ARCH COAL, INC.

October 20, 2006

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

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

Dear Ms. Silvey:

These comments are submitted by Arch Coal, Inc. (Arch) in response to the notice posted by MSHA in the Federal Register on September 8, 2006 announcing a new proposed rule. The proposed rule in question contains revisions to 30 CFR Part 100. It is entitled "Criteria and Procedures for Proposed Assessment of Civil Penalties (Proposed Rule)."

Arch is the second largest coal producer in the United States. Our corporate office is located in St. Louis, Missouri. Our subsidiary companies employ over 4,000 individuals and operate mines in Colorado, Kentucky, Utah, Virginia, West Virginia, and Wyoming. We appreciate the opportunity to comment on this important subject.

Introduction

In the "Summary" section, MSHA states that the Proposed Rule's intended purpose is "…to induce greater mine operator compliance with the Mine Act and MSHA's safety and health standards and regulations, thereby improving safety and health for miners." In our opinion, the Proposed Rule is unlikely to have this effect.

In our view, increasing civil penalties for safety violations is not the most effective way to improve health and safety conditions for miners. In terms of improving safety performance, our subsidiary companies are motivated by a fundamental desire to prevent injuries. Increased assessments will not change our level of commitment to the miners who work at our subsidiary operations.

Arch's foundation safety principle is that "everyone goes home in the same condition they reported to work, injury free." This principle serves as the basis of our strong safety culture. It is presumptuous to think that the fear of a larger civil penalty will motivate improved safety performance more than a genuine concern for the welfare of people.

Arch's subsidiary operations meet, and in many cases exceed, regulatory requirements. We believe that violation trends are only one of many indicators of an operation's safety health. Based on our experience, organizations with effective health and safety processes consider a number of key indicators to identify and analyze their critical safety needs. The most significant of these indicators are "upstream" in nature. Operators who truly want to improve health and safety performance are proactive in their approach. They attempt to identify and trend "at risk" behaviors through techniques such as observations and safety audits. In doing so, they attempt to identify and eliminate the "root causes" of injuries.

In our view, citation trends are "down stream" indicators of safety performance. In addition, citations are not directly related to injury trends. We've closely analyzed the relationship of injury and citation trends at our subsidiary companies. We see little (if any) clear correlation between these two indicators. As a result, we do not believe that increased assessments will lead to improved regulatory compliance. Nor will they result in fewer injuries.

Arch believes that organizations truly committed to improving health and safety performance should focus on developing and supporting process-oriented, systems-based approaches that reduce "at risk" behaviors. We invite MSHA to join us in supporting safety improvement efforts with this objective. Significant safety improvement in the mining industry will only occur if/when systemic changes are implemented that elevate the industry's safety culture. We seriously doubt that increased penalties will motivate this type of meaningful change.

The Proposed Rule fails to advance the fundamental changes necessary to improve health and safety. It fails because it is based on the faulty assumption that mine operators will only respond to the "fear of punishment." We believe that more effective tools are available to motivate improved safety performance.

Philosophically, the Proposed Rule falls short because it fails to distinguish between "good actors" and "bad actors." It is based on the premise that all mine operators are irresponsible and motivated by a "fear of punishment." While this approach may be appropriate for certain marginal operators, or those without comprehensive safety processes, it does not apply to Arch. Nor does it apply to the other reputable mining companies who have demonstrated their commitment to health and safety.

Size of Operator

One area in which the Proposed Rule clearly misses the mark is the manner in which it treats large operators. Large mine operators typically have more comprehensive safety processes than small operators. They invest in safety staff and resources because it's the right thing to do. It also makes good business sense. Instead of recognizing the efforts made by many of these companies, the Proposed Rule punishes them.

We recognize that MSHA must consider an operator's size when calculating civil penalties. The Agency is required to consider two key factors: 1) the appropriateness of the penalty to the size of the business of the operator charged; and 2) the effect of the penalty on the operator's ability to continue in business.

While the Agency must consider these factors in the assessment equation, we feel they can meet this requirement in a more constructive manner. It can be done in a manner that does not place a different value on the health and safety environment in which a miner works based on the size of the operator that employs them.

