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[redacted]

(Name removed)

Mr. Jay Mattos
Deputy Director, Program Evaluation and Information Resources
Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, VA 22209-3939

Re: Appeal of Denial to Expedite Corrections to the MSHA Diesel Exhaust Rule

Dear Mr. Mattos:

This is an appeal of the Mine Safety and Health Administration's ("MSHA") denial of Petitioner MARG Diesel Litigation Coalition's ("MARG" or "Petitioner") Petition requesting MSHA's expedited correction of information used in developing the June 6, 2005 and January 19, 2001 Diesel Particulate Matter Final Rules (70 Fed. Reg. 32868-32968 and 66 Fed. Reg. 5706-5755) (collectively, the "DPM Final Rule"). The MARG Petition is incorporated herein.

MSHA violated the Data Quality Act ("Data Quality Act" or "DQA"), as well as Office of Management and Budget ("OMB") and Department of Labor ("DOL") guidelines, first by relying on faulty data to support a flawed DPM Final Rule and Final Limit, and second by ignoring established procedures for handling MARG's Petition to correct these gross errors. MARG's Petition to correct this data is critical to bringing DOL and MSHA's Final Rule into compliance with these statutory and regulatory requirements. Failure to do so will perpetuate the use of bad science and have a crippling effect on the impacted industries.

BACKGROUND

On August 10, 2005, MARG filed a Petition for Expedited Data Quality Act Corrections (the "Petition") pursuant to the Data Quality Act;[1] the OMB Information Quality Guidelines (the "OMB Guidelines"), 67 Fed. Reg. 8452 (Feb. 22, 2002); and the Department of Labor's

[1] Section 515, Treasury and General Government Appropriations Act for Fiscal Year 2001; P.L. 106-554; see 44 U.S.C. Sec. 3516 (other provisions).

"Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information" (the "DOL Guidelines"), *available at* http://www.dol.gov/cio/programs/InfoGuidelines/informationqualitytext.htm (Oct. 1, 2002).

Specifically, MARG urged expedited review, correction of the record, and the grant of a concurrent Petition for An Emergency Stay, pending withdrawal of the total carbon ("TC") Final Limit on diesel particulate exhaust published in 2001 and originally scheduled to take effect January 20, 2006. This DPM Final Limit – 160 micrograms of total carbon – is based on faulty data and is completely unsupported by sound science. It provides neither health nor safety benefits; moreover, regulated parties cannot feasibly measure or comply with it. In fact, MSHA has acknowledged serious errors in its analyses, particularly it reliance on total carbon as a surrogate for diesel exhaust. MSHA published rule amendments on June 6, 2005, adopting a replacement "Interim Limit" based on elemental carbon, a new diesel exhaust surrogate.[2] However, even after acknowledging that total carbon cannot be measured accurately, MSHA failed to correct or withdraw the January 20, 2006, 160 mcg total carbon Final Limit.

MSHA rejected MARG's Petition arbitrarily, without any substantive analysis or explanation. It replied simply, and without explanation or analysis, that "the information quality issues raised in your complaint should be handled through rulemaking procedures." *See* Ex. 1, DOL Letter from Fesak to Chajet – January 3, 2006. MSHA failed to address the merits of the Petition; concluded that the Petition would be handled better as part of the Agency's rulemaking process, contrary to DOL's own DQA Guidelines; and denied MARG an opportunity to make an effective appeal to an independent, unbiased party outside the Agency. For the reasons below, and those set forth in great detail in the original Petition, we request that MSHA withdraw its DPM Final Limit and make the corrections requested in the MARG Petition.

[2] As MSHA is well aware, the history of the DPM Final Limit is particularly confusing, and there has been much concern regarding feasibility issues and industry compliance. Initially, MSHA published a final rule in January 2001, establishing interim and final limits for DPM exhaust. Industry groups subsequently challenged the rule in U.S. District Court. MSHA issued a new final rule on June 6, 2005 that, among other things, revised the DPM Interim Limit. On September 7, 2005, MSHA proposed another rule, yet again seeking to phase in the DPM Final Limit over five years "because [MSHA was] concerned that there may be feasibility issues for some mines to meet the limit." 70 Fed. Reg. 55019 (Sept. 19, 2005). MSHA also expressed its intent to "initiate a separate rulemaking to convert the final DPM limit from a total carbon limit to an elemental carbon limit." *Id.* MARG's Petition specifically challenged the June 6, 2005 DPM Final Rule. For reasons discussed below, MSHA is required to address the substantive merits of MARG's Petition and to make the necessary corrections.

