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November 29, 2014  
Ms. Sheila A. McConnell  
Acting Director  
Office of Standards, Regulations and  
Variances  
Mine Safety and Health Administration  
U.S. Department of Labor  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209

Dear Director McConnell,

Re: RIN 1219-AB72—MSHA's Proposed Amendments to 30 CFR Part 100

Attached are the comments of ten former members of the Federal Mine Safety and Health Review Commission in response to the above-named proposed rule. The comments have been reviewed and approved by these former Commissioners, and I have been authorized to file them on their behalf.

Feel free to contact me if you have any questions or require additional information.

Sincerely,

  
Michael F. Duffy

AB72-COMM-27

November 29, 2014

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Acting Director  
Office of Standards, Regulations and  
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Mine Safety and Health Administration  
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1100 Wilson Boulevard, Room 2350  
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Dear Director McConnell,

Re: RIN 1219-AB72—MSHA's Proposed Rule to Amend 30 CFR Part 100.

The comments set out below are filed on behalf of ten former members of the Federal Mine Safety and Health Review Commission who have served in six administrations from 1978 through 2012 and represent a cumulative total of nearly sixty years of service to the Commission. The comments are directed exclusively at proposed section 30 CFR 100.1 (Scope and Purpose), proposed section 30 CFR 100.2 (Applicability), and proposed section 30 CFR 100.9 (Commission Review of the Secretary's Proposed Assessment) insofar as they would apply to the assessment of civil penalties by the independent Review Commission and its administrative law judges. The comments are also in response to the Secretary's rationale for proposing these amendments to 30 CFR Part 100, set forth in Section IV of the preamble to the proposed rule and entitled: "Proposed Alternatives To Change the Scope, Purpose, and Applicability of This Part." We take no position on the merits of the proffered rule as it applies to the proposal of civil penalties by the Mine Safety and Health Administration.

Thirty-six years ago the principal author of the Federal Mine Safety and Health Act of 1977 (Mine Act) said after introducing the first five persons to serve as members of the Federal Mine Safety and Health Review Commission:

It is our hope that in fulfilling its responsibilities under the [A]ct, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct and to the mining industry and miners in appreciating their responsibilities under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

*Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res., 95th Cong., 2d Sess., 1 (Aug. 24, 1978).*

Twenty years ago, the Supreme Court, favorably citing the above description of the Commission's separate and independent status, vis a vis that of the Secretary, stated:

Petitioner's statutory claims . . . arise under the Mine Act and fall squarely within the Commission's expertise. The Commission... was established as an independent-review body to "develop a uniform and comprehensive interpretation" of the Mine Act[.]  
*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994).

That initial statement, endorsed by the Supreme Court, has provided fundamental guidance for Commissioners who have served ever since. Accordingly, we the undersigned former Commissioners strongly oppose the proposed rule as an attempt to circumvent the express design of the statute, an unprecedented attack on the Review Commission's independence, and an unlawful usurpation of the Commission's role as the ultimate and dispassionate assessor of civil penalties under the Mine Act. Thus, we join with the current Commission in opposition to the proposed rule.

### **Congress' Explicit Design of the Mine Act Precludes the Proposed Rule.**

Within the broad parameters of the commerce clause, Congress in the modern era has chosen to regulate many commercial activities. The exercise of such far-reaching regulatory power has been accompanied by appropriate due process guarantees. Thus, it is not enough to simply enforce standards of conduct that Congress deems appropriate and necessary; those upon whom the standards are imposed must be given the right to have that conduct impartially reviewed. Generally speaking, Congress has chosen to house both the enforcement and adjudicative functions within separate divisions of the same agency or cabinet department. With respect to labor relations, mine reclamation, and water and air quality, the mining industry has been regulated and adjudged, respectively, by the

National Labor Relations Board, the Office of Surface Mining, and the Environmental Protection Agency.

