AMERICAN SOCIETY
OF SAFETY ENGINEERS
1800 East Oakton Street
Des Plaines, Illinois 60018-2187
847.699.2929
FAX 847.296.3769
www.asse.org

April 27, 2010

The Honorable Lynn C. Woolsey
Chairwoman
Subcommittee on Workforce Protections
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

RE: ASSE Comments on the
Protecting America's Workers Act
(HR 2067)

Dear Chairwoman Woolsey:

The American Society of Safety Engineers (ASSE) appreciates this opportunity to comment on your legislation, the Protecting America's Workers Act (PAW Act; HR 2067). and applauds you for your unwavering leadership in bringing to the table proposals to advance this nation's commitment to the safety and health of its workers.

ASSE represents the interests of its more than 32,000 member safety, health and environmental (SH&E) professionals who work with employers in every industry across the country and provide the leading expertise and experience employers rely on to make decisions to protect their workers from workplace hazards. From their frontline experience, they know how committed many employers are to protecting workers but also how too many employers fall short of their responsibilities. They also understand the value of the variety of ways

the Occupational Safety and Health Administration (OSHA) works to achieve its mission but understand that changes are needed to help ensure OSHA has the tools needed to better achieve its goals.

While the increased penalties and many of the other measures proposed by this bill will help remind many employers' of their responsibilities to their workers, increased penalties cannot be allowed to overshadow OSHA's continuing responsibility to reach out to employers in cooperative ways. As you move forward this legislation, we urge you also to join with our members in supporting OSHA's full commitment to its cooperative programs, specifically the Voluntary Protection Program – including the Challenge program and the Safety & Health Achievement Recognition Program (SHARP) – that this Administration has proposed for significant cutbacks. Greater emphasis on enforcement should not come at the price of a successful tool our members use to solidify their employers' commitment to safety and health. Worker safety is important enough that a full commitment to the variety of tools that advance safety for OSHA is needed from Congress.

The following comments on each section of HR 2067, including what we understand are proposed changes for a new version of the PAW Act, reflect the expertise and experience of our members as well as their passion for the idea that whatever is done to impact workplace safe and health by Congress or the Administration must reflect their hard-won understanding of how best to protect workers. We urge you to listen to them and to work with them to make sure that your laudable goal of reforming the Occupational Safety and Health Act (OSH Act) will achieve its goal where it counts, on the job floor where workers are at risk.

Section 101. Coverage of public sector employees

Providing coverage to the more than 8 million public sector employees that the OSH Act now fails to protect has long been a key ASSE public policy position. Over the last several years, ASSE's members in Florida have worked diligently to see legislation passed that would advance this issue without resolution. This year, ASSE is joined with both labor and business organizations in a coalition effort to advance public sector protections in Florida, perhaps the only place in the nation where business, labor and the safety and health profession are joined together in a common cause. As a result of our members' work in Florida, we know first-hand how difficult it would be to accomplish this goal in each state that now does not protect its workers with federal safety and health standards, no matter how beneficial it would be not only to a state's public sector workers but also to taxpayers who pay for public sector employers' lack of risk management that accompanies the failure to protect workers adequately. ASSE applauds you for addressing this issue where it most logically needs to be addressed, through a change in the OSH Act. The OSH Act should cover all of this nation's workers, and ASSE urges you to do all that you can to make sure this provision is not sacrificed in the debate over this legislation.

Section 102. Ceding OSH Act jurisdiction to federal agencies

ASSE commends you for addressing the long unresolved issue of the appropriate balance between the responsibility of OSHA to protect workers in all industries and the sometimes competing regulatory authority of other federal agencies over some industries. Establishing a process whereby the Secretary of Labor certifies an agency's safety and health standard to assure appropriate coverage of workers in an industry will allow OSHA to cede jurisdiction and avoid conflicts without ceding adequate protections of workers in industries regulated by other agencies. The resolution proposed here will be particularly helpful in the airline industry where there have long been difficulties in determining how best to protect airline workers. ASSE supports this provision.

