TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
DEPARTMENT OF LABOR)
)
Mine Safety and Health Administration)
)
30 C.F.R. 75)
)
Underground Coal Mine Ventilation)

Pages: 1 through 247

Place: Grand Junction, Colorado

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
hrc@concentric.net

TRANSCRIPT OF PROCEEDINGS

Date: May 22, 2003

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005-4018
(202) 628-4888
hrc@concentric.net

UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF:)
)
DEPARTMENT OF LABOR)
)
Mine Safety and Health Administration)
)
30 C.F.R. 75)
)
Underground Coal Mine Ventilation)

Garfield Room
Holiday Inn
755 South Horizon Drive
Grand Junction, Colorado

Thursday,
May 22, 2003

The hearing in the above-entitled matter was convened, pursuant to notice, at 8:00 a.m.

APPEARANCES:

On behalf of the Department of Labor:

MARVIN W. NICHOLS, JR.
Director, MSHA Office of Standard Regulations
1100 Wilson Boulevard
Arlington, Virginia 22209

RON FORD
Economist, MSHA Office of Standard Regulations
1100 Wilson Boulevard
Arlington, Virginia 22209

JON KOGUT
Mathematical Statistician, MSHA Division of

APPEARANCES, Continued:

On behalf of the Department of Labor:

LEW WADE
Associate Director of Mining Research
National Institute for Occupational Safety and Health (NIOSH)

BOB THAXTON
Committee Chair and Technical Advisor, MSHA
Division of Coal Mine Safety and Health

LARRY REYNOLDS, Esquire
MSHA Office of the Solicitor

GEORGE NIEWIADOMSKI
Mine Safety and Health Specialist
MSHA Division of Coal Mine Safety and Health

P R O C E E D I N G S

(8:00 a.m.)

MR. NICHOLS: Good morning. My name is Marvin Nichols; I'm the Director of the Standards Office for MSHA. And I'll be the moderator for today's public hearing.

On behalf of Dave Lauriski, the Assistant Secretary for MSHA, and Dr. John Howard, the Director of NIOSH, we want to welcome all of you here today.

Can you hear me in the back? Can the court reporter hear me? Okay.

Today's public hearing is the last of six hearings we've held to receive your comments on two related MSHA regulatory actions.

First, we have reopened the record for comment on the joint MSHA and NIOSH single sample proposed rule that was originally published on July 7, 2000.

Second, we have reproposed the plan verification rule. It was published in the Federal Register on March 6, 2003.

Your comments today will be included in the record for both proposed rules.

The two proposed rules are based upon the 1996 recommendation of the Secretary of Labor's Advisory Committee on the elimination of pneumoconiosis, and the comments received in response to the previous proposal rules

published in 2000.

These rules are intended to eliminate black lung and silicosis by eliminating miner overexposures. They completely changed the federal program for controlling, detecting, and sampling for respirable dust in coal mines.

The emphasis of the new program will be on verified engineering controls, so that miners are protected on every shift.

Let me introduce our panel up here. To my left is Bob Thaxton with Coal Mine Safety and Health. In the center is Larry Reynolds with the Office of the Solicitor. And at the end is George Niewiadomski, Coal Mine Safety and Health. To my right is Lew Wade with NIOSH. As you know, MSHA and NIOSH are partners on the single sample rule. Next to Lew is John Kogut with MSHA. And at the end of the table is Ron Ford. Ron is an economist in my office.

Let me mention how today's public hearings will be conducted. The formal rules of evidence do not apply at these hearings, and the hearing is conducted in an informal manner. Those of you who have notified MSHA in advance will be allowed to make your presentations first. Following these presentations, others who request an opportunity to speak will be allowed to do so.

I would ask that all the questions regarding these rules be made on the public record, and that you refrain

from asking questions of the panel members when we are not in session. The reason we do this is that we want all the discussion of these rules on the record.

Following the completion of my opening statement, Bob will give you an overview of the new proposed plan verification rules. Also, as with the five previous hearings, we will work through lunch. We want to give everyone ample opportunity to make comments on these rules.

A verbatim transcript of this hearing is being taken, and it will be made available as part of the official record. Please submit any overheads, slides, tapes, and copies of your presentations to me, so that these items may be made part of the record. The hearing transcript, along with all of the comments that MSHA has received to date on the proposed rule, will be made available for review. We intend to post a copy of the transcript on MSHA web page at www.MSHA.gov. If you wish to obtain a copy of the hearing transcript before then, you should make your own arrangements with the court reporter.

We are also accepting written comments and data from any interested party, including those who do not speak here today. You can give written comments to me during the hearing, or send them to the address listed in the hearing notice. If you wish to present any written statements or information for the record today, please clearly identify

them. All written comments and data submitted to MSHA will be included in the official record.

Due to requests from the mining community, the agency will extend the post-hearing comment period for both plan verification proposal and the single-sample reopening from June 4 to July 3, 2003. And the notice announcing these extensions will be out soon.

Let me give you some background on the two proposed rules. First, the single-sample proposed rule, which was originally published on July 7, 2000, would allow MSHA to make compliance determinations on single-sample results. The agency would no longer use the averaging method to determine if miners were being overexposed to respirable dust.

Averaging can mask individual overexposures by diluting a high sample with a lower concentration taken on another shift. Using single-sample measurements rather than averaging multiple samples for compliance purposes will better protect miners' health.

Single samples can identify and remedy excessive dust conditions more quickly. Single-sample measurements have been used for many years by OSHA, and at metal and non-metal mines in this country.

MSHA and NIOSH are jointly reopening the rule-making record for this proposed rule to provide an

opportunity for you to comment on the new information in the record concerning MSHA's current enforcement policy, health effects, quantitative risk assessment, technological and economic feasibility, and compliance costs, which has been added since July, 2000.

For example, we updated the preamble to include the most recent information on the prevalence of black lung among coal miners examined under the Miners' Choice Program during the 2000 through 2002 period. These findings show that miners continue to be at risk of developing black lung under the current dust control program.

The quantitative risk assessment is based on additional and more recent data. None of the new information changes the actual finding published in the federal register on July 7, 2000.

The single-sample issue has been through a long public process, which is outlined in the preamble of the proposed rule.

The second regulatory action is the reproposed plan verification rule. This proposed rule supersedes the one published on July 7, 2000. MSHA held three public hearings on the previous proposed rule during August of 2000. Many commenters urged the agency to withdraw the earlier proposed rule, and go back to the drawing board. Some commenters believed that MSHA had failed to adequately

address their concerns. The reforms in the Federal Dust Program recommended by the Dust Advisory Committee by NIOSH in its criteria document and reforms urged by coal miners since the mid-1970s.

After carefully considering all the facts, issues, and concerns expressed by commenters, MSHA is proposing a new rule in response to the comments made to the July 7, 2000 proposed rule. And Bob Thaxton will now give us an overview of the proposed plan verification rule. You can follow Bob on the screen behind me. And we're also posting Bob's presentation on the MSHA web page for further reference. And we would ask that you hold any questions regarding the presentation until you come up to the table to speak, and we'll deal with those at that time. Bob?

MR. THAXTON: Before I start, could somebody have faxed in a document on -- testing?

(Presentation held off the record.)

MR. THAXTON: Okay, if we can go back on the record. Our first speakers are the NMA/BCOA panel. If you would, please, identify yourselves, and spell your name for the court reporter.

MR. WATZMAN: I'm Bruce Watzman, last name is spelled W-A-T-Z-M-A-N.

MR. BEERBOWER: I'm Dave Beerbower with Peabody Energy, B-E-E-R-B-O-W-E-R.

MR. LAMONICA: Joe Lamonica, L-A-M-O-N-I-C-A. I'm a consultant to the Bituminous Coal Operators Association.

MR. WATZMAN: Thank you, Mr. Chairman and members of the committee. We introduced ourselves. We appear today on behalf of our two associations, the National Mining Association and the Bituminous Coal Operators Association.

We appear today not to share with you specific comments on the proposed regulations; we'll do that by the closing comment period. Rather, we want to use this opportunity to share some general comments on the philosophy that we believe should govern revisions to the respirable coal mine dust sampling program, including the proper use of single-shift samples to determine an operator's compliance with the applicable dust standard.

At the outset, we want to recognize that may of the issues that the industry has long advocated to improve the program are contained in the proposed rules. Other elements are inconsistent with what we believe is necessary to restore confidence in the system, and we'll suggest amendatory language where we believe appropriate.

We must highlight that this is what the rule-making process is designed for. To provide an opportunity for the affected community to offer suggestions to improve upon the product that the agency has produced. That is what this testimony and our written submission are designed for,

to improve upon proposed rules that we believe are a step in the right direction.

We would note further our concern that many of the comments submitted in the prior hearings are, in our estimation, based on emotion rather than fact. The industry has never sought, nor would we seek, to increase the dust standard. And this proposal cannot and does not circumvent the statutorily-imposed two-milligram standard. Likewise, we've always advocated the primacy of controls to protect miners from exposure to respirable dust, and this proposal maintains that time-tested practice, while recognizing that situations will arise where traditional controls are not adequate to protect miners' health. In those instances we must use non-traditional means to protect miners, and we support the proposal's recognition of this.

Before turning to our comments in the proposal, we want to comment on the agency's announcement that they would extend the comment period by 30 days.

On April 20 we submitted a letter to the agency requesting that this hearing be postponed for 30 days, and that the comment period remain open until September 4 of this year. That request, if granted, would have amounted to a 90-day extension beyond the scheduled closure date of June 4.

Rather than grant this, the agency, as noted

previously, extended the comment period by 30 days. While we appreciate this and recognize that our request could have been turned down in its entirety, we're at a loss to understand the rational behind this decision to grant so short an extension, while still appearing to be responsive to the stakeholders.

Without belaboring the point, I want to briefly explain the rationale behind our request. As many of you are aware, and as Dr. Wade commented on, we have been working cooperatively for the last several years with government, with labor, and industry for the development of a mine-worthy person-wearable continuous dust monitor. While this has not advanced as quickly as we would have liked, we are on the verge of a major breakthrough in the way we sample for and protect miners from exposure to excessive concentrations of respirable coal mine dust.

This month the designer will deliver to NIOSH several units for underground testing. The devices have, as previously noted, been tested successfully in the lab, and we're in the final stages of the testing and development process. Namely, to validate the device's mine-worthiness, and to document its reliability and precision compared to the existing graphometric system.

Under the testing protocol that's been developed, the devices will be tested for several weeks in underground

mines, following which the results will be analyzed. Several companies, including Mr. Beerbower's, have volunteered to participate in the underground testing process, and they are anxious to do so.

If successful, the PDM has the potential to alter the dust sampling and control landscape more than anyone could have ever imagined. Some believe that it will bring about a paradigm shift in the manner in which we protect miners from coal mine dust. While this may be somewhat of an overstatement, what we do know is that it will empower miners and operators to take real-time corrective action when circumstances warrant.

Regrettably, the agency's decision on our extension request will deny us from having this information as we and others develop comments on the proposed rules. Quite simply, we're concerned that final decisions will be made without the benefit of this science, and those who suffer from that are the agency's stakeholders.

We thought the experience gained as the industry struggles to comply with the new noise and diesel rules had taught us all a lesson of what happens when decisions are made in the absence of full and complete science. Regrettably, that appears not to be the case. Denying us the ability to utilize in the rule-making the knowledge that will be gained is inconceivable. The proposed regulations

recognize the role that the PDM can play in the future, but that role cannot be defined until the testing is complete.

Quite simply, if the devices prove mine-worthy and reliable, we'll be back at the drawing board sooner than any one of us wants to be. To deny adequate time to test and analyze the device's utility underground makes little sense, and has the potential to thwart, rather than foster, the use of this tool.

At this point, Mr. Chairman, we'll share with you some of our preliminary thoughts on the proposed rule. As noted previously, we'll file comments by the close of the comment period, including suggested revisions to the proposal.

As a backdrop to this discussion we would ask that a series of letters, which I will provide you, dated April 5, 1996, February 6, 1998, May 21, 1998, November 2, 1998, and December 16, 1998, between our organizations and MSHA be included as part of this record. These letters transmitted and expanded upon an MSHA- and industry-crafted conceptual outline for a new respirable dust sampling program that we believed then, and continue to maintain today, will enhance the protections afforded miners against the potential health consequences where excessive dust concentrations are encountered.

Let me briefly explain this. First, MSHA

assumption of sampling for compliance with the existing respirable coal mine dust standard based upon the results of a single-shift determination that considers all sources of variability. And I emphasize all sources of variability. And once the personal dust monitoring equipment becomes available.

The use of mine-proven commercially-available continuous coal mine dust monitoring instrumentation.

Third, compliance determinations based upon personal, and only personal, samples.

Fourth, MSHA recognition of the use of administrative controls and supplied air helmets as a supplemental means for obtaining compliance with the dust standard.

And fifth, MSHA recognition that the science underlying the NIOSH criteria document is insufficient to warrant a reduction in the current dust standard.

This conceptual outline was developed not as a type of menu from which one could pick and choose selected items. Rather, it is a comprehensive program to restore confidence in the dust-sampling process, and further protect miners from the potential health consequences in those limited instances where exposure to excessive dust exists.

It would be unfair if we did not reiterate again that the agency's proposal addresses to some degree most of

these elements. Regrettably, in our estimation it's done in a bifurcated, incomplete manner. This we can't tolerate.

Reform of the dust program must be undertaken in a comprehensive manner. If it involves awaiting the results of the PDM testing, so be it; we would support that wait.

At this point Mr. Beerbower will now discuss single-shift sampling and the use of supplemental controls.

MR. BEERBOWER: Thank you. My name is Dave Beerbower; I'm vice president of safety for Peabody Energy. And I appear today in my capacity as the chairman of the BCOA safety committee, and as vice chairman of the NMA safety and health committee.

It should come as no surprise that the industry continues to oppose the use of single-shift samples for compliance, if this is implemented without our having the benefit of the PDM. This is the position that has been set forth in our prior communications with the agency, and we maintain that position today.

Our objection to the use of single-shift sampling was well-documented in our oral and written comments submitted on the previous regulatory proposal. It is not our intent to rehash those objections to the single-shift proposal in its entirety. The prior record, which we understand has been incorporated into this proceeding, well documents our concerns.

It would, however, be insightful to highlight a few of those prior comments. In industry testimony before the agency on July 19, 1994 in Salt Lake City, an industry witness stated, "We contend that MSHA and NIOSH have underestimated variability in the underground mining environment. Although the agency takes into consideration sampling and analytical errors, the agency's finding totally ignored environmental variability that can exceed sampling and analytical errors."

The witness went on to state, "Reliance on a single sample and a single sample only will be contrary to good, sound, and accepted industrial hygiene practice."

This was followed by another industry witness who stated, "Practically speaking, the use of single samples for non-compliance determinations will do nothing to improve miner health. In fact, what you've heard is that such a procedure may have a net effect of causing respirable dust levels to rise, based on the requirements placed upon operators by MSHA to modified dust control plans and practices, particularly after a non-compliance determination."

Mr. Chairman, nothing in this newly-proposed rule has given us reason to alter those earlier comments. The issues remain, from our perspective, the same.

We do not believe that single-shift samples

accurately reflect the dust concentrations that miners are exposed to during their working careers.

If we can agree that most exposures to respirable coal dust present a chronic, rather than acute, health hazard, our focus should be on the miners' long-term exposure, rather than their exposure from a single shift.

Probably the most informative critique of the single-shift sampling was prepared by Dr. Thomas Hall. Among other things, Dr. Hall concluded that "employment of the single-sample strategy, therefore, is a de facto effect to reduce the current coal mine dust standard in mines without going through the normal rule-making process, because operators will be forced to ensure that exposures are well below the currently allowable limit to avoid citations."

His conclusion arose from the fact that, for an operator to assure with a confidence level of 95 percent that an individual sample will not exceed the limit, they will have to maintain average dust concentrations from one-quarter to one-fifth below the allowable exposure level.

Dr. Hall went on to reference the published literature, saying, "A single day's measure of exposure does not provide an accurate representation of long-term exposure. It is not relevant the help out comes from exposure to chronic toxins, and can lead to misleading

interpretations, with a high possibility of taking an incorrect decision regarding the compliance or non-compliance status of the environment."

One of the stated purposes of this new rule is to restore credibility to the dust-sampling program. And yet the agency would require operators to void an average of 67 percent of the samples they take because they will fail to achieve the verification production level. This is because all operator samples must exceed the tenth-highest production total of the last 30 shifts.

In a normal bell-curve distribution, two-thirds of those samples will fall below that level, which will require the operator to resample.

Others state it differently. If the production distribution is normal, three samples will be required to be taken to get one good one.

Now, if the distribution is skewed, it may require many more samples to be taken for those standards to be met. The miner who is being sampled under this system will quickly conclude that the operator is going to keep sampling until he gets a low-enough concentration to be submitted to the agency. And no amount of explanation will be able to convince those, who are naturally skeptical, and the credibility that is so important to any dust-control scheme will be destroyed.

Mr. Chairman, single-shift sampling was a bad idea in 1971. It was a bad idea in 1994. And it remains a bad idea today.

Consistent with our previous communication with the agency, we remain opposed to the use of single-shift samples until the agency recognizes all sources of variability that can impact that sample. Until its use is tied to only the personal sampling, and until such time as we have the tools available to determine the real-time exposure of miners to respirable dust.

The next issue we want to discuss is the use of supplemental controls to protect miners where traditional engineering and environmental controls are not adequate to maintain dust concentrations below the applicable standard.

As you are well aware, the industry has long advocated that MSHA recognize the use of supplemental controls to protect miners from exposure to excessive concentrations of respirable dust. In those circumstances, where a combination of engineering and environmental controls are inadequate, and in those situations where unforeseen conditions arise that necessitate the long-term use of such controls.

Indeed, in 1997, Energy West Mining filed with the agency a petition for rule-making to allow for the use of airstream helmets or the NIOSH-approved air-purifying

respirators as a supplemental means of compliance with respirable dust standards. The rationale for their petition stated, "The use of airstream helmets is a highly protective method of minimizing the exposure of miners to respirable dust. In combination with the application of all other feasible engineering and environmental controls, allowing the use of airstream helmets and other NIOSH-approved methods as specified herein for the purpose of achieving compliance with applicable respirable coal mine dust standards will go far in eliminating pneumoconiosis and other pulmonary diseases."

While we are heartened that the proposed rules contain provisions for the use of supplemental controls, we believe the proposal, as written, dramatically discourages the use of effective respiratory equipment and administrative control measures, and therefore would diminish their potential to protect coal miners' health. In order for supplementary control measures to be practical and useful, they must be readily available when the need arises. Therefore, the only way a mine operator could realistically use such measures would be to have a pre-approved plan to do so.

As the proposal is presently written, it is very unlikely that a mine operator would ever apply to MSHA for the use of supplementary control measures. Moreover, it is

even more unlikely that approval would be granted, because mine operators would not, or could not, use all engineering or environmental controls that may be mandated solely at the discretion of MSHA.

Regrettably, more often than not decisions on control technology feasibility become concentrational disputes between mine operators and MSHA district officials. When these situations arise, operators have few remedies available, and controls, whether meaningful or not, are installed merely to achieve plan approval."

In order for the use of supplemental control measures to be practical and functional, they must be approved for mine operators that make a request to use them prior to a situation or circumstance that would require their use. Approval to use supplemental control measures would be granted by the MSHA district manager, and mine operators with the pre-approval to use those controls would then be expected to implement these measures when, for example, number one, either the verification limit is exceeded; or secondly, if a mine has been placed on a reduced standard due to the presence of quartz; or thirdly, when unusual conditions are encountered or anticipated which occur briefly and intermittently.

Using such control measures in conjunction with administrative procedures, will more quickly provide a high

degree of respiratory protection for miners. A proposal finalized along the lines just discussed would provide an effective system to continually control hazards associated with exposure to coal mine respirable dust.

At this point, Mr. Lamonica will share our thoughts regarding mine verification.

MR. LAMONICA: Thank you. I'm Joe Lamonica, and I serve as a consultant on the health and safety matters for the bituminous coal operators association.

The present respirable dust program was conceived, developed, and tested started around 1965, and was put into regulations becoming effective around the summer of 1970. It was designed to measure the exposure of miners to the respirable dust by having the miners wear a dust pump set in a cyclone separator for the whole shift.

The sets were mailed to what was then the Bureau of Mines, where they were processed to determine the concentration of dust. If this sounds familiar, it is because the present program is still basically the same after more than 30 years.

Has the program been successful since it was implemented in 1970? The answer, in our opinion, was a resounding yes. But, as in Mr. Thaxton's presentation, there are still, I believe he said eight percent of the samples showing excess of the two-milligram standard.

Dust levels in those days -- I'm talking back in the early seventies -- reached 10 to 20 milligrams per cubic meter, and even greater. These conditions do not exist today in the mines run by responsible operators. Average levels today are near the two-milligram-per-cubic-meter standard. So why change?

The reasons are many. But I want to focus on the one major reason, and that is that the mine operator takes the majority of samples submitted to MSHA.

Cases of sampling fraud have caused a loss of credibility with the program among our nation's miners. How do we try to restore that credibility? We do it by taking the dust sampling program out of the hands of the operators, and putting it totally in the hands of MSHA.

Imagine our surprise when we read the proposed rule of March 6, 2003. MSHA would do compliance sampling, but operators would do plan verification sampling. The operators are still in the dust-sampling business, still subject to accusations of tampering and fraud. You have heard from the miners, the operators, the advisory committee on which I served, the experts, and even the pseudo-experts, and they all agree: MSHA should do all compliance sampling.

Renaming some of the sampling as verification sampling does not hide what it really is. The government does not have to wrest this program from the operators.

They will gladly turn it over to MSHA.

The proposed regulations are overly complicated, based on the sheer volume of the document alone. This is particularly the case with the proposed plan verification requirement. MSHA's proposed verification sampling requirements are so burdensome that it is entirely likely that the agency will be involved much more heavily with these plans than is reasonable.

After more than 30 years of dust sampling experience, is this the best we can do? It is a Band-Aid on the present system, which is broken. So what do we do?

As was frequently stated, our request for extension of time was not fully granted, preventing us from giving detailed comments at this time. But we will speak to what can be done conceptually.

If we remove the mine operator from all sampling and it becomes MSHA's responsibility, then all references to dust sampling can be removed from the proposed regulation.

Regulations are not required for MSHA sampling programs. Those are governed by MSHA policy. MSHA can design its program to be one in which all of its sampling is compliance sampling. It does not have to be overly complicated.

The proposed rule can then be reduced to addressing the following. Conditions and circumstances

under which the operator submits a dust-control plan, and revisions to that plan. Actions to be taken by the operator if MSHA finds non-compliance. Actions to be taken by the operator if the applicable standard is reduced due to quartz. Actions to be taken by the operator if there are Part 90 miners present. Conditions and circumstances governing the use of supplemental controls.

This provides the basis of a simplified rule that can be understood by all, from the tool room to the board room. It eliminates the need for someone whose primary responsibility is to interpret the rule.

As for the PDM, this approach allows for MSHA to convert over to the sampling method once both MSHA and NIOSH approve the device. Mr. Watzman has provided in our opening remarks compelling reasons for using the PDM. The PDM will change the paradigm of respirable dust sampling in coal mines.

When the present dust-sampling program was being designed in the 1960s, one of the major obstacles was the dust sampler. There was no device that could give us real-time information. As a result, we have a program that gives us dust concentrations days, and sometimes weeks, after the fact. A response to excessive dust levels cannot take place if and when they occur.

The workplaces in the mine are rarely static, but

in fact dynamic, always moving, always changing. The PDM gives us real-time information as to exposure trends that allow the miner and mine management to take corrective actions to remove the miner from possible excessive exposures.

The approach that's outlined allows the rule-making process to move forward, while testing of the PDM is being completed. Even if MSHA has to repropose the rule based on the above, it would be short and sweet, to the point, workable, understandable to all, and performance-rather than prescriptive-based. This will put the final rule on a fast track.

Thank you.

MR. WATZMAN: Mr. Chairman, this concludes our testimony. We would be happy to answer any questions you might have.

Before doing so, let me reiterate that we believe the proposed rules are a step in the right direction, but that they must be revised to first remove the cloud of controversy that continually surrounds the respirable dust-sampling program.

Second, builds confidence on the part of both mine operators and miners, that sampling results are reliable and representative of the dust concentrations to which miners are exposed.

Third, encourages, rather than discourages, the use of all tools to protect miners where traditional controls are not effective.

And fourth, encourages the introduction of new sampling technology to empower miners and operators to initiate intervention measures based upon the results of real-time sampling. Adoption of a sampling system based upon these principles will enable us to achieve the goal that we all strive to achieve: elimination of coal worker's pneumoconiosis.

Thank you.

MR. NICHOLS: Thank you. I'm sorry I missed part of your opening statement, and I need to step out again. But Dave, is it the industry position that this miner that Bob had the example on, where we were averaging these five samples, and this miner was exposed to greater than three milligrams on two of the samples and less than two on three of them, that the industry position is that this miner is protected?

MR. BEERBOWER: I think our comment has been, Marv, that if we get to the PDM, we'll know exactly on every shift what miners are exposed to. And therefore, that situation will not occur.

And so we believe that, with the PDM, exactly what Bob talked about will be taken care of and eliminated.

MR. NICHOLS: We had this discussion back in 2000 about the PDM, and I believe the last hearing we had your position was that this is just around the corner. And here it is 2003, and we don't see the instrument yet. What happened?

MR. BEERBOWER: Well, I guess I would respectfully say, Marv, that the agency was actively involved in some of the things that prevented it from being in use today.

We had, in our dust partnership with the UMWA, we had agreement. And had MSHA involved, and had NIOSH involved, that we would be pursuing the belt-wearable device that is currently being tested.

Unbeknownst to us, the agency got together with the manufacturer and insisted if they were going to provide funds, that they were insisting on their PDM-2 model, which would have provided for a one-pound cassette to be mounted on the chest of the miner to be sampled. That went on for almost, well, less than a year, but pretty close to a year, that we were unaware that that was moving along at the expense of the device that we had asked for.

And so when we found that out, we made immediate corrections to the program. And so I guess there have been a lot of politics played in this thing.

But I think what has been consistent has been our insistence that a real-time dust-sampling system is

required. It's been the consistent support of the UMWA with us and in our partnership insisting on that. We've been meeting with the agency since 1993 developing that process. And I'm encouraged at this point that I really feel that the device is on the very near horizon that will provide what we're looking for to eliminate exposures.

MR. NICHOLS: Okay. Go ahead.

MR. NIEWIADOMSKI: I'd like to ask a question directed to the panel.

One of your key recommendations is, to restore confidence in the sampling program, that the government take over all compliance-related sampling. By doing so, are you implying or recommending, or implying that the operators would be involved in no sampling at all?

And let me just, the second part of the question is, given that, then what would be the disposition of the PDM? I mean, if the PDM is proven to be mine-worthy, would the industry then, in fact, purchase these devices? Or would they rely on MSHA to purchase these devices and monitor exposures?

MR. NICHOLS: Well, I think those are all details that will have to be worked out once we see the capability of the device, George.

But I would say this on the issue of operators doing sampling. We certainly would continue to do sampling

for our own purposes, to make sure that what we're doing is the best that's possibly available out there to us. But those samples would not be submitted to MSHA for compliance purposes. Those would be for our testing to be used.

And again, I have to keep going back to the PDM. If I have PDMs on all of the DOs in the mine, then I'll know, on an ongoing basis, exactly what our exposures are, and what actions we need to be taking. So to me, and I think to most of the folks that we represent here, that is a better example of the solution that I think would be pleasing to everyone.

MR. THAXTON: I have three questions I'd like to ask. I'd like to just add to Dave's statement. There's two things.

One is that as soon as the device is determined to be acceptable to both NIOSH and MSHA, then we know what we're working with.

Second, what you have proposed provides no incentive for the use of PDM. So there needs to be an implementation plan for the PDM.

And how we get from where we are today to that implementation, because these things are not going to be built overnight, it's going to take a while once we get to the production mode, and then we can start assimilating these into the industry and the conversion over from the

present program to the use of PDMs.

So those are details that have to be worked out. Those are things that we are working on now in our comments to you, and we're trying to do that through a consortium of industry, labor, and government in what would a reasonable implementation program be for the PDM.

Just let me ask just a clarification of Mr. Beerbower. He indicated that monitoring of the DOs, is that something you would do on your own, for your own purpose? You would monitor each and every designated occupation?

MR. BEERBOWER: Again, George, those are details we're going to have to work out. I certainly think that that is along the lines which we would be pursuing.

Historically, the DO has been the occupation which is deemed to be the highest concentration. And so if he is in compliance, or he or she is in compliance, then we have pretty good assumption that everyone else would be in compliance. And we certainly are open to other suggestions that might come forward that would be better than that.

MR. THAXTON: My first question actually follows along that same line on the PDM, and you can decide who's best to answer.

Are you indicating that you have a desire at this time, with what you've seen on the PDM and what it's potentially capable of doing, that you're going to place

those units on each and every miner, on each and every shift? Or are you proposing, as you indicated just now, that you're looking at more of a limited deployment of such devices, that you would be monitoring the DOs with those devices?

MR. BEERBOWER: No, we would not be looking to put the devices on every miner. And I think that would be overkill. I don't think that's going to be necessary.

What we do want to do is understand what the environment is on a section, out-by areas, and then monitor those areas which are deemed to be a hazard.