In contrast, Congress has also determined that in other contexts, due process is better achieved if the enforcement and adjudicative functions reside in wholly separate and independent agencies. That so-called “split enforcement model” has been adopted with respect to workplace safety in general industry through the Occupational Safety and Health Act of 1970, and in the mining industry under the Mine Act. With regard to the Mine Act, Congress was fully aware of the shortcomings of the prior regime where enforcement and adjudication of mine health and safety at coal mines, under the 1969 Coal Mine Health and Safety Act, and at metal/nonmetal mines, under the 1966 Metal and Nonmetallic Safety Act, both resided in the Department of the Interior. Chief among Congressional concerns was a propensity for MSHA’s predecessors to settle cases for what one of the 1977 Act’s chief proponents characterized as “pennies on the dollar.”<sup>1</sup>

Reasonable minds may differ on the wisdom of choosing the split enforcement model over more traditional regulatory constructs. Nevertheless, the split enforcement model was a deliberate policy judgment made by Congress and enacted into law after extensive experience and study. As such, it cannot be taken lightly nor undermined by attempts to blur the distinct line drawn by Congress between enforcement and adjudication. It is neither appropriate nor legitimate for an executive branch agency to second guess Congress and adopt an extra-statutory enforcement and adjudicative arrangement that it prefers to the system duly devised and enacted. The Secretary is attempting to do just that in this proposed rule, and we strongly object to that attempt.

### **The Proposed Rule Conflicts With the Explicit Statutory Language of the Mine Act.**

By the straightforward and unambiguous terms of the Mine Act, the Commission possesses exclusive authority “to assess all civil penalties” after having applied six statutory criteria to the facts surrounding the violation in question:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith

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<sup>1</sup> Floor Statement of Senate Labor Committee Chairman, Sen. Harrison Williams (D-NJ), reported in *Legislative History of the Federal Mine Safety and Health Act of 1977* at 89.

of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Mine Act also grants exclusive authority to the Commission to review, and approve or deny, proposed settlements proffered by the Secretary and mine operators.

No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

30 U.S.C. § 820(k).

These explicit provisions incontestably establish that the Commission is the ultimate authority in determining the appropriate penalty to be imposed once the facts of a violation are established. Even when the Commission is not actively involved in the procedure by which a civil penalty is ultimately paid by a violator, the Mine Act, nevertheless, defers to the Commission as the actual “assessor” of that penalty. Section 105(a) of the Mine Act provides that when a mine operator chooses not to (or fails to) contest a civil penalty proposed by the Secretary within 30 days, that proposed penalty shall be deemed to be a final order of the *Commission*, thus making explicit the superior position of the Commission over that of the Secretary when it comes to the assessment of civil penalties. As noted above, this interrelationship with its emphasis on the oversight role of the Commission harkens back to Congressional dissatisfaction with the prior system where strict separation between the enforcement and adjudicative roles was not clearly established so as to avoid the compromising of penalties for the sake of administrative convenience.

In devising improvements to what it considered a failed regulatory scheme for improving miner safety, Congress, in the years leading up to the passage of the Mine Act, asked and answered the perennial question first asked by the Roman poet Juvenal: “*Quis custodiet ipsos custodes?*” (“Who watches the watchmen?”). The answer was the split enforcement model whereby the independent Commission would be the ultimate arbiter of what would constitute appropriate civil penalties for violations of the Mine Act.

Although the statutory language vesting assessment authority exclusively with the Commission is abundantly clear, the equally clear legislative history of the relevant provisions provide an exegetical “slam dunk” in favor of the Commission’s preclusive role with respect to the assessment power.

The following citations to that history have been fully set forth in the current Commission’s comments on the proposed rule. They bear reiterating here because for nearly four decades they guided us prior Commissioners in recognizing our primary role in the Congressional scheme for assessing penalties under the Mine Act. That role was

unquestioned until this foray into a statutory reconstruction of what Congress clearly expressed.

Thus, with respect to the Commission's exclusive and independent authority to assess all civil penalties, the Senate Report states:

Section [110(i)] provides that the civil penalties are to be assessed by the Mine Safety and Health Review Commission rather than by the Secretary as prevails under the Coal Act (Sec. 109(a)(3)). . . . Where a penalty is contested the normal proceedings for the hearing of cases by the Commission controls.

S. Rep. No. 95-181, at 45-46, *Legis. Hist.* at 633-34.

Moreover the Conference Report on the Act makes it clear that Congress decided unequivocally to vest the authority to assess violations in the Commission, not the Secretary, and not on the Secretary's terms:

The Senate bill provided that the independent Mine Safety and Health Review Commission would have the authority to assess all civil penalties, based on proposals made by the Secretary. The Secretary, in making his proposals, would rely on a summary review of information available to him, and need not make findings of fact. . . . The House amendment . . . provided that the Secretary assess civil penalties, after the charged person is afforded the opportunity for a public hearing. . . . The conference substitute conforms to the Senate bill . . .

