Association of Bituminous Contractors, Inc.
815 Connecticut Avenue, N.W.
Washington, DC 20006

Before the Mine Safety and Health Administration

Re: **RIN 1219 - AB51**

The Association of Bituminous Contractors has represented construction contractors engaged in mine construction, both surface and underground, since 1968. The Association regularly comments on matters pertaining to mine safety and health as they pertain to construction work performed by independent contractors on mine property. The Association offers the following comments on MSHA's proposed rule, published in the Federal Register on September 8, 2006, to amend 30 CFR Part 100 to increase civil penalty amounts and to implement the Mine Improvement and New Emergency Response Act of 2006 (MINER Act).

MSHA should limit its rulemaking to implementation of the MINER Act, and not use this rulemaking as an opportunity to reformulate the existing points process to increase civil penalty amounts. There is no evidence that simply increasing penalty amounts will have the desired effect of improving safety and health at mine construction sites, particularly under a formula process that fails to take into account the irregular inspection of construction sites, the changing nature of construction projects, and the lack of mandatory standards applicable to construction work. MSHA should focus its rulemaking on implementation of the MINER Act, and defer other changes until a better study can be made of how the penalty process can be effectively and fairly applied to the construction industry.

MSHA should not add a provision to include repeat violations as part of a contractor's history. Because MSHA has not promulgated mandatory safety and health standards for construction, its application of existing mine standards to construction work is often arbitrary and inconsistent. Therefore, using so-called repeat violations as part of the penalty formula would simply compound what is already an arbitrary and inconsistent process.

MSHA should not reduce the history of violations time period for contractors until it has a better understanding of its impact. Because contractors perform construction for limited periods of time at multiple sites, their work may not be regularly inspected the way it is at a mine. Furthermore, depending on when a site is inspected (start-up, full production, or wind-down), there may be a lot or only a little to inspect. Therefore, if it is assumed that the number of violations issued to a contractor is to some degree a function of the number of inspections and the amount of work being performed at the time the inspections are conducted, reducing the time period in which such violations are measured may make such measurement less accurate and more arbitrary as it applies to construction contractors. MSHA estimates that the change will result in a *de minimis* increase in the average assessment for independent contractors, but it provides no basis for this estimate. At the very least, MSHA should share its analysis for review and comment.

MSHA should not delete the single penalty provision. While no violation should be ignored, the existing practice of treating non-Significant and Substantial violations under the single penalty provision allows both MSHA and contractors to focus on more meaningful

matters, and this provision should be retained. It is ironic that MSHA proposes to eliminate the specific categories for special assessments because of the administrative time involved, and at the same time proposes subjecting thousands of non-S&S violations to a much more cumbersome administrative process.

MSHA should not eliminate the specific categories used to determine whether or not to pursue a special assessment. It is inconceivable that having to review an alleged violation in light of the existing categories is so burdensome that it should be eliminated in favor of a process which is totally arbitrary. If MSHA believes the existing categories should be modified, it should change them, but it nevertheless should be required to proceed under a process which has some degree of transparency.

The time limit for requesting a conference should not be shortened. Construction projects are of limited duration, they may be small in scope, and for a given contractor they may be widely spread around the country. Therefore, a contractor often chooses to review a citation at its home office before deciding whether or not to request a conference or contest a violation. Requiring contractors to act before they can complete their internal investigation and review may cause contractors to file unnecessary requests simply to preserve the conference as an option. Ten days is not an undue length of time for a contractor to conduct its investigation and decide whether or not to request a conference, and this time limit should not be shortened.

The regulation dealing with the penalty for failure to provide timely notice under section 103(j) of the MINER Act needs to be clarified so that a contractor is not penalized for time spent in rescue or providing first aid. Many construction crews are small, or may only have a single supervisor. There needs to be some recognition that implementing rescue procedures and providing first aid are matters of first importance, and that notifying MSHA is secondary to these requirements.

Respectfully submitted,

ASSOCIATION OF BITUMINOUS CONTRACTORS, INC.

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