Title II – Increasing Whistleblower Protections

Section 201. Expanded whistleblower protections

ASSE supports expanding federal whistleblower protections to employees who report injuries, illnesses or unsafe working conditions on the job. Shielding workers from recrimination and retaliation for reporting or refusing to work in unsafe conditions is a necessary element of effective whistleblower protections. ASSE also supports proposed changes for a new version of the PAW Act providing that whistleblower rights could not be waived through employment agreements or collective bargaining agreements, and that an individual's right to bring a claim under OSHA's whistleblower provisions do not preclude claims under other state or federal laws. If a worker's job security and compensation are not protected, they, in turn, will rarely be able or willing to risk taking needed steps to help correct risks to workplace safety.

Section 202. Refusing dangerous duties

ASSE supports protecting employees from workplace discrimination for refusing to perform a duty if the employee has a reasonable apprehension that performing the duty would result in serious injury or health impairment. A tenet of effective workplace safety and health is that every person in a workplace, from management to worker must be committed to safety and health. Permitting workers who have a meaningful sense of a dangerous workplace risk to protect themselves or other workers is consistent with the training that our members provide workers and assistance they provide employers in workplaces every day.

Section 203. Whistleblower complaint procedures

ASSE supports the proposed expansion of the statute of limitations from 30 to 180 days for reporting discrimination resulting from protected whistleblower activity concerning reporting injuries, illnesses or unsafe working conditions. This provision is comparable to the statutory period for safety whistleblower protection

provided to commercial drivers under the Surface Transportation Assistance Act, which OSHA also enforces.

ASSE also supports the provision that, if findings are not issued within 90 days of a complaint, the complainant may request a hearing. This private right of action is currently available under the Mine Act in whistleblower protection cases. Because complainants may have lost their jobs due to their protected activity, lengthy delays in concluding investigations and holding hearings can exemplify the saying, "Justice delayed is justice denied." Our members fully understand the importance of these provisions. SH&E professionals themselves can face the kind of discrimination these provisions guard against for simply doing what they have a professional and ethical responsibility for doing

However, ASSE cannot agree with provisions allowing complainants to seek review of an OSHA order with the U.S. Court of Appeals, which amounts to a private right of action in what Congress has determined should be handled as a regulatory enforcement matter. It is important that whistleblowers receive all the protections they need to pursue a complaint and receive timely responses to complaints through the regulatory system. At the same time, the current system was established to avoid protracted and expensive litigation, which this provision would undermine. Since its establishment, the whistleblower function at OSHA has suffered from a lack of adequate resources. Instead of opening the process to further litigation and forcing OSHA to apply scarce resources to more litigation, Congress should ensure that OSHA has the funding necessary to carry out this important function so claims can receive their due attention in a timely manner.

For the same reasons, ASSE cannot support proposed additional provisions in a revised PAW Act that would give whistleblowers access to the federal courts if the Department of Labor's Administrative Law Judges or the Administrative Review Board fails to comply with time deadlines.

TITLE III – Increasing Penalties for Violators

Section 301. Posting employee "whistleblower" rights

Consistent with its support for expanded whistleblower protections to employees who report injuries, illnesses or unsafe working conditions on the job, ASSE supports the expansion of employer posting requirements to include whistleblower protections.

Section 302. Prohibition on discouraging employee reports of injury or illness

ASSE agrees that employers should be prohibited from discouraging employees to report injuries and illnesses. For our members, effective safety and health management is dependent on timely and accurate reporting of injuries and illnesses. However, ASSE is concerned that the broad sweep of the language in this provision

can take away from SH&E professionals and employers the ability to use rewards and recognition programs to encourage attention and commitment to safety and health in a workplace. Training workers is a key component of our members' responsibilities. As with any teacher, using appropriate rewards and providing recognition for individual or team achievement is an inherent part of training. Allowing language to move ahead that would bar them from using appropriate teaching tools would be an unintended consequence of this provision. ASSE urges an amendment that would protect rewards and recognition that are part of an appropriate safety and health training program administered by an adequately prepared SH&E professional.

