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**VIA US MAIL and EMAIL**

The Honorable Richard Stickler,
Assistant Secretary of Labor; and
Ms. Patricia W. Silvey, Office of Standards
Untied States Department of Labor
Mine Safety & Health Administration
1100 Wilson Blvd., Room 2350
Arlington, Virginia 2209-3939

Re: **RIN 1219-AB51**
Stillwater Mining Company Comments--Criteria and Procedures for Proposed Assessment of Civil Penalties

Dear Mr. Secretary and Director Silvey:

**Introduction & Summary**

Stillwater Mining Company (SMC) welcomes this opportunity to comment on the proposed rule that would establish new criteria and procedures for the assessment of civil penalties by the Mine Safety and Health Administration ("MSHA"). SMC is a palladium and platinum producer with its corporate office in Billings Montana. SMC operates two underground mines near the towns of Nye and McCleod Montana that are subject to MSHA jurisdiction. The company also operates smelter and refinery facilities in Columbus Montana that are subject to OSHA jurisdiction.

SMC is committed to the protection of its workforce and the environment. In fact, the company has been recognized by state and federal agencies for the significant positive outcomes resulting from this commitment. SMC supports effective regulations and fair enforcement that advances safety and health. The company actively supports, participates in, and sponsors scientific and engineering research to identify, evaluate and prevent hazards.

SMC is the only United States producer of palladium and competes with regulatory costs and foreign competition, from countries where wages and benefits are orders of magnitude below the US. SMC is committed to maintaining and increasing a stable US supply of its metals, which are used primarily for the reduction of exhaust emissions. SMC provides good paying, safe jobs and resources vital to the State of Montana's economy and its environmental commitment to clean air.

We have not previously provided testimony on this topic but are members and supportive of the Mining Awareness Resource Group (MARG) who presented testimony in Salt Lake City on October 4, 2006. Today, we submit comments similar to MARG that support testimony, which established that sections of the proposed rule are inconsistent with:

(1) Congressional intent;

(2) fairness and logic;

(3) good government; and

(4) the promotion of mine safety and health.

We agree with the MARG recommendation that an advisory committee be established to audit the civil penalty system and suggest reforms that advance safety and health, instead of adopting the counter-productive provisions contained in the proposed rule.

We also register our strong objections to the provision of the proposed rule that place flagrant penalties under Section 110(a) of the Mine Act, rather than Section 110(b) as adopted by Congress. This MSHA error and its expansion in the October 26, 2006 MSHA policy letter (#I06-III-04), define the applicability of the new $220,000.00 "flagrant" civil penalty as the equivalent of unwarrantable failure violations, and rewrite the MINER Act that limited the $220,000.00 penalty to flagrant abatement failures, that present the most serious types of hazards to miners. We urge you to revoke them immediately and adopt policy and regulations consistent with the MINER Act.

**Congressional Intent — Address Serious Hazards & Penalize Recalcitrant Operators To Promote Safety**

Following the tragic incidents in the coal industry earlier this year, Congress enacted the Mine Improvement New Emergency Response Act ("MINER Act," Pub. L.109-236, S 2803). These amendments to the 1977 Federal Mine Safety and Health Act (the "Mine Act") require that MSHA revise, by the end of this year, its criteria for assessment of civil penalties (30

C.F.R. Part 100) to address Congressional concerns reflected in the MINER Act. However, Congressional silence on civil penalty provisions for non-serious violations, at safe mines committed to protecting the work force, constitutes an endorsement of the success of current rules applicable to circumstances not addressed by the MINER Act.

The U.S. mining industry, including SMC, that are representative of the metal and nonmetal industry, have demonstrated consistent improvements in safety and amassed the best mine safety record in the world. Yet, the proposed civil penalty amendments are an across the board, massive escalation of monetary penalties, which punishes safe operators as well as the bad actors, and increases penalties for non-hazardous, technical violations, and violations caused without any fault by the mine operator.

