

**A TRAGIC ANNIVERSARY: IMPROVING SAFETY
AT DANGEROUS MINES ONE YEAR AFTER
UPPER BIG BRANCH**

HEARING
OF THE
**COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS**
UNITED STATES SENATE
ONE HUNDRED TWELFTH CONGRESS
FIRST SESSION
ON
EXAMINING IMPROVING SAFETY AT DANGEROUS MINES ONE YEAR
AFTER UPPER BIG BRANCH

MARCH 31, 2011

Printed for the use of the Committee on Health, Education, Labor, and Pensions



Available via the World Wide Web: <http://www.gpo.gov/fdsys/>

U.S. GOVERNMENT PRINTING OFFICE

81-653 PDF

WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
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THURSDAY, MARCH 31, 2011

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Enzi, Blumenthal, Isakson, Paul, and Manchin.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Health, Education, Labor, and Pensions committee will please come to order.

Almost a year ago, this committee met in the wake of the worst mining accident our history has seen in decades. On April 5, 2010, 29 miners were killed in an explosion at Massey Energy's Upper Big Branch Mine in West Virginia.

One of the most devastating aspects of the disaster was the overwhelming sense that the explosion was not an unfortunate incident, but an accident waiting to happen. The mine had a long history of rampant safety violations.

Members of this committee were rightly concerned that this dangerous mine had not been given more rigorous oversight, and that the procedures we had enacted to target mines with repeated safety violations had not been effective in putting this mine back on track.

We told Mr. Joe Main, at that time, the newly-appointed head of the Mine Safety and Health Administration, that we expected him to use every tool in his arsenal to make sure a disaster like Upper Big Branch never happens again. Now, we are revisiting this devastating event 1 year later to explore what we've learned, what changes have been made, and what further reforms may be needed to ensure that all miners can come home safely at the end of their shifts.

Much of the underlying evidence from the Upper Big Branch investigation cannot be released at this time, I understand, due to a pending criminal investigation. Nonetheless, solely looking at what has been publicly released so far, we already know why the 29 miners were killed in the explosion.

Small methane ignitions happen frequently in mines, but unlike Upper Big Branch, they do not cause massive explosions. With properly maintained conditions, those small methane ignitions are relatively harmless.

At Upper Big Branch, large quantities of coal dust, which were allowed to accumulate in violation of safety laws, turned the small ignition into a massive explosion. That is why people died. We also have strong reason to suspect that there were active efforts to prevent safety inspectors from doing their job at the mine. Last year we heard testimony from one witness, miner Jeffrey Harris, that safety laws were followed at Massey mines only when inspectors were present.

We have also learned of at least one criminal indictment that's been issued accusing a high-level Massey official of providing illegal advance warnings when inspectors were about to enter a mine.

Now, while obviously this is an indictment, not a conviction, it does lend some credence to Mr. Harris's testimony that ignoring safety procedures was the norm, and not the exception, at Upper Big Branch and at other Massey mines.

Finally, we know that the tools in the law that are supposed to address situations like this, where an operator is repeatedly and flagrantly disregarding safety rules were not and they do not seem to be working. The pattern of violation process is supposed to target the worst actors. But as the Department of Labor's Inspector General has found, in the 32 years since Congress created this process, no mine has ever been placed on POV status, largely because MSHA has spent decades creating obstacles to prevent this process from working effectively.

Fortunately, over the past year since Upper Big Branch, MSHA has taken wide-ranging efforts to find problems in our mine safety enforcement and to fix them. From the implementation of an aggressive impact inspection program, to an attempt to eradicate Black Lung disease once and for all, Assistant Secretary Main has taken an aggressive, comprehensive approach to miner safety.

I look forward to hearing about those efforts, and how they will allow MSHA to function more effectively. I am also impressed that MSHA seems to have acted so quickly to fix the substantial problems that have often crippled the agency. Last year, for example, MSHA submitted a report to us and this committee on the inadequate review of citations and assessment of the gravity of those citations by supervisors. MSHA responded by improving its training program, and I intend to continue to monitor the effectiveness of this.

But in this situation, as with many of the challenges facing our mine safety programs, I do not share the view that Congress is absolved of its responsibility to legislate as a result of action by the agency.

Last year after the tragedy we began bipartisan efforts to explore possible mine safety legislation. Unfortunately, we were not able to find enough common ground at the time to move forward. But now, with new information about the tragedy and new efforts by MSHA leading the way, I hope we can restart that process and make real progress.

To honor the 71 miners whose lives were lost last year, both at Upper Big Branch and around the country, we must rededicate ourselves to building a safer future for everyone who goes to work each day in America's mines.

[The prepared statement of Senator Harkin follows:]

PREPARED STATEMENT OF SENATOR HARKIN

Almost a year ago, this committee met in the wake of the worst mining accident our country has seen in decades. On April 5, 2010, 29 miners were killed in an explosion at Massey Energy's Upper Big Branch mine in West Virginia. One of the most devastating aspects of the disaster was the overwhelming sense that the explosion was not an unfortunate incident, but an accident waiting to happen. The mine had a long history of rampant safety violations, and there was strong evidence that the operator was putting profits over workers' lives.

Members of this committee were rightly concerned that this dangerous mine had not been given more rigorous oversight, and that the procedures we had enacted to target mines with repeated safety violations had not been effective in putting this mine back on track. We told Joe Main, the newly-appointed head of the Mine Safety and Health Administration, that we expected him to use every tool in his arsenal to make sure a disaster like Upper Big Branch never happens again.

Now, we are revisiting this devastating event 1 year later to explore what we've learned, what changes have been made, and what further reforms are needed to ensure that all miners can come home safely at the end of their shifts.

Much of the underlying evidence from the UBB investigation cannot be released at this time due to a pending criminal investigation. Nonetheless, solely looking at what has been publicly released so far, we already know why the 29 miners were killed in the explosion. Small methane ignitions happen frequently in mines, but unlike Upper Big Branch, they do not cause massive explosions. With properly maintained conditions, those small methane ignitions are relatively harmless. At UBB, large quantities of coal dust—which were allowed to accumulate in violation of safety laws—turned the small ignition into a massive explosion. That is why people died.

We also have strong reason to suspect that there were active efforts to prevent safety inspectors from doing their job at the mine. Last year we heard testimony from one witness, miner Jeffrey Harris, that safety laws were followed at Massey mines only when inspectors were present. We have also learned of at least one criminal indictment that has been issued accusing a high-level Massey official of providing illegal advance warnings when inspectors were about to enter a mine. While obviously this is a criminal indictment, not a conviction, it lends credence to Mr. Harris's testimony that ignoring safety procedures was the norm, not the exception, at Upper Big Branch and other Massey mines.

Finally we know that the tools in the law that are supposed to address situations like this—where an operator is repeatedly and flagrantly disregarding safety rules—were not and are not working. The pattern-of-violation process is supposed to target the worst

actors. But as the Department of Labor's Inspector General has found, in the 32 years since Congress created this process, no mine has ever been placed on POV status, largely because MSHA has spent decades creating obstacles to prevent this process from working effectively.

Fortunately, over the past year since Upper Big Branch, MSHA has taken wide-ranging efforts to find problems in our mine safety enforcement and to fix them. From the implementation of an aggressive impact inspection program to an attempt to eradicate Black Lung disease once and for all, Assistant Secretary Main has taken an aggressive, comprehensive approach to miner safety. I look forward to hearing about those efforts, and how they will allow MSHA to function more effectively.

I am impressed that MSHA seems to have acted so quickly to fix the substantial problems that have often crippled the agency. Last year, for example, MSHA submitted a report to me on the inadequate review of citations and assessment of the gravity of those citations by supervisors. MSHA responded by improving its training program. I intend to continue to monitor the effectiveness of MSHA's response. But in this situation—as with many of the challenges facing our mine safety programs—I do not share the view that Congress is absolved of its responsibility to legislate as a result of action by the agency.

Some commentators have suggested that there is a dichotomy in Congress between those who believe that MSHA needs expanded powers, and those who believe that MSHA has all the powers it needs but just isn't using them effectively. I think that's exactly the wrong way to look at the issue. The question is not: did or didn't MSHA have the tools to prevent Upper Big Branch. The question is: what do all of us need to do to prevent the next disaster? I have never believed that *either* MSHA needs to fix the regulatory process *or* we need to pass new mine safety legislation. That is a false choice. Instead, we need to *both* improve the regulatory structure *and* pass legislation to improve mine safety.

With congressional oversight, MSHA has taken important steps to find problems and fix them. We need to ensure that those efforts continue. In addition, I look forward to hearing from the witnesses about the additional steps that Congress can take to improve mine safety. Almost 1 year after Upper Big Branch, we now have sufficient information to make intelligent reforms to our mine safety laws, and we shouldn't waste any time in doing so.

Last year, after the tragedy, we began bipartisan efforts to explore possible mine safety legislation. Unfortunately, we were not able to find enough common ground at the time to move forward. But now—with new information about the tragedy and new efforts by MSHA leading the way—I hope we can restart that process and make real progress. To honor the 71 miners whose lives were lost last year, both at Upper Big Branch and around the country, we must rededicate ourselves to building a safer future for everyone who goes to work each day in America's mines.

With that I'll turn to Senator Enzi for his opening statement.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman, and good morning.

This hearing marks a very tragic anniversary. As the Chairman mentioned, it was a year ago today, 29 West Virginia miners went to work in difficult jobs to provide for their families and fuel our Nation's economy when they were lost in a single accident.

The families of those men have had to sacrifice too much, but just as they have no doubt found ways to honor their loved one's memory over the past year, I believe the safety of mining in America will improve because of this accident and a life somewhere will be saved because of their loss.

Since we do not yet have an official report on the cause of the Upper Big Branch tragedy, the Chairman has called this hearing to focus on general mine safety issues. I appreciate the appearance of Assistant Secretary Joe Main and Elliot Lewis from the Inspector General's Audit office to testify about this Administration's effort to improve mine safety.

Frankly, some of the news coming out of the Administration is not encouraging. Since the accident last year we have learned that MSHA knew of problems at Upper Big Branch and failed to use the full extent of its authority to improve safety there. The Upper Big Branch mine was even slated to be put on a proposed Pattern of Violation notice for increased enforcement, but a computer glitch at MSHA eliminated the warning.

Two Inspector General reports have highlighted major concerns about MSHA's dysfunctional pattern of violations process and concerns about the quality of training MSHA inspectors receive. I look forward to hearing more about those reports from Mr. Lewis this morning.

I was also disturbed to read about a report sent from MSHA's Office of Accountability to you, Mr. Chairman, in your capacity as Chairman of the Labor, Health and Human Services Appropriations Subcommittee. That was sent on March 25, 2010. I read about this report in the newspaper earlier this month and saw that it found inadequate inspection documentation and citation writing in a vast majority of the field offices audited, as well as failure to complete required inspections in some mines with high methane liberation.

The problems this report exposed are exactly the concerns I spoke about at last year's hearing on this accident and tried to address in mine safety discussions with many Senators on today's panel last summer. It is difficult to understand why this report has not been shared with the group working on mine safety. I understand that Chairman Kline has an outstanding request for all of the reports the Office of Accountability has produced and I will be joining him in that request today.

My concern then, and even more so now that I have read this appropriations report, is that MSHA has an outsized mandate. The Mine Act does not allow MSHA the flexibility that the Occupational Safety and Health Administration, OSHA, has to focus on bad actors and requires a burdensome citation writing process for every single violation of a standard, no matter how minor.

Taxpayers have spent thousands of dollars training MSHA inspectors to identify serious, life-threatening hazards and uncover malfeasance. Why do we send them around to the safest mines on

the planet multiple times a year to write citations for unflushed toilets and trash can lids that are ajar?

This is a serious question that I hope we can explore together.

I visited one mine last year and the snow was falling and it was about a quarter of an inch, and it was quickly melting, but an employee was trying to shovel it. It was too wet and too little to sweep or to shovel. The reason they were doing it? Just a week before they had gotten a written citation under the same circumstances.

