

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

In the Matter of:

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

Wednesday,
October 4, 2006

Hilton Salt Lake City Center
255 South West Temple
Salt Lake City, Utah 84101

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 Variances, MSHA

JAY MATTOS, Acting Director,
Assessments

PETER MONTALI
Office of Metal and Nonmetal
Mine Safety and Health

KEITH WATSON
Office of Assessments

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PARTICIPANTS (continued):

ROBERT STONE
Economic Analysis Division

WILLIAM CROCCO
Office of Coal Mine Safety and Health

JACK POWASNIK
Office of the Solicitor

GERRY GUNN
Regulatory Development Division

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I N D E X

Opening Statement, Patricia W. Silvey, Acting Director of the Office of Standards, Regulations and Variances for the Mine Safety and Health Administration	4
Testimony of James Poulson, Utah American Energy	19
Testimony of David Graham, Manager, Safety and Health for General Chemicals Soda Ash Partners in Sweetwater County, Green River, Wyoming, accompanied by Henry Chajet, Senior Partner, Patton Boggs and counsel to MARG 34	
Testimony of Mike Crum, Wyoming Mining Association	71
Testimony of Jack Cottrell, Kinross Gold Corporation	82
Testimony of Mike Crum, FMC Corporation, Green River, Wyoming	102
Testimony of David Litvin, Utah Mining Association.	118
Adjourn	123

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P R O C E E D I N G S

9:07 a.m.

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

The members of the MSHA panel are and the persons responsible, primarily responsible for drafting this proposal, are to my right, Jay Mattos, who is the Director of the Office of Assessments and the chair of the Rulemaking Committee.

MR. MATTOS: Jay Mattos.

MS. SILVEY: Peter Montali.

MR. MONTALI: Pete Montali.

(Telephone rings.)

MS. SILVEY: I'm sorry, excuse me. Somebody from work. So it goes. Can't get away from them.

Peter Montali is with the Metal/Nonmetal Mine Safety and Health Office.

Next to Pete, Gerry Gunn.

MS. GUNN: Gerry Gunn.

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1 MS. SILVEY: Gerry Gunn is with my office
2 and she's the regulatory specialist on the committee.

3 To my left Jack Powasnik.

4 MR. POWASNIK: Jack Powasnik.

5 MS. SILVEY: And Jack is with the
6 Department of Labor's Office of the Solicitor and he
7 is obviously the lawyer on the committee.

8 To his left, Robert Stone.

9 MR. STONE: Robert Stone.

10 MS. SILVEY: And Robert is MSHA's chief
11 economist and so his staff provided economic
12 assistance to the committee.

13 To Robert's left, William Crocco.

14 MR. CROCCO: William Crocco.

15 MS. SILVEY: And Bill is with the Coal
16 Mine Health and Safety Office. So those are the
17 members of the MSHA Rulemaking Committee.

18 This is the third of six hearings on this
19 proposed rule. The first hearing was held on
20 September 26th in Arlington, Virginia; the second,
21 September 28th in Birmingham; the fourth will be
22 October 6th in St. Louis; the fifth, October 17th in
23 Charleston, West Virginia; and the sixth, October 19th
24 in Pittsburgh.

25 The comment period will close on October

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1 23rd. In accordance with the MINER Act, as some of
2 you know, MSHA must issue final regulations for those
3 provisions dealing with civil penalties that are
4 contained in the MINER Act by December 2006. We have
5 a short time frame for doing that. We will
6 accept documents today that you would like to submit
7 for the record.

8 This hearing will be conducted in an
9 informal manner. As many of you who have participated
10 in these hearings know, formal rules of evidence do
11 not apply. Members of the panel may question
12 witnesses. Witnesses may ask questions of the panel.

13 Scheduled speakers will make their presentations
14 first. After that, others will be allowed, although
15 it doesn't appear that we have any time problems
16 today. The transcript of this hearing will be posted
17 on the MSHA website within a week after today.

18 Before I discuss the provisions of the
19 rule, I want to give a short overview of the civil
20 penalty process beginning with the clarification of a
21 few terms.

22 The first term is "citation." The
23 inspector issues a citation for a violation of any
24 MSHA standard, rule, order, safeguard, or regulation.

25 The inspector sets a time to abate the condition.

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1 The second is an "order." The inspector
2 can issue an order under several different
3 circumstances. Primarily, when a violation is not
4 abated within the time allowed by the inspector; when
5 the inspector finds a violation caused by an
6 unwarrantable failure; when the inspector determines
7 that an imminent danger exists. And when an order is
8 issued, the order does not necessarily require that
9 the entire mine be shut down. It applies to the area
10 affected by the order.

11 Third, "significant and substantial," or
12 as we refer to "S&S". An S&S violation is one that is
13 reasonably likely to result in a reasonably serious
14 injury or illness. The inspector makes the S&S
15 determination at the time of the issuance of the
16 citation.

17 Finally, "unwarrantable failure." This
18 term has been defined to mean "aggravated conduct,
19 constituting more than ordinary negligence."

20 Under the Mine Act, MSHA proposes
21 penalties, and the Federal Mine Safety and Health
22 Revision Commission, or the Commission, assesses
23 penalties. A proposed penalty that is not paid or
24 contested within 30 days of receipt becomes a final
25 order of the Commission by operation of law.

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1 Penalties that are contested before the Commission are
2 reviewed de novo. We will use the term "assessment"
3 to refer to MSHA's assessments as well as assessments
4 that are final orders of the Commission.

5 The Mine Act requires MSHA to consider six
6 criteria in assessing civil penalties and they are:
7 the appropriateness of the penalty to the size of the
8 business; the operator's history of previous
9 violations; whether the operator was negligent; the
10 gravity of the violation; the operator's good faith in
11 abating the violation; and the effect of the penalty
12 on the operator's ability to continue in business.
13 The first five criteria are applied to compute the
14 penalty amount. The final criterion is applied after
15 the penalty is proposed, upon a request by the mine
16 operator. The operator must send in supporting
17 documents that the amount of the penalty will
18 negatively affect the company's ability to continue in
19 business. MSHA will review this information and may
20 adjust the penalty.

21 MSHA published the proposed rule in the
22 Federal Register on September 8th. It was placed on
23 MSHA's website and a copy was sent to the Small
24 Business Administration Office of Advocacy.
25 Basically, the proposed rule does two things. It

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1 revises MSHA's civil penalty program to increase
2 penalty amounts and to improve the effectiveness of
3 MSHA's civil penalty process. These changes are
4 intended to induce greater mine operator compliance
5 with the Mine Act and MSHA's safety and health
6 standards and regulations, thereby improving safety
7 and health for miners. Second, the proposal
8 implements the three provisions of the Mine
9 Improvement and New Emergency Response Act of 2006,
10 also known as the MINER Act.

11 The proposal does not change the way
12 inspectors issue citations. The inspectors will
13 continue to make factual determinations with respect
14 to safety and health violations as they do now. And
15 please note that while the MINER Act and the Mine Act
16 contain provisions for criminal fines, this rule, as
17 the name implies, only concerns civil penalties.

18 Under the existing rule, MSHA has three
19 types of assessments: single, regular, and special.
20 I will now address the proposed changes to each type
21 of assessment.

22 But before I address the changes, I want
23 to clarify for the record that -- I want to clarify
24 one aspect of the proposal and that aspect relating to
25 single penalty and that is that the existing rule

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1 provides for a \$60 single penalty for non-S&S
2 violations that are timely abated, and where the
3 operator does not have an excessive history of
4 violations. Under the proposal, the Agency proposes
5 to delete the single penalty, but in deleting the
6 single penalty, the proposal would replace all
7 penalties associated with non-S&S violations, would
8 then have to be processed through the regular formula
9 system.

10 So in deleting the single penalty, we are
11 not getting rid of penalties for non-S&S violations,
12 but we're replacing that aspect of the penalty with
13 the regular formula penalties. All non-S&S violations
14 will be processed through the regular assessment
15 provision and receive a higher penalty through that
16 provision.

17 The Agency has taken this action in the
18 belief that eliminating the single penalty provision
19 will cause mine operators to focus their attention on
20 preventing all hazardous conditions. Regular
21 assessments are derived by assigning penalty points
22 for the statutory criteria and then converting the
23 total points to a dollar amount. The penalty point
24 tables are published in Section 100.3 of the rule.
25 Regular assessments are computer-generated through

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1 MSHA's Management Information System. The proposal
2 would make a number of changes through the process --
3 to the process and the tables used for computing
4 penalty amounts.

5 The point tables would be revised so that
6 the penalties increase proportionately to increases in
7 operator size, history, and negligence, and the
8 gravity or seriousness of the violation. The regular
9 assessment changes are as follows:

10 Size: The size criterion includes
11 operator size and controller size. For coal mines,
12 operator size is measured by tonnage of coal produced
13 by that mine during the previous calendar year. For
14 metal and nonmetal mines, operator size is measured by
15 the hours worked at the mine during the pervious
16 calendar year. Size for independent contractors is
17 measured by the total hours worked at all mines.
18 Under the proposal, the maximum number of points for
19 operator size would increase from 10 to 20. The
20 proposal would continue to assign no points for the
21 smallest number of operators and at this point I want
22 to make a clarification to the proposal for the
23 smallest operators, smallest coal operators.

24 The preamble to the proposed rule states
25 that according to 2005 data, nearly half of the

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1 existing coal mines had annual tonnage of up to 15,000
2 tons. This figure included surface facilities that do
3 not produce coal. And if we exclude those facilities
4 which would be a more accurate number, from the total
5 number of coal mines, that would generate more
6 accurate data. With this revision, approximately one-
7 fourth of producing coal mines had actual tonnage of
8 up to 15,000 tons.

9 The proposal makes no changes to the size
10 points for controlling entities. We did solicit
11 comments on whether greater weight should be placed on
12 the size of the controlling entity. And so I invite
13 you to address this issue at the public hearing today
14 or in your written comments.

15 History of violations. The proposal
16 includes several changes to the history criterion. We
17 will shorten the time period for determining violation
18 history. We will change independent contractor
19 history from an annualized number to the total number
20 of violations. We will add a new component for repeat
21 violations of the same standard. And we would
22 increase the number of history points. Under both the
23 existing rule and the proposals, only violations for
24 which the penalty has been paid or finally adjudicated
25 are included in determining history. Under the

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1 proposal, the time period for determining history
2 would be shortened from 24 months to 15 months and we
3 did this because we think that the shorter time period
4 would more accurately reflect an operator's current
5 state of compliance. Both the existing rule and the
6 proposed rule base history for production operators on
7 violations per inspection day.

8 Under the existing rule, history for
9 independent contractors is based on the average number
10 of violations over the past two years. The proposal
11 would change this to the total number of violations in
12 the previous 15 months. Since we were no longer using
13 24 months and using the 15 months, we did not think
14 that there was any need to annualize the violations
15 for independent contractors. In the proposal, MSHA
16 solicited comments on this approach to determining
17 violation history for independent contractors. Again,
18 I invite you to address this issue here today and that
19 is whether independent contractor history should be
20 annualized. The maximum number of penalty points for
21 this component of the violation history would be
22 increased from 20 to 25.

23 Significantly, we add a new component to
24 the history criteria for repeat violations of the same
25 standard. Under the proposal, penalty points are

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1 added for more than five repeat violations of the same
2 standard during the preceding 15 months. Under the
3 proposal, repeat violations are determined according
4 to the manner in which the standard is cited. For
5 example, a violation of Section 56.14101(a)(1) would
6 not be considered for determining the number of
7 previous violations of Section 56.14101(a)(2). MSHA
8 solicits comments on this approach to determining
9 repeat violations. MSHA also solicited comments in
10 the proposal on two additional aspects of repeat
11 violations: whether penalty points should be based on
12 the total number of repeat violations, as in the
13 proposal, or on the number of repeat violations per
14 inspection day; and whether repeat violations should
15 include all violations, as in the proposal, or only
16 S&S violations.

17 The Agency invites you to address these
18 aspects of repeat violations.

19 This new component of violation history
20 would add up to 20 penalty points.

21 Negligence: The proposed rule would
22 retain the existing five levels of negligence, and
23 would double the maximum number of penalty points from
24 25 to 50, with the increased placed entirely in the
25 three highest levels of negligence. Under the

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1 proposal, penalties would increase proportionately for
2 operators who exhibit increasingly high levels of
3 negligence.

4 Gravity: The proposal would retain the
5 three components of gravity -- likelihood, severity
6 and the number of persons potentially affected -- but
7 would increase the number of penalty points from 30 to
8 88.

9 Good faith in abating the violation: The
10 existing rule adds 10 penalty points if the operator
11 does not abate the violation within the time specified
12 by the inspector, and reduces the total penalty amount
13 by 30 percent if the violation is timely abated. The
14 proposed rule would decrease the reduction for timely
15 abatement to 10 percent and no penalty points would be
16 added for violations that are not timely abated.

17 The penalty point conversion table: The
18 dollar amounts on the existing table range from \$72 to
19 the \$60,000 statutory maximum. The minimum regular
20 assessment is \$60 under the existing rule. The
21 proposed rule provides a maximum of 208 penalty
22 points. The revised conversion table begins with
23 \$112. And under the proposal, as I stated earlier,
24 with the 10 percent reduction for timely abatement,
25 the lowest penalty amount would be \$100. The dollar

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1 amount of the penalty increases steadily as the number
2 of penalty points increases. Beginning at 133 points,
3 each additional penalty point corresponds to an
4 increase of approximately \$3,070. The maximum penalty
5 of \$60,000 is reached at 140 points.

6 Special assessments are processed where
7 the violation is of such a nature that an appropriate
8 penalty cannot be determined using the regular
9 formula. The existing rule lists certain categories
10 of violations, that must be reviewed to determine if a
11 special assessment is appropriate. The proposed rule
12 would remove this list. However, under the proposal,
13 MSHA would retain its discretion to determine which
14 types of violations would be reviewed for special
15 assessment without being limited to a specific list.
16 MSHA anticipates that the proposal would provide an --
17 that the proposed regular assessment provision will
18 provide an appropriate penalty for most types of
19 violations and therefore most types of violations
20 would be processed through the regular assessment
21 provision. In so doing, this will permit MSHA to
22 focus its enforcement resources on more field
23 enforcement activities rather than on administrative
24 review activities.

25 The proposed rule would also shorten the

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1 time allowed to request a health and safety conference
2 with the district manager. Under the proposal, this
3 time would be shortened from 10 days to 5 days. MSHA
4 believes that this would result in a more effective
5 civil penalty system because penalties would be
6 assessed closer in time to the issuance of the
7 citation. I would draw your attention to the fact
8 that we've gotten a lot of comment on this aspect of
9 the proposal.

10 Finally, the proposal implements the civil
11 penalty provisions of the MINER Act. And these
12 provisions were effective on June 16, 2006. We
13 issued, MSHA issued a procedure instruction letter to
14 MSHA personnel which addressed those violations. I
15 will discuss each provision separately.

16 Unwarrantable failure: Under the MINER
17 Act, minimum penalties for \$2,000 and \$4,000
18 respectively for unwarrantable failure citations and
19 orders. Basically, under the MINER Act right now,
20 these citations that are issued as unwarrantable are
21 being processed, either through the regular formula
22 system or through the special assessment and are
23 receiving the \$2,000, at a minimum, the \$2,000 and the
24 \$4,000.

25 Penalties for "flagrant" violations: The

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1 MINER Act established a new penalty of not more than
2 \$220,000 for "flagrant" violations. Those are
3 violations involving "a reckless or repeated failure
4 to make reasonable efforts to eliminate a known
5 violation of a mandatory health or safety standard
6 that substantially and proximately caused, or
7 reasonably could have been expected to cause, death or
8 serious bodily injury." And I was quoting from the
9 MINER Act's definition of "flagrant" violations. As
10 stated earlier, these are being processed as special
11 assessments.