In our opinion, it's inappropriate for MSHA to assess a large operator thousands of dollars more for the same violation than a small operator. The Colorado Mining Association (CMA) submitted comments to MSHA in response to the Proposed Rule. In their comments they reference an illustrative example. The example compares how two identical citations (i.e., identical gravity, the same violations per inspector day rate, a comparable history of repeat violations, and the same number of persons affected by the condition, etc.) would be assessed for a large and a small operator.

In the example referenced in the CMA comments, a small operator would pay a civil penalty of $2,748. A large operator would be required to pay $13,609 for this identical citation. The difference in the penalty is a result of the additional twenty (20) penalty points assigned to the large operator because of its size. We agree with the CMA conclusion. The 395% increase in the amount of the penalty for the large operator is inappropriate and unjustified.

The situation becomes more outrageous if the large operator is owned by a large corporate entity. In this case, an additional five penalty points would be added to their point total. The result would be a penalty of $20,302. This represents an increase of 639% compared to the small operator's assessment. In effect, the operator is penalized twice for the company's size. And in many cases, the large company is probably investing more resources in their safety program than the small operator.

We recommend that MSHA revise the penalty point structure in the Proposed Rule. The Agency should place less emphasis on an operator's size and more emphasis on what the operator is doing to constructively improve health and safety conditions. We encourage MSHA to reduce the proposed 20 penalty points assigned for an operator's size to a more reasonable number. We suggest reducing the number of size categories in Tables III-1-2-3 to six (6). With the exception of the size category for the smallest operators, one penalty point should be assigned for each of the other five (5) categories. A maximum of five (5) penalty points should be assigned to the largest operators. In addition, we recommend the Agency eliminate all penalty points related to the size of an operator's controlling entity.

Instead of focusing on an operator's size, we encourage the Agency to focus on what an operation is actually doing to reduce citations and injuries. An operator should receive a penalty point reduction if it engages in proactive efforts to improve heath and safety conditions for miners. If the operator invests in a Behavior Based Safety program to reduce "at risk" behaviors; if they implement a systematic program to identify and reduce repeat violations; if they train their supervisors and employees on how to identify and correct violations; if they engaged MSHA in joint problem-solving activities to reduce violations, or support similar types of proactive improvement interventions, they should get a penalty reduction credit.

In our opinion, the "carrot" is more effective than the "stick." In order for the civil penalty structure to be effective, it has to distinguish the "good actors" from the "bad actors." The Proposed Rule fails to make that distinction. Instead, it punishes operators because of their size, even though these same operators may be more actively engaged in meaningful safety improvement activities.

Good Faith Reduction

The Proposed Rule would reduce the current 30% "good faith" penalty reduction to 10%. For the same arguments outlined above, Arch recommends that the Agency retain the current 30% penalty reduction for an operator's "good faith in abating a violation." Our bottom line is that "good actors" should be rewarded and "bad actors" punished.

Cost Impact

In Arch's view, cost is not a primary driver when it comes to health and safety. In our opinion, no lump of coal is worth getting hurt over. We recognize that MSHA is required to modify some aspects of the civil penalty process to comply with the MINER Act. In our opinion, however, the proposed adjustments to the penalty point formula are excessive.

To evaluate the impact of the proposed penalty point formula, we asked our subsidiary operations to re-calculate some of the typical S&S violations they've received using the new penalty formula. We compared the results to the original assessments. The operations that conducted this comparison are all classified as large operators. They will be assessed the maximum penalty points for size. They will also be assessed the maximum points for being affiliated with a large corporate entity.

The results produced by this exercise indicate that assessment values will increase in the range of 200% to 300% under the Proposed Rule. As a result, we encourage MSHA to revise their approach to large operators, and reinstate the 30% "good faith" reduction to mitigate the impact of this increase.

Single Penalty

The Proposed Rule would eliminate the "single penalty" assessment. Arch is opposed to this change. It's a commonly known fact that some citable conditions involve minor technicalities that pose no serious threat to health and safety. A good example is a citation issued for failing to punch a fire extinguisher inspection tag, even though the fire extinguisher was inspected. The single penalty assessment should be retained for minor citations that are technical in nature.

Repeat Violation Basis

MSHA has requested comments on whether the basis for "repeat violation history" should be all citations (as proposed) or only S&S citations. In our opinion, an operator's "repeat violation history" should be limited to S&S citations. The same argument for retaining the "single penalty" assessment also applies to this issue. The subjective manner in which some inspectors enforce the regulations and the "de minimis" nature of some citations also lends support to this conclusion.

