

U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION

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PUBLIC HEARING
PROPOSED RULE - CRITERIA AND PROCEDURES FOR
PROPOSED ASSESSMENT OF CIVIL PENALTIES

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HELD OCTOBER 6, 2006
At The Hilton St. Louis Airport
10330 Natural Bridge Road
St. Louis, Missouri 63134

+ + + + +

9:00 a.m.

+ + + + +

BEFORE:

PATRICIA W. SILVEY, Moderator

PARTICIPANTS:

Agency Panelists:

PATRICIA W. SILVEY, Director
Office of Standards, Regulations
and Variances, MSHA

JAY MATTOS, Acting Director,
Assessments

PETER MONTALI
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Mine Safety and Health

KEITH WATSON
Office of Assessments

PARTICIPANTS (continued):

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P-R-O-C-E-E-D-I-N-G-S

(9:00 a.m.)

MS. SILVEY: Good morning. My name is Patricia W. Silvey, and I am the Acting Director of the Mine Safety and Health Administrations Office of Standards, Regulations and Variances. I will be the moderator of this public hearing today on MSHA's proposed rule concerning civil penalties.

The members of the panel are, to my right, Jay Mattos, who is the Acting Director of MSHA's Office of Assessments and the chair of the Civil Penalty Rulemaking Committee. To his right is Peter Montali, and he's with MSHA's Office of Metal and Nonmetal Mine Safety and Health. To his right is William Crocco, who's with MSHA's Office of Coal Mine Safety and Health. To my left is Jack Powasnik with the Department of Labor's Office of the Solicitor, and he is the attorney on the project. To his left is Robert Stone, who is MSHA's Chief Economist, and his staff provides economic assistance on the project. To his left is Gerry Gunn, and she's in my office as the Regulatory Specialist on the project.

This is the fourth of six hearings on this proposed rule. As many of you know, the first hearing was held in Arlington, the second in Birmingham, the

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1 third was earlier this week in Salt Lake City,
2 today's, and the fifth will be October 17th in
3 Charleston, West Virginia, and the final hearing will
4 be October 19th in Pittsburgh.

5 The comment period for this proposal will
6 close on October 23rd. I want to underscore that in
7 accordance with the MINER Act, we must issue
8 regulations related to the penalty provisions of the
9 MINER Act by December, 2006. We will accept documents
10 today that you would like to submit for the record.

11 This hearing will be conducted in an
12 informal manner. Formal rules of evidence will not
13 apply. Members of the panel may question witnesses;
14 witnesses may ask questions of the panel.

15 Scheduled speakers will make their
16 presentations first, and after that, others will be
17 allowed to speak. It doesn't appear that we're going
18 to have any time issues. After that, others will be
19 allowed to speak. The transcript of this hearing will
20 be posted on the MSHA website within a week.

21 Before I discuss the provisions of the
22 rule, I want to give you a very basic overview of the
23 civil penalty process, beginning with the
24 clarification of four terms that are used throughout
25 this rulemaking.

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1 The first term is "*citation*". The
2 inspector issues a citation for a violation of any
3 MSHA standard, rule, order, safeguard or regulation.
4 The inspector sets a time to abate the condition.

5 The second term is "*order*". The inspector
6 issues an order under several different circumstances.

7 (1) When a violation is not abated within
8 the time allowed by the inspector, including all
9 extensions.

10 (2) When the inspector finds a violation
11 caused by an unwarrantable failure by a mine operator.

12 (3) When the inspector determines that an
13 imminent danger exists. An order requires withdrawal
14 of affected miners until the violation is abated.
15 When an inspector issues an order, the order does not
16 require that the entire mine be shut down. It only
17 applies to the area affected.

18 Third, "*significant and substantial*," or
19 "*S&S Violation*". An S&S violation is one that is
20 reasonably likely to result in a reasonably serious
21 injury or illness. The inspector makes the S&S
22 determination at the time of the issuance of the
23 citation.

24 Finally, "*unwarrantable failure*". This
25 term has been defined by case law to be,

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1 *"aggravated conduct, constituting more than*
2 *ordinary negligence by a mine operator."*

3 Under the Mine Act, MSHA proposes
4 penalties, and the Federal Mine Safety and Health
5 Review Commission -- or the Commission -- assesses
6 penalties. A proposed penalty that is not paid or
7 contested within thirty days of receipt becomes a
8 final order of the Commission by operation of law and
9 is not subject to review by any court or agency.

10 Penalties that are contested before the
11 Commission are reviewed de novo. We will use the term
12 "*assessment*" to refer to MSHA's proposed assessments,
13 as well as assessments that are final orders of the

14 Commission. The Mine Act requires MSHA
15 and the Commission to consider six criteria in
16 assessing civil penalties. The first is the
17 appropriateness of the penalty to the size of the
18 business, the operator's history of previous
19 violations, whether the operator was negligent, the
20 gravity of the violation, and the operator's good
21 faith in abating the violative condition and, finally,
22 the effect of the penalty on the operator's ability to
23 continue in business.

24 The first five criteria are used to
25 compute the penalty amount. The final criterion is

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1 used if the operator makes a request to MSHA, and in
2 the request, asserts that the amount of the penalty
3 negatively affect the operator's ability to continue
4 in business. And in that situation, the operator has
5 to send in supporting documentation, and MSHA may
6 adjust the penalty. MSHA published the proposed rule
7 in the Federal Register on September 8th. A copy of
8 the proposal was placed on MSHA's website and a copy
9 was sent to the Office of Advocacy at the Small
10 Business Administration. Basically, the proposed rule
11 does two things. First, it revises MSHA's civil
12 penalty program to increase penalty amounts and to
13 improve the effectiveness of MSHA's civil penalty
14 process.

15 These changes are intended to induce
16 greater mine operator compliance with the Mine Act and
17 MSHA's safety and health standards and regulations,
18 thereby improving safety and health for miners.

19 As I mentioned earlier, the proposal
20 implements three provisions of the Mine Improvement
21 and New Emergency Response Act of 2006, also known as
22 the MINER Act.

23 The proposal does not change, and I want
24 to underscore, does not change the way inspectors
25 issue citations. Under the proposal, the inspectors

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1 will make factual determinations with respect to
2 safety and health violations and will issue citations
3 and orders just as they do now.

4 Also, please note that while both the Mine
5 Act and the MINER Act contain provisions for criminal
6 fines, this rule, as the name states, only concerns
7 civil penalties.

8 Under the existing rule, MSHA has three
9 types of assessments: the single penalty, the
10 regular and special. I will now address the proposed
11 changes to each type of assessment.

12 I'm going to begin with single penalty,
13 and as I do so, I want to clarify, for the record,
14 what we have done in the proposal with respect to the
15 single penalty. The existing rule provides for a
16 sixty-dollar single penalty for non-S&S violations
17 that are timely abated and where the operator does not
18 have an excessive history of violations. The agency
19 proposes to delete the single penalty provision, but
20 in doing so, the agency will replace the single
21 penalty with the regular formula. And by that, I mean
22 that the single penalty, non-S&S violations, all that
23 will now be processed through the regular formula
24 system.

25 So, by using the term "delete," it doesn't

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1 mean that we're just getting rid of all non-S&S
2 violations and doing nothing with them. They will now
3 be in accordance with the proposal. They will be
4 processed through the regular formula system.

5 In taking this action, the agency believes
6 that eliminating the single penalty and processing
7 those non-S&S violations through the formula system
8 will cause mine operators to focus their attention on
9 preventing all hazardous conditions.

10 Regular assessments are derived by
11 assigning penalty points for the statutory criteria,
12 at least the first finding of the statutory criteria,
13 and then converting the total points to a dollar
14 amount. The penalty point tables are published in
15 Section 100.3 of the rule.

16 Regular assessments are computer-generated
17 through MSHA's Management Information System. The
18 proposed rule would make a number of changes to the
19 process and to the tables used for determining penalty
20 amounts. The point would be revised so that the
21 penalties increase proportionately to increases in
22 operator size, history, and negligence and the gravity
23 or seriousness of the violation.

24 Regular assessment changes are as follows;

25 Size: The size criterion includes the

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1 operator size and controller size. For coal mines,
2 operator size is measured by tonnage of coal produced
3 by that mine during the previous calendar year.

4 For metal and nonmetal mines, operator
5 size is measured by the hours worked at that mine
6 during the previous calendar year.

7 Size for independent contractors is
8 measured by the total hours worked at all mines during
9 the previous calendar year.

10 Under the proposal, the maximum number of
11 points for operator size would increase from ten to
12 twenty. The proposal would continue to assign no
13 points for the smallest operators - coal mines that
14 produce up to 15,000 tons of coal, metal and nonmetal
15 mines with 10,000 or less hours worked, and
16 independent contractors who have worked up to 10,000
17 hours at all mines.

18 Please note that the preamble to the
19 proposed rule states that according to 2005 data,
20 nearly half of the existing coal mines had annual
21 tonnage of up to 15,000 tons. This figure included
22 463 surface facilities that do not produce coal. So,
23 to exclude those facilities would provide a more
24 accurate number, and by doing that, approximately one-
25 fourth of producing coal mines had annual tonnage of

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1 up to 15,000 tons.

2 So, that's a correction from what was in
3 the preamble on size. The proposal makes no changes
4 to size points for controlling entities. In the
5 proposal, MSHA solicited comments on whether, in
6 considering the size of the operator, greater weight
7 should be placed on the size of the controlling
8 entity.

9 So, I invite you to address that issue
10 either in your comments here today or in comments that
11 you might send to us.

12 History of violations: The proposal
13 includes several changes to the history criterion. We
14 will shorten the time period for determining violation
15 history, changing the independent contractor history
16 from an annualized number to the total number of
17 violations, adding a new component for repeated
18 violations of the same standard and increasing the
19 maximum number of history point.

20 Under both the existing rule and the
21 proposal, only violations for which the penalty has
22 been paid or finally adjudicated are included in
23 determining an operator's history.

24 Under the proposal, the time period for
25 determining history would be shortened from twenty-

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1 four months to fifteen months. The agency took that
2 action because we felt like that shorter time period
3 would provide a more accurate picture of the
4 operator's current state of compliance.

5 Both the existing rule and the proposed
6 rule base history for production operators on
7 violations per inspection day. Under the existing
8 regulation, history for independent contractors is
9 based on the average number of violations over the
10 past two calendar years.

11 The proposed rule would change this and
12 use the total number of violations during the previous
13 fifteen months.

14 Since history would no longer be based on
15 twenty-four months, the agency felt like there was no
16 need to annualize the number of violations. MSHA
17 believes that this change would have a de minimis
18 effect on the average assessment issued to independent
19 contractors.

20 In the proposal, MSHA solicited comments
21 on this approach to determining violation history for
22 independent contractors, i.e., whether an annualized
23 average should continue to be used.

24 Again, I invite you to address this issue
25 either here today or in your written comments. The

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1 maximum number of penalty points for this component of
2 violation history would be increased from twenty to
3 twenty-five.

4 The proposal adds a new component to the
5 history criterion for repeat violations of the same
6 standard. Under the proposal, penalty points are
7 added for more than five repeat violations of the same
8 standard during the preceding fifteen months.

9 Under the proposal, repeat violations are
10 determined according to the manner in which the
11 standard is cited, and in the proposal, we said that
12 it would be determined by paragraphs, the citing of
13 paragraph numbers.

14 For example, a violation of Section
15 56.14101(a)(1) would not be considered in determining
16 the number of previous violations of Section
17 56.14101(a)(2).

18 MSHA solicits comments on this approach to
19 determining repeated violations. Penalty points are
20 assigned for the total number of repeated violations
21 during the fifteen-month period.

22 In the proposal, MSHA solicited comments
23 on two additional aspects of repeat violations:

24 (1) Whether penalty points should be based
25 on the total number of repeat violations (as in the

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1 proposal) or on the number of repeat violations per
2 inspection day; and,

3 (2) Whether repeat violations should
4 include all violations (as in the proposal) or only
5 S&S violations.

6 The agency invites you to address these
7 aspects of repeat violations.

8 The new component of violation history
9 would add up to twenty penalty points.

10 The next criterion is negligence. The
11 proposed rule would retain the existing five levels of
12 negligence, and would double the maximum number of
13 penalty points that could be assigned for negligence -
14 from twenty-five to fifty - with the increase placed
15 entirely in the three highest levels. Under the
16 proposal, penalties would increase proportionally for
17 operators who exhibit increasingly higher levels of
18 negligence.

19 Gravity: The proposed rule would retain
20 the three components of gravity - likelihood, severity
21 and the number of persons potentially affected - but
22 would increase the maximum number of penalty points
23 that could be assigned for each component. The maximum
24 total gravity points would increase from thirty to
25 eighty-eight.

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1 Good faith in abating the violation: The
2 existing rule adds ten penalty points if the operator
3 does not abate the violation within the time specified
4 by the inspector, and reduces the total penalty amount
5 by thirty percent if the violation is timely abated.

6 The proposed rule would decrease the
7 reduction for timely abatement to ten percent. Under
8 the proposed rule, no penalty points would be added
9 for violations that were not timely abated.

10 Penalty point conversion table: The
11 dollar amounts on the existing conversion table range
12 from \$72 to the statutory maximum of \$60,000. The
13 statutory maximum corresponds to 100 penalty points,
14 which is the sum of the maximum points for five of the
15 six criteria. The minimum regular assessment is \$60.

16 The proposed rule provides a maximum of 208 penalty
17 points. The revised conversion table begins with
18 \$112. Under the proposal, with the 10% reduction for
19 timely abatement, the lowest penalty amount would be
20 \$100.00. The dollar amount of the penalty increased
21 steadily as the number of penalty points increases.
22 Beginning at 133 points, each additional penalty point
23 corresponds to an increase of approximately \$3,070.
24 The maximum penalty of \$60,000 is reached at 140
25 points. Thus, although all penalties are increased,

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1 violations with the highest number of penalty points,
2 which would generally be those that involve higher
3 negligence and gravity, or greater violation history,
4 will increase at a greater rate.

5 Special assessments are processed where
6 the violation is of such a nature that an appropriate
7 penalty cannot be determined using the regular
8 formula. The existing rule lists certain categories
9 of violations, such as fatalities, serious injuries,
10 and unwarrantable failure, that must be reviewed to
11 determine if a special assessment is appropriate.

12 The proposed rule would remove this list.

13 However, under the proposal, MSHA would retain its
14 discretion to determine which types of violations
15 would be reviewed for special assessment without being
16 limited to a specific list.

17 MSHA anticipates that the proposed regular
18 assessment provision will provide an appropriate
19 penalty for most types of violations. This change
20 will permit MSHA to focus its enforcement resources on
21 more field enforcement activities rather than on
22 administrative review activities.

23 The proposal would shorten the time
24 allowed to request a Health and Safety conference with
25 the district manger from ten days to five days. We've

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1 gotten a lot of comments and testimony on that aspect
2 of the proposal.

3 Including that in the proposal, we believe
4 that it would result in a more effective civil penalty
5 system, because penalties would be assessed closer in
6 time to the issuance of the citation.

7 Finally, as I stated earlier, the proposed
8 rule implements civil penalty provisions of the MINER
9 Act. These provisions were effective on June 16,
10 2006. And by that, I mean MSHA issued a procedure
11 instruction letter to MSHA personnel containing
12 information on procedures for processing violations
13 consistent with the MINER Act, and we are processing
14 those violations right now.

15 Unwarrantable failure citations and
16 orders: The MINER Act establishes minimum penalties
17 of \$2,000 and \$4,000, respectively, for unwarrantable
18 failure citations and orders. The proposed rule
19 includes these two provisions. Basically, as
20 unwarrantable violations are issued today, they are
21 being processed and would receive the minimum penalty
22 amounts, consistent with the MINER Act, either through
23 the regular assessment process or through special
24 assessment.

25 Penalties for "*flagrant violations*:" The

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1 MINER Act established a new penalty of not more than
2 \$22,000 for "flagrant" violations, that is, and those
3 violations, as defined in the MINER Act, are
4 violations involving

5 "A reckless or repeated failure to make
6 reasonable efforts to eliminate a known
7 violation of a mandatory health or safety
8 standard that substantially and
9 proximately caused, or reasonably could
10 have been expected to cause, death or
11 serious bodily injury."

12 As stated earlier, these violations are processed as
13 special assessments and are included in the proposed
14 rule to be processed under the special assessment
15 provision.

16 Failure to notify: The MINER Act
17 establishes a penalty of not less than \$5,000 and not
18 more than \$60,000 for failure to timely notify MSHA of
19 a death or an injury or entrapment with a reasonable
20 potential to cause death. As stated earlier, these
21 violations are processed as special assessments.

