COMMENTS REGARDING MSHA'S PROPOSED AMENDMENTS TO ITS CIVIL PENALTY REGULATIONS

TO: Mine Safety & Health Administration

FROM: Tony Oppegard
Attorney-at-Law
P.O. Box 22446
Lexington, KY 40522
859/948-9239

on behalf of the Appalachian Citizens Law Center
207 West Court Street, Suite #202,
Prestonsburg, KY 41653
606/886-1442

RE: 30 CFR Part 100 (RIN 1219-AB51)

DATE: 11/9/06

The Appalachian Citizens Law Center is a public interest law office that represents coal miners in eastern Kentucky in safety-related matters, as well as other citizens of the area in coal mining-related issues.

Tony Oppegard has been involved in mine safety matters for more than 26 years. From 1980 to 1990, with the Appalachian Research & Defense Fund of Kentucky (Hazard, KY), I represented coal miners in numerous safety discrimination cases before ALJs of the Federal Mine Safety & Health Review Commission, as well as on appeal to the FMSHRC and the U.S. Courts of Appeals. I also represented miners and their families in other safety-related

litigation and advocacy work. For example, I represented 7 of the 8 families of the coal miners killed in the December 7, 1981 Topmost Disaster in Knott County, Kentucky, in their dealings with MSHA.

From 1991 to 1998, I ran the Mine Safety Project, a public interest law office in Lexington, KY, that represented coal miners and their families in safety discrimination cases and other safety-related litigation and advocacy work. For example, I represented 3 of the 8 families of the miners killed in the December 7, 1992 Southmountain Disaster near Norton, Virginia, before the blue ribbon panel appointed by Virginia Governor Douglas Wilder to investigate the accident.

From June, 1998 through January, 2001, I was the Advisor to DOL's Assistant Secretary of Labor for Mine Safety & Health, J. Davitt McAteer, at MSHA's headquarters in Arlington, Virginia. In April, 2001, I was appointed by Kentucky Governor Paul Patton as the General Counsel of the Kentucky Department of Mines & Minerals (later renamed the Office of Mine Safety & Licensing). In that position, which I held through May, 2005, I was primarily responsible for prosecuting mine safety violators in license revocation proceedings before the Kentucky Mine Safety Review Commission and for investigating mining accidents.

I am now in private law practice, specializing in mine safety litigation. I am

currently representing Claudia Cole, whose husband, Russell Cole, was killed in a roof fall at the Stillhouse Mining No. 1 mine at Cumberland, Kentucky, on August 3, 2005. I am also representing Stella Morris, whose husband, David "Bud" Morris, bled to death following a haulage accident at the H & D Mining No. 3 mine - located at Cumberland, Kentucky - on December 30, 2005. And I am representing Mary Middleton, the widow of Roy Middleton; Melissa Lee, the widow of Jimmy Lee; Tilda Thomas, the widow of Paris Thomas; and Priscilla Petra, the widow of Bill Petra, each of whom was killed in the explosion and its aftermath at the Kentucky Darby No. 1 mine - located at Holmes Mill, Kentucky - on May 20, 2006, as well as the lone survivor of that disaster, Paul Ledford.

GENERAL COMMENTS ABOUT THE PROPOSED REGULATIONS

Because my area of expertise is coal mining, I will address these comments solely to the proposed regulations as they pertain to coal mining.[1] It is critical to note that these regulations would not have been proposed - and the MINER Act would not have been passed - had it not been for the deaths of far too many coal miners this year. As of today, 45 coal miners have already died in mining accidents in the United States this year; 15 of those mining deaths have occurred

[1] This is certainly not meant to diminish the importance of these proposed regulations to metal/nonmetal miners, 23 of whom have died in mining accidents already this year.

in Kentucky and 22 in neighboring West Virginia. This compares with 22 coal mining deaths in the entire country during 2005. In other words, the death toll in America's mines this year has already more than doubled last year's figure. Therefore, it is fair to say that there is a crisis in coal mine safety enforcement today. In considering these proposed regulations, MSHA should not forget that fact.

