

Testimony of George Ellis, President
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Proposed Rulemaking on Respirable Coal Mine Dust
February 8, 2011

The Pennsylvania Coal Association (“PCA”) offers the following testimony to the Mine Safety and Health Review Administration (“MSHA”) concerning its Proposed Rule for modification of 30 C.F.R. Parts 70, 71, 72, et al. with respect to respirable dust control. The proposal was published at 75 Fed. Reg. 64412 (October 19, 2010).

PCA is an association that represents the majority of underground and surface coal mine operators in Pennsylvania. It represents large longwall mines and one section continuous miner mines.

Significant progress has been made over the last several decades concerning the prevention of coal workers’ pneumoconiosis (“CWP”). Our members strive to maintain the lowest possible levels of respirable dust in their respective operations. The improvements in respirable dust control are evidenced by the significant decrease in the incidence of CWP over the past several decades. The fact that this rulemaking is driven by a few so-called “hot spots” (areas of increased levels of CWP) attests to our meaningful improvements to control respirable dust.

The development of the continuous personal dust monitor (“CPDM”) has presented the agency with a unique opportunity to restructure respirable dust control. We believe that the agency has in the proposed rules ignored that opportunity and tried to merge the old system and the new without recognizing the possibilities of the new technology. We do not reject use of the CPDM. It is better than the existing gravimetric system but it is not perfect or perfected. It has had its problems in development and will continue to do so. But the agency has utterly failed to take advantage of this technology and its most suitable use.

We strongly object to the proposed rule in its current form. It is replete with technical and operational impracticalities and the misapplication of dust control technologies, and represents a departure from the cooperative approach necessary to eradicate coal workers’ pneumoconiosis from the industry. We recognize that MSHA, the industry and labor met and discussed respirable dust monitoring for several years and the rule reflects little or nothing of that very substantial effort.

Accordingly, we would respectfully request that MSHA set aside this rulemaking and recommend that MSHA continue on the course it set out last year when it launched the End Black Lung Initiative. That approach was all encompassing, clearly envisioned all interested parties, i.e. government, labor, healthcare and industry to work together towards our shared goal of ending Black Lung. It is unfortunate that the spirit of the End Black Lung Initiative and ability for all of us to continue to work effectively going forward has been severely compromised as a result of this proposed rulemaking.

We would also note for the record that we believe MSHA places inappropriate weight and support for the rule on studies and information presented by various personnel from NIOSH. Other than the vague references in the preamble, the agency has not discussed the report data, its methodologies and conclusions in an open manner with all interested parties. Although these presentations and reports contain information that raises concern, we are left to question the basis for its findings and recommendations. Some of this information has not undergone the appropriate level of scrutiny, nor has it been subjected to the degree of peer review required if it's going to be relied upon to drive rulemaking and attendant requirements of this magnitude. We do not believe that the data has been substantiated for accuracy or fact, nor does it necessarily support the provisions within the proposed rule. Rather, the conclusions drawn from this information appear to be predicated on the biases of its authors and presenters.

This rulemaking is premised on the existence of so-called CWP hotspots. If so-called hotspots do exist or existed within certain geographical areas and are further the result of substandard mine operation practices, they simply do not warrant industry-wide rulemaking, especially of the draconian nature of the proposed rule. The industry has made repeated requests for the underlying data which has been relied upon to drive its conclusions contained in the NIOSH reports. We simply want the ability to engage our experts with the same data points and information to determine whether the findings and conclusions are consistent with those of the report authors. MSHA has not adequately supported the need or desirability of many of the provisions within the proposed rule. We are aware that the National Mining Association has filed several freedom of information act requests for the relevant data. We would ask that such data be provided expeditiously so it can be addressed before this rulemaking is concluded.