22 For those of you who haven't done so,
23 please sign the attendance sheet in the back of the
24 room before. We will post the transcript of all the
25 public hearings on our website. Each transcript will

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1 be posted there approximately one week after the
2 hearing. It will include the full text of my opening
3 statement and the specific issues for which the Agency
4 seeks additional comments.

5 We will now begin today's hearing. Please
6 begin your presentation by clearly stating your name
7 and organization for the reporter.

8 Our first speaker is John Henriksen with
9 Illinois Association of Aggregate Producers.

10 ORAL TESTIMONY

11 MR. HENRIKSEN: Good morning. My name is
12 John Henriksen. I serve as the Executive Director of
13 the Illinois Association of Aggregate Producers, the
14 trade association representing companies that produce
15 crushed stone, sand and gravel.

16 Prior to serving in this association, I
17 worked for four years as a trial attorney for the
18 State of Kentucky's coal mine reclamation program and
19 eleven years as legal counsel for the Illinois
20 Department of Mines and Minerals.

21 I say that not because people love
22 lawyers, but I say that to make this hearing panel
23 understand that my comments are not just a function of
24 my advocacy for the people I serve, but also flow from
25 my experience as an attorney working for government,

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1 enforcing regulations against the mining industry. I
2 have seen both sides of this issue. I've sat where
3 you sat. I put together regulatory programs. So, my
4 comments are offered with that in mind and with that
5 background.

6 In Illinois, Aggregate Producers are a
7 very numerous and diverse industry. The IAAP's 107
8 producing members range in size from "mom and pop"
9 operations that manufacture less than one hundred
10 thousand tons of these products each year to companies
11 that produce well over twenty million tons annually.

12 My favorite member is Eagle Quarries.
13 That's Lyle and Sandy Bushman. Lyle crushes and Sandy
14 loads, that's my smallest member. Of course, I also
15 represent Vulcan Materials Company and so on.

16 The point is that we are a diverse
17 industry, and these regulations which appeared, in our
18 mind, to be a one-size-fits-all, causes us some
19 concerns.

20 We operate nearly four hundred surface and
21 underground mines and are located in eighty out of one
22 hundred and two Illinois counties. In 2005, these
23 companies produced about one hundred and twenty-one
24 million metric tons of crushed stone, sand and
25 gravel. When the value of these construction

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1 aggregates are combined with the value of cement
2 manufactured using crushed stone and the value of
3 silica sand produced, you have close to a billion-
4 dollar-a-year industry. On behalf of all of our
5 members, I want to thank MSHA for providing this forum
6 to receive comments on the proposed rule "*Criteria and*
7 *Procedures for Proposed Assessment of Civil*
8 *Penalties*". Like MSHA, the IAAP is committed to safe
9 mines and a health workforce. Safety is, and will
10 continue to be, the number-one priority for our
11 industry. Our Association is proud of our industry's
12 safety record. We have not had an aggregate mine
13 fatality in Illinois since 3/24/2003. And, for the
14 record, we haven't had a coal mine fatality in
15 Illinois since April 15, 2003. I think we're one of
16 the few major aggregate coal producing states in this
17 nation that had that outstanding safety record. The
18 Illinois aggregate industry understands that its
19 employees are its most valuable asset. Given this
20 core value, please be advised that our good safety
21 record is not an accident. Our safety record is
22 grounded upon our proactive efforts in three areas.
23 First, this record is grounded on our industry's
24 strong commitment to safety training. Our industry
25 partnered with MSHA to implement Part 46 rules and

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1 every subsequent federal regulatory initiative, from
2 noise monitoring, to HazCom training, to working on
3 the Guarding Task Force, and we were there.

4 Second, our record is grounded on our
5 creation and support of a comprehensive association
6 safety awards program. There are four levels, bronze,
7 silver, gold and what we call our rock-solid level,
8 our highest level. For the calendar year of 2005,
9 sixty-two mines or associate member companies were
10 awarded the IAAP's Rock Solid Excellence in Safety
11 award, which means they have outstanding safety
12 programs, no reportable accidents and no S&S
13 citations. As you can see from the signs next to me
14 on the wall in the hearing room, many of these awards
15 or many of these companies are designated in bold
16 print, and those are multi-year awards. One of our
17 members have gone three years with no reportables, no
18 S&S, an outstanding safety program. Finally, our
19 record in our state is grounded on our ongoing
20 professional relationship with employees and
21 officials from MSHA and our State grants program.
22 MSHA and State grants people serve on the IAAP Safety
23 Committee.

24 In fact, yesterday, -- Wednesday when I
25 was going over my thoughts about our oral

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1 testimony today with our IAAP Safety Committee, I had
2 an MSHA official in the room. We were sharing every
3 concern we had about these regulations with this guy.

4 We were holding nothing back, because we've come to
5 look at MSHA as our partner in safety in the State of
6 Illinois. They're on our Safety Committee to help
7 conduct our safety seminars. They operate booths at
8 our annual convention in order to distribute safety
9 materials and answer questions. They help to
10 implement our safety awards program and they actually
11 present these awards during our annual meeting. On
12 May 18, 2006, Steve Richetta, Manager of MSHA's North
13 Central District and Kevin LeGrand, MSHA's Peru Field
14 Office Supervisor, presented awards to one hundred and
15 fifteen operations owned by thirty IAAP member
16 companies.

17 I do want to mention that makes a real
18 difference to our safety people and our mine
19 superintendents when they have Steve Richetta and
20 Kevin LeGrand presenting the award and shaking their
21 hand. It makes a difference. The mining industry, in
22 general, and MSHA, in particular, have both taken a
23 beating in the press since the Sago Mine Disaster, a
24 beating that we think is unwarranted. We are proud
25 of our industry. We are proud of our accomplishments,

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1 and we are very proud of our collaborative
2 relationship with your agency. For that reason, we
3 are deeply concerned that MSHA has proposed a sweeping
4 rewrite of its civil penalty rules without providing
5 ample time for review and comment.

6 We are equally concerned that MSHA has
7 proposed these rules without first engaging in the
8 collaborative rulemaking process that was so
9 successful in the development of MSHA's Part 46.
10 Now, I understand full well that the Mine Improvement
11 and the New Emergency Response or MINER Act requires
12 MSHA to implement four distinct civil penalty changes
13 by December of 2006. I understand that. It's the
14 law.

15 We have a concern about one of these
16 changes, which I'll get to in a minute. However,
17 MSHA's proposed rule goes significantly beyond what
18 the MINER Act and Congress mandates. This proposed
19 rule also contains a sweeping and complex rewrite of
20 MSHA's penalty process, yet gives insufficient time
21 for industry to prepare its response. The first of
22 six hearings began on November -- excuse me --
23 September 26, 2006 with only three speakers present.

24 We believe that the lack of participation at this
25 hearing was not due to lack of interest, but to the

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1 abbreviated amount of time provided to prepare. I was
2 talking to one of my members, to our safety guy
3 yesterday, and he was under the impression that this
4 was a done deal and that you all have already decided
5 to put these new penalties in place and that there's
6 nothing they could do but be able to pay double fines.

7 I said, no, and these penalties, we're at the
8 beginning of this process. That's the perception, and
9 I think that's driven down the participation so far.
10 Now, with that background, the IAAP's comments can be
11 summarized as follows, -- two areas.

12 First, regarding the four penalty changes
13 mandated by the MINER Act, we submit that the proposed
14 regulation implementing a five-thousand-dollar minimum
15 penalty for failing to notify MSHA in fifteen minutes
16 about a fatality, serious injury or entrapment should
17 be amended, not the statute, but the regulation that
18 implements the statute. I'll go over that in a bit.

19 Second, we contend that the remainder of the
20 rulemaking not mandated by the MINER Act be withdrawn.

21 We respectfully submit that MSHA sit down with all
22 of the stakeholders in order to determine if the
23 criteria and procedures for the proposed assessment of
24 civil penalties should be amended and then work to
25 come up with a system that is both fair and effective.

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1 In the event that you elect not to withdraw such
2 rules, we've identified some areas that we believe
3 should be addressed if you do go forward.

4 Turning first to the changes mandated by
5 the MINER Act, I want to focus on the fifteen-minute
6 notification requirement set forth in Section 100.5(f)
7 that reads, as follows:

8 *"(f) The penalty for failure to provide timely*
9 *notification to the Secretary under*
10 *Section 103(j) of the Mine Act will be not*
11 *less than five thousand dollars and not*
12 *more than sixty thousand for the*
13 *following accidents: (1) The death of an*
14 *individual at the mine, or (2) An injury*
15 *or entrapment of an individual at the mine*
16 *which has a reasonable potential to cause*
17 *death."*

18 Although the penalty range and time requirement in
19 Section 100.5(f) is mandated by the MINER Act, we
20 believe that the additional regulatory language can be
21 inserted in order to carry out the intent of Congress
22 without sacrificing the safety of our workforce, and
23 let me explain. Many of our operations do not have a
24 lot of people on site. Again, I refer back to Lyle
25 and Sandy Bushman. There's two of them and a part-

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1 time farm kid that comes on, who comes on and drives a
2 loader when they need him. The mine manager or
3 foreman charged with calling MSHA may also be needed
4 to administer first aid to the victim in order to
5 stabilize his or her condition.

6 That same mine manager or foreman may also
7 be needed to contact emergency vehicles and then guide
8 the vehicles to the injured person for evacuation.

9 It makes no sense for our people to spend
10 precious time calling MSHA instead of trying to save
11 the life of an injured person.

12 For that reason, let me propose a new
13 Section 100.5(g) that tracks Congressional intent
14 without putting the health and safety of our workforce
15 at risk.

16 *"(g) Timely notification to the Secretary under*
17 *Section 103(j) of the Mine Act will be*
18 *determined as follows: (1) Fifteen*
19 *minutes from the time that the death of an*
20 *individual at the mine has been confirmed;*
21 *(2) Fifteen minutes from the time that an*
22 *entrapment of an individual at the mine*
23 *which has a reasonable potential to cause*
24 *death has been confirmed or; (3) Fifteen*
25 *minutes from the time that an individual*

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1 with an injury at the mine which has a
2 reasonable potential to cause death has
3 been located, received first aid,
4 stabilized and evacuated from the mine
5 property."

6 By adding this language, you ensure that our
7 employees do the right thing in the case of an injury
8 which has a reasonable potential to cause someone's
9 death. We want our employees to do everything
10 humanly possible to save an injured person's life and
11 then call MSHA. We understand, and I understand in
12 particular, the need to put teeth into the
13 notification requirement. It is important that MSHA
14 be notified quickly in the event of a death,
15 entrapment or serious injury. We also understand that
16 in the past, people have abused that and not done what
17 they're supposed to do.

18 However, we submit that Section 100.5(f),
19 as written, will hamper decision-making during an
20 emergency. By adding the language suggested, we can
21 ensure that our workforce will concentrate on life
22 saving when seconds matter and will then quickly
23 contact MSHA after the crisis is passed. Turning to
24 our second major area of comment, we respectfully
25 request that the remainder of the rulemaking not

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1 mandated by the MINER Act be withdrawn so that MSHA
2 can sit down with all the stakeholders in order to
3 determine if the criteria and procedures for the
4 proposed assessment of civil penalties should be
5 amended. The basis for this request is, as follows:
6 We submit that MSHA has not taken the time necessary
7 to perform the cost/benefit analysis mandated by
8 Federal law before promulgating these rules. The IAAP
9 has conducted an initial review of the statistics and
10 tables provided within the proposed rule. Based on
11 this review, we are unable to find information
12 adequate to confirm MSHA's critical assumptions on the
13 proposed rule. The proposal does not quantify the
14 improvement in safety and health it purports to
15 promote, devoting a mere paragraph to benefits in the
16 preamble. For example, unlike the MSHA rules that get
17 specific about the number of injuries or diseases
18 prevented, this proposal never goes that far. It
19 presents the estimated cost impact, but never
20 quantifies the benefits. In the Preliminary
21 Regulatory Economic Analysis for these rules, which I
22 pulled that off of your website, at Page 12, MSHA says
23 as much:

24 *"The likely reduction in violations and the*
25 *benefits resulting from increased*

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1 the impact this proposal will have on the budgets of
2 safety professionals. How much of the corporate
3 safety budget will have to go toward paying for
4 penalties and litigation; thus, shrinking the amount
5 of money left for accident prevention, compliance
6 assistance, safety training resources and equipment?

7 We know lawyers have to eat, too, but we'd
8 rather spend our Association member's money on safety
9 training equipment and things that prevent injuries
10 and deaths.

11 In short, the current proposal lacks the
12 economic data required to authorize such sweeping
13 changes. For that reason alone, we believe,
14 respectfully, that it should be withdrawn.

15 Here's another issue, Unfair Impact. Many
16 of the proposed changes would penalize the vast
17 majority of the mining industry, for the actions of a
18 few. There is no established data to suggest that
19 increased penalties will drive improved safety
20 performance within the overall mining industry. The
21 majority of the provided data is divided between coal
22 and the metal and nonmetal industries. The stone,
23 sand and gravel industry accounts for approximately
24 ninety-two percent of the metal and nonmetal industry.
25 However, the stone, sand and gravel industry only

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1 accounts for thirty-eight percent of this sector's
2 revenues.

3 The proposed penalty increases will have a
4 significant impact upon the stone, sand and gravel
5 industry's business based on the fact that there is a
6 larger volume of plants across the country that are
7 subject to mandatory inspections. Given that the
8 stone, sand and gravel industry does not generate the
9 majority of the revenues that MSHA used to justify
10 the overall metals and nonmetal penalty increases,
11 these rules will have a disproportionate impact on our
12 sector.

13 Unintended Consequences. Our industry is
14 concerned that increasing civil penalties will promote
15 litigation rather than promote safety; thereby, moving
16 us away from our current cooperative relationship with
17 MSHA. Money used to pay resulting penalties may
18 divert resources that could otherwise be used to
19 enhance overall safety and health for the miners.
20 MSHA provided no hard data to support their stated
21 position of driving safety improvement by increasing
22 penalties significantly for violations. IAAP requests
23 that MSHA provide the public with the sources of data
24 that was used to conduct their varying analyses.
25 Another unintended consequence that we believe that's

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1 even more serious than more money is changing our
2 relationship. We have come so far in the ten years
3 since I've been on board with my agency -- my
4 association. When I started in '96, we were at war
5 with them constantly. In the seminars that I put on
6 were seminars focusing on how to lawyer up and how to
7 defend yourself in assessments. That changed with the
8 Part 46 collaborative rulemaking process, and since
9 then, the rules for us have been so much better, and
10 it's been better for MSHA, too. We've worked together
11 on things and we've made a lot of progress. That's
12 one of the unintended consequences of this thing.

13 They were hard, I think, on our part, and maybe on
14 the part of MSHA, too, on the enforcement side. We
15 don't want to go there.

16 The next area is Faulty Underlying
17 Assumptions. MSHA's revamped penalty proposal is
18 ultimately grounded on a number of false assumptions
19 set forth in this rulemaking: First, MSHA states at
20 Page 53056, top of the middle column, that the number
21 of violations of MSHA's standards and regulations has
22 been on the rise since 2003. Based on this increase
23 in violations, MSHA is proposing a new civil penalty
24 process that will result in higher penalties. The
25 underlying assumption, as stated at the bottom of this

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1 column, is that

2 *"the proposed changes are intended to induce*
3 *greater mine operator compliance with the*
4 *Mine Act and MSHA's safety and health*
5 *standards, thereby improving safety and*
6 *health for miners."*

7 However, MSHA's own statistical data clearly shows
8 that the total case incident rate for the aggregates
9 industry declined in the period 2003-2005. Those
10 charts to my right in the hearing room, charts which I
11 will also make available to the court reporter for the
12 transcript, show that during the period of time where
13 violations went up in 2003-2005, during that same
14 period of time, the case incident rate has been
15 declining. In fact, our mines have become safe during
16 this time period; thereby, negating the need for
17 additional civil penalties. In fact, as you can see
18 from these charts and display, data supplied by MSHA
19 indicates that the total case incident rate for the
20 aggregates industry has steadily declined since 1989,
21 and the case incident rate, those are injuries, level
22 1 through 6. These are MSHA's own statistics. MSHA
23 lacks the empirical data to support the need for
24 additional penalties given that this agency's own data
25 shows that the current violation and penalty system is

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1 working fine to reduce injuries at our mines.

2 Second, MSHA states at Page 53066,
3 middle column, end of the first paragraph,
4 the assumption that *"mine operators and*
5 *independent contractors will change their*
6 *compliance behavior in response to*
7 *increased penalties."*

8 In reality, most operators and independent
9 contractors have already changed their compliance
10 behavior in response to MSHA's enforcement approach
11 and continually increasing worker's comp premiums.

12 That's the driver in our way. It's more correct to
13 assume that most operators and independent contractors
14 are at a plateau that will be hard to improve on based
15 on the inconsistencies of inspectors and of the
16 inconsistencies of the interpretation of these
17 standards.