12 Finally, failure to notify: The MINER Act
13 established a penalty of at least \$5,000, not more
14 than \$60,000 for violations involving failure to
15 timely notify MSHA of a death or an injury or an
16 entrapment with a reasonable potential to cause death.

17 These are being processed right now as special
18 assessments and would be processed under the proposal
19 as special assessment.

20 Please sign the attendance sheet before
21 you leave, if you have not done so.

22 We will post our transcripts on our
23 website. The transcript will include the full text of
24 my opening statement and the specific issues for which
25 we seek additional comment.

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1 We will now begin. Please begin your
2 presentation by clearly stating your name for the
3 reporter and your organization and spelling your name
4 for the reporter.

5 Thank you. Our first speaker will be
6 James Poulson with Utah American Energy.

7 MR. POULSON: Good morning. My name is
8 James Poulson, J-A-M-E-S, P-O-U-L-S-O-N.

9 I am the Safety Director for Utah American
10 Energy which is a Murray Company. I would like to
11 thank MSHA and this panel for the opportunity to
12 provide these comments on the proposed civil penalty
13 rule. It's a rule which will have widespread effect
14 on the industry and I believe not in the manner which
15 MSHA seeks.

16 Andalex Resources, Incorporated, West
17 Ridge Resources, Incorporated and General Resources,
18 Incorporated, all companies which are subsidiaries of
19 Utah American Energy with the parent company of Murray
20 Energy, we are underground coal mining operations.
21 We're located in Carbon and Emery County. We have
22 over 600 plus employees in the Utah work force which
23 represents a very sizeable percent of Utah's
24 underground coal miners.

25 We take the safety of our employees as the

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1 absolutely top commitment. It is our moral and
2 ethical responsibility to protect the health and
3 safety of our employees.

4 The proposed rule will be very harmful to
5 the safety efforts of responsible operator. Civil
6 penalties are not an incentive for safety nor do they
7 have any positive effect on our, or any other
8 responsible operator's safety efforts.

9 We strongly urge MSHA to significantly
10 modify the proposed rule and return to the prior
11 penalty system to the extent possible.

12 Some of the provisions of the proposed
13 rule are statutory based and cannot be affected by
14 rule making procedures. Our comments will be more
15 aimed at the changes in which MSHA has some discretion
16 or are otherwise statutory, but subject to
17 interpretation.

18 The changes, as a whole, are a misguided
19 attempt to increase safety by punitive actions against
20 the operators. The results will be greatly increased
21 civil penalties which in which will be tripling them.

22 Our specific comments are as follows:

23 100.3(b), appropriateness of the penalty
24 to the size of the operator's business. MSHA has
25 proposed to increase the penalty points for size from

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1 an old maximum of 10 to 20 points for mines over 2
2 million tons of production. MSHA contends that this
3 is to make the monetary penalty proportional and
4 therefore increase compliance.

5 This view is seriously flawed and
6 discriminatory. Large operators are inherently safer.

7 This proposed change has the reverse effect of
8 punishing size, which is generally a safety enhancer.

9 The series of mine disasters that led to the MINER
10 Act were all at smaller mines. This is typical of the
11 proposed rule and shows the disconnect between the
12 reality at mining operations and the MSHA bureaucracy.

13 Next point, 100.3(d), negligence. The old
14 five-tier system determining points to be assessed for
15 negligence was effective and has been retained by
16 MSHA, but with the points for the upper three tiers
17 increased, and doubled at the level of the "reckless
18 disregard." Our view is that the increase should not
19 apply to "moderate negligence" and that is not at a
20 volitional stage of culpability and is subject to wide
21 variation of interpretation.

22 100.3(d), gravity. MSHA has increased the
23 potential from a maximum of 30 penalty points under
24 the previous rule to 88 penalty points under the
25 proposed rule. Historically, the gravity portion of a

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1 citation is the most frequently contested item by our
2 company in health and safety conferences conducted
3 with the Agency. This is primarily due to the
4 inspector's determination of the gravity being
5 speculative in nature and subject to individual
6 interpretation. This excessive increase in penalty
7 points is unwarranted in potentially subjective areas.

8 100.3(f), demonstrated good faith of the
9 mine operator in abating violations. In this
10 misguided section, MSHA, actually decreases the
11 beneficial effect of timely abatement of violations by
12 operators. Previously, an operator could receive a
13 reduction of 30 percent for timely abatement. Now it
14 is only 10 percent. This is a disincentive, rather
15 than an incentive, to timely compliance.

16 100.3(g), penalty conversion table. This
17 now sets a floor of \$112 for a penalty. It is
18 inappropriate to set such a floor for non-significant
19 and substantial, "non-S&S" penalties and mere
20 paperwork violations. This is the purpose for which
21 the single penalty assessment was designed, but this
22 has also been eliminated at Section 100.4 of the
23 proposed rule. The deletion of the single penalty,
24 and the floor of \$112 will have the effect of merely
25 increasing bureaucracy and inefficiency and will not

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1 have any real effect on safety compliance. The
2 concentration of MSHA and the operator should be on
3 the elimination of potential S&S violations.
4 Elimination of the single penalty causes the intention
5 to be blurred. Lumping all violations, both S&S and
6 non-S&S, into one category actually diminishes the
7 emphasis on the S&S.

8 This is a further example of the lack of a
9 practical approach of MSHA to the real issues.

10 100.4, unwarrantable failure. Much of the
11 proposed rule in this area is designed to implement
12 the statutory requirement of the MINER Act. As such,
13 there is little discretion possible.

14 It is difficult to gauge the effect of one
15 proposed change, the elimination of the list of
16 specific categories that can be the basis of a special
17 assessment. Our view is that this has not been a
18 problem before, so why should it change, and that any
19 change would probably lead to an increase in special
20 assessments, which, if "flagrant" can be assessed at
21 \$220,000. This is an unacceptable combination as it
22 provides MSHA with too much discretion.

23 100.6, procedures for review of citations
24 and orders. The time period for requesting a health
25 and safety conference has been reduced from 10 days to

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1 5 days. There is no reason for the change.

2 The rule goes on to incorporate certain
3 statutory disclosures. MSHA predicts that for each 10
4 percent increase in penalty for violations, there will
5 be a 3 percent decrease in its probability of
6 occurrence. This appears to be bogus, as compliance
7 at responsible operations is not driven by penalty
8 costs, but by other motivations. This is a cynical
9 attitude by MSHA and indicates a punitive mindset,
10 rather than safety mindedness.

11 Further in the disclosure portion, MSHA
12 states that the proposed rule is economically feasible
13 for the mining industry because the anticipated
14 expected increase in penalties will be \$15.9 million,
15 equal to .07 percent of the coal mine sector revenue
16 of \$22.1 billion in 2004. This again shows a
17 disconnect between the economic challenge faced
18 especially by underground coal mines and the
19 "understandings" of MSHA.

20 I would be glad to answer your questions.

21 Thank you.

22 MS. SILVEY: Thank you. I don't know
23 necessarily, I do have a couple of comments. On page
24 2 of your testimony and your testimony on 100.3(b),
25 the size, and you state that our proposal is flawed

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1 and discriminatory and being you give support, "the
2 large operations are inherently safer." Do you have
3 any data to support that and if you don't have any
4 data today, because I'm not meaning to put you on the
5 spot, could you provide some for the record?

6 MR. POULSON: Yes. There will be some
7 written testimony I'll be sending in with this also.
8 We will have supporting data of this.

9 MS. SILVEY: Okay, if you could be as
10 specific as you can when you provide the data.

11 There's been a lot of discussion on the
12 single penalty and a lot of testimony on the single
13 penalty and for that reason that's one of the reasons
14 I clarified in the opening statement what we were
15 doing, what the Agency was doing in the proposal. And
16 you are accurate. By deleting the single penalty, we
17 were replacing it with being processed through the
18 regular formula system as you accurately said in your
19 testimony. So all penalties, S&S and non-S&S would be
20 processed through the formula. In doing that, it was
21 the Agency's belief that by making that change, mine
22 operators would focus on non-S&S violations and S&S,
23 all violations and eliminate all hazardous conditions
24 from the mining work place.

25 Your testimony is of the -- you testify

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1 that -- you think that by so doing this we actually
2 diminish health and safety. In your particular mine
3 and I don't know necessarily you gave me five -- I
4 know you said of Murray Energy and you gave here three
5 operations, do you have an estimate of how many of
6 your, of the violations fall in the S&S category
7 versus the non-S&S category?

8 MR. POULSON: I can tell you --

9 MS. SILVEY: About.

10 MR. POULSON: Greater than 50 percent fall
11 in the S&S category. I did some analysis on it here
12 and provided some data the other day and currently
13 there is a higher percent of citations roughly in the
14 neighborhood of 57 percent fall in S&S.

15 Now as I talked about before, S&S and non-
16 S&S is totally discriminatory or is --

17 MS. SILVEY: I was going to say judgmental
18 is a more accurate.

19 MR. POULSON: Judgmental and it's the
20 perception between a certified mine inspector and the
21 operator. One of the things MSHA needs to focus on, I
22 believe is consistency. We have a very large problem
23 with consistency from one examiner to the next or from
24 one inspector to the next, I should say.

25 MS. SILVEY: And clearly we hear that all

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1 the time and we continue to hear that and I would be
2 remiss if I didn't say that wherever you have -- and
3 I've said this before, so I think I sound like a
4 broken record. Wherever you have the human element,
5 you're going to have some element of no pun intended
6 of subjectivity. So we try to focus on consistency
7 and to improve consistency in our training and in our
8 re-training, refresher training and that type of
9 thing. But -- and in your testimony you also, I think
10 that there's a reference here that the non-S&S or
11 paperwork violations and I guess it's been my
12 experience that the non-S&S, some can be paperwork as
13 you said, but probably some can be more than
14 paperwork, but it's just that where the gravity does
15 not rise to the level to be S&S.

16 MR. POULSON: Right.

17 MS. SILVEY: And those are ones that at
18 some point in the future, if allowed to be unchecked,
19 they may indeed lead to S&S violations.

20 MR. POULSON: Yes. Another point I'd like
21 to make and you made this in your opening statement
22 about factual determinations. This is what needs to
23 be done by inspectors writing citations. We need to
24 have factual evidence or factual matters in this body
25 of citation, not speculative. I'd like to share that

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1 point with you. There's a lot of speculative things
2 that go into citations.

3 MS. SILVEY: Okay, I just have one final
4 comment and it's more of a comment than anything
5 because on page four of yours you put here, you quote
6 from our analysis and just so everybody knows, when
7 any agency does rules, there are various executive
8 orders and statutory requirements that we must comply
9 with and in terms of the impact of the rule, the
10 regulatory economic analysis. So these comments, you
11 were quoting from our analysis where we may -- and
12 clearly, we made some assumptions, but one thing I
13 would ask all of you to do, if you read the analysis,
14 the cost analysis and if you disagree with any of the
15 assumptions we made in there, if you could provide
16 specifics on, if you take issue with anything. If you
17 could provide specifics before the record closes,
18 either today here, or before the record closes on
19 October 23rd.

20 Talking about one of the -- your one
21 statement that we anticipated and expected increase of
22 \$15.9 million for the coal sector, and one of the ways
23 that we determine the feasibility of a rule is there's
24 a screening process, a threshold screening process.
25 And when we compare the revenues, excuse me, the

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1 projected cost of a rule to the revenues of that
2 sector and then you get a certain percentage and if
3 it's under a certain percentage then it sort of
4 automatically meets the threshold for feasibility.
5 And that's basically what we did by doing that.

6 But if anybody disagrees with any
7 assumptions that we included, I could invite you to
8 provide specific comments.

9 Would you care to make any further comment
10 on that, Robert?

11 MR. STONE: No, that's fine.

12 MS. SILVEY: Jay?

13 MR. MATTOS: Yes, I have one or two
14 questions. On the special assessments, you had a
15 concern in your testimony. You expressed concern
16 about the effect that the change might have and I want
17 to clarify one thing is our intent, the committee's
18 intent, what the special assessment provision was to
19 actually reduce the number of special assessments that
20 we would be doing.

21 It's our hope and our intent that the
22 regular formula will give an appropriate penalty to
23 each citation and that the -- the reason we took out
24 the list is because that list requires us, MSHA, to
25 look at every citation or order issued within those

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1 categories and we'd rather not do that if we don't
2 have to. We've rather have it go through the regular
3 formula, reduced to paperwork, reduced to review
4 process the enforcement folks go through.

5 So it really is a housecleaning type
6 provision more than any intent to change what's done.

7 Right now the enforcement people have the discretion
8 to recommend any citation or order for special
9 assessment. They would retain that discretion, but
10 they would not have to review every citation within
11 certain categories to do that. So just to clarify
12 that, our intent really is to reduce --

13 MR. POULSON: Let me make sure I
14 understand. Your thinking is the special assessment
15 would be gone or would be very low, would be reduced?

16 MR. MATTOS: That's our hope, that's our
17 expectation. Hopefully, that's the way it would work
18 out.

19 Going back to the size issue, the size of
20 the operation, the size of the company, I do have a
21 question there, your concern about penalizing larger
22 companies, larger businesses, larger operations.

23 The Mine Act requires us to consider that
24 in the penalty assessment process and I'd be
25 interested in your thoughts on how we might change

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1 that part of the proposal to accommodate what the
2 requirements are in the Mine Act.

3 MR. POULSON: I'll provide that in the
4 written portion testimony.

5 MR. MATTOS: That's great. The Committee
6 would be interested. As a group, we wrestled with a
7 lot of issues and a lot of different viewpoints while
8 we were going through the process and the more
9 information that we get during these hearings, the
10 better it is for us.

11 MR. POULSON: I guess off the top of my
12 head I would say this. I mean it's America. We ought
13 to be treated the same and fair.

14 MR. MATTOS: I don't think anybody is
15 going to argue that one, but we do have the provisions
16 of the Mine Act that we have to accommodate that.

17 MR. POULSON: I understand.

18 MR. MATTOS: If you would provide
19 something.

20 MR. POULSON: Yes.

21 MR. MATTOS: Anybody else who is speaking
22 here today, I'd be interested in that particular and
23 also the gravity. You talk about the subjectivity of
24 the gravity of the violations. We've had comments in
25 other hearings and we hear it all the time the

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1 consistency issue. It's a difficult issue. One that
2 we hear a lot about are the number of persons affected
3 by a condition.

4 And I'd be interested in hearing proposals
5 or ideas or thoughts on how we could obtain more
6 consistency when determining gravity in all the areas,
7 and particularly the number affected.

8 We had comments or testimony last week,
9 where you'd have two categories, zero and more than
10 zero, for number affected, something like that. Those
11 are interesting ideas.

12 MR. POULSON: Right.

13 MR. MATTOS: And we're certainly open to
14 that kind of discussion. I didn't have any other
15 questions or comments.

16 MR. STONE: Let me just amplify one point
17 that Jay just made which is the number of special
18 assessments that we estimate would result from this
19 proposed rule. Looking at the 2005 penalties, there
20 were 3,189 special assessments. We estimate that
21 under this proposed rule that number would decline
22 from that to 491, so that all but about 2500 would go
23 away and only about 500 would remain and that's our
24 intention.

25 MR. POULSON: That's the intent. I

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1 understand.

2 MR. CROCCO: Could I ask you a question
3 about the 30 percent, the 10 percent reduction or
4 abatement?

5 MR. POULSON: Sure.

6 MR. CROCCO: You said by reducing that, I
7 think that would be a disincentive for operators to
8 abate. Are you saying that we'd see a large increase
9 in 104(b) orders because operators wouldn't abate the
10 conditions on time?

