November 9, 2006

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

Re: Comments of Alliance Coal, LLC on MSHA's Notice of Proposed Rulemaking re Criteria and Procedures for Proposed Assessment of Civil Penalties (RIN:1219-AB51)

Dear Ms. Silvey:

In response to MSHA's Federal Register Notice of October 26, 2006 (71 Fed. Reg. 62572) reopening the comment period until November 9, 2006 in connection with MSHA's notice of proposed rulemaking ("NPR") published in the Federal Register for September 8, 2006 (71 Fed. Reg. 53054), set forth below are the comments of Alliance Coal, LLC ("Alliance") on the proposed rules. Alliance is a diversified coal producer employing approximately 2,300 people. We are the fifth largest coal producer in the Eastern United States operating eight underground coal mining complexes in Illinois, Indiana, Kentucky, Maryland, and West Virginia which sold almost 23 million tons of coal in 2005.

Alliance has followed closely both MSHA's and Congress' examination of mine safety issues this year following several tragic coal mine accidents. We have paid particular attention to this summer's enactment of the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), and have been engaged in a regular cooperative dialogue with MSHA about the Agency's implementation of the new law. As a member of the National Mining Association ("NMA"), Alliance has also participated fully in all of the meetings held between MSHA and NMA's Coal Mine Safety Subcommittee on MINER Act implementation. In this regard, Alliance strongly supports the comments of the NMA on these proposed regulations. We also wish to associate ourselves with the comments of Peabody Energy and Arch Coal, Inc. on this proposal.

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Having said that, Alliance also believes that this proposal is so fundamentally flawed (especially because of its failure to contain any meaningful implementation of the MINER Act's new penalty provisions) that it should be withdrawn in favor of a new NPR which melds the new MINER Act penalty provisions into a logical, cohesive whole with MSHA's pre-MINER Act penalty scheme.

We first comment on whether requests by operators to MSHA for safety and health conferences should be in writing and should contain a brief statement of the reason why each citation or order should be conferenced. Although Alliance generally agrees with MSHA that such conferences should be in writing and include a brief statement of the reason why the citations or orders in question should be conferenced, we recommend that such requirements not be made mandatory because informality is at the heart of the conference process, and circumstances may arise where an operator may not be able to conform to such mandatory requirements.

Furthermore, Alliance objects to MSHA's proposal to reduce the period of time for submitting additional information or requesting a conference from ten days to five. Operators need the current ten-day period to gather relevant information, undertake necessary internal discussions and clearances, and consult with outside experts (including counsel). Reducing the time allowed from ten days to five will severely hamper the ability of operators to avail themselves of the informal conference process and will lead to increased litigation of MSHA civil penalty assessments before the Federal Mine Safety and Health Review Commission.

Alliance also strongly objects to MSHA's proposed deletion of the current single penalty assessment provision in 30 C.F.R. § 100.4. MSHA has justified this proposed deletion by asserting that it "will provide a greater incentive for mine operators to abate hazards . . . [and] will cause mine operators to focus their attention on preventing all hazardous conditions before they occur and promptly correct those violations that do occur." 71 Fed. Reg. 53063. As numerous commentors have already pointed out, however, the pervasive regulation and inspection of underground coal mines by MSHA results in a multitude of citations for violations of standards that are non-S&S and have been abated within the time set by the inspector. *See* 30 C.F.R. §100.4 (a). Alliance believes that MSHA was correct in its view expressed when the single penalty provisions were promulgated in 1982 that "[s]ingle penalty violations have minimal impact on safety and health ...." 47 Fed. Reg. 22288 (Fri. May 21, 1982). This is especially the case because, as the Agency then stated, the single penalty provision will not alter compliance responsibilities of either MSHA or the mine operator . . . . [A]ll violations will continue to be cited, all hazards must be abated and all penalties must be paid. MSHA does not believe that this new provision will either encourage operators to violate the Act, or allow hazards, once identified, to remain uncorrected." *Id.* 22291.

Those statements were true then and they are true today. The single penalty assessment provision should be retained.

In addition to these comments, Alliance wishes to address our concerns about: (1) the proposed changes to 30 C.F.R. § 100.3(b) dealing with the size of the operator; and (2) the new language in 30 C.F.R. § 100.3(c)(2) regarding consideration of repeat violations of the same standard.

Alliance agrees with the comments of the NMA that MSHA's proposed focus on the size of the operator is misguided. This provision severely and unjustifiably penalizes large mines, like ours, to the advantage of small mines. It is well demonstrated that small mines are at the heart of the problem, and it is these mines that should be targeted for increased inspections and enhanced available penalties. As the United Mine Workers of America ("UMWA") said in its comments: "[i]t has become clear that small mines generally do not offer their miners the level of protection as larger operations." UMWA comments of Oct 23, 2006, at 3. We wholeheartedly agree.

MSHA should recognize that the underground coal mining industry has changed dramatically, and for the better overall, since mandatory civil penalty provisions were first enacted as a central feature of the Federal Coal Mine Health and Safety Act of 1969. Since then the mainstream of industry has changed from one which was generally closely held to a publicly-owned, much more consolidated industry, whose large mines are not only much safer than their predecessors but also much more productive. The mainstream of our industry has learned that safety and productivity go hand in hand. With those lessons learned, a strong "safety culture" has developed and matured, especially at larger mines, and the time has come, Alliance submits, for MSHA to recognize these changes and to make them, as seamlessly as possible, part of its enforcement and compliance responsibilities.