MR. LAMONICA: Let me just add one comment to that. And that is, initially you have to know for sure what the designated occupation is. What, in reality, it is, so that there may be a necessity of sampling everybody on the section, say, initially until you are confident that you have properly designated the designated occupation. And then you can key on --

MR. THAXTON: In line with that, isn't the purpose of the PDM, though, is that you're able to monitor each individual? And you would be able to move that person, and make use of administrative controls? As such, does it truly represent what the DO occupation would be exposed to, given that you could make those kinds of moves, as opposed to what we currently require, which is that the sampler stay within

that occupation, no matter who is there -- determining whether the current DO concept is it's true, it represents the highest concentration on the section that fits in compliance, you expect everybody else to. But if you're actually putting this unit on an individual, that unit goes where the individual does. Doesn't that destroy that concept in that fashion?

MR. BEERBOWER: I don't think so. And from that standpoint, again, I think as Joe mentioned, we have to be sure of what the DO is. And if that means we have to sample two, it might mean that. I just don't know until we get into the details.

But clearly, the use of administrative controls is just that, just as you defined it. That if people are overexposed or have the potential to be overexposed, that you move them, or that you replace miners at different times during the shift, or have them do different jobs. I mean, that is, in itself, the essence of administrative controls.

MR. THAXTON: My second question doesn't relate to the PDM, it relates to your reference to supplemental control measures, both administrative controls and respiratory protection.

Are you suggesting, under your general concept, that we should be considering allowing the use of those controls at any time it would be a selection process by the

operators to determine what best is able to protect miners in any given condition?

MR. BEERBOWER: Again, I can't answer that. We're still in the process, Bob, of putting together our comments to make sure. And quite honestly, we're pressed for time to do that. We wish we had more time, and we requested more time to do that. But again, those are the kinds of details we just have not gone through yet.

MR. WATZMAN: Bob, let me add, just so we're clear on this, and I want to be clear based upon the way you asked the question. We are not talking about using those supplemental controls in lieu of traditional engineering and environmental controls. And I want the record to be clear on that. Because you posed the question in such a manner that it could be read into that that we were suggesting that you use those supplemental controls in lieu of the others.

MR. THAXTON: Your comment earlier was that you recognized the continued use of engineering controls. The way the current proposal is written is that you would have to come to the agency first to get approval to utilize those. You said that would probably be a hampering of the operator, in order to get the best controls or best --

MR. WATZMAN: Right. It's just a time delay, Bob. And I think the current P-code debacle that we're going through on noise regulations, that's what we envision that

evolving into.

And so rather than doing that, what we envision this as being is a toolbox, if you will, of dust control measures and devices that the operator can choose, the miners and operators can choose from to use, if they know from the PDM that there are certain circumstances in which they are out of compliance.

MR. THAXTON: The last question I have is in relation to if a PDM is deployed on particular miners. Who do you envision being allowed to make the decision as to whether a miner is being overexposed, and that action would have to be taken at that point to take care of the exposure? The idea of a PDM actually giving you real-time readings would indicate that you shouldn't have people being overexposed. You see that they're potentially being exposed to high dust concentrations that are going to result in non-compliance or overexposure versus the standard, at what point do you take action to remove that miner, or take corrective actions of adjusting your controls? At what point do you do that? And who does that?

MR. BEERBOWER: Well, that's the beauty of the PDM. It allows the miner himself or herself to take those actions.

For instance, if they would recognize -- the device itself, and I will defer to Erich Rupprecht who is

here to give testimony today, too, on the device; he's part of R and P, which is the developer of the device. But it will actually, as I understand it, it will project ahead at any point in time in the shift, and it will project what your exposure will be at the end of the shift if you continue as you are currently being exposed. That gives the miner the opportunity, then, to, if a couple of sprays need cleaned or if they need to check their volume of air or any type of engineering control may need some additional help or improvement, that gives them the ability, or at least the indication, that something needs to be done.

It also gives the operator, then, a heads-up that hey, we need to be looking at perhaps administrative controls that might be administered on the section.

But I think it's going to be a mix between the miners themselves and the operators, as to what actions are taken to respond. But we will know, on a real-time basis, whether we're going to be overexposed or not.

MR. NIEWIADOMSKI: John, before you ask your question, I just want to follow up to what Bob indicated. And that is the trigger of the corrective action, whether it's moving an individual or implementing some additional controls, at what concentration or how high above the standard would that be undertaken?

Remember, you were saying that single samples

remains a bad idea, unless it is used -- and maybe I'm mischaracterizing it, so correct me -- in conjunction with personal sampling.

MR. BEERBOWER: Again, the personal dust monitor is what we're shooting for. That's what we believe is the solution. To come in and take a single sample on a bimonthly basis, and assume what it looks like we're going to be trying to assume the environment the miner is exposed to, we think is wrong.

We would rather see the PDM, which is a continuous monitoring of his exposure on every shift that he works. That makes more sense to us.

MR. NIEWIADOMSKI: If, for example, if the instrument indicates that if an individual continues under the same conditions, then his exposure would be 2.1, 2.3, whatever, if it's going to be above the standard, the question I'm asking -- and I'm not trying to put you on the spot -- that is, at what level you would deem that immediate corrective action needs to be taken?

MR. BEERBOWER: Well, we would consider anything over two. The device has a predictive capability to say that at the end of the shift it would be X. And if that X is over two, then we would expect that immediate actions would be taken to get it back under two.

MR. NIEWIADOMSKI: Thank you.

MR. KOGUT: I have several questions and comments. The first one relates directly to what you were just talking about, though.

You mentioned a lot of previous comments that you had submitted, industry had submitted, in response to earlier single-sample proposals. And I think Bruce said that, was it you that talked about Tom Hall, Dave? Okay.

I think one of the things that you specifically mentioned was the shift-to-shift variability and locational variability.

What you just said now was that you were going to, the way you see the use of the PDM would be that you would consider it an overexposure if there was an overexposure projected or ascertained for an individual shift. How do you reconcile that with your earlier comments about including shift-to-shift variability as something that should be included in assessing the accuracy of a single-shift measurement?

And in particular you said that, in an example that Bob gave in his earlier presentation, where you had a couple of samples that were above three, you said the PDM would take care of that.

Now, the way I read Tom Hall's comments and the industry's earlier position is that shift-to-shift variability should be taken into account in making a non-

compliance determination. And since those exposures of 3.5 or 3.6 are within the normal course of shift-to-shift variability, that you would not consider that an overexposure. So how do you reconcile those two positions?

MR. BEERBOWER: Very easily. And I think this is where the paradigm shift needs to take place in our thinking, as an industry and as an agency.

There is a huge difference between a single shift being sampled once every two months versus a continuous dust monitor which is giving you continuous read-outs of the miner's environment on a daily basis, on every shift that he works.

When you sample on an intermittent basis like that, then you do need to take into account all of the variability. When you are sampling on a continuous basis, then when we see, with the predictive nature of the PDM, that someone is going to be overexposed, we can wipe that out. And we can take care of those things, so that the variability is much, much less when you're sampling on every shift, rather than one shift every two months.

So, I mean, that variability will be accounted for when you have the dust concentration on every shift that the person works.

MR. KOGUT: Well, I'm still a little confused, I think. Suppose that, to use a real example, suppose that

somebody is wearing one of these PDMs, and for the first four shifts that you look at, the concentration, the full-shift concentration, would be, the average full-shift concentration was, say, 1.5. And then on the fifth shift you were looking at, the concentration was at 2.3. What would be the response that you're recommending after you see that shift?

MR. BEERBOWER: If during the shift the miner sees that his concentration or his exposure would be projected to be 2.3, then they would take immediate action to get it down below two.

MR. KOGUT: And by immediate action, are you including administrative controls --

MR. BEERBOWER: Absolutely.

MR. KOGUT: -- and rotating, job rotation?

MR. BEERBOWER: Absolutely.

MR. KOGUT: I see. So your solution to that kind of scenario would probably amount to something like job rotation, is that right?

MR. BEERBOWER: It could. I mean, that's one of the tools that should be available. But there are many others.

MR. KOGUT: I think the reason that in the hierarchy, or a reason that in the hierarchy of controls, that administrative controls such as job rotation are placed

lower down in that hierarchy than environmental and engineering controls, is that when you rotate jobs, it's true that you're not allowing an individual miner to become overexposed relative to a particular limit. But what's happening is that whoever gets rotated into that job, the exposure of that person is getting increased.

And so, although you're reducing the exposure to any particular miner, you're spreading the risk around a greater population. So there's a larger population at risk. And I think that that's really the primary reason why administrative controls are subordinated to engineering environmental controls. And it sounds like the way you would be using this PDM, you are taking an administrative action, job rotation, and really in that case you would be using that instead of a potential environmental or engineering control.

MR. WATZMAN: John, that's incorrect. I think you're viewing it as that we would view administrative controls as the primary remedial action that could be taken, and that's incorrect. And if we left that impression, then we need to correct that.

Administrative controls is but one action that could be taken in the event that the PDM predicts that if all circumstances remain unchanged, the miner would be overexposed at the end of that shift. It may be

administrative controls, it may be environmental controls, it may be engineering controls, it may be some combination of all of them.

But if we've left you with the impression that administrative controls would be the primary response in the event that there's a prediction of an overexposure, then we need to correct the record in that regard.

I think secondly, yes, I would agree with your argument. For the sake of argument I will agree with you that rotation then causes two individuals to be exposed, rather than one individual. But the test that we must meet is a two-milligram standard.

If two individuals are exposed to one milligram, we'd like to get to the point where no individuals are overexposed, or they're exposed to as low a level as is deemed possible. But I don't agree with the basis for your argument, that we have increased the health risk, because a second individual was exposed.

The test that must be met is two milligrams. That is the statutory limit. You're carrying this argument, I think, to the argument that we deal with now in terms of using rotation or administrative controls where we're dealing with a carcinogen. And we've had these discussions as it relates to diesel equipment, and the agency's decision not to allow rotation for purposes of compliance with the

diesel particulate matter.

The same is not true here, and I don't think it's fair to carry that argument forward when we're talking about dust.

MR. KOGUT: Well, my point really was just that there's a reason for subordinating administrative controls to engineering and environmental controls, and that's expanding the population at risk to me seems like the primary argument in favor of that subordination.

MR. WATZMAN: Well, understand too, John, that job rotation is not the only administrative control. It could be the miner simply changing where he's standing on a working section. Or spending time differently, maybe on the amount of time a conveyor would be running, or the machine would be cutting differently. So administrative controls are not limited to job rotation only. And I think the results are well documented by NIOSH and by tech support that where you stand, for instance on a continuous miner section for the continuous miner operator and for a shear operator, is extremely important as to what your dust concentrations are going to be.

MR. KOGUT: I've got some other questions, also. First I want to give some comments, because you brought up these various comments that have been brought up with respect to what should be included in the sources of error

in a single-shift measurement. I want to point out, first of all, that in the July 7, 2000 proposal, which is part of this record and part of this proposal for single sample, I believe that we have already dealt with all of those proposals or suggestions from the industry as to what should be included. Our responses to those are included on page 42096.

MR. WATZMAN: Jon, let me comment on that, and maybe I can --

MR. KOGUT: Let me just finish -- through 42097 of the July 7, 2000 proposal. So if all you're doing is resubmitting the same comments, I think we have the same answers. So if you're going to submit something, I would suggest that you submit responses to our responses.

MR. WATZMAN: Then I will agree with you, and I will respectfully say that your response, because you responded to our concerns or our previous comments, doesn't mean that you accommodated those.

We still have a disagreement. Unless I've missed something, we still have a disagreement in terms of environmental variability, and whether that is a factor that should be considered in determining what the, I'll use the phrase citable level is, on the basis of a single sample. That was not previously included. And unless I've missed it, and if I did I stand corrected, and please point that

out to me.

Because I go back to a document put together by NIOSH entitled "Occupational Exposure Sampling Strategy Manual." And in this they talk about strategies for sampling. When they say the full-period consecutive sample measurement is "best" in that it yields the narrowest confidence limits on the exposure estimate. And this is after considering both exposure variation and the precision accuracy of sampling and analytic methods.

In our estimation, there are still sources of variability that are not included. When you make the determination as to what is a, for purposes of single sample, a citable level. And 2.33 was what was previously proposed. It remains 2.33. So in our estimation, those sources that we believe should be included, and you have responded to but did not include, still remain a point of disagreement between us.

MR. NICHOLS: And let's don't devolve into a debate here about issues we've talked about for a long time. Let's --

MR. KOGUT: No, I'm getting on to something else.

MR. NICHOLS: Just wait a minute. If we need to ask a clarifying question, let's do that. If the panel does not agree with this proposal, let's be clear on what they do not disagree with; let's try to keep it at that. In some of

the previous hearings we've gotten to debating old issues, and I don't want to do that.

The purpose here is to collect information on what these new rules require, and whether we have agreement or disagreement. So go ahead.

MR. KOGUT: Okay. Well, just in response to your question to me, where you asked if we've addressed that vocational variability issue, you'd like to know where it is.

In the July 7, 2000 proposal, it's under the measurement objective on pages 42089 through 42090. And then it's also discussed in the appendices to that notice.

In response to the material that Tom Hall introduced about the probability of erroneous citation, that's dealt with in some technical detail in appendix C of the February 3, 1998 notice, which is also a part of this record. And it's summarized in the current notice on page 10825.

But the primary technical justification or the technical response to the issue of erroneous non-compliance determinations is in appendix C of the February 3, 1998 notice.

Just one other thing in response to what Dave Beerbower said about the skewed distributions of production.

What you said about two samples that are not valid

for every one that is, that would hold if you're randomly sampling the shifts. Now, you only get that ratio if you're randomly sampling the shifts. Particularly on the operator samples, we would expect that the operator would know in advance which shift there's going to be maintenance on, which shift he's not expecting full production on, so he would not sample shifts on which he expects the production to be low.

MR. BEERBOWER: I'm going to say, Jon, as an operator, we expect full production on every shift.

MR. KOGUT: Okay. The other thing is that you said that if it's a skewed distribution, then it would be some other ratio, or even worse.

Actually, the way that the VPL, the verification production limit, is formulated as a percentile rather than some function of the mean of standard deviation, that's a non-parametric criterion. So whatever that ratio is, it's going to be the same regardless of the shape of distribution.

MR. BEERBOWER: I disagree with that, Jon, and I'll tell you why.

MR. KOGUT: Well, that's a technical issue, and --

MR. BEERBOWER: If we have 30 samples, and at the beginning of that 30-sample cycle we were in very good conditions and at high production. And in the last 20

samples, we had rock or bad roof that we ran into, or water that reduced production by 30 percent, I could be sampling for at least 10 or 12 shifts to get a good sample. And that's the skewing that I was talking about.

MR. KOGUT: Yes, okay, you're talking about skewing over time --

MR. BEERBOWER: That's exactly right.

MR. KOGUT: -- rather than the actual shape of the --

MR. BEERBOWER: Exactly right.

MR. KOGUT: I understand. Okay.

MR. FORD: I've got a question. And that is, has any representative of either the NCA or BCOA had any discussions with the company designing the PDM device concerning the cost of a PDM device to an operator, when the device becomes commercially available?

MR. WATZMAN: No. Specific discussions with the designer of the device? No.

MR. FORD: Just another follow-up question. So then is it correct to say that, at this time at least, you don't have any cost estimate whatsoever of what you might think the PDM device would cost?

MR. WATZMAN: No, I wouldn't say that, either. I mean, we have heard what they believe it may cost. But you know, I don't think they even know. And I would defer to

Erich when he testifies. I mean, I'm not sure that even they know and can tell you affirmatively exactly what it will cost today. We're not to that point.

MR. FORD: Okay. One last question. And I realize this is a big question. When we know that you don't want to put the PDM device when it becomes commercially available on every miner, and then also realize on the other end we really don't know how it's going to be implemented and how many people you're going to put it on if we ever get it into the mine -- and realizing those are big ifs -- is there any price range in the PDM-1 device that you could specifically say, a reasonable price range, where industry could not accept it?

MR. WATZMAN: In our discussions with R and P, they've given us a range that again is extremely dependent on volume. So until we see what the regulation looks like and how many of these devices are going to be bought, it's impossible to make those projections.

But the ranges that we have heard are acceptable, at least in our estimation, to what costs we could bear.

MR. FORD: Right. And I should get those ranges from the --

MR. WATZMAN: I think it's better if you ask Mr. Rupprecht.

MR. FORD: I understand, okay.

MR. KOGUT: I have actually one more question to Dave Beerbower.

You said just now that you try to achieve your maximum production on every shift. What I want to know is, what is it that limits your production rate on, say, a long wall? What's the limiting factor on the production?

MR. BEERBOWER: Jon, I mean, the list is enormous. It can be belt delays, it can be hard cutting, it can be bad roof. It could be water on the face, it could be any of those numbers. Maintenance issues certainly are all involved.

MR. KOGUT: Do you ever limit the production on a longwall in order to comply with the two-milligram limit?

MR. BEERBOWER: Absolutely not. Absolutely not.

MR. KOGUT: Would you include the speed and depth of the cut on a long wall, would you include those among engineering controls?

MR. BEERBOWER: I think I'd rather look at those as administrative controls. Because, again, it's not really engineering, it's more of an operating-type issue that you can change on whim. We do that --

MR. KOGUT: That's a fine line, though.

MR. BEERBOWER: -- you know, part-cutting or something like that, we'll do that. Or if it's bad roof, we'll shorten the cut up, things like that. So I wouldn't

consider that to be an engineering control.

MR. KOGUT: What if somebody designed the regulator on the --

MR. NICHOLS: Jon, we need to move on here.

MR. KOGUT: -- speed of the cut, would that be an engineering control?

MR. BEERBOWER: Again, I think it's administrative. Speed is, to me, administrative.

MR. KOGUT: Okay.

MR. NICHOLS: Okay, Jon, we've got to move on.

MR. REYNOLDS: I have a couple questions. I just want to clarify. I understand this is your preliminary comments and you will be providing detailed comments later, but I just wanted to clarify that the position of the panel is that you do support the use of personal dust monitors, and you believe their use would be most effective once you've identified high-exposure areas. You're talking about using them in specific occupations in the mine. And you don't foresee a situation where the industry would want to or need to use PDMs on all miners, on all shifts. Everybody's nodding your head, but --

MR. BEERBOWER: It's overkill. I mean, I don't think that's --

MR. REYNOLDS: I just want to clarify it for the record and the people at the hearing. You do not --

MR. BEERBOWER: That's correct. The answer is that what you have stated is correct.

MR. REYNOLDS: Okay. You don't believe there would be any circumstance in the future where the industry would support using personal dust monitors for every miner.

MR. BEERBOWER: If you bought them, we might.

MR. REYNOLDS: If we bought them, and included all the record-keeping requirements and the data to be created about every miner and --

MR. BEERBOWER: Sure. And the magnets, and the calibration, sure.

MR. WATZMAN: Where there is a situation -- I don't want to walk away from this thing in saying it's an absolute impossibility. If we take a look at all the people in one section, and all their exposures are high, that's a different case than what we traditionally think of is that there will probably be one, maybe two, that are high, and some that are very low.

And what we're saying is, for the very low there would not be a necessity to have 24/7 with a PDM. But that depends on what we find on that section.

We've got to think beyond what the conditions are today. We've got to look to the future; what's it going to be then? One of the problems with these regulations is that they get outdated as technology moves forward. Then we're

back to this type of hearing again.

So I would qualify our answer on that matter.

MR. REYNOLDS: There's one other matter I wanted to clarify, too.

With regard to the, the scheme of the proposal is that the operator designs a plan, and the operator tests the plan to ensure that the engineering controls will maintain respirable dust levels within the standard. And what Dave had to say was that it was too burdensome for the operator, because it is believed that the operator would have to take at least three samples for every valid sample to get the 67 percentile of production.

And the other issue was that Joe had mentioned that the operators want to get out of the sampling business. And that even if we call it something else, this is still a compliance sampling.

The industry would prefer that MSHA basically conduct all the compliance sampling, I mean conduct all the verification sampling for the first 30 days a section operates.

MR. BEERBOWER: You know, again, we're in a position where the verification of the dust plan we think is unnecessary when you have a PDM.

MR. REYNOLDS: We don't, though. We don't have one yet.

MR. BEERBOWER: I understand that. But again, we don't want to be doing any sampling. You heard that loud and clear. That is correct.

MR. REYNOLDS: Okay. I just want to verify again, you do not, you would prefer to have MSHA doing as much sampling as necessary during the opening of a section to meet the stringent requirements that are in this proposal for verification samples.

MR. BEERBOWER: Understand, Larry, what we're saying with plan verification is, when a mine has a plan, it submits it to MSHA. MSHA looks at it. There aren't mines out there coming up with some, you know, we're only going to put two sprays on a shear, and submitting that to MSHA for approval, and getting that approved. That doesn't happen.

MSHA has a footprint by which they're looking at all dust control plans. And if they feel that that plan will be successful in maintaining the dust level below two milligrams, then it is approved.

Now, whether you come in --

MR. REYNOLDS: Under the provision --

MR. BEERBOWER: Well, whatever you call it. Once it's approved, then we're allowed to operate under those conditions. Then MSHA can come in and take a compliance sample. It doesn't have to be a verification sample.

MR. REYNOLDS: Okay, I'm talking in terms of what

the proposal calls for.

MR. BEERBOWER: I understand. We disagree with the proposal.

MR. REYNOLDS: And the proposal is based on the recommendation of the advisory committee, that we have a verification, that the operator verifies the controls --

MR. BEERBOWER: But that can be done through the regular compliance sampling program. It doesn't need to be special sampling, and it certainly doesn't need to be done by the operators.

MR. REYNOLDS: But a key element is -- there's a key element in the proposal, which was to get the issue of production into the sampling, to make sure that we're sampling at production levels that people actually work in.

MR. BEERBOWER: I understand.

MR. REYNOLDS: And if we were to just do compliance samples, rather than the verification samples, we wouldn't be doing that.

MR. BEERBOWER: Why not? Why?

MR. REYNOLDS: Because --

MR. BEERBOWER: I mean, the example Bob showed did exactly that. In fact, it factored it in.

MR. REYNOLDS: During the first 30 days of the section --

MR. BEERBOWER: I don't care when you sample it.

Come in any time you want.

MR. KOGUT: Are you suggesting that we base a non-compliance determination on that formula that Bob used to extrapolate the production level and ventilation levels?

MR. BEERBOWER: Well, I find it interesting in that the operator samples we voided if they don't meet the tonnage levels, but MSHA samples would be factored. I'm ont sure how you justify one versus the other.

MR. KOGUT: The formula that Bob was talking about didn't have anything to do with making a non-compliance determination. It had to do with MSHA's internal decision as to whether to do a follow-up, another sample in the next bimonthly period. That's a very different thing from doing a non-compliance determination.

MR. BEERBOWER: Is it, if it's over 2.33?

MR. KOGUT: You mean over 2.33 after you do the extrapolation?

MR. BEERBOWER: Yes.

MR. KOGUT: Well, there's uncertainty in the extrapolations.

MR. BEERBOWER: And what would you do then?

MR. KOGUT: I'm not suggesting that we make a non-compliance determination based on that formula. I was asking you if you were proposing to do that.

MR. BEERBOWER: MSHA will have to make their own

determinations on what you're going to do on writing citations. I'm not in the citation business; you are. We're interested in getting the dust control levels down to where we are assured that miners are not going to be overexposed.

Now, however you decide you want to write a citation is your business. But we're going to get the dust levels down with a PDM one way or the other.

MR. THAXTON: I have one final question, and then we're through.

In your discussions of the PDMs and what we would like to find out, is it your contention that we should modify the proposal to make the use of personal continuous dust monitors, if and when they become available, mandatory at all coal mines? Or are you saying that we should continue to allow some operations to utilize the current sampling technique, as well as the PDM?

MR. BEERBOWER: Bob, we're not prepared to make those comments at this time. We will do that before the end of the comment period. But there's still a lot of details that we have to work out in our counter-proposal that we'll be submitting to you. But we certainly will take that into consideration.

MR. THAXTON: I would only ask, if it's possible, if you could give us a copy of the presentation that you

made to us, it would be helpful.

MR. BEERBOWER: Well, it's a work-in-progress. At the end of the comment period, when we're ready to come forward with what our proposal is, that's when.

MR. NIEWIADOMSKI: Marv, let me ask this. I'm going to make it the final question.

MR. WATZMAN: I wouldn't bet on this being the final one.

(Laughter.)

MR. NIEWIADOMSKI: What I heard is that you're perfectly satisfied with the current plan approval process.

MR. BEERBOWER: Absolutely not.

MR. WATZMAN: Current?

MR. NIEWIADOMSKI: You're talking about the process of approving the dust control parameters in mine ventilation plans.

MR. BEERBOWER: No, we are not.

MR. NIEWIADOMSKI: You're not?

MR. BEERBOWER: No, we are not.

MR. NICHOLS: Okay. Are you going to leave us any of your testimony today?

MR. WATZMAN: We will, if we've made some changes, we'll get them to you in the next day or two. I just need to put everything together in one document.

MR. THAXTON: There were some documents you said

you were going to give to us.

MR. WATZMAN: Yes. And those I have, and I can give that to you and to the reporter.

MR. NICHOLS: Okay, thanks.

MR. BEERBOWER: Thank you, gentlemen.

MR. NICHOLS: Does the court reporter need a break? Okay. Erich?

MR. RUPPRECHT: My name is Erich Rupprecht. That's spelled R-U-P-P-R-E-C-H-T. And I am attending this meeting to represent Rupprecht and Patashunek Company, Inc., which many people know as R and P. And I will be referring to us as R and P in the interest of time.

We've been involved in the development and commercialization of particle mass measurement systems for over 20 years, and are located in Albany, New York. And I would like to thank MSHA for the opportunity to make this oral presentation as part of the public hearings that this committee has been conducting in recent weeks.

During the past few years R and P has participated in a NIOSH-sponsored project to develop a personal continuous dust monitor. And the resulting device is a single-piece unit that R and P calls the PDM, or some people would call it the PDM-1, that is designed to assess the exposure of individual miners in underground coal mines.

Previous work on an R and P machine-mounted dust

monitor and a two-piece personal continuous dust monitor, also known as the PDM-2, was jointly funded by NIOSH and MSHA. We would also like to acknowledge the strong support for these projects by other stakeholders as well, such as miners and their representative organizations, and mining companies, along with leading industry groups.

I would like to make some comments today with respect to the rules being proposed by MSHA concerning plan verification in 30 CFR Part 70, 75, and 90. And specifically, I would like to describe the advances that could be realized for miners, mine operators, and mine regulators through the use of a personal continuous dust monitor.

First, just a little bit of background. R and P has developed a number of particle measurement systems over the past decade that have contributed to improvements in the quality of the air that all of us breathe above-ground. These include real-time instrumentation for diesel engine manufacturers to help develop diesel engines with reduced particular matter emissions.

R and P has also been at the forefront of ambient particulate matter measurements in cities, tribal lands, and other areas such as national parks, which US EPA-approved continuous real-time monitors and immigrated manual samplers. Most recently we developed a real-time monitor

for the very challenging measurement of particle emissions from smokestacks. This new system has received a US EPA conditional method approval for use at coal-burning power plants, and is also the subject of a newly-approved method by ASTM, formerly known as the American Society for Testing and Materials.

R and P is committed to innovation in the field of particulate matter measurement, and to crafting new technologies that enable the monitoring of airborne particular matter concentrations in challenging environments.

An example of our company's commitment to develop new measurement technologies for real-world needs is the personal dust monitor, or PDM. R and P's PDM continually measures the amounts of particles collected on a filter while sampling the mine atmosphere from within a miner's breathing zone. The device is small enough to be work on the belt of a miner, in place of the current cap-lamp battery, and provides real-time coal dust exposure information to miners under actual operating conditions.

The technology in the PDM is based upon first principles of physics, and is not an inferred mass measurement that could be affected by particle properties, such as particle size, color, or composition. The monitor's filter-based mass readings are as accurate and as

reproducible as the weighing of filters on a gravitational balance in a laboratory.

The PDM represents a technological breakthrough, by measuring an individual miner's exposure to airborne particulate matter during the course of a shift. And we believe the unit can be a powerful tool for both miners and mine operators, with feedback concerning the mine atmosphere made available on an ongoing basis.

The monitor travels with the miner during an entire shift, and provides continuous feedback of the total average and projected exposure of a miner to airborne particulate matter. We believe that this platform provides the real-time on-site information to miners and mine operators to demonstrate compliance with dust exposure standards set by Congress. The real-time feedback generated by the unit provides the ability to take administrative actions when those are appropriate in response to the dust exposure of individual miners.

Tamper-evident features built into the monitor's hardware and firmware and its ability to store the results from a month's worth of 12-hour shifts internally could make it also an attractive tool to mine operators, as well. I'm sorry, to mine inspectors, as well.

We would also like to suggest the use of the PDM as an engineering tool to monitor areas in underground mines

to determine the average particle concentration and training information at fixed locations. Implementing the same filter-based mass measurement technology in both personal and fixed monitoring applications could provide the basis for comparing dust-loading results directly, avoiding the potential for introducing uncertainties from the use of different technologies.

The final form taken by the verification rules concerning respirable dust in coal mines will be the result of the many factors that MSHA is taking under consideration. It is not the place of R and P to comment on the exact manner in which we might think that personal continuous dust monitors should be implemented in underground coal mines.

