

**WORKPLACE SAFETY AND HEALTH: OVERSIGHT
OF MSHA AND OSHA REGULATION AND EN-
FORCEMENT**

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT, SAFETY, AND
TRAINING

OF THE

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

EXAMINING WORKPLACE SAFETY AND HEALTH OVERSIGHT OF THE
MINE SAFETY HEALTH ADMINISTRATION AND OCCUPATIONAL SAFE-
TY AND HEALTH ADMINISTRATION REGULATION AND ENFORCEMENT

JULY 11, 2002

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C O N T E N T S

STATEMENTS

THURSDAY, JULY 11, 2002

	Page
Wellstone, Hon. Paul D., a U.S. Senator from the State of Minnesota	1
Enzi, Hon. Michael B., a U.S. Senator from the State of Wyoming	3
Henshaw, John, Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC; and David Lauriski, Assistant Secretary, Mine Safety and Health Administration, U.S. Department of Labor, Washington, DC	7

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
John Henshaw	28
David D. Lauriski	31
U.S. Chemical Safety and Hazard Investigation Board	35
Response to questions of Senator Wellstone from John Henshaw	38
Response to questions of Senator Murray from David Lauriski	39
Response to questions of Senator Murray from John Henshaw	40
Response to questions of Senator Enzi from David Lauriski	41
Response to questions of Senator Wellstone from David Lauriski	44
Response to questions of Senator Murray from David Lauriski	51
Response to questions of Senator Enzi from John Henshaw	53

WORKPLACE SAFETY AND HEALTH: OVER-SIGHT OF MSHA AND OSHA REGULATION AND ENFORCEMENT

THURSDAY, JULY 11, 2002

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT, SAFETY, AND TRAINING,
OF THE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND
PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-430, Dirksen Senate Office Building, Senator Wellstone (chairman of the subcommittee) presiding.

Present: Senators Wellstone and Enzi.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. We will ask for some order in the back and for people to please come in and be seated, because we will now bring the Subcommittee on Employment, Safety, and Training to order.

First, I want to call this hearing of the Subcommittee on Employment, Safety, and Training to order, and I want to thank both witnesses for joining us today.

Mr. Henshaw and Mr. Lauriski, nothing could be more important than protecting the health and safety of working men and women.

Our topic today is oversight of the regulation and enforcement responsibilities of two vitally important Federal agencies, the Occupational Safety and Health Administration, better known as OSHA, and the Mine Safety and Health Administration, known as MSHA.

Two days ago on Wall Street, the President, referring to financial practices and behavior, said, and I quote: "Self-regulation is important, but it is not enough." He was referring to the necessary Government role in regulating a market economy. He went on to point out that it is also sometimes the job of Government to "ensure that those who breach the trust of the American people are punished."

Earlier this year, the President had this to say about the importance of Government standards and the enforcement of these standards, and I quote again from the President: "A good business always respects the boundaries of right and wrong"—and I know that my colleague Senator Enzi absolutely agrees with that. "In our country, the law defines many of these responsibilities, from workplace safety to environmental protection."

Finally, during a recent visit to a high school in Missouri, President Bush said that he wants Government agencies to be accountable. Enforcement of sound standards and holding Government accountable is what today's hearing is all about. This is a committee oversight hearing.

Without minimizing concerns about national security or the current lack of confidence in financial markets, the trauma that working men and women and their families face every day from injury, illness, and even death on the job is no less important. As events of the past year have sorely demonstrated, systems, whether they be to protect financial markets, our national security, or the safety and health of our work force, cannot work unless everyone does the job they are supposed to do—auditors, financial analysts, corporate executives, and Government.

Today we will examine how well Government is performing its job with respect to the safety and health of America's workers. Born from the blood, sweat, and political struggle of thousands of Americans, OSHA and MSHA are charged with protecting the safety and health of hard-working men and women as they go about their daily jobs. They are responsible for administering comprehensive regulatory and enforcement systems to ensure that workers do not lose their lives, are not injured, and do not contract illnesses because of exposure to workplace hazards or risks.

OSHA's purpose according to the Occupational Safety and Health Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."

MSHA was created among other reasons because Congress found that there was "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines."

Today we will examine how well OSHA and MSHA are meeting these responsibilities. Frankly, I have concerns as chairman of this subcommittee. I am troubled about whether OSHA is meeting its responsibilities under the OSH Act to set mandatory occupational safety and health standards necessary to accomplish the overall goal of safe and healthful working conditions.

Protecting workers from exposure to explosive chemicals, from the ravages of tuberculosis, from the heartache of birth defects, miscarriages, and other reproductive health problems caused by exposure to toxic chemicals, from disabling hearing loss, from lung cancer and other respiratory is what OSHA is supposed to be about. OSHA cannot abdicate these responsibilities. It is a higher duty to America's working men and women. It simply cannot do everything by consensus. That is why Congress gave OSHA the authority to promulgate mandatory occupational safety and health standards.

In setting up these hearings, I had an understanding with Mr. Henshaw and the distinguished ranking minority member that we would use the time here today to focus on issues other than repetitive stress injuries—not because this issue is not extremely important, but because we wanted to be sure that other important safety

and health issues did not get lost. So I do not want to dwell on the topic of repetitive stress injuries other than to note my concern that the administration's dismissive attitude toward setting a meaningful repetitive stress injury standard was, I fear, just the tip of the iceberg.

Voluntary partnerships and programs have their place, but the fact is, as President Bush has noted, self-regulation is never enough. We need standards, and the Government needs to enforce those standards, because not everyone can be counted on to do the right thing.

That is what Government is for. That is why we should hold Government accountable to do this.

I also have some grave concerns about MSHA's enforcement efforts. I will want to focus in particular on two catastrophic events. First, there was the massive coal impoundment failure at A.T. Massey mine in Kentucky that spewed 300 million gallons of coal sludge into over 70 miles of creeks and rivers along the Kentucky-West Virginia border. This was said to be a catastrophe on the same scale in terms of damage to the ecology and surrounding communities as the Exxon Valdez oil spill—the worst ecological disaster ever—in the Southeast United States.

How could such a catastrophe happen just 6 years after a similar impoundment failure at the same site and the purported correction of deficiencies by the company? What went wrong, and how can such catastrophic failures be prevented in the future?

Then, there is the recent tragic explosion in the Jim Walters Resource Mine in Alabama, killing 13 miners. At the time of the explosion there were 31 outstanding citations that had not been abated, some for violations that I would have thought were serious—1,000 feet of flammable coal dust—but which the MSHA inspector apparently did not think were serious. Were the MSHA inspectors doing their job? Was the company being held to sufficiently rigorous standards? Is the pattern of violations and citations at this mine indicative of overall gaps in MSHA's enforcement efforts? And how can MSHA accomplish its daunting enforcement challenges on the budget and with the resources currently being sought by the Bush Administration in its fiscal year 2003 budget?

These are some of the questions that I will want to explore with our witnesses today. Again, I thank the two of you for coming, and I look forward to your testimony.

Senator Enzi?

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman.

The topic of today's hearing is "Workplace Safety and Health: Oversight of MSHA and OSHA Regulation and Enforcement." As the ranking member of this subcommittee, I feel a special responsibility to protect the safety and health of America's workers.

One of the most important aspects of this responsibility is to oversee the agencies charged with protecting our workers and miners, and I thank you for having this hearing.

The Occupational Safety and Health Act created the Occupational Safety and Health Administration, OSHA, in order to assure

as far as possible every working man and woman in the Nation safe and healthful working conditions.

The Mine Safety and Health Administration was created under the Mine Safety and Health Act to create the safety and health of the mining industry's most precious resource—the miner.

Today we pause to assess the effectiveness of these agencies in reaching these goals over the past year. Today we also look ahead to discuss OSHA's and MSHA's vision and strategies for enhancing their effectiveness.

This hearing is entitled "Oversight of MSHA and OSHA Regulation and Enforcement." However we cannot focus merely on regulatory and enforcement activities to gain a full appreciation of either agency's effectiveness.

Furthermore, where problems may be identified, we must look beyond just regulation and enforcement for the answers. Regulation and enforcement are vital to OSHA and MSHA's mission to protect our workers and miners. However, standards and enforcement alone will not assure their safety and health. An approach to occupational safety that is adversarial in nature and based solely on enforcement has not effectively tapped into the resources of the Agency, nor has it effectively tapped into the resources of employers and employees across the country who are committed to improving safety in mines and other workplace.

The fact is enforcement alone cannot ensure the safety and health of the work force. We must focus our efforts on preventing injuries and illnesses from occurring in the first place.

It is also a fact that the Government cannot ensure the safety of all of the Nation's workers and miners on its own. It would take OSHA 167 years to inspect every workplace in America one at a time. OSHA and MSHA must partner with business and labor to seek creative and proactive solutions to workplace safety.

OSHA's Voluntary Protection Program is an excellent example of the successes of a proactive and collaborative approach. Overall, employers participating in VPPs have illness and injury rates that are more than 50 percent below the average for their industries. They have fewer lost workday injuries, and they have reduced workers' compensation costs.

I would like to see the codification of this important and successful program. I urge these agencies to consider the unique needs and capabilities of small mines and small businesses in OSHA's and MSHA's regulatory and compliance activities. Small businesses and small mines face unique safety and health challenges that could greatly benefit from the guidance of OSHA and MSHA, respectively, as well as from the guidance of larger companies, those VPP companies that I mentioned.

I look forward to hearing from Assistant Secretary Henshaw and Assistant Secretary Lauriski about their agencies' efforts to address these concerns.

With respect to enforcement activities, the skills and training of compliance officers and investigators is a key to effective enforcement. I also look forward to hearing from the assistant secretaries about their agencies' efforts to enhance the training and skills of compliance officers. I would also like to hear about OSHA's and

MSHA's efforts to improve the effectiveness and fairness of the standard-setting process.

I want to thank the two assistant secretaries for appearing today, and I thank them for their efforts to improve the safety and health of Wyoming's and America's workers and miners.

This last year, I had an opportunity to learn a little something about statistics. One-third of the Nation's coal is mined in my country, and I remember having a visitor from the Tokyo press come to my county to take a look at the mines—we talked him into it; he was pretty sure that they were dirty and dangerous—and after he had a chance to tour, he found out that they were both clean and safe.

We have had some mines that have gone for 4 years without a lost time accident. But this last year, we had one injury that paralyzed a person from the neck down, and we had a death. Now, compared to past years, that is about a 1,000—or, actually, it is a higher percentage than that—percent increase in deaths. So that sometimes the statistics get skewed by having a good workplace. But it is something that everybody has been cognizant of. Some new programs have come out of it. One of my favorites is the Come Home Safe Program where everybody in the family is encouraged to encourage the worker to be safe that day and to come home to them that night.

Another program that does not have any legal constitution is one of near misses, talking about the near misses and sharing those with other people who might be in that same situation, because the near miss is an accident that did not quite happen, but it is an accident that could happen, and that is where some of the good prevention comes in.

I would like to thank you for your efforts in focusing on collaboration and education and compliance assistance to make your mission more effective.

I apologize that I will not be able to be here for the entire hearing. We are having a bill that I have put hundreds of hours into debated on the floor, and I have an amendment that is pending at the moment, so I am going to have to go over there.

I would ask unanimous consent remain open so that I can address some questions after the testimony even if I am not here—in this case, unanimous consent is just you, I guess.

Senator WELLSTONE. Absolutely, and I am pleased to give that unanimous consent.

I also want to apologize and say that we have everything going on today. We have a markup in the HELP Committee that was just rescheduled for the same time as our subcommittee hearing. We have, as Senator Enzi said, a very important debate going on on the floor, and he has been very involved with some of the reform efforts. But it did seem to me that it was too important to put this off, so we will go forward, and any questions or responses to any comments that you want to put in the record, please do so, Senator.

Senator ENZI. Thank you.

[Questions of Senator Enzi may be found in additional material.]

Before we begin I have a prepared statement from Senator Murray.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Senator Wellstone, for calling this important hearing today. I appreciate your long-standing commitment to protecting workers in this country.

As you know, America's workers are the foundation of our economy—an economy that, even during an economic downturn, remains the strongest economy in the world.

I believe workers must be safe and healthy for the economy's potential to be maximized.

I look forward to getting an update from Mr. Henshaw and Mr. Lauriski on current efforts by the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) (m-shaw) to improve protections for workers.

Thank you, also, Senator Wellstone, for cosponsoring a bill I recently introduced, S. 2641, the Ban Asbestos in America Act of 2002.

This legislation will take a crucial step forward in protecting workers and consumers by doing something which most Americans thought was done years ago: it bans asbestos in the U.S.

The Environmental Protection Agency tried to ban asbestos in 1989, but the EPA's regulations were overturned in 1991.

While new uses of asbestos were banned, existing uses were not.

Last year the United States consumed 13,000 metric tons of chrysotile asbestos to make roofing materials, gaskets, friction products and other items.

In contrast, asbestos has been banned in more than 20 countries, and will be banned throughout the entire European Union by 2005.

My interest in this issue stems from a series of newspaper articles which appeared in the Seattle Post-Intelligencer.

In late 1999, the paper ran stories about asbestos contamination from the vermiculite mine near Libby, Montana.

The paper reported on the high incidence of asbestos-related disease in that community caused by decades of exposure to the asbestos from the mine.

But the Post-Intelligencer's investigation wasn't limited to Libby.

The paper has covered asbestos-contamination at talc, taconite and vermiculite mines throughout the country, has found elevated concentrations of asbestos in dust samples at gas stations, and has covered EPA's findings on asbestos in horticultural products made with vermiculite.

The paper has repeatedly raised questions about whether we are doing enough to protect workers and consumers from asbestos exposure.

I'm convinced that we're not; and that is why I have introduced the Ban Asbestos in America Act of 2002.

Senator WELLSTONE. Mr. Henshaw?

**STATEMENTS OF JOHN HENSHAW, ASSISTANT SECRETARY,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
U.S. DEPARTMENT OF LABOR, WASHINGTON, DC.; AND DAVID
LAURISKI, ASSISTANT SECRETARY, MINE SAFETY AND
HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR,
WASHINGTON, DC.**

Mr. HENSHAW. Thank you, Mr. Chairman.

Thank you for the opportunity to discuss the Occupational Safety and Health Administration's commitment to protecting American workers.

I would especially like to discuss the Secretary's and my vision for the Agency and the progress that OSHA has made in achieving that vision.

When we look at the State of occupational safety and health in this Nation, we have many reasons for optimism. At 6.1 injuries per 100 workers, the overall injury and illness rate is the lowest since the Bureau of Labor Statistics started compiling these statistics, and there is a chart to my right which displays this.

Since OSHA's inception in the early 1970's, the rate has fallen by about 45 percent. In those industries where OSHA has targeted inspections, there have been even greater improvements.

Furthermore, the extent of cooperation between businesses, labor, and OSHA as measured by the number of partnerships, participation in the Voluntary Protection Program that Senator Enzi mentioned, and amount of compliance assistance activities is greater than ever before.

Even though we have accomplished much, I recognize that there is also much to do. Nearly 6,000 workers suffer fatal accidents each year, and in the year 2000 alone, there were 5.7 million injuries and illnesses in America's workplaces. Our focus, as you reiterated earlier, is to drive down fatalities and injuries and illnesses even further—as far as possible.

Enforcement and regulatory actions are certainly two of the more important tools for making workplaces even safer. OSHA is increasing its enforcement efforts in 2002 with more inspections, particularly health inspections, and targeting enforcement on the most dangerous workplaces in the high-hazard industries.

Through our enforcement efforts, we plan to conduct 36,400 inspections this year.

OSHA is also setting realistic goals and objectives in our regulatory program. We have spent the past year assessing the Agency's capabilities and planning regulatory priorities. OSHA's regulatory agenda now reflects an honest appraisal of what we can responsibly accomplish and the commitments we plan to meet.

Our current regulatory agenda, published May 13 of 2002, includes the publication of two final rules and seven Notices of Proposed Rulemaking.

Beyond our regulatory and enforcement activities, I would like to point out how OSHA is showing safety and health leadership in other ways. During the 9 months of rescue and cleanup of the World Trade Center site, we monitored safety conditions to ensure that problems were fixed before anyone got hurt. We protected thousands of workers by overseeing the fitting and distribution of more than 130,000 respirators and handing out over 40,000 pieces

of personal protective equipment and taking more than 6,000 air and bulk samples. I am pleased to report that there were no work-related deaths after the collapse of the two buildings and only 35 lost time injuries and a remarkably low rate of 2.3 injuries per 100 workers. Demolition sites normally have about 4.3 lost time injuries.

OSHA is also taking the lead in the safety and health of immigrant workers. As the committee has noted, many immigrant workers are often at greater risk than other workers, and far too often lose their lives on the job. OSHA has targeted inspections at workplaces such as meatpacking, where there are large numbers of immigrant workers. We have added Spanish language capability to our 800 emergency number. We have created a Spanish web page and are distributing Spanish language editions of employee rights notices.

I believe that for OSHA truly have beneficial impact in workplaces, we must go beyond enforcement and standard-setting. OSHA's participation with industry, professional and labor organizations is another valued means of protecting workers.

There are currently 137 active partnerships between OSHA and the private sector that are producing positive results for the Agency's Strategic Partnership Program.

Mr. Chairman, in conclusion, I believe that whenever we enter a workplace, whether as inspectors or as providers of compliance assistance, it is imperative that we provide services that will help lead to a safer workplace, because when OSHA truly helps employers and their employees, the impact extends beyond the confines of the workplace. It extends to the overall health and welfare of the community.

That is the Secretary's and my goal—to ensure that OSHA makes a difference where it counts—in the lives of every worker in America.

Thank you. I would be pleased to answer questions.

Senator WELLSTONE. Thank you, Secretary Henshaw.

[The prepared statement of Mr. Henshaw may be found in additional material.]

Senator WELLSTONE. Mr. Lauriski?

Mr. LAURISKI. Mr. Chairman, thank you for this opportunity.

I am pleased to appear before you today to discuss the ongoing efforts of the Mine Safety and Health Administration to promote safety and health in our Nation's mines.