In my home State of Wyoming, the mining industry and the jobs and energy it supports are critical. The industry supports about 43,000 jobs in Wyoming, both directly and indirectly. Mining jobs are good jobs that pay, on average, 86 percent higher than the average wage in the State. These jobs will never be outsourced.

During the last 3 years, unemployment has soared to sustained highs we have not seen in this country since the Great Depression. Mining employment is one of the few areas where the private sector employee has seen some moderate growth and is not somehow dependent on Federal spending.

Of course, the mining industry would be creating far more jobs if the economy was in a swifter recovery and if power from coal wasn't being discouraged in the United States

In Wyoming, we work hard to keep employees safe at work. Mines in Wyoming have developed safety programs far beyond what MSHA requires. An Arch Coal operation called Black Thunder is the largest surface coal mine in the country and it's located in the Powder River Basin in Gillette, WY. This operation is responsible for 8 percent of the Nation's coal supply, and they have an excellent safety record.

Last year they were Wyoming's safest mine and received an award for working more than 2 years and 6-million employee hours without a loss-time injury. One reason they are so successful is that they have implemented a safety program far and above anything required by MSHA. This program periodically pairs employees from different work groups for a shift. One of these employee's purpose is to observe the other and identify safety hazards that are observed.

Many of the hazards are behavioral and are easily fixed once pointed out, explained and corrected. Employees are not punished for any lapses, and the observing employee has volunteered for the duty, although they are still paid by the company. The record shows that what Black Thunder is doing is working, but it's certainly a very different model than MSHA.

In Wyoming we don't just mine coal. We also mine trona, soda ash, bentonite, and uranium, among other resources. While there are some common safety concerns and practices with underground coal, some of the hazards presented are quite different. These differences must be recognized, and solutions for one type of mining should not be blindly applied to others, especially when the policy adds burdensome requirements that will make extracting the resource more costly.

While you can't outsource mining in Green River, WY to India, if the cost of extracting trona in Wyoming drives the price up, buyers will obtain it from mines in China, and hundreds of American jobs will disappear.

Talk to almost any U.S. coal miner and you will hear that the industry does feel that this Administration's policies are threatening the industry's future. Although the basis for the concern goes well beyond MSHA and the subject of this hearing, it is worth mentioning because safety regulations won't matter if there aren't any jobs to keep safe.

Although I was pleased to hear last week that the Administration sees a future for coal with the announcement that they will move forward with coal leases in the Powder River Basin, the President's overall energy policy seeks to increase prices for Americans and seeks to limit the use of coal.

The President's decision to allow the EPA to regulate greenhouse gases under the Clean Air Act will kill jobs in Wyoming and throughout the country, and there are a sizeable number of other regulations coming down the pike that will make it more difficult to use coal, our Nation's cheapest, most abundant energy source.

I know that many of my colleagues here today share my interest in keeping these jobs in America, but also making them safer. This goal can be achieved if we include stakeholders in policy discussions, if we work to find solutions that address their valid concerns and agree to do the possible, instead of holding out for political victories that will be difficult to achieve.

I was honored to work with the former Chairman Kennedy, Senator Rockefeller, Senator Murray, and Senator Isakson to author the MINER Act in 2006, the first major change to the Mine Act in a generation. In fact, I think it was 28 years. The MINER Act has advanced mine safety technology across the board and done much to better prepare mines to deal with emergencies. We were able to pass it because we had the support of both labor and industry, Republicans and Democrats and we got their support by involving everyone in the process.

I stand ready to re-engage in that process with partners interested in forming achievable goals, sharing information, consulting all affected stakeholders and reaching agreement rather than making political points. I believe this is the best way we can honor the 29 men who died on April 5th and the 42 other miners who lost their lives at work last year.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Enzi.

It's a long-standing policy of this committee that only the Chair and the Ranking Member make opening statements; however, we are joined today by our esteemed colleague, Senator Manchin, and I will obviously recognize him for questions during the question period, but I would ask in absence that whatever statement he may have be made a part of the record.

I also know that Senator Rockefeller wanted to be here this morning, but was unavoidably called away. I also ask in absence that his statement be inserted at this point into the record.

[The prepared statement of Senator Rockefeller follows:]

PREPARED STATEMENT OF SENATOR ROCKEFELLER IV

I would first like to thank Chairman Harkin, Ranking Member Enzi, Senator Murray, Senator Isakson, and all the members of this committee for holding this hearing today.

We have always had a great deal of bipartisan collaboration on mine safety issues, and I look forward to our continued work on this critical issue.

Often in Congress, tragic events like those that happened at the Upper Big Branch mine in Montcoal, WV receive a lot of attention right when they happen. Unfortunately, there is not always the follow through that is necessary to make sure that those tragedies do not happen again.

This hearing—and the work that the committee members and their staffs have done over the past year—is truly a testament to each Senator’s commitment to mine safety.

As the members of this committee know, the safety of West Virginia’s coal miners is extremely important to me. Their job is hard, it is dirty, and it is dangerous—but it is absolutely necessary to keep our country running.

It is impossible to put into words how devastating the Upper Big Branch disaster has been to West Virginia’s mining community. I was there with the families as they hoped and prayed for 29 husbands, fathers, brothers, sons, and grandsons—and I made a commitment that day to not rest until we made every improvement necessary to our mine safety laws.

Over the past year, we have seen important improvements in the enforcement of our mine safety laws. The Mine Safety and Health Administration has:

- initiated 228 “impact inspections” that target mines with poor compliance;
- pursued, for the first time ever, injunctive authority to stop hazardous mining conditions;
- issued emergency rock-dusting standards to prevent explosions;
- proposed important revisions to the broken “Pattern of Violations” process; and
- conducted more outreach to operators on safety and compliance standards.

Congress has also taken steps to improve mine safety. We provided an additional \$22 million to help reduce the backlog of appeals at the Federal Mine Safety and Health Review Commission—a backlog that has only served to delay safety.

We also enacted into law an amendment that I offered to the Wall Street reform law that requires disclosure of serious safety violations to the Securities and Exchange Commission. This law makes sure that safety violations are known to investors and impact a company’s bottom line.

While these are important and necessary improvements, they are only incremental. There is much more we can and should do *today* to improve mine safety, increase accountability, make our enforcement more efficient, and protect miners who speak out about unsafe conditions.

Even as the civil and criminal investigations into the Upper Big Branch disaster continue, we must remember that Congress’ obligation to learn from these tragedies and adjust our laws where necessary is not put on hold.

I have always believed that our country has a continuing obligation to make sure that coal miners—and all workers for that mat-

ter—can go to work, do their jobs, and return home safely to their families at the end of the day.

I know that the Upper Big Branch families are still looking for answers and are still looking for action. If there is one message that I would like to relay to them today, it is that we have not forgotten the miners. I stand with them today in my commitment to improve mine safety for future generations.

I thank the Chair.

The CHAIRMAN. And, now, Mr. Joseph Main, the Assistant Secretary of Labor from Mine, Safety and Health Administration for more than 40 years, has worked to improve every aspect of miner health and safety, both in the United States and internationally.

Mr. Main began working at coal mines in 1967, and he quickly became an advocate for miners' safety and health. In 1982, he was appointed the administrator of the United Mine Workers of America Occupational Health and Safety Department, a position he held for 22 years.

Mr. Main has extensive hands-on experience inspecting and evaluating mining conditions, plans, and systems and has been involved in a number of mine emergencies and accident investigations.

We welcome Mr. Main back to the committee.

Our second witness is Mr. Elliott Lewis, the Assistant Inspector General for Audit, Office of Inspector General of the U.S. Department of Labor.

Prior to his current position, he served as the Deputy Assistant Inspector General for Audit. Before joining the Federal Government, he was a partner at T.R. McDowell and Company, CPAs in Columbia, SC from 1986 to 1991.

Both your statements will be made a part of the record in their entirety.

We'll start, of course, with Assistant Secretary Main. If you could sum it up in several minutes for us, we'd appreciate it; then we'll go to Mr. Lewis, and follow with a question period.

Mr. Main, welcome back.

STATEMENT OF JOE MAIN, ASSISTANT SECRETARY, U.S. DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ARLINGTON, VA

Mr. MAIN. Thank you, Mr. Chairman.

Senator Enzi, Senator Manchin, I 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, legislation is still needed to fully protect our Nation's miners.

I want to also acknowledge the families of those miners. They carry the heaviest burden of that tragedy, and they are constantly in our prayers.

Since I last testified before Congress 11 months ago we have made significant progress in MSHA's investigation into the Upper Big Branch explosion. The underground investigation, which has been quite extensive, is nearing completion.

Based on the evidence we've gathered so far, 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 tail-gate side of the vinyl 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 and extinguished.

Our preliminary analysis shows, 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.

It is likely to be some time before MSHA can provide a final report on the Upper Big Branch disaster, but we will hold a briefing on June 29th in Beckley to share with the public the information that we have gathered during the investigation, including an overview of the physical evidence and summaries of other evidence.

While we are continuing our investigation of Upper Big Branch 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 the deepest respect for those who choose mining as a career. I was a miner myself. Mining is critically important to our economy, and I believe that a commitment to safety is fully compatible with a thriving industry.

Since Upper Big Branch, MSHA has worked hard to use every tool at its disposal to encourage operators to live up to their obligations, to provide a safe and healthful workplace.

One of our most effective enforcement tools has been our impact inspections. From April 2010 through February 2011, MSHA has conducted 228 targeted impact inspections at mines with special concerns. We have conducted these impact inspections at times during off hours, taking hold of phone lines to prevent advance notice when covering key parts of the mine quickly before hazards could be hidden or covered up.

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

We've also taken important actions to improve the broken pattern of violations program. We adopted new screening criteria and used new criteria for 14 mines on a potential pattern of violations. Some of these mines have successfully reduced their violations. For the few that have not, the next step is an evaluation by MSHA as to whether they should be given notices of pattern violations actions.

MSHA has also published a proposed rule which would address laws in the current rules to meet the intent of the statute. MSHA has taken a number of other actions as well to ramp up our efforts. This includes regulatory actions such as the announcement of the Emergency Temporary Standard on rock dust, and a proposed rule

that would revise requirements for operator examinations of underground mines as well as issuance of a number of targeted compliance guidance to the mining industry.

Upper Big Branch also highlighted the importance of addressing the growing backlog at the Federal Mine Safety and Health Administration and we are taking several actions to attack the problem. MSHA cannot be in every mine all the time, and mine operators must find and fix hazards in conditions, whether or not MSHA is there. That's their responsibility. I believe that many mine operators want to do this and want to run safe mines.

In order to assist the mine operators MSHA has undertaken extraordinary education and outreach effort. I have traveled the country speaking to miners, operators, mining organizations and associations, and listening to their ideas and concerns.

We're working together to improve consistency in enforcement of the mining standards; implement new compliance programs and initiatives to improve mine safety in this country.

The committee has a long history of standing up for our Nation's miners. I hope that you do so again, and pass new mine safety legislation, and quickly, as you did following the Sago Mine disaster.

Since Upper Big Branch we've learned that there are systemic flaws in the law that only Congress can fix.

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 merit attention:

First, Congress should fix the broken POV system. There's only so much we can do through regulations.

Second, Congress should revise MSHA's injunctive authority. We used the provision and learned that the process may be slower than needed to protect miners. New legislation should provide us sufficient authority to act as soon as we believe protecting line safety—miner safety and health—requires our immediate action.

Third, legislation should strengthen the criminal provisions of the Mine Act. No mine operator should be risking the lives of its miners 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, legislation must ensure miners are fully protected from retaliation. Miners know best the conditions in their mines. But as some of the surviving miners and their family members have reported, miners are afraid to speak out because they fear they will lose their jobs if they speak out.

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.

Thank you.

