

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

In the Matter of:)
)
PUBLIC HEARING ON PROPOSED)
RULE CRITERIA AND PROCEDURES)
FOR PROPOSED ASSESSMENT OF)
CIVIL PENALTIES)

Tuesday,
September 26, 2006

Conference Room G, 25th Floor
1100 Wilson Boulevard
Arlington, Virginia

The meeting in the above-entitled matter was
convened, pursuant to Notice, at 9:07 a.m.

BEFORE: PATRICIA W. SILVEY
Moderator

PARTICIPANTS:

Agency Panelists:

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

JAY MATTOS, Acting Director,
Assessments

PETER MONTALI
Office of Metal and Nonmetal
Mine Safety and Health

KEITH WATSON
Office of Assessments

ROBERT STONE
Economic Analysis Division

WILLIAM CROCCO
Office of Coal Mine Safety and Health

PARTICIPANTS (continued):

Agency Panelists:

JACK POWASNIK
Office of the Solicitor

Speakers:

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P R O C E E D I N G S

(9:07 a.m.)

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2
3 MS. SILVEY: Good morning. My name is
4 Patricia W. Silvey. I'm the acting director of the
5 Office of Standards, Regulations, and Variances for
6 the Mine Safety and Health Administration. I will be
7 the moderator of this public hearing today on MSHA's
8 proposed rule concerning civil penalties.

9 The members of the panel are: to my left
10 and the chair of the Civil Penalty Committee, Jay
11 Mattos, who is the acting director of Assessments; to
12 his left, Robert Stone, who is the economist from my
13 office; to his left, William Crocco, who is from Coal
14 Mine Safety and Health and who was coal's
15 representative on the committee; to my right, Jack
16 Powasnik, who is from the Labor Department Solicitor's
17 Office and our attorney on the committee; Pete
18 Montali, who represents Metal and Nonmetal Mine Safety
19 and Health; to his right, Keith Watson from the Office
20 of Assessments; and also, in the audience, Jerry Gunn,
21 who is from my office.

22 This is the first of six public hearings on
23 this proposed rule. The second hearing will be held
24 on September 28 in Birmingham, Alabama; the third
25 hearing, October 4 in Salt Lake City, Utah; the

1 fourth, October 6 in St. Louis; the fifth, October 17
2 in Charleston, West Virginia; and the final hearing
3 will be held on October 19 in Pittsburgh.

4 The comment period for this rule closes on
5 October 23, and for those of you who have been
6 following developments in mine safety this year, I
7 know all of you are familiar with the Miner Act, and
8 in accordance with the Miner Act, MSHA must issue
9 regulations related to the penalty provisions of the
10 Miner Act by December 2006.

11 We will accept documents today that you
12 would like to submit for the record.

13 This hearing will be conducted in an
14 informal manner. Formal rules of evidence will not
15 apply. Members of the panel may question witnesses,
16 and witnesses may question the panel.

17 Scheduled speakers will make their
18 presentations first, and after that, others will be
19 allowed to speak, and from the list that I have before
20 me now, I don't think there will be any problem with
21 people having an opportunity to speak.

22 The transcript of this hearing will be
23 posted on the MSHA Web site within a week.

24 Before I discuss the provisions of the rule,
25 I want to give you a short overview of the civil

1 penalty process, beginning with clarification of four
2 terms that are used throughout the rule.

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

7 The second is an "order." The inspector
8 issues an order under several different circumstances,
9 as many of you know. When a violation is not abated
10 within the time set by the inspector, or including any
11 extension, when the inspector finds a violation caused
12 by unwarrantable failure under certain conditions,
13 when the inspector determines that an imminent danger
14 exists, an order requires withdrawal of affected
15 miners until the violation is abated. The order does
16 not necessarily require that the entire mine be shut
17 down, and it applies to the area affected by the
18 violation.

19 The third is "significant and substantial,"
20 or as those of us in the mining industry call it,
21 "S&S." An S&S violation is one that is reasonably
22 likely to result in a reasonably serious injury or
23 illness. The inspector makes the S&S determination at
24 the time of the issuance of the citation.

25 Finally, "unwarrantable failure." This has

1 been defined by case law to be "aggravated conduct
2 constituting more than ordinary negligence by a mine
3 operator."

4 Under the Mine Act, MSHA proposes penalties,
5 and the Federal Mine Safety and Health Review
6 Commission -- I might later refer to it as "the
7 commission" -- assesses penalties. A proposed penalty
8 that is not paid or contested within 30 days of
9 receipt becomes a final order of the Commission by
10 operation of law and is not subject to review by any
11 court or agency. Penalties that are contested before
12 the Commission are reviewed de novo.

13 We will use the term "assessment" to refer
14 to MSHA's proposed assessments, as well as assessments
15 that are final orders of the Commission.

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

25 The first five criteria are applied to

1 compute the penalty amount. The final criterion is
2 applied after the penalty is proposed upon request by
3 the mine operator. The operator must send in
4 supporting documentation if the operator believes that
5 the penalty would negatively affect the company's
6 ability to continue business. MSHA will review this
7 information and may adjust the penalty.

8 MSHA published a proposed rule in the
9 Federal Register on September 8. A copy of the
10 proposal was placed on MSHA's Web site, and a copy was
11 sent, in accordance with federal requirements, to the
12 Office of Advocacy at the Small Business
13 Administration.

14 Basically, the proposed rule does two
15 things. It revises MSHA's existing civil penalty
16 program to increase penalty amounts and to improve the
17 effectiveness of MSHA's civil penalty process. These
18 changes are intended to induce greater mine operator
19 compliance with the Mine Act and MSHA's safety and
20 health standards and regulations, thereby improving
21 safety and health for miners.

22 Second, the proposal implements three
23 provisions of the Mine Improvement and New Emergency
24 Response Act of 2006, which I've refer to as the
25 "Miner Act."

1 The proposal does not change the way
2 inspectors issue citations. Under the proposal, the
3 inspectors will make factual determinations with
4 respect to safety and health violations and will issue
5 citations and orders just as they do now.

6 Also, please note that while both the Mine
7 Act and the Miner Act contain provisions for criminal
8 fines, this rule, as the name implies, concerns only
9 civil penalties. Under the existing rule, MSHA has
10 three types of assessments: single, regular, and
11 special. I will now address the proposed changes to
12 each type of assessment.

13 The existing rule provides for a \$60 single
14 penalty for non-S&S violations, timely abated, and
15 where the operator does not have an excessive history
16 of violations. The agency proposes to delete the
17 single penalty provision and believes that eliminating
18 this provision will cause mine operators to focus
19 their attention on preventing all hazardous
20 conditions.

21 Regular assessments are derived by the
22 second part of the existing rule regular assessments.
23 These are derived by assigning points for statutory
24 criteria and then converting total points to a dollar
25 amount. The penalty point tables are published in

1 Section 100.3. Regular assessments are computer
2 generated through MSHA's management information
3 system.

4 The proposed rule would make a number of
5 changes to the process and to the tables used for
6 determining penalty amounts. The point tables would
7 be revised so that the penalties increase
8 proportionately to increases in operator size,
9 history, and negligence, and the gravity or
10 seriousness of the violation.

11 Regular assessment changes are as follows:

12 Size. The size criterion includes the
13 operator size and controller size. For coal mines,
14 the operator size is measured by tonnage of coal
15 produced by that mine during the previous calendar
16 year. For metal and nonmetal mines, the operator size
17 is measured by the hours worked at the mine during the
18 previous calendar year. Size for independent
19 contractors is measured by the total hours worked at
20 all mines during the previous calendar year.

