

November 25, 2002

By e-mail to comments@msha.gov;
Regular mail submission to follow

Mr. Marvin W. Nichols
Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
1100 Wilson Blvd., Room 2352
Arlington, VA 22209-3939

Dear Marvin:

The National Stone, Sand & Gravel Association (NSSGA) is pleased to offer the attached comments to the Mine Safety and Health Administration (MSHA) on MSHA's Advanced Notice of Proposed Rulemaking (ANPRM) for Diesel Particulate Exposure of Underground Metal and Nonmetal Miners.

The NSSGA, based near the nation's capital, is the world's largest construction material 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.

NSSGA has always wholeheartedly supported efforts, regardless of their source, that promote miner health and safety, and has actively offered its own products and services to advance health and safety within the mining sector. We have also supported those features of the Diesel Particulate Matter (DPM) Rule that have already gone into effect. Our views are more fully elucidated in the attachment.

NSSGA appreciates the opportunity to comment afforded by MSHA's ANPRM. If you have any questions or comments, please do not hesitate to contact us.

Sincerely,

James Sharpe, CIH
Vice President, Safety & Health Services

CC: Dave D. Lauriski

Enclosures (8)

**Comments of the National Stone, Sand & Gravel
Association on MSHA's Advance Notice of Proposed
Rulemaking re Diesel Particulate Matter Exposure of
Underground Metal And Non-Metal Miners**

November 25, 2002

Having reviewed carefully MSHA's advance notice of proposed rulemaking (ANPRM), published in the Federal Register for September 25, 2002 (67 Fed. Reg. 60199), regarding amendments to MSHA's health standard for diesel particulate matter exposure of underground metal and non-metal miners (the DPM Rules), the National Stone, Sand & Gravel Association (NSSGA) offers the following comments.

Initially, we wish to note that of the approximately 200 underground mines covered by the DPM Rules, about 110 mines are aggregate operations and many of these are run by NSSGA member firms. The NSSGA is not a party to the litigation which led to the July 15, 2002 settlement agreement (see 67 Fed. Reg. 47297, Thurs. Jul. 18, 2002), which, among other things, called for this rulemaking to amend, on an expedited basis, key provisions of the DPM Rules. However, we followed the parties' settlement negotiations closely. Indeed, of the 31 mines studied in the "Report on Joint MSHA/Industry Study: Determination of DPM Levels in Underground Metal and Non-Metal Mines" (Draft Report), nine are operated by NSSGA members. Thus, the nation's underground stone mining industry, most of which is represented by the NSSGA, has an enormous stake in the outcome of the changes to the DPM Rules under consideration.

MSHA has set out 48 questions in the ANPRM to which it seeks information, data, and comments. NSSGA is considering each of these questions, and will continue to do so, but at this juncture, we are not prepared to respond to all of them. Importantly, fully half of the questions deal with the issue of whether or not it is technologically and economically feasible for operators to comply with the DPM Rules. We think the level of

attention paid to that issue is wholly appropriate because, in our view, technological and economic feasibility is at the very heart of the DPM Rules, as well as the amendments contemplated by the July 15 settlement agreement and discussed in this ANPRM. Thus, in addition to responding to as many of MSHA's specific inquiries as we now can, the NSSGA first wishes to provide MSHA with our views on this central issue.

Technological and Economic Feasibility

Section 101(a)(6)(A) of the Federal Mine Safety and Health Act of 1977 (the Mine Act) requires, among other things, that when MSHA promulgates standards dealing with such issues as DPM, those standards must be feasible. See 30 U.S.C. §§ 801, 811(a)(6)(A). The issue has withstood legal scrutiny and hence is well settled.¹

