H.R. 5663, MINER SAFETY AND HEALTH ACT OF 2010

HEARING

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, JULY 13, 2010

Serial No. 111–72

Printed for the use of the Committee on Education and Labor

Available on the Internet:
http://www.gpoaccess.gov/congress/house/education/index.html

U.S. GOVERNMENT PRINTING OFFICE
57–344 PDF WASHINGTON : 2010

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C O N T E N T S

H.R. 5663, MINER SAFETY AND HEALTH ACT OF 2010

Tuesday, July 13, 2010
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 3:00 p.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Payne, Woolsey, Tierney, Kucinich, Holt, Loebsack, Altmire, Courtney, Shea-Porter, Chu, Kline, McMorris Rodgers, Price and Guthrie.

Also Present: Representatives Rahall and Capito.

Staff Present: Aaron Albright, Press Secretary; Andra Belknap, Press Assistant; Jody Calemine, General Counsel; Lynn Dondis, Labor Counsel, Subcommittee on Workforce Protections; Patrick Findlay, Investigative Counsel; Jose Garza, Deputy General Counsel; Gordon Lafer, Senior Labor Policy Advisor; Livia Lam, Senior Labor Policy Advisor; Sadie Marshall, Chief Clerk; Richard Miller, Senior Labor Policy Advisor; Revae Moran, Detailee, Labor; Alex Nock, Deputy Staff Director; Megan O'Reilly, Labor Counsel; Robert Presutti, Staff Assistant, Labor, James Schroll, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Kirk Boyle, Minority General Counsel; Casey Buboltz, Minority Coalitions and Member Services Coordinator; Ed Gilroy, Minority Director of Workforce Policy; Angela Jones, Minority Executive Assistant; Barrett Karr, Minority Staff Director; Ryan Kearney, Minority Legislative Assistant, Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Ken Serafin, Minority Workforce Policy Counsel; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairman MILLER. A quorum being present, the committee will come to order for the purposes of receiving testimony on legislation that has been introduced dealing with serious flaws in our Nation's mine safety laws. That would be H.R. 5663.

These flaws became devastatingly obvious on April 5th, when a massive explosion ripped through the Upper Big Branch Mine in West Virginia, killing 29 miners. It is simply unacceptable for mine workers to die or be injured in preventable accidents. And it is unacceptable for some mine companies to game the mine laws to avoid protecting their employees. And it is unacceptable that mine

workers across the Nation live in fear of their jobs if they raise safety issues at work. And it is unacceptable that mine workers are not given the most updated safety technology and training to protect their health and safety.

While it will take much to determine the precise cause of the Upper Big Branch explosion, we already understand the disastrous results when mine owners operate on the margins of safety in order to put more coal on the belt. Further study and investigation isn't needed to understand the results when workers' voices are silenced by fear of retaliation for speaking out on safety problems. And we know the consequences of safety when a miner operator repeatedly disregards safety to do everything to avoid tougher oversight. The consequences are that miners die.

These messages were clear when we traveled to Beckley, West Virginia, to hear from miners and family members who lost loved ones on April 5th. The testimony was chilling. What we heard was how an outlaw mine company valued production over the lives of human beings. We heard how miners would get sick because there wasn't enough oxygen. We heard how widespread fear and intimidation had paralyzed miners from demanding management fix serious problems. And we learned how a Federal agency lacked the resources and the legal authority to fix those chronic problems.

In 2009 Massey's Upper Big Branch Mine was cited 515 times for serious violations, including 54 orders to evacuate the mine due to urgent safety concerns. While the mine corrected unsafe conditions when it was confronted by MSHA inspectors, it repeatedly slipped back to a pattern of noncompliance. In the weeks before the explosion, MSHA closed the mine seven times; six times for failures related to improper mine ventilation.

Despite this pattern of serious violation there was little MSHA could do to get Massey to turn this operation around. The millions of dollars in proposed fines over the years didn't work. Dozens of temporary closure orders didn't work. And it seems complaints that miners not even getting enough air below didn't work.

The Upper Big Branch Mine is a perfect example of how current law is inadequate, especially for those operations that do everything to flaunt the law.

H.R. 5663, the Miner Safety and Health Act, will fix these problems that have allowed some mine owners to operate on the margins of safety without being held accountable. Among other provisions, the legislation will revamp the broken pattern of violation sanctions so that our Nation's most dangerous mine operators improve safety quickly.

Furthermore, responding to serious concerns raised in Beckley, the Miner Safety and Health Act will empower workers to speak up about safety concerns, strengthening the whistleblower protections.

The bill will eliminate incentives for owners to appeal violations regardless of the merits and ensure that overdue penalties are paid promptly.

The bill will give MSHA additional powers to shut down the mine when there is a continuing threat to the health and safety of miners.

Also, recognizing that some mine operations bide their time to retaliate against whistleblowers, the bill will ensure that the underground coal miners are dismissed only if the employer has just cause.

Finally, the bill will guarantee that basic protections are available in all workplaces. Workers should have basic work place protection no matter if they work in a mine, extracting coal, or in an oil refinery handling explosive chemicals.

In two dozen hearings over the last 3 and a half years, this committee has not only examined gaps in mine safety but also the significant shortcomings of the Occupational Safety and Health Act.

I want to thank Congresswoman Woolsey for leading the effort to reform the Occupational Safety and Health Act.

Your legislative work on the Workforce Protection Subcommittee has made a clear case for strong action. That is why under the legislation, all workers will have strong whistleblower protections, not just miners. For the second time in four decades, for the second time in four decades, criminal and civil penalties will be increased, and those penalties will be indexed for inflation.

Lastly, employers will have to fix safety problems more quickly, even pending appeal. Unlike mine safety laws, other workplaces are allowed to put off fixing many hazards found while the violation is appealed.

And I would like to thank all the Members of the House, Senate and the administration who have worked for weeks putting the legislation together.

And particularly, I want to recognize the leadership of the United States Senator Robert C. Byrd, who was one of the coal miners' best allies in Washington. Senator Byrd was personally involved in making these decisions on this bill up to the last weeks of his life. Recognizing the importance of Senator Byrd's legacy to our Nation's miners and workers, my manager's amendment will change the name of the legislation to the Robert C. Byrd Miner Safety and Health Act of 2010.

After the 2006 Sago and Aracoma tragedies, Senator Byrd said, and I quote, "If we are truly a moral Nation, then those moral values must be reflected in government agencies that are charged with protecting the lives of our citizens."

And I agree.

Finally, this bill responds to the promise I made to families paying the ultimate price for a job our Nation depends on. The promise was to do everything in my power to prevent similar tragedies. I believe that this bill is our best chance to fulfill the promise made to the families of Aracoma, Sago, Darby, Crandall Canyon and now Upper Big Branch.

I thank all the witnesses for joining us today and I look forward to your testimony and your expertise.

And I now recognize Congressman Kline, the senior Republican on the committee.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor

We meet today to consider urgent legislation to address serious flaws in our nation's mine safety laws.

These flaws became devastatingly obvious on April 5th when a massive explosion ripped through Upper Big Branch Mine in West Virginia, killing 29 miners.

It is simply unacceptable for mine workers to die or be injured in preventable accidents.

It is unacceptable for mine companies to game the mine laws to avoid protecting their employees.

It is unacceptable that mine workers across the nation live in fear of their jobs if they raise safety issues at work.

And it is unacceptable that that mine workers are not given the most updated safety technology and training to protect their health and safety.

While it will take months to determine the precise cause of the Upper Big Branch explosion, we already understand the disastrous results when a mine owner operates on the margins of safety in order to put more coal on the belt.

Further study and investigation isn't needed to understand the result when workers' voices are silenced by fear of retaliation for speaking out on safety problems.

And, we know the consequences for safety when an operator repeatedly disregarded safety and do everything to avoid tougher oversight.

Miners die.

This message was clear when we travelled to Beckley, West Virginia to hear from miners and family of miners who lost loved ones on April 5th. The testimony was chilling. What we heard was how an outlaw mine company that valued production over the lives of human beings.

We heard how miners would get sick because there wasn't enough oxygen.

We heard how widespread fear and intimidation has paralyzed miners from demanding management fix serious problems. And, we learned how a federal agency lacked the resources and legal authority to fix these chronic problems.

In 2009, Massey's Upper Big Branch mine was cited 515 times for serious violations, including 54 orders to evacuate the mine due to urgent safety concerns. While the mine corrected unsafe conditions when confronted by MSHA inspectors, it repeatedly slipped back into a pattern of non-compliance.

In the weeks before the explosion, MSHA closed the mine seven times, six times for failures related to improper mine ventilation. Despite this pattern of serious violations, there was little MSHA could do to get Massey to turn this operation around. The millions of dollars in proposed fines over the years didn't work. Dozens of temporary closure orders didn't work. And, it seems, complaints that miners were not getting enough air below didn't work either. The Upper Big Branch mine is the perfect example of how current law is inadequate, especially for those operations that do everything to flout the law.

H.R. 5663, the Miner Safety and Health Act, will fix these problems that have allowed some mine owners to operate on the margins of safety without being held accountable.

Among other provisions, the legislation will revamp the broken 'pattern of violations' sanctions so that our nation's most dangerous mine operations are able to improve safety quickly.

Furthermore, responding to serious concerns raised in Beckley, the Miner Safety and Health Act will empower workers to speak up about safety concerns strengthening whistleblower protections.

The bill will eliminate incentives for owners to appeal violations regardless of merit and ensure overdue penalties are paid promptly.

The bill will give MSHA additional powers to shut down a mine when there is a continuing threat to the health and safety of miners.

Also, recognizing that some mine operators may bide their time to retaliate against whistleblowers, the bill will ensure that underground coal miners are dismissed if the employer has just cause.

Finally, the bill will guarantee that basic protections are available in all workplaces.

Workers should have basic workplace protections no matter if they work in a mine extracting coal or at an oil refinery handling explosive chemicals.

In two dozen hearings over three-and-a-half years, this committee has not only examined gaps in mine safety, but also the significant shortcomings with the Occupational Safety and Health Act.

I want to thank Congresswoman Woolsey for leading the effort to reform the OSH Act. Your legislative work in the Workforce Protections Subcommittee has made a clear case for strong action. That is why, under the legislation, all workers will have to strong whistleblower protections. Not just miners.

For the second time in four decades, criminal and civil penalties will be increased and those penalties will be indexed to inflation.

Lastly, employers will have to fix safety problems more quickly, even pending appeal. Unlike mine safety laws, other workplaces are allowed to put off fixing many hazards found while the violation is appealed.

I would like to thank all those members of the House, Senate and the administration who have worked for weeks putting this legislation together.

In particular, I want to recognize the leadership of a United States Senator Robert Byrd who has been one of the coal miner's best allies in Washington. Senator Byrd was personally involved making decisions on this bill up to the last week of his life.

Recognizing the importance of Senator Byrd's legacy to our nation's miners and workers, I intend to change the name of the legislation to the Robert C. Byrd Miner Safety and Health Act of 2010.

After the 2006 Sago and Aracoma tragedies, Senator Byrd said that "if we are truly a moral nation * * * [then those] moral values must be reflected in government agencies that are charged with protecting the lives of our citizens."

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I believe that this bill is our best chance to fulfill the promise made to the families of Aracoma, Sago, Darby, Crandall Canyon and Upper Big Branch.

I thank all the witnesses for joining us today and I look forward to your testimony.

Mr. KLINE. Thank you, Mr. Chairman.

And good afternoon to all our distinguished witnesses from inside and outside the Federal Government. This is a far-reaching piece of legislation, and we value the multiple perspectives that you all bring.

The April 5th Massey Mine explosion that took the lives of 29 West Virginians was a mining tragedy, the likes of which our Nation had not seen in four decades. We all share a goal of preventing such a tragedy from ever happening again.

Over the years, Congress has taken repeated steps to improve mine safety. Yet, as this loss reminds us, more work must be done to modernize our laws, toughen penalties on bad actors, and ensure Federal agencies are fulfilling their oversight and enforcement responsibilities.

I mention my appreciation for the viewpoints represented here today, but I would be remiss if I did not acknowledge the notable absence of the Labor Department's Inspector General. As the agency's independent watchdog, the IG is in a unique position to offer unbiased analysis of MSHA's strengths and weaknesses in enforcing our mine safety laws.

I am disappointed Chairman Miller declined my request to call the IG to testify and share his perspective on issues clearly relevant to any serious discussion about mine safety.

In recent months, the IG's office has identified weaknesses in mine inspector training and retraining, leaving MSHA personnel without the up-to-date knowledge of health and safety standards or mining technology needed to perform their inspection duties. The IG's office also identified a disturbing failure by MSHA to enforce its "pattern of violation" authority under current law, which subjects mines with repeated safety violations to stricter scrutiny and tougher enforcement. As outlined in a June 23, 2010, alert memorandum, the IG's office described an internal MSHA policy that resulted in at least ten mines being removed from potential POV sta-

tus for reasons "other than appropriate consideration of the health and safety conditions at those mines."

I have corresponded with Assistant Secretary Main about this unacceptable breakdown in enforcement, and I look forward to continuing that dialogue today as we seek answers about the agency's enforcement practices and capabilities.

This is a vital discussion that cannot wait, particularly because this committee appears to be moving quickly toward a vote. In fact, today we are examining legislation introduced by the majority as Members left Washington for the Independence Day work period.

I do appreciate Chairman Miller's apparent urgency. I would simply urge us to act as quickly as is prudent to make the necessary changes to the law and its enforcement to protect miners.

Unfortunately, we do not yet have all the information we need to identify how best to keep miners safe and crack down on bad actors. Three investigations in the Upper Big Branch explosion by MSHA, an independent Federal review commission, and the State of West Virginia are currently under way.

At Congress's request, the Inspector General is conducting a review of MSHA policies that led to lax enforcement. The results, which will include recommendations for reform, are not expected until September.

This committee requested and was granted extraordinary authority from the House of Representatives to investigate underground mine safety in May. An investigation is still ongoing.

Instead of rushing to legislate without all the facts, I hope we listen to the experts who are here today and use their expertise, along with the eventual findings of the investigations I just mentioned, to enact a bill with a clear focus on making mines safer, period.

One important way to do that would be to set aside H.R. 5663's misplaced inclusion of OSHA reforms in a bill that ought to be squarely focused on the safety of miners underground. The proposed changes to the OSHA act would dramatically reshape workplace safety policies for virtually every private-sector employer in America. These provisions will drive up costs and litigation for employers, all of which—all of which—would make it more difficult to create jobs at a time when our economy needs them the most.

And for all these changes proposed under the banner of workplace safety, the legislation does nothing to help employers make their workplaces safer. Once again, it is a punishment-only approach that ignores the importance of proactive prevention.

Members on both sides of the aisle are anxious to make mines and miners safer. The bill before us today is a missed opportunity to learn the lessons from Upper Big Branch and a clumsy attempt to drive up workplace litigation in the name of safety. I hope to rectify both of these flaws before the bill receives a vote in this committee.

Thank you, Mr. Chairman. I yield back.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Senior Republican Member, Committee on Education and Labor

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I have corresponded with Assistant Secretary Main about this unacceptable breakdown in enforcement, and I look forward to continuing that dialogue today as we seek answers about the agency's enforcement practices and capabilities.

This is a vital discussion that cannot wait, particularly because this committee appears to be moving quickly toward a vote. In fact, today we are examining legislation introduced by the majority as Members left Washington for the Independence Day work period. My staff advises me that a committee vote on this legislation could come as early as this week.

I do appreciate Chairman Miller's apparent urgency—I would simply urge us to act as quickly as is prudent to make the necessary changes to the law and its enforcement to protect miners.

Unfortunately, we do not yet have all the information we need to identify how best to keep miners safe and crack down on bad actors.

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Members on both sides of the aisle are anxious to make mines and miners safer. The bill before us today is a missed opportunity to learn the lessons from Upper Big Branch, and a clumsy attempt to drive up workplace litigation in the name of safety. I hope we rectify both of these flaws before any bill receives a vote in this committee. Thank you, and I yield back.

Chairman MILLER. Thank you.

Without objection, we will hear opening statements from the chair and the ranking member of the subcommittee of jurisdiction, the Subcommittee on Workforce Protections.

And I will now recognize Congresswoman Woolsey and then recognize Congresswoman McMorris Rodgers.

Congresswoman Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman, and thank you for your leadership on miner and worker health and safety. You mentioned Senator Byrd's support, and I have been made aware that Senator Byrd, who was involved in the drafting of this bill, had words said at his funeral, because his family at the funeral asked that in lieu of flowers, contributions be made to help the families of the UBB disaster.

So following in Senator Byrd's huge footsteps, H.R. 5663 is a truly comprehensive bill. It will make lifesaving improvements to benefit the hardworking men and women, who often perform the most dangerous work in our Nation. The Subcommittee on Workforce Protections has made bringing worker health and safety into the 21st century our very top priority. So, along with the full committee, we have held several hearings on health and safety, including two legislative hearings this year, on H.R. 2067, the Protecting America's Workers Act, PAWA, which now has about 113 co-sponsors.

And just about three weeks ago, the subcommittee traveled to Middletown, Connecticut, to explore the causes and solutions of a February explosion at the Kleen Energy Plant, which killed six workers and injured at least 50 others. This recent accident in Middletown, as well as the tragic blast at Upper Big Branch Mine in West Virginia, and explosions in Washington State and in the Gulf involving multiple fatalities and injuries underscores how our Federal health and safety laws must be strengthened.

This year has been a particularly tragic one for the American worker. And the sad truth is that these explosions probably, absolutely could have been prevented had employers put miners and workers above profits.

Among other important provisions in H.R. 5663, it strengthens whistleblower laws to protect those workers and to protect those miners who speak out about unsafe conditions. Since inspectors cannot be at every single workplace every minute, we depend on miners and other workers to be vigilant. Yet when they are, they often lose their jobs or are otherwise retaliated against. So, Mr. Chairman, I commend you for inserting these protections in H.R. 5663, which also includes the provision to provide that miners cannot be fired except for good cause.

H.R. 5663 also contains other important provisions, including complete overhaul of the pattern of violation section in the Miner Act—the Mine Act, to effectively reign in serial violators. And H.R. 5663 adopts from PAWA updated criminal and civil penalties, a

family involvement provision and abatement during contest, some of this which is already in the Mine Act, fortunately.

So, again, Mr. Chairman, thank you for your leadership. I look forward to hearing from our distinguished panel and these wonderful witnesses you brought before us today, and to work with you to pass this very, very important legislation.

I yield back.

Chairman MILLER. The gentlelady yields back.

With that, the chair would recognize the ranking member of the subcommittee, Congresswoman McMorris Rodgers.

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman, and thank you for holding this important hearing today.

I don't think any of us will ever forget the April 5th explosion at the Upper Big Branch Mine or the attempted recovery efforts that followed the weeks after. The explosion left our Nation deeply saddened and with many questions about the cause and the overall safety of the Upper Big Branch Mine and mines around the country.

Since then, several investigations have ensued, including within this committee, looking at the underlying causes of the explosion and the need for changes to our mine safety regulations and laws.

I am concerned that the bill we are considering today may be premature. We have yet to see the findings of any of these investigations, including by this committee.

Let me be clear, we need to ensure that our mines are safe. No bad actor should go unpunished, especially when lives are at stake. But we need to better understand what laws are working within the current safety structure and which ones are not, including examining whether the Mine and Safety Health Administration was fully enforcing the current safety laws to the best their ability.

I fear that the bill that we are considering today may not even make our mines safer, but it will negatively impact every employer in this Nation, making numerous unrelated changes to OSHA, in fact raising the cost of doing business for every employer in America. At a time when jobs are scarce and the economy is struggling, we need to do all we can to encourage policies that expand on economic recovery and that encourage a better working relationship between the safety inspectors and our employers, not one that is going to take scarce resources away from safety and put it towards litigation.

I would like to thank our witnesses for being here, and look forward to hearing more from them on what we can do to ensure that our workplaces are safe, including those that are underground. And I yield back the balance of my time.

Chairman MILLER. I thank the gentlewoman. The gentlewoman yields back the balance of her time.

Without objection, the committee is joined on the dais today by two Members of the West Virginia delegation who will be recognized to ask questions after the Members who are currently in the room, the sitting members of the committee who are currently in the room, have an opportunity to ask questions. And that is Congressman Nick Rahall and Congresswoman Shelley Moore Capito.

Welcome to the committee, and thank you for your involvement in this unfortunate event, but we appreciate all of the help you and your staffs have given this committee.

And with that, I would like to introduce our first panel of witnesses at this hearing.

Our first will be Mr. Joseph Main, who is the Assistant Secretary of Labor for the Mine Safety and Health Administration. He began working in coal mines in 1967 and has more than 40 years of experience in mine health and safety. He served as Administrator of the Occupational Health and Safety Department of the United Mine Workers for 22 years.

Ms. Patricia Smith is the Solicitor of Labor for the Department of Labor. Previously, Ms. Smith served as the New York State Commissioner of Labor since March 6, 2007. Prior to that, Ms. Smith served as Chief of the Labor Bureau of the New York State Attorney General's Office.

Mr. David Michaels is the Assistant Secretary of Occupational Safety and Health. And before coming to OSHA in 2009, he was a professor at George Washington University School of Public Health from 1998 to 2001. Mr. Michaels served as the Department of Energy's Assistant Secretary for Environmental Health and Safety.

Welcome to the committee. We look forward to your testimony. As you know, your written statements will be placed in the record in their entirety, and you proceed in the manner in which you are most comfortable.

Most of you all have experience before the committee, but you know, we have a lighting system here. The green light will go on when you begin, and a yellow light will give you a warning when to wrap up, and then a red light when it should come to an end. But we want you to convey your comments and important thoughts on this matter that you are most comfortable. Thank you.

Mr. Main—Secretary Main, excuse me.

STATEMENT OF HON. JOSEPH MAIN, ASSISTANT SECRETARY, MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. MAIN. Mr. Chairman, thank you, ranking member, members of the committee. I appreciate the invitation to testify on behalf of the U.S. Department of Labor Mine Safety and Health Administration today about the Miner Safety and Health Act of 2010.

Secretary Solis and I are dedicated to safeguarding the health and safety of our Nation's miners, and this bill helps reform, will help realize that goal, and I hope the administration's—excuse me, and I offer the administration's thank you.

Thank you, Mr. Chairman, Congresswoman Woolsey, Congressman Rahall and your House and Senate colleagues, especially Senator Harkin, Senator Rockefeller and the late Senator Byrd, for your work on the bill with critical provisions we have sought.

We are all mindful of the urgency of our efforts. We have heard the pleas for change from the family members of miners lost in the Upper Big Branch Mine. I want Eddie Cook, Gary Quarles, Alice Peters, Steve Morgan, Clay Mullins and Goose Stewart and the family and friends of all the coal miners to know that their govern-

ment is listening. We will make good on President Obama's promise to act before another horrific mine accident.

The administration fully endorses the committee's effort to pass this bill this session. Simply put, this bill will save lives. The bill is true to the Mine Act principles that mine operators are responsible for the health and safety of our most precious resource, the miner. It promotes a culture of safety and will give MSHA effective new tools to hold to account mine operators who fail or refuse to meet their obligations.

The most important of these new tools is the revamped pattern of violation system. As I have said repeatedly, the current system is broken. As I have said on many occasions, we need to fix the pattern of violation system. No mine has been placed on the pattern since Congress enacted the law in 1977. This legislation eliminates the rule that MSHA base a POV finding on final orders of the Federal Mine Safety and Review Commission orders that are issued years after the fact.

This bill requires MSHA to act on current conditions of the mine and takes a remedial approach, unlike the current punitive system, for changing conduct of mines where noncompliance elevates the risk to miners.

The bill also establishes strong protections for miners to take an active role in their own health and safety. Unlike miners MSHA is not at a mine on every shift every day. As the committee learned at the Beckley field hearing, many miners won't speak up about safety problems for fear of losing their jobs. Armed with the bill's new training requirements and stiff penalties for discrimination, we are resolved to changing that culture of fear.

The bill also fixes the serious problems of advance notice of inspections. Inspectors cannot make effective inspections where unscrupulous operators break the law by getting advance notice of an inspection. They hide dangerous practices with temporary fixes until the inspectors leave.

The bill increases criminal penalties, requires posting of the criminal provisions on mine property and gives MSHA subpoena power to uncover this illegal conduct. MSHA will work with the Justice Department to stamp out this unconscionable practice.

The bill's preshift examination provision for underground coal mines advances the principle that operators take responsibility for preventing violations and not wait on MSHA to find the problems. Diligent preshift inspections and a communication plan to protect miners will lead to fewer citations and safer mines. The bill advances better technology for atmospheric monitoring of methane and other dangerous gases. That will help prevent deadly explosions and will provide critical information about mine conditions during mine rescue operations when timely information is a matter of life and death.

Other important provisions expedited power to revoke mine plans that do not adequately protect miners and improvements to our certification process for safety personnel providing regular recertification and a revocation process for those who shirk their responsibilities. Solicitor Smith will discuss the bill's important clarification of what violations are significant and substantial and its

improvements to the Secretary's investigation and injunctive powers.

Finally, I would like to express the administration's support for the Protecting America's Workers Act provisions included in this bill. All workers deserve a safe and healthful work place.

Again, I would like to thank the committee for moving this bill forward. I can think of no better way to honor the memory of Senator Byrd and the 29 miners who perished at the Upper Big Branch Mine than to enact safeguards to protect miners from another disaster. This bill is our best chance to accomplish this goal.

I will be happy to answer any questions that you may have. Thank you.

[The statement of Mr. Main follows:]

Prepared Statement of Hon. Joseph A. Main, Assistant Secretary of Labor, Mine Safety and Health Administration, U.S. Department of Labor

MR. CHAIRMAN, MR. RANKING MEMBER, AND MEMBERS OF THE COMMITTEE: I appreciate the opportunity to appear here today on behalf of the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), and on behalf of Secretary of Labor Hilda Solis, to discuss the Miner Safety and Health Act of 2010. Secretary Solis has been a great supporter of MSHA's mission and a champion of greater protections for all workers. I am also pleased to join the Solicitor of Labor, Patricia Smith, and Assistant Secretary David Michaels, who I have worked with closely these past months. Both are powerful advocates for stronger safeguards to protect the health and safety of all workers and for holding employers accountable.

When I took on the mission of leading MSHA as the Assistant Secretary I did so with a clear purpose in mind—to implement and enforce the nation's mine safety laws in order to improve health and safety conditions in the nation's mines and enable miners to go to work, do their job, and return home to their families each and every day free of injury, illness or death. That is what my administration is about.

I must acknowledge why we are here. We would not be discussing sweeping improvements to the Mine Act if it were not for the 29 miners who lost their lives at the Upper Big Branch (UBB) Mine. Since the disaster, I have met with the families of the victims of that tragedy on several occasions. My prayers go out to the families and their loved ones. I believe I speak for everyone here when I express my hope that we will all remember their profound loss as we move forward in making reforms that will save other mining families, other mining communities, from experiencing their grief.

We saw in living detail how committed these families are to protecting their brethren from going through this kind of tragedy again when they testified at this Committee's field hearing in Beckley. They bravely told me and this Committee how the mining industry and our mine safety system had failed them. I want Eddie Cook, Gary Quarles, Alice Peters, Steve Morgan, Clay Mullins, and Goose Stewart to know that their pleas for change did not fall on deaf ears.

When the Secretary and I met with the President shortly after the Upper Big Branch explosion, he made clear his personal commitment and that of the Administration to honor the victims of this disaster by ensuring justice is served on their behalf and that an accident of this magnitude never happens again. He told the nation "we owe [those who perished in the UBB disaster] more than prayers. We owe them action. We owe them accountability. We owe them an assurance that when they go to work every day, when they enter that dark mine, they are not alone. They ought to know that behind them there is a company that's doing what it takes to protect them, and a government that is looking out for their safety."

To ensure that justice is done on their behalf, I have directed MSHA to conduct a thorough and comprehensive investigation into what caused the explosion on April 5th. I am pleased to report that this investigation is well underway. MSHA investigators have conducted more than 100 interviews with Massey employees and MSHA personnel. In addition, our investigative team has finally been able to reenter the mine safely and our physical investigation of the mine is ongoing.

This investigation will be the most open and transparent in MSHA's history. We will be holding a number of public hearings, enabling unprecedented public participation in the investigation. Moreover, MSHA is conducting its investigation in a manner designed to avoid any interference in the Justice Department's criminal investigation.

Today's hearing is a critical step forward in making good on the President's promise that this Administration would take action to prevent future mine accidents. The Secretary and I applaud the work of Congressman Miller, Chairwoman Woolsey, Congressman Rahall and their Senate colleagues in drafting this bill, as well as the hard work of their staffs. I personally appreciate the opportunity that all of you gave me to have worked so closely with you on this legislation. It closes some critical gaps in the Mine Act and establishes strong new protections for miners. I am proud to tell you that this Administration fully endorses the Committee's efforts to move this legislation this year and we look forward to working with you on this legislation as it moves through the legislative process.

This bill rests on a solid foundation of principles. Those principles are:

• that every worker is entitled to come home from work safely at the end of a shift;

• that fatalities, injuries and illnesses can be prevented when employers institute and follow safety plans, prevent hazards, and protect workers, even in dangerous industries like mining; and,

• that the best role MSHA can play is to enforce mine operators' obligation to take responsibility for the safety and health of their workers.

The tragic explosion at the Upper Big Branch mine revealed that the nation's mine safety laws are not serving these principles the way they should. The Miner Safety and Health Act of 2010 will bring those principles back to the forefront, and put the health and safety of miners first.

I believe this bill really will change the culture of safety in the mining industry. It does not simply fix a particular hazard or practice that caused the last disaster, as has often been the pattern in mine safety reform. Instead, it gives MSHA the tools it needs either to make mine operators live up to their legal and moral responsibility to provide a safe and healthful workplace for all miners, or to step in with effective enforcement when operators refuse to live up to this responsibility and endanger miners.

While Solicitor Smith and I look forward to discussing many aspects of the bill, I would like to discuss a few particular provisions I believe will, if enacted, save lives, help prevent mine explosions, help ensure that miners have a meaningful and protected voice about their own health and safety at work, and bring problem mine operators into compliance with the law.

Among the most important provisions of this bill is its replacement of the Mine Act's pattern of violations (POV) provision. The bill would make the POV system a meaningful tool in MSHA's arsenal. When I first appeared before this Committee in February to testify about the backlog of contested cases pending before the Federal Mine Safety and Health Review Commission, one of the areas I identified for needed reform was MSHA's current pattern of violations process. The Mine Act's POV provision was intended to provide MSHA a powerful tool to deal with mine operators who demonstrated, through continued significant and substantial health or safety violations, a disregard for the health and safety of miners. Instead, the POV provision is an empty vessel—it has never been successfully implemented against a mine operator in the history of the Mine Act—and is broken by all accounts, including MSHA's.

I have been working on POV reform since shortly after my confirmation. Last winter, and well before the explosion at Upper Big Branch, MSHA put its planned reform of pattern of violations regulations on its Spring Regulatory Agenda. This legislation will expedite that needed reform.

Under current regulations, establishing an operator's pattern of violations simply takes too long and exposes miners to risk when MSHA should be acting. MSHA can only act after an operator has a number of violations that have become final orders of the Commission. Given the current backlog of Commission cases, MSHA is pursuing pattern violators years after the violations occurred. The Miner Safety and Health Act of 2010 fixes this problem by eliminating the final order requirement and directing MSHA to identify mines with a pattern of recurring accidents, injuries, illnesses or citations or orders for safety or health violations that indicate an elevated risk to miners. This change will allow MSHA to use this enhanced enforcement tool looking at more recent violations and events rather than ones that are years old. The bill still provides that operators can seek an expedited review of withdrawal orders issued under the pattern process, but it does not require cases to work their way through the system before MSHA can act. I believe this bill will save lives and prevent injuries by enabling MSHA to act quickly to enforce compliance with the Mine Act at operations with high levels of violations.

The bill also makes the Mine Act's pattern provisions more remedial than current law and more focused on forcing a change in the safety culture of mines that fail to establish a commitment to miner safety and health. Under this bill, if MSHA de-

termines that a mine has a pattern of recurring citations, MSHA is authorized to require the operator to take particular actions tailored to the risks to which miners have been exposed, including additional training for miners, establishing a health and safety management program, and designating certified safety personnel at the mine to address the mine's health and safety problems. The bill also increases the number of workplace inspections for mines in pattern status and authorizes MSHA to directly communicate with a POV mine's workforce about conditions at the mine and the rights of miners under the Act.

Under the new POV program, MSHA will have an open and transparent system for choosing mines that need to be put into POV status. The data that MSHA uses to evaluate the appropriateness of putting a mine on POV status will be available for the public to review and the criteria will be direct and comprehensible. I believe many mine operators will take advantage of this openness and transparency to monitor their own performance and change their ways before they put their miners into danger. Those mine operators should know whether their lack of compliance will necessitate putting them on POV status, before that happens, and they will be able to improve conditions at their mines before MSHA must step in to assist in remediating the conditions at the mine.

I strongly believe that a safe mine requires the active involvement of miners who are informed about safety and health issues as well as their rights under the Act to demand a safe workplace. I have met with many mine operators, and those operators with the strongest safety and health cultures would agree that the participation and involvement of miners in safety and health is a key component of their safety records. However, the powerful testimony at the Committee's Beckley field hearing underscored that there are operators who fail or refuse to embrace this view.

Miners that testified at the hearing made clear that that some miners are often afraid to speak up about conditions at their mines. Even when miners know of threats to their own safety and the safety of their fellow miners, they face a significant risk of losing their jobs, sacrificing pay, or suffering other negative consequences if they come forward.

No one knows the conditions in the mines better than the miners themselves. Just as a traffic cop cannot be on every street corner catching every speeding car, MSHA inspectors cannot be in every mine, finding every hazard every day of the week. It is absolutely crucial that miners bring dangerous conditions to mine operators' and MSHA's attention before those conditions cause injuries, illnesses, or even fatalities.

This bill establishes important protections for miners when they exercise their rights under the Mine Act. The Mine Act has long protected from retaliation miners who come forward to report safety hazards. We have heard loud and clear, however, that those protections are simply inadequate and that miners lack faith and belief in the current system. The Miner Safety and Health Act of 2010 makes dramatic changes in this area and gives MSHA the tools it needs to protect miners who come forward. The bill:

- Makes explicit the right of all miners to refuse to perform work they reasonably believe to be unsafe;
- Creates a fairer and faster process to get miners their jobs back if they are discriminated against for coming forward to complain about safety or health issues;
- Eliminates the financial disincentive for miners to report safety hazards that might result in the mine being shut down so the hazards can be fixed by guaranteeing miners pay during all safety-related shut downs. No one should have to choose between a paycheck and protecting him or herself; and,
- Substantially increases penalties for mine operators who retaliate against miners who report safety hazards.

MSHA will work hard to vigorously enforce these new protections. Part of this reform is to ensure that miners are aware of their rights. This bill makes strides in that direction. It requires that miners receive annual refresher training on their rights, including the right to report hazardous conditions, receive training, participate in mine inspections through a representative of miners, and refuse to work in hazardous conditions.

The bill also includes several important provisions to require mine operators to find dangerous conditions in their mines before they hurt or kill miners and to take action to fix them. The Labor Department's Spring 2010 Regulatory Agenda announced our intention to use new tools to detect and prevent hazards to workers. Generally, DOL announced its intent to move towards a broad strategy that requires employers to understand that the burden is on them to obey the law before they are visited by DOL. We call this compliance strategy "Plan/Prevent/Protect." The provision on the pre-shift review of mine conditions advances this strategy.

The Mine Act mandates operator pre-shift examinations for such hazards or violations of mandatory health or safety standards as the Secretary requires. These ex-

aminations are a critical component of an effective safety and health program for underground mines. In the ever-changing mine environment, it is critical that hazardous conditions and violations be recognized and abated quickly. The provision in the bill is designed to ensure that all hazards and violations are communicated effectively so that they can be abated before anyone is hurt or killed by them. The result should be a reduced risk of injury, illness and death and should lead to fewer citations for safety and health violations during MSHA inspections of underground mines.

The legislation will also help MSHA and SOL enforce the law successfully after inspectors cite a serious violation by clarifying the meaning of a significant and substantial (S&S) violation. My colleague, the Solicitor, will talk about this important provision in more detail. Let me just say that since the early 1980's, the meaning of an S&S violation under the Mine Act has been unreasonably restricted by a Commission interpretation of the law that is not consistent with Congressional intent or with protecting the safety and health of miners. The bill corrects this problem by expressly defining an S&S violation as one with a reasonable possibility of resulting in a miner's injury, illness or death.

I will share an example of how the Commission's interpretation of the law restricts MSHA from doing its job. In the recent hearing to put Massey's Tiller Mine on a pattern of violations, the Secretary needed to establish that a certain number of Massey's violations were S&S in order to prevail. Although the Commission judge has not yet issued a written decision, he announced from the bench that the Secretary did not prevail. The judge ruled that it is not a "significant and substantial" violation of mine safety regulations to operate a piece of equipment with an impermissible opening into an enclosed electrical component in a gassy mine where combustible coal dust could be present. The judge interpreted the governing caselaw to require MSHA to show that the equipment have an existing source of electrical sparks within the enclosed electrical component before the violation could be considered "significant and substantial." This is clearly wrong, imposing an inappropriate standard that puts miners at risk and defies common sense. The Mine Act is intended to protect miners, not expose them to needless risk before MSHA is allowed to effectively act. It does no good to penalize an operator with an S&S violation after miners have died in an explosion. This is an example of why the law needs to be changed and why Congress needs to ensure that when a mine operator allows miners to be exposed to serious hazards the law treats it as a serious violation.

Now I would like to mention a preventive measure the bill adds that modernizes existing standards. The provision in the bill to expedite the process of improving atmospheric monitoring in mines will make operators, MSHA, state agencies and mine emergency teams better prepared for mine emergencies. Specifically, the provision requires the National Institute for Occupational Safety and Health to advance the research in how to better monitor the atmosphere in mines for the deadly threats of methane and other dangerous gases. The Secretary then plans to engage in rulemaking in response to NIOSH recommendations. We anticipate that ultimately we will be able to have real-time monitoring of a mine's atmosphere during a mine emergency.

In addition, in day-to-day operations, mine operators would know when their miners are being put in peril as a result of a build up of dangerous gases. It will then be incumbent upon operators to determine the cause of the build up and to plan how to effectively fix the problem. The bottom line is that better atmospheric monitoring will prevent deadly explosions, fires, injuries, and fatalities and speed the rescue of miners in the event of emergency.

The bill will also prevent disastrous explosions by updating the rock dust standards. The bill not only mandates that operators increase the amount of incombustible dust present in airways—the established method of suppressing the threat of combustible coal dust—but it also establishes a framework for operators to better monitor the explosibility of the dust present in their mines. Just as better atmospheric monitoring mandated by this bill will give operators the information they need to plan how to prevent methane and gas explosions, better monitoring of explosive coal dust will give operators the information they need to plan how to prevent a build up of coal dust that results in devastating propagation of explosions.

As I mentioned at the outset, this bill includes important new tools to allow MSHA to step in and act quickly to protect miners at risk. The Solicitor will talk about the most important of these—enhanced power for MSHA to seek an injunction. I would like to highlight several other provisions. First, the bill gives MSHA the authority to revoke mine safety plans based on material changes in the mine conditions or if the original plan was based on inaccurate information. This means that MSHA does not have to sit on the sidelines when it sees that conditions in the

mine do not match the conditions described in the mine plans for roof control, ventilation and emergency response.

In addition, under this bill, MSHA will play an increased role in ensuring the competence of those personnel in mines whose jobs are so critical to maintaining a safe workplace that the law requires them to be certified as qualified. The bill's certification provisions will allow MSHA and the states to reinstate accountability in mine safety and health. The bill requires recertification of certified personnel to ensure their skills are up to date, as well as a means to revoke a certification if someone in a certified safety position fails to carry out his or her responsibilities. MSHA will work with states to assure those who have positions of responsibility that are certified or qualified are doing their job, and that they lose their certification if they fail to carry out their responsibilities. MSHA will step in where gaps exist in state laws and certifications to ensure that those who perform certified or qualified safety jobs are qualified safety professionals. I pledge to work closely with my counterparts in the states to create a seamless certification system.

Another important means of protecting miners at risk is through adequate and appropriate training. Too often the rush to produce as much coal as possible means cutting corners when it comes to training miners properly. If there is a serious accident or fatality, MSHA's ability to cite violations does not necessarily address the root problem. The ability to ensure miners have the training they need will improve working conditions and save lives.

Finally, I would like to comment on a new tool given to the Justice Department in this bill. The bill will increase criminal penalties for giving advance notice of an MSHA inspection. I am sure many were shocked to hear the testimony at the Beckley field hearing about how common it is for mine operators to have advance notice of MSHA's inspections. This is a serious problem. MSHA recently took enforcement action against two Ben Bennett mines in Kentucky, Manalapan Mining Company's RB #5 Mine and Left Fork Mining Company's Mine #1, when agency inspectors caught the company tipping off the mine as the inspectors arrived. At other mines MSHA has attempted to prevent the advance notice by capturing mine phones to keep mining personnel from tipping off the underground mining operations. Another example is the Tiller Mine, a Massey operation in Virginia that MSHA recently tried, unsuccessfully, to make the first mine ever placed on a pattern of violations. According to a report in the Washington Post, miners at the surface routinely alert underground miners that a federal inspector is headed underground. Clearly, my inspectors cannot conduct effective inspections if unscrupulous mine operators know that the inspector is on the way and make quick and short-lived fixes to hazards that put miners at risk just to avoid enforcement actions. This bill attacks the problem by making it a serious crime to give advance notice of an MSHA inspection. Our whole enforcement system relies upon fair and accurate inspections—this provision will enhance the integrity of that system. This is also another reason why MSHA needs the power to use subpoenas provided under this bill. Some mine owners who operate their mines in violation of health and safety laws when MSHA inspectors are not present, and use unlawful tactics to get tipped off about pending inspections, should know that under this bill, we will be able to more effectively investigate and expose these unsafe and illegal practices which endanger miners.

My colleague, Assistant Secretary Michaels, will discuss this significant aspect of the legislation in more detail, but I would like to express the Administration's strong support for including provisions from the Protecting America's Workers Act in this bill. All workers, regardless of where they work—underground in a mine, out in the ocean on an oil rig, or in a factory on the land—deserve a safe and healthful workplace.

I had the privilege of working with Senator Robert C. Byrd throughout my career. Without a doubt, coal miners never had a better friend than Senator Byrd. He fought with his legendary tenacity to keep them safe and protect them from black lung disease. I can think of no better way to honor his memory and the memory of the 29 miners who perished at the Upper Big Branch mine than to prevent another disaster. This bill is our best chance to accomplish this goal. I look forward to working with the Committee as the bill moves forward. I am happy to answer your questions.

Chairman MILLER. Thank you.
Solicitor Smith.

STATEMENT OF HON. M. PATRICIA SMITH, SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR

Ms. SMITH. Chairman Miller, Ranking Member Kline and the members of the committee, for more than three decades the enforcement tools of the Mine Act and the Occupational Safety Act have played a pivotal role in cutting the number of work-related deaths, injuries and illnesses.

But as recent tragic events have demonstrated, all tools need to be periodically sharpened. The tools in the Mine Act and the OSHAct are no exception.

I would like to focus today on several provisions in H.R. 5633 that will, if enacted, sharpen our enforcement tools and help make our mines and other workplaces healthier and safer places to work.

Under the Mine Act, an operator with significant and substantial violations can be subject to increasingly severe enforcement actions, including withdrawal orders. Although Congress did not define significant and substantial in 1977 when it passed the Mine Act, MSHA and the Solicitor's Office believe the phrase applies to all violations that have a reasonable possibility of resulting in injury, illness or death, and excludes only violations that either present no hazard or violations in which the hazard is speculative or remote. We believe this interpretation is consistent with the legislative history of the Mine Act.

Unfortunately, the Federal Mine Health and Safety Review Commission does not agree and has established a four-part test for S&S, which in our view has hampered enforcement for many years. Violations under the commission-imposed standard must rise nearly to a level of imminent danger before they are considered S&S. I have given several examples of these cases in my written testimony. Section 201 of the bill would more closely reflect what we believe was Congress's original intent by defining an S&S violation as one in which there is a reasonable possibility that such a violation could result in injury, illness or death. We support this streamlined definition, which we think will provide a clearer standard for operators, enhance mine health and safety, and reduce counterproductive litigation over whether a particular violation is indeed S&S.

Mine safety and effective enforcement will also be enhanced by the bill's amendment to the Mine Act injunction relief provision. Section 108(a)(2) of the act authorizes the Secretary to ask a Federal District Court for appropriate relief, including a temporary or permanent injunction, if she believes that the operator of a mine is engaged in, quote, "a pattern of violations of mandatory health or safety standards that constituents a continuing hazard to the health and safety of miners."

This provision has provided two difficulties. First, it requires the Secretary to establish a pattern, a term that closely echoes the term "pattern" in Section 104(e)'s pattern of violations provision, which as Assistant Secretary Main has described has proved difficult to apply and to enforce.

Second, it limits the basis for the pattern to violations of mandatory health and safety standards. Section 203 of the bill addresses these issues. It replaces the term "pattern" with the phrase "course of conduct," and it specifies that the behavior that would support

injunctive relief is not limited merely to violations of mandatory health and safety standards, but it includes other things, like violations of orders.

A third welcome provision in the bill is the provision expanding the Secretary's authority to issue subpoenas for the purpose of taking testimony and other evidence. Currently, that power is only given in conjunction with public hearings. Section 102 of the bill would authorize the Secretary to issue subpoenas in conjunction with the performance of any of her functions. It would also authorize MSHA representatives and attorneys to question individuals privately, to take an individual's confidential statement outside the presence of the operators or attorney if the individual so desires, and to maintain the confidentiality of that statement to the extent permitted by law.

The bill also adds two new criminal provisions to the Mine Act and strengthens both the Mine Act's and OSHAct's current sanctions for criminal conduct. The bill would amend the Mine Act so that giving advance notice of MSHA inspections would be treated with the severity it deserves. Advance notice prevents MSHA inspectors from being able to observe the mining as it is actually occurring. The bill would make such conduct, which is currently treated as a misdemeanor, a felony.

The bill would also provide a brand new criminal provision making it a felony to retaliate against any person, miner or nonminer, who reports unsafe conditions to MSHA. Such conduct would be subject to the fines set forth in the code and would carry a maximum prison term of ten years. This provision would encourage miners, their relatives and others to notify the government of mine safety violations by ensuring them that retaliation for acting would be met with effective punishment.

Both the Mine Act and the OSHAct already contain some criminal provisions. However, most of these violations are treated as misdemeanors. Building on that foundation the bill would analyze all such violations by individuals, operators, and employers under a knowing standard and would raise the maximum penalties for knowing violations fourfold and make first-time convictions felonies rather than misdemeanors, which is currently the case.

These charges, especially the prospect of a significant period of incarceration, we believe would focus management personnel on their responsibility to keep their mines safe. The bill would also make other important improvements to the OSHAct. And I will mention just two of them.

First, it grants rights to accident victims and their families and other representatives. They must be notified. Second, the bill would allow OSHA to require prompt abatement of all serious hazards, even if the employer files a notice of contents. And Assistant Secretary Michaels' testimony will explain the importance of that.

So I appreciate the opportunity to testify on this important legislation. As Secretary Solis said when the bill was introduced, there is a tremendous need for this legislation in order to save the lives and health of American workers in mines and throughout the Nation, and I look forward to your questions.

[The statement of Ms. Smith follows:]

Prepared Statement of Hon. M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor

For more than three decades, the enforcement tools in the Mine Act and the Occupational Safety and Health (OSH) Act have played a pivotal role in helping cut the number of work-related injuries, illnesses, and deaths to historic lows. But, as recent tragic events have demonstrated, all tools need to be recalibrated and sharpened from time to time if they are to remain useful. The tools in the Mine Act and the OSH Act are no exception. I would like to focus my comments today on several provisions in H.R. 5663, the "Miner Safety and Health Act of 2010," that will, if enacted, sharpen our existing enforcement tools and help make our mines and other workplaces safer and healthier places to work.

Under the Mine Act (the Act), an operator with "significant and substantial" (S&S) violations can be subject to increasingly severe enforcement actions, including withdrawal orders. Although Congress did not define the phrase "significant and substantial" in 1977 when it passed the Mine Act, the Mine Safety and Health Administration (MSHA) and the Solicitor's Office believe that the phrase applies to all violations that have a reasonable possibility of resulting in injury, illness or death, and excludes only those violations that present no hazard or violations in which the hazard is speculative or remote. We believe that our interpretation is consistent with the legislative history of the Act, which makes it clear that the "S&S" standard was designed to cover all but purely technical violations of the Act. Unfortunately, the Federal Mine Safety and Health Review Commission does not agree, having established a four-part definition of "S&S" that, in our view, has hampered enforcement for many years. In essence, violations under the Commission-imposed standard must arise nearly to the level of an imminent danger before they are considered significant and substantial.

I'd like to give you a few examples. In a 2009 case, an underground coal mine operator with a gassy mine had coal and coal dust accumulations up to four inches deep across nearly the entire width of the belt entry in several locations. The mine also had random piles of coal dust from six to eight inches deep. However, a Commission administrative law judge held that the accumulations violation was not S&S because, at the time of the violation, there were only "potential" ignition sources in the area and those potential ignition sources were no different from ignition sources present in all belt entries. He also noted that methane levels were low at that time. Cumberland Coal Resources, LP, 31 FMSHRC 137 (Jan. 2009) (ALJ), reversed in part on other grounds, 2010 WL 2149801 (May 2010).

In another 2009 case involving an underground coal mine, an operator failed to hang ventilation curtains, which are used to control coal mine dust. This was a violation of the operator's ventilation plan. A Commission administrative law judge acknowledged that coal was being cut without any ventilation controls in place, that there was no air movement, and that the air was thick with suspended coal dust. Yet the judge found that the violation was not S&S because, at the time of the violation, there were no potential ignition sources and methane levels were low. The judge also noted that the mine had not experienced other coal dust ignitions. Sidney Coal Co., 31 FMSHRC 1197 (Oct. 2009) (ALJ).

And we face the same challenges with other types of violations. For example, in a 2006 case, the Review Commission found that a violation of certain "hands-on" firefighting training requirements was not S&S because it was not reasonably likely that the lack of that type of training would lead to serious injury. The Commission ruled in this manner even though miners in that mine actually had died fighting a fire improperly. Jim Walter Resources, Inc., 28 FMSHRC 579 (Aug. 2006).

Section 201 of the bill would more closely reflect what we believe was Congress' original intent by defining an "S&S" violation as one in which there is a "reasonable possibility that such violation could result in injury, illness, or death." We support this streamlined definition, which will provide a clearer standard for operators, inspectors, and the Commission. This new definition not only will enhance mine safety and health, it will help reduce counterproductive litigation over whether a violation is "significant and substantial."

Mine safety and health, as well as swift and effective enforcement, will also be enhanced by the bill's amendment to the Mine Act's injunctive relief provision. Section 108(a)(2) of the Act [30 U.S.C. § 818(a)(2)] authorizes the Secretary to ask a federal district court for appropriate relief, including a temporary or permanent injunction, if she believes that the operator of a mine is engaged in "a pattern of violation of * * * mandatory health or safety standards" which, in the Secretary's judgment, constitutes a continuing hazard to the health or safety of miners. This provision has presented two difficulties. First, it requires the Secretary to establish "a pattern"—a term that echoes the term "pattern" in Section 104(e)'s "pattern of viola-

tions" provision—which has proved difficult to apply and enforce. Second, it limits the bases for "a pattern" to violations of mandatory health or safety standards.

Section 203 of the bill addresses both of these difficulties. First, it replaces the term "pattern" with the phrase "course of conduct," which is clearer, simpler, and more reflective of the kind of operator behavior that the Secretary's injunction authority is intended to correct. Second, it specifies that the kind of behavior that will support injunctive relief includes, but is not limited to, violations of mandatory health or safety standards. We believe that because the bill broadens the bases on which the Secretary can seek injunctive relief, it will enhance her ability to obtain such relief when necessary to protect miners.

