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Mine Safety & Health Administration
Office of Standards,
Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939
Electronic mail: zzMSHA-comments@dol.gov

Re: Comments on Proposed Rule
30 CFR Part 100
RIN 1219-AB51

Dear Sir/Madam:

The Pennsylvania Coal Association ("PCA") offers the following comments to the Mine Safety and Health Administration ("MSHA") concerning its Proposed Rule to amend 30 C.F.R. Part 100 to revise its procedures for assessing proposed civil penalties to increase penalties under the Mine Act and to implement the new civil penalty requirements of the Mine Improvement and New Emergency Response Act ("MINER Act"), P.L. 109-236. The Proposed Rule was published at 71 Fed. Reg. 53054 (September 8, 2006).

PCA is an association that represents the majority of underground and surface coal mine operators in Pennsylvania. PCA represents operators of large and small underground bituminous coal mines. The mines of our members are routinely inspected by MSHA inspectors and receive citations and orders for which civil penalties are proposed by MSHA.

As indicated in the preamble, the Proposed Rule goes beyond amendments necessary to implement new civil penalty requirements of the MINER Act. Rather than simply implementing the new requirements of the MINER Act with respect to civil penalties, the Proposed Rule dramatically reshapes the whole penalty structure, as well as modifying the procedures,

making the system imbalanced. While some increase in civil penalties may be warranted, the reconfiguration of the system is not and in some instances appears to be contrary to law. The new scheme will greatly increase the amount of operators' penalties without any demonstrated concomitant increase in safety and without economic analysis of the purported increase.

It is well recognized that the majority of mine injuries are not the result of conditions but are behavior-based. Few of MSHA's mandatory standards address behavior and the proposed increase in penalties does nothing to foster general safety. The Proposed Rule is not based on any reasoned approach to mine safety. Instead, it seems to be driven by media criticism of MSHA. MSHA has not performed any economic benefit analysis in this crucial area.[1]

PCA believes that Proposed Rule should be revised in the following respects.

1. The three-tier penalty system that includes single penalties for non S&S violations should be retained.

2. The proposed addition of the new "repeat" category for history of violations in addition to the existing category should be eliminated.

3. The "good faith" reduction of 30%, rather than 10%, for prompt abatement should be retained.

4. The proposed significant increases of penalties, without a showing that such increases will promote safety, should be reduced.

5. The regulatory criteria for special assessments should be retained, rather than eliminated.

6. The time for requesting a conference should be kept at 10 days and the conferencing system should be improved. The rules

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[1] PCA submits that any analysis that MSHA has performed with respect to the impact of the rule based upon 2005 citation statistics is flawed because of the significant increase in the number and severity of enforcement actions in 2006.

should address the inadequacies of the conferencing process, including scheduling of conferences in a timely fashion and providing that conferences be fair, balanced, and independent of the District structure.

Single Penalty Assessments Should Be Retained

The existing three-tiered (single, formula, and special) assessment system takes into account the fact that many enforcement actions include technical violations, recordkeeping violations, or violations with very low potential for injury. This sort of system was credited for permitting "the mining community to focus its resources on those violations having the greatest impact on miner safety and health." 47 Fed. Reg. at 22291 (May 21, 1982). In 1982, MSHA outlined the need for a three-tiered system including a relatively small penalty for non S&S violations:

> MSHA believes that the single penalty provision will help achieve improved health and safety for miners by eliminating the need to spend disproportionate amounts of time reviewing and processing violations whose impact on safety and health is minimal. The primary focus of both MSHA and the mining community must be on the prevention and correction of conditions which pose a serious risk to the safety and health of miners.