Last year, we set meaningful and measurable safety goals to reduce mining industry fatalities and to reduce the nonfatal days lost injury rate. I am happy to report that in 2001, the number of mining deaths and the incident rates of injuries in this country was the lowest ever recorded. This year, like last year, we have set ambitious goals, but they are achievable goals, both for safety and for health.

Beginning in around 1994, the industry reached a plateau in reducing injuries and deaths, so it was evident that we needed new ideas and methods to get to the next level of safety and health. This agency has primarily emphasized the enforcement mechanisms embodied in the Mine Act, focusing on physical conditions in the workplace. The Act, however, provides us with a broad range

of tools such as education and training, compliance assistance, and technical support, in addition to enforcement.

In numerous meetings over the past year with our stakeholders, we have been asked time and time again to use tools that are preventive rather than reactive. Utilizing this input from our stakeholders, we have devised a management plan to help move the mining industry to a new level of safety and health. This plan focuses on more collaboration with stakeholders, assistance to the industry in preventing accidents and illnesses, and improvements in internal practices to enhance mine safety and health performance.

Our stakeholders have committed themselves to work collectively to meet our health and safety goals.

There are two major accident investigations which I know are of interest to you. First is the Martin County Coal Company's impoundment breakthrough in Inez, KY. When I began at MSHA, the investigation of that incident was completed, and the report was ready to be released.

MSHA cited the company for two violations that contributed to the release of 300 million gallons of coal slurry, and we assessed each of those violations at the statutory maximum \$55,000 civil penalty.

As a result of the failure, I ordered an internal review of our procedures related to that impounded into our general coal mine impoundment procedures and processes nationwide. That review is nearing completion.

We are also working with the Department of Interior's Office of Surface Mining to improve communications and discuss how to best address the recommendations of the National Academy of Sciences Impoundment Report that Congress requested.

In September of last year, explosions at Jim Walter Resources Number 5 underground mine in Alabama killed 13 miners and injured three others. We have completed the onsite part of our investigation, and the mine is now in production, and we are continuing to analyze evidence to determine the cause of the explosion. If the investigation reveals a violation of MSHA standards, we will take enforcement action.

Some have expressed concerns about MSHA's practice at the mine, so I have assigned an internal review team to investigate the quality of our management processes and procedures, including enforcement activities, at the mine and in the MSHA district in which it is located. The review, like the investigation, is continuing.

MSHA will continue to enforce and meet its mandate under the Mine Act. I want to emphasize that there will be no less enforcement. Enforcement will focus on more overall safety and health matters and identifying system weaknesses that may lead to accidents.

Since we began our compliance assistance efforts last year, some skeptics have said that we cannot increase compliance assistance without lessening enforcement. I respectfully disagree. As you can see in this chart, there was an increase in the number of citations and orders that we issued—5½ percent, to be exact—from 2000 to 2001. This increase cannot be attributed solely to a rise in the number of mines, because we know that there was only a 1⅓ percent increase in the number of mines during the same period.

Mr. Chairman, I use this statistic advisedly to show that MSHA is committed and will continue to commit to its enforcement requirements. But MSHA's principal objective is not to issue citations. It is to reduce fatalities and injuries. We do not believe that the number of citations issued should become the measure of effectiveness in achieving our objective.

While we have seen a reduction in the types and severity of violations we have found at mines, we have also seen a reduction in the injury and fatality rates. This chart shows the correlation between unsafe conditions in the workplace and accident rates. A significant and substantial citation, or an incident citation as the chart shows, is issued for those violations that have a reasonable likelihood of producing a serious injury or illness. This chart supports the basic philosophy of the Mine Act. A declining number of serious violations correlates with the rate of decline and serious injury rates.

As I said earlier, we are concerned about the flattening of injury and fatal incident rates. The traditional enforcement scheme is no longer bringing a reduction in these rates. This is solid evidence that we need to move the agency in a new direction. We must use other tools. To do otherwise is to accept the status quo, and accepting the status quo is not something that we should be willing to do.

We are revamping our internal training programs to strengthen our processes, to correct any existing weaknesses or gaps, and most importantly, to further support our own staff's health and safety skill sets.

We are also responding to our stakeholders' call for more user-friendly training materials and mine site training for mine operators and miners and have translated numerous materials into Spanish.

Secretary Chao recently announced a major new compliance assistance initiative to help employers better understand and meet their responsibilities to protect workers. In support of that initiative, we at MSHA have developed a compliance assistance plan that sets out specific steps that we are taking to improve our outreach to mine operators and miners.

Our website provides access to a multitude of resources for compliance assistance. It also provides access to MSHA's data retrieval system to retrieve mine-specific information. More reports will be added to this system as time progresses, and the website will soon be available in its entirety in Spanish.

Compliance assistance is always needed when new regulations are issued. Prior to the effective date of the new final rule on hazard communication, we will hold 15 national rollout meetings and about 100 supplemental local meetings to give mine operators the opportunity to learn how to comply with the rule. We will also provide onsite compliance assistance.

Operators of small mines face unique challenges in protecting their workers, so we are establishing an Office of Small Mine Health and Safety that will coordinate a National Small Mine Initiative to assure compliance at small mines and to give compliance assistance.

And we are reviewing existing regulations to determine applicability to current mining practices and to identify those that create undue burden on small mine operators.

MSHA has published several important final rules recently. The hazard communication rule, which is an information and training rule, will reduce injuries and illnesses related to chemicals in the mining industry. The high-voltage longwall rule allows a mine to use current technology without the need to petition this agency for a modification of the existing standards. The Office of the Inspector General made three recommendations on asbestos that would require rulemaking, and recently completed seven public meetings to gather information and data to assist us in our deliberations on these issues. We also solicited written comments in the public comment period just closed this past Tuesday. We are also continuing our work on health rules that will address respirable coal mine dust concerns.

Finally, technical support is another tool of the Mine Act. Our technical experts are creating partnerships to more effectively identify and evaluate technological solutions to mining hazards, and we are also identifying new technologies to address emerging hazards.

In conclusion, Mr. Chairman, we have examined our way of business and look for new ways to use our existing tools to get to the next level of improved health and safety performance. I have just outlined some of those for you. I am confident that, working in partnership with our stakeholders, we can achieve these goals.

Mr. Chairman, that concludes my prepared remarks, and I would be happy to answer any questions.

[The prepared statement of Mr. Lauriski may be found in additional material.]

Senator WELLSTONE. I would like to thank both of you, and I will start with Mr. Henshaw—and by the way, I do appreciate, Mr. Henshaw, that the trend of reduction in injury and illness is important, but what we want to do is make sure that it continues that way. We want to make sure that the kind of vigilance that we have seen in the past continues. But I appreciated your comment that however much improvement you feel we are making, we can still do better. I very much appreciate your saying that.

Let me start out by giving your own background. On numerous occasions before this committee and in speeches, you have said that as a safety and health professional—and you are one—you have one goal, and that is to reduce workplace injuries and illnesses and fatalities, and that during your tenure at OSHA, that is going to be the agency's main focus.

Isn't one of OSHA's major tools for reducing exposure and the resulting injuries and illnesses and fatalities the promulgation—the promulgation—of safety and health standards, and isn't the promulgation of standards one of the agency's major responsibilities under the Occupational Safety and Health Act?

Mr. HENSHAW. Certainly, Senator, that is one of the tools that we have is setting appropriate standards and enforcing those standards. So that is an appropriate tool, yes.

Senator WELLSTONE. Then, why don't you list standard-setting as one of your top priorities? You have said in written testimony that the top priorities are building OSHA's leadership, enforcement, out-

reach and education, and voluntary partnerships and programs, but you have not said that one of your top priorities is the promulgation of standards. Why not?

Mr. HENSHAW. I think I have said that the execution of our regulatory agenda is a top priority within the agency, and that is the issue around what we described in the May issue of our Regulatory Agenda is what we are going to accomplish, and I think that if you look at the same speeches, you will hear me say that we are holding our managers accountable for accomplishing those endpoints as described in the regulatory agenda.

To me as a manager, that means that that is a primary focus certainly for those groups that are involved in developing those standards and regulations. They are going to be held accountable for achieving those goals described in the Regulatory Agenda.

Senator WELLSTONE. Let me pursue why I am concerned about not listing the promulgation of standards as one of your primary objectives, because I think that that is where OSHA has been at its best is these standards, which have really led to the protection of the work force.

Let us look at OSHA's regulatory program. With respect to your regulatory program, the administration has removed more than a dozen regulatory initiative from its regulatory agenda, including standards updating permissible exposure limits, expanding the chemical process safety management standard to cover reactive chemicals, extending the lockout-tagout standard to the construction industry and regulating cancer-causing chemicals like metal working fluids.

The development of many other standards has been delayed, including standards on hexavalent chromium and silica.

So instead of focusing on these major hazards, the administration has identified the following as its priorities for regulation: signs and barricades; translating the exit route standard into plain English terms; and an administrative rule on changes in State plan regulations.

Can you tell me how many injuries, illnesses or fatalities OSHA estimates they will prevent through the promulgation of these standards, and why are these the priorities for the administration as opposed to the promulgation of standards dealing with the really serious hazards that are out there?

Mr. HENSHAW. Senator, I think you are referring to that in the last few months, we have released four final rules, one of which is the signs and barricades that you mentioned. And I am sure that you are aware that we still have way too many highway fatalities or fatalities of workers in work zones. This is a major problem in this country, and it is very critical that we get those standards updated.

The previous standard that OSHA had on the books was in 1973 which is critically in need of repair and improvement, and that is what this direct final rule was all about. I don't know what the estimate is as far as how many lives could be saved, but certainly we are talking about a serious fatality risk in work zones in this country, and we think that this standard will improve that.

Senator WELLSTONE. But my question—listen, you are always gracious when you come up here to testify—but with all due re-

spect, I do not see how a regulation on signs and barricades and the other things I mentioned are more important than addressing tuberculosis or the dangers of explosion from reactive chemicals or unburdening workers from having to pay for their own protective equipment or shielding workers from chemicals that cause birth defects, miscarriages, and other reproductive health problems.

Where is the promulgation of standards that deal with these major concerns that affect our work force?

Mr. HENSHAW. Senator, some of those are on our regulatory agenda. If I might, I would like to just reiterate—you mentioned that we had withdrawn several items from the old regulatory agenda. The old regulatory agenda had something like 58 items addressed. We had so many on the regulatory agenda that a few of them got lost, and for some reason, we cannot find out why they were not recorded in the following 6-month period, like in shipyards. We had items in there that were from the early 1980's and late 1970's that were not being addressed.

As a manager, my job is to fine-tune a group of professionals to work on issues and resolve those issues. If we have too many things on our plate, we get nothing done, so it is critical that we pick the right priorities and work on those.

As I mentioned before, the regulatory agenda is what we are going to do in the next 12 months, and tuberculosis is on that regulatory agenda. Glycol ethers are on that regulatory agenda.

Senator WELLSTONE. Well, let me give you a case study just to take this line of questioning a little further. Let me focus on a minute on the process safety management rule for hazardous chemicals.

A study by the Chemical Safety Board concluded that 66 workplace deaths and 404 injuries took place in the 5 years between 1992 and 1997 that were attributable to reactive chemicals and not covered by OSHA's current standard. At the end of the last administration and the beginning of this administration, OSHA was beginning to consider a rule to deal with the gaps in coverage. And the first step was to issue a request for public comment—that was the first step—on which chemicals not currently covered should be included in how OSHA should regulate them. That was in May of 2001.

In September of 2001, the current PSM rule showed up on the now infamous hit list of 57 rules that industry lobbyists thought should be eliminated as too burdensome. In December of 2001, the rulemaking to expand the process safety management rule was withdrawn because of resource constraints and other priorities—not postponed, not delayed, but withdrawn.

Did you truly not have the resources to put a notice out to the public asking them for their ideas? What could have been more important than that? What initiative bumped that completely off your agenda? Was it the signs and barricades initiative? Was it the translation of exit routes into plain English? I do not get these priorities.

Mr. HENSHAW. Senator, the issue is not as simple as just issuing a request for information, and I will give you a case-in-point. It is critical that we look at what is our work load, what are our re-

sources, and what can we get done over a period of time. And what I do not want to do is waste time.

The case-in-point is glycol ethers. It is on the regulatory agenda, but the last time that that was addressed by OSHA was in 1994. Now we have to reinitiate our request for information because technology and the processes have changed.

So what I do not want to do is be premature in requesting information, because that information has to be used. If we are going to require people to submit the information, and we are going to study it, we need to take it to the next step and not just let it languish. And the problem now with glycol ether is that we have to reinitiate the work. And in any standard, it is very critical that they understand how compounds are being used, because—this has to be a rifle shot, Senator—we have to make sure that we promulgate a standard that is as effective as we possibly can make it. That means we have to collect valid information, it has to be relevant to today and the industries and technologies of today, and then we have got to move forward with the promulgation of the right standard.

So a request for information, while it seems like a simple task, the point is that somebody spent a lot of money generating the information, and now we have to use it. If we do not use it, we have wasted all that time and energy, and I do not want to do that in the future.

Senator WELLSTONE. You did not know—I do not want to belabor the point—but we have this Chemical Safety Board which has clear conclusions about deaths and injuries, and then, you have the industry that has the hit list, and then, the rulemaking to expand the rule is withdrawn. You did not know what questions to ask? You are telling me that you did not know what questions to ask; is that your position?

Mr. HENSHAW. No, sir, that is not what I said. I said I did not want to ask questions and get information that I could not use, that I could not take it to the next step, or would be wasting time and energy to do that, such as in the case of glycol ether.

Senator WELLSTONE. If you do not ask the questions and you do not go out there, there is no next step. You cut the whole process off.

Mr. HENSHAW. No, sir. The regulatory agenda does not mean—when we took things off the regulatory agenda, it does not mean they are not going to be addressed. It just means that in the next 12 months, here is what we are going to focus on, here is what we have decided will be our priorities.

We can always argue the priorities. If you want to argue the priorities, that is a separate issue. But once we decide what our priorities are, then we have got to carry through with those items, and the decision was—

Senator WELLSTONE. So the priorities—well, there are two different questions—so when is this going to be addressed?

Mr. HENSHAW. It is still in our list of things to look at.

Senator WELLSTONE. Eighteen months from now?

Mr. HENSHAW. I cannot say precisely when we will address that.

Senator WELLSTONE. Well, I think this is more important than signs and barricades. It is a question of priorities.

Now, you are highly-qualified safety and health professions, with many years of experience dealing with occupational safety and health issues in the chemical industry, and you served as president of the American Industrial Hygiene Association.

Is it your position as a safety and health professional that the current OSHA standards that are on the books are sufficient to protect workers from significant risk of harm and injury, illness, or death, as OSHA requires?

Mr. HENSHAW. I think there are two parts to that question, if I may.

Senator WELLSTONE. Certainly.

Mr. HENSHAW. Some of our existing standards are in need of revision, and I think that is a fallacy that we have had in the past, that once a standard is written, it is forever, and it should not be. The reality of the world is that it changes on a regular basis, and our standards must be updated to meet those realities. That is number one. So our existing standards even themselves need to be frequently updated and modified to accommodate the world in technology.

In respect to new issues that have not been addressed by the agency, certainly the agency needs to continue to develop regulations, but we need to continue to develop those in a way that we select the priorities in the proper fashion and we execute our obligations when we prepare these standards, that we do them in a way that is sustaining, do them in a way that produces the effect that we are looking for, which is helping to reduce injuries and illness.

Senator WELLSTONE. Well, I want to say to you that I appreciate your answer—or, I appreciate your position—which is, No, Senator, obviously, we do not necessarily have enough standards, and it is a matter of our priorities, but I do not see anything more important than, again, addressing tuberculosis, dangers of explosion from reactive chemicals, unburdening workers from having to pay for their own protective equipment, shielding workers from chemicals that cause birth defects. To me, these should be the priorities now. I do not understand what I consider to be the delay.

Let me ask you about enforcement. I know that you focus on the really bad apples, but the number of significant enforcement cases has come down in the last couple of years, but the total number of egregious enforcement cases has come down as well. So if you project out the 2002 numbers, inspections in manufacturing are down 16 percent; the number of workers covered by your inspections is down 30 percent, 56 percent for manufacturing; and the number of hours your inspectors spend in safety enforcement is down 22 percent; and health inspections are down 20 percent.

So it seems to me that you are spending less time protecting fewer workers. Am I wrong about these 2002 numbers in terms of the number of inspections going down?

Mr. HENSHAW. The number of inspections is not going down. In fact, we are increasing the number of inspections. Now, clearly, as a result of the World Trade Center, resources were about 3 percent off of our goal—

Senator WELLSTONE. Serious inspections. Excuse me. The number of serious inspections.

Mr. HENSHAW. The number of serious violations in fact has gone up. I do not know what "serious inspections" you are talking about. But the number of willful violations and serious violations has gone up.

You spoke about significant cases, and the significant case is just the arbitrary cut-off of those violations or penalties above \$100,000. Using that arbitrary cut-off, Senator, those are less than it was last year and the year before.

Senator WELLSTONE. That is what I was referring to. I am looking at your own answers to our questions.

Mr. HENSHAW. Right. And those were significant cases, which is an arbitrary cut-off of those cases above \$100,000.

What we do have, however, increasing is that the serious and willful violations are up. Senator, I do not use significant cases as a goal mainly because it is an arbitrary number, and I do not want to drive a performance that drives unintended consequences, meaning pushing to get above \$100,000 to meet some sort of expectation.

Senator WELLSTONE. OK. I just want to take note, thought, for the record in terms of some of the information that I have here that the total number of significant cases—that is \$100,000 or more—

Mr. HENSHAW. Which is an arbitrary cut-off.

Senator WELLSTONE. I understand—but by your own figures, has gone down each year, and the number of egregious enforcement cases conducted by OSHA also has gone down. Is that correct?

Thank you.

Let me turn to Mr. Lauriski for a moment. I appreciate your being here, and also, I am encouraged by your reassurances that you have provided today that MSHA is fully committed to continuing enforcement of the Mine Act. But I am worried about some of the actions that you have taken that I think are going to make it difficult to do so, so let me ask you a few questions, starting out with dust sampling, because we have talked about that before, which is something that I have been interested in for a number of years.