We feel strongly, however, that ignoring the new capabilities offered by the PDM could jeopardize the health of many miners, present and future. We applaud the interest expressed by a number of this committee's members during a meeting that I attended before, which was the one in Washington, Pennsylvania, to seek input concerning the appropriate use of the PDM.

And we would encourage industry organizations and mine workers' groups to offer concrete suggestions to this committee during the comment period concerning the implementation of PCDMs in a constructive manner.

Echoing the views expressed by an industry

representative during the Washington, Pennsylvania meeting of about two weeks ago, we believe that the current wording of the proposed ventilation plan verification rule does not provide suitable incentive for the use of PCDMs.

The implementation of PCDMs should not, in our opinion, be an afterthought of the regulation, but a new centerpiece to provide timely, accurate, reliable information to miners, mine operators, and mine regulatory authorities concerning dust exposure levels. We believe that the new rule should be written to ensure the use of the best technology in a constructive manner. And we suggest that the approval of the R and P PDM by the Secretary of Labor should trigger a phase-in period of PCDM rules, during which the implementation of personal monitors would be increasingly strongly encouraged.

The new PDM should be viewed as a significant augmentation of the integrated filter sampling program currently administered by MSHA. The PDM has advanced through a number of technological hurdles during its multi-year development. In laboratory testing carried out recently at the Pittsburgh Laboratory of NIOSH using a variety of coal types, the monitor demonstrated equivalent performance to the current integrated filter method.

In the final phase of its development, the unit is about to go underground in a number of coal mines to confirm

its performance under actual working conditions. R and P is confident that the upcoming mine trials will be successful, and that the prototype instruments developed under the current NIOSH contract will form the basis of a commercially-available measurement technique with important health benefits for miners, mine regulators, and mine operators.

R and P is committed to the commercialization of the PDM in collaboration with the important stakeholders: with MSHA, NIOSH, miners and their representatives, and industry. Additional investments in injection molding and other processes will be required on our part to take the PDM from its present prototype configuration into a commercial form. And we will seek input from stakeholders to help ensure that the final device meets their needs in terms of physical configuration and information processing and storage capability.

With widespread implementation of the PDM, we anticipate that the unit price will be significantly less than $10,000, including support software and the base station used for battery charging and data downloading. Projected availability of the commercial unit is during calendar year 2004, with the exact timing dependent upon a number of factors, such as the time required for the Department of Labor approval process.

In order to launch a commercial product, there has to be a market. In this regard, R and P is planning to approach interested stakeholders following the successful completion of the NIOSH underground mining tests to solicit the purchase of initial quantities of the PDM by each of a number of parties. This can serve to acquaint early adopters with the new measurements of technology through first-hand experience, and will provide R and P with the clear signal that the underlying interest exists for the commercialization of the innovation.

This ends my prepared presentation concerning the PDM within the context of the proposed PCDM regulations, and the potential benefits that we believe exist for the industry-at-large.

In addition, I have two technical comments to make concerning the proposed MSHA rules.

First, we strongly support the definition of respirable dust based upon standards of the International Standards Organization, ISO. This would provide comparability of US dust exposure measurements with those of other countries, and lead to better-defined measurements of those particles with the potential for the greatest human health impact. We will refer to pages 10806 and 10879 of the proposed rules in this regard.

Secondly, pages 10827 and 10879 suggest that the

collection filters used in the PDM may not be appropriate for quartz analysis. We would propose that the final rules should provide sufficient flexibility for the future use of filter cartridges from PCDMs for quartz analysis. Preliminary work in this area is showing good promise, and points to the possibility that PDM filter cartridges could, in fact, be used in the future for both mass measurements and quartz analysis.

I would like to thank the committee for allowing me the opportunity to provide comments concerning the recognition of personal continuous dust monitors as part of the new MSHA rule-making. We believe that the PDM holds significant potential to improve the convenience and relevance of underground dust concentration measurements for the protection of miners' health, and seek to work together with all interested parties to maximize the benefits from the measurement technique.

And I do have one with me, so that at the appropriate time, either during a break or if you would like me to show one, I could do that as well.

MR. THAXTON: The committee has seen them. We will not take the committee time to do it at this time. We would like to continue with Erich, as far as your testimony.

MR. REYNOLDS: Actually, since he's referenced the PDM, we should have a picture and a description of what it

is, like we did before, for people. If it's a particular one, if you could just identify which one it is, and where it is.

MR. RUPPRECHT: I believe it's a picture of a PDM shown by Dr. Wade.

MR. REYNOLDS: It's the same thing as Dr. Wade?

MR. RUPPRECHT: It's the same device as what was shown at the first meeting in Pennsylvania that I attended, and the same device that was shown by Dr. Wade. I always seize the opportunity to show interested parties.

MR. THAXTON: At this time, because of the list of speakers, we need to go ahead with some questions for you. Because there were a couple things that were brought up that we'd like to follow up on.

Two things. Are you planning to market the PDM technology without the cap lamp to other industries? In other words, is this technology only applicable right now to the coal industry, or are you applying that technology to be utilized by other industries to also monitor dust levels?

MR. RUPPRECHT: We have used our core technology, called TEOM, Teaford Element Oscillating Microbalance, in more and more applications over time, where we feel that that measurement technique really brings an advantage to protection of the environmental health or human health. And yes, we're beyond this initial application of the TEOM

technology in this form factor for coal mine. We foresee in future years also to look for other applications in metal/non-metal mines perhaps, or in other occupational fields, in occupational hygiene, for this type of device.

MR. THAXTON: So that could also impact on the demand for the instrument, so that it would affect the commercialization, is what I'm getting at.

MR. RUPPRECHT: Right. And I think it is in everyone's interest, or certainly in many people's interest, to see this used in coal mines, as well as others. Anything that can be done to drive up the volume would have a good effect with the prices.

MR. THAXTON: The second question I had is that you indicated this device does provide a lot of benefits; it's very desirable benefits. If this device does provide such desirable benefits, why do you think that it's necessary for this committee to place things in the rule that actually provide incentives for its use? If the device on its own provides such valuable information, and is desirable, why wouldn't you think that people would want to make use of the device on its own merits?

MR. RUPPRECHT: There would certainly be some companies or some interests that would use it on its own merits. But to use it constructively to the full extent that it could be used on occupations that are subject to the

highest exposures, and to enable that change in paradigm, really requires some recognition on the part of the new rules, I believe, to make the best use of the PDM.

MR. THAXTON: So are you suggesting, then, that we should make these units mandatory at mines?

MR. RUPPRECHT: That is a decision that is up to MSHA. And one consideration could be that there could be a certain phase-in period, because obviously you can't make 10,000 or 2,000 of these overnight. But that is certainly a route that you may want to consider. And further consideration is to what extent miners within mines would be equipped with these, and that's been part of the discussion so far.

MR. THAXTON: Do you believe the technology would work its way into the industry without it being made mandatory by law?

MR. RUPPRECHT: I do not think that it would work its way into the industry to the extent to realize the potential of this device to protect human health, as compared to it being incorporated in the rule-making that you are now considering.

MR. THAXTON: We have heard several numbers thrown out over the past months as to the anticipated current pricing of the units versus what it could be in the future. We realize that it depends on volume of units, it depends

on paying for the technology, it depends on the demand and a phase-in-type period.

Can you just give us what your stance is at this time, given what you know about the instrument, what is the range? We realize you can't tie it down exactly, but give us what your range of cost for the current units are individually? Considering that these would be looked at not only by mines that employ three or four hundred miners, but also mines that employ as little as seven to 10 miners.

MR. RUPPRECHT: At the present time, with the uncertainties that still exist in what's actually going to be in it, and with some final decisions about the final design of the device, I would say that the best statement that I could make right now is that the cost, once we get it into production quantities, would be significantly less than $10,000.

What does that mean? Whether that means $4,000, or $8,000, or $7,000, I really can't say right now.

MR. THAXTON: Or $9,999.99.

MR. RUPPRECHT: If the quantities are there -- I don't consider one dollar to be significant.

MR. NIEWIADOMSKI: I have a couple questions. You had mentioned in your opening statement that the proposal does not provide suitable incentives for the use of the PDMs. And you also indicated that you would recommend a

phase-in period. Is that one of the incentives that you're recommending? Or what do you mean by, what other incentives would you recommend that MSHA consider?

MR. RUPPRECHT: I think today there is no PDM that is ready to go into the mines. So today, you cannot require a rule that will go into effect six months from now to require PDMs to go into mines.

What we feel is something to consider is that, through input from mine workers and industry and the various perspectives that exist, that a structure be put in place that says once a PCDM, the PDM, once a PCDM has received the approval of the Secretary of Labor, that, then, kicks a transition period off, during which there would be then a phase-in of the structure of rules that I think should rely increasingly upon the PDM to determine what the exposure is underground.

So obviously today, there can't be anything. But I think that there is sufficient interest on the part of a lot of the constituencies here, both industry and mine workers, to put together that framework that would then come into effect once the approval is realized for the first PCDM.

MR. NIEWIADOMSKI: Given your experience with the MMRDM and the PDM-2 which you apply the same technology, of course, more miniaturized in the current design, are you

confident that the PDM-1 will withstand the rigors of a mining environment? Given the way, I mean, the pounding and so forth. Do you think that the technology will survive the punishment that is anticipated?

MR. RUPPRECHT: Absolutely. I alluded to some of the other applications in which our mass measurement technique is being employed. Some of those involve temperatures up to 900 degrees c, where they are being used for catalyst research. And the new applications, where we have also attracted a lot of interest just for environmental protection, is in the use of the technique where we put the mass sensor itself inside a smokestack, and have it run inside the smokestack under smokestack conditions. So, yes.

MR. NIEWIADOMSKI: But those are more in a fixed position, stationary position, rather than being on a person. And the pounding that of course that equipment will take. I'm talking about the impact.

Because remember the problems we had with the MMRDM? One of the issues was durability, okay? The PDM-2 was durability. Those were key issues, weren't they?

MR. RUPPRECHT: Yes. And when these first six go underground, the plastic cases in which these first six are encased will not survive the rigors of mine -- and that's one of the points I made, is that there certainly are a few more steps, but those are engineering steps to go through --

one of those is clearly to get the injection molding done at a $50,000 to $70,000 expense with the right material, in order to make sure that that is accomplished.

MR. NIEWIADOMSKI: Thank you.

MR. REYNOLDS: I have a couple questions. When you mentioned you anticipated the cost to be under $10,000, and that would include the actual device and the charging station and other equipment, and also the software --

MR. RUPPRECHT: Some basic software for collecting data.

MR. REYNOLDS: I wanted to ask you, when you were talking about the basic software, I know we can get real-time measurements, and you can get in-the-shift measurements. The software that you're developing at this point, what do you mean in terms of long-term data collection, long-term exposure data?

MR. RUPPRECHT: One of the great things about software is that it is so flexible. And we asked that same question ourselves, and that's one of the points that I was referring to when I expressed that we would want to work together with mine workers, industry, and government to determine what type of values should be downloaded, how should they be stored, and so on. And since it's a software type of issue.

MR. REYNOLDS: Would the instrument have the

capability of like measuring an individual's exposure over an entire working lifetime? If we had the --

MR. RUPPRECHT: Potentially, yes, absolutely. With the proper tracking of an employee, number of tags-along, with either downloading from the PDM --

MR. REYNOLDS: So theoretically we would have the information by a personal identifier for somebody that was there during their entire working career, if the software was so designed.

MR. RUPPRECHT: If that person wore the PDM every day, yes.

MR. REYNOLDS: Okay.

MR. KOGUT: I wonder if you could describe a little bit more what the underground field-testing is going to consist of. In particular, are you going to be able to come up with any estimates of the operational lifetime of these units? Are you going to do any accelerated life testing or anything like that?

MR. RUPPRECHT: I personally have not been privy to the test program that is being worked out by NIOSH and other interested parties for the below-ground testing. So I don't have the knowledge to be able to answer that.

MR. KOGUT: Do you have any other estimates? Any independent estimates of the lifetime?

MR. RUPPRECHT: As a company we manufacture our

products to have long lives. You can look at what we manufacture in other applications, and we will use the best engineering principles and practices to design and choose the final materials of construction for this. But generally the time --

MR. KOGUT: Are you going to have a five-year money-back guarantee?

MR. RUPPRECHT: Generally, the equipment that we make carries good, solid warranties. We stand behind what we do, and they have long lives. But I really don't have a specific answer to that right now.

Right now our main focus is in working together with the individuals at MSHA, NIOSH, and industry and mining groups to go through the underground mining process. Once that is completed satisfactorily, then we will be turning our attention to those issues.

MR. FORD: I'd like to ask a couple questions. You made the statement twice that through widespread use of the PDMs, you could maintain a price significantly below $10,000. Based on that statement I wanted to ask you, has your company conducted any studies that show the decrease-in-production price of the PDM in relationship to an increase in the demand for such devices?

MR. RUPPRECHT: We ordinarily do those types of studies for other products that we make. We have done some

preliminary work here, as well. However, recently our focus has been on these final tasks, and will be shifting more to looking at manufacturing costs, pricing, and how do we design it for the best manufacturability, serviceability. That will be coming soon, not far from now. But that's a normal sort of thing that we do, yes.

MR. FORD: I understand that through the underground testing, that might be modified.

MR. RUPPRECHT: Correct. There may be certain parameters that are identified, where we may need to beef up this or that.

MR. FORD: Right. But what I'm trying to get at is, probably you've done some sort of study or examination to get you to the statement that through widespread use, it will be less than $10,000. And I'm just asking that, is it possible that we can have a copy of those statements or those studies or those analyses that you've done?

MR. RUPPRECHT: At the present time we don't have anything formal. I can tell you, however, where we will be soliciting some first sales to kick things off, initially that the selling price would be some measure above $10,000. Because even if we produce these in quantities of 25 or 50, the manufacturing costs would drive up our necessary selling price into that range.

So we will do everything that we can to promote

the widespread use of this technology. Because we don't just want to use it in coal mining. This is an obvious and very important first application, but certainly we want this to be of the best widespread benefit.

MR. FORD: Right. And again, I don't want to keep hitting this point -- and this is not a question, this is a statement -- that if you do have any sort of studies like the one we're talking about now, before the record closes, whatever timing that is, could you please provide them to us.

MR. RUPPRECHT: Okay.

MR. FORD: The other thing I wanted to ask is that, along those same lines, assuming that the in-mine testing that's going to be conducted in the next couple months reflect your best estimates of how you believe it will come out, do you have any indication of how long it would be before the device can become commercially available? I mean, a time period. And based on volume, also?

MR. RUPPRECHT: Certainly our experience is that initially the production quantities, that when manufacturers are small, and what we will initially try to do is, upon successful completion of the underground mining tests, to gather together a small number, a number of orders from early adopters, so that we perhaps will have a total order

of somewhere in the range of 25 to 30 to give us some practice, and to set the wheels in motion. And we won't earn anything off of those. That's just going to be eaten up in the processes required to get things going, like the injection molding and so on.

And we, as a company, have made things in large quantities before. I do want to point that out. For example, the air samplers that are used in the fine particulate matter network in the United States by the US EPA for the new fine particulate regulations that went into effect in the late 1990s, we produced 75 percent of the sequential variety of those. And the sequential variety represents about 90 percent of those that are out there. And those are much larger in size than what we're talking about here.

So we have the capability of entering into manufacturing. We as a company have the ISO 9001 certification up to its latest revision, which is the year 2000 revision. And we're the first company in our industry to have that.

In terms of timing, the best I can do right now, because you don't know what delays can come into the process and the exact --

MR. FORD: That's why I ask.

MR. RUPPRECHT: -- time for the actual approval

process by the Secretary of Labor, my best statement right now is the one I also read, which would be sometime during the year 2004, hopefully earlier than later.

If, for example, the testing and report by NIOSH were completed by September of this year, then it would be conceivable that the first batch of these, if there weren't large engineering modifications, would be completed sometime in the middle of 2004. But once again, there are some uncertainties.

MR. FORD: The cost we're talking about today, something widespread, less than $10,000, does that include the actual price to the operator? Or does that not include like distribution cost that has to be tacked onto that?

MR. RUPPRECHT: It's a general estimate. And the cost of the distribution really depends upon how these units are going to be purchased, whether it's going to be done through individual mine operators, where in a case like that we could sell directly from R and P to the mine operators and cut out the middleman. Or whether some other distribution makes best sense to serve our customers. But I would think that in the case of the government purchasing certain quantities directly, or these being purchased directly by the mine operators, that universe is fairly small. And that could be done directly between R and P and those entities.

MR. FORD: When the PDM device becomes commercially available, will other companies besides your own company be able to manufacture and sell the device?

MR. RUPPRECHT: No. Our plan is to remain the sole manufacturer, as we have been for other devices that we have developed. And I'll give you one example of one of those devices, which is a continuous monitor for looking ambient air quality measurements. In the US we hold a 75-percent market share. All other instruments are government-approved holding the other 25 percent internationally. If you take the entire world together, we hold perhaps about a 50-percent market share or so.

We price it right. We price it right, and provide the service necessary for users to use our technology correctly. It doesn't make sense for us to develop something, and then to fall flat on our face because the price is wrong, or we don't provide the service.

MR. FORD: I've got a couple more questions, and that's it. Just a couple more.

After the PDM-1 device is used on a shift, and before it can be used on another shift, can you talk about what kind of annual maintenance needs to be performed on that device? Like does it have to be cleaned? Or do parts have to be replaced or recharged? And then at the very end, can you give us a range about what you think the annual cost

of that maintenance would be?

MR. RUPPRECHT: I think the first question, you may have misspoken, but what the daily maintenance is when you take it off at the end of the shift. There is a docking station, which was shown, I believe, at the first session of this committee, where the sampler would then be removed from the miner's belt and put into that docking station. That serves two purposes. One is to recharge the batteries, which is a process that takes on the order of eight hours or so. And the other purpose is to download the data stored in that monitor into some sort of computer system.

The other thing that you need to do is to replace the filter, the collection filter in that monitor with a new collection filter. We had the hardware here to demonstrate that also at the first meeting. We have it here. And that's a very simple process, in which a filter is removed and a new filter put on.

The cost per filter is typical for filters. The teflon filters that you often get for sampling in mines or ambient air generally range somewhere around eight dollars each or so, and this would be in that same sort of ballpark.

MR. FORD: But how about like the battery? Eventually does it, can you use it for the full year and recharge it? Or does it eventually have to be rebought?

MR. RUPPRECHT: We're using the very latest -- and

one of the keys to the small size and features that we're able to pack into that device is that we are using the very latest in battery technology. And we're using lithium ion batteries that are used in the computer area. And those typically do not have memory effects, which is the case with other battery technologies.

I would anticipate that the change interval for the batteries would be over one year.

MR. FORD: And one last question. That is, we talked about the life of the PDM-1 in the mine. And your statement was that it's difficult to say what that life would be, because we really haven't had the in-mine testing yet.

But again, assuming your best estimates, let's say the in-mine testing goes as you believe it would go, or the best it could go, what do you think would be the life of the PDM-1?

MR. RUPPRECHT: I think everyone here acknowledges that the conditions underground are very strenuous. And we will not be making our final choices concerning materials and so on in a vacuum, and we will seek as much input on an engineering level from groups represented here so we make the right decisions. I think especially important is the housing material that's chosen, and the way the housing is constructed.

Our ambient particulate monitors are designed with a 10-year life in mind. I would think that one would want to shoot for a lifetime here, in this case, in the range of five to seven years or so.

MR. FORD: Thank you.

MR. THAXTON: Thank you.

MR. REYNOLDS: One last question, Erich. The patent on the TEOM, do you recall what year it was granted?

MR. RUPPRECHT: The original TEOM patent has expired. But in the form in which we are using the TEOM oscillator here, where we're using the momentum compensation, which is one of the keys to make it work, that patent is only on the order of two or three years old. And other pieces of our equipment are also covered by patents.

MR. THAXTON: Thank you. Okay, we're going to take five minutes.

(Whereupon, a short recess was taken.)

MR. DERICK: My name is Link Derick, D-E-R-I-C-K. I represent 20 Mile Coal Company, an affiliate of RAG American Coal Holdings.

I appreciate the opportunity to talk today. The comments I have, the written comments I'm going to read from will be incorporated into RAG Coal Holding comments, so I won't hand them in today. But I do have some exhibits for what I'm talking about that I will give to the panel today.

On plan verification on the mean air velocity, several parameters for dust control can be maintained consistent throughout the cutting sequence for continuous mining sections, such as water sprays and scrubber quantities. However, some are not feasible. Without a booster pump on the working sections, the water pressure may drop as the cutting sequence advances, or as the total section advances. The mean air velocity is dependent on tubing length, and may vary by 100 percent or more.

The lowest possible exposure, we should always strive for the lowest possible exposure. And that may cause a wide variance, depending on many factors. The ventilation plan must list the minimums, since you cannot operate below the minimum values. You may normally have large blast-open cross-cut air quantities, but when rooming that quantity may drop significantly. A section may be closer to the mouth of the panel, and have excess air to assure adequate air is available at the back of the panel. If higher-than-stated quantities are present and the dust concentrations are below the allowable limit, then everyone should be pleased.

If there is a question, MSHA can and has requested in the past that the parameters be lowered to match the plan for their plan approval verification.

One of the attachments I have is an example of the mean air velocity. And we recently used this with some

discussions with District Nine personnel, and since then have put it in a more formal format. So I'm going to hand that out to the panel now, with some other exhibits that are attached.

What the exhibit shows is cutting from one cross-cut on 250-foot centers to another. And it shows the difference of true-A and true-B, but shows the mean air velocity for each cut. And as can be seen, it shows a difference when fans are moved after certain shifts, and indicates that the mean air velocity can change upwards of 100 percent just from fans moving.

So on plan verification it would be possible for a single shift to maybe cut back to a minimum. But as you can see, this is one cut to another, the parameters changed on a working section. So it might not be quite that easy, and it may not be that wise, to reduce to the lowest level, when that may only occur for one cut out of an entire section mining cycle.

Next, the 060 application versus designated occupation. This comment is talking about sampling multiple occupations under the current regulations or a current request.

MSHA has mandated most longwall mines to sample the 060 designated area versus the designated occupation. At the end of the shift, the 060 concentration does not

represent the personal exposure of anyone on the face. Then true dust exposure of the miners is not being tracked. The operator should have the option of sampling multiple occupations, or MSHA sample multiple occupations, when administrative controls are used to rotate personnel from downwind of the shear. This should definitely be allowed if all personnel at or downwind of the shear are utilizing airstream helmets, and compliance is achieved solely by administrative controls, and no credit is given for the airstream helmet.

Administrative controls are equal to engineering controls in most other health-related compliance issues. Not mandating 060 is allowed under current regulation, since nothing prohibits this interpretation or application.

On the 060, during the first few times that was done, up to 100 passings of the pump occurred, which is not very reliable for monitoring a person's exposure.

Airstream helmets. We understand that OSHA has listed the protection factor of an airstream helmet to be 25, which means an exposure of 0.08 milligrams per cubic meter versus 2.0 milligrams per cubic meter at the compliance level. MSHA has proposed a factor of four, with the intention of compliance with the 2.0 milligram per cubic meter standard, which would be an exposure of 0.5 milligrams per cubic meter if the current standard is met.

We continue to support the lowest possible exposure by utilizing airstream helmets, and especially because of the additional safety benefits that are provided, such as head protection from possible small pieces of coal, side and front eye protection, the cool filtered air, and the attached hearing protection. Most of our miners have made positive comments about the airstream helmet usage, and several injuries definitely have been prevented by their usage. Airstream helmets have been utilized at some RAG longwall mines since 1989.

The quartz and dust calculation, 100 micrograms of quartz. The intent of the quartz standard is to keep the exposure to quartz to 100 micrograms or less. This is the five percent of the 2,000 micrograms of total respirable dust at the two-milligram standard. The calculation of a new total respirable dust level based on dividing the percent of quartz into 10 penalizes many mines without ever even exceeding the standard. All samples should be analyzed for quartz in the two milligram of total respirable dust, and the 100 micrograms of quartz should not be exceeded.

I have an attachment. I'm going to read some first, and it's part of your attachment. The attachment is two ways. One is on a small-print eight and a half by 11, and I took portions of that so it's clearer to go through. But I want to read this first.

The quartz concentration of a sample cassette cannot be assumed that if the dust load increases, the quartz percent remains the same. Most effective dust-control measures are possible on the coal dust portion of the sample from cutting or transporting of coal.

At the same time, the quartz from the intake dust and shield movement or roof rock is more difficult to control. The attached exhibit indicates a hypothetical example of how the dust standard can be lowered and lowered, without ever exceeding the two-milligram standard or the 100 micrograms of quartz.

The existing regulations could be complied with by directing more coal dust to a roof-bolter machine, or possibly by using belt air to the face in either a longwall or continuous miner section. This could be an option if the total dust exposure is low, however the sample is high in quartz and the coal dust is low in quartz. This possibility was probably unintentional in the regulation, but may be counter-productive to exposing miners to higher dust levels to achieve compliance with the quartz standard. This defeats our objective of the lowest possible exposure for miners.

Turn to the examples. The hypothetical situation, which is sometimes close to reality, is on a longwall, took four major sources of dust: the intake, the belt, the

shear, and the shields. And in the example I did, taking 12 percent quartz in the intake at a two-milligram load, three percent quartz on the belt at a .6-milligram load, three percent quartz on the shear at a .6-milligram load, and 10 percent quartz on the shields at a .4-milligram load, equals compliance with the two-milligram-per-cubic-meter standard. At the same time, that equates out to 100 micrograms, 24 micrograms of quartz for the intake, 18 micrograms of quartz for the belt, 18 micrograms for the shear, 40 micrograms for the shields. Which again is compliance with the 100-microgram standard.

Applying the 100 micrograms divided by the 2,000 micrograms total dust in the two-milligram standard produces the five percent quartz, which equates to the current two-milligram standard. This example indicates compliance with the dust standards. But since it is exactly on the allowable limits for both respirable dust and quartz, an operator would begin dust reduction measures.

Second page talks about taking the belt air away from the face. The weight of the quartz and coal dust is removed from the formula, and the resulting other three have been left the same, which now you have 1.2 milligrams per cubic meter of total dust, and 82 micrograms of quartz. Both in compliance with the existing standards.

However, by taking that measure, you now have 82

micrograms of quartz divided by 1200 micrograms total, and have a 6.8 percent quartz, by percent. Dividing that into the 10, that section now has a 1.47 milligram-per-cubic-meter standard, which shows that the shear dust could be significantly higher, and in this case could be doubled, from 0.6 milligrams to 1.2 milligrams, and still be in compliance with both standards.

The most feasible dust control measure would be to direct the belt air away from the face. This would direct the crusher and tailpiece discharge dust away from the working face. By removal of this dust, the standard reduces because of that fraction of the sample that is removed is lower in quartz. The shear dust could now be doubled, and still result in compliance. However, this is against the practice of the lowest possible exposure.

The third page is additional dust controls on the shear. Additional measures take the shear down to a 0.4 milligram and a three-percent quartz, which, doing the same as I read before, would result in a 7.6 percent quartz. Both total weight would now be one milligram, which is in compliance with the two milligram. The quartz would be at the 100 micrograms of quartz. However, a new standard of 1.32 milligrams per cubic meter.

At this point the shear dust could technically be tripled, and still remain at 1.8 milligrams per cubic meter

totally, and still be in compliance with the 100 micrograms of quartz.

Recommendations for the proposed dust regulations, option of multiple occupations versus 060 designation. In lieu of the 060 designation, sampling of multiple occupations should allow for several administrative options to control exposure. Two common administrative-type controls are possible for working downwind of the shear on the longwall face. One, the operators can simply be rotated to avoid an overexposure. And second, the safe zone can be provided near the tailgate, where a person could spend their time during a portion of the mining cycle that their tasks are not required. Some employees prefer this position to limit their walking of the face.

Optional switch to 100 micrograms weight versus percent. The setting of the standard to 100 micrograms of quartz and testing each sample for that weight will add assurance to compliance for this fraction of the total dust, since it creates a concern of its own.

Airstream helmet relief for current non-compliance. We have conducted our own testing, and have also reviewed similar testing on the efficiency of airstream helmets on longwall mining faces, and have determined that the protection factor has ranged from three to six under actual conditions. This protection factor accounts for the

high velocities, occasional lifting of the visor, and normal employee movements that are present on the longwall face that result in a slight reduction of the efficiency. Testing has been done with both airstream helmet testing on a fixed-location mannequin, and by wearing of the cyclone alongside the nose of an employee.

Recommendation one for the airstreams. If added in the ventilation plan, the district manager should be able to allow for a protection factor of two for personnel downwind of the shear, for a maximum exposure outside the helmet of four milligrams per cubic meter.

Recommendation number two. If added in the ventilation plan, the district manager should be able to allow for a protection factor of two for quartz, as long as the total dust remains in compliance with the two-milligram standard. This would allow the outside of the helmet exposure to 200 micrograms out of the total 2,000 micrograms of total respirable dust.

The allowance for the protection factor could be for several reasons. The need may be required for normal conditions, but present throughout a panel, or could be for conditions unique to certain portions of a panel, such as roof problem areas where movement of the shields is required immediately.

As a general comment, on the 1.38 MRE conversion

calculation, in reviewing the dust results of both MSHA and operator samples on MSHA website, the concentration does not appear to be the weight difference times 1.38 MRE conversion that we understand. It varies up to 1.46, and this occurs for samples with a sampling time of 480 minutes.

That concludes my comments.

MR. NICHOLS: Thank you, Link. Anybody have any questions of Link?

