UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

JOINT MOTION OF PETITIONERS FOR STAY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioners state that no publicly held corporation owns 10% or more of any Petitioners' stock, and Petitioners identify their parent corporations as follows:

- AmCoal Holdings, Inc. (parent of American Coal Co.)
- Andalex Resources, Inc. (parent of West Ridge Resources, Inc.)
- Mill Creek Mining Co. (parent of KenAmerican Resources, Inc.)
- Murray American Energy, Inc. (parent of The Harrison County Coal Co., The Marion County Coal Co., The Marshall County Coal Co., The Monongalia County Coal Co., The Ohio County Coal Co.)

- Murray Energy Corp. (parent of American Energy Corp.; OhioAmerican Energy, Inc.; UtahAmerican Energy, Inc.)
- Murray Energy Holdings Co. (parent of Murray Energy Corp.)
- Ohio Valley Resources, Inc. (parent of Murray American Energy, Inc.; The Ohio Valley Coal Co.)

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 26.1-1 of the Eleventh Circuit Rules, Petitioners list the following persons having an interest in the above-captioned case:

- AmCoal Holdings, Inc. (Murray Energy Corp. subsidiary)
- The American Coal Co. (petitioner)
- American Energy Corp. (petitioner)
- Andalex Resources, Inc. (UtahAmerican Energy, Inc. subsidiary)
- Broadbent, Gary (petitioners' counsel)
- Coal Resources, Inc. (Murray American Resources, Inc. subsidiary)
- Green, Edward (petitioners' counsel)
- The Harrison County Coal Co. (petitioner)

- KenAmerican Resources, Inc. (petitioner)
- Lord, Samuel (respondents' counsel; on detail to MSHA)
- Main, Joseph
- The Marion County Coal Co. (petitioner)
- The Marshall County Coal Co. (petitioner)
- McKown, Michael (petitioners' counsel)
- Means, Thomas (petitioners' counsel)
- Mill Creek Mining Co. (Coal Resources, Inc. subsidiary)
- Mine Safety and Health Administration (respondent)
- The Monongalia County Coal Co. (petitioner)
- Murray, Robert (Robert E. Murray Family Trust trustee)
- Murray American Energy, Inc. (petitioner)
- Murray American Resources, Inc. (Murray Energy Corp. subsidiary)
- Murray Energy Corp. (petitioner)
- Murray Energy Holdings Co. (Murray Energy Corp. parent)
- National Institute for Occupational Safety and Health
- Nelson, April (respondents' counsel)
- Office of the Solicitor, Department of Labor

- OhioAmerican Energy, Inc. (petitioner)
- The Ohio County Coal Co. (petitioner)
- The Ohio Valley Coal Co. (petitioner)
- Ohio Valley Resources, Inc. (Murray Energy Corp. subsidiary)
- Robert E. Murray Family Trust (Murray Energy Holdings Co. sole shareholder)
- Schumann, W. Christian (respondents' counsel)
- Secretary of Labor (respondent)
- Smith, Patricia (respondents' counsel)
- Strassler, Heidi (respondents' counsel)
- U.S. Department of Labor
- UtahAmerican Energy, Inc. (petitioner)
- Waldman, Edward (respondents' counsel)
- West Ridge Resources, Inc. (petitioner)
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January 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION, ALABAMA COAL ASSOCIATION, WALTER ENERGY, INC., and WARRIOR INVESTMENT CO., INC.,	)	
Petitioners,	)	Docket No. 14-11942-E
v.	)	
MINE SAFETY AND HEALTH ADMINISTRATION and THOMAS E. PEREZ, SECRETARY, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondents.	)	

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Petitioners certifies that the following listed parties have an interest in the outcome of this case as of January 4, 2016:

1. Alabama Coal Association – Petitioner
2. Bell, Genea – Counsel for Petitioners
3. Chajet, Henry – Counsel for Petitioners
4. Jackson Lewis P.C. – Counsel for Petitioners
5. Lord, Samuel Charles – Counsel for Respondent (on detail to MSHA)
6. Main, Joseph – Assistant Sec'y for Mine Safety & Health, U.S. Dep't of Labor
7. Meyerstein, Avi – Counsel for Petitioners

8. Mine Safety and Health Administration – Respondent
9. National Institute for Occupational Safety and Health
10. National Mining Association – Petitioner
11. Nelson, April – Counsel for Respondent
12. Office of the Solicitor, DOL
13. Perez, Thomas E. – Respondent
14. Schumann, W. Christian – Counsel for Respondent
15. Smith, Patricia – Counsel for Respondent
16. Strassler, Heidi – Counsel for Respondent
17. Sweeney, Katie – Counsel for Petitioners
18. Udell, Collin O'Connor – Counsel for Petitioners
19. United States Department of Labor – Respondent
20. Waldman, Edward – Counsel for Respondent
21. Walter Energy, Inc. (Stock symbol WLT) – Petitioner
22. Warrior Investment Co., Inc. – Petitioner
23. Watzman, Ross – Counsel for Petitioners

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), and Fed. R. App. P. 26.1, Petitioners identify the following subsidiaries, conglomerates, affiliates and parent corporations as of January 4, 2016:

1. Atlantic Development & Capital LLC – owned by Jim Walter Resources, Inc.

2. Atlantic Leaseco LLC – owned by Atlantic Development & Capital LLC

3. Black Warrior Methane Corp. – owned by Jim Walter Resources, Inc.

4. Black Warrior Transmission Corp. – owned by Jim Walter Resources, Inc.

5. Blue Creek Energy, Inc. – owned by Walter Energy, Inc.

6. Jim Walter Resources, Inc. – owned by Walter Energy, Inc.

7. Maple Coal Co. LLC– owned by Atlantic Development & Capital LLC

8. Taft Coal Sales & Associates, Inc. – owned by Walter Minerals, Inc.

9. Tuscaloosa Resources, Inc. – owned by Walter Minerals, Inc.

10. Walter Black Warrior Basin, LLC – owned by Walter Exploration & Production LLC

11. Walter Exploration & Production LLC – owned by Walter Natural Gas, LLC

12. Walter Minerals, Inc. – owned by Walter Energy, Inc.

13. Walter Natural Gas, LLC– owned by Walter Energy, Inc.

Dated: January 4, 2016

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JOINT MOTION OF PETITIONERS FOR STAY

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 705, and Rule 18 of the Federal Rules of Appellate Procedure, Petitioners now move the Court for a stay of the implementation of the remainder of the rule entitled *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors* ("Dust Rule"), beginning with the next phase ("Phase II") set to take effect on February 1, 2016. Petitioners' arguments on the validity of the Dust Rule were briefed in 2014 and argued in March 2015; a decision has not been issued.

As noted in Petitioners' briefs, the Dust Rule was promulgated unlawfully by Respondents, United States Secretary of Labor and Mine Safety and Health Administration ("MSHA"). Among its flaws is the fact that MSHA promulgated the rule unilaterally, without the participation of the National Institute for Occupational Safety and Health ("NIOSH"), as required by statute. *See* Brief of National Mining Association ("NMA Br.") at 17-28; Brief of Murray Energy Corporation ("MEC Br.") at 24-29.

The Phase II requirements in particular stand to cripple the industry. Within a month, Phase II will usher in radically new and different respirable coal mine dust sampling requirements that will make it impossible for underground coal mine operators to maintain simultaneous compliance with both the Dust Rule and a different mandatory safety standard that requires the near-constant application of

rock dust, *i.e.*, dust composed of pulverized limestone or other inert dust that is dispersed throughout an underground coal mine to minimize the potential for a coal dust explosion. Simply put, the two rules are in direct conflict with each other, meaning operators will be doomed to violate the one or the other.

BACKGROUND

The background of the Dust Rule has been fully presented in the briefs previously filed in this matter; it is summarized here with additional facts to provide context for why a stay is both justified and urgently needed at this time.

A. The Dust Rule – A Phased Implementation

This case involves petitions seeking review of mandatory health standards promulgated by MSHA that regulate coal miner exposure to respirable coal mine dust in the nation's coal mines with the stated goal of reducing the incidence of coal workers' pneumoconiosis ("CWP") in coal miners. These standards (collectively, the Dust Rule) were promulgated in May 2014.

The Dust Rule takes effect in three phases. The first phase took effect on August 1, 2014, and imposed substantial new mandates on underground coal mine operators and new enforcement responsibilities on MSHA. Phases II and III will unfold in 2016. Phase II takes effect on February 1, when underground coal mine operators for the first time will be required to sample for respirable coal mine dust using a new device called the continuous personal dust monitor ("CPDM"), to be

worn by coal miners working the dustiest jobs and providing, in theory, a real-time reading of the respirable coal mine dust concentration in that miner's working environment. The number of respirable dust samples underground coal mine operators will be required to take will also increase dramatically. Phase III takes effect on August 1, when the maximum allowable average respirable coal mine dust concentration in the working atmosphere will be reduced from 2.0 mg/m³ to 1.5 mg/m³ as measured over a full shift.

To date, the Dust Rule has already imposed substantial burdens and costs on coal companies, requiring them to, *inter alia*, re-engineer mines, purchase expensive equipment, train personnel on the new requirements, hire new employees, and obtain government certifications of competency for personnel. These costs have hit a coal industry substantially weakened financially even compared to the already-weakened state it was in when the Dust Rule was promulgated in 2014. New evidence of the lack of feasibility of the remainder of the Dust Rule, beginning with the Phase II dust sampling requirements – in particular their incompatibility with existing mandatory rock dusting standards – and MSHA's refusal to stay temporarily the Phase II requirements until the problems with them can be resolved, compels Petitioners to file this Motion.

B. Phase II Sampling Requirements

Underground coal mine operators will not be able to comply with the additional requirements that will be imposed on them by Phase II of the Dust Rule and at the same time be able to comply with existing mandatory safety standards requiring the application of large amounts of rock dust (which is necessary to mitigate the potential for coal dust explosions). A large fraction of rock dust is measured by the CPDM along with respirable coal dust. The result, as early industry test sampling data have now shown, will be multiple, repeated violations of the respirable dust standard resulting not from excessive exposure to the toxic agent that is the target of the Dust Rule – *coal dust* – but from exposure to *rock dust*, an inert substance with no known negative occupational health effects.

All of this is put into perspective in the attached declaration of Patrick Brady, the Murray Energy Corporate Director of Safety. As Mr. Brady explains:

- Most of Murray Energy's mines operate three production shifts per day, which means that coal is always being produced. Given the around-the-clock coal production schedule, the mines are almost always generating *coal* dust, which in turn requires a near-constant application of *rock* dust to suppress the combustibility of the coal dust. Brady Dec. (Exh. 1) ¶¶ 14, 16.

- Industry testing of the CPDM demonstrates that even when

no coal is being produced, the CPDM can register respirable dust concentration levels above the legal limit due *solely to the presence of rock dust* in the mine environment. *Id.* ¶ 17 and Attach. 1.

- Although the current sampling machine – the coal mine dust personal sampler unit, more commonly referred to as the "gravimetric sampler" – also collects respirable coal and rock dusts in the atmosphere, the same problem does not exist under the regulations now in effect because under the existing system, operators may schedule their sampling period to avoid interference with rock dusting. For example, they have the option to sample over consecutive days, in contrast to consecutive shifts, meaning they can rock dust on a scheduled maintenance shift and then not sample until two production shifts later (the day after the last sampling), by which point most of the rock dust in the air will have settled. Starting February 1, all samples will need to be collected over consecutive shifts. That mandate gives insufficient time for widely dispersed rock dust to settle, so there is a high likelihood that any sample taken on the production shift following bulk rock dusting activities will be badly contaminated by rock dust. Plus, the number of required samples is ballooning, from five every two months under the current rules to 30-45 every quarter. Because it

takes approximately 21-24 samples to realize 15 *valid* samples, this will mean as many as 63 to 72 samples over consecutive shifts on every active mining section per quarter. It will be impossible to accomplish this without interference from rock dust, which in turn will result in violations and citations. *Id.* ¶¶ 11–13.

Moreover, Mr. Brady states, Murray Energy and others in the coal mining industry only recently became aware of the magnitude of this problem:

- CPDMs only became available for purchase recently.

Because the CPDM is a new device, Murray Energy had no means of testing the functionality of the devices until it began receiving delivery of them this past fall. *Id.* ¶ 27.

- Preliminary test sampling with the CPDM by Murray Energy and other operators shows excessive sample contamination by rock dust, and a corresponding difficulty to comply with the legal respirable dust standard (2.0 mg/m³), let alone the lower standard (1.5 mg/m³) that will take effect August 1. *Id.* ¶ 28 and Attach. 1.

Brady's declaration is particularly compelling given his long career in high-ranking positions at MSHA and his extensive knowledge of the respirable dust program. *See id.* ¶¶ 3–5.

C. MSHA's Denial of an Emergency Stay

As explained in the Brady Declaration, over the past several months, Petitioners have alerted MSHA to the discovery of this problem and sought a temporary administrative stay of Phase II. In addition to Murray Energy, the National Mining Association ("NMA") and the chairmen of the House Appropriations Committee and House committees and subcommittees with jurisdiction over MSHA have corresponded with MSHA leadership to express their concerns. *Id.* ¶ 21 and Attach. 1. In fact, at a stakeholders' meeting convened by MSHA on November 30 in response to these issues, MSHA's Administrator for Coal Mine Safety and Health acknowledged that some mines (including most of Murray Energy's) could reasonably foresee having difficulty complying. *See id.* ¶ 22. The Safety Director of the United Mine Workers of America, also in attendance at that meeting, expressed the same concern. *See id.*

Despite this chorus of concerned stakeholders, Petitioners' request for a temporary administrative stay has been rebuffed. *See id.* ¶ 21 and Attach. 5. Petitioners and MSHA are in ongoing discussions to schedule visits by MSHA health officials and NIOSH to observe Murray Energy's CPDM respirable dust test sampling, but at the time of this filing no firm commitments have been made. *Id.* ¶¶ 25–26.

STANDARD OF REVIEW

Petitioners seek a stay of Phase II of the respirable coal mine dust rules pending resolution of their underlying petitions. *See* 5 U.S.C. § 705; FED. R. APP. P. ("Rule") 18. This Court, "to prevent irreparable injury . . . may issue all necessary and appropriate process to postpone the effective date of [the] agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

A party seeking a stay of agency action must satisfy the same four-factor test as a party seeking a stay of a district court's order. *See Weng v. U.S. Att'y Gen.*, 287 F.3d 1335, 1338 n.5 (11th Cir. 2002), *abrogated by Nken v. Holder*, 556 U.S. 418 (2009). Those four factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted).

ARGUMENT

A temporary stay is justified here. *First*, for the reasons fully briefed and addressed at oral argument on March 17, and the additional reasons explained in this Motion, the Dust Rule is invalid and Petitioners are likely to succeed on the

merits. *Second*, for the same reasons, Petitioners will be irreparably injured absent a stay. *Third*, other parties interested in this proceeding are not likely to be injured by a stay because the requested stay is directed solely at the process of collecting dust samples. Under the stay requested, sampling would continue to be carried out as it is now. And as MSHA regularly touts, the coal industry is already doing an outstanding job complying with the existing requirements. *Fourth*, for the same reason, the public interest, which in this context is served by controlling the incidence of CWP while also preserving the viability of underground coal mining and the jobs of thousands of miners, would not be adversely affected by a stay.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

Petitioners understand that because argument was held in March, the Court may already have a sense of how it intends to rule on the merits. Suffice it for purposes of this Motion that Petitioners believe the arguments they raised in their briefs and further elucidated at oral argument have already demonstrated that the Dust Rule was improperly promulgated, is not feasible, and is wholly invalid. This is true because, among other things:

- MSHA acted unlawfully when it changed the legal standard for the permissible average respirable dust concentration level unilaterally, without NIOSH's participation in the rulemaking. *See* MEC Br. at 24-29; NMA Br. at 17-28.

- MSHA failed to demonstrate with the requisite sufficiency that the Dust Rule is feasible in both a technological and economic sense. *See* MEC Br. at 33-59; NMA Br. at 31-51.
- MSHA failed to demonstrate that the Dust Rule is based on the latest scientific data in the field or that MSHA considered the best available evidence or experience gained under other health or safety laws. *See* MEC Br. at 59-65; NMA Br. 52-60.
- MSHA's mandate that operators adopt the CPDM for sampling and compliance purposes was arbitrary and capricious, as was MSHA's refusal to allow operators to use NIOSH-approved airstream helmets and administrative controls for compliance purposes. *See* MEC Br. at 66-71; *see also* NMA Br. at 40-46 (CPDMs in particular are not feasible).

The one additional and important point to make, which further exposes the Dust Rule as arbitrary and capricious, and Phase II in particular as not feasible, is the newly discovered rock-dusting conundrum that itself will frustrate the ability of mine operators to comply with Phase II and subsequent requirements.

As Mr. Brady's declaration demonstrates, mandated rock dust in underground coal mines dramatically impacts CPDM measurements of respirable coal mine dust. The data show that even when no coal is being produced and no

toxic coal dust is being released into the mine atmosphere, CPDMs will still register excessive dust concentrations in violation of the legal standard. MSHA promulgated and implemented the Dust Rule even before the current CPDMs were available to mine operators to discover the problems raised here.

In the past, underground coal mine operators generally were able to comply with the applicable respirable coal mine dust and rock dusting standards by managing the periods of time and places where dust sampling was occurring, as well as when and where rock dust was being applied, to reduce contamination of the samples with rock dust. *See* Brady Dec. (Exh. 1) ¶ 19. That will change February 1.

The impending demands for more intensive sampling with CPDMs set to begin on February 1, 2016, will mandate that underground coal mine operators sample the "designated occupation" (or "DO") and each "other designated occupation" (or "ODO") on every mechanized mining unit ("MMU") (*i.e.*, the mining equipment used on a working section where coal dust is generated) on consecutive normal production shifts until 15 valid representative samples are taken for the DO and each ODO for every MMU in the mine. *See* 30 C.F.R. § 70.208(a). This will require sampling over approximately 42 to 72 consecutive shifts per MMU per quarter. Not only will this mean a steep increase in the number of required coal mine dust samples, but many of the samples will consist

of substantial portions of rock dust with little or no respirable coal dust. Yet those excursions will still be cited as violations and require immediate and potentially disruptive "corrective actions." *See* Brady Dec. (Exh. 1) ¶¶ 13, 16.

That problem will be confounded by MSHA's requirements for rock dusting, which require in relevant part: "All underground areas . . . shall be rock dusted to within 40 feet of all working faces. . . . All crosscuts that are less than 40 feet from a working face shall also be rock dusted." 30 C.F.R § 75.402.

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 80 percent.

Id. § 75.403.

Further, "to protect miners from the potential of a coal dust explosion," MSHA stressed in 2010 guidance that:

> [A]reas downwind of belt transfers, the returns of active sections, tailgates of longwalls, and the bleeder entries often require *continuous rock dusting* with bulk dusters, trickle dusters or high pressure rock dusting machines to maintain the required incombustible content levels and suppress float dust accumulations. Mine operators should use mechanical rock dusters on the working sections and in the return entries of these sections to maintain compliance. Also, mine operators should use bulk dusters on a regular basis in other areas of the mine to assure compliance and maintain the required incombustible content of total dust in all accessible areas.

MSHA Program Information Bulletin No. P10-18 (Sept. 21, 2010) (emphasis added).

This regulatory conundrum was only recently discovered. Although a commenter raised a concern with the proposed rule about the CPDM not distinguishing between respirable coal dust and other dusts in the air, MSHA dismissed that concern on the premise that "[a]ny respirable dust in the mine atmosphere is considered respirable *coal* mine dust to which miners are exposed and, when measured, is counted for determining compliance with the respirable dust standards." I-2-FR-1, at 24,866 (emphasis added). Operators had no data of their own to learn the magnitude of the problem since the CPDM was not yet on the market and the intensified sampling requirements were not yet in effect. The breadth of the problem has only come to light with the acquisition of CPDMs and initial testing of the equipment by operators. *See* Brady Dec. (Exh. 1) ¶ 27.

MSHA has refused to hit the pause button despite its own Coal Administrator's acknowledgment of the potential compliance hardship faced by mines running three production shifts per day (such as Murray Energy's). *Id.* ¶ 23. MSHA's stubbornness is arbitrary and capricious. There is no known scientific literature documenting any toxicological effect of rock dust. Nor was there any mention in the voluminous legislative history of the Coal Mine Health and Safety Act of 1969 – where this program was first launched, *see* MEC Br. at 1, – of a desire of Congress to eradicate occupational exposure to rock dust. To the

contrary, the requirements to blanket the mine with rock dust are drawn directly from the statute. *See* 30 U.S.C. § 864(c), (d).

So while the statutory program has always used the generic terminology "respirable dust," the discussion in *all of the literature* referenced in the record of this case is focused on the toxicological effects of respirable coal dust particles. Indeed, throughout the preamble to the Dust Rule, MSHA uses the term "respirable coal dust" interchangeably with the terms "respirable coal mine dust" and "respirable dust." The very root of the health concern is the fibrogenic effect of coal dust (*i.e.*, the ability of coal dust to cause large, fibrous growths that obstruct the functions of the lungs). *See* I-QRA-23 at 52; *see also* I-2-FR-1, at 24,830 (discussing the fibrogenic character of various ranks of coal). This is also reflected in the Black Lung Benefits Act ("BLBA"), which provides benefits to coal miners disabled by CWP or to their widows, and defines "miner" to mean, among other things, a coal mine employee exposed to "coal dust." 30 U.S.C. § 902(d); *see also* U.S. DEP'T OF LABOR, BLACK LUNG DESKBOOK, Part II(A)(2), *available at* http://www.dol.gov/brb/References/reference_works/bla/bldesk/main.htm#part_ii (recognizing "coal dust" and "coal mine dust" as equivalent terms that mean "airborne particulate matter occurring *as a result of the extraction or preparation of coal* in or around a coal mine") (emphasis added).

Other dusts have always been treated differently. For example, the Occupational Safety and Health Administration ("OSHA") treats rock dust as an "inert" or "nuisance" dust, or by the vague but synonymous term "particulates not otherwise regulated." *See* 29 C.F.R. § 1910.1000 Tables Z-1 & Z-3. MSHA's closest related regulation is reflected in its permissible exposure limit ("PEL") for limestone, which incorporates by reference the Threshold Limit Value ("TLV") established by the American Conference of Government Industrial Hygienists ("ACGIH") in 1973 of 10 mg/m³, five times greater than the legal standard for respirable coal mine dust. *See* 30 C.F.R. §§ 56.5001(a), 57.5001(a).[1]

Congress is also troubled by what MSHA has done here. On December 18 the President signed the omnibus appropriations bill for 2016, which contains an Explanatory Statement incorporating House Report 114-195, in which Congress found that the CPDM may "mischaracterize rock dust as coal dust, thus subjecting operators to enforcement actions where no overexposure to coal dust" exists. H.R. Rep. No. 114-195, at 22 (2015) (cited by Explanatory Statement on the Consolidated Appropriations Act, 2016, Division H, 114 Cong. Rec. 10280, Pub. L. No. 114-113 § 4 (2015)) (excerpt attached as Exh. 2). Congress also directed NIOSH to commission further research on the issue by the National Academy of

[1] *See also* MSHA, HAZCOM TOOLKIT 31-32 (July 2002), *available at* http://www.msha.gov/REGS/COMPLIAN/Guides/Hazcom/HazComToolKit.pdf (noting MSHA PEL of 10 mg/m³ for "nuisance particulates," including limestone, and pointing out that "adverse effects are not likely to occur in the workplace").