ARGUMENT

Under the Data Quality Act and OMB and DOL Guidelines, MSHA's failure to consider MARG's Petition must be overturned; MARG's Petition to correct deficient data and analyses in the DPM Final Rule should be granted; and MSHA's Final Limit should be withdrawn. Federal law requires these results because: (1) the Data Quality Act and its implementing guidelines grant MARG the right to petition for correction of deficient data independently of any rulemaking process, particularly given that heightened scrutiny applies to the "influential information" at issue here; (2) MSHA has utterly failed to consider MARG's Petition in any way, contrary to law, even though the DPM Final Rule amply meets the criteria for a case of "unusual circumstances" requiring review under the Guidelines; and (3) the DPM Final Rule itself, and the data and analyses underlying it, violate the DQA's standards for quality information, as detailed in MARG's Petition. Only by actually considering and granting MARG's Petition can MSHA and DOL come into compliance with these critical statutory and regulatory mandates. Until then, they will continue to perpetuate the use of bad data, resulting in faulty, though important, policy decisions.

THE DATA QUALITY ACT REQUIRES REVIEW OF MARG'S CHALLENGE TO THE DPM FINAL LIMIT.

A. The DQA requires that MSHA ensure and maximize the "quality, objectivity, utility, and integrity" of information it disseminates, including information disseminated in rulemaking.

MARG's Petition is entitled to full consideration under the DQA because it challenges the "utility," "integrity," and "objectivity" of data and analysis underlying the DPM Final Limit. The DQA and OMB Information Quality Guidelines establish information quality standards and require agencies to establish procedures for correcting sub-standard information. They require that MSHA disseminate only "quality" information, which is marked by "objectivity, utility and integrity." *See* 66 Fed. Reg. 49724 (Sept. 28, 2001). "Utility" refers to the usefulness of the information for its intended users; *i.e.*, whether it is sufficiently transparent. *Id.* OMB's "integrity" standard is meant to ensure that information is not compromised through corruption or falsification. *Id.* "Objectivity" involves a focus on ensuring accurate, reliable, and unbiased information. *Id.* Particularly where scientific, financial, or statistical information is presented, the OMB Guidelines require that data be the product of sound research and analytical methods. MARG has challenged the DPM Final Limit on all of these grounds.

Moreover, there is no question that these standards apply to a rulemaking, such as the DPM Final Rule. "Dissemination" means the "agency initiated or sponsored distribution of information to the public." *Id.* at 49725. OMB itself has said in no uncertain terms that

information used in rulemaking is "disseminated" for the purposes of the DQA and therefore is subject to DQA requirements and procedures. *See* September 20, 2001 Mem. from John D. Graham, Administrator, OMB, to President's Mgt. Council, *available at* http://www.whitehouse.gov/omb/inforeg/oira_review-process.html (last accessed Feb. 16, 2006) ("This law affects the regulatory development process because Federal regulations may be based on the findings of scientific or other research studies disseminated by a Federal agency in the course of rulemaking.") The OMB Guidelines similarly require agencies, where possible, to incorporate Data Quality Act standards and procedures into their existing processes, such as rulemaking.

B. Even stricter quality standards apply to MSHA's DPM Final Rule because it constitutes "influential" information.

MSHA's DPM Final Rule faces even greater than normal scrutiny under DQA information quality standards because it constitutes "influential" information, as described in the OMB and DOL guidelines. "Influential" information is scientific, financial, or statistical information, the dissemination of which "the agency can reasonably determine . . . will have or does have a clear and substantial impact on important public policies or important private sector decisions." *Id.* at 49725. When disseminating influential information in the context of analyzing safety, health, or environmental risks, agencies must take the additional step of applying the quality principles which Congress applied pursuant to the Safe Drinking Water Act Amendments of 1996 (42 U.S.C. 300g-1(b)(3)(A) & (B)) ("SDWA"). *Id.* at 49719.