For a number of years, MSHA has sampled for coal dust in each mine six times a year. Is it your intention to continue to sample six times a year?

Mr. LAURISKI. Senator, it has not been a number of years. Up until 1998, the frequency of those samples was four times a year, and even prior to that, it was one time a year. I think that since 1998 or 1999, the frequency was one to six times a year.

We had a decision that came down called Excel Mining that required us to take a re-look at how we were doing our dust sampling and the frequency with which we had to do it, principally because the court decision required us to not rely on multiple samples taken over a single shift for compliance purposes, but for us to look at multiple samples taken over multiple shifts to determine compliance.

So in that regard, we did reduce the frequency by which we take samples, MSHA, that is, but not the frequency with which an operator is obligated to take samples. They still have that obligation under the Mine Act. We do our obligation as part of our routine fours and twos inspections, and we have made those samplings to

be consistent with the times that we are onsite to do our mandatory inspections.

Senator WELLSTONE. Well, I have gone through this before about—I am not so reassured by the companies taking their own samples, nor the miners. I do not quite understand—how can you justify reducing the number of times that you sample for dust given the magnitude of the problem of miners not being able to see 6 inches in front of them because of coal dust levels?

Mr. LAURISKI. Senator, the number of samples that is actually being taken is not less today than it was prior to the Excel decision. The frequency with which we take samples as an agency has been reduced by just two times per year. However, again, there is no less frequency on the part of the operator to supply these samples.

Senator WELLSTONE. But I am talking about oversight. One of the things that we have learned, I believe—this past week, it is on the Senate floor—is that we do not ask the accounting industry to monitor the accounting industry. It does not work out too well. And in the same way, we do not ask this industry to monitor. We want oversight. We want MSHA to be there. And you play a key role, yet you are reducing the number of times that you are sampling for dust.

Mr. LAURISKI. But again, Senator, we are not reducing the number of samples being taken over that same period of time. It is still the same sample level as it was before; it is just that we are not on the site as frequently as we were before with dust sampling equipment. We are now matching our sampling strategy against the number of times that we are mandated to inspect the mines each year.

So with that, what happens is that it allows us to look at those areas that are in most need of our attention, those areas where samples exceed the exposure limit, as opposed to sampling those areas where there is not an exposure limit exceeded.

Senator WELLSTONE. Well, again, the only thing I can tell you is that the people who pay the price—the miners—are certainly not comfortable with your answer, which is the same number of samples, but we are relying on the industry to do some of this as opposed to our doing it more times per year. And I think we were counting on you, MSHA, to do it. The fact that the industry is doing more of the sampling is not the answer to the question.

The coal industry has a long and unpleasant history of coal dust sampling fraud. You know that, and I know that. And that is the very reason for the agency's strong enforcement role. That is what you are supposed to be about. And you cannot say it is not a problem because we know it is a problem.

I am told that as recently as this year, we have seen four people convicted of dust fraud in the State of Kentucky, and as long as there is one case of fraud, as long as one miner continues to suffer from black lung disease, it is the obligation of the agency to do all that it can to enforce the full extent of the law's coal dust exposure limits. And I will tell you that I do not think that reducing from six to four times that the agency samples for coal for coal dust is the way to accomplish this goal.

We have a major difference here. You cannot tell me that we have not gotten the clearest example of fraud on the part of this industry.

I want to ask you about the metal/nonmetal interim diesel particulate rule. Is the interim concentration limit going to go into effect as scheduled?

Mr. LAURISKI. Senator, the interim concentration limit level has been challenged by several parties to the rule that was final last year. The interim standard is due to go into effect on the 19th of this month. We are currently in negotiation with all the parties to the litigation to determine where we are going to be at the 19th. At this point, I cannot say whether it will be at the 400 microgram level or not, or whether there will be a different level.

We undertook in this negotiation with the parties, with labor, industry, and MSHA, a look at the sampling strategy and a look at our ability to sample for particulate matter in an adequate manner to determine whether or not the sampling equipment that was on the market was capable of determining the levels that made a determinant, and that process is wrapping up. I hope that before next Friday, we are able to move forward and that we will have a final rule, but to sit here and tell you that it could be at the 400 microgram level, I cannot do that today.

Senator WELLSTONE. But you will have an answer within a week or so?

Mr. LAURISKI. Yes.

Senator WELLSTONE. And let me ask you this. If the rule goes into effect, whatever the standard is, will you enforce the standard on the date it goes into effect?

Mr. LAURISKI. Yes. That is part of the negotiations that we are having with the litigants in terms of how we would implement the 400 microgram level. Now, keep in mind this is not a permissible exposure limit; it is simply a concentration limit that is taken in the mine. So again, that could depend upon the negotiations and any settlement which would come out of those negotiations between now, and hopefully, again, by the time that the limit is scheduled to go into effect.

Senator WELLSTONE. If it goes into effect, if the regulation is written and is supposed to go into effect on the 19th, will you go to court on the 19th if no settlement is reached?

Mr. LAURISKI. Well, it is already before the courts, and we just as recently as this week filed an update with the court system, so if there is not successful settlement, then obviously, things would be as they were a year ago. but I am very optimistic that we are going to reach a settlement with the parties in this matter.

Senator WELLSTONE. I am not a lawyer, so this a layperson's question. I do not understand why part of your answer was—it would be one thing to say we are still in negotiation over exactly what the standard will be, but then I asked whatever the standard is, will you—and I am now thinking about the well-being of miners and are you going to start enforcing it when it goes into effect. Why do you have to wait until next week to tell me whether you are going to enforce the standard once it goes into effect?

Mr. LAURISKI. Well, quite frankly, the standard is in effect. The only thing that comes about next week is the interim concentration

limit of diesel particulate. And of course, if we do not reach settlement, we are already enforcing that part of the rule that went into effect a year ago. The only thing that is outstanding, again, is that portion that has to do with the interim concentration limits, and again, I am going to say that we are hopeful that we will have resolution of this issue by next Friday so we will have a rule that is complete without challenging the court.

Senator WELLSTONE. And I am hopeful that you will, too, and I am also hopeful that you will go on record that you will enforce that immediately, that the enforcement will not be put off.

Let me go to Martin County Coal. First of all, we know the history of it, so I do not know that I need to go over that with you. MSHA wrote only two violations for the October 2000 County Coal impoundment failure, one for not following the approved plan to redirect the discharge of the fine slurry along the seepage barrier, and one for failing to immediately report a significant increase—more than double, as it turns out—in water flow from the South Main Portal in September of 1999.

Can you explain these inconsistencies?

Mr. LAURISKI. I am not quite sure I understand the inconsistencies that you are speaking of, Senator.

Senator WELLSTONE. Why only two violations, and that is it—and my understanding is that one of them, the fine was \$110,000. Is that correct?

Mr. LAURISKI. Total.

Senator WELLSTONE. Total. For the most massive ecological disaster ever experienced in the Southeast, and the total fine was \$110,000. Don't you think the penalty should have been increased?

Mr. LAURISKI. Senator, we assessed the penalty at the maximum allowed by statute.

Senator WELLSTONE. That is all you could do by statute?

Mr. LAURISKI. That is correct.

Senator WELLSTONE. Then, would you agree with me that we ought to change that statute and have stiffer penalties?

Mr. LAURISKI. Senator, I—

Senator WELLSTONE. Because with your support, I am pleased to do that.

Mr. LAURISKI [continuing]. I understand that, and it is something I would like to consider, but I would prefer not to say today that I am ready to make that determination.

But I do want to make a correction, however. There were not just two violations that were issued to Martin County Coal. There was a total of 11. Two were contributory, and the others were non-contributory to the incident itself.

Senator WELLSTONE. I am focusing on the contributory. My understanding is that the State of Kentucky wrote five citations, none of which MSHA cited; is that correct?

Mr. LAURISKI. I do not know that, Senator. I can find that out for you.

Senator WELLSTONE. That would be helpful. And I cannot get you on record as to the \$110,000 seems to be a pretty flimsy, weak fine for the damage that this company did to the people?

Mr. LAURISKI. Well, again, that is the statutory maximum that is allowed, and that is what we assessed on these two citations.

Senator WELLSTONE. Tell me if I am wrong here. It is my understanding that the investigating team found clear evidence that Martin County Coal knowingly submitted false information as part of its plan to reopen the impoundment after the 1994 failure. They took testimony from one of the people who drew the map submitted in 1994, admitting that they knew there was not a 70-foot coal barrier, and they took testimony from the contractor who built the seals that the plan he followed was not the same plan that was submitted and approved by MSHA.

It is also my understanding that both of these factors potentially directly contributed to the impoundment failure, yet MSHA did not cite the company for either of these violations. Is that correct?

Mr. LAURISKI. My understanding in reviewing the investigative report and talking with the investigators is that there was a determination made that there was no inaccuracy in the mine map itself.

However, with respect to the seals that were built, there was a violation issued to the country as well as to the contractor that did built those seals. But it was the opinion of the investigation team that even though those seals were changed in a design that was different from what the plan approved, the seals as they had been changed or as they had been approved would not have withstood the massive amount of slurry and pressure that would have been placed against them after the release of the slurry from the impoundment.

There was, however, a violation issued on the seal construction, but it was not determined to be contributory.

Senator WELLSTONE. Wow. Did any member of the original investigating team express concern about the findings included in the final report?

Mr. LAURISKI. Senator, before I arrived at MSHA, that was my understanding, that there was a concern expressed about the investigation. Secretary Chao asked for an IG investigation which is still ongoing.

At the time that the report was released, I personally spoke with all the investigators and asked them personally if any of them had issue with the investigation or the investigative report, or if they had any issues with signing that report, and with one exception, all of the investigative team members agreed with the report's findings and agreed to sign it. One individual who had concerns asked me if I would consider not having his name on the report and if I would consider not having him sign the report, and I told him that would be fine.

Senator WELLSTONE. Did you express any reluctance to sign the report?

Mr. LAURISKI. I did not sign the report.

Senator WELLSTONE. You did not sign the report.

Mr. LAURISKI. I did not—

Senator WELLSTONE. I am sorry. Did they express any reluctance to sign the report?

Mr. LAURISKI. Again, with one exception. I spoke with every team member, and every team member that I spoke to, with one exception, expressed no reservation about signing the report.

Senator WELLSTONE. Was any member of the original investigating committee pressured in any way to sign the final report?

Mr. LAURISKI. No, sir, not to my knowledge—not by me.

Senator WELLSTONE. And you mentioned the investigation now going on. It has been nearly 2 years since this happened. There is an ongoing IG investigation going on right now, your own internal investigation; is that correct?

Mr. LAURISKI. There are actually two. There is the IG investigation, and then, I ordered an internal review at the same time, or at near the same time, that we released the report on Martin County. That would have been in—

Senator WELLSTONE. So you have done your own investigation.

Mr. LAURISKI. We are doing our own investigation. It is still ongoing. But we are nearly complete.

Senator WELLSTONE. And please tell me, can this committee, other Members of the Congress, and the citizens most affected by this disaster expect a full accounting of what happened?

Mr. LAURISKI. Absolutely. That is the reason for the review. The review is to look at MSHA's management processes and practices not only with respect to Martin County but with respect to how we do these things on a nationwide basis—to look at our approval processes for plans, to look at our inspections, to look at all of our management of the impoundments themselves.

We are looking at two issues. One is to identify if we have weaknesses, and two is to identify if we have strengths. And where we have weaknesses, we want to make sure that we make corrections to those areas. That is why I ordered this internal review.

Senator WELLSTONE. Moving to the Jim Walters Resource Mine, I am looking at these different—there are 31 citations, and one of the citations—I am looking at one of the citations, one of 31, for violations that were unabated at the time of the mine explosion. This is dated September 18, 2001, 5 days before the mine explosion. It says, quote: "Float coal dust black in color was allowed to accumulate in the intake for the future 3-East belt conveyor. The accumulations were observed on the mine floor for a distance of 1,000 feet." End of quote.

Then, there is a column for "S and S" and it is checked "No." What does "S and S" mean?

Mr. LAURISKI. It is a designation to describe the seriousness of the violations. We call it "significant and substantial," which means that it is a violation that has a reasonable likelihood to cause reasonably serious injury or illness.

Senator WELLSTONE. Well, I absolutely do not understand this report here. Experts that I have spoken with say that 1,000 feet of float coal dust in a mine like this is highly dangerous. I have never heard anybody say otherwise.

Do you have any idea why an MSHA inspector would treat this as nonS and S?

Mr. LAURISKI. Senator, we are very concerned—no, I do not, because I did not see the condition, and the conditions that are viewed at the time the citations are issued are what determine whether or not an inspector would make that designation "significant and substantial." I did not see it, so I cannot second-guess per-

haps what the inspector saw when he issued that particular citation.

However, one of the things that I mentioned in my testimony is that we have ordered a complete internal review about our management practices as they did in Martin County with respect to Jim Martin Resources and with respect to our management of District 11 to see if we were performing our duties in a diligent manner that was consistent with the law, and that investigation is ongoing.

Senator WELLSTONE. You have an ongoing investigation.

By the way, this form, as you probably know, then, if you are doing the investigation, indicates that only one worker was affected. Does that sound right to you—1,000 feet of float coal dust on the mine floor that affects only one worker?

Mr. LAURISKI. Again, Senator, I do not know what the circumstances were at the time the inspector wrote that particular violation, and it would be wrong of me to prejudge and to place myself in his position when I did not have the same opportunity to see the same things he or she saw. I cannot do that.

Senator WELLSTONE. Can you see any justification—let me give you another example. Here is another one on September 14, 2001. Nine hundred twenty-five feet of float coal dust on the mine floor—925 feet—and also, nonS and S affecting only one person.

Another one on September 4, 2001. Six hundred feet of float coal dust nonS and S affecting one person.

Why would this be treated as nonserious?

Mr. LAURISKI. Again, Senator, there are several—there are a lot of factors that go into determining the seriousness of a violation to categorize it as “significant and substantial,” and there have to be circumstances that are looked at in addition to just the fact that you had float coal dust in this instance. The inspectors are trained to look at other issues—were there sources for ignition? How many people were present in the area? All those factors are considered at the time the inspector finds the violative condition and issues a citation.

Given the fact that I was not there, I cannot tell you what the conditions were at the time that the inspector saw the particular—

Senator WELLSTONE. But you were not there on site.

Mr. LAURISKI [continuing]. I did not see what he saw.

Senator WELLSTONE. Yes, but you are the head of MSHA.

Mr. LAURISKI. That is correct, and that is, again, one of the reasons why I have asked for an internal accounting and internal review of our practices and procedures at this mine as well as in District 11, to have a better understanding, to know whether or not we were managing our processes in accordance with the Mine Act.

Senator WELLSTONE. The number of persons affected—does that have some bearing on the penalty that the company would ultimately have to pay?

Mr. LAURISKI. It can, yes.

Senator WELLSTONE. Because I see another one—7,000 feet of float coal dust, and this one is actually marked “S and S,” not “nonS and S,” but it says only one person was affected.

I just cannot understand how any inspector could reach this conclusion. I am told—look, I am not from Alabama—but I am told that Alabama mines are among the most gaseous in the country, subject to explosions, and float coal dust is highly flammable. And I just do not see how any inspector can say this is a nonserious problem.

There were 31 unabated—I know you are nodding your head so you know this—there were 31 unabated violations at this mine at the time of the explosion that killed 13 miners. How could that have happened?

Mr. LAURISKI. Well, from what we know, they were unabated in the sense that we had not issued the termination paper. What I do not know is whether or not those conditions had actually been corrected by the mine operator. That is part of the review that we are undertaking to understand those practices and processes.

And again, I do not have the answers for you to understand why the inspector would have allowed 31 violations to go unterminated—and I think that is the better term here—untersminated—for a period of time if the operator had in fact corrected those conditions or, if they were not corrected, why extensions were not given, or more severe enforcement actions were not taken.

I do not have the answer. That is part of the review that we are undertaking that will give us a better understanding of what occurred there.

Senator WELLSTONE. But as the head of MSHA, you have an obligation to make sure that these kinds of conditions are abated; correct?

Mr. LAURISKI. That is correct.

Senator WELLSTONE. So you are not trying to justify this; you are just trying to say that you do not know what happened.

Mr. LAURISKI. No, I am not trying to justify it. I do not have a—

Senator WELLSTONE. You are just saying you do not know what happened.

Mr. LAURISKI. I do not have the facts to understand—again I was not there. I cannot determine why they were S and S, why they were not S and S. I do not have the facts to understand why they may have been left unterminated for a period of time. But the review team will give us that information.

I can tell you that—

Senator WELLSTONE. When is this review team going to give you this information.

Mr. LAURISKI. Well, we are hoping that by the end of this year, we will have that review completed. Just this week, they are on site in Alabama, interviewing witnesses—I am sorry—interviewing our employees with regard to some of these issues. They have been reviewing records. This is a very long and lengthy process. We have a dedicated team that is assigned to this project, and I am confident that they will return a report that will give us good information with which we can move forward.

Senator WELLSTONE. Let me say to you that part of the position that you have taken is that you really cannot answer this yet because the investigation is not complete, which means that you can-

not answer a number of these questions. And I know you are going to be doing this investigation.

I am sorely tempted to have this subcommittee—this is an oversight hearing, and I think maybe we might do an investigative hearing as well and have people come in under sworn testimony so that we can try to get to the bottom of it with you, because to me, it is just—we had innocent people who were killed, and MSHA was supposed to be there, and action was not taken, and people died. And I want to get to the bottom of it, because I think your mission—and you agree—is critically important as it affects people's lives. I feel that way about the coal dust. I feel that way about these other conditions. I feel that way about the ecological disaster that happened. And I think it is time for this committee to get tougher on these issues.

I want to give each of you—and I appreciate, again, both of you being here. We have a markup in another room—there would be more people here otherwise—and we have other people on the floor, but I think it is extremely important for us to do this, and I appreciate the responsiveness that both of you are here.

I guess, Mr. Henshaw, our main disagreement may be at the moment over the whole question of priorities and the promulgation of what standards and how quickly, and that is where I take some exception with where you are heading. And it does seem to me that whatever your view is, I think the two of you obviously, everything you do, you do honestly and you do sincerely, and it is what you think is right.

