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Health, Safety and Environment Department
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November 25, 2002

Mr. Marvin Nichols
Director
Office of Standards, Regulations and Variances
U.S. Mine Safety and Health Administration
1100 Wilson Blvd., Room 2313
Arlington, VA 22209-3939

Re: 67 FR 60199, ANPR on Diesel Particulate Matter
Exposure in Underground Metal and Nonmetal Mines

Dear Mr. Nichols:

Thank you for the opportunity to present these comments on behalf of the United Steelworkers of America. The USWA represents the majority of unionized metal and non-metal miners in the United States and Canada, and has worked aggressively to lower diesel particulate matter (DPM) exposures in both countries. The current ANPR results from a July 15, 2002 settlement agreement between the Department of Labor, the mining industry and the USWA. That settlement agreement in turn resulted from an industry challenge to the current DPM rule, in which the USWA intervened on the side of MSHA.

We will comment first on two additional issues that have arisen in the rulemaking, and then on the questions posed in September 25 Federal Register notice.

A. The 31-Mine Study

In October, MSHA scientists completed the report, "Determination of DPM Levels in Underground Metal and Nonmetal Mines." The study is crucial to the main subject of the ANPR – the use of elemental carbon as a surrogate for DPM. The study also provides important data on the reliability of the SKC sampler and the technological feasibility of DPM control. Since that time, some industry participants have urged that the

report not be finalized, and instead be revised in accord with their wishes before being placed in the rulemaking record.

We strongly disagree. The USWA helped negotiate the settlement agreement that led to the ANPR. We hope that further negotiations will help resolve some of the issues in the final rule. We believe that it is appropriate to negotiate policy. However, it is never appropriate to negotiate science. All parties to the study had a chance to review and comment on the protocol, and to submit suggestions on how the draft report might be clarified. It has been peer-reviewed by NIOSH. The study should now be signed as a final product and submitted to the record. Otherwise MSHA cannot effectively use it in the current rulemaking. That would harm the interests of all parties.

B. Bifurcated Rulemaking

We applaud MSHA's decision to move quickly to a proposed rule after considering the comments submitted in response to the ANPR. Unfortunately, several important questions remain with respect to the final concentration limit, effective in 2006. Among those questions are the efficiency of different filters in the 100-200ug/m³ range, the relationship between elemental carbon (EC) and total carbon (TC) at low levels, and the feasibility of DPM levels below 160 um/m³ TC. (The feasibility of the 160 level was settled in the previous rulemaking, and MSHA need not revisit it.)

For these reasons, we believe it is appropriate to split the rulemaking into two segments. The first, commencing quickly, should consider the interim concentration limit, and the ancillary parts of the regulation. The second, commencing within six months to a year, would consider the final limit. If MSHA keeps to an appropriate schedule, there is no reason why the final concentration limit cannot be established in late 2003 or early 2004, giving the industry plenty of time to come into compliance.

C. Questions Raised in the ANPR

1. Concentration Limits [57.5060(a) and (b)]

We support the 308ug/m³ interim concentration limit for EC, as specified in the settlement agreement. We believe that the 308 ug/m³ limit should be directly enforced, and that the cumbersome method of the settlement agreement, where EC is used to check the TC concentration, should be eliminated. As stated above, we believe the final concentration limit should be decided in a second round of rulemaking. However, if MSHA chooses to rely on personal sampling, the term "concentration

limit” should be replaced with the term “permissible exposure limit” or “PEL.”

2. Extensions of Time to Comply [57.5060(c)]

We believe this issue was properly decided in the original rulemaking, and that no change is required. However, we are interested in any evidence the industry might submit to support its position that additional extensions should be granted. If MSHA does propose to change this section, no more than one additional extension should be granted. In addition to the information currently required in the application, the Secretary should require the mine operator to submit a detailed compliance plan specifying how he or she will meet the concentration limit in force at the time the extension expires. The regulation should also require the Secretary to hold a hearing on the request, should the miners’ representative or the operator request one.