18 Third, MSHA states at Page 53069, Section
19 C - Benefits that:

20 *"The reduction in the number of violations,*
21 *particularly S&S violations will reduce*
22 *the number and severity of injuries and*
23 *illnesses."*

24 The problem with this assumption is that safety
25 professionals generally agree that the biggest share

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1 of MSHA violations are for allegedly unsafe conditions
2 while the biggest share of accidents are caused by
3 unsafe behaviors.

4 MSHA has done nothing to address unsafe
5 behaviors by the miner him or herself. By MSHA's own
6 statistics, only twenty-three percent of violations
7 written in metal and nonmetal sector are S&S.
8 Therefore, seventy-seven percent of the violations
9 written are not reasonably likely to result in a
10 reasonably serious injury or illness.

11 In summary, the lack of required economic
12 data, the unfair impact on our industry, the
13 unintended consequences flowing from these rules and
14 the underlying faulty assumptions for this new penalty
15 system support our respectful request that the
16 remainder of the rulemaking not mandated by the MINER
17 Act be withdrawn to allow MSHA to sit down with all of
18 the stakeholders, the coal industry, the aggregates,
19 the metal industry, the labor unions, everybody, all
20 the stakeholders in order to determine if the criteria
21 and procedures for the proposed assessment of civil
22 penalties actually need to be amended. However, in
23 the event that MSHA elects to proceed with this
24 rulemaking package, let me highlight a few concerns we
25 have about the pending proposal, with the

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1 understanding that my words today are not exhaustive,
2 that our committee is proposing a much more extensive
3 set of written comments on every facet of this
4 proposal.

5 First, the big one for us, Retain Single
6 Penalty Assessment Criteria. IAAP urges MSHA to
7 retain the Single Penalty Assessment for non-serious
8 violations. Operators must eliminate all hazards and
9 legitimate violations, but the enforcement of
10 regulations by agency personnel is not equal and
11 consistent. Removing the Single Penalty Assessment
12 may result in higher penalties for citations
13 erroneously issued, more contested citations, and the
14 diversion of resources away from improving safety and
15 health in the mine. Removing the single penalty has
16 the potential to create a more adversarial
17 relationship between MSHA and operators without making
18 mines safer and healthier for miners. It is important
19 to recognize that such citations often occur for
20 highly subjective conditions where one inspector may
21 find a situation in full conformity with MSHA
22 requirements, while another issues a citation because
23 he or she speculates that a minor hazard might exist
24 if the condition continued to exist in the future.
25 Often, these involve housekeeping, like, small

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1 amounts of material on a walkway that is rarely
2 accessed, dirty toilets, uncovered trash cans, minor
3 holes in guards where no one has access to the area,
4 and equipment defects where the equipment has not been
5 inspected prior to being used for the day and is not
6 in service.

7 Other categories of non-S&S citations
8 include paperwork, late filing of a 7000-2 quarterly
9 hours report, failure to note an inspection date on a
10 fully-charged fire extinguisher, faded labels or other
11 technical violations of MSHA's HazCom standard. Often
12 these are rated as "*not likely of injury*" and "*low*" or
13 "*no*" negligence. Despite the low fines often
14 associated with the Single Penalty Assessment, MSHA's
15 own data tends to prove that this class of violations
16 has helped to improve safety and health at our mines.

17 The Single Penalty Assessments have increased in
18 2003, 2004 and 2005, and your incident rate has gone
19 down in those three years. That seems to be working
20 rather well. There doesn't seem to be any kind of real
21 justification for scrapping what seems to be working
22 and creating a new system that will really have the
23 effect of just doubling the amount of revenue that
24 comes in to the government. MSHA's rationale for
25 deleting the single provision found at Page 53063,

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1 first column, third paragraph states:

2 *"Deleting the single penalty provision will*
3 *cause mine operators to focus their*
4 *attention on preventing all hazardous*
5 *conditions before they occur and promptly*
6 *correct those violations that do occur".*

7 Yet, in the preceding paragraph, MSHA flatly states,
8 that the penalty assessment they want to delete is for
9 non-S&S violations, those that are not reasonably
10 likely to result in reasonably serious injury or
11 illness. In essence, the stated rationale for
12 eliminating the Single Penalty Assessment is
13 contradicted by MSHA's own description of this penalty
14 and the regulation. Another hot point for us is we
15 ask that you delete the repeat violation criteria. The
16 repeat violation category should not be included in
17 the regular assessment penalty point scheme and
18 should, therefore, be deleted. The repeat violation
19 category appears to be redundant with the history of
20 violations criteria. Moreover, because many of MSHA's
21 standards are subjectively interpreted, MSHA
22 inspectors can use a single standard to cover a
23 multitude of unrelated conditions, safe access under
24 30 CFR 56.11001 can relate to everything from a bent
25 ladder step, to a cable across a walkway, to having to

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1 step over a barrier to access a screen, to a method of
2 accessing a dredge, to having a method of greasing a
3 conveyor that an inspector does not prefer.
4 Therefore, simply having a "history" of repeated
5 violations under this particular regulation does not
6 mean that the exact same condition is recurring. MSHA
7 inspectors can use a single standard to cover a
8 multitude of unrelated conditions; thereby creating an
9 artificial history of repeat violations. In addition,
10 IAAP members have observed those standards which
11 include training, using equipment tools upon
12 manufacturers intended design, unsafe access, hazard
13 communications, and barricading and posting signs
14 warning against entry have been subjectively
15 interpreted throughout our state.

16 Repeated violations may not be enforced
17 uniformly throughout the system. The standard
18 sometimes covers so many different areas of a
19 property. What exactly would a repeat violation
20 cover? Until MSHA can ensure consistency in its
21 enforcement and unless it switches from performance
22 oriented standards to objective criteria, the repeat
23 citation criteria should be rejected. Third area, do
24 not reduce the time for conference requests. IAAP
25 recommends that MSHA be consistent with OSHA, where a

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1 fifteen-day period to submit additional information or
2 request a safety and health conference is granted. At
3 a minimum, we respectfully request that MSHA retain
4 the current ten-day period. MSHA's proposed change
5 would not provide mine operators with sufficient time
6 to evaluate and determine the appropriate course of
7 action to take following the issuance of citations by
8 MSHA. The stone, sand and gravel industry is somewhat
9 unique due to the fact that many of our members have
10 remote locations. It is very possible for a citation
11 not to reach the proper hands in the amount of time to
12 request a safety and health conference. A line
13 operator could be on vacation during the five-day
14 period or be otherwise unavailable to respond. In
15 addition, all operations need time to seek the
16 appropriate guidance before moving forward with a
17 safety and health conference or additional time to get
18 the paperwork together, so you have a good
19 presentation. In any case, if you're going to make a
20 change, you should clarify if you're talking workdays
21 or calendar days, because that makes a difference.

22 MSHA states at Page 53064, first column,
23 second paragraph,

24 *"That the reduction of conference time to five*
25 *days would result in a more effective*

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1 *civil penalty system because penalties*
2 *will be assessed closer in time to the*
3 *issuance of the citation."*

4 In reality, the reduction of five days would have no
5 bearing whatsoever on this process. It is normally
6 months before an assessment is received now. If a
7 citation is conferenced, it may take several weeks for
8 the conference, then several more weeks for the result
9 and then months before the assessment, if any, is
10 issued. This is a problem with MSHA's system that
11 can't be corrected by reducing the right to conference
12 by five days. All it would do is hinder an operator's
13 right to conference. All it will do, frankly, is
14 drive operators, when they get a violation, you know,
15 to their lawyers to contest violations. I think it
16 has the opposite effect that MSHA is trying to
17 achieve. You know, there can't be anything wrong with
18 giving the operators ten days to think about whether
19 they want to contest it, to think about whether they
20 want to get it cancelled, getting the records in
21 order, you know, so that they make a cogent
22 presentation to the conference office. It will result
23 in, at the end of the day, a better final violation, a
24 better final assessment and will reduce litigation.
25 Which, again, we're not here to feed lawyers. We're

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1 here to promote mine safety and health.

2 In conclusion, we respectfully request
3 that MSHA adopt the proposed new Section 100.5(g),
4 that I outlined earlier, in order to ensure that the
5 fifteen-minute notification rule carries the intent of
6 Congress without sacrificing the safety of our
7 workforce. What our members are doing now is telling
8 our people to save a life. We'll take the hit. Save
9 a life. We'll take the hit. Do whatever you can. Do
10 whatever you'd normally do to save that injured
11 person's life. Go through the mine's safety plan, and
12 if MSHA wants to cite us for not calling in fifteen
13 minutes while you're saving that person's life,
14 applying CPR, go ahead and we'll take the hit. I
15 don't think that we should come to that. I think that
16 the proposal that I've suggested, or something that
17 you all could devise would carry out the intent of
18 Congress to punish people if they don't do what
19 they're supposed to do, and yet, not cloud the
20 judgment of people who are in life-and-death
21 situations with somebody underground, and that's what
22 I'm talking about. We also request that you withdraw
23 the elements of this rule that are not specifically
24 noted in the MINER Act of 2006 and do as your sister
25 agency OSHA has done in numerous cases and convene an

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1 advisory panel to work on developing a Part 100 rule
2 that would go much farther to achieve our goal of zero
3 fatalities. There are clear precedents for this even
4 within MSHA. MSHA did this with the Part 46 rule for
5 mine safety and training. It worked very well.

6 Again, we were apart of that. It was a tedious
7 process. It was a long process, but at the end of the
8 day, you had a good rule system that everyone bought
9 into and it has been working extremely well. It is
10 our contention that this collaborative effort has been
11 a major factor in the reduction of the total case
12 injury rate in our industry. We were able to work
13 together to develop a training rule that was modern
14 and effective with broad support. In the event that
15 this rulemaking is not withdrawn by MSHA, in the event
16 you elect to go forward with this, rewrite your
17 penalty system, please make the rule changes suggested
18 in our comments and at least consider them. One final
19 note: It appears to us that the many are being
20 punished for the transgressions of a few. The
21 companies that run an aggressive and successful
22 program are getting punished for the ones that don't.
23 MSHA already has the tools for strict enforcement.
24 You already have the power to levy huge fines. You
25 have the power to shut mines down. Use them on the

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1 companies that just don't get it. Run the bad actors
2 out. Do what you have to do, but don't rewind the
3 rules to the point where it basically doubles the
4 civil penalties for everybody that's doing a good job
5 day in and day out. I want to thank you all for the
6 opportunity to make the concerns of the IAAP known to
7 MSHA during this comment period. A copy of my
8 remarks, I may have written on it, but there's a copy
9 to the court reporter to aid her, along with a copy of
10 these charts that are to my right. I will be happy to
11 answer questions if that will be helpful.

12 MS. SILVEY: Thank you, Mr. Henriksen. I
13 was wondering, did you have something to say?

14 MR. CRAMER: Yes.

15 MR. HENRIKSEN: We're a package deal.

16 MS. SILVEY: Okay.

17 MR. CRAMER: Good morning. My name is
18 John Cramer, spelled with a (C). I'm President of the
19 Casper Stolle Quarry and Contracting Company. Casper
20 Stolle came from Germany in 1844, and 1845, we had his
21 first quarry, and the family has been quarrying
22 continuously since that date. Our present quarry, the
23 oldest one running, was founded in 1882, and we're
24 about five years away from being mined out of that.
25 Twelve years ago, we acquired our competitor, and

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1 we're operating two quarries right now on the other
2 side of the river in Illinois. We had -- We operated
3 a very safe quarry for many years. In fact, our
4 insurance company rated us as a cement plant, which
5 had a five-dollar per hundred rate rather than a
6 quarry, which is a ten-dollar per hundred rate. We
7 carried that up until we acquired the other quarry and
8 became a bigger operation, and we had a negative
9 experience rating the whole time. So, I will let
10 those numbers speak for themselves. I have been on
11 the board of the National Stone Association and
12 Illinois Association of Aggregate Producers, been
13 president of one, and chairman of the National
14 Association, and have been quarrying since before MSHA
15 came along. So, I had the benefit of continual
16 experience with the organization and its predecessor.

17 The one fact that is critical in my mind
18 is that when MSHA came along, they were straight
19 punitive. It was folks out of the coal mines, and I
20 know that the coal mine attitude between employee and
21 employer are adversarial; whereas, with a family-run
22 quarry operation, I was part of our employees'
23 families, and they were part of my family, too. When
24 MSHA would come on, guys would take their hearing
25 protectors, and where they wouldn't go anywhere, if

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1 they had dust protectors, they cover them up. They
2 just did not like the attitude, that adversarial
3 attitude.

4 Another thing that happened that cost them
5 jobs, they didn't like it for that reason. There were
6 jobs that had to be automated as a result, and that's
7 fine. As time went on with Mr. Lewinski, things
8 changed. We cooperated, and the attitude of the
9 people has been reversed a hundred percent. I know
10 you didn't want to hear the bad part, but the good
11 part is that things are working, and what we're doing
12 now is working. Our people are coming to us if they
13 see something, or if something happens to them, they
14 say, oh, I slipped on this; let's go check and see
15 where we can improve it. They're coming to us with
16 safety improvements, and we're providing them
17 everything that they need to have a safe workplace. I
18 had, unfortunately, the experience that required me to
19 make a fifteen-minute rule telephone call. We had,
20 just this year, Monday morning, first load in the
21 morning for a truck driver that backed over the high-
22 wall.

23 I heard it on the radio, and I ran. The
24 first thing was, should I go down and see what's going
25 on? No, I got to make a telephone call, and I did. I

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1 made that. It was a five-minute telephone call. I
2 was asked some questions that I needed to get answers
3 for. I went over and got them, came back, and I was
4 really answering MSHA's questions, rather than
5 providing -- We had a safety plan and it was working,
6 but I was providing information to MSHA, and if
7 things had been different, I should have been in other
8 places. And, so, I personally -- I'm sitting in that
9 chair waiting for somebody to call me to tell me
10 something, what's going on at MSHA, but I should have
11 been out there. I should have been directing traffic,
12 making sure that the first responders were taken care
13 of. As it turned out, the guy climbed out of the cab
14 and wanted to walk down the hill. He backed over a
15 pile of dirt, and he fell down and was cushioned. In
16 fact, the truck was only damaged in the cab, very
17 little damage to it, nothing happened and the guy is
18 back at work. He didn't want to backup the high-wall
19 anymore, but I don't blame him for that. The rules
20 and regulations are sponsored by coal mine accidents.
21 I've got two children, and I feel like we're MSHA's
22 children, the mines, the coal and mining metal and
23 nonmetal. I know if one of those kids came in at
24 night past curfew, I didn't punish both kids, and I
25 feel that the rules and regulations that are coming

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1 along are punitive, and I'm afraid that the response
2 that the industry is going to have is the response
3 that my employees first had when MSHA first started.
4 I would ask that you amend that fifteen-minute rule
5 and withdraw the proposed rules not mandated by the
6 MINER Act, and let us sit down and really make some
7 meaningful changes that are going to benefit our work.

8 Thank you.

9 MS. SILVEY: Thank you. I'm sure some
10 members of our panel have some comments. I have some
11 comments. First of all, some of the comments I make
12 will probably be sometimes for the witness, and
13 sometimes they will be applicable to everybody in the
14 room. I'm sure you know that throughout these
15 hearings, so far, we've gotten a lot of comments and
16 testimony. Significantly, one of the things we heard
17 in Salt Lake on Tuesday was that we were penalizing --
18 and I'm going to talk about penalties, too, later on
19 and punitively -- that we were penalizing the large
20 operators, comment after comment. I would draw your
21 attention to the transcript when it's published on the
22 website at the Salt Lake hearing. So, we say, or I
23 say, why are we penalizing the large operator? So,
24 they said to us because part of what I pointed out in
25 my opening statement when I said that under the

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1 regular formula, in the size criterion, the smallest
2 operators, the smallest coal operators, those who get
3 less than the thousand tons of coal in the previous
4 calendar year, metal and nonmetal operators working
5 less than ten thousand hours, and independent
6 contractors, less than ten thousand hours at all
7 mines, they get no points for size.

8 So, then a big operator comes in and says,
9 but it doesn't matter what I do and what the violation
10 is, you know, it can be low gravity, low negligence,
11 but I still got twenty points, or whatever. Maybe we
12 raised it to twenty-five, I forget, but I start out
13 with twenty-five points for size.

