

# TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF: )  
 )  
PATTERN OF VIOLATIONS )

Pages: 1 through 117  
Place: Denver, Colorado  
Date: June 2, 2011

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

IN THE MATTER OF: )  
 )  
PATTERN OF VIOLATIONS )

Denver, Colorado

Thursday  
June 2, 2011

APPEARANCES

MSHA Panel: PATRICIA W. SILVEY, JAY MATTOS,  
CHERIE HUTCHISON, ANTHONY JONES

Speakers:

MIKE CRUM, Safety Team Leader, FMC Corporation,  
FMC Westvaco Mine; Chairman of the Mining Awareness  
Resource Group

MARK SAVIT, Counsel, Mining Awareness Resource  
Group

MATTHEW PEDERSEN-HOWARD, Director of Health and  
Safety, Rio Tinto Minerals

JERRY GLYNN, Financial and Safety Manager for the  
Expanded Shale & Clay Group, Texas Industries

ROBERT BUTERO, United Mine Workers

TIM McCREARY, Safety Manager, Thunder Basin Coal  
Company

P R O C E E D I N G S

(10:36 a.m.)

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MODERATOR SILVEY: Again, good morning.

4

AUDIENCE: Good morning.

5

MODERATOR SILVEY: My name is Patricia W.

6

Silvey. I'm the Deputy Assistant Secretary for

7

Operations for the Mine Safety and Health Administration.

8

And I will be the Moderator of this public hearing on

9

MSHA's Proposed Rule on Pattern of Violations.

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On behalf of Assistant Secretary of Labor,

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Joseph A. Main, I would like to welcome all of you here

12

today.

13

At this point, I would like to introduce the

14

members of the MSHA panel. To my left, Jay Mattos, who

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is the Chair of the Pattern Rulemaking Committee; to my

16

right, Cherie Hutchison, who is with the Office of

17

Standards and Regulations; and to her right, Anthony

18

Jones, who is with the Department of Labor, Office of the

19

Solicitor -- in other words, our lawyer on the project.

20

In response to requests from the public, MSHA

21

is holding public hearings on its Pattern of Violations

22

proposed rule. This is the first of four public hearings

23

on the proposed rule.

24

As you heard me say in the prior hearings,

25

because this hearing is being held in tandem with the

1 Proposed Rule on Examination Of Work Areas, so it's at  
2 Charleston, West Virginia on June 7th; in Birmingham,  
3 Alabama on June 9th; and in Arlington, Virginia on  
4 June 15th.

5 The Pattern of Violations proposal applies to  
6 all mines -- coal and metal and nonmetal, surface and  
7 underground. In the back of the room, we have copies of  
8 the Federal Register that contains the proposal.

9 The purpose of the hearing is to receive  
10 information from the public that will help MSHA evaluate  
11 the requirements in the proposal and produce a final rule  
12 that will improve safety and health conditions in mines.

13 Each hearing will be conducted in an informal  
14 manner. Formal rules -- as many of you who have  
15 participated in MSHA hearings know, formal Rules of  
16 Evidence will not apply.

17 The hearing panel may ask questions of the  
18 speakers. And, quite frankly, the speakers can ask  
19 questions of the hearing panel. Speakers and other  
20 attendees may present information to the court reporter  
21 for inclusion in the rulemaking record.

22 MSHA will accept written comments and other  
23 appropriate information for the record from any  
24 interested party, including those who are not presenting  
25 oral statements. We ask that everyone in attendance sign

1 the attendance sheet, as I stated earlier, so that we  
2 will at least have a record of people who attended the  
3 hearing, even though they may not have spoken.

4 Those of you who notified MSHA in advance of  
5 your intent to speak will make your presentations first,  
6 but others who wish to speak will be given an opportunity  
7 to do so. If you have a hard copy or electronic version  
8 of your presentation, please provide a copy to the court  
9 reporter.

10 The post-hearing comments for the proposed rule  
11 ends June 30th. MSHA must receive your comments by  
12 midnight, Eastern Daylight Savings Time on that date. As  
13 you know, MSHA provides -- is proposing to revise the  
14 Agency's existing regulations for Pattern of Violations.  
15 MSHA determined that the existing Pattern of Violations  
16 regulation does not adequately achieve the intent of the  
17 Federal Mine Safety and Health Act of 1977, or the Mine  
18 Act.

19 Congress included the Pattern of Violations  
20 provision, which you know was a new provision, in the  
21 1977 Mine Act. Congress included that provision so that  
22 operators would manage safety and health conditions at  
23 their mines and find and fix the root causes of  
24 significant and substantial, or S&S, violations to  
25 protect the safety and health of mines.

1           Congress intended that MSHA use the Pattern of  
2 Violations provision to address operators who have  
3 demonstrated a disregard for the safety and health of  
4 miners. MSHA intended that the proposal would simplify  
5 the existing Pattern of Violations criteria, improve  
6 consistency in applying the Pattern of Violations  
7 criteria, and more adequately achieve the statutory  
8 intent.

9           The proposal would also encourage chronic  
10 violators to comply with the Mine Act and MSHA's safety  
11 and health standards. MSHA requested comments from the  
12 mining community on all aspects of the proposed rule and  
13 is particularly interested in comments that address  
14 alternatives to key provisions in the proposal.

15           The preamble to the proposal discusses the  
16 provisions in the rule and includes a number of specific  
17 requests for comment and information. The proposed rule  
18 would provide that the specific criteria, as you know --  
19 let me back up. The proposed rule includes the general  
20 criteria that MSHA would use to review a mine for a  
21 pattern of violation.

22           Then the proposed rule would provide that the  
23 specific criteria used in the review to identify mines  
24 with a pattern of significant and substantial violations  
25 would be posted on MSHA's website. In the preamble to

1 the proposal, MSHA requested suggestions on how the  
2 Agency should obtain comments from mine operators and  
3 miners during the development of and periodic revision to  
4 the specific POV criteria.

5 MSHA also requested comments on the best  
6 methods for notifying mine operators of changes to these  
7 criteria. MSHA has received a number of comments on the  
8 Pattern of Violations proposal. So in the public hearing  
9 notice, we refined our position further.

10 And as stated in the public hearing notice, for  
11 those of you who read the notice, MSHA plans to provide  
12 any change to the specific criteria to the public for  
13 comment via posting on the Agency's website before MSHA  
14 uses it to review a mine for a Pattern of Violations.  
15 So, in other words, we would obtain comments from  
16 stakeholders before we revise the specific criteria and  
17 use it to review a mine for a Pattern of Violations.

18 MSHA plans to review and respond to any  
19 comments received and revise, as appropriate, the  
20 specific criteria and post it on the Agency's website.  
21 In other words, we would post our response to any  
22 comments. And we would also post any revised specific  
23 criteria on the Agency's website. MSHA requests comments  
24 on this approach -- proposed approach to obtaining public  
25 input into revisions to the specific Pattern of

1 Violations criteria.

2 MSHA also requested comments on the burden  
3 that monitoring a mine's compliance record against the  
4 proposed specific POV criteria using the Agency's website  
5 would place on mine operators. MSHA asked that  
6 comments -- commenters include detailed rationale and  
7 supporting documentation for any comment or suggested  
8 alternative.

9 And, at this point, I do want to bring to you  
10 alls' attention that you -- most of you know -- some of  
11 you know that MSHA has developed a web tool that  
12 operators can use to, basically, put in their mine ID  
13 number. And then it will populate the data for that  
14 particular mine would be populated on this web tool. And  
15 it will show you where you are within the range  
16 of approaching the specific POV criteria, so ...

17 And I hope that at least some of you have found  
18 that useful. And we have gotten some responses from some  
19 mine operators. And they are, indeed, using it. I  
20 gathered that a week ago on our website and determined  
21 how many people by the number of hits that we've gotten  
22 on that particular tool.

23 MR. MATTOS: And it's been about 800 a week.

24 MODERATOR SILVEY: Okay. Thank you.

25 To be considered as a mitigating circumstance,

1 the proposed rule would provide that an operator may  
2 submit a written safety and health management program to  
3 the District Manager for approval. MSHA would review the  
4 program to determine whether the program parameters would  
5 result in meaningful, measurable, and significant  
6 reductions in S&S violations.

7 MSHA would like to clarify at this point,  
8 because we've gotten some comments on this issue so far  
9 so we would like to clarify that the Agency did not  
10 intend that these safety and health management programs  
11 be the same as those referenced in the Agency's  
12 rulemaking on comprehensive safety and health management  
13 programs.

14 Rather, MSHA would consider a safety and health  
15 management program as a mitigating circumstance in the  
16 Pattern of Violations proposal when it (1) includes  
17 measurable benchmarks for abating specific violations  
18 that could lead to a Pattern of Violations at a specific  
19 mine, and (2) addresses hazardous conditions at that  
20 mine.

21 MSHA also requested detailed information and  
22 data on the cost, benefits, and feasibility of  
23 implementing the proposed provisions. MSHA requested  
24 specific comments on its estimates of numbers of mines  
25 affected, which are likely to vary from year to year.

1           As you address the proposed provisions, either  
2 in your testimony to us today or in your written  
3 comments, please be as specific as possible about how  
4 changes would affect the safety and health of mines. But  
5 also, if you have -- and you heard me say this in the  
6 prior hearing, those of you who were here, if you have  
7 specific alternatives to the provisions we've proposed,  
8 please be as specific as possible in your alternatives,  
9 in your -- any suggested rationale for your alternatives,  
10 in the impact or the benefit to the health and safety of  
11 miners, and any information that you might have on cost  
12 data or other data in that regard.

13           MSHA will make available transcripts of all the  
14 public hearings approximately two weeks after the  
15 completion of the hearing and, as you all know, you may  
16 view the transcripts on [www.regulations.gov](http://www.regulations.gov) or on MSHA's  
17 website at [www.msha.gov](http://www.msha.gov).

18           And we will now begin the testimony. And  
19 please begin by clearly stating your name and  
20 organization and spelling your name so the court reporter  
21 will have an accurate record.

22           And now we will go to our first speaker. Our  
23 first speaker is Mike Crum on behalf of MARG, which I  
24 believe is the Methane Awareness Resources Group. You  
25 know, everybody likes to use acronyms. We are not

1 in D.C. now, so spell out your organization. That was  
2 humor, so in case you all don't know that. And Mark  
3 Savit, who is MARG's -- MARG -- M-A-R-G, apostrophe  
4 "s" -- who is their learned counsel. That was a little  
5 humor too. The --

6 MR. SAVIT: I --

7 MODERATOR SILVEY: The learned part.

8 MR. SAVIT: I laughed -- for the record,  
9 I laughed.

10 MODERATOR SILVEY: Okay. Okay.

11 MR. MATTOS: I think it was more of a chuckle,  
12 but --

13 MODERATOR SILVEY: Okay. Thank you. All  
14 right. We can -- we will begin.

15 MR. CRUM: Good morning. My name is Mike  
16 Crum -- M-I-K-E, C-R-U-M. I'm employed by FMC  
17 Corporation as a safety team leader at the FMC Westvaco  
18 Mine. And I serve as Chairman of the Mining Awareness  
19 Resource Group, or MARG.

20 MARG is a coalition dedicated to protecting its  
21 employees and the environment. MARG members include FMC;  
22 Cargill Salt; Detroit Salt; Morton Salt; Mosaic Potash;  
23 Tata Chemicals, formerly known as General Chemical; and  
24 other mining interests that support our efforts.

25 MARG seeks to ensure that the laws and

1 regulations are feasible, effective, based on sound  
2 science, and implemented and enforced fairly. MARG  
3 represents its members in select matters, which impact  
4 the mining industry before the Federal agencies, the  
5 Congress, and the Courts. MARG also serves its members  
6 by providing a forum for communication and the exchange  
7 of information and by creating coalitions to assist in  
8 achieving common goals.

9           Today, I present MARG's comments on the MSHA  
10 proposed rule on patterns of significant and substantial,  
11 S&S, violations. MARG seeks a transparent and fair rule  
12 for the use of MSHA's most severe civil enforcement tool,  
13 closure orders resulting from a pattern of S&S  
14 violations. Unfortunately, the proposed rule is neither  
15 transparent, nor fair, is contrary to law, and must be  
16 reopened and repropoed.

17           The first fundamental problem with the MSHA  
18 proposal is that it withholds for future web posting the  
19 actual criteria the Agency will use for pattern  
20 determinations. By not disclosing, proposing, and  
21 adopting the criteria through notice and comment  
22 rulemaking, MSHA prevents full analysis of the rule's  
23 impact and a meaningful opportunity for interested  
24 parties to comment on the proposal.

25           As a result, we believe that the proposed rule

1 violates the Administrative Procedures Act, APA, and Mine  
2 Act rulemaking mandates. For example, Section 104(e)(4)  
3 of the Mine Act authorizes the secretary to "make such  
4 rules as he deems necessary to establish criteria for  
5 determining when a Pattern of Violations of mandatory  
6 health or safety standards exists." By not disclosing  
7 the criteria and publishing them for comment, MSHA  
8 exceeds its authority and violates its Mine Act mandate.

9           Second, if adopted, the proposed rule will  
10 result in closure orders issued against employment sites  
11 before the employer has an opportunity to: (1) discuss  
12 the alleged pattern with the Agency; (2) contest the  
13 validity of alleged citations or orders used to identify  
14 a pattern; (3) address the accuracy of Agency data used  
15 for pattern identification; or (4) obtain a judicial  
16 review of alleged violations constituting a pattern.

17           The proposed rule, if adopted, will deny mine  
18 operators Mine Act Section 105 citation and penalty  
19 contest rights and due process of law by permitting the  
20 use of contested violations to impose pattern closure  
21 orders. The contest provisions of the Act provide  
22 critical protections against improperly issued citations.  
23 MSHA's elimination of contest rights and the protection  
24 they provide is not authorized by the Mine Act.

25           In addition, the proposed rule will eliminate

1 the current rule's notice of a proposed pattern and the  
2 established opportunities to demonstrate to MSHA that the  
3 proposed pattern is based on erroneous data, a common  
4 occurrence in the overloaded MSHA database. This current  
5 system has proven critical to prevent inapplicable and  
6 incorrect pattern enforcement and invalid mine closure  
7 orders.

8 Further, contrary to the purpose of the Mine  
9 Act, the proposed rule's elimination of the Notice of  
10 Potential Pattern will deny mine operators and their  
11 employees an opportunity to improve their performance and  
12 then -- and, thereby, their safety record.

13 If adopted, the proposed rule will require mine  
14 operators, if they wish to gain future MSHA consideration  
15 of mitigating circumstances prior to pattern closure  
16 order issuance, to submit safety and health management  
17 programs to MSHA for approval. By doing so, the proposed  
18 rule seeks to impose a new substantive safety standard  
19 program mandate, bypassing the rulemaking provisions of  
20 the Act.

