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Sent:	Thursday, December 04, 2014 2:01 PM
To:	zzMSHA-Standards - Comments to Fed Reg Group
Subject:	RIN 1219-AB72
Attachments:	Newmont Mining Corp Comments RIN 1219-AB72.pdf

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Please find attached Newmont Mining Corporation's Comments

NEWMONT.

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AB72-COMM-36

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December 3, 2014

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

Re: **RIN 1219-AB72**
Comments on MSHA's Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties Under 30 C.F.R. Part 100

To Whom It May Concern:

Newmont USA Limited is pleased to offer the following comments to the Mine Safety and Health Administration ("MSHA") concerning its Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties under 30 C.F.R. Part 100. The proposed regulation was published at 79 *Fed. Reg.* 147 (July 31, 2014).

Newmont USA Limited ("Newmont") is a subsidiary of Newmont Mining Corporation. Newmont operates 4 underground gold mines and 6 major open pit gold mines in Northern Nevada, employing 3500 people in the process.

Newmont recognizes the significance of the Part 100 penalties for the effective enforcement of the Mine Act and supports transparency and the simplification of this process; however, the proposed rule does not further these goals and appears detrimental to the enforcement scheme and the due process rights of mine operators.

1. The Proposed Criteria Changes Would Substantially Eliminate Fairness and Critical Judgment with Respect to the Issuance of Enforcement Actions.

Among the most significant changes proposed to the assessment of civil penalties is the wholesale elimination of intermediate categories currently used in the assessment of the negligence and gravity associated with alleged violations of the Mine Act. Specifically, the Negligence criterion would be reduced from five categories to three: Not Negligent, Negligent and Reckless Disregard; the Likelihood of Occurrence categories would be reduced from five to three: Unlikely, Reasonably Likely and Occurred; and the Persons Affected category would be

reduced from 11 categories to two: only "no persons affected" or "one or more persons affected." Definitions of each category would also be added. Newmont agrees with the proposed rule as to the "Persons Affected" category. However, changes to the "Negligence" and "Likelihood of Occurrence" proposed changes present significant potential for abuse and inflation of assessments.

The stated intent behind these proposed changes is to increase uniformity and simplify the assessment of penalties. While this may be the end result, it comes at the expense of fairness, reasonableness, and the exercise of judgment by authorized representatives of the Secretary who have been trained and indoctrinated into an aggressive enforcement system. This reduction in the range of possible assessments will necessarily result in less variation but this is not a desirable outcome because the penalties associated with the particular enforcement action and surrounding circumstances will be less equitable. While MSHA's assessment tools may not be perfect, they are not improved by making them less precise and generic.

With respect to negligence, the current classification of low, moderate, and high negligence will be reduced to a simple category of "negligent." As the Mine Act is already a strict liability scheme, the elimination of these distinctions will result in a confusing and inflexible approach. The extremes of no negligence and reckless disregard are, at present, the exception and not the rule for the vast majority of enforcement actions. The majority of enforcement actions fall within the low, medium, and high categories. By reducing this tier to a single flat category, it will eliminate from consideration the actions of operators and other mitigating circumstances that currently factor into the negligence analysis. The present system affords consideration for "good faith," unusual circumstances, and other considerations that either reduce or increase the penalty upon the operator. This has the positive effect of treating different circumstances according to their relative merits. With the proposed changes, what is now treated as a low negligence enforcement action will be most likely treated as the equivalent of a high negligence enforcement action based on training and behaviors of enforcement personnel. The lack of consideration for the behavior of the operator results in a less equitable enforcement scheme. Because this is a strict liability scheme, the impact of this "flattening" is particularly unbalanced.

Another result of this reduction in the available assessment option for negligence will be a tendency to inflate the assessment. When left with the option of "negligent" or "reckless disregard," many inspectors may be inclined to mark enforcement actions that would have otherwise been "high negligence" to "reckless disregard." As "reckless disregard" also serves as a basis for a "flagrant" designation, this will also inflate the number of potential "flagrant" assessments subject to the special assessment process which is not transparent and is not addressed in this proposal. This resulting assessment and penalty inflation will result in greater litigation as the assessments are challenged by operators. In a similar fashion, it is unclear what will happen with § 104(d) citations and orders, but to support an "unwarrantable failure" designation, something more than mere negligence is required. Accordingly, it would seem that every § 104(d) citation and order issued will necessarily entail a "reckless disregard" and likely a "flagrant" designation.