A third welcome provision in the bill is the provision expanding the Secretary's authority to issue subpoenas for the purpose of obtaining testimony and other evidence. Currently, the Mine Act only authorizes the Secretary to issue subpoenas in connection with a public hearing. Section 102 of the bill would authorize the Secretary to issue subpoenas in connection with the performance of any of her functions under the Act. Section 102 would give MSHA subpoena power similar to OSHA's and would greatly enhance MSHA's ability to conduct effective inspections and investigations. Section 102 also would authorize MSHA representatives and attorneys to question individuals privately, to take an individual's confidential statement outside the presence of operator attorneys if the individual so desires, and to maintain the confidentiality of a statement to the extent permitted by law.

The bill also adds two new criminal provisions to the Mine Act, and strengthens both the Mine Act's and the OSH Act's current sanctions for criminal conduct. The bill would amend the Mine Act so that, for the first time, giving advance notice of MSHA inspections would be treated with the severity it deserves. Advance notice prevents MSHA inspectors from being able to observe mining as it is actually being done. The bill would make such conduct—currently treated as a misdemeanor—a felony punishable by fines set forth in title 18, U.S. Code (the criminal code), and a maximum prison term of five years.

The bill also contains a brand new criminal provision making it a felony to retaliate against any person—miner or non-miner—who reports unsafe conditions to MSHA. Such conduct would be subject to the fines set forth in title 18, U.S. Code, and would carry a maximum prison term of ten years. This provision goes well beyond traditional civil whistleblower sanctions that allow the Secretary to penalize those who discriminate against miners making safety complaints to their employers. It encourages miners, their relatives, and others to notify the government of mine safety violations by providing the assurance that retaliation for such activity will be met with truly effective punishment.

Both the Mine Act and the OSH Act already contain some criminal provisions. The Mine Act's current structure sets criminal penalties for agents who "knowingly" violate the Mine Act or mandatory standards and for operators who willfully violate the Mine Act or mandatory standards. The OSH Act also allows criminal sanctions for employers who willfully violate OSHA standards, if those violations cause a worker's death, but they are treated as misdemeanors. Building on that foundation, the bill would analyze all such violations by individuals, operators, and employers under the "knowing" standard, would raise the maximum penalties for such knowing violations fourfold, and would make even first-time convictions felonies rather than misdemeanors, as is currently the case. The bill would also allow criminal sanctions for employers whose knowing violation of an OSHA standard causes or contributes to serious bodily harm to an employee. Maximum prison terms would be increased from one year to five years for first-time convictions of this new OSHA provision, and of the Mine Act criminal provisions, and increased from five years to ten years for second and subsequent convictions. For knowing violations of the OSH Act that cause or contribute to a worker's death, a first conviction is punishable by up to ten years in prison and subsequent convictions are punishable by up to twenty years in prison. These changes—especially the prospect of a significant period of incarceration and a lifetime felony criminal record—will, in our view, focus those in management positions on their personal responsibility for ensuring safety in the mines and other workplaces they control in a way the former penalty structure did not.

The bill also makes several other important improvements to the OSH Act. First, it modernizes the Act's whistleblower provisions, bringing them in line with those of the Mine Act and other safety laws. For the first time, workers filing OSH Act whistleblower complaints would be entitled to an administrative hearing and review, instead of having to wait years to have their cases heard in District Court. And, like whistleblower complainants under the 18 other statutes administered by the Department, including the Mine Act, OSH Act whistleblowers would have the

right to pursue their cases on their own behalf if the Department declines to take them.

The bill also increases OSH Act civil penalties to bring their value back to their approximate value the last time penalties were raised in 1990. It also allows future inflation adjustments, correcting an oversight that has led to OSH Act penalties, unlike virtually all other Federal civil penalties, continually declining in value. We believe this provision will go a long way toward restoring the OSH Act's deterrent effect, and will make it harder for employers to treat OSHA penalties as simply a cost of doing business. In addition, the criminal penalties in this bill are based on similar provisions in the Clean Water Act and the Resource Conservation and Recovery Act, meaning that killing a person will be treated just as seriously as killing a lake.

In addition, the bill, for the first time, grants rights to accident victims and their families or other representatives. It requires that victims be kept informed of the status of accident investigations, and any resultant enforcement actions and settlement negotiations. They will have the right to meet with OSHA before any citation is issued, to receive a copy of any citation, and to be notified of any notice of contest. They must also be notified of any legal proceedings, and will have the right to participate in those proceedings. They will also have the right to make a statement to the parties conducting any settlement negotiations, and a similar right to make a statement to the Commission, which the Commission must consider in rendering its decision. To assist in exercising these rights, the Secretary will have to designate a family liaison in each OSHA area office. We understand that none of these provisions will restore a lost worker to a grieving family, or restore full use of faculties to an injured worker. But we believe they are the least we owe these workers and their families.

Finally, subject to an expedited hearing before the Commission, this bill will allow OSHA to require prompt abatement of all serious hazards, even if the employer files a notice of contest. As Assistant Secretary Michaels' testimony explains in greater detail, this provision is crucial. Currently, if an employer contests a citation for any reason, abatement is not required until the Commission fully resolves the contest, so a dangerous condition can be allowed to exist through years of legal delays. This bill will prevent this travesty from recurring.

I appreciate the opportunity to testify on this important legislation. As Secretary Solis said when this bill was introduced, there is a tremendous need for this legislation in order to save the lives and health of American workers, in mines and throughout the nation. I look forward to working with the Committee on this legislation as it moves forward and to responding to any questions you may have.

Chairman MILLER. Thank you.

Secretary Michaels.

STATEMENT OF HON. DAVID MICHAELS, ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. MICHAELS. Thank you, Chairman Miller, Ranking Member Kline, members of the committee.

Every day in this country 14 workers are killed on the job. Every day we encounter employers who cut corners on the safety and health of their workers, children who lost parents or parents who have lost children from workplace injuries. Workers are fired for voicing health and safety concerns. Companies subject workers to known hazards while the courts spend years deciding contested citations, and our Nation's workplace protection agencies are plagued with outdated laws, tools and penalties that make it difficult to deter safety and health violations.

During the time that I have been assistant secretary for OSHA, 54 workers have been killed in explosions at the Kleen Energy Power Plant in Connecticut, the Tesoro Refinery in Washington State, the Upper Big Branch Mine in West Virginia and on the Deepwater Horizon oil rig. We add their names to the long list of recent disasters, like the explosion at the BP refinery in Texas, the

Sago and Darby mines in West Virginia and Kentucky, and the Imperial Sugar Plant in Georgia, where dozens of works were killed and hundreds more injured.

But only disasters make national headlines. What is not widely publicized are the more than 5,000 other workers killed on the job in America each year. These tragedies happen in every corner of the country, usually one at a time, far from the evening news and the morning headlines.

Secretary of Labor Hilda Solis's vision for the Department of Labor is good jobs for everyone. Good jobs are safe jobs, and we want to do more than make our Nation's workplaces safe.

I, therefore, want to congratulate you, Mr. Chairman, and all the co-sponsors of the Miner Safety and Health Act for recognizing not only that the Nation's 350,000 miners desperately need better protection, but that this Nation's 135 million workers who are covered by OSHA also need better more up-to-date protection. The Miner Safety and Health Act makes critical amendments to the Occupational Safety and Health Act, which has not been significantly updated in 40 years.

This legislation would increase OSHA's civil and criminal penalties, enhance whistleblower protections and victims rights and give OSHA the authority to require abatement of serious hazards, even if and while the employer contests citations issued for them.

These provisions are strongly supported by the Obama administration. Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. When the employer's voluntary efforts are not enough. Swift, certain and meaningful penalties provide an important incentive to do the right thing.

However, OSHA's current penalties are not large enough to provide adequate incentives, especially for large employers. As a result, unscrupulous employers often consider OSHA penalties the cost of doing business. It is more effective—more cost effective to pay the minimal OSHA penalty than to correct the underlying health and safety problem.

The Miner Safety and Health Act makes much needed increases in OSHA's civil and criminal penalties. Nothing focuses attention like the possibility of going to prison. This bill would make it a felony with up to 10 years in prison when an employer knowingly violates an OSHA standard which causes or contributes to the death of any employee.

Good jobs are also jobs where workers' voices are an essential part of the conversation about creating safe workplaces. Since OSHA cannot be at every workplace all the time, we rely heavily on workers to act as our eyes and ears in identifying hazards. If employees fear that they will lose their jobs or otherwise be retaliated against for participating in safety and health activities, they are not likely to do so.

The OSHAct states the worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions. Unfortunately, there are serious deficiencies in this law. The Miner Safety and Health Act doesn't protect workers who refuse to perform tasks they reasonably believe could result in serious injury or illness to themselves or to other employees. The Miner Safety and Health Act would also expand the rights of workers and victims' families,

and establish a family liaison in each OSHA area office to keep victims informed of the status of investigations and enforcement actions, and to assist victims in asserting their rights. This will help our investigations, since victims and their families are often the source of useful information.

One of the most significant changes that this legislation makes to the OSHAct is the provision that requires abatement of serious, willful, and repeat hazards during the contest period. Currently, if an employer contests an OSHA citation, that employer is not obligated to correct the hazard during the administrative contest period, leaving workers exposed to serious or deadly hazards for months or even years.

The Miner Safety and Health Act would enable OSHA to issue failure to abate notices to a workplace with a citation under contest. It is important to note that this legislation also safeguards the rights of employers by allowing an accelerated appeal to the Occupational Safety and Health Review Commission.

Mr. Chairman, in the months that I have been at OSHA, I have spoken with children, spouses and parents of workers who have been killed on the job. The one thing they ask for is for our laws to have the best possible protections to prevent more workers from leaving their loved ones behind.

We applaud the important work this committee has done in drafting the Miner Safety and Health Act, and we look forward to working with you on it. Thank you for inviting me to testify. I am happy to answer your questions.

[The statement of Mr. Michaels follows:]

Prepared Statement of Hon. David Michaels, Ph.D., MPH, Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor

Chairman Miller, Ranking Member Kline, and Members of the Committee, thank you for the opportunity today to discuss the Miner Safety and Health Act of 2010, which would bring needed reforms to our nation's workplace health and safety laws. Every day in this country, 14 workers are killed on the job. Every day we encounter employers who put profits above the safety of their workers, children who have lost parents, or parents who have lost children from workplace injuries. Workers are fired for voicing safety and health concerns, companies subject workers to known hazards while the courts spend years deciding contested citations, and our nation's workforce protection agencies are plagued with outdated laws, tools, and penalties that make it difficult to deter safety and health violations.

Until 1970, there was no national guarantee that workers throughout America would be protected from workplace hazards. In that year the Congress enacted a powerful and far-reaching law—the Occupational Safety and Health Act of 1970 (OSH Act), which created the Occupational Safety and Health Administration (OSHA) and provided workers with the rights they needed to protect their safety and health on the job.

But today, 40 years after the Act was passed, American workers continue to face unacceptable hazards on the job. And while these hazards and working conditions have changed significantly, the law has not been substantially modified in those 40 years.

During the seven months I have been the Assistant Secretary of OSHA, explosions at the Kleen Energy power plant in Connecticut, the Tesoro refinery in Washington State, the Upper Big Branch mine in West Virginia, and on the Deepwater Horizon offshore oil drilling platform in the Gulf of Mexico have killed 54 workers. We add their names to a long list of recent disasters, like the explosions at the BP refinery in Texas, Sago and Darby mines in West Virginia and Kentucky, and the Imperial Sugar plant in Georgia that killed dozens of workers and injured hundreds more. But these are only the tragedies that make national headlines. What is not publicized are the more than 5,000 other workers killed on the job in America each

year, the more than 4 million who are injured, and the thousands more who will become ill or die in later years from present day occupational exposures. Every day in this country we have a Sago mine disaster, every two days an Upper Big Branch, and every month the loss of a fully loaded Boeing 747. These tragedies happen in every corner of the country, usually one at a time, far from the evening news and the morning headlines.

Secretary Solis' vision for the Department of Labor is "Good Jobs for Everyone." Good jobs are safe jobs and we must do more to make our nation's workplaces safer. OSHA has already taken significant steps toward this goal. In April, the Labor Department released its Spring regulatory agenda which includes a new enforcement strategy—Plan/Prevent/Protect—an effort designed to expand and strengthen worker protections through a new OSHA standard that would require not just the best employers, but every employer to implement an Injury and Illness Prevention Program tailored to the actual hazards in that employer's workplace. Instead of waiting for an OSHA inspection or a workplace accident to address workplace hazards, employers would be required to create a plan for identifying and remediating hazards, and then to implement this plan.

Essentially, through this common sense rule, also known as "Find and Fix," we will be asking employers to find the safety and health hazards present in their facilities that might injure or kill workers and then fix those hazards. Workers, those who are most directly at risk, would participate in developing and implementing these workplace safety plans and evaluating their effectiveness in achieving compliance.

While we believe this enforcement strategy will go a long way toward eliminating the "catch me if you can" mindset prevalent in corporate America, the workplaces of 2010 are not those of 1970 and the OSH Act, which has remained stagnant for 40 years, must be brought into the 21st century to ensure OSHA has the tools and authority to prevent safety and health violations.

I therefore greatly appreciate the work of this Committee in proposing legislation that would significantly increase OSHA's ability to help protect American workers. I want to congratulate you, Mr. Chairman, Congresswoman Woolsey and other cosponsors of the Miner Safety and Health Act for recognizing not only that the nation's 350,000 miners desperately need better protections to prevent any more Sago or Upper Big Branch disasters, but that this nation's 135 million workers in general industry who are covered by OSHA also need better, more up-to-date protections. Clearly, whether a worker leaves home in the morning on his way to a mine or on her way to a refinery or construction site, every worker needs and deserves equally effective protections.

Title VII of the Miner Safety and Health Act provides critical amendments to the OSH Act that would increase OSHA's civil and criminal penalties, enhance whistleblower protections and victims' rights, and give OSHA the authority to require abatement of serious hazards even if and while the employer contests citations issued for them. These provisions, strongly supported by the Labor Department and endorsed by the Obama Administration, would enable OSHA to more effectively accomplish its mission to "assure safe and healthful working conditions for working men and women."

Because OSHA can visit only a limited number of workplaces each year, we need a stronger OSH Act to leverage our resources to encourage compliance by employers. We need to make employers who ignore real hazards to their workers' safety and health think again. Federal OSHA and state plans combined have just over 2,200 inspectors, which translates to about one compliance officer for every 60,000 workers. OSHA needs more modern tools to ensure that employers are safeguarding the safety and health in our country's almost 9 million workplaces.

Today, my testimony will focus on the Title VII provisions of the Miner Safety and Health Act, which address significant weaknesses in current OSHA law, and how this legislation would address those problems by bringing OSHA into the 21st century.

Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. Those incentives are affected, in turn, by both the magnitude and the likelihood of penalties. Swift, certain and meaningful penalties provide an important incentive to "do the right thing." However, OSHA's current penalties are not large enough to provide adequate incentives, especially for large employers. Currently, serious violations—those that pose a substantial probability of death or serious physical harm to workers—are subject to a maximum civil penalty of only $7,000. Let me emphasize that—a violation that causes a "substantial probability of death—or serious physical harm" brings a maximum penalty of only $7,000. Willful and repeated violations carry a maximum penalty of only $70,000.

Congress has increased the OSH Act's monetary penalties only once in 40 years despite inflation during that period. Unscrupulous employers often consider it more cost effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem. The current penalties do not provide an adequate deterrent. This is apparent when OSHA penalties are compared with penalties that other agencies are allowed to assess.

For example, in 2001 a tank full of sulfuric acid exploded at an oil refinery in Delaware, killing Jeff Davis, a worker at the refinery. His body literally dissolved in the acid. The OSHA penalty was only $175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing EPA to assess a $10 million penalty for violating the Clean Water Act. How do we explain to Jeff Davis' wife Mary, and their five children, that the penalty for killing fish and crabs is so much higher than the penalty for killing their husband and father?

Other examples abound. The Department of Agriculture is authorized to impose a fine of up to $140,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to $325,000 when a performer curses on air. The Environmental Protection Agency can impose a penalty of $270,000 for violations of the Clean Air Act and a penalty of $1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job—even when the death is caused by a willful violation of an OSHA requirement—is $70,000.

The Miner Safety and Health Act makes much needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as $250,000. These increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept worker injuries and deaths as a cost of doing business.

Unlike most other Federal enforcement laws, the OSH Act has been exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation. This has reduced the real dollar value of OSHA penalties by close to 40%. In order to ensure that the effect of the newly increased penalties does not degrade in the same way, the Miner Safety and Health Act also provides for inflation adjustments for civil penalties based on increases or decreases in the Consumer Price Index (CPI).

Criminal penalties in the OSH Act are also inadequate for deterring criminal wrongdoing. Under the OSH Act, criminal penalties are limited to those cases where a willful violation of an OSHA standard results in the death of a worker and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction for a violation that costs a worker's life is six months in jail, making these willful crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have not been updated since the law was enacted and are weaker than virtually every other safety and health or environmental law. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. There is no prerequisite in these laws for a death or serious injury to occur. Other federal laws provide for a 20-year maximum jail sentence for dealing with counterfeit obligations or money, or mail fraud; and for a life sentence for operating certain types of criminal financial enterprises. It defies logic that serious violations of the OSH Act that result in death or serious bodily injury are treated as lesser crimes than insider trading, tax crimes, customs violations and anti-trust violations.

It is clear that nothing focuses attention like the possibility of going to prison. Unscrupulous employers who knowingly refuse to comply with safety and health standards as an economic calculus, and cause the death or serious injury of a worker, will think again if there is a chance that they will be incarcerated for ignoring their responsibilities.

The Miner Safety and Health Act would amend the criminal provisions of the OSH Act, as it would also amend the Federal Mine Safety and Health Act, to change the burden of proof from "willfully" to "knowingly." Specifically, Section 706 states that any employer who "knowingly" violates any standard, rule, or order and that violation caused or contributed to the death of any employee is subject to a fine and not more than 10 years in prison. Most federal environmental crimes and most federal regulatory crime use "knowingly," rather than "willfully." This would ease

the burden on prosecutors by harmonizing these worker safety provisions with similar (or comparable or analogous) crimes.

In the 1980s, we saw in Texas and California that aggressive criminal law enforcement procedures improved occupational safety and health. In Texas, the number of trenching fatalities dropped dramatically when one county adopted a well-publicized criminal prosecution effort. Los Angeles County California also mounted an effective criminal prosecution program during those years. In addition, OSHA continues to work with New York State's prosecutors on similar prosecutions, even as recently as the Deutsche Bank case. The Committee has wisely included a provision stating that nothing in the Act shall preclude a state or local law enforcement agency from conducting criminal prosecutions in accordance with its own laws.

Good jobs are also jobs where workers' voices are an essential part of the conversation about creating safe workplaces. As my colleague Assistant Secretary Joe Main has testified, this Committee heard powerful testimony from the mining community at its field hearing in Beckley, West Virginia about how important it is for miners to be able to come forward and report dangerous conditions in the mine before tragedy strikes. It is equally important that workers in other dangerous industries, like oil refineries, chemical plants, and construction, feel that same security in coming forward.

The OSH Act was one of the first safety and health laws to contain a provision—11(c)—for protecting employees from discrimination and retaliation when they report safety and health hazards or exercise other rights under the OSH Act. Since OSHA cannot be at every workplace at all times, we rely heavily on workers to act as OSHA's "eyes and ears" in identifying hazards at their workplaces. This protection is fundamental to OSHA's ability to safeguard the workforce. If employees fear that they will lose their jobs or otherwise be retaliated against for actively participating in safety and health activities, they are not likely to do so.

OSHA's 11(c) provision is now 40 years old and is one of the weakest whistleblower provisions in any federal law. Last April you heard from a worker whose discrimination claim was upheld by OSHA, but because of weaknesses in the law, the case was never carried forward to litigation. At that hearing, Deputy Assistant Secretary Jordan Barab testified that he was outraged that in the year 2010, workers in this country still fear being fired or disciplined for exercising their rights.

The Miner Safety and Health Act strengthens whistleblower protections for workers in both mining and general industries. It makes explicit that a worker may not be retaliated against for reporting injuries, illnesses or unsafe conditions to employers or to a safety and health committee, or for refusing to perform a task that the worker reasonably believes could result in serious injury or illness to the worker or to other employees.

Additionally, the Act increases the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with most of the other whistleblower statutes enforced by OSHA. Over the years many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline.

The Miner Safety and Health Act's adoption of the "contributing factor" test for determining when illegal retaliation has occurred is also a significant improvement in 11(c). The Act would employ this same test for whistleblower complaints in the mining industry as well, making both 11(c) and the Federal Mine Safety and Health Act consistent with other whistleblower statutes enacted since 1989, when the "contributing factor" scheme was introduced. This would enhance the protections afforded to America's workers and improve workplace safety and health.

The private right to enforce an order is another key element of whistleblower protections in the Miner Safety and Health Act, and has been included in most other whistleblower statutes enforced by OSHA. It is critically important that if an employer fails to comply with an order providing relief, either DOL or the complainant be able to file a civil action for enforcement in a U.S. District Court.

The Miner Safety and Health Act also allows complainants or employers to move their cases to the next stage in the administrative or judicial process if the reviewing entities do not make prompt decisions or rulings. For example, the Act would allow complainants to "kick out" to a hearing before an Administrative Law Judge (ALJ) if the Secretary has not issued a decision within 120 days from the case filing, and to district court if an ALJ or the ARB has not issued a decision within their 90-day time limits.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades. In addition, the Miner Safety and Health Act amends section 17(j) of the OSH Act to include an employer's history of violations of section 11(c) as a consideration in assess-

ing civil penalties. This is also a long overdue change that underscores the importance of preventing the chilling effect of retaliation on workers.

The Miner Safety and Health Act also includes a section that would expand the rights of workers and victims' families. No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and embrace their desire to be involved in the remedial process. Family members also provide useful information to OSHA inspectors about the culture and environment of a workplace and the events leading up to an incident that results in serious injury or death. The moving testimony of the families of the Upper Big Branch miners before this Committee in May and Jodi Thomas's testimony on the Kleen Energy explosion last month demonstrate how much family members have to offer MSHA and OSHA.

Although it is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements, we have found that some of these policies are not always applied consistently. The Miner Safety and Health Act would help us in this area by placing into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA, to receive copies of the citation at no cost, to be informed of any notice of contest, and to appear and make a statement during settlement negotiations before an agreement is made to withdraw or modify a citation.

The Act also requires the Secretary to designate at least one employee at each OSHA area office to serve as a family liaison, similar to the program already in existence at MSHA. The OSHA family liaisons would keep victims informed of the status of investigations, enforcement actions, and settlement negotiations, and assist victims in asserting their rights. As we have seen at MSHA, the family liaisons have effectively enhanced victims' rights and involvement in the enforcement process. The last thing we want is to repeat situations when family members, like Miss Tonya Ford who testified before this Committee in April, find out about the tragic circumstances of their loved one's death from the media and not from OSHA. In addition to the helpful fixes in the Act, OSHA is also working administratively to incorporate suggestions we have received from victims on how to improve our enforcement process and better involve victims and their families.

One of the most significant changes that the Miner Safety and Health Act makes to the OSH Act is the provision that requires abatement of serious, willful, and repeat hazards during the contest period. Currently, if an employer contests an OSHA citation, that employer is not obligated to correct the hazard during the administrative contest period leaving workers exposed to serious or deadly hazards for months or years after the hazards have been identified.

The lack of any requirement for employers to abate hazards during the contest period also seriously undermines the effectiveness of OSHA's already low penalties. Largely because OSHA is pressured to negotiate away penalties in order to avoid employer contests and ensure that hazards are quickly fixed, the average current OSHA penalty is only around $1,000. The median initial penalty proposed for all investigations conducted in FY2007 of cases where a worker was killed was just $5,900. Clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties—even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost than the message that a $5,900 penalty sends. By giving OSHA the authority to require abatement during contest, we not only ensure that workers are protected immediately but also can hold employers accountable for keeping a safe and healthful workplace. We must not forget that the stronger the message OSHA sends, the better the deterrence and more lives are saved.

The Miner Safety and Health Act would enable OSHA to issue failure to abate notices to a workplace with a citation under contest, which would carry a penalty of up to $7,000 for each day the hazard goes uncorrected. This provision would greatly strengthen the right of workers in general industry to be protected from the most egregious workplace hazards.

OSHA believes this protection is critical. Too often hazards remain uncorrected because of lengthy contest proceedings—periods that can last a decade or more. A recent OSHA analysis found that between FY 1999 and FY 2009, there were 33 contested cases that had a subsequent fatality at the same site prior to the issuance of a final order.

This is not the first time that this issue has been before Congress. During hearings on comprehensive OSHA reform in the 102nd and 103rd Congresses, numerous examples were presented of employees being hurt or killed while an inspection was under contest. While those opposing this provision argued that employers would needlessly spend large sums on abatement for a citation that is later overturned, business representatives testified that even when there is a contest most employers abate hazards during the review process.

Additionally, the State of Oregon, which operates its own safety and health program, requires abatement during contest for serious violations. This provision was included in Oregon's original statute and has not been revised since 1977. Although attorneys have objected in State legislative hearings on due process grounds, there have been no court challenges of this provision

It is also important to note that the Miner Safety and Health Act guards the rights of employers by allowing an appeal to the Occupational Safety and Health Review Commission (OSHRC) regarding the requirement to abate during contest.

MSHA has long had a similar provision under its current law. It is now time that we protect general industry workers from known hazards during contest, that are just as deadly, as we do for miners.

Based on the long experience with this provision under the Mine Act, the GAO recommended that Congress require protection of workers during contests. Similarly, various environmental statutes also require that violations be corrected when they are identified. In weighing the balance between employee protection and employer contest rights, it seems clear that employee safety should take precedence.

Mr. Chairman, an essential element of achieving Secretary Solis's goal of good jobs for everyone is to change the culture of safety in the American workplace. Under both the OSH Act and the Mine Act, employers are legally and morally responsible for the safety and health of their workers. The important reforms in the Miner Safety and Health Act go far in encouraging employers to accept this responsibility and giving OSHA and MSHA the tools we need to deal with employers who refuse.

In the months I have been at OSHA, I have spoken with children, spouses and parents of workers who have been killed on the job. They do not care about the specifics of the legislative process or the details of how one law compares with another. The only thing they want; the only thing they ask you to do is pass laws that contain the best possible protections, that prevent any other workers—whether mine workers, refinery workers, construction workers, or hospital workers—from losing their lives, from leaving their loved ones behind. We know we can provide these workers with better protections. We know we can prevent many of these deaths, injuries and illnesses. In a civilized society, this level of death and injury on the job is simply too high a price to pay, especially when we have it within our means to prevent them.

We applaud the important work this Committee has done in drafting the Miner Safety and Health Act, and we look forward to working with you on this legislation as it advances through the legislative process. Thank you again for the opportunity to testify today. I am happy to answer your questions.

Chairman MILLER. Thank you very much.

Thank you, again, all of you, for your testimony.

When I first came to Congress, we had the Scotia Coal Mine disaster back in March of 1976.

Joe, you and I have been at this about as long as anybody around here.

And I was taken back this weekend looking at the report on the Scotia mine. The report said that, from 1970 to 1976, the Scotia mine had been ordered closed 110 separate times; 39 times for imminent danger conditions. During this same period, some 855 notices for Federal health and safety violations were issued against the company. In the period of January 1974 to February 1976, the mine had been cited for 63 separate violations of Federal ventilation and methane standards. It was that explosion that killed 26 miners. And mine inspectors, I think, were included in that tragedy with the loss of life.

[The House Committee on Education and Labor, Subcommittee on Labor Standards staff report, "Scotia Coal Mine Disaster," October 15, 1976, is excerpted on the following pages. To see the original report in its entirety, please access the following Internet address:]

[COMMITTEE PRINT]

SCOTIA COAL MINE DISASTER

MARCH 9 AND 11, 1976

A STAFF REPORT

OCTOBER 15, 1976

This report has not been officially adopted by the Committee on Education and Labor and (or the Subcommittee on Labor Standards) and may not therefore necessarily reflect the the [sic] views of its members

Prepared by the staff of the House Committee on Education and Labor, Subcommittee on Labor Standards, John H. Dent, Chairman

U.S. GOVERNMENT PRINTING OFFICE
77–245 WASHINGTON : 1976

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MICHAEL BLOUIN, Iowa
ROBERT CORNELL, Wisconsin
PAUL SIMON, Illinois
EDWARD BEARD, Rhode Island
LEO ZEFERETTI, New York
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RONALD MOTTL, Ohio
TIM HALL, Illinois

ALBERT H. QUIE, Minnesota
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INTRODUCTION AND SUMMARY

On March 9, 1976, at 11:35 A.M., dangerous concentrations of methane gas accumulated in a poorly ventilated section of the Scotia Coal Mine and was ignited by an unknown source. The coal mine explosion that resulted killed 15 miners. Again, on March 11, 1976, at about 11:20 P.M., the same conditions combined in the same section of the Scotia mine to cause a second explosion in which another 11 men died. Thus, within a 60-hour period, 26 men lost their lives in the bowels of the Scotia coal mine, located near Oven Fork, in Eastern Kentucky. As of this date, the bodies of the 11 men killed in the second explosion remain entombed in the mine.

Why did Scotia happen? This same question was asked of the Farmington disaster in 1968 which claimed the lives of 78 coal miners; the Hyden disaster of 1970 which killed 38 miners; and the Itmann and Blackville disasters of 1972 in which 14 died.

In 1969, the U.S. Congress responded to the Farmington disaster by enacting the Federal Coal Mine Health and Safety Act, which is, perhaps, the strongest such law in the world. Since the passage of the Federal Coal Mine Health and Safety Act of 1969, over 1,000 coal miners have died in mine explosions, roof falls, and other coal mine accidents.

Why did Scotia happen? Since the disaster, the House Education and Labor Committee, under the direction of Chairman Carl Perkins and Labor Standards Subcommittee Chairman John H. Dent, has been searching for answers and insights into the Scotia tragedy. In conjunction with the Senate Committee on Labor and Public Welfare, the Committee held three days of public hearings in Washington, D.C. and Whitesburg, Kentucky. The Committee heard from Scotia widows, miners, company officials, outside professionals, and Federal Government officials. The Committee and its staff reviewed thousands of pages of testimony, conducted individual interviews, and analyzed mine inspection reports and other related documents.

In order to inform the full Committee, and the public at-large, as to what has been learned thus far about the Scotia disaster, Mr. Perkins and Mr. Dent instructed the staff to prepare this report. The views contained herein are those of the majority staff, and do not necessarily represent those of the Committee.

Why did Scotia happen? While all the causal factors related to the disaster have yet to be conclusively determined, the available evidence strongly supports the following conclusions:

1. The Scotia Coal Company, in effect, ignored the requirements of the Federal Coal Mine Health and Safety Act, its standards and administrative regulations;

2. The Mining Enforcement and Safety Administration (MESA) failed to effectively enforce the Federal Coal Mine Health and Safety Act at the mine;

3. Ultimate responsibility for the first explosion of March 9, 1976, rests with the Scotia Coal Company, but responsibility for the second explosion of March 11, 1976, must, in the staff's opinion, rest with MESA.

The Scotia Coal Mine, near Oven Fork, Kentucky, was known as one of the most dangerous mines in the United States and the most gassy mine in Eastern Kentucky. In addition, the Scotia mine had a long and chronic history of Federal coal mine health and safety violations. From 1970 to 1976, the Scotia mine had been ordered closed 110 separate times—39 times for imminent danger conditions. During this same period, some 855 notices for Federal health and safety violations had been issued against the company. In the period January 1974 to February 1976, the mine had been cited for 63 separate violations of Federal ventilation and methane standards.

In addition, the record contains evidence that:

- The Scotia mine's ventilation plan was regularly violated and, at the time of the first explosion, Scotia was in violation of its ventilation plan;
- At various times, methane readings taken by the company officials had registered as high as 9 percent;
- The required 20 minute methane monitoring regulation was repeatedly violated and seldom adhered to at the Scotia mine;
- Required preshift mine inspections for hazardous ventilation, methane and other conditions were not regularly conducted at the Scotia mine: preshift inspection reports were routinely falsified; and the section of the mine which exploded had not been inspected prior to the shift in which the first explosion occurred;
- A methane gas feeder which measured at least 5 percent had existed in that section of the mine which exploded;
- The company's safety education and training program was a sham, and no one, including the company's safety inspector, could remember the last time a fire or mine evacuation drill had been conducted at the Scotia mine. Six of the 15 miners killed in the first explosion suffocated to death.

From the record, it is clear that the Scotia mine was a bad mine, a dangerous mine, a mine with a long and chronic history of health and safety violations. It was a mine which in our opinion placed production and profit before the safety and health of its miners. It was a mine which essentially ignored the law.

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CHART A

SCOTIA COAL MINE—SUMMARY OF VIOLATION NOTICES AND CLOSURE ORDERS, MAY 13, 1970 TO MAR. 9, 1976

	1970	1971	1972	1973	1974	1975	1976
Total number of violation notices issued	79	94	156	116	103	214	92
Total number of closure orders issued	6	23	13	24	18	23	3
Total number of 104(a) closure orders issued (imminent danger)	5	7	4	9	5	9	0
Total number of violation notices and closure orders	85	117	169	140	121	237	95

Source: Mine Safety Enforcement Administration, U.S. Department of the Interior.

CHART B

SCOTIA COAL MINE—SUMMARY OF SAFETY AND HEALTH VIOLATIONS, JANUARY 1974 to FEBRUARY 1976

Category of violation	Total number of—	
	Violations	Closure orders
Ventilation—30 CFR, pt. 75, subpt. D	63	10
Electrical equipment general—30 CFR, pt. 75, subpt. F	41	1
Combustible materials and rock dusting—30 CFR, pt. 75, subpt. F	86	8
Fire protection—30 CFR, pt. 75, subpt. L	53	3
Dust standards—30 CFR, pt. 70, subpt. B	28	0
Trailing cables and grounding—30 CFR, pt. 75, subpts. G and H	10	3
Miscellaneous—30 CFR, pt. 75, subpt. R	71	4
Roof support—30 CFR, pt. 75, subpt. C	23	7
Mandatory safety standards, surface coal mines and surface work areas of underground coal mines—30 CFR, pt. 77	28	2
Maps, hoisting and mantrips—30 CFR, pt. 75, subpts. M and O	17	1
Total	420	39

Source of data: Senate Subcommittee on Labor—Staff Study.

CHART C

Scotia Coal Mine—Summary of ventilation violations, January 1974–February 1976

Description of violation	*Total number of times violation was cited*
Not enough air reaching the working face	26
High methane concentration	7
Approved ventilation plan not being followed	18
Line brattice out of position	6
Methane monitor inoperative	3
Permanent stopping was installed with incombustible material	1
Water sprays not provided for the head drive	1
Fans at new returns section not equipped with a pressure gage and an automatic signal device to give alarm	1
Tests for methane were not being taken at 20-minute intervals	1
Permanent brattices had not been constructed	2
Lost coal and coal dust	1

Source: Mining Enforcement and Safety Administration, U.S. Department of Interior.

* * * * *

Chairman MILLER. And the report goes on, and obviously, one of the responses was the idea of changing the OSHA laws, or the

MSHA laws, and going to a pattern of violation. And now 33 years later, we see essentially the same problem of violations after violations, citations after citations, dangerous and hazardous working conditions repeatedly created through the operation of mines and now culminating with the loss of 29 miners.

I think that makes a rather compelling case. It will make it for different reasons from different sides of the aisle. I think that the fact of the matter is, the current law isn't working, and the pattern of violations that existed then were exceeded even by the Massey mine here and the closures. I mean, it was closed—54 times this mine was closed. At what point does the benefit of the doubt go to the miner?

And I think when we look at the changes that we are seeking to make, it is about not only empowering the miner, but also giving the miner, if you will, the edge on a safe workplace. Right now, the edge is against the miner. The edge clearly works against the miner because the process is so cumbersome or so threatening to the miner that the miner never gets a level playing field to discuss what might be wrong.

As we heard when we were in Beckley, you can lose your job. You can lose your shift work. You can lose your overtime. You can lose all sorts of events within the mine. And so we go from 1976 to today, and we are in the same predicament that we were in 1976. Now, clearly, as we documented last year, there has been a gaming of the existing system. I don't know if it had been allowed to operate on the level, whether it would have been better, but it hasn't, and now the same people who have been gaming it are suggesting that we shouldn't make any changes so they can continue to game it, and they will do something better in lieu of it.

Joe, I would just like your comments. You have watched this expanding of disasters and violations and closures. I mean, this is not a record to be proud of as a country.

Mr. MAIN. I began representing miners when I was about 19 years old and spent a lifetime doing that to improve mine safety in this country. And I have looked pretty hard where we are today and where we came over the years. And there are a number of things that I think are just so compelling that we have to fix here.

I think that the folks who were in Congress when it passed the 1977 law would be more than highly disappointed to find out that 33 years later, not one mine had ever been placed on the enforcement action of pattern of violations that they sought.

The recent problems we have identified with the pattern of violation I think pales compared to the bigger problem here in the computer glitch that occurred in the policy of how mines are selected for the pattern in terms of a policy by district. I think those are just small parts of a larger problem.

And I am starting off with the fact that I think the pattern of violations is one thing that we have to fix in this legislation, and we have to do it in a way that a Federal agency will actually implement it, unlike the Federal agencies over the past 33 years. As a starting point, I think that is something we have to fix.

Chairman MILLER. Thank you.

Secretary Michaels, you in your testimony endorse the provision that requires employers to correct hazards which would cause seri-

ous bodily injury or death while employers are contesting the claims from the OSHA review commission. Would you provide some examples and why this is necessary?

Mr. MICHAELS. Yes. The way the OSHA law works currently is that if an employer decides to contest the violation, they don't have to abate the problem until the contest is over. Now, most—it is worth noting that most contests are about the penalty. Employers don't like the penalty; they would like to contest it.

The second most about the classification, is it willful or not?

But the third most important is they don't want to abate the hazard or they don't agree with the abatement. So, in the period that—in between the end of the contest period, essentially the adjudication, nothing is done. We had a situation, for example, in 2007 where OSHA cited a company in Ohio, Republic Engineered Products, for not providing fall hazards ranging from 7 feet to 31 feet. And there was a contest. The employer contested this. Less than a year later, in February 2008, while this contest was still going on, a supervisor broke his pelvis when he fell from 13 feet from an unguarded location.

OSHA felt—you know, we went in and issued new citations about not protecting people from fall hazards. But the first violations hadn't been abated yet. And that is the sort of problem we are trying to deal with here. When we see a problem, we think it should be fixed immediately.

Now, this bill provides, as I said, protection for employers. They can ask for an immediate hearing, an accelerated hearing, in front of the review commission. If they really don't believe the problem exists, then we can adjudicate it quickly. But we can't let workers wait for months or even years unprotected until that contest is over.

Chairman MILLER. Thank you.

Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Again, thanks to the witnesses for being here and for their testimony.

Secretary Main, I wanted to thank you for your prompt response to my letter. I sent you a letter with some questions dated July 1st. You responded with a letter dated July 9th. It is not always that we get that sort of responsiveness from members of this administration or any other. So thank you very much.

In your response, picking up on the issue of the pattern of violation, you expressed a frustration in the letter that I think I just heard here. You said, plans, I am quoting, "plans for a new POV process have been under way for many months prior to the IG's alert memorandum. I have identified the POV program as requiring evaluation and modification shortly after taking office," and so forth. And it seems to me that on both sides of the aisle here there is agreement that the pattern of violation issue needs to be addressed.

So, again, I just want to thank you for getting back. We will be staying in touch with you as we go forward.

Solicitor Smith, and in fact, all of you talked about felonies, the fact that this law now has a lot of felonies. In virtually every section, there is a new felony. And perhaps increased penalties should

be part of this. But I am a little bit concerned that we may be overreaching in a couple of places and get some unintended consequences.

Secretary Main, one of the new felonies is associated with the advance notice of a mine inspection, as I read it, and certainly, I think the Chairman's language and our discussions would recognize that we don't want somebody to send out the alert and have people cover up before the inspectors get there.

On the other hand, it seems to me the way the language is now that you might have somebody just arranging for a union representative to accompany the inspector, arranging for transportation or something of that nature. I wouldn't think we would want that to be a felony. Do you see any problem with that language or just hang them high?

Mr. MAIN. Well, I think the intent here is to hold accountable those who give advance notice of an inspection that would have its purpose to be to provide some ability for the enforcement action.

Mr. KLINE. Exactly. So let me interrupt because I am running out of time. So we want to be careful in language if we are going to make a law here and put it in statute that we be careful that we are going after the person who is doing this for the purpose of impeding the investigation and not for some other purpose. We don't want to make everybody a felon.

Mr. MAIN. I think it is in our interest to make sure that we have a provision in place that changes the culture that exists today of advance notice being provided to a mine that undercuts the ability of the law to be enforced and miners to be protected.

Mr. KLINE. Moving to another subject before I run out of time, it was mentioned that, for the first time, we are going to provide a statutory definition of significant and substantial. And I think Solicitor Smith, in fact, mentioned that. Eliminate the current four-prong test and so forth.

My question is, have we—and I guess this will probably be in your domain, again Secretary Main. Have you looked at what sort of percentage of violations would be S&S under this? I mean, currently now, according to the number I have here in front of me, it is about 36 percent of the citations are designated significant and substantial. And I have heard some, you know, sort of back-of-the-envelope calculations here that say we might go upwards of 90 percent. Have you looked at that? Do you have any idea? And if—if—this number jumps to that sort of percentage, wouldn't that cause you to lose focus with your resources and conditions that are supposed to be focused at these really egregious violations that threaten miner safety and health? Have you looked at that yet?

Solicitor Smith, do you have the answer to that?

Ms. SMITH. We have looked at it and thought about it. I can't give you any statistics because we are not able to do an advance. But one of the things that we have been thinking about quite seriously is an increase in the contest rate. And we think that there are many provisions in this bill that will actually decrease the contest rate. I think this definition is a simpler definition. And one of the reasons we have a high contest rate now is because we do have a four-part definition which is complicated and difficult to prove.

The second thing that we believe is that, though we do believe that probably the number of S&Ss will go up, that we believe that is actually consistent with the legislative history of the Mine Act, that they wanted different types of violations to be S&S. And I can give you one example if you would like of a type of a case where we think it should be S&S and it is not S&S right now. And that is a situation in a coal mine where there are high concentrations of coal dust, where the ventilation controls, the curtains are not being put in place. It is a gassy mine with a high concentration of coal dust. And we believe that that should be an S&S situation. The commission—ALJ found that because there wasn't any potential ignition at that moment when the inspector was there and cited it, that it was not S&S. Yet 5 minutes after that inspector left or an hour after that inspector left or a month after that inspector left, there could have easily been an ignition site. So that is why we believe that that type of a violation should be S&S.

Mr. KLINE. Thank you. I see my time has run out. I just think that we ought to be careful when we are putting things in statutes that we don't have an unintended consequence of making everything but paperwork an S&S violation, and therefore if everything is bad, then sort of nothing is bad.

I yield back, Mr. Chairman.

Chairman MILLER. The gentleman yields back.

Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman.

Dr. Michaels, is it true that OSHA can only inspect the average workplace about once every 137 years?

Mr. MICHAELS. There are different ways to calculate it, but OSHA has a relatively small number of inspectors. With our State partners, a little over 2,000 inspectors for 7 million or 8 million workplaces. So, yes, it takes a long time. If we tried to go to every workplace, it would take us a very long time.

Mr. KILDEE. That is incredible. But I read it, and I checked with every one of the staff people up here, and they said that is the number. Given the lack of inspectors relative to the number of workplaces, what elements in this legislation would most help leverage your limited resources?

Mr. MICHAELS. I think that is a very good question. There are a couple of them. The first, obviously, is whistleblower protection. Workers are the eyes and ears of OSHA. They have more on the line in terms of safety than any of us. They are the ones whose arms and whose lungs are in danger, so they have to feel free to raise issues of safety. And if they don't have adequate whistleblower protection, and frankly, under the current OSHA law, then they can't raise problems with their employers without the fear of losing their jobs, and they can't call OSHA without fear of losing their jobs. So that alone will have a great impact.

I think increased penalties will also have a important impact, because the reason we have penalties more than anything else is deterrence. We obviously want to get the word out to employers that if you don't fix your problems before OSHA gets there, you will have to pay a penalty. And the larger—right now—I don't believe that the fines that we can impose are adequately large in terms of a deterrence effect. And so both of those will help us tremendously.

Mr. KILDEE. In many instances, OSHA hands over or contracts with State government to carry on the inspection. How does that affect your ability to do your job?

Mr. MICHAELS. Well, we work in cooperation with States; 21 States have programs where they essentially do the OSHA—they are the OSHA program for those States. And four additional ones do that only for public-sector workers. We work closely with them.

The law says that they have to be at least as effective as Federal OSHA, and it is our job to oversee them. And there are some problems I know this committee has looked into with our ability to ensure that they do their job well, and we appreciate the help you have given us on this so far. But in those States, they are OSHA, so we have got to help them and support them and push them into doing as good a job as they can do.

Mr. KILDEE. Doesn't that create a greater burden on you? You have to trust a bit further away from where these laws are passed, that they be enforced.

Mr. MICHAELS. The OSHA law essentially says, if States want to take on the responsibility, they should do that, and we will support them in doing that, and that is what we do.

Mr. KILDEE. You know, I can recall, just I will very quickly, I can recall a few years ago near my district, Owosso, Michigan, a young woman reached into the press. And when you reach into the press, you are supposed to hit two buttons, and then you put your hands in and remove. And she had done that, and both of her hands were totally mashed. And I can recall that probably changed my 13-year old daughter at that time, her attitude towards many things in life, how that could be permitted. That machine had been cited several times, and they never did anything to repair it. So I lost a little trust at that time in my OSHA.

And I think that you have to really watch them to make sure that—this is a Federal law, and if we do give some of the responsibility to the State, to really watch them very carefully.

Mr. MICHAELS. Yes, we agree. In fact, this committee held hearings on this very question following what was pretty clearly poor performance of OSHA in Nevada. A number of workers were killed, construction workers. Nevada didn't—the Nevada OSHA program did not follow up well. There were hearings held here. We started an investigation of the Nevada OSHA, which found some very serious problems which we issued a report about. We are opening up a lot—we have opened up an office in Las Vegas to monitor their work much more carefully.

But out of that also came a new program where we are doing essentially in-depth audits of every State OSHA program, including Michigan, and we have just gotten the reports back. We are now reviewing them and will be releasing them soon. And hopefully that will be effective in helping to make sure that those State programs are effective as the Federal program.

Mr. KILDEE. Thank you very much, Dr. Michaels.

Chairman MILLER. Mr. Guthrie.

Mr. GUTHRIE. Thank you, Mr. Chairman.

Thank you for holding this meeting, and we appreciate it, on very serious issues that we need to address, and I appreciate the opportunity to be here.

I want to look at the OSHA, in section 705 and 706. The bill makes significant changes to the penalty provisions of OSHAct: 706 would impose Federal criminal sanctions, as we discussed, on any company officer or director for knowing violations. And do you believe that this would lead to businesses to decide to litigate instead of settle, because if they settle a future action of knowing could be used and therefore give a backlog of cases to establish the knowing part?

Mr. MICHAELS. I am going to defer to the Solicitor of Labor on this.

Ms. SMITH. When it comes to the criminal penalties, those cases are not litigated in front of OSHA. So what will happen in those situations is that if OSHA and the Solicitor's Office find that there are very significant cases, very significant violations, they will refer them to the U.S. Attorney's Office. And the U.S. Attorney's Office will then examine them and make a determination about whether or not there should be a criminal prosecution in those situations.

Mr. GUTHRIE. It is serious, I understand. But also any just settlement for any other violation before it gets to the U.S. Attorney, the employer may not want to settle and choose to litigate because settling would prove a knowing and therefore could be used against them later if somebody decides that they get this to a criminal court.

Ms. SMITH. Whatever finding is made in the civil court is not binding in the criminal court. So the knowing standard that the U.S. Attorney will make will be different than a knowing standard that will happen at the OSHAct at the OSH level.

Mr. GUTHRIE. You know, companies that have really good safety programs and safety records, the ones that are really serious about safety, have safety audit teams. They go in—and internal audits within their own workers and their own workforce.

And do you think just the knowing—because maybe make a list of things we need to improve on and fix and do better, in terms of their overall program to make it robust and safer. Most major corporations have these kind of teams that do that.

Does that affect this at all? Would it be less likely to have these kind of teams because of the establishment of the "knowing" standard?

Ms. SMITH. I think you need to put that in perspective. Both the criminal penalties and the "knowing" standard actually come out of the environmental safety standards—the Clean Air Act, the Clean Water Act, the Resource Recovery Act. They have those exact same provisions. And, yet, I haven't seen any press reports that major companies, you know, have cut back on their environmental programs because of those provisions.

What we are really trying to do with these provisions is make violations under these safety laws—we will call them the human safety laws—just as serious as violations under the environmental safety laws.

And so, again, I think we have to look at those laws that we have taken them out of. And I, personally, haven't seen any reports that there are fewer environmental corporate plans because of these provisions.

Mr. GUTHRIE. Okay. Thanks. Yeah, we are just trying to clarify, so thank you for that.

And then, in section 703, it would allow OSHA inspectors to immediately enact changes to the workplace without OSHA showing an imminent threat or providing employers with a hearing or a judicial review of the inspector's allegation.

I understand we discussed trying to show a pattern, but it does allow them, without showing an imminent threat, it puts the judgment on the OSHA inspector, who could be unfamiliar with the workplace and have authority to disrupt business operations before the objections of the validity of the citation could be heard.

I understand your concern about the one who continues to object in order to prevent that from going forward. What about the good players in this? We are focused on the bad players. What about the good players who get caught in this?

Mr. MICHAELS. Well, you know, it is interesting. Oregon has this already, and we never hear any complaints. And MSHA has this, as well.

Most employers actually abate immediately. And, as I said before, most contests are around the level of the fine and, secondarily, around the classification. Many companies don't want to be given a willful citation, because that affects their ability to get, for example, municipal contracts.

The third thing is that—and so we are not talking about a large number of cases, but we are talking about important ones, where people really are in danger. And so I am not worried about the companies that have good programs, because they are they ones who are going to want to abate immediately. This is really aimed at those recalcitrant employers, those employers who don't want to do the right thing and where people could get hurt.

Mr. GUTHRIE. Well, I absolutely agree with you on that.

The question is, how do you capture those without putting the net over people who are trying to do the right thing? I mean, that is the concern. I understand that. And I agree with you completely that the recalcitrant employers should be—as, obviously, we have seen in the mine before.

Well, thank you. And I am about out of time, so I yield back.

Chairman MILLER. The gentleman yields back.

Congresswoman Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Solicitor Smith, you won't be here, I don't believe—at least you won't be able to respond to panel two. So I am going to ask you to respond to some of the written testimony that we will be hearing on the next panel.

Mr. Snare, in his written testimony, when he is talking about—he claims that the abatement-during-contest provision in Title VII of the Miner Safety and Health Act will, and I will quote him, "eliminate OSHA and the Solicitor's Office's prosecutorial discretion in handling these contested cases and eliminate one source of potential leverage they can use to resolve cases with the requirement to impose immediate abatement."

You are the Solicitor's Office. How would you respond to that?

Ms. SMITH. Well, I mean, that may be true in the current system. What happens is that, if you haven't abated, you could say, "Okay,

now you will abate now. We will do whatever." But, frankly, I think that worker health and safety and having immediate abatement is far more important than the ability of the Solicitor's Office to wheel and deal cases.

Ms. WOOLSEY. He also argues that changes in Title VII will strain the resources of the Solicitor's Office. How do you see that working? How will you handle the increased demands of your office?

Ms. SMITH. Well, I have to say, as the Solicitor, I am very concerned about the resources of my office. And there are a number of provisions in this bill that I think will counteract some of those concerns.

First of all, there is a provision that says—for prejudgment interest. One of the reasons that employers contest is because they contest the level of the penalties, and they are hoping that they will get penalties reduced, because there is time value to money. But by requiring prejudgment interest, I think you are going to eliminate a certain number of those cases. To the extent that you have individuals who don't want to abate, we are going to eliminate, if this bill is passed, a certain number of those cases.