21 Separate and distinct rulemaking procedures  
22 have been announced at both OSHA and MSHA to determine if  
23 company safety program mandates should be required and,  
24 if so, what program mandates should be adopted through  
25 those separate rulemaking procedures. By seeking to

1 adopt safety program mandates through this unrelated  
2 pattern rulemaking, MSHA engages in an end run around  
3 Mine Act Section 101 mandatory rulemaking for safety and  
4 health standards.

5           The very concept of determining whether there  
6 is a Pattern of Violations, which are of such nature as  
7 could have significantly and substantially contributed to  
8 the cause and effect of mine health or safety hazards,  
9 requires the consideration of the circumstances  
10 surrounding the citations and possible hazards, including  
11 the impact of the safety program in place at the mine.

12           Mandating MSHA advance approval of a safety  
13 program, as proposed in this pattern rulemaking, violates  
14 the Agency's duty to consider the mine's safety program  
15 as a hazard mitigating circumstance, regardless of  
16 whether MSHA knew of the program, let alone approved it,  
17 in advance.

18           MSHA does not have authority to attach such a  
19 precondition, with its associated mine operator burden,  
20 to the exercise of its statutory duty to evaluate the  
21 circumstances surrounding suspected violations before  
22 issuing closure orders.

23           We understand the need for fair and equitable  
24 use of MSHA enforcement tools to achieve safety, as well  
25 as a need to reform the troubled MSHA enforcement system.

1 We do not believe, however, that this flawed proposal  
2 will enhance safety, nor comply with the mandates of the  
3 Mine Act, the APA, and the due process protections of the  
4 Constitution.

5 We urge you to revoke, revise, and repropose  
6 this rule. Thank you for allowing me to testify on  
7 behalf of MARG.

8 MODERATOR SILVEY: Thank you.

9 MR. SAVIT: My name is --

10 MODERATOR SILVEY: I'll have comments at the  
11 end of both of yours.

12 MR. SAVIT: Okay. My name is Mark Savit.  
13 M-A-R-K; S-A-V, like Victor, I-T. And I also represent  
14 the Mining Awareness Resources Group as counsel.

15 And I wasn't here really to testify about what  
16 has already been said in the written remarks, which we'll  
17 be glad to provide to the reporter at the close of our  
18 testimony.

19 However, there are a couple of issues that have  
20 come up based on the notice of the hearing, which  
21 Ms. Silvey mentioned, that I'd like to address and a  
22 couple other issues that I'd like to just bring to the  
23 panel's attention, as well as raising a question or two  
24 of the panel with regard to some of the representations  
25 in the proposed rule.

1           The first one that I'd like to bring to the  
2 panel's attention is that the panel has now -- or the  
3 Agency has now announced in its Notice of Hearing two  
4 different things; one about safety and health management  
5 programs, and one about making criteria available for  
6 comment.

7           It seems to me that the rulemaking, at the very  
8 least, needs to be reopened so that those who are not  
9 here to make direct comments through oral testimony have  
10 an opportunity to comment on what the Agency said when  
11 it filed its Notice of Hearing with regard to announcing  
12 criteria, enforcing comment, and what type of safety and  
13 health management program would be.

14           It is not -- it doesn't comply with the  
15 Administrative Procedure Act for the Agency to give  
16 rolling targets to comment on and then not provide  
17 general comment periods for the entire industry, or all  
18 the stakeholders to provide --

19           MODERATOR SILVEY: Yeah. I would disagree with  
20 you on that. But we are not going to argue that point  
21 here.

22           MR. SAVIT: Well --

23           MODERATOR SILVEY: The -- no.

24           MR. SAVIT: Okay.

25           MODERATOR SILVEY: Let me just -- the notice

1 was given to everybody broadly in the public hearing  
2 notice. The opportunity for a public hearing is for that  
3 portion of the mining industry who wishes to avail  
4 themselves, either who requested to come to the public  
5 hearing or who wishes to avail themselves of the  
6 opportunity for a public hearing.

7 But we provided through the mechanism that is  
8 required by the Administrative Procedure Act -- I'm just  
9 saying this for the benefit of everybody in here and --  
10 by the Administrative Procedure Act and the Mine Act. We  
11 provide the form for proper notice of a government to  
12 provide any notice to the public. And that was through  
13 the Federal Register.

14 So in any event -- and, obviously, that's why  
15 they have lawyers in the world because people disagree on  
16 various approaches that one can take. But, in any event,  
17 if you would proceed with your testimony, Mr. Savit.

18 MR. SAVIT: Clearly, we disagree. But I need  
19 to --

20 MODERATOR SILVEY: Okay. But I said -- yeah,  
21 we are -- obviously, we are not going to argue that  
22 point. So if you would --

23 MR. SAVIT: But I didn't ask to argue it.

24 MODERATOR SILVEY: No, I understand.

25 MR. SAVIT: But I needed to put that point on

1 the record --

2 MODERATOR SILVEY: Okay. I said --

3 MR. SAVIT: -- because it's not otherwise in  
4 it.

5 MODERATOR SILVEY: -- if you would proceed with  
6 your testimony.

7 MR. SAVIT: Let me offer a comment or two on  
8 both of those issues.

9 First of all, with regard to the Agency's offer  
10 to -- which it doesn't seem to be codified anywhere,  
11 although it's an offer that's made in the Notice of  
12 Hearing, but doesn't appear in the proposed rule, to  
13 provide some comment period and some notice of what the  
14 criteria would be.

15 My first impression of why that doesn't  
16 suffice, based on the testimony we gave, is because the  
17 criteria would not be subject to challenge under the APA  
18 if the Agency considers them not to be a part of the  
19 substantive rule, but merely measurements of how you  
20 would comply with the rule. And the Agency has taken  
21 that position over and over and over again.

22 We would submit that it is those criteria that  
23 need to be challengeable because the rest of the rule  
24 really doesn't have any substance. And if you propose  
25 criteria, no matter whether you offer a comment period or

1 not, you've tried to exclude those criteria from formal  
2 challenge. And that is an inadequacy.

3 The second piece I want to address is this  
4 issue about safety and health management plans. It is in  
5 my opinion -- and we will undoubtedly disagree, so  
6 I'll let you know you disagree with me in advance.

7 MODERATOR SILVEY: No, I don't know. I haven't  
8 heard -- I haven't heard --

9 MR. SAVIT: Oh, you will.

10 MODERATOR SILVEY: I haven't heard your opinion  
11 yet.

12 MR. SAVIT: Ms. Silvey, we've known each other  
13 a long time.

14 MODERATOR SILVEY: I know.

15 MR. SAVIT: I know you'll disagree with it  
16 that --

17 MODERATOR SILVEY: He knows.

18 MR. SAVIT: -- that it is disingenuous of the  
19 Agency to say on the one hand, here is a request for a  
20 comment asking all of the stakeholders to tell us what  
21 ought to be in a comprehensive safety and health  
22 management plan; and then to say, here are criteria for  
23 safety and health management plans, which would be  
24 considered mitigating circumstances under this rule.

25 What that means is that the Agency has already

1 determined that some criteria, other than those which are  
2 a little bit hazy and, once again, not promulgated and  
3 not proposed as a rule, show criteria other than those  
4 that would be used by the District Managers to approve  
5 safety and health management plans as mitigating  
6 circumstances under the Pattern of Violations rule would  
7 be added to any other requirements for a safety and  
8 health management plan that is on which comments are now  
9 being solicited.

10           So to say, we want all your comments and  
11 we'll -- we will take them to heart, and we'll act on  
12 them, but we want you to use these other safety and  
13 health management programs, which may -- which won't be  
14 the same as the ones we're soliciting comments on means  
15 the Agency has already made its decision that criteria  
16 other than those, or in addition to those, that would be  
17 required to be considered by the District Managers of  
18 mitigation have to be -- would have to be included in a  
19 comprehensive safety and health management plan that  
20 would be adopted under the other rule.

21           The -- those, I think, are a bit technical  
22 legal points. I would ask -- I would just make a couple  
23 comments and ask a question.

24           The first comment is, I personally have availed  
25 myself of the new web tool with regard to Pattern of

1 Violations and found it to have been in error at least  
2 once in a very major way --

3 MODERATOR SILVEY: Okay.

4 MR. SAVIT: -- where a mine did not meet all of  
5 the criteria under category A, but yet the answer in the  
6 right-hand column said, yes, anyway. That leaves me to  
7 think that maybe the Agency is ignoring some of the  
8 criteria or maybe they're reading it way different than I  
9 am.

10 But in a case where in category A is no -- or  
11 one of the criteria is that a certain percentage of S&S  
12 citations must meet heightened negligence requirements.  
13 The mine was well below that; but yet it said, Yes, you  
14 meet all the criteria in category A.

15 MODERATOR SILVEY: Did you bring that to  
16 anybody's attention at MSHA?

17 MR. SAVIT: Well --

18 MODERATOR SILVEY: Particularly, Mr. Mattos?

19 MR. SAVIT: I haven't yet.

20 MODERATOR SILVEY: Can you give us that  
21 specific incident?

22 MR. SAVIT: I'll be glad to talk to you --

23 MODERATOR SILVEY: Okay.

24 MR. SAVIT: -- about that specific person --

25 MODERATOR SILVEY: Okay.

1 MR. SAVIT: -- but off the record. I don't  
2 want to put that mine's name --

3 MODERATOR SILVEY: No.

4 MR. SAVIT: -- in play in a -- in a --

5 MODERATOR SILVEY: Okay. Well, off the record,  
6 though, if you would just let us know. We --

7 MR. SAVIT: -- public hearing.

8 MODERATOR SILVEY: I think we would like to  
9 know that. I mean, not think. I know we would like to  
10 know that.

11 MR. SAVIT: It is --

12 MODERATOR SILVEY: Okay.

13 MR. SAVIT: Okay. It's --

14 MODERATOR SILVEY: Okay. No. And I don't want  
15 it to do any --

16 MR. SAVIT: It is incorrect on at least once.

17 MODERATOR SILVEY: -- any harm to that  
18 particular mine either. Yeah.

19 MR. SAVIT: And that brings me to the next  
20 point about economic impacts. One of the things that the  
21 Agency has failed to consider that has, in fact, occurred  
22 is that when the POV notice, coupled with the Dodd-Frank  
23 reporting requirements --

24 MODERATOR SILVEY: Uh-huh.

25 MR. SAVIT: -- have come out, we actually

1 represent a non-MARG member who was on the potential POV  
2 list in the last draft.

3 MODERATOR SILVEY: Uh-huh. Uh-huh.

4 MR. SAVIT: They did not get a Pattern of  
5 Violations notice. When -- they actually are not even  
6 a U.S. stocks filer, but they made the announcement  
7 anyway. After making the announcement, their stock  
8 dropped 15 percent. That economic impact is nowhere  
9 addressed --

10 MODERATOR SILVEY: Yeah.

11 MR. SAVIT: -- in any of this, in any of the  
12 materials. And I needed to say that it far exceeds any  
13 economic harm that could have resulted from the  
14 imposition of the debtor.

15 MODERATOR SILVEY: It could -- it could  
16 possibly be unlimited. It could be -- it could possibly  
17 be unquantifiable, in my opinion, in terms of -- you know  
18 what I'm trying to say. I -- that --

19 MR. SAVIT: I understand what you're saying,  
20 but --

21 MODERATOR SILVEY: -- that I don't know what  
22 the projection is. But on that issue, the  
23 Dodd-Frank Act --

24 Who passed the Dodd-Frank Act?

25 MR. SAVIT: I, I don't -- we don't need to --

1                   MODERATOR SILVEY: I know. That was -- that  
2 was -- no.

3                   MR. SAVIT: -- engage in a dialogue about this.

4                   MODERATOR SILVEY: That was a little -- that  
5 was a little rhetorical, but only a little.

6                   All I'm saying on the Dodd -- really. Only --  
7 seriously, only a little rhetorical.

8                   The Dodd-Frank Act was passed by Congress.  
9 That's all I'm saying.

10                  MR. SAVIT: I understand that.

11                  MODERATOR SILVEY: Okay. All right.

12                  MR. SAVIT: However, however, this company  
13 isn't even a U.S. filer --

14                  MODERATOR SILVEY: Well --

15                  MR. SAVIT: -- and under current rules isn't  
16 required to make a disclosure under Dodd-Frank.

17                  MODERATOR SILVEY: I don't know. I don't know  
18 the --

19                  MR. SAVIT: No. I'm just telling you the  
20 facts.

21                  MODERATOR SILVEY: Yeah.

22                  MR. SAVIT: And, yet, because of the --

23                  MODERATOR SILVEY: Well --

24                  MR. SAVIT: -- press releases and announcements  
25 that the Agency has made about Potential Pattern of

1 Violations, their stock dropped 15 percent.

2 MODERATOR SILVEY: Okay. Well, that --

3 MR. SAVIT: I understand maybe --

4 MODERATOR SILVEY: Yeah.

5 MR. SAVIT: -- unquantifiable, but it needs to  
6 be taken into account --

7 MODERATOR SILVEY: But -- yeah. But you  
8 understand --

9 MR. SAVIT: -- in some -- in some way. That,  
10 that's where I -- that's what I'm trying to say.

11 The last question I would ask is in -- I  
12 have -- let me make one more comment and then ask the  
13 question.

14 The elimination of the Notice of Potential  
15 Pattern, I think, bothers everybody, including the MARG  
16 group, more than almost anything else.

17 And the rationale for it seems to be, based on  
18 what I have read from the Agency, that too many companies  
19 who receive pattern notices actually do what the Agency  
20 wants them to do and improve their performance. And,  
21 therefore, the Agency isn't issuing enough Section 104(e)  
22 pattern violations.

23 And this seems like a way in which enforcement  
24 is glorified above the goal that it is intended to  
25 achieve, which is to induce the companies that get the

1 potential pattern to change their behavior. That goal is  
2 being accomplished almost 100 percent by the potential  
3 notice. And, yet, the Agency proposes to eliminate it  
4 for reasons that I can't fathom based on the data that's  
5 been presented.

6 Speaking of data, the last bit of data I would  
7 like to see from the Agency is on page 5721 of the  
8 proposed rule. And it says that MSHA data and experience  
9 show that violations of approval, training, or  
10 record-keeping regulations, for example, can  
11 significantly and substantially contribute to safety or  
12 health hazards.

13 I would respectfully request at this time that  
14 that data be released and the experience be described  
15 with some particularity. Thank you.

