

**PROPOSED MINE SAFETY AND HEALTH
ADMINISTRATION RULE ON COAL DUST**

HEARING
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE
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PROPOSED MINE SAFETY AND HEALTH ADMINISTRATION RULE ON COAL DUST

THURSDAY, JULY 31, 2003

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN
SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 2:17 p.m., in room SD-192, Dirksen Senate Office Building, Hon. Arlen Specter (chairman) presiding.
Present: Senators Specter and Harkin.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good afternoon, ladies and gentlemen. Sorry to be a little bit late. We have had some complex discussions on the energy bill which is currently pending, and it looks as if we may have solved the problem of the energy bill. That has occasioned just a little late start here.

We have three issues which the subcommittee is going to take up in a moment, and all of this is in preparation for floor action on the bill on Labor, Health and Human Services and Education, where we have issues on overtime regulations. We may have issues on the union financial audit matter. We may have issues on the coal dust rules.

We are going to be functioning under very tight time constraints, but I think we can get all of the issues covered, and we are going to have to move along within the time constraints of 5-minute opening statements.

STATEMENT OF DAVID D. LAURISKI, ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH, MINE SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

Senator SPECTER. We start with Assistant Secretary for Mine Safety from the Department of Labor, Mr. David Lauriski, who prior to his current position served as chairman of the Coal Mine Safety Committee for the Utah Coal Operators, a certified mine safety professional. He attended Utah State University and the College of Eastern Utah. Thank you for joining us, Mr. Lauriski, and we look forward to your testimony.

Mr. LAURISKI. Good afternoon, Senator Specter. I am pleased to appear before you today to discuss two MSHA proposed rules designed to limit miners' exposure to respirable coal mine dust and its devastating effects.

I announced on June 24 that MSHA has stopped all work on finalizing these proposed rules. We have recognized for some time the need to reduce miners' risk of lung disease, improve the coal mine dust sampling program, and restore miners' confidence in it.

MSHA's two proposed rules in July 2000 on this same subject as those we are discussing today, accepted public comment and conducted public hearings. When I arrived at MSHA in May 2001, I reviewed the state of miners' health and concluded that coal miners continue to be exposed to excessive concentrations of dust, and that there remains an unacceptable risk of miners developing pneumoconiosis, or black lung disease. We are aggressively using all the tools that the law provides including enforcement, education and training, and technical assistance, to address miners' health.

However, MSHA and our Nation's coal miners are working with a respirable coal mine dust program that has not fundamentally changed since 1980, and the current program has distinct weaknesses that only regulatory action can affect. Since the mid-1970's, MSHA has sought development of different kinds of fast response, direct readout respirable dust monitors for measuring the concentration of respirable dust. In 2001, I found that personal dust monitors, or PDM's as they are called, can produce a real-time readout of dust exposures, but they were still in the development stage and not commercially available.

With this knowledge and with the knowledge of the comments received on the 2000 proposed rules, I determined that the agency should repropose the proposed rule, known as plan verification. That proposed rule would require mine operators to verify and periodically monitor the effectiveness of their mine ventilation plans for the purpose of limiting miners' exposure to dust.

In consultation with the National Institute for Occupational Safety and Health, NIOSH, I also decided that we would seek further comment on the joint finding by NIOSH and MSHA that the average concentration of respirable dust be accurately measured over a single shift and reopened the record on that as well. We did that in March of this year.

Both of these proposals were designed to reduce miners' over-exposure to dust, thereby reducing the prevalence of black lung. As part of this rulemaking process, we received 62 written comments on the proposals. In May, we held a series of six public hearings to receive additional comments and drew 177 speakers and over 450 attendees.

Commenters recognized the agency's intent to create greater protection for miners' health. However, during the hearings representatives of both industry and miners, as well as individual miners themselves, told us very clearly that they preferred we wait for the results of testing of this new PDM technology before proceeding with the rulemakings. And after reviewing the public comments, we consulted with NIOSH and found that the initial test results of the prototype PDM were promising. At that point we stopped work on the rules.

MSHA is working with NIOSH to complete the in-mine tests of the prototype PDM's. It will be necessary to successfully complete this testing before we move on to a production model. From what we have learned so far from the prototype testing, the PDM is truly

promising, but still not ready for regular use by miners. Once testing of the prototype PDM has been concluded and upon a positive finding by NIOSH and MSHA, each agency has agreed to contribute \$150,000 to purchase production type PDM's for further testing.

Last week MSHA and NIOSH staff met to discuss the progress of research and the requirements of future research. Next week we are consulting with the parties involved in the in-mine testing and the PDM manufacturer to plan for collaborative research where production prototypes will be tested in coal mining operations throughout the United States.

As we proceed with this testing, we believe it best serves the mining community to leave the current rulemaking record open. The long history of the reform of the Federal coal mine respirable dust program contained in this extensive rulemaking record should be preserved. Moreover, because we have extended the comment period indefinitely, the results of the current in-mine testing of the prototype PDM will become a part of the public record. An open record ensures that all information obtained during these discussions will be available to the public. We believe that is important.

MSHA, of course, will continue to enforce the current dust rules during the interim period while the PDM's are tested and developed.

PREPARED STATEMENT

Mr. Chairman, my father worked underground as a coal miner for nearly 50 years, the majority of which was at the coal production face. He had evidence of black lung disease and suffered from heart disease which I believe was exacerbated by his years of mining. Improving miners' health and safety and addressing the issues related to black lung disease are of personal importance to me.

Again, thank you for your interest in the health and safety of our Nation's miners and the opportunity to discuss these important issues with you today, and I would be pleased to answer any questions.

[The statement follows:]

PREPARED STATEMENT OF HON. DAVID D. LAURISKI

Mr. Chairman and Members of the Subcommittee: I am pleased to appear before you today to discuss two MSHA proposed rules designed to limit miners' exposure to respirable coal mine dust and its devastating effects. As I announced on June 24, MSHA has stopped all work on finalizing the proposed rules.

We have recognized for some time the need to reduce miners' risk of disease, improve the coal mine dust sampling program, and restore miners' confidence in it. Since the mid 1970s, MSHA has sought development of fast-response, direct-readout respirable dust monitors for measuring the concentration of respirable dust. An MSHA Task Group reviewed the sampling program in 1991 and made recommendations for improvement. The Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Workers made recommendations in 1996. MSHA took prompt action on certain recommendations, for example initiating a nationwide awareness program on the hazards associated with exposure to excessive levels of respirable coal mine and quartz dust and on ways to prevent occupational lung disease. With NIOSH, we also implemented a special screening initiative called the Miners' Choice Health Screening Program (Miners' Choice) as part of the "End Black Lung Now and Forever" campaign. Miners' Choice offered chest x-rays for both underground and surface coal miners. Thousands of miners participated. Other Advisory Committee recommendations required rulemaking; in response, MSHA

proposed two rules in July 2000 on the same subject as the proposals we are discussing today, accepted public comment, and conducted public hearings.

When I arrived at MSHA in May 2001, I reviewed the state of miners' health and concluded that coal miners continued to be exposed to excessive concentrations of dust and that there remains an unacceptable risk of miners developing coal workers' pneumoconiosis, or black lung disease. I found that personal dust monitors (PDMs) were still in the development stage and not commercially available. With this knowledge, and with knowledge of the comment received on the 2000 proposed rules, I determined that the Agency should repropose one of the 2000 proposals and re-open the record on the other.

The first proposed rule, called "Verification of Underground Coal Mine Operators' Dust Control Plans and Compliance Sampling for Respirable Dust," or "Plan Verification," would require mine operators to verify and periodically monitor the effectiveness of their mine ventilation plans in limiting miners' exposure to dust. The second proposal, "Determination of Concentration of Respirable Coal Mine Dust," or "Single Sample," reopened the record on the joint finding by the National Institute for Occupational Safety and Health (NIOSH) and MSHA that the average concentration of respirable dust can be accurately measured over a single shift. Both of these proposals were designed with the goal of sending more miners home healthy every working day.

As you know, the past decades have seen great strides in reducing miners' overexposure to respirable coal mine dust and thereby lowering the prevalence of black lung disease. The percentage of dust samples taken by mine operators that exceeded the 2-milligram per cubic meter standard has decreased from 54 percent in 1970 to 8 percent in 2002. However, NIOSH and MSHA recently documented that black lung continues to occur and everyone agrees that the current rate of black lung disease is unacceptably high and that we need to increase our efforts to further reduce levels of respirable dust in coal mines. We are aggressively using all the tools that the law provides—enforcement, education and training and technical assistance to address miners' health. However, MSHA and our nation's coal miners are working with a respirable coal mine dust program that has not fundamentally changed since 1980, and the current program has distinct weaknesses that only regulatory action can change.

One concern is the laborious and cumbersome process that is required to identify a violation of the coal mine dust limits. MSHA is the only worker health and safety enforcement agency that needs to take several full-shift samples and average the results in order to identify a violation of a health standard. This is a crucial concern because taking an average can mask overexposures that may affect the health of miners.