14 So, Mr. Henriksen, you started out saying,
15 you know, this reg is one-size-fits-all, and in a
16 conceptual way, I understand what you are saying, but
17 there are things that we tried to do in the proposal
18 to take into consideration what the Mine Act says and
19 the application of the statutory criteria. One aspect
20 was size, and there we got criticized, because we said
21 for certain small operators, you're giving them no
22 points for size. In a way, I'm just making this as
23 the difficulty of as we go forward and what we have to
24 do. You said it correctly. This is really a short
25 process, but it is the beginning of the process, and

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1 we have to legitimately go back and take everybody's
2 comments into consideration and figure out what to do,
3 no matter how difficult it is. Otherwise, what's the
4 point of the process? I don't think we started out
5 with a public hearing or a rulemaking process, to
6 come to the point where we say what's the point of the
7 process. There is some point to the process.

8 So, the next thing I do want to say, and I
9 think I say on behalf of the entire panel, that you
10 all are to be commended for the safety record and the
11 safety achievements by the members of your association
12 over the last, as you said, 2003. I was going to say
13 during the last year, and that's clearly a record to
14 be proud of and you are to be commended for that. On
15 the failure to timely notify, your comment about that,
16 and you've accurately said that. That's a MINER Act
17 provision, and to some extent, we have no choice in
18 what we do there. I would like to say here, as I have
19 said in two other hearings, that if you had a
20 management person at one of your small mines, and it
21 was a situation, as you put it, of life and death, and
22 that person was frantically working to save a life, I
23 would hope that in that particular situation, that
24 person would not take a hit from MSHA. I have
25 representatives of our Coal Mine Safety and Health

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1 Office and, obviously, you know that I'm not out there
2 every day inspecting mines, and our Metal and Nonmetal
3 Office, but I would say that I have worked in metal
4 and nonmetal, though. I would say that I hope that in
5 that particular situation, nobody would take a hit for
6 failure to call MSHA within fifteen minutes when the
7 alternative was saving a life. I have my lawyer here.
8 So, I hope I'm not saying anything illegal.

9 MR. HENRIKSEN: And let me address that.
10 I understand that MSHA would not want to penalize
11 someone who is busy trying to save someone's life, but
12 that's not what the rule say.

13 If you really want -- I believe that -- I
14 believe you, just what you say. I believe that's
15 MSHA's intention, and that intention should be put
16 into the rules, so that the inspectors know what
17 they're doing.

18 I mean, I understand how you want to do
19 what Congress has told you to do, for starters.
20 Secondly, the over-arching thing is that people have
21 been delinquent in not calling MSHA about serious
22 injuries, entrapments or death, and sometimes they've
23 hid them. With that being said, I think you can take
24 what Congress has given you, and tempered by these
25 rules, to have a fair result, so that your intent and

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1 your good faith is reflected in the rules. I don't
2 think that anyone in Congress would call you to
3 question, you know, if you had some sort of language
4 along those lines.

5 I propose something like that that allows
6 the fifteen minutes to start running after a seriously
7 injured person -- First off, make sure they're
8 seriously injured. Don't just call MSHA. I mean,
9 again, to back up, we have MSHA people on our safety
10 committee. You can imagine, once this thing became
11 law, all the phone calls MSHA has been getting deluged
12 with, you know, from every field office in Duluth,
13 everywhere, by people. I think this is a real
14 opportunity for you guys to take what Congress has
15 given you, which is difficult to deal with, take that
16 and use your regulatory process, use the tools you
17 have, temper that so that it makes sense. You guys
18 say, what we care about is safety, saving lives. But
19 make sure the person -- Find the person and make sure
20 they're seriously hurt, that it's something that might
21 cause them to die, and make sure they get the first
22 aid, make sure they're stabilized, make sure they're
23 taken to the hospital, and then call MSHA. In fact,
24 it's ludicrous to call MSHA before you have done all
25 of those things, because unless you've gone through

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1 the whole process, you don't know if that's something
2 that could have killed somebody. That's the
3 appropriate time to call MSHA. I think your rules can
4 be changed just enough to do that, and then it's the
5 best of both worlds. We do what we're supposed to do,
6 and you all have a tool against folks that hide
7 serious injuries, deaths or entrapments. You all need
8 those tools, because in the past, people weren't -- I
9 think the term of art was "*immediately*". Well, they
10 weren't doing it at all. Now you have a time, and now
11 you have a penalty.

12 MS. SILVEY: I have one more comment, and
13 then maybe some other members may. You mentioned -- A
14 number of times, you mentioned, or you made reference
15 to our economic analysis and how maybe we were not
16 in compliance with the regulatory or maybe executive
17 order requirements. One of the things I want to say
18 for everybody is that when you accurately spoke about
19 some of the other rules where we quantify, or did the
20 best job we could in quantifying the benefits, we
21 didn't do that in this rule. One of the differences
22 is that this rule deals with -- The other rules dealt
23 with the cost of compliance. They were rules where we
24 put into place safety and health standards, and what
25 we had to do was then project the cost of complying

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1 with those safety and health standards. This rule, on
2 the other hand, as everybody knows, really deals with
3 the cost of non compliance. When you're dealing with
4 that type of rule, the requirements are different.
5 The regulatory requirements in terms of what we have
6 to show with respect to the Office of Management and
7 Budget are different. So, with this kind of rule, we
8 really do not have to go forward and quantify,
9 specifically quantify the benefits. We really didn't
10 have to do as much as we did, but we felt an
11 obligation to come forward and present the cost, at
12 least present some qualitative statement of the
13 benefits as best we could, and that's what we did in
14 the preamble to the rule and in the accompanying
15 economic analysis. Although, even as I say that, for
16 the assumptions that we present, if people want to
17 specifically comment on the assumption, if you
18 disagree, not just disagree, but provide a specific
19 definitive date, then we welcome that.

20 MR. HENRIKSEN: And, again, as you just
21 admitted and has admitted in the preliminary stuff, I
22 mean, the cost benefit ratio has not been fully
23 developed.

24 Again, I'm not taking a potshot at your
25 economist. You're on a very fast time line, and the

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1 reason you're on a fast time line is because you all
2 have elected to take the MINER Act stuff, which is on
3 a fast time line, and roll in a complete revamp of
4 your penalty system. You all have elected to do that,
5 and I don't think you have to do both things. You've
6 got to go forward with the MINER Act, and that's fine,
7 but I'm just -- I respectfully request that you
8 consider, seriously consider pulling back the part of
9 the proposal that is not mandated by the MINER Act,
10 put together a process just like you did for the Part
11 46. Again, that was tedious, that was arduous and it
12 took time, but that was buy-in from my people from top
13 to bottom. My state and all the surrounding states
14 throughout the nation, there was a buy-in. We trained
15 based on Part 46. We make sure our safety awards are
16 a function of compliance of Part 46. If we have that
17 kind of, you know, collaborative process where we look
18 at fines and everything else as a group, you know, we
19 may come up with something, at the end of the day,
20 very much like what you've proposed, or it may be
21 totally different, but the point is that it will,
22 hopefully, be better.

23 MS. SILVEY: Okay. Thank you.

24 MR. MATTOS: I have a question. On the
25 comment you made earlier about one-size-fits-all, I

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1 would be interested in hearing from you any thoughts
2 you have on how we would address the issue of coal
3 versus metal and nonmetal. Specifically, I mean, the
4 intent of the proposal is to have an escalating
5 penalty structure for repeat violations, and as the
6 number of violations increases, the penalties
7 increase. The only differences in the rule are in the
8 size of the operation, those criteria that we're
9 using. Do you have any thoughts on other ways that we
10 would be able to address the one-size-fits-all issue?

11

12 MR. HENRIKSEN: Well, I'm reluctant to
13 suggest that because of the Sago Mine disaster and
14 other reasons, coal mines, metal and nonmetal, and I
15 don't think I have enough data to really make that
16 kind of claim.

17 What I do think is that that's precisely
18 why we need to pull back this rulemaking and sit down
19 with the coal people, the metal and nonmetal people,
20 everybody, and let's look at the industries and let's
21 look at what's working. Let's look at the bad actors
22 and how we can go after them.

23 Part of what the MINER Act does is give
24 you some radically large processes for going after bad
25 actors penalty wise. I understand that, but I think

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1 that we need to look at, if coal mines are not run as
2 safely as aggregate mines, does that justify higher
3 penalties for them? Okay. Maybe, if that's true, and
4 I don't know if it's true, but again, when you, later
5 on with all the criticisms from the small -- from the
6 big operators about getting hammered hard by this
7 proposal because they're big, you know, they say we're
8 being treated unfairly compared to the little guys.
9 That's, again, another reason to pull back and study
10 this thing. I am, as I sit here, I am not convinced.

11 I have not seen any data from you all, or I've got no
12 feeling from my ten years of working for the
13 Association or my many years before that being an
14 enforcement person, I don't have a feeling at all that
15 your system is not working. Yes, these sixty-dollar
16 civil penalty assessments are not big, sexy fines, but
17 if I am a small operator and I get five, ten of these
18 sixty-dollar tickets, I'm going to fix them. That's a
19 small cash outlay. The big cash outlay might be a
20 brand new guard, or it might be a new compliance thing
21 that this inspector wants. Again, I have done
22 rulemaking. It's hard, once you're going forward, to
23 step back from a process once you've started. There's
24 all sorts of things loading into this rulemaking that
25 I believe I understand, but with all due respect, I

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1 suggest that you go forward with your MINER Act for
2 the rulemaking and make the change I suggested. Pull
3 the rest back, and let's work together. Let's talk to
4 the coal guys and find out if their places are -- if
5 Their places are more dangerous than aggregate mines.

6 If their safety programs aren't being implemented as
7 strong as ours, maybe they should get fined harder. I
8 don't know. We don't know, and that's the whole
9 point. We're making -- We're creating -- You're
10 creating a penalty system that's a change in the way
11 things are done, and notwithstanding how hard you've
12 worked on your analysis, it's incomplete. With all
13 due respect, it's incomplete because you haven't sat
14 down and talked with us. Ten years ago, I would not
15 have even thought that was even a possibility, because
16 we were constantly at war, you know, with MSHA. All I
17 heard from my members was MSHA this and that, hard-
18 nose inspectors. Since then, it's been very
19 different, you know, and it's a refreshing change. I
20 honestly think that you all can sit down with our
21 industries and look at your penalty process and come
22 up with something that maybe does increase fines,
23 maybe does go after sectors, or coal, whoever, maybe
24 does penalize big guys versus little.

25 For instance, if Illinois has the best

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1 incident rate, maybe we should get a break. I don't
2 know. There's these factors that could be looked at,
3 and I'm saying because you are on this -- You've
4 hooked this penalty assessment process to the MINER
5 Act car, I think it's hurdling down the track, and
6 it's time to uncouple the car, put it on the side,
7 reach out and meet with us. I know the National Mine
8 Association would be tickled to sit down with you all,
9 their safety people, and people from my industry would
10 be glad to sit down with you all and talk about this.

11 There are safety professionals all over this country
12 that will be glad to talk with you about their
13 concerns about this thing and how they can craft
14 something that addresses the concerns that you all
15 have that maybe you're not being punitive enough, or
16 maybe you want to enhance compliance.

17 MS. SILVEY: One of the things I want to
18 say is that, and we've heard this, too, that when you
19 talk about the fines, and everybody will say, you
20 know, penalties should not come to me. I would
21 probably say that if a policeman stops me for
22 speeding. What we are hearing, and that is truly
23 laudable, companies with good safety and health,
24 injury and illness rates and safety records. The
25 thing of it is, and that could be another criteria in

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1 terms of what should be an indicator of where the
2 penalties should go, but one thing about it, to do
3 that, that would require a change in the law.

4 So, what we have in terms of the penalty
5 proposal, the penalty that we propose, we started with
6 the law that we have and the existing rule, and to
7 build in an index of the safety and health record of
8 a company as one of the additional indicators, and
9 that would require some kind of a Congressional
10 change. So, I wanted to say that. I mean, I say that
11 in terms of criteria that MSHA must consider in doing
12 the penalty. So, we heard that, but we've heard it
13 before. So, thank you.

14 MR. HENRIKSEN: Thank you.

15 MS. SILVEY: Next we will hear from Paul
16 Kraus with the American Coal Company.

17 MR. KRAUS: Good morning.

18 MS. SILVEY: Good morning.

19 MR. KRAUS: My name is Paul Kraus, K-r-a-
20 u-s, and I'm the manager of Health and Safety for the
21 American Coal Company, a subsidiary of Murray Energy.

22 I would like to thank MSHA and this panel for the
23 opportunity to provide comments on the proposed Civil
24 Penalty Rule, a rule which will have widespread effect
25 on the industry, and not in the manner that MSHA

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1 seeks.

2 The American Coal Company is a large
3 underground coal mining operation in Southern
4 Illinois. This operation includes three long walls,
5 six continuous mining units, a large preparation plant
6 and over seven hundred and fifty employees. We take
7 the safety of our employees as our absolute top
8 commitment. It is our moral and ethical
9 responsibility to protect the health and safety of our
10 employees.

11 I didn't bring a chart like that one
12 (indicating), but I could have. Last month, we
13 finished with an NFDL rating of 1.57, and 5.5 for the
14 quarter, which is under the national average. The
15 proposed rule will be very harmful to the safety
16 efforts of responsible operators. Civil penalties are
17 not an incentive for safety, nor do they have any
18 positive effect on our, or any other operator's safety
19 efforts. We strongly urge MSHA to significantly
20 modify the proposed rule and return to the prior
21 penalty system to the extent possible. Some of the
22 provisions of the proposed rule are statutory-based
23 and cannot be affected by rulemaking procedures. Our
24 comments will be more aimed at the changes in which
25 MSHA has some discretion or are otherwise statutory,

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1 but subject to interpretation.

2 The changes, as a whole, are a misguided
3 attempt to increase safety by punitive actions against
4 operators. The result will be greatly increased civil
5 penalties, in effect, tripling them. Our specific
6 comments are as follows: 3(b) Appropriateness of the
7 Penalty to the Size of Operator's Business: MSHA has
8 proposed to increase the penalty points for size from
9 an old maximum of ten to twenty for mines over two
10 million tons of production, which we have. MSHA
11 contends that is to make the monetary
12 penalty proportional and, therefore, increase
13 compliance. This view is seriously flawed and
14 discriminatory. Large operations are inherently
15 safer. This proposed change has the reverse effect of
16 punishing size, which is generally a safety enhancer.

17 The series of mine disasters that led to the MINER
18 Act were smaller mines. This is typical of the
19 proposed rule and shows the disconnect between the
20 reality at mining operations and the MSHA bureaucracy.

21 100.3(d) Negligence: The old five-tier system
22 determining points to be assigned for negligence was
23 effective and has been retained by MSHA, but with the
24 points for the upper three tiers increased and doubled
25 at the level of reckless disregard.

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1 Our view is that the increase should not
2 apply to moderate negligence, as that is not at a
3 volitional stage of culpability and is subject to wide
4 variation of interpretation.

5 100. 3(e) Gravity: MSHA has increased the potential
6 from a maximum of thirty penalty points under the
7 previous rule to eighty-eight penalty points under the
8 proposed rule. Historically, the gravity portion of a
9 citation is the most frequently contested item by our
10 company in Health and Safety conferences conducted
11 with the agency. This is primarily due to the
12 inspector's determination of the gravity being
13 speculative in nature and subject to individual
14 interpretation. This excessive increase in penalty
15 points is unwarranted in potentially subjective areas.

16 100. 3(f) Demonstrated Good Faith of the Operator in
17 Abating Violations: In this misguided section, MSHA
18 actually decreases the beneficial effect of timely
19 abatement of violations by operators. Previously, an
20 operator could receive a reduction of thirty percent
21 for timely abatement. Now, it's only ten percent, a
22 disincentive rather than an incentive to timely
23 compliance. 100.3(g) Penalty Conversion Table: This
24 now sets a floor of one hundred and twelve dollars for
25 a penalty. It is inappropriate to set such a floor

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1 for non-significant and substantial non S&S penalties
2 and mere paperwork violations. This is the purpose
3 for which the Single Penalty Assessment was designed,
4 but this has also been eliminated at Section 100.4 of
5 the proposed rule. The deletion of the single
6 penalty, and the floor of one hundred and twelve
7 dollars will have the effect of merely increasing
8 bureaucracy and inefficiency and will not have any
9 real effect on safety compliance.

10 The concentration of MSHA and the operator
11 should be on the elimination of potential S&S
12 violations.

13 The elimination of a single penalty causes
14 the intention to be blurred. Lumping all violations,
15 both S&S and non S&S, into one category actually
16 diminishes the emphasis on S&S. This is a further
17 example of the lack of a practical approach of MSHA to
18 real issues.

19 100.4 Unwarrantable Failure: Much of the
20 proposed rule in this area is designed to implement
21 the statutory requirement of the MINER Act. As such,
22 there is little discretion possible. It is difficult
23 to gauge the effect of one proposed change, the
24 elimination of the list of specific categories that
25 can be the basis of a special assessment.