16 MODERATOR SILVEY: Okay. Thank you.

17 Now, I have a few comments. And I'm going to  
18 say this to everybody, not meaning that -- I would ask  
19 people -- obviously, these are public hearings and people  
20 can make whatever comments they wish to me, whether they  
21 have a basis in fact or no basis in fact. That's why we  
22 are here.

23 But I would ask you to please repeat -- read  
24 the proposed rule, read MSHA's -- any further  
25 representations MSHA makes at each advanced stage in the

1 process. People who deal with notice and comment  
2 rulemaking know how the process is done. They know, in  
3 fact, that the Agency can refine its position at either  
4 step, at either point in time.

5 Obviously, people can agree or disagree with  
6 the Agency. But I ask you to look at it in an objective  
7 manner, in a non-emotional manner, and to provide us  
8 as clearly as you can your comments.

9 Now, in regard to that, let me go back  
10 and start to see if we can bring a little clarity to the  
11 comments so far, because all I've heard is that the  
12 proposed rule we issued -- all I've heard are legal  
13 principles, sort of.

14 Now, for those of you who don't happen to  
15 know -- and I don't know why I say this either. I happen  
16 to be a lawyer, but not MSHA's lawyer. And I hasten to  
17 tell that to everybody because I have never, but I've  
18 heard that the proposed rule violates the Mine Act,  
19 the APA, and the due process clause of the Constitution.

20 And I will go back and say that -- and when we  
21 proposed this rule, we intended to hopefully bring some  
22 clarity to a process, to a tool that the Congress  
23 included in 1977; and that the Congress, indeed, intended  
24 for the Agency to use. But we hope to fashion a rule  
25 that could be used in a more consistent and in a more

1 clear manner.

2 But that's one reason agencies go through  
3 rulemaking. They go through rulemaking to hear comments  
4 from the public and to try to get alternatives, specific  
5 alternatives, to a proposal published by the Agency.  
6 And any specific comments that would help us would be  
7 alternatives to what we proposed.

8 So with that being said, in terms of a -- I go  
9 back first to Mr. Crum. There were a few things in  
10 your comments that I wanted -- if at all possible, if you  
11 could clarify. And that is at one point you gave four  
12 things that this rule would not allow you all to do, one  
13 of which was to discuss allege -- if you can remember  
14 your four points.

15 It was in this place in your testimony. You  
16 said discuss alleged patterns with the Agency.

17 Do you remember when you said that?

18 MR. CRUM: Yep.

19 MODERATOR SILVEY: Can you repeat those four  
20 things for me again, please?

21 MR. CRUM: (1) Discuss the alleged pattern with  
22 the Agency; (2) contest the validity of alleged citations  
23 or orders used to identify a pattern; (3) address the  
24 accuracy of Agency data used for pattern identification;  
25 or, (4) obtain judicial review of alleged violations

1 constituting a pattern.

2           MODERATOR SILVEY: Okay. Let's go -- let's  
3 take those, each one.

4           When you say would not allow to discuss alleged  
5 patterns with the Agency, what did you mean there,  
6 please? Just, you know, for the record so I'll fully  
7 understand what you meant.

8           MR. CRUM: Well, as we understand the rule,  
9 the pattern letter comes to the operator right now, and  
10 you have to start the process of defending yourself. So  
11 there's no up-front warning. There's no up-front notice  
12 saying: Hey, you guys are getting close; you need to make  
13 some changes, or we need to review your data.

14           MODERATOR SILVEY: Well, that was the purpose,  
15 though, of doing the web too. But when you say discuss  
16 alleged pattern with the Agency, in point of fact, under  
17 the existing -- you can discuss the pattern, the alleged  
18 pattern, with the Agency.

19           There is -- there -- you know, there is a  
20 process for -- even if you get a pattern letter, the -- I  
21 just -- I couldn't understand exactly what you meant  
22 there. That's what I'm trying to figure out, exactly  
23 when you say discuss alleged pattern with the Agency.

24           And the second was what? Give me the second  
25 one?

1 MR. CRUM: Contest the validity of alleged  
2 citations orders --

3 MODERATOR SILVEY: Okay.

4 MR. CRUM: -- used to identify a pattern.

5 MODERATOR SILVEY: And the third one was --

6 MR. CRUM: Address the accuracy of Agency data  
7 used for pattern identification.

8 MODERATOR SILVEY: And what did you mean by  
9 that one? Address the accuracy --

10 MR. CRUM: Oh. Just --

11 MODERATOR SILVEY: -- of the data?

12 MR. CRUM: Mr. Savit pointed out a discrepancy  
13 that he has already found within the web tool.

14 MODERATOR SILVEY: So that's the -- that's an  
15 example of what you're talking about there. Because  
16 later on in your testimony, you said also something about  
17 based on erroneous data. And I wanted -- do you remember  
18 that statement? And I would like you to explain that.  
19 You know, you -- I was trying to make notes where there  
20 were parts that I didn't understand. So I don't know  
21 exactly where it was in your testimony.

22 MR. CRUM: Would --

23 MODERATOR SILVEY: Something about based on  
24 erroneous data. So just if you could give me an example  
25 if -- so then we can try to get to at least know what

1 you're talking about so we can fix --

2 MR. SAVIT: If the panel would allow me to  
3 answer that --

4 MODERATOR SILVEY: Okay. Okay.

5 MR. SAVIT: -- on behalf of MARG. I will speak  
6 from personal experience involving non-MARG members.

7 MODERATOR SILVEY: Uh-huh.

8 MR. SAVIT: I've represented four or five mines  
9 that have received potential pattern notices. Every one  
10 of them has contained either erroneous numbers of  
11 citations, included contractor citations that weren't to  
12 be included with the operator, had mistakes in the  
13 severity rate or reporting issues, or otherwise had  
14 included vacated citations or modified citations.

15 MODERATOR SILVEY: Okay. Uh-huh.

16 MR. SAVIT: I have never found one in which all  
17 of the data were entirely accurate.

18 MODERATOR SILVEY: Okay.

19 MR. SAVIT: And that discussion prior to the  
20 issuance of a notice would be eliminated in the proposed  
21 rule because the notice -- there would be no notice of a  
22 potential pattern.

23 MODERATOR SILVEY: Uh-huh. Okay. But --

24 And in response to Mr. Crum and Mr. Savit, just  
25 so everybody knows, the reason that the Agency proposed

1 to eliminate Potential Pattern of Violations is because  
2 when you look at the plain -- even though it is in the  
3 existing rule, when you look at the plain language of the  
4 Mine Act, the Mine Act says a Pattern of Violations.

5 The Mine Act does not say anything about a  
6 Potential Pattern of Violations. Obviously -- and I will  
7 say to you all because the comments are on MSHA's  
8 website, and you can go and look at them. We have gotten  
9 a lot of comments about the proposed elimination of that  
10 provision.

11 So just so you and so -- and your concern about  
12 it or some -- let me put it this way. Maybe not concerns  
13 from everybody, but concerns from some members of the  
14 mining community. But the comments are public record, so  
15 everybody can go and look at them.

16 MR. CRUM: Ms. Silvey?

17 MODERATOR SILVEY: Yes?

18 MR. CRUM: I'd also like to bring to the  
19 panel's attention probably three or four or maybe five  
20 years ago when numerous mining operations across the  
21 country received the pattern notice erroneously, that  
22 came through out of the MSHA database, which was  
23 subsequently rescinded and notification provided.

24 MODERATOR SILVEY: A pattern notice or a  
25 potential pattern notice?

1 MR. CRUM: A potential pattern notice.

2 MODERATOR SILVEY: A potential pattern notice.  
3 I was going to say not a pattern notice.

4 MR. CRUM: Right. Excuse me.

5 MODERATOR SILVEY: Okay. Let's get out --  
6 yeah. Okay. The next point I would like to turn to --  
7 and this is kind of -- it's for both of you. If --  
8 because it seems to me that there is still some confusion  
9 on this issue of safety.

10 And, Mr. Crum, you've mentioned it in your  
11 testimony. And then Mr. Savit mentioned it again, the  
12 safety and health management program.

13 So as not to confuse the safety and health  
14 management program that's referenced in this proposed  
15 pattern rulemaking with the safety and health --  
16 comprehensive safety and health -- and I'll try to  
17 clarify that -- with the comprehensive safety and health  
18 management program that was the subject of public  
19 meetings about a year ago in MSHA. Those are two  
20 separate entities.

21 That rulemaking may or may not go forward, that  
22 safe -- comprehensive safety and health management  
23 program. Those are by purpose intended to be different  
24 programs. That comprehensive safety and health  
25 management program was intended to address a safety and

1 health management program of an entire company.

2 As I said this morning -- from earlier this  
3 morning from the person who works on the shops, the  
4 responsibilities of the person who works on the shop  
5 floor up to and including the CEO for addressing safety  
6 and health at that mine overall globally.

7 This safety and health management program is  
8 intended to be directed -- it's a different -- one has  
9 nothing to do with the other. It's intended to be -- and  
10 it's elective. That's the most significant thing I want  
11 to say to people here. I wrote that down somewhere.  
12 It's elective.

13 It's for operators -- only operators who  
14 wish -- who may see -- who may -- who may see that they  
15 may be approaching a Pattern of Violations and wish to  
16 come in to MSHA and avail themselves of that mitigating  
17 circumstance provision in the proposed rule, whatever  
18 section it was -- something, something, something 88, I  
19 think.

20 And I forget what the -- what 104 something 88,  
21 if I'm not mistaken -- who wish to avail -- see that they  
22 are approaching a Pattern of Violations and come into  
23 MSHA and say, I want to submit to you, MSHA, Mr. District  
24 Manager, a safety and health management program aimed at  
25 the areas in which my mine is experiencing S&S violations

1 that draw me within the ambit of this specific criteria;  
2 albeit, as you said, Mr. Savit, the specific criteria  
3 that's not included in the proposed rule.

4 Now, I've given you that one because that is  
5 the way the rule is so constituted. And we -- I'm going  
6 to discuss that in a few minutes. But if an operator --  
7 if Joe Blow operator sees that he's within, you know, who  
8 knows? He's as close as 85 percent to what the specific  
9 criteria are, and then says: Well, I'll -- I may get to  
10 a hundred; I may fall within that in the next month; but,  
11 rather than do that, I'm going to come up with -- maybe  
12 my -- I look at it, and my areas are S&S violations in  
13 roof control and ventilation and combustibles.

14 I'm making this up. I'm going to go in to MSHA  
15 with a safety and health management program aimed at  
16 those areas, the areas of the S&S violations where I'm  
17 having the problems. And I say, I'm going to reduce  
18 these, MSHA; and this is my plan for reducing these and  
19 blah-blah-blah-blah-blah. And we said it had to have  
20 meaningful benchmarks, measurable, meaningful, and that  
21 type of thing.

22 So that's what that safety and health  
23 management program is aimed on. But if an operator just  
24 wants to go on and not do anything, an operator can  
25 choose to do that if the operator doesn't want to avail

1 himself or herself of that mitigating circumstance  
2 provision. That's what that was meant to be.

3           It was in no case intended to be an end run  
4 around rulemaking. It was in no case meant to be a  
5 rulemaking at all. As I said, if an operator wished to  
6 do so, the operator could. If the operator chooses not  
7 to do so, the operator doesn't have to. So, you know, I  
8 hope that that clarifies -- that I clarified that because  
9 that has troubled me.

10           And so the next thing I heard that troubled me  
11 was -- I'm sorry -- that didn't trouble me. But I think  
12 Mr. Crum mentioned this -- troubled MSHA enforcement or  
13 some kind of MSHA enforcement. What exactly were you  
14 talking about there?

15           MR. CRUM: I think we all understand the  
16 scrutiny that the Agency is under following all the  
17 tragic mine disasters. And when we look at the safety  
18 and health of our membership mines, we consistently -- we  
19 are consistently at or below national average. And  
20 that's hats off to all the operators, miners, and  
21 management for progressing their safety and health  
22 programs and the safety of their miners.

23           When we look at the pattern issue and we talk  
24 about the Agency's scrutiny for higher paper, higher  
25 negligence, more S&S violations; and we all know that's

1 there. I mean, I hear it from the guys. And we are  
2 starting to see significant changing interpretations in  
3 enforcement. A great example is guarding.

4 MODERATOR SILVEY: I was going to say when you  
5 say you hear, you -- what -- and I'm reading between the  
6 lines. And I don't like to do that. But what I think  
7 I'm hearing you say is that you hear that there is some  
8 mandate for higher -- for more paper? Higher paper?

9 MR. CRUM: Yep.

10 MODERATOR SILVEY: Can -- do you -- is that  
11 some rumor you are hearing? Or do you have specific  
12 examples of that? If you have specific examples, I would  
13 ask that you give those to me.

14 MR. CRUM: Well, when we -- I'll give you a  
15 great example. When we look at citations that are  
16 written --

17 MODERATOR SILVEY: Uh-huh.

18 MR. CRUM: -- the mine inspectors today start  
19 everything basically at high negligence. And they've got  
20 to justify moving that lower. So most of our citations  
21 we see today are moderate negligence -- moderate  
22 negligence or higher.

23 MODERATOR SILVEY: Okay. Wait a minute. Wait.

24 MR. CRUM: When we -- let me finish.

25 MODERATOR SILVEY: Yeah.

1           MR. CRUM: When we start talking about the  
2 negligence level with the inspector in the field,  
3 there's --

4           MODERATOR SILVEY: Is the Metal/Nonmetal  
5 District Manager here?

6           MALE SPEAKER: Yes.

7           MODERATOR SILVEY: Still here? Thank you.

8           MR. CRUM: There is --

9           MODERATOR SILVEY: You listen to this.

10          MR. CRUM: There is very little conversation  
11 that happens when we start talking about whether or not  
12 anybody's been in the area, whether or not anybody's done  
13 a workplace exam because they don't work in that area  
14 during that shift where you would expect a low negligence  
15 citation to arise out of that situation, very little  
16 conversation around low negligence, and from more  
17 than just the guys in our area.

18           We hear it all across the country from our  
19 membership. I will have to write a novel to justify low  
20 negligence.

21          MODERATOR SILVEY: But you were going to give  
22 me, I thought -- see, when you said, let me finish, I  
23 thought you were going to giving me a specific concrete  
24 example to -- an example of what you -- of your  
25 proposition.

1           MR. CRUM: Inch-and-a-half shaft sticking out  
2 of a mortar, over six feet above the ground,  
3 automatically S&S. Whereas, in the past, based on MSHA's  
4 guarding handbook, not necessarily be guarded.

