

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

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MINE SAFETY AND HEALTH ADMINISTRATION

+ + + + +

DIESEL PARTICULATE MATTER EXPOSURE
OF UNDERGROUND METAL AND NONMETAL MINES

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

OCTOBER 7, 2003

+ + + + +

ARLINGTON, VIRGINIA

+ + + + +

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m. in Conference Room J, 25th Floor, 1100 Wilson Boulevard, Arlington, Virginia, Becki Smith, presiding.

Panel Members:

Becki Smith

Doris Cash

Deborah Green

John Kogut

Jim Petrie

George Saseen

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I-N-D-E-X

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Speakers:

Jim Sharpe, Vice President of Safety
Health Services for the National Stone,
Sand and Gravel Association 15

Mike Wright, Director, Health Safety
and Environment Department, United
Steelworkers of America 35

Peter Galvin 53

Bruce Watzman, National Mining
Association 62

Adjourn 77

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P-R-O-C-E-E-D-I-N-G-S

9:03 a.m.

CHAIRMAN SMITH: Good morning. My name is Becki Smith. I am the Deputy Director of MSHA's Office Standards, Regulations and Variances. And on behalf of Dave Lauriski, I'd like to welcome all of you here today to this public hearing.

The purpose of this hearing is to obtain input from the public on a proposed rule that was published in the Federal Register on August 14, 2003, addressing diesel particulate matter exposure of underground metal and non-metal miners.

I'd like to introduce those on the panel with me here today. To my far right is Jim Petrie. Jim is Metals District Manager from the North Central District and Chairman of the Diesel Particulate Committee.

George Saseen is from MSHA's Technical Support Organization. And on my left, Deborah Green is from the Solicitor's Office for Mine Safety and Health. Doris Cash is from the Metal and Non-Metal Organization of MSHA. And John Kogut is from MSHA's Program Evaluation Information Resource Organization.

There are other MSHA representatives in the audience who may ask questions of the panel

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1 members as they give their testimony.

2 This hearing is being held in accordance
3 with Section 101 of the Federal Mine Safety and Health
4 Act of 1977. As is the practice of this Agency,
5 formal rules of evidence will not apply. Therefore,
6 cross examination of hearing panel members will not be
7 allowed, but the panel may explain and clarify
8 provisions of the proposed rule.

9 Also, as moderator of this public hearing,
10 I reserve the right to limit the amount each speaker
11 is given, as well as the questions of the hearing
12 panel.

13 Those of you who have notified MSHA in
14 advance of your intent to speak will be allowed to
15 make your presentations first. I will call speakers
16 in the order that requests were made.

17 Following these presentations, others who
18 request an opportunity to speak will be allowed to do
19 so.

20 We invite all interested parties to
21 present their views at this hearing and if you wish to
22 speak, please be sure to sign in at the registration
23 table.

24 We will remain in session today until
25 everyone who desires to speak has an opportunity to do

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1 so. Also, if you are signing up to speak today, we
2 would like for you to sign in the general sign in
3 sheet, so we have an accurate record of attendance at
4 today's hearing.

5 We will accept written comments and data
6 at this hearing from any interested party, including
7 those who are not speaking at the hearing.

8 When I call you to speak, please come to
9 the speaker's table and begin your presentation by
10 identifying yourself and your affiliation for the
11 record. If you have a prepared statement or any
12 supporting documents for the record, please leave a
13 copy with us today.

14 You can give written comments on this
15 hearing to us today or you can send them to MSHA's
16 Office of Standards electronically, by facsimile, by
17 regular mail or hand carry using the address
18 information listed in the hearing notice.

19 In addition to this hearing today, there
20 was a hearing in Salt Lake City on September 16th; in
21 St. Louis on September 18th; and in Pittsburgh on
22 September 23rd.

23 The post-hearing comment period will end
24 on October 14 and submissions must be received on or
25 before that date.

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1 A verbatim transcript of this hearing will
2 be made as part of the record and it will be posted
3 MSHA's website. If you would like a copy sooner, you
4 can make your own arrangements with the court
5 reporter. The company information is available at the
6 registration table.

7 We will have a lunch break at noon and
8 short breaks in the morning and afternoon as
9 necessary.

10 Before we begin, I would like to give you
11 some background on the proposed rule we are addressing
12 today.

13 On January 19, 2001, MSHA published the
14 final rule addressing the health hazards to
15 underground metal and non-metal miners from exposure
16 to diesel particulate matter. The rule establishes
17 new health standards for underground metal and non-
18 metal miners by requiring use of approved equipment
19 and a low sulphur fuel and by setting an interim and
20 final concentration limit for diesel particulate
21 matter in the underground mining environment.

22 MSHA established staggered effective dates
23 for enforcement of the concentration limits. The
24 interim concentration limit of 400 micrograms per
25 cubic meter of air of total carbon was to become

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1 effective on July 20, 2002. The final concentration
2 limit of 160 micrograms per cubic meter of air of
3 total carbon was scheduled to become effective January
4 20, 2006.

5 On January 29, 2001, several mining trade
6 associations and individual mine operators challenged
7 the final rule and the United Steelworkers of America
8 intervened in the case which is now pending in the
9 District of Columbia Circuit.

10 On July 5, 2001, as a result of the
11 Federal Phase 1 settlement negotiations, MSHA
12 published two notices in the Federal Register. One
13 delayed the effective date of Section 57.5066(b)
14 related to tagging requirements in the maintenance
15 standard. The second notice proposed a rule to make
16 limited revisions to Section 57.56(b) and added a new
17 paragraph to Section 57.5067(b) regarding the
18 definition of introduced in the engine standard. The
19 final rule was published on February 27, 2002.

20 Phase 2 of the settlement agreement was
21 reached in June 2002 and under the agreement, the
22 interim concentration limit became effective on July
23 20, 2002 without further legal challenge. Mine
24 operators had one year to develop and implement good
25 faith compliance strategies to meet the interim

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1 concentration limit.

2 MSHA agreed to conduct compliance
3 assistance during the one-year period and MSHA also
4 agreed to
5 re-enter rulemaking on several other disputed
6 provisions of the 2001 rule.

7 The legal challenge to the rule has been
8 stayed pending completion of the additional
9 rulemakings.

10 On September 25, 2002, MSHA published an
11 advance notice of proposed rulemaking. MSHA noted in
12 the advance notice that the scope of the rulemaking is
13 limited to the terms of the settlement agreement and
14 addresses MSHA's intent to re-propose the interim and
15 final concentration limits.

16 On July 20, 2003, MSHA began enforcing the
17 interim final limit of 400 micrograms. The Agency's
18 enforcement policy is also based on the terms of the
19 settlement agreement and was discussed with the
20 litigants and stakeholders on July 17, 2003.

21 The enforcement policy is written into a
22 compliance guide and both the compliance guide and the
23 program policy letter are posed on MSHA's website on
24 the sole source page for diesel particulate matter.

25 On August 14, 2003, MSHA published its

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1 proposed rule which would accomplish four things.
2 Number one, revise the interim concentration limit
3 measured by total carbon to a comparable permissible
4 exposure limit measured by elemental carbon which
5 renders a more accurate diesel particulate matter
6 exposure measurement.

7 Number two, increase flexibility of
8 compliance by requiring MSHA's long-standing hierarchy
9 of controls of metal and non-metal mines, but prohibit
10 rotation of miners for compliance.

11 Number three, allow MSHA to consider
12 economic, as well as technological feasibility, in
13 determining if operators qualify for an extension of
14 time in which to meet the diesel particulate matter
15 limits.

16 And four, simplify requirements for a
17 diesel particulate matter control plan.

18 What I'd like to do now is ask Jim Petrie,
19 Chairman of the Diesel Particulate Committee to
20 present an overview of the proposed rules, after which
21 I will begin to call speakers.

22 Jim?

23 MR. PETRIE: Thanks, Becki. If I could
24 dim the lights here?

25 (Pause.)

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1 The presentation I have is very short,
2 only about 10 slides. And it compares the provisions
3 in the existing rule with what we're proposing.

4 My glasses. The provisions in the
5 existing rule that I'll be addressing are the interim
6 limit, the special extension which is the extension of
7 time requirements, the exceptions to the diesel
8 particulate limits for performing maintenance,
9 inspection and repair; the prohibition on respiratory
10 protection and the prohibition on administrative
11 controls; and lastly, the control plan requirements.

12 If any of you have any questions as I go
13 through this, just speak up and ask them and I'll try
14 to address them.

15 Under the interim limit, the existing rule
16 is based on 400 micrograms per cubic meter. We're
17 proposing to reduce that to 308 micrograms per cubic
18 meter which is 400 divided by 1.3. The 1.3 was
19 arrived at through the settlement agreement.

20 The total carbon is the surrogate in the
21 existing rule and in the proposed rule, we will change
22 that to elemental carbon.

23 Under the existing rule to concentration
24 limit, we're proposing to change that to a personal
25 exposure limit or PEL. I don't have it on here, but

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1 would also use an air factor of 1.12 time the 308 to
2 determine if there was a sitable over-exposure.

3 The proposed rule does not address the
4 final limit. MSHA believes it needs more time to
5 consider both the economic and technical feasibility
6 of controls and wanted to take separate rulemaking to
7 address the final limit.

8 The extension of time requirements under
9 the existing rule, they would apply only to the final
10 limit. Under the proposal it would apply both to the
11 interim limit as well as the final limit.

12 Under the existing rule, we would only
13 consider technological constraints, but under the
14 proposal we would consider both economic and
15 technological constraints.

16 The existing rule would limit the
17 extension of time to one per mine of not more than two
18 years or to one extension of not more than years.
19 Under the proposal, there would be no limit on the
20 number of extensions that would have to be renewed
21 every year.

22 I wanted to talk a little bit about the
23 hierarchy of control requirements. Under the existing
24 rule you have to use engineering or work practice
25 controls. There is no allowance for rotation of

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1 miners. You would have to obtain approval to use
2 personal protective equipment for inspection,
3 maintenance and repair activities. And personal
4 protective equipment, if used, would have to meet the
5 requirements of MSHA's existing metal/non-metal air
6 quality standards which are 57.5006. Those standards
7 incorporate ANSI's 88.2 1969 by reference.