In March of this year, we published a new regulatory proposal on plan verification and, along with NIOSH, we reopened the rulemaking record on the use of a single sample for compliance determinations. These proposals are designed to reduce miners' overexposure to dust, thereby reducing the prevalence of black lung. One would require mine operators to verify the effectiveness of their mine ventilation plans in limiting miners' exposure to dust; the other would allow MSHA to make compliance determinations based on a single sample, rather than an average of multiple samples, which can mask overexposures. As you know, the rulemaking process is designed to elicit comment from stakeholders affected by the proposals. As part of that process, we received 62 written comments on the proposals. In May we held a series of six public hearings to receive additional comments. These hearings were held in Pennsylvania, West Virginia, Indiana, Kentucky, Alabama and Colorado and drew 177 speakers and over 450 attendees.

Commenters recognized the Agency's intent to create greater protections for miners' health. However, during the hearings, representatives of both industry and miners, as well as individual miners, told us very clearly that they preferred we wait for the results of testing of new PDM technology before proceeding with the rulemakings. A PDM is designed to produce a real-time readout of dust exposure so that, if there is a problem, action can be taken promptly to correct the problem and reduce the risk of miners' overexposure to respirable dust. By deferring action on this rulemaking, we will be able to gather data and build a consensus on identifying, developing, and implementing the most effective technology to address this issue.

In our proposal, we provided for optional use of PDMs, should they prove feasible and be approved for use. At the same time, we felt that we ought to take feasible action as soon as possible to improve the coal mine dust control program, rather than delay until completion of the development and testing of the PDMs, since there is no certainty regarding how long that might take to complete.

After reviewing the public comments, we consulted with NIOSH and found that the initial test results of a prototype PDM were promising. At that point, we suspended work on the rules. On June 24, we formally announced that we had stopped all work on finalizing the proposals. Should the PDM prove to be accurate and reliable, we would then examine how the PDM could provide optimum benefit in a regulatory scheme for controlling dust overexposures.

MSHA is working with NIOSH to complete the in-mine tests of the prototype PDMs in mines located in Pennsylvania, West Virginia, Alabama and Utah. It will be necessary to successfully complete this testing before we move on to a production model. From what we have learned so far from the prototype testing, the PDM is truly promising, but still not ready for regular usage by miners.

Once testing of the prototype PDM has been concluded, and upon a positive finding by NIOSH and MSHA, each agency has agreed to contribute \$150,000 to purchase production prototype PDMs for further testing. Last week, MSHA and NIOSH staff met to discuss the progress of the research and the requirements of future research for the production prototype units. Next week, we are consulting with the parties involved in the current NIOSH in-mine testing and the PDM manufacturer. We will be getting input on plans for the next step—collaborative research where production prototypes will be tested at coal mining operations throughout the United States.

As we proceed with the testing, we believe it best serves the mining community to leave the current rulemaking record open. The long history of the reform of the Federal coal mine respirable dust program contained in this extensive rulemaking record should be preserved. The record contains all public comment from the July 7, 2000 and March 6, 2003 rulemaking proposals, transcripts of the 2000 and 2003 public hearings, the 1996 recommendations of the Advisory Committee on the Elimination of Pneumoconiosis, and other evidence relevant to the rulemaking. Moreover, because we have extended the comment period indefinitely, the results of the current in-mine testing of the prototype PDMs will become a part of the public record. An open record ensures that all information obtained during these discussions will be available to the public. We believe that is important. The record will remain open until a decision is made on our next step.

MSHA of course will continue to enforce the current respirable coal dust rules during the interim period while the PDMs are tested and developed.

Mr. Chairman, like many, I come from a coal mining family. My father went to work underground as a coal miner in his teens in order to help support his family. His mining career spanned nearly 50 years of underground work, the majority of which was spent in the face of the mine. He had evidence of black lung disease and suffered from heart disease, which I believe was exacerbated by his years in the mines. Improving miner safety and health and addressing the issues related to black lung disease are of personal importance to me.

Again, thank you for your interest in the health of our Nation's miners and the opportunity to discuss these important issues with you today. I would be pleased to answer any questions.

Senator SPECTER. Well, thank you very much, Mr. Secretary.

I think that the preferable way to proceed, before questioning you, would be to have the second panel present their views and have the entire picture on the table. Then we can proceed to Q&A. So if you would step down for just a minute, I would like to call on Mr. Joseph Main and Mr. David Beerbower to testify.

STATEMENT OF JOSEPH A. MAIN, ADMINISTRATOR, DEPARTMENT OF HEALTH AND SAFETY, UNITED MINE WORKERS OF AMERICA

Senator SPECTER. Mr. Main has been the Administrator of the United Mine Workers of America, Department of Occupational Health and Safety, since 1982. Since 1998, he has served on the Centers for Disease Control and Prevention Federal Advisory Committee on Mine Health Research. Welcome, Mr. Main. We look forward to your testimony.

Mr. MAIN. Thank you, Senator. On behalf of the miners of this country, I want to pass on their appreciation for the hearing that is being held today. It is on a very important issue that has a lot to do with the very lives of coal miners.

I do not know how much you have heard about the public hearings that have been held throughout the coal fields on the proposed rule that MSHA has issued, but I could tell you this. After six public hearings, it was soundly rejected by coal miners across this country. After about 200 witnesses testified at those public hearings, there was no support for this rule.

One of the great concerns of the miners is that that rule is still alive and well. It still sits ready, poised to have a final rule crafted from, and it contains many provisions that violate the Mine Act, ignore the historical record that has been built, including hearings before your very committees in the past to reform the black lung program. It fails miserably to address the needs of the Nation's miners.

We urge, as one of the outcomes of this, for action to be taken through this body to cause the withdrawal of that rule which would harm miners in our opinion, and in its place have the agency focus its full attention on crafting a rule that the historical record has shown that is needed and that is desperately wanted by coal miners, one that will reduce the levels of coal mine dust in this country and eliminate the unhealthy coal dust that miners breathe that give them the black lung disease.

There is several provisions of that proposal, and I am not going to get into them today and we do not have the time to do that. But I am going to hit on a couple issues.

One of the core issues of this proposal that is wrongheaded would turn on its head provisions that Congress gave miners in the 1969 Coal Mine Act. What it would do would be to allow mine operators to seek approval from MSHA to increase the dust levels in the Nation's mines and use, instead of environmental controls, respiratory controls. That we think is wrongheaded and is a complete step backwards in terms of protecting the Nation's miners. While doing that, under the proposals, which are very complicated and confusing and difficult for miners or even safety professionals to understand, but the nonetheless at the end of the day, would serve to allow dust levels to rise in the Nation's coal mines up to, legally, 8 milligrams of dust. Now, that is just not germane for the mine workers saying that. That is what is on record by the agency officials themselves. It will also rise to a level of, according to the MSHA officials, 9.32 milligrams before the operator could be cited where they would be on that so-called 8 milligram standard.

How this occurs is real simple. Where we take a dust sample at today in the mine on a section, the law says that you cannot exceed 2 milligrams. What the plan is, is to allow operators to submit proposals to increase the dust levels, claiming they have exhausted their engineering controls, and in lieu of those engineering controls, put air stream helmets on the miners.

Senator SPECTER. You say the law allows what precisely?

Mr. MAIN. The law right now says that you cannot exceed 2 milligrams of respirable dust per cubic meter of air averaged over a shift, and that law gets turned on its head by using a deceptive formula that allows a factor to be applied that would allow the dust to be raised four times that level based on approvals from MSHA to do so.

But the key here is that operators would abandon the development of new engineering controls because the operators would put the agency in a box to prove to me they are feasible. They do not exist yet, for example. It is going to completely end, we believe, over the long term the development of new dust controls and allow by its own measure the increase of dust.

Now, the agency has argued it does not do that. That is not in there. It is in there. Why else would you have a provision in the law that allows you to seek to increase dust levels and to use respirators if the intent was not to do that, because that is the clear end result.

We urge the committee to act to end that provision as well as other provisions of the proposed rules that is very harmful for miners. In 1995, NIOSH issued a criteria document recommending a number of changes to the respirable dust program. In 1996, a U.S. Department of Labor Secretary appointed a fellow advisory committee to come up with recommendations to end this terrible disease, to develop standards. Laced through these proposed rules is standard after standard that both ignore and are contrary to the recommendations of both of those bodies. And we urge the attention be placed on building this continuous dust monitor, which I just personally tested this last week in an underground mine in Alabama. It is a terrific device and it will help miners.

PREPARED STATEMENT

But I think there is more to the record than 5 minutes allows us to address today. Mr. Chairman, I will just say this in closing. I, on behalf of the miners who have come out to these hearings, urge this body to act to cause that proposed rule issued March 6 by MSHA to be withdrawn and removed from further consideration. Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF JOSEPH A. MAIN

I appreciate the opportunity to appear here today on behalf of the United Mine Workers of America and miners across the country to address the "Proposed MSHA Rules on Coal Dust" and the coal mine respirable coal mine dust program. Included as part of my testimony is an April 17, 2003 letter I forwarded to David Lauriski, Assistant Secretary of Labor for MSHA. It includes extensive comments on MSHA's proposed rules to completely overhaul the current respirable dust standards. Those proposed rules are 30 CFR Parts 70, 75, and 90—Verification of Underground Coal Mine Operators' Dust Control Plans and Compliance Sampling for Respirable Dust, and 30 CFR Part 72—Determination of Concentration of Respirable Coal Mine Dust. Those proposed rules need to be withdrawn, and new proposals must be crafted to meet the needs of miners.

