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EXAMINING RECENT REGULATORY AND ENFORCEMENT ACTIONS OF THE MINE SAFETY AND HEALTH ADMINISTRATION

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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EXAMINING RECENT REGULATORY AND ENFORCEMENT ACTIONS OF THE MINE SAFETY AND HEALTH ADMINISTRATION

Thursday, March 3, 2011
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:06 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Bucshon, Kelly, Woolsey, Payne, Kucinich, and Miller.

Also present: Representatives Capito and Rahall.

Staff present: Kirk Boyle, General Counsel; Casey Buboltz, Coalitions and Member Services Coordinator; Ed Gilroy, Director of Workforce Policy; Marvin Kaplan, Professional Staff Member; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Brian Newell, Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Ken Serafin, Workforce Policy Counsel; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Loren Sweatt, Professional Staff Member; Joseph Wheeler, Professional Staff Member; Aaron Albright, Minority Deputy Communications Director; Tylease Alli, Minority Hearing Clerk; Daniel Brown, Minority Staff Assistant; Jody Calemine, Minority Staff Director; Brian Levin, Minority New Media Press Assistant; Jerrica Mathis, Minority Legislative Fellow, Labor; Celine McNicholas, Minority Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Julie Peller, Minority Deputy Staff Director; and Michele Varnhagen, Minority Chief Policy Advisor and Labor Policy Director.

Mr. WALBERG [presiding]. A quorum being present, the subcommittee will come to order. Good morning. And welcome to the Subcommittee on Workforce Protections.

Let me also welcome to our subcommittee our distinguished colleagues from West Virginia, Mrs. Capito, who will be joining us, and Mr. Rahall. They are most welcome. And without objection, they will be permitted to join and participate in our hearing this morning. And I hear no objection.

During today's hearing, we will take a close look at some recent regulatory and enforcement actions of the Mine Safety and Health Administration.

I wish to thank Secretary Main for the time he has taken to be with us today.

Mine safety is a shared goal that continues to develop and improve. In 1969, a great year, my high school graduation, the Coal Mine Safety and Health Act was enacted to provide a comprehensive legal framework to protect workers in above-ground and underground mines. In 1977, Congress passed the Federal Mine Safety and Health Act, which created MSHA.

The Mine Act established several important safety requirements, including a mandate that inspections must occur twice a year for surface mines and four times a year for underground mines. Additionally, coal miners must perform their own safety inspections at the start of each shift, as well as weekly and monthly safety inspections.

Congress has taken steps in recent years to strengthen mine safety laws, most notably with the 2006 Miner Act. The strong, bipartisan efforts in 2006 required MSHA to conduct an overhaul of its penalty policies and also led to increased penalties for the worst offenders. Despite the progress that has been made, more must be done to protect those workers.

Last April's tragedy at Upper Big Branch mine forever changed the lives of the families and community of Montcoal, West Virginia. This horrific event will forever serve as a stark reminder of the need to remain vigilant in providing strong and effective safety protections for America's miners.

Although nearly a year has passed, several investigations continue to search for the cause of our nation's worst mining tragedy in four decades. While we are awaiting the findings of these investigations, it is vital we allow the results of the investigations to shed light on the—in this crisis so we can pursue the right reforms in a responsible way.

I know many of us are frustrated by the delay and anxious to act. I recognize the sense of urgency to move forward with mine safety reform. Chairman Kline and I share that urgency. That is why we are here today.

Improving miners' safety must consider—improving miner safety must consider the efforts already underway within MSHA. Since the explosion at Upper Big Branch, MSHA has developed a series of reforms geared toward enhancing mine safety through existing law. These initiatives include changes to the pattern of violations process and emergency temporary standard on rock dusting and new regulations on miner exposure to coal dust.

However, if there is one thing we know, it is the strongest laws on the books cannot protect miners if the agency charged with enforcing those laws fails to do so. An article in today's Charleston Gazette reveals a 2010 report by your administration written just days before the Upper Big Branch tragedy. The report as described by the Charleston Gazette, "details serious enforcement lapses, including incomplete inspections and inadequate enforcement actions." I am troubled by this report and hope you can provide greater details during today's discussion.

We have learned in recent years that the cause of workers' safety is best advanced when we work together. We have a responsibility

to pursue common-sense rules that protect workers and hold bad actors accountable for violating the law.

That is the work this subcommittee will pursue. And I hope we can perform with you in this effort.

At this time, I would like to recognize my colleague from California, Lynn Woolsey, the senior Democratic member of the subcommittee, for her opening remarks.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning and welcome to the Subcommittee on Workforce Protections. During today's hearing, we will take a close look at some recent regulatory and enforcement actions of the Mine Safety and Health Administration.

I wish to thank Secretary Main for the time he has taken to be with us today. Your knowledge and experience on these matters is extremely valuable, and we appreciate your efforts as well as those of the administration staff.

Mine safety is a shared goal that continues to develop and improve. In 1969, the Coal Mine Safety and Health Act was enacted to provide a comprehensive legal framework to protect workers in aboveground and underground mines. In 1977, Congress passed the Federal Mine Safety and Health Act which created MSHA.

The Mine Act established several important safety requirements, including a mandate that inspections must occur twice a year for surface mines and four times a year for underground mines. Additionally, coal miners must perform their own safety inspections at the start of each shift, as well as weekly and monthly safety inspections.

Congress has taken steps in recent years to strengthen mine safety laws, most notably with the 2006 MINER Act. The strong, bipartisan efforts in 2006 required MSHA to conduct an overhaul of its penalty policies and also led to increased penalties for the worst offenders.

Despite the progress that has been made, more must be done to protect these workers. Last April's tragedy at Upper Big Branch Mine forever changed the lives of the families and community of Montcoal, West Virginia. This horrific event will forever serve as a stark reminder of the need to remain vigilant in providing strong and effective safety protections for America's miners.

Although nearly a year has passed, several investigations continue to search for the cause of our nation's worst mining tragedy in four decades. We are all awaiting the findings of these investigations. It is vital we allow the results of the investigations to shed light on this crisis so we can pursue the right reforms in a responsible way.

I know many of us are frustrated by the delay and anxious to act. I recognize a sense of urgency to move forward with mine safety reform. Chairman Kline and I share that urgency. That is why we are here today.

Improving miner safety must consider the efforts already underway within MSHA. Since the explosion at Upper Big Branch, MSHA has developed a series of reforms geared toward enhancing mine safety through existing law. These initiatives include changes to the pattern of violations process, an emergency temporary standard on rock dusting, and new regulations on miner exposure to coal dust.

As with any policy proposal, questions and concerns remain. However, I am encouraged the administration is taking advantage of the tools already at its disposal in an effort to strengthen safety for miners. I look forward to learning more, Secretary Main, about these and other efforts underway at the administration.

We have learned in recent years that the cause of worker safety is best advanced when we work together. We have a responsibility to pursue commonsense rules that protect workers and hold bad actors accountable for violating the law. That is the work this subcommittee will pursue and I look forward to collaborating with my colleagues on this effort.

At this time, I would like to recognize my colleague from California, Lynn Woolsey, the senior Democratic member of the Subcommittee, for her opening remarks.

Ms. WOOLSEY. Chairman Walberg, thank you for holding this timely hearing on mine safety. I also want to welcome Congressman Nick Rahall, who is on the panel today, who you have agreed

should have a voice because he represents West Virginia's 3rd District where Upper Big Branch is located.

He has been there for the families since the day of the explosion, helping them every step of the way. Congressman Rahall is from the heart of coal country and a recognized leader on mine safety. And we are honored to have him here today, along with Congresswoman Capito.

Last year, Mr. Chairman, the committee held three hearings on mine safety. In February, we examined causes for and solutions to the growing backlog of mine safety appeals, which has impaired MSHA's ability to act in a timely manner against chronic violators. Six weeks later on April 5, 2010, a massive explosion ripped through the Upper Big Branch mine, killing 29 miners over a two-mile area. It was the largest United States coal mine disaster in the past 40 years.

Six weeks after that, this subcommittee traveled to Beckley, West Virginia to hear from the miners and the families of the victims. Witnesses testified about the lack of ventilation. They testified about coal dust accumulation so thick you couldn't see in front of your hand, a long wall mining machine that operated with a ball of flame on its cutting head, a culture of retribution against anyone who raised safety concerns and a system of advanced notice that tipped off underground miners to correct violations before MSHA inspectors could get underground.

A gentleman, Gary Quarles, was one of our witnesses and testified that when MSHA came on-site, staff radioed miners underground to warn them, "We have got a man on the property," which was code to correct the condition or direct the inspector's attention away from deficiencies. Mr. Quarles' testimony was validated by the U.S. Attorney's recent indictment charging Massey's security director with allegedly making false statements about his practice of training and directing guards to provide advanced notice of mine inspection.

Mr. Chairman, I would like to include that indictment in the record for this hearing.

[The information follows:]

SEALED

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON GRAND JURY 2010-01
FEBRUARY 24, 2011 SESSION

FILED
FEB 25 2011
TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:11-cr-00038

18 U.S.C. § 1001
18 U.S.C. § 1519
18 U.S.C. § 2(b)

HUGHIE ELBERT STOVER

I N D I C T M E N T

The Grand Jury Charges:

COUNT ONE

(False Statements to Federal Agents)

Background

At all relevant times:

1. Performance Coal Company, Inc. ("Performance"), was a corporation engaged in the business of operating an underground coal mine near Montcoal, Raleigh County, West Virginia, known as the Upper Big Branch Mine, the products and operations of which affected interstate commerce. As such, Performance was an "operator" within the meaning of 30 U.S.C. § 802(d) and was subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") and to the regulations promulgated thereunder.

2. Defendant HUGHIE ELBERT STOVER was employed by Performance as the head of security.

3. In this capacity he supervised all of the security guards who worked at Performance.

4. Furthermore, as an employee and agent of Performance, he was subject to the provisions of the Mine Act and to the regulations promulgated thereunder.

5. The United States Department of Labor was a department of the executive branch of the Government of the United States and was responsible for the enforcement of laws of the United States relating to labor and employment conditions, including the Mine Act.

6. The Mine Safety and Health Administration ("MSHA") was an agency of the United States Department of Labor and was responsible for the enforcement of the Mine Act and the promulgation and enforcement of federal regulations related to mine safety and health, codified in Title 30 of the Code of Federal Regulations.

7. As part of MSHA's regulatory and enforcement efforts, and pursuant to its statutory authority, MSHA mine inspectors made periodic, unannounced inspections of coal mines to ensure compliance with the mandatory health, safety, and other regulations found in Title 30, Code of Federal Regulations, and issued citations for violations of the regulations. Violators were subject to civil and criminal penalties under the Mine Act.

8. The Mine Act made it a crime for any person to give advance notice of such an inspection. Among the purposes of this

prohibition against advance notice was to ensure that MSHA inspectors would have the opportunity to observe mining operations as they were actually and normally carried out.

9. The Federal Bureau of Investigation ("FBI") was an agency of the Department of Justice, which was a department of the executive branch of the Government of the United States. The FBI was responsible for investigating and enforcing the criminal laws of the United States.

Federal investigation of advance notice

10. In late 2010 and early 2011, FBI Special Agents, working with MSHA Special Investigators, investigated allegations that advance notices of inspections had been given on a regular and continuing basis at Performance's Upper Big Branch Mine, in violation of the Mine Act.

11. In the course of the investigation, FBI Special Agents and MSHA Special Investigators conducted interviews of Performance employees and contractors, including defendant HUGHIE ELBERT STOVER and security guards who worked under his supervision, and inquired about Performance's policy and practices regarding announcing the presence of MSHA inspectors at the Upper Big Branch Mine.

12. The investigation revealed that there were multiple radio channels that were used by the security guards at the Upper Big Branch Mine. One channel was known as the "security channel." A second channel was known as the "Montcoal channel." Radio

transmissions on the Montcoal channel could be heard by individuals working in the Upper Big Branch Mine office.

False statements about advance notice

13. On or about January 21, 2011, at or near Montcoal, Raleigh County, West Virginia, and within the Southern District of West Virginia, defendant HUGHIE ELBERT STOVER knowingly and willfully made materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, in that (1) defendant HUGHIE ELBERT STOVER stated and represented to an FBI Special Agent and an MSHA Special Investigator that Performance had a practice and policy dating back to at least 1999 that forbade security guards at the Upper Big Branch Mine from giving advance notice of an inspection by prohibiting the announcement of the presence of MSHA inspectors at the Upper Big Branch Mine over the Montcoal channel; and (2) defendant HUGHIE ELBERT STOVER stated and represented that he would have fired any security guard who did not abide by the practice and policy forbidding the announcement of the presence of MSHA inspectors over the Montcoal channel.

14. These statements and representations were false, fictitious, and fraudulent, as defendant HUGHIE ELBERT STOVER then and there well knew, because defendant HUGHIE ELBERT STOVER had himself directed and trained security guards at Performance's

Upper Big Branch Mine to give advance notice by announcing the presence of an MSHA inspector over the Montcoal channel.

In violation of Title 18, United States Code, Section 1001.

COUNT TWO

(Concealment of Documents in Federal Investigations)

1. The Grand Jury realleges and incorporates by reference paragraphs one through twelve of Count One of this Indictment as if fully set forth herein.

2. At all relevant times, numerous documents relating to several years of security operations at the Upper Big Branch Mines were stored, along with other items, in the garage of a house known as the "Barracks" near the main security gate at the Upper Big Branch Mine.

3. In early January 2011, defendant HUGHIE ELBERT STOVER directed a person known to the Grand Jury (the "Known Person") to dispose of thousands of pages of the security-related documents, including documents that reflected the presence of MSHA inspectors at the Upper Big Branch Mine in prior years. Defendant HUGHIE ELBERT STOVER directed the Known Person to dispose of these documents by placing them in a trash compactor near the main security gate at the Upper Big Branch Mine. At the time he ordered the Known Person to dispose of the documents, defendant HUGHIE ELBERT STOVER knew that the FBI and MSHA were conducting an investigation into allegations of criminal conduct involving Performance's Upper Big Branch Mine, including allegations that advance notices of inspections had been given at Performance's Upper Big Branch Mine, in violation of the Mine Act.

4. On approximately January 11, 2011, the Known Person carried out defendant HUGHIE ELBERT STOVER's instruction by sorting through the documents in the Barracks garage, preserving at the direction of defendant HUGHIE ELBERT STOVER, a limited number of documents related to property transfer and equipment removal, and disposing of thousands of pages of security-related documents in the trash compactor.

5. These documents were later recovered after the federal government inquired about their existence in the course of its investigation into allegations of advance notices of inspections having been given at the Upper Big Branch Mine.

6. On or about January 11, 2011, at or near Montcoal, Raleigh County, West Virginia, and within the Southern District of West Virginia, defendant HUGHIE ELBERT STOVER knowingly and willfully caused the Known Person to conceal, cover up, mutilate and destroy records and documents. Defendant HUGHIE ELBERT STOVER did so with the intent to impede, obstruct, and influence the investigation of a matter within the jurisdiction of agencies of the United States, that is, the Federal Bureau of Investigation and the Mine Safety and Health Administration, by having the records and documents disposed of and otherwise destroyed.

In violation of Title 18, United States Code, Section 1519, and Title 18, United States Code, Section 2(b).

R. BOOTH GOODWIN II
United States Attorney

By: _____
BLAIRE L. MALKIN
Assistant United States Attorney

_____
STEVEN R. RUBY
Assistant United States Attorney

Mr. WALBERG. Without objection, it will be included.

Ms. WOOLSEY. This committee reviewed legislation 7 weeks later, which included the Labor Department's recommendations and the intelligence we gathered in Beckley. As this bill was marked up, it further captured views of academics, industry and labor.

It authorizes MSHA to issue subpoenas in investigations and inspections. It mandates the temporary closure of mines with a pattern of significant violations until they improve their safety management systems. It makes the sanction under pattern of violations more remedial and less punitive.

It requires chronic violators who are placed on pattern of violations to sustain improved safety performance for 1 year instead of

90 days under current law. It updates underground coal mine safety standards, makes it a first instance felony to knowingly violate a safety standard which exposes a miner to significant risk or injury or death, strengthens whistleblower protections and deters legislation designed only to delay enforcement.

