

verification sample result at the mine site for five years. Monitoring must be conducted in addition to, and not in lieu of, any other sampling the Secretary performs.

MSHA is proposing to delete the requirements for plan verification monitoring. The Agency believes that such monitoring is adequately addressed under § 57.5071, which requires mine operators to monitor in order to determine, under conditions that can be reasonably anticipated in the mine, whether DPM exposures exceed the applicable limits specified in § 57.5060. No monitoring frequency is specified under existing DPM monitoring requirements. MSHA believes that these requirements provide an effective alternative to the existing plan verification sampling requirements. Further, MSHA will conduct additional compliance sampling whenever the Agency suspects that miners' exposures to DPM are not being maintained to the PEL.

The Agency also believes that operator sampling may not always be necessary to determine if controls are being used or maintained. The proposed control plan would require that mine operators specifically describe the controls being used to reduce the miners' exposures to the DPM limit. If MSHA finds during an inspection that specified controls were missing or not being maintained, MSHA has existing enforcement tools to require that mine operators correct the situation.

MSHA is proposing to retain the requirement that mine operators keep a copy of the current control plan at the mine site for its duration. Existing § 57.5062(f) specifies that an operator's failure to comply with the provisions of the diesel particulate matter control plan in effect at a mine, or to conduct required verification sampling is a violation of this part without regard for the concentration of diesel particulate matter that may be present at any time. MSHA intends to adopt this position and cite mine operators for a violation of the plan without consideration of a miner's exposure to the DPM limit. The Agency is proposing to delete this requirement in the rule language only and explain this enforcement position in the preamble.

Existing § 57.5062(d) requires the operator to provide access to records maintained under this section to specified individuals and agencies. The existing rule further requires the mine operator to maintain a copy of the plan and the plan verification monitoring results. As explained earlier in this preamble, MSHA does not believe that verification monitoring is justified in a

proposed rule. Pursuant to § 57.5071, MSHA has access to any record listed in the DPM rule, including an operator's control plan. This access, among other things, provides the Agency with the means to verify an operator's control plan without requiring additional compliance from mine operators. Therefore, MSHA intends to delete this requirement.

MSHA believes that this proposal would provide an alternative method of protecting miners' health provided for under the existing standard. MSHA is interested in providing compliance flexibility to mine operators where such flexibility does not compromise miners' health or safety. The Agency is proposing to retain the current requirement for a control plan with modifications to eliminate unnecessary requirements.

MSHA emphasizes that the proposed modifications do not compromise miners' health or safety under § 101(a)(9) of the Mine Act. Section 101(a)(9) provides: "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." MSHA interprets this provision of the Mine Act to require that all of the health or safety benefits resulting from a new standard be at least equivalent to all of the health or safety benefits resulting from the existing standard when the two sets of benefits are evaluated as a whole. *Int'l Union v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 962–64 (D.C. Cir. 1990); *Int'l Union v. Federal Mine Safety and Health Admin.*, 931 F.2d 908, 911 (D.C. Cir. 1991). The Agency believes that the proposal meets this test.

I. Section 57.5071 Exposure Monitoring

Proposed § 57.5071 would make conforming changes to the existing requirements for mine operators to monitor DPM levels to be consistent with the other changes being proposed. While the existing rule limits DPM concentration in the mine, the proposed rule would limit a miner's DPM exposure. Therefore, existing paragraph (a) requiring the mine operator to monitor the concentration of DPM would be revised to require mine operators to monitor a miner's full-shift airborne exposure.

Similarly, existing paragraph (c) requiring mine operators to take prompt corrective action when the concentration limit is exceeded would be revised to substitute "PEL" for "concentration limit."

J. Section 57.5075 Diesel Particulate Records

Existing § 57.5075(a) summarizes the recordkeeping requirements of the DPM standards contained in §§ 57.5060 through 57.5071. Proposed § 57.5075(a) would number the Diesel Particulate Recordkeeping Requirements table within the section without changing the requirements under existing § 57.5075(a). MSHA intends to delete table entries for existing § 57.5060(d), approved plan for miners to perform inspection, maintenance or repair activities in areas exceeding the concentration limit, and § 57.5062(c), compliance plan verification sample results. MSHA intends to add the requirement for maintaining a copy of the control plan for the duration of the plan in accordance with proposed § 57.5062(d). As a clarifying change to the table, MSHA also intends to add the existing requirement for posting notice of corrective action being taken under § 57.5071(c).

X. Regulatory Impact Analysis

This part of the preamble reviews several impact analyses which the Agency is required to provide in connection with its proposed rulemaking. The full text of these analyses can be found in the Agency's Preliminary Regulatory Economic Analysis (PREA).

A. Cost and Benefits: Executive Order 12866

Executive Order 12866 requires regulatory agencies to assess both the costs and benefits of regulations. In making this assessment, MSHA determined that although this final rule will not have an annual effect of \$100 million or more on the economy, and therefore is not a significant regulatory action as defined by 3(f)(1) of E.O. 12866, the rule meets the § 3(f)(4) definition, that is, the rule may " * * * raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order." MSHA completed a Preliminary Regulatory Economic Analysis (PREA) which estimates both the costs and benefits of the rule. This PREA is available from MSHA and is summarized below.

Table X–1 presents the total yearly compliance costs by provision and mine size for the proposed revisions. All MSHA cost estimates are presented in 2001 dollars. The proposed rule would result in a net cost of \$4,539 per year for underground metal and nonmetal mine operators. This would be an average cost of \$25 for each of the 182 underground