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General Comment

On behalf of the Associated General Contractors of America (AGC) and its members, please accept the attached comments regarding MSHA's proposal to revise 30 C.F.R. Part 100.

Attachments

AGC of America Comments_Criteria and Procedures for Assessment of Civil Penalties-30 C.F.R. Part 100

AB72-COMM-61

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

March 30, 2015

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:

On behalf of the Associated General Contractors of America ("AGC"), we thank you for the opportunity to submit the following comments on the Mine Safety and Health Administration's ("MSHA") notice of proposed rulemaking. The Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties under 30 C.F.R. Part 100, published at 79 *Fed. Reg.* 147 (July 31, 2014) and 80 *Fed. Reg.* 7393 (February 10, 2015) proposes a number of changes to the penalty criteria for enforcement actions under the Mine Act and the associated penalties.

AGC is the leading association for the construction industry. AGC represents more than 26,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. Many of AGC's members work directly and indirectly with mining sites throughout the country and are frequently working on projects within MSHA's jurisdiction. These firms are called upon to construct buildings, infrastructure, and utilities, maintain existing structures, and provide various other construction related services for mine operators. AGC is concerned about the impact of the proposed rule changes to both the mining industry and to AGC's member companies.

I. MSHA's Proposed Changes Are Not Needed

According to MSHA's statistics, the "all injury" rate has dropped each year from 2007 to 2013[1]. The injury rate per 200,000 hours worked has plummeted in both metal/nonmetal mines (from 3.02 to 2.11) and in coal mines (from 4.21 to 3.11). In this same time period, citations and orders issued peaked in 2008 at 173,551 enforcement actions (for 14,907 mines) and dropped to 118,619 (for 13,761mines) in 2013[2]. This drop has occurred despite an increase in the number of inspection hours per mine (56 to 59 hours). MSHA also notes in the proposed rule that regularly assessed enforcement actions have decreased by 26% from 2010 to 2013 and that its various

[1] http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalendarYear/All-Injury%20Rates.pdf.
[2] http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.asp.

special initiatives and promulgated rules since 2010 "have worked."[3] These numbers tell a compelling story. Not only have mines been getting safer, they are also achieving greater compliance with the regulations and having fewer enforcement actions issued as a result.

As the overall regulatory climate has been steadily improving, it is puzzling why MSHA feels it necessary to rebuild the current penalty assessment and enforcement scheme. The proposed rules do not appear to have been prompted by either safety concerns or any discernable uptick in enforcement actions. Moreover, the backlog of contested cases created between 2007 and 2010 peaked in 2010, and has been on a steady decline since. The case workload of Commission judges is anticipated to continue to decline[4]. The projected 2016 case numbers are nearly back to (pre-backlog) 2007 levels. As a purely practical matter, the current enforcement scheme is administratively manageable, and there is no reason that the judicial case load would prompt any regulatory change. As the system is manageable, the industry safety record has been improving, and the current system has been lauded as working, the current system is not in need of an overhaul.

MSHA states in the preamble that reduced numbers of violations should not preclude improvements in the civil penalty assessment process.[5] While this is trivially true, it fails to provide any substantive basis why these particular rules are in need of improvement – even assuming that the proposed rules are, in fact, an improvement.

The existing rules provide a number of benefits that should not be dispensed with without good reason. First, the current enforcement scheme is largely understood by inspectors and the regulated community. There is no need to train or re-train MSHA personnel by keeping the existing system in place. The time, expense, and waste associated with implementing a new system is avoided if the status quo is maintained. Second, the current scheme enjoys the benefit of a substantial body of law that has grown around it. With the current enforcement scheme, operators, the agency, and the Federal Mine Safety and Health Review Commission can draw upon a wealth of experience in addressing the assessment criteria and penalties for any particular case. Analogies can be readily drawn to prior cases involving similar circumstances and facts. We can say with reasonable certainty, for example, what distinguishes a moderate negligence citation from a high negligence citation. We can also assess what factors are likely to contribute to a Significant and Substantial ("S&S") designation or mitigate against it. This allows decisions to be reached that align with prior judicial decisions and further develop the law. The Conference Report of the 1977 Mine Act identified that this was one of the intended benefits of establishing the Federal Mine Safety and Health Review Commission:

> [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

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

4 http://fmshrc.gov/plans/FMSHRC%20FY2016%20CBJ.pdf at p.12.

5 79 *Fed. Reg.* 44494, 44495 (July 31, 2014).