[The prepared statement of Mr. Main follows:]

PREPARED STATEMENT OF JOSEPH A. MAIN

Chairman Harkin, Ranking Member Enzi, and members of the committee, 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—nearly 1 year later—about the ongoing investigation into the April 5, 2010 explosion at the Upper Big Branch (UBB) mine in West Virginia that needlessly took the lives of 29 miners, and to report on the actions that we have taken since the explosion. The accident at UBB was the worst mining disaster since the creation of MSHA by the Federal Coal Mine Health and Safety Act of 1969 (Mine Act) and the deadliest coal mine disaster this Nation has experienced in 40 years. As a result of the explosion, the need to rethink how we approach mine safety and health to protect miners has taken on a new urgency.

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. We owe it to the memory of the 29 miners who died at Upper Big Branch and to the families that they left behind to rededicate ourselves to protecting today's miners.

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 makes 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 miners, their families, their communities and the mining industry.

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 who cut corners on safety.

While enforcement is the major tool at our disposal to secure compliance with the Mine Act and health and safety standards, 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 who play by the rules—continue to thrive.

UPPER BIG BRANCH INVESTIGATION

Since I last testified before this committee in April 2010, MSHA has made significant progress in its investigation of the explosion. I would like to first provide a brief overview of the investigation and then give you 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. MSHA has conducted more than 260 witness interviews and has dedicated 108 enforcement personnel to the investigation. This 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. Our investigative teams have combed through every inch of the accessible parts of the mine. To date, more than 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 committee that while MSHA is investigating the cause of the accident and how 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 U.S. 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 has honored 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. That criminal investigation is ongoing and, on March 1, the U.S. Attorney issued the first indictment related to the disaster. He indicted the head of Security at Performance Coal, a Massey subsidiary, for obstructing justice and making false statements about his role in giving advance notice of underground inspections at the mine. We will continue to support DOJ as they work to bring those who violated the law to justice.

Since the outset, MSHA has been conducting one of the most transparent accident investigations in the history of the Agency. The investigation is long and complex and, we have been releasing information as soon as we are able, including in response to numerous requests under the Freedom of Information Act (FOIA). It is important, however, that we give the investigation team the ability to collect and analyze data and other evidence before we disseminate the information to the public. Within this framework, we have established an "Upper Big Branch Single Source Page" on our Web site at: <http://www.msha.gov/PerformanceCoal/PerformanceCoal.asp> to post as much information as we can to keep the public informed about the accident. We are continually reviewing our disclosures and pending requests for information to determine what additional information we can release and post to our Web site. As with past investigations, MSHA cannot prematurely release information or documents vital to the investigation.

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. It is critical to them that the team conducts a thorough investigation and determines what caused the deaths of their loved ones. 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.

To continue to be as transparent as possible, MSHA will hold a briefing on June 29, 2011, to share with the public information gathered during the investigation of the explosion at the Upper Big Branch mine in Raleigh County, WV. The briefing coincides with the 1 year anniversary of the start of the underground investigation at the Upper Big Branch Mine and will be held at MSHA's Health and Safety Mine Academy in Beckley, WV. Although the underground investigation and interviews are still ongoing, by June, MSHA investigators will be able to compile additional relevant evidence in order to provide a substantive presentation to the public.

We know that for the families, the past year has been incredibly difficult and that the investigation is taking more time to finish than we had originally thought. The families have been very much in our hearts and prayers as we work to conclude this complex investigation as quickly as possible.

We also have held regular briefings for the committee leadership and your staff on the status of the investigation and our preliminary findings.

When I testified last April, the investigation team had just been selected, and 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 that 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 February 2011, MSHA conducted 228 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 by Jeffrey Harris—a former Massey employee who had spent time at UBB in 2006—before this committee last April, and again from witnesses at a field hearing conducted by the House Education and Workforce Committee 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. For example, Mr. Harris testified that miners at UBB were ordered to put up ventilation curtains when inspectors were in the mine, but to take them down as soon as the inspectors left.

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 4,200 citations and 396 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, TN, 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 orders for substantial 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 escape to the surface in the event 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 belt line and inadequately supported ribs—these violations required equipment to be shut down, which effectively closed the mine to production, except for maintenance personnel. The mine has made improvements, but only after MSHA placed it in MSHA's pattern of violations program.

During another impact inspection in September 2010 at a mine in Boone County, WV, 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 No. 1 mine located in Pike County, KY. 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 agreed 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 in the case against Freedom Energy, that case 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 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. To date, nine of these mines have completed their evaluation period. Eight mines met their improvement goals for reducing serious violations, and two mines did not. The two mines that did not meet their goals now have the opportunity to submit a response to MSHA's evaluation report, and after review MSHA will determine in each case whether the mine will be given notice of a pattern of violations. Additional mines are still under review for potential pattern of violation actions.

The next step in fixing the broken POV program was the proposed revisions to the existing regulation. As promised, on February 2, 2011, we published a proposed rule on POV, which would revise the existing regulation to 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 other regulatory actions after UBB. Comments on this proposal are due April 4, and I would welcome any comments you might have for the rulemaking record. A public hearing will be scheduled on the proposed rule.

On September 23, 2010, MSHA issued an Emergency Temporary Standard on 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. On December 27, 2010, therefore, MSHA published a proposed rule that would revise 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. This rule would re-instate 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 are contested and add to the backlog. 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 citations and orders are contested. 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 disputed violations so they do not become part of the backlog.

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 mobile command 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 mobile command 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 and quality of training of mine rescue teams. I can tell you that I and the other mine emergency personnel who coordinated 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 addition to the 29 miners who died at UBB, 42 other miners died

on the job last year for a total of 71 miners, compared to 34 in 2009. And most of these non-UBB related deaths are the types that are recurring in the mining industry.

Despite the attention paid to coal mine fatalities in the media, more miners have died at metal/nonmetal mines than in coal mines, even though the fatality rate is lower for those individuals. From 1990 through 2010, and not including black lung-related deaths, 838 miners perished in metal/nonmetal mines as compared to 820 miners who died at coal mines. Additionally, over 80 percent of the metal/nonmetal fatalities occurred at surface mines, and a majority of the fatalities were at mines with 20 or fewer employees. 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, because these are the best vehicles for establishing a culture of safety in mining workplaces. Well-designed safety and health systems should be developed with everyone in the company involved—from the CEO to the miners. If properly implemented, these systems ensure that operators routinely find and fix hazards in their mines instead of waiting for MSHA to find them. If MSHA can identify problems in a mine, so can a mine operator. We have begun the process of involving our stakeholders in our plans to move forward by already holding three public meetings on the efficacy of an MSHA safety and health program standard.

We also have had several successful, targeted education campaigns last year. For example, 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 on the MSHA Web site 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 to allow the mining industry to have access to the training. This program will also improve our consistency in enforcing standards.

Also in 2010, we initiated a resource page on our Web site 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 National Stone, Sand and Gravel Association (NSSGA) and developed with the association’s assistance.

Quality training is another important component in making our mines safer. 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 keep 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.

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.

One important outgrowth of our outreach to our stakeholders is MSHA’s renewed attention to improving consistency in the citations issued by MSHA’s inspectors. To address the concerns that we have heard about consistency, we’ve taken several steps 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 Conference Litigation Representatives (CLRs); and mandatory, comprehensive, refresher training for all inspectors. In 2010, we developed a new 2-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, thousands of 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. As required by the Mine Act, we have addressed economical and technological feasibility in our proposed rule. 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 asking you to again stand up for miners and pass new and needed mine safety legislation.

Almost 1 year has passed since we lost those 29 miners at Upper Big Branch. We have learned much in that time. One important lesson we have learned is 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, proposed 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 hope that we can 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, under some circumstances, the POV provisions of the existing Mine Act could potentially put some mines in POV status indefinitely while, under other circumstances, it would be insufficient to ensure long-term change. 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 ensure the immediate safety of miners at 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 under section 108(a)(2), the current statute could be simplified to help MSHA in making its case. The lesson learned is this: the litigation process under the existing law is time consuming and does not adequately 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 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 of the serious obstacles to successful prosecutions. 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 involvement 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 House Education and Labor Committee's field hearing in Beckley last year, miners were afraid to speak up about conditions at Upper Big Branch. They knew that if they did, they 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 committee. This coming Tuesday is the 1-year anniversary of the tragedy at Upper Big Branch. Along with the families, we mourn the deaths of these 29 miners. I know their loved ones want answers about what happened on that day, and so do I. The team is moving forward with the investigation.

Going forward, 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 obligation of maintaining a safe and healthful workplace squarely on the operator's shoulders. Improved mine safety and health is a result of operators fully living up to 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 goals of preventing another mine disaster and providing our Nation's miners the safety and health protections they deserve. We owe the victims of the Upper Big Branch disaster and their families no less.

The CHAIRMAN. Thank you very much, Mr. Secretary.

Mr. Lewis, welcome to the committee. And, as I said, your statement will be made a part of the record. If you could sum it up, I would appreciate it.

**STATEMENT OF ELLIOT P. LEWIS, ASSISTANT INSPECTOR
GENERAL, U.S. DEPARTMENT OF LABOR, OFFICE OF THE IN-
SPECTOR GENERAL, WASHINGTON, DC**

Mr. LEWIS. Good morning, Mr. Chairman and members of the committee. Thank you for inviting me to testify today in my capacity as the Assistant Inspector General for Audit at the Department of Labor.

I am pleased to discuss the OIG's oversight work relative to the Mine Safety and Health Administration and specifically our report on MSHA's Pattern of Violations or POV Authority.

POV authority is an important tool that lets MSHA take enhanced enforcement actions when a mine demonstrates recurring safety violations that could significantly and substantially contribute to the cause and effect of health and safety issues.

Once MSHA notifies a mine it demonstrates a potential pattern of violations, the mines take immediate action to reduce future significant and substantial violations or face tougher sanctions.

In response to a congressional request, the OIG conducted an audit to determine how MSHA had used its POV enforcement authority.

When we completed our audit in September 2010, we concluded that in 32 years, MSHA never successfully exercised its POV authority. Specifically, our audit found that MSHA did not implement regulations for administering its POV authority until 1990.

The regulations require the use of final citations and orders in determining a POV; appeal a warning period, both of which were not required in the Mine Act.

We also found that MSHA did not verify the implementation of mine operators' written POV corrective action plans.

While MSHA District personnel reviewed and discussed with mine operators the plans they submitted, we found that MSHA did not approve, disapprove or monitor those plans.

Our third finding was that MSHA's POV computer application, implemented in 2007 contained logic errors, inconsistencies with the stated selection criteria, and an anomaly in one of the spreadsheet's formulas.

The computer application errors had the potential to incorrectly include mines that had not met the POV screening criteria, as well as to exclude mines that had met the POV criteria.

We found that delays in MSHA's testing of rock dust samples from underground coal mines could cause critical delays in MSHA identifying serious safety hazards, including the risk of explosions.

We found that MSHA had no performance standard for the timeliness of testing these samples, but established a 19-day standard before the completion of our audit. We subsequently raised concerns that a 19-day standard did not convey an appropriate level of urgency for completing these tests.

Finally, we conducted several what if analyses aimed at demonstrating the impact of various changes to the POV model criteria. We found that changing certain criteria, most notably, the requirements to use final orders, significantly affected POV screening results.

In subsequent work we found that improvements in a mine safety record as a result of the POV process was not always sustained.

Mines receiving a potential POV notification reduced their rate of significant and substantial violations by an average of 63 percent in the first subsequent inspection period. However, this rate declined to 51 percent after eight inspection periods.

We made 10 recommendations; among these are evaluating the appropriateness of requirements in the POV process that were not included in the Mine Act, establishing guidance on the preparation, review, and monitoring the mine operators' POV corrective action plan, and reevaluating the performance standard for timely completion of laboratory tests of rock dust or any other samples that yield enforcement-related data.

Our oversight work in the area of mine safety and health continues. We currently have one audit in progress to determine whether MSHA effectively and timely collects civil penalties from mine operators.

In the near future, we plan to assess whether MSHA's laboratories are providing timely and quality services in support of MSHA's inspection and investigative responsibilities.

We will also audit metal/nonmetal mandatory inspections and its oversight of miner training.