8 Under the proposal, the requirements are
9 somewhat similar. You would also have to use feasible
10 administrative and engineering controls, rotation of
11 miners would be prohibited as in the existing rule.
12 You would be required to use personal protective
13 equipment or respirators, if controls were found and
14 feasible. And again, the respiratory protection
15 requirements would be tied to those requirements that
16 are in MSHA's existing air quality standards with the
17 exception that the types of filters to be used for
18 diesel particulate would be specified.

19 In regards to rotation of miners, the
20 existing rule prohibits it. It defines though
21 administrative controls uniquely as rotation of
22 miners. Any other type of work practice controls
23 would be allowed under the existing rule.

24 Under the proposal, it also limits
25 rotation of miners, but allows other administrative

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1 controls, anything except rotation of miners, so the
2 two requirements in the existing and the proposal
3 really are similar. It's just a difference in
4 wording.

5 Regarding respiratory protection
6 requirements, the proposal does not include provisions
7 on medical evaluation of respirator wearers or
8 transfer of miners, but we do solicit comments in the
9 proposal on those provisions.

10 Regarding the control plan requirements
11 under the existing rule they are triggered by a single
12 violation. Under the proposal it would be triggered
13 if a mine was not in compliance within 90 days of
14 receiving a citation. The existing rule requires
15 verification monitoring whereas the proposal does not
16 have any specific verification monitoring
17 requirements. The existing rule would require that
18 the control plan remain in effect for three years from
19 the date of the violation, whereas the proposal would
20 require that it be in effect for one year after the
21 citation is terminated.

22 And lastly, the proposal does contain
23 other conforming changes such as where the existing
24 rule talks about total carbon. We would make changes
25 in the proposed rule to reference elemental carbon or

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1 where the existing rule talks about concentration
2 limits, the proposal would change those to personal
3 exposure limits. So there are a number of minor
4 conforming changes that are in the proposal.

5 And lastly, we do have, as Becki
6 mentioned, we do have a compliance guide and program
7 policy letter posted on MSHA's website on the single
8 source diesel particulate page.

9 Any questions? Yes?

10 MR. WRIGHT: Mike Wright from the
11 Steelworkers. Jim, I just want to say again what I
12 said in a previous hearing that with respect to the
13 1.3 multiplier, I think it's important to note that
14 that wasn't just a bargained number in the settlement
15 agreement. It actually resulted from real data that
16 all of the parties saw and agreed with. If that data
17 had subsequently become invalid, then we would be
18 talking about a different multiplier here. So it's a
19 data driven number, not a negotiated number.

20 MR. PETRIE: Thank you, Mike. Yes, Jim?

21 MR. SHARPE: What's the Agency's objection
22 that we end rotation of employees to this standard?

23 MR. PETRIE: We believe that since diesel
24 particulate is considered a carcinogen, that it's not
25 appropriate to rotate workers, that it's exposing

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1 additional individuals to those contaminants.

2 Any other questions? Thank you.

3 CHAIRMAN SMITH: Thank you, Jim. We had a
4 previous request for a speaker from MARG at this
5 hearing. Do we have someone here representing MARG?

6 All right, then our first speaker will be
7 Jim Sharpe.

8 Good morning.

9 MR. SHARPE: Good morning.

10 CHAIRMAN SMITH: Do you mind clipping on a
11 lavalier and spell your name.

12 MR. SHARPE: You'll probably be able to
13 hear me without this, but I'll --

14 CHAIRMAN SMITH: Jim, if you'll spell your
15 name and give your affiliation for the reporter.

16 MR. SHARPE: My name is Jim Sharpe. The
17 last name is S-H-A-R-P-E, Vice President of Safety
18 Health Services for the National Stone, Sand and
19 Gravel Association.

20 Good morning. On behalf of NSSGA I would
21 like to thank MSHA for arranging this public hearing
22 in the D.C. Metropolitan area. It affords NSSGA the
23 opportunity which has been foreclosed by the original
24 hearing scheduled to present our views.

25 I see there are others besides myself on

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1 the schedule this morning who also intend to take
2 advantage of this opportunity to speak.

3 NSSGA based near the nation's capital is
4 the world's largest mining association by product
5 volume, representing 800 member companies and
6 approximately 120,000 working men and women in the
7 aggregates or construction materials industry. During
8 2002, a total of about 2.73 billion metric tons of
9 crushed stone, sand and gravel, valued at \$14.6
10 billion were produced and sold in the United States.

11 Based on the number of metal/non-metal
12 mines involved, MSHA's proposed DPM rule far and away
13 is now having and will continue to have its greatest
14 impact on underground stone mines which NSSGA
15 represents.

16 Of the 196 underground dieselized metal
17 and non-metal mines, 97 or nearly 50 percent, are
18 stone mines. No other metal/non-metal commodity comes
19 close to this number of mines. Of these 97
20 underground stone operations, 56 are considered small
21 by MSHA's definition of a small mine. All are
22 considered small by the definition used by the Small
23 Business Administration.

24 NSSGA plans to submit detailed, written
25 comments before the comment period closes in a week.

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1 Therefore, our purpose today will be to highlight
2 issues with DPM rulemaking that we have particular
3 concerns about.

4 But first, let me summarize NSSGA's
5 position. We believe there is insufficient exposure
6 response information to justify establishment of
7 occupational exposure limits for DPM at this time.

8 Nevertheless, our industry is committed to
9 trying to comply with the interim permissible exposure
10 limit, the PEL.

11 We steadfastly oppose the final PEL,
12 however, because of the dearth of exposure response
13 data and because we believe the final PEL is neither
14 technologically nor economically feasible.

15 We support rotation of workers as a viable
16 administrative control option and oppose any attempt
17 to impose further record keeping burdens on the
18 industry already burdened in regulatory paper, some of
19 it quite unnecessary. And if you don't know what I'm
20 talking about, it's in part the beloved HazCom
21 standard that you imposed on the industry a year ago.

22 The title of this section of my talk is
23 called the January 2001 Rulemaking Was Arbitrary and
24 Capricious. We're all sitting here today essentially
25 because of the final DPM rule issued on January 19,

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1 2001, the last day of the previous Administration.
2 This rulemaking was arbitrary and capricious for
3 several reasons. The health effects, risk
4 characterization sections of this document were not
5 independently peer-reviewed. For a regulation that
6 imposed the economic burden on an industry that this
7 one does, failure to submit this work product for
8 validation by credible independent resources is
9 inexcusable and must be rejected for that reason
10 alone.

11 You are all aware that the Office of
12 Management and Budget, OMB, has issued guidelines for
13 federal agencies to follow that are designed to
14 improve the quality of information, developed and
15 disseminated by federal agencies, including MSHA.
16 Those guidelines are currently in effect, although
17 they post dated issuance of MSHA's January 2001
18 rulemaking, they are relevant in this rulemaking,
19 nonetheless, because (1) they set a standard for
20 information quality against which all rulemaking,
21 present or past must be measured; and (2) MSHA
22 specifically mentions in its preamble to the August
23 14, 2003 proposed rule that MSHA has incorporated into
24 the record of this particular rulemaking the entire
25 existing rulemaking record including the risk

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1 assessment to the January 19, 2001 standard and
2 because MSHA says on that same page of the preamble
3 that it requests comments on the final PEL on which
4 the 2001 risk assessment is based.

5 We would expect MSHA to respond that OMB's
6 data quality guidelines do not apply because OMB's
7 recommendation of independent peer review only applies
8 to influential studies. Influential studies are those
9 that bear on a significant regulatory action defined
10 in Section 3F1 of Executive Order 12866, among other
11 things as having an annual effect on the economy of
12 \$100 million or more or adversely affecting in a
13 material way the economy, a sector of the economy,
14 productivity, competition, jobs, the environment,
15 public health or safety and so forth.

16 MSHA's economic analysis essentially
17 concludes that the rule will not cost more than \$100
18 million, nor will it have an adverse effect on a
19 sector of the economy, productivity, competition or
20 jobs. But as the industry pointed out in this
21 technical and economic feasibility analysis in 2000,
22 MSHA's figures are grossly underestimated. Besides,
23 as we will see later, the economic feasibility
24 analysis is predicated on what we believe is a flawed
25 instrument, MSHA's estimator.

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1 Further information on the weaknesses of
2 MSHA's economic analysis will be provided before the
3 comment period closes.

4 NSSGA would also point out that even to
5 prior to issuance of the OMB guidelines, Congress gave
6 all federal government agencies the standard to follow
7 when disseminating information in the context of
8 health risks. We're speaking of the principles
9 applied by Congress to risk information pursuant to
10 the Safe Water Drinking Act amendments of 1996. Those
11 guidelines constitute Appendix 2 of the Department of
12 Labor's own guidelines for ensuring and maximizing the
13 quality of the activity, utility and integrity of
14 information dated October 1, 2002.

15 We commend MSHA for having an earlier
16 version of its 2001 risk assessment independently peer
17 reviewed. Clearly, the Agency subscribes to the
18 principle of independent peer review of its work.

19 All right then, what's the final risk
20 assessment that appears in the 2001 regulation peer
21 review? Of course, even with that peer review, we
22 wonder if that process meets guidance in the current
23 OMB proposal published in the Federal Register
24 September 15, 2003 for how a peer review is to be
25 done, namely, whether the peer review (1) has any

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1 financial interest in the matter at issue; (2) has, in
2 recent years advocated a position on the specific
3 matter at issue; (3) is currently receiving or seeking
4 substantial funding from the Agency through a
5 contractor research grant, whether directly or
6 indirectly; or (4) has conducted multiple peer reviews
7 for the same agency in recent years or has conducted a
8 peer review for the same agency in the same matter in
9 recent years.

10 NSSGA respectfully asks MSHA to provide
11 this information during this rulemaking.

12 I would also like to state here that NSSGA
13 supports the comments made throughout this lengthy
14 rulemaking by Drs. Borak, Cohen and Valberg concerning
15 MSHA's risk assessments as well as the comments of YMC
16 Global.