5           MODERATOR SILVEY: How high up did you say it  
6 was?

7           MR. CRUM: Over 6 feet. Smooth shafts who --  
8 which we have dealt with for eons in our industry.

9           MODERATOR SILVEY: Uh-huh.

10          MR. CRUM: We always had half the diameter of  
11 the shaft sticking out, a smooth shaft. No hazard  
12 exists. No need to guard. Change in interpretation.

13          Now, when we talk about program policy manual,  
14 we talk about the MSHA's guarding handbook, which MSHA  
15 has referred to in numerous citations that I've received,  
16 we don't talk about it.

17          That's the inspector's interpretation. That's  
18 the way we're going. We're done. If you need to  
19 conference it, you know your conference rights.

20          MODERATOR SILVEY: Well, I would like to -- I  
21 mean, thank you for that specific example. But I would  
22 like it if you have any examples because it was -- it's a  
23 general statement, if you would provide those to us. I'm  
24 ask -- and anybody else that you were mentioning, if  
25 that's going to come up in your testimony, if you would

1 do that. Because that's the only way we can address  
2 certain things, is deal with specific examples. On  
3 the --

4 MR. SAVIT: Can I -- before -- can I add one  
5 thing to it?

6 MODERATOR SILVEY: Uh-huh. Yes.

7 MR. SAVIT: What we said in the testimony was  
8 we too understand the need for fair and equitable use of  
9 MSHA enforcement tools to achieve safety, as well as the  
10 need to reform the troubled MSHA enforcement system.

11 Let me just refer the panel back to Mr. Main's  
12 repeated testimony that the system needs to be reformed  
13 and new legislation needs to be passed because they say  
14 MSHA doesn't have adequate tools to do its job.

15 If Mr. Main is saying that -- and I'm not going  
16 to make any comments on my own -- it's hard for us not to  
17 determine that the Agency, itself, thinks there is  
18 something wrong with the enforcement system.

19 MODERATOR SILVEY: Okay. But you used it in  
20 the context of you said it -- troubled. And I just want  
21 to -- with all due respect to what Mr. Main said, I want  
22 an explanation of what you meant by saying that. Okay.

23 I do want to, at this point -- and those of you  
24 who were here earlier heard me say that -- I want to  
25 say because this is coal and metal/non-metal, I want to

1 also recognize the tremendous safety improvements that  
2 have been made in the mining industry and say that -- and  
3 say again that that was through the combined efforts of  
4 operators, miners, and everybody at the state  
5 government -- everybody who had a role in safety and  
6 health.

7           And I think people are to be commended and --  
8 you know, in the metal/non-metal industry, we don't have  
9 the same concept for mine examiners as we do in the coal  
10 industry. But there is the concept that the workplace be  
11 examined.

12           So the people who do the examinations, I think  
13 the people who do it day in and day out who do them,  
14 while not under the same structure as in the coal  
15 industry, they still carry on a deep and a solemn  
16 responsibility. And I think we do give our appreciation  
17 to those people.

18           MR. SAVIT: Absolutely.

19           MODERATOR SILVEY: Yeah.

20           MR. SAVIT: We join in that.

21           MODERATOR SILVEY: Right. And because -- and  
22 the bottom line our goal is to try to fashion the best  
23 rule that's consistent with the legislative intent, but  
24 it's also fair and equitable.

25           Along that line, I just have one other comment;

1 and that is that we, recognizing that the way the  
2 proposed rule is structured, the general criteria in the  
3 rule, the specific criteria on the website right now, and  
4 we said that if we made any change to it and before we  
5 made -- we would make any change and use that changed  
6 specific criteria -- and for lack of a better word, I'll  
7 just call it the formula.

8           It's embodied in the formula. Before we would  
9 change it and use that changed criteria to review a mine  
10 for a pattern, we would make that changed criteria  
11 available to the public; post it on the website; allow  
12 the public to have the opportunity to comment; respond to  
13 the comment; post our response to the comment; and if we  
14 made any revisions in response to the public's comment;  
15 we would do that all on the website.

16           So from you all what I'm hearing, I think I've  
17 probably explained it as clearly as I can. Would you add  
18 anything to it?

19           MR. MATTOS: I -- that's -- that's the --

20           MODERATOR SILVEY: -- plan.

21           MR. MATTOS: -- that's the plan.

22           MODERATOR SILVEY: From you all, what I'm  
23 hearing is that our plan is not really -- that you have  
24 problems with our plan.

25           MR. SAVIT: I don't see any -- I don't -- were

1 a mine to receive a pattern notice -- and there's no  
2 warning under your proposed system -- there's no  
3 potential pattern warning.

4 MODERATOR SILVEY: Right.

5 MR. SAVIT: So were you to receive a pattern  
6 notice -- and we haven't -- we don't know this yet  
7 because there haven't been very many of them --

8 MODERATOR SILVEY: Right.

9 MR. SAVIT: -- but anyone worthy of earning his  
10 or her pay would want to challenge the basis for the  
11 adoption of the criteria. If the criteria are subject to  
12 public comment and posted on the web and made subject to  
13 comment and so on and so forth, that allows a comment.  
14 I'm certainly going to concede that, although it does not  
15 hold the Agency to any APA standard for consideration of  
16 the comments --

17 MODERATOR SILVEY: Uh-huh.

18 MR. SAVIT: -- or adoption of the comments.

19 MODERATOR SILVEY: No, I hear you. I'm --  
20 yeah.

21 MR. SAVIT: It's just a courtesy that the  
22 Agency is extending.

23 MODERATOR SILVEY: Yeah.

24 MR. SAVIT: So the Agency is absolutely free to  
25 say: Well, we heard your comments and too bad; we're

1 going to adopt what we said we're going to adopt.

2 MODERATOR SILVEY: Uh-huh. Yeah.

3 MR. SAVIT: Now, once the notice is issued  
4 anyone worth his or her pay, we'd want to challenge the  
5 criteria or the adoption procedure for the criteria. But  
6 if the Agency is going through this informal process and  
7 adopting them as criteria, they may not be subject to  
8 challenge under the provisions of the Act where you can  
9 challenge the rulemaking.

10 MODERATOR SILVEY: Uh-huh.

11 MR. SAVIT: And that was my point.

12 MODERATOR SILVEY: Uh-huh. Okay.

13 MR. SAVIT: They have to be subject to  
14 challenge.

15 MODERATOR SILVEY: No, I understood with that  
16 one.

17 MR. SAVIT: And that's where I am.

18 MODERATOR SILVEY: That's why I didn't -- I  
19 understood that point, clearly. Yeah.

20 MR. SAVIT: It was a technical legal point  
21 only.

22 MODERATOR SILVEY: Yeah. Okay.

23 MR. SAVIT: And that's where we would go.

24 MODERATOR SILVEY: Right.

25 MR. SAVIT: And where we -- frankly, I think

1 everybody is going with the current rule is if somebody  
2 gets a notice, at some point they will want to challenge  
3 the adoption of the current criteria --

4 MODERATOR SILVEY: Uh-huh.

5 MR. SAVIT: -- as being non-APA compliant.

6 MODERATOR SILVEY: Yeah. That's a good --  
7 that's a point there. I was going to say because that is  
8 exactly the makeup of the current rule in terms of --

9 MR. SAVIT: Right.

10 MODERATOR SILVEY: -- the specifics.

11 MR. SAVIT: Right. But --

12 MODERATOR SILVEY: I'm glad you said that.  
13 You -- actually, I almost forgot that point that -- yeah.  
14 Right.

15 MR. SAVIT: I -- we certainly --

16 MODERATOR SILVEY: Right.

17 MR. SAVIT: I mean, I certainly was prepared to  
18 do that --

19 MODERATOR SILVEY: Yeah.

20 MR. SAVIT: -- had my client received a  
21 notice --

22 MODERATOR SILVEY: Yeah.

23 MR. SAVIT: -- that -- but they didn't receive  
24 it. They got off -- they didn't get a POV notice.  
25 They -- you know, they had a PPOV.

1           MODERATOR SILVEY: And so you were prepared --  
2 you were prepared to do what now?

3           MR. SAVIT: We would absolutely have challenged  
4 the criteria as being adopted in a non-APA compliant  
5 manual -- manner.

6           MODERATOR SILVEY: Yeah. But the -- see, yeah.

7           Well, we don't -- we can -- we'll talk about  
8 that off the record because -- but the basis for the --  
9 that would have been kind of ingenious to figure out how  
10 to do that because the basis for the challenge to the  
11 existing rule is long gone.

12          MR. SAVIT: No. But it's the criteria that  
13 were adopted and which are not subject to rulemaking --

14          MODERATOR SILVEY: Right.

15          MR. SAVIT: -- criteria. So we would argue  
16 that the period in which you would challenge those  
17 would -- that is not -- that's in the statute for  
18 challenging rulemaking doesn't apply, number one.

19          And, number two, I would take a position that  
20 there is a -- that a Court would call a pre-enforcement  
21 challenge to those criteria unripe for review is fairly  
22 high.

23          MODERATOR SILVEY: So you would --

24          MR. SAVIT: So the -- they only become ripe for  
25 review if you --

1 MODERATOR SILVEY: -- apply them.

2 MR. SAVIT: If -- yeah, once they're applied.

3 MODERATOR SILVEY: So you would challenge them  
4 as final Agency action? Or you would --

5 MR. SAVIT: Absolutely.

6 MODERATOR SILVEY: Okay. Well, I'm -- you  
7 know, this is worth something to me. It's always good to  
8 learn something here.

9 MR. SAVIT: I --

10 MODERATOR SILVEY: You understand what I'm --

11 MR. SAVIT: I hope I didn't hand the playbook  
12 to the opposing team. But I think in the interest of --

13 MODERATOR SILVEY: You all got -- this is  
14 useful.

15 MR. SAVIT: Seriously --

16 MODERATOR SILVEY: Yeah. Uh-huh.

17 MR. SAVIT: -- in the interests of fairness,  
18 that is final Agency action.

19 MODERATOR SILVEY: Okay.

20 MR. SAVIT: It would become challengeable once  
21 again only after the notices were issued.

22 MODERATOR SILVEY: Okay.

23 MR. SAVIT: Notices were issued.

24 MODERATOR SILVEY: I hear you. Yeah.

25 MR. SAVIT: And in this case, there's no

1 opportunity to avoid that because you're proposing  
2 eliminating the potential pattern notice.

3 MODERATOR SILVEY: Okay.

4 MR. SAVIT: So it would just raise a tremendous  
5 amount of litigation. And it would be relitigated every  
6 time you change the criteria.

7 MODERATOR SILVEY: Uh-huh. Okay. That's  
8 helpful. I mean, this conversation is useful. This --  
9 you know.

10 MR. SAVIT: As much as that means to my income,  
11 I'm still willing to give it up.

12 MODERATOR SILVEY: Do you have any comments?

13 MR. MATTOS: I have one or two questions, I  
14 guess.

15 MODERATOR SILVEY: Okay.

16 MR. MATTOS: Well, I have one comment. One,  
17 one way is --

18 MODERATOR SILVEY: They add a little levity  
19 here.

20 MR. SAVIT: Don't -- yeah. Well, you know. I  
21 mean, I laughed at learned counsel. I chuckled at  
22 learned -- yeah.

23 MR. MATTOS: Mild humor we have.

24 MR. SAVIT: Right.

25 MR. MATTOS: You said that the most bothersome

1 component of this proposed rule is the elimination of the  
2 potential pattern part of the current rule.

3 MR. SAVIT: At least my -- to MARG, I believe  
4 it is. And to everyone I've talked to, it is.

5 MR. MATTOS: And you concluded that we must not  
6 be -- MSHA must not be happy with the number we're  
7 getting on to pattern of violation. And I just want to  
8 clarify that for the record, is MSHA would be very  
9 happy --

10 MODERATOR SILVEY: -- if nobody --

11 MR. MATTOS: -- if nobody made pattern  
12 violations.

13 MODERATOR SILVEY: True.

14 MR. SAVIT: Well -- and let me just --

15 MR. MATTOS: And --

16 MR. SAVIT: Go ahead.

17 MR. MATTOS: -- just -- I mean, just to -- I  
18 mean, that is not --

19 We do have a District Manager back here who  
20 would be very happy not to have any mines on that list.  
21 And that's our goal is to not, but --

22 MR. SAVIT: And I don't disagree with the  
23 District Manager --

24 MR. MATTOS: But really --

25 MR. SAVIT: -- or the Assistant District

1 Manager I think is also back there, right? Yeah. There  
2 he is. So --

3 MR. MATTOS: But this proposal and the items in  
4 this proposed rule are -- were developed so that we would  
5 get a more proactive approach to this from the mine  
6 operators and putting out what the criteria are and where  
7 you -- so you can see where you are against that criteria  
8 at any point in time up-to-date.

9 A good operator would be monitoring that  
10 religiously and getting with us to tell us, number one,  
11 are there errors in the information? Because, trust me,  
12 we get -- as many citations as we issue in a year,  
13 150,000 or upwards of that, there are mistakes made, or  
14 the stage that these citations -- the stages they go  
15 through; they're modified; they're issued; they're  
16 modified.

17 They're issued to the wrong contractor, the  
18 wrong operator. There are a million ways to make  
19 mistakes on these citations. And that web tool is just  
20 one more we have. We constantly are notified by it;  
21 there's a mistake here or a potential mistake. And  
22 sometimes we're right; sometimes we're not. We'd like to  
23 have 100 percent accuracy, but that will never happen.

24 But that web tool would -- does provide -- and  
25 we get a lot of calls from operators saying: There's an

1 error in this. Sometimes they're right. Sometimes we're  
2 right. But that is a good thing for all of us. If we  
3 have a problem with the system, that's how we uncover it.  
4 We get notified of those. We find some ourselves. But  
5 we'd rather find them ourselves before they get to an  
6 operator.

7           But the whole point is that it's to be  
8 proactive. It's to have people monitoring this ahead of  
9 time. And once you're getting to a point where, you  
10 know, we have problems here; we have issues here; we need  
11 to address some things -- that's what -- that's where  
12 we're really trying to get.

13           So having said that, though, the approach --  
14 and you've seen the approach that we have developed here  
15 with proposals. But -- and you're basically saying we  
16 need to reopen the rule. There's nothing in here that  
17 you see that -- or suggestions for changes to this one  
18 that would alleviate the concerns you've addressed here.

19           MR. SAVIT: I don't see specific changes to  
20 this rule, other than re-opening it and re-including the  
21 potential notice -- the pattern notice.

22           Let me address a couple things that you said.

23           With regard to how -- I know MSHA would at the  
24 operation's level be extraordinarily happy that it would  
25 not issue anymore POV notices. It would issue none in

1 the future and that everyone would comply.

