

SECRETARY OF LABOR
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FROM:

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SUBJECT:

Department of Labor Submission under E.O. 13783
Promoting Energy Independence and Economic
Growth

Introduction

Executive Order (EO) 13783, *Promoting Energy Independence and Economic Growth* and Office of Management and Budget (OMB) memorandum M-17-24, *Guidance for Section 2 of Executive Order 13783, "Promoting Energy Independence and Economic Growth"* directed each federal agency to consider whether the agency has existing regulations, orders, guidance documents, policies, and other similar agency actions that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. EO 13783 defines "burden" to mean "to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources." M-17-24 further describes the types of agency actions that are covered under Section 2(a) of EO 13783 as actions that materially: (1) affect the design and/or location of domestic energy production; (2) affect the design and/or location of drilling or mining of energy production resources; and (3) limit the use of certain sources of energy, such that the development of domestically produced energy resources from a certain sector may be negatively affected. The EO further requires the head of each agency to submit to the Director of OMB by July 26, 2017, a draft report regarding the agency's review of actions that potentially burden the development or use of domestically produced energy resources.

To address the requirements in EO 13783 and M-17-24, the Department considered its existing regulations, orders, guidance documents and other such agency actions with particular attention to its Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA). MSHA helps to reduce deaths, injuries, and illnesses in the nation's mines with a variety of activities and programs, including developing and enforcing safety and health rules for all U.S. mines. OSHA assures employers provide safe and healthful working conditions for working men and women by setting and enforcing standards and other activities.

On May 12, 2017, the Department of Labor submitted its initial plan for review of existing regulations, orders, guidance documents, policies, and other similar agency actions to determine whether they potentially burden the development or use of domestically produced energy resources. This report transmits the results of the Department's review. The Department conducted a review of its actions for the specific purposes of EO 13783, and will also incorporate an ongoing review of deregulatory actions that could apply to the provisions of EO 13783 into the work of the Regulatory Reform Taskforce that has been convened under EO 13777, "Enforcing the Regulatory Reform Agenda."

Report on Review of MSHA Actions

After considering MSHA regulatory actions using the M-17-24 guidance, the Department determined that none rise to the level of burden described in EO 13783. MSHA conducted a broad review of its regulations and considered numerous options for reducing regulatory burden, as directed by EO 13783 and the guidance of M-17-24. MSHA's review process included an analysis of its legislative mandates and current regulatory requirements. MSHA's thorough review reflects the agency's considerable commitment to helping mine operators be successful in providing a safe workplace while continuing to examine ways to reduce burdens.

In early March 2017, MSHA established a Working Group to review and identify existing rules that could potentially be removed or revised to reduce mine operators' regulatory burdens and costs. Establishment of the MSHA Working Group was in response to regulatory reform initiatives specified in EO 13771 and EO 13777 and related guidance. The members assigned to the working group represented a highly knowledgeable cross section of MSHA personnel and program areas and included representation from the Office of the Solicitor. The working group initially identified over 175 existing mining requirements (e.g., test, examination, calibration) for internal discussions to evaluate for potential removal or revision. Many requirements are limited to specific types of mining, mining conditions and activities, and equipment used. The working group has also evaluated whether tests, examinations of areas or equipment, and calibration of equipment that mine operators are required to conduct can be reduced in frequency or streamlined while achieving the same level of protection for miners as existing rules. In addition, the group intends to continue to identify opportunities to revise rules and take advantage of less costly methods, advances in technology, or innovative techniques.

MSHA has legislative requirements that provide explicit restrictions when considering altering standards and regulations. Authorizing statutes prohibit MSHA from reducing established

protections.¹ Many of the deregulatory actions considered for elimination or change by the working group could not be implemented because of these statutory restrictions. However, MSHA has a long history of seeking input from industry stakeholders and exploring options to achieve a safe workplace for miners. MSHA will continue to work with industry stakeholders to find regulatory methods that do not unnecessarily obstruct, delay, curtail, or otherwise impose significant costs, as permitted by law.

The Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 et seq., as amended provided strong direction on how MSHA should balance safety and commerce.

SEC. 2. Congress declares that--

- (a) 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;
- (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;
- (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce...

Further, MSHA has additional guidance when implementing or changing regulations. Section 101(a)(6)(A) of the Mine Act, 30 U.S.C. 811(a)(6)(A), requires the Secretary of Labor, in setting health standards, to consider the feasibility of the standards. Section 101(a)(6)(A) of the Mine Act states that the Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under the Mine Act, shall set standards to assure, based on the best available evidence, that no miner suffer material impairment of health from exposure to toxic materials or harmful physical agents over his working life.² In developing these standards, the Mine Act requires the Secretary to consider the latest available scientific data, the feasibility of the standards, and experience gained under other laws. Thus, the Mine Act requires that the Secretary, in promulgating a standard, based on the best available evidence, attain the highest degree of health and safety protection for the miner with feasibility a consideration. When examining each change to regulations, MSHA considers Congress' intent in developing the Mine Act, including the following:

In adopting the language of section 102(a)(5)(A), the Committee wishes to emphasize that it rejects the view that cost benefit ratios alone may be the basis for depriving miners of the health protection which the law was intended to insure. The committee concurs with the judicial constitution that standards may be economically feasible even though from the standpoint of employers, they are "financially burdensome and affect profit margins adversely" (*I.U.D. v Hodgson*, 499 F.2d 647 (D.C. Cir. 1974)). Where substantial financial outlays are needed in order to allow industry to reach the permissible limits necessary to protect miners, other regulatory strategies are available to accommodate economic feasibility and

¹ Federal Mine Safety & Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164, Title I, Section 101(a)(9) No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard.

² 30 U.S.C. 811(a)(6)(A).

health considerations. These strategies could include delaying implementation of certain provisions or requirements of standards in order to allow sufficient time for engineering controls to be put in place or a delay in the effective date of the standard.³

MSHA is diligent in conducting extensive outreach and partnership with the mining industry. Because safety requires not just enforcement of regulations, but a culture of safety, MSHA is heavily involved in day to day assistance to the mining community while seeking input on better and less burdensome approaches. MSHA provides substantial training, materials, briefings, templates, and sample plans to help mines develop and maintain safety programs. For example, almost monthly MSHA provides both briefings and interactive calls to the community, as well as briefings and materials the operators can use with their employees. MSHA has a voluntary assistance program that provides the expertise to help mines be successful without having program development costs. Our technical centers evaluate innovative ideas for safety and are frequently involved in evaluating potential safety problems submitted to MSHA by operators and other safety experts. Each of these actions improves safety without transferring additional burden to the operators.

MSHA provides other substantial support to the operators. MSHA's web pages contain considerable numbers of aids to the mining community. The website has pamphlets, training course materials, checklists, sample plans, and even reference materials for the startup of mining operations. Through its grant programs, MSHA provides financial support for development of training and safety improvement.

In each regulatory action, MSHA also considers the judicial finding on economic feasibility. In the OSHA Cotton Dust case, for example, the Supreme Court stated that a standard would not be considered economically feasible if an entire industry's competitive structure was threatened. According to the Court, the appropriate inquiry into a standard's economic feasibility is whether the standard is capable of being achieved.⁴

MSHA is aware of the changing economic climate for mining. MSHA follows and for several years has participated in the Department of Energy's Energy Information Administration (EIA) briefings and workshops on the underlying economics of energy demand. When considering the economic climate for the mining community, particularly coal, for actions considered when complying with this executive order, MSHA was cognizant of the driving forces in the decline in the coal industry. The fundamental economic issue for coal is a collapsing demand. "Electric power generation accounts for more than 92% of U.S. coal demand, and domestic coal production has declined significantly over the past decade as coal has been displaced by natural gas and renewables in electric generation."⁵ Coal plant retirements have been driven by a number of factors, including low natural gas prices and environmental regulations, such as EPA's Mercury and Air Toxics Standards and other environmental regulations affecting coal

³ S. Rep. No. 95- 181, at 21-22 (1977), reprinted in 1977 U.S.C.C.A.N. 3421-22.

