NEWMONT.
The Gold Company

Newmont Mining Corp.
Nevada Operations
P.O. Box 669
Carlin, Nevada 89822

October 31, 2006

MSHA Office of Standards, Regulations and Variances
1100 Wilson Blvd. Room 2350
Arlington, Virginia 22209-3939

Re: COMMENTS IN RESPONSE TO MINE SAFETY AND HEALTH ADMINISTRATION, NOTICE OF PROPOSED RULEMAKING
Criteria and Procedures for Proposed Assessment of Civil Penalties
Fed. Reg. Vol. 71 No. 174 September 8th, 2006

Dear Sir or Madame;

Newmont Mining Corp. respectfully submits comments on the notice of proposed rule making for assessments of civil penalties. Please disregard our comments dated October 18, 2006 and replace them with this version.

Please find attached our comments and recommendations for improving the proposed Civil Penalty rule.

Should you have any questions or require additional information, please contact me directly.
Thank you for the opportunity to provide comments in this matter.

Sincerely,

Richard Tucker
Nevada Regional Manager
HSLP Relations
Newmont Mining Corp.
Phone: 775-778-4480
Mobile: 775-304-2407
Email: Richard.Tucker@newmont.com

Attachment

COMMENTS IN RESPONSE TO MINE SAFETY AND HEALTH ADMINISTRATION NOTICE OF PROPOSED RULEMAKING
Criteria and Procedures for Proposed Assessment of Civil Penalties
Fed. Reg. Vol. 71 No. 174 September 8th, 2006

Newmont Mining Corp. is pleased to submit these comments in response to the Notice of Proposed Rulemaking ("NPR") referenced above. While we recognize that the recently enacted MINER Act (Pub. L. 109-236) requires that MSHA revise certain criteria for assessment of civil penalties in order to conform the current criteria and procedures (30 C.F.R. Part 100) to those changes implemented by the MINER Act, the NPR propose changes far in excess of those required by the Act. As shown below, the proposed changes not only go far beyond what is necessary to implement the MINER Act, but MSHA has offered no evidence that the changes it proposes will have any effect whatsoever on either safety or compliance. Further, the proposed changes will penalize large mines in several significant ways, rather than provide relief for smaller mines, as required by the Act. In addition, the elimination of the single penalty assessment will not only shift the focus of the MSHA enforcement program, but will put the already broken civil penalty system under pressure that it cannot cope with. In short, notwithstanding MSHA's unfounded urgency in rushing these changes to promulgation, all facets of the mining community, industry, labor and government would be better served by the formation of an advisory committee to both advise MSHA regarding what, if any, changes need to be made to the civil penalty system and to audit the system and work cooperatively with MSHA to improve it, once the changes mandated by the MINER Act are implemented.

BACKGROUND

The current penalty assessment system was put into effect in 1978. With the exception of gradual increases in the maximum penalty from $10,000 fine to a $60,000 and the institution of the single penalty assessment, the program has been largely unchanged since then. As it currently exists, the

system encompasses three types of penalty assessments, so-called single penalty assessments, regular penalty assessments and special assessments.

Following the tragic incidents which occurred at the Sago, Aracoma and Darby mines earlier this year, considerable media and legislative attention was paid to a number of mine safety enforcement issues, but especially to the dollar amounts of the penalties assessed against those companies for past violations. By and large, the analyses done by the media and the congress did not analyze industry assessment data in relation to either compliance or safety histories. But rather, simply contrasted the amounts of individual or aggregate penalties against the incomes of the parent companies of the mines in question. Much public outcry was raised as to those amounts, and, apparently in response to that outcry and other pressures, congressional hearings were held and the MINER Act was passed. In addition to imposing a number of substantive requirements on coal mines and adding substantive new requirements regarding the reporting of certain accidents, the MINER Act increased the maximum civil penalty from $60,000 to $220,000 for "flagrant violations." It also set minimum penalties of $5,000 for accident reporting violations in three specified instances and also set minimum penalties of $2,000 and $4,000 for penalties issued under Section 104(d) of the Act.

