

**Testimony of Arthur M. Wolfson**  
**Before the United States House of Representatives**  
**Education and Workforce Committee**  
**Hearing on “Protecting Workers and Powering America: The Future of Mining”**  
**May 8, 2026**

Chairman Walberg and Members of the Committee:

Good morning and thank you for the opportunity to testify about mine safety compliance and how our system of regulating mine safety could better serve the regulated community.

First, a brief background about myself: I am a Partner in the Pittsburgh Office of Fisher & Phillips LLP, practicing in the firm’s Workplace Safety and Catastrophe Management Practice Group. While my practice specializes in all types of workplace safety law, I maintain a subspecialty in mine safety and health regulatory compliance. Currently, the majority of my practice involves counseling mine operators on meeting their health and safety regulatory requirements. I have practiced in this area of law since 2007. Prior to that, I worked for the United States Department of Labor.

My mining clients are subject to the Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq. (the “Mine Act”) and the regulations promulgated by the Mine Safety and Health Administration (“MSHA”). The Mine Act is premised upon laudable goals, namely 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.” 30 U.S.C. § 801(a). Yet, in enacting the law, Congress also recognized that “the existence of unsafe and unhealthful conditions and practice in the Nation’s coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated.” 30 U.S.C. § 801(d). Thus, the Mine Act recognizes that safe and healthy workplaces in mining go hand-in-hand with a prosperous mining industry. Moreover, the Mine Act also recognizes that mine operators have the primary responsibility for achieving these goals. See 30 U.S.C. § 801(e).

Nevertheless, employers in the mining industry face a far more onerous regulatory environment than those in general industry. This is for three primary reasons: (1) The Mine Act requires MSHA to conduct regular inspections- all surface mines must be inspected in their entirety at least twice per year and all underground mines at least four times per year; (2) MSHA inspectors have a statutorily prescribed right of entry such that they may enter a mine without the company’s consent or a warrant; (3) Mine operators are strictly liable for all violations their mine site irrespective of fault, knowledge or degree of hazard. See Asarco, Inc. Northwestern Mining Dept.

v. FMSHRC, 868 F.2<sup>nd</sup> 1195 (10<sup>th</sup> Cir. 1989). Employers in general industry who are regulated by the Occupational Safety and Health Administration (“OSHA”) face none of these realities.

Even within this framework, however, opportunities abound to improve the regulatory landscape to meet the Mine Act’s mandate of providing safe and healthy workplaces and a prosperous mining industry. This is particularly important, given the significant resources the mining industry devotes to safety and health and regulatory compliance. It is imperative that these resources are most useful in meeting their objectives. The examples highlighted below are not exhaustive but serve to illustrate how improvements within the context of the goals of the Mine Act would serve today’s regulated community to promote a safe and prosperous mining industry. They are also in keeping with the Mine Act’s mandate that mine operators have primary responsibility in meeting these goals as they would provide greater freedom and clearer paths to achieving regulatory compliance. Each is discussed in turn below.

**1. The Mine Act should include a Pattern of Compliance designation to reward excellent performance.**

The Mine Act sets forth a progressive enforcement scheme and provides for increasingly severe sanctions for increasingly non-compliant behavior. See Sec’y of Labor, MSHA v. Cement Div., National Gypsum Co., 3 FMSHRC 822, 828 (April 1981). At the far end, the most extreme sanction is a Pattern of Violation (“POV”) designation, which is authorized by Section 104(e) of the Mine Act as follows:

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 coal or other mine health 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 the cause and effect of a coal or other mine safety hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such areas until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(e). Put differently, if MSHA deems that a mine has exhibited a pattern of violations with a significant and substantial (“S&S”) designation, any future S&S violation would result in a

closure order until the mine completes an entire inspection without any S&S violations.<sup>1</sup> The POV designation is reserved for mine operators with the greatest history of non-compliance. See The American Coal Co., 38 FMSHRC 2062, 2109 (Aug. 2016) (stating that POV provides “an effective enforcement tool against repeat violators who are undeterred by MSHA’s standard enforcement scheme.”).

It stands to reason that a progressive enforcement scheme like the one in the Mine Act would include an extreme sanction for the most egregious offenders. Yet, to fulfill the Mine Act’s objective of promoting safe and healthful workplaces and sustainable mining operations, the Mine Act should correspondingly include an incentive at the other end of the spectrum – a Pattern of Compliance – for mine operators with historically good compliance efforts. OSHA-MSHA’s sister agency- provides such an incentive for employers in general industry in the form of its Voluntary Protection Program (“VPP”). OSHA recognizes VPP as its “official recognition of the outstanding effort of employers and employees who have achieved exemplary occupational safety and health.” See [www.osha.gov/vpp/all-about-vpp](http://www.osha.gov/vpp/all-about-vpp). Employers apply for VPP based on a series of performance-based criteria. If granted VPP designation, those employers are entitled to certain enforcement relief while they are so designated. See [www.osha.gov/vpp](http://www.osha.gov/vpp) (explaining that VPP-designated employers are not subject to OSHA programmed inspections while they keep their VPP status).