As a responsible operator committed to worker safety and health, SMC routinely conducts internal risk assessments of its emergency preparedness plans and implements improvement strategies. The company has developed internal safety management standards that establish, at a minimum, compliance to MSHA standards but in many cases go far and beyond regulatory requirements.

MSHA is fully aware that the Mine Act is a strict liability law, requiring penalties for every violation, regardless of risk or fault. Every year, thousands of citations are issued for non hazardous violations like trash cans without lids, broken or missing light bulbs, and working fire extinguishers whose inspection tags were not dated last month. Under the current assessment system, so long as the operator does not have an excessive history of these non-serious violations, and they are abated in a timely manner, they are the subject of a "single," $60.00 penalty. SMC has received such citations and has demonstrated exceptional good faith towards the abatement and prevention of their recurrence.

The MSHA proposal would eliminate these single, minimum penalties and treat non-serious violations under the same system used for serious hazards. By so doing, the MSHA proposal goes far beyond the high risk, high fault violations of concern to Congress. While the MSHA proposal may make MSHA appear to be a more vigorous regulator, it will not make the industry safer, and it does not comply with the intent of Congress.

**The Flagrant "Policy" Is Not Authorized By Law**

The October 26th MSHA "flagrant" penalty policy memorandum sets forth definitions and procedures that extend the application of the MINER Act $220,000 penalty far beyond the intent of Congress. Congress adopted the flagrant penalty as an express amendment to Section

110(b) of the Mine Act. By its explicit terms, that provision applies only to violations that are not abated, and Congress intended that only the most hazardous of those unabated violations, caused by recalcitrant operators, qualify for the $220,000 penalty.

In contrast, the MSHA regulatory proposal and policy applies the $220,000.00 MINER Act flagrant penalty, regardless of abatement, to Mine Act Section 110(a) penalties for violations that are the equivalent of unwarrantable failure violation findings (resulting from "reckless disregard" or more than two unwarrantable violations of the same standard). This MSHA rewrite of the MINER Act is unauthorized bad policy that loses the Congressional focus on the most serious hazards caused by recalcitrant operators.

MSHA's error applies the $220,000.00 penalty, irrespective of the failure to "correct" (abate) a violation that triggers section 110(b). Moreover, the October 26,2006 MSHA flagrant violation policy letter equates flagrant to unwarrantable violations, rather than triggering the new fine by failures to abate known violations caused by reckless conduct. It is clear that the Congress did not intend to apply the $220,000 flagrant penalty based on unwarrantable violations (addressed by the minimum penalty -- $2000 and $4000--provisions of the MINER Act, and not by changing the maximum $60,000 penalty applicable to them under Section 101 (a).

MSHA should correct its penalty proposal to be consistent with the MINER Act and withdraw its October 26, 2006 policy letter.

**The Principles of Good Government and Fairness**

The deletion of the "single" penalty ($60.00) assessment for non-"significant and substantial" violations will result in non-hazardous and technical violations penalized under the assessment formula intended for serious violations. It will significantly increase fines for non-serious hazards, contrary to intent of Congress, and create greater delays and inefficiencies in the MSHA penalty system.

Between 30-40% of the citations issued by MSHA nationally in the non-coal industry are for non-serious, "non-significant and substantial" violations. Under the proposed rule, penalties for these non-serious citations will further burden the perpetually slow, inefficient and confused MSHA assessment system, extensively criticized at the public hearings, and drive up total penalties by at least three fold, even though they are not related to the serious hazards Congress addressed in the MINER Act.

The ensuing higher fines and longer delays will force mine operators to seek more conferences and contest more violations and penalties, and impose greater costs in time, money and other resources on operators, MSHA, the U.S. Department of Labor's Office of the Solicitor and the Federal Mine Safety and Health Review Commission (FMSHRC). These costs, delays and counterproductive use of limited safety and health resources will be attributable to abated, non-serious violations. Rather that encourage improved safety by penalizing serious hazards and recalcitrant operators as intended by Congress, the proposal will divert scarce resources, encourage needless disputes, and be counter productive to safety.