The interesting thing is, unlike MSHA, where when they increase the penalties—and there was, as we know, a great increase, and there is a great backlog. The last time they increased the penalties in OSHA, there was only a 4 percent increase in the contest rate.

And my office has already gotten together a work group to, sort of, deal with the fact that there may be an increase in the contest rate and how we are going to deal with it prospectively, as opposed to what unfortunately happened in the MSHA situation, which was that we didn't plan ahead for those possibilities and then we, sort of, got caught up with a big backlog.

So I am not really concerned about the resource level, if this bill passes, in my office.

Ms. WOOLSEY. Okay. Thank you very much.

Secretary Michaels, you probably would like to respond to both of those questions, but I would like to ask you about the workers' ability to blow the whistle. Why is that important? I mean, how does that make things safer and improve the health of our workplaces?

Mr. MICHAELS. Well, let me give you an example. There have been press reports that workers on the Deepwater Horizon said—you know, they saw what was going on there, they said it wasn't safe. But they said they were scared for their jobs; they didn't want to say anything.

Just think what would have happened if one of those workers had, you know, called a government agency and said, "Look, there are some decisions being made here that are simply wrong. Can we stop it now?"

You know, workers are the eyes and ears of every public health and environmental regulatory agency on the ground where the hazards are worst. And their voices are necessary to protect themselves and to protect the rest of us.

OSHA has the weakest anti-retaliatory whistleblower protection law of any agency. OSHA actually enforces the whistleblower pro-

tection laws for all of the new legislation—the patient protection bill that has just been passed by Congress; the financial reform bill that is going to be passed soon will be given to OSHA to protect workers. And all of those laws have much stronger provisions than the OSHA Act, because we were the first one, and it was written very badly 40 years ago. It was written in a weak way.

And so, we and MSHA need stronger whistleblower protection laws because workers have to be able to protect themselves. They have to call us in. They have to be able to tell their employers, "Here is a hazard," without fear of being fired.

Ms. WOOLSEY. So, Secretary Main, let's follow up on this whistleblower issue. At our hearing in Beckley, it was very clear to me that the workers knew they were working in very unsafe conditions. So did their families.

How are we going to be able to—we have to pass this, but what do we need to do then? What are our next steps so that they know they can count on this protection?

Mr. MAIN. I think the most important thing we can do is pass the legislation that puts in place protections and vehicles to make these improvements.

I was at the hearing in Beckley, West Virginia, as well, and anyone that walked away from there that didn't understand the real need to enhance protections for miners, to give them a voice, probably was on another planet, as the saying goes. There is a compelling case here to be made, and I just want to touch on that for a second, in terms of the need.

When you have miners that go to work that leave notes for their families that they may not come back home from work, I think that is a very dire situation we have in workplaces in this country. And we really need to examine how we fix a problem like that to make sure that the message that the worker leaves is, "I will see you when I get home tonight."

Ms. WOOLSEY. Yeah.

Mr. MAIN. In terms of the legislation, there are a number of pieces that are going to be very helpful to answer the questions you have raised.

One is making it clear that miners have the right to refuse unsafe work. I think that is a critical provision that is going to be in the law; giving miners the right to let their boss know, let MSHA know that there is an unsafe problem and put the obligation on the employer—which it is their employer's responsibility in the first place to make sure that the workplace is safe for those miners. But it puts an obligation on the employer to fix it.

It sets protections for miners that if they are retaliated against for exercising that right with telling the government, telling their employer, that they have protections that are far more meaningful than today. I think the message we heard is that miners do not have faith that the protections that are contained in the current law really protect them.

Giving miners a fair shot of having a paycheck if they do complain about a condition and MSHA comes in, does observe it, does take the enforcement action, does issue an order, instead of waiting months or years to get a paycheck in those cases.

Having a provision that requires miners to, every year, be trained on their rights, which is contained in this new legislation.

I think all of those pieces will help make the world a better place for miners.

Ms. WOOLSEY. Okay.

Thank you, Mr. Chairman.

Chairman MILLER. The gentlewoman yields back.

Congresswoman McMorris Rodgers?

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman.

And thank you all for being here.

We are all committed to making sure that we are taking steps to have a safe workplace, and especially as it relates to mine safety and the example of the Upper Big Branch Mine. I believe that it is important, before we just move ahead with legislation, that we better understand if anything in this bill would have actually prevented the mine disaster and what those complaints were and why MSHA hadn't taken action.

But what concerns me—you know, I think we could get to an agreement on mine safety and the appropriate response. But also attached to this bill is a very broad reform of OSHA that is only going to increase litigation, discourage settlements, and create disincentives for cooperation between business owners and OSHA.

And we hear from the proponents that we need swift, meaningful, serious penalties. And we certainly get those in this bill, the many new felony offenses, the increased penalties—first offense, from 6 months to 10 years. It is increased from 6 months to 10 years. Second offense is increased from 1 year to 20 years.

And I really believe that a more cooperative approach, better communication between OSHA and employers will go a long way towards making our workplace safer. And I believe that we have seen that in recent years.

So I want to ask the question, what evidence is there to suggest that this more adversarial approach is actually going to create a safer workplace? And how is litigation going to help make the workplace safer? And how are these changes going to impact small businesses and their ability to succeed, especially during a very difficult economic environment?

Ms. SMITH. Well, I am not sure I can answer all of that, but let me start out by trying.

When it comes to the OSHA provisions, I think one of the things that this bill does is it puts the OSHA provisions basically on par with the MSHA provisions, in the provisions that it deals with, so that workers in oil refineries can have the same safety standards as workers in mines have.

And I think that is one of the reasons, for instance, we had the immediate abatement provision. The immediate abatement provision has already been in MSHA. It has been in the Mine Act for many years. We don't, you know, hear a lot of complaints about immediate abatement, and we think that workers in oil refineries and other workplaces should have that, sort of, same safety rights.

When it comes to the increase in penalties, I think Dr. Michaels talked about OSHA. Penalties haven't been increased in 40 years. And for a serious violation that a worker dies in—not a willful, but a serious violation—the maximum penalty is $7,000. And to the ex-

tent that you believe that penalties are a deterrent—and I believe that employers do pay attention, that most employers want to do the right thing, but sometimes, I mean, they need a little nudging. And a $7,000 penalty is not a big nudge.

So I think that what we have seen is that most employers want to do the right thing, but it is very difficult to get to the recalcitrant employers. And that is what this bill is basically dealing with.

Mr. MICHAELS. And if I could follow up briefly, you know, we have various provisions in our laws and our policies to protect small-business people. We reduce our penalties automatically for small-business people, so, in fact, that $7,000 penalty becomes quite a bit lower for a small business.

But it is also important to think about fairness beyond even the question of deterrence. There are so many small businesses that do the right thing, that make the capital investment even during rough times to make sure their workers are safe. We are putting them at a competitive disadvantage if we are saying to the other employers, the recalcitrant employers, "Don't worry, we are not going to do anything until someone is hurt, and then we will just give you a small fine." That is really not fair. We have to level the playing field, and this bill is a small attempt to do that.

Mrs. MCMORRIS RODGERS. One thing about our current system is that it protects due process by allowing the employers to challenge the assessments made by OSHA before requiring the corrective action. And it is not uncommon for those cited violations to be overturned or found not valid.

If this legislation were to become law, what would happen if an employer is required to take a corrective action that is found to be warrantless? Would they have the ability to recoup any losses that had been incurred for errors in the determinations made by the OSHA inspectors?

Mr. MICHAELS. You know, I don't know the figure of the percentage of violations that are actually overturned. It is a very small one. But this system builds in, essentially, an immediate accelerated review process. So, if the employer has good reason to think that the abatement requirements that OSHA is putting forward are not accurate or fair, they can go to the review commission immediately and essentially stay that. I think it is quite fair, and I think that does provide the protection that small employers need.

Ms. SMITH. And if I could add to that, even though an employer has to abate the unsafe condition immediately, that doesn't mean that they can't appeal the penalty and that they can't get the penalty reduced. Just because you abate doesn't mean that you, sort of, have to give up and you can't contest anything that OSHA has done.

In the MSHA context, where you do have to abate immediately, you find that employers contest the penalties all the time. They can also contest the underlying citation, which would mean, if they win that, that they shouldn't have abated. In MSHA, it is less than a 2 percent rate where the actual citation is overturned, so I don't think that that is really a big problem.

Mrs. MCMORRIS RODGERS. Okay. Time is up. Thank you.

Chairman MILLER. Mr. Courtney?

Mr. COURTNEY. Thank you, Mr. Chairman.

As Congresswoman Woolsey mentioned in her opening comments, a couple of weeks ago this committee held a hearing in Middletown, Connecticut, which looked at the natural gas power plant explosion, the Kleen Energy plant explosion, where, again, we had testimony from a brother of one of the victims who described the misgivings that his brother had the day that they did a natural gas blow through the pipes, which manufacturers of these turbine engines are now, actually, on record recommending not be used. They recommend much safer alternatives.

Yet it was pretty clear that the workers did not feel empowered to step out and say, you know, "Why don't we evacuate the area when this procedure is going on?" Again, there were a lot of unrelated extraneous workers who were in the area, and some of them were killed as a result of that blast.

And it is clear—because, obviously, this isn't an MSHA context; it is an OSHA context—that the law contains many gaps in terms of protecting workers who clearly were experienced in the work that they were doing but weren't being given the legal standing to actually step out and challenge whether or not it was a safe workplace for them to be in. And, obviously, events proved that these misgivings were, unfortunately, well-founded.

So, again, I think this committee should respond to what we are hearing at these field hearings as well as today's testimony about the fact that we need to strengthen these laws, not to hinder the economy but to just get us to a point where the mission of OSHA is actually achieved.

I would like to ask the Solicitor about two provisions that you mentioned in your testimony. Number one is the modification of the subpoena powers, where, again, your testimony indicated that what we are trying to do for MSHA is really to put it on par with the subpoena powers in OSHA.

I was wondering if you could actually just, kind of, maybe be more specific in terms of how that would actually help the enforcement of mine safety?

Ms. SMITH. First of all, let me tell you that giving the Secretary subpoena power is very common. Not only does she have it in OSHA, she has it under the Fair Labor Standards Act, she has it under the Family Medical Leave Act.

And what that means is that, in an investigation—well, take the investigation right now. In the investigation, there are people that you want to talk to who don't necessarily want to talk to you voluntarily. There are papers that you need. There are records that you need. And without subpoena power, the only way that you can do it now in an investigation is in a public hearing.

If you are not doing an accident investigation, if what is happening is you are looking into a particular citation or in the litigation context, you are trying to prove that a citation was actually substantial and significant, very often you can't rely upon the kindness of strangers to get your evidence. You basically need subpoena power.

And so, that is what we are asking for. Again, it is very common to give the Secretary the subpoena power. She has it under OSHA,

she has it under the Fair Labor Standards Act. And there is nothing improper with giving the Secretary subpoena power.

If there is a dispute, if somehow the employer feels that the Secretary has subpoenaed something that they are not entitled to, either they do nothing and the Secretary is forced to go into court and get an order or they go into court and get an order to quash. So there are plenty of places where any disputes can be resolved.

Mr. COURTNEY. And the notion that this provision is somehow jumping the gun in terms of, you know, not waiting until there has been, you know, a full set of findings regarding this mine disaster, I mean, in fact, what we are talking about is really just creating parity in the law——

Ms. SMITH. Creating parity, exactly.

Mr. COURTNEY [continuing]. And just following existing precedent that, again, as you point out, extends to wide areas of administrative law.

The other area that you mentioned in your testimony was on injunctive relief, in terms of trying to get the standards clarified. Again, I was wondering if you could help us, sort of, understand what the problem is right now and how that change will help, again, the goals here.

Ms. SMITH. Well, right now, the injunctive relief provision, which has never been used, requires that there be a pattern of violations. And Assistant Secretary Main discussed the broken pattern of violations provision. And right now, what we want to do is to clarify it to make sure that we are not required to get someone on an administrative pattern of violations before we can get an injunction. That is why we are asking Congress to change the language to "course of conduct," which makes clear that we don't have to have an administrative pattern of violations, something which has never happened in 30 years.

The second thing is that, right now, it limits the injunction power to mandatory health and safety standards, but think of the situation where an operator has a course of conduct of refusing to abate. That could be an order—or they have a course of conduct of refusing to withdraw miners when they are ordered to be withdrawn from the mines. That type of thing would not fit under the injunction provision right now. So we are asking that also to be clarified, such that not just mandatory health and safety, but other things would be subject to injunctions.

Mr. COURTNEY. Thank you, Mr. Chairman.

Chairman MILLER. The gentleman's time has expired.

Mr. Price?

Mr. PRICE. Thank you, Mr. Chairman.

Certainly, we all believe that any workplace death is a tragedy and any injury is unwanted by all of us.

Secretary Michaels, you have talked a number of times about, quote, "unscrupulous employers," unquote. Do you want to name any?

Mr. MICHAELS. We have certainly had our problems with an oil company with two initials, "BP." We have gone in there and we have said——

Mr. PRICE. Anybody else?

Mr. MICHAELS. No, I don't think we need to go into the specifics here of any one. But if you would like, I could certainly get you a list.

Mr. PRICE. I would love to have that list.

Mr. MICHAELS. Okay.

Mr. PRICE. Secretary Main, after the tragedy at the Upper Big Branch, MSHA took action to shut down a number of mines. Did you have that authority to shut down the mines before the tragedy?

Mr. MAIN. The tools that we used are tools that were used, actually, at Upper Big Branch, in terms of the issuing of orders under section 104(d) of the Mine Act, in particular. And those shutdowns actually involved a short period of time and targeted areas of the mine where the conditions, we felt, merited that action.

The problem is none of those shut down a mine to hold the mine down in terms of what we are talking about with this legislation. That is what we are hoping to be able to do with section 108, as the Solicitor of Labor has pointed out.

Mr. PRICE. But could you have shut those mines down before the tragedy?

Mr. MAIN. We did at Upper Big Branch. I mean, there was—at times, I know there was a 3-day shutdown at Upper Big Branch. There was one that was a day and a half at Upper Big Branch.

Mr. PRICE. So, when you see an imminent threat, you are able to shut a mine down?

Mr. MAIN. Well, here is the problem, and here is a problem we run in to. You know, section 104(d) of the act was probably the most effective tool in bringing to bear the enforcement provisions of the Mine Act on the mine operator——

Mr. PRICE. But when you see an imminent danger, you are able to shut a mine down, correct?

Mr. MAIN. If you see an imminent danger over an issue, until that issue is corrected.

Mr. PRICE. Okay.

Mr. MAIN. But what we don't have is the——

Mr. PRICE. I got you. I got you.

Mr. MAIN. Okay.

Mr. PRICE. Solicitor Smith, you gave an example to Ranking Member Kline about this awful problem that was an imminent danger. If that was indeed the case and you all recognized that, MSHA recognized that, then you could shut the mine down right then, couldn't you?

Ms. SMITH. No, that wouldn't be considered an imminent danger.

Mr. PRICE. And the reason for that is?

Ms. SMITH. Because there was no ignition spark.

What we are saying is that, even though it is not an imminent danger, we think it should be a significant and substantial violation. An imminent danger is a more substantial, more serious violation than a substantial and serious violation under the Mine Act.

Mr. PRICE. I wanted to talk a little bit about the "knowing" requirement, that knowing that something is happening exposes one to significant liability. I don't know if you saw the Politico this morning, this article——

Ms. SMITH. I have not.

Mr. PRICE [continuing]. "Danger on the Hill: Safety Hazards Abound Across Capitol Complex." There is a quote here, "Workplace safety experts say that if Congress were a private-sector business it would be at risk for massive fines from government regulators."

Solicitor Smith, I am just interested in asking you, who in the House of Representatives would you deem to be an officer with liability for knowing the 6,300 violations?

Ms. SMITH. Now you are asking me a corporate question. I am not exactly—I am not well-attuned enough to the corporate laws of a corporation. I couldn't answer that, let alone could I answer it about Congress. But I am sure that there is an appropriate expert out there who would know the answer to who is a corporate officer——

Mr. PRICE. Somebody who ran the House maybe? Somebody who ran the House?

Ms. SMITH. Well, maybe one of the lawyers who works for the House.

Mr. PRICE. There you go.

But let me get back to MSHA. MSHA has inspectors in underground mines virtually every day, correct?

Mr. MAIN. Depending on the mines. We have mines that are very gassy mines that call for more frequent inspections.

Mr. PRICE. And they are down there all the time, right?

Mr. MAIN. Not every mine, no. There are 14,500 mines——

Mr. PRICE. Right, but they are down in the mines all the time. If they know that something is a challenge and they don't do anything about it, are they exposed to the "knowing" level of liability—MSHA, itself?

Ms. SMITH. They would not be. They would probably be exposed to other Federal laws but not that one.

Mr. PRICE. Well, why not?

Ms. SMITH. Because they are not——

Mr. PRICE. They are the same as anybody else down there, right?

Ms. SMITH. Well, they could be, but they are not an operator or an agent.

Mr. PRICE. So they don't have the criminal penalties that one is exposing the officers and directors of the company to; is that right?

Ms. SMITH. Not under this statute. I am not saying that they don't have it under other statutes.

Mr. PRICE. Do they have criminal penalties under other statutes?

Ms. SMITH. I don't know the answer to that. But I don't know the answer "yes," and I don't know the answer "no."

Mr. PRICE. Okay. Thank you.

I yield back.

Chairman MILLER. Ms. Chu?

Ms. CHU. I understand that it can take an inspector an hour from the time that they arrive to reach the critical areas in the mines for inspection. Testimony from one of the mine workers, Jeff Harris, said that once workers knew there was an inspector around, they would start prepping the area so that it was up to code.

And in the non-union Massey Mines, when an inspector came, the code words would go out, "We have a man on the property,"

and those words would be radioed from the guard gates and relayed to all working operations in the mine, and word would spread pretty quickly.

How does the mine safety bill deal with this? I know that there are severe penalties if there is advance notice, but is there a way of detecting such advance notice while it is happening rather than after the fact?

Mr. MAIN. You know, one of the views of this legislation is that, for those who were bad actors in the mining industry, it makes them a better corporate citizen when it comes to mine health and safety. And I think that was intended in the 1969 Mine Act, the 1977 act, and I think it is the hope of this act that, when individuals who would contemplate making those kinds of decisions realize the consequences, they will be less apt to do that.

And giving advance notice to interfere with the inspection of a mine that places miners in danger is one of those things that we fully expect the Mine Act to send that kind of a message to.

Mine operators who comply with the law every day, that take care of business—you know, this law was aimed at getting at the worst of the worst out there that are failing to comply with the law. But we would hope that the provisions that are contained in this act will change the thinking of those who would desire to engage in actions like that.

Ms. CHU. And would there be a way of detecting this advance notice as it is happening?

Mr. MAIN. Yes. I think the tools that are in—there are a lot of these pieces that actually fit together to help support the overall application of this law. And one of them is giving miners the opportunity to report unsafe conditions, violations of the law.

One is the subpoena powers that are contained in the law, as well, that gives an opportunity for that information to be gained from those folks that would be engaging in that. And, you know, just a multitude of other provisions that will help, hopefully, change the attitude toward folks that would engage in those practices.

Ms. CHU. Then let me ask about another issue, which is, once an inspector was known to be in the area, certain actions would try to cover up the situation. For instance, this same Jeff Harris, a West Virginia miner, testified that they would put up ventilation curtains, and then once the inspector left, they would take them down, and that some workers would point this out, but the inspectors would reply, "We need to catch it."

It is good to have whistleblower protections, but would it be worth it to report such things, for miners to report such things, if it is necessary to catch it in order for some action to take place?

Mr. MAIN. Yes, this is a practice that was not only reported from the Upper Big Branch Mine, but around the same time of the Upper Big Branch disaster, we made special inspections at mines in response to complaints about conditions at these particular mines.

In three of these mines, we actually went to the mine, captured the phone to prevent a call from being made underground, to try to determine what the conditions were in real time. And the agency inspectors were able to do that. And they found cases, as you had

described here, that was described at the Upper Big Branch Mine where ventilation controls were not in place, where mine officials were actually on-site, overseeing the work activities, without these kind of ventilation controls. Apparently, miners were working in dust, and the lack of controls to dilute methane from exploding.

We are hopeful that the combination of changes that are put in this legislation will help curb those, giving a miner a voice to report them; not having a fear that something could happen if an operator decides that they are going to try to engage this these kinds of activities, such as, you know, the subpoena authority would have to rout out that kind of information; having greater penalties in terms of criminal application law for those who engage in knowing conduct like that.

So I think collectively there are a number of pieces in this legislation that will help to deter that kind of conduct.

Ms. CHU. And if the worker points this out as the inspector is there, is that worker protected under the whistleblower provisions of this law?

Mr. MAIN. From everything I have read, I think absolutely, yes.

Ms. CHU. Thank you. I yield back.

Chairman MILLER. Mr. Holt?

Mr. HOLT. I would be happy to yield my time to Mr. Rahall.

Chairman MILLER. Well, under the agreement we had—you were in the room at the time——

Mr. HOLT. Oh, okay.

Chairman MILLER [continuing]. You can ask, and then I am going to Mr. Rahall and Mrs. Capito at that point.

Mr. HOLT. Fine. Fine. Okay. Thank you, Mr. Chairman.

Chairman MILLER. So you can use your time now or you can give it to Mr. Rahall or you can do something else.

Mr. HOLT. Thank you.

What I would like to address, then, is the safety technology and whether we are—I mean, enforcement is one thing. And, I mean, I think the points that have been raised, perhaps partly while I was out of the room, are important. But I would like to find out whether we are putting enough emphasis on the development of the safety technologies.

Communication, for example, is something that we have been working on in New Jersey—not a mining State, but good in telecommunications. And we have been working on non-interruptible communications that can work in cases of coal mine collapse and a dirty environment and so forth.

And I am wondering if we need to be building into the legislation more support for this sort of thing.

Mr. MAIN. I don't think there is any question that we could always use more support on technology development. And the mining industry has, I think, identified whenever the—the MINER Act was enacted in 2006. And looking at ways that can prod that, I think, is very beneficial for miners in this country.

One of the provisions that is in the bill deals with beefing up the atmospheric monitoring of the conditions of the mines that would enable information to come very swiftly to the operational folks at the mine on increases of methane that could cause explosion; on increases of carbon monoxide—it is an indication that there may be

a fire burning in a mine; on changes of airflow indicate that ventilation controls are damaged somewhere—to be able to get miners more quickly out of the mine.

And I think, by the same token, looking at beefing up the technologies that are available for use during mine emergencies. I have been doing mine emergencies for 20-some years, and one of the things that inhibits our ability to quickly enter a mine is a lack of knowledge about the mine environment—the decision to send in mine rescue teams into an environment that could be explosive and cost them their lives. And one of the provisions in the legislation calls for more research to develop technologies that could be in use doing the post-accident circumstances, where you could more quickly understand that mine environment and more quickly get into the mine to rescue miners.

So, yes, I think things like that we need to be looking at more proactively.

Mr. HOLT. Thank you.

Would the other witnesses care to comment on that? No.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Mr. Rahall?

Mr. RAHALL. Thank you, Mr. Chairman. And I appreciate you and Ranking Member Kline for allowing me to sit with the committee this afternoon. And, certainly, I am happy that you chose to name the pending legislation after our late senior Senator, Robert Byrd.

Joe, let me preface my questions by saying I understand, and I am sure we all do, the situation that you inherited upon taking over as Assistant Secretary and head of MSHA. There was quite a strain on budgets, as there still are. Perhaps training was not up to par, and safety was not stressed to the degree that it is today. And there was a different ideological bent from above, which is very important, as we all know, whether it is MSHA or OSHA or MMS, in the case of the oil rig disaster. And so you have been making quite a few changes, and we all appreciate that, a different emphasis, et cetera.

You have also commented on Chairman Miller's bill and the manner in which you feel it will help correct a lot of the current deficiencies.

The critics of the pending legislation will say that it unduly penalizes the good actors or that current law is sufficient; why not enforce current law? That is what the critics will say of the pending legislation. I believe you have answered that in a number of different responses already.

But one of the previous questioners on the minority side asked you if you currently had the power to shut down a mine, and reference was made specifically to UBB. We all know there have been various lawsuits filed by the owners of that mine against you. We know what their strategy is. If it were not a serious issue, it would really be laughable, but it is a serious issue.

And the question was asked if you had the power to shut down UBB specifically. We know that one of the lawsuits is challenging you on ventilation plans. We know there had been controversy over

the adoption of the ventilation plan just days before this tragedy struck.

My question is, if the owner knew there were problems with the ventilation plan and had serious disagreements with MSHA over the ventilation plan that you adopted or that you approved, could the owner of the mine, himself, shut the mine down if he felt it was unsafe due to that ventilation plan?

Mr. MAIN. I think that, without question, if the operators of Upper Big Branch thought in their mind that the mine was dangerous, they could shut that mine down any time they desired.

Mr. RAHALL. They don't need your approval to shut down their mines?

Mr. MAIN. They don't need our approval to shut down a mine. And——

Mr. RAHALL. Thank you.

Let me ask you about—well, I believe you have commented on the whistleblower protection. I will skip all that.

As you know, there have been a lot of questions by the current families of UBB miners as to who had access to the mine post-disaster, post-April 5th. They want to know names. They want to know the full list of who has been in that mine during the investigative process. And I commend you in the manner in which you have responded to the families. And you and Kevin Strickland have had these meetings, along with our State office of mine inspection and Davitt McAteer.

But my question, and I guess I will get right to the bottom line: Why can't we make a disaster scene a crime scene, like we do if there is an accident on the highway or something? We rope it off. Nobody is allowed to come onto those premises except the law enforcement personnel, except those who are investigating the disaster.

That question has been asked a number of times by the families. Could you comment on that? I know perhaps there are legal ramifications to it, as well as knowledge of the mine. But just comment on why we just cannot rope it off like a normal crime scene.

Mr. MAIN. I think we are transitioning closer to that, Congressman, as we move forward. And I think the outgrowth, if you look back at this investigation, may push us closer to that kind of a model than we have now.

There has been a historical model where, upon an accident, an investigation is conducted that usually involves at least three to four parties, depending on the representation of mine—the Federal agency, MSHA; the State agency; the mine operator; and if there is miner representatives, representatives of the miners. So you always have that group that is going to be involved in those kind of traditional investigations.

Upper Big Branch is a bit hybrid from that, given the involvement of a Justice Department investigation, whatever they are doing with regard to their dealings with the disaster.

The other thing that I think we all realize is that there is a lot to maintaining a mine. As we went back in, we had to have a lot of work done to repair damages, to make examinations, resources that the mine operator has that is necessary in the actual investigation of a mine. It is a little difficult to get around.

I think the concept of the government taking over total control and not letting anybody in that mine is a challenging one since the mine operator controls the power center, the power cables, the ventilation of the mine, the whole nine yards it takes to keep a mine safely operating.

Mr. RAHALL. So MSHA would have to legally just take over the whole mine in order to prevent a company or any other non-pertinent players from coming into that mine after the investigation—I mean, after a tragedy?

Mr. MAIN. Yeah, I think you are right, but I think there are some real complications in trying to do that, given the maintenance, the inspection, the resources it takes to keep a mine open and that you have to be in the mine correcting and fixing things.

Mr. RAHALL. Thank you, Mr. Chairman.

Chairman MILLER. The gentleman's time has expired.

Congresswoman Capito?

Mrs. CAPITO. Thank you, Mr. Chairman. I would like to thank you and the ranking member for having the hearing and also for allowing me to participate.

As all of you know, West Virginia is still mourning the loss of our 29 miners killed at the Upper Big Branch Mine, and we are still mourning the passing of our senior Senator, and wish to thank everybody here who are non-West Virginians, thank you for your good thoughts and prayers during these difficult times for us.

I actually represent Sago, and during the Sago Mine disaster, shortly after that, we did do a mine safety act. And I think we found, in the process of this unfortunate accident, that several of the measures that we moved forward in that bill actually helped us in the inspections or in the rescue efforts and the timeliness of those. So I was very pleased to see that some of those measures helped. Unfortunately, we didn't get a good outcome, but it did help.

I would also like to say, Secretary Main, when you were here in February, you mentioned several changes that needed to be made, a lot of which are in the chairman's bill. I would just like to go over four points that you mentioned: improve implementation of the Mine Act and mine safety and health; simplify the contested case process; improve consistency by MSHA inspectors and supervisors; and create an environment where fewer cases enter the contest process.

I would like to ask about that because I am concerned—and this has already been asked before, but I am concerned that, recently, since that MINER Act, we have had, gosh, 30 percent more numbers of citations by MSHA, we have many more penalties, but also the contested case has taken 587 days when, before, it took 374 days. I know you are familiar with these statistics.

My concern is—I mean, that concerns me. And we have heard this about a lot of mines, that it is prolong, prolong, prolong. Is the process that this bill puts forward going to perpetuate that and make it worse?

And what provisions do you think are being made—I heard the Solicitor say that she thinks that the standard will be clearer and it could actually pull down the number of cases. But I think most

people looking at it think it is going to increase the number of cases. What is your reaction to that?

Mr. MAIN. I want to take the first part, and I will let Solicitor of Labor Smith take the second part.

If you look at the pattern of violations—which, a lot of folks think that a reason that there is a contesting of the violations is to forestall the application of a potential pattern of violations, is one of the issues. The legislation really changes that, to the extent that we will not be looking at the final orders of the commission to make that determination. So that is one piece that I think gets, sort of, removed fairly quickly.

Mrs. CAPITO. So you don't have to wait until the end to make the determination; is that correct?

Mr. MAIN. Pardon?

Mrs. CAPITO. You don't have to wait until the end to make the determination?

Mr. MAIN. That is correct, based on the orders, citations that are issued.

I think some of the provisions built in that stiffens the resolution of these cases for the commission, also helps disincentivize those who would be taking a shot at having a—or to contest the violation to get a better deal, which is one of the concerns I have.

If you look at the comments that I made back in February—and I think this is pretty close to it—that basically all it took was mailing a letter, costing you 44 cents, to appeal a penalty that has been assessed to a violation and wait a couple of years and get maybe a 47 percent break. There are a lot of provisions, I think, that are designed to undercut that—or to change that, to disincentivize that.

Mrs. CAPITO. Okay. Thank you.

Mr. MAIN. And Solicitor Smith may have some other additions to that.

Ms. SMITH. Well, basically, what this bill did was look at the incentives for why the contest rate went up so much, the reasons the contest rate went up so much. It wasn't just because there were more inspectors and more citations, but the actual contest rate went up dramatically.

Mrs. CAPITO. Right.

Ms. SMITH. And so, as the Assistant Secretary said, one of the things was that individuals would contest so that there wouldn't be a final order for a pattern. And that is one thing that has been eliminated.

Secondly, to the extent that there was a great delay, there is the time value of money. So prejudgment interest reduces that incentive to contest.

Then, as the Assistant Secretary said, you know, there was a GAO report in 2007 that said the commission would often dramatically reduce the penalties even when they upheld the citation.

Mrs. CAPITO. Right.

Ms. SMITH. So that has been eliminated in this bill.

So we think that the, sort of, non-necessary reasons to contest have been really dealt with and that that will help the contest rate in the future.

Mrs. CAPITO. Well, thank you.

I see my time is up, but I would like to ask the chairman and the ranking member: I have worked on a solitary bill on my own that incorporates a lot of what you have but then some other suggestions based off of what Secretary Main suggested in March. So I would hope maybe we could work through some of these as you are marking up the bill. I would appreciate that.

Chairman MILLER. I would be glad to take look at it. Thank you.

Mr. Altmire?

Mr. ALTMIRE. Secretary Main, I wanted to focus on the regions within MSHA. I come from western Pennsylvania. And, anecdotally, I hear from mining operators and miners alike throughout western Pennsylvania that there is a difference in enforcement, which results in a difference in outcomes, safety records within the different regions of MSHA, western Pennsylvania comparatively having a pretty good record. Anecdotally, that is what I hear.

And I wondered, is there truth to that statement that there is a substantial difference in the safety records within regions? In your experience, which regions of the country have the best records of safety? Which ones need improvement? And is this due to a difference in enforcement within the regional administrators of MSHA?

Mr. MAIN. I grew up in southwestern Pennsylvania, and I probably know a lot of the folks that you have conferred with in that area.

I think, you know, as a starting point, there are some mine operators who take a different view about how they run mines than other mine operators do. And I think, as we all have looked at statistics and saw a number of mine operators who seem to chug along every day and comply with the law and have a good safety management program in place that is unaffected by the law, and that others seem to have difficulty complying with the law. And, to me, a lot of that is the management style.

I would have to take a look at the different geographics of the country to answer your question. It is my hope that the mine operators in that region are some of the best in the country, you know, and do operate their mines as safe as they have the capability of doing.

Mr. ALTMIRE. It is not just the mine operators, because many mine operators, of course, operate mines within multiple jurisdictions, multiple regions. But it seems as though there are certain regions—even though mine operators operate in more than one region, there are certain regions that have better safety records than others. What is the reason for that?

Mr. MAIN. Well, when we announced our plans to do the follow-up public hearings on the Upper Big Branch disaster, one of the things that we are going to be doing is holding a public forum to address one of the issues I think that you have raised, and that is the concerns that we have heard from the miners and from mining families about the culture of safety in that region and to try to do something that changes that culture to a more positive one.

I think that, you know, there is an expression from miners and mining families in the area of the Upper Big Branch Mine that has raised serious concerns about the way that mine safety in those

mines are managed and the fear that miners have and families have that you may not hear as much or any from some other regions of the country. That is something that we are taking a look at, with regard to the Upper Big Branch Mine.

Mr. ALTMIRE. And have you found, Secretary Main, that there is a correlation, either direct or indirect, between the number of citations for safety violations that are given out to a mine operator and the number of incidents that occur?

Mr. MAIN. In cases, there is some correlation to that.

I think, as a starting point, there are two factors that we would probably look at the most. That is the number of orders that a mine gets or receives. That is a sign that things are more out of control, as the saying goes, than one that would not be receiving a lot of orders. The second one would be a mine that has a large number of S&S violations.

And we are trying to provide some parity with that analysis, in that a mine with 35 miners running an underground coal mine, let's say, with 35 miners having one or two mining units, compared to a mine employing 900 miners and 15 mining units. I mean, we have to be able to look at those comparisons to make those judgments.

But, all things considered, S&S violations, orders, and high accident rates would be amongst things that we would look at to make those determinations.

Mr. ALTMIRE. Thank you.

Secretary Michaels, very quickly, do you think it is appropriate, as we consider this bill moving forward this week, to have a distinction between coal mines, underground coal mines, which present very different challenges to surface metal mines and nonmetal mines?

Mr. MICHAELS. You know, I am not familiar with the mining industry because both surface mines and underground mines are covered by MSHA. I would defer to my colleagues on the panel here.

Mr. ALTMIRE. Secretary Main?

Mr. MAIN. Yes. We have jurisdiction over all of the mines in the country. And I think it is very wise that Congress made that decision in 1977 to give all miners equal protection under the law.

There are differences from one coal mine to another. There are differences from a coal mine to preparation plants. There are differences from a sand and gravel facility. There are differences from a cement facility. But all things considered, the way the law is constructed, there are different standards that apply to the coal side and the non-coal side to provide the kind of protections that, you know, we would like to have in place.

And I think it is important to understand that miners that work at a sand and gravel facility have a right to as much protection as a miner does at an underground coal mine. Not to say that they face the same kind of consequences or conditions, but all those work sites, on their own, have various hazards that need to be dealt with. And, you know, some hazards you are going to find at a sand and gravel facility or at a cement facility is some of the same ones you are going to find at a coal mine.

Mr. ALTMIRE. Thank you.

Chairman MILLER. Thank you.

Mr. Tierney? No questions?

Well, thank you very much for your time and your expertise and your testimony. And, obviously, as we digest everything we are hearing today, we will get back to you. But thank you so much for all of your cooperation and help in drafting the legislation and bringing your experience to that. Thank you.

The committee will hear from a second panel, at this point. We are going to swap out.

Welcome to the committee, and thank you very much for agreeing to join us this afternoon.

Mr. Stewart and Mr. Grayson, thank you. I know you have traveled some distance to get here, and we appreciate that very much.

Let me go through the introductions of this panel for the audience and members of the committee.

Mr. Stanley "Goose" Stewart worked as a coal miner for 34 years and was an employee of the Upper Big Branch Mine in West Virginia for 15 years. He was close friends with many of those killed in the explosion at the mine in April. Mr. Stewart was on his way into the mine when the explosion occurred.

Dr. R. Larry Grayson is a professor of energy and mineral engineering at Pennsylvania State University. He was the first associate director of the Office of Mine Safety and Health Research at the National Institute of Occupational Safety and Health. He chaired the Mine Safety Technology and Training Commission, established by the mining industry in 2006.

Mr. Bruce Watzman is the senior vice president of regulatory affairs of the National Mining Association. He monitors Federal health and safety policy for the U.S. mining industry.

Mr. Cecil Roberts, Jr., is the president of the United Mine Workers of America and has served in this capacity since 1995. He is a sixth-generation coal miner and serves on the Safety and Occupational Health Committee of the AFL-CIO.

Mr. Jonathan Snare is a partner in the Morgan Lewis labor and employment practice. Mr. Snare's practice focuses on labor-related issues, including occupational safety and health, mine safety and health, and whistleblower cases. During the Bush administration, he served as Deputy Solicitor of Labor and Acting Solicitor of Labor under Secretary Chao.

Ms. Lynn Rhinehart is the general counsel to the AFL-CIO. She is a former aide to Senator Howard Metzenbaum of the Senate Labor Committee and a member of the Obama transition team for the National Labor Relations Board. From 2007 to 2009, she served as co-chair of the ABA Committee on Occupational Safety and Health.

Thank you all for joining us. We look forward to your testimony. Again, your written statements will be included in the record in their entirety, and you should proceed in the manner in which you are most comfortable.

Also, if you want to comment on something that you heard back and forth between the members of the committee and the witnesses, feel free to do so. That would, obviously, be helpful to the Members, I think, as we sort through the record as we go forward with this legislation.

But welcome. And, again, thank you.

Mr. Stewart, we going to begin with you. And welcome back to the committee.

STATEMENT OF STANLEY STEWART, COAL MINER, UPPER BIG BRANCH MINE

Mr. STEWART. Thank you, Chairman Miller, for allowing me to speak here today.

My name is Stanley Stewart. Most people know me as "Goose." I have been a coal miner for 34 years, the last 15 with Performance Coal at the Upper Big Branch Mine in Montcoal, West Virginia, and I am a Massey employee.

I was underground April 5th when UBB exploded. Luckily for me and my crew, we were able to escape. I am here to speak for my 29 brothers who did not make it out.

This tragedy should never have happened in America today. The April 5th explosion was a 1920s-style explosion, and we should be beyond that. The only reason 400 men didn't die is because of the mechanization used in coal mining today.

Something needs to be done to stop outlaw coal companies who blatantly disregard the laws. Many things were wrong at the UBB mine. Management regularly violated the law. Some examples: Concerning advance warning on inspector arrivals, a section boss would be called from outside and he would be told, "It's cloudy outside," or, "There's a man on the property," meaning there is an inspector outside, get things right to pass the inspection.

In 2009 we were made, by Chris Blanchard, the President of Performance Coal, to cut coal going into our air supply. We mined this way for over 2,000 feet, and several months later we were allowed to mine the legal way. On January 4, 1997, an illegal air change was made during our shift. An overcast was knocked out, short-circuiting our air, and it caused an explosion. It wasn't as big as April 5th, but I thought I was a dead man, and I know it was covered up.

Around 2003 or 2004, there was a bleeder that spewed methane in the mine. The methane readings were 5 percent at the power center, and at least 20 percent further back in the mine. We were made to sit underground for nearly an hour before management let us leave the mine. When we would move the longwall to a new face, we were always made to load coal before all the shields and ventilation were in place, so someone could call Mr. Blakenship and say we were "in the coal."

In the months before the explosion, I worked on Headgate 22. My section foreman consistently got low air readings. He would complain to upper management. He would be berated, told to go back to work or he would lose his job, and the air was never fixed, so he quit. The longwall worried me because of the constant ventilation problems, and with so much methane being liberated and no air moving, I knew that area was a ticking time bomb.

There were at least two fireballs on the drum of the shearer on the longwall, according to separate reports of miners working those shifts. That meant methane was building in the area, proving ventilation problems and possible methane monitor problems. I have worked the longwall in dust so thick I couldn't see my hand in front of my face and couldn't breathe because of improper ventila-

tion. I once asked the assistant coordinator why we didn't have proper air on the longwall. I was told, "It's funny, you are the only one to say anything about it: My response was, "That's because everyone is too afraid to lose their jobs if they say anything."

In my years of working for Massey, I feel they have taken coal mining back to the early 1900s using three principles: fear, intimidation, and propaganda. I know personally that Massey sends a safety director to the hospital to pressure miners hurt on the job back to work and have them sit in the office so their accident doesn't get listed as a "lost time accident." This bill needs to require truthful reporting because with a fabricated safety record, MSHA can't target the right mines for a Pattern of Violation.

In my first few years at Massey I saw more men maimed and killed than in my 20 years in the union. This is why the UMWA was formed in 1890, to protect and give miners rights. A coal mine is the worst place in the world to work without rights, and at Massey you have very little rights. You knew if you stood up to them you would be out of a job.

This bill must be passed to give all miners rights. If this bill is passed, hopefully miners will feel they can stand up to the Massey empire or other rogue companies and protect themselves without retaliation. With the current system, a Pattern of Violations must be fixed so the outlaw companies must be made to understand that they can't continue to put miners' lives at risk to turn a profit. It puts teeth in the law. It makes retaliating against miners that report violations to MSHA or refuse to work in unsafe conditions subject to a fine, and by making retaliations subject to a criminal penalty.

Outfits like Massey will always find a way to fire you regardless of the laws. That is why it is important to have rights to challenge any unfair firing in an underground coal mine. With a union you have that right. Without a union, this bill gives miners protection to fight firings.

This bill must pass to keep companies honest or to make them pay the price. Partisanship needs to be set aside on this legislation because human lives are at stake. Twenty-nine families are suffering from this needless explosion, their communities are suffering from their deaths, and I myself am suffering.

In closing, I simply ask you to remember what the Constitution says: of the people, by the people, and for the people. People's lives are at stake. It is very serious down in those mines, and those people need protection. All I ask is that you do the right thing and help them. Thank you.

Chairman MILLER. Thank you very much.

[The statement of Mr. Stewart follows:]

Prepared Statement of Stanley Stewart, Coal Miner, Upper Big Branch Mine

My name is Stanley Stewart. Most people know me as "Goose". I've been a coal miner for 34 years the last 15 years with performance coal at the Upper Big Branch (UBB) mine in Montcoal, West Virginia, and am a Massey employee.

I was underground April 5th when UBB exploded. Luckily for me and my crew, we were able to escape. I'm here to speak for my 29 brothers who did not make it out. This tradedy should never have happened in America today. The April 5th explosion was a 1920s style explosion and we should be beyond that. The only reason 400 men weren't killed, is the mechinazation used in coal mining today.

Something needs to be done to stop outlaw coal companies who blatently disregard the laws. Many things were wrong at Upper Big Branch such as low air constantly.

Management regulary violated the law concerning advance warning on inspector arrivals. A section boss underground would be called from outside and be told, "it's cloudy outside" or "there's a man on the property" meaning there is an inspector outside, get things right to pass inspection.

- In 2009, we were made by Chris Blanchard, the president of performance coal, to cut coal going into our air supply. We mined this way for 2,000 feet and several months later we were allowed to mine the legal way.
- On January 4, 1997, an illegal air change was made during our shift. An overcast was knocked out and as a result there was an explosion. It wasn't as big as April 5th, but I thought I was a dead man and I know it was covered up.
- On July 26, 2009 our crew on the second shift was told by upper management to change from sweep to split air in headgate 21, where the long wall is now. We knocked stoppings while crews were still working, which can short circuit their air supply. This violated MSHA requirements to evacuate miners when changing the ventilation system, but upper management made it clear we had to do this job. I'm not sure if MSHA was aware of the whole situation. But it scared me and when I got home I wrote it down.
- On headgate 22 the tracks were never laid within ½ mile from the mantrip to our section. We had a buggy for emergency transport that we used to travel from the mantrip to our section but it got a flat tire. It was not fixed until the inspectors wrote them up for it. After that we weren't allowed to ride it from the mantrip to the section so it wouldn't breakdown again.
- Around 2003 or 2004 there was a bleeder that spewed methane in the mine. The methane readings were 5% at the power center so it was at least 20% further back in the mine. We were made to sit underground for nearly an hour before management let us leave the mine.
- A young man I personally know was working at a Massey mine as a fireboss and was told by upper management to fix the books to proper air readings when the section had virtually no air. He was so angry he quit Massey. I would provide his name privately.
- When moving the long wall to a new face we were made to load coal before all the shields and ventilation were in place so someone could call Mr. Blakenship to say we were "in the coal".
- In the months before the explosion on headgate 22, my section foreman got consistently low air readings and complained to upper management. He would be berated and told to go back to work or he would lose his job, and the air was never fixed. He was afraid something would happen so he quit.
- The long wall worried me because of the constant ventilation problems and with so much methane being liberated and no air moving I felt that area was a ticking time bomb.
- There were at least 2 fireballs on the drum of the shearer on the long wall according to separate reports of miners working those shifts. That meant methane was building in that area proving ventilation problems. The questions I have are how could methane build to that point where a fireball could start? How could this happen if the methane dectectors had been working?
- I've worked the long wall in dust so thick I couldn't see my hand in front of my face and I couldn't breathe because of improper ventilation. I once went to the assistant coordinator and asked why we didn't have proper air on the long wall face. I was told "it's funny you're the only one to say anything about it." My response was "that's because they are too afraid of to lose their jobs to say anything."
- I've worked on the continuous miner section as a miner operator and more often than not the dust would be so thick I'd shut off the machine to let the air clear to see if the job was being done properly.

In my years of working for massey I feel they have taken coal mining back to the early 1900s using 3 principles; fear, intimidation and propaganda. I know personally that Massey sends a safety director to the hospital to pressure miners hurt on the job to return and sit in the office so their accident doesn't get listed as a "lost time accident".

I notice that one criteria for the new pattern of violation in HR 5663 is a mine's accident and injury rates. This bill needs to do something to require truthful reporting because with a fabricated safety record, MSHA will fail to target the right mines for a pattern of violation.

In my first few years at Massey I saw more men maimed and killed than in my 20 years in the union. This is why the UMWA was formed in 1890; to protect and give miners rights. A coal mine is the worst place in the world to work with no

rights and at Massey you have very little rights. You knew if you stood up to them you'd be out of a job.

I wonder what will happen to me for speaking out now.

New legislation needs to be passed to give all miners some kind of rights. If this bill is passed, hopefully enough miners will feel they can stand up to the Massey empire or any other rogue company and protect themselves without retaliation. There's nothing wrong with mining coal the right way. I did it for 20 years for Peabody Coal, a UMWA mine, so I know it can be done.

• The current system of pattern of violations (POV) must be fixed so the outlaw companies must be made to understand they can't continue to put miner's lives at risk to turn a profit. One big thing this bill fixes is keeping unsafe mines from contesting violations as a way to avoid being put on the POV.

• It puts teeth in the law by making it a felony and not a misdemeanor where there is advance notice of an inspection. It makes retaliating against miners who report violations to msha or refuse to work in unsafe conditions subject to a fine and it sends a strong message by making retaliation subject to criminal penalty.

• Big outfits like Massey will always find a way to fire you regardless of the laws. That is why it is important to have rights to challenge any unfair firing in an underground coal mine. With a union you have that right. Without a union, this bill gives miners protection to fight firings that are not based on "good cause".

• If a miner reports violations and msha shuts down a mine until its safe, miners get full pay. Today they only get 4 hours pay and the company doesn't always pay that. In my case I've not been paid at all when the mine was shut down or we were sent home early for unsafe conditions.

This bill must pass to keep coal companies honest or to make them pay the price for their unscrupulous behavior. Partisanship needs to be set aside on this legislation because human lives are at stake.

29 familes are suffering right now from this needless explosion, the communities are suffering from their deaths and I myself am suffering.

In closing, I simply ask all of you to remember what the constitution says, "of the people, by the people and for the people." People's lives are at stake. It's very serious down in those mines and those people need protection. All I ask is that you do the right thing and help them.

Thank you.

Chairman MILLER. Mr. Grayson.

STATEMENT OF DR. R. LARRY GRAYSON, PROFESSOR OF ENERGY AND MINERAL ENGINEERING, PENNSYLVANIA STATE UNIVERSITY

Mr. GRAYSON. Good afternoon, Mr. Chairman and distinguished members of the committee.

As a former UMWA coal miner myself, mine superintendent, and manager of mine safety and health research at NIOSH, I really thank you for the opportunity to discuss provisions in H.R. 5663.

It is agonizing that we are again at a point where a major underground coal disaster has shattered the lives of so many people, and that industry and MSHA just seem to be powerless from stopping these disasters. We had only one such event during the period of 1991 through 2000; thus, it appears it can be done.

The tripartite Mine Safety Technology and Training Commission, which I chaired in 2006, indicated the key to achieving this goal includes processes that, number one, require major hazard-related risk management which must now involve the screening of mines with high risk for disasters and serious injuries; second, facilitate the creation of a safety culture of prevention of hazardous conditions that can lead to major hazardous events, and, I will add, serious injuries as well.

It is imperative that these processes must drive adoption of best practices in building a culture of prevention. The objective is to ensure that everyone in the organization involved with the mine, top

to bottom, performs the critical task of their jobs, aimed at removing threatening conditions with painstaking thoroughness. The same approach must be used in MSHA.

The Commission noted that industry has to fundamentally change the management approaches and the work practices taken to fulfill basic safety requirements. We recognize that simple regulatory compliance alone is not sufficient to mitigate significant risk.

Now since 2007, my graduate student and I worked on developing an effective and straightforward tool to analyze the risk of underground coal mines. The Safe Performance Index model contains essentially the same elements discussed in the new Pattern of Recurring Non Compliance or Accidents provisions for screening high-risk mines. The accident-related elements that we used include the no days-lost incidence rate, the non-fatal days lost incidence rate and adjusted severity measure, where statutory charged days are added in there.

The citation-related elements we used included the number of citations for 100 inspection hours, the number of S&S citations per 100 inspection hours, and the number of unwarrantable failure and imminent danger withdrawal orders per 1,000 inspection hours. I will give some detailed results on the SPI modeling of an 82-mine sample in my more extensive written comments.

The more salient points related to H.R. 5663 are summarized as follows:

Our sample represents about 18 percent of the producing mines, and I am convinced that the SPI works very well at objectively determining high-risk mines. Similar discriminatory power could be achieved with an appropriate application of the new Pattern of Recurring Non Compliance or Accidents provisions of H.R. 5663. I believe the key to success depends on a judicious weighting of the components delineated in the subsection on rulemaking, as specified in paragraph (8)(B), to determine the threshold criteria.

The worst-performing 10 percent of mines in our study were characterized by different measures. Some had a high injury rate and a high elevated citation rate, while others had either a very high injury rate or a very high elevated citation rate. Four MSHA potential Pattern of Violation mines were on the list, and one was the longwall mine.

Three of the worst-performing eight mines got there because of a terrible severity measure. Two of them had good S&S and order rates. Thus, I reemphasize that the injury experience must be integrated with the citation experience in considering mines for pattern status.

Regarding benchmark criteria for the 90-day evaluations, I suggest that the major hazard-related S&S citations and orders should immediately have a higher benchmark of the 25th percentile of the top-performing mines. A pattern mine should alternatively be permitted to pass the benchmark for citations if the S&S rate is reduced by 70 percent, provided that reduction of 70 percent takes the mine's S&S rate to one that is below the mean for the grouped mines. The target of having mines in the top 25th percentile set forth in the bill for reducing the injury rate appears appropriate.

Regarding termination of pattern status, both the S&S rate and the order rate need to be considered. And the 80 percent reduction

of the rates needs to be coupled with the caveat that the improved S&S and order rates should both be less than the mean for group mines. For injuries, the performance benchmark of the 25th percentile of top-performing mines is a reasonable challenge for trying to build a culture of prevention.

The goal in this legislation should be to ensure that a low-performing mine that deserves to be placed on pattern status should be compelled to build a new safety culture that focuses day to day on preventing major hazard-related conditions and lost-time injuries.