Miners across the country were surprised and dismayed by the proposed respirable dust rules issued by MSHA on March 6, 2003. They are complicated, confusing and difficult to comprehend. More importantly, they would erode the protections contained in the Federal Mine Safety and Health Act (Mine Act). They also are contrary to numerous recommendations of NIOSH: the NIOSH, 1995 *Criteria for a Recommended Standard—OCCUPATIONAL EXPOSURE TO RESPIRABLE COAL MINE DUST*, as well as the 1996 *Report of the Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers*.

There is an unquestionable need to overhaul the respirable coal mine dust program to lower the unhealthy coal mine dust levels. It has been known for years that if miners breathe unhealthy coal mine dust, their lungs can be destroyed and lives cut short. The unhealthy dust causes the disease called pneumoconiosis and often referred to as the "Black Lung" disease has claimed the lives of tens of thousands of miners, many who could only survive while attached to oxygen tanks gasping for

air. A study entitled "Pneumoconiosis Prevalence Among Working Coal Miners Examined in Federal Chest Radiograph Surveillance Programs—United States, 1996–2002" issued by NIOSH in April of this year confirmed that working miners are still getting the disease. It identified several hundred working miners afflicted with stages of the disease based on recent chest x-rays. Most of the x-rays were taken through the "Miners Choice" chest x-ray program which your committee provided special funding for in MSHA's appropriations. That study however did not include x-rays from many miners who work at smaller mining operations suspected of being the most at risk.¹ Over 1,000 miners continue to die each year from the disease. The anguish and suffering of victims afflicted with this disease is immeasurable. Disability and health care costs from the disease are in the tens of billions of dollars. According to the Department of Labor, as of May this year there were about 106,519 recipients of federal black lung disability benefits. That does not include about 6,000 black lung claims being paid by mine operators or miners receiving state disability benefits not covered by the federal program.

The respirable dust sampling program has been wrought with manipulation and fraud. That has been the subject of congressional hearings, investigations and study over the years. Government records show that in the 1990's alone, over 160 companies and/or individuals were convicted on criminal charges of fraudulent dust sampling practices which hid unhealthy dust levels. Given the historical record, that may be just the tip of the iceberg. Just two months ago, a mine operator and four company officials were convicted in federal court on charges of violating the federal mine laws aimed at controlling coal mine dust. According to reports, the violations occurred over a four year period from the time the mine opened until the company was caught.

Endless complaints have been lodged by miners about manipulation of the dust sampling program by mine operators for years as they have called on the government to reform the respirable dust program. However, the proposals MSHA presented for public comment both ignored lessons learned over decades of illness and operator abuse, and disregarded promising technological advances that the mining community expects will present valuable "real-time" information which can prevent miners' future over-exposure to the deadly dust.

MSHA's March 2003 proposals are filled with formulas, exemptions and loopholes that are subject to unlimited interpretation. They are wrongheaded, ill-advised and would not effect the necessary reform of the respirable coal mine dust program.

While the recent proposals included some improvements, such as taking a single respirable dust sample of a miner to determine compliance, the improvements were overshadowed by numerous adverse provisions. For example, they set the stage for allowing an increase in respirable dust levels and would dramatically reduce compliance-sampling in the nation's coal mines.

Congress made clear 33 years ago, with the passage of the 1969 Federal Coal Mine Health and Safety Act, that respirable coal dust in the mine atmosphere was to be reduced to protect miners from disease. Section 201(b) of the Mine Act states that ". . . it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupational-related disease during or at the end of such period."

The 1969 Mine Act also set the maximum dust levels that could be allowed in the nation's coal mines. Section 202(b)(2) of the Mine Act states that ". . . each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air."

The 1969 Mine Act prohibited the use of respirators as a substitute for environmental controls. Section 202(h) of the Mine Act states that ". . . Use of respirators shall not be substituted for environmental control measures in the active workings . . ."

MSHA's proposals would overturn these specific protections by allowing mine operators to exceed the maximum 2 milligram (mg/m³) respirable dust standard and to replace environmental controls with respirators. Those provisions would not only serve to increase respirable dust in coal mines but would also interfere with the con-

¹ Funding for the "Miners Choice" program was unfortunately ended by MSHA with a majority of the nation's miners not receiving the x-rays. I urge congressional action to restore it, and to shift funding for the program to NIOSH who is better suited to conduct the chest x-ray program.

tinuing development of respirable dust controls that could contain unhealthy coal mine dust.

In a September 10, 1997 document filed by then-General Manager of Energy West Mining, Dave Lauriski (who is now current Assistant Secretary of Labor for MSHA) while seeking rule making by MSHA on broader use of respirators, Mr. Lauriski acknowledged that MSHA's historical interpretation of the Mine Act prohibited the use of respirators as a substitute for environmental/engineering controls. On page 5 of that document, Lauriski stated the following: "Nevertheless, for years the Secretary (through the Secretary's delegates the Assistant Secretary of Labor for Mine Safety and Health and officials of the Mine Safety and Health Administration ('MSHA')) has taken the policy position that, because Mine Act §202(h) states the 'use of respirators shall not be substituted for environmental control measures,' it altogether prohibits the use of respirators (even as a supplement to environmental controls) as a means of compliance with the respirable dust standards of Title II of the Mine Act." Lauriski disagreed with that interpretation by the government. Now that Lauriski controls the reins at MSHA, he proposed implementing rules which previous administrations rejected.

As for the increased respirable levels, these are not clearly stated in the proposed rules but are apparent from the complicated formulas, qualifiers and exemptions. Despite initial denials by agency officials, the proposed rule would allow mine operators to increase respirable dust levels and to exceed the 2 mg/m³ standard—even with the possibility of having the average concentration of respirable dust in the mine atmosphere of active workings approved by MSHA exceeding 9 mg/m³ before being considered illegal. One way for that to occur is under Part 70.209 of the proposed rule. That proposed provision would allow operators to (a) claim they believe they are using all feasible environmental respirable dust controls, and then (b) file a request to MSHA for approval to increase the dust levels exceeding the 2 mg/m³ including a mandate that miners must wear respiratory protection in lieu of the environmental controls.

Definitions in Part 70.2 of the MSHA proposed rules including Equivalent concentrations and Protection factor (pf) would be used to establish the maximum levels of respirable to be approved when an operator files a request to exceed the standard. Those definitions (coupled with the previous provisions) could allow the respirable dust levels to be increased up to a maximum of 8 mg/m³ at the same exact locations measured with the same instruments the law currently prohibits exceeding 2 mg/m³. Definitions in parts 70.2 including Citation threshold value (CTV), Table 70-2 Part 70.218 and other provisions would be used to determine when the operator would be cited. Those standards could allow a mine to have respirable dust levels reach 9.32 mg/m³ before MSHA would cite the operator, even though the current law prohibits dust levels exceeding 2 mg/m³. In other words, the law does not permit this to occur.

An exchange between Joe Main, Administrator of Occupational Health and Safety for the United Mine Workers of America, and MSHA official Bob Thaxton, who was presiding over the May 6, 2003 public hearing on the proposed dust rules, sheds more light on these proposals:

Mr. MAIN. Okay. And in this mine that I talked about, let's say that you have this factor of four, you're at a mine environment measured the same way we do now, reading 8 milligrams—

Mr. NICHOLS. Let's deal with that 8 milligrams. Did you tell Joe that mine operators could go to 8 milligrams?

Mr. THAXTON. What we talked about, Joe, is that there is no 8 milligrams actually specified in the rule.

Mr. MAIN. That's right.

Mr. THAXTON. We said it's a protection factor that would be assigned could, theoretically, allow somebody to go up to a maximum of 8 milligrams.

Mr. MAIN. When I asked you the specific question, Bob, okay, how much dust, when you do that formula, that factor of four, how much dust would you be actually measuring?

Mr. THAXTON. That's why I said—

Mr. MAIN. It could go up to what?

Mr. THAXTON. It could go up to a maximum of 8 milligrams.

The proposals also would substantially reduce compliance sampling. The agency plans, through Agency policy, to reduce current compliance sampling by as much as 90 percent. Compliance sampling would be reduced to one shift a year in the vast outby areas of coal mines and as little as three shifts a year on coal producing sections.

The proposals also ignored the extensive efforts by labor, industry, and NIOSH, which were working cooperatively toward development of a revolutionary “continuous sampling” device that could change the landscape of the respirable dust sampling program. The parties had supported development of along sought continuous dust sampling device, with one that is now housed in a miner’s cap light battery compartment, that would—for the first time—provide accurate and instantaneous information on the dust levels miners are exposed to on a continuous basis. We were working to develop a strategy for reforming the respirable dust program centered around the revolutionary continuous monitoring device which could also address a number of needed reforms. The particular device, called the PDM-1 (personal dust monitor) has already undergone extensive development and testing and has proved to measure dust as accurately as the dust sampling devices currently in use.