17 Asides failing to peer review its 2001
18 risk assessment in support of this rule, we see no
19 evidence that MSHA subjected to peer review, the seven
20 so-called Haney Industrial Hygiene Studies. The
21 studies were completed during 2000 in response to
22 concerns by Mr. Haney about interferences in MSHA's
23 recommended DPM sampling method. NSSGA supports the
24 numerous comments made about these reports that were
25 submitted for the record by the MARG Coalition on July

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1 31, 2000 and supports the motion made by the National
2 Mining Association to have these documents stricken
3 from the record.

4 Although numerous criticisms of these
5 studies were mentioned by MARG, the most pertinent in
6 the context of these oral remarks, the ones I'm making
7 this morning is the following: the Haney studies and
8 reports were conducted without an apparent protocol or
9 independent peer review. They have not been published
10 nor submitted for publication. The Haney reports lack
11 the capacity for independent verification because the
12 underlying data have not been released, missing data
13 has not been accounted for and equipment procedures
14 are neither available nor standardized.

15 According to MSHA, Mr. Haney's work
16 established the submicronic impacter can eliminate
17 inherent interferences from carbonaceous minerals and
18 graphitic ores. MSHA gave Mr. Haney's research such
19 weight that the use of the submicronic impacter was
20 included in the 2001 rule. At the time the 2001 rule
21 was promulgated NIOSH was in the midst of doing its
22 own study of possible interferences with the 5040
23 analytical method for DBM, but MSHA brushed aside
24 industry's plead to wait on the results of that study,
25 saying the health risk to miners compelled it to take

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1 action to complete what by that time had become a
2 nearly decade-long rulemaking.

3 Parenthetically, MSHA was quick to point
4 out that NIOSH supported MSHA's rulemaking. That may
5 well be, but nowhere is it clear NIOSH-supported
6 setting mandatory exposure limits. In fact, NIOSH is
7 charged with recommending exposure limits to
8 regulatory agencies, but has pointedly failed to make
9 any such recommendations regarding DPM.

10 OSHA, MSHA's sister agency in the
11 Department of Labor, an agency with responsibility for
12 tens of thousands of work sites where DPM is present,
13 has done so either. But while basing a significant
14 provision of the sampling portion of its 2001
15 rulemaking on a shaky foundation, the Agency stumbled
16 yet again by requiring that the surrogate remain total
17 carbon and not elemental carbon. Its reasoning for
18 doing so was that MSHA "does not at this time know the
19 ratio between the amount of elemental carbon and the
20 amount of DPM. Accordingly, rather than deal with the
21 uncertainties in all samples which this approach would
22 present, MSHA is going to use a method that is
23 sampling for both organic carbon and elemental carbon
24 that properly provides accurate results."

25 MSHA took this action in the face of a

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1 clear recommendation from its own research agency,
2 NIOSH, that elemental carbon, not total carbon be used
3 as a surrogate for DPM in field measurements. NIOSH
4 also took the opportunity to state that measuring for
5 elemental carbon would also reduce sampling costs, an
6 important consideration for operators, particularly
7 small ones, another point that seems to have been lost
8 on the Agency.

9 NIOSH submitted its comments on July 31,
10 2000, yet MSHA disregarded them in its final 2001
11 rule. The Agency was also aware of an occupational
12 exposure limit based on elemental carbon promulgated
13 in 1996 by the Federal Republic of Germany. By
14 dismissing this expert advice, the Agency violated
15 Section 101(a)(6)(A) of the Mine Act which states that
16 "the Secretary in promulgating mandatory standards
17 dealing with toxic materials or harmful physical
18 agents under this subsection, shall set standards
19 which most accurately assure on the basis of the best
20 available evidence" -- that's my emphasis -- "that no
21 miner will suffer material impairment of health or
22 functional capacity."

23 Additionally, the provision states and I
24 quote, "In addition to the attainment of the highest
25 degree of health and safety protection to the miner,

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1 other considerations shall be the latest available
2 scientific data in the field." Also my emphasis.

3 As we all know, under consideration in
4 this rulemaking is changing the surrogate from total
5 carbon to elemental carbon. We have heard no
6 testimony from anyone during these proceedings
7 objecting to this proposed change and for the record,
8 NSSGA supports the use of elemental carbon as the
9 surrogate as well.

10 We would add, also again parenthetically,
11 that we do not believe Congress under the Mine Act
12 gave MSHA a mandate to perform research studies as it
13 has done during this rulemaking. We see that MSHA
14 itself agrees. Why else would the Agency insert into
15 the preamble of its 2001 final rule the following
16 comment by individuals representing the United Mine
17 Workers? "First of all, MSHA is not a research
18 agency. It's a regulatory agency so that it would be
19 inappropriate to initiate research. It was not
20 arbitrariness or indifference on MSHA's part that it
21 did not initiate research on coal miners, it was not
22 within their mandate and it is inappropriate in any
23 event."

24 The Agency's arbitrary and capricious
25 behavior can also be seen in this cavalier dismissal

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1 of industry complaints at the time of the 2001 rule
2 that the submicron impacter was not available in
3 sufficient quantities for sampling. Get the old
4 Bureau of Mines, BOM specifications and then have a
5 local machine shop use them to produce the impacter
6 was MSHA's advice.

7 The Agency stated it is an omission that
8 impacters were not commercially available. Even
9 taking the Agency's outrageous advice might not have
10 produced an acceptable impacter since MSHA comments
11 that sapphire nozzles are more precise, yet also
12 claims that results using either the BOM sampler or
13 one commercially made would yield the same results.
14 But it wasn't just the impacter that was not
15 available, the field cassette wasn't either.
16 According to NIOSH and industry sources, the cassettes
17 were not available for field use before August 2002.
18 If so, that would throw into question all of the
19 results from the 31 mine study which was done the fall
20 of 2001 and was used by MSHA as justification for its
21 recommended sampling methodology, use of elemental
22 carbon as a surrogate after the EC/TC ratio that forms
23 the basis of the current rulemaking.

24 MSHA's arbitrary and capricious rush to
25 rulemaking does not stop here. While commenting that

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1 it would accept any control or combination thereof,
2 aside from worker rotation and initially personal
3 protective equipment, to meet the PELs in the
4 standard, Agency pronouncements repeatedly favor
5 exhaust filtration devices.

6 But MSHA failed to mention that some
7 platinum-based filters are capable of producing levels
8 of nitrogen dioxide above MSHA's regulatory limit
9 which is 5 parts per million as a ceiling vetting.
10 The result was that some well-meaning operators, mine
11 operators, following MSHA's advice, unwittingly
12 exposed their miners to elevated levels of this air
13 pollutant, forcing immediate evacuation of the
14 affected area of the mine until levels were brought
15 under control. After the horse was out of the barn,
16 the Agency issued a program information bulletin on
17 the problem on May 31, 2002. The literature will show
18 that this problem was known for some time before MSHA
19 publicly acknowledged it.

20 We previously mentioned in the estimator.

21 MSHA's predicated its entire technical and economic
22 feasibility analysis on the use of this computerized
23 spreadsheet program for use with Microsoft XL software
24 to help mine operators to determine which control or
25 combination thereof would be most appropriate to

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1 reduce DPM levels to require concentrations. However,
2 as comments submitted to MSHA by the diesel litigation
3 group in a report dated May 21, 2002 reveal the
4 estimator is seriously flawed, in part, because it
5 assumes perfect air mixing and the existence of
6 effective ventilation for dilution of exhaust
7 particulate. Because the instrument is flawed, MSHA's
8 feasibility conclusions must be considered invalid and
9 therefore withdrawn.

10 In summary, MSHA has built a regulatory
11 record on DPM based on nonpeer-reviewed research and
12 analysis and disregarded its statutory requirements
13 under the Mine Act, based on inherently flawed
14 instruments and in a manner that has subjected miners
15 to other health risks and operators to unnecessary
16 costs, all apparently in a mad rush to get a rule out
17 the door during a politically favorable regulatory
18 climate. This behavior is more than irresponsible.
19 It may constitute regulatory misfeasance.

20 The new Administration and MSHA can
21 rightfully exclaim not guilty, but it will assume the
22 sins of its predecessor if it allows rulemaking on the
23 final PEL to move forward. We urge the Agency in the
24 strongest possible terms to drop the final PEL and to
25 do so in this rulemaking.

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1 This section of my talk is called filters
2 as a control operation and I have two pages left. So
3 I know you can cut me off at any time.

4 MSHA's emphasis on filters is apparently
5 based on its belief that this technology is the best
6 and perhaps only cost-effective way to reach this
7 disputed final PEL. Stone operators are particularly
8 troubled by this recommendation and seek filtration as
9 the choice of last resort. They hold this view for a
10 number of reasons. Filters are costly and of
11 questionable durability. Filtration systems present
12 logistical problems, especially active systems, making
13 them far less practical than passive systems. They
14 may lead to stresses on engines, or as we have seen,
15 substitution of another pollutant or pollutants in the
16 air that miners breath for the one MSHA wants
17 operators to control. A behavior change is required
18 because most equipment operators resist active
19 systems.

20 The reluctance of stone operators to
21 believe filters are a viable control technology can be
22 seen in comments NIOSH made to MSHA in a recent
23 letter, June 25, 2003 was the date of it. "With
24 regard to the availability of filters in the interim
25 standard, the experience to date has shown that while

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1 diesel particulate filters, DPF systems, for
2 retrofitting most existing diesel power-operated
3 equipment in metal and non-metal mines are
4 commercially available, the successful application of
5 these systems is predicated on solving technical and
6 operations issues associated with the circumstances
7 unique to each mine.

8 Operators will need to make informative
9 decisions regarding filter selection, retrofitting,
10 engine and equipment deployment, operation and
11 maintenance and specifically work through issues such
12 as in-use efficiencies, secondary emissions, engine
13 back thresher, DPF regeneration, DPF reliability and
14 durability.

