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CORPORATE HEADQUARTERS

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March 7, 2011

MSHA, Office of Standards,
Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

Re: RIN 1219-AB73

Dear MSHA:

This letter is the Commentary of Greer Industries, Inc. to the above-referenced Proposed Rule. It is our fervent hope that MSHA will give serious consideration to these comments in the spirit that they are intended. Our Company's number one priority is, and has always been, miner safety and health always come first; however, the newest proposed rule does not and will not increase the safety and health of the mining community. Conversely, the new proposed rule (1) violates the Due Process Clause of the Fifth Amendment to the United States Constitution; and (2) contradicts one of the most basic concepts in our American justice systems, the "presumption of innocence." Moreover, MSHA already possesses adequate enforcement tools in its graduated enforcement scheme, which if properly and prudently utilized, would adequately address the concerns expressed by the agency in proposing the changes included in this rulemaking process.

First, the Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Specifically, the principals behind the Due Process Clause point to the fact that government officials can only take away a person's rights, goods, lands, life or freedom in accordance with well established laws. In short, the accused must be granted what is "due" him/her, meaning his or her right to have a fair legal process and not an arbitrary and capricious one created at the whims of a government official or agency involved.

Proposed rule - Section 104.2(a) would provide that "[s]pecific pattern criteria will be posted . . . and used in the review to identify mines with a pattern of S&S violations" which include "[c]itations for significant and substantial violations." This portion of the proposed rule would eliminate the existing requirement in Section 104(3)(b) that only citations and orders that have become "final" are to be used to

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identify mines with a potential pattern of violations. Any person who has worked in the mining industry knows that the issuance of an S&S citation to an operator is an extremely subjective matter. In other words, what one person may perceive as an S&S violation, another may defend as non S&S, or not even a violation at all. In fact, many mine operators have been successful in challenging the S&S designations of violations by exercising their right to procedural due process.

Further, just because an inspector subjectively believes that a citation should be issued as S&S does not establish proof of such violation. On the contrary, the actual issuance of a citation can be the direct result of an individual inspector receiving undue pressure from his/her supervisor to issue more S&S citations because the inspector's or his MSHA district's violation rate is below the national standards. In addition, there can also be situations as simple as personality conflicts, or a phenomenon called a "new sheriff in town," that can cause an individual inspector to issue more citations (and more S&S designations) than a mine actually deserves. Also, for pure political reasons, an increase of S&S violations and/or elevated enforcement actions, such as alleged unwarrantable failure 104(d)(1) citations, typically emerge after a well publicized mine disaster, irrespective of the actual safety of a particular mine. Due to the subjective and arbitrary nature of the issuance of citations, and the designations of gravity and negligence factors in such citations, major inconsistencies have become a mainstay in the mining industry. Unfortunately for the operator wrongfully accused of an unwarrantable failure enforcement action (a 104(d) issuance), a cessation of an operation and withdrawal of personnel have resulted merely due to the allegation. Even if MSHA's position is found to be legally non defensible and reversed, the mere allegation results in substantial disruption to the operation in the form of lost time and expense, and distracts from the operation's overall safety that is not accounted for but only partly protected by legal challenge.

As a result of the subjective issuances of violations (and subjective designations such as S&S or unwarrantable failure) by inspectors, mine operators are forced to expend substantial resources (including the time of safety professionals and money) to challenge arbitrary violations through the use of the legal process. Notably, many mine operators, including our company, have been extremely successful in these challenges. However, under the new rule, mine operators would be (1) forced to pay a penalty, and (2) labeled a mine operator with a "pattern of significant and substantial violations," prior to a formal hearing and prior to an inspector's allegations being substantiated. Essentially, what the new proposed rule does is to move the actual process of a legal proceeding subsequent to the imposition of the fines and punishment. In other words, under the new proposed rule, a mine operator's property becomes a "taking" prior to due process of law, a direct violation of the Fifth Amendment. When coupled with the elevated enforcement tools already available to the agency that is simply an unnecessary and far too heavy-handed weapon to add to the agency's enforcement arsenal.

Second, the concept of the presumption of innocence is one of the most basic in our American justice system and applies to civil laws as well as criminal laws. This basic right comes to us from English jurisprudence, and has been a part of that system for so long, that it is considered common law. The basic concept, as applied to the mine act, is

that prior to the imposition of a penalty or fine, the government has the burden of proving that a mine operator actually violated a specific provision of the mine act. Clearly, the burden of proof remains on the government, and there is no requirement that a mine operator prove its innocence.

As a mine safety professional for over thirty years, I have successfully challenged a large number of citations (or designations of S&S, gravity and negligence) where the government was unable to meet its burden of proof. Although citations were issued, the government failed to meet its burden. As a result, the mine operator was not required to pay the penalty and fine originally assessed. The new proposed rule essentially takes the right to the presumption of innocence away from the accused and requires the accused to now prove its innocence to recover property that was taken without due process. This should never happen to any mine operator or to any citizen of the United States.

Lastly, the agency already possesses the graduated enforcement tools necessary to shut down all or any part of unsafe operations (through the use of unwarrantable failure to comply, imminent danger, and other elevated enforcement actions). However, part of the problem is that the agency has in many instances improperly and improvidently utilized its elevated enforcement tools to the point that operators are distracted from legitimate safety activities to address the whims of inspectors. Perhaps additional training of inspectors concerning the proper use and issuance of graduated enforcement tools already in place would be a far more efficient and effective use of resources rather than seeking to take away legal due process rights of operators. When properly issued and not overwritten, enforcement actions are not challenged and time, resources and attention remain focused on the primary goal of miners' health and safety.

Based on the foregoing, the new proposed rule should not be promulgated in that it violates the Due Process Clause of the Fifth Amendment and contradicts the presumption of innocence. In addition, MSHA already possesses adequate enforcement tools in its graduated enforcement scheme.

Sincerely,



Mark A. Wilson
Vice President Greer Industries, Inc.