Years of work, considerable taxpayer dollars, and the tremendous efforts of the NIOSH research laboratory in Bruceton, Pennsylvania led to the development of the PDM-1. By being housed inside the cap light battery, it can be comfortably worn by miners. And unlike the current dust samplers, the PDM-1 could provide miners instant and constant information on dust levels they are exposed to on each shift—every day; they also allow for a downloading of the dust data—even to MSHA—at the end of the shift. It allows miners to project dust exposures for the remainder of the shift and can lead to instant changes in dust controls, thereby preventing overexposure to unhealthy dust. This device would empower both miners and operators with accurate levels of respirable dust so miners can be protected from unhealthy respirable coal mine dust. The device can also be used for compliance sampling as well as dust control verification on a daily basis.

The parties had anticipated that the PDM-1 device would be the centerpiece of any revised respirable dust sampling program. MSHA surprised the parties involved in the development of the continuous dust monitor—even though it was proving to work accurately—and issued the March 6, 2003 proposals just as NIOSH was preparing for the last round of scheduled in-mine testing of the continuous dust sampling devices. Not only is continuous dust monitoring not the centerpiece of the MSHA proposals, but it is only mentioned as a suggestion which operators may choose to utilize. That was despite the Agency’s promises to miners over the years to get such a needed device in the nation’s coal mines to protect miners from the unhealthy dust that has stricken tens of thousands of miners.

MSHA’s proposals also disregarded an extensive public record on reforming the respirable coal mine dust program including the comments on the respirable dust rules proposed by MSHA in 2000 that was soundly rejected by both labor and industry. The 2003 proposals were from flawed proposals which both labor and industry had demanded be withdrawn in 2000. During the public hearing held by MSHA on May 6, 2003, John Gallick, a company safety manager for RAG Emerald Resources, Emerald #1 Mine in Pennsylvania summed up the frustrations of both labor and industry with the following statement: “First let me say that this rule appears to closely parallel the previous proposed rules that were soundly rejected by all the stakeholders. I cannot understand why MSHA has not listened to the stakeholders, and actually attempted to develop a rule that the stakeholders could support.”

Miners from across the country attended the six public hearings held throughout the coal fields to respond to the rules proposed by MSHA earlier this year. When the public hearings ended one fact was certain—the Agency proposals were soundly rejected. Despite overwhelming demands for withdrawal of these rules, however, the Agency refused to scrap them. Instead, it simply extended the comment period, but adhered to the proposals as published in March 2003. This leaves the highly-flawed proposals in place, from which final rules might still be crafted. However, MSHA’s proposals are so flawed that they must be tossed out.

I urge this Committee to take action that would require MSHA to withdraw the March 6, 2003 proposed dust rules and cause MSHA to go back to the drawing board and draft new rules, rules that would address the needs of the nation’s miners to protect them from disease resulting from unhealthy coal mine dust that has already claimed the lives of tens of thousands of miners.

Such new proposals should include increased respirable dust sampling—in particular mandating requirements for continuous dust sampling devices in all underground coal mines; decreasing the respirable dust levels in coal mines; sampling the miners’ full shift of work, with no margin of error added before operators will be cited when unhealthy dust levels are identified. Compliance sampling also needs to be required by regulation and in a way that would bring about long overdue credibility to the respirable-dust program. Meaningful miners’ participation in the dust sampling program is also essential for there to be confidence in the troubled respirable dust sampling program.

It is imperative that among other improvements, the respirable dust levels in coal mines are lowered and that sampling of the dust is increased to assure miners are protected from disease. It is imperative that the respirable dust regulatory program provide confidence that coal mine dust is controlled to healthy levels so miners will not suffer disease.

Senator SPECTER. Thank you, Mr. Main.

**STATEMENT OF DAVID A. BEERBOWER, VICE PRESIDENT FOR SAFETY,
PEABODY ENERGY CORPORATION**

Senator SPECTER. We now turn to Mr. David Beerbower, Vice President for Safety, Peabody Energy Corporation, St. Louis, Missouri. Thank you for joining us today, Mr. Beerbower, and the floor is yours.

Mr. BEERBOWER. Thank you, Mr. Chairman. I am here representing in my capacity as Vice Chairman of the National Mining Association's Health and Safety Committee. I would also note that I am the Chairman of the Health and Safety Committee at the Bituminous Coal Operators of America, and we are partnered with the United Mine Workers in several initiatives together for safety and health.

I think it is important, as we talk about the issues here today, that we really not focus all of our attention on the debate about these rules, but I would rather focus on what we envision—and I think the United Mine Workers and MSHA agree with this—that the PDM could be the cornerstone for a vast new paradigm in the way that we have looked at dust control and the way that miners can control their exposures to dust.

In public testimony, we have put our comments into the rule-making process, and that is a matter of the record.

Suffice it to say, though, that we do support the Assistant Secretary's decision to announce on the 24th of June that he was suspending the current rulemaking to permit an ongoing evaluation of the PDM. That evaluation will be completed prior to closure of the rulemaking record and completion of that regulatory initiative.

Simply put, we envision the PDM to be the centerpiece upon which this new program should be built. On the week of June 23rd, we tested this device at one of our mines in southern West Virginia, and I had the pleasure of being present during some of that testing and did wear one of these devices. I was amazed at the capabilities of this device, although there are certain shortcomings that need to be worked on in the software and in the hardware. I believe those are manageable and ones that we need to move forward with if we are going to have this device available to miners.

The good news about this device is it does show a miner exactly what he is exposed to in real time on a personal basis so that if he or she determines that they are being over-exposed or they are in an area that needs some additional controls, they can take immediate action to prevent any over-exposure above the 2 milligram standard. This PDM represents a technological breakthrough that permits extended real-time assessment of respirable dust concentrations and will enable real-time corrective actions to prevent those over-exposures.

We commend MSHA and NIOSH for their continued support and commitment to purchase 25 production models of the prototypes following completion of this initial round of testing. The 25 units

will permit broader testing in different applications to ensure the integrity, practicality and feasibility of these units. This final step is an integral element of the validation process and will enable the parties, labor, industry, and Government, to then consider a deployment strategy upon which new regulations can be based.

Beyond the PDM, we have shared with MSHA on several occasions what we believe to be a background for a new dust paradigm. Our recommendations were contained in a series of letters that provided an outline for a new respirable coal dust sampling program that we believed then would enhance the protections afforded to miners against the potential health consequences of excessive dust.

However, the potential that the PDM offers has moved us beyond our thinking that we had in 1996. If this potential proves to be feasible, we see the PDM being the keystone of a new respirable dust regulation that will enable us to prevent over-exposures.

PREPARED STATEMENT

Mr. Chairman, protecting miners from over-exposures to respirable dust remains a complex and challenging issue, and it is one that we are committed to as operators and as an association. There are many factors that play into this. Mine design, geology, and equipment are important variables in designing an effective dust control plan. I believe we are on the verge of having a tool that holds significant promise to assist us in fulfilling our ultimate goal, the elimination of workers' pneumoconiosis.

Thank you for the opportunity to speak here.

[The statement follows:]

PREPARED STATEMENT OF DAVID BEERBOWER

Thank you, Mr. Chairman and Members of the Subcommittee. I am David Beerbower, Vice President of Safety for Peabody Energy Corporation. I'm appearing today in my capacity as Vice Chairman of the National Mining Association Safety and Health Committee. I would note that I also serve as Chairman of the Safety Committee for the Bituminous Coal Operators Association, which partners with the United Mine Workers in a joint, Safety and Training Committee. I have been involved in my present capacity for 12 years and have worked in various operating positions in underground coal mines during my 34 year career with the industry.

Before I turn to the specifics of the Mine Safety and Health Administration's (MSHA) respirable coal mine dust program a few words about NMA and the importance of mining to our everyday lives—a fact overlooked by most Americans. NMA represents the producers of energy, industrial and agricultural minerals. NMA members produce the majority of coal, copper, gold, lead and zinc produced in the United States. Without their products the words read here could not have been produced. Before hardware and software, you must have earth ware—the minerals that form the foundation on which the U.S. economy is built. The ink that forms the words you read is derived from minerals. The light by which you read may be produced by a tungsten filament fueled by electricity transmitted through copper wire and generated from the burning of coal which produced nearly 56 percent of our nation's electricity.

Yet, despite its indispensable contribution to American commerce, mining is a business subject to the often perverse whims of both geology and economics. Still, to the industry's credit, technological ingenuity, better training, improved engineering methods and conscientious safety awareness by miners, mine operators and equipment manufacturers has enabled the industry to achieve commendable safety and health improvements.

Recently much attention has been focused on a recent regulatory initiative by the Mine Safety and Health Administration to revise the existing regulations governing how coal operators sample for and protect miners from exposure to respirable coal mine dust. This issue is of paramount importance to the industry as we share a

common goal with MSHA and the coal miners themselves—the total elimination of coal workers pneumoconiosis.