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1 Our view is that this has not been a
2 problem before. So, why change it, and that any
3 change would probably lead to an increase in special
4 assessment, which, if flagrant, can be assessed at two
5 hundred and twenty thousand dollars. This is an
6 unacceptable combination, as it provides MSHA too much
7 discretion. 100.6 Procedures for Review of Citations
8 and Orders: The time period for requesting a Health
9 and Safety conference has been reduced from ten days
10 to five days. There is no reason for this change.
11 The rule goes on to incorporate certain statutory
12 disclosures. MSHA predicts that for each ten percent
13 increase in penalty for violations, there will be a
14 three percent decrease in its probability of
15 occurrence. This appears bogus, as compliance at
16 responsible operations is not driven by penalty costs,
17 but by other motivations. This is a cynical attitude
18 by MSHA and indicates a punitive mind-set, rather than
19 safety mindedness. Further, in the disclosure
20 portion, MSHA states that the proposed rule is
21 economically feasible for the mining industry, because
22 the anticipated expanded increase in penalties will be
23 15.9 million dollars, equal to .07 percent of coal
24 mine sector revenue of 22.1 billion in 2004. This,
25 again, shows a disconnect between the economic

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1 challenge faced especially by underground coal mines
2 and the understandings of MSHA. On a personal note,
3 just to echo what was said previously, we also had an
4 incident this week on Wednesday where one of our
5 employees had an apparent heart attack on the coal
6 mine property. The phone call was at 3:00 clock in
7 the morning, and at that time, we were trying to
8 collect the information over the phone on exactly what
9 occurred, because it wasn't apparent that it was a
10 heart attack at that point. Our first response is to
11 the individual CPR, to ascertain the individual's
12 injuries, whether it was an accident or a natural
13 cause, and then the decision was made to call MSHA.
14 To do that all in a fifteen-minute time frame at 2:00
15 o'clock, 3:00 o'clock in the morning is an extremely
16 difficult exercise. I know that that can be changed,
17 and I hope that MSHA would not start the clock ticking
18 on the very instant when something like that is
19 discovered, because the first thing that people need
20 to do, as far as safety is concerned, is the
21 individual. It is very difficult on our part, in some
22 of these instances, to comply with these provisions.
23 I will be glad to answer any questions that you may
24 have, and I appreciate the opportunity to address you.

25 MS. SILVEY: Thank you. On that incident

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1 that you had Wednesday when you called MSHA, you said
2 3:00 a.m. in the morning, did you get somebody?

3 MR. KRAUS: Yes, we did.

4 MS. SILVEY: Did you call the 800 number,
5 or did you call the district?

6 MR. KRAUS: We called the individual
7 inspector assigned to our property.

8 MS. SILVEY: Assigned to your property?

9 MR. KRAUS: Yes. He was there on the
10 property when I arrived.

11 MS. SILVEY: Okay.

12 MR. KRAUS: And it turned out that it was
13 natural causes. It was a heart attack, and we lost a
14 very valuable employee.

15 MS. SILVEY: Well, I'm sorry to hear
16 that.

17 MR. KRAUS: I appreciate that.

18 MS. SILVEY: I really don't have -- I
19 don't think I have any comments. Do you have any?

20 MR. MATTOS: Just one point of
21 clarification on the special assessments review. Our
22 intent in removing the list of categories that we
23 automatically consider for a special assessment where
24 our hope and our intent is to reduce the number of
25 special assessments that we're doing. Right now, the

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1 way the rule is written, MSHA must go through a
2 review process starting with the inspector, and the
3 process goes through to the assistant district
4 managers and the district managers. We are hopeful
5 that the regular formula would provide a good enough
6 penalty, civil penalty, so that that number of special
7 assessments can be reduced. We currently have
8 discretion to specially assess any citation, and we
9 would retain that discretion. It would really be
10 taking away a list that we are automatically going to
11 review. I just wanted to clarify that. We are hoping
12 not to have more, is what I'm trying to say.

13 MS. SILVEY: I Said I wasn't going to
14 make this comment, and I don't know what, because, you
15 know, in a way, philosophically, you sometimes don't
16 change how people feel about things or their approach
17 to things.

18 The statutory provision for this proposal
19 is a civil penalty provision, and by that, I mean that
20 the whole purpose of the law, the Mine Act was
21 remedial, proactive in nature and not punitive. You
22 know, I guess, though, when people see a penalty, they
23 think of punitive. So, I hear all the comments and
24 testimony. Comments and testimony we heard earlier
25 couch the proposal as punitive in nature, but in point

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1 of fact, it was meant to be proactive and preventative
2 and as an effective inducement for safety, or on the
3 other hand, a deterrent to unsafe behavior. So, with
4 that in mind, we tried to propose some things to sort
5 of provide a great inducement, but like some of you
6 are telling us, we didn't do it in the manner which
7 would be most effective, and we appreciate that. But
8 as each of you all come forward, if you can provide,
9 when you make conclusory statements to us, if you can
10 provide specifics to back up your conclusions, and
11 then that would be very helpful to us, particularly if
12 we were to go ahead and make a change. That would be
13 very useful, any specifics that you can provide.
14 Thank you.

15 MR. CROCCO: Can I ask you a question?

16 MR. KRAUS: Certainly.

17 MR. CROCCO: Under repeat violations, you
18 have a pretty large coal mine, a big operation and you
19 probably get a fair number of citations. Could you
20 talk a little bit about what you do, in your mind, the
21 processes that you have in place to address repeat
22 violations or prevent them from reoccurring?

23 MR. KRAUS: One of our problems right now
24 is that we've got three underground coal mines under
25 one ID, and we're seriously considering assigning an

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1 ID for each mine. As this new rule is written, the
2 history is all under the single ID that we have. So,
3 one mine that we have is a little bit more difficult
4 to maintain compliance, because of geologic
5 conditions, than the other two mines. So, our best
6 interest is to split them up, and we're seriously
7 considering that.

8 We look for the root cause of anything
9 that occurs. The big problem is the 75.400s, as it is
10 in any underground coal mine. You're going to have
11 coal spillage from time to time. We are doing the
12 utmost to analyze each individual occurrence and to
13 propose and recommend things to keep them from
14 occurring again that are repeat in nature. We've
15 entered into a partnership with MSHA on the Repeat
16 Violation Reduction program. We have monthly meetings
17 with the inspector, and we pick out the violations
18 that are being issued on a repeat nature, and we try
19 to target them. Right now, it's 75.400s and 75.1900s
20 for us, because we have the largest underground diesel
21 fleet in the country. We have a hundred and seventy-
22 one pieces of diesel equipment. So, 75.1900s is a big
23 one for us. I know eliminating men, too, because as I
24 mentioned, we had a hundred and seventy-one, and we're
25 down to about a hundred and ten now, and we're going

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1 to all battery-powered haulers and cable-cart haulers.

2 We are eliminating our diesel equipment. So, that,
3 in itself, eliminates the 1900.

4 MS. SILVEY: Where are your three mines
5 located, these three mines?

6 MR. KRAUS: Right outside of Harrisburg,
7 Illinois. A little town called Galatia.

8 MS. SILVEY: So, they are really
9 geographically together?

10 MR. KRAUS: Two of them are completely
11 hooked together in different coal seams.

12 MS. SILVEY: Okay.

13 MR. KRAUS: So, there's a Number 5 seam,
14 which is a loaded seam, and then a 6 seam.

15 MS. SILVEY: Okay.

16 MR. KRAUS: It's about a hundred feet
17 above it. They are serviced by the same portal.

18 MS. SILVEY: Okay.

19 MR. KRAUS: But they're under the same
20 ID.

21 MS. SILVEY: I understand. Thank you.

22 MR. KRAUS: Thank you.

23 MS. SILVEY: We will next hear from John
24 View with Journagan Construction and Aggregates.

25 MR. VIEW: My name is John View, Vice

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1 President of Leo Journagan Construction Company,
2 Incorporated, or Journagan Construction and
3 Aggregates. We're located in Southwest Missouri,
4 Northwest Arkansas. in the Springfield area.

5 Leo Journagan Construction Company has
6 approximately one hundred miners employed. We have a
7 total of three hundred and twenty employees between
8 our construction operations and our mining operations.
9 We operate at eighteen sites in two states. We're a
10 surface mining, nonmetal operation. Aggregate
11 production is what we do. The proposed changes in the
12 MINER Act are mandated changes by Congress. However,
13 the rest of the proposed rule changes we've started to
14 discuss here appear to go well beyond those
15 requirements. We question whether MSHA's assumptions
16 of increased penalties leads to increased compliance.

17 On the contrary, we believe the best environment for
18 increased safety is achieved through the cooperative
19 effort accomplished by Part 46 between MSHA and the
20 industry. Knowing that MSHA inspectors had the
21 ability to issue citations that represent much larger
22 monetary penalties will only cause problems. Changes
23 should be focused towards safety, not penalties. I
24 understand there's a difference in how we think we can
25 get there. However, we are also concerned that the

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1 money used to pay the increased penalties will shift
2 funds for overall safety and health efforts by the
3 operators.

4 In addition, we have to consider health
5 insurance costs, fringe benefits for employees in our
6 mines and many other rapidly escalating costs that
7 increases a situation that has already made it
8 necessary for some employers to cut back on those
9 fringe benefits. Payment of dramatically increased
10 MSHA penalties will only add to a tendency to further
11 reduce employee health insurance benefits and other
12 related benefits for those employees.

13 It will probably lead to increased, in
14 some situations, increased employee evaluations where
15 employees are cited for specifically violating MSHA
16 regulations in order to further reduce costs for the
17 employers. MSHA's preamble discussions are in Part
18 100 and refer to the number of citations that were
19 steadily increasing since 2003, that has been spoken
20 about, and they proposed that the metal and nonmetal
21 miners with less than ten thousand hours are exempt
22 from those penalty points assessment. Further on in
23 the comments, on a couple of pages later, MSHA makes
24 the comment that this eliminates approximately one
25 half of the metal and nonmetal mines from the penalty

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1 point assessment. If the penalties are on the rise,
2 MSHA has not done anything to analyze why those
3 penalties are on the rise. They make the assumption,
4 based on the ability to pay for a larger operator,
5 that they are able to carry the cost of increased
6 enforcement. They've exempted the small operator
7 from those penalty point assessments. The problem
8 that has a tendency to cause is, let's assume there's
9 a small operator, with less than five employees,
10 operating next to a larger operator who has three
11 operations, three small operations. One of those
12 small operations is located in the same area as the
13 exempt small operator. The larger operator is
14 penalized and has additional costs to his operation
15 as a result of this penalty point assessment and the
16 history assessment for the parent company.

17 That has a tendency to inhibit free trade
18 and competition between the operator that is exempt
19 from those penalty points and the operator that's not.

20 Let's face it, MSHA knows it and we know
21 it. A violation is a violation. We're not out here
22 to try to eliminate your ability to write citations
23 for valid violations. We all want to be on a level
24 playing field. If there is penalty points to be
25 assessed, they should be assessed equally to everyone.

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1 In the alternative, the penalty points should not be
2 assessed based on the controlling entity's size. This
3 is further complicated by the fact that a controlling
4 entity may operate in several states. That
5 controlling entity may operate in a couple of
6 different or several different MSHA districts. This
7 could lead to these various divisions of a company's
8 business being included in determining the size of
9 that operator, which are unrelated to mining. It
10 becomes a gray area. Where do you draw that stopping
11 point on administration to determine the controlling
12 entity's size?

13 Secondly, larger companies which are
14 vertically and regionally integrated operate under
15 different management controls in many situations.
16 Those competitive -- Those divisions and regions are
17 competitive with one another and independent of one
18 another when assessing safety incentives and other
19 performance criteria within their divisions -- between
20 their divisions. It does not seem reasonable to
21 punish one division for the poor safety performance
22 in another division by using this controlling entity
23 analysis. What's more, larger companies often operate
24 in multiple MSHA districts that have their own
25 management priorities in areas of safety concerns,

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1 both for the company and for the MSHA district. By
2 maintaining these separate entities and not looking at
3 the controlling entity, it reduces the impact of an
4 occasional loose-canon inspector, I will call it, or
5 also the loose-canon operator supervisor who may be in
6 one area, if I could use that on our side. I don't
7 like to use that term, but it's only fair. We're not
8 perfect, and you're not perfect. We want to strive
9 for improvement and not to adversely affect the rest
10 of the operation. We believe MSHA should continue
11 placing emphasis on safety performance at individual
12 mine sites. Local management, supervisors and
13 employees are likely to retain more ownership of their
14 safety performance if they know that they are the ones
15 that are most responsible for maintaining a good
16 compliance track record for their operation. The
17 Single Penalty Assessment has been addressed. This
18 system works now. The incident rate is decreasing
19 over the last fifteen years. We urge MSHA not to
20 eliminate the Single Penalty Assessment.

21 Enforcement of MSHA's regulations is not
22 necessarily consistent, since some inspection
23 personnel understandably have more or less expertise
24 and personal emphasis regarding certain standards.
25 It is also important to keep in mind that many non S&S

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1 citations have historically been issued in highly
2 subjective conditions. Where one inspector may find a
3 situation in conformity with the regulation and make
4 that cycle through his inspection period without any
5 violations, the next inspector comes in the next year,
6 and they rotate around, and he finds an obvious
7 violation of something that has been an accepted
8 practice. These are usually minor situations
9 involving simple housekeeping or temporary oversight,
10 and in many cases, they're related to minor paperwork
11 errors or oversights.

12 MSHA admitted in its rulemaking notice
13 that calculating the points and assessments under this
14 proposed new system will be very time-consuming and
15 costly for them by removing the Single Penalty
16 Assessment and putting them all on a regular
17 assessment subject to the special assessment review.
18 This seems especially unnecessary for the type of
19 violations, propose little risk of injury or illness
20 to mine employees to even be put in that category.
21 Again, we recommend that you maintain the Single
22 Penalty Assessment. Regarding the penalty points for
23 minor violations, this five-fold increase in penalty
24 points for those violations classified as unlikely to
25 result in injury or illness is not justified. This

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1 effectively eliminates this distinction between S&S
2 and non S&S citations from a penalty perspective. The
3 current penalty program for gravity should be
4 maintained. Remember again that one half of the
5 operators are exempt in metal and nonmetal from this
6 penalty point for minor operation violations. Good
7 faith incentives has been discussed previously, and
8 I'll discuss it some more. I want to reiterate,
9 especially based on what Madam Chairman Silvey had
10 just related in the last comments. MSHA is limited
11 somewhat in what they can propose in looking at the
12 incident rates from insurance companies and good
13 performance by mine operators. Journagan Construction
14 Company also has a below-industry average for incident
15 rates, and we have an incident modification rate of
16 .79, industry standard being 1, and bad operators
17 being above that. We're very proud of that and
18 envious of that. However, we oppose the reduction for
19 good faith from thirty percent to ten percent because,
20 as previously mentioned, many of those citations are
21 the result of temporary oversight or subjective
22 evaluation by an inspector. It is counter-productive
23 to sharply reduce the incentive for abating such
24 citations quickly. This would also further reduce the
25 need for follow-up inspections by MSHA. That's a cost

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1 savings for MSHA. Also, this thirty percent incentive
2 for early abatement and prompt abatement provides an
3 incentive for the operator to temporarily disrupt his
4 operations, put a couple of people on fixing something
5 that can be fixed right away before the inspector
6 leaves, and it's abated and taken care of. That has
7 cost savings, health savings and safety savings for
8 all involved.

9 MSHA does not want to come back thirty
10 days later and find out the operator fixed the
11 situation the day before they were scheduled to come
12 back. The fact that they fixed it while he was there
13 is thirty days of increased safety operation that
14 needs to be considered by this Commission.

15 While I understand you cannot provide an
16 incentive not provided in the law by looking at safety
17 records of individual mines, and what have you, what
18 you can do is maintain the good faith incentive that
19 has been allowed by law and not further penalize us by
20 diverting our ability to comply or by decreasing our
21 desire to comply instantaneously. The repeat
22 violation category and the regular assessment penalty
23 point calculation seems to duplicate the history of
24 violations criteria. MSHA can use a single standard
25 to cover many unrelated conditions. For instance,

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1 Safe Access under 30 CFR 56.1101, it can relate to
2 several different items, from a bent rung on a ladder,
3 to the requirement of an employee having to step over
4 a barrier to access a screen or access a belt in
5 several other situations. If a company establishes a
6 multiple violations history of 56.1101, that is not
7 necessarily a repeat violation of the same violation.

