



January 1992

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Recommended Citation

Heenan, Michael T. and Ruffenach, C. Gregory (1992) "National Institute of Occupational Safety and Health: Limits of Authority in Rulemaking Under the Federal Mine Safety and Health Act of 1977," *Journal of Natural Resources & Environmental Law*. Vol. 7 : Iss. 2 , Article 3.

Available at: <https://uknowledge.uky.edu/jnrel/vol7/iss2/3>

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National Institute of Occupational Safety and Health: Limits of Authority in Rulemaking Under the Federal Mine Safety and Health Act of 1977

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I. INTRODUCTION

The National Institute of Occupational Safety and Health (NIOSH), which was created by the Occupational Safety and Health Act of 1970,¹ is an agency within the Department of Health and Human Services (HHS) (formerly the Department of Health, Education, and Welfare). Its primary role is scientific research and investigation. NIOSH plays a supportive role to the Labor Department, which is the enforcer of workplace safety and health standards. NIOSH, however, is not a regulatory agency. NIOSH's Program Plan provides:

Because NIOSH is a scientific institute, not a regulatory agency, its influence on the prevention of occupational health problems, depends to a large extent, upon the scientific quality of its findings and recommendations. In short, NIOSH fulfills its leadership mission through persuasion based on scientific integrity.²

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¹ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 22, 84 Stat. 1590, 1612 (1970).

² Program of the National Institute for Occupational Safety and Health (Program Plan by Program Areas for FY 1984-89).

Before the creation of NIOSH, the Secretary of Health, Education, and Welfare (HEW)³ had been delegated important responsibilities related to health in the mining industry under the Federal Coal Mine Health and Safety Act of 1969.⁴ When NIOSH was created by the Occupational Safety and Health Act of 1970, responsibilities of the Secretary of HEW under the 1969 Coal Act were administratively delegated to NIOSH.⁵ Later, with the enactment of the Federal Mine Safety and Health Act of 1977, NIOSH was given statutory authority to research and address certain other health issues under the Act.⁶

In recent years, NIOSH seems to have abandoned its role as an impartial scientific advisor with respect to issues arising in the mining industry and instead has participated in rulemaking by the Labor Department's Mine Safety and Health Administration (MSHA) essentially as an outside interested party.⁷ NIOSH has taken an activist role in two respects. First, the agency has not confined its activities to developing scientific criteria for regulations, but rather has repeatedly enmeshed itself in the process of advocating exactly what the standards should say. Secondly, and sometimes at the behest of labor union representatives, NIOSH has assumed a public commentator role and in this fashion has controverted and made public objections to safety as well as health standards proposed by MSHA.⁸ To date,

³ The Department of Health, Education, and Welfare was redesignated as the Department of Health and Human Services on May 4, 1980. Department of Education Organization Act, Pub. L. No. 96-88, § 509(a), 93 Stat. 668, 695 (1979).

⁴ Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 501, 83 Stat. 742, 798 (codified as amended at 30 U.S.C. § 801 note (1988)). The Department of HEW's Public Health Service investigated health problems in mines for many years prior to the 1969 Coal Act.

⁵ Pub. L. No. 91-596, § 22, 84 Stat. 1612. The Secretary of HEW was assigned responsibilities for proposing health standards under the 1969 Coal Act and this responsibility was administratively delegated to NIOSH, and continued until it was shifted to the Secretary of Labor under the Federal Mine Safety and Health Act of 1977.

⁶ Federal Mine Safety and Health Act of 1977, § 303(a)(3), 30 U.S.C. § 951 (1982).

⁷ *Id.* at § 302(a), 29 U.S.C. § 557(a) (1988). MSHA was created in 1978 when the 1977 Mine Act transferred the federal mine safety and health program from the Interior Department to the Labor Department. MSHA is headed by an Assistant Secretary of Labor, who administers a broad regulatory program to reduce injuries and illnesses in the mining industry.

⁸ NIOSH has participated as a commentator on health issues in air quality standards, 30 C.F.R. § 56.5001 (1991); on health issues in the radiation standards, 30 C.F.R. § 57.5037 (1991); on safety issues in the coal mine ventilation standards and explosive standards, 30 C.F.R. §§ 75.300, 75.1300 (1991); and on governmental enforcement issues in the pattern of violations regulations, 30 C.F.R. § 104.3 (1991).

the Labor Department has not taken a public position either endorsing or opposing NIOSH's participation in this fashion.