The information underlying MSHA's DPM Final Rule is thus subject to this heightened standard because it is scientific and statistical information employed in considering safety, health, and environmental risks and industry economic and technical feasibility. It has a "substantial impact" on the important decisions represented by the DPM Final Rule, including the first use by any agency in the United States of limits on elemental carbon to regulate diesel exhaust. MSHA is therefore obligated to apply the higher standards of data quality enunciated in the Safe Drinking Water Act, *i.e.*, it must use "(i) the best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data)." 42 U.S.C. 300g-1(b)(3)(A). *Id.* As detailed below and in MARG's Petition, MSHA's Final Rule fails to meet these strict standards.

MSHA FAILED TO COMPLY WITH REQUIRED DQA PROCEDURES WHEN IT FAILED TO CONSIDER MARG'S PETITION.

A. Contrary to the DQA and prevailing guidelines, MSHA completely failed to consider MARG's properly submitted Petition.

Although MARG filed a proper petition under the DQA and subsequent guidelines, MSHA ignored the statute and guidelines when it completely failed to consider MARG's Petition. The DOL Guidelines establish complaint procedures by which an "affected" party such as MARG can petition for the correction of information that fails to meet DQA standards. *See* DOL Guidelines. Specifically, complainants are required to, *inter alia*, identify the information in question; indicate how they are affected by the factual errors; carefully describe the nature of the complaint, including an explanation of why they believe the information does not comply with OMB, Departmental, or agency-specific guidelines; and describe the change requested and the reason why the agency should make the change. MARG's Petition satisfied all of these requirements. As acknowledged in MSHA's own letter denying the Petition, MARG set forth in great detail specific challenges to the DPM Final Limit, the agency's "Estimator" program and "31-Mine Study," various analytical and sampling techniques, economic and technological feasibility analyses, and risk assessment.

MSHA has, nonetheless, utterly failed to consider this proper Petition. Instead, it has attempted to evade its statutory and regulatory responsibilities by strangely concluding – without any explanation or analysis whatsoever – that "the information quality issues raised in your complaint should be handled through rulemaking procedures." *See* Ex. 1, DOL Letter from Fesak to Chajet. This breach of DQA procedure is particularly egregious given how "influential" this information is and thus how stringent an information quality standard applies.

MARG is entitled under the DQA and its implementing guidelines to have each alleged factual error addressed by the Agency. It does not matter whether these errors *could* otherwise be addressed through the rulemaking process. Since MARG has invoked the DQA, DOL has a congressional mandate to address them under the DQA. Indeed, the DQA exists to ensure that the ongoing rulemaking process is based on valid data inputs to prevent bad regulations from ever being made. Particularly here, where MSHA initiated a new rulemaking because of admitted significant problems with the data underlying the existing Final Rule, MARG's DQA Petition must be considered fully and properly under the controlling DQA standards and process to prevent further misuse of unreliable data. DOL has no authority to effectively ignore this DQA Petition and summarily remove it to an entirely different administrative regime, *i.e.*, rulemaking.

B. MSHA violated the DQA, and OMB and DOL Guidelines, by failing to respond to MARG's Petition in a timely manner, prejudicing MARG and perpetuating the use of faulty data in important decision making processes.

Notably, the OMB Guidelines were amended to require that agencies respond to information quality petitions in a timely manner, acknowledging that any administrative appeals process must have firm deadlines in order to be meaningful. The OMB Guidelines state, "Agencies shall specify appropriate time periods for agency decisions on whether and how to correct the information, and agencies shall notify the affected persons of the corrections made." 67 Fed. Reg. at 8459. Moreover, under the DOL Guidelines agencies should "respond to complaints and appeals within sixty (60) days of their receipt, unless they deem a response within this time period to be impracticable. If an agency believes that more time is required…it should estimate the time needed and notify the complainant within the 60-day period of the reasons for the delay and the time that it estimates that a decision will be reached." DOL Guidelines.

MARG submitted its petition to MSHA on August 10, 2005, yet MSHA did not respond in any way until more than 60 days later, and even then it only indicated that it required additional time to consider the Petition, promising a substantive response by November 25, 2005. *See* Ex. 2, DOL Letter from Mattos to Chajet, October 26, 2005.[3] MSHA missed its own deadline, as well, finally responding to MARG on January 3, 2006, nearly five months after the Petition was submitted. It is unclear, however, what MSHA was doing during these many months since even by this late date MSHA had failed to consider MARG's DQA Petition in any way, choosing instead to "consider" these gross factual errors in the context of agency rulemaking. While MSHA promises the DPM Final Rule is "expected to be published by May 2006," MSHA's track record of delays and severe DQA violations makes this promise highly suspect.