MR. NIEWIADOMSKI: I have one question. Are you recommending that the agency propose enforcing a separate quartz standard of 100 micrograms per cubic meter?

MR. DERICK: Yes.

MR. NIEWIADOMSKI: So what you're saying, you want us to -- currently we set the standard based on a percentage of quartz.

MR. DERICK: Yes. If you go in the information provided on the smaller sheet, the quartz example, this is an actual recent sample of a longwall dust set 0.5 milligrams per cubic meter. It came back to 12 percent of quartz. It results in a 0.833 standard.

However, that was only 25 percent of the total dust allowed and 60 percent of the quartz limit. Now, that sample would be one where the operator has to take the third sample and average it in. But the assumption currently is that, with that .5 milligram per cubic meter standard, that

the current regulation assumes that if that atmosphere then went to two milligrams, that quartz percentage would remain at 12 percent. And that is not what is normally going to happen.

Typically, intake quartz and shield quartz is going to remain constant. The additional dust is probably going to come from this cutting of the coal.

MR. NIEWIADOMSKI: So your recommendation is that the agency enforce the two-milligram standard for coal mine dust, and for quartz a separate standard of 100 micrograms per cubic meter.

MR. DERICK: Yes. And that we analyze each sample.

MR. NIEWIADOMSKI: For each sample.

MR. DERICK: Yes.

MR. NIEWIADOMSKI: Thank you.

MR. NICHOLS: Thanks, Link. David Hales, San Juan Coal Company.

MR. HALES: It's still good morning. My name is David Hales. I am the underground safety coordinator at San Juan Coal Company. That's Hales, H-A-L-E-S.

I've been employed in the underground coal mining industry for the past 28 years. And during my career I've operated all types of mining equipment: continuous miners, longwall equipment, conventional mining -- the list goes on

and on.

I've been a front-line supervisor and a CM section development work room and tiller mining, first mining, supervising longwall production and down shifts supervised during set-up and recovery operations. And during the past 13 years of my career, I've worked in safety management.

I've had the good fortune to work for some of the safest mining operations in the world, and I appreciate the opportunity to participate in this public hearing today.

The San Juan Coal Company has reviewed the proposed rules for single-shift sampling and ventilation plan verification. And this review has resulted in our identifying a list of issues or areas of concern, and I'll detail those concerns with these comments.

First, we feel that the proposed rule requires operators to increase dust exposures for our miners. The case for protecting miners from the effects of elevated levels of respirable coal dust has been clearly made in the past. In our view, this fact appears to be ignored by a proposal that would require our miners to be exposed to higher-than-normal levels of dust through the proposed ventilation plan verification process. Not overexposures per the standard, but certainly higher levels than they're being exposed to today.

The studies referenced in the preamble refer to

the fact that relative risk is lower with decreased exposures, and relative risk is higher with higher accumulative exposures. If this information is correct, why would MSHA propose a rule that will undoubtedly assure increasing the dust exposures for our miners?

The proposed rule does not recognize those proactive operators that have devised ventilation plans, controls, and procedures that are currently achieving dust exposures far less than the maximum allowable concentration. As written, these mines will be penalized, and their miners forced to be exposed to higher-than-normal levels of dust because of the prescriptive nature of this verification process.

Given a choice of being exposed to 0.6 milligrams per cubic meter or 2.0 milligrams per cubic meter, I feel our miners will choose the former. Except this rule, as currently proposed, won't allow it.

MSHA has proposed limits on how far you can exceed the ventilation plan minimums. If an operator can achieve less than one milligram, greater than 115 percent of the plan minimums, that operator will now need to reduce the level of controls, and thereby increase the exposure to miners in order to prove to MSHA that the minimum achieved in the plan will achieve two milligrams or less.

If an operator is already achieving less than that

allowable standard, and is exceeding the minimum stated in their plan, what's to be achieved through this process, other than increasing those exposures?

All of this is required, regardless of the MSHA and/or operator sampling history that has been compiled over the mine's history. MSHA might argue that all an operator needs to do is put those levels in their plan, and that will be good enough.

There are problems associated with that approach. An operator might take that bait and make those changes. Then if one of those extra controls stops working, the operator is cited for failing to comply with the ventilation plan, even though the exposures are not exceeded.

It seems that operators must prove that they can attain two milligrams before they can attain less. This rule as written will serve to encourage some operators to remain dust levels at no lower than the applicable standard. Taken literally, it could actually result in prohibiting an operator from doing more, without risking increasing citations.

In our view, this proposed plan verification process will result in higher-than-normal dust exposure for our miners, and serve no other purpose at our mine. Our ventilation plan minimums are being exceeded and dust exposure levels encountered are less than half of the

allowable standard. If we can achieve that now, why should our miners be forced to undergo this plan verification process?

Two, the regulated ability to implement the use of supplemental controls. Conditions that could result in a request for the use of supplementary controls are often of short duration, sometimes as short as a shift or two. This proposed process provides for MSHA to have 30 days to evaluate a supplemental controls request. The operator then gets five days to respond with a new ventilation plan and PAPR protection program, then another 30 days before anything is verified. Then another five days for the operator to submit the administrative controls proposal. Then add another 30 days for validating true sampling. And all of this without any reference to the resources MSHA will utilize to perform these tasks.

Does this mean that production must stop during MSHA's consideration of the supplemental controls request? Does this mean production can continue without adding the controls? This would seem to assure an unnecessary increase in the dust exposures for miners.

If miners are to be protected, ventilation systems and dust controls must be less prescriptive, and must be allowed to be more immediately responsive to the dynamic environment that exists in an underground mine. The ability

to use such supplementary controls should be left to the discretion of the operator. Such supplementary controls could then be implemented and reduce exposures from the first shift on which conditions changed.

Allowing MSHA 30 calendar days to make this decision is unreasonable, if not unconscionable. The prescriptive approach that has been proposed will only serve to assure miners are exposed to higher-than-necessary dust levels while awaiting MSHA approval.

Today if an operator observes that conditions in the mine have changed, the operator can add the additional controls necessary to cope with the situation, even if those specific controls are not listed in the vent plan. The parameters can be exceeded to the point that an operator can achieve the lowest concentration attainable. Under this proposal, that ability is taken away.

It seems reasonable that a district manager would be able to approve a plan based on samples that have been collected in the past, and there should be no requirement to go through this process if dust levels being achieved are already low.

Number three, issues surrounding the verification production level. The verification production level can change with variations in mining conditions. This can occur overnight.

The proposed rule is not clear concerning how an operator goes about modifying that VPL when such changes occur. Is this yet another ventilation plan amendment request, and another approval process, that in turn results in additional verification? What additional resources does MSHA propose for management of these new processes? They were not readily identifiable in the published documents. And this implies that the approval processes are to be managed by existing resources. We see that would result in a further bogging down of the ventilation plan approval process itself.

Another issue is that of determining whether a VPL has been exceeded on 33 percent of all production shifts. Due to limitations of resources, MSHA can take weeks to evaluate and approve such things as ventilation change requests or ventilation plan amendments. Some have gone without final action for months. District offices do not have the resources to manage this proposed requirement.

In addition, the proposed rule does not address what an operator is allowed to do while this verification is pending. If shift length and the VPL are to be included in the ventilation plan, how will these issues be addressed? Occasionally a mine will encounter a condition such as poor roof at the tailgate. An operator may need to keep miners over into the next shift to mine past this poor roof.

Since this would exceed the shift length as stated in the plan, does working overtime constitute a plan violation? The proposal says that plan violations will not be issued for exceeding the stated VPL. However, section 37-A-1 of the current regulation requires an operator to follow the provisions of the approved plan.

It would seem that if an operator must include those shift lengths and production levels in the approved plan, and those items were exceeded, the operator would have violated the plan.

We can find no proposal to change the language of 37-A-1 and how it would be enforced contained in this proposed rule.

Item four, establishing limits on exceeding ventilation plan parameters. The rule reiterates a previous stance that engineering controls shall be the primary means of protecting miners. It then goes on to limit how much protection can be afforded, by limiting the amount that plan minimums can be exceeded. There is no explanation of where the 115-percent maximum came from.

When you consider the variability in instrumentation, this proposal could mean there is less than five-percent leeway. It's not uncommon to have 10-percent variability with anemometers, pressure gauges, et cetera. There's an even greater difference between the old type of

devices and some of the newer digital equipment.

Whose equipment is used to verify what the parameters are at any one given time? Longwall face heights can very from shift to shift, resulting in changes to the face velocities at each end of the longwall face. Having sufficient cushion in volume delivered to the intake end of the longwall to assure continuous compliance with plan minimums, taking into account that you must cope with all manner of variations in mining heights.

Another factor the proposal does not address is the fact that the longwall ventilation system must deal with the various characteristics of the cave. If the cave hangs up and allows air to travel behind the shields, there must be sufficient volume available to maintain the minimum face velocity. This can require an amount more than 115 percent of the stated plan minimum quantity. Without this capability, a mine would be faced with the need for major ventilation changes during the working shift. The proposed maximum would not provide that capability.

This proposal does not appear to recognize the dynamic underground mining environment. Making ventilation plan minimums so restrictive destroys a mine operator's capability of dealing with these changing conditions.

As written, this proposed rule could make it illegal to deal with elevated methane. If an operator had a

minimum requirement of 3,000 CFM at the roof bolter, that operator would be forced to limit air quantity at the roof bolter to not greater than 3,450 at any time.

Our mine has areas where methane has been an issue. On a typical day, 3,000 CFM does an excellent job of maintaining the dust and gas levels below the required levels. On infrequent occasions it has taken as much as 20,000 CFM to carry away the gas production. It's absolutely unreasonable to require 20,000 as a minimum, when this condition occurs so infrequently, and 3,000 CFM has proven effective in controlling dust exposures.

This need has not occurred at all in the last six months, but it could occur again in the next two months. It could occur tomorrow.

Mines need the flexibility to be able to deal with the day-to-day ventilation needs. This proposal takes away that necessary flexibility.

As proposed, an operator could actually receive a citation for having too much ventilation. For example, an operator has a required minimum quantity over the roof bolter of 3,000 CFM. This operator is undergoing sampling by MSHA or is conducting sampling under the verification process. The mining cycle has the roof bolter moving to support a cut in the last open cross-cut. That cross-cut has just broken through to the return entry, making it the

last open cross-cut. Well, the last open cross-cut minimum is 15,000 CFM. Does this operator take the citation for exceeding the ventilation plan maximum of more than 115 percent, or does the operator take a citation for insufficient air passing through the last open cross-cut when we lower the quantity to the maximum 115 percent of plan minimums as 3450?

Given our particular set of longwall equipment, if the minimums on the longwall faces were set at 60,000 minimum quantity and at 400 feet per minute minimum face velocity, the maximums allowed would be 74,750 for the quantity, and 460 feet for the face velocity.

If the face had been cutting 10 feet higher, the mine would need that minimum of 60,000 CFM to meet the velocity requirement. If the mine height changed to 13 feet, which can happen in less than a shift, the minimum quantity required jumps to 78,000. This would require a major ventilation change that would require evacuation of the mine, dropping power, and a complete pre-shift made after the change.

Such a change could be considered to be one that would materially effect the health and safety of miners. This would require a ventilation plan amendment submittal and review. It would also trigger a round of verification sampling.

The dynamic environment of an underground mine demands broader flexibility than is spelled out in this proposed rule.

The question of how will MSHA deal with cooling sprays on equipment. These are not considered dust-control devices. Yet if this rule is enforced verbatim, during verification sampling such cooling sprays could not be used. How will that protect miners and/or the equipment they are operating?

There are proposed requirements to list specific work practices in the vent plan. Practices can change with the dynamics of the environment. Do we simply provide a laundry list of industry work practices? Will verification of the vent plan then have to be completed with each of these practices being employed? Will vent plan verification require that each individual cut sequence on the longwall be verified in order to include that sequence in the vent plan?

Multiple sequences will need to be listed in that plan to avoid having to go through that plan approval process, in order to be able to cope with a sudden change in mining conditions.

If each of these requires this plan verification, where are the resources to manage this system coming from?

Five, the proposed rule eliminates the ability to cope with methane or other gases. The operation of a mine

that produces methane requires much greater flexibility than the proposed rule will allow. The gas liberation will be very erratic, and the mine ventilation requirements can vary from day to day, shift to shift, and even cut to cut.

As proposed, this rule destroys the ability of an operator to respond to such changes. If you're already operating to 115 percent of the plan minimum and encounter excessive methane, the operator would not be able to respond without first obtaining a vent plan amendment approval.

An operator might then be cited for failure to take immediate corrective action to reduce concentrations of methane or other gases. If the operator took immediate corrective action to increase the ventilation to remove the gas, if the volume exceeded the 115-percent ceiling on the vent plan parameters, they could also be cited, unless there had been a plan amendment submitted.

The proposal does not address how such an issue would be handled. Would this then prompt another round of verification sampling? And what additional resources does MSHA plan to incorporate in order to manage this system?

Ventilation regulations require that an operator provide name plate ventilation quantities for cumulative pieces of equipment of certain types. Limits on how much excess ventilation that is provided will automatically put limits on the numbers of pieces of equipment. That limit

will not be based on anything to do with the diesel equipment.

Emergency situations can result in the need for additional units on a given section, and those needs may vary from shift to shift. A ventilation plan that is so prescriptive will limit the ability of an operator to respond to those needs, and prohibit that same operator from responding to the emergency situation.

Responding will require an operator to prepare and submit a ventilation plan amendment to increase the minimum quantities, which will trigger additional vent plan verification sampling, another question of MSHA resources.

I have some issues surrounding sampling triggers. Sampling appears to be primarily triggered by production levels, and not exposure levels. In my career I've often seen higher dust levels when production is lower than normal. This decreased production can be caused when mining through a fault, a dike, or other such conditions. The material being mined can produce substantially more dust, and often contains quartz.

The subject of sampling triggers does not seem to be correct, or its impact completely analyzed.

Based on our understanding of the proposal, the sampling triggers proposed would have resulted in over 30 events of verification sampling at our mine just since

October, 2002, most caused by vent plan amendments being submitted. This verification sampling would be required in spite of the fact that dust levels measured by MSHA and operator samples have averaged less than one milligram, and no sample exceeded two milligrams.

Based on our understanding of this proposal, impact and cost of implementing this rule has been grossly underestimated.

There are some other sampling issues. MSHA appears to be taking both sides of the sampling argument. For compliance sampling, MSHA touts the reliability of the use of single-shift sampling, claiming it is representative of individual exposures. MSHA then turns around and requires five valid samples to verify the suitability of a new or transferred part-90 miner in order to assure their exposures are not excessive.

Is single-shift sampling representative and reliable, or not? Non-compliance for a part-90 miner will be determined by a single sample. Compliance requires an average of five samples, or an undefined MSHA abatement regimen.

The proposal establishes a quarterly evaluation of approved plan parameters. Does MSHA propose to utilize the current sampling history to determine whether an MMU is designated for the sampling? This did not appear to be

discussed in the publication.

The preamble states that dust concentrations on sample shifts may be substantially lower than what is typical on non-sample shifts. We find this implication that all operators are manipulating dust sample results to be offensive.

The statement that the use of single-shift sampling is more likely to find those intermittent overexposures is flawed. The facts are that there is just as good a chance that single-shift sampling will find abnormally low dust concentrations, and miss high ones. Because of the dynamic environment, the best way to accurately identify individual exposures is through sampling of occupational exposures on multiple shifts.

The proposal talks about a change to MSHA sampling practices. MSHA currently samples multiple occupations on the same shift. It was not clear how this part of the proposal is viewed as a change to present practice.

MSHA currently monitors ventilation parameters during each visit, not just during health inspection visits. Ventilation parameters at our mine are evaluated at least every five days. It was not clear how this part of the proposal is viewed as a change to present practice.

MSHA currently does unannounced sampling visits. The sampling practice now captures all phases of our mining

process. It was not clear how this part of the proposal is viewed as a change to present practice.

Being able to accurately determine a miner's own exposure relies primarily on the ability to analyze the samples. MSHA dust labs have been found to be grossly inaccurate in the past, and we have not seen any discussion how that has been corrected included in this publication.

This and other issues are already contained in previous documents to the single-shift sampling rule. These previous comments have obviously been summarily dismissed.

Number nine, additional issues have not been clearly explained so that we can understand what would be required. What is that sufficient number of samples that will be required to demonstrate the high level of confidence that the plan has affected? How will part-90 dust control plans be verified, and by whom? What is the time frame for completing this verification? Where do the resources come from to perform this review?

The final rule should eliminate the current practice of sampling locations, rather than occupations; i.e., sampling entities such as the 060 occupation code on a longwall.

It is our opinion that protecting miners should be about determining individual personal exposures, not the concentrations found in such random locations that an

individual miner may or may not visit infrequently.

The proposal limits the use of PAPRs. The 30-day limit on the use of PAPRs is not adequately addressed at Energy West petition for rule-making, and falls short of providing the level of protection that is available. The use of PAPRs should not be so restrictive.

The proposal contains no defined abatement process. This entire subject regarding abatement process was very vague, if not incomplete, and many of our questions went unanswered.

What is the time frame for abatement of the citation for exceeding the CTV? What is that abatement process? What resources will MSHA utilize to perform the additional sampling? What portion of the current inspection process will be reduced to provide those resources?

Number 11, the proposal contains no definition of what constitutes all feasible controls. How will MSHA determine when an operator has exhausted all feasible engineering or environmental controls? And how is this determination made?

Operators need to be able to review a list of those expected controls that MSHA feels must be exhausted, and in order to accomplish this feasibility test, can we question whether this feasibility test can be applied equitably across all lines.

Number 12, the proposal results in the additional of several new approval processes. Based on the current capability of the agency to respond to ventilation plan amendment requests, and recognizing that those needs do not go away, it is clear that MSHA has proposed several multi-layered approval process. The agency does not currently have the resources to manage those processes, and the proposal does not contain a plan for acquiring that ability.

The individual components of the proposed rule could provide value to proposed application methods for those components are unworkable and unreasonable. These proposed methods stand to result in our miners being exposed to increased levels of dust, and our mine being subjected to gridlock while trying to wallow through the verification process.

In many cases the operator will be ultimately faced with multiple occurrences, and no alternative to plan and choose your violation.

Thank you for the opportunity of providing these comments. We request that they be applied in development of the final rules.

MR. NICHOLS: Thank you, David. Wait a minute, Jon.

MR. REYNOLDS: One thing we really need to clarify, Dave, and it would explain a lot of the concerns

you had on the rule.

Under the procedures for verification, the 115-percent parameter variation and the minimum requirements, that would only apply during verification sampling. And I think --

MR. HALES: What if you hit methane? How do we cope with methane if we're verifying?

MR. REYNOLDS: But you had this thread that went through, which made it clear to me that I think you understood that there was a minimum for all of your parameters.

MR. HALES: Yes, that's how we understand it.

MR. REYNOLDS: Okay. I just wanted to clarify, that would only be during the sampling for verification.

MR. HALES: Then my question remains, what if we hit methane?

MR. REYNOLDS: You would be able to do whatever you needed to do to deal with the methane.

MR. HALES: That's not spelled out in the rule.

MR. REYNOLDS: Okay. But I just wanted to clarify that.

MR. HALES: That's not in the rule.

MR. REYNOLDS: Okay. But with regard to the one clarification under 7201, those minimum parameters would only be placed on you during the time you were doing

verification sampling, not during all of your mining. So if you wanted to increase your parameters for any reason, you could.

MR. HALES: How about for compliance sampling?

MR. NICHOLS: Okay, we're going to have to move on. Here's what we're going to do for the rest of the day to the extent we can.

So far we've worked our way through one panel and four other presenters. And it's just after noon. We have 20 additional presenters signed up. And I want to be able to give everybody an opportunity to do that.

I would ask the panel that if you understand the comments from a presenter, accept those. I mean, if you feel compelled to have to ask a question, we can do that. But we can clarify our position in the preamble.

I would ask the presenters that if you know material is already in the record, especially put in by you, because we do have some people that will be repeat presenters, try to limit that. And I want to try to work my way through these next 20 presenters.

So Chris Barbee, Tammy Thompson with IUOE 953.

(Discussion held off the record.)

MR. BARBEE: Comments being made by Teresa Thompson and Chris --

MR. NICHOLS: Go ahead and spell your name. I'm

sorry.

MR. BARBEE: Teresa, T-E-R-E-S-A, Thompson, T-H-O-M-P-S-O-N. Chris Barbee, C-H-R-I-S B-A-R-B-E-E. We are coal miners and miners' representatives from IUOE, which is the International Union of Operating Engineers, Local 953, New Mexico, employed at BHP-Biliton and Mexico Coal, San Juan Underground Mine in Waterflow, New Mexico.

A fundamental goal of MSHA, organized labor, and coal miners is the reduction in the number of cases of black lung and silicosis. This is shown by the concerted efforts of all parties, such as this hearing, to produce a method by which to reduce exposures to harmful dust generated in the workplace.

With this goal in mind, we must produce a system that is effective, practical, verifiable, and enforceable. The following are points for consideration when devising this method.

Effective. The best measure of effectiveness would be to see a reduction in the number of cases of black lung and silicosis and any other respiratory ailment contracted by exposure to dust in coal mines. All participants in the industry recognize the need for controlling exposure to dust. This need is what has produced the laws and mining methods we use today.

As we are not willing to wait for an inevitable

outcome to measure effectiveness, we must gauge our efforts against a known standard. That standard is, lower dust exposure is safer and healthier for coal miners. Any regulation produced by MSHA must be measured against this standard.

Practical. Any number of methods could be used to achieve reduced dust exposures. But whatever method is mandated, it must be useable by all parties concerned. The greater the level of difficulty, the less effective any method will become. The following are points of concern.

Verification. The proposed rule would require an operator to run a mining section at the quantity and velocity levels, and with any engineering controls prescribed in their vent plan. If an operator has been exceeding these levels to control dust, they would be required to reduce these levels back to plan specifications. For verification, this could potentially expose miners to elevated dust levels, even if they were at or below the limits specified by regulation.

This would continue until the vent plan was verified as workable. If the vent plan were to be verified at such a reduced level, then the miners could potentially be exposed to elevated dust levels from that point on. Operators would then have a choice to make, either run the section with the reduced levels as prescribed in the vent

plan with the potential of more dust, or put the higher quantity and velocity levels they are actually using into their vent plan.

We strongly emphasize that the first option is unacceptable, due to the potential for increased exposure to dust. Also, if MSHA's intent is to have higher quantity and velocity limits in approved vent plans, just mandate this and save the miners from potential exposures to higher levels of dust. If indeed higher limits are MSHA's goal, then why were any vent plans approved with the limits that were too low?

Maximum 15 percent over plan levels. The limit of exceeding the vent plan levels by a maximum of 15 percent would be extremely impractical in some cases. As shown in the attachments to this document, which are the pages I referenced in the back, a mining height variation of as little as 1.3 feet could produce a citable condition on a longwall face by exceeding the face velocity specified in the vent plan by 15 percent. This condition could arise from variation in seam thickness or top coal falling out in front of the shields, or any other number of conditions. Neither of these conditions is directly controlled by the vent plan, but could trigger a violation or a reevaluation of the plan.

At the very least, it could force miners out of

the mine for a major air change and re-preshifting of that mine.

If some conditions are not dealt with immediately, such as caving on a longwall tailgate, this could expose miners to a far more dangerous situation than a 9,000 CFM air change.

Incentive for cleaner air. It is recognized that certain operators are in need of being held to a higher standard in their dust exposure control efforts. It is also recognized that if operators are held to a very limiting standard -- i.e., 15 percent max rule -- this could become a disincentive to achieve lower exposures to dust if the operator finds it more economical to operate as close to the maximum of two milligrams per cubic meter as possible.

We are proposing the use of a category scale to encourage operators to achieve lower dust exposure levels below the 2.0 milligram per cubic meter limit, which is the table specified. It is an attempt to get operators to provide clean air to coal miners. That, of course, is an immediate benefit to coal miners. And if operators are viewing the restrictiveness of some portions of this plan, can they gain relief from some of those restrictions by verifying and proving that they are doing a good job in providing clean air? That's what the four categories listed are. Again, this is just one possible example. The numbers

don't have to be the same. But it's a thought along the line of can we produce something that guarantees us reductions of exposures to coal dust with an incentive to operators to actually have that as their goal, rather than an economic one.

Verifiable. Operator sampling. The proposed plan would put required dust sampling for verification solely in the hands of MSHA. All this is a welcome thought for miners who have worked for an unscrupulous operator who may have cheated on their dust sampling, it could introduce problems.

The threat of a citation based on these samples, operator samples, would be removed without a specified method of how MSHA will handle an out-of-compliance sample. Would it be enough for an operator to claim "we're working on it" to avoid the attention of MSHA?

We maintain that operator sampling should continue with the potential of a citation based on operator results. This would give the good operators the opportunity to remedy dust generation issues, and give MSHA the enforcement needed to deal with compliance problems regardless of the source of data.

Single-shift sampling. Single-shift sampling could reduce the workload on inspectors, dust labs, company officials, and even miners' representatives by reducing the number of tests required in the long run. However, MSHA has

noted a concern of masking true data by averaging multi-shift samples, and possibly lowering a result to within acceptable numerical limits. This could allow a higher-content dust sample to be effectively ignored, along with its potential effect on coal miners.

We maintain that it would also be possible to give approval to a plan based on a single-shift sample, while masking that same data by just plain not measuring it. A sampling program must be comprehensive enough to take in mining conditions that could produce higher dust levels that may not be evident on a single-shift sample day. We propose, at the least, to keep the existing multi-shift sampling regimen, and even increasing the number and variety of locations needed for verification.

We are making no effort to reduce MSHA's enforcement abilities. In fact, we encourage MSHA to enforce any compliance issues through communication with operators and coal miners to produce a safer workplace.

Please consider the above suggestions when formulating a better method of reducing dust exposures to coal miners. Thank you for the opportunity to air our concerns, and to provide these comments into the record.

MR. NICHOLS: Thank you. Thank both of you.

MR. KOGUT: I have one question. Can you say specifically where in the preamble or in the rule itself you

got the impression that a mine operator would be cited for exceeding the ventilation parameters by 15 percent?

MR. BARBEE: Well, as was presented there, it is a fairly common mistaken understanding, apparently, that the exceedence of 15 percent over your verified limit during the verification process. Okay, now, it has been stated that that would not be the case under normal mining conditions?

MR. REYNOLDS: Right. Those limits would only apply during the verification sampling, not at all times.

MR. BARBEE: Okay. Now, my statement is still inclusive of what you said.

MR. REYNOLDS: There was another thing I thought we should clarify here, too.

MR. NICHOLS: I give up.

MR. REYNOLDS: Just quickly, I think we need to clarify it. We would not require the operator to bring down the dust control parameters before we verified the plan. When I heard your testimony, it sounded as if you thought we were going to require the dust control parameters to come down, and then we would verify. And during that time we brought them down, we were going to be exposing miners to more dust. That's not the case.

We'd go into the verification process and start something new. And the operator would have to tell us what the minimum requirements were for their plan to control the

dust. So it would not make it worse conditions for the miners now, until -- do you understand what I'm saying?

MR. BARBEE: You would not require an operator to reduce to, for instance, what they now have in their plan. If an operator exceeds their plan minimum --

MR. REYNOLDS: It would be a new system. It would be a new verification.

MR. BARBEE: Correct. But where shall we establish that minimum?

MR. REYNOLDS: In your plan, under the new verification.

MR. BARBEE: Do we just pick a number out of the air?

MR. REYNOLDS: You would have to test it. I mean, it's the operator's plan.

MR. BARBEE: Right. And it's during that testing, if the operator says we have 36,000 CFM as our minimum in our plan, we're --

MR. REYNOLDS: And if you tested it and that's not enough, then you'd have to make it more.

MR. BARBEE: Then you have to do something to get your sampling below the minimum, or below the specified maximum, the two and the 100.

If the operator threw their hands in the air and says we're running at 136,000, for instance, that's what

we're going to stick in our plan, they can be fairly well assured that they're going to be in compliance on their dust.

If they feel that that minimum which is currently specified in their plan -- and again, hypothetically, 50,000. If they felt that that was going to be adequate, they would have to run the entire shift with that 50,000. If the plan goes bust and they do not get below the maximums on the dust, you have just run the coal miners in a situation where they have exceeded the federal maximums. We have put those coal miners into an experiment that has failed.

MR. THAXTON: Okay, let's get this straight, and we'll do it from a technical standpoint to clarify this.

Under the proposed rules, operators will submit their proposed ventilation plan with the dust controls. Those controls will be reviewed by the agency. They will be applying engineering concepts to that to determine whether those controls are reasonably expected to result in compliance.

We will look at previous data. If your mine has used 130,000 CFM for the past three years, and their dust concentrations have been shown by dust samples by MSHA and operator to be 1.8, 1.9, for them to come in and say now we're going to try 50,000, no. That will not be accepted by

the agency. It will not receive the tentative approval, provisional approval to try. They will be held to conditions that they have to put in the plan to start out with that are reasonably expected to result in meeting the standards of two milligrams and 100 micrograms. And that's the best we can explain it.

It's an engineering determination by the agency as to whether the proposed controls that the operator is going to provide will result in compliance. We are not going to let people go in and say I've got 100,000 CFM, cut back to 30,000, and say I want to try this. That's not the way the program works. It's going to be based on information that's available for that type of mining to determine the quantity of air. If they've got methane being liberated in the mine and they have to have 100,000 in order to control the methane, this is the ventilation plan. It's for control of methane and respirable dust. If they need 100,000 CFM to control the methane, then that's what their minimums are going to be. There's no change from that aspect from what they have right now.

