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November 9, 2006

Patricia W. Silvey
Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: Proposed Rule Amending Criteria and Procedures for Proposed Civil Penalty Assessments, RIN 1219-AB51

Dear Ms. Silvey:

The National Mining Association (NMA) submits the following supplemental comments for consideration by the Mine Safety and Health Administration (MSHA) in the above-referenced rulemaking to amend the criteria and procedures for proposed civil penalty assessments under the Mine Safety and Health Act (Mine Act); including the implementation of the amendments enacted in the Mine Improvement and New Emergency Response (MINER) Act.

In comments filed on Oct. 24, 2006, NMA urged MSHA to abandon proposed changes that are not related to implementation of the MINER Act and to focus this rulemaking on the MINER Act amendments to the civil penalty provisions of the Mine Act. We do so again. However, the purpose of this letter is twofold: first to comment on the specific request contained in the Federal Register published on Oct. 29, 2006 (71 Fed. Reg. 62,572), and second, to request that MSHA provide public notice and opportunity to comment on the contents of a Program Instruction Letter (PIL) intended to implement § 8(a)(2) of the MINER Act for flagrant violations.

Conference Process

Currently, conference requests must include a statement as to the basis for the conference. We are therefore puzzled by the agency's request for comments on this point. We believe the more fundamental question to be asked is whether or not the conference process is working. This question is increasingly important given our belief, which is shared by many within MSHA, that the elimination of the single penalty assessment combined with the dramatic expansion of the history criteria will result in a substantial increase in requests for a conference. We urge the agency to restructure the conference process by returning it to the fundamentals of the Conference and

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Litigation Representative Program and removing the conference process from the direct control of the District Managers and placing it under the purview of a neutral third party.

Flagrant Violations

Several days after the close of the original comment period for this rulemaking, MSHA released Procedure Instruction Letter No. I06-III-04, "Procedures for Evaluating Flagrant Violations." The PIL is intended to establish uniform procedures for evaluation and assessment of civil penalties for flagrant violations as set forth in § 8(a)(2) of the MINER Act. The proposed civil penalty regulations published on Sept. 8 inserted a provision in the special assessment regulations, § 100.5, setting forth the maximum amount of the penalty that may be assessed for flagrant violations and then repeated the statutory language setting forth the meaning of "flagrant." However, both the proposed rule and the PIL appear to treat MINER Act § 8(a)(2) as amending § 110(a) of the Mine Act. See 71 Fed. Reg. at 53,074 (proposed § 100.5(e) referring to § 110(a)(2) of the Mine Act). In fact, § 8(a)(2) amends § 110(b) related to penalties for failure to correct a violation described in a citation issued under § 104(a) of the Mine Act. See MINER Act, Pub. L. No. 109-236 § 8(a)(2), 120 Stat. 501.

Like the proposed rule which incorrectly refers to § 110(a)(2), the PIL does not reflect the statutory structure which places the flagrant violation penalty in § 110(b), the provision for penalties for unabated citations. As a consequence, neither the proposed rule nor the PIL limit the evaluations for possible flagrant violation assessments to violations for which a citation was issued under § 104(a) which has not been corrected within the time period permitted for its correction.

Moreover, the PIL does not explicitly address the language which defines a flagrant violation in terms of violations that both "substantially and proximately caused . . . death or serious injury," nor does it reference the statutory concept of "known violations." The PIL speaks to the proximate cause, but does not mention "substantially." It is not clear whether this is an omission or the agency infers that "substantially" is satisfied by other criteria it sets out in the PIL.

The importance of these issues deserve and require public notice and comment as part of the agency's rulemaking to implement the MINER Act civil penalty requirements – not merely implementation through a policy document, which deprives the industry of the ability to provide comments.

Sincerely,

Bruce Watzman

cc: Richard Stickler, Assistant Secretary, Mine Safety and Health Administration

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