.

The Act also recognizes the need to develop standards expeditiously. As noted above, the Act contemplates that once the Department of Health and Human Services has recommended standard setting, the process be initiated within 60 days, or the Secretary of Labor appoint an advisory committee to evaluate the recommendation. To move the regulatory process along, the Act establishes a hybrid system of rule-making that, for the most part, follows the informal notice and comment rule-process of the Administrative Procedure Act.\textsuperscript{28} Although the MSH Act provides an opportunity for a hearing on request, it per-
mits the Secretary to dispense with a hearing when no request is made. And each step in the rule-making process is accompanied by a strict deadline that the Secretary must adhere to, which, at least in theory, guarantees that standards will be issued within a matter of months, not years.

As noted, the Act has a section devoted just to respirable coal dust. The section begins by providing that all coal mine operators "shall take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed" and spelling out in detail the requirements for sampling. The section then sets interim standards: For the first three years following the statute’s enactment, mine operators were to "continuously maintain the average concentration of respirable dust . . . at or below 3.0 milligrams of respirable dust per cubic meter of air." Thereafter, mine operators were required to maintain average concentrations "at or below 2.0 milligrams of respirable dust per cubic meter of air [2 mg/m^3]." The Act gave MSHA the authority to issue short-term permits to mines that could not come into compliance with these standards within the time limits prescribed, but that authority ended in 1975. By that time, Congress expected that mines would be in compliance with the 2 mg/m^3 interim standard and that MSHA would be well on its way to setting a revised, more stringent standard. The section provided that, "[b]eginning six months after" the statute’s enactment, and "from time to time thereafter," the Secretary of Health and Human Services shall establish, in accordance with section 811 of this title, a schedule reducing the average concentration of respirable dust in the mine atmosphere . . . below the levels established in this section to a level of personal exposure which will prevent new incidences of respiratory disease and the further development of such disease in any person.

29 Id. § 811(a)(1)-(3). For a critique of “hybrid” rule-making requirements, see generally Stephen Williams, “Hybrid Rulemaking” Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).
30 Id. § 811(a)(4)(A)-(C) (requiring, as a general rule, the Secretary to issue a standard within ninety days of the certification of the hearing record). See generally In re United Mine Workers of Am. Int’l Union, 190 F.3d 545, 550-51 (D.C. Cir. 1999) (noting that the time limits in the MSHA Act generally must be observed). See also H.R. REP. NO. 95-312, at 17-18 (1977) (explaining need for timely action on MSHA standards); S. REP. NO. 95-181, at 20 (1977).
32 Id. § 842(a).
33 Id. § 842(b)(1).
34 Id. § 842(b)(2).
35 Id. § 842(b)(6).
36 Id. § 842(d).
This provision clearly contemplated that, acting on the advice of the Department of Health and Human Services, the Department of Labor would swiftly promulgate a revised standard below the interim standards to prevent the incidence of respiratory disease. Congress thus recognized that the interim standards did not provide an adequate measure of protection for miners and that tougher standards had to be developed right away. Congress also recognized that the solution to the black lung problem was to fix mines by forcing mine owners to reduce exposures to protect workers, not to “fix” miners by placing them in respirators. Forty years later, however, the interim standards are still in effect, with no prospect of MSHA action on the horizon.

B. The Standard-Setting Process in Practice

On paper, the process for developing health standards looks seamless. Scientists and mine health experts at the Department of Health and Human Services take on initial scientific steps of identifying and evaluating mine health hazards, evaluating how seriously they threaten miners, and determining the levels of exposure to toxic substances miners can tolerate without suffering “material impairment of health or functional capacity.”

Once the Department of Health and Human Services, acting through the National Institute of Occupational Safety and Health (NISOH), completes that task, it sends a Criteria Document to the Department of Labor, acting through MSHA, which then takes on the responsibility for determining the technological and economic “feasibility” of a standard and how a standard would be implemented by industry.

So the question then becomes: What happened? Given the attention Congress paid to developing a standard-setting process that enlisted the participation of two major Cabinet Departments and the resources they could bring to bear, why has this process borne so little fruit? And perhaps most importantly, why has MSHA failed—forty years—to revise the interim coal dust standard Congress set in 1969?

The answer, I believe, is a complicated one that combines a regrettable mix of politics, lack of will on the part of MSHA, stiff opposition from mine operators, a Congress that simultaneously criticizes MSHA for poor performance while denying the agency the resources it needs to meet its considerable responsibilities, flaws in the Act’s structure that separate the science-based experts at NIOSH from the mining experts at MSHA, and the blizzard of requirements in addition to those imposed by the MSH Act that stifle health and safety rulemaking generally. This essay addresses only the last two points, although the remainder are also worthy of attention.


38 See generally Evaluating the Effectiveness of MSHA’s Mine Safety and Health Programs Before the H. Comm. on Education and Labor, 110th Cong. 3 (2007) (statement of J. Davitt McAteer) (making many of the same observations and noting that public health advocates are “mystified that MSHA’s regulations to protect miners from black lung and silicosis are nearly 30 years
1. The Flaws in the Mine Safety and Health Act

There are at least two serious structural flaws in the MSH Act that hobble its ability to issue health standards. First and foremost, the Act separates the NIOSH scientists from the MSHA regulators, and because the MSH Act parallels the Occupational Safety and Health Act, the NIOSH scientific staff is responsible for providing scientific support for both agencies. One consequence of that decision is that NIOSH has devoted most of its resources to broad-based occupational hazards that are regulated by OSHA, not MSHA. Indeed, although NIOSH has issued well over a hundred Criteria Documents since 1972, only two have focused on health hazards regulated exclusively by MSHA: NIOSH’s 1987 Report “Radon Progeny In Underground Mines - Criteria For A Recommended

old, its exposure limit for asbestos is 20 times less protective than OSHA’s standard, and its rules on mine rescue teams are seriously outdated.”

available at http://edworkforce.house.gov/testimony/051607DavittMcAteerTestimony.pdf. For a critical examination of the politics of MSHA standard-setting with an emphasis on the ongoing controversies over the accuracy of the monitoring of respirable coal dust, see James L. Weeks, The Fox Guarding the Chicken Coop: Monitoring Exposure to Respirable Coal Mine Dust, 1969-2000, 93 AM. J. OF PUB. HEALTH 1236 (2003). See also Brandy E. Fisher, Between a Rock and a Healthy Place, 106 ENVTL. HEALTH PERSP. 544 (1998) (pointing out that “[f]rom 1991 to 1997, more than 160 companies or individuals were convicted of or pled guilty to criminal acts of fraudulent dust sampling” and explaining the high incidences of non-compliance with respirable dust standards by mine operators); Sec’y of Labor v. Excel Mining, LLC, 334 F.3d 1 (D.C. Cir. 2003) ( recounting some of the history of the dispute between MSHA and mine operators over dust sampling practices).