This article reviews authority that has been delegated to NIOSH under the Federal Mine Safety and Health Act of 1977 to participate in MSHA rulemaking activities and analyzes the limits on that authority. Four conclusions are reached.

First, NIOSH basically has been given responsibility under the 1977 Mine Act for determining the appropriate criteria for limiting exposure to health risks such as respirable mine dust, toxic substances and excessive noise. By contrast to its responsibilities in the health area, NIOSH has not been given any authority in the safety field.

Second, the authority of NIOSH under the 1977 Mine Act is limited to developing scientific criteria. NIOSH does not have authority to develop or comment on actual standards or language for standards regardless of whether the standards pertain to health or safety. Congress clearly envisioned the role of NIOSH under the 1977 Mine Act to be that of a highly credible scientific institution unhampered by the adversarial posture that inevitably attaches to whatever agency is charged with actually developing standards, promulgating them, and carrying out policing activities. Under the 1977 Mine Act, creation and implementation of standards are functions to be carried out by the Secretary of Labor through MSHA.

Third, the role of NIOSH under the 1977 Mine Act is that of a scientific support agency for the rulemaking agency. It is appropriate for NIOSH to participate in the development of health standards only through intra-executive branch consultation, not through the 1977 Mine Act's Section 101 commenting procedures.⁹

Fourth, it is particularly inappropriate for NIOSH to enter rulemaking as a public commentator at the behest of an "interested person" such as a labor or industry organization that has its own independent opportunity to comment. In this connection, the role of NIOSH is one that should be exercised solely because of its statutory mandate, and not in response to invocation or entreaty by private parties.

⁹ 30 U.S.C. § 811(a)(2) (1988) says, "[T]he Secretary [of Labor] shall afford interested persons a period of 30 days after any . . . publication to submit written data or comments on the proposed rule."

II. DISCUSSION

In analyzing the role of NIOSH in the mining area, this article reviews the evolution of the agency's authority beginning with authority delegated to the Secretary of Health, Education, and Welfare (now Health and Human Services) under the 1969 Coal Act; authority delegated to NIOSH under the Occupational Safety and Health Act of 1970; authority delegated to NIOSH under the Federal Mine Safety and Health Act of 1977; and authority assigned to NIOSH by the MSHA-NIOSH Interagency Agreement.

A. *The Federal Coal Mine Health and Safety Act of 1969*

In the Federal Coal Mine Health and Safety Act of 1969, Congress created a system for regulating coal mine safety and health. Title II of the 1969 Coal Act set out interim health standards to remain in effect until superseded by improved standards.¹⁰ On a similar basis, Title III of the 1969 Coal Act set out interim safety standards.¹¹

The program was administered under the auspices of two cabinet officials, the Secretary of Health, Education, and Welfare (HEW) and the Secretary of the Interior. In this connection, Congress declared, *inter alia*:

[I]t is the purpose of the Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of the Interior to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal miners¹²

The 1969 Coal Act's delegation of authority to the two departments with regard to rulemaking, inspections, and enforcement was not by any means equally divided. Rather, the bulk of responsibility for administering and effectuating the mandates of the 1969 Coal Act was delegated to the Secretary of the Interior.

Requirements for rulemaking were established in section 101 of the 1969 Coal Act. The Secretary of Interior was vested with

¹⁰ Pub. L. No. 91-173, § 201(a), 83 Stat. 760.

¹¹ *Id.* at § 301(a), 83 Stat. 765.

¹² *Id.* at § 2(g), 83 Stat. 743.

primary responsibility for promulgating improved mandatory safety standards.¹³ The Secretary of HEW's role in the promulgation of improved mandatory safety standards was limited to consultation.¹⁴ With respect to improved mandatory health standards, the Secretary of HEW's role was more significant but the Secretary of Interior was still responsible for promulgation.¹⁵ Thus, consistent with the overall scheme of the 1969 Coal Act, authority to actually promulgate rules was exclusively within the province of the Secretary of the Interior, while the Secretary of HEW was limited to conceptual development and revision of health standards.¹⁶

The 1969 Coal Act gave broad authority to the Secretary of the Interior's representatives to enter into coal mines for purposes of investigation and inspection.¹⁷ Separately, the Secretary of HEW was given right of entry to coal mines as follows: "For the purpose of developing improved mandatory health standards, the Secretary of Health, Education, and Welfare or his authorized representative shall have a right of entry to, upon, or

¹³ Subsection a of section 101 states:

The Secretary [of the Interior] shall . . . develop, promulgate, and revise, as may be appropriate, improved mandatory safety standards for the protection of life and the prevention of injuries in a coal mine, and shall . . . promulgate the mandatory health standards transmitted to him by the Secretary of Health, Education, and Welfare.