Sciences – the very sort of thing Petitioners have been asking MSHA to do already. Explanatory Statement, 114 Cong. Rec. at 10280 (excerpt attached as Exh. 3); *see also* Exh. 4.[2]

II. UNDERGROUND COAL COMPANIES WILL BE IRREPARABLY HARMED IF A STAY DOES NOT ISSUE.

The irreparable harm facing the nation's underground coal mine operators beginning with the start of Phase II arises not only from the sheer cost of compliance in the first instance, *see* Brady Dec. (Exh. 1) ¶¶ 27–28, 31, but also

[2] The Court should take notice of these supplemental facts. Not only are they public record, and therefore subject to judicial notice, but supplementing the record in this case "is in the interests of justice." *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003). Absent consideration of extra-record evidence, the agency will not have to defend its actions in light of new factual developments that undermine its case. *See Am. Petrol. Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (extra-record evidence may be considered where it confirms or disproves the validity of an agency's decision), *cert. denied*, 430 U.S. 922 (1977); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) (same). When an agency fails to grant a stay, it does not develop the robust administrative record typical in rulemakings and other proceedings. *See* Steven Stark and Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*¸ 36 ADMIN. L. REV. 333, 350–51 (1984). Thus, supplementing the record is necessary to ensure the Court makes "an informed decision." *Schwartz*, 341 F.3d at 1225 n.4. Failing to consider extra-record evidence would deprive Petitioners of meaningful review. *See, e.g.*, *GTE Sylvania, Inc. v. Consumer Prods. Safety Comm'n*, 404 F. Supp. 352, 367–68 (D. Del. 1975). This comports with the well-established principle that going beyond the administrative record is justified where, as here, "the agency failed to examine all relevant factors or to adequately explain its grounds for decision." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *see also Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1058 (9th Cir. 2010) (agreeing that extra-record evidence is "necessary to determine whether the agency has considered all relevant factors" (internal quotation marks omitted)); *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1246 n.1 (11th Cir. 1996).

from the cost of lost production and enforcement consequences and penalties that will be caused by the inability to comply. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and concurring in the judgment) (observing that compliance costs needlessly expended "almost always" constitute irreparable harm). *In re EPA* is a useful recent analogy. There, the Sixth Circuit stayed implementation of a controversial Environmental Protection Agency rule to "silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." 803 F.3d 804, 808 (6th Cir. 2015); *accord Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 18 (D.D.C. 2014) (staying regulation, reasoning in part that, absent a stay, the agency and the parties might expend significant time and effort complying with the regulation, only for the regulation to be overturned on appeal). This Court has noted in a similar context that staying a case pending "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case" is a "good . . . if not an excellent" reason for issuing a stay. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).

The same is true here. Absent a stay, the underground coal mining industry must expend exorbitant resources – at a time of unprecedented economic fragility – in an effort to comply (probably unsuccessfully) with a burdensome regulation that

will be for naught if the Dust Rule is vacated. Worse, these costs will be expended in futility given the interference from non-toxic rock dust that frequently will make compliance impossible despite having no safety or health implications.

III. NO ONE WILL BE HARMED BY A STAY.

Other stakeholders – the nation's underground coal miners in particular – will not be harmed by a stay (nor, for that matter, will MSHA). As Petitioners pointed out in their merits briefs, since passage of the 1969 Coal Act, the prevalence of CWP has fallen dramatically, from around 30% to about 3-4%. *See* I-2-FR-1, at 24,827. This is below the background prevalence among the general population. *See* I-COMM-57-7, at 11.

In rejecting Petitioners' request for an administrative stay of Phase II, MSHA touted the great job industry is doing complying with the law. *See* Brady Dec. (Exh. 1) at Attach. 5 (Assistant Secretary Main emphasizing that "MSHA's analysis of over 41,000 samples from underground coal mines for the first year since the new rule took effect in August 2014 shows overwhelming compliance – approximately 98 percent of operators and MSHA-collected underground coal mine dust samples were at or below the applicable respirable dust standards"). Although the Assistant Secretary's logic for denying the request for a stay is flawed because it is focused on compliance under the existing sampling procedures and ignores the newly discovered problems that will be posed by the sampling

procedures that will go into effect on February 1, his point about widespread compliance shows the coal mining community takes compliance seriously and does it well – where it is possible.

As explained above, the problematic, confounding changes that Phase II will impose relate only to process, not outcomes (the protection of miners' health from coal dust). There is no reason to expect that industry would be any less successful complying with the coal dust standard *following existing processes* come February than it has been over the past year (and for many years before that). Miners' health will not suffer if the Dust Rule is stayed short of Phase II's disruptive effects. Accordingly, the equities weigh heavily in favor of a stay.

IV. A STAY IS IN THE PUBLIC'S INTEREST.

MSHA's failure to anticipate the inherent conflict between the Dust Rule and the rock dusting standards is a classic case of the government entirely failing to consider an important aspect of the problem. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts freely stay agency actions pending further review where there is a legitimate question about whether the agency itself followed the law. *See*, *e.g.*, *In re EPA*, 803 F.3d at 808 ("A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law."). Courts also do not shy from declining

to defer to agencies' claims of representing the public's interest where it appears they have not followed the law. *See*, *e.g.*, *SEC v. Citigroup Global Mkts., Inc.*, 673 F.3d 158, 168 (2d Cir. 2012) (stating that a court does not merely "rubber stamp" agency arguments that the agency's position represents the public's interest); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA."); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009) ("There is no question that the public has an interest in having Congress' mandates [in the governing law] carried out accurately and completely [by the government]."); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (stating "there is a strong public interest in meticulous compliance with the law by public officials").

Because MSHA failed to account for the confounding effect of mandatory rock dust on the intensified respirable coal dust sampling requirements that will be required by Phase II, the public interest would be best served by a stay of Phase II pending this Court's decision on the merits of the Dust Rule as a whole.

CONCLUSION

Phase II of the Dust Rule should be stayed for the reasons stated here and in Petitioners' earlier briefs on the merits.[3]

[3] Counsel for Respondents was given advance notice of the filing of this Motion.

Dated January 4, 2016

Respectfully submitted,

/s/ Avi Meyerstein

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2016, I filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record registered to receive electronic service.

/s/ Daniel Wolff

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1

DECLARATION OF EDWIN PATRICK BRADY

I, Edwin Patrick Brady, declare as follows:

Background

1. I am the Corporate Director of Safety for Murray Energy Corporation ("Murray Energy"). As the producer of approximately 65 million tons of thermal coal per year, Murray Energy is the largest underground coal mining company in the United States, employing thousands of people and operating 12 underground coal mines in five states. As the corporate head of safety, I am responsible for the safety and health of all of these miners and for compliance at all of our mining operations with the safety and health regulations promulgated and enforced by the federal Mine Safety and Health Administration ("MSHA"). I manage and carry out this responsibility through and with a team of dedicated safety professionals, including other executives as well as the safety managers and supervisors at each of our 12 mines.

2. I have worked in coal mining my entire adult life. For most of my career, I was employed by the United States government, first in 1972 for the U.S. Bureau of Mines (an agency within the Department of the Interior and a predecessor to MSHA) as a co-op student while pursuing my undergraduate degree in mining engineering, and then for MSHA, where I served for approximately 30 years, from 1977-2007. I also have a master's degree in safety.

3. Over my 34 1/2-year MSHA career, I held a number of positions, including mining engineer, supervisory coal mine inspector, assistant district manager, district manager, and – for the last four-plus years of my service – as the Superintendent of the National Mine Safety and Health Academy ("Mine Academy"), located in Beckley, West Virginia. In this final position, I was responsible for the education and training of all federal mine inspectors and all cooperative training programs with the states and foreign countries. While at the Mine

Academy, I also oversaw the training programs administered to the many private-sector mining companies that send their supervisory corps to the facility to obtain their mandatory basic and advanced training. The training programs for both federal inspectors and coal companies included training on MSHA's respirable dust standards and program.

4. For the several years that I oversaw the coal mine inspection program in MSHA Coal District 3 (Morgantown, WV), 1983-1985, I was responsible for the inspections at over 80 coal mines employing all forms of mining systems, including conventional mining, continuous mining machines, and shortwall and longwall mining machines. I regularly participated in the inspections myself. Each of these mines were required to comply with MSHA's respirable dust standards and related standards, including obtaining and keeping current their MSHA-approved ventilation, methane and respirable dust control plans (hereinafter "respirable dust control plans"). I was responsible for overseeing MSHA enforcement, which included citations and orders issued for non-compliance, and re-inspection to ensure adequate and timely abatement of all violations. Later, as an assistant district manager and a district manager, I worked with coal mine operators to ensure that their mines submitted proposed respirable dust control plans that ensured adequate compliance with MSHA's qualitative and quantitative respirable dust control standards to prevent the development of Coal Workers' Pneumoconiosis ("CWP"), Chronic Obstructive Pulmonary Disease ("COPD"), and other respiratory diseases, and required them to make changes where I deemed it necessary before I would grant the necessary regulatory approval.

5. As part of my responsibilities with MSHA, I worked with dozens of coal mine operators over the years to help them find ways to reduce respirable dust levels through the use

of various engineering controls, including water and water sprays, chemicals, mechanical scrubbers, equipment design, and ventilation controls and technologies.

6. Over the course of my career, I have developed an intimate familiarity with the ways in which coal dust is generated, measured, and suppressed.

7. As Murray Energy's Corporate Safety Director, I oversee and provide technical support (through and with Murray Energy's team of safety and engineering professionals) to each of Murray Energy's 12 coal mining operations in five states. At Murray Energy alone, hundreds of employees, including health and safety specialists, mining engineers, and technicians are called upon to collaborate and coordinate in furtherance of our company program to control and remove concentrations of respirable coal dust in our mine atmospheres.

The Dust Rule and Related Litigation

8. As part of my responsibilities at Murray Energy, I worked directly with our General Counsel and private engineering and health consultants on the preparation of Murray Energy's extensive comments on MSHA's proposed respirable coal dust rules after they were announced in the Federal Register in October 2010. Murray Energy's comments were supported by a number of highly regarded experts, including former senior leaders from the National Institute of Occupational Safety and Health (NIOSH) and true pioneers in the field of industrial hygiene as it relates to occupational exposure to respirable coal dust. An important conclusion of the experts is that the Dust Rule was not feasible for a number of reasons, including the mandated use of the continuous personal dust monitor, or CPDM, beginning February 1, 2016.

9. I am of course familiar with Murray Energy's petition for review filed in the Eleventh Circuit (No. 14-11942) challenging the final rules that were promulgated on May 1,

2014. I am making this declaration in support of a request for a stay of the next phase of the Dust Rule, which is scheduled to take effect on February 1, 2016.

10. As explained in the briefs filed in the litigation, the CPDM is a device that will (starting on February 1) be required to be worn by any miner working during scheduled respirable coal mine dust sampling periods in occupations referred to as the "designated occupation" or "DO" and other occupations referred to as "other designated occupations" or "ODOs." The DO is, by definition, the job that takes place in the dustiest area of a working section of mine. That will typically be the job of the miner assigned to operate the coal-cutting machine. ODOs are the next dustiest occupations, typically the roof bolter and coal-haulage operators. Each mechanized mining unit, or MMU – that is, the suite of equipment used to mine coal on a working section of a mine – has its own DO and at least one ODO, but more usually two ODOs, that need(s) to be sampled. In other words, mines with multiple MMUs will have mandatory quarterly DO and ODO sampling for each MMU. (There is also mandatory sampling in other "designated areas" or "DAs," but we believe we are equipped to manage that part of the sampling program, so I will not further address that part of the program in this declaration.)

11. Under the current regulations, operators are required on a bimonthly basis to take five atmospheric dust samples at the DO while coal is being produced. The five samples can be taken on consecutive production shifts, or on production shifts over five consecutive days. The sampling machine used (the coal mine dust personal sampler unit, commonly referred to as the "gravimetric sampler") does not display dust concentration in real time. Rather, a cassette inside the machine collects the dust and is sent to an MSHA laboratory for weighing. Notification of results by MSHA can take weeks. If the amount of dust collected by the cassette weighs more than the legal limit, MSHA issues the operator a citation.

12. Beginning February 1, the sampling process will change significantly. Operators will be required to take 15 valid dust samples at a DO and each ODO on a quarterly basis. Samples will need to be taken on consecutive production shifts and over the entire shift, without regard to the length of the shift. (As is currently required, production during sampling periods may not drop below 80% of the average rate of production during the preceding 30 production shifts in order for samples to be valid and representative of typical mining conditions.) The full set of valid samples for the DO must be collected before sampling on the ODOs can begin. Although MSHA will continue to take its own inspection samples using the gravimetric sampler, operators will be required to sample using the CPDM.

Why the Dust Rule Is Not Feasible

13. Because every MMU has one DO and at least one ODO, for which we need to obtain 15 valid samples per quarter, the new requirements will require every operator to take a minimum of 30 samples per quarter on each MMU. Because most of Murray Energy's MMUs have two ODOs, however, that will require taking a minimum of 45 samples per quarter. I say "a minimum" because, realistically, we will have to take many more samples. That is because, for a number of reasons, it is extremely difficult to obtain 15 consecutive *valid* samples (i.e., full-shift samples that reflect 80% of average production over the previous 30 production shifts). Based on our experience over the past 16 months of collecting samples during 80% of average production for the previous 30 shifts (a change that took effect on August 1, 2014), it takes our mines about seven or eight full-shift samples to obtain five valid and representative samples. So for the DO alone, beginning in February, that will mean roughly 21-24 shifts will be needed to complete DO sampling. MMUs with two ODOs will require roughly 63-72 shifts to complete

sampling. MMUs with only one ODO will require roughly 42-48 shifts to complete quarterly sampling.

14. Because most of our mines operate using three production shifts per day, and most of our MMUs have two ODOs apiece (for a total of three sampling occupations for each MMU), quarterly sampling could easily entail around-the-clock sampling in our mines for the better part of eight months out of the year (i.e., nearly two months every quarter) after also factoring in available manpower and equipment.

15. This assumes our validity rate remains the same for the new CPDM as it was for the gravimetric sampler that has been in use for decades. Preliminary test sampling with the CPDM gives me a lot of reasons to worry things are going to get worse. For example, there are any number of "void codes" – having to do with the functioning of the CPDM and the like – for which MSHA will void a sample, rendering it invalid for purposes of satisfying our quarterly sampling. It will also be harder to obtain valid samples because of contamination from rock dust, the big issue that I discuss in the paragraphs that follow. This is because operators will have to reduce production to reduce respirable coal dust generation in order to avoid going out of compliance. The problem, though, is that by reducing production, we risk not satisfying the 80% of average production requirement, which will render samples invalid. So it is a Catch-22. The bottom line is that we could very well see substantially prolonged sampling periods because of the difficulty of obtaining *valid* samples.

16. That leads me to the biggest problem of all, and here is where it gets really tricky for us. Under a separate set of mandatory standards, our mines are required to apply rock dust – essentially pulverized limestone, dolomite, or gypsum dust (or some other inert dust) – throughout the mine on a near-constant basis to suppress the combustibility of the coal dust in

the atmosphere. Current MSHA rock dusting requirements mandate that operators must maintain at least 80% non-combustible content of coal mine dust in all accessible areas of the mine. To accomplish that, operators have to use mechanical rock dusting equipment. The problem is that a large portion of the rock dust disbursed into the mine atmosphere is also respirable, and therefore gets measured by the CPDM as part of the respirable coal mine dust. In other words, the impending demands for more frequent sampling with CPDMs set to begin on February 1, 2016 will run headlong into the rock dust standards, because there will be no downtime when we can apply rock dust without interfering with the required respirable coal dust sampling. The result will be an inability to comply, on the one hand, with the existing rock dust standards without, on the other hand, simultaneously releasing so much rock dust into the mine atmosphere that the DO and ODO respirable dust samples will measure above the legal limit on a regular basis.

17. Attached to this declaration as Attachment 1 is a letter from Bruce Watzman of the National Mining Association and Gary Broadbent of Murray Energy to the Assistant Secretary of Labor for Mine Safety and Health, Joseph Main, explaining the problem. Attached to that correspondence is a Power Point presentation depicting an in-mine study conducted by another coal mine company. That study demonstrates two main points: (1) CPDM measurements exceed the respirable dust standard even when no coal is being produced; and (2) the amount of sampling that will be required as of February 1 will put the new respirable dust sampling mandates on a collision course with existing rock dusting requirements – underground coal mine operators will not be able to comply with both requirements at once.

18. To be clear, I should point out that the gravimetric sampler also does not discriminate between respirable coal dust and other types of respirable dusts in the mine

atmosphere. The critical distinctions between the existing sampling requirements and those set to take effect on February 1 that gives rise to our problem are the frequency and duration of sampling that will be required as of February 1, as well as the fact that the CPDM gives real-time dust-level measurements which will cause us to cease or reduce production to avoid violations.

19. This problem does not exist under the existing regulations because of the far more limited sampling frequency and duration, as well as the inability of the gravimetric sampler to provide real-time data. Under the existing system, operators are required to take five valid samples at the DO every two months. Compliance with the legal standard is determined based on the average concentration of those five samples, which is determined (as noted above) through laboratory analysis of the cassettes, the results of which can take weeks to get back. And here is the thing: operators have much greater flexibility to schedule their five bimonthly samples to avoid interference with rock dusting. Right now, operators have the option to sample either on consecutive shifts or on consecutive days. The option to sample over consecutive days is hugely important – it allows operators to schedule bulk rock dusting during scheduled maintenance and then conduct dust sampling two production shifts later with some confidence that the rock dust will have largely settled by then. That will no longer be possible beginning February 1 in a scheme that *requires* sampling over consecutive shifts – that requirement gives insufficient time for widely dispersed rock dust to settle, so there is a high likelihood that any sample taken on the production shift following or during bulk rock dusting activities will be contaminated with inordinately high amounts of rock dust.

20. This problem – one that all underground coal mines will share – will be felt even more acutely at mines that operate three production shifts, as most of Murray Energy's mines do. With limited downtime, our mines are operated to produce coal around the clock, which means

they are almost constantly generating coal dust. That in turn means that we must constantly be rock dusting to suppress the combustible content of the coal dust. If we are in a period of sampling (as we will be nearly 2/3 of the year at all of our mines, for the reasons given in paragraph 14), the CPDM will be measuring the respirable fraction of the rock dust and confounding our results. We will have to reduce or cease coal production to avoid citations for exceeding the legal coal dust standard even though it will be because of rock dust, not coal dust.

21. These issues have been brought to MSHA's attention multiple times over the past couple of months, as demonstrated by the Attachments to this declaration:

- September 21, 2015: letter from Congressmen Hal Rogers, John Kline, Tom Cole, and Tim Walberg to Assistant Secretary Main, stating the views of the chairmen of the House of Representatives Appropriation Committee and subcommittee and the House committees and subcommittees of jurisdiction over MSHA (included as part of Attachment 1);
- October 2, 2015: letter from NMA's Bruce Watzman to Assistant Secretary Main, calling the Assistant Secretary's attention to the sampling data compiled by another coal mine operator demonstrating the same issues addressed in this declaration and seeking an opportunity to discuss the issues with MSHA (included as part of Attachment 1);
- October 8, 2015: letter from NMA's Bruce Watzman and Murray Energy's Gary Broadbent again raising these issues and requesting an emergency stay of Phase II of the Dust Rule (included as part of Attachment 1);
- October 19, 2015: response from Assistant Secretary Main to the Congressmen's letter of September 21 dismissing as unfounded the concern that violations of the respirable dust standard will rise as a result of the mandated increase in sampling (Attachment 2);
- October 30, 2015: response from Assistant Secretary Main to NMA's Bruce Watzman's letter of October 2, again dismissing as unfounded the concern that violations will rise as a result of the mandated increase in sampling or any confounding by rock dust (Attachment 3);
- November 4, 2015: letter from NMA's Bruce Watzman to Assistant Secretary Main requesting the convening of a stakeholders' meeting to confer on and agree upon additional in-mine testing to determine the extent of the problems raised by the industry (Attachment 4);
- November 6, 2015: response from Assistant Secretary Main to Bruce Watzman's and Gary Broadbent's letter of October 8, again dismissing as unfounded the concern that violations will rise as a result of more frequent sampling, and denying the request for an emergency stay (Attachment 5);
- November 17, 2015: letter from Murray Energy's Gary Broadbent, replying to Assistant Secretary Main's response letter of November 6, and requesting that MSHA reconsider the denial of the request for an emergency stay of Phase II (Attachment 6);

- December 9, 2015: letter from myself to Assistant Secretary Main expressing disappointment in how MSHA has been handling this matter, noting that Murray Energy intends to embark on determining for itself whether Phase II could be complied with, and restating Murray Energy's interest to learn what assistance MSHA might offer (Attachment 7);
- December 11, 2015: letter from myself to Dr. John Howard, Director of NIOSH, inviting NIOSH to observe our sampling testing program, copying Assistant Secretary Main (Attachment 8).
- December 16, 2015: Dr. Howard responded to my letter of December 11, expressing interest in further discussions (Attachment 9).

22. I attended by phone a stakeholders meeting that Assistant Secretary Main held on November 30 concerning this subject, as requested by NMA's Bruce Watzman. That meeting was attended by representatives of the country's underground coal mine operators, the United Mine Workers of America ("UMWA"), and NIOSH, as well as by the senior leaders of MSHA and the agency's attorneys. At that meeting, MSHA's Administrator for Coal Mine Safety and Health, Kevin Stricklin, as well as the UMWA's director of occupational safety and health, Dennis O'Dell, both expressed or acknowledged the concern with rock dust interfering with respirable dust samples at mines operating three production shifts per day. Officials from other coal companies pointed out the concerns exist even at mines running just two production shifts per day. Despite renewed requests by the industry participants for MSHA to stay Phase II to give all stakeholders time to demonstrate the confounding effect of rock dusting and to see if a pathway to compliance could be identified, MSHA refused. Assistant Secretary Main repeatedly stated that he is not willing to delay the implementation of the next phase of the Dust Rule or even to conduct an industry-wide study of the issues raised. Instead, he repeated that he is willing to work with industry on a mine-by-mine basis to address issues as they arise.

23. Although I was disappointed with, and frankly could not understand, Assistant Secretary Main's unwillingness to engage industry and other stakeholders (including the UMWA and NIOSH) on an industry-wide study, I took him at his word that he was willing to work with

individual mines. To that end, I called him the next day, on December 1, to learn what assistance MSHA might be able to offer. I spoke with one of his administrative aides and was told he would get back to me. To my chagrin, it was a full week before anyone responded to my call. Finally, on December 8, Kevin Stricklin, MSHA's Administrator for Coal Mine Safety and Health, returned my call. I know Mr. Stricklin well (indeed, I know the Assistant Secretary), but I was discouraged by what Mr. Stricklin told me. Despite acknowledging that any company running three shifts per day may have trouble complying with the sampling regime set to take effect on February 1 because of the rock dusting requirements, Mr. Stricklin offered very little in the way of assistance other than saying he would tell Secretary Main that I would be sending him a formal written request.

24. My follow-up letters to the Assistant Secretary and the Director of NIOSH are attached here as Attachments 7 and 8. The Director of NIOSH, Dr. John Howard, did acknowledge my letter in a response letter of December 16, in which he expressed an interest in further discussion with Murray Energy about this subject. That letter is attached here as Attachment 9.

25. As for MSHA, Coal Mine Health Division Chief Greg Meikle called my Corporate Safety Manager, Tom Todd, on December 23, requesting to set up a time when he and Mr. Stricklin could observe Murray conduct CPDM respirable dust test sampling.

26. We have been in ongoing discussions with both NIOSH and MSHA to have them observe CPDM testing as it will be required to be conducted beginning on February 1, 2016. To date, no dates have been confirmed.

27. It is important to emphasize that this problem is not something Murray Energy could have been aware of until just recently. As was pointed out in the briefs filed in the

litigation, there was a serious question in 2014 whether there would even be sufficient supply of CPDMs in time to meet the February 1, 2016 deadline. Although the supply question appears to have resolved itself, it has only done so recently. Murray Energy placed an order for 77 CPDMs on August 31, 2015. We did not order them earlier because we were aware of problems to units purchased by other operators earlier in the year that required a recall. We received 37 of our units during the first two weeks of October. We have been notified by the manufacturer that the balance of our ordered units will be shipped the week of January 4, 2016. Regardless, given that the CPDM is a new device that we have only recently acquired, Murray Energy had no means of testing the functionality of the devices for ourselves at our mines until this time. I was aware of a comment in the administrative record of the Dust Rule pointing out that the dramatic increase in sampling would pose problems in light of rock dusting requirements, but MSHA dismissed that comment as mistaken. The problem for industry is that we simply had no data of our own because we were being directed to do something we had never had to do, and with a new device we had never had to use. It was only after the industry data gathered by another coal company (as described above in paragraphs 17 and 18) became known to us, and we had had the opportunity to engage with MSHA leadership on the implications of that data, that we realized the enormity of the problems facing us.

28. Phase II of the Dust Rule has Murray Energy very worried. The preliminary results of our sampling with the CPDM tend to confirm that compliance with Phase II will not be feasible in light of existing rock dusting requirements. MSHA likes to tout the CPDM's "real-time" readout of dust concentrations because, the agency says, it allows the miner performing the job of the DO or an ODO to adjust where he or she is positioned to avoid the dust. In fact, one of the displays on the CPDM is the projected end-of-shift average respirable dust concentration.

This is an important piece of information which MSHA also believes encourages the miner to reposition himself or herself to avoid exceeding the legal average concentration. In our experience, MSHA's viewpoint is unrealistic and based on wishful thinking for two general reasons. *First*, once the CPDM is exposed to a plume of rock dust, that spike in respirable dust content gets recorded and leaves the DO or ODO with very little margin for exposure for the remainder of the shift. Furthermore, rock dust from bulk dusting activities in general will typically be widely dispersed, as intended to comport with rock dusting requirements; and the DO and ODOs only have so much space to move around because they have their designated jobs to do, after all, and it is those occupations that MSHA demands be sampled. So it is far easier said than done. *Second*, more typically, the miner wearing the CPDM will instead cause production to cease or be reduced in order to reduce the amount of dust generated. This is because the enforcement consequences for failing to comply with a mandatory standard when the hazard is known rise significantly, and our miners are trained to recognize potential hazards and violations and take steps to avoid them.