8 The bent ladder rung cited at 561101 and the follow-
9 up inspection later to find an employee stepping over
10 a barrier for a violation of 56.1101 is not the same
11 violation, but under your standards, that is a repeat
12 violation and would be considered as such. Guarding
13 is another instance. Guarding covers not only
14 vehicles. It covers belts, belting material, and it
15 also covers motors. There are several areas there
16 where repeat violations of that violation would not be
17 what MSHA is referring to as a repeat violator of the
18 same violation. Because each inspector subjectively
19 interprets MSHA standards according to his own
20 expertise and personal insights, the repeat violation
21 is likely to be unevenly applied. There is no way,
22 with the current citation numbers in the Code of
23 Federal Regulations, at this time, for MSHA to track
24 repeat violations. I would further say repeat
25 citations, because not all citations are violations.

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1 When they are mitigated, there are some that can be
2 mitigated down to a lower level. There are some that
3 can be vacated in their entirety when everybody
4 understands what the situation is. MSHA comments that
5 small operators are not necessarily who MSHA is
6 targeting with history criteria. MSHA thinks the
7 record may not reflect systemic problems of non
8 compliance with the small operators, again, because
9 they are exempt from this assessment. Recent
10 administrative law review of MSHA's actions in the
11 last year have indicated that independent operators
12 were cited at a mine for a violation. They had their
13 own ID number and their own right to operate. The
14 operator was also cited for that violation by the
15 independent contractor. MSHA's Review Commission has
16 said there is no appeal by the operator of the
17 violation committed by the independent contractor.
18 That amounts to triple damages. Now you want to add
19 history onto that to increase further the penalty on
20 an operator who's trying to comply with the
21 regulations. MSHA believes larger operators show a
22 lack of commitment to good mine safety and health. I
23 would contend that that's not true. The larger
24 operators have the ability to improve mine safety and
25 health much more economically than the small operator.

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1 After all, a violation is a violation, and the
2 ability of a larger operator to mitigate that and
3 eliminate that, as stated by the coal operator that
4 was just up here, is an ongoing, continuous process of
5 improvement, and together with MSHA, under Part 46, we
6 can continue to do that and accomplish that. The
7 time allowed for conference request and additional
8 information, we believe MSHA should be consistent
9 with OSHA in allowing fifteen days to submit
10 additional information or request a conference on
11 citations.

12 At the very least, and in the alternative,
13 MSHA should maintain their current and present ten-day
14 standard and not reduce it to five days.

15 Industry in general across this nation is
16 subjected to a fifteen-day turnaround period. Miners
17 currently have a ten-day period. It is proposed that
18 it be reduced to a five-day period. We feel that this
19 is unfair. The proposed change does not allow mine
20 operators to determine the appropriate course of
21 action following the issuance of a citation. Our
22 industry is unique, since operators often have sites
23 that are scattered over a wide range and wide
24 geographic area. It is possible for a citation to not
25 reach the proper management authority for a day or

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1 two, especially considering work schedules, vacation
2 time and illness. It is also possible that when that
3 operator appeals that citation, that the appropriate
4 MSHA person is not on the other end to receive that
5 and discuss that and mitigate that citation in a
6 timely manner because of schedules, vacation time and
7 illness. All operations, large and small, need time
8 to seek appropriate guidance to research the
9 circumstance of the citation before requesting a
10 conference. This saves time spent in conference and
11 litigation for both the mine operators and MSHA
12 personnel. That's what we all want to do, is
13 eliminate the time we have to spend following up on a
14 citation. We need to efficiently spend our time in
15 eliminating the cause of that citation and improving
16 our mine operations.

17 The timeliness of accident notification,
18 we have one final recommendation, and I'm going to
19 divert from that a little bit. It would appear that
20 the gentleman from the IAAP had a very good
21 alternative proposal on the surface there. I feel
22 that the fifteen-minute time frame is unreasonable. I
23 believe this proposal and Chairman Silvey's response
24 to that, the intent is to allow the compliances
25 necessary in a reasonable manner and attend to the

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1 physical needs of the employees in a hazardous area.
2 I don't believe it is the intent of MSHA to do away
3 with that. I think we have a viable alternative that
4 was proposed earlier, and I would request that you
5 favorably consider that request.

6 Again, thank you for allowing me to
7 comment. If you have any questions, if I can find
8 them in my notes, I will try to answer them.

9 MS. SILVEY: Thank you, sir. I do have
10 one comment. I think maybe it is just a clarification
11 to make sure that we are on the same wavelength. You
12 mentioned the size, and you kept saying no points, no
13 assessment for small mines. Just so everybody knows,
14 I am trying to half way try to make sure that we are
15 clear on your testimony. You were going through the
16 proposal for the regular assessment and the various
17 criteria in that proposal.

18 MR. VIEW: Yes.

19 MS. SILVEY: And MSHA proposed different
20 tables for size. So, it's not that small mines, mines
21 under a certain tonnage category for coal mines, hours
22 for metal and nonmetal mines and hours for independent
23 contractors, it's ten thousand tons for coal mines,
24 ten thousand hours for metal and nonmetal mines and
25 ten thousand hours worked at all mines for independent

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1 contractors. It's not that that category of operation
2 would not get any penalties. It's just that they
3 would not get any points for size. So, they would end
4 up getting penalties under the proposal. It's just
5 that it would be no points for size.

6 So, I just want to clarify that for
7 everybody, and there is no change from the existing
8 rule. That's the same as it is under the existing
9 rule.

10 MR. VIEW: Yes, ma'am. And what I was
11 referring to -- And pardon me. I beg your forgiveness
12 if I wasn't clear.

13 MS. SILVEY: No. That's fine.

14 MR. VIEW: I meant that the size category
15 should remain as it is. It should not go to the
16 controlling entity in order to increase penalties and
17 assessments to the operator. That, again, is a free
18 trade -- not a free trade, wrong word, but economic
19 competitiveness between competitors. It keeps us on
20 the same playing field as much as possible, based on
21 the size of the individual mining entities, rather
22 than the controlling entities. I apologize if I was
23 misleading.

24 MS. SILVEY: No problem. Thank you. We
25 next have Bob Pono (sic) from Frontier-Kemper.

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1 MR. POND: It's Pond, P-o-n-d.

2 MS. SILVEY: I'm so sorry, Mr. Pond.
3 Boy, I really messed that up.

4 MR. POND: Well, if that's all you've
5 done, you're forgiven.

6 MS. SILVEY: Thank you.

7 MR. POND: My name is Bob Pond. I'm
8 Executive Vice President of Frontier-Kemper
9 Constructors. We're a shaft and tunneling contractor,
10 with about a third to half of our revenue coming from
11 mining work, both coal and metal and nonmetal. We
12 also have an operation which designs and manufactures
13 hoisting equipment. We'll celebrate our 100th year in
14 business next year, and we have the first contractor
15 ID ever issued by MSHA, A01. People from our
16 machinery division teaches at the academy periodically
17 on hoisting equipment. We've had a cooperative
18 relationship with MSHA and MESA since the very
19 beginning. We're going to submit more details,
20 written comments on the 23rd. We are owned, in the
21 end, by a very large and diversified conglomerate in
22 Europe.

23 My question on controlling entity is, you
24 know, you can ultimately go as high as you want to,
25 but as some point, while they may control you in terms

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1 of share ownership, they have absolutely no
2 participation or influence in how you conduct your
3 business. So, I would ask, and we'll put this in our
4 comments, the controlling entity be the entity which
5 controls the behavior regarding operations, as opposed
6 to financial only.

7 The second concern we have, and people
8 have commented on the fifteen minutes at length, and I
9 won't spend too much time on it. But given the
10 importance of the sixteenth minute and the price tag
11 that attaches to that, I really do think you need to
12 clarify what one minute zero is. There's been a
13 number of good reasons why it should begin, perhaps, a
14 little bit later than you have envisioned.

15 In our experience, and I think it is
16 recognized by others and I'm sure recognized by MSHA,
17 a great many accidents and, in fact, perhaps the
18 majority are caused by unsafe acts or unsafe behavior
19 by an individual. MSHA has the power to issue
20 citations to individuals, but doesn't seem to use it
21 hardly ever. That power also exist in Canada, it
22 exist in Germany and France, and it has great effect
23 there. The individual miners take it much more
24 seriously than perhaps some of ours do. We suggest
25 that you could go a long way towards improving safety

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1 by making a little more use of your power to issue
2 individual citations. I know there's a lot of heat
3 that would attach to that, particularly from some of
4 the labor unions, but I think the benefit would
5 outweigh just taking a little gas, which you take
6 anyway all the time.

7 Also, there's certainly no uniform
8 interpretation of regulations, despite the program
9 bulletins from district to district and from inspector
10 to inspector. That's a fact of life. We work in all
11 the districts. We've seen all of them. Every time a
12 district record changes, there's a difference in
13 interpretation.

14 So, we're always left a little bit in
15 limbo on compliance, particularly with some more
16 esoteric rules and how this is going to be looked at.

17 It doesn't mean that either interpretation is wrong.

18 It just means which one can you count on. This
19 penalty process or increased penalties, I think, will
20 have an effect of making us contest more. That's
21 going to choke a system that's already choked, as you
22 know, and we have that concern. We would also suggest
23 that it's well time for MSHA to write and implement
24 Part C of some of the regulations that has to do with
25 construction and recognize the distinction between

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1 construction and mining. It is different. We have a
2 more transient workforce. We're not there for twenty-
3 five years. We're on a particular site for a year.
4 So, the fluidity of our workforce is different. The
5 origin of our workforce is different, and the
6 regulations should recognize that. I did notice that
7 in your statistics, you show an increase in citation
8 revenue, theoretically, of forty-four million dollars.

9 I think it would go a long way toward taking some of
10 the public heat off, and we know that you've got lots
11 of it these days because of Sago. To show what you're
12 going to do with that money and how that extra money
13 is going to improve safety in the mines and miner
14 safety, well, perhaps by spending it, if you do get
15 it, on training and on other things which help, rather
16 than just use it as a fund mechanism. The impression
17 most of us have now is that it's a thinly-veiled
18 funding mechanism that has only the purpose of
19 increasing your revenue. Another comment I'll make is
20 that many of us are self-insured for worker's comp.
21 So, we have an absolute giant incentive to do a very
22 good job of safety and preventing accidents, because
23 the money is coming out of our pocket and not an
24 insurance company. That's probably the king-sized
25 motivator we have. With that, I will conclude just by

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1 saying that I think these hearings are a good idea.
2 You should do more of them from time to time, and you
3 will get our written comments at the appropriate date.

4 MS. SILVEY: Thank you, Mr. Pond. I have
5 just a couple of comments, sir. First of all, a
6 number of you said that today, and I want to say that
7 we at MSHA appreciate it. You have mentioned the
8 cooperative relationship with MSHA, and we appreciate
9 that, because quite frankly, we couldn't do our job,
10 and we don't take it for granted. I certainly don't,
11 and I don't think the members of the panel today take
12 it for granted when the mining industry works with us
13 in a cooperative manner. And you are right, we've
14 taken a lot of heat and, unfortunately, that's some of
15 the things that some members of the public don't see.

16 The fact that on a day-to-day basis, every day, each
17 and every day, we do work together cooperatively and
18 we do work together to achieve some of the same things
19 that these fine companies up here have achieved for
20 the last three years. So, I would like to make that
21 comment. With respect to the increase in penalty, the
22 forty-four million dollars, you're right. We show a
23 forty-four-million-dollar increase, if you apply the
24 proposed rule to the violations that the Agency issued
25 in 2005. Now, we went further, and we projected that

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1 if after the proposal with the higher penalties, in
2 effect, mine operators, would ultimately expend more
3 money to improve compliance, and that ultimately would
4 result in reduced penalties. We did carry that
5 forward and we showed that.

6 You stated, Mr. Pond, that it would be
7 good if we showed what we were going to do with some
8 of that money, that the public would like to see.

9 But in point in fact, the Mine Act
10 requires that all penalties go to the U. S. Treasury.

11 So, any penalties that we collect, they don't come
12 back to the Labor Department. They go to the U. S.
13 Treasury and the general receipts of the Treasury and,
14 therefore, are used for the Government's budget.

15 MR. POND: Maybe spend a little more time
16 on the Hill, then.

17 MS. SILVEY: Yes, I'm sure. So, that's
18 really all I have. Does anybody else have comments?

19 *[No Verbal Response]*

20 MS. SILVEY: Thank you.

21 MR. POND: Thank you all.

22 MS. SILVEY: Next we will have Jerry
23 Neels with Delta Company, Inc.

24 MR. NEELS: Good morning. I just want to
25 echo that we do appreciate the opportunity to have

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1 this hearing. I'm Jerry Neels. I'm the Corporate
2 Safety Environmental Manager with Delta Companies,
3 Incorporated. We are a construction company,
4 primarily hot-mixed asphalt. We also have ready-mix
5 plants and six mining operations, employing about a
6 hundred and twenty-five people in the mine division.
7 We're located in Missouri, Illinois and Arkansas,
8 three states. We are a subsidiary of COLAS, French-
9 owned COLAS headquartered in Paris, France. We've
10 been owned by them since about 1992, just to give you
11 a little bit of background on our company. I would
12 also like to state, you know, for the record, in
13 addition, we're a member of IAAP, and I'm not going to
14 repeat John's comments. John did an exceptional job
15 summarizing many of the feelings of the members. In
16 my prepared statements, I'm going to kind of deviate,
17 for brevity, if nothing else, because I'll be just
18 repeating a lot of things that John has already said.

19 So, in the interest of time, I'll kind of just move
20 ahead.

21 We are also a company very committed to
22 safety. One of our operations just passed the million
23 mile -- million man hour, consecutive man hour, excuse
24 me, milestone this year without a disabling injury in
25 one of our quarry operations. Ten years ago -- I have

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1 been in this industry twenty years. I had kind of
2 given up on ever having any of my operations go
3 through a full inspection without getting any
4 citations from MSHA. This year, we had two of our
5 operations, in this last round of inspections, had
6 zero citations. I think that's a reflection again of
7 the increase in the training and the education of our
8 people that came through Part 46. Our compliance in
9 our company has improved dramatically since I have
10 been affiliated with our company. At one point, we
11 were in excessive history, and that's quite a change
12 in our violation history.

13 There's a couple of things I just want to
14 add, kind of supporting what John said, and I'm not
15 going to read my whole prepared text. The Single
16 Penalty Assessment system, as stated by several of the
17 speakers, already does work well. I've kind of viewed
18 that, in a way, in the past, as somewhat of a tool
19 that MSHA uses to educate the mining industry. They
20 are assessed for some of the more minor violations,
21 the technical things, the paperwork violations and the
22 less serious situations, and in MSHA's own words, not
23 reasonably likely to cause a serious injury. I think
24 industry has used those non S&S or the concept of the
25 non S&S to educate not only the mine companies, but

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1 also the workers. You know, it gives us an
2 opportunity to come into full compliance for all the
3 regulations that don't really result in anything
4 serious that's going to result in accidents and
5 injuries. So, I think that system does work well, and
6 we really would like to see that maintained. The
7 reduction in good faith proposal, again, it's already
8 been stated by the other speakers at the hearing this
9 morning, and I guess our feeling is that the proposal,
10 as it's written, kind of does the opposite of what
11 they intend to try to do. Most of your -- Especially
12 with your minor violations, we take care of those
13 before the inspector either, one, leaves the area or,
14 two, usually by the end of the inspection. That
15 reduction in good faith, or that good faith reduction
16 credit you get for thirty percent, obviously, that
17 places an incentive for you to take care of that right
18 away in a timely manner. So, by eliminating that, it
19 seems to fly in the face of taking care of everything
20 right away. We would like to see that stay at thirty
21 percent. You mentioned earlier that we get a chance
22 to ask questions. So, maybe I would like to ask a
23 question. I may be a little bit confused on this
24 issue, but on repeat violations, excessive history
25 proposal, as stated in the proposal, the one thing

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1 that I would like to see -- And this has been
2 confusing for us, and I have failed to be able to get
3 the same answer, I think, from the same -- the same
4 question from several different inspectors with the
5 same answer, and that is how MSHA defines what
6 constitutes an inspection day. There's a lot of
7 confusion out there about that. I've researched the
8 law. I've talked to the Solicitor's Office about that
9 in one of our contests, and I can't find it anywhere,
10 and no one has been able to provide that.

11 MR. MATTOS: It's classified information.

12 MS. SILVEY: He wasn't supposed to do
13 that, because I was going to say first that I just
14 said you can ask questions, but I didn't mean it.

15 MR. NEELS: Is that because I'm rambling?

16 MS. SILVEY: He stole my thought. That
17 was humor. I was going to infuse a little humor here.
18 Jay will answer that.

19 MR. MATTOS: The inspection days are any
20 day an inspector shows up at an operation to conduct
21 an inspection.

22 MR. NEELS: For any reason?

23 MR. MATTOS: Not for any reason, only for
24 inspection and investigation type activities.

25 MR. NEELS: Let me just ask that. Is

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1 that in a policy somewhere that's available to the
2 mining industry?