Id. at § 101(a), 83 Stat. 745.

¹⁴ Subsection c of section 101 states: "In the development and revision of mandatory safety standards, the Secretary [of the Interior] shall consult with the Secretary of Health, Education, and Welfare . . ."

Id. at § 101(c), 83 Stat. 745.

¹⁵ Subsection d of section 101 provides as follows:

The Secretary of Health, Education, and Welfare shall . . . develop and revise, as may be appropriate, improved mandatory health standards for the protection of life and the prevention of occupational diseases of miners. In the development and revision of mandatory health standards, the Secretary of Health, Education, and Welfare shall consult with the Secretary [of the Interior] . . . Mandatory health standards which the Secretary of Health, Education, and Welfare develops or revises shall be transmitted to the Secretary, and shall thereupon be published in the Federal Register by the Secretary [of the Interior] as proposed mandatory health standards.

Id. at § 101(d), 83 Stat. 746.

¹⁶ With regard to the respective authority of each of the Secretaries under the 1969 Coal Act, both were given authority "to issue such regulations as each deems appropriate to carry out any provision of this Act." *Id.* at § 508, 83 Stat. 803. Regulations are, of course, to be distinguished from mandatory standards, which could only be promulgated by the Secretary of the Interior under section 101 of the 1969 Coal Act.

¹⁷ *Id.* at §§ 103 (a)-103(b), 83 Stat. 749.

through, any coal mine."¹⁸ Consequently, under the 1969 Act, direct contact with mines by the Department of HEW was generally limited to investigations related to developing proposals for improved health standards.

Similarly, in connection with enforcement, section 104 of the 1969 Coal Act authorized the Secretary of the Interior to issue citations and orders for violations of the Act's mandatory standards.¹⁹ The Department of HEW was delegated no enforcement authority. Under the 1969 Coal Act, the Secretary of HEW was basically limited to research into health issues. Safety research responsibilities were not included.²⁰ The Secretary of HEW's responsibilities included evaluating and approving devices to measure respirable dust, participating in the development and promulgation of procedures for sampling of respirable dust and for analyzing dust samples,²¹ coordinating a program for periodic medical examinations and chest x-rays for coal miners,²² approving respiratory protection devices,²³ and determining allowable exposures to quartz in respirable dust.²⁴ Separate and apart from involvement in respiratory protection, the Secretary

¹⁸ *Id.* at § 103(b)(2), 83 Stat. 749. (The Secretary of HEW's (now HHS) rights of entry are set out in greater detail in 42 C.F.R. § 85.5(a) (1990).)

¹⁹ *Id.* at § 202, 83 Stat. 760.

²⁰ The Secretary of HEW, however, was given responsibility under Title III for establishing minimum requirements relating to mine operators' duties to provide for emergency medical assistance, communications and transportation.
Id. at 501(a), 83 Stat. 798.

²¹ *Id.* at § 203, 83 Stat. 763.

²² *Id.* at §§ 202(h) and 204, 83 Stat. 763, 764.

²³ *Id.* at § 205, 83 Stat. 765.

²⁴ Section 206 provides:

Within six months after the date of enactment of this Act, the Secretary of Health, Education, and Welfare shall establish, and the Secretary [of the Interior] shall publish . . . proposed mandatory health standards establishing maximum noise exposure levels for all underground coal mines. Beginning six months after the operative date of this title, and at intervals of at least every six months thereafter, the operator of each coal mine shall conduct, in a manner prescribed by the Secretary of Health, Education, and Welfare, tests by a qualified person of the noise level at the mine and report and certify the results to the Secretary [of the Interior] and the Secretary of Health, Education, and Welfare. In meeting such standard under this section, the operator shall not require the use of any protective device or system, including personal devices, which the Secretary or his authorized representative finds to be hazardous or cause a hazard to the miners in such mine.