We think, however, that where a difference may exist between us and MSHA lies in our respective views as to whether or not the existing administrative record for the DPM Rules and the new augmenting administrative record which will be developed as a result of this current rulemaking will *adequately demonstrate* that it is technologically and economically feasible for industry to comply with the DPM Rules. Stated simply, NSSGA does not believe the existing administrative record for the DPM Rules, as published in the Federal Register for January 19, 2001 (66 Fed. Reg. 5706), supported the conclusion that it is technologically and economically feasible for operators of underground stone mines to comply with the DPM Rules. MSHA obviously disagreed, since the Agency finalized the DPM Rules. Furthermore, NSSGA has not seen any new information since January 19, 2001 which changes our view regarding feasibility. Fortunately, it appears that MSHA is now reconsidering that question. We

¹ See *National Mining Ass'n. v. Sec. of Labor*, 153 F.3d 1264, 1269 (11th Cir. 1998)

say this because, in large part, the July 15 settlement agreement and this expedited rulemaking are based on the premise stated in the ANPRM that:

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.

The NSSGA is very pleased that MSHA is reconsidering this issue. Based on our understanding of the negotiations leading to the settlement agreement, however, the bulk of the “new information” noted above was that generated by the 31 mines studied in the Draft Report, including the nine mines operated by NSSGA members. Here we note, with grave concern, that, in its discussion of the 31-mine study, the ANPRM states that:

. . . MSHA is in the process of developing the final report [of the study]. MSHA will include the final report in this [new] rulemaking record.

Id. 60200.

The NSSGA believes strongly that it is premature to finalize the Draft Report. Our letter of November 4, 2002 to Mr. Robert M. Friend, MSHA’s Administrator for Metal and Non-Metal Mine Safety and Health (copy enclosed), sets out the reasons for our concerns in detail. To briefly reiterate its key point, however, we believe that a hasty finalization of the Draft Report will co-opt and prejudice MSHA’s ability to fairly “evaluate this new information in conjunction with compliance changes that would result from a proposed standard.” Id. 60201. In other words, MSHA cannot have it both ways. If the Agency is taking a fresh look at the new information to determine its effect on MSHA’s determination of the technological and

economic feasibility of current DPM control technology, then it is clearly erroneous and, at the very least, premature for MSHA to publish a final report of the 31-mine study concluding that it is technologically and economically feasible for underground metal and non-metal mine operators to comply with both the interim and final concentration limits set forth in the DPM Rules.² With regard to underground stone mines, in particular, such a conclusion is troublesome enough as it relates to the interim limit, but it is extraordinarily problematic and untrue in connection with the final concentration limit.

Furthermore, implementation of the settlement agreement itself will generate important new information regarding technological and economic feasibility which should undoubtedly become part of the administrative record in this expedited rulemaking. Thus, as part of its compliance assistance to underground metal/non-metal mine operators covered by the DPM Rules, to be carried out between July 20, 2002 and July 19, 2003, MSHA has committed to conduct DPM baseline sampling at all of the mines subject to the DPM Rules. 67 Fed. Reg. 47298. The NSSGA urges MSHA to compile and publish this baseline data as it becomes available so that both the Agency and all other interested parties can examine and comment on this

² The final Draft Report made available to us states in its executive summary that compliance *may* be feasible, but in numerous other portions of that Draft where feasibility is addressed, technological and economic feasibility is categorically concluded. Furthermore the Draft Report pays only lip service to industry comments on the earlier March 29, 2002 Draft Report. In order to make sure that these comments become part of the administrative record of this current expedited rulemaking, the NSSGA hereby incorporates by reference, as though fully set forth, our own comments of May 22, 2002, as well as the May 21, 2002 comments of John Head, P.E., for the Diesel Litigation Coalition, the May 22, 2002 comments of AngloGold (Jeritt Canyon) Corporation and Kennecott Minerals Company, and the May 24, 2002 comments of Getchell Gold Corporation. All of these comments present compelling information demonstrating that it is not now technologically or economically feasible for operators of underground stone mines to comply with the concentration limits specified in the DPM Rules.

information during this expedited rulemaking. We say this because, to the extent that the baseline sampling carried out during the 31-mine study may not be representative of DPM exposures throughout the industry, the compliance assistance DPM baseline sampling now being conducted by MSHA should provide an enormously valuable database, which will be fundamental to determinations of technological and economic feasibility.³

In addition, the settlement agreement specifies that:

“MSHA will ... work with NIOSH, ... 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.

