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PUTTING SAFETY FIRST: STRENGTHENING ENFORCEMENT AND CREATING A CULTURE OF COMPLIANCE AT MINES AND OTHER DANGEROUS WORKPLACES

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

EXAMINING PUTTING SAFETY FIRST, FOCUSING ON STRENGTHENING ENFORCEMENT AND CREATING A CULTURE OF COMPLIANCE AT MINES AND OTHER DANGEROUS WORKPLACES

APRIL 27, 2010

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C O N T E N T S

STATEMENTS

TUESDAY, APRIL 27, 2010

ADDITIONAL MATERIAL

PUTTING SAFETY FIRST: STRENGTHENING ENFORCEMENT AND CREATING A CULTURE OF COMPLIANCE AT MINES AND OTHER DANGEROUS WORKPLACES

TUESDAY, APRIL 27, 2010

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:07 p.m. in Room SD–430, Dirksen Senate Office Building, Hon. Tom Harkin, Chairman of the committee, presiding.

Present: Senators Harkin, Murray, Brown, Casey, Franken, Bennet, Enzi, and Isakson.

Also Present: Senator Rockefeller.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

The topic of today's hearing couldn't be more timely or more important, in the wake of the West Virginia coal mining disaster that killed 29 miners; the refinery explosion in Anacortes, WA, where seven workers died; the disaster that killed six people at a Connecticut natural gas power plant; and, just last week, a blast, on the Louisiana oil rig, off the Gulf of Mexico, that most likely killed 11 workers. It is time to focus renewed attention on the safety of our fellow workers. This string of recent worker deaths and injuries is a grim reminder that too many employers cut corners on safety, too many workers pay the price with their lives.

As the son of a coal miner, I feel these losses very deeply and on a very personal level. My thoughts and prayers are with the families and coworkers of those killed, those injured or missing because of these awful tragedies. While there is very little comfort we can offer during this difficult time, we can promise that their loved ones will not have died in vain. We will learn from these tragedies so that no one has to go to work in fear that they won't come home at the end of the shift.

Certainly, the history of the American workplace suggests that, when we focus our efforts, we can do great things to improve safety and health. Since the passage of the Coal Mine Health and Safety Act and the Occupational Safety and Health Act, four decades ago, countless lives have been saved, and the number of workplace accidents has been dramatically reduced. But, we still have a long way to go. Every year, tens of thousands of American workers are killed

or permanently disabled by workplace injuries and occupational disease.

In 2008, the latest available data, 5,214 workers were killed by traumatic injuries. An estimated 50,000 to 60,000 died from occupational diseases. Too many workers remain in harm's way, and it's long past time to strengthen the critical laws that help keep Americans safe on the job.

One area in our health and safety laws that needs particular attention is enforcement. While the vast majority of employers are responsible and do all they can to protect their workers, there is, unfortunately, a population of employers that prioritize profits over safety and knowingly and repeatedly violate the law.

The deadly blast at the Upper Big Branch Coal Mine, earlier this month, was a tragic example of the dangers of this approach. This facility had a record of numerous and serious safety violations, including 515 violations, last year alone—515, last year alone. That's 76 percent more than the national average. So far this year, it has already accumulated 124 additional violations. Even more troubling, 48, 48 of these accrued citations were repeated, quote, "significant and substantial violations of safety standards that the mine operator knew, or at least should have known, presented a serious threat to worker safety."

The problem of repeat offenders is certainly not limited to the world of mining. Flagrant abuse of the law is common in many of our most dangerous industries. Unfortunately, the penalties for breaking the law are often so minimal that employers can dismiss them as just a minor cost of doing business.

Currently, serious violations, where there is a substantial probability of death or serious physical harm, are subject to a maximum civil penalty of $7,000 under OSHA. For comparison, that's $18,000 less than the maximum fine for a class-1 civil environmental violation under the Clean Air Act.

Criminal penalties under OSHA are also weak. If a worker dies because of the willful act of his or her employer, that employer faces a maximum conviction for a misdemeanor and up to 6 months in jail. In contrast, that same employer willfully violating the Clean Water Act could be fined up to $250,000 and spend up to 15 years in prison. In other words—this is my point—our laws do more to protect the environment than it does to protect our workers.

In addition to putting real teeth in our safety and health laws, we have to make sure that our Federal agencies have the enforcement tools they need to identify mines and nonmine workplaces with the worst safety records, and hold these repeat offenders accountable. We have provisions in our laws that are supposed to target repeat offenders, but they're either rendered ineffective, through mistaken interpretation, or undermined by employers who will go to great lengths to game the system.

There's no question that a mine, like the Upper Big Branch, should have been receiving special scrutiny under the Pattern of Violation provisions of our mine safety laws. This is an operator that, even in the wake of the worst mining disaster in recent history, continues to use such unsafe practices that, just today, MSHA ordered the withdrawal of miners from three different Massey Mines, due to hazardous conditions.

As bad as UBB's record was, the law has been interpreted to allow them to continue operating without Pattern of Violation treatment, as long as they can reduce their violations by more than one-third in response to a written warning. With a record as spotty as UBB's, a partial reduction in their numerous citations is hardly a sign of a safe mine, and should not be a "get-out-of-jail-free card" to escape the intent of the law.

It's not just historically weak interpretations of the law that are to blame; employers also find creative ways to ensure that the system cannot work as Congress intended. In the mining industry, for example, some chronic violators have avoided being placed on Pattern of Violation status, and avoided paying legitimate penalties, by contesting nearly every citation that is assessed against them. Because MSHA uses only final orders to establish a pattern of violations, and the average contested citation takes over a year to adjudicate, since there are now 16,000 cases backlogged at the Federal Mine Safety and Health Review Commission, repeat offenders are able to evade Pattern of Violation status by contesting large numbers of violations.

At the Upper Big Branch Coal Mine, for example, Massey contested 97 percent of its Significant and Substantial violations, in 2007. A similar problem is seen in nonmine workplaces. While the backlog of cases is not nearly as great at the Occupational Safety and Health Review Commission, under OSHA's weaker law, the employers don't even have to fix a known hazard until the entire review process is completed, years later. I think this is unacceptable, and it's got to change.

So, we sit here today, on the eve of Workers Memorial Day—that's tomorrow April 28—a day that is set aside to remember the thousands of men and women who die on the job in our country every year. The best way we can honor their memory is to renew our efforts to protect workers' lives and improve safety and health in our country's coal mines and other dangerous workplaces.

With that, I would yield to my friend Senator Isakson.

Senator ISAKSON. Well, thank you, Chairman Harkin.

First of all, I'd ask unanimous consent that the full statement of Senator Enzi, the ranking member of the committee, be placed in the record.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. A little over 3 years ago, just after Christmas, I got in an airplane with Senator Ted Kennedy, Senator Jay Rockefeller, and Senator Mike Enzi, and traveled to the Sago Mine disaster in West Virginia. I got to see, firsthand, the tragedy of the deaths of miners in an accident; got to meet, firsthand, with the families of those West Virginians that had lost their loved ones; still have the picture of Junior Hemmer that was given to me by his daughter. I attended the signing at the old executive office building, of the MINER Act, which Senator Rockefeller and myself, Senator Enzi and Senator Kennedy were proud to be a part of.

I take this hearing probably more seriously than I take just about any hearing, because when you look in the face of someone who has lost a loved one to a tragedy, no matter what that tragedy is, you really understand the full impact of the loss of a human life.

None of us on this committee want to do anything other than to ensure the laws that we have work in the interest of the safety of miners, and make sure that we approach these with very serious and studied opinions.

In particular, I was very pleased, at that time, to work in a deliberate way to make sure we found out the determination of the cause before we ran off halfcocked, thinking, by adding a fine or adding a statute, we'd improve the situation.

I think I'm correct, Mr. Main—and you can correct me if I'm wrong—but on the day of the explosion that we're talking about today, there were MSHA inspectors in the mine—they were just in another part of the mine—which shows you that, even on the day of the problem, if the inspectors that are there to prevent the problem were there, then there must be something either they need to do or we need to do.

However, I want to point out, Senator Rockefeller—and I'm referring to him, because he's sitting here and he can correct me if I'm wrong—went to extensive effort, in the MINER Act, to try and target those things we knew we could do to, hopefully, meet what every person's goal in this committee is, and that is, ensure this never happens again. But, it's happened again. And that's a wake-up call for all of us, everybody at MSHA, everybody at OSHA, and everybody in the U.S. Senate and the Congress, to act on.

We should recognize, too, that enforcement of existing law is as important as creating a new law that you think's going to get at the problem if you're not using the existing law. For example, I want to read a few things that MSHA has the authority to do now:

> "MSHA may, under section 104(b), order an immediate withdrawal of any mine, from any part of the mine, or from the entire mine when a hazard that cannot be immediately abated is endangering miners."

Now, I'm not about to say that the inspectors there that day didn't know there was something getting ready to happen, but they obviously didn't or they'd have had the power to close that mine.

> "MSHA can seek a temporary or permanent injunctive relief to close a mine, or take any other appropriate action, whenever it finds a mine operator engaged in behavior that constitutes a continuing hazard to miners, under Section 818(a) of the MINER Act. If MSHA determines that there is a consistent pattern of significant and substantial violations, they may issue a Pattern of Violation letter, under 104(e), for which violations found after issuance of a letter, MSHA will issue an order withdrawing miners from the affected area."

And,

> "MSHA may, under the MINER Act, find flagrant violations, whereby there has been a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and approximately caused, or reasonably could have been expected to cause death or a serious bodily injury, and that violation can cover a fine up to $225,000."

My point is not to say we've done enough, but it is to say we've given a lot of authority to MSHA already. The enforcement of that

authority and the use of that authority by MSHA is critical if the U.S. Senate, and all of us in it, reach the goal, as was stated at the ceremony the President spoke at the other night, to see to it that this never happens again. We wanted to do that in the MINER Act, we want to do that today, but there—it's all hands on deck. It's everybody we can find that can do anything to help us find the causes, so we can prohibit those causes. It's finding out all the information of who did what when. It's taking the authorities that exist and making sure they were exercised before we blame it on some—or you pass some new authority just to correct something that wasn't used anyway.

Whatever the case, the wives and loved ones of the 29 miners of West Virginia lost in the most recent incident are at the top of our mind and at the bottom of our hearts.

I look forward to working with the Chairman, Senator Rockefeller, and Senator Byrd. I think Congressman Rahall deserves a tremendous amount of credit for his—I saw more of him on television, and he was there at the right hand of the families, the inspectors, and the government officials, seeing to it that everything that could be done was done. I commend him for doing that; and Senator Rockefeller and Senator Byrd, for their untiring support of efforts to improve mine safety, which is so critical to the families, but it's critical to the great State of West Virginia.

With that, I yield back my time.

[The prepared statement of Senator Isakson follows:]

PREPARED STATEMENT OF SENATOR ISAKSON

I am pleased to welcome Mr. Joseph Main and all of our witnesses to today's hearing.

It has now been 3 years since Senators Kennedy, Enzi and I joined Senator Rockefeller on a visit to Upshur County, West Virginia to meet with the devoted families of the miners who perished in the Sago Mine tragedy. It was, to say the very least, one of the most moving experiences of my life.

Sadly, we find ourselves here again, this time after the tragedy at Upper Big Branch mine.

After Sago, many of us in this room delved into the safety challenges and how the industry and the Federal and State regulators were meeting them. We consulted professional safety experts inside and outside the mining community—including academicians and technology experts. The result was the MINER Act that Congress passed in the summer of 2006.

At the same time as Congress was responding to these tragedies, so was the entire mining industry. Complacency about safety was no longer acceptable for 21st century mining. Employees, employers, and MSHA staff set out to put the industry on course to drive mine accidents down to zero.

After Sago, more attention was focus on areas of the mine where incidents were more likely to occur. Mines better managed risk by designing programs specifically designed to raise awareness of safety underground. Almost a billion dollars has been invested in communications technologies, increased oxygen supplies for underground survival, and enhanced rescue capabilities.

Despite these efforts, we lost another 29 brave miners at Upper Big Branch earlier this month. I will continue to pray for the families as we seek answers to their questions.

One we have heard asked is whether this mine was known to be operating in an unsafe manner and, if so, why MSHA allowed that? There is no doubt that MSHA has extensive legal authority under current law to stop unsafe mining when it finds it.

MSHA may, under section 104(b), order an immediate withdrawal of miners from any part of the mine or the entirety of the mine when a hazard that cannot be immediately abated is endangering miners. This includes closure of the area, equipment, or practice that is alleged to be in violation of the standards.

MSHA may seek temporary or permanent injunctive relief to close a mine or take any other appropriate action whenever it finds a mine operator engaged in behavior that constitutes a continuing hazard to miners, under Section 818(a).

If MSHA deems a mine operator's conduct to be reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care, the agency may, under Section 104(d), issue an unwarrantable failure citation. Such violations carry a maximum civil penalty of $70,000.

If MSHA determines that there is a consistent pattern of significant and substantial violations, they may issue a pattern of violations letter under Section 104(e). For each significant violation found after issuance of the letter, MSHA will issue an order withdrawing miners from the affected area.

MSHA may, under the MINER Act, find "flagrant" violations, whereby there has been a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Such violations carry a maximum civil penalty of $220,000.

Under the 1977 Mine Act, MSHA can bring criminal charge against agents, officers and directors who knowingly authorize order or carry out violations of mandatory standards. Similarly, MSHA may impose criminal penalties on any person who knowingly falsifies a record or document required to be maintained.

I know some are now asking that we increase MSHA's authority. Before we even consider such an action, I think we first have to determine why MSHA did not use all the authority it already has with regard to Upper Big Branch. Despite issuing over 60 orders to withdraw miners during the last 18 months, MSHA did not seek injunctive relief, did not find a pattern of violations, took no action to eliminate what it now calls a "loophole" in its own pattern violation rules, and did not even seek to classify any of the multiple violations that it cited as "flagrant."

In closing, every time we discuss mine safety, I cannot help but remember George "Junior" Hamner. Junior Hamner died in the disaster at Sago Mine. His loving daughter gave me a picture of him and asked that in my capacity as the Ranking Member of the Employment and Workplace Safety Subcommittee, I would work to see that future generations of miners would not suffer as her father did. I promised her I would.

It is in light of that promise that I will continue working with the industry, the Obama administration, and my colleagues on both sides of the aisle to ensure that American mining is unquestionably the safest mining in the world.

The CHAIRMAN. Thank you very much.

I ask the indulgence of the committee, since this tragedy took place in Senator Rockefeller's State, I've asked Senator Rockefeller to join us here. And I'd like to recognize him for a brief statement.

Senator Rockefeller.

STATEMENT OF SENATOR ROCKEFELLER

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I enormously appreciate the attitude of yourself and your colleagues in allowing me to be here, as indeed you did after the Sago Mine disaster, and we wrote legislation.

Congressman Rahall being in the audience is important.

I just wish that everybody, other than those who were there, who are watching in the audience and in the other overflow room, could have been at the ceremony—the Miners Memorial on Sunday, which was one of the most powerful and gripping experiences that I've ever had.

Workplace safety is important in all industries, but it's absolutely critical in those industries where the risks of injury are great, and the consequences of poor safety are severe. Sadly, we've been there before, after the tragedy of Sago and Aracoma. I had the honor, as I indicated, of joining this committee then. I would like to be made a permanent member, but I'm not going to push the envelope.

[Laughter.]

It meant a lot to the families, there at Sago, that Senators Kennedy and I'll just say, in particular, Senator Isakson and Senator Enzi were there, because they had not been to West Virginia before; they had not been to a mine disaster before; and they moved in with those families and talked with them. For quite a long period they were a part and parcel, and then became a part and parcel of the legislation that we passed. It would not have passed if it had not been for Senator Isakson and Senator Enzi, and their perseverance. It was as if they had became West Virginians.

We vowed to improve safety in the mines, and we passed the MINERs Act, which we thought was pretty good. We were reacting to what we had seen at Aracoma, not at Aracoma, at Sago. It was a good piece of legislation that did improve safety, particularly with respect to response teams and—actually, the only piece of Federal legislation in the previous 30 years, which says something, probably not very good. Frankly, that legislation was not enough.

First and foremost, safety is about a company doing the right thing to develop a true culture of safety. Easily said, hard to do, something that I'll want to be talking with Mr. Main about.

We need to find out what is working in safe mines, where people are doing the same thing. They may be larger, they may be smaller. Because these are doing the right thing every day, and we cannot forget about what it is about them that allows them to do the same act of mining, in the same danger, but to do it safely. What do they do that others don't?

On the other hand, we need to know what is not working, likewise, in more dangerous mines. Why do injuries and deaths occur there, whereas they don't in mines that are watched over more carefully? Because the mine operators who show no regard for safety should not be allowed to gain competitive advantage, because some are being very careful and very specific in the way they try to do safety in the right ways, and others aren't. The sad fact is, in the coal fields, which are remote, far distant—in this case, Senator Isakson, even more distant than Sago. I mean, way, way back in the hills of southern West Virginia.

Safety is also about State and Federal Government stepping in; I think, toughening up our laws, where appropriate. I don't disagree with what you said, Senator Isakson, but I think there is room for improvement. We sort of react to the latest mine disaster. Is that a good way to do safety legislation? I don't think it probably is, but it's a heck of a motivator, and it makes us do things that we might not otherwise have done. So, we need to grab the spirit of this moment, the sadness of this moment, and do our duty.

We will learn a lot from MSHA's investigation into this tragedy. That investigation will take 6, 8, 10 months. I'm not sure legislation can wait for that. In point of fact, I'm quite sure it can't. So, therein also lies an immediate problem. I don't think it's necessarily going to be a problem, because I think many of our problems in our system are already quite clear. I would just name four, Mr. Chairman, and then I'll be finished, for the moment.

First, we know that MSHA can issue immediate withdrawal orders for imminent dangerous violations, but we need to find out if MSHA is doing all it can do to find them, and if it is using its authority to the fullest extent.

Second, currently the Mine Safety and Health Review Commission has a backlog of more than 16,000 cases, consisting of 82,000 violations. That's an awful lot of violations and appeals and all kinds of other things. I think that has to change. I'm certain that has to change. We must help do that, either by self-reforming of MSHA, or, more likely, doing it in legislation so that MSHA really has no choice but to do it; and then budget help has to follow that.

We need to put an end to the loopholes in the law that allow some mines to put profit over safety. We all know what that is. It's the using of the appeal process, because that way, they can go ahead and mine; and, since they're appealing, they don't have to pay a fine, they can go ahead and do what they're doing. That doesn't seem right at all.

Third, we also need to improve MSHA's enforcement efforts, themselves, and determine what new authorities, as an agency, that MSHA may need. MSHA must not be shy about this. It is a culture unto itself. It's a culture which is a different one now, I think, than the last time we did legislation. I'm talking about such things as subpoena power or, a little bit more farfetched but not at all out of the ring, enhanced criminal penalties.

And fourth, there's also more work to do to protect whistle blowers. I believe in whistle blowers. I don't believe in irresponsible whistle blowers, who've just had a really bad week with their wife, and they're just furious and want to cause trouble. There's nothing in me that says that we can't find a way to separate those out and

to take, not just the 1-800-number phone calls, which are more removed, but make the whistleblower system work.

Mr. Chairman, I thank you for letting me come here. I look forward to this.

PREPARED STATEMENT OF SENATOR ROCKEFELLER

I want to thank Chairman Harkin, Ranking Member Enzi and all my colleagues on the committee for allowing me to participate in this timely hearing the day before Workers Memorial Day.

Workplace safety is important in all industries—but it is absolutely critical in those industries where the risks of injury are great and the consequences of poor safety are severe.

Sadly, we have been here before—after the tragedies of Sago and Aracoma. I had the honor of joining the committee then. And it meant a lot to the families of the miners lost in those tragedies when several members of this committee—Senators Enzi, Kennedy, and Isakson—came to West Virginia at the time to see the essence of my State up close.

Following those tragic events, we vowed to improve safety in the mines, and we came together to pass the bipartisan MINER Act—a good piece of legislation that did improve safety and rescue response—the most significant Federal mine safety legislation since 1977.

But it is clear that we must do more. We must honor the sacrifice of the 29 brave miners killed at the Upper Big Branch mine by learning from this terrible tragedy and making mining safer.

First and foremost, safety is about a company doing the right thing to develop a true culture of safety. We need to find out what is working in safe mines, because there are companies doing the right thing every day and we cannot forget that.

And we need to know what is not working in dangerous mines. The mine operators who show no regard for safety should not be allowed to gain a competitive advantage by risking the lives of their employees.

Safety is also about State and Federal Governments stepping in and toughening up our laws—and providing the resources and the people to enforce those laws. We will learn a lot from the Mine Safety and Health Administration's investigation into the tragedy, but many problems in our system are already quite clear.

First, we know that MSHA can issue immediate withdrawal orders for imminently dangerous violations. But we need to find out if MSHA is doing all it can to find them and if it is using its authority to the fullest extent.

Second, the Federal Mine Safety and Health Review Commission currently has a backlog of more than 16,000 cases consisting of 82,000 violations. That must change. We must reduce the appeals backlog as soon as possible and put an end to the loopholes in the law that allow some mines to put profits over safety.

Third, we need to improve MSHA's enforcement efforts and determine what new authorities the agency may need, such as subpoena power or enhanced criminal penalties.

And fourth, there is more work to do to protect whistleblowers. No one should fear losing their job because they are trying to make the workplace safer.

We are all committed. The President is committed. So, let's get down to business. Mr. Chairman, thank you for having me here. I am grateful and I look forward to working with you on this important issue going forward.

The CHAIRMAN. Thank you very much, Senator Rockefeller. Again, my personal thanks to you for your great leadership in so many areas, but in this area, in which I also care so much about, along with you and Senator Isakson and others.

It's been mentioned that Congressman Nick Rahall is here in the audience, who represents the Third District of West Virginia, for 34 years. Born and raised there. That's where the Upper Big Branch disaster occurred. I served in the House for several years with Mr. Rahall, as did you, right, Senator Isakson?

Again, you're welcome here, Congressman Rahall. If you'd like to join us up on the podium, however you feel. Welcome. Thank you, Nick.

Well, let me just say to everyone, their statements will be made a part of the record in their entirety. I'm going to ask each of our witnesses if they could sum up in about 5 minutes or so. We have, if I'm not mistaken, four different panels.

We'll start, first, with Mr. Joe Main, who is Assistant Secretary of Labor for Mine Safety and Health, for the U.S. Department of Labor.

Again, your statement will be made a part of the record in its entirety.

Mr. Main, if you could sum up in 5 minutes or so, I'd sure appreciate it.

STATEMENT OF JOSEPH A. MAIN, ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH, WASHINGTON, DC

Mr. MAIN. Thank you, Mr. Chairman.

Chairman Harkin, Ranking Member Enzi, members of the committee, thank you for inviting us here today. I do wish it was under far different circumstances.

I do want to pass on some words of appreciation to Senator Rockefeller, Congressman Rahall, the staff of Senator Byrd and others who spent a lot of time with us at the Upper Big Branch Mine during some pretty difficult days, a couple weeks ago, and shared with us the difficulties that is faced when you have a mine emergency like this. I mean, several times a day we'd have to call the families together to give them bad news or just news—of hope—that is never good news. That takes a toll on a family that, unless you're there living through that, one can never appreciate and understand. I think that's what drives me, in the job that I have, to end that kind of grief in the coal fields of this country. I do appreciate all the support and help that we had from folks here, during those difficult days.

Let me express my deepest condolences, too, to the families and friends and coworkers of the 29 miners who perished in the Upper Big Branch Mine, and offer my wishes for a speedy recovery to the surviving miner, who remains under medical care.

We're also very thankful that the other injured miner has been released from the hospital. Our prayers are with them all.

As the President said, "We owe them more than prayers. We owe them action. We owe them accountability." That ought to be—they ought to know that, behind them, there's a company that's doing what it takes to protect them, and a government that is looking out for their safety.

I want to remind the committee that we do not just face a safety crisis in this country, just on the mining side; it's one of workplace safety. Fourteen workers lose their lives every day in this country by just doing their jobs.

Fatalities in coal mines are preventable. Explosions in coal mines are preventable. The tragedy at Upper Big Branch Mine did not have to happen.

On April 5, 2010, at 3:02 p.m., an explosion occurred at the Upper Big Branch Mine, and it took the lives of 29 miners. Initial reports indicate that the explosion was massive.

From 2007 to today, MSHA has steadily increased its enforcement presence at the Upper Big Branch Mine. In 2007, MSHA inspectors were onsite at the Upper Big Branch Mine a total of 934 hours. That increased to 1,854 hours in 2009, double the amount of time over those 2 years. During those inspections, MSHA found and issued an increasing number of violations, citations, and orders; including significant and substantial violations.

In December 2007, MSHA informed the mine that it could be placed into Pattern of Violation status; however, the mine operator was able to avoid the status by reducing its level of serious violations. The mine again had a significant spike in safety violations in 2009, where MSHA issued 515 violations—citations and orders. In 2009, MSHA issued 48 withdrawal orders for repeated violations, and that was 19 times the national rate.

Just as troubling, three other massive mines had more citations. The Department of Labor is in litigation to establish that one of these, the Knox Creek, Tiller No. 1 mine, is a pattern violator. If MSHA prevails, Knox Creek will be the first mine placed on a Pattern of Violations status since the passage of the 1977 MINE Act.

In the wake of this tragedy we know that weaknesses, even in our strongest tools, are clear. Most important, changes are needed. Changes are needed for mine operators to take more responsibility for the high number of violations being cited at mines across the country, increasing mine operator inspection requirements, and reforming the Pattern of Violations program.

MSHA's Pattern of Violation program should be our most effective tool for holding bad actors accountable, but the policies, that this Administration inherited, make it easy for operators, like Massey, to avoid the Pattern of Violation status. Massey used a popular tactic to avoid Pattern—or potential Pattern of Violation status; contesting violations blocked MSHA from using the violations to put the mine in a potential Pattern of Violation status for over 500 days. When you figure this is a 2-year history that's used under the process, another 500 days, you're looking at 3 years to get to a start of the problem.

The current system also allows operators to avoid Pattern of Violation status by reducing its S&S violations by more than 30 percent in 90 days, which is the formula that's used. The Upper Big Branch Mine did this in 2007 and avoided the pattern status.

In terms of reform, there are steps that we are taking. Our regulatory agenda focused on regulations that require companies to take responsibility to find and fix problems before they're discovered. What we call the "plan, prevent, protect" system. Secretary Solis is committed to changing the "catch-me-if-you-can" approach everywhere it exists. Some of those regulations that we'll be talking about was announced in the Federal Register yesterday.

We are soliciting information on the use of comprehensive safety management programs, and plan to propose a rule to re-institute the preshift examinations for violations of mandatory safety and health standards, that was removed about 1992, which is currently contained from the 1969 Coal Mine Health and Safety Act.

New regulations to simplify the Pattern of Violations criteria are also planned. In addition, we're considering greater use of other tools to stop scofflaw mine operators sooner, such as the MINE Act's existing provision to seek permanent or temporary injunctive relief, which has been talked about today.

We need budgetary, regulatory, and legislative action to solve the backlog problem. While the backlog at the Federal Mine Safety and Health Review Commission adversely impacts the use of MSHA's current Pattern of Violation process, more fundamentally it has severely reduced the deterrent value of its penalties. There are more than 16,000 cases pending before the Commission. We should build on the Administration's proposed 27-percent increase in the Commission's budget, to provide sufficient personnel to quickly resolve disputes.

In testimony before the U.S. House of Representatives on February 23, I outlined specific measures to address the backlog problem. They included simplifying the citation/penalty determination process; improving the conferencing system; corporate-wide holistic settlements; and operator implementation of meaningful health and safety programs.

MSHA and Federal prosecutors also need more tools to investigate and punish wrongdoing. Unlike other agencies that enforce Federal law, MSHA lacks the authority to subpoena testimony and documents as part of its investigative process. MSHA's criminal penalties must be enhanced so that the threat of jail is real for the worst offenders. Knowing violations of key standard laws—of key safety laws should be felonies and not misdemeanors.

Most importantly, we must empower the miners. Miners must be able to raise valid safety concerns without fear of retaliation.

We look forward to working with the committee on strengthening whistleblower protections for miners. Due to limits of MSHA's current authority, I think it is necessary to examine the current statutes, regulations, and policies, and ask, "What more can we do to ensure the health and safety of America's miners?"

There are miners—mine operators every day that run safe operations and safe mines. Miners go to work and come back every day unharmed, free of illness, free of death. That is the standard we need to put in place across this country. Miners and other workers have the right to come home safely after every shift.

I look forward to continue to work with this committee and would be happy to answer any questions that you have.

I thank you again, Mr. Chairman, for calling this important hearing.

Thank you.

[The prepared statement of Mr. Main follows:]

PREPARED STATEMENT OF JOSEPH A. MAIN

Chairman Harkin, Ranking Member Enzi, members of the committee, I want to thank you for inviting us here today. I wish I were here under different circumstances.

Let me first express my deepest condolences to the families, friends and co-workers of the 29 miners who perished in the Upper Big Branch Mine on April 5, 2010, and offer my wishes for a speedy recovery to the surviving miner who remains under medical care. Our prayers are with all of them.

As the President said,

> "We owe them more than prayers. We owe them action. We owe them accountability. We owe them an assurance that when they go to work every day, when they enter that dark mine, they are not alone. They ought to know that behind them there is a company that's doing what it takes to protect them, and a government that is looking out for their safety."

Every worker has a right to a safe and healthy workplace. Every worker has a right to go home at the end of his or her shift and to do so without a workplace injury or illness. Workplace fatalities—even in an industry like underground coal mining—are preventable. No one should die for a paycheck.

I also want to remind the committee that we do not just face a mine safety crisis in this country; we face a workplace safety crisis. Fourteen workers lose their lives every day in this country, just doing their jobs. Dr. David Michaels, Assistant Secretary of Labor for the Occupational Safety and Health Administration, will be testifying later this afternoon and will describe important measures that need to be taken to ensure the safety of all American workers.

Throughout the media coverage of the Upper Big Branch tragedy, many commentators have implied that we should expect and accept a certain number of fatalities every year in coal mining. The Department of Labor and the Mine Safety and Health Administration (MSHA) could not disagree more strongly. Fatalities in coal mines are preventable. Explosions in coal mines are preventable. The tragedy at the Upper Big Branch mine did not have to happen. That is why I am so grateful to be here with you to discuss how we can make President Obama's promise a reality.

EVENTS AT THE UPPER BIG BRANCH MINE

First, I would like to share with you a short summary of what happened on April 5, 2010 at Performance Coal Company's Upper Big Branch Mine-South (UBB) in Montcoal, WV. The mine operator of UBB is Massey Energy Company.

We know there was a catastrophic explosion that triggered carbon monoxide alarms at the mine at 3:02 p.m., indicating this was the likely time of the explosion that killed 29 miners and put two survivors in the hospital. Initial reports indicate that the explosion was massive.

The accident investigation team will evaluate all aspects of this accident and identify the cause of the disaster. Based upon initial reports from the mine rescue teams, the most extensive damage appears to have occurred in and near active working sections of the mine. The rescue teams reported mining equipment severely damaged in these areas. Every miner working in this area was believed to have been killed instantly.

While the cause of this specific explosion is still being determined, most mine explosions are caused by the combustion of accumulations of methane, which may combine with combustible coal dust mixed with air. Historically, blasts of this magnitude have involved propagation from coal dust.

The explosion at the Upper Big Branch Mine occurred at or around the time of a shift change. It killed miners in and around two working sections of the mine. It also killed and injured miners who we believe were traveling from the working sections at the end of their shift.

At approximately 3:27 p.m., MSHA records indicate the company alerted MSHA and the West Virginia Department of Miners' Health, Safety and Training of the explosion. Immediately, over 20 mine emergency rescue teams from Massey, other coal companies in the region, the State, and MSHA responded to the disaster, with the first rescue teams going underground at approximately 5:30 p.m. Due to the ex-

tensive damage from the explosion, the rescue teams reportedly had to proceed more than a mile on foot to reach the working section.

Within 10 hours of the explosion, rescue teams had found 18 victims in the Upper Big Branch Mine, in addition to the seven dead and two injured miners evacuated by fellow miners immediately following the explosion. Rescue efforts continued in the early morning hours of April 6, but were suspended when rescuers reported encountering heavy smoke, methane, and carbon monoxide. Rescuers started drilling bore holes to clear the air inside the mine before the rescue teams re-entered the mine.

Mine rescue teams made additional efforts to enter the mine early in the morning of Wednesday, April 7, the night of Thursday, April 8, and early in the morning of Friday, April 9. Each time they were forced to exit before the final four miners were found. Finally, on the evening of April 9, the final four miners were found—three in the long-wall 22 section, and one in the long-wall headgate area. A total of 29 miners died as a result of the explosion, and one remains hospitalized. From the time of the explosion until the last missing miner was located, the rescue effort lasted 104 hours.

These tragic events followed a years-long effort by MSHA to use the tools we had available to force Massey Energy to comply with the law and turn around its extensive record of serious safety and health violations at the Upper Big Branch Mine. From 2007 until today, MSHA has steadily increased its enforcement presence at Upper Big Branch Mine. In 2007, MSHA inspectors were onsite at Upper Big Branch mine a total of 934 hours. In 2009, inspectors were onsite at the mine for a total of 1,854 hours.

During all those hours of inspections, MSHA found and issued an increasing number of citations for "significant and substantial" ("S&S") violations of the Mine Act, including an alarming number of citations and orders requiring miners to be withdrawn from the mine. In December 2007, MSHA informed the mine it could be placed into "pattern of violations" status if it did not take steps to reduce its significant and substantial violations. If implemented, pattern of violations status would have given MSHA a powerful enforcement tool, enabling the agency to order the withdrawal of miners from any area with S&S violations until such violations were fixed. However, the mine operator was able to successfully avert these consequences by reducing the levels of serious violations thereby avoiding being classified in a "pattern of violations" status.

Upper Big Branch mine again experienced a significant spike in safety violations in 2009. MSHA issued 515 citations and orders at the mine in 2009 and another 124 to date in 2010. MSHA issued fines for these violations of nearly $1.1 million; though, most of those fines are being contested by Massey.

The citations MSHA has issued at Upper Big Branch have not only been more numerous than average, they have also been more serious. Over 39 percent of citations issued at Upper Big Branch in 2009 were for S&S violations. In some prior years, the S&S rate at Upper Big Branch has been 10–12 percent higher than the national average.

In what is perhaps the most troubling statistic, in 2009, MSHA issued 48 withdrawal orders at the Upper Big Branch Mine for repeated actions that could significantly and substantially contribute to a hazard that the operator knew or should have known violated safety and health rules. Massey failed to address these violations over and over again until a Federal mine inspector ordered it done. The mine's rate for these kinds of violations is nearly 19 times the national rate.

Despite the 515 citations and orders issued at Upper Big Branch in 2009, three other Massey mines had more citations. The Department of Labor is in litigation to establish that one of these, the Tiller #1 Mine operated by Massey's Knox Creek Coal Corporation, is a pattern violator. If MSHA prevails in the litigation, Knox Creek will be the first mine to be placed on pattern of violations status since the passage of the Mine Act.

MSHA'S CURRENT TOOLS FOR HOLDING MINE OPERATORS ACCOUNTABLE

Following my confirmation as Assistant Secretary of Labor for Mine Safety and Health, I began evaluating MSHA's enforcement program to identify areas in need of improvement. Among those identified was the need for mine operators to take more responsibility for the high number of violations being cited at mines across the country, increasing mine operator inspection requirements and reforming the "pattern of violations" program.

In the days since the Upper Big Branch mine explosion, we have spent a considerable amount of time at MSHA reviewing the tools available to MSHA to enforce the

law, the weaknesses in those tools, and how we think those tools should be changed. I would like to start by describing the tools we have available.

Federal law places the responsibility for compliance with safety and health standards on mine operators. MSHA is charged with the promulgation and enforcement of those standards. Under the Mine Act, MSHA inspects all underground mines at least four times annually and all surface operations at least twice annually. The act requires inspectors to cite all violations they observe. MSHA also investigates all fatal accidents and miner complaints of hazardous conditions or discrimination.

When faced with a mine with a seriously deficient safety record like the Upper Big Branch mine, MSHA has limited tools to hold bad actors accountable and to try to force them to change their behavior. For example, MSHA can withdraw miners from a mine or a section of a mine, if an inspector finds a condition which presents an "imminent danger." The withdrawal order is in effect only until the hazard is abated. Since 2000, MSHA issued five imminent danger orders at the Upper Big Branch mine, with the last one coming in 2009.

MSHA also has the authority to require abatement of all cited violations. If a mine operator fails to abate a violation within the time prescribed by MSHA, MSHA can withdraw miners from the affected portion of the mine until the operator corrects the condition and MSHA ensures that the hazard no longer exists. Since 2000, MSHA issued 17 of these withdrawal orders at the Upper Big Branch mine, including four in 2009 and one in 2010.

MSHA can hold operators who engage in actions that could significantly and substantially contribute to a hazard that they knew or should have known violated safety and health rules to a more rigorous enforcement regime. If MSHA finds repeated violations of this type, known as "unwarrantable failures," it can immediately issue orders withdrawing miners from the affected area of the mine until MSHA determines that the violation is abated. Since 2000, MSHA has issued 17 withdrawal orders under Section 104(d)(1) of the Mine Act based on unwarrantable failures, and 67 withdrawal orders for repeated similar violations under Section 104(d)(2) of the Act at the Upper Big Branch mine.

Finally, MSHA has the authority to place a mine into a "pattern of violations" category based on a number of criteria including the number of serious violations within a 24-month timeframe. If a mine ultimately ends up in a "pattern of violations" status, MSHA can issue withdrawal orders for every serious violation until each violation is fixed. The Upper Big Branch mine was placed into a "potential pattern of violations" category in 2007, but quickly reduced its serious violations by more than 30 percent to avoid ending up in an actual pattern of violations status.

Were it not for a computer error in the screening process, the mine could have been placed into a potential pattern of violations status in October of 2009, when the last pattern of violations review for this mine took place.[1]

Upon notification of being in potential pattern of violations status, the mine then would have been given 90 days to reduce its S&S violations by 30 percent, or to reduce its level of S&S violations to below the industry average for mines of similar type and size. From October through December 2009, the Upper Big Branch Mine dramatically reduced its level of S&S violations by nearly 65 percent. For this reason, even had there been no computer programming error, the mine would not, under MSHA's current rules, have been in a pattern of violations status at the time of the explosion.

WEAKNESSES IN MSHA'S CURRENT TOOLS

When I accepted President Obama's appointment to lead MSHA, I had a number of goals and reforms in mind for the agency. The most important of these goals was to shift the current enforcement model for mine safety and health to one that is consistent with the intent of the Mine Act—a model in which all mine operators take primary responsibility for ensuring compliance with safety and health standards. While tough enforcement is critical to having safer mines, MSHA cannot be in every mine, every day on every shift. That is why miners are safest when employers take responsibility for preventing violations and hazards, not when MSHA cites them.

MSHA's current toolbox of enforcement measures is not well stocked to encourage prevention. While many mine operators and other employers in dangerous industries have a culture of safety, driven by the recognition they are responsible for safeguarding their workers' safety and health, others choose a different approach. They choose to take advantage of the fact that MSHA cannot be looking over their shoulders at every minute of every day to monitor their behavior. They make a calculated

[1] MSHA will be notifying the pattern of violations screening process and revising and confirming the accuracy of the programming and query system used going forward.

decision about how and if they should comply with mine safety and health laws, weighing the likelihood they will be caught against the consequence if they should. This is the "catch-me-if-you-can" approach to safety and health in action.

The "catch-me-if-you-can" model of workplace safety and health appears to have been at work at Upper Big Branch. The company that owns this mine, Massey Energy, has a troubling record when it comes to protecting its workers. In Calendar Year 2009, MSHA assessed nearly 10,985 citations and orders against Massey Energy. Systemic safety problems are not limited to the Upper Big Branch mine, to Massey Energy, or to the mining industry. Indeed, the "catch-me-if-you-can" approach to compliance appears in all types of American workplaces. My colleague, Dr. David Michaels, will shortly testify about how OSHA is dealing with this phenomenon in the non-mining sector.

At MSHA, our "pattern of violations" program should be one of our most serious and effective tools for holding bad actors accountable. MSHA's experience at the Upper Big Branch mine demonstrates the program's limitations under current procedures.

Massey Energy employed a popular tactic at Upper Big Branch used by mines with troubling safety records to avoid potential pattern of violations status. Massey Energy contested large numbers of their significant and substantial citations. In Calendar Year 2009, the Massey Energy Company was assessed penalties that totaled in excess of $13.5 million, and contested $10.5 million of those penalties, or 78 percent. MSHA uses only final orders to establish a pattern of violations. It takes more than 600 days for the average contested citation to reach the "final order" stage from the day the citation is written. The delay is due largely to a more than 16,000 case backlog at the independent Federal Mine Safety and Health Review Commission (FMSHRC).

Even where the violation is obvious, operators have a huge incentive to contest the violation. A contest blocks MSHA from using the violation—even the obvious ones—to put the mine into a potential pattern of violations for an average 500 days after the case has been contested. For operators with troubling safety records, that may amount to 500 days without having to worry about being put into a "pattern of violations" status. In fact, the Upper Big Branch mine contested the majority of its serious violation citations. From 2007 to 2009, the mine contested 77 percent of its S&S violations.

Even when the excessive contest strategy fails and a mine ends up in a "potential pattern of violations" status, it can almost always avoid the ultimate "pattern of violations" label with temporary improvements in safety. The current system allows an operator to avoid going into pattern of violation status if the operator reduces its S&S violations by more than 30 percent within 90 days. Upper Big Branch mine did this in 2007 and avoided pattern of violations status, even though the number of S&S violations remained above the national average. The policies this Administration inherited make it relatively easy for operators like Massey to avoid pattern of violations status. In fact, MSHA has been able to place only one mine into pattern of violations status, and that order was revoked when one of the violations on which it was based was thrown out through the contest process.

As you can see, the current rules and procedures make it far too easy for mines to avoid the one robust tool MSHA has for really cracking down on recalcitrant operators.

IMPROVING MSHA'S TOOLS: AREAS FOR REFORM

The weaknesses in even our strongest tools are clearer in the wake of the Upper Big Branch tragedy. The path we need to be on to strengthen those tools is clearer, too. Undoubtedly, as we learn more about what happened at Upper Big Branch, we will have more and better ideas about how to change our practices, regulations and law. For now, I would like to outline some of the steps we are taking already and those we would like to recommend.

Plan/Prevent/Protect Regulations. Secretary Solis is committed to changing the "catch-me-if-you-can" approach everywhere it exists. That's why our regulatory agenda, which we made public just yesterday, is focused on regulations that will require companies to take responsibility to find and fix problems *before* they are discovered by the Department's worker protection agencies. To achieve this goal, we need a system that encourages employers to engage in planning and control of hazards. This kind of planning, coupled with enforcement, will result in actual protection of workers or what we call the "plan/prevent/protect" system.

At MSHA, we announced that we are moving forward to solicit information on requiring use of a comprehensive health and safety management program. In addition, we will be proposing a rule to re-institute the pre-shift examinations in areas of

mines where miners work or travel for violations of mandatory safety and health standards. The 1969 Coal Mine Health and Safety Act (and the Mine Act) provides that such inspections may be required, and the requirement had been contained in MSHA's regulations until they were changed in 1992. We believe that these measures will help prevent hazardous conditions from ever existing and threatening workers.

Pattern of Violations. We know that even with these new measures in place it is too easy for mine operators to evade responsibility and too hard for the government to hold bad actors accountable. We must find new ways to compel chronic violators to protect the health and safety of their workers. The "pattern of violations" tool was placed in the Mine Act in 1977 to achieve that very goal.

As I noted in my February 23, 2010, testimony before the House Committee on Education and Labor, the current criteria used for determining that an operator has a potential pattern of violations include a mine's history of S&S violations of a particular standard, history of S&S violations related to a particular hazard, and history of S&S violations caused by an unwarrantable failure to comply with health and safety standards.

Under current regulations, MSHA only considers violations that have become final orders of the FMSHRC. Citations and orders that are under contest, no matter how egregious, are not considered in establishing that a mine has a potential pattern of violations. Once a potential pattern is found, an operator has a notice period to reduce the number of S&S violations at its mine. If the operator fails to reduce the number of violations, only then are they placed in pattern of violations status. By the time the current process is over, mine operators are being considered for pattern of violations status based on violations that, in many cases, were written years ago.

We realize the current "pattern of violations" program is broken and must be fixed. That is why in our regulatory agenda we announced that we will be issuing new regulations to simplify the criteria for placing mines into the "pattern of violations" program. We are looking into what other changes in the regulations or statute are necessary to streamline the "pattern of violations" program and make it more effective, including strengthening the conditions for operators being removed from "pattern of violations" status. We will consider what notice period, if any, is appropriate, and how the use of health and safety management programs for operators with these kinds of serious violations can play a role in improving the pattern of violations system. Meanwhile, right now we are in the process of reviewing pending cases of operators with significant numbers of S&S citations in order to expedite appropriate cases.

In addition, we are considering greater use of other authorities for stopping scofflaw mine operators more quickly, such as the existing authority under the Mine Act to seek permanent or temporary injunctive relief. The Mine Act empowers the Secretary to obtain an injunction in Federal court against a mine operator she believes is engaged in a "pattern of violations" of the Mine Act. Though it has been a part of the act for years, we do not believe any Administration has ever attempted to use the provision. Because we do not believe that the Mine Act requires a Federal court to have final orders in hand from FMSHRC in order to issue an injunction against an operator with a pattern of violations, bringing this existing tool into the Department's arsenal will enable it to bypass the backlog of cases awaiting final orders from FMSHRC and permit it to take swift action against mine operators who are chronic lawbreakers.

Injunctive relief obtained directly from a Federal court would combine strong enforcement with immediate safety measures. This relief could be used to require court-ordered, company-funded, full-time monitoring of problem mines, or the implementation of a comprehensive mine or corporate-wide health and safety plans. Most important, it could be used to shut down mines until they can assure compliance with the law. MSHA could take direct action through the courts.

FMSHRC Backlog. While the backlog at FMSHRC adversely impacts the use of MSHA's current "pattern of violations" process, more fundamentally it has severely reduced the deterrent value that penalties were meant to have. There are more than 16,000 cases pending before FMSHRC, including $209 million in contested fines. The average case takes more than 600 days to resolve from the time it is issued. I believe that we need budgetary, regulatory, and legislative action to solve this problem.

The budgetary actions needed would include building on the Administration's proposed 27 percent increase in FMSHRC's budget this year to provide sufficient personnel to quickly resolve disputes.

MSHA's planned regulatory actions include improving the use of effective mine safety and health management programs by all mine operators. The best way to re-

solve the backlog problem looking forward is for mine operators to take full responsibility for compliance with the Mine Act and mandatory health and safety standards issued under it. They must take measures to ensure safer and healthier mines that, under rigorous and complete inspections, receive fewer citations and orders from MSHA because there are fewer violations to cite. This will require operators to more fully inspect their own mines for violations.

Helpful legislative actions could include requiring mine operators to put significant penalty amounts, as well as penalties associated with more serious violations, into escrow or providing for pre-judgment interest. If operators have to put aside penalty amounts during the contest period or know that they will have to pay interest if a penalty is ultimately imposed, they will be less likely to contest cases just for the sake of delay. The current system provides a financial benefit for delaying tactics.

In testimony before the U.S. House of Representatives on February 23, 2010, I outlined specific measures MSHA was considering to address the backlog problem. They included making the citation process more objective and consistent by simplifying the citation and penalty determination process and improving related training, improving the conferencing system, making greater use of the "closeout" inspection meeting after mine inspections, continuing to develop training programs and materials to aid mine operators with compliance, and corporate-wide holistic settlements that require operators to implement meaningful health and safety programs.

Enhanced investigative and law enforcement tools. MSHA and Federal prosecutors need more tools to investigate and punish wrongdoing. Gaps in MSHA's legal tools undermine the deterrent effect of its investigative powers. MSHA should have the authority to issue subpoenas to require companies and individuals to turn over documents promptly when needed. Moreover, MSHA's criminal penalties must be enhanced so that the threat of jail is real for the most egregious violators. "Knowing" violations of key safety laws should be felonies, not misdemeanors.

Empowering miners. No one knows what goes on in a mine, including what safety corners are being cut, better than the miners. They must have a voice in the workplace if we want to know about hazards before they cause death and injury. Empowering miners to protect themselves will give them that voice. Too many miners are afraid of losing their jobs or facing other forms of retaliation for raising valid safety concerns to MSHA.

We believe that additional measures would give miners the courage and confidence to come forward when necessary. For example, the statute should be amended to enhance protections for miners from retaliation when they do come forward. Miners should be assured of pay and should not have to wait months to get it while a withdrawal order is in effect. They should not have to balance the risk to their paycheck with the risk to their lives. We look forward to working with the committee on strengthening whistleblower protections for the Nation's miners.

As the preliminary report Secretary Solis and I provided to the President noted, this is not an exhaustive list. We should build on recent improvements in the transparency of MSHA data, so that before an accident occurs, miners and the public can easily use MSHA reports and data to identify companies that must improve their safety practices.

Other critical steps, for example, could address particular conditions, such as improving control of mine gases, rules to ensure sufficient rock dusting, and improving mine emergency response. We are reviewing the full range of our legal and regulatory authority, as well as possible management reforms, and will continue to do so as we move forward with the investigation to determine how to ensure that another disaster like the explosion at the Upper Big Branch mine does not happen again.

CONCLUSION

At 3:02 p.m. on April 5, 2010, an explosion occurred at the Upper Big Branch mine and took the lives of 29 miners. Any loss of innocent life of this magnitude is a profound tragedy. Making this event even more tragic is the fact that, as history has shown us, mine disasters are preventable.

I had the opportunity to watch the mine rescue teams and MSHA personnel coordinating the response and the search for survivors. I had the honor of meeting with the families of the miners as they waited for news about their loved ones. They showed an unbelievable level of courage and composure even when they knew they were facing difficult odds.

