JAN 08 2015

The Fertilizer Institute
Nourish, Replenish, Grow

PCA
America's Cement Manufacturers

January 8, 2015

Mine Safety and Health Administration
Office of Standards, Regulations & Variances
1100 Wilson Boulevard
Arlington, VA 22209

Re: RIN 1219-AB72

To Whom It May Concern:

The National Mining Association ("NMA"), the Portland Cement Association ("PCA") and The Fertilizer Institute ("TFI") are pleased to submit these comments on the Proposed Rule "Criteria and Procedures for Assessment of Civil Penalties under 30 C.F.R. Part 100" (79 Fed. Reg. 44,494, July 31, 2014) ("the Proposed Rule"). Collectively we represent over 100 mining companies from virtually every sector of the mining industry.

As demonstrated below, the Proposed Rule must be withdrawn because it exceeds MSHA's authority, violates the Mine Safety and Health Act of 1977 (30 U.S.C. § 801, *et seq.*) (the "Mine Act" or "Act") and the Administrative Procedures Act (5 U.S.C. § 551, *et seq.*) ("APA"); and fails to accomplish the goals stated in the Proposed Rule or justify its elements with sound analysis and reasoning. In essence, the proposal, if adopted, would constitute an arbitrary and capricious rule, without articulating any reasonable basis for the changes set forth in the proposal.

NMA is a national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA's membership includes operations and facilities that will be directly impacted by the rule should the agency finalize it as proposed.

The PCA today represents twenty-seven (27) cement companies operating eighty-two (82) manufacturing plants in thirty-five (35) states, with distribution centers in all fifty (50) states, servicing nearly every congressional district. Members of PCA account for approximately eighty percent (80 percent) of domestic cement-making capacity.

AB72-COMM-45

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic, information and public communications programs.

Overview of MSHA's Proposed Changes to Part 100

In the commentary accompanying the Proposed Rule, MSHA asserts that its proposed changes will (1) improve objectivity and consistency in how inspectors write citations and orders; (2) result in earlier resolution of enforcement issues due to fewer areas of dispute; (3) result in greater emphasis on more serious safety and health conditions; and (4) provide increased openness and transparency in the application of the regular formula penalty.

In addition, MSHA criticizes the Federal Mine Safety and Health Review Commission's ("Commission") alleged inconsistencies in assessing penalties independently pursuant to Section 110(i) of the Act (30 U.S.C. § 820(i)). MSHA argues that its authority is being undermined by the Commission's inconsistencies, and that those inconsistencies encourage operators to file "an excessive number of penalty contests" in the hopes of obtaining a lower penalty. MSHA also states that the Commission does not have the authority to assess civil penalties *de novo* according to the six statutory criteria and that its practice of doing so interferes with the Secretary's ability to establish a penalty policy that serves as a deterrent to mine operators.

Substantively, the proposed regulations seek to amend the existing Part 100 regulations. The regulations utilize a formula to determine civil penalties for MSHA to propose that operators pay for citations and orders, issued by inspectors (not proposed as "special assessments" under 30 C.F.R. § 100.5). Citation findings, made by inspectors, on citation form check boxes, determine category placement and points for the MSHA penalty formula. In addition to the specific changes proposed by, MSHA, the agency requested alternatives to its proposed changes in order to accomplish the goals it seeks to achieve by the Proposed Rule.

The key elements of proposed Part 100 changes, as described by MSHA, are as follows:

- Increased emphasis on violation history (including repeat violations), negligence and the "severity" factor of the gravity criterion.
- Less emphasis on mine size, controller/contractor size and the "likelihood of occurrence" factor of the gravity criterion.
- The "Negligence" criteria would be reduced from five categories to three: "Not Negligent", "Negligent" and "Reckless Disregard;" eliminating the existing "Low Negligence" and "High Negligence" categories.

- The "Likelihood of Occurrence" categories would be reduced from five to three: "Unlikely," "Reasonably Likely" and "Occurred;" eliminating the existing "No Likelihood" and "Highly Likely" categories. Definitions of each category would be added, including a significant change in the definition of "Occurred," such that no injury or illness would actually have to occur in order for a citation or order to be assessed a penalty under in that category.

- The "Persons Affected" category would be reduced from 11 categories to two: only "No Persons Affected" and "One or More Persons Affected."

- The penalty calculation formula, total penalty points used for all factors considered in setting a penalty would be changed from 208 to 100 penalty points. The conversion of penalty points to dollar amounts would also be changed. The existing regulations impose a $112 penalty for any citation or order with 60 points or fewer, and a $70,000 penalty for any citation 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.

- Minimum penalties for unwarrantable failures would be increased by 50 percent. The minimum penalty for a 104(d)(1) citation or order would be raised to $3,000 and the minimum penalty for a 104(d)(2) order would be raised to $6,000.

- Two alternatives are under consideration by MSHA to limit the discretion of the Commission, an independent federal agency established by Congress to review MSHA actions, in departing from the penalty MSHA proposes. Currently, the Commission exercises independent authority in assessing penalties.

- MSHA also requested comment on a potential, additional 20 percent, good faith penalty reduction, if the citation and proposed penalty are accepted as issued, without contest, and the penalty is paid within thirty (30) days after it has been proposed by MSHA.

Analysis

A. The Proposed Rule Does Not Comport With The Mine Act And The Administrative Procedures Act.

The proposed changes do not comport with statutory requirements. When Congress passed the Mine Act, it identified priorities that the Secretary of Labor was directed to address. These include:

- The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
- The need to provide more effective means and measures to improve the working conditions and practices in coal and other mines;

29 U.S.C. § 801 (emphasis added). MSHA has not conducted a data-driven analysis of penalties, health and safety performance, and the proposed changes, nor articulated reasons to undertake this major regulatory change, or any of its specific elements. Instead, the proposal, at best appears to be a change for the sake of change, and at worst seeks to ease the Secretary's burden of proof on enforcement actions, restrict mine operators' ability to contest MSHA's proposals and increase penalties without a safety rationale.

Recent enforcement history data shows that citation rates are down, the Commission docket backlog is dramatically reduced, and most importantly, accident and fatality incidents are down. In other words, based on MSHA's analysis, the current rule is accomplishing its goals and MSHA has not identified any data or other evidence showing that the Proposed Rule will have any different effect in improving safety and health. In our view the Proposed Rule fails to identify the problem or concern it seeks to solve, analyze the facts associated with that problem or concern, and articulate empirical data to justify its provisions as solutions to the identified problems or concerns.

