U.S. DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

PUBLIC HEARING ON

EMERGENCY TEMPORARY STANDARD

SEALING OF ABANDONED AREAS - FINAL RULE

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TRANSCRIPT OF PROCEEDINGS

Lakeview Golf Resort & Spa

One Lakeview Drive

Morgantown, West Virginia 26508

July 10, 2007

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BEFORE:

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P R O C E E D I N G S

(Hearing was called to order at 9:15 a.m.)

MS. SILVEY: Good morning. My name is Patricia W. Silvey, and I am the Director of the Mine Safety and Health Administration's Office of Standards, Regulations, and Variances. I will be the moderator of this public hearing today on MSHA's Emergency Temporary Standard, or ETS, for sealing abandoned areas in underground coal mines.

On behalf of Assistant Secretary Richard E. Stickler, I want to welcome all of you to this public hearing. The members of the panel, and I'd like to introduce them, to my right, Erik Sherer -- and these are some of the people who helped developed the ETS. And to his right, William Baughman, and before I go -- Erik Sherer is with Coal Mine Safety and Health; excuse me. To his right, William Baughman, who's with my office. To my left, Clete Stephan, and Clete is with the Office of Technical Support. And to his left, Javier Romanach, and he's our attorney on this project. And to his left, Ron Ford, and he's an economist from my office.

This is the first of four hearings on the Emergency Temporary Standard. The second, as most of you know who've followed this rule-making so far, the second hearing will be in Lexington on Thursday, and the third will be in Denver on July 17th, and the fourth in Birmingham, Alabama, on July 19th.

You know what happens, people say the best-laid plans, the next sentence I had on here was that in the back of the room we have copies of the ETS, and I thought we did, but now I see that they've been improperly collated, so assuming that we have a break, we will have properly collated copies at the time of the break. We do have the Federal Register notice extending the comment period to August 17th. I think most of you know the comment period has been extended to August 17th.

The purpose of these hearings, as many of you know who have participated in MSHA's rule-makings over the years, is to receive information from the public that will help us evaluate requirements in the ETS and develop a final rule that protects miners from hazards associated with sealed abandoned areas. We will also

use the data and information gained from these hearings to help us craft a rule that responds to the needs and concerns of the mining public, so that the provisions of the ETS can be implemented in the most effective and appropriate manner.

We published the ETS in response to the grave danger miners face when underground seals separating abandoned areas from active workings fail. Seal failures at the Sago Mine and the Darby No. 1 Mine in 2006 raised awareness of the problems with construction and design of alternative seals. MSHA investigated these and other failures of alternative seals and conducted in-mine evaluations of these seals. MSHA also reviewed the history of seals in the United States and other countries.

On February 8, 2007, NIOSH issued a draft report titled, *Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines*. The report makes recommendations for seal design criteria which would reduce the risk of seal failure due to explosions in abandoned areas of underground coal mines.

Based on MSHA's accident investigation

reports, the draft NIOSH report, MSHA's in-mine evaluations, and review of technical literature, MSHA determined that new standards are necessary to immediately protect miners from hazards associated with sealed areas.

The ETS addresses seal strength, design and installation, construction and repair, sampling and monitoring, and training. This ETS was issued in accordance with section 101(b) of the Mine Act. Under section 101(b), the ETS is effective until superseded by a mandatory standard, and in accordance with the Mine Act, the mandatory standard must be issued no later than nine months after publication of the ETS. The ETS also serves as the proposed rule, as most of you know, and commences the regular rule-making process.

As stated earlier, we will use the information provided by you to help us decide how to help us decide how to best craft the final rule. The preamble to the ETS discusses provisions of the ETS and also includes a number of specific requests for comment and information. And I want to reiterate that. We

included a number of specific requests for information in the ETS. And I would ask you, as you address the provisions of the ETS and any specific requests for comment that we have made, either in your comments with us today or those sent to us in Arlington, please be as specific as possible with respect to, one, the impact on miner safety and health, specific mining conditions, and feasibility of implementation. That will be very important. At this point, I want to reiterate the specific requests for comment and information.

Number one, in the ETS, MSHA considered a performance-based approach to the strength requirement for seals. However, as all of you know, we included specific pounds-per-square-inch numbers when referring to the strength of seals in the ETS, as the Agency believes this represents a more appropriate approach. MSHA is interested in receiving comments on the Agency's approach to the strength requirement.

MSHA is also interested in receiving comments on the appropriateness of the three-tiered approach to seal strength in the ETS and the strategy in the ETS for addressing seal strength greater than 120 psi.

Under the ETS, new seals must be constructed and maintained to withstand: 50 psi overpressure when the atmosphere in the sealed area is monitored and maintained inert; 120 psi overpressure when the atmosphere is not monitored and is not maintained inert; and -- or an overpressure greater than 120 psi if the atmosphere is not monitored and not maintained inert, and certain other specified conditions are present.

MSHA requests comments on the appropriateness of the Agency's strategy for addressing seal strength greater than 120 psi. If commenters believe a different regulatory approach should be developed in the final rule, MSHA would like commenters to provide the details for such a strategy, rationale for such a strategy, and feasibility of using such a strategy.

MSHA seeks the views of the mining community regarding whether there are other effective alternatives to the requirements in the ETS with respect to providing the most appropriate and protective action for miners exposed to hazards in sealed areas. Commenters should provide supporting

data, specific alternatives, including information on technological and cost implications.

Most alternative seals constructed before July 2006 were constructed to withstand a static horizontal pressure of 20 psi. MSHA considered requiring mine operators to remove existing seals and replace them with seals that withstand at least 50 psi. MSHA also considered whether to require operators to build new seals outby existing seals or structurally reinforce them.

At this point, MSHA believes that replacing existing seals is impractical and in some instances may create additional safety hazards. MSHA seeks comments on the feasibility of including in the final rule a requirement that existing seals be removed or replaced with higher strength seal.

MSHA also considered whether to require mine operators to reinforce existing seals. MSHA will continue to explore technological advances addressing feasible and safe methods to reinforce existing seals in underground coal mines. Commenters are encouraged to submit information and supporting data, as you are

going to hear me say that over and over again, because please, when you submit your information, be specific and include supporting data where applicable.

MSHA believes that the sampling strategy in the ETS will yield results that reflect a reasonable representation of the atmosphere in a sealed area. MSHA requests comments addressing the sampling approach in the ETS. The Agency is particularly interested in comments concerning sampling, the sampling frequency, including sampling only when a seal is outgassing. MSHA requests comments on whether another approach is more appropriate for the final rule, particularly when the seal is ingassing. The Agency also requests comments, information, and experiences of the mining community concerning sampling sealed areas.

In the ETS, mine operators must develop a sampling protocol to be included in the ventilation plan and submitted to the District Manager for approval. The ETS requires the mine operator to implement the action plan specified in the sampling protocol, or to withdraw all persons from the affected area when specified concentrations are encountered.

Action plans must provide protection to miners, equivalent to withdrawal, and address hazards presented and actions taken when gas samples reach levels indicated in the ETS.

Historically, when methane levels reached 4.5 percent in active areas, miners were withdrawn from the areas that were -- were withdrawn from these areas. MSHA requests comments on this approach and whether it provides adequate protection for miners. Commenters are encouraged to submit specific language, with supporting data.

MSHA is soliciting comments concerning issues related to establishing a sampling baseline. The ETS requires that the mine operator specify procedures in the protocol to establish a baseline analysis of oxygen and methane concentrations at each sampling point over a 14-day sampling period. The baseline must be established after the atmosphere in the sealed area is inert or the trend reaches equilibrium. MSHA is particularly interested in comments concerning the establishment of a baseline.

MSHA is requesting comments on the

appropriateness of the ETS requirement regarding the use of open flames or arc associated with cutting and soldering activities within 150 feet of a seal and the feasibility of this requirement. Again, MSHA suggests that commenters provide specific rationale in support of their position and include alternatives, if applicable.

The ETS requires each newly constructed seal to have at least two sampling pipes. One sampling pipe must extend into the sealed area approximately 15 feet, and the second pipe must extend into the first connecting crosscut inby each seal and to the center of the first connecting crosscut in the middle of the intersection.

The ETS affords flexibility to mine operators for the placement of the sampling pipe to allow more accurate sampling strategies to better protect miners. Therefore, the ETS requires that the location of sampling points be specified in the protocol provided under the ETS. MSHA requests comments regarding the appropriate number and location of sampling pipes for the final rule.

The ETS requires that corrosion-resistant water drainage be -- a system be installed in the seal at the lowest elevation within the set of seals and that seals not impound water. MSHA requests comments on this requirement for water drainage systems, including effective alternatives for the final rule.

MSHA requests comments on the appropriateness of the ventilation plan contents and whether additional information should be included. As you know, we listed a variety of information that must be included in the ventilation plan. When submitting information supporting your position, please include data related to economic and technological feasibility.

The ETS requires removal of insulated cables from the area to be sealed and removal of metallic objects through or across seals. MSHA believes that removal of insulated cables and metallic objects through or across seals is feasible and will not involve significant technical or practical problems, but the Agency solicits comments on this provision.

MSHA is also requesting comments on the scope and possible alternatives concerning site preparation,

examinations, the training requirements, and notifications to the Agency related to construction and repair of seals.

MSHA has prepared a Regulatory Economic Analysis for the ETS. The Regulatory Economic Analysis contains supporting cost data. MSHA requests comments on all the estimates of cost and benefits presented in the ETS and in the Regulatory Economic Analysis.

To date, the Agency has received one comment on the ETS. You can view comments on the Agency's website at www.msha.gov under the section entitled Rules and Regulations. MSHA has answered, as most of you know, a number of compliance questions from the public covering a range of issues in the ETS. These questions and answers are posted on MSHA's Seals Single Source Page.

As many of you know, the format for the public hearing is as follows:

Formal rules of evidence will not apply, and the hearing will be conducted in an informal manner. Those of you who notified the Agency in advance of your intent to speak or who signed up here today will make

your presentations first. After -- I don't think -- it doesn't appear as though we will have any time constraints though. After all scheduled speakers have finished, others can request to speak.

If you wish to present written statements, please clearly identify your material. As you know, you may also submit comments following this public hearing to MSHA, by August 17th, to the address listed in the Federal Register.

MSHA will post the transcripts from the public hearings on our website. Each transcript should be posted approximately one week after the hearing.

We will now begin with persons who have requested to speak, and please begin by clearly stating your name and organization for the record, and also, if you would spell your name, we would appreciate that.

So our first speaker today will be -- you'll have to help me. Who is this?

MR. SHERER: It's Ron Wooten.

MS. SILVEY: Is it Ron? Are you the first speaker? Okay, I'm sorry. Oh, that's what I couldn't quite figure out here. Excuse me, now I did, even with

my glasses on. Interstate Mining Compact, Ron Wooten.

RONALD L. WOOTEN

MR. WOOTEN: Thank you very much, Ms. Silvey. Good morning. My name is Ron Wooten, W-O-O-T-E-N, and I am the Director of the West Virginia Office of Miners' Health, Safety, and Training. Accompanying me today is Mr. Monte Hieb, who is our Agency's Chief Engineer, who will have some West Virginia-specific comments at the conclusion of my brief remarks.

I am appearing today on behalf of the Interstate Mining Compact Commission. West Virginia's Governor, the Honorable Joe Manchin, III, currently serves as Chairman of IMCC. IMCC is a national, multi-state, governmental organization, representing the natural resources, environmental protection, and mine safety and health interests of its 24 member states.

Several IMCC members implement their own mine safety and health regulatory programs, as we do in West Virginia, and almost all of the states carry out training responsibilities pursuant to the Mine Safety and Health Act of 1977, as amended by the Mine

Improvement and New Emergency Response Act of 2006, the MINER Act.

My purpose today is to provide some preliminary comments on the Emergency Temporary Standard on sealing abandoned areas, published by the Mine Safety and Health Administration on May 22, 2007, at 72 Federal Register 28796. While we can appreciate MSHA's desire to move expeditiously to address the requirement in section 10 of the MINER Act to issue mandatory health and safety standards for seals of abandoned areas, we believe that the Emergency Temporary Standard begs as many questions as it answers.

Part of this results from the interaction between the ETS and its accompanying preamble and other MSHA documents, such as program information bulletins, procedure instruction letters, and various documents contained on MSHA's website, such as mine seal design and approval requirements. These latter documents expand upon and, at times, contradict the ETS and essentially raise policy and technical documents to the level of a rule, without following APA rule-making

requirements.

Given the overlap between MSHA's rules and state regulatory programs, it is critical that MSHA work with the states to clarify and resolve any conflicts or confusion attending implementation of the ETS. Many of the questions and concerns that we articulate below could have been avoided or answered had MSHA done more in the way of outreach to the states in developing the ETS.