Mr. Chairman, this is a detailed list, but it is absolutely necessary if we are going to adequately protect miners who are being considered cogs in a wheel to make the energy and metals our nation needs. Instead, they are the mothers, they are the fathers, the community and church leaders, little league coaches and youth mentors. It our moral obligation, Mr. Chairman, to make sure our laws protect and value their lives.

It is also an imperative that we bring MSHA and OSHA into the 21st century. Mr. Chairman, this committee visited the Coalburg mine in West Virginia. And we learned firsthand of the hazards and protections needed by miners. It was overwhelming.

We need this committee, under your leadership to go down in a mine and get the total feel of what this is all about because it is pretty overwhelming. And if you didn't think you were going to be protected, you would have your heart in your throat every minute that you were doing the work. So I hope that this year we can find common ground to advance legislation that the Department of Labor has requested and legislation that our nation's miners deserve.

With that, I yield back.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Ranking Minority Member, Subcommittee on Workforce Protections

Chairman Walberg, thank you for holding this timely hearing on mine safety.

I also want to welcome Congressman Nick Rahall, who represents West Virginia's 3rd District where Upper Big Branch is located. He has been there for the families since the day of the explosion, helping them every step of the way.

He is from the heart of coal country and a recognized leader on mine safety, and we are honored to have him here today along with Congresswoman Capito.

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Six weeks after that, this subcommittee traveled to Beckley, West Virginia to hear from miners and families of victims.

Witnesses testified about:

- the lack of ventilation;
- coal dust accumulations so thick you couldn't see in front of your hand;
- a long wall mining machine that operated with a ball of flame on its cutting head;
- a culture of retribution against anyone who raised safety concerns;
- and a system of advance notice that tipped off underground miners to correct violations before

MSHA inspectors could get underground.

Gary Quarles (Kwor-els) testified that when MSHA came on site, staff radioed miners underground to warn: "we've got a man on the property"...which was code for correct the condition or direct the inspector's attention away from deficiencies.

Mr. Quarles (Kwor-els) testimony was validated by the U.S. Attorney's recent indictment charging Massey's security director with allegedly making false statements about his practice of training and directing guards to provide advance notice of mine inspections. Mr. Chairman, I would like to include that indictment in the record for this hearing.

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- mandates the temporary closure of mines with a Pattern of significant Violations until they improve their safety management systems;
- makes the sanction under Pattern of Violations more remedial and less punitive;
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- updates underground coal mine safety standards;
- makes it a first instance felony to knowingly violate a safety standard which exposes a miner to significant risk of injury or death;
- strengthens whistleblower protections; and
- deters litigation designed only to delay enforcement.

Mr. Chairman, this is a detailed list, but it is absolutely necessary if we are going to adequately protect miners. Miners are not simply cogs in a wheel to make the energy and metals our nation needs. They are mothers and fathers, community and church leaders, Little League coaches and youth mentors. It is our moral obligation to make sure our laws protect and value their lives.

I hope that this year we can find common ground to advance legislation that the Department of Labor has requested and our nation's miners deserve.

Mr. WALBERG. Thank you.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow questions for the record, statements and extraneous material referenced during the hearing to be submitted for the official hearing record.

Ms. WOOLSEY. Without objection.

Mr. WALBERG. It is now my pleasure to introduce our distinguished witness. The Honorable Joseph A. Main was confirmed as Assistant Secretary of Labor for Mine Safety and Health on October 21, 2009. Mr. Main has been a coal miner, a mine safety advocate for over 40 years.

Mr. Main worked for the United Mine Workers of America in various positions from 1974 to 2002, including 22 years as the administrator of the UMWA's occupational health and safety department. Prior to his nomination, Mr. Main worked as a mine safety consultant.

Welcome, Mr. Secretary. You are now recognized to provide your testimony. And, as is the custom here with a director being in the place and you being our only witness, we will afford you a greater latitude for your time and testimony. But please leave us time as well for questioning. Thank you.

STATEMENT OF HON. JOSEPH A. MAIN, ASSISTANT SECRETARY, MINE SAFETY AND HEALTH ADMINISTRATION

Mr. MAIN. Thank you, Mr. Chairman, Representative Woolsey, members of the subcommittee, Congressman Rahall. I do appreciate the opportunity to be here today to update you on mine safety and health, report on MSHA's actions since the April 5th explosion at the Upper Big Branch mine, that tragically took the lives of 29 miners, and discuss why, despite MSHA's extraordinary efforts in the wake of the Upper Big Branch disaster, that legislation is still needed to fully protect our nation's miners.

Since I last testified before this committee, we have made significant progress in MSHA's investigation into the Upper Big Branch explosion. The underground portion of the investigation, which has been extensive, is nearing completion.

Based on the evidence we have gathered so far, it appears that a low volume of methane or methane fuel from natural gas provided the fuel for the initial ignition on or near the face of the tailgate side of the long wall shear or cutting machine. Small methane ignitions are not uncommon in coal mines, but when proper safety measures are followed, these ignitions are generally controlled or extinguished. Our preliminary analysis show, however, that at Upper Big Branch, the small ignition was not contained or quickly extinguished. Instead, a small methane ignition transitioned into a massive explosion fueled by an accumulation of coal dust that propagated the blast.

While it is likely to be several months before MSHA can provide a final report on the cause or causes of the Upper Big Branch disaster, we know already that explosions in mines are preventable and that a workplace culture which puts health and safety first will save lives and prevent tragedies.

I have a deep respect for those who choose mining as a career. That is the occupation I chose when I was 18 years old. Mining is critically important to our economy. And I believe that a commitment to safety is fully compatible with a thriving industry.

MSHA has worked hard in the wake of the Upper Big Branch tragedy to encourage operators to live up to their obligations to provide a safe and healthful workplace. We are using every tool at our disposal to make that happen.

One of our most effective enforcement tools has been our "impact inspections". Since April of 2010, MSHA has conducted 220 impact inspections at mines with special concerns. We have conducted these impact inspections at times off-shift, taking hold of phone lines to prevent advanced notice and covering key parts of the mine as quickly as we can before hazards are—can be hidden or covered up.

Another important post-Upper Big Branch enforcement action was MSHA's decision for the first time ever to seek federal court injunction for a pattern of violation. Shortly after we filed the action, the mine operator announced it was permanently closing the mine and agreed to a court order that ensured the safety of the miners during the shutdown and protected the livelihood of the displaced miners.

We have also taken important actions to improve the broken pattern of violations program. We adopted new screening criteria, used those criteria to put 14 mines on a potential pattern of violation and published a proposed rule which would address flaws in the current rule to meet the intent of the statute. MSHA has taken a number of other steps in the wake of the Upper Big Branch tragedy, including accelerating additional regulations such as the emergency temporary standard on rock dust and providing targeted compliance guidance.

Upper Big Branch also highlighted the importance of addressing the growing backlog at the Federal Mine Safety and Health Review

Commission. And we are taking several actions to attack that problem.

MSHA cannot be in every mine, and mine operators must find and fix hazardous conditions, whether MSHA is there or not. I believe that many mine operators want to do this and want to run safe mines. In order to assist mine operators, MSHA has undertaken extraordinary education and outreach efforts.

I have traveled the country speaking to miners, operators, mining organizations and associations and listening to their ideas and concerns. We have been forming alliances with industry stakeholders. We have been working together with the industry and miners to improve consistency in enforcement of mining standards and implementing new programs such as the "Rules-to-Live-By" that targets the most common mining deaths and "Safety Pro-in-a-Box", a valuable Web-based compliance resource. And I am committed to continuing those partnerships.

This subcommittee has a long history of standing up for the nation's miners. It has never subscribed to the myth that mining fatalities are an inevitable aspect of the business. I hope that you will again stand up for miners and pass new mine safety legislation. It is time to move such legislation.

Since Upper Big Branch, we have learned that there are systemic flaws in the law that only Congress can fix. And the administration supports legislation that gives MSHA the enforcement tools it needs to ensure that all mine operators live up to their legal and moral responsibility to provide a safe and healthful workplace for all miners.

Let me mention just a few of the areas, among others, that merits your attention. There is only so much we can do through regulations. Second, MSHA should revise MSHA's injunction of authority. We need to fix the broken pattern of violations system. We have used the provision and learned that the process may be slower than needed to protect miners. That is in regard to the "section 108" injunctive action that we have just initiated for the first time. New legislation should provide us sufficient authority to act as soon as we believe protecting miners' safety and health requires immediate action.

Third, legislation should strengthen the criminal provisions of the Mine Act. No mine operator should be risking the lives of its workers by cutting corners on health and safety. But for those who knowingly engage in such practices, we need to send them a clear message that their actions will not be tolerated.

Finally, new legislation must ensure miners are fully protected from retaliation. Miners know best the conditions in their mines. But as some surviving miners and family members have reported, some miners keep critical information to themselves because they fear they will lose their jobs of they speak up.

I look forward to working with the committee to find the best way to accomplish our shared goal of providing our nation's miners the safety and health protections that they deserve. With that, I thank you very much.

[The statement of Mr. Main follows:]

Prepared Statement of Hon. Joseph A. Main, Assistant Secretary of Labor, Mine Safety and Health Administration

Chairman Walberg, Ranking Member Woolsey, and Members of the Subcommittee:

I appreciate the opportunity to appear here today on behalf of the U.S. Department of Labor, Mine Safety and Health Administration (MSHA) to update you on mine safety and health, and report on the actions we have taken since the April 5, 2010 explosion at the Upper Big Branch (UBB) mine in West Virginia that needlessly took the lives of 29 miners. That accident was the worst mining disaster since the creation of MSHA by the Mine Act and the deadliest coal mine disaster this nation has experienced in forty years. The need to rethink how we approach mine safety and health to protect miners took on a new urgency for all of us following that disaster. I also want to discuss why, despite MSHA's extraordinary efforts in the wake of the UBB disaster, legislation is still needed to fully protect our nation's miners. The safety and health of those who work in the mines in this country is of great concern to President Obama, Secretary of Labor, Hilda Solis, and me. The Secretary has articulated a forward-looking vision of assuring "good jobs" for every worker in the United States, which includes safe and healthy workplaces, particularly in high-risk industries, and a voice in the workplace. At MSHA, we are guided by that vision.

I arrived at MSHA over a year ago with a clear purpose—to implement and enforce the nation's mine safety laws and improve health and safety conditions in the nation's mines so miners in this country can go to work, do their jobs, and return home to their families safe and healthy at the end of every shift. Having been involved in mining since the age of 18, I have a deep respect for those who choose mining as a career. I have spent most of my life with miners, mine operators and mine safety professionals. I think we can all agree that mining is critically important to our economy, and I believe most understand our collective responsibility to ensure that effective health and safety standards are in place and are followed to prevent injury, illnesses and death.

I know that it is possible for a mine to be a safe place to work for miners and a profitable business for operators. Most of the industry shares this belief and make the commitment to safety because it is not only the right thing to do, but the smart thing to do as well. Injuries, illnesses, and fatalities have for too long taken a toll on the mining industry and its workers.

In addition, at MSHA, we are concerned with the economic and technological feasibility of our regulations and the Mine Act requires us to take that into consideration when developing regulations. We also understand that MSHA's effective enforcement of the law should create a level playing field, so that operators who play by the rules and provide safe mine conditions do not have to compete against operators that cut corners on safety.

MSHA will continue to partner with the industry to ensure that miners are safe and healthy and that the industry and those who derive their livelihood from the industry—especially those that play by the rules—continue to thrive.

Upper Big Branch Investigation

Since I last testified before this Committee in July 2010, we have made significant progress in MSHA's investigation into the Upper Big Branch explosion. As many of you are new to the Committee, I would like first to provide a brief overview of the investigation and then provide an update on what we have learned so far.

The investigation team was named just after the explosion, but there was a delay in getting the team members underground due to unstable conditions and the need to provide a safe working environment for the investigators. The investigative team began its physical inspection at the end of June 2010. The underground investigation—which has been extensive—is nearing completion. At the time of my July 2010 testimony before the Committee, we had conducted approximately 100 interviews. Now, we have held over 260 witness interviews. MSHA has dedicated 108 enforcement personnel to the investigation, which includes 10 mine dust survey teams, 7 mapping teams, 3 electrical teams, 1 ventilation team, 1 geology team, 1 flames and forces team, 1 evidence collection team, and 1 inspection activities team. In addition, 45 technical support personnel are performing testing and other technical activities related to the investigation. In July, we had just begun our physical investigation, but now our investigative teams have combed through every inch of the accessible parts of the mine. To date, over 2,000 pieces of evidence have been collected and tested, including equipment, and gas, dust and other samples. While there still is more work to be done, MSHA is committed to completing the investigation in as timely a manner as possible.

I want to note for the Subcommittee that while MSHA is investigating the accident with the purpose of understanding what caused the accident and working to prevent future, similar accidents, the Department of Justice (DOJ) also opened its own investigation into possible criminal wrongdoing almost immediately after the explosion. The United States Attorney for the Southern District of West Virginia requested that MSHA delay its announced public hearings and the release of witness transcripts so as not to jeopardize the separate criminal inquiry by DOJ. MSHA is honoring that request in recognition of the President's instruction for the Department of Labor to work with DOJ to ensure that every tool in the federal government is available in the investigation of the accident.

Since the outset we have conducted the investigation in as transparent a manner as possible. MSHA has established an "Upper Big Branch Single Source Page" on our website at: *http://www.msha.gov/PerformanceCoal/PerformanceCoal.asp* to keep the public informed about the accident. We post as much information as we can on that site.

In addition, we have honored our commitment to the families to keep them as informed as we can about the findings of the accident investigation team to date. To the extent that we have been able to release information, my colleagues and I have met with the families of the victims on a number of occasions to bring them up to date on the status of the investigation. The last family briefing was on January 18, 2011, when we met with the families for almost four hours. The Solicitor of Labor, M. Patricia Smith, joined us at this briefing. In addition, consistent with Section 7 of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), MSHA family liaisons are in continuous contact with the families.

Finally, we have held regular briefings for the Committee leadership and your staff on the status of the investigation and our preliminary findings.

When I testified in July, there was little I could tell you about what caused the explosion at Upper Big Branch. In the intervening months, we have learned a tremendous amount. Based on the evidence that the team has gathered to date, it appears that a low volume of methane and/or methane fuel from natural gas provided the fuel for the initial ignition on or near the face of the tailgate side of the longwall shearer, or cutting machine. Small methane ignitions are not uncommon in coal mines, but when proper safety measures are followed, these ignitions are generally controlled or extinguished by proper ventilation and safety equipment on the longwall shearer, such as mining bits and water sprayers.

The evidence to date shows, however, that at Upper Big Branch, the small ignition was not contained or quickly extinguished. The analysis also indicates that a small methane ignition transitioned into a massive explosion, fueled by an accumulation of coal dust that propagated the blast.

While the investigation is not complete, and it is likely to be several months before MSHA is able to issue a report, we do know already that explosions in mines are preventable. Most importantly, we know that a workplace culture, which puts health and safety first, will save lives and prevent tragedy.

MSHA's Actions after Upper Big Branch

The tragic events of April 5th at the Upper Big Branch mine changed the lives of many people—the miners' families, their communities, miners around the country, and those of us at the Department of Labor dedicated to mine safety. When the Secretary and I sat with the families on those fateful days following the explosion, waiting for news of their loved ones, we committed to them that MSHA would act boldly to prevent another similar disaster. President Obama reiterated that promise when shortly after the accident he told the nation that "we owe [those who perished in the UBB disaster] more than prayers. We owe them action. We owe them accountability."

The MSHA team has pulled together and worked hard to make good on the President's promise. We are using every tool at our disposal, including ramped-up enforcement, targeted upgrades in our regulations, and education and outreach.