Section 706 of the APA prohibits agencies from acting in an arbitrary and capricious manner. Agencies act in an arbitrary and capricious manner if they relied on factors which Congress did not intend the agency to consider, failed to consider an important aspects of the problem, offered an explanation for its decision that is contrary to the evidence, or is made a decision that is so implausible that it could not be considered to a difference of opinion or the product of agency expertise. *See Nat'l Truck Equip. Ass'n. v. Nat'l Highway Traffic Safety Admin.*, 711 F.3d 662, 667 (6th Cir. 2013) (applying 5 U.S.C. § 706 to agency actions). Because the Proposed Rule does not provide sufficient empirical data to justify its adoption, or predict the consequences of its implementation, and because the apparent effects of the Proposed Rule will be contrary to Congress' intent, MSHA's implementation of the Proposed Rule would be arbitrary and capricious, and violate federal law.

As an example of the proposal's effects being contradictory and devoid of data, MSHA asserts that the Proposed Rule simplifies the gravity and negligence criteria, and places an increased emphasis on the more serious hazards. 79 Fed. Reg. at 44,495. We disagree. We are concerned that based on the cursory explanations in the Proposed Rule, its provisions will have the opposite effect, inaccurately or imprecisely elevating the severity of enforcement actions for lower-risk conditions, resulting in confusion, misdirected safety resources, inconsistent enforcement, unnecessary litigation and illogical compliance initiatives within the industry. Reduced and conflated categories of proposed citation and order descriptions/findings (e.g. negligence and likelihood) will create greater inconsistency between inspectors and MSHA districts and less precision in factual determinations required of MSHA inspectors, and will result in inspectors assessing higher gravity and negligence levels, rather than improving the accuracy levels of the inspector findings.

1. Industry's Alternative Proposal

If MSHA plans to move ahead with this rulemaking, we suggest convening an advisory committee to plan and oversee the conduct of a six month trial of a revised citation format, with proposed new categories of findings, used by a representative number of inspectors from diverse districts, to obtain data to compare to the prior six months, to determine the realistic impact of changing citation descriptions and Part 100 penalty categories. We would be pleased to work with MSHA to plan and coordinate such a study to develop data to analyze whether revisions to Part 100 are necessary or beneficial.

B. The Proposed Rule Does Not Comport with MSHA's Stated Objectives

MSHA contends that the simplification (reduction of descriptive categories) of penalty criteria, should lead to fewer areas of dispute and earlier resolution of enforcement issues, place increased emphasis on more serious hazards and lead to more "openness and transparency." 79 Fed. Reg. at 44,495. MSHA's assertions are incorrect.

During the last six years, MSHA frequently pointed to a backlog in contested citations, penalties, and litigation as the cause for the Agency's enforcement difficulties, and need for changes. *See, e.g.* Final Rule, Pattern of Violations ("POV"), 78 Fed. Reg. 5056, 5060 (Jan. 23, 2013); Testimony of Hon. Joseph Main, Asst. Secretary of Labor, MSHA, Hearing before Comm. On Education and Labor, p. 13 (Jul. 13, 2010). MSHA's historical records confirm that the rise in litigation followed a 400+ percent increase in penalties proposed by MSHA beginning in 2008. After this seismic shift in enforcement efforts, and the Commission's and MSHA's investment in additional resources and manpower, the contest backlog was reduced from 18,190 in Sept. 2010 to approximately 6,500 cases as of Sept. 30, 2014 – a reduction of approximately 65 percent. The Commission backlog in cases is not justification for this rule.

The Proposed Rule will put the mining industry and the agencies back in the same predicament they were in in 2008, with enforcement increases, higher contest rates and a resurgence in the number of dockets in backlog status. Specifically, proposed revisions to the negligence and gravity designations are combined with proposed changes to the likelihood criteria, deleting categories and collapsing them, thereby reducing inspector options in describing violations, and encouraging increased inspector severity and fault ratings, with their attendant consequences of increased enforcement and penalties. This will result in more contests of penalties, not less.

Essentially, the Proposed Rule's "likelihood" changes would adopt the interpretation of the Significant & Substantial ("S&S") violations advocated by the Solicitor's Office, increasing enforcement risks, without analysis of the real hazards and risks posed by the alleged violation. *See* Testimony of Hon. M. Patricia Smith, Solicitor of Labor, U.S. Dep't. of Labor, Hearing before Comm. On Education and Labor, p. 19 (Jul. 13, 2010).

The Proposed Rule uses a change in the likelihood criteria to broaden, without authority or support, the definition of the underlying S&S criteria, established by the Federal Mine Safety and Health Review Commission ("Commission") over thirty years ago. It will

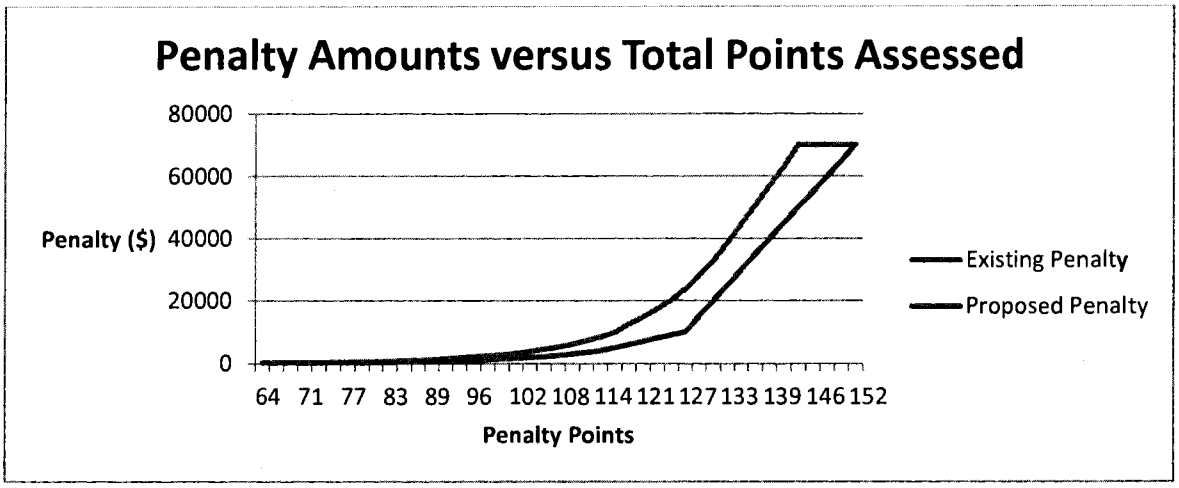
force operators to contest increased numbers of S&S citations, orders and increased penalties with greater frequency. Moreover, the relationship of the MSHA's Pattern of Violations (POV) rule and this Proposed Rule will also cause increased challenges to S&S findings, driven by the changed likelihood criteria.

Finally, the proposed collapse of negligence and likelihood categories will be counterproductive to transparency because inspectors will be far more limited than under the current rules in describing their findings, resulting in less precision in MSHA's enforcement actions. Simply put, the Proposed Rule likely will yield counter-productive results with respect to dispute resolution and timely enforcement.

