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March 28, 2015

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

Re: 30 C.F.R. Part 100
RIN 1219-AB72

To Whom It May Concern:

The following comments are submitted on behalf Peabody Energy ("Peabody") in response to the Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties under 30 CFR, Part 100. Peabody submits the following comments in addition to the comments presented at the public hearing in Chicago, Illinois on February 12, 2015. Peabody appreciates the opportunity to comment on this proposed rule which is of concern due to the potential impact to Peabody's operations. Peabody operates nine surface mines and four underground mines in six states.

I. Introduction

On July 31, 2014, MSHA published a Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties under 30 C.F.R. Part 100. 79 Fed. Reg. 44494. The deadline for submitting comments has been extended to March 31, 2015.

The proposed regulations seek to make several significant amendments to the existing Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties. MSHA also requests comment on additional items not specifically included in the proposed rule. The key elements are as follows:

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- Increased emphasis on violation history (including repeat violations), negligence and the severity factor of gravity.

- Less direct emphasis on mine size, controller/contractor size and the likelihood of occurrence factor of gravity.

- The Negligence criterion would be reduced from five categories to three: Not Negligent, Negligent and Reckless Disregard.

- Likelihood of Occurrence categories would be reduced from five to three: Unlikely, Reasonably Likely and Occurred. Definitions of each category would be added.

- The Persons Affected category would be reduced from 11 categories to two: only "no persons affected" or "one or more persons affected."

- The proposed rule would revise the penalty conversion table from 208 possible points to 100. Penalties would correspond to totals ranging from "31 or fewer" to "73 or more." Minimum and maximum penalties would remain at $112 and $70,000, respectively.

- Minimum penalties for unwarrantable failures would be increased by 50%. 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.

- MSHA has put forth two alternatives to render the penalty regulations applicable to both the proposal of penalty by MSHA and the assessment of penalty by the Commission.

- Though not codified in the proposed regulations, MSHA has requested comment on an alternative that would afford operators an additional 20% good faith penalty reduction if the operator accepts a citation as issued and agrees not to contest.

- MSHA has requested comments that address alternatives to its proposed changes that improve consistency and objectivity in the application of the new proposed criteria, including violation per inspection day ("VPID") formula, negligence, likelihood of occurrence, and severity.

II. Specific Issues

For the specific reasons detailed in Section III below, Peabody opposes the following aspects of the proposed rule:

(1) The proposed potential scope of Part 100 such that it would apply to both the proposal of penalties of the Secretary and the assessment of penalties by the Commission.

(2) Increased impact of violation history, particularly given the broad-based standards that are most frequently cited.

(3) The proposed reduction of categories of negligence from five to three.

(4) The effect of the proposed changes on usual penalty amounts.

Additionally, Peabody will offer a comment on the proposed amendments to the Gravity provisions, which have taken several forms in the development of the proposed rule.

III. Analysis

A. Scope of Part 100 and Potential Applicability on the Review Commission

Under the current structure, MSHA proposes a penalty under Part 100; however, once the citation is contested, the Review Commission conducts a *de novo* review of the citation and penalty. Penalties assessed by the Commission are independent of what is proposed by MSHA.

The proposed rule includes two potential changes to the scope of Part 100, both of 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 Administrative Law Judges and the Commission. Put differently, under the proposed expanded scope, Administrative Law Judges and the Commission would be bound by the provisions of Part 100 when deciding cases.

The proposal includes the following two alternatives for changing the scope of Part 100:

(1) Requiring the Commission to apply the penalty formula when assessing civil penalties; therefore, if MSHA meets its burden of proving penalty-related facts, the ALJ would be required to assess the penalty proposed by MSHA;

(2) Require the Commission to consider the penalty formula when assessing penalties but allow for departures when aggravating or mitigating factors are not adequately considered by the proposed penalty, and providing a written justification for doing so.

Any change to the scope of Part 100 is objectionable for several reasons.

1. The Proposed Change is Contrary to the Act

The proposed rule that pertains to the assessment of civil penalties exceeds the Secretary's authority and infringes on the Commission's authority.

The Mine Act puts forth separate responsibilities between the Secretary and the Commission for the imposition of penalties. The Act delegates to the Secretary the authority to propose civil penalties. 30 U.S.C. §§ 815(a) and 820(a). However, Section 110(i) provides that "The Commission shall have the authority to assess all civil penalties provided in this chapter." 30 U.S.C. § 820(i); see also 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").