One of our most effective enforcement tools has been our impact inspections. After the disaster at the Upper Big Branch mine, MSHA began to conduct strategic "impact" inspections at coal and metal and nonmetal mines that needed greater attention. From April 2010 through January 2011, MSHA has conducted 220 "impact" inspections at mines with special concerns. These inspections are ongoing. Targeted mines are those that could be at risk of explosion, mines with poor compliance histories or histories of accidents or fatalities, or mines with other warning signs, such as efforts to cover up violations, hotline complaints or mines with poor examination procedures. MSHA has also conducted inspections at mines with recurring problems dealing with adverse physical conditions or that have a poor safety culture. From testimony at the field hearing conducted by the Education and Workforce Com-

mittee in May 2010, we heard the different ways in which operators would use their knowledge of our inspection methods to hide the violations they were committing. Therefore, MSHA has conducted these impact inspections in a way that has shaken up even the most recalcitrant operators. MSHA has shown up at their mines during "off hours," such as evenings and weekends. In some cases, MSHA has taken hold of the mines' phone lines upon arrival to prevent unscrupulous operators from giving advance notice of the inspectors' presence at the mine. Our inspectors have gone into those mines in force, with sufficient personnel to cover the key parts of the mine quickly before hazards could be hidden or covered up.

The results of the impact inspections have been significant. MSHA inspectors have issued more than 4,100 citations and 380 orders for violations of mine safety and health laws, rules and regulations during these targeted inspections—and miners are safer because we conducted those inspections. Some of the conditions and violations MSHA found during "impact" inspections are quite disturbing. For example, in July 2010, MSHA inspectors commandeered company phones during the evening shift at a mine in Claiborne County, Tennessee, to prevent surface personnel from notifying workers underground of MSHA's presence on the property. Inspectors found numerous ventilation, roof support, and accumulation of combustible materials violations. These types of conditions potentially expose miners to mine explosions and black lung disease. The operator was also mining into an area without necessary roof support, placing miners at further risk from roof falls. In all, MSHA issued 27 citations and 11 orders as a result of that inspection.

Unfortunately, the mine operator did not get the message. MSHA has now conducted four "impact" inspections at the mine, based on its ongoing compliance problems and apparent disregard for the law, and in November 2010, the mine was issued a potential pattern of violations notice. During the December 2010 "impact" inspection—after the potential pattern of violations letter went out—inspectors issued four very serious orders for accumulations of combustible coal dust of up to 24 inches in depth covering extensive areas where miners work and travel, and for not properly maintaining a lifeline in the mine's secondary escapeway. Coal and rock dust on the lifeline and reflective markers would have made it more difficult for miners to effectively escape to the surface in the case of an emergency. During the next regular safety and health inspection at the mine on January 19, 2011, MSHA found more violations for accumulations of combustible materials, not maintaining proper clearance on a beltline, and inadequately supported ribs—these violations required equipment to be shut down and effectively closed the mine to production.

During another "impact" inspection in September 2010 at a mine in Boone County, West Virginia, MSHA inspectors arrived in the middle of the evening shift and prevented calls to warn those working underground. Inspectors found that the mine was making illegal deep cuts into the coal seam. In addition, many areas of the working section were without adequate ventilation while these excessive cuts were being taken, exposing miners to the risk of explosion and black lung. The inspection revealed that air readings were not being taken during the work shift and that mine ventilation was being short-circuited. In one particular area, suspended coal dust was so thick it was difficult to see the massive continuous mining machine in operation nearby. Again, these are conditions that can also result in explosions and cause black lung. The inspector issued 11 closure orders during that inspection.

Another important post-UBB enforcement action was MSHA's decision—for the first time since the passage of the Mine Act—to seek a federal court injunction under the Mine Act's "pattern of violation" injunction section. We filed the injunction action against Massey Energy's Freedom Energy Mining Company's Number 1 mine located in Pike County, Kentucky. The mine had a pattern of violations of mandatory safety and health standards, which in our view, constituted a continuing hazard to the health and safety of the miners working at the mine. From July 2008 to June 2010, MSHA had issued 1,952 citations and 81 orders to the company for violating critical standards including improper ventilation, failure to support the mine roof, failure to clean up combustible materials, failure to maintain electrical equipment, and failure to conduct the necessary examination of work areas.

Shortly after we filed the action, the operator announced it was permanently closing its mine and moving the miners to other mines it owned in the area. It did agree to a court order that ensured the safety of miners during the shutdown process and protected the livelihood of the displaced miners.

MSHA has also evaluated other mines for possible injunctive relief, and we will continue to use this remedy when mines are engaged in a pattern of violations and miners are faced with continuing hazards to their safety and health. Yet despite a successful result, the case against Freedom Energy demonstrates that injunctive court actions will not always proceed quickly or result in instant relief.

MSHA has also issued new enforcement policies and alert bulletins addressing specific hazards or problems to ensure that miners and mine operators understand important enforcement policies. We have addressed topics such as the prohibition on advance notice of MSHA inspections, mine ventilation requirements that protect against mine explosions, and the right of miners to report hazards without being subject to retaliation.

I have said that the pattern of violations, or POV process, is broken and MSHA is committed to fixing it. In the provision's 33-year-old history, no mine has ever been subject to the full measure of the law contemplated by Congress. While we were reviewing the POV process prior to the UBB disaster, the incident heightened the urgency of moving forward with reforms. Therefore, in October 2010, we put new screening criteria in place for the pattern of violations or POV program. This was a critical first step in reforming the current POV program to give the Agency an effective enforcement tool to address mines that repeatedly violate safety and health standards. Notifications of potential pattern of violations have been sent to 14 mines using these new screening criteria and procedures, with additional mines still under review for potential pattern of violation actions.

The next step in fixing the broken POV program was the proposed revisions to the regulations. As promised, on February 2, 2011, we published a proposed rule on POV, which would address flaws in the current rule and reflect the intent of Congress when it wrote the POV provisions, such as not limiting MSHA to looking at enforcement actions that have resulted in final orders and eliminating the potential POV process.

MSHA also accelerated action on several other regulatory actions after UBB. In September 2010, MSHA developed and issued an Emergency Temporary Standard for increasing the incombustible content of combined coal dust, rock dust, and other dust in coal mines to minimize the potential for coal dust explosions. This ETS is based on research findings and recommendations by the National Institute for Occupational Safety and Health (NIOSH), within the Department of Health and Human Services. As discussed above, we strongly believe that coal dust played a role in the UBB disaster.

The UBB disaster highlighted the need to ensure that mine operators take seriously their obligation to find and fix the hazards in their mines, even when MSHA is not looking over their shoulders. In December 2010, therefore, MSHA published a proposed rule that would revise its requirements for pre-shift, on-shift, supplemental and weekly examinations of underground coal mines. The proposed rule would require that operators identify and correct violations of mandatory health or safety standards and review with mine examiners on a quarterly basis all citations and orders issued in areas where examinations are required. If implemented, this rule would reinstate requirements in place for about 20 years following the passage of the 1969 Mine Act.

The UBB disaster also enhanced the urgency of our need to address the backlog of cases at the Federal Mine Safety and Health Review Commission (FMSHRC). We have taken a number of actions to attack this problem. First, we are being good stewards of the supplemental appropriations that Congress provided for the Department and FMSHRC to reduce the backlog. The extra resources are helping us to resolve cases, and we continue to explore ways in which we can reduce the number of contested cases.

Last fall, I also launched a pre-contest conferencing pilot program in 3 MSHA districts. The pilot program allows the mining industry to meet on the local level with MSHA to resolve differences over citations and orders before they become matters of litigation and add to the backlog of contested cases. We are currently assessing the pilot program to determine how we can improve consistency and implement the conferencing program throughout MSHA to provide opportunities to resolve disputes before litigation is necessary. Just last month, MSHA held a stakeholder meeting with representatives from the coal and metal and non-metal industries and labor to discuss the pilot project and share ideas for an effective pre-contest process. Although it is too early to see the impact, I believe an effective pre-contest conference program could be an important tool in resolving cases.

Finally, the UBB disaster reinforced my concerns about MSHA's mine emergency response capabilities. I had already ordered a review to identify gaps in the system before UBB. Sadly, I saw many of those gaps first hand at the UBB site, such as inadequate communications and emergency equipment coordination.

MSHA has made major progress in this area. MSHA's new state-of-the art mobile command center based in Pittsburgh is in service and nearing full operational capability. The center will improve MSHA's capacity to provide better communications, advice and guidance during a mine rescue and recovery. At the UBB site, I had difficulty communicating with the Department's headquarters and even with MSHA

emergency response staff who were in the vicinity of the mine. Our new center should help correct these difficulties. In addition, MSHA is updating its technology, developing standard operating procedures and implementing more comprehensive command and control training for the MSHA district personnel that would be responding to mine emergencies.

As a result of these improvements, we are better able to respond to and manage mine emergencies, but as MSHA continues its thorough review of emergency plans and procedures to identify and fix gaps in the system, we know that more needs to be done. For example, some mine operators do not have available mine emergency equipment and are not prepared to quickly respond to emergencies. We are working with the mining industry, state agencies, drilling companies and others to identify areas for improvement in overall mine emergency response and equipment needs.

Something that should not go unnoticed is that the 2006 MINER Act greatly enhanced our mine rescue response to the Upper Big Branch tragedy. The MINER Act improved the number, availability of and quality of training of mine rescue teams.

I can tell you that I and the other mine emergency personnel coordinating the rescue efforts at Upper Big Branch greatly appreciated this improvement in mine rescue team strength and preparedness.

Education, Outreach and Compliance Assistance

As I said at the outset, I believe that most mine operators want to run safe mines. In order to reach and assist these mine operators, MSHA has ramped up its education, compliance assistance, and outreach.

First, we have made it a priority to educate mine operators, contractors, miners, trainers and others about how to prevent injuries and fatalities in mines. Let's remember that it was not just the Upper Big Branch disaster that led to mining deaths in 2010. In total, 71 miners died on the job last year, compared to 34 in 2009. And most of these non-UBB related deaths are the types that are recurring in the mining industry. I have spoken to members of the mining industry and those who train miners about the causes of these accidents and the practices that can prevent them. We know how to prevent these deaths, but more must be done to put that knowledge to work.

One way to put that knowledge to work is to ensure that the industry is more proactive about safety. Operators should have effective safety and health management systems in place, since these are the best vehicles for establishing a culture of safety in mining workplaces. These systems should be developed with everyone in the company—from the CEO to those working in the mine. In October 2010, MSHA held three public meetings, which highlighted the importance of safety and health management systems in our nation's mines.

We also have had several successful, targeted education campaigns last year. In early 2010, we launched a new program called "Rules to Live By." This is a fatality prevention initiative focusing on 13 frequently-cited standards in metal and nonmetal mining and 11 frequently-cited standards in coal mining that most commonly caused or contributed to fatal accidents over a 10-year period. This effort combines education and outreach on the front end, followed by enhanced enforcement by MSHA. In November 2010, we initiated a second phase of "Rules to Live By" focusing on 9 coal safety standards aimed at preventing other catastrophic accidents. We have posted information on the "Rules to Live By" initiative and the training module used to instruct inspectors on how to handle enforcement of the targeted standards on the MSHA website to allow the mining industry to have access to the training. This will also improve our consistency in enforcing standards.

In December 2010, we published a safety alert called "Watch Out!" to draw attention to the potential dangers to miners posed by shuttle cars, scoops, continuous mining machines and other equipment in underground coal mines. Seventy underground coal miners have died from being crushed or struck by this equipment since 1984—6 of them in 2010 alone. Without question, it is time to act to prevent these needless deaths. A solution to prevent these deaths is the use of proximity detection technology, which can warn miners when they are too close to the mining equipment. The technology can also shut down the machine before there is any harm to miners. Proximity detection systems are already used in South Africa, and MSHA has approved 3 systems for use in U.S. mines. MSHA plans to issue an Emergency Temporary Standard requiring these detection systems on certain kinds of mining machines.

For metal and nonmetal mines, many of the citations MSHA issues are for violations of equipment guarding. As a result, in 2010, MSHA published "Guarding Conveyor Belts at Metal and Nonmetal Mines," a photo-illustrated PowerPoint guide that provides detailed compliance information. The guide helps the metal and nonmetal mining industry meet the requirements of MSHA's guarding standards on

conveyor belts, and enhances awareness of guarding compliance and miner protection for both industry stakeholders and MSHA's metal and nonmetal enforcement personnel. It supplements existing guarding guidance contained in "MSHA's Guide to Guarding Equipment," and MSHA's existing program policy manual. The new guide was piloted through several state aggregate groups and distributed with the support of the National Stone, Sand and Gravel Association (NSSGA).

Also in 2010, we initiated a resource page on our website for the metal and nonmetal industry that includes a "Compliance and Updates" section. And just this year, MSHA released "Safety Pro in a Box," a resource intended to provide meaningful compliance assistance to small and new operators in the aggregates industry. This safety tool box, which provides helpful compliance guides, was suggested by the NSSGA and developed with the association's assistance.

In addition, mine operators and contractors need to train miners and mine supervisors on the conditions that lead to deaths and injuries, as well as on measures to prevent them. This is an industry in transition as new miners are replacing the aging workforce. MSHA is working with the mining industry to help ensure that education, training and knowledge transfer keeps pace with that transition and does not undercut health and safety gains made over the years.

Moreover, to promote better understanding of the mining industry's concerns with MSHA's enforcement program and to improve mine safety and health, MSHA has entered into alliances with a number of mining associations, including the NSSGA, the Industrial Minerals Association-North America and the Portland Cement Association. MSHA's Administrator for Metal and Nonmetal and I have met frequently with these groups and with many state aggregate associations across the country about their concerns. In addition, a joint technical committee was formed between MSHA and the NSSGA to develop compliance assistance materials. MSHA followed up on this committee's work by issuing Procedural Instruction Letters (PIL) and Program Information Bulletins (PIB) to advise MSHA inspectors and the mining industry on compliance.

MSHA is also teaming up with the Interstate Mining Compact Commission, an organization which represents state mining agencies, to coordinate a federal and state effort that promotes a culture of safety and encourages mine operators to live up to their responsibilities to provide safe and healthful workplaces, to fully comply with state and federal requirements and to provide effective training for their miners.

MSHA also meets on a periodic basis with mine operators to discuss their specific concerns. On February 16, 2011, MSHA held stakeholder meetings with representatives of the coal and metal and non-metal industries, and labor. One concern we've heard from the industry is about the consistency in the citations issued by MSHA's inspectors. Consequently, we've taken several steps to address it, including a review of enforcement actions to ensure that MSHA policies and procedures are followed; a review of agency inspection procedures; field inspection audits to improve inspections; training of CLR representatives; and mandatory, comprehensive, refresher training for all inspectors. In 2010, we developed a new two-week training program for all MSHA field office supervisors to improve the quality and consistency of enforcement. As previously noted, we are working on establishing an effective pre-contest citation and order conference procedure that will provide earlier opportunities to resolve disputes. We also hope that the conferences will serve as learning experiences for both operators and MSHA personnel so that discrepancies in citations can be corrected going forward.

Eradicating Black Lung

On the health front, MSHA continues to move forward on its "End Black Lung—Act Now!" initiative, which is a comprehensive strategy to fulfill the promise made 40 years ago with the passage of the 1969 Federal Coal Mine Health and Safety Act to eradicate Black Lung. According to NIOSH, in the past decade over 10,000 miners have died from Black Lung disease. Black Lung still kills hundreds of former coal miners each year and severely impairs the lives of many more; there are alarming indications that it is on the rise, even in younger miners.

In December 2009, we launched Phase I of the initiative, which includes education, outreach and enforcement. In October 2010, we launched Phase II by publishing a proposed rule, which would address shortcomings in the sampling process; lower the existing exposure limits for respirable dust; take advantage of new technology for measuring exposure—the continuous personal dust monitor; and expand medical surveillance, so that miners can take proactive steps to reduce hazardous exposures and better manage their health. On February 15, MSHA concluded a series of public hearings held across the country on this proposed rule, and we are encouraging all interested parties to submit comments by May 2, 2011.

Need for Legislation

This Committee has a long history of standing up for our nation's miners. It has never subscribed to the myth that mining fatalities are an inevitable aspect of the business. I am joining the plea that Secretary Solis made to you when she testified before the full Committee last month—for you to again stand up for miners and pass new mine safety legislation.

Almost one year has passed since we lost those 29 miners at Upper Big Branch. We have learned much in that time. As I noted at the outset, we have come a long way in our understanding of what happened that day, and that understanding has allowed us for the first time in recent weeks to share with you some of the preliminary analyses of our investigative team.