Id. at § 206, 83 Stat. 765.

of HEW was also assigned responsibilities in connection with noise control in mines.²⁵

Consistent with the separateness of health and safety policy responsibilities throughout the 1969 Coal Act, section 501(a), which relates to research assistance, provides: "The Secretary [of the Interior] and the Secretary of Health, Education, and Welfare, as appropriate, shall conduct such studies, research, experiments, and demonstrations as may be appropriate."²⁶ The types of research that may be appropriate are set out in the subsections to Section 501(a). Subsection b of section 501 goes on to state that "[a]ctivities under this section in the field of coal mine health shall be carried out by the Secretary of Health,

²⁵ *Id.* at § 317(m), 83 Stat. 789.

²⁶ Section 501 sets out the types of research that may be appropriate as:

(1) to improve working conditions and practices in coal mines, and to prevent accidents and occupational diseases originating in the coal-mining industry;

(2) to develop new or improved methods of recovering persons in coal mines after an accident;

(3) to develop new or improved means and methods of communication from the surface to the underground area of a coal mine;

(4) to develop new or improved means and methods of reducing concentrations of respirable dust in the mine atmosphere of active workings of the coal mine;

(5) to develop epidemiological information to (A) identify and define positive factors involved in occupational diseases of miners, (B) provide information on the incidence and prevalence of pneumoconiosis and other respiratory ailments of miners, and (C) improve mandatory health standards;

(6) to develop techniques for the prevention and control of occupational diseases of miners, including tests for hypersusceptibility and early detection;

(7) to evaluate the effect on bodily impairment and occupational disability of miners afflicted with an occupational disease;

(8) to prepare and publish from time to time, reports on all significant aspects of occupational diseases of miners as well as on the medical aspects of injuries, other than diseases, which are revealed by the research carried on pursuant to this subsection;

(9) to study the relationship between coal mine environments and occupational diseases of miners;

(10) to develop new and improved underground equipment and other sources of power for such equipment which will provide greater safety; and

(11) for such other purposes as they deem necessary to carry out the purposes of this Act.

Id. at §§ 501(a)(1)-(11), 83 Stat. 798.

Education, and Welfare, and activities under this section in the field of coal mine safety shall be carried out by the Secretary [of the Interior]."²⁷

Requirements imposed on the Departments to report separately to Congress are consistent with the division of responsibilities between the two Departments. While there is a mandate for consultation between the Secretary of the Interior and the Secretary of Health, Education, and Welfare,²⁸ Congress made it clear that it would look to the Secretary of the Interior for annual reports on the state of safety in mines.²⁹ On the other hand, the requirement for reports on health was directed to the Secretary of HEW.³⁰

From the foregoing, it is clear that under the 1969 Coal Act enforcement of both safety and health standards was the responsibility of the Secretary of the Interior. The Secretary of the Interior was also responsible for seeing to the promulgation of both health standards and safety standards. On the other hand, the Secretary of HEW was given responsibility for devel-

²⁷ *Id.* at § 501(b), 83 Stat. 799; the Legislative History of the 1969 Federal Coal Mine Health and Safety Act provides the following explanation:

Both the Senate bill and the House amendment contained provisions under which studies, research, experiments, and demonstrations will be carried on in the fields related to working conditions, prevention of accidents, and control of causes of occupational diseases in the coal mining industry. . . .

The House amendment also required that activities in the field of health be carried out by the Secretary of Health, Education, and Welfare and the activities in the field of safety be carried out by the Secretary [of the Interior]. This House provision was included in the conference substitute.

Statement of the Manager on the Part of the House, 91st Congress, 1st Sess. § 501 (1969), 1969 U.S. CODE CONG. & ADMIN. NEWS 2503, 2606.

²⁸ See Pub. L. No. 91-173, § 101, 83 Stat. 742, 745-46.

²⁹ *Id.* at § 511(a), 83 Stat. 742.