We know the kinds of events that lead to explosions in coal mines, and we know the actions that can be taken to prevent them. There are specific techniques that a mine operator can employ to reduce the levels of combustible materials such as

methane and coal dust. Equally important is an operator's commitment to a culture of safety centered around protecting the health and safety of his or her workers, rather than simply avoiding a citation or a fine.

MSHA has assembled a dedicated team of professional investigators that will look into every aspect of this accident. We will work closely with State officials. During our investigation, we will honor our commitment to transparency and openness, and we will make the results of our investigation fully public at its conclusion. At that time, we will present you, the President, the families, and the American people with a formal report on our findings.

We take every incident that results in injury or loss of life seriously and personally. Due to the limits of the current authority given to MSHA, and the efforts companies like Massey will take to escape enhanced enforcement, we think it is necessary to examine the statutes, regulations and policies on the books and ask ourselves what more we can do to ensure the health and safety of America's miners. These men and women work hard every day to ensure that we have the electricity we need to light our homes, power our industries, and ensure our national security. We owe it to them to do everything we can to make sure that every miner—and every worker—comes home safely at the end of every shift.

I look forward to continuing to work with this committee and would be happy to answer any of your questions.

The CHAIRMAN. Thank you very much, Mr. Main. Thank you for your leadership.

Just one question I have for you. You said that MSHA's taking a look at regulatory changes that will simplify the criteria for placing mines in the Pattern of Violations program. I guess, if you don't want to get into all that now, I'd ask you to submit to us what those regulatory changes are that you can do, that we don't have to address legislatively. If there are things you can do with regulations that relieves us of the burden of doing it legislatively, we'd much rather do that so we can focus on just what we need to do legislatively. If you could maybe submit that to us later on.

Mr. MAIN. I'll be happy to do that.

The CHAIRMAN. A good list of those regulatory changes.

Mr. MAIN. We will do that.

The CHAIRMAN. I'd appreciate that very much.

Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman.

Thank you very much, Mr. Main, for being here to testify on all the work that you and your inspectors do.

Do you know if MSHA has ever sought injunctive relief to close a mine that had been deemed to constitute a continuing hazard to miners?

Mr. MAIN. In terms of the injunctive relief that we're talking about, I think what we're about to pursue is probably going to be the first time in the history of using that under the MINE Act, from what I'm told from our legal department.

Senator ISAKSON. It is true you already have injunctive relief, is that correct?

Mr. MAIN. There is injunctive relief that exists—that talks, in part, about being part of the Pattern of Violations. There is some language that will probably be tested. There is a provision, that we fully intend to test, and there may be a need for Congress to take a look at remedying any shortcomings in that injunctive relief as we move forward.

Senator ISAKSON. To date, you've never used the power that you do have. Is that correct?

Mr. MAIN. That particular power, to my knowledge, in the history of the MINE Act since 1969, I do not believe that's the case. Yes.

Senator ISAKSON. In your printed statement of your remarks, your preprinted testimony, on the third paragraph of page 5, you cite a spike in violations at this mine, and refer to 515 citations that were filed in 2009, and 124 in 2010. To try and figure out what those violations would be, I divided that number into that 1.1 million, which was the amount you said those fines would accumulate to. That's a $1,725 average fine per 624 violations. Then I went to look at the authority that you've got on fines, and under civil penalties at MSHA, you've got up to $50,000 on standard violations, up to $220,000 flagrant violations, up to $5,000 a day on a failure to correct, $250,000 on a criminal willful violation, $500,000 on a repeat willful violation, and then $10,000 or 5 years in prison for making a false statement to authorities.

If I take those numbers of authority and talk about serious violations, it wouldn't take a minute to get to $1.1 million, yet you issued 639 violations during that 15-month period leading up to the explosion. Were most of those 624 violations, like, a rag being found or a miner smoking or something like that? What were those violations?

Mr. MAIN. As far as miners smoking, I'm not aware that any dealt with that. I think the most often cited were ventilation problems, combustible material problems, things of that nature. I think one of the—and having been on this job for about 6 months, and trying to figure out how all these components work, and looking back to how the MINE Act was enforced, and the tools that the agency had to use during the course, particularly, of that spike, and understanding the whole penalty process, one of the things I came to realize is that probably the tool that is most effective, even beyond the dollars, is the ability to shut down a facility to get a problem fixed. I think, when I looked at what the agency did over that period of time, they seemed to ratchet up the use of that tool much more than is normal. As a matter of fact, I think this mine wound up to have the most 104(d)(2) orders of any mine in the United States.

Senator ISAKSON. Those are shut down orders?

Mr. MAIN. Those are shutdown orders.

Senator ISAKSON. How many times was that done?

Mr. MAIN. There were 48 of those that was issued at the Upper Big Branch Mine. And from the statistics that the folks showed me, that was the mine that had the most. It's been my view that over time, the quickest way to get something fixed is to stop it and fix it.

One of the worries I have is that we do need to fix this penalty system. I don't think there's any question about that. This contest process has really, I think, crippled the implementation—MINE Act crippled the—what I think was some great provisions put in, in the new MINER Act. That's the reason that we've looked at some of these quicker enforcement tools, and ones that deal with, sort of, the halting of the process until things get fixed. The two on top of that list, one is this injunctive action, that we're talking

about, that we really need to put in use, and put in use quick, as opposed to later.

Everyplace that I went in the last couple weeks, I was asked a simple question, "Why didn't you shut that mine down?" If you look at the way all those orders or, all those tools are laid out, it's basically designed to find an area of the mine that's out of compliance, force the operator to fix that, and, once it's fixed, to go back into compliance. As far as a tool that's really laid out to deal with a holistic mine problem that encompasses several standards, the only one that you have is the Pattern of Violations, really, that's been used over the last—well, the Pattern, since 1977; and that's the heaviest tool, I think, that's been in the MINE Act since 1969.

We need to do something quick, which—the injunctive relief is your best tool that we've looked at. We need to fix this Pattern problem, where people actually respect it. To have a law that was put into effect after the Scotia disaster in 1977, that I think Congress really thought was going to fix a problem, the application of that law was undercut. We went through 33 years without one single mine ever actually having been placed on the Pattern. That may change if the courts agree with us here with the case that we have going forward.

As we looked at the Pattern—and I was looking at this prior to the Upper Big Branch disaster—this is something that we talked about at the House hearing in February. The Pattern system we saw was broken, in respect to how difficult it was to put mines on that has a troubled compliance history, and how easy it was to get off. Setting there, you can see how it's very easy to game the system on both ends. Contest the violations, let them string out; it'll be years before it ever gets there, and they're going to be so overloaded in the court system that scheduling a hearing's going to be difficult. And still will be, if we don't fix that side of the problem.

On the getting-off side, means that they don't really get put on the Pattern, they are put on notice that they can be on a Pattern, but if they drop their S&S rate for just a short period of time, they can get off. We've had mines, that I saw, in looking to the data, that have been, twice over, identified as Pattern mines.

The Pattern hasn't been used much. I think if you go back in the mid-1990s, for a short period of time, and then, just recently, post-2007, is about the only periods of time that the Pattern was ever utilized as a tool. What we aim to do and—in regard to my testimony in February, and what we aim to do now, is to fix that.

This 24-month history is a problem. This 24-month history held hostage to the contest process is a problem. How we select these mines—from what I've seen I'm not happy with that. We need a better identifier of a formula. The computer error that was found, that's just one of the issues that I think we have to go back and repair to make this system work.

To make it work, I think we have to have a process in place that effectively identifies those mines that has a troubled history. We have to quickly deal with applying the Pattern. We've got to make it tough for them to get off. Tough means that, if you believe that they got there, in the first place, because they didn't have an effective health and safety program, and they weren't inspecting their mine to take care of business, one logical assumption would be—

for them to get off, they would have to have an effective health and safety program that does that. Not just over 90 days for a drop of the S&S violations, but to fix so those miners can have some comfort.

Another issue that we've looked at is this subpoena issue. There was a story that hit today, over three other mines that MSHA made inspections at recently, two of them before the Upper Big Branch disaster and one after the disaster. All three of those was triggered by anonymous complaints. Now, did miners make those complaints? We don't know. There was some specificity that probably some miners were worried; worried enough about it to make a call, but was careful enough not to leave their name behind.

When our inspectors went in those mines, we found illegal conduct that one would not think that we would see in mines today, and conduct that was only found because, when the inspectors got there in two mines, they captured the phone so the mine operators couldn't call underground.

Senator ISAKSON. I hate to cut you off, but the Chairman's about to have a hissy fit over here because we've gone 5 minutes over.

Can I just ask for one clarification that takes two words?

The CHAIRMAN. OK, sure.

Senator ISAKSON. You want to replace "hazard to miners," in the current injunctive relief, with the terminology "Pattern of Practice," is that what I heard you say?

Mr. MAIN. I'm sorry?

Senator ISAKSON. Currently under injunctive relief, you're allowed to do it if you see a persistent hazard to miners. You wanted—and what I was trying to understand out of your testimony, you'd like to expand that or change it to "Pattern of Practice" of the mine operator. Is that correct?

Mr. MAIN. Yes. We want to work with Congress to actually fix that, and talk through what we really need to do to change that language.

Senator ISAKSON. OK. Thank you, sir.

Mr. MAIN. OK.

Senator ISAKSON. Sorry about that.

The CHAIRMAN. No, that's alright, Senator Isakson. Thank you very much.

Senator Byrd wanted to attend. He is unable to attend the hearing. He gave me some questions he wanted to ask. I will submit those, for the record, to you, Mr. Main, without asking them.

[The information referred to may be found in Additional Material.]

We are privileged to have Senator Rockefeller here to join us.

Just in terms of the order, I'd say it's Rockefeller, Senator Brown, Senator Murray, Senator Bennet, and Senator Franken, unless Republicans show up, in which we'll go back and forth.

Senator ROCKEFELLER. Mr. Main, this is 26 pages of violations at the mine that we have just been dealing with. They take place, actually, only since January 1, 2009. We're talking about a relatively short period of time, and all of these violations. Now, I'm constantly—you run into mine ventilation plan, dust control, all kinds of things which are accumulation of combustible materials, all things with are just bespeaking of something about to happen.

My question is—we're sitting here sort of fixed on the Pattern of Violation. Should it be, should it not be? Why isn't it possible for one of your people, a Federal inspector, duly trained, when they come upon such a thing, maybe they make a quick phone call to you, or something of that sort, but that they have the power to shut down that portion of the mine which appears to be affected, and which——

Mr. MAIN. Yes.

Senator ROCKEFELLER. These are all for real. These are all very, very much for real. They carry fines with them, they carry violations with them, they're part of the problem which is squashing MSHA, in terms of working out the appeal process and all the rest of it. I don't want to imply that MSHA's a bureaucracy, but I do want to imply that you have individual folks who are well-trained, who are professional mine inspectors; they see these problems; many of them have worked in the mine, maybe most of them have worked in the mines, so they have to know what it is. It's pretty hard to miss combustible materials when you're looking at it. It's pretty hard to miss ventilation problems when you're feeling it. Why can't they take action? Why is it that we have to go through this enormous thing leading up to a Pattern of Violation, which, in fact, has never been used?

Mr. MAIN. Probably a good way to start this is understanding what the tools are that the inspectors have. I don't disagree with you, Senator Rockefeller. And I think you're going to see a more aggressive use of tools that exist in that MINE Act.

If you look, historically, at what's happened—I'm going to take an easy one, a situation where you have a continuous miner that is not permissible. What that means is that there's some component on that piece of equipment that has a gap where—in the housing that houses the electrical components, of which a spark, a tiny spark, could get through that could ignite an explosion. The cause of Commission decisions—and this is something we have, too, on our decks that we want to talk about some reforms on—the Commission decisions, over the years, have defined those kind of standards to the point that it is very difficult for that inspector to cite—and just starting up the ladder—those kind of conditions as a S&S, or serious violation.

When I looked at the way the standard's applied currently, and found that you almost have to have the explosion occur to find a serious violation in that regard, that tells me we've got a problem with the way that the standards are being interpreted, and the way they're being applied in this country, but it's over years of litigation through the review Commission.

When an inspector goes to the mine, they have full authority to use their tools, whatever they have at their disposal, if they determine a condition as imminent danger, to issue that 107(a) order to have those miners moved from that particular area until the company fixes that specific problem. Let's say its curtain down; once the company puts the curtain back up, the ventilation curtain, they can go back to work.

Senator ROCKEFELLER. Mr. Main.

Mr. MAIN. Yes.

Senator ROCKEFELLER. Ventilation is no mystery; you can feel it. Dust is no mystery; you taste it, you can smell it, and you breathe it in. Why, if that is a condition that one of your inspectors finds, that he cannot simply close things down for a period of time so that that can be fixed?

Mr. MAIN. In the past, I think that there has been a weakness in the enforcement of the law, and that has a lot to do with the way that the law has been interpreted, that—to be honest—I think, going forward, we're going to test that every day, to utilize the tools that's in our possession.

During this recent sweep, as an example, that we kicked off after the Upper Big Branch—and the focus of that was to make sure we didn't have another Upper Big Branch out there in any of the mines—we had six mines that were actually shut down because the tools that was in that tool bag was probably more used than they have been over time. Now, once the companies fix those—like the ventilation problems, clean up the coal dust——

The CHAIRMAN. Mr. Main——

Mr. MAIN. Yes.

The CHAIRMAN [continuing]. I'm going to interrupt you, right here, just a second.

Mr. Isakson just gave me this,

> "MSHA may seek temporary or permanent injunctive relief to close a mine or take any other appropriate action whenever it finds a mine operator engaged in behavior that constitutes a continuing hazard to miners, under Section 818(a)."

You just said you've got dust; we know dust is a hazard. It can be an explosive hazard. I mean, that's not even a question. He asked you a very straight forward question.

Mr. MAIN. That's——

The CHAIRMAN. Why can't you use that? Why has it never been used? Is that what you're telling me?

VOICE. That was his answer to me some time ago.

Mr. MAIN. Yes. It's never been used in the history of the MINE Act, that we know of, Senator. We're in the process——

The CHAIRMAN. Why?

Mr. MAIN. That's a good question.

The CHAIRMAN. Well, who can answer it?

Mr. MAIN. We're going to use——

The CHAIRMAN. If you can't answer it who can answer it?

Mr. MAIN. I can't speak for past Administrations, but I can tell you this. We're going to use it.

The CHAIRMAN. Well I sure hope so.

Mr. MAIN. Yes.

The CHAIRMAN. If nothing else comes out of this hearing, at least you're going to start using that for the future.

Mr. MAIN. It will be used.

The CHAIRMAN. Thank you, Mr. Main. I'm sorry to interrupt you, but I wanted to get that issue taken care of. I'm sorry to have interrupted you on that, but——

Senator ROCKEFELLER. You didn't.

The CHAIRMAN. I appreciate that, thank you.

Now, can we go to Senator Brown?

I ask people, please keep in mind that we have three more panels.

Senator BROWN. I think Senator Enzi was next, was he not?

VOICE. [Inaudible.]

The CHAIRMAN. OK.

STATEMENT OF SENATOR BROWN

Senator BROWN. Well, thank you, Mr. Chairman, for holding this hearing.

Mr. Main, thank you for joining us, and the other panels, from the mine workers and citizens and people in the community in West Virginia.

Tomorrow is Workers Memorial Day in this country, a day to honor the working men and women killed, disabled, or injured on the job. In my State of Ohio, alone, in 2008, 167 workers died on the job, nearly 119,000 injury claims were filed with Ohio Bureau of Workers Compensation.

Before my question, I'd like to share a real quick story that I had actually shared with Mr. Main when he was in my office. I wear on my lapel—it was given to me at a Workers Memorial Day, 10 years ago, a depiction of a canary in a birdcage—and everybody in this room knows what that's about—to signify the importance of worker safety and all the other things that come with that.

The question I have is that you mentioned in your statement, Mr. Main, that quote "MSHA has limited tools to hold bad actors accountable and to try to force mining companies to change their behavior." You gave an example of a tool that MSHA does use to force a change in behavior, by issuing a withdrawal order in stopping production. These orders are only used when conditions present imminent danger. My question is, Isn't that too late? Are withdrawal orders used enough? Are the thresholds that make a withdrawal order necessary adequate to prevent disasters?

Mr. MAIN. Yes, there are about four basic tools that the inspectors have under the MINE Act to take action. One is what we call 104(a) citation, which is—they cite the condition; if it isn't corrected in the time given to abate, it's what we call a 104(b) closure order.

Now, we have the 107(a) imminent danger order, which, if the inspector observes a condition they believe to be imminently dangerous, they can take quick action for that condition, shut down that area until it's corrected.

We have the 104(d)(1) and (d)(2) orders. 104(d)(1) order is conditions are serious, that are willful violations by the mine operator, that can be cited first as a citation, and then as an order. Then, once they issue that—which closes down that area, once they issue an order, until that condition's fixed. Once a mine gets on what we call the (d)(1) series, any subsequent inspection, when the inspector finds a similar violation, they can issue an automatic (d)(2) order. That was the 48(d)(2) orders that was issued at the Upper Big Branch, and how they got to that.

Then, the other provision under the MINE Act is the 104(e) Pattern of Violations, which is a long process to get to. It's a system that's broken.

The injunctive relief action that has been spoken about here is something that our folks have been taking a look at. And we do fully intend to implement that. It is the one tool in the MINE Act that gets to a broader application. We are asking Congress to take a look at that, to—presuming there'll be some challenges to that—look at those pieces in there that may be troubling. We're going to take the first run of using that through the courts, but that's one that we hope to have some support from Congress.

That's basically the tools that exist.

Senator BROWN. Do you think the withdrawal orders used—stopping production—are they used too late? Are they used early enough that it saves lives?

Mr. MAIN. It's my belief—and that's the reason we're looking at a number of things that I think that we have to do to fix this problem. We've got to figure out a way to empower those miners, that are working in some of these conditions, that are fearful to report, and figure out how we can empower them to be able to take action to protect themselves. That's the issue that I think is front and center here.

As I look at the penalties versus the order—I mean, the one that gets you to the quickest action, in my opinion, is that order. Penalty is just going to be—for whatever is the end result of the penalty process, however it's worked out, it's going to be a lot longer period of getting the penalties worked out.

Senator BROWN. Well, that's, obviously, the point of the withdrawal order.

You said "empower the miners" to report and to point out these violations. Simple question, Are union mines safer than nonunion mines?

Mr. MAIN. Well, I think that if there are worker representatives at mines, and those representatives have a chance to freely exercise that right, that Congress gave them under 103(f), and if they're traveling with those inspectors during that process, there's absolutely no thought in my mind, otherwise, that those mines have to be safer. Where the mine operator allows their workers to have a voice in safety, and freely exercise that, I think, are safer mines.

Senator BROWN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Brown.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman, I want to thank you for having this hearing to recognize the men and women who we have lost on the job, and to talk about how we can make our workplaces more safe and healthy.

I want to express my sincere sympathy to all of the families that are here in this room, and, really, thousands across the country.

Two days ago I was in Anacortes, WA, where over 1,000 people from the community came to a memorial service for the seven men and women who died in the tragic refinery fire on April 2d at the Tesoro Refinery: Dan Aldridge, Matt Bowen, Donna Van Dreumel, Matt Gumbel, Darrin Hoines, Lew Janz, and Kathryn Powell. It was an overwhelming event, and I know that all the families here

are suffering terribly. I just want to say, to all in this room and to the other room—in the overflow room—I really respect your courage in being here, because I know that nothing we can do can bring back your loved one, but your courage and conviction in coming here today, and being in the audience, helps us really push hard to do the right thing so this won't happen again. I just personally want to thank all the families that are here today.

Mr. Chairman, I have some questions for the panel coming up on OSHA, regarding the Tesoro Refinery, but I do want to ask Mr. Main, we've worked long and hard on these mining issues, and it's so troubling that we just can't seem to get there. I noticed, on April 22d, an article in the *New York Times* entitled, "Two Mines Show How Safety Practices Vary Widely." It outlined the safety culture at two separate nonunion mining operations, one at TECO Coal and one at the Upper Big Branch, that were operated by a subsidiary of Massey. The article referenced a Federal mine inspector by the name of Daniel Woods, saying that Massey mines were some of the most difficult mines to handle. And he said:

> "Inspections that should have taken a day, took three, because the first day would be spent arguing with Massey operators over paperwork and permission to enter certain sections of the mine."

Do MSHA inspectors require the mine operator's permission to go into a mine?

Mr. MAIN. No.

Senator MURRAY. So, what is the barrier for an inspector to get into a mine?

Mr. MAIN. I'm not sure what happened on this particular case. Having been out on inspections in my lifetime, I know there are different ways that mine operators deal with inspections. Some of them work with the process, work with the inspectors. Some use tactics to just delay an inspection process.

There are times when inspectors have to take extraordinary action to enforce their right to go to the mines. That does not happen very often. I think, in most cases, what happens is, the inspector goes through their normal process of doing mine inspections.

What's raised here—and if you couple what was raised in that situation with what we found in three recent inspections that we just reported on today, I think you get some ideas about how—and even that story—I heard a little bit about it, didn't read it all—but how some mines set up their operations to normally flow with the compliance to the law, and others do not. We'll have to look into more details of that. But, I could appreciate why an inspector may have had some difficulties.

Senator MURRAY. I think we need to understand that. We need to know if there's something we can do in the law to make sure that inspectors get in.

Now, in your written testimony you talk about how Massey Energy employed a popular tactic of contesting a large number of citations. How does that tactic help operators avoid a pattern of violations?

Mr. MAIN. Real simply, this. For the cost of a postage stamp, they can file a request to contest a violation. That violation goes into a process to be adjudicated. Right now, we have a 16,000 case

backlog, we have years to resolve those backlogs. Until those particular violations are finalized by the court system, by the judicial system, they can't be counted as part of the operator's history.

Senator MURRAY. Is there an increased penalty for contested violations?

Mr. MAIN. No.

Senator MURRAY. Well, is there any disincentive for operators to file?

Mr. MAIN. One of the things we're looking at is creating some disincentives—a fair disincentive for those operators who do try to game the system. There has to be some process, at the end of the day, as all of these issues get resolved, to deal with that. Currently, no, there's not.

Senator MURRAY. OK. I appreciate that.

My time's up. Thank you, Mr. Chairman.

TESORO,
SAN ANTONIO, TX 78259,
May 5, 2010.

Hon. PATTY MURRAY,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR MURRAY: With this letter, and on behalf of the Tesoro Companies, I am requesting that the attached materials be included in the formal record for the hearing, "Putting Safety First: Strengthening Enforcement and Creating A Culture of Compliance at Mines and Other Dangerous Workplaces," held on April 27, 2010 by the U.S. Senate Committee on Health, Education, Labor, and Pensions.

Tesoro is making this request because a reference to an incident at, as well as the safety history record of, our refinery in Anacortes, WA, was made during the course of said hearing. Tesoro believes that the materials contained in the attached two documents provide the committee with a more comprehensive treatment of the issues that were raised during the hearing.

Thank you in advance for your consideration of this request.

Sincerely,

LYNN D. WESTFALL,
Chief Economist,
Senior Vice President for External Affairs.

ATTACHMENTS

REFINERY SAFETY

The Facts from OSHA data:

1. The rate of safety incidents in the refining industry is 83 percent better than the rate for general industry.
2. Since 2005, the refining industry has reduced its incident rate by 36 percent versus just 9 percent for general industry.
3. The 2009 incident rate for the Anacortes refinery is 18 percent better than the latest average rate for the refining industry as a whole.
4. The Anacortes refinery reduced its incident rate by 63 percent between 2008 and 2009.
5. In the last 2 years, employees at the Anacortes refinery have worked over 1.3 milk hours and recorded only seven reportable incidents, ranging from a strained back requiring physical therapy to a lacerated finger that required four stitches.

The Anacortes refinery has received or will receive the following safety awards from the National Petrochemicals and Refiners Association:

1. 2006: Meritorious Award for low incident rates;
2. 2007: Meritorious Award for low incident rate;
3. 2007: Achievement Award for 2 years without a lost time accident;
4. 2007: Achievement Award for over 1.5 million man-hours without a lost time accident;

5. 2009: Meritorious Award for low incident rate; and
6. 2009: Gold Award for a 25 percent or greater reduction in incident rates over the last 3 year.

ANACORTES REFINERY SAFETY VIOLATIONS

The Facts:

1. While the initial investigation resulted in 17 alleged violations, L&I subsequently agreed to withdraw 14 of the citations and reduce the fine to $12,250.
2. Of the remaining three citations, two have been corrected and one will be corrected by the end of the year.
3. We also agreed with L&I to have a third party review nine related areas of concern. The company that was hired completed their review in March but has not yet issued their report.
4. Of 52 similar investigations carried out at refineries across the United States, the average number of initial violations is 17.4 per facility and the average penalty is $98,300.

- The range of the number of alleged violations has been from 1 to 56.
- The range in the initial fines has been from $1,125 to $3,042,000.

Source: OSHA database

The CHAIRMAN. Senator Murray, you just put your finger on it. That's how they do it. They just get these huge backlogs; and, until they get a final adjudication, MSHA can't do anything.

Senator MURRAY. Well, and I would say—16,000 of them—obviously, what we're doing is just delaying the safety of our mine workers.

Mr. MAIN. Yes. It can——

The CHAIRMAN. Senator Bennet's not here.

Mr. MAIN [continuing]. Hold them up for——

The CHAIRMAN. Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

I'd like to associate myself with Senator Murray's remarks, and address myself to the families, and thank them for being here to bear witness and to make sure that this doesn't happen to other miners and other families.

I think anyone who reads your testimony about the number and nature of the violations by Upper Big Branch Mine and by Massey would be shocked. I'm wondering, is there something wrong with the law here? Is there something wrong with the culture here? I assume there's no love lost between MSHA and Massey.

You say that these mines have stayed open, have been held open because of the way the law has been interpreted. My question is, by whom? I mean, even when there's been dust and violations in ventilation and gas leaks, these are all the things that we suspect caused this explosion. Well, who—the way the law has been interpreted—has kept these mines open, this mine open, even in the face of all these violations. Who interpreted the law that way to allow these mines to stay open?

Mr. MAIN. There's different litigation events that's happened over the years that has led to the current application of the Mine law, for one. The Federal Mine Safety and Health Review Commission deals with the resolution of enforcement actions that MSHA takes, citations they issue, orders they issue. A lot of the historical application of the law has been developed through the Review Com-

mission. That's one of the reasons that we think we need to take a look at some of the provisions that are the center of the universe for limiting MSHA's inspectors' ability to use some of these. One of them I just pointed to earlier was this notion that a permissibility violation, where you have a piece of equipment that has a gap in it that a spark could escape from—it just takes a little spark to blow up a coal mine in a gassy mine—has to go to an extraordinary step, almost an explosion, before you can consider that serious, under the—I mean, that's the way——

Senator FRANKEN. I'm sorry, but you're saying that this is in courts and——

Mr. MAIN. This is in——

Senator FRANKEN [continuing]. Litigation?

Mr. MAIN. Yes, there's been litigation, over the years, that has refined the definitions of the applications of law.

Senator FRANKEN. And these are judges? Federal judges? Who's making——

Mr. MAIN. Federal Review Commission.

Senator FRANKEN. Federal Review Commission.

Mr. MAIN. Yes. There are a couple areas that we are looking at for some relief, which we may be well looking at legislatively, and that's some of the things we want to have a chance to discuss with the committee. One of them is redefining this Significant and Substantial issue. Another is unwarnable failure, where there's an unwarnable failure on the part of the mine operator to address a safety condition. Those, over the years, based on my view—and, I think, the view of others—have been constrained to the point that—if you look at the S&S rate nationally, it's about a third of the violations. If you went back during a period of when—about 1980, you are looking at about 80 percent of the violations being S&S. Now, I'm not saying that that's where they should land at, but I'm just saying, over the years, that's where the application of those have settled. To change that, we need to change the definitions that are used to identify which standards are serious and which are not.

There are a number of things that we have, Mr. Chairman and Senator, on the table to take a look at, here, as we move forward, in trying to figure out what all reforms that really need to be——

Senator FRANKEN. Maybe there are definitions of what—what's S&S? Serious——

Mr. MAIN. Significant——

Senator FRANKEN [continuing]. And Substantial?

Mr. MAIN [continuing]. And Substantial. And it——

Senator FRANKEN. Yes.

Mr. MAIN [continuing]. Drives Unwarnable Failure violations and orders. It drives the Pattern of Violations process, because, to be able to cite either one of those, it has to be significant and substantial.

Senator FRANKEN. Well, I know we have three other panels. I had another question that I'll submit to you, on—you say you want the miners to be empowered. There are miner representative systems, where miners can participate in this, but only 2 percent of the mines, say, in Kentucky, have that. And I wanted to know why. I'll submit that in writing for you, sir.

Mr. MAIN. OK. Thank you.
Senator FRANKEN. Thank you Secretary Main.
Mr. Chairman.
The CHAIRMAN. Thank you.
We have been joined by our Ranking Member, Senator Enzi.
Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman.

I appreciate Senator Isakson standing in as the Ranking Member for me. And I appreciate you putting my statement in the record.

The Upper Big Branch Mine is the worst accident in 40 years, and 29 people lost their lives. I know that the families and communities are hurting. and I appreciate those of you who are here. Our sympathies go out to you.

As you may know, I represent another coal mining State. Being able to safely mine our natural resources and enjoy the economic benefits of the industry is as important to the people of Wyoming as it is to the ones of West Virginia. That's why I worked with Senator Rockefeller and Senator Byrd, along with Senators Kennedy and Isakson, to write that MINER Act, in 2006, in response to the string of tragedies that occurred that year. It's very frustrating, for those of us who worked so hard on the MINER Act, to hear accounts of MSHA's activity at this mine.

MSHA found over 500 violations in 2009, over 100 violations so far in the current year, and a significant amount of them were unwarranted failures. In the last 2 years, MSHA issued over 60 orders to withdraw miners from the UBB site, because of hazardous conditions. MSHA inspectors spent 180 days there in 2009, yet no one from the Regional Mine Office followed up to ensure that the UBB was placed on a Potential Pattern of Violation status in October 2009, as it should have been. Back in 2007, UBB was appropriately placed on a Potential Pattern of Violations status, and they moved quickly to reduce and improve its safety record to avoid being on that status. Now, compared to 2007, MSHA has a larger budget, more inspectors, and new leadership, partly because of the MINER Act.

I will submit a series of questions that deal with this.

I won't take up more time now, knowing that we have three more panels to go, and other important questions.

I thank Senator Rockefeller for all of the action that he helped us to take 4 years ago with the Miner Act. I think it's one of the fastest times that we've ever passed a law in Congress. We addressed a lot of the issues that came to our attention from the Sago and Aracoma accidents. I know, from the oversight hearings that we held after that, that we did do a lot of those things. We do expect agencies to report to us when they find something that isn't covered by the law, that needs to be covered by the law.

I'll have followup questions to dig into that a little bit deeper.

Thank you for being here today.

PREPARED STATEMENT OF SENATOR ENZI

Good morning. I want to thank Chairman Harkin for scheduling today's hearing. Two recent tragedies have focused the country on the important topic of workplace safety, one the most important missions of the HELP Committee. As a Senator from a State whose primary industry is energy production, my heart goes out to the families and communities that lost those hard-working Americans this month. The work they do benefits every single one of us and underpins our entire economy, and we appreciate it though too few of us ever let them know. Perhaps out of the tragic accidents that have taken the lives of 29 men in West Virginia, 7 in Senator Murray's home State of Washington and left 11 missing off the coast of Louisiana, we can build a new commitment to keeping workplaces safe.

Although these mass accidents capture the media's attention until the next story comes along, the truth is that men and women lose their lives nearly every day in workplace incidents, some of them heartbreakingly senseless. Congress created the Occupational Safety and Health Administration in 1970 and the Mine Health and Safety Administration in 1977 to have a singular focus on making workplaces safer. Since then more Federal agencies have been established to further this cause: the National Institute of Occupational Safety and Health (NIOSH), the Chemical Safety Board and other more specialized agencies. Despite the recent tragedies, workplace injuries and deaths have, in fact, shown a long-term downward trend.

The most recent BLS data for 2008 indicates the *lowest* annual number of workplace fatalities since recordkeeping began in 1992. Concentrated efforts to focus on minority groups that had traditionally higher rates seem to be paying off, as well. In 2008, deaths among Hispanic workers were down 14 percent and deaths among African-American workers down 12 percent. Injury rates have shown a similar drop. Since 1994, the total case rate has declined by 50 percent; and, the lost-days-away-from-work rate has declined by 44 percent. Mining accidents, too, have seen a long-term downward trend and last year was the safest on record, though this month's tragedy makes that fact difficult to recognize.

This progress is certainly encouraging, but it should not cause anyone to become complacent. The number of work-related deaths and injuries still remains unacceptably high. Workplace injuries continue to bring hardship to employees and their families and burden our economy. All of us involved in this issue must continue our effort to make our Nation's workers and workplaces safer.

We owe it to those whose workplace accidents were not prevented to analyze why not, and learn what can be done better. There is no doubt that after an accident, a workplace will receive a great deal of regulatory attention, but I want to look for ways to reach the workplace before anything goes wrong and prevent accidents. One undeniable fact is that enforcement alone cannot ensure the safety of America's workforce. Simple mathematics show the shortcomings of an inspect-and-sanction system. With less than 2,400 OSHA employees, more than 7 million workplaces, and inspectors averaging around 40 inspections a year, it is clear that

most workplaces will never see an OSHA inspector until it is too late.

If we truly want to continue to improve workplace safety we need to think creatively; and, to fashion policies aimed at getting results. One shining example of creative thinking that has proven to make workplaces safer was recently placed on the chopping block by the Department of Labor. No program has been more successful in creating such a culture of safety in the workplace than the Voluntary Protection Programs, or VPP. Since it was created in 1982, Republican and Democrat administrations alike have fostered its growth to now 2,284 worksites, a quarter of which are unionized, covering almost 1 million employees.

The results speak for themselves. VPP worksites have an average Days Away Restricted or Transferred (DART) case rate of 52 percent below the average for their industry. And it isn't just large worksites. In recent years, smaller worksites have made significant strides in VPP, increasing from 28 percent of VPP sites in 2003 to 39 percent in 2008. One of today's witnesses, Kelli Heflin, is the safety manager of a 65-employee Colorado company that has seen a decrease from 13 annual injuries to zero since it joined VPP.

VPP works because it creates a culture of safety at worksites and builds a partnership between management and employees. At a VPP worksite, safety is truly everyone's responsibility. Participants also have access to a network of safety experts and years of experience solving safety problems.

The benefits of VPP extend beyond making workplaces safer. It also saves money in two direct ways. First, VPP participants save money by avoiding injuries. In 2007, Federal Agency VPP participants saved the government more than $59 million and private sector VPP participants saved more than $300 million. Additionally, taxpayers get more for their dollar when workplaces make the significant commitment to safety required by VPP because it allows OSHA to focus its resources where they are most needed.

VPP Participant employers are extremely proud of the strong safety record these partnerships have enabled them to achieve. They contribute a great deal to reducing the VPP program expenditures. VPP participants have assigned approximately 1,200 of their own employees to act as OSHA Special Government Employees (SGEs) who conduct onsite evaluations for OSHA.

I was very surprised when the Administration's Budget Request proposed eliminating the small amount it takes to administer VPP—$3.125 million and sought to transfer the 35 FTE it takes to run the program to other functions. Throughout Dr. Michaels confirmation process I and other members of this committee asked about his commitment to compliance assistance and the VPP program specifically, and were repeatedly assured that he "recognized their great value" and would "continue to support" VPP and work with this committee to do so. Instead, the budget proposed cutting all funding, and transferring away all staff. Equally disturbing was the fact that despite all of the assurances, this action was taken without any outreach to the Republican Members of this committee, many of whom repeatedly expressed their support for VPP.

The budget proposal stated that OSHA was seeking "alternative non-Federal forms of funding" and working closely with stake-

holders, but, to date, no plan to secure such funding has been offered by the Administration or in either the House or Senate authorizing committee. To the extent such "alternative funding" is bureaucratic code for a fee-based system such a proposal is simply not workable and completely counterproductive. Participating employers already voluntarily absorb significant costs to participate in the current program. Asking businesses—particularly small businesses, and particularly in the current economic environment—to take on more costs will only result in them dropping out of the program. Further still, a fee-based system simply destroys the credibility and integrity of VPP participation for employees.

This half-baked plan to defund VPP was unanimously rejected by the Senate Budget Committee last week, and I suspect a similar rejection may come via Appropriators. I hope the Department will consider itself on notice that the Senate supports innovative, cost-effective approaches to improve workplace safety, and we do not want to see programs that are working, like VPP, diminished. Senator Landrieu and I introduced legislation yesterday that will codify the program, expand it to include more small businesses and incorporate improvements suggested by a recent GAO report. I look forward to working that legislation through the committee this year.

Whether in a coal mine, an oil field or a shoe store, improving workplace safety has been an issue of longstanding concern to me. From my days as a small businessman, to my service in the Wyoming State Legislature, and now, in my service in the Senate, I have been very supportive of innovative efforts to increase workplace safety—especially for small businesses without the resources to have in-house safety experts. Although we sometimes disagree on the way to get there, we all agree that zero accidents is where we'd like to get.

Finally, I know that this hearing was originally scheduled to coincide with Workers Memorial Day. I certainly join the rest of the committee in honoring all the lives that have been lost in workplace accidents, in the recent mass accidents and every other accident. On this day, it is appropriate to remember those who have been lost, and to recommit to the mission of improving workplace safety. By looking seriously at the whole issue—and making no subject off limits—we can pay them the best tribute of real progress in reducing workplace fatalities.

The CHAIRMAN. Mr. Main, thank you very much for being here, thanks for your leadership in this issue. We'll followup on that 818(a).

And please thank Secretary Solis——

Mr. MAIN. Will do.

The CHAIRMAN [continuing]. For her help on this, and for her great interest in moving this forward. We've talked on that, on a couple of occasions, and I know she wants to get to the bottom of this and change things, too. So, thank her on our behalf.

Thank you very much, Mr. Main.

Mr. MAIN. Thank you.

The CHAIRMAN. Now we call panel two.

Panel No. 2, Mr. Cecil Roberts. Mr. Roberts has been president of the United Mine Workers of America since 1995. He's a sixth-

generation coal miner, who's devoted his career to advocating for better treatment for miners. Mr. Roberts graduated from West Virginia Technical College in 1987, received an honorary doctorate in humanities from West Virginia University of Technology in 1997.

Then we have Mr. Jeff Harris. Mr. Harris is a third-generation miner. He has been working in mines in West Virginia for more than 30 years. He is currently employed at the Harris No. 1 Mine in Boone County, WVA, where he works as a roof bolter who pins the underground roof of the mines to keep it safe.

Next, we have Mr. Wes Addington. Mr. Addington is deputy director of the Appalachian Citizens Law Center, a nonprofit law firm that fights for justice in the coal fields by representing coal miners and their families on the issues of black lung and mine safety. He is also director of the Center's Mine Safety Project. Mr. Addington earned his undergraduate and law degrees from the University of Kentucky.

Last we have Mr. Bruce Watzman. Mr. Watzman is National Mining Association's senior vice president for regulatory affairs. His responsibilities include working with member companies on the design of safety and health programs for use in the mines, and with Federal and State regulators, on the management on safety and health programs. He also serves on the executive committee of the mining section of the National Safety Council, and on various planning and advisory committees for MSHA and the National Institute of Occupational Safety and Health. Before joining the NMA, Mr. Watzman was a legislative assistant to Representative Nick Rahall, of West Virginia.

Welcome, all of you, and thank you for being here. I thank you for your patience, as I will thank the next two panels.

Your statements will be made a part of the record in their entirety. I would appreciate it if you could sum it up in 5 minutes so we could engage in some rounds of questions.

Mr. Roberts, we'll start with you. Welcome back to this committee. You are no stranger to us, nor a stranger to this committee. I know what you've been going through over the last several weeks, too, so thank you for being here, Cecil.

STATEMENT OF CECIL E. ROBERTS, PRESIDENT, UNITED MINE WORKERS, TRIANGLE, VA

Mr. ROBERTS. Thank you very much, Mr. Chairman.

I want to thank you for holding the hearing today. I want to thank this committee for the work you did in 2006. I want to thank you for the compassion that you've shown over the years to coal miners, particularly those involved in tragedies. We're very thankful for legislation that was passed in 2006.

I want to thank my friend Senator Rockefeller, also, for his lifelong commitment to keeping coal mines safe, not only in West Virginia, but across this Nation.

I want to thank Senator Byrd for his hard work, for many, many years, on this particular issue; our friend Nick Rahall, who is here today, and thank him, not only in this instance, but for many years of hard work and dedication to coal miners of this Nation.

I want to also recognize the family members who are here today. Someone mentioned the Handler family. They are here, as well as

others from Sago and other disasters across this country. What we hope, and what my prayer is, is that I never have to do this again the rest of my life.

Someone asked me, Senator Rockefeller, as I entered the memorial service on Sunday, "What do you hope to come of this?" I said, "I hope this is my last one."

These were Massey employees, in a nonunion mine, but I want to tell you, they were my friends, they were my neighbors. I've known some of them—the Davis family, in particular—all my life. And I've got to tell you, it's the most emotional thing I think I've been through for a while. And I apologize for that.

As we come today, I want to point out, this is five of these tragedies in the last 4 years. All of these tragedies are preventable.

I want to say something here, that I firmly believe in my heart, that this tragedy should never have occurred at Upper Big Branch. The only way it occurred, the law that you wrote was violated. If they had been in compliance with the laws that Congress had written in 1969, updated in 1977, updated in 2006, it would have been impossible for this tragedy to have occurred.

I want to point out one other thing—and I'm going to talk about MSHA myself here momentarily, but we've avoided one thing. Why is it that we have operators, in this Nation, that will practice this kind of mining? We have had coal companies on Coal River, Senator Rockefeller, in that area, in Logan County, for 100 years. I defy anyone to go back and see where Peabody had a tragedy like this, where Armco had a tragedy like this, where Bethlehem had a tragedy like this—it never happened. Why is it that this particular company has had two of these—two of these—tragedies, at Aracoma and now Upper Big Branch?

I want to report something, so all of you can understand something. These miners who work at Massey are scared to death. They're intimidated. This company is run like it was 1921, not like it's the present day. That's the truth. You don't have to take my word for this. Not only are the miners intimidated, but the communities are intimidated. I can tell you one thing, the communities and the people in West Virginia have had enough of this, and they're about ready to stand up and take a position, here.

My position is that, when you talk about criminal prosecution, here, now's the time, because the people who knew that this was going on—there's no question in my mind that the people at the very top here, and the board of directors, knew that this mine was in this kind of shape. This owner of this company, this president and CEO, he doesn't live 1,000 miles away. He lives right in the heart of the coal fields, checks on these mines every single day. Fear and intimidation is the rule there.

Let me tell you, we have to understand, when we have people like this—I think we should hold the Federal Government and MSHA responsible, here; but, I must say to you, How is it that a company can be allowed, in this day and age, to put people in this kind of a position? Congress should stand up and take a position that we're not going to tolerate this. This is the United States of America. This is not China, and this is not Colombia, this is America we're living in.

A young man of 28, 5 years ago, wrote his mother and his fiance a letter—he has a young baby, which I happened to meet on Sunday—and said, "If I die in this coal mine, please tell everyone that I love them." That's the kind of letter people used to write when they went off to Vietnam, in my era. That's the kind of letter people used to write to go to Iraq and off to war. That's the kind of letter young men write. That's not the kind of letter they're supposed to write when they get their dinner bucket and go to work in the United States of America.

There are some things MSHA can do, and Joe Main mentioned some of them. I am proud to say to you that I thank President Obama for putting a coal miner in charge of this agency, instead of a coal executive, for the first time in the history of this country. I submit to you, you can hold Joe accountable, and you should, but it's not going to be long that the coal industry's going to be in here saying, "He's too tough on us." I'm putting you on notice that that's what's going to happen. Because he's going to enforce the law, MSHA's going to enforce the law, and coal miners are going to be safer for this.

I am, today, sending a letter to Joe Main, I'm sending a letter to Hilda Solis. It's time for us to have a public hearing on this situation in the State of West Virginia. Because they do have subpoena powers whenever they have a public hearing. Let's put everyone at—that had anything to do with this tragedy up where the families can come—by the way, families are excluded from these investigations, when they have them in private; but, if you have a public hearing, the families, who are the most affected by what happened here, they can come, subpoena powers can be issued, and put somebody in jail if they lie.

I know I've gone over my time. I know I'm emotional about this, but I invite all of you to take the records of this coal company—this is not the worst mine they have. This is the fourth-worst mine they have. There are three others in worse shape than this one.

I'm sorry, and I got carried away, but I must tell you how I feel about this today.

Thank you.

[The prepared statement of Mr. Roberts follows:]

PREPARED STATEMENT OF CECIL E. ROBERTS

Thank you for allowing us to address this committee. As President of the United Mine Workers of America ("UMWA"), I represent the union that has been an unwavering advocate for miners' health and safety for 120 years.

This committee has played an important role in addressing employees' health and safety. I would like to express my particular appreciation to the leadership of this committee for your efforts directed at protecting and enhancing the health and safety of coal miners throughout the Nation. Your continued attention is critical to dealing with the challenges that all too often prevent some miners from being able to go home safely at the end of their shift. After all, going to work, whether as a coal miner or other worker, should be a means for earning a paycheck and providing for your family, not a roll of the dice about whether you will live to see another day.

Yet, for too many American workers, the price of a job has been the employee's life. Earlier this month 29 brave coal miners perished at Massey's Upper Big Branch mine, and one more remains hospitalized as I prepared this statement. Our hearts and prayers go out to all the families who have lost their loved ones as well as with the family sitting by the hospital bed of the injured miner. We know the entire community has been devastated by this tragedy.

We also share the grief of the families of workers killed at the Tesoro Refinery days before the Upper Big Branch mine exploded, those missing after the gas rig

fire just last week in the Gulf of Mexico, and the thousands of other workers killed in the last year due to atrocious health and safety conditions at work. Tomorrow is Workers' Memorial Day to remember and honor those who have died from their work. We are glad to have this opportunity to discuss how our government can do a better job to protect our Nation's workers from unsafe and unhealthy work places.

Statistics from the mining industry offer dramatic proof that improved laws and regulations make a huge difference in workers' safety. We recently celebrated the 40th anniversary of the mining industry's key legislation, the Coal and Mine Acts. In the 40 years *before* that landmark legislation, an average of 809 miners were killed in coal mines each year; and in the 40 years since it was enacted an average of 83 miners were killed.

While these numbers prove beyond a doubt that strong laws make a huge difference, more must be done. We are here today to talk about what could and should be done to change a system that still allows miners and other workers to die at work or *from* their work, whether from preventable occupational illnesses or from avoidable work-site tragedies.

Today we were asked to focus on problems the government faces when dealing with employers that repeatedly fail or refuse to heed their duty to obey workplace safety laws and regulations. Unless operators do what the law requires of them, and do so each and every day—not just when a government inspector is physically on site—miners will continue to be exposed to needless hazards to their health and safety, too many will be injured, too many will be made sick, and too many will pay the ultimate price with their life.

These challenges have persisted for decades, if not longer. I have been here repeatedly, and my predecessors before me, to complain about the terrible conditions miners endure when operators don't follow the law and miners are killed as a result. I also have testified about problems that follow when there's an MSHA governed by industry executives.

I thank President Obama for naming an Assistant Secretary who is a coal miner and who knows the industry through the eyes of a miner. In fact, the President and Vice President have shown an unparalleled interest and commitment to the problems still plaguing mine safety, for which we are deeply appreciative.

Turning to the factors that adversely impact miners' health and safety, we must start by looking at the operators and their mines. First and foremost, it is every operator's responsibility to provide a safe and healthful workplace. Yet, we know corners are frequently cut, which means that miners' health and safety gets sacrificed.

It is time to hold CEOs and corporate Boards of Directors accountable when the facts reveal systematic problems with health and safety compliance. It is not enough to issue fines or levy charges against low-level managers who violate the law when they are doing what their supervisors direct and expect. There is something dreadfully wrong when corporate executives are eager to speak about their productivity and profits, but reluctant to consider the cost to their workers.

In the last 10 years, 52 miners were killed working for Massey. This happened while Massey's CEO, Don Blankenship, has been paid millions upon millions each year; since 2003 Don Blankenship has been compensated by more than $5 million each year, and he made over $28 million in just 1 year! Last year he earned over $17 million. These figures include significant "performance" awards and don't even include the stock options he was also given. This is terribly wrong.

This brings me to the primary question we were asked to address today, which is: What can be done to prevent recalcitrant employers from violating the law and jeopardizing their employees' health and safety?

While we appreciate and rely upon the work of MSHA personnel who inspect mines, review mining plans, and perform other critical functions dedicated to miners' health and safety, MSHA can and should be more pro-active and effective in using all the enforcement tools Congress provided in the Mine Act. The enhanced penalty structure that came out of the 2006 MINER Act has been turned on its head by an industry challenging so many citations that cases are backlogged for years; its Pattern of Violation enforcement tool—in the law since the 1977 Act but untouched until a few years ago is burdened by a regulatory framework that completely frustrates Congress's intent; and the opportunity to seek injunctive relief is a tool that has not been utilized, but is available and could offer the swift and effective relief needed when a mine demonstrates a pattern of unsafe conditions.

In the MINER Act, Congress directed that higher fines should apply to MSHA violations. However, since the higher penalties took effect, many operators including Massey, began routinely challenging MSHA citations and orders thereby clogging the adjudicative process and delaying the resolution of alleged violations. Yet, until

there is a "final order," the operator doesn't have to pay a penny towards the fine. By way of example, Massey has been assessed with fines amounting to $1.1 million since January 2009 for its alleged violations at Upper Big Branch; very little of these penalties have been paid because the company has filed "contests" and they remain caught up in the FMSHRC backlog.

Since the MINER Act took effect in 2006, the docket of the Federal Mine Safety and Health Review Commission (FMSHRC) has mushroomed. Its backlog is well over 16,000 cases, of which 9,000 new cases were added in fiscal year 2009, alone; compare this to the 2,700 cases filed in fiscal year 2006. Cases entering the system now will likely take at least 2 or 3 years to be resolved. The problem of delayed payments was a problem Congress tried to fix in 1977 in the Mine Act:

> "The committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation."