It is anticipated that the Secretary will cite Section 508 of that Act as purported authority to impose the Part 100 regulations on the Commission. That section states as follows:

> The Secretary, the Secretary of Health and Human Services, the Commissioner of Social Security, and the Panel are authorized to issue such regulations as each deems appropriate to carry out any provision of this chapter.

30 U.S.C. § 957. The Secretary cited this provision as authority for the current version of Part 100, along with 30 C.F.R. § 815 and 820. It is anticipated that the Secretary will specifically argue that Section 508 authorizes the Secretary to

promulgate regulations to apply to the Commission, because the Commission is created by the Mine Act (i.e., "this chapter).

Such reliance would be inappropriate. 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. See UMWA v. Kleppe, 561 at 1262.

Such is not the case under the Mine Act. When Congress enacted the Mine Act in 1977, it established the Federal Mine Safety and Health Review Commission as a separate 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 Act highlights this change as follows:

> In the past, the Secretary of the Interior was given the responsibility both for enforcement of the act and for the administrative review of enforcement actions. Parties displeased with the Secretary's enforcement actions could take an appeal to the same Secretary. The conference report adopts the provisions of the Senate bill which establishes an independent commission to review enforcement actions. This 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, at1348 (1978).

The Conference Report further explains the significance of this change:

> The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is 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.

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, at1360 (1978).

Therefore, under the Mine Act, Section 508 does not authorize the Secretary to promulgate regulations that cover administrative adjudication because the Secretary is no longer charged with that role. Indeed, it is worth again considering the language of Section 508, which authorizes the Secretary "to issue such regulations as each deems appropriate to carry out any provision of this chapter." 30 U.S.C. § 957(emphasis added). Unlike to Coal Act, the Secretary is not authorized "to carry out" administrative adjudication of disputes under the Mine Act. Therefore, Section 508 does not authorize him to promulgate regulations in furtherance of that function.

2. The Proposed Change is Contrary to Commission Precedent

The proposal is contrary to Commission precedent. The Commission has consistently recognized that, under the Mine Act, the Secretary proposes penalties but it ultimately assesses them. In Douglas R. Rushford Trucking, 22 FMSHRC 598 (Rev. Comm. May 2000) 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.

> The Act requires that "[i]n assessing civil monetary penalties, the Commission shall consider the six statutory penalty criteria[.]

22 FMSHRC at 600; 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."); see also Spartan Mining Co., 30 FMSHRC 699, 723 (Rev. Comm. Aug. 2008)(recognizing that "In determining the amount of the penalty, neither the judge not 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., 21 FMSHRC 1284 (Rev. Comm. Dec. 1999), 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.

Berwind, 21 FMSHRC at 1317; see also Mathies Coal Co, 6 FMSHRC 1, 3-4 (Rev. Comm. Jan. 1984) (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 case law, the proposed amendment that would render Part 100 applicable to the Commission is unsound policy. 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, at1360 (1978).

The proposed changes would amount to undue deference afforded to the Secretary's litigating position in contested cases. The Commission should give no deference to any of MSHA's determinations, including penalty proposals. 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 44508. Yet, such reductions are based on the evidence established before the Administrative Law Judge, which may include factors not considered by the Secretary or reflected in his proposed penalty. 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 "Although [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").

Finally, the proposal makes no mention of special assessments. However, if the proposed rule is adopted, the logical next step is for MSHA to seek affirmance of specially assessed penalties if a violation is upheld. This is contrary to current practice, which 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); see also S&M Construction, Inc., 18 FMSHRC 1018, 1052-53 (ALJ Koutras June 1996) (declining to impose the specially assessed penalties requested by the Secretary because they were "unsupported"); 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 penalty 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").

B. Increased Impact of Violation History

The proposed rule would increase the impact of History of Previous Violations considerations from a possible 22% of the total maximum penalty points to possible 26% of the total maximum penalty points. There are two separate components of History of Previous Violations: Violations per Inspection Day (VPID) and Repeat Violations per Inspection Day (RPID). The number of VPID categories would remain the same (11); however, the impact of VPID points would increase from a possible 12% to a possible 16% of total maximum points. The impact of RPID points would remain at a possible 10% of total maximum points. However, there would be a reduction in number of RPID categories from 21 to 11. This would result in a key change to RPID as the value at which a mine incurs the maximum number of RPID points would be halved- from 1.0 to 0.5. This change would adversely impact mine operators with respect to frequently cited standards.

