



Chapter 7

MSHA’s Diesel Particulate Matter (DPM) Rulemaking for Metal/Non-Metal Mines: What Have We Learned?

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§ 7.01. Introduction.

The rulemaking of the U.S. Department of Labor’s (Labor Department) Mine Safety and Health Administration (MSHA or “Agency”) on the subject of miners’ exposure to Diesel Particulate Matter (DPM) in underground Metal and Nonmetal (“M/NM”) mines has been a remarkable saga.¹ This chapter explores the implications and questions that this unique regulatory story pose for future rulemaking in the mining industry—and for federal regulation in general.

MSHA’s M/NM DPM rulemaking began like most other federal regulations in the standard notice-and-comment context. This Metal/Non-metal diesel particulate matter rulemaking took a nearly unprecedented change of course, however, when the mining industry challenged the final rule in court and the parties embarked on a wide-ranging settlement negotiation that altered not only the contents of the rule but the process by which the parties interacted and made rulemaking decisions. The central thesis of this chapter is that the valuable lessons learned during these end-stages of this regulation can, and ought to, inform future such MSHA rulemakings in their beginnings—and result in substantively better rules, greater credibility of regulatory process, and more meaningful governmental interaction with regulated communities.

§ 7.02. Summary of Early Regulatory History.**[1] — Promulgation of the “Final” DPM Rule and Immediate Legal Challenges.**

MSHA promulgated its “final” M/NM DPM Rule (“DPM Rule” or “Rule”) on January 19, 2001,² pursuant to the general rulemaking authority of section 101 of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”),³ which, among other things, authorizes the Department of

¹ This chapter is based, in part, on the panel presentation of Edward M. Green, of Crowell & Moring, LLP, Edward P. Clair, of the Labor Department’s Solicitor’s Office, and the author at the 24th Annual Institute of the Energy and Mineral Law Foundation in June 2003. The views and opinions expressed in this chapter are solely those of the author. The author gratefully acknowledges the contributions of his fellow panelists in analyzing and exploring the issues raised by this rulemaking and the valuable outline prepared for the Institute presentation by Mr. Green.

² 66 Fed. Reg. 5706.

³ 30 U.S.C. § 801 *et seq.* (1982).