At this point, it will be incumbent on the Agency, we believe, to work closely with the states to either revise the rules or provide additional background information so as to insure effective implementation of the ETS. We encourage MSHA to use the state regulatory agencies as a resource through the IMCC in that endeavor.

The remainder of my testimony will address several topics that are raised in the ETS, including existing seals, new seals, and the certification process.

Existing Seals: Given the implications for the safety and health of miners, we agree with MSHA

that replacing existing seals may be impractical and may create safety hazards. We also agree that seals do not need to be universally remediated. Instead, an assessment of risk should be undertaken to determine whether the existing seals should be remediated to insure effective operation. Any such risk assessment should be based on location of the seals, their proximity to work areas -- active work areas, the nature of the gas concentrations inby the seals, and the overall condition of the seals.

The West Virginia Legislature, recognizing this concern, passed Senate Bill 68 this past March, authorizing the Director of the Office of Miners' Health, Safety, and Training to require additional inspections and sampling where remediation may be unsafe.

To the extent that an existing seal must be remediated, how do we deal with the 10-foot minimum requirement for seal location in the coal pillar? We believe that a degree of flexibility and discretion is required when making these adjustments to remediate existing seals.

We are also uncertain, from the ETS, how MSHA anticipates monitoring for methane and oxygen concentrations of areas sealed prior to May 22nd, 2007. If the existing sampling pipes are not functioning properly, is the installation of a new pipe expected? If only one pipe is in place, does the new standard anticipate the installation of a second pipe? In our judgment, the drilling of holes from the surface into the mine for monitoring may not be a safe or advisable practice.

New Seals: It has come to our attention that MSHA is requiring a safety factor of two for seal design. We question the basis for such a high safety factor and whether it is truly practical and necessary in all circumstances. Rather than increasing seal design requirements with arbitrary and/or unspecified safety factors embedded in the design and approval process, we request that full details of the design be made clear to designers up front, without a safety factor expression. This will reduce confusion for all involved.

Furthermore, it is important for MSHA to

consider the practicality and reasonableness of seal design, including recognition of the types of materials that are readily available in mines for the purposes of seal design and construction. To set standards that are out of touch with the reality of mining operations will only frustrate the ability of mine operators, particularly small operators, to comply with the ETS; i.e., ventilate versus seal.

With respect to monitoring, we question the value of a second sampling pipe in each seal as set forth in section 75.335(d). MSHA states that it has included this new provision in the ETS so that the operator can obtain a more representative sample of the sealed area. We question whether this is truly the case. What is the basis for MSHA's belief that a second pipe will provide a representative sample of the entire sealed area or that the benefits would outweigh the risks? We question whether the risk of requiring multiple metallic conductors through every mine seal is wise, from a safety standpoint, or necessary from an operational perspective.

In its 120 psi reinforced concrete seal

approval document, MSHA states that a typical time period for the curing of new seals is 28 days. MSHA states in its preamble that the baseline sampling period for gas concentrations could extend for a period of 14 days or until such time as the atmosphere in the sealed area is inert or the trend reaches equilibrium. What happens if, during or after this time period, the atmosphere is not inert?

Rather than engage in such an extensive sampling process, which may be difficult to oversee, and the need for inerting, is there the potential for an alternative approach? One question -- one suggestion may be to designate certain sections of the mine as high-risk zones or safety zones that would have limited access or may require other safeguards during the time that the atmosphere is not inert.

With regard to the height of seals, MSHA has set various upper limits in its mine seal design and approval document. In some mines, the entries are well over seven or eight feet high. How does MSHA anticipate addressing this situation? We anticipate that MSHA's reference to entry dimensions at section

75.336, without limitation, would allow the states to address this issue.

With respect to how we may appropriately address pressure in excess of 120 psi; for example, due to anticipated pressure piling, we suggest that still larger seals may not be the best answer. The handling of excessive pressures can, we believe, be accomplished with existing technologies and innovative designs that incorporate blast-wave mitigation techniques such weak-wall structures or entry geometry modifications in the region just inby the seal.

We believe it is important to explore and develop concepts such as those incorporating stacked or hanging rock dust bags and/or water-filled plastic tanks to provide blast-wave disruption and flame quenching in the region just inby the seal. These measures and techniques, we feel, will serve to reduce the force and the extensiveness of an explosion before it encounters the mine seal.

We believe that these types of mitigative approaches are realistic and can serve to address many of MSHA's concerns, including the uncertainty

associated with addressing explosion pressures by seals alone. We request that specific language be included to allow the development and use of such alternative methods as an option for dealing with explosion pressures.

With regard to inerting, we question whether this option is always feasible, given existing technologies and the availability of inerting equipment in the U.S. Also, inerting may create a false sense of security that there are no explosive mixtures behind a set of mine seals. We know that this is not always the case. In certain instances, avoiding areas near older seals, altogether, as an alternative to inerting, may be the safest, best solution. Establishing safety zones around certain seals, as an alternative to inerting, should also be considered.

At section 75.336(b)(2), MSHA requires that a professional engineer be designated to conduct or have oversight of seal installation and certify that the provisions of the approved seal design have been addressed. What does this require? Must the PE be onsite and monitor the construction of the seal on an

hourly or daily basis? With regard to the certified person in section 75.337(b), does a similar requirement apply? Must this person be at the construction site daily? When a PE is incorporating a seal design that has been approved by MSHA, must the PE recertify the design of the seal itself or only that it is installed properly?

Finally, we appreciate the opportunity to submit this statement today. While MSHA has made significant strides in addressing the topic of mine seals, we believe that additional work is needed, particularly with regard to the practical application of the rule and the implications of the rule for mine operators and state regulatory authorities.

Additionally, while we recognize that *one size does not fit all* regarding implementation of the rules that apply nationwide, it is important for MSHA to provide a mechanism for resolution of difference among various MSHA districts regarding rule interpretation and application. We would welcome an opportunity to work in partnership with MSHA to address the above comments and adjust the rule accordingly.

It is now my pleasure to introduce Mr. Monte Hieb, who has some West Virginia-specific comments.

MONTE HIEB

MR. HIEB: Good morning. My name is Monte Hieb, spelled H-I-E-B, and I am the Chief Engineer for the West Virginia Office of Miners' Health, Safety, and Training. I appreciate the opportunity to present comments to you this morning.

My first comment today is in regards to legacy seals or those seals that were installed before, and in many cases long before, May 22, 2007. It is recognized that certain mines, particularly older mines, have seals in remote or inaccessible areas that may be difficult, if not impossible, to safely access and monitor. Such seals that are in non-critical areas of the mine could perhaps be more safely dealt with in certain cases by creating safety zones around them and restricting access to, but keeping the outby areas properly rock-dusted and maintained.

One of the lessons learned in recent explosions is that the diligent efforts to reduce coal float dust and keeping entries adequately rock-dusted

is in fact an effective means to arrest flame and stop an explosion from propagating very far into the active areas of the mine.

In the future, rather than categorically requiring all seals of less than 50 psi design pressure be retrofitted or else continuously monitored and kept inert, a risk analysis approach may in certain cases be appropriate to determine whether certain seals are best left alone. In such cases, as Mr. Wooten previously mentioned, a red zone or safety zone could be established to restrict access, and appropriate changes in the ventilation could be made to safeguard escapeways in the ventilation system, to the active sections of the mine, in the event of an explosion.

MSHA Rule 75.336(b)(3)(iii)(B) requires the ventilation plan include safety precautions taken prior to seal achieving full design strength. The Federal Register preamble, on page 28808, states that such safety precautions could include withdrawing miners a safe distance from the seal installation site. It is requested that a similar provision such as this be expanded and approved as an alternate way to deal with

certain legacy seals that are in non-critical areas of the mine.

My second comment today is with respect to active areas of the mine where it is necessary or desirable to install seal systems which can handle explosion pressures of 120 psi or higher. It is requested that MSHA insert a provision in the regulations which both allows and encourages the development of methods to achieve necessary explosion protections by innovative means, other than simply erecting larger and stronger seals.

Explosion modeling tools are now available to facilitate the design and evaluation of blast-wave mitigation structures, which may be used inby the seals themselves to take some of the shock loading pressure off the seals in an explosion. By simply disrupting and/or momentarily delaying the initial blast-wave with an inby weak-wall structure, the full brunt of a propagating blast upon the seal may be reduced. Removing this load could provide the same equivalent benefit of a stronger seal.

The effect of explosion mitigation may be

enhanced further by incorporating flame retardant and/or flame cooling by rock dust dispersion, water dispersion, or similar counter-measures. Blast-wave mitigation has the potential of being a valuable and innovative tool in designing effective seal systems for the future. It is recommended that engineers be allowed and encouraged to pursue their development by adding to regulation the necessary language to specifically allow their use, provided that proper documentation is developed to support projections of their performance in an explosion.

My third comment today is with regard to a possible conflict between existing West Virginia law and the ETS. I will describe the conflict briefly here and will suggest a possible solution. I kindly request that you give this matter your careful and thoughtful consideration.

At issue are the new responsibilities being assigned to the registered professional engineer who must, according to the language of the present ETS as it's worded, certify all new mine seal designs and certify that the seals are constructed in strict

accordance with the design. During the design and approval process, the professional engineer is faced with an ethical and legal dilemma. The seal approval process, as implemented under the ETS, should specifically allow the design engineer to have complete direction and control over his seal design. To proceed otherwise would be ill advised and quite likely in violation of certain state laws and federal mandates.

Since the ETS requires that the engineer certify his design, state law requires that he maintain control over all specifications, reports, drawings, plans, design information, and calculations that he certifies and seals -- and seals, in this case, with his professional engineer stamp. The engineer's seal and signature shall be used by the registrants only when the work being stamped is under the registrant's complete direction and control.

Further, even if an engineer is checking the work of an out-of-state registrant, the law in West Virginia is clear that the registered engineer, quote, shall completely check and have complete dominion and control of the design, unquote. It cannot be said a

design engineer has complete dominion and control if his design, when he is being -- of his design, when he is being constrained to follow prescribed design rules and methods that he may or may not agree with. It is one thing for MSHA to advise the certifying registered professional engineer what they would recommend as acceptable components in the design. It is quite another to make them prerequisites by MSHA for approval.

Executive Order 13132 was issued by President Bill Clinton, quote, in order to guarantee the division of governmental responsibilities between the national government and the states, unquote. The jurisdiction over professional engineers is an issue of state law, whereby policing authority is reserved to the state. In section 4(c) of Executive Order 13132, it is required that, quote, any regulatory preemption of state law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations were promulgated, unquote.

MSHA has an explicit obligation to resolve

this conflict per section 4(d), which states that when an agency foresees the possibility of a conflict between state law and federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate state and local officials in an effort to avoid such a conflict. In this case, this should include both the West Virginia Office of Miners' Health, Safety, and Training and the West Virginia Board of Registration for Professional Engineers.

MSHA states in its May 22, 2007, ETS that the ETS does not have federalism implications because it will not have substantial direct effects on the states, on the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Accordingly, under EO 13132, no further agency action or analysis is required.

This appears to be incorrect, and it is requested that MSHA recognize that, in many state jurisdictions, significant federalism implications do exist and that in the case of certifications by a

professional engineer, that the state's primacy rights, in its requirement that the PE exercise complete control and dominion over design, should prevail over such conflicts between federal rules or policy.

As a solution, it is proposed that MSHA adopt a performance-based regulatory approach to seal design as opposed to a compliance-based approach. In this context, when a regulation sets performance goals and allows individuals and firms to choose how to meet them, it is called a performance-based regulation.

I was interested and pleased to hear Ms. Silvey, in her opening statement, make reference to performance-based approach and would encourage development of that approach in this case. In such a case, in other words, MSHA would still set the minimum standard for what level of performance a seal system would be required to achieve. A standard could be a specific pressure pulse that the seal system would be designed to withstand or the system could be more general, such as simply requiring operators to design a seal such that would protect miners from a methane explosion.

Significantly, Executive Order 12866, which was put into effect by President Bill Clinton in 1993 and subsequently amended slightly in 2002 and again in 2007, requires that for non-independent agencies that, quote, each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives rather than specifying the behavior or manner of compliance that regulated entities must adopt. This is referring to the performance-based regulatory approach. And unquote should be after my last use of the word adopt.

Additional requirements outlined in EO 12899 include, among other things, a Regulatory Economic Analysis or REA, which MSHA addressed in a prepared document of approximately 70 pages. However, the MSHA REA does not appear to have specifically addressed nor even considered the feasibility of a performance-based approach.

With the Agency's permission, I would like to make one recommendation in this regard. Let me begin by saying that foremost responsibility of the professional engineers under West Virginia law is the

welfare of the public. A West Virginia PE must certify only those designs that conform to accepted engineering standards and which safeguard the life, health, property, and welfare of the public. In addition, the practice of engineering is a privilege as opposed to a right. All registrants are required to exercise this privilege by performing services only in the areas of their competence according to current standards of technical competence.