I commend the committee for inclusion of several important provisions: First is the independent investigation of mining disasters. Second is ensuring that MSHA inspects mines during normal operations on all shifts. I do recommend that MSHA inspectors should also perform a major hazard sweep at a mine at the beginning of a quarterly inspection. Third is allowing MSHA to invoke justifiable mitigating circumstances for an identified pattern mine.

In closing, I do believe that the new Pattern of Recurring Non Compliance or Accidents provisions will be a much-needed improvement over the current Pattern of Violations process. The 1-year remediation process, coupled with quarterly monitoring of performance, should inculcate in pattern mines adoption of practices and processes aimed at building a safety culture of prevention which is necessary to eliminate mine disasters and ultimately all fatalities and serious injuries.

This concludes my oral comments. I would be happy to take questions.

Chairman MILLER. Thank you.

[The statement of Mr. Grayson follows:]

Prepared Statement of R. Larry Grayson, George H. Jr. & Anne B. Deike Chair in Mining Engineering; Professor, Energy & Mineral Engineering, Pennsylvania State University

Good afternoon Mr. Chairman and other distinguished members of the Committee. As a former UMWA coal miner, mine superintendent and manager of mine safety and health research at NIOSH, I very much thank you for the opportunity to discuss certain provisions in Miner Safety and Health Act 2010, H.R. 5663.

It is agonizing that we are again at a point where a major underground coal mine disaster has shattered the lives of so many people, and that industry and MSHA seem powerless from stopping these disasters. In pursuing this legislation, our first priority must be to try to effectively prevent underground coal mine disasters from ever occurring again. We had only one such event during the period 1991-2000, thus it appears that it can be done. At the same time, we need to focus on the goal of preventing all fatalities and all serious injuries, especially those giving full and partial disabilities. Eventually we want to reduce lost-time accidents at the vast majority of mines to zero as well.

In my opinion, and the opinion of the tripartite Mine Safety Technology & Training Commission, which I chaired in 2006, the key to achieving these goals are setting up processes that will:

1. Require major hazard-related risk management as the first priority, which now must involve the screening of mines with high risk for disasters and serious injuries; and

2. Facilitate the creation of a safety culture founded on prevention of hazardous conditions that can lead to major-hazard events, fatalities or serious injuries.

In my opinion, it is imperative that any initiative that focuses on these processes must also focus on driving adoption of best practices in building and maintaining a culture of prevention. The objective is to ensure that everyone in the organization involved with the mine, top to bottom, performs the critical tasks of their jobs, aimed at removing threatening conditions, with painstaking thoroughness. The

same approach must be used in MSHA regarding its supervisors and inspectors, who are the last line of defense in preventing disasters.

In its report, the Mine Safety Technology & Training Commission stated that "The commission strongly believes that companies which do not pursue the outlined approaches aimed at fulfilling fundamental safety requirements should not be permitted to operate underground coal mines." In our collective minds, and in complete tri-partite consensus, we urged the underground coal industry to adopt the approaches we outlined. Our most succinct, relevant closing paragraph noted the following:

In particular in order to move forward safely and productively, the commission believes that a number of broad issues framed by our recommendations deserve serious attention, and should be used to fundamentally change the management approaches and work practices taken to fulfill basic safety requirements. First and foremost, risk-based decision-making must be emphasized, employed, and improved in all aspects of design, assessment, and management. It is imperative that a risk-assessment-based approach be used, founded on the establishment of a value-based culture of prevention that focuses all employees on the prevention of all accidents and injuries. Importantly, every mine should employ a sound risk-analysis process, should conduct a risk analysis, and should develop a management plan to address the hazards and related contingencies identified by the analysis; simple regulatory compliance alone is not sufficient to mitigate significant risks.

Next I will focus on a methodology to screen for high-risk mines that my graduate student and I worked on beginning in 2007, and which contains essentially the same elements discussed in the new Pattern of Recurring Non Compliance or Accidents provisions (Section 202, paragraph (e)(8)) of H.R. 5663. The accident-related elements we used included:

- The no days-lost incidence rate,
- The non-fatal days lost incidence rate, and
- The severity measure, calculated as the total statutory[1] days charged plus restricted work days plus lost work days multiplied by 200,000 and the result divided by the employee hours worked.

The citation-related elements we used included:

- The number of citations per 100 inspection hours,
- The number of S&S citations per 100 inspection hours, and
- The number of withdrawal orders per 1000 inspection hours.

One of three methods we pursued for safety risk analysis, which was follow-up work on the risk assessment recommendation made by the Mine Safety Technology & Training Commission, was to develop an effective and straight-forward tool that any company could use to analyze the risk levels of its underground coal mines.

As does paragraph (e)(8) of Section 202 relating to the new Pattern of Recurring Non Compliance or Accidents provisions, the Safe Performance Index (SPI) embraces all of the significant inputs for screening mines for high risk, from both the citation and injury perspectives. It similarly uses normalized measures. Fatalities and disabilities were brought into the risk calculation through use of the Severity Measure, because their serious nature is highlighted better and has more influence in determining the total risk level of a mine. In my opinion, we used the SPI methodology to analyze several groups of mines with robust results in targeting high-risk mines.

In a recent analysis of a sample of 82 underground coal mines, the top-performing 10% of mines with the highest SPIs were characterized by low injury rates and low elevated citation rates (see Table 1). The following points characterize these best or safest-performing mines:

- All of them had an non-fatal days lost incidence rate (NFDL IR) and severity measure (SM/100) much less than the averages for all mines.
- All of them had a significant and substantial citation rate per 100 inspection hours (SS/100 IH) and withdrawal orders rate per 1,000 inspection hours (O/1000 IH) much less than the averages for all mines.
- Seven of the eight mines had no orders, including three longwall mines.
- Four pilot mines and four longwall mines were in the list.
- Significantly, no mines on the MSHA list of potential pattern of violations made the list.

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[1] Some injuries or illnesses are of such a degree of severity that a standard time charge of lost workdays has been adopted by MSHA, called statutory days charged. For a single incident, the charge can range from 6000 for a fatality or full disability to a lower amount for a partial disability or loss of a body part.

TABLE 1.—TOP 10% SPI BEST–PERFORMING MINES

Mine ID	SPI	NDL IR	NFDL IR	SM/100	C/100 IH	SS/100 IH	O/1000 IH
Pilot Mine 3	99.8	0.00	0.00	0.00	0.57	0.00	0.00
Pilot Mine 4	98.0	0.00	0.00	0.00	1.04	1.66	0.00
LW-19	97.5	5.74	0.00	0.00	0.45	0.49	0.00
LW-25	96.4	0.32	0.30	0.12	2.09	1.44	0.43
Pilot Mine 12	96.3	3.19	0.00	0.00	2.29	1.87	0.00
LW-26	96.1	0.26	0.47	1.02	1.60	0.77	0.00
Pilot Mine 14	96.0	9.39	0.00	0.00	0.60	0.72	0.00
LW-14	95.4	2.10	1.02	0.22	2.23	1.66	0.00
Scaled Averages	.....	3.67	3.67	3.67	3.67	3.67	3.67

On the other hand, the worst-performing 10% of mines with the lowest SPIs were characterized by variable and different measures (see Table 2). The following points characterize these worst-performing or high-risk mines:

• For three of the mines, a very high rate for withdrawal orders per 1,000 inspection hours (O/1000 IH) got them on the list.

• For three of the mines, a very high rate for severity measure (SM/100) got them on the list

• The remaining two mines had four or five metrics that significantly exceeded the means for the metrics.

• Importantly, four MSHA potential pattern of violation mines were on the list, one being a longwall mine.

TABLE 2.—BOTTOM 10% SPI POOREST–PERFORMING MINES

Mine ID	SPI	NDL IR	NFDL IR	SM/100	C/100 IH	SS/100 IH	O/1000 IH
MSHA List-20	59.3	3.70	6.77	0.20	8.69	10.00	9.77
MSHA List-6	52.1	14.65	7.06	2.28	6.61	10.42	9.46
MSHA List-18	42.7	1.53	1.40	0.45	5.96	5.42	23.60
LW-22	41.2	3.74	6.84	5.15	5.42	3.35	17.71
Pilot Mine 29 also LW-3	40.1	2.93	2.54	27.14	1.27	1.03	0.40
MSHA List-11 also LW-31	33.9	3.89	4.27	1.98	5.92	7.46	23.67
LW-2	32.3	2.92	4.23	29.20	2.14	1.97	0.79
MSHA List-3	0.0	3.46	4.65	37.29	6.57	6.75	5.46
Scaled Averages	.....	3.67	3.67	3.67	3.67	3.67	3.67

The sample of 82 underground coal mines represents approximately 18% of such active producing mines. In our SPI calculations we used all citation and injury data extracted from the MSHA Data Retrieval System, not just final orders. The rationale was to look at a one-year snapshot of the risk variations in underground coal mines, and to identify those with excess risk. I am convinced that the SPI works very well in objectively determining low-risk mines from high-risk mines. I believe ultimately that similar discriminatory power could be achieved with an appropriate application of the provisions of the new Pattern of Recurring Non Compliance or Accidents provisions (Section 202 paragraph (e)(8)) of H.R. 5663. In my opinion, the key for success depends on a judicious weighting of the components delineated in paragraph (8)(B) to determine the threshold criteria, which will lead to an appropriate screening of high-risk mines that are dangerous because of a very high level of serious injuries or a very high level of elevated citations, or high levels of both. Realizing that weighting factors will likely be determined through rulemaking, I emphasize, however, that the weighting factor applied to the Severity Measure, including statutory days charged for fatalities and disabilities should not be downplayed. Disabilities and serious injuries to miners have an overwhelming and inestimable impact on them and their families.

Other very important features of H.R. 5663 concern the remediation of conditions and/or the injury experience of a mine placed on pattern status, the benchmark criteria for continuation of the remediation effort, and the one-year benchmark criteria for termination of pattern status. Related to these aspects, the Mine Safety Technology & Training Commission stressed the need for all underground coal mines to build a culture of prevention that involves all mine personnel from top to bottom. Our goal in this legislation is to ensure that a mine that deserves to be placed on pattern status should truly be involved in building a new safety culture that focuses day-to-day on preventing major hazard-related conditions and lost-time injuries. It is difficult to say how long this process could take for a specific mine, but most ex-

cellent-performing mining companies who have built such a culture will tell you that it is more than a year. However, these companies generally were not pressed as severely as they would be in pattern status, and were very deliberative in selecting the tools and practices they thought would be most effective. A one-year period in pattern status, in my opinion, would enhance the probability that any mine in such status would systematically focus its remedial efforts to ensure that the 90-day benchmarks would be achieved, and another withdrawal order would not be issued. The cumulative effect of the successive 90-day evaluations would likely be to inculcate the processes and practices employed into daily work routines.

Regarding the benchmark criteria for the 90-day evaluations, a pattern mine should be challenged to have high goals, but I believe that the first-quarter evaluation is somewhat steep for a mine that has a 'bad' S&S citation record and which was likely chaotic in its approach to safety. I suggest that the challenge for the initial 90-day period would be to move the pattern mine to the top-performing 50th percentile of rates for all S&S citations but to the top-performing 25th percentile of rates for all major hazard-related S&S citations. I believe that the target for reducing the injury rate is appropriate, primarily to significantly reduce a high Severity Measure, which would include statutory charges. Based on the historical evidence of the potential pattern of violations process, I agree that the pattern mine should alternatively be permitted to 'pass' the benchmark for citations if the S&S rate is reduced by 70 percent with the caveat that the 70-percent reduction takes the mine's S&S rate to one that is below the mean for mines of similar size and type. The following 90-day evaluations could then seek the 35th percentile for the S&S citation rate and injury rate, and a 70-percent reduction for the S&S citation rate, provided the rate is below the mean value for mines of similar size and type. I again suggest that major hazard-related S&S citations should have the higher benchmark of the 25th percentile. In the end, application of these benchmark criteria would logically reflect the intent that a culture of prevention is being built and that a pattern mine pursues the types of safety performances achieved by the low-risk mines.

Regarding termination of pattern status for a mine, as related to the mine's elevated-citation performance, I examined the eight mines of the 82 in my database which fell in the bottom 10% of the SPIs. The worst-performing S&S rate among the eight mines was 10.41 per 100 inspector hours, and an 80% reduction of that would yield a rate of 2.08, which is 57% of the mean rate for all 82 mines. On the other hand when looking at orders, the worst-performing order rate was 23.67, and an 80% reduction would yield a rate of 4.73, which would exceed the mean rate for all mines by 29%. Thus I suggest that both the S&S rate and the order rate needs to be considered in evaluating the citation performance, and that the 80% reduction in the S&S and order rates needs to be coupled with the caveat that the improved S&S rate and order rate should both be less than the mean of all mines in the mine size and type category.

One other important issue must be noted here, that three of eight mines in the bottom 10% of mines in my SPI ranking got there because of a terrible Severity Measure. Two of them had good S&S and order rates. In these three cases, the Severity Measure reflected one fatality and several full and partial disabilities. One mine had a total of 16,098 total lost days, including statutory days plus restricted day and lost work days. In the other two mines, each of which had total lost days above 6,000, full disabilities were involved. Thus, I re-emphasize that the injury experience at mines must be integrated with the citation experience in considering mines for pattern status.

The 25th percentile mine's O/100 IH rate was 0.37; however, very significantly 20 of the 21 mines in the upper quartile had zero orders. In our database, 60 mines of the 82, or 71% of them, had a mean performance or better. Thus getting zero orders in our database mines was frequent, at nearly 25%; and doing better than the mean order rate was highly probable, at approximately 70%.

Switching to the accident experience, my comments will focus on both the number of lost-time accidents and the Severity Measure as the 25th percentile benchmark is examined. A total of 16 mines among 82, nearly 20% of them, had no lost-time accidents. Further 24 of 82, over 29%, had one or no lost-time accidents. Among them were 5 of 18 small mines, 1 of 6 medium-size mines, and 5 of 40 longwall (large) mines. Specific to the Severity Measure, 22 mines, or nearly 27%, had less than 10 lost work days, and similar performances were achieved for the Severity Measure. Thus it appears that the 25th percentile is a reasonable challenge, particularly since our goal is zero lost-time accidents as well as zero fatalities and serious injuries. This is a major point the Mine Safety Technology & Training Commission also emphasized in its report. Further, with progressive improvement occurring

responsive to the 90-day reviews, achieving the benchmark level apparently would be facilitated by the monitoring.

I would like to commend the Committee for its inclusion of several important provisions. First, the Mine Safety Technology & Training Commission also recommended that an independent investigation of mining disasters should be conducted. Second, it was important to ensure that MSHA inspects mines during normal operations on shifts other than day shift; I personally recommend that MSHA inspectors also perform a major-hazard 'sweep' of a mine at the beginning of a quarterly inspection. Third, the Committee was insightful about allowing MSHA to invoke justifiable mitigating circumstances for an identified pattern mine, because sometimes statistics may be deceptive and also because some accidents occur from fast-changing conditions.

In closing, I do believe that the new Pattern of Recurring Non Compliance or Accidents provisions will be a much needed improvement over the current Pattern of Violations process. The one-year remediation process coupled with quarterly monitoring of performance should inculcate in pattern mines adoption of practices and processes aimed at building a safety culture of prevention, which is necessary to eliminate mine disasters and ultimately all fatalities and serious injuries.

This concludes my written comments.

Chairman MILLER. Mr. Watzman.

STATEMENT OF BRUCE WATZMAN, SENIOR VICE PRESIDENT, OFFICE OF REGULATORY AFFAIRS, NATIONAL MINING ASSOCIATION

Mr. WATZMAN. Thank you, Mr. Chairman. We appreciate the opportunity to share our views on H.R. 5663.

As backdrop to today's discussion, it is helpful to note that U.S. mining operations have decreased fatal and nonfatal injuries by 72 percent and 64 percent, respectively, over the last two decades. Eighty-seven percent of all U.S. mines worked last year without a single lost-time injury. Those trends sustained our dedication to injury-free mining, and we expect 2010 will close with more than 85 percent of all U.S. mines operating without a single injury.

The tragedy at the Upper Big Branch mine in April, however, was an abrupt interruption to the positive trend, and has, appropriately, caused all of us to reexamine the adequacy of the industry's current safety and health practices and the existing statutory and regulatory authorities to achieve that goal.

While there are many voluntary initiatives, technology advances, and innovations in miner training and safety awareness underway in U.S. mines today, today's hearing focuses on legislation to address the role and the enforcement authorities of the Mine Safety and Health Administration and the relevant rules that govern their actions, the actions of mining operations, and the workforce.

In support of our shared safety and health goals, we have looked at the proposed legislation within the framework of the following principles:

Will it improve miner safety and health, our number one priority?

Does it ensure greater transparency in the regulatory, investigative, and enforcement process?

Will it build upon, rather than dismantle, the positive features of the existing law and regulations that have contributed to improvements?

Does it avoid additional layers of enforcement, penalties, and other actions that are already provided for under the law but not fully utilized?

Does it provide penalties that are commensurate with the severity of the violation?

Will it protect due process rights, and will it maintain a robust domestic mining industry that meets the needs of the American people while maximizing the safety and health of its workforce?

We have used this framework to identify omissions in the proposal that merit attention, provisions that basically align with these principles and that the industry could support with some modification, and provisions that are counter to these principles. And all of these are discussed in our written submittal.

Consistent with our principles, NMA supports improvements in the Nation's mine safety and health laws that target recalcitrant operators, create fair and uniform procedures for enforcement, provide transparency in the development and administration of regulatory requirements, focus resources on problem areas, and encourage the development and implementation of performance-improving processes that are outside the bounds of the current regulatory structure.

We believe that before embarking upon a comprehensive overhaul of the Miner Act, there should be a clear-eyed assessment of whether fundamental components of the existing law are being properly and fully executed.

As Representative Capito touched on, there are many areas that have been identified by the Assistant Secretary that are in need of attention. However, we believe that H.R. 5663 fails to address these fundamentals, raising real-world questions about its effectiveness. For example, when half the inspectors are new and the other half are not properly trained, as documented in the IG's recent report, won't adding more punitive and complex requirements aimed at mine operators only put more weight on an unstable foundation? If there is no strong correlation between S&S violation rates and injury rates, as documented in several analyses, what does this tell us about the effective implementation of the existing law? If injuries, incidents, or near misses arise more from at-risk behavior than from at-risk conditions, are we properly focusing the program at effectively allocating safety resources? If inconsistency in the application of the law is, as the Assistant Secretary has suggested, an impediment to regulatory certainty and compliance, won't we be better served by improving implementation rather than imposing more changes on inspectors and operators who are currently struggling to attain clarity, consistency, and credibility in the application of the safety law and regulations?

Finally, are our shared safety objectives well served by a full-scale insinuation of MSHA into the complexities of mine management? We understand the call by members to address perceived shortcomings in MSHA's statutory and regulatory structure; indeed, we share many of these concerns with certain elements of MSHA's authority. However, we do not believe that sufficient attention has been given to the weaknesses in the execution of that existing authority. Absent such an evaluation, we believe the legislation layers harshly punitive and restrictive provisions over a

flawed framework to the detriment of successful safety and health programs.

Mr. Chairman, we remain ready to work with members of this committee on actions we should be taking, some of which I have outlined, just as we did before Congress enacted the Miner Act of 2006.

Thank you. I would be happy to answer any of your questions.

Chairman MILLER. Thank you.

[The statement of Mr. Watzman follows:]

Prepared Statement of Bruce Watzman, Senior Vice President, National Mining Association

The National Mining Association (NMA) appreciates the opportunity to share our views on the Miner Safety and Health Act of 2010 (H.R. 5663), legislation that has been introduced to amend the nation's mine safety laws.

As backdrop to today's discussion, it is helpful to note that U.S. mining operations have decreased fatal and non-fatal injuries by 72 percent and 64 percent respectively over the last two decades. Eighty-seven percent of all U.S. mines operated without a single lost time injury in 2009. Those trends have sustained our dedication to injury-free mining, and we expect 2010 to close with more than 85 percent of all U.S. mines operating without a single injury.

The tragedy at the Upper Big Branch Mine in April was an abrupt interruption to that positive trend and has appropriately caused all of us to re-examine the adequacy of the industry's current safety and health practices and the existing statutory and regulatory authorities to achieve our goal. While there are many voluntary initiatives, technology advances and innovations in miner training and safety awareness underway in U.S. mines, today's hearing focuses on legislation to address the role and enforcement authorities of the Mine Safety and Health Administration (MSHA) and the relevant rules that govern their actions, the actions of mining operations and the workforce.

In support of our shared health and safety goals, we have looked at the proposed legislation within the framework of the following principles:

- Will it improve mine safety and health—our number one priority;
- Does it ensure greater transparency in the regulatory, investigative and enforcement process;
- Will it build upon, rather than dismantle, the positive features of existing laws and regulations that have contributed to mine safety and health;
- Does it avoid additional layers of enforcement, penalties and other actions that are already provided for under the law, but not fully utilized;
- Does it provide penalties that are commensurate with the severity of the violation;
- Will it protect due process rights; and
- Will it maintain a robust domestic mining industry that meets the needs of the American people while maximizing the health and safety of its workforce?

We have used this framework to identify omissions in the proposal that merit attention; provisions that basically align with these principles and ones the industry could support with some modification; and provisions that are counter to these principles.

I would like, first, to turn to the omissions, which we believe could make significant contributions to miner safety and health:

I. Items of Omission

A. Inspection and Enforcement Resources and Allocation

The Committee has received testimony at earlier hearings that established that: (1) the Mine Safety and Health Administration's (MSHA) authority under existing law was adequate but often unexercised; and (2) improvement in the allocation and use of resources would enable the agency to direct attention to the places where they are most needed. For the most part, H.R. 5663 bypasses these fundamental issues and instead adds more punitive and complicated measures on top of an existing law the agency has not utilized to the fullest extent.

Much attention was been devoted in prior hearings to the backlog of appeals of enforcement actions and penalties before the Federal Mine Safety and Health Review Commission (Commission). Yet, as this Committee has been advised in prior testimony, appeals of enforcement actions do not compromise the safety of miners

because under the Mine Act, unlike most other laws, mine operators must abate violations before any hearing is provided or suffer closure of the mine.

The backlog of existing appeals is symptomatic of more fundamental issues related to implementation of the existing law rather than a cause for changing the law. Testimony from the Committee's Feb. 23, 2010, hearing identified a convergence of circumstances that have not only produced an increase in the number of appeals of citations and penalties, but also point to fundamental weaknesses in the existing law's implementation. There were substantial areas of agreement among all who testified at the February hearing on ways to address these circumstances.

1. Lack of Consistency in the Enforcement of the Law

The Assistant Secretary testified that consistency in the application of the laws is critical to an effective mine safety program and requires ongoing training and review. He reported that a substantial number of highly experienced mine inspectors have retired, and almost 50 percent of the current inspectors have been hired in the past four years. Moreover, the Inspector General recently found that 56 percent of the "journeymen" (those that have completed entry level training) inspectors have not completed mandated retraining, and 27 percent do not believe the training provided is adequate for them to effectively perform their duties. Office of Inspector General, USDOL, Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining (March 30, 2010). Specifically, the IG report found that, "MSHA did not assure that its journeyman inspectors received required periodic retraining * * * inspectors may not possess the up-to-date knowledge of health and safety standards or mining technology needed to perform their inspection duties."

Fully trained and experienced inspectors are fundamental to a credible program. Again, as the Assistant Secretary advised the Committee, consistency requires effective and ongoing training at all levels—inspectors, District Managers and conference officers—to ensure inspectors "are not issuing citations for conditions where there is no violation or where there is a lack of evidence to support the inspector's findings." Effective training of inspectors and managers is also important to assure consistency in the application of the law, including the characterization of any violation, because the criteria (e.g., likelihood and severity of possible injury, number of persons possibly affected, and negligence) are inherently subjective.

Failure to address this critical component of the enforcement program is a shortcoming of the pending legislation. Inspector training programs must be improved and the delivery of training must be more frequent than the current requirement for two weeks training every two years. An effective understanding of the statutory requirements, as well an effective understanding of applicable interpretative case law are essential if the agency's enforcement is to achieve the objectives miners and mine operators expect. Moreover, this will reduce the number of citations challenged before the Commission as inspector actions conform to applicable case law rather than alleging statutory language needs to be included to justify unwarranted actions.

2. Changes in the Law & Regulations

The significant turnover in MSHA's inspectors also coincided with substantial changes in the law under the MINER Act. At a time when new inspectors were coming on board and more than half of the experienced inspectors were not receiving retraining, they were all faced with an array of new standards they were expected to enforce. Moreover, the MINER Act and MSHA regulatory actions changed the civil penalty assessment system in terms of both the manner and amount of penalties for different types of citations. As the Assistant Secretary testified forthrightly, "[t]hese changes can create a potential for inconsistent application of the Mine Act."

3. Suspension and Revision of the Conference Process

MSHA historically held safety and health conferences, when requested by mine operators, to discuss and resolve disputes over violations related to inspector findings. These conferences covered whether a violation existed or the seriousness and potential consequences of such violations—all factors that impact the level of the penalty for the violation as well as the consequences for future citations. The resolution of these matters often would result in no formal appeal being filed by the operator before the Commission. In February 2008, MSHA suspended the conference process for most violations. This had the perverse effect of pushing to the Commission the resolution of most of the violations and penalties that had been routinely resolved without any formal appeal. The process reinstated by MSHA a year later did little to relieve the Commission backlog because a conference is only provided after a penalty was assessed and after an operator appeals both the citation and the penalty to the Commission. As the chair of the Commission testified on Feb. 23,

"[t]he vast majority of our cases result in settlements." Indeed, many of these settlements involve the very citations and penalties that were previously resolved in a MSHA conference.

The absence of a timely and meaningful conference process has not only contributed to and aggravated the backlog of appeals; it also has robbed the program of a time-proven tool that provided some assurance against the risk that inherently subjective factors would lead to arbitrary outcomes. As MSHA found in its rulemaking for the former conference process, "the safety and health of miners is improved when, after an inspection, operators and miners or their representatives are afforded an ample opportunity to discuss safety and health issues with the MSHA District Manager or designee." 72 Fed. Reg. 13,624 (March 22, 2007).

We were not alone in recognizing the need to reinstate a transparent, independent conference process to address, prospectively, the case backlog before the Federal Mine Safety and Health Review Commission. The Assistant Secretary for MSHA has testified that, "The option to hold conferences prior to the operator's contesting the penalty seems to be the best approach to resolve disputes over violations early in the process and keep those citations out of the backlog."

Some believe this matter can be addressed by MSHA initiating administrative action to reinstate the conference process. We disagree. While it is correct that MSHA can reverse this administratively, the same actions that gave rise to this situation can be repeated in the absence of statutory conference authority. We believe that the pending bill should be amended to provide this authority.

B. Inspection Activity and Resource Allocation Decisions

The preceding discussion leads us to raise another fundamental question. Are we focusing our resources where they are most needed? Under current law, MSHA must inspect every underground mine four times a year and every surface mine twice per year. But this mandate does not translate into four days or two days of inspections annually. Rather, these inspections often last for weeks, months or yearround for some mines. Some underground mines, because of their size, not based on compliance history, experience 3,000-4,000 on-site inspection hours each year. There must be a better way to deploy the resources to where they are needed most.

NMA believes it is time to consider a different way of deploying resources based upon safety performance. Under existing law, mine operators must immediately report all accidents and report quarterly all lost time injuries and reportable illnesses directly to MSHA. This has produced an extraordinary database that can be used to guide inspection activity and allocate inspection resources based on documented need and analysis related to safety performance and risks. It is far more likely that effective inspection activity will be based on documented need and analysis than on entirely subjective or ambiguous criteria, let alone on rote compliance with mandates of the Act.

Some believe that MSHA lacks adequate resources to implement an effective enforcement program to focus on recalcitrant operators while still meeting the statutory mandates to inspect each underground mine four times a year and each surface mine twice yearly. We disagree. MSHA must be authorized and directed to utilize the information available to identify problem areas and allocate its inspectorate accordingly. Just as MSHA was able to identify 57 mines for targeted enforcement in the days immediately following the Upper Big Branch tragedy, so too must they utilize this same information to target mines that pose an immediate hazard to miner safety and health.

Working together we believe a system can and must be developed that would refocus the number and scope of inspections based on performance and the adoption of verified and objectively administered performance goals. H.R. 5633 should be amended to provide MSHA with the authority to implement such a program.

C. Plan Review

Central to the functioning of an effective safety management program is the development and administration of a transparent process that provides for timely consideration of plans necessary to ensure the safety and health of miners. Unfortunately, MSHA's plan review process does not meet these goals.

Today, MSHA's technical resources are challenged as operators face more difficult geologic conditions. As a result, plan consideration has become more difficult and less timely. MSHA, industry, academia and others are competing for the small pool of technical expertise required to assist in the development of mining processes and plans necessary to maximize resource recovery AND ensure the safety and health of the workforce. Imposing new punitive measures without addressing this fundamental need will do little to advance miner safety and health.

At its core, the submission of plans culminates in a quasi-risk assessment process, the goal of which is multi-faceted. While plans are structured to comply with regulatory requirements, they are, in the broader sense, intended to foster a culture of prevention at the mine. Unfortunately, the lack of a defined process for the consideration of plans frustrates this objective and jeopardizes miner safety and health.

H.R. 5663 will exacerbate this problem by expanding MSHA's authority without addressing the true underlying problem. Despite characterizations to the contrary, MSHA has the authority to revoke plans and has not been hesitant to do so. While this authority is cast in terms of plan revisions resulting from the violation of underlying standards or the identification of a potentially hazardous condition, the end result remains the same. The legislation's punitive plan revocation approach will worsen the plan process to the detriment of miner safety.

Before we embark upon comprehensive overhaul of the Mine Act, there should be a clear-eyed assessment of whether fundamental components of the existing law are being properly and fully executed. The Assistant Secretary has set forth several areas that need attention: (1) improved implementation of the Mine Act; (2) simplification of the contested case process; (3) improved consistency by MSHA inspectors and supervisors; and (4) creation of an environment where fewer cases enter the contest process. None of these fundamental needs related to the implementation of the existing law are advanced by H.R. 5663.

If half the inspectors are new and the other half are not properly trained, adding more punitive and complex requirements aimed at mine operators will only put more weight on a unstable foundation. In light of the information gathered at recent hearings regarding the substantial turnover in inspectors and the significant shortcomings in inspector training, maybe it is time to step back and perform an objective evaluation of: (1) the relationship (or correlation) between violation rates and injury rates at mines; (2) the source of injuries in terms of "at risk" conditions or "at risk behaviors"; and (3) consistency and clarity in the application of the law.

If there is not a strong correlation between significant and substantial violation rates and injury rates, what does that tell us in terms of the implementation of the existing law? This question was examined in 2003 where ICF Incorporated, in a report to the Department of Labor, entitled Mine Inspection Program Evaluation, stated that, "[t]he data indicate that the numbers and types of days lost injuries occurring over the past 5 to 10 years are not well correlated either quantitatively or qualitatively with the citations issued through inspection enforcement activities.

If injuries, incidents or near misses are arising more from "at risk" behavior than"—at risk" conditions, what does that tell us about the focus of the program and allocation of safety resources? And, if inconsistency in the application of the law is, as the Assistant Secretary has suggested, an impediment to regulatory certainty and compliance, wouldn't we be better served by focusing on improving implementation than foisting more changes on inspectors and operators struggling to attain clarity and consistency in the application of existing law and regulations?

These are areas that should be examined and included as part of a broad effort to improve mine safety but unfortunately the pending bill is silent on these aspects.

II. Areas of Conceptual Agreement

The National Mining Industry supports improvements in our nation's mine safety and health laws that would (1) create fair and uniform procedures for enforcement; (2) target recalcitrant operators; (3) provide for transparency in the development and administration of regulatory requirements; (4) provide flexibility to the government and mine operators to focus resources on problem areas; and (5) encourage the development and implementation of processes for improving performance that are outside the bounds of the current regulatory structure. While H.R. 5633 does not address all of these components and, in fact, moves in several areas in a direction that we feel will be detrimental to miner safety and health, there are selected aspects of the bill that move in this direction and are ones NMA could support, if modified.

A. Independent Investigation Authority

The establishment of an independent authority to investigate mine disasters has been debated for many years. Some have advocated the creation of a full-time authority along the lines of the Chemical Safety Board or the National Transportation Safety Board to investigate, report on and make recommendations for the prevention of future mining disasters. H.R. 5663 takes a more tailored approach by vesting this authority with the National Institute for Occupational Safety and Health, Office of Mine Safety and Health Research. Should such authority be granted, we support vesting this authority in NIOSH.

We are concerned; however, that the language of the bill goes beyond what is necessary and will complicate an already difficult environment. Mine disaster investigations are tedious endeavors. The work of the investigative teams must be exhaustive and without reproach. MSHA has proven capable of undertaking such investigations, and their authority to do so must not be undermined. What has been called into question is the ability of the agency to examine its own actions during the period preceding and following the event. We believe this is the appropriate role for NIOSH.

Rather than duplicating the investigatory activities already instituted by MSHA, applicable state authorities and other entities, NIOSH's role should focus solely on MSHA activities.

B. Pattern of Violations

NMA supports reform of the Pattern of Violation system. The current system is dysfunctional and has not served its intended purpose. Neither mine operators nor miners are able to navigate the current system. It lacks transparency, does not provide timely information, and is not structured to rehabilitate problem mines.

H.R. 5663 represents a step in the right direction to correct the problems with the current system by looking at the mine's overall safety performance and not rendering POV determinations solely on the basis of subjective compliance determinations. We are concerned, however, that the provision is overly punitive and will not accomplish the sponsor's goal to rehabilitate problem mines. In his July 6 response to the Inspector General's, June 23, Alert Memorandum, MSHA Sets Limits on the Number of Potential Pattern of Violation Mines to be Monitored, the Assistant Secretary stated the need for the, "* * * creation of a screening system that will identify mines that chronically fail to implement proper health and safety controls." He went on to stress the need for the agency to, "[f]ocus its POV enhanced inspection resources on those mine operators that have chronically failed to protect the safety and health of the miners and that continue to put miners at risk."

We support the Secretary's goal. We are, however, extremely concerned that under the pending legislation many of the decisions regarding implementation of a new POV program are vested with MSHA rather than proscribed in the legislation. MSHA created the dysfunctional system that exists today. We cannot afford to repeat that situation.

We believe a workable system can be developed to properly identify and rehabilitate problem mines, and we look forward to working with this committee to develop to correct metrics to accomplish this goal.

C. Modernizing Health and Safety Standards

Title V of H.R. 5663 contains provisions that are, for the most part, applicable to underground coal mining. These provisions would update and expand existing requirements related to: (1) communicating information regarding dangerous conditions throughout the workforce; (2) updating rock dust standards; (3) examining the application of new technologies to protect miners; and (4) enhancing miner training.

These subjects are conceptually ones the industry has long supported to improve miner safety and health, and NMA could support with slight modification.

III. Areas Where the Pending Legislation Will Not Advance Miner Safety

As noted earlier, NMA supports improvements in our nation's mine safety and health laws that would (1) create fair and uniform procedures for enforcement; (2) target recalcitrant operators; (3) provide for transparency in the development and administration of regulatory requirements; (4) provide flexibility to the government and mine operators to focus resources on problem areas; and (5) encourage the development and implementation of processes for improving performance that are outside the bounds of the current regulatory structure. Unfortunately, the majority of the pending legislation is not "rehabilitative" as some have contended. Rather, the bill is harshly punitive and restrictive, creates new disciplinary authorities that have little to do with miner safety, and intrudes on management prerogatives and labor/management practices to the detriment of overall management of effective safety and health programs.

Turning to those areas that NMA believes do not align with the principles we have articulated, we note the following:

A. Mine safety progress is threatened by overly punitive provisions

Rather than affording mine operators the flexibility needed to structure safety programs to meet individual mine site needs, the bill will thwart progressive programs that have led to dramatic safety improvements across U.S. mining. The expansion of potential liability will have the unintended consequence of causing companies to pare back their safety programs to the bare regulatory requirements rath-

er than adopting new techniques, processes and practices that have led to health and safety improvements in the U.S. and elsewhere.

B. Mine safety would not be advanced by additional MSHA workforce authority

The bill would inject MSHA, for the first time, into matters that are reserved for management decision-making and/or the subject of labor/management negotiation. The expansion of MSHA authority into hiring and termination decisions, mine site staffing and operational decisions will not advance mine safety and may expose the agency to liability considerations, as these actions extend beyond enforcement of regulatory standards into mine design and operational considerations.

C. Mine safety and health will not be improved by penalty provisions that are not commensurate with the severity of the violations

H.R. 5663 would increase financial penalties, establish new criminal penalties and restrict the ability of mine operators to contest inappropriate enforcement actions. These stricter enforcement provisions, which would apply to all mines, will not contribute to improved health and safety. The MINER Act and the 2006 revisions to the Part 100 civil penalty regulations exceeded the agency's estimated impact many times over. Yet the legislation proposes further increases in penalties, limits operator's ability to contest frivolous enforcement actions and places undue limitations on operators and on the Federal Mine Safety and Health Review Commission's authority to reduce unwarranted enforcement actions.

Further, the dramatic expansion of offenses that are now deemed "criminal" and the application of civil and criminal liability to officers, directors and agents will discourage the implementation of new ideas and discourage miners from accepting management positions, quell innovation and create a lack of experienced miner leadership over time.

Finally the dramatic expansion of pay protection to include operator decisions that might have resulted in a closure order may discourage operators from closing down areas of a mine for safety reasons—to the detriment of miner safety.

D. Misallocation of safety resources will weaken safety efforts and results

H.R. 5633 will greatly expand the definition of "significant and substantial" violations. The current process for indentifying a violation as S&S was developed more than 20 years ago by the Federal Mine Safety and Health Administration under the Carter administration. The Commission recognized that no differentiation in the severity of violations led to unfocused safety efforts and set in place today's definitions. Returning to those old days, when roughly 90 percent of all citations were deemed "significant and substantial," is a step in the wrong direction that will destabilize safety efforts and demoralize much of our work force.

Miners and operators understand the current definition and process for designating a violation as S&S. Unfortunately, many MSHA-determined violations are routinely modified by AJL's. Rather than redefining S&S to validate incorrect designations, the focus should be on ensuring that inspectors receive the training necessary to correctly identify violative conditions and their attendant severity. Treating virtually every citation as S&S will shift attention away from those conditions and practices that have the highest potential to cause injury or illness and focus efforts on mere rote conformity with the regulations, absent any consideration of risk.

E. Transparency is undermined by proposed rulemaking process

Notice and comment rulemaking is fundamental to the MINER Act and its predecessor statutes. It serves a dual purpose: 1) It affords stakeholders the due process required by law by providing a reasoned forum that allows all interested parties to comment on proposed regulations; and 2) It helps governmental agencies such as MSHA collect the best available information so that final regulations are effective and fair. H.R. 5663 would circumvent this crucial rulemaking process in key areas—and forgo the advantages it confers—by requiring the Secretary to issue "interim final rules" that are effective upon issuance, in the absence of stakeholder input.

Conclusion

Today's mine safety and health professionals face challenges far different from those anticipated when our nation's mine safety laws were first enacted. More difficult geological conditions, faster mining cycles and changes in the workforce introduce potential complications requiring new and innovative responses. Today's challenge is to analyze why accidents are occurring in this environment, and use that analysis as a basis for designing programs or techniques to manage the accident-promoting condition or cause.

Regrettably, the bill before the committee does not respond to many of these challenges and will not, in our view, accomplish our shared goal. Trying to force safety improvements through punitive measures fails to acknowledge the complexities of today's mining environment, and is not the answer we all seek. Acting on false perceptions of what is needed now will only create false perceptions of progress, not safer mines.

We understand the call by members to address perceived shortcoming in MSHA's statutory and regulatory structure. Indeed, we share the concerns of others with certain elements of MSHA's authority. We do not believe, however, that sufficient attention has been given to the weak foundation upon which MSHA's regulatory authority is built and to the execution of that authority to warrant such sweeping legislation.

We stand ready to work with the members of the committee on actions we should be taking—some of which I have outlined—just as we did before Congress enacted the MINER Act.

Chairman MILLER. Mr. Roberts.

STATEMENT OF CECIL ROBERTS, PRESIDENT, UNITED MINE WORKERS OF AMERICA

Mr. ROBERTS. Mr. Chairman, thank you for this opportunity to appear again before this committee. I appreciate the opportunity we have had to work together. Unfortunately, we have been working on a problem that is at this moment unsolved, and that is the fatalities we are seeing in the coal fields and the grief that has come to the families of the coal miners throughout this country.

Ranking Member Kline, we appreciate this opportunity, and members of the committee, my fellow West Virginians, Congressman Rahall and Congresswoman Capito, I applaud your leadership that you have shown throughout the time of the Upper Big Branch tragedy, trying to comfort the families of who have lost loved ones.

I want to thank this committee for naming this legislation after my dear friend, Senator Byrd. The last appearance he made in the United States Senate was on Upper Big Branch, and I had the opportunity and I believe I was the last witness to ever testify before Senator Byrd, and had the opportunity to go up and thank him for what he had done for coal miners. And I said at the time of his death, he was the best friend a coal miner ever had.

I want to mention one other person here today. I want to applaud the courage of a coal miner who is testifying here today, and that is Stanley Stewart. I hope everybody on this committee understands the courage it takes for someone like Stanley to come here and testify and tell you what has gone on in this coal mine and what a difficult position that places him in. I admire him for what he has done and I have told him that personally.

I want to say that these miners who lost their lives at Upper Big Branch, they were employees of Massey Energy, but they were also our friends. I knew a number of these miners, played ball with some of them. I knew their parents, and in some instances I knew their grandparents.

I would just like you to think for a moment. There was a young man—and it has been mentioned here, but not dwelled upon very much—named Josh Snapper. You have to work 6 months in a coal mine to get a miner's certificate in the State of West Virginia. He had not yet earned a miner's certificate, but he knew he was working in a dangerous place. And if a 25-year-old miner who had not yet obtained a miner's certificate knew he was working in a dan-

gerous place, didn't everybody else know that? Didn't the CEO of this company know that? Didn't the mine foreman know that? Didn't everyone know this?

He wrote a letter to his mother. And he had a one-year-old baby that I had the opportunity to meet at the memorial service in Beckley. And he said, "Tell my fiance, tell my baby that I love them. I love you, Mom." Those are the kind of letters we used to write when we were going to Vietnam and World War I and World War II and Korea, people going off to the Middle East to fight. You understand a young man writing those kind of letters. That is the kind of letters we are supposed to write going to work? This young man knew that he was in a seriously dangerous place, and he lost his life there. He knew he might, and he left a letter behind.

Mr. Chairman, I would just say to you that some think we are moving too fast here. I have had to revise my testimony several times as I have appeared in the Senate and in the House because of the fatalities that continue to occur here. On Friday, we had the 41st fatality that happened in Illinois. That is just this past Friday.

So as we ask ourselves, "Are we moving too fast?" maybe we should ask ourselves, "Are we moving too slowly here?" because miners are continuing to die in this Nation's coal mines and we have got to find out why.

I want to point out something if I might; 41 miners have died this year in the Nation's coal mines, 31 of them in one place, one company. Now, we can say, "Gee, that is just unfortunate that occurred." That is not unfortunate. There is something wrong here when 31 out of 41 fatalities occur at one company. It is not just 31 out of 41 this year; 54 fatalities at this one company in 10 years. And this same company comes to Congress and testifies that they have the safest mines in the country—God help us if that is true.

We know, and there is no one up on this dais today and no one sitting here today knows that this is an abnormal occurrence. There is something drastically wrong at this company. Forty-one miners have lost their lives this year. We have failed these miners in this country when that happens, and we have to do something about that.

I want to tell you what works, and I am going to simplify this. We have to have good laws. We have to have those laws obeyed. And we have to have those laws enforced by our government, whether it is Federal or State. And we have got to punish those who fail to abide by the law.

I am going to tell you why good laws work. There is a perfect example of that. We just recently celebrated the 40th anniversary of the Mine Act. In those 40 years prior to the passage of the 1969 act, 32,000 coal miners died. How many: 32,000. Forty years after the passage of the act: 3,200. So those who say laws don't work, the statistics say otherwise.

Now, every time we have ever passed a law or considered a law, there are those who come here and say this is going to put us out of business. I invite you to go back and get the legislative history of the 1969 act, when people came in here and said if we have to comply with this law there won't be a coal mine to operate in the United States of America. I suggest to you that the coal industry

has continued to operate, it has continued to prosper. Good laws, obey those laws.

Now I am going to make a bold statement here. Most of this industry—and I have said as high as 95 percent—do the right thing. So we are not writing laws here to destroy an industry; we are writing laws to try to make those who will not obey the law comply. That is what we are trying to do. And we have to give MSHA the tools that they need to enforce the laws, and we have got to punish those who absolutely refuse, Mr. Chair, just refuse to comply with these laws. They turn their backs on them, they ignore them, they say, These laws really don't pertain to me. And I don't care what Congress writes, I don't care what Congress says, I am not complying.

Now, you have got to come to grips with that. That is the truth. Now I know I am getting a little emotional here, but just do the research on it and see if I am telling you the truth. You have got to stop the lawbreakers if you want to save miners' lives.

And with that, I thank you, Mr. Chairman.

Chairman MILLER. Thank you.

[The statement of Mr. Robert follows:]

Prepared Statement of Cecil E. Roberts, President, United Mine Workers of America

Thank you for inviting me to address the Education and Labor Committee about this important legislation. As President of the United Mine Workers of America ("UMWA"), I represent the union that has been an unwavering advocate for miners' health and safety for 120 years. I am pleased to have this opportunity to speak in support of H.R. 5663. It addresses some very serious problems that have been highlighted this year in the coal industry as well as other industries.

This Committee plays a significant role in advancing miners' health and safety. We are deeply appreciative of the leadership you have shown in trying to protect and enhance the health and safety of all miners. Your continued oversight is essential. We share with you the common goal of wanting to ensure that all miners will go home safely and in good health after the workers' shifts each and every day.

This Committee knows all too well that the status quo is inadequate; this year 40 coal miners have died at work—and we are barely half way through the year! The horrific Upper Big Branch disaster claimed 29 underground coal miners. But eleven other coal miners also died—one or two at a time. We can and must do a better job of protecting our nation's miners.

I have testified before this Committee as well as before Senate Committees about some of the shortcomings in the existing laws and about problems MSHA confronts in enforcing the law. H.R. 5663 addresses many of the issues we have been discussing. I will review some of the current problems that demand attention, then speak about how the proposed legislation will address those problems; and I will make a few suggestions to further improve the proposed legislation.

A fundamental problem MSHA confronts is how to deal with operators that habitually violate the law. Voicing her apparent frustration on this very point after yet another miner died, on July 1 Secretary of Labor Hilda Solis issued a press release in which she stated:

* * * 31 of the 40 coal mine fatalities that have occurred in 2010 have occurred at Massey mines. We have issued citations, closure orders, stop orders, and fines to get Massey to take its safety responsibility seriously. Earlier today, the U.S. Attorney in the Southern District of West Virginia announced four Massey supervisors will be charged criminally stemming from a MSHA and FBI investigation into the deaths of two miners at a Massey mine in 2006. But yet again, today we mourn the tragic loss of another miner whose safety was entrusted to Massey Energy (emphasis added.)

Clearly, the status quo isn't good enough. MSHA's efforts have failed to motivate at least some mine operators, like Massey, to do what is necessary to operate their mines safely each and every day. We know many operators are performing much better. In fact, of the 40 coal fatalities in 2010, not one was at a union operation.

Even before the Upper Big Branch disaster in April, we met here to discuss how the huge and growing backlog at the Federal Mine Safety and Review Commission ("FMSHRC") was undermining miners' health and safety. While more Administrative Law Judges have been hired to deal with FMSHRC cases since I testified in February, there remains the problem of operators routinely challenging MSHA citations in an effort to delay resolution of their outstanding citations and orders—whether to delay paying the penalties or to avoid the enhanced fines that attach to repeat violations, or to escape the challenging Pattern of Violation enforcement tool MSHA has threatened to use. And though Congress increased fines when it passed the MINER Act of 2006, because citations and orders are being regularly challenged, that new fine structure has not served to induce better compliance.

After a citation is fully litigated and there remains no further issue about an operator's obligation to pay a particular penalty, as it stands today a mine with unpaid fines can continue its production notwithstanding a lengthy delinquency. We understand that there is more than $27 million in unpaid fines resulting from MSHA final orders! One way to avoid any such delinquencies would be to require all assessed fines to be placed into an escrow account, as we have previously suggested.

Consistent with the expectation that all fines shall be paid close in time to the violation, the proposed legislation provides that when due process procedures have been exhausted, the operator must promptly pay its fines. And while MSHA has claimed uncertainty about its authority to take action against an operator with delinquent fines, the legislation will give MSHA the ability to temporarily close a mine if fines are not paid within 180 days. We think that's fair: operators that work within the legal framework shouldn't have to compete against those who flaunt the system.

MSHA also has been uncertain about its authority to take immediate action to shut down a mine when it observes violations the Agency believes place miners' health and safety at immediate risk. The proposed legislation addresses this by granting MSHA the authority to seek injunctive relief when it believes the operation is pursuing a course of conduct that jeopardizes miners' safety or health. This is sorely needed.

Another shortcoming with the existing framework concerns the criminal penalties in the Mine Act. They have been insufficient to coerce the compliance we need. First, the criminal sanctions only amount to misdemeanors—a virtual slap on the wrist—even though the consequences for Mine Act violations can be deadly. We know it can be difficult for a government agency to convince a prosecutor to pursue a case for Mine Act misdemeanors. This means that some who could have been prosecuted under the applicable legal standards likely escaped criminal prosecution simply because the criminal sanctions now available to prosecutors are too mild.

More importantly, the top-level people who create and maintain the corporate policies that put company profits ahead of workers' safety have been permitted to remain in power and to continue their misguided practices while their subordinates have to take the blame, including any criminal liability. We believe that CEOs and corporate Boards of Directors should be held accountable; they should have to take responsibility when systemic health and safety problems are evident within a company. H.R. 5663 would provide these changes: it imposes criminal penalties for "knowingly" taking actions that directly or indirectly hurt workers, and makes a felony any such conduct, with jail time increased from a one year maximum to five year maximum for a first offense and ten years for a second offense, and the fines increased from a maximum of $250,000 to $1 million, or $2 million for a second offense. It also makes it easier to prosecute corporate representatives who knowingly authorize, order, or carry out policies or practices that contribute to safety and health violations. We fully support these improvements to the criminal penalties.

Even though the existing law requires MSHA inspections to occur unannounced, we have all heard stories about the many ways operators game the system so inspectors will not discover unsafe work practices or conditions. When this Committee visited Beckley for its hearing with Upper Big Branch families, you heard reports about the various signals and codes that were relayed underground (such as, "we've got a man on the property" from Gary Quarles testimony on 5.24.10) before the inspectors could arrive on a section, allowing managers to direct make-shift changes to avoid getting cited. And when MSHA took over the communication stations upon arrival at a couple of operations in Kentucky during recent blitz inspections, MSHA inspectors discovered many more violations than had previously been discovered—violations that likely would have been covered- up and gone undetected if the special warning codes were allowed to continue. To deal with these issues, the proposed legislation increases the criminal penalties for those who give notice, and requires information about the criminal penalties to be posted at mines so all miners will

be on notice that giving any kind of notice about an MSHA inspection is improper and constitutes a very serious violation of the Act.

There has been a lot of discussion about the Pattern of Violation ("POV") tool that MSHA has long had a right to use, but which has not been effectively utilized. MSHA has alerted some operators about their being vulnerable to being put into a Pattern and this has generally been successful in accomplishing some short-term improvements. This happens because being put onto a POV is properly perceived as being a dramatic event that would be hard to ever escape. However, MSHA has been both too hard and too easy in its prior use of the POV. It is too hard insofar as if any mine would actually be placed into a POV (as opposed to just getting a warning notice about the possibility), under the current scheme it would be nearly impossible for the mine to ever again operate; once the POV attaches miners must be withdrawn if MSHA finds any S&S violation. But even the most-attentive operator may not be able to avoid all violations all the time. For example, barometric pressure changes can quickly give rise to an S&S violation.

