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MSHA/OSRV

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FACSIMILE COVER SHEET

TO: MSHA - Dept. of Labor
Office of Standards, Regulations & Variances

TELECOPIER NO.: (202) 693-9441

FROM: Todd A. Scott
Corporate Counsel

DATE: _____ day of _____, 2006

TIME: _____ : _____ M, CST

NUMBER OF PAGES (including cover sheet): _____

RE: RIN 1219-AB29
Comments to FR 05-17802/FR-05-B737
DPM Exposure in Underground M/NM Mines

Thank you. Todd

CC: Iowa U.S. Senate and Congressional Members
Rich White, Iowa Limestone Producers Association
Gary Walter, National Stone, Sand & Gravel Association
Thomas R. Scott, President & CEO of RPC, Inc.

AB29-Comm-101

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January 25, 2006

(VIA Facsimile @ (202) 693-9441
MSHA, Department of Labor
Office of Standards, Regulations and Variances
1100 Wilson Boulevard
Arlington, VA 22209-3939

RE: Diesel Particulate Matter Exposure of Underground M/NM Miners
Codified at 30 C.F.R. Part 57
70 Fed. Reg. 53270-53293 (FR 05-17802) published on 9/7/2005
70 Fed Reg. 55017-55018 (FR 05-18737) published 9/19/2005
R.I.N. 1219-AB29

To Whom It May Concern:

On behalf of The River Products Company, Inc. of Iowa City, Iowa, I am submitting the following comments in opposition to the proposed diesel particulate matter (DPM) rule published by the Mine Safety and Health Administration (MSHA) in the above-referenced Federal Registers. River Products Company is a small business under the Small Business Administration standards. It has been locally owned since its inception in 1920. We have four limestone open-pit quarries, two sand and gravel operations, and one underground limestone mine. Our underground mining operation is located near Columbus Junction, Iowa and is subject to the interim DPM permissible exposure level (PEL) and will be affected by the proposed rule.

Our Columbus Junction Underground mine is considered a small mine under MSHA's standards as it employs less than twenty people. River Products Company is member of the National Stone, Sand and Gravel Association (NSSGA), and we generally support the more detailed and written comments that the association will submit to the administration. When I last wrote to MSHA concerning this subject shortly after the proposed- midnight rules of the prior administration were published on January 19, 2001, I stated our company position:

> ***River Products Company, Inc. agrees with our national association, the National Stone, Sand & Gravel Association (NSSGA). Miners' exposure to DPM should be minimized; however, we believe a final rule on DPM is premature for the following reasons:***

1. ***Current scientific information on DPM is inadequate to define an acceptable DPM exposure level; and yet somehow MSHA has defined a PEL.***
2. ***Compliance is not technically feasible at this time.***
3. ***Compliance is not economically feasible.***

Our position remains the same five years later.

Current scientific information on DPM is inadequate to define an acceptable DPM exposure level; and yet somehow MSHA has defined a PEL. MSHA already acknowledged, in the June 6, 2005 preamble to the final rule, that "the current DPM rulemaking record lacks sufficient feasibility documentation to justify lowering the DPM limit below 308 ug/m3 at this time..." 70 FR 32916. No new evidence has been produced to suggest that a lower limit is needed. Therefore, the proposal to phase-in a lower limit, and to base it on total carbon, is arbitrary, capricious and an abuse of discretion.

This rule has been complicated from the beginning by the fact that DPM exposure cannot be measured directly. Instead, the required method (NIOSH 5140) requires a measurement of total carbon (TC) present in the workplace. The concern is that the underground mine contains numerous sources of carbon, including cigarette smoke and oil mists. The presence of these carbon sources can lead to elevated DPM readings. MSHA unsuccessfully attempted to use a conversion factor to convert Total Carbon readings to Elemental Carbon and avoid false results. Furthermore, they have utilized an error factor that is allegedly based on statistically evidence. We do not believe a universal error factor can properly account for individual situations. For example, my loader operator may smoke double than what MSHA's statistics show. Is this a precise and accurate measurement of DPM exposure?