³⁰ Federal Coal Mine Health & Safety Act of 1969, Pub. L. No. 91-173, § 511(b), 83 Stat. 742, 804 (1969)(amended 1977) provides:

Within one hundred and twenty days following the convening of each session of Congress, the Secretary of Health, Education, and Welfare shall submit through the President to the Congress and to the Office of Science and Technology an annual report upon the health matters covered by this Act, including the progress toward the achievement of the health purposes of this Act, the needs and requirements in the field of coal mine health, a description and the anticipated cost of each project and program he has undertaken under sections 301(b) and 501, and any other relevant information, including any recommendations he deems appropriate. The first such report shall include the recommendations of the Secretary of Health, Education, and Welfare as to necessary mandatory health standards, including his recommendations as to the maximum permissible individual exposure to miners from respirable dust during a shift.

oping certain health standards for promulgation by the Secretary of the Interior.

B. The Occupational Safety and Health Act of 1970

No sooner than the 1969 Coal Act was passed, Congress enacted the Occupational Safety and Health Act of 1970 ("OSH Act").³¹ The OSH Act created a system of safety and health enforcement for the vast majority of the working places throughout the country that were not regulated under a specific statute, such as the 1969 Coal Act. The OSH Act gave primary enforcement responsibility to the Secretary of Labor, unlike the 1969 Coal Act which gave such authority to the Department of Interior. As with the 1969 Coal Act, however, the Secretary of HEW was given major responsibilities. In contrast to the Coal Act, those responsibilities under the OSH Act were not limited exclusively to health matters, but rather included safety policy responsibilities as well.

Section 22 of the OSH Act created the National Institute of Occupational Safety and Health (NIOSH) as an agency through which the Secretary of HEW's responsibilities would be carried out.³² While the authority of NIOSH is generally stated in terms which indicate that its authority is derived from and is exercised on behalf of the Secretary of HEW, there are also certain elements of independence. For example, section 22(c) not only authorizes the Institute to perform the HEW functions under the OSH Act, but also separately provides authority to develop safety and health standards:

The Institute is authorized to —

- (1) develop and establish recommended occupational safety and health standards; and
- (2) perform all functions of the Secretary of Health, Education, and Welfare under sections 20 and 21 of this Act.³³

³¹ Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 29 U.S.C.).

³² *Id.* at § 22, 84 Stat. 1590, 1612. In introducing the concept of a new Institute to be included as a part of the scheme to be implemented under the pending OSH Act, Senator Jacob Javits stated that the purpose was to "elevate the status of occupational health and safety research to place it on an equal footing with research conducted by HEW into other matters of vital social concern." S. Rep. No. 1282, 91st Cong., 2d Sess. 57 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5177, 5221-22.

³³ Presently codified at 29 U.S.C. § 671 (1985).

Although NIOSH was vested with authority to develop standards under the OSH Act, it is interesting to note that the House Bill, which was not adopted, limited the role of NIOSH to producing criteria upon which the Secretary of Labor could promulgate health and safety standards. The House Bill distinguished between submitting criteria and developing standards. The House Report notes:

Criteria are scientifically determined conclusions based on the best available medical evidence; they are commonly presented in the form of recommendations describing medically acceptable tolerance levels of exposure to harmful substances or conditions over a period of time. They may also include medical judgments on methods and devices used to control exposure or its effects.

Standards, on the other hand, will be developed by the Secretary of Labor and *while they will reflect the criteria described above, they may be modified by practical considerations* such as feasibility, means of implementation and the like. *They will specify the conditions that will be required to be present in the working place.*³⁴

The reasoning for the distinction was that NIOSH as a scientific agency must be free of conflicts. The House Report further provides:

Many safety and health recommendations incorporate new insights based on research. These recommendations, if implemented, may require changes that cost substantial sums of money. This fact alone creates a *potential conflict of interest between management and labor.*

. . . .

The *public interest orientation of governmental research efforts* should be aided by the statutory definitions of both Secretaries' responsibilities. This *should also help to assure freedom from even a theoretical conflict of responsibilities.*³⁵

It is to be particularly noted that under the OSH Act, the authority of NIOSH expressly includes safety as well as health.³⁶ As indicated above, no similar authority was articulated under

³⁴ H.R. Rep. No. 1291, 91st Cong., 2d Sess. at 27-28 (1970) (emphasis added).

³⁵ *Id.* at 27 (emphasis added).