3. Exceptions to the Concentration Limit [57.5060(d)] and 4. Respirators [57.5060(e)]

These provisions must be considered together. First, if MSHA ultimately relies on personal sampling, 57.5060(d) must be read to include exposure above the PEL, calculated without any correction for respirator use (i.e. the exposure a miner would experience if he or she was not wearing a respirator). However the use of an enclosed cab or clean-air station should be considered, based on actual monitoring data. Approval to work in an area above the limit should continue to require advance approval by the Secretary, and should be reviewed periodically, and at the request of the miners’ representative.

Respirators are uncomfortable and difficult to use properly over an extended period. By restricting visibility and creating breathing resistance, they can add to the hazards of any working environment, especially underground mining. If the rule allows respirators at all, they should only be used at the approval of the Secretary, and only after all other feasible controls have been, or are being, installed. There must be a written respiratory protection program. Medical exams should be provided for miners required to wear respirators. Miners who cannot wear them for medical or religious reasons should be allowed to transfer to non-respirator areas with full earnings protection. Most important, no miner should be required to wear a respirator for more than an hour without a break in an area that provides clean air, or four hours in any twenty-four hour period.

We understand that no respirators are currently approved for DPM exposure. MSHA could therefore allow unapproved respirators with appropriate filters (R-100 or P-100) for a very brief period, to give manufacturers a chance to submit DPM respirators for approval.

We agree that employee rotation should never be used as a means of compliance with the DPM standard. In fact, if the dose-response curve for DPM is convex upward, employee rotation would likely increase the cancer rate.

5. TC to EC [57.5061(b)]

We concur with the proposed change.

6. Personal Sampling [57.5061(c)]

We agree that personal sampling more accurately measures personal exposure. However, area sampling can also be useful for checking the reliability of personal sampling, and the degree to which that sampling is representative. Area sampling can also provide important information about the quality of compliance plans. MSHA should retain the ability to collect area samples for such purposes, and to require that operators collect them, even if area samples cannot, in themselves, trigger a citation.

7. DPM Control Plans [57.5062]

MSHA should not delete the requirement for a DPM control plan. In fact, nothing would do more damage to the effectiveness of the standard than deleting the need to prepare and follow a detailed control plan. Substituting the hierarchy of controls for a DPM control plan is like substituting a factsheet on geology for a map of the mine. Nor is a ventilation plan an adequate substitute for a DPM control plan, since DPM control depends on much more than ventilation. The same is true of a respiratory protection plan. No mine owner would operate without a business plan, a financial plan, a marketing plan, or a plan of operations. We find it troubling that they would propose – or MSHA would consider -- attempting to reduce DPM exposures without a plan for doing so.

Control plans are highly cost effective in that they force mine operators to think about how to control DPM efficiently, instead of simply slapping on another layer of controls. They help MSHA determine whether the company is acting in good faith. They facilitate compliance assistance. They provide important information for the miners' representative to participate in the mine's safety and health program.

Under the current standard, a single violation can trigger a control plan. We believe this is appropriate. If that violation is minor and easily corrected, the control plan will simple and brief.

8. Feasibility

Feasibility was extensively reviewed in the original rulemaking. MSHA has already determined that the 400ug/m³ and 160 ug/m³ TC levels – and, by implication their EC equivalents – are technologically and economically feasible. Both levels must be presumed feasible until proven otherwise. We are aware of no new evidence that conclusively changes that determination for the 160 ug/m³ TC level, and none that even challenges it for the 308 ug/m³ EC level. However, several studies are under way that could further refine the feasibility estimates for the final 2006 EC PEL. Those should be placed in the record and considered in the second phase of the rulemaking that we have proposed.

9. Paperwork

We will reserve comment on the paperwork burden of the regulation until the proposal phase of the rulemaking.

Thank you again for the opportunity to submit these comments. American miners have waited far too long for effective control of the fumes, dust and smoke from unregulated diesel equipment. We look forward to working with all parties to achieve an effective and fair final regulation as quickly as possible.

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Mine Safety and Health Specialist

Michael J. Wright
Director of Health, Safety and
Environment

From: Wright, Mike [mwright@uswa.org]
Sent: Monday, November 25, 2002 4:57
To: 'comments@msha.gov'
Subject: Comments on the DPM ANPR

Attached are the comments of the United Steelworkers of America on the Advance notice of proposed rulemaking on Diesel Particulate matter Exposure of Underground metal and Nonmetal Miners, 67 FR 60199.

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