Mr. Chairman, thank you for the opportunity to testify on our work. I would be pleased to answer any questions that you or any members of the committee may have.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF ELLIOT P. LEWIS

Good morning, Mr. Chairman and members of the committee, I appreciate the opportunity to discuss the OIG's oversight work relative to the Mine Safety and Health Administration (MSHA) and specifically our report on MSHA's Pattern of Violations (POV) Authority. As you know, the Office of Inspector General (OIG) is an independent entity within the Department of Labor; therefore, the views expressed in my testimony are based on the findings and recommendations of my office's work and not intended to reflect the Department's position.

As we approach the 1-year anniversary of the Upper Big Branch mine disaster, which took the lives of 29 miners, we are reminded of the incredible sacrifices that workers make every day and the Department's responsibility to ensure worker safety and health.

MSHA OVERSIGHT WORK

Over the years, the OIG has devoted significant resources to providing oversight of MSHA's safety and health responsibilities. For example, previously issued audits found that:

- MSHA's Accountability program, established to ensure that mine inspection responsibilities are performed effectively, was not well designed and needed to be strengthened.
- MSHA was not fulfilling its statutory inspections mandate due to resource limitations and a lack of management emphasis on ensuring that inspections were completed.
- MSHA did not have a rigorous, transparent review and approval process for roof control plans consisting of explicit criteria and plan evaluation factors, appropriate documentation and active oversight.
- MSHA did not ensure its journeyman inspectors received required periodic retraining, therefore the inspectors may not have had the up-to-date knowledge of health and safety standards or mining technology.

Consistent with the committee's request, I will focus my testimony on the Pattern of Violations Audit that we conducted after the disaster at the Upper Big Branch Mine.

PATTERN OF VIOLATIONS AUDIT

Last year's explosion at the Upper Big Branch Mine South in Montcoal, WV, raised concerns about the mine's safety record and MSHA's process for identifying mines with a potential pattern of violations. These concerns were amplified when MSHA reported that a computer error had omitted Upper Big Branch from the potential POV list. This omission precluded MSHA from (a) warning the mine operator that the mine demonstrated a potential pattern of violations and (b) initiating closer monitoring of the mine's rate of significant and substantial (S&S) violations.

POV authority is an important tool that lets MSHA take enhanced enforcement actions when a mine demonstrates recurring safety violations that could significantly and substantially contribute to the cause and effect of health and safety issues. Once MSHA notifies a mine it demonstrates a potential pattern of violations, the mine must take immediate action to reduce future S&S violations or face tougher sanctions.

In response to a congressional request, the OIG conducted an audit to determine how MSHA had used its POV enforcement authority. We were also asked to review MSHA's policy, criteria, regulations, and information systems regarding POV sanctions to determine whether they were reliable and effective in determining and sanctioning habitual violators.

During the course of this audit, we became aware that MSHA had, at times, set arbitrary limits on the number of potential POV mines to be monitored in any single district. The OIG was very concerned about 10 mines that may have been excluded for reasons other than appropriate consideration of the health and safety conditions at those mines. We immediately relayed our concerns to MSHA, which subsequently discontinued that policy and re-examined the safety and health conditions at those mines.

We completed our audit in September 2010, and concluded that in 32 years, MSHA had never successfully exercised its POV authority. We determined that successful administration of this authority had been hampered by a lack of leadership and priority in the Department across various administrations. This allowed the rulemaking process to stall, and fall victim to the competing interests of the industry, the operators, and the unions representing the miners as to how that authority should be administered. Specifically, our audit found that:

- **MSHA did not implement regulations for administering its POV authority until 1990, even though it had the authority to do so since 1977.** The regulations MSHA implemented in 1990 created limitations on its authority that were not present in the enabling legislation; specifically, requiring only the use of final citations and orders in determining a POV, and creating a "potential" POV warning to mine operators and a subsequent period of further evaluation before exercising the POV authority. This made it difficult for MSHA to place mines on POV status. According to MSHA officials, in the 17 years that followed—from 1990 until mid-2007—MSHA district offices across the Nation operated with limited guidance from the national office and performed POV analyses based on individual interpretations of requirements. District offices were responsible for conducting the required annual POV screening of mines, but never put any mine operator on POV status. In 2007, MSHA made its first attempt to implement a standard quantifiable method for screening and monitoring potential POV mines.

- **MSHA did not verify the implementation of mine operators' written POV corrective action plans.** POV regulations gave a mine operator who received a potential POV warning reasonable opportunity to institute a program to reduce repeated, S&S violations at the mine. The regulations gave mine operators an opportunity to submit a written corrective action plan, which would give them additional time before MSHA made a determination of the mine's POV status. Most mine operators submitted a written corrective action plan, even though regulations did not require them. While MSHA District personnel reviewed and discussed with mine operators the plans they submitted, we found that MSHA did not approve, disapprove or monitor these plans. In addition, the nature and basis of MSHA's reviews also varied based on each District Manager's interpretation of the POV criteria and process. As a result, MSHA could not demonstrate that these corrective action plans had any role in subsequent declines in violation rates.

- **Three logic errors caused unreliable results from MSHA's POV computer application.** MSHA's POV computer application, implemented in 2007 in connection with the POV model, contained logic errors, inconsistencies with the stated selection criteria, and an anomaly in the spreadsheet formulas used to identify mines having more than five S&S violations of the same standard. These deficiencies occurred because the computer application was not developed, tested, main-

tained, and documented in the disciplined and structured manner normally associated with major computer applications.

To demonstrate the potential impact of these errors, we ran both MSHA's uncorrected program and the OIG's corrected program against a copy of the enforcement data as of May 10, 2010. MSHA's uncorrected program produced a list of 17 mines for potential POV evaluation. The OIG's corrected program, run against the exact same data, produced a list of 21 mines for potential POV evaluation. Our test results showed that the computer application errors had the potential to incorrectly include mines that had not met the POV screening criteria, as well as to exclude mines that had met the POV screening criteria.

- **Delays in Testing Rock Dust Samples.** Our audit also identified a lack of timeliness in MSHA's testing of rock dust samples from underground coal mines that could cause critical delays in MSHA identifying serious safety hazards including the risk of explosions.

Mine inspectors do not currently have a way to measure rock dust samples on-site during an inspection; therefore, they must collect and send samples to MSHA's National Air and Dust Laboratory. Lab personnel test the samples and report the results to the mine inspector. Based on the reported results, the inspector determines whether a violation had occurred and a citation should be issued.

According to lab personnel, fluctuating workloads and the laboratory's recent participation in the National Institute for Occupational Safety and Health (NIOSH) evaluation of a portable dust meter, affected how quickly rock dust samples were tested after they were received. During the spring and summer months, rock dust samples were normally tested and the results were reported to mine inspectors in 2–3 days. However, during fall and winter months, inspectors collect a higher volume of samples because cold air dries out mine surfaces and increases the risk of explosions. During these periods of increased risk and workload, it could have taken 2 or 3 weeks to test and report results.

The handling of some rock dust samples from the Upper Big Branch mine illustrates the critical importance of completing these tests in a timely manner. On March 15, 2010, a mine inspector collected 14 rock dust samples from Upper Big Branch Mine during an inspection. Lab tests were not completed until 2 days after the April 5, 2010 accident. The results showed that one of eight samples tested (six samples contained too much moisture to test) did not meet regulatory standards. Based on these results, MSHA issued an S&S citation on April 13, 2010.

We found that MSHA had no performance standard for the timeliness of testing these samples. As a result of our concerns, on July 29, 2010, MSHA directed that rock dust samples were to be tested and the results reported to mine inspectors within 19 calendar days. However, the OIG told MSHA management that 19 days did not convey an appropriate level of urgency for completing tests related to safety hazards within a mine. MSHA is currently upgrading its National Air and Dust Laboratory and has indicated that the performance standard will be revisited when the upgrade is completed in July 2011.

- **Changing certain criteria significantly affects POV screening.** In an effort to provide information that may be helpful in MSHA's stated goal to revise the criteria and procedures, we conducted several "what if" analyses aimed at demonstrating the impact of various changes to the then-existing criteria on the number of mines (a) identified as having a potential pattern of violations and (b) meeting MSHA's improvement metrics.

For example, eliminating the POV model's requirements for final orders resulted in the most significant change. This modification produced a list of 91 potential POV mines versus a list of 16 when only final orders were used.

Furthermore, while 94 percent of potential POV mines met MSHA's improvement metrics within the first inspection period following receipt of their notification letter, fewer mines would have satisfied those standards if evaluated over a longer period of time. After two inspection cycles, 89 percent of mines still satisfied the improvement metrics. After three inspection periods, the success rate decreased to 85 percent.

After the release of our audit, we were requested by a House of Representatives committee to perform an expanded analysis of mines that had received potential POV notifications to determine the extent to which safety improvements were maintained over a longer period of time.¹ Mines receiving a potential POV notification from MSHA reduced their rate of S&S violations by an average of 63 percent after

¹ OIG Report No. 05-11-002-06-001, "Pattern of Significant and Substantial Violation Rate Extended Analysis," issued December 15, 2010.

one subsequent inspection period; but the average reduction rate declined to 51 percent after the 8th subsequent inspection period.

On September 30, 2010, MSHA announced more stringent POV improvement provisions. MSHA currently requires mines to implement appropriate corrective action programs that achieve a 50 percent reduction in the rate of S&S violations, or a rate within the top 50 percent for all mines of similar type and classification. Furthermore, mines that do not choose to implement corrective action programs need to meet a more stringent improvement metric—a 70 percent or more reduction in their S&S issuance rates or a rate within the top 35 percent for all mines of similar type and classification.

POV AUDIT RECOMMENDATIONS

Our POV audit contained 10 recommendations to MSHA. Specifically, Mr. Chairman, we recommended that MSHA:

- Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority.
- Seek stakeholders' input (e.g., miners, miner representatives, mine operators) in the development of POV screening criteria, but assure that the process, including rulemaking, is not stalled or improperly affected because of competing viewpoints.
- Assure that POV selection criteria are sufficiently transparent to allow stakeholders to reasonably determine an individual mine's status at any point in time.
- Assure that POV decisions are based solely on the health and safety conditions at each mine.
- Implement a standard process for documenting all factors—both quantitative and non-quantitative—used to make POV decisions.
- Establish guidance on the preparation, review, and monitoring of mine operators' POV corrective action plans.
- Eliminate the requirement that mines be in an "active" status to be screened for a pattern of violations.
- Use system development life cycle techniques (analysis, design, test, implement, and maintain) to reduce the risk of errors in any POV-related computer application.
- Re-evaluate the performance standard for timely completion of laboratory tests on rock dust or any other samples that yield enforcement related data, including addressing workload fluctuations and resources needs.
- Examine its process and metrics for monitoring the improvement of potential POV mines to increase the likelihood that improvements are not temporary.

CURRENT CONCERNS AND PLANNED AUDIT WORK

The committee also requested that the OIG discuss any serious pending matters stemming from prior OIG work. We have one pending matter that would require legislative action. The OIG recommends a technical review of the existing language under Section 103(k) in the Mine Act to ensure that MSHA's long-standing and critically important authority to take whatever actions may be necessary to protect miner health and safety, including issuing *verbal* mine closure orders, is clear and not vulnerable to challenge.

Mr. Chairman, our oversight work in the area of mine safety and health continues. We currently have one audit in progress to determine whether MSHA effectively and timely collects final civil penalties from mine operators. In the near future, we plan to assess whether MSHA's laboratories are providing timely and quality services in support of MSHA's inspection and investigative responsibilities. We will also audit MSHA's oversight of miner training. In addition, we plan to audit MSHA's Metal/Nonmetal mandatory inspections.

Mr. Chairman, thank you for the opportunity to testify on our work. I would be pleased to answer any questions that you or any members of the committee may have.

The CHAIRMAN. Thank you very much, Mr. Lewis.

We'll begin now, a series of 5-minute rounds of questions.

Mr. Main, even outside the context of the pattern of violations process, MSHA can get an injunction to close down the mine if operation of the mine poses a continuing hazard to mine operators.