C. MSHA's Proposed Rule Benefits Bad Actors and Creates a Randomized Distribution of Penalty Amounts

The Proposed Rule changes the maximum penalty points that can be assessed against an operator from 208 to 100 penalty points. Because the maximum points for the Proposed Rule decreases by 52 percent, the relative weight of each penalty point has a commensurate increase in significance. Mathematically speaking, the transition from a 208 point scale to a 100 point scale means that the relative value of each penalty point under the Proposed Rule is increased by 108 percent.

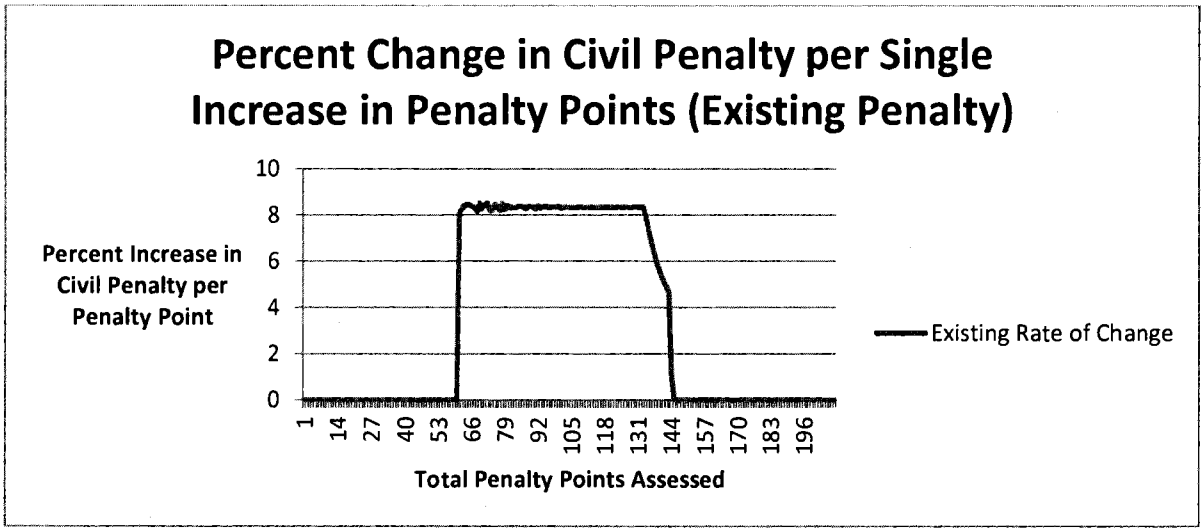
The graph below plots the civil monetary penalty amounts against the total penalty points assessed for the existing and Proposed Rules. To allow for a side-by-side comparison, the penalty amounts for both rules have been normalized to a 208 point scale.



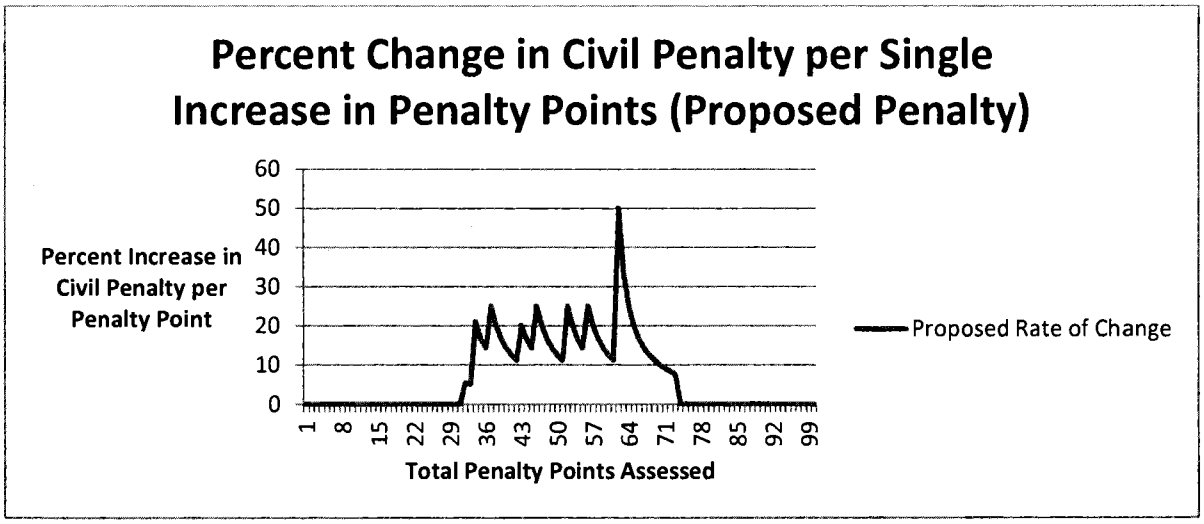
The fact that the Proposed Rule imposes a slower rate of increase in civil monetary penalties issued to operators receiving more severe citations and orders is evident by the fact that higher penalty point assessments are required under the Proposed Rule to reach the equivalent monetary penalties under the existing rule. This result is inconsistent with MSHA's stated objective to place increased emphasis on more serious hazards. 79 Fed. Reg. at 44,495.

Also, MSHA intends for the aggregate civil monetary penalty amounts assessed under the Proposed Rule to be comparable to the aggregate civil penalty amounts assessed under existing rule. 79 Fed. Reg. at 44,496. Based on the difference between the two curves in the graph above, and the fact that certain criteria (e.g. mine size; violation history) are fixed values, the only ways to offset the apparent gap between the two curves would be for MSHA to (a) increase the negligence and gravity determinations for the citations issued, or (b) issue a greater quantity of citations and orders than the agency currently issues. Both scenarios punish the operators who (a) historically receive non-S&S, Low Negligence citations, or (b) are historically in compliance with MSHA's standards.

Under the existing rule's penalty point conversion system, the civil monetary penalty increased at a near-constant rate of 8 percent per penalty point. However, under the Proposed Rule's penalty point conversion, the civil monetary penalty increase per penalty point is completely arbitrary, with fluctuating increases across the newly proposed penalty point scale. The following two graphs depict the percent change in civil penalty per single increase in penalty points. Under the existing rule the monetary penalty increases at approximately 8 percent per penalty point until the maximum monetary penalty is reached.



Under the Proposed Rule, the civil monetary penalty amounts would increase anywhere between 11 percent and 50 percent per point.



The graph for the Proposed Rule shows arbitrary peaks and valleys at various intervals across the 100 penalty point scale. These peaks and valleys indicate that MSHA's proposed monetary penalties do not uniformly increase in severity as a function of the total penalty points assessed. For example, if a citation receives 37 penalty points, the monetary penalty is 25 percent higher than a citation receiving 36 penalty points. However, if a citation receives 42 penalty points, the monetary penalty is only 11 percent higher than a citation receiving 41 penalty points.