The standard-setting provisions of the Occupational Safety and Health Act (OSHA) and the MSH Act are virtually identical. Compare, for example, 30 U.S.C. § 811(a)(6)(A)-(B) with 29 U.S.C. § 655(b)(5). Moreover, both statutes place considerable emphasis on NIOSH’s role in providing the scientific foundation for standard-setting. See 30 U.S.C. § 811(a)(1); 29 U.S.C. § 655(b)(1). I do not mean to suggest that OSHA has been significantly more successful in setting health standards than MSHA. In fact, OSHA’s record of setting health standards is nearly as dismal as MSHA’s. OSHA set quite a number of health standards in its early years, often based on NIOSH Criteria Documents. Since 1980, however, the agency has set only ten health standards, the vast majority of which have been issued as a result of court orders ruling that the agency had unreasonably delayed addressing a serious health problem. See, e.g., Pub. Citizen Health Research Group v. Brock, 823 F.2d 626 (D.C. Cir. 1987); Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986); Pub. Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (litigation to force OSHA to issue a standard for ethylene oxide); In re Int’l Chem. Workers Union v. Pendergrass, 958 F.2d 1144 (D.C. Cir. 1992); In re Int’l Chem. Workers Union, 830 F.2d 369 (D.C. Cir. 1987) (litigation to force OSHA to issue a standard for cadmium); Pub. Citizen Health Research Group v. Chao, 314 F.3d 143 (3d Cir. 2002); Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin., 145 F.3d 120 (3d Cir. 1998) (litigation to force OSHA to regulate hexavalent chromium); Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Pendergrass, 878 F.2d 389 (D.C. Cir. 1989) (litigation to force OSHA to issue a standard for formaldehyde); In re United Steelworkers of Am. v. Rubber Mfrs. Assoc., 783 F.2d 1117 (D.C. Cir. 1986) (litigation to force OSHA to issue benzene standard on remand from the United States Supreme Court). See generally David C. Vladeck, Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide, in ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed., 2005) (describing the difficulties in OSHA’s health standard-setting process).

As I will explain in a moment, the slow trickle of NIOSH Criteria Documents flowing to MSHA is not, in itself, the source of the problem. Having received only two such documents in over thirty-five years, MSHA has nonetheless failed to address either hazard. Despite repeated promises, MSHA has still not developed a standard for radon exposure, and at this rate, it never will. Nor has MSHA concluded a new standard for respirable coal dust.

Before taking a closer look at MSHA’s failure on that score, it is useful to pause to explore why the bifurcation of responsibility might have some bearing on MSHA’s inability to promulgate health standards. In my view, the most successful health and safety agencies are science-based agencies such as the Food and Drug Administration, the Public Health Service, the Centers for Disease Control, the Environmental Protection Agency, and the Nuclear Regulatory Commission. One thread that ties these agencies together is that science drives their regulatory process. These agencies make regulatory decisions based on science. They are also, in the main, protected from the overtly political forces that often dominate decision-making in other, non-science agencies. Because of their science-based focus, these agencies strive to build their workforce around scientific staff. The agencies’ regulatory and enforcement mission is set in scientific terms. And the agencies must justify their decisions, to the public and to reviewing courts, based on reputable science.

To be sure, with regard to its standard-setting mission, the same could be said of MSHA. MSHA must also make its case for health regulation based on science. The Supreme Court’s “Benzene” decision provides the template MSHA must follow. MSHA must make a threshold finding that a health haz-

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41 MSHA was sued in 1984 by the Oil, Chemical & Atomic Workers International Union over its failure to address the risks to hard-rock (non-coal) miners from radon. The D.C. Circuit dismissed the action based on MSHA’s commitment to develop a standard that would be completed no later than June 1987. Oil, Chem. & Atomic Workers Int’l Union v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985). Needless to say, MSHA did not fulfill this commitment.

42 Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) [hereinafter Benzene]. In the Benzene case, the Supreme Court reviewed OSHA’s strict health standard for occupational exposure to benzene, a solvent widely used in industry that had been linked to, among other things, excess cases of leukemia, aplastic anemia, and other blood disorders in workers exposed to benzene fumes. Based on its reading of provisions of the OSH Act that are essentially identical to those in the MSH Act, OSHA argued that once it identifies an occupational hazard, it is obligated to reduce the exposures to the lowest amount possible, constrained only by notions of technological and economic feasibility. OSHA’s argument was based on 29 U.S.C. § 655(b)(5), which directs the agency to “set the standard which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard” over the course of his or her entire
ard poses a significant risk to miners. Typically, such a finding would require the preparation of a quantitative risk assessment that demonstrates that there is evidence that, at exposure levels consistent with those found in mines, exposure to the substance causes a material impairment to health. Once significant risk is found, the agency then may proceed to standard-setting, an enterprise that is also driven by scientific concerns. Standard-setting for health risks encompasses establishing various exposure limits (including daily, time-weighted average exposure limits that restrict a miner’s overall daily exposure to a substance, and short-term exposure limits, that protect miners from high-burst, short-duration exposures), medical monitoring, medical removal protection, and other measures designed to carefully monitor the presence of the toxic substance working life. The MSH Act is no different. See 30 U.S.C. § 811(a)(6)(A); Benzene, 448 U.S. at 639-40. But the Benzene Court found an important limitation on OSHA’s regulatory authority. Relying on 29 U.S.C. § 652(8), which defines the term “occupational safety and health standard,” the Court held that Congress’s direction that such standards be “reasonably necessary or appropriate to provide safe or healthful employment,” did not give OSHA license to regulate until it could show that the toxic material actually imposed a “significant risk” on workers. Id. at 642-46. Once OSHA finds significant risk, the Act then directs OSHA to drive down exposures as much as possible. But rule-making must be preceded by a finding of significant risk. In the Court’s view, it is the Agency’s responsibility to determine, in the first instance, what it considers to be a “significant” risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it. Although the Agency has no duty to calculate the exact probability of harm, it does have an obligation to find that a significant risk is present before it can characterize a place of employment as “unsafe.” 448 U.S. at 655.