21 Under the proposal, the maximum number of
22 points for operator size would increase from 10 to 20.

23 The proposal would continue to assign no points for
24 the smallest operators, coal mines that produce up to
25 15,000 tons of coal, metal/nonmetal mines with 10,000

1 or less hours worked, and independent contractors who
2 have worked up to 10,000 hours at all mines.

3 Please note that the preamble to the
4 proposed rule states that, according to 2005 data,
5 nearly half of the existing coal mines had annual
6 tonnage up to 15,000 tons, and this figure included
7 463 surface facilities that do not produce coal. So,
8 therefore, that sentence in the preamble should be
9 corrected to read: "Approximately one-fourth of
10 producing coal mines had annual tonnage up to 15,000
11 tons" instead of one-half.

12 The proposal makes no changes to size points
13 for controlling entities. In the proposal, MSHA
14 solicited comments on whether, in considering the size
15 of the operator, greater weight should be placed on
16 the size of the controlling entity. I invite you to
17 address this issue at this public hearing or in your
18 written comments.

19 History of Violations. The proposal
20 includes several changes to the history criteria:
21 shortening the time period for determining violation
22 history, changing independent contractor history from
23 an annualized number to the total number of
24 violations, adding a new component for repeat
25 violations of the same standard, and increasing the

1 maximum number of history points.

2 Under both the existing rule and the
3 proposal, only violations for which the penalty has
4 been paid are finally adjudicated or included in
5 determining an operator's history.

6 Under the proposal, the time period for
7 determining history would be shortened from 24 months
8 to 15 months. The shorter time period would more
9 accurately reflect an operator's current state of
10 compliance. Both the existing rule and the proposed
11 rule base history for production operators on
12 violations per inspection day.

13 Under the existing regulation, history for
14 independent contractors is based on the average number
15 of violations over the past two calendar years. The
16 proposed rule would change this and use total number
17 of violations in the previous 15 months.

18 Since history would no longer be based on 24
19 months, there is no need to annualize the number of
20 violations. MSHA believes that this change will have
21 a de minimis effect on the average assessment issued
22 to independent contractors.

23 In the proposal, MSHA solicited comments on
24 this approach to determining violation history for
25 independent contractors; that is, whether an

1 annualized average should continue to be used. Again,
2 I invite you to address this issue, either here today
3 or in your written comments. The maximum number of
4 points for this component of violation history would
5 be increased from 20 to 25.

6 The proposal adds a new component to the
7 history criteria for repeat violations of the same
8 standard. Under the proposal, penalty points are
9 added for more than five repeat violations of the same
10 standard during the preceding 15 months. Repeat
11 violations, under the proposal, are determined
12 according to the manner in which the standard is
13 cited. For example, a violation of Section
14 56.14101(a)(1) would not be considered a repeat
15 violation of Section 56.14101(a)(2).

16 MSHA solicits comments on this approach to
17 determining repeat violations. Penalty points are
18 assigned for the total number of repeat violations
19 during the 15-month period, and also in the proposal,
20 MSHA solicited comments on two additional aspects of
21 repeat violations: whether penalty points should be
22 based on the total number of repeat violations or on
23 the number of repeat violations per inspection day,
24 and whether repeat violations should include all
25 violations, as in the proposal, or only S&S

1 violations.

2 We invite you to address these aspects of
3 repeat violations. The new component, i.e., repeat
4 violations, would add up to 20 penalty points.

5 Negligence. The proposed rule would retain
6 the existing five levels of negligence and would
7 double the maximum number of penalty points that could
8 be assigned for negligence from 25 to 50, with the
9 increase placed entirely in the three highest levels.

10 Under the proposal, penalties would increase
11 proportionately for operators who exhibit increasingly
12 high levels of negligence.

13 Gravity. The proposed rule would retain the
14 three components of gravity -- likelihood, severity,
15 and the number of persons potentially affected -- but
16 would increase the maximum number of penalty points
17 that could be assigned for each component. The
18 maximum total gravity points would go from 30 to 88.

19 Good Faith and Abating Violation. The
20 existing rule adds 10 penalty points if the operator
21 does not abate the violation within the time specified
22 by the inspector and reduces the total penalty amount
23 by 30 percent if the violation is timely abated.

24 The proposed rule would decrease the
25 reduction for timely abatement to 10 percent. Under

1 the proposed rule, no penalty points would be added
2 for violations that are not timely abated.

3 Penalty Point Conversion Table. The dollar
4 amounts on the existing conversion table range from
5 \$72 to the statutory maximum of \$60,000. The
6 statutory maximum corresponds to 100 penalty points,
7 which is the sum of the maximum points for five of the
8 six criteria. The minimum regular assessment is \$60.

9 The proposed rule provides a maximum of 208 penalty
10 points. The revised conversion table begins with
11 \$112.

12 Under the proposal, with a 10-percent
13 reduction for timely abatement, the lowest penalty
14 amount would be \$100. The dollar amount of the
15 penalty increases steadily as the number of penalty
16 points increases. For example, beginning at 133
17 penalty points, each additional penalty point
18 corresponds to an increase of \$3,070. The maximum
19 penalty of \$60,000 is reached at 140 points. Although
20 all penalties are increased, violations with the
21 highest number of penalty points, which would
22 generally be those that involve high negligence and
23 gravity or greater violation history, will increase at
24 a greater rate.

25 Special assessments are processed where the

1 violation is of such a nature that an appropriate
2 penalty cannot be determined under the regular
3 formula. The existing rule lists certain categories
4 of violations, such as fatalities, serious injuries,
5 and unwarrantable failure, that must be reviewed to
6 determine if a special assessment is appropriate.

7 The proposed rule would remove this list.
8 However, under the proposal, MSHA would retain its
9 discretion to determine which types of violations
10 would be reviewed for special assessment without being
11 limited to a specific list. MSHA anticipates that the
12 proposed regular assessment provision would provide an
13 appropriate penalty for most types of violations, and
14 this change will permit MSHA to focus its enforcement
15 resources on more field enforcement activities rather
16 than on administrative-review activities.

17 The proposed rule would shorten the time
18 allowed to request a health and safety conference with
19 the district manager. Under the existing rule,
20 operators or any party has 10 days to make this
21 request. The proposed rule will shorten this time to
22 five days. MSHA believes the proposed reduction would
23 result in a more effective civil penalty system
24 because penalties would be assessed closer in time to
25 the issuance of the citation.

1 Finally, the proposed rule implements civil
2 penalty provisions of the Miner Act. Although these
3 provisions are included in the proposal, the
4 provisions were effective on June 15, 2006. In
5 addition, the agency has issued a procedural
6 instruction letter to MSHA personnel containing
7 information on procedures for processing violations
8 consistent with the Miner Act. I will discuss each
9 provision separately.

10 Unwarrantable Failure Citations and Orders.

11 As many of you know, the Miner Act established
12 minimum penalties of \$2,000 and \$4,000, respectively,
13 for unwarrantable failure citations and orders. The
14 proposed rule includes these two provisions.

15 Basically, what that means is that
16 unwarrantable failures violations will receive minimum
17 amounts consistent with the Miner Act, either through
18 the regular assessment or special assessment
19 provisions.

20 Penalties for "Flagrant" Violations. The
21 Miner Act established a new penalty of not more than
22 \$220,000 for "flagrant" violations; that is,
23 violations involving "a reckless or repeated failure
24 to make reasonable efforts to eliminate a known
25 violation of a mandatory health or safety standard

1 that substantially and proximately caused, or
2 reasonably could have been expected to cause, death or
3 serious bodily injury." As stated earlier, these
4 violations are processed as special assessments.