11 MR. POULSON: No, I'm not saying that.
12 I'm saying that if there's a greater incentive for an
13 operator to abate the condition in a timely manner,
14 then he's going to be more likely to do so. But when
15 you go out there and you put the 10 percent factor out
16 there for him, I think there's going to be more
17 disincentive for the operator to abate them.

18 MR. CROCCO: Of course the risk is you can
19 get a (b) order if you didn't abate.

20 MR. POULSON: There is a risk, yes.

21 MR. CROCCO: For a company of your size,
22 it's a pretty good size company, is the \$60 penalty an
23 adequate incentive for compliance, do you think?

24 MR. POULSON: Well, again I'd like to go
25 back to the statements I made before. An organization

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1 shouldn't be driven by penalties for safety. There
2 should be something that comes from within and it's
3 something we've got to and want to do, all operators
4 want to do. Sixty dollars is, in my view, yes. We
5 treat a \$60 assessment just as high as we treat
6 anything else, the same way.

7 MR. CROCCO: So you don't see the penalty
8 system or the assessment system as any kind of
9 incentive for any operator to comply or change the way
10 he's doing business or systems in place to pick up
11 violations and correct them?

12 MR. POULSON: In my view, no.

13 MS. SILVEY: Anybody else? Okay, thank
14 you. And we look forward to getting your additional
15 comments. We appreciate it.

16 Next, we have David Graham and I think
17 this acronym, Methane Awareness Resources Group, maybe
18 different than the Mining -- Mining maybe. That's
19 close enough. It used to be methane.

20 MR. GRAHAM: That's correct. They
21 expanded the horizon.

22 Good morning, my name is David Graham, D-
23 A-V-I-D, G-R-A-H-A-M. I'm the manager of Safety and
24 Health for General Chemicals Soda Ash Partners in
25 Sweetwater County, Green River, Wyoming. We operate

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1 an underground trona mine that will be impacted by
2 this proposed rule.

3 I also serve as the chairman of the Mining
4 Awareness and Resource Group, the MARG Coalition which
5 is a group of companies supported by other
6 associations and committed to protecting the safety
7 and health of our employees and communities.

8 Accompanying me today is Henry Chajet,
9 senior partner, Patton Boggs and counsel to MARG.

10 Concepts underlying MARG's participation
11 in rulemaking have never changed. MARG members are
12 committed to aggressively protecting all personnel
13 from hazards. MARG members support sound research to
14 identify, evaluate and prevent hazards. MARG members
15 support sound regulations and fair enforcement that
16 advances safety and health.

17 Unfortunately, the MSHA proposed civil
18 penalty rule does not further safety and health, is
19 inconsistent with the principles of good government
20 and fairness and violates the duties Congress imposed
21 on MSHA regarding the issues of new rules.

22 We hope the Agency will learn from its
23 history and salvage this rulemaking so it can reform
24 its rules to advance safety and health. To do so, we
25 urge MSHA to appoint and independent, outside advisory

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1 committee composed of industry and labor to audit its
2 enforcement and civil penalty history, consider
3 options and make recommendations to the Secretary of
4 Labor.

5 MSHA's recent history demonstrates to the
6 public and the regulated community that it should look
7 beyond its bureaucratic fence line for assistance in
8 accomplishing this worthy mission. The first flaw
9 with the proposal to amend the civil penalty rules is
10 its clear intent to increase civil penalties against
11 the metal and nonmetal mining industry for nonserious
12 violations of the thousands of regulations applicable
13 to our facilities. The MINER Act adopted specific,
14 detailed provisions aimed primarily at problems
15 Congress perceived in the coal industry and
16 specifically detailed general applicable penalty
17 provisions for very serious hazards and gross
18 misconduct.

19 Congress did not intend to increase
20 penalties for non-coal industry violations for items
21 like trash cans without lids, housekeeping in
22 bathrooms, a broken light bulb or spilled product
23 scheduled for clean up on the next shift in a facility
24 that handles 8 million tons of product a year. Nor
25 did the Congress intend for MSHA to increase penalties

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1 for paperwork violations and fire extinguishers that
2 work, but their inspection tags were not dated on the
3 last, regularly scheduled inspection.

4 According to MSHA's preliminary regulatory
5 economic analysis for the proposed rule, the PREA,
6 dated July 2006, 77 percent of metal and non-metal
7 violations are nonserious, not categorized as
8 significant and substantial, S&S violations, by MSHA
9 inspectors. These minor violations should not be the
10 subject of any increase in penalties. The MSHA PREA
11 is confusing at best and at worst, demonstrates that
12 the proposal is inconsistent with MSHA's mission and
13 the congressional intent.

14 On page 1, the PREA estimates that the
15 cost of the proposed rule is \$29.9 million annually.
16 But at pages 19 and 20, the PREA estimates a \$44
17 million increase in penalties with total penalties
18 assessed under the proposed rule at \$68.5 million.
19 Most telling is the information presented in the PREA
20 about serious violations and the absence of more
21 detailed data regarding these serious violations that
22 were the focus of the MINER Act. At page 16 of the
23 PREA, MSHA estimates that there were a total of
24 116,673 violations assessed in 2005 and that about
25 52,000 were issued in the metal and non-metal

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1 industry. Penalties for these violations totalled
2 about \$25 million in 2005 with about \$9.5 million
3 assessed against metal and non-metal industries.

4 MSHA does not present an analysis of
5 penalty assessments for S&S versus non-S&S violations,
6 nor a detailed analysis of unwarrantable violations
7 and assessments. An example, the data for the
8 unwarrantable violations and penalties issued in the
9 non-coal industry.

10 We strongly suggest that this data and its
11 analysis be published for comment. At page 20, the
12 PREA estimates that only \$1.9 million of the \$44
13 million increase in total penalties proposed by the
14 new rules would result from the unwarrantable failure
15 violations for which Congress imposed new minimum
16 penalties.

17 MSHA's PREA estimates do not include any
18 annual penalty increase for the flagrant violations
19 addressed by the MINER Act, nor the late notification
20 minimum penalty proposed by the Act. The failure to
21 estimate the impact of these new penalties, a clear
22 focus of the MINER Act, prohibits meaningful analysis
23 of and input on this proposal. The failure to focus
24 the proposed rules on violations creating serious
25 hazards that result from gross misconduct, directly

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1 contradicts the congressional intent and does not
2 further MSHA's mission of advancing safety and health.

3 Pending recommendations of a federal
4 advisory committee that audits MSHA's enforcement
5 system, MSHA should delete all provisions of its
6 proposal that increases penalties beyond the scope of
7 those expressly adopted by Congress for serious
8 hazards and gross misconduct.

9 Just last week, MSHA presented the
10 Sentinels of Safety Awards to mines in various
11 commodity and size groups that recorded the most hours
12 without a loss time or accident. In addition to the
13 numerous winners, there were hundreds of other mines
14 that achieved outstanding safety and health records
15 and accumulated millions of hours worked without
16 injuries or illness. We commend those mines for that.

17 MSHA has not conducted any analysis of its
18 massive database to determine what differentiates safe
19 employers from the ones it intends to penalize. In
20 fact, MSHA's proposed rules will increase penalties
21 assessed against safe mines and for this reason they
22 are inconsistent with MSHA's mission and congressional
23 mandate.

24 We suggest that MSHA provide safety
25 incentives by providing safe mines with penalty

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1 reductions rather than penalizing them with counter
2 productive penalty increases. We suggest that MSHA
3 ask the independent advisory committee to analyze (1)
4 the relationship, if any, between the 10 leading
5 causes of fatalities and serious injuries and the 10
6 leading causes of citations and penalty amounts
7 nationally and in each MSHA district; (2) the
8 relationship, if any, between injury and illness rates
9 at each regulated facility and the 10 leading causes
10 of citations and penalty amounts, the number of
11 violations issued per inspection day, the number of
12 repeat violations at each facility, and the size of
13 each facility; (3) the relationship, if any, of the
14 inspectors assigned to each regulated facility and the
15 number of violations issued per inspection day, the
16 number of repeat violations, the percentage of
17 violations designated as significant and substantial,
18 the percentage of violations designated low, moderate
19 and high negligence, the number of orders issued, the
20 penalties assessed against the facility and the injury
21 and illness rates at each facility, the impact of
22 prior penalty increases, example, \$10,000 to \$60,000
23 maximum penalty, on the incidents of violations and
24 safety performance.

25 We note that the PREA analysis at page 21

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1 indicating that the new rules will result in a 19
2 percent decrease in violations is speculative, not
3 supported by any data analysis and contrary to our
4 actual experience, it demonstrates that incidents and
5 type of citations issued is primarily influenced by
6 the inspector conducting the inspection and the time
7 he spends inspecting the facility.

8 I'll give you an example of that. In
9 1999, I told an inspector in the fourth quarter,
10 calendar for fourth quarter that our mine was having a
11 good year. We had 32 citations at that time and you
12 know what, guys, to be honest with you, that's pretty
13 good for us. The ensuing inspection, I got 52
14 violations and it wasn't because we run a bad mine.
15 There was no difference between that mine in the third
16 quarter than it was the fourth quarter other than we
17 got an inspector and I made a stupid statement.

18 We believe that if MSHA analyzed its
19 database, it would find that its inspectors
20 specialized in issuing citations for violations of
21 particular standards. For example, some inspectors
22 focus on housekeeping, others on electrical matters
23 and others on fire prevention type things. The result
24 is the repeat violations are common at most larger and
25 medium-size facilities. And while the subject matter

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1 cited at each mine may change as inspectors rotate,
2 the 10 leading causes of violations does not seem to
3 change substantially from year to year.

4 As a result, we believe that increasing
5 penalty amounts for repeat violations is neither
6 justified nor fair, nor will it improve safety. In
7 addition, the repeat violation proposal will operate
8 as a penalty increase based on mine size. Large gassy
9 mines with more permissible equipment will receive
10 more permissibility violations than smaller mines.
11 Larger mines with more production and more product
12 transfer points and miles of transportation belts will
13 receive more violations for spillage than small mines
14 with not very many belts. Larger mines will
15 receive more inspection days and thus more violations
16 and therefore more repeat violations and higher
17 penalties. If safety and health is our
18 primary objective and the primary objective of MSHA,
19 is there a difference or should there be a difference
20 in a fine for a large mine that has a lid off a trash
21 can as opposed to a small mine that has a lid off of a
22 trash can? I don't understand the difference.

23 The single minimum penalty permits MSHA,
24 industry and labor to correct minor violations, issue
25 a reasonable fine for them and focus the penalty

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1 system and related resources on serious hazards. It
2 also reduces work for the MSHA assessments office,
3 MSHA conference officers, solicitors and penalty
4 collection officials, all of which have had
5 significant problems keeping the process current over
6 the last two years.

7 The assessment office, in particular, has
8 suffered repeated delays and losses of penalty
9 proposals, contests and payments. I don't know what's
10 happened over the last two years and I've talked to
11 several other operators, but there seems to have been
12 some type of change going on in the assessment office
13 where it appears that penalty cases have been lost,
14 checks have been lost, checks have not been applied to
15 the appropriate case numbers. We never had that
16 problem ever and all of a sudden within the last two
17 years, we're experiencing a lot of problems.

18 I had -- I just had one the other day
19 that's two years old that was paid that we got a call
20 from a collection agency on it that we had already
21 provided a copy of the check back to the assessment
22 office saying that it's paid. And got a call from a
23 collection group through an attorney. We had to
24 supply her with that. So there's problems within
25 there that number one shouldn't be and this rule is

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1 not going to help in that particular department.

2 Eliminating the single minimum penalty
3 will produce a 77 percent increase in the application
4 of the regular assessment formula for metal and non-
5 metal mines. Not only increasing penalties, but
6 vastly increasing the administrative workload to
7 assess, conference, contest and otherwise respond to
8 these penalties. It will further overextend MSHA and
9 mine operator resources and cause counterproductive
10 penalty disputes over minor violations. None of
11 these costly delays have been identified, nor analyzed
12 by the PREA.

13 In conclusion, we urge MSHA to go back to
14 the drawing board, limit its immediate proposal to the
15 specific mandates of the MINER Act and appoint an
16 advisory committee to audit MSHA enforcement and
17 recommend improvements.

18 Thank you very much for your attention and
19 consideration. We would be pleased to answer any
20 questions you might have.

21 MS. SILVEY: Thank you. I do have some
22 comments. I think with respect to your comment on the
23 Office of Assessments, I'll let Jay discuss that and
24 clearly if you have any specific problems, any
25 specific issues that you know -- if you could give

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1 them to us today, we would definitely and I want to
2 say that for the record, we would definitely, I
3 promise you, we will take those and we will go back
4 and we will look into them. I mean he can talk about
5 the specifics of it, but I promise you, speaking for
6 the Agency, we would do that.

7 On your -- a lot of your discussion went
8 to the preliminary regulatory economic analysis which,
9 as you correctly noted, we have to do. And as I said
10 at an earlier hearing, and I think I said a little bit
11 this morning, maybe not as artfully as I did at an
12 earlier hearing, when we do this analysis, we make
13 certain assumptions and if you know what assumptions
14 are, you know, people can agree with your assumptions
15 or you can disagree with them. And you make the best
16 assumptions that you think, you build in the best
17 assumptions given the circumstances that you have.

18 So I would say to all of you in terms of
19 providing your comments, if you have disagreements or
20 if you think you have better assumptions, if you
21 would provide them to us for the record. But I would
22 like to comment on a couple of things. First of all,
23 with respect to the preliminary regulatory economic
24 analysis, first of all, everything in there was based
25 on -- we took our 2005 violation data and used that as

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1 a basis for projecting forward, had these proposed
2 penalties been applied to that date. And when you
3 said that we didn't -- it didn't project there would
4 be any -- I'm not necessarily taking these in any
5 order, that that would be any -- we didn't project any
6 violations for the MINER Act, any money for the MINER
7 Act into the new projections. We didn't. We didn't
8 for flagrant violations and we didn't, if I remember
9 correctly, for failure to notify violations. That was
10 two categories. We did for unwarrantable failures.
11 We didn't for flagrant, I think probably because
12 flagrant wasn't a category when we applied it to the
13 2005 data. And I would dare say to probably anybody
14 in this room, flagrant is probably going to play
15 itself out in the coming months and years in terms of
16 what happens there.

17 In terms of the failure to notify, I think
18 when we applied it to the 2005 data, we had -- there
19 as one violation for a timely -- failure to notify
20 MSHA in a timely manner. And I think that violation
21 had already received the minimum which was over
22 \$5,000. So it didn't change, we didn't add anything
23 additionally to the total penalty amounts for that.

24 Now you're sitting here and I know I can
25 see what you want to say to me right now and that is

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1 we are whistling "Dixie" if we think we can only get
2 one failure to notify a violation under this new --
3 now that the new MINER Act has gone into effect which
4 is probably true.

5 MR. GRAHAM: I'm glad you said that to
6 yourself and didn't make me do that.

7 (Laughter.)

8 MS. SILVEY: That's probably true. We
9 probably will get more, but how many more, whether we
10 get 5 or 10, I would probably suggest to you and you
11 may prove me wrong that we probably will not get a
12 whole lot more than a few, quite honestly, and I may
13 be really wrong.

14 So it was with that thought process that
15 we did this analysis. But I do want to talk a little
16 bit about the analysis and to do that I want to go
17 Table 4-9 of the PREA and talk about the -- actually I
18 said Table 4-9. Actually, it's Table 4-11. And the
19 reason I want to do that is is because that kind of
20 shows in a nutshell what we did. And we tried to
21 separate this, the mining sectors and we gave the old
22 proposed penalties. If you apply the penalties under
23 the old proposal, the existing rule and they came out
24 at \$24.8 million. And then under the proposed rule,
25 all other things being equal, the penalties came out

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1 at \$68.5 million which was an increase of roughly \$44
2 million. And that's assuming that mine operators have
3 no change in compliance.