S. Conf. Rep. No. 95-461, at 58 (1977), *Legis. Hist.* at 1336. The Conference Report goes on to make it crystal clear that Congress made a conscious choice to grant the Commission independent authority to assess penalties without limitation or interference by the Secretary:

The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program.

*Legis. Hist.* at 1360.

## **The Proposed Rule Contravenes Decades of Deference by the Courts and the Secretary to the Commission's Authority to Assess Civil Penalties.**

As we note above, until this regulatory initiative undertaken by the Secretary, the Commission's independent and exclusive authority has been unquestioned. For example, in *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7<sup>th</sup> Cir. 1984), the Court held that in assessing civil penalties Review Commission judges were not required to comply with the proposed penalty regulations applicable to MSHA under 30 CFR Part 100.

[W]e find no basis upon which to conclude that these MSHA regulations [Part 100] also govern the Commission. It cannot be disputed that the Commission and its ALJs constitute an adjudicatory body that is independent of the MSHA. Sen. Rep. No. 461, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary. . . . Furthermore, *neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals in section 100.3 of the MSHA regulations.* *Id.* at 1152. (Emphasis added.)

In the preamble to the proposed rule, the Secretary notes that until now he has concurred with the *Sellersburg* decision and with extensive Commission jurisprudence establishing the Commission's exclusive and independent authority to assess penalties under the Mine Act:

Historically, the Secretary (through MSHA) has affirmatively limited the scope, purpose, and applicability of part 100's penalty formula by explicitly stating that the Commission is not expected to consider the formula when assessing civil penalties. *See* 30 CFR 100.1 and 100.2 (limiting scope and applicability of part 100 to MSHA's proposed penalties). In the preamble to the 1982 Final Rule, MSHA stated: When a proposed penalty is contested, neither the formula nor any other aspect of these regulations applies. If the proposed penalty is contested, the Mine Safety and Health Review Commission exercises independent review, and applies the six statutory criteria without consideration of these regulations. *Criteria and Procedures for Proposed Assessment of Civil Penalties* (May 21, 1982, 47 FR 22286-87). 79 FR 44508.

We agree wholeheartedly with the Secretary's summary of his position thus far. We part company with the Secretary, however, when he goes on to suggest that his position over nearly four decades has been merely a policy choice that he can summarily reverse through his own discretion and that his now contrary view regarding the Commission's singular and independent assessment authority is entitled to deference by the Commission. The Secretary's decades-old deference to the Commission's

prerogatives regarding assessment authority has been dictated by his and his predecessors' strict adherence to the explicit language of the statute and clear Congressional intent—not by their voluntary forbearance. Moreover, we find it particularly disconcerting that a party who appears before an independent tribunal would find it appropriate to impose strictures on that tribunal with respect to how it decides cases involving that very same party.<sup>2</sup> We are not back in the day when both enforcement and adjudication were subsumed under the same cabinet department whereby the Secretary of the Interior could dictate how each function should be carried out.

The Secretary cannot support such an anomalous position by resorting to his authority to issue regulations under section 508 of the Mine Act. First, section 508 applies only to regulations governing the actions and authority of MSHA, and cannot be utilized to circumscribe the actions and authority of the Commission and its judges. Second, it is a fundamental canon of administrative law that an agency cannot promulgate a rule that conflicts with the underlying and enabling statute that the agency administers. Such an action would be *ultra vires* and must be rejected outright. *See, e.g., National Labor Relations Board Union v. FLRA*, 834 F.2d 191, 196-197 (D.C. Cir. 1987).

Here, the Secretary seeks by regulation to rescind section 110(i) of the Act, which vests the exclusive and independent authority to assess civil penalties with the Commission. That course of action is impermissible under the clear terms of the Mine Act no matter how administratively convenient it might be to undertake.

### **The Proposed Rule Contravenes the Requirements of Executive Order 12866.**

In the preamble to the proposed rule the Secretary makes passing reference to Executive Order 12866, which, among other things, requires federal agencies to provide an appropriate regulatory impact analysis for “significant regulatory action.” One of the criteria defining “significant” is whether, as the Secretary indicates, it results in “creating a serious inconsistency or interfering with an action of another agency.”

We believe there is more to E.O. 12866 than that. Indeed, the order explicitly sets forth twelve “Principles of Regulation” that agencies are required to follow in proposing new regulatory actions. Most tellingly, principle number ten provides:

Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

The proposed rule is in direct conflict with the Commission’s procedural rules set forth at 29 C.F.R. Part 2700, which, with minor alterations, have applied to the

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<sup>2</sup> The Secretary’s about face calls to mind Cassius’ question in Act I, Scene 2 of Shakespeare’s *Julius Caesar* : “Upon what meat doth this our Caesar feed, that he has grown so great?”

assessment of civil penalties by the Commission and its judges since 1978. Accordingly, since the proposed rule runs afoul of E.O. 12866, it must be withdrawn.