29. I honestly do not know how we will be able to comply. The problem is what I noted above in the previous paragraph – if a miner thinks he is going to end the shift out of compliance, he is far more likely to cut production to avoid generating dust than to proceed in the face of high respirable dust readings. That means our mines will routinely be cutting (if not ceasing entirely) production as a means of not having respirable dust violations, but it also means we won't be operating efficiently and that goes directly to our bottom line. It would be one thing if the dust causing the high readings were truly coal dust – that is, after all, what the Dust Rule is aimed at protecting against. But as I've described already, we know based on preliminary data that we will be measuring large amounts of rock dust, which is not the subject of any health-

effects studies that of which I am aware. I do not think it is fair. Nor do I think penalizing operators for having rock dust in the mine atmosphere is what Congress ever intended – *especially since it is required to be there by statute*.

30. The bottom line is that compliance with the coal dust standard will routinely be judged based on miner exposures to high concentrations of rock dust, not coal dust. I realize the gravimetric sampler also measured respirable rock dust, but the gravimetric sampler has never been used to conduct as much sampling as we will be required to conduct beginning on February 1, and neither does it provide real-time information. So while our samples under the existing system no doubt contain some amount of respirable rock dust, we can be confident that what is being measured is predominantly respirable coal dust. That will no longer be true come February 1.

31. In addition, ongoing efforts to comply will be both very costly and time-consuming. The costs of the Dust Rule were addressed in the briefs we previously filed so I won't repeat them here, other than to note that they are very onerous and all for a revamped program that offers no obvious health benefits.

32. I would be remiss if I did not point out that these new regulations are being imposed at the same time as so many other roadblocks are being placed in front of the coal industry. A slew of environmental requirements arising under the Clean Water Act and Clean Air Act, and the extremely low cost of natural gas, are combining like at no other time in our history to make the cost of coal uncompetitive as a source of electricity, which is the primary market for most coal mined by American coal miners, and certainly for the vast majority of Murray Energy's coal. Already a number of publicly traded coal companies have recently declared bankruptcy, and the financial news reports daily on the imminent bankruptcies of other

coal companies. These are extremely difficult times, especially for people like myself and others at Murray Energy, including our founder and President and CEO, who have spent our entire careers working within the industry we love. This Administration may not be able to save us from competition from the likes of natural gas, but surely it should be held accountable for imposing infeasible regulations.

33. At the very least, we need a stay of Phase II long enough to conduct a scientifically sound study of the issues raised in this declaration and in the attached correspondence with MSHA. I am aware that Congress just recently directed NIOSH and MSHA to work with the National Academy of Sciences to do just that. In fact, I have been told that NIOSH has already been engaged in several studies of respirable coal dust and rock dust that might shed some light on this subject matter, and that draft reports of those studies are in the hands of MSHA leadership for review and comment, and have been for some weeks. Regardless, and by whatever means it gets done, further study should be undertaken and the results published and analyzed before the industry is forced to adopt the Phase II dust sampling mandates, which simply are not feasible.

I swear under penalty of perjury that the foregoing is true and correct.

/s/ Edwin Patrick Brady
Edwin Patrick Brady

Date: January 4, 2016

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 1

October 8, 2015

The Honorable Joseph A. Main
Assistant Secretary of Labor for Mine Safety and Health
US Department of Labor
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

Re: ***REQUEST FOR EMERGENCY STAY OF THE MANDATES TO USE CONTINUOUS PERSONAL DUST MONITORS AND TO SAMPLE ON CONSECUTIVE SHIFTS FOR EXTENDED PERIODS BEGINNING ON FEBRUARY 1, 2016***

Dear Mr. Secretary:

The purpose of this letter is to request that you issue an emergency stay of two new regulatory mandates that will otherwise take effect on February 1, 2016: (1) the mandate to use continuous personal dust monitors ("CPDMs" or "CPDM") to sample for respirable dust; and (2) the mandate to sample respirable dust on a quarterly basis at the designated occupation ("DO") and other designated occupations ("ODO") on consecutive normal production shifts until 15 valid representative samples are taken at all such occupations. *See* 30 C.F.R. §§ 70.201 and 70.208 (and a number of sections elsewhere in 30 C.F.R. Parts 70 and 90). This emergency stay is essential because when coal mine dust is measured with the CPDM on the schedule required under the new mandates, the presence of ***rock dust*** (recognized by MSHA to be, at most, a "nuisance" dust) in the mine atmosphere is so substantial that it frequently results in CPDM readings of exposure in excess of the respirable dust standards set forth in 30 C.F.R. §70.100, even though the amount of ***coal dust*** in the sampled mine atmosphere does not exceed these standards. Indeed, oftentimes, the amount of rock dust required to be used underground is such that, even if coal is not being produced, the amount of rock dust entrained in the mine atmosphere does and will continue to exceed the respirable dust standards when measured with the CPDM.

Because of the urgency of our need for an emergency stay, for the reasons explained further in this letter, ***we respectfully request that you respond to us within 30 days of today.***

This problem has been graphically demonstrated in the PowerPoint presentation provided to you in the letter of October 2, 2015 by the National Mining Association ("NMA"). A copy of that letter and the attached presentation is enclosed herein. Based on the recently collected data presented in that PowerPoint, the problem appears to be twofold: CPDM measurements exceed the respirable dust standard *even when no coal is being produced*; and the amount of sampling required puts the new sampling mandate on a collision course with existing rock dusting requirements – underground coal operators will not be able to comply with both requirements at once.

Murray Energy and NMA strongly support the objective of eliminating coal workers' pneumoconiosis ("CWP"). However, an unintended consequence of the respirable coal mine dust standards you promulgated on May 1, 2014 (79 Fed. Reg. 24,814, *et seq.*) has been this collision with MSHA's demands for more frequent and more extensive rock dusting underground. This collision must be addressed—and it must be addressed now—in order to harmonize these two conflicting federal mandates so that underground coal mine operators are treated fairly and are not penalized, despite their efforts to comply with these mandates.

The data now confirm that required rock dusting will contaminate the dust samples mandated to be taken by the CPDM. Obviously, coal operators cannot stop rock dusting. We must maintain an 80% incombustible content. But the new regulations requiring consecutive shift respirable coal mine dust sampling leave no time for rock dusting without contaminating the samples.

We explain more fully below.

Demands for Increased Sampling of Respirable Coal Mine Dust and More Frequent and More Extensive Rock Dusting Underground Using the CPDM

The data attached to NMA's letter of October 2 show that rock dust in underground coal mines dramatically impacts CPDM measurements of respirable dust. In fact, even with the belt not running and no coal production occurring, the CPDMs were registering dust measurements in excess of the legal standard. Making matters worse is that while in the past underground coal mine operators generally were able to account for the problem and to generally stay in compliance with applicable respirable coal mine dust standards, as well as rock dusting standards, by managing the periods of time and places where dust sampling was occurring, as well as when and where rock dust was being applied, to reduce contamination of the samples with rock dust. The impending demands for more frequent sampling with CPDMs set to begin on February 1, 2016 (*see* 30 C.F.R. §70.208(a)(1)) will mandate that underground coal mine operators "sample. . . the designated occupation (DO) in each MMU [mechanized mining unit] on consecutive normal production shifts until 15 valid representative samples are taken. . . ." This will result in a veritable continuous avalanche of coal mine dust samples, many of which will consist of substantial portions of "nuisance" rock dust,[1] with little or no respirable coal dust.

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[1] *See* MSHA Handbook PH06-VI-1, Metal and Nonmetal Health Inspection Procedures, Ch. 21 at page 22 (adopting the ACGIH list of "nuisance particulates," inclusive of calcium carbonate), available at http://www.msha.gov/Readroom/HANDBOOK/MNMInspChapters/Chapter21.pdf. In fact, MSHA's permissible exposure limit ("PEL") for calcium carbonate is 10 mg./m³.*See* MSHA HazCom Toolkit (July 2002), at page 32 (noting MSHA PEL for calcium carbonate as 10 mg/m^3), available at http://www.msha.gov/REGS/COMPLIAN/GUIDES/Hazcom/HazComToolKit.pdf.

That problem will be confounded by MSHA's requirements for rock dusting as follows, in pertinent part, at 30 C.F.R §§ 75.402 and 75.403, respectively:

> All underground areas . . . shall be rock dusted to within 40 feet of all working faces. . . . All crosscuts that are less than 40 feet from a working face shall also be rock dusted.
>
> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, and other dust shall not be less than 80 percent.

Following the Upper Big Branch Mine Disaster on April 5, 2010, MSHA issued Program Information Bulletin No. P10-18 (Sept. 10, 2010), reiterating the agency's expectations for rock dusting ". . . to protect miners from the potential of a coal dust explosion. . ." and stating, in part:

> . . . areas downwind of belt transfers, the returns of active sections, tailgates of longwalls, and the bleeder entries often require *continuous rock dusting* with bulk dusters, trickle dusters or high pressure rock dusting machines to maintain the required incombustible content levels and suppress float dust accumulations. Mine operators should use mechanical rock dusters on the working sections and in the return entries of these sections to maintain compliance. Also, mine operators should use bulk dusters on a regular basis in other areas of the mine to assure compliance and maintain the required incombustible content of total dust in all accessible areas.

Emphasis added.

Simply put, as you can see from the above (and as you well know), application of more and more rock dust in more and more areas of underground coal mines means that more and more of that "nuisance" rock dust is being measured when respirable coal mine dust samples are being taken in conformance with Part 70.[2]

The Unintended Consequences of Two Conflicting Federal Mandates

During the rulemaking that led to the May 2014 respirable coal mine dust standard, some commenters expressed concerns that, in essence, increased requirements for more frequent and more extensive rock dusting would likely affect the levels of silica to which miners are exposed. 84 Fed. Reg. 24,883. These commenters said "that applying rock dust introduces quartz into the sampling air stream thereby contributing to the total amount of respirable dust being measured

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[2] The respirable dust standard in 30 C.F.R. Part 70 is currently 2.0 mg/m³, set to be reduced to 1.5 mg/m³ as of August 1, 2016. *See* § 70.100.

and is a *major source of weight gain in many samples*." *Id.* (Emphasis added.) MSHA's response to this comment was as follows:

> Mine operators can work with their [rock dust] suppliers to ensure that the rock dust purchased contains a low percentage of respirable dust. . . . Limiting the percentage of respirable material and exercising care in application of rock dust to limit the exposure of miners working downwind will reduce or eliminate the potential impact on respirable coal mine dust levels.

Id. Mr. Secretary, as is amply shown by the discussion above, that statement is a sham. Its hollowness is further demonstrated by the enormous problems (well known to MSHA in May 2014) with the rock dust being used in the industry. As you well know, much of the rock dust supply being used across the coal fields utterly fails to meet the long-standing definition of rock dust found in 30 C.F.R. § 75.2 in terms of particle size and dispersibility characteristics.[3] Much work to address this vitally important issue is being carried out by rock dust producers, coal mine operators, and by NIOSH and its contractors, collectively, in the NIOSH Rock Dust Partnership.[4] Indeed, NIOSH is currently recommending use of rock dust with a smaller particle size in order to conform to the Part 75 definition. In turn, these smaller particles will better propagate the dispersion of explosion-quenching rock dust into the mine atmosphere in the event of a mine explosion. *However, as you should be able to readily see, this will pose an even greater Catch-22 for operators because it will increase the amount of respirable rock dust being applied—and will lead to an even greater number of noncompliant respirable dust samples.*

The CPDM only makes matters worse. In the rulemaking preamble, MSHA noted operator concerns with the CPDM not distinguishing between respirable coal dust and other dusts in the air. MSHA dismissed these concerns on the premise that "[a]ny respirable dust in the mine atmosphere is considered respirable *coal* mine dust to which miners are exposed and, when measured, is counted for determining compliance with the respirable dust standards." 84 Fed. Reg. 24,866 (emphasis added). Taken by itself, that response is remarkable, divorced as it is from any association with the particular type of respirable dust – respirable coal dust – that is the source of the health concerns that gave rise to the dust sampling and compliance scheme in the first instance. It is all the more remarkable in light of the new mandates imposed by the May 2014 rulemaking. What industry could not have known during the comment period, and what MSHA either, did not know or failed to acknowledge, is what the industry data are now telling us: that rock dust skews CPDM measurements far more than anyone could have anticipated.

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[3] Section 75.2 defines "rock dust," in pertinent part, as follows: ". . . inert material, preferably light colored, 100 percent of which will pass through a sieve having 20 meshes per linear inch and 70 percent or more of which will pass through a sieve having 200 meshes per linear inch; the particles of which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air. . . . "

[4] Both Murray Energy and NMA participate in the Rock Dust Partnership. MSHA engages with the Partnership as an observer.

The bottom line is that in its zeal to promulgate a lower coal dust standard and impose a costly but unproven technology (the CPDM) on coal operators to measure coal mine dust samples, MSHA, among other things, "entirely failed to consider an important aspect of the problem."[5] Unfortunately, because the CPDM was a new (and as of yet still undeveloped) technology, the Nation's coal operators had no empirical data of their own to study. Thus, during the comment period preceding the May 2014 final dust rule, coal operators could only use their best professional judgment to question MSHA's rulemaking wisdom. Now, however, with operators beginning to acquire some CPDMs in advance of the looming February 2016 deadline, hard sampling data taken from CPDMs are at last becoming available – and that sampling data is exposing MSHA's failure to consider the implications of its dust rulemaking. As the presentation included with the NMA's letter of October 2 makes abundantly clear, the new respirable coal dust sampling requirements will be incompatible with existing rock dusting requirements.

This industry data by itself should be sufficient to cause MSHA to hit the "pause" button on the February 2016 deadlines pending further robust testing and analysis of the conflicting regulatory mandates. But our request for a stay is not based solely on that data. Rather, ongoing NIOSH testing in this area also compels an administrative stay. In that regard, under the auspices of the Rock Dust Partnership, we understand NIOSH is carrying on three key projects which bear on the problem at hand, as follows:

- During the week of September 14, NIOSH carried out CPDM sampling of the underground mine atmosphere at Alpha Natural Resources' Stockton Mine, while no coal was being run, but while the atmosphere contained entrained rock dust. The results specifically showed that a number of CPDM samples containing only rock dust were in excess of the respirable coal mine dust standard. A report on the NIOSH testing at Stockton is being prepared. We understand that report will be provided to the Partnership this month, following a NIOSH briefing for you.

- In vitro testing of rock dust at NIOSH's Morgantown, WV laboratories showed no abnormalities. Importantly, NIOSH had planned to carry out animal studies of the health effects of rock dust if the in vitro testing so warranted. That next step is now unclear. We understand that a report of the NIOSH in vitro testing is also being prepared and should be available this month.

- Work is just beginning at the NIOSH Bruceton Experimental Mine to develop a slurry rock dust. The objective of this work is to develop rock dust which could be applied as a slurry so as to avoid the problem of entrained rock dust in the atmosphere. Then when the slurry dried, it would be dispersible in the event of an explosion. The timetable for completion of this work is unclear.

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[5] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

All of these Rock Dust Partnership projects are important. The testing at the Stockton Mine confirms the existence of the problem we are bringing to your attention. The testing at NIOSH's Morgantown laboratories tends to show there are no adverse health effects from rock dust—and that MSHA's categorization of rock dust as a mere "nuisance" dust is appropriate.[6] And the work getting underway at Bruceton may result in a technological remedy to the problems described in this letter. It will take time to see if this slurry approach works; and there may be other approaches to solve these problems. That is precisely why the emergency stay we are requesting must be granted. Imposition of the current February 1, 2016 deadline mandating extended periods of nearly continuous sampling with the CPDM not only puts the cart ahead of the horse, but does so with a cart that has no wheels.

Outcomes, Findings, and Conclusions

Having given the problems discussed above considerable thought, here is the outcome of what will happen if you do not grant the emergency stay we are seeking. We believe that on a typical working section, operators will have to sample approximately 60 consecutive production shifts per quarter with CPDMs, compared to the current five samples every bi-monthly period. This means, in effect, that rock dusting these areas will add significant amounts of rock dust to the samples' weight. As you know, MSHA inspectors often conduct impact inspections focused solely on rock dust compliance. If the CPDM indicates overexposure, as it most certainly will, then the operator must immediately implement corrective actions, which may include stopping coal production.

In short, as we see the situation looming upon us on February 1, 2016 – just a few short months from now – we conclude as follows:

- rock dust significantly affects the weight of CPDM samples;
- there is no time-sensitive method to quantify the amount of rock dust versus coal dust in a CPDM sample;
- MSHA currently classifies rock dust as a "nuisance" dust and allows a permissible exposure limit ("PEL") of 10 mg/m^3, as compared to the MSHA respirable dust standard in Part 70 2.0 mg/m^3, reduced to 1.5 mg/m^3 beginning on August 1, 2016;
- current rock dust requirements mandate that operators must maintain at least 80% non-combustible content in all areas—and to accomplish that, operators have to use mechanical rock dusting equipment;

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[6] We note here that a preliminary literature search shows no peer-reviewed reports regarding adverse health effects of rock dust,

- *in an enormous variety of operating settings, unless the requested emergency stay is granted, compliance with one or the other of the rock dust or the respirable coal mine dust standards will be impossible; and*

- *most importantly, respirable rock dust does not cause CWP; that disease is caused by respirable coal dust.*

Mr. Secretary, this collision of two significant safety and health requirements is on the verge of creating a perfect storm for the Nation's underground coal mine operators. In that regard, we note with approval and appreciation the September 21 letter sent to you on this very subject by Congressmen Hal Rogers, John Kline, Tom Cole, and Tim Walberg. A copy of that letter is enclosed. These Members of the House of Representatives are the chairmen of the committees and subcommittees of jurisdiction over MSHA's implementation of the Federal Mine Safety and Health Act of 1977 and the tax dollars you spend on this implementation. As such, they are the leading authorities on mine safety and health of the Majority in that House.

We have read their letter to you carefully and note they have asked for your response to it by October 19, 2015. We in turn ask for a response to our letter within 30 days of today. In that regard, we are prepared to work closely with you and your colleagues, as well as NIOSH, in order to work toward a solution to the problems described herein. In the interim, however, we must insist that you grant our request for the stay discussed above. Should you fail to grant our request or provide us with some other equivalent form of relief, we will consider all available options, including seeking judicial and Congressional relief.

Sincerely yours,

Gary M. Broadbent
Assistant General Counsel
Murray Energy Corporation

Bruce Watzman
Senior Vice President
National Mining Association

Enclosures

cc w/ Enclosures: The Honorable John Howard, Director, National Institute for Occupational Safety and Health

BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

October 2, 2015

Mr. Joe Main
Assistant Secretary for Mine Safety and Health
US Department of Labor
201 12th Street South
Arlington, VA 22202

Dear Mr. Secretary:

Attached for your information, review and comment is an update of the PowerPoint presentation we provided earlier presenting the results of sampling conducted at an underground coal mine to examine the impact of rock dust on compliance sampling using both the new Continuous Personal Dust Monitor (CPDM) and the gravimetric sampler (CMPDSU). Despite the fact that the agency never provided any comment or reaction to the earlier results we felt it important to continue this work to inform you of the difficulties operators will experience when CPDM use is mandated, as a matter of law, next February.

As before the in-mine testing demonstrate a lack of correlation between the CPDM and CMPDSU with the CPDM results routinely higher than those of the gravimetric. Side-by-side testing of both units demonstrates extreme variations by both instruments when exposed to the same mine environment. Of equal significance, the results demonstrate that rock dusting significantly affects CPDM samples and leads us to conclude that it will be impossible to comply with both the rock dust and respirable coal mine dust standards due to the susceptibility of the CPDMs to inadvertently measure rock dust on the same standard as coal dust. Next February, the respirable dust expanded consecutive shift sampling schedule, combined with existing rock dusting requirements, will make it impractical if not impossible to comply with both regulations without contaminating the respirable dust samples.

Mr. Secretary as before we would welcome the opportunity to meet with you and your experts to discuss these results. Our goal, like yours, is to develop a sampling system that is both protective of miner's health and feasible. Unfortunately the final rule does not meet this test. If implemented as planned next February the rule will lead to

significant disruptions across the underground industry at a time when it can least be afforded – without any benefit to miners health.

We look forward to your response.

Sincerely,

Bruce Watzman

Feasibility of Respirable Dust Rule Requirements

Feasibility of February 2016 Respirable Dust Rule Requirements

- Even though MSHA defines rock dust a **"nuisance"** dust, MSHA has historically never considered the impact of airborne rock dust into respirable dust compliance determinations. Rock dusting has always had an effect on respirable dust sampling, but under the previous rule, mine operators could effectively manage and schedule both respirable dust sampling, as well as rock dusting, so that the respirable dust samples were minimally contaminated.
- Phase 3 of the new respirable dust rule, which becomes effective in February 2016 eliminates this scheduling option from mine operators, and MSHA has created competing regulations which are **not feasible**. Respirable dust samples **will be** contaminated with airborne rock dust, and mine operators will be unfairly penalized for what MSHA considers a nuisance dust.

Feasibility of February 2016 Respirable Dust Rule Requirements

- The new rule which takes effect in February 2016 is not feasible:
- On a typical underground working section, operators will have to sample approximately 60 consecutive production shifts per quarter with Personal Dust Monitors (PDM) compared to the current requirements of 5 samples every bi-monthly period, which effectively leaves no time to rock dust these areas without contaminating the samples.
- Exacerbating this conflict, MSHA has increased scrutiny on rock dusting, often conducting impact inspections focused solely on rock dust compliance.
- The most critical flaw in the new rule requires an operator to immediately implement corrective actions, which may include stopping production, when the PDM indicates overexposure. This requirement disregards possible contamination by rock dust.

Definition of Coal Mine Dust

- The definition of coal mine dust originally published in June 1992 in the *Review of the Program to Control Respirable Coal Mine Dust in the United States, Report of the Coal Mine Respirable Dust Task Group* states: "**Coal mine dust is produced when material is extracted from the coal seam by drilling, blasting, and cutting , and during loading and transporting of that material from the mine**."(1)

- The Department of Labor Benefits Relations Board's Black Lung Deskbook has definitively defined the terms in Part II (A)(2). This states " The terms "**coal dust**" as found in 30 U.S.C. §902(d), 20 C.F.R. §§725.101(a)(26), 725.491, 725.492, and "**coal mine dust**", as found in 20 C.F.R. §725.202(a)**, both refer to airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine. There is no distinction between the two terms**."(2)

(1) MSHA-2010-007-0211 dust task force.pdf, Page 9
(2) Department of Labor, Benefits Review Board, Black Lung Deskbook, Part II, (A)(2).

Revised Definition of Coal Mine Dust

- Respirable coal mine dust is revised in the Preamble to the recent Final Rule as: "**Any respirable dust in the mine atmosphere is considered respirable coal mine dust** to which miners are exposed and, when measured, is counted for determining compliance with the respirable dust standard." (3)

- MSHA's own CPDM training certification presentation points out that the CPDM gives the ability to find dust generation problem areas quickly but also states that it "**measures concentration of respirable dust without regards to composition**." (4)

- MSHA's new respirable dust rule conveniently revised the interpretation of coal mine dust, which conflicts with the definition historically accepted by the Black Lung Benefits Review Board and the 1992 Report of the Coal Mine Respirable Dust Task Group.

- The variances in the two definitions created an issue when operators attempt to comply with both rock dusting requirements and respirable dust sampling requirements.

(3) Federal Register/Vol. 79, No. 84, Page 24866
(4) MSHA CPDM training presentation, slide 34.

Existing MSHA Requirements for Rock Dusting

- 30 CFR 75.402 states in pertinent part that …All underground areas of a coal mine shall be rock dusted to within 40 feet of all working faces….All crosscuts that are less than 40 feet from a working face shall also be rock dusted.
- 30 CFR 75.403 states in pertinent part that …Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 80 percent.

Existing MSHA Requirements for Rock Dusting

- In addition, MSHA PIB No. P10-18, issued on September 10, 2010 reiterates the expectations for rock dusting.
- It states in part that…the effective application of rock dust is essential to protect miners from the potential of a coal dust explosion. It also states in part that…areas downwind of belt transfers, the returns of active sections, tailgates of longwalls, and the bleeder entries often require continuous rock dusting with bulk dusters, trickle dusters or high-pressure rock dusting machines to maintain the required incombustible content levels and suppress float coal dust accumulations. Mine operators should use mechanical rock dusters on the working sections and in the return entries of these sections to maintain compliance. Also, mine operators should use bulk dusters on a regular basis in other areas of the mine to assure compliance and maintain the required incombustible content of total dust in all accessible areas.