Like the pattern of violations, this authority had never been used prior to your tenure. At the hearing last year you heard from us about that.

I want to give credit where credit is due. My understanding is that since then, MSHA has used that authority to get an injunction and close down a dangerous mine.

My question is this: Can you tell us about the circumstances of that injunction—and you mentioned that there were four things that we need to do, you think, legislatively: The first one was fix the broken POV system. Why do we need to fix the pattern of violations process if MSHA has the authority to close the mine under a different provision?

Mr. MAIN. I think starting with the first part of that, yes, MSHA did for the first time use the authority under Section 108 of the Mine Act to seek an injunction, to force a mine operator to change the way it was doing business, that we believed that was placing miners in harm's way. This particular mine had nearly 2,000 citations over a 2-year period; had been issued over 80 orders; and when we examined the conditions of the mine, it was very clear to us that we needed to take extraordinary action.

In doing so, we found that this is not a simple process. It does take time. And for those that may think that we have this magic provision, that we can go in and shut down a mine, it really doesn't exist. This is, I think, one of the closest things that anyone's ever used to get to that point.

What we have to do is to take a case and prove it to a judge that this mine merits the kind of action that we are requesting, and there's no guarantee about the outcomes of those.

In this particular case we were lucky to have reached a settlement with the mine operator, and we did achieve the goal that we had sought, which is to force the company to put into place plans and programs, in addition to what regulations the Mine Act currently had, to improve the working conditions of those miners.

In retrospect, having tried the law, we think that we need to look at this and discuss more legislation to try to find something that works swifter, where action is needed.

The CHAIRMAN. Of course, that raised a question in my mind, I mean, when you—sort of like using the atom bomb. When you close down a mine you put a lot of miners out of work, too. And, so if there's things that you can do, step by step, to get them to fix up their violations so that the mine can continue to operate, it seems to me that's the best way to proceed.

And, second, you mentioned strengthening the criminal aspects of the Mine Act. Could that be helpful in making these mine operators meet safety requirements without going to the extent of shutting the mine down?

Mr. MAIN. What we seek to achieve is to have the mine operating both in compliance with the law and protecting the miners. And the course that we chose at the Freedom Mine that we talked about where the injunctive action was sought, was to force the company to put into place plans and protections that would take those miners out of harm's way.

The intent was not to close down a mine and eliminate the jobs. The intent was to fix the problem. And, I think moving forward, as you see how we're structuring a number of our enforcement programs, it is designed to accomplish just that. And, I think that's

the best approach that we need to take, is to be able to take immediate action, though, where action is necessary immediately.

The CHAIRMAN. The last question I have before my time runs out is, the fourth point you had was—my own language was protecting whistleblowers.

Now, we heard from Jeffery Harris last year. You mentioned him in your written testimony also, about his testimony, and others. It seems to me that as we look at it—at least as I look at it, whistleblower protection for miners are outdated, and they don't offer the same protections as modern whistle-blower laws like Sarbanes-Oxley, so, shouldn't miners have the same whistle-blower protection as the stockbrokers? And I hope that you have some suggestions for us because I do believe that this is one key area that we have to focus on. That is to protect people who come forward at risk of losing their jobs, or being laid off or other disciplinary action, so they are able to give us the information we need.

So, whatever suggestions you have on that, I'd like to see them.

Mr. MAIN. I think there is a lot of discussion in the legislation that was being crafted last year that had some very reasonable and logical outcomes to protecting miners who speak out, but I think that the committees from Congress who conducted investigations into the tragedy last year—held hearings, I should say—gained, I think, a wealth of information about what's going on in some of these mines, and there is real fear of these miners to speak out.

It was just not in Upper Big Branch. If you look at the outcomes of some of the impact inspections—I'll give you an example of one in September, when we went into a mine late in the evening when nobody thought we would show up. We commandeered the phones, which is not an easy task to do.

For the inspectors to get on a mine property pass, everybody has a cell phone, and a CB radio as far as the trucking folks go, to get on the ground, but they did, and when they arrived on the ground, on the mining section, they found that the ventilation control was not in place. And these are controls that are needed to prevent mine explosions, prevent black lung disease.

The dust was so thick that the inspector could hardly see this huge continuous mining machine. You have to ask yourself some questions.

This was well after Upper Big Branch. This is when we all understood the consequences of taking actions that have been identified after Upper Big Branch Mine.

Why were the miners working in such conditions? Why wouldn't they speak out? What was the mine operator thinking about? What did he expect the ramifications for a Mine Act to be, to do that? I have to say that that mine, in September, was not the only mine where we're finding this kind of conditions; and that's where we have our greatest worry. What goes on in those mines when MSHA's not there, can't be there? What is it that we need to do to provide those miners who work at an occupation in this country, to have enough faith that they can speak out and cause these conditions to be corrected?

What can we do to have those mine operators think like a lot of other mine operators who run mines every day, that respect the law?

Those are why we think pieces of legislation are needed in those areas.

The CHAIRMAN. Thank you, Mr. Secretary.

Senator ENZI.

Senator ENZI. Thank you, Mr. Chairman.

In my opening remarks, Mr. Main, I mentioned a report that had been given to Chairman Harkin and the Appropriations Committee even prior to the Upper Big Branch that brought to light problems at the agency, and we learned about it through an article early in March. Chairman Kline, who is our comparable committee on the other side of the Hill, requested those reports, and others going back to 2007.

Has that request been complied with?

Mr. MAIN. I think our folks are in the process of complying with that. I think one of the central issues is that the audits are both performance audits and individual accountability audits that's tied in with that; so there's some privacy issues that's being addressed in terms of making sure that the information—we are going to provide the information, yes. Just making sure we do it in good proper response.

I understood that you had requested that as well. We'll be more than happy to provide that.

Senator ENZI. I have joined them in the request primarily because it's so late in coming. I mean, this is a report that went out a year ago.

And if it went to the Chairman of the Subcommittee on Appropriations, it seems like you would have already vetted all the privacy stuff. It seems like it would have been like a 2-day thing in the mail?

Mr. MAIN. Yes, we would.

Senator ENZI. One of the reasons I'm frustrated is because in every department that I'm working with I have made requests, and other people on the Republican side of the committee have made requests, and we're not getting information. And we get kind of frustrated.

Mr. MAIN. If I may clear up here and provide some understanding, because the report that was provided to the Appropriations Committee, it was provided to both the House and the Senate and both the Chairman and the Ranking Minorities. That report is out in public.

What is the substance of the request is all the reports that went into making the report. There are several of those reports. There is something like 60-plus reports. And that's what's being evaluated now to make sure that, as we provide the information to you, that we do it in a proper way.

But it is forthcoming, the actual report itself, that was sent to both the Senate and the House. It is actually a public document.

Senator ENZI. OK. Now since last June, the Charleston, WV, Gazette's report on its efforts to obtain MSHA records regarding two significant methane outbursts at the Upper Big Branch Mine in 2003 and 2004, and your agencies preliminarily indicated that extreme levels of methane buildup were likely the cause of the Upper Big Branch explosion.

Why have you denied the Freedom of Information requests regarding documents which highlight what your agency may or may not have known about the pockets of methane located beneath the coal scene at the Upper Big Branch?

Mr. MAIN. Yes, I think, again, to put things in perspective, I've been doing investigations for longer than I care to mention—a good 30 years, and I've worked MSHA jointly in these investigations: The Wilberg tragedy, the Jim Walter's mine disaster, the Greenwich explosion—a number of those. And, traditionally, it has been the case of the agency to conduct investigations, amass all the evidence and information; and when they conclude their evaluation, they put out a report and release all the information with that.

And, on the heels of that—this goes back to, I think the Pyro tragedy in 1989. MSHA, on the tail end of their investigation issues an internal report. The differences have been—what we've done this time—which I think we've put out more information than ever has been, with the exception of the Sago Mine explosion, which I'm sure you're familiar with, in 2006, and what we try to do is temper the balance of what we need to assure that stays within the confines of the investigation until the investigation pool desk has historically been done, and release whatever information we can to the public.

The other complication we have is that starting jointly with our investigation, so did the Department of Justice. First time in history. Like I say, I've been doing this for decades. First time in history there's ever been such an involvement by the Department of Justice on the front end.

And, to assure that we do not do anything to jeopardize their investigation, it has created some complications in the way that we proceed with our investigation. And we have assured the Department of Justice that as we proceed, we're not going to do anything that would jeopardize the investigation that they are conducting.

That's the long answer, but it's how investigations have been traditionally—

Senator ENZI. You realize the longer it takes for these documents to get out, the more that it looks like MSHA knew more than they did, and could have done more to prevent what happened; and that there's some kind of an effort to cover up with the whole process.

One of the reasons people want to look at these records is, it's reported that Massey Energy had submitted plans and saw the degasification wells, and maybe they'd been approved and maybe they hadn't.

But, without these reports regarding the previous methane outburst, it seems impossible to determine whether or not these degasification wells could have saved lives.

So, could you provide us with more insight into these Massey claims?

Mr. MAIN. We have set June 29 as the day that we plan to release what we believe is releasable in terms of information regarding the investigation. We think it will be in a position of winding up the underground investigation, be out of the underground shortly. We're wrapping up interviews, and we're reviewing just hundreds and hundreds of documents.

It is our plan to try to amass that information and put it out in some context as to what it means; and keeping in mind whatever we do, we're going to balance that with the Justice Department to make sure that we don't create a problem there.

I would remind folks, too, that if you look back at some historical mine disasters—we've got Jim Walter's disaster in 2001—it is, I think, 15 months before the agency ever released its report and information.

Senator ENZI. You're doing something rather incredible right now, and that's announcing a specific date for release of the thing, 3 months in the future.

If you're that specific on it already—I mean, June 29th is 3 months—

Mr. MAIN. We've talked to our investigative team; we have had discussions with the other Federal agencies; we've had discussions with our own folks, and we feel comfortable at this stage that we're going to be able to produce information that will be of value by June 29th. And, we're working toward that.

Senator ENZI. Pretty incredible. My time is more than up, sir.

Mr. MAIN. All right, thanks.

The CHAIRMAN. Senator Manchin.

STATEMENT OF SENATOR MANCHIN

Senator MANCHIN. Thank you, Mr. Chairman. Thank you for the courtesy you've extended to myself and Senator Rockefeller, who couldn't be here today, and I have some questions later on, on our second round that I'll ask on his behalf.

We're, as you know, both representing the State of West Virginia. As the Governor of the State of West Virginia previously, three of these horrible tragedies happened, which was Sago in 2006, Aracoma followed 3 weeks later; and then last year, UBB, as we came up on our 1-year anniversary. Our hearts are still heavy, and we're very much in contact with the families, whose lives have been changed forever.

The coal miners in West Virginia—and I'm sure around the country—and I know that Senator Rand Paul will have the same feeling that I have—that they're the salt of the earth; they're hard workers; they're patriotic people; they provide for their families; they work hard; they don't ask for an awful lot.

But what they do ask for is safe conditions. And, I've told every miner, I don't intend, in West Virginia to have one miner in an unsafe condition; nor should a family expect them not to return home safely. We've done everything humanly possible, and we're continuing to.

After Sago and Aracoma, I knew immediately that we had to have rapid response; we had to have tracking communications; we had to have shelter and oxygen, because we know at Sago with those things, we'd have saved 12 miners.

This was a horrific explosion; and back when I was growing up in Farmington, WV in 1968 was the last time we ever had any of these safety changes that were made.

With all that being said, as the 1-year anniversary—again I say, our prayers and thoughts go out. I want to say to you, Mr. Main, and Mr. Stricklin, your entire group, I worked with you, sat with

you for 5 days and 5 nights. I know the dedication you've committed. I'm not here to put the blame—and the sins of the past, and people want to make a political—the bottom line is, we're going to need to fix things.

The difference is with Sago, we knew we needed a change. We knew we could, and we changed it in 1 day in West Virginia, which was unheard of. I brought Democrats and Republicans, and I said, this is the time to be a West Virginian. Don't worry about the politics. We've got to fix things and make it safer. We can't let a miner and the families go through what we've just seen.

