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Office of Management and Budget
Comments on: Federal Regulatory Review
As proposed in 74 FR 8319; February 26, 2009

The United Mine Workers of America, International Union (UMWA) offers the following comments on the above-captioned notice. Our comments are focused on the implications of a new executive order on federal regulatory review, and how such an executive order might impact workers' health and safety.

The relationship between OIRA and the agencies.

We endorse the statement submitted as part of the comments submitted by the Center for Progressive Regulation (CPR) in its letter of February 20, 2009, in which CPR contended that OIRA should assist agencies in achieving their statutory mandates, as opposed to finding ways to reduce the effects of regulation on the economy. Doing this would help to achieve the goal of a "smarter better government," that President Obama and the UMWA both seek.

Disclosure and transparency

The UMWA is a primary stakeholder of the Department of Labor's Mine Safety and Health Administration (MSHA). When MSHA embarks on a rule making, it routinely solicits comments by publishing an advanced notice of proposed rule making, a proposed rule, and a final rule, as required by the Mine Act. At each stage, the Agency solicits written comments and it also holds public hearings. The process is carried out in full view of the interested parties: miners, mine operators, equipment manufacturers, and others, as it should be.

We suggest that OIRA's procedures for evaluating costs should be subject to the same level of public disclosure and scrutiny. This is necessary both to ensure public accountability, but also to compensate for OIRA's lack of expertise in the highly technical nature of MSHA's subject matter, that is, miners' safety and health. What to OIRA may seem like a trivial "correction," could in fact have important consequences. One way to guard against this would be to have public review of OIRA's decisions about rules.

Encouraging public participation in agency rulemaking processes

Public participation is essential for development of good and useful rules. Encouraging public participation will help ensure that broad based, first-hand knowledge will be considered in the rule making process, and it helps lead to the creation of rules that will be understandable. One way to encourage public participation is to require hearings to be held at times and places that are convenient for and accessible to the stakeholders. Sometimes more is needed to promote active participation. Coal miners

wanting to participate in MSHA hearings (or other workers wanting to participate in OSHA hearings) generally must leave work, and may forfeit their income and pay their own travel expenses to participate. Those testifying for coal operators, on the other hand, generally suffer no such loss. The real consequence of this economic inequality means that there are often fewer workers participating in a public hearing than are the numbers of workers who are interested in the particular subject. Likewise, blue-collar workers like those the UMWA represents tend not to be comfortable with the written word, so few submit written comments. While we support the holding of public hearings, we also urge changes so the hearings' system will better balance the access for workers.

The role of cost-benefit analysis

There are numerous benefits resulting from rule making. Rules are designed to further achieve the goals of the agency. While costs are not to be ignored, cost benefit analysis, as promoted, has several fundamental problems. We will focus on four, all of which were also mentioned in the CPR letter noted above. First, cost benefit analysis is *not* required by the Mine Act; neither is it required for the similar OSHAct for which the Supreme Court rejected the notion in a landmark case. Indeed, and as shown below, the MSH Act has statutory language that is even clearer than the OSH Act about the need to provide feasible protections to workers. Second, neither costs nor benefits are easily quantified. Third, a cost benefit analysis inevitably results in an exchange of costs for benefits, as if each were an equivalent commodity, which assumption we expressly reject. Fourth, inasmuch as a cost benefit analysis *appears* to resolve many problems, its use would likely supersede other pertinent criteria.

The Mine Act, like the OSHAct, lists specific criteria for evaluating exposure limits for toxic substances, and "costs," per se, are not among them. The Acts require that limits be "feasible," i.e., capable of being achieved. The Mine Act says [(Sec. 101 (a) (6) (A)],

> "The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired."

Clearly, the preeminent purpose of this section is to ensure the health of the miner. Feasibility, which term does <u>not</u> mean cost, is simply one of numerous factors to consider in the overriding mandate to assure "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."

The case before the Supreme Court in which the issue of cost-benefit analysis was addressed directly, concerned the Permissible Exposure Limit (PEL) that OSHA set for cotton dust. This PEL was challenged by the American Textile Manufacturers' Institute on the grounds that OSHA had not conducted a cost-benefit analysis. The Court decided that OSHA was not required to do so because other criteria were well described in the Act, including feasibility. The Court concluded, "Cost-benefit analysis by OSHA in promulgating a standard under 6 (b) (5) (the parallel language in the OSHAct) is not required by the Act because feasibility analysis is." ATMI v. Donovan , 452 US 490, at 509 (1981). The Court recognized that the directive to require "feasible" protections meant that Congress placed the highest priority on the "benefit" to worker health, and that any "standard based on balancing of costs and benefits...would be inconsistent with the command set forth in Sec. 6 (b)(5)" *Id.*

Further, costs and benefits are not well quantified. To illustrate this problem, we use an example pertinent to the mining industry. Several risk assessments have been conducted on the risk of lung cancer associated with exposure to particulate matter in the exhaust of diesel engines. These were derived from one data set from a study of animals and from one epidemiologic investigation. Several different investigators produced results (probability of lung cancer per $\mu g/m^3$ for a working lifetime) that ranged over nearly four orders of magnitude, from 2 to 920 x 10^{-6} per $\mu g/m^3$ (from 10^0 to 10^3) with a small overlap between the estimates from animals to humans. Stayner *et. al* 1998. When existing exposure was used to estimate existing risk, one outcome was the absurd result of a risk (i.e., a probability) greater than 1. These results are incoherent and practically useless for making policy to control exposure to diesel particulate matter. Variability is almost wholly dependent on who made the risk estimates rather than on the data. Such results do not provide a sufficient foundation for calculating either costs or benefits.