Leg. Hist., Senate Report at 604. Unfortunately, the penalty scheme is broken again; not only is there delay in the payment of any assessments but the increased penalty structure Congress implemented through the MINER Act has not lead to the intended improvement in operator compliance.

The reality is that as it stands now, operators have every incentive to file contests and take appeals to the FMSHRC, because MSHA and the FMSHRC routinely compromise their fines to settle cases. Assessed penalties are reduced by about 47 percent when they are contested. We believe this system has to change: MSHA needs to do a better job supporting the citations its inspectors write by allowing inspectors to defend their work, and providing MSHA with help from the Solicitor's office so the Agency can determine which cases to pursue and which ones to settle, which should be decided based on the merits of a case, not expediency.

The delay in resolving MSHA litigation is important for a number of reasons, one of which pertains to the *amount* of fines an operator has to pay based on its "history of previous violations." Under the Mine Act, Congress directed MSHA to consider an operator's "history of previous violations" when figuring the fine for health and safety violations. MSHA's regulation (at 30 CFR Part 100) provides that when an operator engages in repeated violations of the same standard, penalties should increase. Yet, until there's a "final order," the citation is excluded from MSHA's calculations about the operator's history of violations; and MSHA's penalty structure considers only final orders from the preceding 15 months.

With operators like Massey routinely contesting their S&S citations, the increased penalties intended for repeat violations have been effectively eliminated. In other words, Congress's directive that MSHA consider the operator's history of previous violations no longer has any role in the enforcement scheme.

Another adverse effect of the litigation backlog arises with the "pattern of violation" (POV) tool that Congress gave MSHA in Section 104(e) of the Mine Act. Like with the history of violations provision, MSHA's regulation requires it to consider only "final" citations and orders. The POV mechanism was Congress's suggested means for dealing with habitual violators: after the Scotia mine exploded in 1976 and Congress enacted the Mine Act in 1977, it developed the POV language to allow MSHA to move against operators that have a lot of S&S violations and show little in the way of improved compliance, or operators that experience a worsening trend of S&S violations indicating a greater than normal risk of disaster. The legislative history shows Congress intended the POV criteria to be flexible, so that it could consider both quantitative and qualitative factors. However, the regulation MSHA finally promulgated in 1990 is unnecessarily complex. By having such a complex structure, MSHA tied itself up with bureaucratic hurdles that reduced the flexibility Congress clearly intended it to maintain. As you know, MSHA didn't *ever* use the POV until after the 2006 disasters and it was called before Congress to answer about its lax enforcement efforts.

As written, the POV regulation requires MSHA to give the operator a written warning about it potentially being placed in the POV status before the POV will be implemented. Since MSHA began using this tool after 2006, Massey mines have received 13 written warnings, more than a third of those issued nationwide.

The rationale for using a warning letter before imposing the POV status on a mine is that MSHA's primary goal for the POV is to achieve compliance with all applicable health and safety standards, not shut down mines. So long as the operator reduces its S&S violations within 90 days, it is freed of MSHA's more rigorous enforcement. MSHA's warning letters certainly get the operators' attention, and MSHA has generally been able to effect the requisite short-term corrections from operators so they are then freed of the POV threat.

Clearly MSHA should be able to exercise its POV enforcement authority more than it has chosen to do so far. The POV regulation is simply too complicated and bureaucratic. We believe MSHA should simplify its POV procedures so it can take swift action when the Agency observes chronic safety problems at an operation. We want MSHA to be able to use this tool to stop unsafe operators from continually placing miners in harm's way. When miners lives are what's at stake we believe it is far better to err on the side of protecting the miners, even if there is some possibility that MSHA might sometime close a mine when a lesser remedy might arguably be feasible. We would rather see MSHA shut all or part of a mine without having to go through such formal procedures, recognizing MSHA's decision to impose a POV would be subject to review at the FMSHRC.

Even though the goal of the POV provision is to reduce violations, the reality is that it is still too easy for a law-breaking operator to make some temporary fixes simply to escape the POV consequence without making the significant, systemic health and safety improvements necessary to turn an unsafe operation into a safe one. While we are not opposed to having MSHA first put operators on notice that conditions at their operation warrant a heightened level of attention and may lead to a POV absent quick and significant improvements, any operator that receives the warning notice should still be required to operate under the improved conditions for a prolonged period—long enough so that miners at the operation can see the difference and work under the improved conditions, which should then represent the new norm. If an operator gets a first warning letter, even if it then improves and avoids application of a POV, MSHA should have a system for watching the operation to ensure there have been systematic improvements, not just temporary fixes to get the government off its back.

We also note that while MSHA seems to consider only 24 months of history when looking at the POV criteria, unlike its regulation on fines there is nothing in the POV regulation that requires MSHA to limit its review to 24 months' worth of history at an operation when considering the heightened enforcement. We suggest the Agency has more flexibility than it has claimed and we encourage it to exercise its full range of discretion in this regard.

To make its enforcement tools more effective, we encourage MSHA to identify mines that would be subjected to higher penalties for repeat violations or for a "pattern," and prepare to litigate those cases more quickly, with cooperation from the FMSHRC to give priority attention to these cases. Doing this would reduce some of the incentives operators now have for filing contests.

In addition to the POV issues discussed above, we understand MSHA has been reluctant to close a mine based on the number or type of violations or withdrawal orders; we believe it's authority to do so should be clarified. The Agency should be more aggressive in moving to shut mines that are dangerous. If an operator makes only short-term, band-aid remedies despite systemic safety problems, MSHA should be able to move against it. To the extent there is any ambiguity about MSHA's authority to close a mine, that uncertainty must be eliminated. MSHA should not have to wade through months or years of records of violations before moving to shut a dangerous mine.

Some other suggestions we support include requiring employers to pay their penalties into an escrow account, rather than waiting until the contest process is completed; eliminating the 15-month limit and expanding the look-back period for purposes of considering an operator's history of violations; and hiring more ALJs at the FMSHRC, and staff within DOL to move cases more quickly and reduce the FMSHRC backlog.

There are also some new powers that would help MSHA to be more effective in ensuring miners have a safe and healthful place to work. We recommend expanding the Secretary's subpoena power so that it resembles that in OSHA. This would give the Agency the authority to compel a witness to provide evidence as part of the routine enforcement scheme, instead of only as part of a post accident public hearing. We also believe it is important to improve the whistleblower protections to encourage miners who may know about dangers to come forward. The criminal provisions should be enhanced so that MSHA violations can be prosecuted as felonies, not only misdemeanors. Also, it should be clarified that the criminal penalties apply to those who contribute to unlawful conduct; in some cases it should not just be the front line supervisors who are held liable, but higher management should be accountable for corporate policies that put profits ahead of miners' safety and health.

MSHA should also start factoring in the work of contractors that work on mine property when considering the safety record of the owner and operator. By treating the operator and its contractor as two separate entities, MSHA overlooks data that should reflect on the operator's safety record.

We believe that investigations of the Upper Big Branch tragedy will show that safe mining practices were *not* followed at that operation and miners were being exposed to senseless dangers. We already know that MSHA issued 515 citations and orders at the Upper Big Branch mine in 2009, and another 124 so far in 2010; moreover, the paper MSHA issued to Upper Big Branch reflects serious health and safety violations: 39 percent of the 2009 citations were for "significant and substantial" ("S&S") violations. These violations are usually quite serious—the kind of violations that can contribute to mine fires, explosions and the deaths of coal miners. Even more troubling is the fact that MSHA issued 48 withdrawal orders at Upper Big Branch due to *repeated* S&S violations the operator knew or should have known constituted a hazard. These numbers far exceed industry norms.

For the Upper Big Branch investigation, we are encouraging MSHA to hold public hearings. Doing so would allow the government to subpoena witnesses, and would give it the right to question top management. We are convinced that the many problems that contributed to the explosion at Upper Big Branch did not develop at the foreman or mine supervisor level, but reflect corporate policies that should be heard in the open. Only by conducting an open hearing will miners, the public, and the families of those killed be able to learn what really happened.

Operators that invest in equipment and training to make a mine safer should not have to compete against those that refuse to make these needed investments. In the end it's miners who pay the price when operators do not adhere to what the law requires. As long as there are good paying jobs in mining, there will be workers willing to take the work thinking and praying they will be the lucky ones. Working in America in the 21st Century should not require such a gamble. And unless operators start running their mines consistent with what the law requires, we will continue to witness miners dying.

The Union and coal miners hailed the passage of the MINER Act as the dawn of a new day to improving coal mine health and safety. We have seen some improvements, but we have a long way to go. MSHA should be given more enforcement tools to help it enforce the law. And the law should be strengthened further. Thank you for allowing us to address this committee, and for your continued commitment to workers' health and safety.

The CHAIRMAN. I wish my dad could have met you.

Mr. ROBERTS. I wish I could have met your dad.

The CHAIRMAN. Yes, I wish you could have, too. He started working in the coal mines underground sometime between 1905 and 1910—I don't know when—and worked there for 20 years. That was before I was born, I want you to know.

[Laughter.]

VOICE. In Wyoming.

The CHAIRMAN. No. This was Iowa. Iowa was second, once, only to Pennsylvania, in the number of coal mines. And listening to him, later in life, talk about those early years, when they were working in those mines, and what would happen to them if they tried to organize a labor union or anything like that, just to hear what would happen to them sort of reminds me of what you're talking about right now. I would have thought that those days were long gone—long gone—back in the Dark Ages, someplace like that. I wish he could have met you.

Mr. Harris, welcome. Please proceed. As I said, your statements will be made a part of the record.

STATEMENT OF JEFFREY HARRIS, MINE WORKER, FARLEY, WV

Mr. HARRIS. Yes.

I am Jeff Harris, a third-generation coal miner. I've worked at the Massey mines. And what really concerns me with the panel——

I really appreciate everybody for being here, and the families.

I am really sickened by what really went on. The reason I say what I say is that I worked at the Massey mines. The mines that

I worked at, at the Massey mines, they would take air readings until they got the right one, and then they would just—that's what they would do. Because the new detectors and everything reads memory, they wouldn't turn them in. When I first went to work for Massey, everyone had told me about it, and I said, "No, they hadn't"—I said, "It can't be that bad."

I went over there, and I worked at the Big Branch Mines. When the inspectors would shut the mines down that I went to work for, at the Kepler Mines, in Pineville—when they would shut the mines down, Massey would transfer us to different mines. Didn't matter if you worked there and knew it or nothing. That's where you had to go, where—you had to live out of your car. Went over to the Big Branch Mines, never knew nothing about the mines, went into the mines. They'd never give you a safety meeting. You went up on that section, and the first thing they said, "That's your machine." I was a roof bolter. You went up to that roof bolter, the first thing they'd do was start tearing the ventilation curtain down, that ventilates the face.

I heard Senator Rockefeller talk about the dust and the debris and stuff that creates the explosion. Hey, when the inspector would show up on the property, they would shut the section down. They would drop dust, they would get all the debris away that could cause an explosion. Soon as the inspector would leave the property they jerk all the ventilation back down and start mining coal. It's impossible for you to mine 600, 700 feet of coal in a 8-hour period out of coal mines, and do it right.

I worked at union mines. I was working out of union mines. We try to do everything right. We do everything right, and the company wanted us to do everything right. It's not fair to those miners. Like I say, I worked there, and I talked to those guys. I'm not telling you what someone told me. I'd try to get those guys to understand that we need to stand up. And you know what they said? "If you don't like it, you get out of here, because if we stand up, we all are fired." And that's the way that they operate.

I worked until I couldn't take it no more. My wife was worried to death. I would fear for my safety the whole time I worked for them. So, I quit. I said, "I will starve to death first." It's not right for a person, a human being, to have to go to work under those type of pressures and do a job. I mean, it's not right.

People have gotten hurt, when I worked there. They would let you come to work. To keep from filing a accident report, they would put you on light duty—let you stay out in the bath house, or do a light-duty job to keep from filing an accident report, so it wouldn't go against the mines.

It's just so much that, I don't have enough time to tell it all. But, it's not fair. Like Cecil said, this is America. We shouldn't have to live like that. I'm on the Mine Committee at the mines where I work at. I'm on the Safety Committee, and I have as much power as MSHA. I can tell them to shut the section down if something's not right, and we are going to fix it. Those men at Massey, they don't have that right. It's just not right.

[The prepared statement of Mr. Harris follows:]

PREPARED STATEMENT OF JEFFREY HARRIS

My name is Jeffrey Harris. I am a coal miner from Beckley, WV. I have over 30 years of experience as an underground coal miner. For the last 4 years I have worked at the Harris #1 Mine, which is owned and operated by the Patriot Coal Company. I am a roof bolter, which means my job is to pin the underground roof of the mine to keep it safe. I also have experience doing most of the underground jobs including running equipment, working on the belts, and construction.

Before my current job, I worked for Massey. I worked at the Keppler Mine in Pineville, WV and my job was roof bolter there, too. I worked for Massey for about 6 months in the first half of 2006. Even though I was hired to work at the Keppler Mine, I spent a little time at the Upper Big Branch, and some other Massey operations. When MSHA shut down the Keppler mine because of violations, the Company would send us to other mines to work.

In the end, I quit my job with Massey because I couldn't take the poor conditions in the mine. I was scared and didn't feel comfortable working there. I am here to tell you about some of the things I know from my time working at Massey mines; things that aren't right and which shouldn't be allowed to continue. I am here because I am concerned that other miners are working in conditions I know aren't safe.

Sometimes, if we had heard that there was too much gas, we'd be told the problem was taken care of and not to worry. We might not believe them that the problem was fixed, but we had a job to do and we worked. Then when an inspector came by, he would find excess gas and shut us down. This showed us that the Company couldn't be trusted.

You might wonder why we would work if we thought it was dangerous. The answer is simple: either you worked or you quit. If you complained, you'd be singled out and get fired. Employees were scared, but like me they have to feed their family. Jobs are scarce, and good paying coal mining jobs are hard to come by.

One of the problems at Upper Big Branch Mine was with the air. When we were outside they might talk about safety but as soon as you went underground it was a different story. When we got to a section to mine coal, they'd tear down the ventilation curtain. The air was so thick you could hardly see in front of you. When an MSHA inspector came to the section, we'd hang the curtain, but as soon as the inspector left, the curtain came down again. Some people would tell the inspectors about these kinds of ventilation changes that were made for the inspectors benefit, but the inspectors told us "we need to catch it," and that didn't happen very often.

At the Massey mines, we'd also shut down equipment when the inspectors were at the mine so they couldn't take readings while we were mining. We'd have to say the machine was "down." As soon as the inspector left, we'd kick it right back into service. This was a common practice. I could tell the inspectors would get frustrated, but they had a lot of ground to cover and couldn't hang around waiting.

In checking for gas, we would take a number of gas monitors to check for gas levels, but we would only report the lowest. If other readings were too high, they wouldn't get reported at all.

The Massey mines were always understaffed, which also meant there weren't people available to take all the safety readings, or take care of the ventilation like it should be done. Our regular schedule was a 12-hour day with 4 hours mandatory overtime. We had to wait for our replacement to take over before we could leave our equipment to go home. If the replacement didn't come, we'd have to stay and keep on working even beyond the 16 hours.

Reports about Massey's lost time accidents are also misleading. I was lucky and never got hurt while I worked for Massey, but I know plenty of other guys who did get injured. If you got hurt, you were told not to fill out the lost time accident paperwork. The Company would just pay guys to sit in the bathhouse or to stay home if they got hurt—anything but fill out the paperwork.

I could say even more but this gives you an idea of some of the problems. If an operator wants to, it's pretty easy to cut corners on safety. That's exactly what I saw at the Massey mines where I worked. People shouldn't have to work like that. Nobody should have to fear for their life just to earn a paycheck.

Thank you for giving me this chance to talk about mine safety. I would be happy to answer your questions.

The CHAIRMAN. Well, Mr. Harris, thank you very much, very powerful statement. That's why it's always good to have someone like you, who's out there, that gets their hands dirty, and goes in those mines, come here and tell us what it's really like.

Mr. Addington.

STATEMENT OF WES ADDINGTON, DEPUTY DIRECTOR, APPALACHIAN CITIZENS' LAW CENTER, WHITESBURG, KY

Mr. ADDINGTON. Chairman Harkin and members of the committee and Senator Rockefeller, thank you for allowing me to speak to you today regarding the health and safety of America's miners.

My name is Wes Addington, and I'm an attorney at the Appalachian Citizens' Law Center, a nonprofit law firm that represents miners and their families on mine safety and health issues. At the Law Center, I operate the Mine Safety Project, which works to improve safety conditions for miners in the coal fields. Primarily, the Mine Safety Project represents miners that suffer workplace discrimination for making protected safety complaints.

Unfortunately, I'm before you today following the mine explosion in Montcoal, WV, which has claimed the lives of 29 miners. The Massey disaster, at Upper Big Branch, now becomes synonymous with death in the coal mines, like the four recent disasters before it: Crandall Canyon, Darby, Aracoma, and Sago. All were preventable. Five coal mining disasters in barely 4 years is not only a crisis, it's a national disgrace.

My father was a Kentucky coal miner, and his father before him, and all four of my great-grandfathers were miners. Congress's opening declaration in the MINE Act of 1977 is that, "The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource, the miner." However, moving forward, the miner should also be our most precious resource in any strategy to improve mine safety in America and prevent future disasters. Miners best know the conditions present in their mines, more so than even inspectors and operators, and can provide invaluable information to Federal regulators working to ensure their protection.

Congress realized, long ago, that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards.

We have to the reach the point in this country that miners, without hesitation, report unsafe conditions. However, recent mine disasters and scores of individual mining fatalities show that this is not happening frequently enough. Unfortunately, in too many mines, miners that complain about unsafe conditions are harassed, interfered with, or even discharged. Many miners feel that those who do complain aren't supported or protected to the degree envisioned under the MINE Act. Understandably, then, an experienced and skilled coal miner will often quit a bad situation and find a new job elsewhere, rather than ask MSHA or the State mine enforcement agency to investigate and remedy the unsafe conditions. Thus, the Federal Government has to do a better job of publicizing miners' safety rights and increasing their support of miners who exercise those rights.

Now, I know my time is limited here, but I would just like to point the committee to my other two topics of interest that I planned on talking about today, which is increasing the frequency and the quality of training of miner safety rights, and the failure of MSHA to place mines on a Pattern of Violation notice.

What I would like to talk about, really briefly, is representatives of miners. Representatives of miners are working miners that are selected by at least two other miners to represent them in safety and health matters at their mine. Miners' reps are granted special rights, under the Federal law, which are designed to encourage active participation in the enforcement of mandatory health and safety standards, and to keep their coworkers apprised of issues that might affect mine safety and health. They have the right to accompany MSHA inspectors during an inspection of the mine, for the purpose of aiding such inspection and to participate in pre- and post-conferences held at the mine. They also have a right to receive every copy of any order, citation, notice, or decision that is given to the mine operator.

Yet, with all the inherent safety advantages—the Miners' Right—the Rep system offers to miners, it is shockingly underutilized.

A Freedom of Information Act response revealed, in 2008, that more than 98 percent of 249 coal mines in eastern Kentucky's MSHA district No. 6 did not have one miners' representative. Only 4 of those 249 mines had miners' representatives. One reason for the lack of miners' reps is that miners are often interfered with, or at least discouraged, by the operator if they show interest in becoming a miners' rep. One of our current clients was discharged for becoming a miners' rep at his mine.

MSHA should devote special attention toward increasing the number of miners' reps, and I would encourage Congress to consider a change in the law to require miners' reps on every shift at every mine, to ensure the substantial safety protections gained through this system.

Thank you.

[The prepared statement of Mr. Addington follows:]

PREPARED STATEMENT OF WES ADDINGTON

SUMMARY

We have to reach the point in this country that miners, without hesitation, report unsafe conditions. However, recent mine disasters and scores of individual mining fatalities show that this is not happening frequently enough. Unfortunately, in too many mines, miners that complain about unsafe conditions are harassed, interfered with, or even discharged.

REPRESENTATIVES OF MINERS

Representatives of Miners are working miners that are selected by at least two other miners to represent them in safety and health matters at their mine. Miners' Representatives are granted special rights under Federal law, which are designed to encourage active participation in the enforcement of mandatory health and safety standards and to keep their co-workers apprised of issues that affect their health and safety. Yet, with all the inherent safety advantages the Miners' Representative system offers to miners, it is shockingly underutilized. MSHA should devote special attention towards increasing the number of Miners' Representatives. I would encourage Congress to consider a change in the law to require a Miners' Representative be designated at every mine on each shift to ensure the safety protections gained through this system.

MINERS' RIGHTS TRAINING

Congress envisioned a robust program to train the Nation's miners in the duties of their occupations, which includes thorough training of miners as to their statutory rights. Miners are in a unique position to monitor workplace conditions when inspectors are absent and have an active voice in safety issues at their mines. The

present program has systemic shortcomings. In my experience, too many miners do not know that they can, under the law, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators without retaliation. Thus, to meet Congress' goals under the Mine Act, miners need more extensive and more frequent training of their statutory rights. Not only should the frequency of miners' statutory rights training increase, but also the quality of and methods by which miners receive such training.

PATTERN OF VIOLATIONS

In response to the Scotia Mine Disaster in 1976, Congress sought to address chronic and repeat violators and prevent operators from continually piling up citations for dangerous conditions. It is clear from the legislative history that Congress believed the "pattern of violations" provision in the Mine Act would be a strong enforcement tool to go after the worst violators. Yet, 33 years and more than a dozen mine disasters later, MSHA apparently has only issued one (1) "pattern of violations." The implementing regulation and MSHA's internal criteria for determining a "pattern" is currently framed so that it is nearly impossible for a repeat violator to be subjected to the enhanced enforcement intended in the statutory provision. MSHA has not used the statutory tools available in the Mine Act to aggressively address problem mines. Not only has MSHA unnecessarily constrained its ability to use the "pattern of violations" provision, it has reportedly never sought an injunction or restraining order against a mine that it believes engaged in a pattern of violation that constitutes a continuing hazard to the safety of miners as allowed under section 108(a)(2) of the Mine Act. Thus, additional legislation may be needed to fully realize Congress' intention 33 years ago to prevent mine operators from engaging in a pattern of recurrent violations that can ultimately lead to the deaths of miners.

Chairman Harkin and members of the Senate Committee on Health, Education, Labor, and Pensions, thank you for allowing me to speak to you today regarding the health and safety of America's miners.

My name is Wes Addington and I am an attorney at the Appalachian Citizens' Law Center, a non-profit law firm that represents miners and their families on mine safety and health issues. The Law Center is based in Whitesburg, KY, which is centrally located in the Appalachian coal fields.[1] At the Law Center, I operate the Mine Safety Project, which works to improve safety conditions for miners in the coal fields. Primarily, the Mine Safety Project represents miners that suffer workplace discrimination for making protected safety complaints. In addition to mine safety, we also focus on the area of miners' health where we represent disabled miners afflicted with black lung disease and miners' widows whose husbands have died from the disease.

Unfortunately, I am before you today following the mine explosion in Montcoal, WV, which claimed the lives of 29 miners. The Massey Disaster at Upper Big Branch now becomes synonymous with death in the coal mines like the four recent disasters before it: Crandall Canyon, Darby, Aracoma, and Sago. All were preventable. Five coal mining disasters in barely 4 years is not only a crisis, it is a national disgrace.

My father was a Kentucky coal miner and his father before him and all four of my great grandfathers were miners. Congress' opening declaration in Federal Mine Safety and Health Act of 1977 is that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner."[2] However, moving forward, the miner should also be our most precious resource in any strategy to improve mine safety in America and prevent future disasters. Miners best know the conditions present in their mines, more so than even inspectors and operators, and can provide invaluable information to the Federal regulators working to ensure their protection. Congress realized long ago that "mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards."[3]

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[1] Whitesburg is in Letcher County, site of the 1976 Scotia Mine Disaster, which killed 26 miners and mine inspectors and led to the passage of the Federal Mine Safety and Health Act of 1977.

[2] 30 U.S.C. § 801 et al. ("Mine Act").

[3] S. Rep. No. 95–181, 95th Cong. 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*.

We have to reach the point in this country that miners, without hesitation, report unsafe conditions. However, recent mine disasters and scores of individual mining fatalities show that this is not happening frequently enough. Unfortunately, in too many mines, miners that complain about unsafe conditions are harassed, interfered with, or even discharged. Many miners feel that those who do complain aren't supported or protected to the degree envisioned under the Mine Act. Understandably then, an experienced and skilled miner will often quit a bad situation and find a new job elsewhere, rather than ask MSHA or the State mine enforcement agency to investigate and remedy the unsafe conditions. Thus, the Federal Government has to do a better job of publicizing miners' safety rights under current law and increasing their support of miners that exercise those rights. In areas, current law is insufficient to properly protect our miners. With that in mind, I make the following recommendations:

REPRESENTATIVES OF MINERS

Representatives of Miners are working miners that are selected by at least two other miners to represent them in safety and health matters at their mine.[4] Miners' Representatives are granted special rights under Federal law, which are designed to encourage active participation in the enforcement of mandatory health and safety standards and to keep their co-workers apprised of issues that affect their health and safety. Miners' Representatives have the following rights:

- The right to receive a copy of every proposed mandatory health or safety standard or regulation at the time of publication in the Federal Register. Sec. 101(e) of the Mine Act.
- The right to accompany an MSHA inspector during the inspection of the mine, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Sec. 103(f).[5]
- The right to receive a copy of the notification to the operator for every citation or order issued by MSHA. Sec. 105(a).
- The right to receive a copy of the notification to the operator for every citation that the operator has failed to correct. Sec. 105(b)(1)(A).
- The right to receive a copy of any order, citation, notice or decision that is required by the Mine Act to be given to the operator. Sec. 109(b).
- The right to receive a copy of any electrical equipment permit granted. Sec. 305(b).

In view of these special safety rights granted to Miners' Representatives, it's clear that Congress intended them to play a central role in matters of safety and health and be a vital source of information for the rest of the miners. MSHA has said that the Miners' Representative "plays an important part in our inspection work." MSHA further stated:

> Congress put this into the Act because they felt that you [the miner], with your knowledge of the work site, could provide our inspectors with a great deal of useful information. They also felt that if you watched what happened during an inspection you would better understand how the Act's safety and health requirements work.

In fact, MSHA recommended that every shift have a Miners' Representative available.[6]

Yet, with all the inherent safety advantages the Miners' Representative system offers to miners, it is shockingly underutilized. A Freedom of Information Act response revealed, in 2008, that more than 98 percent of the 249 coal mines in eastern Kentucky's District 6 did not have a Miners' Representative.[7] One reason for the lack of Miners' Representatives is that miners are often interfered with or at least discouraged by the operator if they show interest in becoming a Miners' Representative. One of our current clients was discharged for becoming a Miners' Representa-

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[4] 30 U.S.C. § 813(f).

[5] "Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness." S. Rep. No. 95–181, 95th Cong. 1st Sess. 36 (1977)

[6] A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977. U.S. Department of Labor, MSHA (2000).

[7] The FOIA request was made by Dr. Celeste Monforton for every mine in the country with more than 5,000 employee hours.

tive at his mine. Additionally, MSHA does not sufficiently promote or encourage miners to become Miners' Representatives.

Thus, I would implore MSHA to devote special attention towards emphasizing and encouraging miners to become Miners' Representatives. Far too many miners aren't even aware that they can designate one of their co-workers to travel with inspectors during inspections and receive copies of all citations, orders, and notices issued to the operator. I would encourage Congress to consider a change in the law to require a Miners' Representative be designated at every mine on each shift to ensure the safety protections gained through this system.

MINERS' RIGHTS TRAINING

Congress envisioned a robust program to train the Nation's miners in the duties of their occupations, which includes thorough training of miners as to their statutory rights. The present program has systemic shortcomings.[8] The result is that a large number of miners do not have a thorough understanding of their statutory rights and as a consequence they are unable to exercise such rights. After completing the required 40-hour training for new underground miners in Kentucky myself, I realized that the portion of the training on miners' rights was woefully inadequate if we expect miners to actively participate in enforcement of health and safety standards at their mines.

Training miners as to their statutory rights is an integral part of the Mine Act's requirements for health and safety training. For example, for new underground miners:

> Such training shall include *instruction in the statutory rights of miners and their representatives under this Act*, use of the self-rescue device and use of respiratory devices, hazard recognition, escape ways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned.[9] (emphasis added).

Similarly, for new surface miners,

> Such training shall include *instruction in the statutory rights of miners and their representatives under this Act*, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned.[10] (emphasis added).

Importantly, the Mine Act also requires that all miners receive at least 8 hours of refresher training annually.[11]

Federal Regulations set forth requirements for training and retraining of underground and surface miners, including training as to statutory rights. Part 48 requires that miners receive such statutory rights training only if they are new miners, and to a lesser extent, if they are experienced miners who are newly employed by an operator, transferring to the mine, or returning to a mine after an absence of 12 months or more. Part 48 does not require that miners must receive statutory rights training during their annual refresher training.[12]

In passing the Mine Act, Congress realized that miners must play a crucial role in maintaining a safe and healthy workplace:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.[13]

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[8] The bulk of my submitted testimony on miners' rights training was submitted to MSHA as part of Petition for Rulemaking in 2008. We had asked MSHA to make all of the changes recommended in this section of my testimony as they are able under their rulemaking authority. MSHA denied the Petition in full. For example, in response to a request that all miners be provided with a copy of MSHA's "A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977," the agency stated that the handbook "is available to miners on MSHA's Web site." April 8, 2008 Letter from Acting Assistant Secretary, Richard E. Stickler. Anyone who has ever viewed MSHA's complicated Web site would understand that this was essentially non-responsive.

[9] 30 U.S.C. § 825(a)(1).

[10] 30 U.S.C. § 825(a)(2).

[11] 30 U.S.C. § 825(a)(3).

[12] 30 CFR part 48.

[13] S. Rep. No. 95–181, 95th Cong. 1st Sess. 36 (1977).

Because miners know the day-to-day work conditions as well as or better than anyone, obviously they should be encouraged to insist on maintaining a safe and healthy workplace. They are in a unique position to monitor workplace conditions when inspectors are absent. However, in my experience many miners do not know that they can, under the law, voice concerns about workplace health and safety, refuse to perform unsafe work, review and give input to many aspects of an operator's plans for mining, or speak with MSHA inspectors and investigators without retaliation. Many miners do not realize that they may designate a representative to perform numerous functions under the Mine Act, and that such a representative need not necessarily be affiliated with a labor union.

Even if miners have some understanding of their statutory rights, they will not exercise those rights for fear of retaliation. They often lack confidence in MSHA's ability to protect them from retaliation, and rarely have anywhere else to turn for help. The upshot of this dynamic is that miners who find themselves working in unsafe or unhealthy conditions usually are silent about the unsafe conditions or find work at another mine, rather than speak out and risk retaliation, which can result in the assignment of undesirable work, threats from management or outright discharge. I've represented miners that have been fired for complaining about unsafe equipment and refusing to perform unsafe work. I've also represented a miner that was illegally suspended by the operator for not having required training for which the operator was actually responsible to provide.[14]

Thus, to meet Congress' goals under the Mine Act, miners need more robust and more frequent training of their statutory rights. To remedy the problems outlined above, MSHA must change not only the frequency of miners' statutory rights training, but also the quality of and methods by which miners receive such training.

As to the issue of *frequency* of statutory rights training, as noted above, MSHA requires statutory rights training under Part 48 primarily only for new miners. This obviously presents a problem, because even if new miners received the most dynamic statutory rights training, such knowledge fades over time. A miner may not need to exercise his or her statutory rights until several years into a mining career. At that juncture, if such miners have had relevant training only at the outset of their careers, they often do not know their statutory rights well at all and cannot protect themselves. An obvious solution to this dilemma is to require statutory rights training in annual refresher training.

There should also be changes in the *methods by which miners receive statutory rights training, and the substance and quality of that training*. Operators and management personnel should not be permitted to provide any of the required statutory rights training to miners. There is simply too great a conflict of interest to permit mine operators to conduct statutory rights training. Operators have incentive to downplay the expansiveness and importance of these rights, the key role which Congress envisioned miners playing in regulation of the workplace, and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Instead, miners should receive statutory rights training only from trainers who are independent of mine operators, such as trainings provided by State mine safety agencies.

Additionally, the training should delineate each of the following statutory rights of coal miners and/or miners' representatives:

- Protection against discrimination for exercising any rights under the Mine Act.
- How-to's of naming a miners' representative for the various functions a representative can serve under the Mine Act and its implementing regulations.
- Participation in inspections.
- Reporting and notifying inspectors of violations and imminent dangers, and requesting inspections.
- Pay for being idled by withdrawal order.
- Contesting enforcement actions.
- Participation in investigations where dangerous conditions cannot be corrected with existing technology.
- Review of imminent danger orders.
- Participation in cases before Federal Mine Safety Health Review Commission that affect the miner.
- Part 48 training rights, including:
  - Training during working hours.

[14] "No miner who is ordered withdrawn from a coal or other mine . . . shall be discharged or otherwise discriminated against because of such order; and no miner who is ordered withdrawn from a coal or other mine . . . shall suffer a loss of compensation during the period necessary for such miner to receive training and for an authorized representative of the Secretary to determine that such miner has received the requisite training." 30 U.S.C. § 104(g)(2).

- Pay while receiving training.
- Receiving training records from operator.
- Protection from discrimination and loss of pay for lack of training.
- Review of all types of Part 48 training plans.

Free examinations to ascertain exposure to toxic materials or harmful agents.

- Request of Department of Health and Human Services to study/research substance in mine environment for toxicity, or whether physical agents/equipment within mine are dangerous.
- Availability of chest x-rays free of charge, including explanation of intervals when such x-rays are to be made available.
- Transfer to less dusty atmosphere upon black lung diagnosis.
- Review and comment upon/objection to proposed standards, including legal challenges to proposed standards.
- Request to modify application of a certain safety standard at a mine, and participation in MSHA's decision when operator requests such a modification.
- Right to access information (recordings, findings, reports, citations, notices, orders, etc.) within MSHA and Department of Health and Human Resources.
- Observation of operator's monitoring of miner's exposure to toxics and other harmful agents, and access to records of exposure and information about operator abatement in cases of overexposure.
- Access to operator's accident records and reports.
- Notice of MSHA proposed civil penalty levied against operator.
- Operator posting of MSHA orders, citations, notices, etc., as well as receipt of same by miners' representative.
- Review of roof control plan and instruction in revision to such plan.
- Review of mine map illustrating roof falls.
- Notification of and instruction on escape from area where ground failure prevents travel out of the section through the tailgate side of a long-wall section.
- Review of records of examinations and reports (pre-shift examinations, weekly examinations for hazardous conditions, weekly ventilation examinations, daily reports of mine foremen and assistant mine foremen).
- Review of records of electrical examinations and maps showing stationary electrical installations.
- Review of underground mine maps.
- Operator's notification of submission of new ventilation plan or revision to existing ventilation plan, review of existing ventilation plan, comment upon proposed ventilation plan and any proposed revisions, and instruction from operator on ventilation plan's provisions.
- Review of records of examination of main mine fan.
- Review of records of examination of methane monitors.
- Review of records of torque/tension tests for roof bolts.
- Review of records of tests of ATRS roof support/structural capacity.
- Special instruction when rehabilitating areas with unsupported roof.
- Operator posting of escapeway maps and notification of changes to escape ways.
- Participation in escapeway drills.
- Posting and explanation of procedures to follow when mining into inaccessible areas.
- Review of records of diesel equipment fire suppression systems, fuel transportation units, and underground fuel storage facilities, as well as records of maintenance of diesel equipment and training records of those operating diesel equipment.
- Review and comment upon emergency response plans.
- Any other rights set forth in either statute or regulation.

This additional training would highlight to miners that they are expected to exercise their statutory rights. A more informed and empowered miner workforce would decrease the odds that conditions in a mine could deteriorate to the point that a mine disaster could occur.

PATTERN OF VIOLATIONS

In response to the Scotia Mine Disaster in Letcher County, KY, which killed 23 miners and 3 mine inspectors in 1976, Congress sought to address chronic and repeat violators and prevent operators from continually piling up citations for dangerous conditions. The result was section 104(e) of the Mine Act which substantially increased the penalties for any operator that has a "pattern of violations."[15] It's

[15] 30 U.S.C. § 814(e).

clear from the legislative history that Congress believed the "pattern of violations" provision would be a strong enforcement tool to go after the worst violators:

> Section [104(e)] provides a new sanction which requires the issuance of a withdrawal order to an operator who has an established pattern of health and safety violations which are of such a nature as could significantly and substantially contribute to the cause and effect of mine health and safety hazards. The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster. . . . That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.[16]

They also believed it would send a strong signal:

> The committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The committee views the [104(e)(1)] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. *The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient* [17] (emphasis added).

Finally, they felt that they provided flexibility, so a rigid standard wouldn't constrain the agency's use of the provision:

> It is the committee's intention to grant the Secretary in Section [104(e)(4)] broad discretion in establishing criteria for determining when a pattern of violations exists. . . . The committee intends that the criteria make clear that a pattern may be established by violations of different standards, as well as by violations of a particular standard. Moreover. . . . pattern does not necessarily mean a prescribed number of violations of predetermined standards. . . . As experience with this provision increases, the Secretary may find it necessary to modify the criteria, and the committee intends that the Secretary continually evaluate the criteria, for this purpose.

Yet, 33 years and more than a dozen mine disasters later, MSHA apparently has only issued one (1) "pattern of violations" under the Mine Act. The implementing regulation and MSHA's internal criteria for determining a "pattern" is currently framed so that it is nearly impossible for a repeat violator to be subjected to the enhanced enforcement intended in the statutory provision.[18] I have attached to my testimony a letter recently sent by myself and longtime mine safety advocate Tony Oppegard to MSHA requesting that they rescind and rewrite the regulation so that it complies with the statutory requirements of section 104(e).

Much has been recently made of the effect that the significant backlog of cases at the Federal Mine Safety and Health Review Commission ("Commission") has had on MSHA's ability to enforce the "pattern of violations" provision against repeat violators. The claim is that mine operators are appealing all violations upon which a pattern could be based and their pending status ties MSHA's hands.[19] Although the backlog is troubling and should be addressed, it is a red herring and not the root cause of the problem.[20] Never mind that the backlog has only existed for a couple

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[16] S. Rep. No. 95–181, 95th Cong. 1st Sess. 36 (1977).

[17] S. Rep. No. 95–181, 95th Cong. 1st Sess. 36 (1977).

[18] 30 CFR part 104; *http://www.msha.gov/POV/POVsinglesource.asp*.

[19] Although a recent report cited a "computer program error" and not the Commission's backlog for the failure to send a warning letter that Upper Big Branch mine may be placed on a "pattern of violations." *http://wvgazette.com/News/montcoal/201004130638*.

[20] In fact, further undercutting the claim that endless appeals are preventing "pattern of violations" notices, is the 2006 agreement between the Solicitor and Massey Energy wherein the company could reopen delinquent penalties that had become final orders of the Commission:

> We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor—MSHA—Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000–179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within

Continued

of the 33 years the "pattern of violations" provision has been on the books. Simply, MSHA has not used the statutory tools available in the Mine Act to aggressively address problem mines. Not only has MSHA unnecessarily constrained its ability to use section 104(e), it has reportedly *never* sought an injunction or restraining order against a mine that it believes engaged in a pattern of violation that constitutes a continuing hazard to the safety of miners as allowed under section 108(a)(2).[21] Thus, additional legislation may be needed to fully realize Congress' intention 33 years ago to prevent mine operators from engaging in a pattern of recurrent violations that can ultimately lead to the deaths of miners.

Once again, we as a nation are reeling from another mine disaster. However, Congress has an opportunity to enact changes that can ensure the protection of today's miners and prevent future generations of mining families from suffering like too many families have over the years. Thank you for taking my recommendations into consideration.

TONY OPPEGARD, ATTORNEY-AT-LAW,
LEXINGTON, KY 40522.
WES ADDINGTON, ATTORNEY-AT-LAW,
WHITESBURG, KY 41858,
April 12, 2010.

JOSEPH A. MAIN,
Assistant Secretary of Labor for Mine Safety & Health,
Mine Safety & Health Administration,
1100 Wilson Boulevard,
Arlington, VA 22209,

Re: Request to rescind "pattern of violations" regulation.

DEAR MR. MAIN: On behalf of the coal miners that we represent in safety-related litigation in the coal fields of eastern Kentucky, we hereby respectfully request MSHA to immediately rescind its "Pattern of Violations" regulation found at 30 CFR Part 104, and to re-write the regulation so that it complies with the statutory requirements set forth in § 104(e)(1) of the Mine Act and as expressed in the Mine Act's legislative history.

Section 104(e)(1) provides, in pertinent part, that:

> "**If an operator has a pattern of violations of mandatory health or safety standards** in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of . . . mine health or safety hazards, **he shall be given written notice that such pattern exists**. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to . . . a safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative determines that such violation has been abated" (emphasis added).

The committee that drafted the "Pattern of Violations" provision stated that:

> "The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster which occurred in March 1976 in eastern Kentucky. That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. **The committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.**
>
> **The committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's**

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a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.—*Secretary of Labor, MSHA* v. *Rockhouse Energy Mining Co.*, 31 FMSHRC 847 (Aug. 11, 2009).

[21] 30 U.S.C. § 818(a)(2).

> **standards. The committee views the** § 105(d)(1) notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. The existence of such a pattern should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.
>
> The committee intends that the criteria [to determine when a pattern of violations exists] make clear that a pattern may be established by violations of different standards, as well as by violations of a particular standard. Moreover, while the committee considers that a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations of predetermined standards nor does it presuppose any element of intent or state of mind of the operator. . . .''—*Legislative History of the Federal Mine Safety & Health Act of 1977*, at 32–33 (1978) (emphasis added)

Based on the foregoing plain language of the statute, as well as its legislative history, we believe the Mine Act mandates MSHA to notify an operator whenever a pattern of violation exists. The regulation promulgated by MSHA—which **WARNS** the operator that it might be placed on a pattern if it doesn't improve its safety performance—in our view, contradicts the plain language of the provision and, moreover, defeats its intent. By **WARNING** an outlaw operator, MSHA is effectively telling the operator how to avoid being placed on a pattern and thus how to avoid stricter scrutiny of its compliance with the law. We think it akin to an MSHA inspector observing a violation, but improperly warning the operator that a citation will be issued if the violation is not corrected in a prescribed period of time.

The fact that only one coal mine in the entire United States has been placed on a pattern under § 104(e)(1) since the passage of the Mine Act in 1977 should make it obvious to MSHA that this provision of the law is not working. We believe that the Congress that enacted this important enforcement tool in 1977 would be stunned to know that it has only been used once in the past 33 years—despite the fact that miners continue to die at an unacceptable rate in our Nation's mines.

Indeed, the extensive and flagrant violation history of the Upper Big Branch mine makes clear that that mine should have been "placed on a pattern" long before the recent disaster. Any mine that accumulates almost 50 unwarrantable failure violations in a single year deserves the heightened scrutiny provided by § 104(e)(1) of the Mine Act. The fact that Massey's Upper Big Branch mine did not meet the criteria set forth in MSHA's "pattern of violations" regulation is proof that the regulation contradicts the intent of the statutory provision. Had MSHA used this enforcement tool as Congress intended, the mine would have received the stricter scrutiny that might have prevented the disaster.

Please call us if you have any questions about this request. Thank you for your consideration of this matter.

Sincerely,

TONY OPPEGARD,
Attorney-at-Law,
P.O. Box 22446, Lexington, KY 40522; (859) 948–9239.
WES ADDINGTON,
Attorney-at-Law, Appalachian Citizens Law Center,
317 Main Street, Whitesburg, KY 41858; (606) 633–3929.

The CHAIRMAN. Thank you, Mr. Addington. Thank you for that suggestion. We'll look at it seriously.

Mr. Watzman, welcome.

STATEMENT OF BRUCE WATZMAN, SENIOR VICE PRESIDENT, REGULATORY AFFAIRS, NATIONAL MINING ASSOCIATION, WASHINGTON, DC

Mr. WATZMAN. Thank you, Mr. Chairman, for the opportunity to appear today.

Before turning to the topic of this hearing, let me again express the condolences of the entire mining community to the families of those who tragically lost their lives at the Upper Big Branch Mine. Our thoughts and prayers are with all who are touched by this

tragedy. Our heartfelt thanks go out to the rescue team members who worked so tirelessly to recover their fellow miners.

I come here today to assure you that we will join with you to find out what happened at the mine, and why it happened. We do not accept that mining tragedies are inevitable. We join with others here today to ensure that from this tragedy will emerge a stronger resolve to do better what we've tried so hard to do well.

We understand the significance of the challenge we face, to bring all miners home safely from their important work. This is the responsibility that we owe all who work in the mines, and it's the debt that we owe those who perished at the Upper Big Branch Mine.

Mine safety is an operator's obligation, and must be their highest priority. Both operators and MSHA have a shared responsibility to ensure a safe workplace. It is this shared responsibility that led to the dramatic improvement of the last 2 years, where we achieved all-time historic lows, in terms of the number of miners who lost their lives. Still too many, but the record was improving.

Several themes have emerged since the events of April 5, and I'd like to address three that are most relevant to this hearing.

First is the question of the adequacy of enforcement authority provided MSHA under the MINE Act, the quality of workplace inspections, and the appropriate application of the full range of enforcement authority provided in the law.

Second is the backlog of cases pending before the Review Commission, and whether these appeals jeopardize miners' safety and health by preventing MSHA from instituting additional sanctions against operators.

And third, whether new laws or regulations are necessary to create a culture of prevention across the industry.

Turning to the first issue, attached to my written statement is an analysis demonstrating how the enforcement authority under the MINE Act goes well beyond the enforcement authority provided OSHA, for example. Mines are subject to mandatory inspections. Inspectors have warrantless entry authority; authority to withdraw miners from any area of the mine, for failure to abate cited conditions, for failure to comply with mandatory standards, and when an imminent danger is present. The enforcement powers under the MINE Act are extensive. They need to be used, when conditions warrant, rather than broadly supplemented.

The second issue is the backlog of cases before the Review Commission. We support efforts to eliminate the backlog. Its continuation does not serve the interest of miners nor mine operators. We want to assure you that we're ready to take the steps now to correct what all agree is a dysfunctional citation and appeals process. Unlike under OSHA, appealing a citation under the MINE Act, does not stay the requirements to correct the alleged violation. The "abate first and contest later" rule of the MINE Act imposes immediate and substantial obligations on operators to eliminate, whether valid or not, the perceived hazard that gave rise to the condition under which the citation is issued.

Now, some believe that the backlog results from a deliberate attempt by some operators to clog the adjudicatory system to prevent the agency from placing a mine on the pattern cycle. Even if one

were to accept this, there is, without question, the ability of the agency to take additional enforcement actions. The imminent danger authority, which was discussed earlier, is available. Unlike pattern authority, it doesn't require even the finding of a violation of a mandatory standard. It's far more powerful than the pattern tool, but it's infrequently used.

MSHA also has injunctive relief authority. The fact is, Congress did not limit MSHA's enforcement authorities. The tools are sufficient, when properly used.

The final point is what we need to do to create a culture of safety across the entire industry, a culture of prevention across the industry. In our view, the strategies for improving performance must change. Last year, 86 percent of the mines in our industry worked the entire year without a lost-time accident. Enforcement contributed to this record. It's necessary, but it, in and of itself, is not sufficient.

We need to place renewed emphasis on risk-based safety performance through programs that share the best of the best in safety performance with the entire industry. These are vital components of an effective safety effort that go beyond regulatory enforcement authority.

Mine operators who improve their performance year after year recognize the need to go beyond mere conformity with the law. They understand that regulations alone aren't sufficient to bring about continued improvement.

It's time for all of us to recognize that culture, leadership, training, and other organizational behavioral factors influence performance. To the extent they fall short, regulators provide a needed and necessary safety net. Regulators and mine operators must stand apart, but an adversarial relationship should not be a hostile relationship as we seek better ways to improve miner safety.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Watzman follows:]

PREPARED STATEMENT OF BRUCE WATZMAN

Mr. Chairman and members of the committee, thank you for providing the National Mining Association (NMA) the opportunity to share our thoughts on: (1) whether the Federal Mine Safety and Health Act of 1969 as amended and as administered by the Mine Safety Health Administration (MSHA) is an effective tool to ensure safe worksites and safe operator behavior; and (2) whether the enforcement authorities of the act, including the assessment and adjudication structure, are sufficient to create a culture of compliance at the Nation's mines.

Allow me, again, to express the condolences of the entire mining community to the families of those who tragically lost their lives at the Upper Big Branch (UBB) mine. Our thoughts and prayers are with all who were touched by this tragedy, and our heartfelt thanks are extended to all of the rescue personnel who worked so tirelessly to recover the fallen. We also commend President Obama and Vice President Biden for giving appropriate recognition and solace to the mining community at Beckley, WV last weekend.

COMMITMENT TO A COMPLETE, IMPARTIAL AND TRANSPARENT INVESTIGATION

I come here today to assure you that the full resources of American mining will join with State and Federal agencies, academic institutions and other professionals to find out what happened at the Upper Big Branch mine and why it happened. This will require a thorough review of the roles played by all parties—mine management, miners and Federal and State regulators—who were shaping the policies and procedures at the mine prior to the accident. We do not accept this or any mining tragedy as inevitable. Preventing a reoccurrence must include a complete and trans-

parent examination of the actions of all parties. At the very least, we must use Upper Big Branch as a tool to further improve mine safety.

For those reasons we applaud the decision of Secretary of Labor Solis to request an independent party to undertake a review of MSHA's actions leading up to and following this tragic event. This will ensure an impartial and open investigation. As in the past, numerous valuable reports will emerge from the examination process that is now underway. Despite inevitable overlaps, the forthcoming analyses, findings and recommendations must be evaluated and decisions to implement the recommendations must be made quickly to better protect miners.

