TESTIMONY OF

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The National Mining Association (NMA) appreciates the opportunity to share our views on the Miner Safety and Health Act of 2010 (H.R. 5663), legislation that has been introduced to amend the nation's mine safety laws.

As backdrop to today's discussion, it is helpful to note that U.S. mining operations have decreased fatal and non-fatal injuries by 72 percent and 64 percent respectively over the last two decades. Eighty-seven percent of all U.S. mines operated without a single lost time injury in 2009. Those trends have sustained our dedication to injury-free mining, and we expect 2010 to close with more than 85 percent of all U.S. mines operating without a single injury.

The tragedy at the Upper Big Branch Mine in April was an abrupt interruption to that positive trend and has appropriately caused all of us to re-examine the adequacy of the industry's current safety and health practices and the existing statutory and regulatory authorities to achieve our goal. While there are many voluntary initiatives, technology advances and innovations in miner training and safety awareness underway in U.S. mines, today's hearing focuses on legislation to address the role and enforcement authorities of the Mine Safety and Health Administration (MSHA) and the relevant rules that govern their actions, the actions of mining operations and the workforce.

In support of our shared health and safety goals, we have looked at the proposed legislation within the framework of the following principles:

- Will it improve mine safety and health—our number one priority;
- Does it ensure greater transparency in the regulatory, investigative and enforcement process;
- Will it build upon, rather than dismantle, the positive features of existing laws and regulations that have contributed to mine safety and health;
- Does it avoid additional layers of enforcement, penalties and other actions that are already provided for under the law, but not fully utilized;
- Does it provide penalties that are commensurate with the severity of the violation;
- Will it protect due process rights; and
- Will it maintain a robust domestic mining industry that meets the needs of the American people while maximizing the health and safety of its workforce?

We have used this framework to identify omissions in the proposal that merit attention; provisions that basically align with these principles and ones the industry could support with some modification; and provisions that are counter to these principles.

I would like, first, to turn to the omissions, which we believe could make significant contributions to miner safety and health:

I. Items of Omission

A. Inspection and Enforcement Resources and Allocation

The Committee has received testimony at earlier hearings that established that: (1) the Mine Safety and Health Administration's (MSHA) authority under existing law was adequate but often unexercised; and (2) improvement in the allocation and use of resources would enable the agency to direct attention to the places where they are most needed. For the most part, H.R. 5663 bypasses these fundamental issues and instead adds more punitive and complicated measures on top of an existing law the agency has not utilized to the fullest extent.

Much attention was been devoted in prior hearings to the backlog of appeals of enforcement actions and penalties before the Federal Mine Safety and Health Review Commission (Commission). Yet, as this Committee has been advised in prior testimony, appeals of enforcement actions do not compromise the safety of miners because under the Mine Act, unlike most other laws, mine operators must abate violations *before* any hearing is provided or suffer closure of the mine.

The backlog of existing appeals is symptomatic of more fundamental issues related to implementation of the existing law rather than a cause for changing the law. Testimony from the Committee's Feb. 23, 2010, hearing identified a convergence of circumstances that have not only produced an increase in the number of appeals of citations and penalties, but also point to fundamental weaknesses in the existing law's implementation. There were substantial areas of agreement among all who testified at the February hearing on ways to address these circumstances.

1. Lack of Consistency in the Enforcement of the Law

The Assistant Secretary testified that consistency in the application of the laws is critical to an effective mine safety program and requires ongoing training and review. He reported that a substantial number of highly experienced mine inspectors have retired, and almost 50 percent of the current inspectors have been hired in the past four years. Moreover, the Inspector General recently found that 56 percent of the "journeymen" (those that have completed entry level training) inspectors have not completed mandated retraining, and 27 percent do not believe the training provided is adequate for them to effectively perform their duties. Office of Inspector General, USDOL, *Journeyman Mine Inspectors Do Not Receive Required Periodic Retraining* (March 30, 2010). Specifically, the IG report found that, "MSHA did not assure that its journeyman inspectors received required periodic retraining … inspectors may not possess the up-to-date knowledge of health and safety standards or mining technology needed to perform their inspection duties."