> 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). The development of the case law becomes deeper and richer as each new case appears. By revamping the entire system, particularly by eliminating whole categorical distinctions, this body of law may be potentially rendered obsolete. The value of a long-established legal framework and the certainty of the parties working within that framework will be lost with nothing to replace it. Third, because of the loss of certainty and predictability, contested enforcement actions are unlikely to be resolved at the pre-trial stage. Currently, many cases can be resolved early because the parties can readily assess the strengths and weaknesses of their respective cases based upon the wealth of case law and legal experience that has gone before. By radically changing the system, the assessment of cases will become much more difficult and unpredictable. Cases that would otherwise settle will be much more contentious and likely to go to trial. An increase in litigation is the inevitable result until a new body of case law is established, a process that is likely to take decades to complete.

As MSHA has not offered any justification for the proposed rule changes beyond the assertion that they will be an improvement, the status quo should not be changed. The proposed rule introduces uncertainty and confusion to an area of regulation that is otherwise stable, effective, and working. There will be a tremendous loss in the form of a robust legal framework, judicial efficiency, predictability, and pre-trial case resolution. Absent some imperative to change or large gains expected from the proposed changes, the current rules should remain in place. While there is room for improvement in the current system, it should be in the form of providing additional training to inspectors to promote consistency among inspectors and across districts. Better execution of the current regulatory framework would reduce the number of contested enforcement actions, reinforce expectations, and reduce litigation.

II. MSHA's Proposed Changes Would Substantially Reduce Fairness in the Issuance of Enforcement Actions and Prevent Both Operators and the Agency From More Easily Identifying the More Worrisome Hazards

MSHA has stated that its objectives are to increase uniformity and simplify the assessment of penalties, but it is not apparent that either is a means to improve the system. Uniformity and simplicity necessarily come at the expense of complexity, nuance, and tailoring enforcement actions to meet the circumstances being encountered. While one size may be simple and uniform, one size does not fit all.

The elimination of intermediate categories currently used in the assessment of the negligence and gravity associated with alleged violations of the Mine Act will have a dramatic impact upon assessments. The proposed rule reduces the Negligence criterion from five categories to three: Not Negligent, Negligent and Reckless Disregard; reduces the Likelihood of Occurrence categories from five to three: Unlikely, Reasonably Likely and Occurred; and

reduces the Persons Affected category from 11 categories to two: only "no persons affected" or "one or more persons affected." The severity of injury category eliminates the "permanently disabling" category, reducing the possible options to three. While these changes may "simplify," this is not an improvement.

We would not expect a laborer to be better at his job by removing a wrench and drill from his toolbox, leaving only a hammer. Every problem would start to look like a nail and the end result would be a lot less pleasing. The situation here is no different. MSHA proposes to reduce the assessment tools by eliminating 14 of 26 possible designations. Even setting aside the Persons Affected category, the Severity, Negligence and Likelihood of Occurrence categories fall from 14 potential designations to just 9. The toolbox is starting to look rather bare. The likely result is that the majority of run-of-the-mill citations will now be designated as "negligent," "lost workdays or restricted duty," and "reasonably likely." Enforcement actions for what would otherwise be deemed low negligence and unlikely being lumped together with high negligence and highly likely citations. While the latter type of citation is plainly of greater concern and presents a greater threat to safety, the penalty scheme will no longer reflect that.

The reason for the current number of categories is precisely to avoid the inequity of treating dissimilar citations in the same manner. The mitigating circumstances that inform as to the proper evaluation of a citation will be rendered largely meaningless under the new scheme. Penalties will no longer reflect the particular circumstances of any given citation. The graduated penalties meant to deter more critical violations will no longer serve the same function. The positive incentive of mitigating citations where operators demonstrate good practices and other circumstances will similarly be lost. The net result will be to move from a system that incentivizes operators to do everything possible to improve safety to one that ignores such efforts.

While this does present a problem in that the system will necessarily become less fair and less nuanced and less effective at deterrence, there is yet another problem. The current system provides an effective signaling system to both operators and the agency. High negligence citations rightfully engender more cause for concern than low negligence citations. Similarly, those violations that are highly likely to cause an injury or illness are of greater concern than those presenting a low likelihood. By distinguishing between these types of violations, scarce agency and operator resources can be better directed to areas presenting greater safety hazards. Just as high prices signal to producers in a marketplace to increase supply, so too, do different enforcement assessments signal to safety personnel where the potential hazards are greatest. The distinction between different violations is critical to providing meaningful feedback to both operators and the agency. By lumping everything into limited categories, the information is less effective at identifying where efforts to improve safety should be focused. If resources are not allocated where they are most needed, miner safety will suffer as a result.

