UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

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MINE SAFETY AND HEALTH ADMINISTRATION

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CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES PUBLIC HEARING

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THURSDAY
DECEMBER 4, 2014

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The above-entitled matter met in Conference Room J, 25th Floor, 1100 Wilson Boulevard, Arlington, Virginia, at 9:00 a.m., Patricia Silvey presiding.

PANEL MEMBERS
PATRICIA W. SILVEY, Deputy Assistant Secretary for Operations, Mine Safety and Health Administration
ANTHONY JONES, Office of the Solicitor, Department of Labor
JAY MATTOS, Director, Office of Assessments, Accountability, Special Enforcement and Investigations, Mine Safety and Health Administration
SHEILA McCONNELL, Deputy Director, Office of Standards, Regulations, and Variances, Mine Safety and Health Administration

ALSO PRESENT

ADELE ABRAMS, Law Office of Adele Abrams PC
JOSEPH CASPER, National Stone, Sand and
Gravel Association
HENRY CHAJET, Jackson Lewis PC
ALLAN DUPREE, Alpha Natural Resources
MARK ELLIS, Industrial Minerals Association - North
America
JEFF KRATZ, Institute of Makers of Explosives

ALLEN McGILTON, Murray Energy Corporation

WILLIAMS C. MEANS, GMS Mine Repair & Maintenance

Inc.

ANDY O'BRIEN, Unimin Corporation

DENNIS O'DELL, United Mine Workers of America

HUNTER PRILLAMAN, National Lime Association

LINDA RAISOVICH-PARSONS, United Mine Workers of

America

DEBRA SATKOWIAK, Institute of Makers of

Explosives

BRUCE WATZMAN, National Mining Association

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*All presentations are attached to the transcript.

1 P-R-O-C-E-E-D-I-N-G-S
2 (9:03 a.m.)
3 MS. SILVEY: Good morning, everybody.
4 I guess nobody can say good morning in return.
5 That's okay. We'll take that too.
6 Before we get started, I'd like to
7 direct your attention to the exits in this room.
8 There are three exits to my left, and you all can
9 see one, two, three, in case of an emergency,
10 which obviously we don't anticipate.
11 Also, I'd like to announce the codes
12 to the bathrooms. The code to the women's
13 bathroom is 415. The code to the men's bathroom
14 is 243. If you forget that, forget the codes,
15 I'm going to put this little yellow sticky right
16 here, and you're welcome to look at it.
17 So, as most of you know, and maybe
18 some of you who -- some of you don't know. I'm
19 not sure. Well, I won't say that. This is a
20 public hearing on the Mine Safety and Health
21 Administration's Proposed Rule on the Criteria
22 and Procedures for the Assessment of Civil

1 Penalties.
2 My name is Patricia W. Silvey, and
3 that's S-I-L-V-E-Y. I'm the Deputy Assistant
4 Secretary here at MSHA, and I will be the
5 moderator of this public hearing on our proposed
6 rule.
7 On behalf of Assistant Secretary of
8 Labor for Mine Safety and Health, Joe Main, I
9 would like to welcome all of you here today, and
10 we really do appreciate your attendance at this
11 hearing.
12 I'd like to introduce the Members of
13 the Panel. To my left is Jay Mattos, and he is
14 the Director of the Office of Assessments. Many
15 of you know Jay. He is the Chair of the Civil
16 Penalties Rulemaking Committee.
17 To my right is Sheila McConnell.
18 She's the Acting Director of the Office of
19 Standards, and to her right is Anthony Jones, and
20 he's with our solicitor's office.
21 MSHA published this Civil Penalties
22 Proposed Rule on July 31st, and in response to

1 requests from the public, is holding two public
2 hearings to receive testimony. Obviously, you
3 know this is the first hearing, and the second
4 hearing will be held on December 9th in Denver,
5 Colorado. But for your information, I want to
6 announce that we plan to hold two additional
7 hearings.
8 They have not been specifically
9 scheduled, but we will announce them as soon as
10 we can. The hearings will be held in Chicago and
11 in Birmingham.
12 Obviously, we will extend the post
13 hearing comment period right now, probably until
14 about mid-February. I would say that depends on
15 when the other two hearings are held. We will
16 allow at least an additional 30 days past the
17 time -- the date of the last -- of the next
18 hearing we're going to have. We will announce
19 that obviously in the Federal Register.
20 The purpose of this hearing, as most
21 of you know, is to receive information from the
22 public that will help MSHA evaluate the proposed

1 changes and develop a final rule. We ask that
2 you please sign the sign-in sheet in the back of
3 the room, and most likely, most of you have done
4 that.
5 MSHA hearings, as also most of you
6 know, are conducted in an informal manner.
7 Formal rules of evidence do not apply. The
8 hearing panel may ask questions of the speakers.
9 The speakers may ask questions of the hearing
10 panel.
11 Speakers and other attendees may
12 present information to the court reporter for
13 inclusion in the rulemaking record. MSHA will
14 accept written comments and other information for
15 the record from any interested party, including
16 those not presenting oral statements.
17 I will now provide a short overview of
18 the civil penalties process. Section 104 of the
19 Mine Act, Federal Mine Safety and Health Act of
20 1977 requires them to issue citations or orders
21 to mine operators for violations of a mandatory
22 safety or health standard.

1 On issuing a citation or order, the
2 Secretary's Authorized Representative of the
3 inspector specifies a time for the violation to
4 be abated. Sections 105 and 110 of the Mine Act
5 requires to propose a civil penalty for
6 violations, and I will at this time reiterate the
7 definitions of several terms we use throughout
8 the rule.
9 The first term is significant and
10 substantial or S&S. As many of you know, an S&S
11 violation is one that is reasonably likely to
12 result in a reasonably serious injury or illness.
13 The inspector makes the S&S determination at the
14 time the citation is issued.
15 Another term is unwarrantable failure.
16 The term has been defined to mean aggravated
17 conduct constituting more than ordinary
18 negligence by a mine operator.
19 Under the Mine Act, MSHA proposes
20 penalties and the Federal Mine Safety and Health
21 Review Commission, or the Commission, assess
22 penalties.

1 Under MSHA's existing rule, a proposed
2 penalty that is not contested within 30 days
3 becomes a final order of the Commission, and is
4 not subject to review by any court or reviewing
5 agency.
6 The Mine Act requires MSHA and the
7 Commission to consider six criteria in proposing
8 and assessing penalties: The appropriateness of
9 the penalty to the size of the business, the
10 operator's history of previous violations,
11 whether the operator was negligent, the gravity
12 of the violation, the operator's good faith in
13 abating the condition and the effect of the
14 penalty on the operator's ability to continue in
15 business.
16 The first five criteria are applied to
17 determine the penalty amount. The last criterion
18 is the effect of the penalty on the operator's
19 ability to continue in business is applied when
20 requested by a mine operator after the penalty is
21 proposed.
22 The operator sends in documentation

1 and MSHA reviews the documentation and may adjust
2 the penalty. MSHA's proposal to amend the
3 evaluation factors for determining the regular
4 formula penalties is -- and by the way, this
5 proposed rule only deals with the regular formula
6 penalties.
7 MSHA's proposal is structured to
8 encourage operators to be more accountable and
9 proactive in addressing safety and health
10 conditions. MSHA was guided by three key
11 principles in developing the proposed rule:
12 improvement in consistency, objectivity,
13 efficiency and how inspectors write citations and
14 orders by reducing the number of decisions
15 inspectors have to make, which could lead, MSHA
16 projected, to fewer areas of dispute and earlier
17 resolution of enforcement issues.
18 Second principle was greater emphasis
19 on the more serious safety and health conditions,
20 and the third principle was openness and
21 transparency in the application of the agency's
22 regular formula penalty.

1 The proposal does not change the
2 process that inspectors use to issue citations.
3 Under the proposals, inspectors would continue to
4 make factual determinations of safety and health
5 violations, and issue citations and orders just
6 as they do now.
7 The proposed rule would reduce the
8 maximum number of penalty points that could be
9 assigned from 208 under the existing rule to 100.
10 It involves changes, as I said earlier, to MSHA's
11 regular formula penalty, including a change to
12 the citation and order form, which is MSHA form
13 7000-3.
14 I think we have copies of the draft
15 form. We have copies of the draft form in the
16 back of the room.
17 Using the regular assessment formula
18 under the proposed rule, total penalties proposed
19 by MSHA and the distribution of the penalty
20 amount by mine size would generally remain the
21 same as under the existing rule.
22 I say generally because we expect that

1 total penalty amounts for small metal/nonmetal
2 mines, as we did our evaluation, which we
3 included in the proposal, would decrease.
4 The existing minimum penalty of
5 $112.00 and the maximum penalty of $70,000.00 for
6 non-flagrant violations would not change. The
7 maximum penalty of $242,000.00, obviously for
8 flagrant violations, would not change.
9 Under the proposal, minimum penalties
10 for unwarrantable failure violations would
11 increase to provide a greater deterrent for mine
12 operators who allow these types of violations to
13 occur. At this point, I would like to reiterate
14 some of the specific requests for comments and
15 information that were included in the preamble to
16 the proposed rule.
17 First, MSHA is proposing a change to
18 how an operator's overall violation history would
19 be determined; to increase the weight of the
20 violation history criterion as a percentage of
21 total penalty points and in recognition of the
22 importance of the need for operators to prevent

1 violations from occurring and recurring.
2 I also think we have copies of a
3 visual that depicts the percentage of each
4 criterion under the existing rule as compared to
5 the projection of the percentage of each
6 criterion under the proposed rule.
7 An operator's history of previous
8 violation is based on both the total number of
9 violations, and the number of repeat violations
10 of the same provision of a standard in a 15-month
11 period proceeding, the occurrence date of the
12 violation being assessed.
13 Under the existing rule, only
14 violations that have been paid, fined or
15 adjudicated or have otherwise become final orders
16 of the Commission (final orders) we refer to them
17 as final orders are included and determined in an
18 operator's violation history.
19 MSHA's proposing to clarify its intent
20 under the existing rule that only violations that
21 have become final orders of the Commission are
22 included in a violation history.

1 The proposal would revise the
2 negligence criteria to increase accountability
3 for operators who either knew or should've known
4 of safety and health hazards at their mines. The
5 proposal would increase the relative weight of
6 the negligence criteria and reduce it five
7 categories under the existing rule to three.
8 In the majority of contested cases
9 before the Commission, the issue is the parties'
10 disagreement on the degree of negligence. The
11 proposed reduction in the amount of categories
12 would not change the definitions of not negligent
13 and reckless disregard.
14 Under the proposal, the definition of
15 negligence would be revised to mean that the
16 operator knew or should've known about the
17 conditional practice.
18 Some commenters have expressed concern
19 that reducing the categories of negligence would
20 result in violations being placed in a higher
21 category. I heard that when I recently attended
22 a conference in Birmingham. I did hear that.

1 Commenters projected that reducing the
2 categories of negligence would result in
3 violations being placed in a higher category, and
4 would result in higher penalties.
5 In MSHA's projection of penalties
6 under the proposal, which is what we included in
7 the proposed rule, MSHA did not make this
8 assumption. Rather, MSHA assumed that low,
9 moderate and high negligence determinations would
10 fall into the negligence category, and that is
11 what we assumed. We can have more discussion
12 about that.
13 Under the proposed rule, the
14 categories of no negligence and reckless
15 disregard would remain the same. The proposed
16 rule would, we have received comments on this,
17 would remove mitigating circumstances from the
18 negligence category definition.
19 MSHA believes that reducing the number
20 of negligence categories would improve
21 objectivity and consistency in the inspector's
22 evaluation of negligence, thereby facilitating

1 earlier resolution of enforcement issues.
2 The proposed rule would restructure
3 the point table for the proposed categories to
4 reflect an increase in the relative weight of the
5 negligence criteria. You can see that in the
6 visual that we provided, that the agency has done
7 that in its belief that that change appropriately
8 reflects actions under the control of operators
9 that have a direct impact on miner safety and
10 health.
11 The proposed provision would retain
12 the three gravity factors in the existing rule:
13 likelihood of the occurrence, severity of injury
14 or illness if the event were to occur, and
15 persons potentially affected but would reduce the
16 number of subcategories associated with each
17 factor.
18 Similar to the agency's proposed
19 changes to the negligence criteria, the proposal
20 would simplify the gravity criteria by decreasing
21 the subcategories of each of the proposed factors
22 of gravity.

1 MSHA believes that this proposed
2 change would decrease inspector subjectivity, and
3 improve objectivity and consistency. Some
4 commenters have expressed concern that reducing
5 the subcategories of gravity would result in
6 violations being placed in a higher category, and
7 result in higher penalties.
8 The proposal would reduce the existing
9 five categories of likelihood of the occurrence
10 to three: Unlikely, reasonably likely or occur.
11 Commenters objected to the removal of the
12 existing no-likelihood category; however, as
13 discussed in the preamble to the proposal; the
14 existing categories of no likelihood and unlikely
15 would be combined to improve objectivity and
16 consistency of enforcement.
17 The proposal would eliminate the
18 highly likely category. I might digress here. I
19 was looking at this comment myself the other
20 night, and when I looked at it, I was thinking
21 about it. I thought, "That comment sort of makes
22 sense."

1 But then when I looked at it, and we
2 combined no likelihood, no likelihood had zero
3 penalty points, and has zero penalty points under
4 the existing rule. So, I looked at the proposal:
5 the combination of no likelihood and unlikely.
6 Well, guess what? No likelihood and
7 unlikely, zero penalty points. So, anyway. You
8 make a call.
9 Severity: the proposal would reduce
10 the four existing categories of severity of the
11 injury or illness to 3. No lost work days. Lost
12 workdays or restricted duty or fatal. It would
13 eliminate existing permanently disabling
14 category, which sometimes is often for the
15 inspector to anticipate.
16 It would change the persons affected
17 aspect of the gravity criteria. Under the
18 proposal, the inspector could make 11 different
19 determinations for persons affected and those 11
20 different categories would be reduced to 2: no
21 persons affected or persons affected.
22 As stated in the proposed rule, MSHA

1 would like to emphasize that simplification will
2 enable MSHA to be more consistent in citations.
3 MSHA will emphasize the proposed changes in
4 future inspector training obviously.
5 The rule was structured to have
6 minimal changes in overall penalties. The
7 proposal does place an increased emphasis on
8 operators who continue to allow violations to
9 occur.
10 Like the existing rule, the proposal
11 would provide for a 10 percent reduction in the
12 penalty amount of a regular assessment, where the
13 operator based the violation within the time set
14 by the inspector.
15 In an effort to provide for increased
16 operator focus on prevention of safety and health
17 hazards, MSHA is considering an alternative that
18 would recognize both prompt operator abatement of
19 safety and health hazards, as well as prompt
20 payment of the proposed penalties.
21 Consistent with this, and with the
22 prior civil penalty regulations, this alternative

1 would provide an additional 20 percent good faith
2 reduction in proposed penalties when neither the
3 penalty nor the violation is contested, and the
4 penalty is paid before it becomes the final order
5 of the Review Commission.
6 Under this alternative, operators who
7 promptly abate the safety and health hazards
8 promptly pay the penalties would be eligible for
9 up to a 30 percent overall good faith reduction
10 in the amount of penalties.
11 We have got comments on that also.
12 Most of the comments do not like the additional
13 20 percent to the operators giving up their right
14 to contest.
15 MSHA is proposing an increase in the
16 minimum penalties for unwarrantable failure;
17 citations and orders by 50 percent to provide a
18 greater deterrence for operators who allow these
19 types of violations to occur.
20 Under the proposal, citations or
21 orders issued under Section 104(d)(1) would be
22 $3,000.00 for the minimum penalty, and for

1 citations and orders issued on Section 104(d)(2)
2 would be $6,000.00.
3 Several commenters have stated that
4 taking this proposed action is not necessary,
5 stating that initiatives such as Rules to Live By
6 and impact inspections have worked.
7 Finally, in the proposal, in the
8 preamble to the proposal, MSHA offered
9 alternatives related to the scope and
10 applicability of the rule, and most of you have
11 read those alternatives because we have got
12 comments, real specific comments, on those
13 alternatives.
14 In the proposal, MSHA seeks comments
15 on the two alternatives that would address the
16 applicability of the proposed civil penalty
17 formula when the Federal Mine Safety and Health
18 Review Commission assess civil penalties.
19 MSHA's first proposed alternative
20 would be to modify the scope and applicability of
21 MSHA's civil penalty regulations so that it would
22 govern both MSHA's proposal of penalties and the

1 Commission's assessment of civil penalties.
2 Similarly, this alterative would
3 require the administrative law judge to apply the
4 penalty formula to the facts found by the ALJ
5 when assessing civil penalties according to the
6 six statutory criteria.
7 If the Secretary, under this
8 alterative, meets his burden to prove the facts
9 alleged, the formula would be used to assess the
10 penalty. If the Secretary does not meet his
11 burden, the judge would apply the civil penalty
12 formula to the facts that are found to arrive at
13 the assessment.
14 MSHA's second proposed alternative,
15 similar to the first, but we give the Commission
16 more flexibility to depart from the civil penalty
17 formula in appropriate cases.
18 MSHA did not prepare a separate
19 regulatory economic analysis for the proposed
20 rule, but its analysis was presented in the
21 preamble to the proposal.
22 MSHA requests comments, and we have

1 gotten some on the estimates of costs and
2 benefits presented in the preamble, and on the
3 data and assumptions the agency used to develop
4 estimates.
5 I might say that we have gotten
6 comments, but when we do get comments on our
7 estimates, if you would be real specific in your
8 -- the data that you present instead of
9 presenting summary data, and be specific in how
10 you arrived at your data in your conclusions.
11 MSHA solicits comments that address
12 alternatives to all of the aspects of the
13 proposal. As I said before in talking about the
14 estimates of cost and benefits, commenters are
15 requested to be specific and submit detailed
16 rationale and supporting documentation for any
17 suggested alternatives.
18 You may submit comments at this public
19 hearing, as many of you know, and through the
20 close of the comment period, which will probably
21 be around mid-February, but we will be announcing
22 that in the Federal Register.

1 MSHA will make available a verbatim
2 transcript of this public hearing, approximately
3 two weeks after the completion, and you may view
4 the transcripts on MSHA's website, www.MSHA.gov,
5 and on www.Regulations.gov.
6 We will now begin today's testimony.
7 If you have a copy of your presentation, please
8 provide it to the court reporter, and to the MSHA
9 panel, and please begin by clearly stating your
10 name and organization, and spelling your name, if
11 you would, please, for the court reporter to make
12 sure we have an accurate record.
13 At this point, thank you. We will
14 begin with our first speaker. Our first speaker
15 is Adele Abrams of the Law Office of Adele
16 Abrams.
17 MS. ABRAMS: Good morning. My name is
18 Adele Abrams. That's A-D-E-L-E, just like the
19 singer. Abrams is A-B-R-A-M-S. I'm pleased to
20 present these comments on MSHA's proposed rule,
21 to modify the civil penalty criteria in 30 CFR
22 Part 100.3, and also to make other changes to the

1 system of jurisprudence, established in the Mine
2 Act.
3 I'm a Certified Mine Safety
4 Professional and attorney with the Law Office of
5 Adele L. Abrams PC in Beltsville, Maryland, and
6 Denver, Colorado, and I am testifying as counsel
7 today on behalf of our client, United Safety
8 Associates, or USA.
9 USA is a California based association,
10 providing education and training services to its
11 membership in the areas of illness and injury
12 prevention, accident and injury avoidance, safety
13 and risk management procedures, and maintaining
14 work place safety.
15 In addition, USA is active in
16 legislative affairs, representing its membership
17 and relevant issues.
18 First and foremost, USA strives to
19 protect miners in the work place and assist its
20 membership in fostering safety cultures and safe
21 workplaces.
22 USA appreciates the spirit of the

1 proposed Civil Penalty Rule, however we believe
2 that the effects of the rule as proposed would be
3 detrimental to mine operators without any
4 commensurate safety and health benefits.
5 Specifically, USA objects to the
6 proposed modifications to both negligence and
7 gravity, the increased weight of history
8 violation, including the BPID and RPID rates, the
9 proposed increase in minimum penalties for
10 unwarrantable failures, and MSHA's attempt to
11 govern and regulate the impartial third-party
12 decision maker, the Federal Mine Safety and
13 Health Review Commission.
14 USA requests further guidance from
15 MSHA on the following questions, which are left
16 unanswered by MSHA in the proposed Civil Penalty
17 Rule.
18 First, what effect will the new format
19 of citation documentation have on the rate of
20 significant and substantial issuances or S&S, and
21 on the ability to achieve settlements in
22 contested cases that can be approved by the

1 judges of the Federal Mine Safety and Health
2 Review Commission?
3 Second, how will the new and limited
4 negligence donations effect the issuances of
5 104(d) citations and orders, and the
6 categorization of flagrant violations?
7 Third, how will the reduced gravity
8 options effect the issuance of imminent danger
9 orders under Section 107(A) of the Mine Act?
10 Fourth, how will MSHA's existing
11 informal pre-assessment conferences be affected
12 by the 20 percent good faith penalty reduction
13 for not contesting the assessment or the
14 violation?
15 Finally, will requesting the informal
16 pre-assessment conference remove an operator from
17 eligibility for the proposed additional 20
18 percent good faith penalty reduction?
19 To go into some of the specifics of
20 the rule, USA strongly opposes the realignment of
21 the negligence designation from 5 categories to
22 3; by removing the categories of low negligence

1 and high negligence, MSHA is proposing that
2 mitigation is no longer a defense or should be
3 taken into consideration during penalty
4 assessment.
5 Currently, MSHA citations allow for
6 inspectors to determine operator negligence,
7 based on the amount of mitigating circumstances
8 surrounding each issuance. Adopting the proposed
9 Civil Penalty Rule new negligence designation
10 would not only place a greater emphasis on
11 negligence when determining the penalty amount,
12 but it would also disregard mitigation and group
13 a wide range of conditions under the umbrella of
14 negligent.
15 This could also result in an exclusion
16 of mitigation evidence at Federal Mine Safety and
17 Health Review Commission hearings, which
18 interferes with operators' due process rights.
19 MSHA's intent to ignore relevant mitigating
20 factors when determining penalty assessments and
21 negligence will lead to steep increases in
22 penalties for mine operators, and difficulty

1 settling formal and informal contests of
2 citations after issuance.
3 Given the proposed rule in its current
4 state, MSHA would no longer accept mitigation
5 provided by operators as justification for
6 penalty reductions, and negligence modifications
7 to citation documentation would be largely
8 unavailable.
9 This is unacceptable and would
10 adversely effect all members of the mining
11 industry.
12 In our written comments, we've
13 included Appendix A, which I've also attached to
14 the comments given to the Panel here today. We
15 did a comparison of citation penalties for an
16 existing docket that we have. That is all 104(a)
17 regularly assessed citations.
18 It shows that the current amount of
19 penalties would be $18,110.00, and this would
20 rise under the new criteria to $177,000.00. That
21 is a 977 percent increase for a docket with only
22 Section 104(a) regularly assessed citations at a

1 metal/nonmetal mine.
2 Just anecdotally, I will tell you
3 we've looked at some other individual citations
4 for smaller mines. In some cases, they would go
5 from $11,000.00 to $30,000.00 for a single
6 citation. Another model that we ran,
7 consistently the penalty increases seem to be 60
8 percent or greater increase over the current
9 penalties.
10 In addition, USA also opposes the
11 realignment of the likelihood of injury
12 designations proposed in the rule. As with the
13 proposed modifications to negligence, MSHA is
14 proposing to reduce the categories from five
15 options to three, but by removing no likelihood
16 and highly likely categories, this is once again
17 proposing changes that could adversely effect
18 mine operators.
19 It is well established that S&S
20 citations carry greater effects in a mine's
21 history. They can carry greater penalties. They
22 are reportable to the SEC by publically traded

1 companies, some of which are members of the USA
2 group.
3 USA is concerned that proposed changes
4 will drastically increase the number of
5 significant and substantial issuances, which
6 could effect all operators, and also could result
7 in placement of more operators under a pattern of
8 violations.
9 Furthermore, by removing the highly
10 likely category, USA fears that MSHA will issue
11 107(A) Imminent Danger Orders in conjunction with
12 the hazard that inspectors feel is reasonably
13 likely to occur.
14 This would contradict the bulk of the
15 existing Federal Mine Safety and Health
16 Commission case law, and the Mine Act, which
17 defines Imminent Danger Orders as requiring more
18 serious circumstances than an S&S violation.
19 As proposed, the Section 107(A)
20 issuance, an underlying 104 issuance, may mirror
21 each other, thereby blurring that delineation and
22 exposing operators to more liberal and

1 unjustifiable use of Imminent Danger Orders.
2 Again, Imminent Danger Orders are
3 considered elevated actions for purposes of
4 pattern of violations. These are also issuances
5 that must be reported to the securities and
6 exchange commission by publically traded
7 companies.
8 Moreover, by blurring this delineation
9 on Section 107A issuances and the distinction
10 with S&S, it puts under review years of control
11 and case law that would have to be reevaluated
12 and perhaps relitigated.
13 The proposed changes would alter the
14 meaning of existing case law, and require
15 clarification from the courts. This is a serious
16 consequence of the proposed rule. It warrants
17 critical scrutiny, and frankly could lead to more
18 litigation.
19 USA also strongly opposes the Civil
20 Penalty Rules increased emphasis on history
21 points during penalty assessment. Under the
22 proposed rule, the overall weight of history of

1 previous violations for a mine will increase in
2 relation to each penalty assessment.
3 We fear that this is adversely going
4 to effect medium and large mine operators in a
5 significant way, and increase penalties in a
6 manner such as those shown on our chart.
7 USA opposes the proposed increases in
8 minimum penalties for unwarrantable failure
9 issuances. We do not agree with MSHA that 50
10 percent increase in penalties will foster further
11 compliance. This seems to merely be an attempt
12 by MSHA to increase penalties without
13 justification.
14 USA requests that if MSHA intends to
15 maintain this provision, additional evidence
16 supporting the claim that the increased penalties
17 will assist with miner safety and health be
18 provided.
19 The proposed Civil Penalty rule states
20 that an additional 20 percent reduction would be
21 incentive for operators to promptly pay and abate
22 alleged violations, but abatement is already

1 required for the alleged violations when it is
2 due, and the payment is due when the order
3 becomes final regardless of the additional 20
4 percent reduction.
5 We view this as a means to discourage
6 formal and informal contests of penalties and
7 violations. We are also very troubled by the
8 proposed rules attempt to govern the Federal Mine
9 Safety and Health Review Commission. The
10 Commission was created in the Mine Act to be
11 independent of the Department of Labor, and
12 specifically it was to remain an unbiased third
13 party decision maker for disputes between
14 operators and MSHA.
15 MSHA's attempt to restrict the
16 authority of the Federal Mine Safety and Health
17 Review Commission and its administrative law
18 judges, and bind them to the penalty assessments
19 determined by MSHA underscores the entire purpose
20 of the independent agency.
21 If MSHA is committed to govern this
22 third-party decision maker, operators are

1 effectively without unbiased recourse until they
2 appeal to the US Courts of Appeal, and even that
3 court may only have authority to vacate, uphold a
4 Commission decision or remand it, but not to
5 reconsider the penalties.
6 USA requests that the Commission and
7 its judges retain de novo penalty authority, and
8 we maintain that MSHA lacks authority to alter
9 via regulation the statutory criteria of the
10 Commission in a way that would allow the agency
11 to fine operators out of business.
12 Thank you very much for your
13 consideration.
14 MS. SILVEY: I'd just like to make a
15 few preliminary comments, which is some of the
16 things I said in my opening statement, and which
17 is why I said them.
18 With respect to some statements in
19 your testimony, which we do appreciate, as I
20 said, this proposed rule would have no impact on
21 certain things that were deeply rooted in the
22 Mine Act and warrant its own -- as we know them,

1 the significant and substantial.
2 This proposed rule is significant and
3 substantial. S&S would be implemented in the
4 same way. It has to be the definition. That
5 would not change. It has to be a violation as
6 reasonably likely to result in a reasonably
7 serious illness or injury.
8 Under this proposed rule, an inspector
9 would have to make that determination.
10 I would also like to say, and I will
11 say this because many of the comments contained
12 this, and that deals with MSHA's projection of
13 the impact of the proposed rule versus what the
14 commenters have assumed MSHA's assumptions.
15 I think I said that in my opening
16 statement because I wanted to convey to the
17 commenters what our assumption was. And when we
18 looked at reducing the categories, we thought
19 that that would result in -- obviously the
20 inspector would have to make fewer
21 determinations, and we thought that that would
22 result in a simplification of the citation form,

1 and fewer decisions by the inspector; less
2 subjectivity and more objectivity and therefore
3 leading to earlier resolution of disputes.
4 Now, our assumption, our take, as I
5 said in the opening statement, I take the current
6 citation form and compare it to the one for the
7 proposed rule. MSHA's assumption may be wrong.
8 Why is that? Now we have low, moderate and high,
9 that under the proposed rule, the inspector's
10 determination would be negligent.
11 There would be no low, no moderate and
12 no high. So, by me saying that, whatever is
13 marked high negligence now would go -- our
14 assumption was that that was followed in the
15 negligence category. Not reckless disregard.
16 To be reckless disregard, and you know
17 that, you have to have an additional component
18 there. I think the commenters are projecting
19 that high negligence would go to reckless
20 disregard.
21 MS. ABRAMS: May I just respond to
22 that? I want to note for the record that when we

1 did our comparison and our table, anything that
2 was high negligence currently we did back down to
3 negligent.
4 MS. SILVEY: Okay.
5 MS. ABRAMS: We did not move it up to
6 reckless disregard. Our concern, to clarify my
7 testimony a little bit: Right now, for something
8 to be an unwarrantable failure, it is either high
9 negligence or reckless disregard. And for
10 something to be flagrant, it is either high
11 negligence or reckless disregard.
12 The concern is if high negligence now
13 is rolled into simple negligence, will we either
14 have 104(d)s being issued with just the negligent
15 category? And if not, is that going to push
16 inspectors who feel that there has been
17 aggravated conduct to go to the extreme of
18 marking things reckless disregard, which has
19 other ramifications including greater scrutiny,
20 including criminal prosecution.
21 MS. SILVEY: And I understand that,
22 but -- and I don't think so. But one of the

1 things I did also say in my opening statement was
2 that we would be training our inspectors. I
3 don't know if you all heard that, but I did say
4 that.
5 So, that's one of the things. If we
6 issue any rules, one of the things we do have to
7 do is I think it is our obligation to train our
8 inspectors, and we would do that.
9 I also want to comment on the
10 additional 20 percent good faith. You -- in your
11 comments, you were concerned that that proposed
12 provision would somehow be affected by the pre-
13 assessment conference.
14 If an operator chose to participate in
15 the pre-assessment conference, that would not
16 take away the additional 20 percent under the
17 proposed rule. So, I want to make that clear.
18 MS. ABRAMS: Yes, thank you for
19 clarifying that.
20 MS. SILVEY: And I want to ask you --
21 I should've asked this first. USA, you said, is
22 a California based association providing