47 Fed. Reg. at 22292.

The removal of the single penalty assessment will greatly increase penalties for non S&S citations that present no real degree of hazard. Currently a non S&S Section 104(a) citation with moderate negligence would be assessed at $60. Under the new scheme (with no points assessed for repeated history) a Section 104(a), non S&S citation with moderate negligence, 1.1 Violation Per Inspection Day ("VPID"), production over 2 million tons per year, an unlikely likelihood of occurrence, with a severity of lost work days and two persons affected, would have a penalty of $512; more than 8 times the current penalty. If the severity were permanently disabling and there was a "repeat" history of 10 (not uncommon for commonly issued citations), the penalty would increase $1,140. It is our

evaluation that the penalties for the commonly-cited violations will increase 10 times over the current penalties.

This will place an inordinate emphasis on de minimis conditions. Under the Occupational Safety and Health Administration's analogous penalty system, similar violations, classified as "other than serious," commonly have no penalty assessed. While that is not possible under the Mine Act, it should be recognized that some violations do not merit significant penalties.

Many citations do not address significant hazards. For example, one of PCA's members was just cited for an alleged violation of 30 C.F.R. § 75.400 for the drill tailings from horizontal degas holes contained within a sump and which were soupy in consistency. The mine had not previously been cited with respect to such tailings and the citations represented a change in the field office interpretation of what constitutes a "hazardous" accumulation of coal. This would be assessed under the current scheme at $60. Under the proposed rules, the penalty would be between $154 and $764, depending on the "repeat" history points.

But Section 75.400 has also been interpreted to cover "accumulations" of combustible materials such as paper bags from rock dust, candy wrappers, and drink containers. One operator has even been cited for an accumulation of combustible materials when it had gathered such materials up and placed them roadside to be transported from the mine.

In a similar example, an operator of a metal/nonmetal mine was cited under 30 C.F.R. § 57.11001, the safe access to a workplace standard, for failing to have a doorknob on a men's restroom door. Leaving aside the validity of such a citation, it is this sort of de minimis type situation that merits a single relatively low penalty so the operator and MSHA will spend less time on violations where impact on safety and health is minimal and spend more tome on prevention and correction of conditions which pose a serious risk to the safety and health of miners.

There is an additional basis for keeping the single penalty assessment in the penalty scheme. A $60 penalty makes it far less likely for an operator to contest such citations. The cost of an increased number of contests both from an operator's standpoint, MSHA's standpoint and those of the Department of Labor's solicitor's office and the Federal Mine Safety and

Health Review Commission is not referenced in the calculations concerning economic benefit. Such cost must be calculated in order to determine properly the economic impact of the new regulations.

Decrease in Good Faith Reduction

MSHA has proposed changing the amount of reduction in the penalty when an operator abates the citation within the time period set by the inspector from 30% to 10%. MSHA appears to shrug this change off with the assertion that the operator has to abate the condition anyway and there is no reason to reward it for doing what it is supposed to do. See 71 Fed. Reg. at 53061. In 1982, MSHA approached this subject differently, stating with respect to a 30% reduction:

> Since the civil penalty system by its very nature addresses existing hazards, timely abatement is most critical to miner safety and health. The good faith criterion is the principal mechanism within the civil penalty formula for recognizing abatement, and MSHA believes that this revision encourages the early correction of hazardous conditions. 47 Fed. Reg. 22290.

MSHA inspectors do not actually put their citations in writing until the end of their shift (or even the next day for metal/nonmetal mines). The times they set for abatement typically begin when they verbally inform an operator's representative that they will issue a citation. A citation does not, of course, legally have any effect until it is in writing and the operators' efforts to correct conditions based upon verbal representations receive no reward other than the good faith reduction. A reduction from 30% to 10% for the good faith credit removes substantially all of the incentive to begin abatement even before the citation or order has been officially issued. It will also be less of an inducement for early correction of violations.

History of Violations

MSHA has proposed making two significant changes in the use of an operator's violation history: (1) reduction in the time period for history of violations from 24 months to 15 months; and (2) creation of a second separate category of violation history for "repeat violations." PCA believes

that the reduction in the time period does more accurately capture what might be going on at a mine and PCA supports that proposed change. However; PCA objects to creation of the additional category, the "repeat" violation, to be used in addition to the category established in Section 105(b)(1)(B) of the Mine Act, "the operator's history of previous violations." The addition of the repeat violation category to the already existing violation history category appears to count history twice for an operator. Additionally, there are more significant problems with this proposal.