MSHA should provide a similar incentive to mine operators with commensurate relief from enforcement if achieved. Such would require a statutory change, as presently all mines are subject to a minimum number of inspections per year. But the change would be well worth the effort and, most importantly, would be in keeping with the original goals of the Mine Act. Namely, mine operators who have primary responsibilities for ensuring safe and healthy workplaces, could achieve that aim by pursuing performance goals if they so choose. If achieved, certain enforcement relief would be appropriate for the period of time that the mine operator met the criteria. It would also allow mine operators to deploy their resources as they see fit in pursuit of safety and health.

It is noted that commenters have been calling for performance-based incentives for mine operators within the MSHA enforcement scheme for decades. See, e.g., Karen L. Johnston, The Federal Mine Safety and Health Act of 1977: Is it suffering from a Mid-Life Crisis, 78 Denv. U.L. Rev. 441, 461-62 (2001) (calling for greater industry self-regulation, performance-based flexibility in regulation and incentives). It is time for Congress to heed those suggestions and provide these options to mine operators in pursuit of safety and health in their workplaces.

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<sup>1</sup> As discussed more fully below, an S&S designation is a heightened finding made by an inspector when issuing a citation or order and is intended to be reserved for more serious violations.

## **2. The MSHA enforcement scheme should reward and not punish mine operators who exceed regulatory requirements.**

The health and safety standards established by MSHA set a regulatory floor. In practice, mine operators typically exceed it with practices and safety protections that go beyond what is required. But while mine operators should be encouraged and rewarded for exceeding the bare minimum requirements, far too often, MSHA turns a blind eye or even increases enforcement over safety protections not required by law. Such enforcement runs counter to the objective of the Mine Act and defies common sense.

Consider how MSHA cites conditions on non-required safety protections. MSHA will frequently issue citations under broadly worded standards for conditions that may exist on such items, even when they are not required to be deployed.<sup>2</sup> Worse yet, MSHA frequently assigns such citations an S&S designation, thereby increasing a mine's history of enhanced enforcement actions, for equipment it was not even required to have. Take, for example, shielded electrical cables on mobile equipment in underground coal mines. A "shielded" cable includes an extra protective barrier within a cable that will take a stray current to ground thereby providing an additional measure of safety to prevent shock hazards. Shielded cables are not required for this type of equipment and are significantly more expensive than their non-shielded counterparts. Many mine operators, however, make that investment and utilize shielded cables to provide the safety benefit for their employees. Yet, MSHA typically refuses to recognize the practical safety effect of shielded cables, routinely citing minor damage to the outer jacket of a shielded cable as S&S when the shielding would protect against an electrical shock in that circumstance. See e.g. Sec'y of Labor, MSHA v. Prairie State Generating Co., LLC, 46 FMSHRC 147 (March 2024) (ALJ) (review pending). Failure to recognize the benefits of safety protections that exceed regulatory requirements disincentivizes their use, which runs counter to the mandate of the Mine Act. MSHA policy and practice should do the opposite.

Likewise, MSHA over-relies on a limited point from case law to deem irrelevant any safety protection it considers to be a "redundant safety measure." That point of law originates from Buck Creek Coal, Inc. v. FMSHRC, 52 F. 3d 133 (7<sup>th</sup> Cir. 1995) which stated only that measures to fight fires do not mean that fires do not pose safety hazards, a point made when evaluating one prong of a four-part test for S&S. It did not, however, state that all additional safety measures are irrelevant when deeming a violation S&S. MSHA, however, typically relies on Buck Creek to advance such a position. For example, in Sec'y of Labor, MSHA v. Consol Pennsylvania Coal Co., LLC, 41 FMSHRC 803, 821 (Dec. 2019) (ALJ), MSHA disregarded the utilization of a sensitive

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<sup>2</sup> An example of a broadly worded standard is 30 C.F.R. § 75.1725(a), which authorizes inspectors to issue Citations for "defects affecting safety" in underground coal mines.

ground fault on an underground feeder.<sup>3</sup> The sensitive ground fault was designated to deenergize the feeder at a level twenty-five times less than required by law, yet MSHA disclaimed the relevance of this feature in deeming the citation to be S&S. MSHA should revisit this approach and establish practice and policy that encourages the use of these safety measures.

### **3. MSHA should provide clearer definitions for key terms.**

Mine operators devote considerable resources to providing safe workplaces and to complying with the requirements of MSHA. To optimize their efforts, MSHA should ensure that key terms are clearly defined. A number of terms that play a critical role in the MSHA enforcement scheme, however, leave too much room for uncertainty. Two such terms are discussed below as examples but MSHA should undertake rulemaking efforts to provide clear definitions for these and other key terms.