1 education and training services. Is that an
2 independent contractor?
3 MS. ABRAMS: No. It is a group.
4 Frank D'Orsi, of the Ontario, California area, is
5 the head of it and it is a consortium of I think
6 at this point about 15 to 20 mining companies,
7 primarily in the aggregates and --
8 MS. SILVEY: Okay, but when you put in
9 here -- when you say, "Providing education and
10 training."
11 MS. ABRAMS: They have monthly
12 meetings where safety subjects are presented, and
13 the USA members exchange -- it's a networking
14 opportunity for them to exchange best practices.
15 There are a number of consultants, including a
16 few retired MSHA inspectors who are members of
17 the USA Group as well, and provide consultation
18 services to its members.
19 MS. SILVEY: Okay, but it is
20 operators?
21 MS. ABRAMS: Yes.
22 MS. SILVEY: All right. Also, with

1 respect to -- and then obviously, I know this. I
2 really do know this but we make some assumptions,
3 and then you take the proposed rule and you make
4 other assumptions, and that's where the
5 disconnect is with respect to the comments.
6 You said -- but you did use the term
7 fears. You didn't say that it did. You fear
8 that it will adversely effect medium to large
9 mine operators and result in significant
10 increases.
11 We did not project that. As a matter
12 of fact, I even said in my opening statement we
13 projected a decrease, and overall penalties for
14 small nonmetal mines. So -- so -- and also, we
15 did not project, and you can see it in our
16 tables, any increase in overall penalties.
17 I mean one of our goals when we
18 started this process was to keep overall
19 penalties the same. Obviously, if the -- if we
20 were to apply -- if we were to take it, and take
21 it forward, and take it to final rule, and apply
22 the additional 20 percent reduction, it would

1 result in a -- in a reduction in overall
2 penalties.
3 So, that is where we -- that's what we
4 did with the data, and those are the assumptions
5 that we used. With respect to your -- the last
6 thing I will say, last comment I'll make, we --
7 that we do take into consideration your comment
8 on the alternatives in the proposed rule with
9 respect to the Federal Mine Safety and Health
10 Review Commission. Thank you.
11 MS. ABRAMS: Thank you.
12 MS. SILVEY: Okay, did you have --
13 MR. MATTOS: Yes, I do. Thanks,
14 Adele. I was able to read your comments last
15 night. That was interesting. Then I got real
16 concerned when I saw Appendix A. I think you
17 said that --
18 MS. ABRAMS: We ran the numbers
19 several times. I just want to comment in
20 response to what Ms. Silvey was saying. You know
21 we agree that for your very small operators; the
22 mom and pops that have on location and have three

1 inspection days a year and get two or three
2 citations a year that the penalties probably will
3 either go down or remain the same.
4 For the United Safety Associates
5 Group, most of their members tend to be in the
6 medium to larger size companies, and the models
7 that we've run just seem to continually show
8 substantive increases anywhere from a 50 percent
9 increase, up to as you saw, nearly 1000 percent.
10 MR. MATTOS: That's what I wanted to
11 ask you about. The assumptions that you have in
12 your model; do you have more than one that you're
13 running? I mean I'd be really interested in
14 seeing those.
15 MS. ABRAMS: Yes. I believe there
16 will be additional ones. Other clients are also
17 going to be testifying. One of our counsel will
18 be out there in Denver from our Denver office.
19 We can try to provide some additional models for
20 the record if you would like that.
21 MR. MATTOS: Yes. For the record or
22 not --

1 MS. ABRAMS: But in terms of the
2 assumptions, I mean we were using the criteria as
3 stated in the proposal. As I mentioned to Ms.
4 Silvey, if something is currently high
5 negligence, we didn't bump it up to reckless
6 disregard. If something was permanently
7 disabling, we were using lost work days for that.
8 I will say on the gravity, that's
9 going to be one of the tough calls because when
10 it's reasonably likely, it means nothing has
11 actually occurred. It's going to be a
12 speculative injury, and right now if an -- if an
13 inspector classifies something as permanently
14 disabling, what are they going to be trained to
15 do? To roll that back to lost work day or to
16 bump that out to a fatality?
17 Because permanently disabling
18 generally signifies paralysis, amputations, those
19 types of things, which do have a potential to be
20 fatal if improper medical treatment is given.
21 So, the fear, to use the word that we
22 -- as they say in the movies, "Be afraid. Be

1 very afraid."
2 MS. SILVEY: It was in your comments.
3 I was mindful of that, and I noted that several
4 times that you used "fear."
5 MS. ABRAMS: And I don't scare easily,
6 Pat.
7 MS. SILVEY: Okay, but fear has to be
8 based on -- you know, that's why I said to all of
9 you at the beginning we need specific details.
10 Not just a conclusion statement of fear. I fear
11 that's what I'm getting is a conclusion statement
12 of fear.
13 MS. ABRAMS: The apprehension is, to
14 use a synonym, that the inspectors will tend to
15 move things to the right side, to speak. I don't
16 mean the correct side. To the more serious side
17 in terms of gravity, in terms of negligence. You
18 know, likelihood and severity, as well as the
19 negligence classification.
20 MR. MATTOS: Well, fear was what I had
21 with Appendix A. So, it wasn't apprehension.
22 But I did -- I was able, last night, to take a

1 quick look at it, and this is from an actual
2 docket?
3 MS. ABRAMS: Yes. It's a current
4 docket that we have.
5 MR. MATTOS: What is that docket
6 number?
7 MS. ABRAMS: I don't know if off the
8 top of my head.
9 MR. MATTOS: No, no. Not right this
10 second, but if you could let me know right what
11 it is, I'd like to take a look at that one.
12 MS. ABRAMS: Sure.
13 MR. MATTOS: Because the reason I ask
14 was I took a look in the database for all the
15 proposed assessments that we did and we have done
16 since the last update of the rule, and plugged in
17 these points and found very few actually out of -
18 - we've done 1.1 million violations we've
19 assessed since the last update of the rule.
20 I plugged these in, and out of all
21 these -- that docket, there were only 249
22 citations that met these criteria. So, I was

1 like, "Okay, well, at least this isn't common,
2 something common."
3 So, I'd really like to take a closer
4 look at --
5 MS. ABRAMS: In fact, somebody that we
6 used, which I won't state now, they are going to
7 be testifying at the Denver hearing. I believe
8 they're already signed up for that. So, they
9 could probably expand upon that information.
10 MR. MATTOS: I'd love to get that
11 docket, but the -- maybe it's a good point to
12 explain what we actually did. We took all -- we
13 took -- when we started doing this proposed rule,
14 we were looking at different computations and
15 permutations and ways to try to adjust these
16 evaluation factors.
17 Every time we came up with one set, we
18 would go to the most recent year's worth of
19 citations that we had assessed, and we would
20 calculate the assessment using whatever
21 permutation and combination we had derived at
22 that point, and actually assessed each one of the

1 citations for that one-year period.

2 When we settled upon the proposal that

3 we have now, we went back -- which took us a

4 while to get to. You might be shocked to find

5 that out, but we then went back and looked at the

6 most current year. Looked at another whole set

7 of data, and the -- and the results were

8 surprisingly similar.

9 I mean there were very little

10 differences. So, we said, "Oh, okay. We have

11 what we have." Now, that's not to say that there

12 are cases, individual citations, where you have a

13 big jump, like some of these examples you have

14 here.

15 And try as we might to eliminate every

16 one of those, when we're using a formula scheme

17 like this is not attainable without -- I've come

18 to the conclusion that the only way to really get

19 perfection is to go to every regulation and

20 assess a penalty against that regulation, and

21 that's just not doable either, really.

22 The different permutations and

1 combinations of the negligent and gravity -- so,
2 I just wanted to clarify that that's how we did
3 go and make the assumptions that we made in the
4 rule, the preamble to the rule, and in moving
5 things around, the way you describe you did.
6 I think, just to respond, a lot of the
7 quantum leaps, as it were, in the penalty amounts
8 in the modeling that we did seems to really
9 emanate from the history of violations, the VPID
10 and the RPID points, which again the smaller
11 operators have virtually nothing in that.
12 But if you go to a cement plant, or if
13 you go to a taconite plant, if you go to an
14 underground metal/nonmetal mine, you know that
15 has extensive -- they might have a lot of non-S&S
16 citations but they are being inspected pretty
17 pervasively.
18 That tends to overall raise the rates
19 that we have, so the number are what they are.
20 But by giving greater rate and significance to
21 the history points as well as to the negligence
22 points, that is going to, I think for the mid-

1 size and larger companies drive everything
2 upward.
3 Again, this is a rather extreme thing.
4 I was in fact shocked myself to see what the
5 numbers came out at, but when we ran some other
6 dockets that we have, every one of them was
7 coming up with a fairly significant increase.
8 MR. MATTOS: Okay, I appreciate that.
9 Thank you.
10 MS. SILVEY: Okay, thank you.
11 MS. ABRAMS: Thank you very much.
12 MS. SILVEY: Next presenter will be
13 Allen McGilton with Murray Energy.
14 MR. McGILTON: Good morning.
15 MS. SILVEY: Do you have copies of
16 your--
17 MR. McGILTON: I do.
18 MS. SILVEY: You do? Can we have a
19 copy, please? If that's okay.
20 MR. McGILTON: Good morning. My name
21 is Mr. Allen McGilton, A-L-L-E-N. McGilton is M-
22 C-G-I-L-T-O-N. I'm the Assistant Corporate

1 Safety Director for Murray Energy Corporation.
2 Before I begin, I'd like to say that
3 Murray Energy Corporation agrees with the
4 comments that Adele Abrams made here today. We
5 have similar comments that we're putting together
6 for a detailed objection to the rule.
7 Today, I'm going to speak in
8 generalities more than specifics. There will be
9 some specifics, but let me say that I agree with
10 Adele Abrams that large companies with repeat
11 violations and a lot of employees are going to
12 see a dramatic increase in the penalties.
13 Anybody that doesn't believe that?
14 I've got some swamp land in Florida I'll offer to
15 sell you.
16 One of my responsibilities is to
17 manage the company's assessments from the Mine
18 Safety and Health Administration. I've been in
19 this position for the last seven years. Murray
20 Energy is the largest privately owned coal
21 company in the United States, producing
22 approximately 64 million tons of high quality

1 bituminous coal each year.
2 Murray Energy and its subsidiaries
3 employ approximately 7,400 hardworking Americans
4 and currently operate 13 active coal mines
5 consisting of 13 underground longwall mining
6 systems, and 46 continuous miners in Ohio,
7 Illinois, Kentucky, Utah and West Virginia.
8 Murray Energy provides high-paying
9 stable employment in some of the most
10 economically disadvantaged areas of the country,
11 and is a low-cost producer of bituminous coal,
12 helping to provide safe reliable and affordable
13 energy.
14 As such, Murray Energy has a
15 substantial interest in the proposed rule. Prior
16 to joining Murray Energy, I worked 37 years with
17 the US Bureau Mines, the Mining Enforcement and
18 Safety Administration, MESA, and the Mine Safety
19 and Health Administration, MSHA.
20 I spent the last 24 years as a
21 supervisory coal mine safety and health
22 inspector.

1 During my career with the government,
2 I issued and evaluated thousands of citations and
3 orders, reviewed tens of thousands of citations
4 and orders issued by inspectors under my
5 supervision, and conducted health and safety
6 conferences before there were designated health
7 and safety conference litigation representatives.
8 My performance was evaluated as highly
9 effective over 20 times, and outstanding or
10 exemplary five times while as a supervisor, and
11 in 1999, I received the US Department of Labor's
12 Distinguished Service Award for exemplary work.
13 Sorry, I'm a little dry up here. I
14 didn't see any water.
15 MS. SILVEY: Right here.
16 MR. McGILTON: I didn't see that.
17 MS. SILVEY: You can take it. Please
18 help yourself. Pat's water. Just remember that:
19 who gave you the water.
20 MR. McGILTON: It's too late. It's
21 already in type. I can't take it back now. You
22 probably don't even remember me, but I remember

1 you.

2 My primary responsibility for Murray

3 Energy is to evaluate citations and orders, and

4 advise operations. Personnel and citations and

5 orders should be contested, and also the grounds

6 for the contest.

7 Typically, we contest citations and

8 orders when one or more of the inspector's

9 evaluations are exaggerated or inaccurate, or

10 when there should've been no violation, or when

11 MSHA has proposed a special assessment.

12 During my seven years with Murray

13 Energy, I personally have been involved in

14 contesting and resolving of contest over several

15 thousand citations and orders issued by many

16 different inspectors, from many different MSHA

17 field offices in many different MSHA districts.

18 In resolving these contests, I have

19 worked with numerous inspectors, conference

20 litigation reps, technical advisors and numerous

21 attorneys from the Solicitor's Office, and

22 numerous administrative law judges from the

1 Federal Mine Safety and Health Review Commission.
2 Overall, I believe my combined
3 experience of 44 years with MSHA and Murray
4 Energy has given me unique insight into the past
5 and current operations and practices of MSHA in
6 regards to issuing citations and orders, and
7 later resolving a variety of disputes as part of
8 the formal contest process.
9 Based on this experience, I have the
10 following comments to the proposed rule on the
11 criteria and procedures for assessment of civil
12 penalties. Again, these will be more in general
13 than are very detailed rule objection we will be
14 filing.
15 First, in contrary to the stated
16 intended purpose of the proposed rule will not
17 improve the civil penalty process, and reduce the
18 number of citations and orders mine operators
19 contest.
20 We do not believe that will occur.
21 Murray Energy does not contest citations and
22 penalties to save money. It contests citations

1 and penalties to ensure accuracy, and thus
2 improve miner safety.
3 Contesting citations and proposed
4 penalty assessments is not and never has been a
5 money-making or money-saving proposition. The
6 time, effort and expense to contest citations and
7 propose penalty assessments almost always exceeds
8 or greatly exceeds any potential reduction of the
9 penalty.
10 Murray Energy has contested and will
11 continue to contest citations, orders and
12 proposed penalty assessments when the underlying
13 paper is speculative when designations and
14 mischaracterized or misstates or overstates the
15 actual conditions, practices or hazards, or when
16 the proposed penalties do not reflect the gravity
17 or conduct at hand such as large special
18 assessments for moderate negligence 104(a)
19 citations.
20 MSHA needs to understand that accuracy
21 is more important to the mine operator, and
22 should be to MSHA. Accurately written citations

1 improve miner safety and health, and better deter
2 unsafe conditions and practices.
3 For instance, when the citation is
4 accurately written and issued, operators are more
5 likely to learn from any mistakes and to take
6 action to prevent similar conduct or conditions
7 in the future.
8 When the inspectors overinflate
9 various designations, or overstate, misstate or
10 guess about the conditions or conduct observed,
11 operators are more likely to become defensive and
12 protective of the personnel, and to contest the
13 citations and associated penalties in an attempt
14 to have the conduct and conditions accurately
15 portrayed.
16 The final rule will not fix this
17 problem. Small operators, without the legal
18 resources, will be forced to take a 30 percent
19 reduction, which will still result in inflated
20 penalties.
21 As an example, one of our operations
22 in southern Illinois was cited for an S&S

1 violation related to damaged roof bolts.
2 It appears the top -- I'm sorry. It
3 appears that the top of mobile equipment had
4 inadvertently hit the roof bolts and damaged
5 them. The citation was issued as moderate
6 negligence, and MSHA proposed a $9,800.00 special
7 assessment.
8 Everyone, including MSHA's inspectors,
9 knew the cited area had massive, competent and
10 thick limestone in the immediate roof, and indeed
11 the inspector's own notes mentioned this. There
12 were no cracks, slips, joints or other geological
13 anomalies present in or near the cited area.
14 There also was no material on the
15 floor, but the citation was designated as being
16 S&S. During settlement negotiations, and despite
17 knowing these facts, MSHA refused to offer any
18 paper changes to remove the special assessment.
19 Instead, we were offered a take or
20 leave it 20 percent reduction. We left it and
21 went to trial. Unsurprisingly, after the
22 testimony of the mine geologist and the issuing

1 inspector, the ALJ removed the S&S designation
2 and special assessment, and imposed a $268.00
3 penalty.
4 The accurate result was reached,
5 despite MSHA's attempt to avoid it.
6 As another example, the inspector
7 cited another one of our mine operators for dirty
8 showers and surface facilities, claiming there
9 was mold in the corners of the shower area and in
10 places on the floor.
11 Unbelievably, the inspector designated
12 the citation as reasonably likely to result in
13 lost workday injuries to ten persons because of
14 staph infections that could lead to amputations
15 of a finger or hand if not stopped in time.
16 MSHA proposed a whopping $15,570.00
17 regular assessment for the citation, due almost
18 entirely to the exaggerated gravity designations.
19 During settlement discussions, MSHA never offered
20 to change any of the paper, but only offered a
21 ten percent reduction in the penalty.
22 After trial, the ALJ unsurprisingly

1 concluded that the cited condition was unlikely
2 with lost work days or restricted duty, one
3 person affected, reduced the penalty to $500.00.
4 Again, the accurate result was reached, despite
5 MSHA's attempt to avoid it.
6 Importantly, these are not isolated
7 instances. I routinely see exaggerated citations
8 that do not reflect the requirements or intent of
9 the regulations, or MSHA's own internal policies
10 and procedures.
11 Citations for a one-inch by one-inch
12 hole in a stopping or accumulations of coal five
13 feet by two feet by one-inch under a belt are
14 examples of the loss of objectivity, and the lack
15 of common sense when applying 30 CFR.
16 These results are inflated penalties
17 that MSHA refuses to admit were erroneous, and
18 this means the mine operator either must pay for
19 claimed misconduct or conditions that did not
20 exist, or pay even more to contest the errors to
21 obtain accurate and fair results from an ALJ.
22 This is a misallocation of resources,

1 and effort, and will not be corrected by the
2 proposed rule. The proposed rule fails to
3 address the real problem: a lack of consistency
4 and uniform enforcement and instead sacrifices
5 accuracy and due process for hope for consistency
6 and objectivity.
7 MSHA repeatedly states that the
8 proposed rule and the goal of the new Part 100
9 are to simplify the criterion rules to place an
10 increased emphasis on more serious hazards to
11 increase objectivity and clarity in the section -
12 - in the citation and order process, and to
13 improve consistency in the application of the
14 criteria.
15 Said another way, MSHA wants to
16 minimize areas of disagreement, speed up the
17 process and get mine operators to accept proposed
18 penalties and pay them quicker.
19 To get there, MSHA wants to dumb down
20 several of the inspector's evaluations to
21 compensate for the lack of consistency that
22 exists in the inspector's knowledge of the

1 existing criteria regarding gravity and
2 negligence.
3 In my opinion, MSHA wants to simplify
4 the evaluation process so that it can increase
5 penalties and reduce the number of modifications
6 in contest proceedings.
7 MSHA admits -- MSHA attempts to shift
8 the blame to the industry for logging too many
9 contests, and has created a proposed rule that
10 sacrifices accuracy and due process for a pipe
11 dream of consistency and objectivity.
12 I believe the new proposed criteria
13 will not lead to the hoped for consistency or
14 quick payments MSHA wants. For instance, unless
15 MSHA agrees that all conduct previously
16 categorized as high negligence falls within the
17 new negligent category, I foresee many heated
18 disputes over where that conduct falls in a new
19 criteria. Because no operator wants conduct to
20 be described as reckless disregard.
21 In other words, high negligence
22 citations under the existing rule might've been

1 resolved short of trial with operators accepting
2 the designations will now be more likely to go to
3 trial because operators will be less willing to
4 accept the label of reckless disregard.
5 In any event, if the proposed rule is
6 not abandoned or considerably reconstructed, MSHA
7 should clarify this issue as part of the final
8 rule, and agree that all high negligence conduct
9 will fall within a new negligence definition,
10 which you addressed earlier.
11 MS. SILVEY: Yes, I did.
12 MR. McGILTON: The proposed changes to
13 negligence criteria are also troubling because
14 they run counter to statements by MSHA in prior
15 rulemaking and importantly will encourage less
16 safe behavior by the mine operator than under the
17 existing rule.
18 Specifically, MSHA's final rule
19 criterion and procedures for proposed assessment
20 civil penalties issued on May 21st, 1982, which
21 actually started this whole thing, created the
22 five existing categories of negligence.

1 In doing so, MSHA stated in the
2 preamble, "In developing these categories, MSHA
3 has responded to the concerns of commenters that
4 further clarification of the allocation of
5 negligence points was necessary, and that due
6 consideration be given to all factors bearing on
7 the operator's negligence."
8 In other words, more specificity was
9 needed so that these conduct related designations
10 would be more accurate, which is what remains
11 important to the industry, and general public
12 today.
13 Of even more significance, MSHA also
14 stated in the 1982 preamble that, "MSHA has
15 developed these categories of negligence, which
16 include mitigating circumstances to allow the
17 operator the flexibility to consider all the
18 facts and circumstances surrounding a violative
19 condition or practice."
20 For example, an inspector may
21 determine the negligence involved is low or
22 moderate, where there is a reasonable likelihood

1 of a reasonably serious injury occurring from the
2 condition or practice because the operator,
3 although negligent, has taken measurable steps to
4 prevent the violation or protect miners from
5 exposure to the hazard."
6 "Mitigating circumstances may include
7 but are not limited to actions which an operator
8 has taken to prevent, correct or limit exposure
9 to a violative condition or practice. An
10 operator's action should be taken into
11 consideration to the extent that it directly
12 relates to the specific violation cited."
13 In other words, MSHA consciously
14 recognized that factoring in mitigating
15 circumstances would promote miner safety because
16 mine operators would be incentivized to take
17 measures or steps to prevent the violation, or
18 protect miner's exposure to the hazard.
19 By removing all consideration of
20 mitigating circumstances from the negligence
21 criteria in the proposed rule, MSHA is now
22 undermining the first priority of the Mine Act to

1 protect the health and safety of its most
2 precious resources, the miner.
3 Murray Energy strongly encourages MSHA
4 to abandon the proposed rule, or at least the
5 proposed negligence criteria because of the
6 negative impact it will have on miner safety.
7 MSHA continued to encourage mitigation
8 to improve miner safety. Additionally, I foresee
9 many disputes over the proposed gravity
10 likelihood criteria.
11 It appears that MSHA is attempting to
12 abandon, or at least significantly change decades
13 of legal precedence regarding the S&S analysis.
14 In particular, MSHA is proposing a definition of
15 reasonably likely that is much broader than the
16 third prong of the Mathies test.
17 Certainly operators are going to
18 contest whether this new definition is consistent
19 with the Mine Act and the prior decisions.
20 Proposed rule vaguely defines unlikely as
21 including little or no likelihood.
22 I envision that there will be disputes

1 over what little means, and a tendency of MSHA
2 inspectors to place what would've been unlikely
3 conditions under today's rule into the new
4 reasonably likely category.
5 This in turn will result in more S&S
6 designations, and thus more unwarrantable
7 failures and more POV violations.
8 While this may improve MSHA's
9 statistics, it will do little, if anything, to
10 improve miner safety.
11 Finally, the new occurred criterion
12 should be read broadly to include a large amount
13 of conduct that under the existing rule would be
14 reasonably likely or unlikely. For example, an
15 operator's one-time practice of failing to
16 realign a belt could cause the event of a coal
17 accumulation that comes in contact with multiple
18 belt rollers, which could've resulted in injury
19 or illness, or they could not have.
20 Certainly operators will contest these
21 types of overreaching designations.
22 Overall, if MSHA really wants to

1 improve consistency in the application of its
2 criteria, reduce the number of contests and
3 citations and orders, and increase the prompt
4 payment of these assessed penalties, then MSHA
5 should withdraw the proposed rule, reevaluate the
6 training of its district managers, assistant
7 district managers, supervisory coal mine safety
8 and health inspectors, and coal mine inspectors,
9 and ensure that the existing criteria and rules
10 are better understood and more consistently
11 applied by these individuals.
12 Third and last, MSHA should not try to
13 bind the Commission to Part 100, but should bind
14 its own CLRs and attorneys to Part 100 during
15 pre-hearing settlement negotiations.
16 It is true that the Commission and
17 ALJs often issue decisions to set penalties that
18 appear to me to be arbitrary. The Commission has
19 no criteria or guidance similar to Part 100 to
20 assist its ALJs in setting penalty amounts.
21 As a result, we believe that ALJs are
22 often left guessing as to how to turn the six

1 statutory criteria into an appropriate penalty
2 amount.
3 We have raised these precise issues in
4 a case currently before the Commission involving
5 special assessments, which is under the American
6 Coal Company Docket No. LAKE 2007-701.
7 In that case, we have argued that the
8 Commission and its ALJs should be guided by,
9 although not bound to, the regular assessment
10 mechanism in Part 100 from which baseline
11 penalties may be drawn and substantial divergence
12 is explained.
13 Two ALJs have recently agreed with
14 this approach. ALJ Zielinski stated that,
15 "Absent some guideline, a judge has no
16 quantitative reference point to aid in specifying
17 a penalty within the current statutory regulatory
18 range of $1.00 and $70,000.00."
19 The Secretary's regulations for
20 determining a penalty amount by regular
21 assessment take into consideration all the
22 statutory factors that the Commission is

1 obligated to consider, and that the product of
2 that regular assessment formula to provide a
3 useful reference point that would promote
4 consistency and the imposition of penalties by
5 Commission judges.
6 ALJ McCarthy held that, "Although the
7 Commission is not bound by the Secretary of the
8 proposed penalty, or the 100.3 point scheme, I
9 find that the regulations at least provide a
10 helpful guide for assessing an appropriate
11 penalty that can be applied consistently."
12 Unquestionably, the Mine Act expressly
13 delegates to the Commission, not to the
14 Secretary, the authority to assess all civil
15 penalties. As a result, if MSHA attempts to bind
16 the Commission to Part 100, thereby removing or
17 at least severely limiting the authority to
18 assess penalties, MSHA will be violating the Mine
19 Act.
20 This is why we have advocated that the
21 Commission be guided by but not bound to Part
22 100 and why MSHA should do the same.

1 Furthermore, the Commission is an adjudicative
2 body that conducts evidentiary hearings and
3 ensures that mine operators are afforded due
4 process and other constitutional protections.
5 Removing or limiting the authority of
6 the Commission to assess penalties could in turn
7 remove or limit the Commission's ability to
8 evaluate and resolve due process or
9 constitutional issues.
10 Finally, Murray Energy was shocked
11 that MSHA was seriously considering binding the
12 Commission to Part 100 when MSHA's own attorneys
13 and CLRs do not follow Part 100. Specifically,
14 inspectors routinely issue citations with
15 exaggerated evaluations, not based on any or very
16 little evidence.
17 When contested, CLRs or MSHA attorneys
18 often will agree to modify the paper to
19 accurately reflect what should've been the
20 correct evaluation at the time the citation was
21 issued, but the same time, only agree to reduce
22 the penalty by a maximum of 30 percent.

1 Almost always, applying Part 100 to
2 these paper changes would result in a much
3 greater reduction, very often 60 to 70 percent.
4 Based on my experience, I believe
5 multiple districts have internal caps on the
6 penalty reductions. Usually 30 percent. They
7 can be given regardless of the paper changes
8 warranted by what is often undisputed evidence.
9 This perverse system encourages
10 inspectors to issue inflated, exaggerated paper
11 after which MSHA can agree to modify the paper to
12 what it should've been in the first place, but
13 keep much of the inflated penalty.
14 This strikes me as a type of
15 government sponsored Ponzi scheme. But sadly, in
16 these situations, the industry is forced to
17 choose between accepting the right paper with the
18 wrong penalty, or incurring the significant
19 expense and burden of contest proceedings and a
20 hearing before an ALJ to obtain the accurate
21 paper and penalty.
22 Our government should not be acting

1 this way. We strongly urge MSHA to reconsider
2 the proposed rule and withdraw it completely.
3 Our formal and detailed comments will be filed
4 timely. Thank you. I'm happy to take questions.
5 MS. SILVEY: Thank you. First of all,
6 I'd like to comment. You gave your background.
7 So, I want to say that we do appreciate your
8 service here at MSHA.
9 MR. McGILTON: Thank you.
10 MS. SILVEY: And I note many of us
11 have received a Department of Labor Distinguished
12 Career Service Award, and that is an award to be
13 proud of.
14 MR. McGILTON: I am proud of it.
15 MS. SILVEY: You -- I want to say that
16 you stated at the outset that your comments were
17 very general. You did state that you were going
18 to file your comments with specifics.
19 MR. McGILTON: Yes.
20 MS. SILVEY: Because one of the things
21 I stated in my opening statement was that when
22 you -- when anybody provides comments, and they

1 provide recommendations and conclusions, if you
2 could support that with specific rationale, that
3 is the way that we can make a more informed
4 decision about how to proceed with respect to the
5 final rule.
6 I do note that some of the commenters
7 have provided some specifics, and whether the
8 specifics -- some of them have provided specifics
9 with respect to the impact of the rule on
10 particular citations.
11 Whether those specifics are accurate
12 or not, to use your term, that is something we
13 will -- we can, as Jay said earlier, we will take
14 -- hopefully, we'll take some of these specifics
15 and apply it to our own database because that's
16 what we did, and see where we come out on that.
17 By the way, we do agree on some
18 things. So, just so you know, we think that we -
19 - I'm sure you probably know that from your
20 experience at MSHA that we strive for consistency
21 with respect to the inspectors' evaluation of the
22 citations.

1 Toward that end, we have continuous
2 training of our inspectors. Recently, we've
3 instituted a new process whereby if changes are
4 made in citations and orders, changes as they go
5 up the line are made in special assessments in
6 citations and orders that are designated as
7 special assessments.
8 Then we have a process where we send
9 those citations and orders back to the field
10 office supervisors, and ultimately so they can
11 get to the inspectors.
12 Our goal is that that would be a
13 teaching moment, and a learning experience for
14 the inspectors if the citations and orders were
15 changed.
16 MR. McGILTON: Can I make one comment
17 on that?
18 MS. SILVEY: Yes.
19 MR. McGILTON: That just doesn't
20 happen. If papers change in a conference; if
21 papers change through litigation, it's seldom
22 that the inspector even knows it was changed.

1 MS. SILVEY: That's why I'm saying to
2 you we've instituted a process. We have recently
3 instituted a process whereby all the changes, if
4 changes are made, go back to the inspector who
5 has issued that citation, and I'm
6 metal/nonmetal, both come under me.
7 So, we have done that, and I intend
8 that that be done with respect to every change,
9 and every inspection.
10 MR. McGILTON: That will help greatly.
11 Seven years ago when I was still with MSHA, it
12 was that way. It was that way. As the
13 supervisor, I'd get a copy of modifications. So
14 would the inspector. That's changed somehow in
15 the last seven years, and I don't know when it
16 took place, but that's the way it is today.
17 MS. SILVEY: Yes, but we are doing
18 that.
19 MR. McGILTON: Okay. I understand.
20 MS. SILVEY: The other thing you said,
21 and you did say, "I believe that multiple
22 districts have internal caps on the penalty

1 reductions."