D. Proposed Rule Lacks Clarity for the Negligence and Gravity Categories

While MSHA asserts that the Proposed Rule simplifies the gravity and negligence criteria, and places an increased emphasis on the more serious hazards, 79 Fed. Reg. at 44,495, a numerical analysis of MSHA's proposal demonstrates that the changes in the negligence and gravity definitions will have the opposite effect, elevating the penalties of less-hazardous violations, resulting in confusion, inconsistent enforcement and unfocused compliance efforts within the industry.

The new categories of gravity and negligence are so broad and imprecise that there is no way for operators to understand how each inspector will interpret a particular negligence or gravity category and apply those interpretations to a particular mine's conditions. These broad categories will delay and hinder safety initiatives as operators try to distinguish the proverbial wheat from the chaff of potential hazards.

MSHA asserts that reducing the number of negligence categories would improve objectivity and consistency in the evaluation of negligence, resulting in fewer areas of disagreement, thereby facilitating resolution of enforcement issues. 79 Fed. Reg. at 44,502. If MSHA truly believes the criteria of negligence and gravity deserve added emphasis in the penalty calculations, industry does not understand why MSHA published such cursory discussion of those criteria. For example, the Proposed Rule offers zero guidance as to how the old categories of negligence and gravity will be incorporated into the new definitions. In other words, there is no explanation as to whether the new definition of "Negligent" will encompass the old "Low Negligence" or a

portion thereof. Likewise, there is no explanation as to whether the new definition will encompass some or all of the old "High Negligence," or if that classification will be entirely subsumed into the category of "Reckless Disregard."

Presumably, the new "Negligent" category will only replace the existing "Low" and "Moderate" negligence categories because MSHA is placing greater emphasis on negligence. 79 Fed. Reg. at 44,495. Moreover, if the proposed category of "Negligent" encompassed the existing "High Negligence" category, it would result in a relative reduction in penalty points. The table below demonstrates the results of this assumption. For that reason, it appears that the current "High Negligence" category would be subsumed into the proposed "Reckless Disregard" category, resulting in a 78 percent increase in the relative weight of penalty points for that category.

Negligence Penalty Point Comparison - Existing versus Proposed Rule					
Existing Categories	**Points / 208**	**Penalty Point Percentage**	**Proposed Categories**	**Points / 100**	**Penalty Point Percentage**
No Negligence	0	0.00%	**Not Negligent**	0	0.00%
Low Negligence	10	4.81%	N/A	--	--
Moderate Negligence	20	9.62%	**Negligent**	15	15.00%
High Negligence	35	16.83%	N/A	--	--
Reckless Disregard	50	24.04%	**Reckless Disregard**	30	30.00%
Unweighted Average		11.06%	**Unweighted Average**		15.00%

Oversimplification of these criteria is not the answer to an increasingly complex work and regulatory environment. Broadening the definitions of negligence and gravity criteria will not enhance safety. The Mine Act already requires an operator to abate an alleged hazard, regardless of any gravity or negligence description. Hence the proposed definitions can only be punitive in nature, and unclear in their application and intent, as they will provide mine operators with less information about an MSHA inspector's findings.

1. **Changes to the Negligence Criteria Will Increase Disputes and Deter Improvements in Safety Efforts and Initiatives**

The Secretary asserts that when assessing a civil monetary penalty, the Mine Act directs the Commission to consider whether an operator was negligent. 79 Fed. Reg. at 44,502. However, the Act and the current regulations do not require that negligence be

treated as a simple (yes/no) criterion. Because the term negligence encompasses such a broad range of behavior in a complex work environment, the new, broader negligence categories will not resolve disputes over negligence, but rather will lead to increased disputes, and will reduce the significance of the negligence criteria in the long-term.

Further, the proposed changes to the negligence criteria do not clarify the parameters inspectors will use, but rather by failing to include any recognition of mitigating circumstances, or reasonable efforts to exercise due diligence, the Proposed Rule drastically expands the definition of "Negligent," constricts the definition of "Not Negligent," and completely eliminates the category of "Low Negligence."

Rather than having clear differences between low, moderate and high negligence, the proposed single "Negligent" category will cause greater inconsistency between individual inspectors and between MSHA districts. Based on MSHA's historical enforcement data, the use of the "No Negligence" category is extremely rare. Because the proposed "Not Negligent" and "Reckless Disregard" categories invoke the same definitions used in the existing regulation for "No Negligence" and "Reckless Disregard," we are concerned that the Proposed Rule's category "Negligent" will be applied to conditions that would have previously been considered as low or moderate negligence, while "High Negligence" would be considered "Reckless Disregard." If true, conditions that are currently assessed with "High Negligence" would become "Reckless Disregard" allegations and are subject to special assessments and trigger additional POV criteria.

Applying the Proposed Rule's negligence categories to future citations, actual or inferred knowledge will result in a "Negligent" assessment at a minimum. By treating all actual and inferred knowledge as "Negligent," regardless of any mitigating circumstances, the Proposed Rule is removing incentives for operators to try and reduce negligent conduct. These definitions will remove economic penalty incentives for operators and their agents to act with more than the "slightest degree of care" necessary to overcome the Reckless Disregard threshold. The proposed negligence categories will, in effect, create a race to the bottom for rewarded efforts, with the floor being set at the reckless disregard designation.

Under the existing rule, the negligence determination traditionally depends on a number of factors including the duration of the condition, whether and when the condition was reported to management, the nature of the alleged condition, and if applicable, factors associated with the operation of the equipment. Under the Proposed Rule, those factors, important to safety, are irrelevant. The Proposed Rule becomes virtually an "all or nothing" determination in contrast to the existing rule that actually accounts for variations in circumstances encountered in day-to-day operations, and ameliorates penalties for operators that are making good faith efforts to eliminate or minimize hazards as they are discovered.

The Proposed Rule also eliminates the consideration of mitigating factors. Mitigating circumstances do not excuse a wrongful act but instead reduce the degree of culpability and associated damages or punishment. *Black's Law Dictionary*, p. 236, 7th ed. 1999. The Mine Act does not prohibit or discourage the consideration of mitigating circumstances. Under the existing rule, "Moderate" and "Low" negligence designations

take mitigating circumstances into account. This is an appropriate consideration when assessing penalties because mining is performed in a dynamic and ever-changing environment. Absent mitigating circumstances, operators would be forced to have supervisors standing over the shoulder of every miner, in every part of a mine. Consideration only of whether the operator knew or should have known of the condition does not give an adequate account of the negligence associated with of a particular violation.