We also have learned how to better use all of MSHA's available tools and strategies to fully enforce the Mine Act—including targeted enforcement, regulatory reforms and compliance assistance. The strategies the Agency has used for its impact inspections have been largely successful. In addition, its regulatory actions, if implemented, will make operators more responsible for finding and fixing violations and will highlight those mines with continuing problems. Our extraordinary compliance assistance and outreach efforts also will ensure that operators who want to do the right thing have the tools they need to avoid violations and hazards.

To make MSHA truly effective in cracking down on serial violators who seem indifferent to miners' health and safety, MSHA needs additional tools that only Congress can provide. We need to change the culture of safety in some parts of the mining industry, so that they are as concerned about the safety of their miners when MSHA is not looking over their shoulders as when MSHA is there—because MSHA cannot be there all the time. The Administration supports legislation that gives MSHA the enforcement tools it needs to ensure that all mine operators live up to their legal and moral responsibility to provide a safe and healthful workplace for all miners.

I am not asking the Committee to take up any particular bill. I understand that this is a new Congress with new leadership. I am asking that we work together across the aisle and across the branches to address at least the following areas:

Pattern of Violations: There is a reason that no Administration—Democratic or Republican—has figured out how to effectively apply the current statutory POV program. It is broken and can be improved only so much through regulation. For example, the provisions of the current POV statute could potentially put some mines in POV status indefinitely while being insufficient to ensure long-term change in other circumstances. While we believe we are making significant improvements to the POV program within the confines of the current statute, changes to the law that provide MSHA the tools to engage in a long-term, more remedial approach with chronic violators would be a significant improvement to current law.

Injunctive Relief: The current law does not have a "quick fix" to the safety of mines like the Freedom Energy Mine where MSHA for the first time ever sought an injunction for a pattern of violation under section 108 of the Mine Act to change a culture of non compliance that threatened the safety and health of the miners. While MSHA was successful in compelling the mine to implement additional safety and health protections as a result of using section 108(a)(2), the current statute could be simplified to help MSHA make its case. The lesson learned is this: the litigation process using the existing tool may be slower than needed to protect miners, and new legislation should consider language that clearly provides the Secretary of Labor with sufficient authority to act when she believes protecting miner safety and health requires immediate action.

Criminal Penalties: Legislation should strengthen the criminal provisions of the Mine Act. No mine operators should be risking the lives of their workers by cutting corners on health and safety, but for those who would engage in such a practice, we need to put a new weight on the side of protecting the lives of miners. We hope and intend that criminal prosecutions under an enhanced Mine Act would continue to be rare. Now they are rare, however, because the bar for prosecution is too high. We hope that with new legislation they will be rare because a more serious law will provide a successful deterrent.

These enhanced criminal penalties should also extend to those who provide advance notice of MSHA inspections. In the aftermath of UBB, there were troubling reports of some operators providing advance notice of an MSHA inspection in order to hide violations and conduct that put miners at serious risk. This is an intolerable evasion of the law that is all too common. Increasing existing criminal penalties for these tactics would send a clear message that this behavior will not be tolerated.

Whistleblower Protection: New legislation must ensure miners are fully protected from retaliation for exercising their rights. Because MSHA cannot be in every mine, finding every hazard every day of the week, a safe mine requires the active involve-

ment of miners who are informed about health and safety issues and can bring dangerous conditions to the attention of their employer or MSHA before these conditions cause an injury, illness or death. Yet, as we heard from miners and family members testifying at the Committee's field hearing in Beckley, miners were afraid to speak up about conditions at Upper Big Branch. They knew that if they did, that could lose their jobs, sacrifice pay, or suffer other negative consequences.

The Mine Act has long sought to protect from retaliation those miners who come forward to report safety hazards. But it is clear that those protections are not sufficient, and many miners lack faith and belief in the current system. Legislation that creates a fairer and faster process is urgently needed.

Conclusion

Thank you for allowing me to testify before the Subcommittee. At the end of the day, it comes down to this: MSHA cannot be at every mining operation every shift of every day. There could never be enough resources to do that, but even if there were, the law places the responsibility of maintaining a safe and healthful workplace squarely on the operator's shoulders. Improved mine safety and health is a result of operators fully exercising their responsibilities. Taking more ownership means finding and fixing problems and violations of the laws and rules before MSHA finds them—or more importantly-before a miner becomes ill, is injured or is killed. Mines all across this country operate every day while adhering to sound health and safety programs. There is no reason that every mine cannot do the same.

I look forward to working with the Committee to find the best way to accomplish our shared goal of providing our nation's miners the safety and health protections they deserve.

Mr. WALBERG. Thank you for your testimony. And we look forward to, indeed, working with you. That is our purpose, as well as your purpose.

At this point, we will go to questioning from members. And I will start by relinquishing that time to the chairman of the full committee, Chairman Kline.

Mr. KLINE. Thank you, Mr. Chairman, for the courtesy and for yielding the time.

Mr. Main, this morning, as Chairman Walberg mentioned, there is a story that was based on a report which MSHA submitted to the Appropriations Committees in the House and the Senate. And it is pretty damning when you look at it.

You have mentioned several times today and in previous briefings and meetings that we have had that MSHA was, quote—was using "every tool at our disposal." And you asked here just now for new legislation to give you more tools.

And yet, it seems, looking at this story, that there is—the failure is not in having the right tools in the toolbox, but in the people using the tools in the toolbox. And so, when I looked at this—and I am embarrassed to admit that I hadn't seen this report beforehand. But let me just go through a couple of these. And I am going to be asking for your comment on it.

It says that on March 25, 2010, MSHA submitted a mandated report to the Senate Appropriations Committee on the activities of MSHA's internal office of accountability. And here are some findings:

Over the previous 2 years, according to the report, MSHA auditors from the agency's accountability office found inspectors in 20 of 25 field offices reviewed did not properly evaluate the gravity and negligence of mine operator safety and health violations. Supervisors in 21 of those 25 field offices did not perform in-depth reviews to ensure that inspectors took appropriate enforcement actions in accordance with MSHA policies.

MSHA officials in 15 of the 25 field offices audited did not adequately document inspections so that any enforcement actions taken would stand up in court. Inspectors in four of the field offices did not complete mandatory spot inspections for mines that generated large amounts of explosive methane gas. At an unspecified number of field offices there was a "lack of comprehensive inspections of all areas of the mining operation" and inappropriate levels of enforcement issuances.

And then the story goes on to say that the findings mirror those of numerous MSHA internal reviews conducted after major mining disasters over the last 20 years as well as repeated criticism from the Labor Department, inspector general and the U.S. Government Accountability Office. So the question is can you give us some indication, a, is this accurate, and, b, what are you doing to address these? And what progress have you made?

Mr. MAIN. Yes. I think the findings represent what the findings were with regard to the audit that was conducted. And I take for face value the—you know, the conditions that were—or the findings that were described by the audit team or the findings that existed.

I think to understand the prospective of what it means—if you look back at the audits within MSHA over the last 10, 20 years, I think you are going to find problems that are identified during audits, number one. Secondly, when I became the assistant secretary in October of 2009, one of the things I started looking quickly at was the audits that were being conducted by MSHA and another change in the agency that occurred, which was the new inspectors that were coming into MSHA.

As a matter of fact, the day I took the job, I think we had about half the inspectors that were hired since the Sago disaster. And with the 2-year training cycle they go through, had about 2 years experience under their belt. That was metal, non-metal and coal averaged out across the board.

And you had a number of the new inspectors that were coming on were replacing the supervisors in MSHA. MSHA is an aged workforce, and, as we saw, the mining industry losing a lot of experience during the—that era from probably early—or the latter part of the early 2000s through this past decade, there was a lot of change out in the agency.

And one of the things that I realized when I took this job, that we had to do things different. And that was we needed to create training programs that, instead of kept—we keep identifying these problems, to try to figure out a way to fix them. And to take into consideration the fact we had a lot of new supervisors coming within—coming into these jobs in the agency, that was a greater reason to do that.

So about June of last year, we implemented a new training program for all MSHA supervisors for coal and metal and non-metal. And it is a 2-week training that supervisors are going through. I think we have about half of the metal, non-metal inspectors through it as we speak. We are holding the coal inspectors until we get through with some Upper Big Branch duties that we have the ability to cycle those in.

But the short message is that, you know, I think these problems existed. I think there is a number of problems like this existed over time. And I think we had to put in place, which we have, measures to train these problems out.

The second measure that I initiated was a complete review of the MSHA inspection program, the policy and procedures. And I have tasked our folks to look at everything that our inspectors do to determine whether or not we are following policies, whether or not the policies are clear and all these internal audits and review—and there is quite a number of them, if you look back over the last 10, 15 years—to make sure that the systemic problems we are finding, that we train MSHA inspectors as we put them through the cycles and the retraining cycles.

But what is happening right now is that there is a crew that is plowing through everything the inspectors do to try to get some clarity to the job they do and to both use these to retrain inspectors, but also to improve the consistency in what we do in carrying out our job. Because one of the other concerns that I heard from the first day I was here was the consistency issue.

And so, to tackle a number of these, I mean, we just needed to retool our system. So, you know, hopefully, as we look down the road, the kind of systemic problems that we have seen from these audits, that last one you spoke of and back over the years, that we have put successfully a program in place that we don't find these or find these kind of things.

Mr. KLINE. Well, I hope that we move beyond hopefully and are really doing this.

And my time has long expired. I apologize and yield back.

Mr. WALBERG. Thank you, Mr. Chairman.

I turn now for 5 minutes of questioning to the ranking member, Ms. Woolsey.

Ms. WOOLSEY. So, Mr. Secretary, for the record: yes or no, haven't these findings in that report and their recommendations—haven't they all received corrective actions that were implemented?

Mr. MAIN. Yes, they were corrected at the time, once the audits were conducted to fix that problem.

Ms. WOOLSEY. Okay.

Mr. MAIN. But I think, in a bigger picture, we looked at this more broadly and to figure out a way that, you know——

Ms. WOOLSEY. I know. And I appreciate that. I just wanted that for the record.

Mr. MAIN. Yes, that is correct.

Ms. WOOLSEY. That those findings absolutely they were corrected immediately. Using that as our base, I mean, one of the things we learned over the last 2 years on this subcommittee is—and we have known, but we proved it with our hearings—is that MSHA is really stretched to its outer limits for legal authorities. And it is really important that we have legislation that would better advance the culture of safety with the sub-set of mining operators, who habitually violate safety standards and put production ahead of safety.

So I would like to give you as much time as we can to identify the specific areas in the Robert C. Byrd mine safety bill that we wrote and introduced—and how would that have helped? And how will it help?

Mr. MAIN. Well, I think there are a number of provisions in the legislation that was introduced last year on the House side that would help improve mine safety. And I just start with these. What is it we know that we need to fix? For all of us who attended the congressional hearings last year, both on the House side and the Senate side, and particularly the field hearing in Beckley, West Virginia, where families and miners brought to light conditions and problems that existed with regard to mine safety.

Ms. WOOLSEY. Right.

Mr. MAIN. I think there was a pretty healthy roadmap that was laid out from just the information that was collected here on the Hill. You know, it told a story about miners being fearful of speaking out about conditions. It talked about tactics where advanced notice was being provided underground to the mine when inspectors would show up. It was a story about violations that were not taken care of.

It was a story about when MSHA is not there, how the mine law is applied differently. And when you look at—when you take value from the information we—that we all, I think, saw at that time, you understood that we needed to do something to change the culture of the mining industry.

For those who decided that when no inspector was around, that they would put their miners at greater risk and challenge their health and their safety to make a profit, we have to do something different. MSHA can't be there all the time. So how do we deal with mine operators that act that way?

How do we give miners more courage to speak out about the conditions that exist in the mines that they work at? You know, since the Upper Big Branch tragedy, we have made a number of these "impact inspections". We have made a number of them where we have had to go in, we believe, to capture the phones, to make sure that no notice went to the mining folks underground so we could get a good view of what is really going on.

And in some of those cases, I mean, we found situations that you could have had a mine explosion at the snap of a finger. I mean, we walk in a section and find the ventilation controls down. That is ventilation controls that are needed to dilute any methane that is liberating from the coal seam or to control the coal mine dust that can cause both explosions or to black lung disease. And there was intentional acts to operate that way.

And, as you described in the one particular case, the inspector walked up to this huge mining machine. There is so much dust, they couldn't even see it. That is an indication that we have a problem.

This happened after the Upper Big Branch tragedy, the case that I am talking about and I think you may have referred to. So I think there is a lot of things that we found that we have got to take care of having mining operators who think about operating that way to think differently. And you have to have tools that are applied when MSHA is not at that mine.

And we have talked about the criminal provisions. We have talked about the subpoena provisions.

Ms. WOOLSEY. Yes.

Mr. MAIN. We have talked about new rules that would better protect miners who do speak out, protect their pay, their jobs, their—you know, if they get placed in jeopardy. Those are a number of things that I think are still important today.

Ms. WOOLSEY. So can you talk a little bit more about subpoena power and why is that necessary?

Mr. MAIN. Well, let us just use a current case in West Virginia. We have a state agency that has subpoena power that is using that power to subpoena witnesses where we have an accident investigation going on. We have to go to a public hearing before we can ever have that kind of a power.

Information that we are able to get through the use of that state subpoena is something we don't have. And I think a reasonable person would look at it from the standpoint of why doesn't the agency have it. And its lack thereof,—is that really impeding the agency's ability to get the job done? And I think the answer to the latter part of that question is, yes, if the state wasn't there in this particular case.

Ms. WOOLSEY. Okay.

Mr. WALBERG. Thank you for your testimony. Time is expired. I will claim my 5 minutes of questioning here.

Mr. Main, I think going on from Chairman Kline's questioning about the report that we saw in the paper today. But your testimony states that MSHA has developed new 2-week training program for MSHA field supervisors to improve the quality and consistency of enforcement. Last year, the Department of Labor's inspector general issued a report critical of MSHA's ability to track training for inspectors. How is the agency prepared to track training for all field supervisors now?

Mr. MAIN. Yes. You know, one of the things that you—I think your point about me, I am a find and fix kind of person. And since I took this job October of last year, there have been a number of deficiencies. And a number of these have occurred over the years. The computer error that happened back, I think, in—or 2007 with the POV program, some of the audits that date back to—if we look back at Sago, Aracoma Alma Darby, Crandall Canyon, deficiencies that are there.

And the I.G., we have been working with him closely for them to work with us to help identify problems we have so we can fix them. I think with regard to the report that you have raised, every one of the recommendations they made we agree with. And we have implemented different programs within MSHA to make sure that we do have a good tracking system. We are taking a look at how we do train, how we set up training programs.

We looked at the issues they raised about the missed training. And that is something that we have agreed to fix as well. So we agree with what they found and said we need to fix it.

Mr. WALBERG. And so, the process is in place now of actually fixing that?

Mr. MAIN. Yes. Yes.

Mr. WALBERG. Let me move to MSHA's recently announced—the reinstatement of whistleblower at a mine in Puerto Rico. The whistleblower program is already considered to be very strong. And the reinstatement of this worker demonstrates that in this instance,

MSHA is working on behalf of miners. Can you tell the committee how many whistleblower complaints were made last year? In how many cases were workers reinstated? And how many cases were deemed without merit?

Mr. MAIN. If you give me 1 second, I may——

Mr. WALBERG. Sure, sure. And as you are looking——

Mr. MAIN. If I can't answer it today, I will try my best to do that.

Mr. WALBERG. Yes.

Mr. MAIN. If I can't, I promise I will send the information to you.

Mr. WALBERG. I guess, along that, as you are thinking through the answer, how long does it take to resolve whistleblower cases, on average? And does the whistleblower office report directly to you?

Mr. MAIN. The whistleblower office is in the office of assessments. And currently within MSHA, we have an evaluation going on of our entire structure. And I will just start out with that. Currently, yes, it is in the office of assessments, which is below the office of the assistant secretary. And they report through the office of assessments to us.

And we are looking at the entire infrastructure of how this whole program of the special investigation program works, which is all one program that is in the assessments program and looking at how we can make that more efficient and more effective. So it is currently there, but a review may change that here, that we have ongoing. As far as the number of cases that we have, I will probably have to get back to you and provide you the update information on that.