Existing MSHA Requirements for Rock Dusting

- NIOSH is currently recommending rock dust with a smaller particle size in order to better propagate the dispersion of the rock dust into the mine atmosphere in the event of a mine explosion to prevent the explosion from propagating, this increases the already present amount of respirable dust in the rock dust that is being applied.
- When asked about the respirable fraction of rock dust and the impact on respirable dust samples, MSHA answered and published in their "Frequently Asked Questions," "Mine operators should obtain from suppliers rock dust that has as little respirable size particles as possible….." This conflicts directly with the explosion containment properties that rock dust is intended for.

Increased MSHA Scrutiny on Compliance with Rock Dusting Requirements

- MSHA continues to conduct impact inspections and collect more rock dust samples than ever before.
- Mine Example #1 – 472 rock dust samples collected during an impact inspection. (3 citations – 71%, 72% and 78%)
- Mine Example #2 – 40 rock dust samples collected (4 citations – 69%, 77%, 77% and 79%)
- Mine Example #3 – 41 rock dust samples collected (0 citations)
- Mine Example #4 – 34 rock dust samples collected (0 citations)
- Mine Example #5 – 18 rock dust samples collected (0 citations)

Comparison of Existing and Future Requirements

Current Respirable Sampling Requirements

Operator Sampling Schedule:

- Five samples taken on consecutive production shifts or days each bimonthly cycle
- Sampling utilizing CMPDSU

Sampling Requirements Under the New Rule

Operator Sampling Schedule:

- 15 Samples taken on each DO and ODO to be ran consecutively each quarter, equating to a minimum of 60 samples taken on a typical continuous miner section without taking into consideration any issues that may void a sample and require additional sampling.
- Sampling will utilize the CPDM

Current Rockdusting Practices

- Currently able to meet both standards by scheduling sampling and rockdusting cycles during periods samples are not taken to prevent sample contamination by rock dust.
- Rockdust ***is applied*** to the section in bulk by mechanical means before and after sampling is conducted to prevent sample contamination with rock dust during the 5 sample shifts each bimonthly cycle.
- Outby dusting in bulk and with mechanical means such as "trickle dusters" ***is scheduled*** to prevent contamination of samples during periods when sampling is not conducted in order to prevent contamination of samples with rock dust during the 5 bimonthly samples.

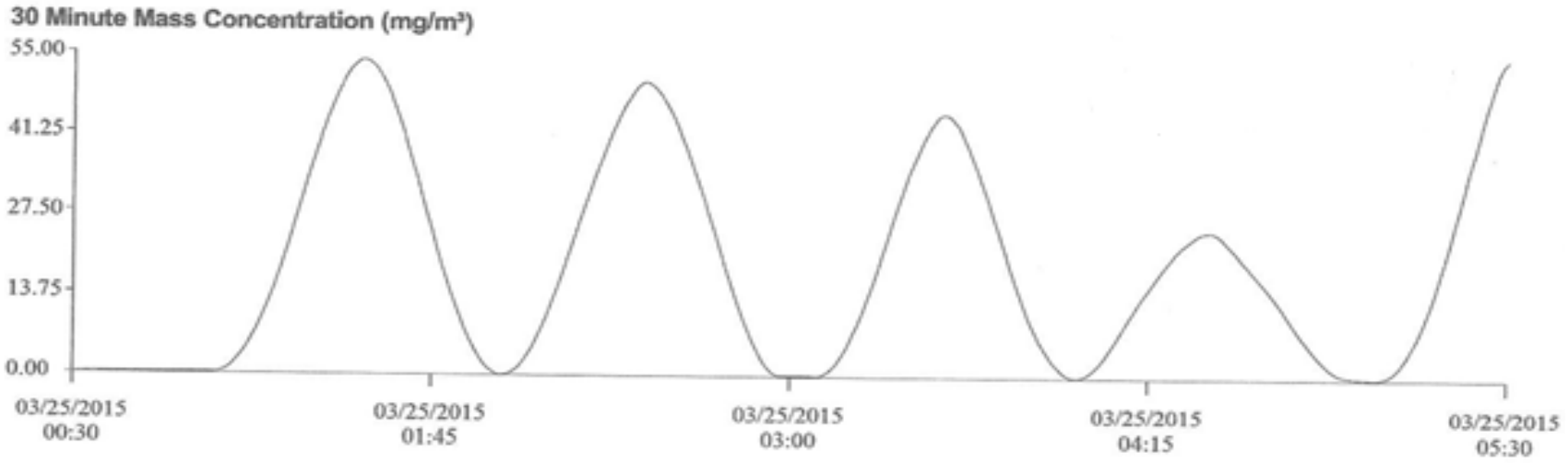
Rockdusting Under the New Rule

- Will be unable to schedule sampling and rockdusting cycles during periods samples are not taken to prevent sample contamination by rock dust.
- Rockdust ***cannot be*** applied to the section in bulk as required to meet the standard during any shift sampling is occurring (**minimum 60 shifts**) without contaminating the sample due to the CPDM not having the ability to distinguish between coal dust and required rock dust
- Outby dusting in bulk and with mechanical means such as "trickle dusters" ***cannot be*** scheduled during periods when sampling is being conducted to prevent contamination of samples with rock dust (**minimum of 60 shifts**).

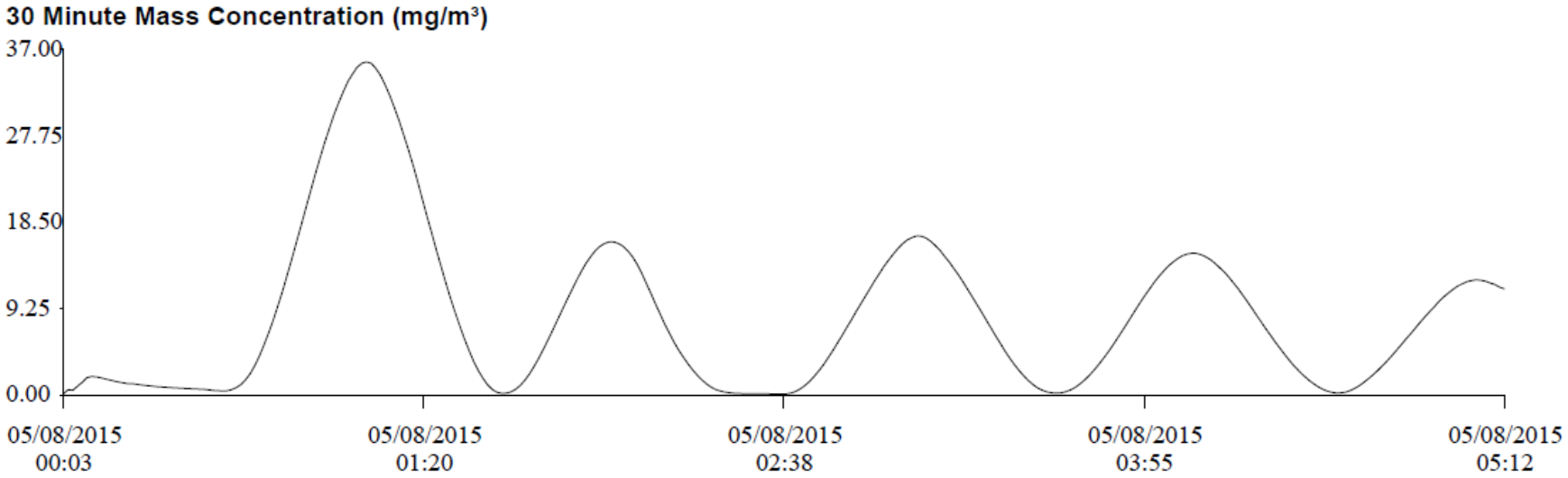
Operators conducted underground tests of PDMs when exposed to airborne rock dust generated by a trickle duster in areas outby the working section

- Multiple samples taken at two different underground mines
- Samples taken both upwind and downwind of trickle duster
- Duster was operated on and off in 30 minute cycles
- Sampling conducted on non-production shift with belts not operating to minimize influence of any coal dust
- Sampling was conducted with PDM3600 units
- PDMs were cleaned and filters changed according to manufacturer's recommendations.
- Filters from each sample were kept and sealed.
- Sample results show obvious spikes due to rock dust well above compliance limits with graphs showing fluctuations that coincide with the on/off cycles of the trickle rock duster.
- Sample results have been shown to be reproducible under a variety of conditions.

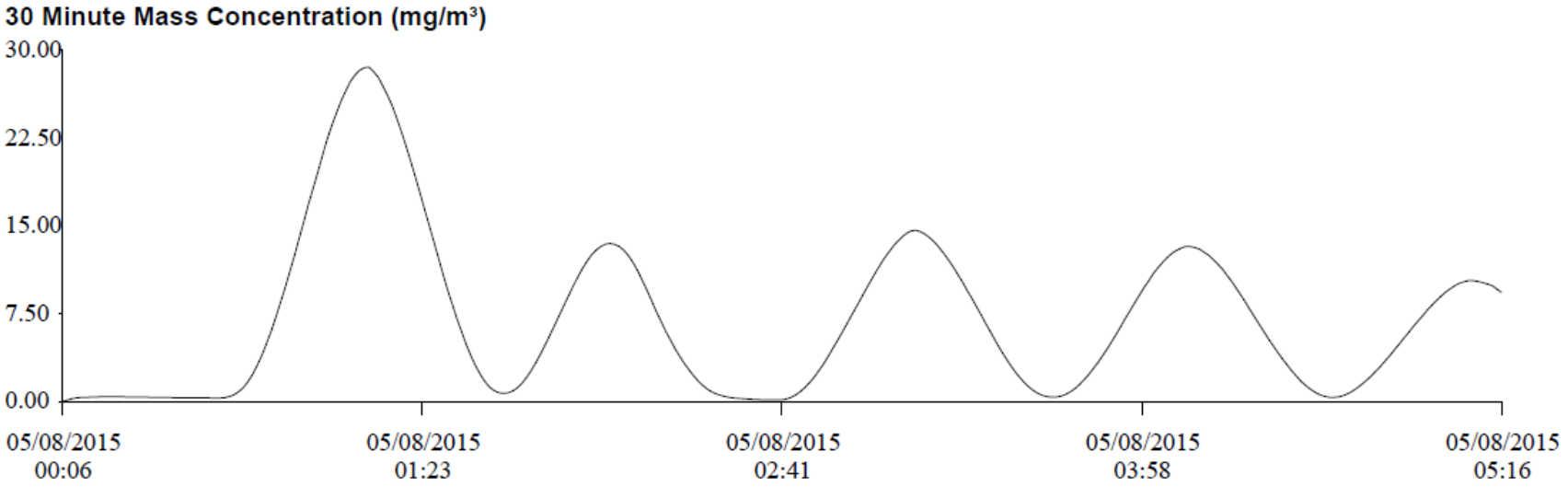
The following slides are results of the samples taken and the used filters from the sampling units.



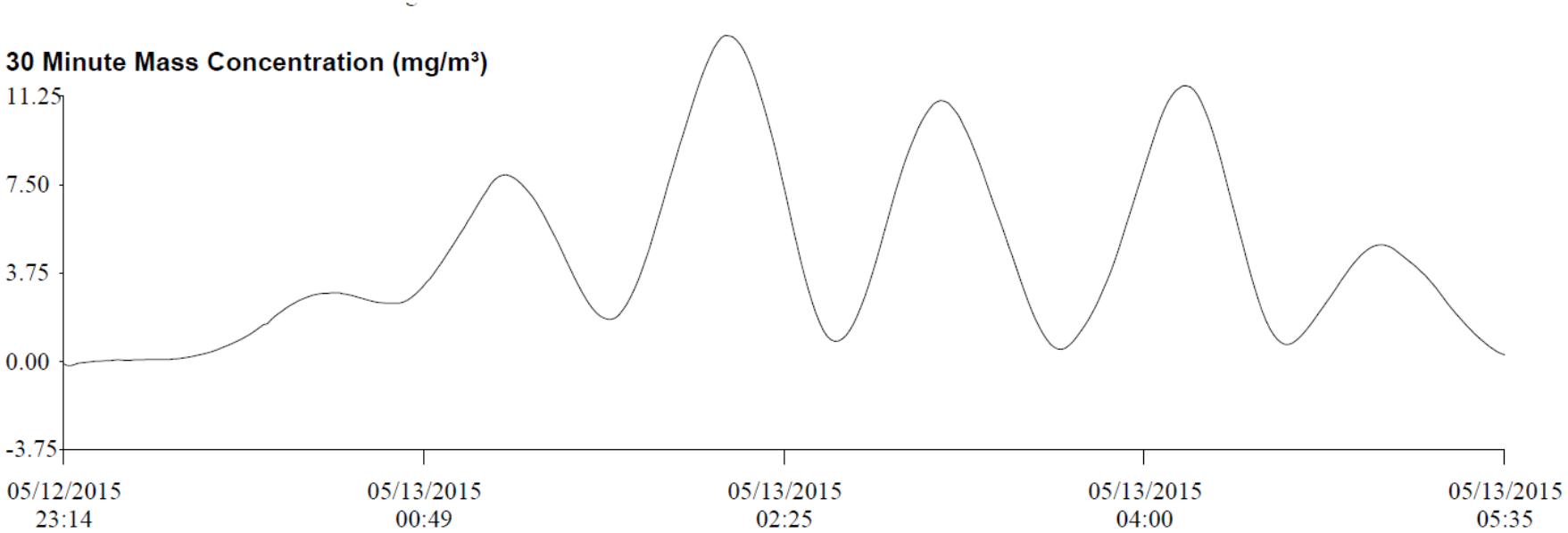
- 50’ outby duster
- EOS concentration – **20.720 mg/m³**
- Conveyor belts off
- Duster cycled on and off on 30 minute intervals
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.202 mg/m³



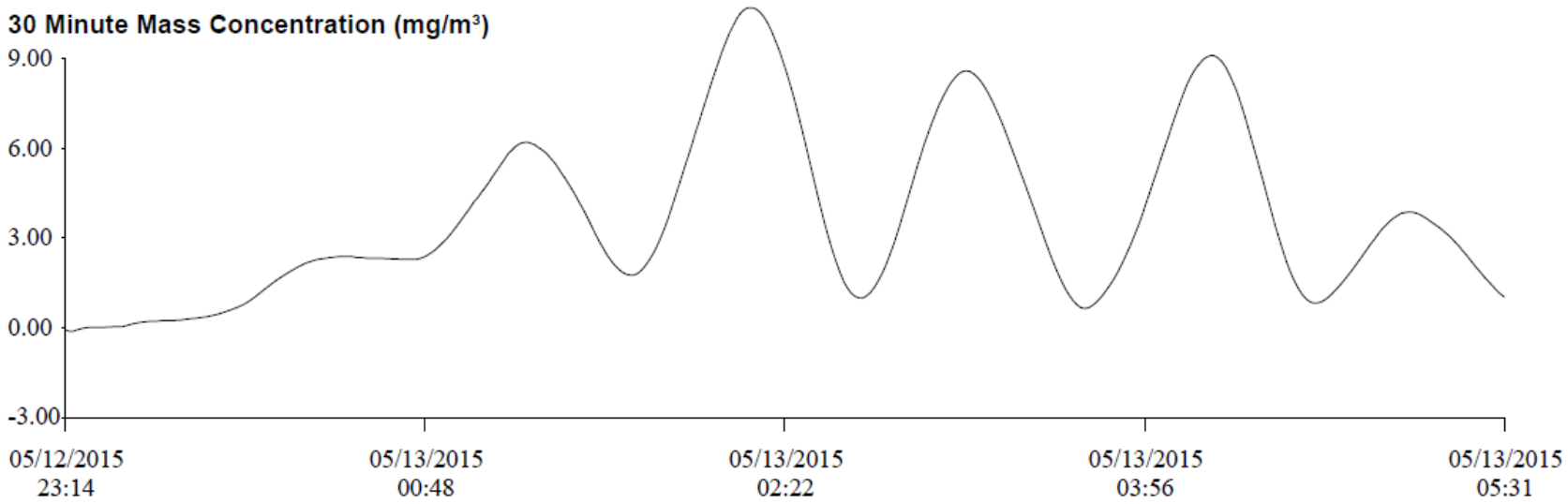
- 500’ outby duster
- EOS concentration – **8.788 mg/m³**
- Conveyor Belts off
- Duster cycled on and off on 30 minute intervals
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.202 mg/m³



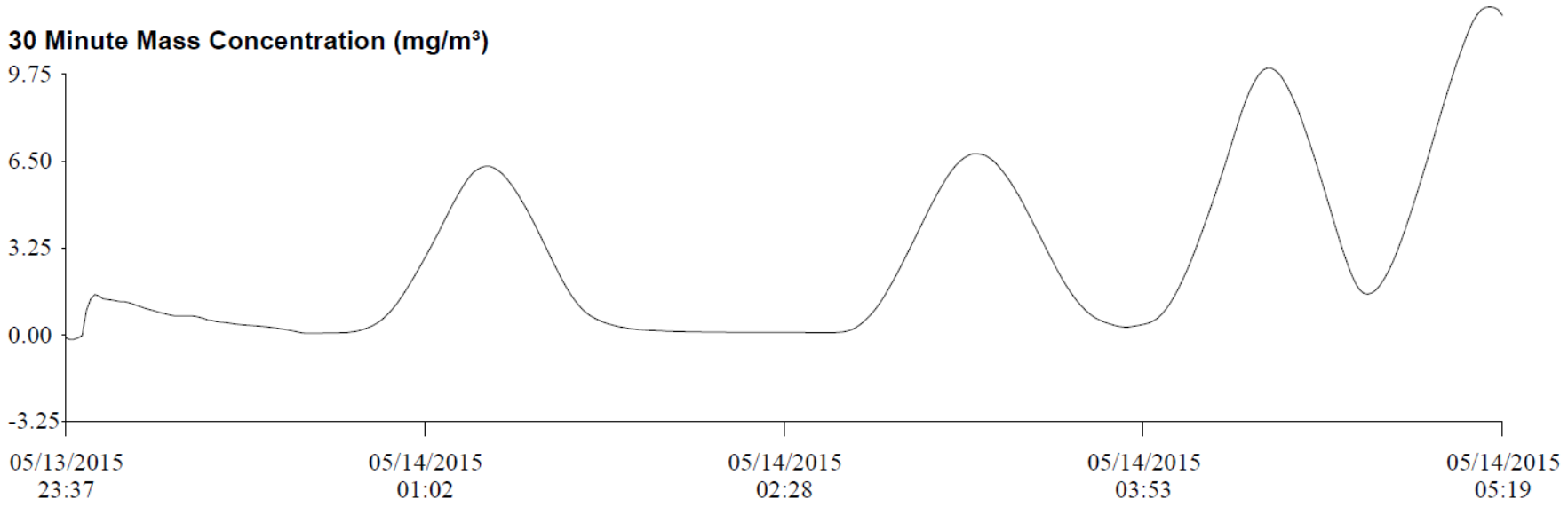
- 1000’ outby duster
- EOS concentration – **7.351 mg/m³**
- Conveyor belts off
- Duster cycled on and off on 30 minute intervals
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.093 mg/m³



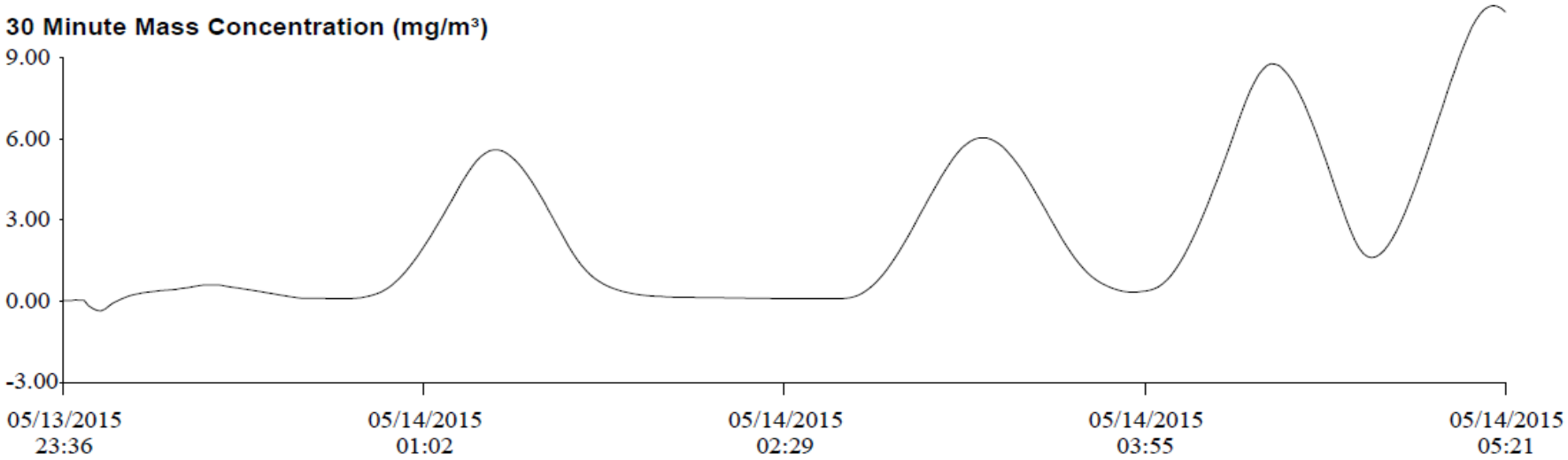
- 1500’ outby duster
- EOS concentration – **4.481 mg/m³**
- Conveyor belts off
- Duster cycled on and off on 30 minute intervals
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.742 mg/m³



- 2000’ outby duster
- EOS concentration – **3.705 mg/m³**
- Conveyor belts off
- Duster cycled on and off on 30 minute intervals
- EOS concentration – 3.705 mg/m³
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.742 mg/m³

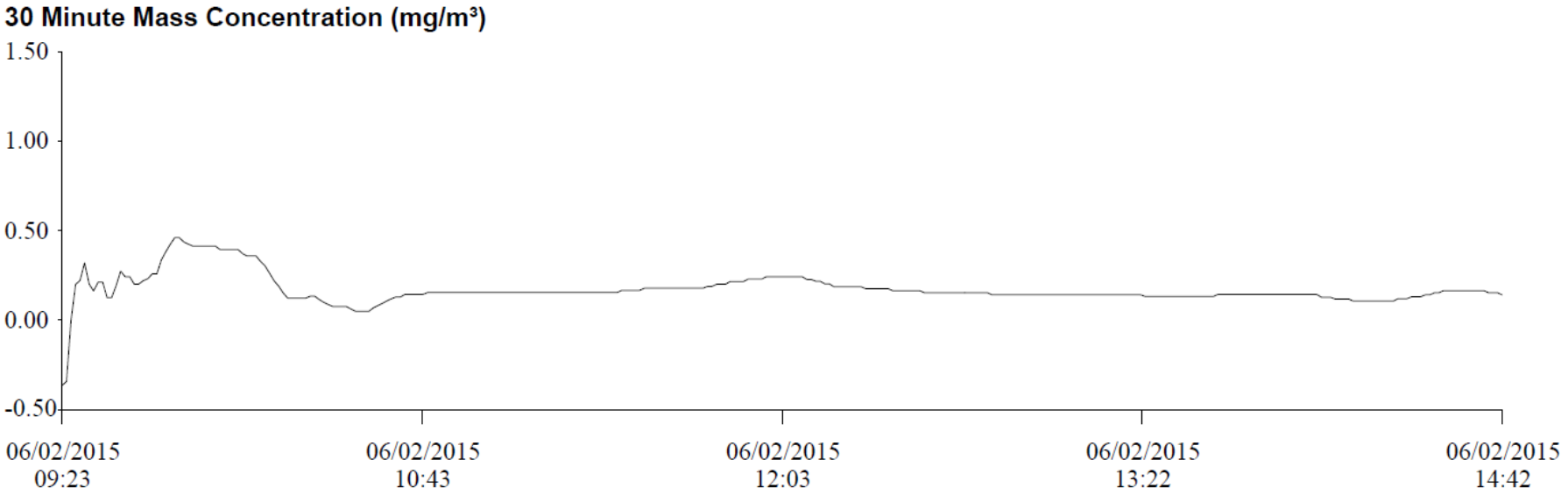


- 2500’ outby duster
- EOS concentration – **3.220 mg/m³**
- Conveyor belts off
- Duster cycled on and off on 30 minute intervals (other than during maintenance power outage from 01:20 – 02:20.
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.127 mg/m³