The DQA requires prompt correction of faulty science and inaccurate data held out by federal agencies to the public as true. MSHA's failure to respond in a timely manner to MARG's request severely prejudices MARG's interests, as well as the interests of other stakeholders who invariably rely on MSHA's faulty information to make important policy decisions. These decisions have far-reaching impact on the health and safety of mineworkers and the economic viability of an entire industry.

[3] "Due to the breadth of your request, we are unable to respond in the 60 days referred to in the Department of Labor's 'Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Department of Labor.' In accordance with the Guidelines, I am writing to inform you that a decision on how to respond to your request is currently scheduled to be completed by November 25, 2005."

C. MARG's DQA Petition must be considered independently of any MSHA rulemaking.

Pursuant to the DQA, as well as the OMB and DOL Guidelines, MSHA is required to provide a complete, timely response to factual errors contained in any information disseminated by the federal government, something it completely failed to do here. *See* 67 Fed. Reg. at 8459 ("agencies shall establish administrative mechanisms allowing affected persons to seek and obtain where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines"). Rulemaking is the quintessential mechanism for an agency to disseminate information, and rulemaking is the venue where information quality is most important.

DQA review and agency rulemaking must work hand-in-hand to ensure that decision makers have accurate information upon which to base policy decisions. DQA standards ensure that information disseminated to the public is transparent, reproducible, and accurate and that rulemaking procedures addressing broader policy objectives use accurate data. As a result, Congress established the DQA as a mechanism separate and apart from the rulemaking process to require agencies to respond to and correct fundamental data quality issues quickly enough to protect the information used in rulemaking. *See* James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 Admin. L. Rev. 835, 841 (2002). Otherwise, rulemaking dockets could easily remain open for years without final resolution and would continue to use erroneous information for extended periods of time, while faulty information disseminated by a government agency would continue to hold the false air of authority.

Here, MSHA disseminated a significant amount of inaccurate information as part of its DPM Final Rule with a clear and substantial impact on the Agency's DPM exposure policy decisions, widely affecting the U.S. economy. Even standing on its own, outside the context of occupational exposure limits, MSHA's dissemination of this deficient data and analysis will adversely affect the domestic mining industry, which is already faced with competitive challenges by unregulated foreign producers, threatening the U.S. supply of the metals and minerals so critical to our nation's economy and defense. With so much at stake, most notably jobs and worker safety, the DQA rightly requires government decision makers to rely upon only accurate factual data in rulemaking.

D. Because the DPM Final Rule presents "unusual circumstances," DOL's own DQA Guidelines preclude MSHA from ignoring MARG's Petition and addressing DQA violations only through rulemaking.

DOL's Guidelines implementing the DQA specifically require that MARG's Petition be considered prior to MSHA's final rulemaking because the DPM Final Rule presents "unusual circumstances." After the draft DOL Guidelines contemplated handling DQA complaints in rulemaking (when challenging data involved in the rulemaking), significantly the final DOL Guidelines struck this language.[4] Instead, the final DOL Guidelines require that complaints regarding data involved in a rulemaking must be considered prior to final agency action on the rulemaking when, as here, "an earlier response would not unduly delay issuance of the agency action or information product and the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does not resolve the complaint prior to the final agency action." *Id.* The DOL Guidelines also direct agencies to consider: (1) the impact of the information on the complainant; (2) the extent to which the complainant's concerns have been rendered moot as a result of actions taken by the agency; (3) the mechanisms available under the Administrative Procedure Act or other laws to resolve complainant's concerns; and (4) the public interest to be served in pursuing further action on the complaint.