With this in mind, it is proper and justified to consider, if seals must be certified, to entrust the professional engineering community with the rights and responsibilities of a performance-based approach regarding seal design and construction. As a first step toward compliance with the mandate of EO 12899, which also requires a federal agency to seek views of appropriate state, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities, it is requested that MSHA give full autonomy to the professional engineer in the design and construction aspects of mine seals.

In this regard, however, MSHA should make available its considerable expertise in the way of constructive comments to those seal applications which they may review. In particular, during this transition time, the knowledge acquired by MSHA in the past year is a valuable asset to the industry, but in the end, MSHA either should accept full responsibility for seal design and certification, if certifications are required, or the registered professional engineer should be allowed and given the proper autonomy to carry out his responsibilities in the manner that he is required to under state law.

This concludes my comments this morning. I wish to add, also, that we may be submitting written comments to MSHA between now and the end of the ETS comment period, both in this regard and in other matters. Thank you.

MS. SILVEY: Thank you.

MR. WOOTEN: Just to follow up, Ms. Silvey, if I may, we definitely will be submitting detailed comments on the part of the Interstate Mining Compact Commission during the comment period to hopefully

further expound on our brief comments this morning.

MS. SILVEY: Yeah, I was going to say I hope both of you do, because you gave very, I think, useful comments to us, and at certain points, I tried to write down notes where I would ask you to clarify certain things, which you could do either today or you could do in comments to us in Arlington before the record closes.

MR. WOOTEN: I think our detailed comments will take care of that.

MS. SILVEY: Okay. Well, I want to go over a couple of things though.

MR. WOOTEN: Certainly, certainly.

MS. SILVEY: And actually, either one -- you don't have to do it now, because some of it I couldn't -- if I had a tape, if I were like the court reporter, I couldn't even keep up with it fast enough, but there were some additional things that when you gave your comments, I would definitely like to hear more about.

So first of all, Mr. Wooten, you spoke, you said that, at times, certain of the provisions -- certain of the things that we have issued, certain

information out there, PIBs, I guess, and I sort of lost -- compliance --

MR. STEPHAN: Appeals.

MS. SILVEY: -- yeah, appeals and maybe compliance information contradict the ETS. I was really going to ask you to really repeat that sentence, but you don't have to repeat it. What I'm more interested in is specific examples of where they --

MR. WOOTEN: Sure.

MS. SILVEY: -- where this information contradicts the ETS. And so now, if you don't want to repeat the statement, you don't have to do it now, but I'm particularly interested in specific information, specific examples of where certain information out there contradicts the ETS, and quite honestly, what is our information, or as you later -- both of you later went into, what is certain state provision or anything like that, if you would provide that to us. Because I want to say on behalf of MSHA and for everybody and for all the states here -- I know we have at least one other state here and maybe more than that -- that we are very interested in working with the state. I mean

we must work with the state, because one of the things we want to do is to develop a final rule, as I said in the opening statement, that is as protective as it can be, but at the same time, that obviously can be feasibly implemented.

So I mean, that's our goal here, so to that extent, we've got to work with everybody here to try to do that, and also, as I said earlier, we need as specific information as possible. Because oftentimes -- you know, I've been doing this a long time; some people would say too long, and oftentimes what you do is you do get people to give you general comments, but then when it's incumbent upon you to develop this -- the Agency to develop the final rule, you've got to translate the general comments into something, and I know some of you know what I'm talking about.

So to the extent that you can provide us with the specifics on your comments -- and now I'm jumping, quite honestly, to the end here, Mr. Hieb, and to say that one of the things, when you talked about a performance-based approach for the approval of seal design, I would ask you to provide us with specific

alternative language for this. I mean, you gave sort of an example of what it could be, it could reflect this or it could, but it you could be -- if you could craft a standard. I mean if you could be as specific as you can, and I say this to everybody here, when you are giving us comments, if you've given us -- because we did ask for certain alternatives in certain things. But I'd ask you to be as specific as possible.

Now to continue on, both of you, Mr. Wooten and Mr. Hieb, spoke of assessment of risk with respect to existing seals, that in certain cases that that should be an assessment of the risk to determine whether the seal should be remediated or that remedial action should be taken, and I believe, Mr. Wooten, you gave some criteria for this assessment of risk. You gave the location of the seal, I think, you know, the level of the atmosphere. I didn't quite write all of that down, but in terms of what this -- how this assessment of risk should be done, if you should be -- if you can be specific about when the assessment of the risk should be done, by whom, how, what's to be included in it, that would be -- we would appreciate

that, too.

You asked a question about the sampling of seals. I think you asked a question about the second sampling pipe for seals that were constructed before May 22, 2007.

MR. SHERER: There's no requirement.

MS. SILVEY: There's no requirement for a second sampling pipe for those seals, the ones constructed before. I believe that was one of the questions, before May 22, 2007. For a new seal, and some of you tech support people here, don't sit back silently now here if I give the wrong -- if I make a mistake here. For new seals, you said that MSHA was requiring a safety factor of two and that you thought that that was unnecessary, and you know, maybe I'm misspeaking here, and I tell you all, if I'm misspeaking, I correct the record, and I don't -- maybe MSHA is requiring a safety factor. I didn't think MSHA was requiring a safety factor of two, so maybe if you want to clarify that right now, or if you want to submit that in the record, you can do it however you want it.

MR. WOOTEN: We'll definitely submit a response on the record, but let me say, Ms. Silvey, that it was our understanding, and basically what my statement addressed was, if there is a safety factor of two, if a 50 psi seal is really a hundred psi, let's say so.

MS. SILVEY: I don't disagree with that.

MR. WOOTEN: Okay.

MS. SILVEY: But I'm just saying it wasn't my understanding that we were requiring a safety factor of two. And then you also questioned the value of the second sampling pipe, and you gave some rationale for questioning it in your statement, Mr. Wooten, but if you have any additional information on why you question the value of the second sampling pipe -- and some of this information, if anybody in here has some of the same comments as Mr. Wooten and Mr. Hieb, if you would file, you know, some of the -- if you would listen to me and act accordingly. Actually, I think you talked about the risk of having a second sampling pipe there.

Then you talked about the period for inerting and that you thought there could be alternatives to

inerting, and you went into -- you included some information on that, but I would ask you again if, in terms of alternatives to inerting, if you would include specifics on that, too. And while you are doing that, address both the risks that these alternatives would address. I mean talk about the risks that they -- how they would be as effective as the inerting.

And then you talked about the greater than 120, and I had asked that, as most of you know, in my opening statement. You talked about addressing greater than 120 psi, and I would ask you there if you could be specific in your approach for addressing greater than 120 psi. Back to inerting, when we talked about inerting, you talked about there could be problems associated with inerting. I would ask you to be specific there with respect to what these problems are.

And you, Mr. Hieb, when you mentioned yours, you were talking about that you thought that with respect to seal, that there could be a safety zone and restricted access instead of doing certain specific action that we require in the rule, in the ETS. So I would ask you to be specific in terms of what you are

talking about with respect to this safety zone. What would this safety zone be, and how would you go about prescribing restrictive access to the safety zone? And the same comment I made earlier about the risk analysis approach.

Also, when you were talking about that, you were talking, particularly, you were talking about for non-critical areas of the mine, and if, you know, if we've got to do all of this, take some of this information into consideration, then you've got to tell me what you are talking about with respect to non-critical areas of the mine, if you could be a little bit more definitive with respect to what you are talking about.

I guess the last, biggest comment that you made, and which we take very seriously, was the comment with respect to the professional engineer and the responsibilities of the professional engineer. And I would say -- the first thing I would say, you gave us that, and that's good. I like that you did that. You gave us that the solution would be for us to adopt a performance-based approach. Well, there, the only

thing I would say there is like I said earlier, if you would be specific in terms of your approach to this performance-based approach -- no pun intended, but you know, your suggestion for that. And one of the things we had in mind when we talked about this professional engineer was indeed that the mining community would be innovative and come up with designs that MSHA would approve, sort of a two-step process, that we would approve at the design process, at the first stage, and then we would approve in the mine, at the site installation process. If we -- and I see that. You've told me that in your comments, that you see some problems with the way we crafted the design approval part of this. As I said, I would suggest to you that you let us know in terms of alternative language suggestions you have for that, and then we would obviously take your comments into consideration, what you said about the professional engineer this morning.

Do any of my colleagues have --

MR. SHERER: I have a couple of --

MS. SILVEY: Yeah, please do.

MR. SHERER: Okay. First of all, I want to

thank you gentlemen for taking the time to prepare your comments, and I think you brought out a lot of interesting things that we do need to consider. I have several questions and then comments myself, based on your comments.

The first one is just a warning. We did not have any requirements for remediation of existing seals, any requirements to put sampling pipes in existing seals, and I caution everybody to be extremely careful around existing seals, seals built prior to May 22nd. We have had problems, as you know, with Darby, so be extremely careful, and if you have questions, contact us. We'll be glad to discuss those sorts of issues.

The second one is you mentioned one thing, Mr. Hieb, that got my attention, that we should look at changes in ventilation outside of sealed areas, and I would certainly appreciate any additional comments you may have on that, and in particular, the strength of the ventilation controls. We've seen when seals do fail that there is massive damage to the existing ventilation controls outby those seals, so any comments

you may have on that would certainly be appreciated.

The second one is you mentioned that there is software. I think you mentioned it as blast-wave software. Any experience and comments you may have on that would certainly be appreciated. We're just trying to get up to speed on that ourselves.

And the third comment and last comment was again on professional engineers, is how you would recommend that we could come up with a workable system. We have had a lot of problems with professional engineers in the past. Some are much better than others. There's an issue of the low cost supplier of that service, and sometimes they're -- you get what you pay for. So how would you recommend that we approach that?

Another related issue is registration of those professional engineers. As a federal agency, we don't have a lot of experience with state-based registration of professional engineers. We do know that it is a state function. Should we require those engineers to be registered in the state where the seals are constructed? So any comments along those lines would

again be of great help to us.

MR. WOOTEN: If I could just follow up for just a second, Ms. Silvey --

MS. SILVEY: Yes.

MR. WOOTEN: -- just to correct the record on -- as it regards my statement. We regarded the lack of remediation requirements as a positive.

MR. SHERER: Okay.

MR. WOOTEN: Secondly, the reference to sampling pipes in old seals, we were more concerned about those that were not working, which I would assume would have to be handled through the ventilation point. We thank the panel.

MS. SILVEY: And again, I want to thank you all. As I said at the beginning and as Erik said, you've given us a lot of constructive comments, and so to the extent that you can -- we do appreciate it, and I want everybody here to know that we appreciate their comments, and we appreciate -- we will, all comments that will be given to us, and to the extent that you can be even more clarifying and specific, that would just be helpful to us as we go to the final rule.

MR. WOOTEN: Thank you. We'll do so. We appreciate your time.

MS. SILVEY: John Gallick with Foundation Coal. Excuse me, it seems like -- I'm sorry. I don't generally do this. People who know, who've done hearings with me sort of know that. Maybe we should take a five-minute break now. But please no longer than ten minutes.

(Brief recess in proceedings.)

MS. SILVEY: We will now reconvene the Mine Safety and Health Administration public hearing on seals. Next we will hear from John Gallick with Foundation Coal. Mr. Gallick.

JOHN GALLICK

MR. GALLICK: My name is John Gallick, G-A-L-L-I-C-K, and I'm testifying on behalf of Foundation Coal Corporation, and its affiliates.

Foundation Coal Corporation and its affiliates offer the following comments to the Mine Safety and Health Administration concerning the Emergency Temporary Standard for sealing of abandoned areas published on May 22nd, 2007. Foundation Coal

Corporation's affiliates operate underground mines in Pennsylvania and West Virginia, as well as surface mines in West Virginia and Wyoming.

First, I want to thank you for extending the written comment period so we can respond in more detail to this proposed rule. The Agency's actions on sealing of abandoned areas epitomizes the issues the industry has faced during the last 18 months.

In June and July of 2006, the Agency published program information bulletins P06-12 and P06-16 that essentially changed the standard for alternate seal construction from a 20 psi standard to 50 psi and added requirements for sampling inside of sealed areas. These program information bulletins ignored standard rule-making procedures in favor of policy enforcement. Clearly, if there was a need for immediate action on sealed area safety, issuing an emergency temporary standard would have been justified at that point in time, not in May of 2007. For various reasons, the Agency was not challenged on its use of program information bulletins to establish rules and regulations.

Well, what was the outcome of these program information bulletins? First, the sampling procedures and protocols to be used by the agency were never published. Second, the Agency had no 50 psi alternate seals available for use, and none were timely forthcoming. This left the industry in a total quandary.