4 Then what we did is and as I said earlier,
5 people can disagree with the assumptions we made and
6 the process by which we -- that we went through. Then
7 what we did, we said that the Congress, in its wisdom,
8 included penalties in the Mine Act because the
9 Congress did believe, rightly or wrongly, that
10 penalties would be an increased incentive for
11 compliance. And so what we then did, we said that if
12 the penalties were to increase, then mine operators
13 would change their behavior and they would expend
14 additional money to improve compliance and we
15 estimated that they would expend roughly \$9 million to
16 improve compliance. Now we didn't add that \$9 million
17 to the cost of the rule because we felt that \$9
18 million would be the cost of compliance, complying
19 with existing standards anyway.

20 Then we took another step. We said after
21 mine operators would expend that \$9 million to improve
22 compliance with the rule, violations would go down.
23 And so therefore, with the improved compliance,
24 violations would go down, penalties would go down from
25 \$68 million to \$45.7 million. Thereby resulting in a

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1 \$20 million increase in the proposal as opposed to
2 with no change in compliance, the \$44 million.

3 Now as I said we built certain assumptions
4 in, but I just wanted to explain to everybody so they
5 understand those assumptions and you could take issue
6 with them.

7 MR. CHAJET: Ms. Silvey, we do understand
8 the assumptions and we do take issue with them. And
9 if I may point out for the record, the assumption that
10 Sentinels of Safety winner and there are several in
11 this room who both MSHA and the industry and labor
12 groups should be very proud of.

13 MS. SILVEY: We are.

14 MR. CHAJET: To assume in a mine like that
15 is going to reduce its violations by 19 percent
16 because you're raising the penalty from \$60 to \$120 is
17 an outrageously wrong assumption.

18 MS. SILVEY: Okay.

19 MR. CHAJET: You're looking at the wrong
20 place. You're saying is the industry going to be able
21 to reduce its violations because you're raising a
22 penalty where you should be looking and saying are you
23 going to change the behavior of the inspectors who
24 write violations at an average rate of so many per
25 day, whenever they come to the property and is that

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1 going to change because you're changing the penalty
2 system. The leading cause of violations and its
3 relationship to safety is data that MSHA has and has
4 never analyzed. It's the basic mission of the Agency
5 that this proposal has not looked at. What is the
6 relationship to safety of the penalty system and the
7 citation system? What are the leading causes of
8 citations? How do they relate to accidents on site?
9 How does a Sentinels of Safety winner respond to your
10 penalty or not because we have hundreds of mines that
11 go without lost time or injuries. That's not here.

12 MS. SILVEY: Let me say to you that
13 clearly one of the reasons for issuing this proposal
14 is that we hope that it would be a greater mine
15 operator inducement to even more improved compliance.

16 And as I say that I will say to all of you, I was at
17 the Sentinels of Safety presentation the week before
18 last, I think it was, and clearly, we in MSHA as I'm
19 sure the mining industry is as well as the labor
20 segment, that we all are very proud of the Sentinels
21 of Safety winners, people who go hours, millions of
22 hours without a lost time accident and clearly without
23 a fatality. But that being as it's said, the civil
24 penalty structure that MSHA has, you know you work
25 with what you have. I'm not saying that any process

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1 can't be improved. And the process that we have now,
2 the statutory criteria that we apply in terms of the
3 proposal of penalties, we do not have a statutory
4 criteria that says that you apply the safety, the
5 injury or illness rate of an operator.

6 Now that's now saying that, you know --
7 but we look at a lot of factors, but when we look at
8 the statutory criteria that I mentioned in my opening
9 statement. So then what we've done in this analysis
10 is we've made general projections about safety
11 performance and improved safety performance. And
12 that's where we are with respect to this proposal.
13 And not saying that you -- as I said, that we can't
14 improve where we could go. That's part of the reason
15 we're having this public hearing today. So I would
16 just like to make that point in terms of the analysis
17 and what the analysis shows.

18 Do you want to add anything to that,
19 Robert?

20 MR. STONE: Let me make a couple of
21 comments. First of all, in designing this proposed
22 rule, we had central parts of the rulemaking
23 committee, representatives from coal and metal who
24 brought to bear their expertise on what would be an
25 appropriate penalty, what the structure of penalties

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1 should be, how to modify penalties to reflect what
2 they think is hazardous and what needs to be modified.

3 In addition, you seem to make the
4 assumption that there are only good mines and bad
5 mines, but I think -- and certainly there are better
6 mines and worse mines, but even the best mines would
7 want to avoid violations and those violations that in
8 some -- they have some relationship to increased risk
9 of injury. And so even the best mines might find some
10 inducement to be even safer. I think absolute safety
11 is the goal, but it's hard to reach. And so further
12 incentives will lead, we hope, to increased safety.

13 But the other thing is that it's not that
14 every mine will have a 19 percent reduction in
15 injuries, sorry, 19 percent reduction in citations.
16 The bad actors, we hope, will have a much more
17 dramatic inducement to reduce their injury rates --
18 sorry, reduce their citations and ultimately injuries
19 and possibly fatalities because they are the ones that
20 are going to have a much more dramatic impact because
21 they have the much larger number of citations.

22 MR. GRAHAM: Could I ask a question, while
23 I'm thinking of it? You know, the proposed standard
24 doesn't address collection of outstanding penalties
25 that I see. My understanding is that there are some

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1 operators that fail to pay large amounts of money and
2 MSHA has no mechanism, if you will, to collect that
3 very easy. I guess there may be a mechanism there,
4 but it's not an easy mechanism to work.

5 MS. SILVEY: That's right.

6 MR. GRAHAM: Why was there not anything in
7 here that have MSHA the ability to collect those fines
8 or penalties from those operators that refuse to pay
9 as opposed to a lot of operators like General
10 Chemical, like the other trona mines in southwestern
11 Wyoming, like a lot of the coal mines that when they
12 get an assessment, we write the check and send it
13 back. And if you have somebody out there that's not
14 paying their bills, it appears or I would assume that
15 there needs to be something in there that gives MSHA
16 the teeth to be able to collect those and give them an
17 incentive, if you will, to pay.

18 (Pause.)

19 MS. SILVEY: No, that's -- let me see.
20 Who has the MINER Act?

21 To your question, the MINER Act --
22 penalties. Where is it?

23 That's it, thank you. The MINER Act added
24 a change to Section 108? I have the MINER Act right
25 here with me. The MINER Act made a change to Section

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1 108 which amended it to say "for any operator who
2 fails or refuses to comply with any order or decision
3 including a single penalty assessment order that is
4 issued under this act." And I think the thought
5 process was was that was giving MSHA greater teeth in
6 going after just those operators that you talked
7 about.

8 MR. GRAHAM: But does that apply only to
9 the three areas in the MINER Act or does that apply to
10 all --

11 MS. SILVEY: No, that was all. Yes, that
12 was a change to the injunction provision of it of the
13 act and that's just the general change.

14 MR. CHAJET: Ms. Silvey and members of the
15 panel, we have several basic messages to give you.
16 One is that we think you're kind of operating in a
17 vacuum. You ought to get some outside, independent
18 people that are working in the industry, mine
19 operators, union personnel and put them in a room as
20 an advisory committee and let them look at your data
21 and let them work with you so that you can advance the
22 cause of safety. Because where you're coming from is
23 more of the same. It's just more of the same thing
24 you've got and obviously the Congress wasn't satisfied
25 with that.

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1 So what the Congress has said to you is
2 they focused on very serious, very serious hazards and
3 very severe guilt. That's where they came down and
4 said we're changing the penalty structure in the MINER
5 Act for flagrant violations, for unwarrantable
6 violations, things that are of extreme hazard and high
7 levels of fault or guilt. And instead of aiming at
8 that instruction from Congress, MSHA has proposed a
9 rule that goes all over the place, takes non-serious,
10 non-S&S violations, increases penalties in the entire
11 arena and doesn't focus on recalcitrants. As Mr.
12 Graham said, doesn't go in and talk about bad
13 operators that don't pay or operators that have
14 serious violations.

15 It is a broad-brushed more of the same.
16 I'm old enough and so are some other people to recall
17 what led to the minimum penalty.

18 MS. SILVEY: Okay --

19 MR. CHAJET: I'm not finished. What led
20 to the minimum penalty was in the 1970s. We had
21 congressional oversight hearings and I commend all of
22 you to go back and read them, where we came in with
23 thousands upon thousands of penalties that were issued
24 for the trash cans without lids, for the kinds of
25 things that Mr. Graham talked about. And that

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1 resulted in the minimum penalty being proposed to try
2 to focus on serious issues.

3 You're moving away from that. You're
4 moving back wards this everybody is the same. You
5 have likelihood and gravity to consider. You could
6 consider the current leading causes of injuries in
7 likelihood and gravity. You haven't done that.

8 MS. SILVEY: Okay, look, let me ask Mr.
9 Graham, let me ask you a question here, Mr. Graham and
10 that is I have written this down so Mr. Chajet
11 reminded me. You mentioned -- I wrote down three
12 things because I forgot the fourth. In your testimony
13 you mentioned trash cans without lids, broken light
14 bulbs, housekeeping in bathrooms. Have you been
15 issued a lot of violations, citations like that?

16 MR. GRAHAM: I have, over the years, yes.

17 MS. SILVEY: Let's put it in a short time
18 frame. Have you been issued a lot of them like that
19 in the recent past? I want to look at some of those.

20 MR. GRAHAM: I'll give you what I have.

21 MS. SILVEY: Would you send those to me?

22 MR. GRAHAM: I don't know what "a lot" is
23 to me. "A lot" could be three --

24 MS. SILVEY: I don't know what I'm asking
25 myself, but the categories -- I wrote these three down

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1 because that's what when you were talking. Could you
2 send those to me?

3 MR. GRAHAM: Sure.

4 MS. SILVEY: I'd appreciate it if you
5 would send those to me.

6 MR. GRAHAM: The one that sticks out in my
7 mind was the one that we got the last quarter.

8 MS. SILVEY: Okay, that would be a good
9 one.

10 MR. GRAHAM: Where there's a trash can
11 with an orange peel, one. Now granted, I'll give you
12 the facts --

13 MS. SILVEY: Send that to me.

14 MR. GRAHAM: -- if food is in there, it
15 will be covered.

16 How is that -- if you think penalizing me
17 \$112 or \$100 or whatever is going to correct that
18 situation and that's going to improve the health and
19 safety of the people at our operation, I don't see
20 where that fits. I don't see where that fits. You
21 have the data. You have the data. Mr. McAteer was
22 infamous for his statement. We have carbon copy
23 accidents that happen over and over again. We have
24 the same causes. You have the data. You know how to
25 find these causes and penalize them and this rule

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1 doesn't do that.

2 MS. SILVEY: Okay, the next thing that I
3 wanted to -- you said you would get those to me and I
4 would appreciate it if you would do that.

5 I still have one more comment for Mr.
6 Graham.

7 Jay, do you have anything?

8 MR. MATTOS: I have a couple of things.
9 One thing I wanted to touch on are the assessment
10 issues that you brought up because I do want to get
11 into that a little bit. Pat introduced me as the
12 Director of Assessments.

13 MS. SILVEY: I meant acting Director.

14 MR. MATTOS: I've been acting in there
15 since March.

16 MR. GRAHAM: We won't hold you
17 responsible.

18 MR. MATTOS: Well, no. What you
19 described, the lost checks, bills, some of the
20 procedural problems that we've had at MSHA are
21 unacceptable. We've had that and won't deny that.
22 We're working hard to identify the problems and we've
23 made some headway over the last --

24 MR. CHAJET: And we have to say that your
25 people in the Solicitor's Office have been extremely

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1 cooperative in trying to find the problems and cure
2 them. Everyone has cooperated in trying to fix it.
3 But the amount of work that we've put into the
4 process, on your side and on our side, has been
5 immense.

6 MR. MATTOS: It's unacceptable and we're
7 working to clear that up.

8 Going toward -- or speaking to the issue
9 of the recalcitrant operators who don't pay debt,
10 that's something we've also been working very hard to
11 remedy. We do have things that we can do. The debt
12 collection act specifies how we handle these things
13 and that's where you're getting some of these calls
14 that you shouldn't be getting. We're getting some of
15 those from the Treasury Department. We are currently
16 transferring all of our delinquent debts to Treasury
17 for collection and there are some debts that are going
18 to Treasury that we have to recall because the
19 payments weren't applied to the right place. But
20 we're recalling those things and we're taking care of
21 those. There are fewer and fewer cases of that
22 happening.

23 But they are now the ones who are going
24 after operators who are not paying their civil
25 penalties and may have some tools at their disposal,

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1 going to the credit bureaus, attaching income tax
2 returns, things like that. We're taking full
3 advantage of that now. We started doing that at the
4 end of March, beginning of April. I just wanted
5 to comment on that.

6 A little different topic, we were talking
7 about the trash can lids and those kinds of things.
8 Is it your recommendation or are you suggesting that
9 perhaps we identify certain types of violations such
10 as the ones we're discussing here that would get a
11 less severe penalty that need to be in a different
12 category than all of the other citations?

13 MR. GRAHAM: My feeling is and this is
14 just my feeling, I think we should stick with what the
15 MINER Act says. You've got three things there that
16 are what Congress identified through some tragedies
17 that happened that they specifically wanted to
18 address. And those are major items.

19 MS. SILVEY: It's significant for you and
20 I'm kind of -- it's significant for everybody here to
21 know that even prior to the Congress issuing the MINER
22 Act and the President signing it on June 15th, MSHA
23 was in the process of doing a proposed rule for civil
24 penalties which was revised in our existing civil
25 penalty proposal. Then Congress comes, as you

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1 accurately said, Mr. Graham, and issued the MINER Act,
2 enacted the MINER Act. And of course, as Henry says
3 and has those three provisions in there that Congress
4 says clearly, MSHA actually more than three for
5 penalties, had a fourth one in there dealing with
6 criminal penalties, but because this is a civil
7 penalty proposal, it does not deal with the criminal
8 penalty aspect.

9 We were in the process of revising our
10 existing proposed rule at the time and so what we did
11 is knowing that the Congress had instructed MSHA that
12 by December 2006 we had to issue final regulations to
13 deal with the things in the MINER Act, so what we did
14 is we merged the two sets of proposals together and
15 that's the proposal that we are here to talk about
16 today.

17 COURT REPORTER: May we take a minute
18 while I change tapes?

19 MS. SILVEY: Yes, sir.

20 (Off the record.)

21 MS. SILVEY: We will now reconvene the
22 Mine Safety and Health Administration's public hearing
23 on the Agency's civil penalty proposal.

24 We are continuing the presentation of the
25 MARG group with Mr. David Graham and Mr. Henry Chajet,

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1 so we will continue.

2 MR. GRAHAM: If I could, I'd like to
3 answer the last question that Mr. Mattos posed.

4 I think part of the situation comes in and
5 we talked about trash cans without lids, housekeeping
6 in bathrooms, those kind of things. I feel that
7 there's a -- and I've heard the words "incentive",
8 "disincentive", whatever come up. I don't know
9 whether it's an incentive or a disincentive to have to
10 pay a citation or what, but I don't think applying
11 certain points that increase citations for those type
12 of violations are going to further health and safety
13 for miners.

14 I believe in answering your question what
15 can we do or what should we do, I think we should
16 concentrate on those things that are major in nature.

17 I mean we had the criteria, the S&S criteria and the
18 non-S&S criteria and you know what, to be honest with
19 you, I probably griped about those more than anything.