The DPM Final Rule satisfies all of these considerations, requiring DOL to substantively and fully consider MARG's Petition apart from, and prior to, final agency action on rulemaking. First, MARG and its members will suffer actual, irreparable harm from the agency's dissemination of flawed information. MSHA has acknowledged that its DPM Final Limit is not feasible because it cannot be measured accurately. The Agency has effectively ignored its own Federal Register admissions and testimony at recent public hearings, where mine operator after mine operator testified that the DPM Final Rule creates substantial harms and costs, lacks feasibility, and has no scientific or engineering justification. *See* Hearing Transcripts, Hearing On Proposed Rule for Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Mines, Salt Lake City, Utah, Jan. 9, 2006, *available at* http://www.msha.gov/regs/comments/05-17802/hearings.asp (last accessed Feb. 16. 2006) (testimony of General Chemical, Stillwater Mining and other MARG members describing in detail the irreparable harm they suffer by attempting to comply with MSHA rules, including evacuation of miners due to gas emissions caused by exhaust control equipment failures, "burn through" of filters, and potential underground fires).

[4] DOL's draft guidelines previously stated, "Concerns regarding information in a rulemaking must be presented in the rulemaking in accordance with the rulemaking procedures."

Second, MARG filed its Petition in response to a completed Final Rule; *i.e.*, MARG sought correction of information MSHA disseminated as part of the June 6, 2005 DPM Final Rule. Though MSHA subsequently initiated rulemaking to revise the DPM Final Limit and phase it in over a period of several years, the Final Limit remains in existing regulations, currently scheduled to go into effect on May 20, 2005. Yet, it is still not feasible, and most significantly, it is still based on the faulty and inaccurate information challenged in MARG's DQA Petition. Avoidance of DQA review is not permitted simply because MSHA chose to initiate rulemaking; particularly since DOL rulemaking dockets have remained open for years without final resolution, and the proposed rulemaking suffers from the very DQA defects that MARG's Petition seeks to correct. The ongoing harm of denying immediate consideration of MARG's DQA Petition is clear. MSHA's obligation under the DQA to correct bad data is unchanged and even heightened in order to ensure that its current rulemaking utilizes only DQA-compliant information.

Third, MSHA has failed to resolve these information quality issues consistent with the APA and the feasibility and safety requirements of the Federal Mine Safety and Health Act (the "Mine Act"). *See* 30 U.S.C. § 811. MSHA has acted arbitrarily and with total disregard for its statutorily-mandated review procedures. The DPM Final Limit violates the Mine Act on at least two grounds, including the feasibility standards of Sec. 101(a)(6), and the safety provisions of Sec. 101(a)(9).[5] MSHA already has declared that its total carbon limits cannot be measured accurately and that there is insufficient evidence of the feasibility of compliance with its Final Limit – two critical admissions that DQA corrections are needed to its earlier data, analysis and conclusions to the contrary. *See, e.g.*, 70 Fed. Reg. 32868, *et seq.*

A rule that does not permit compliance measurements and for which industry compliance is not feasible, provides no safety and health protection whatsoever, and unnecessarily consumes industry and government resources. Moreover, the outcome of MARG's DQA challenge has potential ramifications for the lawsuits pending before the U.S. Circuit Court of Appeals for the District of Columbia Circuit and therefore could have serious consequences affecting all parties' legal rights.

Fourth, DOL's immediate consideration of MARG's Petition will advance the public's interest in due process and the dissemination of accurate, transparent information for government decision-making purposes. MARG is entitled to have its substantive DQA concerns addressed fully and promptly before the Agency moves forward; any further delay of MARG's Petition effectively denies MARG its right to meaningful review. Moreover, the DOL Guidelines provide for review of MARG's DQA decision by an independent third party, *i.e.*, an agency

[5] *See* 30 U.S.C. § 811.

official who neither responded to MARG's initial Petition nor is from the same office that prepared the faulty information under challenge. By attempting to include MARG's DQA Petition in rulemaking, MSHA has violated this mandate by referring MARG's complaint back to the same office which promulgated the faulty data in the first instance.

Lastly, it is indisputable that MSHA has completely ignored the information quality standards and procedures enunciated in the DOL Guidelines requiring MSHA's explicit consideration of the unusual circumstances surrounding the DPM Final Rule and MARG's Petition. Instead, MSHA essentially ignores MARG's Petition, failing to provide any determination, explanation, or analysis to prove that the Petition is not entitled to consideration prior to the Agency's next rulemaking. If the unusual circumstances contemplated by the DOL Guidelines do not exist here, they will never exist. MSHA's failure to review and grant MARG's Petition eliminates the right to substantive review set forth by DOL's Guidelines and violates OMB and DQA mandates.[6]

III. MSHA's FINAL DPM RULE VIOLATES THE DATA QUALITY ACT.

As MARG detailed in its Petition, MSHA's conclusions and policy determinations in the DPM Final Rule are corrupted and unreliable because MSHA based them on unscientific methodology and unreliable data, in violation of the Data Quality Act and DOL and OMB Guidelines.

