



Your Honor, thank you for the opportunity to testify this morning. And thank you to the representatives from OSHA and the Solicitor's office, who I want to commend for putting together a very strong proposal. My name is Matthew Shudtz. I am a Senior Policy Analyst with the Center for Progressive Reform. My written comments are in the docket and they form the basis for these remarks. I'll highlight a few points from the written comments, and I'd also like to respond to a few issues that have come up during the course of the hearing.

I will address four main points:

1. OSHA's statutory obligations;
2. Medical surveillance;
3. Enforcement; and
4. Small businesses.

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I'll begin with *The Statutory Context*.

On the first day of the hearing, Mr. Perry stated in his opening remarks that OSHA must meet several legal tests in developing standards, and that one of those tests was to demonstrate that the regulatory approach chosen is cost effective. I couldn't recollect that standard being discussed in the preamble to the proposed rule, so I got up and asked where that standard came from and how it relates to the economic feasibility analysis required under the Supreme Court's interpretation of the OSH Act. I'm afraid the record of my questions and OSHA's answers may be a bit confusing, so I just want to take this opportunity to clear up the point I wanted to make.

Of course, the *Cotton Dust* decision is the touchstone for any discussion about the economic analyses involved when OSHA is setting a regulation under § 6(b)(5). And as I recall the first day of the hearing, I believe a representative of the Solicitor's office indicated that she believed the cost effectiveness test Mr. Perry mentioned was something that originated in the *Cotton Dust* case. I took a look back at the case and could not find a mention of cost effectiveness as an appropriate criterion for setting standards under § 6(b)(5). I also took a look back at the NPRM and could not find any discussion of what a cost effectiveness test means in the context of a regulation promulgated under § 6(b)(5), much less how such a test might have shaped this proposed rule.

The reason I highlight this issue is that it's not entirely clear to me what the difference is between a cost-effectiveness test and a cost-benefit test. And since the *Cotton Dust* decision was pretty clear in stating that basing a standard on cost-benefit analysis would be inconsistent with the § 6(b)(5) mandate to regulate "to the extent feasible," I am concerned that any provision of this proposal that's based on a cost-effectiveness test is ripe for a legal challenge.

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That brings me to the issue of *Medical Surveillance*.

As I noted in my written comments, a drastic change to the medical surveillance provisions of the proposal occurred while the proposal was under Executive Order 12,866 review at the White House. The draft proposal that went over to OMB would have required medical surveillance for all workers exposed above the action level for at least 30 days in a year, and once the medical surveillance provisions were triggered, employers would have had to provide for exams on a yearly basis. When the proposal emerged from White House review more than two and a half years later, the trigger had been bumped up to the PEL and the frequency of exams had dropped to a triennial requirement.

The reason I harp on this issue is that it appears these changes were made primarily for cost-cutting purposes. Again, on the first day of the hearing, I asked a question seeking clarification on the justification for setting the medical surveillance trigger at the PEL, rather than the action level, and OSHA staff indicated that the choice of a PEL trigger was based on some type of risk-benefit calculation – that workers exposed above the PEL are the most likely to suffer adverse health effects and so ensuring they get medical exams is more important than providing the same assurance to workers who are exposed in the 25-50 microgram range.

Now, here is my problem with that reasoning. OSHA has clearly stated in the preamble that workers face a significant risk of adverse health consequences even at the action level. It is unfair and unjustifiable under the § 6(b)(5) mandate to provide different levels of protection to workers based on whose risks are more or less – though in every case – significant when providing those protections are feasible for all. There is no evidence in the record to suggest that using an action level trigger for medical surveillance is either economically or technologically infeasible.

OSHA staff described the decisionmaking construct as being risk-based, but that's not the relevant standard under § 6(b)(5). Congress delegated OSHA the task of regulating "to the extent feasible," not to the extent that only the most at-risk workers are protected.

In the final rule, I urge OSHA to adopt what is currently listed as "Regulatory Option #6," which would require medical surveillance for all workers exposed above the action level for at least 30 days per year and would provide for annual medical exams.

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I'd like to shift gears a bit and talk about **Enforcement**.

A number of stakeholders have suggested that OSHA could better protect workers who are exposed to silica dust by simply beefing up enforcement of the existing standard.

I don't think that solution is practical, much less appropriate. From a practicality standpoint, there are too many worksites (many of them transient) where silica exposure is a problem. I'm not sure if the record contains an explanation of the time it takes to conduct a health inspection focused on silica exposure, or the number of industrial hygienists on OSHA or state-plan agency staffs who can conduct those sorts of inspections. I would encourage OSHA to include that information in the preamble to the final rule because I think it will clearly show that inspections are only a partial solution to the problem of silica-related disease.

What's so important about this proposal, and what makes it so imperative that the final rule be published soon, is that it's a comprehensive solution. Enforcing the current standard won't lead to the medical surveillance, training, or other ancillary provisions that ensure employers are protecting workers to the extent feasible.

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Last, I'd like to say just a few words about **Small Businesses**.

I want to commend OSHA for taking the time to do the analysis of the proposal's potential effects on what the agency calls "very small entities" (that is, employers with 20 or fewer employees). Some stakeholders like to focus on the proposal's potential effects on businesses that meet the Small Business Administration's standards for what defines a small business.

I want to take this opportunity to note for the record that SBA's small business size standards were adopted for a purpose very different than assessing the potential effects of regulatory proposals. The size standards were originally adopted pursuant to the 1950s-era Small Business Act, which was primarily an effort by Congress to establish government purchasing preferences and financial assistance programs that would benefit U.S. small businesses. SBA's goal in setting these standards was to create inclusive criteria so that its loan programs would have the broadest impact. SBA's Office of Advocacy, which has been actively lobbying for scaling back this proposal and has primary responsibility within SBA for dealing with Reg Flex Act implementation did not create the size standards. In fact, the Office of Advocacy did not exist until nearly 20 years after the standards were first developed. To my mind, this history raises significant questions about the size standards' relevance and validity for purposes of analyzing the potential effects of this proposal. Again, I urge OSHA to include a note about this history in the preamble to the final rule.

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In **Conclusion**,

I would like to reiterate my support for OSHA's proposal. Stakeholders have many different opinions on the risk and cost numbers and on the optimum form for a protective standard, but the simple fact is that millions of workers are exposed to this deadly dust and it is high time for a comprehensive standard. OSHA's proposal is a significant step in the right direction and while I believe the recommendations I've made today and that appear in my written comments are critical to providing the best protections for workers, the single most important thing the agency could do with this rule is get it published and start enforcing it as soon as possible.

Thank you again for the opportunity to testify.