Section 303. No loss of employee pay for inspections

ASSE supports protecting workers from loss of wages, benefits and other considerations when they are needed to participate in an OSHA inspection. However, the language of the provision is too vague to ensure that only employees truly needed for the inspection will receive these protections, thus encouraging confusion about who would be protected. An amendment is needed to clarify that the provision entitles only workers reasonably necessary to be involved to be paid only for time reasonably necessary for the inspection. An employee who is the employees' representative may appropriately accompany the inspector throughout the inspection, and other employees have the right to speak to the inspector while being paid if they choose. Other employees, however, cannot concurrently cease work in order to accompany an inspector on a walk-around inspection. With greater clarification to meet these concerns, ASSE could support this provision.

Section 304. Investigations of fatalities and serious injuries

ASSE urges amendments to the provision lowering the threshold for requiring employers to report and OSHA to investigate incidents from those resulting in hospitalization of three or more employees to two employees. First, ASSE urges an amendment to the definition of "serious incident" to better define the kind of hospitalization that would trigger a serious incident. We suggest the addition of "for medical treatment" to the definition would help ensure that only appropriate hospitalizations bring about inspections and not, for example, a hospitalization simply for observation that results in no treatment. With the amendment, the definition would read

> The term 'serious incident' means an incident that results in the hospitalization <u>for medical treatment</u> of 2 or more employees.

ASSE also urges that the language allowing employers to take action to prevent injury to employees or substantial damage to property be expanded to include situations where inaction might result in disruption to essential services. Given the nation's recent experiences with natural disasters, including protections against

those who may have to protect essential services in spite of a workplace incident is appropriate. Our suggested amendment would read

> The appropriate measures required by this paragraph do not prevent an employer from taking action on a worksite to prevent injury to employees or substantial damage to property or to avoid disruption of essential services.

With these changes, ASSE would support these provisions.

Section 305. Prohibiting unclassified citations

ASSE opposes barring OSHA from designating any citations as unclassified. Now, the unclassified category is used to modify some willful, repeat or serious findings, or to establish constructive alternatives aimed at correcting an employer's workplace practices. ASSE understands the assumption that barring unclassified citations guards against inappropriately lenient results from citations. Nevertheless, we are not convinced that such an assumption, in practice, is correct. Employers face difficult legal ramifications that, without unclassified citations, will lead to greater litigation and lessen OSHA's ability to leverage its efforts to change safety practices of some employers.

In practice, unclassified citations are often sought by employers during settlement of citation cases where having a willful, repeat or serious citation on their record can cause their debarment from federal, state or local government contract work. Depending on the state, a willful violation allows the employee or his estate in an injury or fatality case to avoid the worker's compensation exclusive remedy shield and sue the employer in tort, create a worker's comp award multiplier, or be used as a finding of "negligence per se" in comparative negligence states.

ASSE does not argue that, in certain cases, such exponential impact of the classification is warranted for truly egregious employers. As a whole, though, the possible impact will be truly out of proportion to the typical violations that will be at issue, especially for companies that have overall commitment to worker safety and health commitments and, when an isolated incident occurs, are willing and able to work with OSHA to correct lapses and provide appropriately for affected employees. In such a case, loss of a federal contract can have a debilitating financial impact not only on companies but on its workers, even the community.

Instead of taking this step to limit the tools OSHA has to deal with employers individually, ASSE believes more can be gained by requiring OSHA to improve organizational controls and staff training to ensure that regional offices do not inappropriately accede to unclassified citations when doing so would not reflect an employer's overall commitment to a safe and healthy workplace. ASSE urges that this provision be eliminated.

Section 306. Victims' rights

ASSE believes that the entire process of investigating and determining appropriate actions under the OSH Act needs to reflect a sensitivity to the impact and loss that a victim and victim's family has experienced, especially for a victim's family when there has been a fatality. Workers deserve a level of humanity from government and employers that the OSH Act should encourage. Not only is such an attitude the right thing to do, it is also the prudent thing when the process has the potential of becoming irrationally adversarial even when all parties are well-intended. This is particularly true for the provisions proposed here to facilitate more and better communications with victims and their families.