By eliminating the "Low Negligence" category, and discarding the role mitigating circumstances might play in the existence of a hazardous condition, the Proposed Rule will cause a regression in safety efforts because it will discourage, or at a minimum not encourage, efforts to increase compliance. This outcome would be the inevitable by-product of MSHA removing economic rewards in its penalty system for exercising a higher standard of care, and as a result could actually increase the risk miners face on a daily basis.

As currently proposed, the "Not Negligent" definition is too restrictive relative to the definition of "Negligent." If the proposed three-pronged Negligence determination is adopted, the definition of "Not Negligent" should be expanded to include considerations of the operator's exercise of reasonable diligence, or that mitigating circumstances are present.

The elimination of "High Negligence" raises significant questions as to the future application and misapplication of the term "Unwarrantable Failure" and the issuance of 104(d) citations and orders. The Commission defines an unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Co.*, 9 FMSHRC 1997 (Rev. Comm. Dec. 1987). In *Emery Mining*, the Commission held that an unwarrantable failure cannot be equated with ordinary negligence. The elimination of "High Negligence" under the Proposed Rule would result in an increase in the number of "Reckless Disregard" findings leading to increased unwarrantable failure findings. If an assertion of negligent conduct continues to be insufficient to support an unwarrantable failure, all future citations and orders issued under Section 104(d) would require a "Reckless Disregard" finding. An increase in "Reckless Disregard" findings would obviously result in increased penalty points for each citation and order, and a resulting increase in the total amount of penalties assessed by MSHA annually. In addition, MSHA must be cognizant of the fact that the classification of a citation or order as "Reckless Disregard" as opposed to "High Negligence" will expose operators to a significant increase in civil litigation because there are a number of states where such a classification can trigger an exemption to workers' compensation coverage. Similarly, a "Reckless Disregard" classification is a predicate to a "Flagrant Violation" finding under Section 110(b)(1) of the Act, while a "High Negligence" classification is not. Not only does this underscore the importance of the distinction between those two classifications, it raises the question of whether the elimination of "High Negligence" was made for the purpose of increasing the number of enforcement action eligible for assessment as "Flagrant Violations."

We anticipate that without a detailed and specific explanation of how MSHA intends to apply the new negligence categories, it will be impossible for inspectors and operators

to know how their actions compare to the requisite standard of care, resulting in a significant increase in litigation to determine the ultimate answer.

2. Changes to the Likelihood Criteria Will Increase Disputes

MSHA asserts that the proposed criteria for likelihood will reduce the relative weight of the likelihood criteria from 23.1 percent to 12 percent of the total penalty assessment criteria. However, the range of points that can be assessed for likelihood under the Proposed Rule is 25 out of 100 points, as compared to the original structure of 50 out of 208 points. In essence, the percentage of total penalty points that can be assessed for the likelihood parameter is slightly increased under the Proposed Rule. This is contrary to MSHA's expressed objective and must, therefore, be changed. In addition, the definition of likelihood has been expanded and the categories muddied, rather than clarified.

Because MSHA has not explained how it will interpret and apply the terms "Unlikely" and "Reasonably Likely," we are concerned that the penalty points associated with "Unlikely" will in fact rise from 5 percent of the maximum penalty points under the existing regulation to 14 percent under the Proposed Rule. MSHA should apply the Proposed Rule's "Unlikely" category to those conditions that satisfy the existing rule's categories of "No Likelihood" and "Unlikely" (*e.g.* inadvertent failure to set the parking brake on an automobile with an automatic transmission, or failure re-attach the safety chain around a compressed gas cylinder stored against the wall), and assess zero penalty points to those conditions.

a. Reasonably Likely

The proposed definition of "Reasonably Likely" raises a point of significant concern due to the term's relationship with S&S designations. Although the Mine Act does not contain a definition of S&S, citations and orders are properly designated as S&S "if based upon 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (Rev. Comm. Apr. 1981). The Commission has emphasized that "it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Rev. Comm. Aug. 1984) (emphasis in original).

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 44,503 (emphasis added). We disagree and have serious concerns with MSHA's intention to expand the definition of the term "Reasonably Likely" because the existing definition is a foundational element of MSHA's enforcement program. For over thirty years, the Commission has required that S&S citations 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).

The proposed changes in the definition of "Reasonably Likely" are important because the new definition would eliminate the requirement that the probability that the hazard cause or contribute to the injury be reasonable, and would reduce the requirement that the alleged hazard will result in an injury or illness, to a possibility (however remote), that the condition or practice is likely to cause an event that could result in an injury or illness. Also, the Proposed Rule offers no explanation or definition of the term "event," nor does it explain the level of probability necessary to determine that this event could result in an injury or illness.

The proposed definition of "Reasonably Likely" allows for greater subjectivity by inspectors regarding the actual or hypothetical link between a violative condition and a prospective injury or illness. As a result, the proposed definition would lower the burden for an S&S designation from a condition with a reasonable probability of causing an injury or illness, to a condition with a slim possibility of causing an event that could lead to an injury or illness. MSHA has not explained why it seeks to expand the definition of "Reasonably Likely" or how MSHA anticipates this definition will be applied to S&S determinations. We are gravely concerned that this subjective language will exacerbate existing concerns over consistency of enforcement between individual inspectors and between districts. Disagreements between inspectors and operators over the validity of these links and actual or perceived enforcement inconsistencies between inspectors and districts will lead to elevated contest rates and more litigation, when there is no need to redefine the term and no data to support that the result would be increased safety.

The Commission's thirty-year old definition for "Reasonably Likely" and the test for S&S designations are not only durable, they satisfy Congress' intent. When Congress established the Commission, one of the purposes was to create a separate, independent agency 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 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). This statement from the report is particularly relevant to the proposed changes to the term "Reasonably Likely," primarily because the Proposed Rule fails to state whether the relationship between Reasonably Likely and S&S would change or remain the same. Any changes in the legal standard for S&S designations will drastically alter the body of case law on which the Secretary, miners and operators have relied. In addition, by shifting away from the Commission's well established test for S&S to a regulation, the Proposed Rule opens the door for S&S criteria to become a term that is defined by each political administration.

The Secretary's desire to escape the Commission's legal test for Significant and Substantial would eviscerate three decades of judicial precedent and create confusion and uncertainty for operators, miners and miners' representatives regarding the conditions that could create a Significant and Substantial hazard.

Despite the agency's desire, lowering the bar for S&S designations does not advance safety improvements, otherwise the Proposed Rule would have included empirical data to justify the change in the meaning of "Reasonably Likely" and "Occurred." To the contrary, the dilution of the term "Reasonably Likely" will blur the distinctions between high-risk hazards that generate a likely risk of serious injury or illness and hazards that generate only a possible risk any of injury or illness.