Peabody opposes the increase in impact of violation history due to the presence of several broad-based standards affecting both surface and underground coal mines. Standards such as 30 C.F.R. 75.400 (Accumulations of Combustible Material) and 30 C.F.R. §§77.1606(c) and 77.404(a) (Defects Affecting Safety) cover a vast array of conditions within each standard. Standards involving required plans such as 30 C.F.R. 75.75.370(a)(1) (Ventilation Plan Requirements) and 30 C.F.R. § 75.220(a)(1) (Roof Control Plan Requirements) present a similar issue, as any violation of the many requirements within the given plan is recorded as a violation of that single standard.

1. 30 C.F.R. § 75.400

Section 75.400 requires as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400. Section 75.400 is the most frequently cited standard in underground coal. See http://www.msha.gov/stats/top20viols/top20viols.asp (listing most frequently cited standards for 2014). It has been cited for a wide range of dissimilar types of conditions including, but not limited to:

- Hydraulic oil on diesel equipment
- Trash at a stopping
- Coal accumulation at a belt tail piece
- Coal spillage on a working section
- Float dust on electrical equipment
- Diesel spill at a lube car
- Material in the cab of a piece of equipment

If MSHA is to increase the impact of violation history, it should take this as an opportunity to divide Section 75.400 into several standards, so that disparate types of conditions are not treated as violations of the same standard for purposes of violation history. For example, separate standards could be promulgated to address coal spills along beltlines, the presence of float dust, the presence of oil or hydraulic fluid on equipment, and the accumulation of trash. If such dissimilar conditions were cited under different and more specific standards, they would only count toward the RPID for future violations of the more specific standard, instead of all such violations counting under the broad umbrella of Section 75.400. If such a change were implemented, operators would be less likely to be adversely impacted by the change to RPID under the proposed rule.

2. 30 C.F.R. §§ 77.1606(c) and 77.404(a)

The standards addressing "Defects Affecting Safety" for surface coal mines present a similar issue. Section 77.1606(c) appears under the heading "Loading and Haulage Equipment" and requires that:

> Equipment defects affecting safety shall be corrected before the equipment is used.

30 U.S.C. § 77.1606(c). Similarly, Section 77.404(a) appears under the heading "Machinery and Equipment" and requires that:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 77.404(a). The two standards are two of the top three most frequently cited standards in surface coal. Section 77.1606(c) is the most frequently cited and Section 77.404(a) is the third-most frequently cited; together, they accounted for over 17% of all citations issued in 2014. See http://www.msha.gov/stats/top20viols/top20viols.asp.

Here too, the standards are exceedingly broad and could cover innumerable types of conditions, including but not limited to fuel line damage, lighting, brake maintenance and operational functions of an untold number of types of equipment and machinery. As with Section 75.400, if MSHA is to increase the impact of violation history, it should repromulgate these standards into separate more specific standards so that past violations are not counted toward an RPID of future dissimilar violations.

3. Plan Violations

Violations of standards involving plans also present the concern of dissimilar past violations being subsumed into the RPID of a future violation of the same standard. Section 75.220(a)(1) addresses the requirement for developing and following a roof control plan as follows:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

30 C.F.R. § 75.220(a)(1). A roof control plan may contain innumerable requirements, including, but not limited to:

- Torque values for installed roof bolts
- Roof bolt spacing
- Pillar dimensions
- Maximum distance an ATRS can be set beyond the last row of roof bolts

•Required roof sounding device

•Supplemental roof supports

•Transfer tubes to insert resin into the drill hole

•Angle roof bolt installation procedures

Section 75.370(a)(1) addresses the requirement for developing and following a ventilation plan as follows:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1). A ventilation plan may also contain innumerable requirements, including, but not limited to:

•The functionality of a spray at a belt transfer point

•The number of water sprays on the continuous miner

•The quantity of air in the last open crosscut of the working section

•The perimeter mining process

•The locations of measuring points for worked out areas

•Types of respirators

•Designated area locations

•Types of water filters

If MSHA is to increase the impact of violation history, provisions must be made to account for the difference in type of conditions that may fall under a plan requirement standard so that disparate types of conditions are not treated as violations of the same standard for purposes of violation history.

C. The Proposed Reduction in Categories of Negligence

The proposed rule would increase the impact of Negligence from a possible 24% of total maximum penalty points under the current rule to a possible 30% of total maximum penalty points under the proposed rule. The number of negligence categories would be reduced from five to three: Not Negligent, Negligent and Reckless Disregard. Each category would be defined as follows:

•Not Negligent: The operator exercised diligence and could not have known of the violative condition or practice.