I think in your case—and you also have the professional expertise which I think is extremely important for your job—it does trouble me when I think that what I consider to be some pretty important standards get on some hit list and all of a sudden are wiped out, because I think the consequences of the inaction can be tragic.

I wonder if I could perhaps give each of you if you would like a chance to respond. The questions have been tough and hard-hitting, and if you want some time just to conclude, and if there are some other things you want to say for the record, please do so.

I do want to keep the record open for 2 weeks if that is all right with you both. I think other Senators will want to submit questions.

I also want to include with unanimous consent a strong statement from Senator Kennedy as part of the record as well.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

I commend Senator Wellstone for convening today's hearing and for his leadership in standing up for America's workers. As I review this Administration's record on protecting worker health and safety over the last year and a half, one pattern becomes crystal clear. This Administration is imposing a terrible burden on America's working families. Time after time, the Administration has supported deregulation, weaker enforcement, and the rollback of worker protections in favor corporations rather than workers. The Administration is rolling back, stalling and delaying standards that would protect millions of hard-working Americans from dangers on the job.

The tragic consequence of this Administration's inaction is the toll it takes on the safety and health of working people. America's working families are paying a tremendous price in injuries and illnesses. Sometimes workers are paying for the Administration's indifference with their very lives.

The record of safety in our nation's mines is dismal. The number of on-the-job fatalities has risen each of the last two years. Last year, in Alabama, workers suffered the nation's worst mining accident in nearly twenty years. This year the number of mine fatalities is poised to be even higher than last year's unacceptable rate. These are the tragically predictable consequence of the backlog of necessary, mine inspections.

This Administration has consistently failed to enforce policies that keep miners safe.

The Administration's policies on OSHA rulemaking have set workplace health and safety back by a decade. Despite years of research and extensive consultation with employers, workers and medical professionals, this Administration has simply thrown pending worker protections overboard. They have delayed or rolled back pending standards on tuberculosis, beryllium and chemical exposure that would make a huge difference for worker safety.

Consider the Administration's record on ergonomics for instance. Ergonomic hazards are the nation's leading cause of workplace injury, accounting for more than one-third of all workplace injuries. The Administration has failed to offer any new ergonomics standard and has failed to deliver on a promised comprehensive approach to this problem. Without anymore ergonomics standard. American workers have needlessly suffered over 1.8 million ergonomics related injuries in the last year alone. The Administration has even cut back on the requirements on employers to report ergonomic injuries in the workplace.

The Administration's record is no better when it comes to the hazards faced by America's workers from beryllium exposure. The health hazards are well documented—so well documented that Congress authorized compensation for workers who are ill as a result of beryllium exposure. However, many workers in the United States still have no protection against exposure to beryllium. OSHA proposed a rule that would have solved this problem but this Administration has rolled back that proposed rule by issuing, a new request for information. The research is already there. America's workers need action on this matter, not further delay.

The Administration's record on occupational exposure to tuberculosis is equally dismal. Globally, TB kills almost 3 million people a year. In the U.S., outbreaks have occurred in hospitals, correctional facilities, shelters and nursing homes among, other workplace settings. OSHA estimates that more than 5 million Americans have suffered occupational exposure to TB. This Administration again rolled back a proposed rule that would have protected workers when it comes to TB exposure. There is no question that America's workers are put at risk every day because of the lack of adequate workplace protections from TB.

Proposed new standards to protect workers from exposure to highly hazardous chemical combinations were also undermined by this Administration. The U.S. Chemical Safety and Hazard Inves-

tigation Board has recommended new worker protections and these protections should be implemented in a standard for dangerous chemical combinations. This glaring gap in our workplace health and safety standards has claimed the lives of over one hundred workers in recent years. Yet, this Administration refuses to take serious action.

With rule after rule, it's the same story. The facts are clear. A rule is proposed to protect worker safety and then this Administration rolls it back. The Administration has even called for a more than 10% reduction in the number of full-time employees who develop worker protection standards. These are not the actions of an Administration serious about protecting workers.

American working families deserve better. They deserve action. They should not be asked to choose between their jobs and their health. Yet that is exactly what they must do every day because this Administration refuses to put meaningful protections in place. I look forward to the testimony our witnesses today and I hope for greater action to protect America's workers from the responsible agencies in the future.

Senator WELLSTONE. Would either of you care to conclude with any remarks? If so, please do so.

Mr. HENSHAW. Senator, I would just briefly—I do share, obviously, your concern, and as you know, I am deeply committed to accomplishing the result which is reducing fatalities and injuries and illnesses. And the issue around the regulatory agenda and the priorities, it is true, is a priority issue, but I see a lot of issues, and when you talk about the signs and barricades, that is a critical issue. If you remember, a few months ago, give workers were killed when a truck drove through a construction site on a roadside. That is very impactful to me and obviously to this Nation when we lose five workers in one incident. And whether it is the signs and barricades or other contributing factors, the point is that that has got to be a focus, and I really want to focus on that.

So we can argue about whether it should be signs and barricades or reactives. That is fine, and we should debate that. But I am going to make my best judgments as to where we can be the most impactful on reducing fatalities, injuries, and illnesses.

On the issue of our inspection process, I firmly believe inspections are a critical part of being successful in our mission and goals, and we will continue to foster very strong and forceful inspections.

The measures that I am going to be using which will drive the outcome, which is reducing injuries and illnesses and fatalities—they will not be arbitrary numbers. They will be numbers or measures that will reflect on the outcome that we are looking for, which is reducing fatalities, injuries and illnesses.

While it may be that the significant cases are down, which is an arbitrary cut-off, the number of serious violations or the percent of serious and willful violations, and the average penalty per violation, is up. To me, those are indications that we are still strong on enforcement.

So we will continue to drive those kinds of things. We will also drive and get into more workplaces. That is why the number of our

inspections is up and will continue to be up over the next few years.

So I share your concern. We are working very hard, and I am committed to accomplishing results.

Senator WELLSTONE. Thank you, Mr. Henshaw.

Mr. Lauriski?

Mr. LAURISKI. Senator, I would just like to conclude by saying that I share your concern as well about these accidents, and I want you to know that I take this job very seriously, and I take what has happened there very seriously. But I think it would also be inappropriate for me to offer premature information that I do not have. I think it is more appropriate to have the facts so that you can know the solutions to the problems. Otherwise, we are not getting at the root cause of what could or could not be an issue here.

What I want you to know as well is that we in MSHA take our jobs very seriously. We have a staff of dedicated professionals who have a great deal of passion for improving the health and safety of this Nation's miners. And I think that that is evidenced by this chart that is on my left. The Act is having the impact that it was designed to have. However, it is also very evident that there has to be more than what we have been using as our basic mechanism for the past 25 years, and that is enforcement. And that is evidenced by the leveling of our progress in this industry.

So we think that there has to be more to the equation than just enforcement—not lessening of enforcement but other tools that we bring to the mix, tools of education and training, tools of technical support and tools of compliance assistance. And working together with all of those tools, we think we can get this trend in the right direction again.

I appreciate the opportunity to appear before you today, and I appreciate the questions.

Thank you very much.

Senator WELLSTONE. I appreciate both of you being here, and we will hear from you again.

I did not mean to be fidgety. I was just told that I need to go and vote in another committee. My thanks, our thanks, the committee's thanks, to both of you for being here.

This hearing is adjourned. Thank you.

[Additional material follows:]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF JOHN HENSHAW

Mr. Chairman, Members of the Subcommittee: Thank you for this opportunity to discuss the Occupational Safety and Health Administration's (OSHA) commitment to protecting America's workers. I would like to discuss the Secretary's and my vision for the Agency and the progress OSHA has made in achieving that vision.

When we look at the state of occupational safety and health in this Nation, we have many reasons for optimism. The overall injury/illness rate has fallen for eight consecutive years. At 6.1 per 100 workers for 2000, it is the lowest since the Bureau of Labor Statistics started compiling this statistic. Since OSHA's inception in the early 1970's, the rate has fallen by about 45 percent. In those industries where OSHA has targeted its inspections, such as construction, there have been even greater improvements.

Furthermore, the extent of cooperation between business, labor, and OSHA, as measured by the number of partnerships, participation in voluntary programs, and amount of compliance assistance activity, also is higher than ever and continues to promote worker protection.

Even though we have accomplished much, there is also a great deal left to do. Nearly 6,000 workers suffer fatal accidents each year, and in the year 2000 alone, there were 5.7 million injuries and illnesses in America's workplaces. Our work is focused on driving down fatalities and injuries and illnesses even further.

ENFORCEMENT AND REGULATORY ACTIONS

Enforcement and regulatory actions are certainly two of our important tools for making workplaces even safer. Mr. Chairman, you asked me to discuss OSHA's enforcement and regulatory efforts over the past year, so let me summarize our work in those areas for you.

Strong and fair enforcement is an essential part of our mission. OSHA is increasing its enforcement efforts in 2002, with more inspections, particularly health inspections, and targeting the most dangerous workplaces. We plan to conduct 36,400 inspections this year and will focus more enforcement on workplaces such as construction and other high-hazard industries. Approximately 3,000 of our inspections will be in workplaces with the highest injury/illness rates. Employers with fourteen or more injuries or illnesses per 100 workers that result in lost workdays can anticipate an inspection. Employers who experience a rate of between eight and fourteen injuries or illnesses are on a secondary list for possible inspection.

Effective and credible enforcement depends upon the skills, training, and expertise of OSHA's compliance officers. To accomplish their mission, compliance officers must be experts in workplace conditions and the industrial practices in the workplaces they visit. To ensure that compliance officers have that expertise, OSHA plans to increase the number of compliance officers who are certified by professional associations of industrial hygienists and safety engineers. Certification will improve respect for compliance officers and increase employer and employee trust of OSHA enforcement staff. We are also considering recruitment of more compliance officers from the private sector and allowing staff to complete internships with employers. These steps will strengthen the effectiveness of our compliance officers and enable them to become more familiar with the workplaces and industries that they inspect.

OSHA is also setting realistic goals and meeting its objectives for our regulatory program. I have spent the past year assessing the Agency's capabilities and planning regulatory priorities. OSHA's regulatory agenda now reflects an honest appraisal of what we can reasonably accomplish and the commitments we plan to meet.

Publishing "wish lists" of regulatory actions that never get accomplished harms the Agency's credibility in the eyes of both employers and employees. For instance, we recently removed several shipyard projects from the Regulatory Agenda. Although some of these projects had been on the Agenda for as long as twenty years, they did not involve significant changes or improvements to OSHA's shipyard standards and were never completed. The current Regulatory Agenda, published May 13, 2002, anticipates the publication of two final rules, including a revision to the exit routes standard, and seven Notices of Proposed Rulemaking, in the next six months.

Beyond tightening our regulatory agenda, OSHA's standards setting will also be strengthened by restructuring the Agency. To accomplish our strategic plan goals and program priorities, OSHA has proposed a restructuring of the national office's functions. One of the changes is to merge OSHA's Directorate of Health Standards and Directorate of Safety Standards, to provide a more integrated and efficient approach to rulemaking. The merged organization will continue to carry out the De-

partment's commitment, consistent with applicable law, to development of standards based on sound science, public safety, and considerations of economic feasibility.

Beyond our regulatory and enforcement activities, OSHA is also showing critical and measurable leadership in other ways. During the nine months of rescue and clean up at the World Trade Center site, we protected thousands of workers by overseeing the fitting and distribution of more than 130,000 respirators, handing out over 40,000 pieces of personal protective equipment, and taking more than 6,000 bulk air samples. We also monitored safety conditions to ensure problems were fixed before anyone was hurt. We are pleased to report that we helped return thousands of workers safely to their families at the close of their exhausting shifts. There were no worker-related deaths and only 35 lost time injuries—a remarkably low rate of 2.3 injuries per 100 workers.

OSHA also played a central role in addressing hazards associated with bioterrorism. Working with the Postal Service, the Centers for Disease Control, EPA, and the FBI, OSHA produced a Risk Reduction Matrix for anthrax in the workplace. The matrix helps employers assess the risk of anthrax exposure in their workplaces and make the timely and accurate decisions necessary to protect their workers.

Another issue in which OSHA is taking the lead is the safety of immigrant workers. As this committee has pointed out, many immigrant workers lose their lives on the job. OSHA is targeting inspections at workplaces such as meatpacking plants and nursing homes where there are large numbers of immigrant workers. We have added Spanish-language capability to our 1-800 emergency number, have created a Spanish web page on our website, and are distributing Spanish-language editions of the notices employers are required to post, informing workers of their rights. We are also publishing much of our informational material, such as All About OSHA, in Spanish and are planning to produce public service announcements in Spanish.

Our outreach to immigrant workers is not limited to Spanish-speaking workers. Many regions have in place or are developing programs and publications to address workers speaking other languages. For example, OSHA's Chicago regional office is engaged in a major outreach effort to Polish-speaking workers and OSHA's Region IX, in the West, maintains an 800 number complaint and technical assistance line that provides information in Spanish, Korean and Tagalog.

PARTNERSHIPS AND VOLUNTARY PROGRAMS

For OSHA to truly have a beneficial impact in workplaces, we must go beyond enforcement and standards setting. OSHA-industry partnerships are another valuable means of protecting workers. There are currently 137 active partnerships between OSHA and the private sector that are producing positive results for the Agency's Strategic Partnership Program. For instance, we have recently established a partnership with the Hispanic Contractors Association. HCA has agreed to work with us in identifying and distributing safety and health information in Spanish, helping us to reach Spanish-speaking employers and employees and improve safety and health.

We also are forming partnerships around our effort to address musculoskeletal disorders. Several industry and union groups have agreed to work with us to develop industry-specific guidelines for nursing homes, poultry processing plants and grocery stores. We have also signed an agreement with the printing and graphic arts industry to focus on outreach, training and education on best practices in ergonomics.

In January, OSHA's Boston Area Office formed a partnership with Local 76 of the International Association of Bridge, Structural and Ornamental Iron Workers and the Capco Steel Corporation, which is building a new convention center in that city. Parts of the agreement that will help protect workers include: a comprehensive safety plan, site-specific training for all workers, daily monitoring by the contractor's safety officer, and designation of an employee as labor safety liaison for safety and health complaints.

Last October, OSHA teamed up with the National Association of Minority Contractors to ensure the safety of workers building the Georgia World Congress Center Phase IV expansion project. The agreement also calls for Georgia-wide implementation of safety and health programs to address the most common construction-site hazards.

In Chicago, OSHA signed a regional partnership with an association of telecommunication tower erectors under which all member employers would follow safebuilding practices such as having a safety and health monitor on-site at all times, and a safety and health program in place. Tower erectors participating in the partnership will receive focused inspections and could receive reduced penalties in appropriate cases.

OSHA's Voluntary Protection Programs (VPP) continue to be a very effective way of reducing injuries and illnesses. This summer we celebrate the 20th anniversary of the VPP.

More than 800 companies participate in Federal or State OSHA VPP with injury/illness rates that are about one-half the average for their industries and safety and health practices that go beyond OSHA's requirements for protecting their workforces. We intend to increase the number of VPP participants by 12 percent this year and to continue using VPP firms to mentor smaller businesses that need assistance in identifying and eliminating workplace hazards.

Another voluntary program involving the private sector in reducing workplace hazards rates is the Safety and Health Achievement Recognition Program (SHARP). Employers who receive a voluntary on-site consultation visit from a State consultant program may apply for SHARP. To participate, the employer must agree to abate any violations found by the consultant and to institute a safety and health program. In return, OSHA exempts the employer from scheduled inspections for one year. The SHARP program will grow by about five percent this year.

COMPLIANCE ASSISTANCE, EDUCATION, AND OUTREACH

OSHA is expanding outreach efforts to help employers and employees understand and comply with its regulations. For instance, following the release of the new recordkeeping regulation, OSHA placed information about the rule on its website, www.osha.gov, conducted training sessions via satellite, and worked with trade associations and labor groups to enhance awareness of the new rule. By the end of this year, more than 15,000 people will have viewed the satellite training, which also is available for download from OSHA's website. In addition, for workers and employers who do not have access to the web, more than 25,000 packets of printed material about the recordkeeping rule have been distributed. Providing small employers with information about recordkeeping also is the initial focus of a new partnership between the Association of Small Business Development Centers and the Department of Labor.

OSHA's website has proven to be a valuable outreach mechanism by providing extensive technical links to the Agency's documents, regulations, and interpretations, and to electronic interactive tools that help educate employers and employees about workplace hazards. These tools include free interactive e-CATS and expert advisors that help employers determine what requirements apply to their workplaces, analyze specific site conditions, and develop appropriate plans for eliminating hazards. For example, OSHA is developing an evacuation e-tool to help employers comply with standards that relate to workplace emergencies and evacuation procedures. The Department, including OSHA, will be working closely with the Small Business Administration to deploy this tool as part of the President's Business Compliance One-Stop initiative. Business Compliance One-Stop is a single point of service web portal designed to help businesses find, understand, and comply with pertinent laws and regulations at all levels of government.

OSHA's field offices provide additional direct assistance to the regulated community. All of OSHA's 67 local offices now have a compliance assistance specialist who provides frontline advice, training, education, and outreach to the local community. The specialists make presentations to employer and worker organizations, respond to requests for assistance from community and faith-based groups, and alert the public to other forms of assistance such as State consultation offices.

As part of OSHA's implementation of the compliance assistance initiatives announced by the Secretary in June before the National Federation of Independent Businesses, OSHA is, for the first time, establishing an office that will serve as a dedicated one-stop resource for the small business community. This Office will be staffed by personnel who have expertise in small business issues and a commitment to assisting small employers with occupational safety and health matters. More than 94 percent of U.S. establishments employ fewer than 50 workers. It is important that we reach out to employers who may not have the resources to hire health and safety experts.

In addition, OSHA works closely with the Small Business Administration's Office of Advocacy and the small business community during the rulemaking process, consistent with the Small Business Regulatory Enforcement Fairness Act.