When MSHA hastily published the first proposed rule in 2001 on DPM exposure to underground miners, the National Cancer Institute (NCI) and the National Institute for Occupational Safety and Health (NIOSH) were currently in its fourth (4^{th}) year of a massive seven-year research effort to determine whether exposure to DPM causes cancer. In other words, MSHA drafted and implemented a rule based on a guess or hypothesis. No one yet knows at what exposure level DPM causes adverse health effects or cancer. On November 5, 2003, researches from NCI and NIOSH held a public meeting on some of their preliminary results. Interestingly, out of the 13,744 underground miners' records surveyed for the study who were exposed to diesel, there were 2,398 deaths from 1947 to 1997 with 217 of these deaths attributable to lung cancer. Thus, approximately nine percent (9%) of the deaths were due to lung cancer. However, between the years 1995 and 1998, lung cancer rates for the general public ranged from 9.8 percent to 14.0 percent for a similar demographic. In other words, the study indicates that lung cancer death rates for underground miners exposed to diesel were lower than the general public. MSHA should first finish the research, subject it to peer review, then draft a rule – if warranted.

Compliance is not technically feasible at this time. In the event MSHA continues to mandate an exposure limit based on a guess and not science, we urge the PEL to remain at the current interim limit of 308 ug/m3 EC (elemental carbon). This limit still causes us great concern with the current technology available. In fact, the data gathered at our mine and at others involved in the "31-mine study" demonstrate that our operation and other underground stone mines cannot consistently bring levels down below the current PEL through application of available technologies. Since 2002, River Products Company has completed 10 DPM tests with approximately 40 individual samples. Some of the tests were performed by MSHA, as well. Our test results range from a low of 19 ug/m3 to a high of 451 ug/m3. Due to fortunate timing and an error factor, none of our samples were citable offenses. Out of the 37 samples only four exceeded the current interim limit; however approximately 20 of the 37 samples would have failed the proposed 160 ug/m3 TC. See attached test results summary.

There are so many variables that affect DPM personal samples, including but not limited to: equipment, engines, fuel, and location, location, location. When too many machines are working in one area, it is obvious that DPM concentration will rise. For a small mine that operates one shift a day, it is very difficult to administratively control separation of equipment usage. Similarly, the outside ambient air temperature and humidity significantly affect the results. Our test results show that when we did sampling in May, October, and December, our average reading was 131 ug/m3 EC. However, our sampling in the months of July, August and September averaged 214 ug/m3 EC. I would be remiss if I failed to point out that the aforementioned averages may be deceiving on account of the fact that our truck drivers who are sampled, drive in and out of the mine to the crusher. In sum, regardless of the final PEL chosen and regardless of our overall good test results, we and all other mines are going to struggle to meet any threshold for the driller and the blasters, in particular, who work in a dead head all day and often on the ground outside of environmental cabs.

The DPM rules have been characterized as a "technology-forcing" statute. Mine operators were required to provide MSHA an inventory of engines in their underground mine, and any replacement engine has to be a Tier I or newer engine. This is one area where River Products Company disagrees with NSSGA. Since MSHA has arbitrarily picked a permissible exposure level, we believe we should have the freedom to meet the requirements how we see fit. Buying new equipment is costly. There may be less expensive alternatives to improve DPM levels, such as ventilation or alternative fuels. Also, if a motor is ruined, one cannot replace it with a similar motor, if it is not on the initial inventory of engines or approved engine list. If motor retrofit is not feasible under such circumstances, then a piece of otherwise good equipment is useless in the underground mine. Finally, newer is not better. For example, River Products currently has two loaders available in the underground mine. One is 1999 Volvo with Tier II engine, and the other is 1971 Terex. We recently retained a company to do a tail-pipe emission tests of all equipment so we could better identify the DPM polluters, if you will, because personal samples do not identify the source of the DPM. Well, to our surprise, the 1971 Terex loader had one-half (1/2) of the DPM coming out of its tailpipe than did

the much newer, MSHA approved Tier II engine in the 1999 Volvo. Why fix it if isn't broke?

River Products Company has implemented many controls in order to reach the levels we have reached. Before the initial inventory was even required, we immediately replaced our 1970's haul trucks with trucks built in the 1990's. Later we removed a 1992 loader for a 1999 loader with a Tier II engine. We have recently purchased a newer roof-scaler with Tier II engine. We have retrofitted one of our drills with a Tier II engine, and are looking at buying a new drill to replace our second drill. We have installed a third vertical air shaft in our mine, we have added brattice cloth for over 25 rooms and adjusted brattice cloth throughout our mine, changed traffic patterns, and utilized portable fans. In fact, various MSHA personnel have characterized our ventilation as very good. We have tried a 20% bio-diesel (B20) mixture, despite one manufacturer only recommending a five percent (5%) blend. The B20 showed insignificant improvements. We are now considering a B99, with the hope that the current $1.00 per gallon tax credit remains to help control costs. We have not tried diesel particulate filters on account of the cost and negative performance history reported by producers and manufacturers. We have implemented all feasible control technology in order to meet the mandatory limit, but despite these efforts, one hundred percent (100%) attainment is still questionable.