5 Failure To Notify. The Miner Act
6 establishes a penalty of not less than \$5,000 and not
7 more than \$60,000 for failure to timely notify MSHA in
8 the event of a death or injury or entrapment with
9 reasonable potential to cause death. As stated
10 earlier, these violations are processed as special
11 assessments.

12 I would ask each of you to sign the
13 attendance sheet at the back of the room, if you have
14 not done so, and, to reiterate, we will post the
15 transcript of all public hearings on the Web site. It
16 will be posted approximately one week after the
17 completion of each hearing. The transcript will
18 include the full text of my opening statement and the
19 specific issues for which the agency seeks additional
20 comment.

21 We will now begin with the people who have
22 called in to the agency. Please begin your
23 presentation by clearly stating your name and
24 organization for the reporter. First on the list, we
25 have Edward Fitch. Could I have the list, please?

1 (Pause.)

2 MS. SILVEY: I probably should have
3 mentioned that Ned is a retired Department of Labor
4 employee.

5 (Pause.)

6 MR. FITCH: Good morning. Some of you
7 already know me, and it's good to see you today. My
8 name is Ned Fitch. I recently retired after over 30
9 years as a headquarters litigation attorney for MSHA
10 and MESA. It is a pleasure to speak as an interested
11 private citizen today on the proposed rule to raise
12 mine safety penalties.

13 I submit the following two observations and
14 recommend that the proposed rule be modified
15 accordingly.

16 The changes are intended to induce greater
17 mine operator compliance with the Mine Act and MSHA's
18 safety and health standards and regulations, thereby
19 improving safety and health for miners. The fact of
20 the matter is that increasing the regular civil
21 penalties for all mine operators about 300 percent
22 over those that were assessed in 2005 is not supported
23 by the excellent overall compliance record of the
24 mining industry as a whole.

25 The enhanced focus of increasing the civil

1 penalties on the few operators who are not trying to
2 maintain the high level of safety compliance mandated
3 by the Mine Act should not be adversely affecting the
4 many mine operators who are meeting those
5 responsibilities.

6 While it is a simple approach, it is
7 punishing the entire mining industry for the conduct
8 of a few bad apples. The general increase is an
9 unreasonable and unfair tax. It takes money away from
10 companies which have a good compliance record, as well
11 as from those pieces whose compliance efforts need
12 significant improvement. One size does not fit all.
13 Increasing the general civil penalties for responsible
14 mine operators will not enhance their compliance. The
15 current civil penalties have been adequate to achieve
16 that for those operators. It is simply a new tax on
17 the mining industry as a whole.

18 Since January 2, 2006, the mining industry
19 has been under intense scrutiny and impacted by new
20 safety initiatives at both the state and federal
21 levels. The most significant are the new requirements
22 of the Miner Act. These new requirements have direct
23 costs to the industry, whether in the form of
24 additional training time for all miners, the
25 installation of life lines, additional new SCSRs, or

1 other material and personnel costs.

2 A dollar spent on safety by a mine operator
3 is better than a dollar sent to the Federal Treasury
4 as an enhanced penalty. Mine Act civil penalties are
5 not even earmarked for enhancing mine safety and
6 health with additional compliance assistance where it
7 is needed most: at the mines that are not achieving
8 the high level of safety that is mandated by the Mine
9 Act. Taxing the industry as a whole with this
10 proposed general increase in civil penalties above
11 inflation or cost-of-living levels is unsupported by
12 the logic advanced in the proposed rule.

13 Two. The single penalty should be revised
14 to reflect the sizes of mine operations but not thrown
15 out as a regulatory failure. The fact of the matter
16 is, the single penalty works, and it is one of the
17 Reagan administration's significant advances in the
18 administrative functions surrounding the Mine Act. In
19 the days before the single penalty, a significant
20 amount of industry and agency time was spent on post-
21 inspection negotiations on the appropriate penalty for
22 every violation. The establishment of the single
23 penalty significantly reduced the time and personnel
24 dedicated to penalty issues of the less-significant
25 violations.

1 I suggest that the single penalty be
2 maintained but revised to reflect the size of the
3 mine. A small mine operation could be assessed a \$50
4 single penalty, a mid-sized operation could be
5 assessed \$125 single penalty, and a large operation
6 could be assessed a \$275 single penalty. The actual
7 dollar amount is not important, but a single penalty
8 for nonserious violations allows all parties to keep
9 the focus on the hazards that cause the accidents and
10 the injuries in the mining industry today.

11 The elimination of the single penalty, as
12 proposed, will increase MSHA's and the mining
13 industry's post-inspection conferencing time and the
14 expense associated with the penalty process. It will
15 increase the litigation of citations before the
16 Federal Mine Safety and Health Review Commission, and
17 the administrative law judges will hold de novo review
18 of the appropriate civil penalty for each violation on
19 a case-by-case basis.

20 The elimination of the single penalty is
21 essentially the equivalent of a "Mine Lawyers
22 Employment Act," which I believe that the majority of
23 the mining community does not think is needed. Having
24 litigated several of the high accident assessment
25 cases in the last 15 years, one thing is quite clear:

1 If the mine operators believe that they have been
2 abused by the agency and its findings, they have the
3 resources to litigate and achieve substantive results
4 by challenging the agency's findings before the
5 administrative law judges and the Commission.

6 In closing, I would like to say that the
7 mining industry's overall safety record does not
8 support the increased assessments that the proposed
9 rule would likely impose on 90 percent of the industry
10 in the hope that it will improve the conduct of the
11 remaining 10 percent and ultimately result in
12 achieving the goal of improving health and safety for
13 all miners. The single penalty should be revised but
14 not eliminated. Remember that 75,394 out of 116,731,
15 nearly two-thirds, of the citations issued were
16 assessed single penalties in 2005.

17 Depending on your vantage point, no penalty
18 is ever enough, and whatever the penalty is may seem
19 to be too much.

20 Finally, "yes" to improved training and
21 planning and "no" to raising the entire industry's
22 civil penalties and the elimination of the single
23 penalty. Thank you very much.

24 MS. SILVEY: Thank you. We will next have
25 Adele Abrams from the Law Office of Adele Abrams.

1 MS. ABRAMS: Good morning. My name is Adele
2 Abrams, and I am president of the Law Office of Adele
3 L. Abrams, PC, in Beltsville, Maryland.

4 We are a 10-employee firm that focuses on
5 MSHA and OSHA litigation, representing mine operators
6 and contractors in proceedings before the Federal Mine
7 Safety and Health Review Commission. We also do
8 training, site audits, and consultation at the mine,
9 and, as such, I do have an MSHA contractor ID number
10 and, therefore, am subject to MSHA enforcement and
11 penalties under the proposed rule.

12 In addition to being an attorney, I am also
13 a certified mine safety professional, and I am an
14 active member of many mining and safety organizations,
15 but my comments this morning are those of myself and
16 are not on behalf of any of the organizations that I
17 occasionally represent or participate in.

18 (Discussion held off the record.)

19 MS. ABRAMS: I will submit more detailed
20 comments for the record electronically, and I realize
21 the time is limited here. So I would like to hit some
22 of the high points.

23 First of all, as we all know, the mining
24 industry has pervasive regulation, the most heavily
25 regulated industry, I believe, that is out there.

1 Moreover, because of the mandatory inspections,
2 regardless of a mine's performance in terms of injury
3 and illness rates, more citations are generated during
4 these MSHA inspection years than you would have at
5 comparable OSHA-regulated sites.

6 Moreover, because of strict liability and
7 limited affirmative defenses available to mine
8 operators, many more citations are sustained than in a
9 comparable OSHA inspection.