We acknowledge that in an ideal world, every plausible risk and every possible risk would be eliminated, but in the every-changing mining environment this is extremely difficult. MSHA must continue to maintain a firm distinction between S&S conditions and non-S&S conditions. Indeed, MSHA's prioritization of certain mandatory safety and health standards over others in the "Rules to Live By" program and the impact inspection program is an effort to identify and focus on those circumstances that pose the highest risk of harm. MSHA should continue to make a similar distinction between conditions or practices where there is a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature, and not treat them the same way as conditions where the nexus between the condition, the hazard and the injury or illness are tenuous.

b. Occurred

In the current rule the term "Occurred" in undefined. Despite that lack of definition, Block 10.A of MSHA Form 7000-3 confirms that a finding of "Occurred" pertains to the existence of an injury or illness. This approach is echoed by MSHA's Citation and Order Writing Handbook, which directs MSHA inspectors that the "Occurred" box in Block 10.A, can only be checked when an injury or illness has actually occurred. MSHA Handbook Number PH13-I-1(1), p. 11 (emphasis added).

We are particularly troubled by the proposed definition of the term "Occurred." The proposed definition seeks to change the plain meaning of the term "Occurred" and shift the reference of the occurrence from the injury or illness to an unidentified, potential or actual event that purportedly results, or could result, in an injury or illness. The word "occurred" is the past tense of the word "occur" which is defined by Merriam-Webster's Dictionary to mean "to happen." Thus, the work occurred refers to something that has already happened. The proposed definition of Occurred is:

> 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 44,503 (emphasis added). The proposed definition would change this consideration to whether an event has occurred, not an injury. This is a significant and unwarranted change that despite MSHA's characterization will have far reaching ramifications. The Proposed Rule fails to define the word "event" or explain how MSHA

will interpret and apply the word. For example, the Proposed Rule would allow a citation for inadequate parking brakes to be cited as "Occurred" even when no miner is injured or even present in the area. The proposed definition of "Occurred" would also increase the subjectivity of the category.

The current practice for designating a citation as "Occurred" is based on the objective fact of whether or not an injury or illness has resulted from the cited hazard. The proposed definition would give the inspector the latitude to choose the circumstances that "could have resulted in an injury or illness," with no explanation as to the assumptions the inspector is allowed to make. For example, in a condition similar to the hypothetical mentioned previously in the discussion of the term "Unlikely," an inspector observes an unattended vehicle, parked on a mild slope with its tires in a wheel ditch, but the emergency brake is not set, and no miners are in the vicinity. Arguably, the failure to set the emergency brake could result in a fatal injury if the unattended vehicle were to begin moving down the slope and a pedestrian walked in front of the vehicle's path. This new definition encourages inspector speculation which will result in a significant increase in "Occurred" designations, which will, in turn, result in increased penalties and contested cases.

These assumptions and hypothetical scenarios show that the proposed definitions of "Reasonably Likely" and "Occurred" are impermissibly vague and allow for multiple outcomes and conclusions for which there is no data demonstrating an increase in safety. These overly broad definitions run counter to one of the Secretary's stated purposes for the Proposed Rule – to improve objectivity, transparency and consistency.

c. The Proposed Changes to Likelihood Have A Disproportionate Penalty on Lower-Risk Conditions as Compared to Higher-Risk Conditions or Actual Occurrences

The chart below details the change in the relative weight of assessed penalty points for likelihood determinations under the Proposed Rule. Although MSHA offered a proposed definition for "Reasonably Likely," MSHA did not explain what percentages of previously issued citations would have fallen into the new "Unlikely," "Reasonably Likely," or "Occurred" categories.

Likelihood Penalty Point Comparison - Existing versus Proposed Rule					
Existing Categories	**Points / 208**	**Penalty Point Percentage**	**Proposed Categories**	**Points / 100**	**Penalty Point Percentage**
No Likelihood	0	0.00%	**Unlikely**	0	0.00%
Unlikely	10	4.81%	N/A	--	--
Reasonably Likely	30	14.42%	**Reasonably Likely**	14	14.00%
Highly Likely	40	19.23%	N/A	--	--
Occurred	50	24.04%	**Occurred**	25	25.00%

However, MSHA's stated goal is to place a greater emphasis on the gravity of violations. Hence, we assume that any citations that are designated under the existing rule as "Unlikely" would be marked as "Reasonably Likely" under the Proposed Rule. This results in nearly a three-fold increase in the weight of penalty points from the existing rule to the Proposed Rule for identical conditions.

Because MSHA has not disclosed whether existing "Highly Likely" conditions would be considered to be "Reasonably Likely" or "Occurred," we have assumed that 50 percent of the citations originally designated as "Highly Likely" would be designated as "Reasonably Likely" and the remaining 50 percent would be designated as "Occurred." This assumption is based on MSHA's new definition of "Occurred," and the goal of elevating the severity of enforcement actions for higher-risk conditions.

Half of the violative conditions originally marked as "Highly Likely" would now be designated as "Reasonably Likely" and receive fewer penalty points for the same condition assessed under a new definition, but the other half of those "Highly Likely" violative conditions would be designated as "Occurred" and receive a harsher penalty under the Proposed Rule.

Moreover, under the Proposed Rule, conditions that resulted in an actual injury or illness are treated no worse than the conditions that were designated as "Highly Likely" under the existing rule. In short, an actual accident or injury would be treated with the same severity as a possible injury. MSHA has provided no justification for treating possible injuries or illnesses the same as situations where injuries or illnesses have actually occurred.

If adopted, the Proposed Rule's likelihood determinations will result in significant penalty increases for conditions that are less likely to result in injury or illness, while other conditions that were "Highly Likely" to result in injury or illness may receive a smaller percentage of penalty points than the existing rule required. Thus, this overbroad category once again fails to achieve MSHA's stated goal.

E. Proposed Increase to the Minimum Penalties for Unwarrantable Failure

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 Section 104(d)(1) and from $4,000 to $6,000 for an order issued under Section 104(d)(2).

Congress established the existing statutory minimums of $2,000 and $4,000 in 2006. Although the Mine Act allows 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.[1] Although the Debt Collection Improvement Act excluded penalties authorized under certain statutes (e.g. the OSH Act), the Mine

[1] The Debt Collection Improvement Act also limited the first inflation-based adjustment to any civil monetary penalty to no more than 10 percent of such penalty. Pub. L. 104-134, title III, § 3100(s)(2), Apr. 26, 2006. This proposed increase exceeds that statutory constraint.

Act was not included in those exclusions. Thus, MSHA's attempt to adjust minimum penalties for reasons beyond those allowed by Congress does not give effect to Congressional intent, but rather seeks to assert authority that Congress did not grant to the Secretary.

