STATEMENT OF
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BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

July 13, 2010

For more than three decades, the enforcement tools in the Mine Act and the Occupational Safety and Health (OSH) Act have played a pivotal role in helping cut the number of work-related injuries, illnesses, and deaths to historic lows. But, as recent tragic events have demonstrated, all tools need to be recalibrated and sharpened from time to time if they are to remain useful. The tools in the Mine Act and the OSH Act are no exception. I would like to focus my comments today on several provisions in H.R. 5663, the "Miner Safety and Health Act of 2010," that will, if enacted, sharpen our existing enforcement tools and help make our mines and other workplaces safer and healthier places to work.

Under the Mine Act (the Act), an operator with "significant and substantial" (S&S) violations can be subject to increasingly severe enforcement actions, including withdrawal orders. Although Congress did not define the phrase "significant and substantial" in 1977 when it passed the Mine Act, the Mine Safety and Health Administration (MSHA) and the Solicitor's Office believe that the phrase applies to all violations that have a reasonable possibility of resulting in injury, illness or death, and excludes only those violations that present no hazard or violations in which the hazard is speculative or remote. We believe that our interpretation is consistent with the legislative history of the Act, which makes it clear that the "S&S" standard was designed to

cover all but purely technical violations of the Act. Unfortunately, the Federal Mine Safety and Health Review Commission does not agree, having established a four-part definition of "S&S" that, in our view, has hampered enforcement for many years. In essence, violations under the Commission-imposed standard must arise nearly to the level of an imminent danger before they are considered significant and substantial.

I'd like to give you a few examples. In a 2009 case, an underground coal mine operator with a gassy mine had coal and coal dust accumulations up to four inches deep across nearly the entire width of the belt entry in several locations. The mine also had random piles of coal dust from six to eight inches deep. However, a Commission administrative law judge held that the accumulations violation was not S&S because, at the time of the violation, there were only "potential" ignition sources in the area and those potential ignition sources were no different from ignition sources present in all belt entries. He also noted that methane levels were low at that time. *Cumberland Coal Resources, LP*, 31 FMSHRC 137 (Jan. 2009) (ALJ), *reversed in part on other grounds*, 2010 WL 2149801 (May 2010).

In another 2009 case involving an underground coal mine, an operator failed to hang ventilation curtains, which are used to control coal mine dust. This was a violation of the operator's ventilation plan. A Commission administrative law judge acknowledged that coal was being cut without any ventilation controls in place, that there was no air movement, and that the air was thick with suspended coal dust. Yet the judge found that the violation was not S&S because, at the time of the violation, there were no potential ignition sources and methane levels were low.

The judge also noted that the mine had not experienced other coal dust ignitions. *Sidney Coal Co.,* 31 FMSHRC 1197 (Oct. 2009) (ALJ).

And we face the same challenges with other types of violations. For example, in a 2006 case, the Review Commission found that a violation of certain "hands-on" firefighting training requirements was not S&S because it was not reasonably likely that the lack of that type of training would lead to serious injury. The Commission ruled in this manner even though miners in that mine actually had died fighting a fire improperly. *Jim Walter Resources, Inc.,* 28 FMSHRC 579 (Aug. 2006).

Section 201 of the bill would more closely reflect what we believe was Congress' original intent by defining an "S&S" violation as one in which there is a "reasonable possibility that such violation could result in injury, illness, or death." We support this streamlined definition, which will provide a clearer standard for operators, inspectors, and the Commission. This new definition not only will enhance mine safety and health, it will help reduce counterproductive litigation over whether a violation is "significant and substantial."

Mine safety and health, as well as swift and effective enforcement, will also be enhanced by the bill's amendment to the Mine Act's injunctive relief provision. Section 108(a)(2) of the Act [30 U.S.C. § 818(a)(2)] authorizes the Secretary to ask a federal district court for appropriate relief, including a temporary or permanent injunction, if she believes that the operator of a mine is engaged in "a pattern of violation of . . . mandatory health or safety standards" which, in the Secretary's judgment, constitutes a continuing hazard to the health or safety of miners. This

provision has presented two difficulties. First, it requires the Secretary to establish "a pattern" – a term that echoes the term "pattern" in Section 104(e)'s "pattern of violations" provision – which has proved difficult to apply and enforce. Second, it limits the bases for "a pattern" to violations of mandatory health or safety standards.

Section 203 of the bill addresses both of these difficulties. First, it replaces the term "pattern" with the phrase "course of conduct," which is clearer, simpler, and more reflective of the kind of operator behavior that the Secretary's injunction authority is intended to correct. Second, it specifies that the kind of behavior that will support injunctive relief includes, but is not limited to, violations of mandatory health or safety standards. We believe that because the bill broadens the bases on which the Secretary can seek injunctive relief, it will enhance her ability to obtain such relief when necessary to protect miners.

A third welcome provision in the bill is the provision expanding the Secretary's authority to issue subpoenas for the purpose of obtaining testimony and other evidence. Currently, the Mine Act only authorizes the Secretary to issue subpoenas in connection with a public hearing. Section 102 of the bill would authorize the Secretary to issue subpoenas in connection with the performance of any of her functions under the Act. Section 102 would give MSHA subpoena power similar to OSHA's and would greatly enhance MSHA's ability to conduct effective inspections and investigations. Section 102 also would authorize MSHA representatives and attorneys to question individuals privately, to take an individual's confidential statement outside the presence of operator attorneys if the individual so desires, and to maintain the confidentiality of a statement to the extent permitted by law.