Since enactment of the Mine Act we've seen a dramatic decline in respirable coal dust levels. The statutory limit of 2.0 mg/m³ which became effective in 1972, three years following passage of the Act, has improved the conditions to which miners are exposed. In 1969 the average dust concentration was 7.7 mg/m³. Today we find, based upon the results of sampling conducted by both operators and MSHA, average dust levels of 1.1 mg/m³, well below the statutory limit, but problem areas still exist. Today some operations have reached the technological limitations of traditional engineering and environmental controls and in those cases interim measures are needed to protect miner's health while new control technologies are explored.

It is not our intent today to get into a debate about the benefits or shortcomings of MSHA's recent regulatory initiative. Rather, we want to share our views of what we envision a new dust sampling program would encompass. Our public testimony on the proposed rule is part of the rulemaking record and is available. Suffice it to say that we support the Assistant Secretary's decision announced June 24 to suspend the rulemaking to permit on-going evaluation of new dust sampling technology, the Personal Dust Monitor (PDM). The evaluation will be completed prior to closure of the rulemaking record and completion of the regulatory initiative.

Simply put, we envision the PDM to be the centerpiece upon which the new program is built. Never before have we had within our grasp a tool to empower miners and mine operators to initiate intervention actions based upon the results of real-time sampling. We say this recognizing that testing of the PDM has not been completed and that the tests conducted to date indicate that manageable design changes and software modifications are necessary before production prototypes are manufactured. But even with this we are excited about the prospect for this technology and how dramatic a difference it can make.

During the week of June 23 we tested the PDM at our Harris No. 1 mine located in Southern West Virginia. I was present for a portion of the testing and wore one of the devices during my time underground. The device exceeded my expectations and enabled us, in the short time it was in use, to detect conditions affecting dust levels that might have otherwise gone unnoticed. Of great importance, we were able to take immediate remedial action to reduce the dust levels. Contrast this to the current system where we collect samples, mail them to MSHA's laboratory for analysis and obtain the sample results 2 to 3 weeks later after we've mined through a problem area.

Mr. Chairman the PDM represents a technological breakthrough that permits extended real-time assessment of respirable dust concentrations that will enable real-time corrective actions to prevent overexposures. At long last we have within our reach a tool that will provide personal, real-time sampling results so that miners and operators can take corrective actions when needed.

The path we've followed to get to this point has been long and arduous. It began more than ten years ago when a decision was made to explore the possibility of taking existing proprietary technology, the Tapered Element Oscillating Microbalance (TEOM), and adapt it for use in the underground environment. This decision gave rise to the development of a cumbersome machine mounted device which proved that the TEOM technology could work underground. It was then decided to explore the possibility of miniaturizing the technology so that miners could have a personal tool to provide them with real-time sampling results. Regrettably, decisions made by the previous Administration's Assistant Secretary delayed, by months if not years, our reaching the important milestone that has been reached today.

We commend MSHA and NIOSH, the National Institute for Occupational Safety and Health, for their continued support and commitment to purchase 25 production prototypes following completion of this initial round of testing. The 25 units will permit broader testing in different applications to ensure the integrity, practicality and feasibility of the units. This final step is an integral element of the validation process and will enable the parties, labor, industry and government to then consider a deployment strategy upon which new regulations can be based.

Beyond the PDM we have shared with MSHA, on several occasions dating back to 1996, our views on a wholesale revision of the existing dust program. Our recommendations were contained in a series of letters that provided an outline for a new respirable coal mine dust sampling program that we believed then would enhance the protections afforded miners against the potential health consequences where excessive dust concentrations are encountered.

However, the potential that the PDM offers has moved us beyond our thinking of 1996. If this potential proves to be feasible we see the PDM being the cornerstone of a new respirable dust regulation that will enable us to prevent overexposure to respirable dust on a real-time rather than after the fact basis.

Mr. Chairman protecting miners from exposure to respirable coal mine dust remains a complex and challenging issue. There is no one simple solution. Mine design, geology and equipment are important variables in designing a dust control program, and these are mine specific. Thankfully we are, I believe, on the verge of having a tool that holds significant promise to assist us in fulfilling our goal—elimination of coal workers pneumoconiosis.

Thank you for this opportunity. I'd be happy to try to answer any questions you might have.

Senator SPECTER. Thank you very much, Mr. Beerbower.

Mr. Lauriski, would you step back to the table so we can have an analysis three ways on what we are doing here?

When the Federal statute, the Federal Mine Safety and Health Act of 1977, as amended in 1995, provides that the miners shall be exposed at or below 2.0 milligrams of respirable dust per cubic meter of air, how do we move, Mr. Lauriski to your testimony on up to 8 milligrams?

Mr. LAURISKI. Senator, I never testified that we would go up to 8 milligrams. In fact, this rule does not allow miners to be exposed to 8 milligrams of dust, and I am going to point to two things.

Senator SPECTER. But where does the 8 milligrams come in then?

Mr. LAURISKI. Well, Mr. Main, in his analysis of what this rule says, believes that the protection factors that we have assigned devices that can be used to protect miners would allow the miners to be exposed to milligrams up to 8. That is not true.

Senator SPECTER. What would the miners be exposed to?

Mr. LAURISKI. They would be exposed, depending upon the protection factor to a divisor of 4 into the actual milligrams that were in the air. That would be their actual—

Senator SPECTER. How many milligrams?

Mr. LAURISKI. They would divide the actual mine environment by the protection factor that was afforded. It can range from a protection factor of 2 up to a protection factor of 4. That is based upon all the science that has been done on these devices.

Senator SPECTER. Well, how many milligrams of coal dust would they then be exposed to?

Mr. LAURISKI. It would depend on what the mine atmosphere was. Let us assume that the mine atmosphere was 2 milligrams on the outside of this device. Their actual exposure using these protection factors, if you used a protection factor of 4, it would be .5 milligrams per cubic meter of air.

Now, these devices that Mr. Main talks about that we have incorporated into this rule were first incorporated into the proposed rule of July of 2000, before I arrived here, Senator, and they recognized the value that these devices have in protecting miners' health. We brought that rule forward into this proposed rule of 2003 because they have the ability to protect miners. Many miners use these across the country today. These devices do not substitute for engineering or environmental controls. They are to be used only as a supplement to those controls, and that is very clear in our proposed rule.

I would also say that, one, I cannot override what the statute says.

But two, I would direct you to our proposed rule where it talks about, in section 7100, where it says: "each operator must continuously maintain the average concentration of respirable dust in the

mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2 milligrams per cubic meter of air.”

Senator, we have not advocated, nor do I advocate, the allowance of exposing miners to any concentration above 2 milligrams, and we have not attempted to do that. What we have attempted to do is to leave the hierarchy of controls in place and provide miners with a supplement to protect their health from the debilitating effects of black lung.

Senator SPECTER. Mr. Lauriski, precisely why was the new rule suspended?

Mr. LAURISKI. We stopped work on this new rule for two reasons. One, we heard very clearly during the public process, the public comment period, about the potential of these devices here. This is the PDM. Hearing that comment and knowing that we had some favorable results from the first round of testing, I made the conscious decision that we should then suspend further work on this rule, giving us the time and the opportunity to work with NIOSH to see how this device can best be used in a regulatory environment for miners.

Senator SPECTER. You say the first results were positive?

Mr. LAURISKI. Yes, sir.

Senator SPECTER. Then why was it that you suspended the rule?

Mr. LAURISKI. We did not suspend the rule. We left the rule-making record open. We simply stopped work on the rule. We extended the comment period indefinitely.

Senator SPECTER. The information I have is that on June 24th of this year, the Mine Safety and Health Administration announced that it would suspend the proposed rules and keep the record open until further notice. Is that incorrect?

Mr. LAURISKI. No, that is correct. We suspended work on the rule, but kept the record open.

Senator SPECTER. Well, why did you suspend the proposed rules if the testing up to that point was satisfactory?

Mr. LAURISKI. Well, Senator, we did not suspend the rule. We suspended work. There are differences. As I understand the Administrative Procedure Act—

Senator SPECTER. You suspended the proposed rule.

Mr. LAURISKI. No. We suspended work on the rule and kept the record open. You suspend a rule—

Senator SPECTER. I just read you my information and you said it was accurate, and that is: “The Mine Safety and Health Administration announced it would suspend the proposed rules and keep the record open until further notice.”

Mr. LAURISKI. Senator, I am not sure where you got that. I could read you exactly what we said in our release.

Senator SPECTER. Please do.

Mr. LAURISKI. All right. What we said is that: “all activity to finalize the proposed rules will stop, i.e., is suspended, the work, and the record will remain open.” This information conveyed the practical circumstance of what the agency intended, not the specific legal action the agency would take when publishing a Federal Register document. And the Federal Register document that we provided keeps the rulemaking record open indefinitely. That allows

us the opportunity to take the information we gather from the testing of the PDM's and to use that information from that test and incorporate it into the rulemaking record itself.