Thus, in specific regard to this NPR, rather than automatically penalizing larger mines because of their size, we recommend that MSHA give serious thought to ***rewarding safety***. For those operators who invest substantial resources in safety (both people and technologies), Alliance recommends that MSHA work with interested operators to develop voluntary methods to (a) quantify this investment, (b) measure its success, and (c) plug such data into its civil penalty assessment scheme. In short, civil penalty assessment ***credits*** should be developed to recognize the investments of operators in highly-trained and motivated safety professionals and safety technologies aimed not just at compliance with MSHA's safety standards, but also at successfully achieving beyond-compliance results.

Alliance also urges MSHA to drop proposed new § 100.3(c)(2) dealing with repeat violations of the same standard. This proposal in our view has little justification, and, again has the potential to penalize large mines like ours. We say

this because all underground coal mines are dynamic operations, with constantly changing (albeit often predictable) conditions as mining progresses. Furthermore, the area covered by large underground coal mines is enormous. At our Dotiki Mine, for example, we have mined over 23,000 acres during the almost 40-year life of the Mine to date, and we currently have approximately 2,100 acres of active workings, with 20 miles of beltline. While we aim to be totally vigilant, conditions are constantly changing underground, and it is impossible not to have repeat violations of the same standard, no matter how vigilant the operator may be. This does not mean that we have an "attitude" with "little regard for getting to the root cause of violations of safe and healthful working conditions," as MSHA asserts, or that we "show a lack of commitment to good mine safety and health practices by letting cited and corrected hazardous conditions recur." *Id.* 53059.

Finally, Alliance wishes to express disappointment with the failure of this NPR to do anything to implement the new penalty provisions of the MINER Act other than to repeat them verbatim. Mere rote repetition is not what the Congress wanted when it instructed MSHA "[n]ot later than December 31, 2006, . . . [to] promulgate final regulations with respect to penalties." MINER Act § 8(b). We recognize that MSHA was working on revisions to Part 100 prior to enactment of the Miner Act, but Congress has demanded more of MSHA than a simple revamping of Part 100, and one which is not particularly well thought out at that.

As we have said in our previous correspondence with MSHA regarding the MINER Act, while its legislative history is limited due to its expedited consideration, it should be used where possible to help understanding of the MINER Act and to aid its effective implementation. To this end, we note that in his introduction of S. 2803 on May 16, 2006, Senator Mike Enzi (Chairman of the Senate Health, Education, Labor, and Pensions Committee) said:

> [T]hroughout the development of this legislation my long-held view that the vast majority of mine operators take their safety responsibilities with great seriousness has been reinforced. The conscientious efforts of mine operators throughout the country have been the principal reason behind our continual improvement in mine safety over the years. We must recognize this essential fact even as we must also recognize that there are a handful of operators who do not fall in this camp. In the instance of these "bad actors," the MINER Act provides tools MSHA can use to more readily deal with those . . . . The MINER Act creates an increased maximum [penalty] for flagrant violators . . . and creates minimum penalties for the most serious types of infractions.

152 Cong. Rec. S4619 (daily ed. May 16, 2006).

Furthermore, as the Senate passed S. 2803, on May 24, 2006, Senator Edward Kennedy (Ranking Minority Member of the Committee) said:

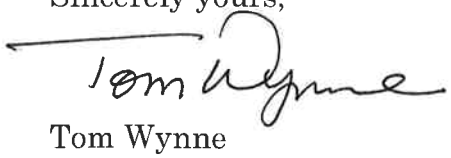
> We . . . need greater incentives to prevent accidents from happening. Too many mining companies have been paying fines that cost less than parking tickets. Under this bill, companies can no longer treat violations of health and safety laws as a cost of doing business. We impose substantial new minimum penalties on companies that put miners at risk and do not take their obligation seriously to provide a safe workplace. These new penalties escalate when companies continue to ignore their safety obligations

152 Cong. Rec. S5050 (daily ed. May 22, 2006).

What we derive from these statements is that the Congress determined that MSHA's pre-MINER Act penalty authority was inadequate and decided it should be strengthened. Congress has now specifically granted new penalty tools to the Agency. In response to this grant of authority, however, MSHA has simply grafted the bare statutory provisions onto proposed revisions to its prior penalty rules, without any explanation as to how it will implement (1) the new minimum penalty provisions of MINER Act § 8(a)(1)(3), the "flagrant violation" provision of MINER Act § 8(a)(2), or the failure to timely notify provision of MINER Act § 5(b)(2). Alliance submits that both operators and miners deserve to know more about how MSHA will implement and administer these entirely new and nuanced statutory provisions. And we wish to add that, having reviewed MSHA's Procedure Instruction Letter ("P12") No. I06-III-04, "Procedures for Evaluating Frequent Violations," issued on October 26, 2006, not only do we have serious concerns about it, but we also fundamentally object to rulemaking by PIL on such an important issue.

Alliance appreciates the opportunity to comment on this NPR, and stands ready to work with MSHA to achieve the goals of the MINER Act.

Sincerely yours,



Tom Wynne
Vice President Operations