Fortunately, Mitchell-Barrett block seals were in the regulation and could be installed in most mines without waiting for an alternate seal design to be approved. One of our operations was forced to scramble and install 92 new Mitchell-Barrett seals, most of these in front of previously approved alternate seals. This was done to comply with program information bulletin P06-12 and P06-16. Frankly, the installation of Mitchell-Barrett seals were the suggestion of your Agency, so that this issue would be over with and we could move forward with all the other issues we had to comply with.

Is that the end of the story? No. Actually, the publishing of this Emergency Temporary Standard was, as Yogi Berra was supposed to have said, déjà vu

all over again, only worse this time. The Emergency Temporary Standard was published without an MSHA sampling protocol. There were no 120 psi seals available for use, and like the program information bulletins of a year ago, the Mitchell-Barrett seals has been deleted from history. Thus the same operation that scrambled to comply last summer with the program information bulletin publications is now scrambling to build a third set of seals and in some areas a fourth set of seals.

It is unbelievable that this Agency, which was given leeway by the industry to enforce and properly develop program information bulletins last summer and which had a mandate from Congress in the MINER Act, to complete a final regulation using the normal rule-making process and to complete this by December 15th of 2007, would instead choose the Emergency Temporary Standard method for rule-making. By choosing this path, the Agency has set in motion confusion throughout the industry. The industry in general, and my company in particular, has been forced to again scramble to attempt to comply with a set of regulations published

without any lead time prior to enforcement. These public hearings will not clear the confusion and turmoil this Agency has caused by failing to follow the normal rule-making process and the timelines established in the MINER Act. I only hope that the final regulation will clear up some of the confusion that now exists.

I will now address some specific comments on the proposed regulation. The proposed regulation requires three levels of seal designs. Foundation Coal will respond in detail concerning seal designs in our written comments. Today I only want to comment on the exclusion of the Mitchell-Barrett seal from the proposed regulation.

Mitchell-Barrett seals have been in use throughout the industry and was the only design written into regulation. This design has, over time, been rightly called the gold standard for seal construction. NIOSH has tested and published reports on Mitchell-Barrett seals. NIOSH has found in their explosion gallery tests that Mitchell-Barrett seals are capable of withstanding overpressures of above 95 psi. An

engineering group of the West Virginia Office of Miners' Health, Safety, and Training, which just spoke, has recently reached the same conclusions. Clearly, this seal design would have been sufficient for all explosions inside the sealed areas that have been reported by MSHA.

For these reasons, I urge you to reinstate the Mitchell-Barrett design into the proposed regulations. This design has a long history of providing a safe separation between a sealed area and the active mines. When properly installed in normal mining conditions, there is no history of catastrophic failure of Mitchell-Barrett seals.

I would like to recommend a clarification concerning the weekly sampling requirements for seal lines. The Agency recognizes the need for sampling to occur when the barometric pressure is decreasing or the seal is outgassing, yet requires a sample on a weekly, and I read that to mean every-seven-day basis. The regulation should state, instead, that a sample should be taken on a calendar weekly basis. This will allow flexibility in sampling time. The preamble, on page

28800, implies that the examination time should be based on, quote, barometric conditions to the extent possible, unquote. The Agency assumes that this sample will be coupled to the weekly examination; therefore, the every-seven-day standard would not be an issue. That scenario is likely to be the case in most operations; however, by providing the flexibility of using a calendar week rather than the every-seven-day standard for conducting this sampling, provides the operator an option to sever the weekly sampling requirements in 75-360 and 75-364 from the sampling requirements that are listed in 75.335(b)(1). There is no safety concern with calling for a weekly sampling regimen rather than insisting upon sampling every seven days.

Next, I believe the proposed rule fails to consider the totality of the sealed areas as it relates to sampling. We have been told that any one sampling location in a sealed area, regardless of the size of the sealed area, will result in an action plan implementation, including the possible withdrawal of people. The Preamble, again on page 28802, discusses

MSHA's opinion that leakage into sealed areas as a result of barometric changes, would not, quote, significantly impact the atmosphere in a large portion of the sealed area, but it may affect the atmosphere at a sampling location where the seal is ingassing. Therefore, it is important that samples be representative of the atmospheric conditions in the larger portion of the sealed area rather than just the area immediately inby the seal, unquote.

The preamble acknowledges the need to review the entire sealed area, yet the action plans and sampling protocols ignore borehole data that can provide a clearer picture of inertness of the entire sealed area. The regulation should allow for the use of borehole samples as a means of establishing a condition of the entire sealed area and not rely on an action plan based on one seal set in a large number of seals.

Concerning training, I applaud the Agency's desire to develop a regulation for the training of certified persons using a performance standard. I would like to have the Agency clarify that, even though

the training is required for certified persons assigned to sample seals, there is no need or requirement to change or modify Part 48 Training Plans.

Continuing on my discussion of sampling issues in the proposed regulations, I want to comment on the action levels, particularly the safety factor built into the Emergency Temporary Standard regulation. The gas action levels listed in the Emergency Temporary Standard mirror the gas levels used in the July 2006 program information bulletin. While providing a safety factor for hand-held sampling may be understandable, the failure to acknowledge a chromatograph reading to determine inert levels is not understandable.

The regulation should allow for narrowing of the safety factor when follow-up chromatograph samples are taken. This is how the system works for other gas readings taken by MSHA inspectors and should be provided for in this regulation. A chromatograph reading of oxygen below 12 percent levels should be considered inert. Methane levels should only require action from 4 percent to 16 percent levels.

I would suggest that the regulation should

read as follows: The atmosphere should be considered inert when (1) the oxygen concentration is less than 12 percent, (2) the methane concentration is less than 4 percent, or (3) the methane concentration is greater than 16 percent.

I agree with the proposed regulation to provide an opportunity for additional samples to verify an initial sample of concern. I would first reduce the sampling concentration of concern to a sample of 12 percent oxygen or greater and a methane concentration of from 4 percent to 16 percent. Then, rather than rely on two additional samples at one-hour intervals, I would require additional samples over a 24-hour period. Taking two additional samples over one-hour intervals does not provide sufficient time for a sealed area to equalize after a barometric swing. In addition, as I stated earlier, a bag sample can be taken and analyzed for verification of the hand-held samples during this longer period of additional samples.

Also concerning sampling, the Emergency Temporary Standard requires operators to submit their sampling protocol to MSHA. Neither the regulation nor

the preamble discusses the Agency's sampling protocol. We have been asking for a written protocol from the Agency -- that the Agency intends to use, since the sampling program information bulletin was issued a year ago. We have heard about or have seen various inspectors' attempts to obtain a bag sample for chromatograph analysis. These systems have ranged from a revamped ELF dust pump with attachments to placing a rock-dust sampling bag over a sampling port and trying to insert a bottle sample in the bag.

I would like MSHA to provide the Agency's sampling protocol to be used by MSHA inspectors. This doesn't need to be part of a regulation, but it should be made available to interested parties for comment. For example, will MSHA rely strictly on a hand-held sample, or will a bag sample be used for confirmatory chromatograph readings? If a confirmatory sample is to be taken, what pump system does MSHA plan to use? The industry has a need to understand what protocol the Agency intends for its inspectors to follow.

Next, I'd like to comment on the action plans and the use of the term, affected area. I would expect

MSHA's review of affected area to be based on more than a generalized cookbook formula and that mitigating systems be permitted to minimize the area listed as affected. For example, rock dust and/or water bags added to the active side of the seal can act to reduce explosion forces. These types of actions taken by an operator should be considered when establishing an affected area. I have heard of districts stating that the entire mine is affected, yet the regulations clearly contemplate allowing for operating under an action plan.

I'd like to briefly comment, also, on the use of artificial inerting. Foundation Coal plans to comment more extensively concerning inerting in its written comments. From our review of inerting, it is clear that experience in the United States with nitrogen or carbon dioxide gas inerting is generally limited to mine-fire-type activities. The use of gases to inert sealed areas other than mine fires generally involves the control of spontaneous combustion.

In mines where inerting is done for spontaneous combustion control, typically, a pipeline

is used to carry the gas to the seal line, and gas is pumped through the seal. There is no attempt or logical reason to try to pump an entire sealed area with nitrogen or carbon dioxide. Yet we are hearing that districts are requiring mines who choose to pump gases into sealed areas as a means of inerting, to drill a borehole at the deepest end of the sealed area and begin pumping from that location until the nitrogen or carbon dioxide areas appears -- carbon dioxide appears at the seal line. If a drill site cannot be set up in the deepest area of the sealed area in question, then some mines are being told that a one-for-one exchange of volume in the sealed areas must be pumped to prove an inert atmosphere. This does not make sense.

Pumping the entire sealed area in a one-for-one exchange of gases requires an inlet or an outlet borehole. In either case, this minimizes the value of carrying a pipeline underground to provide inert gases. Why do that if boreholes will still need to be drilled into the sealed area? Logically, the goal should be to provide artificial inerting by pumping nitrogen or

carbon dioxide at the seal line so that, at a minimum, a buffer zone of inert atmosphere is in place inby the seal line.

Next, the prohibition of burning or welding within a 150 feet of sealed areas need to be reconsidered. The application of the prohibition of cutting and welding within 150 feet of a seal may not be entirely enforceable or can cause great interruption in some mines, where the next entry or two entries over from the seal contains a pre-existing belt, belt-drive, shop area, travelway, or track.

There is no grandfather clause in this rule for these situations. If additional new seals, as anticipated by the standard and being required in the new Emergency Temporary Standard plans are to be built, and there’s not adequate space in front of existing seals, the new seals may be placed within 150 feet of the existing areas listed above.

The standard where the 150-foot distance comes from, the permissible equipment zone near gob lines, is of a completely different nature from the seal situation. In the 150-foot gob scenario, the hazard

is that there are generally no permanent ventilation structures between the gob and the permissible zone, so that any of a number of incidents, such as gob reversal, low gob pressure, large roof falls pushing out gob air, could result in gob air carrying methane to the work area. In areas where seals -- in areas around seals, there are definite airflow patterns, separated by permanent ventilation devices that are designed to carry away any outgassing from seals. A standard for welding and cutting near seals may be necessary, but using the 150-foot prohibition requirement is not appropriate.

I'd also like to comment on a proposed rules requirement for certifications. This certification goal should be twofold. One is to have properly designed seals -- a properly designed seal that is appropriate for the mining conditions. That is the logical province of a professional engineer. Once the design is developed and submitted, the professional engineer's job should be ended. Unless there is an issue with the application of the agency, such as missing information, for example, that application

should then be approved.

The second goal, the proper installation of the seals themselves, should be under the direction of certified persons and installed by trained workers. There is no need for another professional engineer to be involved in the construction process. Seal installations can involve a significant number of days to complete. A professional engineer is not needed as an onsite observer of this construction.

As stated earlier, my company intends to provide additional written comments on this regulation, including responding to your questions and requests in the preamble. I do have one question for you, though. I would like to know if it would be possible to have a list of the mines that have been affected by this standard to date, the number of mines, and the names of the mines that have been affected. I know at least one of my mines have been. Thank you for your time and for allowing me to comment on this hearing -- at this hearing.

MS. SILVEY: Okay. Thank you, Mr. Gallick, and thank you for your comments. I do have a few

comments for you, even though I know you said you will be providing specific answers to the questions that we raised in the preamble. You wanted from us, but I'll get to your question first.

MR. GALLICK: Okay.

MS. SILVEY: The mines that have been affected by this ETS.

MR. GALLICK: Yes.

MS. SILVEY: And you know one of your mines has been affected.

MR. GALLICK: Yes, ma'am.

MS. SILVEY: Now, when you say mines that have been affected, I want to make sure we're on the same wavelength. You're talking about the mines that -- one of your mines is sealed right now. Is that what you're talking about?

MR. GALLICK: Yeah, the mines I'm referring to are mines that have either been shut down or --

MS. SILVEY: Yeah, what are you --

MR. GALLICK: -- inhibited from total production due to areas being closed, maybe not necessarily the whole mine, but various parts of the

mine shut down due to, either voluntarily, or at the Agency's request where --

MS. SILVEY: Oh, I see. Okay. I'm glad you explained that, because I --

MR. GALLICK: -- where the gas levels inby the seals are such that the action plan, either they voluntarily shut down, like in our case, we did, or whether the Agency involuntarily shut them down.

MS. SILVEY: Okay. So now, just so we clarify for everybody, what you really wanted to ask me was, and I'm to some extent putting words in your mouth, you wanted to ask me how many mines have been issued citations since the ETS.

MR. GALLICK: No.

MS. SILVEY: No?

MR. GALLICK: No, that maybe some of the mines --

MS. SILVEY: Well, when you said -- you said shut down, so --

MR. GALLICK: Well, some mines have voluntarily closed areas. Once our examiners find -- our, meaning, I'm speaking as a broad industry.

MS. SILVEY: Okay.