The Supreme Court has already spoken to this issue. When considering an agency's construction of a statute which it administers, "[f]irst, as always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]" *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Here, Congress' intent could not be any more clear: the penalty amounts established in Sections 104(d)(1) and 104(d)(2) can be raised for inflation but not for agency policy reasons. The Secretary must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43.

MSHA has not claimed, nor could it claim, that these proposed increases are justified based on inflation during the last eight years. Rather, 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 44,507. The proposal lacks any evidentiary rationale for this belief.

Not only has MSHA not provided data or evidence to show that a 50 percent increase will serve as a more effective deterrent than do the existing penalties, MSHA has not provided any data or evidence that the existing minimum penalties are ineffective deterrents. In addition, the proposed penalty increase is contrary to MSHA's claim that the Proposed Rule would result in reduced overall penalties and fewer points of dispute. *See* 79 Fed. Reg. at 44,512 (asserting that a benefit of the proposed changes to part 100 would be to improve the efficiency of MSHA's enforcement efforts and minimize disputes).

F. Scope of Part 100 and Review Commission Authority

MSHA's concerns regarding the Commission's independent role in the assessment of penalties are unfounded. 79 Fed. Reg. at 44,508-09. MSHA complains that when the Secretary has sustained the burden of proof for the violation and all penalty related facts, the Commission may nonetheless assess a civil penalty different from the penalty 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. Yet, Congress also 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 citation 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 citation and proposed 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. Based on that decision, an Administrative Law Judge ("ALJ") independently assesses a penalty which may or may not depart from that originally proposed by MSHA.

MSHA proposes two potential changes to the scope of Part 100, which would expand the scope of the penalty regulations to include not only the proposal of penalties by MSHA but also the assessment of penalties by the Commission. Put differently, under the proposed expanded scope, the Commission and ALJs would be bound by the provisions of MSHA's Part 100 regulations when assessing penalties once they determine that a violation had occurred.

The two alternatives for changing the scope of Part 100 are:

> (1) Require the Commission to apply the penalty formula when assessing civil penalties according to the six statutory criteria; or
>
> (2) Give the Commission flexibility to depart from the part 100 penalty formula in much the same way that district court judges were authorized, in limited circumstances, to depart from the Sentencing Guidelines before the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005).

As discussed below, both of MSHA's proposed modifications to the scope and applicability of Part 100 are contrary to Congressional intent as expressed in the plain language of the Act, exceed the Secretary's authority, and infringe on the authority granted exclusively to the Commission by statute. Moreover, they are not justified by any data demonstrating a relationship that improves safety and health.

1. The Proposed Change to the Commission's Authority is Contrary to the Act

The Mine Act deliberately divides authority for proposing and assessing penalties between the Secretary and the Commission. The Act delegates to the Secretary the authority to propose civil penalties. 30 U.S.C. §§ 815(a) and 820(a) (emphasis added).

If a mine operator disagrees with the Secretary's allegations, the operator may contest the citation, order or proposed assessment of penalty. *Id.* § 815(d). The Act directs the Commission to afford the mine operator a hearing and "thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order

or proposed penalty ...." *Id.* (emphasis added). This split authority was precisely what Congress intended when it passed the Mine Act. *See* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 906 (1978) (stating, "The Secretary proposes his penalty to the independent Mine Safety and Health Review Commission which has the final authority to assess penalties"). The plain meaning of the Act, and the legislative history expressly authorize the Commission, and by extension the Commission's ALJs, to affirm, modify (higher or lower) or vacate the Secretary's proposed penalty based on the facts found during a hearing. Both of MSHA's alternatives violate the express terms of the Mine Act and if implemented would be *ultra vires* actions.

The Secretary cited Section 508 of the Act, along with Section 105 and 110 (30 U.S.C. §§ 957, 815 and 820) as authority for the current version of Part 100. However, it would be inappropriate for MSHA to rely on Section 508 (or either of the other two sections previously relied upon) to expand the scope of those regulations.

Section 508 does not authorize the Secretary to promulgate regulations that govern the Commission. Section 508 was carried over into the Mine Act from the Federal Coal Mine Safety and Health Act of 1969 ("Coal Act"). The Coal Act authorized the Secretary of the Interior to enforce its provisions and provide for administrative adjudication of disputes. *See* 30 U.S.C. §§ 815 and 819(a)(3)(1969); *see also, UMWA v. Kleppe*, 561 F.2d 1258, 1261 (7th Cir. 1977) (noting that under the Coal Act, the Secretary of the Interior was charged with "administering and implementing the provisions of the Act [and]...allow[ing] for administrative adjudication"). Section 508, therefore, authorized the Secretary of the Interior to promulgate regulations covering both the administration and implementation of the Coal Act and administrative adjudication. *UMWA,* 561 F.2d at 1262. That authority was exercised by the creation of the Board of Mine Operations Appeals with the Secretary of the Interiors Office of Hearings and Appeals ("BMOA").

Similar authority was not granted in the Mine Act. When Congress enacted the Mine Act, it abolished the BMOA and established the Commission as a separate agency to provide for administrative adjudication of disputes under the Mine Act. 30 U.S.C. § 823 (establishing the Commission). As mentioned earlier, the 1977 Conference Report eliminated the Secretary of Interior's dual role of enforcement and administrative review. The 1977 Conference Report adopted the Senate's proposal to establish an independent commission to review enforcement actions. 1977 Conference Report, at 1348. Congress expected the Commission would develop a sound and definitive body of case law, enabling the Secretary and the industry to adopt a consistent course of conduct. *Id.* The 1977 Conference Report further explains the significance of this change. The Commission:

> [I]s assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained by the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program.

Id. at 1360. Congress' desires to separate administrative review from enforcement functions and for the Commission to create a definitive body of case law are particularly relevant to MSHA's proposed changes to the term "Reasonably Likely." As mentioned previously, the Secretary's and Solicitor's aforementioned desire to escape the Commission's legal test for S&S would gut over thirty years of case law, and MSHA has not provided any data that correlates an expansion of the scope of S&S designations with improvements in safety. To the contrary, the expansion of the term "Reasonably Likely" will blur the distinctions between hazards that generate a plausible risk of serious injury or illness and hazards that generate a possible risk of and injury or illness.

Because of Congress' explicit separation of enforcement and adjudicatory duties in the Mine Act, the current section 508 does not authorize the Secretary to promulgate regulations that cover administrative adjudication. It is worth noting that, as a result of those changes, the language of Section 508 was also changed. As currently codified, it authorizes the Secretaries "to issue such regulations as each deems appropriate to carry out any provision of this chapter." 30 U.S.C. § 957. As opposed to the broader language of the Coal Act, authorized the Secretary promulgate regulations necessary to carry out "administrative adjudication" of disputes under the Mine Act.

