

The proposed rule, "Determination of Concentration of Respirable Coal Mine Dust," has been referred to as "Single, Full-Shift Sampling" based on the Agencies' finding that a single, full-shift measurement would, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed. However, where appropriate, the term "single, full-shift sample," will now be referred to as "single sample" in this document and any subsequent publications. This reopening notice does not change the actual finding as published in the July 7, 2000 **Federal Register**.

II. Background

In 1972, the Secretary of Interior and the Secretary of Health, Education, and Welfare issued a "joint finding" under the Federal Coal Mine Health and Safety Act of 1969. The finding concluded that a single, full-shift measurement of respirable dust would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

In 1994, the Secretary of Labor and the Secretary of Health and Human Services tentatively concluded that the 1972 joint finding was incorrect. Therefore, on February 18, 1994, the Secretaries published a proposed Joint Notice of Finding in the **Federal Register** (59 FR 8537). The Joint Notice proposed to rescind the 1972 finding and, instead, to find that a single, full-shift measurement *will* accurately represent the atmospheric conditions with regard to the respirable dust concentration during the shift on which it was taken. Concurrently, on February 18, 1994 (59 FR 8356) MSHA published a separate **Federal Register** document announcing how MSHA intended to use both single, full-shift samples and the average of multiple, full-shift samples for noncompliance determinations, and solicited public comment on the proposed enforcement procedure.

On February 3, 1998, MSHA and the National Institute for Occupational Safety and Health (NIOSH) published a final Joint Notice of Finding in the **Federal Register**, along with MSHA's enforcement policy implementing the joint finding (63 FR 5664 and 5687 respectively).

In May 1998, the National Mining Association and the Alabama Coal Association petitioned the United States Court of Appeals for the 11th Circuit to review the 1998 Notice of Finding. On September 4, 1998, the 11th Circuit issued a final decision and order vacating the Joint Finding on the

grounds that the Agencies failed to comply with all the requirements for a health standard under section 101(a)(6)(A) of the Mine Act (30 U.S.C. 811(a)(6)(A)).

In response to the Court's ruling, on July 7, 2000, the Secretaries published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM), Determination of Concentration of Respirable Coal Mine Dust (Single Sample) (65 FR 42068). In that document, the Secretaries proposed a new mandatory health standard in 30 CFR part 72 that stated that a single, full-shift measurement would accurately represent atmospheric conditions to which a miner is exposed during such shift. The proposed rule would rescind the 1972 Joint Notice of Finding.

During August 2000, three public hearings were conducted. Transcripts of those proceedings are available to the public (www.msha.gov, under Statutory and Regulatory Information).

III. MSHA's Current Enforcement Policy

The Federal Mine Safety and Health Review Commission's decision in *MSHA v. Excel*, 23 FMSHRC 600 (June 2001) precluded MSHA from citing an operator on the average of multiple samples collected by an inspector on a single shift. This decision affirmed an Administrative Law Judge dismissal of three citations alleging violations of the respirable dust standard based on the average of multiple inspector samples taken on a single shift. The Secretary's appeal of the Commission's decision is now pending before the D.C. Circuit Court of Appeals (D.C. Cir. No. 01-1335). Oral argument was held on October 7, 2002. In August 2001, MSHA ceased issuing citations on the average of multiple samples taken on a single shift pending a resolution of the appeal. Currently, all noncompliance determinations are based on the average of multi-shift sample results. Because this change has taken place since publication of the July 7, 2000 NPRM, references to enforcement action based on the average of multiple samples taken by inspectors on a single shift no longer reflect MSHA's current enforcement policy. The promulgation of the Single Sample rule would address the 1972 Finding and the consequences of the June 2001 Commission decision.

IV. Revisions To Update Data for the Rulemaking Record

The Agencies also solicit comments on revised information to update the rulemaking record which address the following:

(a) Health Effects

(Please see Section VII, 65 FR 42075, of the July 7, 2000 notice of proposed rulemaking for a complete discussion of Health Effects). The following provides an update on the Miners' Choice Program.

MSHA and NIOSH implemented the Miners' Choice Health Screening Program (Miners' Choice) in October 1999. The Miners' Choice program and Coal Workers' X-Ray Surveillance Program (CWXSP) identify cases of simple and complicated pneumoconiosis, including coal workers' pneumoconiosis and silicosis—hereafter referred to as "CWP." All of the Miners' Choice x-rays were processed using the same procedures and criteria used in the CWXSP in accordance with the requirements of 42 CFR part 37.

MSHA and NIOSH are conducting preliminary analyses of the first three years of the Miners' Choice program. These data and analyses are being handled, conducted, and reported pursuant to the DOL's and DHHS's respective Information Quality Guidelines.¹ Preliminary analyses of these data are expected in Spring 2003. The analyses will be made available to commenters through the MSHA and NIOSH Web sites, www.msha.gov and www.cdc.gov/niosh/homepage.html, respectively.

As of the end of fiscal year 2002, more than 19,500 active coal miners from 20 states voluntarily participated in Miners' Choice. The overall CWP prevalence rate for radiographic categories of simple CWP categories 1, 2, 3, and PMF combined was 2.8% (546/19,517) among miners examined in Miners' Choice during the 2000-2002 period. This is similar to the CWP prevalence rate of 2.25% for initial participants in the Miners' Choice Program reported in the 2000 NPRM (65 FR 42100). Among Miners' Choice participants, the CWP prevalence rate was higher among underground coal miners at 3.8% (356/9,265), than it was for surface coal miners, 1.8% (188/10,184). The CWP prevalence rate for independent contractors was 2.9% (2/68). These findings show that CWP continues to occur among coal miners working under the current program to

¹ Specifically, the information is maintained in a confidential manner, all methodologies for data processing are transparent, and all available records were included. This information is reliable and accurate, and is presented in a clear and objective manner, as required by the Department of Labor's Information Quality Guidelines and the Department of Health and Human Services' Guidelines for Ensuring the Quality of Information Disseminated to the Public.