

DEPARTMENT OF LABOR**Mine Safety and Health Administration****30 CFR Part 57****RIN 1219-AB28****Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners****AGENCY:** Mine Safety and Health Administration (MSHA), Labor.**ACTION:** Proposed rule; notice of public hearing; close of record.

SUMMARY: This proposed rule addresses two provisions of the Mine Safety and Health Administration's final rule pertaining to "Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners," published in the **Federal Register** on January 19, 2001 (66 FR 5706, RIN 1219-AB11).¹ The two provisions are § 57.5066(b) (regarding the tagging provision of the Maintenance standard) and § 57.5067(b) (regarding the definition of "introduced" in the Engine standard). This proposal gives notice of MSHA's intent to revise these two provisions and requests comments from the mining community.

By this document, the Agency is also announcing its intent to hold a public hearing pursuant to section 101 of the Federal Mine Safety and Health Act of 1977 (Mine Act).

DATES: Comments on the proposed rule must be received on or before August 6, 2001.

The public hearing will be held on August 16, 2001 in Arlington, Virginia.

If individuals or organizations wish to make an oral presentation for the record, submit your request at least 5 days prior to the hearing date. However, you do not have to make a written request to speak. Any unallotted time will be made available for persons making same-day requests.

The rulemaking record will close August 20, 2001.

ADDRESSES: Comments on the proposed rule may be transmitted by electronic mail, fax, or mail. Comments by electronic mail must be clearly identified as such and sent to this e-mail address: comments@msha.gov. Comments by fax must be clearly identified as such and sent to: MSHA, Office of Standards, Regulations, and Variances, 703-235-5551. Send

comments by mail to: MSHA, Office of Standards, Regulations, and Variances, Room 631, 4015 Wilson Boulevard, Arlington, VA 22203-1984.

You may use mail, fax or electronic mail to send us your request to make an oral presentation at the public hearing.

The hearing will begin at 9:00 a.m. and will be held at: The U.S. Department of Labor, Mine Safety and Health Administration, 7th Floor Conference Room, 4015 Wilson Boulevard, Arlington, Va 22203.

This proposed rule is available on MSHA's webpage at <http://www.msha.gov>, under Statutory and Regulatory Information.

FOR FURTHER INFORMATION CONTACT: David L. Meyer, Director; Office of Standards, Regulations, and Variances; MSHA, 4015 Wilson Boulevard, Arlington, Virginia 22203-1984. Mr. Meyer can be reached at Meyer-David@msha.gov (E-mail), 703-235-1910 (Voice), or 703-235-5551 (Fax).

SUPPLEMENTARY INFORMATION:**I. Background**

On January 19, 2001 (66 FR 5706), MSHA published a final rule addressing the exposure of underground metal and nonmetal miners to diesel particulate matter (dpm). The final rule establishes new health standards for underground metal and nonmetal miners working at mines that use equipment powered by diesel engines. The rule is designed to reduce the risk to these miners of serious health hazards that are associated with exposure to high concentrations of dpm. The final rule was to become effective on March 20, 2001.

On January 29, 2001, AngloGold (Jerritt Canyon) Corp. and Kennecott Greens Creek Mining Company filed a petition for review of the rule in the District of Columbia Circuit. On February 7, 2001, the Georgia Mining Association, the National Mining Association, the Salt Institute, and MARG Diesel Coalition filed a similar petition in the Eleventh Circuit. On March 14, 2001, Getchell Gold Corporation petitioned for review of the rule in the District of Columbia Circuit. The three petitions have been consolidated and are pending in the District of Columbia Circuit. The United Steelworkers of America (USWA) has intervened in the AngloGold case.

While these challenges were pending, the AngloGold petitioners filed with MSHA an application for reconsideration and amendment of the final rule and to postpone the effective date of the final rule pending judicial review. The Georgia Mining petitioners

similarly filed with MSHA a request for an administrative stay or postponement of the effective date of the rule. On March 15, 2001 (66 FR 15033), MSHA delayed the effective date of the final rule until May 21, 2001, in accordance with a January 20, 2001 memorandum from the President's Chief of Staff (66 FR 7702). This delay was necessary to give Department of Labor officials the opportunity for further review and consideration of these new regulations. On May 21, 2001 (66 FR 27863), MSHA published a document in the **Federal Register** delaying the effective date of the final rule until July 5, 2001.

Elsewhere in this issue of the **Federal Register**, MSHA is publishing a final rule addressing the exposure of underground metal and nonmetal miners to diesel particulate matter. In the same **Federal Register** document, MSHA also delayed the effective date of one provision of the final rule, § 57.5066(b) (regarding the tagging provision of the Maintenance standard) because MSHA believes it needs further clarification, and that the affected mining public could benefit from further dialogue. MSHA believes that this dialogue will both clarify the delayed provision and help ensure that it is effectively implemented, thus providing improved health protection for miners. MSHA also believes that the delay of the effective date of this provision will assist the parties in negotiating an acceptable disposition of the current pending litigation.