It is somewhat unclear to us as to how MSHA intends to accomplish this provision of the settlement agreement, but it would appear that one aspect of this commitment is the new Metal/Non-Metal Diesel Partnership (the Partnership) being developed under the leadership of the National Institute for Occupational Safety and Health (NIOSH). In addition to the NSSGA and NIOSH, other partners are the National Mining Association and the United Steelworkers of America. As we understand it, MSHA will be a non-partner observer of the Partnership’s activities. The specific goal of the Partnership is to identify technologically and economically feasible DPM controls, using existing and available technology, that can be retrofitted onto existing diesel powered equipment used in underground metal/non-metal mines, to reduce

³ Indeed, the NSSGA remains astonished that MSHA could have promulgated the DPM Rules without ever having conducted any systematic baseline sampling of in-mine exposures of miners to DPM. The sampling carried out during the 31-mine study was a good start, but it is the industry-wide baseline DPM sampling now being carried out by MSHA which may show the first complete picture of DPM exposures of miners at all of the mines covered by the DPM Rules.

DPM emissions to, or below, the concentration limits specified in MSHA's DPM Rules. Clearly, the work of the Partnership will generate important information for MSHA to consider during the course of this expedited rulemaking. Enclosed please find the draft Partnership Agreement and a "Plan of Study for Evaluating Performance of Diesel Particulate Filters in Underground Mines" prepared by NIOSH.

Although we think that MSHA's commitment to work with NIOSH, equipment manufacturers, mine operators, and representatives of miners to improve practical mine-worthy filter technology is in no way fulfilled by MSHA's role in the Partnership as a non-partner participant, nevertheless, NSSGA is enthusiastic about the Partnership's goals and activities.⁴ We say this particularly because we are aware of the activities of the Coal Diesel Partnership among NIOSH, the Bituminous Coal Operators' Association, and the United Mine Workers of America. As we understand it, the Coal Diesel Partnership was formed, in part, to deal with the substantial and ongoing implementation problems of MSHA's health standard for DPM exposure of underground coal miners (the Coal DPM Rules), also published in the Federal Register for January 19, 2001. See 66 Fed. Reg. 5526. The Coal DPM Rules were not subject to litigation. However, we have learned that their implementation has been extraordinarily vexing, both to MSHA and underground coal mine operators. Some problems have been solved, but a multitude remain. It is our understanding that the Coal Diesel Partnership has been a useful forum for discussion of those severe implementation issues.

For example, a June 17, 2002 NIOSH Report to the Coal Diesel Partnership, "Results of Filter Testing Conducted at Deer Creek Mine May 2002," identified, for the first time, serious problems resulting from NIOSH field tests of ceramic filters. The field tests demonstrated that diesel engines

⁴ NSSGA is very interested to learn more about how MSHA intends to go about fulfilling its obligations pursuant to this requirement of the settlement agreement.

operating with such filters installed on them generated dangerous levels of NO₂ emissions. The Deer Creek Mine field testing, in turn, resulted in a May 31, 2002 MSHA Program Information Bulletin (PIB No. P02-4) alerting mine operators and miners of the potential health hazards that could be caused by currently available platinum-based catalyzed DPM exhaust filters.

Perhaps even more importantly, a subsequent August 7, 2002 Joint NIOSH-MSHA Report to the Coal Diesel Partnership, "Technical Issues Affecting Implementation of Diesel Filtration Technology on Permissible and Non-Permissible Vehicles in Underground Coal Mines," addressed further the NO₂ emissions problem resulting from the use of catalyzed DPM filters, and identified for the first time the potential underground mine fire hazard associated with the use of paper filters and the similar potential fire hazard associated with the use of ceramic filters.