We understand the significance of the task we face, to ensure a tragedy like this one is not repeated. Our goal remains to bring all miners home safely from their important work. That is the responsibility American mining owes all who work in our mines, and it is the debt we owe those who perished.

We join with others here today to ensure that from this tragedy will emerge stronger resolve and more comprehensive cooperation in our pursuit of safer mines. Our expectation is that from this and similar hearings and from the exhaustive investigations underway we can do better in what we've tried hard to do well.

Last week in remarks to the Nation, President Obama stated that all miners deserve "a company that's doing what it takes to protect them, and a government that is looking out for their safety." We agree. American mining has made significant investments in and commitment to mine safety in recent years and has successfully lowered our rate of injuries. Last year was the safest year in history for all of U.S. mining and for coal mining. We understand, however, that this accomplishment offers little solace to the families that lost loved ones. The loss of life at the Upper Big Branch Mine calls our progress into question. We understand that. Only when the lessons learned from this tragedy are clearly identified and woven into the fabric of daily operating procedures can we expect to realize the full results of our commitment to safety.

As this committee considers what it will hear today and the results of the investigations that are currently underway, it is appropriate to consider if existing enforcement authority is sufficient to protect miner safety. Put another way, we should consider whether the enforcement process is properly focused on quality workplace inspections and the appropriate application of the full range of enforcement authority provided in the law.

MSHA'S ENFORCEMENT AUTHORITY IS SUFFICIENT

In our view, the enforcement authority provided MSHA under the Mine Act is sufficient to ensure that mine operators are providing a safe and healthy work environment for their employees. The Mine Act goes well beyond the authority provided to the Occupational Safety and Health Administration (OSHA), for example. Unlike workplaces in general industry, mines are currently subjected to mandatory inspections during which inspectors have the authority to enter without a warrant, evaluate an entire mine and withdraw miners from any area of a mine for failure to abate cited conditions, for unwarrantable failure to comply with mandatory standards, and in any area that presents an imminent danger. Withdrawal orders may be issued on the spot by any authorized representative of the Secretary. This is the most powerful enforcement tool afforded any enforcement agency.

Many mines, because of the time needed to conduct an inspection, have inspectors on site nearly every day. Additionally, the Mine Act contains individual civil penalties for corporate officers and agents for knowing violations and possible criminal sanctions of 1-year for accidents not involving a fatality. In sum, the enforcement powers under the Mine Act need to be used when conditions warrant, and if MSHA was not using them to their fullest extent, Congress should examine the reasons for that before increasing the enforcement power. (Attachment 1 summarizes MSHA's critical enforcement authority.)

Much attention also has been focused on MSHA's use of the "Pattern of Violation" authority under the act. While we can speculate on whether or not placing UBB under a Pattern of Violation would have prevented the events of April 5, we must recognize that MSHA has other enforcement tools that accomplish the same result as the pattern provision. In fact, the "imminent danger" withdrawal authority of the act, unlike "Pattern," does not even require the finding of a violation of a mandatory health or safety standard before a withdrawal order can be issued.

Hence, "imminent danger" authority is a far more powerful enforcement tool than the "pattern" authority.

BACKLOG IN CONTESTED CITATIONS IS UNTENABLE AND MUST BE ADDRESSED

Let me turn now to the citation and appeals process and clearly state that the current backlog in contested citations is untenable and must be addressed. Let me be equally clear that when a violation is cited, the mine operator must abate the underlying cause within the time set by the mine inspector. The abatement action is not subject to appeal: It must be taken. This requirement is also unique to American mining. (See attachment 2)

Once the underlying condition has been abated, only then can the merits of the original alleged violation and the resulting penalty be contested. Recently, attention has focused on the rate at which mine operators have been formally contesting citations and actions, including citations and withdrawal orders issued by MSHA. Attention has also focused on whether this has prevented the agency from instituting additional sanctions, including "Pattern of Violations" enforcement. This matter was thoroughly discussed at a February hearing before the House Education and Labor Committee. While reasonable people may disagree on the cause for the backlog of cases pending before the Federal Mine Safety and Health Review Commission, all agree that this situation cannot continue. The backlog does not serve the interest of miners or the interest of mine operators. We pledge to work with Congress to eliminate it.

Reducing the backlog will require, among other things, the commitment of additional resources to fund the hiring of new staff at the Commission and within the Department of Labor's Office of the Solicitor. Attachment 3 contains a summary of the evolution of the agency's conference system for citations and actions and our additional recommendations for improving the current system.

POTENTIAL CAUSES OF APPEALS TO CITATIONS, ORDERS AND PENALTIES

Looking beyond the immediate task of reducing the backlog, we need to examine the causes and what must be done to prevent a reoccurrence. During his testimony before the House, MSHA Assistant Secretary Main outlined several steps he was considering to address this problem. While details remain to be worked out, we support the thrust of his views and look forward to working with him and all stakeholders to eliminate the backlog.

To fix an appeals process that all agree is broken, it is important to understand why it is broken. Allow me to offer our observations on the causes of the increase in appeals—many of which we share with Assistant Secretary Main. Key among the contributing factors is the subjectivity of the citation and order process, the discretionary authority of the inspector and the related influence of inspector training and experience. The regulations upon which inspectors base enforcement actions are predominately comprised of performance-based standards. The interpretation of these standards is based on individual circumstances and can vary from inspector to inspector and between inspector and operator based on the facts unique to the cited condition or practice.

The penalty amounts, which have also increased, are not only based on the inspector's enforcement discretion in alleging a violation of a standard, but also on the inspector's conclusions on a number of other factors, all of which are discretionary based on his or her interpretation of the circumstances surrounding an alleged violation. These factors can have a profound impact on penalty amounts. They include likelihood of occurrence, severity of injury, degree of negligence and the number of persons affected by the allegations, to mention only a few of the considerations that are set out in the regulations and in the Mine Act and influence the penalty calculation.

Because there is unavoidable subjectivity in the citation and order process and wide discretion is afforded the inspector when characterizing violations under the penalty criteria, inspector training and experience can have significant influence on the outcomes as was pointed out in the recent Department of Labor, Office of the Inspector General report on required retraining of inspectors. (Report Number 05–10–001–06–001, March 30, 201)

Until Feb. 2008, an informal consultation process was used to resolve most of the disagreements between the inspector and the mine operator that arose from the subjective interpretation of performance-based standards and the discretionary authority of the inspector in assessing factors that affect penalties. When that process was suspended, all differences were, by default, thrown into the appeals process. There was, however, no commensurate increase in resources to handle the inevitable growth in what are now classified as "formal contests" simply because they are pending at the Commission, rather than at the agency. Between higher fines and the elimination of lower level conferences, appeals were inadvertently incentivized

because any disagreement over any aspect of the inspector's enforcement discretion became subject to a formal contest proceeding.

Allow me to re-state our commitment to work with Congress and MSHA to eliminate the backlog while preserving operators' due process rights. NMA and MSHA have both offered suggestions for achieving that objective, and we look forward to additional productive recommendations from this committee and others.

MINE SAFETY GOES BEYOND REGULATORY REQUIREMENTS AND ENFORCEMENT

Beyond the enforcement arena, we need to examine what programs, procedures and practices are working and disseminate that information across all of mining. We have worked with companies to foster the implementation of risk management processes, and we've launched a risk-based safety awareness campaign targeting known hazards. We initially focused attention on selected areas of mining operations with the highest accident rates and then built voluntary awareness programs around each one. Going forward, we envision a larger effort to ensure that best practices and procedures and information on promising techniques and technologies for reducing accidents on the job are shared throughout mining.

Our efforts are singular in focus, to bring all miners home safely from their important work. In the end, mine and miner safety is the operator's obligation and must be their highest priority. To the extent they fall short regulators provide a needed safety net in the full meaning of the term. If unintended consequences of policies have diminished MSHA's perception of its authority, we have a shared mission to rectify that situation.

ATTACHMENT 1.—CRITICAL ENFORCEMENT AUTHORITY OF THE FEDERAL MINE SAFETY AND HEALTH ADMINISTRATION

I. ENFORCEMENT AUTHORITY

Citations

MSHA may issue a citation for violation of the 1977 Mine Act or for violation of a mandatory health or safety standard, rule, order or regulation. A citation requires that corrective action be taken by the mine operator to correct the condition or practice cited, but it does not result in the cessation of the activity or equipment at issue. A citation shall be issued with reasonable promptness, shall be in writing, and shall describe with particularity the nature of the violation, including reference to the statutory or regulatory provision alleged to have been violated. Further, "the citation shall fix a reasonable time for the abatement of the violation." Citations may be characterized as "significant and substantial."

- The term "significant and substantial" refers to the gravity of, or the degree of hazard or risk posed by, the alleged violation. The Commission has held that "[a] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazards contributed to will result in an injury or illness of a reasonably serious nature."

Additionally, MSHA may issue an unwarrantable failure citation for a violation that could significantly and substantially contribute to a health or safety hazard and resulted from a heightened degree of negligence, such as indifference to health and safety. This starts the cumulative enforcement action known as the "unwarrantable failure" withdrawal order chain, which the operator remains on until there is an intervening inspection that reveals no further violations resulting from heightened negligence.

- The term "unwarrantable failure" refers to the operator's degree of fault or negligence in causing a violation or allowing it to exist. The term has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence."

Withdrawal Orders

A withdrawal order may be issued on the spot and without a hearing and results in the immediate closure of the area, equipment, or practice that is alleged to be in violation of the standards. All personnel associated with the condition or practice must be withdrawn, except those persons necessary to correct the violation.

Every withdrawal order issued requires that the inspector determine the "area affected" by the condition, which depends on the nature and extent of the hazard specifically identified. Depending on the facts and circumstances, a withdrawal order

could include, for example, a piece of equipment or area of a mine, or it could affect an entire mine depending on the nature and extent of hazard.

Withdrawal orders may result from failure to abate a violation within the time prescribed under section 104(b).

An unwarrantable failure withdrawal order may be issued subsequent to a section 104(d)(1) citation during the same inspection or within 90 days after issuance of such a citation if violations result from heightened negligence (and regardless of whether any serious hazard is presented) until a complete inspection of the mine reveals no further heightened negligence violations.

MSHA has withdrawal order authority under section 104(e) of the Mine Act for significant and substantial violations following written notice from MSHA of a "pattern of violations." This is also a cumulative enforcement process that results in the issuance of a withdrawal order every time a violation is found to "significantly and substantially" contribute to a serious hazard until an entire inspection of the mine reveals no further "significant and substantial" violations.

MSHA has the authority to issue a withdrawal order under section 107(a) if an imminent danger is found by an inspector, which is a condition or practice "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." A finding of an imminent danger does not require a finding of a violation of a mandatory health or safety standard.

MSHA may issue a withdrawal order for untrained miners under section 104(g) of the Mine Act, which affects every miner deemed to have inadequate training and forces the withdrawal of such miners until they have received the required training.

II. INJUNCTIVE AUTHORITY

The 1977 Mine Act authorizes MSHA to pursue a civil action against an operator in Federal district court seeking relief, including temporary or permanent injunctive relief or a restraining order. MSHA may seek such relief whenever a mine operator or its agent refuses to comply with any order or decision issued under the 1977 Mine Act; interferes with, hinders, or delays MSHA from carrying out its duties; refuses to allow an inspection or accident investigation; or refuses to provide other information or documents.

III. PENALTY ASSESSMENTS CRITERIA

A mine operator who receives a citation or a withdrawal order is subject to a maximum civil penalty of $70,000, unless the violation is deemed to be "flagrant," which can result in a maximum civil penalty of $220,000. "Flagrant" violations are "[a] reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

Any operator who fails to correct a violation for which a section 104(a) citation has been issued may be assessed a civil penalty of not more than $7,500 per day that the condition is allowed to continue unabated.

MSHA must impose a minimum penalty of $5,000 for failure to timely notify MSHA of an accident involving the death of an individual at the mine or an injury or entrapment of an individual at the mine that has a reasonable potential to cause death. Minimum penalties must be assessed for unwarrantable failure violations at $2,000 for citations or orders issued under section 104(d)(1) and $4,000 for orders issued under section 104(d)(2).

Civil and/or criminal penalties may be imposed by MSHA/DOJ on agents, officers and directors who knowingly authorize, order or carry out violations of mandatory standards.

Criminal penalties may be imposed on any person who knowingly falsifies a record or document required to be maintained under the 1977 Mine Act.

Attachment 2.—MSHA/OSHA Comparison

MSHA	OSHA
No State Plans	State plans.
Annually, two (2) mandatory complete inspections for surface operations; four (4) mandatory complete inspections for underground operations.	No mandatory inspections.
No general duty clause	General duty clause requirement that employers correct hazards irrespective of defined regulatory requirements.
Mandatory penalties for all citations	No mandatory penalties for all citations.

Attachment 2.—MSHA/OSHA Comparison—Continued

MSHA	OSHA
Inspectors have closure order authority for failure to abate, unwarrantable failure, and imminent danger conditions.	Closure orders by court order only.
Individual civil penalties for corporate officers and agents for knowing violations and possible criminal sanctions of 1 year possible for accidents not involving a fatality.	No individual civil penalties for corporate officers. Six-month criminal sanctions for fatality-related incidents.
Injury & illness reports and statistics are required to be submitted to MSHA for each incident by each mine site.	Injury & illness reports and statistics are required to be maintained in a log and made available for review but not reported.
Mandatory new employee training: 40 hours for underground miners, 24 for surface miners. Mandatory refresher and task training.	No mandatory minimum general training required. Training required by specific standards.
Regulatory requirements are supplanted by required site operating plans that must be approved by MSHA. Plan provisions are enforceable as if they were regulatory requirements.	No general plan approval authority.
Employee representative entitled to inspection walk-around pay.	No walk-around pay.
Individual employees may bring discrimination cases based on safety even if MSHA refuses to prosecute a case.	No private right of action for safety discrimination case.

Attachment 3.—Mine Safety and Health Administration (Citation/Conference System)

I. HISTORY OF ENFORCEMENT ACTIONS (THE INITIAL SYSTEM)

Mine Safety and Health Administration regulations in 30 CFR Part 100.6 provide for an informal resolution of questions regarding enforcement actions. This history timeline begins with the adoption of the Alternative Case Resolution Initiative (ACRI).

During the Clinton administration in 1994, ACRI was developed with MHSA and the Office of the Solicitor joining together and designating Conference/Litigation Representatives (CLR). The CLR was an inspector trained by the Solicitor to handle the informal conferences that the District Manager was required to conduct. By 2001, the CLRs were handling all the safety and health conferences and about 35 percent of the total number of cases that operators contested (the Solicitor placed limits on what type of cases the CLRs could handle). An MSHA Fact Sheet (95–9) has the following quote:

> Mine operators may also seek informal conferences following the issuance of the citation or order under 30 CFR Part 100.6. The CLRs in Coal Districts and Supervisory Mine Inspectors in Metal/Nonmetal Districts primarily serve on behalf of the District Manager and meet with the operator to attempt an informal resolution of the dispute before a civil penalty is assessed.
>
> This widely recognized and highly commended program is one of the few times that non-lawyers have represented a Cabinet-level official in a legal proceeding. As of Aug. 30, 2001, MSHA has trained over 100 enforcement personnel to act as CLRs for the ACRI program and there are CLRs designated in each MSHA district office. The CLRs are currently responsible for processing approximately 35 percent of the total number of cases contested by mine operators.
>
> MSHA and the mining community are reaping the benefits of the ACRI program. The CLRs efforts have reduced formal litigation, improved relations between MSHA and the mining community, improved communications between MSHA's inspectors and the legal community, and permitted the dedication of legal resources to more complex and serious cases.

As noted, this system worked reasonably well. Some key points as to why the conferences seemed to work include:

1. The request for a safety and health conference had to be made within a 10-day period.
2. Most CLRs did not require the operator to list in writing the arguments to be presented at the conference.
3. Non-Significant & Substantial (non-serious) violations were assessed at a set dollar value regardless of the inspector evaluation. Few non-S & S violations ever went to conference and very few ever were entered in the ALJ system.

4. In many instances the CLRs were used by the District Managers as "instructors of the law" so that changes in evaluations were passed through the MSHA system as a teaching tool to reduce improper enforcement. Conversely, the same applied to operators, who learned why a violation was appropriately evaluated in a certain manner and how its impact on safety could be used to train employees on preventative actions.

5. The CLR made decisions based on the facts of the case presented at the safety and health conference.

II. THE INTERIM SYSTEM

Beginning early in the last decade, MSHA embarked on a "new hiring" process to replace retiring inspectors. Additionally, as a way to accomplish MSHA's mandate to complete "100 percent" inspection, MSHA determined that a reallocation of resources was needed. A casualty of that reallocation was the demise of the consultation process. In sum, the agency initiated several actions that, when viewed in total, wrecked the previous safety and health conference system and gave rise to the situation we find ourselves in today. The following timeline of administrative actions shows the evolution of today's flawed system:

Oct. 26, 2006

MSHA publishes the standard that is intended to be used for determining flagrant violations. (PIL I06–III–04 now released as PIL I08–III–02) Repeat history is defined as the third allegation of unwarrantable failure of the same standard in 15 months.

April 27, 2007

The new Part 100 civil penalty regulations are released. Assessments for violation are dramatically increased. In addition the single price penalty for non-serious, non-S&S violations is dropped. (Attachments 2 and 3 document the significance of these changes for hypothetical, but routinely issued violations, under the old and new penalty formulas).

June 14, 2007

MSHA issues its first list of Pattern of Violation (POV) mines. Two of the many selection requirements are: two elevated enforcement actions and 10 (surface) or 20 (underground) S&S violations in a 24-month period.

Note that on Dec. 7, 2007; June 17, 2008; March 16, 2009; and Oct. 7, 2009, additional lists of mines that were categorized as potential POV mines were released.

Oct. 4, 2007

MSHA announces the "100 percent" plan for meeting mandatory inspection requirements. CLRs, who were already postponing citation conferences, were now assigned to inspections.

Feb. 4, 2008

MSHA issues PIL I08–III–1. This PIL essentially formalizes the end to manager's conferences. Informally, prior to this date, and for most of 2007, conferences were not being scheduled. After this date, all the previously requested but unscheduled conferences were placed in the administrative system.

IV. PRESENT SYSTEM

On March 27, 2009, MSHA published a new model for conferences. Rather than conducting an informal conference prior to receiving an assessment and filing with the Commission, the new system requires the operator to wait until an assessment is received and file after the enforcement action in question is docketed. Now all conferences will take place only after civil penalties are proposed and timely contested. This means that an operator eager to avoid litigation through the conference process must contest the citation, file a written request for a conference within 10 days, wait for a period of at least 4 to 6 weeks, receive the proposed penalty assessment, contest the penalty within 30 days of receipt and then have a conference within 90-days, unless an extension is requested (usually by MSHA).

In short, all of the enforcement actions that in the previous conference system would not have reached the Commission are now included as part of the total number of docketed enforcement actions and each such case will remain on the list of contested cases until resolved. The delay created by MSHA's changes to the contest system increases the number of cases that are being challenged through the ALJ system, and it is likely that this number will continue to increase.

The system also creates other bottlenecks that need to be addressed:

• The new system requires the operator to wait for the assessment and to formally contest those violations with which he disagrees. The Solicitor is then required to respond, and the operator may then be required to formally respond (generally through attorneys). In some districts, the CLR routinely asks for a 90-day stay so that an attempt to settle the case can be made, as is contemplated in the new conference system.

• All of the enhanced conferences require some type of legal paperwork to the Commission to finalize whatever agreement is reached. Again, the more informal pre-assessment system did not include this requirement. Clearly the informal system allowed for a more nimble system where the operator and CLR could resolve a larger amount of cases without burdening the Commission.

• The requirement to contest a citation(s) within 30 days of receipt of the penalty often results in operators' challenging all of the enforcement actions issued by an inspector within a docket due to the sheer volume and the limited time available to examine the allegations underlying each enforcement action and the components that affect penalty assessments.

CONCLUSION

Beyond the interpretive differences that may exist between an operator and inspector, policy choices made by MSHA have also contributed to the dramatic increase in the Commission's caseload.

All these factors combined to create a process that increased the number of citations at the same time it eliminated an informal procedure for contesting them, forcing operators into a time-consuming, expensive adjudicatory process that does nothing to increase mine safety. In sum these are:

• The new Part 100 civil penalty rules;
• Failure to maintain an effective "close-out" conference at the end of each inspection day;
• The loss of an effective safety and health conference process;
• The loss of an independent conference decision process;
• Timing and grouping of proposed assessments; and
• MSHA's heightened Pattern of Violation criteria and focus.

We believe the conditions that gave rise to the "back-log" can be fixed administratively without legislation. However, doing so requires all parties to recognize that:

• All conditions affecting mine safety are abated by the operator within the time set by the inspector and prior to adjudication of the dispute.

• The convergence of increased enforcement actions, coupled with the unofficial and then official cessation of safety and health manager's conferences, set in motion a significant increase in litigated cases. Unfortunately, operators today have no option but the Commission for contesting enforcement actions.

• During the time conferences were unavailable (February 2008 to March 2009) MSHA issued a policy on flagrant violation standards, four patterns of violation cycle letters and a new penalty system under Part 100. Also, we believe an evaluation of violation in many districts would show a pattern of increased gravity that subsequently increased the penalties to a point where a challenge was necessary. Filing for a formal hearing using attorneys and cluttering the "Commission" system is the only avenue available for an operator.

CHANGES SHOULD BE MADE IN THE SYSTEM

The following are suggested changes that would help unlock the logjam at the "Commission:"

• MSHA should improve the training of inspectors and enforcement authorities for recognizing and evaluating a violation. The number of enforcement actions being modified is a clear indication that inspectors are not being properly trained or supervised on how to evaluate a citation. The issue of inspector training was recently highlighted in a March 30, 2010 report of the DOL, Office of the Inspector General, who found failures in the agency's inspector training program.

• Revert to the informal conference (pre-assessment). This conference was more timely and, because it was informal, generated minimal paperwork compared to the more time-consuming, formal system in place today. Unfortunately, many current cases are now handed to counsel due to the requirement for a timely response to a "Commission" deadline.

Provide the CLRs autonomy from the managers in their district. We have long advocated a different reporting scheme for the CLRs. Having them report, as is currently the case, to the District Manager introduces unnecessary conflict. MSHA

should create a separate office where the CLR could report to a more independent review.

Provide more realistic timeframes for operators to respond to agency notices. The current 30-day response time is insufficient, necessitating operators to initiate enforcement action challenges merely to protect themselves from responding to individual actions because time has expired. Concurrent with this, MSHA should reform the manner in which it bundles dockets to ensure they include only the enforcement actions and related proposed civil penalties from the same inspection.

Mandate that the CLR and ALJ decisions be used as training tools for inspectors so that better evaluations are completed by inspectors. Having to "re-litigate" settled issues because information is not shared on a timely basis across the agency unnecessarily adds to the Commission backlog and drains scarce resources.

The CHAIRMAN. Thank you very much, Mr. Watzman.

Before we start a round of questions, I was told, earlier, that many people here had some photographs of their loved ones who lost their lives, either in the last event, or maybe some previous. You've been very kind to come here. Hold up those pictures so we can see who these people are, these real human beings. Hold them up. Hold them up for us.

[Pause.]

Now, were these all people who lost their lives in the Upper Big Branch?

VOICE. They're from different——

The CHAIRMAN. Other events.

[Pause.]

Well, thank you for being here. And thank you for——

VOICE. Thank you.

The CHAIRMAN [continuing]. For bringing those pictures.

Mr. Watzman, let me start with you. You point out, in your testimony, that MSHA inspectors have the authority to enter a withdrawal order, on the spot, if they see an imminent danger. Well, that sounds all well and good, doesn't it? Sounds good. It depends on an inspector being there at exactly the right place at exactly the right time. How can you do that? You can't depend on that. It seems to me, you just can't depend that someone's going to be at the right place at the right time to prevent an imminent disaster. It seems that we need to have the ability to more effectively target operators who routinely put their workers at risk, to stop them before they become an imminent threat.

I do disagree with your suggestion that the, quote, "Imminent Danger Withdrawal authority accomplishes the same result as MSHA's Pattern of Violation authority."

In February, in a hearing before the House Committee on Education and Labor, you said, "The Pattern of Violation is in the law for a very valid reason." Well, it is there for a valid reason. It's just that it's not being used, and there probably are some legislative things that we need to address, in making sure that that pattern can be used more effectively. We've got to quit letting people game the system, as they do right now, with these Patterns of Violations that go on year after year after year, and they never have to do anything, because they never get a final adjudication. They never get that final adjudication, you see. That's how they game the system.

While the imminent danger can be used, it just seems to me that it is not practical to have someone there, exactly the right place, at exactly the right time.

Mr. WATZMAN. Mr. Chairman, you're exactly right. An inspector can't be at a mine every moment the mine is operating, nor can they be in every location in the mine. There are several factors that come into play.

One of the things in the title for this hearing is "changing the culture within the industry," changing the culture across the industry. And that's an important element.

There are additional authorities. The Assistant Secretary was entered into a dialogue with several of you earlier about the injunctive relief authority. They don't have to wait for the pattern. The agency, today, does not have to wait for the adjudicatory process.

My point is, pattern is an important tool, and I'm not trying to minimize the significance of that tool, but what I'm trying to impress upon you is that there are other tools that exist today while we continue to work through this backlog that troubles all of us.

The CHAIRMAN. "Changing the culture," is that what you said? Well, I don't think Mr. Harris's culture needs to be changed, or the workers that work with him—I don't just mean him—or Mr. Roberts and the other miners' families out here. I've been around coal miners most of my life. They work hard. These are hardworking people. And they want to work. They know they're providing the energy to run America. They want to take care of their families. Some of them want their kids to grow up to be lawyers, or Senators—I don't think my dad ever wanted me to be one of these, but——

[Laughter.]

The CHAIRMAN [continuing]. Nonetheless. They care deeply about their fellow workers and their health and their welfare. It seems that the culture we're talking about changing happens to be at the employer level. Is that what you're talking about?

Mr. WATZMAN. I think the culture needs to be changed across the entirety of the industry. There are many factors that come into play when you're talking about culture. It has to start from the top down, clearly. That's recognized across organizations, be they in mining or outside of mining; that the leadership comes from the top down, and that sets the message for the entire organization. Those are some of the things that we're trying to do across the industry, voluntarily, to take—and it was discussed earlier—the best of the best. There are companies out there that perform, year in and year out, without lost-time accidents. We're trying to determine and share what they do, and why they're able to accomplish that, and make sure that the entirety of the industry has the benefit of that.

The CHAIRMAN. Mr. Roberts, your observation on changing the culture. Obviously, there are some mine organizations and owners, that, as you pointed out, operate good mines.

Mr. ROBERTS. We don't need to change the culture of the entire industry, because most CEOs that I know, most presidents of companies I know, would never have tolerated what's been going on at the Upper Big Branch Mine and some of these other Massey—they would have fired people, they would have sent people in there and cleaned these mines up themselves. I'll give you—I won't call their name, because I didn't ask if I could use their name today. I've had CEOs call me that's got their names on—one of their mines is on

Potential Pattern here. He says, "Cecil, I don't know what's going on there." They called me and said, "But, I'm going to find out." He said, "I thought I had leadership there that I could depend on. If that's not the case, they'll be gone. And I'm telling you, I'm going to fix this." Now, that's the CEO of the company telling me they're going to fix this pattern of violations. They're not under it. They were on the list for a potential.

Ninety-five percent of this industry—now, this is a bold statement from me on the other end here—you don't have a problem like this. But, we have a serious problem, here, with about 5 percent of this industry who do not care what laws you pass, they don't care who you send to enforce it. They're going to fight this, day in and day out. We have got to come to grips with this and fix it.

The CHAIRMAN. Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman. I appreciate you holding this hearing, which was called "Creating a Culture of Compliance." That's what we're trying to do.

Mr. Addington, I'm sure you're aware that MSHA has, for a long time, had an anonymous reporting system for reporting hazards, where anybody can use an 800 number or file a report online; and as the Web page says, in bold letters, they don't need to identify themselves. In your experience with miners, are they aware of this anonymous reporting system? Have any of the employees you've worked with tried to use this system? And what was the result?

Mr. ADDINGTON. Yes and no. Enough miners are not aware of, broadly, their statutory safety rights under the act, including the 800 number. The problem—it is a nice function, that they can anonymously make a complaint. The problem, in reality, is, depending on what they're complaining about, it's not very hard to figure out, at the mine site, who made that complaint. If they're complaining about the belts, it might be the belt examiner, that they look for first. A number of the clients that we represent, anymore, when they make complaints, they make sure their name is on it, because they have more protection under the law, they feel, that way.

In theory, it is a good function. In certain cases, it's essential, because miners can be protected, using the 800 number. In other instances, they're just as well better off making the complaint out in the open.

Senator ENZI. Thank you. That's helpful.

Mr. Watzman, since 2006, MSHA's budget's increased—and that's after the MINER Act passed—has increased by 36 percent. MSHA's hired over 100 new coal inspectors. Perhaps due to these increased resources, MSHA was able to complete 100 percent of their statutorily required inspections in 2008 and 2009, for the first time. Why do you think MSHA was unable to properly followup on the clearly concerning record of the Upper Big Branch Mine? Does MSHA need more flexibility to focus on bad actors?

Mr. WATZMAN. Senator, I can't speculate as to the thought process within the agency, and the actions that they choose to take, or not choose to take. What we know is that there are mines in this country, given their size and given the requirement that MSHA must inspect every underground mine in its entirety four times a

year. There's a misperception that four times a year means an inspector's in the mine 4 days a year. There are mines in the country that the quarterly inspection begins the first day of the quarter, and the closeout is the last day of the quarter, and they roll into the next inspection. There are mines in the country where there's an inspector in the mine every day that the mine is operating. I won't tell you that that's the rule, because it's not. There are many mines where that occurs.

I'd like to leave you with that thought, rather than try to speculate on why MSHA did or did not take any followup actions based upon the information that they had available to them.

Senator ENZI. Thank you. I noted that the Upper Big Branch Mine had inspectors on the site 180 days in the last year. That wasn't every day, but that was pretty significant. When an MSHA inspector identifies a hazard and issues a citation, is there any way for the operator to avoid abating that hazard?

Mr. WATZMAN. No. Under the law the operator has to abate the hazard, and the citation fixes an abatement time. Oftentimes, it's by the end of the shift; it may be by the end of that day, depending upon the conditions that they found. It may be an extended abatement period, and the inspector may extend the abatement period beyond that originally set, if it requires a technologic add-on to a piece of equipment or something of that nature. There is a fixed requirement for them to abate the citation long before this adjudicatory process takes place that we discussed earlier, before the Review Commission.

Senator ENZI. Does contesting it get them out from under having to abate it?

Mr. WATZMAN. No.

Senator ENZI. Thank you.

I'll yield my time.

The CHAIRMAN. Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I'm really glad, Mr. Addington, that you said what you did about if somebody calls a 1-800 number, which is not the culture of southern West Virginia or most of West Virginia. We don't spend a lot of time calling 1-800 numbers, because the assumption is, nothing's going to happen. The most important thing you said is, they can trace where that phone call came from. I serve on the Intelligence Committee. You don't have to have been in NSA or the CIA to know that's a very easy thing to do. Making the phone call is, in fact, not being—not reporting a danger, is putting your own job in danger. That's what it comes down to, to me.

I'd like to say, to Mr. Watzman, you're the head of a very large corporation. I think, as President Roberts just said, that about 86 percent of the coal operators that operate mines——

Mr. WATZMAN. It's higher than that, probably.

Senator ROCKEFELLER [continuing]. Are good—well, let's just say 86 percent—do a good job—try to do a good job. I have had those same phone calls that you have. People who are on that list, who don't want to be on that list, shocked they are on that list, and they want to do something about it. On the other hand, there are some that don't, that proudly flaunt that they don't, who require production schedules, perhaps every 2 hours of every day of every year,

to find out not how the safety is doing, but how the production is coming along. I'm talking fairly specifically here.

Why is it that you've not stood up in this association? I have so many operators coming to me, disavowing any relationship with this particular company, which is, in fact, involved in all of the recent—Aracoma, Sago, through the subsidiary, Upper Branch—all of them. Why is it that part of your responsibility isn't to confront those people? Your association's responsibility is to confront those people, saying, "You're giving all of us a bad name." Or, why is it that you wouldn't accept the idea that the board of directors should be brought in? Because sometimes the personality of a CEO—a president—can overwhelm the presence of a board, because they're well paid, they don't have to show up a lot, and they don't have the same responsibility. Maybe we ought to have something wherein those board members have to go down a mine——

[Laughter.]

Senator ROCKEFELLER [continuing]. Two or three times a year. Maybe we ought to have something like—the safety record of that mine has to appear in the SEC report that they submit, the safety record in the mine. Well, you can say, "Well, that would have to apply to all industries." No industry is like the coal industry. No industry is like the coal industry, in terms of danger, and in terms of remoteness and intimidation.

To you Mr. Harris—no, I won't make this to you, because you've already been so eloquent on it.

To you, President Roberts. Intimidation, to me, is at the bottom of so much of this.

Mr. ROBERTS. There's no doubt.

Senator ROCKEFELLER. It's not totally provable, but it's an utter fact. I've heard so much of it, in these last 40 years that I've been working with this problem. Therefore, you have to get at intimidation. You can't get at intimidation through rules and regulation, through MSHA, through any law that we pass. That is the culture of the mines, I think, that you and I are talking about. How do you respond to that?

Mr. ROBERTS. I think that there are a couple things that I would suggest that we might want to think about.

First of all, the law says, currently, that any miner who feels he or she is in danger has a right, legally, to withdraw from that particular area. That doesn't happen in these mines, because of fear of being fired and blackballed. You lose the job you have, and never get another job at Massey, if you exercise that right.

The second thing is, if you call this 1-800 number and they find out about it, as Mr. Addington so eloquently put it, they're afraid they're going to get fired for that.

If I were to encourage you to think about something right now, I would put criminal penalties on any mine operator who disciplines someone—and I don't mean that somebody just didn't want to work—if someone legitimately felt they were in danger, no one should be forced to work in that condition. No one should be fired, Senator, for calling someone to say, "I think this mine's going to explode." There are stories here, now—and people have come to us, and I'm sure they've come to you, that said, "There were grown

men here, crying, afraid that this mine was going to explode, that's been in the mining industry for years."

We should be embarrassed—me, in particular, for what I do—and all of us, to say, in America, that shouldn't happen. We should put someone in jail, whether it's a section foreman or mine foreman or the owner of the company, who allows something like that to happen. We need to give, somehow, power to these workers to say, "If I call MSHA, I'm not going to get fired, because the boss is going to jail if he fires me. Not only that, the CEO is subject to going to jail if he fires me."

You need to somehow convince these workers that the government of this country will stand up for them and can protect them. Right now, they don't believe it.

Senator ROCKEFELLER. I thank you, Mr. Chairman.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. I want to followup on something Senator Rockefeller said, Mr. Watzman. You said that mine operators—that mine safety must be their highest priority. And you said, "They must go beyond mere conformity with the law." It sounds like, from everything we've heard, that Massey had a reputation of not doing that, to say the least. Why does the National Mining Association tolerate that?

Mr. WATZMAN. Senator, I don't think it's a question or an issue of tolerating. I'm not sure that there's much value gained in ostracizing an individual or an organization. What we would rather do, and what we're trying to do, as I said earlier, is raise the performance of the entire industry—through the sharing of best practices, through the voluntary awareness programs that we've initiated, through the new Web site that we've created, called safetyshare .org—to make sure that we can disseminate, across the industry, the best practices, the best of the best, so that we can bring that level of performance up. I'm not sure that ostracizing an individual or an organization moves us in that direction.

Senator FRANKEN. Well, if that organization willfully defies any—I mean, they're not going to respond to the newest Web video on safety—Massey, obviously. I mean, I think that's silly, frankly.

Mr. Addington, when we had Mr. Main here, I kind of said—this is shocking, this testimony, to me, that these mines continue to stay open. And I say, "Why can't you shut down a mine? Or shut down part of a mine?" And he said, "Well, because the Federal Mine Safety and Health Review Commission has made some rulings that made it hard to shut down." Is that true, in your experience?

Mr. ADDINGTON. Well, it probably is partly true, in some respects. As to Pattern of Violations, I don't believe that's true.

If you'll look at Section 104, Pattern of Violations, the statute, as it was intended—and if you look at the legislative history, it really was intended to be a hammer. Unfortunately, through implementing regulations in 1990, it was weakened, and then MSHA's own internal criteria that they're using now weakened it even more.

I mean, we've heard, a couple times during the hearing, about Potential Pattern of Violations. You won't find that in the statute. The statute says nothing about Potential Pattern of Violations. It

says, "If a mine is engaged in a Pattern of Violations, they get a notice." Well, right now, what's been happening is, they get a warning that they might eventually get a notice. You can see—and then, the criteria for getting off that warning is relatively easy, compared to what it takes to get on the warning. In the current state, you're talking about years before you can get a potential—or get a Pattern of Violations Notice.

Senator FRANKEN. Well, I think we have to examine what we can do legally to make sure that mines that are clearly not safe are shut down.

Thank you.

And thank you, Mr. Chairman.

The CHAIRMAN. Well, I might respond, if I might, Al, on that. Let's say a miner sees some potential safety violations that he could report that would shut the mine down. Then they're out of work. They don't get paid. Right away, you've got the conflict. "Should I report it? It's unsafe, but they shut it down, me and my fellow workers are out of work and we're out of pay." I can understand the conflict that would arise, that a miner might feel, in that kind of a situation.

Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thank you and Ranking Member Enzi, for calling this hearing.

We're grateful to have Senator Rockefeller with us.

I, first of all, want to express personal condolences for all those who lost someone in this tragedy. No words of condolence or sorrow can match the grief that so many people feel. It is important that we have hearings, like this and others, to change policy and to try to do our best to be responsive to this tragedy.

I grew up in a region of Pennsylvania which, for decades, more than one generation, was an anthracite coal region—the anthracite capital of the world, really. I have a very, very limited sense, based upon some reading and some family history and things like that, just a fleeting glimpse of what it's like to work in a mine, or what it's like to have a family member do this. A lot of us come to these issues with a degree of humility that we should acknowledge.

There was an essay written by Stephen Crane, just before the turn of the last century, about a mine near my hometown of Scranton—a beautiful, haunting essay about all the ways you could die in that mine, all the darkness and danger, as only a great writer like he could express. At one point in the essay, he talks about the "hundred perils," meaning the hundred different ways you could die in a mine.

With all of the modern technology and advancements, I don't think any of us could even imagine this kind of a tragedy happening today. If it means changing policy, we need to do that. If it means amending or adjusting, we've got to do that.

I apologize for being late, and maybe not being able to stay for the next panel, but I want to ask a fundamental, basic question that is on the minds, I think, of all of us, and may have been answered 13 times already, but repetition around here is actually a good thing. That's the basic, fundamental question—based upon

the experience at the table from our witnesses—and we're grateful for your presence and your testimony. What does the U.S. Senate—I'll leave the House; they've got their own work to do—but, what should the U.S. Senate do, and the Administration do, in the next 6 months, to make sure that this kind of tragedy does not happen or we substantially reduce the likelihood that something like this would happen again?

I'll start with Mr. Roberts. I've known him over the years.

I'm grateful for your leadership on these issues on behalf of working men and women.

Mr. ROBERTS. Mr. Senator, thank you.

There's a number of things I suggest in my testimony. One is dealing with the backlog that exists at the Review Commission. There's not only a disincentive that doesn't exist, there's an incentive to appeal every one of these fines, because, if you look at the record, you get a 40-some percent reduction on appeal. If you get cited for a million dollars, and you're going on appeal—before it's all over, you're going to end up paying half that, or less.

By way of example—and it hasn't come out here, by the way—they owe over a million dollars in fines, at Upper Big Branch, and they've paid 100-and-some thousand dollars of that, the rest of it, I guess, is still sitting somewhere in an appeal process.

We argue that there's no reason why these fines should not be paid immediately and held in escrow if they want to appeal. That way they do not get the benefit of that money in their pocket and encourage them to do this.

I would point this panel back to 1977 and what this Congress wrote, that these fines should be paid in close proximity of the time they were issued, because that Congress understood that failure to do that would lead to something similar to what we have currently. So, we would argue and pay those fines quickly.

The second thing we would argue—I think this whole Pattern of Violations has been kicked around here pretty good—it's absolute failure, the way it works right now. What should happen is, if you're appealing this cases, pay the fines. If, indeed, you had been issued these penalties, I think it's time for MSHA to take a real close look at you, even though you're appealing this, because it may be too late, as was the case at Upper Big Branch, while all this is in appeal, while we're trying to get to some magical point in our lives here, to say, "Oh, yes. That mine should be shut down."

I think if, indeed, there's been this many penalties issued, then I think we take the step to say, "All right, the district manager needs to send more inspectors more frequently into that mine, because there's something wrong here." Just because you haven't got to the final day when some appeal process says you have to pay these fines—it's too late for these miners. They've gamed the system here. And I mentioned that in my testimony.

There's going to be someone to argue that, "Well, we don't really need laws," or whatever, and I would point out—and I said this in the beginning—had the law been obeyed here, we would not have had this explosion and 29 miners losing their life.

However, I would point out, good laws work. We just recently celebrated the 40th anniversary of the 1969 Coal Mine Health and Safety Act that came effective in January 1970.

Just something for you to think about. The 40 years prior to that act, 32,000 miners lost their lives—over 32,000. The 40 years after, 3,200. Those who say, "Oh, gee, laws don't work," that's not true. Those who say, "Let's do away with laws and let us be about the business of doing whatever we want," well, that's what we did the 40 years before we passed the 1969 Act, and it didn't work.

I've got a lot of ideas about this, but, I would like to give the other panel members some chance, here.

Senator CASEY. Thank you.

The CHAIRMAN. Senator Rockefeller wanted to make one more comment, and I just have a certain question for Mr. Harris.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

We've been talking a lot about the culture, and I think it's important to point out that, I would say, 98 percent of West Virginians, of Pennsylvanians, of Ohioans, Wyomingites——

[Laughter.]

Have never been down a mine. What people have to understand is, this isn't sort of a public place we're talking about. This is 35 minutes, 45 minutes up a beautiful hollow, with lovely streams and things, and then all of a sudden you come to this enormous mine. It's a private, private life. Decisions are made by very few, and the effects are very many.

The miners are put in an impossible cultural position, because if they get offered payment of $65,000 or $70,000, what are they going to do?

VOICE. Fight to keep their job.

Senator ROCKEFELLER. Are they going to say, "No, not interested?" That's not the way it works. When they—and they have families, so they have an obligation to the families. They've got to survive, and they've got to take care of their families, as well as to keep the lights on in America. It isn't really a choice for them, this culture.

To me, the culture has to start from the top. I'm going to give you an example. I'll be short, Mr. Chairman, as I always am.

[Laughter.]

I was Governor, for 8 years, of West Virginia. We were having unacceptably high death rates in our mines. I decided that, as chief executive—that is the CEO—that I would go to each of the mines—where the mine inspectors would gather after there had been a death. That had never happened before. There I was sitting, as they were trying to explain to each other what happened and who should have done what. Things happened. Everything was different, because the culture change took place at the top.

Now, I'm not saying that I changed the world, but it did have an effect.

VOICE. That's true.

Senator ROCKEFELLER. That's why, in a secret world, at the end of 35 miles of hard driving, and then 1,000 to 2,000 feet underground, where only a few people from that State, or from any State, have ever been, it has to come from the top. It has to come from the top.

Senator ENZI. And, Mr. Chairman, related to that, yes, I have been down in an underground mine, but I know that most people have not.

The CHAIRMAN. Because we're Senators.

Senator ENZI. There's a fellow from West Virginia—I don't know that he still lives there—named Homer Hickam, who's written some great books that give you a little bit of an understanding of what it is. Right after 2001, he wrote a book called, "We Are Not Afraid," which talks about the culture of the miners, as well as, perhaps, the way that Americans ought to view the terrorism attacks that we've had. He also has a book, called "The Red Helmet," that even gets into some mine accidents. I'd recommend those to people that haven't been in a mine.

Thank you.

The CHAIRMAN. Thank you all.

Listening to everybody—I've been respectful of not trying to interfere, but hearing all the questions, and hearing the comments and stuff, I keep thinking, "What's Harris got to say about this? What's a guy who actually goes in the mines, and works in those mines"—you got any last thing you want to say, here?

Mr. HARRIS. Yes. I really believe that those people that died, didn't have to die. It didn't have to happen. It could have been avoided. That's what I like about being in a union mine. You have representation all the time, you don't have to be scared to call that 800 number. You don't have to have that fear.

The coal operators, they want to get the work done safely. They want you to go home safely. They want you to return to your families. You don't have that in nonunion mines. You don't have it. Inspectors have told me that they have asked for representation at the nonunion mines, some of the men that walk with them. They say, "No, because we going to get fired if we do." I mean, you shouldn't have to live like that. To be on this side of it, it's really worth it, because you have voice.

And if they're going to shut the mines down, they're going to shut the mines down. It doesn't matter what you say or do. If Massey's going to shut the mines down, he's going to shut it down anyway. He's going to lay everybody off anyway, so it doesn't matter. You do so much for him, then he's going lay you off. He doesn't care about you, all he cares about is what he's getting out of there—coal and that money. He wants to be the lead coal producer in the southern Appalachian. And as long as he can be that, he doesn't care about anybody. That's all I have to say.

The CHAIRMAN. Well, Mr. Harris, I think that is a great final word.

Thank you for this panel.

We'll now bring our next panel up. Panel three is David Michaels. Dr. Michaels is Assistant Secretary of Labor for Occupational Safety and Health. He's a nationally recognized leader in the scientific community's efforts to protect the integrity of the science that forms the basis of our public-health, environmental, and regulatory policies. Before coming to OSHA, he was professor of environmental and occupational health at the George Washington University School of Public Health and Health Services. From 1998 to 2001, Dr. Michaels served as the Assistant Secretary of Energy for Environment, Safety, and Health.

Mr. Michaels, we'll just hold on here a second until we get some calm restored here.

We're now shifting over to OSHA. I just might say, parenthetically, that this panel and the next panel, now, we're going to be shifting for MSHA to OSHA, and focusing on the Occupational Safety and Health program.

[Pause.]

Could we please take conversations out in the hall? If you really need to talk, I'd appreciate it. We really do have to move along here.

OK. Mr. Michaels, welcome to the committee. Your statement will be made a part of the record in its entirety. If you could sum it up in 5 minute, we would deeply appreciate it.

Mr. Michaels, welcome.

STATEMENT OF DAVID MICHAELS, PhD, MPH, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, WASHINGTON, DC

Mr. MICHAELS. Thank you, Chairman Harkin, Ranking Member Enzi, members of the committee.

Today, we are meeting under the shadow of three recent tragedies that have captured the headlines and the hearts of the American people: the almost unimaginable deaths of 29 miners in West Virginia; the loss of seven refinery workers in Washington State; and the 11 workers still missing from the Deepwater Horizon.

We are also here in the knowledge that 14 Americans fail to come home from work to their families every single day of the year. We must think seriously and act courageously to ensure that OSHA has the tools it needs to enforce safe working conditions. If we are to fill Secretary of Labor Hilda Solis' vision of "good jobs for everyone," we must have effective laws that will ensure that all employers do the right thing. Good jobs are safe jobs. American workers still face unacceptable hazards.

Yesterday, the Labor Department released its spring regulatory agenda, which includes a new enforcement strategy: plan, prevent, protect. This new approach would require each employer to do what many employers do now; to implement their own Injury and Illness Prevention Program tailored to the actual hazards of that employer's worksite. We're asking them to find and fix their hazards.

Last week, we announced a new initiative to implement long overdue administrative changes to our penalty formulas, which will have the effect of raising OSHA penalties, while maintaining our policy of reducing penalties for small employers and those acting in good faith. We will implement a new severe-violator enforcement program, increasing our focus on repeatedly recalcitrant employers.

While important, these two administrative measures are severely limited by the constraints of current OSHA law. The Administration supports the Protecting America's Workers Act, PAWA, which makes meaningful and substantial statutory changes to OSHA's penalty structure and enforcement program.

The most serious obstacle to effective OSHA enforcement is the very low level of civil penalties allowed under our law, as well as our weak criminal sanctions. Currently, the maximum penalty for serious violations, those that pose a substantial probability of death or serious physical harm, is only $7,000. OSHA penalties have not

been raised since 1990. PAWA indexes civil penalties to the consumer price index, to ensure the new penalty structure does not degrade over time.

It is a sad truth that, for some irresponsible employers, nothing focuses attention like the possibility of going to prison. Currently, successful criminal prosecution, under the OSH Act, only results in a misdemeanor. Under PAWA, it is a felony.

Another obstacle to protecting workers is that now if the employer contests a violation, OSHA cannot force that employer to fix the hazard until after the contest is decided. This loophole in the law has fatal consequences. OSHA has identified at least 30 cases, over the last 10 years, in which workers have been killed during the contest period after the citation was filed. PAWA would require employers to abate serious, willful, and repeat hazards after the citation is issued.

We know that OSHA works better if workers are actively involved in protecting their health and safety. If employees fear they will be retaliated against for participating in safety and health activities, they are not likely to do so. OSHA's whistleblower provisions are 40 years old, and lag far behind similar provisions in law that provide stronger worker protections and have been enacted with strong bipartisan support.

PAWA provides workers with a private right of action. It is critically important that, if an employer fails to comply with an order providing relief, both DOL and the worker can file a civil action. PAWA also codifies a worker's right to refuse unsafe work, and prohibits employer retaliation against employees for reporting injuries or illnesses.

OSHA recognizes the importance of family participation. While it is OSHA's policy to talk to families during the investigation process, and to inform them about our citation procedures and settlements, this policy has not always been implemented consistently and in a timely manner. PAWA would place into law the right of a victim or family member to meet with OSHA regarding the investigation, and receive copies of the citation at the same time as the employer, at no cost. PAWA would also enable victims to be informed of any notice of contest, and to make a statement before an agreement is made to withdraw or modify a citation.