It's an engineering judgment as to what is necessary for the type of mine that's going on. And we start from that. And we'll move forward from there.

MR. NIEWIADOMSKI: Especially at the VPL. That's what people are forgetting. I mean, we're talking about

raising the production bar significantly higher than the one we have right now. And the problem that we have right now, when an inspector goes out there and samples, and the plan parameters are exceeded by 200, 300 percent, he has to make a determination whether or not the plan would work at the plan parameters.

But what has to be factored into the decision the district manager is going to be making now is that the VPL is going to be significantly higher than the production level that we're sampling under current conditions.

MR. NICHOLS: Okay, thanks. Our next presenter will be Jim Stevenson.

MR. STEVENSON: My name is Jim Stevenson, S-T-E-V-E-N-S-O-N. I'm an international safety representative for the United Mine Workers of America. I worked 23 and a half years underground at Sunnyside, Utah, and have been currently working for the union now for about close to 11 years.

I was confused when I read this rule. I've been sitting here all morning for six hours, six and a half hours; I'm more confused now than I ever was.

I'm going to mention some stuff that Mr. Beerbower talked about, and some other gentleman. And that's the petition for modification for rule-making, September 10, 1997, by Energy West.

We've dealt with airstream helmets out here in the west for a long time, and we developed at the University of Utah RACALs back in the early eighties, maybe prior to that. When they first come out at Sunnyside, we used them for head protection, because you couldn't breathe through them. I mean, there were prototypes and all this, though.

They are very good for that, for face balances. They were cumbersome. Guys couldn't move around, you couldn't hear. Today I don't think they're that much better now.

When this petition was first put out there, we mentioned to Energy West that hey, the Mine Act says you can't use respirators for engineering controls. And they come up with all this stuff. I mean, you can read it. It's too narrow of a definition, we need to have this, da-da-da. Well, it wasn't approved. Okay, that was 1997.

And by the way, the author of this was Dave Lauriski, general manager at Energy West Mining Corporation in 1997.

Has anybody in here ever had anybody that's died from black lung? A family member? Anybody close to them? Anybody in this room? I have. My dad died from black lung. He got it when he was 58, weighed 165 pounds, four years later he died, he weighed 80 pounds. It's a debilitating, nasty disease.

We've been talking about getting rid of coal mine dust in this country since 1969. And nothing's happened. Nothing's changed. The two-milligram standard, we've still got guys who are getting black lung every year. And now you guys want to up that standard.

At Energy West, in 1999, to make another end run to get PAPRs as engineering controls, they asked MSHA and them to do a study at Trail Mountain Mine to see if we would come in, along with MSHA -- Bob was there, I can't remember who all took part in that -- to come in and see if there was something they could do to help them, because they couldn't stay in compliance.

Well, on Tuesday, July 20, Bob Thaxton, Bob Gainey, Bob Cornett was involved, Mike Bactall toured the longwall section to review dust control measures with MSHA suggested in a June 24, 1999 meeting in Price, Utah. On Wednesday, the 21st, 1999, the MSHA and the representatives met at the Trail Mountain Mine with Randy Tatin and other representatives at Energy West Mining Company to discuss their findings.

Bob Thaxton told Energy West that the fifth head roller area needed more water sprays; these sprays needed to produce more volume. I won't read this verbatim, but the sprays that Energy West had installed needed to be moved, and had no positive effect on dust control. That water

sprays should be installed, to the belt, atomizing sprays accomplished nothing. He wanted all spray handles removed so that no one could alter the volume of air. He emphasized repeatedly the need for greater volume of water on the longwall belt. The scrubber didn't work; it needed to be synchronized with the belt. He also recommended a different filtering system because the 10-mesh filters weren't any good. He recommended 40- to 50-mesh filters.

At the face area he posed a number of problems. Dust generated by shield movement actually obscured MSHA's team's vision. They observed too high a concentration of dust. Stated that an agreement had to have been in place for the dust survey, the protocol agreement, he would shut that longwall down.

Well, anyways, this study went on. And our folks were working with, along with MSHA, our local folks. We actually had to go in there and ventilate that mine for Energy West. Now, this is the same guy that said airstream helmets were going to cure everything. The same guy. You guys's boss now.

This is the point that we're at. That dust study went down the tubes. They did make some significant increases as far as getting their dust levels down. But when it come to actually doing something, like slowing drum revolutions down, changing tech angles, doing more coverage

over their stage loader, they were, in their intakes they were up above one milligram when you turned into the section. They also found out that they had their crews eating lunch in the belt return in 1.4 milligrams of dust. So what did they do? That was easy. You guys go eat in the intake.

But did they do anything about revolutions on the shear, which was recommended by MSHA? You got to slow your drum rotation down, or get a smaller wheel. Whatever it was that cost money, they weren't going to do it. And they didn't do it. And that leads us to where we're at right now.

I mean, from what I've heard in here today it's about money. Ask Mr. Beerbower would they slow production down at the Peabody Mine to take a -- his answer was no, absolutely not. We're not going to do that.

Now we got a new proposed rule. The way I see it, and I tell you, it's confusing to me, because I'm not an engineer, and probably everybody in this room's a hell of a lot smarter than I am. But to allow a plan to bring in a new plan to control dust that allows a mine operator to send in a plan for verification, and then lets him change it, the way I understand it, either through a phone call or a piece of paper or a letter saying we have exhausted all of our engineering controls, administrative controls, we can't

comply, we need to use airstream helmets. And effectively, under you guys's formula, the dust can go from two milligrams up to better than eight. It could even go higher than that.

To me that's ridiculous. You know, there's hundreds of thousands of dead coal miners in this country right now because of, first of all, it's the responsibility of the coal operators. They killed most of them. Since MSHA come into existence, you've been playing right along. You're an accessory to it, as far as I'm concerned. I mean, it's just ridiculous, this day and age. The PDMs have been out there for a long time. They should have been in the miens a long time ago.

It's just like using, take your noise register example. And I'm not going to get off the subject of dust, because that's what I want to talk about. Engineering controls for noise regs. What happened with them? The only engineering control you'll find is an attempt where this country said don't enter this area without hearing protection. What are we going to have in underground coal mines now? Don't enter this longwall without a PAPR?

And if you think that for one second, that coal operators in this country are going to do anything or spend any money on engineering controls, administrative controls, fixing their diesels, doing anything with ventilation if

something new comes out, it ain't going to happen, fellows. All they're going to do is say we can come into compliance using airstream helmets. Bingo. It's going to get approved, nobody can say anything about it. The dust sampling is going to go from at least 34 a year down to three. You only have to do them if you want to. That's not a reg, that's just policy.

It makes no sense. It doesn't make any sense. Does it make any sense to anybody here? It doesn't to me.

We've got to fix this problem. There's new generations of miners. I've been diagnosed with first, what do you call it, black lung. I worked in a mine for 23 years, 11 years on the longwall. We didn't have, just wore them mouth respirators.

But I'm here to tell you, we've got to fix this problem once and for all. This policy needs to be torn up, because this policy is this policy right here. This petition for modification. This new policy is this policy right here for Trail Mountain dust study. It's Dan Lauriski's policy.

Did any of you guys make any of the changes on this? I don't think so.

MR. NICHOLS: You've got the enforcement scheme confused. I think Bob Thaxton laid out in complete detail this morning --

MR. STEVENSON: It didn't make any sense to me.

MR. NICHOLS: Well, he laid out the enforcement model that the primacy of engineering controls is what's going to be used to control dust. Only after you exhaust all of those --

MR. STEVENSON: No, it says feasible, Marvin. Feasible controls. When the operator tells you that they've done everything that they can --

MR. NICHOLS: Well, that's not the operator's call, Jim. That's the agency's call.

MR. STEVENSON: And that scares me. Because now they got this to where if you go in there and say yes, we agree with you, you're going to slap the airstream helmets on, and we're going to be mining in eight, 10 milligrams of dust.

MR. NICHOLS: We understand your comments. The record is full of us trying to explain the enforcement model. And if you don't understand it or accept it, we'll take that as a comment. We've got to move on.

MR. STEVENSON: Okay. Well, you know, I'm not going to sit up here and -- if you want me to get off, I'll gladly do that. But what I'm telling you is, this isn't going to work, and you're going to have a lot more black lung cases in this country. And you're going to have more dead miners that somebody's got to answer for one of these

days. And we want them answered for now.

MR. NICHOLS: Thank you. Joe Main.

MR. MAIN: I promise I'll be short today, Marvin. My name is Joe Main, I'm the administrator for health and safety for the United Mine Workers. And we represent coal miners across the country that's going to be affected by this rule.

As the last speaker said, and I think a few speakers before, this is a very complicated rule. And we do hope that the government takes that to heart. I've had more questions asked of me, and some of them I've been able to answer with the help of information I've got from the panel and other things, that I've answered it, just to go back and figure out that the answer I gave was wrong because there was other provisions that changed what I had thought the answer was to begin with.

We don't need a confusing rule for miners. If they can't read it, they can't understand it, it's not going to work. And we talked to some MSHA folks, too, along the way who, some of them haven't had a chance to really get into it. But I can tell you straight out in all honesty that most of the people I've talked to cannot figure this rule out. And that is not the way we need to do this, in terms of rule-making.

I want to start off this morning with, there's an

article in the Louisville Courier-Journal today which strikes at the heart of what we're doing here. And it deals with the prosecution that took place yesterday in Muhlenberg County in Kentucky, and involved a case where a federal prosecutor says it appears to be in scope of any employees guilty of violations from 1996, when the mine opened, to March, 2000, the day a flood alerted fellow investigators of the problem.

Prosecutors alleged that the company and its employees routinely flaunted federal mine safety laws aimed at controlling levels of coal mine dust that causes black lung. I didn't say that, the federal government said that with regard to the case.

The heart of the problem that we have here, this is another of many cases where the federal government has had to prosecute mine operators who have conducted fraudulent activities which was aimed at hiding the dust levels in the nation's coal mines.

And as we said in 2000, and as we say here again today, our concern is that the proposal that's before the public fails to fix that problem. Verify any planning you want, whenever MSHA walks out of there or when the samplers are gone, you have coal companies like apparently what happened here from this case engages in conduct that does not have those controls in place.

Our concern is that when you look at what's causing black lung in this country, that's probably one of the key problems that we have to address if we really want to fix this problem. We've got to come up with some means to provide those miners in this kind of situation with better protection.

As has been pointed out many times over, we believe that there's only two ways to do that. One is to, Marvin, you put your guys there every day in every shift, and we know that can happen. Or we put some device there that can document with some degree of comfort what the conditions are that holds this mine operation accountable. And there's a dynamic here that I don't think has been addressed yet, and if it has I've missed it. And that is the fact that what this is doing to the industry is causing an unfair advantage in the marketplace. Because the mine operators that make sure that the controls are in place, the curtains are up, the sprays are working, all the dust parameters are working fair, is disadvantaged with those who fail to do that.

And at the end of the day, the time they saved in doing these things, they mine more coal. An unfair system, and it's one that drives other operators that want to stay in business in some of these markets to do the same thing. We have a genuine concern about both the health of the

miners affected, but also the health of the industry itself, because it drives down to the last common denominator. We've got to get continuous dust monitors mandated in these coal mines, covering a wide range of occupations, to the point that we're comfortable that we've got a handle on the actual dust levels in coal mines, and that we've got monitoring of those miners that are known to be in the dustier locations. We just have to have a standard required to do that.

And as I listen to all the debate discussion -- I've been doing this, as I've pointed out, for about 25 years -- and I get concerned about the -- I have a friend who died of black lung, who called me from the hospital one day after he had a lung transplant to tell me that some inhumane lawyers representing some company that didn't care about their past employee had just moved to cut him off of black lung because he had another lung that didn't have black lung in it, okay? That's the reality of what we're dealing with in this world.

I have no compassion for those people, nor should anybody sitting in this room. And we should look at this for what it is. It's been pointed out, somebody put these miners who are dead in their graves. Somebody did that. Somebody has made miners sick that are working in the mines today, or can no longer work in the mines today.

And when it comes to really settling this whole issue, what the government, I think, is obligated to do is to listen to the victims of this disease, not the perpetrators. I mean, when it comes to which side are we going to fall on here in fixing this problem, you've got to understand that there are people really being hurt by this disease that need to have the opportunity to have their voice heard.

What's so frustrating is miners that have testified throughout the course of these proceedings have tried to lay out a case to the government in trying to get you to understand why they're getting the disease. On non-sampling days, things are not as good as they are on sampling days. And there's a way to fix that. And we urge the government to take action to fix that problem to keep these miners out of this unhealthy dust.

Put those continuous monitors in. I don't care how much they cost. I think we're going to arrange right now that, the price I think that the responsible operators in the industry have accepted that reality. We need to do it, and we need to spend the money to do it.

But I challenge the economic assessment that's made on this whole rule-making, to the point that have you considered the cost that the individual who gets this disease has to pay. The cost on society for these black

lung victims. Because that's the balance here.

You know, we're trying to do some preventative medicine, so we don't have on the backside these miners struggling through all these complicated cases trying to get compensation at the end of the day for the disease they caught. They don't want the disease. They don't want the compensation, they don't want the disease. But there's a cost there.

And if you haven't done that economic assessment, I urge the government to go back and do that. Because when you balance it out, the number of victims that we've had -- and I think right now we're 106,000 current recipients from the Federal Black Lung Program, the trust; another 6,000 getting paid straight from employer responsibilities. We have unknown thousands out there that's on temporary disability from state programs not included in those figures. I mean, we're talking about billions and billions of dollars of cost here with regard to the failure to control this disease. And I think that has to be factored in.

And I think again, whenever we make the decision of how we fix this rule, we fix it with the victim in mind. Not those people -- they should not have the upper hand here in deciding what the rules ought to be.

And I liken the industry in some ways to the

tobacco industry. You know, we went through a terrible time in history where people were confused by a product that they got hooked on. And in this case, we've got people that have been abused by being controlled in the workplace and having unhealthy dust dumped on them.

If there's no people that die from this disease or no recognition that people were ill, I think our case would have no merit. But when we talk about the hundreds of thousands of people that have died, the terrific amount of people that have this disease, that case has merit. And I think we need to start looking at this as a tobacco-industry-type problem in saying enough is enough, we're going to fix it. And we're going to let those victims have a stake in the fixing of the problem.

Miners across the country -- this rule that we have here, which they think is wrong, and with all the details, Marvin, that you've heard throughout the course of the hearings, that somebody had to lay out the framework for this.

Well, the matter of fact is that would you look at the signature on the document that come out of this, the Assistant Secretary. And I think he has to be responsible for the role that he has posted here.

When miners ask where this proposal came from that allows the dust to be elevated to eight milligrams -- and I

have to disagree with Bruce on this one, because I went through the MSHA training class; I don't think you have yet. But under this rule, it is legitimate for a mine operator, if they get a plan approved from MSHA, to escalate their dust levels up to as much as eight milligrams.

Now, MSHA says they're not going to let that happen. But the fact of the matter is there is now, under this rule, a process for that to take place. And we have a fear that it is going to happen.

When we look at where the basis of that came from, we were told by the agency, and when I got a document that supported that, it came from a change in leadership at MSHA, which includes, I presume, Dave Lauriski and the other individuals that now control the agency that also came from industry. The petition by MSHA in 1997 by Energy West, whose signature on that is the mine manager who, the former mine manager, Dave Lauriski, who is now the Assistant Secretary. And the purpose of that was to use airstream helmets in lieu of engineering controls in the workplace, as they called it I think a supplement.

It also was hinged on a 1994 study conducted by Energy West, or for Energy West, when airstream helmets in the 1997 study on airstream helmets as well, which is an old, outdated study.

We examined the petition for rule-making, which is

the document filed on September 10, which is a matter of the record, that we've been formally notified. That MSHA has set as the basis for the March 6, 2000 rule proposal. We found that the document was signed, as I said, by the General Manager of Energy West Mining, which was Dave Lauriski. And that proposal sought to allow airstream helmets or PAPRs as a replacement for environmental engineering controls, and has the ingredients we find in the rule today.

In that document, Mr. Lauriski made clear his chapter had been taking action by MSHA for years to allow these respirators to be used in lieu, or as he called it a supplement for environmental engineering controls. He further called for the use of PAPRs to be used continuously, in conjunction with feasible environmental engineering controls to achieve compliance with the applicable respirable dust standards. That's in the document.

Now, Lauriski complained that MSHA had rejected the use of the particular airstream helmets in that manner for years. He specifically noted that MSHA's position was the result of the interpretation of the Mine Act. One page five of the September 10, 1997 document, he states the following. Says, section 202(h) of the Mine Act and its corresponding regulations at 30 CFR Section 70.300 requires operators to maintain an adequate supply of respiratory

equipment, and to make such equipment available to all persons exposed to concentrations of respirable dust in excess of the standards. It is logical to conclude that respirators should be accepted as a means of compliance with the Mine Act standards for allowable concentrations of respirable dust under perfect circumstances.

That position of Lauriski was however in direct conflict with the Mine Act. And he acknowledged as much just shortly thereafter in this document.

What he went on to say. Nevertheless, for years the Secretary, through the Secretary's delegates, the Assistant Secretary of Labor for Mine Safety and Health, and officials of Mine Safety and Health Administration, MSHA, has taken a position that because Mine Act Section 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. That was his exact words on page five of his document. He clearly recognized the longstanding interpretation of the Mine Act. He disagreed with it, but he clearly understood what it was.

He went on to state the policy of the agency, which reinforced that specific finding. In that document, as he laid out the longstanding interpretation of the Mine

Act that prohibited him from doing what he sought to do, which was to use airstreams as a supplement to engineering controls and increase the levels of respirable dust above that allowed by the Mine Act, he could not accomplish that as a mine operator. But now he's using his position as the Assistant Secretary to change that longstanding, which he recognized and laid out, interpretation of the Mine Act, which along the way helps his former company that he worked for, Energy West Mining, who was the company behind the move to do that.

And he's using his position to push his mine operator opinion on the nation's coal miners, and increase dust levels in the nation's coal mines. And that is wrong. That is wrong when we have that kind of activity take place in the government. And we object to it very strongly.

Now, if MSHA proceeds with the Lauriski proposal, which permits mine operators to file requests to replace engineering controls with PAPRs, which is not legal according to what Lauriski himself had laid out, the agency would then request that Congress substantially MSHA's budget. Moreover, the industry could easily sabotage MSHA's ability to function and bring MSHA's other missions to a halt, if even a small number of mine operators seek to use PAPRs as a replacement to engineering and environmental controls.

There was a case study, Jim Stevenson just talked about it just a bit ago, where following the failure to get the standards implemented, Energy West moved to try another circuit. And that was to get MSHA to agree that they had exhausted feasible engineering controls, and use airstream helmets.

There was a long, protracted study which Bob was involved with, I was involved with, and a number of other people, that went over a period of months, that involved an enormous amount of enforcement folks from your end, Marvin, technical folks from the Health Department, and tech support, to go in and show Energy West how to put dust controls in that coal mine. And we were constantly against this position that they were laying out to let us use airstream helmets. We had to deal with that all the way through.

At the end, I don't know how much money was spent by MSHA just to get through that one exercise. But it took months, it took a lot of people, and it was running so ragged. And I think that's a factor, an economic factor that you folks have to really go through to figure out what the real implications of this PAPR program that you have devised will do.

I think that if 50 companies come at you, we're in big trouble. Unless you decide to spend limited resources

to respond to those requests. Bob, you were there and worked with us. And I know it was a long, painful, resource-exhausting process. And the sad thing is at the end of the day, we got Energy West Train Mountain Mine to implement the kind of dust controls that other companies used on a routine basis, but they just could not figure out how to do those. I mean, some very elementary things that I know, Bob, you got upset. We did, Jack Kusar. Just to try to get those controls implemented.

This is the track that we fear is laid out with this proposed rule. That what we're about ready to do is invite an opening of Pandora's Box, whether it's a major run made by coal companies to come after this agency to get relief and use those PAPRs. And we think it's one that's dead wrong to begin with, and we oppose it, and we laid it out. But it's going to have a dramatic drain on this agency resources.

As we went through the rule-making process, Marvin, and I apologize for this, we are learning as we go through. And some things we didn't have a lot of time to focus on as we sort of grabbed our hands around this rule, because we had a number of other things that was going on. But we finally came to realize that this is not the only rule-making activity that's taking place that's affecting the overall respirable dust program.

There was a proposal launched earlier this year, dealing with the ventilation coal mine conveyor belt entries, the ventilation of those. And allowing the air from those belt entries to be dumped on the face. And with the way we view it, the high velocities.

And what we fear is happening here, and this rule is actually going to come to a close, I think it's June 30 as a comment period deadline --

MR. NICHOLS: July 3.

MR. MAIN: The comment period on the --

MR. NICHOLS: Oh, yes, that's correct.

MR. MAIN: And we have officially requested an extension, because there's so many things we need to go back and look at. And Marvin, we're serious about that, and we hope we will get it.

But if that extension don't take place, come June 30 the comment period is closed. And we have on July 3 the closing of the comment period on this.

Now, what's about ready to happen is, with the implementation of this set of rules, we're going to have more dust dumped on coal faces where these miners work, and we're going to compound our problems here, fellows.

One of the things that happened at Trail Mountain was that the dust levels that was being generated in these belt entries was increasing the dust going onto the guys on

the face. And we had upwards of I know 12 milligram in the documents I looked at yesterday that we had to deal with to get those dust levels down.

And the company and the union submitted a proposal to MSHA to eliminate the partition line facing we had at that mine on belt entries. And we did that because we just have 1.8 milligram of dust being travelled up that belt and being dumped on the miners at the face. And we're sitting here very concerned now that we have a more complicated problem with this rule-making going to have that as a problem we may be facing across this country.

Now, in addition to that rule-making, there was a rule that was proposed from NIOSH's recommendation of the one-milligram standard, that we reduce the actual dust exposure down to one milligram. And MSHA had initiated rule-making to lower the dust limits in the nation's mines to achieve that goal.

On December 9, MSHA withdrew that rule, saying that MSHA was currently developing regulatory alternatives to issues relating to respirable dust, coal mine dust. Therefore, we are withdrawing this item at this time. And we all thought that was going to be incorporated into the rule-making, or that's what the inference was.

MR. NICHOLS: Hey, Joe, just how brief were you going to be?

MR. MAIN: I'm getting to the close. But we found out in the rule-making, Marvin, that you had declared the lowering of the dust standard to be beyond the scope of the rule-making. That boggles our mind. So you closed the door, slammed the door shut where we can't even address that, and this rule has been withdrawn.

But what I'm saying, there's a connecting of dots here. There's a lot of things happening here where we have refined the issues to a limited number. And as we have proceeded with this rule-making, we've acted to increase the dust levels, reduce sampling, and only allow consideration of the most valuable devices, an option that we believe, and as an operator said, won't be exercised.

In my closing remarks, and I'm there, Marvin, I've got to say that the PAPRs don't work. I'm very concerned about the agency's reluctance to deal with this problem. Regardless of what industry says, there's a standard that they've had since 1969 to provide respirators to miners to protect them from the black lung disease, and other respiratory effects.

The failure of the government to deal with that, and the failure of the industry to provide this in a necessary fashion, at times I think has contributed to some of this problem. And what we're talking about is if we've got this brand-new device here that we can't use, well, they

can use it. They are using it. The problem of it is, it's not being used in its approved fashion. And I think there's a serious problem here where there may have been some risks to miners while little attention was paid to a respirator that has been declared faulty by a large number of miners supported by the industry.

And we're now ready to take that PAPR under this Lauriski Energy West proposal, to coal miners across the country. We oppose that, and urge the government to seriously look into this problem with the failure of mine operators currently to provide adequate protection to the miners.

And my last comment is that please listen to the miners, and understand that there is a lot of people that have died and are suffering from this disease. And we need to get increased inspections, continuous dust monitors, and lowered dust standards in the country. Thank you.

(Applause.)

MR. NICHOLS: Thanks, Joe.

MR. MAIN: No questions?

MR. NICHOLS: No, I want to keep it moving right along here.

(Laughter.)

MR. CURTIS: My name is Tain Curtis, T-A-I-N C-U-R-T-I-S. I'd like to thank the panel for this opportunity

to come and voice our concerns.

I'm the safety committee chairman of local 1769. I represent 247 underground coal miners at the Deer Creek Mine in Huntington, Utah. I work for Energy West Mining.

We produce approximately four million tons a year. I have 22 years of varied experience, both on longwall and continuous mining stations. I've been exposed to various amounts of dust over my career in mining.

The Act of 1977 states that the best asset that mining has is the miner. In section 202 it talks about the two-milligram standard set forth as the standard for the industry. This is a standard that I have dealt with in my career.

I am aware of the extensive testing done at the Trail Mountain Mine, our sister mine, and the bad conditions that they had on the longwall and the dust. I work now with many of those miners and individuals who were involved with the test. They said that even though the dust was bad, they were able to come into compliance with the dust standard, without the use of the airstream helmet.

Although many of them used the airstream helmet, they did not use it to lower a three-milligram standard; they used it to lower a two-milligram standard.

I still work with many miners who do wear the airstream helmet. They wear them again to reduce the two-

milligram standard, not a higher standard. I have not talked to one miner who thinks that it would be beneficial to use it to reduce a higher standard than two milligrams.

They also do not wear them necessarily in complete compliance with the manufacturer's recommendations. And also, like most coal miners, if they were told they would have to wear them, they probably would not. We're dealing with a coal mine mentality of I'll do it my way, my experience.

I'm all for a single-sample reg that is done for the entire time of the shift. Miners who work longer shifts are exposed to more dust. But I'm against in any way the current standard being raised, even in adverse conditions.

Now I'll get to the emotional part of my comments. I also personally one part-90 miner whose entire career has been under the two-milligram standard, and yet he has the signs of black lung. I'd also make aware that a fellow miner, in 1999, died underground. His cause of death was unknown, until an extensive autopsy was performed. It then came out that he also had black lung. That was not the exact cause of his death, but it was present in his lungs.

Both of these individuals worked under the two-milligram standard, and yet still had black lung.

I'm just a coal miner, and I'm faced with a new dust reg that is very complicated, and it can raise the dust

standard above the two-milligram standard. In my opinion, we need to lower the standard, not raise it, and make the standard in the regs understandable to the miners.

I've said before that we need to be careful of what we put into the atmosphere of an underground coal mine. Someone breathes downwind. Has there been any thought, if we raise the standard, or if the standard has to be raised because of adverse conditions, what happens to our returns? I would suppose that everybody knows that if you want a bigger bang in your gun, all you have to do is put in more powder.

These are all concerns that I have, and the people I represent at Deer Creek Mine have. We've been told about the PDM that's being tested, and can tell me that my dust exposure, both instantaneous and throughout the work day. Something like this would be beneficial to us as miners, to know of the specific jobs we do and the exposure to the dust we have. We should encourage this type of research.

In closing, I don't think that the new dust regs represent what should be happening at our mines. Still today, when dust sampling is taking place, people either intentionally or unintentionally do things different when they wear a dust pump.

Again, thank you for your time and effort you've put into our concerns. And I'd ask again that we make the

dust standard a standard that we can live with and work with, and that will be beneficial to all miners.

You said in your presentation today that we're going to reduce black lung by only 42 individuals. And I grieve for those 42 individuals under this current standard that would die. But this is not leading to the complete elimination of black lung, which should ultimately be our goal in the dust regs. And thank you.

MR. NICHOLS: Thank you, Tain. The next speaker is Jim Weeks.

MR. WEEKS: Well, good afternoon. My name is Jim Weeks. I'm a certified industrial hygienist. I worked as a hygienist for the United Mine Workers International Union for over 20 years. Prior to that, my first involvement with this issue was in 1978. And when I got into this issue at that time, I was a latecomer, because miners had been talking about this issue really since 1970. And they have been very clear in their complaint about what the problem is with dust monitoring, and they've been very consistent about it. I think by now we've probably gone through at least a couple generations of miners that have had the same experience.

MR. NICHOLS: Excuse me, Jim, but you need to spell your name for the court reporter, please.

MR. WEEKS: Weeks. Let's see, how do you spell

that? It's W-E-E-K-S, just like it sounds.

The message that I heard from miners starting from that time and continuing to the present is, well, it's many things, but there are two that are very prominent. One is an accurate assessment of what miners are exposed to. And the second is a conscientious effort to control exposure.

There are many other things along the way, but I think those two are very, very prominent. And it continues up to the present day.

A couple of other historical benchmarks that I want to mention. The first publication, at least that I'm aware of, that described the development of the tapered element that is the heart of the R and P monitor, was in 1986 in a Bureau of Mines publication. There might have been one before that, but that was the first one. And here we are, in 2003. What does that make it, 17 years later? And we still don't have a working model in the mines. So it's been a very long time coming to get this instrument developed, and get it into the mines.

Now, a couple of other things. Also for the record, I was a member of the Dust Advisory Committee, along with Joe Lamonica and Joe Main. And I was also one of the reviewers of the NIOSH criteria document on respirable dust.

What I want to talk about today is more conceptual, and very brief, and we'll give you more detailed

comments at a later time. And I want to talk basically about three issues. The single sample, the quartz policy, and the adjustment that you're proposing for the protection factor for the airstream helmet.