Thus, the Coal Diesel Partnership identified crucial issues that apparently were unanticipated by MSHA prior to promulgation of the Coal DPM Rules. We fully expect that the new Metal/Non-Metal Diesel Partnership will likely identify (and hopefully resolve) both known, as well as currently unforeseen, problems with DPM control technology. Copies of the aforementioned June 17 NIOSH Report, the May 31 PIB, and the August 7 Joint NIOSH-MSHA Report are enclosed.

The NSSGA also wishes to comment favorably on the settlement agreement's recognition of the concept of "practical mine worthy filter technology." 67 Fed. Reg. 47298. We are disappointed and concerned, however, that despite the Agency's commitment to improving practical mine-worthy filter technology, the ANPRM never even uses the term in any of the 24 questions dealing with technological and economic feasibility. We hope this omission is not a signal MSHA is abandoning its commitment because we believe successful identification of practical mine-worthy filter technology is crucial to the success of this expedited rulemaking.

We say this because NSSGA is not aware of any actual in-mine results which would allow the assessment of the feasibility of aftertreatment systems, nor do we know of any such results published in the international literature. Because of this dearth of data, NSSGA believes the amendments to the DPM Rules should clearly state that the standard for feasible aftertreatment systems is “practical mine- worthy filter technology,” and that this term should be defined in the DPM Rules themselves. We propose the following definition for the term: *Practical mine- worthy filter technology means affordable, effective, and durable filters which will enable mine operators to comply with the DPM concentration limits specified in 30 CFR § 57.5060 by consistently reducing DPM emissions by no less than 80% in actual conditions of use, without causing engine damage or failure or otherwise creating safety or health hazards such as unhealthful or impermissible levels of any air contaminant.*

Successful development and use of practical mine-worthy filter technology is the critical underpinning to any valid determination that it is technologically and economically feasible for underground metal/non-metal mine operators to comply with the concentration limits of the DPM Rules. To highlight and reemphasize our concerns about this problem, we enclose a copy of a May 22, 2002 letter to MSHA from the Engine Manufacturers Association (EMA) cautioning MSHA about the feasibility of its DPM Rules. That letter states in part as follows:

[I]t is EMA’s position that filters are simply not add-on devices and cannot be unconditionally applied to all existing engines. . . .

Because improper integration of particulate filters can harm the engine and deteriorate performance, any aftertreatment device must be verified to be compatible with engine exhaust characteristics, temperature profile, backpressure requirements,

and engine protection. It is also necessary to verify that emission reductions claimed by equipment manufacturers will indeed occur after installation.

* * *

Due to the current state of technology, EMA believes that MSHA should reconsider or delay implementation of the requirement that requires retrofitting mining equipment with filter technology. Additional time is needed to test and verify filter equipment that can be successfully applied to the wide range of engines and equipment operating in mines today. Failure to complete the necessary testing and verification may not only result in a lack of [DPM] reductions, but in equipment and engine damage or failure that could jeopardize safety.

Practical mine-worthy filter technology, when it is developed and suitable for use, by and large would appear to be the engineering control of choice in underground stone mines. Mine ventilation may play a role too, but, as has been demonstrated by industry commenters on the May 29, 2002 Draft Report (see footnote 2, *supra*), the costs of ventilation changes are likely to be enormous, if they can even be accomplished at all. Thus, for example, John Head's comments of May 21, 2002, point out as follows:

MSHA's feasibility conclusion relying on no major ventilation additions in the industry is contradicted by the three trona mines in the [31-mine study] study which recorded compliance with the DPM limits using ventilation quantities averaging 1.29 million cubic feet per minute (cfm) (needed for methane gas control). These primary airflows in

the trona mines can be contrasted against the eleven stone mines in the study which were out of compliance with the DPM limits and averaged main airflows of only 99,000 cfm (with nine of the fourteen readings estimated by MSHA sampling personnel as essentially zero flow. . . .