If nothing else, the Data Quality Act and its implementing guidelines prohibit the use of such faulty data and procedures in rulemaking in order to ensure that when an agency makes its policy determinations it is relying upon credible and accurate information. Such deficient information and analysis permeate the DPM Final Rule, especially regarding risk assessment information and analyses, and technological and economic feasibility. These defects violate the DQA, especially given that MSHA is obligated to apply the Safe Drinking Water Act's heightened standards requiring using "(i) the best available peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data)." 42 U.S.C. at § 300g-1(b)(3)(A).

The DPM Final Rule is heavily dependent on MSHA's risk assessment information analyses, which fail to meet these Data Quality Act and scientific standards, including that data be reproducible, developed through independent peer review, transparent, and free from bias and

[6] Notably, to our knowledge, MSHA has never before considered a DQA petition under the DOL Guidelines, involving an affected person challenging data presented in a final rule.

conflicts of interest. Flaunting these established standards, MSHA supported its total carbon Final Limit with studies that were unrelated to total carbon, or diesel exhaust, and were faulty or not independently peer-reviewed. Worse yet, MSHA transferred its risk analysis and conclusions to a different substance to be regulated, elemental carbon, without undertaking any analysis of the risks associated with EC or its new limits, their benefits, or their feasibility.

Moreover, projections by MSHA's "Estimator" on the feasibility of MSHA's proposed limits were not subjected to independent peer review. *See* 68 Fed. Reg. at 48703 (Aug. 14, 2003); *See also* 70 Fed. Reg. at 32920 ("commenters' observation that the Estimator fails to account for imperfect mixing between DPM emissions and ventilating air flows is a valid criticism"). MSHA's Final Limit was based on the now repudiated and withdrawn American Conference of Governmental Industrial Hygienists ("ACGIH") Threshold Limit Value ("TLV") for DPM. The ACGIH and thus the MSHA standards were the result of an illegal conflict of interest, whereby Mr. Thomas Tomb, former chairman of MSHA's DPM drafting committee, was also the primary author of the ACGIH TLV. MSHA's reliance on the TLV as an external support for its new standard is thus phony since it was an MSHA official who primarily authored the ACGIH TLV. *See* Transcript of Mr. Thomas Tomb Deposition, May 23, 2001, admitted to the record of the MSHA rulemaking.

Likewise, in the 31-Mine Study MSHA relies upon, MSHA had to void 25% of the samples it collected generally and all of the samples collected from one mine in particular. *See* 70 Fed. Reg. 32890 (Jun. 6, 2005). The study's measurements did not accurately reflect routine mining conditions in the mines studied, nor did MSHA use an adequate sample size to extrapolate findings beyond the mines that were studied. *See* 68 Fed. Reg. 48678. The study did not include personal samples of workers taken inside of equipment cabs even though these cab environments are part of the workplace. *See id.* In addition, mines were not randomly selected by MSHA for the study in accordance with proper statistical methodology. *See id.* MSHA's rulemaking deals uniformly with mines, even though MSHA's own study recognizes the wild variation between mine environments based on the many differences in diesel equipment, mineral configurations and underground conditions. *See* 70 Fed. Reg. at 32891.

MSHA admits that its adopted limits are not based on scientific evidence supporting the health risks of the total carbon or elemental carbon levels adopted. *See id.* at 32889. MSHA's standard is based on one, single sample of elemental carbon exposure, which is not an accurate representation of any health risk or diesel exhaust exposure, which includes all of the constituents of exhaust, not EC or TC alone. Scientific literature indicates that lung cancer risks are not suspected for exposure to the elemental carbon present in DPM. *See* National Toxicology Program, *Tenth Report on Carcinogens* (U.S. Department of Health and Human Services, 2003), and *Comments of Dr. Jonathan Borak*, Yale Medical School, in the rulemaking record. *See also* National

Toxicology Program, *Eleventh Report on Carcinogens* (U.S. Department of Health and Human Services, 2005). Moreover, there is no scientific support for any dose-response relationship for total carbon or elemental carbon. *See* 66 Fed. Reg. at 5710 (Jan. 19, 2001). In order to resolve risk questions, NIOSH and the National Cancer Institute are engaged in a massive study of potential health effects to establish a personal exposure limit for the EC and TC content in diesel particulate matter. Until the study is complete, however, the "facts" which MSHA needs to support its Final Rule simply do not exist.