Let me be very clear about the single sample. In principle, we support the idea of the single sample, for many reasons. A single sample, in an unannounced inspection taken by MSHA, for several reasons.

First of all, of all the samples that are out there, this is the most accurate. Mine operators' samples lack credibility. And when MSHA takes samples over several days, the later-day samples are consistently lower than the first sample. So this is the most accurate sample there is. So we're partway there.

Secondly, it's what the Mine Act calls for, not only in the section where they talk about what an average is, but also in the sections where they say the requirements of the Act are that each miner on each shift, that exposure should be kept at or below the standard for each miner on each shift. That sounds like one miner, one shift, one sample. So the Act is very clear in preferring a single sample.

Tied with the accuracy, there's another reason why the single sample is better than what exists today.

There is a confusion, I think, between -- this is

inside-the-beltway talk here, but it's important. It has to do with the issue of risk assessment. And there is a process of risk assessment. There's another process which is separate, which is called risk management. With this disease, a chronic disease that requires repeated exposure over many years, risk assessment has to be done looking at exposure over those many years -- 10, 20, 30 years, whatever it takes -- looking at exposure and seeing at what exposure level people come down with black lung. That risk assessment essentially was done in the NIOSH criteria documents. The conclusion that they came to was the exposure limits should be one milligram per cubic meter, rather than two milligrams per cubic meter.

I think the whole idea of the proposition of doing risk assessment on individual measurements, over one shift or five shifts or 20 shifts, makes no sense whatsoever. A miner works maybe 250 shifts per year. Over 10 years, that's 2500 shifts. That's not even getting to the point where he's going to start to develop risk, although some miners are developing black lung in less than 10 years.

And to try and take samples that are taken over one or two or five shifts, in that context, and say we're going to try and estimate, we're going to try and evaluate the risk of disease based upon these five samples, is just a non-starter. It makes no sense whatsoever.

The purpose of dust monitoring is not based upon risk assessment. This is a process of risk management. That is, the idea is then for an individual miner, for his 250 shifts out of the year, suppose you take five samples for that miner for one year. Now, that would be a lot under this rule. But let's say five samples. That means there are 245 shifts during the year of which you're not measuring exposure.

What happens on those shifts? And the idea, the intent of the Mine Act is to keep, to maintain, continuously maintain exposure for each mine at each shift at or below the two-milligram standard. And that applies not only to the shifts where you measure, but those 245 other shifts where you don't measure. Which I would argue, in those shifts, have a much larger impact upon that miner's risk of having black lung than the five shifts that you measure.

So that the purpose of monitoring and sampling is to try and keep exposure over the entire year below the exposure limit. It cannot be based on risk assessment. And doing a simple unannounced inspection, a single unannounced inspection by MSHA is one way of sort of keeping the mine operator's feet to the fire. So we support the single sample.

Now, we don't support the single sample the way it's being proposed in this rule. There are many reasons.

First of all, you don't sample for a full shift when you're doing compliance sampling. I don't understand why you're not doing this, frankly. The technology is there, the means are there. I just don't understand why it's there. And the fact of the matter is that many, many miners are now working 10- and 12-hour shifts. That's the fact of life that we have to deal with. And if that's the case, then you need to sample over that entire shift. And the exposure limit that applies to that shift would have to be proportioned reduction. That is, if it's a 10-hour shift, the limit is 1.6 milligrams rather than two milligrams.

The other two problems, and I'll talk about them kind of together, has to do with the way you treat measurement uncertainty, and the other is your whole approach to taking multiple samples and only issuing citations for one, or an average of two, depending on what the level is.

Now, I've spoken about the measurement uncertainty problem before. I'm not going to repeat myself on that. The basic issue is that we recognize that there is measurement uncertainty, that there is doubt. We don't see any reason why the benefit of the doubt should be given to mine operators. I don't see any reason why the benefit could not be shared. I don't see any reason why, since what

the Mine Act calls for is that exposure be at or below the standard, it would seem to me that you would want a high degree of confidence that exposure was at or below the standard. That is the other tail of the distribution. And that you would issue citations for anything over 1.7 milligrams per cubic meter. That way you would know, with a high degree of confidence, that the exposure was below the standard. That's what we want. That's what's going to prevent disease.

And when you look at the NIOSH recommendation of moving the standard to one milligram, it's all the more reason to say we need to go to the lower end of this, rather than the upper end. So you're giving the full benefit of the doubt -- I should be more specific. You're giving 95 percent of the doubt to mine operators in terms of the uncertainty issue.

And I proposed at one point sharing the uncertainty. And the comment that I got back from you all at some place was, well, it's not really sharing an uncertainty. We're taking multiple samples, and if one sample is over 2.3 or two, or the average of two is over whatever the next level is, that you would issue a citation.

And that uncertainty distribution was asymmetrical, as if that mattered. That's not the issue.

The issue is giving the benefit of doubt to mine

operators. Whether it's asymmetrical or not is really unimportant to this debate.

And this policy, which essentially raises the standard up to 2.3, is directly contrary to the recommendations of the advisory committee, and it's directly contrary to the recommendations of the NIOSH criteria document. And what you've said is we're not raising the standard. And that reminds me, frankly, of a discussion that went on earlier today in which several times it was said oh, this is the last question. And the last question kept going on several times over. And I thought, well, where really is the last question going on here?

And that's what this is like. It's like we're not raising the standard, we're just not enforcing it until it gets to 2.3. Well, quite frankly, last time I checked 2.3 was more than two. That looks like raising the standard to me. And it just doesn't make sense.

Now, the issue of multiple samples, and only issuing citations for one, however that formula works is complicated, like just about everything else in this rule. I have to make one aside here.

I started out trying to make a flow chart for this rule, from the start. You know, we've got a branch this way and that way and the other thing. I spent about six hours on it. And I had hoped to bring it here, but I didn't get

done with it. And I just got so hopelessly lost that it was really frustrating. It was reminding me of, you know the guy who invented the Lien-O-Type, a very complicated machine. He invented the machine; he went stark-raving mad, spent the rest of his life in an insane asylum. I felt like that guy trying to do this flow chart. This is a very complicated rule. And for that reason alone you should get rid of it.

Anyway, back to the multiple sample business. If several people in the same exposure area -- I forgot the exact terminology you used -- if you would only issue a citation, say, for one. And the mine operators complain about this. This is like, well, sample until you get a citation. And I look at it this way. I mean, I don't mind taking a lot of samples. I think you should sample until mine operators get it right. And that is get exposure down.

But the way the policy is constructed, it seems to me, the likelihood of getting a citation depends upon the number of samples that you take. If you take more samples, you have a larger likelihood of getting a citation, all conditions being the same. That doesn't make any sense to me. The likelihood of citations should depend upon the dust level, not on the number of samples that you take. So it seems like a rather irrational policy.

We'll go into these issues in more detail with our

written comments, so let me move on to the quartz issue.

Just a couple of comments on this. One of the problems with the existing system, the 30-year-old system we have now, is taking averages over five shifts, and if the average is over, and so on. Well, what you're proposing doing with the quartz policy is exactly the same thing. It's not five, it's three, and you take the average over three shifts. And during those three shifts you could very easily expose miners to levels of quartz in excess of 100 micrograms, and document those exposures, and do nothing about it. And then go on to this obsolete, cumbersome formula of calculating your reduced standard. That doesn't make a whole lot of sense to me.

I think a much more straightforward approach is, if you get 100 micrograms of quartz, that's a violation.

Now, some might complain and say well, we don't know when we're getting into quartz. That's simply not the case. People have a pretty good idea when you're getting into quartz in a mine. Roof bolters are in quartz. Whenever the roof bolter dumps the dust pile on the ground, there's a lot of quartz around. You're cutting into top, you're cutting into bottom, you're getting into quartz. If you're fixing up a roof fall, you're getting into quartz. Any time you dig into rock, the likelihood of getting into quartz increases.

So what's needed, I think, is a simple policy that says you get into quartz, you've got to do something about it. And that if you enforce the standard that sets 100 micrograms, that's the limit, we're going to enforce that limit. I think that's a much simpler way to go, rather than this average of three samples.

Now, this all goes without saying that NIOSH also recommended, and has recommended for 20 years, that the quartz limit should be reduced to 50 micrograms. And given that, it seems like, leaving aside the question of feasibility and whether it's feasible to make that limit, once you err on the side of caution in dealing with quartz, and develop a policy that is more sensitive to miners' exposure, rather than, say, tolerating the average of three.

Now let me go on to the formula you propose for using power air-purifying respirators, the airstream helmet. Now, let me be very clear. I want to talk about an extremely narrow issue here. And that is, you propose modifying the protection factor dependent upon air velocity. Okay, that's what you're proposing. That's what I'm criticizing.

And we raised this question and got a number of studies from the agency that support it. And I'm not going to go over them in any detail; please, I'm ont going to do that. But I do want to start with the Energy West petition

that others have talked about.

First of all, this is not a scientific document, it's a legal brief. The point of legal briefs is to advance the interest of the client, so right from the start it's not pertinent.

He does refer to many studies, and none of the studies that he refers to in here talk about protection factors. None of them talk about the effect of velocity on protection factors.

And one thing worth pointing out here, the purpose of this petition, and the wording here is important, the appropriate use of airstream helmets should be considered in engineering control. This is not a supplement to engineering control, this is a substitute for an engineering control. That's what they wanted. They wanted the agency to consider respirators in engineering control.

When this and other similar sort of attempts were made in this same period, one of my professors, a most conservative professor, who gave the Cummings lecture of American industrial hygiene, and he went ballistic over this proposal that respirators should be considered an engineering control. This is directly contrary to every principle of industry hygiene, and makes no sense whatsoever. That's what they wanted here.

And to reintroduce this into the record goes right

back to that same old discussion. It's simply not acceptable. It's not a good practice. And you know, it just doesn't -- we don't particularly like that one.

Now, what Energy West also had done was a study by Bhaskar, B-H-A-S-K-A-R, at the University of Utah. What he did was put respirators, put these airstream helmets on a number of miners. It's a very interesting study. And looked at the protection factors under a variety of conditions.

And two things impressed me about this. One of them was, there's a huge variation in the protection factors, from as low as three to as high as 26 or so. And it varied considerably from mine to mine. And though he measured the ventilation, the air velocity that these miners were exposed to, did not even look at the question of the effect of that air velocity on the protection factors.

I did. I looked at it both in terms of the protection factor, the log transformed protection factor, and there's no relationship between the air velocity and the protection factors in this study by Bhaskar.

Now, there were two documents actually by miners and others at NIOSH. They looked at the workplace protection factor of a lead smelter. And they got huge protection factors, up to 2,000. And they didn't look at velocity at all. It simply wasn't an issue. They never

measured it, they never did anything with velocity.

There's a very interesting experiment, because when they put these airstream helmets on miners, the people who were the investigators monitored miners -- I'm sorry, these were not miners. These were people that worked at this lead smelter. Monitored them. These guys had to ask permission to raise the shield. And if they raised the shield, they turned the dust sampler off, so that they only got samples inside and outside when the shield, the face shield, was down. This was no attempt to represent any kind of real work circumstances.

The other thing they did was that they took total dust samples. These are not respirable dust samples. And these were some big particle sizes there -- 17 micron particles was the mass median diameter of these particles. That has a big effect when you're looking at the difference in respirable mass. In 17 micron particles, about 5,000 times the critical mass of one micron particle. So that if the filter snags one of these guys, it makes a big difference in the protection factor that you get. So this is not really applicable at all. The conditions are not applicable to coal mining.

Then there was a study we got from Greenhow, done in England in 1979. He put these masks on three miners at one mine or another. And the purpose of this study was to

find out whether these miners accepted, whether they liked the airstream helmet. He made no measurements of dust exposure, none of velocities, no protection factor, nothing. This was a consumer survey. It was fine as far as it goes, but it's just not pertinent. And it was old, anyway; 1979.

Now, the only document that we received -- actually, we didn't receive it, we had to get it separately -- was a study done by Sacal at the Bureau of Mines, published in 1981. He did a couple of things. He put this helmet on a mannequin and put him in a wind tunnel, specifically to look at the effect of ventilation on the protection factor.

Now you might ask, well, a mannequin is not a miner, a wind tunnel is not a mine, what's the point? Well, the point is experimentally, if you want to look at this one factor, you've got to get rid of all the others. So you get rid of all the others, and you look at whether or not there's much effect of ventilation or the velocity on the protection factor. And he found that there was, on the mannequin in the dust sample. That there was.

Now, the other thing he found is that there was a big variation, in fact the variation on this issue was orientation. And if you were facing the air, you got one protection factor; if you were standing sideways to it, you got another one. In fact, the effect of whether you were

facing it or turning sideways was bigger than the effect caused by ventilation itself.

Nevertheless, they took the same experiment, put it into a mine, found basically the same sort of thing. That it was much more muddled, because there was much more going on in the mine. And there is some effect of ventilation upon the protection factor. It's not huge, and it doesn't account for much.

In fact, if you go back to this Bhaskar, the guy in Utah, there's all these sources of variation and protection factor. Whether the face shield is up or down, the type of skirt, flow rate in the fan -- nobody talked about the flow rate in the fan -- the type of filter in the fan, and random variation, which appears to be large. Now, all of those affect the protection factor to a great extent. And then you focused only attention on air velocity, and there was no consideration of the angle of orientation in relationship to it.

Now, this seems like so much nitpicking on my part, except that when we look at your definition of an equivalent concentration, you propose dividing the concentration by the suggested protection factor, which I don't think is warranted in the first place. And I think that this adjustment, based upon air velocity, is not documented, and I think it really runs afoul of the

requirements for data quality in the Department of Labor, and in the government as a whole.

The data that is provided on this lacks utility, to use the language of the data quality regs.

So anyway, that's pretty much what I have to say. We support the single sample, not the way you're doing it. You should enforce the 100-microgram quartz limit. And I think that the documentation of the velocity adjustment on the protection factor is not justified.

So if you have any questions, I'll be glad to respond to them, or whatever.

MR. THAXTON: Thank you, Jim. Next is Keith Plylar.

MR. PLYLAR: Good evening. My name is Keith Plylar, P-L-Y-L-A-R. I am the chairman for the MWA Local 2397 health and safety committee. I am employed at Jim Walter Resources, Number Seven Mine, in Alabama. This is the second hearing I've had the opportunity to attend.

I'm also on the board of mine examiners for the state of Alabama. I'll try to get through this pretty quickly. I really blame the panel for this being drug out as long as it has. Seems like you all have been redundant on so many questions to the earlier commenters.

On page 10786 of March 6, 2003 of the federal register, the following can be found. "In order to improve

mine confidence in the respirable dust sampling program." These words in this declaration by MSHA is like a knife in the heart of the coal miners.

There are volumes upon volumes of testimony available to anyone who wishes to research it that clearly demonstrates that miners across the land has lost all confidence in MSHA years ago, and currently view MSHA and MSHA's employees as a direct threat to miners' daily health and safety.

Also on this same page, the following can be found. "In the interim, MSHA enforcement efforts continue to focus on lowering the quartz exposure of miners as recommended by the dust advisory committee." MSHA is incorrect in calling the period of times as the release of the DAC report as an interim. During this time two mine disasters have occurred, bodies recovered and investigations completed. Also during this time, wars have been waged and won. This time period is not an interval. It's been longer than a lifetime for the many who have died.

MSHA is also wrong that this proposed rule represents enforcement efforts focused on lowering the quartz exposure of miners. By stating that the proposal recognizes that there may be special situations that occur intermittently and for short periods of time where the dust control measures may not protect the miners from

overexposure, give an example of mines through a rock parting with high quartz content. The key word here is enforcement.

How is improving PAPRs, airstream helmets, an enforcement effort? How is reducing the number of shifts sampled and reducing the number of samples taken for compliance of determination a focused enforcement effort?

On May 20, 2003 in Birmingham, Alabama, the UMWA representative Tom Wilson testified about a 1989 study at JWR, Jim Walter Resources, Number Four Mine, which verified that non-compliance of this is on longwalls, and that management persons manipulated sample results. Before following the study, engineering controls were recommended which MSHA did not take in a timely action, or where MSHA did not take any action at all.

Mr. Wilson also cited engineering controls that he was aware of which MSHA never had required. Engineering controls that he spoke of had been required for government bodies outside of the mining industry with success. The control of the speed at which the drums run on the shears.

I first worked on a mine where management made a decision in years past to intimidate the miners towards supporting airstream helmets instead of engineering controls. This operator went so far as to suggest placing airstream helmets on the dust inlets of the dust pumps. In

other words, he wanted to put the dust sampling devices up in the helmets to see what the miner was getting exposed to.

Now, I ask you, what is the difference between this approach and the sampling of the dinner holes in eastern Kentucky, where many operators had been fined and convicted?

During all this, MSHA was doing everything, including advance notice of inspections. They could not verify the high dust levels. Is this MSHA and their policy that we are now being asked to trust? MSHA simply deserves no such trust.

Thank God for the UMWA health and safety department, because they came in, took all the heat from the miners, the company, and yes, even MSHA, the hazard -- while forcing engineering controls on our longwalls. At the end of this process, when the operator was stating all the times they could not come in compliance, there was a list of engineering controls put on in effect at that mine. And here is a list of them.

All of the longwall shields and sprayers installed on the top of them, the longwalls had dust suppression sprays for the shield legs and bodies. The schedule of maintenance for the shift is additional and effective sprays have been added to the shear. And a mine environment was helped there for everybody, including MSHA spacers when they

finally came around and looked at all the new improvements.

And I ask you again, if we had been satisfied with wearing an airstream helmet, we would have never had any of these controls.

Like Mr. Wilson in Birmingham, I, too, want to go on the record in support of engineering and environmental controls, not the airstream helmets. I also want to provide examples of these controls, many of which MSHA simply will not discuss.

They include, or could include, number of bits on a drum, the angle of the bits, and forcible bit maintenance plan. Volume or quantity of air, maintenance plans, section roadway maintenance plans, improvements in belt line maintenance, water infusion from -- scrubbers on the crushers, development of additional sub-mains for ventilation purposes, drum size restrictions, drum rotation controls, controls over cutting sequence, control over interdirectional versus bidirectional cutting, return entry capability, control over panel widths, size of water supply line, and the induction of booster pumps on the water system.

MSHA officials with personal ties to the operators cannot be allowed to continue to give away the health and safety in the interest of profits or personal agendas over the miners' health and safety. History shows that it was

MSHA, not the miners, that supported deeper cuts, wider longwall faces, the elimination of the restriction against the use of belt air for ventilating active workings.

Equally, history will show that this was MSHA, not the miners, that supported these issues without first fulfilling their enforcement responsibilities to ensure that these systems complied with all parts of the regulations, including those covering --

I've always been told that if you don't learn from history, you will repeat it. I sincerely believe that greed is the driving force behind these proposed rules. History shows us that it was greed that caused the landmark 1969 and 1977 Mine Acts to be adopted. If we continue on this path without learning from our past in accepting the responsibilities that come with mining, we should clearly expect future stronger action from Congress.

I submit that these proposed rules, along with the future actions caused by these rules, will have a dramatic negative impact on mining in the United States. I support compliance sampling 365 days a year, 24 hours per day, seven days a week. In other words, continuously. I also support and recognize the importance of the concept of plan verification. However, I do not support MSHA's proposed schedule of frequency for plan verification. It is completely inadequate.

Since conditions change daily, plans need to be verified daily. Actually, each production shift.

The following testimony from a guy named Herman Weber, which was a financial secretary at a local in Birmingham, Alabama. I also went and checked with my local union about the finances that it would cause, the financial burden it would cause our local to participate in these plan verifications. Because the way it's written in the regulations right now, the miner has no right of pay from the operator to go and try to verify these plans. I definitely believe that that was not the intent of the Mine Act.

I would also like to add that we talk about a level playing field all the time between the union operators and non-union operators. And I want to add that the plan verification now in effect in these new regulations would put non-union miners against union miners, and that the non-union miners would not be able to participate in this. So all miners across this land would be shut out of the process.

The only way to have plan verification and to assure the respirable dust was being maintained below two milligrams is a continuous monitor of respirable dust. Which we have talked about this device all morning, and I want to go on the record saying that we support this device.

And that these regulations should be withdrawn, and be rewritten around this device of using the continuous dust monitor.

This proposed rule has guidelines built in it that would expose miners to greater concentrations of respirable coal dust. This rule could allow operators to manipulate the dust-sampling process during plan verification. I am opposed once again to the proposed regulations, and am requesting that these proposed regs be withdrawn.

Section 70-209 and section 70-212 of the new proposed rules states that MSHA will consider all comments from representative of miners, and provide copies of these comments to the operators upon request. I believe that this language is in direct conflict with the intent of the Mine Act, and that miners should not have to be concerned with reprisal from operators once MSHA sends their comments back to the operator.

The intent of the Mine Act was for miners to be protected from retaliation of operators when they spoke up for their health and safety. Miners' confidentiality must be protected at all times, from MSHA to the operator.

But it's become evident to me that MSHA has constantly been trying to intimidate miners from commenting on any plan that the operator submits. I strongly oppose this language in this regulation, as I did back in the

original ventilation regulations when they came out.

I've just got a couple other things. I want to address something. The MSHA panel this morning asked the BCOA panel if they considered a device that controlled speed, drum speed, et cetera, an engineering control. It's my understanding that the panel answered that they did not; they considered it administrative. And I want to go on the record disagreeing with this.

I believe that controlling the speed of any drums on the longwall, and even actually on your miner, can be an engineering control, also.

In closing, let me say that these new rules are very complicated and confusing, to say the least, and they will lead to more cases of black lung disease. MSHA should, for the safety and the health of the miners, withdraw these regulations immediately. I think you see that not only the labor force of the United Mine Workers, but also the operators oppose these rules. And I think the majority of the people that's testified here today in front of you all has told you all how complex these rules are. And it's very hard to understand.

If you think you see people with degrees having a hard time understanding them, you think about the working miners out there.

With that, I'll close and take any questions.

MR. NICHOLS: Thanks. Lawrence Oliver? Is Lawrence Oliver here?

MR. OLIVER: Good afternoon. My name is Lawrence Oliver. I'm a local union president at a surface coal mine in New Mexico. And on or around near the reservation we have about seven or eight surface coal mines, but we similarly have one new one, which is an underground mine. And we do have some coal miners there at the underground mine.

I just noticed that on the document, it does say that there is going to be some, I guess, dealing with the rules and regulation and all that's pertaining to this on surface coal mining. And just by reviewing what was presented this morning, and also the testimony that was given this morning, I believe this process, the new process, the new rule, does really strip away some important protections that was mandated by Congress on the current laws.

And today when coal is thought to be the most economical source of energy, and then also production of 24 hours a day and millions of man-hours per year in these operations, and also with the thousands of miners' health at risk, I believe the reduction in the sampling wouldn't really help at all. Because as has been said, there are changes that occur, you know, on any section of a mine site.

On the surface mine, we do have a lot of coal dust that does settle at nighttime. There's no wind. And a lot of the coal dust just sits there, you know. It continues to accumulate as the tipple is going. And sometimes we do have problems with the meshing coming down in the tunnel in the hopper. And it's very scary, you know, when you think about maybe somewhere there's a spark or something happens that there's an explosion. Because we have experienced that, where welding with the flames from that touch the coal, and there's coal dust that comes down from on top, you know, and there would be an explosion. And we're afraid of that, on these nights when it's like this, in the tipple area, that there's a high concentration of coal dust in the air, and that may happen.

So I think the continuous, more sampling would provide more protection for the miners of a surface coal mine.

And then also the presentation that, also from the presentation I believe that it also limits the penalties, and that it provides for the operator to come up with plans and policies. In the past this is what we had. We had experience that the operators would have these policies, and also plans that they would go by. But they often would do a real good job on it. It would sound good, but they wouldn't really go by it. You know, there would be times when, to

their benefit, that they will put that aside.

But to the laws and policies and regulations, the implementation of the enforcement with the penalties have provided for corporate responsibility. And I do agree that this proposed rule is complicated, and could also lead to continuous disputes, even now today. We do have disputes between the representatives of the miners, the company, and then even the MSHA inspector. And what is the interpretation? And with this complicated new rule, there could be continuous interpretation disputes between the miners, operator, and also the miners would be I believe the most unproductive.

I just want to say that MSHA does, I believe, has a responsibility for the health and safety of all the miners. And we do look to them to provide those protections and safety. But at this point in time, I believe the rule does really limit the protection of the miners, and I believe it's very, an ill-advised rule, and I don't agree with it. And I just respectfully request that it be withdrawn. And that's all on my presentation, thank you.

MR. NICHOLS: Thank you very much. Larry Linville.

MR. LINVILLE: My name is Larry Linville. I'm a representative from the United Mine Workers Local 1307, Kimber, Wyoming. I'm also a surface coal miner. And we

have several questions the local sent me up here for. Do you need the spelling of my name? L-I-N-V-I-L-L-E.

As Mr. Thaxton started out this morning, he said there would be little change, if any, on surface mine. And I sat there and looked at the regulation in 10791, right under federal register, MSHA recognizes that dust advisory committee made several recommendations also impact on surface coal mine workers. These surface coal mine issues are beyond the scope of this proposal and rule, and will be addressed by the agency. What does that mean?

MR. NICHOLS: That means they're beyond the scope of this rule, and may be taken up by the agency at a later date.

MR. LINVILLE: And just behind that on this page, it says non-compliance determinations, single-sample determinations at all coal mines, and it includes surface mines.

MR. NICHOLS: Well, that part would apply to the surface mines. But plan verification and the other parts would not.

MR. LINVILLE: Well, we're pretty concerned not only like Lawrence Oliver down in Arizona, we have some new problems up at our mine. The company is, they're trying to come in compliance with dust control and stuff like that, building sheds over the tipples, which catches a lot of

light dust, shoots it right down the tipple, goes on the beltline, and then it's shipped on up into our silos, which causes more dust and more chance for explosions and stuff like that.

We're very concerned with this. We've seen a tremendous amount of coal-dust build-ups since they've built these building sheds. And we're at a loss of being able to keep the darn things clean, because we don't have water to use in the wintertime. And we're in our fourth year of a drought, which means we have less water, that you can't use in the winter to begin with, which is a hell of a lot of coal build-up. A lot more chance for explosion. One of these days it's going to blow.

We're really concerned with that. One of the other things I want to relate to you is that I started in 1977, and so did Max Bareno. And Max Bareno retired this year with black lung on a surface mine. So we do have the problems on the surface mines.

We also have problems when you get in these real dry eras. I drive a coal truck; I have for 25 years. And when it gets really dry in there, it's nothing to have a quarter inch of dust all over that coal truck. Not only that, you have to use a windshield wiper to wipe off the coal dust off the window before you can take off.

That coal truck is 20 years old. The cab is not

very tight. So what do you think is happening to me, with the dust coming into cabs and stuff like that? I'm getting a little bit more concerned every time I go to a union meeting and I see one of our retirees coming in with an oxygen bottle, and it kind of reflects back to me, is this my future?

My local, I want you to know that our local is adamantly against the adoption of these rules and regulations. And we would prefer that you scrap them, and we need to start and look at something totally different.

I will stop at that. Only one other comment I have to say is that when I see these old guys come in -- and I'm getting to be an old guy, you can see the hair turning white -- carrying these oxygen bottles, and still participating in our union meetings and stuff; and then I see the proposed regulations coming down the pike that doesn't look good for us; I'm just wondering, are you guys going to try and kill us with these regulations?

MR. NICHOLS: The answer is no.

MR. LINVILLE: I hope not. But I mean, with the increased amount of dust coming towards us, the obvious answer kind of worries me.

Thank you for letting me come here and talk to you.

MR. NICHOLS: Thank you.

(Applause.)

MR. NICHOLS: Jeff Jarman.

MR. JARMAN: Are you as tired as I am?

MR. NICHOLS: No, I'm ready to go.

MR. JARMAN: Now, be honest. I'd like to thank you for the opportunity to address you today. My name is Jeff Jarman, J-A-R-M-A-N. I represent 247 miners from Local 1769 in the Deer Creek Mine of Energy West. We produce approximately four million tons a year. I have 21 years' experience in underground coal mining; 19 of those 21 years have been in maintenance. I've worked in-by, in the face, and in out-by areas. I also have my mine foreman papers, and an understanding of the ventilation process.

I have served for six years as Local 1769's recording secretary, and eight years as a safety committee member. As recording secretary I've been involved with many of our retired disabled members of our local.

I'd like to read from the Act, section 2(b). "Death or serious injury from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families." This was a declaration from Congress in 1977.

As recording secretary, I've been involved with the families of these disabled miners who have suffered from ailments which require that they spend time on oxygen, or

whose x-rays have indicated black lung conditions. I've also been involved with these families, as well as the individual miners, and seen how they are still suffering from these black lung conditions.

The levels of dust they have been exposed to under this two-milligram standard is still too high if these cases exist. If even one of my 247 brothers gets black lung, then this standard for dust control in coal mines is not acceptable.

I'd like to tell you a story about a member of our local, who died in Deer Creek Mine in 1999. Tain mentioned this in his comments. In my capacity as a union officer, I had the opportunity visit with his widow on several occasions to take care of his benefits.

Although his death was not attributed to black lung or to his exposure to coal dust in the mine, the news of the autopsy results and the confirmation that he did have black lung added to the grief that his wife and children had already suffered. Congress declares that death and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines caused grief and suffering. I've seen this first-hand, and it's ugly.