Head comments at 4.

Finally, as a general comment on the fundamental concept of technological and economic feasibility, NSSGA notes the recently issued executive order dealing with “Proper Consideration of Small Entities in Agency Rulemaking.” Executive Order 13272 of August 13, 2002. 67 Fed. Reg. 53461. Many of NSSGA’s affected member companies are covered by E.O. 13272, and MSHA must comply with that executive order (copy enclosed). Additionally, MSHA must comply with the new Office of Management and Budget (OMB) “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,” published in the Federal Register for February 22, 2002. 67 Fed. Reg. 8452. The NSSGA believes that these Guidelines apply to the development of information by MSHA during this expedited rulemaking.

We now turn to our specific responses to the questions raised by MSHA in the ANPRM.

Responses to ANPRM Questions

As noted at the outset, NSSGA has under review each of the 48 questions raised by MSHA in the ANPRM; however, at this juncture we are not prepared to respond to all of them. Furthermore, we anticipate that during this expedited rulemaking, we will be able to furnish more detailed information at other appropriate times. For current purposes, and for ease of reference, we provide answers to questions based on the format of major categories noted in the ANPRM, as follows:

- *Sections 57.5060(a) and (b), Limit on concentration of diesel particulate matter.*

(a) What are the appropriate interim and final limits if EC is the surrogate?

Although we are not able to respond to this question at the moment, we do wish to state firmly that complying with the total carbon-based DPM interim and final concentration limits in the original DPM Rules is not technologically or economically feasible in underground stone mines. Our view is supported by data gathered from the nine mines operated by NSSGA members participating in the 31-mine study, and we believe that this conclusion will be buttressed by the compliance assistance baseline DPM sampling currently being conducted by MSHA as part of the settlement agreement. The NSSGA believes that elemental carbon-based concentration limits are the most appropriate of any surrogate for DPM at this time. We remain very concerned, however, that simply converting from total carbon-based concentration limits to *equivalent* elemental carbon-based limits fails to fully address our feasibility problems.

- *Section 57.5060(c) addresses application and approval requirements for an extension of time in which to reduce the concentration of DPM to the final limit.*

(a) What circumstances would necessitate an extension of time to come into compliance?

Generally speaking, although it is now uncertain as to what the final DPM elemental carbon-based concentration limit will be because of issues involving technological and economic feasibility, nevertheless it is quite likely that a number of mines will need extra time to comply. Operators should be granted an extension if they are acting in good faith to identify, obtain, or install practical mine-worthy filter technology or other engineering controls, and if they are utilizing, or in the process of utilizing, feasible administrative controls and personal protective equipment (PPE), if appropriate, and if they

are otherwise in compliance with provisions of the DPM Rules aimed at minimizing the DPM exposure of miners.

(b) What should be the duration of the extension?

The extension should last up to one calendar year from the time of its approval by MSHA.

(c) Should MSHA allow more than one extension?

MSHA should allow more than one extension as long as the operator is working to identify, obtain, or install practical mine-worthy filter technology or other engineering controls, utilizing feasible administrative controls and PPE, if appropriate, and is otherwise in compliance with provisions of the DPM Rules aimed at minimizing the DPM exposure of miners.

(d) What actions should mine operators be required to take to minimize DPM exposures if they are operating under an extension?

Mine operators should be in compliance with other portions of the DPM Rules aimed at minimizing the DPM exposure of miners, and should also utilize feasible administrative control methods and PPE, as appropriate. These actions will help to lower the DPM exposures of miners while the operator determines what engineering controls are feasible.

- *Section 57.5060(d) addresses certain exceptions to the concentration limit.*

(e) Would this provision be necessary if MSHA includes in the final rule its current hierarchy of controls for its other exposure-based health standards for metal and non-metals mines?