2 I don't know of any districts that

3 have caps on the penalty reductions. If they --

4 and do you have any basis for saying that?

5 MR. McGILTON: Yes, but I don't want

6 to give up the source.

7 MS. SILVEY: Okay, but I mean -- and

8 you can have a general basis, but I guess my

9 point is do you have any specific --

10 MR. McGILTON: Well, even if you've

11 been told by a conference litigation rep that the

12 district manager can't give you more than 30

13 percent, even if you're not told when you get it,

14 we have mines in four MSHA districts. When every

15 MSHA district has the same offer at the end of

16 the day, it's all they're going to do.

17 It's pretty evident that four

18 districts in four different parts of the country

19 had to get their instructions from somebody above

20 them. They can't all be exactly the same. And

21 for a while, it was 20. Everybody was 20. Then

22 it went to 30. Then everybody was 30.

1 It's just too obvious not to be the
2 way it is.
3 MS. SILVEY: Well, that is not our
4 policy, agency policy from -- so, we -- you know
5 -- and obviously things do go on.
6 MR. McGILTON: It infuriates the
7 operator. You get a $2,000.00 citation. They
8 agree it should be non-S&S. Under the formula,
9 it should be $308.00, and yet all you can get
10 taken off is $600.00.
11 So, they agree with you, and my
12 argument is, "Well, if it had been issued that
13 way, this would've been the penalty. Why can't
14 you give me that now?" "Oh, we're not bound by
15 Part 100 now." That's what I hear.
16 MS. SILVEY: Okay, I hear you. One of
17 the things I will say is that one of the goals we
18 had in issuing this proposed rule, and you heard
19 me say, was to improve objectivity to lessen
20 subjectivity, and hopefully lead to less
21 disagreements.
22 You're talking to me now about

1 disagreements. Less disagreements over citations
2 and orders. That was one of the goals we had in
3 reducing the number of determinations that
4 inspectors had to make.
5 As you see, and as I noticed in my
6 opening statement, inspectors have to make
7 between 15 -- about 15 determinations when you
8 take into consideration persons affected.
9 We do agree with you, with respect to
10 the citations from the beginning and that the
11 inspectors should do, and I -- and I believe
12 probably most of them do the best job they can
13 with respect to issuing accurate citations.
14 That is one of our goals in terms of
15 training our inspectors. But as I said earlier,
16 most of your comments were general, and so we do
17 look forward to getting the specific --
18 MR. McGILTON: Yes, absolutely. You
19 will get them.
20 MS. SILVEY: Okay. Do you have
21 anything?
22 MR. MATTOS: Just one. On S&S, you --

1 your opinion was that there would be a change in
2 the S&S rate. But I don't -- the -- as Pat said
3 earlier in her opening statements, or earlier
4 anyway, S&S is reasonably likely to result in a
5 reasonably serious injury, and that is not
6 changing.
7 We are combining -- we are proposing
8 that the reasonably likely and highly likely
9 category be combined into reasonably likely.
10 Those are the two categories that now are used to
11 determine S&S as one of the prongs.
12 MR. McGILTON: There's no -- there's
13 no -- anything that you're planning to change the
14 definition from reasonably likely to anything
15 like reasonably possible? Is there any plans to
16 --
17 MR. MATTOS: No. We were -- the
18 proposal is what's in the preamble to the rule.
19 The definition of reasonably likely would be a
20 condition or practice cited as likely to cause an
21 event that could result in an injury or illness,
22 which is the same as right now reasonably likely

1 and highly likely are both determined to be S&S
2 if it's a reasonably serious injury.
3 So, we're not trying to change the
4 definition of S&S, just to clarify.
5 MR. McGILTON: Okay.
6 MR. JONES: Can you clarify how you
7 believe the Part 100 formula should be used by
8 the Commission Administrative Law Judges?
9 MR. McGILTON: Well, we do have some
10 judges that use it as a guideline, and I believe
11 they should use it as a guideline. But when
12 there are other mitigating circumstances that
13 lead them to believe they should either raise or
14 lower the penalty, I believe they should have
15 that latitude.
16 I know in a recent -- I mean I've been
17 to 11 trials with many different ALJs, and I had
18 conferences with many, and I had a CLR that I was
19 trying to finish two citations with. One of the
20 Judges, McCarthy, said, "What seems to be the
21 hold up?" And I said, "Well, the agency has
22 agreed to modify these non-S&S, but they want to

1 keep all the money."

2 He said, "What do you mean?" So, I

3 told him. He told the CLR, "Well, I want you to

4 know that I follow Part 100 pretty closely, and

5 if this goes to trial, that's the way it's going

6 to go. So, you ought to reconsider your

7 positions."

8 Well, as soon as they reconsidered

9 their position, they didn't give me exactly what

10 Part 100 was, but they at least came close. Not

11 tripled it. So, we settled it. We resolved it.

12 I think a lot of these would be

13 resolved without litigation if Part 100 was

14 followed by the CLRs, the solicitors, and if the

15 ALJs -- if we take it to the point where an ALJ

16 is going to hear the case and something is

17 presented that causes him not to follow Part 100,

18 either up or down, we could live with that.

19 The ones that stick pretty close to

20 it? Everything gets settled. I'll tell you

21 right now if MSHA would follow Part 100, and not

22 just say, "We don't have to." We would take 90

1 percent of these out of court. They wouldn't
2 even go.
3 But here's the problem: If you give us
4 what it should've been after it has been issued
5 and it is posted on the webpage, and somebody
6 like a Ken Ward gets a hold of it, and he wants
7 to do MSHA bashing? Well, then you look bad.
8 So, what do you do to protect that image? You
9 cut it off at 30 percent. You can't go worse
10 than 30 percent.
11 Let's face it. What was the good
12 faith reduction before the April 2000 Part 100
13 came into effect? It was 30 percent. It went
14 from 30 to 10. Now, you're proposing to go back
15 to 30 again.
16 MS. SILVEY: We understand. We
17 understand. Okay, all right. Thank you. At
18 this time, we're going to -- in a few minutes,
19 we're going to take a break, but before we take a
20 break, Assistant Secretary Main is here, and I'd
21 like to ask if he'll say a few words. He can say
22 how many he wants. I'll just say that you don't

1 have to put this on the record.

2 (Whereupon, the above-entitled matter

3 went off the record at 10:28 a.m., and resumed at

4 10:57 a.m.)

5 MS. SILVEY: We will now reconvene the

6 Mine Safety and Health Administration's public

7 hearing on the proposed penalties.

8 At this point, our next speaker is

9 Jeff Kratz, with the Institute of Makers of

10 Explosives.

11 MR. KRATZ: Thank you. Good morning,

12 ladies and gentlemen of the Panel. Thank you for

13 hosting this hearing today, and allowing us to

14 provide some oral comments.

15 Ours is going to be a little bit

16 shorter because our interest isn't as strong as

17 some of the other people's today. My name is

18 Jeff Kratz. That is the common spelling, J-E-F-

19 F. Last name is Kratz, K-R-A-T-Z. I am

20 accompanied by Deb Satkowiak. Want to spell your

21 name for the record?

22 MS. SATKOWIAK: Also common spelling,

1 S-A-T-K-O-W-I-A-K.

2 MR. KRATZ: I'm here representing the

3 Institute of Makers of Explosives, or IME. IME

4 is the safety and security institute of the

5 commercial explosive industry.

6 Our members' companies' products are

7 essential in mining operations, and my comments

8 address two issues IME has with the assessment of

9 civil penalties proposal.

10 Before I get down to it, I just want

11 to say that we generally agree with the first two

12 people here testifying or commenting. But we

13 have a little bit different focus than what they

14 do, as we just represent mainly contractors too

15 to different mines. Not the mines themselves.

16 Our first concerns relate to MSHA's

17 policy on the assignment of contractor ID

18 numbers. For safety and other reasons, mining

19 companies are increasingly using independent

20 contractors to perform their onsite blasting

21 operations.

22 Therefore, IME members are not only

1 producing and transporting explosive materials,
2 but they are also engaged as independent blasting
3 contractors at mine sites.
4 Currently, MSHA issues unique ID
5 numbers to each mining location, even though one
6 company may control multiple mines across the
7 nation.
8 In contrast, MSHA assigns only one ID
9 number to independent blasting contractors
10 irrespective of how many mine sites they service
11 across the country.
12 Among other things, patterns of
13 violations status and penalties are based on the
14 size of the entity committing the violation, the
15 company's history of violations and repeat
16 violations associated with an ID number.
17 As a result, contract blasters are
18 exposed to much higher penalties than similarly
19 situated mine operators. An example of this is a
20 blasting contractor doing work at two mines, but
21 those contracts are employed by the same company.
22 They would face higher penalties and

1 stiffer fines than for example a mining company
2 that has the same violations because violations
3 for the mining company are treated separately at
4 each mine site; but the violations for the
5 blasting contractor will be consolidated.
6 MSHA's current policy predisposes
7 blasting contractors who operate at multiple
8 sites to excessive points during the penalty
9 assessment phase burdens them with the larger
10 monetary fines, and leaves them with no option
11 but to contest disproportionate penalties.
12 So, our second concern relates, and we
13 talked about this earlier, is MSHA's reduction on
14 penalty categories. This proposed change could
15 lead to more severe penalties being issued, or
16 result in less flexibility to negotiate penalty
17 settlements.
18 Currently, MSHA recognizes five
19 penalty categories: none, low, moderate, high and
20 reckless.
21 The proposed rule would reduce these
22 categories to not negligence, negligence and

1 reckless.

2 Other than the penalty category of

3 reckless, it is likely that the proposed penalty

4 category reduction will result in the assessment

5 of a violation to a category higher in fines and

6 harsher penalties.

7 IME understands and supports safe

8 working conditions for those working in mining

9 and drilling operations. Our members adhere to

10 the best practices contained in IME's safe

11 library publications, which exceed federal

12 requirements for producing, using and

13 transporting explosive materials.

14 We respect the important role MSHA

15 plays in protecting mine workers and the general

16 public. Further, we appreciate MSHA's efforts

17 towards improving nationwide consistency and

18 objectively enforcing operations.

19 However, the proposed penalty category

20 consolidated with companion consequences already

21 burdened by our industry by the nation's -- by

22 the agency's unfair and unjust ID assessment

1 policy for contractors.
2 We request that the ID numbers for
3 mining companies and blasting contractors be
4 assigned on a site-by-site basis, that do not --
5 and that no consolidation of penalty categories
6 be made at this time.
7 I just want to say that we understand
8 that the training that you talked about earlier,
9 the training of inspectors, but there also needs
10 to be a follow up with that training to ensure
11 that the consistency -- there's still consistency
12 throughout the country.
13 So, thank you. I'd be happy to field
14 any questions that you may have.
15 MS. SILVEY: Thank you for your
16 comments. As I said earlier, and I'm going to
17 probably reiterate this to everybody so I don't -
18 - I'm not making -- I'm not being -- making any
19 distinctions. We do appreciate specifics when
20 you make your comments.
21 I know you made about three general
22 comments, but when people do make comments, we

1 would ask that you be specific-- specifics would
2 help us tremendously.
3 We understand your comment on
4 independent contractor ID numbers. I'm very
5 familiar with that, as you might know. I would
6 like to just ask you, even though that comment is
7 a little out of the scope of this rulemaking.
8 So, I'll say that to everybody, but I -- but
9 would like to -- and I'm sure you appreciate what
10 I say when I say it.
11 I would -- and generally speaking, I'm
12 a person who, when things are outside the scope
13 of the rulemaking, I may or may not engage in
14 further comment on them. But it's Dyno Nobel one
15 of your member companies?
16 MR. KRATZ: Yes, they are.
17 MS. SILVEY: Let's take Dyno Nobel.
18 Not for any reason to -- it could've been any one
19 of them for that matter. Explosives companies.
20 But how many mines might Dyno Nobel go to in a
21 year? Just an estimate. Round estimate.
22 MS. SATKOWIAK: Let me just say that

1 we have 30 member companies, and of those 30
2 member companies, it does include the
3 manufacturers, the transporters.
4 MS. SILVEY: Right.
5 MS. SATKOWIAK: Those include the
6 people that provide the blasting platforms and
7 provide the magazines.
8 MS. SILVEY: I understand.
9 MS. SATKOWIAK: So, our members are
10 the main suppliers of explosives materials to the
11 mines.
12 MS. SILVEY: No, I understand. I'm
13 just asking, take one of them who services the
14 mines. I'm asking how many different mines might
15 one contractor go to in a year? A number.
16 MS. SATKOWIAK: I'd be concerned to
17 even try to estimate that for you.
18 MS. SILVEY: So, it's a big number?
19 MS. SATKOWIAK: We can get back to you
20 if you want.
21 MS. SILVEY: I made my point.
22 MS. SATKOWIAK: I don't want to be

1 off.

2 MS. SILVEY: I understand. That's

3 what I wanted to -- it's a big number. But you

4 are asking us to give -- for each mine site that

5 contractor goes to, you want that contractor to

6 have a different ID number.

7 MS. SATKOWIAK: So, we have companies

8 that have legally separate entities, and those

9 legally separate entities are set up as LLCs, and

10 those are entities that are recognized by ATF for

11 separate license or permit numbers.

12 So, they are recognized by ATF as

13 separate legal entities, but yet MSHA is

14 recognizing them only as one.

15 MS. SILVEY: Okay, so --

16 MS. SATKOWIAK: And this is

17 inconsistent. I'm sorry, ma'am. This is

18 inconsistent as well for -- Dyno Nobel may be

19 traded differently than some of our other member

20 companies.

21 MS. SILVEY: Okay, let me just -- I

22 want to get it straight. Now I'm clarifying what

1 you're asking. Are you asking that Dyno Nobel
2 has legal entities, and you are asking for them
3 to have separate ID numbers? Not what I said
4 earlier when I was asking you to give me the
5 estimate. I just want to make it clear.
6 MS. SATKOWIAK: So, you have
7 subsidiary companies that may have a similar --
8 similar names, right. Am I answering your
9 question?
10 MS. SILVEY: No, I'm asking you. So,
11 you are asking for each of the -- you said they
12 have different companies with -- that have
13 separate licenses. So, you're asking for them to
14 have separate ID numbers?
15 MS. SATKOWIAK: Yes, so we have a
16 parent company, and then they have separate
17 subsidiaries. Legally, separately organized that
18 each of those need to have separate contractor ID
19 numbers.
20 MS. SILVEY: Okay, I got it.
21 MS. SATKOWIAK: Because this is
22 inconsistent. The mines have separate contractor

1 ID numbers, but all of these subsidiaries of a
2 parent organization have the same contractor ID
3 number.
4 So, the reason we brought this up, and
5 we understand that it wasn't a question that was
6 in the proposed rulemaking, but the reason we
7 bring this up is because basically it would have
8 a snowball effect if you have one contractor and
9 that, say, failure to put a hardhat on; it will
10 roll across and be applied to --
11 MS. SILVEY: Okay, trust me, I
12 understand. But your comment doesn't say that.
13 Your comment says a blasting contractor doing
14 work at two mines. It goes to a blasting
15 contractor. But now you're telling me you're
16 really asking for a -- if a -- if there is a
17 subsidiary of Dyno Nobel. This is really a more
18 refined comment than what --
19 MS. SATKOWIAK: Yes.
20 MS. SILVEY: I'm just trying to
21 clarify. That's all I'm doing.
22 MS. SATKOWIAK: We had to be kind of

1 general because there is litigation in this. So,
2 we were general. We understand what you're
3 saying, and we'll see if there are specifics that
4 we can submit because I absolutely respect the
5 fact that you do need specifics.
6 MS. SILVEY: Right. Okay, thank you.
7 MR. MATTOS: Just one question, or
8 maybe a question and a comment. The issue goes
9 to two sections of this regulation, actually.
10 It's the history, violation history piece where
11 you're getting all your violations combined into
12 one basket.
13 But the other one -- and I understand
14 that. I really don't have a question. I
15 understand where you're coming from on that one.
16 The second one though is on the size of the
17 business of the operator that needs to be
18 considered when assessing civil penalties under
19 the Mine Act.
20 In that respect, the contractors, in
21 your instance, the companies, the overarching
22 companies, equate to what would be a controlling

1 company in the coal and nonmetal mines.

2 So, in that respect it is consistent.

3 When we're looking at the size of the business of

4 the operator, we consider the controlling company

5 size, which in the example where Pat used Dyno

6 Nobel, so -- so, there is consistency on that

7 end, but there's an inconsistency I think where

8 what you're saying on the -- and I just want to

9 clarify that there are two components of this

10 regulation that do apply to this contractor ID

11 thing.

12 So, if there -- if there is some

13 feedback that you can give us on addressing the

14 inconsistent and consistent part, because we do

15 have the size of the business of the operator to

16 consider and for civil penalties purposes, and

17 Congress' intent there was bigger companies would

18 get bigger penalties. That was their intent.

19 MS. SATKOWIAK: Thank you. We will

20 work towards that.

21 MR. MATTOS: Thank you.

22 MS. SILVEY: Thank you.

1 MS. SATKOWIAK: Thank you.
2 MS. SILVEY: Our next -- our next
3 presenter will be Joe Casper with the National
4 Stone, Sand and Gravel Association.
5 MR. CASPER: Good morning, Ms. Silvey
6 and Mr. Mattos, Ms. McConnell and Mr. Jones.
7 Thank you for this opportunity to provide
8 testimony on the Part 100 rule.
9 My name is Joseph Casper. Last name
10 is spelled C-A-S-P-E-R, just like the ghost. The
11 National Stone, Sand and Gravel Association has
12 been pleased to help lead the way to improve
13 through a number of aggressive programs, safety,
14 performance and compliance, for almost the last
15 15 years.
16 Actually, 13, during which time
17 aggregates operators have succeeded in reducing
18 the industry's injury rate to what is now the
19 record low level of just 2.11 injuries per
20 200,000 hours worked.
21 Also, NSSG has worked diligently with
22 MSHA to facilitate improvements in inspector

1 consistency in compliance with MSHA standards.
2 MSHA is to be credited in our view with
3 significant reductions in inspector inconsistency
4 over the past several years. We appreciate that
5 diligent effort.
6 With regard to this proposal, we are
7 concerned with a number of items, a number of
8 which I will relate this morning, and all of
9 which will be addressed in our formal written
10 comments to be submitted likely in January.
11 First, given -- with regard to
12 negligence and gravity, given that the proposal
13 includes no explicit guidance on reconciling
14 current categories of classifying negligence with
15 new categories, there is no way for an operator
16 to understand how an inspector would interpret
17 conditions relative to the proposed categories.
18 For instance, it is unclear how
19 citations that are currently marked as high
20 negligence or low negligence would be treated.
21 And it appears that the elimination of high
22 negligence under the proposal would result either

1 in one, unwarrantable failures accompanied by
2 findings of negligence, or two, an increase in
3 the number of reckless disregard findings to
4 support unwarrantable failures.
5 Both scenarios from our standpoint are
6 problematic. With respect to the first, an
7 unwarrantable failure must be more than ordinary
8 negligence, and therefore not supported by a
9 finding that an operator was negligent.
10 If MSHA were able to support an
11 unwarrantable failure by finding only that an
12 operator was negligent, it would result in a
13 delusion of the meaning unwarrantable failure,
14 and in turn increase in 104(d) citations.
15 Regarding the second possible
16 consequences, if negligent is deemed insufficient
17 for supporting an unwarrantable failure, this
18 would require use of reckless disregard to
19 support a 104(d).
20 An increase in reckless disregard
21 findings would obviously result in increased
22 penalties and most likely an increase in the

1 number of enforcement actions considered for a
2 flagrant violation.
3 Also, we urge MSHA to be cognizant of
4 the fact that the classification of a citation as
5 reckless disregard as opposed to high negligence
6 will expose operators to a major increase in
7 civil litigation because there are a number of
8 states in which such a classification can trigger
9 an exemption in workers' compensation coverage.
10 The proposed rule would eliminate the
11 consideration of mitigating factors, something
12 that is critical to a full evaluation of operator
13 culpability for alleged violations.
14 We strongly oppose the proposed
15 changes on negligence.
16 Another major concern regarding
17 gravity is that changes to the likelihood of
18 occurrence criteria. The proposed definitions
19 would change this consideration to whether an
20 event, not an injury, has occurred.
21 This will result in an increase in
22 occurred designations, which will lead to

1 increased penalties. So, the proposed definition
2 would be based on the inspector's interpretation
3 as to whether or not the event is one that
4 could've resulted in an injury or illness.
5 This would appear to run directly
6 counter to the aim of improved objectivity and
7 consistency. Accordingly, it appears that the
8 proposed definition would lower the burden for
9 significant and substantial designation from a
10 condition with a reasonable probability of
11 causing an injury to a caution -- to a condition
12 with even a slim possibility for causing an
13 injury.
14 This proposed definition of reasonably
15 likely also raises a point of uncertainty, namely
16 the relationship between it and S&S designations.
17 The Secretary's proposed definition of
18 reasonably likely is, "A condition or practice is
19 likely to cause an event that could result in an
20 injury or illness." Violations are properly
21 designated as S&S if, based upon the particular
22 facts surrounding the violation, there exists a

1 reasonable likelihood that the hazard contributed
2 to it will result in an injury or illness of a
3 reasonably serious nature.
4 The condition is emphasized that it is
5 the contribution of a violation to the cause and
6 effect of a hazard that must be significant and
7 substantial. These proposed changes will lead to
8 greater subjectivity, not less.
9 Also, these changes would make it more
10 difficult for intelligent conferencing of
11 citations. Further, there is no explanation as
12 to assumptions an inspector should make in
13 evaluating levels of gravity.
14 So, we would contend that these
15 revisions will yield more disagreements over
16 citations, and thus more contests, and these
17 changes risk radically altering three decades of
18 case law. We strongly oppose these proposed
19 changes.
20 Regarding the authority of the Review
21 Commission, we believe it should not be curbed.
22 The rule looks to possibly curb the role of the

1 Federal Mine Safety and Health Review Commission
2 in dramatic fashion.
3 This is fundamentally wrong for a
4 number of reasons. The proposed changes contrary
5 to the 1977 Mine Act, which called for third
6 party review of contested citations. Also, this
7 proposal is contrary to Federal Mine Safety and
8 Health Review Commission precedent.
9 We believe that no deference should be
10 afforded to the Secretary's proposed penalties
11 and strongly oppose these changes. Assessment
12 costs should not go up by virtue of this rule.
13 MSHA claims that the proposed
14 amendments would've resulted in 2.7 million less
15 dollars for penalties for citations issued in
16 2013 than was assessed under the current penalty
17 regulations.
18 NSSGA performed calculations of cost
19 impacts for small, medium and large operations
20 with both current and proposed regulations,
21 definitions and factors in place, and found that
22 penalty assessment cost increases ranging between

1 50 and 80 percent.
2 We will be happy in our formal
3 comments to submit this chart to show how those
4 increases were achieved.
5 MS. SILVEY: And did you use specific
6 citations?
7 MR. CASPER: We took examples and
8 explicitly stated how the citation had been
9 written and what the costs were under the current
10 rule, and then under the future rule.
11 MS. SILVEY: Okay.
12 MR. CASPER: So, yes, we are explicit.
13 These costs will be borne by customers working to
14 construct housing, office buildings, schools,
15 hospitals and highways needed by our communities
16 and for economic recovery.
17 This kind of infrastructure spending
18 was reporting just in this morning's Washington
19 Post to be supported by the Obama Administration,
20 and thus, these costs are very important to keep
21 in mind in our analysis of where this proposal
22 ought to go.

1 These cost increases contradict MSHA's
2 assertion that operator's will see a reduced
3 level of penalty assessments.
4 Also, we suggest that MSHA use this
5 opportunity to do what NSSGA has suggested for a
6 number of years now: Use this opportunity to
7 grant enforcement credit to excellent operators.
8 We believe that this proposal fails to
9 take the opportunity to develop an approach for
10 granting some measure of enforcement credit to
11 those operators that have done very well in
12 safety issues and on compliance.
13 This could be done by reinstituting
14 the single penalty provision in place before the
15 2008 Part 100 changes, and/or by implementing the
16 NSSGA supported pattern of compliance program,
17 granting some enforcement relief to operators
18 with an excellent track record with regards to
19 safety and compliance.
20 For instance, maybe there would be
21 relief for excellent operators of the mandatory
22 to and for inspections for surface and

1 underground operators respectively.
2 These are compelling ideas that would
3 further boost compliance.
4 In conclusion, NSSGA strongly opposed
5 key provisions of this proposal because despite
6 good work done by MSHA and industry to achieve
7 improvements in compliance and inspector
8 consistency, these provisions are expected to
9 foster less consistent enforcement and
10 compliance.
11 Accordingly, such factors would result
12 in increased burden on operators, which would
13 serve to impede their continued efforts to
14 successfully manage workplace safety and health,
15 and compliance with standards.
16 Further, this proposal fails to meet
17 the agency's stated goals in the proposal. NSSGA
18 would be pleased to work with MSHA to develop a
19 more positive approach to improving Part 100. We
20 will submit formal written comments in time for
21 the January 9, 2015 deadline. Thank you very
22 much for your considerations.

1 MS. SILVEY: Thank you. First of all,
2 let me state that MSHA appreciates the work of
3 all of the operators who are in this room, and
4 their associations with respect to worker
5 associations also who work with MSHA to achieve
6 improvements in safety and health, miner safety
7 and health,
8 With Miner Day being Saturday, we know
9 that we could not be -- improvements that we have
10 achieved, and we have had sort of a glitch in the
11 -- you know, glitch is not the right word with
12 respect to metal/nonmetal fatalities this year.
13 We all know that. But the overall achievements
14 in miner safety and health could not be done by
15 MSHA alone and could not be done without the help
16 of the operators and the workers, and their
17 workers. We do appreciate that.
18 But with respect to a number of your
19 comments, I -- and I'm going to reiterate that
20 the proposal does not change the definition of
21 S&S and unwarrantable failure. We put those --
22 we said that in the proposed rule. I said that

1 this morning, and it does not.
2 And to state something that you said,
3 we did not -- the agency did not intend and does
4 not intend to change three decades of case law,
5 as you put it.
6 We did intend to create a situation
7 that would reduce subjectivity and improve
8 objectivity. With respect to -- and I'll just
9 take one of your examples. People have heard me
10 say that, so that's why -- that's when you have
11 to be specific in your comments.
12 But with respect to negligence, I
13 think you anticipated that high negligence and --
14 you anticipated that high negligence would be
15 rolled into reckless disregard, but there's a
16 definition of reckless disregard and it is more
17 than ordinary negligence.
18 So, with us having only three
19 categories, our projection was that low, moderate
20 and high negligence would be negligence. It is
21 negligence. Reckless disregard is another
22 definition, and there -- it has to be more than

1 negligence.
2 I know the definition says ordinary
3 negligence, but more than negligence and there
4 have to be aggravating circumstances. And so,
5 our assumptions were that those three categories
6 would be just negligence.
7 Now, I said also in my opening
8 statement that that does portend something that
9 we have to do, which means that we have to do
10 additional training of all of our inspectors if
11 this rule were to go into effect in some form or
12 fashion.
13 I say that to everybody, but I -- we
14 do look forward where you particularly in your
15 comments -- and I -- I'm -- you all have heard me
16 -- all of you heard me say this. When you said,
17 "Assessments cost would go up." We did not
18 intend for assessment costs to go up.
19 So, with respect to your conclusion
20 that when you say you performed calculations of
21 cost impacts and they would have cost increases
22 ranging from 50 to 80 percent, and we heard from

1 some people who said it would be magnitudes of 50
2 to 80 percent.
3 And so, we do -- we would like you to
4 support that with specific details of how you got
5 -- you came to your computations. We put ours in
6 the proposed rule, and we'd like to see yours.
7 MR. CASPER: They will be included in
8 our written comments.
9 MS. SILVEY: Okay. Do you have
10 anything? Okay, thank you.
11 MR. CASPER: Thank you.
12 MS. SILVEY: We will next have Bruce
13 Watzman with the National Mining Association.
14 MR. WATZMAN: Thanks, Pat, and thanks
15 Members of the Panel. I apologize. I don't have
16 a copy of my written statement. As you can see,
17 I've made changes throughout the day. I will
18 provide you a clean copy following the hearing.
19 I'm Bruce Watzman. Last name is
20 spelled W-A-T-Z-M-A-N; Senior Vice President of
21 the National Mining Association. NMA, along with
22 the Portland Cement Association and the

1 Fertilizer Institute will be filing detailed
2 comments on the proposed rule.
3 Today, I'll highlight our overarching
4 concerns with the rule, namely the failure to
5 substantiate a need for the rule, the failure to
6 comport with the requirements of the Mine Act,
7 and the proposed rule's limitation on fair and
8 equitable adjudicatory process.
9 In the simplest sense, this rule is,
10 in our opinion, a solution in search of a
11 problem. From our perspective, the proposed rule
12 must be withdrawn because it exceeds MSHA's
13 authority, violates the Mine Safety and Health
14 Act, and fails to accomplish the goals stated in
15 the proposed rule.
16 In essence, the proposal, if adopted,
17 would constitute an arbitrary and capricious rule
18 without articulating any reasonable basis for the
19 changes set forth in the proposal.
20 In the commentary accompanying the
21 proposal, the agency asserts that the proposed
22 changes will, one, improve objectivity and

1 consistency in how inspectors write citations and
2 orders; two, result in earlier resolution of
3 enforcement issues due to fewer areas of dispute;
4 three, result in greater emphasis on more serious
5 safety and health conditions, and four, provide
6 increased openness and transparency in the
7 application of regular penalty formula.
8 We respectfully disagree. In our
9 view, the proposal fails to meet these
10 objectives.
11 Consideration of this proposal dates
12 back to the days following the tragedy at the
13 Upper Big Branch Mine, and we all regret that
14 that occurred and we continue to think about the
15 miners and the families of the miners who
16 perished in that tragedy.
17 The proposal, the premise of the rule,
18 no longer -- in our view is no longer valid.
19 Namely, the need to reduce controversy and
20 thereby reduce the number of contested citations
21 resulting in the backlog before the Federal Mine
22 Safety and Health Review Commission.