We changed it, and you all took it, and I commend both the Chairman and the Ranking Minority Member here, Mr. Enzi, for taking that, running and making those changes.

What we're trying to grapple with now, I think, Mr. Main and Mr. Lewis, is with your audit and everything. We appreciate that. We don't know which way to go right now. How do we enforce it? It's not being enforced. How do we make the agency enforce it or do its job?

I'll give you an example: We put a hotline in, in West Virginia. You're talking about whistle-blower and all the different things. Since May 7, after the explosion in April of last year, through June—one month, we had 16 calls to that hotline. I guaranteed every miner. I said, you should be empowered to make a call and we'll protect you. From July 2010 through the present we've had 70 calls on our line, trying to make sure—and I'm sure it's led up to them. And, we've coordinated that with MSHA.

What we're looking for right now is the significant and substantial violations. The things that causes deaths in mine explosions are things of this sort: ventilation. If it's not ventilated properly it will build up with fuel. The fuel's going to be basically, either methane, which ventilation will take care of, or coal dust, which rock dusting can take care of that, if it's done properly to hold that lethal powder down, if you will.

Those types of violations—I can't see how we would tolerate at all when we have a pattern of someone that is not continuing to keep up—why we shouldn't be able to shut them down.

What we're grappling with here, if you have the power, why don't you use it? Not you. Why hasn't the agency used it over the year? If there's a flaw, and allows basically, different companies to skirt that and play Lucy Goosey, then we've got to change that. That's what we're looking at right now.

We're waiting for, I think, the direction. I know that there's—this is going in two directions: Criminal investigation and both the civil investigations, to see how we can make it better. I know I've used my time already on this, but I think what we're saying is—can you tell me in what districts the coal production has gone down or increased? And, is it relative to the amount of violations you've seen?

That would probably be my first question, and I'll come back to my second round.

Basically, the amount of coal being produced—the different districts, and does the coal production—basically, is it relative to the amount of violations you see?

So, as we're pushing more coal, we're going for production. Are you seeing that now, disregard for safety, and just mining? Have you all evaluated that?

Mr. MAIN. One of the things right after the Upper Big Branch Mine that I initiated was the Special Impact Inspection Program. That helped us identify mines, wherever they were, that were having health and safety or violation rates that were on the highest levels in the country.

That was one of the criteria we used to target mine impact inspection. I can tell you this, even though there's a number of mines that are targeted in Appalachia, it's just not Appalachia.

We have mines that are having difficulties figuring out how to comply with the health and safety standards. They're all over the country. A large number of those in Appalachia; a large number of those in District 4, MSHA District 4, 6, 7—in that region.

Senator MANCHIN. Mr. Lewis, just very quickly, if I may, Mr. Chairman.

The CHAIRMAN. Go on.

Senator MANCHIN. What is the one thing, through your audit, that probably startled or surprised you more than anything?

Mr. LEWIS. I think in this most recent audit, where we looked at the POV process, was what we weren't really looking for, but ran into with the testing labs and not having the standard and how long it might take to turn around samples that would have a more immediate effect on the safety in the mine.

Senator MANCHIN. You two have been working on that together?

Mr. MAIN. Yes, actually, we worked quite well with the Inspector General's Office. And, I'll tell you something about the lab. It was put in, in southern West Virginia right after the 1969 Mine Act, and it's been in there ever since.

One of the things that it brought to our attention was the need to take a look at all these pieces of infrastructure that's been in MSHA all these years and not been subject to an evaluation. And, actually, we're working to look at all of our labs now.

Senator MANCHIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I try to keep you to 5-minute rounds so that everyone gets at least a chance to ask at least one question or two. But, we can always have a second round.

Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Mr. Main, thank you for being here today. In 2006 I went with Senators Rockefeller, Enzi, and Kennedy to the Sago Mine 2 days after that disaster, and a young lady by the name of Ms. Emmer gave me this picture which I keep with me every day since. That's her dad, Junior Emmer, who died in the Sago Mine disaster a few days after Christmas. And, she told me, when she gave me the picture, she said, I want you to keep this with you to remember this is what you're responsible to. Don't let this happen to any other miner in West Virginia.

Now, I've kept it with me for that reason, because it is important to understand the importance of the impact of what we do.

I've got a couple of questions that will sound critical, but I'll try to be very objective about MSHA and its operation.

First of all, in terms of Upper Big Branch, even though it's been said in testimony and statements that there were difficulties in that mine, you never took advantage of the flagrant violation rule and assessed it against the Upper Big Branch before the explosion; yet you did it in 125 other instances, in other mines across the country.

We gave you that authority after the Sago Mine disaster in the MINER Act. Do you know why it wasn't used in the case of Upper Big Branch?

Mr. MAIN. Yes. Actually, we've used it 142 times—the number of times that the pooling has been assessed. And, that's something that we're taking a look at, as part of the look back of the portion of history prior to the Upper Big Branch tragedy.

We're going to have to sort out what that means. I'll add in the context, too, of all of this is that one of the problems that I think exists is one that Congress has helped us out with and we need more help with our backlog issue in terms of the way we assess penalties and what happened to them.

When I look at the number of mines that are contesting a large number of penalties that we're issuing, and I look at those being stacked up 2, 3, 4 years before they ever get to the process, I'm worried about the flagrant violations as well, which we have cited. The first ALG decision we announced this past week, the violation, I think occurred in December 2006; but the delay that's in this whole penalty process that is as much of the problem as the penalties that we are issuing. And, we have a terrible problem with this backlog of cases. We have got to get those flushed out so penalties mean something, so, those who are cited doesn't have the belief that they're going to get a huge discount as they wait.

And, I just looked at the numbers here recently: 1,369 mines last year contested over half of the violations they were cited. I mean, it gives you a trend here. Yes, we need to be using flagrance, I think more than what we had. We're looking at that, and looking back. But this whole penalty system is—there's such a logjam here, that I really worry about that.

Senator ISAKSON. I'm glad you brought that up, because let me make a point. This is an observation I have from my experience in mines in Georgia. We don't have deep earth mines like coal mines. We have a lot of surface mines in Kaolin minerals and things like that.

We've had some difficulties with inconsistencies of MSHA inspections in Georgia, and in particular, inspectors. I notice in the I.G.'s report, there was a comment about arbitrary limits on the number of pattern of violations fines that were being levied by MSHA in terms of that.

And, then Senator Harkin referred a minute ago—I was in the hearing here a year or so ago when MSHA was talking about having authority to close the mine when they already had the authority to get an injunction to close the mine and never used it. And, I think the Chairman mentioned they finally did use it.

It seems to me like there's an inconsistency of enforcement in the agency which contributes to the number of complaints you have or number of contentions you have in terms of the fines that are levied.

I do understand that there would be mine companies that would just challenge every one of them, or challenge the preponderance of them. But, in the case of my experience in Georgia, when I called it to the agency's attention, they found out they were inconsistently, in the case of one region, assessing fines and violations; that there is an inconsistency in the agency in the assessment of violations that raises the question, why there would be a challenge by the mines and begs the question, why would a terrible disaster like Upper Big Branch, if flagrant violation was never used when it had been used, as you say, in 142 other cases?

I would just point out that inconsistency of enforcement or using the tools that you have may be contributing to the challenge that you have in other mines.

Mr. MAIN. I think in response to the questions that you have raised, we have taken—the day that I came here, and this is something that we had a discussion about in my early days, about looking at how we improve consistency in the application of the Mine Act.

I realize that half the inspectors I had the day that I started the job had about 2 years or less. And, we've had discussions about that in the past. And there is a need for us to put into place mechanisms to improve our overall consistency as we go forward.

One of the things that it answers the audits that was raised. I mean, we've done audits in the past. We're going to continue to do audits in targeted areas to try to figure out where would we have some inconsistencies or need to improve performance. And, what we do with that information is apply that, to try to fix those.

We launched a special program for training our supervisors this past summer. This is a 2-week training program. And one of the key things that it deals with is all these audits and internal reviews—all the findings of those, and these inconsistency issues.

We've also launched late last summer, an effort to revise our entire mine inspection program to get that information back in, to trade it back in to our inspectors through the procedures we use.

I just met, about a week ago, with our CLR—those are the staff that actually resolve the contested violations within MSHA—about improvements in performance.

But, I have to say this: That at the very beginning, the first staff that I looked at was, are we writing paper that was bad? And the answer to that question in 2009 and 2010 was no. Less than 1 percent of the paper that we issue as a violation sticks as a violation. And, what that tells me is that the core problem here is that we need to get the industry more focused on finding and fixing the violations within the workplace.

And, if we can accomplish that, what happens is that we cite less violations, we're citing less orders. Instead of the company writing checks to lawyers or to the U.S. Treasury, we're plowing that money right back into the mines. And, the miners have it best of all, because they have an improved health and safety program.

What Senator Enzi was talking about, the mining company is far superior than what we have, as far as the standards under the Mine Law, that's what we strive to have in the industry. The different mining companies looking at those mining programs and making improvements.

But, consistency is something we're working on; and we'll continue to work on it. I think we're making progress, but I think at the end of the day, there's an operator responsibility here we can't lose sight of, to operate the mines, to have a responsibility to put into place health and safety programs, inspect, to find and fix the conditions. If they did that, we'd be finding less.

Senator ISAKSON. OK. Thank you.

The CHAIRMAN. Thank you.

Senator Paul.

STATEMENT OF SENATOR PAUL

Senator PAUL. Thank you, Mr. Chairman.

Thank you for coming today. I, like Senator Manchin, have lots of miners in my State, and we are concerned about their safety; and our hearts do go out to families of those who lost loved ones at Upper Big Branch.

That being said, every regulation doesn't save lives. And, there is a point or a balancing act between when a regulation becomes burdensome enough that our energy production is stifled. We have to assess the costs of regulation and whether they save lives, and whether some are simply burdensome on the production of energy.

One of the rules that I'm concerned with is the Respirable Dust Rule that's being promulgated. There's evidence that we've been doing, actually, a pretty good job with reducing black lung over the years. From the passage of the Mine Act in 1969 the prevalence of black lung has been reduced from 33 percent to 3 percent. I think we've been doing a good job. And do we always want to do better? Yes, we'd like to do better. We need to weigh, basically, whether or not that's going to save lives; whether it's going to improve health versus whether or not it's going to raise the cost of business.

MSHA has estimated that it will cost \$30 million for the entire industry. We have industry estimates saying that it could cost \$30 million per mine. There's a bit of a discrepancy in what the cost will be.

What I'd like to see from you would be the reports, the health reports talking about whether or not black lung is an increasing problem, a decreasing problem; whether or not we're looking at pneumoconiosis versus silicosis.

But, the data behind the promulgation of the rule, I understand we've asked for them and we haven't gotten those reports. I'd like to see those health reports and know when we can be provided the data that went into determining the Respirable Dust Rule. Can you tell me when we can get that information?

Mr. MAIN. I don't know that we have any standing requests of U.S. reports. I know that MIOSHA has standing requests for reports that they have issued, and we have been working, actually, with the mining industry to—

Senator PAUL. Can you provide the information to my office for the health reports and the studies that went into why we need to change the Respirable Dust Rule?

Mr. MAIN. I can provide you the reports that we relied on in our rulemaking. And, just as a follow-up, I think if you asked any coal miner in Kentucky, West Virginia, The Appalachia, do you know somebody that died of black lung, the answer's going to be yes.

Senator PAUL. I didn't hear your first part. You said you can or cannot provide those reports?

Mr. MAIN. Yes, if you'll give us the request, we'll provide you the reports.

Senator PAUL. This is going into effect May 2, and we'd really like to see the studies as to how you're determining the cost and how you're determining whether or not this is a health problem that needs a change in the Respirable Dust Rule.

Mr. MAIN. Yes, we will provide you the reports we relied on in making—and I just want to note that based on MIOSHA's findings miners are still getting the disease; younger miners are getting the disease. This is a disease that has plagued the industry since we've mined coal.