In each category of mining, but especially in underground coal mining, MSHA issues citations and orders for a disproportionate number of violations of one or two standards. In coal mining, over 12% of the violations are of 30 C.F.R. §75.400 (accumulation of combustible materials). That standard does not set out any criteria for what constitutes a hazardous accumulation of coal. What is applied is a "reasonable man" standard that allows the standard to skirt constitutional due process requirements. See e.g. Old Ben Coal Co., 2 FMSHRC 2806 (Rev. Comm. 1980), Utah Power & Light Co. 12 FMSHRC 965, 968 (Rev. Comm. 1990) aff'd 951 F.2d 292 (10th Cir. 1991). See also, Alabama By-Products, 4 FMSHRC 2128, 2129 (Rev. Comm. December 1982). Those criteria have evolved and became more restrictive without the benefit of rulemaking through the years. Citations have been issued for depths of coal from "0 to 8 inches" under a conveyor belt. Citations have been issued for coal that is so wet that it has to be scooped up in buckets. Citations have been issued where the incombustible content of the material approaches 70%. Citations have been issued for paper bags and candy wrappers. Citations have been issued for "spider webs" of coal dust. Those citations addressed conditions at the face, in roadways even where the bottom consists of coal, along conveyor belts, and in return airways. The use of a repeat violation criterion for such a vague standard which can cover a myriad of situations arbitrarily lumps together different areas of the mine and different violation scenarios.

This is even better illustrated by the metal/nonmetal safe access citation involving the missing doorknob to the men's room referenced above. The cited standard, 30 C.F.R. § 57.11001 is one of the most frequently cited standards in metal/nonmetal. The repeat history would treat this sort of citation with the same weight as one that might address a serious condition of access. See e.g. Lopke Quarries, 23 FMSHRC 705, 706 (Rev.

Comm. July 2001) (access to an elevated work area by crawling up conveyor belt.)

The fact that the repeat violation category is not limited to S&S violations is extremely problematic. The thrust of this change, as well as other changes such as elimination of the single penalty, appears to have virtually eliminated the significance of an S&S finding, contrary to the intent of the Mine Act.

Further, if MSHA concludes that a repeat violation criterion is to be added to the penalty structure, significant changes in the design of this criterion must be made. As proposed, if an operator has six violations of a standard over a 15 month period, it reviews added penalty points. This criterion fails to consider that large mines will receive more violations. Many mines of even rather modest size have 300 or more inspector shifts each year. As noted earlier, violations such as those involving accumulations of combustible material are subjective and involve conditions in unrelated areas of a mine. Operators of larger mines could receive more total citations of this type of standard, than operators of smaller mines because of the size of the operation and the number of inspection shifts received in a 15 month period. Using a rate per inspection shift would at least provide some fairness in assessing repeat violations.

Special Assessment Criteria

The proposed rule virtually eliminates the criteria to be applied in determining what particular violations are considered appropriate for special assessment. 71 Fed. Reg. 53063. While MSHA indicates that this is being done because fewer penalties will be reviewed for special assessment, we believe that it is being done in order to preclude review of MSHA's decisions to specially assess violations which otherwise are only appropriately assessed by the formula. This is the same sort of argument the Secretary made in Secretary of Labor v. Twentymile Coal Company, 456 F.3d 151 (D.C. Cir. 2006), i.e., the absence of criteria to review an exercise of discretion precludes review.

The majority of S&S violations should be assessed by the formula and those violations potentially subject to special assessment should be limited to a very small category, which would include "flagrant" violations as defined by the MINER Act. "Discretionary" use of special assessments

should be eliminated. Such exercise of discretion only lends to arbitrary enforcement as seen with respect to independent contractors See e.g., Twentymile Coal Co., 27 FMSHRC 260 (Rev. Comm. 2005), aff'd 456 F.3d 151 (D.C. Cir. 2006).