10 We recognize, those of us in the industry,
11 that, to a certain extent, MSHA's hands are tied, and
12 many of the components of this rule are mandated under
13 the Miner Act. In the interest of time, I'm not going
14 to address those because MSHA had virtually little
15 discretion in how to implement those.

16 But the remainder of this rule, I believe,
17 is an overreaction to the congressional scrutiny and
18 the pressure that followed the horrifying events that
19 occurred at the Sago mine earlier this year.

20 The fact is, penalties do not drive safety,
21 at least at most mines and certainly at those mines
22 that I represent, and MSHA has offered no supporting
23 data to show that safety performance will increase
24 when penalties go up. The criteria that you've
25 proposed here does look at violations per inspection

1 day, it looks that the number of repeat violations,
2 but nowhere in this does it factor in a mine's actual
3 safety performance in terms of lives, in terms of
4 injuries and illnesses.

5 There is also a problem because of the
6 unique structure, the bifurcation, of the citation and
7 the penalty process. Unlike OSHA where you get a
8 citation and a penalty at the same time, with MSHA you
9 get the citation first and then months, or sometimes
10 years, later, you will get the proposed penalty. And
11 it appears, under this rule, that many, many more
12 citations will be specially assessed, which is going
13 to further cause a delay between the time of an
14 inspection and the issuance of a citation and an
15 operator actually finding out what the proposed
16 penalty will be.

17 Because of the unfettered potential for the
18 special assessments, as well as the proposed repeat
19 categorization, this is going to drive operators to
20 have to contest virtually all citations that are
21 issued because it is going to be a wild card. They
22 will not know what the end result will be, and they
23 will have a very narrow window in which to decide
24 whether or not to retain counsel, whether to take it
25 to the next level.

1 This is going to increase the workload for
2 sure on the CLRs, the conference and litigation
3 representatives, as well as on the Solicitor's Office,
4 and, of course, on the whole Federal Mine Safety and
5 Health Review Commission.

6 I am already seeing, just because of
7 enhanced enforcement in the wake of Sago, citations
8 that can't be conferenced for 30 or 60 days, despite
9 very timely requests, and I do not believe that
10 reducing the period when you can request a conference
11 from 10 days to five days is going to have a bit of
12 difference in this. It is not delay on the operators'
13 part that is causing the backlog at the CLRs; it is
14 simply the number of citations already being contested
15 now because of the heightened penalty potential, the
16 repeat potential, et cetera. So I think the proposed
17 rule is going to exacerbate that situation.

18 To say a little bit more about the reduction
19 of the conference period, MSHA has to recognize, as a
20 practical matter, that many companies have a
21 centralized office that handles safety, that makes
22 determinations on whether or not to proceed with
23 conferencing or challenging citations, and the
24 citations, in the first instance, are given to the
25 mine location. It may take a good week for those to

1 be communicated to a corporate safety officer, much
2 less for them to confirm with their in-house or their
3 outside counsel and make a determination whether or
4 not to seek a conference and invest those resources.

5 I also represent a number of contractors who
6 do work on a national basis, and, again, the citations
7 may be left for them at the mine office and not given
8 to them for days later. Then they have to transfer
9 that information to a corporate safety office. It's
10 going to be extremely difficult for any of those
11 companies that do centralize their safety operations
12 to be able to get the information they need within
13 five days to make a decision, and, effectively, what
14 you're doing is closing the door to the conference
15 process to a majority of these larger operations.

16 What is that going to do? As Mr. Fitch very
17 eloquently said, it is going to the "Mine Lawyers
18 Employment Act." It is going to leave them no
19 recourse but to file a notice of contest, and I think
20 you are also going to see an increase in expedited
21 hearing requests if this rule goes through in the
22 manner in which it is proposed.

23 Those are some just basic observations that
24 I wanted to make. I do have a few comments to make on
25 the specific proposals, and if there is time

1 permitting, I would like to go through those now, not
2 in as much detail as I've written down, however.

3 First of all, on the single penalty
4 assessment, I very much disagree with the idea of
5 abolishing it entirely. Quite often now, that will be
6 a criterion for companies to decide whether or not to
7 invest the resources to hire counsel or to even
8 conference citations. If, again, all non-S&S
9 citations are thrown into the potential special
10 assessment mix because you're removing all criteria
11 for that, you're going to have no recourse but to
12 conference every single citation and try to get the
13 gravity reduced since, of course, if it's under a
14 regular penalty point system, the difference between
15 lost work days and permanently disabling is going to
16 make quite a bit of difference.

17 These are all subjective evaluations made by
18 inspectors on the fly. It is rare that you're going
19 to get two or three inspectors who would look at a gap
20 and a guard and characterize it the same way. So
21 there is usually some room for disagreement upon a
22 gravity characterization once you get beyond the first
23 finding of unlikely.

24 Also, many of these involve things like
25 housekeeping, small amounts of material on a walkway

1 or dirty toilets. Do we really need to be litigating,
2 as, indeed, one client of mine is right now, a toilet
3 citation because a truck driver forgot to flush, and
4 MSHA was offended by that and issued a non-S&S
5 citation? Is this really what we need to be tying up
6 the courts with?

7 I don't think there would be a lot of
8 disagreement in raising the non-S&S, single penalty
9 assessment perhaps to \$112 per citation, which is the
10 lowest amount under your new proposed penalty
11 criteria. I think it's worth noting that, under
12 OSHA's somewhat analogous system, there, other than
13 serious citations, which are comparable to the non-S&S
14 here, often have zero penalty, and de minimis
15 citations with OSHA have zero penalty.

16 So I think MSHA really needs to revisit
17 this. The proposed deletion of the single penalty is
18 unnecessary, and where a non-S&S citation involves
19 somewhat egregious conduct, they already have
20 authority to specially assess non-S&S citations that
21 are characterized as high negligence.

22 With respect to the regular assessment
23 criteria, there does not seem to be any logic to
24 having more onerous burdens on small coal operators
25 than on comparable metal/nonmetal operators, and I

1 believe the current penalty point system addressing
2 operator and control and company size should be
3 continued.

4 I do support reducing the history of
5 violations period from the previous 24 months to the
6 previous 15-month period, and I think this does need
7 to be clarified that this applies only to citations
8 and orders that have been finally adjudicated. There
9 are significant legal and procedural problems with the
10 repeat violation criteria, and I will speak to that in
11 a moment.

12 The BPID criteria achieve the goal of
13 discouraging high rates of citations, and that should
14 be continued in its present form, with the
15 modification cutting it back to 15 months, and I also
16 support including or continuing the minimum number of
17 citations to trigger history points for small
18 operations because many of them simply do not have
19 sufficient inspection days to offset even six or eight
20 citations that they might get in a 15-month period.

21 These same criteria should also apply to
22 contractors working at mines, and I disagree with
23 enhancing history penalty criteria for contractors.
24 MSHA seems to miss the point that many of these
25 contractors operate nationwide but have a single

1 contractor ID number, regardless of the number of mine
2 sites that they may have active operations on on a
3 daily basis.

4 It is quite easy, if the contractor is
5 working at 50-plus mines a day, for them to compile
6 more than 50 citations in a 15-month period,
7 especially if these are for non-S&S citations, things
8 like missing paperwork that they just left out of
9 their truck when they went to visit somebody else's
10 work site.

11 So if MSHA is going to crack down on
12 contractors in this rule, in terms of history of
13 violation, perhaps it should consider excluding non-
14 S&S citations from a contractor's history of
15 violations so that only those citations that deal with
16 actual safety hazards are considered.