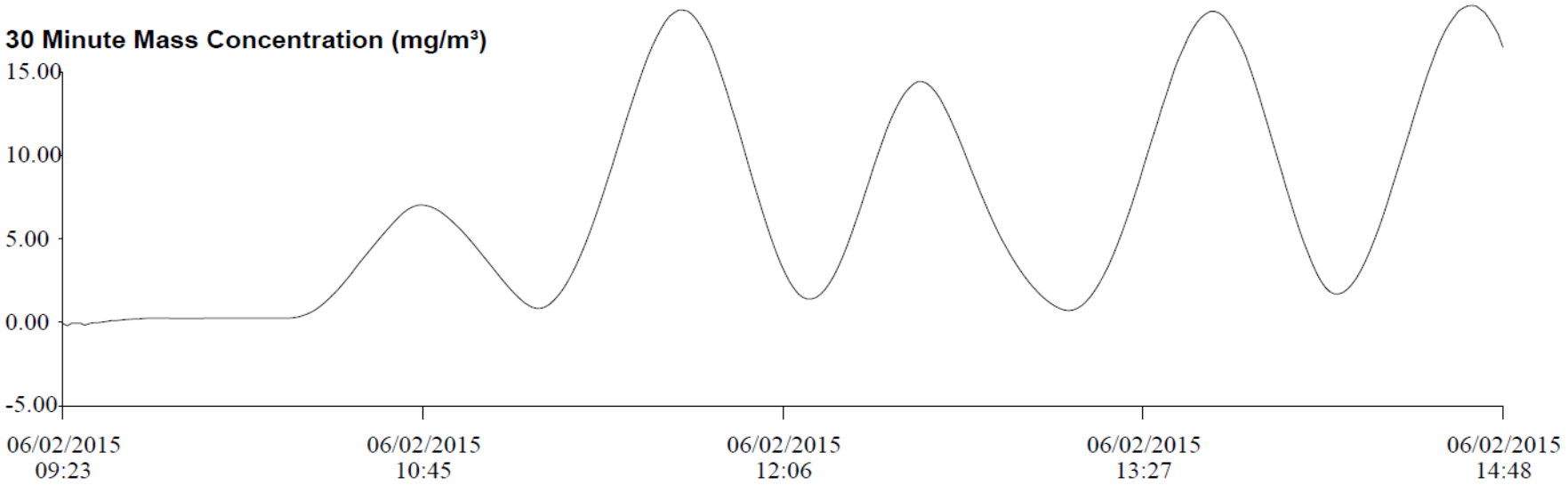


- 3000’ outby duster
- EOS concentration – **2.865 mg/m³**
- Conveyor Belts off
- Duster cycled on and off on 30 minute intervals (other than during maintenance power outage from 01:20 – 02:20.
- Control PDM was placed inby duster 250’
  - Control EOS concentration – 0.127 mg/m³

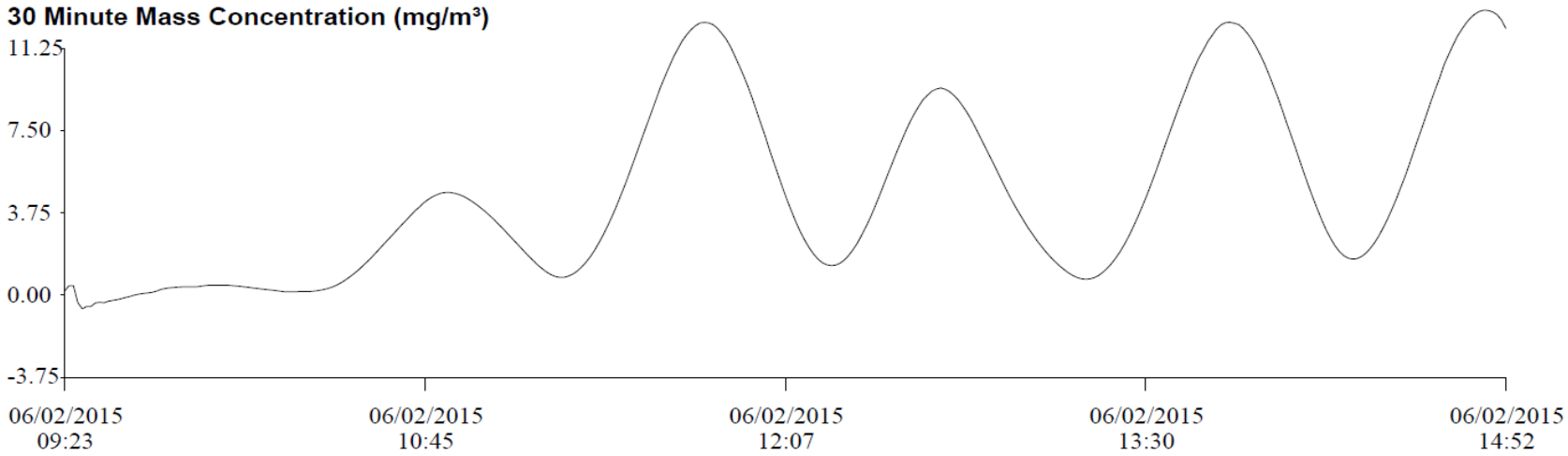
- **Observations made up to 10,000 ft. outby duster after sampling was complete showed visible rock dust in the mine atmosphere.**



- 250’ inby duster
- PDM ran alongside CMPDSU, independent lab provided CMPDSU results
- PDM EOS concentration – **0.172 mg/m³**
- CMPDSU concentration **– 0.151 mg/m³**
- Conveyor belts running, mine in production
- Duster cycled on and off on 30 minute intervals



- 2000’ outby duster
- PDM ran alongside CMPDSU, independent lab provided CMPDSU results
- PDM EOS concentration – **7.562 mg/m³**
- CMPDSU concentration – **4.112 mg/m³**
- Conveyor belts running, mine in production
- Duster cycled on and off on 30 minute intervals



- 3000’ outby duster
- PDM ran alongside CMPDSU, independent lab provided CMPDSU results
- PDM EOS concentration – **5.104 mg/m³**
- CMPDSU concentration – **3.488 mg/m³**
- Conveyor belts running, mine in production
- Duster cycled on and off on 30 minute intervals

PDM Filter Examples from Test Samples

Example 1

250’ Inby Rock Duster
EOS – 0.127 mg/m³

Example 2

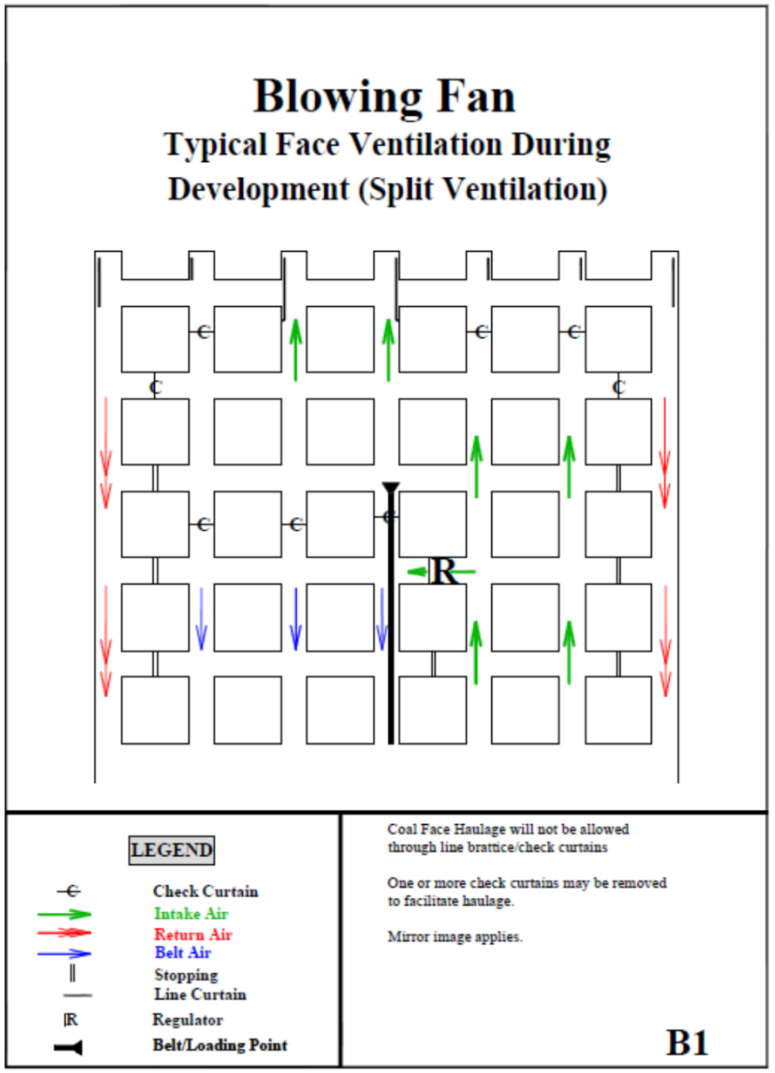
1000’ Outby Rock Duster
EOS –7.351 mg/m³

Example 3

2500’ Outby Rock Duster
EOS – 3.220 mg/m³

Operators conducted underground tests of PDMs on equipment operators at a producing coal mine

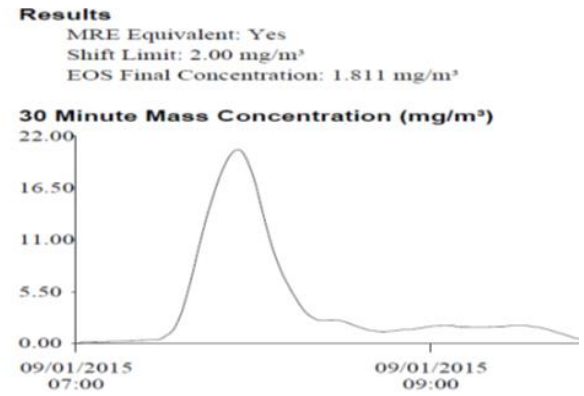
- Dust parameter exams were completed before mining began to include:
  - Proper ventilation
  - Water Sprays
  - Roof bolter vacuum
- Samples conducted by person certified in sampling with both CPDM and CPDMSU
- CPDM Sampling conducted with new PDM-3700 units maintained to manufacturers specifications.
- CPDMSU Gravimetric samples ran concurrently with CPDM and analyzed by an independent 3rd party lab.
- Multiple samples conducted on various occupations including DO's and ODO's.
- Sample results have been shown to be reproducible under a variety of conditions.

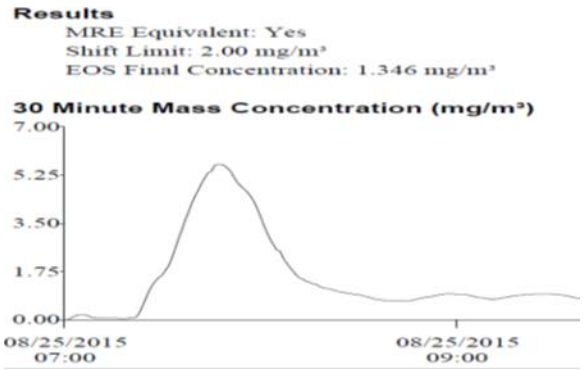


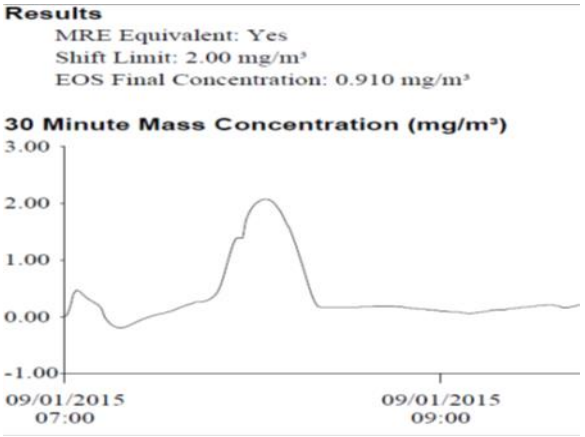
Ventilation setup for operation sampled

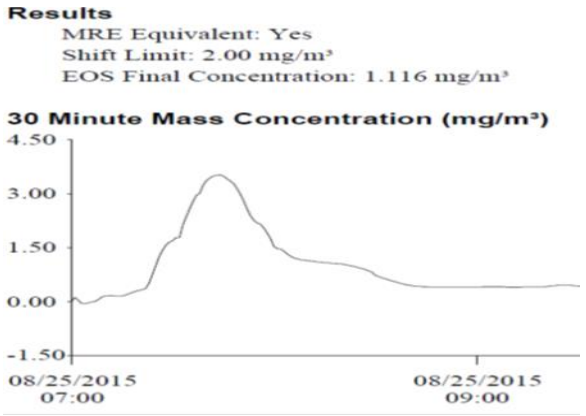
The following slides are results of the samples taken.

Rock Dust Contamination of PDM Samples on the Working section









Employees arrived on section at 7:45 a.m., approximately 1 hour after section had been bulk rock dusted.

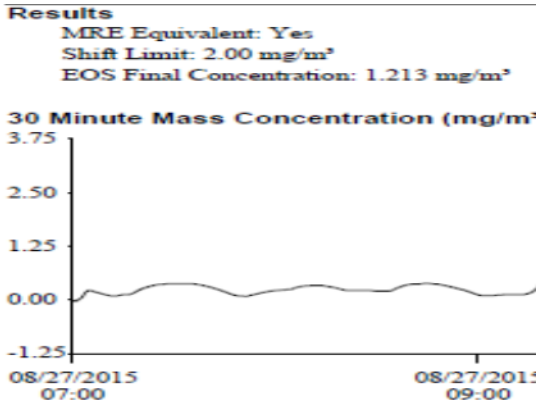
Employees arrived on section at 7:30 a.m., approximately 1 hour after section had been bulk rock dusted.

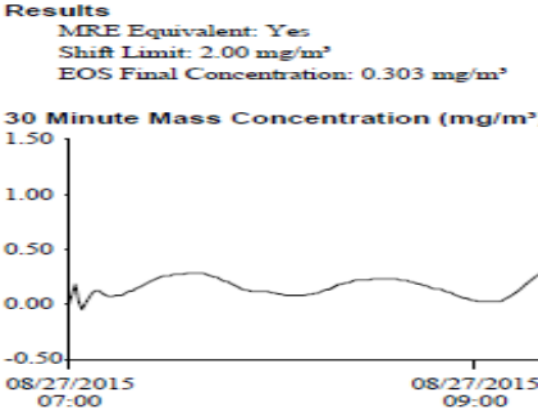
Rock Dust Contamination of PDM Samples on the Working section

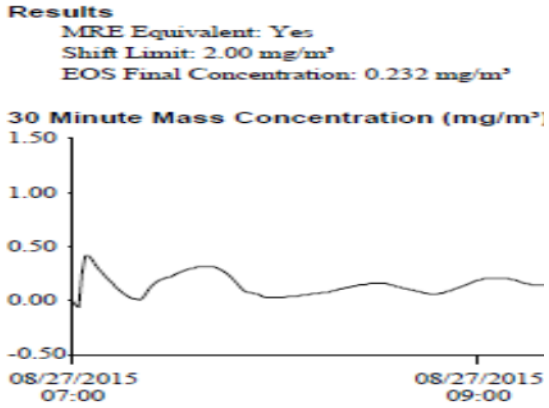
- The previous examples show significant spikes in dust on the PDM prior to production beginning.
- There had been no production on the section at the time of the arrival of crews for a minimum of 5 hours prior to the crew arrival.
- The only dust in the mine atmosphere at the time is rock dust that had been applied by the previous shift in order to meet the 80% incombustible content rule.
- In order to meet compliance under the current 2.0 standard without regards to the composition of dust, one of the operators was only able to make compliance by having almost no dust exposure during the entire 8 hour shift as shown in this example where the EOS (End of Shift) concentration was 1.811 mg/m3.

Rock Dust Contamination of PDM Samples on the Working section

- Questions were posed during testing concerning the initial spikes and are these actually showing contamination of the sample by rock dusting.
- The below PDM chart excerpts show the same section crew arrival when rock dust was not applied during the idle previous shift due to a belt move on the previous shift and compliance standards already being met for dusting.





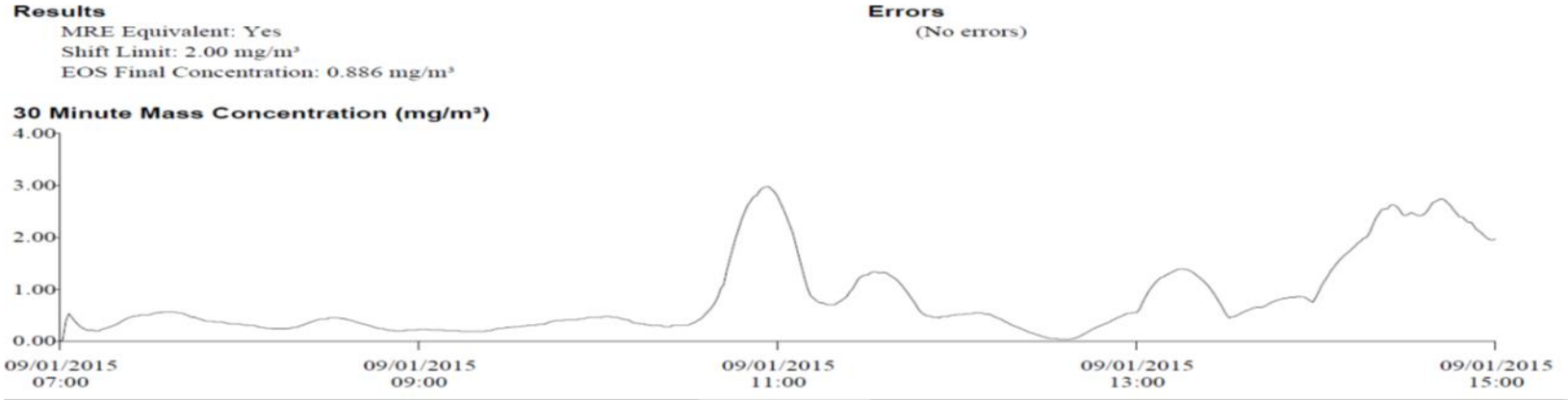


- Employees arrived on section at 7:25 a.m.,
- Section **was not** bulk dusted on previous idle shift.
- Samples were taken on DO and ODOs on section.
- No spike noted at beginning of shift as seen previously when section had been dusted

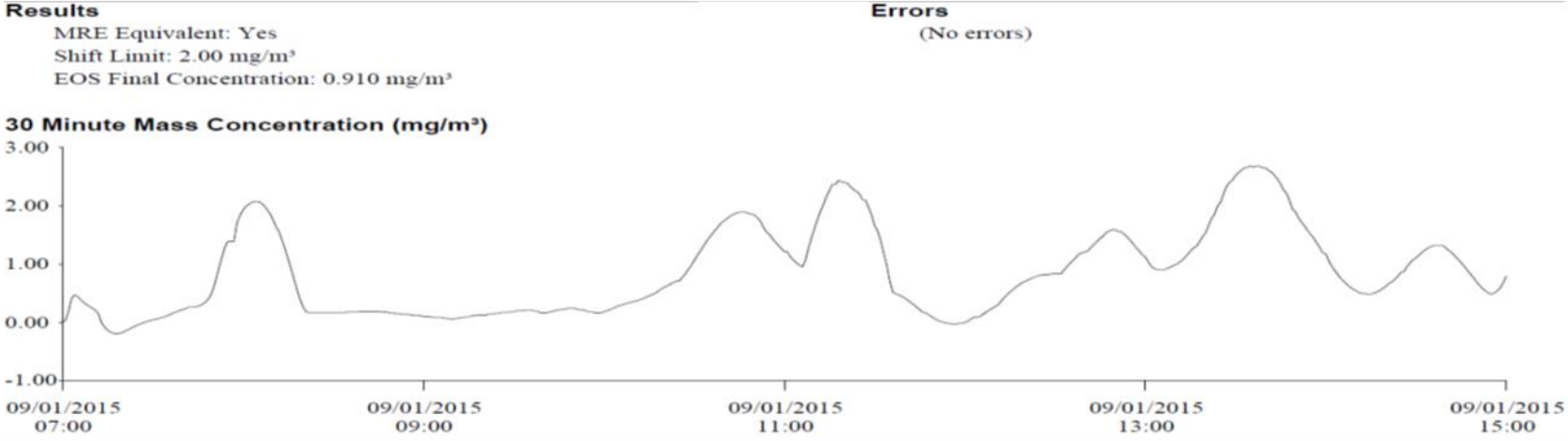
Rock Dust Contamination of PDM Samples on the Working section

- Samples taken on Scoop Operator (top) and Roof Bolter Operator (bottom).
- Scoop was parked outby section at beginning of shift and was not affected by bulk rock dusting of section prior to arrival.
- Roof bolter was parked on the working section and received contamination from bulk rock dusting prior to the arrival of crew, indicative of spike at the beginning of the shift.
- Approximately 10:30 am, the scoop operator began rockdusting the adjacent headings to the location the roof bolter was working in order to meet compliance standards for rock dust and prepare for the next mining cycle. The spikes correspond to respirable dust exposure by the roof bolter operator and indicates they were contaminated by the rock dust application as they advanced to each adjacent entry.

Scoop



Roof Bolter



Findings

- Rock dusting significantly affects the PDM samples
- There is currently no method to quantify the amount of coal dust versus the amount of rock dust being applied in the mine during a sample run even though in a MSHA press release dated April 23, 2015 the PDM is referred to as “cutting –edge technology developed to provide real-time information about dust levels. It also allows miners and operators to identify problems and make necessary adjustments.”
- MSHA currently classifies rock dust as a “nuisance dust” and allows a PEL of significantly higher standard than that currently and proposed for respirable dust in coal mines.
- Under current regulations, operators are required to maintain at least 80% non-combustible content in all areas. In order to meet this compliance standard MSHA recommended mechanical means of dusting in PIB P10-18.
- Under the new sampling rule, it will be impossible to comply with both the rock dusting and respirable dust standard due to the susceptibility of the PDMs to inadvertently measure rock dust on the same standard as coal dust.

Accuracy Issues

- We have also identified accuracy issues when comparing the PDM units with gravimetric sampling units.

- During underground testing to evaluate the effects of rock dust, gravimetric and PDM units were placed side by side at three locations in the belt entry with the belts running.

- While evaluating the effects of a trickle duster on the PDMs and gravimetric units, significant variations were noted in the results obtained.

- The side by side tests indicate that the rock dust continues to drastically contaminate the results obtained by the PDM, and extreme variations existed when comparing the results obtained by both instruments when exposed to the same mine environment.

Conclusions

- It is obvious that the upcoming respirable dust sampling requirements are not feasible. Even though MSHA has designated airborne rock dust as a "nuisance" dust, when the respirable dust rule was crafted, no regard was given to the fact that rock dust will contaminate respirable dust samples.
- The rule does not allow the operator adequate opportunity to comply with both rock dusting and respirable dust sampling regulations.
- The rule also requires immediate corrective actions when respirable dust noncompliance is determined by the PDM, without regard to whether the noncompliance is falsely caused by rock dust.

Conclusions

- Testing was also conducted to compare the accuracy of the PDM unit and the gravimetric unit. Even when exposed to the same respirable dust levels underground, extreme variations in the results were obtained.
- A hold on the February 2016 implementation date should be required until a feasible alternative can be evaluated that will provide the desired protection for all miners.
- CPDM is an excellent engineering tool allowing us to pinpoint the dust generation sources, but should not be used for compliance determinations.
- Although the CPMDSU (Gravimetric Sampling Unit) is also susceptible to contamination from rock dusting as is the CPDM, the new technology in the CPDM allows us the opportunity to determine the source and whether the source is harmful dust generated from mining or the nuisance dust from rock dust contamination of the sample when used as an engineering tool.

Congress of the United States
Washington, DC 20515

September 21, 2015

The Honorable Joseph Main
Assistant Secretary
Mine Safety and Health
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

Dear Assistant Secretary Main:

The report accompanying the House Fiscal Year 2016 Departments of Labor, Health and Human Services, and Education appropriations bill contained language regarding concerns with the Mine Safety and Health Administration's Continuous Personal Dust Monitor (CPDM) regulation.[1] We share your concern about the safety and health of our nation's miners and support the goals to (1) develop protocols that protect miner health; (2) develop a mechanism to ensure that mines will not have to halt production when sampling projections indicate end-of-shift exceedance of the applicable standard; and (3) ensure mine operators are not incorrectly cited for noncompliance with the respirable coal mine dust standard when particles other than coal dust may have been collected in the samples.

We remain concerned that the agency, in issuing the new coal mine dust regulation, has not sufficiently considered the impact of new rock dust composition within the context of the overall changes promulgated. Rock dust has been, and remains, an important feature of explosion suppression. However, the changes to the CPDM regulation occurred prior to the rock dust remix recommended by the National Institute for Occupational Safety and Health to improve its effectiveness as an explosion suppressant. Any testing related to the regulation has not taken into consideration smaller rock dust particles.