Finally, it is a little-known fact that State and local employees who respond to our emergencies, repair our highways, clean and treat our drinking and waste water, pick up our garbage, take care of our mentally ill, provide social services, and staff our prisons—they are not covered by OSHA, unless the State in which they work chooses to do so, and only 25 States have elected to do so. Public-sector workers perform work that is as dangerous as those in the private sector, and, according to the Bureau of Labor statistics, they have a higher injury rate than private-sector workers. Public employees deserve to be safe on the job. The days of treating public employees as second-class citizens must come to an end.

Mr. Chairman, as we prepare to observe Workers Memorial Day tomorrow, we realize that our work is far from done. To quote from President Obama's statement, in the wake of the Upper Big Branch mine disaster,

"We owe all workers action. We owe them accountability. We owe them assurance that, when they go to work every day, they are not alone. They ought to know that, behind them, is a government that is looking out for their safety."

I join with you, Mr. Chairman, in dedicating ourselves to bringing about the day when there will be no more workers memorialized for dying on the job.

Thank you again for this opportunity to testify.

[The prepared statement of Mr. Michaels follows:]

PREPARED STATEMENT OF DAVID MICHAELS, PHD, MPH

Chairman Harkin, Ranking Member Enzi, members of the committee, I want to thank the committee for inviting us here today. It is a sad, but true commentary on human nature and the political system that great advances are all too often made only in the shadow of great tragedy.

Today, we are meeting under the shadow of two recent tragedies that have captured the headlines and the hearts of the American people—the almost unimaginable deaths of 29 miners in West Virginia, and the loss of seven refinery workers in Washington State. We are also here today in the knowledge that 14 Americans fail to come home from work to their families every single day of the year. In addition, tens of thousands die every year from workplace disease and over 4.6 million workers are seriously injured on the job. Most of these workers die one at a time, far from the headlines and nightly news, remembered only by their family, friends and co-workers. I have here before me a pile of news clips collected over the last couple of weeks describing workers, men and women, young and old who have been crushed, electrocuted, burned, or who have died in falls, trench collapses and forklift accidents.

These are the invisible relentless daily tragedies of the American workplace. Thank you for inviting us here today to work with you to find ways to stop this senseless sacrifice in American workplaces.

Until 1970, although certain industry-specific protections such as the Coal Mine Health and Safety Act of 1969 existed, there was no national guarantee that workers throughout America would be protected from workplace hazards. In that year the Congress enacted a powerful and far-reaching law—the Occupational Safety and Health Act of 1970 (OSH Act).

The results of this law speak for themselves. The annual injury/illness rate among American workers has decreased by 65 percent since 1973. Employers, unions, academia, and private safety and health organizations pay a great deal more attention to worker protection today than they did prior to enactment of this landmark legislation.

The promise of the act, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" is needed today as much as it was 40 years ago. Yet the means provided by the act to achieve that worthy goal are tragically outdated and inadequate. It has now been almost 40 years since the Occupational Safety and Health (OSH) Act was passed, and aside from an overdue increase in penalties almost 20 years ago, no significant change has been made to this law. There are far too many obstacles that prevent effective enforcement of the law, far too many loopholes that allow unscrupulous employers to continue to get away with endangering workers. This must stop.

Now is the time to think seriously and act courageously to ensure that OSHA and MSHA have the tools they need to enforce safe working conditions, and that this government develops effective incentives that will ensure all employers do the right thing. If we are to fulfill Secretary Solis' vision of *Good Jobs for Everyone*, we must address these urgent problems. Good jobs are safe jobs, and American workers still face unacceptable hazards.

We all know that most businesses want to do the right thing and will expend the necessary resources to ensure that their workplaces are safe. We need to make sure that they have the information and assistance they need to protect their employees. There are still far too many businesses in this country who continue to cut corners on safety, endangering the health and safety of their workers. As Secretary Solis pointed out to President Obama in her report last week on the Upper Big Branch mine disaster, she is committed to taking action now to stop reckless mine operators and other business owners who risk the lives and health of their workers. Too often, we see employers who assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. If they find that the costs of

compliance outweigh the penalties they will face if caught, they opt to gamble with their workers' lives. This is a "catch-me-if-you-can" approach to safety and health. It is what we saw in action at Upper Big Branch and what we at OSHA see far too often in the workplaces we visit.

We know that we do not have, nor will we ever have enough inspectors to be in every workplace often enough to make sure that all workplace safety laws, rules and best practices are followed. Therefore, we need to find ways to leverage our resources to ensure the goals of the OSH Act are met. Our mission must not be to punish or react, but to require employers to plan, prevent and protect.

To do this effectively, major changes need to be made in the act. The Occupational Safety and Health Act is almost 40 years old. Since enactment, the act has not been significantly modified in all of those years and has not kept up with many of the significant advances made in other laws, including consumer and worker protections.

OSHA has already taken broad steps toward this goal. Just yesterday, the Labor Department released its Spring regulatory agenda which includes a new enforcement strategy—Plan/Prevent/Protect—an effort designed to expand and strengthen worker protections through a new OSHA standard that would require each employer to implement an Injury and Illness Prevention Program tailored to the actual hazards in that employer's workplace.

Instead of waiting for an OSHA inspection or a workplace accident to address workplace hazards, employers would be required to create a plan for identifying and remediating hazards, and then implement this plan. Essentially, through this common sense rule, we will be asking employers to find the safety and health hazards present in their facilities that might injure or kill workers and then fix those hazards, also known as "Find and Fix." Workers would participate in developing and implementing such a plan and evaluating its effectiveness in achieving compliance. OSHA will soon initiate rulemaking on this standard with stakeholder meetings, the first to take place in June in New Jersey.

Additionally, we are doing everything we can within the limits of our law to expand and strengthen workplace protections. Last week, we announced a new initiative to implement long-overdue administrative modifications to our penalty formulas, which will have the effect of raising OSHA penalties while maintaining our policy of reducing penalties for small employers and those acting in good faith. These changes will be well-advertised so that all employers are aware of the new policies. However, OSHA believes any administrative changes we are able to make would still be inadequate to compel bad employers to abate serious hazards. These steps are an effort to do the best with the outdated, antiquated tools we have. But, we can only do so much within the constraints of the current OSH Act.

We also announced that OSHA will implement a new Severe Violators Enforcement Program, increasing our focus on repeatedly recalcitrant employers, which will be discussed in more detail later in my testimony.

While important, both of these administrative measures are severely limited by constraints of current law. To adequately plan, prevent and protect, the law governing OSHA must be updated to reflect the 21st Century.

The Administration supports the Protecting America's Workers Act (PAWA), which makes meaningful and substantial statutory changes to OSHA's penalty structure and enforcement program. PAWA, coupled with our vigorous "plan/prevent/protect" regulatory agenda, will begin to make the "catch-me-if-you-can" approach to workplace safety a thing of the past.

PENALTIES

The most serious obstacle to effective OSHA enforcement of the law is the very low level of civil penalties allowed under our law, as well as our weak criminal sanctions.

While most employers understand the business case and the moral case for providing a safe workplace, many do not and the threat of penalties plays a major incentive in forcing them to comply with the law. The deterrent effects of these penalties are determined by both the magnitude and the likelihood of penalties. Swift, certain and meaningful penalties provide an important inducement to "do the right thing." However, OSHA's current penalties are not large enough to provide adequate incentives. Although OSHA can, in rare circumstances involving large numbers of egregious violations, generate large penalties, most OSHA fines are far too small to serve as anything more than an inconvenient cost of doing business.

I also want to stress here that OSHA enforcement and penalties are not just a reaction to workplace tragedies; they serve an important preventive function. Just as the fear of a ticket and large fine keeps the average driver from running red

lights to make it to the meeting for which he or she is late, OSHA inspections and penalties must be large enough to discourage employers from cutting corners or underfunding safety programs to save a few dollars. Even the largest fines, when levied on a giant corporation, have little effect on the company's bottom line.

Congress has increased monetary penalties for violations of the OSH Act only once in 40 years despite inflation during that period. As a result, unscrupulous employers often consider it more cost-effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem.

Currently, serious violations—those that pose a substantial probability of death or serious physical harm to workers—are subject to a maximum civil penalty of only $7,000. Let me say that again, a violation that causes a "substantial probability of death or serious physical harm" brings a maximum penalty of only $7,000. Willful and repeated violations carry a maximum penalty of only $70,000.

After factoring in reductions for size, good faith and history, as well as other factors, the current average OSHA penalty for a serious violation is only around $1,000. The median initial penalty proposed for all investigations conducted in fiscal year 2007 in cases where a worker was killed was just $5,900. Clearly, OSHA can never put a price on a worker's life and that is not the purpose of penalties—even in fatality cases. OSHA must, however, be empowered to send a stronger message in cases where a life is needlessly lost than the message that a $5,900 penalty sends.

The current penalties do not provide an adequate deterrent. This is apparent when compared to penalties that other agencies are allowed to assess. For example, the Department of Agriculture is authorized to impose a fine of up to $130,000 on milk processors for willful violations of the Fluid Milk Promotion Act, which include refusal to pay fees and assessments to help advertise and research fluid milk products. The Federal Communications Commission can fine a TV or radio station up to $325,000 for indecent content. The Environmental Protection Agency can impose a penalty of $270,000 for violations of the Clean Air Act and a penalty of $1 million for attempting to tamper with a public water system. Yet, the maximum civil penalty OSHA may impose when a hard-working man or woman is killed on the job—even when the death is caused by a willful violation of an OSHA requirement—is $70,000.

In 2001 a tank full of sulfuric acid exploded at an oil refinery in Delaware, killing Jeff Davis, a worker at the refinery. His body literally dissolved in the acid. The OSHA penalty was only $175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to $10 million. How can we tell Jeff Davis' wife Mary, and their five children, that the penalty for killing fish and crabs is many times higher than the penalty for killing their husband and father?

The Protecting America's Workers Act makes much-needed increases in both civil and criminal penalties for every type of violation of the OSH Act and would increase penalties for willful or repeat violations that involve a fatality to as much as $250,000. These increases are not inappropriately large. In fact, for most violations, they raise penalties only to the level where they will have the same value, accounting for inflation, as they had in 1990.

Unlike most other Federal enforcement agencies, the OSH Act has been exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 39 percent. In order to ensure the effect of the newly increased penalties do not degrade in the same way, PAWA indexes civil penalties to increases or decreases in the Consumer Price Index (CPI). These penalty increases are necessary to create at least the same deterrent that Congress originally intended when it passed the OSH Act almost 40 years ago. Simply put, OSHA penalties must be increased to provide a real disincentive for employers not to accept injuries and worker deaths as a cost of doing business.

Throughout its history, OSHA has faced the problem of employers who have allowed multiple serious and repeated violations to exist across several of their workplaces. It isn't only the coal mining industry that faces employers like Massey Energy that rack up dozens or hundreds of violations throughout the corporation.

Sometimes even large penalties are ineffective. After OSHA cites these companies at one location, workers often continue to get hurt or die from the same kinds of hazards at another site within the same company. OSHA has only limited tools to require recalcitrant employers to abate life-threatening hazards. As I stated earlier, OSHA issued its new Severe Violators Enforcement program (SVEP) last week. SVEP is a refinement of the Enhanced Enforcement Program, designed as a supplemental special enforcement tool to address recalcitrant employers who fail to meet

their obligations under the OSH Act. This program includes more mandatory inspections of an identified company; mandatory follow-up inspections, including inspections at other locations of the same company; and a more intense examination of an employer's history to assess if there are systemic problems that would trigger additional mandatory inspections. This is about as close as OSHA can come, within the limits of our law, to MSHA's "pattern of violations" system.

There are a number of improvements to OSHA's law that could allow us to implement a pattern of violations authority that would facilitate more severe penalties when a pattern is identified. Additional authority to propose higher penalties for "multiple repeat violations" could enable OSHA to address situations in which companies demonstrate consistent and repeated disregard for the lives of their employees.

In addition, under current law, OSHA cannot cite a repeat violation if the original violation occurred in one of the Nation's 21 "State-Plan" States which administer their own OSHA programs. Permit me to explain this. If a roofer who was not provided fall protection is killed after falling from a roof in Ohio, OSHA will investigate and determine, among other things, if other employees of that contractor had ever been injured or killed under similar circumstances. If OSHA had previously cited that employer for violations of our fall protection rules in a State where we have jurisdiction, we could cite the employer for a repeat violation. However, if the previous violation had occurred in nearby Indiana or Kentucky, perhaps just a few miles from the site of the fatality, the law states that we could not classify the events around the fatality as a repeat violation, even if the original violation involved a worker who was killed under identical circumstances—simply because they were in State-Plan States. This defies any common sense definition of a repeat violation.

Enhanced civil penalties and an improved mechanism for going after repeatedly recalcitrant employers are much needed. Also needed is a much more effective way of addressing the most egregious employer wrongdoing. The solution here is enhanced criminal sanctions and the real threat of incarceration for employers whose knowing violation of OSHA standards leads to the death or serious bodily injury of an employee. It is a sad truth that nothing focuses attention like the possibility of going to prison. Unscrupulous employers who refuse to comply with safety and health standards as an economic calculus will think again if there is a chance that they will go to prison for ignoring their responsibilities to their workers.

Under the OSH Act, criminal penalties are currently limited to those cases where a willful violation of an OSHA standard results in the death of a worker and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction for a violation that costs a worker's life is 6 months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970. The criminal provisions in the OSH Act are weaker than virtually every other safety and health and environmental law. Most of these other Federal laws have been strengthened over the years to provide for much tougher criminal sanctions. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. There is no prerequisite in these laws for a death or serious injury to occur. Other Federal laws provide for a 20-year maximum prison sentence for dealing with counterfeit obligations or money, or mail fraud; and for a life sentence for operating certain types of criminal financial enterprises.

Simply put, serious violations of the OSH Act that result in death or serious bodily injury should be felonies like insider trading, tax crimes, customs violations and anti-trust violations.

PAWA would also amend the criminal provision of the OSH Act to change the requisite mental state from "willfully" to "knowingly." Most Federal environmental crimes and most Federal regulatory crime use the term "knowingly," rather than "willfully." Under a "knowing" standard, the government must only prove that the defendant had knowledge of the facts that constitute the offense, i.e., that the conduct at issue was not accidental or a mistake. Harmonizing the language of the OSH Act with that of these other statutes would add clarity to the law. PAWA would do that through the provision that any employer is subject to criminal prosecution if that employer "knowingly" violates any standard, rule or order and that the violation results in death or serious bodily injury to an employee. OSHA strongly supports this change in the law.

ABATEMENT DURING CONTEST

Another major obstacle to protecting workers in the OSH Act is that OSHA cannot force employers to fix an identified workplace hazard if the employer has contested the violation until after the contest is decided.

When OSHA identifies a serious workplace hazard, one capable of killing or seriously injuring a worker, we cite that employer. Employers then have the right to contest that citation. This is as it should be. The problem—often the fatal problem—with the law as currently written, is that the employer is under no obligation to fix the unsafe condition until the contest is settled, which can be months, or even years, after the initial citation. Workers are, therefore, left without protection from identified health and safety hazards.

We don't tell truck drivers to continue operating on faulty brakes for weeks or months until their court appeal is heard. Why should we allow employers to continue operating dangerous machinery for months or years after the hazard has been identified and cited?

The OSH Act can allow dangerous conditions to exist for many years while litigation is under way. For example, in 1994, OSHA cited a Dayton Tire facility in Oklahoma City for multiple violations of the Lock Out/Tag Out standard that had already killed one worker. An Administrative Law Judge (ALJ) affirmed the violations almost 3 years later, and the Occupational Safety and Health Review Commission then accepted the case for review, but has still not issued a decision. In 2006, 12 years after being cited, Dayton closed the facility without ever abating the violations.

This loophole in the law has had fatal consequences. OSHA has identified at least 30 cases between fiscal year 1999 and fiscal year 2009 where workers have been killed during the contest period after a citation was filed. The only situation worse than a worker being injured or killed on the job by a senseless and preventable hazard, is having a second worker needlessly felled by the same hazard.

The lack of any mechanism to force employers to abate hazards during the contest period also contributes to the low level of OSHA penalties. OSHA inspectors are primarily interested in making sure that workers are safe, not in collecting fines. Many employers have learned that by threatening to appeal even the most irrefutable hazard, they force OSHA staff to choose between immediate abatement of a life-threatening hazard, or pursuing violation through a lengthy appeal. Faced with a situation where it may be months or years until a contested citation is settled and a hazard is fixed, OSHA is often forced to settle at a much lower level than would be deserved in order to get faster abatement of the hazard so that workers are safe.

OSHA supports a provision of PAWA that would require employers to abate serious, willful and repeat hazards after a citation is issued during the contest period. This provision would also enable OSHA to issue "failure to abate" notices at a workplace with a citation under contest, enhancing the right of workers to be protected from the most egregious workplace hazards.

Now, it has been argued that mandated abatement during the contest period is "unjustified" and "an outrageous trampling of due process rights." Those who feel this way should know that a similar requirement has existed in the mine safety laws for 40 years without wreaking havoc in the mine industry. OSHA is merely asking to provide general industry workers with the same protection that miners have possessed for decades. In weighing the balance between employee protection and employer contest rights, employee safety should come first.

WHISTLEBLOWER PROTECTION

OSHA will never be able to inspect every workplace every day, or even every year. Far from it. Which is why Congress designed the OSH Act to rely heavily on workers to help identify hazards at their workplaces. If employees fear that they will lose their jobs or otherwise be retaliated against for participating in safety and health activities or expressing concern, they are not likely to do so. Secretary Solis flagged the importance of robust whistleblower protections in preventing workplace disasters by including a recommendation to improve the whistleblower provisions of the Mine Act in her report to the President last week.

The OSH Act was one of the first safety and health laws to contain a provision for protecting whistleblowers—section 11(c). Forty years ago, that provision was innovative and forward looking. In 2010, however, it is a legal dinosaur. It is clear that the OSH Act's whistleblower provision is in dire need of substantial improvement. Notable weaknesses in section 11(c) include: inadequate time for employees to file complaints; lack of a statutory right of appeal; lack of a private right of action; and OSHA's lack of authority to issue findings and preliminary orders, so that a complainant's only chance to prevail is through the Federal Government filing an

action in U.S. District Court. Achieving the Secretary's goal of *Good Jobs for Everyone* includes strengthening workers' voices in their workplaces. Without robust job protections, these voices may be silenced.

In recent years, a number of more modern, more effective whistleblower protections have passed the Congress with strong bi-partisan support. Additionally, there has been bi-partisan consensus for the past 25 years on the need for uniform whistleblower protections for workers in every industry—making the different whistleblower statutes more consistent and equitable. This Administration supports uniformity as well.

The Protecting America's Workers Act expands the OSH Act's anti-retaliation provisions. The bill codifies a worker's right to refuse to perform unsafe work, protects employees who refuse work because they fear harm to *other* workers, prohibits employer policies that discourage workers from reporting illnesses or injuries, prohibits employer retaliation against employees for reporting injuries or illnesses, and grants workers the right to further pursue their case if OSHA does not proceed in a timely fashion.

Additionally, current laws give workers only 30 days to file an 11(c) complaint. It often takes workers more than 30 days to learn what the law says and how to file a complaint. Many complainants who might otherwise have had a strong case of retaliation have been denied protection simply because they did not file within the 30-day deadline. For example, we received an 11(c) complaint from a former textile employee who claimed to have been fired for reporting to management that he had become ill due to smoke exposure during the production process. The worker contacted OSHA to file an 11(c) complaint 62 days after he was fired, compelling OSHA to dismiss the case as untimely under existing law. PAWA would increase the existing 30-day deadline for filing an 11(c) complaint to 180 days, bringing 11(c) more in line with some of the other whistleblower statutes enforced by OSHA, and greatly increasing the protections afforded by section 11(c).

The private right of action is another key element of whistleblower protections that is lacking in OSHA's current 11(c) provision. It is critically important that, if an employer fails to comply with an order providing relief, both DOL *and* the complainant be able to file a civil action for enforcement of that order in a U.S. District Court. Most of the other whistleblower provisions that OSHA enforces have this private right of action provision—certainly the OSH Act should be amended to include it and PAWA does just that.

Finally, PAWA would codify a number of OSHA's high standards for professionalism and transparency in conducting whistleblower investigations that are of critical importance to this Administration. For example, PAWA requires OSHA to interview complainants and to provide complainants with the respondent's response and the evidence supporting the respondent's position. PAWA affords complainants the opportunity to meet with OSHA and to rebut the employer's statements or evidence. While we train our investigators on the critical importance of conducting thorough interviews with complainants and involving complainants in the rigorous testing of proffered employer defenses, we believe that requiring these investigative steps by statute could only assist OSHA in its mission of providing robust protection to occupational safety and health whistle blowers.

These legislative changes in the whistleblower provisions are a long-overdue response to deficiencies that have become apparent over the past four decades. This legislation makes good on the promise to stand by those workers who have the courage to come forward when they know their employer is cutting corners on safety and health and guarantees that they don't have to sacrifice their jobs in order to do the right thing. OSHA has the responsibility of administering 16 other whistleblower statutes in addition to the provision in its own governing statute. The fact that almost all of those other statutes are more protective to workers is a fact that needs to be addressed now, and this committee has been involved, with bipartisan support, in passing many of those whistleblower laws that provide far greater protection than OSHA's law.

This hearing provides OSHA with the opportunity to identify areas where the Agency and the Administration have identified needed legislative changes that go beyond those proposed in PAWA. These changes would strengthen the OSH Act and provide an added deterrent to businesses that ignore workplace safety and health hazards.

I would propose amending the OSH Act to provide for assessment of civil penalties against employers who violate the whistleblower provisions. Currently, while an employer found to be discriminating against an employee must make the employee whole again, there is no provision for civil penalties against employers. The provisions are not in the current version of PAWA but similar provisions are included in the S-MINER Act that was passed in the House of Representatives in

2008. Under this provision, any employer found to be in violation of Section 11(c) of the Act would be subject to civil penalties of not less than $10,000 and not more than $100,000 for each occurrence of a violation.

Finally, as conclusion of these cases can often take many months, a provision should be made to re-instate the complainant pending outcome of the case. The Mine Act provides that in cases when MSHA determines that the employee's complaint was not frivolously brought, the Review Commission can order immediate reinstatement of the miner pending final order on the complaint.

FAMILIES AND VICTIMS

PAWA includes a number of sections that would expand the rights of workers and victims' families. OSHA has long known that workers, and often their families, can serve as OSHA's "eyes and ears," identifying workplace hazards. Workers injured in workplace incidents and their friends and family often provide useful information to investigators, because employees frequently discuss work activities and co-workers with family members during non-work hours.

In addition, family members and co-workers are sincerely interested in learning how an incident occurred, finding out if anything could have been done to prevent it, and knowing what steps the employers and employees will take in the future to ensure that someone else is not similarly injured or killed.

While it is OSHA's policy to talk to families during the investigation process and inform them about our citation procedures and settlements, this policy has not always been implemented consistently and in a timely manner. In addition, OSHA's interactions with families and victims could certainly be expanded without slowing down the enforcement process.

PAWA would place into law, for the first time, the right of a victim (injured employee or family member) to meet with OSHA regarding the investigation and to receive copies of the citation or resulting report at the same time as the employer at no cost. PAWA would also enable victims to be informed of any notice of contest and to make a statement before an agreement is made to withdraw or modify a citation.

No one is affected more by a workplace tragedy than workers and their families, so we fully recognize and appreciate their desire to be more involved in the remedial process. However, we do believe that clarification is needed of the provisions allowing victims or their representatives to meet in person with OSHA before the agency decides whether to issue a citation, or to appear before parties conducting settlement negotiations. Our fear is that this process could result in significant delays in our enforcement process, which neither OSHA nor the families would want.

PREVENTING FRIVOLOUS CONTESTS

Some have argued that if OSHA's monetary penalties are increased, employers would be more likely to contest enforcement actions and clog the system with litigation. We have certainly seen that phenomenon in mine enforcement. The Labor Department's Report to the President on the Upper Big Branch Mine disaster suggested one method of addressing this problem: requiring mine operators to put significant penalty amounts into escrow. The committee should look into this option for OSHA as well.

PRESUMPTIVE WILLFULS

Not a week goes by that I don't read about a worker killed or seriously injured from a 10- or 15-foot deep trench collapsing on top of them. The law says that trenches more than 5 feet deep must be protected by a trench box or equivalent protection. These protections are well known and these deaths are completely, easily and cheaply preventable. I would attest—and I don't think there is a single construction safety expert in this country who would contradict me—there is no construction company owner in this country who does not understand the hazards inherent in deep trenches or how to prevent collapses. In fact, sometime in the 5th century BC, the historian Herodotus, observing the Phoenician army digging trenches wrote of the hazards of trench collapses and how to avoid them. Yet, 2,500 years later, workers continue to die in trenches.

There is no reason why such a well-recognized and easily preventable violation that leads to the death or serious injury of a worker should not be a presumptive willful citation. There are other violations that would fall into the same category; workers working at great heights without fall protection, for example.

IMMINENT DANGER

Currently, when OSHA identifies an imminent danger, such as a worker in a deep trench or at a high elevation without fall protection, the Agency cannot take immediate action to shut down the process or remove employees from harm until the hazard is corrected. OSHA must seek an injunction in Federal District Court if the employer refuses to voluntarily correct an imminent danger. While this process can work smoothly and rapidly in many situations where relatively quick court action can be obtained, some hazards can result in death in minutes. In addition, inspectors often work far from the courthouse when worker safety demands quick action.

In contrast, the Mine Act treats imminent danger orders as essentially self-enforcing, requiring mine operators to evacuate miners in the affected area immediately, until the hazard is corrected, and then seek review in the Commission. Unfortunately, OSHA does not have the same authority as MSHA, which can order the withdrawal of miners or equipment if certain hazards are not abated.

The committee might consider providing OSHA the authority, similar to the authority MSHA has, to "tag" a hazard or workplace condition that poses an imminent danger of death or serious injury. The employer would then be required to take immediate corrective action or have the workplace shut down. Internal procedures could be developed to ensure that compliance officers do not take unjustified actions.

CONTRACT EMPLOYEES AND MULTI-EMPLOYER WORKSITES

Another obstacle to effective OSHA enforcement is the growing use of contract employees and OSHA's inability in certain circumstances to determine the hazards these employees face and to force the responsible party to control those hazards.

For example, the General Duty Clause of the OSH Act addresses an employer's responsibility to protect its own employees from recognized hazards, even where no standard exists. The employer is not responsible under the General Duty Clause for a hazard encountered by contract workers, even if the employer creates or controls the hazard. Contract employees receive less training than direct-hire employees so they may need added protection.

In modern, multi-employer work settings, employers are often responsible for the working conditions of many workers who technically may be employed by others. Employers with control of complex, multi-employer workplaces should bear responsibility for making the workplace safe and healthful not only for workers on their own payroll, but for all affected workers. The wording of the present 5(a)(1) of the OSH Act only requires an employer to provide safe working conditions for "his employees." Extending an employer's general duty beyond its own employees to also protect contract employees from recognized hazards that the employer creates or controls would enhance the utility of the general duty clause.

The goal of this hearing is to identify barriers to enforcement and ways to encourage employer compliance with the law. To that end, I would be remiss if I failed to mention one additional barrier to protection for almost 9 million workers in this country who provide this Nation's most vital services: public employees.

It is a fact, little known among the American public, that public employees in the United States—who respond in our emergencies, repair our highways, clean and treat our drinking and waste water, pick up our garbage, take care of our mentally ill, provide social services and staff our prisons—are not covered by OSHA unless the State in which they work chooses to do so. Today, almost 40 years after passage of the Occupational Safety and Health Act, half of the States still do not provide federally approved coverage for public employees.

According to the Bureau of Labor Statistics, the total recordable case injury and illness incidence rate in 2008 for State government employees was 21 percent higher than the private sector rate. The rate for local government employees was 79 percent higher. Clearly, some public sector jobs are extremely dangerous. Public employees deserve to be safe on the job, just as private-sector employees do.

In testimony before this subcommittee in May 2007, Jon Turnipseed, Safety Supervisor for the City of San Bernardino Municipal Water Department in California, said it most succinctly:

> From my own view as a public sector employee, the simplest but most compelling reason is that saving lives and preventing injuries always tops the list of values that our government holds dear in every other responsibility it undertakes. State and local government workers are, in many instances, the "first responders" upon whom we all depend. Whether a terrorist attack or a natural disaster, these first responders are the first people who rush in to help save lives. We put a premium on that capability in our society. These same people who protect the public from hazards deserve no less of a commitment to occupa-

tional safety and health protections from their employers, the public, and all of us here today.

Twenty-six States and one territory now provide federally approved OSHA coverage to their public employees and you will find that they consider it not a hardship, but a necessary provision for the safety of their employees and the provision of good government. Nonetheless, in 2008 there were more than 277,000 injuries and illnesses with days away from work among State and local governmental employees. In a State that has public employee coverage, a public employer can be held responsible for safety violations. A crane operator in New Jersey died from injuries after his head was crushed by a cargo spreader in 2008. New Jersey, which has an OSHA program for public employees, issued a citation for willful OSHA violations. However, if this tragedy had occurred in Pennsylvania or Delaware, which have no public employee safety and health programs, the employer could not have been held accountable.

Again, we support the Protecting America's Workers Act, which extends OSHA coverage to public-sector employees. Because the extension of such coverage will have costs, it should occur over time, and we welcome further discussion of implementation issues. There is simply no good argument in the 21st century for allowing public employees to be injured or killed under conditions that would be illegal and strictly punished if they were private sector employees. The days of treating public employees as second class citizens must come to an end.

Mr. Chairman, as we prepare to observe Workers Memorial Day tomorrow we realize that our work is far from done. Whether it be the death of 29 workers in a coal mine in West Virginia, the loss of six employees in an explosion at an oil refinery in Washington State, or the single deaths that occur in workplaces each day in America, this carnage amounts to an unacceptable burden for the workers of America to bear in producing the goods and services that fuel not only our economy, but also our country. To take from President Obama's statement last week in the wake of the Upper Big Branch mine disaster, we owe all workers action. We owe them accountability. We owe them assurance that when they go to work every day they are not alone. They ought to know that behind them is a government that is looking out for their safety.

I join with you, Mr. Chairman, in dedicating ourselves to bringing about the day when there will be no more workers memorialized for dying on the job. Thank you again for the opportunity to testify today. I am happy to answer your questions.

The CHAIRMAN. Mr. Michaels, thank you very much for your testimony.

I read your written testimony last night; I thought maybe you were going to talk about some of these examples here. I mentioned in my open statement, how the fines and penalties, of both civil and criminal, are tougher on environmental laws than they are on worker safety.

You put, in your testimony, about the 2001 tank full of sulfuric acid that exploded at a refinery in Delaware, killed Jeff Davis, a worker. His body was literally dissolved in the acid. The OSHA penalty was $175,000. Yet, in the same incident, thousands of dead fish and crabs were discovered, allowing an EPA Clean Water Act violation amounting to $10 million. How can we tell Jeff Davis's wife, Mary, and their five children that the penalty for killing fish and crabs is many times higher than the penalty for killing their husband and father?

Now, again, these things just cry out for us to do something. We've got to make the necessary changes. And that's what we look to you for, is your suggestions and your advice on how we change these.

Right now—and we just heard from MSHA; I think you were here during all that—they have the authority to order the withdrawal of miners from an area, until they have abatement. They can shut down a mine. We know that that doesn't happen that

often. Yet, OSHA cannot immediately shut down the process or remove workers from harm until the hazard is corrected. Is that correct?

Mr. MICHAELS. Yes, sir. If an OSHA inspector is in a facility and sees a hazard that we believe is imminent—is dangerous to workers—we can certainly ask the employer to shut it down, but we can't require it. We have to go to court to do that.

The CHAIRMAN. Even though there may be imminent danger.

Mr. MICHAELS. Yes, sir.

The CHAIRMAN. Do you have any advice or any suggestions for legislative changes?

Mr. MICHAELS. I certainly would like to see that changed. I think that's an extremely important change. MSHA has the ability to be given a report, not even be onsite, but to make a phone call and say, "Shut that down until we arrive." And we certainly can't do that. The OSHA law is very weak, and hasn't been amended, in any substantive way, since 1970.

The CHAIRMAN. Yes. Let me tell you, as a former member of the House representing a very rural district in Iowa, and as a Senator representing a lot of small towns and communities, over the years I've heard story after story of OSHA inspectors coming out and nitpicking on something. They find some little thing. You hear all these horror stories. Some of them, we've tried to track down. It's very hard to do. But, address yourself to that. I'm sure you've been around long enough——

Mr. MICHAELS. Yes.

The CHAIRMAN [continuing]. You've heard all this, right? They just pick on these little——

Mr. MICHAELS. Yes.

The CHAIRMAN [continuing]. Things, and just create nonsensical kinds of things that they've got to fix up.

Mr. MICHAELS. Yes, I believe that was the case in the early 1970s. When OSHA first began, they took all the standards, from many different consensus organizations, and I'm told that they just applied them all equally. Any violation they found, they issued a citation. Obviously, that was a severe mistake. OSHA took a real beating. I think they learned. This was, actually, under Presidents Nixon and Ford. I think it got straightened out, really, by the Ford administration. And OSHA hasn't been that way since.

OSHA takes its job very seriously. We have relatively few inspectors. We and our State partners have only about 2,000 inspectors to cover 8 million workplaces and 130-plus million workers across the country. We only look at serious problems. Eighty-three percent of our violations are serious violations, which means they could threaten death or impose serious physical harm on the worker involved. We don't have time to nitpick.

The CHAIRMAN. Tell me about—quickly, my time's running out—the SVE Program, this Severe Violators Enforcement Program. How does that differ from your Enhanced Enforcement Program?

Mr. MICHAELS. Well, it's reshaped. We could certainly get you more information on this. It really makes us focus on those employers, where we found serious problems, that we think are quite recalcitrant, and it makes us go back in there on a regular basis and see what's going on there. We think it's a big advance. We're just

putting it into effect now. I wasn't here for the previous program, but I'm confident this program is really going to do a good job.

The CHAIRMAN. Thank you, Mr. Michaels.

Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

I helped to get the Post Office under OSHA when I first got here and called for inspections in my office on a regular basis. I know the number of inspectors indicates that a business is only going to be inspected once every 100 years. I suspect that the thousands of people that we'd have to hire in order to have a shorter period of time than that would create quite an economic burden in this country.

There is a program that's working very well, and that's the VPP program, the Voluntary Participation Program——

Mr. MICHAELS. Right.

Senator ENZI [continuing]. Where they volunteer safety experts to work as special government employees, and have some pretty extensive criteria for them to ever be recognized that way. VPP leverages 35 FTEs to get the help of 2,400 special government employees to conduct inspections and audits. I'm pretty impressed with that. I'm even more impressed with some of the independent evaluations that have been done, because it shows that it saves taxpayers millions of dollars every year, just in personnel. It also avoided serious injuries, probably $59 million worth, in 2007, not to mention the pain and agony that goes with that.

VPP has shown very strong growth. I've wanted to get it down into even medium-sized businesses, not just the big businesses, and that had been happening more in recent years. VPP gives recognition to exemplary workplace safety and public-relations value that's intangible with regard to spreading OSHA's core mission, and making sure that people go home safe. Given those factors, do you believe that the VPP is worth preserving?

Mr. MICHAELS. Yes, I do. I'm a great believer in the VP Program. When I was at the Department of Energy, I ran the VPP program. I think the concern that I've heard, from your office and from others, is our shifting of resources around that. And I want to discuss that.

We think it's a very worthwhile program. We are very much focused, though, on those employers who are not the good participants, the ones that really want to make a difference. The VPP program are employers who get it. There are 14 workers who die every day on the job, and there are lots of employers who are just irresponsible and don't care. We're forced with choosing between, Do we put our resources into those employers who want to do the right thing and those employers who don't? So, what we've done is, we've just said we have to really focus on those—increase enforcement on employers who don't really understand this.

We want to see the VPP program continue. We'd like to work very closely with your committee and with the association of VPP companies, the VPPPA, in finding alternative means of funding for this program, because we think it's a good program, and we want it to continue.

Senator ENZI. Looking at the budget, we're talking about $3.5 million of changing resources?

Mr. MICHAELS. Somewhere in that ballpark.

Senator ENZI. Yes. So, 3.5 million; and just in the Federal savings, there's $59 million in savings. If you look at the injuries out in the private sector, there's about $300 million in savings. Doesn't it seem like we really ought to extend that program and get more of the people that are good participants into that program so that they're doing extensive inspections and cutting down accidents, and then we can shift more of the resources of the inspection over to the bad actors.

Mr. MICHAELS. I'm not sure where the $59-million figure comes from. I'd love to see that.

I believe it's a useful program, and I believe the companies involved want to do the right thing, and we should encourage them, and we should find a way to do that. We really do have to focus on the small companies, the high-hazard companies. VPP is primarily large companies. Only 6 percent of the employees covered in the VPP program work at employers of less than 250 people. It's big employers who can afford, essentially, to help us find some way to fund this program.

Senator ENZI. If we drop that, how much of the extra resources are we going to need just to take care of the ones that we're going to be neglecting, who does do a good job. I'll be interested to know who's developing this new proposal, and who's been briefed on it, and whether it'll require new legislative authority, and how long it'll take to put the system in place, and how we can work more with more of the good people so that you can really concentrate on the bad people.

I have a bunch of additional questions, but I'll provide those in writing, especially since the vote's already started.

The CHAIRMAN. I'd note the vote started at 4:30, but I know Senator Murray has another meeting she has to attend to, and I'm going to recognize Senator Murray before we go on.

Senator MURRAY. I really appreciate that, Mr. Chairman, because I do want to talk to you about the terrible tragedy in my home State, at the Tesoro Refinery. We lost seven workers, and it's just had a huge impact.

I'm trying to understand how OSHA's inspection protocols work in States like my State and 26 other States that operate a DOL-approved State Occupational Safety and Health Program. Can you tell me how the Federal OSHA programs, like the Petroleum Refinery National Emphasis Program, are conducted in States like mine?

Mr. MICHAELS. Well, I can tell you, yes. We have a National Emphasis Program that focuses specifically on oil refineries, because we believe refineries are particularly dangerous facilities. We've had a number of terrible events. BP Texas City being one example, but certainly the Tesoro Refinery was another.

In Federal States we take our experts in process safety management—it's a relatively small number, people who understand refining and things like that—and we put them in to do inspections. We're trying to cover every refinery in the States that are Federal States. We've asked States, who operate their own State programs, to do the same thing, because under the OSHA law, States must be at least as effective as the Federal OSHA.

Now, fortunately, Washington State has a good OSHA system, and has decided to replicate what we do. They have adopted——

Senator MURRAY. There isn't any requirement for——

Mr. MICHAELS. In this case, there is no requirement. When this NEP, the National Emphasis Program, was put into effect, it was allowed to be voluntary on the parts of States. Certain States, a small number, have decided not to do that. We are quite concerned about that.

Senator MURRAY. Yes.

Mr. MICHAELS. We are now re-evaluating whether—when we have a national program—we should allow States to opt out of it, because it would no longer be a national program.

Senator MURRAY. But, does OSHA do followup inspections to sites that have been inspected as part of that national——

Mr. MICHAELS. Yes. In fact, we recently had a followup inspection at the BP-Husky facility in Ohio. I'm sorry, Senator Brown isn't here. We went into that facility, we found a number of violations. We asked BP-Husky to abate those. When we went into the followup, we found—we had abated those, but went to the other part of the facility, because these are very large refineries—they hadn't made changes. The same changes that we required in one part, they hadn't made them in the other part. They just ignored that. We just issued a more-than-$2-million fine against BP-Husky for exactly that problem.

We are extremely concerned about oil refineries and the possible catastrophic events associated with them. So, we're going back into them and seeing what we can do.

Senator MURRAY. Well, as you know, the Tesoro's Refinery was cited for 17 serious safety violations in April 2009, so this is a big concern. And I want to followup with several other questions, but I wanted to ask you, before my time's up. In your written testimony, you explained that, under current law, OSHA cannot develop a Pattern of Violations, or cite an employer of repeat violations, if that employer has employees in multiple States. Right?

Mr. MICHAELS. Right.

Senator MURRAY. If the original violation occurs in one of these 21 State-Plan States that administer their own OSHA programs, do you necessarily know that other States have violations, as well?

Mr. MICHAELS. That's correct, we don't know, and we can't use that information. It's one of the many weaknesses of the law that we hope might be addressed.

Senator MURRAY. Well, what is the logic behind that?

Mr. MICHAELS. That's the way the law was written. The State plans are quite independent.

Senator MURRAY. Well, Mr. Chairman, this is a serious problem.

Mr. MICHAELS. Yes.

Senator MURRAY. Because if a refinery—and many of them do have operations in many States, and they're under State-run OSHA plans, then those violations don't add up in totality, and people don't know about it.

Mr. MICHAELS. Correct.

Senator MURRAY. I mean, it seems we have to fix that.

Mr. Chairman, I know we have a vote. I have a number of questions I'd like to submit for the record. I want you to know this is something I intend to pursue.

[The information referred to may be found in Additional Material.]

The CHAIRMAN. Thank you very much, Senator.

VOICE. Inaudible.

The CHAIRMAN. Yes, sir.

VOICE. Inaudible.

Senator ENZI. Mr. Chairman, I just wanted to mention that that $59-million figure comes from an OSHA press release.

Mr. MICHAELS. Great. I'd like to see it, thank you.

[Laughter.]

The CHAIRMAN. All right.

Well, Senator Rockefeller, if you don't have any——

Senator ROCKEFELLER. No. I just want to yield to Senator Murray.

The CHAIRMAN. Oh. She has——

Senator Murray.

Well, Mr. Michaels, thank you very much.

There's a vote on, right now. We'll recess, here, for about 10 minutes. We'll go over and vote. We'll be back, and we'll take the next panel.

I would invite panel four to go ahead and take the table: Margaret Seminario, Holly Shaw, Michael Brandt, and Kelli Heflin.

We'll be right back.

[Recess.]

The CHAIRMAN [resuming the chair]. The Health, Education, Labor, and Pensions Committee will resume its sitting.

Again, I want to thank all of you for your patience and for your willingness to be here.

Our fourth panel, Margaret Seminario, director of Occupational Safety and Health for the AFL–CIO, has worked extensively on a wide range of regulatory and legislative initiatives at the Federal and State level, serves on numerous Federal agency and scientific advisory committees, participated in international safety and health work through the ILO, the OECD, and international trade union organizations.

Holly Shaw is an instructional technology teacher at E.M. Stanton School, in Philadelphia, where she has taught for 20 years. In September 2002, Holly's husband, Scott Shaw, lost his life while working for Armco Construction on a dredging project in the Schuylkill River, in Philadelphia. Since the incident, Holly has been active helping others who have been affected by a workplace fatality. She is the founder and chairperson of the Tristate—Family Support Group, which provides support to families suffering from the loss of a family member to a work-related injury. She's also active with United Support and Memorial for Workplace Fatalities, where she travels and advocates on behalf of families who have lost their loved one to a workplace fatality.

Michael T. Brandt—Dr. Brandt is a certified industrial hygienist and the president-elect of the American Industrial Hygiene Association, with more than 30 years of professional experience in risk management and business operations management, serving in

highly technical and challenging leadership roles in the chemical industry, research and development, manufacturing in the nuclear and high-hazard sector. He currently serves as operations technical chief of staff at Los Alamos National Laboratory.

And Ms. Kelli Heflin, regulatory safety manager at Scott's Liquid Gold, a VPP STAR site. Kelli is very active in Region 8, assisting OSHA at their information sessions and serving as an SGE. I'm sorry, what is an SGE?

Ms. HEFLIN. SGE is a Special Government Employee. I have been trained, in a special class——

The CHAIRMAN. Oh.

Ms. HEFLIN [continuing]. To assist OSHA on their VPP audits.

The CHAIRMAN. There you go. Thank you.

She's also very active in the VPP Participants Association, serving as Region 8 chairperson, as secretary on the National Board of Directors. Started her safety career at Rocky Flats Environment Technology Site, working in a research development group that helped employees develop proactive decontamination techniques prior to entering radioactive areas—or prior to leaving radioactive areas. Either one, I suppose, right? Kelli has a master's degree in environment policy management, and a doctorate in safety management.

Welcome, to all of you. As said before, your statements will be made a part of the record in their entirety. I would appreciate it if you could each sum up, in about 5 minutes. That would be great.

Ms. Seminario, please proceed.

STATEMENT OF PEG SEMINARIO, DIRECTOR OF SAFETY AND HEALTH, AFL–CIO, BETHESDA, MD

Ms. SEMINARIO. Thank you very much, Senator Harkin. I appreciate the opportunity to testify today on making the safety and health of workers a higher priority and improving protections on the job.

Tomorrow, April 28, is Workers Memorial Day, a day unions and others, here and around the globe, remember those who have been killed, injured, and diseased on the job.

Nearly four decades after the job safety and health law was passed, we find that the promise of safe jobs for American workers is far from being fulfilled. And, without question, while we've made great progress, there are too many workers being killed, injured, and diseased on the job. We are reminded of the terrible toll, by the recent tragedies in West Virginia, the Tesoro Refinery in Washington State, and last week's disaster off the Louisiana coast.

In 2008, there were 5,214 workers killed on the job. That's an average of 14 workers every day. The vast majority of these deaths could be prevented if protective safety and health measures were followed. The fact is that, for too many employers, the safety of workers is secondary, taking a backseat to production. For some employers, there is a total and blatant disregard for workers, and worker safety and other worker protections are totally ignored.

My testimony today will focus on the adequacies of protections under the Occupational Safety and Health law. That's the law that governs the safety and health for the majority of America's workers.

The OSH Act was enacted in 1970. It was one of the first safety and health laws that was enacted. It was right after the Coal Mine Safety law, in 1969, and part of a whole class of safety and environmental laws. Virtually all the other safety and health laws in this country—and environmental laws—have been updated and strengthened since. OSHA has not. Except for very, very small changes, the act today is exactly as it was enacted—signed into law in 1970. The simple fact is that it's out of date, and it is too weak to provide for incentives for compliance, to deter violations, and to protect workers from unnecessary injury and death.

Unlike under the Mine Safety and Health Act, there are no regular inspections under the Occupational Safety and Health Act, in that the oversight of workplaces is exceedingly rare. Today, the AFL–CIO released our annual Death on the Job Report. It's a report that looks at the state of safety and health in the United States. What we find is that today there are approximately 2,200 Federal and State OSHA inspectors. With this level of resources, the Federal Government has the capacity to inspect workplaces under ITS jurisdiction about once every 137 years.

I think one thing that's important to note is that OSHA's capacity is less today than it was in 1980. They had 450 more inspectors in 1980 than they do 20 years later, even though the workforce is 40 percent bigger. We aren't paying the kind of priority, and giving safety and health the kind of emphasis, it needs.

As we heard earlier, from Dr. David Michaels, the penalties under the Occupational Safety and Health Act are low, exceedingly low, particularly for a serious violation. We find that not even the maximum penalties are hardly ever assessed. The average serious penalty for an OSHA violation last year under Federal OSHA was $965.

The penalties are appallingly weak, even in cases where workers are killed. We did an analysis of OSHA fatality inspections, and we found that, last year in the United States, the median penalty—the typical penalty in a worker death was $5,000. That's it, $5,000 when a worker was killed and that these penalties vary widely from State to State. In Utah, it was only $1,250. In your State, Senator Harkin, the median penalty when a worker was killed was $3,000. So, these penalties for deaths often are in very serious situations, from trench cave-ins to lockout of hazardous equipment. They are from very serious, well-recognized hazards.

If the civil penalties are weak, the criminal penalties are even weaker under the OSH Act. The maximum criminal penalty for worker death, for a willful violation, is 6 months in jail. Very few of these are prosecuted. Since OSHA was enacted, only 79 cases have been prosecuted under the act, with defendants serving a total of 89 months in jail. During this time, there were 360,000 workplace fatalities. By comparison, under EPA and environmental laws, there were 387 criminal enforcement cases initiated, 250 defendants charged, resulting in 76 years of jail time in just 1 year. In just 1 year. The comparison here—there is a total weakness in the laws that are designed to protect our workers.

It is clear—40 years after the enactment of the Occupational Safety and Health law—that it is time to move forward and to strengthen the protections that we provide workers in this country.

We must not only mourn the loss of those who have died, but to take action to prevent these tragedies from occurring.

I would urge and advocate that the committee strengthen the Occupational Safety and Health Act, and start moving on this by taking up the Protecting America's Workers Act, legislation introduced by Senator Edward Kennedy before his death. This legislation would address many of the core deficiencies in the current OSHA law by extending coverage to workers who aren't covered, strengthening civil and criminal penalties, and providing workers stronger rights and antidiscrimination protections.

So, I would just conclude and encourage the committee to look carefully at the deficiencies in this law, consider the testimony of those who are joining me today, and then move forward and strengthen the Occupational Safety and Health Act to give workers in this country the protection they deserve.

Thank you.

[The prepared statement of Ms. Seminario follows:]

PREPARED STATEMENT OF PEG SEMINARIO

Senator Harkin, Ranking Member Enzi, and other members of the committee, my name is Peg Seminario. I am Safety and Health Director for the AFL–CIO. I appreciate the opportunity to testify today on making the safety and health of workers a higher priority and improving protections on the job.

Tomorrow, April 28, is Workers Memorial Day—a day unions and others here and around the globe remember those who have been killed, injured and diseased on the job. Here in the United States, it also marks the 39th anniversary of when the Occupational Safety and Health Act went into effect.

Nearly four decades after the job safety law was passed we find that the promise of safe jobs for American workers is far from being fulfilled. Without question, progress has been made in improving protections and in reducing job fatalities, injuries and illnesses. Too many workers remain at serious risk of injury, illness or death. In the past few weeks and months there have been a series of workplace tragedies that have saddened and outraged us all—the coal mine disaster at the Massey Energy Upper Big Branch mine in West Virginia that killed 29 miners, an explosion a few days earlier at the Tesoro Refinery in Washington State that killed seven workers, and the explosion at the Kleen Energy Plant in Connecticut in February that also claimed the lives of six workers. Last week there was a catastrophic explosion that destroyed the Transocean oil rig off the Louisiana coast. Seventeen workers are known to have been injured in the blast, and eleven workers are still missing, with little hope of finding them alive.