17 Another thing that needs to be considered
18 here is that there have been a lot of changes in
19 ownership in the mining industry over the years, and
20 especially in recent years, and whereas, in the past,
21 it was not unusual for MSHA to give out a new mine ID
22 number if a company was purchased by a totally
23 separate entity and made significant changes in the
24 management at the mine.

25 In a couple of recent instances that I've

1 been involved with, MSHA has refused to do that, and
2 so a new company coming in that should have really a
3 clean start with the agency is, instead, encumbered by
4 a mine that may already be under excessive history of
5 violations or be right at the cusp of that. Again,
6 given the heightened penalties here, I think that is a
7 policy that needs to be revisited by MSHA.

8 I don't have any real problems with the
9 increase in penalty points for the negligence and the
10 modification of points for persons potentially
11 affected, but there does not seem to be a valid basis
12 for the fivefold increase in penalty points under the
13 gravity that you have in some instances. It
14 effectively eliminates the distinction between S&S and
15 non-S&S citations, from a penalty perspective. For
16 example, a non-S&S citation classified as unlikely,
17 but if an injury resulted, it would be fatal, would
18 have 30 penalty points for gravity, whereas an S&S
19 citation classified as reasonably likely to result in
20 lost work days would have 35 penalty points for
21 gravity.

22 Again, these gravity findings are highly
23 subjective, and since far fewer citations may be able
24 to be conferenced in the future, many of these non-S&S
25 citations will be forced to proceed to trial if the

1 heightened penalties are adopted. So the current
2 penalty points for gravity, I believe, should be
3 maintained.

4 I also oppose reducing the good-faith
5 penalty decrease from 30 percent to 10 percent, as
6 this provides a disincentive for prompt abatement. It
7 seems contrary to the letter and the spirit of both
8 the Mine Act and the Miner Act, and there is no
9 justification given for it. If somebody doesn't
10 timely abate, MSHA already has fairly severe sanctions
11 they can impose under Section 104(b) of the Mine Act,
12 as well as, of course, specially assessing the related
13 citations. But to reduce this good-faith reduction
14 without any justification seems only intended to
15 further hike the penalties on those good operators.

16 The special assessment process; there needs
17 to be some objective criteria retained for this. MSHA
18 should not have unfettered discretion to specially
19 assess any citations it chooses. This can be used to
20 selectively target operators who are critical of MSHA,
21 who have disputes with district managers, or who
22 exercise their due process rights under the law.

23 So the existing list of eight categories for
24 special assessment is permitted, should be retained,
25 and there should also be public guidance that

1 clarifies who special assessment computations are
2 obtained. Any action to the contrary, I believe,
3 violates mine operators' rights under the Fifth
4 Amendment and also under the Administrative Procedure
5 Act.

6 With respect to the repeat violations, there
7 is really no need to include a repeat violation
8 category under the regular assessment penalty point
9 scheme, and it should be deleted. In my opinion, it
10 is redundant, with a history of violations criteria.
11 In many cases, it is going to be counting those same
12 citations twice solely for the purpose of escalating
13 the punitive civil penalties, and these penalties,
14 under the original act, are supposed to be a
15 deterrent; they are not supposed to be punitive.

16 Moreover, many MSHA standards are
17 subjective, and so one standard can cover a multitude
18 of sins. For example, safe access can relate to
19 anything from a bent ladder step, to a table that's
20 stretching across a walkway, to having to step over a
21 barrier in order to change a screen. This does not
22 mean that they are having the same problem arising
23 over and over again. In a plant, the safe access
24 citation can refer to almost anything. I think of it
25 as MSHA's general duty clause, really, and that needs

1 to be considered. Housekeeping is another one that
2 can be very subjective.

3 Also, another problem with the repeat
4 violations is that, unlike OSHA, MSHA does not group
5 its violations. With OSHA, if you have a couple of
6 fire extinguishers that have expired tags, you're
7 going to get one citation that's going to say: "Fire
8 extinguishers were found not to have a current
9 inspection tag."

10 With MSHA, every single fire extinguisher
11 that has an expired tag is going to be written as a
12 separate citation, and if you don't believe me, I have
13 one operation that got 35 fire extinguisher citations
14 in a single inspection, and not one of those had any
15 problem with its functional operation. It was simply
16 a paperwork violation. Under the proposed scheme
17 here, they would clearly be in the repeat category,
18 and those would be astronomical fines for that
19 operator, even though there was no impact on safety
20 whatsoever.

21 So perhaps, at a minimum, if you are going
22 to go forward with this repeat criteria, it should
23 excluded non-S&S citations and especially those that
24 are paperwork in nature because, otherwise, unless
25 there is some consistency in enforcement, or unless

1 you have performance-oriented standards, this is going
2 to be a meaningless exercise. No one is going to be
3 able to predict what will trigger a repeat violation.

4 Finally, the repeat criteria, if you choose
5 to go down this misguided path, should be prospective
6 only in nature, and it should not consider any
7 citations that were issued prior to rule's effective
8 date. There is a legal presumption, as you know,
9 against retroactivity of laws, and many operators have
10 already, during the past 15 months and today, accepted
11 non-S&S and other citations that were relatively low
12 penalty because they were unaware that the agency was
13 going to consider using those against them in the
14 future for the purpose of jacking up the penalties.
15 No doubt, many of those cases would have been
16 adjudicated if this information had been available.
17 So the penalty repeat criteria should be limited to
18 prospective application, if it is used at all.

19 That is really all I have to say other than
20 I think MSHA has grossly underestimated the cost of
21 this rule. They have looked at the across-the-board
22 increase in penalties, which is threefold, as Mr.
23 Fitch said, but MSHA itself is also going to have its
24 resources adversely impacted because more inspectors,
25 more field office supervisors, more district managers

1 are going to be involved in hearings that will take
2 them out of the fields and diminish their availability
3 for inspections and compliance assistance.

4 Moreover, company resources that would
5 otherwise be dedicated to improving safety, purchasing
6 safety equipment, purchasing outside training
7 resources; those resources are going to be impacted
8 because many times the cost of adjudicating citations
9 comes right out of a company's safety budget.

10 So I do appreciate your patience in
11 listening to me here. I realize I've gone over my
12 allotted time, and I will be happy to respond to any
13 questions you might have, and I will submit these
14 comments in a more detailed manner for the record.
15 Thank you.

16 MS. SILVEY: Thank you. I do have a few
17 comments, and Jay does also.

18 The last thing you said was a good segue
19 into my first comment, and your statement that we did
20 not provide any basis for showing that the rule would
21 result in an improvement in safety and health
22 performance. On page 53069, we show, and I'm going to
23 get to the second part of your statement where you
24 said we underestimated the cost, we show the impact of
25 the proposal, both with unchanged compliance and with

1 increased compliance response to higher penalties.

2 Now, we didn't go the next step, and I'll
3 say that to everybody, which would be to take that
4 improved compliance and quantify that in terms of
5 safety and health results, but, clearly, we projected
6 that as a result of increased penalties, operators
7 would expend, as you said, would expend increased
8 costs to improve compliance. Everything we put in
9 here is a projection.

10 We've got to make some projections, an
11 estimate, and, in so doing, we projected that
12 operators would expend, I believe, \$8.9 million of
13 additional expenditures to improve compliance so that
14 ultimately these improved costs would result in
15 increased safety and health at the mine and,
16 therefore, reduced violations.

17 Now, as I said, the next step would be to
18 take that improved compliance and try to express it,
19 quantify it, in terms of safety and health
20 performance, and we did not take it to the next step,
21 to quantify, but we do believe that the increased
22 penalties will qualitatively result in -- actually
23 more than qualitatively, I think I can say, but we
24 just didn't take it to the next step.