In addressing workplace hazards, OSHA will sometimes use guidelines or Hazard Information Bulletins when these tools can expeditiously and effectively protect workers. For example, OSHA recently issued a bulletin on how to prevent exposure to beryllium in dental labs. It recommends engineering controls, work practices, training, personal protective equipment, and housekeeping procedures to reduce beryllium exposure.

OSHA's Training Institute, located near Chicago, is regarded as one of the leading safety and health educational facilities in the world. The Institute trains Federal and State compliance officers and consultants and, when space is available, offers training to the private sector. To leverage the facility's resources and allow thousands of private sector trainees to benefit from the training, OSHA established an outreach-training program. Individuals who complete a one-week trainer course are then authorized to teach 10-hour and 30-hour courses in construction and general industry standards. We have also established an on-line outreach-training program that is available through colleges funded by OSHA and the Association of General Contractors. During the past three years, more than 600,000 students have received training through the outreach program.

OSHA is inaugurating an innovative training grants program that differs from the program of the past. The new program will provide short-term grants to a broader range of nonprofit grantees, enabling them to train employees and small businesses in selected occupational safety and health topics, including homeland security. One of the goals for the new Grants program will be to develop and pilot test safety and health training materials that will be available on the Internet, allowing a larger audience to benefit from them.

Employers and workers should have no doubt about OSHA's commitment to enforcing the Occupational Safety and Health Act. At the same time, the regulated community should know that OSHA will provide them with the knowledge and tools needed to comply with the law. The vast majority of employers take their responsibility to safeguard their workforce very seriously. Their commitment is reflected in the reduction in the injury/illness rates and the increased cooperation between OSHA and the Nation's employers. For those who neglect this responsibility there are consequences, as OSHA does not hesitate to use its enforcement authority. However, OSHA's mission is not only to issue citations. Whenever we enter a workplace, whether as inspectors or as providers of compliance assistance, it is imperative that we provide services that will help lead to a safer workplace. Because when OSHA truly helps employers and their employees, the impact extends beyond the confines of the workplace to the overall health and welfare of the community. That is the Secretary's and my goal, to ensure that OSHA makes a difference where it counts—in the lives of every worker in America.

PREPARED STATEMENT OF DAVID D. LAURISKI

Mr. Chairman and Members of the Committee: I am pleased to appear before you today to discuss the ongoing efforts of the Mine Safety and Health Administration (MSHA) to promote miners' safety and health. When I appeared before the full Committee, I talked about my meetings with miners and operators, representatives of industry and labor organizations, State Grant representatives, and many other members of the mining community. These are our stakeholders. I wanted to hear first hand from everyone about their safety and health issues and concerns. Today, I am able to tell you about the outcome of those meetings and the management plan we have developed to guide the Agency as we work to improve miners' safety and health.

I believe it is vitally important to establish rigorous goals. The President has set government-wide management goals we are working to accomplish. Secretary Chao has established a strategic plan for the Department of Labor that sets out four goals, one of which is to foster quality workplaces that are safe, healthy, and fair. And I have challenged our own staff and our stakeholders to work together to meet ambitious, but achievable, goals. Last year, we set meaningful and measurable safety goals to reduce mining industry fatalities and to reduce the non-fatal days lost injury rate. I am happy to report that, in 2001, the toll of mining deaths in this country was the lowest ever recorded.

We have also set health goals to reduce coal mine dust and silica samples that indicate overexposure and to reduce noise levels to below a level which would trigger a citation. And we have set goals for our own internal Agency performance—to establish MSHA as a model workplace. These goals address MSHA employee injury and illness claims, our injury incidence rate, and our workers' compensation costs. I am committed to doing everything we can to meet, or exceed, all of the above goals.

This year, the number of fatalities and the non-fatal injury rates began to rise compared to the same time last year. January was especially disappointing and we knew we had to keep that month's increase in fatalities from becoming a trend. We began a "Focus on Safe Work" initiative. We sent hundreds of MSHA personnel out to all coal and metal and nonmetal mining operations to speak with workers and supervisors about the fatalities that had occurred. We visited nearly 10,000 mine

sites and spoke with nearly 150,000 miners, distributing materials and focusing on the unique hazards at particular mines.

While the mining industry has made significant and laudable progress in reducing injuries and fatalities in the past century, beginning in the mid-1990's, there has been no further significant reduction in fatal accident rates. We had reached a plateau and we needed new ideas and methods to get to the next level in safety and health. Some have coined this the "Next Step to Zero." The industry has increased productivity and improved technology, yet the Agency has not significantly changed its business strategy since enactment of the Mine Safety and Health Act in 1977. During my meetings with stakeholders, I heard concern about MSHA's one-dimensional approach: the Agency has primarily emphasized the enforcement mechanisms embodied in the Act—focusing on physical conditions in the workplace. The Act, however, provides us with a broad range of tools, such as education and training—which includes compliance assistance—and technical support, in addition to enforcement. I believe that these additional tools will lead us to the next level of improved safety performance.

MSHA staff reached out to hundreds of stakeholders, following my own initial meetings with them. These stakeholders included mine operators, miners, equipment manufacturers, and others. Following our meetings with stakeholders, we studied their comments and suggestions. They said they want us to be more proactive. This is just what the Secretary has asked all of the Department of Labor to do—to use tools that are preventative rather than reactive.

Based on the input from our stakeholders, we devised a management plan that will meet the challenges of the 21st Century and help move the mining industry to a new level of safety and health. The plan focuses on more collaboration with stakeholders, assistance to the industry in preventing accidents and illnesses, and improvements in our internal practices to enhance mine safety and health performance. I took this plan back to our stakeholders with the challenge for them to work with us to get to the next level of safety—to take that next step to zero. And I asked for their commitment to work collectively to meet the goals I spoke of earlier. To this, they have all agreed.

ENFORCEMENT

MSHA will continue to enforce the Act and meet its mandate for four inspections per year at each underground mine and two inspections per year at each surface mine. I want to emphasize that there will be no less enforcement. Our efforts will strike a healthy balance between enforcement, education and training, technical support, and compliance assistance. Enforcement will be more focused on problem areas. Using mine profiles, our safety, health, and compliance specialists will concentrate on those areas or activities that are more likely to produce accidents that cause injuries or create health problems. We are improving training for the specialists to increase their capabilities and improve consistency. When they visit mines, they are becoming more prepared to focus on overall safety and health matters and identify system weaknesses that may lead to accidents. These weaknesses may be violations of existing regulations or weaknesses not covered by regulations, either of which could lead to an injury or illness.

Since we began our compliance assistance efforts last year, some skeptics have said that we cannot increase compliance assistance without lessening enforcement. I respectfully disagree. As you can see in this chart, there was an increase in the number of citations and orders we issued (five and one-third percent, to be exact) from 2000 to 2001. This increase cannot be attributed solely to a rise in the number of mines because we know that there was only a one and one-third percent increase in the number of mines during the same period.

Mr. Chairman, I use this statistic advisedly to show that MSHA is committed to, and will continue its commitment to, enforcement. But, MSHA's principal objective is not to issue citations—it is to reduce fatalities and injuries. We do not believe that the number of citations issued should become the measure of effectiveness in achieving our objective.

TRAINING AND EDUCATION

Our safety and health compliance specialists are dedicated to mine safety and health. They are highly trained professionals. Many have received professional certification in their field and more are working toward certification. We are revamping our internal training program to strengthen our process, to correct any existing weaknesses or gaps, and, most importantly, to further support our own staffs health and safety skill sets.

Our stakeholders, from the individual miner at the mine to the CEO of a company, have told us that training for the mining industry is crucial to the success of our program to reduce accidents and illnesses. We are responding to their call for more user-friendly training materials for mine operators and miners. They also called for more mine site training where safe practices related to specific problems can be demonstrated. Our safety and health compliance specialists are now providing such training when they uncover system deficiencies at mines. We are also exploring innovative approaches to delivering training, such as web-based learning, DVDs, and the use of simulation devices.

Secretary Chao recently announced a major new compliance assistance initiative to help employers better understand and meet their responsibilities to protect workers. We know that the vast majority of mine operators want to comply but are often hampered by the volume and complexity of the regulations. If we are to get to the next level of safety, we have to make mine operators our allies and give them the help they need, not just to comply with regulations, but to have a broader view of how to identify and prevent hazards, and the importance of compliance. We need partnerships where we share abilities and information. For example, we are developing materials on "Best Practices" culled from industry, labor, academia, and MSHA experience for use at all mines, but most importantly to assist mines with poor performance or limited resources.

In support of the Administration's initiative, we in MSHA have developed a Compliance Assistance Plan that sets out the specific steps we are taking to improve our outreach to mine operators and miners. Compliance assistance can mean different things to different people. We use the term broadly to identify concepts and accident prevention activities such as education and training, accident and violation analysis, hazard identification, root cause analysis, technical support, and access to information. Access to information means the information is readable, easily understood, and written in plain language the reader understands—in other words, "user-friendly". Because we know that there are increasing numbers of Spanish-speaking workers in the mining industry, we have translated numerous "best practices" cards, student and instructor guides, entire training programs, and handout materials. We will very shortly make available all materials on our web site in Spanish.

Our web site, www.msha.gov, provides access to a multitude of resources for compliance assistance. We have posted a list of the 20 standards most often cited by major commodity and mining type and are beginning to post best practices information for each of those. On the web site, miners and mine operators can find safety, tips, accident investigation reports, hazard alerts and bulletins, and "single source" pages. These pages give the user access to all documents and resources related to a particular standard, especially new ones. It also provides access to MSHA's Data Retrieval System which permits miners, operators and other interested parties to retrieve mine overviews, accident histories, violation histories, MSHA dust sampling results, operator dust sampling results, and employment/production data. More reports will be added to this system as time progresses.

Compliance assistance is always needed when new regulations are issued. I believe that the assistance should be rendered before the regulation becomes effective so that everyone is aware of their obligations and knows how to comply. Just last month we issued a new final rule on hazard communication. It will take effect on September 23, 2002 for mines with more than five miners. Prior to that date, we will hold 15 National Roll Out Meetings and about 100 supplemental local meetings to give each of those mine operators the opportunity to learn how to comply with the rule. The rule will become effective on March 21, 2003 for mines with five or fewer miners. We are preparing to provide on-site compliance assistance to those mines prior to that date.

SMALL MINES

When we set the effective date of the hazard communication rule, we specifically considered the impact on small mines. Operators of small mines face unique challenges in protecting their workers. In the metal and nonmetal mining industry, about one-half of all mines employ five or fewer miners. In the coal industry, about one-fourth employ five or fewer miners. Small mines typically have fewer resources to devote to safety and health and often lack the expertise to implement accident prevention programs. Small mines have higher fatality rates. In calendar year 2000, mines with five or fewer employees had a fatal incidence rate four times greater than the rate at operations employing 20 or more. To bring small mines to the next level of safety, we are developing a small mine initiative. We are establishing an Office of Small Mine Health and Safety in our Directorate of Educational Policy and Development. The Office will coordinate a national program to assure compliance

at small mines and to give compliance assistance. The staff will determine the special needs of small mine operators and assist in development of programs to address those needs.

REGULATIONS

When developing regulations, we assess the impact of the regulations on all mines, and on small operators in particular. We are reviewing existing regulations to determine applicability to current mining practices and to identify those that create undue burden on small mine operators. Let me give you an example of what I am talking about.

I spoke with a mine operator in the bluestone industry who was the only miner at his operation located in the back yard of his home. MSHA's rules require that each mine have a stretcher to be used to transport injured miners. He asked me why he had to have a stretcher if there was no one to carry him out on the stretcher. My answer to him was that this was a prime example of a well-intentioned rule that was not flexible and which needs to be reassessed to allow alternate methods of complying with the intent of the rule. This is but one example where a one-size rule does not "fit all".

MSHA has published several important final rules recently. The hazard communication rule, an information and training rule, will reduce injuries and illnesses related to chemicals in the mining industry by increasing miners' and mine operators' awareness of chemical hazards. The high-voltage longwall rule allows a mine to use current technology without the need to petition the Agency for a modification of a standard. This rule recognizes that advanced technology, already in widespread use in the mining industry, can be used safely when it meets new requirements for the design, construction, installation, use and maintenance of high-voltage longwall equipment and associated cables.

When I appeared before the full Committee, we discussed the Office of the Inspector General's recommendation that we take regulatory action on asbestos in three areas. They recommended that we lower the existing permissible exposure limit for asbestos, change our analytical method to quantify and identify fibers in our asbestos samples, and address take-home contamination from asbestos. Subsequent to that hearing, we issued an Advance Notice of Proposed Rulemaking in March 2002 requesting information and data from the public to assist us in our deliberations on these three issues. The last of seven public meetings on this issue was held on June 20. We also solicited written comments and the public comment period just closed on July 9, 2002. We will use the input obtained at these meetings, as well as the written comments, to assist us as we move forward in our decision-making process.

We will continue our work on health rules that will control respirable coal mine dust. These rules would require the mine operator to verify the effectiveness of their mine ventilation plan to control respirable coal dust under typical mining conditions and to make adjustments as necessary. We anticipate proposing a rule that would allow us to accept testing and evaluation of certain mine equipment by independent laboratories. Our proposed rule on the use of belt entry ventilation for coal mines recognizes that improved technology, such as new atmospheric monitoring systems, makes it possible to safely use this type of ventilation system. We are looking carefully at ways we might provide flexibility in our current rules that would encourage mine operators to increase the number and quality of mine rescue teams. These teams are critical in life-threatening emergencies underground.

TECHNICAL SUPPORT

While mine operators provide rescue teams, MSHA gives technical assistance to the operators during mine emergencies. That is just one of the many ways we give technical assistance. We have on staff experts on ventilation, roof support, electricity, ground stability, structural analysis, impoundment stability, mine fires and explosions, and chemical exposure. These people are creating partnerships with other government agencies, equipment manufacturers, mining companies, and trade and labor organizations to more effectively identify and evaluate technological solutions to mining hazards. We are also identifying new technologies to address emerging hazards.

In conclusion, Mr. Chairman, when I arrived at MSHA I found very competent staff who care deeply about the safety and health of miners. With this expert resource, we needed to examine our way of business and look for new ways to use our existing tools to get to the next level of improved safety and health performance. I have just outlined some of those for you. I am confident that, working with our stakeholders, we can achieve our goals.

Mr. Chairman, other members of the Committee, that concludes my prepared remarks. I would be happy to answer any questions.

U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD (CSB) STAFF FINDINGS:
REACTIVE HAZARDS

PRINCIPAL STUDY FINDINGS

1. The limited data analyzed by CSB include 167 serious incidents in the U.S. involving uncontrolled chemical reactivity occurring from 1980 to June 2001. Forty-eight of these incidents resulted in a total of 108 fatalities. The data include an average of six injury-related incidents per year, resulting in an average of five fatalities per year.

2. About 50 of the 167 incidents affected the public.

3. Over 50 percent of the 167 incidents involved chemicals not covered by existing Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) process safety regulations.

4. Approximately 60 percent of the 167 incidents involved chemicals that are either not rated by the National Fire Protection Association (NFPA) or have "no special hazard" (NFPA "0").

5. For the purpose of the OSHA PSM regulation, NFPA instability ratings have the following limitations with respect to identifying reactive hazards:

They were designed for initial emergency response purposes, not for application to chemical process safety.

They address inherent instability only, not reactivity with other chemical substances—with the exception of water—or chemical behavior under process conditions.

NFPA Standard 49—on which the OSHA PSM-listed highly reactive chemicals are based—covers only 325 chemical substances, a small percentage of the chemicals used in industry.

The ratings were established by a system that relies, in part, on subjective criteria and judgment.

6. Reactive hazards are diverse in nature. Data analyzed by CSB demonstrate this diversity because the incidents involve:

Over 40 different chemical classes (i.e., acids, bases, monomers, oxidizers, etc.), with no single or few dominating classes.

Several types of hazardous chemical reactivity, with 36 percent attributed to chemical incompatibility, 35 percent to runaway reactions, and 10 percent to impact- or thermally-sensitive materials.

A diverse range of chemical process equipment—including reaction vessels, storage tanks, separation equipment, and transfer equipment. Storage and process equipment (excluding chemical reaction vessels) account for over 65 percent of the equipment involved; chemical reaction vessels account for only 25 percent.

7. There is no single or combination of data sources that contains the data needed to adequately understand root causes and lessons learned from reactive incidents or for other process safety incidents.

8. Incident data collected by OSHA and EPA provide no functional capability to track the occurrence of reactive incidents with serious worker or public impacts. Although limited, such data are a valuable resource for analyzing incident trends and targeting prevention actions at a national level.

9. It is difficult to identify causes and lessons learned in existing sources of process safety incident data because industry associations, government agencies, and academia generally do not collect this information. It was reported in only 20 percent of the 167 incidents. However, more than 60 percent of reactive incidents, in which some causal information was available, involved inadequate practices for identifying hazards or conducting process hazard evaluations; nearly 50 percent involved inadequate procedures for storage, handling, or processing of chemicals.

10. Over 90 percent of the incidents analyzed by CSB involved reactive hazards that are documented in literature available to the chemical processing industry.

11. Although several computerized tools and literature resources are available to identify reactive hazards, surveyed companies do not generally use them. In some cases these tools provide an efficient means to identify certain reactive hazards without having to conduct chemical testing.

12. Surveyed companies share material safety data of a general nature with industry for most chemicals and share good handling practices for some. This typically does not include detailed reactive chemical test data, such as thermal stability data, which can be valuable in identifying reactive hazards.

13. Approximately 70 percent of the 167 incidents occurred in the chemical manufacturing industry. Thirty percent involved a variety of industrial activities that store, handle, or use chemicals in bulk quantities.

14. There is currently only limited guidance available to industry through professional societies or trade associations that addresses the management of reactive hazards throughout the life cycle of a chemical manufacturing process. There are significant gaps in guidance available on the following topics:

Unique aspects of reactive hazards during process hazards analysis, such as the need for reactive chemical test data, and methods to identify and evaluate worst case scenarios involving uncontrolled reactivity.

Integration of reactive hazard information into process safety information, operating procedures, training, and communication practices.

Review of the impact on reactive hazards due to proposed changes to the process.

Concise guidance targeted at companies engaged primarily in the bulk storage, handling, and use of chemicals to prevent the inadvertent mixing of incompatible substances.