1 During the last few years, MSHA
2 frequently pointed to the backlog in contested
3 citations, penalties and litigation as the cause
4 for the agency's enforcement difficulties and the
5 need for change.
6 MSHA's historical records confirm that
7 the rise in litigation followed a more than 400
8 percent increase in penalties proposed by MSHA
9 beginning in 2008.
10 After this seismic shift in
11 enforcement efforts, and the Commission and
12 MSHA's investment in additional resources and
13 manpower, the contest backlog was reduced from
14 approximately 18,000 in September of 2010 to
15 approximately 6,500 at the end of the last fiscal
16 year. A reduction of approximately 65 percent.
17 The Commission's backlog in cases is
18 not justification for this rule. The proposed
19 rule does not comport with the Mine Act. MSHA
20 has not, in our view, conducted an adequate data-
21 driven analysis of penalties, health and safety
22 performance and the proposed changes, nor

1 sufficiently articulated reasons to undertake
2 this major regulatory change, or any of its
3 specific elements.
4 Instead, the proposal at best appears
5 to be change for the sake of change, and at
6 worse, seeks to ease the Secretary's burden of
7 proof on enforcement actions, restrict mine
8 operators' ability to contest MSHA proposal
9 citations, and increase penalties without a
10 safety rationale.
11 Recent enforcement history shows that
12 citation rates are down, the Commission backlog
13 is dramatically reduced, and most importantly,
14 accidents and fatalities are down.
15 In other words, the current rule is
16 accomplishing the goal of this proposal and MSHA
17 has not identified any data or other evidence
18 showing that the proposed rule will have any
19 different impact on improving safety and health.
20 In our view, the proposed rule fails
21 to identify the problem or concern it seeks to
22 solve; analyze the facts associated with the

1 problem where concerned, and articulate empirical
2 data to justify its provisions as solutions to
3 the identified problems or concerns.
4 The proposed rule does not comport
5 with MSHA's stated objectives. MSHA contends
6 that the simplification reduction and descriptive
7 categories of penalty criteria should lead to
8 fewer areas of dispute and earlier resolution of
9 enforcement issues, place increased emphasis on
10 more serious hazards and lead to more openness
11 and transparency.
12 In our view, these assertions are
13 incorrect. In our view, the proposed rule will
14 put the mining industry and the agency back in
15 the same predicament that existed in 2008 with
16 enforcement increases, higher contest rates and a
17 resurgent in the number of dockets and backlog
18 status.
19 Specifically, proposed revisions to
20 the negligence and gravity designations are
21 combined with proposed changes to the likelihood
22 criteria, deleting categories and collapsing

1 them, thereby reducing inspector options in
2 describing violations, and encouraging increased
3 inspector severity and fault ratings with the
4 intended consequences of increased enforcement
5 and penalties.
6 This will result in more penalties and
7 more contests, not fewer. The proposed changes
8 to the Commission's authority is contrary to the
9 Act.
10 The Mine Act deliberately divides
11 authority for proposing and assessing penalties
12 between the Secretary and the Commission. The
13 Act delegates to the Secretary of the authority
14 to propose civil penalties.
15 If a mine operator disagrees with the
16 Secretary's allegations, the operator may contest
17 the citation, order or proposed assessment of
18 penalty. The Act directs the Commission to
19 afford the mine operator a hearing, and
20 thereafter shall issue an order based on findings
21 of fact, affirming, modifying or vacating the
22 Secretary's citation, order or proposed

1 penalties.

2 The split authority was precisely what

3 Congress intended when it passed the Mine Act.

4 The plain meeting of the Act and the legislative

5 history expressly authorized the Commission or by

6 extension the Commission ALJs to affirm, modify,

7 higher or lower, or vacate the Secretary's

8 proposed penalty based on the facts found during

9 the hearing.

10 Complete independence of the

11 Commission from the Secretary is of paramount

12 importance to ensure a fair adjudicatory process.

13 The proposal would violate this basic tenant, and

14 must be withdrawn.

15 I would draw your attention to the

16 comments that were submitted earlier this week by

17 ten former Commissioners from the Federal Mine

18 Safety and Health Review Commission, who pointed

19 to this proposal and asked that those provisions

20 of the proposal be withdrawn.

21 As I mentioned at the outset, NMA, PCA

22 and TFI will be filing detailed written comments

1 on the proposal. Our conclusion, however, is
2 that the proposal fails to articulate any
3 quantitative basis for the changes it seeks to
4 implement.
5 Not only does the proposal offer scant
6 evidence that the contemplated changes will
7 actually bring about improvements in health and
8 safety or reductions in litigation that MSHA
9 predicts, the data indicates that the opposite
10 will occur.
11 The agency has not demonstrated a
12 statistically significant relationship between
13 citation histories and penalties, and accidents
14 or injuries, nor tied the relationship to its
15 proposed changes.
16 In essence, the proposal will generate
17 -- will not generate improvement and safety.
18 What it will do however is result in a diversion
19 of safety resources and a return to the increased
20 contest rates and lengthy Commission docket
21 backlog encountered beginning in 2008.
22 Mr. McGilton and others -- Mr.

1 McGilton has testified, and others will be
2 testifying at this hearing, and will be
3 presenting you with facts.
4 These are the facts that the
5 information deals with day in and day out.
6 Inconsistency, lack of transparency that leads to
7 controversy and that leads to contest. It is not
8 that the industry has a fear of the unknown, but
9 rather a fear of the known; the known facts that
10 they deal with day in and day out.
11 MSHA previously revised the Part 100
12 regulations. We commented extensively on that,
13 and Ms. Silvey, you and I had the opportunity to
14 attend a meeting at the office of management and
15 budget that we requested prior to the rule being
16 finalized.
17 We presented our analysis of what we
18 thought the impact of that rule would be on the
19 industry. Our view was that the agency had
20 grossly underestimated the costs of that rule.
21 The good news is we were right. The
22 bad news is we were right. The costs of the

1 previous Part 100 rate changes have greatly,
2 greatly exceeded what the agency estimated those
3 to be.
4 Once again, we believe that the agency
5 has grossly underestimated the impact of this
6 rule, and we believe that the facts will
7 demonstrate that. Thank you very much.
8 MS. SILVEY: Thank you. I'd like to
9 make some comments and ask you some -- I don't
10 know about questions, but you said this proposed
11 rule fails to comply with the Mine Act, and
12 particularly exceeds MSHA's authority. Would you
13 tell me how it exceeds MSHA's authority?
14 MR. WATZMAN: We'll expand upon that
15 in far greater detail in our written comments. I
16 think the most glaring example, and the one I
17 will point to today, and the one I talked about
18 in my comments, was the shackles, if you will,
19 that you will be placing on the Commission and
20 the ALJs should the rule be finalized in its
21 current form. We think that is in direct
22 violation of the Mine Act, and the Congressional

1 intent in enacting the Mine Act.
2 MS. SILVEY: Okay. One of the things
3 I do want to say for everybody is that we did not
4 issue this proposed rule, and I don't -- I mean I
5 don't think you will find this statement in
6 there: using the Commission's backlog of cases as
7 justification. So, I want everybody to know
8 that.
9 Another thing I want to comment on,
10 and you are precisely right about the -- I guess
11 the 2007 penalty proposal that we did because a
12 number of people -- you know, people generally
13 think that we did it because of the Miner Act,
14 and clearly there were some provisions that were
15 in the Miner Act that we included in that
16 proposal.
17 By and large, the biggest change in it
18 was, as you correctly put it, changes that were
19 just to the existing penalties to overall
20 structure of the existing penalties.
21 One of the things -- because one of
22 the things I kind of like to use, and I want all

1 of you to do that. And when I'm wrong, I'm wrong
2 and facts are facts. One of the things I would
3 like to say is we used projections in that rule
4 based on the data, the number of inspectors and
5 the citations which is what we did here.
6 The citations that we had at the time.
7 Subsequent to issuing that proposed rule, after
8 the Miner Act, and after -- obviously everybody
9 knows unfortunately the tragic accidents at
10 Aracoma, Sago, and Darby. MSHA got additional
11 inspectors, as most of you know, with additional
12 inspectors going through additional training.
13 MSHA issued more citations. So, we
14 had more people. More citations, which we did
15 not factor into the projections in the '07
16 proposal. I guess it was '06 or '07. Well, it
17 came out in '07.
18 And so, therefore obviously our
19 projections were off. I think though even with
20 the additional inspectors and additional
21 citations, over time the citations that we have
22 now and the penalties that we have now, what we

1 have seen with -- and with some additional
2 training of our own inspectors, and we continue
3 to do that every day; we've seen the citations as
4 well as the penalties have taken a downward turn.
5 Probably the result -- somebody had in
6 their comments that some of the programs we have
7 implemented, Rules to Live By and impact
8 inspections. So, we hope that obviously that
9 downward turn reflects an upward trend in safety
10 and health conditions at the mines. I must say
11 and I will say better results of better training
12 of our own people.
13 So, I just wanted to make that
14 comment. I would ask you if you would -- Bruce,
15 if you would, I -- I -- I heard, and I wrote all
16 your conclusions. But I would ask with respect
17 to some of them if you would follow it up with
18 details, as I am asking everybody if you would
19 please do that.
20 That is -- that is the most useful
21 way. If you have details to support and
22 rationale, that's the most useful way we can take

1 what you say and move to a final rule that would
2 be -- as Assistant Secretary Main said in his
3 comments, that would be responsive to the
4 concerns of the mining public. And we hope to do
5 that.
6 MR. WATZMAN: We will be doing that.
7 MS. SILVEY: Okay, thank you.
8 MR. WATZMAN: Thank you.
9 MS. SILVEY: Our next speaker would be
10 Henry Chajet. I guess it's a new title here.
11 So, Jackson Lewis. Oh, so you have a
12 presentation?
13 MR. CHAJET: I have one slide.
14 MS. SILVEY: Okay, I can look at one
15 slide. I'll just sit back and look at your one
16 slide.
17 MR. CHAJET: Good morning, Ms. Silvey.
18 MS. SILVEY: Good morning.
19 MR. CHAJET: Members of the Panel,
20 good morning. It is my pleasure to be here
21 again. We go back at least 36 years together in
22 working on a variety of different mine safety and

1 health regulations.
2 First of all, I appreciate the
3 privilege of appearing before you. I appear
4 before you today on behalf of a new coalition
5 that is called the MSHA Fairness Coalition. That
6 is a very hopeful term. Because we don't think
7 we've achieved that goal yet, but we are hoping
8 that you will help us achieve that goal by
9 abandoning this rule.
10 Let me start with the fact that the
11 ten former review commissioners, including
12 chairman and chairpersons, filed these comments a
13 couple of days ago. Mr. Watzman alluded to
14 them.
15 I would strongly suggest that you read
16 them.
17 MS. SILVEY: I have reviewed them.
18 Thank you.
19 MR. CHAJET: That is a terrific
20 indication of the problems with this rule. When
21 you have a bipartisan group of appointees that
22 were appointed by republican and democratic

1 presidents and confirmed by the senate, telling
2 you not to finalize and adopt the provisions of
3 this rule, dealing with the Review Commission.
4 It is a critically important
5 independent group that was created by Congress,
6 and MSHA frankly doesn't have the authority to
7 change the law. Only the Congress does.
8 I would hope that you would read that
9 and withdraw that provision immediately to that
10 it doesn't serve to be further controversy in
11 this proceeding.
12 Second, when I first got into this
13 business, one of the first cases that I worked on
14 was the National Gypsum Case. I argued that case
15 and review commission ruled in that case, and
16 determined the meaning of the term significant
17 and substantial violations.
18 I hear, coming from the Panel, this
19 concept that this rule was not intended to change
20 that definition. But from the perspective of a
21 practitioner of mine safety and health, and
22 occupational safety and health law, I can tell

1 you that this rule will in fact impact how
2 inspectors change, write up, modify, allege
3 violations.
4 When they have to check a box that
5 says, "Likely," or, "Unlikely," or check a box
6 that says, "Occurred," or "Not occurred," they're
7 making a determination that goes into their
8 thought process about the nature of the
9 violation: whether it is significant and
10 substantial.
11 You will have to change the citation
12 forms if you finalize this rule.
13 MS. SILVEY: We have a draft. I hope
14 people -- did you put copies of the draft at the
15 back? We have a draft that reflects the -- we
16 have a draft that reflects the proposed rule. I
17 thought it was at the back of the room.
18 MR. CHAJET: Well, let me give you an
19 example. At page 44503 of the Federal Register,
20 the agency states that, "A condition or practice
21 has occurred if it has resulted or could have
22 resulted."

1 MS. SILVEY: I got you. I got that
2 underlined before you --
3 MR. CHAJET: I hope you delete that
4 today.
5 MS. SILVEY: But I have it underlined
6 before -- you can come up here and look at Jay's
7 Federal Register. I want you to come up here.
8 MR. CHAJET: You're changing the --
9 MS. SILVEY: No. I want you to come
10 up here and look at it. I request that.
11 MR. CHAJET: I would be happy to look
12 at Jay's Federal Register before this hearing is
13 over.
14 MS. SILVEY: Okay.
15 MR. CHAJET: But in the meantime, what
16 you've put out on the street for all of us to
17 comment on changes the very nature of the English
18 language in addition to the Mine Act.
19 MS. SILVEY: No, I appreciate your
20 comment. It's well taken. Okay, you know what
21 the judge says when you made your case. Move on.
22 MR. CHAJET: I do know.

1 MS. SILVEY: Okay. Move on.
2 MR. CHAJET: Let me look at this slide
3 up here that's on the -- that's on your
4 PowerPoint presentation on the screen. What you
5 are proposing to do is to collapse categories
6 that inspectors are currently using to categorize
7 an alleged violation.
8 When you do that, you're not going to
9 get more transparency. You're going to create an
10 opaque system that can't be understood, right?
11 Inspectors have five choices, and they're going
12 to be given three, and that's not going to work.
13 It's not going to be clearer what they mean.
14 It's going to be more difficult to
15 discern what they mean, and you're not going to
16 get a 30 percent rate of overturning S&S for
17 challenge violations. You're going to get a 70
18 percent rate of overturning violations.
19 We have a group of inspectorate, and
20 I'm glad you're moving to help train them with
21 reviewing paper that's been modified, but we have
22 a group of inspectors who routinely doesn't get

1 this right based on the challenge rate and based
2 on the numbers that are overturned.
3 By folding these criteria into fewer
4 groups, you're going to get an even larger rate
5 of error by these inspectors. It is impossible
6 for an inspector to check negligent or reasonably
7 likely and then not have it impact their
8 determination of unwarrantable failure or
9 significant and substantial.
10 So, you cannot disassociate what they
11 check on these boxes from the check mark on the
12 S&S, or the check mark on the unwarrantable
13 failure box. This rule will impact both. And
14 because of that, it's going to drive the
15 penalties substantially higher.
16 Worse, what's really, really bad about
17 this is that you're taking out the incentive for
18 voluntary safety efforts. People who go and do
19 lots of things that are pro-safety that are not
20 required by MSHA; sometimes MSHA calls those
21 mitigating circumstances.
22 You come up with this concept. These

1 are mitigating circumstances. We do extra
2 inspections. We buy extra equipment. We do
3 extra training. All of these are wonderful
4 things that have helped reduce fatalities and
5 injuries in this business.
6 And you're going to say to the
7 inspectors, "Don't take those into consideration
8 under this rule." This is counterproductive, and
9 that is wrong.
10 This agency should never be in the
11 position of taking away incentives for safety
12 improvement. That's exactly where you find
13 yourself today with this rule.
14 I would suggest, as Mr. Watzman said,
15 that this is a solution trying to find a problem.
16 You have not defined what the problem is. In
17 fact, you've taken a current problem, a 30
18 percent rejection rate for S&S, and you're going
19 to expand it tremendously with this proposed
20 rule.
21 My partner, Mark Savit, will be
22 presenting in Denver a statistical analysis and a

1 more detailed presentation on behalf of this
2 coalition of mining companies that seeks MSHA
3 fairness and further safety improvement.
4 I would suggest to you that when you
5 see that data analysis, you will see that this
6 proposed rule would drive up penalties by factors
7 of ten. Order of magnitude. And you will see
8 that it will have an adverse impact on safety
9 performance.
10 When you say, "Take out mitigating
11 circumstances," you can't -- it's like taking the
12 heart away from the soul, right? Negligence is a
13 term that is defined by law by whether somebody
14 acts on a reasonable basis.
15 That includes whether somebody takes
16 proactive actions, whether somebody works to
17 prevent the problem. Let me give you an example
18 that will, I hope, drive this home.
19 One of the citations in the National
20 Gypsum Case was for having a trash can without a
21 lid marked as significant and substantial. All
22 right, there's a regulation in the metal/nonmetal

1 book that requires receptacles for waste that
2 have food products or wrappings to have a lid.
3 Now, under your current proposed rule,
4 could that result in an injury? If the inspector
5 does the analysis, yes, it could attract a rabid
6 rodent, and it could end up harming somebody.
7 Would it? No.
8 MS. SILVEY: Could it likely?
9 MR. CHAJET: No. And the answer is
10 you're removing the likely part from this rule.
11 MS. SILVEY: No. I don't think so.
12 MR. CHAJET: You are. You're removing
13 the likely part. And you are also taking the
14 negligence -- suppose that mine operator bought
15 30 trash cans, and they all had brand new lids,
16 and put them all over the mine property. And one
17 of the lids came off, and was not noticed in that
18 morning's area inspection, right?
19 The area inspection was done. I just
20 bought 30 brand new trash cans. They all had
21 lids. I now had one without a lid. I'm not
22 going to get mitigating circumstance credit for

1 that. You're going to mark me up for high
2 negligence occurred because it says "could."
3 That's going to turn into an
4 unwarrantable failure for something that is
5 irrelevant, and that's what was going on at the
6 time of the National Gypsum Case. This agency
7 was running a 93 percent rate of significant and
8 substantial findings with a process that looks an
9 awful lot like what you've just proposed.
10 There was no differentiation between
11 the various levels of negligence and the various
12 levels of seriousness, and at that time, the
13 Review Commission made a very wise ruling and
14 said, "This doesn't make any sense. This has to
15 change. We have to have a better understanding
16 of what is important."
17 We have made progress. You've come up
18 with Rules to Live By. This is a rule to live
19 without. And I strongly suggest that the agency
20 withdraw it before we spend anymore time, effort
21 and money on this terrible proposal. I'd be glad
22 to answer any questions.

1 MS. SILVEY: Okay, first of all, I'd
2 like you to give us some specifics to support
3 some of the conclusions you made. I'm going to
4 ask you like I ask everybody else.
5 Second of all, I appreciate your
6 comment with respect to the Federal Mine Safety
7 and Health Review Commission, as well as your
8 comment. Can I borrow your Federal Register,
9 Jay? As well as the comment you made with
10 respect to page --
11 MR. CHAJET: 44053.
12 MS. SILVEY: No, I know. I know it.
13 44503.
14 MR. CHAJET: Occurred means --
15 MS. SILVEY: Oh, 44503 and the little
16 chart we had, the gravity chart table 11, and we
17 have given the definitions "unlikely," and we
18 gave "reasonable likely," and "highly likely,"
19 and "occurred." We gave a definition of occurred
20 that said, "Condition or practice cited has
21 caused an event that has resulted or could have
22 resulted in injury or illness," and you drew to

1 our attention the phrase in there, "Could have
2 resulted." So, I appreciate your comment on
3 that.
4 Now, let's take your chart here. Take
5 a teaching moment. The compressed penalty
6 criteria, you contend, which is more subjective
7 and unclear, and you can visually see five
8 categories of negligence were reorganized. As
9 somebody earlier said, "Collapsed into three."
10 In our projections, we said, "No
11 negligence; that the operator is not negligence."
12 No negligence, moderate negligence or high
13 negligence would be negligent. These -- these
14 are the assumptions we make. Reckless disregard
15 has its own definition, and you know it has --
16 everybody knows it has to be aggravated conduct,
17 and that would be -- still be reckless disregard.
18 So, let's take likelihood. No
19 likelihood and unlikelihood we assume in our
20 assumptions we made both in the proposals and the
21 data computations that no likelihood and unlikely
22 would collapse into, to use your term or

1 somebody's term, unlikely. Reasonably likely
2 would be reasonably likely, and highly likely --
3 what?
4 MR. CHAJET: Why are you doing this?
5 MS. SILVEY: No, because I want to
6 explain what we did. Reasonably likely and
7 highly likely would be reasonably likely and
8 occurred. It's a little unclear.
9 MR. CHAJET: I think so.
10 MS. SILVEY: Okay, I'm saying that for
11 me, but I want everybody to understand before
12 they leave here that no likelihood and unlikely
13 would be unlikely, and that reasonably likely and
14 highly likely would be reasonably likely and
15 occurred would be occurred.
16 And I take it -- I take notice of the
17 fact -- of the phrase in occurred, or could have
18 resulted. So, I'm saying that for the record.
19 But why am I -- I'm doing that -- I'm doing that
20 to articulate what we intended in the proposal,
21 and -- and the now I understand the value of
22 these hearings.

1 These hearings do make you look at,
2 sort of look at, what you did to make sure that
3 it is clear to the public. And if you have any
4 questions in your comments to us when you --
5 please be -- please present them. So, anyway.
6 MR. CHAJET: Ms. Silvey, I draw your
7 attention to the same page, 44503. Even the
8 reasonably likely category -- even the reasonably
9 likely category uses the word "could." Could is
10 a speculative word. It's not part of the law.
11 MS. SILVEY: No.
12 MR. CHAJET: The law is reasonably
13 likely. Not could. Could could be anything.
14 Could could be that rodent that is rabid that
15 comes out and bites that trash can that doesn't
16 have a lid, and then threatens me.
17 MS. SILVEY: Okay, but reasonably
18 likely is -- reasonably likely is speculative.
19 We all know that. So, we are not going to argue
20 over --
21 MR. CHAJET: But we tried hundreds of
22 cases over whether something is S&S or not.

1 MS. SILVEY: I understand that, and we
2 didn't --
3 MR. CHAJET: And this make it more
4 opaque.
5 MS. SILVEY: We didn't change the
6 definition of S&S.
7 MR. CHAJET: You did. You changed it
8 right here on page 44503.
9 MS. SILVEY: Okay, well, I'm saying to
10 everybody here that we did not change it. So, we
11 will just agree to disagree on that.
12 MR. CHAJET: Do you think that an
13 inspector, when he is now given a choice for high
14 negligence, that he would've previously marked
15 high negligence, is going to go to moderate? Or,
16 do you think he's going to go to reckless? I
17 personally think he's going to go up.
18 MS. SILVEY: We did not -- and I said
19 -- I clearly said to everybody, "We did not use
20 that -- that." We did not project that.
21 Reckless disregard is its own definition, and we
22 didn't change that, and that's in the proposal.

1 So, I don't -- you know, I -- I --
2 there's no sense in bantering back and forth over
3 that, and I -- and you know I'm not going to --
4 you know, I don't want to. I never cut -- I'm
5 not going to entertain much of it.
6 MR. CHAJET: My concern is I don't
7 understand why you're doing this.
8 MS. SILVEY: Okay, that's fine. But
9 as I said --
10 MR. CHAJET: I don't understand any --
11 MS. SILVEY: -- follow it up with
12 specifics.
13 COURT REPORTER: If the speakers could
14 not speak over each other for the transcript.
15 MR. CHAJET: We're going to give you,
16 of course, written comments and highly detailed
17 statistical analysis of data from your website
18 that Mark Savit will put on the record in Denver.
19 MS. SILVEY: Okay.
20 MR. CHAJET: And we're going to give
21 you a set of comments before the end of the
22 rulemaking record. But underlying all of this is

1 I just don't get it. What is the purpose?
2 MS. SILVEY: I hear you. I said just
3 give me specifics.
4 MR. CHAJET: All right.
5 MS. SILVEY: Okay.
6 MR. CHAJET: Thank you.
7 MS. SILVEY: And be factual in your
8 specifics. Do not be, "Speculative." You got
9 anything to say?
10 MR. MATTOS: No thanks.
11 MS. SILVEY: Okay, thank you.
12 MR. CHAJET: Thank you very much. I
13 appreciate the opportunity to be here with you
14 today.
15 MS. SILVEY: Our next speaker will be
16 Allen Dupree, who will probably me a little more
17 -- oh, they heard me. You weren't supposed to
18 hear that. I forgot I had on this mic. He'll
19 probably be a little more toned down.
20 MR. DUPREE: Still good morning.
21 MS. SILVEY: Happy to have you here.
22 MR. DUPREE: It's good to be here, Ms.

1 Silvey. My name is Allen Dupree, A-L-L-E-N D-U-
2 P-R-E-E. I'm Senior Vice President for Alpha
3 Natural Resources. Alpha's companies operate
4 mines in facilities in Pennsylvania, West
5 Virginia, Kentucky, Virginia and Wyoming and
6 employ approximately 10,000 miners at these
7 operations.
8 Prior to coming to Alpha, just to let
9 you all know my perspective on some of these
10 issues that we're going to talk about, I've had
11 24 years with the Mine Safety and Health
12 Administration, from a ventilation specialist and
13 tech support to a coal mine inspector,
14 supervisor, assistant district manager over
15 engineering groups and enforcement groups,
16 district manager, and also conducted several MSHA
17 internal reviews of which the purpose was to
18 evaluate MSHA's enforcement actions.
19 Thank you, the Panel today, for giving
20 me the opportunity to provide comments regarding
21 the proposed rule. After careful review of
22 MSHA's proposed changes to Part 100, I have

1 several observations and concerns.
2 The agency seems to have concluded
3 that the need for reducing the inspector's
4 options in the evaluation of the violations will
5 provide enforcement consistency.
6 I think the key to solving
7 inconsistencies by inspectors is not by rewriting
8 Part 100 again. Rather, the key is to train
9 inspectors and field office supervisors to
10 consistently and properly evaluate the conditions
11 concerning the violations they are citing. I'll
12 touch on that in a minute.
13 A review of the history if Part 100
14 post 2007 shows a significant increase in
15 citations contests via increase in litigation was
16 a result of a tsunami of events, including the
17 major changes in penalty pricing of non-S&S
18 citations, dramatically increasing penalties.
19 At the same time as the penalty system
20 and assessment increases were occurring, the
21 agency chose to restrict the use of informal
22 manager's conferences as a means to correct

1 misevaluations in a timely and informal manner.
2 In the pattern of violations process,
3 they required an operator to contest many cases
4 so his rights to contest a POV designation were
5 preserved.
6 This proposed rule change does not
7 help correct or improve any of these issues and
8 actually has the potential to exacerbate some of
9 them. In reality, the problem of high level of
10 contest seems to have been resolved, and I think
11 Ms. Silvey alluded to that fact a few minutes
12 ago.
13 The agency's statements and the
14 preamble tend to support that a lot of these
15 issues have resolved themselves through the
16 backlog of cases.
17 The preamble emphasizes four
18 principles, four key principles, for developing
19 the rule, improving consistency and objectivity
20 and efficiency in how inspectors write citations
21 and orders, simplification of the penalty
22 criteria, greater emphasis on the more serious

1 safety and health conditions, and the openness
2 and transparency in the application of the
3 agency's regular formula penalty criteria.
4 MSHA's key principles, one and two,
5 discuss reducing decision making for inspectors,
6 as well as simplification of the process;
7 reducing the number of decisions an inspector
8 makes -- must make for each citation may seem to
9 be a logical way to reduce contest of citations.
10 The reality is that the present
11 options did not present a problem prior to the
12 last rewrite when numerous changes went into
13 effect.
14 MSHA has commented several times that
15 the industry flooded the penalty system with
16 contests after 2007 rule became final. I think
17 it is critical to understand why that increase in
18 contested citations came about.
19 One factor which directly impacts
20 increased litigation is the severe hurdles placed
21 on obtaining a manager's conference in the MSHA
22 system, and that exists today in certain

1 districts.

2 While the final rule includes the

3 manager's conference process, this process

4 continues to be at the discretion of the district

5 managers. As stated in the proposed rule, "All

6 parties shall be afforded the opportunity to

7 review with MSHA each citation and order issued

8 during an inspection."

9 It is within the sole discretion of

10 MSHA to grant a request for conference, and to

11 determine the nature of the conference, and that

12 is not consistent today.

13 If our goal, as stated by MSHA, is

14 early resolution of disagreements, this is a

15 perfect opportunity. The elimination of informal

16 manager's conferences, as I said, is still an

17 ongoing concern and continues to push contests

18 into the formal administrative arena.

19 It has been over seven years since the

20 previous rewrite of Part 100 in the elimination

21 or restriction of manager's conference went into

22 effect. I am asking that any new rewrite of Part

1 100 include a requirement that manager's
2 conferences be timely and available to operators
3 as a legal requirement.
4 The lack of these conferences may not
5 be dismissed by the agency with a statement that
6 is within the sole discretion to provide these.
7 All regulative parties need some sense of
8 certainty when planning how to manage a business.
9 Not knowing when or if a conference
10 will be granted, and only informally knowing what
11 the MSHA district is going to do with conference
12 requests is not providing this certainty.
13 A relevant manager's conference, one
14 that is timely and is open discussion of the
15 relevant facts of the citation, the mitigating
16 circumstances involved and the relevant case law
17 will ultimately lead to a reduced number of
18 contests.
19 If the results were shared with the
20 inspectors and operators as a teaching tool, then
21 the system will be value added, and I know we
22 touched on that a little bit earlier this

1 morning.

2 In fact, following a previous internal
3 review, in which MSHA's manager's conferences
4 were discussed, MSHA responded to the internal
5 review that consistency and enforcement actions
6 will continually be enhanced through the ACRI
7 program. That was MSHA's response to the
8 internal review.

9 They also stated, "regularly scheduled
10 meetings will be held with all district CLRs;
11 attorneys from the Solicitor's Office will be
12 part of the meeting when possible. Discussions
13 will focus on recent Commission decisions,
14 examples of upheld and modified citations and
15 orders, and how conference officers can best use
16 the ACRI program to train the inspectors on
17 determining the appropriate level of enforcement
18 when issuing violations."

19 The present limited access to
20 manager's conferences continues to hinder
21 consistency and enforcement actions, which is one
22 of the key points we've talked about today.