History of Violations

The Proposed Rule changes the time period for calculating an operator's "history of violations" from 24 months to 15 months. In our opinion, an 18-month period to evaluate an operation's violation history would be a more effective time frame. It would provide a more realistic picture of the operation's violation trends. It would also provide more time to determine whether the operation's corrective measures to reduce violations are effective.

Health & Safety Conference Request

MSHA is also proposing to change the time period for requesting a conference with the Agency to resolve citations. The Proposed Rule would reduce the time period from 10 days to 5 days. The Agency rationalizes that the shorter time frame will result in a more efficient assessment process.

Arch strongly disagrees with this proposed change. In our opinion, the current 10-day time period to request a conference should be retained. In addition, the Agency should initiate measures to fix the current conference process. In its current state, the conference process is ineffective.

Based on our experience, the conference system is already bogged down. Backlogs exist that have delayed conferences for some citations as long as six months. Shortening the time period for requesting a conference will lead to more delays. It will force operators to request a conference before they've fully investigated a citation in order to comply with the 5-day window. A minimum of 10 days is necessary to investigate and identify any mitigating factors related to an alleged violation. A shorter time period will result in many unnecessary citations being referred to conference.

The shorter time period to request a conference will also result in the litigation of more citations/orders. If the conference process continues to be an ineffective mechanism for resolving differences related to citations, operators will be forced to pursue their legal options. This will result in increased legal costs for operators and MSHA. It will also create additional delays in resolving disputes. As a result, it will contribute to a less efficient civil penalty assessment process.

Changing Standards

In its cost analysis of the Proposed Rule (page 53067), the Agency states that "MSHA assumes that each 10% increase in penalty for a violation is associated with a 3% decrease in the probable occurrence." Arch believes that this assumption lacks any logical foundation in fact.

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The Agency uses 2005 civil penalty assessment totals as the baseline for their cost analysis. On the surface, this appears logical. What it fails to recognize, however, is that the manner in which MSHA is enforcing existing regulations has changed dramatically.

In the aftermath of Sago, Alma, and Kentucky Darby, the playing field has changed. The Agency's approach to enforcement has become more stringent. This has resulted in the issuance of more citations/orders. In addition, the citations/orders issued are more serious in nature. Compared to pre-Sago, underlying safety conditions at Arch's subsidiary operations have not changed, and in many cases have improved. The Agency's reaction to these conditions, however, has become more exaggerated and extreme. In 2006, the Arch subsidiary mines implemented several new measures to improve their safety standards. Even though standards have improved at these mines, we've witnessed a 243% increase in the number of orders issued by MSHA. In addition, our percentage of S&S violations compared to total violations has increased by 3%, and our violation per inspection day ratio has increased by 38%.

There's also significant variation from MSHA District to MSHA District (and among local offices within the Districts) in the enforcement of regulations. The Agency's approach to enforcement lacks consistency. Antidotal reports from the field indicate that MSHA is pushing their inspectors to adopt a stricter enforcement approach. In our view, this is resulting in more arbitrary decisions by inspectors. Decisions on whether a citation is S&S or unwarrantable are increasingly subjective in nature. This situation is further complicated by the influx of new inspectors who are still learning their trade. It's also contributing to an increase in the number of citations we're referring to litigation.

In our opinion, the 2005 civil penalty costs are not an accurate baseline for evaluating the cost impact of the Proposed Rule. Based on current enforcement trends, we think the cost impact is going to be much higher.

Arch recommends that MSHA attempt to mitigate this impact. One way would be to implement improved training programs for the Agency's field inspectors. In addition, MSHA should consider implementing a quality control process to monitor enforcement trends, and to assure that concepts such as S&S and unwarrantable are being properly applied. The objective of these efforts should be to improve the consistency of enforcement activity across the mining industry.

Closing

Arch appreciates the opportunity to comment on this important issue. We share your desire to improve health and safety conditions for miners. We disagree with the Agency's contention that the best way to accomplish this objective is through increased civil penalties. It's our hope that MSHA will consider our recommendations seriously. They are offered constructively in an effort to develop a more equitable approach to assessing civil penalties. Please contact me if you have any questions.

Sincerely,

Anthony D. Bumbico

Anthony S. Bumbico

Vice President of Safety

Arch Coal, Inc.