⁴ 452 U.S. at 508-509.

⁵ <https://www.eia.gov/todayinenergy/detail.php?id=31792>

generation.⁶ New long term capital investment has moved away from coal to natural gas and other alternate energy sources. For example, EIA's June 26, 2017 "Today in Energy," EIA projects that trends in coal production could range from flat to continuing declines through 2040, and states that future coal production depends on resources and technology, not just policy choices. In fact, technology could provide an opportunity to substantially decrease the decline and potentially allow a leveling of demand through 2040.

MSHA is not alone in regulating health and safety in mining. MSHA provides the operators with courtesy web links and electronic access to regulatory offices and regulations in at least 43 states. Because of the number of regulatory authorities, it is highly unlikely that a reduction in MSHA's regulations could create a measurable change for the industry as a whole.

MSHA is looking to other options to maintain or improve safety and health through its Petition for Modification Process. Section 101(c) of Mine Act allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor (Secretary) determines that (1) an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or (2) that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. The regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification. This process allows individual coal mine operators to modify mandatory safety standards to meet the needs of a particular mine site as long as the operator can meet the requirements for a modification under section 101(c) of the Mine Act. Nevertheless, MSHA did not stop its comprehensive review of regulations with a single review, and believes further improvement may be made by considering additional public input.

MSHA intends to conduct robust stakeholder outreach to gather input from the regulated community on MSHA's regulatory reform efforts- specifically on existing rules that (1) could be removed or revised, including those for which less costly methods, advances in technology, or innovative techniques exists; and (2) could be revised to include alternatives to safety standards which MSHA typically approves in Petitions for Modification submitted by mine operators. These outreach efforts will provide an opportunity for stakeholders to present their views and recommendations, information, and data, including economic and technological feasibility concerns. MSHA intends to hold stakeholder meetings in various locations around the country. In addition, during its quarterly training and stakeholder calls, walk and talks, conferences, and alliance meetings, MSHA will inform participants, as appropriate, that the Agency is seeking stakeholder input on its regulatory reform initiative. MSHA is also considering issuing a Request for Information in the *Federal Register* to collect recommendations, information, and data on rules that can be removed, revised, or modified. Information provided by stakeholders will help improve the health and safety of miners and assist MSHA in determining the appropriate regulatory action.

⁶ See, e.g. EIA Projections (March 8, 2016) available at <https://www.eia.gov/todayinenergy/detail.php?id=25272>; EIA Projections (March 20, 2014) available at <https://www.eia.gov/todayinenergy/detail.php?id=15491>.

MSHA concludes that it has complied, and will continue to comply with the requirements of Executive Order 13783 while advancing the mandate to protect the miners and the commerce of the mining industry.

Report on Review of OSHA Actions

After considering its OSHA actions, the Department determined that none rise to the level of burden described in EO 13783 and M-17-24. A variety of safety regulations necessary to protect employees from death or injury apply to oil exploration and extraction and to downstream energy businesses. In general, these standards have been in force for many years without evidence that they have unduly impeded development or use of domestically produced energy. The affected energy establishments have been able to develop engineering practices and comply without a significant impact on the domestic industry's ability to produce energy resources. OSHA actions do not unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources, and do not materially affect the design or location of domestic energy production, drilling or mining of energy production resources, or limit the use of certain sources of energy.

On March 25, 2016, OSHA issued a final rule on occupational exposure to respirable crystalline silica, which covers hydraulic fracturing operations in the oil and gas industry as well as certain construction tasks and other activities in the energy sector. OSHA has issued guidance to assist employers in understanding the rule, and the Agency is pursuing a range of other compliance assistance efforts. OSHA began enforcing requirements for construction on September 23, 2017, but the Agency will not begin enforcing requirements for hydraulic fracturing operations until June 23, 2018, and requirements for certain measures to limit employee exposure to silica in hydraulic fracturing will not be enforced until June 23, 2021.