Nor should MSHA forget that the Mine Act and its amendments have only one purpose: to protect the health and safety of the miner. The wishes and complaints of the industry in their comments concerning these proposed regulations - insofar as they are not related to safety - should be disregarded.

MSHA likewise should realize that in all likelihood not a single coal miner from eastern Kentucky (or from anywhere else for that matter) will comment on these proposed regulations, whereas dozens of operators and mining associations will do so. That does not mean that miners do not care about fines and how they affect coal mine health and safety; it simply means that the non-union coal miners of eastern Kentucky[2] do not have the resources to hire representatives to speak on their behalf.

---

[2] Regrettably, there is not a single UMWA mine in the coalfields of eastern Kentucky. Moreover, there are virtually no "representatives of miners" in this region's non-union mines.

Has MSHA ever wondered why virtually no non-union miners from eastern Kentucky ever appear at MSHA-sponsored public hearings to voice their opinion? The answer is not complicated: if a miner did so, he would soon find himself without a job... just as miners in eastern Kentucky are routinely discharged or discriminated against in other ways for making safety complaints or for refusing to work in unsafe conditions.

Finally, the agency should remember that every day in eastern Kentucky, in many mines, coal miners are required to work under unsafe conditions in order to support their families. Every single fatal accident in Kentucky's mines this year was preventable, and almost all of them were caused by violations of federal mining laws. Even as you read these comments, there are coal miners in eastern Kentucky being required to work under unsupported top, without ventilation curtains being installed, with safety devices on electrical equipment bridged out, in violation of the mine's pillar plan, or without adequate training.

COMMENTS ABOUT MSHA'S DISCUSSION AND ANALYSIS OF THE PROPOSED CHANGES TO PART 100

MSHA should simply disregard the protests of the many operators and and industry trade associations that argue that civil monetary penalties have nothing to do with mine safety. Hogwash. Many coal companies in eastern Kentucky will only comply with safety requirements in order to avoid citations

and fines. Congress' original intention that companies must be made to pay for violations of health and safety standards - in order to get their attention and induce compliance - was correct. However, the problem through the years has been that MSHA's fines have been far too low to ensure compliance - and, to compound the problem, the agency has done an abysmal job of collecting adjudicated civil penalties. Until coal companies are required to pay meaningful fines for safety violations - i.e., fines that are substantial enough that they cannot simply be deemed "a cost of doing business" - the safety of miners will continue to be jeopardized by those operators whose highest priority is mining coal as quickly and cheaply as possible.

COMMENTS ABOUT SPECIFIC REGULATIONS

Section 100.1 The rule states, in part, that Part 100 is intended "to assure the prompt and efficient processing *and collection* of penalties" [emphasis added]. However, I see nothing in the proposed regulation that addresses the critical issue of MSHA's failure to collect civil penalties that have been adjudicated. It is well documented that many mine operators in eastern Kentucky historically have not paid their fines, yet they have continued in business and have even opened new mines and/or started new mining companies without complaint or interference from MSHA. Unless the problem of unpaid and uncollected civil

penalties is addressed by MSHA, Part 100 will not adequately protect miners' health and safety.

Section 100.3(b) MSHA solicited comments on "whether, in considering the size of the operator, greater weight should be placed on the size of the controlling entity". The answer is "yes", MSHA should place more weight on the size of the controlling entity.

Section 100.3© We agree with MSHA's intent that only violations which have become final should be included in an operator's history, but we disagree with the reduction of the applicable time frame from 24 to 15 months. Given the lengthy period of time that it takes for contested citations to be resolved through the contest and appeals process, 15 months would not "more accurately reflect an operator's current state of compliance". Miners would be better served if the time period remained at 24 months.

Since we disagree with MSHA's proposal to reduce the time period to be considered in computing an operator's history of previous violations, we also believe that an annualized average should continue to be used for independent contractors.

Although we believe MSHA is correct in adding the component of "repeat violations" under section 110.3(c)(2), we disagree with MSHA's intention of

counting only repeat violations of the *exact same standard.* The example given in the "discussion and analysis" section of the proposed rule - i.e., the difference between 30 CFR 75.202(a) and 30 CFR 75.202 (b), where subsection (a) requires that the roof, face and ribs be adequately supported, while subsection (b) prohibits working or traveling under unsupported top - may warrant consideration as different standards for the purpose of defining "repeat violations".