MR. GALLICK: Once our examiner finds methane levels or oxygen levels in the action level, they have withdrawn people from the mine or withdrawn people from an area of the mine, which prohibits production or shuts the entire mine down.

MS. SILVEY: Okay.

MR. GALLICK: I would think -- I'm guessing, but I would think most of them have been voluntarily done by the examiners, by the operator's examiners.

MS. SILVEY: Okay. Well, I --

MR. GALLICK: But we have no information of the number and the impact of this regulation.

MS. SILVEY: Okay. I'll tell you the truth. I can't answer that. I don't know if we've issued -- if any mines have been shut down now, as you put it -- I'll use your involuntarily or whether -- I don't know what mines that have voluntarily closed down. You said your mine had. Do you have this information?

MR. SHERER: We have issued several 107(a) imminent danger orders.

MS. SILVEY: Yeah, I thought we had issued

some.

MR. SHERER: We can certainly provide you a list of those that we have. As far as voluntary shutdowns, we may not be aware of all of them. Some of them we are. Some of them we may not be.

MS. SILVEY: That's what I would think, too.

MR. GALLICK: I think it would help everybody as we work through the impact of this rule.

MS. SILVEY: Well, you know, to the extent that just so everybody is on the same wavelength and has the same information, at some point, we can provide the list of -- I don't know whether -- see, some of the same people won't be there. I don't know whether we'll do it in Lexington. I don't know whether we'll have it all by then, but at some point, as Erik said, we can provide the list of mines that we've issued citations to and then the voluntary ones, that's -- I think that is another point. I don't know that we can make that promise to provide information on the ones that are voluntarily closed down.

MR. GALLICK: Well --

MS. SILVEY: As you are part of the mine --

MR. GALLICK: I would expect your districts know which ones have been voluntarily shut down. They certainly know ours.

MS. SILVEY: And then they may. You may be right there. Okay. You said that, Mr. Gallick, about the sampling protocol. You mentioned the Agency sampling protocol, and in terms of the protocol that our inspectors are going to use when they do their sampling, we will -- we are going to issue shortly, I believe, a procedure instruction letter which sets forth the procedures for our inspectors, and obviously, as with all the procedure instruction letters and program information bulletins, that will be available to the mining public, which sets forth the protocol that the inspectors will use, and it should be very shortly. And when I say very shortly, I would hope that it would be within the next week.

MR. SHERER: I can't guarantee you any time. I've been trying to get that one out since -- a long time.

MR. GALLICK: Thank you, Erik. We certainly need to know how we're going to be sampled by the

Agency --

MS. SILVEY: Yeah, we will.

MR. GALLICK: -- and understand it. Thank you.

MS. SILVEY: And we appreciate that from you, and quite frankly, everybody else in the mining community should know how the Agency will be sampling, and so we will be getting that out.

MR. GALLICK: Thank you.

MS. SILVEY: You mentioned about Mitchell-Barrett and the exclusion of Mitchell-Barrett seals from the ETS, but the Mitchell-Barrett seals, in terms of, obviously, this ETS is crafted in a different way than the existing rule -- well, not existing any more but the prior seals rule. But Mitchell-Barretts, I don't think are excluded from the ETS, as long as Mitchell-Barrett -- and I shouldn't probably be saying Mitchell-Barretts. I should probably be saying solid concrete, as long as those seals meet certain parameters.

MR. GALLICK: It's clear, though, that two things. One is that the present Mitchell-Barretts are

given credit for 20 psi, and the NIOSH studies have listed it at above 99, so it's clear that the safety -- Monte Hieb discussed the safety factor of two. Mitchell-Barretts get a minus safety factor of five. The other part of that is -- so essentially, they are not going to be of any value going forward. They're given no credit going in the past.

It's unbelievable to me that -- that has been the standard sealing method and has done quite well, in my opinion, and frankly, it won't meet either the 50 or the 120, obviously, as going forward, so you'll never see another one in a mine, and I don't think the Agency's thought that -- the value of Mitchell-Barrett or solid block stopping, as your phrase --

MS. SILVEY: Right.

MR. GALLICK: -- properly. That's my view.

MS. SILVEY: Okay. Well, you know, to the extent then, if you don't think we have, you provide just with some -- any more details on the solid concrete in terms of the --

MR. GALLICK: I'd be glad to, and one of the things that surprised me was NIOSH had done a report

on various seals and had presented it, and I don't have the quote exactly with me, but at an Australian ventilation conference -- Erik, you probably remember that -- when I looked through the issue, the reports that were listed in the preamble having to -- that had been analyzed as part of the rule, that report wasn't in there, and that surprised me.

MS. SILVEY: Okay.

MR. SHERER: One comment I've got on Mitchell-Barretts is they're just a specification, and they are very dependent on the size of the opening, the strata of the floor and the roof rock, so in retrospect, there could be problems with certain applications. Other applications may be fine. We didn't specifically prohibit that. It's just that all new seals have to meet performance-type specifications.

MR. GALLICK: I understand, and I appreciate what you're saying on specific designs and how they're built, et cetera. It just seemed to me that, again, what was a seemingly good standard, you know, and all the discussion was over alternates to that standard. We threw out the initial standard as well as the

alternates, and I continue to have problems with that.

MS. SILVEY: Yeah. Mr. Gallick, you mentioned about the Part 48 Training Plan, but there's not a requirement in the ETS to modify the Part 48 Training Plan.

MR. GALLICK: I realize that, but at least one district has asked operations to modify their Part 48 program, so I decided to go on the record and get your answer, which takes care of my issue. Thank you.

MS. SILVEY: Okay, thank you. The next thing you mentioned with respect to the action plan, and I sort of maybe will ask you to refresh my memory here, that you said we ignored borehole data, and I'm a little confused by that. I was going to ask you to clarify that, or did you mean we ignored -- when you say borehole data, you mean prior data that you all have?

MR. GALLICK: I mean both.

MS. SILVEY: Or sampling data?

MR. GALLICK: I mean both. What I would say, and maybe I didn't say it clearly enough, and I apologize.

MS. SILVEY: That's okay.

MR. GALLICK: The large gob areas -- and I'm referring to the longwall type gob areas -- typically have boreholes in them, typically have multiple sets of seals. We would look at that as looking at, between boreholes and seals pipes, a totality of the gob measurement of its inertness. Yet, from my understanding of the enforcement actions, one seal in that series of seals and in the boreholes, one seal that falls into the action levels, that whole gob is considered to be an action-level type concern, to the point where, for instance, let's say I had a set of seals, and two miles away I have boreholes showing total inertness in that area of that sealed design. I have to put 120 psi seals around the entire perimeter, including areas that are clearly inert.

Most of the time, what you're seeing at that seal line is some kind of influence, I'll use the term, of either the active side of the mine's ventilation system, the fan influence, or breathing in that area for some reason. I think, and I won't ask anybody to respond to that, although you know who I'm looking at,

the totality of the gob, I think, is not in question. I think it's clear that that's an inert gob -- I mean inert seal area. Excuse my change of choice of words, an inert seal area. Yet, as I read the rule, I would have to treat that whole area as non-inert, and if I wanted to add 120 psi seals to make it go away, and that's all -- one of my concerns. I think we need to be looking at totality of sealed areas, not individual seal readings, especially when we're talking a 15-foot pipe, or you know, a 15-foot pipe should not be the measurement for a large acreage of sealed area.

MR. SHERER: One comment I've got on that, Mr. Gallick, is the most common borehole, of course, is a gob ventilation hole, and our experience is those have almost no correlation to what's going on down in the area that is sealed.

MR. GALLICK: Uh-huh.

MR. SHERER: It's a gravity fractionation of the methane. That's what allows you to pull almost pure methane off of those. We do have the same concerns. It's certainly something that we're trying to dig into right now ourselves.

MR. GALLICK: And I can appreciate that, and I appreciate you being concerned about it in terms of when we put our written comments together. I do believe, for instance, we would put in -- you know, right now we use those holes because they're there.

MR. SHERER: Sure.

MR. GALLICK: But going forward, we may put a hole in another location if it would help satisfy a sampling standard so that we wouldn't be in this concern.

MS. SILVEY: Or, if you, as we thought -- we were hoping to try to do when we structured the ETS, to get a more representative sample.

MR. GALLICK: Right.

MS. SILVEY: Of the entire area.

MR. GALLICK: Right.

MS. SILVEY: With respect to your comment on the prohibition of welding or cutting, the only thing I do here is reiterate what I said in my opening statement, if you have alternatives, if you would get specific language, and with the specific language, if you would get specific support. And when I say that, I

mean if you have an alternative about how it addresses the risk and that type of thing.

MR. GALLICK: That should be no problem. We'll do that.

MS. SILVEY: Okay.

MR. SHERER: I can say that we are trying to address that specific issue and some current questions and answers, and we hope we'll have it resolved very soon.

MR. GALLICK: I hope so. Thank you.

MS. SILVEY: And the last thing I have is on the, again, on the certification of the -- by the professional engineer. I believe I understood you to say that there was no need for the PE to be involved in the installation process.

MR. GALLICK: That's correct.

MS. SILVEY: Okay, and you think that that's sufficiently handled by the certified person?

MR. GALLICK: I believe that's, as I said, a twofold process. The PE makes sure that the design fits the area that it's going to go into in the mine. Once all that is done and it's approved, and everyone

agrees that that model of seal, and this is how it's going to be installed -- it meets it, then it becomes the province of the operations, the certified people and the installers, to install it properly. My concern is that a PE will get tied up on day-to-day reviews of seals, and some of our seal projects go on for months.

MS. SILVEY: Okay.

MR. GALLICK: And that PE does not need to be trying to get in there and look at construction. That should be the certified person and the trained installers putting it in properly.

MS. SILVEY: Well, let me make sure I understand you, though. Is your concern in terms of just the logistics, the time, and the whatever of that that's necessary for the PE, or is your concern that, going into the installation, the construction and installation, is not the proper province of the PE? I mean which is it? I'm sort of hearing a little bit of --

MR. GALLICK: I'm more concerned about the former than the latter.

MS. SILVEY: Okay.

MR. GALLICK: The PE's -- the PE, obviously -- I shouldn't say obviously. Many PE's are also quite capable of going in and doing the lead on a construction, being a construction foreman. I'll use that term. You certainly don't have to be a PE to be a good construction foreman.

MS. SILVEY: Okay.

MR. GALLICK: And that's what he's there for is to make sure it's installed right.

MS. SILVEY: Okay. Anybody? Do you have any more? Okay, thank you, Mr. Gallick. Thank you very much.

MR. GALLICK: Thank you.

MS. SILVEY: Next we will hear from R. Henry Moore, Pennsylvania Coal Association.

R. HENRY MOORE

MR. MOORE: Thank you. I'm R. Henry Moore of the law firm, Jackson, Kelly, PLLC, and we have the privilege of being outside safety counsel for the Pennsylvania Coal Association. We are pleased to offer comments on the proposed rule. PCA is an association that represents the majority of bituminous coal mines

in Pennsylvania, and it represents operators of both large and small underground bituminous coal mines.

The Pennsylvania coal-mining industry has a long history of developing large mines without sealing up until 19 -- the early 1990s we were not permitted to seal. This helps us have a perspective on the significant safety benefits of sealing abandoned areas. We are concerned that MSHA has lost sight of the benefits of not having large abandoned areas of underground coal mines that must be inspected and ventilated. It is a significant safety benefit not to have to inspect such areas. It is also a significant safety benefit to have these areas sealed and allow them to become inert. We believe the Agency has lost perspective with respect to the atmospheres that may be contained behind seals. In so doing, the Agency has created what can only be considered as regulatory chaos.

We recognize that the explosion at Sago was a terrible tragedy, but we also recognize that it was in many ways an aberration and that this subject requires measured and considered action by the Agency.

Unfortunately, the scope of that tragedy appears to have caused the Agency to ignore law and proper procedure. The best example of this was when the Agency improperly increased the requirement for alternative seals from 20 psi to 50 psi by use of a policy document last year, program information bulletin P06-16, without the benefit of notice and comment rule-making, and frankly, without the benefit of the use of the Emergency Temporary Standard process.

The dangers of such approach were also exemplified by the fact that there were two very significant errors in the ETS that we have found so far. The ETS eliminated the previous seal criteria in section 75.335(a), making it questionable as to whether MSHA inspectors can site defects in the construction of seals built prior to May 22nd, 2007, but cited after that date. That standard no longer exists.

An even more significant error was the insertion of the requirement that no cutting or welding be conducted within 150 feet of seals. The application of that prohibition of cutting and welding within 150 feet of a seal failed to consider existing arrangements

where the next entry or two entries over from the seal contains a pre-existing belt drive, belt, shop area, or track. The prohibition also failed to consider ventilation arrangements in western mines with a longwall. There for the purpose of controlling spontaneous combustion, the gob isolation stoppings behind the longwall face are within 150 feet of the tail drive of the longwall. This means that cutting and welding cannot be performed on a longwall face where gob isolation seals are used. This sort of requirement is untenable. It is these types of errors that notice and comment rule-making would have eliminated.