43 See generally Kennecott Greens Creek Mining Co. v. MSHA, 476 F.3d 946 (D.C. Cir. 2007) (applying significant risk analysis in judicial review proceeding regarding an MSHA health standard). There is one textual difference in the MSH and OSH Acts that might justify a different, and less exacting, approach by MSHA. In Benzene, the Court construed section 3(8) of the OSH Act as imposing a significant risk requirement on the agency. But there is no analogue to section 3(8) in the MSH Act. The D.C. Circuit has taken note of this disparity in the wording of the two Acts and has suggested, in dicta, that MSHA might not be required to make a significant risk determination as a precondition to regulating. Nat’l Mining Ass’n v. MSHA, 116 F.3d 520, 527-28 (D.C. Cir. 1997).

44 Although the Benzene Court suggests that OSHA would not be required “to support its finding that a significant risk exists with anything approaching scientific certainty,” the Court goes on to say that the agency “must support its finding that a certain level of risk exists by substantial evidence.” 448 U.S. at 655 & n.62. This evidence must be consistent with “a body of reputable scientific thought.” Id. at 656. The clear message is that significant risk determinations must be science-based, and the agency must be able to justify its finding on the basis of substantial scientific support. See generally Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1486-90 (D.C. Cir. 1986) (explaining how the agency goes about making a significant risk determination).
in the workplace and to provide full protection for the miner.\textsuperscript{45} All of these decisions are based on science and medical considerations.\textsuperscript{46}

My submission is that developing science-based standards becomes difficult, if not impossible, if the agency responsible for making these decisions is largely dependent on another agency for scientific expertise. But MSHA and NIOSH are separated in every way possible. As a formal matter, they are parts of different agencies with different leadership, different cultures and orientations, and different agendas. As a practical matter, they are separated physically. As a result, their staffs do not have the kind of day-to-day interactions that is essential to foster team-building. So the first problem MSHA faces is that it is an agency with a science-driven mission without a strong scientific infrastructure of its own.

The second problem MSHA faces is that the statute does not require the agency to set priorities that reflect actual risk in the workplace. Indeed, nothing in the Act addresses priority-setting, let alone requires MSHA to allocate its standard-setting resources in a way that optimizes miner health. The absence of such a requirement enables the agency to gravitate towards safety standards. MSHA has done so for obvious reasons. Safety standards address evident risks, they impose far less significant compliance costs on mine operators than do health standards, and it is easier to persuade mine operators to accept safety standards, since operators have strong and obvious short-term economic incentives to avoid safety hazards that pose an immediate threat to a mine’s productivity as well as a miner’s health.\textsuperscript{47}


\textsuperscript{46} MSHA followed this approach in its rulemaking to protect miners from diesel exhaust. Diesel Particulate Matter Exposure of Underground Coal Miners, 66 Fed. Reg. 5526 (Jan. 19, 2001).

\textsuperscript{47} Some scholars argue that, based solely on cost-benefit grounds, safety standards should be preferred by agencies because, dollar-for-dollar, they provide for higher savings than do health standards. \textit{See}, e.g., John F. Morall III, A Review of the Record, 10 REGULATION 25 (1986) (arguing that, as a general rule, safety standards are more cost beneficial than health standards). These arguments, in my view, are misplaced for several reasons. First, they generally overlook the fact that health regulations are rarely imposed simply to avoid cancer deaths, but the cost-benefit analyses they rely on only count cancer deaths avoided as a benefit. For instance, Morall singles out the OSHA formaldehyde rule as one being exceptionally costly (he claims that it costs $72 billion per life saved). \textit{Id.} at 34. Apart from the fact that Morall discounts benefits but assumes that agency estimates of costs are accurate, Morall looks only at lives saved. \textit{Id.} However, the formaldehyde rule was promulgated by OSHA mainly to safeguard workers from non-cancer risks, and Morall neglects to mention that the United States Court of Appeals for the District of Columbia Circuit remanded the standard to OSHA because it found that the agency had not adequately justified the standard it set, because the Court thought it might be too lax. \textit{See} Pendergrass, 878 F.2d at 389. Moreover, these arguments rely too heavily on cost-benefit analyses that are heavily weighed against regulatory efforts that produce benefits in future years. \textit{See generally} Frank Ackerman & Lisa Heinzerling, \textit{Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection}, 150 U. Pa. L. Rev. 1553 (2002); Thomas O. McGarity, \textit{Professor Sunstein’s Fuzzy
Both of these flaws have come into play with regard to respirable coal dust. As noted, NIOSH did not issue a Criteria Document for coal dust until 1995 – well over twenty years after Congress directed it to do so. NIOSH did so shortly after MSHA took its first, preliminary steps towards rulemaking. In January 1995, the Secretary established an Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers (Advisory Committee) to “make recommendations . . . for improved standards, or other appropriate actions,” to eliminate pneumoconiosis and silicosis through the control of respirable coal mine dust.48

In September 1995, NIOSH finally issued its Criteria Document recommending standards “to reduce or eliminate health impairment from exposure to respirable coal mine dust.”49 The Criteria Document called for cutting the interim standard of 2.0 milligrams of respirable dust per cubic meter of air (2 mg/m³) in half. NIOSH made the recommendation based on “an evaluation of [the] health effects data, sampling and analytical feasibility, and technological feasibility.”50 NIOSH went on to emphasize that its recommended exposure limit “does not ensure that miners exposed at this concentration over a working lifetime will have a zero risk of developing occupational respiratory disease.” Therefore, NIOSH urged MSHA to adopt a standard that would impose additional measures to protect miners’ health, including “(1) keeping worker exposures as far below the [exposure limit] as feasible through the use of engineering controls and work practices, (2) frequent monitoring of worker exposures, and (3) participation of miners in the recommended medical screening and surveillance program.”51