The reduction of the likelihood categories presents a similar problem. Reducing the Likelihood of Occurrence categories to Unlikely, Reasonably Likely and Occurred and eliminating "No Likelihood" and "Highly Likely" will eliminate the ability of MSHA inspectors to account for mitigating circumstances and use their judgment in evaluating the severity of hazards. The conflation of "No Likelihood" and "Unlikely" will result in greater penalties being assessed for hazards that literally have no potential to occur. This serves no purpose but to increase penalties for operators for violations that, by definition, will not result in any injury to miners.

Similarly, the elimination of "Highly Likely" will also result in the same type of inflation noted above with respect to negligence. In this case, the result will be a larger number of enforcement actions that are erroneously identified as "Occurred" that have not, in fact, occurred. This is due to the proposed definition of "Occurred:"

> a condition or practice that has caused an event that has resulted or could have resulted in an injury or illness.

79 *Fed. Reg.* at 44503 (emphasis added). By expanding the definition of "occurred" to include events that merely "could have resulted in an injury or illness" based upon an unidentified, potential or actual event, the meaning of "occurred" no longer bears any resemblance to its ordinary usage. Rather than reflect something that has actually happened, the definition invites open-ended speculation as to what might have happened or what could have been. This will invite both considerable litigation and will inflate numerous assessments. It also detracts from the stated goal of uniformity as one inspector's speculations may bear no resemblance to those of another.

There is also a comparable problem with the proposed definition of "Reasonably Likely." In the Proposed Rule, MSHA seeks to modify the definition of "Reasonably Likely" to "*be a condition or practice that is likely to cause an event that could result in an injury or illness.*" 79 *Fed. Reg.* at 44503 (emphasis added). This is a drastic change from the current assessment of reasonably likely in MSHA's enforcement program. For over 30 years, the Commission has required that Significant & Substantial ("S&S") enforcement actions accurately allege that the condition or practice have "*a reasonable likelihood that the hazard contributed to will result in an injury or illness. . . .*" *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Rev. Comm. Jan. 1984) (citing *National Gypsum Co.*, 3 FMSHRC at 825) (emphasis added). By eliminating the element of probability and reducing the standard to one of mere possibility, this waters down the standard to the point that "Unlikely" and "Reasonably Likely" are almost indistinguishable. This will result in greater litigation, particularly as this introduces greater subjectivity by inspectors regarding the actual or hypothetical link between a violative condition and a prospective injury and the proposed definition would lower the burden for an S&S designation from a condition with a reasonable probability of causing an injury, to a condition with a slim or speculative possibility of causing an injury. This will also result in a potential increase in Pattern of Violation notices issued – a tool that should be reserved for serious non-compliance.

As a whole, these proposed efforts to "simplify" the assessment process will blur the definitions currently used, inflate the assessments without a factual basis for doing so, and result in increased litigation as the current scheme of penalty assessments is upended and decades of legal precedent are effectively discarded.

2. The Proposed Changes Reducing the Role of the Commission Violate the Mine Act and are Contrary to Congressional Intent.

The changes to the assessment options and the proposed reduction in Commission authority are also contrary to Congress's intent in establishing the Commission. The Commission is a separate, independent agency designed to provide for administrative adjudication of disputes under the Mine Act. 30 U.S.C. § 823 (establishing the Federal Mine Safety and Health Review Commission). The Conference Report of the 1977 Mine Act ("1977 Conference Report") identified the benefits of the Commission as follows:

> [The Commission] will insure fairness and due process, and will also encourage the development of a sound and definitive body of case law which will enable the Secretary, the miners, and the mining industry to adopt a consistent course of conduct in every case.

Conf. Rep. on S. 717, Federal Mine Safety and Health Amendments of Act of 1977, reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1348 (1978).

As discussed above, the proposed changes to the penalty criteria will necessarily defeat this primary purpose of establishing an independent adjudicative agency and associated body of law. Miners and operators have relied upon the analysis, adjudications, and rulings of the Commission for decades. The proposed changes to definitions, legal standards, and assessment criteria appear to be a direct attack upon the authority of the Commission and the body of law that has developed in this area. For example, the Commission has flatly rejected the proposed S&S definition that is currently being proposed by MSHA. *National Gypsum Co.*, 3 FMSHRC 822, 825 (Rev. Comm. Apr. 1981) (rejecting Secretary's position that a violation is of a significant and substantial nature if it presents more than a remote or speculative possibility that any injury or illness may occur--only purely 'technical' violations or those with only a remote or speculative chance of any injury or illness occurring could not be cited as significant and substantial.). The proposed rule will undermine and circumvent the Commission's authority. This also opens the door for S&S criteria to become a term that is defined by each political administration.