III. Assessments Will Inflate Without Any Corresponding Increase in the Nature of the Violations

The reduction in the available assessment options will be a tendency to inflate assessments, particularly with respect to negligence. When left with the option of "negligent" or "reckless disregard," inspectors may be inclined to mark enforcement actions that would have otherwise been "high negligence" to "reckless disregard." As some enforcement actions that would otherwise be "high negligence" will now fall into the "reckless disregard" category, the potential for further inflation in the form of "flagrant" penalties is also likely. "Reckless disregard" serves as a basis for a "flagrant" designation. As greater numbers of "reckless disregard" penalties appear, the inevitable tendency will be to lower the bar for "flagrant" violations. The increase in "reckless disregard" and "flagrant numbers" will be a function of the rule changes, and not the result of violations that warrant greater assessments. Operators will have inflated violation histories and inflated penalties as a result of these changes and not due to any change in the underlying facts supporting the citations.

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. In addition, the elimination of "unlikely" as an intermediary category will likely result in the majority of enforcement actions as falling within the "reasonably likely" category. As the "reasonably likely" designation supports the finding that a violation is S&S, the designations will also inflate. As the number of S&S violations is one of the factors used to establish a Pattern of Violations ("POV"), operators and contractors face a greater risk of increased S&S numbers and POV status, without any corresponding increase in the nature of the violations.

Although one of MSHA's goals is to reduce litigation, these changes will have the opposite effect. Assessment inflation will result in greater litigation as the assessments are contested by operators and contractors. As the stakes have been raised for these very types of penalties (i.e., S&S, POV, and flagrant violations), there is more incentive to challenge them when there is any dispute about them.

IV. Penalties Will Inflate Without Any Corresponding Increase in the Nature of the Violations

With the reduction of categories, there will be some number of enforcement actions that are overstated, whether they have an increase in just a gravity category or whether further increases in the form of S&S designations, unwarrantable failures, or flagrant violations are issued. With these inflated assessments come increased penalties. Even apart from the re-weighting of the penalty scheme, jumps in penalty amounts appear inevitable even though the underlying conditions do not warrant the increases.

MSHA's proposed rule change also 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 minimum ($112) and maximum ($70,000) penalties would now be associated with penalty point totals of "31 or fewer" and "73 or more," respectively. A plain re-weighing to a 100 point total is not objectionable by itself, but when combined with the changes to the relative category weights, the penalty amounts appear to substantially increase.

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. These changes, particularly when the changes to the assessment categories for gravity and negligence are factored in, appear to result in a dramatic increase in penalties. As the current penalty scheme has resulted in year-over-year improvements in mine safety, the current penalties operate as an effective deterrent and an increase in penalties is unwarranted.

V. MSHA Lacks the Authority to Reduce the Role of the Federal Mine Safety and Health Review Commission

MSHA also proposes to eliminate the independence of the Federal Mine Safety and Health Review Commission by binding the Commission to MSHA's Part 100 penalty assessment and formula, and limit departures from the regulation formula. 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.

Congress established the Commission as an independent adjudicative body to curb any excesses of the agency. The Mine Act delegates to the Secretary the authority to propose penalties, but the ultimate determination of the penalty amount rests with the Commission. 30 U.S.C. §§ 815, 820. 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).

The Commission is a separate, independent entity designed to provide for administrative adjudication of disputes under the Mine Act. 30 U.S.C. § 823. In electing to establish the Commission, Congress cabined MSHA's authority, making MSHA's citations, orders and proposed penalties subject to review, reversal, and modification. MSHA lacks the authority to simply "undo" Congressional action, reduce the role of the Commission or expand its own powers through rulemaking. MSHA's authority cannot exceed the authority that Congress has delegated to it. MSHA's proposed rule oversteps the bounds of its delegated authority. The proposals set forth by MSHA to wrest control of penalties from the Commission is neither authorized nor consistent with the directives of Congress.

VI. Conclusion

Overall, the proposed rule changes are a step backward. The existing rules are effective, understood by the regulated community, MSHA personnel, and the Commission. By severely overhauling the penalty assessment procedures, the value of decades of legal precedent may be lost, fairness and balance will be lost, and assessments and penalties will be inflated for no cause. Dispensing with mitigating circumstances as a meaningful way to modify assessed violations sends the wrong message to operators. Instead of encouraging operators to focus all of their efforts on mine safety, it sends the message that the strict letter of the law is all that matters. The unintended consequences of the proposed rules far outweigh any perceived benefit. The proposal should be withdrawn.

Sincerely,

Stephen E. Sandherr

Chief Executive Officer