Notwithstanding the fact that the penalty increases mandated by the MINER Act are specifically limited to discrete types of penalties, MSHA now proposes to completely change the way in which it assesses penalties with respect to all types of violations, from the most trivial, to the most serious. In support of these wide-ranging changes, however, MSHA has offered nothing other than its "belief" that the proposed changes will enhance safety.

Indeed, MSHA has never demonstrated that there is any relationship whatsoever between citation histories and safety records. Beginning in 1990, MSHA has attempted to find a correlation between

penalty amounts and violation frequency with safety records. However, as the following statements, taken entirely from previous proposals to amend the civil penalty system, those attempts have been largely unsuccessful:

> MSHA did not intend to imply that, taken by itself, the number of violations at a mine reflects a mine's overall safety and health environment. Rather, MSHA presented these aggregate data to illustrate that the proposed [changes in the regulations] would have affected mines that, in the aggregate, had injury rates than those mines that would not have been affected [by those changes]. As the purposes of citations is to prevent conditions that may result in fatalities or injuries, a directly proportional relationship between fatality and injury rates and [an excessive history of violations] is unlikely. 57. Fed. Reg. 2974 (Jan 24, 1992).
>
> * * *
>
> On the basis of this more detailed review, the Agency concludes that the data cannot support the argument that mines that would have received an excessive history assessment under the previous or new criteria had a statistically significant higher incidence of fatalities and injuries than mines that would not have received an excessive history assessment. 57 Fed. Reg. 60690 (Dec. 21, 1992)

Despite these clear statements that there is no correlation between increased citations and reduced injuries and fatalities, MSHA concludes its current NPR by stating: The benefits of the proposed rule are the reduced number of injuries and fatalities that would result from increased compliance with MSHA's health and safety standards in response to higher penalty assessments. 71 Fed. Reg. 53069 (Sept. 8, 2006). In other words, despite the fact that no relationship between citation history and accident history has ever been established, MSHA repeatedly asserts that it believes that increasing penalties will result in increased safety and health for our nation's miners. In the absence of data, such a belief is entirely without basis.

MSHA's conclusion is particularly inappropriate with regard to the metal/nonmetal segment of the mining industry. Between 2002 and the second quarter of 2006, the "all incident rate" for metal/nonmetal declined from 3.99 to 3.22, or almost 20%. These improvements took place in

spite of a massive influx of new, inexperienced miners -- those most likely to be involved in an accident. In short, to the extent that penalties actually do have any effect on safety, it is quite apparent that they are already doing their job in the non-coal sector. There is simply no need to change the system with regard to the metal/nonmetal sector except insofar as mandated by the MINER Act.

Putting aside for a moment, the basic question of whether the proposed overhaul of the penalty system would increase safety, MSHA has not even offered any evidence that it would increase compliance. There have been several adjustments in the amount of penalties between the promulgation of the current system and this proposal but MSHA has yet to demonstrate that the increases in penalties had any effect on the number or severity of citations issued. For instance, in the year following MSHA's increase in the maximum civil penalty in 2003, the number of citations actually increased by approximately 10% from 110,038 t0 121,246. That trend continued in 2005, when the number of citations again increased to 128,225. Despite these statistics, MSHA posits that each 10% increase in penalties will result in a 3% decrease in citations, a result contrary to what has happened in the past.