MSHA's current POV protocol is also too easy insofar as after MSHA issues a POV warning notice the Agency only requires a 30% reduction in the short run for an operator to be relieved of the extra scrutiny. It is too easy for an operator to demonstrate short-term improvements without making the wholesale changes needed to render the mine safe on a long-term basis. The focus of a POV program should be to capture the attention of management and miners alike to affect a wholesale cultural change—to make everyone at the unusually hazardous operation aware of what may be comprehensive problems, and to make sure they learn and practice different and safer work practices. The improvements should be fully integrated so the mine operates more safely going forward on a long-term basis, not just long enough to get the mine off MSHA's watch list.

Rather than the punitive POV model now in place, the legislation seeks to turn the POV into a rehabilitation program. It provides for MSHA to tailor any remediation to the particular operation: if MSHA determines that more training would be helpful, it could require that; if the mine would benefit from a comprehensive health and safety program, the Agency could mandate that one be designed and implemented. The legislation also mandates a doubling of the inspections while the operation remains in POV status, as well as a doubling of the fines after 180 days if adequate improvements are not accomplished. An operation would remain in POV status for at least one year, which should be long enough to ensure that the new practices are actually working. Finally, MSHA plans to measure a mine's success against objective benchmarks, properly comparing any operation to other mines of similar kind and size.

The proposal also would provide more immediacy in MSHA's assessment of an operation: MSHA would evaluate a mine's safety record for POV purposes based on contemporaneous citations and orders MSHA inspectors would be writing, rather than measuring a mine's safety record based on final orders that now can take years to process. Because contested citations are now caught up in a very long backlog at the FMSHRC, by using only final orders for POV purposes (as MSHA now does) the Agency could be placing a mine on a POV in 2010 based on its unsafe conduct from 2008, because it could take that long for the underlying orders to become final. From a safety management point of view this doesn't make sense. A mine with poor safety practices in 2008 should be placed in the POV status in 2008—when the added scrutiny is most needed, not years later when the various legal challenges get resolved. Likewise, if management at an operation with numerous S&S citations and withdrawal orders in 2008 recognized it had serious problems with its safety practices and initiated changes that yielded significant improvements, under the current scheme that mine might be vulnerable to a POV in 2010, after its safety practices had improved.

The POV tool is an extreme one and should be available for MSHA to help put an immediate end to unsafe work practices before miners get hurt. It is precisely when MSHA inspectors are writing an unusually large number of citations and orders that a mine should receive the extra attention POV anticipates, not years later when those citations—if contested—finally become final orders. And because the overwhelming percentage of citations and orders that MSHA inspectors write are upheld even when contested, there is no serious issue about due process based on a POV process that is prompted by written citations as opposed to final orders. In FY 2009, only 4-11% of litigated penalties related to unwarrantable failure and S&S citations ended up being withdrawn or dismissed. With a POV program re-focused on rehabilitation rather than punishment, and given the small withdrawal and dismissal rate, it is fully consistent with the protective purposes of the Mine Act to err on the side of safety and accept this modest margin of error. The proposed legislation would make the POV program more remedial and less punitive, which we

support. The goal must be to turn operations with the worst health and safety records into much safer operations, and to teach the miners and managers about what is required to operate safely so they will do so on a long-term basis.

A related issue that also affects the POV program arises from the current system for accident and injury reporting. Operators are required to report on all accidents and injuries and to file quarterly reports with MSHA. However, the reporting process is now badly flawed. Operators go to extraordinary lengths to dissuade their employees from ever filing accident reports even when an injury is serious. Some would rather pay an employee with a broken back to perform light duty than have him report the injury. While we have heard stories about these practices for years, former Massey employee Jeff Harris testified about his personal knowledge of this practice when he addressed the Senate HELP Committee on April 27, 2010.

To the extent that accident and injury reports constitute a factor used in measuring an operator's relative safety record for POV status, all operations should be obligated to report accidents and injuries pursuant to the same objective standard. This is an area where changes may be required for H.R. 5663. Only if accident and injury reports are regularly and reliably filed can we learn about dangerous mining practices, and about problems with equipment. If reports are not provided when all accidents occur, the same problems are more likely to recur. There is no place for subjectivity; rather, all accidents and injuries should be reported so the mining community can learn from our collective experiences. Top level mine management should also be required to sign off on the reports—both to ensure that the personnel with the power to make changes (when needed) actually know about the accidents at an operation, and to provide much-needed accountability.

A strength of the proposed legislation concerns the entities from which MSHA would receive and maintain accident and injury data. As it stands today, MSHA reports do not relate the health and safety records of an operator's contractors to the operator itself. Yet, if an operator would be required to take more responsibility for those working on its property, that operator would be more attentive to its contractors' safety records and start demanding better health and safety performance. A disproportionately high rate of accidents is attributable to contractors, so this change is warranted. And while any operator could be demanding better compliance with mine safety laws and regulations, operators generally have made no effort to exercise this power. Imposing the legal requirement is appropriate and should effect better contractor compliance with Mine Act requirements.

Miners continue to be intimidated into working in an unsafe manner, and this has got to change. As you heard at the Beckley, WV hearing in May 2010, and as Jeff Harris testified before the Senate HELP Committee in April 2010, miners have provided testimony about how difficult it is for them to raise safety concerns at a non-union mine. Even when they know that their work environment is dangerous, miners are reluctant to voice safety issues because jobs are scarce—and coal-mining jobs pay well. The testimony confirmed that a miner working at a non-union operation has good reason to fear losing his job for complaining about unsafe conditions. But no miner should have to choose between earning a good paycheck (while praying he will survive) and working safely. No worker should feel he is jeopardizing his family's economic security by raising bona fide work concerns on the job. And no miner should be told he needs to find another job when he tries to exercise the statutory right to refuse unsafe work, as coal miner Steve Morgan reported his 21-year old son Adam Morgan was told by his boss at the Upper Big Branch mine before perishing in the April 5 disaster. In short, the anti-discrimination protections in the existing law are terribly important, but they don't go far enough to protect miners. H.R. 5663 addresses this continuing problem by making sure that miners are specifically trained each year about their safety rights, and authorizing punitive damages and criminal penalties for retaliation against miners who blow the whistle on unsafe conditions.

As for accident investigations, the Act requires MSHA to investigate all serious accidents. However, it now does so with one arm essentially tied behind its back. This results from the fact that MSHA investigative interviews are conducted on a volunteer basis. That is, MSHA identifies who might have helpful information and invites them to meet with the Agency. Any individual may decline MSHA's invitation. Likewise any witness can leave the interview at any time. The only exception lies with the public hearing option, for which MSHA has the power to subpoena witnesses and documents, but which has rarely been used. We think MSHA should have the subpoena power for all accident investigations, not just for a public hearing component of an accident investigation as is expected to occur as part of the Upper Big Branch investigation. By providing MSHA with the subpoena power MSHA could speak with anyone it thinks has relevant information to contribute and it would give MSHA broader authority to review records. We also think that granting

the Agency subpoena power for inspections would better protect miners who may wish to speak with MSHA inspectors. The legislation would make these changes.

In the aftermath of the Upper Big Branch tragedy, we urged MSHA to conduct a public hearing for its primary investigation for multiple reasons: only by doing so could it utilize its subpoena power; and we believe that allowing an open hearing would permit more issues to be more fully explored, reducing the possibility that some less popular but still any feasible theories about root causes would be overlooked. Yet, MSHA chose to conduct this investigation largely behind closed doors. We think that procedure creates needless problems. And while MSHA plans to conduct a separate investigation into its own conduct as it relates to the Upper Big Branch mine, such an internal investigation could produce issues that bear on the primary investigation. It would be best if all such issues would be raised, considered, and resolved at the same time, not sequentially. We also believe that MSHA should not be the one investigating its own conduct, but an independent investigation team should perform this analysis. The proposed legislation addresses this by requiring a parallel and coordinated investigation to be performed under the direction of NIOSH for all accidents involving three or more fatalities. The independent team would include knowledgeable participants from other interested entities, including employer and worker representatives. We think this procedure will help assure the mining community, Congress, and the public at large that the investigation is thorough.

However, the proposed legislation should be adjusted to incorporate a role for the miners' representative to participate fully in all accident investigations. For some of the more recent multi-fatal accident investigations, even though the UMWA was designated as a miners' representative, the UMWA was excluded from the accident interviews. The miners' representatives are permitted to join in the underground investigation, but little more. Without being allowed to join the interviews, the miners' representative cannot fully represent the miners at the operation who have selected such a representative.

The Upper Big Branch investigation is another current MSHA accident investigation in which the UMWA has been excluded from the interviews even though the Union has been designated as the miners' representative for miners at that operation. The government has claimed that the on-going criminal investigation justifies MSHA's closed-door investigation and the exclusion of the miners' representative. Yet, for another investigation now taking place—that following the BP explosion in late April—there is also a parallel criminal investigation. If simultaneous civil and criminal investigations are feasible in that context we believe it should also be viable for accident investigations within MSHA's jurisdiction. We thus urge a change in the legislation to specifically provide for miners' representatives to fully participate in all accident investigations. After all, miners who made their designation have a significant interest in learning what happened, and they may be returning to work at the same operation. They should have a seat at the table in the form of their designated representative.

There has also been a recurring problem with the process of designating a Section 103(f) miners' representative after a disaster occurs at a non-union operation. The Act does not presently provide for a family member to designate a miners' representative on behalf of a miner who is trapped or dies in a mine accident. The proposed legislation would change this, so that the family member may exercise the right to designate a miners' representative if the miner is unable to exercise his right due to a mine accident.

Though we don't yet have official information from the accident investigation, it is generally believed that inadequate rock dusting exacerbated the Upper Big Branch explosion. This legislation would require more protective rock dust standards. To reduce the likelihood of dangerous coal dust explosions, the Bill also requires the use of technology to better monitor rock dust compliance.

To the extent the proposed legislation anticipates MSHA rulemaking and authorizes the Agency to exercise new and expanded responsibilities, we wish to note that it will require full funding for these new mandates. I think we can all agree that it would be far better to support a pro-active MSHA than to fund yet more large-accident investigations.

Finally, the UMWA is in support of those provisions of the proposed legislation that would fall within OSHA's jurisdiction.

Thank you for allowing me to speak about H.R. 5663; we look forward to working with you to pass it into law.

Chairman MILLER. Mr. Snare.

STATEMENT OF JONATHAN SNARE, PARTNER, MORGAN LEWIS, TESTIFYING ON BEHALF OF THE COALITION FOR WORKPLACE SAFETY

Mr. SNARE. Good afternoon, Chairman Miller, Ranking Member Kline, and members of the committee. I appreciate the the opportunity to appear before you at this hearing to address a number of important issues raised by the proposed H.R. 5663. And specifically, I am going to be focusing on Title VII, the amendment to the Occupational Safety and Health Act.

I am testifying today on behalf of the Coalition for Workplace Safety, which is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. My testimony and comments are not intended to represent the views of my law firm, Morgan Lewis, or any of our clients.

By way of background, Chairman Miller, as you have indicated, my legal practice is focused on labor and employment matters, including workplace safety and health issues. I also served for a number of years in several positions at the Labor Department, including the Acting Assistant Secretary for OSHA, and as the Deputy Solicitor from 2006 to 2009, and the Acting Solicitor.

The coalition's concern with this proposed legislation is the dramatic changes to the OSH Act that are focused exclusively on punishing employers, which at the end of the day will not result in any actual real-world impact that improves workplace safety and health. The coalition further believes that this approach has unintended consequences which may undermine the underlying intent and goals of this bill.

Penalties alone will not improve workplace safety. Remember, in many cases, penalties are imposed after the fact of an injury or fatality. The critical mission of OSHA is to assist employers to make sure that injuries and fatalities never occur in the first place. As such, the current focus should be on efforts to prevent workplace injuries and fatalities before they occur, not creating new methods of punishment after the fact.

The coalition is further convinced that this proposed legislation will create greater cost, litigation, and hamper job creation. Especially during these challenging economic circumstances, the adverse impact on the ability of employers to create jobs is a critical factor and should be of concern to this committee and Congress. These proposed changes will impose substantial costs on businesses, particularly small businesses, which are struggling to create and maintain jobs.

Let me briefly summarize our concerns with this legislation. The abatement of hazards in section 703 creates a burdensome new requirement on employers to abate any hazard subject of a serious willful or repeat violation. The only way for an employer to suspend abatement while contesting the citation is to file a legal action with essentially a very high burden of proof, similar to a temporary injunction. This is essentially a mini-trial on the merits of the underlying citation.

The other punitive provisions include the failure to abate, and a pre-final order interest imposed on employers, again, before the adjudication of the citation on the merits.

Abatement is more than protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their due process, adjudicative rights, is similar to asking a criminal or civil defendant to pay a fine or serve a sentence before a trial is held.

As to the civil penalties in section 705, the increases in this legislation focus again on a punishment-focused approach, which in and of itself will not result in any improvement of workplace safety and health. From the employer's perspective, how can we not say that this bill is about punishment? Broadening the scope of a repeat violation in this legislation and the other new proposed penalties will not result, in our judgment, in any prevention of workplace injuries or fatalities. Remember, there is no evidence that higher penalties, civil or criminal, have any bearing or result on improved workplace safety and health.

As to the criminal penalties in section 706, the expansion of these penalties, both by reducing the intent level to knowing, and creating personal culpability will yield greater levels of challenges.

First, as to reducing the level of intent from the current "willful" to "knowing" would upend decades of OSHA law going back to 1970, introduce tremendous uncertainty, and further guaranteeing substantial increases in contested cases.

As to the criminal liability on an officer or director is also equally troublesome. We believe it will impose a witch hunt to hold corporate officers and directors liable. Expanding the criminal liability for an officer or director will make any employer's personnel unduly subject to prosecution and it will create a great deal of confusion. You saw that confusion in response to a question by Congressman Price to the Solicitor as to what it means and who is a corporate officer or director.

The coalition is also concerned about the whistleblower requirements in section 701. I will refer and incorporate my comments in the written statement.

To conclude, Mr. Chairman, the proposals in Title VII of H.R. 5663 would result in significant and dramatic changes to the OSH Act with the imposition of a more punitive civil and criminal penalty structure and make it harder for employers to exercise due process rights. We believe this legislation is only about the punishment of employers, the vast majority of whom want to do the right thing with regard to workplace safety and health. And this bill will do nothing to prevent workplace and safety injuries and fatalities.

And as recent data made clear, with the lowest level of recorded injuries and fatalities, the best way to achieve a continued improvement on workplace safety and health is a proactive approach, with balance of enforcement and compliance assistance.

Mr. Chairman, thank you for the opportunity to present these remarks, and I look forward to answering any questions.

Chairman MILLER. Thank you.

[The statement of Mr. Snare follows:]

Prepared Statement of Jonathan L. Snare, on behalf of the Coalition of Workplace Safety

Good afternoon Chairman Miller, Ranking Member Kline and Members of the Committee. My name is Jonathan Snare. I am an attorney and I am currently a partner with the DC office of Morgan Lewis & Bockius LLP law firm. I appreciate

the opportunity to appear before you at this hearing to address a number of the important issues raised by the Miner Safety and Health Act (H.R. 5663), and specifically to focus on Title VII "Amendments to the Occupational Safety and Health Act." I am testifying today on behalf of the Coalition of Workplace Safety (CWS) which is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity and accountability. Members of the CWS include associations comprising a wide range of employers from small businesses to large corporations, such as U.S. Chamber of Commerce, National Association of Manufacturers, Associated Builders and Contractors, National Association of Home Builders, NFIB, American Foundry Society to name a few. By way of further background, I am also a member of the Labor Relations Committee of the U.S. Chamber of Commerce and serve on its OSHA Subcommittee. My testimony and comments are not intended to represent the views of Morgan Lewis & Bockius LLP or any of our clients.

Background

As you may recall, I testified before the Subcommittee on Workforce Protection on March 16, 2010 on behalf of the U.S. Chamber of Commerce on many of these same issues. I would like to incorporate my statement from the hearing into the record here, and I will not repeat in detail my prior testimony. Instead, I will offer comment on several of the OSHA provisions in H.R. 5663 of concern to the CWS and its members.

As I mentioned, I am a partner with Morgan Lewis & Bockius LLP, in the Labor & Employment Practice Group. My practice is focused on advising clients in the labor and employment field, largely in areas of workplace safety and health, as well as whistleblower matters, regulatory issues, wage and hour/FLSA, and other related matters.

Before joining Morgan Lewis in February 2009, I served for over five years in several positions at the U.S. Department of Labor. Among those positions, I served as the Deputy Assistant Secretary for the Occupational Safety and Health Administration (OSHA) from December 2004 through July 2006, as well as serving as the Acting Assistant Secretary for OSHA for most of that period, from January 2005 through April 2006. I then served as the Deputy Solicitor of Labor from July 2006 through January 2009 and I served as the Acting Solicitor of Labor for most of 2007.

Having had the privilege of running two of the Department of Labor's largest agencies, OSHA and the Solicitor's Office, I once had the responsibility of overseeing OSHA's critically important mission of assuring a safe and healthy workplace for every working American, and of the Solicitor's Office crucial role of providing legal support to OSHA to assist the agency in implementing the goals of its mission. In so doing, I believe I developed an understanding and insight on the many different strategies and tools that OSHA already has available to implement these important goals.

The concern that the CWS has with this proposed legislation is that its dramatic changes to the OSH Act are focused exclusively on punishing employers which, at the end of the day, will not result in an actual "real world" impact that improves workplace safety and health. The CWS further believes that this approach has unintended consequences that may undermine the intent of the bill. Penalties alone will not improve workplace safety—remember, in most cases, penalties are imposed after the fact of an injury or fatality. The critical mission of OSHA is to assist employers to make sure these injuries and fatalities never occur in the first place. As such, our current focus should be on efforts to prevent workplace injuries and fatalities before they occur, not on creating new methods of the punishment after the fact.

The CWS is convinced that Title VII of H.R. 5663 will create greater cost, litigation and hamper job creation. Especially during these challenging economic conditions, the adverse impact on the ability of employers to create jobs is a critical factor and should be of concern to this Committee and Congress. These proposed changes will impose substantial costs on businesses, particularly small businesses, which are struggling to create and retain jobs in this difficult time.

OSHA's wide-ranging mission and structure and why this proposed legislation will not improve workplace safety and health

The OSH Act tasked OSHA with the difficult mission "to assure so far as possible * * * safe and healthful working conditions" but it has always been the responsibility of the employers, not OSHA itself, to ensure safety and health on the jobsite. OSHA has never had the resources, even when the agency had its largest number of employees, to inspect the 7 million worksites now within its jurisdiction. When you take into account that federal OSHA conducts approximately 38,000 inspections it would take the agency over 90 to 100 years to inspect every worksite (and this

timeframe is only slightly changed with the announced goal of 42,500 inspections in the OSHA FY 2011 budget). Clearly, enforcement alone will never be able to reach every workplace or serve as an effective deterrent. OSHA does not have the funds, and will never have the funds, to hire the staff large enough to reach each worksite on a regular basis through enforcement.

The only way to leverage OSHA's resources to reach the greatest number of worksites and have the most positive impact on workplace safety and health is to assist employers in their efforts to make workplaces safer. This approach can be achieved by using existing programs that offer compliance assistance, outreach, and training. Congress recognized this when it enacted the OSH Act. The Act's first section, "the Congressional statement of findings and declaration of purpose and policy," has several paragraphs dedicated to the importance of OSHA's role in compliance assistance, outreach and training. This point also was made by the Clinton Administration's OSHA Assistant Secretary Joe Dear when he launched an aggressive compliance assistance program.

Since the inception of the OSH Act, America's workplaces are becoming increasingly safer. Over the last several years the agency has taken an approach to utilize existing programs to assist employers. Partially in part to these efforts data from the Bureau of Labor Statistics from 1994 to 2008 shows the total recordable case rates for workplaces injuries and illnesses have been cut in half (improved by 53.6 percent), and workplace fatalities are now at their lowest level ever. Congress should look to ways to continue these improvements rather than enact changes that would hinder these efforts.

Simply put, while enforcement plays a role, the best approach to further improving workplace safety and health under this existing system and structure is a proactive approach that reaches employers before there is a problem and provides them with the support and guidance they need to protect their employees. As part of this approach, workplace safety and health standards and regulations need to be clear and understandable so employers will be able to understand their obligations and to implement the necessary steps to be in compliance. OSHA would be better served if it would focus more of its existing resources or additional resources it receives from Congress on providing the type of training, education and compliance assistance materials to ensure that employers clearly understand what they are required to do while also maintaining appropriate enforcement.

Additionally, OSHA should also make sure its inspectors (Compliance Safety and Health Officers, or CSHOs) are properly trained to apply the OSHA standards and regulations to the actual worksite. Remember, that unlike MSHA which only has jurisdiction over one industry, OSHA has a wide ranging jurisdiction over 7 million workplaces in a vast array of settings in general industry, maritime and construction, and OSHA area offices often have the close to impossible task of enforcing against many different types of jobsites in their area with many different applicable standards and requirements. Often times, misunderstandings between OSHA and an employer occur because one side or the other has a different understanding of what exactly is required to be in compliance with OSHA requirements. That is usually why employers will contest OSHA citations and this legislation fails to take this factor into account. Instead, this bill focuses solely imposing more punitive requirements on employers and making it harder for employers to exercise their due process rights. It is important to mention in this discussion that most OSHA citations are either accepted by the employer or settled

My experience in government service, as well as in private law practice, is that most employers want to do the right thing in terms of workplace safety and health, as most employers care about their most valuable resource, their employees. For the vast majority of employers, workplace safety and health makes sense for business and economic reasons, as those with safe worksites are often the most productive and efficient, with the lowest overhead and workers' compensation rates, and it makes sense because it is the right thing to do.

OSHA already has sufficient available enforcement tools and penalties to impose sanctions against employers where the circumstances warrant

The CWS is of the opinion that there are already sufficient penalties and enforcement tools to take action against those employers. Under the OSH Act, there are currently five general categories of civil penalties available to OSHA to impose on employers: Willful; Repeat; Failure to Abate; Serious; and Other than Serious. Under the current structure, penalties for willful violations can be imposed up to $70,000 for each willful violation of an OSHA standard or the General Duty Clause. While not defined in the statute, a willful violation has come to mean one where the employer is established to have been aware of and intentionally violated these requirements or acted with reckless disregard or plain indifference to workplace

safety. OSHA also may impose a civil penalty of up to $70,000 for each repeat violation, which is a violation of the same or substantially similar requirement by the same employer at the same or different facility. For serious violations, OSHA may impose a civil penalty up to $7000. Additionally, OSHA has the ability to impose instance by instance penalties (the egregious policy) under certain circumstances so that the agency could impose willful violations for each instance of conduct, for example it could impose a willful penalty for each employee affected. In other words, the agency already has the prosecutorial authority to impose penalties in large amounts (sometimes in the multiple of millions of dollars) in these cases, as we have seen.

The agency also may impose a civil penalty of $7000 per day for a failure to abate a violation for each day beyond the required abatement date that the particular condition or hazard remains unabated. Further, OSHA currently has the authority to shut down an employer's operation if OSHA believes that there is a serious hazard, which poses an imminent danger to employees.

As to potential and available criminal sanctions, the OSH Act provides that an employer may be subject to a criminal fine of up to $10,000 and six months in jail for the first willful violation resulting in the death of an employee, and a criminal fine of up to $500,000 and twelve months in jail for the second willful violation resulting in an employee fatality. And as I already noted in my testimony, OSHA did not hesitate during the previous administration to refer cases that met this criteria to the Department of Justice for review and consideration for criminal prosecution.

I also want to make clear on behalf of the CWS that it understands that its members need to fully comply with their workplace safety and health obligations. As I previously noted, the CWS believes that all parties have a respective responsibility and that employers should be held accountable including providing the necessary training, equipment, resources, and management emphasis on workplace safety. The CWS does not condone those employers who have intentionally flouted their obligations to protect their employees and fail to comply with their workplace safety and health obligations. Those employers—a small minority of employers—deserve the full range of enforcement sanctions by OSHA depending on the particular facts of the violation in question.

CWS's specific concerns with the provisions in Title VII of the Miner Safety and Health Act of 2010 (H.R. 5663)

As I previously mentioned, these proposed changes will simply not achieve the desired results in terms of improving workplace safety and health. Further, many provisions of this legislation and these revisions will result in adverse consequences to OSHA in terms of the administration of its enforcement, and to the Solicitor's Office, which is charged with the responsibility of litigating contested cases.

At its core, let me repeat a point I noted at the March 16 hearing—these proposed changes in H.R. 5663 can be best described under the old adage "bad facts make bad law." This effort to change the OSH Act with enforcement-only sanctions appears to be driven by the conduct of the few outlier employers who fail in their workplace safety and health obligations. These proposed penalty increases and other sanctions will do nothing to assist employers to understand their obligations for workplace safety and health, such as the small business owner who is trying to understand how to comply with applicable requirements. For example, how will increasing penalties help her design a more effective workplace safety program when she knows she is unlikely to see an inspection unless there is an accident or fatality? Increased penalties and new criminal liabilities will promote an adversarial relationship between employers and OSHA. As a result, employers will be more hesitant in proactively engaging OSHA. This employer is obviously better served with more outreach and compliance assistance materials than increased penalties. Again, the goal here is compliance and prevention, not sanction. This approach benefits employers but more importantly it benefits employees.

Specifically, the CWS has the following concerns with these provisions of Title VII of H.R. 5663:

Abatement of hazards pending contests of citations (Section 703): This section creates a new burdensome requirement on employers to abate any hazard that is the subject of a serious, willful or repeat violation (exempting only other-than-serious violations). The clear result of this new requirement will be to reduce or eliminate the ability of an employer to challenge a citation through the Occupational Safety and Health Review Commission (OSHRC) administrative process by requiring this immediate abatement to all of these citations. Importantly, immediate abatement is already available through the emergency shutdown mechanism when OSHA identifies an imminent hazard to employees (Section 13 of the OSH Act) in certain situations.

This proposed mandatory abatement provision would substitute an employer's ability to suspend abatement while contesting the citation with a higher burden of proof akin to what is required for securing a temporary injunction: (i) the employer has to demonstrate a substantial likelihood of success of its underlying contest of the citation; (ii) the employer will suffer irreparable harm absent a stay of this requirement; and (iii) the stay of this requirement will adversely affect the health and safety of workers. Even more troubling, this proposal gives OSHA the authority to impose a civil penalty on employers of $7000 per day if they have not corrected the hazard after the citation or obtained such a stay through the OSHRC. This punitive new set of penalties is simply unjustified and an outrageous trampling of due process rights. Abatement is more than just protecting against a hazard; it is part of accepting responsibility for the violation. Mandating abatement before allowing the employer to exhaust their adjudicative process would be like asking a criminal or civil defendant to pay a fine or serve a sentence before the trial is held.

I should also point out the potential adverse impact on the workload of the OSHRC with this proposal, in that employers may be faced with no choice but to file legal action to stay this requirement, which is required to have a hearing in 15 days in this legislation, followed by a decision in 15 days. There is also a process by which a party objected to the initial decision to appeal to the Commission itself. The implications to the Commission workload are staggering to imagine.

There is another provision in this proposed legislation which will add another burden to employers who chose to exercise their due process rights of contesting OSHA citations. Section 707 imposes what is termed "pre-final order interest" (essentially prejudgment interest), compounded daily, which begins to accrue on the date an employer contests any OSHA citation. This additional penalty on employers for OSHA citations which have not yet been adjudicated by the OSHA Review Commission appears to be unduly punitive, and will not result in any improvement of workplace safety and health; the supposed goal of H.R. 5663. The only result of this provision will be to increase the difficulties for employers who choose to exercise their due process rights and to contest any citations they believe were incorrectly or wrongly imposed to the particular situation.

In addition, this provision will eliminate OSHA and the Solicitor's Office prosecutorial discretion in handling these contested cases and eliminate one source of potential leverage that OSHA and the Solicitor's Office can use to resolve cases with the requirement to impose immediate abatement.

The combined effect of mandatory abatement and the greater difficulty in getting a stay will be that the OSHA inspector who issues the citation will have the roles of judge and jury. This is grossly unjust as many OSHA inspectors are unfamiliar with the industries and workplaces they are inspecting. They very well may not know the best workplace procedures and which are actually the safest. Enhancing their authority as this section is a prescription for overzealous and improper citations.

In sum, this provision is unduly punitive and makes it much more difficult for employers, particularly smaller employers who lack resources, to challenge certain citations, which they may believe in good faith are incorrect or improperly imposed by the agency in the first place. The end result of this requirement will not be an improvement in workplace safety and health. Instead, the only result of this onerous set of requirements will be to impose more costs and more burdens on employers at precisely the wrong time in this challenging economic environment when employers everywhere are struggling to stay afloat.

Civil Penalties (Section 705): The increases in civil penalties in Section 705 raise the issues already mentioned about a punishment-focused approach, which will in and of itself, not result in any improvement of workplace safety and health. From the employers' perspective, how can we not say that this bill is about punishment? If you have any doubt that this new legislation is about punishment of employers, let me cite the new provision in Section 705 that will give OSHA the authority to consider an employer's history of OSHA citations from state plan states as part of the process to determine whether a federal OSHA violation is a repeat violation or not. This is another example of a dramatic change to 40 years of OSHA practice for the sole purpose of punishing employers. When combined with the recent steps taken by OSHA to increase civil penalties and more aggressive enforcement, such as through the new SVEP program as well as the new higher penalty calculations in the OSHA Field Operations Manual, employers may have no choice but to consider contesting every citation to avoid these further punitive sanctions.

Even now, employers have difficulty understanding what OSHA requires in its standards, as well as understanding its potential liability; these new proposed penalties and other new requirements (such as the immediate abatement requirement and new criminal sanctions) will only add to the difficulty for employers to not only

understand what is required of them but to face a dramatic increase in costs, precisely at a time in our economic life, when employers can ill afford such sanctions.

Criminal Penalties Section 706): These proposed changes to increase the criminal sanctions will do nothing positive for workplace safety and health. Again, these expansions of criminal sanctions—both by reducing the necessary intent level to "knowing" and creating personal culpability—will yield much greater levels of challenges instead of improvements in workplace safety.

First, the CWS is concerned by the proposal to change the level of intent (mental state) necessary for criminal penalties from the current "willful" to "knowing." Such a change would upend decades of OSHA law—dating to the passage of the OSH Act in 1970 and introduce tremendous uncertainty, further guaranteeing substantial increases in contested cases. While the "knowing" standard is used in environmental statutes, it has not been the standard for OSHA criminal culpability. In environmental law, the term "knowing" has come to be associated with a low level of intent, almost akin to a strict liability standard where the party in question has to know only that a given activity was taking place, not that there was a violation occurring or that environmental laws were being broken. As there is no further definition in the bill of this standard, employers (and OSHA inspectors) will be left to guess what this means and when it should apply. This is a prescription for utter confusion and legal challenges that will be costly to both the employer and the agency.

Further, imposing criminal liability on any "an officer or director" is equally troublesome. The CWS believes this proposal will result in a witch hunt to hold officers or directors responsible. Expanding criminal liability to any officer or director will make corporate personnel unduly subject to prosecution even if they generally have no involvement in day to day operations. All of these terms are vague and ambiguous as to who would fall within these categories. These terms are also vague as to how they would be applied in the legal process; do they apply only to the corporate entity or other legal entities such as partnerships? Does this mean that any limited partner or director would now be subject to potential criminal prosecution? How would responsibility be determined? None of these changes will improve workplace safety and health, and actually, this new requirement, if adopted, could result in adverse impacts as corporate employees would now fear that any decision they could make on the jobsite could subject them to prosecution; a safety director or E, H & S employee could be faced with the reality that every one of their decisions would be micromanaged, potentially by employees who have little or no expertise in safety and health. This will create a chilling effect on these employees trying to simply do their job, or even taking these jobs. Furthermore, these are the people that should get those jobs—the ones that care enough and know what should be done, but do not want to be exposed to criminal liability because of the actions of an employee they could not control. This could create uncertainty on the jobsite with a net reduction of workplace safety and health.

New whistleblower requirements (Section 701): This section will add new requirements and create additional complicated and costly procedures for adjudicating whistleblower cases, without any evidence or justification that the existing protections available to employees under Section 11(c) of the OSH Act are somehow deficient. The CWS is also concerned with other proposals in Section 701 which are overly punitive on employers and will benefit no one, aside from trial lawyers.

For example, this section completely eliminates any flexibility for an employer and employees to negotiate employment contracts or agreements which include an arbitration clause applicable to whistleblower rights. Arbitration clauses are often used as a mechanism for resolving disputes which is quicker and less costly than litigation. This section also includes broad and vague language prohibiting settlement of any whistleblower claims that contain "conditions conflicting with the rights" protected in Section 701 including the restriction on the complainant's right "to future employment with employers other than the specific employers named in a complaint." This blanket prohibition on the ability of employers and whistleblower complainants to enter into settlements that make sense to them in the context of the particular case at hand will make it more difficult, at the end of the day, for the parties to settle these cases. The end result: more litigation and more costs on employers.

Furthermore, this section grants employees a right to bring an action against their employer in federal court for no reason greater than the Administrative Law Judge or the review board missing a 90 day deadline to issue their decisions—deadlines that were predicted to be routinely missed by whistleblower law expert Lloyd Chin in his testimony to the Subcommittee on Workforce Protections on April 28.

We also note that the new whistleblower provisions being discussed today allow employees to recover, against the employer, their attorneys' fees and costs if they are successful in getting an order for relief from either the Secretary or a court.

Similarly, allowing small businesses that successfully defend themselves against an OSHA citation to recover their attorneys' fees has long been one of our key goals. Bills to permit this have passed the House with bipartisan support in previous Congresses. While inclusion of this idea would not cure the problems we see with these whistleblower provisions, we believe allowing small businesses the same opportunity as employees to recover attorney's fees is only fair.

The adverse impact of Title VII of H.R. 5663 on the OSHA contested caseloads and the administration of OSHA litigation

I would also like to reiterate an issue and concern I mentioned in my testimony on March 16, 2010—the potential impact of these proposed changes to the OSH Act on the OSHA adjudicatory process. The net result of these proposals to increase civil and criminal penalties; dramatically revise the whistleblower structure under the OSH Act; and require immediate abatement will cause not only employers to contest citations at higher rates, but will result in delays in the ultimate resolution of contested enforcement cases, and unduly strain the resources of OSHA and the Solicitor's Office.

We do not need to look any further than the recent example of MSHA enforcement of the mine industry after changes to increase the penalties and other sanctions to get a picture of the potential difficulties and challenges. Indeed, this Committee held a hearing on this subject on February 23, 2010 and heard testimony raising these same concerns. As I mentioned in my testimony at the March 16, 2010 hearing, the increased penalties under the Miner Act, combined with the aggressive use of existing tools, such as the Pattern of Violation mechanism, resulted in a dramatic increase in contest cases. For example, the percentage of contested MSHA violations went from just over 5 percent in 2005 (the year prior to the Miner Act), jumping to over 20 percent by 2007, and over 25 percent in 2008 and 2009.

From personal experience I can attest to the challenges these increases posed for the Solicitor's Office and MSHA. During this same period, I was the Acting Solicitor and Deputy Solicitor and we devoted significant time and effort to manage the impact of these higher contest rates. We had to shift resources within the Solicitor's Office, and take other often difficult steps, to assist with this dramatic increase in the workload. Due to the risk of the Pattern of Violations and the significantly higher penalties, it was much more difficult to settle cases, further adding to the problem. The MSHRC also faced problems in that they simply did not have enough ALJs to hear all of the cases. Funding increases partially solved this problem but it still remains a huge problem and the resolution of many cases has been delayed for months, if not years. The current backlog of cases is 16,000 and the caseload docket increased from 2,700 cases in FY 2006 to more than 14,000 cases in FY 2009.

I think it is important for this Committee to carefully consider the practical real world impact of any of these proposed changes to the penalty structure which will have a significant impact on the administration of the OSHA contested caseload. While the budget situation at DOL is different now from the time I served, these proposed changes will still have what I believe to be a significant impact on the OSHA adjudicatory process, and I believe this Committee should be aware of the impact of this legislation and should take these concerns into account when considering this legislation.

Conclusion

The OSHA proposals included in Title VII of the Miner Safety and Health Act (H.R. 5663) would result in significant and dramatic changes to the OSH Act, with the imposition of a more punitive civil and criminal penalty structure, and make it harder for employers to exercise due process rights to contest citations or defend against whistleblower complaints, without any beneficial impact on workplace safety and health. The CWS believes that this legislation is only about the punishment of employers, the vast majority of whom want to do the right thing in terms of workplace safety and health, and this bill will not prevent workplace safety and health injuries and fatalities. There is nothing in this proposed legislation that will provide any assistance to employers, and most importantly small businesses, to improve safety in their workplaces. Rather, this proposed legislation will result in higher costs and added liabilities on employers, including small businesses, who are struggling in this challenging economic time to maintain operations, expand, and trying to retain jobs. These increased costs will have only a detrimental impact on these efforts.

The goal here, as I previously noted, is to prevent workplace fatalities and injuries from occurring, not merely punishing the employer after they occur. As recent data makes clear, with the lowest ever recorded level of workplace injuries and fatalities, the best way to achieve continuous improvements in workplace safety and health

is to utilize a proactive approach with enforcement when appropriate, and offer outreach, training, and compliance assistance to that vast majority of employers who want to do the right thing and comply with their workplace safety and health obligations.

Mr. Chairman, thank you for this opportunity to speak to you on these important issues, and I would now be happy to respond to any questions that you and the Committee may have.

Chairman MILLER. Ms. Rhinehart.

STATEMENT OF LYNN RHINEHART, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR, CONGRESS OF INDUSTRIAL ORGANIZATIONS

Ms. RHINEHART. Thank you, Mr. Chairman, Ranking Member Kline, and members of the committee, both for holding this hearing and for inviting me to testify here today. We really appreciate the committee's continued efforts to promote worker safety and health, including the introduction of the Miner Safety and Health Act last week.

Clearly, we still have major problems in the mines with getting mine operators to pay attention to worker safety problems that need to be addressed. President Roberts and Mr. Stewart have eloquently spoken to these issues. We fully support the mine workers on these points. But the problem isn't limited to mines, and that is the fundamental point that I want to speak to here today.

Just as the Mine Act needs to be strengthened to get mine operators to pay attention to safety and put safety before profits, so does the main law protecting worker safety and health, the Occupational Safety and Health Act of 1970. The OSH Act is a good law, it has saved lives, it has prevented injuries, but it has serious shortcomings and it is woefully out of date. Other than a civil penalty increase in 1990, the law has never been updated or strengthened in 40 years since its passage. It has fallen behind the Mine Act, and it has fallen behind environmental laws designed to protect us from harm from contaminated air, from contaminated water, from unsafe mines. But the OSH Act has fallen far behind.

Now, some would say the law is actually fine and that the problem that we face is just with a few bad actors out there. We disagree. This is a systemic problem that needs to be fixed. We still have more than 5,200 workers dying on the job each year, an average of 14 workers each and every day. Millions of workers are injured each year. OSHA has issued thousands of citations for violations of the OSH Act in connection with those fatalities that I just referenced. This is not a matter of just happenstance, things happen; these are violations of the law that lead to worker fatalities and injuries, and it is a systemic problem that needs to be addressed.

The average penalty for violating the OSHA law, a serious violation of the law that carries a substantial risk of death or serious injury is $965. Even in cases where workers are killed, the average penalty is about $5,000. This is not enough to get employers to pay attention to safety and make investments in safety on the front end. It is too easy to write penalties like this off as just a cost of doing business.

The criminal penalty provisions in the OSH Act are even weaker. As you know, the maximum penalty under the law for willful violations of the law that result in a worker fatality is just six months in jail, which is a misdemeanor. And it also carries a $250,000 fine.

The penalties for polluting the environment or harassing protected wildlife on public lands are higher than the penalties for violating the OSHA law and killing workers. Because the penalties are so weak, the Department of Justice rarely prosecutes cases under the OSH Act. One telling statistic, the Department of Justice brought four times more criminal cases last year for violations of the environmental laws than have been brought in the entire 40-year history of the OSH Act; four times more cases in 1 year than in 40 years under the OSH Act because the criminal penalty provisions are just so weak.

Now we have heard today that the bill is too punitive and what we need is more compliance assistance and cooperation; that penalties have nothing to do with promoting safety. But when OSHA only has enough inspectors to inspect workplaces once over 137 years, on average—which is the case now—you have to have strong penalties when violations are found if the system is to work. Otherwise, the law just does not provide an adequate incentive for employers to comply with the law and protect workers. The penalties, in our view, have everything to do with bringing about greater compliance and prevention of problems before tragedies occur, and they are just too weak right now to make that happen.

We have heard today about the importance of strong whistleblower protections and about making sure that workers are protected when they speak out about job hazards. The whistleblower protections in the OSH Act are the weakest of any of the 17 whistleblower laws enforced by OSHA. They are out of the mainstream of whistleblower protections passed by Congress over the past number of years, signed into law by both Republican and Democratic Presidents.

The details of these weaknesses are contained in my written statement which is submitted for the record. Suffice it to say, the whistleblower protections in the OSH Act are woefully out of date and really do not provide workers with recourse when they suffer discrimination for raising job hazards or exercising their rights under the law. They have 30 days to bring their case forward. They are dependent on the Secretary of Labor bringing their case. If the Secretary doesn't act, workers are out of luck; they have no private right of action. This is completely out of the mainstream of whistleblower protection laws.

So if we are serious about our commitment to worker safety and health, and this committee clearly is, and if we are serious about wanting to prevent deaths and injuries on the job, we need to strengthen the OSHA law and provide meaningful penalties that will bring about greater compliance before fatalities and injuries occur. We need to strengthen protections against retaliation for workers who raise job hazards. We need to get employers to correct hazards more quickly, and not use the litigation process before the OSHA Review Commission to stall abatement and leave workers at risk. And that is what the Miner Safety and Health Act would do.

If I may take just 20 seconds to make one more comment about the concerns that have been expressed here today about this bill costing employers money, and that not being a good idea at a time when the economy is really struggling. We are for jobs, we are all for jobs, we are all for safe jobs. When you think about the costs here, you need to think about the costs of workplace fatalities, injuries and illnesses. They are enormously expensive, not just in human terms—which those costs are incalculable, you cannot bring a loved one back—but the financial costs of injuries and illnesses are $50 billion a year. So we submit that preventing those injuries, preventing those fatalities and eliminating those costs is actually good for the bottom line and good for the economy.

So we strongly support this legislation and the OSH Act provisions in it and urge its prompt adoption. Thank you.

Chairman MILLER. Thank you very much. Thank you to all of you for your testimony.

[The statement of Ms. Rhinehart follows:]

Prepared Statement of Lynn Rhinehart, General Counsel, AFL–CIO

Thank you for the opportunity to testify today in support of H.R. 5663, the Miner Safety and Health Act of 2010. On behalf of the AFL-CIO, a federation of 56 national and international unions representing more than 11.5 million working women and men across the United States, I want to convey our strong support for this legislation and to urge that it be enacted into law without delay. We appreciate the Committee holding this hearing, and its steadfast efforts to strengthen the job safety laws and protect worker safety and health.

Stronger safety and health protections for America's workers—its miners and other working men and women—are urgently needed. Forty years after the passage of the Occupational Safety and Health Act and the Coal Mine Health and Safety Act, the sad fact is that too many workers are still being killed, injured, and diseased on the job. Tragedies like the recent blast at Massey's Upper Big Branch mine, where 29 workers died, the explosions at the Tesoro Refinery in Washington State and the Kleen Energy plant in Connecticut, which claimed 13 more lives, and the recent explosion on the BP/Transocean Deepwater Horizon oil rig in April, which killed 11 workers, are vivid and painful illustrations of the need for stronger measures to protect workers' lives. But these fatalities are just the tip of the iceberg. In 2008, more than 5,200 workers were killed on the job by job hazards—an average of 14 workers each and every day. Millions of workers suffered injuries. The devastation and hardship these fatalities and injuries cause to workers and their families are incalculable. The direct cost of these injuries to employers in terms of medical and lost wage payments is more than $52 billion each year. When indirect costs such as lost productivity are added in, the annual costs skyrocket to $156-312 billion.[1] Clearly, more needs to be done to reduce this toll and bring about greater attention to worker safety and health.

In his testimony, United Mine Workers of America President Cecil Roberts has described why the improvements in H.R. 5663 are needed to bring about stronger safety and health protections for our nation's miners. The AFL-CIO strongly supports these measures and the reforms sought by the Mine Workers. My testimony will focus on the provisions of H.R. 5663 that amend the Occupational Safety and Health Act of 1970 (OSH Act), our nation's primary worker safety law.

There is no question that the OSH Act has made a tremendous difference in bringing greater attention to workplace safety and in preventing countless fatalities, injuries, and illnesses. But since its passage 40 years ago, the law has never been significantly updated or strengthened, and as a result, the law is woefully out of date. The OSH Act's penalties are weak compared to other laws, the government's enforcement tools are limited, and protections for workers who raise job safety concerns are inadequate and far weaker than the anti-retaliation provisions of numerous other laws. The law simply does not provide a sufficient deterrent against employers who would cut corners on safety and put workers in harm's way.

[1] AFL-CIO, Death on the Job: The Toll of Neglect (April 2010) (citing data from Liberty Mutual Insurance).

H.R. 5663 would address several major shortcomings in the OSH Act by (1) strengthening both the civil and criminal penalty provisions in the law, (2) improving anti-discrimination protections for workers who raise job safety concerns or otherwise exercise their rights under the OSH Act, (3) requiring employers to fix hazards to ensure that workers are protected while litigation over citations is pending, and (4) giving victims and family members more rights to participate in the enforcement process. These provisions, which are drawn from the Protecting America's Workers Act (PAWA), H.R. 2067—legislation that has been introduced in the last several Congresses and has already been the subject of numerous Congressional hearings—will greatly improve worker protections by updating and strengthening key provisions of the law. PAWA contains other important measures to address shortcomings in the OSH Act and improve worker safety and health, such as extending OSHA coverage to millions of state and local public employees who are not (and have never been) covered by the law, and enhancing worker and union rights in the enforcement process. We continue to support the additional measures contained in PAWA, and we urge their adoption.

I will now address each of the four major OSH Act provisions in H.R. 5663.

1. Stronger Civil and Criminal Penalties for Violations of the Law

The OSH Act gives employers the responsibility to comply with health and safety standards and protect workers from harm. Because OSHA's inspection and enforcement resources are so limited, the system largely relies on employers taking their responsibilities seriously and complying on their own. Unlike the Mine Act, there are no mandatory inspections under the OSH Act, even for the most dangerous industries or workplaces. At current funding levels, federal OSHA only has enough inspectors to inspect each of the nation's 8 million workplaces once every 137 years.

Given how infrequently inspections occur, in order to provide a strong incentive for employers to comply with the law and deter violations, it is essential that there be strong enforcement when workplaces are inspected and violations are found. But that is simply not the case. Current OSHA penalties are too low to deter violations. The average penalty for a serious violation of the law—defined as a violation that poses a substantial probability of death or serious physical harm to workers—was just $965 in FY 2009. The statute authorizes up to $7,000 for these violations.

Even in cases of worker fatalities, the median initial total penalty in FY 2009 was a paltry $6,750, with the median penalty after settlement just $5,000. Many of these are fatalities caused by well-recognized hazards: trench cave-ins, failure to lock-out dangerous equipment, and lack of machine guarding. To cite just a few examples:

- In January 2009, Andrew Keller was killed in a trench cave-in in Freyburg, Ohio. Keller was 22 years old. The company, Tumbusch Construction, was cited for three serious violations and penalized $6,300. The penalties were later reduced to $4,500. Six months later, in June 2009, OSHA found similar violations at another jobsite of Tumbusch Construction. This time the company was cited for both serious and willful violations with a total of $53,800 in penalties proposed. The company has contested the violations.
- A July 2009 fatality case in Batesville, Texas, where one worker was killed and two workers injured when natural gas was ignited during oxygen/acetylene cutting on a natural gas pipeline. The employer—L&J Roustabout, Inc.—was cited for three serious violations with $3,000 in penalties. The case was settled for $1,500.
- In August 2009, Andrea Taylor, age 28, was killed on the job at Affordable Electric in Lamar, South Carolina. South Carolina OSHA cited the company for five serious violations of electrical and lock-out standards with a proposed penalty of $6,600. In an October 2009 settlement, three of the violations were dropped and the penalties were reduced to $1,400.
- In August 2009, at SMC, Inc. in Odessa, Texas, a worker was caught in the shaft of a milling machine and killed. The company was cited for one serious violation. The $2,500 proposed penalty was reduced at settlement to $2,000.

These are not meaningful penalties—they are a slap on the wrist. Penalties of this sort are clearly not sufficient to change employer behavior, improve workplace conditions, or deter future violations.

The OSH Act's civil penalties were last increased by Congress in 1990 (the only time they have ever been raised). Unlike all other federal enforcement agencies (except the IRS), the OSH Act is exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 40 percent. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to $11,600 for a serious violation and to $116,000 for a willful violation of the law.

H.R. 5663 would strengthen the civil penalty provisions in the OSH Act in several ways. First, the bill would increase civil penalties to account for inflation since the last increase, and would index penalties to inflation in the future. Second, the legislation would add a mandatory minimum penalty of $20,000 ($10,000 for employers of 25 or fewer employees) for violations that involve a fatality, and authorize penalties of up to $50,000 for these violations. These provisions would merely update the OSH Act's civil penalty provisions for inflation and ensure that at least a minimum penalty is assessed when the violation leads to a worker fatality. Third, the legislation would make clear that an employer's history of violations in states with state OSHA plans would be considered by the Secretary of Labor in deciding whether to issue a citation for a "repeat" violation, which carries higher penalties. These are modest measures, but they are much needed and long overdue.

Criminal Penalties

The criminal penalty provisions of the OSH Act are exceedingly narrow and weak. Under the OSH Act, criminal penalties for violations of the law are limited to cases where a willful violation results in a worker's death, and even then, the maximum jail term is six months—a misdemeanor. (The Act also authorizes prosecutions for false statements and for giving advance notice of an OSHA inspection, with a maximum six month jail term for each).

By contrast, both the Coal Mine Health and Safety Act and environmental laws authorize prosecutions with more significant penalties for knowing violations of the law, and they do not require that a fatality or other harm occur as a precondition of prosecution. The environmental laws also authorize prosecutions for "knowing endangerment"—knowing violations of the law that put others at imminent danger of death or serious harm—which carry far greater penalties (15 years) than does the OSH Act (6 months for willful violations that cause a fatality). Compare, e.g., 42 U.S.C. 6928(e) and (f) (knowing endangerment under the Clean Air Act) and 33 U.S.C. 1319(c)(3) and (6) (knowing endangerment under the Clean Water Act) with 29 U.S.C. 666(e) (OSH Act). The six month maximum penalty under the OSH Act for willful violations that result in a worker fatality are even weaker than the one-year maximum penalty under the Wild Free-Roaming Horses and Burros Act for maliciously harassing a wild horse or burro on public lands. 16 U.S.C. 1338. My point here is not in any way to denigrate strong criminal enforcement provisions for violations of wildlife and environmental protection laws, but rather to say that the weakness of the OSH Act's penalties when compared to these laws sends a terrible message about the value the law places on workers' lives, and undermines strong and credible enforcement of the job safety law.

Because the OSH Act's criminal penalty provisions are so weak, very few cases are prosecuted by the Department of Justice. Given its limited resources, DOJ understandably focuses on prosecuting felonies with meaningful sanctions, not misdemeanors. As best as we can tell from available records, in the 40 years since the passage of the OSH Act, only 79 cases have been prosecuted under the OSH Act, with defendants serving a total of 89 months in jail. By comparison, in FY 2009 alone, there were 387 criminal enforcement cases initiated under federal environmental laws and 200 defendants charged, resulting in 76 years of jail time and $96 million in penalties. In other words, there were more prosecutions, penalties, and jail time in one year for violations of environmental laws than have occurred for violations of the OSH Act in OSHA's entire 40-year history.