In 2008, 5,214 workers were killed on the job—an average of 14 workers every day—and an estimated 50,000 died from occupational diseases. More than 4.6 million work-related injuries were reported, this number understates the problem due to limitations in the data collection and underreporting. The true toll of job injuries is two to three times greater—about 9 to 14 million job injuries each year.

The vast majority of workplace deaths and injuries could be prevented if protective safety and health measures were followed. The fact is that for too many employers, the safety of workers is secondary, taking a back seat to production. For some employers, there is a total and blatant disregard for workers. Worker safety requirements and other worker protections are totally ignored.

Today's hearing is examining the safety practices and protections at mines and other dangerous workplaces. As you have heard from other witnesses, clearly there were serious problems at the Massey mine and in the Mine Safety and Health Administration's (MSHA) oversight and enforcement that need to be examined and addressed. Action should be taken to improve mine safety regulations, enforcement and legislation, just as was done in 2006 following the series of disasters at Sago and other mines.

My testimony today will focus on the adequacy of protections under the Occupational Safety and Health Act, the law that governs safety and health for the majority of America's workers. This job safety and health law is out of date and too weak to provide incentives for compliance, to deter violations or to protect workers from retaliation.

The Congress should act to strengthen the OSH Act to hold employers responsible for protecting workers and accountable when they fail to do so, to provide government the necessary authority and enforcement power to get hazards corrected and deter future violations, and to give workers and unions stronger rights and protections to have a voice in safety and health on the job.

EMPLOYERS HAVE A LEGAL RESPONSIBILITY TO PROTECT WORKERS—BUT ENFORCEMENT AND PENALTIES ARE TOO WEAK TO CREATE AN INCENTIVE TO IMPROVE CONDITIONS AND DETER VIOLATIONS

The Occupational Safety and Health Act places the responsibility on employers to protect workers from hazards and to comply with the law. The law relies largely on the good faith of employers to address hazards and improve conditions. For this system to work, it must be backed up with strong and meaningful enforcement. At present, the Occupational Safety and Health Act and the OSHA enforcement program provide limited deterrence to employers who put workers in danger. OSHA inspections and oversight of workplaces are exceedingly rare. There are no mandatory inspections even for the most dangerous industries or workplaces. In fiscal year 2009, there were approximately 2,200 Federal and State OSHA inspectors combined. OSHA has the capacity and resources to inspect workplaces on average once every 94 years—once every 137 years in the Federal OSHA States.

Over the years OSHA's oversight capacity was diminished, as the number of inspectors declined at the same time the workforce increased. The fiscal year 2010 appropriations provided for an increase in OSHA's enforcement staff and an increase in funding for OSHA State plans, and returned Federal enforcement staffing levels back to their fiscal year 2001 levels. Even with this recent increase, the number of Federal OSHA enforcement staff today is 450 fewer than it was in fiscal year 1980, while the size of the workforce is 40 percent larger than it was at that time.

Since there is no regular oversight, strong enforcement when workplaces are inspected and violations are found is even more important. The penalties provided in the OSH Act are weak. Serious violations of the law (those that pose a substantial probability of death or serious physical harm to workers) are subject to a maximum penalty of $7,000. Willful and repeated violations carry a maximum penalty of $70,000 and willful violations a minimum of $5,000. These penalties were last adjusted by the Congress in 1990 (the only time they have been raised). Unlike all other Federal enforcement agencies (except the IRS), the OSH Act is exempt from the Federal Civil Penalties Inflation Adjustment Act, so there have not even been increases in OSHA penalties for inflation, which has reduced the real dollar value of OSHA penalties by about 40 percent. For OSHA penalties to have the same value as they did in 1990, they would have to be increased to $11,600 for a serious violation and to $116,000 for a willful violation of the law.

The maximum civil penalties provided for under the OSH Act are rarely assessed. Indeed, just the opposite is the case. In fiscal year 2009, the average penalty for a serious violation of the law was $965 for Federal OSHA and $781 for the State OSHA plans combined. Again this is the average penalty for violations that pose a substantial probability of death or serious physical harm. California had the highest average penalty for serious violations and South Carolina had the lowest. Both of these are State-Plan States. California amended its OSHA law in 2000 to increase penalties, with the maximum penalty for a serious violation in that State set at $25,000 compared to $7,000 maximum penalty under Federal OSHA and the other State plans.

For violations that are "other" than serious, which also carry a statutory maximum under the OSH Act of $7,000, the average Federal OSHA penalty was just $234. Clearly, for most employers these levels of penalties are not sufficient to change employer behavior, improve workplace conditions or deter future violations.

OSHA penalties for violations that are willful or repeated also fall well below the maximum statutory penalties. For both willful and repeat violations, the OSH Act provides a maximum penalty of $70,000 per violation. For violations that are willful, a $5,000 mandatory minimum penalty is also prescribed. In fiscal year 2009, the average Federal OSHA penalty for a willful violation was $34,271, and the average willful penalty for State plans was $20,270. For repeat violations, the average Federal OSHA penalty was only $3,871 and for State plans the average was $1,757, a fraction of the statutory maximum penalty for such violations.

Even in cases of worker fatalities, OSHA enforcement is appallingly weak. In fiscal year 2009, the average total penalty in a fatality case was just $7,668 for Federal and State OSHA plans combined, according to OSHA inspection data. The median penalty—which reflects the mid-point of the penalties assessed in fatality cases—is even lower, currently $5,000 for both Federal OSHA and the State OSHA

plans. These data, both averages and median penalties, include enforcement cases that still are under contest, and it is likely that after settlements and final resolution these penalty levels will be much lower.

A state-by-state analysis of fatality investigations shows penalties in cases involving worker deaths vary widely from State to State. In fiscal year 2009, Utah had the lowest median penalty for fatality investigations, with a paltry $1,250 in penalties assessed, followed by Washington ($1,600) and Kentucky ($2,000). Minnesota had the highest median penalty ($26,200), followed by New Hampshire ($17,000) and Colorado ($12,000).

What kinds of cases are resulting in such low penalties when workers are killed? Many are for deaths from well-recognized hazards—trench cave-ins, failure to lock-out dangerous equipment, and lack of machine guarding. They include:

• A January 2009 trench cave-in in Freyburg, OH. The victim Andrew Keller was 22 years old. The company, Tumbusch Construction, was cited for three serious violations and penalized $6,300. The penalties were reduced to $4,500. Six months later, in June 2009, OSHA found similar violations at another jobsite of Tumbusch Construction. This time the company was cited for both serious and willful violations with a total of $53,800 in penalties proposed. The company has contested the violations.

• A July 2009 fatality case in Batesville, TX, one worker was killed and two workers injured when natural gas was ignited during oxygen/acetylene cutting on a natural gas pipeline. The employer, L&J Roustabout, Inc., was cited for 3 serious violations with $3,000 in penalties. The case was settled for $1,500.

• A fatality in August 2009, in Lamar, SC. Andrea Taylor, 28, an employee of Affordable Electric was killed on the job. South Carolina OSHA cited the company for five serious violations of electrical and lock-out standards with a proposed penalty of $6,600. In an October 2009 settlement, three of the violations were dropped and the penalties reduced to $1,400.

In August 2009, at SMC, Inc. in Odessa, TX, a worker was caught in the shaft of milling machine and killed. The company was cited for one serious violation. The $2,500 proposed penalty was reduced at settlement to $2,000.

What kind of message does it send to employers, workers and family members, that the death of a worker caused by a serious or even repeated violation of the law warrants only a penalty of a few thousand dollars? It tells them that there is little value placed on the lives of workers in this country and that there are no serious consequences for violating the law.

THE OSH ACT AND OSHA ENFORCEMENT POLICIES DISCOUNT PENALTIES FOR VIOLATIONS EVEN IN CASES OF WORKER DEATH

Why are OSHA penalties for workplace fatalities and job safety violations so low? The problems are largely systemic and start with the OSH Act itself. The act sets low maximum penalty levels, particularly for serious violations, which carry a maximum of $7,000, clearly not a deterrent for many companies. For example, in 2008, a Walmart store employee in Valley Stream, NY was trampled to death, when the company failed to provide for crowd control at a post-Thanksgiving sale. The company was cited for one serious violation and penalized $7,000, the maximum amount for a serious violation.

For a willful or repeat violation the maximum penalty is $70,000. In assessing penalties, under the act, employer size, good faith, history, and gravity of the violation are to be taken into consideration.

Throughout its history, OSHA procedures for considering these four factors have resulted in proposed penalties that are substantially below the maximum penalties. The agency starts with a gravity-based penalty, which is then adjusted by specified percentages for each of the other three factors (except in certain circumstances). For high gravity serious violations, the current OSHA penalty policy starts with a base of $5,000, not $7,000 to determine the penalty. This is true even for fatality cases, which under OSHA policy are supposed to be classified as high-gravity. In fatality cases, no reductions are allowed for good faith, but penalty reductions are still allowed for employer size and history. These reductions vary by the size of employer, with smaller employers eligible for much larger reductions. In many cases there is an automatic 30 to 90 percent discount in penalties, regardless of the gravity of the violations that are found.

OSHA's general policy is to group multiple instances of the same violation into one citation, with one penalty. For example, if five workers are injured due to an employer's failure to provide guarding for machines, the employer will only be cited once for the violation, even though five workers were hurt. This policy further minimizes the level of overall penalties in enforcement cases, including fatalities.

The initial citations and penalties in OSHA enforcement cases, weak to begin with, are reduced even further in the resolution of cases. Due to limited staff and resources, OSHA area directors and Department of Labor solicitors are under tremendous pressure to settle cases and avoid time consuming and costly litigation. Moreover, under the OSH Act there is no requirement for employers to abate violations while a challenge to a citation or penalty is pending. Thus to secure abatement of the hazards, OSHA has a great incentive to settle cases. The result of these settlements is generally a large reduction in proposed penalties—often 30–50 percent.

Last Friday OSHA announced two major enforcement initiatives: the Severe Violators Enforcement Program (SVEP) and a revamping of the formulas for assessing penalties for violations. The SVEP program calls for enhanced follow-up and enforcement for the most persistent and egregious violators who have a history of willful, repeated or failure to abate violations, particularly related to fatalities, major occupational safety and health hazards or underreporting of injuries or illnesses. The new penalty policy which will become effective over the next several months will result in an increase in the average penalty for serious violations from the current average of $1,000 to an average of $3,000 or $4,000, according to OSHA.

These enhancements in OSHA's enforcement program are welcome. But they still do not change the fact that there are significant limitations in the OSH Act itself—including a maximum penalty of $7,000 for a serious violation and no authority to require abatement of serious hazards while a contest of a citation is pending—that can only be addressed by changes in the law.

OSHA CRIMINAL PENALTIES ARE WEAK AND DO NOT HOLD EMPLOYERS ACCOUNTABLE

If the civil penalties under the Occupational Safety and Health Act provide little deterrence or incentive for employers, the criminal penalties are even weaker. Under the Occupational Safety and Health Act, criminal penalties are limited to those cases where a willful violation of an OSHA standard results in the death of a worker, and to cases of false statements or misrepresentations. The maximum period of incarceration upon conviction is 6 months in jail, making these crimes a misdemeanor.

The criminal penalty provisions of the OSH Act have never been updated since the law was enacted in 1970 and are weaker than virtually all the other Federal safety and environmental laws, which have been strengthened over the years to provide for much tougher criminal penalties. The Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act all provide for criminal prosecution for knowing violations of the law, and for knowing endangerment that places a person in imminent danger of death or serious bodily harm, with penalties of up to 15 years in jail. Again, there is no prerequisite for a death or serious injury to occur.

Since 1977 the Mine Safety and Health Act has provided for criminal penalties for willful violations of safety and health standards and knowing violations for failure to comply with orders or final decisions issued under the law. Unlike the OSH Act, these criminal penalties are not limited to cases involving a worker's death. But like the OSH Act for the first offense, the penalty is only a misdemeanor with up to 1 year in jail.

The weak criminal penalties under the OSH Act result in relatively few prosecutions. With limited resources, Federal prosecutors are not willing or able to devote significant time or energy to these cases. According to information provided by the Department of Labor, since the passage of the act in 1970, only 79 cases have been prosecuted under the act, with defendants serving a total of 89 months in jail. During this time, there were more than 360,000 workplace fatalities according to National Safety Council and BLS data, about 20 percent of which were investigated by Federal OSHA. In fiscal year 2009, according to information provided by OSHA, there were 11 cases referred by DOL for possible criminal prosecution. The Department of Justice (DOJ) has declined to prosecute 2 of these cases; the other 9 are still under review by DOJ.

The bottom line is that there is no real accountability for employers or corporate officials who knowingly violate the law and put workers in danger

By comparison, according to EPA in fiscal year 2009 there were 387 criminal enforcement cases initiated under Federal environmental laws and 200 defendants charged resulting in 76 years of jail time and $96 million in penalties—more cases, fines and jail time in 1 year than during OSHA's entire history. The aggressive use of criminal penalties for enforcement of environmental laws and the real potential for jail time for corporate officials, serve as a powerful deterrent to environmental violators.

In recent years the Justice Department launched a new Worker Endangerment Initiative that focuses on companies that put workers in danger while violating environmental laws. The Justice Department prosecutes these employers using the much tougher criminal provisions of environmental statutes. Under the initiative, the Justice Department has prosecuted employers such as McWane, Inc. a major manufacturer of cast iron pipe, responsible for the deaths of several workers; Motiva Enterprises, which negligently endangered workers in an explosion that killed one worker, injured eight others and caused major environmental releases of sulfuric acid; and British Petroleum for a 2005 explosion at a Texas refinery that killed 15 workers.

These prosecutions have led to major criminal penalties for violations of environmental laws, but at the same time underscore the weaknesses in the enforcement provisions of the Occupational Safety and Health Act.

In the Motiva case, the company pleaded guilty to endangering its workers under the Clean Water Act and was ordered to pay a $10 million fine. The company also paid more than $12 million in civil penalties for environmental violations. In contrast, in 2002 following the explosion, OSHA initially cited the company for three serious and two willful violations with proposed penalties of $161,000. As a result of a formal settlement, the original serious and willful citations were dropped and replaced with "unclassified" citations carrying $175,000 in penalties, greatly undermining any possibility of criminal enforcement under the OSH Act.

In the BP Texas City refinery disaster, where 15 workers were killed and another 170 injured in 2005, under a plea agreement, the company pleaded guilty to a felony violation of the Clean Air Act and agreed to pay $50 million in penalties and serve a 3-year probation. BP also agreed to pay $100 million in criminal penalties for manipulating the propane market. BP paid no criminal penalties under the OSH Act, even though 15 workers died and OSHA issued hundreds of civil citations for willful, egregious violations of the law. Under the OSH Act, even if BP had paid criminal penalties, it would have been a misdemeanor, not a felony. Instead, BP paid $21 million in civil penalties in a settlement reached with OSHA. These civil penalties issued by OSHA were not sufficient to change BP's practices. In October 2009, OSHA found that BP had failed to abate the hazardous conditions that caused the 2005 explosion. OSHA issued 270 notices of failure to abate previous hazards, cited the company for 439 new willful violations and proposed $87.4 million in fines—the largest in OSHA's history. Under the OSH Act, OSHA has no authority to take criminal action against BP for these latest violations.

WORKER AND UNION RIGHTS UNDER THE OSH ACT ARE LIMITED AND PROTECTIONS AGAINST EMPLOYER RETALIATION ARE WEAK

Workers and unions play an important role in improving conditions in the Nation's workplaces. Workers have first-hand knowledge of conditions that create hazards and the changes that are needed to address them. The importance of worker and union participation in worksite safety and health programs and activities is widely recognized and recommended. The rights workers have under the OSH Act to be involved are very limited. At present there is no Federal OSHA mandatory safety and health program standard that requires that workers and their representatives be involved in efforts to identify and correct workplace hazards, although a number of State OSHA plans have standards that provide for worker and union participation. Many unions have secured these rights through their collective bargaining agreements.

In the OSHA enforcement process, workers and unions have the right to file a complaint, receive an inspection, and to participate in the OSHA inspection by exercising the right to walk around or talk privately to inspectors. Once the inspection is completed, workers' and unions' rights are quite limited. They can contest the abatement date, but not the proposed penalties or classification of violations, and only have very limited rights to object to settlements that are reached between OSHA and employers. The result often is weak enforcement actions and settlements by OSHA.

Many workers simply are in no position to exercise any safety and health rights, fearing employer retaliation if they raise safety and health concerns or even report injuries. While the OSH Act includes provisions under section 11(c) that prohibit employers from discriminating against workers for exercising their rights, the measures are so weak that in practice they provide little protection.

Section 11(c) requires that all discrimination complaints be filed within 30 days which gives little time for action. Cases can only be prosecuted by the Secretary of Labor, and must be brought in Federal court. There are no provisions for preliminary reinstatement while employer challenges are pending.

The anti-discrimination provisions of the OSH Act were adopted in 1970. Since that time more than two dozen other laws that provide anti-discrimination or whistleblower protections have been enacted, all of which provide stronger protections and more effective enforcement mechanisms. Many of these (16 laws) are enforced by OSHA under agreements with other agencies.

These include the Surface Transportation Assistance Act, the Federal Railroad Safety Act, the Toxic Substances Control Act and the Sarbannes-Oxley Act all of which provide for administrative process for an individual to seek review of the Secretary's decision, including the right of a complainant to seek review in the case where the Secretary finds no violation. A number of these statutes provide individuals the right to pursue the case on their own if the Secretary fails to act. Some of these statutes provide for preliminary re-instatement of the individual based on the initial investigation, so a worker is not adversely affected while the case and possible employer challenges are being resolved.

The OSHA whistleblower program is a small program with a small staff. In fiscal year 2009, the program had 73 staff members responsible for investigating complaints in the field. (For fiscal year 2011, the President's Budget requests an additional 25 investigators). As noted above, in addition to administering section 11(c) of OSH Act, the office investigates discrimination complaints under 16 other statutes, under agreements with other agencies. As the GAO noted in a 2009 report on the whistleblower program, even though the number of statutes the office is responsible for enforcing has grown, the number of staff has remained the same, making it more difficult for the office to meet its responsibilities.

According to data provided by OSHA, in fiscal year 2009, Federal OSHA received 1,280 section 11(c) discrimination complaints, and completed action on 1,173 cases. Only 15 of these cases were recommended for litigation and another 246 settled. Of these cases, 834 were dismissed by the agency, of which 104 were appealed by complainants to the OSHA National Office. Of these 10 were remanded back to the regions for re-hearing.

Of the cases that are found meritorious by investigators, few are actually litigated by the Solicitor of Labor (SOL). In fiscal year 2009, four of the cases recommended went to court. Since fiscal year 1996, out of the 467 cases referred by OSHA to SOL, only 32 lawsuits in 11(c) cases were filed.

The outcomes of the cases brought under the other statutes, (901 cases in fiscal year 2009), is similar. However, under most of these other statutes, unlike under section 11(c), the individual has the right to pursue the case on their own or to seek independent review of the Secretary's decision in an administrative process or in court. Under the current provisions of the OSH Act, an individual complainant has no rights independent of the Secretary, and cannot pursue the case independently or seek review outside the agency.

Workers who raise safety and health concerns or report injuries should be protected against employer retaliation. The best protection comes by having a collective bargaining agreement and union representation. For those who are not represented, protection under the Occupational Safety and Health Act is critical. The Congress should strengthen the OSH Act to provide workers the same kind of rights and protection against discrimination that have been provided under the Surface Transportation Assistance Act, the Mine Safety and Health Act and other laws.

CONGRESS SHOULD ACT TO STRENGTHEN THE JOB SAFETY LAWS

The recent disasters at the Massey Upper Big Branch coal mine, Tesoro refinery, Kleen Energy plant and Transocean oil rig have highlighted the serious dangers too many workers face on the job and the importance of strong safety and health protections. While each of these tragedies is still under investigation, we know that in these four cases there were catastrophic failures and as a result 42 men and women are dead, and another 11 men have likely perished. We also know that these kinds of tragedies are not isolated or new, as evidenced by the Imperial Sugar Refinery fire in 2008 that killed 14 workers, the 2005 BP Texas City Refinery blast that killed 15, the dozens of miners killed in 2006 and 2007 at the Sago mine, the Crandall Canyon mine and other mines, and the daily toll of 14 workers who lose their lives on the job each day.

As a nation we must not only mourn their loss, but take action to prevent these tragedies from continuing to occur.

This Occupational Safety and Health Act is out of date and too weak to provide meaningful incentives for employers to address job hazards or to deter violations. The levels of penalties for serious violations, even in cases of worker deaths are little more than a slap on the wrist, and there is no accountability for employers who put workers in grave danger.

The Congress must act.

This committee should start by taking up the Protecting America's Workers Act (PAWA—S. 1580) legislation to strengthen the Occupational Safety and Health Act. The bill was introduced by Senator Harry Reid on behalf of the late Senator Edward Kennedy last August with the co-sponsorship of many on this committee.

PAWA would address many of the core deficiencies in the current OSH Act. It would extend coverage to public sector and other workers who lack protection. It would increase civil and criminal penalties to provide more meaningful penalties for those who violate the law and provide a greater deterrent to prevent future violations that put workers in danger. It would strengthen 11(c) anti-retaliation protections and expand workers', unions' and victims' rights in the enforcement process.

Specifically, on enforcement, the bill changes the law to require that employers abate serious hazards even if they contest citations, similar to the requirement in the Mine Safety and Health Act. Currently under the OSH Act, there is no requirement to correct violations until a contest is resolved, which can sometimes take years. The legislation would update the base penalties amounts in the OSH Act to adjust for inflationary increases since 1990 when the penalties were last raised. The bill would increase the penalties for serious violations to $12,000 from $7,000 and those for repeat and willful violations to $120,000 from $70,000, and provide for inflationary adjustments in the future.

To ensure that penalties for violations that result in worker deaths are more than a slap on the wrist, the bill sets higher penalties for such violations. For serious violations that result in a worker death a maximum penalty of $50,000 and a minimum penalty of $20,000 is provided, with a minimum of $10,000 for smaller employers. For willful and repeat violations related to worker deaths, a maximum penalty of $250,000 and minimum of $50,000 is provided, with a minimum of $25,000 for small employers.

PAWA also properly strengthens the criminal provisions of the Occupational Safety and Health Act, which have not been modified since the act's passage in 1970. The bill would make criminal violations a felony, instead of a misdemeanor as is now the case, making it more worthwhile for prosecutors to pursue these violations. PAWA also expands the criminal provisions to cases where violations cause serious injury to workers. It expands the criminal provisions to apply to all responsible corporate officers, not just the top officer or corporation itself. These enhanced criminal provisions will provide a greater incentive for management officials to exercise management responsibility over job safety and health, and give OSHA and the Department of Justice the tools needed to prosecute corporations and officials who cause the injury or death of workers.

The legislation would strengthen the OSH Act's whistleblower provisions to protect workers from retaliation for raising job safety and health concerns, exercising their rights or reporting injuries, by bringing the law into conformity with other whistleblower laws. It extends the time period for filing complaints, provides an administrative process for review, and gives the complainant the right to proceed with a case if the Secretary fails to act and to seek an administrative review of the Secretary's decision. The legislation also codifies the right of a worker to refuse to perform work that poses a serious danger and provides for reinstatement of a worker who has been terminated, while legal challenges are pending.

The legislation also expands the rights of workers, unions and victims to be involved in the enforcement process. It gives workers and unions the right to contest proposed penalties and the characterization of violations, not just the period for abatement, and the right to seek review of settlements reached by employers and the government. Victims of workplace injuries and the family members and representatives of workers killed or incapacitated are given the right to receive copies of citations and documents, to meet with the Secretary or representative of the Secretary, to be informed of contests and settlements and to have the opportunity to make a statement before the parties before any settlement is finalized.

This committee and the Congress cannot bring back the 29 miners who died in West Virginia, the seven workers who died in the Tesoro Refinery explosion in Washington, the six workers killed at the Kleen Energy plant in Connecticut, and the thousands of others who lost their lives on the job in just the last year. The committee and the Congress have the responsibility and the duty to do everything in their power to prevent similar tragedies and unnecessary deaths from occurring in the future.

It has been four decades since the Congress enacted the Occupational Safety and Health Act. It's time for the Congress and the Nation to make the protection of America's workers a high priority. It's time for the Congress to renew the commitment to safe jobs for American workers and to strengthen the job safety and health law by passing the Protecting America's Workers Act.

Federal OSHA and State OSHA Plan Inspection/Enforcement Activity, Fiscal Year 2009

Inspections	Federal OSHA	State Plan OSHA
Inspections	39,057	61,310
Safety	33,256	48,221
Health	5,801	13,089
Complaints	6,675	8,612
Programmed	24,336	39,676
Construction	23,952	26,245
Maritime	338	47
Manufacturing	7,312	9,998
Other	7,455	25,020
Employees Covered by Inspections	1,332,583	3,011,179
Average Case Hours/Inspection		
Safety	18.5	16.1
Health	34.8	27.0
Violations—Total	87,491	129,289
Willful	395	171
Repeat	2,750	2,046
Serious	67,439	55,090
Unclassified	10	14
Other	16,697	71,456
FTA	200	512
Penalties—Total ($)	94,981,842	59,778,046
Willful	13,537,230	3,466,130
Repeat	10,644,022	3,594,205
Serious	65,072,944	43,018,854
Unclassified	128,000	131,500
Other	3,907,648	7,390,658
FTA	1,691,998	2,176,699
Average Penalty/Violation ($)	1,086	462
Willful	34,271	20,270
Repeat	3,871	1,757
Serious	965	781
Unclassified	12,800	9,393
Other	234	103
FTA	8,460	4,251
Percent Inspections with Citations Contested	17.1 percent	13.1 percent

Source: OSHA IMIS Inspection Reports, Fiscal Year 2009

State By State OSHA Fatality Investigations and Penalties, Fiscal Year 2009

State	No. of OSHA Fatality Investigations Conducted, Fiscal Year 2009 [1]	Total Penalties [1] ($)	Average Total Penalty Per Investigation ($)	Median Initial Penalty [2] ($)	Median Current Penalty [2] ($)	State or Federal Program [3]
Alabama	20	298,010	14,901	12,250	6,900	Federal
Alaska	5	21,900	4,380	4,200	2,975	State
Arizona	17	164,995	9,706	16,500	10,500	State
Arkansas	15	166,675	11,112	5,500	5,500	Federal
California	160	1,640,385	10,253	11,655	9,260	State
Colorado	11	278,400	25,309	15,000	12,000	Federal
Connecticut	8	42,475	5,309	10,000	6,300	Federal
Delaware	3	42,040	14,013	4,000	2,520	Federal
Florida	81	643,166	7,940	7,500	6,400	Federal
Georgia	43	376,205	8,749	11,300	7,000	Federal
Hawaii	6	28,625	4,771	2,938	2,938	State
Idaho	5	54,350	10,870	7,500	7,500	Federal
Illinois	52	129,315	2,487	4,625	4,500	Federal
Indiana	42	172,913	4,117	6,000	5,250	State
Iowa	21	246,900	11,757	5,175	3,000	State
Kansas	12	178,550	14,879	7,400	7,000	Federal
Kentucky	31	125,275	4,041	3,250	2,000	State
Louisiana	48	99,215	2,067	3,625	2,750	Federal

State By State OSHA Fatality Investigations and Penalties, Fiscal Year 2009—Continued

State	No. of OSHA Fatality Investigations Conducted, Fiscal Year 2009 [1]	Total Penalties [1] ($)	Average Total Penalty Per Investigation ($)	Median Initial Penalty [2] ($)	Median Current Penalty [2] ($)	State or Federal Program [3]
Maine	6	14,160	2,360	3,750	2,500	Federal
Maryland	20	90,676	4,534	6,763	4,073	State
Massachusetts	23	148,200	6,444	11,750	7,000	Federal
Michigan	28	142,090	5,075	6,300	5,400	State
Minnesota	14	260,600	18,614	26,600	26,200	State
Mississippi	14	106,360	7,597	10,150	6,780	Federal
Missouri	20	117,125	5,856	8,838	5,250	Federal
Montana	5	13,000	2,600	2,500	2,500	Federal
Nebraska	16	312,737	19,546	12,550	7,875	Federal
Nevada	11	93,100	8,464	9,100	5,950	State
New Hampshire	3	3,500	1,167	17,000	17,000	Federal
New Jersey	39	201,567	5,168	3,000	3,000	Federal
New Mexico	6	23,200	3,867	7,800	7,800	State
New York	53	625,632	11,804	5,400	4,800	Federal
North Carolina	54	171,245	3,171	4,650	4,063	State
North Dakota	4	27,962	6,991	5,825	5,063	Federal
Ohio	39	134,895	3,459	7,000	5,175	Federal
Oklahoma	25	281,150	11,246	10,000	6,000	Federal
Oregon	25	79,250	3,170	5,000	5,000	State
Pennsylvania	43	262,315	6,100	5,850	4,888	Federal
Rhode Island	4	7,900	1,975	11,025	10,075	Federal
South Carolina	17	13,745	809	3,000	2,375	State
South Dakota	3	7,605	2,535	4,200	2,730	Federal
Tennessee	42	195,920	4,665	5,400	5,400	State
Texas	167	1,562,851	9,358	6,000	5,000	Federal
Utah	14	21,600	1,543	2,750	1,250	State
Vermont	2	5,250	2,625	5,250	5,250	State
Virginia	36	678,652	18,851	14,000	10,000	State
Washington	32	77,625	2,426	1,600	1,600	State
West Virginia	10	242,880	24,288	5,400	4,450	Federal
Wisconsin	23	110,045	4,785	5,550	3,820	Federal
Wyoming	8	33,156	4,145	4,625	4,250	State
National Median State-Plan States				6,338	5,000	
National Median Federal States				6,750	5,000	
Total or National Average [4]	1,450	11,118,267	7,668			

[1] OSHA IMIS Fatality Inspection Reports, Fiscal Year 2009. Report was issued on January 7, 2010.
[2] Median initial and median current penalties on Fiscal Year 2009 fatality investigations provided by OSHA on April 14, 2010.
[3] Under the OSH Act, States may operate their own OSHA programs. Connecticut, Illinois, New Jersey and New York have State programs covering State and local employees only. Twenty-one States and one territory have State OSHA programs covering both public- and private-sector workers.
[4] National average is per fatality investigation for all Federal OSHA and State OSHA plan States combined. Federal OSHA average is $8,152 per fatality investigation; State plan OSHA States average is $7,032 per fatality investigation.

The CHAIRMAN. Thank you very much, Ms. Seminario.

Ms. Shaw, welcome to the committee. Please proceed.

STATEMENT OF HOLLY SHAW, PHILADELPHIA, PA

Ms. SHAW. Thank you, Chairman Harkin and Ranking Member Enzi. Thank you for inviting me and allowing me the honor of speaking to you.

I am here because I lost my husband to a workplace accident. He was killed on the job. He was too young, and it should not have happened.

Scott Shaw celebrated his 38th birthday on July 13, 2002. Scott and I celebrated our ninth wedding anniversary on August 14, 2002. Our son, Nicholas, celebrated his third birthday on September 12, 2002. His daddy wasn't there. His daddy died 5 days before, on September 7, when he fell into the Schuylkill River.

Scott fell off the barges he was working on, helping to dredge the river. There were only two other employees on both the barges at the time. A coworker of Scott's told me that Scott was walking from one barge to another to get oil. He was missed after several minutes, and his hat was discovered floating in the water. Scott's body was found, 2 days later.

Scott wasn't wearing a life jacket that day. He wasn't required by his company to wear one. No one from the company checked to make sure their workers had life jackets. There was no life preservers on the barge. When Scott walked from one barge to another, he navigated old tires that were attached between the barges. They were uneven and not sturdy. The barges themselves were not the same height, so the tires were fastened at an acute angle. This is how the employees traveled between the barges. No one saw Scott go into the water. I like to think he hit his head and didn't know what happened. He was 6 foot 3, he was handsome, he was strong, and he was an excellent swimmer.

This was not the first time Scott had fallen off of the barge. I can remember two times that Scott came home, soaking wet, complaining he'd fallen in. The company should have known then there was a problem.

Scott's death was needless. The company Scott was working for, Armco Construction of Philadelphia, neglected to follow safety regulations. OSHA completed an investigation into Scott's death, and found the company had committed four serious violations, and they were fined $4,950.

The first violation was committed when the employees weren't checked and confirmed that they were wearing life jackets. For this, his company was fined $2,100.

The second violation was found because the company did not have life preservers on the barge. Armco Construction, Scott's company, was fined $750 for this violation.

The third violation was for the way the barges were hooked together. Again, this was termed a "serious violation." Again, the fine was only $1,050.

The last violation, another serious one, was because of the toxic fumes that the employees were breathing when they put the crane away. Armco was fined $1,050 for this.

OSHA terms these fines "citations." I call it a travesty.

Weeks Marine, the company that Armco leased the barges from, was not investigated. They claimed they did not know how the barges would be attached. They claimed they were not responsible for the barges after they were leased.

The U.S. District Court for the Eastern District of Pennsylvania found, in a ruling made on March 31, 2006, that Weeks Marine did know that the barges did not have a means of ingress and egress. Yet, when leased to companies, their barges were not equipped with a gangway or a ladder.

Weeks Marine resurfaced in controversy again in 2009. They subcontracted barges to Kosnac Tugs. Staten Island workers from Local 333, United Marine Division, protested by striking against Kosnac Tugs. One of the issues that was being protested was the unsafe practice of attaching barges. Again, Weeks Marine denied responsibility. The barges were attached haphazardly. Barges were

tied together. Again, the only way to go from one barge to another was either jumping from barge to barge or navigating across makeshift, unsturdy platforms. A deckhand was crushed to death between two barges. Another family suffers because of the same negligence.

I am here today to personalize the fact that a worker's life is worth more than the fines that OSHA places on these companies that are at fault. Scott and I have two sons, who are now 13 and 10 years old. Ryan, my 13-year-old, doesn't remember a lot about his dad. He saw a therapist, weekly, for a couple of years because of grief issues. He's entering high school next year, and was accepted to a magnet high school, a great honor. His dad isn't here to celebrate with me. Nicholas only remembers when his dad would tickle him and read to him. Ryan and I tell him stories about his father, so he knows his dad loved him very much.

My sons are without a father. I am without a husband. We will never sit together and watch our sons graduate from high school and then college. I will never feel my husband's arms around me again. I will never again be able to hear his voice.

According to the fines OSHA levied on Scott's company, Scott's life was worth $4,950. The company owner was not prosecuted. If he had been charged criminally, he would have been convicted of a misdemeanor. That's it. Not a felony. He could walk away and live his life.

My husband didn't walk away. Scott left behind a wife, three sons—two sons from our marriage, and one from a previous marriage—two sisters, one brother, a mother, and many family members and friends who loved him tremendously.

We are here today to talk about the process of fining companies, especially repeat violators, by OSHA. I am still, after almost 8 years, appalled at the paltry fines that were levied against Armco, Scott's company. They should have had to pay as dearly as I did for their ongoing neglect of workers' safety. They should be criminally prosecuted, if possible.

Not only did they knowingly put their workers in danger, but they let their company insurance lapse, so there was no insurance on Scott when he was killed. This was a conscious action on the part of the company.

The company that Armco leased the barges from, Weeks Marine, claimed that they did not know how the barges would be fastened together, and that they were not responsible. No action was taken against them.

As I said earlier, the Staten Island shipyard workers went on strike last year. Not because of low wages. Not because of health insurance. They went on strike because Kosnac Tugs and Weeks Marine were knowingly exposing their workers to unsafe practices, including how they fastened barges together.

I believe it's imperative that a message is sent that a worker's life is worth more than a couple of dollars. Companies that do not practice safety precautions should be fined highly, so it sends a message. A worker's life is invaluable, and companies that disregard worker safety should be sent to prison. They must be punished.

I also mentioned, that Armco was fined $4,950 for four serious violations. One day, 2 years after Scott's death, searching for information on the OSHA site, I discovered that Armco was given the opportunity to plead down the fines. They only had to pay $4,000 for Scott's death. I was never notified that they were granted this privilege. I was never notified about the informal hearing that occurred. I was never given the opportunity to talk to OSHA before this plea deal was made with the company. I was never asked if I knew anything that would help the initial OSHA investigation.

I am pleased that OSHA announced on April 22, 2010, a new system of fining companies. The fines are being raised, and criminal charges can be filed against repeat offenders. There are too many repeat offenders.

My situation with Armco Construction and Weeks Marine is not unique. Jeffrey Davis was 50 years old when he was killed in an explosion at the Motiva Enterprise LLC Refinery in Delaware City, DE. There was a history of leaks in the tanks of sulfuric acid. These leaks were never addressed, and were one of the catalysts to the horrendous explosion in 2001. Jeffrey's body was never found, but his boots were. Eight other workers were injured.

Also, the recent disaster at the Upper Big Branch mine in West Virginia, run by Massey Energy, has brought the subject of dodging violations, deliberately hiding unsafe workplaces, and putting greed before the lives of the workers to the forefront of current news, to the attention of the public. Massey has a proven history of unsafe workplaces, yet has not been held accountable. Twenty-nine hard-working men lost their lives because of this greed. Twenty-nine men's families suffer needlessly because of this greed. I am in a place to know that the suffering, the grief does not go away. Neither does the anger.

The CHAIRMAN. Could you skip to your last paragraph?

Ms. SHAW. Yes. Sure. Not a problem.

As an elementary schoolteacher and as a parent, I know that it is important that a child understand there are consequences to their actions, and they must accept responsibility for what they have done. Adults must face their responsibility, must be held accountable for their actions.

Please don't let another family suffer as we have. The more that companies are actually punished, the more they will realize they must practice workplace safety and must protect their workers.

Thank you for your time.

[The prepared statement of Ms. Shaw follows:]

PREPARED STATEMENT OF HOLLY SHAW

SUMMARY

My husband, Scott Shaw, was killed while working for Armco Construction. He fell off of a barge into the Schuylkill River on September 7, 2002. He left behind a family who loved him dearly.

- He fell off one of the barges he was working on, helping to dredge the river.
- Scott was walking from one barge to another to get oil. He was missed after several minutes, and his hat was discovered floating in the water. His body was found 2 days later.

Armco Construction did not guarantee their workers' safety.

• Armco Construction of Philadelphia, neglected to follow safety regulations. OSHA completed an investigation into Scott's death, and found the company had committed 4 serious violations, and they were fined $4,950.

- 1st Violation: employees weren't checked and confirmed that they were wearing life jackets. Fine: $2,100.
- 2d Violation: company did not have life preservers on the barge. Fine: $750.
- 3d Violation: the way the barges were hooked together. Fine: $1,050.
- 4th Violation: toxic fumes that the employees were breathing when they put the crane away. Fine: $1,050.

Weeks Marine, the company that Armco leased the barges from, was not investigated.

- Their claims:
  - they did not know how the barges would be attached;
  - were not responsible for the barges after they were leased; and
  - the U.S. District Court for the Eastern District of PA found, March 31, 2006, that Weeks did know and did not provide means of navigating between barges (ladder/gangway).
- Repeat offender:
  - Leased barges to Kosnac Tugs.
  - Also were fastened together in an unsafe manner.

A worker's life is worth more than the fines that OSHA places on these companies that are at fault.

Process of fining companies, especially repeat violators, by OSHA:

• A message is sent that a worker's life is worth more than a couple of dollars. Companies that do not practice safety precautions should be fined highly.

• A worker's life is invaluable, and companies that disregard workers safety should be sent to prison.

There are too many repeat offenders.

My situation with Armco Construction and Weeks Marine is not unique.

How valuable family members can be to OSHA's investigation process:

- The Protecting America's Workers Act is a powerful tool:
  - to allow families to have a say in investigations;
  - to fight for safe workplaces; and
  - to enforce stiffer penalties against offending companies, and especially the repeat violators.

Every family should know that their loved one is protected at work.

Adults must face their responsibility, and must be held accountable for their actions.

The more that companies are actually punished, the more they realize they must practice workplace safety, and must protect their workers.

Chairman Harkin, Ranking Member Enzi, and distinguished members of the committee, thank you for inviting me and allowing me the honor of speaking to you. I am here because I lost my husband to a workplace accident. He was killed on the job. He was too young, and it should not have happened.

Scott Shaw celebrated his 38th birthday on July 13, 2002. Scott and I celebrated our 9th wedding anniversary on August 14, 2002. Our son, Nicholas, celebrated his 3d birthday on September 12, 2002. His Daddy wasn't there. His Daddy died 5 days before on September 7, when he fell into the Schuylkill River. Scott fell off the barges he was working on, helping to dredge the river. There were only two other employees on both the barges at the time. A co-worker of Scott's told me that Scott was walking from one barge to another to get oil. He was missed after several minutes, and his hat was discovered floating in the water. Scott's body was found 2 days later.

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We are here today to talk about the process of fining companies, especially repeat violators, by OSHA. I am still, after almost 8 years, appalled at the paltry fines that were levied against Armco, Scott's company. They should have had to pay as dearly as I did for their on-going neglect of workers' safety. They should be criminally prosecuted, if possible. Not only did they knowingly put their workers in danger, but they let their company insurance lapse, so there was no insurance on Scott when he was killed. This was a conscious action on the part of the company. The company that Armco leased the barges from, Weeks Marine, claimed that they did not know how the barges would be fastened together, and that they were not responsible. No action was taken against them. As I said earlier, the Staten Island shipyard workers went on strike last year. Not because of low wages. Not because of health insurance. They went on strike because Kosnac Tugs and Weeks Marine were knowingly exposing their workers to unsafe practices, including how they fastened barges together. I believe it is imperative that a message is sent that a worker's life is worth more than a couple of dollars. Companies that do not practice safety precautions should be fined highly, so it sends a message. A worker's life is invaluable, and companies that disregard workers safety should be sent to prison. They must be punished.

I also mentioned before that Armco was fined $4,950 for four serious violations. One day, 2 years after Scott's death, I was searching for information on the OSHA site. I discovered that Armco was given the opportunity to plead down their fines. They only had to pay $4,000 for Scott's death. I was never notified that they were granted this privilege. I was never notified about the informal hearing that occurred. I was never given the opportunity to talk to OSHA before this plea deal was made with the company. I was never asked if I knew anything that would help the initial OSHA investigation.

I am pleased that OSHA announced on April 22, 2010, a new system of fining companies. The fines are being raised, and criminal charges can be filed against repeat offenders. There are too many repeat offenders. My situation with Armco Construction and Weeks Marine is not unique. Jeffrey Davis was 50 years old when he was killed in an explosion at the Motiva Enterprise LLC Refinery in Delaware City, DE. There was a history of leaks in the tanks of sulfuric acid. These leaks were never addressed, and were one of the catalysts to the horrendous explosion on July 17, 2001. Jeffrey's body was never found. His boots were. Eight other workers were injured. The recent disaster at the Upper Big Branch mine in West Virginia, run by Massey Energy, has brought the subject of dodging violations, deliberately hiding unsafe workplaces, and putting greed before the lives of workers to the forefront of current news, and to the attention of the public. Massey has proven history of unsafe workplaces, yet has not been held accountable. Twenty-six hard working men lost their lives because of this greed. Twenty-six men's families suffer needlessly because of this greed. I am in a place to know that the suffering, the grief does not go away. Neither does the anger. That's why I speak up. That's why I represent all of those families who have suffered a loss.

I am here today to not only discuss how fines to companies for deliberate neglect of worker safety should be raised, I also am here as a family member, representing other families who have lost a loved one. I am here to represent the miners and their families in West Virginia. I am here to represent the refinery workers from Washington State and their families. I am here to represent the workers and their families who were killed today, yesterday, and in the past week. I am here to illustrate how valuable family members can be to OSHA's investigation process. I am pleading with you to remember those workers we have lost not as a statistic, but as a person. Look at the faces of those we have lost. Please let family members be involved in the process, so we may help you. Please send a clear message to companies that safety is important. Lives are important. Cut into the company's profits and send that message.

The Protecting America's Workers Act is a powerful tool to allow families to have a say in investigations, to fight for safe workplaces, and to let citizens know that a life is more important than greed by enforcing stiffer penalties against offending companies, and especially the repeat violators. I ask that you consider the importance of the Protecting America's Worker's Act. This issue is not important only on Worker's Memorial Day every April 28, but every day that someone goes to work. Workers should have the right to come home safe to their families. Every family should know that their loved one is protected at work. No family should suffer like those I represent have.

As an elementary school teacher and as a parent, I know that it is important that a child understand there are consequences to their actions, and they must accept responsibility for what they have done. Adults must face their responsibility, and must be held accountable for their actions. Please, don't let another family suffer as we have. The more that companies are actually punished, the more they realize they must practice workplace safety, and must protect their workers.

Thank you for your time.

The CHAIRMAN. Thank you, Ms. Shaw.

Dr. Brandt, welcome. And please proceed.

STATEMENT OF MICHAEL BRANDT, MS, MPH, DrPH, CIH BOARD PRESIDENT (2010–2011), AMERICAN INDUSTRIAL HYGIENE ASSOCIATION, LOS ALAMOS, NM

Dr. BRANDT. Thank you. Chairman Harkin and Senator Enzi, I'm honored and pleased to be here to testify in support of worker health and safety, and to prevent needless worker injuries, illnesses, and deaths.

I'm here representing the American Industrial Hygiene Association and our membership of more than 10,000 health and safety professionals.

AIHA believes we can improve worker health and safety in five ways. First, holding employers who willfully disregard the law accountable by increasing penalties and enforcement. Second, requiring injury and illness prevention programs in every workplace. Third, continuing to fund compliance assistance programs, such as the VPP, and consultation services to assist small- and medium-sized businesses. Fourth, showing the value of health and safety to employers and employees. And fifth, improving training and skill-development opportunities for OSHA and MSHA inspectors.

I'll briefly expand on these comments.

Workers expect to return home, healthy and safe. This requires employees, employers, and health and safety professionals to identify and eliminate occupational risks. To do so, it is essential that we have enforceable regulatory oversight.

Second, while most employers are doing the right thing, there are still many who feel it is not worth the cost. For these employers, the minimal penalties for health and safety violations is just considered the cost of doing business. And as we've heard today, this must stop.

AIHA supports increasing the penalties for egregious and willful violations. It is inconceivable that a willful violation of an OSHA rule resulting in a fatality is a misdemeanor with minimal penalties. Employers know that if they violate an EPA rule, the penalty can be severe, while violating an OSHA rule is simply a "slap on the wrist."

Third, AIHA supports that section of the Protecting American Workers Act, which increases civil and criminal penalties for employers who violate OSHA rules and regulations, as well as increasing penalties for willful violations. We also support language to make officers and directors legally responsible under the act.

Fourth, criminalizing willful violations through changes in regulations must be carefully considered and applied, however. The standard of evidence will need to be higher than it is today. As a result, some OSHA and MSHA inspectors may need increased training and skill development. AIHA supports efforts to ensure compliance officers achieve professional certification as a certified industrial hygienist or a certified safety professional.

Fifth, most of America's employers are concerned about their workers and realize that health and safety precautions are good for the bottom line. An AIHA study demonstrated how workplace risk-reduction programs positively impacts the bottom line. We need to share these results with employers and employees.

Sixth, penalties and enforcement alone are not sufficient to achieve improved worker health and safety. AIHA supports an approach in which stronger penalties and enforcement are balanced by providing more compliance assistance and greater funding for consultation services to employers. One of the most successful is the Voluntary Protection Program. AIHA supports continuation of this program, and hopes this Senate Committee feels the same way and ensures adequate funding to support VPP.

OSHA is also taking steps to change its agency. One effort being considered is to require an injury and illness prevention program in every workplace. Assistant Secretary Michaels recently said that what is needed is a requirement that every employer establish a comprehensive worker health and safety program that features management leadership, worker participation, and structure that fosters continuous improvement.

OSHA is also addressing the problem of outdated permissible exposure limits by creating an agency task force to compile options on how best to deal with the issue of the PELs, most of which are more than 40 years old and are scientifically obsolete.

In conclusion, and with respect to funding, Congress can play an important role. OSHA and EPA were both created in 1970, yet the annual budget for OSHA is just over $550 million, while the EPA budget is over $10 billion. EPA's budget is 18 times greater than that of OSHA.

AIHA members, and, I suspect, the family members here, do not understand this budget discrepancy. Society has such stringent penalties and enforcement for environmental matters, yet penalties that directly impact workers are not given the same importance. Shouldn't we care at least as much about people?

On behalf of the AIHA, I thank you for this opportunity to participate and present our views. AIHA offers our assistance to Congress and OSHA and MSHA in any way.

I'll be happy to answer any questions that you might have.

Thank you.

[The prepared statement of Dr. Brandt follows:]

PREPARED STATEMENT OF MICHAEL T. BRANDT, MS, MPH, DRPH, CIH

Chairman Harkin and members of the committee, employees and employers across the United States, as well as the professionals who work on the front line of worker health and safety, thank you for holding this hearing.

My name is Michael Brandt and I serve as the President-elect of the American Industrial Hygiene Association (AIHA). Today, I am here solely as a private citizen representing the AIHA and our membership of more than 10,000 health and safety professionals. I hold a doctorate in public health with a specialty in Environmental Health Sciences. I also hold master's degrees in industrial hygiene and public health policy, am a certified industrial hygienist, and, finally, have been involved in the occupational health and safety profession for more than 32 years. I am currently employed at the Los Alamos National Laboratory in Los Alamos, NM.

It is a privilege for me to represent the AIHA and our membership who work each day to protect worker health and safety. I appreciate the opportunity to appear at this hearing to discuss how we can work together to transform our workplaces into ones in which employees and employers work together to ensure worker health and safety, and by doing so create a competitive business advantage for American businesses. It goes without saying it is truly unfortunate we meet under circumstances where 29 workers recently lost their lives in the Upper Big Branch coal mine and just this past week 11 workers were lost in the Deepwater Horizon oil rig explosion in the Gulf of Mexico. Such tragedies again show us the fragility of life and why worker health and safety requires our full attention and resources.