I think that the Chairman's father is a black lung victim as well.

Senator PAUL. It's been greatly on decline over the last 30 years.

Mr. MAIN. We hope to get rid of this disease. That's our goal.

Senator PAUL. We've been succeeding with the current rule in greatly declining black lung disease over the last 30 years.

Mr. MAIN. There has been a decline. There's absolutely no question about it, but miners are still getting the disease, but we'll be happy to provide you with the reports that we relied on.

Senator PAUL. Thank you.

The CHAIRMAN. Your time is a great example to set.

Senator Blumenthal.

STATEMENT OF SENATOR BLUMENTHAL

Senator BLUMENTHAL. Thank you, Mr. Chairman, and thank you for having this hearing which focuses on one of the Nation's major workplace safety tragedies. And, I must say, Connecticut has no coal mines, but I'm here because the principles and values and the mistakes made can inform all of us. Every family has a right to expect a worker who leaves in the morning come back at the end of the day, and anytime in the workplace that there's a tragedy of the kind that happened here, it reflects on our Nation as a whole.

I want to thank you, and the Mine Safety Health Administration for its self-reflection over the past year to increase the effectiveness of current safety requirements, and, Mr. Lewis, the work that you've done in looking into possible improvements.

I want to say that my colleagues, Senator Manchin and Senator Rockefeller have been extraordinarily responsible and responsive to the particular issues raised in this tragedy.

And, I want to ask: After any worker safety tragedy of this kind, and any mining accident, miners' families continue to suffer, as they have here—29 families wanting to know what happened in the Upper Big Branch tragedy.

Has the Mine Safety and Health Administration been keeping those families informed about the ongoing investigations by both your department and by other branches of the government, such as the Department of Justice?

Mr. MAIN. I can speak to the Mine Safety and Health Administration. I can tell you that we have had a family liaison that works with them. We've had, I think, seven family-briefing meetings on our investigative findings on what was releasable, what we could share with them since the tragedy.

But, I would also like to share with you: We had 71 other miners that died last year. We have mines in virtually every State in the United States, and one of the things that probably gets lost in the shuffle here is that, if you look at the last two decades, most of the mining deaths have been at non-coal mines. I'm talking about metal mines, sand and gravel mines; and when we've taken a look at the data, we find some of the largest number of deaths at surface facilities and some of the smaller facilities that occur.

And, in each of these deaths, we have assigned a family liaison to work with the families. It is something that we believe in as an agency; I personally believe in. I work with the grieving families all my life. But that's something that we do.

Senator BLUMENTHAL. Do you think that the system of liaison and information can be improved; and what, specifically would you do to improve it?

Mr. MAIN. Yes, I think we can. I grew up as a farm kid; went to work in the mines, and I believed in the find it and fix it mentality that has taken me through all my life. Families pay the biggest price for all of these, whether it's a single accident that happened in Iowa or the tragedy in West Virginia. And, whatever we can do to both make their life easier and provide them what we can to help ease their pain and to bring closure, we owe it to them.

Yes, we're always looking to see what we can do better. I will also say this, that Senator Manchin mentioned: We all spent a lot of time with the families right after the tragedy occurred during the week-long rescue and recovery operation; and the pain and grief that you see in the eyes of those families is something that I think that all of us that make the decisions ought to see, as Senator Manchin has pointed out, because you really understand the consequences of failure in mine safety in this country.

Senator BLUMENTHAL. As I mentioned, we don't have any coal mines in Connecticut, but we have had similar kinds of tragedies, and we've seen families experience the same kind of grief in construction accidents, in an energy plant tragedy that occurred very recently.

And, I wonder if you feel that the families would be justified, in this instance, if they were dissatisfied with the level of information that's been provided.

Mr. MAIN. You can never provide enough information to the families; and I'm going to start from that equation. If I was there as, say the father, the son, the wife, the brother, the sister of the miner who lost their life, I would be asking every question of everybody to get an answer.

And, to that extent, I think that's what drives us to try to figure out ways that we can accomplish that. Our event on June 29 will, as much as we can along those lines, be able to answer the questions. They want to know what went wrong; why did this happen, and we owe them that answer.

Senator BLUMENTHAL. Thank you. My time has expired, but I may have some more questions if there is follow up.

Thank you.

The CHAIRMAN. We'll get a second round here of 5 minutes each.

I'm glad you brought this up, Secretary Main, about the number of fatalities. I think we have to be constantly reminded of what a

dangerous occupation this is. From 1990 through 2010, if I'm not mistaken, that's 20 years, not including black lung deaths, 838 miners perished in metal and nonmetal mines compared to 820 miners who died at coal mines. So, 1,638 miners died in 20 years. That's really kind of shocking when you think about it.

Now, the injury rate—I don't have the data on that, but I can get that, but that's also extremely high.

My point is, to back up what you just said, but some people say, well, there ought to be different rules for different types of mines. Surface mine's different than deep coal mining; krona mining is probably different than coal mining. And while I think it probably does make some sense to have different rules for different types of mines, there are some rules that, I think, would cover all mines.

For example, it doesn't really make sense to have one set of rules for a whistleblower at an underground coal mine and another for a whistleblower at a silver mine or gold mine or krona mine.

I just wanted to make that point, that I think there are some standard rules that can apply to all, but there may be some in which we would have to look at different rules for different types of mines.

Mr. Main, I wanted to get to this issue of backlog. Because of what you're going after to reduce this backlog, are you saying that somehow that is preventing or slowing down your ability to conduct the kind of investigations and to issue the kinds of citations that might be needed on a day-by-day basis right now because you're working so much on the backlog?

Mr. MAIN. There is no question that the backlog is taking up a certain amount of resources, in MSHA, in the Solicitor of Labor's Office; and there is a belief in my mind that there is—some operators, I think, take the easy route of, if you issue me a citation, I'm going to contest it.

If you look at the history, they can expect about 2 years before it ever gets to resolution.

The CHAIRMAN. If it's contested.

Mr. MAIN. If it's contested. And, I think that does have some impact on how some of the miners view the penalties. And if mines that operate a short time decide by the time they ever get to me, I'm going to be out of here—do I believe there's mines that operate like that? Yes, I do. Do I believe that some mines have calculated the cost of fines, the cost of doing business, by keeping their money in their own pocket for 2, 3, 4 years? Yes, I think there's a lot of things that adversely affect the overall enforcement system.

I can tell you this: that our backlog dollars that Congress so gratefully gave us to help fix this, runs out in July.

The CHAIRMAN. Did Congress not provide additional funding to reduce that backlog?

Mr. MAIN. Congress, yes, through July of this year. And, the Senate Appropriations, on its bill, had added money to that. But, as we now stand, funding ends in July.

The CHAIRMAN. Do we have information—not in this committee, but the Appropriations Committee on how much we would need to continue to reduce that backlog in a timely manner?

Mr. MAIN. Yes. I think we have a request in fiscal year 2012 that outlines the moneys needed; and I think the gap money is somewhere around \$3 million to get from July to October 1.

The CHAIRMAN. OK. Thank you.

Mr. MAIN. And I think around \$23 million was in the Omnibus bill, but there's a specific amount in the fiscal year 2012 appropriations.

The CHAIRMAN. That joint plan was to reduce it in 3½ years. If you continue to get the additional funding, is that still—

Mr. MAIN. I think as we move forward we look at where history's at, I will tell you, when we started this discussion, it was in February of—January, February 2010. The moneys was appropriated in July, and after Upper Big Branch, as everybody knows, my agency started to increase the enforcement intensity in the mining industry.

You had some mine operators that contested the actions that we have taken. I think we've seen an incline since July 5th as far as more contested cases. And, I think we've tackled around 1,900 cases as a result of the backlog activity that we've taken.

The hope is, as we move forward with applying the tools, that we are having the industry take greater ownership, looking forward to, hopefully, some legislative opportunities here, that we think that there's going to be a changed attitude in the mining industry that has us citing less violations as we go forward.

But we're not there quite yet.

The CHAIRMAN. Thank you, Secretary Main.

Senator Enzi.

Senator ENZI. Thank you again, Mr. Chairman.

I want to congratulate you on completing 100 percent of MSHA's required inspections in 2010 and noted that that marked the third year that MSHA has achieved that—2008, 2009, but I noted in your March 25, 2010 Office of Accountability Report to Chairman Harkin at the subcommittee that 4 of 19 field offices audited failed to complete section 103(i) periodic spot inspections required by statute for mines that liberate high amounts of methane gas in 2009.

How was MSHA able to achieve 100 percent of mandated inspections in 2009 if these required spot inspections weren't done?

Mr. MAIN. Starting with the spot inspections first, MSHA does about 6,000 spot inspections of mines based on the 103(i) spot inspection program, and from what I understand there were four locations—or four different spot inspections—missed out of that 4,000.

The other thing that I understand is the cause of the find and fix actions that we take, that that message was reinforced throughout the industry, or throughout the agency, and we have been completing the inspections.

When we claim 100 percent inspection, it's based on a general inspection of a mine; and that's not to say that everything—we don't live in a perfect world. We wished that we did, but with all the pieces that we inspect, to get 100 percent, there's some quality improvements we could always make.

Senator ENZI. Now, mines with high methane liberation have a higher explosion risk, and that's why they're targeted for these 103(i) inspections. Do you think it's more important for an MSHA

inspector to inspect every inch of a three-employee gravel pit that has had no loss time accidents for a decade and never had a methane explosion, than to complete spot inspections for mines with high risk of methane explosions?

Mr. MAIN. I think you have to put it in context. I've done mine inspections all my life. I've been in gravel pits; I've been in coal mines; I've been in silver mines. And, there's two things that I've learned about this Mine Act—I went to work before there ever was a Mine Act in 1967. I remember the first day a Federal inspector ever arrived where I was. It was one of the best days of my life. If you look at how effective the Mine Act has been; if you go back to 1978, whenever the metal/nonmetal—1966 metal/nonmetal Mine Act was joined to the 1969 Mine Act, we had about 200 plus, about 280 deaths that year.

We have been able to achieve such great reductions, and particularly on the metal/nonmetal side as a result of the implementation of that act, the 2006 Miner Act, the adding on of inspectors to the point that the last 2 years a metal/nonmetal has been two of the most historically low years in the history of mine safety.

So, pulling inspectors off of those, you risk a reeling back of the successes that you've made. And, I think that Congress and this agency, the mining industry, needs to have the recognition of how all those pieces of legislation, regulations came together to provide us with the safest 2 years in the history of mining.

Senator ENZI. Now, was UBB scheduled for 103(i) spot inspection; and were those completed?

Mr. MAIN. They were scheduled for those. As far as, were they all completed, that's something that will be assessed. Actually, there was no audits that involved Upper Big Branch in the ones that we have been talking about here this morning.

I want to put those audits in perspective: MSHA's been auditing agency performance since probably its creation in May 1969, it is a function that the agency has to do—to go out and look at how its performance is to carry out the Mine Act.

If we don't find problems, somebody's going to be worried that we're not looking in the right places, so we try to target to find the right areas where we had concern.

And, it's the same thing with the IG audits that are done. Those are targeted in particular areas to help us be a better agency.

We're hopeful that all the audits that we've been talking about were helpful to make improvements to the agency going forward.

Senator ENZI. How many times has MSHA inspected large underground mines and issued zero significant and substantial citations; or is it even possible?

Mr. MAIN. Yes. We have some mines in this country that are very large. I know one in northern West Virginia, up in the Senator's area, the McElroy Mine. I think it's probably the largest underground mine that we have in this country, two sections—or two long mines; employs close to 1,000 miners; and they have a vast area. And, we take that into consideration when we look at how mines are.

We have some mines that are very small, and we take the smallest gravel pit. But, yes, there are mines that have inspections that

do not receive S&S violations, both from the coal side and on the non-coal side.