Cost benefit analysis inevitably leads to an exchange of health and safety on the one hand and costs on the other. Agencies such as EPA, CPSC, FDA, OSHA, and MSHA have a mission to prevent disease and injury caused by environmental or occupational hazards or hazards associated with consumer goods or food and drugs. Use of a cost benefit analysis would result in an exchange of dollars for health and safety as if they were exchangeable commodities. They are not. It simply is not appropriate to apply a cost-benefit analysis to the regulation of environmental or occupational hazards, or hazards associated with consumer goods or food and drugs. Such an exchange may be appropriate for regulations by agencies that regulate economic transactions where there is an exchange of value among like commodities. However, this is not the case with regulatory agencies whose aim is to protect and promote health and safety.

While costs are considered when requiring the protection of health and safety, it is important to first set the public health goal, and then to find the means for achieving it. As an alternative to cost-benefit analysis, we suggest that it may be appropriate to utilize a cost effectiveness analysis, that would identify the most effective and efficient way to reach goals by reducing costs *without* compromising health or safety.

Cost-benefit analysis tends to crowd out other methods, claiming to be reasonable, rational, and objective and therefore superior. One commentator said, "Cost

benefit analysis is an antidote to public ignorance." Sunstein 2002. While "the public" may not be able to calculate risks or project costs with any degree of confidence, we represent workers who have considerable first hand practical knowledge about how things get done – or not done – at work – in fact they have knowledge that so-called experts sometimes lack. If a policy for protecting workers from occupational hazards is to succeed, it must succeed where that exposure occurs, i.e., on the job. The knowledge of miners is essential for designing policy that will succeed. To dismiss "the public" as ignorant is short-sighted and reveals an ignorance of its own. Different kinds of knowledge are needed to create effective policies and no single approach should prevail. This is one more reason why "the public" must be involved in making policy.

Methods of ensuring that regulatory review does not produce undue delay.

We should point out that when President Clinton issued EO 12866 in 1993, the principal aim of this Order, indeed the only aim that he mentioned when he signed it, was the need to issue regulations without undue delay. He said, on September 30, 1993,

> "One primary objective of this order is to streamline the regulatory review process, thus reducing the delay in the developing and promulgating rules." Presidential Papers, Administration of William J. Clinton, no. 39 at p. 1933.

This is an important objective and, whatever else OIRA may do, it should not unnecessarily delay rules. Under MSHA, regulations generally further miners' health and safety. There should be no additional delays to a rule making process that generally takes too long. (Some notable exceptions were the rules that resulted from the MINER Act of 2006: after a series of mine disasters in 2006, Congress required MSHA to promulgate several regulations on a relatively short timetable. MSHA responded. This shows that regulations can be promulgated in a reasonable period of time, though few rules actually match that Congressionally mandated timeline.) There are no magic formulae for achieving this. It requires setting deadlines and allocating sufficient resources so that agencies can meet such deadlines.

Conclusion

Over the past three decades, regulatory reform has generally proceeded with the assumption that federal regulations create excessive costs in our economy. We do not agree. Moreover, using a cost benefit analysis, with its focus on reducing costs, often jeopardizes the integrity of a rule.

The rules MSHA promulgates generally promote workers' safety. Indeed, the history of regulation in the coal mining industry demonstrates the effectiveness of direct regulation, i.e., creating rules and a means for enforcing them. We offer two such examples:

First, when the Federal Coal Mine Health and Safety Act was passed in 1969, there was a dramatic and sustained drop in the rate of fatal injuries. Prior to this Act in 1969, the rate of fatal injuries was more than twice that in other advanced coal producing countries. After the Coal Mine Act took affect, the rate of fatal injuries dropped every

year for the next decade The methods for mining safely had been well developed by the Bureau of Mines and others *prior* to the Coal Mine Act, but they were not mandatory until that law passed. Only when the specific protections were required and their use was enforced by frequent mandated inspections, with penalties for non-compliance, did we witness a decline in the rate of fatal injuries. Weeks & Fox, 1983.

Second, a similar result was achieved in preventing pneumoconiosis, commonly referred to as black lung. Before the Act, exposure to respirable dust was around 6 mg/m^3 but within eighteen months, it declined to 3 mg/m^3 then to its current level of about 1 mg/m^3 (though problems persist). A decline in the prevalence of pneumoconiosis followed (though problems persist here too). Knowledge of this success (and failures) in preventing occupational disease was gained by medical surveillance of all coal miners. Weeks 1993.

Would these measures – mandatory inspections, specific safe mining practices, stringent dust controls, and medical surveillance – have survived a cost benefit analysis? Would that analysis accurately predict trends in fatalities and in the occurrence of black lung? We do not know. But we do know that because of the measures initiated by the Coal Mine Act, many miners are alive today and many miners' families are intact. It is worth it. And there is more to do. We support the promulgation by MSHA of more protective rules, because too many miners are still killed and injured on the job. Too many are getting sick from their work, and we are seeing resurgence in the incidences of black lung disease. Let us not restrain the regulations necessary to address these substantial problems.

References

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