

**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:** Final rule.

**SUMMARY:** This final rule revises two provisions of the Mine Safety and Health Administration's (MSHA) existing 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).

The two provisions are the evidence and tagging provisions of the Maintenance standard and the definition of introduced in the Engine standard. The revisions clarify the existing rule.

**EFFECTIVE DATE:** March 29, 2002.

**FOR FURTHER INFORMATION CONTACT:**

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**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 established new health standards for underground metal and nonmetal miners working at mines that use equipment powered by diesel engines. The rule was 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 Court of Appeals. On February 7, 2001, the Georgia Mining Association, the National Mining Association, the Salt Institute, and the 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 Court of Appeals. The three petitions have been consolidated and are pending in the District of Columbia Circuit Court of Appeals. The United Steelworkers of America (USWA) intervened in the litigation.

While these challenges were pending, the AngloGold petitioner 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 petitioner 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 15032), 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 (Department) 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** further delaying the effective date of the final rule until July 5, 2001 to allow the Department an opportunity to continue negotiations to settle the legal challenges to the final rule.

As a result of settlement negotiations, on July 5, 2001, MSHA published two notices in the **Federal Register** addressing the January 19, 2001 final rule on dpm exposures of underground metal and nonmetal miners. One notice (66 FR 35518) delayed the effective date of § 57.5066(b) regarding the evidence and the tagging provision of the Maintenance standard; clarified the effective dates of certain provisions of the final rule; and gave correction amendments. MSHA noted that its intent in delaying the effective date of final § 57.5066(b) was to assist the parties in negotiating an acceptable disposition of the pending litigation.

The proposed rule published in the **Federal Register** on July 5, 2001 (66 FR 35521) would clarify in § 57.5066(b)(1) and (b)(2) of the maintenance standards the terms *promptly* and *evidence*, as used in paragraphs (b)(1) and (b)(2), respectively. The proposed rule would also add a new paragraph (b)(3) to

§ 57.5067 (regarding the definition of *introduced* in the Engine standard) to clarify that 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. The proposed rule allowed the affected mining community further opportunity to express its concerns to MSHA about these provisions of the January 2001 final rule.

The comment period on the proposed rule closed on August 6, 2001. MSHA received comments from trade associations, organized labor, and individual mine operators. A public hearing was held in Arlington, Virginia, on August 16, 2001. The United Steelworkers of America presented the only oral testimony at this hearing. The rulemaking record closed on August 20, 2001.

**II. Section-by-Section Discussion of This Final Rule**

The following section-by-section analysis explains this final rule and its effect on existing standards.

**A. Section 57.5066, Maintenance standards**

Paragraph (b)(1) of this final § 57.5066, as published on January 19, 2001, requires operators of underground metal and nonmetal mines to authorize and require that each miner operating diesel-powered equipment underground affix a visible and dated tag to the equipment at any time the miner notes evidence that the equipment may require maintenance to comply with the maintenance standards of paragraph (a) of § 57.5066. However, the January 19, 2001 final rule did not specify the type of evidence MSHA intended for equipment operators to use to determine when the equipment must be tagged for prompt examination by an authorized person. The January 19, 2001 final rule, as published, could have resulted in equipment operators tagging a piece of diesel-powered equipment for reasons unrelated to diesel emissions. This was contrary to what MSHA intended, and the mining community requested that MSHA clarify the term *evidence*.

Revised paragraph (b)(1) of § 57.5066 is the same as the January 19, 2001 final rule with the exception of the clarification of the term *evidence*. *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."

Commenters commended MSHA on proposing to clarify § 57.5066(b)(1). Some commenters, however, suggested that MSHA make further modifications to the tagging requirements of the standard to avoid confusion with the tagging requirements of MSHA's safety standard for self-propelled mobile equipment at § 57.14100(c), Safety defects; examination, correction and records.

These commenters were concerned that a miner would operate a defective piece of equipment tagged under § 57.14100(c), which requires tagged equipment to be removed from service until defects are corrected. Commenters feared that the two tags might be confused and tagged equipment could be removed unnecessarily or that unsafe equipment might not be removed. Section 57.14100(c) requires that:

When defects make continued operation hazardous to persons, the defective items, including self-propelled mobile equipment, shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

A commenter suggested that MSHA allow the mine operator to choose the means of identification for purposes of the dpm tag to avoid confusion with the tagging requirements of § 57.14100(c). Other commenters suggested that the best way to reconcile § 57.14100(c) and proposed § 57.5066(b)(1) is by adding an additional paragraph (b)(3) to proposed § 57.5066(b)(1), to allow a mine operator to incorporate the mine's procedures adopted pursuant to § 57.14100 or allow the mine operator to develop an alternative system for identifying equipment referred to in the dpm standard. These commenters also suggested that the alternative system be subject to approval by the appropriate MSHA District Manager.