MSHA admits that total carbon cannot be measured reliably due to interferences. MSHA acknowledges that the current DPM rulemaking record lacks sufficient evidence of feasibility to justify lowering the limit below its new, June 2005 limit of 308 micrograms EC. *See* 70 Fed. Reg. at 32916. MSHA acknowledges that the ratio of elemental carbon to total carbon is not predictable and varies in a statistically significant manner from day to day and place to place, essentially rendering conversions from TC to EC impossible. These admissions undermine the data, analysis and conclusions underlying the June 2005 MSHA Final Rule, as well as the September 2005 proposed rule.

MSHA's data regarding technological and economic feasibility is similarly flawed, perhaps explaining why MSHA admits that there is insufficient evidence of feasibility today. *See id.* MSHA's "Estimator" computer program, which it used to determine feasibility, analyzed faulty data and assumptions. Its calculations were based on the incorrect assumption that retrofitted filters are available for, and would fit, all of the equipment in various mining operation fleets. *See id.* at 32919. Similarly, the MSHA calculations assumed unrealistically that all controls operate perfectly 100 percent of the time and that ventilation in all mines was perfect. *See* H. John Head, *Technical and Feasibility of New DPM Regulations*, Report prepared by Diesel Litigation Group, May 21, 2002, cited in the rulemaking record. The Estimator program utilized inadequate emission sample sizes, as well. *See* 68 Fed. Reg. 48678.

In addition, MSHA's feasibility calculation is based on the incorrect assumption that diesel exhaust filter technology is a feasible method of compliance with the PEL, contrary to the position of diesel engine manufacturers. *See* Engine Manufacturers Association and Euromat, *Investigations into the Feasibility of PM Filters for Nonroad Mobile Machinery*, Aug. 31, 2002, at 12, *available at* http://www.euromot.biz/download/events/2003-03/NRMM_PM_Filters_310802.pdf (last accessed Feb. 16, 2006). MSHA's feasibility determination was based partly on the incorrect assumption that mines could use platinum-based filters, which MSHA has since warned can produce dangerous levels of nitrogen dioxide. *See* MSHA Program Information Bulletin PIB02-04, *Potential Health Hazard Caused by Platinum-Based Catalyzed Diesel Particulate Matter Exhaust Filters*, May 31, 2002, *available at* http://www.msha.gov/regs/complian/PIB/2002/pib02-04.htm (last accessed Feb. 16, 2006).

The faulty MSHA technical feasibility data and conclusions were the basis of the faulty economic analysis data and feasibility conclusions reached by MSHA as demonstrated by the DQA petition.

As a result of these and other incorrect assumptions and data inputs, the Estimator and MSHA conclusions on feasibility are incorrect. This faulty data explains how MSHA could set a 160 TC Final Limit even though both MSHA and industry data indicate that 90-95% of the industry cannot comply with this level. *See* 70 Fed. Reg. at 32916. Indeed, only by using faulty data, assumptions, and analysis could MSHA conclude that this Final Limit is feasible when MSHA itself admits that 30-37% of the industry is not even in compliance with the Interim Limit it adopted in June 2005. *See id.*

IV. CONCLUSION AND RELIEF REQUESTED

MARG respectfully requests that its Data Quality Act Petition be fully considered and granted at this time. MSHA and DOL have a legal obligation to promptly provide a complete, substantive response to all information challenged in MARG's Petition. MSHA has no authority to avoid DQA mandates by combining the DQA review process with its ongoing rulemaking, as it attempts here. Upon review of MARG's Petition, it will be clear that MSHA has violated the Data Quality Act, and the OMB and the DOL Guidelines in numerous ways that require correction now.

Respectfully submitted,

/ [redacted] (Name removed)

EXHIBIT INDEX