OSHA has four regulatory initiatives on its current regulatory agenda that potentially impact energy industries. OSHA is considering revising its standard on Process Safety Management (PSM) to clarify certain provisions and to better reflect industry best practices that have developed over the past two decades since the standard was first enacted. The PSM standard applies to downstream petroleum refineries, petrochemical plants, electric utilities, and other energy producing establishments (the standard does not apply to oil and gas extraction or production operations). OSHA collected stakeholder feedback on this issue through an RFI in 2014 and received additional stakeholder input through the SBREFA process in 2016, all of which will be considered as OSHA determines its next steps.

OSHA is also considering updating its standard for Control of Hazardous Energy, also known as lock-out/tag-out. This standard mandates procedures to ensure that equipment is de-energized before and during servicing and maintenance so that employees are not harmed by electrical, mechanical, pneumatic, or other sources of hazardous energy. Since that standard was promulgated in 1989, technologies have advanced that employ computer-based control of hazardous energy, and these newer technologies conflict with the existing standard. OSHA is considering issuing an RFI seeking stakeholder input, or holding a stakeholder meeting and opening a public docket to explore the issue.

OSHA is exploring updating its standards on emergency response and preparedness, which could potentially affect in-house emergency responders and fire brigades at energy establishments. OSHA's current standards are outdated and cover only certain aspects of emergency response; consequently, they do not address the full range of hazards facing emergency responders. A draft standard has been developed by an expert subcommittee of OSHA's National Advisory Committee for Occupational Safety and Health. OSHA plans to seek further stakeholder input and conduct research to begin its assessment of potential costs, benefits, and small-business impacts of regulatory alternatives, which would permit OSHA to initiate a SBREFA process.

Finally, on January 9, 2017, OSHA promulgated a final standard governing occupational exposure to beryllium, which in part applies to limited operations in coal-fired power plants. The Edison Electric Institute is among the litigants opposing this rule, and OSHA is currently in discussions with them to address their concerns, either through revising the rule, developing interpretive guidance material, or a combination of both.

In accordance with EO 13777, OSHA is engaged in a number of regulatory reform efforts, some of which could reduce regulatory burden in the oil and gas industries. For example, OSHA is developing a final rule under its Standards Improvement Project (SIP), which will be the fourth such rule promulgated by the Agency. This rulemaking seeks to reduce regulatory burdens, eliminate obsolete or ineffective provisions, and/or increase compliance flexibility. SIP IV will include provisions that eliminate requirements to use social security numbers for recordkeeping purposes and provisions that modernize various medical surveillance requirements. OSHA is also developing a final rule to adopt modified fit testing procedures under its Respiratory Protection standard, which will reduce the time necessary to administer required fit tests. Several regulatory initiatives on OSHA's current Regulatory Agenda are also designed to update and modernize existing rules, many of which have been requested by industry groups. Examples include amending OSHA's standards on Control of Hazardous Energy, Powered Industrial Trucks, and Power Presses to reflect newer technologies and equipment. In addition, OSHA has assembled a task force to methodically review existing rules to identify further opportunities for reducing burdens and eliminating unnecessary requirements. OSHA is also seeking input from stakeholders as it engages with them on a variety of issues.

OSHA believes it unlikely that any of these regulatory initiatives will impose costs or impacts on energy industries of a magnitude contemplated in EO 13783; however, OSHA will carefully evaluate the potential impacts of all regulatory alternatives developed or being considered for these initiatives to determine whether such impacts are likely to occur.

Conclusion

The Department has completed a review of our agency actions to identify rules and guidance that would fall under the purview of the EO. While the Department does not believe that any of its actions rise to the level of burden described in in EO 13783, MSHA and OSHA have done additional analysis of their existing actions and have outlined areas where they are considering options to reduce regulatory burden where possible, while maintaining statutorily required worker protections. Moving forward, as part of our continuing implementation and compliance with EO 13777, "Enforcing the Regulatory Reform Agenda," our Regulatory Reform Task Force

will continue to specifically look for any deregulatory actions that could apply to the provisions of EO 13783 and prioritize them appropriately.