

November 4, 2002

Robert M. Friend
Administrator, Metal and Non-Metal
Mine Safety and Health
U.S. Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, Virginia 22209-3939

Dear Bob:

The NSSGA, based near the nation's capital, is the world's largest construction materials association by product volume, representing more than 850 member companies and approximately 120,000 working men and women in the aggregates industry. During 2001, a total of about 2.75 billion metric tons of crushed stone, sand and gravel, valued at \$14.5 billion, were produced and sold in the United States. Of this tonnage, a substantial portion came from the 109 underground aggregate mines operating in this country.

The purpose of this letter is to express to you the strongly held view of the National Stone, Sand & Gravel Association (NSSGA) that it is premature to finalize the draft "Report on Joint MSHA/Industry Study: Determination of DPM Levels in Underground Metal and Non-Metal Mines" (the Report). We also endorse the October 10, 2002 letter concerning the Report sent to Assistant Secretary Lauriski from Bruce Watzman of the National Mining Association.

As you know, the data examined and analyzed in the Report is the result of a joint MSHA/Industry study involving 31 mines, some of which are operated by NSSGA member companies. The joint study examined, for the first time in any systematic fashion, real in-mine levels of diesel particulate matter (DPM) exposure of underground metal and nonmetal miners. While the study is not necessarily representative of the DPM exposures of miners throughout the underground metal and nonmetal mining industry, nevertheless it provided crucial new information which we believe served as the basis for the July 15, 2002 settlement agreement among the litigating parties (*see* 67 Fed. Reg. 47297, Thurs. Jul. 18, 2002). As part of the settlement, MSHA agreed to engage in expedited rulemaking to revise important portions of the Agency's standards for DPM exposure of underground metal and non-metal miners (the DPM Rules). *Id.* 47298. That expedited rulemaking has now begun through an advance notice of proposed rulemaking (ANPRM) published in the *Federal Register* for September 25, 2002 (67 Fed. Reg. 60199).

We are troubled that premature finalization of the Report could well fundamentally undercut and compromise the settlement agreement, the ANPRM and other initiatives. Because we believe that outcome is not intended by MSHA, we ask that finalization of the Report be deferred, and that information gathered during the expedited rulemaking be given consideration by the Agency prior to any finalization of the Report.

At the outset, please know that, while the NSSGA is not a party to the litigation which led to the July 15 settlement agreement, we followed the settlement negotiations closely. Further that, since a significant portion of our membership is affected by the DPM Rules, the NSSGA will file comments both on the ANPRM, as well as on the proposed rules themselves once they are published. We also want you to know that we were impressed with the cooperation and diligence of all the litigating parties in the negotiations leading to the settlement agreement. Stakeholders have that process, as well as the process used to create Part 46, as worthwhile models for future cooperation.

Very specifically, although we have a number of problems with the draft final Report we have seen, our central concern is that we believe it is clearly erroneous and certainly premature for any final Report to conclude that it is technologically and economically feasible for underground metal and non-metal mines to comply with both the interim and final concentration limits set forth in the DPM Rules.¹ Such a conclusion makes a mockery of both the settlement agreement and the expedited rulemaking because the unresolved issue of technological and economic feasibility is at the very heart of both. Thus, the settlement agreement is prefaced with the following statement of the problem:

The industry parties contend that the interim standard of 400 micrograms per cubic meter is not . . . feasible to achieve at the majority of mines with engineering controls alone, and will pose significant compliance problems. . . . They further contend that the final standard of 160 micrograms per cubic meter of air must be revoked because it is not feasible under any foreseeable circumstances. . . . The United Steelworkers of America contend that the interim standard is feasible and . . . also contend that achievement of the 160 micrograms per cubic meter of air standard is feasible. In light of these divergent positions, and *in consideration of practical compliance questions raised during the joint industry/labor/government study*, the parties will take the steps set forth below.

67 Fed. Reg. 47297. (Emphasis added.)

Among the steps next spelled out in the settlement is agreement on MSHA's part:

. . . to work with equipment manufacturers, mine operators and representatives of miners to improve *practical mine worthy filter technology*, including the availability of after-treatment control technology for diesel powered engines, particularly for engines of less than 50 hp and 250 hp or greater.