25 But if you have any additional, and I'm sure

1 you will, if you have any additional comments or any
2 additional specifics with respect to costs, if you
3 would include those in your comments to us, your
4 written comments to us.

5 The other thing I would comment on, where
6 you said, MSHA has refused to give out a new mine ID
7 where the company has changed ownership, and I was
8 first going to ask you if you could provide specific
9 examples for the record, but before I do that, I'm
10 going to ask Jay to address that because I think we
11 can address that right now. Jay?

12 MR. MATTOS: It would be good to know what
13 the specifics were --

14 MS. SILVEY: So I'll still ask you to
15 provide the specifics.

16 MR. MATTOS: The history is supposed to
17 restart with the change in ownership at an operation,
18 notwithstanding a new mine ID. Was it an operator ID
19 that they were trying to --

20 MS. ABRAMS: It was. You know, there is no
21 secret in this because the request was made through
22 the Solicitor's Office and was discussed with the
23 Dallas Metal-Nonmetal Office, and the request was
24 rejected. It was after U.S. Lime purchased the St.
25 Clair mine that had previously been owned by Oglebay

1 Norton.

2 MR. MATTOS: And they requested a new mine
3 ID?

4 MS. ABRAMS: They requested a new mine ID
5 because they had a new safety director, the had new
6 management people at the mine, and they are both
7 separate, publicly traded companies with no links
8 between them whatsoever. I was told without
9 qualification that MSHA no longer will give out a new
10 mine ID number. If you buy somebody else's problem,
11 you have inherited that problem, and you have to pay
12 the higher penalties.

13 MR. MATTOS: Just to clarify, with a change
14 in ownership, you get a new operator ID versus a new
15 mine ID. The mine IDs are supposed to follow the
16 property forever.

17 MS. ABRAMS: They would not wipe the
18 history.

19 MR. MATTOS: The history is supposed to be
20 started with that, but we need to check into that to
21 make sure.

22 MS. SILVEY: We'll check into that.

23 MR. MATTOS: But just to clarify, the system
24 is supposed to work the way you described, not with a
25 new mine ID but with --

1 MS. ABRAMS: This was this year.

2 MS. SILVEY: We'll check into that.

3 MR. MATTOS: One question I had: You
4 referred to special assessments quite a bit, and one
5 thing I would like to clarify is that our hope and
6 expectation is a reduced number of special
7 assessments. The reason that the committee
8 recommended removing that specific list was because we
9 don't want to be obligated to look at those for
10 special assessments. We would like to see if we can
11 get those through the regular formula and not
12 specially assess those. So it really is our hope to
13 reduce the number of special assessments.

14 We already have discretion to specially
15 assess any citation or order. What we don't want to
16 do is say, we are actually going to review every one
17 of these types for special assessment. The regular
18 penalty formula will take care of it. That's our
19 hope.

20 Is that why you thought that the special
21 assessments would go up, the number would go up?

22 MS. ABRAMS: Well, once you have no
23 parameters against which to benchmark or project what
24 an agency may do, it does lead to arbitrary and
25 capricious application, and under the historical

1 model, the district managers, in the first instance,
2 with input from the inspectors, made the initial
3 recommendations for special assessment.

4 I used to see those forms before you stopped
5 giving them out, and I have a case right now, a motion
6 for settlement just went over, where there is a lot of
7 friction between the district manager and a small
8 operator, and they specially assessed everything, to
9 the tune of over \$19,000, and, in the end, the case
10 settled in the \$4,000 range.

11 But all of those had to be rolled back, and
12 a majority of the citations ended up, under the
13 guidance of the Solicitor's Office, being put back
14 into regular assessments because it was clear, after
15 depositions, at no small cost to the operator and,
16 presumably, to the agency as well, it made it clear
17 there was no basis for why every citation in this
18 particular inspection had been characterized as having
19 elevated negligence, even though they were all non-
20 S&S. It pretty much came out that it was solely for
21 the purpose of kicking it into special assessments.

22 MS. SILVEY: But, you know, just to follow
23 on to what Jay said, it's funny how different -- you
24 know, you can articulate different things in what you
25 do. Our goal was, just as Jay said, to have fewer

1 things in the category of special assessments and,
2 therefore, to allow, as you said -- MSHA does spend
3 quite a number of resources on doing special
4 assessments -- to allow more attention to be spent
5 directly doing direct field enforcement activities.

6 That was, indeed, our goal, and we followed
7 that through in terms of projections, in terms of
8 taking our 2005 violation data and projecting how it
9 would be treated under this proposed rule. So, you
10 know, we will, obviously, look at all of the comments
11 and things that we receive and take comments into
12 consideration, but our goal was to try to create a
13 more appropriate penalty through the formula system
14 with the sense of reducing resources.

15 MS. ABRAMS: I'm pleased to hear you say
16 that for the record because I don't think that's how
17 it came across in the proposed rule, but I, again,
18 have to caution that you need to be very careful about
19 the misapplication of this based upon personal
20 vendettas that may exist between some mine operators
21 or mine personnel and either the inspectors of
22 district managers in certain areas of the country.
23 Without some parameters, this does leave itself open
24 to accusations against the agency of engaging in
25 arbitrary and capricious acts that are an abuse of

1 discretion.

2 The other thing I would note is, about a
3 year or so ago, I was at the Admchet Mineral Law
4 Foundation seminar that they held over at the
5 Department of Labor, and I believe Page Jackson stood
6 up at that meeting and stated that every citation that
7 is specially assessed is also reviewed for possible
8 criminal referral. And if that is, indeed, still the
9 case, then any citation that could be specially
10 assessed has to be taken extremely seriously by a mine
11 operator and should very well be a candidate for
12 consideration for an expedited hearing under the
13 Federal Mine Safety and Health Review Commission
14 procedures that allow a hearing within 72 hours
15 because, obviously, if the citation can be kicked out
16 at that stage, it obviates the potential for there to
17 be a criminal investigation. Thank you very much.

18 MS. SILVEY: Thank you.

19 MR. MATTOS: Thank you.

20 MS. SILVEY: Next, we have Patrick Jacomet
21 with Ohio Aggregates and Industrial Minerals
22 Association.

23 MR. JACOMET: Good morning.

24 ALL: Good morning.

25 MR. JACOMET: My name is Patrick Jacomet.

1 I'm with the Ohio Aggregates and Industrial Minerals
2 Association, and our trade association represents 94
3 producers of aggregates and industrial minerals, which
4 would include limestone-tainted gravel, salt-clay
5 shale, and dimensional stones. We also have 84
6 associate members, which would be suppliers of
7 ancillary items, such as tires, loaders, belting, and
8 those types of services. We represent over 90 percent
9 of Ohio's production of 150 million tons.

10 This morning, I would like to thank you for
11 the opportunity to be here and to speak to you. I'm
12 going to reiterate a lot of things that have been said
13 already, and I will offer written testimony later on,
14 so I'll try to abbreviate what I have written down
15 today for you.

16 When MSHA was first created under the 1977
17 Mine Act, the maximum civil penalty was \$10,000. It
18 has since been increased several times to the current
19 maximum penalty of \$60,000. When Congress amended the
20 1977 law this year and the Miner Act, a new maximum
21 penalty for flagrant violations was set at \$220,000,
22 and certain statutory minimum penalties were
23 designated for Section 104(d) citations and orders, as
24 well as violations of the immediate reporting
25 requirements in 30 C.F.R. § 5010.

1 The Ohio Aggregates Association recognizes
2 that MSHA has no discretion to deviate from these
3 standard minimums and must also implement the \$220,000
4 maximum penalty for flagrant offenses for those
5 citations issued after June 16 of this year.