•Negligent: The operator knew or should have known about the violative condition or practice.

•Reckless Disregard: The operator displayed conduct which exhibits the absence of the slightest degree of care.

It is noted that the definition of "Not Negligent" in the proposed rule is the same as the definition of "No Negligence" in the current rule. The definition of "Reckless Disregard" in the proposed rule is the same as it is in the current rule.

Peabody opposes the proposed Negligence criteria for several reasons.

First, the proposed rule would eliminate the consideration of mitigating factors. Under the current rule, both moderate and low negligence account for the considerations of mitigating factors in assessing negligence. It would seem to be appropriate to consider mitigating factors, due to the dynamic nature of the mining environment and the practical nature of mining. Consideration only of whether the operator knew or should have known of the condition does not give an adequate account of the negligence of a particular violation. Operators often are able to present mitigating factors to either the issuing inspector or representative of MSHA during settlement negotiations. Under the proposed definitions of negligence, such considerations would no longer be available.

Second, if the proposed three-pronged Negligence determination is adopted, the definition of "Not Negligent" should be simplified to "The operator did not

know, nor should have known of the violative condition or practice" so that it mirrors the definition of "Negligent." As it is currently constructed, the "Not Negligent" definition is too restrictive relative to the definition of "Negligent." Put differently, if mitigating factors are not to be considered, the sole consideration in a negligence determination is whether the operator knew or should have known of the violative condition. If the operator did not know, nor is there any reason why it should have known, the proper finding should be "Not Negligent."

Third, Peabody is concerned how citations that are currently marked as high or low negligence would be treated under the proposed rule. Common experience dictates that currently, the most common negligent designation is "Moderate." It is presumed that a "Moderate" negligence designation under the current rule would correspond to a "Negligent" designation under the proposed rule. What is uncertain is how findings of "Low" and "High" negligence under the current rule would translate to the proposed rule. If citations currently marked as "Low" would be subsumed in a "Negligent" finding under the proposed rule, operators would be adversely impacted by a comparatively higher negligence finding for the same condition. This further highlights the problem with eliminating consideration of mitigating factors. With respect to current "high" negligence findings, subsuming those in a "Negligent" finding under the new rule would not adversely impact operators, and could be considered a benefit. However, any translation from "High" negligence under the current rule to "Reckless Disregard" under the proposed rule would adversely impact operators. As discussed in more detail below, findings of "Reckless Disregard" correspond with higher penalties and are more apt to lead to review for "Flagrant" designations.

On February 10, 2015, MSHA issued a Notice, intending to clarify the proposed rule, whereby it contended that the current Low, Moderate and High negligence designations would be subsumed into the proposed "Negligent" category and that the proposed rule would not result in an increase in citations written as "Reckless Disregard." While the clarification of the intent of the proposed rule is appreciated, Peabody remains concerned that in practice, at least a portion of citations currently written as High Negligence would be written as Reckless Disregard under the proposed rule. If MSHA is to fulfill its intent that the current designations of Low, Moderate and High negligence would be subsumed under the proposed "Negligent" category, inspectors must be rigorously trained on this point and held accountable for any deviation.

Fourth, the elimination of "High Negligence" raises significant questions as to the impact on unwarrantable failure. Unwarrantable failure is defined as

"aggravated conduct constituting more than ordinary negligence." Emery Mining Co., 9 FMSHRC 1997 (Rev. Comm. Dec. 1987). An unwarrantable failure would not be congruent with the "Negligent" category of the proposed rule, because such test for unwarrantable failure has been rejected. See Emery Mining, 9 FMSHRC at 1999). As such, under the current structure, unwarrantable failure is not typically associated with a moderate negligence finding, but rather a finding of either high negligence or reckless disregard. High negligence is substantially more common.

Therefore, the elimination of "High Negligence" under the proposed rule would result in either: (1) unwarrantable failures accompanied by findings of "Negligent;" or (2) an increase in the number of Reckless Disregard findings to support unwarrantable failures. Both scenarios are problematic. With respect to the first, an unwarrantable failure must be "more than ordinary negligence" and therefore not supported by a finding that an operator was "Negligent." If MSHA were able to support an unwarrantable failure by a finding only that an operator is "Negligent," this would result in a dilution of the meaning of unwarrantable failure and, in turn, an increase in 104(d) citations and orders. Moreover, the issuance of unwarrantable failure citations and orders under Section 104(d) of the Act is one of the screening criteria used for identifying mines for pattern of violations designation.