20 But in retrospect, looking back at them, they're not
21 really that bad. I mean you have certain things that
22 you know are not serious and do not pose hazards. And
23 as Mr. Chajet said, you have the data. Take a look at
24 the total number of citations that you write and put a
25 top 5 list, top 10 list and take it -- and then make a

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1 list of the fatalities that we have and see if there's
2 any correlation there, guys.

3 I think you'll find, as we find when we do
4 that, you don't see that correlation. You don't see
5 -- and you know what? You can have a banner year as
6 far as accidents. You can have a banner year, 10, 12
7 maybe, recordable type accidents. And you get 100
8 citations. On the flip side, you can have a real bad
9 year and get 30 citations.

10 So I think the thing that I would propose
11 that we do is let's take a look at where our problems
12 lie and if we're going to penalize or incentivize a
13 company, let's look at those things that pose those
14 problems, those things that cause death. Those things
15 that cause serious disabling injuries and concentrate
16 our efforts there. There's where the incentive will
17 be. There's where companies will put the effort.

18 I mean you know to be honest with you, you
19 get a citation for a trash can lid not on a trash can
20 with an orange peel in there, it actually -- guys
21 laugh at that to be honest with you, because they say
22 what does that do? What does that do? You're really
23 protecting me. Not only the salary guys, but the
24 hourly guys too. That doesn't do any good for the
25 Agency. That doesn't do any good for the company. It

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1 doesn't do any good for health and safety. Should we
2 put a lid on? Absolutely. That's what it says.
3 That's what we need to do. But how do we incentivize
4 an operation or a company or whatever, how are we
5 going to do that to keep people from getting hurt and
6 killed?

7 MS. SILVEY: I'd like to talk just a
8 little bit, I'd like to use a graphic, maybe just to
9 think about it, not necessarily that this is resolving
10 anything because first of all we all know, I think we
11 would all agree, that when it comes to S&S and non-S&S
12 and those of us who have been here from the beginning
13 and when I say the beginning, the time of the National
14 Gypsum case, you know I think we sort of come to terms
15 with it and that there are some -- there is some
16 judgment involvement and that some judgment on the
17 part of the operators, some judgment on the part of
18 MSHA, that probably there will be some disagreements,
19 but if you were to draw a line and this is not like a
20 bell-shaped curve and you can't see this line, but
21 let's say that there's a straight line drawn across
22 this paper and that about a third of the way from the
23 end of this side I draw this line down. I intersect
24 this horizontal line with a vertical line. And to the
25 right of that I write S&S. And that generally we may

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1 all agree that the third to the right of that
2 everything the inspector writes is probably S&S in
3 that category. There might be a little bit of
4 disagreement, but for the most part, let's just say
5 that we all agree.

6 To the left of here, I intersect it about
7 a third on this side, down here and on this side there
8 are all non-S&S and we all sort of agree that these
9 probably are not reasonably likely to resort to a
10 reasonably serious injury or illness. But that leaves
11 a gradation of violations, somewhere in here that
12 either one, there may be some judgment, lack of
13 agreement on, or two, depending on the situation, it
14 may be that this one, a violation in here may be
15 closer to S&S than non-S&S, depending on one or two
16 factors. And so when you talk about non-S&S, I think
17 it's not maybe always good to lump all non-S&S into
18 that these are the ones that you don't focus on,
19 because these are the ones, I think all of us say to
20 professionals might agree, that some non-S&S may,
21 given the right circumstance, lead to an S&S
22 violation.

23 So one of the things I think we try to do
24 in this civil penalty proposal was to get -- now, like
25 we're hearing from you saying that maybe there was a

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1 better way to do it, but one of the things we try to
2 do was to get operators to focus equally as much on
3 the ones that are in this gray area, so to speak, and
4 making sure that if there were a condition, that it
5 tended more toward the left than going toward the
6 right with the ones that are clearly S&S.

7 So that's -- you know, obviously, we've
8 heard a lot -- we've taken a lot of comment from the
9 labor segment and from the industry segment on how to
10 treat these non-S&S violations and what we can do is
11 we'll go back and we can take all that into
12 consideration.

13 MR. CHAJET: Ms. Silvey, I appreciate
14 that. I tried the National Gypsum case and we won it
15 because the citations were for broken light bulbs and
16 trash cans without lids and we went then to Congress
17 in 1979 and 1980 and we said to the Congress, there's
18 this penalty structure out there that's providing
19 penalties for broken light bulbs and trash cans
20 without lids, as if they were serious violations. And
21 then you, the Agency's proposal puts you back 20 some
22 years.

23 MS. SILVEY: Okay. We understand what
24 you're saying, but I did ask Mr. Graham and he
25 promised me he would, to send me those broken light

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1 bulb and trash can violations. I want to look at them
2 and he promised he'd do that.

3 MR. CHAJET: And I appreciate that.

4 MS. SILVEY: And then Mr. Hooker and I
5 will get together.

6 MR. CHAJET: And we should ask the rest of
7 the industry to send you all the rest of them, so you
8 can get all 77,000 of them that were issued last year.
9 But you have the data.

10 MS. SILVEY: Okay.

11 MR. CHAJET: Remember, our bottom line
12 request to the Agency, right, institute the changes
13 that the MINER Act told you to do.

14 MS. SILVEY: Okay, thank you.

15 MR. CHAJET: Go get an advisory committee,
16 get some advice from people who live with this every
17 day on how you can adjust the likelihood and gravity
18 to take into effect causes of accidents and injuries,
19 on how you can adjust good faith to take into effect
20 not just abatement, but maybe the failure of people to
21 pay penalties at all, on how you can adjust negligence
22 so you're putting more weight on flagrant, more guilty
23 operators, because your system that you have wasn't
24 satisfactory to the Congress.

25 Go outside. Implement the rest after

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1 you've had those recommendations. That's out bottom
2 line request to you.

3 MS. SILVEY: Thank you.

4 MR. CHAJET: Thank you.

5 MS. SILVEY: Thank you, Mr. Graham. I'm
6 sorry, I said thank you too quickly.

7 MR. MONTALI: Mr. Graham, I just had one
8 comment here. You mentioned looking at the total
9 number of citations that were issued during the year
10 and relate those to accidents. And that's a very good
11 thought on that.

12 Also, during the last few years, the
13 metal, non-metal industry actually set some records
14 and it's not MSHA's records, it's your record because
15 you're there day in and day out. All the accolades
16 goes to metal and non-metal industry and not to MSHA.

17 One thing though if we take a look of the
18 citations that were issued most frequently and it is
19 on the MSHA website, the standard that is issued the
20 most throughout the nation and of course everybody
21 knows this as guarding. But there's one thing that
22 you try to correlate. With all the citations that you
23 look at the guarding citations, how many fatalities
24 have occurred because of guarding. Yes, we do have
25 some, but it's not the highest. The thing is, the

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1 citations that are issued on guarding, how many
2 injuries and fatalities have been prevented by issuing
3 those citations and that's kind of tough correlation
4 to actually come up with.

5 How many did we save because those
6 citations were issued to prevent those injuries versus
7 if they weren't issued, how many more injuries would
8 we have had? So that's a little bit intangible to try
9 to relate that you've seen in recent years, one year
10 we had a number of supervisory fatalities and we tried
11 to have some programs, you know, the SMART, and we
12 also had a program going out speaking to various
13 companies throughout the country regarding this and we
14 see a decline in that now.

15 But I just wanted to make that comment
16 about how many fatalities and serious injuries have we
17 prevented because citations were issued.

18 MR. GRAHAM: You're right, and I agree to
19 some extent with what you say. Don't get me wrong.
20 I'm not saying that the standards aren't protective,
21 they are. But if you look at what's transpired over
22 the years from the inception of the act, which
23 obviously was a good thing if you look at the number
24 of fatalities that we had in the mid-1970s, the late
25 1970s, to what we have now? You can't argue with the

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1 fact that it doesn't work.

2 But things change, you know? We've looked
3 at conditions which is what the standards are,
4 condition-related stuff, for years. Forever. Right?

5 We haven't looked at the people aspect. I'm sorry.
6 We have looked at the people aspect to some extent.
7 But the standards have not reflected anything that
8 deals with people. It's all condition related. Who
9 takes the guards off? Who doesn't put the guards back
10 on? Those are people-related conditions, right? I
11 mean, those are situations where we know a guard has
12 to be on. We know if that guard is not on, somebody
13 can get hurt. But who takes that off and who doesn't
14 put it back on, and why?

15 Those are questions we need to ask in the
16 future. And when we look at these type of committees
17 and things that put together standards and regulations
18 for the safety and health of miners, those are things
19 in the future that we're going to have to look at.
20 Because we're getting away from, I mean we've got the
21 condition-related stuff. We've gotten penalties.
22 We're getting into the penalty aspect again. The next
23 step we have if we're really concerned with safety and
24 health is people-related stuff.

25 MS. SILVEY: Okay, thank you. Thank you

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1 all very much. Next we will have Mike Crum, Wyoming
2 Mining.

3 MR. CRUM: Good morning, my name is Mike
4 Crum. M-I-K-E C-R-U-M. I'm speaking on behalf of the
5 Wyoming Mining Association. The Wyoming Mining
6 Association, WMA, appreciates the opportunity to
7 provide comments on a proposed rule on civil
8 penalties. WMA is a state-wise trade association,
9 representing 28 bentonite, coal, trona, and uranium
10 mining companies in Wyoming.

11 Wyoming leads the nation in the production
12 in each of these solid minerals. The WMA shares with
13 Mine Safety and Health Administration a genuine
14 concern for the safety of our miners. Each mining
15 company in Wyoming has multi-pronged approaches to
16 enhance the safety and health of miners and their work
17 place. Although the events at Sego and Darby were
18 tragic, MSHA's approach to a broad-brush shotgun cure-
19 all is not the answer.

20 As a trade association that represents
21 conscientious operators, the WMA takes exception at
22 the quote on page 53055, bottom of the third column,
23 "the intended purpose of civil penalties under the
24 Mine Act is to convince operators to comply with the
25 Act's requirements."

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1 WMA members have dedicated safety staff,
2 provide countless hours of training, employ behavior
3 based safety systems, and perform thousands of
4 physical conditions audits per year. The industry,
5 investment, and safety is unparalleled, and totals
6 millions of dollars per year.

7 Members also have sound partnerships with
8 their work forces to promote safety. The key to
9 improve safety and health of miners is engaging every
10 employee and visitor in the safety process and hold
11 them accountable for compliance with all safety rules
12 and regulations. Increasing penalties will not
13 accomplish this fundamental approach to safety
14 accountability unless directed to the root cause of
15 the violation, which in many cases is beyond the
16 control of the mine operator.

17 The scope of control can be determined by
18 evaluating the overall safety program, training
19 provided to miners, policies and procedures in place,
20 and proactive safety efforts that are in place and
21 documented. Operators should receive credit for
22 implemented safety activities that are designed to be
23 proactive and not reactive.

24 It is well understood that any violation
25 of the mandatory safety standard is in fact a

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1 violation. However, citations have not shown any
2 correlation with the mechanism of injury. Operators
3 that spend countless hours performing those tasks that
4 are considered upstream safety indicators will be
5 unjustly punished for minor violations of safety
6 standard. The WMA members will also be unjustly
7 punished due to their size alone.

8 Why are higher penalties automatically
9 imposed on larger operations? Is it only because MSHA
10 feels larger operations can afford the penalties?

11 The proposed rule is designed to punish
12 those operators who realistically have safety records
13 -- realistically have better safety records and
14 historically have received many 104(a) non-S&S
15 violations for items such as missing monthly
16 inspection on one fire extinguisher, or a guard that
17 is in place but the bolt wasn't holding it on the
18 bracket.

19 It is with considerable effort and
20 dedication of safety that the WMA's members' citation
21 history shows very few significant and substantial
22 violations and that they have very, very few high
23 negligence violations.

24 MSHA should look closely at the accident
25 data and seek to drive results where the accidents are

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1 occurring. In cases where a miner made a conscious
2 choice to disregard a safety standard after receiving
3 training, having access to safety equipment and/or
4 violating company policy, MSHA cites the operator as
5 being in violation when clearly it was a personal
6 choice that caused the accident.

7 The penalty assessments for repeat
8 violations should be considered only for S&S
9 violations. Typically, an S&S violation is one that
10 would have a direct impact on safety and therefore the
11 penalty for repeat violations should only be covered
12 for repeat S&S violations.

13 In regards to the conferencing period,
14 shortening the conferencing time period will neither
15 improve safety, nor provide any advantage for MSHA.
16 The conferencing process is overloaded presently.
17 Shortening the time period will only add to this
18 burden. Operators may react to this in one of two
19 ways. First, if the operator missed the deadline
20 inadvertently, citations that don't go to the
21 conferencing officer will be contested on the penalty
22 assessment. Secondly, operators who are still
23 investigating mitigating circumstances, will send more
24 citations to conference than is necessary just to
25 ensure bases are covered. Both of these situations

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1 will further slow the system.

2 The problem with the conferencing process
3 are not within operators taking citations through the
4 proper channels, but rather the inefficiency of the
5 process in general. Some WMA members have had
6 citations in conference for six months at the present
7 time. One citation request for conference was made
8 well within the 10-day time frame, and the company has
9 not received one reply to their request.

10 It is also very difficult to take care of
11 citations at the inspection closeout to try to
12 eliminate the conferencing or avoid the conferencing
13 process when all inspectors participating in the
14 inspection are not present at the closeout.

15 WMA would like to make the following
16 specific recommended changes to the rule. 100.3(c)
17 history of previous violations. WMA recommends that
18 MSHA adopt an 18-month period instead of the proposed
19 15-month period. An 18-month period will allow for
20 the completion of three regular inspections for
21 surface operations when we're already looking at four
22 or five for an underground operation. This time frame
23 would allow for a more realistic comparison of
24 performance and provide the operation the necessary
25 time to ensure sustainability and improvements or

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1 actions and would be a more accurate reflection of
2 violations for inspection day.

3 100.3(f). The demonstrated good faith of
4 the operator in abating violations. WMA recommends
5 that MSHA reconsider its proposal to decrease good
6 faith efforts to 10 percent from the original 30
7 percent. This is a considerable reduction and
8 operators who are diligent in correcting violations
9 should receive that consideration. Not all violations
10 are known to the operator and when an operator commits
11 the resources to quickly abate a noncompliance
12 situation, a 10 percent reduction in the penalty does
13 not correlate at times to that effort. Additionally,
14 with the significant increase in potential penalties,
15 the reduction and the recognition of good faith is
16 inconsistent.

17 100.6(b) procedures for review of
18 citations. WMA recommends that MSHA reconsider its
19 proposal to revise the time frame for requesting a
20 conference. The current 10-day limit is an
21 appropriate time frame that allows adequate time for
22 an organization to determine if a conference should be
23 requested. Due to various shift schedules that exist
24 within the mining industry, it could be expect that an
25 organization will be unable to gather the required

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1 information to make the appropriate determination on
2 whether or not to conference a citation within the
3 proposed 5-day time frame.

4 In summary, there are serious problems
5 with the proposed rule which begin with larger
6 penalties for larger operators who contribute greatly
7 to the industry's safety record being as low as it has
8 ever been. These large operators have a proven track
9 record of good-faith safety programs and solid safety
10 performance, including partnership project, safety
11 studies and many other proactive safety practices.
12 Now the Agency intends on punishing them for nothing
13 more than size.

14 Finally, cited safety violations and
15 mechanisms of injury have historically not correlated,
16 so there's no basis for the Agency action to simply
17 raise the monetary penalty. There are better ways to
18 improve the safety record of the industry and WMA
19 would be willing to work with the Agency to find those
20 ways.

