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**Sent:** Wednesday, December 03, 2014 4:19 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Cc:** Hensley, Clellan; Moore, Rockford D.; McCoy, Keith W.; Akers, Bennie J.; Wilder, David L.  
**Subject:** RIN 1219-AB72  
**Attachments:** Proposed rule RIN 1219-AB72 Comments.docx

Comments on proposed regulation Docket No. MSHA-2014-0009

**DEC - 3 2014**

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## **RIN 1219-AB72 30 CFR Part 100 Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule**

TO: MSHA  
Office of Standards, Regulations, and Variances  
1100 Wilson Blvd.  
Room 2350  
Arlington, VA 22209-3939

My company is a small producer of coal both underground and surface as well as coal preparation plants with associated shipping. Our production is in the three million ton range. We operate these mines in central Appalachia. All the seams we mine tend to be in the thirty-six inch and less in thickness. Central Appalachian producers are in a struggle for survival at the writing of this regulation.

I would like to take this opportunity to address the new proposed rule **RIN 1219-AB72**. I will first give a few non-specific general comments about the proposal in general. The proposed regulation does not address any potential impacts concerning the effect these changes can/would have on the issuance of citations. The proposed regulation also does not discuss the potential impact these changes may have upon the Section 104(e) P.O.V. (Pattern-of-Violations). I sincerely believe these changes will increase both the number of citation issued to mines and thereby increase the number of mines that are impacted by P.O.V. This is due to my impression that S&S rates will increase significantly should this rule become final.

The current regulation, as written, does permit inspection personnel the choice to utilize their experience and training in order to properly assign negligence, gravity, and total number of persons directly affected by the condition cited. However, current regulations give the inspector a wide range of choices in the current checkbox system. This greater number of choices allow for the mitigating factors on behalf of the operator to more fully be taken into consideration.

The proposed standard does nothing to change any requirement the inspector must perform inspection-wise. The inspector still must make all areas of the mine and issue noted citations under the proposed regulation. Neither does the proposed regulation do anything directly associated with safety in the mine to improve conditions affecting safety in the mine. The inspector will still be required to check the situation and conditions to be cited - the newly proposed standard merely limits the inspector to a smaller choice set on the MSHA Form 7000-3a standardized form. These limited choices will, in my opinion, lead the inspector to more often check citations as more serious.

For instance, the proposed rule uses the same wording for citation categories with the only wording differing from current forms on the phrases of "Negligence." Current regulations have categories of No Negligence, Low Negligence, Moderate Negligence, High Negligence, and Reckless Disregard. These terms currently have possibly significant impacts on the weight of citations in both the issuance of S&S citations and flagrant citations. The proposed rule with the limited negligence selections would tend to lead the inspector to almost never select "Not Negligent". Under current inspection procedures witnessed in the field the operator is determined to "...know or should have known..." when any condition is observed in the mine and discovered by the inspector.

## **RIN 1219-AB72 30 CFR Part 100 Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule**

In the many hundreds of citations that I have reviewed from our multiple operations in the past several years I have not witnessed a handful of citations marked as no negligence or low negligence. Almost always is checked as "moderate negligence" regardless of conditions at the mine. Under the proposed rule will Non-S&S citations require "No Negligence" findings as a basis to be issued? Or can a finding of "Negligent" be found to be Non S&S? Will a finding of "Negligent" under the proposed rule be an automatic basis for Section 104 (d) actions against individuals and operators or even Section 110 actions against individuals and operators? The current regulation at least provides the inspector five levels of negligence findings of which three provide some degree of mitigating factor for the operator and agents.

The proposed rule Table X Negligence also appears to disallow any factors mitigating negligence since if the condition exists the operator either knew or should have known of the presence. Operators must be given the opportunity for mitigating circumstances and this proposal does not permit any credit(s) for mitigating circumstances. Again, it is my contention that the negligence standard within the proposed regulation leads the citation writer into checking the box for the new term "Negligent" which is defined as: "The operator knew or should have known of the violative condition or practice".

The mine is a very dynamic environment and conditions can change dramatically in a very short period of time and these changes can occur across large areas of a mine. The operator and the agents of the operator may truly not have any knowledge of any of the conditions being cited. Under the proposed changes the inspector will basically have no recourse other than to check the box, as a minimum, as "Negligent" should any violative condition be found during the course of an inspection. It is my contention that this alone would translate into a significantly higher rate of S&S for mines across the nation. This would be a means to larger penalties in the long term for mining operations. The MSHA inspector should be given the authority as is present in the current regulation to permit the determination of any mitigating circumstances on behalf of the operator.

Commenting on the impact on the cost of cited conditions it is true that upon the face of the proposed regulation penalties appear to be lower than at the current time. In a test to determine a comparison between the proposed regulation and the current regulation used a written citation to calculate penalties. I used the current penalty tables to calculate the penalty of a typical S&S citation our operations receives under the current penalty table and the proposed penalty table. This citation was marked Reasonably Likely, Lost workdays, S&S, 1 person affected with Moderate negligence. The current penalty was \$249. Under the proposed penalty table a penalty of \$7000 was determined to be required.

This determination was dependent upon the term "negligence" in Table 10 and Gravity in Table 12. Keeping in mind this is before the proposed 10% reduction for Good Faith or the 20% reduction for not contesting of the citation. The problem is that given the limited choice of determinations in Table 10 and Table 12 I must assume that in the proposed regulation a determination of "Moderate" negligence in the current regulation would correlate at least to a "Negligent" determination in the new regulation since there was evidently some negligence or the condition would not have been cited.