15 We would also add other circumstances left
16 out of the recitation by NIOSH, practicality, operator
17 acceptance and cost. We would also point out that
18 since these systems are equipment-based, operators
19 must make micro-based decisions applicable to each
20 relevant piece of diesel equipment, as well as macro
21 decisions that is mine-wide that NIOSH is talking
22 about.

23 Here's what one stone operator had to say
24 about the filters, "engine filters are too large of an
25 expenditure to partake unless it is deemed necessary."

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1 Yearly maintenance is also real high for engine
2 filters. Management will not consider engine filters
3 until it is deemed as the last resort when all other
4 controls have failed."

5 Based on the aforementioned issues an
6 operator must go through when considering filters as a
7 controlled technology, it's no wonder these devices
8 are avoided because requirements to determine their
9 mine worthiness are beyond the scope of most
10 operators. Mines are set up to sell or and to make a
11 profit doing so. They're not set up to perform many
12 research projects to determine if filters are going to
13 work on every piece of equipment MSHA believes might
14 need them.

15 Clearly, an operator could hire a
16 consultant to work through the myriad of details
17 associated with determining the suitability of the
18 filtration control device; this gentleman who I quoted
19 a minute ago did. However, consultants cost money and
20 MSHA has not included consultant costs in its economic
21 analysis. This is yet another reason why MSHA's
22 economic feasibility analysis should be voided.

23 Stone operators have been committed to
24 meeting MSHA's unjustified interim PEL. Still,
25 judging by the results of MSHA's recently completed

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1 baseline studies, a significant portion are having
2 trouble doing so, 16.2 percent of the stone samples
3 were out of compliance with the interim limit.
4 Clearly, many more will be unable to comply with the
5 final PEL.

6 While stone operators are drawing upon the
7 entire panoply of recommended control measures to come
8 into compliance, except for worker rotation and
9 filtration, the most promise seems to come from
10 ventilation upgrades. This may be due in part to the
11 characteristically low ventilation rates in most
12 underground stone mines, as well as the fact that the
13 trona mines which are heavily ventilated because of
14 their gassy nature, has successfully met both MSHA's
15 interim and final PELs on the strength of ventilation
16 alone.

17 A focus on ventilation is in direct
18 contrast to recommendations from MSHA which tend to
19 downplay the necessity of making major ventilation
20 upgrades. We suspect MSHA's subordination of
21 ventilation improvements is due to the recognition,
22 its recognition that making such changes is generally
23 very costly. As such, it would void the
24 underestimates so characteristic of MSHA's economic
25 feasibility analysis.

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1 The example of one stone operator, Kerford
2 Limestone, is a case in point. This operator decided
3 that ventilation would its primary method of
4 compliance. It did so after commissioning a
5 ventilation and DPM study. The consultant was asked
6 to determine control operations and costs for
7 complying with the final PEL. The results of that
8 effort produced an estimate of \$348,450 for engine
9 improvement and \$1.15 million for improvements to the
10 ventilation system. Additional costs were proposed
11 for maintenance are estimated to range from \$25,500 to
12 \$38,000 per year.

13 To date, the mine is focused on complying
14 with the interim limit and in so doing has invested
15 \$975,000 since October 2001, primarily for ventilation
16 improvements. However, the cost also includes
17 consultant study costs, a new blasting rig and a new
18 engine for bolting rig. The bulk of this expenditure,
19 \$500,000 was to drop a new ventilation shaft. This
20 mine participated in the 31 Mine Study. In contrast
21 to the cost that is spent to date, MSHA based on
22 sampling results from the 31 Mine Study and applying
23 its estimator, for first year costs for this mine to
24 comply with the interim limit at \$155,200. MSHA
25 estimates for this mine alone are off by \$1 million.

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1 If you multiply that million by 96 other stone mines,
2 you get \$96 million and that comes very close to the
3 \$100 million cutoff for a significant regulatory
4 activity.

5 Despite these costly changes, mine
6 management believes you will need to make even further
7 changes to comply with the interim limit. They are
8 listed in this order of priority. Ventilation
9 improvements, cab improvements, other engineering
10 controls, other administrative controls, engine
11 replacement and engine filters.

12 This operator has been forced to make
13 these changes even though its highest recorded DPM
14 value from personal exposure monitoring was 400
15 micrograms per cubic meter total carbon.

16 Well, we'll stop here, but let me say
17 we're committed to listing some of these remarks more
18 fully in our written comments and to offer additional
19 comment at that time. Thank you very much for the
20 opportunity to comment.

21 CHAIRMAN SMITH: Thank you, Jim. Are
22 there questions of mr. Sharpe from the panel?

23 Bob Haney from MSHA's Technical Support
24 Center. bob?

25 MR. HANEY: Jim, do you know if any of

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1 your member mines are currently using filters for the
2 400 level limit?

3 MR. SHARPE: To my knowledge, none are.

4 MR. ELLIS: Could you repeat the question
5 for the record?

6 MR. SHARPE: The question was to my
7 knowledge are any of the member mine underground
8 dieselized stone mines using filtration to comply with
9 the interim limit? And my answer was I don't know of
10 any that are and don't believe that any are.

11 CHAIRMAN SMITH: Thank you very much.
12 Appreciate it.

13 Our next speaker is Mike Wright.

14 MR. WRIGHT: Here's my formal statement if
15 you would like it.

16 (Pause.)

17 I note these chairs still have price tags
18 on them. I wonder if that's some --

19 CHAIRMAN SMITH: You can buy a few if you
20 like.

21 MR. WRIGHT: Some subtle comment on
22 economic feasibility.

23 My name is Mike Wright and I'm privileged
24 to direct the Health Safety and Environment Department
25 at the United Steelworkers of America, a labor union

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1 with approximately 600,000 members in the U.S. and
2 Canada. They include the majority of organized metal
3 and non-metal miners in North America. Of course,
4 miners in the United States will be directly affected
5 by this rulemaking, but Canadian miners will be
6 affected as well since what MSHA does will be watched
7 by Canadian regulators and employers and of course,
8 miner workers. Obviously, we have a keen interest in
9 this rule.

10 This rulemaking is based on a January 19,
11 2001 final rule for DPM in underground metal and non-
12 metal mines, a challenge to that rule by several mine
13 operators and trade associations with subsequent
14 intervention by the USWA, our union, and a July 15,
15 2002 settlement agreement between the parties. In the
16 settlement agreement, MSHA agreed to propose changes
17 to certain provisions of the rule while other
18 provisions went into effect. It is important to note
19 that MSHA did not and could not agree to do more than
20 propose changes to the existing rule and subject those
21 changes to notice and comment rulemaking. MSHA did
22 not and could not give up its statutory mandate to
23 consider the evidence fairly and set standards which
24 "most adequately assure on the basis of the best
25 available evidence that no miner will suffer material

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1 impairment of health or functional capacity even if
2 such miner has regular exposure to the hazards dealt
3 with by such standard for the period of his working
4 life."

5 The emphasis was mine. It was the same
6 passage that Jim quoted earlier. I chose to emphasize
7 a slightly different part of it.

8 MSHA is under no legal obligation to make
9 any changes to the current standard and cannot make
10 such changes unless they comport with the requirements
11 of the Mine Act. Likewise, the USWA's participation
12 in the settlement agreement does not imply unqualified
13 support for every change MSHA has proposed. Some we
14 do support, others we oppose. Still others, we would
15 support only if modified or backed up with additional
16 worker protections. We made this clear to MSHA and
17 the industry litigants when we signed the settlement
18 agreement and we repeat it now.

19 I will not comment today on the need for a
20 DPM standard. The USWA believes that issue was fully
21 settled in the previous rulemaking which resulted in
22 the current standard. There is no evidence that
23 weakens MSHA's conclusion, I' sorry, no new evidence
24 that weakens MSHA's conclusion that DPM is a
25 carcinogen which must be controlled at the lowest

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1 feasible level.

2 Let me now turn to the specifics of the
3 MSHA proposal starting with section 57.5060(a). DPM
4 is a mixture of many different individual chemicals.
5 It is impossible to sample for all of them, so
6 sampling concentrates on a single chemical or a well-
7 defined chemical family that acts as a surrogate for
8 DPM, in general. In this rulemaking, MSHA proposes to
9 change the surrogate from total carbon to elemental
10 carbon, primarily because sampling and analysis of
11 elemental carbon is less subject to interference by
12 carbon that may be tied up in substances like oiliness
13 and cigarette smoke.

14 Since the atmosphere of a working mine
15 will generally contain less elemental carbon than
16 total carbon and will never contain more, a change in
17 the surrogate necessitates a change in the level of
18 that surrogate permitted in the air miners breathe.
19 MSHA has chosen an interim level of elemental carbon
20 equal to 308 micrograms per cubic meter, based on data
21 showing this level to be most consistent with the
22 total carbon level of 400 micrograms per cubic meter
23 which is, of course, the limit in the current
24 regulation. We agree with this change.

25 The change to EC in the new interim level

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1 of 308 are supported by the currently available
2 evidence and well explained in the preamble. However,
3 MSHA should not preclude a different finding with
4 respect to the final limit. New evidence may show
5 total carbon to be more representative than the actual
6 risk to miners. Even if elemental carbon is retained
7 as the surrogate for the final level, the conversion
8 factor between total carbon and elemental carbon may
9 be different at lower levels of total carbon.

10 MSHA also proposes to base compliance
11 determinations on personal exposure rather than
12 environmental concentrations. We agree that personal
13 sampling gives a better representation of real
14 exposure and we support the change. However, MSHA
15 should define exactly what is meant by personal
16 exposure. In particular, exposure could be defined as
17 in most Department of Labor standards for air
18 contaminants as and I'm quoting here, "the exposure
19 that would occur if the employee were not using
20 respiratory protective equipment." That's from the
21 OSHA cadmium standard. Otherwise, OSHA will be
22 embroiled in endless disputes over how much time every
23 sample employee wore a respirator, the effective
24 protection factor for that employee under those
25 circumstances and the concentrations of DPM during

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1 that period.