21 Thank you for allowing my comments on
22 behalf of the WMA. We will submit comments prior to
23 the -- submit written comments prior to the deadline.

24 MS. SILVEY: Thank you. I'm going to ask,
25 say this for everybody, and that is when you all

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1 provide your written comments to us, for those of you
2 who do follow up your comments here today with written
3 comments, when you do, if there are areas in which you
4 disagree with the proposal, when you so state that,
5 then if you have specifics, very specifics in support
6 -- first of all, if you have alternatives, specific
7 alternatives to the proposal, if you would include
8 those.

9 Secondly, if you have specifics, either
10 data or very specific information in support of your
11 alternative, if you would include that, that would be
12 very useful to us in helping us move forward with the
13 final rule that we have to do in a short period of
14 time.

15 I only have a couple of comments for you,
16 Mr. Crum, and that is when you quoted to page 53055
17 and I guess in some ways I am going to continuously go
18 back to this, that you didn't agree with our statement
19 that penalty, the intended purpose, because that's one
20 of the basic premises behind civil penalties. And
21 either you buy it or you don't quite frankly. And
22 even if you don't buy it, you pretend to because as I
23 said -- I don't mean that literally, but the Congress
24 did and the congressional wisdom, when they passed the
25 Mine Act, they included penalties as one of the tools

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1 in the Mine Act, to help induce compliance.

2 So that statement, quite frankly, is a
3 direct quote from the Senate report that accompanied
4 the Mine Act.

5 MR. CRUM: And we understand the quote is
6 30 years old.

7 MS. SILVEY: Right, that's right. But the
8 Mine Act was amended recently, but then there was
9 nothing done to the basic premise of the civil penalty
10 framework except for the four provisions that were
11 added. So that's the only reason I make that comment.

12 But even as I make it, when you provide
13 your specific comments, if you could -- your written
14 comments, if you could provide specifics, that would
15 be useful for us.

16 Actually, I don't have any other -- one
17 other thing I would say and that's kind of a repeat is
18 the fact that we've gotten a lot of comments today
19 here on size, that the proposal seems to be penalizing
20 the larger operators and I would underscore again
21 that's a reflection of the statutory criteria one
22 being size and as you have -- as some of you have said
23 to me today, to us today, there are different ways
24 that you can apply size and so when you all in your
25 specific comments, if you have different applications

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1 or different ways, if you would be -- different
2 alternatives, if you would provide that to us, we
3 would appreciate it.

4 MR. CRUM: In following up on that
5 comment, in looking at the table on metal, nonmetal
6 size, an operator with less than 10,000 hours still
7 gets zero penalty points, if you will.

8 MS. SILVEY: For size.

9 MR. CRUM: For size.

10 MS. SILVEY: Yes.

11 MR. CRUM: Our goes for large operations,
12 it goes from 10 to 20. For the trash can lid that Mr.
13 Graham referred to, it's a violation. It's a
14 violation. It's a violation.

15 MS. SILVEY: Yes, I understand.

16 MR. CRUM: So we get 20 points when a
17 small operator starts out at zero for a citable
18 offense.

19 MS. SILVEY: I understand.

20 MR. CRUM: With the same understanding all
21 the way across the board.

22 MS. SILVEY: I clearly understand. I've
23 got your point. I appreciate it, right. Yes. Okay.

24 Any others?

25 MR. MONTALI: I have one question. You

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1 made a statement regarding the 10-day to the 5-day.
2 You were opposed to that for the manager's conference
3 and you did state that there were times that you
4 requested manager's conferences and they were months,
5 in fact, you did make a statement that there's one
6 that was -- actually requested six months ago and
7 you've had no reply as to whether or not it's been
8 granted or when it's going to be held. Is that
9 correct?

10 MR. CRUM: Obviously, I had a little bit
11 to do with the Wyoming Mining Association comments.
12 If you'd hold that comment to the FMC presentation or
13 hold that question. I'd rather answer it there.

14 MR. MONTALI: Okay.

15 MR. CRUM: I'm not necessarily in a
16 position to answer questions for the entire mining
17 association.

18 MS. SILVEY: I understand. Okay. All
19 right, thank you, Mr. Crum.

20 MR. CRUM: Thank you.

21 MS. SILVEY: Next we have Jack Cottrell.
22 Kinross.

23 MR. COTTRELL: Good morning. My name is
24 Jack Cottrell. It's C-O-T-T-R-E-L-L. I'm the
25 corporate manager of Health and Safety for Kinross

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1 Gold Corporation. Kinross is a multi-national gold
2 company with surface and underground mines employing
3 approximately 1,100 miners in Alaska, Washington and
4 Nevada. These mines are among the safest in the
5 country, measuring lost time in accident years, not
6 hours. And our Washington mine received a 2005
7 Sentinels of Safety award.

8 Kinross appreciates the opportunity to
9 comment on the proposal criterion procedures for
10 proposed assessments of civil penalties which were
11 issued in September 2006.

12 Regarding the proposed civil penalties,
13 Kinross wishes to comment on the following issues:

14 One, total number of violations in Section
15 100.3(c)(1). Repeat violations of the same standard,
16 Section 100.3(c)(2). Negligence in 100.3(d). Four,
17 reducing assessments based on the effects of the
18 assessment on the ability to stay in business. And
19 five, the general comments regarding section 3(a),
20 general discussions in the preamble.

21 When these proposals were considered
22 individually, they seem innocuous, however, when
23 considered as reframing the MSHA penalty structure,
24 the proposed regulations remove mine operators from
25 interfacing with the Agency regarding

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1 misinterpretations of the regulations and deny
2 operators the right to contest citations.

3 These proposals, the proposal of
4 relevancies are also largely unsubstantiated. In
5 Section 100.3(c)(1), total number of violations, where
6 this section addresses the total number of violations
7 issued each year and establish a ration based on the
8 number of citations issued for inspection date,
9 Kinross encourages the Agency to stipulate in the
10 regulation and not the preamble that inspection days
11 are based on the number of inspectors on site each
12 day, therefore, if three inspectors are on site for
13 one day, this would count as three inspection days.

14 The section 100.3(c)(2) repeat violations
15 of the same standard. If a pattern of violations is
16 to be established, it must be based on violations that
17 are more seriously than a typical 100.4(a) citation.
18 There are so many variables that enter into a citation
19 and many are paperwork violations or minor exceedences
20 of MSHA rules. Many of these citations are issued
21 because of what is important to the inspector and thus
22 a company may be placed on a pattern violation because
23 of an inspector's philosophy and not of the
24 requirements of the act. Many violations of this
25 nature are contested and vacated and in later sections

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1 of the proposal, MSHA is recommending that this
2 proposal be removed. Citations which are
3 inappropriately written must not be held against an
4 operator.

5 The Agency has not explained how this will
6 reduce accidents. Kinross recommends the Agency
7 rethink this proposal and develop a more realistic
8 approach to repeat violations.

9 Section 100.3(d) negligence. Mine
10 operators are required to be on alert for conditions
11 or practices in the mine and to take steps to correct
12 or prevent hazardous conditions and practices. What
13 constitutes being on alert? Kinross mines have task
14 training programs, planned inspections, task
15 observations, risk assessment, accident investigations
16 and safety communication procedures and standards.
17 Does this constitute being on alert?

18 If MSHA truly wants to reduce accident
19 rates, negligence of both the company and the miner
20 must be addressed. Kinross encourages MSHA to be
21 proactive in assisting mining industry and focusing on
22 systems and processes versus the reactive punishment
23 approach.

24 Kinross recommends the good faith standard
25 discussed in 100.3 be increased and provisions added

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1 to provide incentives to implement and maintain
2 proactive safety systems.

3 Section 100.3(h). This is the only place
4 noted that discusses the reduction of a penalty and it
5 only addresses a provision if an assessment would
6 adversely affect a business. This, in effect, frames
7 all citations in a pay all or nothing status. Kinross
8 urges the Agency to readdress this issue as it is
9 either unclear or the Agency is constantly trying to
10 limit communications with mine operators.

11 Number 5 in Section 3(a), general
12 discussions in the preamble. Excuse me, yes, it's
13 general discussions in the preamble. This philosophy
14 in the last paragraph is flawed where the Agency
15 states the proposed changes are intended to induce
16 greater mine operator compliance with the Mine Act and
17 MSHA safety and health standards, thereby improving
18 safety and health for miners.

19 As MSHA is aware, in the larger mining
20 community there are five separate industries, namely
21 metal mining, nonmetal mining, sanding gravel, coal
22 mining, and specialty mining. These industries are
23 unique and each has its own set of issues involving
24 safety. Just as the transportation industry has
25 several unique industries within the larger industry,

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1 shipping cannot be regulated the same as trucking and
2 trucking cannot be regulated the same as the airline
3 industry. The same is true with mining.

4 Kinross believes the Agency must redirect
5 their thinking and refocus on how to prevent injuries.

6 The Agency must not assume that by penalizing large
7 metal mining companies, small coal or small standard
8 gravel companies will solve their safety and health
9 problems. These proposed regulations suggest this
10 philosophy.

11 When miners receive an industry guard
12 mandated training instructions or willfully violate
13 MSHA safety rules and the Agency does not address the
14 issue, safety is not served. When personal
15 responsibilities are considered and proactive
16 management systems are implemented to manage test
17 training and planned inspections, task observations,
18 risk assessment and safety communications, then a
19 reduction of accidents will occur and miners will be
20 protected.

21 Statistics indicate that miners are
22 injured by how they work, not where they work, yet
23 there is no provision in this proposal to address this
24 issue. The Agency must address the problem before the
25 problem exists and not use the one regulation fits all

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1 or the broad brush philosophy to solve problems that
2 do not exist in other mining industries. Regional or
3 local problems must not be the basis to regulate
4 unrelated industries in the mining community. In this
5 regard, increased penalties should be directed to the
6 coal industry since it is the industry that prompted
7 congressional action.

8 Kinross encourages MSHA to abandon the
9 punitive approach of yesterday and address issues
10 proactively and provide incentives to regulations that
11 encourage companies to implement systems and processes
12 that prevent safety issues instead of punish them
13 after the fact. If a punishment tool must be used, it
14 should be the exception, not the rule and Kinross
15 believes the act recognizes this.

16 MSHA has the opportunity with this
17 proposed regulation to improve the way the act is
18 managed and Kinross cannot emphasize enough the need
19 for the Agency to manage the act proactively instead
20 of harboring the punitive approach which has had a
21 limited ability to lower mine accidents.

22 Thank you again for the opportunity to
23 comment on these regulations and considering our
24 concerns.

25 MS. SILVEY: Thank you. I'd just like to

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1 make a couple of points here, Mr. Cottrell.
2 Throughout your testimony you said that you would like
3 us to provide incentives instead of punishing
4 operators. And so from that I take it that from your
5 testimony your concept of the penalties is a concept
6 of punishment.

7 I mean like yes, I have to take it.

8 MR. COTTRELL: It certainly isn't a
9 reward.

10 MS. SILVEY: All right. I wanted to
11 follow that and the reason I asked you that is because
12 I think the frames of the Mine Act intended and I
13 think MSHA does and so in carrying out implementing
14 the Mine Act, the Mine Act is -- it's remedial
15 legislation which is meant to be proactive in nature,
16 remedial legislation and which is meant to serve to
17 prevent accident and injuries before they happen. We
18 do that -- the Mine Act, obviously, I don't have to
19 tell you that is set up for doing that in a number of
20 ways. Enforcement, one way. Obviously, compliance,
21 setting benchmarks for health and safety, setting
22 standards. Operators and miners complying with the
23 standards and then enforcement, one of the aspects of
24 enforcement is penalties. But that's all from the
25 standpoint of being remedial and it may be a funny way

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1 of sounding and serving as an incentive for
2 compliance.

3 Now people might disagree with that and I
4 guess that's what you're telling me, but I guess one
5 of the things I want so that everybody can see and
6 will understand is that it's only within the framework
7 of the Mine Act that the Agency is issuing this civil
8 penalty proposal.

9 MR. COTTRELL: I probably stand alone in
10 this, but I have no problem with the Mine Act. I
11 think it's a good act. I think it's been managed
12 wrong for the last 40 years.

13 Otherwise, if the punitive actions were
14 effective, you would have seen less citations written.
15 You would have seen less accidents and less problems.
16 If the punitive approach works across the country,
17 our jails would be empty. It simply doesn't work in
18 the mining industry.

19 I've spent probably 90 percent of my time
20 in the field at mines and I've worked in gold mines,
21 copper mines, lead mines, iron mines, all over the
22 country. And in every mine that I've been at, I've
23 literally had to have two different programs. I've
24 had to have an MSHA program and I've had to have a
25 proactive program to implement proactive systems into

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1 the management system.

2 I've never seen a relationship between the
3 citations that we've received in any of the mines that
4 I've been at and in the reduction of accidents. The
5 reduction of accidents has always come by having
6 proactive management systems involving the miners and
7 looking at behavioral type systems to get miners to
8 understand the risks of what they're doing and
9 evaluate that risk before they go ahead and do that
10 job.

11 The system -- if the system has been
12 designed to reduce accidents, the penalty system, it
13 doesn't work. And I think what MSHA needs to do is
14 rephrase their question, is why has the penalty
15 assessment system failed to reduce accidents and
16 protect miners? I think that's the real issue on
17 this.

18 MS. SILVEY: Well, in part, I think that
19 we have -- we are talking maybe somewhat -- maybe not
20 totally -- somewhat a little bit of semantics in terms
21 of what tool is what, but I would like to ask you in
22 your closing statement I think you said we would like
23 to see MSHA provide incentives instead of punishing
24 operators. And you talked about the safety programs
25 that you had implemented at your company. If you

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1 would -- and you talked about the things that you
2 didn't like in the proposal. If you would then when
3 you talked about the things, a couple of times you did
4 provide some examples of what we -- as a matter of
5 fact, one thing struck me, what we should do
6 differently in the civil penalty proposal. But in
7 every example of where you talked about what we didn't
8 do, the things that you didn't like, if you have
9 something that you would substitute in its place, if
10 you could provide that. I know specifically you
11 talked about the size area, I remember what you didn't
12 like and you gave an example of what we should do in
13 the size area.

14 And so those are the kind of things, that
15 would be very useful to us.

16 MR. COTTRELL: Okay, I agree that there
17 should be a broader approach to solving this issue,
18 that the tragic incidents that brought all this about
19 really didn't need to happen and -- but the system
20 just doesn't seem to be working and I think there
21 needs to be some kind of a natural approach or a
22 larger, broader approach to look at how we can
23 incorporate some of the proactive things into the act.

24 I think the act allows it. It's just everybody is
25 caught up in let's get a bigger hammer and beat people

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1 up more. And it isn't working.

2 MS. SILVEY: One of the things, I do want
3 the record to reflect this, is that from almost 40
4 years since the '69 Coal Act and a little bit more,
5 with the Metal and Non-Metal Act of '66, when you look
6 at, there are things that we do look at as indices of
7 improvement in safety and health. And one of the
8 things that we look at year after year is fatalities.

9 When you look at the fatalities in the mining
10 industry during that passage of time, I do think that
11 we all agree that the fatality rate has improved
12 dramatically in the mining industry over that time.
13 So there has -- programs have to be put in place and
14 as Pete said earlier and the credit clearly doesn't go
15 just to MSHA. The credit really goes to the mining
16 industry Sentinels of Safety session in Washington a
17 couple of weeks ago, so I think that we should
18 acknowledge that credit for the improvements that have
19 been made.

20 Now as I say that and then I agree with
21 you, Mr. Cottrell that with the things that happened
22 earlier this year then greater improvements need to be
23 made.

