KENTUCKY COAL ASSOCIATION

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December 19, 2014

Sheila A. McConnell
Mine Safety & Health Administration
Office of Standards, Regulations & Variances
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: RIN1219-AB72
30 C.F.R. Part 100

Dear Ms. McConnell:

The Kentucky Coal Association (KCA) welcomes this opportunity to submit comments on the proposed rule "Criteria and Procedures for Assessment of Civil Penalties" under 30 C.F.R. part 100 (hereinafter "the proposed rule")[1]. KCA is a trade association representing all segments of the Kentucky coal industry and related businesses. KCA's member companies produce approximately 90% of the coal mined in Kentucky and employ a similar percentage of the nearly 12,000 workers engaged in mining coal in Kentucky.

No proven and documented problem will be solved by the proposed rule.

The Mine Safety and Health Act of 1977[2] (hereinafter the "Mine Act") was passed by Congress to protect the health and safety of the miners in the United States of America. The Mine Act is replete with references to the responsibility of the Mine Safety and Health Administration (hereinafter "MSHA") to focus on the protection of life and the prevention of injuries to this country's miners. In the "summary" for this proposed rule, MSHA claims the "proposal would...provide improved safety and health for miners." However, MSHA supplies no studies, analysis or data proving this claim. In fact, if the proposed rule is enacted in its current form, rogue mine operators will be rewarded, conscientious operators will be ignored and the safety of miners will be adversely affected. The proposed rule is aimed not at the safety of miners, but rather at the convenience of MSHA, despite the fact that the proosed rule creates a real potentiality of eroding miners' safety.

The "background" section of the proposed rule sets forth statistics showing mine safety is improving under the existing part 100 scheme, thereby suggesting the proposed rule is unneeded. Under the **current** part 100 regimen, mine-related fatalities have decreased decade by decade.

[1] 79 Fed. Reg. 44494 (July 31, 2014)
[2] 30 U.S.C. §801 et seq.

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Injury rates have also consistently improved. MSHA touts that the "number of [regularly assessed citations and orders] decreased by approximately 26%...from 2010 to...2013 and the percentage of violations contested decreased by approximately 6%" during the same time frame.[3] In other words, mine-related deaths, injuries, enforcement actions and citation contests are decreasing under the present system. Nonetheless, MSHA desires to radically change the way monetary penalties are assessed to operators for violations of mining law. Nowhere in the proposed rule is convincing evidence presented that MSHA's sought-after revisions to part 100 will improve the health or safety of miners. In fact, as outlined below, safety is undermined and jeopardized by the proposed rule.

The well-established significant and substantial (S&S) analysis will be cast into doubt, and cause increased litigation, if the proposed rule is enacted

The "significant and substantial" terminology is taken from section 104(d)(1) of the Mine Act and refers to more serious violations. *Knox Creek Coal Corp.* 36 FMSHRC 1128 (May 2014). Thirty years ago, the Federal Mine Safety & Health Review Commission (hereinafter "the Commission") established the analysis for deciding if a violation is significant and substantial. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). A violation is S&S if, based on the particular facts surrounding the violation, there exists a **reasonable likelihood** that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div'n, Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The proposed rule seeks to discard decades of legal precedent and experience concerning S&S violations. The proposed rule redefines **"reasonably likely,"** a critical factor in the S&S analysis. If adopted, "reasonably likely" will mean that the "condition or practice cited [by the MSHA inspector] is likely to cause an event that could result in an injury or illness." First, instead of addressing hazards or accidents in a mine, the proposed rule focuses on events. An "event" is undefined in the proposed rule. Operators are provided no guidance on identifying what "events" must be avoided or eliminated.

Second, MSHA seeks to include events that merely "could" cause an injury in the definition of events that are "reasonably likely" to result in an injury. Scores of events in a mine "could" result in injury or illness. This, however, is not a reasonable likelihood of injury. See *Cement Div'n, Nat'l Gypsum Co.*, 3 FMSHRC at 825-27 (allowing conditions that present a "remote or speculative chance that an injury or illness will result" to be characterized as S&S will render the language in the Mine Act to be "virtually superfluous.") Although in a criminal case and under a different set of circumstances, the United States Supreme Court has said that the "reasonable likelihood standard does not require [proof] that it was more likely that not [but] the standard requires more than a mere possibility..." *Johnson v. Texas*, 509 U.S. 350, 367 (1993). MSHA's proposed rule hopes to expand the definition of "reasonably likely" into anything that possibly could happen. That is disallowed by the Mine Act and by decades of legal precedent defining "reasonably likely." More importantly, by focusing resources on eliminating

[3] 79 Fed. Reg. 44494, 44495 (July 31, 2014)

these attenuated conditions, practices or events that "could" cause harm, mine operators will have less time, money, personnel and resources to combat the conditions, practices and events that are actually "reasonably likely" to result in a reasonably serious injury or illness.