Fully trained and experienced inspectors are fundamental to a credible program. Again, as the Assistant Secretary advised the Committee, consistency requires effective and ongoing training at all levels—inspectors, District Managers and conference officers—to ensure inspectors "are not issuing citations for conditions where there is no violation or where there is a lack of evidence to support the inspector's findings." Effective training of inspectors and managers is also important to assure consistency in the application of the law, including the characterization of any violation, because the criteria (e.g., likelihood and severity of possible injury, number of persons possibly affected, and negligence) are inherently subjective.

Failure to address this critical component of the enforcement program is a shortcoming of the pending legislation. Inspector training programs must be improved and the delivery of training must be more frequent than the current requirement for two weeks training every two years. An effective understanding of the statutory requirements, as well an effective understanding of applicable interpretative case law are essential if the agency's enforcement is to achieve the objectives miners and mine operators expect. Moreover, this will reduce the number of citations challenged before the Commission as inspector actions conform to applicable case law rather than alleging statutory language needs to be included to justify unwarranted actions.

2. Changes in the Law & Regulations

The significant turnover in MSHA's inspectors also coincided with substantial changes in the law under the MINER Act. At a time when new inspectors were coming on board and more than half of the experienced inspectors were not receiving retraining, they were all faced with an array of new standards they were expected to enforce. Moreover, the MINER Act and MSHA regulatory actions changed the civil penalty assessment system in terms of both the manner and amount of penalties for different types of citations. As the Assistant Secretary testified forthrightly, "[t]hese changes can create a potential for inconsistent application of the Mine Act."

3. Suspension and Revision of the Conference Process

MSHA historically held safety and health conferences, when requested by mine operators, to discuss and resolve disputes over violations related to inspector findings. These conferences covered whether a violation existed or the seriousness and potential consequences of such violations—all factors that impact the level of the penalty for the violation as well as the consequences for future citations. The resolution of these matters often would result in no formal appeal being filed by the operator before the Commission. In February 2008, MSHA suspended the conference process for most violations. This had the perverse effect of pushing to the Commission the resolution of most of the violations and penalties that had been routinely resolved without any formal appeal. The process reinstated by MSHA a year

later did little to relieve the Commission backlog because a conference is only provided *after* a penalty was assessed and *after* an operator appeals both the citation and the penalty to the Commission. As the chair of the Commission testified on Feb. 23, "[t]he vast majority of our cases result in settlements." Indeed, many of these settlements involve the very citations and penalties that were previously resolved in a MSHA conference.

The absence of a timely and meaningful conference process has not only contributed to and aggravated the backlog of appeals; it also has robbed the program of a time-proven tool that provided some assurance against the risk that inherently subjective factors would lead to arbitrary outcomes. As MSHA found in its rulemaking for the former conference process, "the safety and health of miners is improved when, after an inspection, operators and miners or their representatives are afforded an ample opportunity to discuss safety and health issues with the MSHA District Manager or designee." 72 Fed. Reg. 13,624 (March 22, 2007).

We were not alone in recognizing the need to reinstate a transparent, independent conference process to address, prospectively, the case backlog before the Federal Mine Safety and Health Review Commission. The Assistant Secretary for MSHA has testified that, "The option to hold conferences prior to the operator's contesting the penalty seems to be the best approach to resolve disputes over violations early in the process and keep those citations out of the backlog."

Some believe this matter can be addressed by MSHA initiating administrative action to reinstate the conference process. We disagree. While it is correct that MSHA can reverse this administratively, the same actions that gave rise to this situation can be repeated in the absence of statutory conference authority. We believe that the pending bill should be amended to provide this authority.

B. Inspection Activity and Resource Allocation Decisions

The preceding discussion leads us to raise another fundamental question. Are we focusing our resources where they are most needed? Under current law, MSHA must inspect every underground mine four times a year and every surface mine twice per year. But this mandate does not translate into four days or two days of inspections annually. Rather, these inspections often last for weeks, months or year-round for some mines. Some underground mines, because of their size, not based on compliance history, experience 3,000-4,000 on-site inspection hours each year. There must be a better way to deploy the resources to where they are needed most.

NMA believes it is time to consider a different way of deploying resources based upon safety performance. Under existing law, mine operators must immediately report all accidents and report quarterly all lost time injuries and reportable illnesses directly to MSHA. This has produced an extraordinary

database that can be used to guide inspection activity and allocate inspection resources based on documented need and analysis related to safety performance and risks. It is far more likely that effective inspection activity will be based on documented need and analysis than on entirely subjective or ambiguous criteria, let alone on rote compliance with mandates of the Act.