24 MR. COTTRELL: I haven't looked at the
25 statistics lately, but if memory serves me right,

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1 there was a dramatic decrease in fatalities when the
2 MSHA act was implemented. But since then it's been
3 static. It's been up and down. You can probably
4 track it within a certain range and I don't think
5 there's been a downward trend in the last several
6 years. I think it's something that needs to be looked
7 at.

8 So again, why has the penalty system
9 failed in reducing that trend?

10 MR. MATTOS: I think that is a presumption
11 that -- the numbers of injuries and injury rates have
12 been decreasing steadily over time and continue to
13 decrease. When we start looking at fatalities the
14 closer we get to zero fatalities, the number, the
15 statistical significance of the numbers begins -- one
16 fatality increase or decrease, you know. But the
17 injury rates, all categories have been declining and
18 continue to decline.

19 But it's not due to the civil penalty
20 structure, it's a combination of factors, the
21 proactive systems that you were discussing.

22 MR. COTTRELL: But MSHA makes the point
23 quite clearly in these regulations. That's what these
24 regulations aim to do is to reduce the accident rate
25 and it isn't doing that. That's why I think we need

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1 to take a broader look at this from an MSHA, company,
2 unions, anybody that wants to participate in this is
3 how do you make this work, how do you hold bad actors
4 accountable and reward good performers. Back in the
5 '80s, MSHA had a program out that we termed it the
6 "dirty 30." MSHA had another name for it, but where
7 they looked at the 30 worst mines in the country and
8 then they went in and tried to help those companies
9 address the issues of why they were having so many
10 accidents. That went on for about two or three years
11 and then it was abruptly canceled and they went back
12 to the let's hit them more with citations.

13 I think there was a window there that
14 there was an opportunity to start affecting the
15 accident rate, but that was thrown away again for
16 stricter enforcement. So it's just -- I don't see
17 that the strict enforcement, you need to have the
18 strict enforcement out there. It has to be there for
19 people who aren't going to comply with the act. But
20 when you have people who are trying to comply with the
21 act and working with it, there should be some
22 incentives and some recognition of that.

23 MR. MATTOS: I had a couple of questions.

24 In your testimony, well, one point and a couple of
25 questions. On the inspection days, the way we count

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1 inspection days, if there are three inspectors there,
2 that's three inspection days. That's the way it's
3 currently done and we wouldn't change that.

4 MR. COTTRELL: All right.

5 MR. MATTOS: We'll clarify that as you
6 suggest.

7 This is a question. ON the repeat
8 violation component, you commented on contested
9 violations. I wasn't clear on the point you were
10 trying to make.

11 MR. COTTRELL: The minor 104(a) citations,
12 the garbage can lids, the minor ones, the paperwork
13 ones, can all be brought in and if those keep
14 happening, you get on a pattern of violations type of
15 a program.

16 I don't know if that's going to really
17 reduce any accidents.

18 MR. MATTOS: I think the part of your
19 testimony I'm referring to is on citations that are
20 issued in error or something to that effect?

21 MR. COTTRELL: Yes, the company shouldn't
22 be held accountable for those citations that were
23 improperly written.

24 MR. MATTOS: And those that are vacated,
25 subsequently vacated or --

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1 MR. COTTRELL: It seems like it's going to
2 be harder to contest citations under the new rules.
3 You don't have a chance to go down and talk with the
4 district where you can solve some problems up front.
5 It seems like you're going to have to go right to an
6 ALJ. And it just seems like it's going to be harder
7 to address these issues and our communications is
8 being limited on some of those things.

9 MR. MATTOS: Is there a specific component
10 of the proposal that leads you to think that it would
11 be harder to discuss or contest --

12 MR. COTTRELL: I think the way that
13 everything is being set up on negligence and how you
14 try and address issues is really -- it's not so much
15 complicated, it's just removing us. It says -- it's
16 almost like we don't want to talk with the district
17 any more, just go talk to an ALJ. I don't think
18 you're going to solve a lot of problems that way.

19 MS. SILVEY: Why do you think that you
20 won't be able, under this proposal you won't be able
21 to talk to the district?

22 MR. COTTRELL: It's the way I read the
23 proposal as I was reading it. If that's wrong, if I
24 got the misinterpretation on that, then I'm wrong.

25 MS. SILVEY: You still will have

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1 opportunity to request a conference with a district
2 manager. Now we've heard a myriad of testimony that
3 we should not be shortening the time period from 10
4 days to 5, so then we have to look at that, but you'll
5 still be able to request a safety and health
6 conference with the district manager.

7 MR. COTTRELL: Isn't there a provision in
8 there that says MSHA has the sole discretion as to
9 which ones are discussed?

10 MS. SILVEY: But that's in the existing
11 rule. There's nothing changed on the safety and
12 health conference, except for the time frame and
13 that's something we're going to go back and look at.

14 MR. COTTRELL: That's not the way that it
15 works right now. Right now I feel like I have an open
16 door. I can go down and talk with the district any
17 time I want to.

18 This seems like I call the district and
19 they say no, we don't even want to talk about that.

20 MS. SILVEY: No. This proposal was not
21 intended to change that at all.

22 MR. COTTRELL: Then it needs to be
23 clarified.

24 MS. SILVEY: I don't think it says that.
25 I didn't think it says that, but you were telling me

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1 you thought it said that.

2 MR. MATTOS: The proposed rule is similar
3 to the existing rule in 100.6(c). That's the
4 discretion and it's just combined into all one
5 paragraph.

6 The way we look at these paragraphs, we
7 were reading them and we thought we could make it
8 clearer.

9 MS. SILVEY: We didn't. You can see we
10 didn't. You can see what happens when you think.

11 MR. MATTOS: But the provision that is
12 within the sole discretion to grant a request for a
13 conference, I just read that from the existing rule.
14 We're just carrying over the language.

15 MS. SILVEY: It shows you how you can do
16 some things unintended consequences of what you do.

17 MR. COTTRELL: Change isn't easy.

18 MS. SILVEY: Yes.

19 MR. MATTOS: One other question that I had
20 is on your comment on the ability to stay in business.

21 MR. COTTRELL: It just appeared to me as I
22 read the regulation that the citations were going to
23 become all or nothing. If it didn't affect your
24 business, you were just going to pay the fine, pay the
25 assessment, whatever the assessment was. There was no

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1 avenue to go in and discuss that and to really try and
2 lower negligence or lower some of these other aspects
3 where the dollar amount is high.

4 MS. SILVEY: Again, that process doesn't
5 change from the way it is under the existing, the
6 process.

7 MR. COTTRELL: Okay.

8 MS. SILVEY: I don't want to mislead
9 anybody. The 10 days we did propose the 10 days to
10 request a safety and health conference. We proposed
11 that that be reduced to five days, but we got a lot of
12 comment on that and we will have to just take that
13 comment into consideration and we look at that.

14 MR. COTTRELL: And reclarify that, that
15 would be fine.

16 MS. SILVEY: Yes. Anybody else?

17 MR. CROCCO: Let me ask you one question.
18 You talk a little bit about some violations that were
19 out of control of the operator or were acts of
20 individuals. Did you have a recommendation that we
21 could address?

22 MR. COTTRELL: I can give you an example
23 of a horrible accident we had about three years ago.
24 We had an operator who tried to jump a dozer off a
25 beach pad and unfortunately the berm was too high and

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1 he had his rigs up too high and he flipped the dozer
2 over and sustained a permanent disability. He's no
3 longer able to work in the mining industry.

4 When MSHA came in and investigated that,
5 they tore our training program apart. And they
6 couldn't find anything wrong with our training
7 program. The employee had been observed three months
8 before doing the job correctly. He was supposed to
9 come down and get some gas and -- or get refueled and
10 then come back up on the pad.

11 He had been observed on a task
12 observation, a formal observation where the supervisor
13 observed him doing the job correctly. MSHA went in
14 and looked at our maintenance program and they tore
15 our maintenance program apart and they couldn't find
16 anything wrong with our maintenance program. So they
17 tore the machine apart. They couldn't find anything
18 wrong with the machine. So then they started looking
19 at our EMT and our emergency response system and they
20 started dissecting that and they couldn't find
21 anything wrong with it. He was packaged right.
22 Medically, he was right. And those people
23 literally saved the man's life.

24 They then wrote us a citation for an
25 employee not controlling his equipment, when in fact,

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1 he had had all the training. He had been observed
2 doing it right. He had made a conscious decision to
3 do this and ended up not only destroyed equipment,
4 destroying his life.

5 MSHA wrote us a citation again for the
6 employee not controlling his equipment and marked
7 negligence as moderate. I asked --

8 MS. SILVEY: Negligence was what?

9 MR. COTTRELL: Our negligence, the
10 company's negligence was moderate.

11 MS. SILVEY: Was moderate.

12 MR. COTTRELL: I asked the inspector and
13 the investigators at the time where our negligence was
14 at. That was four years ago and I'm still waiting for
15 an answer.

16 So sometimes miners violate rules and yet
17 the companies are blamed for those. You do everything
18 right and something still happens. There's no
19 provisions to look at that and to give companies
20 credit where credit is due.

21 MS. SILVEY: Okay, anybody else? Thank
22 you.

23 MR. COTTRELL: Thank you very much.

24 MS. SILVEY: Next then we will have Mr.
25 Crum who is now speak on behalf of FMC.

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1 MR. CRUM: Again, my name is Mike Crum.
2 M-I-K-E C-R-U-M. I'm with FMC Corporation out of
3 Green River, Wyoming. FMC appreciates the opportunity
4 to provide comments on the proposed rule regarding the
5 revisions to the violation of penalty assessment
6 regulation.

7 FMC, like MSHA, is genuinely concerned
8 about safety of our miners and has a multi-prong
9 safety program striving for continuous improvement of
10 the safety and health of our miners.

11 Although the events at Sego and Darby were
12 tragic, these unfortunate situations have been within
13 the coal mining industry and not within the metal and
14 nonmetal industry.

15 FMC supports MSHA's agenda of protecting
16 miners and searching for ways to improve the industry.

17 However, MSHA should focus their efforts where the
18 problems occur. MSHA's approach to a broad brush
19 cure-all lumping all mining operations together is
20 simply not the answer.

21 The unfortunate events that occurred at
22 Sego and Darby became media events with politicians
23 attempting to enact knee jerk regulations that do
24 little to improve the overall safety of miners, much
25 less bring focus to the real issues in the industry.

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1 As a conscientious operator, FMC takes
2 exception to the quote on page 53055, bottom of the
3 third column, understanding this 30-year old quote,
4 "the intent and purpose of the civil penalties under
5 the Mine Act is to convince operators to comply with
6 the Act's requirements."

7 FMC takes every violation seriously. Our
8 business leaders, our managers are judged. They are
9 held accountable for a non-S&S violation to the same
10 degree as they are for an S&S violation.

11 FMC has a dedicated safety staff, provides
12 countless hours of training, employs behavior-based
13 safety systems, performs greater than a thousand
14 physical conditions per year and has a sound
15 partnership with our union leadership in the safety
16 arena.

17 The key to improved safety and health of
18 our miners is engaging every employee and visitor in
19 the safety process and holding them accountable
20 equally for compliance with all safety rules and
21 regulations, as well as company policies.

22 Increasing penalties will not accomplish
23 this fundamental approach to safety accountability
24 unless directed to the root cause of the violation
25 which in many cases is beyond the control of the mine

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1 operator. The scope of operator responsibility can be
2 determined by evaluating the overall safety program,
3 training provided to miners, policies and procedures
4 in place and proactive safety efforts that are in
5 place and documented.

6 Operators should receive credit for
7 implemented safety activities that are designed to be
8 proactive and not reactive. The change in good faith
9 efforts' percentage, if any change is made, should be
10 increased for those operators who diligently correct
11 violations in a timely manner.

12 The proposal is not appropriate for the
13 efforts made to quickly abate violations. It is well
14 understood that any violation of a mandatory safety
15 standard is, in fact, a violation. However, citations
16 that have not shown an correlation with the mechanism
17 of injury has not been considered.

18 Operators that spend countless hours
19 performing those tasks that are considered upstream
20 safety indicators will be unjustly punished for minor
21 violations of a safety standard.

22 FMC and other large operations will also
23 be unjustly punished due to our size alone. In 2006,
24 a year to date, only one fatal accident has occurred
25 at operations with more than 200 employees.

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1 Therefore, it begs the question why are larger
2 operations automatically imposed higher penalties? Is
3 it only because we can afford the penalties, at least
4 when our markets are strong?

5 An axiom in American justice is the
6 punishment should fit the crime. This should not be
7 modified just by a number of people, my employees.

8 Fatality numbers for large operations with
9 greater than 500 employees for previous years breaks
10 down as follows: in 2005, 4 of 35 total fatalities;
11 11 percent. 2004, 2 of 27 fatalities, 7 percent.
12 2003, 1 of 26, 3.8 percent. 2002, 5 of 42 fatalities,
13 12 percent. As the above illustrates, large
14 operations account for only an average of 9.2 percent
15 of the fatal accidents that have occurred in the last
16 four years.

17 However, the proposed rule is designed to
18 punish those operations who realistically have better
19 safety records, but may historically have received
20 many 104(a) non-S&S violations for items such as
21 missing the monthly inspection of fire extinguishers
22 out of maybe one, two out of a total of 400 that we
23 may have on property; or a guard that is in place.
24 The only thing that's going to move it is if someone
25 picks it up because a bolt is missing.

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1 If inspectors want citations, they can
2 find them in any operation, even the Sentinels of
3 Safety winners' operations who we all command. It is
4 with considerable effort and dedication to safety that
5 FMC citation history shows very few S&S violations and
6 that we have very, very few high negligence violations
7 in our history.

8 MSHA should closely analyze their accident
9 data and look to drive results where the accidents are
10 occurring within the industry.

11 Questions also arise as to the root cause
12 of fatal accidents where the primary cause is
13 conditions or behaviors. In cases where a miner made
14 a conscious choice to disregard a safety standard
15 after receiving training, having access to safety
16 equipment and/or violating the company policy MSHA
17 cites the operator as being in violation when clearly
18 it was a personal choice that caused the accident.

19 Is expanding MSHA's ability for citing individuals
20 unrealistic?

21 MSHA also seeks comments on how to assess
22 repeat violations. The penalty assessments for repeat
23 violations should be considered for S&S violations.
24 Typically, an S&S violation is one that would have a
25 direct impact on safety and therefore the penalty for

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1 repeat violations should only be covered for repeat
2 S&S violations.

3 MSHA is also requesting comments on
4 shortening the conferencing time period. Shortening
5 the conference time period will not improve safety nor
6 provide any advantage for MSHA. The conferencing
7 process is overloaded at the present time and
8 shortening the time period will merely add to this
9 burden.

10 Operations may react in one of two ways.
11 First, if the operator missed the deadline
12 inadvertently, citations that don't go to the
13 conferencing officer will be contested on the penalty
14 assessment and taken before the Commission. Secondly,
15 operators who are investigating mitigating
16 circumstances and run out of time will send more
17 citations to conference than is necessary just to make
18 sure all bases are covered. Both of these
19 situations will further bog down the already
20 overloaded system.

21 The problems with the conferencing process
22 are not necessarily with taking the citations through
23 the proper channels, but with the inefficiency of the
24 process in general. FMC has had citations in
25 conference for six months at present time and has also

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1 requested a conference back in July on a citation well
2 within the 10-day time period and I have yet to hear a
3 reply on whether or not my conference will be granted.

4 It is also very difficult to take care of
5 citations at the inspection close out, negating the
6 need to conference when all inspectors participating
7 in the inspection are not present at the close out.