Mr. WALBERG. I would appreciate that. Let me go, in the interest of time here. In fact, in the interest of time, we are running out of it. And I want to abide by my own rules to start this process. So we will come back to some of those questions.

At this point, let me yield 5 minutes to Congressman Rahall from West Virginia.

Glad you are participating with our committee today.

Mr. RAHALL. Thank you very much, Chairman Walberg.

Mr. WALBERG. Go ahead. Okay.

Mr. RAHALL. Okay. Thank you very much, Chairman Walberg. I appreciate your allowing me to sit in with—on these hearings today, which are tremendously important. I appreciate your work, Chairman Kline's work, Ranking Member Woolsey and her very kind comments and she and former Chairman Miller's visit to Beckley, West Virginia shortly after the UBB disaster. And I appreciate all the committee's deep concerns for our coal miners, their health and safety and especially for those family members that have not yet reached closure over this UBB disaster.

Mr. Main, I appreciate you and Mr. Stricklin's work. He is here accompanying you today—and all of MSHA's work. You have come under a little criticism here in the latest reports that have been released, but I think you responded very adequately to the chairman's questions and the fact that you have—since you have been on-board at MSHA, which is, what, a year now?

Mr. MAIN. A little over.

Mr. RAHALL. A little over a year—you have had a lot of work to do, a lot of changes to make, a lot of attitudes to change, and a lot

of philosophies to change as well. And I commend you for the work you have been doing under some very trying circumstances.

I did underscore something that was in your written testimony. You make the point that, "MSHA's effective enforcement of the law should create a level playing field so that operators who play by the rules and provide safe mining operations do not have to compete against operators that cut corners."

Now, I think that is an important point. It is unseemly that any operator would enhance their competitive advantage in the world marketplace by cutting back on measures that ensure the health and safety of their miners. But we have seen it happen. And the good actors, those who abide by the law and their workers, unfortunately, suffer as a result.

It is a delicate balance for you to target the bad actors and ensure that companies with good records are not adversely affected. And so, I am asking you, I guess—and you have addressed the broken system of pattern of violations. And I know in last year's Robert C. Byrd Mine and Health Safety Act we tried to improve that process whereby good actors can work their way off of any endangerment of being put on the POV.

What assurances can you provide those who are truly abiding by the law who want to do the good thing for their workers and have safety as their paramount concern? And that is the majority of them, I might add, certainly, in my district. But how can you assure them that we are going to address their concerns in—as we move forward, both regulatorily and legislatively?

Mr. MAIN. First off, I would like to thank you, Congressman Rahall, for joining our rescue and recovery operations at Upper Big Branch mine. You were there to provide a lot of moral support for the families. And that meant a lot for those who spent time with the families through the most difficult time of their life. To have folks like Congressman Rahall, now Senator Manchin and others there with us was—it was very helpful.

And I think that there are a number of us that have gone through so many of these tragedies with families that understand our core mission in life is really to find the problems and fix them and make sure that we have mines in this country where the miner can go to work every day, really not worry about, you know, if he is going to make it through the shift or she is going to make it through the shift and get home at the end of the day. And that is our real objective here.

With regard to the actions we are taking, we have—I think, went out of our way to really try to target—where it is that we need to spend our energies doing what? After the Upper Big Branch tragedy, you bet it shook me up. And I think it shook everybody up in the mining industry to try to figure out how could we at this time in our life have the worst mine disaster in 40 years. And one of my responsibilities was to stay focused on what it is we need to do and to make sure that we used the tools that we had effectively in the places that we needed to.

And what we did with the impact inspection—I just wanted to make sure that we were out there with our troops looking for and spending the extra time at mines that had the most concern. And the program that we initiated right after Upper Big Branch, I

think, has accomplished that. It has give me a level of comfort that we have got a better handle on, you know, trying to identify and spend the time at mines that we need to.

It is not a perfect system, but I think it is about as close as, I think, we are going to get in terms of applying that kind of attention. So, you know, out of 14,500 mines that we have inspected, you know, we have responsibility for, we have tried to focus on those that need the attention.

When I revamped the pattern of violation——

Mr. WALBERG. I am sorry. The gentleman's time is expired.

I am sure we will have further questioning.

And I now move on and welcome the gentlelady from West Virginia, Mrs. Capito, for questioning.

Mrs. CAPITO. Thank you, Mr. Chairman. Thank you for allowing me to be a part of this committee meeting. I appreciate it very, very much.

And I would like to thank the Secretary for being—always having an open door and being willing to help me understand the way he is moving forward with MSHA. He has been very respectful, but also very quick to respond. And I appreciate that.

Mr. MAIN. Thank you.

Mrs. CAPITO. I want to go—and we talked about this last time we met a couple—last week—to the pattern of violation. I was home last week talking to a lot of folks who are in the industry trying to meet the standards of the new pattern of violation. And just so I understand it correctly, understanding that the backlog is and probably still remains to be a big problem, but that is a problem you have identified and tried to work on.

But also the fact that your new rule, as I understand it, says that, not only do you fall into the pattern of violations for violations that have been certified, that have been gone through any kind of a grievance or an appeal kind of a process, but also if you are cited for a violation and you still have—as the operator, you have not—not be able to have judged whether that is a viable or non-viable violation or the strength of the violation. But even though you haven't had that judgment yet, it still falls within the range and accumulates to become one of the pattern of violations.

And I guess the question is this—do you feel that this alleviates some kind of due process that people would have to—you know, to repeal these, understanding that the appeal process is very skewed and distorted and stalled, in some cases. So what is your response?

Mr. MAIN. Yes, and maybe I can spin off of a question raised by Congressman Rahall and answer your question in tandem with that about the pattern of violation process. We have the current process, which we have cleaned up some of the flaws with it, under the current rules, which provides some transparency to the industry to let them understand what the rules are. And I am a firm believer in that. You know? They need to know what the rules are so that we don't have mines gravitating that way.

Under this current rule, there is a provision that we have to use final rules for part of the determination. And I think that gets to the crux of the problem that you are raising as to an issue that is addressed in the proposed rule where we are taking out that final rule as a requirement that we have to meet.

And I will explain why we are doing that. When I first started taking a look at the pattern of violation process, it was one that, well, no mine in the United States had ever been placed on an actual pattern as contemplated by this Congress when they passed the law in 1977. Thirty-three years, no mine had ever had that standard actually applied.

And that told me that the provision was broke as a start. And we looked at the processes in place, and we found some deficiencies in the way that the rules was applied and sometimes how easy it was to get off. It wasn't as stiff of a—it wasn't the kind of threat that Congress had recognized.

So we fixed, under the current rule, what we could, looked forward to the statute. And what the statute told us is there was no proposed pattern of violation to send out this notice in advance. So we took that out. There was no indication that Congress intended for us to wait for a citation to be finalized before we applied the pattern. And I just saw some cases that just came through about a week or so ago of 4 years ago of pretty serious violations.

These had to wait 4 years before they become final order. So we had a concern that we can't wait for years. We don't need to be putting a mine on a pattern notice 4 years after they racked up, you know, the violations when they may have become a perfect mine by that time. You know? So——

Mrs. CAPITO. Not to interrupt, but my time is kind of running out here.

Mr. MAIN. Okay.

Mrs. CAPITO. But would a better approach be to expedite the—I understand—you know—expedite the backlog to make—you know, and have us, maybe, write in there that, you know, these have to be washed out in 40 days or 50 days or something of that nature, take the most egregious ones first, you know, and move those through the system first. You know? I understand you don't want—you don't want these patterns of violations out here for 4 years.

And the other thing, in case I run out of time, I would like to say the transparency aspect is tremendous. I know that you are going to be doing this on a Web site so that the operators can follow, you know, where they are and how they are falling into that. But if you could speak to the expediting the backlog as a way to have final judgment made before they fall into the pattern of violation.

Mr. MAIN. When I took this job in October of 2009, one of the other things on my deck to look at was this backlog. And unfortunately, we have a backlog that precludes a lot of immediate action. There are so many violations stacked up, 80,000-some violations, because of this backlog, that it is an impediment, I think, to get us to where you may want to go.

We have applied a lot of resources to fix the backlog. We are appreciative of the money that Congress appropriated to help do that. Even with the monies appropriated, it is going to take us in a matter of, not months, but years to get the backlog down and, I guess, to the number of programs going forward, to cut and to—these contested violations, I think, is work for the industry, for miners, for the government and all of us.

Mr. WALBERG. We will have to end the questioning. The time is ended. But this is an issue we won't end here and need to continue looking at it.

At this point, we will move to the ranking member of the full committee, Mr. Miller.

Mr. MILLER. Thank you very much, Mr. Main. Thank you for being here. And I have sort of the same questions as Mrs. Capito and Mr. Rahall have raised here. As I look at it, last year, it took about 824 days to move a citation to final order of an unwarrantable failure. That is like 3 years. I mean, that is forever.

Mr. MAIN. Yes.

Mr. MILLER. I also know that the inspector general, in their September 29, 2010 recommendations recommended that you do exactly, apparently, what you are doing. And that was to evaluate the appropriateness of eliminating or modifying the limitations on current regulations, including the use only of final orders in determining the pattern of violation. So, you know, we have this other report where they made the recommendations and you met every one of those recommendations. And that is sort of a test of whether or not the inspector general is effective or not.

And here, you are doing it again. You are meeting his recommendation, which is to think of another way of doing this, because, clearly, those 80,000 citations are a way of gaming the system.

Because they game the system, we had to put up $22 million additional for people to deal with the backlog. The appropriators did that, I think, last year in one of the C.R.s, one of these things that comes through here every couple of weeks now.

So we are chewing up taxpayer resources because they are gaming the system. And the inspector general looks at this system and says, you ought to go—you ought to move to a new system. These citations—you took action here against somebody who, from July 2008 to 2010—what the hell is the name of this mine? Mr. Massey again—Massey's Energy—Freedom Energy Mining Company's Number One.

Between 2008 and 2010, had 1,952 citations and 81 orders to the company violating critical standards, including improper ventilation, failure to support the roof in the mine, failure to clean up the combustible materials, failure to maintain electrical equipment, the failure to conduct the necessary examinations of the workplace. I mean, how long are we going to let these people—we are down to—you said there were 14,500 mines in—within your operation at MSHA. So we are down to where there is about 14, 15, maybe 20 mines that are really in this atmosphere.

So it is just a question of—I mean, I think we should change the statute so that you don't have to work within a bad system. But the fact of the matter—it is a very simple decision for the Congress. Are we just going to continue to empower rogue operations that endanger miners that are on notice from thousands of citations that this is a dangerous workplace?

Is the Congress going to sit here and say, we will just wait for the next accident? Because, apparently, we can only legislate if people die. It is the only way the Congress can move. We get all

our adrenaline pumped up here, and then maybe we do something. But we don't do anything in between accidents.

And we now are on notice from the inspector general's office, from your office, from the level of citations that we have a relatively few number of mines that have decided it is in their economic interest, their economic—whatever their business plan is to game this system and put these miners at risk. These miners are subsidizing their business plan with their risk in the workplace.

This should not be a hard decision for the Congress of the United States. You know, we keep saying, well, you know, there is a lot of good operators. And Mr. Rahall is always pounding me about this. And I agree. Why should those good operators enable these people to play this system this way at the risk of these miners? There is a question in there somewhere, and I bet you can find it. [Laughter.]

Mr. MAIN. There are two points that I think you raised. One, it was a Freedom Mine that we took the first Section 108 injunctive action against. And it was a mine that had amassed nearly 2,000 violations over a 2-year period, over 80 orders. And it had ownership, when we put this mine on this 108—or took this 108 injunctive action—had ownership of the mine with the most "D" orders in the United States out of 14,500 mines.

And to address the point that Congressman Rahall raised, that is the kind of mine that we need to be dealing with. And that is where we are putting our strategic attention to identify mines like that and move in. No one, I don't think, could tolerate, or should tolerate a mine with that kind of a record. And I think we need to be active.

What we learned in that was that it takes time to do that. And I don't want Congress to think we have this silver bullet either that we can just decide today that we have an Upper Big Branch that we need to deal with in that context and tomorrow have that mine shut down. That was a lesson that we learned from the experience of Freedom Energy.

And as far as the problem that we recognized a year ago——

Mr. WALBERG. The gentleman's time has expired.

And we will move on now to Mr. Rokita.

Mr. ROKITA. Thank you, Mr. Chairman.

Thank you, Mr. Main, for being here today. In a hearing with Secretary Solis 2 weeks ago, on February 16th, I asked if the Department of Labor and MSHA would make the underlying data and assumptions associated with your respirable coal dust rule available to stakeholders so that they can comment while the rule is open so that we can have a better rule.

Mr. MAIN. Okay.

Mr. ROKITA. The 10 business days came and went yesterday. We got nothing in writing. You did meet with my staff. And you said, it is not—you don't have access to the data. It is NIOSH's data.

You did agree in that meeting—and I want to get it on the record here—that you will help us get that data. And so, I want to know if now you will agree to keep the rule open so long as it takes so we can get that data because apparently no one has really asked until I have been asking, I guess—so that we can have a better

rule at the end of the day. It is a yes or no question. I am just trying to get your thoughts on it.

Mr. MAIN. Well, I think there is some confusion over the data. And I know we were over yesterday meeting with some of the congressional folks. But the data that we relied on for the rule is what data that we provided yesterday. There is a request for data that has, as I understand, been made by the mining industry for information that was developed by NIOSH with—you know, to do with some of the findings that they have, which is not data that we have relied on to develop the rule.

Mr. ROKITA. Okay.

Mr. MAIN. That is additional information. And what we have done is we have actually talked to NIOSH, our staff, when this was brought to our attention because we want to get the information out there as well, too, just to clear the air. But NIOSH is the——

Mr. ROKITA. So does that mean you didn't have access to the—NIOSH's data when you prepared this rule?

Mr. MAIN. As I understand it, the data that is being requested is data that was not relied on by our folks when we developed the rule as a starter. It is data that folks would like to get that NIOSH used to develop some of their information.

Mr. ROKITA. Okay.

Mr. MAIN. Okay? And what we are trying to earnestly do is work with NIOSH and—or work with the folks who have made the request to get that information released. We have made——

Mr. ROKITA. Because you would like to rely on it?

Mr. MAIN. Pardon?

Mr. ROKITA. Because you would like to rely on it?

Mr. MAIN. No, because there is an interest by the public to get the information. We want to be helpful to get it out.

Mr. ROKITA. Okay.

Mr. MAIN. Okay.

Mr. ROKITA. But would you keep the rule open so that we could get—until we get that data?

Mr. MAIN. Well, since it doesn't deal with the underlying data that was used with the rule, it would not be proper, I don't think, to do that.

Mr. ROKITA. But it would help shape the rule.

Mr. MAIN. Pardon?

Mr. ROKITA. It would help shape the rule and maybe make a better rule.

Mr. MAIN. It may give folks some ideas about what they want to comment on. But this rule has been in the making since 2000. This is the third rulemaking. And, you know—actually, we have held seven public hearings, six in the coal fields, to give the mining community a chance to provide information.

I just put out a notice yesterday capitalizing all the questions that have been raised to ask the industry again to provide information. But the subject of what we are talking about is not data that the standard was directly built from.

Mr. ROKITA. Okay.

Mr. MAIN. But, you know, we are going to be helpful to——

Mr. ROKITA. Well, thank you for your help. And I would hope that you keep the rule open because that might provide us some

data that would help make this a better rule so that we can stay in the mining business here in America but keep miners safe. And that should—that is a common interest we all have.

In January, the president issued an executive order that serves to improve regulation of regulatory review. Since you took office in late 2009, your agency has propounded no less than six major rulemaking activities for the mining industry. And we just referenced some of that.

Can you tell the subcommittee what you are doing to take into account the cumulative costs and burdens that are being—or would be imposed no stakeholders by these regulations? And does MSHA conduct an analysis or any safety—on any safety or health benefits when preparing these regulations?

Mr. MAIN. Yes, by law, we have to do that analysis. And we do it as a responsible act of the agency as well. I think if you look at our regulatory agenda, we have tried to develop a strategic approach to the regulations.