Additionally, the sampling frequency mandated by the new rule in conjunction with the new mandated sampling technology increases the likelihood for operators to be cited for

[1] "The Committee is aware that rock dust may be used in mining operations to suppress coal dust. The Committee notes that this use may create the potential for the new Continuous Personal Dust Monitors, required by MSHA, to mischaracterize rock dust as coal dust, thus subjecting operators to enforcement actions where no overexposures to coal dust exist. The Committee notes that an extension on enforcement of the regulation would provide time for MSHA to complete its current review of this problem and design protocols to prevent the potential for inaccurate compliance determinations."

contaminated, but otherwise compliant, samples. It appears the sampling technology is not yet proven to effectively distinguish between rock dust and coal dust, meaning operators may be incorrectly cited for noncompliance based on false readings of the mine environment. Further, it is unclear if the new rock dust will be more prone to become airborne in the mine environment, increasing the possibility of flawed results.

We request you provide the relevant committees with information detailing how the agency is working to ensure the sampling technology is capable of accurately distinguishing between coal and rock dust, as well as the steps you are taking to address concerns that mine operators may be incorrectly cited for otherwise compliant samples. Additionally, we ask MSHA to provide the relevant committees with the results of any studies examining the interaction of rock dust and the CPDM. Thank you for your attention to our comments. We respectfully request your response by October 19, 2015.

HAL ROGERS
Chairman
Committee on Appropriations

JOHN KLINE
Chairman
Committee on Education and Workforce

TOM COLE
Chairman
Subcommittee on Labor, Health and Human Services, Education and Related Agencies

TIM WALBERG
Chairman
Subcommittee on Workforce Protections

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 2

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South
Arlington, Virginia 22202-5452

OCT 19 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations

The Honorable John Kline
Chairman
Committee on Education and Workforce

The Honorable Tom Cole
Chairman
Subcommittee on Labor, Health and Human Services, Education and Related Agencies

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections

U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rogers, Chairman Kline, Chairman Cole, and Chairman Walberg:

Thank you for your letter of September 21, 2015, regarding the Mine Safety and Health Administration's (MSHA's) final rule, *Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors* (79 FR 24814) (dust rule). In your letter, you express concern that MSHA, in issuing its final rule on respirable coal mine dust, did not sufficiently consider the ongoing examination of the composition of rock dust by the National Institute for Occupational Safety and Health (NIOSH), including whether possible changes in particle size and mix will affect test results. You also express concern that the increased sampling frequency and new sampling technology will increase the likelihood that mine operators will be cited for samples that are contaminated by rock dust but are otherwise compliant with the new coal mine dust standards.

We appreciate your support for our shared goal of better protecting miners' health. With tens of thousands of known deaths from pneumoconiosis, over $45 billion in compensation paid to miners and their families, and miners still getting the disease, actions are needed to end this unnecessary plague on miners. The purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent the disease. The controls in place prior to the rule's implementation last year simply failed to protect miners from the horrific disease.

Regarding your concern that possible future changes in rock dust composition and particle size may affect operators' ability to comply with the dust rule, we note that the NIOSH research on particle size and mix is ongoing and has not concluded. MSHA is involved in that research, as a

member of the on-going NIOSH Rock Dust Partnership. Any recommendation from NIOSH to change the particle size and mix of rock dust would require notice-and-comment rulemaking to revise MSHA's rock dusting standard before taking effect. This process would allow for thorough public participation and full consideration of any operator concerns, including the possible impact of new rock dusting standards on operators' ability to comply with the dust rule.

Regarding your second concern – that changes in sampling frequency and new sampling technology may increase the rate of incorrect citations – our experience to date is that these concerns will not be borne out. MSHA's analysis of over 41,000 samples from underground coal mines since the new rule took effect in August 2014 shows overwhelming compliance – approximately 98 percent of operators' underground coal mine dust samples were at or below the respirable dust standards. Operators' average concentrations for occupations with the greatest dust exposures are at a new record low of 0.65 milligrams per cubic meter of air (mg/m^3), which is far below the 1.5 mg/m^3 standard that will become effective on August 1, 2016. The dust controls that were used at these mines worked to control miners' exposures despite claims by some operators that compliance was not achievable.

In addition, this sampling was conducted with approved gravimetric sampling devices during normal production shifts. To comply with MSHA's existing rock dust standards, rock dusting would have occurred at various times during these normal production shifts. That dust exposures were nonetheless well below the respirable dust standards during this testing period indicates that the increased sampling frequency will not lead to a higher rate of contaminated sampling. Additionally, there is further evidence that rock dusting has not adversely affected sampling results. The average of respirable dust concentrations in occupations with the greatest exposure has dropped year-after-year since 2010 when the total incombustible content of rock dust increased 15 percent, from 65 to 80 percent.

To facilitate compliance, we implemented the final rule with phase-in periods. The first phase, which began on August 1, 2014, closed a number of loopholes to more accurately represent the respirable dust that miners were exposed to over the course of a shift. Phase II increases the amount of sampling to assure that protections from the unhealthy coal mine dust are in place. The existing bimonthly sampling only monitors the mine atmosphere for about five percent of miners' exposure, which is not sufficient to protect miners from the disease. Specifically, Phase II will add the Continuous Personal Dust Monitor (CPDM), a new state-of-the-art tool that went through years of research and testing before approval. The CPDM will allow miners and mine operators for the first time to monitor, in real time, miners' exposures to respirable dust. With this real-time information, miners and mine operators can make adjustments during the course of a shift to reduce exposures to coal mine dust. The gravimetric sampling device used since the 1969 Federal Coal Mine Health and Safety Act (Coal Act) has left miners working in unhealthy dust for days while the samples collected during a shift are analyzed; the use of the new CPDM will eliminate that delay. Collectively, these protections are critical to improving miners' health and preventing pneumoconiosis.

NIOSH's initial tests of the CPDM were conducted at mine sites that represented various areas of the country, types of mines, ventilation systems, and types of equipment, and subsequent testing continued to demonstrate that the CPDM can accurately and precisely measure respirable

coal mine dust in the mine environment.[1] Based on the results of these NIOSH studies, MSHA and NIOSH published a final rule in April 2010 that established the approval requirements for the CPDM (75 Fed. Reg. 17512).

The CPDM, like the existing gravimetric sampler, does not distinguish between the constituents of respirable dust measured at coal mines. The gravimetric sampler has collected coal mine dust in the same manner since the 1969 Coal Act, and the CPDM does not change this approach. As long as properly maintained dust controls are used, mine operators who will be required to use the CPDM for dust sampling should see no increase in the number of samples that exceed MSHA's dust standards due to the type of sampling device used.

Moreover, as explained above, the CPDM has the advantage of providing mine operators and miners with real-time sampling results. These real-time sampling results will enable them to identify problems, assess the effectiveness of dust controls in different mining conditions, and make adjustments to controls or mining systems. By taking immediate action to correct dust conditions, operators can better protect miners from overexposure to all respirable coal mine dust. NIOSH's in-mine tests with the CPDM sampled all mine dust, like the gravimetric sampler under the prior rule. The samples would have included rock dust. NIOSH studies that verify the performance of the CPDM in underground coal mine environments are enclosed.

Your second concern is also unfounded because the use of effective engineering controls in the outby areas of a mine also reduces the need for frequent rock dusting during production. Mine operators may use a variety of controls consisting of scrapers, conveyor belt alignment, air velocity, and water sprays during coal production to keep airborne coal dust to a minimum. Keeping dust levels down means less rock dust is needed. Even when rock dusting occurs during production, maintaining the dust concentration level in a mine is achievable using "best practices" to control dust. Based on MSHA's sampling data, the Agency does not believe that rock dusting has contributed to an increase in overexposures.

MSHA has offered assistance to operators leading up to and throughout the dust rule phase-in, and that assistance will continue. MSHA provided extensive assistance to mining industry stakeholders across the country in the implementation of the rule and has a standing offer to assist mine operators who may need additional compliance assistance or information on engineering controls[2]; one operator responded to our offer to provide in-mine assistance. I

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[1] See Volkwein, J.C., R.P. Vinson, L.J. McWilliams, D.P. Tuchman, and S.E. Mischler. June 2004. Performance of a New Personal Respirable Dust Monitor For Mine Use. CDC Report of Investigation 9663; Volkwein, J.C., R.P. Vinson, S.J. Page, L.J. McWilliams, G.J. Joy, S.E. Mischler , and D.P. Tuchman. September 2006. Laboratory and Field Performance of a Continously Measuring Personal Respirable Dust Monitor. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, 2006, CDC Report of Investigations 9669; and Page, S., J. Volkwein, R. Vinson, G.Joy, S. Mischler, D. Tuchman, and L. McWilliams, 2008. Equivalency of a Personal Dust Monitor to the Current United States Coal Mine Respirable Dust Sampler. Journal of Environmental Monitoring. These studies are enclosed.

[2] Over an approximate 1½ year period since the final rule was published, MSHA has extended this offer of compliance assistance to the industry at every stakeholder outreach meeting on the dust rule, and at several additional stakeholder meetings held at the Agency's Arlington Headquarters (a total of 18 meetings).

would also urge that you have mine operators concerned about Phase II compliance contact MSHA so that we can assist them.

To assist mine operators in the implementation of the respirable dust rule and to address your concerns regarding rock dusting and the increased sampling frequency, MSHA, in collaboration with the mining industry, will conduct in-mine evaluations to identify and apply best practices for managing rock dusting and respirable dust sampling. MSHA will take appropriate action to address legitimate issues identified.

Again, it is critical that there be more frequent sampling of the mine atmosphere and more immediate awareness of the unhealthy dust, which the new CPDM offers, if miners are to be protected from developing pneumoconiosis. Miners deserve no less.

Thank you for your continued support in improving the safety and health of our Nation's miners.

Sincerely,

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

Enclosures

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 3

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South
Arlington, Virginia 22202-5452

OCT 30 2015

Mr. Bruce Watzman
National Mining Association
101 Constitution Avenue, NW
Suite 500 East
Washington, DC 20001

Dear Mr. Watzman:

Thank you for your letter of October 2, 2015, enclosing an updated PowerPoint (PPT) presentation you submitted previously that presents results of sampling conducted at an underground coal mine to examine the impact of rock dust on compliance sampling using both the new Continuous Personal Dust Monitor (CPDM) and the gravimetric sampler. Your PPT presentation showed that a mine operator conducted underground tests of CPDMs when exposed to airborne rock dust generated by a trickle duster in areas outby the working section. You believe that these results demonstrate that rock dusting significantly affects CPDM samples and that it will be impossible to comply with both the rock dust and respirable coal mine dust standards once the second phase of MSHA's respirable dust rule becomes effective on February 1, 2016.

The CPDM and the gravimetric sampler measure the same thing: total respirable mine dust of any type. This measurement includes any respirable rock dust in the sampled environment. The current rock dust standards have been in place since 2010. Sample results since that time, and especially over the last year, show that rock dust is not currently causing respirable dust compliance problems. It is not clear why sampling using a CPDM would be any different.

The gravimetric sampler has been used to collect respirable coal mine dust in the same manner since the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), and the CPDM does not change this approach. As long as properly maintained dust controls are used, coal mine operators who will be required to use the CPDM for dust sampling should see no increase in the number of samples that exceed MSHA's dust standards due to the type of sampling device used.

The CPDM is a state-of-the-art tool that benefited from years of research and testing with the participation of industry before MSHA and NIOSH published in 2010 a final rule that established the approval requirements for such devices (75 Fed. Reg. 17512, Apr. 6, 2010). This final rule allowed for thorough public participation in the rulemaking process. In 2011, MSHA and NIOSH approved a commercial CPDM as meeting the requirements of 30 CFR Part 74.

The CPDM will allow miners and mine operators for the first time to monitor, in real time, miners' exposures to respirable dust. With this real-time information, miners and mine operators can make adjustments during the course of a shift to reduce exposures to coal mine dust. The gravimetric sampling device used since the Coal Act has left miners working in unhealthy dust for days while the samples collected during a shift are analyzed; the use of the new CPDM will change that.

Your test results, which showed that CPDM measurements exceeded the respirable dust standard when no coal was being produced, confirms what we already know. As has been the case for years, any accurate dust sampler will measure the respirable portion of dust in the mine atmosphere. If a trickle rock duster is operated on and off for 30-minute cycles, sampling downwind of the trickle duster with a gravimetric sampling device will not show obvious spikes due to the intentional dispersion of respirable-sized rock dust particles. However, the CPDM will show these spikes in respirable dust concentrations. The CPDM has the advantage of providing mine operators and miners with real-time sampling results which will enable them to identify problems, assess the effectiveness of dust controls in mining conditions, and make adjustments to controls or mining systems. By taking immediate action to correct dust conditions, operators can better protect miners from overexposure to all respirable coal mine dust.

Your results seem to imply that miners would be assigned to continuously work in the immediate areas where rock dust is applied throughout their shifts. MSHA's experience is that mine operators do not apply rock dust under such conditions. MSHA does not believe that these results demonstrate actual sampling results under the rule, or that it would be impractical or impossible for operators to be in compliance with both the rock dust and respirable coal mine dust standards. Accordingly, your conclusion that your results support a prediction that MSHA will issue invalid citations after the February 1, 2016 effective date for Phase II of the respirable dust rule is unfounded.

You also state that in-mine testing demonstrates a lack of correlation between the CPDM and the gravimetric sampler with the CPDM results routinely higher than those of the gravimetric sampler. It is unclear whether your side-by-side sampling study to compare the CPDM and gravimetric sampler results met NIOSH's Accuracy Criterion[1] or any other rigorous testing standards. The testing on which MSHA relied in deciding to sample with CPDMs met the highest testing standards and demonstrated that the CPDM's results highly correlate with the results from gravimetric samplers.

NIOSH test results of the CPDM, which were peer-reviewed, have proven that the CPDM can accurately and precisely measure respirable coal mine dust in the mine environment, and that end-of-shift concentrations measured by the CPDM and the gravimetric sampler are statistically indistinguishable. NIOSH arrived at this conclusion from laboratory tests conducted in a dust chamber at the NIOSH Pittsburgh Research

[1] Kennedy, E.R., T.J. Fischbach, R. Song, P.M. Eller, and S.A. Shulman. 1995. Guidelines for Air Sampling and Analytical Method Development and Evaluation, NIOSH Publication No. 95-117.

Laboratory. The dust chamber provided a uniform atmosphere, which maintained control of the test variables, for comparing the CPDM and the gravimetric sample.

Tests conducted at mine sites similarly found that the CPDM accurately and precisely measures respirable coal dust. The NIOSH mine site tests included a variety of coal types, machine types, geographic locations, and seam heights. NIOSH collected 108 full-shift samples. Labor and industry contributed to the development of in-mine test protocols to determine if the CPDM was suitable for use in coal mines, durable for everyday mine use, and ergonomically acceptable to miners. In a 2008 study, NIOSH also reported additional data from 180 randomly-selected mechanized mining units (MMUs), which represented 20 percent of all MMUs in production at that time. The results indicated the suitability of the CPDM for in-mine use to assess respirable dust concentration defined in accordance with the personal sampler (gravimetric sampler).[2] It is unclear whether your side-by-side comparisons of end-of-shift concentrations measured by the CPDM and the gravimetric sampler were conducted under similar statistical rigor.

Your PPT presentation also indicates that a mine operator conducted underground tests of CPDMs under conditions that demonstrate an inability of CPDMs to provide accurate results in the presence of rock dusting. The conclusions drawn from this testing, however, are based on inaccurate assumptions about mine conditions. Accordingly, the results do not demonstrate any deficiency in the CPDM's sampling accuracy, even in the presence of rock dusting.

Specifically, testing was conducted on equipment operators at a producing coal mine where there had been no production on the section for a minimum of five hours prior to the crew's arrival, and the only dust in the mine atmosphere was rock dust that had been applied by the previous shift. All four operator full-shift samples showed spikes in dust readings prior to production beginning, but those spikes did not equate to an overexposure over the full shift. The data did not provide information on the amount of rock dust applied or how it was controlled to apply the needed amounts. All four end-of-shift samples measured less than the existing 2.0 milligrams per cubic meter of air (mg/m^3) standard and three of the four end-of-shift samples were less than the standard that will become effective on August 1, 2016. Similar results were reported for samples taken for the scoop operator and roof-bolter operator with both end-of-shift samples measuring less than 1.5 mg/m^3. However, respirable dust lingering in the atmosphere of a coal mine, especially on the working section, indicates poor ventilation. Similar to a methane detector that alerts a miner to the presence of excess methane, the spikes in

[2] See Volkwein, J.C., R.P. Vinson, L.J. McWilliams, D.P. Tuchman, and S.E. Mischler. June 2004. Performance of a New Personal Respirable Dust Monitor For Mine Use. CDC Report of Investigation 9663, page 5; Volkwein, J.C., R.P. Vinson, S.J. Page, L.J. McWilliams, G.J. Joy, S.E. Mischler , and D.P. Tuchman. September 2006, pages 2, 15, 16. Laboratory and Field Performance of a Continuously Measuring Personal Respirable Dust Monitor. CDC Report of Investigations 9669; and Page, S., J. Volkwein, R. Vinson, G. Joy, S. Mischler, D. Tuchman, and L. McWilliams, 2008. Equivalency of a Personal Dust Monitor to the Current United States Coal Mine Respirable Dust Sampler. Journal of Environmental Monitoring, 10(1) 96-101, pages 2, 6.

respirable dust detected by the CPDM inform the miner and the mine operator that adjustments to ventilation controls are necessary.

Based on our review of the information you presented, it appears that your test results demonstrate that mine operators and miners will benefit from using the CPDM because, unlike the gravimetric sampler, the CPDM has the advantage of providing the mine operators and miners with real-time sampling results. These real-time sampling results will enable them to identify problems and assess the effectiveness of dust controls in different mining conditions. If there is a short-term, high concentration of dust in the atmosphere, for example, as a result of rock dusting, the CPDM's real-time sampling results would allow a miner to reposition himself to avoid exposure to the high-dust concentration. Moreover, I recently observed dust controls in action controlling coal mine dust and was impressed by their efficiency. Using effective engineering controls to keep respirable coal mine dust to a minimum, which includes exercising care in the application of rock dust to limit the exposure of miners working downwind, will reduce or eliminate the potential impact of rock dust on respirable coal mine dust levels.

You also stated that the respirable dust rule's expanded consecutive shift sampling schedule, combined with the existing rock dusting requirements, will make it impractical, if not impossible, to comply with both regulations without contaminating the respirable dust samples. However, you provide no explanation for why sampling over 15 shifts would be any different than sampling over 5 shifts, as is required currently. To comply with MSHA's existing rock dust standards, rock dusting would have occurred at various times during normal production shifts. MSHA's analysis of over 41,000 samples from underground coal mines for the first year since the new rule took effect in August 2014 shows overwhelming compliance – approximately 98 percent of operator and MSHA-collected underground coal mine dust samples were at or below the respirable dust standards. Operators' average concentrations for occupations with the greatest dust exposures are at a record low of 0.65 milligrams per cubic meter of air (mg/m^3), which is far below the 1.5 mg/m^3 standard that will become effective on August 1, 2016. The dust controls that were used at these mines worked to control miners' exposures despite claims by some operators that compliance was not achievable. As rock dusting would have occurred during most or all of these shifts already, there is no reason you have articulated that would support an argument that sampling on more shifts would make any difference.

Furthermore, even the 2010 rule change requiring additional rock dusting did not adversely affect sampling results. In fact, the average of respirable dust concentrations in occupations with the greatest exposure has dropped year-after-year since 2010, when the total incombustible content of rock dust increased from 65 to 80 percent.

You also expressed concern regarding NIOSH research into rock dust composition and particle size that you believe may affect a mine operator's ability to comply with the dust rule. As you know, any change in MSHA's existing rock dust requirements would require public notice-and-comment rulemaking procedures. NIOSH research on particle size and mix is ongoing and has not concluded. MSHA is involved in that research with the ongoing NIOSH Rock Dust Partnership. Any recommendation from NIOSH to change the particle size and mix of rock dust does not constitute an industry

requirement unless MSHA adopted such a recommendation through public rulemaking. This process would allow for thorough public participation and full consideration of any operator concerns, including the possible impact of new rock dusting standards on operators' ability to comply with the dust rule.

At the House Subcommittee on Workforce Protections hearing on October 21, 2015, you stated that MSHA was not willing to work with industry on its concerns about the impact of rock dusting on dust sampling. This is simply not the case. As you know, MSHA has offered assistance to operators leading up to and throughout the dust rule phase-in, and that assistance will continue. In fact, MSHA provided extensive assistance to mining industry stakeholders across the country to ready them for the implementation of the rule and has made a standing offer to assist mine operators who may need additional compliance assistance or information on engineering controls. Over an approximate one and one-half year period since the final rule was published, MSHA has extended this offer of compliance assistance to the industry at every stakeholder outreach meeting on the dust rule, and at several additional stakeholder meetings held at the Agency's Arlington Headquarters -- a total of 18 meetings. Only one operator has responded thus far to our offer to provide in-mine assistance regarding rock dust concerns and sampling despite repeated offers from MSHA. I urge you to encourage mine operators concerned about compliance to contact MSHA so that we can assist them.

In addition, since extensive, controlled NIOSH research already has been conducted regarding the CPDM's equivalence to the gravimetric sampler in measuring total mine respirable dust, we do not agree that additional research is needed. Furthermore, as you have articulated no explanation as to how or why mine operators would or should rock dust differently over 15 shifts than they currently do over 5 shifts, it is unclear why research would be needed regarding that particular issue either. In short, MSHA does not believe you have offered reasons why operators that currently comply with both the rock dust standards and the respirable dust standards would be unable to comply when sampling more shifts using an equivalent sampling device.

Finally, I want to reiterate that the purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent black lung disease, a chronic, irreversible occupational lung disease caused by the inhalation of dangerous levels of respirable coal mine dust by those working in coal mines. There are no specific treatments to cure the disease, and the chronic effects of the disease may progress even after miners are no longer exposed to respirable coal mine dust, resulting in increased disability and death. Other complications may follow, such as pulmonary and cardiac failure, that result in total disability and premature death.

Since 1969, more than 76,000 deaths have identified the disease as a cause or contributing factor, and, over $45 billion in federal compensation costs have been paid since 1970. Miners are still getting the disease, and in FY 2014, about 7,400 federal compensation claims were filed as a result of the disease. Since the late 1990s, the number of identified pneumoconiosis cases has doubled, with younger miners getting the disease. Of the autopsies conducted on the 29 miners who were killed at the Upper Big Branch mining disaster in 2010, lung tissue from 24 miners could be examined and

17 of the 24 (71 percent) had evidence of the disease. Five of those 17 miners had less than 10 years of coal mining experience. The autopsy findings of the Upper Big Branch miners are one more indicator that this disease is more widespread, despite MSHA having received only one Part 50 filing on the disease from the Upper Big Branch mine since January 2010.

Under the CDC/NIOSH Coal Workers' Health Surveillance Program, x-rays were conducted on 15,668 miners from 2010 to 2014. Of that number, 464 miners were found to have pneumoconiosis, with 90 of those having the most severe form of the disease. According to NIOSH, the program conducts surveillance on only 32 percent of our Nation's coal miners, so the number of cases of the disease is likely much higher. Also between October 1, 2010, and September 30, 2015, NIOSH notified 488 active coal miners on behalf of MSHA that they were eligible for Part 90 rights based on evidence of coal workers' pneumoconiosis from chest x-rays. Under Part 90, miners with the disease have the right to transfer to less dusty positions. MSHA's Part 50 data on the evidence of pneumoconiosis reported by mine operators show that they reported 701 cases from October 1, 2010, through September 30, 2015, from about 200 mines in nine states, including West Virginia, Virginia, Kentucky, Pennsylvania, Colorado, Alabama, Illinois, New Mexico, and Utah.

We need to continue our actions to end this unnecessary plague on coal miners. The purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent the disease. The controls in place prior to the rule's implementation last year simply failed to protect miners from the horrific disease.

Thank you for your continued interest in improving the safety and health for our Nation's miners.

Sincerely,

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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 4

BRUCE WATZMAN
Senior Vice President, Regulatory Affairs

November 4, 2015

The Honorable Joseph A. Main
Assistant Secretary of Labor
For Mine Safety and Health
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

Dear Mr. Secretary:

Thank you for your letter of October 30. We appreciate the timeliness of your response and its detail.

Implicit in your response and specified in detail in your letter to Chairman Rogers, Kline, Cole and Walberg was a stated desire to work with the industry – something we have long sought. Indeed, your October 19 letter states:

> "… MSHA, in collaboration with the mining industry, will conduct in-mine evaluations to identify and apply best practices for managing rock dusting and respirable dust sampling."