2           However, when you look at the testimony that's  
3 taken place and the answers to the questions posed by  
4 Congressman Miller in the last several hearings that  
5 Mr. Main has given, he has vowed over and over again that  
6 he -- you know, he believes this tool is underused and it  
7 should have been used more. And he vows to use it more  
8 in the future and -- etc., etc., etc.

9           The primary reason why it hasn't been used as a  
10 final notice over the years has been that it -- the  
11 potential pattern notification has been an adequate  
12 incentive to operators to change their -- the way in  
13 which they do their compliance or their safety and health  
14 programs, if that's -- I don't want to get -- this isn't  
15 for argument.

16           But the reason why there haven't been any --  
17 very many pattern notices actually sent is because the  
18 PPOV, or the potential pattern notice, is a tremendous  
19 incentive for everybody to take corrective action. And  
20 the only reason why I concede to eliminate it  
21 from achieved goal perspective, rather than some issue  
22 about what the statute says -- now, I understand what the  
23 statute says.

24           It also says that MSHA can promulgate rules to  
25 implement that section of the statute. And if MSHA

1 chooses to implement a rule or promulgate a rule with a  
2 potential pattern notice in it, it can do that.  
3 Nobody -- I don't think anybody would challenge its  
4 ability to do that. But all I was getting at was there  
5 have been very few notices. There has been a criticism  
6 of that.

7           The primary reason why there's been very few is  
8 the potential pattern notice. And, therefore, I don't  
9 see a reason to eliminate it, except to respond to  
10 concerns from Congress that the Agency isn't issuing  
11 enough pattern notices.

12           MR. MATTOS: Thank you.

13           MODERATOR SILVEY: Well, I don't know that -- I  
14 won't even respond to that. I do want to say do -- say  
15 one other thing just for -- that for the operators who  
16 have received under the current rule, the existing rule,  
17 Potential Pattern of Violations, they are using -- they  
18 are -- some of them are availing themselves of that  
19 provision.

20           We have that in our procedures, a mitigating  
21 circumstance, right? They are, indeed, availing  
22 themselves of that and are submitting corrective action  
23 programs in the nature of safety and health management  
24 programs aimed at the particular conditions at their  
25 mine. And so they are -- I'm sure we've gotten what?

1 Between the two phases that we have run the existing --  
2 I suspect we've probably gotten at least ten.

3 MR. MATTOS: Yeah.

4 MODERATOR SILVEY: About ten.

5 MR. MATTOS: Sure.

6 MODERATOR SILVEY: I, to be honest -- and I  
7 probably should have done that -- I have not looked at  
8 some of them to see how they are constructed. But we  
9 have gotten about ten. And for -- and, really, for the  
10 most part, except for one, through those -- through the  
11 implementation of successful ones, operators achieved  
12 significant reductions in their -- in the target --

13 MR. MATTOS: Correct.

14 MODERATOR SILVEY: -- areas. Is that right?

15 MR. MATTOS: That's right.

16 MODERATOR SILVEY: Yeah. So, anyway, thank you  
17 for your comment and testimony.

18 MR. CRUM: Thank you.

19 MODERATOR SILVEY: And if you have any -- as I  
20 have said to many people and many times, if you have any  
21 specific -- any additional specific comments meaning  
22 specific comments with specific alternatives, specific  
23 rationale for your alternatives, specific impact on  
24 safety and health for miners, specific data on costs --  
25 not general -- you know the difference between general

1 and specific -- please get back to us before the record  
2 closes on June 30th.

3 I'm sorry. I --

4 Did you have anything?

5 MS. HUTCHISON: Huh-uh.

6 MODERATOR SILVEY: No?

7 And, you?

8 MR. JONES: I did. Just for the record,

9 Mark --

10 MODERATOR SILVEY: Oh, no.

11 MR. JONES: -- you mentioned the economic  
12 impact of the Dodd-Frank regulations?

13 MR. SAVIT: Uh-huh.

14 MR. JONES: Well, since those were promulgated  
15 and enforced by the Securities and Exchange Commission,  
16 that's a cost that's more accurately should be factored  
17 to the FCC and not to MSHA.

18 MR. SAVIT: As -- what I said was is a company  
19 that didn't -- that wasn't a Dodd-Frank reporter that  
20 made the announcement and had that happen to its stock  
21 anyway.

22 MODERATOR SILVEY: We are --

23 MR. SAVIT: This is not a -- they're not a  
24 Dodd-Frank reporter, so --

25 MODERATOR SILVEY: I understand. Okay.

1 MR. SAVIT: -- it's not -- I don't see where  
2 that goes.

3 MODERATOR SILVEY: Thank you.

4 MR. SAVIT: Okay.

5 MODERATOR SILVEY: Thank you very much.

6 MR. SAVIT: We can talk off the record after,  
7 if you --

8 MODERATOR SILVEY: Thank you.

9 MR. SAVIT: Thank you.

10 (Off the record.)

11 (On the record.)

12 MODERATOR SILVEY: Our next person,  
13 organization, is Matt Pedersen-Howard with Rio Tinto.

14 (Off the record.)

15 (On the record.)

16 MODERATOR SILVEY: Good morning.

17 MR. PEDERSEN-HOWARD: Hi, again.

18 MODERATOR SILVEY: Hi.

19 MR. PEDERSEN-HOWARD: I presented at your  
20 public forum in Sacramento.

21 MODERATOR SILVEY: I remember.

22 MR. PEDERSEN-HOWARD: So don't worry. I won't  
23 overrun this time.

24 MODERATOR SILVEY: Thank you.

25 MR. PEDERSEN-HOWARD: Okay.

1 MODERATOR SILVEY: I appreciate that.

2 MR. PEDERSEN-HOWARD: I'll keep you on track.

3 MODERATOR SILVEY: Okay.

4 MR. PEDERSEN-HOWARD: So my name is Matt  
5 Pedersen-Howard. I work for Rio Tinto. I'm the Director  
6 of Health and Safety for Rio Tinto Minerals. That's a  
7 division of the broader Rio Tinto Group. We're a global  
8 mining company, one of the biggest in the world, as the  
9 Rio Tinto Group. And our division, as it probably gives  
10 away by the name, looks after the minerals division. We  
11 have, as it stands right now, borates and talc. So the  
12 U.S. Borax Group is one that's ours.

13 We operate, again even in our division,  
14 internationally, in the U.S., Canada, Argentina, in  
15 Europe, in France, Holland, Serbia -- we have a  
16 development project there -- and in Australia, as well.  
17 Rio Tinto operates in many more countries than that.

18 Our approach really in terms of health and  
19 safety and environment and product stewardship  
20 sustainability is along the lines of taking a  
21 behavior-based approach. We try and drive sustainable  
22 and desirable culture through engaging our employees and  
23 making sure that it's based on sound scientific  
24 approaches, which I guess, you know, in the same  
25 situation that in MSHA, and probably could never be in

1 that kind of situation in terms of how you would promote  
2 desirable things in U.S. mining.

3 But I just thought I'd put that out there at  
4 the front end recognizing the difference between how we  
5 have operated and how you guys have to deal with certain  
6 things.

7 Regarding the POV proposal, we do have a few  
8 issues and a few concerns with that. And we've also  
9 submitted a counterproposal, actually, already on the  
10 record. So that's -- you already have that to look at.

11 But, essentially -- I mean, our issues and  
12 concerns with the proposal, fundamentally, in our  
13 viewpoint, any rulemaking or any pattern violation should  
14 really be intended to improve the mine safety and health  
15 in U.S. mining.

16 And I think that's probably one thing --  
17 whereas, we disagree on a lot of things, that's probably  
18 one thing that everyone in this room can agree upon is  
19 that we want everyone to go home in the same way, if not  
20 a better condition that they came to work in. And that's  
21 certainly something that we hold as a value.

22 And I know a lot of other mining companies  
23 around the U.S. strive for that, as well. And I think  
24 that a lot of action has been taken in that regard. So  
25 just to make sure that we're clear on the purpose, this

1 should really be targeted at, you know, issues where  
2 we're seeing violations, but also injuries because,  
3 fundamentally, that's what we want to reduce.

4           To us, it's not about necessarily increased  
5 violations or citations and how we deal with that.  
6 What's the impact on the overall miner in the U.S.,  
7 knowing improving our safety and health performance in  
8 that regard?

9           So with that, I just made a few notes. And I  
10 haven't got anything, you know, formal to submit today.  
11 But I produced a few notes to read off.

12           I still think the proposal is fairly  
13 complicated, a lot of criteria in that proposal. I know  
14 that the web interface that you put together certainly  
15 helps. We've used that to review where we're at, you  
16 know, on the pattern. But I still think there's a lot of  
17 detail in that that perhaps could be simplified further.

18           Fundamentally, there's a -- it's based on  
19 citations. And as you've probably seen -- in fact, you  
20 made a note in the documents you have at the back -- you  
21 had 80 -- 88,000 contested citations back in November.

22           So I guess the question I would have initially  
23 is what is the reason why people are contesting  
24 citations? I have my own view on that. But I think that  
25 would be an interesting piece of information to get out

1 there. I don't know if you have that data available.

2 MR. MATTOS: When you say why they're  
3 contesting --

4 MODERATOR SILVEY: They --

5 MR. PEDERSEN-HOWARD: Why are people contesting  
6 citations?

7 MODERATOR SILVEY: They contest it -- they  
8 contest for a variety of reasons --

9 MR. PEDERSEN-HOWARD: Absolutely.

10 MODERATOR SILVEY: -- as you probably know,  
11 some of which end up being no reason. And the reason I  
12 say that is because a few operators contest all. So they  
13 just make a decision to check the box and contest. And  
14 so there I can't get in their mines -- for those few who  
15 decide to contest all, I don't know why. Others decide  
16 that they will -- at the end of the day if an operator  
17 gets ten violations, they decide that they will pay the  
18 nine. And they will contest this one.

19 And obviously, for whatever reason, they  
20 probably have a legitimate reason for contesting that  
21 one. They've gone through an affirmative thought  
22 process. So there are a number of reasons why operators  
23 contest.

24 MR. PEDERSEN-HOWARD: Certainly, speaking from  
25 my experience and within our group, the subjectivity

1 aspect regarding likelihood in negligence, which is the  
2 main driver between why we would contest a citation.

3           And I guess the issue I have with basing any  
4 additional enforcement action on citations is that they  
5 are inherently subjective and particularly subjective  
6 when it comes to those two areas of assessment. And the  
7 likelihood, obviously, drives the potential S&S, which  
8 clearly impacts what this would be looking at.

9           So I think it's probably more broad-reaching  
10 than POV. But, obviously, POV is linked based on S&S  
11 citations. The subjectivity of that likelihood  
12 assessment and negligence really has a huge impact on  
13 whether we'll have disagreement around citation  
14 assessments and probably I would speculate a large  
15 percentage of why there has been so many contested  
16 citations.

17           So I don't know if that's beyond the scope of  
18 this. But I certainly would welcome a clearer, more  
19 consistent, and perhaps fairer approach to assessment and  
20 whether it's for the guidelines so that inspectors have  
21 somewhat a more broadly consistent approach to assessing  
22 citations. We've seen a lot of variation in how people  
23 assess likelihood. And, typically, we're not necessarily  
24 in line with where we view that likelihood piece.

25           So the next question I would have is how do

1 citations correlate with injuries? And it's sort of a  
2 fundamental question that has based our thinking around  
3 our proposal. Are we seeing a correlation between mining  
4 operators that are having the bulk of the injuries with  
5 the bulk of the citations? And I haven't seen any data  
6 that so far supports that.

7           And drilling into that further, are we seeing a  
8 correlation between the number of citations issued  
9 against a particular standard with the potential to cause  
10 injuries to certain -- in certain matters? Does that  
11 correlate to what we're seeing in terms of an injury  
12 statistic standpoint in the U.S.?

13           And I haven't seen that data to support it. I  
14 suspect there's probably not as good a correlation as we  
15 initially would think there would be between citations  
16 and injuries. So I don't know if you had that  
17 information.

18           MR. MATTOS: I can answer that --

19           MODERATOR SILVEY: Well, but you don't have to.

20           MR. MATTOS: Well, I just -- one, there's a --  
21 there's an issue with the injury data. There are some  
22 limitations to the injury data that don't allow us to  
23 make a good analysis of that. And that's something  
24 that -- it's an ongoing problem.

25           MODERATOR SILVEY: Although -- and I shouldn't

1 say -- I am going to say it. You say how do citations  
2 correlate with injuries?

3 Well, I'll just say one thing and then, as they  
4 say, And if the thing speaks for itself -- if you were to  
5 look on our website prior to April 5th, sadly to say,  
6 2010, and saw all of the citations we had written for  
7 ventilation and float coal dust for one particular mine  
8 operation, then I think maybe some people would go back  
9 and say that citations -- there is some correlation  
10 between citations and injuries. But, anyway, I don't  
11 want -- I mean, you go on with your testimony.

12 MR. PEDERSEN-HOWARD: But I would argue that's  
13 one specific case. And --

14 MODERATOR SILVEY: That may be. That --

15 MR. PEDERSEN-HOWARD: -- and maybe not data  
16 points.

17 MODERATOR SILVEY: But I said -- but you asked  
18 the question.

19 MR. PEDERSEN-HOWARD: Yep.

20 MODERATOR SILVEY: I said the thing speaks for  
21 itself, didn't I?

22 MR. PEDERSEN-HOWARD: In --

23 MODERATOR SILVEY: So -- okay.

24 MR. PEDERSEN-HOWARD: In one case.

25 MODERATOR SILVEY: But --

1 MR. PEDERSEN-HOWARD: But I think we probably  
2 need to take a broader look to see if there's much of a  
3 correlation is my --

4 MODERATOR SILVEY: But you --

5 MR. PEDERSEN-HOWARD: -- is my argument.

6 MODERATOR SILVEY: -- you get my point, though,  
7 I think.

8 MR. PEDERSEN-HOWARD: Yeah.

9 MODERATOR SILVEY: Okay.

10 MR. PEDERSEN-HOWARD: The next question that I  
11 would have is is severity rate the best measure? And  
12 that I guess is a moot point.

13 In our proposal, we looked at whether days lost  
14 is a more meaningful or a better measure in terms of how  
15 you would assess. In fact, I would commend MSHA for  
16 actually trying to incorporate an injury statistic  
17 against, you know, just purely citations issued.

18 From our standpoint, again, we think there's a  
19 little bit of a disconnect in the risk arena, you know,  
20 in terms of where we see potential for injuries and how  
21 that would occur around awareness perception, judgment,  
22 and control. And we just think there's a bit of a  
23 disconnect in terms of how do you manage that from an  
24 enforcement standpoint. It probably comes back a little  
25 bit to the discussion previously around the correlations

1 and the data.