MSHA also proposes to shorten the time allowed to request a safety and health conference and require the requests in writing. The purported basis is that it will expedite and improve the penalty process. This view is without foundation. Delays in the process occur not in the request for a conference, but after the citations are issued, regardless of a conference request. In many situations, conferences are not held for months after a request and penalties often are delayed for more than one year after a citation is issued, regardless of the occurrence of an informal conference.

The reduction of the time period for requesting a conference or complicating the request method serves no purpose other than to cut off or provide disincentives for MSHA holding conferences with operators' and miners' representatives. These conferences address safety and health and enforcement concerns informally, rather that being forced to initiate litigation to do so. Encouraging litigation and discouraging safety and health discussions between MSHA, mine operators and miners is bad policy.

The proposal also constitutes bad government policy because it unfairly increases fines for large, safe mine operators, which MSHA has long acknowledged have better safety records than small operations. While SMC understands that "mine size" is one of the factors that should be considered in proposing penalties, along with the degree of the hazard and fault in causing the violation, MSHA is neither required nor should it unnecessarily penalize safe mines because they are large facilities. Yet, the MSHA proposal to increase penalties based on repeat violations will unduly penalize large, safe mines. Larger mines receive more inspection days than smaller mines, and more repeat violations of most commonly cited standards. SMC opposes this MSHA proposal to increase fines based on repeat violations since it is not based on concepts of "violations per inspection day," nor does it take into account safety performance, to neutralize the discriminatory, illogical application of the proposal.

SMC willingly commits extensive resources to the management of its health and safety processes and expects participation and accountability at all levels of its organization. The

company is an active and willing participant in government sponsored safety improvement initiatives that are intended to improve worker safety and health. Participation is done not because it is required but because we believe accident and injury reduction is the right thing to do. We believe such proactive steps should be recognized and rewarded rather than disregarded or penalized solely due to the size of the company.

**Safety and Health Is Not Advanced By The Proposal**

As described above, the proposed rule misses a critical opportunity to provide incentives for safety achievement, focus higher penalties on recalcitrant operators and serious hazards, and improve the efficiency and effectiveness of the MSHA penalty system. In addition, the proposal reduces an existing safety incentive by reducing the reduction of penalties for prompt abatement of unsafe conditions.

The reduction of the "good faith" prompt abatement, penalty decrease from 30% to 10% is a disincentive for the quick elimination of hazards. SMC supports the retention of the current 30% penalty decrease because it encourages the rapid implementation of safety improvements to address a violation.

**Advisory Committee Recommendation**

As was stated by MARG in its Salt Lake City testimony, it is recommended that MSHA convene an advisory committee to audit the MSHA civil penalty system and analyze those portions of the Notice of Proposed Rulemaking (NOPR) that extend beyond the MINER Act. The agency's failure to analyze the relationship between the issuance of citations and reductions in fatality and injury rates calls into question the premise upon with the NOPR was issued. Moreover, such an examination will provide the opportunity to evaluate the economic issues, data supporting the assumption that increased penalties drive safety performance and the effects of the penalty assessment process on improving safety and health.

**Conclusion**

MSHA should view this rulemaking as an opportunity to bring together stakeholder representatives to identify opportunities to improve the civil penalty system and address the root cause of serious threats to mine safety and health. Stillwater Mining Company would welcome and actively participate in such an initiative. The October 26, 2006 "flagrant" policy letter, and the rulemaking proposals to rewrite and expand the MINER Act flagrant penalty application, and increase penalties for non-serious violations, will promote increased litigation, waste limited safety resources, further delay and complicate the MSHA penalty

system, and should be withdrawn since they are counter-productive to safety and health and contrary to law.

Sincerely,

Steve Wood
Director, Safety
Stillwater Mining Company