BRUCE WATZMAN
*Senior Vice President, Regulatory Affairs*

May 2, 2014

The Honorable Joseph Main
Assistant Secretary for Mine Safety and Health
U.S. Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard, 21st Floor
Arlington, VA 22209

Dear Sec. Main:

On May 1, 2014, the National Mining Association (NMA) filed a petition with the United States Court of Appeals for the Eleventh Circuit seeking judicial review of the Mine Safety and Health Administration's (MSHA) final rule entitled "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors." RIN 1219-AB64 (79 Fed. Reg. 24,813, May 1, 2014). *National Mining Association et al., v. MSHA*, No. 14-11942-E (11th Cir.). NMA requests MSHA postpone the effective date of the final rule pursuant to 5 U.S.C. § 705 which provides the agency authority to do so pending judicial review.

NMA has sought judicial review of the final rule because the rule embodies fundamental legal and technical infirmities in its scope, foundation and framework. Even putting those severe defects aside for the moment, the implementation schedule and the new requirements are misaligned and, as a result, preclude a fair and proper opportunity for coal mine operators to comply with the rule. In many cases, compliance will be infeasible. Here are several of the more immediate issues where the effective dates and the rule requirements are not properly aligned:

- Beginning Aug. 1, 2014, mine operators must take "immediate corrective action" when a single sample exceeds the "excessive concentration value" (ECV). However, mines will continue to utilize the coal mine dust personal sampler unit (CMDPSU) until Feb. 1, 2016 to determine whether a sample or samples exceed the ECV. The CMDPSU samples require days--sometimes weeks—before the lab analyses are complete and the reports available to mine operators. In all likelihood, by the time the results from sampling become available—days to more

than a week later—no one will know what condition caused the excessive concentration in the sample or samples. In short, the 'immediate corrective action" called for in the rule beginning Aug. 1 is not aligned properly with the technology that will be used for measuring dust concentrations. It would seem that the concept of an "immediate corrective action" was intended to align with the introduction of the new continuous personal dust monitor (CPMD), with its capability to measure concentrations in real-time. However, the CPMD will not be introduced until Feb. 1, 2016---18 months after the requirements for "immediate corrective actions" take effect.

- The reliability of the new CPMD in accurately measuring compliance with the new standard under the new sampling protocol remains subject to considerable uncertainty. It is not clear that MSHA considered all sources of variability to determine whether their accuracy would be compromised. Moreover, like many prior MSHA rulemakings mandating new technologies, the industry has grave concerns about the availability of a sufficient supply of these new units before Feb. 1, 2016, and the sustainability of the supply thereafter. And, in advance of Feb. 1, 2016, companies will need to acquire a sufficient number so they can plan and test for the introduction of these units well before the effective date. We also understand that MSHA has recently requested the manufacturer to make changes and add features to the units. This development may only further delay production and exacerbates the potential for supply shortfalls in advance of Feb. 1, 2016.

- The problems identified above are further exacerbated by the significant change to utilize a single sampling protocol for ascertaining compliance. The rulemaking docket amply reflects the high risk of inaccurate results from using a single shift sampling protocol and how using that approach makes meeting the reduced dust concentration standard infeasible. Tellingly, MSHA failed to abide by section 202 of the Mine Act when it acted alone in rescinding the "Joint Finding" by the Secretary of Labor and Secretary of Health, Education and Welfare that single shift sampling does not accurately represent the atmospheric conditions to which a miner is continuously exposed. As we and other commenters raised during the rulemaking, rescission of the finding requires joint action by both Secretaries resolve it properly.

- By changing the definition of "Normal Production Shift," the final rule requires operators, beginning Aug. 1, 2014, to collect full-shift samples during periods when normal production is at least 80 percent of the average production from the most recent 30 production shifts. This represents a significant and substantial change in the existing and longstanding sampling protocol that requires sampling when production is at least 50 percent of the average production reported during the operator's last sampling period. The agency suggests in the final rule that it thoroughly evaluated the potential operating problems from this new regime. But

> we see little evidence that the agency fully understands the difficulties this new requirement poses especially in view of ever changing factors with coal markets, coal transportation (rail and barge), unplanned customer outages and even weather -- all of which affect the run rate at coal mines. Decreasing flexibility for sampling by increasing the production percentage threshold for an eligible sampling period makes it only more likely that operators will be unable to satisfy the basic sampling requirement under the final rule. Moreover, the effective date of the rule does not provide sufficient time for operators to review and statistically analyze operating histories, make projections for the new sampling scheme and develop procedures to satisfy the new and substantially higher 80 percent average production requirement. Without more time and a satisfactory resolution of the issues raised here, mine operators can only guess which shifts will meet the 80 percent production threshold.

To be clear, these examples are not exhaustive of the legal and technical problems with the final rule. They do, however, present real and immediate structural issues with the rule and merit the agency postponing the effective date of the rule until these issues are resolved judicially or otherwise.

If MSHA's purpose is simply to register more citations, disrupt work schedules and dislocate more coal miners, perhaps the agency will not view an administrative stay of the effective date of the rule as serving the agency's interest. However, if MSHA's genuine purpose is to protect coal miners through an effective framework that delivers focused and real protections where they are needed, then an administrative stay pending judicial review will serve everyone's interest.

Sincerely,

Bruce Watzman