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MSHA/OSRV

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To: zzMSHA-Standards - Comments to Fed Reg Group

Subject: Fw: RIN 1219-AB51 / Comments on Proposed Rule entitled "Criteria and Procedures for Proposed Assessment of Civil Penalties"

The Virginia Coal Association, Inc. (VCA), whose members produce approximately 70 % of the coal that is mined annually in Virginia, appreciates this opportunity to offer the following comments concerning MSHA's proposed rule entitled "Criteria and Procedures for Proposed Assessment of Civil Penalties." The VCA believes that many of the provisions of the proposed rule go far beyond the requirements of the Mine Improvement and New Emergency Response (MINER) Act. Some of the proposed provisions are violative of due process, others are unnecessarily punitive, and still others appear to be illogical. The VCA urges MSHA to redraft the proposed rule to address the following specific comments.

Regular Assessment Criteria (Part 100.3)

Throughout the discussion of the proposed rule, MSHA justifies the proposal by stating that MSHA "believes" that the significantly higher penalties that will result from the penalty point scheme will be an inducement for better compliance. No facts or statistics are cited to support this "belief." The VCA does not necessarily agree with MSHA's belief that higher penalties will lead to safer mining. Furthermore, an operator who is forced to pay exorbitant civil penalties or the increased litigation costs that will result from the proposed rule may be forced by limited resources to reduce other areas of its operation's budget, including non-mandated safety training.

The proposed rule states in Section 100.1 that its purpose is to "provide a fair and equitable procedure for ... determining proposed penalties for violations...." The VCA does not believe that the proposed rule, as currently written, achieves that purpose. In fact, under the provisions of the proposed rule, larger operations will almost certainly be punished more severely for repeat violations than will smaller operations. A mine with 20 belt lines has a much greater potential for repeat violations than does a mine with two belt lines. The same can be said of a mine with 100-plus miles of airways and travelways compared to a mine that only has 10 miles of airways and travelways. Yet past statistics show that the larger operations are usually the safer operations. Consequently, under the proposed rule, for repeat violations the safer operation is likely to be punished more severely than the less-safe operation. This would appear to be an illogical result and certainly not what Congress intended.

The VCA believes that MSHA should not place greater weight on the size of the controlling entity since mines are operated independently. Furthermore, as written the proposal could lead to subjective penalty assessments by MSHA since the proposed rule does not direct how high MSHA should go to determine the size of the "controlling entities."

With regards to repeat violations, the VCA is opposed to their inclusion in the proposed regular assessment penalty point scheme because they are redundant with the "history of violations" criteria and in many cases are only being used to establish and impose punitive civil penalties. If the Agency insists on their inclusion, the VCA believes that MSHA should factor in the number of inspector days during which repeat violations were cited. Furthermore, the proposed rule should specifically provide that for a violation to be considered a repeat violation under the proposed rule, it must be the exact same condition that leads to the violation (not just a violation of the same umbrella standard). Furthermore, the VCA also believes that MSHA should only consider significant and substantial (S&S) violations when determining repeat violations of the same standard. Finally, from a legal standpoint, repeat violations can only be utilized as criterion in the penalty point scheme if the provisions of the rule are not applied retroactively. Consequently, violations that occur prior to the effective date of the proposed rule should not be utilized in the proposed point scheme. To do otherwise would be violative of due process because it would penalize operators for agreeing to accept and pay prior citations without knowing that their actions in doing so could be used to trigger heightened penalties in the future.

The proposed reduction of the credit for "demonstrated good faith of the operator" from the current 30% to 10% also appears to be illogical as it will operate as a disincentive for prompt abatement.

Single Penalty Assessment (Part 100.4)

Unless MSHA intends to categorize all violations in the future as significant and substantial, the proposed elimination of the single penalty assessment makes no sense. Likewise, it makes no sense to categorize a minor paperwork error as significant and substantial and then to assess the elevated monetary penalties for it under the proposed regular assessment criteria. Under the proposed penalty point conversion in Part 100.3, a violation assigned 20 or fewer penalty points would be assigned a penalty of $112 compared to a $72 penalty currently. This is an increase of 55.6%. Consequently, it would appear that a non-significant

and substantial (non-S&S) violation would be assessed at $112 compared to $60 currently (an increase of 86.7%). This is simply too large of an increase for non-S&S violations. The single penalty assessment should be maintained for non-S&S violations.

Special Assessment Process (Part 100.5)

The VCA believes that MSHA should retain the list of eight categories of violations that may be reviewed for special assessment. Without retention of those categories of violations, MSHA has unbridled discretion to utilize this potentially punitive process. Such a process invites arbitrary treatment and is extremely unwise. The MINER Act has already provided MSHA with more-than-adequate tools under the "flagrant" violation definition and maximum penalty assessment provisions.

Conference Requests (Part 100.6)

The time within which to submit additional information or to request a health and safety conference should remain at ten days. Shortening such a time period makes no sense and may actually discourage early settlements. The VCA believes that the proposed rule will result in a greatly increased workload on operators and MSHA employees due to a predictable increase in violation conferences requested. Operators need time to gather information and talk to their employees before requesting a conference. With the proposed rules' shortened timeframe, operators will be unnecessarily forced to request conferences on nearly every violation issued to protect themselves and then cancel them later if they are determined to be unwarranted.

Cost of the Proposed Rule

The VCA believes that MSHA has grossly underestimated the costs of the proposed rule (MSHA estimates that penalties alone will increase across-the-board from $24.8 million to $68.5 million per year at current citation rates). The proposed rule's elimination of the single penalty assessment, imposition of greatly increased penalty amounts, inclusion of repeat violation provisions, and the shortened conference request period will result in an exponentially higher number of conference requests and a litigation explosion. Not only will operators' costs rise as a result, but so will the Agency's.

Again, the VCA appreciates the opportunity to provide these remarks and requests that they be carefully considered.

Sincerely,

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