2           In terms of our proposal -- I won't go into all  
3 the details because it's clear we've already submitted  
4 it, so I'm sure if there's any questions -- we were  
5 looking at a fairly simple approach in terms of where do  
6 people fit in terms of their injury rates; and if they're  
7 in the lowest 8 percent in terms of injury rate in that  
8 particular category and have the worst citation rates per  
9 inspector hour in that category, then they would be  
10 considered for a POV.

11           Now, with that, we also believe that there's  
12 probably a better model in terms of how a POV would be  
13 utilized. We -- from our standpoint, obviously with  
14 sites that we want to improve, we see engagement in  
15 helping them improve as being the best model. Clearly,  
16 it becomes more challenging from your standpoint to do  
17 that. But, again, connecting the engagement piece we  
18 found to be more effective.

19           In terms of the proposal, again, it would be  
20 based on a quarterly review for the previous 12 months'  
21 statistics. Again, threshold numbers would be posted on  
22 the website, as you have, to try and provide that  
23 clarity. Any sites that meet one, but not both, criteria  
24 would essentially be given a notice of some warning:  
25 Hey, you know, you're in this area; you're close; you

1 might want to consider looking at something to improve  
2 citation rates or injuries.

3           And then parallel to, you know, some of the  
4 approaches you would be taking with how do we manage  
5 sites on a POV with increased inspections, maybe it's a  
6 little bit more support in that area. And then any site  
7 that has been issued a POV gets expedited hearings  
8 because it would be based on issued citations, rather  
9 than being final orders.

10           So, therefore, if it's triggered a POV, is  
11 there an avenue to then help expedite any issues? And if  
12 that subsequently turns out to be a successfully  
13 contested citation, then it would take them off the POV.  
14 The POV would be an ongoing process. So, therefore, it  
15 would be somewhat self-managing and the course of that  
16 review would come up and assuming after a period of time,  
17 you know, off that list, then clearly, you've made  
18 sufficient improvement.

19           So again the proposals would do so. I'll spare  
20 all the details, a couple of pages. So -- and,  
21 essentially, that's all I -- so I don't know if you have  
22 any --

23           MODERATOR SILVEY: I do.

24           MR. PEDERSEN-HOWARD: -- questions of me.

25           MODERATOR SILVEY: With respect to your

1 proposal -- and like you said, you provided it, and I  
2 don't want to get into the details of it.

3 But for everybody who has provided specific  
4 suggested proposal alternatives, thank you for doing so;  
5 because, quite frankly, whether we wholeheartedly are  
6 with it or not, a lot of times it provides the basis for  
7 a starting point or a basis for an idea about something  
8 or -- and turning that idea into something.

9 But on the injury rates -- and maybe Jay will  
10 say more than I will say about this. Well, first of all,  
11 let me ask him a question.

12 (Off the record.)

13 (On the record.)

14 MODERATOR SILVEY: The reporting information is  
15 used -- the reporting information under Part 50 is used  
16 in calculating injury rates. And I think in terms of  
17 some of the things we have found recently and with  
18 respect to -- with respect to the application of the PPOV  
19 under the existing rule and some mines for the Part 50  
20 data and going in and doing an audit of their reporting  
21 data, that in some cases -- and, clearly, I'm not saying  
22 this in every case.

23 I start my life from the premise that all  
24 American companies start out in the day at the beginning  
25 of every day to achieve -- with the goal of achieving

1 safety and health for their workers, whether it be in the  
2 general industry or in the mining industry.

3 That's just my belief. And that's my personal  
4 belief. So let me say that, since it's going to be on  
5 the record.

6 And so -- but with that in mind, I  
7 guess that -- you know, and so I say that for all the  
8 operators in here to let you know that's my personal  
9 feeling.

10 Now, and with that in mind, we know that there  
11 probably -- there are some operators who, when it does  
12 come to the reporting, that the data that are reported,  
13 then this data are subsequently used to calculate the  
14 injury rates, that sometimes the data are not always --  
15 what's the -- what word should I use? Are not always --  
16 we find later that it's not always accurate, for lack of  
17 a better word.

18 So I think the only thing I would say to that  
19 is that you're right. That's a -- that is one index.  
20 And clearly we use it too. But that's probably one thing  
21 that for it to be an all-out index, that's something --  
22 that's just -- maybe that's just a point I want to make,  
23 instead of saying anything else.

24 Would you add anything to that?

25 MR. MATTOS: Well, I was going to ask a

1 question on how we would deal with -- how do we deal with  
2 like the limitations in the injury data that we have?  
3 Some of it is just non-response to the injury  
4 reporting requirements. How do we overcome that barrier  
5 because it is self-reporting?

6 MODERATOR SILVEY: Yeah. I was more talking  
7 about what we found for a few operators who maybe didn't  
8 report injuries or things that happened. Then,  
9 subsequently, we went in and did a Part 50 audit. And  
10 then people talked and said, On X date they had eight  
11 ambulance run. And that -- and, you know, when you say  
12 ambulance, they went to the hospital.

13 So you know whatever happened was serious  
14 enough for the person to go to the hospital. But nothing  
15 was reported. So to -- candidly, that's what I  
16 was talking about. And Jay had another one.

17 MR. PEDERSEN-HOWARD: Yeah. I mean, there's  
18 always that issue.

19 MODERATOR SILVEY: Yeah.

20 MR. PEDERSEN-HOWARD: But I would argue that  
21 there's other avenues to deal with that issue. I mean,  
22 that's another fundamental issue, regardless whether  
23 people aren't reporting accurately.

24 MODERATOR SILVEY: But here, yours was -- yours  
25 was -- that was part of it.

1 MR. MATTOS: Yeah.

2 MODERATOR SILVEY: Yeah.

3 MR. PEDERSEN-HOWARD: Wouldn't the same issue  
4 affect --

5 MODERATOR SILVEY: Yeah.

6 MR. PEDERSEN-HOWARD: -- the severity rate,  
7 though?

8 MR. MATTOS: Oh, yes.

9 MODERATOR SILVEY: Yeah.

10 MR. MATTOS: And it deals with all of the --  
11 anything to do with the injury experience in the mines.

12 MODERATOR SILVEY: Right.

13 MR. PEDERSEN-HOWARD: And my comment was more  
14 around is severity rate the best measure if we're looking  
15 at injury rates.

16 MODERATOR SILVEY: Does anybody else have any?  
17 No?

18 MS. HUTCHISON: No.

19 MODERATOR SILVEY: Okay. Thank you very much.

20 MR. PEDERSEN-HOWARD: Thank you.

21 MR. MATTOS: Thank you.

22 MODERATOR SILVEY: Okay.

23 And, again, thank you for your specific  
24 proposal.

25 At this point, I want to make a general

1 comment. It doesn't matter that Mr. Pedersen-Howard  
2 was -- is up here or not. It sort of goes, though, to  
3 part of his comments. And he, in terms of -- and we've  
4 heard that a lot, the subjectivity that is embodied in  
5 our -- in the writing of our citations.

6 First of all, I would like to say  
7 that we strive every day -- and it might not look like it  
8 to you all -- to improve consistency. And by me  
9 saying -- in the application of enforcement. And by me  
10 saying improving consistency, to some extent the opposite  
11 side of that is to reduce subjectivity to the extent that  
12 we can. Obviously, when you've got 800 or 900 or in  
13 excess of a thousand inspectors, there's some amount of  
14 subjectivity. I will start by getting -- by just stating  
15 that.

16 But in talking about these citations, I'm  
17 hearing so much about that. And you would -- one would  
18 think that all of them citations are contested. And then  
19 after they are contested, you know, this large percentage  
20 is vacated. And then -- and some great percentage of  
21 that -- of those are then changed significantly. But --  
22 and a matter of fact, just so people know, the vast  
23 majority probably are not contested.

24 Or are they?

25 MR. MATTOS: 70 percent are not contested.

1           MODERATOR SILVEY: Yeah, a large -- a large --  
2 even though in round numbers, in the last few years, that  
3 leaves a lot of them being contested. But a large  
4 majority of them are not contested. And then a de  
5 minimis amount -- a minuscule amount are vacated. And  
6 then some -- I don't know what the percentage is -- some  
7 smaller percentage, fewer -- I think much lower than  
8 10 percent are changed.

9           And for the purposes of this rule, I think the  
10 change that we are looking at is the -- is any change in  
11 the S&S designation. If it's changed from S&S to  
12 non-S&S, because the S&S violations are the ones that  
13 form the basis for the Pattern of Violations. Oh, I  
14 think we had some data. You're on that in the proposal,  
15 actually, on there. Didn't we?

16           MR. MATTOS: Yeah.

17           MODERATOR SILVEY: Yeah. So we have some data  
18 on that. Yeah. There, you can look at -- they're real  
19 small numbers. I don't even want to read them. But  
20 they -- over 700,000 from 2006 through 2010, with 3400  
21 vacated out of 700,000. And out of that same 700,000,  
22 6,000 were modified from S&S to non-S&S.

23           So that's really -- that's quite a small  
24 percentage. But not saying that -- I mean, obviously,  
25 anything we can do to improve the application of our

1 enforcement, that is a goal that we ascribe to.

2           Anyway, our next speaker is Jerry Glynn with  
3 Texas Industries.

4           Yeah. Hi. How are you?

5           MR. GLYNN: How are you?

6           MODERATOR SILVEY: Okay. Nice to see you.

7           MR. GLYNN: Nice to see you, again, Ms. Silvey.

8           MODERATOR SILVEY: Yeah, nice to see you.

9           MR. GLYNN: My name is Jerry Glynn --  
10 G-L-Y-N-N. I'm with Texas Industries. I'm their  
11 Financial and Safety Manager for the Expanded Shale &  
12 Clay Group.

13           Several of the items that Ms. Silvey has  
14 already pointed out form the basis of what I was going to  
15 say. So you'll hear it again, but that's okay.

16           MODERATOR SILVEY: That's okay.

17           MR. GLYNN: That's one of the things I like  
18 about the hearings. I testified down in Sacramento --

19           MODERATOR SILVEY: Right.

20           MR. GLYNN: -- on the safety and health  
21 management system. And at the time, there was a lot of  
22 vagueness in that proposal and continues to be some  
23 vagueness in that proposal. This proposal for the  
24 pattern of violation contains, again, a certain degree of  
25 vagueness.

1           And I think that because of the  
2 inconsistency -- and you hear that word again -- within  
3 the Agency to interpret the standards, that this ongoing  
4 pattern of consistent inconsistency makes this a  
5 dangerous proposal to all mine operators.

6           As we know, the industry is filled with a lot  
7 of stories of good operators who have a history of good  
8 Intron inspections, receiving multiple citations during  
9 an inspection, multiple S&S citations -- when they've had  
10 no history of such. And an inspector will say: Hey, you  
11 know, we've been told, if we see it, we cite it. And  
12 that's the mentality.

13           So a plant that's had 20 years of good records,  
14 all of a sudden, has a lot of citations. That doesn't  
15 mean that they're a bad operator. And it could possibly  
16 mean that all the other inspectors for the past 20 years  
17 were incompetent. But we know that's not true.

18           There are a lot of really good inspectors. I'm  
19 involved in the Rocky Mountain District, in the Western  
20 District, and the South Central District. And all the  
21 inspectors, the majority that I have met, are good people  
22 doing what they feel is the best job possible.

23           But there is an inconsistency in the  
24 interpretation of the standards because I don't think  
25 there's anybody on the panel who could say that all

1 inspectors understand and interpret the standards the  
2 same way every time. And we all understand that.

3           So to propose a Pattern of Violations that  
4 would put possibly somebody on a POV, you know, based on  
5 citations issued, as opposed to the final orders, is a  
6 section of the proposal that, you know, deeply troubles  
7 me. And many people have written in and commented that  
8 it is a violation of the due process of the Fifth and  
9 Fourteenth Amendments.

10           MSHA has many tools available and the power to  
11 protect the miners and, at the same time, preserve the  
12 rights of the operators. And one of the reasons that is  
13 cited in the proposal is the backlog of citations that  
14 are being contested as a basis as a justification for  
15 violating this due process that is afforded every citizen  
16 and most industries in the United States.

17           As we all know, there are times in this country  
18 that situations come up that we disagree with. For  
19 example, here recently, I think a lot of people were  
20 appalled at a certain religious group out of Kansas that  
21 protest at military funerals. We appall that. It's  
22 disgusting. But the Supreme Court upheld their First  
23 Amendment rights because the rights of the First  
24 Amendment come above those of emotion. And it is the  
25 Constitution that is the foundation of this country.

1           And I have to say as a veteran of a foreign war  
2 that before you put on the uniform, you have to take an  
3 oath and part of that oath is that you swear to defend  
4 the Constitution from all enemies, both foreign and  
5 domestic. And to me, there's nothing more important than  
6 the protection of the citizens of the United States that  
7 the Constitution provides.

8           And the Constitution and the intent of the  
9 Constitution far outweigh the intent of the Mine Act.  
10 And on that basis, that is why we oppose this proposed  
11 Pattern of Violations rule.

12           Thank you.

13           MODERATOR SILVEY: Thank you.

14           MR. MATTOS: Thank you.

15           MODERATOR SILVEY: That was very -- I would  
16 just like to make a few points here in this solemn  
17 period.

18           On a serious note, though, I would like to say  
19 on behalf of the panel -- and this is for you and for  
20 any -- and I'm sure there are others -- for any other  
21 veterans in here, that we appreciate your service to this  
22 country.

23           I think I -- and I take into consideration what  
24 you said about the due process. Granted, all Americans  
25 are under the Constitution. I will only make one point

1 on that, and that is that in the preamble to the proposed  
2 rule and -- but you made your point very strongly. And  
3 I'm going to acknowledge it, that we think the  
4 legislative history does not contemplate final orders.

5 For everybody in here who knows it, we did do  
6 it in the existing rule. What I mean is we exempted  
7 final orders. Final orders -- I'm sorry. Excuse me.  
8 That we required that only final orders be used in the  
9 existing rule. But if when you -- and I don't have to go  
10 to the preamble to see this.

11 As many of you know, those of you in the -- and  
12 you know that, Mr. Glynn -- probably know that the --  
13 much of the impetus behind the '77 Act was the Scotia  
14 Mine disaster -- and in talking about Scotia, when you  
15 look at the legislative history, Congress said that what  
16 happened at Scotia was that violations were allowed to  
17 exist over and over and over again and not -- and so when  
18 you read the legislative history and it's -- and the  
19 book, there are two books like this thick of the  
20 Congressmen at that time who were debating this '77 Mine  
21 Act.

22 And when you read it, you see very vividly that  
23 when they were referring to Scotia, they were intending  
24 that violations be the basis of Pattern of Violation --  
25 of a Pattern of Violations.