Many changes have taken place regarding dust control and ventilation requirements in coal mines since I started in the mines. With the addition of scrubber miners

in underground coal mines and other engineering controls, mine environments have improved. The only way a mine atmosphere can improve is by limiting the amount of dust a miner is exposed to, implementing tougher ventilation controls, and imposing better engineering standards.

Under the regulation that you propose, the standard increases and becomes more lax. Reading from the Act, section 2(g), Congress declares that it is the purpose of this Act to establish interim mandatory health and safety standards, and to direct the Secretary of Health, Education, and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the nation's coal and other mines.

So what is the purpose of the Act? Certainly it's not to relinquish responsibility of dust sampling in the mines, or to reduce the number of times a samples is taken in a year. It is to develop and promulgate improved mandatory health standards for coal miners. I suggest to you that this proposed regulation undermines the purpose of the Act.

Although I support single sampling and sampling for the entire shift, I strongly feel that the reduction of the frequency of sampling is detrimental, and does not improve or protect the health and safety of miners. Single

sampling and sampling for full shifts, and the reduction in the two-milligram standard, does improve and protect the health and safety of miners.

Airstreams are being used as supplemental controls by some individuals in my mind. The use of these airstreams, although not within the manufacturer's recommendations, help to reduce the exposure of dust to levels below the two-milligram standard.

I am aware of the testing of airstream that was done at the Trail Mountain Mine of Energy West, and so are many of my coworkers. Because of our participation in this process, we strongly feel that the continued testing and further development of this type of device is necessary.

This is evident by the number of miners who choose not to use an airstream because of its deficiencies. Approximately 65 miners who worked at the Trail Mountain Mine are now working at the Deer Creek facility. With their knowledge of the airstream, they understand and oppose the use of this control. A reduction of the dust exposure to levels below the two-milligram standard is the only acceptable solution.

The slide presentation that was made earlier indicates that MSHA could reduce the number of cases of black lung by 42 people. It's still not enough. The total elimination of black lung is the only acceptable solution.

A great need exists in coal mines for research, testing, and development of personal dust monitoring systems that record daily exposures to dust in the mine environment. For many operators it is a continuous struggle to meet the current two-milligram standard. To allow this standard to go by the wayside, coupled with the proposed belt air regulations, causes concern for MSHA's commitment to the Act of 1977.

My comments today do not include facts about the proposal, but are rather based on emotion. The coal miners who contract illnesses because of exposure to dust are left with not only physical challenges, but also overwhelming emotional stress. This emotion not only affects both miners, but also his entire family. This emotional impact reaches far beyond this one individual.

I ask this panel to consider the facts expressed regarding this proposal, to take into account the emotional aspects, as well as the facts, which can be devastating to families.

My comments today are based largely on the concerns and comments of the 247 members of my local, 1769. My coworkers and I appreciate the opportunity to make our comments here. Thank you.

MR. NICHOLS: Thank you. Dennis O'Dell.

MR. O'DELL: Hello, my name is Dennis O'Dell, D-E-N-N-I-S O apostrophe capital D-E-L-L. Have 26 years mining

experience, 19 underground, with Consolidated Coal Company, and seven as an international health and safety rep for the United Mine Workers of America.

I believe that this proposed rule is laced with exceptions, formulas, and qualifiers that make it all but impossible to determine what exposure levels are. These all reduce the level of protections miners currently have under the Mien Cat. The proposed rule also may have so many variables that it is ripe for manipulation.

The proposals include provisions for operators to gain use of respirators or PAPRs, administrative controls, in lieu of environmental engineering controls, and allow considerable increases in dust levels in a mine environment. That is now prohibited under the Mine Act, and would also diminish protection for miners. It establishes requirements for quarterly dust sampling by mine operators for plan verification, which has exemptions built in it to avoid those.

MSHA had advised us that they expect 85 percent of the MMUs to be exempt from the quarterly dust sampling requirements. The proposed rule also reduces the requirements for out-box sampling by 83 percent, to once per year. The proposal contains the voluntary use of continuous dust samplers in lieu of the quarterly plan verification sampling. However, it's designed in a way that would

discourage operators from using PCDMs. This proposal is extremely complicated to understand, and is filled with loopholes.

Anybody in here ever see the movie "Groundhog Day?" And if you haven't, it's a movie where a guy gets up and relives the same thing every day. He goes to bed, he wakes up, and he relives the day again. He goes to bed, wakes up, and relives the same day. I see by grins some of you have seen that movie. That's how I used to feel.

We have hearing in Washington, PA, when you heard the mining community come out and oppose this rule. We went to bed, you woke up in Charleston, West Virginia, everybody in the mining industry come out and opposed this rule. You went to bed, and you woke up in Evansville, Indiana, everybody in the mining industry came out and opposed this rule. You went to bed, and you woke up in Lexington, Kentucky, everybody in the mining industry came out and opposed this rule. You went to bed, you woke up in Birmingham, Alabama, everybody in Birmingham, Alabama opposed this rule. You wake up and you're in Grand Junction, Colorado, everybody in the mining industry opposes this rule. That should send a clear message to everybody in this room, as well as those of you who serve on this panel.

As I understand it, I'd like to talk a little bit about the plan verification. As I understand or may ont

understand it. To sample multiple occupations is required, as specified in 7206. At that point all samples are transmitted to MSHA, where no citations issued to the mine operator if the verification sample results show the applicable dust standard has been exceeded. This will only be cited if they fail to take the steps to determine the cause and take corrective action to eliminate the overexposure. I'm still not real clear, after sitting through three hearings, how this works.

Then I read that the agency would approve a plan only when a sufficient number of verification samples demonstrate, at a high level of confidence, that the plan is effective at production levels at or above the VPO. I'm still confused and not sure what a high level of confidence is, or whose high level of confidence, and what or how many samples is deemed sufficient, and who makes this decision.

The proposed rule also allows certain longwalls and other operations to use approved PAPRs, administrative controls, or both to supplement engineering or environmental controls if the mine operator is unable to verify a ventilation plan. This will be permitted only after the administrator for coal mine safety and health determines that the operator has exhausted all feasible engineering or environmental controls. Then the district manager may also allow the mine operators to use PAPRs to achieve compliance

with this.

And here it is again, where the term is used, the applicable dust standard. Which is not the same standard as has been defined by the Act. Still, this allows this rule to be too complicated.

The sad part also about the whole concept is that MSHA has already laid out the operators' argument on how they can use PAPRs in their plans to verify plan verification.

If you look at page 10798 and 10799, under limitations of engineering controls, it is MSHA's position that technology is generally available to control respirable dust to or below the applicable dust standard, which is still not the standard as required by the Act; that MMUs employing continuous and conventional mining methods of mining, wherever unusual or adverse conditions are encountered, it is possible that available controls may be inadequate to continuously protect all miners from overexposure.

At this point it makes me believe that MSHA has given up. MSHA recognizes, unlike other mining systems, longwall MMUs may have acute dust problems. This makes it more difficult, according to the preamble, to control the work environment downwind of the shear, longwall shear operator, on a constant basis.

Then it goes on to say that no new advancements in longwall dust control technology has been reported since 1989. And I'm curious, and I wonder why this has been allowed to happen.

Now let's move on to 10802, which is the reason to not use PAPRs.

The actual fitter seal of the respirator helmets where repeated work task motions in confined work spaces, raising the visor and higher velocity along the longwall face, all may significantly reduce the actual degree of respiratory protection provided in the workplace. I can guarantee you that this will happen.

Longwall mine operators are not ready to shear on the longwall, do not look straight ahead and face the air as it comes across them. They look at the face, they watch their binders, they watch the roof, they watch the floor, they look up once in a while. And then when they cut toward the tell, they have the wind towards their back. So this would cause the PAPR to not be efficient, as you would say it was.

If you look on page 10803, you further go on to say that the expected degree of workplace respiratory protection that would be provided by a properly functioning PAPR is also affected by the orientation of the helmet to the air flow. There is a wind tunnel test that showed

clearly that at higher air flow rates, helmet efficiency was greatest when facing directly against the air flow, and was reduced when the helmet was oriented in other directions. This is extremely important, since miners are more likely to orient their heads at angles to the air flow or to face downwind than face directly into the air flow.

Other researchers have reported that the helmeted PAPR system are vulnerable to inward leakage into the wearer's breathing zone. In summary, there is a consensus among studies that the effectiveness of the PAPR is reduced when air velocities are increased. According to MSHA, you are still proposing, after all that has been said in these studies and which you chose to ignore, you're still proposing to add a PF factor of four to be applied when using a PAPR under air velocity conditions of 400 FPM or less, and a PF of two when the air velocity is equal or exceeds 800 FPM.

I'd like to try to understand this, as a quick overview. If the rule passes and becomes final, the operator has 12 months to approve his parameters. The operator submits a plan. And I question in what time period is this? Is this in a 12-month time period?

The district manager reviews the plan. How long will he take to review the plan? The district manager gives a conditional approval. What is the time period that this

occurs?

The operator has 45 days to verify. After what I've already mentioned, what is the time period now?

Now, if the operator has difficulty establishing his desired BPO, or encounters other unexpected breakdowns or unforeseen circumstances, and it's not defined what unforeseen circumstances may be, the district manager may grant an extension on top of this up to 30 days to complete the verification sampling.

Now my question is, how much time is expended to this point?

Plans today are pretty detailed, at least in the districts that I represent, but still could be better. Included in the plans that I look at and review in MSHA district three, it shows number of sprays, air velocities, required locations of sprays, water pressure required, location of methane and air readings, as well as other things listed in the ventilation plan already. The only real exception that I can see that is different in the ventilation plans today and what is proposed in this rule is that MSHA would allow plans to be revised to include worst practices, and allow the use of such items as airstream helmets. And this all goes with the plan verification process.

I'd like to move on to 75370, to further

complicate things. Or, I'm sorry, in 70.208 on page 10876. When a verification limit is exceeded, the operator must do this. Number one, he stops sampling, and make approved respiratory equipment available. This is an easy out for airstreams.

Number two, determine a cause and take action to reduce -- number three, submit in writing within five days any proposed revision to the plan parameter. This is, the time period is still going on.

Then the district manager will review, again, and how much more time has passed and lapsed that we still don't have a plan verification?

Then the district manager will notify the operator in writing if the proposed revisions is provisionally approved -- doesn't even go out and check it, but just emails him or calls him on the telephone -- at this point, and to what a resumed sampling from the point it stopped, or to begin all over again. And more time has passed.

Next the district manager may then require on top of this additional control measures before the operator may resume or initiate sampling. Now, how much more time has expired? How much time has gone by? Are you confused yet, because I am? This is all in the proposed rule. But let's look at 70.209, which further complicates things.

Now, if either verification limit is exceeded, the

administrator will approve or deny the operator's request to use supplementary controls within, here's another 30-day period. Or, as the language in the preamble says, as soon as practicable after its receipt from MSHA. What is practicable? And how much time has passed now?

I would venture that a judge would say that this language is too broad. This whole process could be like that child's song that many of us heard: this is the song that never ends, it just goes on and on, my friends.

Or it could go like this. I could be an operator, and I could sample. I could come down and say I can't comply; I've exhausted all my feasible engineering and/or administrative controls. Give me the higher dust concentration exposure, and give me PAPRs.

The bottom line is this. In the plan verification process that is laid out, nothing is really there to help, because there is no real teeth to the rule. There is nothing that holds anybody accountable for anything. And there's really not a whole lot required in the plan than what's required now, but there are a whole lot more loopholes than what is allowed now.

I would ask this panel to go back, look at the existing ventilation plans that we have in the field today, add language to the 75371 if you want to do something. Language guidelines making the operators list any and all

controls used. For example, the air, water pressure, or whatever was used that day to comply with the samples taken in. And not a minimum, but use the actual production levels that mirrors the actual production average at that time. Make them list in their plans what it took to actually come into compliance with a 2.0-milligram standard.

Some of this we do now to comply. If an operator goes out of compliance today, he has to come back into compliance. Just make the operator put in their plans everything that they use to comply to bring them back into the 2-milligram standard. Whatever they did, have them do it and present it under a new rule.

We don't need anything as far as PAPRs, which under this proposed rule shows that PAPRs will not really work effectively, as I've mentioned before. And if you really want to know what's going on in the environment, then use PDMs, real day-to-day data which could be collected, and which miners could be protected with real-life data, not PAPRs that will not protect the miners. The PDMs will make the miners and operators alert to actual conditions. It will take all the guesswork out of everything for you. It will take the guesswork out of everything for the operator, as well as the guesswork out of everything for the miners.

PDM is a simple concept. Real-life data, real-life awareness to immediately fix the problems. Everybody

wins. The miners work in a cleaner, healthy environment. The operators have a cleaner, healthy environment, plus they reduce the liabilities of miners contracting black lung.

If you drive down the road and a police officer hits you with a radar gun, and if you're speeding, you're breaking the law and you're stopped. You're made aware by the officer that you were speeding, and he tells you the speed you were going at. Maybe you also receive a lecture from the officer how your disrespect for the law has endangered not only yourself, but has endangered others as well. And then maybe he'll give you a warning, or maybe he'll give you a citation.

Your reaction is that you'll slow down and become more aware of your speeding, your reckless driving.

PDMs will have the same effect, and the outcome in protecting the workers and the miner operators. I'm asking you to go back to the well, where you have the tools and the means to make this whole process work. We need to make it a lot simpler than what this proposed rule has given us.

Not to be disrespectful, but I really believe that this proposed rule, as it is written, is nothing more than a piece of junk. Based on the miners' comments, as well as the comments offered you today by the operators, I don't believe that you can even go back to repair what is in this proposal as it is written today. Every section of this

proposed rule as it is written has had comments in a negative manner.

I hope at this time you will take it back to Mr. Lauriski and tell him the truth, that miners, industry, the general public, vendors, doctors, associations, everyone has given negative comments as to why this rule will not work. If the proposed rule passes, it will be a slap in the face to the entire mining community, with a message that tells us that MSHA's attitude is that you really don't care, that you know what's best for us, not us. It will give the mining community the impression that these hearings were a farce, and you really didn't listen, but felt like you had to go through the motions.

The passing of this rule will be the straw that breaks the camel's back. No one in the community will ever be able to be confident that your agency is really there to protect miners' health and interests.

I heard one of the operators this morning call this a Band-Aid fix. I will go on further to say it's more than a Band-Aid fix; it needs a tourniquet fix. I believe that if this rule passes, it will continue to allow the blood flow, with the eventual loss of limb and life.

We, the mining community, have offered you several comments on how to rewrite and repropose a rule that will actually work. Even this morning, with questions passed on

by your panel to the operators, it showed that there was confusion on the intent of this proposal. I heard this was said, but what did that mean? You said this, but did you mean that? And then you came back and said to the operator that if your comments are the same as they were in 2000, the panel responded by saying well, we listened to what you said. And if you look on page 42096 and 42097, you'll see what was done.

Well, I did. And just as the operators, you did to them what you did to us. You didn't respond to what they had asked you to respond to, and you didn't address their concerns, as well as you didn't address our concerns.

We have problems that need to be fixed. We have a Mine Act that lays out what you can and can't do, as prescribed by Congress. I would ask that you save everybody, that you go back and simplify and comply, even if it means taking more time to get it done. I think we need to go back and do the right thing.

I believe that this panel, if you were to go back to the drawing board, that you could actually rewrite and repropose a new rule, and have it adopted and approved in a shorter time period than a plan verification process would allow, under this proposed rule. And with that, you could also gain the confidence back from the mining community that you're about to destroy if we continue this train ride.

Thank you.

MR. NICHOLS: Thank you. Charles Larson.

MR. LARSON: Good afternoon. My name is Charles Larson, and that's spelled L-A-R-S-O-N, please, not E-N.

Boy, I am tired. Somebody asked if we were tired, and I'm about that. I work straight graveyard, and I didn't sleep a wink past 1 o'clock last night, so I've been up since a little over 12, 24 hours. Well, no, 12 hours. Whatever it is, I don't know.

But anyway. I'm here representing Local 1261. We are out of Consol Energy in Emery, Utah. There's 47 miners. We've been mining coal since the 13th of December, last year.

Up until September of last year I've been out of the coal industry for 12 years. After we were laid off in 1990, just a few days after my birthday. Anyway, I chose not to go back in the coal mine for various personal reasons that I won't go into. But anyway, during that time I had opportunity to explore other avenues of income and further my education. And due to that education I was able to start two businesses from scratch on my own and sell them both in 12 years.

So I've dealt a lot with state tax laws, licensing laws, corporation laws, and IRS laws, just to name a few. And I thought the IRS had a corner on the market on

incomprehensible rules and laws, but I tell you what, you guys take the cake. I am not kidding you, I'd rather deal with the IRS.

Anyway, I found this very hard to understand. I've not had it only for a few days, and after a while I just kind of gave up. I couldn't understand it. It boggled my mind. And I've been out of the industry for quite a while, I understand that, and I don't understand everything that's going on right now, like some of these other guys do that have been dealing with this for years and years and years. So I haven't been, and I don't understand entirely.

I have a couple of questions and comments. One is about the feasibility of engineering, and the limits of the feasibility. And I just wonder what those limits are.

If the first time someone said let's fly a rocket to the moon, and somebody said oh, that's not feasible, let's don't do it, and they's give out what would have happened, well, not too much, but otherwise we wouldn't have gone to the moon.

If somebody had said to the Wright brothers it's not very feasible to make that stick and canvas contraption fly, and they'd given up, how far behind would we be right now in the air industry?

If somebody had told me well, Chuck, it's not very feasible to start a business of your own, it's a lot of

work, and it might not work out, where would I be? I might still be on the unemployment line waiting for Consolidation Coal to call us back again, which they seem to do on regular occasions.

I have one more example of feasibility and the limits of feasibility. And everybody knows about the famous dikes in Holland. Last night, while I was having trouble sleeping -- I was watching a movie --

MR. NICHOLS: Can we get a little more to the point here of these mining rules?

MR. LARSON: Okay. That's the question. I'll forget my last example.

What are the limits of feasibility? If an engineer can engineer a piece of equipment to create more dust than we can control, certainly they should be able to engineer something to control that dust. Or they need to set a limit on their engineering to begin with.

If we can't feasibly control the dust that's put out, then that equipment shouldn't be used in the first place. That's my concern about where the feasibility goes, to the extent of feasibility. What is that, where is that extent?

And that's not an answer, to my knowledge, in this document where it's going to stop, and who's going to stop it necessarily. Or who's going to give the word that it

stops.

And I have one more personal note, and then I'm going to wrap it up, because I've got a long ways to go and I've got a graveyard shift.

I don't have any personal family members that died of black lung, but for four years I worked in a nursing home before I became a coal miner. And I had the opportunity to get to know several coal miners in that four years, that worked in the coal mines I'm going to assume before the regulations. They were quite elderly in '75. They all suffered various forms or degrees of black lung or silicosis. And I watched those men die. And many of them I knew quite well, I'd grown up around them and their children, I knew them, and they died a very horrible death.

One of them told me it was like being about two feet below the water line, and trying to swim up to get that last breath of air. And you just can't do it. You kick and kick and kick, and the surface is always just over your head. That's the way he described his problem, with his breathing problems, as he was sucking on his oxygen tank.

They died a terrible death, most of them. So my comment is don't take a step back in time. Don't step back into that century before, where there was no regulations. I can see the regulations going up and up and up here. I don't know enough about this to, I have to take other

people's words on some things, so I'm not going to comment on them, because I don't know about them myself.

But what little I understand, the regulations just start to go up and up and up. And where does it stop? When the next coal miner or coal operator can't comply, then we've got another round of laws to enact or rules to change so they can comply.

That's all I have to say, and I thank you for your time, and I appreciate it. Thank you very much.

MR. NICHOLS: Thank you. Ben Staley.

MR. STALEY: Good afternoon. I'm president of local 1261, Emery, Utah. That was my financial secretary in front of me. Ben Staley, S-T-A-L-E-Y.

I've worked in mines since 1980, both union and non-union. I chose to stay in the mines after Consol laid off. I've been in continuous-miner sections, longwalls and out-by. I've seen the mine operators take dust samples, and the way they manipulated the results. Anything from -- the section, leaving the sample out by the last cross-cut, to sending the employee to an alternative job for the day.

The operator should never be responsible for taking their own samples, ever.

Both my grandfathers died having black lung. They all started working in the coal mines before the Mine Act of '69. To increase the dust exposure limits, and then try to

minimize the effects with an airstream helmet is to condemn a lot more coal miners to an early retirement, carrying oxygen bottles. Higher health costs, and eventually a death from black lung. That's the long-term effect.

One of the short-term effects I've also already experienced personally. I'm also a former employee of Willow Creek in Utah. This mine was a very gassy mine, it also had hydrocarbons. When we was cutting, we ignited those hydrocarbons, those pulled up underneath the miner. They ignited. It was, like I say, it was very gassy, with methane, too. It wasn't a big problem. You could see whole streamers of gas that was on fire also. But it was the dust. When that dust caught on fire, she would boom. I was there. If we had had higher dust levels in there, what would it have been? Maybe I wouldn't be here.

Well, I don't have all the facts and numbers all these other gentlemen have, but I do have the experience on there. Thank you.

MR. NICHOLS: Thank you. Myron Kendell.

MR. KENDELL: My name is Myron Kendell. I am the safety committee chairman for local 1307. We are a surface mine, and I don't want to repeat some of the stuff that's already been gone over. But my concerns are that we need some clear, enforceable rules for our miners.

Surface miners don't think they have the dangers

of black lung, but we do. We have them. And we need some clear, enforceable laws that we can, guidelines that we can follow to protect our people.

And with that, that's about all I have.

MR. NICHOLS: Thank you. Tom Wilson?

MR. WILSON: My name is Tom Wilson, W-I-L-S-O-N. Miners have testified across this land in this round of public hearings, as well as in earlier forums, that airstream helmets are not being used per the manufacturer's recommendations. In light of this, MSHA should require operators to have an approved PAPR rotation program. When PAPRs are on line property.

In fact, MSHA should require all operators to have an approved respiratory equipment program, period. No exception. I'm talking construction, surface, underground, everybody. Every facet of the industry.

MSHA should also require annual paid training concerning these approved programs. And I want to stress that MSHA should require this paid training to be in addition to current paid training miners receive.

I also wouldn't care if MSHA required every operator to provide every miner at least 12 PAPRs per year. With this said, I absolutely object to, in the strongest terms possible, the use of the approved air purifying respirator as a supplemental means of compliance. This is

wrong. If MSHA says it's right, then what we'll next be considering is blinders for all miners, so that we can start allowing coal, coal dust, and float coal dust to accumulate in the mines. There is no difference.

MSHA's proposed rule encourages poor mine designs. MSHA's proposed rule will force operators to lower their standard operating procedures so to stay competitive with those operators who have no such standards. MSHA's proposed rule takes back the industry mentality approach towards health.

These proposals, combined with earlier agency actions, are gutting all the original health and safety core programs of MSHA. As well as the Mine Act. This would include the core program of enforcement. In fact, I believe this was the first core program that was gutted.

We have arrived at a point in time where the operators don't want to be responsible for examining their coal mines. Operators are currently letting MSHA -- the mines. It has become cheaper to pay MSHA's fines than employ the necessary examiners to adequately perform the task.

One note here. From the miner's perspective, it is obvious that MSHA is failing at this, also. Regulations require operators to maintain coal dust incombustible in their mines. Name one operator that cares enough to verify,

through samples, that they are maintaining their mines incombustible. They have turned this operator responsibility over to MSHA.

For further discussion on either of those two points, I refer you to the UMWA disaster report on Jim Walters Number Five. Who should be surprised that the operators want out of this sampling business, as well? And from all appearances, just like the earlier two examples, MSHA also wants to be out of this business.

I want to refer you to page 10785 of the federal register. The first point, middle column, is about the overview of proposed rule, second paragraph. MSHA believes the proposed rule would significantly improve miners' health and protection from the debilitating effects of occupational respiratory disease by limiting their exposures to respirable coal mine dust to no more than the applicable dust standards on each shift.

Many miners have testified that they are currently using respiratory equipment when dust is in compliance. Miners' explanation for this is that it is their wish not to be exposed to even the lower levels of dust. This health action by these miners is eliminated by these proposals.

Drop down to the next paragraph. Under this proposed rule, MSHA would be responsible for all compliance and abatement sampling. I support compliance determinations

being made on all samples.

The same paragraph, two sentences down. Starts with "this proposed rule specified that compliance and abatement determinations will be based on the results of single samples." Miners have already testified concerns and objections to the proposed reduction in sampling. Industry has already stopped MSHA in the past from using results of single samples. I anticipate additional legal action against the single sample determination by industry. Should this occur, and if industry stops MSHA again from utilizing the single sample, MSHA's ability to monitor compliance with the standard is even less than what has been projected.

The last sentence in that paragraph. MSHA samples will be used to set a reduced dust standard in the quartz content when the respirable dust exceeds five percent. It is my belief that this will result in less quartz being identified.

On down towards the bottom of that page, last paragraph. The sentence starts, "The VPL is defined as the tenth-highest production level recorded in the most recent 30 production shifts." I disagree with this definition. The VPL should be defined as the highest production level recorded in the most recent 30 production shifts. This is the only definition that achieves the high level of confidence refers to in proposed 7204.

Picking up at the environmental control parameters must not exceed 115 percent of the quantities specified in the ventilation plan. Miners have spoken very clearly to MSHA that engineering or environmental control parameters are not the same on non-sample days as when samples are being taken.

I spoke on the 20th in Birmingham concerning a study which verified that parameters were being upgraded during samples. I object to MSHA proposing allowing or building in any percentage of manipulation of parameters on sampling days. I also object to an agency that fails to fulfill their responsibility to take legal action when manipulation of required sampling is occurring at any percentage, let alone at a proposed 15 percent.

On page 10786, the first column. First full paragraph. This proposed rule would require that the mine operator provide a copy of any request for supplemental controls to the representative of the miners. This would provide an opportunity for miners' input prior to MSHA making any determination. Commenters have already demonstrated that miners and miners' representatives' inability to participate in the proposed verification sampling, due to the insurmountable financial cost, on commenting on what is proposed that occurs after the verification samples have been completed. This is referring

to the request being made for supplemental controls, a request that is of the utmost importance to the miners.

In reality, this would provide an opportunity for miners' input concerning activities from which he has been financially excluded. What is just and fair with this process.

I also want to point out that this is an additional financial cost above and beyond what Herman Weber referred to in Birmingham, Alabama. To my knowledge, both of these financial burdens to the miner was not considered by MSHA when they calculated the financial burden of these proposed rules.

Same page, third column. Consistent with the Mine Act and its implementing regulations, this proposed rule preserves the premise of engineering controls to the extent that they are technologically and economically feasible. Clearly, this clearly creates exceptions to preserve the primacy of engineering controls. MSHA has introduced language technologically and economically feasible. This is not found in the Mine Act, and is inappropriate in these proposals.

When the Act was first enacted, there was a stipulation in the Act when operators had trouble achieving a three-milligram standard, and later on the two-milligram standard. Those can be found on page 34 and 35 of the Act.

These proposed rules suggest this industry returning to the days of applications for a permit for non-compliance. This approach was specifically prohibited beyond 72 months from the date of the enactment of the Mine Act.

This proposed rule is written in a manner that will create many biases. One such bias that it will create is between the different MSHA districts. Stakeholders told MSHA that they wanted consistency with enforcement between districts. On the heels of this request, MSHA proposes rules that fail to provide this. Actually, it does just the opposite. The proposal shifts additional authority to the MSHA district manager without spelling out thorough definition of regulatory criteria. This increases the potential for bias between the MSHA districts.

Marvin, I also want to comment or respond to one of your further comments to brother Jim Stevenson. You stated the MSHA had explained throughout these hearings MSHA's enforcement model, and that we just didn't understand it.

My response is that we do understand MSHA's proposed enforcement model. The model we want is called the 1977 Mine Act. Thank you.

MR. NICHOLS: Thank you. Larry Kuharcik.

MR. KUHARCIK: Hello, my name is Larry Kuharcik, K-U-H-A-R-C-I-K. I'm a member of local 1702 of the United

Mine Workers. I want to thank you gentlemen for flying out here to see me again, because you're probably tired of seeing me.

I want to review here for a second. In the year 2000 we had these hearings back in Pennsylvania and West Virginia, and I testified. Back then NIOSH advisory committee to UMWA, basically we came up with three things we asked you to do on this new rule proposal. One was to lower the dust levels. What did we do? We raised them.

Two was to implement a continuous monitoring system, which we're getting in a rush and we're not going to wait for.

Three, we asked for more inspections. We got less. Why? My question is why. Why are we going downhill instead of uphill to gain, to improve?

Now, we heard today -- and thank you, Lew, for your report on PDM and everything -- but we heard today that within six months it's going to be perfected. Marvin, you said at one of the meetings I was at with you that it's been years and years and years, and we can't wait no more. Well, if it's been that long, why can't we wait six more months for a PDM to be perfected and put into use? Where we will be monitored 24/7, and know what we're working in.

I thought of this on the plane ride out here. Have any of you gentlemen ever wore an air helmet for any

reason? I testify to you before --

MR. REYNOLDS: The last time you asked this question, I said yes I have.

MR. KUHARCIK: You have?

MR. REYNOLDS: Yes.

MR. KUHARCIK: Oh, good. I'm glad someone did. I wish I'd have brought one here today, and asked for a volunteer, other than you, Larry, that never wore one. To put that thing on this morning at 8 o'clock when we started. And every 10 minutes I was going to ask Joe Main to run up there and take a bottle of solution of water and emulsion oil, and spray it on your face mask. Then I was going to ask Dennis O'Dell to come up every 20 minutes and cup his hand over the intake filter to simulate the filter being plugged up or a battery getting low. We were having fun now, weren't we? And I was going to ask you how you felt, in this nice environment.