We believe that a collaborative effort is timely and critical. Its absence was the very reason we were compelled to conduct the sampling that served as the basis for the PowerPoint presentation we submitted to the agency. This notwithstanding, we ask the agency to immediately convene a meeting of all stakeholders - industry, labor, NIOSH and MSHA to develop and implement a study protocol to examine issues related to rock dusting and respirable dust sampling. We believe it is imperative this meeting occur and a study protocol be developed prior to Thanksgiving to give us any chance of seeing results and identifying a solution in time to implement necessary adjustments in advance of the February deadline

We stand ready to work with you and your technical experts and look forward to an expeditious response to this request.

Sincerely,

Bruce Watzman

CC: Dr. John Howard, NIOSH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 5

U.S. Department of Labor

Mine Safety and Health Administration
201 12th Street South
Arlington, Virginia 22202-5452

NOV 06 2015

Mr. Gary M. Broadbent
Assistant General Counsel
Murray Energy Corporation
46226 National Road
St. Clairsville, OH 43950

Mr. Bruce Watzman
National Mining Association
101 Constitution Avenue, NW
Suite 500 East
Washington, DC 20001

Dear Messrs. Broadbent and Watzman:

This letter responds to your October 8, 2015 letter on behalf of the Murray Energy Corporation and the National Mining Association (NMA) requesting that the Mine Safety and Health Administration stay the effective date of two provisions of the Agency's final rule on lowering miners' exposure to respirable coal mine dust. The two provisions, which are effective on February 1, 2016, (Phase II) require that underground coal mine operators use a new sampling device, the continuous personal dust monitor (CPDM), for respirable coal mine dust sampling and that designated occupation (DO) and other designated occupation (ODO) sampling be conducted on consecutive normal production shifts until 15 valid representative samples are collected. You state that an emergency stay is needed because when coal mine dust is sampled using the CPDM on the final rule's sampling schedule, the presence of rock dust in the mine atmosphere from more frequent and more extensive rock dusting will result in frequent overexposures predominantly due to "nuisance" rock dust with little or no coal dust.

In particular, you predict a collision course consisting of underground coal mine operators being unable to comply with MSHA's rock dusting standards, in place since 2010, and MSHA's respirable coal mine dust standards at the same time because Phase II of the respirable coal mine dust rule requires more frequent dust sampling using the CPDM for collecting samples and because, in 2010, MSHA issued a Program Information Bulletin (PIB) reiterating the Agency's expectations for rock dusting in accordance with the rock dusting standards to protect miners from the potential of a coal dust explosion. In support of your request for a stay, you have attached the NMA's October 2, 2015

correspondence and an updated PowerPoint presentation previously submitted to MSHA. You also state that NIOSH's on-going rock dust testing compels an administrative stay. I am denying your request for a stay of the provisions of the coal mine dust rule, which are essential in protecting miners from black lung, a horrific disease.

Your assertion here and in the NMA's October 2, 2015 correspondence is that changes in sampling frequency and new sampling technology will result in frequent overexposures primarily due to rock dust with little or no coal dust. However, MSHA's experience to date is that this assertion will not be borne out. MSHA's analysis of over 41,000 samples from underground coal mines for the first year since the new rule took effect in August 2014 shows overwhelming compliance -- approximately 98 percent of operators' and MSHA-collected underground coal mine dust samples were at or below the applicable respirable dust standards. In addition, mine operators' average concentrations for occupations with the greatest dust exposures are at a record low of 0.65 milligrams per cubic meter of air (mg/m^3), which is far below the 1.5 mg/m^3 standard that will become effective on August 1, 2016. In addition, you acknowledge in your letter that, in the past, underground coal mine operators were generally able to be in compliance with the respirable coal mine dust standards and the rock dust standards by managing the time and place of dust sampling and rock dusting. The advances made during the first year that MSHA's dust rule has been in effect make that truer than ever.

Mine operators have and will continue to manage rock dusting. MSHA's sampling results show that, since the increased rock dust standards went into effect in 2010, there has not been an adverse impact on respirable dust sampling results. As our data have shown, the respirable dust levels recorded have dropped each year since the rock dust standard went into effect.

During the first year of the dust rule, sampling was conducted with approved gravimetric sampling devices during normal production shifts. These were full-shift samples taken during at least 80 percent production levels rather than 50 percent production levels under the previous rule. During these shifts, rock dusting would have occurred at various times to comply with MSHA's rock dust standards. The dust exposure results from these shifts were nonetheless well below the dust standards during this sampling period and indicate that the increased sampling frequency does not lead to a higher rate of overexposures. Additionally, there is further evidence that rock dusting has not adversely affected sampling results. The PIB on rock dusting was issued in 2010 following an explosion at the Upper Big Branch mine which claimed the lives of 29 miners. Since that time, the average of respirable coal mine dust concentrations in occupations with the greatest exposure has dropped year-after-year even though the total incombustible content of rock dust increased from 65 to 80 percent.

Although dust samples were collected with the gravimetric sampler and not the CPDM during the first year of the dust rule, neither the gravimetric sampler nor the CPDM distinguishes between the constituents of respirable dust measured at coal mines. In other words, the CPDM and the gravimetric sampler measure the same thing: total respirable mine dust of any type. Accordingly, the statement in the PowerPoint that "MSHA has historically never considered the impact of airborne rock dust into respirable dust compliance determinations" is simply incorrect. The gravimetric sampler has been used to collect respirable coal mine dust in the same manner since the Federal Coal Mine Health and Safety Act of 1969, and the CPDM does not change this approach. As long as properly maintained dust controls are used, coal mine operators who will be required to use the CPDM for dust sampling should see no increase in the number of samples that exceed MSHA's dust standards simply because of the type of sampling device used.

You also state that the CPDM is "unproven technology" and its use makes matters worse because rock dust skews CPDM measurements far more than anyone could have anticipated. In addition, the NMA's October 2, 2015 correspondence states that in-mine testing shows a lack of correlation between the CPDM and the gravimetric sampler, with the CPDM results routinely higher than those of the gravimetric sampler. The CPDM is a state-of-the-art tool that benefited from years of research and testing with the participation of industry before MSHA and NIOSH published in 2010 a final rule that established the approval requirements for such devices (75 Fed. Reg. 17512, Apr. 6, 2010). This final rule allowed for thorough public participation in the rulemaking process. In 2011, MSHA and NIOSH approved a commercial CPDM as meeting the requirements of 30 CFR Part 74.

NIOSH test results of the CPDM, which were peer-reviewed, have proven that the CPDM can accurately and precisely measure respirable coal mine dust in the mine environment, and that end-of-shift concentrations measured by the CPDM and the gravimetric sampler are statistically indistinguishable. NIOSH arrived at this conclusion from laboratory tests conducted in a dust chamber at the NIOSH Pittsburgh Research Laboratory. The dust chamber provided a uniform atmosphere, which maintained control of the test variables, for comparing the CPDM and the gravimetric sample.

Tests conducted at mine sites similarly found that the CPDM accurately and precisely measures respirable coal dust. The NIOSH mine site tests included a variety of coal types, machine types, geographic locations, and seam heights. NIOSH collected 108 full-shift samples. Labor and industry contributed to the development of in-mine test protocols to determine if the CPDM was suitable for use in coal mines, durable for everyday mine use, and ergonomically acceptable to miners. In a 2008 study, NIOSH also reported additional data from 180 randomly-selected mechanized mining units (MMUs), which represented 20 percent of all MMUs in production at that time. The results indicated the

suitability of the CPDM for in-mine use to assess respirable dust concentration defined in accordance with the personal sampler (gravimetric sampler).[1] From the information submitted, MSHA has no reason to believe that the NMA's side-by-side comparisons of end-of-shift concentrations measured by the CPDM and the gravimetric sampler were conducted under similar statistical rigor.

You state that "NIOSH is currently recommending use of rock dust with a smaller particle size in order to conform to the Part 75 definition" and that use of this rock dust "will pose an even greater Catch-22 for operators because it will increase the amount of respirable rock dust being applied -- and will lead to an even greater number of noncompliant respirable dust samples." You also expressed concern that the NIOSH research into rock dust composition and particle size may affect a mine operator's ability to comply with the dust rule. MSHA is involved in that research with the ongoing NIOSH Rock Dust Partnership. Any recommendation from NIOSH to change the particle size and mix of rock dust does not constitute an industry requirement unless MSHA adopted such a recommendation through public rulemaking. This process would allow for thorough public participation and full consideration of any operator concerns, including the possible impact of new rock dusting standards on operators' ability to comply with the dust rule.

You also state that three key NIOSH projects involving: (1) CPDM sampling at Alpha Natural Resource's Stockton Mine; (2) in-vitro testing of rock dust at NIOSH's Morgantown, West Virginia, laboratories; and (3) development of a slurry rock dust at NIOSH's Bruceton Experimental Mine, compel an administrative stay of Phase II of the dust rule. MSHA disagrees. The NIOSH project at the Stockton Mine involves an evaluation to quantify the differences in rock dust dispersibility when using an untreated rock dust and a rock dust treated with an anti-caking additive. The in-vitro testing involves an examination of the physical characterization and the cytotoxicity of treated and untreated rock dust. Finally, the research at the Bruceton Mine involves the formulation of slurry rock dust. All three NIOSH projects are ongoing and have not concluded. When concluded, none of these projects should adversely affect a mine operator's ability to comply with MSHA's existing rock dust standards and the requirements of Phase II of the dust rule, and may, in fact, have the potential to make compliance with both rules easier.

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[1] See Volkwein, J.C., R.P. Vinson, L.J. McWilliams, D.P. Tuchman, and S.E. Mischler. June 2004. Performance of a New Personal Respirable Dust Monitor For Mine Use. CDC Report of Investigation 9663, page 5; Volkwein, J.C., R.P. Vinson, S.J. Page, L.J. McWilliams, G.J. Joy, S.E. Mischler , and D.P. Tuchman. September 2006, pages 2, 15, 16. Laboratory and Field Performance of a Continuously Measuring Personal Respirable Dust Monitor. CDC Report of Investigations 9669; and Page, S., J. Volkwein, R. Vinson, G. Joy, S. Mischler, D. Tuchman, and L. McWilliams, 2008. Equivalency of a Personal Dust Monitor to the Current United States Coal Mine Respirable Dust Sampler. Journal of Environmental Monitoring, 10(1) 96-101, pages 2, 6.

Moreover mine operators always should exercise best practices, including effective control technologies, to keep dust levels down. Using best practices to keep dust levels down means that less rock dust is needed. MSHA's sampling experience shows that the use of effective engineering controls in the outby areas of the mine reduces the need for frequent rock dusting during production. Mine operators may use a variety of dust controls consisting of scrapers, conveyor belt alignment, air velocity, and water sprays during coal production to keep airborne coal dust to a minimum. Thus, even if rock dusting occurs during production, maintaining the dust concentration level in a mine is achievable using best practices to control dust.

The PowerPoint presentation showed that mine operators conducted underground tests of CPDMs when exposed to airborne rock dust generated by a trickle duster in areas outby the working section. You assert that these test results demonstrate that rock dusting significantly affects CPDM samples and that it will be impossible to comply with both the respirable dust and the rock dusting standards.

The test results, which showed that CPDM measurements exceeded the respirable dust standard when no coal was being produced, confirm what we already know. As has been the case for years, any accurate dust sampler will measure the respirable portion of dust in the mine atmosphere. If a trickle rock duster is operated on and off for 30-minute cycles, sampling downwind of the trickle duster with a gravimetric sampler will not show obvious spikes due to the intentional dispersion of respirable-sized rock dust particles. However, the CPDM will show these spikes in respirable dust concentrations in real time. NMA's test results demonstrate that mine operators and miners will benefit from using the CPDM because, unlike the gravimetric sampler, the CPDM has the advantage of providing the mine operators and miners with real-time sampling results. These real-time sampling results will enable them to identify problems, and assess the effectiveness of dust controls in different mining conditions. If there is a short-term, high concentration of dust in the atmosphere, for example, as a result of rock dusting, the CPDM's real-time sampling results also would allow a miner to reposition himself to avoid exposure to the high-dust concentration. By taking immediate action to correct dust conditions, operators can better protect miners from overexposure to all respirable coal mine dust.

The results presented in the PowerPoint presentation seem to imply that miners would be assigned to continuously work in the immediate areas where rock dust is applied throughout their shifts. MSHA's experience is that mine operators do not apply rock dust under such conditions. MSHA does not believe that these results demonstrate actual sampling results under the rule, or that it would be impractical or impossible for operators to be in compliance with both the rock dust and respirable coal mine dust standards. Accordingly, your conclusion that the results support a prediction that MSHA will issue invalid citations after the

February 1, 2016 effective date for Phase II of the respirable dust rule is unfounded.

The PowerPoint presentation also indicates that a mine operator conducted underground tests of CPDMs under conditions that demonstrate an inability of CPDMs to comply with the respirable dust standards in the presence of rock dusting. The conclusions drawn from this testing, however, are based on inaccurate assumptions about mine conditions.

Specifically, testing was conducted on mining equipment operators at a producing coal mine where there had been no production on the section for a minimum of five hours prior to the crew's arrival, and the only dust in the mine atmosphere was rock dust that had been applied by the previous shift. All four operator full-shift samples showed spikes in dust readings prior to production beginning, but those spikes did not equate to an overexposure over the full shift. The data did not provide information on the amount of rock dust applied or how it was controlled to apply the needed amounts. All four end-of-shift samples measured less than the existing 2.0 mg/m^3 standard and three of the four end-of-shift samples were less than the standard that will become effective on August 1, 2016. Similar results were reported for samples taken for the scoop operator and roof-bolter operator with both end-of-shift samples measuring less than 1.5 mg/m^3. However, respirable dust lingering in the atmosphere of a coal mine, especially on the working section, indicates poor ventilation. Similar to a methane detector that alerts a miner to the presence of excess methane, the spikes in respirable dust detected by the CPDM inform the miner and the mine operator that adjustments to ventilation controls are necessary.

Moreover, I recently observed dust controls in action controlling coal mine dust and was impressed by their efficiency. Using effective engineering controls to keep respirable coal mine dust to a minimum, which includes exercising care in the application of rock dust to limit the exposure of miners working downwind, will reduce or eliminate the potential impact of rock dust on respirable coal mine dust levels. Accordingly, your statement that MSHA's rule on lowering miners' exposure to respirable coal mine dust and its standards on rock dusting is "on the verge of creating a perfect storm for the Nation's underground coal mine operators" has no merit. MSHA does not foresee that mine operators will have difficulty, as you have expressed, complying with the requirements in Phase II of the dust rule.

On the other hand, a stay of Phase II of the final rule would put its health benefits on hold and result in continued harm to miners. Black lung is debilitating and can result in disability and premature death. The prevalence rate of lung disease among our nation's coal miners continues despite the fact that incurable black lung is preventable. Additionally, young miners are showing evidence of advanced and seriously debilitating lung disease from exposure to respirable coal mine dust. Phase II of the final rule will reduce miners' exposure to

respirable coal dust and, as a result, will lower their risk of developing black lung disease. The public interest is best served by implementing Phase II of the final rule on schedule because the public interest under the Mine Act lies primarily in improving miners' health.

I want to reiterate that the purpose of the dust rule is to reduce miners' exposure to unhealthy coal mine dust to prevent this horrific disease. With tens of thousands of deaths from pneumoconiosis known, over $45 billion in compensation costs, and miners still getting the disease, actions are needed to end this unnecessary plague. Collectively, the protections afforded miners by MSHA's final rule on lowering miners' exposure to respirable coal mine dust are critical to improving miners' health and preventing pneumoconiosis.

For the foregoing reasons, I am denying your request to stay the two provisions of the final rule involving the requirement that underground coal mine operators use the CPDM for respirable coal mine dust sampling and that DO and ODO sampling be conducted on consecutive normal production shifts until 15 valid representative samples are collected. Thank you for your continued interest in improving the health and safety of our nation's coal miners.

Sincerely,

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

Attachments

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 6

MURRAY ENERGY CORPORATION
46226 National Road
St. Clairsville, Ohio 43950

PHONE: (740) 338-3100
FAX: (740) 338-3405
www.murrayenergycorp.com

November 17, 2015

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Joseph A. Main
Assistant Secretary of Labor for Mine Safety and Health
US Department of Labor
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

Re: ***REQUEST TO RECONSIDER DENIAL OF EMERGENCY STAY OF THE MANDATES TO USE CONTINUOUS PERSONAL DUST MONITORS AND TO SAMPLE ON CONSECUTIVE SHIFTS FOR EXTENDED PERIODS BEGINNING ON FEBRUARY 1, 2016***

Dear Mr. Secretary:

On behalf of Murray Energy Corporation, thank you for your response of November 6 to our letter of October 8 regarding our concerns with the looming deadline of February 1, 2016 for underground coal mine operators to begin sampling for respirable coal mine dust on a quarterly basis using continuous personal dust monitors ("CPDMs" or "CPDM") while at the same time having to rock dust on a nearly continuous basis pursuant to existing standards. Respectfully, however, it is disappointing to say the least that, in denying the emergency stay we requested, you largely avoided addressing the primary basis for our request: the inability of operators to remain in compliance with the respirable coal mine dust standard while concurrently complying with the rock dusting standards *on account of the newly mandated sampling schedule*. The conundrum is real, Mr. Secretary, and it needs to be addressed. Accordingly, we ask that you reconsider your denial of our request.

As stated in our October 8 letter, the principal concern is that the impending demands for more frequent sampling with CPDMs, set to begin on February 1, 2016 (*see* 30 C.F.R. § 70.208(a)(1)), mandating that underground coal mine operators sample the designated occupation (DO) and other designated occupations (ODO) on consecutive normal production shifts until 15 valid representative samples are taken, will run headlong into the rock dust standards found at §§ 75.402 and 75.403. The result will be an inability to comply, on the one hand, with the existing rock dust standards without, on the other hand, simultaneously releasing

so much nuisance rock dust into the mine atmosphere – causing the DO and ODO samples to measure above the legal limit on a regular basis. In what surely has to be an unintended consequence, the CPDM will be overwhelmed by harmless nuisance rock dust. The outcome of this confounder is such that an operator's achievement reducing respirable coal dust could easily be negated by the large volume of nuisance rock dust, thereby undermining the integrity and the purpose of the whole program.

You dismiss this jeopardy without reasoned analysis. For example, you cite data that purport to show that operators are overwhelmingly in compliance with the dust standard since the effective date of the first phase of the new dust rule. But those statistics mislead. Aside from the confounding factor of the more stringent 1.5 mg/m³ legal standard that will take effect in August 2016, the shortcoming to the data you cite is the fact that they are based on existing sampling requirements. The problem is that as of February 1, 2016, radically different sampling requirements will take effect. So it is illogical and unreasonable for you to now fall back on historical compliance as evidence that industry's demonstrable concerns about the feasibility of *future compliance* are overstated.

Similarly, you observe that the 2010 change to the rock dust standard (from 65% noncombustible content to 80% noncombustible content) has not had an adverse effect on respirable dust sampling, and in fact dust levels have dropped in that time period. Again, you are unreasonably relying on the data demonstrating the industry's success under the existing regulatory scheme to conclude that the entirely different scheme that will take effect in February 2016 will not pose any difficulties. That is an apples-to-oranges comparison; the two schemes are not the same and it is the material difference between the two which is at the heart of the problem we asked you to consider in our October 8 stay request. As you well know, the February 1 deadline will institute a sea change in how dust samples are collected, and it is that change that will create the need for the requested emergency stay.

Under the existing system, operators may schedule their five bi-monthly samples to avoid interference with rock dusting. That has remained true over the past year, even with the new requirement to sample at 80% of average production levels. But that will no longer be true beginning February 1, 2016. On February 1, as you are aware, the system changes dramatically in ways that are central to the rulemaking.

Key to the changes that you must know will take place are that, currently, the sampling protocol requires five bi-monthly samples taken at the DO either on consecutive normal production shifts or on normal production shifts over five consecutive days. Starting February 1, however, on a quarterly basis, operators will be required to take 15 valid representative samples over 15 consecutive normal production shifts, and then – after the DO sampling is complete – the same at the ODOs. Where there is more than one ODO, sampling again must be successive, not concurrent. Mr. Secretary, that is an enormous change.

Even putting aside the substantial increase in the number of samples required, the *requirement* to sample over "consecutive" shifts is a fundamental change from the *option* to

sample over either consecutive shifts or consecutive days. The option to sample over consecutive days allows operators to schedule bulk rock dusting during a maintenance shift and then conduct dust sampling two production shifts later with some confidence that the rock dust will have largely settled by then. That is not the case in a scheme that *requires* sampling over consecutive shifts – that requirement gives insufficient time for widely dispersed rock dust to settle, so there is a high likelihood that any sample taken on the production shift following bulk rock dusting activities (for example, during a scheduled maintenance shift or power move) will be contaminated with inordinately high amounts of rock dust. That is precisely the problem demonstrated by the presentation included with our letter of October 8.

When the sharp increase in the number of required samples is factored into the equation, as it must be, it will make widespread interference from rock dusting inevitable. Depending on the type of MMU and ventilation system, sampling starting on February 1 will necessitate at least 45 valid samples on a continuous miner section (i.e., 15 valid and representative samples for the DO and typically two ODOs). Under a best case situation, this will mean at minimum anywhere from around-the-clock sampling for at least 15 days (at mines that run three production shifts daily) to nearly a month of twice-daily full-shift sampling (at mines utilizing two production shifts). We have thought long and hard about this problem, but simply cannot figure out how we and other mine operators will be able to do that while also staying in compliance with the rock dusting requirements during those time periods.

In reality, the situation will be far more dire than the aforementioned best-case scenario. As it is (and as the past year and one-half of sampling at 80% average production informs us), it takes an operator about seven or eight full-shift samples to obtain five valid and representative samples at 80% of average production. So for the DO alone, beginning in February, that will mean roughly 21-24 shifts will be needed to complete DO sampling (putting aside rock dust contamination issues). Mines with two ODOs will require roughly 63-72 shifts to complete sampling (even if a mine has only one ODO, it will require roughly 42-48 shifts to complete quarterly sampling). As you can see, for some mines, quarterly sampling could easily extend well beyond a month of near-constant dust sampling.

Now add to that mix the requirement to keep the mine adequately rock dusted at all times and the task becomes nearly impossible. Given the need to sample on consecutive production shifts, there will be no time to conduct bulk rock dusting and allow that dust to settle before sampling begins again.

In response, you remark dismissively that respirable dust lingering in the mine atmosphere indicates poor ventilation in the working section. Mr. Secretary, you know better than that. Respirable dust particles can remain entrained in the mine atmosphere for hours, even in mines that are properly ventilated to control methane and sweep away noxious gases pursuant to an MSHA-approved ventilation plan. Yes, the levels eventually go down – but the readings toward the beginning of the shift following bulk rock dusting spike to excessively high levels, skewing the end-of-shift results. Indeed, the slides provided to you graphically illustrate this inherent dynamic.

Criticizing the examples the October 8 letter provided of the persistent, lingering effects of rock dust measured over a full shift after rock dust has been applied (during shifts that began over five hours after the last production shift), you point out that all four full-shift samples described in the Power Point actually measured below the current 2.0 mg/m³ standard, and three of the four measured below the 1.5 mg/m³ standard that takes effect in August 2016. But that is of no comfort whatsoever. Keep in mind, those full-shift samples were taken over the course of a production shift that commenced five hours after the last production shift. Rock dusting occurred on the interim shift. The spikes that were recorded toward the beginning of the shift were caused by that rock dust and skewed the full-shift results, leaving the operator with almost no margin during production. Indeed, the problem is highlighted by the fact that for one of the samples, the end-of-shift average measured above the 1.5 mg/m³ legal limit that will take effect in August 2016. While it might be coal mine dust being measured, coal mine dust composed mostly, if not entirely, of rock dust is not the cause of black lung disease and is not the reason Congress enacted the dust rules in the first place.

Nor is the answer that, as you suggest, a miner wearing the CPDM can simply move to another area of the mine. Once the CPDM is exposed to a plume of rock dust, the spike is recorded and leaves the DO or ODO with very little margin for exposure for the remainder of the shift. Furthermore, rock dust from bulk dusting activities in general will typically be widely dispersed and the DO and ODOs only have so much space to move around – they have their designated jobs to do, after all, and it is those occupations that MSHA demands be sampled. So although it is a frequent refrain of the agency that the CPDM will allow its wearer to re-position himself to avoid areas of high concentration, that is far easier said than done, and will not eliminate the problem identified in the study we brought to your attention.