Senator SPECTER. Well, why did you take the action that you did, whatever you characterize it as a suspension of the rules or just about the same thing which you have just said? Why did you take that action?

Mr. LAURISKI. So that we would have the time to see how these devices were going to function in the mine and if the prototypes worked effectively, we could then commit some resources, dollar resources, to the purchase of additional units and then put those units in the mine—and we are doing this in consultation with NIOSH—production units, and best determine how these units can be used in a regulatory fashion.

Senator SPECTER. Mr. Main, do you think it is possible to use that personal dust monitor with modifications?

Mr. MAIN. We have long supported the development of the continuous dust monitors. As a matter of fact, the mine workers and miners are on record back as early as the mid-1970's calling for its development. We support it as a continuous dust monitor that is in the mine every day, even as MSHA promised.

If I might, I would like to take a minute just to clear the record.

Senator SPECTER. I would be glad to have you do that if you deal with my question first.

Mr. MAIN. Sure.

Senator SPECTER. And that is, do you think that this personal dust monitor can be modified or programmed to meet the concerns that you have?

Mr. MAIN. Absolutely.

Senator SPECTER. It can be. Okay, now proceed with your other point.

Mr. MAIN. Thank you. I think the debate about the increase of the dust did not come from Joe Main, did not come from the mine workers. It came from a series of questions asked of MSHA during a preliminary meeting on the rule before we ever got into the public hearings because this rule is so complicated and so confusing, we could not, quite frankly, understand it nor could miners. During those exchanges, we were told that under this formula, the mine operator could make a request to MSHA, which there is provisions in the rule to carry out what I am talking about, to have the dust levels increased in their mine when they would claim that they believed that they could not control the dust with environmental controls, that there was not any feasible controls to do that, and at which time the agency would then review the approval request which would in place of—and you can call it substitute or supplement. I do not care what you call it. It is the same thing—instead of using engineering controls, environmental controls, could use respirators to allow those dust levels to rise.

I would just like to take a second, if I could, to read a part of the public record. This was an exchange that took place between myself and some MSHA officials during the Washington hearing, which was a follow-up to try to clarify this issue from what the agency had already told us.

Mr. Main, which is myself. Okay, in this mine that I talked about, let's say that you have this factor of 4. You're adding mine environment measurement the same way we do now, reading 8 milligrams.

Mr. Nichols, who was the head of the hearing. Let me deal with that 8 milligrams. Did you tell Joe that mine operators could go to 8 milligrams?

Mr. Thaxton, who was one of the framers of the regulations at the hearing. He worked for MSHA. What we talked about, Joe, is that there is no 8 milligrams actually specified in the rule.

Mr. MAIN. That's right.

Mr. THAXTON. We said it's a protection factor that could be assigned, theoretically allow somebody to go up to a maximum of 8 milligrams.

Mr. MAIN. When I asked you the specific question, Bob, okay, how much dust—when you do that formula, that factor of 4, how much dust would you be actually measuring?

Mr. THAXTON. That's why I said—

Mr. MAIN. It could go up to what?

Mr. THAXTON. It could go up to a maximum of 8 milligrams.

As we went on through the testimony—

Senator SPECTER. Mr. Main, is that your concern, that it could go up to 8 milligrams?

Mr. MAIN. Well, our concern basically is this is a starting point. Congress was right when it said the maximum dust levels should not exceed 2 milligrams. Congress was right when they said you have got to control that through environmental measures. You cannot use respirators as a replacement, substitute, or whatever else you want to now call it, to achieve that goal.

Our fear is what this rule does is allows operators to basically substitute engineering controls with respirators and increase dust levels.

Senator SPECTER. Is it your concern that if there were 8 milligrams, that the respirators would reduce the exposure to 2 milligrams and you object to the use of the respirators?

Mr. MAIN. We object to the use to deal with dust by throwing respirators on miners and increasing the dust I think is about the short message. And I would also point out that the particular respirator—there is a wealth of information that shows that this particular one, although it could provide some benefit at low dose levels, is faulty and it has been found—

Senator SPECTER. So you think that this respirator will not keep the inhalable dust to the 2 milligram level.

Mr. MAIN. Yes, I believe that that is the case.

Senator SPECTER. Mr. Lauriski, do you think that is a valid concern?

Mr. LAURISKI. No, I do not, Senator.

Senator SPECTER. Why not?

Mr. LAURISKI. I think that all the tests that have been conducted on these devices—they have been used in this country since about 1980. There have been numerous studies and tests done on these. There are actually protection factors assigned by scientific institutions that in some instances in mines, these devices can provide as high as 94 percent efficiency.

Senator SPECTER. Well, let us come back to the reason you suspended the rule.

Mr. LAURISKI. Okay.

Senator SPECTER. Why did you suspend the rule?

Mr. LAURISKI. So that we would have the ability to test these personal dust monitors that we all agree have some extremely val-

uable benefit and give us time to see how these devices can best be used in a regulatory scheme. That would give us valuable information to understand how we should proceed with this proposed rulemaking.

Senator SPECTER. Mr. Beerbower, what is your view on this? Do you think that these respirators provide the protection to keep the dust below the 2 milligrams required by law?

Mr. BEERBOWER. Senator, we have long encouraged our miners to wear these devices. I do believe that they do provide a protection factor for miners exposed at any level of dust. I think one of the reasons that the questions have been raised about it is because when we look at the PDM and the capabilities that it has, it is completely different in the way that mines would approach dust control. In essence, the rules were written based on the old method of sampling. In other words, we would take a sample at the face. We would wait 2 to 3 weeks to get the results back from the MSHA laboratory. Those results would be posted on the mine board, but where we were mining at the time that sample was taken is long gone, and we did not have the ability to take action to stop those immediate over-exposures. However, with the PDM, we will know exactly what they are exposed to at any time during the shift and be able to take actions to stop that over-exposure.

Senator SPECTER. Mr. Lauriski, there would be a resolution of the issue if instead of suspending, you withdrew the rule. What is the difference, as you see it, between those two courses of action?

Mr. LAURISKI. Well, withdrawing the rule, Senator, would really take all of the work that has gone on since about 1995–1996 in developing the proposed rules as they are today, first starting with the Dust Advisory Committee back in the mid-1990's, then the development of these proposed rules by the previous administration, and then the work that we have done since I have been here since 2001. We think that by withdrawing those rules, that that would be a step backwards. We think preserving the record is very important.

Perhaps more importantly than that, Senator, is that by keeping these rules open, we can take the information that we gain from the additional testing of these PDM's and we can incorporate that information into the public comment record. It is important that we do that and that we have a full representation of what goes on. That includes a collaboration with all of the parties who have the same interests and share the same interest in the use of these devices as us.

The other concern that we have is that if you withdraw these rules and you continue to work on the PDM, what happens theoretically if these PDM's do not function. Then you have a withdrawn rule and you start all over again. Now, the development of these is going to take some time yet.

Senator SPECTER. Well, if the personal dust monitors do not function, then they are unsatisfactory to keep the dust at a 2 milligram level.

Mr. LAURISKI. Well, they only measure the dust, Senator. They do not provide any protection factors. They measure the exposure level that the miner sees. They do not provide that protection.

Senator SPECTER. That is what the controversy is now on the personal dust monitors, whether they ought to be used. Right?

Mr. LAURISKI. No. I think we all agree. I think all of this table agree that this is the device that holds a lot of promise. I think the controversy comes with these devices that are on my right.

Senator SPECTER. With the powered air purified respirators?

Mr. LAURISKI. That is correct.

Senator SPECTER. Well, what is your view there, Mr. Main?

Mr. MAIN. Well, on the respirators, miners need respirators to be used the way that Congress intended and that is when a mine operator gets out of compliance and until they get their mine back in compliance by the law and get the engineering standards in place, which they are under violation in that time frame, they have to have a quality respirator.

Senator SPECTER. But only when the mine is out of compliance?

Mr. MAIN. Basically under the law, if they are in risky dust areas, higher dust areas, they have to be provided a respirator. We think that is the proper way and to keep the law in place that requires the operator to put the engineering controls in place to get there.

Now, with regard to the personal dust samplers, we believe that it will revolutionize the way that we do the dust sampling program in that it will let, as Dave Beerbower stated earlier, miners wear these every day, every shift. It is a remarkable device. I had it on. It gives you an instantaneous notice of dust levels increasing, lets you make automatic changes in the dust controls.

The problem here is that the rules that is on the table—and there is a list of them further than what I have laid out here today that is very problematic, that are contrary to the Mine Act. They eliminate, for example, compliance sampling. There is no compliance sampling for sections and outby areas left in the standards under those proposals, and they would be reduced, even with what the Government says they are going to do, by around 90 percent.

Example. One shift to be sampled in the outby areas of a coal mine a year and as little as three on an operational section. That is just outrageous.