2 Unfortunately, basing compliance
3 determinations on personal sampling has one serious
4 drawback. An operator can cheat by moving a miner
5 being sampled to a lower exposure area. Therefore,
6 the standard must authorize MSHA inspectors to insist
7 that every sampled miner perform work that is
8 representative of his or her normal routine. MSHA
9 inspectors must also be empowered to backup personal
10 sampling with area sampling where necessary to full
11 characterize representative exposures.

12 In its August 14, 2003 Federal Register
13 notice, MSHA discussed the use of an air factor based
14 on the 95 percent confidence limit of the elemental
15 carbon measurement. A citation would be issued only
16 if MSHA was 95 percent confident that the exposure
17 limit had been exceeded.

18 Some commenters see this standard
19 primarily as a legal requirement with penalties for
20 non-compliance. They argue that no penalty should be
21 assessed unless MSHA is sure that the standard has
22 been violated. Others see the standard primarily as a
23 public health measure which at the very least should
24 be triggered with a preponderance of the evidence,
25 indicates that miners are at risk. In fact, the

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1 standard is both a legal requirement and a public
2 health measure.

3 In the notice, MSHA states that the
4 prevailing practice under other OSHA and MSHA
5 standards has been to cite only when noncompliance is
6 indicated at a high level of confidence, the legal
7 approach.

8 However, many OSHA standards including the
9 most recent also protect public health through the use
10 of an "action level", typically half the exposure
11 limit at which additional sampling and some controls
12 kick in. The USWA recognizes the legal difficulty of
13 citing for noncompliance where the Agency is not
14 confident that noncompliance has occurred. But we
15 suggest that MSHA consider the use of action levels in
16 the rulemaking for the final DPM exposure limit and
17 other air contaminants as a way to protect public
18 health as well as the legal rights of employers.

19 Turning now to Section 57.5060(c). MSHA
20 proposes to modify the requirements for special
21 extensions of time granted to operators to come into
22 compliance with the applicable exposure limits.
23 Specifically, operators can seek extensions of time to
24 comply with both the interim and final limits and MSHA
25 could grant more than one extension. The length of

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1 the extension would be limited to one year. Finally,
2 MSHA could grant an extension for economic, as well as
3 technological reasons.

4 The USWA does not support these changes
5 with respect to the interim standard. The current
6 standard found the interim level to be feasible
7 without the need for any special extensions and that
8 is the legal status quo. In last year's settlement
9 agreement, we agreed to a reopening of the record
10 because the mine operators insisted that the new
11 evidence would show that some mines might need the
12 special extensions to come into compliance with the
13 interim level. However, in the intervening 15 months,
14 neither the industry nor NIOSH nor any other party has
15 submitted any convincing evidence showing the need for
16 the extraordinary relief from the interim limit which
17 would be granted by a special extension. Indeed, the
18 entire industry has already had a one-year de facto
19 special extension by MSHA's decision, to which we
20 agree, to delay the enforcement of the interim limit.

21 In short, the industry has not met its
22 burden to show that MSHA's original decision with
23 respect to special extensions should be abandoned.
24 The evidence in this record simply does not contain
25 sufficient grounds for changing this standard to allow

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1 special extensions for compliance with the interim
2 level.

3 To be sure, deliveries of filters or other
4 equipment necessary for compliance may sometimes be
5 delayed due to factors beyond the mine operators'
6 control, that problem is routine and it is routinely
7 handled by MSHA in the course of its enforcement
8 activities by giving sufficient time for abatement.
9 There is no reason to overlay that process with this
10 new regulatory device of special extensions.

11 We believe remaining issues regarding
12 special extensions, their duration, renewability and
13 whether economic feasibility should be considered
14 should be left to the rulemaking on the final limit
15 where we do support special exceptions. However, we
16 are troubled by the discussion of economic
17 infeasibility in the Federal Register's notice.

18 Economic factors are already a de facto
19 part of feasibility determinations. Our union has
20 represented workers handling plutonium, nerve gas,
21 tetraethyl lead, nickel carbonyl, infectious disease
22 agents and shock-sensitive explosives. We know it is
23 possible to solve any industrial hygiene or safety
24 problem with enough money. However, no one believes
25 that a control is feasible, if it is so exotic or

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1 expensive that it would drive the industry out of
2 business. That kind of feasibility determination is a
3 required part of rulemaking. A standard must be
4 economically feasible for the industry, taken as a
5 whole.

6 But what should happen after a standard
7 has been promulgated and a mine operator claims that a
8 control is simply too expensive for his or her mine
9 even though it is available and would be effective?
10 We believe that MSHA's enforcement process already
11 contains enough flexibility to deal with that
12 situation and there is no need to modify the
13 standard's provision regarding the criterion for
14 special extensions.

15 One particular problem with the proposed
16 change is that it does not contain any definition of
17 economic feasibility. The Federal Register notice
18 contains an example where the cost of retrofitting
19 controls on to a piece of equipment would exceed the
20 value of the equipment. We agree that replacing the
21 equipment is a better alternative than retrofitting
22 the controls, but only if the new equipment is ordered
23 immediately. Economically infeasible is not the same
24 thing as expensive or even economically inefficient.
25 Those are three different concepts.

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1 In general, controls should be considered
2 economically feasible if their implementation would
3 not bankrupt the company or force the mine to close.

4 In addition, the proposal does not
5 indicate how MSHA would enforce the new language.
6 Would MSHA demand a complete financial accounting?
7 Would that accounting cover just the mine or the
8 entire company? Would the miners' representative have
9 access to those records as well? Would individual
10 miners?

11 USWA would object strenuously to any
12 provision that did not allow the miner's
13 representative access to all the records used by MSHA
14 to determine the feasibility and controls of a
15 particular mine. In short, MSHA should withdraw this
16 aspect of its proposal until such time as the Agency
17 can fully consider its ramifications.

18 Turning now to Section 57.5060(d), this
19 section currently specifies the areas under which
20 miners can work in concentrations of DPM above the
21 concentration limit. Much of it becomes moot if the
22 concentration limit is changed to an exposure limit.
23 MSHA proposes to delete this section as written and
24 substitute a requirement to use the standard hierarchy
25 of controls.

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1 USWA recognizes that there may be areas or
2 activities where the PEL cannot be met. For the most
3 part, these should be areas that miners enter for
4 short periods under unusual circumstances. An example
5 would be fixing a conveyor in an incline that is also
6 used as an air return, or driving an effective soup
7 tram to an area where it can be repaired. In these
8 cases, engineering controls and work practices might
9 not be feasible and the standard should allow the use
10 of respirators. However, routine use of respirators
11 for any normal production job or activity should be
12 allowed only under a special extension and only for
13 the final exposure limit or where controls are in the
14 process of being installed.

15 Under the hierarchy of controls, MSHA
16 considers the control to be effective and therefore
17 required if it can reduce exposure by 25 percent. We
18 agree in part with this cut off, but a control should
19 also be considered effective if it can bring the
20 operator into compliance no matter what the percent
21 reduction in exposure.

22 If, for example, the exposure on a
23 particular job is 340 micrograms per cubic meter, and
24 a proposed control can reduce that exposure to 290
25 micrograms per cubic meter, that control should be

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1 required even though it only achieves a 14 percent
2 reduction.

3 The current standard bars the use of
4 respirators as methods of compliance, in general,
5 although they are permitted for some activities under
6 the current provisions of 57.5060(d).

7 One of the defects of the current standard
8 is that it does not contain requirements for an
9 effective respirator program. MSHA has begun to
10 correct that in the proposed standard, but the
11 requirements are grossly inadequate and threatened
12 both the lives and the livelihoods of miners. In
13 particular, there is no explicit requirement for
14 medical evaluations for miners required to wear
15 respirators.

16 As MSHA's Federal Register notice itself
17 points out, quoting the preamble to OSHA's respirator
18 standard, "specific medical conditions can compromise
19 an employee's ability to tolerate the physiological
20 burdens imposed by respirator use, thereby placing the
21 employee at increased risk of illness, injury and even
22 death." A mine operator who puts a miner in a
23 respirator without a medical evaluation is risking
24 that miner's life. A decision by MSHA to authorize
25 that would border on criminal negligence. MSHA

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1 standards are supposed to save lives, not threaten
2 them.

3 Transfer provisions go hand in hand with
4 medical evaluations for workers unable to wear
5 respirators. Such miners must be placed in areas that
6 do not require respirators with no loss in earnings.
7 It is fundamentally unfair for a miner to lose his or
8 her job or suffer a loss of income simply because his
9 or her employer cannot meet the obligations of the
10 standard.

11 In addition, miners fearing the loss of a
12 job, if they flunk the respirator evaluation, may not
13 answer the questions truthfully or may resist the
14 evaluation all together. Transfer rights with full
15 earnings protection are required for sound medical
16 reasons. They are also required for legal reasons.
17 In the Federal Register notice, MSHA references
18 section 101(a)(7) of the Mine Act which states, in
19 pertinent part, and I'm quoting, "In addition, where
20 appropriate, any such mandatory standard shall
21 prescribe the type and frequency of medical
22 examinations or other tests which shall be made
23 available by the operator at his cost to miners
24 exposed to such hazards in order to most effectively
25 determine whether the health of the miners is

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1 adversely affected by such exposure. Where
2 appropriate, the mandatory standard shall provide that
3 where a determination is made that a miner may suffer
4 material impairment of health or functional capacity
5 by reason of exposure to hazard covered by such
6 mandatory standard. That miner shall be removed from
7 such exposure and reassigned. Any miner transferred
8 as a result of such exposure shall continue to receive
9 compensation for such work at no less than the regular
10 rate of pay from miners in the classification such
11 miner held immediately prior to this transfer."

12 In the preamble to the proposed standard,
13 MSHA describes this section of the Mine Act as
14 establishing the statutory authority for the Agency to
15 promulgate medical evaluation and transfer provisions.

16 However, it does much more than simply establish the
17 statutory authority. It establishes a requirement
18 that MSHA include such provisions when an appropriate
19 medical protocol is available and where transfers will
20 protect miners' health. Once those findings are made
21 and they are surely true for respirator users, the
22 Agency has no discretion.