With respect to the second possible consequence, if Negligent is deemed to be insufficient to support an unwarrantable failure, this would require the use of a Reckless Disregard finding to support a citation or order issued under Section 104(d). An increase in Reckless Disregard findings would obviously result in increased penalties and, most likely, an increase in the number of enforcement actions considered for a flagrant designation. In that regard, Section 110(b)(2) of the Mine Act defines "flagrant" as:

> [A] reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2). Two Administrative Law Judges have defined "reckless" for purposes of a flagrant designation as "consciously or deliberately disregard[ing] an unjustifiable risk of harm arising from [the operator's] failure to make reasonable efforts to eliminate a known violation of a mandatory...standard." Rox Coal, Inc., 35 FMSHRC 625, 632 (ALJ Barbour March 2013); Stillhouse Mining LLC, 33 FMSHRC 778, 803 (ALJ Paez March 2011). As noted, the

definition of "Reckless Disregard" is the same in both the current and proposed versions of Part 100. That definition overlaps with the definition of "reckless" for flagrant. Therefore, an increase in citations with Reckless Disregard findings would likely lead to an increase in those considered for flagrant designations.

D. Effect on Penalty Amounts

MSHA claims that the proposed amendments would have resulted in $2.7 million less in assessed penalties for citations issued in 2013 than was assessed under the current penalty regulations. 79 Fed Reg. at 44511. The analysis leading to this conclusion is based on MSHA's "projection of inspector behavior," and is therefore inherently suspect. 79 Fed. Reg. at 44513. Any contention that the proposed regulations would lower penalty should be viewed with skepticism. Several important points in this regard are detailed below.

1. Higher Minimum Penalties for Unwarrantable Failure

First, the proposed regulation contains a provision that would increase 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). This provision is objectionable for several reasons.

First, it is arguable that MSHA is without authority to change the minimum penalties for unwarrantable failures. The minimum penalty for an unwarrantable failure is established by statute. Section 110(a) of the Mine Act establishes that the minimum penalty for a Section 104(d)(1) citation/order is $2,000 and the minimum for a Section 104(d)(2) order is $4,000. 30 U.S.C. § 820(a)(3)-(4). The assertion of authority by MSHA to establish minimum penalties for unwarrantable failure violations may be contrary to the Act. To that end, by setting the minimum penalties in Section 110(a) of the Act, Congress reserved that authority for itself. It did not delegate that authority to the Secretary. It is anticipated that the Secretary will cite Section 110(a) for its purported authority to issue this proposed amendment, as the Secretary has cited that provision, among others, as authority for the current Part 100 regulations. However, that provision contains no grant of authority for the Secretary to revise the minimum penalties set forth by Congress; rather, it sets forth those very minimums.

Moreover, Congress established those minimums as $2,000 and $4,000, respectively. In Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court held that when considering an agency's construction of a statute which it administers, "First, 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[.]" 467 U.S. at 842. Here, Congress' intent could not be any more clear: the minimum penalties for Section 104(d)(1) and Section 104(d)(2) citations and orders are $2,000 and $4,000, respectively. Cf. Stansley Mineral Resources, Inc., 35 FMSHRC 1177, 1180 (Rev. Comm. May 2013)(concluding that "the language of Section 110(a)(3) is clear"). The Secretary must give effect to the unambiguously expressed intent of Congress. Chevron, 467 U.S. at 842-43. MSHA's attempt to set minimum penalties different from those set by Congress does not give effect to Congressional intent, but rather constitutes an attempt to usurp authority specifically reserved for itself by Congress.

Second, MSHA's proposal to increase minimum penalties for unwarrantable failures is not supported by sound policy considerations. MSHA contends that it proposes the increases "to provide greater deterrence for operators who allow these types of violations to occur." 79 Fed. Reg. at 44507. Such rationale is a bald assertion and devoid of any support. MSHA has provided no data or evidence that the $2,000 and $4,000 minimum penalties do not provide sufficient deterrence for operators. Moreover, it is contrary to MSHA's claims that the proposed regulations would result in reduced overall penalties and fewer points of dispute.