#### **a. Significant and Substantial (“S&S”)**

Significant and Substantial, commonly referred to as S&S, is a heightened finding that an inspector may make when issuing a citation of order. It is reserved for violations that are more serious in nature but not so serious as to rise to the level of an imminent danger. A mine’s history of S&S violations is tracked and may serve as the basis for heightened enforcement, including POV. Additionally, S&S violations typically carry higher civil penalties than their Non-S&S counterparts. The S&S designation, therefore, plays a central role in the MSHA enforcement scheme.

The term “significant and substantial” is not defined by the Mine Act or any implementing regulation. Instead, the term appears in Section 104(d)(1) as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard and if he also finds that, while the conditions created by such violation do not cause an imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard...he shall include such finding in any citation given to the operator under the Act.

30 U.S.C. § 814(d)(1). The criteria for what constitute an S&S violation have historically been subject to varying interpretive case law. See e.g. Sec’y of Labor, MSHA v. Cement Div., National Gypsum Co., 3 FMSHRC 822 (April 1981); Sec’y of Labor, MSHA v. Matthew Coal Co., 6 FMSHRC 1 (Jan. 1984); Sec’y of Labor, MSHA v. Newtown Energy, Inc., 38 FMSHRC 2023 (Aug. 2016); Sec’y of Labor, MSHA v. Peabody Midwest Mining, LLC, 42 FMSHRC 379 (June

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<sup>3</sup> A feeder is a piece of equipment into which mined material is deposited. It then feeds that material onto a conveyor to facilitate transport.

2020); Sec’y of Labor, MSHA v. Consol Pennsylvania Coal Co., 47 FMSHRC 793 (Sept. 2025), appeal docketed, 25-3016 (3d. Cir).

The regulated community would be best served by a clear and workable definition of S&S. Because an S&S designation is reserved for more serious violations but not those that rise to the level of an imminent danger, the definition should make clear that an S&S designation is based on the particular facts and circumstances of the violation at issue, which present discrete hazard and a meaningful degree of likelihood that the hazard will occur. Such definition would be in keeping with the progressive enforcement scheme of the Mine Act and provide mine operators with a workable standard for where to prioritize their compliance efforts. The absence of a workable standard for S&S leaves the meaning of the term to guesswork, which does not serve the regulated community or the cause of mine safety. MSHA should undertake rulemaking to codify such a definitional standard for S&S.

b Injury which has a reasonable potential to cause death

The Mine Act contains a particularly stringent immediately reporting requirement. Section 103(j) of the Mine Act, 30 U.S.C. § 813(j), and its implementing regulation at 30 C.F.R. § 50.10 require that certain “accidents” be reported to MSHA within fifteen minutes of their occurrence.<sup>4</sup> MSHA has defined the term “accident” for purposes of immediate reporting to include twelve specific types of events. Included in that definition is “An injury to an individual at a mine which has a reasonable potential to cause death.” 30 C.F.R. § 50.2(h)(2). Anecdotally, this is the most common immediately reportable accident.

MSHA, however, has not defined what is meant by an injury “which has a reasonable potential to cause death.” Instead, the agency has allowed judges to interpret the meaning of the term on a case-by-case basis. See, e.g., Sec’y of Labor, MSHA v. Cougar Coal Co., 25 FMSHRC 513 (Sept. 2003); Sec’y of Labor, MSHA v. Consol Pennsylvania Coal Co., LLC, 40 FMSHRC 998 (Aug. 2018). Such approach does not serve the regulated community well. Events that may give rise to an injury which has a reasonable potential to cause death are unplanned, often chaotic and may require coordination among various company personnel. With the 15-minute timeframe, a decision as to whether or not to call MSHA must be made very quickly. Under these circumstances, mine operators and miners would benefit from a clear definition of what constitutes such an injury. Indeed, MSHA’s sister agency, OSHA, has a comparable regulation and provides that an immediately reportable non-fatal injury is one that involves a formal hospital admission. See 29 C.F.R. § 1904.39(a)(2). This is a bright line rule - either the employee was admitted to the hospital or not. The mining industry would benefit from a similarly clear standard as to when an injury which has a reasonable potential to cause death that must be immediately reported to MSHA has occurred. MSHA should undertake rulemaking to provide such a standard.

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<sup>4</sup> By contrast, OSHA’s parallel provision allows eight hours for the reporting of a fatality and 24 hours for the reporting of other qualifying events.

## CONCLUSION

The Mine Act and the MSHA enforcement scheme impose a strict regulatory framework on the mining industry, the likes of which are not seen in general industry. Even within this framework, however, Congress and MSHA should take every opportunity to make necessary changes to advance the goals of the Mine Act - health and safety of America's miners and the future growth of the mining industry. Such changes include, but are not limited to, an incentive program that eases enforcement burdens when mine operators meet demonstrated performance benchmarks, a regulatory environment that recognizes safety measures that exceed regulatory requirements and clear definitions for key terms that are central to MSHA's enforcement scheme. If these steps were taken, the regulatory landscape in mine safety would better achieve its stated goals.

I welcome the Committee's questions.