1           Now, having said that, the point I want to  
2 acknowledge that you made, you said not even the Mine Act  
3 can override the Constitution. So we hear you. Thank  
4 you. Okay.

5           Okay. Our next speaker is Mr. Butero, United  
6 Mine Workers.

7           MR. BUTERO: Hello, again. My name is Robert  
8 Butero -- spelled B-U-T-E-R-O. And as stated earlier in  
9 the previous testimony, as far as United Mine Workers  
10 have submitted written comments on the previous  
11 rulemakings and also the one here today, so I just want  
12 to talk a little briefly about, you know, these  
13 regulations and what they meant.

14           As you know, everybody points out that this  
15 Pattern of Violations has been included in the Mine Act  
16 since 1977 but, as we all know, basically has not ever  
17 been enforced. Maybe here recently there have been a  
18 couple issues, but nothing has ever been really enforced.

19           And when people talk about that way back in the  
20 early days, the passage of the Act, they always called  
21 that basically the death penalty because they thought  
22 once a mine got on the Pattern of Violations, that they  
23 would never be able to get off of it. But for years here  
24 I've been hearing, you know, especially from the industry  
25 that they want to target the bad operators and not go

1 after the good operators.

2 And, of course, their proposal is that, you  
3 know, when they come to the -- when MSHA comes to the  
4 mine site, they leave their ticket book at home until  
5 they know they got a bad -- they got a problem child, and  
6 then they try to deal with it.

7 This here proposal is meant to deal with the  
8 problem children. You know, as we have seen, you know,  
9 through the years that if a company has shown this  
10 reckless disregard for the mine health and safety, then  
11 they should maybe get the death penalty and be put out of  
12 business because they give us all a bad name.

13 And that's one of the problems that we've faced  
14 over the last few years is we've had many people,  
15 environmentalists, you know, many people that are looking  
16 at us through this microscope. And we do not need any  
17 more disasters in the mining industry to be looked at.  
18 So we should all be welcoming a way of trying to  
19 eliminate this.

20 You say on your website that you have this  
21 posting of you can fall into the Pattern of Violations or  
22 not. And if a mine operator is conscious of that, they  
23 should know what's happening at their mine. And as  
24 Mr. Mattos stated earlier, you know, we want the  
25 operators to be proactive. And they should be proactive

1 from the minute they open their doors for business is  
2 my -- as far as health and safety and not be waiting for  
3 some kind of novice telling them, you guys are doing  
4 something wrong.

5           They should be proactive in that step. And  
6 that's why we are against, you know, the novice to know  
7 that. They should be proactive from the beginning, and  
8 they should be there to try to stay off of the Pattern of  
9 Violations for doing things right.

10           And that's where this all comes -- as far as  
11 the criteria is concerned, you know, we think MSHA, you  
12 know, is a -- you've had the Act for over 30 years now.  
13 And I think you have developed enough data to know what  
14 constitutes a bad operator and what doesn't constitute a  
15 bad operator. And those are things that you should be  
16 using to determine that, you know, what is there. We  
17 agree with, you know, the -- be included in it.

18           One of the things that, you know, is kind of  
19 a -- you know, a bad situation even from the -- you know,  
20 our represented mines are probably some of the highest  
21 cited mines in the United States. And, again, when it  
22 comes to the major disasters in fatalities and stuff,  
23 the UMWA represented mines are not in that category.

24           So there is -- you know, so there is a -- why  
25 is this happening where those mines, if you give it to

1 them like this, you have to enforce it equally across the  
2 board and make sure everybody gets the same enforcement  
3 of this where even this too won't work in weeding out  
4 those bad operators.

5 And with that, I close my comments.

6 MODERATOR SILVEY: You got anything?

7 MR. MATTOS: Thank you.

8 MODERATOR SILVEY: No? Yeah. Okay.

9 Thank you, Mr. Butero.

10 MR. BUTERO: Thank you.

11 MODERATOR SILVEY: Is there anybody else who  
12 wishes to comment? Anybody in the audience?

13 Well, I can't tentatively conclude this hearing  
14 because I was notified that a representative of Thunder  
15 Basin is coming at 1:00. So we have to take a break till  
16 1:00 because I have been given prior notice now. So if  
17 we can take a break until 1:00.

18 Now, I know what people usually do when we take  
19 a break, but -- they usually leave. But if some of you  
20 don't have anywhere to go, if you would please come back  
21 at 1:00 so he won't feel like we're here listening to  
22 Thunder Basin, and he won't feel alone. But you all can  
23 tell him I said that too.

24 Okay. Thank you.

25 (Recess was taken.)

1           MODERATOR SILVEY: We will now reconvene the  
2 Mine Safety and Health Administration's public hearing on  
3 the Agency's proposed rule on Pattern of Violations.

4           Our next speaker is -- I know his last name is  
5 Cleary.

6           Is it McCleary or Clear --

7           MR. McCREARY: McCreary.

8           MODERATOR SILVEY: McCreary --

9           MR. McCREARY: Sounds good.

10          MODERATOR SILVEY: -- with the -- you know,  
11 I'm -- this is from memory -- with Thunder Basin Coal  
12 Company.

13          MR. McCREARY: That's correct.

14          MODERATOR SILVEY: Thank you. Come on down.

15          MR. McCREARY: Okay. I will.

16          COURT REPORTER: Actually, sir, could you scoot  
17 over one chair?

18          MR. McCREARY: Okay.

19          COURT REPORTER: Thank you.

20          MODERATOR SILVEY: And if you would spell your  
21 name for the court reporter, please.

22          MR. McCREARY: McCreary -- M-C-C-R-E-A-R-Y.

23          MODERATOR SILVEY: And your first name?

24          MR. McCREARY: Tim.

25          MODERATOR SILVEY: Tim. That's -- I wasn't

1 sure. Okay.

2 MR. McCREARY: I'll bet you can spell it.

3 MODERATOR SILVEY: Yeah. Thank you. Okay.

4 MR. McCREARY: Members of the panel, my name is  
5 Tim McCreary. I'm the Safety Manager at Thunder Basin  
6 Coal Company in Wright, Wyoming. I want to thank you for  
7 the opportunity to address the panel concerning Thunder  
8 Basin's views on the proposed rule regarding pattern of  
9 violation, or POV.

10 I'm fortunate to work at Thunder Basin Coal.  
11 That's because safety is a core value at Thunder Basin.  
12 We have a strong commitment to safety, starting with  
13 the CEO of our company. Thunder Basin implemented a  
14 behavior-based safety process about four years ago.  
15 We've seen over the past 30 or so years that more regs,  
16 more rules will only get you so far in terms of safety.

17 The rule is only as good as the behavior that  
18 drives compliance. For these reasons, I don't believe  
19 Thunder Basin will be affected by this section of the  
20 Mine Act.

21 Having said that, we at Thunder Basin can't sit  
22 by when there are fundamental problems with this proposed  
23 rule that affect the very foundation of our society.

24 On the pattern criteria, this section states  
25 that it would specify the general criteria that MSHA

1 would use to identify mines with a pattern of violation.  
2 MSHA has asked for comments on how the Agency should  
3 obtain comments during the development of and periodic  
4 revision to the POV screening criteria.

5 Obviously, this tells us that the Agency  
6 expects the POV regulation to be a moving target. Since  
7 the latest retolling of the criteria, it's difficult to  
8 believe that the Agency doesn't already have a desired  
9 formula for the criteria in mind.

10 The current rule has specific benchmarks in  
11 each category. If the Agency intends to adjust those  
12 numbers and formulas, there should be a public comment  
13 period prior to this being put into action. Transparency  
14 has been touted as a cornerstone of this administration.  
15 And this proposed rule is anything but transparent.

16 Also, MSHA must normalize the formulas for each  
17 category. By using whole number cutoffs to determine the  
18 weigh points, the size of the operation is overlooked.  
19 There must be a formula to normalize the equation to keep  
20 every size operation on a level playing field.

21 As far as a pattern of violation of the same  
22 standard is concerned, our largest citation category at  
23 Thunder Basin is 77.404(a), which is a catchall standard  
24 for mobile and stationary equipment.

25 When no other standard fits, violations are

1 written under 404(a). At a large operation with more  
2 than 400 pieces of mobile equipment, a quick glance by  
3 the standard number might indicate a pattern of repeat  
4 violations. But if you dig in a little deeper and read  
5 the description of the violation, they are nearly all  
6 written for totally different conditions.

7 Does this truly reflect a pattern of violation  
8 or repeat violations? I don't think so. MSHA needs to  
9 spell out the specific criteria and allow for a public  
10 comment period on that criteria before a final rule is  
11 developed. The proposed rule would eliminate the  
12 existing requirement in 104.3(b) that only citations and  
13 orders that have become final orders are to be used in  
14 the POV calculation.

15 The Agency states that due to the large number  
16 of contested citations and the time to process them, that  
17 only using final orders hinders MSHA's ability to enforce  
18 the Mine Act.

19 Let's be perfectly frank here. The Agency  
20 intends to eliminate due process if this becomes final.  
21 When George Mason forged out the Bill of Rights, he  
22 intentionally put in place what we know as the Fifth  
23 Amendment to the Constitution. This Amendment prevents  
24 individuals from being deprived of life, liberty, or  
25 property without due process.

1           Due process extends to all persons and  
2 corporate entities to protect against abuse of government  
3 authority. Our system of justice has always worked on  
4 the premise that a person is innocent until proven  
5 guilty. I think the past 235-year history of our country  
6 proves that it's been an extremely important part of our  
7 Constitutional rights.

8           By allowing an MSHA inspector to issue a  
9 citation or order without the possibility of due process  
10 as to the validity of the citation or order will allow  
11 the inspector to become the judge, jury, and executioner  
12 for an operation that is nearing POV status. Inspectors  
13 are not right every time.

14           MSHA also needs to consider the reasons for the  
15 large number of citations under contest. I believe in  
16 large part that it's due to regulatory creep. That is  
17 when inspectors in the field continue to stretch the  
18 reach of the regulation.

19           The industry has done a good job over the years  
20 at eliminating violations, and the inspectors seem to  
21 feel a need or pressure to write more citations.  
22 Therefore, we find a stretch of the meaning of the  
23 regulation to find something to write. Understanding  
24 that the Secretary has been given broad discretion to  
25 develop these rules, no one should ever believe that the

1 Congress had any intent to eliminate our Constitutional  
2 rights in the process.

3           Due process is a basic right of a democratic  
4 society. MSHA must reinstate the provision that only  
5 final orders be used in determination of a pattern of  
6 violation. The Agency in the proposed rule -- or the  
7 Agency states in the proposed rule that all references to  
8 PPOV, or Potential Pattern Of Violation, would be  
9 deleted. Recent months have shown this to be a very  
10 valuable tool for MSHA to have in their toolbox.

11           As MSHA stated in an April 12, 2011 press  
12 release: Major reforms to the POV process have been  
13 implemented, including a new screening criteria and a new  
14 review process that improves the Agency's ability to  
15 identify problem mines.

16           Between November and December last year, the  
17 Agency put 14 mines on a pattern of violation. Ten of  
18 those operations have made enormous improvements in their  
19 S&S rates. One operation had an 87 percent reduction.  
20 The least improved in this group showed an improvement of  
21 39 percent in their S&S'. This is a tremendous success  
22 story.

23           With these types of results, why wouldn't MSHA  
24 want to keep this tool? Is MSHA's mission to improve  
25 safety in our nation's mines, or is it to close down

1 mining operations? A large underground mine might well  
2 be handed a death sentence if not allowed the notice of  
3 the potential to be placed on a POV.

4 MSHA has proven that notifying mining  
5 operations of their potential is extremely effective.  
6 The Agency must keep the Potential Pattern Of Violation  
7 notice in the toolbox. Although the current rule has  
8 some misgivings, it has recently proven its  
9 effectiveness. We appreciate the opportunity to share  
10 our views on this important topic.

11 The POV tool could be crafted to be extremely  
12 effective in dealing with chronic and persistent  
13 violators of safety and health laws. But to be  
14 effective, the final rule needs to be transparent by  
15 involving all stakeholders on the specific -- truly  
16 specific criteria. It must afford mine operators due  
17 process and fair notice with opportunity to make  
18 meaningful improvements.

19 Thanks for your time and consideration.

20 MODERATOR SILVEY: Thank you, Mr. McCreary.

21 One thing I wanted to say, and I wanted to say  
22 it at the beginning. And Mr. Glynn is gone now. But in  
23 response to one of the things he said -- and for those of  
24 you who were here, and I think all of you who were  
25 here -- he mentioned -- he made a reference to the safety

1 and health management system public meeting in  
2 Sacramento. And he referred to that as a proposed rule.

3 But I want to clarify for everybody because,  
4 you know, then some people have made the leap to the  
5 reference to safety and health -- the safety and health  
6 management program in the Pattern of Violations proposal.  
7 That would be a mitigating circumstance that a mine  
8 operator could adopt and come into MSHA with to get it  
9 approved with measurable benchmarks if a mine operator  
10 felt he or she were approaching a Pattern of Violations.

11 Now, that safety and health management system  
12 regulatory action that we started was in no way a  
13 proposal. We didn't propose -- and several people have  
14 made references to the fact that that was vague and we  
15 didn't know what you -- we didn't propose anything. We  
16 actually did what the President had said that he wants  
17 agencies to do. We sought the public's input into what a  
18 meaningful proposal should look like.

19 That's why we had those public meetings. And  
20 we still have not moved to a proposal. But as I said  
21 earlier, the safety and health management program that we  
22 wanted operators -- that operators could choose to adopt  
23 under this proposed rule to be considered a mitigating  
24 circumstance, that would be a safety and health  
25 management program aimed to eliminate or to address or to

1 correct the S&S violations that gave rise to the pattern.

2           So that would be a safety and health management  
3 program in a distinct specific area. The safety and  
4 health management system, as I've talked to a number of  
5 you about, is clearly a proactive approach that many  
6 companies have voluntarily adopted to deal with safety  
7 and health in the entire place -- in the entire mine  
8 and to involve all of the workers in the mine or the  
9 plant, whatever it is, and so that they would infuse a  
10 proactive approach to safety.

11           So I guess in a way, I just want to make sure  
12 that people understand the two. The two were never  
13 intended to be the same.

14           One of the -- I guess two more things.

15           With respect to the 14 mines, Mr. McCreary, you  
16 said that we had -- or that had been given Notice of  
17 Pattern of Violations. Just as a technical  
18 clarification, they've been given notice of a PPOV, of a  
19 Potential Pattern of Violations, under the existing rule.