23 We do not believe such provisions will be
24 expensive. Miners with respiratory or cardiovascular
25 conditions who are unable to tolerate the increased

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1 breathing resistance causes by negative pressure
2 respirators may be able to wear positive pressure
3 respirators without any problem. The OSHA lead
4 standard requires medical evaluations for respirator
5 users. Likewise, it requires transfers from regulated
6 area for a variety of conditions. Many workers have
7 been transferred for high lead blood levels or medical
8 conditions like kidney disease, but every few have
9 ever been transferred because of their inability to
10 wear a negative or positive pressure respirator.

11 Respirators are hard to tolerate under the
12 best of conditions. It is virtually impossible to
13 wear one effectively for a full work shift.
14 Therefore, any standards should mandate break time
15 where a miner can remove his or her respirator in
16 clean air. The clean air can be provided by
17 outfitting an enclosed booth with filtered air or by
18 providing fresh air to an area close to the miner's
19 work station. At a minimum, a 10-minute break should
20 be allowed every two hours.

21 MSHA proposes to retain the ban on
22 employee rotation for the purpose of compliance and we
23 agree. DPM is a carcinogen. Rotation may reduce the
24 risk to an individual miner, but it will not
25 necessarily reduce the overall risk to the population

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1 of miners. In fact, depending on the shape of the
2 dose response curve, it may actually increase the
3 population risk, resulting in more cancer overall.

4 Section 57.5062. The current standard
5 requires mine operators to establish a DPM control
6 plan. MSHA proposes to retain this requirement. We
7 strongly agree. Planning is essential for any complex
8 activity. Mine operators have spent a great deal of
9 time and money in this rulemaking, arguing that the
10 control of DPM is exceedingly complex. It is hard to
11 understand how they can simultaneously argue that
12 control plans are unnecessary.

13 Turning to Table 57.5075(A). The table of
14 recording requirements does not seem to include the
15 records of exposure of miners required by Section
16 57.5071(A). These records are useful to mine
17 operators and the miners' representatives and MSHA and
18 they should be retained for a minimum of five years.
19 We assume that was either an oversight or something we
20 missed in some other part of the standard.

21 Finally, let me note that some members of
22 the public health community may submit comments or
23 briefs between now and October 14th. While those
24 comments may not agree with ours in every respect, we
25 believe they should be given the same weight as the

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1 comments of any other party. Miners' health is after
2 all a subset of public health. We welcome the
3 participation of any person or group that wants to see
4 a strong, effective DPM regulation. That concludes my
5 oral testimony that's written. I just want to add one
6 thing parenthetically that is I want to thank MSHA for
7 all of the work you have put into this regulation,
8 both in the previous Administration and the current
9 Administration. I know that a lot of midnight oil has
10 been burned around here and a lot more will be burned.

11 Some day miners will be protected against this
12 problem and it will be due, in large measure, to your
13 efforts and we applaud you for that.

14 I'm ready to answer questions.

15 CHAIRMAN SMITH: Thank you, Mike.

16 Questions?

17 No. Thank you very much. We appreciate it.

18 MR. WRIGHT: Thank you.

19 CHAIRMAN SMITH: I think we're going to
20 take about a 10-minute break. We'll resume at 20
21 after.

22 MR. WRIGHT: I have more copies of my
23 comments if anyone wants them, I'll leave them on the
24 table.

25 CHAIRMAN SMITH: Thank you.

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1 (Whereupon, the foregoing matter went off
2 the record at 10:09 a.m. and went back on
3 the record at 10:25 a.m.)

4 CHAIRMAN SMITH: If we could get started,
5 please. Our next speaker is Pete Galvin, and there he
6 is. Good morning, Pete.

7 MR. GALVIN: Good morning, Becki. Thank
8 you. You can hear okay? Yes, no?

9 CHAIRMAN SMITH: If you would spell your
10 name for the record, please.

11 MR. GALVIN: Deborah, can you hear me now?
12 Can you hear me now?

13 MS. GREEN: It's just not real clear.

14 MR. GALVIN: Okay. The name for the
15 record is Galvin, G-A-L-V-I-N. I want to begin by
16 thanking the Secretary for granting me permission to
17 make a presentation at these hearings. As a former
18 employee of the Department of Labor, such permission
19 is required in order to participate in DOL hearings,
20 and I am, of course, bound not to reveal deliberative
21 information which I am aware.

22 I would also like to note that according
23 to DOL Ethics Council, no such permission is required
24 for me to submit written comments nor to participate
25 in litigation in connection with this or other

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1 rulemakings.

2 I understand that a copy of the
3 communications between myself and the Department on
4 this matter are being made a part of the record, and
5 if there are any questions about that, I will submit a
6 copy along with my final written statement.

7 For those here whom I haven't met, I
8 should explain that I retired from the Department this
9 May after 30 years. I served as Co-Counsel for
10 Administrative Law in the Office of the Solicitor
11 downtown and provided expert advice to all of the
12 agencies of the Department on the rulemaking process.

13 In addition, I spent a few years on detailed MSHA and
14 was extensively involved in the development of the
15 2001 rule on DPM, serving as a liaison between the
16 Committee and the Assistant Secretary.

17 While with MSHA, I was constantly amazed
18 by the technical expertise and practical approach of
19 the Agency staff as well as their professionalism and
20 integrity. I was proud, really proud, to have the
21 opportunity to work with you all.

22 My comments at this time are on behalf of
23 myself only and have been prepared without
24 compensation of any sort. This could change as the
25 process continues, and consultations are ongoing among

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1 the steel workers, mine workers, health experts,
2 administrative law experts and others interested both
3 in this rulemaking and in MSHA's implementation of the
4 rule. Given my background, I will be raising factual
5 and legal questions about some of the proposals which
6 others are bound by prior commitment to support. I
7 would remind the Agency and the mining community that
8 by law rulemaking is not a negotiation; rather, the
9 law requires certain findings be made.

10 Today, all I'm going to do is just
11 summarize a few points I'll be making in extensive
12 detail in my written comments. First, health risks.
13 I am really disappointed to continue to see some mine
14 operators continuing to question the significance of
15 the risk posed by DPM to the nation's underground
16 miners -- risks shared by supervisors and operators
17 underground as well.

18 The Agency had its risk assessment
19 independently peer reviewed. The findings by EPA
20 since that time have confirmed the seriousness of risk
21 at the much lower levels characteristic of outdoor
22 environmental exposure. Unfortunately, however, some
23 mine operators may be getting incorrect information
24 about the science from those with ulterior motives.
25 MSHA owes it to the mining community to put any such

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1 doubts to rest, and I would urge the NMA to join in
2 that effort.

3 Two, feasibility. I am pleased MSHA has
4 decided to reopen the question of feasibility because
5 it's my contention that based on the updated record
6 it's now feasibility for the mine industry to more
7 rapidly implement the final limit than was initially
8 contemplated by the Agency and ultimately to lower the
9 final limit.

10 In this regard, I will be pointing out
11 that some key assumptions used in the regulatory -- I
12 say regulatory flexibility analysis but it's a
13 regulatory economic analysis for the final rule have
14 turned out to be significant overestimates and need to
15 be adjusted.

16 Three, proposed changes affecting
17 implementation of the final rule. Although the Agency
18 has indicated that the changes to the proposed rule
19 have to do with the interim limit, I've counted at
20 least seven changes which actually alter how the final
21 rule would be limited -- I'm sorry, how the final
22 limit would be implemented. A simple example is the
23 proposed amendment to the allow operators extensions
24 of time to meet the final limit due to economic
25 considerations. Such changes cannot be made at this

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1 time because they require a determination that,
2 contrary to the Agency's previous finding, it's not
3 feasible for the industry as a whole to meet the final
4 limit as set forth in the rule.

5 Four, extensions of time to comply with
6 the interim limit. The current rule contains no such
7 extensions. After delaying enforcement of the interim
8 limit for a year and providing extensive technical
9 assistance to any of the 200 or so covered operators
10 who requested it, there's nothing in the record to
11 support the need for such extensions. In my written
12 comments, I will also be separately addressing the
13 question as to whether any extension is warranted for
14 the final limit, even for technological reasons given
15 the record at this point in time.

16 Fifth, operator exceptions from the
17 interim limit. Current rule permits the interim and
18 final limit to be exceeded only for short-term
19 activities in defined areas of the mine. In such
20 cases, respiratory protection has to be used to
21 protect the miners. The proposed rule would expand
22 the limited scope exception into a broad new approach
23 similar to that under the noise rule, drawing
24 operators, MSHA and the Review Commission into
25 findings about individual operator technological and

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1 economic feasibility. My comments will challenge the
2 justification for such a fundamental change to the
3 rule and point to a number of problems it will create.

4 My comments will also address the need for
5 shortcomings in the current proposed rule concerning
6 the requirements for the use of PPE in the narrow
7 circumstances where it is appropriate.

8 Six, type of limit. Concentration limit
9 is inherently more protective than a PEL of equivalent
10 value. A miner moves throughout the day and there
11 are some areas which will have limited DPM exposure.
12 The miners' exposure in every area of the mine is
13 limited as required under a concentration limit. His
14 or her personal exposure for the day is going to be
15 less than it would be if no such limit were in place.

16 Accordingly, the Agency cannot possibly find that an
17 interim PEL of 500 micrograms of DPM per cubic meter
18 is as protective as an interim concentration limit of
19 500 micrograms of DPM per cubic meter. The Agency
20 made the findings necessary to adopt a concentration
21 limit based on an assessment of risk, and it cannot
22 adopt a PEL unless it can figure out a way to convert
23 the concentration limit to a PEL that offers an
24 equivalent amount of protection.

25 Type of sampling. Area and occupational

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1 sampling have an appropriate role to play in
2 determining compliance with a concentration limit, and
3 the record provides examples of such situations. They
4 can also provide an important check to be sure
5 personal sampling is not being manipulated.
6 Accordingly, the Agency has no basis for asserting
7 that eliminating such sampling approaches will not
8 diminish miner protection.