MSHA should include in the regulations the matrix of criteria that it is now using to calculate special assessments. The perception has always been that MSHA's special assessments are the result of arbitrary calculations. PCA believes that it would be far better if mine operators understood how MSHA arrives at the amount of special assessments. Over the last several years with all the delays in assessing penalties and recently the errors MSHA is making in determining for collection purposes which penalties have been paid, it is essential that MSHA take steps to provide a credible explanation of its penalty calculations. PCA's proposals would foster that goal.

Operator Size

The Proposed Rule will, according to MSHA, impose larger increases in penalties on larger operators. The percentages of increases in the penalties are as follows for each mine size:

Number of Employees	Percent Increase
1-5	48
6-19	53
20-500	241
501	333

71 Fed. Reg 53067

There is no justification for this disparate treatment. The penalty scheme already takes into account mine size. There is no basis for disproportionately increasing the penalties on larger operators, especially given MSHA's position over the years that it is "small" mines that sustain a disproportionate share of injuries. Larger operators, using MSHA's definition, typically have proven effective safety programs to reduce injuries. Despite this, the Proposed Rule penalizes them for their size.

Controlling Entity

MSHA has asked for comments concerning the weight that should be assigned in the penalty scheme to the size of a controlling entity. No weight should be assigned to the size of the controlling entity. The Mine Act is very specific; it is the size of the operator, not some other entity up the corporate chain that is to be considered in calculating the size of the penalty. [See Section 105(b)(1)(B) of the Mine Act.] The existing system itself is inappropriate and contrary to law because of the use of the size of a controlling entity as a factor in calculating the penalty. No new system should include that factor in any fashion.

Conferences

The Proposed Rule will shorten the period for an operator or miners' representative to request a conference. The purported basis is that it will result in penalties being assessed closer in time to issuance of a citation. 71 Fed. Reg 53064. Such rationale is without foundation. The delay in the process occurs not in the request for a conference but after the request. In some districts conferences are not held for as many as 5-6 months after a request for conference. The average appears to be 2 months in the various districts we informally surveyed but we found that, on occasion, there have been much longer delays in Districts 2, 8 and 9. For example, a District 9 operator is scheduled for a conference next week on a citation and order issued in April 2006. That delay is not caused by the conference request. Further, there are substantial delays in the assessment of penalties, sometimes over a year for special assessments. The reduction of the time period for requesting a conference serves no purpose other than to cut off some operators and miners' representatives from having a conference.

A requirement that would expedite penalty assessments would be to require them to be held within 30 days of the issuance of the citation or order so that, if the operator is not satisfied, it can file an immediate contest.

There is a far larger problem with safety and health conferences. That problem is the conferencing process lacks credibility at this point in time. With the significant increase in the number of citations and orders being written as well as the expected significant increase in penalty amounts it is

vital that the conference be perceived as fair, impartial and effective. Currently, it is none of those things.

In District 2, the conference officer has a reputation for diligence and fairness and ability such that he has been asked to train other conference officers. Despite this, it is our understanding that he is unable to make any change in a citation or order without approval of the District Manager. This is true in other districts also. PCA believes it is time to remove the conferencing officers from under the jurisdiction of the District Managers and their subordinate managers. It is time to reform the process to make it fair, impartial and worthwhile.

PCA appreciates this opportunity to comment on the proposed rules. We understand that MSHA believes it is on a tight time frame for promulgating these rules. That is not however actually the case. The only rules that must be promulgated under the deadlines set out in the MINER Act are those related to certain minimum penalties for Section 104(d) violations and reporting violations and those for flagrant violations. Those deadlines should not be used as grounds for failing to carefully consider comments and objections on the proposed amendments that are not related to implementation of the civil penalty provisions of the MINER Act.

Sincerely,

George Ellis
President