The haste is also exemplified by the totally unrealistic approach that MSHA has taken to the designing of seals. The seals initially on the website were entirely impracticable for installation, and as of last week, if I understand correctly, one of the seal designs for 120 psi seals had improper drawings attached to it. But the Agency's failure to follow a rational development of a new rule, which was contemplated, as we see it, by the MINER Act, has been

compounded by the enforcement approach the Agency has taken before and after the issuance of the ETS.

For example, once the ETS was issued, inspectors fanned out across the coal fields, shutting down coal mines for levels of methane that were considered by MSHA to present, not very long ago, no appreciable hazard. Last year, as Mr. Gallick commented, District 4 forced one mine in West Virginia to install 90 or more new seals to replace what had previously been an acceptable alternative seal design. Then when the ETS was issued, it targeted that mine for enforcement and utterly failed to consider the installation of those new seals. Those seals were Mitchell-Barrett seals which are tested out to 90 to 100 psi, but which the Agency now says are 20 psi seals. The Agency has refused to accept NIOSH testing that proves otherwise, in failing to recognize the absence of the failure of such seals in this country in any explosion that PCA is aware of.

In other instances, the Agency has required operators to totally replace the atmosphere in a sealed area with nitrogen. One mine in Pennsylvania was told

it had to replace the three million cubic feet of air in the sealed area with three million cubic feet of nitrogen. In requiring such action, can the Agency definitively predict where the mine atmosphere in the seal area will travel once it is displaced by the nitrogen and once forced out of the sealed area, whether it will create unintended adverse safety impacts in other areas of the mine? We believe also the same scenario has now happened in a second mine in Pennsylvania, and for the sake of correctness, the mine that was told to replace the three million cubic feet was fortunate, and the atmosphere became inert, naturally.

The Agency has also sent inspectors out to measure the amount of mortar between joints and existing seals. These inspectors have applied criteria, unknown and unannounced to the industry where the seals were built, to the thickness of the mortar. The abatement of such conditions required by inspectors included replacement of the seals.

One significant problem as we see it with the Agency's regulatory and enforcement approach has been

to cause miners to lose confidence in the judgment of both the Agency and the operators. How can an operator convince its miners that the mine is safe, when one minute it yanks the miners out of the mine because of a purported imminent danger behind the seals, and the next, yanks them out of the shower to go back in the mine because MSHA said it's okay now?

One problem, of course, is that in the proposed rule, the Agency has treated the presence of methane behind the seals in an explosive range as an imminent danger. Except under highly unusual circumstances, the presence of methane, even in the explosive range, does not constitute an imminent danger because of the absence of ignition sources in the presence of seals. MSHA itself has recognized this over the years.

The proposed rule, in section 75.335(b)(4)(ii), apparently seeks to eliminate the provisions of section 107(a) of the Act, and the burden it placed on MSHA to actually establish that an imminent danger existed. Section 3(j) of the Act further defines an imminent danger as the existence of any condition or practice in

a coal or other mine which can reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. The mere presence of methane in the explosive range behind seals does not rise to that level. In fact, the Secretary standards contemplate that methane will be present in the sealed area. Section 334 requires that worked out areas be ventilated to dilute and move methane air mixtures to a return or that they be sealed; i.e., the methane will be behind the seals.

The reason methane behind seals should not be treated as an imminent danger is that in addition to having methane in the explosive range, it is necessary to have an ignition source present that presents a reasonable expectation of coming to fruition in order to arguably meet the imminent danger definition. This would mean, despite that, despite the presence of methane in the explosive range, there is no imminent danger present without an ignition source, with sufficient likelihood to meet the reasonable expectation standard.

The presence of methane in the explosive range

behind seals does not constitute an imminent danger because of the absence of ignition sources that are likely to ignite methane. There have been a number of ignition sources suggested over the years that might be present in sealed areas. One is rock fall; one is lightning. MSHA itself has addressed both of these in bleeder and gob ventilations systems course text, which was revised in November 1996, where, quote, while people or equipment provide an ignition source for most ignitions and explosions, other natural and sometimes uncontrollable ignition sources, most notably roof falls and lightning, can and do cause explosion. In examining the history of ignitions and explosions from 1959 to 1994, only 16, about point seven percent of the total number of ignitions and explosions have been attributed to roof falls. Considering the thousands of roof falls -- considering that thousands of roof falls occur naturally in the United States every year, the ignition of methane caused by roof falls is unlikely. Additionally, during that period, lightning was determined to be the ignition source in two mine explosions and a considered possible suspect in three

others, notwithstanding the ignition of methane caused by roof falls and lightning in underground minds may be a concern.

The fact that there is a low potential for ignition for rock fall or roof support materials is confirmed by MSHA's own Sago report, where at page 151, they stated, roof faults can ignite explosive methane mixtures, either by generating frictional heat or by releasing piezoelectric energy. During a roof fall, rocks forming the strata, comprising the immediate and the main roof, rub against one another as the roof fall breaks and falls. In rare cases, the resulting friction from rubbing or from impact can cause temperatures above the ignition temperature of methane.

The USBM has conducted rubbing friction and impact friction experiments. Under carefully controlled laboratory experiments, the USBM was only able to ignite methane air mixtures in a small percentage of tests, even when the methane ignition concentration was an optimum for ignition, and the Sago report also said the only metal roof supports noted in the fall rubble were fully grouted bolts in the wire

mesh noted under the rubble of one fall.

These steel roof support materials have not been associated with ignitions in experiments or in documented observations of gob ignitions. It was not possible to determine whether cable bolts noted near the roof falls were in fall rubble. However, previous laboratory testing of the sparks from cable bolt failure do not ignite methane air mixtures. Thus, it is not appropriate to require withdrawal of miners simply because there is an explosive mixture of methane behind the seals. Nor is it appropriate in all cases, as many districts are doing, to require full withdrawal of miners under an action plan. Such approach ignores the fact that even if there is methane in the explosive range and even if there is an ignition source present, the question then arises whether an explosion will breach the seals.

The existing 20 psi standard for seals was based on the assumption that explosions in sealed areas are unlikely to exceed that amount. That assumption was not invalid. While Sago exceeded that amount, it again appears to be aberrational because of -- based

upon the configuration of the sealed area and the relative recent sealing of the area. It does not, however, equal -- it did not, however, equal 120 psi, as far as I know from the testing, and with the exception of shaft explosions, which are different, it is the most violent explosion that has occurred in this country that we are aware of.

It is for this reason we believe the Agency needs to revisit the seal strength requirements. While the Agency has taken a number of varying positions concerning the strength of Mitchell-Barrett seals, ranging from 20 to 50 psi, testing by NIOSH has shown that such seals have a strength of 95 to 100 psi. We understand that the Agency rejects that particular NIOSH testing, but such position is inconsistent with its acceptance of the NIOSH report on seal design. We agree with a recent presentation by an engineer from the West Virginia Office of Miner Health, Safety, and Training, that MSHA should accept those seals as 90 to 100 psi seals.

Further, we think there should be an upper level standard -- that they should be the upper level

standard because to our knowledge, there has not been a breach of properly constructed Mitchell-Barrett seals in this country.

It is also important to learn from Sago, and in some instances we have not. We believe there are a number of factors present at Sago that should be instructive as to why the explosion was as powerful as it was. It appears the Agency fails to create a standard where there is a significant risk assessment based on those factors. How large is the methane body? How large is the sealed area, and will an explosion be buffered by water or gob or the size of the area? What is the configuration of the entries inby the seals? How mature is the seal area? What is the depth of cover? What is the type of roof-support materials?

All of these sorts of factors must be considered, and the proposed rule fails to do so. We ask that the Agency take steps back and re-evaluate how it is approaching these issues. We believe the proposal fails to consider all the data concerning a sealed area, as well as to recognize the need to evaluate the entire sealed area.

Section 75.335(d) requires the installation of two sampling pipes in each new seal. We do not necessarily disagree with the premise of installing two such pipes, although we believe it should not be motivated by any reliance on NIOSH's run-up distance, because we believe that analysis by NIOSH is seriously flawed. We do, however, believe the installation of separately spaced sampling tubes may well demonstrate a fact that we all believe is true. Once a sealed area is mature and generally inert, the area of methane that is not inert is small and confined to the immediate area of the seals, which will fully support a position that seals installed are more than adequate to contain any ignition. It should be recognized, however, unlike the previous rule, that no sampling pipe at a seal, be it 15 feet from the seal or be it one crosscut back, will provide a fully representative sample of a sealed area of any size. This is especially true of areas where a number of longwall gobs have been included within the seal area.

We are pleased to see that MSHA seems to partially recognize this fact. The preamble discusses

MSHA's opinion that leakage into a sealed area as a result of barometric changes would not, quote, significantly impact the atmosphere in a large portion of the sealed area, but it may affect the atmosphere at a sampling location when the seal is ingassing. But we disagree with the assertion that it is possible for samples at a seal to be, quote, representative of the atmospheric conditions in the larger portion of the sealed area, rather than just the area immediately inby the seal, unquote.

The final rule must acknowledge the need to review the entire sealed area. Under the ETS, MSHA has ignored borehole data that can provide a clearer picture of the inertness of the entire sealed area. The rule must address this situation by permitting the use of relevant borehole data as a means of establishing the condition of the entire sealed area and not rely on an action plan based upon one seal set.

We also appreciate that the proposed rule included the use of multiple samples to verify the content of the atmosphere immediately behind the seals. We do think that the sample should be spaced longer

than an hour apart, perhaps as long as 24 hours, in order to insure that the readings are not aberrational.

We also believe that it is critical that the readings be accurate and the same protocol be used by operators as well as MSHA inspectors. We have seen a wide variety of sampling techniques and equipment used by inspectors, and we are very uncomfortable as to whether inspectors are properly instructed on how to take an accurate sample.

We, frankly, have not come to rest on whether principal reliance should be placed on hand-held or gas chromatograph samples. We have seen some significant variances between the two, and we would like to see this issue analyzed after a protocol is established. We do not believe that most operators have gas chromatographs readily available to them, and the use of an off-site gas chromatograph can result in a delay of 12 to 24 hours to get the result.

Hand-held detectors are the standard in the industry. We are aware that there is potential error in sampling techniques when obtaining a bottle or bag sample and for possible contamination after the sample

is collected, as well as a potential for error in the processing of the analysis. Yet there is a potential for sampling error in the use of hand-held detectors and the use of gas chromatographs to provide the potential for greater precision in analysis of more components in the atmosphere. And I will say that based on the samples that I have seen, the errors tend to put the methane back into the explosive range within the sealed area rather than taking it out, so in case anyone was going to suggest that the errors, that's -- we do not believe that that error should affect the inert levels.

We believe the inert levels in the proposed sealed area are too restrictive. While we recognize the Agency is attempting to take into account sampling error, such approach ignores the fact the atmosphere is behind seals that are designed to contain an explosion. We believe that any atmosphere that is below 5 percent methane or 12 percent oxygen should be considered inert and that any atmosphere above 15 percent methane should be considered inert.

For years MSHA has had an informal limit on

methane in bleeders of 4.5 percent, which you referred to, Ms. Silvey, and that atmosphere is not contained within a sealed area. In addition, we believe it would be appropriate to use, under some circumstances, the Zabatakis nose curve to determine the true explosive nature of the gob. These calculations are, of course, outlined in informational circular 7901.

The margin of error that MSHA proposes simply fails to take into account the nature of the area where the sampling is done; i.e., it is a sealed area. Moreover, we believe that the determination that the atmosphere, where there is a sampling pipe, should not end the inquiry. Once it is determined that a portion of the sealed area is not inert, additional data must be evaluated to determine an overall sense of the atmosphere in the sealed area by looking at other seal data or borehole data, as well as the elevations and locations of water in the sealed area.

This brings us to action plans. The proposed rule leaves too much discretion in the hands of district managers without any guidance as to what should be an action plan. District 2, for example, has

taken the position that the only acceptable action plan begins with total withdrawal from the mine. This is not acceptable in most circumstances.

It fails to consider the fact that the area might not be inert; the size of the area; the potential absorption of ignition forces by water, gob, or the size of the sealed area; and the fact that the seals are designed to contain a certain level of explosion forces.

It fails to make use of the baseline established for the sealed area. If that baseline shows that the area is generally inert, then that is a factor that must be considered in evaluating the size of the non-inert area. If the non-inert area is small, the action plan should accept the withdrawal of miners from the immediate area of the seal, with increased levels of monitoring. Only if a mature area has been determined to be primarily non-inert should there be any requirement to inert the whole area. When the non-inert area is just in the vicinity of the seals, it should be the goal to inert that area, not the entire sealed area.

