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Comment from Bethany Brown, Georgetown University Law Center - Law Student

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General Comment

See attached file(s)

Attachments

MSHA-2011-0001-DRAFT-0022.1: Comment from Bethany Brown, Georgetown University Law Center - Law Student

AB73-COMM-19

I would like to thank you for taking the time and effort to update the process for punishing repeat violators of mine safety regulations. I noticed in the proposed rule that this effort was motivated by the 2006 accidents at Sago, Darby, and Aracoma, but this seems also particularly timely and relevant due to the accident at Upper Big Branch last year. It is my understanding that Massey was prone to utilizing the appeals process to prevent safety shutdowns at that mine, and I am happy to see that you are working to close this loophole.

I would like to submit a couple of comments of general concern as well as a couple of quick comments pertaining to issues for which you specifically requested comment.

Generally speaking, I think that the proposal to utilize an on-line system pertaining to the POV screening criteria is an excellent idea. I agree that this will better enable mine operators to monitor safety concerns within their mines to ensure compliance independent of the reviews. Any plan to make information more accessible to those whom it affects is a step in the right direction. Your proposal mentioned multiple times that the threat of closure provided by a POV status will incentivize operators to independently ensure compliance prior to reaching POV status. I agree, but I would add that the threat of closure must be real for this system of incentives to be effective. Thus, I also applaud the steps taken under this proposal to ensure that the threat of closure will be taken seriously, including an increase to two reviews annually and abandonment of the PPOV.

That being said, I am slightly concerned that the MSHA-approved safety and health management program will replace the appeals process as a manner by which to evade punishment for violations. I do, of course, understand that the program will be a much more inclusive and active process than the appeals process, with the utilization of concrete benchmarks and with miners participating in the development of the program. However, I would urge a strict plan for reporting on and ensuring compliance with the program once it is in place, including providing continuing forums for miner participation into the compliance phase. Miners seem to be in the best position to advocate for compliance as they are best able to observe the safety conditions of the mine and, as they are most affected by dangerous conditions within the mine, have the strongest incentive to ensure that safety precautions do not fail.

As to your request for comments regarding the best method for notifying mine operators of changes to POV screening criteria, I should think that e-mail and posting updates to criteria on the website would be best. Taking advantage of this technology is the most cost-efficient, timely manner of distribution. Additionally, as mines would be able to submit more than one e-mail address to add to the distribution list, the dissemination of information will occur much more quickly than were notice to occur through the mail or other such method. I know that most if not all of the federal district courts use a system of e-mail and on-line notification for motions and other court filings, so it would seem that electronic notification does not offend any notions of fair process.

Finally, you requested comments specifically directed to the burden that monitoring compliance record against the proposed POV criteria using the Agency's Web site would place on mine operators. I found your analysis regarding the actual cost of the labor required to monitor the website to be convincing. Though five minutes per month seems like a short amount of time to monitor the website, I trust your expertise on the issue. I feel strongly that this cost should accrue

to the mine for two primary reasons. The first is that any alternative I can imagine would require the MSHA to strengthen compliance monitoring. Because this would be much less convenient and much more time consuming, likely requiring either reports to be submitted by the mines – taking up more of the operator’s time – or requiring MSHA officials to travel to the mines – costing much more time and money, requiring mines to monitor compliance electronically appears to be the most efficient possibility. Secondly, as this is a cost of ensuring the safety of the mine, this cost should be internalized to the mine’s operations. Were the cost to be subsumed by the public via government intervention, the mine’s books would not accurately reflect the full cost of mining, and the market for mined products would be artificially high.