Black lung—I mean, we have had—anybody that works in the coal industry or lives in coal mine communities knows somebody that dies from the disease. Last report of mortality study published by NIOSH shows that 10,000 miners died from this disease in the period ending 2004. There is a need to act to deal with the rule. And we were asking for all comments——

Mr. ROKITA. Okay, thank you, sir, very much. And I am not in the industry, so maybe you can educate me. If MSHA and you are concerned about the dust that a coal miner is exposed to at the working face, which would make sense that we all be concerned about that, would it not make sense to employ something like air stream helmets rather than worry about the entire environment? I mean, wouldn't that make more cost-effective sense?

Mr. WALBERG. The gentleman's time is expired. And maybe we can get that in the second round.

Mr. ROKITA. Thank you, sir.

Thank you, Mr. Main.

Mr. MAIN. Okay. Thank you.

Mr. WALBERG. We will move to Mr. Payne, who has joined us. Thank you.

Mr. PAYNE. Thank you very much.

I understand mine operators enjoy the time value of money merely by filing a contest and waiting until their case moves to the top of the pile several years later. Mr. Main, is the—is legislation needed to create disincentives for those who use contests simply to buy time or to game the system to create or to evade steeper sanctions, in your opinion?

Mr. MAIN. Yes, I think that we have provided some technical guidance over the past year about reforms that would help fix this process through the legislative process. I don't know if that is what you are referring to or not. But an issue that was raised by Congresslady Capito over the final order—we have a rule that was never used. I am talking about the pattern of violation and talking about the system being gamed and delays in the—in violations that were cited before they could even be used.

I think we all have to ask why was this rule never implemented in 33 years. And what is it going to take to fix it? We have came

up with a solution through a change of regulation to help get us there. But it does not fix the problem entirely. And I think you are going to hear a lot of discussion about this final order issue.

And if you look at the final order application in the pattern of violation system, does it work better for miners' protection now under the current regulations, which means you may have to wait 3 or 4 years to get a—as we just had with the citations that were finalized recently—before we could take action? Or should we have the ability to take action on the front end.

And when we propose a rule, it puts MSHA in the position of being able to take action on the front end not to have to count on those final orders. But at the end of the day, there is still a statutory standard that is going to be applied, which means that every mine that winds up being on the pattern of violation, faces an action—this is legislation—faces an action of a closure order for every "S & S" violation that is found at that mine during the inspection.

Some of those things may be reasons why this law was never used for 33 years. And it may be a central issue that discussions about legislation—this may well be a central issue dealing with the impact of the current rule when it is fully applied, the final order issues. But, as we see it, it is better protective of the miners if we do not use final—wait for final orders before we make a decision about taking any action against a mine that may be considered unsafe enough to have a pattern.

Mr. PAYNE. And there is another question that I have. I really wanted to follow up, too, on the pattern of violations. However, the question about advanced notice—Monday, the U.S. attorney filed an indictment against a Massey security official for making false statements to the FBI and seeking to destroy documents.

The indictment charges that this official directed his security guards at the Upper Big Branch mine to provide advanced notice of MSHA's inspections. The indictment echoes testimony given by Gary Quarles, a Massey miner and the father of a miner killed at Upper Big Branch, who said that, "When MSHA arrived at the mine, Massey radioed to say there is a man on the property. This signals to miners and foremen to correct deficiencies or direct the inspector to—away from the deficiencies."

And so, I wonder if—does this "catch me, if you can" approach put miners at a greater risk. And when advanced notice is expressly prohibited in the Mine Safety Act, is Massey a case of isolated misconduct? Or is this more widespread, in your opinion?

Mr. MAIN. This problem is bigger than we would all like. I should probably start from that statement. The miners' families who talked about this being a problem during the congressional hearings, I think, made that point clear that, you know, there was advanced notification going on. We found this actually happening when we have been making these impact inspections and special inspections.

As a matter of fact, we have had to seek injunctive action against two, and I think, three mines here over the last number of months where we have found this conduct. If you look at the mine that we did an afternoon shift inspection of on—in September, following the Upper Big Branch disaster, the one we talked about—went in the

mine. Ventilation controls not in place, dust so thick that you can hardly see the continuous miner.

Had we not went to that mine at the time we did, we can only imagine what could have happened. But when we got the mine, we captured the phone. We prevented advanced notice because we did that because we thought that this was a mine that may use that tactic and was able to get in and find conditions as they existed.

So if you look at this advanced notice issue, it is a real problem. And I think——

Mr. WALBERG. I am sorry. The gentleman's time is expired.

We will move on to Dr. Bucshon.

Mr. BUCSHON. I would like to thank you again, Mr. Main, for the time yesterday in my office discussing this issue. And so, I don't have any questions today, but I would like to yield the balance of my time to Mr. Rokita from Indiana.

Mr. ROKITA. Thank you, Congressman Bucshon.

You know, West Virginia is kind of the face of the American mining industry. But Indiana is not too far behind, as you know, Mr. Main. And so, these issues are of paramount importance and interest to us. Again, I want to thank you for your time.

Picking up on my question—and, if you remember—again, not being in the industry, instead of achieving some—or trying to achieve an unachievable environment, okay, a standard or environment in the mine, why not use some other technologies that are available, like helmets, that would reduce the cost of mining, protect the miner and move down that route? Are you familiar with what I am talking about, these helmets where the miner actually breathes air that is filtered in a self-contained helmet apparatus?

Mr. MAIN. Some mines actually use those. And the way the law is constructed—and Congress, I think, wisely put this together this way back in 1969—was to say to the mine operators that you have to control the dust in the mine environment. It is a mandate.

And when we started, we had a lot less controls than what we had today, and the dust was much higher. And I think the first standard was about a three milligram standard to give a phase-in time. That was right after the 1969 Mine Act.

The law explicitly said that the respirators could not be used to control the dust. It had to be through the methods of engineering and controlling the dust. And over the years, I think we have developed much better dust control technology to implement what the Congress had thought. And I think we have better ways to manage how we control that dust.

As a matter of fact, you know, when you look at the data, the—you know, almost all the mines in the country are maintaining a level that is at or below the standard that Congress prescribed. So, you know, the fact is that mine operators must control this dust through the—you know, the dust that gets in the environment. I think that is a very wise approach.

As far as additional respiratory protection, operators are obligated to provide that when they get into these dust excursions. The air stream helmets is one methodology, as we call them, that some operators use. But there is nothing to prevent any operator in the mining industry to take to employ these at every mine. But they

are obligated to provide respiratory protection if there is hefty dust——

Mr. BUCSHON. The law you talked about where they weren't allowed to use the air stream helmets—do you—that is a current law?

Mr. MAIN. The current law requires engineering controls, yes, as a primary use.

Mr. BUCSHON. Yes. And that is a statute and not a regulation?

Mr. MAIN. That is a statute.

Mr. BUCSHON. Yes, yes. Would you be supportive of changing that?

Mr. MAIN. No, I think that you—if you look at how we mine coal in this country and if you look at how maintenance happens or doesn't happen in the mines, I think when you let loose of that control measure, the environmental control, you risk of really ramping up the dust levels back in the mines that we have spent decades to get down. And I think we have achieved a point in time in mining history that we have developed a lot of advanced dust control technologies to fix the problem. And a lot of mines operate every day as——

Mr. BUCSHON. These are proven technologies—sorry to interrupt. These are proven technologies, not in the experimental phase? But these are proven, workable, not cost-prohibitive technologies you are talking about?

Mr. MAIN. These are technologies that are used every day in mines that are able to maintain dust control levels.

Mr. BUCSHON. Okay, thank you. I have got one more question. It is not necessarily specific to the mining industry, but industries that you regulate. I am hearing that there is inconsistencies when inspectors come through.

One inspector might come by one month and find—not say anything about something, and another inspector comes by another month and finds something, and you are—these guys are—it seems like they are always chase their tail because the inspectors—the inspections, I should say, aren't consistent. Can you respond to that? And what are your controls to make sure there is consistency across inspections?

Mr. MAIN. Yes, one of the things I looked at when I first became assistant secretary was this issue of inconsistency. And, as I pointed out when I recognized we had about half of the inspector staff that had about 2 years experience under their belt because of this shift of populations of the—you know, the retirements within MSHA as well as the mining industry, we began to, a, look harder at areas where we were having inconsistencies and, b, looking at ways to fix that.

One of the things—I am probably the most traveled assistant secretary that probably ever had this job. My wife tells me that anyway. But I went out to—but it is for purposes. I went out to—met with the aggregates industry in Indiana—in Indiana, Illinois, to South Carolina, North Carolina, California and met with folks in Oregon. And really, we sat down with these aggregates associations, the mining community and sort of talked through a lot of these problems we were having.

As a result, we have really formed, I think, a really good alliance with the National Sandstone and Gravel Association and others as a pipeline to feed those in and give us an opportunity to clear those up. Some of them are policies, and some of them are people.

Mr. WALBERG. I am sorry. The gentleman's time is ended again.

Mr. BUCSHON. Thank you, Mr. Chairman.

Mr. WALBERG. And we will move on to a second round.

And retaining my time, I will move to Ranking Member Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Mr. Secretary, miners are the first line of defense to alert operators of an unsafe condition. But we heard testimony that few miners believe that the existing provisions of the Mine Act adequately protect them from retaliation if they speak up. At the Beckley hearing, we heard that if a miner objects to unsafe conditions, this could—and it could slow down coal production, the miners risk losing their job if they brought it up.

In fact, one of our witnesses, a mother who lost her son, told us that he had said to her repeatedly that he thought he was going to die in that mine because it was so unsafe. And she kept saying, "Well, why didn't you say something about it?" And he said that he would be retaliated against and if not at that very moment, but somewhere down the line.

So the Robert C. Byrd Mine Safety Act extends the 60-day statute of limitations to 180 days. It updates the burdens. And it makes it a felony to knowingly interfere with the livelihood of miners who report hazards or violations to state or federal authorities.

Is this important? Do we need other reforms to protect against retaliation?

Mr. MAIN. I think we have to look very hard at looking at ways to give miners a level of comfort that they can speak out if they are exposed to unsafe or unhealthy conditions and see that action is taken to protect them. They are fearful of losing their jobs. I mean, there is just, in my mind, no doubt about that. You know, some miners have that fear.

And I think we need to be looking at how we increase the protective measures to allow them to have a greater level of comfort. And that means in cases, more time, that, in cases, means more penalties against those who retaliate against miners.

That means that the miner should not have to worry about am I going to get paid if I lose my job or reassigned to—cleaning belts in mines is not always noted to be the most precious job. But, you know, winding up saying something and winding up getting a shovel in your hand and have to clean up along the belt lines, things like that. But, yes, I think those are things that—that we really need to look at in terms of improving the protections to miners.

Mr. WALBERG. Thank you.

We will move to Dr. Bucshon.

Mr. BUCSHON. I toured a coal mine in my district about 4 or 5 months ago, Gibson County Coal, 600 feet down and two miles to the face. I probably told you that. And when I did that, I had to be trained on a self-contained rescue—or self-rescuer. And it was pretty interesting because my staff with me, just the fact that they had to have a self-rescuer was an issue with them.

They couldn't imagine why that would be. And, as you know, my father was a union coal miner for 37 years. So I told them, don't worry, nobody ever uses these things.

But the actual fact is every once in a while, people do have to use them. And it has been brought to my attention here that during some random testing of the self-contained self-rescuers, there has been a significant amount of, I guess, malfunction in an undetermined percentage of the units. And what are we—what is our next generation looking like for those things? Do we have things in the pipeline? And what is MSHA doing to try to straighten that out?

Mr. MAIN. One of the things that I try to do quite often is sit down with the mining industry and look at where we are at with our technology and where we need to go. I just had a meeting with the National Mining—Association about 2 weeks ago to discuss this very subject to try to get a focus on what our next generation of SCSRs are. And we had a pretty healthy discussion about what needs to be on the table.

And I am hopeful that we can organize within the mining community an effort that gets us, more quicker than later, a new generation of devices. And I think we all realize that we have to build a device that allows a miner to actually talk when a device is on because if you get caught in smoke, a breath can take your life, and you lose your buddy. We have got to fix things like that.

Mr. BUCSHON. Another thing is the time limitation on those. I mean, I was—I knew this, but, I mean, you have about an hour, ballpark. Is there anything that we can do to potentially extend that viability time if you have to use a self-rescuer?

Mr. MAIN. There is a lot of things in the discussions that we are looking at. And one is to put a device on and never have to take it out of your mouth and have enough air through add-ons, through dockings to get you out of the mine and looking at ways to reconfigure, possibly, the way that we use self-rescuers.

We have a small industry in terms of the marketing of these kind of devices. We have very few manufacturers that want to get into the business, which we found out about these communication devices. And this is an open discussion we are having with NIOSH and the mining industry looking at other types of equipment such as, maybe, the military uses where there is a larger market share, more availability of devices. But it is something that we are all taking a hard look at to try to figure out what we can develop.

Mr. BUCSHON. Yes. And, as you know, President Obama recently issued an executive order that—wanting every agency to really reexamine there regulations to see where they might be able to be changed, modified, eliminated. How is that going in MSHA? Have you had a chance yet to look over these things and make sure that the regulations we have in place are not outdated and don't need to be updated or eliminated going forward?

Mr. MAIN. Yes, we have actually a couple regulations on our deck that deals with the very topic. One of them is which I talked about just briefly in my written testimony. That is the part 100 penalty rules.

And looking at the way that that rule is constructed and the inefficiencies that exist within the—you know, for mine operators, for

MSHA, for miners, the things that drive inconsistency with the way that the rules are applied. And that is something we plan to issue as a proposed rule here very shortly. That is probably the top one on the list.

Mr. BUCSHON. Okay.

Mr. MAIN. And I think it will be an improvement for a lot of reasons.

Mr. BUCSHON. Yes. Another thing, knowing my dad and his buddies and stuff is, you know, when you institute these, say, specialty masks or whatever that might be required in high-dust areas and—or any type of mask really, compliance is a pretty big—is a potentially big issue. Is there a way with some of these things that we can assure compliance, even if you put regulations in place, that the miners themselves will comply?

Mr. MAIN. Yes, I grew up in the mining industry. And I started out 18 years old eating a little bit of rock dust and coal dust and had a lot of experiences in my life. One of the approaches that I have taken with what we do at MSHA, rules to live by as a start, we identified rules that are tied with the most common fatalities we have in the mining industry. We identified what they were.

We got all the stakeholders together, the mining industry, miners. And we developed a training program that we train our inspectors to that we put it out to the industry. Everybody has the same training program.

We rolled this out about 3 months in advance before we even came through with the compliance side. We built a lot of infrastructure on the front end of this to educate and to get people comfortable with. We have engaged in a similar activity in the metal, non-metal industry with sampling.

But the strategy that we have—we want the industry to be informed. We want to get ahead of the curve and try to get the information out, why are we doing this, what is the importance of it and get folks to buy into it and then bring the enforcement phase on the tail end of that.

Mr. WALBERG. I thank the gentleman. The time is expired again.

And we will move to the gentleman from West Virginia, Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman. I, again, thank you for your courtesies you have extended me today.

I thank you, Mr. Main and Mr. Stricklin and all of your staff, for the work that you have done, that you did at UBB and, most importantly, all the rescuers and emergency personnel who put their lives on the line going into the mine trying to save other lives.

I am going to be with the families once again, and they thank you, Joe, for the way you have updated the families every couple months on your investigation. I will be with them again next month. I hope I can tell them that Congress is doing all that we can to ensure that miners don't have to put their lives on the line to earn a paycheck.

We have acted quickly in the past. Following the Sago disaster in 2006, all the stakeholders came together. The Congress passed the Miner Safety Act. President Bush signed it into law in 2006. And without a doubt, the Miner Act has been responsible for making our mines a lot safer today. So Congress can act quickly.

But we hear a lot today about we have got to wait until your investigation is complete, all the investigations are complete, until every nook and cranny is looked into before Congress can once again move on safety legislation. I don't necessarily buy that argument, but I understand those who are promoting that argument. And sometimes I am afraid that it is being used as an excuse rather than a reason.

I would ask you, Mr. Main—and you have talked about preliminary results of your investigation, both within the family meetings and here today in your prepared testimony. And we all know there are criminal investigations going on at the same time.