In fact, any objective analysis would show that the proposed penalty system would have the opposite effect. For instance, MSHA points out in its proposal that in 2005, over 75,000 citations (about 65% of the total number of citations) were designated "non-S&S," the vast majority of these eligible for the $60 single penalty assessment. In Metal/ Non Metal, 77% of all violations were non-S&S according to the MSHA Preliminary Regulatory Economic Assessment (PREA). As discussed in more detail below, however, subtle changes in the penalty point system could have the effect of increasing non-S&S citations by as much as 2500%, from $60 to $1,337 at the largest mines (see appendix A). Changing this citation from non-S&S to S&S would increase the assessment only approximately $650. Since non-S&S citations account for approximately 65% of a mines citation

total, it would be in a mine's interest to focus its efforts on preventing those violations which are not reasonably likely to result in a serious injury, rather than those violations that are. The math is simple, using the assessments posited above, if a mine received 100 violations, 65% were non-S&S, a 50% reduction in the least serious violations would save them just under $66,000, while a 50% reduction in the most serious violations would save it less than $32,000. In other words, if MSHA is correct in its assumption that mines change their behavior in response to the economic consequences of the civil penalty system (an assumption with which we absolutely disagree) the new penalty structure provides a strong incentive for mines to focus on the least serious violations at the expense of the most serious.

The single penalty assessment program was proposed for a reason. As MSHA has previously stated:

> The purpose of the single penalty assessment rule is to: restructure the civil penalty system to permit MSHA and the mining community to refocus their safety and health efforts on more serious mine hazards. MSHA believes that these revisions [establishing the single penalty assessment] also provide more effective incentives for the prevention of conditions and practices that may result in injury or illness to the Nation's miners. 47 Fed. Reg. 22286 (May 21, 1982)
>
> MSHA has developed this provision to permit the mining community to focus its resources on those violations which have the greatest impact on miner safety and health Id at 22291.

Now, inexplicably, MSHA has totally reversed its position, suggesting that abolishing the single penalty assessment will somehow increase compliance. However, as with the rest of the rulemaking, MSHA offers absolutely no support for its stark reversal of position. MSHA was right the first time. The single penalty assessment does, in fact allow the mine operator to focus its attention on those violations most likely to cause a reasonably serious accident. To abolish it places technical violations on the same footing as those most likely to lead to accidents. In doing so, it devalues the safety purpose the program has left.

What is more, the addition of another 75,000 citations to an already overburdened assessment system will simply overwhelm it. It is already taking months to receive even regular assessments. Longer delays will result in even more confusion from operators, clog up Commission proceedings and create more and more opportunities for mistakes to be made in a system already plagued with problems. According to the NOPR, MSHA currently does regular or special assessments of approximately 41,000 citations. The addition of 75,000 or more citations to that process will almost triple the burden on MSHA. Given the current state of MSHA's assessment processing system it is worse than naïve to think that an immediate tripling of the workload of the assessment office would lead to anything but disaster.

This oncoming administrative disaster is made only worse by the proposal to shorten the time to request an informal conference from 10 days to 5 days. The purpose of such a conference is to allow the mine operator a chance to resolve any differences of opinion with MSHA before there is a need to resort to formal litigation. Anyone familiar with MSHA's civil penalty system must conclude that enactment of the higher proposed penalties will lead to increased litigation. In order to try to avoid the expense and time spent on such efforts, MSHA should make the informal conference process more accessible, not less. If MSHA wishes to work cooperatively with the mining community, it must not shorten the time in which to request an informal conference and rather, work to make the conference process more meaningful by extending the time to request a conference and by reorganizing the management of the conference and litigation process so that it has, at least, an appearance of impartiality, rather than simply being an extension of District management, as it is now.

Even if MSHA were to be able to justify the proposed massive restructuring of penalties it proposes, there are internal flaws in the proposed new penalties which, 1) are patently unfair to larger operators and 2) focus operator attention away from the most serious violations rather than towards

them. First, MSHA has proposed a new section penalizing mines for repeat violations of the same standard. Clearly, this section will penalize large mines simply because of their size and will disproportionately penalize underground mines simply because they are inspected more frequently than surface mines. MSHA has long recognized that the only equitable way in which to measure violation history is to divide the number of citations received by a mine by the number of days and inspectors at the property ("violations per inspector/day, or VPID"). While it has continued to rely on VPID to calculate an operator's history of previous violations, it has inexplicably abandoned that concept in the proposed new section. At the very least, there must be some correction allowed for inspection frequency, rather than an unfair use of raw numbers. In addition, the section will inevitably result in operators being penalized for the least serious, but most frequently cited violations, such as housekeeping. Rather, MSHA already has enforcement tools available, in Sections 104(d) and (e) of the Act to address recalcitrant operators who repeatedly endanger their employees. The insertion of the new penalty criteria is duplicative of those tools, unnecessary and misguided. In addition, the use of raw numbers of violations as the basis for assessing contractors' history of violations will similarly penalize larger, or underground operators disproportionately. Contractors should be subject to the same history of violations provision as operators.