NIOSH’s claim that its recommended exposure limit would still leave miners at risk was driven home by the agency’s risk assessments, which are quite sobering. Although the risk to some extent depends on the nature of the coal being mined (and its carbon content), NIOSH’s assessment showed very high levels of risk remain regardless of the kind of coal mined even at its recommended limit 1.0 mg/m³ – remaining risks range from a high of well over 100 to a low of fourteen excess cases of lung impairment over a working life per 1000 miners.52 This risk determination far exceeds the 1 per 1000 threshold the Supreme Court staked out in Benzene. MSHA also acknowledged that the


50 Id. at iii.

51 Id.

52 Id. at 117–18
science on the adverse health effects of respirable coal dust on miners had long demonstrated that the interim 2.0 mg/m³ was far too high to protect miner health.  

NIOSH did not explain its delay in preparing its Criteria Document. But the Document has many tell-tale signs that NIOSH had the information it needed to prepare it for quite some time. For one thing, most of the health effects data NIOSH relies on was available to the agency for years, if not decades, prior to 1995. Moreover, NIOSH’s own records demonstrates that, at no point since the government started keeping records on the incidence of black lung, has the level of the disease gone below four percent of miners with twenty-five years of mining experience. Since the definition of “black lung” is the material impairment of health and functional capacity, a disease which affects no fewer than four percent of eighty thousand or so miners in the United States, the risk from respirable coal dust plainly satisfied the significant risk test explained in Benzene.

MSHA published a response to the NIOSH Criteria Document on April 25, 1996, announcing its intentions to develop a proposed rule “derived from the recommendations in the Document” that would “address enhanced protections for surface and underground coal miners from exposure to respirable coal mine dust and crystalline silica.” MSHA stated that it would “defer full development” of the proposed rule until it had before it the recommendations of the Advisory Committee.

The Advisory Committee submitted its report to the Secretary on November 14, 1996. The report contained twenty wide-ranging recommendations to reduce miners’ risk from respirable dust. On January 24, 1997,
MSHA published a response to the Advisory Committee Report, backtracking somewhat from its prior pledge to begin rulemaking. This time the agency stated that it was considering both rulemaking and other actions, such as internal administrative or policy changes. MSHA also observed that "[m]any of the recommendations [were] general in nature and would require further development by MSHA to be suitable for publication as a proposed rule."  

Finally, in April 1999, MSHA published its semi-annual agenda giving notice that it expected to publish, by June 1999, an advance notice of proposed rulemaking (ANPRM) aimed at lowering the permissible exposure limit for dust. MSHA did not publish an ANPRM in June, or indeed, in any time thereafter.

But MSHA continued to maintain that an ANPRM on coal dust was in the offing. To force MSHA to give miners some protection while the agency proceeded with its rulemaking, on January 13, 2000, the United Mine Workers of America (UMW) went to court to force the agency to take enforceable measures to protect miners from excessive exposure to coal dust. The UMW filed a petition with the United States Court of Appeals for the District of Columbia Circuit arguing that MSHA had engaged in unreasonable delay by failing to address the key recommendations proposed by the Advisory Committee regarding the long-contentious issue of coal dust sampling. To remedy the agency’s failure, the UMW asked the Court to compel MSHA to begin rulemaking with

appear to be available on the internet, the agency’s progress in implementing the report’s recommendation is set forth on a chart that is available on the agency’s website. See MSHA, Status Report on the Recommendations of the Secretary of Labor’s Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers, http://www.msha.gov/S&HINFO/NUMOADV/ISSU1&2.HTM (last visited Mar. 15, 2008).

62 Id. In the interim, MSHA took a number of modest measures to address the risk of coal dust; in


See The Secretary of Labor & the Assistant Secretary of Labor’s Response to Petition for Writ of Mandamus at 9, In re Int’l Union, United Mine Workers of America, 231 F.3d 51 (D.C. Cir. 2000) (No. 01-1010), available at 2000 WL 35574745.

63 Occupational Exposure to Coal Mine Dust: Lowering Exposure Limit, 64 Fed. Reg. 21, 519 (Apr. 26, 1999) (to be codified at 30 C.F.R. pts. 70-71 & 90). The same agenda also noted that it was considering promulgating revisions to its air quality standard to lower the permissible exposure limits to hazardous air contaminants. The agency said that it anticipated issuing a notice of proposed rulemaking on these revisions by December 1999. Id.
the aim of requiring (1) MSHA to assume full responsibility for all respirable coal mine dust compliance sampling; (2) continuous monitoring for respirable coal mine dust; (3) MSHA to guarantee that miners have full rights to participate in the dust sampling program; and (4) MSHA to ensure that sampling contemplate miners’ full exposure to respirable dust (i.e. beyond 8 hours per day and 40 hours per week). The UMW’s petition, it bears noting, did not contain a request that the Court compel MSHA to undertake rulemaking to reduce the exposure limit from 2.0 mg/m³ to 1.0 mg/m³, since the agency had already announced it was moving towards such a rulemaking on its own accord.

On July 7, 2000, the Secretary published notices of two proposed rulemakings aimed at restructuring the respirable dust sampling program for underground coal mines. The proposed rules would have given MSHA more authority to employ better sampling methods to determine whether coal mine operators are complying with the permissible exposure limit for respirable coal mine dust and required each underground coal mine operator to have a verified mine ventilation plan. The proposed rulemakings were a direct response to the UMW’s petition, and after they were issued, the D.C. Circuit determined that the proposals rendered the union’s challenge moot, and, therefore, dismissed the union’s claim of unreasonable delay.