Newly sealed areas should be monitored more frequently to determine that they are moving to an inert status. The baseline should be used to establish the nature of the sampling point and an indication of what the internal nature of the gob is. These points should not be expected to never enter the non-inert zone because of changes in the mine or barometric swings. The majority of these baseline numbers should be inert, but it can be expected that there are times when they will not be.

The operator must be permitted to take into account the nature of the sealed area in determining an affected area for an action plan. For example, in addition to establishing the amount of a non-inert area, we would expect that mitigating systems be permitted to minimize this affected area. For example, rock-dusting and/or water bags added to the active side of the seal can act to reduce explosion forces, just as they can inby the seals. These types of actions by the operators should be considered when establishing an affected area under an action plan.

We believe the proposed rule’s requirements

for certifications to be excessive. We recognize that it is important to have the seal design certified and to insure that proper construction is accomplished, but we all need to recognize that some of the problems with construction resulted from the failure of the previous rule. When a rule only requires that there be mortar between all the joints, as section 75.335(a)(1)(i) previously did, you cannot expect an operator to know that the mortar is to be some precise thickness or some other similar, post-Sago interpretation of the rule.

We believe that the requirement for certification of a construction by a professional engineer is wholly inappropriate. In some cases, seals are built over series of months so that a professional engineer would, to certify the construction, would require his presence there throughout the construction. It is a waste of resources when that engineer, assuming that he is an employee of that particular company, can be doing work that has far greater safety benefit in other areas of the mine.

In similar fashion, a certified person should

not be required to observe the whole construction process. We agree that the person who has supervised the construction can appropriately certify it was built as specified, but there's nothing in the certification process that particularly qualifies such a person to observe construction practices. Further, we don't want to lose sight of the fact that certified people are not necessarily in abundant supply and that they perform critical functions in the active mining areas that, frankly, have a greater safety benefit on a day-to-day basis. The whole emphasis on certification appears to be less an attempt to insure the seals are built properly, but rather an attempt to provide scapegoats if something goes wrong.

MSHA specifically solicited comments on the Agency's approach to the strength requirements for seals. We believe that the 120 psi seals provided more than adequate level of protection. We also believe that if Mitchell-Barrett seals can be brought to that level with additional and supplemental work, that they should be accepted.

We do not believe that a three-tiered approach

is necessary but a more straightforward, two-tiered approach is appropriate. The proposed rule does not specify how much above 120 psi a seal must be to avoid monitoring and other requirements. We think that 120 psi is more than acceptable requirement. The problem that we have seen already is that people who want to start installing seals that are in that third tier don't really know what number they're dealing with.

We believe any evaluation based on potential detonation ignores the reality, including the types of ignition sources and the fact that there is some question as to whether methane ignition can result in detonation.

MSHA has sought comments on the feasibility of including in the final rule a requirement that existing seals be removed and replaced with higher strength seals. Replacing existing seals is impractical and may create severe safety hazards. Seals do not need to be universally remediated. Instead, an assessment of risk should be undertaken to determine whether the existing seals should be remediated to insure effective operation. Any such risk assessment should be based on

the location of the seals, the proximity to work areas, the nature of atmospheric concentrations behind the seals and the overall conditions of the seals, and the potential sources of ignition. Such evaluation must take into account a realistic assessment of the strength of the existing seal, not an arbitrary assumption that, because it was approved under a 20 psi standard, that is the actual strength of the seal.

We also note that the requirement that all electrical cable be removed from a sealed area, we do not believe that that requirement is necessary or realistic or, frankly, feasible. We are aware of MSHA's theory about a pump cable that was in the sealed area at Sago. Perhaps that is a credible theory in a mine with a very shallow cover such as Sago, but given the quantity of cable left in sealed areas over the years, the theory does not seem to present a realistic possibility of a hazard, generally, in sealed areas. And so that we understand, the Sago, obviously, we were dealing with a thousand-foot plus pump cable.

My understanding is there are high-voltage cables that are left in sealed areas that run for

thousands of feet. If you -- our thought is that if you would take the approach of removing all cable, it would not be any different in our minds than saying well, roof materials present a potential source of ignitions; you should remove all roof support.

Let us conclude by offering a general comment. The previous seal standard, as evaluated in a post-Sago light, is considered inadequate by some, but it certainly was in the level of detail that was included in the standard. Given the fact that almost all the recorded seal failures involve what the Agency considers inadequate construction, this would seem to be the case with the previous standard. When you have inspectors going out to measure mortar thickness years after seal was built, to enforce criteria that were not in the rules, the only conclusion can be -- that can be drawn is that the rule was not specific enough.

The proposed rule has a similar failing. We have no doubt it is intended to provide the operator and the district manager and the Agency flexibility. One need only review, as we have done, the disparity and inconsistency in how the districts dealt with the

approvals of emergency response plans with respect to breathable air, to know our reason for concern with approvals by district managers. If one wishes to be specific to seals, one needs only to look at the long delay in approving 50 psi seals last year to see why we are concerned with any process that gives the Agency the ability to add requirements that are not specified in the law.

We appreciate the opportunity to comment on these proposed rules. Thank you.

MS. SILVEY: Thank you, Mr. Moore. You have talked about some of the comments that we have heard earlier, and as I mentioned to earlier commenters, we appreciate your comments.

One of the things that you mentioned at the outset or early on in your comments, you talked about we had eliminated -- we had two significant errors, and you mentioned 335(a) in particular, and I would -- I believe you said that it eliminated the -- I'm not quite sure what, so rather than me to repeat you, could I ask you to repeat exactly what you said on that standard?

MR. MOORE: Well, I may not be able to repeat exactly what I said.

MS. SILVEY: Well, you could, if you had it written there.

MR. MOORE: Let me say what I said.

MS. SILVEY: Okay, all right.

MR. MOORE: The provisions of 75.335(a)(1), that address specifically the Mitchell-Barretts or concrete block seals, were eliminated in the ETS.

MS. SILVEY: Uh-huh.

MR. MOORE: That raises the question of whether, with respect to pre-May 22nd, 2007 seals, there is a standard to enforce.

MS. SILVEY: I see. You reworded what you said.

MR. MOORE: Perhaps I may --

MS. SILVEY: Even though I didn't write it down, should I ask the court reporter to read it then maybe? No, I won't do that to prolong --

MR. MOORE: But if I expressed it more clearly the second time around --

MS. SILVEY: You did. You did. I appreciate

it very much, your --

MR. MOORE: Because that is an issue.

MS. SILVEY: Okay.

MR. MOORE: And we view it as -- I view it as a mistake because it --

MS. SILVEY: Okay, well let me --

MR. MOORE: It raises the issue of whether or not -- I know the Agency's position is it doesn't raise the issue, but --

MS. SILVEY: No, I wasn't going to say that. What I was going to say is let me just suggest to you that the ETS included -- includes, not included; excuse me -- includes a requirement for construction and repair of seals, and that covers, not only new seals, but existing seals, and in some ways, that requirement is more stringent than in the existing -- than in the previous standard.

MR. MOORE: Well, not to dispute that, but the ETS cannot be retroactive.

MS. SILVEY: No, but I mean, I'm talking about repair of seals that are in place today, and --

MR. MOORE: These were seals that were built

in 2003 or --

MS. SILVEY: I understand that, and now we are getting --

MR. MOORE: -- 2004 or 2005, and --

MS. SILVEY: They might have been built in 2004 or 2005, but they are in the mine today. So anyway, and I think it clearly says that they are to examine the seals immediately. I can understand. This is getting to be semantical, and we won't prolong everybody's discussion here.

MR. MOORE: Yeah, we don't need to --

MS. SILVEY: But examine each seal site prior to construction or repair, and it goes on to talking about under construction or repair, and it could be repairing when you talk about maintenance and repair of existing -- previously existing seals. Let me clarify that. But, you know, there may be instances in which we can even better clarify things, and if we so need to better clarify things, we can do that. This is a good opportunity for me to reiterate that while this is an ETS that went into effect immediately under the provisions of the Mine Act, it also -- and you've heard

me say this now for the third time -- it also serves as the proposed rule and commences the regular rule-making process. So to that extent, then, that's why we're asking for your comments and your suggestions, that if there are things we need to improve, change, or do whatever in the final rule. This is a proposed rule for that, for the rule-making process, and that's in accordance with the Mine Act, and I know Mr. Moore is nodding his head in the affirmative.

Mr. Moore, you brought up, and I'm just -- I'm not going to focus on this very long, because we talked about it earlier, that the ETS does not specify how much above 120 psi. And I think I mentioned that in the opening statement also, that we would like any comments or suggestions people had for -- on the 100 -- particularly on the 120, above the 120 psi tier of the three-tier approach, and particularly with respect to specific mining conditions. We listed three conditions in the ETS: pressure piling, the likelihood of a detonation, and homogeneous atmosphere throughout the sealed area. So if you have any suggestions or further alternatives to what we included in the ETS, I would

appreciate that.

We take into cons -- we take seriously your comments on what's happening in our districts now, and I mean we've heard a number of things, and we will obviously go back and look at what our districts, what's going on in the districts. I mean, I think you all have heard us say this many times before. We try, we aim for consistency, but to a large extent, one of the reasons there is some flexibility is to allow for some flexibility in terms of the many mining conditions.

So, you know, so you sort of have sometimes a rub, so to speak, where things rub together, and I'm sure, you know, you all can appreciate that. But, with respect to addressing major issues with respect to sampling, with respect to installation, we try to achieve consistency in that regard.

I don't have any more comments to you, Mr. Moore. I'll ask if any of my colleagues have any questions or comments.

MR. MOORE: Thank you very much.

MS. SILVEY: Thank you, sir. We will next

hear from Tim Baker, United Mine Workers of America.

TIM BAKER

MR. BAKER: Thank you. My name is Tim Baker. It's B-A-K-E-R. And I'm here to represent the interests of the United Mine Workers of America.

First of all, let me commend the Agency and those individuals who worked on the drafting of this Emergency Temporary Standard. While we do, generally, agree with most of what it contains and won't highlight a lot of that, obviously, because it kind of goes without saying, I will offer some comment on additional protections we believe are necessary and, to the extent possible, discuss some of the other concerns we have which may have been raised here this morning.

The Union is pleased to have the opportunity to offer these comments on the Emergency Temporary Standard. The Union has historically expressed great concern about the practice in the industry for sealing abandoned and worked out areas. We expressed this concern in very stark terms in 1992 when the Agency approved alternative seals, and unfortunately, until 2006, those concerns went largely unheeded, and nothing

was done to address those concerns. But like I said, we are pleased with the efforts of the MSHA staff.

The seal strength, we are generally pleased with the Agency's approach for a 50 psi and 120 psi standard. There is some question and some concern, and we do not object to seals that would withstand pressures greater than 120 psi, but there is this concern of how you determine what that would be. We hear a lot about flexibility. We need flexibility for this and that. As I have said many times when giving testimony, I'm not a big fan of giving coal operators any flexibility. I see what they do with flexibility over the years, and it's not a pleasant thing. Flexibility, in our estimation, is the ability to get out of specific requirements.

So we would always push for, and in this instance, push for as prescriptive a final rule as we can get so that we know exactly what we're dealing with and then we don't get into the, well, gee, you didn't explain that very well, so I did it this way or I did it that way. We would like this to be very prescriptive.

The other thing that we would look at is when we're dealing with seals themselves, we don't believe that new seals should be permitted -- new sealed areas should be permitted to go without being monitored. If you're going to seal an area, after the effective date of the rule, they should be monitored. It's basically as simple as that. Whether it is a 50 psi seal or based on specific conditions in the sealed area, 120 psi, there should be monitoring going on. I would suggest to you that most mine operators are monitoring their sealed areas through boreholes and through the seal itself. It's a practice they are very accustomed to. They just don't report a lot of what they find. When we're dealing with large operators that are using the gob gases to sell to gas companies now, we know that they're monitoring so they know what's back there, and that should be part of this mix.

We are a little concerned when we seal an area, for instance, in a Pittsburgh seam mine where you have longwalls with vast areas that are sealed, and if I sealed off the mains and had ten seals to seal off the entire 15-square-mile area, and I'm only sampling

from two tubes at the very face of the gob, this in reality, tells me nothing. It doesn't tell me what's in the sealed area. The technology exists. They had the availability to monitor through boreholes to let me know what that entire gob is doing. They should be required to do this. They should be required to report that information, and I would suggest that, unlike some of the previous speakers, that when you find an area that is in the explosive range, it absolutely presents an imminent danger to miners.

There is no way that you can convince most miners that when you have an explosive mixture of methane behind a sealed area that it doesn't present a hazard, and action needs to be taken. And in our estimation, until that action's corrected, the miners should be withdrawn. Miners should be withdrawn from the mine until that condition is corrected, whether that is pumping nitrogen, CO, however you're going to inert that area, however you're going to alleviate the problem.