NSSGA believes that this provision would not be necessary if MSHA includes, in the amended DPM Rules, its current hierarchy of controls for other exposure-based health standards. The NSSGA strongly supports this approach. If the use of administrative controls and PPE is specifically permitted, then this exception to the concentration limits could be removed without significant impact. Allowing the application of the hierarchy of controls provides the mine operator with the flexibility to protect miners in

an event of possible over-exposures to DPM, and therefore obviates the need for the exception.

- *Section 57.5060(e) prohibits use of personal protective equipment to comply with the concentration limits; and § 57.5060(f) prohibits use of administrative controls to comply with the concentration limits.*

(f) Currently, there is no approved respirator for use in protecting miners exposed to DPM atmospheres. If MSHA includes requirements for some form of respiratory protection, what type of respirators would be protective of miners? What are their specifications?

At the MSHA DPM Outreach meeting of October 8, 2002 in Ebensburg, Pennsylvania, MSHA representatives stated that full and half-face respirators with R100 or P100-rated filters will be protective to miners. Such respirators are available from various vendors including 3M, North, and MSA. Both R100 and P100 filters are rated as 99.97% efficient, and are used for filtering out oil and non-oil aerosols. The NSSGA believes, however, that it would be prudent for NIOSH to test and approve respirators specifically for protection against DPM pursuant to the appropriate provisions of 42 C.F.R. Part 84. We intend to discuss this with NIOSH officials, and suggest that this work be an adjunct to the new Partnership's activities.

(g) Should MSHA propose to require mine operators to implement a written respiratory protection program when miners must wear respiratory protection?

Existing MSHA regulations on respirator use should apply. See 30 C.F.R. § 57.5005.

(h) Should MSHA require mine operators to apply to the secretary for approval to use respiratory protection? Should the application be in writing? What conditions should MSHA require mine operators to meet before approval is granted to use respirators?

MSHA's general standard for control of exposure to airborne contaminants (30 C.F.R. § 57.5005) contains no requirement for the operator to apply to the Secretary for approval to use respirators. That standard is the proper model here, too. Thus, operators should not be required to apply to the Secretary for approval to use respiratory protection. Ultimately, it is operators who have a statutory obligation for assuring a safe workplace. Therefore, it should be left to the operator how best to discharge that obligation.

(i) *Should MSHA propose to require mine operators to implement a written administrative control plan when they use administrative controls to reduce miners' exposure to their required limit?*

As in the above question, it should be left to the operator as to how best to reduce miners' exposures to the required limit. NSSGA does not support a provision requiring operators to implement a written administrative control plan.

- *Section 57.5061(b) addresses how MSHA will collect and analyze samples for compliance purposes.*

NSSGA supports the use of elemental carbon as the surrogate for DPM in the analysis of samples for compliance purposes.

- *Section 57.5061(c) provides for MSHA to conduct personal, area, and occupational sampling for compliance determinations.*

NSSGA supports MSHA's intent to amend this provision so that only personal samples are used for compliance determinations. MSHA has requested information regarding the cost for mine operators to conduct personal sampling of miners' DPM exposures for elemental carbon-based limits. NSSGA does not now have adequate information on this issue, but wishes to remind MSHA that many of the operators subject to the DPM Rules will need to hire consultants to perform this work. MSHA should be able to obtain consultants' costs. In any event, while not insubstantial, the costs of

sampling pale by comparison to the costs of practical mine-worthy filter technology and feasible ventilation upgrades.

- *Section 57.5062 addresses the diesel particulate control plan.*

The NSSGA believes that the diesel particulate control plan provision of 30 C.F.R. § 57.5062 should be deleted in its entirety. Under the current provision, a plan must be established in the event of a violation of the DPM Rules' concentration limits. That plan, once adopted, must remain in effect for three years at a minimum, assuming no further violation of the concentration limits occurs. Each subsequent violation triggers a new three-year plan obligation.