In addition, MSHA has structured the penalties in such a way as create massive increases in penalties when one of the S&S criteria (either frequency or seriousness) is met, but, since the other criterion is not met, the citation is considered non-S&S. This approach to civil penalties comes dangerously close the misguided and ultimately discarded effort to abandon the *National Gypsum* test for determining S&S. As shown above, reaching only one of the S&S criteria could increase the penalty on a citation now assessed at $60 to over $1,000. If MSHA seriously wishes to focus the attention of mine operators on more serious violations, it must change the point allocations it has proposed in order to ensure that there is a significant difference between S&S violations and non-S&S violations.

Finally, when doing the penalty calculations, one is struck by the fact that the penalties for large operators are disproportionately high. MSHA has long understood that most larger operators have safety programs in place that address most, if not all, of the issues sought to be addressed in the proposed rule. But contrary to its own findings, MSHA would penalize larger operators, more severely than smaller operators regardless of their relative safety records. While we recognize that MSHA must consider an operator's ability to continue in business as a factor in determining the size of the penalty, that factor should not be stood on its head and used as a club for punishing large operators, rather than as a source of financial relief, as mandated by the statute.

The proposed regulations fall far short of their announced goals and, as a result will force operators into spending significant funds on litigation rather than on safety. They are the result of a hasty effort to appease those who would argue, without any basis in fact, that higher penalties will result in improved safety and compliance. Rather than rush to a wrong judgment, MSHA should step back and involve the parties that are impacted most. First, MSHA should immediately release all of the citation and accident history data necessary to do a thorough analysis of the premise underlying this action – which increased penalties will result in greater compliance and increased safety. Let's let the chips fall where they may. If it turns out that there is a significant relationship between penalties and safety, then all parties – industry, labor and government – should work together to craft the best system available. Once it is crafted, we should take a hint from the original penalty rulemaking in 1978. We should set a time during which the efficacy of the new structure can be audited by a tripartite committee and then adjusted to ensure that it accomplishing its goals. Innovative approaches should also be tried. For instance, while operators are penalized for repeated violations, there is no reward for above average safety performance. The "stick" approach has been used for the last 28 years. Isn't it about time we tried the "carrot" as well?

The events at Sago, Aracoma and Darby were truly tragic. All in the mining community mourn the loss of a single miner. However, that is no reason to rush to a solution that lacks any basis in fact and, when analyzed, appears to lead to a result roughly opposite of that it was hoped to achieve. These matters are too important to be decided without analysis. Before MSHA rushes into a wrongly directed system, we urge that you rethink the any changes you propose. Withdraw this rule and propose one that implements that mandates of the MINER Act. Then assemble the parties, do the analysis, and, if necessary, propose a rule that not only accomplishes its goal but also takes the views of the parties into account.

Appendix A

Penalties Calculated on the Basis of a Metal/Nonmetal Mine
Working 300,000 to 500,000 Hours per Year
No Excessive History
No Repeat Violations
Non-S&S

Criterion	Existing Points	Proposed Points
Size of Mine	7	14
Size of Controlling Entity	4	4
Violations Per Inspector Day	16	19
Violations of the Same Standard	N/A	0
Negligence (Moderate)	15	20
Likelihood (Reasonably Likely)	5	30
Severity (No lost Workdays)	0	0
Persons Potentially Affected (3)	4	4
Total Points	40	91
Penalty Conversion	$327	$1,337
Single Penalty Assessment	$60	N/A penalty remains $1,337