It is clear that CWP is not the easily explained and nation-wide problem that MSHA claims as reason and justification for implementation of the one milligram standard (along with a host of 30 C.F.R. Part 75 changes, which appear to bear no relation whatsoever to preventing CWP). Whether this decreased prevalence is the result of thicker seams of coal, with decreased silica concentrations, or the decreased prevalence is the result of specific mining methods utilized throughout the region, the justification for a rule reducing the exposure level to 1.0 mg/m³ has not been adequately demonstrated. This reduction in and of itself is not justified.

This proposed rule also fails to recognize the improvements that have been made in respirable dust concentrations as operators implement advanced dust control technologies and improved work practices. In 2006, the average dust concentration for continuous miner operators in District 2 was .88 mg/m³. In 2010, this number was reduced to .73 mg/m³. This recent downward trend demonstrates that operators are already committed to lowering miners' exposure to respirable coal mine dust, which is the stated purpose of this proposed rule.

But it also must be recognized that these levels, contrary to MSHA's assertion, should not be used to justify a reduction to a 1.0 mg/m³ standard. They are based on an average of eight hours and the new rule will base compliance on full shift single samples, which is a poor industrial hygiene practice and which will create regulatory chaos.

Moreover, reliance on single samples fails to take into account for the variability in sampling. It further fails to consider the fact that the technology that will be used is relatively untested. An underground environment is not conducive to accurate sampling by any means.

The current respirable dust sampling system, which is based upon a five sample average, results in a relatively low number of citations a year. With use of the CPDM, single samples and the taking of 600,000 or more samples a year that number can be expected to skyrocket. Approximately 23 percent of all current 8-hour samples DO exceed 1.0 mg/m³ and 30 percent of DO and ODO samples exceeded 0.8 mg/m³, the standard for 10 hour shifts. Even if there is improvement, this will result in a massive number of citations.

As a point of perspective, a single five section coal mine could be required to produce, and comply, with 10,000 samples each year.¹ The notion that the industry and MSHA can administer a program that increases from an industry-wide 25,000 respirable dust compliance samples per year to 600,000 or more compliance samples per year is not credible. The idea that there will not be a massive onslaught of citations when approximately 15-23% of the current 8-hour samples each year are over 1.0 mg/m³ simply is unrealistic.

The proposed rule indicates that every exceedence of the standard will result in a plan change in addition to a new respirable dust plan separate and apart from the existing ventilation and dust control plan.

Such system will be entirely unworkable. Plans are no substitute for real rulemaking and the existing plan system itself is severely flawed. District Managers have in the past used plans to impose across-the-board requirements that cannot otherwise be justified. They can be used to circumvent notice and comment rulemaking. They can be used unfairly, arbitrarily and capriciously. The fiction is that they are the “operator’s” plans and this is utterly false. They are evaluated in litigation not on the basis of what the operator proposed, but rather on whether the District Manager’s requirements were arbitrary and capricious, a legal standard that is heavily-weighted in MSHA’s favor.

Further operators have no effective remedy in plan disputes. MSHA opposes expedited hearings before the Review Commission on this sort of issue and the current backlog precludes actual expedited consideration. The plan system is already irreparably broken. To require new plans and constant changes based on single samples will make this system worse, if that is possible.

We would also question today whether MSHA has complied with its congressionally-imposed mandate to perform a sound fiscal impact statement and analysis of the proposed rule. Even a cursory review of the fiscal information which accompanies the rule indicates that the numbers are woefully understated. The numbers provided by MSHA do not even begin to appropriate the true costs of the proposed rule and all but obviates a cost/benefit analysis of the proposal.

¹ Two samples per MMU per shift for DOs and ODOs for a section with blowing face ventilation. A mine with 10 MMUs operating 2 shifts per day 240 days a year.

MSHA has calculated the compliance costs of the proposed rule for underground coal operations to be less than \$40 million annually. This estimate drastically understates the cost of the proposed rule. The complexity of this rule and the administrative burden is extraordinary. Operators are currently required to collect approximately 25,000 designated occupation (“DO”) samples per year. The proposed rule, as we understand it, would require operators to collect nearly 600,000 DO and other designated occupation (“ODO”) samples each year. The administrative costs of the rule could easily exceed \$100 million or more per year for underground coal operators alone, and total compliance costs could easily greatly exceed MSHA’s estimates as operators are forced to adjust production schedules, modify methods of mining, and alter effective mine ventilation systems by adding overcast permanent stopping lines and additional air shafts in some situations. We believe that the proposed rule will effectively eviscerate the ability of the underground coal industry to produce coal.