Is the latter holding back the release of some of your work and your investigative work? Is it because of the criminal investigation that is going on by the FBI and other legal entities? I don't want to step in dangerous ground here. But I think it is worth providing the families that type of answer.

Mr. MAIN. Yes, the first thing that I will note is that you are exactly right, that Sago did help—the MINER Act, rather, of 2006. And being on the ground conducting rescue operations, I was very thankful about the efforts put in to beef up our mine rescue teams. They did a superb job at Upper Big Branch.

Our inspectors, the state of West Virginia, the mine rescue teams—and that helped as a result of the Miner Act. And it was done fairly efficiently. I think it was about 6 months after the disaster.

In terms of where we are at with our investigation, what the expectations are, we don't know when we are going to be done. And we have made a commitment to a request from the Department of Justice not to do things that will interfere or jeopardize their investigation. They have asked us to delay our public hearing that we plan to hold and delay release of the transcripts.

And we all know how slow or fast the Justice Department works from time to time. And, unfortunately, I wish I could give the families a better answer and everyone a better answer. We just don't know.

But I think it is going to be months before we are able to release the information that we have as a result of what is going on in the investigation. And I will tell you this: The families deserve to know before and as much as anyone else.

Mr. RAHALL. Is it your opinion this is more of a serious—more serious criminal investigation, the Department of Justice investigation, than you have seen in any previous disasters?

Mr. MAIN. In my experience, I have to say that I think the Department of Justice is very serious about this investigation and getting to the bottom of things that they believe they need to get to the bottom of. And I can't speak for them, but I truly believe this is a very serious investigation.

I think they are approaching it the same way that we are. For the things that they are tasked with, I think they want to find out what it is that went wrong that they need to deal with. And I can assure you on our side, we are going to not only turn over every rock, but pry it apart to understand what went wrong.

Mr. RAHALL. Thank you.

Thank you, Mr. Chairman.

Mr. WALBERG. Thank you, Mr. Rahall.

Holding onto my time, I now turn to Mr. Payne.

Mr. PAYNE. Thank you very much.

I, too, took the opportunity to visit a mine several months before the big tragedy, I think it was, last year. And certainly, to go through the training first in order to go to the mine, secondly, to really go down and enter the mine and to be there was quite an experience. I would recommend that to everyone on the committee as we deal with this because to put yourself in the shoes of those miners is really quite an experience.

And I really have a lot of respect for the courage and for their commitment to their work that they continue to do it. The thing that was interesting that, having a chance to meet some of the workers, they tend to have been the children and grandchildren of former miners. I mean, it is part of the breed. They know that there is going to be danger, but that is what they do.

Many of them want their children to go off to college and not do it, but every kid doesn't go to college. And so, there will be others to do it. So I really take my hat off to people. As a matter of fact, the first labor issues I ever heard of was about the United Mine Union, John L. Lewis.

As a little kid, I recognized he had heavy eyebrows. And I wonder whether that was what you had to have to be a miner. And I didn't have heavy eyebrows.

But it has always been an issue. And it has been a very important part of moving America forward. But I think that in a lot of instances, we don't do as much as we should for miners. And I just wonder with the MSHA's—the pattern of violation, MSHA has proposed reforms to the pattern of violation regulations. But it is unclear whether MSHA has sufficient legal authority to make effective reforms to the pattern of violation process.

Let me give you an example. The DOL inspector general urged MSHA to look at keeping mines on POV for longer than 90 days to ensure that improvements are sticking. His review found that performance improvements at mines which received potential pattern of violation letters for the 90-day review period—but compliance fell off after the 90-day review expired. So I wonder do you need legislation to extend the pattern of violation process to, say, for a year, for example.

Mr. MAIN. I think we are squeezing out everything we can in the current rule as well as in the proposed rule that gets—that has a standard crafted to meet the current statute. To do more than that is going to take legislation. And I think that is just pretty much that simple. And I think there is some different models that were crafted that moved the pattern of violations process away from the current structure of the standard to help fix the kind of problems that you are talking about.

And if you want to move beyond what we are doing on the current standards, you are going to have to change the standard. I know we are talking about coal mines, but this is a standard that applies to the entire mining industry. And there is, I think, two of the 14 mines were metal, non-metal mines. And I just want to sort of bring folks up to speed that may or may not know the industry that well.

But if you look back at the last 20 years in the mining industry, we have had more miners die at these non-coal mines, at metal, non-metal mines, than we have at coal mines. And I know this is an issue that comes up from time to time about the work that we do on that side. In applying the pattern and other enforcement actions, the impact inspections, this is a side of the industry that holds the most mining deaths as opposed to coal.

Mr. PAYNE. The inspector general also recommended that MSHA use citations rather than final orders to determine whether there is a pattern of violation at a mine. Your proposed rule includes this recommendation. However, some industry participants have argued that this deprives them of due process because they will have to litigate each citation before having it count toward history of violation.

Is this rule compromising operator due process rights, in your opinion?

Mr. WALBERG. I am sorry. The gentleman's time has expired. And we will have to get that answer, maybe, in——

Mr. PAYNE. Can he say yes or no?

Mr. WALBERG. Yes or no?

Mr. MAIN. I apologize. I was trying to catch the question.

Mr. PAYNE. Okay. Well, we will give it to you. You can get it to me in writing.

Mr. MAIN. Okay. Okay.

Mr. PAYNE. All right. Thanks.

Mr. WALBERG. Mr. Secretary, thank you for your time and diligence at the table today. Let me just give a couple final questions here. In your testimony, it highlights changes made to the pattern of violations criteria in 2010. The POV proposed rule suggests that mine operators will be judged based on POV criteria.

However, that criteria is not in the proposal. And so, will the criteria be in the 2010 revision? If not, what criteria will be used? And will it be made public for stakeholder input?

Mr. MAIN. Okay. And I apologize. Was the basis of your question what criteria we are going to use for 2010 for the next——

Mr. WALBERG. For 2010 the criteria is not in the present POV proposal. That is indicated as there. Will it be in the 2010 revision? And if not——

Mr. MAIN. Yes, I should probably answer the question this way. If we do another pattern of violation, we will do it under the current rule. And assuming that the new rule would not be completed by the timeline, which is by the end of this year, we would be using the current regulation to apply the next pattern of violation. And the criteria is published for that. Okay?

In terms of the proposed rule, we anticipate we are going to get comments and responses back from the industry and stakeholders about what should be in that criteria. We had made a commitment to the inspector general as part of a review of the pattern of violation process to have a discussion with the stakeholders about the criteria that is used. And we fully expect to do that. But I think for the short-term, one would expect the current rule to be used because the new rule as not conceived would be completed by that time.

Mr. WALBERG. Okay. One of the reasons the mine safety and health review commission is facing a backlog in citations is due to the elimination of the conference process. Your testimony before the committee last February suggested this was one area that MSHA was prepared to reengage in.

Last August, you initiated a pilot program to address the breakdown in the conference process. Can you tell us how that pilot project is working? And do you believe there will be a way to reinstate the conference process in the short-term?

Mr. MAIN. Yes. When I testified here February of last year, this is something I talked about, which was revamping the whole conferencing process. We had it on the track to develop a bit more quickly. I think when Upper Big Branch—when the disaster happened at—it slowed that model down a little bit. But nonetheless, we was able to implement a pilot program.

And we chose three districts of which to conduct the pilot. And it would be—well, the pilot actually involved creating a process where mine operators could raise with MSHA at the district level concerns they had about the citations or orders issued and have an opportunity to settle those out before they become an issue of litigation and resolve those.

We have since concluded those pilots. I had a meeting with the entire—I shouldn't say the entire—the representatives of the mining industry about 2 weeks ago—the National Mining Association, the Bituminous Coal Operators Association, Sand and Gravel Association and others and miners unions—to discuss what we are doing with the pilot, the information that we generally found thus far. And we are doing an evaluation with all the operators that participated.

And those who didn't participate, which was a surprise, we identified a number of mine operators chose not to use that pre-contest process. We are in the process of evaluating that. Mine operators are going to be contacted probably over the next month to get back information. And we are going to use that to develop a pre-contest conferencing process.

I will tell you up front, I mean, we are looking at a resource issue here because we have to take care of the backlog which exists with an amount of our staff. And we are trying to figure out how we set this up as a separate pre-contest model. But that is the status of where it is at. Hopefully, over the next 2 to 3 months, that we will be able to provide some guidance about where we are going to go with the program.

Mr. WALBERG. We look forward to that information as it comes. Well, thank you.

I would like to thank, again, Assistant Secretary Main for taking the time to testify before the subcommittee today.

I appreciate the efforts of the subcommittee and attention to the detail as well as our two members from West Virginia who had—who joined us as well today. And so, at this time, I would recognize the ranking member for any closing remarks.

Ms. WOOLSEY. Thank you, Mr. Chairman.

Mr. Main, thank you for being here. Your testimony has informed us about the many, many efforts that MSHA has underway

to protect miners and the obstacles that you face without additional legislative authorities.

Mr. Chairman, there are many responsible mine operators. And we know that. However, it is at the peril of America's miners and against expert judgment if we ignore Mr. Main's plea for legislation to help deal with that subject of mine operators who chronically violate our mine safety standards and allow them to put miners' safety in the bull's eye.

The 1-year anniversary of the Upper Big Branch explosion is fast upon us. And it had not gone unnoticed that the Congress has failed to pass legislation to prevent tragedies like this from happening again. This is unacceptable.

The least we can do for these families is to work cooperatively together to fix the deficiencies in mine safety. At the same time, we can't ignore a major problem inherited by Mr. Main that requires resources: a growing backlog of mine safety cases lagging for 2 to 3 years at the mine safety review commission. Last year, MSHA received supplemental funds to create backlog centers. The review commission hired six new judges.

However, the Republicans' continuing resolution eliminated funding requested by the administration to reduce the backlog this fiscal year. This is not just a paperwork backlog. The backlog is undermining MSHA's ability to use its existing tools to address serial violators who endanger miners.

Mr. Chairman, I remain hopeful that we can address MSHA's resources needs and will work together to do that. Thank you.

Mr. WALBERG. Thank you, Ms. Woolsey. And I certainly make a commitment that we will attempt to deal with the issues and concern.

And though we come to a year anniversary soon for the tragic mine event, I hope there is appreciation for the speed in which we are moving to address these issues by having hearings such as the one today, by dealing with a budget crisis that is in place and searching for the core criteria, core funding sources and needs that we have, that we can move forward in an economic climate in this country that benefits all, including the hard-working miners.

I spent some time as a steelworker in a furnace division melting steel and in dusty situations, dangerous situations as well that aren't totally comparable, as I understand, to a mine. But I also understand that people that work there, whether it be in a steel mill that I worked in or whether it is in a mine, want to carry on their jobs for their children, for their future.

They want to come home at night. They want to work in a climate that doesn't necessarily put them at risk for future disease and problem. We all know that as we work together, we have to make those decisions that result in an economic situation and a social policy situation that is good for all of us.

I think in getting to the bottom of issues that we are addressing today—and, Mr. Secretary, I would thank you again for being here, but also remind you that we would like to have that whistleblower data so we can add that to our resources so we understand the full perspective of what is needed to do in advancing policy that is good for those who work in our mining industry and hopefully a mining

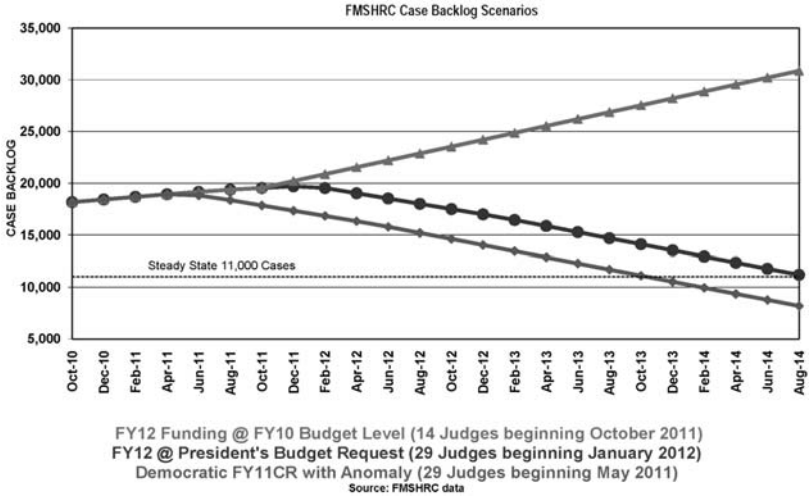
industry that allows us the energy future that this country ought to have as well.

Without those mines being open, without those miners working safely and successfully in the mines, we won't have that opportunity as well. So we will keep moving on. We hope to go down into a mine. I certainly want that experience. And I think there are a number of my committee members that would appreciate that as well.

We want to understand what the safety protections available are, where the malfunctions are, what you are actually looking at in a mine situation. And so, that will definitely be part of our process.

There being no further business, the committee stands adjourned.

[An additional submission of Ms. Woolsey follows:]



[An additional submission of Mr. Main follows:]

DISPOSITION OF COMPLAINTS FILED UNDER SECTION 105(c) OF THE MINE ACT

Section 105(c) Complaints/Investigations	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Complaints Received	126	154	171	169	48
No Violation Found	91	119	121	113	14
Complaint Withdrawn/General	4	4	13	14	4
Complaint Withdrawn/Satisfied	18	17	25	11	2
Currently Open	0	0	0	0	28
Violation Found	13	14	12	28	0
DISPOSITION OF FMSHRC DISCRIMINATION LOSES					
Favorable Decision/Settlement	11	11	4	4	0
No violation	2	1	0	0	0
Withdrawn (while at FMSHRC)	0	0	0	0	0
Pending at FMSHRC	0	2	8	24	0
INDEPENDENTLY APPEALED BY COMPLAINANT					
Independent Appeals Filed	12	15	15	7	2
Favorable Decision/Settlement	7	2	1	1	0
Decision/Settlement—No violation	4	4	1	0	0
Withdrawn (while at FMSHRC)	0	4	5	5	2

DISPOSITION OF COMPLAINTS FILED UNDER SECTION 105(c) OF THE MINE ACT—Continued

Section 105(c) Complaints/Investigations	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Pending at FMSHRC	1	3	7	1	0
DISPOSITION OF TEMPORARY REINSTATEMENT (TR) REQUESTS					
Complaints that Included TR Requests	32	36	53	66	33
TR Sought	7	4	14	20	8
Granted	3	2	8	11	1
Approved Settlement	4	1	5	3	0
Denied/Dismissed	0	1	1	1	0
Pending	0	0	0	5	7
Withdrawn/General	4	0	7	12	3
Withdrawn/Satisfied	5	5	7	1	2
TR not sought	16	27	25	33	14
Investigation ongoing	0	0	0	0	6

Disposition of Complaints Filed Under Section 105(c) of the Mine Act

SECTION 105(C) COMPLAINTS

Complaints received—Complaint was received in the field operations. Alleged types of discrimination for exercising rights guaranteed by the Mine Act include but are not limited to:

- Discharge
- Interference (suspension, harassment/intimidation, reduction in pay, denial of overtime, etc.)
- Applicant for employment (alleged blacklisting, denial of employment)

No Violation Found—MSHA closed the investigation after finding no violation of Section 105(c), usually for one of the following reasons:

- MSHA's investigation of miner's complaint was unable to establish a prima facie case under the Mine Act
- Some adverse action was taken against the miner but there was no evidence the miner engaged in protected activity
- Evidence of protected activity and adverse action found, but no nexus establishing retaliation (insufficient evidence establishing a connection between the miner's protected activity and the adverse action taken)

There appears to be retaliation or discrimination but not under the Mine Act (complaint covered under another federal or state law (FLSA, OSHA, NLRA, etc.) In these instances, the case is referred to the appropriate agency for review and determination.

Complaint withdrawn/General—The complaint was withdrawn by complainant for general reasons:

- Complainant no longer wishes to pursue complaint and signs a waiver to discontinue. (Usually no explanation is given)

Complaint withdrawn/Satisfied—Complaint was withdrawn by complainant after complaint has been satisfied

- Complainant no longer wishes to pursue complaint because he or she and company has reached a settlement (making the miner whole). The merits case is considered resolved and not filed with the Federal Mine Safety and Health Review Commission (FMSHRC).

Currently Open—The case is still under investigation or review.