To illustrate this disparity between the criminal provisions of the OSH Act and environmental laws, take the prosecution of BP after an explosion at its Texas City, Texas oil refinery in 2005. That explosion killed 15 workers and injured 170 others. OSHA issued citations and civil penalties against BP, and settled for $21 million. (OSHA recently announced the largest fine in OSHA's history against BP for the company's failure to abate hazards as promised in the earlier settlement).[2] The Justice Department prosecuted BP, and BP pleaded guilty and agreed to a $50 million fine, not to violations of the OSH Act but for violations of the Clean Air Act. The OSH Act and its misdemeanor penalty was simply not part of the equation.

H.R. 5663 would begin to correct this disparity and bring the OSH Act's criminal provisions more in line with other laws. It is important to point out that even as amended by H.R. 5663, the OSH Act's provisions would still be narrower and weaker than the Mine Act and environmental laws. Under H.R. 5663, criminal violations of the OSH Act would be made a felony, instead of a misdemeanor, and maximum jail terms would be increased to 10 years. Criminal prosecution would be authorized for knowing violations that lead to serious bodily harm, in addition to those that

[2] Steven Greenhouse, "BP to Challenge Fine for Refinery Blast", N.Y. Times, (October 31, 2009)

lead to deaths. Corporate officers and directors could be held personally criminally liable for violations, as is the case under the Mine Act and the environmental laws. These provisions would begin to make the criminal provisions of the OSH Act a more meaningful deterrent to violations that cause death or serious harm. These reforms are sorely needed and are long overdue.

2. Improved Anti-Retaliation Protections

There is universal agreement about the importance of workers being involved in addressing safety and health hazards at the workplace. Workers see first-hand the hazards posed by their jobs and their workplaces, and they are an important source of ideas for addressing these hazards. But in order for workers to feel secure in bringing hazards to their employer's attention, they must have confidence that they will not lose their jobs or face other types of retaliation for doing so. All too often, fear of retaliation for "rocking the boat" leads workers to stay quiet about job hazards, sometimes with tragic results, as we saw with the Massey mine explosion in April.[3]

Unfortunately, the anti-retaliation protections under the OSH Act for workers who raise job safety concerns or exercise their other rights under the law are woefully inadequate and fall far short of the protections offered under many other anti-retaliation laws—including, ironically enough, laws enforced by OSHA. The U.S. Government Accountability Office (GAO) surveyed seventeen whistleblower statutes enforced by OSHA and found that the OSH Act contains much weaker whistleblower provisions than these other federal laws.[4]

Four weaknesses are particularly problematic: (1) the OSH Act's short statute of limitations for filing whistleblower complaints (30 days); (2) the absence of preliminary reinstatement while cases are proceeding through the system; (3) the lack of an administrative process for hearing cases; and (4) the absence of a private right of action for workers to pursue their own cases before the agency or in federal court in situations where the Secretary of Labor fails or chooses not to act, which all too often is the case.[5] These statutory shortcomings leave workers with little or no recourse when they face retaliation for reporting hazards or injuries or exercising their other rights under the law. This undermines the OSH Act's encouragement of full and active worker involvement in workplace safety and health.

H.R. 5663 would correct these shortcomings and bring the OSH Act's anti-retaliation provisions into the mainstream of other whistleblower laws. The bill extends the statute of limitations for filing complaints from 30 days to 180 days, putting the OSH Act on par with the Surface Transportation Act and other major anti-retaliation laws. The bill establishes an administrative process for handling retaliation cases, similar to other whistleblower laws, so that the Secretary of Labor is not required to go to court to pursue these cases but can handle them administratively. The bill establishes timeframes for processing cases, and gives workers the right to pursue their cases before an administrative law judge or court if the Secretary of Labor delays action or chooses not to pursue the case. The bill makes clear that the anti-retaliation protections apply to the reporting of an injury or illness, which is important given the chronic underreporting problem and the prevalence of employer practices and policies to discourage reporting.[6] And, H.R. 5663 codifies workers' right to refuse hazardous work, a long-established right that was upheld by the U.S. Supreme Court decades ago. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

Workers who raise safety and health concerns or report injuries should be protected against retaliation for doing so. H.R. 5663 will update and strengthen the anti-retaliation provisions in the OSH Act and bring these protections up to par with other anti-retaliation laws. Again, this is a much-needed change that is long overdue.

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[3] Dan Barry, et al., "2 Mines Show How Safety Practices Vary Widely", N.Y. Times (April 22, 2010). See also Peter Kilborn, "In Aftermath of Deadly Fire, a Poor Town Struggles Back," N.Y. Times (Nov. 25, 1991) (workers at the Imperial Food chicken processing plant, where 25 workers died in a fire, did not raise safety complaints because they feared losing their jobs).

[4] Government Accountability Office, Whistleblower Protection Program: Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency 50-65 (Jan. 2009).

[5] According to data provided by OSHA, in FY 2009, federal OSHA received 1,280 section 11(c) discrimination complaints, and completed action on 1,173 cases. Only 15 of these cases were recommended for litigation and another 246 settled. Eight hundred thirty-four of these cases were dismissed by the agency, of which 104 were appealed by complainants to the OSHA National Office. Of these 10 were remanded back to the regions for rehearing. Of the cases that are found meritorious by investigators, few are actually litigated by the Solicitor of Labor (SOL). In FY 2009, four of the 15 case recommended for litigation went to court. Since FY 1996, only 32 lawsuits were filed out of 467 cases referred by OSHA to SOL for litigation.

[6] See GAO, Workplace Safety and Health: Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data (Oct. 2009).

3. Abatement of Hazards During Litigation

Under the OSH Act, when OSHA issues a citation to an employer, OSHA sets a date by which the employer must correct the violation, i.e., correct the problem that led to the citation. The vast majority of employers fix the problem and do not challenge OSHA's citation. But if the employer does challenge the citation, the abatement period is tolled while the case is pending, which can take years. In the meantime, unless the employer decides to correct the problem on its own, workers continue to be exposed to the hazard, putting them at risk of harm.

Under the Mine Act, mine operators are required to abate violations even if they challenge the citation itself. The same is true under the state OSHA program in the state of Oregon. To our knowledge, these provisions have worked smoothly, and employers have been able to comply with these requirements without significant hardship.

H.R. 5663 would incorporate this abatement requirement into the OSH Act. Except for violations that are designated "other than serious," the period for abating the hazard would begin to run upon issuance of the citation, and would not be tolled in situations where an employer decided to challenge the citation before the Occupational Safety and Health Review Commission. This provision will better assure that workers are protected from hazards while litigation is ongoing.

The legislation provides a safety valve for those situations where employers believe the abatement requirement would cause great hardship. H.R. 5663 establishes an expedited procedure through which employers may seek a stay of the abatement requirement before the Review Commission. The Commission is authorized to stay the abatement requirement in those instances where employers are able to demonstrate a substantial likelihood that they will succeed in challenging the citation, that worker health and safety will not suffer in the interim, and that the employer will suffer irreparable harm absent a stay. These factors are comparable to the factors for obtaining a stay under the Federal Rules of Civil Procedure. They provide a fair and expedited process for employers to have their day in court, while ensuring that workers are protected from possible harm.

Amending the OSH Act to require employers to abate hazards during litigation is a significant improvement over the current law. This provision will enhance worker protections while providing employers due process to seek a stay in appropriate circumstances. We strongly support this provision and urge its adoption.

4. Victims and Family Members Rights

H.R. 5663 enhances the right of victims and family members to participate in the OSHA enforcement process. Victims and family members would have the right to meet with OSHA investigators, receive copies of any citations, and to be heard before any settlement is reached. We believe these measures are important and appropriate. Victims and family members have a keen interest in the OSHA proceedings surrounding workplace injuries and fatalities, and they deserve information and the right to be heard.

Conclusion

The improvements to the OSH Act in H.R. 5663 are urgently needed to strengthen the job safety law and protect workers from harm. The bill will help deter violations of the law, bring about greater compliance, and better protect workers who expose job hazards and exercise their rights. We urge the Committee and the Congress to approve the legislation without delay. Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.

FEDERAL OSHA AND STATE OSHA PLAN INSPECTION/ENFORCEMENT ACTIVITY, FY 2009

	Federal OSHA	State plan OSHA
Inspections	39,057	61,310
Safety	33,256	48,221
Health	5,801	13,089
Complaints	6,675	8,612
Programmed	24,336	39,676
Construction	23,952	26,245
Maritime	338	47
Manufacturing	7,312	9,998
Other	7,455	25,020
Employees Covered by Inspections	1,332,583	3,011,179
Average Case Hours/Inspection:		
Safety	18.5	16.1

FEDERAL OSHA AND STATE OSHA PLAN INSPECTION/ENFORCEMENT ACTIVITY, FY 2009—Continued

	Federal OSHA	State plan OSHA
Health	34.8	27.0
Violations—Total	87,491	129,289
Willful	395	171
Repeat	2,750	2,046
Serious	67,439	55,090
Unclassified	10	14
Other	16,697	71,456
FTA	200	512
Penalties—Total ($)	94,981,842	59,778,046
Willful	13,537,230	3,466,130
Repeat	10,644,022	3,594,205
Serious	65,072,944	43,018,854
Unclassified	128,000	131,500
Other	3,907,648	7,390,658
FTA	1,691,998	2,176,699
Average Penalty/Violation ($)	1,086	462
Willful	34,271	20,270
Repeat	3,871	1,757
Serious	965	781
Unclassified	12,800	9,393
Other	234	103
FTA	8,460	4,251
Percent Inspections with Citations Contested	7.1%	13.1%

Source: OSHA IMIS Inspection Reports, FY 2009

State	Number of OSHA Fatality Investigations Conducted, FY 2009[1]	Total Penalties[1] ($)	Average Total Penalty Per Investigation ($)	Median Initial Penalty[2] ($)	Median Current Penalty[2] ($)	State or Federal Program[3]
Alabama	20	298,010	14,901	12,250	6,900	Federal
Alaska	5	21,900	4,380	4,200	2,975	State
Arizona	17	164,995	9,706	16,500	10,500	State
Arkansas	15	166,675	11,112	5,500	5,500	Federal
California	160	1,640,385	10,253	11,655	9,260	State
Colorado	11	278,400	25,309	15,000	12,000	Federal
Connecticut	8	42,475	5,309	10,000	6,300	Federal
Delaware	3	42,040	14,013	4,000	2,520	Federal
Florida	81	643,166	7,940	7,500	6,400	Federal
Georgia	43	376,205	8,749	11,300	7,000	Federal
Hawaii	6	28,625	4,771	2,938	2,938	State
Idaho	5	54,350	10,870	7,500	7,500	Federal
Illinois	52	129,315	2,487	4,625	4,500	Federal
Indiana	42	172,913	4,117	6,000	5,250	State
Iowa	21	246,900	11,757	5,175	3,000	State
Kansas	12	178,550	14,879	7,400	7,000	Federal
Kentucky	31	125,275	4,041	3,250	2,000	State
Louisiana	48	99,215	2,067	3,625	2,750	Federal
Maine	6	14,160	2,360	3,750	2,500	Federal
Maryland	20	90,676	4,534	6,763	4,073	State
Massachusetts	23	148,200	6,444	11,750	7,000	Federal
Michigan	28	142,090	5,075	6,300	5,400	State
Minnesota	14	260,600	18,614	26,600	26,200	State
Mississippi	14	106,360	7,597	10,150	6,780	Federal
Missouri	20	117,125	5,856	8,838	5,250	Federal
Montana	5	13,000	2,600	2,500	2,500	Federal
Nebraska	16	312,737	19,546	12,550	7,875	Federal
Nevada	11	93,100	8,464	9,100	5,950	State
New Hampshire	3	3,500	1,167	17,000	17,000	Federal
New Jersey	39	201,567	5,168	3,000	3,000	Federal
New Mexico	6	23,200	3,867	7,800	7,800	State
New York	53	625,632	11,804	5,400	4,800	Federal

State	Number of OSHA Fatality Investigations Conducted, FY 2009[1]	Total Penalties[1] ($)	Average Total Penalty Per Investigation ($)	Median Initial Penalty[2] ($)	Median Current Penalty[2] ($)	State or Federal Program[3]
North Carolina	54	171,245	3,171	4,650	4,063	State
North Dakota	4	27,962	6,991	5,825	5,063	Federal
Ohio	39	134,895	3,459	7,000	5,175	Federal
Oklahoma	25	281,150	11,246	10,000	6,000	Federal
Oregon	25	79,250	3,170	5,000	5,000	State
Pennsylvania	43	262,315	6,100	5,850	4,888	Federal
Rhode Island	4	7,900	1,975	11,025	10,075	Federal
South Carolina	17	13,745	809	3,000	2,375	State
South Dakota	3	7,605	2,535	4,200	2,730	Federal
Tennessee	42	195,920	4,665	5,400	5,400	State
Texas	167	1,562,851	9,358	6,000	5,000	Federal
Utah	14	21,600	1,543	2,750	1,250	State
Vermont	2	5,250	2,625	5,250	5,250	State
Virginia	36	678,652	18,851	14,000	10,000	State
Washington	32	77,625	2,426	1,600	1,600	State
West Virginia	10	242,880	24,288	5,400	4,450	Federal
Wisconsin	23	110,045	4,785	5,550	3,820	Federal
Wyoming	8	33,156	4,145	4,625	4,250	State
National Median State Plan States	.....	.....	6,338	5,000	.....	.....
National Median Federal States	.....	.....	6,750	5,000	.....	.....
Total or National Average[4]	1,450	11,118,267	7,668	.....	.....	.....

[1] OSHA IMIS Fatality Inspection Reports, FY 2009. Report was issued on January 7, 2010.
[2] Median initial and median current penalties on FY 2009 fatality investigations provided by OSHA on April 14, 2010.
[3] Under the OSHAct, states may operate their own OSHA programs. Connecticut, Illinois, New Jersey and New York have state programs covering state and local employees only. Twenty-one states and one territory have state OSHA programs covering both public-and private-sector workers.
[4] National average is per fatality investigation for all federal OSHA and state OSHA plan states combined. Federal OSHA average is $8,152 per fatality investigation; state plan OSHA states average is $7,032 per fatality investigation.

COMPARISON OF ANTI–RETALIATION PROVISIONS

Statute	Statute of limitations	Preliminary reinstatement	Right to get hearing before ALJ or court
Federal Railroad Safety Act (amended 2007)	180 days	Yes	Yes
Consumer Product Safety Improvement Act (2008)	180 days	Yes	Yes
Surface Transportation Assistance Act (1982, amended 2007)	180 days	Yes	Yes
Aviation Investment And Reform Act (2000)	90 days	Yes	Yes
Sarbanes-Oxley (2002)	90 days	Yes	Yes
Patient Protection and Affordable Care Act (2010)	180 days	Yes	Yes
Clean Air Act (1977)	30 days	Yes	Yes
Mine Safety and Health Act (1977)	60 days	Yes	Yes
OSH Act (1970)	30 days	No	No

Chairman MILLER. Mr. Stewart, again, thank you. Mr. Roberts referred to your courage.

I made the statement at the end of the hearing in Beckley that this is an official oversight hearing, this is a continuation of our investigation, and that people ought to understand that any actions of intimidation are an action against obstructing the official duties of this congressional committee. But thank you very much for being here.

I was always mystified when I first started working in my home town. I grew up in a refinery town, and there used to be a big clock out in front, or a big calendar, and there were always accident-free

days. When I got inside the refinery over a number of years, working there in the summer and after school and different times, I was always amazed when you would see people get just crushed, and the next day I would look at the clock to see if it was up there that we lost a day here. And I would say, "What happened to that guy?" And they would say, "He is here, he is on site." They had him show up. They got him to the county hospital, and he is back on site, but he isn't on our team anymore because he can't walk or whatever.

So I always thought that was a little bit misleading, but I always look at it when I visit the different refineries, and they are still doing it. But thank you for being here.

It just amazes me, there is nothing corporations fear more than shareholders with power or workers with power. They just can't get over the idea that maybe—they keep talking about their obligation to the shareholders and their care for their workers, and yet they just don't want them to have any power, not even to be able to stop an unsafe workplace.

Mr. Grayson, let me ask you a question here. As I look through your data and your Safe Performance Index, when I look at the longwall mines, and I think there were 40 longwall mines, is this the universe of longwall mines? Are there more?

Mr. GRAYSON. Yes, sir, that is correct. There were 40 longwall mines that were active. There are two others in—and one that was not yet active.

Chairman MILLER. So of the active ones in 2009, a quarter of them essentially had no withdrawal orders at all during that calendar year.

Mr. GRAYSON. That is approximately correct, yes, about a quarter.

Chairman MILLER. And when you get down to number 22, before you get to six withdrawal orders.

Mr. GRAYSON. Number 22.

Chairman MILLER. I think it is 23. Shoal Creek, is it? You get down to Shoal Creek, which I think had five, and the next one has six. And then you get down to the bottom of this 40, and you get 56 withdrawal orders in one calendar year, and that is the Massey mine. So one thing, apparently it is possible to operate a mine without a withdrawal order.

Mr. GRAYSON. Oh, yeah.

Chairman MILLER. A quarter of them are doing that, and we are dealing with a substantially small number.

Mr. GRAYSON. Of all the 82 mines, 20 of 21 did not have an order of the top 25 percent. Of the top 25 percent mines, 21 of them out of 84 is what it was because there were two duplicate mines, but 20 out of 21 had no orders.

Chairman MILLER. And your Safe Performance Index is designed to provide intensity levels as to the seriousness of these various incidents; is that correct? I am oversimplifying, I am sorry.

Mr. GRAYSON. Yes. The two highest weighting factors are on severity measure, which includes the statutory charges for fatalities and disabilities. But the highest weight also goes to the orders.

Chairman MILLER. And you think that would help us, as opposed to the current Patterns of Violation, exactly how?

[The information follows:]

	A	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T
1	Safe Performance Index: Long Wall Mine Sample Calculation (Prepared by Larry Grayson)																
2																	
3		# Days Lost						Weight ==>	5%	15%	30%	5%	15%	30%		Norm	
4	Mine ID (LW= Long Wall)	Injuries	# Fatals	Empl Hrs	# Citations	# S&S	# Orders	Insp.Hrs	NDLIR	NFDLIR	$M/100	C/100 IH	$$/100 IH	O/1000 IH	PI	PI	SPI
5	LW-Deserado	801	0	343844	250	28	0	965.00	4.07	11.63	7.73	7.16	2.95	0.00	5.07	0.40	60.5
6	LW-San Juan 1	60	0	893530	160	37	0	1522.00	3.36	1.28	0.22	2.90	2.47	0.00	0.94	0.07	92.6
7	LW-Century	440	0	1134394	302	105	0	2777.00	3.35	3.78	1.29	3.00	3.84	0.00	1.85	0.14	85.6
8	LW-Bailey	6610	1	1930802	585	206	0	7263.25	3.11	2.07	11.35	2.22	2.88	0.00	4.42	0.34	65.5
9	LW-Cumberland	562	0	1762062	266	92	0	4344.50	4.77	3.08	1.06	1.69	2.15	0.00	1.42	0.11	88.9
10	LW-Mine 84	0	0	370524	47	16	0	2225.50	9.18	0.00	0.00	0.58	0.73	0.00	0.60	0.05	95.3
11	LW-Dugout Canyon	572	0	618,235	218	26	0	2,034	3.24	1.39	3.07	2.96	1.30	0.00	1.63	0.13	87.3
12	LW-Skyline No 3	148	0	482,319	80	12	0	1,065	0.41	0.59	1.02	2.08	1.14	0.00	0.69	0.05	94.6
13	LW-Mountain View	560	0	416,038	202	30	0	1,443	3.85	8.24	4.46	3.87	2.11	0.00	3.28	0.26	74.4
14	LW-Mountaineer II	1881	0	723,779	201	60	0	1,970	6.36	1.58	8.62	2.82	3.09	0.00	3.75	0.29	70.8
15	LW-Sufco	27	0	772,482	178	38	1	1,807	0.52	0.37	0.12	2.72	2.13	0.55	0.74	0.06	94.2
16	LW-N River No 1	6611	0	811,953	236	59	2	2,240	4.93	3.17	27.01	2.91	2.67	0.89	9.64	0.75	24.8
17	LW-Deer Creek	943	0	613,384	163	31	2	2,126	3.26	1.40	5.10	2.12	1.48	0.94	2.51	0.20	80.4
18	LW-Buchanan No 1	102	0	1,113,679	740	348	2	4,220	1.62	1.03	0.30	4.84	8.37	0.47	1.97	0.15	84.7
19	LW-Bridger	187	0	561,507	218	35	3	880	3.92	2.54	1.10	6.84	4.04	3.39	2.87	0.22	77.6
20	LW-JWR No 7	16098	1	1,837,646	398	114	4	3,947	4.68	5.29	29.06	2.79	2.93	1.01	10.63	0.83	17.1
21	LW-Powhatan No 6	1325	0	1,284,707	408	176	4	3,011	3.11	5.34	3.42	3.74	5.94	1.32	3.46	0.27	73.0
22	LW-Shoal Creek	1316	0	1,231,604	419	135	5	3,478	2.60	12.76	3.54	3.33	3.94	1.43	4.29	0.34	66.5
23	LW-Bull Mt No 1	17	0	348,666	211	33	5	1,132	4.02	0.82	0.16	5.15	2.96	4.40	2.39	0.19	81.3
24	LW-Enlow Fork	1001	0	1,615,516	306	153	5	4,794	1.61	3.01	2.06	1.76	3.24	1.04	2.03	0.16	84.1
25	LW-Federal No 2	721	0	1,069,558	389	109	6	3,692	2.06	6.68	2.24	2.91	3.00	1.62	2.86	0.22	77.7
26	LW-Justice No 1	4	0	312,246	272	131	7	1,680	5.12	0.92	0.04	4.47	7.92	4.15	3.06	0.24	76.1
27	LW-West Ridge	548	0	681,307	315	67	8	1,979	4.70	4.61	2.67	4.40	3.44	4.03	3.67	0.29	71.3
28	LW-Pinnacle	355	0	564,069	280	54	8	2,332	8.86	7.60	2.09	3.32	2.35	3.42	3.75	0.29	70.7
29	LW-West Elk	46	0	872,256	329	70	9	2,137	3.21	0.66	0.17	4.25	3.33	4.19	2.28	0.18	82.2
30	LW-Galatia	2443	0	2,101,777	912	225	9	4,262	4.76	4.76	3.86	5.91	5.36	2.10	3.84	0.30	70.0
31	LW-Robinson Run No 95	2517	0	1,303,942	647	216	9	3,880	1.38	2.19	6.40	4.61	5.65	2.31	4.09	0.32	68.1
32	LW-Elk Creek	471	0	683,546	273	36	10	1,869	0.88	5.85	2.29	4.03	1.96	5.33	3.70	0.29	71.1
33	LW-Mach No 1	418	0	414,021	355	71	10	1,636	12.56	6.21	3.35	6.00	4.41	6.09	5.35	0.42	58.2
34	LW-Shoemaker	264	0	1,015,515	566	189	10	3,680	1.77	1.97	0.86	4.25	5.21	2.71	2.45	0.19	80.9
35	LW-Bear Canyon No 4	155	0	100,307	135	26	12	529	5.98	8.55	5.13	7.05	4.99	22.58	10.99	0.86	14.2
36	LW-Blacksville No 2	464	0	1,232,279	738	205	14	4,641	5.19	3.25	1.25	4.39	4.48	3.00	2.91	0.23	77.2
37	LW-Loveridge No 22	498	0	1,313,323	758	276	15	4,448	2.89	2.18	1.26	4.71	6.30	3.36	3.04	0.24	76.3
38	LW-JWR No 4	863	0	1,219,648	429	180	17	3,191	3.28	6.33	2.35	3.71	5.73	5.31	4.45	0.35	65.2
39	LW-Oak Grove	549	0	698,526	531	170	18	3,478	4.87	6.14	2.61	4.22	4.96	5.15	4.45	0.35	65.3
40	LW-Emerald No 1	2323	0	1,508,306	400	168	19	4,560	4.38	6.44	5.11	2.42	3.74	4.15	4.64	0.36	63.7
41	LW-Bowie No 2	271	0	619,128	266	69	23	1,816	3.23	3.69	1.45	4.05	3.86	12.62	5.72	0.45	55.4
42	LW-Foidel Creek	616	0	1,263,827	619	99	35	2,622	3.80	4.52	1.62	6.52	3.83	13.30	6.24	0.49	51.3
43	LW-McElroy	1650	0	2,172,521	1059	434	48	5,412	2.95	2.63	2.52	5.41	8.14	8.83	5.44	0.42	57.5
44	LW-Upper Big Br South	286	0	482,132	517	202	56	1,848	6.22	5.33	1.97	7.73	11.10	30.18	12.81	1.00	0.0

Mr. GRAYSON. Well, on there, we are getting to the root of the problem that everyone has alluded to. And that is, it is a very serious thing to take away the opportunities for fatalities as well. So focusing on a mine that has high injury rates and/or high days that are lost is imperative to take care of that part of the safety culture. And then the other part of it is, of course—is the orders, which are the most severe, if you will, of the conditions that are being found and cited. And then S&S would follow after that.

Chairman MILLER. And so you think that would give a more accurate picture of what is going on in the mines overall.

Mr. GRAYSON. Yes, sir. I think we need both of those.

Chairman MILLER. Thank you.

Mr. Watzman, you said that you are concerned about this, or you oppose the provisions in this mine where operators pay miners their full wages if an operator closes an unsafe mine area in anticipation of a forthcoming MSHA closure order.

Mr. WATZMAN. Our concern there, Mr. Chairman, is that it will detract from operators taking preemptive action to address safety conditions in the mine.

Chairman MILLER. You have a list of operators that would not close an unsafe area if they had to pay the workers in that area?

Mr. WATZMAN. No. I think operators would close an unsafe area of the mine. In fact, they do that today.

Chairman MILLER. So then which is it? This is a problem or it isn't?

Mr. WATZMAN. It is a problem, Mr. Chairman.

Chairman MILLER. For what operators?

Mr. WATZMAN. You have to look at the totality of the legislation. I don't think the current staff——

Chairman MILLER. Well, let's look at this provision for a second. Is it a problem or isn't it a problem.

Mr. WATZMAN. I am going to speak to this provision if I could.

The current law sets limits on the period of time under which a miner must be paid when there is a safety violation when there is an order issued. It is defined in the statute. The legislation that you have introduced and is before the committee creates an open-ended situation where the operator doesn't always control the outcome of that situation. The operator has to work with the Federal Mine Safety and Health Administration to have that order lifted, and there are no controls we have over the actions of the Mine Safety and Health Administration. So during the pendency of our discussions with the agency, we have to continue to pay miners in perpetuity, and that is a problem for us.

Chairman MILLER. And the operator has the ability in a large mine to continue to mine coal, because that area may be closed, but not prevent the operation of the mine; but the worker who has been exposed to an unsafe work area, he just subsidizes that with his loss of wages.

Mr. WATZMAN. Well, that is not always the case, Mr. Chairman. It depends on how the order is written. The order may apply to a particular area of a mine or it may apply to its entirety.

Chairman MILLER. I understand that. I am making the point that the operator may not necessarily—the damage to the miner may be more severe than the damage to the operator here, but the miner may not have created the unsafe working condition.

Mr. WATZMAN. Well, I agree with you, but what we want to do is prevent the damage from either one——

Chairman MILLER. I would still like a list where that is a problem, where they might not close an unsafe area because they might have to pay workers. I would like to see the names of the individuals.

Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. Thanks again to our witnesses.

Mr. Stewart, I thank you. You gave very compelling testimony in West Virginia and you are here again today. You certainly outlined an unacceptable and untenable situation.

That brings me to Mr. Roberts' quote when he was talking about the 41 fatalities. I believe you said, sir, that "we have got to find out why," and I couldn't agree with you more. We have at least three investigations going on, and we do have to find out why.

Now, Professor Grayson, I want to thank you for your research in the development of the Safe Performance Index. I think that is very, very helpful to us. And I hope anything that goes forward as we continue to work with this legislation will include that. It really is very, very impressive work.

Mr. Watzman, I am going to sort of turn to you and Mr. Snare here for just a minute about section 403—I know I have to kind of dig around in here—403, the Underground Coal Miner Employment Standard. It says, "In general, an operator of an underground coal mine may not discharge or constructively discharge a miner who is paid on an hourly basis and employed in an underground coal mine without reasonable job-related grounds based on a failure to satisfactorily"—and so forth, that section of the bill.

This does appear to create a brand new employment standard, not for all mine workers, but just for underground coal operations. And that sort of raises the obvious question of why this provision singles out underground coal miners from protection while excluding all other workers in the mine industry.

But it really bothers me a little bit that this provision nullifies the at-will employment doctrine that is an important component of all of our Federal labor laws.

Do you have any comments about these provisions and what this may mean for mine operators?

Mr. WATZMAN. Mr. Kline, we share your concern as to the impact this has on the at-will employment doctrine. Quite honestly, we don't know why this is here. We don't see the necessity for creating a special category of protection for underground coal miners as opposed to the rest of the workforce. This is one that we hope over time to be able to have further discussion with the authors of the bill to understand the necessity, the need for this, and hopefully work with them to try to come to a resolution once we better understand the need.

Mr. KLINE. Okay. Thank you.

I had a follow-on question for Mr. Snare, but instead I am going to pick up on the Politico article that ran this morning, "Danger on the Hill," the one Dr. Price referred to. And the article says, "Workplace safety experts say that if Congress were a private sector business it would be at risk for a massive fine from government regulators."

My question is, under 5663, the language that we are looking at here, does it appear to you that OSHA would have the ability to shut down the entire congressional complex in order to achieve abatement if it were to apply to Congress?

Mr. SNARE. Well, Congressman Kline, I think your question really illustrates the problems and concerns generally that we have

raised with this particular bill. I mean, what is the way that is going to force Congress to address these particular issues? There were 6,300 hazards—I saw the same article—a quarter of which were involving life-threatening or potential fatalities. What is the best way at the end of the day to resolve those hazards and make the job site safer? It is to work in a cooperative spirit in some kind of way to set up a mechanism by which to resolve it cooperatively, or to come in with litigation, issue an immediate abatement order and essentially then put the onus to somehow try to shut down Congress.

You heard the questions from Congressman Price to Solicitor Smith as to who they are going to go after in terms of an officer or director. There are all sorts of problems with this. And again, it is a recipe for confusion in my judgment.

Mr. KLINE. Thank you. I am sure that there are probably millions of Americans who would applaud shutting down the entire complex, and maybe some of us on some given days. But it does raise sort of an interesting question if you look at this in the context of other businesses, you can shut down an entire complex over this.

Mr. Chairman, I know we are running out of time and we have some members who would still like to ask questions, so I will yield back the balance of my time.

I am sorry, did you have a comment.

Ms. RHINEHART. I was just hoping that I could just make a comment in response to both of your points.

Mr. KLINE. Absolutely.

Ms. RHINEHART. The first, in regard to the just cause provision that the legislation puts in place for underground coal miners and the fact that that changes the at-will employment situation, that is right. And Congress does that all the time when Congress decides that there is an important public policy reason behind that, when it decides that workers need be to protected in a different way than the at-will standard. So that is not unusual that Congress makes a determination——

Mr. KLINE. That doesn't necessarily mean it is right for this. That was my question to Mr. Snare.

Ms. RHINEHART. I wouldn't say it is right, but it is certainly not unprecedented. Congress does that all the time.

And in terms of OSHA shutting down Congress, the point in the legislation is to require employers to fix hazards, not to have OSHA shut down businesses. The point is on fixing the hazards. So the legislation applies——

Mr. KLINE. Well, thank you. If I can just interrupt for a minute. There is a provision, though, for shutting them down. So I realize that it is somewhat of an absurd example that was brought forth in Politico, but it does underscore the point that you can shut down a complex, and shutting down Congress is kind of another issue. I yield back.

Chairman MILLER. Ms. Woolsey.

Ms. WOOLSEY. So some of you will be pleased to know that the enlarged PAWA bill actually covers all public employees, so that would be the step before including congressional offices. While congressional offices are covered by national labor relations and all

other wage and hour laws now, so we can go the next step, and we will one of these days.

Mr. Snare, tell me, who is the coalition? What is it made of? Who are these people, by name, who actually believe—believe—that during bad economic times that our workers are expendable, that we don't need to protect them from hazards and death and poor working conditions? And also, part of it is that these workers, the coalition, do they believe that a 1900s-type of operation of mines is the way to take care of workers? I mean, who are these people? Can you give us a list of them?

Mr. SNARE. I am happy to, Congresswoman Woolsey, and also raise an issue with the premise of your question.

The Coalition for Workplace Safety—you can go to our Web site—is not mysterious. There is a wide variety of trade associations representing small businesses, large businesses. Examples would include the Chamber of Commerce, Associated Builders and Contractors, the Retail Industry Leaders Association. I could name you—there are probably 30 or 40, and I would be happy to supplement the list representing almost every business in America, both large and small. It is not just large corporations; it would probably be single proprietorships. And again, to the premise of your question as to how they regard workers, the Coalition for Workplace Safety——

Ms. WOOLSEY. Okay, fine. But do they know that you come here in front of us and say that during tough economic challenges, that you don't have to take care of your workers?

Mr. SNARE. That is not what I said, Congresswoman, either in my oral statement or in my written statement.

Ms. WOOLSEY. Well, you did. You said that if we do it right, that workers are going to lose their jobs.

Mr. SNARE. We are merely raising the issue of the costs for impact, Congresswoman.

Ms. WOOLSEY. Mr. Roberts, I have a question for you. For all of my understanding of things, why isn't every single miner a member of your union?

Mr. ROBERTS. I would be glad to support that legislation.

Ms. WOOLSEY. What are the operators doing that keep them from having—is something happening that keeps them from being able to unionize?

Mr. ROBERTS. I would, just by way of example, use the Upper Big Branch mine, if I might. Those miners had three attempts to join a union there. The first vote that was held there was a tied vote, and unions lose on all ties. But not only is the CEO of this company a violator of every health and safety law imaginable—and every environmental law, by the way, he has had some of the worst environmental situations in the history of mining—he is also a very willful violator of the labor laws in this country.

At the first vote at Upper Big Branch that ended up in a tie, he made it clear to those workers, your choice here is not whether you are union or not, your choice here is if you vote for the union, I am shutting this mine down. So he gave the workers a choice of having a job or not having a job. And we see that frequently, but very much so with this particular company that has had such a terrible health and safety record.

Ms. WOOLSEY. So, Mr. Stewart, "Goose," I would like you to speak to this question of mine.

Mr. STEWART. Okay. I was there during those organizing drives. And Mr. Roberts is correct. The CEO, Mr. Blankenship—he practically lived at that mine—had closed-door meetings with the employers—the union does not have that right. He would have diagrams and he would explain, here you get all these things from Massey, over here you get nothing from the union. He would make it look like they were going to starve if they voted a union in.

Plus they would give out extraordinary bonuses. They would take his men on trips to Dollywood, Busch Gardens, other places. I never participated, I want to make that clear. And he would threaten to shut the mine down. I would try to tell those guys, "He can't shut this mine down, that is not up to him," but they believed these things. And he would hammer into them day after day. And he would get enough of them convinced—because they would look up to him like a father figure is what I thought—and they would say, "Oh, he is right, he wouldn't lie to me." So he would sway enough votes to stop them from voting in the UMWA. So that is part of how an organizing drive works in the world of Massey.

Ms. WOOLSEY. I have used all my time. May I ask one more question?

Chairman MILLER. Finish your question.

Ms. WOOLSEY. All right, just quickly. So following the accident, do the workers still believe Mr. Blakenship is the good father?

Mr. STEWART. No, ma'am, I personally don't think so; at least a lot of them that did before don't. But I know for a fact, since the accident, they still blatantly flaunt the laws.

I know of one boy personally, he has already quit a Massey mine and went to a UMWA mine—there happens to be jobs available now. That hasn't always been the case. You either worked for them if you had a job or you didn't work. And so they abused that fear part. Yet this boy was getting low air ratings on the section in which he was working—same thing we got at UBB all the time—and he was told to put it in the fire boss book as correct, and he refused to do it. So he quit. He was able to secure another job.

But things like that, that is just another example of how they just blatantly flaunt the law.

Ms. WOOLSEY. Thank you so much for your honesty with us.

Chairman MILLER. Mr. Guthrie.

Mr. GUTHRIE. Thank you, Mr. Chairman. I will be real brief, and then I am going to yield real quick.

I think Ms. Rhinehart said $965 is the top fine for a fatality. And I agree, I think we need to look at that. But I also don't think that it was implied that businesses calculate $965 versus the life of somebody working when you put them in unsafe positions based on a low fine. I don't think businesses go out every day and try to put people into bad positions.

The other one is, Mr. Roberts, you said if you want to stop the lawbreakers—which is true, you just listed a whole set of laws that Massey, you said, has violated—which I am taking your word for it—and there are also 31 or 41 fatalities. So the questions we are really asking and we are trying to sort out here is, we have this incident that happened, it is a tragedy, where laws are on the

books not enforced; and if not, let's enforce those, because not only did this law look at this mine, it also expands other things at OSHA.

But I am going to yield to my friend from West Virginia because we are almost out of time.

Mrs. CAPITO. Thank you.

I would like to ask Mr. Grayson, in your testimony, you talked about we need to facilitate the creation of a safety culture of prevention of hazardous conditions. A safety culture being across the board, not just the operator, but the miners themselves, the enforcement, MSHA and others that enforce the laws.

From what you have heard today, we have had a lot of emphasis on Patterns of Violations and addressing how to create this culture of safety. In your opinion, does this bill adequately address the other issues; for instance, individual miner training of MSHA inspectors, and all the things that there have been some questions about that you probably use as your risk assessment as well?

Mr. GRAYSON. Honestly, I can't address that one, especially about the training MSHA inspectors. That is an internal problem, obviously, that they have to solve, and I think they probably will solve it, but that is kind of a distinct issue. And the culture it is looking at is building a culture of safety, but it is a preventive-type culture. And I do see this process of remediation, once you have been identified as a high-risk mine, building that kind of a culture over a period of four quarters, those valuation points.

Mrs. CAPITO. Thank you.

Mr. Roberts, Mr. Rahall asked an interesting question in the last panel about the inspection site of an explosion turning into like a police scene and excluding anybody except the inspectors who are on the team to actually do the investigations.

Now, you actually went into the Upper Big Branch mine. I would like to know, A, what you learned and your impression of what he posited out there? But the other thing, it has been kind of the topic of conversation in West Virginia, who should be participating in these inspections, who should be allowed in? What is your opinion on that?

Mr. ROBERTS. Well, I think you have two possibilities to look at there, Congresswoman Capito. One is what the

current law says, and whether or not we would want to go to something similar to what Congressman Rahall is suggesting.

The current law allows for the miners themselves to determine a representative. And it is over and above whether it is a union mine or non-union mine. The miners at Upper Big Branch after this explosion designated the UMWA to be their representative. The law allows us as their representative to be a full participant in this investigation, or at least we think the law says that, which clearly allows us to go underground with the Federal and State inspectors and do everything and anything that they are doing.

I was listed, by the way—it is one of the things that Mr. Blakenship failed to mention in his attack on allowing me to go underground. I would mention that I have had 39 years' experience in this business, been in probably as many coal mines as just about anybody has. So to suggest that Cecil Roberts shouldn't go in this mine, I was listed as one of the representatives when that was

given to MSHA, so I could be up there every day if I wanted to and go into this mine every day with the Federal and State inspectors.

And by the way, it was his idea to allow, as he called—I forget how he termed it—for others to go in this mine, he wanted to go. And then at the last minute his public relations people decided it was better to say we shouldn't allow anybody in the mine. He didn't go. Even his own people thought he was coming the day I was there.

So the law currently says that representative miners clearly can be a full participant in the investigation, which I took advantage of that. Whether or not we could ever get to the point where we could make this MSHA making the mine over, I think they actually have, I believe, the authority to do that if they elected to do it. But the problem they have is obvious, that they would have to bring people in there to run the ventilation, they would have to bring people in there to make sure the electricity was on—I am talking about the government would. That inhibits going to a police state. And that is the problem with that approach.

Mrs. CAPITO. Well, I think the bottom line for you and for me and everybody in this room is we want the answers, we want accurate answers to address this problem. So thank you very much.

Mr. GUTHRIE. Thank you, I yield back.

Chairman MILLER. Mr. Holt.

Mr. HOLT. Thank you, Mr. Chairman. And thank you again for holding these hearings.

Professor Grayson and Counsel Rhinehart, you have presented a very effective use of statistics. And Mr. Roberts, you bring the history of mining and mine regulation alive.

Thank you for excellent testimony. And your powerful story about the young yet not yet certified miner is a story everyone in this country should hear.

As someone who grew up in West Virginia and was raised with, from my earliest memory, admiration for the courage and the work ethic of miners, I have to tell you, Mr. Stewart, Goose, you are an embodiment of courage. Thank you for what you do, but especially thank you for what you have done today. Not easy, I am sure.

With that, let me yield any remaining time to my colleague from West Virginia, Mr. Rahall.

Mr. RAHALL. I thank the gentleman for yielding.

Let me just follow up and commend Mr. Stewart, as well, for your courage and taking the time, being with us today.

In your testimony, you said it so well. You said, "This bill must pass to keep coal companies honest or to make them pay the price for their unscrupulous behavior." Here is the most important line: "Partisanship needs to be set aside on this legislation because human lives are at stake."

You said that, Goose. Thank you for saying that. Because it is often a fear in this contentious election year that these efforts may morph into a political exercise, those harshly against it, knowing that they have the party of "no" in the other body to stop whatever may pass this body. And I hope that is not the case. We owe more to the miners who perished at UBB than to use this issue as any political talking point.

So I hope, Mr. Watzman, Mr. Roberts, UMWA and NMA will remain engaged with this committee, remain engaged with the staff of this committee who worked so long and hard on this bill, who have been on the scene, who were on the scene the morning after UBB happened, who have the knowledge, the expertise, have been around in the agencies and been around this Hill for decades. Let's put it that way.

I hope you will remain engaged with them, resist the inertia that too often comes in election years to retreat into partisan corners, or each Member offer their own proposal, pitting one Member's proposal against another. I hope we don't get into that. And I hope you will agree that you will help us do that work together.

I am not saying every point in this bill, every part of this bill is perfect. I am not saying that at all. But I do think it is the vehicle that we need to be engaged with. And I would hope all parties would allow us that opportunity.

Let me ask a specific question and allow both of you, since I mentioned your names, to comment on my initial point. But anyway, I appreciate the concern, especially you, Mr. Watzman, have about the good actor operates and not being penalized by the provisions of this particular bill.

But my question is, what about the good actors who are penalized when bad actors break the law, cut corners, and are allowed to get away with it?

I heard it this past weekend. I was at a mine site in my district this past weekend where safety violations are few and far between, and they are inspected by the same inspectors as the other guy where the disaster occurred, just down the road from the UBB.

So should we just be turning a blind eye to those bad actors who allow miners to die for the sake of their own competitive advantage in the market?

Mr. WATZMAN. Thank you, Congressman. And I think the short answer is absolutely not. We should not be turning a blind eye to that. The law should be enforced, and it should be enforced to its fullest extent. We shouldn't condone the actions of anybody who is intentionally violating the law.

It is a very strong law. The agency has the tools, and we encourage them to use those tools. Mine safety should not create a competitive advantage for one operator as opposed to another. That is something that we have never talked and argued for, nor will we ever. Mine safety should come first and foremost.

And to your earlier point, let me assure you that we will be engaged. We have met with your staff, we have met with the committee staff. I think we have had good, open, honest discussions about the legislation. My statement identifies areas where we think there are areas of agreement with some wordsmithing around the edges.

I mean, the pattern-of-violation system, as it currently exists, does not work for anybody. It doesn't work for the miners, it doesn't work for the mine operators, it doesn't work for the agency. It is not transparent. No one understands it. No one knows how you work your way through it, how you get off it.

So there are areas where we think that there can be agreement. And we pledge to work with you and the other members of this committee to reach that agreement.

Mr. RAHALL. Thank you.

Cecil?

Mr. ROBERTS. Well, you have our commitment, Congressman, to work to find acceptable resolution to any problems that might exist here.

But to answer your question about these operators who are cutting corners and putting their miners at risk, selling their coal cheaper into the marketplace, one of two things will happen here: Either the operators who are investing heavily in health and safety and protecting their workers and spending money on mine rescue and safety programs are going to have to quit spending that money to compete with these people over here, or we are going to raise these people up.

That is the choice that Congress faces here today, in my opinion: We are either going to have to bring these people up to this standard here, or everybody is going to fall right here. Because you can't ask people to try to stay in business, they won't be able to, so as long as more and more people are allowed to compete on this basis.

Mr. RAHALL. Mr. Snare, let me ask you one quick last question. Should any worker in the United States of America today have to put their life in jeopardy to earn a livelihood?

Mr. SNARE. No, Congressman.

Mr. RAHALL. Thank you.

Chairman MILLER. Mr. Altmire?

Mr. ALTMIRE. Thank you, Mr. Chairman.

Mr. Watzman, I talked during the first panel, you may have heard, about the regional enforcement with regard to MSHA. And I was wondering, in your experience, do you see a difference in the strength of enforcement among different regions?

Mr. WATZMAN. I don't think it is so much a question of the strength of enforcement. It is a difference in terms of application of the standards and how a particular inspector within a region or a field office supervisor or a district manager interprets the regulatory requirements, as opposed to those same individuals in a different region. I mean, you see variability across the MSHA districts, where one will have a very high S&S rate for the operations under their purview, and another one will have an S&S rate that is significantly lower.

So I think it is more an interpretive question. Many of these regulations are subjective. I mean, we don't work in a black-and-white environment; much of it is gradients of gray. And it is the interpretation of the individual as to whether or not a violative condition exists.

Mr. ALTMIRE. Thank you.

Professor Grayson, in your work with the commission that you chaired, what were your findings on that?

Mr. GRAYSON. We had 72 recommendations altogether, but the heart of entire document was that we need to build a culture of prevention and do everything right from top to bottom. Everybody in critical tasks must perform them well. Just like Mr. Stewart is saying. I mean, it has to be done.

Once you do that, your S&S citations, your order rates, your injuries all go down, and the productivity can be maintained.

Mr. ALTMIRE. Did you find—you talked earlier about the top performing mines.

Mr. GRAYSON. That was not part of that commission. All we did is look at the——

Mr. ALTMIRE. Well, I understand that. But in your experience, is there a regional cluster of top-performing mines? Is there a disparity that exists?

Mr. GRAYSON. I did not try to regionalize that. But, from the analysis I did do, it looked like—without doing the statistics on it, it looked like the western mines tended to be performing better in general, I mean, the top level.

Mr. ALTMIRE. Uh-huh. And was the reverse true anywhere in the country, where there was a region that had more work to do than others?

Mr. GRAYSON. As I recall, it probably was southern West Virginia, eastern Kentucky.

Mr. ALTMIRE. And I would ask Professor Grayson and then Mr. Watzman and any other panel members who may want to comment, do you believe that there is a relationship between profits and safety, so that if you are more or less safe as a mine, that that is going to inversely affect your profits?

Mr. GRAYSON. I have done a research study in the past and did not use profits but rather productivity, so tons per employee hour. And what we found in that study—and it was a pretty good-sized study—there was a direct negative correlation for higher productivity and lower severity measure in the large mines and very large mines. It wouldn't wash out statistically in medium-sized mines, 50 to 100. And in the small mines, as the productivity went up, the severity measure also went up. So, the more production, the less safe.

Mr. ALTMIRE. Mr. Watzman?

Mr. WATZMAN. Well, I think the age-old saying goes that a safe mine is a productive mine, and that is shown time and time again. Safety violations unfortunately have the potential to lead to accidents, which leads to shutdowns of the operation, whether it is the operation in its entirety or a particular portion of the mine. So I think that there is a general understanding that a productive mine is a safe mine.

Mr. ALTMIRE. Mr. Roberts, did you want to comment?

Mr. ROBERTS. I would tend to agree—well, in fact, I wouldn't tend to agree—I absolutely agree that you can look at some of the most profitable companies in this country, like CONSOL, for example, in your area. They have some of the most profitable coal mines in the United States of America. They invest heavily in health and safety. They have invested heavily in mine rescue teams. They have invested heavily in making their mines safe. And they are one of the most profitable companies in the country.

Mr. ALTMIRE. All right.

Anyone else on the panel? Ms. Rhinehart?

Ms. RHINEHART. I would just add that, in terms of the workplaces that are covered by the Occupational Safety and Health Act, that the same is true, that the good companies that invest in safety

have lower injury, illness, and fatality records and lower costs related to those injuries and fatalities relative to other workplaces. And so it is a good investment.

Mr. SNARE. Congressman, I can also, just again, just echo Ms. Rhinehart's comments. And during my tenure at the Labor Department, it was our understanding at the sites that I would visit, employers that I would visit, those who made the necessary investments in safety and health were also more productive.

The key is, how do you get to that point, and what are the best methodologies? Is it providing the necessary assistance so an employer understands their obligation? That is part of the debate we are having today.

But, again, I think the bottom-line premise to your question is, you know, a safe workplace is going to be a productive workplace, generally.

Mr. ALTMIRE. Professor Grayson?

Mr. GRAYSON. Yeah, one last comment, and that is relating to the study I described to you. The small mines, so 50 or fewer employees, tend not to have a resident safety person. They have someone who travels around. Whereas large mines have maybe multiple safety people. They tend to have inferior equipment rather than new equipment. They can't afford that, as well, either. And they tend to work in tougher conditions, and there is a general cultural difference, too, in those small mines from the large mines. Not all of them, but——

Mr. ALTMIRE. Thank you.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Mr. Kline?

Mr. KLINE. No questions. I just want to thank the witnesses.

Chairman MILLER. Thank you.

I want to thank you very much for coming here, but I would like to make a couple of—oh, excuse me. Mr. Holt?

Mr. HOLT. Thank you, Mr. Chairman.

I would like to ask Mr. Roberts, considering the importance—I mean, it is statistically clear that organized union mines are different in the numbers. I am wondering whether you think the whistleblower provisions of this legislation are good enough, considering that some mines, many miners are working in nonunionized conditions.

Mr. ROBERTS. Well, I am reminded of what Eleanor Roosevelt said in the 1930s after visiting a coal mine—she was in Wheeling, West Virginia, and went across the river to Ohio and went in a coal mine in the 1930s. She came out, and she said, "There are only two ways to protect miners in this country, and that is legislation or unionization. It is one of the two or both in combination."

I think that the whistleblower protections in this is a bold step forward by this Congress if they pass this legislation, and I think it goes a long ways. But there is still—there is a culture that exists also in certain parts, particularly southern West Virginia and in eastern Kentucky, that no one can protect you from Don Blankenship, the CEO of Massey.

Now, that is their fear. You may keep your job at a protector mine, but mines have finite lives, some 2 years, some 10 years,

some 20 years. But once that mine works out, even if you keep your job there, are you going to be hired by Massey at the next mine? The fear is you won't be, and that is the end of your career.

Mr. HOLT. Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Just on that point, Cecil, I think people say, well, why isn't this in this law? I mean, I appreciate the doctrine "at will." I don't know where the doctrine came from, but the fact of the matter is, if the doctrine "at will" puts you in danger, you may want to think about changing that doctrine.

And, Mr. Stewart, in your testimony, you said, "I worked along wall in dust so thick I couldn't see my hand in front of my face. I couldn't breathe because of the improper ventilation. I once went to the assistant coordinator and asked him why we didn't have proper air on the long wall face. I was told, 'It is funny, you are the only one to say anything about it.' My response was, 'That is because they are too afraid to lose their jobs to say anything.'"

Later in your testimony, you tell us that, "big outfits like Massey will always find way to fire you, regardless of the laws. That is why it is important to have the rights to challenge an unfair firing in an underground coal mine. With the union, you have that right. Without a union, the bills give the miners protection to fight firings that are not based on good cause."

So if the employers have it their way, you couldn't be fired in their mine for raising safety issues, but you could be fired for no reason. It is just a question of the time lag here. Nobody fires you on the spot.

Mr. STEWART. Right.

Chairman MILLER. They just catch up with you later. Another day, another week, another circumstance, a different part of the mine, you are gone. And everybody knows why you are gone.

Mr. STEWART. Exactly. And they use what they call "writing a man up," for little or nothing or things they normally wouldn't write. They write you up a couple times, they got their paperwork, and then the next time he is gone. And if he tries to fight it, they say, "Look, this man has been written up, he has not been performing properly, poor work performance," and he is gone, you know, regardless.