AIHA is the premier association serving the needs of professionals involved in occupational and environmental health and safety. We represent members practicing industrial hygiene in industry, government, labor, academic institutions, and independent organizations. AIHA and our members are committed to protecting and improving worker health and safety, and the health, safety and well-being of everyone in our communities. One of AIHA's primary goals is to bring "sound science" and the benefit of our collective professional experience as practicing industrial hygienists to the public policy process directed at improving regulatory protections for worker health and safety.

AIHA shares the concerns of many that we must apply the lessons learned from the foundational sciences of public health, including epidemiology, industrial hygiene, toxicology, engineering, and environmental health to further develop the technology, resources, and education needed to develop effective and affordable solutions to address health and safety risks. More recently, these resources in universities, government agencies, including OSHA and the National Institute for Occupational Safety and Health (NIOSH) and professional organizations have suffered from underfunding in the United States, eroding the competitive advantage they provide to American enterprises.

I will focus on a few important workplace health and safety changes we believe can make a material difference in both the lives of workers and their employers.

1. Workers and their families expect to return home from work safe and healthy. Workers should not become ill, suffer injuries, or die on the job. Providing a healthy and safe workplace requires that employees, employers, and health and safety professionals collaborate to identify and eliminate occupational risks. In addition, it is essential that we have enforceable regulatory oversight that rewards successful efforts to protect worker health and safety, and is free from tactics intended to challenge and cast doubt over the validity of regulatory findings and delay investing in hazard control measures.

2. Most of America's employers understand the critical importance of health and safety and are concerned about the health and safety of their workers. These employers implement health and safety management systems and hazard identification and control programs to ensure that their workers go home safe and healthy each and every day. They have recognized that healthy and safe workers are good for their business and represent a competitive advantage for U.S. business.

In America today employers no longer need to choose between protecting the health and safety of workers and making money. High performing organizations realize that investing in health and safety protections are good for the bottom line and good for workers. AIHA has clearly demonstrated this competitive advantage through a value study conducted for our members. Conducted on the shop floors across the United States, this "Value of the Profession Study" clearly demonstrates how occupational health programs and workplace risk positively impacts the bottom line, not only in healthier and safer employees, but in a positive return on an organization's investment in health and safety.

This important study was conducted in collaboration with NIOSH and we believe OSHA, MSHA and NIOSH should collaborate further with AIHA to develop additional case studies across industry, business, and commercial sectors and share the case studies results, success stories, and the value methodology with employers. In this way, together we can continue to share cost-effective solutions to common sets of occupational risks and hazards with employers, employees, and the regulatory community.

3. While most employers are "doing the right thing" with investment in healthy and safe workplaces, there are still too many who avoid this investment in their workers because they feel the investment is not worth the cost. It is these employers who must be educated about the benefits of providing a safe and healthy workplace, and if education does not affect their decisionmaking behavior, they must be held accountable for making decisions that injure, kill, or sicken workers.

For many, the minimal penalties for health and safety violations is a small price to pay and does not affect their decisionmaking. It's just a small cost of doing business. This must change!

AIHA supports increasing the penalties for egregious and willful violations. It is inconceivable that a willful violation of an OSHA rule or regulation resulting in a fatality is considered a misdemeanor resulting in minimal penalties. Rep. George Miller in a U.S. House Committee hearing earlier this month commented that:

> "These penalties for failing to protect workers pale in comparison to the penalties for failing to protect animals or the environment generally. Even maliciously harassing a wild burro under the Federal Wild Horses and Burros Act can bring twice as much prison time as killing a worker after willfully violating the law."

It has long been known to employers that if they are to violate an EPA rule the penalty can be financially and operationally severe while violating an OSHA rule is simply a "slap on the wrist."

AIHA supports that section of the Protecting America's Workers Act (S. 1580) that considerably increases both civil and criminal penalties for those employers who violate OSHA rules and regulations. Similar increased penalties are needed at MSHA. AIHA also supports increasing penalties for egregious and willful violations. Consistent and substantial penalties are one of society's primary means to deliver some

measure of justice and improve conditions that affect public health and worker health and safety.

Criminalizing willful violations through changes in the regulations must be carefully considered and applied. The standard of evidence for willful violations will have to be higher than it is today and OSHA and MSHA inspectors will need increased training and skill development to meet the level of evidence required.

AIHA supports OSHA's efforts to ensure compliance officers achieve professional certification as CIHs and CSPs. A similar effort is needed of MSHA inspectors. Establishing criminal violations needs to be based on the weight of evidence collected and evaluated by health and safety professionals using a variety of information sources, both quantitative and qualitative. It is essential that the regulatory process provide for carefully considering the complex conditions affecting risks in the workplace and the determination of risk at a given point in time.

AIHA supports language that would also make officers and directors legally responsible when it is clearly demonstrated that they had, or should have had, direct knowledge and authority for the violation and did not act to mitigate the risk associated with a known violation. Occupational health and safety professionals should not become the "scapegoat" if their recommendations are not followed. In this era of sustainability and social responsibility, the hallmark of an effective occupational health and safety regulatory program needs to be guided by transparency and accountability.

4. Strong penalties and enforcement alone are not sufficient to achieve improved worker health and safety. AIHA supports an approach in which stronger penalties and enforcement are balanced by providing more compliance assistance and supporting efforts to develop occupational health and safety professionals.

Employers need guidance and support to identify hazards and control measures, and to understand regulatory requirements and how to comply with rules and regulations in ways that are practical and in harmony with the employer's daily business practices. There are numerous successful ways in which employers receive the support and assistance they need.

One of the most successful is the Voluntary Protection Program (VPP). VPP sites add value to worker health and safety protection through a systematic approach of management and employee involvement in creating a sustainable healthy and safe workplace. This program has grown considerably since its inception and AIHA supports continuation of the program. OSHA has indicated its continued support of the program, albeit appropriating fewer resources to the program in the future. A 2009 Government Accountability Office report stated that improved oversight and controls would better ensure program quality. AIHA hopes OSHA and the Voluntary Protection Program Participants Association (VPPPA) work together to see that the program remains a viable and successful means to better worker health and safety. AIHA hopes this Senate Committee feels the same way and ensures adequate funding to support the VPP.

Another incentive is to provide greater funding for consultation services for small- and medium-size businesses, which are historically underserved workplaces in terms of health and safety protection and health and safety compliance. These companies and businesses too often do not have access to health and safety professionals or have the financial resources, skills, or technical expertise to implement many of the OSHA required programs and regulations to protect its workforce. AIHA is aware of the limited resources of the Federal Government and suggests OSHA consider additional ways to recognize and use an existing pool of qualified and competent professionals such as industrial hygienists and safety professionals to provide employers the needed guidance and technical expertise.

5. And finally, the agency itself must make some changes in how it does business. OSHA must address the problems with the rulemaking process and the difficulty in updating standards. The agency recognizes these problems and has recently taken the first step to address them.

One of these efforts is implementation of an Injury and Illness Prevention Program in every workplace. AIHA could not have said it better than Assistant Secretary of Labor for OSHA Dr. David Michaels when he recently stated that what is needed is:

> "a requirement that every employer establish a comprehensive workplace safety and health program that features management leadership, worker participation, and structure that fosters continual improvement."

OSHA has also taken the first step in addressing the long-standing problem of outdated permissible exposure limits (PELs) by creating an agency task force to compile options on how best to address the issue of the PELs, most of which are 40 or more years old. These outdated standards place us behind the rest of the

world in health and safety protections for workers, put our workers at risk, and erode the competitive advantage of American businesses.

AIHA offers our support for both of these efforts.

CONCLUSION

In conclusion, AIHA believes we can improve worker health and safety by:

- Showing the value (including financial and other benefits) of health and safety to employers and employees.
- Holding employers who willfully disregard the law accountable by increasing penalties and enforcement on those who fail to protect workers. Active enforcement would ensure that all organizations are complying with the OSHA regulations. This would level the playing field for all businesses, particularly the compliant.
- Continuing and funding compliance assistance programs such as VPP and providing adequate resources to assist small- and medium-size businesses.
- Requiring injury and illness prevention programs in every workplace.

AIHA members and many others believe that working together we can eliminate injuries and fatalities in the workplace. Organizations that make financial investments in health and safety anticipate a positive return on that investment by keeping workers healthy and safe and improving operational performance. There is a cost for investing in health and safety, and in compliance. Organizations that don't invest in OSHA compliance have an unfair financial advantage. It is better for employers and employees if OSHA sets good and reasonable standards, enforces them uniformly, and the consequences for non-compliance are financially and legally meaningful.

As for resources, this is where Congress can play an important role. OSHA and EPA were both created in 1970, yet it is inconceivable that the annual budget for OSHA is just over $550 million while the EPA budget is over $10 billion. Occupational health and safety professionals do not understand this budget discrepancy. Society has such stringent penalties and enforcement for environmental matters, yet the penalties that directly impact workers are not given the same importance. Shouldn't we care at least as much about people?

AIHA members put the health and safety of people first and that is why AIHA supports stronger penalties and enforcement as well as good and reasonable standards. America's workers deserve it.

On behalf of AIHA, thank you for this opportunity to participate and present our views. AIHA offers our assistance to Congress and OSHA in any way possible.

I would be happy to answer any questions the committee may have.

The CHAIRMAN. Thank you very much, Dr. Brandt.

Now we turn to Kelli Heflin.

Welcome, and please proceed.

STATEMENT OF KELLI HEFLIN, COORDINATOR OF REGULATORY COMPLIANCE AND SAFETY MANAGER, SCOTT'S LIQUID GOLD, DENVER, CO

Ms. HEFLIN. Chairman Harkin, Ranking Member Enzi, thank you so much for the opportunity to speak to you today.

I'm here today to talk about the OSHA Voluntary Protection Program, what it means to my company, and to ask you to reject the plan laid out in the Administration's fiscal year 2011 budget proposal.

VPP sites go above and beyond what OSHA requires. In addition to a rigorous audit, each VPP company must submit, annually, a self-evaluation that analyzes the elements of the program, an evaluation of meeting those elements, and what improvements they can make to strengthen that program at their site.

Participation in the VPP has been invaluable to me, in my role as safety manager at Scott's Liquid Gold. It has given me access to education based on real-world experience, networks of experts, and other resources. It has also given me the ability to engage my workforce in a safety program that they have ownership of.

Scott's Liquid Gold started in a garage, almost 60 years ago, as a family business. Currently, we have about 65 employees at our facility. Our products are manufactured totally in the United States. We make a conscious effort to purchase raw materials also in the United States. If you look at our major competitor's label it states, "Distributed by (blank)." That means it is not manufactured here in this country. We manufacture several household chemical products, and a line of skin care called Alpha Hydrox.

The past year has been challenging for us, as a small company, as it has for everyone. There was one thing that remained consistent, and that was our safety program. Prior to implementing VPP elements at our worksite, our injury rate was 13 reportables. After implementing the elements and being in the program for several years, we reduced our injury rate to zero in 2008.

The VPP has a proven track record. Companies that participate in the VPP have about 52 percent less injuries and illnesses than their BLS counterparts. There are significant direct-cost savings with reduced insurance rates and reduced workers compensation claims. However, the most important change that I have noticed is our employees' involvement in their own safety.

One of the primary elements in VPP is employee involvement. Our employees have taken ownership of the program and made a commitment to safety, both at work and at home.

As a small business, we face a number of disadvantages in this global economy. As a safety and health management system, VPP produces a culture change. Workers who are healthy and injury-free are at work, they're not absent. Less time is spent replacing them with temporary workers, and less training time is spent getting those workers up to speed.

VPP is very important in other ways, as well. At Scott's Liquid Gold, our employees take a massive amount of pride in telling others that they achieved VPP status.

I could go on and on about the benefits of VPP and the great people who participate in the program, but I'm also here as a citizen and an American worker. I pay my taxes, vote in all the elections, and I mailed census on time.

[Laughter.]

I'm not here as someone with a political agenda. I don't owe anybody any favors. And I don't make promises to special interest groups or organizations, at the expense of very valuable programs, such as VPP.

I am here to object to the current proposal to cut direct funding to the VPP, or to seek alternative funding for the program. It is imperative that appropriations language be included in the fiscal year 2011 proposal.

The VPP is helping OSHA with their mission of keeping American workers safe. We have extended help in other ways to alleviate the strain on OSHA resources. The cooperative programs budget for fiscal year 2010 was increased. The agency has reduced the number of VPP onsite audits and recertification audits completed. While my company has done more with less, the agency has done less with more.

The proposed budget for fiscal year 2011 directs funding to enforcement and leaves VPP out in the cold, even though it's a proven

program for reducing injuries and illness in the workplace. The alternative funding being proposed is a fee-based system, and I can tell you, Scott's Liquid Gold vehemently opposes this system. The fee-based system not only adds another layer of cost to our already-strained company budget, it reduces the integrity of the program.

The VPP was intended to be a three-way partnership between OSHA, management, and labor. With the Department of Labor's request to eliminate direct funding for VPP, the agency effectively took away that leg of the partnership, violating their own intention under the OSH Act of assisting employers and employees in eliminating hazards at the workplace. The agency is not only doing a disservice to companies that have committed incredible resources—time, money, employees—to keeping American workers safe, but it is doing a disservice to their mission of ensuring the health and safety of all the Nation's workers.

The proposed fee-based funding will exclude small businesses, such as Scott's Liquid Gold, from participating in the VPP. In return, OSHA will lose my company's commitment to helping to educate and train other worksites that may not have the kind of safety program that VPP requires.

Two of the goals of the agency are to ensure safe and healthy workplaces for the Nation's workers, and to give workers a voice in the workplace. Enforcement does not give a voice to the workers. The elements of VPP specifically give that voice to the employees by requiring their participation. OSHA has a huge toolbox, with a variety of tools. By committing most of the cooperative program's budget to enforcement, they have effectively gotten rid of most of their tools except for a metaphorical hammer.

One of the first things that you learn is that you need to use the right tool for the job at hand. By only having a hammer, they are excluding tools for educating companies who have less than stellar safety programs. Hammers are reactive, not proactive. In seeking alternative funding for VPP, the agency is keeping that tool, but they're locking it up and making it available only to the companies that pay for it. This seems to directly conflict with Section 2(b)(1) of the OSH Act.

VPP is not just one tool. It provides many tools for OSHA. It provides manpower, through special government employees; it provides education, through outreach and mentoring; it provides the thoughts and expertise of over 900,000 American workers from over 2,300 worksites, giving a voice to workers about their safety, which is one of the stated goals of the agency. Why would they rely on enforcement actions only?

Realistically, most sites will never see an OSHA compliance officer, and will continue to put employees at risk with unabated hazards. Enforcement actions are usually after the fact and in response to loss of life or imminently hazardous situations. Wouldn't the agency rather save lives than respond to the aftermath of a catastrophic event?

OSHA needs a complete toolbox. And VPP is part of that. Please reject the fiscal year 2011 budget until it includes funding for this very important program.

Thank you very much.

[The prepared statement of Ms. Heflin follows:]

PREPARED STATEMENT OF KELLI HEFLIN

Good afternoon, Chairman Harkin, Ranking Member Enzi and members of the HELP committee and thank you for the opportunity to speak on behalf of Scott's Liquid Gold-Inc., a small manufacturing company located in Denver, CO. My name is Kelli Heflin and I am the Regulatory Compliance and Safety Manager at Scott's Liquid Gold-Inc. I am here today to talk about the Voluntary Protection Program, what it means to my company and to ask you to reject the plan laid out in the Administration's fiscal year 2011 budget proposal.

The Voluntary Protection Program (VPP) was formally announced by OSHA in 1982 and the first site, San Onofrio, CA was approved. The legislative underpinning for VPP is Section (2)(b)(1) of the OSH Act of 1970, which declares Congress's intent,

> "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions."

VPP sets performance-based criteria (4 elements and 133 sub-elements) for a managed safety and health system, invites sites to apply, then assesses these sites against these criteria. OSHA's verification includes an application review and a rigorous onsite evaluation by a team of OSHA safety and health experts. This team usually includes Special Government Employees (SGEs) who are people like myself, who are familiar with the VPP model and have attended training to assist on these audits. VPP company employees who become SGEs do so on a voluntary basis.

Once the audit is complete, the team recommends the site for one of three programs (this recommendation is approved by the National OSHA office at the Department of Labor).

- Star—this site meets all criteria and injury and illness rates are below the BLS industry average.
- Merit—this site meets the criteria, but some of the elements may need improvement and injury rates may be a bit high, but the trend is toward reduction. A site may remain in Merit status for up to 3 years, at which time, they will have a Merit to Star audit. There are Merit goals established by the team to move the site to Star status.
- Star Demonstration—this is for companies who may be a mobile workforce, such as a construction or steel erection project.

VPP sites go above and beyond what OSHA requires. In addition to the rigorous audit, each VPP company must submit annually a self-evaluation that analyzes the elements of the program, what they are doing to meet those elements, how they are doing at meeting the elements and what improvement they can make to strengthen the program at their site. This is far greater scrutiny and attention than non-VPP worksites, which may do little or nothing proactively and, given the number of OSHA compliance officers and the number of worksites, are not likely to see an OSHA inspection for decades unless they have a catastrophic accident.

The companies that participate in the VPP routinely connect with other sites through mentoring and outreach activities at conferences and provide resources to OSHA through the SGE program. OSHA does not reimburse companies for the time and travel of the SGEs—VPP companies absorb all the costs and expenses for their SGEs to participate in VPP onsite audits. Participation by SGEs can be as an "expert" (i.e., Industrial Hygienist) or a generalist (familiar with the VPP model or a unique standard, such as PSM). They are full team members and audit records, programs, interview employees and make recommendations on compliance issues or improvement items. In my experience as an SGE, employees at sites undergoing a VPP audit seem to be more willing to speak to a "non" OSHA auditor. It isn't anything personal against OSHA, but it is a matter of talking with someone else who works for a company, rather than OSHA. SGEs can be managers, supervisors or labor. It truly provides a unique perspective on the audit and both the potential VPP company and SGEs can learn from the experience.

Most importantly, the VPP promotes a partnership between Labor, Management and OSHA.

Participation in VPP has been invaluable to me in my role as Scott's Liquid Gold Safety Manager. It has given me access to education (based on real world experience), networks of experts and resources that I would not have otherwise had the opportunity to access. It has also given me the ability to engage my workforce in a safety program that they have ownership of.

My introduction to safety was at the Rocky Flats Plant in Colorado. It was a scary place. Every Sunday I would drive by the protestors at the site as I drove back to the University of Colorado. Then I got a job there. One of the first things I learned was to rely on the experience of the people I worked with. They took this rookie under their collective wings and educated me to respect radiation and other hazards, not to fear them. The second thing I learned was that I am responsible for my safety and for my co-worker's safety and that I have the duty to report any hazard. Management is responsible for helping to correct the hazard and insuring that the hazard is permanently abated or that I have the proper training to recognize what I need to do to protect myself. I have carried those lessons for almost 20 years.

Scott's Liquid Gold-Inc. started in a garage about 60 years ago as a family business. Currently we have about 65 employees at our Denver facility. Our products are manufactured totally in the USA. We have 13 production employees at our site and it is the only manufacturing facility we have. We make a conscious effort to purchase U.S.-based raw materials. If you look at our major competitor's labels, it states "Distributed by:_____." That means the product is produced outside the USA. We manufacture several household chemical products, including our flagship product, a wood cleaner, an air freshener product and a line of skin care called Alpha Hydrox. The past year has been challenging for us as a small company, as it has for everyone. There was one thing that remained consistent, our safety program.

We entered the VPP in 2003 as a Merit site. Our injury rate was a bit high and we needed to improve our Process Safety Management program (PSM). We started working toward VPP in 2002, shortly after I arrived. Our injury rate was pretty high at that time. In 2001, we had 13 reportable injuries. These injuries ranged from lacerations and ergonomic problems to a broken arm. At the end of 2002, we had two reportables and two injuries that required first aid treatment only. In 2008, we had zero injuries. The VPP has a proven track record. Most companies that participate in the VPP have about 52 percent less injuries and illnesses than their BLS counterparts. There are significant direct cost savings with reduced insurance rates and reduced workers compensation claims. However, the most important change that I have noticed is our employees' involvement in their own safety. One of the primary elements in VPP is employee involvement. Our employees have taken ownership of the program and made a commitment to safety both at work and at home.

As a small business, we face a number of disadvantages in this global economy. We don't have access to a lot of resources, we don't have a large staff of in-house experts and we can't purchase a lot of new technology, but through the VPP, we have a huge network to turn to when we need help with a particular issue. There are about 2,300 sites in the VPP and almost 1 million people are employed by those sites. We also have a great relationship with the Region 8 OSHA people. I have appeared on several panels on their behalf, discussing VPP as a viable solution to unsafe worksites. Even if a company does not want to pursue the recognition, they can still implement the elements with help from a mentoring company and establish a good safety program.

I have a personal interest in safety and health excellence. My grandfather worked for a company, processing uranium ore. He was a member of the Oil, Chemical and Atomic Worker's Union. This was pre-OSH Act. He eventually died from a disease I believe was caused by his exposure to acids and radioactive ore.

My uncle was injured badly in an industrial accident and was out of work for over a year. Several years later, he was killed in a construction accident, leaving a wife and two teenagers behind. I am my grandfather and uncle's legacy. My work in safety may save another family from going through this grief. I believe enforcement has its place, but I also believe that being pro-active in safety will prevent accidents and fatalities from happening in the first place.

VPP not only provides resources to the almost 1 million employees that participate in the program, but it also provides OSHA with much-needed support to keep American workers safe. The SGE program is one of these resources. Mentoring and Outreach by the VPP companies are another way that they are relieved of the burden of educating companies that are not safe in how to establish a good health and safety program. Employees of VPP sites are ambassadors for the VPP. They participate through mentoring and teaching classes at various safety conferences throughout the country. Scott's Liquid Gold was named Mentor of the Year in our region in 2009. Our CEO believes very strongly in the mentoring program. When I visit another worksite, I usually take two employees with me who are well versed in the VPP elements and let them explain the program to the other site. On some occasions, I have found that employees are not willing to speak their minds when their management is in the room. I have asked their management to leave and we have a pretty honest dialogue about what VPP can do. The most common question is "We

already have a pretty safe site, what are they going to do for me?" My response is usually "How about give you control over your own destiny?"

VPP has additional benefits for participating companies. Companies have lower injury and illness rates, they have lower workers compensation costs and usually their insurance premiums are lower. The employees at these companies are healthier and more productive. It affects companies' bottom lines in a good way—not only are costs lower, workers who are healthy and injury-free are at work, not absent. Less time is spent replacing them with temporary workers and training time spent getting those workers up to speed. VPP is very important in other ways as well. At Scott's Liquid Gold, our employees take a massive amount of pride in telling others that they achieved VPP Star status. They take safety seriously and they understand all of the benefits under VPP. Our CEO is certainly a proponent of the program and allows whatever time is necessary for safety meetings, safety training, my time away from the facility and two stretching classes each day. We have almost 95 percent participation in manufacturing and anywhere from 25–40 percent in the administration building (depending on the day). The stretching classes have reduced our ergonomic complaints to almost zero. It's also an opportunity for me to check in with our employees about any concerns or suggestions they have.

I could go on and on about the benefits of VPP and the great people who participate in the program, but I am also here as a citizen and an American worker. I pay my taxes, I vote in all elections and I mailed my census on time. I am not here as someone with a political agenda, I don't owe anyone any favors and I don't make promises to special interest groups or organizations at the expense of a very valuable program such as VPP. I am here to object to the current Administration's proposal to cut direct funding to VPP or to seek "alternative" funding for this program. It is imperative that appropriations language be included in the fiscal year 2011 proposal. The VPP is helping OSHA with their mission of keeping American workers safe. We have extended help in other ways to alleviate the strain on OSHA resources. The Agency actually increased their cooperative programs budget for fiscal year 2010, but has reduced the number of VPP onsite audits and recertification audits completed. While my company has done more with less, the Agency has done less with more. The proposed budget for fiscal year 2011 directs funding to enforcement and leaves VPP out in the cold, even though it is a proven program for reducing injuries and illness in the workplace. The alternative funding being proposed is a fee-based system and I can tell you, Scott's Liquid Gold vehemently opposes this system. I can assure you that out of the other 2,300 companies, a majority have the same feeling. This fee-based system not only adds another layer of cost to our already strained company budget, it reduces the integrity of the program. I worked for a company who obtained an ISO certification and as far as I could tell, it meant nothing except that you had done the proper paperwork and documentation. I don't want to see that happen to the VPP. In addition, employees of VPP companies take a great amount of pride in a cooperative partnership with OSHA. My co-workers noticeably stand taller when talking to OSHA representatives and it is a source of my own pride to hear them talk to other worksites about working with OSHA and obtaining VPP Star. The VPP was intended to be a three-way partnership between OSHA, Management and Labor. With the Department of Labor's request to eliminate direct funding for VPP, the Agency effectively took away that leg of the partnership, violating their own intention under the OSH Act of assisting employers and employees in eliminating hazards at the workplace.

With no direct funding, VPP will not survive as the premiere recognition program for companies. The Administration is not only doing a disservice to companies that have committed incredible resources—time, money, employees—to keeping American workers safe, but it is doing a disservice to the Agency that has been tasked with ensuring the health and safety of all the Nation's workers.

The proposed alternative funding will exclude small businesses such as Scott's Liquid Gold. We simply cannot take on any more cost centers. We have committed to providing our knowledge and expertise on the same level as a Valero or GE. I spend a lot of time mentoring and participating in outreach events. I am always available as an SGE in the event the Region VIII VPP manager needs me. I generally let the other SGEs in our region have first shot at an audit because I do so much outreach, but I am certainly available if needed.

Small businesses such as ours don't get many breaks and establishing a fee-based VPP will be a burden that we will probably choose not to undertake. OSHA will lose my company's commitment to helping to educate and train others who may not have the kind of safety program that VPP requires. We appreciate the VPP for the resources it provides and the partnership with OSHA, but we cannot support another cost to our bottom line.

Two of the goals of the Agency are to ensure safe and healthy workplaces for the Nation's workers and to give workers a voice in the workplace. Enforcement does not give a voice to the workers, the elements of VPP specifically give that voice to the employees by requiring employee participation. OSHA has a huge tool box with a variety of tools. By committing most of the cooperative programs budget to enforcement, they have effectively gotten rid of most of their tools except a hammer. One of the first things that you learn is that you need to use the right tool for the job at hand. By only having a hammer, they are excluding tools for educating companies who have less than stellar safety programs. Hammers are reactive, not proactive. In seeking "alternative" funding, the Agency is keeping that tool, but locking it up and making it available only to those who pay to use it. This seems to directly conflict with Section 2(b)(1) of the OSH Act. VPP is not just one tool, it provides many tools for OSHA. It provides manpower through SGEs. It provides education through outreach and mentoring. It provides the thoughts and expertise of over 900,000 American workers—giving a VOICE to workers about their safety, which is one of the stated goals of the Agency. Why would they rely on enforcement actions only? They could never have the staffing required for worksite inspections of every work place in the United States.

There are approximately 2,300 companies who participate in the VPP, covering over 900,000 workers with more sites indicating interest every day. Those 900,000 workers are full participants in workplace safety and can educate other companies and show them what can be accomplished. Most sites will never see an OSHA compliance officer and will continue to put employees at risk with unabated hazards. Enforcement actions are usually after the fact—reactive—and usually is in response to loss of life or imminently hazardous situations. Wouldn't the Agency rather save lives than respond to the aftermath of a catastrophic event?

OSHA needs a complete tool box and VPP is part of that. Please reject the fiscal year 2011 budget until it includes funding for this very important program.

Thank you.

The CHAIRMAN. Thank you, Ms. Heflin. So, you're opposed to a fee-based system?

Ms. HEFLIN. Yes, sir. I am.

[Laughter.]

The CHAIRMAN. Well, we're looking at that. It's sort of closely akin to other proposals that have been made for fee-based systems in the past. I don't know that I can say in "every" situation, but mostly I've been opposed to fee-based systems, because what you're trying to do is either protect the public or do something that inures to the benefit of society at-large, that type of thing. Therefore, it ought to be picked up by society at-large, rather than just the individual company, or whatever it is that you're looking at for the fee. I'd have to think about it in this context.

One thing, looking at your testimony, you stated that VPP companies go above and beyond what OSHA requires. If that's the case, it would seem to me that you have nothing to fear from increased penalties for violations, especially for knowing or willful violations. Is that so? I mean, tell me how you feel about increasing the penalties for knowing and willful violations.

Ms. HEFLIN. We're not perfect. VPP companies are not perfect. We have violations. They're usually very minor. VPP companies are very familiar with the regulations and the standards, chapter and verse, and we generally try and go beyond what OSHA requires.

I'll give you an example of a not-too-hazardous situation—forklift operator training. The standard only requires that it be done every 3 years. My company does it every year. That's going beyond what the standard requires. Most companies go beyond that.

The CHAIRMAN. Again, it just seems to me that, since you're doing, obviously, good things, and all of these VPP companies are—you've heard the statements made before, and in the previous

panel, about how the penalties for environmental violations are millions of times more than it is for violation of safety.

Ms. HEFLIN. Right. I wouldn't object to increased penalties. When you hear stories, like Ms. Shaw's or the miners in West Virginia. My own family members were killed on a construction accident. I don't object to that at all. That's definitely not what my objection is.

The CHAIRMAN. Oh, OK.

Ms. HEFLIN. My objection is—you need to keep direct funding in for a program that actually reaches out to other companies.

The CHAIRMAN. I understand that now. OK, fine. I get it. OK. Thank you.

Dr. Brandt——

Dr. BRANDT. Yes.

The CHAIRMAN. [continuing]. Could you expand on how increasing penalties for those who deliberately ignore our health and safety laws will change what you call, "the economics of safety?"

Dr. BRANDT. Our association had sponsored a study in which we examined the practices of various employers around the country. What we discovered is that those companies that invest in health and safety saw a positive return on that investment.

I'll give you an example. One of our case studies was a helicopter manufacturer. That manufacturer decided to eliminate a chromium (VI)-based compound in the primer paint used for painting aircraft parts. They were able to substitute that very hazardous and toxic material with a less toxic material. As a result, they were able to—and together with some work practices and personal protective equipment—eliminate worker exposure to chromium; and they were able to improve product quality, so the parts didn't need to experience rework, they didn't have to re-sand the parts; and with the time saved over the course of the year—because this was a very critical step in the manufacturing process—that organization was able to produce one additional aircraft over the course of the year.

In this case, investing in work—the point is, in the 21st-century we no longer have to choose between worker health-and-safety and making money. Employers need workers, workers need employers. We heard that today, where the miners were concerned about—if it's a nonrepresented mine, they're concerned that they might lose their jobs or the mines might be shut down. And then what? How were they going to provide for their families? Well, in America today, we don't need to make that choice, because we can realistically and thoughtfully invest in good health and safety practices, and companies can benefit, with various benefits, not only financial, but the intangibles, as well.

The CHAIRMAN. Thank you very much.

Dr. BRANDT. You're welcome.

The CHAIRMAN. Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman.

I have to agree with what I've heard here. I would mention that, in the Budget Committee last week, the Administration plan to defund the VPP program was unanimously rejected. Again, it was just $3.5 million, and we were dealing with several trillion dollars, so I don't know how significant that was.

Kind of the way I got started in safety. I'm the accountant in the Senate. And I went to see the president of this company, and I said, "You know, if you had a safety program, you'd have more people available for work, and you'd save a lot of money." And he said, "OK, do it." I said, "No, no"——

[Laughter.]

Senator ENZI [continuing]. "I'm the accountant. I'm not the safety guy." But, he couldn't find anybody else to do it, so I did a safety program, and it did just exactly that, it reduced the cost tremendously, and he had more people available to do the work. I've been a firm believer in that, and I've worked on it ever since I got here.

Now, we talked about repeat violations and increasing the fines. One of the things that's always disturbed me is that if a person is cited twice by OSHA, then they're a repeat offender and they fall into a different category. One of the things that I noted, when I was doing the safety program, is that there are a lot of employees, on a hot day, that just don't like to wear a hard hat. Now, there's a reason for wearing a hard hat, and it's actually to keep you from being killed. If the person doesn't wear the hard hat, it's not the employee that gets fined, it's the employer that gets fined. And if two people aren't wearing their hard hat, they're a repeat offender.

We have to be careful, when we devise these penalties, so that the person most in control of the situation is the one who has to have some responsibility for the situation. I don't know exactly how to do that. I've proposed that before.

Another thing that I noted was that, if there was drug and alcohol testing, it brought down worksite accidents dramatically, as well—doing that in some businesses.

Mr. Brandt, do you support workplace drug and alcohol testing programs as a way to maintain safer workplaces?

Dr. BRANDT. Yes, I do, Senator.

Senator ENZI. OK. Thank you. Thank you for brevity of the answer, too.

[Laughter.]

I was glad to see that you supported VPP. What do you think is responsible for the considerable growth of new VPP members over the last decade? And does that build a culture of safety in the workplace?

Dr. BRANDT. A culture of safety reflects the values, traditions, and beliefs of any organization. To have a safety culture requires participation, management leadership, and I just don't mean, well, I write a slogan—that doesn't represent leadership—but leaders who walk the spaces, who walk the talk, who support workers. Similarly, workers need to participate collaboratively with management to solve those problems.

So, problems in the workplace—if we can identify them early, find, and fix—you heard Dr. David Michaels mention, earlier—that's a culture that we need to instill in all workplaces across the United States. We need to find and fix.

There's joint accountability, just as you were talking about. There's accountability, on the part of workers, to work with management, but also accountability on the part of management to work together with the employees to constructively collaborate to solve problems.

The first principle of public health is, intervening early reduces the severity of a problem. Particularly when we look at permissible exposure limits, health hazards, the airborne standards. Those are 40 years old. What we need to do is to change those, because they're obsolete. Early intervention reduces severity. That's what we need to do in the workplaces across this country. Intervene early to protect workers.

Senator ENZI. To followup on that a little bit, Do you believe that the rank-and-file OSHA employees, who are out working every day to do inspections, support VPP?

Dr. BRANDT. I really don't know that many OSHA inspectors, so I really can't comment. I would state that anything that can reduce the workload in a meaningful way for any government agency, and produces positive results, would be hard to reject.

Ms. HEFLIN. Senator Enzi, I work with——

Senator ENZI. Yes.

Ms. HEFLIN. [continuing]. A lot of OSHA people in my region—through phone conversations, I meet them at conferences, I work with them on other panels. I believe that they really do believe in the VPP, but I believe that it's our role, as VPP companies, to continue the education, because it brings other sites in, it educates our OSHA folks, what we can do for them. And I really, really do believe that the more they learn, the more they will support the program.

Senator ENZI. Thank you.

I have more questions for all of you. I'll submit those in writing, and would appreciate an answer.

This has been very helpful. I know we've kept you around a long time.

The CHAIRMAN. Yes. It is getting late. I know we have to go, but I did want to ask Ms. Seminario just one thing.

In your testimony, you discussed the need to strengthen Section 11(c) of the OSH Act and increase whistleblower protections. That has come up in our discussions today, on both the previous MSHA panel and on this OSHA panel, too.

Just tell me a little bit about how you feel about that, about the whistleblower protections. Do we need a unified whistleblower protection policy through everything?

Ms. SEMINARIO. The whistleblower provisions of the OSH Act are 40 years old. They were some of the first ones that were enacted. I think there have been two dozen statutes enacted since that time that have some kind of protections related to the environment, safety and health, and other statutes that provide protections for people who speak up, either in the workplace or to the government.

When you compare those statutes, what you see is that the original OSH Act is the weakest of all of them, because it was never changed. So, we've learned, over the years, as to what needs to be done.

For example, under the OSH Act, there's a very short statute of limitations. It's 30 days. If you don't get your claim filed in 30 days, you're out of luck.

The only person who can take up the claim is the Secretary of Labor, and they have to do it in court. There are a lot of resource issues here. I mean, there are, I don't know, 1,400 11(c) complaints

that were filed with Federal OSHA; they've got 75 whistleblower inspectors.

The fact of the matter is, the resources haven't existed at the Federal Government to take up those cases. The ability for somebody to take up the case on their own would be a very, very helpful provision.

There aren't any rights in the OSH Act for preliminary reinstatement. Even if there's a finding that the person really was retaliated against, while the litigation's going forward, they're out of luck. What we would like to see is the OSH Act brought in line with the very best practice—some of which this committee has recently adopted and recommended, to put those protections in place under the basic safety and health law.

The CHAIRMAN. Very good. Thank you.

Senator Enzi.

Senator ENZI. Mr. Chairman, in light of that question, I have a followup question for Ms. Seminario.

Just last week, the National Labor Relations Board decided a case, in which a Missouri Labor Union had fined one of its members $2,500 for reporting a safety violation by another employee union member to the employer of the hydroelectric facility where they worked. This case involved the setting up of a telebelt, which is a freestanding conveyor-belt that spans 130 feet and transfers material, such as rolled concrete and coarse aggregate. The employee was complying with the employer's safety rules by reporting the violation, and protecting himself and all of his coworkers.

The union in the case is the International Union of Operating Engineers Local 5–13 AFL–CIO. As safety and health director for the AFL–CIO, did you advise the local to fine this member?

Ms. SEMINARIO. I'm not——

Senator ENZI. What kind of message does it send to penalize members?

Ms. SEMINARIO. I have no knowledge of this case or the facts. I'm happy to take a look at it and respond to your question in writing.

Senator ENZI. OK.

Ms. SEMINARIO. Unfortunately, I really don't have the information to respond today.

Senator ENZI. OK. Thank you.

The CHAIRMAN. I'd like to know, too. Respond to us on that.

Just in closing, again, Ms. Shaw thank you very much for being here. I know I speak for my friend Mike, and all of us who are here, that we are sorry about the loss of your husband.

Ms. SHAW. Thank you.

The CHAIRMAN. We appreciate how much you've done to make sure that others don't follow the same fate. I thank you for your leadership in that area and for continuing to speak out and to advocate——

Ms. SHAW. Thank you.

The CHAIRMAN [continuing]. The changes that we need. Thank you very, very much for being here.

Does anyone have any last thing that they need to say or get on the record at all?

[No response.]

Going once. Going twice.

[Laughter.]

Again, I want to thank all of the people here who brought the pictures of their family members. Again, a very poignant way of reminding all of us that there's real people behind all the things we're doing here. These are real people, with real families, with real children, with real wives and kids. It always just does us good to be reminded of that. I thank you very much for being here.

With that, the HELP Committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR BYRD

Mr. Chairman, I thank you and Senator Enzi for the invitation to attend this hearing. I thank you, Senator Harkin, for your commitment to schedule a hearing next month before the Senate Labor-HHS Appropriations Subcommittee.

MSHA inspectors must have had some suspicion, after numerous citations and withdrawal orders for repeat offenses, that the management at the Upper Big Branch Mine was endangering the lives of its miners. As coal production escalated rapidly and drastically, and employment remained relatively constant, MSHA inspectors must have had nagging concerns that conventional enforcement tools like citations and withdrawal orders were not working. Rumors abound about mine company officials tampering with methane detectors, and cleaning up safety problems shortly before inspectors entered a working section. MSHA inspectors must have had some suspicion that when inspectors forced corrective actions in one part of the mine, more egregious violations might be eluding them in other parts.

1. Given the disturbing safety record and the reputation of this particular mine, why did MSHA not do more to force compliance with the law? Why were dangerous mining conditions allowed to fester? Why did MSHA wait until after the tragedy to launch an inspection blitz at coal mines with a history of pattern violations? Why did MSHA wait until after the tragedy to pursue changes regarding patterns of violations? Why did MSHA not seek injunctive relief to force compliance with health and safety standards?

2. What does MSHA do when conventional tools like citations and withdrawal orders prove ineffective? What unconventional tools can MSHA use to force compliance? What does it presently take to close a mine?

3. Aside from the health and safety laws, what remedies exist to deal with a recalcitrant operator who has a reputation for flouting the law, and for putting profits ahead of safety?

4. How many mines have records of violations similar to the Upper Big Branch, and a pattern of frustrating MSHA efforts to enforce compliance? What actions have been taken to address these evasive activities?

5. Is there a culture at MSHA which tends to inhibit the robust enforcement of mining safety laws? What can be done to guard against MSHA inspectors developing relationships with mining companies that tend to impede tough enforcement of the law?

6. Can we better empower mine inspectors? Some have suggested streamlining the citation process (by clarifying the classification of gravity and negligence), or handicapping the burden of proof in inspectors' favor when they defend contested citations and orders.

7. Can we restore public confidence in the Mine Act's system of whistleblower protections, both for hazard complaints and for "Part 90" situations in which miners attempt to exert their right to be moved to a less dusty area of the mine?

8. MSHA is strengthening its efforts to ensure that pre-shift examinations uncover violations of the Mine Act. If the law were to require that each crew leave the mine before subsequent crews

enter, could this provide additional time to conduct more robust pre-shift examinations? If an MSHA inspector entered the mine at the time of a shift change, so that the inspector could observe mine conditions exactly as they were at the end of the previous shift, would that help to insure that hazardous conditions are caught and addressed before a new shift began?

9. Please provide a detailed plan and time line for the investigative process. What hearings will be planned? How will they be structured? Who will participate?

10. According to news reports, Massey Energy officials have said the company had employed a full-time, two-person safety team at the Upper Big Branch mine. How did MSHA interact with this safety team?

11. According to news reports, Massey officials have said that MSHA required them to change their ventilation plan, over the resistance of Massey engineers, and that the new ventilation plan inhibited fresh air from getting into the mine. Is there any truth to that?

12. How could the Mine Act be amended to expand the universe of stakeholders that can seek injunctions or other relief (including ordinary citizens who may be adversely affected by unsafe or unhealthy mining conditions)?

13. Please describe your views about revising 30 CFR Part 104. How will you prevent operators from repeatedly receiving a notice of a *potential* pattern of violations, without ever incurring the consequences for an *actual* pattern of violations under Sec. 104(e) of the Mine Act? Does MSHA have the technological wherewithal to monitor for pattern violators on a continuous basis, and move to notify operators of a pattern the moment one is detected? If so, will you commit to commencing a system of continuous monitoring and notice?

14. Could MSHA streamline the process for referring potentially criminal violations for prosecution by the Department of Justice? Can MSHA or the Congress make it easier for miners or others to initiate the referral process?

15. According to press reports, MSHA negotiated an agreement with Massey Energy in 2006 to waive filing deadlines for contesting citations. Is there any truth to that? Were other operators offered similar waivers? How many times were deadlines waived?

16. Why is MSHA not issuing an Emergency Temporary Standard to expedite its rulemaking agenda, specifically with regard to pattern violations?

17. Recently, a hazard complaint at the Road Fork #51 Mine triggered eight 104(d)(2) withdrawal orders, in connection with the operation of two continuous mines on inadequate ventilation (i.e. two mines were ventilated using a single stream or "split" of fresh air). Please discuss how MSHA evaluates ventilation plans on so-called "super sections" (in which two mechanized mining units are operated on a single set of entries) and on similar mining sections. What type of additional oversight does MSHA conduct to ensure ongoing compliance with safe ventilation practices on these sections? How can you strengthen your evaluation of ventilation plans, and associated enforcement, in this regard? If you could generalize,

how many mine workers are ideally required to operate a "super section" in a safe fashion?

PREPARED STATEMENT OF SENATOR WEBB

I would like to thank Chairman Harkin and Ranking Member Enzi for holding this hearing on strengthening enforcement and creating a culture of compliance at mines and other dangerous workplaces.

It was with great sorrow that our Nation learned of the tragedy at the Upper Big Branch coal mine in Sago, WV, where 29 miners lost their lives. That devastating explosion earlier this month reminded us all of the risks our coal miners undertake each day. It also reminds us of the responsibilities of our own office as Members of Congress. We have a continuing duty to establish, and insist upon, proper standards of safety for those who work in this industry. We must never forget that.

I want to extend my personal condolences to the families, coworkers, and others who were impacted by this tragedy, and to express my commitment to working to help ensure it does not happen again.

Coal has been, and will continue to be for the foreseeable future, the foundation of our Nation's energy resources. Coal's continued strategic and economic importance only highlights the need to protect those who work to extract it.

Virginia is a coal State, ranking No. 13 in the Nation in coal production. In 2008, 24.7 million short tons of coal were produced from an estimated recoverable reserve base of 750 million short tons.

According to the National Mining Association, direct and indirect employment generated by U.S. coal mining in Virginia accounts for 31,660 jobs, for a combined payroll of $1.43 billion. Coal is integral to the economic activity of southwest Virginia. We can—and must—do better by our miners when it comes to enforcing safety regulations and ensuring that companies don't walk away from their responsibility to their workers.

It is also essential that the Mine Safety Administration have the proper resources to ensure the safety of the hardworking men and women laboring in our mines every day.

I look forward to the analysis and recommendations of this committee with regard to how we at the Federal level can improve mine safety, and I pledge to work with my Senate colleagues to implement needed reforms. I believe that improved technology is one area we should be looking at, which is why last Congress I introduced legislation to improve tracking and communications technology for underground coal mines.

There is more we must do, as the tragedy in West Virginia reminds us.

Thank you, Mr. Chairman, for the opportunity to address the committee on this important issue.

PREPARED STATEMENT OF THE COALITION FOR WORKPLACE SAFETY (CWS)*

The Coalition for Workplace Safety (CWS) is a broad coalition comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The Coalition believes that workplace safety is everyone's concern. Improving safety can only happen when all parties—employers, employees, and OSHA—have a strong working relationship. We thank you for this opportunity to express our views on the Protecting America's Workers Act (PAWA), and, specifically, the proposed changes being discussed here today.

WORKPLACE SAFETY IS IMPROVING

Workplace safety has steadily improved over the last 40 years and BLS data shows that workplaces are safer now than they have ever been. Workplace fatalities have declined 23 percent since 1994. This drop occurred even as the workforce expanded, with the economy adding 23 million new jobs over the same time period. Workplace injury and illness rates have shown a similar drop. Since 1994, the total case rate has declined by 50 percent and the lost days from work rate has declined by 44 percent. While the government's reporting system may not capture every workplace injury or illness, the data undeniably reveals the trend of declining workplace injury and illness rates.

This decline is the product of various factors, including employers, employees, OSHA, insurers, safety experts and business and professional associations working together to increase understanding about safe work practices and their importance and how employers and employees can reduce workplace accidents. The advent of modern communications and the Internet have also facilitated sharing information and safety-related guidance.

CWS applauds OSHA for its role in decreasing injuries, illnesses and fatalities, in particular its work in the last 15 years to promote workplace safety through outreach and education. Since its inception, OSHA has established standards employers must meet through its regulations and enforcement activities. For the first 25 years, the agency did not, however, focus on assisting employers and employees to understand OSHA standards and related safe work practices. Beginning in the Clinton administration, this changed and OSHA developed an array of approaches that focused on educating and working cooperatively with employers to improve workplace safety. The CWS is committed to supporting these approaches as they have contributed to the increase in workplace safety, as indicated by the BLS workplace injuries and illness rates.

PAWA WILL NOT IMPROVE WORKPLACE SAFETY

CWS is concerned about several of the provisions in the Protecting America's Workers Act (S. 1580/H.R. 2067). PAWA is unnecessary and will not improve workplace safety. It focuses on increasing penalties and enforcement and does nothing to assist employers in their efforts to make workplaces safer. Increasing penalties on employers will only serve to increase litigation, drain OSHA and DOL resources and harm our economy and hinder job growth.

Experience with the Mine Safety and Health Administration (MSHA) reinforces this point. A hearing in the Education and Labor Committee on February 23, revealed that as a result of the increased penalties from the MINER Act passed in 2006 and MSHA's regulations taking effect in 2007, the backlog at the review commission is now 16,000 cases worth $195 million, and expected to rise further as the current policy at MSHA is to not engaged in settlements. This backlog has impacted safety in the mining industry by absorbing an unprecedented amount of MSHA resources which would otherwise be devoted to field and other activities. Increasing OSHA's penalty regimes in a similar way will neither increase safety in the workplace nor give employers the tools necessary to create solutions towards workplace safety. Our concerns with some of the specific aspects of PAWA that are being discussed today are set forth below in more detail.

Abatement of Hazards Pending Contest

The change to Title III, Abatement of Hazards Pending Contest, eliminates the employers' right to use the administrative appeals process to thoroughly investigate its obligation to abate serious hazards. This is a dangerous diminishment, if not outright elimination, of due process protections for employers. Mandating abatement

*The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

before a review process can be completed is like asking a defendant in a court case to pay a fine or serve a sentence before the completion of the trial. Additionally, requiring abatement prior to a full investigation may lead to inaccurate changes being made, which can lead to unnecessary costs for employers. Conversely, allowing due process to proceed in the normal order will allow employers, especially small businesses, the time and resources needed to find solutions to any workplace safety issues. This is the best way to keep workers safe on the job. As a hearing in the House on March 16 revealed, OSHA already has the ability to shut a workplace down in as little as 1 hour when they determine there is an imminent hazard.

Penalty Changes

There has been much discussion of proposing further changes to this legislation's criminal penalties under title III that would alter the mental state requirements for criminal penalties from "willful" to "knowing." This is a significant change to 40 years of settled law that will cause uncertainty among employers, employees, compliance officers, prosecutors and adjudicators. The uncertainty about potential liability would cause employers to engage in a more defensive posture with OSHA and on workplace safety issues. Not only will this inevitability result in increased litigation, but it would severely disrupt the cooperative approach towards workplace safety that has been so successful over the past 15 years.

Furthermore, PAWA defines an employer as "any responsible corporate officer" which will create unprecedented confusion and disincentives to being a corporate officer. This proposed change would have a chilling effect on how employers dedicate staff and resources that maintain safety programs. These changes do nothing to give employers, especially small businesses, the tools to stay well-informed of safety concerns in the workplace. Increasing penalties and lawsuits does not get to the heart of the problem necessary to find solutions in the workplace.

The bill would also increase civil penalties dramatically which will also lead to more contested cases with the associated impacts already noted above.

PAWA: Not the Right Approach

This legislation goes counter to efforts commenced under the Clinton administration to promote cooperation between employers and OSHA. In order to be effective in making workplaces safer, employers need OSHA to be as much of a resource as it is an enforcement agency. However, we are troubled that many of these effective employer compliance assistance programs are losing funding while the agency focuses on expanding punitive measures like the Severe Violators Enforcement Program. Congress should recognize the improving trends of injury and illness rates and better under current programs that have been successful in bringing about this progress. Lawmakers should look to promoting effective programs that make workplaces safer rather than considering drastic overhauls of OSHA's approach to enforcement. To this end, we hope that Congress will consider codifying and protecting compliance programs like the VPP that have protected millions of American workers.