Id. at 47298.

¹ The draft final Report made available to us states in its executive summary that compliance *may* be feasible, but in numerous other portion of the Report where feasibility is addressed, technological and economic feasibility is categorically concluded.

As we understand it from our discussions with representatives of the industry parties to the settlement agreement (especially Ed Green), the goal of this provision is to resolve the substantial questions of technological and economic feasibility regarding DPM filter and other after-treatment DPM control technology. Here it is important to remember that the DPM filter efficiency information relied on by MSHA during the joint study only consisted of information from vendors or MSHA laboratory tests, which in turn were fed into MSHA's computer model "Estimator." The joint study did not analyze in-mine applications of DPM filters or other after-burner treatment technology to ascertain real DPM efficiency removal data in the field. Indeed, such field work, yet to be done, will be the essential first task of the Metal and Nonmetal DPM Partnership now getting underway among NIOSH, NSSGA, the National Mining Association, and the United Steelworkers of America.

A further complication is those portions of the settlement agreement which commit MSHA to publish new proposed rules allowing mine operators to supplement feasible engineering controls with administrative control methods and personal protective equipment if engineering controls either do not reduce the concentration levels to required limits, are not feasible, or do not produce significant reductions in DPM exposures. *Id.* We fear that a premature finding of technological and economic feasibility in the Report will undercut that portion of the settlement.

Based on this review of the settlement agreement alone, we hope that you can readily see why we are so concerned about premature finalization of the Report. To compound the problem, however, we believe a premature Report could also taint the expedited rulemaking. In this regard, we note that of the questions raised in the ANPRM, fully half deal with technological and economic feasibility. Furthermore, those 24 questions are predicated on the following statement in the ANPRM:

New information on the technological and economic feasibility of current control technology was presented to MSHA following promulgation of the January 19, 2001 standard. MSHA intends to evaluate this new information in conjunction with compliance changes that would result from a proposed standard."

67 Fed. Reg. 60201.

Based on our understanding of the negotiations leading to the settlement agreement, the bulk of the "new information" noted above was that generated by the joint study, including the detailed comments of the industry parties to the litigation.² For MSHA now to finalize the Report, even before the comment period for the ANPRM has been completed, runs the real risk of prejudicing the ability of MSHA to make changes to the DPM Rules consistent with the settlement agreement.

² Disappointingly, the draft of the final Report we have seen pays short shrift to those industry comments.

We are also concerned that a premature Report could strike a severe blow to the development of the newly organized Metal and Non-Metal DPM Partnership. The specific goal of the Partnership is to identify, through in-mine testing, technologically and economically feasible engineering controls, using existing and available technology, that can be retrofitted onto the existing diesel-powered fleet in underground metal and non-metal mines to meet the DPM Rules' concentration levels. We think premature finalization of the Report could inadvertently compromise the Partnership's mission and usefulness.

Finally, while it is not the purpose of this letter to critique in any detail the most recent draft of the Report we have seen; nevertheless, we think that it utterly fails to take into account the real problems identified by industry with in-mine use of DPM filters and other after-burner treatment technology. Thus, for example, questions relating to retrofitting the existing diesel-powered fleet, problems associated with engine back pressures, and potentially hazardous gaseous emissions generated by the use of catalytic converters,³ just to name a few problems, are not even addressed by the most recent draft of the Report we have examined.

For all of the reasons discussed above, therefore, the NSSGA urges that any finalization of the Report be deferred until additional information about technological and economic feasibility becomes available to, and is considered by, MSHA as a result of the expedited rulemaking now underway. Simply put, for now, the joint study has done its job. It has generated very important "new information on the technological and economic feasibility of current control technology," as noted in the ANPRM. MSHA should defer finalization of the Report pending completion of the public comment period on the expedited rulemaking and further activities of the Metal/Nonmetal DPM Partnership.

We hope you will agree with our concerns, and we are available to meet with you to discuss this letter further.

Sincerely,

James Sharpe, M.Ed., M.S., CIH
Vice President, Safety and Health Services

³ Just within the past few days, at the Mining Diesel Emissions Conference in Toronto, several presenters reaffirmed problems of excessive NO₂ emissions from diesel-powered machines operated underground and equipped with passive platinum-based catalytic traps.