³⁶ Presently codified at 29 U.S.C. § 669 (1979).

section 501 of the 1969 Coal Act. On the contrary, the 1969 Coal Act calls for research activities related to health to be performed by the Secretary of HEW and research activities related to safety to be performed by the Secretary of the Interior. This is quite different from the OSH Act which expressly gives research authority to NIOSH for safety as well as health.

In 1971, NIOSH was administratively delegated responsibility for all of the Secretary of HEW's duties under the Federal Coal Mine Health and Safety Act of 1969. Specific statutory authority for NIOSH's involvement in mining did not, however, appear until the Federal Mine Safety and Health Amendments Act of 1977.

C. The Federal Mine Safety and Health Act of 1977

Under the Federal Mine Safety and Health Act of 1977, enforcement and rulemaking authority pertaining to mine safety and health are transferred from the Secretary of the Interior to the Secretary of Labor. The Secretary of HEW, now HHS, continues to have the health responsibilities prescribed under the 1969 Coal Act, but such duties are now expanded to include responsibility for non-coal mines as well as coal mines. The 1977 Mine Act, however, limits the Secretary of HEW's (HHS) and NIOSH's authority in four important respects.

First, in contrast to the OSH Act, the charter of NIOSH under the 1977 Mine Act is limited to health issues as was the Department of HEW under the 1969 Coal Act. In this regard, section 501(b), which relates to research authority of NIOSH, carries forward the express limitations imposed by the 1969 Coal Act. Under the 1977 Mine Act, the limitation set forth in section 501(b) reads as follows:

Activities under this section in the field of coal or other mine health shall be carried out by the Secretary of Health, Education, and Welfare through the National Institute for Occupational Safety and Health established under the Occupational Safety and Health Act of 1970, and activities under this section in the field of coal or other mine safety shall be carried out by the Secretary of the Interior in coordination with the Secretary [of Labor].³⁷

³⁷ 30 U.S.C. § 951(b) (1986).

Second, in contrast to the 1969 Coal Act, the Secretary of HEW's (HHS) authority through NIOSH to develop and revise health standards has been circumscribed. Reminiscent of the House Bill that preceded the OSH Act,³⁸ the Secretary of HEW's (HHS) role in the development of standards under the 1977 Mine Act is limited to submitting pertinent determinations and criteria to the Secretary of Labor. For instance, section 101 provides:

The Secretary of Health, Education, and Welfare *shall submit . . . determinations with respect to . . . toxic substances or harmful physical agents to the Secretary. Thereafter, the Secretary of Health, Education, and Welfare shall submit to the Secretary all pertinent criteria regarding any such substances determined to be toxic or any such harmful agents as such criteria are developed. Within 60 days after receiving any criteria in accordance with the preceding sentence relating to a toxic material or harmful physical agent which is not adequately covered by a mandatory health or safety standard promulgated under this section, the Secretary of the Interior shall either appoint an advisory committee to make recommendations with respect to a mandatory health or safety standard covering such material or agent in accordance with paragraph (1), or publish a proposed rule promulgating such a mandatory health or safety standard in accordance with paragraph (2), or shall publish his determination not to do so.*³⁹

As can be seen, the general grant of authority to the Secretary of HEW (HHS), and NIOSH as the Secretary's delegate, limits NIOSH to the submission of determinations and criteria from which the Secretary of Labor is supposed to decide whether and how a rule should be developed and promulgated. This delineation of distinct Secretarial roles in the rulemaking process is illustrative of the scheme of the 1977 Mine Act and conforms directly to the concept that the Secretary of HEW (HHS), in carrying out a scientific mandate through NIOSH, should be

³⁸ See notes 33-36 and accompanying text.

³⁹ § 101 conformed to the Senate Bill which "authorized the Secretary of HEW to prepare criteria documents, but health standards development responsibility was vested in the Secretary of Labor." S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 39 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1279, 1317 (1978).

free of the conflicts which arise in the process of developing standards.

It should be mentioned in passing that the Secretary of HEW (now HHS) through NIOSH retains important aspects of authority originally granted under the 1969 Coal Act. Thus, NIOSH, on behalf of the Secretary of HEW (HHS), retains authority originally created under the 1969 Coal Act to "establish . . . proposed mandatory health standards establishing maximum noise exposure levels for all underground coal mines."⁴⁰ In addition, the Secretary of HEW (HHS) has retained health related authority under sections 202, 203, 202(h), 204, and 205.⁴¹ The Secretary of HEW (HHS) has also retained a role in relation to emergency medical assistance under section 317(m).⁴² None of these original grants of authority, however, require NIOSH, as HEW's (HHS) delegate, to act inconsistently with the revised rulemaking procedures of the 1977 Mine Act under which the Secretary of HEW (HHS) no longer has independent authority to develop and revise standards.

