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U.S. Department of Labor – MSHA
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November 25, 2002

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Standards, Regs,
and Variances

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MSHA
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RE: Comments on the Advance Notice of Proposed Rulemaking on Diesel Particulate Matter and Underground Metal and Nonmetal Mine Workers

Madame and Sir:

We strongly oppose the U.S. Department of Labor (DOL) and the Mine Safety and Health Administration's (MSHA) actions over the previous year to undermine the final rule to protect underground metal and nonmetal miners from diesel particulate matter (DPM). The Agency's notice in the September 25, 2002 Federal Register was a cleverly-crafted attempt to abandon a protective health standard. In plain language, MSHA announced that the exposure limits established in the January 2001 final rule will not be enforced, and are now the subject of a new rulemaking process. The DOL has no legal basis for failing to enforce all the provisions of the DPM health standard. Sadly, but predictably, this Administration chose to safeguard the interests of the mining industry, rather than the health of workers.

Chronic exposure to DPM is hazardous to human health. The DPM concentrations in underground mines in the U.S. are extreme and workers exposed to these levels face numerous serious health risks. The evidence presented in MSHA's quantitative risk assessment, published with the final rule (Federal Register 66(13)) is overwhelming: 47 epidemiological studies with 41 showing some degree of association between occupational exposure to DPM and lung cancer. The estimate of excess lung cancer deaths is staggering (i.e., it ranges from 15 deaths per 1000 workers up to 830 deaths per 1000 workers.)

Moreover, the evidence linking exposure to particulate air pollution and/or diesel particulate matter with lung cancer, cardiovascular and cardiopulmonary effects are mounting. In the time period following the completion of MSHA's quantitative risk assessment, additional studies and reports have been published which further support the need for a health standard to protect underground miners from diesel particulate matter. These include:

The Report on Carcinogens prepared by the National Toxicology Program of the Centers for Disease Control and Prevention (May 2000) lists diesel particulate matter as a mixture that is "reasonably anticipated to be a human carcinogen."

A study showing that each 10 ug/m³ elevation in fine particulate pollution was associated with approximately 4%, 6% and 8% increased risk of all-cause, cardio-pulmonary, and lung cancer mortality, respectively. (Pope, Burnett, et al, "Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution, Journal of the American Medical Association (March 6, 2002) 287(9): 1132-1141.

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The “Health Assessment Document for Diesel Engine Exhaust,” published by the U.S. Environmental Protection Agency (May 2002) concluded that: “. . .long-term (i.e., chronic) inhalation exposure [to diesel engine exhaust] is likely to pose a lung cancer hazard to humans, as well as damage the lung in other ways.. .”

The International Agency for Research on Cancer (IARC) describes diesel engine exhaust as a “high priority” for re-evaluation in 2003.¹ IARC indicates that a re-evaluation is necessary because of new epidemiological data that was not available in 1989 when the Group 2A designation was made.

Underground metal and nonmetal miners need a protective health standard that is enforced by MSHA. The Agency presented no substantive evidence in its recent Federal Register notices² that justify any further delay in enforcing this rule as it stands.

The Advanced Notice of Proposed Rulemaking (ANPRM) signals other detrimental policy shifts by DOL and MSHA that will have significant legal and occupational health ramifications. These include:

- (1) The ANPRM promotes a change that would permit mine operators to use personal protective equipment instead of engineering controls. MSHA promotes this change in the interest of “consistency,” oddly boasting that it permits the use the PPE with respect to other hazards. Such policies are not to MSHA’s credit and are certainly not appropriate with respect to a carcinogen. MSHA correctly noted in its January 2001 final rule that there is universal agreement in the fields of occupational medicine and industrial hygiene that engineering controls are a first priority for controlling workplace hazards, and personal protective equipment is a last resort.³ The language contained in the final rule, which correctly prohibits the use of PPE to comply with the concentration limits, is appropriate. No change should be made to this provision.
- (2) The ANPRM promotes a change in the surrogate measure for DPM from total carbon (TC) to elemental carbon (EC). In addition to the illegal delay this proposed switch has caused, there is no evidence in the rulemaking record to support this change. Before this switch can occur, NIOSH must provide a clear statement that EC can be an accurate surrogate for DPM over the full range of mining conditions. They must provide an appropriate mathematical conversion factor of EC to DPM and demonstrate that it meets the NIOSH Accuracy Criteria. This evidence, which MSHA previously stated that it lacked, must meet the Department’s and MSHA’s standards for Information Quality, and be subject to public notice and comment. Short of this, MSHA should use the TC surrogate that was lawfully promulgated through the multi-year rulemaking process.