3 MR. MATTOS: Well, that's a good point.
4 We'll put it out on our website.

5 MR. NEELS: Okay.

6 MR. MATTOS: We can raise the fog factor
7 there.

8 MR. NEELS: That would really help,
9 because we found out the difficulty of that process
10 when we found ourselves in excessive history. In
11 trying to get from the Agency what constitutes
12 violations per inspection day, the violations part was
13 easy. It was the per inspection day part that we
14 never were able to run that down.

15 Since that's used in the formula, that's a
16 critical issue for the operator.

17 MS. SILVEY: It is.

18 MR. NEELS: What we did with our, or what
19 I did with my mine superintendents or my quarry
20 foreman, I told them, I said, "*Before the inspector*
21 *leaves, when he closes out, ask him how many hours you*
22 *are going to get credit for the inspection*". So, we
23 started tracking those ourselves, because when we went
24 back and started looking at what was available to us
25 through the website, some of it didn't match up.

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1 That's an issue that I would really like to see the
2 Agency get to the bottom of for the mining industry,
3 if we can.

4 MR. MATTOS: All right. Part of the
5 confusion is that we went with a new computer system
6 last year. We had two different ways that the
7 inspection days were counted, one way for coal and one
8 way for metal and nonmetal operations, but now we're
9 counting them all the same way. The hours don't have
10 anything to do with it.

11 MS. SILVEY: If he was there for four
12 hours doing an inspection that would be one inspection
13 day.

14 MR. NEELS: Okay. Because I don't know
15 about everyone else in the room, but there's a lot of
16 confusion about that issue.

17 MR. MATTOS: If there's two inspectors
18 there that day, that's two inspections.

19 MR. NEELS: I was told by one that it was
20 every four hours of inspection time, and the another
21 that it was, like, every six hours of inspection time.

22 MR. MATTOS: Actually, it used to be
23 every five hours.

24 MR. NEELS: Okay. So, they were both
25 right. Well, thank you for addressing that. That is

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1 an issue that I think is important. In regard to the
2 time allowed to conference a citation, again, I will
3 just kind of reiterate what the other gentleman has
4 spoken about. The rationale that MSHA, you know, for
5 believing that the proposal -- MSHA believes that the
6 proposed reduction would result in a more effective
7 civil penalty system, because penalties will be
8 assessed closer in time to the issuance of the
9 citation. That's a quote from the proposed rule.

10 I just had a little bit of a hard time
11 understanding the logic in that, because it takes a
12 minimum of several weeks, if not several months, for
13 us to get our assessments, anyway, which I really
14 don't understand how just reducing the time to allow
15 the mine operator to make a decision on whether to
16 conference that is going to have that much impact on
17 that. What it is going to do, though, especially if
18 we do away with the single penalty system where you
19 fall into the regular assessment under the point
20 system, I anticipate that it's going to force a lot of
21 us into automatically conferencing all of our
22 citations, so that we have time, then, to look at each
23 citation. When we get citations, we investigate a
24 citation just like an accident. You know, we want to
25 find out what led up to that citation and why did we

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1 get it.

2 Sometimes that takes a little bit of time.

3 Employees may be on vacation. You may have -- You
4 know, your foreman may not be available. He may be on
5 another shift. Sometimes that takes some time. So, I
6 would hate to see us get into a situation where we're
7 automatically requesting conferences just to preserve
8 our right to conference, you know, and then later
9 withdraw it. That's just going to occupy more of
10 MSHA's time to schedule them and all of that. Again,
11 just kind of beating a dead horse here, but we would
12 like to see that at least, at minimum, maintained at
13 the ten days, and if not, increased to the fifteen-day
14 time period. I will just conclude real quickly that
15 the other gentlemen have already addressed the other
16 points that I had identified in my comments, and we
17 will also be preparing some written comments before
18 the 23rd. But, again, this relationship between
19 industry and MSHA, in my opinion, has really come full
20 circle since I have been involved with the Agency for
21 the last twenty years. When Part 46 was implemented,
22 it just seems like everybody had -- Well, my opinion -
23 - Let me state it this way: I always tell my mine
24 superintendents that compliance is the minimum part of
25 safety. We have to comply with the regulations, but

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1 compliance is not safety. Safety involves much more
2 than just complying with the regulations. Through our
3 training, our education and, quite frankly, by
4 insisting that we have good management, that's the
5 number-one issue. The relationship between -- I can't
6 speak to coal, because I'm not in the coal industry,
7 but particularly in the aggregate industry, the
8 relationship between MSHA and the industry,
9 particularly over the last ten years, in my opinion,
10 has contributed more to the reduction of those numbers
11 than anything else. We're focusing on safety.
12 Compliance, yes. Compliance is still important, but I
13 think we are now really targeting how we reduce
14 accidents, and that's what this whole system is about.

15 So, I would like to say that we do have some concerns
16 that with the increase in the penalties, particularly
17 the items that I mentioned, and it could result in
18 spending more of our time just arguing over citations
19 and less time being able to concentrate on safety.
20 After all, the bottom line is that we don't want
21 anybody to get hurt. So, does anyone else have any
22 questions?

23 MS. SILVEY: Does anyone have any
24 questions?

25 *[No Verbal Response]*

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1 MR. NEELS: Thank you.

2 MS. SILVEY: Thank you. We appreciate
3 it. Next we have John Griesemer with Springfield
4 Underground, Inc.

5 MR. GRIESEMER: Good morning. My name is
6 John Griesemer. I'm Vice President of Springfield
7 Underground. We are an underground limestone mining
8 operation in Springfield, Missouri with sixteen
9 miners, and we also have a division in Joplin,
10 Missouri with eleven miners.

11 I guess I had some comments and will be
12 submitting written comments, but I guess I would ask
13 the panel, a lot of what I have to say has been said.

14 I guess I find it a little bit interesting that those
15 of us that didn't talk beforehand are coming up with
16 very similar comments.

17 Is it a waste of your time for me to
18 continue with some of those remarks?

19 MS. SILVEY: No.

20 MR. GRIESEMER: All right. I just don't
21 want to waste your time.

22 MS. SILVEY: We heard some of the
23 comments earlier. We've heard some of the comments
24 before.

25 MR. MATTOS: Some of the comments, if

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1 they're said often enough, might stick.

2 MS. SILVEY: You might want to make sure,
3 so that some of my panel members might listen
4 attentively.

5 MR. GRIESEMER: Springfield Underground
6 is an aggregate mining company that has been in
7 business for over sixty years. We're family owned.
8 We are fairly small, in our opinion. We strongly
9 support a safe work environment for our miners, for
10 their safety and their health. I would reiterate what
11 Jerry said. It wasn't in my prepared comments, but we
12 look at MSHA as a compliance, and we look at safety as
13 something far beyond MSHA.

14 I'm in the situation where I am part of
15 the family ownership of the company. I know most of
16 the employees, their families and their kids. So,
17 safety is something that is not just a number with our
18 insurance company, which we are very proud of. To me,
19 it's names, faces, kids on the baseball teams we
20 support. I mean, this is a very personal issue with
21 us, safety is. It's not a federal regulation and
22 coming from Capitol Hill.

23 Along our line of our commitment to safety
24 and health is working with many different agencies,
25 federal agencies to promote the safety and health of

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1 miners nationwide. Most recently, NIOSH was on our
2 property doing a pillar survey, trying to improve
3 safety of underground limestone. We worked with MSHA
4 on the DPM at the test site, among others. In
5 addition to working with those Government agencies, we
6 work with trade associations and National Stone, Sand
7 and Gravel, the Missouri Limestone Producers
8 Association.

9 It was through our association with
10 National Stone, Sand and Gravel that we were one of
11 the first companies to sign on with the MSHA Industry
12 Joint Alliance on Safety that MSHA did with NSSGA. We
13 believe strongly that the best approach to a safer
14 workforce is to the -- is proactive safety programs
15 and not necessarily punitive programs. I would echo
16 what has been said and talked about. The cooperative
17 atmosphere has been very beneficial, in our opinion.
18 Our understanding, as a member of that Joint Alliance,
19 was that MSHA would leverage knowledge to the mining
20 community and Government agencies to promote the
21 safety and welfare of miners. It's been said before
22 that we believe many of these rules fly in the face of
23 that joint cooperation. The proposed rule and its
24 recommendations will bring back, in our opinion, a
25 more adversarial environment between industry and MSHA

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1 inspectors and is likely to reverse some of the
2 cooperative gains we've made over the years. It is
3 not clear to us that Congress intended MSHA to
4 increase penalties for minor violations, but that's
5 exactly what's being proposed. We believe that, as
6 Jerry just stated, we will be conferencing more
7 citations under the proposed rule, and especially the
8 elimination of the Single Penalty Assessment.

9 The previous incentives to react quickly
10 and fix a condition has been stated while the
11 inspector is still on the property has been
12 drastically reduced and could make some changes in our
13 reaction time. Also, as I stated, the time line
14 reduction from ten days to five days, we believe, is a
15 significant change. I believe, as was said earlier,
16 too, a clarification on workdays or calendar days
17 would be helpful, unless I just missed that somewhere.

18 The problem with a company like ours that has other
19 divisions, as some of these other companies do that
20 are regulated by OSHA, is you get two different -- Out
21 of the Department of Labor, you get one instruction
22 from one side to your left hand, and your right hand
23 is covered by MSHA, and you've got different
24 instructions. So, we would propose that MSHA consider
25 a fifteen-day time line, which is what OSHA has. With

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1 regard to the changes in the special assessment
2 criteria, I understand what you said about, actually,
3 the intent was to reduce the number of special
4 assessments. I guess our interpretation was that it
5 would significantly increase those. I guess it's a
6 matter of interpretation and intent. We believe the
7 current methodology, although not perfect, establishes
8 clearer boundaries and guidelines to simplify
9 implementation.

10 You asked for comments on the particular
11 weight of the controlling entity. Even though we are
12 a small company, as I mentioned, we have businesses
13 that are not covered by MSHA, real estate development,
14 areas that would not be appropriate in using the
15 controlling entity to determine -- well, the point
16 weighting. I'm sorry. We would respectfully request
17 that you keep the Single Penalty Assessment, as I
18 think others have mentioned. Silvey, you asked for
19 specific instances in reviewing citations that we
20 received over the last couple of days, and I would
21 agree with you that you never want to admit you're
22 guilty, but I will say that we have had citations
23 that, when we received them, you say you think there's
24 a difference of opinion with the inspector, but the
25 way the slip, the ticket is written, you say to

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1 yourself it's a single penalty and, you know, we're
2 going to take it as a learning experience. As Jerry
3 said, we investigate those, and we use it as a
4 learning experience. We pay the single penalty, and
5 we move on. Elimination of that, I think, will change
6 our attitude on a lot of those. Let me give you some
7 specifics we've had in the last two years. A
8 housekeeping citation, it was on dust buildup inside
9 of our plant. Our plant is not occupied when it's
10 running. It is inside of a building. It is run by
11 computer from a remote location that monitors the
12 plant. So, we did not feel that a housekeeping
13 citation was warranted for an area that is not
14 accessed, except once a week for maintenance, and at
15 that time, they are responsible for getting safe
16 access. It was a non S&S single penalty, and we did
17 not fight that. In the future, I would see it
18 differently to where we would conference that and take
19 it to a different level.

20 The other one, we received a citation for
21 a dirty outhouse. It is a situation where the
22 chemical -- The company that cleans the chemical
23 toilets was there the day before the inspector. We
24 had a record of that, and employees essentially
25 sabotaged the toilet. During the inspection, we

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1 received a citation for that. Unfortunately, we have
2 video cameras in the area, but it was just outside of
3 the range of those video cameras.

4 That's not one -- You know, that's one of
5 those where you say, okay, what's the safety? Yeah, I
6 agree that it's a health problem, but somebody did
7 that to their own toilet, and the company is cited for
8 it, and you get a Single Penalty Assessment. You use
9 it as a learning experience, and you go on. Under
10 different rules, I don't know. I mean, it's one of
11 those that is an annoyance, and you have got to make a
12 judgment call. I'm just saying that the changes in
13 the rules are going to change how we view those. The
14 other item in the law that I don't like, but I'm not
15 sure you have anything to do with it, but the way the
16 law is written, it assumes I go to work knowing
17 there's violations on my property, and it assumes that
18 by increasing the penalties, I, as the owner/operator,
19 is going to change what I do about those violations.

20 You know, that assumption is insulting to
21 an operator such as myself, that there are violations
22 on my property today that I know about and I'm not
23 fixing them because there's not a monetary incentive
24 from MSHA to fix those. As I've said, that's probably
25 coming from Capitol Hill. That's more of an attitude

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1 of Congress than it is yours, but it is insulting, as
2 a small business operator, for that attitude to
3 permeate down through the regulations, and I believe
4 that's what we have changed in our cooperative
5 relationship with MSHA over the last several years.

6 You've addressed inspection days. That
7 was one of the questions I had. One of the
8 differences I see, though, between our two operations,
9 one being a surface operation and one being an
10 underground, is the days that the inspector is there.

11 They spend a lot more days on the underground than
12 they do the surface operation. I don't know that that
13 does a good job of differentiating between the two,
14 but I will leave that up to you to consider. I don't
15 know that I have a solution to that. Thank you for
16 allowing me to appear today, and as other speakers
17 have said, I feel that these opportunities to express
18 our side of the story are beneficial. If you have any
19 questions, I would be happy to answer them.

20 MS. SILVEY: I don't have any questions,
21 really. Just on the issue of the single penalty, and
22 we've got a lot of that. That's why I revised my
23 opening statement to make some reference to the single
24 penalty. We've gotten a lot of comments on the single
25 penalty.

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1 I mentioned that at the earlier hearing.
2 I mentioned at the earlier hearing that the -- And I
3 won't prolong this, either.

4 Some of you said the single penalty for
5 the category of the non S&S violations, those not
6 reasonably likely to result in reasonably serious
7 injury or illness, but those violations can be sort of
8 a gradation of violations. They can probably be, like
9 you said, you know, broken light bulbs, toilets, and
10 then there can be some that are sort of more safety
11 oriented, but not yet S&S, but I think they can be in
12 the category. I think, so that everybody knows, that
13 it was with that thought in mind that we developed
14 this proposal. Some of the non S&S violations can be
15 in the category that, if left uncorrected, one could
16 probably reasonably conclude that they might, then, in
17 the future sometime, left uncorrected, lead to S&S
18 violations. So, those are the ones that we probably
19 would like to see an increased focus on. I'm sure you
20 would like to see an increased focus on. As you just
21 said, and everybody who's testified, your commitment
22 is to safety. You don't want to see any violations,
23 S&S or non S&S.

24 So, it was those, probably, in that
25 category that would lead, like I said, if left

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1 uncorrected, would turn into S&S violations, and
2 that's where we clearly would like to hope to show
3 some increased focus. You all have said to me,
4 there's different ways to kind of approach something,
5 and we've gotten some of your comments. Thank you
6 very much. Next we have Ed Elliott. He's with the
7 Rogers Group.

8 MR. ELLIOTT: My name is Ed Elliott. I'm
9 Director of Safety and Health for Rogers Group,
10 Incorporated. We're a mining and road construction
11 company with our corporate headquarters in Nashville,
12 Tennessee, with operations in Tennessee, Alabama,
13 Kentucky, Indiana and Arkansas. We are a privately-
14 held company in the mining business since 1908. I
15 want to thank MSHA for providing this forum to receive
16 comments on the proposed criteria and procedures for
17 proposed assessment of civil penalties. The time
18 available to review the rule and the supporting
19 documents are really insufficient to adequately
20 respond, but the following are comments I wish to
21 submit:

22 Since the recent disasters in the
23 underground coal industry, primarily the Sago tragedy,
24 there's been a concerted effort to seek out the cause
25 of such a senseless loss of life. In the sincere

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1 effort to find the root cause, I believe there has
2 been, unfortunately, an equivalent effort to find
3 someone to blame. Many people, unfamiliar with the
4 mining industry, have sought to blame the operating
5 company, defective safety equipment, training methods
6 and, yes, even MSHA. In my twenty-six years in the
7 mining industry, five of which were in surface coal
8 mining, I found that during the emotional time of a
9 tragic event, it is not easy to separate fact from the
10 reactions normal to such an event. People close to
11 the event are greatly affected by what has happened.
12 In many instances, very sincere and dedicated people
13 draw conclusions too rapidly in order to try and make
14 some sense of what happened. I believe that this
15 rule, while honorable in intent, tries to make
16 dramatic and far-reaching changes in the current rule
17 that while some might say is deficient, has had a part
18 in the reduction of fatalities in mining over the life
19 of the rule. I recognize that Congress passed and the
20 President signed into law the MINER Act of 2006 with
21 the intent to improve miner safety and health. But in
22 my opinion, the agencies charged with implementing
23 this Act must proceed, without emotion, for the
24 details of any rule coming from this MINER Act, can,
25 and in many instances, do have far-reaching impacts

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1 not fully considered.