Some believe that MSHA lacks adequate resources to implement an effective enforcement program to focus on recalcitrant operators while still meeting the statutory mandates to inspect each underground mine four times a year and each surface mine twice yearly. We disagree. MSHA must be authorized and directed to utilize the information available to identify problem areas and allocate its inspectorate accordingly. Just as MSHA was able to identify 57 mines for targeted enforcement in the days immediately following the Upper Big Branch tragedy, so too must they utilize this same information to target mines that pose an immediate hazard to miner safety and health.

Working together we believe a system can and must be developed that would refocus the number and scope of inspections based on performance and the adoption of verified and objectively administered performance goals. H.R. 5633 should be amended to provide MSHA with the authority to implement such a program.

C. Plan Review

Central to the functioning of an effective safety management program is the development and administration of a transparent process that provides for timely consideration of plans necessary to ensure the safety and health of miners. Unfortunately, MSHA's plan review process does not meet these goals.

Today, MSHA's technical resources are challenged as operators face more difficult geologic conditions. As a result, plan consideration has become more difficult and less timely. MSHA, industry, academia and others are competing for the small pool of technical expertise required to assist in the development of mining processes and plans necessary to maximize resource recovery AND ensure the safety and health of the workforce. Imposing new punitive measures without addressing this fundamental need will do little to advance miner safety and health.

At its core, the submission of plans culminates in a quasi-risk assessment process, the goal of which is multi-faceted. While plans are structured to comply with regulatory requirements, they are, in the broader sense, intended to foster a culture of prevention at the mine. Unfortunately, the lack of a defined process for the consideration of plans frustrates this objective and jeopardizes miner safety and health.

H.R. 5663 will exacerbate this problem by expanding MSHA's authority without addressing the true underlying problem. Despite characterizations to

the contrary, MSHA has the authority to revoke plans and has not been hesitant to do so. While this authority is cast in terms of plan revisions resulting from the violation of underlying standards or the identification of a potentially hazardous condition, the end result remains the same. The legislation's punitive plan revocation approach will worsen the plan process to the detriment of miner safety.

Before we embark upon comprehensive overhaul of the Mine Act, there should be a clear-eyed assessment of whether fundamental components of the existing law are being properly and fully executed. The Assistant Secretary has set forth several areas that need attention: (1) improved implementation of the Mine Act; (2) simplification of the contested case process; (3) improved consistency by MSHA inspectors and supervisors; and (4) creation of an environment where fewer cases enter the contest process. None of these fundamental needs related to the implementation of the existing law are advanced by H.R. 5663.

If half the inspectors are new and the other half are not properly trained, adding more punitive and complex requirements aimed at mine operators will only put more weight on a unstable foundation. In light of the information gathered at recent hearings regarding the substantial turnover in inspectors and the significant shortcomings in inspector training, maybe it is time to step back and perform an objective evaluation of: (1) the relationship (or correlation) between violation rates and injury rates at mines; (2) the source of injuries in terms of "at risk" conditions or "at risk behaviors"; and (3) consistency and clarity in the application of the law.

If there is not a strong correlation between significant and substantial violation rates and injury rates, what does that tell us in terms of the implementation of the existing law? This question was examined in 2003 where ICF Incorporated, in a report to the Department of Labor, entitled *Mine Inspection Program Evaluation,* stated that, "[t]he data indicate that the numbers and types of days lost injuries occurring over the past 5 to 10 years are not well correlated either quantitatively or qualitatively with the citations issued through inspection enforcement activities.

If injuries, incidents or near misses are arising more from "at risk" behavior than"at risk" conditions, what does that tell us about the focus of the program and allocation of safety resources? And, if inconsistency in the application of the law is, as the Assistant Secretary has suggested, an impediment to regulatory certainty and compliance, wouldn't we be better served by focusing on improving implementation than foisting more changes on inspectors and operators struggling to attain clarity and consistency in the application of existing law and regulations?

These are areas that should be examined and included as part of a broad effort to improve mine safety but unfortunately the pending bill is silent on these aspects.