¹ Diesel engine exhaust is currently listed as a Group 2A agent (i.e., “agent is probably carcinogenic to humans.”) The next designation is Group 1 agents (i.e., “is carcinogenic to humans.”)

² Vol167, No 186 (September 25,2002) and Vol167, No 138 (July 18,2002)

³ Soule, R.D., “Industrial Hygiene Engineering Controls,” in Patty’s Industrial Hygiene and Toxicology, Vol 111, L.J. Cralley and L.V. Cralley (eds), New York, John Wiley and Sons, Inc., 1979.

- (3) The ANPRM recommends a change that would allow individual mine operators to make claims of infeasibility and receive approval from MSHA's local and district offices to defer indefinitely compliance with the rule. We strongly object to this change. There is no requirement in the Federal Mine Safety and Health Act that a safety or health standard be either economically or technologically feasible for each and every mine operator. Making this change would have significant adverse implications for safety and health standards at both MSHA and OSHA. It is offensive that MSHA is cavalierly proposing this change to the long-settled definition of feasibility. (*American Textile Manufacturers Institute v. Donovan (OSHA CottonDust), 452 U.S. 490, 101 S.Ct. 2478 (1981)*)
- (4) The ANPRM suggests that MSHA will be re-examining the technological and economic feasibility of the rule. The accuracy of MSHA's Regulatory Economic Analysis was erroneously challenged by the mining industry during the rulemaking process. The data used to support the industry's allegations failed to meet the most basic economic principles and assumptions. In the end, there was no merit to their claims. If MSHA proceeds with this unnecessary exercise, the Agency must be careful not to accept anecdotal information or data that does not meet MSHA's Information Quality Guidelines. The preamble to a proposed rule must indicate the source of the information, the Agency's assessment of the validity of the information or its plans to undertake a prompt assessment of the validity of the information, and the extent to which the Agency believes the information impacts application of the rule to particular mines or mining conditions. In light of these requirements and the fact that MSHA presented no evidence whatsoever to justify a reconsideration of feasibility issues, this action serves only one purpose: to further delay enforcement of the concentration limit and other provisions of the final rule. The health risks faced by miners, which is amplified by MSHA's proposal, eclipses the dubious benefit of any economic re-analysis.
- (5) The ANPRM asserts that MSHA's actions "should not decrease protection of miners." The Agency fails to provide *any* data, however, demonstrating that its scaled-back rule and lack of enforcement is providing an environment for underground miners that will not exceed 400 ug/m³ of DPM. In order for this "interim" plan to provide equivalent protection, miners' exposures to DPM must be reduced to the concentration limit that should have taken effect in July 2001.

It is time for MSHA to enforce the legally promulgated DPM health standard. The health of miners is more important than acquiescing to the mine operators' unsubstantiated claims. If the industry wants to pursue its lawsuit, let them bring their evidence to the U.S. Court of Appeals. Despite your recent actions, we expect DOL and MSHA to vigorously defend the DPM health standard in any Court proceeding.

Sincerely, (See attached)

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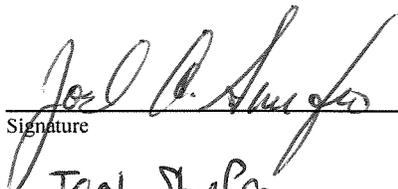
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November 25, 2002



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