After the Court dismissed the action, the 2000 Presidential election, with a bit of help from the Supreme Court of the United States, swept President George W. Bush into office. That ended MSHA’s effort to address coal dust. The new Bush Administration promptly displayed a renewed emphasis on deregulation. As a result, the promised proposed rulemaking on respirable coal dust, as well as the subsidiary rulemakings on sampling and ventilation, were quietly dropped. MSHA formally withdrew its promise to publish a proposed rule to reduce the coal dust standard in its Fall 2002 Unified Agenda, stating that the agency “is currently developing regulatory alternatives to issues relating to respirable coal mine dust. Therefore, we are withdrawing this item at this time.” Since then, the agency has done nothing further to protect miners from respirable coal dust, other than initiate a worker education campaign that fea-

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64 This discussion is drawn from the Court’s opinion in the UMW case, In re Int’l Union, United Mine Workers of Am., 231 F.3d 51, 53 (D.C. Cir. 2000).
68 See In re Int’l Union, United Mine Workers of Am., 231 F.3d 51 (D.C. Cir. 2000) (setting forth chronology of the development of the respirable dust rule through 2000).
tures posters and logos ostensibly designed to heighten miner awareness of black lung.\(^{71}\)

2. Obstacles to Promulgating Health Regulations Imposed by Executive Orders and Other Statutes

Thus far, this essay has focused on the limitations in the MSH Act (and the OSH Act as well, for that matter) that hobble the ability of the agency to promulgate health standards. But there are serious obstacles that these agencies confront, in addition to those embedded in their organic statutes, that make the promulgation of health standards a daunting task. Taken together, these requirements have sapped the collective ability of our public health agencies to do their jobs with anything approaching reasonable dispatch. Some of these obstacles have been imposed by Congress; others by the President through Executive Order; still others by the agency’s own internal review process. But collectively, these obstacles have come close to rendering health regulation a thing of the past – something agencies engage in only when compelled to do so by court order or congressional mandate, or when spurred on by overwhelming political consensus.

a. The Hidden Deterrence of Centralized Regulatory Review

The most formidable of these obstacles is the one imposed by centralized regulatory review. Although all Presidents since President Ford have employed some form of centralized review of agency regulations, systematic, wholesale review of regulations did not begin until the Reagan Administration. Just a month after his inauguration, President Reagan issued Executive Order 12,291 (the Executive Order), which required agencies to prepare detailed Regulatory Impact Analyses specifying the costs and benefits of all proposed "major" rules. The Order provided that, unless otherwise forbidden by law, an agency could not undertake rulemaking unless "the potential benefits to society . . . outweigh the costs," and the agency selected the regulatory option "involving the least net cost to society."\(^{72}\) The Order further required agencies to submit drafts of all proposed and final rules to the Office of Information and Regulatory Affairs (OIRA), a component of the Office of Management and Budget, before publication in the Federal Register, and publication could not proceed without OIRA’s approval.

From the outset, Congress was troubled by the dominant and often obstructionist role OIRA played in rulemakings. OIRA delayed and weakened


rules, met in secret with industry representatives, overrode agency determinations on complex matters of science, and otherwise thwarted the ability of the regulatory agencies to do their jobs. During 1982-83, the House held no fewer than seven hearings to examine health and safety rules seriously delayed or weakened by OIRA. And when the first challenge to the constitutionality of OIRA’s meddling in agency rulemaking came before an appellate court, the Chairmen of the five House Committees, having jurisdiction over regulatory agencies, filed a brief setting forth a blistering critique of OIRA review. Here is just a brief sampling of what the five Chairmen said:

The amici Congressmen object to the systematic usurpation of legislative power by OMB pursuant to Executive Order 12,291. * * * Executive Order 12,291 is the cornerstone of a steadily growing Presidential apparatus, the effect of which is to contravene explicit Congressional delegations of authority, to subvert meaningful public participation in and judicial review of federal regulations, and to impose substantive standards on decision-makers foreign to the statutes they administer. Unless it is checked, the program embodied in Executive Order 12,291 will fundamentally damage the administrative process by which our laws are implemented, the legislative system by which our laws are enacted and monitored, and the separation of powers upon which our system of government rests.

In 1993, shortly after taking office, President Clinton issued Executive Order 12,866 to make a number of significant modifications to the Reagan Executive Order. The most important, in my view, was to inject transparency in the OIRA review process. The Clinton Order also cut back on the number of “significant” agency rules reviewed by OIRA. It also required OIRA, as a gen-

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76 See Exec. Order No. 12,866, §§ 6(b) & 6(c); Regulatory Planning & Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
eral rule, to complete its review of proposed and final rules within ninety calendar days. And it required all agencies, including the so-called independents, to prepare an annual regulatory plan outlining all important regulatory actions the agency intended to take during that fiscal year. The plans had to be personally approved by agency heads. Even with the adjustments made by President Clinton, centralized review of the regulatory output of administrative agencies has never accomplished its objective of making our regulatory agencies better serve the public. Indeed, the ultimate irony is that if OIRA’s review process were subjected to cost-benefit analysis, OIRA review would flunk. The amount of time, energy, money and, at times, political capital, that goes into satisfying OIRA that a rule is worthy of publication dwarfs any conceivable benefits that flow from the process. We have now had a twenty-five year experiment with centralized review. Judged by any legitimate measure, it is time to declare the experiment a failure and move on. There are several reasons for my conclusion.

(i) **Centralized review is a one-way ratchet.** OIRA presses agencies to do less to protect the public health, not more. Agencies do not complain that OIRA is forcing them to do more; they complain that OIRA is forcing them to weaken required protections.

OIRA’s insistence that agencies do less, not more, stems from its singular focus on “least net cost options” – or, in other words, minimizing regulatory compliance costs. The Executive Order requires agencies to perform cost-benefit analysis, which many experts claim is inherently anti-regulatory. My own litigation experience bears this out. I have represented workers and labor unions in litigation to force OSHA to protect workers from exposure to many highly toxic and carcinogenic chemicals, including ethylene oxide, cadmium, hexavalent chromium, formaldehyde and benzene. In each case, OIRA was an obstacle to the agency’s action. Part of OIRA’s objection was its unwillingness to place any value on important health benefits of regulation – including avoiding cancers, miscarriages, genetic damage that might cause infertility or birth

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defects, and kidney failure that might require dialysis or transplant – because they were too difficult to quantify. While the anticipated costs of regulation are generally easier to estimate (and overestimate), the benefits of regulation are notoriously difficult to quantify and are often downplayed or ignored by OIRA. And even when OIRA places a value on a benefit or regulation, it discounts those values heavily. Indeed, lives that are going to be lost twenty or thirty years down the road are devalued to the point of insignificance.