In addition, MSHA's concerns regarding the Commission's independent role in the assessment of penalties are unfounded. 79 *Fed. Reg.* at 44508-09. MSHA complains that when the Secretary has sustained the burden of proof for the violation and all penalty related facts, that the Commission may nonetheless assess a civil penalty different from that proposed by the Secretary

and that the existing approach undermines the Secretary's ability to establish a penalty policy that achieves the deterrent purposes of civil penalties under the Mine Act. MSHA essentially is complaining about the decision of Congress to establish an independent adjudicatory agency to act as a check on MSHA's power.

MSHA's authority cannot exceed the authority that Congress has delegated to it. With respect to the assessment of penalties, Congress spoke directly to this issue when it set forth the Commission's authority:

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

Mine Act § 110(i) (emphasis added).

While MSHA lacks authority to assess penalties against an operator, it can, and does propose the penalty amount it deems appropriate to the violation cited. Thus, under the current structure, MSHA proposes a penalty under Part 100, which the operator may simply choose to contest or pay. Should the operator take issue with the enforcement action itself, the amount of the penalty or the reasonableness of the length of time for abatement, the Commission conducts a *de novo* review of the enforcement action and penalty to determine whether there was, indeed, a violation and if so, whether the characterization of that violation under the criteria mandated for its analysis by Congress is appropriate. Based on that decision, an Administrative Law Judge independently assesses a penalty which may or may not depart from that originally proposed by MSHA. Here, MSHA proposes to eliminate the independence of the Commission by binding the Commission to MSHA's Part 100 penalty assessment and formula and limit departures from the regulation formula. In electing to also establish a Review Commission, Congress necessarily cabined MSHA's authority, and MSHA lacks the authority to simply "undo" that action through rulemaking. The Commission has the authority to assess penalties independently of the proposals set forth by MSHA. MSHA's proposed rule oversteps the bounds of its delegated authority.

Moreover, it is imperative that third-party review by the Commission is maintained and not limited because the Commission provides uniformity in its ability to adjust enforcement actions that are written with improper evaluations of the condition by inspectors. Changes to the criteria for determining likelihood, severity and negligence will make it more difficult for companies to contest enforcement actions that are improperly evaluated. The criteria in the new proposal will

result in more enforcement actions being marked as occurred because of the phrase "could have resulted in an injury or illness." In a recent inspection Newmont had 37% of the enforcement actions vacated because the inspector wrote enforcement actions that were not violations of the Mine Act. The new criteria for evaluating enforcement actions will result in an increased amount of enforcement actions contested and not a reduction.

MSHA complains that the Commission reduced their penalties 33% of the time. MSHA inspectors, managers, and conference litigation representatives need to properly evaluate the enforcement actions based on the facts of violation thereby sustaining their burden of proof instead of attempting to control the way the Commission evaluates penalties.

3. Penalties will Substantially Increase Without any Corresponding Increase in the Basis for Issuing the Enforcement Action.

MSHA's proposed rule change includes an overhaul of the current penalty calculation. The total penalty points used for all factors considered in setting a penalty is changed from 208 to 100 penalty points. The conversion of penalty points to dollar amounts is also changed. The existing regulations impose a $112 penalty for any enforcement action or order with 60 points or fewer, and a $70,000 penalty for any enforcement action or order with 144 points or greater. These minimum and maximum penalties would now be associated with penalty point totals of "31 or fewer" and "73 or more," respectively. While re-weighing the point system to a 100 point total is not objectionable by itself, when combined with the other proposed changes, the penalty amounts will be substantially increased.

The proposed rules place an increased emphasis on violation history (including repeat violations), negligence and the severity factor of gravity. Less emphasis is put upon mine size, controller/contractor size and the likelihood of occurrence factor of gravity. The net result of these changes, particularly when the changes to the assessment categories for gravity and negligence are factored in, result in a dramatic increase in penalties across the board.