However, this is not true in all circumstances. For example, 30 CFR 75.362(d)(1)(I) requires that a qualified person make a test for methane "at the start of each shift at each working place before electrically operated equipment is energized". 30 CFR 75.362(d)(1)(iii) mandates that a qualified person test for methane during the working shift "at 20-minute intervals... during the operation of equipment in the working place'. Although one standard deals with preshift methane examinations, while the other concerns onshift examinations for methane, it would defeat the safety-enhancing purpose of these proposed regulations to treat them as separate standards for the purpose of the "repeat violations" provision. In other words, both violations are for the failure to conduct a test for potentially explosive concentrations of methane, an intentional violation which obviously could have dire consequences for miners at that mine. Therefore, MSHA should consider them as a repeat violation of the same basic standard, not as separate,

unrelated standards.

There are many other similar examples in MSHA's regulations. The bottom line is that MSHA should not split hairs when it comes to protecting miners' safety.

In addition, MSHA should not consider only S & S violations in determining repeat violations of the same standard. The message that would send to operators is that a non-S & S violation is really not that important - so go ahead and violate it as many times as you want... Operators who repeatedly violate *any* safety standard - whether or not it is S & S - demonstrate a disregard for the safety of their employees.

Section 100.3(d) We agree that the five levels of negligence should be retained, but believe that 40 penalty points - rather than 35 - should be assigned for cases of "high negligence".

Section 100.3(e) We assert that MSHA regularly diminishes the gravity of violations by erroneously undercounting the number of miners potentially affected "if the event occurred or were to occur". This is particularly true of ventilation violations, which typically affect numerous miners - if not every miner - on the working section. However, when we reviewed the violations issued by MSHA at the Sago mine - prior to the explosion of January 2, 2006 - we were

dismayed to learn that MSHA had consistently listed as "one" the number of persons affected by violations of the company's ventilation plan.

For example, MSHA cited the mine operator for an unwarrantable violation because it had a battery-charging station located in the intake air course. Although the gases produced by the battery-charging station traveled directly to the face - where they were breathed by every miner - and if an explosion occurred it obviously would have affected every miner underground, MSHA claimed that only "one" miner had been affected by the violation. We defy MSHA to pinpoint who that one affected miner was, and why everyone else working in the mine would not have been affected.

Moreover, our review of the Sago unwarrantable failure ventilation violations found that this was not an isolated occurrence. Such lax enforcement makes a mockery of the inspection and assessment system, and diminishes coal mine safety and health. MSHA needs to take immediate steps to train its inspectors - and their supervisors - as to how to properly determine the number of miners potentially affected by ventilation and other violations. By artificially reducing the number of miners affected by a violation, MSHA is causing fines to be assessed for a smaller amount than is warranted.

We also request that the proposed penalty points for permanently disabling

injuries be increased from 10 to 15. Indeed, it makes no sense to rate a permanently disabling injury as only twice as severe as an injury that causes a miner to miss one day of work (i.e., 10 points versus 5 points). And we likewise suggest that 30 penalty points - instead of 20 - should be assigned for any potentially fatal injury.

Section 100.3(f) We understand that the Mine Act requires MSHA to consider six criteria in assessing civil monetary penalties. However, the fifth criteria - i.e., the "demonstrated good faith of the operator in abating violations" - should be accorded as little significance as possible. Therefore, we strongly disagree with MSHA's proposal to decrease to 10% the current 30% reduction of an assessed fine simply because the mine operator abates the violation within the time set by the MSHA inspector.

This criterion has for years consistently undercut MSHA enforcement efforts because it wrongly rewards a mine operator for doing something that he is *required to do* in the first place. Coal operators must howl at the government in derisive laughter at the illogic of reducing their fine - even for a violation that may have existed for months, and which the operator had no intention of fixing unless and until it was cited - simply because he corrected the violation when he was caught. Therefore, we recommend that the reduction be decreased from 30%

to 2%. Given the statutory constraints imposed on MSHA, such a small decrease would be fair to coal miners.