The compliance cost section of the proposed rule identifies three situations in underground mines in which mine operators could incur additional cost. One of these situations is directly related to the proposed planned revision to the current 30 C.F.R. 75.332(a)(1) standard which now requires that each working section and each area where mechanized mining equipment is being ‘installed or removed shall be ventilated by a separate split of intake air directed by overcasts, undercasts or other permanent ventilation controls. Although this section of the proposed rule identifies that there could be additional costs, there is no specific discussion to outline the benefit or how much the estimated additional cost could be. In most cases, additional overcasts would have to be installed, along with the additional intake stopping line, to deliver the intake air to each individual MMU within the same working section. In many cases this would also require the installation of additional air shafts. Although this may not have been the intent of the proposed rule, the strict language of the revised 75.332(a)(1) standard dictates the addition of these permanent ventilation controls would be mandatory. Further, such costs are not justified.

Many underground mines here and elsewhere successfully operate two independent and separate MMUs within the same working section. In these cases, two separate production crews and two separate sets of mining equipment are used. Each MMU is ventilated with a separate split of intake air. This is accomplished by using permanent ventilation controls to bring intake air to the working section, and then splitting the intake air split in the working section, using temporary

ventilation controls, so that separate splits of intake air ventilate working faces on either side of the section.

This method of “fishtail” ventilation provides a separate split of intake air for each set of mining equipment associated with the individual MMU. The separate intake air split provided to each MMU has not been used to ventilate any other working section. As a result of the success of this type of ventilation scheme from a health and safety standpoint, many mining operations operate two MMUs within the same working section.

This new rule will require the redesign of currently effective mine ventilation systems. The operational cost of redesigning the ventilation systems of underground mines would be excessive and unnecessary based on our interpretation and reading the implications of the proposed rule. There is no justification for such proposal based on respirable dust control. The permanent ventilation controls have proven effective in delivering a separate split of intake air to the working section. In conjunction with the permanent ventilation controls, the approved temporary ventilation controls have proven effective in splitting the air near the working faces to provide each MMU with a separate and distinct split of intake air.

What is truly frustrating to my members is that the preamble discussion on this section completely ignores what they have been told is the intent of MSHA – fully separated splits of air from the mouth of a section to each MMU. If that is the intent then make the requirement clear and justify the need for this change as well as the anticipated costs. None of my members can ascertain how this standard improves respirable dust control. I ask the panel to tell my members in this public hearing “what is the intent of this standard?,” “what purpose does it serve?,” and “what basis does it have?”

We have several other areas of general concern. We do not believe that mandating the CPDMs, as proposed within the rule before us, is appropriate at this time. There’s been a number of deficiencies and problems that have been experienced during this period of evaluation. The unit weighs approximately six pounds. It is simply too bulky today, especially when it’s factored along with the other items that the miners are required to wear on his or her person. The CPDM should be made smaller and more ergonomic, prior to implementing on a nationwide basis. It simply needs more time to work out some of the affordability and reliability issues.

The most notable of MSHA's faulty assumptions is that the CPDM was, and is, designed as a compliance tool that can be consistently and accurately used as a single shift sampler of respirable dust. It cannot. Among other problems, it has shown to be less reliable the lower the concentration. Since measurement of lower concentrations will be critical under the proposed rule, this is of particular concern.

The technology mandated for implementation under the proposed rule is proprietary. MSHA's proposed rule, particularly without the information necessary for a critical review, forces an entire industry to rely upon a single manufacturer, who would have little incentive to further the development of the technology and/or engage in reasonable pricing practices. We have already seen the disadvantages of relying on a few suppliers for safety equipment in the area of SCSRs. To rely on a sole supplier is entirely inappropriate and unwise.