So those are the issues that we look at when we deal with monitoring the seals, simply because we

think that none should go without monitoring.

Construction of seals, I will differ with everybody else that's been up here. You need to have a certified engineer present when the seals are being constructed. And I'm not saying to watch them lay every block, but there's got to be a representative time when that individual is there, a responsible person, who yes, I can point to and say, you said it was done correctly. Somebody has got to be held responsible. I think that becomes very clear from the Sago situation. It also brings to mind what exists out there in other mines. If nobody -- if conditions at Sago are even semi-typical of the industry, how many seals do I have constructed that are inadequate and nobody checked them?

There was nobody there to examine them being constructed. There was no specific or necessary training given to the miners who were installing. It was just, you know, stack the blocks and put some mortar on them. So I think that we must have someone there, at least for a representative time that they're building them. They need to certify that they were

done correctly. They need to sign the book. They need to say that I was there and I witnessed. That is extremely important, because other than that, we're just creating a paper chase. We're not really changing the culture. We're just saying, well, you know, we got it on paper, and it looks good, so somebody needs to be there.

Economic feasibility, and I'll just -- some of the questions you asked, specifically, I won't address them all. Economic and technical feasibility of monitoring and inerting seals, I think, is pretty much -- it goes to my opening statement that, you know, we have the technology. We understand how we need to do these things, and the reality is not doing them does a great disservice to the miners, and we saw that at Sago. So when we talk about economics, I look at it as how expensive is it to do this, based on 17 miners last year? I would say the cost is pretty minimal, and I get frustrated whenever people talk to me about the extreme costs that these things are going to play out. There's a whole lot of families that would argue that point, also.

As far as replacing existing seals, the Union sees that as a definite hazard, an extreme danger. You can't -- I mean, if you have seals that are currently in place and it is determined that they are not functioning in at 20 psi, you would say, you know, they're not structurally sound. We are not certain that it is the least bit feasible to remove those and replace those. It may be necessary to build a seal in front of those, take some remedial action to correct the situation, but removing seals just like we've mentioned before, if a sampling tube is damaged, we wouldn't see why you would want to drill a hole in a seal and put in a new sampling tube. Messing with an existing seal is just too dangerous, as we see it. Replacing those with a new seal in front may be the only practical relief for that particular situation.

I would also agree -- I know this may be shocking, but I almost hate to say it, Hank, but I'll have to agree with you. There's got to be some understanding that existing conditions in mines where you have seals within 150 feet of a track or a belt, those things, at this point, have got to be taken into

consideration. Now, having said that, the down side for industry may be that then that seal now must go beyond 120 psi because of the proximity to the source of a hazard. But we do have to consider that whenever we make the final rule.

We absolutely do support the idea of two sampling tubes in a bag, but like I said before, we need more sampling than that. In general, we are a little concerned that nothing -- I guess the best way to say this is no seal material's been taken off the table. We have, historically, opposed the use of certain seal material, whether it's Omega block or wood and understand the conditions where some may argue that those are necessary, but there are some seal materials that the Union does not believe are protective enough. They just do not meet a basic standard that we can be comfortable with to protect miners. Omega blocks are an example that we need to look at, and you know, we have called for a ban on the use of Omega blocks for any kind of ventilation control and would pursue that in this rule that if you're going to be prescriptive and you're going to define what you can and can't do,

that there should be certain materials that are acceptable and not others. And we would advise the Agency to consider that.

As far as the frequency of sampling, we are in favor of a weekly sampling, once we've reached a baseline and would obviously have the particular sealed area sampled weekly, recorded in the books. Everybody knows what's going on, any hazards recorded. I think that goes pretty much without saying.

Training for seal construction, we think needs to be much more detailed than what it has been, and we are pleased with a lot of what's in the ETS. We would, however, request a couple of things, and that would be that, occasionally, an inspector sit in on training whenever they know they're going to do seal training, so that the inspector can be sure -- the Agency can be sure that that training is applicable to what's going to happen underground. I think far too often, we say you've got to do training and it's on the books, and then two years from now, the training occurs, and we don't even know what's happening in training.

The other thing we would look at is the

individual who is giving training should be required to meet a certain standard and then not for a lifetime be certified. There's got to be some evaluation of the trainer, and that could happen when the inspector's sitting there listening to the training. I mean, obviously, if things aren't going correctly or if he hears things that aren't correct, then he should raise those issues and it should be addressed.

We would also like to say that along with the certified engineer being available and onsite to watch the construction that, quite frankly, an inspector should watch enough of the seal construction for each seal to know that they're being done correctly, also. I don't think that's overtaxing. I think, you know, when they're making their walk, they can watch those individuals building a seal.

That is pretty much the position that the Union has. Like I said, we are very pleased that the Agency has issued this ETS. We hope that our comments will assist you in making it perhaps a little more protective.

The other thing I would like to say before I

close is there has been some comments here about high-risk zones and safety zones, and I would suggest that those comments are ill advised, and I would request that MSHA not consider safety zones or high-risk areas. If we have a large sealed area and we have even part of it in the explosive range, our opinion is that the entire mine's at risk. There's no place in that mine that you can clearly say, if these individuals don't go within so many feet or if they just stay in this section, they'll be okay. That is an unacceptable determination, and I don't know who would make that determination.

I certainly wouldn't want to say to any of you, well, we have a sealed area over there. It's in the explosive range, but if you stay over there, you'll be okay. I don't think that's advisable. I don't think we want to go down that path. That's a slippery slope.

But that's pretty much what our comments are. We will provide detailed written comments to the extent that that will be helpful, and if you have any questions, I'll be happy to answer them.

MS. SILVEY: So you will provide detailed written --

MR. BAKER: Absolutely.

MS. SILVEY: Okay. I think that -- not think. That will be helpful if you do that before August 17th.

MR. BAKER: Yes.

MS. SILVEY: I don't have anything. Do you have anything?

MR. SHERER: I've got two minor questions, Mr. Baker. You had mentioned that you think all new sealed areas need to be monitored and maintained inert. I assume you included the existing areas as already being monitored and maintained inert?

MR. BAKER: The existing sealed areas?

MR. SHERER: Yes.

MR. BAKER: Should be monitored and maintained inert, yes.

MR. SHERER: Okay. I just wanted to clarify that.

MR. BAKER: Yes.

MR. SHERER: Thank you. The second one is you mentioned that MSHA inspectors should be present for

each seal being built. Is that what you suggest or maybe a representative number of seals out of each set of seals?

MR. BAKER: What I would suggest, and I think, Erik, you're probably right, a representative number of seals for a period of time long enough so that they can say, I did witness them building the seal, and they were doing this correctly. And I'm not suggesting that they're going to build a bank of 90 seals and I've got to have an inspector sitting there for 90 -- to watch 90 seals being built, but at least enough to know that it's being done correctly. And then if you're building a lot of seals, as has been said earlier, that, you know, they built 90 seals, you know, two weeks from now or a month from now, you'll still be building them, and he can go in again and look.

MS. SILVEY: Well, just to clarify, too, for everybody here, you supported the professional engineer being at the construction phase installation.

MR. BAKER: Yes.

MS. SILVEY: But I think your comment was that the engineer didn't have to be there for the whole

time, for a representative to get a representative view of what was going on?

MR. BAKER: Exactly.

MS. SILVEY: Okay, same thing then.

MR. BAKER: And he's got to be there to witness it being done and make sure that he's comfortable, because as was stated before, you can call it whatever you want. You can call it a responsible individual signing off, or you can call it the scapegoat. I just want to know that a professional who is responsible for it was there and said it was done right. And that gives me, at least, a comfort level.

MS. SILVEY: I don't have anything. Do you have any questions? No more -- we don't have any more comments. Thank you.

MR. BAKER: Okay, thank you.

MS. SILVEY: Our final commenter -- I shouldn't say final, because somebody else might want to say something -- is Bill Worthington. Is Bill Worthington here? Yeah, on behalf of himself.

BILL WORTHINGTON

MR. WORTHINGTON: Good morning. Is it still

morning?

MS. SILVEY: Good morning. It's still -- no.

MR. SHERER: You just missed it.

MR. WORTHINGTON: I'm Bill Worthington. I come to you as a consultant. I'm an analytical chemist. I have more than 30 years' experience in gas analysis, and I'd like to say that the monitoring and the standard does make sense, and I'd like to emphasize that it only makes sense if it's done correctly.

There's a large misunderstanding in this area between detection of gases and analysis of gases. Several of the speakers before me have mentioned portable units versus gas chromatographs. This difference is being brought to the forefront when they say that.

The reason you're doing the analysis is because you don't know what's there. The detectors normally detect the presence of gas. Most of these depend on the background being something like air. If the background is not air, they don't give good results, and in this case, when you need the device to work for you the most is when it is least effective,

and I would say you need to proceed with great caution about the protocols and the methodology of analysis, to make sure results are correct.

We do know that gases stratify; therefore, the location of the sample points is very important. We've also had discussions about representativeness of the samples. This is also of great importance. I don't know that I have solutions for these, only that they must be thought about. But this brings up the question in my mind, is sampling once a week sufficient? Is that enough? And I don't know where this -- you know, obviously, we are familiar with weeks, and somebody said, oh, once a week is good enough, and I'd like to see some basis for that.

The baseline, have enough baselines been done to know whether or not these are variable or not? Can you go back and do a baseline in three months and determine a different baseline? So I question, also, the basis then of a weekly sample based on you had a stable baseline. Without enough study, this is not justified.

One of the companies I'm affiliated with have

done automatic monitoring systems in Australia and have many of these installed. The results they have gotten in Australia have been superb, and no accidents have occurred in any mines since they've been using this technology.

The gas detection versus analysis, I think if you study the use of analyzers in mines, you can conclude that gas detectors are normally used to protect equipment, and gas analyzers are used to protect lives. A gas detector has the advantage that it gives a fast response; therefore, if you own the mining equipment and you detect a high methane reading, it's very immediately you can take action to protect the equipment. The same thing is true for conveyors, frictional fires, and so forth.

The analyzers, on the other hand, do give accurate analyses. The large benefit of the system is saving the data and trending it to recognize trends over time to predict troublesome times ahead or problems. And that's really all I had to say, just a word on the side of caution.

MS. SILVEY: Well, we appreciate that, but I

tell you one thing, you said you have some comments, and we appreciate your comments, but -- and you said I don't know if I have any solutions, but if you have any additional specifics in response to some of these specific requirements, particularly as related to sampling. You mentioned, you know, detection or analysis, trends and --

MR. WORTHINGTON: The two sample pipes could in fact be a very good idea, because if you have different readings, it does show you do have stratification or perhaps if you have a higher oxygen concentration near the seal, than you do further in, obviously, one would suspect the seal has leaked air into this --

MS. SILVEY: But it --

MR. WORTHINGTON: But this is strictly supposition, you know.

MS. SILVEY: I understand, and I was going to say this is -- I'm only saying that if you would like to and if you have any more specifics beyond your caution, your word of caution to us, if you would --

MR. WORTHINGTON: I'll try to write something

to submit for the record.

MS. SILVEY: Okay. Anybody have -- thank you.

MR. WORTHINGTON: Thank you.

MS. SILVEY: At this point, we have -- we've heard from all of our speakers who signed up, either registered or signed up to speak. Is there anybody else here now who wishes to speak?

(No responses.)

MS. SILVEY: Okay. If there is nobody else here now who wishes to speak, what I'm going to do at this point is thank everybody very much for you attendance here. First of all, we appreciate the ones who spoke and took the time and gave us a lot of good information that we are going to go back and review. Those of you who promised that you're going to get information to us, additional specific information before the comment period closes on August 17th, and then we also appreciate those of you who are here and maybe you didn't speak but you have an interest in these rule-making proceedings and in fact, you may speak at one of the three remaining hearings. So we look forward to your continued -- to those of you who

will speak at one of the three remaining hearings. We look forward to your participation in the remainder of the process.

I am going to tentatively bring this hearing to a conclusion. I say tentatively because the Federal Register notice included the fact that we would be here from nine until five, so we will be back a little bit after one o'clock, just in case somebody couldn't get here until one. But if nobody comes for the one o'clock period, then we will just assume that this hearing and these proceedings are concluded. Thank you again.

(Luncheon recess at 12:15 p.m.)

(Whereupon the meeting adjourned at 1:30 p.m., it having been determined that no additional speakers were present.)

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STATE OF MARYLAND, SS:

COUNTY OF GARRETT, to-wit:

I, Christina D. Pratt, a Notary Public of the State of Maryland, do hereby certify that I recorded the public hearing of the Mine Safety and Health Administration on July 10, 2007, and that this transcript is a true record of those proceedings.

As witness my hand and Notarial Seal this 13th day of July, 2007.

_____
Christina D. Pratt

My commission expires:

November 1, 2008