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VIA HAND DELIVERY AND E-MAIL

The Honorable Richard Stickler
Assistant Secretary for Mine Safety and Health
Ms. Patricia W. Silvey
Acting Director, Office of Standards,
Regulations, and Variances
United States Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard, 21st Floor
Arlington, Virginia 22209- 3939

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

Dear Mr. Secretary and Director Silvey:

Introduction & Summary

The Mining Awareness Resource Group[1] ("MARG Coalition") 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"). MARG is an informal coalition of companies that operate metal and mineral mines and related facilities in the United States that are subject to MSHA jurisdiction.

MARG is committed to the protection of the workforce and the environment. MARG supports effective regulations and fair enforcement that advances safety and health. MARG also supports,

[1] The members of the MARG Coalition are General Chemical, Morton Salt, Mosaic Potash, Newmont Gold, Stillwater Mining, Cargill Salt, Detroit Salt, Carmuese Lime, and FMC Wyoming. MARG notes with appreciation that it has received significant support from a number of other companies and trade associations.

participates in and sponsors scientific and engineering research to identify, evaluate and prevent hazards.

MARG members have observed that regulatory costs and foreign competition, often from countries with wages and benefits orders of magnitudes below those of the US, have resulted in the loss of thousands of US mining jobs and the closure of many US mines since the creation of MSHA in 1978. MARG is committed to maintaining and increasing a stable US supply of critical resources, contributing to the reduction of the US foreign trade deficit and stopping any further erosion of the US non-coal mining industry that provides good paying, safe jobs and resources vital to the economy and the security of our nation.

We provided testimony in Salt Lake City, Utah on October 4, 2006 at the public hearing on the proposed rule. Today, we submit additional comments in support of our 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.

Additionally, we emphasize our 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 counterproductive provisions contained in the proposed rule.

We also register our strong objections to the erroneous provision of the proposed rule that places 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)(copy attached) define the applicability of the new $220,000 "flagrant" civil penalty as the equivalent of unwarrantable failure violations and rewrite the MINER Act that limited the $220,000 penalty to flagrant abatement failures that present the most serious types of hazards to miners. Ironically, the policy letter and the hidden impact of the regulatory proposal section change are an "end run" around this very rulemaking and the Congress. The "flagrant" penalty policy prevents public input through an administrative fiat that exceeds MSHA authority. Worse yet, the regulatory proposal treating flagrant penalties under Section 110(a) of the Mine Act, as opposed to the express adoption by Congress in Section 110(b), appears aimed at reversing the Congressional mandate to focus on the most serious hazards caused by recalcitrant operators. 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 US mining industry, including MARG members that represent the metal and nonmetal industries, have demonstrated consistent improvements in safety and health for at least thirty years and have amassed the best mine safety record in the world. Yet the proposed civil penalty amendments represent an across-the-board and massive escalation of monetary penalties that 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.

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.

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 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. The MSHA error is evident by examining the detailed addition of the MINER Act and the provision of Mine Safety Act that it amends:

UNITED STATES PUBLIC LAWS
109th Congress - Second Session
Convening January 7, 2005
PL 109-236 (S 2803)
June 15, 2006
MINE IMPROVEMENT AND NEW EMERGENCY RESPONSE ACT OF 2006 (MINER ACT)
(as passed by Congress and published on the MSHA Web Site)

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SEC. 8. PENALTIES.

(a) IN GENERAL.--**Section 110** of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 820) **is amended--**

(1) in subsection (a)--

(A) by inserting "(1)" after the subsection designation; and

(B) by adding at the end the following:

"(2) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under paragraph (1) or section 105(c), shall, upon conviction, be punished by a fine of not more than $250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $500,000, or by imprisonment for not more than five years, or both.

"(3)(A) The minimum penalty for any citation or order issued under section 104(d)(1) shall be $2,000.

"(B) The minimum penalty for any order issued under section 104(d)(2) shall be $4,000.

"(4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 106, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection;" and

(2) by adding at the end of subsection (b) **the following:** "Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term 'flagrant' with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." (emphasis added)

Federal Mine Safety & Health Act of 1977,
Public Law 91-173,
as amended by Public Law 95-164*
(as printed on the MSHA Web Site)

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PENALTIES

"SEC. 110.(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 [currently $60,000] for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

[Note that there is no section (a)(1) or (a)(2)]

"(b) Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 [currently $5,500] for each day during which such failure or violation continues." (emphasis added)

The combined provisions of the MINER Act amendment to subsection (b) of the Mine Safety Act are the following:

(b) Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 [currently $5,500] for each day during which such failure or violation continues.

"Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term 'flagrant' with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

The MSHA error can be seen in its proposal for amending the penalty provisions at 30 CFR Section 110, (71 Fed Reg at 53074, Sept 8, 2006) which improperly applies the MINER Act to create a new, unintended subsection (a)(2) of Mine Act Section 110:

> "(e) Violations that are deemed to be flagrant under section **110(a)(2)** of the Mine Act may be assessed a civil penalty of not more than $220,000. For purposes of this section, a flagrant violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

MSHA's error applies the $220,000 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 threefold 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, 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 than 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 counterproductive 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 citation is 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 than 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 MARG 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. MARG 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.

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 decreases 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. MARG 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 we stated in our Salt Lake City testimony, MARG recommends 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 improve the civil penalty system and address the root cause of serious threats to mine safety and health. Instead, 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 counterproductive to safety and health and contrary to law.

Sincerely,

Henry Chajet