8 In addition to the conferencing process,
9 we continue to have problems with assessments. For
10 the past two years, penalty assessments have been
11 wrong. Payments made to one case numbers have been
12 applied to completely separate case number and in one
13 instance, a completely separate mine ID number, even
14 when the desired case for payment is written on the
15 check stub. I have my folks put those on the check
16 stub when I send them to assessments. And citations
17 still in the conferencing process are being assessed
18 and processed when information given to me at the
19 initial conference was that they'd be on hold until
20 that conferencing process has ended. All in
21 all, changing the system now is going to make this
22 process worse, not better.

23 In summary, FMC believes there are serious
24 problems with the proposed rule which began with
25 larger penalties for large operators who consequently

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1 and consistently contribute greatly to the industry
2 safety record being as low as it has ever been. These
3 very operators have stepped up to the plate time and
4 time again for partnership studies, safety studies,
5 SLAM initiative, training improvements, etcetera,
6 etcetera. Because we typically have safety records
7 that are good and we have a genuine interest in
8 promoting the safety and health of miners. Now the
9 Agency intends to punish us for nothing more than our
10 size in a way that is inconsistent to the way we have
11 it right now.

12 Shortening the conference time will only
13 bog down an over-burdened system and ultimately will
14 require more MSHA resources to handle the work load
15 with no apparent relationship to increase safety.

16 Finally, cited safety violations and
17 mechanism of injuries have historically shown on
18 correlation, so there is really no basis for the
19 Agency's action to increase monetary penalties. There
20 are other ways to improve the overall industry safety
21 record and I would encourage MSHA to seek that
22 advisory council in addressing this rule.

23 Thank you.

24 MS. SILVEY: Thank you. One of the things
25 that I would like to say on behalf of MSHA is that --

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1 and you accurately said that, Mr. Crum. For the
2 operators who have joined with MSHA in promoting
3 safety and health and who stepped up to the plate and
4 I'm using your language now, to participate in
5 partnerships when MSHA asks for partners. I know some
6 of you did it with the diesel partnership, for SLAM,
7 for other safety studies. We appreciate that because
8 we could not have gotten some of the information to
9 allow us to move forward without your assistance.

10 But as I say that, I will also make the
11 statement that in terms of -- I mean I'm going to go
12 back to the Mine Act now, for accountability purposes
13 because I'm hearing a lot of testimony that -- in
14 terms of talking about behavior and what we ought to
15 do in terms of these safety programs that are put in
16 place that take into consideration miners' behavior
17 and etcetera, etcetera. And while I may not disagree
18 with you, and quite honestly don't, the -- I go back
19 to the Mine Act now and I have to put that before you
20 and say that the accountability in terms of the
21 responsibility for safety and health in the Mine Act
22 and therefore the person to whom MSHA is charged to
23 interact with, in terms of the issuance of a citation
24 and hence, the ultimate issue of a penalty is the mine
25 operator and that's the set up of the Mine Act.

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1 MR. CRUM: In comment to your comment
2 there, I'll go back to Mr. Cottrell's example which is
3 a fantastic example of where the citation comes out
4 after a tragic event, the operator has done everything
5 possible to prevent that event from occurring, does
6 the negligence on that piece of paper fit with what
7 the operator has done?

8 MS. SILVEY: Now that's a good question
9 and I don't know -- I mean he gave --

10 MR. CRUM: I've been there myself.

11 MS. SILVEY: I understand.

12 MR. CRUM: In a couple of other operations
13 and that's what it comes down to, failure to control
14 mobile equipment.

15 MS. SILVEY: I understand.

16 MR. CRUM: Moderate negligence on the
17 operator.

18 MS. SILVEY: And that's where, yes, so I
19 understand that and that's where those types of things
20 are things that are -- when I started out in the
21 opening statement, are decisions made by the inspector
22 at the time of the issuance of a citation and if there
23 are questions about those, those are the things that
24 you talk to the District Managers about and hopefully
25 at some point you reach some type of agreement about

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1 them. But clearly that's why part of the various
2 criteria you placed in there, you point out to me
3 negligence is because we should have assigned all of
4 the negligence to which we think that is applicable in
5 the situation that Mr. Cottrell gave. If the operator
6 has done everything that the operator should do and
7 there's nothing else that the operator could do, then
8 the citation should reflect that.

9 MR. CRUM: That particular citation under
10 the new point system, that particular X in the box
11 makes thousands of dollars of difference in that
12 event.

13 MS. SILVEY: I understand. I hear you.

14 MR. CRUM: One of the things that I will
15 be doing with my staff is making sure they all have a
16 very, very clear understanding of negligence, gravity
17 and severity. And as an operator, I'm going to be a
18 fool if I don't take every moderate negligence
19 citation to the conferencing process.

20 MS. SILVEY: I understand.

21 MR. CRUM: In that train of thought that
22 system is going to get even more grossly overloaded
23 than it is now.

24 MS. SILVEY: Well, that's a good segue
25 until the next point and you said that in your

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1 testimony and Pete had that question too, but you said
2 you were raising two separate issues, one having to do
3 about a specific conference, but it was one issue
4 before that and I sort of missed that. You said there
5 are two separate issues.

6 MR. CRUM: Yes, I had -- I've got two
7 issues going on right now.

8 MS. SILVEY: Right.

9 MR. CRUM: I have citations in the
10 conferencing process. Up until the point when I got
11 penalty assessment and just finally went to my
12 attorney and said hey, you've got to help me out here.
13 Six months on a half dozen citations, no resolution.
14 Verbal commitment to vacate one. Verbal commitment
15 to have further conversation, didn't happen. I get
16 the penalty assessment, mark the boxes, expecting that
17 these citations were still on hold --

18 MS. SILVEY: You thought that they were
19 still in the process?

20 MR. CRUM: Still in the process because I
21 had gotten no resolution, no word back basically on
22 what the final decision was. I get a penalty
23 assessment. So I mark the box, send them in. I'm too
24 late because quite honestly, I didn't expect those
25 citations on there based on what I was told at the

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1 initial conference.

2 So they denied my contest based on the 30-
3 day time limit that I was over.

4 MS. SILVEY: We'll look into those.

5 MR. CRUM: Just to carry this a step
6 further, I get a call back from the attorney and she
7 asked me, she said well, how can you pay those? I
8 said I didn't pay them.

9 (Laughter.)

10 I have 34 citations on this --

11 MS. SILVEY: On the thing, the group of
12 things.

13 MR. CRUM: I didn't pay any of them. Yet.
14 Okay? I've got two ID numbers that I'm running with.
15 The penalty assessment that I sent in for 0152 with
16 that number on the check stub for whatever reason was
17 applied to 0639.

18 MS. SILVEY: The one that was supposed to
19 be in, you know --

20 MR. CRUM: So now I'm in arrears on the
21 first one.

22 MS. SILVEY: Yes, well --

23 MR. CRUM: That's the one issue which
24 we're just going to continue on. We applied a motion
25 to open the case again, etcetera, etcetera.

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1 And then the second one --

2 MS. SILVEY: Can we get all those numbers
3 from you?

4 MR. CRUM: Absolutely.

5 MS. SILVEY: And the second one?

6 MR. CRUM: The second one was a citation
7 written in July. Sent the email request to the
8 conferencing officer. I still -- it's October 4th. I
9 don't know if that's been denied.

10 MS. SILVEY: We'll get that from you on
11 the break, I mean after -- Pete, did you have a
12 question on that?

13 MR. MONTALI: A couple of questions.
14 Number one, you said that you have a verbal commitment
15 to vacate one and you have another commitment to -- I
16 forget exactly what the second one was. Was this
17 during a conference that you had, a telephone
18 conference with the representative from the District
19 Manager?

20 MR. CRUM: Yes.

21 MR. MONTALI: Okay.

22 MR. CRUM: But I've yet to see the paper
23 vacating that citation.

24 MR. MONTALI: And that was six months ago,
25 approximately six months ago?

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1 MR. CRUM: That verbal request was August
2 14th or that verbal commitment.

3 MR. MONTALI: When you received the
4 assessment for that, did you contact the conference
5 litigation representative to request an explanation as
6 to why you were being assessed when the commitment was
7 that it was to be vacated?

8 MR. CRUM: At that point I talked -- I did
9 talk to the conferencing officer and without my notes
10 I can't remember exactly the entire conversation.

11 MR. MONTALI: If you can send that
12 information with the numbers of the citations and any
13 background information with that, we can take a look
14 at that for you.

15 MS. SILVEY: Thank you. Do you have
16 anything else for us? Thank you very much. We will
17 talk to you on the breaks, so we can follow up, you
18 can provide all the information to us.

19 MR. CRUM: We will submit written comments
20 prior to the deadline. We will also -- there's one
21 other piece that is going to add to the conferencing
22 process, as we talk about it and as we know it now.
23 When an inspector comes into one of our mines in the
24 trona patch, and we may have permissibility violation,
25 every time that's written, it's checked as failed.

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1 Every time. I would just about bet without exception
2 -- I'm not certain that the trona patch has ever had
3 an injury or a fatality due to a permissibility issue
4 with our equipment.

5 I mean one of the things that the Agency
6 really needs to look at is region specific. Don't
7 base the trona patch on the potential or the severity
8 of a potential injury based on coal. We're a heck of
9 a lot less flammable than coal. Our ore, in general,
10 is a fire retardant. So some of those things I think
11 we can work with the Agency to bring this to what's
12 reasonably likely to happen in one of our operations
13 in the trona patch.

14 MS. SILVEY: Okay.

15 MR. CRUM: Is it necessarily going to lead
16 to a fatality? We haven't had it in a lot of years.

17 MS. SILVEY: Thank you.

18 MR. CRUM: Thank you.

19 MS. SILVEY: Next we have David Litvin,
20 Utah Mining Association.

21 MR. LITVIN: Madam Chair, members of the
22 panel, I'm David Litvin, L-I-T-V-I-N. I'm president
23 of the Utah Mining Association, but I'm here today to
24 speak for Mr. Fred Fox who had requested to speak. He
25 was from Kennecott Minerals Company. He had a

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1 conflict and had to leave and asked that I would
2 please present his comment to the panel.

3 Let me start out by just indicating that
4 Utah Mining Association is the voice of mining in Utah
5 since 1915 and represents essentially all of the
6 mining interests and supplier interests in the State
7 of Utah and we work and present the views of mining
8 with the regulatory agencies in Utah, the Governor's
9 office, the Utah legislature, the media and the
10 public. And in that regard, we have an annual
11 convention which was held for the 91st time this year
12 on August 24th and the theme of the convention this
13 year was Utah Mining Begins With Safety and our
14 keynote speaker was Mr. Dye, head of your Agency and
15 we appreciated his participation.

16 And the goal of the Association and all of
17 the operating companies in Utah is to have totally
18 safe mines and of course, we know that's the goal of
19 your Agency as well and we look forward to working
20 with you and we appreciate you being here on this
21 proposed rule because it's a very important rule for
22 promoting and working towards safe operations
23 throughout the United States.

24 Now in that regard, I will be submitting
25 on behalf of the Utah Mining Association written

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1 comments on this rule, but I just wanted to make a
2 couple of verbal points that I think are important.

3 One is what is done on this rule must be
4 viewed in light of what has occurred in the industry
5 of the past year and the political and public reaction
6 to what occurred and what we do now moving forward
7 will also be scrutinized again by the Congress and
8 also by the press, the media, when and if additional
9 incidents occur. So we want to make sure that what's
10 done here and when that media scrutiny occurs or
11 congressional scrutiny occurs, that we give them as
12 accurate a picture as possible of the safety of the
13 mining industry, of the commitment of the mining
14 industry to have safe operations and the progress that
15 has been made in that regard.

16 As we know, the industry continues to get
17 safer and safer and safer over time and that is very
18 important, but we have to be careful that we don't
19 give a misimpression of what's going on and if you
20 lump all violations together, for example, and not
21 distinguish between those which really would not
22 necessarily lead to an injury or fatality with those
23 that would, and then those cumulative violations are
24 looked at, it could present a misrepresentation to the
25 safety efforts of the industry.

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1 So I would just urge you that whatever you
2 do, keep in mind that what's done will be scrutinized
3 by the public, by the media, by the Congress again.

4 Now in terms of Kennecott Minerals
5 comments today, Kennecott Minerals is a company that
6 does hard rock mining in several states throughout the
7 United States. It's part of the old Kennecott Mining
8 name, as you're well-familiar with and is currently
9 owned by Rio Tinto of London. But the comment that
10 Mr. Fox had asked me to make goes directly to Section
11 100.6 of the proposed rule which is the procedures for
12 review and citations and orders and also procedures
13 for assessment of civil penalties and conferences.

14 This issue has been addressed, I think, by
15 every speaker today and so it's obviously a critical
16 issue which we hope you look at very seriously. The
17 time period for requesting health and safety
18 conference has been proposed to be changed from 10
19 days down to 5 days. There is no compelling reason
20 cited by MSHA or no basis for this change. If you
21 read the section of the rule that goes to change this
22 provision, MSHA only has one statement about the
23 change. It says "MSHA believes that the proposed
24 reduction would result in a more effective civil
25 penalty system because penalties would be assessed

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1 closer to the time to the issuance of the citation."

2 Now I don't believe that statement is
3 correct. The purpose of a health and safety
4 conference is to allow the operator to present
5 mitigating circumstances concerning the issuance of
6 the proposed violation. Operators need time to pull
7 together that information. When you have work
8 schedules of people that vary from one mining
9 operation to another, miners may in one operation be
10 flown in or bused in and stay there for many days and
11 then leave and be off for several days. Oftentimes, a
12 mining operation may be curtailed in its production
13 hours, due to the demand for its minerals. It may not
14 be operating seven days a week or may not be operating
15 five days a week. And so to get all the information
16 from the workers that were maybe involved in that
17 particular situation, and to get all that together,
18 all the facts together, five days oftentimes would not
19 be adequate time. And I think to allow for
20 appropriate due process of the law, I think we should
21 continue that 10 days, unless you can show that
22 there's reasons it should be changed and in the
23 proposed rule, you have not done that.

24 So therefore, in conclusion, Kennecott
25 Minerals recommends that MSHA reconsider its proposal

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1 to revise the time frame for requesting a health and
2 safety conference. The current 10-day limit is an
3 appropriate time frame that allows adequate time for
4 determining if a health and safety conference should
5 be requested. Because of the various shift schedules
6 that exist throughout the mining industry, it could be
7 expected that a company would not be able to
8 adequately gather the requested information to make
9 the appropriate determination to conference a citation
10 within the proposed 5-day period.

11 I'm sure that Mr. Fox will give his
12 statement to you in writing as well, after this
13 session today and also the Utah Mining Association
14 will be providing a statement as well.

15 Thank you very much.

16 MS. SILVEY: Thank you, sir. Thank you.
17 We now have -- I don't know whether he wanted to speak
18 again. This may be a mistake. David Graham with
19 General Chemical, did he want to speak again? Okay.

20 Then that represents people who signed up.

21 Is there anybody else who wishes to speak? Well, if
22 nobody else wishes to speak, then on behalf of the
23 Labor Department's Mine Safety and Health
24 Administration, we would like to thank you for those
25 of you who came and did speak and those of you who

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1 came and may not have spoken but showed an interest in
2 this rulemaking.

3 As many of you said, it is an important
4 rulemaking. The two aspects to it, as we were
5 revising our existing rule, but also it will implement
6 the Miner Act provisions. As I said in the opening
7 statement the record closes October 23rd. For those
8 of you who spoke and made promises to us that you were
9 going to follow up your spoken testimony here today
10 with written comments, I urge you to do so before the
11 record closes on October 23rd and again, on behalf of
12 MSHA and our Assistant Secretary, we thank you for
13 your participation in this rulemaking.

14 The hearing is now adjourned.

15 (Whereupon, at 12:27 p.m., the hearing was
16 concluded.)

17

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