I mean, I seen them fire a guy—they went to the section, Chris Blanchard, in fact, and asked him questions. One question was how many buggies he had loaded. He was a miner operator, and a good one. The boy said he didn't know how many. I ran a miner; I never knew how many buggies I loaded. I don't try to count them. You are concentrating on your job. Anyway, he fired him, said "lack of interest in his job."

Chairman MILLER. That is quite possible.

But let me just say this. And I don't want Members to get too far away from what took place in Beckley. When you testified, you stunned not only the members of this committee and people who are pretty darn familiar with coal mining as to the discussions about retaliation and intimidation and about warning that the inspectors were coming on to the property.

But I just wanted for the record, again, recall for the members of the committee that your testimony was corroborated by Eddie

Cook, who was the uncle of Adam Morgan; by Gary Quarles, who was the father of Gary Wayne Quarles; of Alice Peters, who was the mother-in-law of Edward Dean Jones; of Steve Morgan, who was the father of Adam Morgan; and Clay Mullins, who was the brother of Rex Mullins—all who died in this accident, all who testified about the problems of intimidation and the fear in their relatives that died here about raising these safety issues with an outfit like Massey.

And so we ought not to forget that. The idea that somehow it is sacrosanct that Massey can fire anybody for no reason at all, that somehow that protects these miners, their families, is just blown away by this testimony. And I think it is important that we understand that.

And, Mr. Grayson, I want to thank you for your index. We looked at it very carefully. And we hope to some extent this legislation mirrors what you are trying to do and trying to point out.

Because with all due respect to the culture—I have been involved with British Petroleum for many, many years. When I was chair of the Resources Committee, my service on the Resources Committee—Mr. Rahall knows about this—I have had more executives come into my office over the many years telling me how they are going to change the culture, and then something blows up, somebody gets killed, a spill happens, all over the United States of America.

They can't change the culture because they really don't have any benchmarks. They don't know what is going on in that place. And plus, they have a problem: All they want to do is cut costs. Three independent commissions.

And so this idea that good actors—you know, it wasn't very, very long, not long at all, before the CEO of a major oil company, who is out there in deepwater, said, "We don't operate that way." I said, "Well, you had better differentiate yourself, because you are about to pay the price." And sure as hell, that is going on.

And so, with what this country saw unfold, they now want to know what is the safety factor, what is the culture, if you will.

Now, those operators are all telling us how BP operates, and it is not consistent, it is not consistent on costs, it is not consistent on reporting, it is not consistent on worker protection. They have brought me their posters and said, "Well, anybody can pull the switch at any time to shut this place down." Well, apparently they couldn't right before the BP accident, because they were afraid of losing their job, and jobs are hard to come by.

And so, it is easy to talk about, "Well, we are just going to improve the culture." These laws on the books, they didn't improve the culture of Mr. Massey's operation, Mr. Blankenship's operation at Massey. But yet we know when you change the laws, you can change behavior. Look at driving under the influence, look at seatbelts. Education, combined with rational penalties, penalties that people are fearful of, behavior changes.

So I think we have a good beginning with this draft of this legislation. And I want to thank you for your testimony. But these are critical issues, and these are critical issues that reflect a very complex and an inherently dangerous place. There is a reason why we address coal mines in this area.

But we look forward to continuing to work with you as we craft this legislation. We would like to move it soon. But we are certainly open—I have read all of your testimony before coming to this hearing, and I have a lot of underlines and a lot of questions. So we will pour through that.

Without objection, Members will have 14 days to submit additional material and questions for the hearing record, which I think I have another one on intimidation.

Thank you. The committee stands adjourned.

[Additional submissions of Mr. Miller follow:]

July 9, 2010.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER: The American Industrial Hygiene Association (AIHA) would like to take this opportunity to provide comments on your legislation, HR 5663, known as the "Miner Safety and Health Act of 2010. AIHA commends you and the cosponsors of this legislation for your continued interest in the health and safety of miners and workers in other workplaces, an issue that impacts every family in America. We are aware that any legislation amending the Mine Safety and Health Act and the Occupational Safety and Health Act will undergo considerable discussion. It is our hope that our comments will assist in these efforts.

AIHA is the premier association serving the needs of professionals involved in occupational and environmental health and safety. We represent members practicing industrial hygiene in industry, government, labor, academic institutions, and independent organizations. AIHA and our members are committed to protecting and improving worker health and safety, and the health, safety and well-being of everyone in our communities. One of AIHA's goals is to bring "sound science" and the benefit of our collective professional experience as practicing industrial hygienists to the public policy process directed at improving regulatory protections for worker health and safety.

It is unfortunate that one of the reasons for introduction of this legislation is the tragedy that occurred at the Upper Big Branch coal mine where 29 workers lost their lives. It is just as tragic that 11 workers were lost in the Deepwater Horizon oil rig explosion in the Gulf of Mexico and that just over 5,000 worker deaths are reported each year in the United States. The number of worker fatalities shows us the need to put our full attention and resources behind efforts to protect each and every worker.

AIHA is aware that the major focus of HR 5663 is to amend the Mine Safety and Health Act and provide major reform in response to serious health and safety concerns raised by miners and their families. As you stated "these reforms would provide stronger oversight to ensure that employers comply with the law, empower workers to speak up about safety concerns and give the Department of Labor the tools it needs to ensure that all workers go home safely at the end of the day".

While AIHA is supportive of your efforts to reform the Mine Safety and Health (MSH) Act, we are also pleased you have included within HR 5663 some of the major reform measures proposed for the Occupational Safety and Health (OSH) Act. Many of these reforms were found in HR 2067, the Protecting America's Worker Act. Introduction of HR 5663 is another in a long line of legislative measures that attempts to provide the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) with a fresh look at various issues.

With this in mind, AIHA would like to provide the following comments:

Reforms to the Mine Safety and Health Act

The responsibilities of AIHA members fall predominately under the rules and regulations of the Occupational Safety and Health Act, yet we have numerous members who work within the context of mine worker safety and health. In addition, AIHA members work to protect the safety and health of all workers, so our interest in proposals to reform the Mine Safety and Health Act is of importance.

In reviewing the mine reform provisions of HR 5663, AIHA offers our support for the following reforms to miner health and safety:

• Making Mines with Serious and Repeated Violations Safe—Criteria for 'pattern of violations' sanctions should be revamped to ensure that the nation's most dangerous mine operations improve safety dramatically.
• Ensuring Irresponsible Operators are Held Accountable—Maximum criminal and civil penalties should be increased and operators should be required to pay penalties in a timely manner.
• Giving MSHA Better Enforcement Tools—MSHA should be given the authority to subpoena documents and solicit testimony. The agency should be allowed to seek a court order to close a mine when there is a continuing threat to the health and safety of miners. MSHA should require more training of miners in unsafe mines.
• Protecting Miners Who Speak out on Unsafe Conditions—Protections for workers who speak out about unsafe conditions should be strengthened and should guarantee that miners wouldn't lose pay for safety-related closures. Miners should be provided protection from dismissal unless the employer has just cause. Miners should also receive protections allowing them to speak freely during investigations.
• Updating Mine Safety Standards to Prevent Explosions: Outdated standards need to be updated and new standards on issues such as combustible dust need to be considered. New monitoring technology needs to be promoted.
• Increasing MSHA's Accountability—MSHA must assure independent investigation of the most serious accidents, require that mine personnel are well qualified, and ensure that inspections are comprehensive and well targeted.

Title VII—HR 5663 Amendments to the Occupational Safety and Health Act

Over the course of the last fifteen years there have been numerous attempts to amend the Occupational Safety and Health Act. Other than a very few minor amendments, nearly every attempt ended in failure because of the inability of labor, industry and other stakeholders to reach an agreement on the kind of changes necessary and how best to make those changes. The result has been the continuation of an agency agenda that has become nearly impossible to complete. A lack of adequate funding, a shortage of personnel and a standard-setting process that many believe is "broken" has resulted in a view by most employees and employers, as well as occupational safety and health professionals, of an agency that was losing its focus in an attempt to protect workers. It is our hope that the proposed changes in HR 5663 will alter this view.

Inclusion of several reform proposals in HR 5663 is another in a long line of legislative measures that attempts to provide the agency with a fresh look at various issues. With this in mind, AIHA would like to provide several comments on the provisions of HR 5663 that would amend the Occupational Safety and Health Act.

SECTION 701. ENHANCED PROTECTION FROM RETALIATION

AIHA supports efforts to provide whistleblower protections to employees reporting any injury, illness, or unsafe condition to the employer. For those employees who report such conditions, employees should not face retaliation nor should an employee be required to perform any employer work if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of the employee or other employees.

SECTION 703. CORRECTION OF SERIOUS, WILLFUL, OR REPEATED VIOLATIONS PENDING CONTEST AND PROCEDURES FOR A STAY

AIHA supports efforts to protect workers by requiring correction of a hazard during such time that a citation for a serious, willful, or repeated violation has been filed yet is being contested by the employer.

However, for those employers who file a notice of contest of the citation and request a stay of correction of the hazard, AIHA supports language that would provide the employer with the means to demonstrate likelihood of success on its contest to the citation, the employer will suffer irreparable harm absent a stay, or a stay will adversely affect the health and safety of workers.

SECTION 705. CIVIL PENALTIES
SECTION 706. CRIMINAL PENALTIES

There continues to be much debate on whether or not civil and criminal penalties are adequate to deter health and safety violations. While most employers are "doing the right thing" with investment in healthy and safe workplaces, there are still too many who avoid this investment in their workers because they feel the investment is not worth the cost. It is these employers who must be educated about the benefits of providing a safe and healthy workplace, and if education does not affect their de-

cision-making behavior, they must be held accountable for making decisions that injure, kill, or sicken workers.

For many, the minimal penalties for health and safety violations are a small price to pay and do not affect their decision making. It's just a small cost of doing business.

Over the course of the last ten years, there have been numerous bipartisan legislative proposals to amend the OSH Act to increase the penalty provisions, both civil and criminal, for those who violate OSHA rules and regulations that result in serious injury or a workplace fatality. While these proposals have not made their way into law, it goes without saying that the sponsors of these measures all had the same goal—to assure the health and safety of every worker.

In a position statement and white paper first adopted by AIHA more than ten years ago, AIHA stated that "OSHA penalties, including criminal penalties, are woefully inadequate and should be at least as stringent as penalties for violations of environmental laws." AIHA's position on this issue has not changed over the years.

Amending the OSH Act to address the issue of civil and criminal penalties is long overdue. AIHA supports increasing the penalties for both civil and criminal penalties.

Civil Penalties. AIHA supports the increase in civil penalties as outlined in HR 5663.

In addition, AIHA supports language in HR 5663 that considers the employer's history of violations and would provide for additional monetary increases in civil penalties if a willful or repeated violation caused or contributed to the death of an employee.

Criminal Penalties. Under the "Protecting America's Worker Act" (PAWA, HR 2067), an employer could not be convicted under the criminal law unless that employer has acted "willfully" and such willful act caused the death or serious injury to a worker. This would require proof that an employer knew not only that its actions were wrong, but that they were unlawful as well. This "willful" standard is not a familiar one in the criminal law context and the norm is to require a "knowing" standard of proof in which an actor knows that his or her conduct was wrong. Under this standard, employers cannot escape liability by claiming that they did not know what the law required. Note: under either standard a prosecutor would still have to prove that an actor is guilty beyond a reasonable doubt.

AIHA is pleased that proposed language in HR 5663 would change a "willful" act to "any employer who knowingly violates". AIHA supports this change.

Another proposed change in HR 5663 as compared to PAWA would alter the definition of an employer who would be subject to criminal penalties from "any responsible corporate officer" to new language stating "any officer or director". Under current law, only a corporation or sole proprietor can be liable for criminal penalties. The language in HR 5663 broadens this definition so high-level officials (individuals) who act criminally can be prosecuted. This change clarifies that the criminal penalties can reach up to the higher levels of a company, providing that an officer or director who has engaged in criminal conduct that causes the death or serious injury to a worker can be prosecuted.

Finally, AIHA supports language that would increase a criminal penalty violation from a misdemeanor, resulting in minimal penalties, to a felony.

Consistent and substantial penalties are one of society's primary means to deliver some measure of justice and improve conditions that affect public health and worker health and safety. However, criminalizing willful violations through changes in the regulations must be carefully considered and applied. The standard of evidence for willful violations will have to be higher than it is today and OSHA and MSHA inspectors will need increased training and skill development to meet the level of evidence required.

AIHA supports OSHA's efforts to ensure compliance officers achieve professional certification as CIHs and CSPs. A similar effort is needed of MSHA inspectors. Establishing criminal violations needs to be based on the weight of evidence collected and evaluated by health and safety professionals using a variety of information sources, both quantitative and qualitative. It is essential that the regulatory process provide for carefully considering the complex conditions affecting risks in the workplace and the determination of risk at a given point in time.

Conclusion

AIHA applauds your efforts and sincerely hopes you will be successful in your endeavor to advance the cause of worker health and safety. We hope the input we have provided will be of benefit to you during the upcoming discussions and debate on MSHA and OSHA and the efforts to protect workers.

AIHA offers our full assistance to Congress, OSHA, MSHA, and others to deliver the standards, regulations, compliance assistance and enforcement necessary to help achieve our mutual goal to provide workers and communities a healthy and safe environment and the prevention of occupational disease and injury.

Should you require additional information about AIHA or if we can be of any further assistance to you, please contact me.

Sincerely,

MICHAEL T. BRANDT, DRPH, CIH, PMP,
AIHA President

APPALACHIAN CITIZENS' LAW CENTER, INC.,
Whitesburg, KY.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER: We are writing regarding the Miner Safety and Health Act of 2010. As attorneys at the Appalachian Citizens' Law Center we regularly advise and represent miners in the eastern Kentucky area on safety and health matters, including complaints of discrimination in retaliation for making safety complaints. We also represent miners on claims for black lung benefits. The proposed bill contains many substantial improvements to the present law. We overwhelmingly support the bill. However, there are a few areas where we would like to see improvements. In this letter we will specifically explain our support for certain provisions of the bill and ask for a few additional changes.

Independent Accident Investigations

Section 101(b)(2) of the bill requires an independent investigation of all mine accidents involving the death of three or more miners, conducted by team appointed by the Secretary of Health and Human Services and chaired by a NIOSH representative. The provision does not require public hearings; it leaves that decision to the hearing panel. For many years MSHA has had the authority to hold public hearings but it has not used that authority. We support this section and would like to see the panel directed to hold a hearing unless there is a compelling reason not to hold a public hearing.

Subpoena Authority

Section 102 explicitly grants to the Secretary power to issue subpoenas for the attendance and testimony of witnesses and the production of information. This provision is overdue as subpoena power is currently only available if a public hearing is called. For far too long accident investigations have been seriously hindered because investigators must rely upon voluntary interviews.

Designation of Miner Representative

We support extending the right to designate a miners' representative to relatives of trapped miners and to miners unable to work due to a mine accident. This is a sensible provision that protects the right to designate a miners' representative for miners that are trapped or injured. Miners in the most vulnerable situations shouldn't have to relinquish any of their rights under the Act because they are involved in a mine accident.

We also believe that Section 103 should require each mine to have non-management representatives of miners and that a miners' representative must travel with MSHA inspectors during each inspection. Upon being designated as the miners' representative, the individual miner should receive one hour additional training in miner's rights from MSHA.

Conflict of Interest in the Representation of Miners

We support amending current Section 103(a) to prohibit an attorney from representing or purporting to represent both an operator and any other individual during an inspection, investigation or litigation, unless the individual knowingly and voluntarily waives all actual conflicts of interest resulting from the representation. Too often an attorney will purport to represent both the operator and hourly miners without clear indication that the hourly miners have waived any conflict of interest that may exist. The result is miners can be advised and directed based upon the best interest of the operator rather than upon their own individual interest. Allowing this scenario to continue only invites miner intimidation during inspections, investigations and litigation under the Act.

Pattern of Recurring Noncompliance or Accidents

We support the overhaul of the Pattern of Violations provision in the Mine Act. In response to the Scotia Mine Disaster in Letcher County, Kentucky, which killed 23 miners and 3 mine inspectors in 1976, Congress sought to address chronic and repeat violators and prevent operators from continually piling up citations for dangerous conditions. The result was section 104(e) of the Mine Act which substantially increased the penalties for any operator that has a "pattern of violations."[1] The Legislative history reveals that Congress believed the "pattern of violations" provision would be a strong enforcement tool to go after the worst violators:

Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster. * * * That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.[2]

They also believed it would send a strong signal:

The Committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The Committee views the [104(e)(1)] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.[3] (emphasis added).

Finally, they felt the provision provided flexibility, so a rigid standard wouldn't constrain the agency's use of the provision:

It is the Committee's intention to grant the Secretary in Section [104(e)(4)] broad discretion in establishing criteria for determining when a pattern of violations exists. * * * The Committee intends that the criteria make clear that a pattern may be established by violations of different standards, as well as by violations of a particular standards. Moreover * * * pattern does not necessarily mean a prescribed number of violations of predetermined standards. * * * As experience with this provision increases, the Secretary may find it necessary to modify the criteria, and the Committee intends that the Secretary continually evaluate the criteria, for this purpose.

Yet, thirty-three (33) years and more than a dozen mine disasters later, MSHA apparently has never issued a "pattern of violations" under the Mine Act. Thus, we support the proposed changes to the "Pattern" provision. We believe that requiring a remediation plan, quarterly benchmarks, added inspections, training, and reporting is a logical and fair framework for both holding chronic violators accountable and significantly improving health and safety conditions in these problem mines.

Injunctive Authority

We support allowing the Secretary to seek injunctive relief for "a course of conduct that in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners, including violations of this Act or of mandatory health and safety standards or regulations under this Act." This provision can be used to stop an operator from allowing conditions to continuously deteriorate and close a mine before a mine disaster occurs. For example, the proposed provision might prevent a mine disaster like the one at Scotia, where the mine operated with continuing hazards that eventually led to two explosions and 26 deaths. Under the proposed provision, an injunction could be sought and granted in such a case, and miners could be withdrawn from the mine.

Civil Penalties

We support the increased civil penalties, including increased penalties for "Pattern" violators and for retaliation. These increases will help discourage repeated violations and discourage retaliation against miners that engage in protected activity. As the Senate Committee noted in 1977, "the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance with the law. * * * To be successful in the objective of including effective and meaningful compli-

ance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."[4]

Criminal Penalties

We support the increases in current criminal penalties in Section 303. For far too long, no genuine deterrent was available for those that knowingly engage in conduct that results in serious safety or health violations and endangers miners. Additionally, we welcome the new criminal penalty in 303(b) for those who retaliate against informants as a significant deterrent against such actions. In turn, this will empower miners to raise safety and health issues at their mines with a decreased fear of reprisal.

However, we implore that in addition to representatives of the Secretary and law enforcement officers, it should also be illegal in 303(b) to retaliate against a person for providing information to a State agency charged with administering State laws relating to coal mine health and safety. This prevents, for example, the inconsistency of criminalizing retaliation against a miner for providing information to a federal mining inspector but not to a state mining inspector. Finally, we fully support the criminal penalties in Section 303 (c)(1) for giving an advance notice of an inspection. Our office often hears from miners about companies that avoid citations on the working section because they receive advance notice that an inspector is on the mine property and are then able to stop production and/or rectify illegal conditions before the inspector arrives.

Withdrawal Orders Following Failure to Pay

We emphatically support proposed Section 110(l)(2), which allows the Secretary to issue a withdrawal order to mines that do not pay their civil penalties within 180 days. As the Senate Committee noted in 1977, "to be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency."[5]

Our office produced a study in 2006 detailing the staggering number of unpaid fines in Kentucky.[6] We found:

In a review of underground coal mines in Kentucky, MSHA has allowed mines to operate unimpeded for years while accumulating millions of dollars in unpaid fines. Of Kentucky's 297 underground coal mines that MSHA lists in some stage of activity, or not "abandoned," ninety-seven, or approximately one-third, have years in which they paid little to none of the fines MSHA imposed. In the years reviewed since 1995, these mines have over 18,000 unpaid citations (over 8,000 of which were "significant and substantial") totaling over $4.1 million in unpaid fines. Fourteen mines have paid only 10 to 35 percent of MSHA's penalties. Thirty mines have paid less than 10 percent of the fines due and the remaining fifty-three mines have paid nothing.

Proposed Section 110(l)(2) would put an end to what has been essentially a voluntary system of fine payment and collection. No longer would undercapitalized operations be allowed to operate for years and eventually close without ever paying any of their delinquent fines. These operations have boldly ignored the law and rendered meaningless one of the most important enforcement tools for ensuring the safety of America's miners.

Protection from Retaliation

Section 401 amends Section 105(c), adding to current protections for miners from retaliation. We enthusiastically support many of the additional protections including more time in which to file a complaint, a more sensible burden of proof for the miner, and logically allowing a miner to recoup his costs and expenses if he prevails in his claim. Too often, miners are unaware of the current statutory filing period and it expires before they file their claim.[7] A 180-day filing period is reasonable and would prevent the dismissal of otherwise valid discrimination claims.

However, we are concerned that the proposed Section 105(c) as written would not protect miners from retaliation in cases where an operator mistakenly believes that the miner filed a complaint or engaged in protected activity. The Federal Mine Safety and Health Review Commission ("Commission") has long held that adverse action taken against a miner because of the mistaken suspicion or belief that the miner had engaged in protected activity nonetheless violates §105(c). Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (1982). This protection should continue in any new mine safety legislation.

We support the proposed Section 105(c)(B), which would codify long-standing Commission precedent that protects a miner from discharge or other forms of discrimination for refusing to perform a job assignment that the miner reasonably and in good faith believes to be unsafe. Gilbert v. Federal Mine Safety & Health Review

Commission, 866 F.2d 1433 (D.C. Cir. 1989); Simpson v. Federal Mine Safety & Health Review Commission, 842 F.2d 453 (D.C. Cir. 1988); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., supra; Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

The Commission has previously explained the meaning and purpose of the good faith requirement as follows:

"Good faith belief simply means honest belief that a hazard exists. The basic purpose of this requirement is to remove from the Act's protection work refusals involving fraud or other forms of deception [such as] lying about the existence of an alleged hazard, deliberately causing one, or otherwise acting in bad fath * * *" Robinette at 810.

The burden of proving good faith rests with the complaining miner. However, the miner need not demonstrate an absence of bad faith. Gilbert v. Federal Mine Safety & Health Review Commission, supra; Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983). In considering whether a miner's fear was reasonable, the perception of a safety hazard must be viewed from the miner's perspective at the time of the work refusal. Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

To be accorded the protection of the Act, the miner need not objectively prove that an actual hazard existed. Secretary of Labor on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (1986); Secretary of Labor on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516 (1984); Liggett Industries, Inc. v. Federal Mine Safety & Health Review Commission, 923 F.2d 150 (10th Cir. 1991). Nor must the miner prove a violation of a mandatory safety standard. Secretary of Labor on behalf of Robinette v. United Castle Coal Co., supra. In fact, the Commission has stressed that the miner's perception of a safety hazard need only be a reasonable one:

"[T]he 'reasonable person' standard * * * lends itself to the interpretation that there is only one reasonable perception of any given hazard -that of the 'reasonable person'. But the reasonable person is never there. Clearly reasonable minds can differ, particularly in a mine setting where conditions for observation and reaction will not be clinically aseptic." Robinette at 812, n.15.

When reasonably possible, a miner refusing unsafe work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue. Simpson v. Federal Mine Safety & Health Review Commission, supra; Gilbert v. Federal Mine Safety & Health Review Commission, supra; Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co., supra.[8]

The Commission has emphasized that it's "purpose is promoting safety, and [it] will evaluate communication issues in a common sense, not legalistic, manner. Simple, brief communication will suffice * * *" Secretary of Labor on behalf of Dunmire & Estle at 134. According to the Commission, the key to evaluating communication issues is what the "plain meaning of [the words] would convey to any reasonable miner". Id.[9]

Pre-Shift Review of Mine Conditions

We support amending Section 303(d) of the Act to direct implementation of a program to ensure that every miner entering the mine is made aware of the current conditions of the mine, including hazardous conditions, health or safety violations, and the general conditions of the miner's assigned working area. Our office hears complaints from miners that hazardous conditions are too frequently not communicated to the oncoming shift of miners entering the mine. We also support the verbal communication requirement to the oncoming agent (e.g. mine foremen or mine examiners) of the mine's condition, including hazardous conditions or violations of the Act. Although this should be standard practice at every mine, miners still lose their lives due to a lack of communication, between shifts, of hazardous conditions in the mine.

Technology Related to Respirable Dust

Section 504 of the bill requires the Secretary to promulgate regulations within two years, requiring operators "to provide coal miners with the maximum feasible protection from respirable dust, including coal and silica dust, through environmental controls." We are concerned that this section is vague and unenforceable. The words "maximum feasible" are subject to a fact-intensive determination. We prefer an objective standard.

Black lung is not a disease of the past; it continues to be a serious problem for miners. It causes disability and death. The disease is also latent and progressive.

The harmful dust is minute and may be invisible. Consequently younger miners may not believe that are endangering their health when they work in excessive dust. Black lung is also preventable—if the excessive respirable dust is eliminated the disease will be eliminated. X-ray surveillance is showing an increase in simple coal workers' pneumoconiosis and in progressive massive fibrosis. In 1995 NIOSH issued a Recommended Standard advising the respirable dust limits in coal mines be reduced to 1 mg/cubic meter. This bill should require nothing less than the 1995 Recommended Standard. We suggest that the language be changed and that within one year after enactment the Secretary be required to promulgate final regulations that require operators to reduce respirable dust to no more than 1 mg/cubic meter and to further require that operators provide coal miners with the maximum feasible protection from respirable dust.

Refresher Training on Miner Rights and Responsibilities

Section 505 adds an hour of miners' rights training to the yearly refresher training already required. This is certainly welcomed and long overdue. Congress envisioned a robust program to train the nation's miners in the duties of their occupations, which includes thorough training of miners as to their statutory rights. But, the present program has systemic shortcomings.[10] The result is that a large number of miners do not have a thorough understanding of their statutory rights and as a consequence they are unable to exercise such rights.

Training miners as to their statutory rights is an integral part of the Mine Act's requirements for health and safety training. For example, for new underground miners:

Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned.[11] (emphasis added).

Similarly, for new surface miners, Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned.[12] (emphasis added).

However, the Mine Act did not require miners' rights training during miners' annual refresher training. Thus, MSHA requires statutory rights training primarily only for new miners. This obviously presents a problem, because even if new miners received the most dynamic statutory rights training, such knowledge fades over time. A miner may not need to exercise his or her statutory rights until several years into a mining career. At that juncture, if such miners have had relevant training only at the outset of their careers, they often do not know their statutory rights well and cannot protect themselves. An obvious solution to this dilemma is to require statutory rights training in annual refresher training. Thankfully, the proposed amendment to Section 115(a)(3) cures this significant failure to require any follow-up miners' rights training by requiring it during annual refresher training.

In passing the Mine Act, Congress realized that miners must play a crucial role in maintaining a safe and healthy workplace:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.[13]

Because miners know the day-to-day work conditions as well as or better than anyone, obviously they should be encouraged to insist on maintaining a safe and healthy workplace. They are in a unique position to monitor workplace conditions when inspectors are absent. However, in our experience many miners do not know that they can, under the law, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators without retaliation. Many miners do not realize that they may designate a representative to perform numerous functions under the Mine Act, and that such a representative need not necessarily be affiliated with a labor union.

We also applaud the proposed change in the methods by which miners receive statutory rights training. Operators and management personnel should not be permitted to provide any of the required statutory rights training to miners. There is simply too great a conflict of interest to permit mine operators to conduct statutory

rights training. Operators have incentive to downplay the expansiveness and importance of these rights, the key role which Congress envisioned miners playing in regulation of the workplace, and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Instead, miners should receive statutory rights training only from trainers who are independent of mine operators and Section 505 provides this necessary independence.

The additional training is necessary to inform miners of their statutory rights under the Act, which include, but are not limited to:

Protection against discrimination for exercising any rights under the Mine Act How-to's of naming a miners' representative for the various functions a representative can serve under the Mine Act and its implementing regulations

Participation in inspections Reporting and notifying inspectors of violations and imminent dangers, and requesting inspections

Pay for being idled by withdrawal order Contesting enforcement actions Participation in investigations where dangerous conditions cannot be corrected with existing technology

Review of imminent danger orders Participation in cases before Federal Mine Safety Health Review Commission that affect the miner

Part 48 training rights, including:

- Training during working hours
- Pay while receiving training
- Receiving training records from operator
- Protection from discrimination and loss of pay for lack of training
- Review of all types of Part 48 training plans

Free examinations to ascertain exposure to toxic materials or harmful agents Request of Department of Health and Human Services to study/research substance in mine environment for toxicity, or whether physical agents/equipment within mine are dangerous

Availability of chest x-rays free of charge, including explanation of intervals when such x-rays are to be made available

Transfer to less dusty atmosphere upon black lung diagnosis Review and comment upon/objection to proposed standards, including legal challenges to proposed standards

Request to modify application of a certain safety standard at a mine, and participation in MSHA's decision when operator requests such a modification

Right to access information (recordings, findings, reports, citations, notices, orders, etc.) within MSHA and Department of Health and Human Resources

Observation of operator's monitoring of miner's exposure to toxics and other harmful agents, and access to records of exposure and information about operator abatement in cases of overexposure

Access to operator's accident records and reports Notice of MSHA proposed civil penalty levied against operator Operator posting of MSHA orders, citations, notices, etc., as well as receipt of same by miners' representative

Review of roof control plan and instruction in revision to such plan Review of mine map illustrating roof falls Notification of and instruction on escape from area where ground failure prevents travel out of the section through the tailgate side of a longwall section

Review of records of examinations and reports (pre-shift examinations, weekly examinations for hazardous conditions, weekly ventilation examinations, daily reports of mine foremen and assistant mine foremen)

Review of records of electrical examinations and maps showing stationary electrical installations

Review of underground mine maps

Operator's notification of submission of new ventilation plan or revision to existing ventilation plan, review of existing ventilation plan, comment upon proposed ventilation plan and any proposed revisions, and instruction from operator on ventilation plan's provisions

Review of records of examination of main mine fan Review of records of examination of methane monitors Review of records of torque/tension tests for roof bolts Review of records of tests of ATRS roof support/structural capacity Special instruction when rehabilitating areas with unsupported roof Operator posting of escapeway maps and notification of changes to escapeways Participation in escapeway drills Posting and explanation of procedures to follow when mining into inaccessible areas Review of records of diesel equipment fire suppression systems, fuel transportation units, and underground fuel storage facilities, as well as records of maintenance of diesel equipment and training records of those operating diesel equipment

Review and comment upon emergency response plans Any other rights set forth in either statute or regulation

This additional training will highlight to miners that they are expected to exercise their statutory rights. A more informed and empowered miner workforce would decrease the odds that conditions in a mine could deteriorate to the point that a mine disaster could occur.

Authority to Mandate Additional Training

We support amending Section 115 of the Act to allow the Secretary to order additional training if a serious or fatal accident has occurred at the mine, the mine's accident and injury rates, citations or withdrawal orders are above average and if it would benefit the health and safety of miners at the mine. This is a common sense provision that allows training to be mandated when safety or health deficiencies have been proven at the mine.

Black Lung Medical Reports

Section 603 is a needed addition to the black lung benefits claims practice. Coal mine operators who are named as the responsible operator on a black lung claim (and the operator's insurance carrier) by law are allowed to require the miner to submit to two pulmonary evaluations performed by doctors of the operator's choosing. Such evaluations typically consist of obtaining a patient history, conducting a physical examination, and obtaining a pulmonary function test, an x-ray and an arterial blood gas test. In some cases operators defending against a claim have sent miners to be evaluated and have either not obtained a written report from the examining physician (after no doubt being informed verbally and deciding for litigation reasons not to have the report submitted in writing) or have obtained a report but not provided the complete report to the miner. The miner should be informed as to the complete results of the evaluation and the diagnoses and conclusions of the examining physician.

Thank you for your consideration of our comments. If we can answer any questions or provide further information please contact us. We truly appreciate your efforts on behalf of working and disabled miners and their families.

Sincerely,

STEPHEN A. SANDERS, *Deputy Director,*
Appalachian Citizens' Law Center.

ENDNOTES

[1] 30 U.S.C. § 814(e).
[2] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).
[3] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).
[4] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).
[5] S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977).
[6] We have attached a copy of the study to this letter. See "U.S. is Reducing Safety Penalties for Mine Flaws," The New York Times, March 2, 2006, pg. A1.
[7] For example, a 180 day filing period would avoid a situation like in Fulmer v. Mettiki Coal Corp, where the miner's claim was dismissed although he asserted that he visited MSHA within 60 days, but was not informed of the time limit for filing. Disturbingly in this case, further appointments with MSHA were rescheduled until Fulmer was finally asked if his discrimination investigation could be "put off until after hunting season and the holidays." See *http://www.fmshrc.gov/decisions/alj/yk2007-52.pdf.*
[8] The Commission has stated that "[i]f possible, the communication should ordinarily be made before the work refusal, but depending on circumstances, may also be made reasonably soon after the refusal". Northern Coal Co. at 133.
[9] Even where it is reasonably possible for the miner to communicate his safety concerns to the operator, unusual circumstances -such as futility -may excuse a failure to communicate. Northern Coal Co. at 133; Simpson at 459-460.
[10] The portion of our letter regarding miners' rights training was a part of a Petition for Rulemaking submitted to MSHA in 2008. We asked MSHA to increase the frequency and quality of miners' rights training as they are able under their rulemaking authority. MSHA denied the Petition in full. For example, in response to a request that all miners be provided with a copy of MSHA's "A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977," the agency stated that the handbook "is available to miners on MSHA's website." April 8, 2008 Letter from Acting Assistant Secretary, Richard E. Stickler. Anyone who had ever viewed MSHA's complicated website would understand that this was essentially nonresponsive. As of today's letter, access to information on miners' rights isn't noted on MSHA's homepage, despite the inclusion of over 130 other topic headings.
[11] 30 U.S.C. § 825(a)(1).
[12] 30 U.S.C. § 825(a)(2).
[13] S. Rep. No. 95-181, 95Cong. 1st Sess. 36 (1977)

FOR IMMEDIATE RELEASE: *January 26, 2006.*

MSHA Fails to Collect Millions in Fines

SCORES OF KENTUCKY UNDERGROUND COAL MINES IGNORE CIVIL PENALTIES

By WES ADDINGTON

David G. Dye, the acting administrator of the Mine Safety and Health Administration (MSHA), testified before the U.S. Senate Subcommittee on Labor, Health and Human Services, and Education on Monday, January 23, 2005. Dye subsequently walked out of the hearing despite Sen. Arlen Specter's request for him to stay to listen to additional testimony and answer follow-up questions.

During the hearing, Dye noted that from 2000 to 2005, total citations and orders at coal mines increased by 18 percent and "significant and substantial" citations and orders increased by 11 percent. A "significant and substantial" violation is one that is reasonably likely to result in a serious injury. MSHA issued a press release following the hearing trumpeting Dye's comments about "MSHA's aggressive enforcement record."

However, issuing citations is only half of the enforcement procedure under federal law. The system of penalty assessment and collection is the other half. Federal regulations instruct that any mine that violates a mandatory health or safety regulation "shall be assessed a civil penalty." The regulations further explain that the purpose of these fines is not as punishment, but "to maximize the incentives for mine operators to prevent and correct hazardous conditions." Additionally, a purpose of the civil penalty regulations is "to assure the prompt and efficient processing and collection of penalties."

In a review of underground coal mines in Kentucky, MSHA has allowed mines to operate unimpeded for years while accumulating millions of dollars in unpaid fines. Of Kentucky's 297 underground coal mines that MSHA lists in some stage of activity, or not "abandoned," ninety-seven, or approximately one-third, have years in which they paid little to none of the fines MSHA imposed.* In the years reviewed since 1995, these mines have over 18,000 unpaid citations (over 8,000 of which were "significant and substantial") totaling over $4.1 million in unpaid fines. Fourteen mines have paid only 10 to 35 percent of MSHA's penalties. Thirty mines have paid less than 10 percent of the fines due and the remaining fifty-three mines have paid nothing.

[A1] In order to tout an "aggressive enforcement record," MSHA must collect fines on unpaid citations. Congress has long agreed. In their 1977 report leading to the passage of the current Federal Mine Safety and Health Act, the United States Senate "firmly believe[d] that the civil penalty is one of the most effective mechanisms for insuring lasting and meaningful compliance [A2][A3][A4][A5] with the law." The Senate was "disturbed" by the lax enforcement of the civil penalty system and concluded that "the assessment and [collection of] civil penalties * * * have resulted in penalties which are much too low, and paid much too long after the underlying violation to effectively induce meaningful operator compliance."

Unfortunately, nearly thirty years after the Senate's report and the 1977 Act, the payment of fines assessed by MSHA is still essentially voluntary. Otherwise, Kentucky coal mines would not be allowed to operate year after year, accumulating hundreds of unpaid "significant and substantial" citations. This problem is compounded because Kentucky mine safety regulators do not currently levy fines in conjunction with citations issued at the state level.

The Senate was correct. In order "to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." Allowing penalty assessments to remain unpaid for over a decade is not reasonable. It's unacceptable.

MSHA's failure to enforce their penalties for safety violations not only endangers coal miners, but their own personnel. MSHA inspectors not only have to inspect the nation's safest mines, but also the nation's most dangerous ones. It's a thankless job. Every day, inspectors travel underground to spot unsafe conditions and issue citations and orders, and in turn, save miners' lives. Yet, after all of the work and risk from inspectors in each district office, MSHA Headquarters in Arlington, Va., allows thousands of citations to go unpaid. It's a slap in the face to coal miners and coal mine inspectors, not an "aggressive enforcement record."

• Because of the sheer volume of unpaid citations I encountered, only Kentucky underground coal mines that are currently listed as "active," "temporarily idled," "intermittent," currently "non-producing," or "new mine" were reviewed. There are

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also over 300 surface or "strip" mines and 150 coal facilities in Kentucky currently in these five stages that were not reviewed.

Over 12,000 Kentucky mines are currently listed as abandoned and were not reviewed. Some of these mines are truly abandoned but others could reopen at anytime. For example, an underground mine that has never paid any civil penalties, was operating in 2005, changed ownership, and is currently listed as abandoned.

This review did not take into account other states' coal mines, nor any of the non-coal mines that MSHA regulates in their metal/non-metal division. Currently there are 141 non-coal mines operating in Kentucky.

The review's sample only included mines that had a year or years in which they paid little or none of MSHA's fines. Thus, this is not an exhaustive review of unpaid citations in Kentucky's underground mines. Finally, MSHA's online Data Retrieval System only lists citations since 1995.

Building and Construction Trades Department

AMERICAN FEDERATION OF LABOR—CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 SIXTEENTH ST., N.W., SUITE 600 • WASHINGTON, D.C. 20006-4104

(202) 347-1461 www.BCTD.org FAX (202) 628-0724

July 13, 2010

The Honorable George Miller, Chairman
Committee on Education & Labor
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Miller:

On behalf of the Building and Construction Trades Department AFL-CIO, its 13 affiliated unions and their 2.5 million members, we urge you to support the Miner Safety and Health Act HR 5663 and seek its immediate consideration by the Congress.

The recent tragedies at the Big Branch Mine in West Virginia and the Deepwater Horizon oil rig in the Gulf serve to underscore the need for stronger and more rigorous enforcement of safety and health laws governing both the mining and general industry sectors of the economy. Unsafe workplaces whether in mining, construction, manufacturing, transportation, agriculture or service industries are taking an unacceptable toll on the lives of American workers.

Despite improvements in workplace safety and health, some 15 American workers die each day from injuries sustained at work, and 134 die from work-related diseases. Of those killed every day, nearly 4 work in the construction industry. Indeed, construction has the dubious distinction of being the single most hazardous industry in the United States accounting for some 1,200-construction workers killed on the job each year.

H.R. 5663 not only provides for a wide range of necessary enforcement and worker rights improvements in the Mine Safety & Health Act of 1977, but also includes important provisions to strengthen enforcement and worker rights under the Occupational Safety and Health Act.

Specifically, the OSHA provisions strengthen whistleblower protections, increases criminal penalties where workers are killed due to a safety violation, updates civil penalties that have not been increased since 1990, prevents litigation from delaying the correction of safety & health hazards, and provides greater rights for victims of accidents and their family members to participate in proceedings under the OSHA Act.

Given the shortened legislative calendar for this Congress, we believe that a single bill addressing both MSHA and OSHA enforcement issues is an appropriate legislative response to the on going safety & health crisis in the American workplace. We therefore, urge you to support HR 5663 and its expeditious consideration.

Sincerely,

Mark Ayers
President

cc: United States House of Representatives

International Brotherhood of
Boilermakers – Iron Ship Builders
Blacksmiths – Forgers & Helpers
Local Lodge # S8
540 N Commercial St. Suite #101
Harrisburg, IL 62946
Phone: (618)252-8500 Fax (618)252-8544

President: Greg Fort
Vice President: Rodney Shires
Secretary Treasurer: Keith Clayton
Recording Secretary: Dan Bradley

July 11, 2010

Richard D. Miller
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn Building
Washington, DC 20515

Dear Mr. Miller,

I apologize about not getting this letter to you earlier unfortunately we had a fatality at the Willow Lake Mine on July 16, 2010 and I have been involved with the investigation. The Officers of the International Brotherhood of Boilermakers Local S-8 which represents approximately four hundred and fifty coal miners at Peabody's Willow Lake Mine in Saline County Illinois wants to thank everyone for their hard work on the "Miners Safety and Health Act of 2010" we support this bill very strongly. We do have some comments and concerns however. The section on page 4 line 7 " Independent Accident Investigations" is very good but we feel that there needs to be language to insure that the member of a labor organization or other representative of miners has strong protection against management retaliation and language insuring that management has no persuasion on who represents the miners in this investigation.

Section 103. Designation of Miners Representative is very good language and is badly needed. If workers had a level playing field on choosing representation before an accident happened we would not see the type of mining disasters we seen in the last few years.

Section 104. Hours of Inspections we feel that this needs to be insured that inspections shall be conducted equally during the various and days of the week during which miners are normally present in the mine this would help insure the safety of all miners on all shifts all week.

Section 202. Is very good especially the Expedited Review. Companies have to be stopped playing games with the court system to tie up citations and orders.

Assessment and Collection in the pattern is very good we feel this is another way of getting companies to do a better job in compliance to stay away from this point.

Section 204. "(d) Revocation of Approval of Plans this is a good section a lot of times the conditions change in mining and for the health and safety of the miners the plans need to change. Also the plans need to be kept updated on a regular basis companies should not be allowed to let outdated plans hang out there because they do agree with things MSHA suggest to put in them.

Title IV- Workers Rights and Protections, this is a very good and much needed part, especially (B) Retaliation for Refusal to Perform Duties. We support this very strongly.

Section 111. Entitlement of Miners (a) Protection from Loss of Pay is another good part that should make companies work harder to keep from getting to this point.

Section 403. Underground Coal Mine Employment Standard. This is another very good section that is fully supported by the officers of Local S-8.

Section 501. Pre-Shift Review of Mine Conditions This is very good but could be better if the communication program was made a (verbal communication program to ensure that each miner before entering the mine is verbally made aware at the start of such miners shift of the current conditions of the mine, including any conditions that are hazardous or that violate a mandatory health or safety standard or a plan approved under this act and the general conditions of that miners assigned working section or area.

Also there needs to be language to insure the enforcement of examiners reporting hazardous conditions of mandatory health and safety standards or approved plans to be in the examiners books at the end of each shift. At our mine third shift is idle and unbolted areas at the face of the working sections are not even recorded in the examiners books at the end of second shift for oncoming employees.

Also all miners at the start of their shifts need to have access to the examiners books and have adequate time to inspect these books to see the condition of the mine in the area they will be traveling and working.

Section 505. Refresher Training on Miners Rights and Responsibilities. Another very good section, just insure it is enforced, that the company's have no influence on who does this training and the full hour is spent on this training. There should be requirements that the trainer should have experience of being a miner's representative or training equivalent to it.

Annual refresher training needs to be addressed also, at the Willow Lake Mine the underground employees are forced to attend the eight hour underground training and to stay afterwards for two hour surface retraining. The miners use to moving around and working during their shift and then put into a class room for a total of ten hours of retraining, loose interest in the training very quick this making the intent of the training insufficient. There needs to be a limit set on the hours in a twenty four period you have to spend training, we feel it should be no more than eight hours in a twenty four hour period.

Section 117. Certification of Personnel. This is long overdue Mine Managers, Examiners and etc. should have to be recertified. This is the only way you can insure that you are getting qualified employees to ensure the health and safety of the miners. As the times and technologies change and we move forward the methods of mining changes, the conditions change, the equipment changes and the laws change. The only way to insure these people stay in touch with the changes is training and recertification.

The idea of the funds set up under this act is very good and we feel will help insure the requirements are carried out.

We feel that Management employees: General Managers, Superintendents, Safety Directors, Mine Managers, Supervisors and Agents of the company like shift leaders and examiners should be held more responsible for making sure these mines are safe for our workers and seeing that violations of the Federal Mining Laws are reported, recorded and addressed before they lead to more accidents and fatalities. These laws were made for the health and safety of the miners and the only way they can work is to be enforced very strictly.

We are disappointed how ever to not see something limiting the exposure of the miners underground. We understand that switching the miners out at the face is more production for the companies but is the gained production worth the risk if something happens like it did at Upper Big Branch mine? We don't feel like the extra production that is gained is worth the risk. The miner's health and safety have to be put ahead of production and profits, that's the only way to stop these senseless accidents and fatalities.

Again we want to thank you for your hard work in protecting these nations' miners and for giving us the opportunity to voice our concerns and opinion. If you have any questions or there is anything I can do to help please feel free to call or e-mail.

Sincerely,

Greg Fort

Greg Fort
President Local S-8

Interstate Mining Compact Commission
445-A Carlisle Drive, Herndon, VA 20170
Phone: 703/709-8654 Fax: 703/709-8655
Web Address: www.imcc.isa.us E-Mail: gconrad@imcc.isa.us or bbotsis@imcc.isa.us

July 12, 2010

The Honorable George Miller
Chairman
House Education and Labor Committee
Room 2181 RHOB
Washington, DC 20515

Dear Mr. Chairman:

We are writing with regard to H.R. 5663, the "Miner Safety and Health Act of 2010", which you introduced on July 1. The member states of the Interstate Mining Compact Commission (IMCC) commend you for your efforts to protect our Nation's miners by addressing some of the key issues and concerns in the mine safety and health arena. We especially appreciate the Committee's efforts to bring the states into the process of reviewing and providing input on portions of the legislation as it was being drafted.

While there are many different amendments to the Mine Safety and Health Act of 1977 on the table, there is one in particular with which we are particularly concerned as it goes to the heart of the state/federal relationship under the Act. This amendment (Section 507) involves the "certification of personnel" and requires the establishment of various requirements and procedures for certification, registration, qualification or other similar approvals, as well as renewals and revocations. These programs are currently implemented by the states for various competencies in the mine safety and health arena.

Our overarching concern with respect to any amendment addressing certification programs is the impacts that it could have on the existing role of state governments pursuant to our respective regulatory programs. While states do not technically have primary regulatory control in the area of mine safety and health, unlike under some national environmental programs like the Surface Mining Control and Reclamation Act (SMCRA), numerous states have robust mine safety and health programs which enforce state mining laws, sponsor quality certification programs, provide technical assistance, and conduct effective training programs. Many of these state programs pre-date federal mine safety laws and in some cases are more stringent than their federal counterpart.

In the area of certification of various competencies that attend the operation of coal and metal/nonmetal mines, the states have always taken the lead, pursuant to their own programs. And while there are differences among the states in how they address certification, recertification, decertification and reciprocity, this particular

aspect of the overall mine safety and health statutory and regulatory scheme has consistently worked well. We are aware of no instances in the recent past where the states' implementation of their certification programs has been criticized or taken to task for ineffectiveness or inadequacy.

Given the significant role that the states have played in the past in this area, we particularly appreciate the inclusion in new Section 118 of a provision that requires the Secretary, in developing standards and requirements for certification, to consult with the states to ensure effective coordination with existing state standards and requirements. This section goes on to state that these standards ***may*** provide that state certification programs will satisfy the Secretary's certification requirements if the state's program is no less stringent than the standards established by the Secretary. In order to give full force and effect to state certification programs, we request that the word "may" be changed to "shall". Otherwise, the recognition of and deference to state certification programs is a hollow promise and could go unrealized.

In developing federal standards for a national certification process or program, it should be made clear that states will continue to take the lead in this area as long as their programs are no less stringent than the federal standards, as provided in new Section 118 (b)(2). Given the differences between the states, a degree of discretion and flexibility should be incorporated into the process. And it should be provided that if a state is unable or unwilling to take on the full certification program for some reason, this will not preclude the state from continuing to operate those portions of the program that comply with the federal standards.

The importance of coordination with the states in the certification program is critical. For instance, to the extent that there is a belief that certain gaps exist in our programs that need to be filled, they should be specifically enumerated. Again, while we are well aware that differences exist among how the states handle certifications, this has not been identified as a particular problem in the past. We are willing to engage in a coordinated effort with MSHA to identify and agree upon these gaps but this will obviously take some time. Following the conclusion of that effort, decisions will need to be made about the states' willingness and ability to take on additional responsibilities, especially from a resource perspective.

It is for this reason that we believe it is essential that the states be brought into any rulemaking or policy development process as soon as possible to identify potential adjustments to the certification process and programs. We do not see ourselves as just another stakeholder in this process, but rather as co-regulators and full partners with MSHA in addressing this component of the mine safety and health program. And to the extent that changes or enhancements are justified and agreed upon, depending upon their nature and extent, additional funding under Section 503 of the Mine Safety and Health Act may be necessary to allow the states to expand their existing programs. Given this reality, we strongly support the proposed amendment to Section 503(h) that would adjust the authorized level of funding for state grants from $10 million to $20 million per annum so that adequate grant funding is available for the states to take on any expanded responsibilities. This would include not only certification, but also new training requirements, mine mapping and mine rescue responsibilities.

Another concern involves MSHA's greater involvement in the certification process. To date, this process has rested solely with the states. To the extent that Section 507 requires a larger role for MSHA in terms of developing federal standards for a national certification program, we believe the states must be directly involved in that process, as is provided for in new Section 188 (b)(2). This involvement should occur early and often, prior to the release of any proposed rules. In order to insure that all affected states are identified and brought into the process, we believe that the Interstate Mining Compact Commission should serve as the designated convener for state action and input. In this regard, we believe it would be useful for IMCC and MSHA to develop Memoranda of Understanding that delineate our respective roles and responsibilities. These MOUs could also address other areas of intergovernmental cooperation and coordination beyond certification. It may also be useful to consider the development of MOUs between MSHA and individual states on key issues of concern.

We also believe that any involvement by MSHA beyond the development of the national certification standards should be limited. We are opposed to an aggressive federal oversight authority where state decisions are second-guessed and potentially undermined. Once a state receives approval of its certification program from MSHA, this should be the end of the matter, other than monitoring any grant funding that may be received by the states. We believe that a heavy hand by MSHA in overseeing state certification programs will simply erode their effectiveness, waste resources and cause undue friction between governments.

In this regard, we are concerned about the meaning of language in new section 118(b)(1)(C) that refers to the Secretary responding to requests for revocation. If a state is implementing an approved certification program and the Secretary receives a request for revocation, the Secretary should pass this request on to the states for resolution. This appears to be the appropriate route given the state's primary role. A different result could undermine the state's authority and credibility with respect to revocations specifically and certification in general.

With regard to reciprocity, we believe that this should primarily be left to the states to arrange, with general input from MSHA. We see value in a national database that tracks state certifications, de-certifications and those certifications that are revoked. We would welcome the opportunity to work with MSHA in designing such a system. It will also be necessary to provide the necessary resources to develop and implement such a system. From our experience with the Applicant/Violator System under SMCRA, we know first-hand that startup costs for such a system can be significant.