II. Areas of Conceptual Agreement

The National Mining Industry supports improvements in our nation's mine safety and health laws that would (1) create fair and uniform procedures for enforcement; (2) target recalcitrant operators; (3) provide for transparency in the development and administration of regulatory requirements; (4) provide flexibility to the government and mine operators to focus resources on problem areas; and (5) encourage the development and implementation of processes for improving performance that are outside the bounds of the current regulatory structure. While H.R. 5633 does not address all of these components and, in fact, moves in several areas in a direction that we feel will be detrimental to miner safety and health, there are selected aspects of the bill that move in this direction and are ones NMA could support, if modified.

A. Independent Investigation Authority

The establishment of an independent authority to investigate mine disasters has been debated for many years. Some have advocated the creation of a full-time authority along the lines of the Chemical Safety Board or the National Transportation Safety Board to investigate, report on and make recommendations for the prevention of future mining disasters. H.R. 5663 takes a more tailored approach by vesting this authority with the National Institute for Occupational Safety and Health, Office of Mine Safety and Health Research. Should such authority be granted, we support vesting this authority in NIOSH.

We are concerned; however, that the language of the bill goes beyond what is necessary and will complicate an already difficult environment. Mine disaster investigations are tedious endeavors. The work of the investigative teams must be exhaustive and without reproach. MSHA has proven capable of undertaking such investigations, and their authority to do so must not be undermined. What has been called into question is the ability of the agency to examine its own actions during the period preceding and following the event. We believe this is the appropriate role for NIOSH.

Rather than duplicating the investigatory activities already instituted by MSHA, applicable state authorities and other entities, NIOSH's role should focus solely on MSHA activities.

B. Pattern of Violations

NMA supports reform of the Pattern of Violation system. The current system is dysfunctional and has not served its intended purpose. Neither mine operators nor miners are able to navigate the current system. It lacks transparency, does not provide timely information, and is not structured to rehabilitate problem mines.

H.R. 5663 represents a step in the right direction to correct the problems with the current system by looking at the mine's overall safety performance and not rendering POV determinations solely on the basis of subjective compliance determinations. We are concerned, however, that the provision is overly punitive and will not accomplish the sponsor's goal to rehabilitate problem mines. In his July 6 response to the Inspector General's, June 23, Alert Memorandum, *MSHA Sets Limits on the Number of Potential Pattern of Violation Mines to be Monitored,* the Assistant Secretary stated the need for the, "… creation of a screening system that will identify mines that chronically fail to implement proper health and safety controls." He went on to stress the need for the agency to, "[f]ocus its POV enhanced inspection resources on those mine operators that have chronically failed to protect the safety and health of the miners and that continue to put miners at risk."

We support the Secretary's goal. We are, however, extremely concerned that under the pending legislation many of the decisions regarding implementation of a new POV program are vested with MSHA rather than proscribed in the legislation. MSHA created the dysfunctional system that exists today. We cannot afford to repeat that situation.

We believe a workable system can be developed to properly identify and rehabilitate problem mines, and we look forward to working with this committee to develop to correct metrics to accomplish this goal.

C. Modernizing Health and Safety Standards

Title V of H.R. 5663 contains provisions that are, for the most part, applicable to underground coal mining. These provisions would update and expand existing requirements related to: (1) communicating information regarding dangerous conditions throughout the workforce; (2) updating rock dust standards; (3) examining the application of new technologies to protect miners; and (4) enhancing miner training.

These subjects are conceptually ones the industry has long supported to improve miner safety and health, and NMA could support with slight modification.

III. Areas Where the Pending Legislation Will Not Advance Miner Safety

As noted earlier, NMA supports improvements in our nation's mine safety and health laws that would (1) create fair and uniform procedures for enforcement; (2) target recalcitrant operators; (3) provide for transparency in the development and administration of regulatory requirements; (4) provide flexibility to the government and mine operators to focus resources on problem areas; and (5) encourage the development and implementation of processes for improving performance that are outside the bounds of the

current regulatory structure. Unfortunately, the majority of the pending legislation is not "rehabilitative" as some have contended. Rather, the bill is harshly punitive and restrictive, creates new disciplinary authorities that have little to do with miner safety, and intrudes on management prerogatives and labor/management practices to the detriment of overall management of effective safety and health programs.

Turning to those areas that NMA believes do not align with the principles we have articulated, we note the following:

A. Mine safety progress is threatened by overly punitive provisions

Rather than affording mine operators the flexibility needed to structure safety programs to meet individual mine site needs, the bill will thwart progressive programs that have led to dramatic safety improvements across U.S. mining. The expansion of potential liability will have the unintended consequence of causing companies to pare back their safety programs to the bare regulatory requirements rather than adopting new techniques, processes and practices that have led to health and safety improvements in the U.S. and elsewhere.