1 I recommend that the highlighted
2 language or -- be omitted in the proposed rule
3 and manager's conferences be a legally required
4 right afforded to the operator.
5 The ultimate goal of everybody
6 involved in the mining industry should be that
7 when enforcement actions are issued, they are
8 issued correctly to match the conditions
9 described in the violation, and consistently
10 applied throughout the industry.
11 The proposed rule does not accomplish
12 that objective, and if that is our objective,
13 which we've talked about quite a bit today, we'd
14 have one opportunity that exists right now today
15 that we could be using to improve our consistency
16 throughout the industry.
17 One of the key principles MSHA also
18 stated was to place greater emphasis on the more
19 serious safety and health conditions. I agree
20 with that principle, but I'm at a loss to see how
21 this rule accomplishes this goal.
22 This concept was already baked into

1 the system with a non-S&S single price penalty.
2 When Part 100 was rewritten, it changed that
3 single price penalty. I would recommend going
4 back to a single charge per non-S&S citations
5 because all parties' time involved is spent on
6 the more significant citations and orders, as
7 MSHA articulates in its principle.
8 Notwithstanding the assessment
9 process, MSHA already has numerous enforcement
10 tools at its disposal to address serious safety
11 and health conditions without again trying to
12 address this through Part 100.
13 For example, Section 104(d) of the
14 Mine Act creates a chain of increasingly severe
15 sanctions that serve as an incentive for operator
16 compliance. I can say first hand as an MSHA
17 district manager and an assistant district
18 manager over enforcement I never felt as though I
19 needed any additional tools at my disposal to
20 address serious safety concerns.
21 I would also suggest MSHA consider a
22 couple more principles. This new rule will not

1 result in new litigation upsetting a long history
2 of defining such key issues as unwarrantable
3 failure and S&S criteria as we now know it. And
4 Pat, I do not want to have that discussion. I
5 kind of heard what went on earlier, and your
6 thoughts on S&S and unwarrantable failure, but I
7 think that is a risk and I think that is a fear
8 that all of us have.
9 MS. SILVEY: You're probably not --
10 you wouldn't have the same type of discussion
11 that Mr. Chajet had.
12 MR. DUPREE: He's a lot more educated
13 than myself.
14 MS. SILVEY: No, it's not more
15 educated. It's just he's a lawyer.
16 MR. DUPREE: But I will say plainly
17 that by reading the preamble and reading the rule
18 that there's a great concern that the case law
19 will be upended and that S&S and unwarrantable
20 failure will be redefined. There's a grave
21 concern to that.
22 Okay, talking about likelihood of

1 occurrence has definition changes that we believe
2 will result in greater contest. Primarily, the
3 concerns are due to the insertion of the word,
4 "Event," into the definitions of likelihood of
5 occurrence.
6 This change also will greatly effect
7 the assessment of certain categories of citations
8 as well. While the current rule has no
9 definitions, the practice is dictated on the
10 citations form is to -- is to check occurred only
11 with an actual injury or illness. We know that's
12 how it -- how it works today. I believe that's
13 in the citation order writing handbook.
14 The proposal ties a consideration with
15 an event, whether that event has resulted in an
16 actual injury or not. This makes most physical
17 citations potentially occurred, or certainly
18 reasonably likely.
19 Here is an example. If I'm walking
20 down an entry and I find a piece of draw rock on
21 the mine floor, that event has occurred. That
22 draw rock is on the mine floor.

1 I can now check that box that that
2 event has occurred, and the -- the results of
3 that event could be an injury or illness.
4 Our concern is under this definition
5 occurred would be heavily used in evaluating a
6 lot of violations, where condition is found
7 rather than the transparency in the key
8 principles.
9 I'll touch on S&S real briefly, Pat,
10 and feel free to cut me off if you need to. One
11 concern we have is that the proposed rule does
12 define non-S&S as narrowly as possible. The
13 definition of S&S as developed through the Review
14 Commission president has been in place for
15 decades.
16 We feel that the way it is written
17 right now, there will be changes in the
18 definition of reasonably likely; it'll eliminate
19 the requirement the probability that the hazard,
20 cause or contribute to the injury be reasonable.
21 The proposed definition would reduce
22 the requirement to the alleged hazard will result

1 in an injury to a possibility that the condition
2 or practice is likely to cause an event that
3 could result in an injury.
4 Also, the proposed rule offers no
5 explanation or definition of the term event, nor
6 does it explain the level of probability
7 necessary to determine this event could result in
8 an injury.
9 We feel that the proposed definition
10 of reasonably likely will allow for greater
11 subjectivity by inspectors regarding the actual
12 or hypothetical link between a violative
13 condition and a perspective injury.
14 The proposed definitions in this rule
15 are important for more than penalty assessment. I
16 believe that a new wave of litigation will occur
17 that will upset legal precedent.
18 Nowhere in the preamble is there any
19 discussion of the potential effect of the legal
20 precedent built into the definitions of this
21 proposed rule.
22 Previously, the solicitor of labor has

1 alluded to the belief that the S&S principle be
2 changed from the Mathies test to the previous
3 MSHA view that only technical citations are in
4 the realm of non-S&S categorization.
5 This testimony was given in front of
6 the House of Representatives Committee on
7 Education and Labor on July 13th, 2010. So, I
8 think as we hear these things and see these
9 things that's what drives a lot of our concerns
10 to be open.
11 The proposed rule makes significant
12 changes in negligence criteria as well.
13 Negligence effects the unwarrantable failure. On
14 first blush, the proposed -- the category is not
15 negligent and reckless disregard will likely
16 account for a very small number of the
17 evaluations on first blush.
18 The negligent category will likely be
19 marked for 95 to 98 percent of the negligence
20 evaluations. These percentages are not based on
21 anything MSHA has stated in the preamble. I'm
22 assuming that the citations assessed at low,

1 moderate and high negligence will currently roll
2 into the negligence category.
3 Again, the use of reckless disregard,
4 which should by definition be rather limited,
5 would minimize the number of unwarrantable
6 failure designations as we now define it today.
7 If that's the case, then the preamble
8 at least needs to make this clear.
9 The elimination of high negligence
10 raises significant questions as to the impact on
11 unwarrantable failure. It is defined as
12 aggravated conduct constituting more than
13 ordinary negligence.
14 Under the current structure
15 unwarrantable failure is not typically associated
16 with a moderate negligence finding, but rather a
17 finding of either high or reckless disregard.
18 High negligence, as it stands today,
19 is substantially more common and is a general
20 driver for the unwarrantable failure designation.
21 We see a lot of citations and orders that are
22 marked high negligence, 104(d).

1 MSHA should provide for the record its
2 view of the percentages expected in three
3 categories and how the elimination of high
4 negligence will impact the unwarrantable failure
5 designation.
6 Also, I think Ms. Silvey, as you
7 mentioned earlier, I propose that the use of no
8 negligence be replaced with low negligence, or
9 none or low negligence. I think it's almost
10 impossible to achieve no negligence.
11 The six key principles to develop a
12 Part 100 design that meets what MSHA stated but
13 not upset the previous precedence in case law,
14 and it should be designed to be revenue neutral
15 is the key aim for the four MSHA principles as
16 consistency, simplification, openness and
17 appropriate safety emphasis.
18 Revenue neutrality should also be a
19 standard. While the preamble states for this
20 proposed rule the projected impacts consist of
21 slightly lower total payments by mine operators
22 for penalties incurred, our analysis does not

1 reflect this as being neutral.
2 I have a few examples, Ms. Silvey,
3 that I would like to walk through pretty quickly.
4 These are actual citations, and they aren't as
5 dramatic as some of the dollar amounts that we
6 heard today. But when you're operating mines and
7 employing 10,000 miners, you can see how these
8 changes and penalties can add up pretty quickly.
9 How do we advance that?
10 Okay, so, reducing the likelihood of
11 five categories to three: unlikely, reasonably
12 likely or occurred. The statement that will
13 simplify the enforcement process and prove
14 objectivity.
15 Our view is that this will only
16 increase the subjectivity of the evaluation.
17 Looking at the likelihood of the criteria,
18 condition or practice that is likely to cause an
19 event that could result in an injury or illness
20 is what concerns us.
21 Okay, so here's a citation that was
22 issued under 75.1403. Both offside sanders on

1 the number two Brookville main trip were not
2 being maintained in a working condition. The
3 sanders would not open and allow sand to flow
4 from the reserve.
5 So, it was marked as unlikely lost
6 workdays. Non-S&S. Thirteen persons affected.
7 Low negligence. So, under the current Part 100,
8 we assume unlikely lost work days. Thirteen
9 people affected. Low negligence.
10 You can see under the proposal the
11 penalty goes from $263.00 to $1,260.00, and that
12 includes the good faith discount.
13 MS. SILVEY: I have to look at that in
14 more -- I'll say to everybody I have to look at
15 that in more detail. I mean I appreciate the
16 specifics, and an actual citation. I do. And I
17 would ask that every commenter here, who
18 including the first -- who gave us conclusory
19 statements that this proposal would do that if
20 they would follow it up with some specific
21 examples.
22 That would be very useful. I mean the

1 points you gave under the existing rule that we
2 have as opposed to -- on your example, as opposed
3 to the points you gave under this proposed --
4 MR. MATTOS: Just one point there, Al,
5 on that last -- on that citation. It went from
6 unlikely to reasonable likely, rather than our
7 category -- proposed category of unlikely.
8 MS. SILVEY: I noticed that. That's
9 why I said I have to relook at that in more
10 detail. It was unlikely. So, it wouldn't be
11 reasonably likely under the proposal. See,
12 that's one of the things that -- I thank you for
13 pointing that out right now. So, that would
14 effect the penalties.
15 If it were an interactive slide, and
16 you could go there and correct that, then we
17 could probably see a reduced penalty, and there
18 may be -- I -- I just couldn't look at it that
19 quickly. I really do appreciate that example,
20 and I really do want to look at it in detail.
21 MR. DUPREE: I think we can provide a
22 lot more examples in our written comments if that

1 would be helpful.
2 MS. SILVEY: Yes, it would be.
3 MR. DUPREE: Here's an example of the
4 definition of occurred, looking at the new
5 definition of occurred. This was a citation
6 roofs and ribs where miners work and travels
7 shall be supported or otherwise protected.
8 Draw rock was present. The rock in
9 this area separated from the mine roof one to
10 four inches in various locations. Multiple
11 pieces of rock, already fallen to the mine floor.
12 Biggest piece of rock pulled was two feet long,
13 ten inches wide, two inches thick. Test holes
14 reveal cracks at 12 and 29 inches. So, it is
15 obviously a roof issue.
16 So, when the citation was issued under
17 75.202(a), reasonably likely, lost work days
18 restricted. I'm sorry, reasonably likely to be
19 permanently disabling, S&S. Number of persons
20 affected: 1. Moderate negligence.
21 So, under the current Part 100, plug
22 in those categories; if you look at the draw rock

1 on the mine floor, I think you can easily see how
2 you can check the box occurred. An event has
3 occurred. That is our concern.
4 So, going to occurred from reasonably
5 likely, and as you add up the penalty points, you
6 go from a citation to -- after the good faith
7 reductions from $1,200.00 to $7,000.00.
8 I think as we read the rule today,
9 it's easy in my mind to go to occurred. An event
10 has occurred.
11 MS. SILVEY: I appreciate what you're
12 saying. I personally wouldn't mark occurred, but
13 I see what you're saying. So, I'm saying to
14 everybody in that example I wouldn't mark
15 occurred. And as I said, I appreciate what you
16 said.
17 MR. DUPREE: I think the challenge,
18 Ms. Silvey, is that whether we're dealing on the
19 labor side, the industry side or the federal
20 agency side, you have a lot of personalities that
21 you deal with.
22 MS. SILVEY: Right.

1 MR. DUPREE: And even though our
2 intentions are that we wouldn't go to the left or
3 the right, I can connect those dots, and I can
4 check occurred very easily, I believe. You can
5 see what that does to the penalty. That is one
6 of our biggest concerns in the definition is the
7 use of the term event, okay?
8 MS. SILVEY: Yes.
9 MR. DUPREE: All right. Okay, this is
10 just going to discuss a little about the
11 negligence if I can get it to move forward.
12 There we are.
13 This is a 75.403 violations. We're
14 all familiar with the rock dusting violations.
15 This is marked unlikely, fatal, non-S&S and high
16 negligence. It's a 104(a) citation.
17 So, here are some different scenarios.
18 Ms. Silvey, if we look at the likelihood, kind of
19 playing with it a little bit. It's not
20 interactive. But you can see kind of looking on
21 the low side what it'll do to your penalties.
22 It's $807.00 assessment currently. Under the low

1 end, it would be $86.00. The medium kind of side
2 is $960.00. If it's marked on the high end, it
3 could be $12,000.00. Okay?
4 MS. SILVEY: Yes.
5 MR. DUPREE: That may get a little
6 more in line with what you mentioned earlier.
7 MS. SILVEY: It does.
8 MR. DUPREE: Okay, this is the last
9 one that we have, and then I'll finish up. Okay,
10 this is 75.503 violation of permissibility
11 violation marked unlikely, permanently disabling,
12 non-S&S. Number of persons affected: 1.
13 Moderate negligence.
14 This shows the current Part 100, and
15 then a range of low, medium and high examples.
16 MS. SILVEY: This is their instructor
17 anyway.
18 MR. DUPREE: By able-bodied assistant
19 put these together.
20 MS. SILVEY: You should thank your
21 able-bodied assistant.
22 MR. DUPREE: You can see $490.00. It

1 ranges from $315.00 all the way to $5,600.00.
2 MS. SILVEY: I understand. That --
3 that is really what -- that's very useful.
4 MR. DUPREE: We can do some more of
5 those, but I guess in summary we'll add a lot
6 more details concerning these comments in
7 writing. I thought it was important to come to
8 the public hearing and get some answers and
9 thoughts from you all in person. That's very
10 valuable to us.
11 We do feel, though, that this rule, as
12 it is written now, will have a far more reaching
13 impact on litigation and evaluation of
14 enforcement actions in the preamble and the
15 rationale for another rewrite implies.
16 The preamble discussion is a little
17 sparse on what the impact of the proposed changes
18 in Part 100 may have in the S&S designation and
19 also the unwarrantable failure. I think that'll
20 be helpful for us.
21 Both of these designations have major
22 impacts on the operator well beyond the penalty

1 payments. So, I guess as a closing comment, this
2 proposed rule in its current form? Our
3 suggestion would be to reconsider some of the
4 aspects of that rule. I'd be happy to answer any
5 questions that you all have.
6 MS. SILVEY: Thank you. And again, I
7 want to reiterate that I appreciate the specific
8 examples you gave, and we will look at them
9 closely. And I ask that they are instructed --
10 and I ask that every organization, a person who
11 presents comments to the extent that they can,
12 when they have specific examples like that and --
13 and as I said before specific rationale for your
14 comments. That is instructed.
15 So, we do appreciate that, and that
16 causes us to think about certain things. I mean
17 you wouldn't think necessarily -- and another
18 commenter mentioned this, I think, but it didn't
19 hit home until you gave it.
20 You would not think necessarily that
21 the insertion of the word event would make people
22 think that this has a monumental impact on

1 something. But there are things that -- and
2 that's why we hold these public hearings.
3 I'm going to say to you what I said to
4 everybody else who has been up here: That we --
5 when we did our projections, and obviously to put
6 those charts in the proposed rule, we had to make
7 assumptions. We assumed that low, moderate and
8 high negligence would roll into negligence.
9 Now, people have taken that and
10 they've said to me that, "But you got rid of
11 mitigating circumstances." So, you know -- and
12 so there are mitigating circumstances.
13 So, just so everybody knows, you know,
14 I -- I hear what you all are saying. I get your
15 point with respect to what you said about
16 occurred. And I think an earlier commenter made
17 -- commented on that and made a similar comment.
18 But when you get specifics and you can see, you
19 can -- it does have an impact.
20 So, we do appreciate that. I think
21 that's all I -- I don't really have -- and you
22 said when you get -- if you send future comments

1 in, you will have future specifics, and that
2 would be helpful.
3 MR. DUPREE: Yes, mam.
4 MS. SILVEY: You have anything?
5 MR. MATTOS: Not a question. Just
6 want to remind people that the data we used, each
7 violation and how it was assessed and would be
8 assessed under the proposal with our assumptions
9 are out there for use and review and to play
10 with.
11 MS. SILVEY: The complete data set.
12 MR. MATTOS: Right.
13 MS. SILVEY: And we use --
14 MR. MATTOS: So, you can do what Allen
15 just did with these.
16 MS. SILVEY: Yes, and we used -- where
17 is that little chart? Graphic chart. We used
18 the 2013 penalties, proposed penalties. We used
19 the 2013 regular formula proposed penalties,
20 because the proposed rule does not effect special
21 assessments as applied to the -- and the proposed
22 rule takes those penalties, 2013 regular formula

1 proposed penalties.
2 So, I mean that's one thing that
3 obviously it -- it -- it results in a lot of data
4 permutation, but people could do that. Take the
5 data set and use it. Okay, thank you, Allen.
6 MR. DUPREE: Thank you.
7 MS. SILVEY: Our next commenter is
8 William C. Means with GMS Mine Repair and
9 Maintenance.
10 MR. MEANS: Thank you ladies and
11 gentlemen. My name is William Means, M-E-A-N-S.
12 GMS Mine Repair and Maintenance Incorporated is a
13 company that pales in size compared to many of
14 the companies represented in this room, many of
15 whom are our customers.
16 We appreciate them. We hope to
17 continue to work with them on this matter and
18 other matters. GMS, however, is the largest
19 independent underground coal mining contractor in
20 the United States.
21 We serve customers like those in this
22 room, and others, in a dozen states from Virginia

1 to Utah, from Pennsylvania to Alabama. So,
2 hopefully, I can bring a little bit of a
3 different perspective perhaps.
4 I'm certainly not going to try to
5 rehash some of the things that have already been
6 said, and been said more eloquently than what I'm
7 capable of doing.
8 So, rather than even talk about those
9 things that I had considered talking about, I'll
10 focus on a few different matters. I am general
11 counsel for GMS.
12 MS. SILVEY: Another lawyer.
13 MR. MEANS: And by that, I mean I am
14 the entire legal department. Unlike some of our
15 customers who have great resources of that
16 nature, involved in everything from contract
17 negotiations to marketing efforts to safety and
18 workers' comp, HR, everything, MSHA is a very
19 small part of what I do. But it is part of what
20 I do, and I've gained a little bit of knowledge,
21 which may be helpful for you to hear from my
22 perspective.

1 One of my first opportunities, of
2 course, to deal with a citation that we get from
3 MSHA, and I've dealt with dozens, not thousands.
4 So, that is a little different perspective than
5 some of the other folks in the room, too, I
6 guess.
7 But the first opportunity that someone
8 at my level has a chance to deal with this is
9 with the pre-litigation conference. I can tell
10 you from my own experience, and I can even
11 provide letters if you like, district managers
12 are not routinely granting pre-litigation
13 conferences.
14 In some districts? Yes, all the time.
15 Other districts? Never. That is a tremendous
16 loss of an opportunity to resolve differences
17 about allegations in these citations that we get
18 and our customers get.
19 Opportunity number 2. Mr. Mattos, I'm
20 not trying to pick on you a little bit, but
21 compliance office gives us our assessments, our
22 notice of assessments, and I thank you for

1 answering, Ms. Silvey, that it just -- if you
2 resolve something early on, you don't lose your
3 30 percent --
4 MS. SILVEY: Right, yes.
5 MR. MEANS: That was one of the
6 questions I had. But there have been a few cases
7 where really the only thing I had to argue about
8 was the amount of the assessment. The amount of
9 the assessment in those few cases was based upon
10 the number of prior violations.
11 My records were different from what
12 the assessment office said that we had. And what
13 are my records? My records are actually your
14 records. On the MSHA website, there is the MSHA
15 data retrieval system, which I look at everyday
16 for many different reasons.
17 Consistently, I found early on that
18 the number of final orders being counted toward
19 our assessment was not the number that MDRS
20 suggested it should be. So, I checked with your
21 staff, Mr. Jones, with the Solicitor's Office to
22 challenge these things, and they couldn't give me

1 any answers as to why these are different.
2 Ultimately, the most credible answer
3 I was ever given is that there is a different
4 database. Two sets of books, if you will.
5 We've got the MDRS, which is available
6 and accessible to the public, which I can look
7 at, but then the litigators look at something
8 called the MSHA standardized information system,
9 the MSIS. Two different sets of books.
10 No one yet has been able to tell me
11 how I can access MSIS. I can look at MDRS any
12 time I want. The problem with that is if I have
13 to challenge a citation solely based upon the
14 amount of the assessment, I can't look at perhaps
15 what is the more accurate. Maybe MSIS?
16 I can only look at the MDRS, and I
17 don't know whether I should challenge it or not
18 challenge it. And I'm not going to know until
19 after I have challenged it, and have lost my
20 extra 20 percent discount.
21 So, this is a serious problem in my
22 mind, in terms of the loss of an opportunity to

1 deal with some of the inefficiencies in the
2 system without going to some of the serious
3 changes that my colleagues behind me here have
4 already more eloquently spoken to.
5 So, with those comments, I will leave
6 you and let someone else come up here and
7 hopefully say something else eloquently.
8 MS. SILVEY: Well, I have a couple of
9 comments.
10 MR. MATTOS: You know I want to defend
11 myself.
12 MR. MEANS: Go ahead. I would hope
13 so.
14 MS. SILVEY: The first comment I want
15 to say though -- I want to ask you a question.
16 You said you're the largest independent
17 contractor for underground.
18 MR. MEANS: Yes.
19 MS. SILVEY: Do you provide services
20 to the mines, or do you provide - are you a
21 contract services production, or just services
22 like we think of as services?

1 MR. MEANS: I am so glad you asked
2 that question. The Assistant Secretary talked
3 about the mechanized systems for shoveling the
4 coal belts. That's the Belt Badger. That's
5 ours. We invented it.
6 MS. SILVEY: Okay.
7 MR. MEANS: There was comments earlier
8 about pumpable cribs.
9 MS. SILVEY: Yes.
10 MR. MEANS: We do that.
11 MS. SILVEY: You provide the pumpable
12 cribs.
13 MR. MEANS: Yes.
14 MS. SILVEY: Okay.
15 MR. MEANS: We are the distribution
16 for the material. We are the provider of the
17 manpower.
18 MS. SILVEY: Okay, that's what I'm
19 getting to.
20 MR. MEANS: There was mention earlier
21 about state of the art techniques for rock
22 dusting. We have the exclusive distributorship

1 for probably the best product on the market in
2 that regard.
3 MS. SILVEY: And when you -- and so
4 what you're telling me is that you provide that
5 product, but you go into the mines and you do it
6 too?
7 MR. MEANS: Yes.
8 MS. SILVEY: Okay, I got it. That's
9 good enough. That's all I wanted to ask. I
10 appreciate your comments on the pre-litigation
11 conference. Obviously, other people have talked
12 about that, and we do take that seriously. We
13 get it. I think that is a real opportunity to
14 resolve differences early, and that results in
15 the best for all of us. And we do appreciate
16 that you look at the data retrieval system
17 everyday.
18 I think obviously that takes some
19 time, but I think it is good to do that for
20 operators and labor, everybody to look at the
21 data retrieval system.
22 I guess with respect to your comment

1 on a different database, that's a good segue now
2 to Mr. Mattos.
3 MR. MATTOS: Yes. This issue comes up
4 every now and then, and usually the first mistake
5 that people do is they call the Solicitor's
6 Office to find out what's going on. They're not
7 going to be able to answer that question.
8 They're lawyers. They don't know anything about
9 the data system. I'm just kidding around here.
10 MS. SILVEY: We got a lot of lawyers
11 here, I think. But I'm not going to ask them to
12 identify themselves because some of them probably
13 won't, except for Henry.
14 MR. MATTOS: The data retrieval system
15 that's on our website is a subset of our
16 production system. It is not two sets of books.
17 It's a subset of what is -- what our attorney
18 friends call our standardized information system.
19 The issue here, and the one that
20 you're having, is you are counting the number of
21 violations that have been cited and are on the
22 website. The website doesn't have the final

1 order date, and that's the date that's used to
2 determine the history of previous violations as
3 a number of final orders of the Commission within
4 the 15 months of the occurrence date of the
5 violation being assessed.
6 So, that's where -- you can't get
7 there from the data retrieval system. It's a
8 limitation of the data retrieval system.
9 MR. MEANS: However, the data
10 retrieval system does have a column which is
11 labeled as final order date. So, if it is not
12 accurate, it is both inaccurate and misleading.
13 MR. MATTOS: Well, did I say it didn't
14 have the final order date? It doesn't have all
15 of the final order dates. There's a lag time
16 between when the data that's in the production
17 system gets out to the data retrieval system, and
18 the final order dates, particularly for contested
19 cases.
20 It's based upon the Commission
21 decisions that -- the decisions we get from them,
22 and until we record those decisions, there is no

1 final order date. There will be a final order
2 date, but the final order date could've occurred
3 a month ago, or at some other time.
4 So, it's a lag time between the two
5 systems, but one is a subset of the other.
6 Anyway, I --
7 MR. MEANS: I appreciate that. One of
8 the litigators in the Solicitor's Office brought
9 to my attention the MSIS, ultimately after I've
10 asked half a dozen or more of them, and none
11 would either tell me or didn't know.
12 They provided some final order dates,
13 that even upon looking further into the
14 information that I was able to get, still the
15 dates did not match. Those dates, because of
16 that 15-month window prior to the occurrence date
17 of the subject citation, a difference of a few
18 days can make a difference in a penalty.
19 Probably a small difference. Maybe a big
20 difference. But it still makes a difference and
21 the frustration that I have is that there's
22 simply not information readily available to me as

1 a respondent in those cases upon which I can make
2 a decision whether to contest or not contest, and
3 now with this proposal choosing whether to
4 contest or not contest can make a big economic
5 difference.
6 So, those are some of my concerns. I
7 certainly hope that those concerns are addressed
8 thoroughly when the final version of this comes
9 out, if indeed it doesn't die a righteous death.
10 And also that the transparency of the
11 information systems can be improved. We're
12 talking here about transparency in the process,
13 and I'm not really seeing that very well right
14 now. Maybe there's a mechanism to accomplish
15 that. I hope that there is, and I hope that
16 that's one of the goals for MSHA to build upon
17 that.
18 MR. MATTOS: Thank you.
19 MS. SILVEY: Thank you. Our next
20 commenter is Mark Ellis with the IMA-NA, and
21 he'll tell you what that is. He is accompanied
22 by Mr. Andy O'Brien. I thought they were

1 speaking separately.
2 MR. ELLIS: It's a two-for-one deal.
3 MS. SILVEY: Okay.
4 MR. ELLIS: Good afternoon. I'm Mark
5 Ellis, and I am President of the Industrial
6 Minerals Association North America, or IMA-NA.
7 IMA-NA is a Washington D.C.-based trade
8 association, created to advance the interest of
9 North American companies that mine and/or process
10 minerals used throughout the manufacturing and
11 agricultural industries.
12 In addition, IMA-NA represents
13 associate member companies that provide equipment
14 and services to the industrial minerals industry.
15 IMA-NA's producer membership is comprised of
16 companies that are leaders in the ball clay,
17 barite, bentonite, borate, calcium carbonate,
18 diatomite, feldspar, industrial sand, kaolin,
19 magnesium, mica, soda ash/trona, talc,
20 wollastonite and other industrial mineral
21 industries.
22 As such, the nonmetal mines cited in

1 the United States are subject to MSHA
2 jurisdiction, and the requirements of 30 CFR Part
3 100, MSHA's civil penalties regulations.
4 IMA-NA appreciates the opportunity to
5 put these comments before MSHA for consideration.
6 IMA-NA supports MSHA's stated intent
7 in the proposed rule to simplify the criteria for
8 assessing civil penalties, which will promote
9 consistency, objectivity, efficiency in the
10 proposed assessment of civil penalties and
11 facilitate the resolution enforcement issues.
12 The presence of a fair and effective
13 program for the assessment and resolution of
14 civil penalties is an important tool for MSHA to
15 ensure compliance with the Federal Mine Safety
16 and Health Act of 1977, and its associated
17 regulations.
18 Nevertheless, the proposed rule's
19 attempt to change the scope of authority of the
20 Federal Mine Safety and Health Review Commission
21 from de novo review to a diminished and
22 restricted role exceeds the legal authority

1 granted to MSHA by the Mine Act, and subverts
2 Congress' intent when enacting the Mine Act.
3 Moreover, the proposed rules requested
4 simplification of the gravity and negligence of
5 alleged violations when combined with the
6 proposed changes to the Review Commission's
7 authority transgresses all reasonable bounds of a
8 mine operator's constitutionally protected due
9 process rights, making the Commission's role to
10 decide cases as an impartial adjudicator of
11 alleged violations of the Mine Act largely
12 illusory.
13 IMA-NA's principal witness today is
14 Andy O'Brien. He's the chair of our safety and
15 health committee, and with that segue, I will
16 turn things over to Andy.
17 MR. O'BRIEN: Thanks very much, Mark.
18 Andy O'Brien. That's A-N-D-Y O-apostrophe-B-R-I-
19 E-N. Patricia and Panel Members, I understand
20 you're looking for specifics and we intend to
21 provide those specifics in our post hearing
22 briefs, but wanted to show up today to present

1 some verbal testimony as well.
2 My name is Andy O'Brien. I'm Vice
3 President of Safety and Health for Unimin
4 Corporation. I'm pleased to testify before you
5 this morning on behalf of the IMA-NA, concerning
6 MSHA's proposed rule regarding criteria and
7 procedures for assessment of civil penalties.
8 As Mark just noted, IMA-NA and its
9 member companies strongly oppose provisions in
10 MSHA's proposed rule that would subvert the
11 statutory role for de novo review accorded by
12 Congress to the Mine Safety and Health Review
13 Commission in the Mine Act.
14 First, let me provide some background
15 on myself and Unimin. I'm a certified industrial
16 hygienist and certified safety professional with
17 a master of science degree in industry hygiene
18 and a bachelor of science degree in safety
19 engineering.
20 I'm currently the vice president of
21 Safety and Health for Unimin Corporation, and
22 founded in 1970, Unimin has grown from a small,

1 local sand mining company to become a leading
2 producer of non-metallic industrial minerals in
3 the worldwide Sibelco Group.
4 We are the largest producer of
5 industrial sand in each the United States, Canada
6 and Mexico and along with our affiliates in other
7 countries, we are the largest producer in the
8 world.
9 I am responsible for the safety and
10 health of Unimin's employees throughout North
11 America with a current census of approximately
12 2,400 individuals. As Mark also noted, I am
13 chairman of IMA-NA's safety and health committee.
14 Through its proposed rule, MSHA would
15 reduce the range of possible violations, thus
16 shrinking a mine operator's ability to challenge
17 the agency's actions while at the same time
18 greatly limiting the Commission's authority to
19 review the agency's enforcement action.
20 The careful balance of the
21 administrative enforcement process crafted by the
22 Mine Act would tilt unconstitutionally in favor

1 of unchecked agency power to cite, assess and
2 enforce civil penalties with little recourse for
3 the affected parties.
4 Such a change would tread on mine
5 operators constitutionally protected due process
6 rights, and almost certainly lead to protracted
7 federal litigation.
8 The civil penalty enforcement process
9 would thus become anything but simplified as mine
10 operators would have no choice but to appeal
11 thousands of constitutionally inadequate
12 Commission decisions through the federal court
13 system.
14 I'd like to offer a relevant quote
15 that we regard as insightful. "Congress created
16 the Commission to serve as a completely
17 independent adjudicatory authority, which would
18 review orders, citations and penalties in which
19 by providing administrative adjudication of
20 disputed cases under the Mine Act would preserve
21 due process and instill much more confidence in
22 the program."

1 The author of that quote is Mr.
2 Christian Schumann, who currently is the counsel
3 for appellate litigation in the Office of the
4 Solicitor's Division of Mine, Safety and Health.
5 He further has opined, "The Commission, like a
6 court, plays a role in ensuring that the
7 government acts within the parameters of the law
8 and that private parties receive due process of
9 law, which is critically important to the
10 administration justice, and at the same time
11 limited in scope."
12 We agree with Mr. Schumann. By the
13 way, these quoted observations can be found in a
14 West Virginia University law review article that
15 IMA-NA cites in our written comments.
16 MSHA's proposed rule regarding the
17 Commission's authority to assess penalties under
18 the Mine Act has two alternatives, and a third,
19 which would make no change to existing
20 regulations, but would leave open the possibility
21 that MSHA would pursue its agenda on an informal
22 or case-by-case basis.