2. The Role of Special Assessments

The proposed rule implicates only penalties assessed under a regular assessment, pursuant to 30 C.F.R. § 100.3. It makes no mention of penalties assessed under a special assessment, pursuant to 30 C.F.R. § 100.5. MSHA retains discretion as to proposing specially assessed penalties, which can result in assessed penalties upwards of four times the amount of their regularly assessed counterparts. Although the proposed rule does not involve specially assessed penalties, any consideration of total penalties to be incurred by the mining industry must account for specially assessed penalties, or it is incomplete as to the actual penalties operators face. Moreover, MSHA utilizes a matrix when arriving at a specially assessed penalty, but typically does not disclose the use of that matrix in contested cases. In accordance with its stated objective for this proposed rule of

providing increased transparency, MSHA should include in the rule the matrix it uses for proposing specially assessed penalties.

3. The Effect of the Proposed Regulations on Peabody

Although MSHA speculates that the mining industry will receive a modest reduction in total penalties under the proposed rule, an analysis of a typical 104(a) citation for a violation of Section 75.400 at a Peabody Midwest underground mine indicates a near-threefold increase in penalty for such a citation. The comparison, as detailed below, assumes a 104(a) citation, with findings of moderate negligence, reasonably likely, lost workdays and 2 persons affected. It is summarized below.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	10	10
RPID	16	8
Negligence	20	15
Likelihood	30	14
Severity	5	5
Persons Affected	2	1
Total Points	108	61
Penalty	$5,211	$15,000

E. A Comment on Gravity

There are three separate findings made with respect to gravity: likelihood of occurrence, severity of injury and number of persons affected. The proposed rule would retain these three findings. It would reduce the overall impact of gravity from a possible 42% of total maximum penalty points to a possible 36% of total maximum penalty points. Most notably, it would reduce the impact of number of persons affected from a possible 9% to a possible 1% of total maximum penalty points.

Initially, it should be noted that the change to consideration of number of persons affected is the single most positive change in the proposed rule. Under the current rule, seemingly innocuous violations result in high penalties due to the maximum of 18 points that can be assigned for number affected. This is often true for escapeway and lifeline violations, for which all miners on the working section are accounted for in the number affected, even though, in practice, it would not be reasonably expected that all such miners would be affected. The proposed rule

eliminates this possibility, as it contains only two categories for number affected: no persons affected and one or more persons affected. The maximum number of points for number affected under the proposed rule is one. Peabody strongly supports this change.

Peabody objects to the reduction in number of categories of likelihood and severity of injury. Due to the dynamic nature of mining, the assessment process is better served by more rather than fewer categories for each element of gravity, to provide the most accurate account of the cited condition.

The proposed rule reduces the categories of likelihood of occurrence from five to three. The current rule does not include definitions of each category. Initially, the proposed added definitions of each category as follows:

- Unlikely: Condition or practice has little or no likelihood of causing an event that could result in an injury or illness.
- Reasonably Likely: Condition or practice is likely to cause an event that could result in an injury or illness.
- Occurred: Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.

Presumably in response to the significant criticism of these definitions MSHA received in written comments and during its first two public hearings, MSHA amended these definitions in its February 10, 2015 Notice. The proposed rule now sets forth the following definitions:

- Unlikely: Condition or practice cited has little or no likelihood of causing an injury or illness.
- Reasonably Likely: Condition or practice cited is likely to cause an injury or illness.
- Occurred: Condition or practice cited has caused an injury or illness.

The initial proposed definitions of "Reasonably Likely" and "Occurred" were highly objectionable and Peabody believes that change to the definitions set forth in the February 10 Notice are an improvement.

IV. Conclusion

Although the specific impact of the proposed regulations will vary mine by mine, the proposed regulations raise larger concerns that should concern every operator. Principally, for the reasons detailed above, the following items in the proposed rule are most objectionable:

•The proposed change to the scope of Part 100, such that it may purport to apply to both the proposal of penalties by MSHA and the assessment of penalties by the Commission.

•Increased impact of violation history, particularly given the broad-based standards that are most frequently cited.

•The changes to negligence, and possible effect on unwarrantable failure.

•The effect of the proposed rule on penalty amounts

The adoption of these items could have a material adverse impact any mine's compliance and resolution efforts and for this reason is opposed by Peabody.

Peabody Energy is committed to the Safety, A Way of Life Management System to continuously improve safety performance. Peabody emphasizes safe work practices; open dialogue; establishing, following and improving safety standards; employee involvement in safety processes; and the reporting and investigation of accidents, incidents and losses to avoid recurrence. Peabody operations have incorporated risk management systems leading to stronger safety awareness and risk assessment. Safety is a way of life at Peabody, and our vision of zero incidents guides every action.

Sincerely,

Charles A. Burggraf

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Health and Safety
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