2 In the summary of the proposed rule, MSHA
3 states that, and I quote: These changes are intended
4 to induce greater mine operator compliance with the
5 Mine Act and MSHA safety and health standards and
6 regulations; thereby, improving safety and health for
7 miners.

8 I contend that quite the contrary. This
9 rule will diminish the focus on the elements that have
10 the greatest opportunity to reduce injuries and
11 fatalities and, instead, force mine operators to fight
12 what will be seen as improperly-cited violations and
13 unfairly-assessed penalties.

14 It is important to separate the
15 requirements of the MINER Act of 2006 and the other
16 elements of the proposed rule.

17 To the best of my ability, I surmise that
18 the Act requires for these four penalty changes:
19 First, a penalty of five thousand to sixty thousand
20 for failing to report a serious event, two thousand
21 dollar penalty for a 104(d)(1) citation, a four
22 thousand dollar penalty for a 104(d)(2) citation, and
23 last, a penalty of not more than two hundred and
24 twenty thousand dollars for flagrant violations. The
25 proposed rule we are reviewing today is clearly a

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1 great deal more than this. I do not disagree with the
2 need to evaluate the current penalty criteria, but to
3 do so with such haste is clearly improper. The
4 premise stated earlier for this rule of inducing
5 compliance with the rule is theoretical at best and
6 should never be the primary purpose of changes to a
7 rule. There are operators that certainly should be
8 held accountable for their failures to comply with
9 regulations and their overall disregard for safety and
10 health, but I contend MSHA already has in place
11 mechanisms that are dealing with these situations. I
12 disagree with the statement in the proposed rule that
13 it reflects a more appropriate and effective approach
14 to achieving the Congressional purpose with respect to
15 civil monetary penalties. I do not believe that the
16 MINER Act gives MSHA such a broad mandate under their
17 December, 2006 time constraint. In order to
18 accurately achieve the wishes of MSHA in this rule,
19 there needs to be extensive review of citations,
20 injury history and mining fatalities to determine the
21 relationship of one to the other. If this were done,
22 it may bring us to the conclusion that some citations
23 may have no positive effect on the safety and health
24 of miners; yet, inordinate amounts of time are spent
25 in these areas. I admit that I do not know the

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1 answer, but I also contend that MSHA has not
2 demonstrated that my conclusion is incorrect, either.

3 I wish to now comment on specific points of the
4 proposed rule. First, history of violations for
5 inspection day should be changed to reflect the
6 practical application to mine operators. It is
7 logical and common to be able to find more violations
8 at a larger operation. This in no way would indicate
9 less safety attention, but only greater exposure. In
10 the proposed rule, withdrawing the single penalty
11 citation would subject the operator to greater penalty
12 for their inclusion in the regular assessment process.

13 At the least, non S&S citations should not
14 count in calculating the history of violations per
15 inspection day.

16 The definition of an inspection day must
17 be clarified and should be any day or part of any day
18 that an authorized representative is involved in the
19 inspection process or where the facility being visited
20 is subject to a citation. Just to deviate a moment
21 from my written comments, I think there are operations
22 that may have multiple shifts. Therefore, looking at
23 any one day, it should be clarified. In my
24 estimation, it should be eight hours or less that
25 would classify as an inspection day. I think even the

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1 MSHA workday is classified that same way. I think an
2 operation that would have multiple shifts, if the
3 inspector were to be on those shifts in a twenty-four-
4 hour cycle for more than eight hours, I believe they
5 should count as additional inspection days. In
6 addition, the proposed rule introduces anew criteria
7 of repeat violations of the same standard.

8 In the metal and nonmetal regulation,
9 there is great latitude in how the inspector can
10 interpret a violation, and in some cases, violations
11 could be interpreted under several different standards
12 for the same event, or several varied violations could
13 be cited under the same standard. There should not be
14 penalty points for these criteria. In the likelihood
15 points table, the proposed penalty points are
16 increased without clear reasoning and contrary to the
17 similar increases in other areas. In particular, if
18 an injury is unlikely, according to that table, then
19 there should be no penalty points. The decrease in
20 good faith credit demonstrates the reasoning behind
21 this regulation is to punish the operator, not
22 encourage speedy correction of hazards, as stated.
23 The thirty percent reduction for good faith should be
24 retained. Requirements to receive this credit could
25 be expanded to incorporate other elements, such as

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1 having a written safety program or daily safety
2 meetings. The deletion of single penalty provision
3 will not achieve the stated purpose, because the
4 single penalty citations are generally for violations
5 that have little or no impact on employees' safety and
6 health. In fact, many of the single penalty citations
7 can be for simple administrative mistakes or extremely
8 remote hazards. Special assessments should be clearly
9 defined as to how and what they will be applied to.
10 Doing otherwise would only bring about greater
11 inconsistency in applying the rule, or it could
12 actually open up an increased use of this provision.
13 And, again, deviating from my written remarks, as Mr.
14 Mattos brought out, I think the point would be to
15 reduce the amount of use of this. I think, as has
16 been stated earlier, there can be significant
17 different interpretations from district to district.
18 If a district manager were to determine that they
19 wanted special assessment applied to one particular
20 aspect of a regulation, whereas another district did
21 not, I think it could open up for potential use of
22 this in an inappropriate way or an inconsistent way.

23 Prompt notification penalties, this
24 provision of the MINER Act has troubled me from the
25 moment I heard of it. I know MSHA has all good

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1 intentions in wanting to receive this almost
2 instantaneous notification, but I've asked others, as
3 well as myself, what can MSHA do to help at that
4 moment. If I were a miner in distress, I would want
5 the personnel most trained to help me contacted in
6 that order. I am not aware of any emergency response
7 equipment at an MSHA office that would be helpful to
8 almost any emergency event at a mine, and in
9 particular, in the metal -- excuse me -- the nonmetal
10 environment.

11 I would like to learn, at some point, a
12 clearer definition of how MSHA determines that the
13 fifteen-minute notification would enhance the safety
14 of miners. Regarding Safety and Health conference
15 time limit, this proposal to reduce to five days does
16 not allow sufficient time to evaluate citations to
17 determine if there should be a conference. In some
18 cases, the internal investigation of the events
19 surrounding the issuance of a citation could take
20 days, and if testing might be needed, the results may
21 exceed those days, five days. Excuse me

22 The current ten days is insufficient --
23 excuse me -- is sufficient, but should be clarified as
24 to business days or calendar days. In fact, if the
25 time limit were reduced to five days, I would

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1 recommend that consideration be given to anyone
2 receiving a citation to automatically request a
3 conference in order to protect our rights to do so
4 until adequate internal review is completed. The
5 dramatic increase in the penalty amount would
6 encourage this approach, in any event. MSHA, also,
7 should not restrict the ability of the operator to
8 have a conference and, therefore, should remove the
9 sole discretion option, as listed in the regulation,
10 of MSHA even allowing a conference. Regarding the
11 economic assessment, this rule is penalizing larger
12 mines and larger controlling entities more than
13 smaller mines and controlling entities for the same
14 violation, in my estimation, anti-competitive in
15 nature. In coal mining, many of the modern operations
16 are very large, and their customer base is made up of
17 very large power companies or manufacturing plants
18 with long-term contracts. In the nonmetal mining
19 industry, most of the operations are small and are
20 competing equally with other small operators that may
21 be owned by a small controlling entity.

22 We are competing on a daily basis with
23 other operations for the same business. In many
24 cases, the customers request bids, and if we are
25 penalized more for a similar violation, the cost that

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1 goes into the price of our product goes up, and then
2 the smaller operation could actually have an unfair
3 advantage.

4 Violations should be penalized no
5 different, regardless of size of the mine or
6 controlling entity.

7 In addition, a large company may have
8 small operations that could be substantially impacted
9 by this penalty and could affect the decision to
10 continue operation. With respect to smoking or
11 carrying smoking materials, this fine should be raised
12 to a thousand dollars to more accurately reflect the
13 hazard involved in the violator and fellow employees.

14 MSHA inspectors go out in the real world of mining
15 every day to help operators improve safety and health,
16 and they are dedicated to their jobs, but they are
17 also human and subject to all the human frailties, as
18 are we're all. There are times that inspectors assume
19 the worst and write citations based on their
20 assumptions. Sometimes they're right, and sometimes
21 they are wrong, but they are given wide latitude in
22 issuing citations in the accompanying determination of
23 its seriousness. The operator has very little they
24 can do to alter the mind-set of the inspector after
25 they have drawn their conclusions. I have seen many

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1 different interpretations of the regulations from
2 field to field office and from district to district,
3 not with the intent to have differing interpretations,
4 but as the regulation is somewhat vague, the inspector
5 is left to use their judgment as to the interpretation
6 and, naturally, there's going to be differences in the
7 interpretation of those rules.

8 I do not wish to think of MSHA as an
9 adversary when it comes to safety and health, but it
10 seems that we're headed down the road where MSHA is
11 saying that regardless of what you do to promote
12 safety and health, if you violate a standard, we're
13 going to punish you, and we do not care about the
14 other things you do to improve safety. I encourage
15 MSHA to withdraw the parts of this rule that are not
16 specifically required in the MINER Act of 2006 and do
17 as OSHA, your sister agency, has done and convene an
18 advisory panel to work on developing a Part 100 Rule
19 that would involve all constituents in crafting a
20 standard that would improve safety and health.

21 That concludes my written remarks, but I
22 would like to, as there have been some comments made
23 from the panel and others in talking, I would like to
24 point out a few things that I would like to add.
25 First, in talking about -- I know, Silvey, I think you

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1 mentioned about the Mine Act, and it allows you to
2 have some differentiation in size of operations as far
3 as the penalty amount, and unless I'm incorrect, I
4 know what it says. It says, I believe, in the Act
5 that we do not, or that MSHA should not do anything
6 that would harm an operator's ability to remain in
7 business.

8 I don't know, and I would be curious if
9 you could give me the area that it might say that just
10 because there's a larger operator, that they should be
11 penalized more for being a larger operator.

12 MS. SILVEY: No. What it does, it
13 doesn't say that you penalize a larger operator more.

14 When you say penalize, I prefer to use the term that
15 you compute a penalty for a larger operator more.

16 MR. ELLIOTT: Okay.

17 MS. SILVEY: Because as I started out by
18 saying, the Act was not intended to be punitive in
19 nature, but clearly remedial.

20 Now, what it does say is that it provides
21 six criteria and that in determining the amount of the
22 penalty, MSHA takes into consideration six criteria.
23 And in we -- no pun intended, but to develop the
24 criteria for this criterion, one of the things that we
25 do is, we use some judgment, and you might disagree

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1 with that, and hence, that's why we issued this
2 proposed rule. So, in doing so, one of the criteria
3 is size, and what we did is, as I started out, we
4 developed this point table, and we assign zero points
5 for the very smallest operations, and then we went up
6 to twenty points, and at the very top, two million
7 tons of coal and something, which was the highest
8 point. So, it's not a matter of, per se, computing
9 the highest, the most highest points for large
10 operations. It is just that in computing the amount
11 of the penalty, coming up with the amount of the
12 penalty and taking into consideration the criteria, we
13 developed some points for size, with the smallest
14 points to the smallest operators for size, and the
15 largest to the largest operators. Now, if you were to
16 come to me with a particular citation, and the
17 citation had -- the inspector had marked gravity the
18 same on the citation, negligence the same, or let's
19 just say the highest level of gravity occurred, the
20 highest level of negligence and had marked gravity,
21 negligence, history -- Let's just say hypothetically,
22 because history is not going to be the same for a
23 large and a small operation, but relatively speaking,
24 history is going to be the same. Then the penalty is
25 going to be the same in those respects, where the

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1 smaller operator -- Well, I'm not going to sit here
2 before you and say differently, but where the smaller
3 operator will get a break is in size, because the
4 Congress said to MSHA, you, MSHA take size into
5 consideration, and that's why the proposal is
6 structured like that.

7 But we've heard comments, a wide variety
8 of comments. We've heard comments from small
9 operators saying, you know, they shouldn't get
10 penalties, and they are small. Yet, we've heard
11 comments from large operators saying that the
12 structure of the proposal is discriminatory and that
13 we're giving small operators a break. But I say to
14 you today, before I close this hearing, we do have to
15 take size into consideration. So, it's just a matter
16 of how we do it, and that's why we structured it like
17 that.

18 MR. ELLIOTT: And I do appreciate that,
19 but I think that, also, when you would look at doing
20 some research about injuries and violations, that the
21 small operator, in some instances, may need greater
22 motivation. And I think when you also look at a
23 violation, if there's not a guard, and the basic
24 premise, as it states in the beginning summary about
25 inducement for greater compliance, that not having a

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1 guard on at a small operation could be just as much a
2 fatality, cause a fatality as in a large operation.
3 Therefore, the premise you're using for inducement
4 would seem that that inducement should be the same for
5 a large and a small operator.

6 MS. SILVEY: And that was why I took my analogy
7 out and said that if the situation were the same, and
8 take your guarding one, the inspector should be citing
9 gravity the same.

10 MR. ELLIOTT: Okay.

11 MS. SILVEY: If it was a one-person
12 operation or a two-hundred-and-fifty-person operation,
13 it should be citing gravity the same, negligence. It
14 just depends.

15 MR. ELLIOTT: No, I understand.

16 MS. SILVEY: You know, I'm saying that
17 all other things being equal, because the negligence
18 depends on the situation at the moment. The
19 negligence might not be the same, but I am just saying
20 that assuming that all the factors are the same, then
21 the points for those should be the same.

22 MR. ELLIOTT: And it's very difficult.
23 If you have a smaller operation, as I say, the chances
24 are that they're also going to have more citations,
25 just because of, say, a larger operation. If you have

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1 a very small operation, the chances are that you just
2 wouldn't have as many things that may be able to go
3 wrong, with all things being equal. So, in some ways,
4 there's a
5 natural -- there is a natural affect that causes a
6 larger operation to receive more penalties, and
7 without having to add that increased multiplier,
8 that's a factor. In our operations, we have some that
9 even as small as two people, three people are running
10 that operation, and we may be a larger company, but
11 that two-person operation or that three-person
12 operation is competing with the very small company
13 that's a two-or-three-person operation. We're trying
14 to get people to come in the gate and buy that sand
15 and gravel from us.

16 So, having those citations, and they're on
17 a very, very low margin, and when you start factoring
18 in and multiplying the penalties, then it puts them at
19 a competitive disadvantage with that smaller
20 controlling entity down the street that's actually
21 competing for the same product.

22 So, it is just -- It's somewhat different.
23 When I was in coal mining, we had a long-term
24 contract with a power company. We weren't worried.
25 No one, nobody, in the five years that I worked in

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1 that coal company, came in and wanted to buy some coal
2 for their house, but as far as the sand and gravel
3 operation, that happens. The small person buys a few
4 tons here or there. So, those penalties can have a
5 significant economic impact.

6 I don't have anything else. If there
7 would be any questions, I would be glad to answer
8 them.

9 MS. SILVEY: Does anybody have any
10 questions?

11 *[No Verbal Response]*

12 MR. ELLIOTT: It is always good to come
13 up at this time. It's closer to lunch.

14 MS. SILVEY: Okay. Well, thank you, Mr.
15 Elliot.

16 Is there anybody else who wishes to speak?
17 I hesitate to ask that, because if there is, I think
18 I'd have to have a break here. But is there anybody
19 else here that wishes to speak?

20 *[No Verbal Response]*

21 MS. SILVEY: That's not meant to deter
22 you from speaking, either.

23 Well, if there is nobody else who wishes
24 to speak, I would like to reiterate that the primary
25 purpose of this hearing, as all of you have said,

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1 uniformly said today, is to improve health and safety
2 of the mines and, therefore, to assure that every day,
3 every miner goes home, every shift, every day in a
4 safe and healthy manner. To the extent that you all
5 have testified and you all have said to us that you
6 have cooperated with MSHA, we appreciate that, and we
7 know that we can count on you doing that in the
8 future. We would just say to you that as we go
9 forward here from the hearing today and the remaining
10 two hearings in Charleston and Pittsburgh, that we
11 will be mindful of the comments and the testimony that
12 you gave us. We appreciate the time that you took to
13 come out to say these things to us.

14 For those of you who did not make
15 testimony, but came here to appear at this hearing and
16 to show us that you have an interest in these
17 proceedings, we appreciate that, too. So, on behalf
18 of MSHA and our panel here, I would like to say that
19 again and give our thanks to you.

20 This hearing is now concluded.

21 (Whereupon, the hearing was concluded at
22 12:00 p.m.)
23

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