By contrast, some commenters stated that the safety tag required under § 57.14100(c) and the diesel emissions tag required under § 57.5066(b)(1) will not create confusion among miners. These commenters noted that under § 57.5066(b)(1), mine operators have the flexibility to design their own diesel emissions tag and that they can design the tag to be of a particular shape or color to avoid any confusion with the safety tag. These commenters noted, however, that it is essential for the final standard to continue to require that the diesel emissions tag be dated.

MSHA considered the concerns raised by all of the commenters pertaining to the tagging requirements in the dpm standard. MSHA considered requiring a particular design for the diesel

emissions tag, but chose not to impose an additional compliance burden upon operators because little, if any, safety and health benefit would be achieved. Additionally, MSHA believes that the possibility that miners will confuse the safety tag with the diesel emissions tag is remote. As noted by some commenters, proposed § 57.5066(b)(1) does not specify the design of the diesel emissions tag which can be differentiated by size, color, or other obvious visual characteristics to avoid confusion. Under the proposed rule, MSHA left this decision to the discretion of the mine operator. Therefore, the final rule is the same as the proposed rule for the diesel emissions tag.

A commenter suggested that MSHA provide the operator the option of either tagging the equipment as proposed, or allow the miner to include on the pre-shift inspection card that evidence was noted that the equipment might require maintenance related to the diesel engine. This commenter stated that the use of the pre-shift inspection card is allowed under § 57.14100 and it could be used to meet the maintenance-related provision of the dpm regulation. This commenter also stated that this documentation would be available during compliance inspections.

MSHA determined that the tagging requirement of § 57.5066(b)(1) is both necessary and more protective than the alternative suggested by the commenter. The requirements of § 57.5066(b)(1) and § 57.14100(c) cannot be consolidated because these standards serve different purposes. The purpose of § 57.14100(c) is to remove equipment from service if it poses a safety hazard to miners, whereas the purpose of § 57.5066(b)(1) is to identify a potential exposure-related problem that may require maintenance but does not justify removal from service.

A commenter stated that an equipment operator is not a mechanic trained in diesel engine maintenance, and should not have the authority to tag out diesel equipment if the odor or visible smoke level of the equipment changes. This commenter stated that odor is not a reasonable distinguishing factor because multiple activities occurring throughout the working environment could emit a misleading smell. This commenter was also concerned that if the equipment operator became disgruntled that day, the equipment operator could tag the unit in question in order to delay operations. According to this commenter, if the equipment operator believes there is an irregularity in the machine, the equipment operator

should inform the immediate supervisor. Then, the supervisor, the qualified mechanic, and the equipment operator would assess the unit to see if any action should be taken.

MSHA acknowledges this commenter's concerns. However, the dpm rule does not require that the tagged equipment be removed from service. Consistent with the proposed rule, the final rule requires only that the equipment operator be authorized and required to note, by affixing a tag, a potential problem in a diesel-powered machine. It is also the responsibility of the mine operator to respond appropriately to the presence of the tag.

MSHA repropose paragraph (b)(1) to clarify the type of evidence that should alert the equipment operator to the fact that the equipment needs to be tagged for examination. This paragraph, as revised in the final rule, addresses the potential problem of disgruntled miners inappropriately tagging the dpm equipment. MSHA believes that, because equipment operators spend more time operating the equipment than other miners (such as mechanics), and are present when the equipment functions under the widest range of operating conditions, they are better able to detect emissions-related problems than are mechanics. It is MSHA's opinion that even though equipment operators may not be trained or qualified as diesel mechanics, they often recognize the difference between normal and abnormal equipment performance, especially as it relates to diesel particulate matter generation, which is often plainly visible or apparent (for example, black smoke while the equipment is under normal load).

Some commenters suggested that, in terms of the evidence of diesel emission problems, MSHA replace the phrase "under normal operating procedures" with "under normal operations." These commenters believed that their suggested language would clarify and simplify the rule. Other commenters, however, objected to the suggested change, noting that it could alter the purpose of the provision.

MSHA agrees with those commenters who believe that the suggested change could alter the meaning of the provision. MSHA intends that the evidence of diesel emission problems relate to the operation of a particular piece of diesel equipment. On the other hand, the suggested phrase "under normal operations" could be construed as referring to the normal operating procedures of a particular mine as a whole. This is not MSHA's intent.