20           And I do agree with you. It is a wonderful  
21 thing that those 14 -- that at least -- I don't guess  
22 every number of them, but some great majority of them  
23 achieved a tremendous improvement in the --

24           MR. MCCREARY: Ten of those.

25           MODERATOR SILVEY: -- in the -- yeah. And they

1 were significant improvements. And, quite frankly, as  
2 somebody said earlier, when -- initially, when pattern  
3 was put in the '77 Act, some people referred to it as a  
4 death knell.

5 But our whole goal is really the improvement of  
6 conditions in -- safety and health conditions in mines  
7 and not to be looking at ways that -- if mines could stay  
8 off a pattern of violation by some objective indices,  
9 that means that if you use the objective criteria or as  
10 we have now the formula, this specific criteria, that  
11 says that those are the most objective measurements for  
12 determining whether they may be approaching a pattern.

13 So they are doing something right. At least  
14 some things are going the right way. And those are the  
15 things from the Agency's standpoint that we like to see.

16 And the only other thing I would say -- and  
17 I've heard it -- and I hear you all -- that MSHA's  
18 mission is not -- MSHA's mission is to improve safety and  
19 health, not to close any mines. But I hear everybody's  
20 comment in terms of what everybody is saying. And we  
21 are -- the last point I'll make is on the due process,  
22 because I know we're going to hear that until the record  
23 closes.

24 On the due process issue, the only thing -- and  
25 I said that earlier -- the only thing I would say to that

1 is, is when you -- with respect to what we did in  
2 deleting the requirement that we use only final orders, I  
3 think we did do a couple things that the Congress  
4 intended us to do. And those couple of things were to:  
5 (1) look at the statute; and (2) sometimes if the statute  
6 is not painting it clear on its face, then the next thing  
7 you do, you look to the legislative history.

8           And I think we did look to the legislative  
9 history. And we included some of that legislative  
10 history in the preamble. And so -- and we tried to more  
11 accurately reflect the legislative history. But -- and  
12 so I'm -- that's probably enough said. But on that  
13 point, I do hear everybody's point on that.

14           Would you add anything?

15           MR. MATTOS: No.

16           MODERATOR SILVEY: Do you want to add anything?  
17 Okay.

18           Let me ask -- let me see did you -- oh.

19           I -- one other thing and -- because you weren't  
20 here this morning. You know the part that we put in the  
21 public hearing notice that on the specific criteria, if  
22 we make any change to it, we were going to post it on the  
23 website and get input from stakeholders.

24           And then we would respond to -- we would  
25 respond to the stakeholder input, and we would revise the

1 criteria, if appropriate, and we would post both of those  
2 on the website -- the revised criteria, if we did revise  
3 it, and our response to the stakeholder input. I'm just  
4 saying that to say we moved one step from where we were  
5 at the time of the proposal. Okay. I think that's --  
6 if -- I think that's all, if you --

7 MR. MATTOS: I have one question.

8 MODERATOR SILVEY: Okay. Yeah.

9 MR. MATTOS: If we ended up with a rule whereby  
10 we were able to revise the -- we don't publish the  
11 criteria and the specific criteria, just the general  
12 criteria in the rule, and we go out with this kind of a  
13 notice and comment type of scheme when revising the  
14 criteria, if we were to revise the criteria and using  
15 comments from the stakeholders, revise the criteria and  
16 have those criteria out there with our web tool and --  
17 for whatever period of time -- in other words, the  
18 criteria would not take effect until the timeframe if  
19 it's one year. We're looking at the one-year window of  
20 enforcement history. You've got a --

21 MR. McCREARY: Sure. Twelve months.

22 MR. MATTOS: You have a year in which to  
23 monitor your --

24 MODERATOR SILVEY: Your own record.

25 MR. MATTOS: -- your own record.

1 MR. McCREARY: Right. Right.

2 MR. MATTOS: Would that alleviate any of your  
3 concerns on the --

4 MR. McCREARY: Well, I guess I --

5 MR. MATTOS: -- the transparency issue?

6 MR. McCREARY: Well, I don't understand, I  
7 guess. Maybe you can explain to me what the logic is of  
8 not having a specific criteria in the final rule. Why is  
9 that a later development?

10 MODERATOR SILVEY: To be honest, the logic was  
11 just that sometimes the -- based on our experience with  
12 the specific criteria, there might be the necessity to  
13 change it. And this -- and that -- doing it that way  
14 allows the flexibility to change. But we do acknowledge  
15 that we would want to provide stakeholders' input into  
16 the change.

17 And that was why we moved from where we were in  
18 the proposal to the fact that we would -- if we changed  
19 it, we would post that changed criteria on the website  
20 and allow stakeholders -- I don't know; I'm making this  
21 up -- 30 or 60 days to provide comments --

22 MR. McCREARY: Sure.

23 MODERATOR SILVEY: -- then review their  
24 comments and then publish a response to their comments --  
25 whether we took this one; we rejected this one; we took

1 this one. But the ones we took, we saw the necessity to  
2 revise the specific criteria. And so we would post the  
3 specific criteria on the website.

4 And now Jay is asking -- but we wouldn't  
5 make -- we wouldn't use that specific revised criteria  
6 where -- which we've taken into consideration comments.  
7 We would not use that until the passage of some time that  
8 allows some operation under this revised criteria.

9 MR. McCREARY: Sure. Yeah.

10 MODERATOR SILVEY: You --

11 MR. McCREARY: I understand.

12 MODERATOR SILVEY: Okay.

13 MR. McCREARY: I guess I -- my thought would be  
14 let's get it right the first time.

15 MODERATOR SILVEY: Yeah. Okay.

16 MR. MATTOS: And I --

17 MR. McCREARY: Let's not do it until we get it  
18 right and do it the first time and be done.

19 MODERATOR SILVEY: Well, I think, though, for  
20 all of us who have looked at this, we found that there  
21 can be some improvement. Even the criteria that we  
22 started under initially, we -- I mean, this is basically  
23 the same concept.

24 People -- some of the people at MSHA when I go  
25 back and tell them the kind of comments we are getting on

1 the proposed -- on this proposed rule, they will turn to  
2 me and say, but isn't that the way -- isn't that the  
3 manner in which we are operating now? We didn't -- we  
4 don't have the specific criteria, you know -- I mean,  
5 that's their quick comeback to me.

6 We don't have the specific criteria in the  
7 existing rule, do we? And my answer to them is, no, we  
8 don't. And we've been operating that way for 30-some --  
9 you know, in excess of 30 years with --

10 MR. MCCREARY: Well, the ones -- those 14 that  
11 got potential notices in November and December, that was  
12 based on specific criteria, wasn't it?

13 MODERATOR SILVEY: I know. But it's not in the  
14 rule. That's the point that they are making to me. It's  
15 not in the rule. It was the formula that we just posted.  
16 And that's their point. There was no change. The  
17 specific criteria are not in the existing Pattern of  
18 Violations rule.

19 It's just the general criteria that we would  
20 use -- S&S violations are warranted for failures,  
21 imminent danger, or the -- you know, stuff -- but the --  
22 but so many -- for 50 percent or greater S&S violations  
23 are in the top whatever on what -- eight unwarrantables?

24 I'm making it -- whatever it is. That's not in  
25 the existing rule. And that's what they -- that's their

1 comeback to me. And I guess, theoretically -- I'm saying  
2 theoretically now -- I don't have necessarily the best  
3 answer in the world to that.

4 MR. MATTOS: What --

5 MODERATOR SILVEY: But you give somebody a  
6 second bite at the apple, and they are in -- and so  
7 now -- but you all are telling me now you want it. While  
8 we didn't have it in the existing rule, you want it in  
9 this rule.

10 MR. McCREARY: Well, then that --

11 MODERATOR SILVEY: I hear you, though. Yeah.

12 MR. McCREARY: That's the transparent part. We  
13 know what the rules of the game are. You know, it's --

14 MODERATOR SILVEY: I know. But I guess all --  
15 and we want -- all I'm saying is from that respect you  
16 don't know what the rules of the game are under the  
17 existing rule. That's all based on back to me --

18 MR. McCREARY: Well, we do today -- what they  
19 are today, what the rule is today, or what the --

20 MODERATOR SILVEY: Yeah. But you hear what I'm  
21 saying.

22 MR. McCREARY: -- the criteria is today.

23 MR. MATTOS: One of our concerns is if we put  
24 specific criteria into a rule and we got it exactly  
25 perfect -- yep, we got it. And those of us who have

1 struggled with coming up with the protocol for doing  
2 that --

3 MODERATOR SILVEY: Which is --

4 MR. MATTOS: -- is --

5 MODERATOR SILVEY: -- in large part, him.

6 MR. MATTOS: -- is difficult -- no, don't tell  
7 people that.

8 MODERATOR SILVEY: Well, I mean, it's -- you  
9 know?

10 MR. MATTOS: But then something changes, and  
11 we -- I'll -- this here is a hypothetical. If we had put  
12 the criteria into the current rule and then several years  
13 ago we had a large increase in the number of citations  
14 and orders being cited -- being issued. Now, we go from  
15 a handful of mines exhibiting a Pattern of Violations to  
16 hundreds, just --

17 MODERATOR SILVEY: We --

18 MR. MATTOS: -- by virtue of the fact that  
19 there has been a change outside of the rule. Then we're  
20 all back in the same room again going, Okay; we --  
21 this -- we need to go redo the rule. And that process  
22 is -- you know, this process is a --

23 MR. McCREARY: Well, my -- I guess one of my  
24 concerns, or our company's concerns, is that if it's  
25 a continuing moving target, that the Agency may always

1 want to have a certain amount of mines in POV and  
2 continually craft that criteria to meet that target, if  
3 you will, so that if we know what it is today, 20 years  
4 from now, 10 years from now, it's not going to change.

5 We know what the rules are, we play better,  
6 everybody improves, and POV just basically goes away, is  
7 what I guess the hope would be, right? Everybody  
8 improves. Those bad players that are either at some  
9 point maybe out of business because they can't play  
10 anymore or they've just improved, and they've come around  
11 to running their operations safely. So -- but --

12 MR. MATTOS: What we have are two ends of a  
13 spectrum here; a concern over identifying mines that are  
14 exhibiting a pattern based on a formula that: Wait a  
15 minute; these mines aren't really exhibiting a pattern,  
16 but the formula says they are.

17 MR. McCREARY: Right.

18 MR. MATTOS: And we don't want that.

19 MR. McCREARY: Right.

20 MR. MATTOS: But on the flip side, we -- you  
21 know, we don't want to just have a formula that's going  
22 to give us some mines because we want to have mines. And  
23 that's not where we --

24 MR. McCREARY: Right.

25 MR. MATTOS: That's not where we are.

1           MR. McCREARY: Right. And I hear that even  
2 today on the impact inspections that -- you know, I hear  
3 it from our local field office. There's a good chance  
4 that, no matter how good you are, some day you're going  
5 to get an impact inspection because the list keeps  
6 getting shorter of those people. So --

7           MODERATOR SILVEY: Now, I hear what you're --

8           MR. McCREARY: -- is POV going to be the same  
9 way? That's -- no matter how good you play, you're going  
10 to be on the list some day, is what my concern is.

11          MODERATOR SILVEY: Well, I would like to say to  
12 everybody -- and this is not just meant for Mr. McCreary  
13 -- that in the proposed rule when we said that it would  
14 provide a more transparent process, even though I've  
15 heard comments to the contrary that -- I mean, obviously,  
16 I've heard your views on that -- we intended that what we  
17 included in the proposed rule be a more transparent  
18 process.

19                 We did include that specific criteria. We  
20 posted it on the website. We then created this web tool  
21 that people could monitor their own performance,  
22 compliance performance, and know at any point in time  
23 where they are/were. And now we've moved, as I said, one  
24 step further to if we make any change in that specific  
25 criteria, we will make it available to stakeholders for a

1 review and comments.

2           And we then will review your comments and let  
3 you know our response to that. So all of that is in the  
4 interests of transparency, just so you know. But having  
5 said all that, I still hear -- we still -- we hear your  
6 comments. Anything?

7           MR. MATTOS: No.

8           MODERATOR SILVEY: Okay.

9           MR. McCREARY: Okay. Thank you.

10          MODERATOR SILVEY: Thank you. Okay.

11          Is there anybody else who wishes to comment?

12          Anybody else? Nobody else. Okay.

13          (Off the record.)

14          (On the record.)

15          MODERATOR SILVEY: I guess I'll just do what  
16 I'm told, just -- you know. If anybody here -- so you --  
17 so you -- if anybody here hasn't signed the attendance  
18 sheet, please do so. I thought we said that this  
19 morning. But, anyway, you know, some things you just do  
20 what you are told. I think everybody has signed but  
21 Mr. McCreary. And I -- but --

22          MALE SPEAKER: Well, he doesn't like to be --

23          MODERATOR SILVEY: Yeah. Okay. I figured  
24 that. Yeah.

25          MR. MATTOS: We have his name in the record.

1                   MODERATOR SILVEY: Yeah. Okay.

2                   Then if nobody else wishes to make a  
3 presentation, again on behalf of the Mine Safety and  
4 Health Administration, I want to thank you for your being  
5 here at this public hearing. As I stated this morning in  
6 the other public hearing, I want to thank those of you  
7 who came and presented testimony.

8                   But I want to also thank those of you who came  
9 and may not have presented testimony and may present it  
10 later, may have presented comments to us already but did,  
11 in fact, attend this hearing because what that says to us  
12 is that you have an interest in this rulemaking. And we  
13 appreciate that.

14                   And the public hearing forum is, indeed -- is  
15 intended for people who both present and for those who  
16 want to come and just be aware of all of the issues and  
17 maybe want to present some additional things to us before  
18 the record closes, because I have talked to several of  
19 you who, indeed, said that you will be doing so.

20                   And I want to emphasize that all comments must  
21 be received postmarked by June 30, 2011, and MSHA will  
22 take your comments and concerns into consideration as we  
23 develop a final rule. And I encourage all of you to  
24 continue participation in -- throughout the rulemaking  
25 process.

1           And I would like to even say -- ask you at this  
2 point to encourage you to participate in any other MSHA  
3 rulemaking.

4           And at this point the public hearing is  
5 concluded. Thank you very much.

6                   (Whereupon, at 1:28 p.m., the hearing in the  
7 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

CASE TITLE: Patterns of Violations  
HEARING DATE: June 2, 2011  
LOCATION: Denver, Colorado

I hereby certify that the proceedings and evidence are contained fully and accurately on the audio and notes reported by me at the hearing in the above case before the Department of Labor, Mine Safety & Health Administration.

Date: June 2, 2011

ANTHONY & ASSOCIATES, INC.

  
\_\_\_\_\_  
ROGER MEYERS / mzw  
(Official Reporter)