Compliance is not economically feasible. The proposed rule is based on faulty and outdated economic assumptions on feasibility of meeting levels below 308 ug/m3 EC. We cannot accept MSHA's assertion that this final rule will not have an annual effect of $100 million or more on the economy. A figure of $100 million divided by 200 metal/non-metal mines results in $500,000.00 per mine. Just looking at estimated costs for new or newer equipment in our small mine shows a capital contribution over three times the MSHA figure.

Driller	$350,000.00
Powder Truck	$50,000.00
Scaler	$350,000.00
Loader	$250,000.00
Truck 1	$225,000.00
Truck 2	$225,000.00
Truck 3	$225,000.00
TOTAL	**$1,675,000.00**

MSHA fails to recognize that underground mine production costs are usually much higher than surface operations. Therefore, when an underground mine has to compete in the market against a surface operation, profits are much lower. Obviously, any capital contributions and all efforts in complying with the mandated DPM level will cut profits of all underground mine operations across the United States. This "hidden" cost has not been fully explored by MSHA.

MSHA has already acknowledged, in the June 6, 2005 final rule, that establishing a limit below 308 ug/m3 EC would present complications with respect to economic feasibility, particularly where ventilation upgrades would be needed to meet a lower limit. 70 CFR 32942. In addition, MSHA has merely incorporated the regulatory impact analysis from their January 19, 2001 rule. There have been significant changes in the U.S. economy since 2001, including changes in steel and fuel prices coupled with the affects of natural disasters. MSHA should proceed with this rulemaking under all administrative procedures that are required for economically significant rules.

Other provisions. One other issue is the **respirator program.** In the event, we are not able to reach attainable levels; miners will have to wear respirators until feasible controls are implemented. Employees would have to go through an individual fit test and must remain clean shaven for the respirators to seal and work correctly. We have been told by several of our miners, the clean shaven part won't happen. Worker acceptance will be difficult to impossible to enforce short of termination. Another issue is whether a miner should go through a **medical evaluation** before a respirator fit test to determine a miner's ability to wear a respirator. We think this a good idea of putting the horse before the cart; however, we strongly object to MSHA's a **mandatory transfer** to an existing position in a place of the mine where a respirator is not required. MSHA does not mention what would happen in the event there is not an existing position. MSHA is in the business of protecting the health and safety of the miner. They should not be in the business of writing employment law. That is better left to the legislature and courts.

As I stated in the beginning, River Products Company supports regulation that will minimize miner's exposure to DPM. However, given the serious consequences of MSHA enforcement actions, both financially and in light of criminal provisions of the Mine Act, MSHA must base any regulated level on sound scientific evidence of health effects. They should not use Total Carbon as surrogate for DPM, when they admit their conversion and error factors are flawed. Likewise, they should not arbitrarily select a regulated level when they acknowledge such levels are unattainable with current technology. Finally, they should not force the regulated community to accept this standard and the significant costs that go with compliance before completing an honest and detailed regulatory impact analysis.

For all the reasons stated above, we respectfully request the agency complete the necessary scientific and economic analysis prior to publishing a final rule. In lieu thereof, we respectfully request the agency implement the interim level of 308 ug/m3 EC as the final permissible exposure level for DPM.

Thank you for consideration.

Respectfully submitted,

Todd A. Scott
Vice President & General Counsel

DPM
COLUMBUS JUNCTION UNDERGROUND MINE
06 OCT 2005 - 11 DEC 2002

NAME/DATE	10/6/2005	9/15/2005	8/4/2005	7/20/2005	7/7/2005	5/11/2005	8/25/2004	7/17/2003	5/7/2003	12/11/2002	AVERAGE
LOADER	110	111	150	136			90	[redacted]	72		**111.8**
DRILLER	158	451			375	362	271		153	86	**283**
UTILITY	95		238		313						**275.5**
SCALER	124	293	187	218	225			275	82	71	**193**
BLASTER		305	200			294	186		126	144	**209.167**
TRUCK DRIVER		24		112		72	53		19		**56**
TRUCK DRIVER				126							**126**
BLASTER					288						**288**
TOTAL	**121.75**	**236.8**	**193.75**	**148**	**300.25**	**242.67**	**150**	**275**	**90.4**	**100.33**	**193.022**

[redacted]

Sampling and readings are based on Elemental Carbon calculated for a Shift Weighted Average (SWA).