6 Therefore, we limit our comments to those
7 areas where MSHA has gone, we feel, beyond the
8 directives from Congress in ways that are punitive and
9 violative of due process rights or which will have
10 counterproductive impact on abatement of alleged
11 violations.

12 First of all, the single penalty assessment.

13 The Ohio Aggregates and Industrial Minerals
14 Association opposes MSHA's proposal to delete entirely
15 the single penalty assessment, which is currently set
16 at \$60 per nonsignificant and substantial violations,
17 or S&S violations. It is important to recognize that
18 such citations often occur for highly subjective
19 conditions where one inspector may find a situation of
20 full conformity with MSHA requirements while another
21 issues a citation because he or she speculates that a
22 miner hazard might exist if the condition continued to
23 exist in the future.

24 Often these involve housekeeping items, such
25 as Ms. Abrams mentioned: unflushed toilets, rags,

1 material on walkways, uncovered trash cans, minor
2 holes in guards in access areas, and other equipment
3 defects which, in normal service, would be considered
4 minor issues. Often a mine operator is not on notice
5 of a potential violation because other inspectors did
6 not see a problem with that condition.

7 Other categories of non-S&S citations
8 include paperwork, such as late filing, failure to
9 note an inspection date on a fully charged fire
10 extinguisher, or faded labels or other technical
11 violations of MSHA's HAZCOM rules. Often these are
12 rated as no likelihood of injury and/or low or no
13 negligence.

14 Now, under OSHA's analogous penalty system,
15 similar violations are classified as "other than
16 serious" or sometimes called "de minimis." It is
17 common that no penalty at all is assessed. It is
18 sensible that, if MSHA must issue a penalty, that a
19 single penalty assessment be maintained for these low-
20 or no-hazard technical violations.

21 The Ohio Aggregates Association does believe
22 that raising the single minimum penalty under the
23 revised Part 100 to \$112 per citation for non-S&S
24 citations is not needed.

25 MSHA historically has reserved the right to

1 specially assess high negligence for non-S&S
2 citations, and the Ohio Aggregates Association does
3 not have any quarrel with continuation of that
4 approach.

5 With regard to regular assessment criteria,
6 the Ohio Aggregates and Industrial Minerals
7 Association supports reduction of the history-of-
8 violations period from the previous 24 months to the
9 15 months to clarify that this refers only to
10 citations or orders that have been fully adjudicated.

11 The Ohio Aggregates Association opposes the new
12 repeat violation criteria, as discussed later.

13 The BPID criteria achieve the goal of
14 discouraging high rates of citations and should be
15 continued in its present form.

16 We support including a minimum number of
17 citations, 10 in the preceding 15 months, under the
18 proposed rule, to trigger history points because many
19 small operations may not have sufficient overall
20 inspection days to offset such relatively low number
21 of citations. To add to that, we represent
22 approximately 486 surface mines across the State of
23 Ohio, and many of these operations are still small,
24 family-owned operations with single, or maybe just
25 two, production plants. So this really strikes a

1 chord with a lot of our producing members in Ohio.

2 The same criteria should also be used for
3 contractors, as Ms. Abrams had mentioned later,
4 working at mines. We disagree with enhancing history
5 penalty criteria for contractors as many contractors
6 have the single MSHA contractor ID number for
7 nationwide operations.

8 The Ohio Aggregates Association does not
9 oppose increasing the penalty points associated with
10 negligence ratings for citations. It does oppose the
11 fivefold increase in penalty points for those
12 citations classified as unlikely to result in injury
13 or illness, as this effectively eliminates the
14 distinction between S&S and non-S&S citations, from a
15 penalty perspective.

16 Since the gravity findings of an inspector
17 are highly subjective, and since far fewer citations
18 will be conferenced in the future if this proposal is
19 adopted, many non-S&S citations will have to proceed
20 to trial if these heightened penalties are adopted.

21 Therefore, the Ohio Aggregates Association
22 recommends that the current penalty points for gravity
23 be maintained. The Ohio Aggregates Association does
24 not oppose a modification of points for persons
25 potentially affected but does encourage MSHA to be

1 realistic about the application of this criteria.

2 Some inspectors routinely put down one miner
3 for this, which may not be realistic, while others go
4 to the other extreme, counting every employee as
5 potentially affected, even where they never go to the
6 cited area of the mine. Some guides to the regulated
7 community and to compliance officers as to how this
8 will be computed would be very beneficial to us.

9 The Ohio Aggregates Association opposes
10 reducing the good-faith penalty decrease from 30
11 percent to 10 percent, as this is a disincentive to
12 prompt abatement and seems contrary to the letter and
13 spirit of the Miner Act.

14 In regards to special assessments, the Ohio
15 Aggregates Association opposes the revision of the
16 special assessment process because it removes
17 virtually all constraints against use of this
18 potentially punitive power against operators when used
19 in an arbitrary manner. MSHA should not have complete
20 discretion to specially assess any citations it
21 chooses. This could be used to selectively target
22 operators who are critical of MSHA who exercise their
23 due process rights under the law.

24 The existing list of eight categories where
25 special assessment is permitted should be retained, as

1 should public guidance that clarifies how special
2 assessment computations are obtained.

3 The Ohio Aggregates Association recognizes
4 that the new penalty of \$220,000 is required under the
5 Miner Act for flagrant violations, but we are
6 concerned that the definition of "flagrant violations"
7 contained in the proposed rule is overly vague and
8 will be susceptible to capricious and inconsistent
9 enforcement.

10 As noted below, the inclusion of the term
11 "repeated" can lead to subjective results and should
12 be eliminated. The \$220,000 penalty should be limited
13 to repeat violations of the same standard that were
14 issued under Section 104(d) of the act and were
15 characterized as involving reckless disregard.

16 Moreover, to trigger this maximum penalty
17 assessment, any previous violations considered must
18 have already been finally adjudicated at the time that
19 the new citation is issued. In other words, those
20 that are still pending litigation cannot trigger the
21 heightened penalty for a subsequent citation under the
22 same standard.

23 With regard to the statutory minimum penalty
24 for immediate notification -- this is the 15-minute
25 standard -- on one of those citations issued for

1 failure to notify of death or accident with a
2 reasonable likelihood of a resulting death should
3 receive such a penalty.

4 Other Part 5, 50.10 violations, in other
5 words, failure to report a fire or a hoist problem,
6 should not be subject to the \$5,000 minimum penalty,
7 as this goes beyond the intent of Congress in the
8 Miner Act. Again, this is near and dear to the heart
9 of our industry in Ohio, where we do have a lot of
10 family operations, and, indeed, our members, we
11 consider them one big family, and we do take safety
12 very seriously.

13 We have concerns that the 15-minute
14 notification will be a problem for some operators
15 where they have to make a split-second decision on
16 whether to try to contact the MSHA office or provide
17 immediate care to an accident victim. Fifteen minutes
18 -- we believe there should be some kind of leeway,
19 maybe 15 minutes after the accident site is
20 stabilized.

21 Our first priority needs to be to stabilize
22 someone who has been injured, stabilize the situation
23 so that no one else is injured, make sure that we get
24 the proper health care people out there as quickly as
25 possible. Our priority does not need to be trying to

1 contact the MSHA office a couple of hundred miles
2 away. That is really at the heart of our problem with
3 these rules as they stand right now. We would
4 appreciate some clarification to that 15-minute rule.

5 With regard to repeat violations, there is
6 no need to include a repeat violation category in the
7 regular assessment penalty point scheme, and it should
8 be deleted. The Ohio Aggregates Association believes
9 that this is redundant, with the history-of-violations
10 criteria that consider the same citations twice in
11 many cases.