2. The Proposed Change is Contrary to Commission Precedent

The proposal is contrary to Commission precedent. Shortly after the Mine Act was enacted, the Commission confirmed that the Mine Act authorized the Commission to decide independently questions of fact, law and policy. *Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8 (Rev. Comm'n 1981) (citing 30 U.S.C. § 823(d)); *Sec'y of Labor v. Helen Mining Co.*, 1 FMSHRC 1796, 1800-02 (1979)). Since that time, the Commission has consistently recognized that, under the Mine Act, the Secretary proposes penalties but the Commission ultimately assesses them. In *Douglas R. Rushford Trucking*, the Commission succinctly summarized this process as follows:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission 'authority to assess all civil penalties provided in [the] Act.' 30 U.S.C. §§ 815(a) and 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44.

22 FMSHRC 598, 600 (Rev. Comm. May 2000); *see also Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Rev. Comm. March 1983) (finding that "[I]t is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a penalty based on record information developed in the course of an adjudicative proceeding."); *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Rev. Comm. Aug. 2008) (recognizing that "[i]In determining the amount of the penalty, neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary").

Furthermore, the Commission has held that it is not within the Secretary's province to set forth a specific test for adjudicating charges. In *Berwind Natural Resources Corp.*, the Commission held that such was its role and not the Secretary's. It stated:

> We are not bound to defer to any specific tests proposed by the Secretary...It is hardly open to question that this Commission has the authority to interpret the Mine Act and adopt a specific test for adjudicating charges thereunder.

21 FMSHRC 1284, 1317 (Rev. Comm. Dec. 1999); *see also Mathies Coal Co.*, 6 FMSHRC at 3-4 (adopting four-part test for determining whether a violation is "significant and substantial" under Section 104(d) of the Mine Act); *Kenny Richardson*, 3 FMSHRC 8, 16 (Rev. Comm. Jan. 1981) (adopting standard for determining liability under Section 110(c)), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

The proposed amendments to Part 100 would seek to bind the Commission to the specific benchmarks set forth by the Secretary. It would seek to impose upon the Commission and its judges certain definitions of gravity and negligence, as well as a prescribed penalty structure. The amendments, therefore, amount to the very sort of action that the Commission has already found to be outside the Secretary's province.

3. No Deference Should be Afforded to the Secretary's Proposed Penalties

In addition to running counter to the Mine Act and longstanding Commission precedent, any amendment that would bind the Commission to the penalties proposed in Part 100 is unsound policy.[2] Complete independence of the Commission from the Secretary is of paramount importance. As noted above, Congress recognized that the creation of the Commission "preserves due process and instills confidence in the program." 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 1360 (1978).

The proposed changes would amount to a grant of deference *per se* to the Secretary's litigating position in contested cases. Because the penalty is often connected to an ALJ's substantive findings, the ALJ must have the ability to fashion a penalty in accordance with his/her findings. The Secretary criticizes the Commission for, on occasion, lowering the assessed penalty in cases where it affirms the enforcement action with no modification. 79 Fed. Reg. at 44,508. Yet, such reductions are based on the evidence established before the ALJ, which may include factors not considered by the Secretary, reflected in his proposed penalty, or raised by him during the adversarial

[2] The Proposed Rule makes no mention of special assessments. Currently the law requires the Secretary to prove the propriety of a specially assessed penalty. *See, e.g., Cement Division, National Gypsum Co.*, 1 FMSHRC 2115, 2118 (ALJ Broderick Dec. 1979), *rev'd on other grounds* 3 FMSHRC 822 (Rev. Comm. April 1981); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller Jan. 2013) (holding that the Secretary has the burden of establishing why a specially assessed should be above the normal standard); *Big Ridge Inc.*, 35 FMSHRC 3168, 3206 (ALJ McCarthy Sept. 24, 2013) (noting that the Secretary bears the burden of provid[ing] ... evidence concerning the justification for the special assessments"). If the Proposed Rule is adopted, the logical next step is for MSHA to merely seek affirmance of specially assessed penalties if a violation is upheld.

proceeding of a hearing on the merits. The penalty changes, therefore, may be justified despite the fact that the enforcement action is not modified. *See, e.g., Peabody Midwest Mining LLC*, 35 FMSHRC 2419, 2440 (ALJ Manning Aug. 2013) (reducing penalties for two unwarrantable failure orders, despite affirming the orders with no modifications, because "[a]lthough [the operator] demonstrated aggravated conduct constituting more than ordinary negligence, its conduct demonstrated a "serious lack of reasonable care" rather than "reckless disregard," "intentional misconduct," or "indifference").

Conclusion

The Proposed Rule fails to articulate any quantitative basis for the changes it seeks to implement. Not only does the proposal offer scant evidence that the contemplated changes will actually bring about the improvements in health and safety or reductions in litigation that MSHA predicts, the data indicates the opposite will occur. MSHA has not demonstrated a statistically significant relationship between citation histories and penalties, and accidents or injuries, nor tied that relationship to its proposed changes. In essence, the Proposed Rule will not generate any improvement in safety, but the industry is certain the Proposed Rule will result in a diversion of safety resources and a return to the increased contest rates and lengthy Commission docket backlogs encountered in 2008-09.

In response to MSHA's request for comments on a potential additional 20 percent good faith penalty reductions, if the citation or order and proposed penalty are accepted as issues, without contest, and the penalty is paid before a final order of the Commission, we recommend that any such good faith penalty reduction be available here the citation or order and proposed penalty are not contested and the proposed penalty is paid within 30-days after it becomes a final order of the Commission. This will achieve the goals of the good faith reduction (discouraging litigation and rewarding prompt penalty payment), while allowing for orderly and accurate processing and payment of proposed assessments.

In furtherance of these goals of reducing contested citations, order and penalties, we also recommend that MSHA's districts be required to grant informal conferences when requested by the operator on <u>all</u> enforcement actions, prior to MSHA's proposal of a civil penalty. Currently conferences are granted in some MSHA districts, but not in others. We also recommend a revised conferencing structure whereby MSHA's Conference Litigation Representatives (CLR) would report directly to the Solicitor's Office, as opposed to the current structure where the CLR's report directly to an MSHA District Manager (DM). This creates a conflict of interest as the DM has oversight for the enforcement actions issued by MSHA inspectors.

In closing, we again extend our appreciation the opportunity to comment on this rulemaking. In sum we believe the proposal lacks foundation, is ill-advised and will result in consequences detrimental to miner safety and health and counter to the stated intent of the proposal.

The proposal should be withdrawn and a stakeholder group should be convened to ascertain if revisions to Part 100 are warranted.

Should you have any questions regarding these comments please contact Bruce Watzman, National Mining Association at bwatzman@nma.org

Sincerely,

National Mining Association
Portland Cement Association
Fertilizer Institute