GENERAL CONCLUSIONS

1. Reactive incidents are a significant problem in the context of chemical process safety as evidenced by the number and severity, of incidents.

2. The OSHA PSM standard has significant gaps in coverage of reactive hazards because coverage is based on a limited list of individual chemicals with inherently reactive properties.

3. NFPA instability ratings are inappropriate as the sole basis for determining coverage of reactive hazards in the OSHA PSM standard because of the significant limitations of the system with respect to identifying important reactive hazards.

4. There are significant gaps in coverage of reactive hazards in EPA's Chemical Accident Prevention Requirements (40 CFR 68) because EPA has not identified a technical basis for determining what reactive hazards should be covered by the rule.

5. Because of the diverse nature of reactive hazards, improving reactive chemical process safety management requires regulators and industry to address the hazards resulting from combinations of chemicals and process-specific conditions rather than focus exclusively on the inherent properties of individual chemicals.

6. Given the diversity of the reactive hazards, the prevention of reactive incidents can only be accomplished through enhanced regulatory and non-regulatory programs.

7. Existing knowledge of reactive hazards is not being utilized to its fullest extent. There is no mechanism to effectively share reactive chemical test data and lessons learned from previous reactive incidents throughout industry; some of this knowledge is contained in generally available resources for identifying reactive hazards, but it is not widely used.

8. Reactive incidents are not unique to the chemical manufacturing industry. They also occur in many other industries where chemicals are stored, handled, or used.

9. Current good practice guidelines for chemical manufacturers and users are neither complete nor explicit on how to effectively manage reactive hazards throughout the life cycle of a chemical manufacturing process.

STUDY BACKGROUND

The capability of chemical substances to undergo reactions, or transformations in their structure, is central to the chemical processing industry. Chemical reactions allow for a diversity of manufactured products; however, chemical reactivity can lead to significant hazards if not properly understood and controlled. Reactivity is not necessarily an intrinsic property of a chemical substance. The hazards associated with reactivity are critically related to process-specific factors, such as operating temperatures, pressures, quantities handled, chemical concentrations and the presence of other substances, or impurities with catalytic effects.

Safely conducting chemical reactions is a core competency of the chemical manufacturing industry. However, chemical reactions can rapidly release large quantities of heat, energy, and gaseous byproducts. Uncontrolled reactions have led to serious explosions, fires, and toxic emissions.

Incidents involving uncontrolled chemical reactions occur throughout industry. The impacts may be severe in terms of harm to people, damage to physical property, and impact on the environment. Recent incidents across the United States underscore the necessity of carefully managing reactive chemical process safety.

A variety of legal requirements and regulations govern reactive chemical process safety. These include regulations from the Occupational Safety and Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA).

OSHA develops and enforces standards to protect employees from workplace hazards. In the Clean Air Act Amendments (CAAA) of 1990, Congress required OSHA to promulgate a standard to protect employees from hazards associated with releases of highly hazardous chemicals, including reactive chemicals. In 1992, OSHA promulgated its Process Safety Management (PSM) standard in response to this requirement. The standard covers processes containing individually listed chemicals that present a range of hazards, including reactivity, as well as a class of flammable chemicals. Reactive chemicals were selected from a list of chemicals rated by the National Fire Protection Association (NFPA) because of their instability rating of “3” or “4” (on a scale of 0 to 4).

EPA was required by the CAAA to develop regulations to prevent the accidental release of substances that could have serious effects to the public or the environment. In 1996 EPA promulgated its Accidental Release Prevention Requirements in response to the congressional mandate, and the requirements are similar to those of those PSM standard. For the purposes of this regulation, EPA identified covered substances based toxicity and flammability, but not on chemical reactivity.

Several voluntary industry initiatives have been undertaken to provide guidance on chemical process safety, including reactive hazards. These include industry consensus standards such as those from NFPA; and good practice guidelines from the Center for Chemical Process Safety (CCPS), the American Chemistry Council (ACC), the Synthetic Organic Chemical Manufacturers Association (SOCMA), and the National Association of Chemical Distributors (NACD). CCPS is an organization sponsored by manufacturers, government, and academia that has produced recognized industry guidance since 1985 in the area of process safety technology and management. ACC and SOCMA are chemical industry associations; each having programs to promote good practices among their member companies in the area of chemical process safety. Similarly, NACD is an association of chemical distributor companies which promotes a good distribution practices and dissemination of information to end-use customers on the proper handling of chemical products.

This investigation by the U.S. Chemical Safety and Hazard Investigation Board (CSB) examines chemical process safety in the United States—specifically, hazardous chemical reactivity. The objectives of this hazard investigation are to:

- Evaluate the impacts of reactive incidents.

- Examine how OSHA, and EPA authorities and regulations currently address reactive hazards. Within this context, analyze the appropriateness of and consider alternatives to reliance on the NFPA instability rating system to define reactive substances covered under OSHA process safety management regulations.

- Examine how industry and other private sector organizations effectively address reactive hazards through non-regulatory standards and guidance.

- Determine the differences, if any, between large/medium/small companies with regard to their policies, practices, in-house research, testing, and process engineering related to the prevention of uncontrolled chemical reactions.

- Develop recommendations for reducing the number and severity of reactive incidents.

CSB completed the following tasks to accomplish the hazard investigation objectives:

- Analyzed reactive incidents by collecting and reviewing available data.

- Surveyed current reactive hazard management practices in industry.

- Visited companies to observe reactive hazard management practices.

- Analyzed regulatory coverage of reactive hazards.

- Met with stakeholders to discuss the problem and approaches to improve reactive chemical process safety.

The data analysis included evaluating the number, impact, profile, and causes of reactive incidents. Since there is no comprehensive repository of chemical incident data, CSB examined more than 40 data sources (e.g., industry and governmental databases and guidance documents: safety/loss prevention texts and journals; and industry association, professional society, insurance, and academic newsletters). The search criteria for the CSB data collection focused on incidents where the primary cause was related to chemical reactivity. For the purposes of this investigation, an incident is defined as a sudden event involving an uncontrolled chemical reaction—with significant increases in temperature, pressure, and/or gas evolution—that has caused or has the potential to cause serious harm to people, property, or the environment.

Through site visits and a survey of select small, medium, and large companies, information was gathered about good practices for reactive hazard management within the chemical industry. CSB conducted site visits at industry facilities that have implemented programs for managing reactive hazards.

RESPONSE TO QUESTIONS OF SENATOR WELLSTONE FROM JOHN L. HENSHAW

QUESTIONS ON RECORDKEEPING

1. According to OSHA's own estimates, the recently announced change in criteria for reporting work-related hearing loss, from a 10-decibel loss to a 25-decibel loss, could have a profound impact on worker protection and preventing occupational hearing loss. In particular, OSHA has estimated that the original 10-decibel criteria would have resulted in 275,000 cases of hearing loss being recorded annually. The agency estimates that the weaker criteria issues earlier this month will result in 145,000 cases being recorded. That means that 130,000 cases of hearing loss will not be recorded. Cases will only be recorded when workers have reached the point of impairment. There will, therefore, be no ability to use the injury log as a way of identifying jobs where there are problems and intervene before workers suffer severe and significant damage. Since you have repeatedly said your interest as a safety and health professional is in preventing work-related fatalities, injuries, and illnesses, how do such reporting criteria contribute to prevention?

OSHA's new hearing loss recording criteria involve a two-part test. First, the employee's hearing test must show a 10-decibel loss compared to baseline audiogram (the hearing test given to employees when they are placed in a hearing conservation program). This is the same criterion used in the 2001 rule. The change is that the new criteria also require the audiogram to show a 25-decibel hearing level relative to audiometric zero (the reference point used for hearing tests). According to most health care professionals, such as the American Medical Association, the American Academy of Family Physicians, the American Academy of Audiology, and the World Health Organization, a hearing level between audiometric zero and 25 decibels is considered normal hearing-the employee experiences no or very slight hearing problems. By excluding the cases that fall within audiometric zero and 25 decibels the recordkeeping regulation assures that all recorded cases fall outside the normal hearing range and represent the type of occupational illness intended to be captured by the occupational injury and illness recording and reporting system.

The purpose of the 29 CFR Part 1904 occupational injury and illness recordkeeping regulation is to require employers to keep records of serious, significant, and disabling work-related injuries and illnesses per Section 8(c) of the OSH Act. The regulation does not collect other types of data, including information on near misses, minor injuries or illnesses, or accidents resulting only in property damage. To the extent that employers and employees analyze these injury and illness data to avoid future injuries and illnesses, it has protective value. OSHA encourages employers to use the data for this purpose, even though it is not required by regulation.

The Part 1904 regulation is not intended to act as a workplace standard that provides direct protection to workers. That is the purpose of OSHA's safety and health standards, such as the general industry 29 CFR Part 1910 standards. For the purpose of preventing hearing loss to general industry workers, the §1910.95 Occupational Noise Exposure standard requires employers to protect workers from exposure to excessive noise levels. The noise standard requires employers to establish a hearing conservation program for all employees exposed in an 8-hour time-weighted average sound level of 85 decibels or more. This program includes audiometric testing and mandatory hearing protection requirements for employees who experience a 10-decibel loss in hearing.

2. Now that the new recordkeeping standard is in place, I have questions about whether OSHA will be enforcing and citing employers for failure to record injuries and illnesses in past years under the old recordkeeping standard. My understanding is that it has been OSHA's practice during inspections to look at injury logs going back several years, and to cite employers if violations are found on those logs. Will OSHA continue to cite employers for recordkeeping violations on the log 200 for previous years (2001, 2000, 1999) under the previous recordkeeping standard? If not, why not?

Several factors make it difficult for OSHA to issue citations for recordkeeping violations related to the 200 log. Section 9(c) of the OSH Act requires that a citation be issued within six months of the occurrence of the violation. Thus, OSHA can no longer issue citations under the old recordkeeping rule, which was withdrawn effective January 1, 2002. In addition, during the development of the new recordkeeping regulation, OSHA decided that it would be too burdensome and confusing for employers to update the 200 log data using the old rules, while also trying to learn the new recordkeeping rules. Therefore, §1904.44 of the new regulation specifically states that employers are not been required to update their old records.

This regulatory policy, in combination with the OSH Act's Section 9(c) prohibition on issuing any citation after six months following the occurrence of the violation, makes it difficult to routinely issue citations for the old records. However, the agency will continue to consider citations for situations, involving egregious circumstances on a case-by-case-basis.

RESPONSE TO QUESTIONS OF SENATOR MURRAY FROM DAVID LAURISKI

QUESTIONS ON PROCESS SAFETY MANAGEMENT OF HIGHLY HAZARDOUS CHEMICALS

1. Who at OSHA or within the Department of Labor was involved in the decision to withdraw the PSM rulemaking?

As Assistant Secretary, I made the decision to withdraw PSM from the Regulatory Agenda. OSHA had included the possibility of addressing this issue on the Regulatory Agenda for several years, but little progress had been made. As you know, we removed a number of items from the Regulatory Agenda to focus our activities and to make it more likely that we can meet the dates we project. This item was one of the ones we removed due to resource constraints and other priorities. This particular issue is still evolving, and the Chemical Safety Board (CSB) is continuing its work on a report. We are monitoring the situation to determine whether further regulatory action is needed, as well as examining the possibility of issuing non-regulatory guidance to address the issue more quickly than a rulemaking could. Its removal from the Agenda is not an indication that we don't think it is an important issue, nor does it mean no work will be done regarding it.

2. What communications did any of these individuals have with representatives or staff of the Chemical Safety Board prior to the decision to withdraw the rulemaking?

I had no specific communication with the Chemical Safety Board regarding my decision to withdraw this item from the Regulatory Agenda. As will be indicated below in response to other questions, OSHA staff has engaged in discussions of the issue with CSB staff on other aspects of this issue, as well as provided information to CSB. I decided to withdraw the rulemaking after thoroughly considering where OSHA should focus its resources, and what could realistically be accomplished within the state time frame. As noted above, we consider this an important issue, and continue to be involved and to monitor developments. Furthermore, rulemaking is not the only means available to address issues such as these, nor is it often the quickest means to remedy an issue. We are also considering the development of guidance for the chemical industry to help prevent further incidents involving reactive chemicals.

3. In particular was anyone at OSHA or at the Department of Labor aware of the information in the possession of the Chemical Safety Board that led to the attached Chemical Safety Board staff findings?

The CSB shared data and information with OSHA and EPA during this project, and it is likely that some of that data and information are included in the findings. Additionally, for more than two years, OSHA and EPA have maintained a working relationship with the CSB, and have provided input to the study at the staff level.

If so, was this information considered during the decision-making on withdrawing the rulemaking?

I considered a number of factors when making decisions about what items should remain on the regulatory agenda. However, the primary concerns involved resources, priorities for the Agency and for the Department, and the likelihood of action being concluded within the time frame covered by the regulatory agenda.

5. Did you or anyone at OSHA or the Department of Labor ever direct an analysis of OSHA's own enforcement data to confirm the existence of incidents such as those referred to in the Chemical Safety Board staff's findings?

OSHA has not conducted a comprehensive study of any of its internal data to determine the extent and nature of reactive chemical incidents. However, at the request of CSB, OSHA did direct an analysis of its enforcement data to obtain background information on 12 specific reactive incidents in which OSHA responded and conducted an inspection. Additionally, our Office of Regulatory Analysis conducted a preliminary study with respect to reactive chemicals OSHA identified from the National Fire Protection Association's (NFPA) document entitled "Hazardous Chemicals Data" which ranks chemicals according to NFPA's "Standard System for the Identification of the Fire Hazards of Materials." That report was provided to the Chemical Safety Board.

RESPONSE TO QUESTIONS OF SENATOR MURRAY FROM JOHN L. HENSHAW

1. When you testified before the full HELP Committee during the hearing on asbestos and workplace safety that I chaired almost a year ago, Senator Baucus invited you out to Libby to see the devastation that community has experienced. Can you please share your impressions from your visit?

I was able to travel to Libby, Montana, October 4, 2001. Touring the area where mining occurred and touring the surrounding area and town left many powerful impressions about how the unknowing widespread exposure to asbestos found in the products of the mining operation affected the town and its people. I left the area strongly believing that all possible actions should be taken to protect the health of the citizens of Libby, and, most of all, that public policy makers should be diligent about not letting anything similar happen again.

2. Can you please update the Committee on OSHA's most recent activities related to Libby, recognizing, of course, that EPA is the lead agency in the cleanup effort?

OSHA continues to work cooperatively with MSHA and other Federal agencies, including the Environmental Protection Agency (EPA) and the National Institute for Occupational Safety and Health (NIOSH). We have provided an Agency representative to EPA's Interagency Taskforce on Asbestos Contamination in Libby, Montana and have enlisted NIOSH in a request for technical assistance to determine asbestos-exposure levels at worksites from the mining products of other vermiculite mines.

OSHA's prevailing concern, at this time, regarding the Libby, Montana clean-up activities is to ensure that employees conducting this work are appropriately protected. Employee protection has been and will continue to be regulated under the OSHA's Hazardous Waste Operations and Emergency Response standard (29 CFR 1910.120). This standard requires a written safety and health program, employee training, protective work clothing and equipment, including the use of respirators, employee exposure monitoring, medical surveillance, and other provisions to ensure employee safety. OSHA personnel have visited the site and reviewed the written program for clean-up activities at Libby.

In order to determine whether vermiculite from mines other than Libby presents an asbestos-exposure hazard to workers who are using or handling products that contain vermiculite, OSHA has requested assistance from NIOSH. In response, NIOSH has conducted investigations in horticultural facilities and exfoliation plants to determine the extent of asbestos exposure in these settings. NIOSH is analyzing asbestos exposure levels from four sources (vermiculite from South Africa, two mines in South Carolina, and one mine in Virginia) and is nearing completion of this work. Surveys of the horticultural facilities have been completed and the reports are under review. Six exfoliation plants have been investigated; two additional investigations are planned. To date, numerous samples have been analyzed by standard methods (Phase Contrast Microscopy) and by Transmission Electron Microscopy (TEM). TEM will detect asbestos fibers at the lowest concentrations. OSHA is in contact with NIOSH regarding these investigations and awaits the final reports.

3. Do you believe that passage of the Ban Asbestos in America Act of 2002 would result in improved protections for workers from exposure to harmful levels of asbestos?

I have not had an opportunity to review the legislation for its impact on occupational safety and health policy, and the Administration has not produced a Statement of Administration Policy (SAP) on the legislation at this time. Nonetheless, OSHA inspectors are diligent about checking for the presence of asbestos in all inspections of workplaces.

I remain very concerned that mechanics across the country, as well as consumers who work on their cars, are being exposed to harmful levels of asbestos from friction products. The Seattle-Post Intelligencer found concentrations of asbestos ranging from 2.3 percent to 63.8 percent in dust samples it collected at gas stations throughout the nation. I understand there are regulations in place to protect mechanics from asbestos in brakes, but what—if anything—is OSHA doing to make sure these regulations are being followed?

OSHA regulates asbestos exposures to mechanics under the General Industry Standard, (29 CFR 1910.1001). This standard requires employers ensure that employee exposures do not exceed 0.1 fibers/cubic centimeter of air (f/cc) as an eight-hour, time-weighted average (TWA). Under the General Industry Standard for asbestos, OSHA has set mandatory Work Practices and Engineering Controls for Automotive Brake and Clutch Inspection, Disassembly, Repair and Assembly. These requirements apply whenever brake work is done, regardless of exposure levels. When these mandatory work practices and engineering controls are followed, OSHA esti-

mates that the employee's average asbestos exposure will be 0.003 fibers/cubic centimeter. OSHA conducts inspections in response to complaints (from employees) or referrals. Referrals may come from sources such as State public health personnel, law enforcement, or the news media. Additionally, OSHA targets establishments for inspection through the site specific targeting program, National Emphasis Programs and Local Emphasis Programs. These programs do not specifically focus on asbestos; however, in any inspection where asbestos is identified as a potential exposure, this exposure would be investigated and evaluated.

Is OSHA doing any outreach to these small businesses to help them with compliance?