## **RIN 1219-AB72 30 CFR Part 100 Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule**

Secondly, in Table 12 I must also assume the inspector will be required to check "Fatal" in Table 12 with the inclusion of the language "...any work related injury or illness with reasonable potential to cause death..." It is my opinion that inspection personnel will be required to check Fatal at any time they would opine an injury could be left to bleed or some other far-fetched scenario could be contrived to have an end result in the death of a miner.

Under my assumptions on Table 10 and Table 12 this same citation would result in the \$7,000 penalty listed above. If I reduce by 10% for Good Faith my penalty then becomes \$6,300 or I could decide to not contest and reduce my penalty by 30% for a penalty of \$4,900. Or can I reduce the entire penalty by 40% (10% for Good Faith and 30% for not contesting) for a penalty of \$4,200? I prefer the current \$249.

Under the current regulation if I increase the citation's severity to "Permanently Disabling" and the number of persons to an entire crew (12 persons affected) I can only get the penalty to \$1,700. I am afraid this is a sleight of hand in Tables 10 and 12 which will result in increased penalties and increased scrutiny for 104(e) issues for our mines.

However if we take this same citation and merely change the Gravity in 10(B) to Permanently Disabling the penalty under the current table becomes

If this were the only issue this proposal would be appreciated by industry. This reduction in penalty would also be further appreciated by industry given what is happening in the coal industry - decreased prices for sales, increased costs of supplies and materials, and increased costs of employee benefits. The hidden issues lie with the increased possibility of S&S and the consequences which drive from the increase in S&S citations. This would include the increased possibility of POV. Increased costs associated with Section 110 actions driving from citations marked with zero mitigating factors and etc. As a negative capstone of this point is the potential of increased likelihood of Section 104(d), Section 104(e), and Section 110 actions

There is no need for this proposed regulation since accidents are reducing, fatalities are reducing and this proposed regulation does not directly improve safety. It must also be noted that a review of MSHA's MDRS system will indicate certain recalcitrant operators will not be affected by this change since they are currently deemed as "delinquent" in the payments under current schedules or have been classed as uncollectable. MSHA has other means to deal with these bad actors and should not impose additional burdens on industry.

This standard simply places a larger burden on good operators and potentially speeds the process to P.O.V. In addition the attempt to circumvent the use of the ALJ system by dangling a 20% reduction in penalty for not contesting a citation removes the final opportunity for operators to be permitted to present mitigating circumstances in either a hearing before an ALJ or in the forum of an informal conference process. It is my opinion small operators with limited resources will opt for this reduction on a majority of citations issued. This will increase their potential more severe penalties in future instances which may far outweigh the temporary 20% reduction in penalty.

## **RIN 1219-AB72 30 CFR Part 100 Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule**

It is my sincere belief this is limiting the due process of the operators and their agents, especially smaller operators with smaller budgets for legal defense and smaller time budgets for personal appearances either in courts or in conferences. Operators and their agents should never be discouraged from using the full process for adjudication of citations. The current system at least maintains a semblance of a true check-and-balance against the power of the agency against the operator. The current system at least provides a framework of representation for operators to prevent over-reach by the agency and its representatives.

As an example of this over-reach in the current system and to emphasize my previous comments on negligence, penalties, etc., I would like to use the information from a single mine. This mine operated 244 days in 2013. This mine had an average of 1.44 mine inspectors present on site each and every day the mine operated. Not a single citation issued during calendar year 2013 was indicated as having "No Negligence" and less than ten of the 260 citations issued were checked at less than "Moderate Negligence". This would lead me to believe that as discussed above the "No Negligence" category would seldom if ever be checked under the proposed regulation and inspectors would be encouraged to check "Negligent" under the proposed regulations.

MSHA states on page 44495 of the proposed regulation that MSHA proposes "special assessments" in "...cases, such as those involving fatalities or willful violations,,, the proposed rule also may have an indirect impact on special assessments." The use of "negligent" as referenced in the proposed regulation may become very problematic especially when inspectors are citing conditions cited under the Assistant Secretary's special emphasis programs such as "Rules to Live By" and the "Impact Inspections" implemented post Upper Big Branch. I would find it difficult to believe any citation written under either of these programs would find a finding of "Not Negligent".

This problem is compounded when the number of mine visits is cut from ten to six for the mine to fall into the system of repeat violation points. In the case of the citation used for demonstration of penalty above the points were significantly higher when the six is substituted for the ten. Given a mine with the number of inspections we receive this new proposed regulation could have some very significant implications.

I would urge you to withdraw this proposal or as an alternative consider the possibility of permitting companies to begin using penalty dollars or at least a portion of those dollars to finance safety improvements at mine sites in specific areas cited as being unsafe. This could also provide a source of revenue to fund mine rescue teams and stations for smaller operators.

The ever diminishing market in today's world is becoming ever more important for our industry. In today's markets when coal operators are being squeezed from all sides due to decreased sales pricing, competition from foreign markets and all this coupled with increased operating costs are creating razor thin margins. Significant improvements to mine safety could be achieved by utilizing a portion of penalty dollars to finance improved rock dusting equipment, funding additional mine examiners,, to improved roof control systems which would truly improve mine safety.

**RIN 1219-AB72 30 CFR Part 100 Criteria and Procedures for  
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Thank you,

Dave Blankenship,