The problem we have here is we cannot get our attention fully focused to craft this new rule because we cannot get the old rule off the table, and miners are fearful that this Government is going to move forward and keep those ill-advised, what we consider illegal provisions and put those in a final rule. We believe there has to be a new proposal any way that you do this. This rule is so bad, it needs to be taken off the table. But if we are going to do the kind of things we are talking about, it takes rule changes to do that anyway. And our fear is why is MSHA to reluctant to pull this thing off the table unless they plan to use those pieces.

Senator SPECTER. Well, why can you not do the things, as you put it, the things you are talking about, in the interim when the rule is suspended until a revised rule is put into effect?

Mr. MAIN. Well, I think the simple problem here is that the rule was wrongly crafted and the intent I think of the rulemaking process is to give the public a view of the rule that they intend to put in final stages. What we are talking about would accomplish that, to give us a look at a proposal and respond to that proposal that

mirrors what the final rule would be. The problem is what is on the table is they contain so many adverse pieces that are sitting there, poised to be tucked into any final rule, and we would all be left to challenge it only through the courts.

Senator SPECTER. Mr. Beerbower, would you care to comment about the disagreements here between Mr. Lauriski and Mr. Main?

Mr. BEERBOWER. Yes, sir. I think the rules proposed in March are unacceptable to the industry also. We believe that they will require major revision. The role of the PDM was not anticipated to be what we now believe it can be, and therefore that section is going to have to receive a major rewrite. I am not an expert on the rulemaking process and we leave that up to the agency to determine whether they can work those changes into the current record or whether they need to repropose, but there are major changes that need to be made.

Senator SPECTER. Do you think it makes any difference whether the rule is withdrawn or whether it is suspended and then reinstated with changes?

Mr. BEERBOWER. Our concern is the time frame that we are talking about. If suspension would precipitate a quicker rule that we could work with on the PDM, then we are in favor of that. If reproposing would slow the process down, that would be a detriment to the miners.

Senator SPECTER. Well, you are saying if it takes longer, you would not like it, but would it take longer?

Mr. BEERBOWER. I do not know. I really do not know the answer to that question.

Senator SPECTER. That is what I am trying to find out. If you do not know the answer, who does?

Mr. LAURISKI. I can answer that, Senator.

Senator SPECTER. Go ahead.

Mr. LAURISKI. It would take us longer. If we withdraw this rule, we then lose all of the information that we have gathered, that this agency has gathered for the past 8, 9, 10 years and we would—

Senator SPECTER. Well, Mr. Lauriski, why is that? You have gathered that information over 8, 9, 10 years, as you say, and then you put a rule into effect in the year 2000. So all the information you had gathered prior to the time you put the rule into effect in the year 2000 you could use.

Mr. LAURISKI. The rule is not effective. It is simply proposed. And we have the record that has been established over these many years that sits there that we can preserve.

Senator SPECTER. But there is nothing to stop you from reintroducing that record, incorporating it by reference, putting it back into a proceeding.

Mr. LAURISKI. You can, but then you go through the process of having to start all of the public processes over again.

The other thing, Senator, that I think—

Senator SPECTER. What public processes?

Mr. LAURISKI. Through the Administrative Procedure Act, the rulemaking act.

But if I might—

Senator SPECTER. Well, how long does that take?

Mr. LAURISKI. Well, to develop a rule? If I were to sit here and be optimistic, 18 to 24 months to develop a rule from the beginning to the end.

Now, we have a rulemaking record developed. We have the comments that are going to be preserved, but I think what is important here is that by keeping this record open, we take the information that we are going to learn from the testing of these devices right here and we can fold that into the rulemaking record itself. That will give us the ability very quickly to make decisions on how best to use these devices in a regulatory scheme. Certainly if that does require a major revision to the current proposed rule, that part of the proposed rule would have to be repropose. There is no question about that.

Mr. MAIN. Mr. Chairman, if I may. I think I may have a solution to the problem.

Senator SPECTER. Go ahead, Mr. Main.

Mr. MAIN. I thank you, sir.

In 2003, what the agency did was basically withdrew the 2000 rule and repropose a new rule, and we are asking for nothing different than that. We do not care what you call it. Okay? And if we could get a guarantee from the Secretary of Labor's folks from MSHA that they will actually repropose a rule that lets us look at what the actual rule will be before we make the final decision, I think that would solve the problem.

Senator SPECTER. Would you do that, Mr. Lauriski?

Mr. LAURISKI. It is going to depend on the comments that we receive, and if those comments are valid and it changes the proposal substantially, we have a legal obligation to repropose those rules. That is correct.

Senator SPECTER. What Mr. Main has just asked you is assurances that they would have an opportunity to have input on what you have proposed. Is that right, Mr. Main?

Mr. MAIN. To have a review of the proposed rule once it comes out through its normal process.

Senator SPECTER. That you would have an opportunity to comment and have input, make suggestions before it was finalized?

Mr. MAIN. Similar to the process we just used. The legal process in which they would actually just issue a reproposal like they just did in March and—

Senator SPECTER. Would you agree to that, Mr. Lauriski?

Mr. LAURISKI. Senator, if the information tells us that we have a better way to approach these rules and we modify the proposed rules in any way that substantially changes what we have proposed, then the answer is yes. Then we have to repropose those rules and then Mr. Main and all the miners and everybody else has an opportunity to comment on those before they become final.

Senator SPECTER. All right. I think we may be coming to closure here. Let us see if we can work that out. I do not think we are too far apart.

Mr. MAIN. One final comment.

Senator SPECTER. We are pretty close, Mr. Main. You want to say something more?

Mr. MAIN. Just one thing. If the rule is not repropose, we would urge this committee to act to withdraw—

Senator SPECTER. You better finish this before Senator Harkin gets here or starts to participate. Who knows what will happen then.

They do not have too many coal mines in Iowa, do they, Senator Harkin? I withdraw the question. Go ahead, Mr. Main.

Senator HARKIN. Just a second.

I want the record to show that at one time Iowa was one of the major coal-producing States in this Nation, more than Pennsylvania. As a matter of fact—

Senator SPECTER. You may want the record to show that, but are those facts?

Senator HARKIN. It is factual. As a matter of fact, I win a lot of free beers at bars by asking people where the great coal mine leader, John L. Lewis, came from. Do you know, Mr. Main?

Mr. MAIN. Iowa.

Senator HARKIN. Thank you very much. You win.

Most people think he came from West Virginia or Pennsylvania.

Senator SPECTER. That is certainly relevant to what State produces all the coal.

Mr. Main, you have the final word.

Mr. MAIN. Yes. I appreciate that, Senator. I would say this. What miners in this country want is assurances that they are going to see another proposal. Short of that, if the Government does not provide that, we would urge this body to act to withdraw, in any way they can, the rule that is on the table and direct the agency, in any way they can, to issue a rule that meets the needs of the Nation's miners. Thank you.

Senator SPECTER. Well, I think we are really not too far apart, and I am hopeful we can move it together.

Senator Byrd could not be here, and he has asked me to put these questions to you for response in the record. We will be asking more questions for the record.

I want to go back to the Quecreek hearings which we held last October just for a moment, Mr. Lauriski, to ask you when you are going to release your investigative report on the incident, since it has been more than a year since the mine disaster at Quecreek and about 10 months since we had the hearings last October.

Mr. LAURISKI. Senator, I am not sure if you know this, but we were asked by the U.S. attorney who you asked to investigate the matters at Quecreek to withhold the release of our report while they concluded their work. They have now given us the green light.

Senator SPECTER. When did they give you the green light?

Mr. LAURISKI. About 2 weeks ago.

Senator SPECTER. When will we have your report?

Mr. LAURISKI. It is almost on your doorstep. We are making a very small, minor modification to that report, and we would hope—it is imminent.

Senator SPECTER. Within the next week?

Mr. LAURISKI. I would hope within the next 2 weeks.

Senator SPECTER. Thank you very much.

Senator Harkin, do you care to ask anything here?

Senator HARKIN. No.

Senator SPECTER. Well, I am hopeful that we can bring the parties together here. There was action taken in the House to prohibit

any funds from being expended by the Department of Labor on this subject and it was a 2-vote margin, 212 to 210, and I thought our subcommittee ought to take a look at it. We are optimistic about having the Labor-HHS Appropriations bill on the floor starting on September 2, the day we get back, and we wanted to be more knowledgeable on the subject. After hearing the testimony, I am not sure we have accomplished our mission, but we do not know any less than we did when we started. It is fairly technical, but I repeat, I hope we can work it out so that there is agreement between the parties.

ADDITIONAL COMMITTEE QUESTIONS

There will be some additional questions which will be submitted for your response in the record.

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED BY SENATOR ROBERT C. BYRD

MSHA'S PROPOSED RESPIRABLE DUST RULE

Question. Mr. Lauriski, it has been 32 days since I wrote to you about MSHA's proposed respirable dust rule, and I have yet to receive a response. That leaves me with a poor impression about how MSHA views its role in communicating with the miners and their representatives in the Congress.

I urge you to withdraw this seriously flawed rule. It is only one in a series of proposals by this Administration that have eroded the trust of miners in the one agency of the federal government charged with protecting their health and safety.