Third, the 1977 Mine Act provides no basis for NIOSH to participate as an outside party in the Secretary of Labor's Mine Safety and Health Administration's rulemaking proceedings. Rather, NIOSH is intended to cooperate with the Secretary of Labor on an intra-governmental, interagency basis. Section 101 of the 1977 Act specifies a variety of necessary and optional participants in the process of producing standards. The actual and potential participants are named in the Act as follows:

1. "interested person[s]"
2. "representative[s] of any organization of employers"
3. "representative[s] of any organization of employees"
4. "nationally recognized standards-producing organization[s]"
5. "the Secretary of Health, Education, and Welfare"
6. "the National Institute for Occupational Safety and Health"
7. "State[s]"
8. "political subdivision[s]"
9. "advisory committee[s] appointed under section 102(c)."⁴³

⁴⁰ Federal Coal Mine Health and Safety Act of 1969, § 206, 30 U.S.C. § 846.

⁴¹ 30 U.S.C. § 842, § 843, § 842(h), § 844, and § 845.

⁴² 30 U.S.C. § 877(m).

⁴³ 30 U.S.C. § 811 (1986).

Section 101 of the 1977 Mine Act spells out specific roles for each of the Secretaries and NIOSH, who, along with advisory committees on occasion, are essentially the prime movers in the standard development process. Section 101 describes when and how each becomes involved. For example, with regard to the Secretary of Labor's interaction with the Secretary of HEW (HHS) and with advisory committees, section 101(a)(1) provides:

The Secretary [of Labor] shall provide . . . an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstration and experiments.⁴⁴

Section 101(a) also describes a specific role for NIOSH with respect to recommending and providing criteria upon which the Secretary of Labor might formulate new standards. Section 101(a)(1) provides, in pertinent part, as follows:

When the Secretary [of Labor] receives a recommendation, accompanied by appropriate criteria, from the National Institute of Occupational Safety and Health that a rule be promulgated, modified, or revoked, the Secretary must . . . refer such recommendation to an advisory committee . . . or publish such as a proposed rule . . . or publish . . . his determination not to do so, and his reasons therefore.⁴⁵

Once a proposed standard is published by the Secretary of Labor on the basis of NIOSH recommendations, then "*inter-*

⁴⁴ 30 U.S.C. § 811(a)(1).

⁴⁵ 30 U.S.C. § 811(a). The legislative history of the 1977 Mine Act more fully explains the role of the Secretary of HEW acting through NIOSH in the rulemaking process. The House Conferees stated:

The conference substitute also addresses the problems associated with existing procedures for promulgating health standards. Unlike the Coal Act, the conference substitute vests the authority to develop all safety and health standards in the Secretary of Labor.

. . . .

The conferees recognize the health expertise of the Secretary of HEW and the conference substitute thereby authorizes him, through NIOSH, to prepare criteria documents to be used in the development of health standards.

Conference Report on S. 717, 95th Cong., 2d Sess. (1977), 123 Cong. Rec. 35,411 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1359-60 (1978).

ested persons' are given a "period of 30 days . . . to submit written data or comments on the proposed rule."⁴⁶ There is no indication anywhere in the 1977 Mine Act that NIOSH is also authorized to participate in rulemaking as an "interested person."