Newmont reviewed past violations and re-evaluated the penalty assessments based upon anticipated behavior of inspectors under the proposed revisions. The result was a dramatic increase, across the board, in penalty amounts. For example, a non S&S moderate negligence recordkeeping violation changed from $112 (the current minimum penalty) to $1,000. This ten-fold increase is completely arbitrary and unreasonable as there is no change whatsoever to the characteristics of the actual violation. The proposed rule would allow mines to reach maximum Repeat Violations Per Inspection Day ("RPID") points for half the current RPID level. As a result, if an RPID raises the total points by as little as one point it will increase the penalty amount in varying increments from $100.00 to $5,000.00. At 61 points, the penalty increases by $5,000.00 per point increase up to the $70,000.00 maximum. For catch-all standards like 30 C.F.R. §§ 56.14100(b) and 14205, this will be especially apparent because of the mere volume of enforcement actions issued for a variety of circumstances under these standards. The resulting penalty amounts, particularly for large operations, will balloon to completely unreasonable

penalty amounts in relation to the actual seriousness of the violation. High RPIDs will increase the number of enforcement actions contested, rather than encourage compliance. The ability to achieve 100% compliance is thwarted by strict liability nature of the Mine Act and the often-times inconsistent interpretations of inspectors.

In addition, the increase in penalties is also underestimated by simply comparing historical data. As discussed, the changes to the assessment categories and legal definitions of key terms promises to substantially inflate enforcement actions even though there is no change to the underlying condition that led to the issuance of an enforcement action. As a result, a greater number of enforcement actions will be issued as "occurred," "S&S," "unwarrantable failure," "reckless disregard," and "flagrant." The resulting increase in associated penalties is not fully accounted for in looking at historical comparisons, because the two are not strictly comparable. While the resulting changes to penalties appear to be greatly increased, particularly for larger operations, they are understated at that.

4. The Proposed 20% Penalty Reduction Would Not Reduce the Number of Enforcement Actions that are Contested.

MSHA has also proposed an additional 20% penalty reduction in exchange for not contesting an alleged violation. The 20% reduction would have no bearing on whether Newmont elects to contest an enforcement action or not. Newmont contests enforcement action based on the facts of the violation. If Newmont believes that the enforcement action was issued in error, is overstated, or is otherwise improper, it is contested. If Newmont believes that MSHA is wrong, Newmont will contest the enforcement actions, good faith reduction or not. With the new criteria having the potential to increase penalties based on improper evaluations, Newmont would be more inclined to scrutinize the enforcement actions issued, not less.

Moreover, MSHA states that enforcement action numbers have dropped by 26% and the percent of enforcement actions contested dropped by 6%. It appears that what MSHA has been doing is working without a need to change the penalty criteria.

5. MSHA has no Authority to Increase the Minimum Penalties for Unwarrantable Failures.

The Proposed Regulation seeks to increase the minimum penalties for unwarrantable failures from $2,000 to $3,000 for a citation or order issued under § 104(d)(1) and from $4,000 to $6,000 for an order issued under § 104(d)(2). Congress established the existing statutory minimums of $2,000 and $4,000 in 2006. The Mine Act only permits the Secretary to utilize the rulemaking process to increase penalties pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 and the Debt Collection Improvement Act of 1996. Those statutes authorize increases to legislatively-set penalties based on inflation. MSHA's proposed penalty increase is not based upon inflation but is a completely arbitrary upward adjustment aimed at deterrence. MSHA asserts that the increased minimum penalties for unwarrantable failures are intended "to provide

greater deterrence for operators who allow these types of violations to occur." 79 *Fed. Reg.* at 44507. Thus, MSHA's attempt to adjust minimum penalties does not give effect to Congressional intent, but rather seeks to assert authority that Congress did not grant to the Secretary. Congress has spoken directly to this issue; accordingly, MSHA has no authority to increase the minimum penalties as proposed. See *Chevron U.S.A, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

6. Recommended Changes

MSHA has requested comments that address alternatives to its proposed changes that improve consistency and objectivity in the application of the new proposed criteria, including VPID formula, negligence, likelihood of occurrence, and severity. If MSHA's goal is to reduce the number of contested enforcement actions, they should implement an internal communication system that will inform other inspectors which enforcement actions are vacated or modified and why. Newmont's experience is that enforcement actions are issued with some degree of frequency that mirror other enforcement actions that were vacated at conference or were contested. The mistakes made by one inspector may be repeated by the next one. Time and resources are taken up in contests or conferences to resolve these errors. Better training, communication, and consistency are needed among MSHA's personnel. The new criteria do not address this problem and only serve to introduce additional problems.

For these reasons, Newmont urges that the Secretary reconsider the proposal.

Sincerely,

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