9 Area and occupational sampling are a well
10 recognized MSHA practice and have been in use for over
11 30 years. Such an approach to sampling will be
12 particularly important if the compliance surrogate
13 remains total carbon for the final rule, something the
14 Agency is not yet prepared to determine. Sound
15 administrative practices can ensure that inspectors
16 select the proper sampling method, minimizing disputes
17 that might otherwise arise in this regard, because
18 operators in this sector are not yet fully familiar
19 with the practice.

20 Surrogate. I think everybody acknowledges
21 that it would be great to use elemental carbon for the
22 surrogate. Nobody wants to have dispute over
23 interferences, clouding individual enforcement
24 decisions. Unfortunately, however, it isn't that
25 easy, and it's going to be harder, if not impossible,

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1 for the final limit when the effects of filtration
2 have to be taken into account. My comments will go
3 into this in some detail.

4 In addition, I'm going to be raising
5 significant questions about the conclusions in the 31
6 mine study that's not possible using the total carbon
7 method to deal with interferences from oil mist and
8 smoking. For example, I was particularly surprised to
9 see that there was no new evidence since the
10 completion of the 2001 rule about the effect of
11 distance on smoking interferences, yet the Agency
12 suddenly reversed its conclusion. I find it hard to
13 believe the Agency's technical experts who supposedly
14 authored this report came to such conclusions, and I
15 would like the Agency to clarify that point for the
16 record.

17 In addition, I intend to remind the Agency
18 that there's an alternative to measuring the ambient
19 DPM, mainly a solution adopted by the coal sector. I
20 think it's important as the Agency reconsiders the
21 final limit to be wary of those who suggest that
22 measurement complications provide a legal excuse for
23 doing nothing.

24 Ninth, operator DPM control plans and
25 verification sampling. I'm really at a loss to

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1 explain how operators were able to maintain control
2 plans during the year of pre-enforcement compliance
3 assistance but cannot do so in the future even if
4 they're cited. The Agency has not pointed to any
5 evidence that the current requirements are not
6 feasible for the mining industry as a whole. I'll
7 also be making comments on other points and in
8 particular I'll be supporting the concern expressed by
9 the Center for Progressive Regulation about the highly
10 questionable legality of the Agency's extended
11 suspension of the provisions of the rule that should
12 already be in effect -- suspensions that continue to
13 this day. That comment, by the way, for those who
14 haven't seen it, is now available online. Last I
15 looked yesterday it's under the ANPRM heading. The
16 Agency should have long since sought a legal opinion
17 from the Department of Justice.

18 This concludes my remarks. I hope you
19 will find my comments useful when they are submitted
20 next week and will carefully consider the supportive
21 material to which -- that I'll be providing with them.

22 Thank you very much.

23 CHAIRMAN SMITH: Thank you, Pete.
24 Questions of Mr. Galvin? Thank you.

25 MR. GALVIN: Am I entitled to a Jolly

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1 Rancher?

2 CHAIRMAN SMITH: Yes, you are. Our next
3 speaker is Bruce Watzman. Bruce, you might want to
4 clip it further down. It seems to do a little better.

5 MR. WATZMAN: On my tie.

6 CHAIRMAN SMITH: A little less sensitive
7 there.

8 MR. WATZMAN: Better? Thank you. I'm
9 Bruce Watzman, that's W-A-T-Z-M-A-N, of the National
10 Mining Association. On behalf of the NMA members, I
11 appreciate the opportunity to present comments on MSHA
12 proposed rule to the control diesel particulate matter
13 exposure of underground metal and non-metal miners.
14 We'll be filing written comments before the close of
15 the comment period, but having attended two of the
16 three public hearings that have been conducted and
17 having reviewed the transcript of the hearing
18 conducted in St. Louis, there are some issues that I
19 wanted to discuss personally.

20 As you're aware, as you referenced
21 earlier, and as explained in great detail in the
22 preamble, the proposed rule is an outgrowth of a
23 partial settlement agreement entered into by the
24 parties, including NMA, to a challenge of the January
25 2001 final rule. The July 15, 2002 settlement

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1 agreement, which was negotiated by me, representing
2 industry, Mike Wright, representing Intervenor, United
3 Steelworkers of America, and Defendant MSHA, set forth
4 a blueprint for the Agency to follow in promulgating
5 this proposed rule.

6 To the degree that the proposed rule
7 follows the settlement agreement, we support its
8 finalization. More specifically, we support the
9 decision as reflected in 57.5060(a) to use elemental
10 carbon rather than total carbon as the surrogate for
11 determining compliance with the standard. This
12 decision resulted from an extensive study that
13 identified potential confounders in the mining
14 environment that would have raised serious questions
15 as to the Agency's non-compliance/compliance
16 determinations.

17 I must note that this decision came about
18 because of the industry's insistence first identified
19 by the Nevada Mining Association and the MARG Diesel
20 Coalition that samples analyzed on the basis of total
21 carbon were artificially elevated due to sources of
22 carbon not attributable to the combustion of diesel
23 fuel. Regrettably, some in the Agency resisted
24 recognizing this fact, and I'm fearful as to the
25 outcome had their views prevailed. More importantly,

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1 however, the fundamental question remains: Why was
2 this fact not identified prior to adopting TC as the
3 preferred sampling surrogate? Why did the enforcement
4 agency not realize this, and what's steps have been
5 taken to ensure that the sampling and analytic system
6 developed for this rule will provide accurate, precise
7 and reliable results, especially at levels below the
8 400 microgram total carbon or the 308 equivalent
9 elemental carbon level?

10 As part of the sampling process, the rule
11 proposes the compliance determinations be based solely
12 upon personal exposures rather than area or
13 occupational exposure determinations, as was contained
14 in the final rule. We support this change.

15 The second element of the sampling process
16 that is carried forth in this proposal and was a part
17 of the final rule is the use of single samples for
18 compliance determinations. Our decision to agree to
19 the use of single sample for compliance determinations
20 as part of the overall settlement agreement should in
21 no way be viewed as an admission on our part that such
22 determinations accurately reflect the environment to
23 which miners are exposed. Significant variability
24 exists when sampling underground, and sampling
25 averaging has long been recognized as the preferred

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1 method for conducting compliance sampling.

2 I would draw your attention again to the
3 testimony of George Love who presented an analysis of
4 the results of sampling conducted my MSHA and Carmuse
5 at their Maysville operation. We'll be commenting on
6 this in greater detail by the end of the comment
7 period. Suffice it to say that we're extremely
8 concerned that the sensitivity of the sampling and
9 analytic process are not sufficient to meet NIOSH's 95
10 percent accuracy test, and this further renders the
11 use of single sample compliance determinations of
12 questionable validity. We believe that unless MSHA
13 meets its burden of proving that the sampling and
14 analysis system provides accurate results, the rule
15 does not comply with MSHA's duty to adopt only
16 technologically feasible standards.

17 We now understand that the cassettes used
18 in the conduct of both of the 31 mine study and MSHA's
19 compliance assistance visits were not the cassettes
20 that are being manufactured by SKC today. We are
21 unaware of any analysis that has been conducted by the
22 Agency or any outside source to confirm that these new
23 cassettes meet NIOSH's accuracy test. We have three
24 sets of punch-to-punch data: The MARG database taken
25 during the NIOSH study, the 31 mine study samples and

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1 the punch-to-punch data provided by MSHA and obtained
2 by MSHA during their compliance assistance visits.
3 All of these show significant variability punch to
4 punch across the universe of the database. We'll be
5 providing more analysis of this in our written
6 comments.

7 Again, I would reiterate no analysis of
8 punch-to-punch data has been conducted, to the best of
9 our knowledge, for the new redesigned SKC filter or an
10 analysis of whether the two-punch average is enough to
11 correct for the variability. If MSHA has conducted
12 such an analysis, we would ask that this be provided
13 to us as soon as possible so that we can review it and
14 comment on it prior to the end of the comment period
15 which is quickly coming upon us.

16 We support the expansion of the special
17 extension provisions as contained in 57.5060(c) so
18 that they're applicable to both the interim and final
19 limit. Moreover, we believe the decision to consider
20 economic and technologic constraints is proper. We
21 believe that consideration should be given for
22 extensions for periods of greater than one year. This
23 will reduce the paperwork burdens imposed in industry,
24 and provisions could be included to ensure that new
25 technology will be used once proven, even during the

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1 duration of an extension.

2 A central element of the extension process
3 will be the determination by the Agency of whether or
4 not an operator has exhausted all feasible engineering
5 and administrative controls. As the rule is written,
6 this is the paramount threshold test that must be met
7 before an extension determination is considered.
8 We're concerned with the Agency's decision that a 25
9 percent or greater reduction in DPM exposure from a
10 control or combination of controls is significant and
11 thereby effective. We know of no scientific basis nor
12 has the Agency provided any scientific basis for this
13 25 percent determination. Rather, the Agency refers
14 to Commission case law developed under litigation of
15 the occupational noise standard.

16 I would note that even the noise standard,
17 DB exchange rate, a 3 DB engineering control results
18 in a 33 percent reduction in exposure in dose. Yet in
19 this instance the Agency has arbitrarily, in our
20 estimation, come up with a 25 percent threshold test
21 of whether or not a control is feasible.

22 We recently became aware that the Agency
23 is considering, when analyzing the feasibility of a
24 control for compliance with the noise standard, a new
25 and quite troubling test. Historically, MSHA has

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1 followed the decision of the Review Commission, and as
2 such considered an engineering control to be feasible
3 if it achieved a 3 DBA or greater noise reduction. We
4 now understand that the threshold test will apply to
5 an engineering control in combination with
6 administrative controls. One can readily see the
7 impact such a policy will have in this proceeding. If
8 applied to DPM controls, a control with minimal
9 exposure reduction value could be deemed feasible when
10 combined with production cutbacks and administrative
11 control. This has the potential to eliminate the
12 entire concept of mandating only feasible controls and
13 hinder the application of the special extension
14 provisions. Let me give you one example which some
15 may say is not reasonable.