This is disturbing because a violation of the concentration limits, as currently prescribed in the DPM Rules, would be based merely on a single sample, regardless of the potentially localized or unique precipitating conditions or the aberrant nature of that particular sample. Because a single sample exceedance in one location thus dictates a mine-wide plan which must be followed for at least three years, with any departure from any of the terms of the plan subjecting the operator to further enforcement action, it is apparent that this provision is unjustifiably onerous and an extremely disproportionate response to a single sample exceedance.

Moreover, it is particularly unreasonable to require plan modification and a demonstration of the effectiveness of the modified plan in the event of a subsequent single sample exceedance somewhere in the mine, for any reason. The mere occurrence of a single sample above the applicable concentration limit in no way demonstrates the existing plan is inadequate. Indeed, as likely as not, the single sample may not be reflective of the DPM levels normally achieved by the existing control measures. On the contrary, the exceedance may well have been the product of a unique or unusual set of circumstances, or may have been the result of a failure to follow fully one of the required control measures. Although a failure to comply with any of those control measures would itself be a punishable violation under the

provision as now written, it is extraordinarily harsh and irrational also to require modification of the plan (which may well not need changing at all), and the attendant mandatory monitoring that is then required to prove the plan's effectiveness. In lieu of the diesel particulate control plan required currently by 30 C.F.R. § 57.5062, the NSSGA believes that the ventilation plan requirements of 30 C.F.R. § 57.8520 are more than adequate to deal with DPM.

- *Technological And Economic Feasibility.*

We believe that our discussion of the problems associated with technological and economic feasibility set forth above provide MSHA with our position on this fundamental issue. It may be useful to focus the attention of the Partnership on the 24 questions dealing with technological and economic feasibility specified in the ANPRM. The NSSGA intends to discuss that possibility with the Partnership.

- *Paperwork Burden Issues*

As noted above, the NSSGA does not believe it is necessary to develop a written program for the use of administrative controls, or a written program for the use of PPE other than what is currently required by 30 C.F.R. § 57.5005(b). The NSSGA also believes that the diesel particulate control plan provision of 30 C.F.R. § 57.5062 should be deleted in its entirety because the ventilation plan requirements of 30 C.F.R. § 57.8520 can more than adequately deal with DPM.

Conclusion

NSSGA appreciates the opportunity to review and comment upon this ANPRM. We will also look forward to reviewing and commenting on the notice of proposed rulemaking that will be published following MSHA's consideration of all the comments on the ANPRM. We are disappointed, however, that the Agency has apparently abandoned the process used during the discussions among the litigating parties leading to the settlement agreement. We think a revival of that sort of process, with the full

involvement of the NSSGA, could well be more fruitful than the more traditional rulemaking road MSHA has now chosen to travel. The NSSGA would be interested in discussing this further with the Agency.

Finally, we are concerned that this expedited rulemaking may not be proceeding in a timely enough fashion to be completed by July 19, 2003, the date specified in the settlement agreement after which MSHA inspectors will begin issuing citations to operators for “failure to comply with the 400 micrograms per cubic meter of air interim limit.” 67 Fed. Reg. 47298. We are not urging, however, that MSHA complete the expedited rulemaking through any pell-mell rush to judgment because the issues under consideration here are extraordinarily complex and of vital importance to the viability of the regulated industry. We simply point out that time is short. In this regard, as we have stated above, simply converting the current total carbon-based concentration limits to *equivalent* elemental carbon-based limits is not the answer to the severe technological and economic feasibility problems facing operators of underground stone mines. The final concentration limit is especially problematic. NSSGA believes that MSHA should reconsider the final limit with a view toward either delaying its effective date or withdrawing it altogether.

NSSGA stands ready in every way to work with MSHA to address and resolve the important issues at stake.