Section 100.3(g) We believe that the proposed new minimum fine of $112 is too low to induce compliance with safety and health requirements. The assessment system should be changed so that the minimum penalty is approximately $200.

Section 100.3(h) We believe that the ability of a mine operator to remain in business should not be a factor in determining the amount of a civil penalty. Indeed, if a mine operator in undercapitalized, it is virtually certain that he will cut corners on safety in order to save money - and that he will jeopardize miners' safety in doing so. *If an operator does not have sufficient capital to run a safe mine, he should not be in the coal business*. However, that is a problem that requires a change in the statute.

Section 100.4 We wholeheartedly agree that the single penalty assessment - which has for years been a blight on efforts to improve safety in this nation's mines - should be eliminated. We likewise applaud the minimum penalty of $2,000 for all unwarrantable failure citations, and the minimum penalty of $4,000 for all section 104(d)(2) orders.

Section 100.5 We oppose - and frankly do not understand MSHA's

reasoning for - the proposed removal of the list of eight categories that must be reviewed by MSHA for a possible special assessment. Rather than removing this list, we recommend that MSHA keep this list in the regulation, but make clear that MSHA retains the discretion to consider *any other circumstances* which may warrant a special assessment.

Although MSHA asserts that eliminating this list - which contains only the most egregious examples of non-compliance - "will allow MSHA to focus its enforcement resources on more field enforcement activities" , it potentially opens up a giant loophole that would decrease safety protections for miners. For example, the plague of MSHA's misguided emphasis on "compliance assistance" under the Bush Administration - which has diminished safety in the mines and contributed to the unacceptable death rate in our coal mines this year - could be considered "field enforcement activities" by the present (or any like-minded) administration. Simply put, we do not trust MSHA's stated reason for wanting to delete the list of egregious circumstances that clearly warrant a special assessment.

We also strongly disagree with MSHA's belief that under these proposed regulations the special assessment provision generally will not be needed - because the "regular assessment provision would generally provide an

appropriate penalty in most cases".

Section 100.5(d) We do not believe that a fine of $275 for miners who willfully violate the prohibition against taking smoking articles underground is sufficient. Every coal miner knows that having smoking articles underground is both unlawful and dangerous - and there is no justifiable reason for such conduct. Therefore, this fine - which requires proof of intentional conduct - should be raised to $500, an amount that would be more of a deterrent. In addition, if MSHA catches a miner with smoking articles underground, the federal agency should notify the state enforcement agency so that disciplinary action against that miner's certificate can be initiated.

Also, the civil penalty for *repeat violations* of this standard by a miner should be increased - i.e., a second or third violation should cost the miner more than a first offense.

Section 100.5(e) We applaud the "flagrant violation" provision of the MINER Act, and encourage MSHA to assess fines of $220,000 in every instance where it is appropriate to do so. If a miner is killed because of an operator's flagrant violations of the law, even a total fine of $444,000 , $660,000 or $880,000 - for one, two or three contributory violations - will not satisfy a grieving family's desire for justice. However, it may act as a

meaningful deterrent to other mine operators who flagrantly disregard mine safety laws.

Section 100.5(f) The timely notification provision regarding mine accidents is long overdue. In my experience as a prosecutor in Kentucky, this has been an area of abuse by many coal operators, and has had a detrimental effect on the enforcement agency's ability to conduct thorough and meaningful accident investigations. With the attention that this provision has received in the coal industry, MSHA should not accept insipid excuses - and should be reluctant to accept alleged mitigating circumstances - for a company's failure to timely notify the agency of an accident.

Section 100.6(b) We do not believe that the proposed reduction in the time allowed for an operator to request a safety and health conference with MSHA - from 10 days to 5 - will play much of a role in a "more effective civil penalty system", as alleged by MSHA. Nonetheless, we support this proposed change because a coal company simply does not need 10 days to determine whether to *request* such a conference. The 5-day period clearly is a sufficient amount of time for such a decision to be made.