1 Under the first alternative, sections
2 100.1 and 100.2 would be revised such that, "If
3 the Secretary meets his burden to prove the
4 penalty related facts alleged, Part 100 would
5 require the ALJ to assess LSHA's proposed
6 penalty."
7 Likewise, alternative 2 would give the
8 Commission some ability to modify MSHA's
9 mandatory penalties, but only under heightened
10 requirements, which the proposed rule claims are
11 akin to the federal sentencing guidelines, at
12 least before those guidelines were found to be
13 unconstitutional by the Supreme Court.
14 MSHA's proposed heightened
15 requirements include, one, mandating that ALJs
16 identify aggravating or mitigating circumstances
17 of a kind or to a degree, not adequately taken
18 into consideration by the Secretary when
19 formulating the penalty regulations.
20 Two, consider MSHA's policy
21 statements, which have not been subject to
22 rulemaking proceedings. Three, list a Statement

1 of Reasons for assessing the penalty, and four,
2 consider the statutory penalty criteria.
3 On top of the proposed changes to the
4 scope of the Commission's authority to assess
5 penalties, MSHA also proposes "simplifying," its
6 citation form and associated penalty calculations
7 with respect to the possible ranges of
8 negligence, gravity and other statutory criteria
9 identified by the Act.
10 This simplification would, for
11 example, constrain MSHA inspectors to only three
12 options for an operator's level of culpability:
13 not negligent, negligent or reckless disregard.
14 As a result, MSHA inspectors will lose the
15 discretion to issue a citation for high
16 negligence, and will instead likely issue more
17 citations under the categories of reckless
18 disregard which in turn will result in higher
19 penalty assessment against operators.
20 Similarly, by deleting categories of
21 gravity, the default position for MSHA will
22 likely fall on the serious side. For example,

1 MSHA inspectors will no longer have no likelihood
2 or permanently disabling as options on the
3 citation form, and thus MSHA inspectors will
4 necessarily have to choose higher levels of
5 likelihood, including occurrence of a fatality,
6 as designations on the citation.
7 Thus, mine operators will experience
8 more significant and substantial citations and
9 higher penalties as a result. IMA-NA's objection
10 to the proposed rule is as fundamental as it is
11 straightforward.
12 Alternative one takes the power to
13 issue penalties, which is exclusively vested by
14 the Mine Act and the Commission and puts it into
15 the hands of the Secretary. It effectively makes
16 MSHA's proposed penalties the mandatory penalties
17 so long as the ALJ upholds the underlying
18 violations and its associated factors, such as
19 negligence, size of operator and gravity among
20 others.
21 At the same time, MSHA's
22 "simplification," of the criteria form and the

1 re-weighting of the penalty criteria will likely
2 force MSHA inspectors to choose higher levels of
3 negligence as well as other penalty factors when
4 issuing citations.
5 As a result, the proposed rule
6 strengthens MSHA's enforcement power and
7 increases the likely penalties against operators,
8 while at the same time greatly limiting the
9 Commission's ability to review MSHA's enforcement
10 action and the Commission's power to assess
11 alternative penalties as envisioned by the Mine
12 Act.
13 Likewise, alternative two mandates
14 that the Commission apply MSHA policy statement
15 among other things, in addition -- sorry, in
16 addition to the statutory criteria provided in
17 the Act.
18 It thus imposes more stringent
19 requirements on the Commission than those imposed
20 by the Act, and demands that the Commission apply
21 additional factors beyond those identified in the
22 Act.

1 The effect of the proposed rule's
2 adjustment of the Commission's authority combined
3 with the simplification of the penalty criteria
4 and the MSHA citation form would also deprive
5 mine operators of their constitutionally
6 protected procedural due process rights.
7 The proposed rule, through either of
8 its suggested alternatives, transforms the
9 Commission's independent authority to review
10 MSHA's enforcement actions into a rubber stamp,
11 giving MSHA carte blanche to write its own
12 regulations, propose its own penalties and
13 mandate enforcement without any meaningful
14 opportunity for the regulated to be heard.
15 Here the risk of error in providing
16 for virtually unchecked agency authority greatly
17 outweighs MSHA's interest in expedited and
18 predictable outcomes.
19 The Mine Act is unambiguous with
20 respect to the Commission's authority to impose
21 penalties. It is the Commission's, not MSHA's,
22 absolute and exclusive right to assess penalties

1 under the six statutory criteria in the Act.
2 MSHA cannot change the statutory
3 authority of an independent agency, whose sole
4 purpose is to provide for an impartial
5 adjudicatory review of MSHA's actions.
6 Therefore, MSHA -- sorry. IMA-NA
7 strongly urges MSHA to abandon the proposed rule
8 in its current form. The only avenue for
9 changing the authority of the Commission runs
10 through Congress.
11 IMA-NA appreciates the opportunity to
12 comment and testify on MSHA's proposed rule on
13 the criteria and assessment of civil penalties,
14 and it stands ready to assist in developing an
15 alternative rule in a constructive manner.
16 For example, IMA-NA supports the
17 proposed rules procedure for a 20 percent
18 reduction in proposed MSHA penalties if such
19 penalties are paid within 30 days. IMA-NA
20 believes such a procedure would result in less
21 litigation overall, and would have a net positive
22 effect for operators willing to accept MSHA

1 citations but who may otherwise be financially
2 constrained from doing so if required to pay 100
3 percent of the penalty.
4 Likewise, IMA-NA supports the proposed
5 rule's reduction in weight of the persons
6 affected and operator size criteria. That
7 concludes my prepared remarks. Mark and I would
8 be pleased to entertain questions from the MSHA
9 Hearing Panel.
10 MS. SILVEY: Okay, I don't have many.
11 But first of all, to Mark and Andy, and I think
12 I've said this to a couple or organizations who
13 have come and spoken, you have worked
14 cooperatively and collaboratively with MSHA on a
15 number of projects, and we do appreciate that.
16 Everything that the associations and
17 the operators do with their miners with respect
18 to improving safety and health, we, MSHA, we are
19 very -- we note that and we appreciate it. As I
20 said, reductions could not be achieved without
21 that.
22 Saying that, the -- I take notice of

1 both your comments, Mark and Andy, of your
2 comments with respect to the Review Commission;
3 the proposed rule's aspects for the Review
4 Commission.
5 I have heard something, and I don't
6 know exactly whether it was said, Mark, or
7 whether it was just kind of implicit in your
8 comments, but for those of you who have used the
9 term fear, I want you to know from me you -- you
10 have made some very instructive comments to us.
11 Some of you have used examples, and that's very
12 useful.
13 The agency had no hidden objectives,
14 and as I said -- oh, before I get to that, I
15 wrote this down. I'm glad you found that. I
16 should have. I sort of what to slap myself for
17 not. And I don't go and look at law review
18 articles, by the way. Let me tell you I do not
19 sit and do that.
20 But with respect to your quoting Mr.
21 Schumann, I want you to know that I have great
22 respect and admiration for Mr. Schumann. So, I

1 take his comments into consideration also.
2 But with respect to negligence, I have
3 already said -- everybody -- and I think that's
4 some element -- that presents some element of the
5 fear. I have already said what the agency took
6 into consideration and assumptions the agency
7 took into consideration, and that low, moderate
8 and high negligence would be rolled into
9 negligence.
10 High negligence, if the inspector even
11 thought something was high, and that we would
12 train our inspectors so, and if the inspector's
13 thought in his or her mind that ordinarily this
14 would be high negligence, it would not roll into
15 reckless disregard.
16 Those are the assumptions that we
17 made, and those are the assumptions that we would
18 -- that we would train our inspectors on. That's
19 -- and if you have -- when you present anymore
20 comments and testimony to us, we clearly get it
21 on the Review Commission.
22 If you have anymore specifics with

1 respect to the other part of the proposal, the
2 other elements, like hypothetical; if you were to
3 bifurcate it because that's what it looks like
4 I'm hearing, a lot of comments on what we did on
5 the Review Commission. That's one part of what
6 we proposed. Then a lot of comments on what we
7 proposed with respect to the factors that the
8 inspectors used to evaluation citations, and that
9 other part of it.
10 So, if you have any specific comments
11 on the facts that the inspectors use to evaluate
12 citations, then we would appreciate that -- make
13 your point. We got what you said on the 20
14 percent reduction, and we got what you said on
15 some of the other factors, the relative weight of
16 the other factors.
17 If you have any more specifics, we
18 appreciate that. We do appreciate a couple of
19 the specifics you have in here.
20 MR. ELLIS: We struggled with how to
21 present that kind of specific information,
22 because clearly you're dealing with a national

1 database, and we weren't prepared to tackle a
2 national database.
3 I think we saw some interesting
4 presentations from Mr. Dupree on how this might
5 be done in the alternatives, and I think that we
6 could go out and find selected examples to use
7 that way, which wouldn't be trying to tackle the
8 national database.
9 MS. SILVEY: Thank you.
10 MR. MATTOS: And the one that's out
11 there, the one that we have and we based this
12 data on is not too hard to use.
13 MR. ELLIS: I mean Mr. Dupree's
14 administrative assistant.
15 MR. MATTOS: One observation. The 20
16 percent reduction, you did address that one. I
17 do want to point out our -- when we did our
18 projections on the penalty assessments, we did
19 not assume that 20 percent reduction because this
20 wasn't asked in the proposed rule.
21 MS. SILVEY: Yes.
22 MR. MATTOS: But the current contest

1 rate is 20 percent. A little under 20 percent.
2 That 20 -- that's the contest rate, 20 percent of
3 the violations. That 20 percent reduction would
4 apply to the 80 percent that -- assuming
5 everything was equal. The 80 percent that are
6 not being contested now would be receiving a 20
7 percent reduction in the proposed penalty under
8 the -- under that alternative that we've --
9 MS. SILVEY: And that would further
10 reduce the penalties that we had in the proposed
11 rule.
12 MR. MATTOS: Right. And Allen, I
13 don't know that your examples included that 20
14 percent reduction or not. If you didn't -- so,
15 there's another variable for your assistant to
16 put into the formula.
17 MR. ELLIS: Well it's a complicated
18 issue that you're addressing here, and I think
19 that people have approached it from many
20 different directions from a legal perspective,
21 from a business perspective.
22 At what point does it make sense to

1 say, "The cost of contesting this is too much and
2 we're going to pay the penalty?" You know, that
3 20 percent reduction is an incentive to go in
4 that direction. People will contest citations
5 based on principle and history that goes along
6 with that.
7 So, I mean everybody has different
8 motivations for how they approach this. Okay,
9 thank you.
10 MR. JONES: I'd like to note for the
11 record that the comments made by Chris Schumann
12 in the article were made in his individual
13 capacity as a lawyer and citizen, and don't
14 represent the views of the Solicitor's Office or
15 the US Department of Labor.
16 MR. ELLIS: We appreciate that, but
17 obviously we recognize that Mr. Schumann has a
18 notable career here at the Solicitor's Office.
19 MS. SILVEY: And as I said, I have
20 respect and admiration, however you say it, for
21 Mr. Schumann.
22 MR. ELLIS: Okay, thank you.

1 MS. SILVEY: Next commenter will be
2 Hunter Prillaman with the National Lime
3 Association.
4 MR. PRILLAMAN: Thank you. I'm Hunter
5 Prillaman. That's P-R-I-L-L-A-M-A-N. I'm here
6 from the National Lime Association. NLA's
7 Members have plants in 24 states, produce most of
8 the United States's calcium oxide and hydroxide,
9 otherwise known as lime.
10 Because they operate both surface and
11 underground mines, our members have a strong
12 interest in this rulemaking. We've already
13 submitted comments on the proposal and I'm
14 supposed to go through those in detail, but I'd
15 like to discuss just one specific point, and that
16 has to do with the negligence categories.
17 Just in general, recognize that trying
18 to simplify the tool that your inspectors are
19 using makes sense, but if you make the tool too
20 blunt, it doesn't achieve the goals that you want
21 to achieve, and I think that's what you've done
22 or what would be the result of what's been

1 proposed on the negligence categories.
2 In particular, we don't think that it
3 serves the goal of focusing enforcement efforts
4 on the most serious and the most negligence
5 violations.
6 In particular, we strongly oppose the
7 elimination of the low negligence category.
8 Since MSHA rarely, if ever, finds the absence of
9 negligence entirely, the proposed change will
10 result in previously low negligence citations
11 being characterized as negligent lumped in with
12 violations that previously would've been
13 considered to demonstrate both moderate and high
14 negligence. They'll all be in the same category.
15 The problem with that, as I see it, is
16 that the increased impact on the penalty
17 structure for the previously low negligence
18 citations is much more than that of the
19 previously high negligence.
20 So, for example, violations which were
21 previously characterized as low negligence will
22 now be given 15 points out of a possible 100, as

1 opposed to 10 out of a possible 208. That can
2 have a really big impact.
3 Just as an example, if you look at the
4 current rule; if you add 10 points to the minimum
5 level of 30, that takes you from the minimum
6 penalty of $112.00 to $249.00. Under the new
7 rule, if you went -- if -- adding 15 points takes
8 you from $112.00 to $1,000.00.
9 So, there seems to be a little bit of
10 a misbalance in the way that negligence category
11 has been done so that -- so that you're going to
12 have a substantial increase in penalty amounts on
13 what were formerly low negligence categories and
14 actually really hardly any at all on what were
15 previously high negligence violations.
16 Our members at least have a lot of
17 citations that are in the low negligence
18 category. We see those in even really well-run
19 plants. So, anyway, this really is contrary to
20 what MSHA indicated it was trying to do with this
21 rule, which was to increase the impact of
22 negligence.

1 Really, the way it is currently
2 structured, it doesn't do that very much for the
3 higher levels of negligence. It does it much
4 more for the lower levels of negligence, which I
5 don't quite understand.
6 So, just to summarize from my text, to
7 treat the minor infractions the same as those
8 involving more serious negligence is unfair, and
9 does not constitute treating increased negligence
10 as a serious matter.
11 In this case, the proposal makes the
12 penalty instrument too blunt to serve its
13 purpose. That's just one example, and I think I
14 agree with a lot of the comments others have
15 made, and I think there are a few other places
16 too where the -- where the tool has been
17 simplified too much. That's what this example is
18 supposed to show.
19 MS. SILVEY: I really don't have any
20 comments to ask you. You said -- so, is it your
21 analysis that -- on your comment on negligence
22 you clearly understood that our proposal would

1 roll low, moderate and high into one category,
2 negligent.
3 I appreciate that you didn't say high
4 negligence would roll into reckless disregard.
5 But I would like to ask you in terms of your
6 analysis of the citations that most of your
7 member companies get, is it your understanding
8 that a greater majority fall into the low
9 negligence than the high negligence?
10 MR. PRILLAMAN: I think so.
11 MS. SILVEY: But you don't know? You
12 have --
13 MR. PRILLAMAN: I know that they get
14 plenty of low negligence citations because a lot
15 of the housekeeping or electrical knockouts and
16 things like that tend to be assessed at low
17 negligence.
18 So, under this proposal, every single
19 one of those will now have a substantially higher
20 negligence multiplier than it did before. I
21 think that it really makes the process more
22 adversarial at sort of the low end of negligence

1 than it needs to be.
2 So, that's -- that's the problem that
3 I wanted to highlight.
4 MS. SILVEY: Okay, thank you.
5 MR. PEARSON: Thank you.
6 MS. SILVEY: Next we have Linda
7 Raisovich-Parsons with the United Mine Workers of
8 America, and Dennis O'Dell with the United Mine
9 Workers.
10 MS. RAISOVICH-PARSONS: Good
11 afternoon. My name is Linda Raisovich-Parsons,
12 and it's spelled R-A-I-S-O-V-I-C-H hyphen P-A-R-
13 S-O-N-S. I am the Deputy Administrator for the
14 MWA's Department of Occupational Health and
15 Safety.
16 I will send you a copy of -- like Mr.
17 Watzman, I've scratched notes all over this.
18 I'll have to clean it up and get it to you.
19 Upon review of the proposed rule, the
20 union agrees that changes to reduce the number of
21 decisions an inspector must make in writing
22 citations and orders is needed. The list

1 judgment falls on the inspector's part, will
2 streamline the process and provide fewer issues
3 to argue about in court.
4 When issuing citations or orders,
5 inspectors are required to evaluate safety and
6 health conditions, and to make decisions about
7 five of the six statutory criteria.
8 The union agrees that simplifying the
9 criteria would increase subjectivity and clarity
10 in the citation and order process. We also agree
11 with the agency that the changes proposed should
12 result in fewer areas of disagreement and earlier
13 resolution of enforcement issues.
14 However, there are some areas of
15 concern to us, with which we disagree in the
16 proposed rule, and I will summarize those as
17 follows.
18 Number 1: The proposed rule offers two
19 alternative proposals to the scope 100.1 and
20 100.2 applicability sections of the rule. One
21 option recommends that the Commission apply the
22 penalty formula when assessing civil penalties

1 according to the six statutory criteria.
2 The union does not support this
3 proposal because it would unjustly restrict the
4 Commission's flexibility to depart from the
5 penalty formula if circumstances warrant.
6 The Commission must have the
7 flexibility to weight the evidence presented to
8 it, and change a penalty when it finds mitigating
9 or aggregating circumstances that would warrant
10 such changes.
11 To review -- to require the Commission
12 to apply MSHA's formula would be
13 counterproductive and unnecessarily restrictive
14 to the highest judicial body in the industry. We
15 believe that MSHA has overstepped their authority
16 in this area, and there should be no change to
17 this rule.
18 Number 2: In Section 100.3(b), MSHA
19 proposes to reduce the penalty points for
20 operators and contractor size. Under the
21 proposed rule, the maximum number of penalty
22 points would decrease from 15 to 4 for mine size,

1 from 10 to 4 for the size of the controlling
2 entity, and from 25 to 8 for the size of the
3 independent contractor.
4 MSHA points out that the proposed
5 change will decrease the maximum points for this
6 criterion but offers no real explanation other
7 than to propose a penalty in accordance with the
8 operator's income and ability to pay.
9 Union would ask should a driver on the
10 highway offer their tax returns as proof of their
11 income to a state trooper when they're stopped
12 for speeding so they could be considered for a
13 smaller fine and ability to pay?
14 A hazardous condition in a large mine
15 is just as hazardous in a small mine. Therefore,
16 the size of neither an operator nor their bills
17 to pay should be given considerable regard.
18 The danger to the miners must be first
19 and foremost consideration in any situation.
20 Discounts because of a mine size will not provide
21 an effective deterrent.
22 The size of a particular mine is not

1 necessarily indicative of the overall size or
2 financial resources of the operator. Small mines
3 are very often subsidiaries or contract
4 operations of larger employers.
5 Number 3: The union takes issue with
6 the elimination of the permanently disabling
7 subcategory for gravity severity criteria under
8 100.3(e). The proposed rule leaves the other
9 three categories of, one, no lost work days, two,
10 lost work days or restricted duty, or three,
11 fatal, eliminating the permanently disabling
12 choice.
13 It has been our experience that in
14 some accidents, miners are injured but the
15 severity of their injury is not immediately
16 obvious. An injured miner is determined to be
17 disabled later after the date of the injury.
18 MSHA inspectors have modified
19 citations to reflect the permanent disabling
20 choice when this occurs. The MSHA inspector has
21 no way of determining how severe or moderate an
22 injury would be at the time of the accident.

1 Only a physician can make such a determination,
2 and sometimes they too cannot make that judgment
3 until the person is on the mend.
4 Therefore, the option for the
5 inspector to modify a citation to reflect the
6 extent of a miner's injury as permanently
7 disabling must be retained. The citation can
8 become a piece of evidence for the disabled miner
9 and this subcategory must not be changed.
10 Number 4: Lastly, we do not agree
11 with the proposal to provide up to 30 percent
12 overall good faith reduction in penalties to
13 operators who promptly abate cited conditions and
14 who promptly pay the penalties without contest.
15 This proposal flies in the face of
16 those changes made to the Mine Act in 2006, which
17 mandated penalty increases as an incentive for
18 mine operators to prevent and correct violations.
19 MSHA revised Part 100 at that time to
20 reflect these mandated changes. The result was a
21 steady increase in the amount of penalties, and a
22 record number of challenges to citations. So

1 much so that the cases before the Commission
2 became overwhelming.
3 Penalty payment is also delayed with
4 these challenges. So, the companies use this
5 tactic by challenging everything to delay
6 payment. The mining industry has had more than
7 40 years to acclimate itself to the federal
8 regulations and take the necessary actions to
9 comply with the law.
10 There should be no additional
11 reductions above the current 10 percent for good
12 faith.
13 In closing, I'd like to point out that
14 while we discussed the best penalty system today,
15 there are those in the industry who continue to
16 thumb their nose at the government by refusing to
17 pay their penalties at all.
18 In November, the NPR -- was it
19 National Public Radio? Did an eye-opening series
20 on delinquent mines that refused to pay
21 penalties. Not paying fines simply perpetuates
22 the whole system of lawlessness.

1 If a mine operator is not made to pay
2 their fines, what incentive do they have to
3 provide a safe work place? They can cut as many
4 corners as possible to mine as cheaply as
5 possible. Until regulations as enacted to enable
6 serious consequences to those who refuse to pay
7 penalties, these changes to the rules are
8 meaningless to those lawless individuals.
9 The NPR series highlighted some of
10 those most egregious cases, including that of
11 billionaire Jim Justice. As of March 31 of this
12 year, the mining companies he owned owed nearly
13 $2 million in delinquent penalties. All the
14 while, his mines have injury rates twice the
15 national average.
16 Mr. Justice saw fit to contribute over
17 $65 million to charitable causes, while failing
18 to pay the $2 million in mine safety violations,
19 some going back as far as seven years.
20 Where is the justice in this
21 situation? What incentive does this operator
22 have to comply when he can get by with not paying

1 penalties for violations?
2 Justice in America. Let me refuse to
3 pay my income tax for a year or two, and I am
4 certain I'd be penalized severely and maybe see
5 jail time.
6 Until these serious consequences enact
7 for -- such behavior will not be changed. This
8 will not change. I might note that we can see
9 the advantage.
10 I was at a mine a couple weeks ago,
11 and I was surprised at some of your inspectors
12 and how young they look now. I know you've had a
13 huge turnover in the number of inspectors. And
14 to streamline the choices they had to make and
15 make that easier for them to decide; if they've
16 got all these choices to make, there's a lot more
17 things to argue about in court. If it is
18 simplified for them, it would be easier for a new
19 generation of inspectors coming up to learn the
20 system, and to use a modified version of what
21 we've had.
22 With that, do you want to say

1 something, Dennis?
2 MR. O'DELL: Good afternoon. We
3 appreciate the opportunity to speak today at this
4 hearing. My name is Dennis O'Dell, D-E-N-N-I-S O
5 apostrophe D-E-L-L. I am currently the
6 Administrator of Occupational Health and Safety
7 for the United Mineworkers of America.
8 We've already prepared written
9 comments and submitted those. Some of those may
10 change after the hearing today, which we will
11 reflect -- we'll make those changes based on some
12 of the information that was presented before you
13 today.
14 I'm here kind of as just a practical
15 guy. I wanted to speak from experience. For
16 those of you that don't know, I worked as an
17 underground coal miner for 20 years.
18 Twenty years of my life I spent doing
19 everything and anything in a coal mine that could
20 possibly be done, and a lot of that time I spent
21 traveling with the inspectors.
22 I was chairman of my safety committee

1 when I worked at the mine. I had the opportunity
2 to spend numerous, numerous hours, years with
3 inspectors and the safety director.
4 I've heard an awful lot of folks speak
5 today. A lot of smart folks. I'm not sure how
6 much experience they actually have as far as
7 hands-on experience of traveling with an
8 inspector when he's in a mine, or coming outside
9 when he's writing citations, and sitting in the
10 office with the safety director and the
11 inspector, and the union representative or the
12 representative of the miners, whichever may be
13 the case, and talking about what they saw during
14 the day as the citation was being written, and
15 having a little pre-conference, so to speak, as
16 to what boxes he's actually going to mark at that
17 point.
18 That happens. I mean the reality of
19 it is before it even starts, there's a pre-
20 conference that occurs -- well, first and
21 foremost at the site where the citation took
22 place, and then another discussion outside on the

1 office, and then of course there could be a
2 conference with the district managers if they
3 allow that to happen.
4 I don't know if you guys took into
5 consideration actually talking to the inspectors.
6 I would think it would make a lot of sense to
7 actually talk to the inspectors who are out there
8 beating the pavement everyday as to will this
9 actually simplify the process for them?
10 I believe that the system does need
11 fixed. I believe that the more simplified it is,
12 the better it is. I do believe that some of the
13 changes you proposed we support because there is
14 less things to be argumentative about, but I
15 really do believe that it is important that you
16 talk to the inspectors and get their feedback on
17 this before moving forward.
18 I was going to say something earlier
19 about the proposal as far as what -- on the
20 Commission, but I think everybody in the room
21 knows that is something that just needs to go
22 away.

1 I think that's something that should
2 disappear from the whole proposal and needs to be
3 left alone. The system needs to be working as it
4 is currently.
5 I always tell our guys, and we do
6 training at the academy; we have representative
7 miners that travel with our representative miners
8 with the inspectors, and always tell our guys,
9 "Look." We try to educate our guys on what a
10 hazardous condition is, and so on and so forth."
11 I tell our guys the best day is a day
12 that nobody gets hurt. There's no accidents. No
13 injuries and no citations written to be honest
14 with you.
15 We pride ourselves on having mines
16 that we can keep the citations down at a minimum.
17 I know that is impossible to do because of the
18 changing conditions at the mines all the time,
19 but we have some reputable operators that we work
20 with on a daily basis, and they're out there
21 going above and beyond in trying to make the
22 mines safe. We appreciate that.

1 We're all in this together at the end
2 of the day. We want to make the mines safe, and
3 we want to make it so that the miners can go home
4 at the end of the day and be with their loved
5 ones.
6 Moving forward on this, the only thing
7 I really wanted to say outside of what you
8 already have on our comments and what Linda has
9 said is go talk to the inspectors. I mean find
10 out, seriously find out from them -- we do have
11 this younger generation of inspectors that are
12 coming up.
13 I think that if you do simplify it, I
14 think it needs -- some of the things you did are
15 good, but I think it needs tweaked. We addressed
16 that in our comments that we've already
17 submitted. Like I said, we're going to follow up
18 with some other things.
19 That's all actually that I wanted to
20 say. I appreciate the work that you guys do, and
21 hopefully moving forward we can make this work
22 where it is beneficial to the miners, number

1 one, and that it works for the operator as well
2 because like I said, we're in this together.
3 Thank you.
4 MS. SILVEY: Thank you. We appreciate
5 what you do too. One of the things -- and in
6 response, we did talk to some inspectors, and we
7 probably should talk to more of them, and we will
8 do that.
9 MR. O'DELL: One of the things I'd
10 like to say, Pat, and I'm sorry I don't mean to
11 interrupt. But operators were a little concerned
12 about some of the inspectors bumping up to the
13 next level, and in some cases I'm sure that's
14 going to have credible cause.
15 There's a learning process that
16 everybody is going through right now, and it is
17 obvious that among MSHA districts, you have
18 different levels of enforcement. I mean I see it
19 everyday because we represent coal miners across
20 the United States and Canada.
21 I see some MSHA districts that are
22 heavier on enforcement than others MSHA

1 districts. I also see that there are inspectors
2 that write more on the conservative side. So,
3 there's kind of a -- I think the agency needs to
4 wrap around somehow how they get that equal
5 enforcement across the Board because we've always
6 said that's all we ask from you guys is to
7 enforce the law the way it is, and not to be
8 heavy handed on anybody more so than -- I mean a
9 small operator has to be enforced in its
10 operation just like the large operator.
11 MS. SILVEY: Yes.
12 MR. O'DELL: I think there is a
13 disconnect at the district level where you have
14 some stronger enforcement. I think there's a
15 learning curve. I don't know how you address
16 that. I know you have inspectors that go to the
17 academy. I have a lot of respect for those guys,
18 but I think there needs to be more uniformity on
19 how the law is enforced throughout all the MSHA
20 districts.
21 MS. SILVEY: I would say to you,
22 Linda, that we agree. We saw that article you --

1 I don't want to talk much about it. We saw the
2 article that you referred to in your comments,
3 and we agree that operators should pay our
4 penalties.
5 They've incurred the penalties and
6 they should pay them, and we've taken some
7 actions in the last several years to try and get
8 delinquent penalties within the bounds of the
9 Mine Act.
10 We have some limitations with respect
11 to our authority, but we've taken some actions,
12 particularly at operators who have delinquent
13 penalties but then are operating active mines.
14 There obviously we have -- there's an impact on
15 the health and safety of the miners, and we try
16 to do things at those mines, and we continue to
17 do so.
18 Another thing I'd add is that we also
19 note, as I've said to other people, your comments
20 on the Federal Mine Safety and Health Review
21 Commission on the proposed alternatives. They
22 were alternatives in the proposal, and everybody

1 correctly noted that with respect to the Federal
2 Mine Safety and Health Review Commission.
3 MS. RAISOVICH-PARSONS: Unfortunately
4 that's not the majority of the industry. That's
5 just a handful.
6 MS. SILVEY: That's right. I agree.
7 MR. MATTOS: We are collecting 90
8 percent of the penalties assessed. They didn't
9 choose to share that piece of information in the
10 NPR piece.
11 MS. SILVEY: That's why I said we were
12 not going to necessarily defend ourselves here,
13 but we do take note of what she said.
14 MS. RAISOVICH-PARSONS: If you don't
15 have the regulations behind you to be able to
16 impose severe penalties on these folks, then your
17 hands are tied also.
18 MS. SILVEY: Thank you. At this
19 point, is there anybody else in the audience who
20 wishes to make a comment, rebuttal comments?
21 Okay, having seen no one who wishes to make any
22 additional comments, at this time we will bring

1 to a close the Mine Safety and Health
2 Administration's public hearing on the proposed
3 rule on the assessment of civil penalties.
4 I want to say again that we appreciate
5 everybody's attendance here today, and
6 participation in this rulemaking. I sincerely
7 mean that. We believe only through your
8 participation and getting good and specific
9 comments can we move to a final rule that is a
10 rule that we believe promotes the health and
11 safety of the miners, but does so in a manner
12 that is responsive to the concerns of the mining
13 public.
14 With that, I bear in mind that we had
15 this public hearing, and we will have the hearing
16 in Denver on Tuesday. As I stated to you
17 earlier, we will have an additional two hearings,
18 and we will notify you about those in the Federal
19 Register, and probably for some of you, if
20 possible, we can call you.
21 At this point, thank you so much and
22 we bring to a close this hearing.