Imagine wearing one of those where you got to crawl under shields, sweating, humidity, wearing corrective lenses plus the face shield. You can't see. Imagine those conditions and trying to wear an air helmet.

MSHA has told us for years to check the roof, you look, you listen, and you sound. You've heard that many times, I'm sure. Did you ever try to hear in an air helmet? Did you ever try to hear a post crack? A top break? With

that pump running behind your ear? You can't hear.

Jim, I'm here to tell you, air helmets is not the solution to our problem. They are not the solution to our problem, air helmets.

Now, I know this rule doesn't pertain to float coal dust. But surely we are smart enough to know that if we're going to increase the flying dust in coal mines, you're going to get your flying coal dust from your heavier coal dust, which is float dust.

Have any of you been to Beckley, West Virginia, the academy? To see a fire in coal dust explosion in the test tube, in a controlled explosion? Could you imagine putting that much more float coal dust in a mine atmosphere, with the fires we've been having in the coal mines? I testify no one -- my company had four or five fires in the last year, year and a half. Could you imagine if this float coal dust were in there, gentlemen, what's going to happen to us?

And I want to go on to the verification. Not long ago, our longwalls all went to 4160 high voltage. MSHA made the statement they were glad everybody went to the 4160 high voltage, the reason being, they said, it's so much easier for our inspectors. It's a standard cable now everybody is using. It's so much easier because they don't have a bunch of different things to check; they have one standard on this

longwall, high voltage.

Now, under this dust rule, under our new dust rule that you're proposing, every MMU including the longwall will have a different dust level. Now, what's that going to do for your inspectors? How confused are the inspectors going to be, to come to my coal mine? We have three MMU sections and one longwall; they're going to have four different dust plans to go by. The company could submit four different dust programs in one coal mine. Now, how complicated are we going to make that?

Right now we've got an approved plan to start being enforced. I'll tell you, gentlemen, I've been in this coal mining for 32 years. I've been on a safety committee for over 25 years. And when we take dust samples in a coal mine right now, I'll tell you they are a farce. Because I'll tell you what. As soon as your inspector walks in carrying a box of dust pumps, the safety supervisor runs to the telephone. It's not the standard operating procedures carried on the day we do dust pumps. He calls up on a section, make sure your water sprays is working. Make sure all your rows are watered down, the man's coming in with dust pumps. That's not standard operating procedure, Marvin. The readings we're getting even when we're testing isn't true readings.

Gentlemen, it's the black lung aspect. I

testified, and I won't go over it again, I brought you documents of 47 coal miners from out local in nine months died of black lung, average age of 47. You have them, and I wish you'd review them.

Could you imagine -- just think for a second -- in 1955 you was five years old, and you was told your grandpap died, you didn't understand. You was told he worked in a coal mine, he couldn't breathe any more. Six years later, in 1961, when you're 11, you go to Grandma's for Christmas, and your other grandpap's laying in a bed beside the Christmas tree, in a hospital bed, gasping for air. He doesn't live to the next week. He dies from working in the coal mine.

Imagine going home from these meetings today, going straight to your dad's house to go check and see if Lincare brought in his oxygen. He's setting in a chair, 78 years old, because he worked in a coal mine. And he had his lung taken out. Just imagine this. He had his lung taken out in 1993, in May, in Allegheny General Hospital in Pittsburgh. In October he gets a letter from the government cutting off all his federal black lung, stating that if you don't have a lung, you don't have black lung. Gentlemen, that's not a fictional story; that's my life. That was my grandpaps. That's my dad I'm going to go home to see.

I'm just one of thousands of coal miners. You

have to live in a coal miner's shoes in a coal miner's house to realize what this dust is going to do to us. That's the life of a coal miner. Thousands of us. Go home and listen to where you lost grandpaps, where you lost your dad, black lung. It's unbelievable. Who's responsible? The United Mine Workers isn't responsible. MSHA is not responsible for their deaths. The coal companies are. The coal companies did not provide a safe workplace. They've got to be held responsible. Who else could it be?

If they maintained a safe, healthy workplace, none of us would have black lung. But it's not happening. And now we want to let them raise the rate? We want to let them raise it eight percent?

Since 1969, how many thousands of coal miners did you believe was diagnosed with black lung? Thousands. And gentlemen, they all worked with two milligrams. What's going to happen if we increase it? What's going to happen to us, gentlemen? Who's going to be responsible for that? George, are you going to be responsible?

And a couple years from now we have a coal miner dying every six hours from black lung. Ten years from now, if we raise this rate, we'll have a coal miner dying every three hours, who do we come after? Jon? Marvin? Who, you guys? Mr. Lauriski? Who's going to stand up? Who's going to say, "I made that decision?" Who's going to take that

responsibility? Someone has got to be responsible.

Gentlemen, I'll tell you something. I said I've been on a safety committee for over 25 years, and I have respect for MSHA. Those years working with district managers, federal inspectors, I believe we'd done a lot of good for the purpose we were intended to do for the health and safety of the men in the mines.

But under this proposal, under this proposal right now you're trying to pass here, I'll tell you, gentlemen, I'm ashamed of you. And if you can go home tonight, or go to your room when you leave here, and honestly, honestly look at yourself in the face and say I know this is for the best, for the health, safety, and welfare of the coal miners, and you believe that -- then, gentlemen, I'm here looking eye to eye telling you you are miserably failing. We deserve better, and we want better. And now you've got to change this rule.

I asked you before, I challenged you to do the right thing. I'm asking you now. I want to close by telling you to do the right thing, gentlemen. This rule is not the right thing for the health, safety, and welfare of the American miners.

I thank you.

(Applause.)

MR. NICHOLS: You need to go back and read this

rule.

MR. KUHARCIK: No, Marvin, I don't have to read the rule.

MR. NICHOLS: You have sadly misstated what this rule is trying to do.

MR. KUHARCIK: No. I remember George. Now, George said a statement in Washington. You told one of our miners in Washington -- and this is on the record -- you said the problem with this rule, if you'll recall this, you said the problem with this rule is that we, you guys, haven't convinced us that it's good for us. You made that statement in Washington, Pennsylvania, to one of the union men.

And I'll tell you, we may not be doctors, we may not be attorneys. But that was an insult to me, to our intelligence. We're proud Americans that keep you warm in the winter, cool in the summer, and lights over your head in the dark. And we're smart enough to read and know what's good for us, Marvin.

MR. NICHOLS: Well, I'm not --

MR. KUHARCIK: And if we've got to be convinced that something's good for us, then it's not worth the paper it's written on.

MR. NICHOLS: I'm not saying you're not smart. I'm saying you need to understand what we're trying to do

with the rule. You talk about the raising the dust limit. I mean, we're going to have to agree to disagree that that's not what we're trying to do.

MR. KUHARCIK: Well, if that's what the rule is going to do --

MR. NICHOLS: If that's not clear to you when you read these rules, then you need to tell us how to fix it.

MR. KUHARCIK: I'll tell you how to fix it. Lower the level. Do what we did in 2000, lower the level. Wait for the PDM. What's the rush? What's the rush to go with air helmets? Wait for the PDM, lower the levels, and get more inspections. That's how to fix it.

MR. NICHOLS: We've got your comments.

MR. KUHARCIK: Thank you very much, gentlemen.

MR. NICHOLS: Thank you.

(Applause.)

MR. NICHOLS: Larry Huestis.

MR. HUESTIS: I'm Larry Huestis. That's spelled H-U-E-S-T-I-S. And I'm a surface inspector for the United Mine Workers International. I do the surface inspections for all of our surfaces.

You know, after just hearing the last speaker, it's really hard to say anything more than what he just said. You guys have heard all kinds of testimony, all kinds of statements. And all I can do is reiterate what he said.

Go home and do the right thing. Reverse this, stop it, rewrite it. And that's it. Short and sweet. You guys, you've heard it all. Now go do the right thing.

MR. NICHOLS: Thank you. Next, John Ealy.

MR. EALY: John Ealy, E-A-L-Y. Cumberland Mine, Kirby, Pennsylvania. Got 26 years' mine experience. I represent UMWA health and safety committee. Currently have high and low voltage, underground and surface courts.

One thing I do want to touch on before I even get started is, I wish Marvin was here. He must have got mad and left. But I want him to understand that we are raising the milligrams of dust in this rule.

I think I heard you testify that we can go to eight, correct?

MR. THAXTON: Theoretically, with the conditions that Joe Main was putting out at that time, yes.

MR. EALY: But it is in the rule. I mean, it can conceivably go to eight.

MR. THAXTON: No. The rule standard stays the same. It is two milligrams. The concentrations can go up to eight milligrams, under the conditions that Joe Main expressed in his testimony.

MR. EALY: However, those conditions can exist in a mine at any given point in time.

MR. THAXTON: But the standard remains at two

milligrams per cubic meter. There is no change in the standard.

MR. EALY: Okay. Well, once again, confusion exists.

I really wanted to talk to Marvin, but I'll ask you, Mr. Thaxton. Start up on a little bit of a lighter side. But say if you were to wake up in the morning to find out that the speed limit had been changed from 60 to 240 miles an hour for no apparent reason, and we were still killing people at 60 miles an hour, but now we're going 240 miles an hour. And then on the other hand, you realize that the air standards had been changed in your area; that EPA raised the levels. So now they give you a helmet. So now you're going to drive down to work at 240 miles an hour with an airstream helmet on.

I know it seems quite silly to you, but if you put it in perspective, that's what you're asking us to do. And once again, I'm not a rocket scientist, either, but I do understand that that would be quite a shock to your system.

Now, for us to go back and try to explain to the people at our mine that we're going to go to eight milligrams and be required to wear a helmet is very similar to the scenario I just painted.

Now, to go on with this, I'm going to read this for a little bit. When miners are underground, they are not

tall, short, black, white, but more importantly they're not Democrats or Republicans. Black lung does not have the ability to distinguish between all of these different types of people. These are all individuals trying to earn a hard-earned living to support a family, as well as serving a company that they work for.

This rule also encourages small and non-union operators who do not comply now to become even worse. This rule also discourages, and actually makes it financially impossible for miners to have fair representation during the plan verification period.

Furthermore, what good is a rule approval if it is not enforced? Very vividly pointed out by a gentleman this morning, and our dear friend, Mr. Murray of Pennsylvania, in various places throughout the country, nothing in this rule encourages operators to reduce dust. If they fail the verification period, they then exhaust engineering controls, which by the way are not defined. It's very possibly left up to an MSHA inspector who himself does not know what an engineering control is.

At this time the operator will apply for use of PAPRs. How is this better for the miner?

I will compare this rule to the noise rule, which MSHA still does not know how to properly administer. All a company has to do is claim that they have implemented all

engineering controls possible. Once again, not defined. Then place all the people into a hearing conservation plan, provide hearing protection, and put up hearing protection area signs. Why would we believe that a poorly-defined and confusing dust rule would lead to anything but chaos and a reduction in mine safety?

The PDM-1 is proven and ready to go into service. Why not make the use of the PDM-1 mandatory? Let's put all mines and companies on a level playing field.

Let's go forward in an effort to eliminate black lung, not encourage certain operators to cheat and lie at our expense.

We continue to fight against these so-called better rule changes. At the end of the road, if we are successful, we are no better off than we were when we started. Why can't we work together in safety's name to truly make our mines a safer place to work?

I would like to talk about RAG Cumberland Mine, where we were and where we are. Cumberland Mine will receive an award this Saturday evening in Harrisburg, Pennsylvania for the best safety record in Pennsylvania, which I am very proud to be part of, from the home safety association.

By the way, Cumberland Mine is represented by the United Mine Workers of America.

We have a level of accountability and respect between RAG and the mine workers. At one time we had a lot of issues, especially dust control on our longwall. After many changes and hours of working together, we now mine record tonnage and go head-to-head with our non-union counterparts. As bad as two milligrams are, we can successfully mine coal safely in that atmosphere.

Mr. Lauriski, we know what you are trying to do to the working-class men and women of the coal fields. We are a proud, dedicated group. Our families depend on you and the enforcement level that you are mandated to maintain. You have an obligation to us, our families, and the entire coal industry to administer and enforce a clear, well-defined law, without terms like skewing over time, parametrics, and cost factors.

What is a black lung case, let alone a life, worth? Is this decision driven by MSHA's concerns of record-keeping of miners, as stated by the panel? What is MSHA's responsibility? I'll touch on that. Administer and enforce a clear, well-defined rule, regardless of monetary cost.

As stated by the panel earlier today, apparently cost of the PDM, rather than the accuracy, is the issue. The panel actually discussed distribution and maintenance costs. What about the cost of PAPRs? How about batteries,

filters, distribution, and other costs and so forth?

In closing, gentlemen of the panel, Mr. Lauriski and operators, you are responsible for the health and safety of the men and women in the coal fields. And you are all still responsible for the lives to be lost because of poorly-written, enforced, and administered policies and laws. Let's put politics and personal agendas aside once and for all. I'm requesting that this plan be withdrawn and be reissued in a different format.

Thank you.

MR. NICHOLS: Thank you. Mark Byers.

MR. BYERS: It's Mark Byers, B-Y-E-R-S. I represent the miners, we have 130 miners at the Deserado Mine. I'm president of the local union 1984 of the MWA.

I've just got a few comments. There are some very eloquent expressions that we've heard today, and I'm not very eloquent, so I won't belabor it.

When I talk to people, I'm a mechanic, we get to work in some difficult conditions sometimes. And talking with one of the other mechanics, he said if the dust levels are allowed to go up, for any time, on the longwall, he says an airstream helmet won't help me when I'm up there trying to crawl into the shield to fix the shield. It won't fit.

We've heard the saying, if it isn't broke, don't fix it. But if you're going to fix it, make it better. We

don't need confusing, hard-to-understand rules.

Conditions get better when the inspectors are there. Always have, and they always will. A lot of these men, they're inspectors; I have the utmost respect for them. They're capable, qualified, fair, knowledgeable men. They do a good job. They need to be at the mine more. We need to see them more. Because the conditions are better then.

If you're going to fix it, make it better. Make it so we can understand it. Don't leave loopholes where one area is one standard, another area is another standard. It needs to be the same standard all the way across. That's what needs to be done.

Thank you.

MR. NICHOLS: Thank you. Tim, you're last. Come on up here.

MR. BAKER: You know, believe it or not, I'm going to try to be brief, but don't hold me to it. And I'm going to -- sorry, my name is Tim Baker, B-A-K-E-R. I work for the United Mine Workers.

I'm actually going to, without going page by page and column by column -- and I will supply you with those page numbers and exactly what I'm citing in the written document. But I'm going to go through some recommendations that you've been asking me to do, so we're going to go that direction.

Initially, though, I would like to start out by saying we've had a lot of discussion about the PDM-1. Heard a lot of discussion about mine operators want to be out of the sampling business. And I can appreciate that. And some deserve the label that they got, and others don't necessarily deserve a label that's hanging out there.

But one thing I want to make clear, that we pushed the idea of a PDM-1, we believe that's the direction we need to go. And that's going to solve a lot of problems.

We believe that also satisfies the requirement in the Act for the operators to do routine and regular sampling.

Looking through the document and realizing that the only sample that may be taken on an MMU by an operator is a verification sample -- and trust me, after hearing all the panels, they are as confused about how that works as we are -- if the PDM-1 isn't adopted and these rules move forward as they are, and their sampling is cut to a verification sampling, that's not what's in the Act, gentlemen. The Act says frequent and routine, if I'm not mistaken, that operators will take sampling. And as much as they may hate to hear this, they're not out of the sampling business then, because we're going to push and make sure that they continue to sample as they have been. And those samples will be cited, as they should be.

We think the PDM-1 fulfills that requirement for them. We'll have monitoring on a regular routine basis in all areas of the mine. But if we move in the other direction and just do verification, they won't be meeting their obligation. They have an obligation under the Act to sample, and that's the direction we'll be headed. And I'm sure that's not exactly where they'd like to be.

A couple of things I'd like to touch on is, we had talked before, and I had made mention before, that the reduction mentioned by NIOSH on respirable dust standards, a separate standard for quartz, are not in the rule.

My recommendation would be that MSHA go back and reconsider that issue or rule where both of those issues are taken into account. That you do address, and it is within the scope of the next rule, a reduction in the respirable dust levels. And that you do do a separate standard for quartz.

We think that's important for a lot of reasons. We think that's been hanging out there a long time, and that would be certainly our recommendation.

Next, with reference to PAPRs, I think we've heard a lot of testimony, and I'm not going to belabor it. We don't believe it works. We've heard industry say that they don't believe it works. We don't believe that PAPRs belong anywhere in any respirable dust role. Those are not

engineering controls, and should not be perceived as such. And I think that in this proposal, Mr. Lauriski has stopped just short of his initial request in 1997. MSHA needs to go back and needs to look at a rule that does not contain requirements for miners to wear any sort of PAPR as a supplement or as an engineering control, or in lieu of engineering controls.

And if we look at this realistically, miners have said that those who wear them are wearing them for personal protection so that they don't breathe two milligrams. That's the direction it needs to be kept. If they want to wear them, they can. That's protection against two, not against anything higher than that.

With regard to the sampling schemes that the agency is proposing here. Obviously we do not believe that fewer samples, no matter how you define those samples, whether you're going to try to convince us -- and that's obviously hard to do -- that fewer samples are better, we believe the agency needs to go back, look at the information it has been presented in these hearings, in 2000, in the dust advisory committee, and in the NIOSH criteria document, and reassess the situation.

We would suggest that the recommendation that sampling by MSHA be no less than is currently being done by the operator, and the agency, be part of that next rule.

Clearly, we believe that if we are going to instill confidence in the miners, no matter how you look at this situation, less sampling will never do that. There is skepticism at this point on the part of operator samples, and we know that. Trust me, if you go in and do three samples a year on a section, or even six, you will be in that same bag as the skeptics now put down. That nobody's going to believe that they're accurate, nobody believes it's true. And nobody believes it in between times that any parameters are going to be met. That is a hard fact. That is a reality.

This rule will in no form or fashion instill confidence in any miners that I've talked to. It just will not do it.

The other thing that is obviously of major concern is through this preamble in this rule, and through some of the rule itself, it talks about quarterly samplings. And I think we need to be more honest with what we're dealing with here.

If you're going to require quarterly sampling by the operator, let's require it. Let's not say in a rule or in a preamble that we are going to require that 85 percent of the operators aren't going to do it anyhow, because you're not going to make them, so therefore it's not really a requirement. I think we need to be more honest.

So when you go back and you look at this thing, you need to be honest with miners and say hey, we're only going to require 15 percent of the operators to quarterly sample, rather than have us search through this document or through a preamble to find these things out. Let's put it where we can find it. Make it easy. Make it easy. We can make those assessments.

I think why in some respects these hearings have been so contentious is the frustration, at least on my part, that I've got to search through a document that is barely legible, and that I've got to have 12 hours of education from the people who wrote it to find out where things are at. So let's make it simple. The recommendation here is, let's go succinctly through the process. Let's say what we're going to do, and mean what we're going to say.

We'll understand. We may not always agree with it, but we'll understand. And sometimes things won't get so contentious.

With respect to technological and economic feasibility, there is great skepticism on the part of miners that this agency will, in fact, make those determinations in an unbiased manner. And that's a fact.

I don't know where we come to common ground, and maybe those are discussions we need to have if we can get this thing pulled off the table. But we're just not real

confident that you're going to make a determination on what's economically or technologically feasible, on an unbiased basis. And maybe we need to have discussions there. I would suggest that we do that once this proposal is scrapped, which we certainly hope it is.

And I know I beat this horse, so I'll make it real brief. When we talk about parameters, when we talk about parameters that are going to be used to control dust, whether that's for verification sampling or for compliance sampling, we need to be realistic about what we're dealing with there. We need to build into the rule, and I would recommend that that rule, the next rule that comes out, have some mechanism for continuously monitoring those parameters.

I think we have all heard from one end of this country to the other than when you're there, things are fine; when you're not, the parameters aren't held up anyhow. You can claim that you now have a verifiable plan, but when you're not there, trust me, the parameters aren't going to be enforced. We need to deal with that issue, and we need to deal with that issue realistically, not from the perspective that says we're now requiring instead of three or four or eight things to be put in the ventilation plan's parameters, we're now going to require 26 things. And those 26 things are going to get us to a point where we no more know that dust levels are going to be down.

Now, we know that's not going to occur. Let's be honest with each other about that.

If they are running out of compliance and they're not implementing those particular engineering controls, or whatever they may be, environmental controls -- when you're not there, and there's only eight or nine, or whatever it happens to be in their ventilation plan -- trust me, it's not going to change when you're not there and you've required them to put 26 in. So we need to at least face that reality, and then deal with how we solve that problem. Obviously, you know what our position is on solving that problem.

The other thing is we need to be very careful. And we need to be very careful when the rule is rewritten that one thing that I've mentioned several times, we do not retard new technology. You don't build something into the rule, whether it's overt or accidental or however it happens, that actually puts the mine operator in a position of saying, well, it's better not to spend the money to look at that technology, because we don't need it, because we can get by with what we have now. Or we can by using PAPRs as long as something out there doesn't come along. And I think that's a concern we have under the rule, and we've expressed it before. We need to look at the backside effects of what a rule will do whenever we make certain requirements, and

say will it enhance the invention of technology, or will it retard it?

And I think that clearly many people have read this, and there's a lot of people out there saying that there's no need for new technology. Make the machines bigger, make them produce more, even if it's dustier. And when we get to the end of the day, we can get eight milligrams and get PAPRs. We don't need to worry about creating technology to solve the dust problem.

So we need to look at that. We need to look and say, when we write the rule, what will that do to technology. So you know, our recommendation is look further down the road at how that does affect technology.

We need to also look at full-shift sampling. And I know that in the handbook for inspectors, it gets confusing from the standpoint that there are many references in here to the inspector doing full-shift sampling. And to a layperson who picks this up, it would automatically give them reason to believe that if an individual shift was eight hours or 10 hours or 12 hours, you're going to sample them for that full shift. And that's not a fact. That's not true.

Again, we need to be clear on what we're putting out there. If it's going to be a full shift eight hours or less, and I work 10 hours, you're not sampling my full

shift. So let's put those things clearly in the handles, or wherever they may be.

As far as sampling frequency, my recommendation is those things need to be in the rule. I submit to you that if Congress, in 1969 and 1977, had not said MSHA will inspect all surface mines in their entirety twice a year, and all underground miens in their entirety twice a year, and they had allowed the agency to put it in a policy handbook, and they had said you could change it at a whim, then we would not have those inspections occurring today. That's the fear we have with the sampling being in this handbook.

We would have more inspections if it wasn't in the Act. But take it out of the handbook, let's put it in the rule where we know where it's at, and we know exactly what we're getting. That would be our recommendation.

The 95-percent confidence rate, that needs to be eliminated. Our recommendation is that if we can't agree with erring on 95-percent confidence rate to benefit the operator, and I'm sure they would sit there and say but, you know, we don't want a 95-percent confidence rate that errs on the side of the miner. If a measurement from the sampler could be off by that amount to benefit the operator, it only stands to reason it goes the other direction. How we get there and how we make it in the rule, we may have

differences on. Two is two. But if you're creating a rule that says that two is not two, three three, we can't accept that. We need to get, and the recommendation is that two stays at two, you get cited at two.

And I realize we're going to get into the argument, while we can't sustain it in court, well, somehow we're going to have to write a rule then that we will be able to sustain two milligrams at two milligrams. Nothing higher. And I'd like to see a rule with nothing higher than that. We need to get there. We need to get rid of, and our recommendation is we can just scrap the 95-percent confidence rate.

Bimonthly sampling by MSHA should be bimonthly sampling by MSHA. Our recommendation there would be that if you're going to do bimonthly sampling, just because somebody's been a good boy for a bimonthly period doesn't mean you get to skip one. That gives him four months to not be so good. We need more frequent sampling, not less sampling. Our recommendation would be to increase sampling beyond what is current done by MSHA. If you're going to take over the sampling, increase that sampling beyond what is currently being done by MSHA and the operator. And in fact, when these rules were first being talked about, there were 36 samples being taken, not 34. So we would seek to have those samples done at least at the level of 36, and

possibly more. We get the PDM-1, we can solve a lot of those problems with samplings.

Our recommendation would be that -- and I know you're going to say you know what's in it, and you've read it, and you've looked at it. But someone needs to revisit the NIOSH criteria document. Somebody needs to revisit the dust advisory committee report. Somebody needs to revisit the task force report. And we need to seriously look at what they said, and incorporate those things into our rule, because -- and I know you say you explained some of it away in the preamble, but I've read it many times and it's not there. We need to take those recommendations and make a rule around those. Build it around the PDM-1 and follow the recommendations of those three, at least those three reports.

I do have one other concern. When we begin to talk about what are normal conditions and what aren't normal conditions. And the rule talks about, you know, when you have abnormal conditions, or when you're mining under normal conditions, you have certain specifications or certain levels you must meet.

I think that almost everyone on the panel, and I know it was brought up initially by the operators, I'm not sure what's normal. Today, you know, you're mining on a longwall at nine feet of height, and tomorrow it's 13 feet

of height. And today the roof is fine, and tomorrow the roof's broke off.

What is the normal condition? We need to look at those things. Because if anything outside of a solid top and no water from the roof, or everything's ideal, that's normal, those days are few and far between. And special PAPRs used will then be just one 30-day cycle after another. So special use has got to be looked at, and I think eliminated.

We can solve these problems without PAPRs. Let's allow miners themselves to determine if they do or do not want to wear PAPRs. Let's not leave that requirement up to anyone else. Let's not make it a requirement for anyone else.

Abatement. I think that we do need to revisit the abatement issue, because that's not clear in this rule. Every citation that's issued must be abated. That's the way I understand the Act to be, and that's not what I understand in this rule if there's a violation of the dust levels. That can't go forward.

The union would recommend that if a citation is issued, that the abatement process be followed through. That means another dust sample, however that works out, but you've got to abate that. You can't reverify, you can't add a simple engineering control and have somebody say that's

fine, and that's okay. All of those must be abated, within a specific time frame too, if I might say.

I think Jim Weeks mentioned earlier, but I will mention again, we object to averaging quartz when you sample for quartz. And if I understand this correctly, we've had a whole discussion about taking five samples on a section, you average them, and that might mask a high sample that you had but they'll still be in compliance.

I would suggest that averaging three quartz samples would do the same thing. If it stands to reason that averaging respirable dust samples would result in lowering the overall exposure, I would suggest that we have the same thing here. When you find quartz, you know, at this point you have to lower the standard. Of course, we have recommended that a separate quartz standard be initiated. But outside of that, under the rule we're looking at, when you find quartz, you reduce the standard. We don't worry about averaging. I'm afraid that what we'll end up doing is reducing the level of quartz that we found based on the averaging.

I guess really in closing, because I think I've made many of the recommendations -- well, let me back up one minute.

I want to reiterate this. I had discussed last week or put on our record last week about data quality. I

think that the reports, and I think Jim Weeks did an excellent job, that the real concern that the reports that you base the use of PAPRs on, the reports are flawed. The reports are not, there is no peer-review here. There is no sound science based on these reports. Some of them are self-serving; others weren't in-mine tests. Others didn't take into consideration the conditions that exist in a mine.

So we would challenge the validity of using any of those reports to move forward the PAPR program.

And I guess finally, and I know a lot of people said before, we need to pay attention to what miners are saying. Because obviously the agency is not. The agency has not done that. We have testimony from years back making requests on more sampling, on a host of issues that we really don't need to get into at this point, they are on the record. We need to look at that record honestly, and we need to look at that record carefully, and see if we're really addressing the needs of the individuals who face the conditions in the mine on a daily basis, the ones who are going to be affected every day.

And if we can look ourselves in the mirror with this rule and say yes, we've done that, then I missed the point, I'll be honest with you, because I don't think it has. I think that this rule as proposed is going to be harmful. And some of us may not be around to see that. But

I guarantee you that if we start putting people in four or six or eight milligrams of dust with a PAPR, that the days of killing four miners or losing four miners a day from black lung will be, in fact, history. Because we'll begin to lose five, and we'll begin to lose six, and we'll begin to lose eight miners a day to black lung.

The standard has got to stay the same. You've got to engineer and push for technology that engineers dust, respirable and quartz, away. And that's the direction we need to go. I hope that we can get there.

I would respectfully request again that this rule be withdrawn. I would respectfully request that Mr. Lauriski is told how adamant the mineworkers have been. And as a matter of fact, how adamant everybody that's come to this podium has been. We need to dispense with this rule. We need to write a rule that will be effective for miners.

Thank you very much.

(Applause.)

MR. NICHOLS: Thank you. Tim was the last person that indicated they wanted to give a comment, so we thank you for your attendance and participation. And this concludes our public hearing.

(Whereupon, at 4:00 p.m., the hearing was concluded.)

//

REPORTER'S CERTIFICATE

CASE TITLE: UNDERGROUND COAL MINE VENT PROPOSED DUST RULES

HEARING DATE: May 22, 2003

LOCATION: Grand Junction, Colorado

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Mine Safety and Health Administration.

Date: May 22, 2003

Marjorie Bryant

Official Reporter

Heritage Reporting Corporation

Suite 600

1220 L Street, N. W.

Washington, D. C. 20005-4018