Therefore, ASSE supports provisions that would permit a victim to meet with OSHA about the inspection or investigation before the decision whether or not to issue a citation is made; to receive at no cost copies of citations or related reports; and be provided an explanation of rights of employees or their representative to participate in enforcement proceedings.

ASSE is concerned, however, that overlooked in this well meaning effort to increase victims' ability to be a part of the process is the ability of the process to move ahead with proper attention to the facts of each case and the ability of all those involved in helping determine the appropriate outcome of investigations to do their work without inappropriate disruption. A victim's voice must be heard in this process, but a victim's legitimate personal issues and perceptions at a difficult time are not always consistent with what can be highly technical legal issues under negotiation by the parties involved. That is why ASSE urges a needed amendment to limit the definition of "victim" to "an immediate family member" in subsection (a)(2). The common definition of family could mean many people who do not have a close interest in the proceeding.

ASSE also cannot support, as written, the provision requiring that the victim, on request, be given an opportunity to appear and make a statement before the parties conducting the settlement negotiations. The unintended consequence of this provision could be the entanglement of OSHA in more drawn-out actions and a significant increase in the OSHRC's case load. A more reasonable approach that addresses both the intent of this provision and this concern would be provisions that provide for two separate conferences – the settlement conference and victims meeting with OSHA after a settlement conference is held with the employer but before any agreement is finalized. However, ASSE can support the proposed change in a revised PAW Act that would allow a victim to make a statement before an Administrative Law Judge at OSHRC for those cases which have been contested.

With these changes, ASSE looks forward to supporting these provisions.

Section 307. Right to contest citations and penalties

ASSE is not opposed to provisions that would begin the 15-working- day notice period when a citation is modified as well when it is issued. However, ASSE cannot support allowing any employee, even one not involved in an incident at issue in a citation, to allege that a citation fails to designate a violation as serious, willful or repeated. While the OSH Act envisions a role for OSHA in regulating employer behavior, to date, OSHA has limited itself to addressing employer responsibility for safety and health only. Expanding involvement in legal procedures to any and all employees, whether or not they have an interest in a case, will no doubt further complicate an already difficult process and force more cases to trial.

Section 308. Abatement of serious hazards during employer contests to a citation

ASSE urges further consideration of these provisions. What would constitute a serious hazard here needs to be better defined since, in practice, whether a hazard is serious can be a largely subjective decision by an inspector. If this refers to all serious citations and not only to those conditions that pose an imminent danger, then ASSE is concerned the effect of this provision will be overly broad. If an employer contests a serious hazard citation, a mechanism is needed to extend abatement requirements out until the case is adjudicated, at least where the time and method of abatement is also being contested. Too often, in our members' experience, inspectors require specific methods of abatement that reflect a lack of understanding about the operations at issue or are unduly burdensome, especially if the citation is ultimately vacated.

Although the Mine Safety and Health Act (Mine Act) requires that all violations must be abated even if the citations are contested, that law also provides a mechanism for an employer to obtain an expedited hearing no sooner than four working days from the date of contest. If this legislation is intent on demanding abatement while a contest is pending, ASSE could only support this requirement if provisions are also included to provide for expedited adjudication by the Occupational Safety and Health Review Commission (OSHRC) as similarly allowed under the Mine Act.

Section 309. Objections to modification of citations

In general, ASSE supports employee notification of modification to citations. Transparency in the process is a positive for all parties. However, ASSE cannot support the provision allowing an employee or representative, whether or not they are involved in the proceedings, to challenge a proposed agreement for failure meet the purpose of the OSH Act. This provision establishes an unlimited employee appeals process of any citation not dealt with to an employee's satisfaction for

whatever reason. The overlooked impact on OSHA and OSHRC in being required to handle a potential wealth of appeals must be considered.