Final paragraph (b)(2) of § 57.5066, adopts the proposed language requiring that mine operators of underground metal and nonmetal mines make certain that any equipment tagged pursuant to this section is promptly examined by a person authorized to maintain diesel equipment, and that the tag not be removed until the examination has been completed. The mining community requested that MSHA clarify the term *promptly* as it appeared in the January 19, 2001 final rule. In response to commenters, MSHA proposed a revision to paragraph (b)(2) of § 57.5066. MSHA proposed that the term *promptly* be clarified to mean, "before the end of the next shift during which a qualified mechanic is scheduled to work." For example, an equipment operator, on the morning shift, tags a piece of diesel-powered equipment because it is emitting visible black smoke. The operator's qualified person who performs the maintenance checks on such equipment works at the mine only on the midnight shift. The mine operator must make certain that the qualified person examines the tagged equipment before the end of the midnight shift. In the interim, the mine operator can continue to use the equipment as long as the tag is not removed. MSHA's experience is that most underground metal and nonmetal mines have intermittent maintenance schedules. Maintenance at these mines may be conducted on the late night shift during periods of less production activities in the mine. MSHA received no comments specifically addressing this proposed change, and the language of the final rule is the same as the proposed rule.

MSHA proposed no change to the language of paragraph (b)(3) of § 57.5066 of the January 19, 2001 final rule, and MSHA received no comments addressing this provision. Final paragraph (b)(3) of § 57.5066 continues to require that a mine operator retain a log of any equipment tagged pursuant to this section. The log must include the date the equipment is tagged, the date the equipment is examined, the name of the person examining the equipment, and any action taken as a result of the examination. The operator must retain the information in the log for a period of at least one year after the date the tagged equipment is examined.

#### B. Section 57.5067, Engines

Paragraph (a) of § 57.5067 of the January 19, 2001 final rule requires that any diesel engine added to the fleet of an underground metal or nonmetal mine after the effective date of the rule be approved by MSHA under 30 CFR part

7 or 30 CFR part 36, or meet or exceed the applicable dpm emission requirements of the Environmental Protection Agency (EPA) incorporated in paragraph (a) of the engine standard. Diesel engines used in ambulances and firefighting equipment are specifically exempted from this provision in the final rule.

Paragraph (b)(1) of § 57.5067 of the January 19, 2001 final rule states:

(1) The term *introduced* means any engine added to the underground inventory of engines of the mine in question, including:

- (i) An engine in newly purchased equipment;
- (ii) An engine in used equipment brought into the mine; and
- (iii) A replacement engine that has a different serial number than the engine it is replacing.

Paragraph (b)(2) states:

The term *introduced* does not include engines that were previously part of the mine inventory and rebuilt.

Thus, the application of the term *introduced* in § 57.5067 of the January 19, 2001 final rule required mine operators who transferred existing engines or 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 incorporated in paragraph (a) of the engine standard. This is contrary to what MSHA intended, and the mining community requested that MSHA clarify the definition of *introduced*.

Accordingly, MSHA proposed to revise § 57.5067 by adding a new paragraph (b)(3) to clarify that 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. MSHA proposed no change to paragraphs (b)(1) and (2) of the January 19, 2001 final rule, and no comments were received by MSHA on these provisions.

In general, commenters supported the need to clarify the term *introduced* in paragraph (b)(3) of § 57.5067. A number of commenters, however, suggested certain modifications to the proposed language. These commenters recommended that MSHA add "or affiliated company or corporate entities of that operator" at the end of proposed paragraph (b)(3) so that the definition of *introduced* would read as follows:

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 or affiliated company or corporate entities of that operator.

These commenters stated that the suggested language would expand MSHA's concept to include corporate divisions within the same parent corporation, assuring that all operators of multiple underground mines were treated equally regardless of their corporate structure, and also would clarify that affiliated corporations, even across national borders, are included in the term *mine operator* for purposes of the rule.

Additionally, these commenters were of the opinion that proposed paragraph (b)(3) would still impose an undue burden and hardship on numerous mine operators because it would prohibit mining companies that have chosen to segregate different regions by creating separate affiliated corporations (for example, Operator A West, Operator A East, and Operator A Central), from transferring diesel-powered equipment between mines operated by another corporate division. They believe this may cause separate corporate divisions of the same parent-corporation to have to purchase multiple diesel-powered machines when the transfer of one machine is all that is necessary. These commenters also indicated that the same issue arises for operators with mines outside the United States, who may frequently (or even occasionally) transfer diesel equipment between foreign mines (whose ownership necessarily is through a different corporate entity) and domestic mines.

By contrast, some commenters strongly disagreed that MSHA should revise proposed paragraph (b)(3) of § 57.5067 to incorporate the suggested phrase "or affiliated company or corporate entities of that operator," stating that MSHA's intent, as expressed in the proposed rule, was clear and that the definition of *introduced* covered only domestic mine entities. These commenters requested that the preamble to the final rule specifically address this issue so that all interested parties are clear on the application of the term *introduced*.

MSHA wants to emphasize that the exemption from the definition of *introduced* in revised paragraph (b)(3) of § 57.5067 applies to the transfer of existing diesel engines or diesel-powered equipment from the inventory of one underground mine to another underground mine operated by the same mine operator, even if the mines have different identification numbers.

