Illinois Association of Aggregate Producers

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MSHA
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Rm. 2350
Arlington, VA 22209-3939

RIN: 1219-AB29 / Notice of Proposed Rulemaking for Diesel Particulate Matter

The following comments are submitted on behalf of the Illinois Association of Aggregate Producers (IAAP), the trade association representing companies that produce and sell crushed stone, sand and gravel in Illinois.

The IAAP's 114 producing members range in size from "mom and pop" operations that manufacture less than 100,000 tons of these products each year to companies that produce well over 20,000,000 tons annually. Aggregate producers in Illinois employ about 5,000 workers and support personnel at over 400 surface and underground mines and operate in 80 out of 102 Illinois counties. In 2004, these companies sold or used over 111 million tons of crushed stone, sand and gravel. Our State economy is literally built upon construction aggregates.

Currently, 8 underground stone mines operate in Illinois. These IAAP members are currently subject to the interim exposure limit for diesel particulate matter (DPM), a limit affected by the proposed rule. The IAAP opposes the proposed DPM rule published by the Mine Safety and Health Administration (MSHA) in the September 7, 2005, Federal Register (70 FR 53279-53293). Specifically, the proposed rule's phased-in schedule for lowering the DPM permissible exposure limit (PEL) below the current (interim) limit of 308 ug/m3 EC (elemental carbon) should be withdrawn and MSHA should instead adopt this interim limit on a permanent basis for the following reasons.

First, the data gathered in the so-called "31 mine study" (including one Illinois mine) demonstrate that underground stone mines cannot consistently bring levels down below the current PEL through application of available technologies. We urge MSHA to abandon the new approach because it lacks any credible scientific basis from a health perspective, and is premature pending receipt of the final results of the joint NIOSH-NCI study of cancer and DPM exposure in underground nonmetal miners. Given that the preliminary results suggest that there is no elevated cancer risk for these individuals, MSHA should await the publication of the final report before moving forward with a standard that uses the purported carcinogenicity of diesel as the justification for many of the regulatory provisions.

Second, the proposed rule clearly is based upon faulty assumptions as to the technological and economic feasibility of meeting levels below 308 ug/m3 EC. While it may be true that the Mine Act is a "technology forcing" statute, the projections made in this rule go far beyond this into the realm of pure theory. Underground stone mines cannot make purchasing decisions based upon hypotheses as to what technologies may be available during the coming decade when there is scant evidence to support MSHA's assertions.

Third, maintaining "total carbon" (TC) as a surrogate for DPM makes little sense after the agency admitted in the June 6, 2005, final interim rule that TC cannot predictably be used for enforcement sampling due to the likelihood of interferences and confounders such as oil mist and tobacco smoke. In that June 6th final rule preamble, MSHA specifically stated: "the current DPM rulemaking record lacks sufficient feasibility documentation to justify lowering the DPM limit below 308 EC ug/m3 at this time. . . ." 70 FR 32916. No new evidence has been produced to suggest that a lower limit is needed in the three months since MSHA published this statement. Therefore, the proposal to phase-in a lower limit, and to base it on total carbon, is arbitrary, capricious and an abuse of discretion.

Given the serious consequences of MSHA enforcement actions both financially and in light of the criminal provisions of the Mine Act, precision and accuracy in sampling are paramount. MSHA cannot legitimately select a surrogate for enforcement purposes that it admits is flawed, select levels that are unattainable given current technology and which are not supported by the best available scientific evidence in terms of health effects, and then expect the regulated community to accept this standard.

Fourth, MSHA must conduct a full regulatory impact analysis to assess the true economic cost to the industry of its proposal. It cannot simply "update" the original RIA from the January 2001 final rule, as significant changes have occurred within the American economy (e.g., changes in fuel prices due to a war and natural disasters). Moreover, the initial technologies upon which the assessment was based have, in some cases, not been shown to be efficacious in the mining environment and/or actual field implementation has shown that the costs were significantly undervalued in MSHA's initial projections (e.g., the life cycle of filters and their actual replacement costs, the availability of retrofitting devices, and the cost of replacement equipment).

MSHA acknowledged, in the June 6, 2005, final rule, that establishing a limit below 308 ug/m3 would present complications with respect to economic feasibility, particularly where ventilation upgrades would be needed to meet a lower limit. 70 FR 32942. Thus, the agency should not rush to reduce the PEL at this time until it carefully considers the economic ramifications for the stone industry and other metal/nonmetal sectors covered by this standard. This is yet another reason to leave the interim level in place and to abandon the phased-in PEL reduction approach. In light of the uncertainties admitted by MSHA, and the mining industry's experiences to date in complying with the 308 ug/m3 EC rule, we cannot accept MSHA's assertion that this final rule is not an economically significant regulatory action as defined by §3(f) (1) of E.O. 12866 given that this rule will have an annual effect of $100 million or more on the economy. Therefore, MSHA should proceed with this rulemaking under all administrative procedures that are required for economically significant rules.

Fifth, the preamble to the proposed rule indicates that MSHA's considerations are based upon the entire rulemaking record, relating back to information submitted and considered when the initial final rule was adopted in January 2001. However, there are no indications that this information is being subjected to the legally mandated scrutiny that now applies under the U.S. Department of Labor's data quality guidelines, nor that all of the scientific research upon which the agency relies has been subject to peer review. We believe that by incorporating by reference the previous rulemaking record, this newly effective and heightened level of scrutiny is applicable to any of the studies and reports that influence MSHA's public policy decisions in the instant proceeding.

Finally, please note that MSHA, in its negotiations with the parties to the various litigation actions surrounding the DPM rule, has acknowledged that there is some uncertainty about its enforcement procedures. Of particular importance to the underground mining community is the "error factor" attributable to the sampling and analysis for DPM. Presently MSHA only cites an operator for a violation of the interim concentration limit of 308 ug/m3 EC, if the measured value is in excess of 1.12 times the interim limit, or 345 ug/m3 EC.

There are indications that the variability and therefore reliability of sampling and analysis drops with lower levels of DPM. In the note on the error factor on MSHA's web site, Jon Kogurt[1] suggests that the error factor should be increased to 1.15 for the final limit of 160 ug/m3 TC. Recent studies by the National Institute for Occupational Safety and Health (NIOSH)[2] have indicated that the variability of DPM sampling and analysis may be even higher than Kogurt has factored into his analysis, especially when various DPM control technologies are used. If an error factor of, say, 1.20 is used in MSHA's enforcement of the proposed revised final limit of 160 ug/m3 EC, then no citations will be issued unless samples reveal levels in excess of 192 ug/m3 EC. However, these uncertainties in MSHA's enforcement of the proposed revised final limit of 160 ug/m3 EC compel us to oppose the lowering of the limit.

In light of these deficiencies, we encourage the agency to maintain the interim concentration limit of 308 ug/m3 EC as a permanent permissible exposure level for DPM.

Respectfully,

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Illinois Association of Aggregate Producers
JCH/gls
Cc: IAAP Board of Directors
IAAP Safety Committee

[1] Kogurt, Jon, (undated) "Metal and Nonmetal Diesel Particulate Matter (DPM) Standard Error Factor for TC Analysis" MSHA web site: http://www.msha.gov/01-995/dieselerrorfactor.pdf

[2] Noll, J.D., Bugarski, A.D., Schnakenberg, G.H., Patts, L.D., Mischler, S.E., McWilliams, L., (undated), "DRAFT - The Relationship Between Elemental Carbon, Total Carbon and Diesel Particulate Matter in Several Underground Metal/Nonmetal Mines" unpublished paper.