Third, the "occurred" definition proposed by MSHA is counterintuitive and nonsensical. MSHA wishes to define an occurrence as a "condition or practice cited [that] has caused an event that has resulted or could have resulted in an injury or illness." The proposed rule wrongly seeks to equate events that "could" have resulted in an injury or illness as actually having "occurred." Again, nearly any violation of mining law "could" result in an injury. Any pin hole in a trailing cable "could" have gotten in water, "could" have been grasped bare-handed by a miner, "could" have experienced a failure of the grounding system, and therefore "could" have resulted in an injury. Accordingly, under the proposed rule, that citation will now be written as "occurred," despite the fact that no one was injured and no one even touched the trailing cable. "Occurred" should truly mean occurred, as it does under the current system.

The proposed changes to the "negligence" designation discourage, rather than encourage, activity by mine operators to address risks, hazards and violations

Presently, mine operators engage in acts or omissions that are the result of low negligence if "considerable mitigating circumstances" exist. Thus, strong efforts by an operator to prevent or correct hazardous conditions in a mine result in a finding of "low negligence." If the operator presents some, but not considerable, mitigating circumstances, then "moderate negligence" occurred. However, if there are no mitigating circumstances, then "high negligence" is the proper assessment. The current rule understandably punishes an operator more severely if nothing was done to prevent or correct the hazard; that is, the operator demonstrated highly negligent conduct.

Under the proposed rule, "low," "moderate" and "high" negligence will be lumped into one category entitled "negligent." Recognition of operator efforts to proactively stop or fix potential hazards is glaringly absent from the proposed rule as "mitigating circumstances" are never mentioned. Instead, "negligent" is described by MSHA as "the operator knew or should have known about the violative condition or practice." If "mitigating circumstances" are abandoned, and the categories of "low,""moderate" and "high" negligence are erased, an operator who engaged in considerable efforts to safeguard miners' health and safety, which efforts have been successful in other instances though not on this particular occasion, will be treated exactly the same as an operator who did absolutely nothing to prevent or correct the violative condition. In the context of penalty assessments, operators will receive no benefit for trying to keep things safe at the mine. While professing the proposed rule enhances safety, MSHA will actually incentivize derelict, neglectful behavior.

This significant problem is exacerbated by the fact that the proposed rule assigns more weight to the "negligence" designation than it receives under the current part 100 analysis. Accordingly, even if an operator undertakes impressive efforts to protect miners, it does not matter when a monetary penalty is imposed. In fact, the operator will actually be penalized more

severely under the proposed rule. The "mitigating circumstances" defense will be a thing of the past.

MSHA also incorrectly claims clarity and simplicity will result from the proposed rule. The elimination of the "high" negligence designation leaves unanswered questions. For instance, an "unwarrantable failure" violation requires something "more than ordinary negligence." *Buck Creek Coal, Inc. v. MSHA,* 52 F.3d 133, 136 (7th Cir. 1995). If the proposed rule is implemented, there is no longer the category of "high" negligence that was a foundational finding for an "unwarrantable failure." The only available "negligence" option to support an "unwarrantable failure" violation is "reckless disregard." As more "reckless disregard" findings are made, it will exponentially increase the likelihood that the issuance of "flagrant" violations will rise. Under the current system, a "high" negligence finding could justify an "unwarrantable failure," but not a "flagrant" violation. "Reckless disregard" is necessary for a "flagrant" violation. If "high" negligence is erased, the distinction between an "unwarrantable failure" and a "flagrant" violation will be blurred. Miners, operators, and inspectors will be left to maneuver in the void left by no "high" negligence category. Ambiguities about the difference between an "unwarrantable failure" and a "flagrant" violation will create conflict between MSHA and operators. Not surprisingly, an uptick in litigation should then be anticipated.

The Federal Mine Safety and Health Review Commission, not MSHA, assesses monetary penalties

The Mine Act expressly grants the Federal Mine Safety and Health Review Commission the "**authority to assess** all civil penalties" against mine operators for violations of federal mining laws. 30 U.S.C. §810(i). Congress permitted MSHA to propose civil penalties, but the Commission is the entity that ultimately assesses civil monetary penalties.

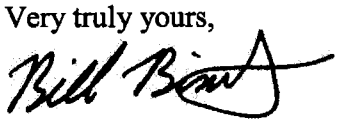
The proposed rule improperly seeks to remove the discretion the Commission has in imposing penalties. The Commission cannot, and should not, be bound by MSHA's formula for the imposition of monetary fines. The Commission and its judges are the appropriate third party arbiters to decide what monetary penalty is appropriate given the particular facts of each case. MSHA's attempt to be the police officer and the judge is misplaced and contrary to express Congressional intent.

Conclusion

The proposed revisions to 30 C.F.R. Part 100 will not promote consistency, objectivity or efficiency and will certainly not simplify the criteria for the assessment of monetary penalties against mine operators. If the proposed rule is adopted, confusion will result, enforcement actions will increase, monetary penalty amounts will multiply and litigation will ultimately be the legacy of this rule. More importantly, safety will not be improved. It will, actually, face uncertainties and disincentives that do not exist under the current part 100 analysis.

Thank you for your consideration.

Very truly yours,



Bill Bissett, President
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