The 1977 Mine Act defines "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization."⁴⁷ Evidently, NIOSH has taken the position that it falls within the category of an "interested person" for purposes of public comment on proposed standards. However, as has been observed by the Federal Mine Safety and Health Review Commission: "Absent from the definition of 'person' [in section 3(f)] is any reference to the government or any governmental entity."⁴⁸ The Commission elaborated as follows:

Where Congress has specifically defined the term "person" so as to avoid including the government and its agencies within that definition, and has expressly included them in other definitions, it is clear that Congress has purposefully legislated into the Act a distinction between a "person" and the government . . . and that neither may be subsumed into the other.⁴⁹

Moreover, there is not the faintest suggestion in the 1977 Mine Act that NIOSH is intended to relinquish its important, specifically delineated, intra-governmental role in favor of publicly advocating a position as might be done by an interested party. In particular, there is nothing whatsoever to suggest that an adversarial or public commenter role was ever envisioned for NIOSH in MSHA rulemaking proceedings. On the contrary, MSHA and NIOSH were clearly intended to cooperate on an intra-governmental basis. In this connection, internal, cooperative, intra-executive branch consultations between federal agencies are favored as a matter of public policy.⁵⁰

⁴⁶ 30 U.S.C. § 811(a)(2) (emphasis added).

⁴⁷ Section 3(f), 30 U.S.C. § 803(f).

⁴⁸ *Wagner v. Pittston Coal Group*, 12 FMSHRC 1178, 1184 (June, 1990).

⁴⁹ *Id.* at 1185.

⁵⁰ See *Sierra Club v. Costle*, 657 F.2d 298, 404-408 (D.C. Cir. 1981) ("[U]nless expressly forbidden by Congress, such intra-executive contacts may take place, both during and after the public comment. . . . [S]ingle mission agencies do not always have the answers to complex regulatory problems . . . and [they need] to know the arguments and ideas of policy makers in other agencies . . .").

Fourth, it is also inappropriate for NIOSH to publicly comment on a proposed standard at the behest of a non-governmental third party. The 1977 Mine Act specifies only one procedure for representatives of labor, or management, to invoke NIOSH's involvement. The procedure relates to specific conditions that may exist at a specific mine and in no way authorizes an extra-governmental role for NIOSH in MSHA rulemaking.⁵¹

D. MSHA-NIOSH Memorandum of Understanding

Shortly after the 1977 Mine Act became effective, MSHA, as the Secretary of Labor's rulemaking and enforcement agency, and NIOSH, as the scientific institute of the Secretary of Health and Human Services (formerly HEW), entered into a Memorandum of Understanding. This Memorandum clearly delineates the respective duties and responsibilities of the two agencies under the 1977 Mine Act. Under this agreement, there is a provision entitled "Development of Mine Health Standards." It provides:

1. MSHA shall advise NIOSH, as far in advance as possible, of the schedule of the rulemaking process for developing standards for toxic materials and harmful physical agents.
2. NIOSH shall appoint one or more coordinators to serve as liaison for NIOSH technical assistance to MSHA in the preparation and review of standards prior to and during the rulemaking process. The coordinator shall be available to address technical health-related issues raised during the rulemaking process.

⁵¹ Specifically, § 501(a)(11) provides:

The Secretary of Interior and the Secretary of Health, Education, and Welfare, as appropriate, shall conduct such studies, research, experiments, and demonstrations as may be appropriate—

....

to determine, upon the written request by an operator or authorized representative of miners, specifying with reasonable particularity the grounds upon which such request is made, whether any substance normally found in a coal or other mine has potentially toxic effects in the concentrations normally found in the coal or other mine or whether any physical agents or equipment found or used in a coal or other mine has potentially hazardous effects, and shall submit such determinations to both the operators and miners as soon as possible.

30 U.S.C. § 951(a)(11). The request must satisfy the requirements set out in 42 C.F.R. § 85.5(a) (1990).

3. NIOSH shall provide, where possible, expert technical witnesses in support of MSHA in public meetings, administrative hearings, court litigations and other legal actions involving toxic materials and harmful physical agents.

It is to be specifically noted that there is nothing in the Memorandum of Understanding which would bring NIOSH into a direct public role in the development of mandatory standards. Rather, NIOSH's role is to "support" MSHA through interagency cooperation "on technical health-related issues." The fact that the interagency agreement does not delegate to NIOSH any responsibility to participate as a third party commentator is entirely consistent with the Institute's role as an impartial scientific arm of the Secretary of Health and Human Services.

III. CONCLUSION

Under the Federal Mine Safety and Health Act of 1977, NIOSH is to pursue scientific research and investigation aimed at determining appropriate recommendations for preventing undue human exposure to unhealthful environmental conditions in mines. Activities that would take NIOSH beyond this scientific scope must be scrutinized carefully lest they contravene the Institute's appropriate role under the 1977 Mine Act.