Violation Found—The Complaint is found to have merit following an investigation and action was filed by the Secretary of Labor with the FMSHRC under Section 105(c)(2)

DISPOSITION OF FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION (FMSHRC) DISCRIMINATION CASES

Favorable Decision/Settlement—Case resulted in a favorable decision after hearing or favorable settlement approved by an Administrative Law Judge (ALJ).

No Violation—Case resulted in an unfavorable decision after hearing.

Withdrawn (while at FMSHRC)—Case withdrawn by complainant or the Secretary prior to decision. Complaint is not pursued.

Pending at FMSHRC—A hearing or ALJ Decision is pending.

DISPOSITIONS OF INDEPENDENTLY APPEALED DISCRIMINATION COMPLAINTS FILED BY COMPLAINANT—SECTION 105(C)(3)

These are cases that MSHA does not pursue after investigation and the Complainant brings his/her own action before the Commission.

Decision/Settlement—Case resulted in favorable decisions after hearing or a favorable settlement was approved by an Administrative Law Judge (ALJ).

No Violation—The case resulted in an unfavorable decision after hearing.

Withdrawn (while at FMSHRC)—Case was withdrawn by complainant or the Secretary after case is filed with FMSHRC before hearing. Complaint is not pursued.

Pending at FMSHRC—A hearing or ALJ Decision is pending.

DISPOSITION OF TEMPORARY REINSTATEMENT (TR) REQUESTS

Complaints that Included TR Requests—Cases where Temporary Reinstatement was requested.

TR Sought—The Secretary filed an application for TR with FMSHRC following a preliminary investigation.

- Dispositions
- Granted—working or economic relief ordered by ALJ
- Approved Settlement—merits case resolved during TR process and approved by ALJ
- Dismissed—Unfavorable decision (TR not granted by ALJ)
- Pending—Decision is pending

Withdrawn/General—The request for TR was withdrawn by complainant (no reason given).

Withdrawn/Satisfied—The request for TR was withdrawn by complainant (reinstated/made whole by company without MSHA involvement).

TR not Sought—The Secretary did not file an application for a TR because no prima facie case has been alleged. Examples include:

- No protected activity
- Individual not a miner, etc.

Investigation Ongoing—Determination to proceed with TR on Miner's behalf still pending.

[Questions submitted for the record and their responses follow:]

U.S. CONGRESS,
Washington, DC, March 18, 2011.

Hon. JOSEPH A. MAIN, *Assistant Secretary,*
Mine Safety and Health Administration, 1100 Wilson Boulevard, Arlington, VA 22209–3939.

DEAR ASSISTANT SECRETARY MAIN: Thank you for testifying before the Subcommittee on Workforce Protection at a hearing entitled, "Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration," on March 3, 2011. I appreciate your participation.

Enclosed are additional questions submitted by members of the Subcommittee following the hearing. Please provide written responses no later than April 1, 2011 for inclusion in the official hearing record. Responses should be sent to Ryan Kearney of the Committee staff who can be contacted at (202) 225-4527.

Thank you again for your contribution to the work of the Subcommittee.

Sincerely,

TIM WALBERG, *Chairman,*
Subcommittee on Workforce Protections.

REPRESENTATIVE TODD ROKITA (R–IN)

1. Mr. Main, you have stated that I am confusing the data that has been requested by stakeholders in relation to MSHA's development of the respirable coal dust regulation. You believe that I, other Members of Congress, and stakeholders are requesting other additional data that National Institute for Occupational Safety and Health (NIOSH) used to develop their findings and you say that data is not relevant because you did not rely on such data when developing the regulation. Two points I would like you to address:

A. You mention that NIOSH used this data to develop their findings. NIOSH's findings were in part the basis of the 1995 NIOSH report. By MSHA's own admission, this report was used as the basis of this rule. Did MSHA then not have access to this hard data when preparing and writing the regulation? And if MSHA did

have access, will you work with Congress and my office to have the data released by NIOSH to stakeholders in a timely manner?

B. You somehow also noted that you did not rely on this data to develop this rule even though MSHA admits it used the 1995 NIOSH report for which NIOSH indicated the data was used. However, you did not answer my question about whether or not you had access to this data directly. Yes or no, did MSHA have access to this NIOSH data when developing this rule?

2. The data used for this rule is from 1995. Are we to believe that this data is relevant in 2011 and should be used as the basis for this rule? It is my understanding that newer findings and data prepared by NIOSH exists but has not yet been released. Can MSHA explain why more recent data would not be used to inform this rule?

3. As part of rulemaking, MSHA prepares economic analyses in order to comply with congressionally mandated procedures on rulemaking. The objective of these laws is to eliminate excessive and unjustified burdens on small businesses, and to ensure that regulations are designed to control their cumulative effects on small businesses. MSHA has estimated that the dust rule will cost less than $100 million, yet statements from experts at the public hearings have placed the burden of the regulation at well over $1 billion. Can you explain the discrepancies? Can MSHA provide for the Committee the analyses, how it was conducted and the assumptions made, along with the backgrounds and training of the personnel involved?

REPRESENTATIVE DONALD PAYNE (D—NJ)

1. Some industry participants have argued that using citations instead of final orders for determining past history of violations for purposes of Pattern of Violations (POV) deprives them of "due process." Will this approach compromise operator due process rights? What are operator due process rights to challenge a notice of POV, if citations are used instead of violations?

U.S. Department of Labor

Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

APR 12 2011

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Walberg:

Thank you for the opportunity to respond to the additional questions from your hearing entitled, "*Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration*," on March 3, 2011 in which Assistant Secretary Joe Main testified. Enclosed, we have restated the questions in their entirety and provided the respective answers.

If you have further questions please call Sharon Block at (202) 693-4600.

Sincerely,

Brian V. Kennedy

Enclosures

ADDITIONAL QUESTIONS
HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND LABOR
"Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration"
March 3, 2011

Representative Todd Rokita (R-IN)

Question:

1. Mr. Main, you have stated that I am confusing the data that has been requested by stakeholders in relation to MSHA's development of the respirable coal dust regulation. You believe that I, other Members of Congress, and stakeholders are requesting other additional data that National Institute for Occupational Safety and Health (NIOSH) used to develop their findings and you say that data is not relevant because you did not rely on such data when developing the regulation. Two points I would like to address:

   A) You mention that NIOSH used this data to develop their findings. NIOSH's findings were in part the basis of the 1995 NIOSH report. By MSHA's own admission, this report was used as the basis of this rule. Did MSHA then not have access to this hard data when preparing and writing the regulation? And if MSHA did have access, will you work with Congress and my office to have the data released by NIOSH to stakeholders in a timely manner?

   B) You somehow also noted that you did not rely on this data to develop this rule even though MSHA admits it used the 1995 NIOSH report for which NIOSH indicated the data was used. However, you did not answer my question about whether or not you had access to this data directly. Yes or no, did MSHA have access to this NIOSH data when developing this rule?

Answer:

In developing the proposed rule, Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, MSHA relied on: (1) the NIOSH 1995 Criteria for a Recommended Standard: Occupational Exposure To Respirable Coal Mine Dust (Criteria Document); (2) the 1996 Report of the Secretary of Labor's Advisory Committee on the Elimination of Pneumoconiosis Among Coal Mine Workers; (3) MSHA's Quantitative Risk Assessment; and (4) data and information in the Agency's Preliminary Regulatory Economic Analysis. The preamble to the proposed rule includes a full discussion of all information and supporting documentation used to develop the proposal. The underlying data for the Criteria Document include medical

information such as chest x-rays and associated work histories for individual coal miners. In developing the proposal, MSHA relied on the conclusions and recommendations in the Criteria Document. MSHA did not have access to the underlying data, nor did MSHA seek access to this data, because MSHA did not need this information.

MSHA is aware that stakeholders have requested from NIOSH documents containing positive radiographic films, data, and data evaluations associated with their more recent reports on Coal Workers' Pneumoconiosis (CWP) prevalence among coal miners. MSHA has contacted NIOSH and encouraged them to disclose releasable information (see attached letter). Also, in response to stakeholder interest in this information, on February 22, 2011, NIOSH posted a new web-based data query system that enables all stakeholders to make customized inquiries about CWP cases identified by NIOSH while preserving the confidentiality of miners' individual medical information. Stakeholders can display the results of their data queries in tables or on maps. The web site is at the following link: http://webappa.cdc.gov/ords/cwhsp-database.html.

Question:

2. The data used for this rule is from 1995. Are we to believe that this data is relevant in 2011 and should be used as the basis for this rule? It is my understanding that newer findings and data prepared by NIOSH exists but has not yet been released. Can MSHA explain why more recent data would not be used to inform this rule?

Answer:

MSHA believes that you are referring to the NIOSH draft Current Intelligence Bulletin (draft CIB) to the 1995 Criteria Document for which the public comment period closed on September 24, 2010. (The draft CIB is available on NIOSH's website at http://www.cdc.gov/niosh/docket/review/docket210/pdfs/0005-Coal-CIB-08-09-2010-Public-Comment%20mda.pdf.) As stated earlier, MSHA relied on the Criteria Document for the proposed rule and not the draft CIB.

The draft CIB states, among its conclusions, that: (1) After a long period of declining CWP prevalence, recent surveillance data indicate that the prevalence is rising; (2) Coal miners are developing severe CWP at relatively young ages (<50 years); and (3) The above individuals would have been employed all of their working lives in environmental conditions mandated by the 1969 Coal Mine Health and Safety Act (i.e., the existing respirable dust standard).

The draft CIB also states that the 1995 findings and conclusions remain relevant, as follows:

1) While findings published since 1995 refine or add further to the understanding of the respiratory health effects of coal mine dust described in the NIOSH Criteria for a Recommended Standard – Occupational Exposure to Respirable Coal Mine Dust, or Coal Criteria Document (CCD), they do not contradict or critically modify the primary conclusions and associated recommendations given there. Rather, the new findings strengthen those conclusions and recommendations.

2) Overall, the evidence and logical basis for recommendations concerning prevention of occupational respiratory disease among coal miners remains essentially unaffected by the newer findings that have emerged since publication of the CCD.

Although NIOSH has not published a final CIB, we do not believe that it would change MSHA's regulatory approach. MSHA believes that the draft CIB supports the need for the Agency to act now to protect miners.

Question:

3. As part of rulemaking, MSHA prepares economic analyses in order to comply with congressionally mandated procedures on rulemaking. The object of these laws is to eliminate excessive and unjustified burdens on small businesses. MSHA has estimated that the dust rule will cost less than $100 million, yet statements from experts at the public hearings have placed the burden of the regulation at well over $1 billion. Can you explain the discrepancies? Can MSHA provide for the Committee the analyses, how it was conducted and the assumptions made, along with the backgrounds and training of the personnel involved?

Answer:

The economic analysis, including the estimated impact on small businesses, is contained in the Preliminary Regulatory Economic Analysis (PREA), which is available on MSHA's website at http://www.msha.gov/REGS/REA/CoalMineDust2010.pdf . The PREA presents the methodology, assumptions, and underlying data used to develop MSHA's estimates of the costs and benefits associated with the proposed rule. Backgrounds and training of personnel involved in the development of the PREA include: economics; industrial hygiene; mining engineering; public health; and field enforcement.

MSHA staff will review the testimony and comments received in response to the proposal, including any issues raised on the economic data and information. The

Agency will address comments on the cost estimates in the Regulatory Economic Analysis that will accompany the final rule.

Representative Donald Payne (D-NJ)

Question:

1. Some industry participants have argued that using citations instead of final orders for determining past history of violations for purposes of Pattern of Violations (POV) deprives them of "due process." Will this approach compromise operator due process rights? What are operator due process rights to challenge a notice of POV, if citations are used instead of violations?

Answer:

MSHA presents its rationale, in Section III.B of the preamble to the proposed rule, for not including a final order requirement in the POV proposal. We have attached a copy of the proposal, which includes the preamble discussion, for your reference.

MSHA is in rulemaking on the proposed POV rule and accepting comments on this and other issues. Once the comment period ends on April 4, 2011, we will hold a public hearing to give members of the public and interested parties a further opportunity to address matters of concern. MSHA will include an analysis of the comments, including analysis of any comments that raise a due process concern, in the final rule.

In terms of operator rights to challenge a notice of POV, the Mine Act provides an opportunity for an operator to obtain temporary relief from an order issued under the Act. See 30 U.S.C. § 815(b)(2). In addition, the procedural rules of the Federal Mine Safety and Health Review Commission (FMSHRC) allow an operator to seek expedited review of any order, see 29 C.F.R. § 2700.52, including an order issued under the POV provision of the Mine Act. See 30 U.S.C. § 814(e). These statutory and regulatory provisions provide a prompt process for operators to use.

U.S. Department of Labor

Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, Virginia 22209-3939

MAR 28 2011

John Howard, M.D.
Director, National Institute for
Occupational Safety and Health
395 E Street, SW, Suite 9200
Patriots Plaza Building
Washington, DC 20201

Re: Freedom of Information Act Request from NMA

Dear Dr. Howard:

As you know, on November 11, 2010, the National Mining Association (NMA) submitted a Freedom of Information Act (FOIA) request to NIOSH for records related to the Enhanced Coal Workers' Health Surveillance Program (ECWHSP) administered by the Division of Respiratory Disease Studies.

The NMA request was noted by the Subcommittee on Workforce Protection at my March 3, 2011, hearing entitled "Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration" as an issue of relevance to MSHA's proposed rule "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors." At this hearing, I informed the Subcommittee that my staff had been in contact with your staff to facilitate disclosure of releasable information. Following the hearing, the Subcommittee submitted further questions concerning this issue.

I request that your staff review the NMA request expeditiously in order to disclose releasable information, as appropriate. If you would like to discuss this further, please contact me at (202) 693-9414.

Sincerely,

Joseph A. Main
Assistant Secretary of Labor for
Mine Safety and Health

You can now file your MSHA forms online at www.MSHA.gov. It's easy, it's fast, and it saves you money!

Prepared Statement of Hon. Nick J. Rahall, II, a Representative in Congress From the State of West Virginia

Chairman Walberg, Ranking Member Woolsey, I thank you and all the Members of the Subcommittee for affording me the privilege of sitting with you today. I join in welcoming Secretary Main.

In just over a month, on April 5th, we will reach the one-year anniversary of the Upper Big Branch Mine Disaster. For me, that is a personal and difficult milestone. That mine is in my District—not far from my home. I spent the days after that tragedy waiting, hour by hour, with the family members of the 29 victims, hoping for miracle that never came.

Since that tragic day, Members of this Committee and I have heard numerous horror stories about the way that mine was managed. Just this week, the Justice

Department handed down its first indictment, confirming reports of illegal management activities at that mine.

April 5th should be a nagging reminder to all of us of the obligation we have to ensure that the circumstances that led to that tragedy are not repeated. The families of the miners at UBB are owed closure and the comfort of knowing that some good will come of the tragedy that took their loved ones.

I continue to believe that it is possible to reach consensus on a bill—a necessary, reasonable bill—that will focus on the worst of the worst offenders, prevent more tragedies, and save precious lives in our coalfields. And I believe that there are times that it is best to effect change through the legislative process—where the people have a voice—rather than allowing agencies a free-hand to make policy changes through regulation and guidance that change with the political winds.

I have heard the argument that we must wait until the every nook and cranny of that disaster is fully, absolutely, and finally investigated before we pass any new legislation. One year after the UBB tragedy, that argument sounds more like an excuse than a reason.

I remind my colleagues that the Sago disaster happened in January 2006. President Bush signed the MINER Act in June 2006. And the MSHA report on the cause of the disaster was issued in May 2007. Without a doubt, the MINER Act has improved the chances for saving lives following an accident.

Mr. Chairman, again, I thank the Members of this Subcommittee for their courtesy. I never want to experience another tragedy like the one at UBB. I never again want to have to look in the faces of wives, children, or grandparents whose loved ones have perished in a preventable mine disaster. When I see the families of the miners who perished at UBB—and I expect to see them early next month on the anniversary of that tragedy—I want to be able to tell them this Congress is doing all that it can to ensure that miners don't have to put their lives at risk to earn a paycheck.

[Whereupon, at 11:47 a.m., the subcommittee was adjourned.]