One of the other things, too is that we look at what we do and how we have applied the law. We issue the 14 potential patterns of violation notices to those non-coal mines; one of them was a surface cement plant in the southeast. And, this was something that may surprise folks, but it showed up on the list as having problems that we needed to take exceptional action in. That mine has successfully lowered its S&S rate; is now off the potential pattern of violation and sent us a letter basically thanking us for showing them how to have a better safety program; and they fully intend to do a better job from here out.

My safety covers more than coal; and we try to use our tools to target the areas where the problems are where we need them the most.

Senator ENZI. I have a number of other questions, but I'll submit them since my time has expired.

The CHAIRMAN. Thanks, Senator Enzi.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

As I mentioned, just for the record, we have no underground coal mines in Connecticut, but we do find that whistleblowers are frequently a source of extraordinarily important information in preventing, as well as investigating and prosecuting these kinds of tragedies.

I know that at the field hearing in Beckley, one of the problems raised by the miners was their fear of retaliation or retribution.

I wonder what the Mine Safety and Health Administration has done to empower miners to come forward and report unsafe conditions before they cause this kind of tragedy?

Mr. MAIN. Through how we train our inspectors to be out talking to miners to let them know their rights; we have our training department—we, being MSHA—do updated information to get out to the miners; we try to send messages, is what I say, publically, as the head of MSHA, what I expect, and what I expected is that mine operators listen to miners, and that miners have the right to speak out; and the way that we respond to discrimination complaints, where miners do speak out.

We are going after the largest number of temporary restraining orders to get—or not a TR—it's an order that puts a miner back to work while their case is being processed; and we let the mining industry know about our actions to do that. But, there's more that we need to do to make the miners feel comfortable with all that we do, to give them more legal powers.

Senator BLUMENTHAL. And, what would you do? And, I guess that's a question also for Mr. Lewis, because your report does not specifically make recommendations with respect to whistleblower protection, but I do feel it is important for both of you to focus on.

If I could ask that question of you, Mr. Main, and then ask Mr. Lewis to answer it as well.

Mr. MAIN. I would say simply that there is a lot of discussion about this and the development of legislation last year for a new mining act. There is a lot of good provisions in that, we should take a look at, that aims at providing miners with a greater voice, a

greater amount of protection, and more penalties for those that take action against the miners; and we support moving forward with those.

Senator BLUMENTHAL. Mr. Lewis.

Mr. LEWIS. That's something that we have not specifically looked at, at this point in MSHA, but we could certainly do so. We have looked at their hotline process for receiving complaints and made recommendations over that in the past and how it's operated.

Senator BLUMENTHAL. Let me make a suggestion, Mr. Lewis, that you do look at it very closely, because in forestalling or improving the kinds of conditions that the miners know best—they're on the scene; they're in the mines, just as workers at a construction site or at an energy plant can see and feel danger before it occurs, they need to be empowered, and absolutely protected against retaliation, not just that objectively it won't occur, but, in fact, in their perception that there is no intimidation.

I know that you share my feeling that they should be protected, and I know you've made that clear, Mr. Main, in what you've said.

To the extent both of you can give us some more specific recommendations in that regard, I would certainly appreciate it.

Let me ask just one last question, if I may, Mr. Chairman, in the minute I have.

Mr. Lewis, do you feel that there has been adequate follow up on the recommendations you've made?

Mr. LEWIS. On all of the recommendations that the agency has certainly been responsive and receptive. We know there's action on all of them. There are some things remaining to be done but I know there is work underway on every recommendation we've made. We've had a good working relationship with MSHA over the last 5 years.

Senator BLUMENTHAL. And, if you could pick an area where there has been either inadequate response, or delay, what would it be?

Mr. LEWIS. I wouldn't characterize it as inadequate response or delay. There are some things that are not going to be done overnight, as I mentioned earlier. One of our significant concerns was the testing labs, and we know that there is a lot that they are looking at there, but we are anxious for them to re-evaluate that standard.

But, we know they're going to have to do some things, and to get themselves in a position to be able to do that more timely.

Senator BLUMENTHAL. Mr. Main.

Mr. MAIN. Yes. If I could make a follow up on it. The lab is one thing that, like I said, that was put in there in about 1970. It hasn't changed much since 1970. We agree it needed overhaul. We've actually made certain changes, and we have some requests in fiscal year 2012 to help fix that.

A couple other issues: One of them is as to the recommendation that was made by the Inspector General that we have a change in legislation, how we issue 103(k) orders because of a language issue that was brought up after the Crandall Canyon disaster, finding that MSHA does not have the legal authority to issue a verbal 103(k) over the phone. That's a real problem. And, that's a recommendation that's in the legislative package.

And, there's recommendations made, as well, that we eliminate the final orders in the pattern of violations process, and our proposed rule covers that.

I think that yes, we have agreed with all the recommendations since I've been here that we have received, and we're looking, honestly, to fix those, and haven't been as yet, completed.

Senator BLUMENTHAL. Thank you very much, and thank you for your constructive work on this issue.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal.

Senator Manchin.

Senator MANCHIN. Thank you, Mr. Chairman.

In the State of West Virginia we have our own inspection, as you know, our own health safety and training office. And, what I hear a lot from both the miners themselves and operators is that there are two inspections going on; and one might contradict the other; and they get very confused. I've even had miners tell me that. They've said, "We're told to do one thing one way and then either the State or the Federal follows up and they're looking for something different." And, it's so confusing that it creates maybe an unsafe condition when we're both intending to create a safer condition.

What I would ask—I found a lack of sharing information. I know that, from the Federal and our State in West Virginia—and I'm sure other States might have the same concern—they are not sharing what they should be. We don't know if they are coordinating inspections. If we're required to do four inspections a year, and the feds are required; so you have the State doing four and the feds doing four, are they coordinating those so they will be at intervals and sharing that information so it would be much more constructive than detrimental to the operation, and, to really, the safety?

Mr. MAIN. I think the answer to that—this is going to be an answer broader than the State of West Virginia—

Senator MANCHIN. I know. I know.

Mr. MAIN. We have about 20 coal States.

Senator MANCHIN. Do most States have their own—I know Utah did not. Does Utah now have their own mine department?

Mr. MAIN. Yes. There is probably about six or seven States that do, but I have been working to organize all the State agencies. As a matter of fact we're set to meet in the month of May to seal a memorandum of understanding. It is an organization that represents State agencies, and we pull in all the State mine safety agencies.

In that meeting we're pulling together all of our district managers on the coal sites throughout the United States after they will be hooked up with all the State agency heads. This is something we've already accomplished one time. And it is to do exactly what you're talking about. We want to bring to bear better coordination between State and Federal agencies and the work that they do and the work that we do, and we're hopeful, to, as a result of all of that, increase that communication coordination.

Senator MANCHIN. Let me just give you this, what I'm finding out. There is such little resource out there with the people that have the expertise, and we're both in the same pool of workforce,

trying to—who's going to pay more to get that inspector to work for Federal or for State.

Do you believe that it's time to have truly one agency doing training and one agency doing inspections? Everyone's trying to do everything and I'm sometimes finding out we're not doing either one as well as we could or should.

Mr. MAIN. I have been a proponent of the continuation of State agencies. I think they serve as an enforcement agency. I think they serve a valuable purpose in protecting the lives of miners. I think that we can improve over all, by having greater coordination between the State agencies and MSHA and accomplish a lot better goal of consistency of how we manage our resources at the mine site.

Senator MANCHIN. Who has primacy? If I have State law, and I've got our inspectors—and we're going out there because we live there. That's us. We're right there every day. Do we have primacy over that, or basically does the Federal have primacy?

Mr. MAIN. If there is a conflict there is a Federal primacy that is applied, but generally the way that a lot of the State laws are constructed, they are constructed in the Mine Act, which was after a lot of the State agencies took place—

Senator MANCHIN. Has MSHA ever considered basically taking the lead role on, basically, teaching the safety end of it, and maybe the States taking a lead on the inspection end of it to make sure that we're enforcing it?

Mr. MAIN. Let me just say this as a Federal employee who works for the Federal Government, I do not see it, probably as in my best interest to step into the State authority issues and let the States make their own determinations. Only thing I can say is that throughout my working career I have seen the value of both agencies, in these—

Senator MANCHIN. The only thing I would ask for, if you would, give me a breakdown of how you're coordinating, because I know, before, we weren't sharing. We didn't know what to look for. The people would come to me as Governor, and they'd say, we're going in and we're looking at this and we're seeing it. You all might have gone in a week earlier, or maybe a day earlier and looked at something different.

We could help each other a lot more if we were sharing that, and if you had a serious violation, whether it be ventilation or rock dust or something, and we're going to come in and in intervals quicker than your interval; we could be looking for what you've been already identifying.

That's what I really saw, Joe, then we get the best bang for our buck.

Mr. MAIN. I truly agree with you, and that's the aim of working with this State organization where we can do it, not just in West Virginia, but throughout the country to help improve that—I agree with that.

Senator MANCHIN. Thank you Mr. Chairman.

The CHAIRMAN. I think that concludes our testimony this morning. I thank you both very, very much, and thank you, Mr. Main, for your great leadership down there. I can assure you that we're going to have to fight very hard on the Appropriations end to make

sure that we can continue to get the extra additional money to reduce the backlog. I'm afraid that if that's not done, one or the other is going to suffer—either we won't reduce the backlog in the 3 years that we've set or we won't be able to do the onsite inspections and things that we need right now.

But I think what Senator Manchin just mentioned is something I think we're going to have to look at. I can discuss that with Senator Enzi as we develop this legislation—the coordination between State and Federal, and who's responsible for what. I don't know a lot about that, and I've got to find out about that, and I'm just wondering if there is something that needs to be put in legislation to better mediate.

Senator MANCHIN. Mr. Chairman, what has happened over the—and I think that Senator Enzi will say the same, because coming from a large mining State, is the confusion. Everybody—let's say that the miners themselves, and the operator really want to do it, but they get confused, or they have been confused in past, of, OK, who has the primacy, and if we're doing this by what the State's telling us. And if the coordination. And you might have it required by law. I think we're four inspections a year.

Mr. MAIN, what's your requirement? How many do you require?

Mr. MAIN. Four.

Senator MANCHIN. Four.

Mr. MAIN. And, I don't round.

Senator MANCHIN. That's a total of eight. Let's say if we both come the same month, four times, that means 8 months might get done with nothing.

If we knew we were coordinating, and we were rotating this, we could almost have a much more—and sharing the information on what to look for. That's what I saw. That's way before you all come in and way before all this happened, I'd been getting those complaints clear back in 2005 and 2006.

The CHAIRMAN. Mr. Main, do you have one thing to—

Mr. MAIN. I would say this: I think that when we're talking about the Appalachian coal fields and realize what we have, I think we have to be very careful about any illumination of enforcement activities.

I totally agree with the Senators, that we do need to do better coordination.

Senator MANCHIN. Let me make it very clear, I do not, under any circumstances, think that we should eliminate it. We'll make sure it's effective and efficient; and if we're both doing it, let's do it so we can improve it.

Mr. MAIN. And we agree with that, and that's the reason I've been working to get the State agencies together. And it's not only on underground coal mines, it's like we inspect impoundments all over the country. We have an issue with our surface impoundments, and how best we can do that.

We have State agencies that do that. We have some obligations that—there are a number of things that would be helpful for us to coordinate.

The CHAIRMAN. Thank you all very much.

The record will remain open for 10 days for further statements, questions submitted by Senators; and with that, the—

Senator MANCHIN. Mr. Chairman, if I may say, on behalf of myself and Senator Rockefeller, we want to thank you for the courtesy you've extended to us.

The CHAIRMAN. Absolutely.

Senator MANCHIN. We're not a member of your committee. You've allowed us to come in and sit and participate.

The CHAIRMAN. Senator Enzi.

Senator MANCHIN. Senator Enzi, thank you so much, my friend. I appreciate it.

Senator ENZI. My pleasure.

Senator MANCHIN. Thank you.

The CHAIRMAN. Thank you all very much. The committee will stand adjourned.

[Whereupon, at 11:38 a.m., the hearing was adjourned.]