The bill also adds two new criminal provisions to the Mine Act, and strengthens both the Mine Act's and the OSH Act's current sanctions for criminal conduct. The bill would amend the Mine Act so that, for the first time, giving advance notice of MSHA inspections would be treated with the severity it deserves. Advance notice prevents MSHA inspectors from being able to observe mining as it is actually being done. The bill would make such conduct – currently treated as a misdemeanor – a felony punishable by fines set forth in title 18, U.S. Code (the criminal code), and a maximum prison term of five years.

The bill also contains a brand new criminal provision making it a felony to retaliate against any person – miner or non-miner – who reports unsafe conditions to MSHA. Such conduct would be subject to the fines set forth in title 18, U.S. Code, and would carry a maximum prison term of ten years. This provision goes well beyond traditional civil whistleblower sanctions that allow the Secretary to penalize those who discriminate against miners making safety complaints to their employers. It encourages miners, their relatives, and others to notify the government of mine safety violations by providing the assurance that retaliation for such activity will be met with truly effective punishment.

Both the Mine Act and the OSH Act already contain some criminal provisions. The Mine Act's current structure sets criminal penalties for agents who "knowingly" violate the Mine Act or mandatory standards and for operators who willfully violate the Mine Act or mandatory standards. The OSH Act also allows criminal sanctions for employers who willfully violate OSHA standards, if those violations cause a worker's death, but they are treated as

misdemeanors. Building on that foundation, the bill would analyze all such violations by individuals, operators, and employers under the "knowing" standard, would raise the maximum penalties for such knowing violations fourfold, and would make even first-time convictions felonies rather than misdemeanors, as is currently the case. The bill would also allow criminal sanctions for employers whose knowing violation of an OSHA standard causes or contributes to serious bodily harm to an employee. Maximum prison terms would be increased from one year to five years for first-time convictions of this new OSHA provision, and of the Mine Act criminal provisions, and increased from five years to ten years for second and subsequent convictions. For knowing violations of the OSH Act that cause or contribute to a worker's death, a first conviction is punishable by up to ten years in prison and subsequent convictions are punishable by up to twenty years in prison. These changes – especially the prospect of a significant period of incarceration and a lifetime felony criminal record – will, in our view, focus those in management positions on their personal responsibility for ensuring safety in the mines and other workplaces they control in a way the former penalty structure did not.

The bill also makes several other important improvements to the OSH Act. First, it modernizes the Act's whistleblower provisions, bringing them in line with those of the Mine Act and other safety laws. For the first time, workers filing OSH Act whistleblower complaints would be entitled to an administrative hearing and review, instead of having to wait years to have their cases heard in District Court. And, like whistleblower complainants under the 18 other statutes administered by the Department, including the Mine Act, OSH Act whistleblowers would have the right to pursue their cases on their own behalf if the Department declines to take them.

The bill also increases OSH Act civil penalties to bring their value back to their approximate value the last time penalties were raised in 1990. It also allows future inflation adjustments, correcting an oversight that has led to OSH Act penalties, unlike virtually all other Federal civil penalties, continually declining in value. We believe this provision will go a long way toward restoring the OSH Act's deterrent effect, and will make it harder for employers to treat OSHA penalties as simply a cost of doing business. In addition, the criminal penalties in this bill are based on similar provisions in the Clean Water Act and the Resource Conservation and Recovery Act, meaning that killing a person will be treated just as seriously as killing a lake.

In addition, the bill, for the first time, grants rights to accident victims and their families or other representatives. It requires that victims be kept informed of the status of accident investigations, and any resultant enforcement actions and settlement negotiations. They will have the right to meet with OSHA before any citation is issued, to receive a copy of any citation, and to be notified of any notice of contest. They must also be notified of any legal proceedings, and will have the right to participate in those proceedings. They will also have the right to make a statement to the parties conducting any settlement negotiations, and a similar right to make a statement to the Commission, which the Commission must consider in rendering its decision. To assist in exercising these rights, the Secretary will have to designate a family liaison in each OSHA area office. We understand that none of these provisions will restore a lost worker to a grieving family, or restore full use of faculties to an injured worker. But we believe they are the least we owe these workers and their families.

Finally, subject to an expedited hearing before the Commission, this bill will allow OSHA to require prompt abatement of all serious hazards, even if the employer files a notice of contest. As Assistant Secretary Michaels' testimony explains in greater detail, this provision is crucial. Currently, if an employer contests a citation for any reason, abatement is not required until the Commission fully resolves the contest, so a dangerous condition can be allowed to exist through years of legal delays. This bill will prevent this travesty from recurring.

I appreciate the opportunity to testify on this important legislation. As Secretary Solis said when this bill was introduced, there is a tremendous need for this legislation in order to save the lives and health of American workers, in mines and throughout the nation. I look forward to working with the Committee on this legislation as it moves forward and to responding to any questions you may have.