CONCLUSION

The Coalition on Workplace Safety continues to stand ready to work with OSHA and Congress to enhance workplace safety. However, PAWA—and the changes presented here—undermine efforts to promote cooperative engagement between employers and the agency, and will not assist employers in making workplaces safer. We will continue to work towards the goal of increasing workplace safety by working together through cooperation, assistance, transparency, clarity, and accountability.

REFINERY SAFETY AT A GLANCE

Personnel and Process safety are cornerstones of petroleum refining facilities nationwide.

PERSONNEL SAFETY

The domestic refining industry continues to improve its workplace safety record, despite a work environment that often complex process equipment, hazardous materials, and handling materials under high pressures and temperatures. This strong industry safety record is reflected by declines in the industry's rate of injury and illnesses—a rate significantly lower than the total recordable incident rate for the entire manufacturing industry.

PROCESS SAFETY

The petroleum manufacturing industry is regulated by the Occupational Safety and Health Administration (OSHA) Process Safety Management Standard (PSM) for Highly Hazardous Chemicals (29 CFR 1910.119) and the U.S. Environmental Protection Agency (EPA) Chemical Accident Prevention Program (40 CFR 68) as well as several other OSHA General Industry standards. Individual sites are required by law to conduct a PSM audit of all 14 facility safety elements[1] every 3 years and to resubmit their Risk Management Plans (RMP) every 5 years.

NPRA and the American Petroleum Institute (API)[2] continue to work jointly on several new industry recommended practices that will enhance workplace safety. In 2010, the industry released several standards, including: Management of Hazards Associated with Location of Process Plant Permanent Buildings, Fatigue Risk Management Systems for the Refining and Petrochemical Industries, and Process Safety Performance Indicators for the Refining and Petrochemical Industries. NPRA and API worked closely with the Chemical Safety Board on the creation of these recommended practices.

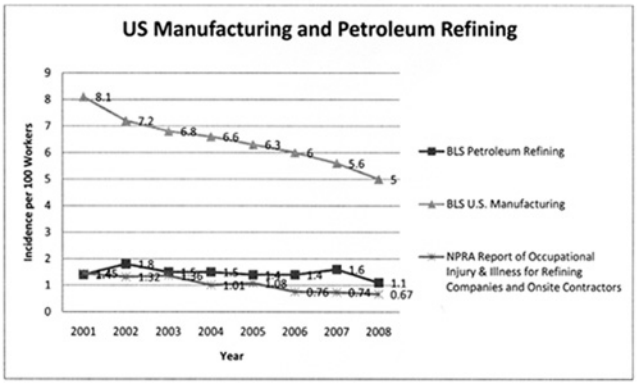
There are approximately 30 safety and fire protection standards and recommended practices maintained by API that refining companies voluntarily comply with in order to promote a safe working environment. In addition to refining industry standards, companies also comply with standards established by the American National Standards Institute (ANSI), American Society of Mechanical Engineers (ASME), the Instrumentation, Systems, and Automation Society (ISA), and National Fire Protection Association (NFPA). Many of these standards are considered Recognized and Generally Available Good Engineering Practices (RAGAGEP) and are enforced by OSHA's General Duty Clause.

QUICK FACTS

According to the 2008 Bureau of Labor Statistics (BLS),[3] the total recordable incident rate for the manufacturing sector as a whole is 5.0 job-related injuries and illnesses per 100 full-time employees. The 2008 BLS total recordable incident rate for petroleum refining facilities is 1.1 incidents per 100 full-time employees.

Based on the 2008 NPRA Occupational Injury & Illness Report that surveys 90 percent of NPRA member refineries, the total recordable incident rate was 0.83 for company employees, 0.53 for contractors that work at those refineries, and 0.67 for both company employees and contractors per 100 full-time employees.

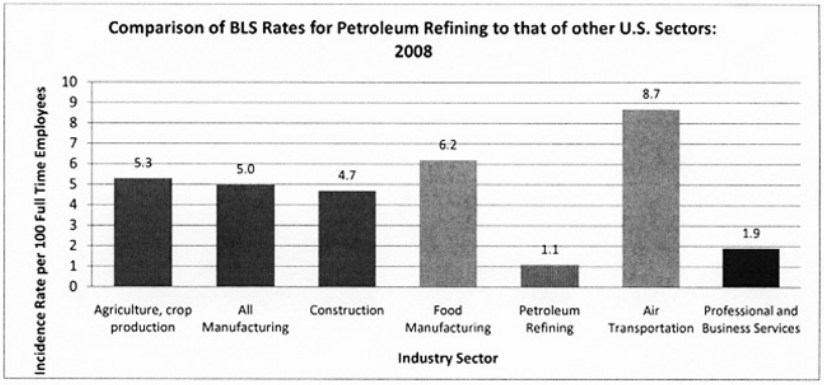
In 2009, 60 percent of NPRA member refineries received the NPRA Merit Award for having a Total Recordable Incident Rate of 1.0 or less in 2008.



[1] Fourteen elements include Employee Participation, Process Safety Information (PSI), Process Safety Analysis (PSA), Operating Procedures, Training, Contractors, Pre-Start-up Safety Review (PSSR), Mechanical Integrity, Hot Work Permits, Management of Change (MOC), Incident Investigation, Emergency Planning and Response, Compliance Audits, Trade Secrets.

[2] API is an American National Standards Institute (ANSI) accredited standards developing organization. They operate with approved standards development procedures and undergo regular audits of their process.

[3] BLS rates are based on a sample rather than a census of the entire population and do not include contractor injury & illnesses numbers in their calculations.



PREPARED STATEMENT OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION

On behalf of the National Stone, Sand and Gravel Association (NSSGA), we offer this testimony for the hearing on "Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces."

By way of background, the U.S. Geological Survey reports that NSSGA is the largest mining association by product volume in the world and represents the crushed stone, sand and gravel—or construction aggregates—industries that constitute by far the largest segment of the mining industry in the United States. Our member companies produce more than 90 percent of the crushed stone and 75 percent of the sand and gravel consumed annually in the United States. There are more than 10,000 construction aggregates operations nationwide. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs, so 70 percent of our Nation's counties include an aggregates operation. Of particular relevance to this hearing is the fact that 70 percent of NSSGA members are considered small businesses.

Unlike coal mines, underground stone mines produce material that is non-combustible and non-flammable. No combustible gas, such as methane is present, and no underground stone mine is categorized as liberating methane or containing a combustible ore. MSHA-approved ("permissible") equipment is not required in underground stone mines because mine fires or explosions cannot occur due to electrical equipment contacting an explosive gas, since explosive gas is not present. Mining methods create cavernous chambers for access by large equipment and to accommodate emergency equipment used by non-mine emergency services. More stable mineral formations result in stable mine roofs, minimizing the need for additional roof supports and emergency escape is easier due to the large mine openings. Because of the large open spaces and mining methods, mechanical mine ventilation generally is not required since natural ventilation provides an atmosphere in which people can work.

NSSGA and its member companies go to great lengths to provide safe and healthful environments for aggregates workers. Implicit in this effort is the industry's commitment to comply with all MSHA regulations and standards tied to worker safety and health.

The first priority of the aggregates industry is, and continues to be, the safety and health of its workers. The safety record of the aggregates industry has improved due to the heightened level of effort invested by the industry to sustain an improved performance. Since 2000, the rate of injury-illness incidence for aggregates operators has been reduced by 41 percent, to 2.46. While fatalities in the aggregates industry continue to decline—seven in 2009—we believe even one fatality is too many and we are working tirelessly to take that number to zero.

The improvement in the aggregates industry safety record is attributable to several factors. The first is that aggregate companies understand that to stay competitive in today's business environment, they must provide a safe and healthful workplace or they will not be able to attract the best workforce possible. Companies know that to remain competitive in America today, you must first care about your people.

NSSGA developed and agreed to a set of safety principles to assist member companies in their efforts to instill safety consciousness as a top priority in their individual organizations as well as to the industry as a whole. In addition, a safety pledge was developed in 2008 incorporating the safety guiding principles. More than 70 percent of the NSSGA member company facilities are managed by CEOs who signed the NSSGA Safety Pledge, thus signifying the importance of safety and a commitment toward ensuring the safety and health of all their employees.

NSSGA was one of the first organizations that formalized an alliance with MSHA. While some argue that these alliances have aligned the agency too closely with the regulated community, we would argue the opposite. In 2002, NSSGA and MSHA set forth a cooperative agreement to develop programs and tools for the improvement of safety and health in the aggregates industry. The reduced incidence rates that resulted speak for themselves. Through these alliances, individual working miners have gained access to more educational materials from their companies, and MSHA has been able to enhance its mission of protecting worker safety and health.

Another collaborative effort resulted in the MSHA Part 46 "Training and Retraining of Miners" regulation in 2000. This effective regulation ensures that every miner knows and understands how to perform their job safely by covering the important safety and health information prior to starting work and annually thereafter. This regulation was developed collaboratively, with input from both labor and industry groups, guaranteeing support of the rule by all involved stakeholders and assuring their commitment to the ultimate goal of injury reduction. The Coalition for Effective Miner Training included many industry groups working in a joint industry/labor arrangement in conjunction with MSHA to develop an effective standard for the aggregates industry, and the part 46 miner training resulted from the group's combined efforts.

Another example of an effective collaboration between MSHA and NSSGA is a cooperative workplace-based training program of 3-day-long workshops on monitoring for both noise and dust, and diesel particulate matter. Agency and association leadership developed and signed an agreement, and the training workshop program launched on December 1, 1997. These workshops have been given every year since 1997, and training specialists from the Mine Safety Academy have educated miners in dust and noise issues. The joint venture aimed at reducing hearing loss and silicosis through a program of recognition, evaluation and control of workplace hazards has won two awards from Innovations in American Government.

Because there's been much discussion of the Federal Mine Safety and Health Review Commission since the coal mining tragedy of April 5, we offer a number of suggestions for alleviating the case backlog at the Commission.

NSSGA is concerned about the delay in producers' ability to obtain from the Federal Mine Safety and Health Review Commission (FMSHRC) a timely hearing on alleged violations.

We applaud Assistant Secretary of Labor for Mine Safety & Health Joseph Main for his goal of improving training for inspectors on behalf of enforcement consistency. We understand that a number of contests from aggregates companies are due to strong disagreement on the basis of the severity finding on a citation. Inspectors need to do a proper job of evaluating and clearly identifying what is "Significant and Substantial" (S&S). NSSGA hears repeated expressions of concern that S&S is being over-written.

Also, we would like to see the agency communicate more proactively with stakeholders about agency changes in enforcement interpretations. Citations should not serve as first notice to stakeholders that there has been a change in the agency's interpretation of what is required to be in compliance. Rather, the agency should notify all stakeholders of such changes in interpretation before enforcement begins so that companies and their workforces are afforded adequate information needed for compliance.

Additionally, we recommend that MSHA re-institute the process of conferencing citations before assessment of penalties. Before it was changed, pre-penalty conferencing enabled operators to close out on inspections satisfactorily without having to add to the Commission's docket.

Further, we encourage the agency to consider changes in civil penalty procedures hastily put in place contemporaneously with enactment of the MINER Act. A major concern, for example, is the regulatory provision specifying how an operator's history should be brought into calculation of civil penalties. While we understand the importance of scrutiny of every company's history in reviewing violations for assessment, the present procedure of assigning maximum penalty points for a 15-month average of 2.1 violations per inspection day is having a disparate and unfair impact on many companies. Take a small company, for example, that in its last two inspections of 1 day each in the previous 15 months, has a total of five violations for a

total of 2 days of inspections. This will cause 25 points to be added to this small company's civil penalty calculation, which can translate into very big fines. Twenty-five points will convert a $555 penalty to $4,099 and it will convert a $4,099 penalty to $30,288. There are small companies that have been assessed penalties as high as $200,000 in a single inspection.

It is understandable that companies will not want a single underserved violation in their history and that they will do everything in their power to contest questionable citations.

We are committed to the notion that operators have every right and need to contest citations with which they do not agree. We hasten to add that history is by no means the sole issue. Every undeserved subjective finding by an inspector will add underserved points to the company's penalty calculations. These are unaudited findings and they represent big money liability. Only by seeking review before the Federal Mine Safety and Health Review Commission—the agency with exclusive authority to assess penalties—can an operator have a voice in the process. Indeed, even MSHA now is telling operators that if they want a conference regarding a citation, they will have to contest the citation formally before the Commission. We have mentioned only some of the concerns of operators that are prompting contests, but the system as a whole is deemed unfair and the only avenue that operators have to bring issues to light is through the contest process. NSSGA would be pleased to work with MSHA to address this and possible solutions.

Also, we offer the attached article, which was published in *Mine Safety and Health* News on Jan. 25, 2010. It was authored by an NSSGA Manufacturers and Services Division member and discusses the background of the backlog, relevant legal issues and includes suggestions for addressing the backlog. For your information, the author participated in an Energy and Mineral Law Foundation Special Institute (March 23 and 24) in Washington, DC, with attorneys from the Solicitor of Labor's office and Judges from the Federal Mine Safety and Health Review Commission. The goal of the panel was to constructively address civil penalty case backlog issues and how they might be resolved for everyone's benefit.

Additionally, we cannot mention—either our commitment to or achievements in—worker safety and health without citing the importance of effective compliance assistance by MSHA. In that vein, we respectfully urge that the Administration change course on plans to shut down the Small Mine Office (SMO): we believe the provision of quality compliance assistance geared to smaller operations adds significantly to the safety and health of our workforce.

SMO compliance assistance has helped operators: (1) provide safer and more healthful work environments; (2) boost compliance; and (3) experience smoother inspections because the operation and workforce were better prepared. Moreover, we're pleased that SMO works on a key priority of yours, the development of a written safety and health plan for every operator. As illustrated at *www.msha.gov*, SMO's compliance assistance correlates to more rapid reductions in injury/illness incidence rates than for those of the overall aggregates industry.

NSSGA and our State aggregate association partners find SMO's work to be critically important to continuing improvements in safety and health among aggregates industry workers.

This guidance was considered most useful when it could be provided without "coordination" or immediate follow-on by an inspector. Operators are concerned that, if compliance assistance visits are followed immediately by enforcement action, inspections will target the very issues focused upon in the compliance assistance visit before adequate time allows for resolution of deficiencies. Presently, it is our understanding that SMO provides compliance assistance without specific knowledge of when an inspection may be forthcoming. This allows the development of greater trust that the assistance is offered for the safety and health benefit of the workers, and with the purpose of enhancing compliance.

SMO's work has enabled companies to more readily comply with pertinent regulations and standards, the enforcement of which has dramatically increased since enactment of the MINER Act. This is critical. Given that many NSSGA member companies—replete with strong staffs involved in safety and health training and compliance—are themselves facing increased compliance pressures. One can only imagine the burdens weighing on small operators.

NSSGA is in receipt of more than 100 stories of SMO personnel having delivered effective compliance assistance. Outlined below are just a few testimonials from around the country:

- Small mines officer helped us quickly bring our operations up to speed on safety.
- Assistance on training plans made for a thorough understanding; for instance, he delivered easy-to-understand explanations.

• Officer conducted a thorough examination via a courtesy walk-through on the range of things inspectors would be checking for.
• Because of our visit with the SMO representative, we had a zero citation inspection.
• The SMO representative provided guidance on updating records and training materials.
• The instruction was so helpful that our contractors have called to express thanks.
• One inspector took the trouble to make a second visit to our facility because the first day's provision of information had been so overwhelming.
• Officer helped us organize all of our training information.
• Officer made my safety training work much more efficient.
• Officer streamlined our paperwork organization so that there will be fewer headaches in the future.

These testimonials describe the qualities of SMO representatives, reflecting favorably on the agency and its mission:

• Very professional, and business-like and added a measure of personal concern.
• Helped us realize that our full compliance was possible.
• Helped us solve our safety problems on numerous occasions.
• After our meeting, I feel really good about spreading the good news.
• I feel that you could not put a monetary value on the small mine program because it does what it is designed for, to save lives, reduce accidents, and help improve operator awareness.
• I can feel comfortable calling this person, instead of an inspector; he was genuinely interested in helping.
• Materials he provided are my new best friends.
• Don't know what small miners would do without you.
• [on courtesy walk-through] It's not easy being picky and polite at the same time, but the SMO representative did.

In closing, we respectfully urge continuation of SMO's critical work to boost compliance in smaller operations that are unlikely otherwise have the staff complement sufficient to oversee in-house compliance assistance with the same level of expertise. Most importantly, SMO's continued existence will help us continue our 9 consecutive years of improvements in the aggregates industry's injury-illness incidence rates.

Thank you for the opportunity to submit these views.

RESPONSE TO QUESTIONS OF SENATOR HARKIN BY BRUCE WATZMAN

Question 1. I agree with your statement that a safety culture starts from the top down and that it is recognized across all organizations, both mine and non-mine workplaces. Unfortunately, there are a minority of operators that wantonly disregard our health and safety laws, using a myriad of tactics to avoid paying penalties and otherwise complying with the law.

Focusing on operators that show a record of egregious health and safety violations, does your organization agree that a strong enforcement structure is necessary to hold companies accountable for repeatedly placing their employees at risk of injury or death?

Answer 1. We believe that strong, vigorous enforcement of the law and regulations is integral to ensuring that workers, in mining and non-mining workplaces alike, are provided a safe and healthful workplace. As noted in our April 27, 2010 testimony, "mine safety is the operator's obligation and must be their highest priority but both operators and MSHA have a shared responsibility to ensure a safe workplace." The Mine Act and its escalating enforcement scheme are designed to hold accountable operators that place their employees at risk of injury or death.

Question 2. Should companies be penalized for chronically accumulating serious job safety violations that can potentially cause serious injury and death?

Answer 2. Under the Mine Act and its escalating enforcement scheme companies are penalized for accumulating serious job safety violation.

Question 3. Would you and your organization support changes in the law in order to discourage unscrupulous operators from pursing frivolous appeals solely for the purpose of delay? If not, why not?

Answer 3. The underlying premise of the question is the belief that some operators' are employing dilatory tactics to prevent MSHA from being able to initiate heightened enforcement actions based upon final resolution of safety violations. We do not agree with this premise. However, it must be noted that MSHA, even in the

absence of final resolution of challenged citations, has the ability to escalate enforcement when they believe it is warranted.

As discussed during the April 27 hearing, MSHA has never used the injunctive relief authority provided by the Congress in Section 108 of the Federal Mine Safety and Health Act and has sparingly used the imminent danger authority provided for in section 107. We support legislation to provide additional appropriations to the Federal Mine Safety and Health Review Commission and the Department of Labor, Office of the Solicitor, to eliminate the backlog of cases pending adjudication as continued delay serves neither miners or mine operators.

RESPONSE BY DAVID MICHAELS, PHD, MPH TO QUESTIONS OF SENATOR HARKIN, SENATOR ENZI, SENATOR BURR, AND SENATOR ISAKSON

QUESTIONS OF SENATOR HARKIN

Question 1. You mention that most Federal crimes under current environmental and regulatory laws use the term "knowingly," rather than "willfully," and recommend amending the OSH Act to change its criminal provision to be consistent with other statutes.

Please explain for us the distinction between the "knowing" standard and "willful" standard and the significance this change would have to the agency's enforcement efforts.

Answer 1. Most Federal statutes, including most environmental statutes, contain a "knowing" *mens rea* standard rather than a "willful" standard.

DOL supports the efforts to amend the criminal provisions of the OSH Act by changing the *mens rea* standard from "willful" to "knowing." Doing so would bring those provisions into the mainstream of Federal criminal laws.

Congress has consistently used the "knowing" standard in criminal provisions in public welfare statutes and in other contexts where, as in the workplace, activities are highly regulated. It is reasonable to assume that anyone involved in such areas is aware of that high degree of regulation. Indeed, in such contexts, courts have recognized a presumption of knowledge of the law. Cf. *United States* v. *Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971) (explaining that when dangerous or harmful devices or products, or obnoxious waste materials, are involved, "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"). The justification for this presumption has been described as follows: "[t]o admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey." Holmes, The Common Law (Howe, ed. 1963). Use of the knowing standard in OSHA's criminal penalty provision would be consistent with this rationale, as employers can hardly be surprised to learn of the existence of standards, rules, and orders pertaining to workplace safety, and the knowing standard places an appropriate and fair burden on them to "know and obey" these standards, rules, and orders.

Question 2a. Compared to our environmental laws, both civil and criminal OSHA penalties under current law seem very low.

Because OSHA penalties are only misdemeanors, in what circumstances would the Department of Justice be able to prosecute cases involving a willful violation that led to a workplace fatality?

Answer 2a. Under PAWA, criminal OSHA violations would be deemed felonies rather than misdemeanors. The Department of Justice has testified that it is more likely to prosecute felonies than misdemeanors. In addition, potential criminal liability is expanded to any responsible corporate officer or director. Both the Clean Water Act (CWA) and the Clean Air Act (CAA) already expressly include "responsible corporate officer" in their definitions of persons to whom the statutes apply. 33 U.S.C. §1319(c)(6) (CWA); 42 U.S.C. §7413(c)(6) (CAA). The term is often defined as a person who is in a position to stop the conduct and has knowledge of the facts, but does nothing to stop the conduct. Similar liability would be appropriate under the OSH Act.

Question 2b. In addition to increasing penalty amounts, what are other ways to ensure that companies whose corporate management knowingly ignores health and safety laws throughout multiple facilities face appropriate consequences for these actions?

Answer 2b. In April, OSHA announced the new Severe Violators Enforcement Program (SVEP), a critical tool that will help the Agency improve its ability to deter safety and health violations, particularly among recalcitrant employers who knowingly and repeatedly put their employees in harms way. The SVEP, which replaces

OSHA's existing Enhanced Enforcement Program (EEP), is intended to focus increased enforcement attention and resources on employers who have demonstrated indifference to their obligations under the Occupational Safety and Health (OSH) Act. In particular, the SVEP targets the most egregious and persistent violators who have willful, repeated, or failure-to-abate violations in one or more of the following circumstances: (1) a fatality or catastrophe situation; (2) in industry operations or processes that expose employees to the most severe occupational hazards and those identified as "High-Emphasis Hazards;" (3) exposing employees to hazards related to the potential release of a highly hazardous chemical; or (4) all egregious enforcement actions.

Under OSHA's definition, employers that behave in a way that indicates they may be indifferent to their legal obligations and thereby endanger their workers would become an SVEP case. The SVEP actions, consisting of more inspections, public notification, and other measures, are intended to increase attention on the correction of the hazards or recordkeeping deficiencies found in these workplaces and, where appropriate, in other worksites of the same employer where similar hazards and deficiencies are present.

The changes the Protecting America's Workers Act (PAWA) would make to the OSH Act's criminal provisions are another way OSHA could better ensure companies whose corporate management knowingly ignores health and safety laws throughout multiple facilities face appropriate consequences for these actions. PAWA would change the burden of proof from "willfully" to "knowingly." Section 311 states that any employer who "knowingly" violates any standard, rule, or order and that violation results in the death of an employee is subject to a fine and not more than 10 years in prison. Currently, the maximum period of incarceration upon conviction of a violation that costs a worker's life is 6 months in prison, making these crimes a misdemeanor. Nothing focuses attention more than the threat of going to prison and we believe this change would better hold corporate feet to the fire when it comes to safety and health.

In addition, potential criminal liability is expanded to any responsible corporate officer or director, which addresses Federal court rulings that limited liability for OSHA violations to corporations and high-level corporate officials. This section is aimed at the small minority of corporate officials who have behaved irresponsibly, resulting in the death or maiming of their employees. OSHA currently has no penalties adequate to deter such conduct.

QUESTIONS OF SENATOR ENZI

Question 1. How many inspections does the average OSHA inspector conduct per year? How many of those are programmed inspections, and how many are in response to an accident or complaint?

Answer 1. In fiscal year 2009, OSHA inspectors conducted an average of 39.6 inspections. Of those, approximately 28.9 inspections were programmed, one inspection was the result of a fatality or catastrophe, and 7.94 were in response to a complaint.

Question 2. Despite your assurances, I have received no information about the alternative funding mechanisms OSHA is supposed to be considering for Voluntary Protection Programs (VPP). Please describe the system you are proposing in detail.

Answer 2. The Agency has been approached by Congress about exploring a fee-based system for operating VPP. We are currently exploring the feasibility and benefit of this type of system and its overall impact on the Agency's effectiveness in achieving its mission to assure the safety and health of our Nation's workers. As part of that process, we have reviewed a 2008 study performed by the Government Accountability Office (GAO), *Federal User Fee: A Design Guide*, and found that user fees, if well designed, can promote economic efficiency and be a viable option to deal with scarce budgetary resources. Our goal in exploring this possibility is to ensure that VPP and other Agency programs will function efficiently as a part of OSHA's overall approach to worker safety and health.

Question 3. Who have you worked with in developing this new VPP funding proposal?

Answer 3. We were approached by the House Education and Labor Committee to explore a fee-based system for running the VPP. Some work will need to be done to determine if it makes sense in this context. In doing so, OSHA is committed to working with the Voluntary Protection Program Participants' Association (VPPPA) and other program stakeholders, to whom we have reached out, to identify the best way to structure a fee-based proposal or any other viable options for obtaining non-Federal funding to support this program and the Agency's overall mission.

Question 4. Who has been briefed on the new VPP funding proposal and been given the opportunity to provide feedback?

Answer 4. Preliminary information has been provided to Congressman George Miller on the VPP fee-based proposal.

Question 5. Will the new VPP funding proposal require new legislative authority?

Answer 5. If we were to pursue this strategy, it would require legislative authority.

Question 6. How long would it take to put this new VPP funding system in place?

Answer 6. If the Administration chooses to pursue this option, it would take some time to establish a system for administering it, after the necessary authorizing legislation is enacted.

Question 7. The 2011 Budget Request also proposed shifting 35 FTEs from "support of VPP and Alliance programs to enforcement activity." Has this shift already occurred? If not, when does OSHA plan to make this shift?

Answer 7. The requested shift of resources is part of the agency's fiscal year 2011 budget request and will not be effectuated until it is authorized by Congress in the appropriations process.

Question 8. Does this shift require congressional approval?

Answer 8. Congress sets the total appropriation for OSHA and designates specific dollar amounts for each of the agency's budget activities. OSHA then determines how many FTE can be supported with the funding provided by Congress and if a requested program increase or decrease was provided within the budget activity threshold approved by Congress. The President's request for fiscal year 2011 reflects the requested shift of 35 FTEs.

Question 9. How many new VPP site applications have been processed since your confirmation on December 3, 2009?

Answer 9. As of May 13, 2010, there have been 76 new VPP applications processed and approved since Dr. Michaels' confirmation on December 3, 2009.

Question 10. On 4/19/10, the National Labor Relations Board issued a decision in International Union of Operating Engineers, Local 513, AFL–CIO and Ozark Constructors, LLC, A Fred Weber-ASI Joint Venture, Case 14–CB–10424. In this case a Missouri labor union fined one of its members for reporting a safety violation by another employee union member to the employer at the hydroelectric facility where they worked. The employee was complying with the employer's safety rules by reporting the violation, and protecting himself and all of his coworkers. Yet the union fined him $2,500 for "gross disloyalty or conduct unbecoming to a member." NLRB ordered the union to rescind the fine and post a notice that stated, in part,

> "WE WILL NOT impose a fine on any employee because he or she reports another employee-member to his or her employer for safety rule infractions, at a time when doing so is part of the work duties of the employee who makes the report."

What kind of message does it send to penalize workers for taking steps to make their workplaces safer?

Answer 10. It sends an unconscionable message. Under the OSH Act, a worker has the right to raise concerns about workplace safety or health, whether or not doing so is part of that employee's work duties.

Question 11. Should a labor union be able to prevent employees from reporting hazardous conduct or prevent an employer from disciplining an employee who fails to follow safety rules?

Answer 11. As previously noted, OSHA does not accept restrictions on a worker's right to participate in the protected activity of engaging in the process of ensuring workplace safety and health. This right to raise safety concerns is not conditioned on the worker being required to do so by official duty.

Question 12. At the hearing, Dr. Brandt, the incoming President of the American Industrial Hygienists Association, stated his unequivocal support for workplace alcohol and drug testing programs. Do you support workplace alcohol and drug testing programs?

Answer 12. As you know Secretary Solis' vision for the Department of Labor is "Good Jobs for Everyone." Good jobs are safe jobs. This is why the Department has launched a "plan, prevent, protect" strategy in our spring 2010 regulatory agenda to expand and strengthen worker protections. This program is aimed at efforts to

require each employer to implement an Injury and Illness Prevention Program, one that not only establishes a plan to identify and correct all workplace hazards, but also fosters a culture to prevent such hazards from occurring in the first place.

There are many different approaches to workplace safety, some of which include drug and alcohol testing, although in our experience we have found that drug and alcohol testing programs often have the effect of discouraging worker participation in the health and safety program, or from reporting injuries and illnesses.

We have found that the best way to prevent workplace injuries and illnesses is through this "plan-prevent-protect" strategy where employers and employees work together to prioritize safety and health, address all hazards that may be present, and build a culture that involves workers and their employers.

QUESTIONS OF SENATOR BURR

Question 1. It has been reported that OSHA plans to remove funds currently devoted to cooperative compliance programs and devote them to increased enforcement, with a specific focus on nonunion employers. Can you confirm whether it is true that funds are being reduced and/or diverted away from these cooperative programs?

Answer 1. OSHA's fiscal year 2011 Congressional Budget Justification, which was delivered to Congress on February 1, 2010, redirects 35 full-time equivalent (FTE) positions to the Federal Enforcement budget activity from Federal Compliance Assistance, specifically the Voluntary Protection Program (VPP). The redirection of resources is not being proposed with a specific focus on nonunion employers. The budget proposes refocusing OSHA's compliance assistance work by freeing up the time devoted by compliance safety and health officers (CSHOs) to cooperative programs to allow for increased inspections and the detection of hazards in the most dangerous workplaces. OSHA continues to strongly support VPP, but feels that Federal funds need to be focused on our top priority, which is enforcement of the law for those companies who continue to put workers at risk. OSHA is actively exploring non-Federal funding options such as a fee-based system in order to continue and strengthen VPP.

Question 2. Second, on what statistical basis does OSHA rely in diverting funds from effective cooperative programs such as VPP and STAR and devoting them to increased enforcement activities specifically against nonunion employers?

Answer 2. OSHA must make hard choices in using our limited resources where they are most needed. As a result, OSHA is reducing Federal resources spent on companies that have a proven record of understanding the importance of worker safety and health to invest resources in companies that are not doing a good job protecting their employees. The redirection of resources is not being proposed with a specific focus on nonunion employers.

Question 3. What criteria has OSHA used in making this decision that cooperative programs are ineffective and that nonunion employers are less safe than unionized employers?

Answer 3. One of this Administration's top priorities is effective compliance assistance. Cooperative programs at union and nonunion employers play an important role in OSHA's efforts to provide a voice for workers and to ensure safe and healthy workplaces and worker rights. The Voluntary Protection Programs (VPP) make a valuable contribution to workplace safety, including many with workplace safety and health programs that serve as models for the rest of American companies.

QUESTIONS OF SENATOR ISAKSON

Question 1. Does the Administration support section 309 of PAWA—Objections to Modification of Citations—which allows "affected employees" (who are undefined) to interfere with settlement negotiations and citation modifications if they allege that these "fail to effectuate the purposes of the act?" I fear the effect of this section will be to seriously impede OSHA's ability to negotiate settlements thus tying up OSHA resources unnecessarily and delaying the implementation of settlement agreements that benefit workers.

Answer 1. I understand that the committee has redrafted this section in a way that addresses your concerns. The revised draft would establish the right of a victim (injured employee or family member) to meet with OSHA, to receive copies of the citation at no cost, to be informed of any notice of contest, and to appear and make a statement during settlement negotiations before an agreement is made to withdraw or modify a citation. If a case is not settled, the victim will have a right to make a statement to the Commission, and to have that statement receive due consideration in any Commission decision. No one is affected more by a workplace trag-

edy than workers and their families, and we fully recognize and appreciate their desire to be more involved in the remedial process.

Question 2. How does the Administration expect an already overloaded review system to cope with the combination of many more whistleblower complaints (the result of extending the deadline from 30 days to 180) and strict deadlines for responses (120 days)?

Answer 2. Protecting workers who suffer retaliation for their protected safety and health activity will continue to be both a priority and a challenge for the Department of Labor. We believe that the current, outmoded filing deadlines unfairly impact these workers and should be revised.

Question 3. What data does the Administration have that supports the changes to 11(c) in PAWA (Title II)?

Answer 3. The Department of Labor supports PAWA's modernization of OSHA's anti-retaliation provisions because it provides a more equitable process for complainants, more adequately protects whistle blowers, and conforms the outdated whistleblower provisions of the OSH Act with other, more modern Federal whistleblower laws. While OSHA does not track the specific number of cases dismissed for failure to file within the current, short 30-day deadline, it is clear from our experience administering 11(c) that this happens all too frequently. We strongly believe 11(c) complainants should be entitled to the same period for filing retaliation claims as employees who file complaints under the other whistleblower laws. The nine most recently enacted or amended statutes have 180-day filing deadlines; two have 90-day periods; and one has 60 days. Only the OSH Act and the equally outdated environmental statutes have 30-day filing deadlines. We also support harmonizing other aspects of whistleblower law, including burdens of proof, private rights of action, and *de novo* review, and believe that the whistleblower provisions of PAWA achieve this harmonization in a way that will provide workers with more adequate protections.

Question 4. Does the Administration believe that the approximately 75 percent of claims that are dismissed are meritorious?

Answer 4. In the past 5½ years, OSHA has dismissed 62 percent of the 11(c) complaints it investigated. Of the 1.5 percent forwarded by OSHA to the Office of the Solicitor for litigation, approximately three quarters of 11(c) complaints were declined for a variety of reasons, only some of which relate to the underlying merits of complainant's claim. Some are settled, some are unsuitable for litigation because crucial witnesses may be unavailable, still others because of the extremely demanding burdens of proof under the OSH Act's whistleblower provision.

Question 5. How does PAWA help a small business looking for answers to the safety questions improve its workplace safety? Why would increasing penalties make a difference to small employers who will very likely never see an OSHA inspection unless they have an accident?

Answer 5. PAWA would enable OSHA to continue to support OSHA outreach initiatives for small businesses through compliance assistance, cooperative programs, and training. In addition, no changes are being proposed to services provided to small employers by OSHA On-site Consultation programs. OSHA will continue to develop and enhance its Web site and outreach initiatives to support the safety and health programs of all employers, including small businesses.

While many employers want to do the right thing, others will only comply with OSHA rules if there are strong incentives to do so. It is unfair to employers who are doing the right thing, especially small employers, to allow unscrupulous employers to gain an unfair competitive advantage by cutting corners on safety and health investments.

Because OSHA can only visit a limited number of workplaces each year, we need to strengthen the OSH Act in order to effectively leverage our resources and encourage voluntary compliance by employers. Increased penalties will make employers of all sizes who ignore hazards to their workers' safety and health think again. Unscrupulous employers often consider it more cost-effective to pay the minimal OSHA penalty and continue to operate an unsafe workplace than to correct the underlying health and safety problem. OSHA penalties must be increased to provide a real incentive for employers not to accept injuries and worker deaths as a cost of doing business.

Question 6. On two separate occasions, a bipartisan group of Senators has written to the Labor Department asking for a safety standard specific to tree care operations. The Bush administration responded and pledged to work toward enacting regulations. The Obama administration has now reversed course, despite the fact

that in 2008, the industry's fatality rate was 62.0, nearly three times that of mining and over five times that of construction. Please explain this decision.

Answer 6. OSHA recognizes that hazardous conditions caused by tree care pose a serious threat to America's workers. However, after careful deliberation the Agency has determined that the major issues the proposed rule was intended to correct are already addressed by existing standards. OSHA issued a directive related to tree care and tree removal operations on August 21, 2008 (CPL 02–01–045). This directive provides guidance on existing OSHA general industry standards that apply to tree care and tree removal operations. Examples of current general industry standards discussed in the directive, include Personal Protective Equipment (29 CFR §1910 Subpart I), Material Handling and Storage (29 CFR §1910.176), Hand and Portable Powered Tools and Other Hand Held Equipment (29 CFR §1910 Subpart P), Machinery and Machine Guarding (29 CFR §1910 Subpart O), First Aid Providers and First Aid Kits (29 CFR §1910.151), Fire Extinguishers (29 CFR §1910.157), Occupational Noise Exposure (29 CFR §1910.95), and Flammable and Combustible Liquids (29 CFR §1910 Subpart H). The directive also provides criteria that will assist in determining whether a particular removal of trees is the type of operation covered by OSHA's logging operations standard (29 CFR §1910.266) and the applicability of current OSHA electrical standards.

OSHA is faced with many difficult safety and health decisions, including decisions about which standards to pursue. In determining the best course of action to correct a hazard, OSHA must take a variety of issues into account including resource limitations and other commitments. The Agency's new regulatory agenda, which was issued on April 26, 2010, is intended to reflect an accurate production schedule with realistic timetables for completing rules. As a result, OSHA made a decision to withdraw tree care, and several other rulemakings from the regulatory agenda rather than push the next action dates out for these standards. OSHA will continue to evaluate tree care as a candidate for further rulemaking.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY MICHAEL BRANDT

Question 1. Just last week the National Labor Relations Board decided a case in which a Missouri labor union had fined one of its members $2,500 for reporting a safety violation by another employee union member to the employer at the hydroelectric facility where they worked. (International Union of Operating Engineers, Local 513, AFL–CIO and Ozark Constructors, LLC, A Fred Weber-ASI Joint Venture, Case 14–CB–10424, 4/19/10) The employee was complying with the employer's safety rules by reporting the violation, and protecting himself and all of his coworkers. What kind of message does it send to penalize workers for taking steps to make their workplaces safer?

Answer 1. While there is no simple answer to your question, I will summarize my opinion and then provide a more detailed explanation of it.

This specific case (355 NLRB No. 25) involves an employee reporting an "unsafe condition" in the workplace to the site safety officer. Every organization has conditions of employment that each employee agrees to obey when they are hired. These workplace rules are typically designed to codify organizational norms and set behavioral expectations for employees. Also, the application of workplace policies is oftentimes subject to interpretation of the specific circumstances surrounding any violation of policy.

My reading of the Decision indicates that while there is a subtext of discord within the union local, the union chose to penalize the worker for reporting the unsafe condition in the workplace. The employee had an obligation to act to report an observed safety hazard to protect himself and his coworkers. The union officials chose to place fidelity to union rules over safety, which is akin to an often used argument that "management places production schedules over safety" when an injury occurs. Both approaches fail to consider the risks to workers resulting from uncorrected, unsafe or unhealthy conditions in the workplace. Doing so could result in a serious injury and a work stoppage. The union's decision to penalize this worker for reporting an observed safety hazard sends the message that will very likely result in silencing other union members who may observe a safety hazard and result in an increased risk in the workplace.

As I stated in my testimony to the HELP Committee, each employee has a reasonable expectation to return home healthy and safe. I also stated that a precondition for a safe workplace is shared responsibility and accountability between labor and management. I will briefly elaborate. A central principle of occupational health and safety is to identify potential hazards and intervene early to eliminate the hazard and reduce the risk. This requires that various defenses be implemented to:

- Create an understanding and awareness of the hazards associated with a given work activity through anticipation and recognition of potential hazards associated with a work activity;
- Give clear guidance on how to work safely through work instructions;
- Eliminate the hazard at the design stage or by implementing controls to mitigate the hazard such as engineering solutions, personal protective equipment, or administrative measures (warning signs, work procedures);
- Evaluate the effectiveness of the control measures in eliminating or reducing the risk associated with the hazard as low as reasonably achievable.

Question 2. Should a labor union be able to prevent employees from reporting hazardous conduct or prevent an employer from disciplining an employee who fails to follow safety rules?

Answer 2. Given the topic of the recent HELP Committee hearing on unsafe workplaces, it does not make any sense for a union to prevent workers from reporting hazardous conduct or unsafe conditions. Each employee has a reasonable expectation that they will return home safe at the end of their work day. Programs such as VPP and other management systems promote both management *and* employee participation and involvement in a workplace safety and health program. Workplace rules that prevent reporting, and thereby prevent correcting, unsafe conditions are not likely to be found in organizations with good safety records. Such workplace rules violate the basic public health and safety principle that intervening early in an unsafe or unhealthy workplace will reduce the severity of the outcome or eliminate the observed risk to workers. Finally, organizations with a just and positive safety culture *encourage* workers to "find and fix" workplace hazards as a routine behavior.

Question 3. I was glad to hear of your support of Voluntary Protection Programs (VPP). What do you think is responsible for the considerable growth in new VPP members over the last decade?

Answer 3. VPP has been successful because contemporary high performing and financially successful organizations recognize that investing in health and safety is good for both the business and for the employees. I describe four examples of how health and safety has been successfully integrated into business; see my response to Senator Harkin's question below. These examples, while not necessarily from VPP sites, reflect the basic components of VPP: management and employee involvement and collaboration toward common goals, work process analysis using common quality management analytic techniques, hazard elimination and mitigation with positive business financial and productivity impacts, and workplace risk reduction.

Health and safety leaders from professional societies such as the AIHA have been promoting a systems approach to health and safety management over the past decade. While there are a number of different management systems being promoted globally each shares these common features:

- management leadership and involvement to lead by example;
- employee participation in work planning, hazard identification and control, and the safe execution of work;
- workplace and work activity analysis to identify health and safety hazards;
- control measure implementation to mitigate or eliminate identified hazards; and measuring the effectiveness of the control measures to reduce or eliminate the identified hazards.

These steps are complimentary and supportive of other workplace continuous improvement and productivity improvement initiatives that have been implemented in commercial business, government, and industry in response to the globalization of markets and the subsequent economic competition.

Question 4. How does VPP build the culture of safety in workplaces?

Answer 4. In my experience as a labor trades worker, practicing industrial hygienist, operations manager, and executive, I have found that operational excellence is derived from a culture of trust and cooperation. Management provides the leadership and the resources to support safety and employees plan and perform their work by being knowledgeable about the potential hazards and take action to eliminate or mitigate those hazards. employers with good safety records encourage their employees to "stop work" in the event that an unsafe condition is observed and take action to correct the condition and eliminate the hazard. Such organizations routinely perform their work safely, securely, and with high quality because they have established a cultural expectation of operational excellence. A common thread in such organizations is a culture of continuous improvement in which work processes are routinely improved and optimized. By comparison, VPP provides a framework for build-

ing cooperative relationships between labor and management to improve the health and safety performance of an organization. VPP and quality management tools and techniques are complimentary and assist organizations to achieve two common goals of any business enterprise. The first goal is to perform high quality work, which means that the workplace will be free of health and safety hazards or identified hazards are controlled. The second goal is to execute work to produce high quality products and services that are valued by customers.

Question 5. Do you support the Administration's request to appropriate no funds and no staff to VPP in fiscal year 2011?

Answer 5. While I understand OSHA's priority of increasing enforcement, I do not support moving the $3M of funding of a program that is designed to create a positive safety culture in which labor and management collaborate to identify and eliminate health and safety hazards.

UNITED MINE WORKERS OF AMERICA (UMWA),
TRIANGLE, VA 22172–1779,
May 7, 2010.

Hon. TOM HARKIN, *Chairman,*
Senate HELP Committee,
731 Hart Senate Office Building,
Washington, DC 20510.

DEAR SENATOR HARKIN: This is a followup to some of the issues and concerns raised during the Senate HELP Committee's April 27, 2010 hearing on chronic enforcement problems that jeopardize workers' health and safety. We would like to supplement the record with this additional information to supplement our written statement and comments made during the hearing.

Many troubling issues have come to light since the Upper Big Branch mine disaster, one of which has to do with accident reporting. Massey repeatedly touts its relatively low "non-fatal lost time" injury statistic, and claims that demonstrates its operations are safer than many comparably-sized competitors. This is wrong. Especially since the Upper Big Branch disaster, many Massey employees have spoken about the significant pressure the Company puts on its injured workers to return to work after suffering work-related injuries, even when the employees cannot return to their normal jobs. Instead, the Company expects its employees to return to the mine, where the operator permits its injured employees to perform "light duty" tasks. This practice means that Massey's lost-time data is misleading, even fraudulent, insofar as the data suggest that Massey employees are not experiencing many of the work-related injuries they actually have suffered. This is troublesome for many reasons: when an injured worker fails to fill out an injury report, MSHA does not learn about it and a potentially dangerous condition—one that might injure other workers—escapes its scrutiny; also, hurt workers don't have the opportunity to heal properly, but are pressured to return to productive work as soon as possible.

It is also worth noting that Massey's CEO, Don Blankenship is paid substantial performance bonuses based on the (apparent) reductions in Massey's lost time accidents! While he is collecting huge sums based on misleading data, his employees are coerced into returning to work despite being hurt on the job: for 2008, Mr. Blankenship was credited with a 13.9 percent reduction in work lost to non-fatal injuries. Yet, if Massey employees are simply paid to stay in the bathhouse when they are hurt, the reported data is meaningless (and Blankenship's bonus is erroneously inflated).

In addition to needed reforms contained in the S-Miner Act, we suggest there are many procedural changes needed that could serve to improve miners' health and safety. While MSHA can certainly take action itself in order to improve miners' health and safety, we believe that legislation is needed to make a number of these changes.

We urge the following improvements be effected:

1. Improve Pattern of Violation regulations to permit the Assistant Secretary to act to identify and impose a pattern of violations regardless of whether violations are under appeal.

2. Fines should be placed in escrow throughout any challenge, until there is a final order. If an operator is delinquent in paying final penalties, its operations should be suspended, but with miners suffering no loss of pay.

3. The Agency should be granted subpoena power for routine investigations, and all accident investigations.

4. Accident investigations should include the families of any families killed from the accident under investigation; families of miners killed should be allowed to designate a miners' representative for purposes of the accident investigation.

5. MSHA's accident investigations should routinely include an inquiry into MSHA's own conduct, and the investigation team should include independent parties who can analyze MSHA's role, if any.

6. MSHA should maintain information about the safety performance of contractors operating on mine properties and reveal the conduct vis-á-vis the mine's operator. When data show that operators tolerate substandard safety performance among their contractors, MSHA should take action against both the contractor and the operator.

7. Improve whistle-blower protections and enhance penalties for discrimination against miners who complain about health and safety conditions. Make it a criminal penalty where prosecution can lead to loss of mining permit and jail time.

8. MSHA should have greater authority to close all or part of a mine when conditions warrant. Give MSHA the authority to pull mining permits when operators become repeat violators and chronically fail to comply.

9. Penalties for employer violations should be increased to felonies, and Company principals should not be allowed to escape prosecution by hiding behind a corporate structure.

10. MSHA should adjust how it evaluates its inspectors (so that they are not judged by the percentage of citations upheld, which serves to dissuade them from issuing citations).

11. Require the mine superintendent to sign all underground and surface examination reports that are required to be recorded in writing.

12. Expand the rights of designated miners' representatives, such that they will have the right to participate in conferences and accident investigations with no loss of pay.

The following substantive improvements are also needed to better protect miners:

- Require continuous monitoring of seals where seals of less than 120 PSI are used.
- Increase rock dusting/incombustible content in intake entries to 80 percent per NIOSH recommendation.
- Improve flame resistant conveyor belts.
- Prohibit the use of belt air to ventilate active working places.
- Pre-shift review of mine conditions—establish a communication program at each operation to ensure that each person entering the operation is made aware at the start of that person's shift of the current conditions of the mine in general and of that person's specific worksite in particular.
- Install atmospheric monitoring systems in all underground areas where miners normally work and travel that provide real-time information regarding carbon monoxide levels, and that can, to the maximum extent possible, withstand explosions and fires.
- Each miner working alone for even part of a shift must be equipped with a multi-gas detector that measures current levels of methane, oxygen, and carbon monoxide.
- Require the use of roof screen in belt entries, travel roads, and designated intake and return escape ways.
- Improve scrutiny of barrier reduction or pillar extraction plans where miners are working at depths of more than 1,500 feet and in mines with a history of mountain bumps.
- Establish a program to randomly remove and have tested by NIOSH field samples of each model of self-rescue device used in an underground coal mine in order to ensure that the self-rescue devices in coal mine inventories are working in accordance with the approval criteria for such devices. This should be a mandatory program unlike the voluntary system used today.
- Require examiners to sign and date to confirm examinations have been made of sealed areas when exams are required more often than the current weekly exams.
- Update all PELs and establish a mechanism to periodically update them if recommended exposures change.
- Increase the strength of psi rating currently required for ventilation controls.
- Require mine superintendents to be certified foreman/mine foreman in the State they are working.
- Require a minimum of four (4) entries to be examined and maintained travelable in all bleeder return entries.
- Require two (2) unobstructed intake escape ways for miners to have access in case of an emergency.
- Eliminate approvals of push/pull ventilation systems.

- Eliminate approvals of wraparound bleeder systems.
- Require all mines classified as gassy to remove methane prior to mining.
- Require machine mounted methane monitors to be calibrated so that they automatically shut down the machine at one percent (1 percent) methane. The monitors will also be designed to shut down if they become bridged out or tampered with.

Finally, we wish to alert you to a problem with the facility at Lake Lynn, which has been shut down for some time due to structural damage of the roof that occurred while blast-testing seals to meet the criteria of the MINER Act. This facility is a great resource to miners for testing new technologies, as well as a great training facility for mine rescue team members. Currently, the industry is forced to test products at the mine site. We recently almost lost a Jim Walters operation in Alabama to a mine fire while doing a test for a mine sealant. It could have resulted in loss of lives and a mine shutdown. It would be a huge help to miners across this country if the Senate could allocate the funds needed to reopen Lake Lynn.

Sincerely yours,

CECIL E. ROBERTS.

[Whereupon, at 5:39 p.m., the hearing was adjourned.]