As part of its ongoing outreach service OSHA contracts with states to provide on-site hazard detection and prevention services by qualified state consultants. Called the OSHA Consultation Program, there are programs in each state to provide small high hazards employers with free and confidential assistance in the correction of workplace hazards, including asbestos. At the employer's request, these consultants conduct a thorough review of the workplace to identify hazards and make cost effective recommendations for their correction or elimination. Should employee training be necessary, the consultant may also provide it at the employer's place of business. In addition, these consultants will work with employers to develop a workplace safety and health management system to prevent hazards from re-occurring. Finally, Secretary Chao announced that OSHA is creating an office dedicated to small business that will serve as one-stop shopping for small-business owners. This will be the first time that small-business concerns will become a permanent fixture in OSHA.

6. How many site inspections has OSHA conducted in the past year to ensure OSHA's regulations are being followed?

Froze October 1, 2001 to June 30, 2002, Federal OSHA has conducted 26,349 inspections and the States have conducted 40,229 inspections.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM DAVID LAURISKI

1. Your testimony indicated working conditions in the country are improving. The rate of worker injuries is now at its lowest levels since records have been kept. I believe we have a great success story here. How much credit should we give to OSHA for that success?

OSHA, in showing the value safety and health add to the workplace, has served as a catalyst for employers and workers, who also deserve credit for the dramatic reductions in the last ten years. I believe there has been a culture shift in this country, and most employers now acknowledge safety and health as a corporate value. OSHA has contributed to this shift by providing assistance and support, and where needed, strong enforcement. We have good examples of "turnaround" companies which, after an enforcement visit, made substantial improvements in their safety records. But I am not satisfied with our progress. There are still far too many workplace fatalities, and injuries and illnesses. I believe that by implementing the Secretary's and my priorities for the Department, we will continue to improve workplace conditions for all our employees.

2. I've heard that OSHA's compliance officers don't understand the industries they are inspecting. Sometimes, the inspector has never even set foot in any plant in that particular industry until he shows up for an inspection. What are you doing to improve the level of competency among your inspector staff?

Many OSHA employees, including a number of front-line inspectors, are board certified by various accreditation bodies and other, non-certified, inspectors have expressed a strong desire to attain certification. One of my goals is to increase the number of certified inspectors, so that OSHA's credibility in the industrial community is recognized. The Agency plans to help inspectors obtain their credentials by providing extra training and paying for the cost of the testing process, consistent with new authorities given us by Congress in Public Law 107-107, the National Defense Authorization Act for Fiscal Year 2002. I also have a task force exploring various other approaches. In addition, we plan to hire more staff with private-sector experience, and are considering having OSHA inspectors intern with companies so that they gain first-hand experience in the type of facilities they will inspect.

3. I've always been concerned about the impact of regulatory agencies on small businesses. Is your agency doing anything to ease the burden on small business? Do you give a small business any break when you conduct enforcement visits?

Do they have to comply with the same regulations as a big company? Doesn't this put them at a competitive disadvantage?

OSHA offers many resources designed specifically for smaller employers and carefully considers any potential regulatory burden on small businesses from its actions. For instance, under the new recordkeeping rule, which became effective January 1,

2002, businesses with ten or fewer employees are exempt from the requirements of the rule. To provide further assistance to small businesses, I've also recently hired a Special Assistant for Small Business, who comes from the small-business sector and who will serve as a liaison to small businesses. In addition, we have created a new position, Compliance Assistance Specialist, and placed one in each of our 67 Area Offices. These specialists will meet with employers and employees to help them understand OSHA's regulations and to encourage safe and healthy workplaces. Under our proposed restructuring, we are creating a Directorate on Cooperative and State Programs, which will provide businesses with compliance assistance. The Agency is also in the process of putting together a new compliance assistance plan, which will be designed to help all businesses, but particularly those in the small business sector. Our Consultation Program is designed to provide free, on-site assistance to small firms. Finally, the Occupational Safety and Health Act does allow the Agency to give significant penalty reductions to small firms cited by OSHA and our Directives to the field inspectors require that the reductions be applied. The amount of the reduction depends on the gravity of the violation, the size of the business, the history of any serious violations, and the good faith of the employer.

4. Business leaders tell me they want to comply with OSHA standards, but they are too complex and technical for them to understand. What's being done to eliminate this confusion?

That's why compliance assistance is so important. The 67 Compliance Assistance Specialists in our field offices are helping employers understand the rules. Another program, the free on-site consultation program, which is available in all 50 states, provides additional assistance. Our partnership and alliance programs are also structured to maximize compliance assistance efforts, such as distribution and delivery of training materials and sharing of "best practices" on how to reduce exposure to workplace hazards. We currently have 137 of these partnerships with individual employers and trade associations. The Agency provides other outreach such as SBREFA compliance guides, electronic advisors, and interpretation letters, which respond to employer questions about how specific requirements apply under various circumstances. Finally, as resources permit, we are beginning to rewrite the regulations in simple-to-understand language. The OSHA Means of Egress rule has been rewritten in simpler language and will be published as a final rule later this year. It will, for example, be called Exit Routes instead of Means of Egress.

5. What role does OSHA play in homeland security? It would seem that workplaces like chemical and nuclear plants would be possible targets for future attacks. Couldn't OSHA help those plants improve their security?

Our roles in the World Trade Center recovery and cleanup operations and in response to anthrax sent through the mail are good examples of the role OSHA can play. Soon after the anthrax scare, we published a matrix of the types of controls that are needed, and made the material widely available through our website and through other sources. OSHA is also working with the Office of Homeland Security's Chemical Security Issues Working Group, which is an interagency task force, with the following members: OSHA, EPA, DOE, DOT, DOJ and OMB. The task force has been meeting since the middle of May, to coordinate efforts on chemical site security programs.

6. Explain to me how OSHA selects sites for enforcement action. I've heard complaints about overzealous inspectors who are "out to get" specific employers. Do you just randomly pick workplaces to visit, or do you have some targeting process in place?

OSHA has established a set of priorities for selecting workplaces for inspection, as described in the Agency's Field Inspection Reference Manual. OSHA's first priority is to investigate all work-related fatalities. Next, we investigate all valid employee complaints, many of them through our phone/fax process. OSHA is required by law to ensure that companies selected for general schedule inspections are selected by an administrative plan based on neutral criteria. We "target" our remaining enforcement activity by our Site Specific Targeting (SST) system, which uses the firm's injury and illness rate, and with Local and National Emphasis Programs. Firms in industries that have an injury and illness rate at least twice the national average are first notified they are on a targeted list, and then are selected for inspection on a random basis. All our field offices use this targeting system and do not indiscriminately select companies for enforcement action.

7. I've always thought that besides conducting inspections, the government ought to find ways to help employers come into compliance with your regulations. What assistance does OSHA offer businesses so they can help themselves correct workplace problems?

The Secretary recently announced a major compliance assistance initiative. As part of that initiative, the Secretary has created a new, permanent, senior position,

dedicated to coordinating the Department's compliance assistance activities, and ensuring that all of the Department's agencies are doing everything needed to help employers comply with the law. The second level of this sweeping change is taking place, in detail, at the agency level. For example, OSHA is creating an office dedicated to small business that will provide one-stop shopping for small-business owners. This will be the first time that small-business concerns will become a permanent fixture in OSHA and its staff will be expert in small business issues and committed to helping small employers with occupational safety and health issues. This staff will function absolutely separate from inspection officers. Finally, OSHA continues to offer free on-site consultation programs in all 50 states. This program, funded at \$51 million in FY2002, gives priority to firms with fewer than 250 employees. Last year, the program provided on-site assistance to more than 27,000 worksites.

8. You continue to mention partnerships as a means of getting employers to address safety and health problems in their workplaces. Do you have any evidence that these partnerships are actually improving conditions?

OSHA has numerous examples of partnerships that have not only reduced injuries and illnesses but have saved employers money. For example, in Cincinnati, OSHA formed a cooperative partnership with the contractors who constructed Paul Brown Stadium for the Cincinnati Bengals. The partnership focused on fall protection, one of the leading causes of fatalities in construction. It was designed to increase employee involvement and establish joint labor and management oversight of conditions at the job site. The partnership produced results as the lost workday injury and illness rate for the site (Dec 2000) was 0.95 per 100 workers compared to a national rate of 4 per 100 for the construction industry. Another partnership that produced positive results was with Pinion Management, a Colorado-based manager of seven nursing homes. At Pinion's homes, workers compensation claims dropped from 115 in 1999 to five by early 2001. Associated costs to the company were reduced from \$232,000 to \$1,500—a 99 percent reduction in the first quarter of 2001. These results mean a lot less pain and suffering for workers and their families as well as reduced costs for employers. OSHA has numerous other examples of successful partnerships.

9. I was quite impressed with OSHA's role during the cleanup activities at the World Trade Center. Your staff needs to be congratulated on doing a great job without conducting any enforcement actions. What was the budgetary impact of your extensive efforts at this site? Will it affect your ability to meet your other goals?

OSHA is continuing to fulfill its mission of protecting the safety and health of the nation's workforce. In FY 2001 and FY 2002, OSHA received a total of \$1.5 million of emergency supplemental funding. As of June 2002, the agency had obligated approximately \$5.7 million toward World Trade Center Emergency Assistance. This included funds to cover the work of over 600 Federal OSHA staff that had, at various times, been onsite to provide guidance and assistance. The work at the WTC complex required some shifting of resources, and required great flexibility and dedication among staff—both those responding and reacting to the emergency and aftermath and those who remained at their work stations to cover for those who went to the WTC site. Although it would be difficult to replicate the shifting of personnel and resources under similar fiscal and workload conditions without disruption of Agency work—the agency continued to provide effective enforcement, outreach, assistance and training while the site clean-up was completed.

RESPONSE TO QUESTIONS OF SENATOR WELLS FROM DAVID LAURISKI

Martin County Coal Impoundment Failure

1. Please list all of the specific violations that the MSHA investigating team originally contemplated citing in connection with the October 2000 Martin County Coal impoundment failure? Which of these violations were later removed from the record? Why were they removed?

Response: The citations and orders issued, whether the violations were contributory or non-contributory, were the consensus of the accident investigation team members. During the course of any accident investigation, team members draw up a list of possible violations to be discussed among the team. At each team meeting, members examine the transcript of interviews conducted and the physical evidence collected during the investigation to assess whether the evidence supports the conclusion that a violation occurred. Where evidence does not support that conclusion, that possible violation is dropped from the list. As you are aware, the investigation was conducted prior to my appointment as Assistant Secretary. To assure myself about the integrity of the report, I personally spoke to each of the nine team members and asked if he or she supported the final report. Save for one, every single member of the committee supported the final report. The one exception asked that his name be removed from the report, and we did so.

2. After the 1994 impoundment failure, what, if any, evaluation review did MSHA impoundment specialists perform to ascertain whether reported deficiencies had been corrected before MSHA approved the mine operator's revised impoundment plan? If there was an evaluation review, when was it performed and by whom?

Response: On May 22, 1994, there was an unintentional release of the Big Branch Slurry impoundment at Martin County Coal Company's (MCCC) I-C mine. MSHA investigated the incident but found no violations. However, an MSHA impoundment specialist recommended that MCCC modify their approved impoundment plan to prevent a similar occurrence. MSHA's impoundment specialists reviewed MCCC's proposed modification and again required modifications before finally approving the revised plan. After the approval on August 8, 1994, MCCC commenced to implement the revised plan.

3. Is MSHA aware of any evidence to show that the mine operator knew, or should have known, of the substandard condition of the impoundment barrier prior to the impoundment failure in October 2000? If so, what steps, if any, did MSHA take to ensure that the mine operator remedied the deficiencies?

Response: A breakthrough incident that occurred in 1994 showed that the natural barrier was not sufficient to prevent a breakthrough. MCCC's approved impoundment

Sealing Plan, dated August 8, 1994, included the design of an artificial barrier (seepage barrier) that would supplement the natural barrier.

The MSHA accident investigation team discovered that MCCC had not deposited fine refuse along the seepage barrier as required by the Sealing Plan. In addition, MCCC examination records showed a greater than two-fold increase in the discharge from the South Mains in September 1999, indicating increased leakage from the impoundment. However, MCCC did not notify the MSHA District Manager or take necessary remedial action. The discharge remained at elevated levels until the time of the breakthrough in 2000.

MSHA approved the Impoundment Sealing Plan recognizing that the seepage barrier was to restrict seepage from the impoundment so that it would not cause another breakthrough. With respect to the water flow readings, an MSHA inspector, during an inspection in September 1999, did warn MCCC to take and record water flow readings. There is no indication that MSHA mine inspectors discovered, during their routine two-times a year inspections, that fine refuse was not deposited all along the seepage barrier.

4. What steps is MSHA taking currently to ensure that impoundment failures of this kind can be avoided in the future?

Response: MSHA's impoundment specialists have re-evaluated each coal mine impoundment for breakthrough potential and are making more frequent inspections. Operators of mines with impoundments that have a higher breakthrough potential have been required to conduct borehole drilling to confirm the location of underground workings. We are more closely evaluating the composition of the strata by testing core samples of the strata and fine refuse. We are encouraging mine operators to abandon inactive impoundments with high breakthrough potential and to implement approved abandonment plans. Several have already done so. In addition, we are working closely with the Office of Surface Mining of the U.S. Department of the Interior to address the recommendations of the National Academy of Science impoundment report requested by Congress.

5. Did MSHA consider referring the coal impoundment failure matter for criminal prosecution? If not, why not?

Response: It is MSHA policy to review for possible criminal prosecution any citation that is characterized as an unwarrantable failure on the part of the mine operator under Section 104 (d) of the Mine Act. MSHA reviewed the two unwarrantable failure citations issued for contributory violations and found that there was not sufficient evidence to support a possible criminal referral to the Justice Department.

Supplemental Question From Hearing: "My understanding is that the State of Kentucky wrote five citations none of which MSHA cited; is that correct?"

Response: The State of Kentucky issued citations to MCCC for violations of the State's surface mining and clean water laws, and of Federal and State environmental laws. The State did not issue any citations for State mine safety and health violations.

Jim Walters Explosion

1. What changes has MSHA made since the disaster at the Jim Walters mine to better protect the safety of miners from this kind of catastrophic event?

Response: The investigation of the Jim Walter Resources Number 5 mine continues and the investigation report will be a vital tool in determining what changes MSHA needs to make, if any. When we know the underlying cause of the accident, we will be in a better position to make that determination. We have, in the mean time, initiated a review of fire fighting and evacuation rules and policy to see if additional guidance to all mine operators would be appropriate, and we are emphasizing the importance of mine examinations to identify and correct hazards before accidents occur. We are also conducting an internal review to investigate the quality of our management processes and procedures, including enforcement activities at the mine and the MSHA district in which it is located.

2. Will all of the information collected in the agency's investigation of this catastrophe, including miners' complaints about health and safety conditions at the mine and MSHA's enforcement activities be made public? If not, please explain what is being withheld and why.

Response: It is MSHA's policy to make public all information concerning accident investigations to the fullest extent possible. MSHA has already released records of all MSHA enforcement actions taken at the Jim Walter Resources No. 5 Mine from 1996 to September 23, 2001. Also, MSHA has released copies of inspectors' notes taken during the inspections. Written summaries of miners' complaints received under Section 105(g) of the Mine Act for the same time period are within those inspection notes and have been released. Written Section 105(g) complaints cannot be divulged since they contain the names of complainants or other information that would divulge the names of complainant such as recognizable handwriting, job titles and other identifiers.

Following the issuance of a comprehensive accident investigation report, MSHA will disclose supporting documents such as test results, measurements and records of observation, photographs, company examination records and the great majority of transcripts of all interviews taken by the accident investigation team. MSHA will not disclose a small number of statements taken by the team when witnesses specifically requested confidentiality.

Inspection Resources

1. Coal mining deaths have increased each year for the past three years. Last year's disaster at the Jim Walters mine was the worst in 17 years and the number of miners killed in coal mines this year has already exceeded last year's death toll. In light of these circumstances, as well as MSHA's limited resources and its apparent difficulty in carrying out all of its mandatory inspections under the Act, how will MSHA be able to maintain quality mandatory inspections while implementing outreach and compliance assistance visits? For example, how will it maintain quality mandatory inspections while also conducting the outreach and Compliance Assistance Visits at all mines in connection with the new Hazardous Communication Standard prior to its effective date of September 23, 2002. What additional resources will MSHA need to achieve its inspection goals during FY 2003?

Response: I think that perhaps there is a misunderstanding about the number of coal mining fatalities last year and this year. There have been 21 fatalities thus far this year, but there were a total of 42 fatalities for all of 2001, so we have not exceeded last year's death toll. Early this year, we saw the number of fatalities begin to rise compared to last year and took immediate action. We began a "Focus on Safe Work" initiative, visiting nearly 10,000 mine sites and speaking with nearly 150,000 miners to draw attention to safety and health hazards, particularly the hazards involved in the fatal accidents we had experienced.

We are committed to providing quality mandatory safety and health inspections while at the same time providing compliance assistance where needed. MSHA has been refocusing its activities to be more proactive in addressing accident and illness prevention, and to more effectively target resources to those hazards that cause fatalities, injuries and illnesses. MSHA's safety, health and compliance specialists are providing needed guidance and information to miners and operators about safe work practices and procedures to prevent fatalities, injuries and illnesses.

In 2001, MSHA's on-site inspection hours increased from the year 2000 by 4.64 per cent for coal mines and 6.35 per cent for metal and nonmetal. This increase far outpaced the increase in the number of mines. The number of coal mines remained almost constant and the number of metal and nonmetal mines increased by less than 1 per cent. In 2001, the non-fatal days lost injury incidence rate decreased by almost 8 per cent. Increased compliance assistance during our inspections is having the intended effect. Consistent with the past several years, we completed 98.4% of our mandatory inspections at coal mines and 75.5% at metal and nonmetal mines in FY 2002. We have hired 75 new metal and nonmetal safety, health and compliance specialists. We will provide them one year of intense classroom and on-the-job training. In fiscal year 2004 they will be fully trained and we expect the completion rate to increase substantially, provided there is no significant increase in the number of active mines. However, it may

not be possible to achieve a 100% completion rate. When we report the number of metal and nonmetal mines in a year, we report the number of mines that were in production at any time during the year. A significant percentage of these surface mines are seasonal in nature and may be in production for only a few months during the year due to weather or reduced demand, thereby limiting our ability to do two inspections a year.