ASSE understands the intent to improve OSHA's and employers' treatment of victims, but this provision appears to dismiss the benefits to OSHA, employers and even employees from meaningful negotiation and the settlement process. An employer attempting to reach a result without resorting to litigation can be a positive step towards improving safety. Injecting additional steps in the process for unlimited reasons could have the unintended consequence of impeding positive results from negotiations. The unintended consequence of this provision is that every disgruntled employee would be given the ability to prolong the process and make it possible that every OSHA could be forced to trial even where OSHA and the employer have agreed to amicably resolve the case.

Sections 310 and 311 – OSHA civil and criminal penalties

ASSE has always supported appropriate and fair enforcement OSH Act violations and generally offers qualified support for the increased levels of civil and criminal penalties proposed in this legislation. While ASSE is concerned that the occupational safety and health community has not engaged in the kind of research that would help determine what levels of penalties adequately deter employers from failing to take responsibility for their employees' safety and health, the civil and criminal penalty amounts sought in this legislation, if the amendments we state below are enacted, can be a positive step forward.

ASSE's hope is that increased penalties for those who do not take appropriate responsibility for worker safety and health can help bring the same level of attention to worker safety that environmental issues receive among many employers due to the rigorous penalties they face through this nation's environmental laws. Arguably, we are now seeing the long-standing attention to environmental issues resulting in widespread voluntary efforts by industry to help lead this nation's growing commitment to environmental sustainability. We can only hope that increased attention to worker safety issues from appropriate penalty levels can help lead to similar highly visible attention to over-all workforce sustainability for this nation.

ASSE's support for the proposed penalties, however, is firmly dependent on amendments to this legislation, as stated below, that would help better define how the penalties are to be applied. They will help ensure that those employers who do not take responsibility for a consistent culture of safety in their organizations are targeted by higher penalties. They also will better help ensure that SH&E professionals are not unfairly left to take responsibility for others in an organization who fail to make needed decisions to protect workers. Our members can find themselves in situations where they are doing their best to fight for resources or decisions from upper management to better address safety and health risks. When they may be the lone voice for safety in an organization, they should not have to

answer for others' failures to address risks. While ASSE does not seek protections for the failure of any SH&E professional to fulfill professional responsibilities, we do believe that worker safety and health is best served by putting those responsible for an organization's commitment to safety and health on notice of the penalty for shirking that responsibility.

To ensure that outcome, ASSE urges the following amendments –

Willful – A long-standing concern of ASSE's members is the lack of specific definition for "willful" in the OSH Act. Without a more specific definition, ASSE cannot endorse requiring willful violations that result in death or serious injury felonies without also addressing the vagueness of what constitutes a willful violation. In practice, "willful" is inconsistently applied. Without a firm definition, OSHA enforcement personnel in the field and the regional offices are left to determine subjectively the level of a violation, leaving employers open to what can seem like selective enforcement of violations. Our members are concerned that too many resources, too many arguments, too much confusion results from what is, in practice, a term inconsistently applied to violations. Most importantly, "willful" is too vague a term to be used as an appropriate benchmark for criminal prosecution. This legislation provides a much needed opportunity to revisit the OSH Act to resolve this contentious issue.

Therefore, ASSE would like to be able to support the suggested change of "wilfull" to "knowing" in a revised PAW Act, which we understand is under consideration. The use of "knowing" is consistent with criminal prosecutions in general and, more specifically, with various environmental statutes (e.g., the Clean Water Act, 33 USC 1319(c)(3)(B)), and its use infers the "mens rea" needed to show criminal intent. However, we cannot support the proposed change to "knowing" without legislative or report language clarifying that, for OSH Act purposes, "knowing" reflects both a knowledge and awareness that the hazard, actions or conditions are likely to place another person in imminent danger of death or serious bodily injury and a knowledge and awareness that the hazard, actions, or conditions constitute a violation of a mandatory safety or health standard.