B. Mine safety would not be advanced by additional MSHA workforce authority

The bill would inject MSHA, for the first time, into matters that are reserved for management decision-making and/or the subject of labor/management negotiation. The expansion of MSHA authority into hiring and termination decisions, mine site staffing and operational decisions will not advance mine safety and may expose the agency to liability considerations, as these actions extend beyond enforcement of regulatory standards into mine design and operational considerations.

C. Mine safety and health will not be improved by penalty provisions that are not commensurate with the severity of the violations

H.R. 5663 would increase financial penalties, establish new criminal penalties and restrict the ability of mine operators to contest inappropriate enforcement actions. These stricter enforcement provisions, which would apply to all mines, will not contribute to improved health and safety. The MINER Act and the 2006 revisions to the Part 100 civil penalty regulations exceeded the agency's estimated impact many times over. Yet the legislation proposes further increases in penalties, limits operator's ability to contest frivolous enforcement actions and places undue limitations on operators and on the Federal Mine Safety and Health Review Commission's authority to reduce unwarranted enforcement actions.

Further, the dramatic expansion of offenses that are now deemed "criminal" and the application of civil and criminal liability to officers, directors and agents will discourage the implementation of new ideas and discourage miners from accepting management positions, quell innovation and create a lack of experienced miner leadership over time.

Finally the dramatic expansion of pay protection to include operator decisions that might have resulted in a closure order may discourage operators from closing down areas of a mine for safety reasons – to the detriment of miner safety.

D. Misallocation of safety resources will weaken safety efforts and results

H.R. 5633 will greatly expand the definition of "significant and substantial" violations. The current process for indentifying a violation as S&S was developed more than 20 years ago by the Federal Mine Safety and Health Administration under the Carter administration. The Commission recognized that no differentiation in the severity of violations led to unfocused safety efforts and set in place today's definitions. Returning to those old days, when roughly 90 percent of all citations were deemed "significant and substantial," is a step in the wrong direction that will destabilize safety efforts and demoralize much of our work force.

Miners and operators understand the current definition and process for designating a violation as S&S. Unfortunately, many MSHA-determined violations are routinely modified by AJL's. Rather than redefining S&S to validate incorrect designations, the focus should be on ensuring that inspectors receive the training necessary to correctly identify violative conditions and their attendant severity. Treating virtually every citation as S&S will shift attention away from those conditions and practices that have the highest potential to cause injury or illness and focus efforts on mere rote conformity with the regulations, absent any consideration of risk.

E. Transparency is undermined by proposed rulemaking process

Notice and comment rulemaking is fundamental to the MINER Act and its predecessor statutes. It serves a dual purpose: 1) It affords stakeholders the due process required by law by providing a reasoned forum that allows all interested parties to comment on proposed regulations; and 2) It helps governmental agencies such as MSHA collect the best available information so that final regulations are effective and fair. H.R. 5663 would circumvent this crucial rulemaking process in key areas—and forgo the advantages it confers— by requiring the Secretary to issue "interim final rules" that are effective upon issuance, in the absence of stakeholder input.

Conclusion

Today's mine safety and health professionals face challenges far different from those anticipated when our nation's mine safety laws were first enacted. More difficult geological conditions, faster mining cycles and changes in the workforce introduce potential complications requiring new and innovative responses. Today's challenge is to analyze why accidents are occurring in this environment, and use that analysis as a basis for designing programs or techniques to manage the accident-promoting condition or cause.

Regrettably, the bill before the committee does not respond to many of these challenges and will not, in our view, accomplish our shared goal. Trying to force safety improvements through punitive measures fails to acknowledge the complexities of today's mining environment, and is not the answer we all seek. Acting on false perceptions of what is needed now will only create false perceptions of progress, not safer mines.

We understand the call by members to address perceived shortcoming in MSHA's statutory and regulatory structure. Indeed, we share the concerns of others with certain elements of MSHA's authority. We do not believe, however, that sufficient attention has been given to the weak foundation upon which MSHA's regulatory authority is built and to the execution of that authority to warrant such sweeping legislation.

We stand ready to work with the members of the committee on actions we should be taking—some of which I have outlined—just as we did before Congress enacted the MINER Act.