(ii) There is also the problem of competence. By way of example, the next new car you buy is almost certain to have an indicator on the dashboard to warn you when the car’s tires are under-inflated. Congress required this safety feature after a spate of deadly roll-over crashes caused, in part, by under-inflated tires. Congress directed the National Highway Traffic Safety Administration (NHTSA) to issue regulations requiring the installation of devices to gauge the pressure in cars’ tires. NHTSA’s proposal would have required automobile manufacturers to install devices that would detect under-inflated tires in virtually all cases. OIRA, however, insisted that NHTSA permit the installation not only of the device NHTSA’s engineers determined was best, but also allow manufacturers to install a far less effective (and cheaper) device favored by the auto industry. Not surprisingly, NHTSA did what it was told. Empowering OIRA economists to second-guess highly technical judgments made by expert agencies is not good government. Ultimately, a court overturned the OIRA-dictated decision and directed NHTSA to require the installation of the more effective devices. But the introduction of this important, life-saving device was delayed for years because of OIRA’s interference. This is hardly an isolated case.80

(iii) There is enormous delay built into OIRA review which has led to further ossification of the regulatory process.81 The regulatory process is so overlain with procedural and regulatory requirements that agencies cannot get their work done in a reasonable time. It now takes OSHA a decade or more to promulgate a standard to protect workers from exposure to toxic substances even when compelled to act by the courts.82 As we have seen, MSHA has chosen to throw up its hands and abandon health standards rulemaking for any substance that might require independent work on MSHA’s part. While the rule-making process grinds glacially ahead, if at all, workers are exposed to unre-

80 OIRA’s meddling in the tire pressure rule, and the back and forth between industry, NHTSA, and OIRA, is recounted in Public Citizen v. Mineta, 340 F.3d 39 (2d Cir. 2003). For a more recent, but equally troubling, example of OIRA’s improper meddling, see Public Citizen v. FMCSA, 374 F.3d 1209 (D.C. Cir. 2004) (setting aside on safety grounds a rule extending the hours truck drivers may drive after OIRA intervened on behalf of trucking companies to reverse the agency’s proposed rule reducing the hours).


sonable risks to their health and well-being. Other agencies face comparable delays. Much of the delay can be traced back to the requirements imposed by the Executive Order.

b. The Barriers Imposed by Other Statutes

Not only has the President encumbered the rulemaking process, so too has Congress.\(^\text{83}\) Congress has passed a number of statutes that add to an agency’s regulatory burden. Chief among these are the Regulatory Flexibility Act of 1980,\(^\text{84}\) the Paperwork Reduction Act of 1980,\(^\text{85}\) the Unfunded Mandates Reform Act/Regulatory Accountability and Reform Act of 1995,\(^\text{86}\) and the Information Quality Act of 2000.\(^\text{87}\) Each of these statutes imposes considerable information-gathering and analytical burdens on regulatory agencies.

The Regulatory Flexibility Act requires agencies to prepare a Regulatory Flexibility Analysis (RFA) whenever they propose a rule that might have a significant economic impact on a substantial number of small businesses.\(^\text{88}\) Agencies are required to consider ways to minimize the impact of regulation on small businesses, including the suitability of setting “differing compliance or reporting requirements” that “take into account the resources available to small entities,” the “simplification of compliance and reporting” obligations for small entities, and “an exemption from coverage” of the regulation for small entities.\(^\text{89}\) In preparing an RFA, agencies have an obligation to conduct outreach efforts to ensure that small businesses are informed of the pending regulatory proposal and have an opportunity to weigh in before the agency finalizes its rule.\(^\text{90}\) As originally enacted, the Act prohibited judicial review of agency determinations under the Act, and, as a result, agencies did not strictly comply with its requirements. In 1996, Congress reinvigorated the Act by expressly authorizing judicial review of an agency’s compliance with both the procedural and substantive

\(^{83}\) In 2000, Professor Mark Seidenfeld published an article setting forth 110 separate procedural steps – some imposed by statute; others by Executive Order – that an agency might have to complete if every analytical requirement applied to a proposed rule. Most of the requirements Professor Seidenfeld identifies would be applicable to health standards promulgated by MSHA. See Mark Seidenfeld, A Table of Requirements for Federal Administrative Rulemaking, 27 FLA. ST. U. L. REV. 533, 536-37 (2000).


\(^{89}\) Id. § 603(c) (2000).

\(^{90}\) Id. § 609.
requirements of the Act. The RFA is now made part of the record on review when there is a judicial challenge to the agency’s rule, and a reviewing court may consider the RFA in determining whether the agency’s action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. MSHA’s obligations under the Regulatory Flexibility Act are substantial. Most coal mines qualify as “small businesses” under the Act and therefore MSHA must be attentive to the requirements of the Act in standard-setting.

The Paperwork Reduction Act (PRA) requires agencies to engage in full-blown notice and comment rulemaking before imposing any reporting or record-keeping requirement on a regulated party. The agency must determine that the collection of information is necessary for the proper performance of the agency’s functions, does not duplicate information otherwise available to the agency, is tailored to minimize burden on small business, and uses technology to reduce burden. The agency must also obtain approval from OIRA. If OIRA approves the requirement, it then assigns it a “control number”; agencies are forbidden from imposing a penalty for non-compliance with an information collection requirement in the absence of an OIRA-issued control number. MSHA would have to follow the PRA twice in any significant health rulemaking; first, in order to collect the information about exposures and feasibility, MSHA would have to determine that the collection was necessary and obtain OIRA’s approval before undertaking it; and second, because health standards generally depend on the dissemination of information to workers to help them safeguard their health, MSHA has to comply with all of the requirements of the PRA, including obtaining OIRA’s approval, for the information-dissemination provisions of its standards.