16 MSHA's expressed policy might deem an
17 engineering control feasible if it had a cost of \$1
18 million and resulted in a reduction of exposure to DPM
19 of three percent if it combined with an administrative
20 control, shift reduction or production cutback that
21 reduces exposure by 22 percent. The combined
22 reduction of 25 percent would meet the Agency's stated
23 threshold test and the three percent effective DPM
24 engineering control would be deemed feasible.

25 As one of the participants that negotiated

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1 the settlement agreement, I'm concerned that this
2 policy, if adopted, will undermine the intent and the
3 spirit of the settlement agreement. At not time was
4 this discussed nor was I led to believe that the
5 feasibility test would be anything more than a facial
6 determination that a particular control or in the case
7 of engineering controls combination of controls meets
8 or does not meet the threshold test. I believe this
9 concept, if finalized and carried forward in the
10 administration of the DPM rule, will seriously
11 undermine the good faith discussions that gave rise to
12 the settlement agreement, and I would encourage you to
13 take a fresh look at this issue. It's not
14 inconceivable that further discussions will be
15 necessary before the DPM issue is finalized, and I'm
16 concerned that such discussions may be tainted by
17 questions of openness and truthfulness.

18 There are several instances in the
19 preamble that accompanies the rule where the Agency
20 poses specific questions and asks for specific
21 comment. We'll be commenting on these in our written
22 submission. Two, however, warrant comment at this
23 time. First, the Agency seeks comment on whether the
24 DPM rule should include no respiratory protection
25 mandates or plan provisions. Irrespective of the

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1 worthiness of such a revision, we believe it is wrong
2 to create within the DPM standard a respiratory
3 protection requirement that treats exposure to DPM
4 differently than other gaseous substances requiring
5 the use of such protective means. If the Agency
6 believes that the existing standard is inadequate,
7 then modification of that section is where the change
8 should be considered.

9 The second is the question of the revised
10 DPM control plan provisions contained in 57.5062. As
11 some are aware, this is a matter that was discussed
12 extensively during the discussions that gave rise to
13 the settlement agreement. While we had, I believe,
14 frank and open discussions regarding the need and use
15 of such a plan, we were not able to reach agreement on
16 a plan scope, duration or enforceability. Because of
17 this, it was suggested that this be a subject for
18 discussion during this rulemaking. While the plan
19 provisions contained in the proposed rule are a
20 dramatic improvement over the plan provisions of the
21 January 2001 final rule, we still have significant
22 questions regarding the necessity for such a plan, its
23 operational aspects and its benefits.

24 The rule is performance based, and as such
25 we question the necessity for a plan. Compliance

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1 determinations will be made based upon MSHA sampling,
2 and operators will be required to initiate abatement
3 actions where sample results exceed applicable levels.

4 Given this regulatory system, we question how MSHA
5 justifies a plan requirement that seems to only impose
6 paperwork burdens and provides the basis for citations
7 that are not related to compliance with the DPM limit.

8 Either compliance is accomplished or it is not, and
9 where compliance cannot be achieved through either
10 engineering or administrative means, the operator will
11 utilize respiratory protection and hopefully rotation
12 of personnel if the final rule permits the use of this
13 recognized administrative control.

14 This time tested use of the hierarchy of
15 controls is more than sufficient to ensure that
16 operators are employing all means to maintain
17 concentrations of DPM at or below allowable levels.
18 Imposition of the control plan requirements will do
19 nothing more than present further opportunity for
20 confrontation and citation. The paperwork
21 requirements of such a plan can become unnecessarily
22 burdensome and the perceived benefits of such a
23 program must be weighed against the real costs that
24 such a plan will impose.

25 The last item that I want to discuss today

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1 involves the question of feasibility of the 2006 160
2 microgram standard. Given our expanded knowledge
3 today of the availability of, reliability of and the
4 utility of the existing suite of engineering controls
5 to achieve compliance with the reduced DPM standard,
6 we do not believe that the 160 limit is feasible, and
7 we urge that it be deleted in this rulemaking. While
8 we recognize the exposure to DPM at certain levels can
9 present some health consequences that must be
10 prevented, we believe the Agency's risk assessment has
11 failed to quantify a dose relationship for DPM
12 exposure that supports the 160 limit or any limit
13 below the interim level. Given the lack of a risk
14 justification for the 160 level, combined with the
15 lack of feasible controls, the final limit does not
16 meet MSHA's statutory requirement and must be deleted.

17 There is no doubt that industry-wide
18 exposures under the negotiated DPM standard will for
19 some be significantly lower than exposures which
20 existed prior to the final rule. For others, their
21 exposures, because of mine-specific conditions, are
22 already below the 400 microgram interim level. To the
23 degree that mines can employ technology to reduce
24 exposures below 400, we encourage them to do so.
25 However, the Agency has not justified the need for nor

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1 demonstrated the means to achieve compliance with the
2 2006 160 microgram level.

3 Regrettably, our continued attempts to
4 validate the technologic feasibility of compliance
5 with the 160 level can best be characterized as the
6 more we know, the less we know. Repeated attempts to
7 validate technology in in-mine, non-laboratory tests
8 have been thwarted by equipment failures. The
9 testimony presented at the Salt Lake hearing by
10 Stillwater Mining and Kennecott Greens Creek were but
11 the latest examples of potential solutions gone
12 astray. Despite repeated conversations, despite the
13 submission of testimony and written documentation of
14 industry experts and despite the work undertaken by a
15 diesel partnership comprised of labor, industry and
16 government, the Agency has not yet accepted the fact
17 that the representations made by the prior
18 administration as to the technologic feasibility of
19 the final standard are without merit. In the simplest
20 of terms, all of us were sold a bill of goods which
21 has proven to be flawed.

22 As MSHA knows well, mining and equipment
23 plans require massive investments and are drawn years
24 in advance. The industry cannot tolerate the
25 uncertainty of an unachievable standard only two years

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1 in the future. On Page 48694 of the proposal, the
2 Agency notes, and I quote, "MSHA concludes that a
3 permissible exposure level of 308 micrograms of EC per
4 cubic meter is technologically feasible for the metal
5 and non-metal underground mining industry," close
6 quote. Of note is the Agency's silence as to whether
7 a lower permissible exposure limit is technologically
8 feasible. Based on the results of the tests at
9 Newmont, Greens Creek, Carmuse and Stillwater, the
10 feasibility of single sample compliance determinations
11 with the 308 EC standard is still in doubt and will
12 require extensions, but there is no doubt that the 160
13 limit cannot be achieved.

14 This completes my statement. As noted
15 earlier, we'll be submitting written comments prior to
16 the close of the comment period, and I'd be happy to
17 respond to any questions you might have.

18 CHAIRMAN SMITH: Thank you, Bruce.
19 Questions? Jon?

20 MR. KOGUT: You indicated that you thought
21 that the existing risk assessment did present some
22 justification for the interim limit but not for the
23 final limit. Could you clarify the distinction that
24 you're drawing?

25 MR. WATZMAN: Jon, I would say that there

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1 are comments already in the record by Dr. Howard Cohen
2 and Jonathan Borak. There will be additional comments
3 put into the record. My belief is that the Agency
4 looked at the -- to some degree looked at this two-
5 prong standard, one, to address what the Agency
6 believes is the cancer risk of exposure to diesel
7 particulate matter and, secondarily, the non-cancer
8 health consequences of exposure to DPM. We disagree
9 with the Agency as to whether or not DPM presents a
10 cancer risk based upon its exposure, and based upon
11 that, we don't believe that the Agency has justified
12 the lower level of 160. We do accept the fact that
13 there are some health consequences, some of a
14 transient nature, if you will, from exposure to DPM,
15 and as such we accepted the interim level of 400
16 micrograms, recognizing that there are some health
17 risks. But we disagree as to whether or not DPM
18 presents a cancer risk.

19 MR. KOGUT: That wasn't exactly my
20 question. My question was is there something in the
21 risk assessment that distinguishes between a health
22 risk above the interim limit as compared to the final
23 limit that would lead you to say that the risk
24 assessment shows that there's a health risk above the
25 interim limit but not above the final limit -- not in

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1 the area between the final limit and the interim
2 limit?

3 MR. WATZMAN: Not wanting to get into a
4 debate on the merits of the risk assessment, I would
5 say that the industry view all along has been that the
6 risk assessment is flawed and that in and of itself
7 did not adequately justify either level because there
8 is no dose response relationship quantified in the
9 risk assessment. However, having said that, as part
10 of a settlement, we accepted the interim level, but we
11 think the risk assessment is flawed, and there has
12 been testimony, Jim Sharp talked about it earlier, the
13 comments of Dr. Cohen and Dr. Borack, the IMC comments
14 that Jim referenced, that the position of the industry
15 all along has been that the risk assessment is flawed,
16 fundamentally flawed.

17 CHAIRMAN SMITH: Thank you, Bruce.

18 MR. WATZMAN: Thank you.

19 CHAIRMAN SMITH: Mr. Watzman is the last
20 of our speakers who have signed up. Are others in the
21 audience interested in speaking? Mr. Wright?

22 MR. WRIGHT: I just have a question for
23 MSHA.

24 CHAIRMAN SMITH: Okay.

25 MR. WRIGHT: We've been talking a lot

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1 about risk assessment this morning. EPA has done a
2 great deal of work on the risk assessment to the
3 general public from diesel. I wonder if that
4 information and their risk estimation and their unit
5 risk estimate is in this record.

6 CHAIRMAN SMITH: Jon?

7 MR. KOGUT: The health assessment
8 document, as it was published in May of 2003, is not
9 in the record, because it came out after the --
10 actually, I'm not sure. It may have been put in the
11 record in connection with this rulemaking.

12 MS. GUNN: Yes, the NPRM from EPA has been
13 put in the record. EPA's proposed rule is in our
14 record.

15 MR. KOGUT: Yes. So that May 2003 health
16 assessment document is in the record for this
17 rulemaking.

18 MR. WRIGHT: It will be in the record as
19 part of it. Okay. Thank you.

20 CHAIRMAN SMITH: Others interested in
21 speaking? If not, we're going to officially close the
22 record on this public hearing. Thank you very much
23 for coming.

24 (Whereupon, at 10:59 a.m., the MSHA Public
25 Hearing was concluded.)

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