You also opine that we have overstated the inaccuracy of the CPDM in particular. Here again we fear you have missed the point. While we believe the jury is still out on whether the current CPDM is, in fact, a reliable device for accurately measuring respirable dust over a full shift, we can put that debate to the side for current purposes because it is quite simply beside the point. Even if we were to continue to sample with the gravimetric sampler after February 2016, we would still expect the results of those samples – once the cassettes had been weighed – to demonstrate routine non-compliance.[1] Given the new hyper-frequency of required sampling, as of February 1 there will be no way to avoid interference from rock dust regardless of the sampling mechanism used.

This then brings us to the significance of a brand new sampling regimen that will judge (and penalize) operators based on miner exposures to total respirable coal mine dust and not

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[1] In fact, Murray Energy mines have already been cited for dust violations based on MSHA full-shift samples taken with the gravimetric sampler resulting from rock dust alone – once on a shift during which rock dust was applied but no coal produced, and another time in an outby area of the mine ventilated with intake air.

merely respirable coal dust. The point of the 30-minute trickle dust cycling documented in the Power Point was not to mimic real-life mining conditions but to illustrate the extent to which the CPDM measures non-toxic rock dust. We take your point that, in theory, the CPDM measures the same content as the gravimetric sampler. But even accepting that premise for the sake of argument, the gravimetric sampler has never been used to the extent or in the manner the CPDM will be required to be used. As noted, under the existing system, operators can schedule their five bi-monthly samples to avoid interference with rock dust. So while the samples no doubt do contain some amount of respirable rock dust, operators (and MSHA) can be confident that what is being measured is predominantly respirable coal dust. That will no longer be true come February.

So the problem is this: regardless of whether operators are using the gravimetric sampler or the CPDM, the increased and more frequent sampling starting in February will result in citations being issued routinely for full-shift samples measuring above the legal limit without any reasonable degree of confidence that the overweight samples are the result of *coal dust – the toxic agent which can cause black lung disease and thus is intended to be the focal point of the dust standards* (as it was when Congress first tackled the issue of coal workers pneumoconiosis in the Federal Coal Mine Health and Safety Act of 1969).[2]

From the beginning of this administration, the President has stressed in executive orders and other public statements the imperative for executive agencies to regulate smartly; to be sensitive to the economic impact of regulations and to pull back where there is excessive regulation. Mr. Secretary, a regulatory scheme that too easily penalizes the nation's underground coal operators for overweight dust samples caused by non-toxic nuisance rock dust is not a smart regulation. MSHA should care about this contamination issue. The envisioned use of a personal monitor to allow miners and mine operators to control respirable coal dust in real time is jeopardized if the measurements are being confounded by so much nuisance rock dust. Industry's concerns should not be dismissed, as they seem to be in your letter of November 6, on the ground that the gravimetric sampler has always measured all respirable dust in a coal mine. Operators have never been confronted with the regulatory conundrum they will be facing in February. And they have never been in greater economic jeopardy and less able to endure regulatory excess. Miners' jobs hang in the balance, Mr. Secretary.

In light of this, we must ask you to reconsider your denial of the October 8 request for a stay. This request is made with the utmost sense of urgency. As we previously noted, we are

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[2] As you know, the in-mine application of rock dust in underground coal mines has been used since the early 1900s as an effective means of preventing coal dust explosions by rendering the otherwise combustible coal dust inert. We are aware of no studies showing any negative health effects of rock dust (which is, as you know, essentially pulverized limestone, dolomite, or gypsum dust (or some other inert dust)). Nor are we aware of any concern of the Congress with the health effects of rock dust.

prepared to consider other available options, including relief through the courts or Congress, should you not stay the February 1 effective date. We respectfully ask that you respond promptly to this request for reconsideration. Given the limited time remaining before the next phase of the dust rule takes effect, should we not receive a response by December 11, we will deem this request denied.

In addition, we want to express our firm support for NMA's request of November 4 that you seek to convene immediately a task force composed of MSHA, NIOSH, industry, and labor to prepare an agreed-upon, scientifically sound study to address the concerns raised in this letter and the letter of October 8. It is not sound scientific analysis for MSHA to use historical data collected under one sampling regime to draw conclusions about the ability to comply under a very different sampling regime that has not yet taken effect. This is the fundamental reason why the near-term study requested in NMA's November 4 letter is so important to address the problem.

NMA stressed in its separate letter that the task force must be convened and produce a workable study framework by Thanksgiving. Murray Energy agrees.

For the foregoing reasons, your initial denial failed to address the problem we set forth in our October 8 request for an emergency stay. Please give immediate attention to this request for reconsideration of that initial denial and grant the emergency stay in the interests of common sense, logic, and the health, safety and economic survival of America's remaining underground coal miners.

Sincerely

MURRAY ENERGY CORPORATION

Gary M. Broadbent
Assistant General Counsel

cc: The Honorable John Howard, Director, National Institute for Occupational Safety and Health

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Brady Declaration
Exhibit 1
Attachment 7

MURRAY ENERGY CORPORATION
46226 National Road
St. Clairsville, Ohio 43950

December 9, 2015

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Joseph A. Main
Assistant Secretary of Labor for Mine Safety and Health
United States Department of Labor
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

Dear Mr. Secretary:

On November 30, you and key members of your staff met with underground coal mining producer members of the National Mining Association (NMA) to discuss the grave concerns we have with the impending February 1, 2016 implementation of Phase II of the new respirable coal mine dust rules. Problems with air travel prevented me from attending this meeting personally; however, I listened on the conference call.

Key to Phase II is its mandate for use of continuous personal dust samplers (CPDMs) to take 15 valid samples of designated occupations (DO) and other designated occupations (ODO) over consecutive complete shifts each quarter in every mechanized mining unit throughout the United States. You were told that this enormously increased number of samples would collide with the mandate for more frequent and more extensive application of rock dust underground, because the CPDMs would collect both respirable coal dust as well as respirable rock dust. Consequently, CPDM samples would routinely exceed the 2.0 mg/m³ respirable coal mine dust standard currently in effect. Such a nationwide outcome, you were told, is wholly inconsistent with the objectives of the new rules.

The industry asked that you work with us to undertake test sampling to determine whether our concerns were valid. You declined that offer, but replied you had been saying since October 2014 that MSHA would be happy to work with any operator asking MSHA for assistance. You also said that only one operator had requested any such assistance. You said that your offer was still open. When the call ended, I had concerns that I wanted to raise with you one-on-one.

With that in mind, I called your office early on the morning of December 1 to discuss your offer of assistance. I wanted to know what it would involve and also wanted to tell you we

are working on test sampling at our mines to see in real underground operating situations if the February 1, 2016 problems we envision will, indeed, occur. I was told you would call me back. Although I never heard from you, I did receive a call Tuesday morning, December 8, 2015, from Kevin Stricklin, who said you asked him to return my call for you. Kevin acknowledged that any company (like ours) running three shifts per day may have trouble complying with the sampling regime set to take effect on February 1 because of rock dusting requirements.

This letter is to inform you that Murray Energy Corporation is attempting to comply with what we consider to be conflicting rock dusting and respirable dust sampling mandates, and to that end we will be undertaking, for test purposes, CPDM sampling as will be required beginning on February 1. We will also notify NIOSH of this sampling. We are still interested to learn about what assistance MSHA has to offer.

Murray Energy Corporation vigorously supports the objective of eliminating coal workers' pneumoconiosis. However, the anticipated conflict between rock dusting requirements and the new respirable dust sampling regimen effective February 1, 2016 will only frustrate the achievement of that objective.

Sincerely,

MURRAY ENERGY CORPORATION

E. Patrick Brady

E. Patrick Brady
Corporate Director of Safety

cc: Mr. Kevin G. Stricklin
MSHA Administrator for
Coal Mine Safety & Health

The Honorable John Howard, M.D.
Director, NIOSH

Mr. Bruce Watzman,
Senior Vice President, NMA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Brady Declaration
Exhibit 1
Attachment 8

MURRAY ENERGY CORPORATION
46226 National Road
St. Clairsville, Ohio 43950

December 11, 2015

The Honorable John Howard, M.D.
Director
National Institute of Occupational
Safety and Health
395 E Street, S.W., Suite 9200
Patriot Plaza Building 1
Washington, D.C. 20291

Dear Dr. Howard:

Further to my letter of December 9, 2015 to MSHA's Assistant Secretary Joseph Main (on which you were copied) regarding the respirable coal mine dust sampling Murray Energy Corporation is undertaking to test whether or not we will be able to comply with "Phase II" of MSHA's new respirable coal mine dust regulations. If NIOSH would like to observe this testing, please contact me at 740.298.1423 or Thomas Todd at 724.875.9702.

As I told Assistant Secretary Main, Murray Energy vigorously supports our shared objective of eliminating coal workers' pneumoconiosis. However, the anticipated conflict between rock dusting requirements and this new respirable dust sampling regimen will only frustrate the achievement of that objective.

Another copy of my letter to Assistant Secretary Main is attached for your convenience.

Sincerely,

MURRAY ENERGY CORPORATION

E. Patrick Brady
Corporate Safety Director

EPB:plj
Attachment
cc: The Honorable Joseph A. Main, Assistant Secretary of Labor, Mine Safety and Health Administration
Mr. Kevin G. Stricklin, MSHA Administrator, Coal Mine Safety & Health
Frank Hearl, P.E., National Institute of Occupational Safety and Health
R. J. Matetic, PhD., National Institute of Occupational Safety and Health
Mr. Bruce Watzman, Senior Vice President, National Mining Association

MURRAY ENERGY CORPORATION
46226 National Road
St. Clairsville, Ohio 43950

December 9, 2015

VIA EMAIL AND FEDERAL EXPRESS

The Honorable Joseph A. Main
Assistant Secretary of Labor for Mine Safety and Health
United States Department of Labor
Mine Safety and Health Administration
201 12th Street South
Arlington, VA 22202

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The industry asked that you work with us to undertake test sampling to determine whether our concerns were valid. You declined that offer, but replied you had been saying since October 2014 that MSHA would be happy to work with any operator asking MSHA for assistance. You also said that only one operator had requested any such assistance. You said that your offer was still open. When the call ended, I had concerns that I wanted to raise with you one-on-one.

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Murray Energy Corporation vigorously supports the objective of eliminating coal workers' pneumoconiosis. However, the anticipated conflict between rock dusting requirements and the new respirable dust sampling regimen effective February 1, 2016 will only frustrate the achievement of that objective.

Sincerely,

MURRAY ENERGY CORPORATION

E. Patrick Brady

E. Patrick Brady
Corporate Director of Safety

cc: Mr. Kevin G. Stricklin
MSHA Administrator for
Coal Mine Safety & Health

The Honorable John Howard, M.D.
Director, NIOSH

Mr. Bruce Watzman,
Senior Vice President, NMA

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Brady Declaration
Exhibit 1
Attachment 9

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

National Institute for
Occupational Safety and Health
Centers for Disease Control
and Prevention (CDC)
395 E Street, SW - Ste 9200
Washington, DC 20201
PH: 202-245-0625

DEC 16 2015

Mr. E. Patrick Brady
Corporate Safety Director
Murray Energy Corporation
46226 National Road
St. Clairsville, Ohio 43950

Dear Mr. Brady:

Thank you for your letter of December 11, 2015 regarding Murray Energy's planned continuous personal dust monitor (CPDM) sampling for test purposes. We are also in receipt of your letter dated December 9, 2015 to Assistant Secretary Joseph Main. As conveyed in those letters, you will be undertaking testing in relation to the new dust sampling regimen, with the goal of determining "whether or not [you] will be able to comply with 'Phase II' of MSHA's new respirable coal mine dust regulations."

The National Institute for Occupational Safety and Health is devoted to protecting the health and safety of our nation's mineworkers and would be interested in: (1) a discussion, at your convenience, to gain further insight into your planned testing methods, and (2) an opportunity to observe your testing procedures. I've asked Dr. R.J. Matetic, Director, Pittsburgh Mining Research Division within the Office of Mine Safety and Health Research, to reach out to you regarding the respirable coal mine dust sampling.

We appreciate your shared support in the effort to eliminate coal workers' pneumoconiosis.

Sincerely,

John Howard, M.D.
Director

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Exhibit 2

114TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 114–195

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS BILL, 2016

JULY 10, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. COLE, from the Committee on Appropriations, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3020]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Departments of Labor, Health and Human Services (except the Food and Drug Administration, the Agency for Toxic Substances and Disease Registry and the Indian Health Service), Education, Committee for Purchase from People Who Are Blind or Severely Disabled, Corporation for National and Community Service, Corporation for Public Broadcasting, Federal Mediation and Conciliation Service, Federal Mine Safety and Health Review Commission, Institute of Museum and Library Services, Medicare Payment Advisory Commission, National Council on Disability, National Labor Relations Board, National Mediation Board, Occupational Safety and Health Review Commission, Railroad Retirement Board, and the Social Security Administration for the fiscal year ending September 30, 2016, and for other purposes.

INDEX TO BILL AND REPORT

OSHA to notify the House and Senate Committees on Appropriations 10 days prior to the announcement of any new National, Regional or Local Emphasis Program including the circumstances and data used to determine the need for the launch of the new program. The Committee directs OSHA to continue to provide such notices in fiscal year 2016.

Crystalline Silica.—The Committee understands that OSHA remains in the process of promulgating regulations to reduce the permissible exposure limit to crystalline silica. The Committee understands that silicosis and other silica-related illnesses are serious and can be deadly. The Committee is concerned, however, that OSHA has grossly underestimated the costs of implementing the proposed new standard. The Committee urges OSHA to delay enforcement of any new standard until it can demonstrate the effectiveness of equipment designed to accurately measure workers' exposure to silica and until it can demonstrate that methods for reducing workers' exposure to silica across all applicable industries can be feasibly implemented in a cost effective manner. The Explanatory Statement accompanying the fiscal year 2015 Appropriations Act urged OSHA to consider all currently available technology as it develops any new standard for workers exposure to silica dust. The Committee believes that personal protective equipment such as airstream helmets and respirators should be part of an all-of-the-above approach to limiting workers' exposure to respirable silica. Employers and workers should have the flexibility to choose from all available technologies that are proven to be effective at reducing workers' exposure to silica rather than the environmental control approach put forward in the proposed rule. Lowering workers' exposure to respirable silica is the goal. The Committee urges OSHA to allow the maximum flexibility possible with all currently available technology to meet any new standard for workers' exposure to silica dust.

Solid Ammonium Nitrate.—The Committee understands that OSHA is reviewing its standards related to the storage of ammonium nitrate and urges OSHA to propose any necessary changes under existing regulations on Explosives and Blasting Agents (29 C.F.R. 1910.109) and not to add ammonium nitrate to the list of chemicals covered under OSHA's Process Safety Management Standards of Highly Hazardous Chemicals (29 C.F.R. 1910.119). The Committee believes that changes to improve the safety of storing ammonium nitrate should be made based on scientific review of current standards rather than through a one-size-fits-all approach under OSHA's Process Safety Management Standards.

MINE SAFETY AND HEALTH ADMINISTRATION

SALARIES AND EXPENSES

The Committee recommends $371,000,000 for the Mine Safety and Health Administration (MSHA). This recommendation is $4,887,000 less than the fiscal year 2015 enacted level and $23,932,000 less than the fiscal year 2016 budget request.

MSHA enforces the Federal Mine Safety and Health Act in underground and surface coal mines and metal/non-metal mines.

The Committee continues bill language designating up to $2,000,000 for mine rescue recovery activities, and provides for the

retention of fees up to $2,499,000 for the testing and certification of equipment.

The Committee includes at least $8,441,000 for State assistance training grants under the Educational Policy and Development program.

The Committee understands that enforcement is an important part of protecting the health and safety of miners. The Committee is concerned, however, about overreliance on an enforcement-focused strategy that disproportionally impacts small businesses. The Committee believes that the Department should do everything possible to assist companies with training and technical support to comply with health and safety standards instead of just inspecting and fining companies indiscriminately for violations large and small. Compliance assistance programs are a vital resource for helping smaller employers comply with regulations and improve their health and safety programs. The Committee appreciates the reductions in mining injury and illness rates that have been achieved in recent decades and remains a strong proponent for vigilant mine safety oversight. The Committee believes that MSHA needs to offer a more formal voluntary protection program including the ability for mine operators to request compliance inspections that do not incur fines for violations. Such a program would increase participation in voluntary inspections, advance the goal of improving health and safety in the mining industry, and achieve greater compliance with standards without the threat of punitive enforcement.

The Committee supports the significant advances MSHA has achieved in mine rescue and communications capabilities.

The Committee appreciates that MSHA is undertaking an effort to redistribute enforcement activity and personnel to reflect the changing levels of coal mining production across MSHA regions and encourages MSHA to continue review and accelerate these efforts in order to most effectively align enforcement activity with current production levels.

The Committee is aware that rock dust may be used in mining operations to suppress coal dust and that recent changes required by the MSHA increase the amount of rock dust required and the frequency of its application. The Committee notes that this use may create the potential for the new Continuous Personal Dust Monitors, required by MSHA, to mischaracterize rock dust as coal dust, thus subjecting operators to enforcement actions where no overexposures to coal dust exist. The Committee notes that an extension on enforcement of the regulation would provide time for MSHA to complete its current review of this problem and design protocols to prevent the potential for inaccurate compliance determinations.

The Committee is concerned that MSHA may be expending unnecessary resources by inspecting coal mines that are not in operation more frequently than necessary to reasonably ensure worker safety. The Committee directs MSHA to review its policies and procedures for inspecting coal mines not in operation and ensure that such guidelines are consistent with statutory requirements and established safety standards.

The coal mining industry has experienced a period of significant decline in recent years and a substantial number of mines have

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Exhibit 3

DIVISION H—DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2016

In implementing this agreement, the Departments and agencies should be guided by the language and instructions set forth in House Report 114-195 accompanying the House bill, H.R. 3020, and Senate Report 114-74 accompanying the Senate bill, S. 1695.

Where the explanatory statement speaks to an issue that was addressed in the House or Senate reports, the explanatory statement should supersede the language in the House or Senate reports. In cases where the House Report and the Senate Report address a particular issue not specifically cited in the explanatory statement, the House Report and the Senate Report should be complied with and carry the same emphasis as the language included in the explanatory statement.

Each department and agency funded in this Act shall follow the directions set forth in this Act and the accompanying statement, and shall not reallocate resources or reorganize activities except as provided herein. Funds for individual programs and activities are displayed in the detailed table at the end of the explanatory statement for this division. Funding levels that are not displayed in the detailed table are identified within this explanatory statement. Any action to eliminate or consolidate programs, projects, and activities should be pursued through a proposal in the President's Budget so it can be considered by the Committees on Appropriations of the House of Representatives and the Senate.

Congressional Reports.—Each Department and agency is directed to provide the Committee on Appropriations of the House of Representatives and the Senate, within 30 days of enactment of this Act and quarterly thereafter, a summary

under the requirements of the Administrative Procedures Act (5 U.S.C.551 et. seq.). OSHA has issued letters of interpretation on substantive policy matters that leave the agency open to liability that can be avoided by going through the proper rulemaking process, including notice and period of public comment. OSHA is expected to implement agency policy changes through the formal regulatory process. As such, the agreement directs that the revised enforcement policy relating to the exemption of retail facilities from coverage of the Process Safety Management of Highly Hazardous Chemicals standard (29 CFR 191 0.119(a)(2)(i)) issued by the Occupational Safety and Health Administration on July 22, 2015, shall not be enforced nor deemed by the Department of Labor to be in effect in fiscal year 2016 until: the Bureau of the Census establishes a new North American Industry Classification System code under Sector 44-45 Retail Trade for Farm Supply Retailers, and the Secretary of Labor, acting through the Assistant Secretary of Labor for Occupational Safety and Health, has carried out all notice and comment rulemaking procedures and invited meaningful public participation in the rulemaking.

OSHA is directed to continue to provide notification to the Committees on Appropriations of the House of Representatives and the Senate 10 days prior to the announcement of any new National, Regional or Local Emphasis Program including the circumstances and data used to determine the need for the launch of a new Program.

MINE SAFETY AND HEALTH ADMINISTRATION

The Mine Safety and Health Administration (MSHA) is directed to provide assistance and data necessary for the National Academy of Sciences study provided in the Centers for Disease Control and Prevention, National Institute of Occupational Safety and Health account. MSHA is directed to report to the

Committees on Appropriations of the House of Representatives and the Senate and authorizing committees of jurisdiction within 72 hours of determining that compliance rates under the new sampling protocols taking effect in 2016 fall below 95 percent, and to provide such committees with quarterly reports on actual compliance rates under the new coal dust rule.

BUREAU OF LABOR STATISTICS

The Bureau of Labor Statistics shall submit a report to Congress within one year of enactment of this Act on the Bureau's efforts to account for and report on all forms of employment in the current economy, including those working in small businesses, part-time or temporary workers, those with fluctuating schedules, and the self-employed.

OFFICE OF DISABILITY EMPLOYMENT POLICY

The agreement does not incorporate the Office of Disability Employment Policy (ODEP) into its partner agency, the Employment and Training Administration. The Department is directed to evaluate and report to the Committees on Appropriations of the House of Representatives and the Senate within 150 days of enactment of this Act on the capacity of ETA to continue providing leadership, effective policy development and grant programs, and subject matter expertise in carrying out the mission of ODEP as proposed in the Senate bill. The report should also consider the potential synergies, efficiencies, and other benefits of unifying ODEP into the direct leadership of ETA along with the broader workforce training system it oversees. Any potential organizational challenges, programmatic concerns, or other issues such an integration might create should also be discussed. Finally, the report should discuss the Department's current utilization of the specialized policy development and analysis resources available from the National Council on Disability.

adhere to the conditions identified in the fiscal year 2015 Appropriations Act and explanatory statement as CDC expands beyond prescription drugs and into the broader category of opioids. The agreement assumes these funds will be distributed via a competitive mechanism and not merely a mathematical formula or standard allocation to each State.

Surveillance of Heroin.—The agreement directs CDC to expand surveillance of heroin-related deaths beyond CDC's current work in HHS's Region 1 and to require applicants for the PDO Prevention for States Programs to collaborate with the State's substance abuse agency or agency managing the State's Prescription Drug Monitoring Program.

Violence Data Collection.—The agreement notes that CDC should continue its current National Vital Statistics System and National Violent Death Reporting System (NVDRS) data collections activities and ensure the activities continue to comply with funding restrictions. The agreement provides an increase for NVDRS to support States not previously funded.

NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

The agreement includes a total of $339,121,000 for the National Institute for Occupational Safety and Health (NIOSH) in discretionary appropriations. Within the total for NIOSH, the agreement includes the following amounts:

Budget Activity	FY 2016 Agreement
National Occupational Research Agenda.....	$115,500,000
Agriculture, Forestry, Fishing.....	25,000,000
Education and Research Centers.....	28,500,000

Budget Activity	FY 2016 Agreement
Personal Protective Technology.....	20,000,000
Mining Research.....	61,300,000
Other Occupational Safety and Health Research.....	112,721,000
National Mesothelioma Registry and Tissue Bank.....	1,100,000

National Academy of Sciences (NAS) Review.—The agreement provides $1,800,000 within the Mining Research funding line and directs the NIOSH Director to charter a NAS review within 90 days of enactment of this Act. Specifically the NAS effort should examine and describe: current monitoring and sampling protocols and requirements to understand miners' occupational exposure to respirable coal mine dust in the United States and other industrialized countries; coal mine dust composition and application procedures, including the impact of new rock dust mixtures and regulatory requirements; monitoring and sampling technologies, and sampling protocols and frequency; and the efficacy of those technologies and protocols in aiding decisions regarding the control of respirable coal mine dust and mine worker exposure. The NAS study will develop science-based conclusions regarding optimal monitoring and sampling strategies that support mine operational decision making as it relates to reducing miner respirable coal mine dust exposure. It is expected the report will be completed within 12 months after enactment of this Act.

Total Worker Health.—The agreement provides funding in the Other Occupational Safety and Health Research line to continue to support the Total Worker Health program at no less than the fiscal year 2015 level.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL MINING ASSOCIATION et al., Petitioners, v. MINE SAFETY & HEALTH ADMINISTRATION et al., Respondents.	Case No. 14-11942
MURRAY ENERGY CORPORATION et al., Petitioners, v. SECRETARY OF LABOR et al., Respondents.	Case No. 14-12163

Exhibit 4

DECEMBER 15, 2015

RULES COMMITTEE PRINT 114-39

TEXT OF HOUSE AMENDMENT #1 TO THE SENATE AMENDMENT TO H.R. 2029, MILITARY CONSTRUCTION AND VETERANS AFFAIRS AND RELATED AGENCIES APPROPRIATIONS ACT, 2016

[Showing the text of the Consolidated Appropriations Act, 2016.]

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Consolidated Appropriations Act, 2016''.

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

DIVISION O—OTHER MATTERS

DIVISION P—TAX-RELATED PROVISIONS

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to ''this Act'' contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 17, 2015 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2016.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the