1 (Whereupon, the above-entitled matter
2 was adjourned at 1:30 p.m.)
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$12,000.00 164:3
$15,570.00 59:16
$177,000.00 29:20
$18,110.00 29:19
$2 213:13,18
$2,000.00 78:7
$242,000.00 12:7
$249.00 203:6
$263.00 159:11
$268.00 59:2
$3,000.00 20:22
$30,000.00 30:5
$308.00 78:9
$315.00 165:1
$490.00 164:22
$5,600.00 165:1
$500.00 60:3
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$70,000.00 12:5 69:18
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A-D-E-L-E 24:18
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C E R T I F I C A T E

This is to certify that the foregoing transcript

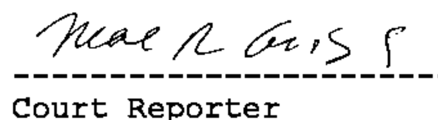
In the matter of: Public Hearing

Before: Mine Safety and Health Administration

Date: 12-04-2014

Place: Arlington, Virginia

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.



Court Reporter

REQUEST TO SPEAK

CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES (PART 100)

RIN: 1219-AB72

Public Hearing
Arlington, Virginia

December 4, 2014

	Name	Organization	Contact Info.
9:29 a.m. 1.	Adele Abrams Esq. CMSP	Law Office of Adele Abrams PC	301-595-3520
9:57 a.m. 2.	Allen McGilton, Assistant Corporate Safety Director	Murray Energy Corporation	740-338-3100 Ext. 3351
10:58 a.m. 3.	Jeff Kratz Manager of Government Affairs	Institute of Makers of Explosives	202-266-4310
11:11 a.m. 4.	Joe Casper, Vice President of Safety	National Stone, Sand & Gravel Association	703-526-1074
11:40 a.m. 5.	Henry Chajet Shareholder & MSHA Fairness Coalition	Jackson Lewis	703-483-8300
11:24 a.m. 6.	Bruce Watzman Senior Vice President Regulatory Affairs	National Mining Association	202-463-2657

REQUEST TO SPEAK

CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES (PART 100)

RIN: 1219-AB72

Public Hearing
Arlington, Virginia

December 4, 2014

Time	No.	Name	Organization	Contact Info.
11:59 a.m.	7.	Allan Dupree Senior Vice President of Running Right and Safety	Alpha Natural Resources	276-619-4410
12:30p. ~~a.~~		William C. Means, Esq.	GMS Mine Repair & Maintenance Inc.	304-290-8000
12:44p.m.	9.	MARK ELLIS	IMANA	
12:47p.m	10.	ANDY O'BRIEN	UNIMIN CORP.	
1:04 p.m.	11.	HUNTER PRILLAMAN	NATIONAL LIME ASSOC.	
1:11 p.m.	12.	LINDA RAISOVICH-PARSONS	UNITED MINE WORKERS	
1:19 p.m.	13.	DENNIS O'DELL	UNITED MINE WORKERS	
	14.			
	15.			
	16.			

TESTIMONY OF ADELE L. ABRAMS, ESQ., CMSP
ON BEHALF OF UNITED SAFETY ASSOCIATES
DECEMBER 4, 2014 PUBLIC HEARING
RIN 1219-AB72

My name is Adele Abrams, and I am pleased to present these comments on MSHA's proposed rule to modify civil penalty criteria in 30 CFR Part 100 and to make other changes to the system of jurisprudence established in the Mine Act. I am a Certified Mine Safety Professional and attorney with the Law Office of Adele L Abrams PC, and am testifying as counsel to United Safety Associates ("USA").

USA is a California based association providing education and training services to its membership in the areas of injury and illness prevention, accident and injury avoidance, safety and risk management procedures, and maintaining workplace safety. In addition, USA is active in legislative affairs, representing membership and relaying relevant issues. First and foremost, USA strives to protect miners in the workplace and assist membership is fostering safety cultures and safe workplaces.

USA appreciates the spirit of the proposed Civil Penalty rule, however USA believes the effects of the rule as proposed would be detrimental to mime operators without any commensurate safety and health benefits. Specifically, USA objects to the proposed modifications to both negligence and gravity, the increase weight of violation history (including VPID and RPID), the proposed increase in minimum penalties for unwarrantable failures, and MSHA's attempt to govern and regulate the impartial third party decision-maker, the Federal Mine Safety and Health Review Commission.

Additionally, USA requests further guidance from MSHA on the following questions, left unanswered by MSHA in the proposed Civil Penalty rule:

- What effect will the new format of citation documentation have on the rate of Significant and Substantial issuances, and on the ability to achieve settlements in contested cases that can be approved by the FMSHRC;
- How will the new, and limited, negligence designations affect the issuance of 104(d) citations and orders, and the categorization of flagrant violations;
- How will the reduced gravity options affect issuance of "imminent danger" orders under Section 107(a) of the Mine Act;
- How will MSHA's existing informal, pre-assessment, conferences be affected by the 20% "good faith" penalty reduction for not contesting the "assessment or violation;" and
- Will requesting the informal, pre-assessment, conference remove an operator from eligibility for the proposed additional 20% "good faith" penalty reduction?

USA strongly opposes the realignment of the negligence designation from five (5) categories to three (3). By removing the existing negligence designations of "Low Negligence" and "High Negligence," MSHA is proposing that mitigation is no longer a defense or taken into consideration during penalty assessment. Currently, MSHA's citations allow for inspectors to determine operator negligence based on the amount of mitigating circumstances surrounding each issuance. Adopting the proposed Civil Penalty rule's new negligence designation would not only place a greater emphasis on negligence when determining the penalty assessment, but it would also disregard mitigation and group a wide range of conditions under the umbrella of "Negligent." This could also result in exclusion of mitigation evidence at FMSHRC hearings, which interferes with operators' due process rights.

MSHA's intent to ignore relevant mitigating facts when determining penalty assessments and negligence will lead to steep increases in penalties for mine operators and difficulty settling formal and informal contests of citations after issuance. Given the proposed rule in its current state, MSHA would no longer accept mitigation provided by operators as justification for penalty reductions, and negligence modifications to citation documentation would be largely unavailable. This is unacceptable and would adversely affect all members of the mining industry. USA group strongly objects to this provision and the proposed Civil Penalty rule.

In our written comments, we include Appendix A, where a comparison of citation penalties shows that $18,110 in penalties under the current criteria would rise to $177,000 under the proposed criteria -- a 977% increase for a docket with only Section 104a, regularly assessed, citations at a metal/nonmetal mine.

USA strongly opposes the realignment of the likelihood of injury designations proposed in the Civil Penalty rule. As with the proposed modifications to the negligence category, MSHA proposed to reduce the existing likelihood of injury designations from five (5) options to three (3). However, by removing the "No Likelihood" and "Highly Likely" categories, MSHA is once again proposing changes that would adversely affect operators.

It is well establish that Significant and Substantial citations carry greater effects in mine's history, can carry greater penalties, and are reportable to the SEC by publicly traded companies. USA is concerned that the proposed changes will drastically increases the number of Significant and Substantial issuances, which would adversely affect all operators and could also result in more operators being placed under a Pattern of Violations.

Furthermore, by removing the "Highly Likely" category, USA fears that MSHA will issue §107(a) Imminent Danger Orders in conjunction with a hazard that inspectors may feel is "Reasonably Likely" to occur. This would contradict existing Federal Mine Safety and Health Review Commission case law and the Mine Act which defines Imminent Dangers Orders as requiring more serious circumstances than a Significant and Substantial violation. As proposed, the §107(a) issuance and underlying §104 issuance may mirror one another, thereby blurring that delineation, thereby exposing operators to more liberal, and unjustified, use of Imminent Danger Orders.

Moreover, by blurring the delineation between Significant and Substantial and §107(a) issuances, including existing case law on what constitutes and Significant and Substantial violation, years of controlling case law would need to be reevaluated and re-litigated. The proposed changes would alter the meaning of existing case law and require clarification from the courts. This is a serious consequence of the proposed rule and warrants critical scrutiny.

USA also strongly objects to the proposed Civil Penalty rule's increased emphasis on history points during penalty assessment. Under the proposed rule the overall weight of the history of previous violations for a mine will increase in relation to each penalty assessment. USA fears that this will adversely affect medium to large mine operators and result in significant increases in penalties per issuance.

USA opposes the proposed increases in minimum penalties for unwarrantable failure issuances. USA does not agree with MSHA that a 50% increases in penalties would foster further compliance with subjected operators. This appears to be merely an attempt by MSHA to increase penalties without justification. USA requests that if MSHA intends to maintain this provision, additional evidence supporting the claim that the increase penalties would assist with miner safety and health be provided.

The proposed Civil Penalty rule states that the additional 20% reduction would be incentive for operators to promptly abate and pay alleged violations, however abatement is already required when an alleged violation is issued and payment is due when the order becomes final regardless of the additional 20% reduction. USA views this as a means to discourage formal and informal contests of penalties and violations.

USA strongly opposes and is deeply troubled by the proposed Civil Penalty rule's attempt to govern the Federal Mine Safety and Health Review Commission. The Federal Mine Safety and Health Review Commission was created to be independent of the Department of Labor, in the 1977 Mine Act, specifically to remain an unbiased third-party decision maker for disputes between operators and MSHA.

MSHA's attempt restrict the authority of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judges, and bind them to the penalty assessments determined by MSHA underscores the entire purpose of the independent agency. If MSHA is permitted to govern this third-party decision maker, operators are effectively without unbiased legal recourse until appeal to the United States Federal US Courts of Appeal, and even they may only have authority to vacate, uphold, or remand, not to reconsider the penalties. USA requests the commission and its judges retain *de novo* penalty authority, and maintains that MSHA lacks authority to alter via regulation the statutory criteria in a way that would allow the agency to fine operators out of business.

Thank you for your consideration.

APPENDIX A
UNITED SAFETY ASSOCIATES
COMMENTS ON MSHA's PROPOSED RULE ON THE
CRITERIA AND PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES

This appendix contains examples of potential penalty increases for medium to large mines if the proposed rule for criteria and procedures for assessment of civil penalties becomes final.

Under current §100.3 penalty assessment, the example docket's penalties are broken down as follows:

Mine Points	Controller Points	History Points	Repeat Violation Points	Negligence Points	Likelihood Points	Severity Points	Number of Persons Affected	Total	Penalty
9	5	25	13	10	30	20	1	113	$7,774.00
9	5	25	11	20	10	10	1	91	$1,337.00
9	5	25	0	20	10	5	1	75	$372.00
9	5	25	14	20	10	5	1	89	$1,140.00
9	5	25	15	10	10	20	1	95	$1,842.00
9	5	25	12	20	30	5	1	107	$4,810.00
9	5	25	0	10	10	10	1	70	$249.00
9	5	25	0	10	10	5	1	65	$150.00
9	5	25	12	10	10	5	1	77	$436.00
TOTAL PENALTY									**$18,110.00**

Under MSHA's proposed rule for criteria and procedures for assessment of civil penalties, the docket's proposed penalties would be the following:

Mine Points	Controller Points	History Points	Repeat Violation Points	Negligence Points	Likelihood Points	Severity Points	Number of Persons Affected	Total	Penalty
2	2	16	7	15	14	10	1	67	$40,000.00
2	2	16	6	15	14	5	1	61	$10,000.00
2	2	16	0	15	14	5	1	55	$4,000.00
2	2	16	7	15	14	5	1	62	$15,000.00
2	2	16	8	15	14	10	1	68	$45,000.00
2	2	16	8	15	14	10	1	68	$45,000.00
2	2	16	0	15	14	5	1	55	$4,000.00
2	2	16	0	15	14	5	1	55	$4,000.00
2	2	16	6	15	14	5	1	61	$10,000.00
TOTAL PENALTY									**$177,000.00**

***RESULTING IN ROUGHLY 977% INCREASE IN PENALTIES.**

Testimony of William (Allen) McGilton

Assistant Corporate Safety Director
Murray Energy Corporation

Re: Proposed Rule on
Criteria and Procedures for Assessment of Civil Penalties

RIN 1219-AB72

December 4, 2014
Arlington, VA

My name is William (Allen) McGilton. I am the Assistant Corporate Safety Director for Murray Energy Corporation. One of my responsibilities is to manage the company's assessments from the Mine Safety and Health Administration (MSHA). I have been in this position for the last seven years. Murray Energy is the largest privately owned coal company in the United States, producing approximately 64 million tons of high quality bituminous coal each year. Murray Energy and its subsidiaries employ approximately 7,400 hard-working Americans and currently operate thirteen active coal mines, consisting of thirteen underground longwall mining systems and forty-six continuous mining units in Ohio, Illinois, Kentucky, Utah and West Virginia. Murray Energy provides high-paying, stable employment in some of the most economically disadvantaged areas of the country and is a low-cost producer of bituminous coal, helping to provide safe, reliable, and affordable energy. As such, Murray Energy has a substantial interest in this Proposed Rule.

Prior to joining Murray Energy, I worked 37 years with the U.S. Bureau of Mines (USBM), the Mining Enforcement and Safety Administration (MESA), and the Mine Safety and Health Administration (MSHA). I spent the last 24 years as a Supervisory Coal Mine Safety and Health Inspector. During my career with the government, I issued and evaluated thousands of citations and orders, reviewed tens of thousands of citations and orders issued by inspectors under my supervision, and conducted Health and Safety Conferences before there were designated Conference Litigation Representatives. My performance was evaluated as "Highly Effective" over twenty times, and "Outstanding/Exemplary" five times, four while as a Supervisor. Additionally, I received the U.S. Department of Labor's "Distinguished Service Award" for exemplary work in 1999.

My primary responsibility for Murray Energy is to evaluate citations and orders and advise operations personnel when citations and orders should be contested and also of the grounds of those contests. Typically, we contest citations and orders when one or more of the "Inspector's Evaluations" are exaggerated or inaccurate, when there should have been no violation, or when MSHA has proposed a special assessment. During my seven years with Murray Energy, I personally have been involved in contesting (and resolving the contests of) several thousand citations and orders issued by many different inspectors, from many different MSHA field offices, from several different MSHA districts. And in resolving these contests, I have worked with numerous MSHA Inspectors, Conference Litigation Representatives and Technical Advisors, numerous attorneys from the Solicitor's office, and numerous administrative law judges from the Federal Mine Safety & Health Review Commission.

Overall, I believe my combined experience of forty-four years with MSHA and Murray Energy has given me unique insight into the past and current operations and practices of MSHA in regard to issuing citations and orders and later resolving a variety of disputes as part of the formal contest process. Based on this experience, I have the following comments to the Proposed Rule on the Criteria and Procedures for Assessment of Civil Penalties.

I. First, and contrary to the stated intended purpose, "The proposed rule will not improve the civil penalty process and reduce the number of citations and orders mine operators contest."

Murray Energy does not contest citations and penalties to save money. It contests citations and penalties to ensure accuracy and thus improved miner safety. Contesting citations and proposed penalty assessments is not and never has been a money-making or money-saving proposition. The time, effort and expense to contest citations and proposed penalty assessments almost always exceed, or greatly exceed, any potential reduction of the penalty.

Murray Energy has contested—and will continue to contest—citations, orders and proposed penalty assessments when the underlying paper is speculative, when the designations and narrative mischaracterize, misstate, or overstate the actual conditions, practices or hazards, or when the proposed penalties do not reflect the gravity or conduct at hand, such as large "special assessments" for moderate negligence 104(a) citations.

MSHA needs to understand that **accuracy is most important to the mine operators and should be to MSHA**. Accurately written citations improve miner safety and health and better deter unsafe conditions and practices. For instance, when a citation is accurately written and issued, operators are more likely to learn from any mistakes and to take action to prevent similar conduct or conditions in the future. But when inspectors over-inflate various designations, or overstate, misstate or guess about the conditions or conduct observed, operators are more likely to become defensive and protective of their personnel and to contest the citations and associated penalties in an attempt to have the conduct and conditions accurately portrayed.

The Proposed Rule will not fix this problem, and small operators without the legal resources will be forced into taking a 30% reduction, which will still result in inflated penalties. As an example, one of our operations in southern Illinois was cited for an S&S violation related to damaged roof bolts. It appeared that the top of mobile equipment had inadvertently hit the bolt heads and damaged them. The citation was issued as moderate negligence, and MSHA proposed a $9,800 special assessment. Our mine personnel were baffled at the S&S designation (and later the special assessment). Everyone—including MSHA's inspectors—knew the cited area had massive, competent, and thick limestone in the immediate roof. Indeed, the inspector's own notes mentioned this. There were no cracks, slips, joints, or other geologic anomalies present in or near the cited area. There also was no material on the floor. But, the citation was designated as being S&S. During settlement negotiations, and despite knowing these facts, MSHA refused to offer any paper changes or to remove the special assessment. Instead, we were offered a take-it-or-leave-it 20% discount. We left it and went to trial. Unsurprisingly, after the testimony of the Mine Geologist and the issuing Inspector, the ALJ removed the S&S designation and special assessment and imposed a $268 penalty. The accurate result was reached, despite MSHA's attempts to avoid it.

As another example, a different inspector cited one of our mine operators for dirty showers in surface facilities, claiming there was mold in the corners of the shower area and in places on the floor. Unbelievably, the inspector designated the citation as Reasonably Likely to result in Lost Workdays Injuries to 10 persons because of "staph infections" that could "lead to amputation of a finger or hand . . . if not stopped in time." MSHA proposed a whopping $15,570 regular assessment for the citation, due almost entirely to the exaggerated gravity designations. During settlement discussions, MSHA never offered to change any of the paper and only offered a 10% reduction in the penalty. After trial, the ALJ unsurprisingly concluded that the cited conditions were "Unlikely", with "Lost Workdays or

Restricted Duty" to 1 person and reduced the penalty to $500. Again, the accurate result was reached, despite MSHA's attempts to avoid it.

Importantly, these are not isolated instances. I routinely see exaggerated citations that do not reflect the requirements or intent of the regulations or MSHA's own internal policies and procedures. Citations for a 1 inch by 1 inch hole in a stopping or accumulations of coal 5 feet by 2 feet by 1 inch under a belt are examples of the loss of objectivity and the lack of "common sense" when applying 30 CFR. The results are inflated penalties that MSHA refuses to admit were erroneous. And this means that mine operators often must either pay for claimed misconduct, conditions or hazards that did not exist or pay even more to contest the errors and obtain accurate and fair results from an ALJ. This is a misallocation of resources and effort and will not be corrected by the Proposed Rule.

II. The Proposed Rule Fails to Address the Real Problem—*a Lack of Consistent and Uniform Enforcement*—and Instead Sacrifices Accuracy and Due Process for Hoped for Consistency and Objectivity.

MSHA repeatedly states in the Proposed Rule that the goals of the new Part 100 are to simplify the criteria and rules, to place an increased emphasis on more serious hazards, to increase objectivity and clarity in the citation and order process, and to improve consistency in the application of the criteria. Said another way, MSHA wants to minimize areas of disagreement, speed up the process, and get mine operators to accept proposed penalties and pay them quicker.

To get there, MSHA wants to dumb-down several of the "Inspector's Evaluations" to compensate for the lack of consistency that exists in the inspector's knowledge of the existing criteria regarding Gravity and Negligence. In my opinion, MSHA wants to simplify the evaluation process *so that it can increase penalties and reduce the number of modifications in contest proceedings*. MSHA attempts to shift the blame to the industry for lodging too many contests and has created a Proposed Rule that sacrifices accuracy and due process for a pipedream of consistency and objectivity.

I believe the new proposed criteria will not lead to the hoped for consistency or quick payments that MSHA wants. For instance, unless MSHA agrees that all conduct previously categorized as High Negligence falls within the new

"Negligent" category, I foresee many heated disputes over where that conduct falls in the new criteria because no operator wants conduct to be described as Reckless Disregard. In other words, High Negligence citations under the existing rules that might have been resolved short of trial with operators accepting that designation will now be more likely to go to trial because operators will be less willing to accept the label of Reckless Disregard. In any event, if the Proposed Rule is not abandoned or considerably restructured, MSHA should clarify this issue as part of its Final Rule and agree that all High Negligence conduct will fall within the new "Negligence" definition.

The proposed changes to the Negligence criteria also are troubling because they run counter to statements by MSHA in prior rulemaking and, importantly, will encourage *less* safe behavior by mine operators than under the existing rules. Specifically, MSHA's Final Rule, "Criteria and Procedures for Proposed Assessment of Civil Penalties," issued on May 21, 1982 created the five existing categories of Negligence. In doing so, MSHA stated in the Preamble: "In developing these categories, MSHA has responded to the concerns of commenters that further clarification of the allocation of negligence points was necessary and that due consideration be given to all factors bearing on the operator's negligence." In other words, more specificity was needed so that these conduct-related designations *would be more accurate*, which is what remains important to the industry and general public today.

Of even more significance, MSHA also stated in the 1982 Preamble that:

> MSHA has developed these categories of negligence, which include mitigating circumstances, to allow the inspector the flexibility to consider all of the facts and circumstances surrounding a violative condition or practice. For example, an inspector may determine that the negligence involved is low or moderate where there is a reasonable likelihood of a reasonably serious injury occurring from the condition or practice because the operator, although negligent, has taken measurable steps to prevent the violation or protect miners from exposure to the hazard. Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct or limit exposure to a violative condition or practice. An operator's action could be taken into consideration to the extent that it directly relates to the specific violation cited.

In other words, MSHA consciously recognized that factoring in mitigating circumstances would promote miner safety because mine operators would be incentivized to "take measurable steps to prevent the violation or protect miners from exposure to the hazard." **By removing all consideration of mitigating circumstances from the Negligence criteria in the Proposed Rule, MSHA is now undermining the "first priority" of the Mine Act: to protect "the health and safety of its most precious resource—the miner."** Murray Energy strongly encourages MSHA to abandon the Proposed Rule, or at least the proposed Negligence criteria, because of the negative impact it will have on miner safety. MSHA should continue to encourage mitigation to improve miner safety.

Additionally, I foresee many disputes over the new proposed Gravity (Likelihood) criteria. It appears that MSHA is attempting to abandon, or at least significantly change, decades of legal precedent regarding the S&S analysis. In particular, MSHA is proposing a definition of "Reasonably Likely" that is much broader than the third prong of the *Mathies* test. Certainly, operators are going to contest whether this new definition is consistent with the Mine Act and the prior decisions.

And the Proposed Rule vaguely defines "Unlikely" as including "little or no likelihood." I envision that there will be disputes over what "little" means and a tendency of MSHA inspectors to place what would have been Unlikely conditions under today's rules into the new Reasonably Likely category. This in turn will result in more S&S designations and thus more unwarrantable failures and more POV violations. While this may improve MSHA's statistics, it will do very little, if anything, for miner safety.

Finally, the new "Occurred" criterion could be read broadly to include a large amount of conduct that, under the existing rules, would be Reasonably Likely or Unlikely. For example, an operator's one time "practice" of failing to realign a belt could "cause the event" of coal accumulations that come into contact with multiple belt rollers, which "could have resulted in an injury or illness," or they could not have. Certainly, operators will contest these types of over-reaching designations.

Overall, if MSHA really wants to improve consistency in the application of its criteria, reduce the number of contests of its citations and orders, and increase the prompt payment of its assessed penalties, then MSHA should withdraw the Proposed Rule, re-evaluate the training of its District Managers, Assistant District Managers, Supervisory Coal Mine Inspectors, and Coal Mine Inspectors, and

ensure that the existing criteria and rules are better understood and more consistently applied by these individuals.

III. Third, MSHA Should Not Try to Bind the Commission to Part 100, but Should Bind Its Own CLRs and Attorneys to Part 100 During Pre-Hearing Settlement Negotiations.

It is true that the Commission and its ALJs often issue decisions and set penalties that appear to me to be arbitrary. The Commission has no criteria or guidance similar to Part 100 to assist its ALJs in setting penalty amounts. As a result, we believe that ALJs are often left guessing as to how to turn the six statutory criteria into an appropriate penalty amount.

We have raised these precise issues in a case currently before the Commission involving special assessments, *American Coal Co.*, Docket LAKE 2011-701. In that case, we have argued that the Commission and its ALJs should be guided by—*although not bound to*—the regular assessment mechanism in Part 100 from which baseline penalties may be drawn and "substantial divergences" explained.

Two ALJs have recently agreed with this approach. ALJ Zielinski stated that, "absent some guideline, ... a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $1.00 and $70,000," that the "Secretary's regulations for determining a penalty amount by regular assessment . . . take into consideration all of the statutory factors that the Commission is obligated to consider," and that the "product of that regular assessment formula provides **a useful reference point** that would promote consistency in the imposition of penalties by Commission judges." *American Coal Co.*, 35 FMSHRC 1774, 1823 (June 13, 2013) (ALJ Zielinski) (emphasis added). And ALJ McCarthy held that, "although the Commission is not bound by the Secretary's proposed penalty or the § 100.3 point scheme, I find that the regulations at least provide **a helpful guide** for assessing an appropriate penalty that can be applied consistently." *Magruder Limestone Company, Inc.*, 35 FMSHRC 1385, 1411-12 (May 21, 2013) (ALJ McCarthy) (emphasis added).

But unquestionably, the Mine Act expressly delegates to the Commission—not to the Secretary—the authority to assess all civil penalties. As a result, if MSHA attempts to bind the Commission to Part 100—thereby removing or at least severely limiting the authority to assess penalties—MSHA will be violating the

Mine Act. This is why we have advocated that the Commission be guided by—*but not bound to*—Part 100 and why MSHA should do the same.

Furthermore, the Commission is an adjudicative body that conducts evidentiary hearings and ensures that mine operators are afforded due process (and other constitutional protections). Removing or limiting the authority of the Commission to assess penalties could in turn remove or limit the Commission's ability to evaluate or effectively resolve due process or constitutional issues.

Finally, Murray Energy was shocked that MSHA is seriously considering binding the Commission to Part 100 *when MSHA's own attorneys and CLRs do not follow Part 100.* Specifically, inspectors routinely issue citations with exaggerated evaluations not based on any, or very little, evidence. When contested, CLRs or MSHA's attorneys often will agree to modify the paper to accurately reflect what should have been the correct evaluations at the time the citations were issued, but at the same time only agree to reduce the penalties by a maximum of 30%. Almost always, applying Part 100 to these paper changes would result in much greater reductions, very often to 60% to 70%.

Based on my experience, I believe multiple districts have internal caps on the penalty reductions (usually 30%) that can be given *regardless of the paper changes warranted by what is often undisputed evidence.* This perverse system encourages inspectors to issue inflated, exaggerated paper, after which MSHA can agree to modify the paper to what it should have been in the first place but keep much of the inflated penalty. This strikes me as a type of government-sponsored Ponzi scheme. But sadly, in these situations, the industry is forced to choose between accepting the right paper but with the wrong penalty or incurring the significant expense and burden of contest proceedings and a hearing before an ALJ to obtain the accurate paper and penalty.

Our government should not be acting this way. We strongly urge MSHA to reconsider the Proposed Rule and withdraw it completely. Our formal and detailed comments will be filed timely.

Thank you. I am more than happy to take questions.

Jeff Kratz
MSHA Public Hearing
December 4, 2014

Good morning ladies and gentleman of the panel. Thank you for hosting this hearing and for the opportunity to provide comments today. My name is Jeff Kratz and I am representing the Institute of Makers of Explosives or "IME". IME is the safety and security institute of the commercial explosive industry. Our member companies' products are essential to mining operations. My comments address two issues IME has with MSHA's assessment of civil penalties proposal.

Our first concern relates to MSHA's policy on the assignment of contractor ID numbers. For safety and other reasons, mining companies are increasingly choosing independent contractors to perform their onsite blasting operations. Therefore, IME members are not only producing and transporting explosive materials, but they are also engaged as independent blasting contractors at mine sites. Currently, MSHA issues a unique ID number to each mine location, even though one company may control multiple mines across the nation. In

contrast, MSHA assigns only one ID number to independent blasting contractors irrespective of how many mine sites they service across the country. Among other things, "patterns of violations" status and penalties are based on size of the entity committing the violation, the company's history of violations, and repeat violations associated with an ID number. As a result, contract blasters are exposed to much higher penalties than similarly situated mine operators.

For example, a blasting contractor doing work at two mines but those contractors are employed by the same company would face higher penalties and stiffer fines than a mining company for the same violation because the violations for a mining company will be treated separately for each mine site, but the violations for the blasting contractor will consolidated. MSHA's current policy predisposes blasting contractors who operate at multiple sites to excessive points during the penalty assessment phase, burdens them with larger

monetary fines, and leaves them no option but to contest disproportionate penalties.

Our second concern relates to MHSA's proposed reduction in penalty categories. This proposed change could lead to more severe penalties being issued, or result in less flexibility to negotiate penalty settlements. Currently, MSHA recognizes five penalty categories -- "none", "low", "moderate", "high" and "reckless". The proposal would reduce these categories to three -- "not negligence," "negligence," and "reckless." Other than the penalty category of "reckless", it is likely that the proposed penalty category reduction will result in the assignment of a violation to a category higher of fines and harsher penalties.

IME understands and supports safe working conditions for those working in mining and drilling operations. Our members adhere to best practices contained in IME's "Safety Library Publications," which exceed federal safety requirements when producing, using, and transporting

explosive materials. We respect the important role MSHA plays in protecting mine workers and the general public. Further, we appreciate MSHA's efforts towards improving nationwide consistency and objectivity in enforcement operations. However, the proposed penalty category consolidation will compound the consequences already burdening our industry by the agency's unfair and unjustified ID number assignment policy for contractors. We request that ID numbers for mining companies and blasting contractors be assigned on a site-by-site basis and that no consolidation of penalty categories be made at this time.

Thank you.

I'm happy to field any questions the panel may have.

We understand training of inspectors but there needs to be follow up w/ that training to ensure consistancy & objectivity.

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12/3/14

TESTIMONY OF

JOSEPH CASPER
VICE PRESIDENT, SAFETY SERVICES
THE NATIONAL STONE, SAND, & GRAVEL ASSOCIATION

ON BEHALF OF

THE NATIONAL STONE, SAND, & GRAVEL ASSOCIATION

BEFORE THE MSHA PUBLIC HEARING ON

CIVIL PENALTIES PROPOSAL 30 CFR PART 100 RIN: 1219-AB72

ARLINGTON, VA

December 4, 2014

Thank you for this opportunity to present on our concerns with MSHA's proposed revisions to the civil penalties rule.

The National Stone, Sand and Gravel Association (NSSGA) has helped lead the way to improve safety performance through a number of programs. In each of the past 13 years, aggregates operators have reduced the industry's injury rate from the year-earlier, now 2.11. Also, NSSGA has worked diligently with MSHA to facilitate improvements in inspector consistency and compliance with MSHA standards.

We are concerned with the changes to the treatment of Negligence and Gravity.

Given that the proposal includes no guidance on reconciling current categories of classifying negligence with new categories, there is no way for an operator to understand how an inspector would interpret conditions relative to the proposed categories. For instance, it is unclear how citations that are currently marked as "high negligence" or "low negligence" would be treated under the proposed rule.