12 Another problem is that, unlike OSHA, MSHA
13 does not group violations into a single citation.
14 Therefore, an operator missing inspections fire
15 extinguishers by a few days, which is a technical
16 violation, may find that he has several citations for
17 the same violation. It's not inconceivable that you
18 could have 10 or 15 violations for fire extinguishers
19 at any one time.

20 Until MSHA can ensure consistency in its
21 enforcement, and unless it switches from performance-
22 oriented standards to objective criteria, the repeat
23 citation criteria should be rejected. At a minimum,
24 only S&S citations should be included under the repeat
25 criteria, and the number of inspection days should

1 also be considered, with an exemption for small
2 operations that have relatively few inspection days,
3 as noted in the BPID criteria.

4 Lastly, conference requests. The Ohio
5 Aggregates Association is puzzled by the inclusion of
6 a shortened period for requesting an informal
7 conference, as this seems designed to thwart early
8 settlement attempts and to encourage protracted
9 litigation.

10 MSHA needs to understand that for many
11 larger companies, citations may be received at the
12 mine site, which can be a small, satellite facility,
13 such as a portable plant or a local office. It may
14 take several days or up to a week or more for the
15 citations to be forwarded to the appropriate person
16 within the larger corporate safety department in the
17 company. The citations are processed and reviewed to
18 determine whether to dispute the allegations.

19 In some cases, mail must be forwarded if a
20 mine operates intermittently, like a seasonal or
21 portable operation. In some cases, MSHA inspectors
22 have been known to leave the contractor citations at
23 the mine office rather than delivering them to the
24 contractor himself. This can further delay the
25 ability to request a conference within the allotted

1 time.

2 Thus, by reducing the time to request a
3 conference from 10 to five days, this may preclude
4 utilization of the conference process entirely for a
5 large number of citations on operations. Because the
6 litigation costs often come out of the safety
7 department's budget, this approach is also harmful
8 because it will reduce resources that could otherwise
9 be dedicated to training programs, purchase of safety
10 equipment, et cetera. We recommend that the 10-day
11 conference-request deadline be maintained.

12 Again, we will be offering written comments
13 at a later date. I would welcome any questions from
14 the Committee. Thank you.

15 MS. SILVEY: Thank you. I would like to
16 make a couple of comments, not questions, per se.
17 I've heard this, and I'm sure we're going to continue
18 to hear it as we go through these civil penalty
19 hearings, about the inspector subjectivity, and,
20 obviously, I think that we would all agree that
21 anywhere you have the human element involved, there is
22 going to be some subjectivity, but, as I stated in my
23 opening statement, basically, there is no change in
24 process in terms of how the inspectors, under the new
25 proposal, how the inspectors will issue citations and

1 orders and any other enforcement paper.

2 We do, in a variety of ways -- we have
3 activities where we try to promote consistency and
4 minimize subjectivity, but I would be the first to say
5 that, as I said, where you have human beings involved,
6 there will be some subjectivity and probably some
7 inconsistency, and we do our best to minimize that.

8 Along that line, I would like to
9 specifically comment on what you said about the
10 failure-to-notify penalty. As you stated and I
11 stated, that was included in the Miner Act. In this
12 proposal, we were consistent with the Miner Act. It
13 will be limited to the three situations that are
14 included in the Miner Act, which are death, injury
15 with the potential to cause death, or entrapment with
16 the potential to cause death.

17 And you stated that you represent a number
18 of small companies in Ohio, and I would suggest to you
19 that if it were a two-person company, and somebody was
20 injured, and the other person was furiously rendering
21 aid to the person who is injured, that I would think
22 that, under those circumstances, MSHA would want the
23 person left to continue rendering aid and that it
24 would be the circumstances of the situation which
25 would determine when the person would call into MSHA.

1 If it's two people, and one is rendering
2 aid, and it's a matter of rendering aid or calling
3 into MSHA, I wouldn't think that I would have to say
4 to you what you would do or what I would do under
5 those circumstances, and I think MSHA would understand
6 that.

7 So, in any event, I guess what I'm trying to
8 say by saying that is, you know, we create the worst
9 kinds of scenarios. I don't think, and maybe I'm
10 being sort of overly optimistic, I don't think that we
11 are going to necessarily see these worst-case
12 scenarios just sort of creeping up everywhere. I
13 would hope that if I'm wrong, you might call me on my
14 phone number, and I'll give it to you when this
15 hearing is over. So that's one thing I would like to
16 say.

17 And then another thing is that, as with any
18 safety and health legislation, and the Mine Act
19 clearly -- Adele said, I think, earlier -- was
20 pervasive safety and health legislation, and it is,
21 but any safety and health legislation is remedial in
22 nature. By that, I mean that it seeks to prevent
23 safety and health situations, accidents, before they
24 occur, prevent hazardous situations.

25 I think that all of the activities,

1 including the things in this civil penalty proposal,
2 are in that nature. Our greatest goal is, quite
3 honestly, that there be no violations in the workplace
4 and, therefore, no circumstances to which a miner
5 could be exposed to situations that might cause
6 injuries or illnesses.

7 So it's with that goal in mind that we
8 published this proposal, and so, you know, we've heard
9 some good comments this morning up to yours already,
10 and we will, obviously, pay attention to those, but I
11 think one of the things we do want to stress, and the
12 mining industry, both industry and labor, are working
13 partners with us in this, and that is in hoping that
14 we carry out the true meaning of the Mine Act, and
15 that is the remedial nature of it.

16 Those are all of the things, not to sound
17 preachy, that I would like to say. Does anybody else
18 have any comments?

19 (No response.)

20 MS. SILVEY: Thank you very much. Those
21 were the only names on the list. Are there any other
22 persons here who wish to comment or provide testimony?

23 (No response.)

24 MS. SILVEY: Okay. Well, then, there being
25 no other persons who wish to comment or provide

1 testimony, I'll tell you what I'm going to do, which
2 is a little unusual at ten-thirty. I think what I'll
3 do is we appreciate everybody being here today and
4 appreciate your interest in this hearing. I'm sure
5 that as we move forward with the remainder of the
6 hearings, that we will see some of you, and we will
7 get further comment and testimony.

8 But for purposes of this hearing, I think I
9 will tentatively close it right now, but we will check
10 back in about, let's say -- this is ten-thirty -- we
11 will check back at about eleven-thirty to see if
12 anybody shows who wishes to, and, at that point, I'll
13 reconvene it. But for purposes of right now, it's
14 closed. Thank you.

15 (Whereupon, at 10:30 a.m., a short recess
16 was taken.)

17 MS. SILVEY: I'm Patricia W. Silvey, and, at
18 this point, I would like to reopen the Mine Safety and
19 Health Administration's rule-making hearing on its
20 civil penalty proposal. Are there any more persons
21 here who wish to make comment or testimony?

22 (No response.)

23 MS. SILVEY: There being no additional
24 persons who wish to provide testimony at today's
25 public hearing, then I would like to officially close

1 this hearing.

2 I want to let you know that the Mine Safety
3 and Health Administration appreciates all of those who
4 provided comment and testimony here today, as well as
5 those who were in attendance here who may not have
6 provided testimony but have an interest in this rule-
7 making.

8 We anticipate that we will see some of you,
9 and we will get additional comment and testimony at
10 the five remaining hearings, and, as I said earlier,
11 please feel free to provide any comments that you may
12 wish to us before the record closes on October 23,
13 recognizing that we are under somewhat tight time
14 constraints, having to meet the requirements of the
15 Miner Act.

16 So, with no additional comments, this
17 hearing is concluded. Thank you.

18 (Whereupon, at 11:32 a.m., the proceeding in
19 the above-entitled matter was concluded.)

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