92 Id.

93 Id. § 601(3) (2000) (defining “small business” to mean a business that meets the definition of a small business under the Small Business Act, 15 U.S.C. § 632(a)(2) (2000), which gives the Administrator of the Small Business Administration (SBA) broad discretion to define small businesses by industrial sector and other criteria). After the enactment of SBREFA, the SBA determined that a large mine was one that employed more than 500 employees; any mine with 500 or fewer employees was deemed to be a small mine and therefore a small business or small entity subject to the full requirements of the Regulatory Flexibility Act. See, e.g., Diesel Particulate Matter Exposure of Underground Coal Miners, 66 Fed. Reg. 5526, 5689-92 (to be codified at 30 C.F.R. pt. 72) (Jan. 19, 2001) (explaining applicability of SBREFA to MSHA health standards rulemaking).


95 Id.


97 The Supreme Court rejected the government’s argument that the PRA applied to regulatory information dissemination requirements in Dole v. United Steelworkers of America, 494 U.S. 26 (1990). Congress amended the Act in 1995 to overrule Dole.
Adding to MSHA’s burden are the detailed, analytical requirements that must be prepared to accompany significant regulatory measures, requirements that are in addition to, and more exacting than, those imposed by the Executive Order. Title II of the Unfunded Mandates Reform Act, entitled Regulatory Accountability and Reform, requires agencies to prepare a detailed economic assessment for any regulatory action that may result in the expenditure by the State, local, or tribal governments, or by the private sector, of $100 million or more in any one year.\(^98\) The assessment must include a “qualitative and quantitative assessment of the anticipated costs and benefits,” and “estimates by the agency of the effect [of the rule] on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive goods, and international competition.”\(^99\) A regulatory initiative like one to regulate respirable coal dust could easily meet the $100 million threshold of the Act, requiring MSHA to spend a good deal of time evaluating the potential economic impacts of such a standard before the standard even could be proposed.

Last, but hardly least, MSHA also has to comply with the Information Quality Act of 2000, which requires agencies to issue guidelines to ensure the “quality,” “objectivity,” “utility,” and “integrity” of information that they disseminate and to establish a process that permits affected persons to seek and obtain correction of information that fails to qualify under these benchmarks.\(^100\) Congress left it to the Director of OMB to provide agencies guidance about how to implement the Act’s requirement, which OMB did in a detailed memorandum issued in 2002, and which OMB augmented in 2004. For MSHA’s purposes, the key requirement imposed by OMB is that regulatory agencies must have independent scientists peer review most of the scientific information disseminated by the government.\(^101\) This requirement would extend to scientific information compiled by MSHA for regulatory purposes. Thus, in formulating a respirable coal dust standard, MSHA might be required to submit the scientific data that it relied on to support its standard to independent peer review.

Taken together, this string of hurdles MSHA would have to surmount to issue a standard for respirable coal dust is daunting. That fact, however, hardly excuses the agency’s forty-year delay in addressing this hazard. But it does

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\(^{98}\) 2 U.S.C. \$ 1532(a) (2000).

\(^{99}\) Id. \$ 1532(a)(2)-(4).


\(^{101}\) See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002); see also OMB, Revised Information Quality Bulletin for Peer Review, Apr. 15, 2004, http://www.whitehouse.gov/omb/infogov/peer_review/041404.pdf. In the only Information Quality Act challenge to make it to the court of appeals, the Fourth Circuit ruled that such claims were not justiciable, finding that the challenger did not show injury-in-fact from the agency’s dissemination of allegedly incorrect data. See Salt Inst. v. Leavitt, 440 F.3d 156 (4th Cir. 2006).
explain why any agency – even one committed to safeguarding miner health – would be reticent to take on such a formidable responsibility.

C. The Micro-Politics of MSHA Standard-Setting

The critique that I have made thus far focuses on structural barriers to protective regulation that exist because Congress and the President have independently determined to make rulemaking more difficult – in part to guarantee a smarter and better regulatory output and in part to throttle back the pace of rulemaking by agencies. These meta-political requirements apply across-the-board, and have relatively the same effect on all agencies engaged in health and safety regulation. They reflect a political judgment that, notwithstanding the importance of protective regulation, agencies should, as a precondition to issuing a regulation, be compelled to demonstrate that the regulation is essential to public health; is based on solid science; and is cost effective.

With MSHA, there is also a complicated micro-political dynamic at work that pushes the agency away from health regulation. MSHA is a small agency, regulating a relatively small, discrete and cohesive industry – a circumstance that often leads to an agency being “captured” by the businesses it regulates. It is easy to see how this happens. Agency officials work closely with their counterparts in industry. They are all members of a small and well-defined group of experts on a subject, so there is a natural interaction among them. Industry representatives also rotate in and out of the government through a “revolving door” that leads directly to the boardrooms and law offices of regulated industry. Over time, close relationships emerge and the agency begins to see itself as much as an industry helpmate as a cop on the beat.\(^\text{102}\) This problem is especially acute in those agencies that regulate a single industry, like MSHA. These agencies tend to form “partnerships” with the industries they regulate, which translates into decreased enforcement efforts and lenient regulation, often at the expense of public safety.\(^\text{103}\)

In recent years, this concern has taken on special force with MSHA, since most of its senior political appointees during the Bush Administration worked for the mining industry before their appointments to MSHA and pre-


sumably will return via the revolving door to industry positions after they leave government service. Indeed, Bush-appointed MSHA Administrator David D. Laurinski had worked for the mining industry for decades prior to his appointment and said, shortly after his appointment, "I don't think there's a whole lot of difference" between "the private and public sectors."

Laurinski's industry ties may have played a role in the agency's decision to abandon its rulemaking to reduce miner's exposure to respirable coal dust. As a coal industry executive Laurinski actually advocated that MSHA's dust standard be raised. When he was appointed to head MSHA, he did not retreat from that view. Not only did he decide to withdraw MSHA's proposed rulemaking to reduce by half permissible dust levels, but Laurinski also actually proposed that the interim standard established by Congress should be abandoned to permit mine operators to increase dust levels while miners would have to wear clumsy, uncomfortable and notoriously ineffective respirators. One newspaper columnist ridiculed the idea by suggesting that readers should "try to imagine wearing one [a respirator] for eight hours in a sweltering mine tunnel hundreds of feet beneath the earth's surface." "Even the manufacturer of the respirators, 3M, thought the idea was half-baked, suggesting that this was an abdication of the responsibilities delegated by Congress to MSHA."