This proposed rule also has been developed to revise the language of § 57.5066(b) (regarding the tagging provision of the Maintenance standard) and to add a new paragraph (b)(3) to § 57.5067(b) (regarding the definition of the term "introduced" in the Engine standard) of MSHA's final rule addressing the exposure of underground metal and nonmetal miners to diesel particulate matter.

MSHA believes that the issues surrounding the two provisions need further input from the public. MSHA will consider all comments on the delayed provision and on the issue of "introduced" currently within the rulemaking record to the January 2001 final rule, as well as any other comments received on this proposed rule. Commenters are encouraged to submit their comments on or before August 6, 2001. Your comments will become a part of the official rulemaking record. Interested persons are encouraged to supplement written comments with computer files or disks; please contact MSHA with any questions about format.

¹ On March 15, 2001, the effective date of the final rule was extended to May 21, 2001 (66 FR 15033). On May 21, 2001, the effective date was further extended until July 5, 2001 (66 FR 27863). On July 5, 2001, MSHA delayed the effective date of § 57.5066(b) (66 FR (to be added by the FR)).

II. Proposed Rule

A. Section 57.5066(b) (Tagging Provision of Maintenance Standards)

Paragraph (b)(1) of § 57.5066(b) as published on January 19, 2001, requires the operators of underground metal and nonmetal mines to authorize and require miners who operate diesel-powered equipment to affix a visible and dated tag to the equipment at any time the equipment operator notes any evidence that the equipment may require maintenance. Paragraph (b)(2) requires the mine operator to make certain that the tagged equipment be “promptly” examined by a person authorized by the mine operator to maintain diesel equipment, and prohibits removal of the tag until after the examination is completed. Paragraph (b)(3) requires that a log be retained of all equipment tagged. This provision specifically lists the information that mine operators must include in the log.

MSHA proposes to revise § 57.5066(b)(1) of the final rule to require that a mine operator authorize each miner who operates diesel-powered equipment underground to affix a visible and dated tag to the equipment when the miner notes evidence that the equipment may require maintenance.

MSHA is proposing to clarify the term “evidence” to mean “visible smoke or odor that is unusual for that piece of equipment under normal operating procedures, or obvious or visible defects in the exhaust emissions control system or in the engine affecting emissions”.

Proposed paragraph (b)(2) would require that a mine operator ensure that any equipment tagged pursuant to this section is promptly examined by a person authorized by the mine operator to maintain diesel equipment, and that the affixed tag not be removed until after the examination has been completed. MSHA is proposing that the term “promptly” means before the end of the next shift during which a qualified mechanic is scheduled to work.

No change is proposed to the language in paragraph (b)(3).

B. Section 57.5067(b)(3) (Definition of “Introduced” in the Engine Provision)

Paragraph (a) of § 57.5067 of the final rule requires that any diesel engines added to the fleet of an underground metal or nonmetal mine in the future be either engines approved by MSHA under 30 CFR Part 7 or 30 CFR Part 36 or engines that meet or exceed the applicable dpm emission requirements of the EPA. Diesel engines used in

ambulances and firefighting equipment are specifically exempted in the final rule from this provision. Only engines approved by MSHA as permissible can be used in areas of the mine where permissible diesel equipment is required. The composition of the existing fleet in an underground metal and nonmetal mine is not impacted by the final rule. However, after the final rule’s effective date, any engine introduced into the underground areas of the mine must be either MSHA approved or meet the applicable EPA requirements.

Paragraph (b)(1) of § 57.5067 of the final rule defines the term “introduced” to mean any engine added to the underground inventory of engines of the mine in question, including an engine in newly purchased equipment; an engine in used equipment brought into the mine; and a replacement engine that has a different serial number than the engine it is replacing. MSHA did not intend, however, for this provision to require a mine operator who moves diesel-powered equipment from one underground mine to another underground mine operated by the same mine operator to obtain MSHA approval for the diesel engine pursuant to 30 CFR part 7 or 30 CFR part 36, or meet or exceed the applicable dpm emission requirements of the EPA that are incorporated in paragraph (a) of § 57.5067.

MSHA proposes no change to paragraph (b)(2).

Accordingly, MSHA proposes to add paragraph (b)(3) to § 57.5067 to clarify that a mine operator operating more than one underground mine may move a piece of diesel-powered equipment from one underground mine to another underground mine even though each underground mine operated by that same operator has a different mine identification number.

III. Impact Analyses

A. Cost and Benefits: Executive Order 12866

There are no costs associated with this proposed rule. The costs shown in the Preliminary Regulatory Economic Analysis (PREA) were taken directly from the Regulatory Economic Analysis (REA) that supported the dpm final rule. These costs are repeated in the PREA in order to give a detailed account of the provisions as they were discussed in the REA that supported the dpm final rule. Because the costs in the PREA have already been accounted for in the REA that supported the dpm final rule, the PREA introduces no new or additional costs.

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of intended regulations. MSHA determined that the DPM final rule (including the two provisions in the PREA) was not economically significant but was a significant regulatory action under Executive Order 12866.