If, the term "willful" is retained, however, in order to provide clarity, ASSE urges inclusion of the following definition of "willful" in the OSH Act that would be similar to MSHA's definitions for "high" negligence and "reckless disregard" (found in 30 CFR 100.3), either of which can be deemed "flagrant" violations under the 2006 MINER Act:

> The employer knew or should have known of the violative condition or practice but displayed conduct which exhibited the absence of the slightest degree of care, and there are no mitigating circumstances.

This definition would provide a more firm grounding for determining willful violations under the increased penalties offered here.

Corporate officer – Further, ASSE cannot support increased civil and criminal penalties without a changes in the OSH Act that would make it clear, through a definition of "corporate officer," who is responsible for the acts the penalties are meant to punish and discourage. ASSE has long advocated evaluating corporate culture and patterns of behavior when determining whether to prosecute high level corporate officials for violations resulting in worker deaths, so we are pleased that HR 2067, as introduced, attempts to focus responsibility where the determinations of a company's commitment to safety and health of its workers are made. However, we urge that this provision intended to define "corporate officer" be amended to better define who the civil and criminal law will hold accountable. In the introduced version of the bill, "any responsible corporate officer" is vague and open for interpretation since it might involve individuals with no actual control or knowledge of day-to-day activities.

As to the latest proposal to change "any responsible corporate officer" to "officer or director" in a revised PAW Act, ASSE believes that this could be a step in the right direction but cannot support the proposed change without further definition. In corporations, an important distinction exists between officers and directors whose decisions can, for example, bind the organization and those who may be officers and directors in name but whose responsibilities flow from those above them in an organization. To be liable under these provisions, an officer and director must be able to have had the ability both to know and be directly responsible for the decisions that led to hazardous conditions or life-threatening non-compliance. Not every officer or director has the ability to do both. To help ensure that the appropriate corporate officer or director is targeted under these provisions, clarification is needed to make this distinction, whether in legislative or report language.

The changes this legislation will bring about are an historical step forward for occupational safety and health law. While we understand that wholesale changes in U.S. legal definitions may not be possible, every opportunity needs to be taken to state clearly who in an organization is responsible for occupational safety and health. ASSE has offered the following definition of "responsible corporate officer," which we believe would send the necessary clear message about who is responsible for determining a responsible organization's culture of safety –

> A person who is a member of the employer's board of directors, a corporate officers, or highest level managers who expressly, tacitly or impliedly authorized or permitted, or by the aggregate conduct of any number of its employees, agents or officers, allowed a corporate culture within the employer's workplace that directed, encouraged, tolerated or led to non-compliance resulting in the violation of any standard, rule, or

order promulgated pursuant to this Act, or regulations prescribed pursuant to this Act through

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant safety and health information to relevant employees.

ASSE strongly believes that inclusion of this language in the legislative or report language that accompanies the PAW Act can help significantly to bring a renewed and focused commitment to worker safety and health among this nation's employers

Conclusion

Again, ASSE applauds you for your leadership in seeking better ways to protect workers from workplace safety and health risks. There is much ASSE agrees with in your bill. Elements of your proposal can be improved to better accomplish your goal of making the OSH Act a more effective law. And we note that the bill does not include perhaps the most important needed change to the OSH Act, a requirement that every employer implement a safety and health program to ensure appropriate analysis of the risks workers face in each workplace, which OSHA can implement through the standards process without action from Congress.

We urge you to listen to the cumulative knowledge and experience of our members who show up each day at workplaces across the nation to take on the challenge of protecting workers from safety and health risks. They know the real effect of laws and regulations on workplace safety and want those laws and regulations to assist them, not make their work more difficult or unnecessarily complicated. ASSE's comments aim to support our members' ability to fulfill their commitment to their employers and the workers for whom they practice their profession. As always, ASSE and our members stand ready to help you in any way they can to achieve our shared goal of protecting workers. We look forward to that opportunity.

Sincerely,

C. Christopher Patton, CSP
President

cc: The Honorable Cathy McMorris Rodgers
Ranking Member