Last Saturday, a 27-year-old worker was electrocuted in a Raleigh County coal mine, the sixth West Virginia coal miner to die on the job so far this year. While MSHA touts its safety record, it is ignoring a series of accidents and near-fatalities that are occurring in Alabama, Kentucky, Illinois, and Pennsylvania. This year's national fatality rate is already well above where it was at this time last year.

And, yet, astonishingly, MSHA supports a \$5 million cut in its own coal enforcement budget, as proposed by the President, when it already lacks the resources it needs to properly inspect our nation's mines. And now MSHA refuses to withdraw its coal dust rule which has undermined its credibility with miners even further.

Mr. Lauriski, what does this Administration think it is gaining by promoting policies that risk the lives of America's miners?

Answer. Please accept my apology for the delay in responding to your June 25, 2003 letter concerning the respirable dust proposed rules.¹

During the six public hearings we held on the proposed respirable dust rules in May of this year, MSHA learned of the promise shown in the initial testing by NIOSH of the prototype Personal Dust Monitor (PDM) and its possible use to assist in the elimination of black lung disease. A PDM is designed to produce a real-time read-out of dust exposure. As a result, on June 24, I announced MSHA would stop all work on finalizing the proposed rules. We have extended the comment period on the proposals indefinitely so that the results of the current in-mine testing of the experimental prototype PDMs will become a part of the public record.

MSHA is working with the National Institute for Occupational Safety and Health (NIOSH) to complete the in-mine tests of the prototype PDMs in mines located in Pennsylvania, West Virginia, Alabama and Utah. If these initial tests are successful, MSHA and NIOSH will purchase production prototype models of the unit for further testing. As we proceed with the testing, we believe it is essential to leave the current rulemaking record intact and that we add to it the results of the PDM testing so we can determine how the PDMs might fit into a regulatory scheme.²

¹ MSHA responded to your June 25 letter on August 13, 2003.

² Subsequent to the hearing, MSHA convened a meeting of stakeholders in order to provide a forum for obtaining and exchanging information about the direction of future research on the PDM. At the August 5, 2003 meeting, staff from NIOSH and the manufacturer of the device reported that the device performed successfully during the initial in-mine tests. Consequently,

As we work to improve miners' health, we are also emphasizing miners' safety. Any illness or injury is one too many. A great number of MSHA employees have worked in mines for many years and feel a deep sense of loss when accidents occur that cause injury, illness or death. As you know, our staff conducts detailed formal investigations of each fatal accident in an effort to prevent a recurrence. They study the scene of the accident, review records at the mine, conduct various tests, as needed, and interview people who may be able to help put together a complete picture of how the accident occurred. We then prepare a report of our findings and share it with the mining industry across the country to prevent similar accidents in the future.

Accidents, whether fatal or non-fatal, present learning opportunities. MSHA defines an accident to include not only incidents that produce injuries, illnesses or deaths, but other unplanned incidents not resulting in personal harm, such as mine fires, entrapments, inundations, ignitions, and roof falls. Mine operators must report these incidents immediately and MSHA investigates many of them to learn how and why the event occurred. MSHA may use the lessons learned to develop hazard alerts or other educational materials for distribution and discussion at mines to prevent similar future accidents.

MSHA certainly is not ignoring accidents. While the number of fatalities at coal mines is higher than it was last year at this time, it remains lower than at this time in 1999. We have increased our efforts to reduce serious accidents and to raise the mining community's awareness of recent accident trends and related potential hazards. MSHA is:

- Finalizing an Emergency Temporary Standard (ETS) to protect underground coal miners from grave dangers such as mine fires, explosions, and gas or water inundation emergencies. The recent deaths of 14 miners at two underground coal mines demonstrate the need for this standard, and it is only the second ETS issued under the Mine Act. The Emergency Evacuation Standard assures that proper training and mine emergency evacuation procedures are in place.
- Taking action to alert the mining industry of the inundation hazard such as that which caused the entrapment of nine miners at the Quecreek Mine. After fully investigating the cause of that accident, MSHA reviewed plans of underground mines operating near abandoned works, and worked with mine operators to provide additional protective measures where needed. MSHA is working to improve the availability and accuracy of mine maps with improved technology.
- Operating a Tri-State Initiative group that focuses on the geographic area which historically has accounted for a large number of mining fatalities, i.e., Virginia, West Virginia and Kentucky.
- Providing special emphasis on assistance to small operations that may not have the technical and safety resources of larger operations through a new Office of Small Mines Safety and Health Compliance Assistance.
- Conducting special emphasis initiatives in which all available personnel contact miners and mine operators to reduce accidents and injuries.
- Issuing hazard alerts and other materials designed to focus the attention of miners and operators on current trends and occurrences through expanded distribution channels.
- Investigating and providing information on "near misses" and how to prevent them.
- Expanding the safety information and materials available on the website. These materials can be used by operators and miners in safety meetings and training sessions to improve the safety environment at the mine.
- Continuing to conduct inspections mandated by the Mine Safety and Health Act of 1977. In 2002, our rate of completion of mandatory inspections was at the highest level in several years.

In addition, MSHA has updated and reissued policies and procedures that were identified internally as needing improvement. It is to MSHA's credit that accident follow-up activities result in local or national improvements as they may be appropriate.

Most recently, MSHA has initiated a nationwide outreach program designed to raise the awareness of accident causation and prevention among the miners, and to encourage all employees of mining companies and contractors to identify hazards and use safe job procedures. MSHA is using all available staff, including education and training specialists and technical experts, as well as enforcement personnel, to conduct these contacts at our nation's coal mines. The major two-week initiative

MSHA and NIOSH each committed \$150,000 to purchase production prototype PDMs. These devices are scheduled for delivery in May 2004.

began on Monday, July 28, 2003, and will include on-site visits to every surface and underground mine in the nation.

MSHA will not reduce its enforcement efforts in fiscal year 2004. The President's budget request does not propose a decrease in inspector positions below the fiscal year 2003 enacted level. While the fiscal year 2004 budget request for the Coal activity is \$5 million less than the fiscal year 2003 enacted level, this decrease is the result of the transfer of 19 information technology FTE to a newly created budget activity that will consolidate MSHA's information technology resources. In previous budgets, the cross-cutting services provided by the Directorate of Program Evaluation and Information Resources were funded by drawing resources from each of the budget activities. There is no effect on the Coal program enforcement or any of its activities.

NATIONAL MINE HEALTH AND SAFETY ACADEMY

Question. Mr. Lauriski, I wrote a letter to you last month, to which I still have not received a response, about Jack Spadaro, Superintendent of the National Mine Health and Safety Academy in Beckley, West Virginia, who was placed on administrative leave by the Mine Safety and Health Administration (MSHA) last Spring.

I have no personal knowledge of the circumstances of his suspension. But, The Courier-Journal of Louisville, Kentucky, and other publications have speculated that Mr. Spadaro's suspension may have been retaliatory. Mr. Spadaro has been a regular critic of MSHA. He has earned a reputation as a whistle blower.

The Washington Post this week reported that hundreds of whistle blower complaints about waste, fraud, and abuse in this Administration are going unexamined, with the backlog of cases more than doubling in the past 18 months.

Mr. Lauriski, this Administration is swiftly developing a bad reputation for its treatment of federal employees who tell the truth about questionable practices in their agencies. The treatment of Mr. Spadaro's case has only contributed to the growing sense among many miners and MSHA employees that the agency is interested in protecting something other than the health and safety of miners. And the failure to respond to the letters of Members of Congress only makes matters worse.

Can you explain to this Subcommittee exactly what your priorities are at MSHA because, frankly, it doesn't seem to be the health and safety of miners.

Answer. I responded to your letter on July 21. As I stated in the letter, Mr. Spadaro was placed on administrative leave with pay on June 4, 2003. Because this is a personnel matter, it would be inappropriate for me to provide any additional information about Mr. Spadaro at this time.

My priority is the health and safety of miners. My goal is to see the mining industry in this country achieve new levels in health protection for miners just as it has broken all records in safety. After several years of relative stagnation, the number of mine fatalities dropped to a new record-low of 72 in 2001 and then to 67 last year. This amounts to a 21 percent decrease in fatalities from the period 2000 to 2002 at all mines. Injuries also are on the decline and for the same period, total injuries at all mines have decreased 18 percent. Additionally, total inspections, investigations and site visits increased from 61,094 in 2000 to 87,957 in 2002.

I have put into place a system that promotes safety as a value. After arriving at MSHA, I developed a management plan to guide the Agency in a new proactive direction that makes sure we get maximum benefit from our resources. As we have implemented the plan, we have set specific goals to reduce injuries and illnesses and have experienced the results I just cited. We have enhanced training and education for both our own staff and for miners and mine operators and compliance assistance is now a part of everything we do. It is through programs such as these that we will see fewer injuries and illnesses.

I am committed to improving the health and safety of our nation's miners. When I accepted this position, I pledged to uphold the law protecting miners. I have done so and I will continue to do so.

CONCLUSION OF HEARING

Senator SPECTER. Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 3:02 p.m., Thursday, July 31, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]