B. Regulatory Flexibility Certification

The Regulatory Flexibility Act (RFA) requires regulatory agencies to consider a rule’s economic impact on small entities. Under the RFA, MSHA must use the Small Business Administration’s (SBA’s) criterion for a small entity in determining a rule’s economic impact unless, after consultation with the SBA Office of Advocacy, MSHA establishes an alternative definition for a small mine and publishes that definition in the **Federal Register** for notice and comment. For the mining industry, SBA defines “small” as a mine with 500 or fewer workers. MSHA traditionally has considered small mines to be those with fewer than 20 workers. To ensure that the final rule conforms with the RFA, MSHA has analyzed the economic impact of the final rule on mines with 500 or fewer workers (as well as on those with fewer than 20 workers). MSHA has concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, the proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, or increased expenditures by the private sector of more than \$100 million.

D. Paperwork Reduction Act of 1995 (PRA)

The proposed rule would impose no new or additional burden hours or related costs. Burden hours and related costs shown in the PREA were taken from the REA that supported the dpm final rule. These burden hours and costs were presented in the PREA in order to give a detailed account of the two provisions.

E. National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969 requires each Federal agency to consider the environmental effects of proposed actions and to prepare an Environmental Impact Statement on major actions significantly affecting the quality of the environment. MSHA has

reviewed the proposed rule in accordance with NEPA requirements (42 U.S.C. 4321 *et seq.*), the regulations of the Council of Environmental Quality (40 CFR part 1500), and the Department of Labor's NEPA procedures (29 CFR part 11). As a result of this review, MSHA has determined that this rule will have no significant environmental impact.

F. Executive Order 12630

This proposed rule is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

G. Executive Order 13045 Protection of Children From Environmental Health Risks

In accordance with Executive Order 13045, MSHA has evaluated the environmental health and safety effects of the proposed rule on children. MSHA has determined that the rule will not have an adverse impact on children.

H. Executive Order 12988 (Civil Justice)

MSHA has reviewed Executive Order 12988, Civil Justice Reform, and determined that the proposed rule will not unduly burden the Federal court system. The rule has been written so as to provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

I. Executive Order 13084 Consultation and Coordination With Indian Tribal Governments

MSHA certifies that the proposed rule will not impose substantial direct compliance costs on Indian tribal governments.

J. Executive Order 13132 (Federalism)

MSHA has reviewed the proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have "federalism implications." The proposed rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the

distribution of power and responsibilities among the various levels of government."

K. Executive Order 13211 (Energy)

MSHA has reviewed this proposed rule in accordance with Executive Order 13211 regarding the energy effects of Federal regulations and has determined that this proposed rule does not have any adverse effects on energy supply, distribution, or use. Therefore, no reasonable alternatives to this action are necessary.

IV. Conduct of Public Hearing

The hearing will be conducted in an informal manner. Although formal rules of evidence or cross examination will not apply, the presiding official may exercise discretion to ensure the orderly progress of the hearing and may exclude irrelevant or unduly repetitious material and questions.

The hearing will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations. The hearing panel may ask questions of speakers. At the discretion of the presiding official, the time allocated to speakers for their presentation may be limited.

A verbatim transcript of the proceeding will be prepared and made a part of the rulemaking record. Copies of the transcript will be available to the public. The transcript will also be available on MSHA's webpage at <http://www.msha.gov>, under Statutory and Regulatory Information.

MSHA will accept additional written comments and other appropriate data for the record from any interested party, including those not presenting oral statements. Written comments will be included in the rulemaking record.

V. Close of Record

To allow for the submission of post-hearing comments, the rulemaking record will close on August 20, 2001.

List of Subjects in 30 CFR Part 57

Diesel particulate matter, Metal and Nonmetal, Mine Safety and Health, Underground mines.

It is proposed to amend Chapter I of Title 30 as follows:

PART 57—[AMENDED]

1. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811.

2. Paragraphs (b)(1) and (b)(2) of § 57.5066 are revised to read as follows:

§ 57.5066 Maintenance standards.

* * * * *

(b)(1) A mine operator must authorize each miner operating diesel-powered equipment underground to affix a visible and dated tag to the equipment when the miner notes evidence that the equipment may require maintenance in order to comply with the maintenance standards of paragraph (a) of this section. The term "evidence" means visible smoke or odor that is unusual for that piece of equipment under normal operating procedures, or obvious or visible defects in the exhaust emissions control system or in the engine affecting emissions.

(2) A mine operator must ensure that any equipment tagged pursuant to this section is promptly examined by a person authorized to maintain diesel equipment, and that the affixed tag not be removed until the examination has been completed. The term "promptly" means before the end of the next shift during which a qualified mechanic is scheduled to work.

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3. Section 57.5067 is amended by adding paragraph (b)(3) to read as follows:

§ 57.5067 Engines.

* * * * *

(b) * * *

(3) The term "introduced" does not include the transfer of engines or equipment from the inventory of one underground mine to another underground mine operated by the same mine operator.

Signed at Arlington, VA, this 29th day of June, 2001.

Dave D. Lauriski,

Assistant Secretary of Labor for Mine Safety and Health.

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