Much more importantly, the CPDM technology is most effective when used in combination with a weekly dose concept, not a single shift exposure, i.e., a weekly accumulated dose based on the amount of mass a person is exposed to. CPDM technology can be most effectively used as a personal sampler, not as a designated occupation sample. The proposed rule completely fails to recognize this.

I ask the panel and the miners in the audience to consider what the agency's choice of single shift sampling does to shift schedules. Presently many mines work a unique or different weekly schedule. Some mines work 4 ten hour day weeks and other mines employ week-end warriors – workers who work one 10 hour shift and two 12 hour shifts per week. When industry and labor were developing the weekly dose concept these type of shifts were factored into the weekly dose concept. These workers are not working extended weekly hours and, in fact, the weekend warrior schedule is less than the 40 hour week used to set the original respirable dust system. By adding a single shift exposure and the accompanying penalties, schedules such as the week-end warrior will no longer be viable.

The entire reason for a personal dust monitor is to measure the exposure of persons, not perform area sampling. That was the idea of the development of the unit and why each person's personal exposure is the proper measurement and not that of an area. This again is indication of the agency's failure to take advantage of the new technology. As the rule is written, the entire CDPM, cap light and all,

must be exchanged worker to worker. This makes absolutely no sense. Real time measurements provided by the CDPM empowers each worker to recognize his exposure increase. Workers can make adjustments in positioning and other basic changes. The industry's concept would allow for meaningful use of multiple operators where needed to maintain compliance. This rule prohibits this practice even though this concept protects each worker from overexposure. This is one example of the proposed rules failure to create a design to protect workers using optional processes rather than the prescriptive design in the proposed rules.

We believe that mine operators should be permitted to use administrative controls to minimize respirable dust exposure to the individual miners, particularly when confronted with abnormal geologic abnormalities. This was permitted with the noise rule. The proposed rule virtually eliminates the use of such controls and it is inappropriate to eliminate this useful tool, especially when the CPDM is most effective at identifying personal exposure.

One of the frustrating failures of the proposed regulation is the total lack of performance options to handle potential excursions above any compliance limit. We find no options to continue production while protecting our employees. A performance program would allow for the changing of operator to assure that no one is out of compliance while production continues. This is not permissible under this proposal.

A performance standard would also allow for the use of PPE if noncompliance is likely. Again this is not permitted in this proposal. If an operator cannot change operators and cannot use PPE and the work is at risk of noncompliance, what does the panel expect an operator to do? As one of our members commented: "under this proposal, an operator or worker can never have a bad day." A more rationally scripted proposal would address this dilemma. This proposal does not.

The proposed rule ignores Personal Protective Equipment ("PPE"), which is an effective means of reducing an individual miner's exposure to respirable dust. Other regulatory agencies give credit for the use of PPE. Most longwall mines require the use of air stream helmets or the equivalent and there is no recognition of this in the rulemaking. Even if primary reliance is on engineering controls, PPE can be used to supplement engineering controls.

We do not believe that the continued use of artificially created sample locations such as Designated Occupations are not necessary when a real time measuring system can be used to help manage the respirable dust inhalation for each individual assigned to these occupations. Personal sampling using real time readings is the major breakthrough in CDPMs and the agency appears to ignore this usage.

The proposed standard fails to incorporate a basic industrial hygiene process of hierarchy of controls. My members understand and accept the need for engineering controls to be the primary means of respirable dust control. My members understand that the engineering designs combined with personal sampling and some usages of administrative controls such as multiple operators will allow for a much more efficient system of respirable dust control that protects all workers and lessens the impact on operations. Also, my members recognize that the actual standard in some cases will be clearly impossible to meet with engineering controls alone. In some cases, even with administrative controls, the reduced standards may be almost impossible. Personal Protective Equipment (PPE) must be the third leg of the hierarchal control regime. This proposed regulation fails to take any of the basic practices into account.