Rule 30(a), derived almost verbatim from section 110(i) of the Mine Act, provides in part that, “[i]n assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision.” 29 C.F.R. § 2700.30(a). MSHA’s proposed rule is in direct conflict with this Commission Rule since it would preclude a judge from assessing a penalty other than by MSHA’s penalty formulas.

Likewise, Rule 30(b) provides that, “In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.” 29 C.F.R. § 2700.30(b). The proposed rule would in effect repeal the Commission’s rule, an outcome never contemplated by Congress, either explicitly in the language of section 110(i), or in the authoritative statements in the legislative history. It would also run afoul of the decision in *Sellersburg*, 736 F.2d at 1152, which states that the Commission “is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary.”

There is no statutory or legal basis for the Secretary’s abrupt departure from procedures established in strict conformity with Congressional intent.

Principle number two of E.O. 12866 provides:

Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

As we stated above, reasonable minds may differ over the relative merits of the split enforcement model set forth in the Mine Act versus the regimes created in the Mine Act’s predecessor statutes where enforcement and adjudication were administered within a single cabinet department. Congress has already made a judgment in favor of the split enforcement model, and only Congress can unmake that decision through legislation. The Secretary has no authority to unilaterally breach the clearly defined line drawn by Congress that vests the Commission with the exclusive and independent authority to assess civil penalties under the Mine Act. If the Secretary believes that the Department of Labor’s nearly four decades of unquestioning allegiance to Congressional intent should now be radically reversed, his sole recourse is to convince Congress of the wisdom of his revised position and to seek appropriate amendments to the Mine Act, as the principle cited above contemplates.

## **The Secretary's Three "Alternatives" for Circumventing the Commission's Authority Are Equally Flawed.**

The proposed rule proffers three means of usurping the Commission's authority under the Mine Act. The first would require Commission judges to adhere strictly to the penalty formulas utilized by MSHA's Office of Assessments to arrive at proposed penalty amounts. The second alternative would allow Commission judges some limited leeway to depart from MSHA's proposed penalties if "mitigating" or "aggravating" circumstances exist that would justify such a departure. The burden would be on the judges to prove that the departure from the proposed penalty is justified. The third alternative is characterized as maintaining the status quo. It does not. Rather, it provides hortatory guidance to the Commission to instruct its judges to presume the validity of the proposed penalties or else explain why they are inadequate, to provide more guidance to its judges on how to rationalize the bases for their assessed penalties (presumably, by referring them to Part 100) or by adopting a policy whereby Commission judges would defer to the Secretary's interpretations of the statutory penalty criteria even if they do not actually apply the formulas in Part 100.

All three alternatives are equally flawed because they are equally unlawful. Each seeks to circumvent the Mine Act by making the adjudicator subservient to the litigant before him or her.

### **Conclusion**

As former Commissioners, we can appreciate the challenges posed to both the Secretary and the Commission in dealing with an unprecedented surge in Mine Act related litigation over the past several years. Assuring prompt and fair justice in the processing of citations, orders, and penalties sanctioned by the Mine Act has become a daunting task. Nevertheless, initiatives taken to streamline the process for handling disputes arising from the enforcement of the Mine Act, and the mandatory standards adopted thereto, must comport with the law. Congress made hard choices in response to the questions it confronted in fashioning the Mine Act. Those choices must be observed and honored. One of those choices was the decision to cleanly separate the enforcement function from the adjudicative function by placing them in wholly separate agencies. With that line of demarcation came the inextricable Congressional decision to grant to the Secretary the duty to propose a penalty, but to grant to the Commission the independent and exclusive authority to actually assess the penalty once the facts surrounding the violation at issue are determined.

We appreciate the opportunity to comment on the proposed rule and trust that our comments will persuade the Secretary to withdraw the proposed rule to the extent that it encroaches upon the role, authority and prerogatives of the independent Review Commission in its exclusive role of assessing penalties under the Mine Act. Given the arguments set forth above, we would assume that the current and future Commissions would not consider themselves bound by such a rule.

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James A. Lastowka  
1984-1990

Joyce A. Doyle  
1985-1996

Ford B. Ford  
1987-1992

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