Notions of moral hazard also may have played a role in MSHA's four-decade long failure to address coal dust exposure. To put it bluntly, mine owners have little economic incentives to clean up their mines to reduce coal dust levels. For that reason, they are staunchly opposed to regulation to drive exposures down. Why? For two reasons. First, black lung has no impact on productivity. When miners become disabled with black lung, mine operators replace them with younger, healthy miners who may even command a lower wage. Second, and perhaps more importantly, mine owners have managed to cap and partially off-load their liability for black lung disease on both the companies that buy coal and the American people. Since 1969, the federal government has administered a compensation program for victims of black lung. Although

104 See Undermining Safety, supra note 4, at 21-26 (reporting on the deep industry ties of MSHA's senior staff); Christopher Drew, Richard Oppel, Jr., & Claire Hoffman, Friends in the White House Come to Coal's Aid, N.Y. TIMES, Aug. 9, 2004, at A1.


106 See Undermining Safety, supra note 4, at 28.

107 Id.; see also Skrzycki, supra note 103.

108 See Undermining Safety, supra note 4, at 28.

109 Id. at 29 (quoting Drew et al., supra note 104).

the program was initially conceived as a temporary federal program until state workers' compensation programs took over, Congress amended the Act in 1977 - through the Black Lung Benefits Act (BLBA) - to make it an ongoing federal program. Through 2004, payments under the program have exceeded $41 billion, and have provided compensation to nearly a million coal miners and their families.

The BLBA's purpose is to "provide benefits, in cooperation with the states, to coal miners who are totally disabled due to pneumoconiosis (black lung) and to the surviving dependents of miners whose death was due to such disease." The BLBA allows current and former coal miners and their surviving dependents to file claims for black lung benefits. As part of the 1977 amendments, Congress expanded the definition of pneumoconiosis to make it easier for miners to get benefits. To be eligible for compensation, a claimant is required to prove that the miner is disabled, the disability was caused by pneumoconiosis, and the disability arose out of coal mine employment. The United States Supreme Court has held that the miner need not show causation, and that "[a]ll three of these conditions of eligibility are presumed if the claimant was engaged in coal mine employment for at least 10 years and if the claimant meets one of four medical requirements."

The Department of Labor handles claims processing under the BLBA. Although the program was initially funded by mine owners, the funding stream was changed with the Black Lung Benefits Revenue Act of 1977, which imposed an excise tax on coal and established the Black Lung Disability Trust Fund (BLDFT). When mine operators are found to be responsible for the miners' disability, they must pay compensation or reimburse the Trust Fund for expenditures. Mine owners do not bear the full cost of the program. According to the Government Accountability Office (GAO), the Trust Fund has absorbed a substantial share of the cost because the excise tax has "not been adequate to fund the program." Indeed, the GAO observed that as of 2008, the "fund had borrowed over $8.7 billion from the federal treasury," with no expectation that this money will be repaid.

112 See generally GAO, Federal Compensation Programs: Perspectives on Four Programs for Individuals Injured by Exposure to Harmful Substances 1-8, GAO-08-628-T (Apr. 1, 2008).
114 Id. § 922.
115 See Black Lung Benefits Reform Act of 1977, § 2, 92 Stat. 95, 95.
117 Id. at 141-42 (setting forth medical conditions).
119 GAO, supra note 112, at 4, 6.
120 Id. at 4.
To be sure, mine operators are still responsible for the lion's share of black lung benefits for current employees. But the benefits are far from generous, and the program effectively extinguishes any additional liability that might accrue to mine operators. It is, in a real sense, an inexpensive insurance program that insulates mine operators from the real costs of their failure to control respirable coal dust – including unpaid wages and benefits that would have accrued to the miner and his family and the value of the pain, suffering and devastation that flows from a miner's slow death from black lung. As a result of this cap on liability, mine operators have less incentive to invest in health improvements that might safeguard miners from the ravages of black lung than would have if they had to internalize the full cost of black lung – a problem reflected in the rising rates of black lung among today's miners. This "moral hazard" problem suggests an additional reason for MSHA's failure to act on respirable coal dust – industry has fixed its liability at a rate well below the real costs to workers and therefore has no economic incentive to drive down exposure rates.

The point here is not to condemn the federal black lung program, which serves an indispensable compensatory function. Without it, miners afflicted with black lung would suffer an even crueler fate. Rather, it is to suggest that the existence of an essentially no-fault compensation fund for those unfortunate enough to succumb to black lung is a safety valve that relieves some of the economic and political pressure that might otherwise be brought to bear on fixing mines to prevent this ongoing epidemic of black lung.

III. CONCLUSION

Let me end where I began. It is easy to see why an agency would respond to the most urgent of pleas – the plea that the catastrophic accidents that all too often claim miners' lives be rendered a thing of the past. No one wants to face another Sago disaster.

To acknowledge the need for disaster prevention, however, is not to suggest that we can turn a blind eye to the tragedy of black lung – a catastrophe that claims far more lives, causes far more suffering, and is just as preventable.

Forty years ago, when Congress passed the first of the modern miner-safety laws, it singled out black lung as the worst of many culprits. MSHA was told in no uncertain terms to address that risk before all others. Forty years later, we see the consequences of MSHA's inaction in the rising rates of black lung.

121 In 1980, the Department of Labor estimated that workers severely disabled by occupational disease, and who received workers' compensation, received compensation that replaced only about one-eighth of their lost wages. U.S. DEPARTMENT OF LABOR, INTERIM REPORT ON CONGRESS TO OCCUPATIONAL DISEASES, 76-77 (1980). See also Elinor P. Schroeder and Sidney A. Shapiro, Responses to Occupational Diseases: the Role of Markets, Regulation and Information, 72 GEO. L.J. 1231, 1246-50 (1984); NICHOLAS ASHFORD, CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY 350 (1976).
affliction among today’s miners. At some point, enough is enough.\textsuperscript{122} That time is now.

\textsuperscript{122} In one of the lawsuits challenging OSHA’s unreasonable delay in regulating ethylene oxide, a highly toxic substance, the D.C. Circuit, fed up with the agency’s delay, said that, “[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.” Pub. Citizen Health Research Group v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987). That sentiment seems particularly apt here.