Safety, health and compliance specialists are not the only MSHA personnel offering compliance assistance. Personnel from MSHA's Directorates of Educational Policy and Development as well as Technical Support have participated in many of the outreach activities. We have an extensive roll-out campaign underway for the new Hazard Communication (HazCom) standard. We are training State Grant and industry trainers on the requirements of the standard. We have developed two training videos (in English and in Spanish) for mine operators' use, model written hazard communication programs, a guide to understanding HazCom, and PowerPoint presentations for use by mine operators, trainers and compliance specialists. We are also developing some generic MSDSs and labels that small mine operators, in particular, can use for their products and we will place interactive HazCom training programs on MSHA's website. So a great deal of compliance assistance will be available outside of the regular inspection process. However, our compliance specialists will assist miners and mine operators during every first inspection they make at a mine since the rule's publication. In most cases this will occur before the effective date of the rule due to the high percentage of small mines and the extra time given small mines to comply.

Stakeholder Input

1. Your testimony refers to meetings you had with MSHA stakeholders to "hear first hand from everyone about their safety and health issues and concerns." My understanding is that some of the issues raised on behalf of workers at those stakeholder meetings included (a) MSHA making rushed inspections at coal mines, (b) MSHA inspectors not appearing at conferences to defend violations where operators are seeking reductions in those violations, and (c) MSHA not effectively using enforcement tools such as S & S violations and unwarrantable failure actions. What, if anything, have you done in response to those concerns?

Response: The Mine Act requires that we make four complete inspections of underground mines and two of surface mines each year. It is our practice to schedule the four underground inspections on a quarterly basis. If there are mines at the end of the quarter that have not been inspected, we increase the number of staff assigned to inspect those mines to complete the inspection before the end of the quarter. While it may appear to others that we are "rushing" the inspection, we spend the same number of inspection hours at the mine as we would in a less compressed inspection.

Safety and health conferences are conducted by a manager, conferencing officer, or supervisor to provide mine operators or representatives of miners the opportunity to provide evidence or information not available to the safety, health and compliance specialist at the time of the inspection. While the safety, health and compliance specialists may or may not attend these conferences, they are always consulted if new evidence has been provided that may affect a violation.

MSHA continues, and will continue, to vigorously enforce the Mine Act. As I stated in my testimony, there was a five and one-third percent increase in the number of citations and orders MSHA issued from 2000 to 2001. And as I cautioned in my testimony, I use this statistic advisedly to show that MSHA is committed to, and will continue its commitment to, enforcement. However, it is not our objective to issue citations. Our objective is to reduce fatalities, injuries and illnesses. We do not believe that the number of citations issued is an appropriate measure of our effectiveness in achieving this objective. The percentage of S&S violations has decreased because the mining industry is correcting the most serious hazards. A decline in the percentage of S&S violations is a reflection of improved conditions in the mines. Attached is a chart which shows the relationship between the percentage of S&S violations and the reduction in the rate of serious injuries. You will see that, as conditions have improved (as reflected in the declining percent S&S), the injury rates have declined concurrently. We are finding fewer serious violations at the mines and fewer miners are getting hurt.

Coal Dust Sampling

1. You acknowledged that MSHA reduced the number of respirable coal mine dust samples from 6 each year to 4 at underground mines as a result of the Excel Mining decision. What part of the Excel Mining decision required those cut backs?

Response: In response to the Excel Mining decision prohibiting MSHA from determining whether miners are overexposed to respirable coal mine dust by using the average of multiple samples taken over a single shift, MSHA reduced routine sampling from 6 times per year to 4 times per year at underground coal mines. The surface sampling frequency remains unchanged at 2 times per year. MSHA just began sampling 6 times a year at underground mines in April 2000. Until 1998, sampling was conducted once each year, and from 1998-2000, MSHA conducted sampling 4 times each year. The current sampling frequency is consistent with the mandated inspection frequency provided in the Mine Act and is the most efficient use of our human resources.

When we do quarterly sampling at underground operations or semi-annual sampling at surface mines, we collect samples from 5 different occupations during a single shift. If the average of these samples exceeds

certain trigger amounts, we will then collect additional samples over 5 consecutive days or shifts. Between routine quarterly sampling and sampling certain locations over 5 consecutive days or shifts, we will be collecting essentially the same number of samples per year as we did under the previous bimonthly sampling program. But by focusing extended sampling on the locations that indicate a potential dust control problem, we can help the mine operator identify and correct the causes of excessive dust emissions.

2. Do the quarterly dust inspections referred to above count as one of the samples used to cite the mine operator? If not, did the Excel Mining decision bar MSHA from using that sample for compliance purposes?

Response: This response is combined with the response to question 3 below.

3. Under MSHA's policy, if a quarterly dust inspection sample taken by MSHA was 5 times the legal exposure limit, could it be counted as one of the samples justifying a citation to the operator for exceeding the dust standard?

Response: Respirable dust samples are sent to a certified weighing lab for analysis and the results of the 1-day quarterly sampling are not available for 3 - 10 days. Since the Excel decision, we base a compliance decision on the average of five consecutive days or shifts and the initial sample cannot be used by itself to determine non-compliance.

4. Including the quarterly dust sample, how many separate dust sampling inspections does MSHA have to make under the agency's current policies in order to cite a mine operator for overexposing a miner to unhealthy coal dust?

Response: MSHA makes two inspections before making a compliance determination. The first inspection is the quarterly 1-day routine sampling that triggers the additional sampling if the concentration exceeds the established limits for any occupation. The second inspection includes the five consecutive days of sampling to obtain the average concentration of those occupations in the identified work area.

RESPONSE TO QUESTIONS OF SENATOR MURRAY FROM DAVID LAURISKI

1. When you testified before the full HELP Committee during the hearing on asbestos and workplace safety that I chaired almost a year ago, Senator Baucus invited you out to Libby to see the devastation that community has experienced. Can you please share your impressions from your visit?

Response: I thank Senator Baucus for encouraging me to visit Libby. I did visit Libby on October 4, 2001 and, as I am sure you would have predicted, I was profoundly moved by what I saw there. It was a very sobering experience to see the effect on the victims and their loved ones as well as on the economy of the town. It renewed my resolve that such a thing will not occur on my watch if MSHA can prevent it. Since that visit, MSHA has increased monitoring efforts for asbestos in mines suspected of having naturally-occurring asbestos fibers in the ore body and has given additional training to its safety, health and compliance specialists in recognizing asbestos.

2. Can you please update the Committee on MSHA's most recent activities related to Libby, recognizing, of course, that EPA is the lead agency in the cleanup effort?

Response: We have continued to sample at all mines where the presence of asbestos is suspected, and have found no over-exposures. MSHA published an advance notice of proposed rulemaking on asbestos and has held 7 public meetings to discuss the issues raised by the Inspector General's report in response to the situation in Libby. We continue to respond to requests for asbestos-related information received under the Freedom of Information Act.

3. Do you believe that passage of the Ban Asbestos in America Act of 2002 would result in improved protections for workers from exposure to harmful levels of asbestos?

Response: We are analyzing the bill to assess its effect, if any, on mining. As we describe in our response to question 8, there is no asbestos mining currently occurring in the United States. The only remaining asbestos mine recently closed. As we continue to sample mines producing different ores, we will learn more about the potential presence of asbestos in these mines.

4. I know MSHA is considering lowering the permissible exposure limit (PEL) for asbestos to match OSHA's limit, which is 20 times more protective. What is MSHA's time frame for issuing the proposed rule?

Response: Recently MSHA conducted seven public meetings to obtain input on the issues raised in the Advance Notice of Proposed Rulemaking relating to asbestos exposure. Additionally, extensive written comments have been submitted to MSHA by various sectors of the mining community and other parties. The record closed on June 27 and MSHA's rulemaking committee will convene in August to review the information received from all parties and, based on this information, determine the next steps.

5. Have most of the comments MSHA has received on this issue been in support of lowering MSHA's PEL as the Inspector General recommended in its report last year?

Response: We are still analyzing the record so I cannot yet answer your question with any definitive information.

6. When MSHA takes samples at mines to test for asbestos contamination, how many samples per site does MSHA usually take?

Response: We collect enough samples to appropriately characterize the airborne exposure. The number varies depending upon the situation, such as the size of the mine, the number of miners, the mine's previous sampling history, and activities taking place at the mine during the sampling period. For instance, because of reports of increased occurrence of asbestos-related disease in the geographic area surrounding an iron mine, we collected nearly 100 samples in order to carefully examine what the likelihood of asbestos exposure in many areas and situations would be. In 2000, we sampled three vermiculite mining operations collecting three samples at the smallest one, and 21 and 17 samples at the other two.

7. Because it is difficult to predict the location of veins of asbestos, how does MSHA ensure it isn't missing asbestos deposits?

Response: We have taken several steps to better assess the possibility of asbestos deposits. We have trained our safety, health and compliance specialists; health specialists; and industrial hygienists about asbestos, including its appearance in natural settings and its likely location. We are gaining additional experience as we collect bulk samples of ore from areas of the mines to confirm whether or not asbestos is present. We are also working closely with the U.S. Geological Survey to help us identify and characterize asbestos deposits and types to assure that we include all types of hazardous asbestiform minerals for consideration in possible rulemaking.

8. I have reviewed the asbestos fiber compliance air sampling results since 2000 that MSHA has posted on its asbestos website. I noticed at the asbestos mine in the Western District, concentrations of asbestos in the air exceeded OSHA's standard for 7 out of 10 samples taken. In some cases, the testing showed concentrations 5 or 6 times greater than OSHA's standard. What is MSHA doing to provide additional protections for these workers?

Response: The pit portion of the mine you reference is now closed and the mill entered a non-producing status as of June 2002. Reclamation activities have begun at this site and MSHA continues to monitor activities at the mine. Before this mine closed, workers wore respirators and MSHA worked with the operator to improve the mine's respiratory protection program and other control measures such as ventilation and clean-up procedures. MSHA also worked with the operator to strengthen the personal hygiene procedures, requiring that miners remove their work clothes (coveralls), hard hats, respirators, and gloves and wash their hands in a designated area before entering the lunchroom.

We examined seven samples using light microscopy and they showed concentrations of unidentified fibers greater than 0.1 fibers/cc (the OSHA standard). We further analyzed two of those samples using the more sensitive electron microscope and identified only about one-half of the fibers as asbestos.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM JOHN L. HENSHAW

1. I understand you've stated that MSHA must shift its focus beyond the traditional enforcement approach it has taken since the inception of the Mine Act. Why is that?

Response: The mining industry has made significant progress in reducing the number of fatalities and accidents since the inception of the Mine Act. Enforcement has been an important tool in that reduction. However, beginning about 1994, we reached a plateau and have not seen significant improvement since then. It is time to look at the other tools the Mine Act provides - - training and education, compliance assistance, and technical support - - to break through that plateau and reach a new level of safety and health. We intend to increase the use of these tools and to also look at quality improvement methods, human factor considerations, and system safety management programs. At the same time, we will continue performing inspections, investigations, and other mandatory enforcement functions.

2. What steps is MSHA taking to address the unique safety needs and capabilities of small mines?

Response: Small mines face unique safety and health compliance challenges and we are taking into consideration their needs in all aspects of our program. Already, the Agency considers the size of a mine when calculating the penalty assessment amount for a cited violation. When requested, we make compliance assistance visits to mines prior to initial opening or the beginning of seasonal operations. This allows mine operators to correct hazards prior to beginning production. We considered the needs of small mines when we established the effective date of our Hazard Communication standard. Mines with five or fewer employees will have six months longer than larger mines to comply with the standard.

We are tailoring training programs specifically for small mines and expanding our compliance assistance activities for these mines. By October 1, 2002, we will have established and staffed an Office of Small Mine Safety and Health comprised of MSHA personnel throughout the country who will focus solely on the unique problems of small mines. The staff will determine the needs of small mines and coordinate all of the Agency's resources to address those needs. The staff will be part of our Directorate of Educational Policy and Development and will be focused on assistance rather than enforcement.

3. What efforts have you made to seek input on improving the agency's performance?

Response: Collaboration with our stakeholders is essential to improved safety and health performance. Our stakeholders include mine operators, miners, miners' representatives, trade associations, academia, equipment manufacturers, State Grant representatives, and anyone else with an interest in mine safety and health. From the time of my appointment as Assistant Secretary, I began holding

meetings with these stakeholders to hear first hand from everyone about their safety and health issues and concerns. I personally spoke with a large number of stakeholders and my staff reached out to hundreds more. Based on what we heard, we developed a management plan that incorporates many of these suggestions. Our plan now includes more collaboration with our stakeholders and assistance to the industry, as well as improvements in our own internal practices. We will continue to consult with them to assess our progress and to work collaboratively toward our common goal.

4. Some have expressed concerns about the decline in the percentage of significant and substantial (S&S) violations that MSHA inspectors issue compared with other citations and orders? Are the concerns valid?

Response: No. The percentage of S&S violations should decline. We expect that. It is a reflection of improved conditions in the mines. It demonstrates that the mining industry is correcting the most serious hazards at their mines. Attached is a chart which shows the relationship between the percentage of S&S violations and the reduction in the rate of serious injuries. You will see that, as conditions have improved (as reflected in the declining percent S&S), the injury rates have declined concurrently. We are finding fewer serious violations at the mines and fewer miners are getting hurt.

5. It is my understanding that you have applied technology initiatives to reduce accidents in the mining industry. Can you give me an example?

Response: I would like to give you three examples. The first two initiatives address a problem that occurs during surface haulage operations at mines. Surface haulage accidents are the leading single category of fatalities in mining in the U.S. today. The third initiative will apply a technology currently available on surface haulage equipment to underground continuous mining machines.

Since 1987, there have been 58 fatalities in the mining industry involving surface haul trucks where restricted visibility was determined to be a contributing factor. As these trucks continue to get larger, the corresponding blind areas are also getting larger. While front, side and rear view mirrors offer increased visibility, our technical staff looked at the possibility of further increasing visibility by the use of video cameras on the trucks along with monitors inside the equipment operator's cab. They worked with video camera system manufacturers and mine operators and successfully adapted the technology for use in the mining environment.

Another recurring source of fatalities is the collapse of coal surge piles. When a dozer operator encounters a void in the surge pile, the surge pile collapses and the

miner can be buried under tons of coal. Because dozer cab windows were not strong enough to withhold the coal, the miner would suffocate. MSHA worked with glass and equipment manufacturers to install windshield glass strong enough to withstand the surge pile burial pressures. MSHA has made this information available to industry and will provide technical assistance to interested operators upon request.

MSHA identified 15 fatal accidents in the last 10 years where operators of remote-controlled continuous mining machines were pinned between the machine and the rib or side of an underground mine. Proximity protection systems are currently available for use on surface haulage equipment. We believe that if these systems could be installed on underground continuous mining machines, they could shut down the machine or defeat certain operating features, such as the tram motors, when the machine operator enters the danger zone of the moving machine. We identified one technology we believed could be adapted for in-mine use and demonstrated it at a repair shop. The technology consistently provided warnings and shut down the machine when it neared the equipment operator positioned at the rear of the machine. The manufacturer of the system will work with us and the mine operator to design and build a mine-duty, permissible, system for continuous mining machines.

6. What is MSHA doing to help assure the safety of workers who don't speak English as their primary language?

Response: English and Spanish are the two languages spoken in the mining industry today. The Bureau of Labor Statistics estimates that 5.8 per cent of all miners are Hispanic, most of whom work in the metal and nonmetal mining industry where they account for 8.4 per cent of the miner population. To assist those who have Spanish as their primary language, we have translated numerous materials into Spanish. These include "Best Practices" cards, safety manuals, Instructors' Guides, videos and many other safety materials. We are in the process of translating numerous other items as well with priority given to materials addressing safety and health issues. As of July 30, 2002, the entire MSHA web site is available in Spanish. On the web site, you can access all MSHA regulations, alerts to safety and health or equipment hazards, compliance guides, single source pages for all information pertaining to particular hazards, inspection data, accident data, investigation reports, lists of the most frequently cited standards, and a multitude of other resources.

We are working with the National Institute for Occupational Safety and Health to develop a probability sample survey of the mining population. This survey will capture demographic and occupational information regarding both mine operator and mine independent contractor employees. If the survey shows that additional languages are spoken in significant numbers, we will then develop materials in those languages as well.

7. We certainly don't want a repeat of the Martin County Coal Co. impoundment failure. There have been some very heavy rains in some parts of the country and there is a concern about impoundments. What are you doing to assure they hold? Is there a generic problem with the way impoundments are built and maintained?

Response: The coal mining impoundments MSHA regulates are designed to function under very heavy rainfalls. When such a rainfall occurs, the mine operator is required to inspect the impoundment. MSHA staff also inspect active impoundments after heavy rainfalls to ensure that there are no imminently dangerous situations. There is no generic problem with impoundments. In the case of the Martin County Coal Company's impoundment, the company failed, in constructing the impoundment, to spread a layer of fine coal slurry around the perimeter, a requirement for this site that would have created a barrier against water seepage. Impounded water, seeping through underlying layers of slurry and rock, gradually formed a conduit for increasing flow that resulted in sudden failure of the impoundment. Had the company followed its approved plan when building and maintaining the impoundment, the failure would not have occurred.

8. What has MSHA done to prevent impoundment breakthroughs?

Response: MSHA's impoundment specialists have re-evaluated each impoundment for breakthrough potential and are making more frequent inspections. Operators of mines with impoundments that have a higher breakthrough potential have been required to conduct borehole drilling to confirm the location of underground workings. We are more closely evaluating the composition of the strata by testing core samples of the strata and fine refuse. We are encouraging mine operators to abandon inactive impoundments with high breakthrough potential and, in fact, several have sought and received approval of their abandonment plans. In addition, we are working closely with the Office of Surface Mining to address the recommendations of the National Academy of Science impoundment report requested by Congress.

[Whereupon, at 11:22 a.m., the subcommittee was adjourned.]