A mine operator may move a diesel engine from one mine to another mine if both mines are underground and

operated by the same mine operator, and the diesel-powered engine being moved was introduced into at least one of the mines before July 5, 2001, the effective date of the rule, and the engine is listed on each mine's inventory. For compliance purposes, MSHA informed the mining community in its most recent diesel particulate public meetings that MSHA will conduct a physical inventory of diesel engines in every underground metal and nonmetal mine. Any diesel engine entered on MSHA's inventory and which meets the requirements listed above will be exempt from the approval requirements of § 57.5067.

Final § 57.5067 does not exempt engines and equipment jointly owned or shared by different mine operators, even if the engine carries an MSHA approval plate or meets the EPA requirements in paragraph (a) of § 57.5067. Final § 57.5067(b)(3) does not exempt diesel engines or equipment transferred between two mines with the same parent corporation or among affiliated mines. As to the transfer of diesel engines and equipment between mines operated by affiliated companies, MSHA declines to accept the commenters' suggestion. The purpose of this provision was to encourage the introduction of cleaner diesel-powered equipment into underground mines as expeditiously as possible. The commenters did not demonstrate a compelling economic need to justify this departure from generally accepted concepts of equipment ownership by operating companies. Expansion of the equipment ownership concept to potentially remote entities who may have little economic interest in or control over the operations of a particular mine would defeat the Agency's objective of getting cleaner engines into underground mines.

This rulemaking was limited in scope in that it only revised two provisions of the January 19, 2001 final rule. MSHA, however, received comments from the mining community regarding the January 19, 2001 final rule's risk assessment, as well as its regulatory flexibility analysis. MSHA did not address these comments because they exceeded the scope of this rulemaking. The preamble to the January 19, 2001 final rule contains a detailed discussion about MSHA's cost analysis and determination of significance of risk, and addresses comments received from the mining community on these issues.

### III. Impact Analyses

#### A. Cost and Benefits: Executive Order 12866

There are no costs associated with this final rule because the costs in the economic analysis for this rulemaking have already been accounted for in the economic analysis that supported the January 19, 2001 final rule. The costs shown in the economic analysis supporting this rulemaking, were taken directly from the economic analysis that supported the dpm final rule published on January 19, 2001.

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of intended regulations. MSHA determined that the January 19, 2001 dpm final rule (including the two provisions in the economic analysis supporting this rulemaking) was not economically significant but was a significant regulatory action under Executive Order 12866.

The economic analysis in support of the January 19, 2001 final rule demonstrated that the dpm final rule for underground metal and nonmetal mines will reduce a significant health risk to underground miners. Benefits of the January 19, 2001 final rule included reductions in lung cancers. As the mining population turns over, MSHA estimated that a minimum of 8.5 lung cancer deaths will be avoided per year. Other benefits include reductions in the risk of death from cardiovascular, cardiopulmonary, or respiratory causes and reductions in the risk of sensory irritation and respiratory symptoms. By improving compliance with the January 19, 2001 final rule, this final rule will contribute to the realization of the benefits mentioned above.

#### 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. 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 final rule does 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 final 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 final rule would impose no new or additional burden hours or related costs. Burden hours and related costs shown in the economic analysis supporting this rulemaking were taken from the economic analysis that supported the January 19, 2001 final rule. The burden hours and costs presented in the economic analysis supporting this rulemaking are provided to give a detailed account of the two revised provisions.

#### E. National Environmental Policy Act

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

In accordance with Executive Order 13045, MSHA has evaluated the environmental health and safety effects of the final 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 final 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 13175 Consultation and Coordination with Indian Tribal Governments

MSHA has reviewed the final rule in accordance with Executive Order 13175, and certifies that the final rule will not impose substantial direct compliance costs on Indian tribal governments.

J. Executive Order 13132 (Federalism)

MSHA has reviewed the final rule in accordance with Executive Order 13132 regarding federalism and has determined that it does not have federalism implications. The final 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 final rule in accordance with Executive Order 13211 regarding the energy effects of Federal

regulations and has determined that this final rule does not have any adverse effects on energy supply, distribution, or use. Therefore, no reasonable alternatives to this action are necessary.

List of Subjects in 30 CFR Part 57

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

Dated: February 14, 2002.

Dave D. Lauriski,

Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, we are amending Chapter I, Title 30 of the Code of Federal Regulations to read as follows:

PART 57—[AMENDED]

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

Authority: 30 U.S.C. 811.

2. Section 57.5066 is amended by revising paragraphs (b)(1) and (2) 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.

\* \* \* \* \*

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.

[FR Doc. 02-4611 Filed 2-26-02; 8:45 am]

BILLING CODE 4510-43-P