My members are confused as to the logic of the X-ray program as written in the proposed regulation. Why wouldn't the proposed rule require all miners to have X-rays and a mandatory transfer if the results indicate a potential medical concern? It is illogical not to mandate every worker get X-rays and every Part 90 miner be required to transfer, if necessary.

The proposed rule requires a reduction in the standard for Part 90 miners from the present 1.0 mg/m³ standard to 0.5 mg/m³. We do not believe this is necessary. What evidence does MSHA have to show that the 1.0 mg/m³ standard that has been used to protect Part 90 miners for the past 40 years is no longer adequate? This appears to be a case of arbitrarily cutting the standard in half, since the proposed standard will be reduced by that amount?

The rule also appears to include a variety of 30 C.F.R. Part 75 changes that bear no rational relationship whatsoever to preventing CWP. We have already mentioned our concern with the revision of the current 30 C.F.R. 75.332(a)(1). The proposed revision of Section 75.332(a) is just one of many examples throughout the proposed rule of the agency proposing a change without any apparent logical basis for doing so.

Another prime example of such a change – also completely unrelated to CWP – is the proposed change related to 30 C.F.R. 75.363 and the posting, correcting and recording of hazardous conditions.

Mine examiners are well trained, certified safety professionals, who evaluate certain areas for hazardous conditions on a mine-by-mine and case-by-case basis. This proposal perverts the entire preshift and onshift examination process that is intended to prevent miners from coming to hazards that are of some imminence. To dictate through a standard, that a respirable dust concentration above a one milligram standard constitutes a “hazardous condition,” is inconsistent with the historical purpose of such examinations. An amount twice that amount is the amount a miner can be exposed to 40 hours a week for forty years. It seems ludicrous to equate that with imminent hazards such as roof conditions and accumulations of methane.

The proposed rule does not address an additional concern we have. Compliance sampling is still based in part on operator sampling. We no longer think that is appropriate. We are tired of being unfairly accused of improprieties or tampering with respirable dust samples when we know that not to be the case. We are also tired of unfairly being accused when irregularities that are part of the filter or cassette manufacturing process have caused an issue such as with low weight samples. We had hoped that such accusations would have ended with the decision in the litigation involving abnormal white centers but they have not. We think, at this point, that compliance sampling should be done only by MSHA, as the Advisory Committee recommended. The CPDM then can be used by operators in its most effective use – to evaluate and control individual exposure over a period of time. MSHA inspectors are a constant day-to-day presence in our mines. They can certainly perform the required sampling if the rule were to go forward.

The proposed rule purports to recognize that there are valid reasons to void samples but makes it clear that MSHA will utilize an overly restrictive approach to evaluating such requests. Further, it is not clear that MSHA will, in fact, void samples that should be voided. It has, in the past, refused to void samples with oversized particles if there is a certain weight gain. That means a sampling device can be dropped and filled with nonrespirable dust from the mine floor without being voided. Despite all evidence to the contrary, we have seen MSHA fail to void samples with 23 mg/m³ concentration. How any person could believe that

sort of sample is valid is beyond us. But such a sample would require an entire plan change despite the clearly erroneous sample.

We also think that this rule is inconsistent with the manner in which MSHA is behaving with respect to the use of dust control technology. For example, scrubber technology is an extremely useful means of controlling dust. MSHA's current approach seems intended to discourage its use or limit its effectiveness. We believe that MSHA must begin to support any method that will reduce individual exposure, be it scrubbers, PPE or administrative controls. I cannot emphasize this enough. MSHA must begin to recognize and encourage methods that it may not believe are the "best" theoretical approaches but that actually reduce personal exposure. We have made great progress and we should not ignore effective tools based on some bias or philosophy of regulation.

PCA appreciates this opportunity to testify and comment on the proposed rules. We would hope that the agency would step back from what we believe is a misguided approach and adopt a more cooperative and fact based concept that can be realistically implemented and help eliminate CWP.