With regard to the new fee structure established in Section 118 (c), we assume that this structure applies only to a certification program developed and implemented by MSHA. To the extent that states continue to implement their own certification programs (pursuant to the approval mechanism discussed above), we understand that our current fee structures will remain in place and operational.

Thank you for the opportunity to present our views and concerns on this important issue. We hope to continue working with you as the bill progresses and as you develop accompany report language.

Sincerely,

Gregory E. Conrad

Gregory E. Conrad
Executive Director

Prepared Statement of ORC Worldwide

ORC Worldwide is a global human resources consulting firm whose Washington, DC office has for nearly 40 years provided a broad array of specialized occupational safety and health services to businesses and other organizations. Currently, approximately 120 leading global corporations in more than 20 industry sectors are members of ORC's Occupational Safety and Health (OSH) networks. The focus of these networks is to help ORC members achieve safety and health excellence by promoting effective occupational safety and health programs, benchmarking and sharing best practices, and creating new strategies and tools to improve safety and health performance. ORC is also an industry voice on national and global safety and health policy issues. The activities of ORC's OSH networks are based on the premise that providing safe and healthful working conditions is the mutual concern of employers, workers and government agencies and that cooperation and collaboration among these key stakeholders is essential to finding solutions to safety and health issues.

It should be noted that companies that are members of ORC's OSH networks have provided information, opinion and advice to ORC in the development of its positions contained herein; however, these comments are solely those of ORC and may differ from the views and comments of individual member companies. ORC's comments below are exclusively focused on the provisions of Title VII of HR 5663 and do not extend to the other provisions of the legislation.

General Comments on Title VII of HR 5663

ORC has closely followed the content and progress of the various OSHA reform efforts that have been introduced in Congress over the past few decades, culminating in this most recent bill in the House of Representatives, HR 5663. ORC is mindful that with the exception of a one-time increase in the civil penalty maximums in 1991, the Occupational Safety and Health (OSH) Act of 1970 has not been significantly amended in the nearly 40 years since its original enactment. As ORC observed in its White Paper issued in November 2008, entitled Breaking the Cycle: New Approaches to Establishing National Workplace Safety and Health Policy, "the almost 40 year old Act has been remarkably durable in its breadth, adaptability and overall effectiveness as a framework for protecting workers."

On the other hand, ORC also noted in its White Paper that "for the 21st Century workplace, [the Act] has become in several significant ways an outdated model for protecting today's workers from occupational safety and health hazards." HR 5663, like its predecessors, would do little to modernize the basic framework of the OSH Act to meet the safety and health challenges of the 21st Century workplace and workforce. In addition, ideally, ORC would have liked to have seen Congress go beyond focusing primarily on the enforcement-related provisions of the Act and also seek to provide OSHA with additional incentives, tools and resources to assist the vast majority of employers that are earnestly interested in protecting their workers but that may lack the capacity and competencies to do so effectively.

However, despite the limited focus and scope of HR 5663, ORC has concluded that with a few modifications suggested below, the proposed amendments to the OSH Act have the potential to afford improved protections to at least those workers facing the most challenging workplace conditions in situations where their employers may be resistant to providing the most essential protections and meeting even the most basic compliance obligations. There are, unfortunately, still too many employers that do not sufficiently appreciate the legal necessity, the moral obligation or the business benefits of assuring a safe and healthful workplace—for those businesses, strong enforcement and assurances of worker rights may be necessary to incentivize compliance.

Comments on Selected Provisions of Title VII

ORC's has the following comments on specific provisions of Title VII:

1. Section 701. Enhanced Protections From Retaliation. The current employee protections from retaliation contained in the OSH Act have not been updated since the passage of the OSH Act in 1970 and contain administrative impediments that limit their effective application. ORC understands the need to update these provisions to be consistent with improvements contained in more recent "whistleblower" statutes.

The new provision, which would protect an employee from retaliation for, among other things, "refusing to perform the employee's duties if the employee has a reasonable apprehension that performing such duties would result in serious injury to, or serious impairment of the health of, the employee or other employees," is a significant change from the current state of the law, which allows employees to refuse work when faced with an imminent danger of death or serious injury. While the new provision may certainly be appropriate in most instances, ORC notes that the provi-

sion's broader scope may also present the opportunity for potentially unwarranted claims. It is our hope that, as this section is implemented, oversight will be provided to ensure the suitable use of this protection.

2. Section 702. Victims' Rights. In recent years, OSHA has gradually provided, through its administrative procedures, injured workers and family members of injured and deceased workers increasing access to compliance activities associated with the injury or fatality. This section of the bill would provide victims enhanced rights of participation in OSHA inspection and citation modification activities as well as proceedings before the Occupational Safety and Health Review Commission (Review Commission). ORC respects the appropriateness of a role for victims in these forums and for the most part, the bill appears to balance the desirability of involvement and input by the victims both with the legal and procedural rights of the actual parties to the proceedings and with the importance of not unduly delaying or otherwise interfering with the resolution of the matter. However, one new provision in the current bill—proposed section 9A(e)(2)—does cause some concern, namely that it may be construed to require the Review Commission to afford evidentiary status ("due consideration") to "information" provided by a victim to the Review Commission, without the parties to the proceeding having the opportunity to provide appropriate rebuttal. It should be made clear that such a construction is not intended and that information provided by a victim may not be relied on as evidence.

3. Section 703. Correction of Serious, Willful, or Repeated Violations Pending Contest and Procedures for a Stay. This provision raises the most concerns for ORC and its members. It would require the period set in a citation for the abatement of any violation alleged to be serious, willful or repeated to commence upon the receipt of the citation by the employer and would disallow the suspension of the time set for abatement, triggered under the current OSH Act by the filing of a notice of contest, until the final resolution of the contested violation. The bill would follow procedures similar to those applied under the Federal Mine Safety and Health Act and allow an employer cited for a serious, willful or repeated violation to file a motion for a stay of the abatement period with the Review Commission, which would review the stay motion on an expedited basis, applying criteria similar to those necessary to obtain preliminary injunctive relief in other legal proceedings. Specifically, the Review Commission would consider whether the employer has a substantial likelihood of success on the merits of the contested citation; whether the employer will suffer irreparable harm absent a stay; and whether a stay will adversely affect the health and safety of workers.

ORC believes that at a bare minimum where an employer is contesting the appropriateness of the proposed date set for abatement or is denying the existence of any violation at all, the burden of getting a stay pending contest should be eased. Specifically, there is no reason to require a showing of "irreparable harm" to the employer, especially if employees are not being exposed to the alleged hazard through some alternative or interim action pending the resolution of the citation. Obtaining a stay in these circumstances should not entail the kind of high burden necessary to obtain preliminary injunctive relief.

4. Section 705. Civil Penalties. ORC supports the proposed increases in civil penalty maximums, the civil penalty "enhancements" (except as discussed below) for willful and repeat violations resulting in the death of an employee, and the periodic inflation adjustment of the statutory penalty amounts. The proposed new civil penalty maximums, in effect, amount to a one-time cost of living "catch-up" over the 19 years since the penalty amounts were last increased by Congress. It is important that civil penalties assessed for violations be a credible partial deterrent (although penalties alone are far from a sufficient incentive for compliance) to future violations.

The reservation ORC has about the enhanced penalties for fatalities is the use of the phrase "caused or contributed to" the death of an employee in section 705(a)(1)(C). In the absence of a definition or clarification of the term "contributed to," the agency may rely on meanings of the same term in other contexts, e.g., injury and illness recordkeeping, where even a slight contribution to an injury or illness by factors related to work would be deemed a sufficient basis to record the case. In order to justify an enhanced civil penalty of this magnitude, the violation should be required to have "caused or directly and substantially contributed to" the death of an employee.

5. Section 706. Criminal Penalties. The existing limited criminal sanctions contained in the OSH Act have been seldom invoked and are nearly universally recognized as inadequate in more than one respect. It is entirely reasonable to regard a willful violation that causes the death of an employee as a felony with appropriate associated penalties. However, with respect to addition of the phrase "contributed

to" as a basis for criminal prosecution, ORC has even greater concerns than those expressed above in the context of civil penalties. Once again, a direct and substantial "contribution" by the violation to the death (or serious bodily harm) of an employee should be required in order to justify criminal liability. We also believe that a clarification of the intention behind substituting the word "knowingly" in HR 5663 for "willfully" in HR 2067, the Protecting America's Workers Act as originally introduced, is necessary. In the absence of an explanation of this proposed change, there is a great deal of uncertainty around whether the use of the word "knowingly" effectively lowers the standard of proof for the prosecutor or whether the two words are legally equivalent.

Similarly, the explicit addition of "any officer and director" to the definition of "employer" for purposes of identifying potential targets for criminal prosecution, absent a clarification of intent, raises significant fears among business managers that they could be subject to prosecution for merely being somewhere in the "chain of command" or having some kind of safety and health role in the company but having no knowledge of, or responsibility for, an event that causes an employee death. Based primarily on case law developed under federal environmental statutes that have applied similar terms, ORC urges, at a minimum, report language that would make clear that the Committee intends to limit potential liability to corporate officials who had knowledge of the existence of the condition that caused the injury or fatality and knew or had reason to know that the condition could result in serious injury or death, had the authority and ability to correct, or cause the correction, of the condition, and knowingly failed to exercise his or her authority to take appropriate action to correct the condition.

Finally, the proposed expansion of criminal liability to cases of knowing violations that cause or contribute to "serious bodily harm" to an employee raises important policy questions about the most effective use of already scarce OSHA resources—criminal investigations require substantial time and effort on the part of specially-trained OSHA compliance staff. However, ORC is pleased to see that the committee has reverted to a more limited definition of "serious bodily harm" than that contained in the first "discussion draft" released following the introduction of HR 2067.

111 F.3d 963 (Table), 1997 WL 159436 (C.A.D.C.), 324 U.S.App.D.C. 204
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTADC Rule 28 and FI CTADC Rule 36 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, District of Columbia Circuit.
PEABODY COAL COMPANY, Petitioner,
v.
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION and Secretary of Labor, Respondents.

No. 96-1205.
March 3, 1997.

On Petition for Review of Orders of the Federal Mine Safety and Health Review Commission.
FMSHRC

REVIEW DENIED.

Before: SILBERMAN, WILLIAMS and GINSBURG, Circuit Judges.

JUDGMENT

***1** This appeal was considered on the record from the Federal Mine Safety and Health Review Commission and on the briefs and arguments of counsel. The court is satisfied that appropriate disposition of this case does not call for a published opinion. *See* D.C.Cir.Rule 36(b).

For the reasons in the attached memorandum, it is

ORDERED and ADJUDGED that the petition for review should be DENIED.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C.Cir.Rule 41(a)(2). This instruction to the clerk is without prejudice to the right of any part at any time to move for expedited issuance of the mandate for good cause shown.

ATTACHMENT
MEMORANDUM

Petitioner **Peabody** Coal Company seeks review of the decision of the Federal Mine Safety and Health Review Commission accepting the Mine Safety and Health Administration's decision not to approve any ventilation **plan** for the Martwick mine in Greenville, Kentucky that did not provide for ventilation during roof bolting. Under the **plan** suggested by the MSHA **Peabody** must install line curtain sufficient to provide 3,000 cubic feet of airflow per minute at the face in a cross-cut while roof supports are being bolted into place. **Peabody** alleges that the MSHA imposed this requirement without affording adequate consideration to whether the requirement is "suitable" to the particular conditions in the mine. See 30 U.S.C. § 863(o) ("A ventilation system and methane and dust control **plan** and revisions thereof suitable to the conditions ... of the coal mine ... shall be adopted by the operator"). **Peabody** contends that the agency instead based its decision upon conditions and considerations that are common to all mines and should therefore have initiated a rulemaking.

On the contrary, the MSHA is free to regulate in an adjudicatory proceeding a risk that may be

common to a large number of mines provided that an identifiable attribute of the particular mine being regulated is shown to give rise to that risk. *Cf.* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion"). We review the ultimate decision regarding how to regulate that risk under the **arbitrary** and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

In the present case, the MSHA found, based upon evidence in the record, that methane emissions from the Martwick mine are in the aggregate very high. Considering the tendency of methane to accumulate in the stagnant air of a cross-cut, the MSHA concluded that the cross-cuts in the Martwick mine should be ventilated during roof bolting in order to lower the risk of a methane pocket forming and being ignited by a spark from the roof-bolter. We cannot say that it was **arbitrary** and capricious for the MSHA to have so concluded. The Petition is, therefore,

***2** Denied.

C.A.D.C.,1997.
Peabody Coal Co. v. Federal Mine Safety and Health Review Com'n
111 F.3d 963 (Table), 1997 WL 159436 (C.A.D.C.), 324 U.S.App.D.C. 204
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 1997 WL 34647682 (Appellate Petition, Motion and Filing) Reply Brief of Petitioner (Jan. 14, 1997)
- 1996 WL 34482916 (Appellate Petition, Motion and Filing) Brief for the Secretary of Labor (Dec. 30, 1996) Original Image of this Document with Appendix (PDF)
- 1996 WL 34482915 (Appellate Petition, Motion and Filing) Brief of Petitioner (Nov. 27, 1996)
Original Image of this Document with Appendix (PDF)

Judges and Attorneys (Back to top)

Judges

Judges

- **Ginsburg, Hon. Douglas H.**
United States Court of Appeals, District of Columbia Circuit
District of Columbia
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Silberman, Hon. Laurence H.**
United States Court of Appeals, District of Columbia Circuit
District of Columbia
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Williams, Hon. Stephen F.**
United States Court of Appeals, District of Columbia Circuit
District of Columbia
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

END OF DOCUMENT

[Additional submissions of Mr. Kline follow:]

AMERICAN SOCIETY OF SAFETY ENGINEERS,
1800 EAST OAKTON STREET,
Des Plaines, IL, July 12, 2010.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER: The American Society of Safety Engineers (ASSE) appreciates this opportunity to comment on your legislation, the Miner Safety and Health Act of 2010 (HR 5663). While we understand and support much of your intent to strengthen occupational safety and health protections for this nation's workers in very workplace, ASSE cannot support HR 5663 in its entirety or support the quick rush to a bill at this time. The bill is so wide-sweeping in attempting to move forward reforms to both the Federal Mine Safety and Health Act (Mine Act) and the Occupational Safety and Health Act (OSH Act) that we fear a careful analysis of the mining provisions in particular in the short time from its July 1 introduction to the scheduled July 13 hearing and possible markup of the bill does not serve the

purpose of advancing occupational safety and health in the most thoughtful way possible.

ASSE is particularly concerned that this rush to markup does not address a glaring failure of the OSH Act to provide more than 8 million public sector workers with the same minimal federal occupational safety and health protections that all other workers enjoy. To propose toughening the safety and health protections most workers already have while so many other Americans—all public servants, many of who serve to protect our welfare, ironically—are not protected at even current levels of protection is unfair to those public servants. Over the last several years, ASSE's members in Florida have worked with labor and business groups to advance protections for state, county and municipal workers with still more work needed to achieve that goal. So we know first-hand how difficult it would be to go from state to state to address this problem. However difficult a federal measure might be, the only reasonably workable fix is through an amendment to the OSH Act. The OSH Act will not be truly reformed until public sector workers receive the workplace protections they deserve.

If this bill moves quickly forward as written, ASSE also fears that some very positive contributions it makes in OSH Act reform will be lost under the weight of opposition to Mine Act reforms that, in the view of our members, will make it difficult to achieve your goal of strengthening oversight of this nation's mines. While we urge you to consider more carefully the strategy of placing so much in one bill to be considered in such short a time, we do respect the commitment you have to occupational safety and health. In response to your bill, ASSE has developed the following comments based on the expertise and experience of our more than 32,000 member safety, health and environmental (SH&E) professionals who work with employers in every industry across the country and provide the leading expertise and experience employers rely on to protect their workers from workplace hazards. However these provisions move forward, we hope to work with you to make sure they can achieve the common goal we share in making sure that this nation's oversight of workplace safety and health is effective.

The following section-by-section comments, beginning with the OSH Act reform provisions in HR 5663, also reflect our members' passion for the idea that whatever Congress or the Administration does to impact workplace safety and health must reflect their hard-won understanding from the job floor of how best to protect workers. We urge you to listen to them and work with them to make sure that your laudable goal of reforming the Mine Act and the OSH Act will succeed where it counts, in more workers returning home each day safe and healthy.

OSH ACT REFORMS

Section 701—Enhanced Protections from Retaliation

ASSE supports expanding federal OSH Act whistleblower protections to employees who report injuries, illnesses or unsafe working conditions on the job. Shielding workers from recrimination and retaliation for reporting injuries, illness or unsafe conditions, testifying before Congress or other bodies, refusing to violate the OSH Act or otherwise exercising their rights are necessary elements to ensuring worker participation and ownership of workplace safety and health. While we recognize that this system unfortunately can be abused for personal and workplace political issues, still, if a worker's job security and compensation are not adequately protected, those with legitimate concerns that an employer ignores will rarely be able or willing to risk taking needed steps to help correct risks to workplace safety.

Section 701(b) Prohibition of Retaliation

ASSE supports protecting employees from workplace discrimination for refusing to perform a duty if the employee has a reasonable apprehension that performing the duty would result in serious injury or health impairment. A tenet of effective workplace safety and health is that every person in a workplace, from management to worker, must be committed to safety and health. Permitting workers who have a meaningful sense of a dangerous workplace risk to protect themselves or other workers is consistent with the training that our members provide workers and assistance they provide employers in workplaces every day.

Section 701(c) Prohibition of Retaliation Procedures

Similarly, workplace safety and health is best served if federal whistleblower protections adequately shield those who in good faith are forced to address workplace hazards by reporting dangerous conditions or practices to outside authorities. For that reason, ASSE supports HR 5663's proposed expansion of the statute of limitations from 30 to 180 days for reporting discrimination resulting from protected activities concerning reporting injuries, illnesses or unsafe working conditions. This

provision is comparable to the statutory period for safety whistleblower protection provided to commercial drivers under the Surface Transportation Assistance Act, which OSHA also enforces.

ASSE also supports the provision that, if findings are not issued within 90 days of a complaint, the complainant may request a hearing. This private right of action is currently available under the Mine Act in whistleblower protection cases. Because complainants may have lost their jobs due to their protected activity, lengthy delays in concluding investigations and holding hearings can exemplify the saying, "Justice delayed is justice denied." Our members fully understand the importance of these provisions. SH&E professionals themselves can face the kind of discrimination these provisions guard against for simply doing what they have a professional and ethical responsibility for doing

Finally, ASSE appreciates the effort in this bill to establish a more reasonable process for determining the appropriateness of claims through the regulatory process by establishing an administrative appeals process. An appeals process should help limit the use of the federal judicial system, a concern we raised with previous versions of these provisions. In the end, however, ASSE cannot support provisions allowing complainants to seek review of an OSHA order with the U.S. Court of Appeals, which amounts to a private right of action for what Congress has determined should be a regulatory enforcement matter. The current system was established to avoid protracted and expensive litigation, which this provision would undermine. As we have said before, the whistleblower function at OSHA has suffered from a lack of adequate resources. Instead of opening the process to further litigation and requiring the Department of Labor to apply scarce resources to litigation, Congress should ensure that OSHA has the funding necessary to carry out this important function so claims can receive their due attention in a timely manner.

Section 702—Victims' rights

The entire process of investigating and determining appropriate actions under the OSH Act needs to be sensitive to the impact and loss that a victim and victim's family has experienced, especially when there has been a fatality. Workers deserve to feel a level of common compassion from government and employers that the OSH Act should encourage. Not only is such an attitude the right thing to do, it is also the prudent thing when the process has the potential of becoming irrationally adversarial even when all parties are well-intended. This is particularly true for the provisions proposed here to facilitate more and better communications with victims and their families.

Therefore, ASSE supports provisions that would permit a victim to meet with OSHA about the inspection or investigation before the decision whether or not to issue a citation is made; to receive at no cost copies of citations or related reports; and to be provided an explanation of rights of employees or their representative to participate in enforcement proceedings. We also support the inclusion in HR 5663 of a provision requiring each OSHA area office to have a family liaison. Having someone especially capable and, we suggest, trained in dealing with victims' families is a positive step forward.

ASSE is concerned, however, that overlooked in this well meaning effort to increase victims' ability to state grievances in the process is the capability of the process to move ahead with proper attention to the facts of each case and the ability of all those involved to do their work in helping determine the appropriate outcome of investigations without inappropriate disruption. A victim's voice must be heard in this process, but a victim's personal perceptions at a difficult time, however legitimate, are not always consistent with the process of negotiating often highly technical legal issues by the parties involved. That is why ASSE continues to urge that an amendment is needed to limit the definition of "victim" to "an immediate family member" in subsection (g). The common definition of family could mean many people who do not have a close interest in the proceeding.

ASSE also is concerned that, while well meaning, the provisions aimed at giving a victim a voice in the legal process as written in this bill have gone too far. We do support giving a victim the opportunity to appear and make a statement before the Occupational Safety and Health Review Commission (OSHRC), which is an environment structured enough to enable all parties to voice their interests in a productive way. Commission members, too, are the most appropriate audience for victims. It is with commissioners that victims' positions can have the most impact on the ultimate outcome in a matter. But we cannot support requiring that the victim, on request, be given an opportunity to appear and make a statement before the parties conducting settlement negotiations. As we have said in the past, the unintended consequence of this provision could be OSHA's entanglement in more drawn-out actions and a significant increase in OSHRC's case load. Since HR 5663 better serves

the victim by providing an opportunity to appear before OSHRC directly, we urge you to delete subsection (c).

Section 703—Correction of Serious, Willful, or Repeated Violations Pending Context and Procedures for a Stay

ASSE greatly appreciates the effort to address concerns we had with similar provisions in the PAW Act that employers were not being given an opportunity to protect their interests in the proposed process, especially when a serious citation is often open to the subjective opinion of an inspector. That concern has been met with provisions in this bill to allow an employer to file with OSHRC a motion to stay a period for the correction of a violation designated as serious, willful, or repeated. That change should provide a fair balance of the interests while still meeting the goal of not allowing employers to avoid their responsibility to correct violations through legal process. We are pleased to support this provision.

Sections 705-706 Civil and Criminal Penalties

ASSE has always supported appropriate and fair enforcement OSH Act violations and does not oppose the increased levels of civil and criminal penalties proposed in this legislation if, as we state below, certain language further explaining provisions, is included in report language to the bill. For most of our members' employers, their commitment to workplace safety and health is driven by both moral and business commitments that these increased penalties will not change. For too many other employers not similarly committed, the current penalties under the OSH Act are not high enough to affect their behavior, in our members' experience. ASSE has become increasingly concerned that, because of the much higher penalties the Environmental Protection Agency is able to impose, the commitment of some employers to worker safety and health may be taking a back seat to concern over avoiding environmental penalties. Arguably, this focus on environmental issues may be partially responsible for the current rush to voluntary sustainability among industry leaders. Appropriate levels of penalties, we believe, can similarly bring increased attention to worker safety and health issues and help lead to greater voluntary attention to the sustainability of this nation's workforce. Workers deserve no less.

ASSE remains concerned, however, that this effort to increase enforcement capability comes at the same time the current Administration is moving away from what our members see as the most successful cooperative effort to work with employers in the Voluntary Protection Program. While stronger enforcement tools are needed, so too is an OSHA fully capable of working with employers to help ensure that employers are fully committed to safe and healthy workplaces and not simply trying to avoid penalties for meeting minimal OSHA standards. We should be able to expect better than minimal adherence from most of this nation's employers. We urge you to join us in not only supporting appropriate OSHA penalties but in also helping ensure that VPP can continue even as this effort moves forward.

We note that ASSE's conditional support for the increased penalties proposed here is based on the fact that HR 5663 addresses key concerns we raised with similar provisions contained in the Protecting America's Workers Act (HR 2067). ASSE appreciates the effort to meet its concerns. As we more specifically say below, our goal was to better define how increased penalties are to be applied and to help ensure that the target of higher penalties are employers who do not take responsibility for a consistent culture of safety in their organizations. Our members can find themselves the lone voice in an organization arguing to upper management for greater resources or commitment to safety and health. If failures occur before they succeed, they should not have to answer for the failure of others to address known risks. ASSE does not seek protections for an SH&E professional's failure to fulfill professional responsibilities, but worker safety and health is best served by putting those responsible for an organization's commitment to safety and health on notice of penalties that can result from shirking that responsibility. While the bill does not go as far as we had wanted in encouraging responsibility for an organization's safety culture, ASSE is pleased that HR 5663 will help see that most SH&E professionals are not unfairly left to take responsibility for others in an organization who fail to make needed decisions to protect workers.

"Any officer or director"—More specifically, for purposes of finding a responsible party under the criminal provisions, provisions in HR 5663 defining an "employer" as "any officer or director" is a significant step forward in the right direction in encouraging responsibility for an organization's safety culture. However, it does not go far enough in making sure those responsible for an organization's commitment to safety and health cannot escape that responsibility. Better language to assign the kind of responsibility that can make a difference in a workplace culture requires the phrase to be "any responsible officer or director." Our members who work in organi-

zations report a vast difference between officers and directors who have the power to make a difference in an organization and those who do not. Aiming these penalties at those who do not have such authority does not serve the purpose of making significant change in employers' perception of OSHA penalties. For this reason, we urge you to change this language to "any responsible officer or director."

Knowing—A long-standing concern of ASSE's members is the lack of specific definition for "willful" in determining criminal responsibility under the OSH Act. In practice, "willful" is inconsistently applied. Without a firm definition, OSHA enforcement personnel in the field and the regional offices are left to determine subjectively the level of a violation, leaving employers open to what can seem like selective enforcement of violations. Our members are concerned that too many resources, too many arguments, too much confusion results from what is, in practice, a term inconsistently applied to violations. Most importantly, "willful" is far too vague a term to be used as an appropriate benchmark for criminal prosecution.

As we have said before, ASSE would like to be able to support the suggested change of "willful" to "knowing" in the OSH Act. The use of "knowing" is consistent with criminal prosecutions in general and, more specifically, with various environmental statutes [for example, the Clean Water Act, 33 USC 1319(c)(3)(B)], and its use infers the "mens rea" needed to show criminal intent, which a judge or jury will ultimately determine whether that has been proven beyond a reasonable doubt. However, we still are unable to support the use of "knowing" without legislative or report language clarifying that, for the purpose of the OSH Act's criminal provisions, "knowing" reflects both a knowledge and awareness that the hazard, actions or conditions are likely to place another person in imminent danger of death or serious bodily injury, knowledge and awareness that the hazard, actions, or conditions constitute a violation of a mandatory safety or health standard, and that the person had the ability to take action to address the hazard or condition and did not. With that explanation on the record, we could support this provision. Without it, the use of "knowing" remains too vague a term to help drive a significant change in the way organizations view worker safety and health, which should be the unwavering goal of this bill.

MINING PROVISIONS

Among ASSE's members are hundreds of safety and health professionals who work at mines and are members of the Society's Mining Practice Specialty. The following comments on some key provisions of this bill are based on their leading experience and expertise in protecting workers in this nation's mines.

Section 101—NIOSH/Panel Accident Investigations

ASSE supports the provision that would create independent panels, headed by NIOSH, to investigate accidents involving the deaths of three or more individuals, or other critical accidents as warranted. This is consistent with the role Congress intended for NIOSH and may lead to better investigations that are not enforcement-driven but are conducted solely to determine what occurred and what needs to be done in the future from a mine safety and health perspective to prevent a recurrence. Because it is unclear how often NIOSH would be called upon to engage in such activities, as they are now doing in the Massey Big Branch investigation, it is imperative that sufficient resources be allocated for NIOSH so that assisting MSHA in investigating key incidents will not detract from the already underfunded responsibilities that NIOSH laudably fulfills.

Section 102—Subpoena Power

This legislation would expand MSHA's existing subpoena power beyond its current capabilities, where MSHA must convene a public hearing to compel testimony and the production of documents prior to the issuance of any citations or commencement of litigation. Although OSHA has similar broad subpoena power, OSHA is not a strict liability statute and does not have warrantless search authority. OSHA also does not have the power already set forth in Section 108(a)(1) (E) of the Mine Act that permits MSHA to obtain injunctions to compel production of documents necessary to carry out its activities under the Act.

From a safety and health management perspective, ASSE is concerned that these provisions could lead to MSHA's misuse of such broad subpoena power during routine inspections by engaging in "fishing expeditions" for the purpose of obtaining documents such as safety/health audits, root cause analytical documents, and "near miss" accident reports. Any of these self-evaluative documents may record the existence of past hazardous conditions that have subsequently been addressed. However, because there is no statute of limitations for the issuance of MSHA citations, and in light of strict liability prosecution, such audit documents or incident reports could

trigger citations regardless of whether a condition had already been adequately addressed and abated prior to its discovery by MSHA.

Such prosecutions would definitely have a chilling effect on companies' practices of self-auditing or using independent safety and health professionals to proactively audit the facilities. Also impeded would be the current practice of documenting "near miss" incidents so that procedures can be reevaluated as needed and additional training on work practices provided to avoid future occurrences. This result would discourage these common means our members use to help mines improve safety and health.

If MSHA is able to compel production of such documents through this expanded subpoena power, HR 5663 should also require MSHA to adopt a "safe harbor" policy—as OSHA has done—wherein the results of audits and other self-evaluative documents will not be used to prosecute the company or its management as long as identified hazards that reflect non-compliant conditions were corrected in a timely manner prior to the agency's inspection of the facility.

Section 201—Significant and Substantial Violations

ASSE cannot support making all violations presumptively significant and substantial as HR 5663 would require. This provision would shift improperly the burden of proof away from MSHA to forcing the mine operator to prove the non-existence of any degree of hazard, which is an almost insurmountable burden. It also detracts attention from truly serious hazards and, by doing so, makes it difficult for companies to learn from inspections about what are the significant issues that must receive priority during their daily workplace examinations. Just as OSHA distinguishes between "serious" (reasonable probability that a reasonable serious injury could occur) and "other than serious" violations (both recordkeeping infractions and less serious hazards that are unlikely to cause injury, or where there is lack of worker exposure), so too should MSHA retain such distinctions.

Moreover, given the use of significant and substantial citations in the expanded Pattern of Violations (POV) criteria proposed in Section 202 of the bill, making virtually every citation a trigger for POV will certainly encourage even more citation contests and diffuse the importance of a significant and substantial classification if even minor hazards are encompassed within this classification.

Sections 301-305—Civil and Criminal Penalties

ASSE's comments concerning increased criminal penalties for "knowing" violations of the OSH Act's standards equally apply to similar violations under the Mine Act, as amended. We support increasing criminal penalties from misdemeanors to felonies. However, we have observed that while the OSHA-related provisions are limited to prosecuting knowing violations that are related to fatal or serious bodily injuries, there are no such limitations under the Mine Act provisions. We urge Congress to apply parity and make it clear that criminal prosecution for knowing violations of MSHA standards should only occur if serious injuries or worse are involved, or individuals have issued false statements or falsified documents in the course of an inspection or investigation.

As noted elsewhere, we also encourage Congress to make it clearer what constitutes "knowing" violations. Further, this should be more precise than simply being aware of a condition that MSHA believes to be a violation since reasonable persons can differ as to what constitutes a hazard or risk when dealing with the agency's subjective standards.

Finally, this legislation would criminalize retaliation against "whistleblowers" and would make such actions punishable by up to 10 years imprisonment, which is a harsher penalty than for knowing violations of mandatory standards. This seems to be a punitive rather than a deterrent measure and is the only example we know where human resources-related actions such as termination, demotion, or transfer could result in incarceration of management if the individual suffering the adverse action had also engaged in protected activity under Section 105(c) of the Mine Act. This provision should be reconsidered, in terms of its proportionality to the offense.

With respect to increasing civil penalties, Congress increased MSHA maximum penalties to $220,000 for "flagrant" violations in the 2006 MINER Act. MSHA also implemented an across-the-board increase in 2007, in part to implement the "flagrant" penalties and also the mandatory minimum penalties for Section 104(d) violations that were set in the 2006 legislation. The result of the 2007 increases was an explosion of contested cases, resulting in the current 17,000-case backlog at the Federal Mine Safety & Health Review Commission (FMSHRC). We are concerned that a new increase, effectively doubling the maximum penalty (from $70,000 to $150,000) for non-flagrant significant and substantial citations, will have the effect of raising all penalties proportionately. This will increase the contest rate yet again,

threatening the viability of the FMSHRC system and depriving both the mining community and MSHA of timely due process in resolving disputes. It needs to be noted that immediate abatement is already required for contested citations, unless deadlines are briefly extended to allow for expedited proceedings at the discretion of the FMSHRC and MSHA. So, contests do not, in our view, directly impact safety or health conditions at the mine. But dramatically increasing the delays that already exist may be detrimental to both sides' ability to litigate cases as witnesses' memories fade, individuals retire, and evidence becomes lost over time.

Although Congress has included a "pre-judgment interest" provision in this legislation as a deterrent to contesting citations, we doubt that this will be effective in reducing contests. The stakes will be too high for mine operators to accept citations they dispute when penalties are doubled and in light of the expanded exposure to Pattern of Violations findings resulting from increased serious and significant citations, which would occur if this bill becomes law contemporaneously with changing the definition of S&S to make all violations presumptively fall into this category.

Congress must also clarify how the pre-judgment interest will be applied in cases that settle before trial. Unclear is whether interest can be waived in the interest of settlement. Also unclear is the situation where citations are modified in terms of negligence or gravity, which would change the basic penalty under the criteria in 30 CFR 100.3, but are not vacated entirely. Would interest be waived where the operator's contest had merit in terms of how a citation was classified, even if a violation is upheld in some form? These issues must be addressed before pre-judgment interest is implemented legislatively. ASSE also believes that the FMSHRC's de novo penalty powers should remain intact, and the FMSHRC should not be bound by the Part 100.3 criteria but should be able to increase or decrease penalties appropriate to the evidence presented and the FMSHRC's findings on a case-by-case basis.

Section 501-507—Rulemaking Provisions

This legislation directs MSHA to engage in rulemaking on a number of critical issues to mine safety in underground coal, and ASSE supports in general these initiatives. However, we note that MSHA already has an ambitious rulemaking agenda that includes such things as strengthening of the crystalline silica standard for all mines and the development of an injury and illness prevention program (I2P2) standard. In our members' view, an I2P2 standard should be a priority because it will have the most significant and positive impact on improving a company's safety culture and ensuring adequate risk assessment, hazard control, employee training and empowerment, and evaluation of the effectiveness of safety programs and procedures. The I2P2 initiative should not be put on the back burner as a result of resource choices that would be necessary if the new rulemaking required by HR 5663 are put on a fast-track for MSHA's standards office. Therefore, if Congress believes that it is necessary to mandate the new rulemaking initiatives, adequate resources should be provided to MSHA's standards office so that the I2P2 rulemaking can also proceed in a timely manner.

ASSE is somewhat baffled by the intention of Section 507, concerning "certification" of personnel. If personnel are already required to be certified, what is the benefit to charging fees for this certification in terms of safety and health? Moreover, we hesitate to support making activities conducted by one whose certification may have lapsed automatically "flagrant" [Section 104(d)] violations, as this could occur through oversight rather than through intentional misconduct. Congress should also more clearly delineate which certifications are within the scope of this provision, what the fees would be, and how often recertification would be required, as there are currently no such specifications to our knowledge in the standards under the Mine Act.

Conclusion

Again, while ASSE believes a better approach would be to give adequate separate attention to Mine Act and OSH Act safety and health reforms, we respect your intention to bring about greater commitment among employers to worker safety and health and look forward to an opportunity to work with you and the Committee to make sure any reforms that are pursued are able to accomplish their intended goal.

Sincerely,

DARRYL C. HILL, PH.D., CSP,
President.

July 13, 2010.

Hon. GEORGE MILLER, *Chairman;* Hon. JOHN KLINE, *Ranking Member,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER AND RANKING MEMBER KLINE: On behalf of Associated Builders and Contractors (ABC), a national association with 77 chapters representing 25,000 merit shop construction and construction—related firms with 2 million employees, we appreciate the opportunity to submit this statement as part of today's Full Committee hearing on H.R. 5663, Miner Safety and Health Act of 2010. ABC and its members are ardent advocates of workplace safety, which is demonstrated through our proven record of cooperation and collaboration with the Occupational Safety and Health Administration (OSHA) and dedication to workplace safety education and training. ABC, however, strongly opposes the provisions (Title VII) that would amend the Occupational Safety and Health Act (OSH Act) that are included within H.R. 5663.

Over the years, ABC and its 77 chapters nationwide have had the privilege of building excellent working relationships with OSHA's national, regional and area offices. OSHA staff members have addressed ABC members at our annual Construction Education Conference and worked with our chapters to conduct safety training courses throughout the country. Communication between both OSHA and ABC members has increased understanding of workplace safety, which has contributed to the decrease in the number of fatalities and injuries in the construction industry since 1994.

The approach taken in H.R. 5663 would strain communications and relations between ABC, its members and OSHA, however, by unnecessarily increasing the adversarial nature of the relationship between OSHA and employers. Specifically, H.R. 5663 changes the OSH Act's penalty scheme by altering the mens rea requirements for criminal liability from "willful" to "knowing" and the broadening the definition of employers to "any company officer or director." The bill provides no definition of "knowing," nor does it provide any limitation or guidance on which "officers or directors" could face criminal charges. At the same time, H.R. 5663 would dramatically increases civil and criminal monetary penalties.

These proposed changes will increase litigation, discourage settlements, and create disincentives for cooperation between employers, associations and OSHA. This will stretch and misdirect the resources of OSHA and other federal agencies and impose substantial costs on businesses at a time they can afford it least, all while doing nothing to prevent workplace accidents and injuries.

ABC also opposes the provision requiring immediate abatement and the limits the provision imposes on an employer's ability to challenge a citation. This denies employers due process rights, and OSHA already has the authority to seek an injunction if a hazard poses an imminent threat.

Lastly, H.R. 5663 contains neither support nor assistance for employers to help them implement better safety programs or understand their obligations. Such compliance assistance is particularly necessary to help small businesses, who often cannot afford to maintain safety personnel or hire consultants to guide them through complicated OSHA regulations.

The construction industry is already strained with job loss, with unemployment over 20 percent, and adding more bureaucratic layers to an already burdened industry is not conducive to expedient economic recovery. Jobsite safety and health is a top priority for ABC, whose objective is to have "zero accident" worksites.

In order to work towards our shared goals of healthy and safe workplaces, OSHA must be a resource for employers as well as an enforcement agency. However, we strongly believe that H.R. 5663 as introduced, will not improve safety but will instead create greater cost, litigation and hamper job creation.

Sincerely,

BREWSTER B. BEVIS, *Senior Director,*
Legislative Affairs, Associated Builders and Contractors.

July 13, 2010.

Hon. GEORGE MILLER, *Chairman;* Hon. JOHN KLINE, *Ranking Member,*
Committee on Education and Labor, 2181 Rayburn House Office Building, Washington, DC.

DEAR CHAIRMAN MILLER AND RANKING MEMBER KLINE: I am writing on behalf of the 2,700 contractor members of the Independent Electrical Contractors (IEC), whose concern for the safety of their employees is second to none. It is unfortunate

that I have to write in opposition to H.R. 5663, The Miner Safety and Health Act of 2010, which will not improve workplace safety but serve merely as a punitive tool that closes the proverbial barn door after the horse has already left. This legislation will serve to bring increased business costs and litigation to an industry that is already facing more than 20% unemployment, while providing no benefits to the hard working men and women in the electrical field.

Prior to addressing IEC's concerns with H.R. 5663, I feel compelled to make clear to the Committee that IEC members are committed to the health and safety of their employees and the well-being of their electrical contracting businesses and customers. For that reason, IEC has been, and continues to be, an active participant with the Occupational Safety and Health Administration (OSHA) and other organizations in a continuing effort to promote the safe products, procedures, and work practices that govern our industry.

OSHA's cooperative programs, such as the IEC/OSHA Alliance, serve as a valuable conduit for ensuring that the busy contractor is kept up to speed on the latest regulations and workplace practices. As part of IEC's agreement with OSHA, IEC commits to educating its members about OSHA regulations, as well as, relaying the best industry practices promoted by OSHA. An excellent example of this partnership is IEC's Jobsite Safety Handbook, which was produced in cooperation with OSHA, and provides contractors with a pocket-sized, jobsite safety guide, written in English and Spanish, for their supervisors and employees.

Cooperative efforts between the government and the private sector, including the IEC/OSHA Alliance, are key reasons why the injury rate in our industry has been in a consistent and steady decline. IEC members believe that one injury is too many, but remain confident in consistent improvements in this field, and committed to ensuring that jobsite injuries and fatalities continue their downward trend.

Specifically regarding Title VII of H.R. 5663, IEC is concerned that the legislation increases penalties and gives OSHA inspectors more authority over the jobsite without doing anything to actually prevent accidents from taking place.

The increased criminal penalties are vague, as there is no clear definition of a "knowing" violation, nor is there any guidance or limitation on the "officers and directors" who could face criminal charges. The lack of clarity that accompanies this significant expansion of criminal liability will undoubtedly discourage settlements and instead increase litigation.

Further, H.R. 5663 will give OSHA inspectors, who may not be experts in the construction industry generally or the electrical field specifically, the ability to shut down a jobsite until an employer makes their recommended changes. Along with denying the contractor their right to appeal for a review of the inspectors' decision, this new authority could have a substantially negative impact on a small business owner's ability to be competitive. When an inspector, who has no training or background in the construction industry, mistakenly orders the abatement of a jobsite, even for a few hours, they will be threatening the economic livelihood of that contractor and every employee on that site, including those who work for other employers on related jobs.

Again, I would like to express our opposition to H.R. 5663 with the clear statement that IEC and its contractor members strongly support improvements to workplace safety, and we remain hopeful that cooperative relationships, such as the IEC/OSHA Alliance, can continue to contribute to a reduction in workplace injury rates.

Thank you for your time and consideration.

BRIAN WORTH, *Vice President,*
Government and Public Affairs.

Prepared Statement of the National Stone, Sand and Gravel Association

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: This testimony for the hearing on "H.R. 5663, Miner Safety and Health Act of 2010" is offered on behalf of the National Stone, Sand and Gravel Association (NSSGA).

By way of background, the U.S. Geological Survey reports that NSSGA is the largest mining association by product volume in the world and represents the crushed stone, sand and gravel—or construction aggregates—industries that constitute by far the largest segment of the mining industry in the United States. Our member companies produce more than 90% of the crushed stone and 75% of the sand and gravel consumed annually in the United States. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs thus 70% of our nation's counties include an aggregates operation.

Aggregates are ubiquitous and essential to the built environment. Currently, the construction industry is suffering the highest unemployment level of any industry sector—21.1%—more than double the national average. According to the U.S. Geological Survey, an estimated 317 million metric tons (Mt) of total construction aggregates were produced and sold in the United States in the first quarter of 2010, a decrease of 11% compared with that of the same period of 2009. The estimated annual output of aggregates in 2009 was 1.92 billion metric tons (Gt), a 23% decrease compared with that of 2008. Companies in our industry have had layoffs for the first time in their history. Although the Reinvestment and Recovery Act has helped to keep the aggregates industry from falling into a deeper recession, if the stimulus funding runs out without an extension of the surface transportation law (the current extension of transportation law expires Dec. 31, 2010), more job losses unfortunately cannot be prevented unless home, office building and commercial construction soar by that time.

We believe that introduction of H.R. 5663, "Miner Safety and Health Act of 2010" misses an opportunity for meaningful, bipartisan mine safety reform. Instead, H.R. 5663 proposes overly broad statutory changes that will adversely affect all mining, and particularly the aggregates production industry. We would submit that the bill's focus should be on requiring recalcitrant mine operators to bring their operations into compliance with current safety and health laws and practices.

This bill includes new increases in penalties just four years after passage of the MINER Act in 2006. Since 2006, penalty assessments for aggregates operators have more than doubled to $17.4 million in 2009. Also, the bill establishes two new funds. The dollars required for these funds are dollars that will not be spent on hiring workers, and making needed investments in safety and health. In addition, the bill lacks provisions for compliance assistance, calls for several rulemakings and includes an unprecedented increase in the authority of the Secretary of Labor. We believe it is premature to grant more authority to a regulatory regime that President Obama recently said is deserving of more review before conclusion of the studies into the cause of the West Virginia coal mine disaster.

NSSGA and its members continue to be committed to providing the safest and healthiest work environments possible. This commitment is demonstrated by NSSGA's work with the U.S. Mine Safety and Health Administration (MSHA), primarily through the MSHA-NSSGA Alliance for education and training. The agreement, into which MSHA entered, is said to be the most productive such relationship MSHA has with industry. Through the alliance, NSSGA has worked collaboratively to perform analysis on safety data, develop "best practices" materials, and communicate to members the importance of safety and health.

This commitment has paid off. In 2009, aggregates operators achieved the lowest total injury incidence rate on record: just 2.46 injuries per 200,000 hours worked. It is the ninth consecutive year in which aggregates operators reduced their injury rate from the previous year. Also, through sustained management's emphasis on safety and health, employee training and education, and other programs, we have reduced the number of aggregates operator fatalities to seven, the lowest number ever. While we are proud of this improvement, we will not rest until we have reduced the number of fatalities to zero.

NSSGA and its members have long recognized the critical importance of worker safety and health and historically have devoted an enormous amount of effort and resources to ensuring the wellbeing of our employees. This unequivocal dedication to safety and MSHA compliance was demonstrated when the NSSGA board of directors authorized a company-by-company Safety Pledge campaign to cut the aggregates industry's national incidence rate in half. There are more than 10,400 pits and quarries in this industry, both small and large. They have achieved unprecedented levels of safety, and under no circumstances do they pose the hazards of underground coal mines.

While not intending to be in any way pejorative towards coal an essential element of the nation's energy mix, we believe that it is critical to point out distinct differences in the risks posed by aggregates operations from those posed in coal mining. For instance, while more than 40% of all coal mines are underground, underground aggregates (stone) mines constitute slightly less than one percent of all aggregate mines. Underground stone mines are cavernous and contain no methane or other flammable gases. Nor is stone dust combustible. Full-sized off-road equipment from dump trucks to front-end loaders is able to drive into underground stone mines; ventilation issues are not comparable to underground coal or other tunneled mines. Also, accidents involving the death of more than one aggregates worker at a time are not characteristic of our industry. They are so rare the last time there was a double fatality accident in the aggregates industry was more than a dozen years ago. According to MSHA's online records, the last time there was an aggre-

gates disaster—classified by MSHA as an accident causing five or more fatalities—was almost 70 years ago, in 1942. To help illustrate these and other substantial distinctions in mine structure, mined materials and operational methodologies, we invite you and your staff to tour an underground stone mine.

We applaud the Committee's exploration of issues tied to safety in the nation's mines; however, we are concerned with a number of provisions of H.R. 5663. Fundamentally, we believe the bill misses the opportunity to improve the regulation and enforcement of mine safety. This bill seems to have been spawned exclusively by the coal disaster at Upper Big Branch. Yet, the safety issues confronting the aggregates sector are fundamentally different from those of the coal sector.

For instance, expansion of the "significant and substantial," or "S&S" category, to apply in cases in which there is a reasonable possibility that such violation could result in any injury or illness, no matter how minor, is inappropriate. It unnecessarily broadens this important classification and eliminates the current requirement that an S&S violation be of a "reasonably serious nature." If this were to be enacted, most violations would satisfy the heightened designation of "S&S." An on-going concern of ours has been that we believe that S&S is very inconsistently applied, and we fear a broadening of this powerful provision.

Further, we think there would be an incentive to ever safer behavior and attentiveness as we get to lower and lower incidence rates if a provision could be added to the law for a "de minims" violation. An alternate solution would be to provide inspectors the discretion to issue a "warning" so that something can be abated at a timeframe appropriate without resulting in a citation. We believe the law has been lacking in this discretion and the ability to downgrade a violation is a must to encourage and focus inspectors, as well as workforces and management to concentrate on compliance, prevention and elimination of issues based on level of risk.

The process of making violation of any requirement of the Act or regulations—no matter how minor—a felony, and reducing the threshold for criminal liability from "willful" to "knowing," would be counter-productive. This provision would criminalize the management of a mine, especially mine personnel who first encounter and assess particular conditions or practices. It would make even minor housekeeping and paperwork violations criminal felonies. We contend that, at the least, a felony should require that the defendant have knowledge that his actions exposed a miner to a reasonable risk of serious injury or illness or death.

Expansion of section 110(c) provisions dealing with personal liability of any officers, directors or agents of the company is overly broad. It would extend liability not only to violations authorized or carried out by officers but also to "any policy or practice that contributed to such violation," without any further definition of the meaning of this phrase. This provision apparently would criminalize entirely legal policies that might be deemed to have "contributed" to a violation.

Increases in maximum criminal and civil penalties are unwarranted for a sector that has continued to reduce injury and illness rates that have been declining for ten years (and six before passage of the MINER Act.) There is no evidence that current penalties—when actually imposed and collected—are insufficient to deter and punish improper behavior.

The overhaul of the Pattern of Violations (POV) provisions is overly broad and will actually result in perverse consequences that will harm aggregates without improving safety. If a mine is placed on POV status, the entire mine (not just the portion with safety issues) would be closed down until it can comply with an MSHA remediation order. Penalties and inspections are doubled while a mine is on POV status. The legislation would allow MSHA to impose rules that base a finding of a POV on an unspecified combination of violations, orders, accidents or injuries, without identifying the degree of risk of injury or illness that should lead to such status. While the current POV program needs revision, this represents regulatory overreach and will lead to unnecessary mine closures. At the very least, pattern status should be limited to mines where a clear pattern of violations, orders, or accidents indicates a significant risk to miners of serious injury or illness or death. The consequences of pattern status are so severe that they should not be imposed due to a "pattern" of minor violations that do not risk significant harm.

NSSGA could support a well-defined system through which a sustained pattern of violations representing genuine risk could lead to a mine closure. But, we would not support the granting of authority to MSHA to shut down a mine without third-party review.

Increases in penalties for retaliation against whistleblowers should be refined. The Mine Act currently prohibits retaliation against whistleblowers, and provides for compensation of miners when sections of the mine are closed for safety reasons. While we support a reasonable extension in the period of such compensation, it is unreasonable to require compensation for an indefinite period, especially if there are

no means of recouping those costs in the event that there's a vacation of the citation that will have led to the closure.

Expansion of subpoena authority to "any functions under this Act" is too open-ended. As written, there are no criteria or limitations for this use of subpoena power. NSSGA could support closure of a possible loophole, but does not support a blanket, vague extension.

Making advance notice of inspections a federal felony is unwise. It is unclear what constitutes advance notice. We support enforcement action against anyone who attempts to subvert mine inspections. However, the definition of what constitutes "advance notice" must be thoughtfully defined. Confidential communication is a primary method by which miners protect themselves, and keeping any information completely confidential in the close confines of a mine or mine site is a challenge. For instance, it is commonplace to inform miners when visitors are on-site, and it may be necessary to summon certain managers and employees to meet with the inspectors as they arrive. Any number of other actions could be incorrectly interpreted as subversive; thus, a much improved definition is necessary to prevent well-intended communication among miners from being construed as inappropriate.

Limitation on use of the same attorneys by operators and operator company employees for defense against alleged violations is ill-advised. This provision injects MSHA into the attorney-client relationship, and is unnecessary because bar standards already prohibit attorneys from representing multiple clients with conflicts of interest, unless there is mutual consent of all parties.

Requirement that operators include independent contractors in injury and illness reports is not appropriate. The Mine Act currently gives production operators and independent contractors equal status and responsibilities under the law. Yet, this requirement constitutes a substantial challenge administratively, as the HIPAA Act prohibits operators from obtaining the required health information and accident details on employees of independent contractors.

If the Act is amended with such a broadening of enforcement powers, it may actually make the problems with the underlying statute worse, which we believe should focus on areas of highest risk first (save lives), then prevent injury or illness, and finally to assure legal requirements are being met. The potential for overreach, regulatory or enforcement misjudgment, reduction of compliance efforts on priority areas of highest risk and instead a very scattered focus on any and all issues from a broken mirror to an uncovered trashcan could result. This would lessen, not improve, our culture of safety.

We appreciate the opportunity to submit this statement for the record of the hearing on H.R. 5663, the Miner Safety and Health Act of 2010.

[Whereupon, at 6:20 p.m., the committee was adjourned.]

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