And, the elimination of 'high negligence" under the proposal would result in either: 1) "unwarrantable failures" accompanied by findings of "negligent," or 2) an increase in number of "reckless disregard" findings to support "unwarrantable failures." Both scenarios are problematic. With respect to the first, an "unwarrantable failure" must be 'more than ordinary negligence' and therefore not supported by a finding that an operator was "negligent." If MSHA were able to support an "unwarrantable failure" by finding only that an operator was "negligent,"

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it would result in a dilution of the meaning "unwarrantable failure," and in turn increase in 104-d citations.

Regarding the second possible consequence, if "negligent" is deemed insufficient for supporting an "unwarrantable failure," this would require use of "reckless disregard" to support a 104-d. An increase in "reckless disregard" findings would obviously result in increased penalties, and most likely an increase in number of enforcement actions considered for a "flagrant" violation.

Also, we urge MSHA to be cognizant of the fact that the classification of a citation as "reckless disregard" as opposed to "high negligence" will expose operators to a major increase in civil litigation because there are a number of states in which such a classification can trigger an exemption in workers' compensation coverage.

The proposed rule would eliminate the consideration of mitigating factors, something that is critical to a full evaluation of operator culpability for alleged violations.

We strongly oppose these proposed changes on "negligence."

Another major concern, regarding "gravity," is the changes to the "likelihood" of occurrence criteria. The proposed definitions would change this consideration to whether an <u>event</u> – not an injury - has occurred. This will result in an increase in "Occurred" designations, which will lead to increased penalties. So, the proposed definition would be based on the inspector's interpretation as to whether or not the event is one that "could have resulted in an

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injury or illness." This would appear to run directly counter to the aim of improved objectivity and consistency. Accordingly, the proposed definition would lower the burden for a "Significant and Substantial" ("S&S") designation from a condition with a reasonable probability of causing an injury...to a condition with even a slim possibility for causing an injury.

The proposed definition of "reasonably likely" also raises a point of uncertainty, namely the relationship between it and "S&S" designations. The Secretary's proposed definition of "reasonably likely" is "Condition or practice is likely to cause an event that <u>could</u> result in an injury or illness" (emphasis added). Violations are properly designated as "S&S" "if - based upon the particular facts surrounding the violation - there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." The Commission has emphasized that "it is the <u>contribution</u> of a violation to the cause and effect of a hazard that must be significant and substantial."

These proposed changes will lead to greater subjectivity, not less. Also, these changes would make it more difficult for intelligent conferencing of citations. Further, there is no explanation as to assumptions an inspector should make in evaluating levels of gravity. So, these revisions will yield more disagreements over citations, and thus more contests. And these changes risk radically altering three decades of case law. We strongly oppose these changes.

<u>Authority of Federal Mine Safety & Health Review Commission Should Not Be Curbed</u>

The rule attempts to dramatically curb the role of the Federal Mine Safety and Health Review Commission; this is fundamentally wrong for a number of reasons. The proposed

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change is contrary to both the 1977 Mine Act, which called for third party review of contested citations. Also, this proposal is contrary to Federal Mine Safety and Health Review Commission precedent. We believe that no deference should be afforded to the Secretary's proposed penalties, and strongly oppose these changes.

Assessment Costs Should Not Go Up By Virtue of This Rule

MSHA claims that the proposed amendments would have resulted in $2.7 million less in assessed penalties for citations issued in 2013 than was assessed under the current penalty regulations. NSSGA performed calculations of cost impacts for small, medium and large operations – with both current and proposed regulations definitions and factors in place - and found penalty assessment cost increases ranging between 50 and 80 percent. These costs will be borne by customers working to construct housing, office buildings, schools, hospitals and highways needed by our communities and for economic recovery. These cost increases fly in in the face of MSHA's assertion that operators will see a reduced level of penalty assessments.

MSHA Should Use This Opportunity To Grant Enforcement Credit to Excellent Operators

Finally, we believe that this proposal fails to take the opportunity to develop an approach for granting some measure of enforcement credit to excellent operators. This could be done by re-instituting the "Single Penalty" provision in place before the 2008 Part 100 changes, and/or by implementing the NSSGA-supported 'Pattern of Compliance' program of granting some enforcement relief (from some of the mandatory two mandatory inspections of surface facilities, or 4 mandatory inspections of underground facilities) for operators with an excellent record of

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compliance and safety. These are compelling ideas that would further boost compliance. Thank you for consideration of these comments.

Conclusion

NSSGA strongly opposes key provisions of this proposal because, just as industry and MSHA have worked diligently to achieve improvements in compliance and inspector consistency, these provisions will foster less consistent enforcement and compliance. Accordingly, such factors would result in increased burden on operators which would serve to impede continued efforts to successfully manage for workplace safety and health, and compliance with standards. Further, this proposal fails to meet the agency's stated goals of: 1) improving inspector objectivity and consistency, 2) earlier resolution of enforcement issues, 3) greater emphasis on more serious safety and health conditions, and 4) provide increased fairness and transparency in penalty criteria.

NSSGA would be pleased to work with MSHA to develop a more positive approach to improving Part 100. We will submit written comments in time for the January 9, 2015 deadline. Thank you.

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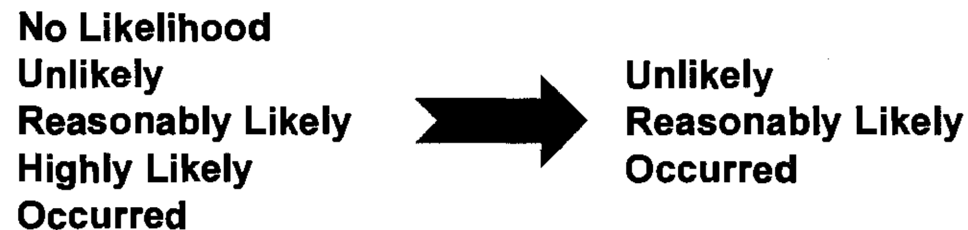
What Is The Main Outcome?

- Compressed penalty criteria, which are more subjective and unclear



- Our data analysis assumes categories will trend towards the middle
  - Low & High → Negligent; Unlikely & Highly Likely → Reasonably Likely
- Revised categories will lead to increased penalties

HENRY CHAJET

Part 100

Example Citation

#1

Part 100 Criteria Category Gravity: Likelihood

Proposed Rule

The proposal would reduce the existing five categories of Likelihood of the occurrence of an event against which a standard is directed to three: (1) Unlikely; (2) Reasonably Likely; or (3) Occurred.

"These proposed changes would simplify the enforcement process, *improve objectivity and consistency*, ..."

79 Fed. Reg. at 44503 (emphasis added)

Comments

While MSHA believes this will improve objectivity, it is our view that is will only increase the subjectivity of the evaluation of the citation.

Our belief is based on the newly defined Likelihood criteria in the proposed rule which is a deviation from numerous years of case law set forth by FMHSRC decisions.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation. Both are items which are contrary to the proposed rule's stated intentions.

Part 100 Likelihood Definition Change #1

New "Reasonably Likely" Definition

"A condition or practice that is likely to cause an event that could result in an injury or illness.

79 Fed. Reg. at 44503 (emphasis added)

This new definition eliminates the reasonable probability requirement that the condition/practice *will* result in an injury and reduces it to the possibility that the condition/practice *could* result in an injury.

This will lead to an increase of subjectivity which will in turn lead to further complications and disagreements in regards to enforcement instead of simplification, improved objectivity and consistency as stated goals by the proposal.

Citation Example - Condition or Practice *(as written)*

When checked, both off side sanders on the No. 2 Brookeville mantrip, serial #8131, were not being maintained in a working condition. The sanders would not open and allow sand to flow from the reserves.

Let's review the actual citation to see the subjectivity impact of this newly defined criterion.

Part 100 Citation Example #1

Mine Citation/Order

[illegible]	[illegible]	[illegible]
Likelihood		Reasonably Likely
[illegible]		[illegible]rk Days
Persons Affected		Yes
Negligence		Negligent

When checked, [illegible] sanders on the No.2 Brookeville mantrip, serial# 8131, were not being maintained in a working condition. The sanders would not open and allow [illegible] to flow from the reserves.

Standard 75.1403 was cited 9 times in two years at mine [redacted] (9 to the operator, 0 to [illegible])

[illegible]	[illegible]	[illegible]
Mine Size Points	11	2
Controller Size Points	10	4
History Points	8	8
Repeated Violation Points	9	1
Negligence Points	10	15
Gravity Likelihood Points	10	14
Gravity Injury Points	5	5
Gravity Persons Points	18	1
Total Points	72	50
Point Penalty	**$293**	**$1,800**
Good Faith Penalty	**$263**	**$1,620**
Additional Good Faith Penalty		**$1,260**

8. Violation: Safety; Part/Section of Title 30 CFR: 75.1403

12. Type of Action: 104(a) — Citation

14. E. Citation/Order Number: 8069199 — F. Dated: 01/14/2009

16. Termination Due — Time (24 Hr. Clock): 1930

17. Action to Terminate: The [illegible] and now open and [illegible] and to flow from the reserves.

18. Terminated — A. Date: 05/02/2013 — B. Time (24 Hr. Clock): 1920

19. Type of Inspection: E01

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Part 100

Example Citation

#2

Part 100 Likelihood Definition Change #2

New "Occurred" Definition

"A condition or practice has caused *an event* that has resulted or *could have* resulted in an injury or illness.

79 Fed. Reg. at 44503 (emphasis added)

This new definition is contrary to MSHA's Citation and Order Writing Handbook, which directs MSHA inspectors that the Occurred criterion, "can *only* be checked when an injury or illness *has actually* occurred."

MSHA Handbook Number PH13-I-1(1), p.11 (emphasis added)

Citation Example - Condition or Practice *(as written)*

Roof and Ribs where miners work and travel shall be supported or otherwise protected. When checked, an area of draw rock is present in the Left Return outby the 001/0 MMU at survey spad 9965 between breaks 79-80. The rock in this area is separated from the mine roof 1-4 inches in various locations between the breaks, with multiple pieces of rock already fallen to the mine floor. The biggest piece of rock pulled measured 2 feet long by 10 inches wide, up to 2 inches thick. Test holes in this area reveal cracks at 12 and 29 inches. The roof is showing signs of deterioration and cutting along the right hand rib and top is cracked in multiple locations between the breaks. The operator had previously set cribs along the left rib inby break 80. Failure to place additional support exposes miners to hazards related to falls of roof and ribs. Miners travel this entry on a regular basis.

Standard 75.202(a) was cited 3 times in two years at mine ####### (3 to the operator, 0 to a contractor).

Let's review the actual citation to see the impact of this newly defined criterion.

Part 100 Citation Example #2

Mine Citation/Order

U.S. Department of Labor
Mine Safety and Health Administration

1 Date: 08/14/2013 — 2 Time (24 Hr. Clock): 0727

8 Condition or Practice:

Roof and ribs where miners work and travel shall be supported or otherwise protected. When checked, an area of draw rock is present in the Left Return outby the 001/0 MMU at survey spad 9965 between breaks 79-80. The rock in this area is separated from the mine roof 1- 4 inches in various locations between the breaks, with multiple pieces of rock already fallen to the mine flour. The biggest piece of rock pulled measured 2 feet long by 10 inches, wide up to 2 inches thick. Test holes in this area reveal cracks at 12 and 29 inches. The roof is showing signs of deteration and cutting along the right hand rib and the top is cracked in multiple locations between the breaks. The operator had previously set cribs along the left rib inby break 80. Failure to place additional support exposes miners to hazards related to falls of the roof and ribs. Miners travel

9 Violation — C Part/Section of Title 30 CFR: 75.202(a)

10 Gravity — A Injury or Illness: Reasonably Likely ☑ — B: Permanently Disabling ☑ — C Significant and Substantial: Yes ☑ — D Number of Persons Affected: 001

11 Negligence: C Moderate ☑

12 Type of Action: 104(a) — 13 Type of Issuance: Citation ☑

Reasonably Likely ☑

16 Termination Due — A Date: 08/14/2013

Permanently Disabling ☑

001

Moderate ☑

19 Type of Inspection: E01

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Part 100

Example Citation

#3

Part 100 Criteria Category Negligence

Proposed Rule

The proposal would reduce the five existing categories of negligence to three: (1) Not Negligent; (2) Negligent; or (3) Reckless Disregard. It would also re-define "Negligent" to eliminate mitigating circumstances.

"MSHA believes that reducing the number of negligence categories would improve objectivity and consistency in the evaluation of negligence, resulting in fewer areas of disagreement,...."

79 Fed. Reg. at 44502

Comments

While MSHA believes this will improve objectivity, it is our view that is will only increase the subjectivity of the evaluation of the citation.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation, especially when the evaluation jumps to the next available selection because the previous selection is no longer available. Both are items which are contrary to the proposed rule's stated intentions.

Also, by eliminating the "High Negligence" category, it remains unknown to how 104 d citations will be issued going forward, since FMSHRC decisions have established that criteria as a requirement.

Part 100 Scenario High/Med/Low

Mine Citation/Order

U.S. Department of Labor
Mine Safety and Health Administration

1. Date: 11/14/2013
2. Time (24 Hr. Clock): 1615

Based on the analytical results of a rock dust survey collected on 11/6/2013 by MSHA Inspector [redacted] the survey is non-compliant. The results show that two samples collected inby the loading point are below the required 80% incombustible content. Bag number 0033080AA collected on the 003-0 MMU 40 feet outby s.s. 2716 in the No 2 entry (Intake) was 76.9% and bag number 0033081AA collected on the 003-0 MMU40 feet inby s.s. 2026 in the No 4 entry (Belt) was 77.9% of the required incombustible content. The operator shall provide additional rock dust to the cited area which will extend 500 feet inby and outby the cited area.

Standard 75.403 was cited 6 times in two years at mine [redacted] (6 to the operator, 0 to a contractor).

C. Part/Section of Title 30 CFR: 75.403

10. Gravity:
A. Injury or Illness (has) (is): No Likelihood ☐ Unlikely ☑ Reasonably Likely ☐ Highly Likely ☐ Occurred ☐
B. Injury or Illness could reasonably be expected to be: No Lost Workdays ☐ Lost Workdays Or Restricted Duty ☐ Permanently Disabling ☐ Fatal ☑
C. Significant and Substantial: Yes ☐ No ☑
D. Number of Persons Affected: 005

11. Negligence (check one): A. None ☐ B. Low ☐ C. Moderate ☐ D. High ☑ E. Reckless Disregard ☐

12. Type of Action: 104(a)
13. Type of Issuance (check one): Citation ☑ Order ☐ Safeguard ☐ Written Notice ☐

14. Initial Action: A. Citation ☐ B. Order ☐ C. Safeguard ☐ D. Written Notice ☐

15. Area or Equipment

16. Termination Due: A. Date 11/15/2013 B. Time (24 Hr. Clock) 0700

17. Action to Terminate

18. Terminated: A. Date B. Time (24 Hr. Clock)

19. Type of Inspection (activity code): E01
20. Event Number
21. Primary or Mill
22. Signature
23. AR Number

Likely

egard

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Part 100

Example Citation

#4

Part 100 Criteria Category Gravity: Severity

Proposed Rule

The proposal would reduce the four existing categories of severity of injury or illness to three: (1) No Lost Workdays; (2) Lost Workdays or Restricted Duty; or (3) Fatal. It would eliminate the existing "Permanently Disabling" category, which is often difficult to anticipate.

"Consistent with proposed changes for other criteria, *MSHA believes that reducing the number of categories would simplify the Severity factor, resulting in improved objectivity and consistency in the enforcement process."*

79 Fed. Reg. at 44503

Comments

While MSHA believes this will improve objectivity, it is our view that is will only increase the subjectivity of the evaluation of the citation.

With increased subjectivity of the evaluation, this will lead to an increase in penalties and litigation, especially when the evaluation jumps to the next available selection because the previous selection is no longer available. Both are items which are contrary to the proposed rule's stated intentions.

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Part 100 — Scenario High/Med/Low

Likelihood	[...]bly Likely
Severity	[...]al
Persons Af[...]	[...]s
Negligence	[...]gent

Mine Citation/Order — U.S. Department of Labor, Mine Safety and Health Administration

Section I—Violation Data

1. Date Mo Da Yr: 03/13/2013
2. Time (24 Hr Clock): 1745
3. Citation/Order Number: [redacted]
4. Served To: [redacted]
5. Operator: [redacted]
6. Mine: [redacted]
7. Mine ID: [redacted] (Contractor)
8. Condition or Practice — 8a. Written Notice (103g) ☐

The operator failed to maintain the outby scoop serial #39361-4/95 in permissible condition and this scoop is used in the return. The breaker panel had a 1/2" bolt 1/4" from being tightened completely down due to the bolt was a 1/4" too long and not being the same size as all of the rest of the bolts in the panel causing the bolts to not all be in uniform. The pump motor conduit was damaged in three different places and not properly repaired. The tram motor packing gland was not run down to the required 1/8" to 1/4", it was found to be out to 1/2" when measured with a standard rule.

Standard 75.503 was cited 11 times in two years at mine [redacted] (11 to the operator, 0 to a contractor).

See Continuation Form (MSHA Form 7000-3a) ☐

9. Violation: A. Health ☐ Safety ☑ Other ☐ — B. Section of Act — C. Part/Section of Title 30 CFR: 75.503

Section II—Inspector's Evaluation

10. Gravity:
- A. Injury or Illness (has) (is): No Likelihood ☐ Unlikely ☑ Reasonably Likely ☐ Highly Likely ☐ Occurred ☐
- B. Injury or Illness could reasonably be expected to be: No Lost Workdays ☐ Lost Workdays Or Restricted Duty ☐ Permanently Disabling ☑ Fatal ☐
- C. Significant and Substantial: Yes ☐ No ☑
- D. Number of Persons Affected: 001

11. Negligence (check one): A. None ☐ B. Low ☐ C. Moderate ☑ D. High ☐ E. Reckless Disregard ☐

12. Type of Action: 104(a)
13. Type of Issuance (check one): Citation ☑ Order ☐ Safeguard ☐ Written Notice ☐

14. Initial Action: A. Citation ☐ B. Order ☐ C. Safeguard ☐ D. Written Notice ☐ — E. Citation/Order Number — F. Dated Mo Da Yr

15. Area or Equipment

16. Termination Due: A. Date Mo Da Yr 03/19/2013 — B. Time (24 Hr Clock) 0700

Section III—Termination Action

17. Action to Terminate

18. Terminated: A. Date Mo Da Yr — B. Time (24 Hr. Clock)

Section IV—Automated System Data

19. Type of Inspection (activity code): E01
20. Event Number: [redacted]
21. Primary or Mill
22. Signature: [redacted]
23. AR Number: [redacted]

MSHA Form 7000-3, Apr 08 (revised) In accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996, the Small Business Administration has established a National Small Business and Agriculture Regulatory Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. The Ombudsman annually evaluates enforcement activities and rates each agency's responsiveness to small business. If you wish to comment on the enforcement actions of MSHA, you may call 1-888-REG-FAIR (1-888-734-3247), or write the Ombudsman at Small Business Administration, Office of the National Ombudsman, 409 3rd Street, SW MC 2120, Washington, DC 20416. Please note, however, that your right to file a comment with the Ombudsman is in addition to any other rights you may have, including the right to contest citations and proposed penalties and obtain a hearing before the Federal Mine Safety and Health Review Commission.

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Industrial Minerals Association — North America

Testimony of Mark G. Ellis
President
Industrial Minerals Association – North America

on behalf of the

Industrial Minerals Association – North America

before the

Mine Safety & Health Administration

regarding

MSHA's Proposed Rule Regarding Criteria and Procedures for Assessment of Civil Penalties
RIN 1219-AB72, Docket No. MSHA-2014-0009

December 4, 2014

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

Good morning. I am Mark Ellis, and I am the President of IMA-NA -- the Industrial Minerals Association – North America. IMA-NA is a Washington, DC-based trade association created to advance the interests of North American companies that mine or process minerals used throughout the manufacturing and agricultural industries. In addition, IMA-NA represents associate member companies that provide equipment and services to the industrial minerals industry. IMA-NA's producer membership is comprised of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. As such, the nonmetal mines sited in the United States are subject to MSHA jurisdiction and the requirements of 30 CFR Part 100, MSHA's civil penalty regulations. IMA-NA appreciates the opportunity to put these comments before MSHA for consideration.

IMA-NA supports MSHA's stated intent in the proposed rule to simplify the criteria for assessing civil penalties, which will promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues. The presence of a fair and effective program for the assessment and resolution of civil penalties is an important tool for MSHA to ensure compliance with the Federal Mine Safety and Health Act of 1977 and its associated regulations.

Nevertheless, the proposed rule's attempt to change the scope of authority of the Federal Mine Safety and Health Review Commission from *de novo* review to a diminished and restricted role exceeds the legal authority granted to MSHA by the Mine Act and subverts Congress's intent when enacting the Mine Act. Moreover, the proposed rule's requested simplification of the gravity and negligence of alleged violations, when combined with the proposed changes to FMSHRC's authority, transgresses all reasonable bounds of a mine operator's constitutionally protected due process rights, leaving the Commission's role to decide cases as an impartial adjudicator of alleged violations of the Mine Act largely illusory.

IMA-NA's principal witness today, Andrew O'Brien, is the Chair of IMA-NA's Safety

and Health Committee.

With that segue, I will turn things over to Andy.

Industrial Minerals Association — North America

Testimony of Andrew O'Brien, M.S., CIH, CSP
Vice President, Safety & Health
Unimin Corporation

on behalf of the

Industrial Minerals Association – North America

before the

Mine Safety & Health Administration

regarding

MSHA's Proposed Rule Regarding Criteria and Procedures for Assessment of Civil Penalties
RIN 1219-AB72, Docket No. MSHA-2014-0009

December 4, 2014

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

Good morning. My name is Andrew O'Brien, and I am the Vice President of Safety & Health for Unimin Corporation. I am pleased to testify before you this morning on behalf of IMA-NA concerning MSHA's proposed rule regarding criteria and procedures for assessment of civil penalties. As Mark just noted, IMA-NA, and its member companies, strongly oppose provisions in MSHA's proposed rule that would subvert the statutory role for *de novo* review accorded by Congress to the Mine Safety and Health Review Commission in the Mine Act.

But first, let me provide some background on myself and Unimin.

I am a Certified Industrial Hygienist and Certified Safety Professional with a Master of Science degree in Industrial Hygiene and a B.S. degree in Safety Engineering. I am currently the Vice President of Safety & Health for Unimin Corporation. Founded in 1970, Unimin has grown from a small, local sand mining company to become a leading producer of non-metallic industrial minerals in the Worldwide Sibelco Group. We are the largest producer of industrial sand in each of the United States, Canada and Mexico, and, along with our affiliates in other countries, we are the largest producer in the world. I am responsible for the safety and health of Unimin's employees throughout North America, with a current census of approximately 2,400 individuals. As Mark also noted I am the chairman of IMA-NA's Safety and Health Committee.

Through its proposed rule, MSHA would reduce the range of possible violations, thus shrinking a mine operator's ability to challenge the agency's actions, while at the same time greatly limiting the Commission's authority to review the agency's enforcement action. The careful balance of the administrative enforcement process crafted by the Mine Act would tilt unconstitutionally in favor of unchecked agency power to cite, assess, and enforce civil penalties with little recourse for the affected parties. Such a change would tread on mine operators' constitutionally protected due process rights and almost certainly lead to protracted federal litigation. The civil penalty enforcement process would thus become anything but simplified as mine operators would have no choice but to appeal thousands of constitutionally inadequate Commission decisions through the federal court system.

I'd like to offer a relevant quote that we regarded as insightful, **quote** "Congress created the Commission to serve as a completely independent adjudicatory authority which would review orders, citations, and penalties and which, by providing administrative adjudication of disputed cases under the Mine Act, would preserve due process and instill much more confidence in the program." **unquote** The author of that quote is Mr. Christian Schumann, who currently is the Counsel for Appellate Litigation in the Office of the Solicitor's Division of Mine Safety and Health. He further has opined, **quote** "the Commission, like a court, plays a role -- ensuring that the government acts within the parameters of the law and that private parties receive due process of law -- which is critically important to the administration of justice and, at the same time, limited in scope." **unquote** We agree with Mr. Schumann. By the way, these quoted observations can be found in a West Virginia University law review article that IMA-NA cites in our written comments.

MSHA's proposed rule regarding the Commission's authority to assess penalties under the Mine Act has two alternatives, and a third, which would make no change to existing regulations, but would leave open the possibility that MSHA would pursue its agenda on an informal or case-by-case basis. Under the first alternative, sections 100.1 and 100.2 would be revised such that **quote** "if the Secretary meets his burden to prove the penalty-related facts alleged, part 100 would require the ALJ to assess MSHA's proposed penalty." **unquote**.

Likewise, alternative two would give the Commission some ability to modify MSHA's mandatory penalties, but only under heightened requirements, which the proposed rule claims are akin to the Federal Sentencing Guidelines, at least before those guidelines were found to be unconstitutional by the Supreme Court. MSHA's proposed heightened requirements include: 1) mandating that ALJs identify aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Secretary when formulating the penalty regulations, 2) consider MSHA's policy statements which have not been subject to rule-making proceedings, 3) list a statement of reasons for assessing the penalty, and 4) consider the statutory penalty criteria.

On top of the proposed changes to the scope of the Commission's authority to assess penalties, MSHA also proposes **quote** "simplifying" **unquote** its citation form and associated penalty calculations with respect to the possible ranges of negligence, gravity, and other statutory criteria identified by the Act. This simplification would, for example, constrain MSHA inspectors to only three options for an operator's level of culpability: not negligent, negligent, or reckless disregard. As a result, MSHA inspectors will lose the discretion to issue a citation for high negligence and will instead likely issue more citations under the categories of reckless disregard, which, in turn, will result in higher penalty assessment against operators.

Similarly, by deleting categories of gravity, the default position for MSHA will likely fall on the serious side. For example, MSHA inspectors will no longer have no likelihood or permanently disabling as options on the citation form and thus MSHA inspectors will necessarily have to choose higher levels of likelihood, including occurrence of a fatality, as designations on the citation. Thus, mine operators will experience more significant and substantial citations and higher penalties as a result.

IMA-NA's objection to the proposed rule is as fundamental as it is straightforward: alternative one takes the power to issue penalties, which is exclusively vested by the Mine Act in the Commission, and puts it into the hands of the Secretary. It effectively makes MSHA's proposed penalties the mandatory penalties, so long as the ALJ upholds the underlying violations and its associated factors such as negligence, size of the operator, and gravity, among others. At the same time, MSHA's **quote** "simplification" **unquote** of the citation form and the re-weighting of the penalty criteria will likely force MSHA inspectors to choose higher levels of negligence, as well as other penalty factors, when issuing citations.

As a result, the proposed rule strengthens MSHA's enforcement power and increases the likely penalties against operators, while at the same time greatly limiting the Commission's ability to review MSHA's enforcement action and the Commission's power to assess alternative penalties as envisioned by the Mine Act. Likewise, alternative two mandates that the Commission apply MSHA policy statements, among other things, in addition to the statutory

criteria provided in the Act. It thus imposes more stringent requirements on the Commission than those imposed by the Act and demands that the Commission apply additional factors beyond those identified in the Act.

The effect of the proposed rule's adjustment of the Commission's authority combined with the "simplification" of the penalty criteria in the MSHA citation form would also deprive mine operators their constitutionally protected procedural due process rights. The proposed rule, through either of its suggested alternatives, transforms the Commission's independent authority to review MSHA's enforcement actions into a rubber stamp giving MSHA *carte blanche* to write its own regulations, propose its own penalties, and mandate enforcement without any meaningful opportunity for the regulated to be heard. Here, the risk of error in providing for virtually unchecked agency authority greatly outweighs MSHA's interest in expedited and predicable outcomes.

The Mine Act is unambiguous with respect to the Commission's authority to impose penalties—it is the Commission's, not MSHA's, absolute and exclusive right to assess penalties under the six statutory criteria in the Act. MSHA cannot change the statutory authority of an independent agency whose sole purpose is to provide for an impartial adjudicatory review of MSHA's actions. Therefore, IMA-NA strongly urges MSHA to abandon the proposed rule in its current form. The only avenue for changing the authority of the Commission runs through Congress.

IMA-NA appreciates the opportunity to comment and testify on MSHA's proposed rule on the criteria and assessment of civil penalties, and it stands ready to assist in developing an effective alternative rule in a constructive manner. For example, IMA-NA supports the proposed rule's procedure for a 20 percent reduction in proposed MSHA penalties if such penalties are paid within 30 days. IMA-NA believes such a procedure would result in less litigation overall and would have a net positive effect for operators willing to accept MSHA citations, but who may otherwise be financially constrained from doing so if required to pay 100 percent of the penalty. Likewise, IMA-NA supports the proposed rule's reduction in weight of the persons affected and operator size criteria.

That concludes my prepared remarks and Mark and I would be pleased to entertain questions from the MSHA hearing panel.

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Testimony of Hunter Prillaman on behalf of the National Lime Association

My name is Hunter Prillaman, and I'm here from the National Lime Association. NLA's members have plants in 24 states, and produce greater than 99 percent of the United States' calcium oxides and hydroxides. Because NLA's members operate both surface and underground mines under the jurisdiction of MSHA, NLA and its members have a strong interest in this rulemaking.

NLA has submitted detailed comments on the proposal, and I don't propose to repeat them in detail here. I would just like to address one specific point.

We believe that collapsing the negligence categories from five into three is a mistake, and cuts against the goal of focusing enforcement efforts and penalties on the most serious, and negligent, violations.

In particular, NLA strongly opposes the elimination of the "low negligence" category. Since MSHA rarely, if ever, finds the absence of negligence, the proposed change will result in previously low negligence citations being characterized as negligent—lumped in with violations that previously would have been considered to demonstrate both moderate and high negligence.

This means that violations which would previously have been characterized as low negligence—and there are many of these—will now be given 15 points out of a possible 100, as opposed to 10 points out of a possible 208. This can result in a comparative increase in the penalty by hundreds of dollars, even for a facility with a good compliance record. Just as an example, under the current rule, adding 10 points to the current minimum penalty level would increase the penalty from $112 to $240. Under the proposed rule, adding 15 points would increase the penalty from $112 to $1000. 249

So, rather than simply shifting penalties to more serious violations, the change will result in substantially higher penalties for what would have been considered low negligence violations under the current rules. This is contrary to what MSHA indicated that it is trying to do with this rule.

We can certainly understand the desire to simplify the penalty process. However, the fact is that there are many violations that represent low negligence. These occur at even well-run operations, and were often candidates for the prior single penalty assessment. To treat these minor infractions as the same as those involving more serious negligence is unfair, and does not constitute treating increased negligence as a serious matter. In this case, the proposal makes the penalty-setting instrument too blunt to serve its purpose.

Thanks.