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Criteria and Procedures for Assessment of Civil Penalties, 30 CFR Part 100

Comment On: MSHA-2014-0009-0090
Criteria and Procedures for Assessment of Civil Penalties, Proposed rule; extension of comment period; close of record.

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Comment from Lou Barletta, CONSOL Energy Inc.

Submitter Information

Name: Lou Barletta
Address:
1000 CONSOL Energy Drive
CNX Center
Canonsburg, PA, 15317-6506
Email: loubarletta@consolenergy.com
Phone: 724-485-4400
Organization: CONSOL Energy Inc.

General Comment

Enclosed is our comment regarding the proposed civil penalty regulations.

Attachments

MSHA Civil Penalty Letter 033115

CONSOL ENERGY

CONSOL Energy Inc.
CNX Center
1000 CONSOL Energy Drive
Canonsburg, PA 15317 - 6506

phone: 724/485-4400
fax: 724/485-4836
cell: 724/736-7876
e-mail: loubarletta@consolenergy.com
web: www.consolenergy.com

LOUIS BARLETTA JR.
Vice President-Safety

March 31, 2015

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

To Whom It May Concern:

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

CONSOL Energy Inc. ("CONSOL") is pleased to submit comments on the proposed rule concerning the proposed civil penalty regulations. CONSOL and its affiliated companies produce approximately 30-33 million tons of coal a year at four longwall mines and one surface mine. It routinely and regularly deals with civil penalties proposed for citations and orders issued at its mines. CONSOL and its predecessors have been producing coal since 1864.

I. Section-by-Section Analysis

A. History of Previous Violations

The proposed rule would increase the impact of History of Previous Violations considerations from a possible 22% of the total maximum penalty points to a possible 26% of the total maximum penalty points. CONSOL opposes such changes.

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 the 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.

With respect to VPID, the proposed rule would increase the impact of violation history for all mines. With respect to RPID, because 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.

CONSOL opposes the increase in impact of violation history due to the presence of several broad-based standards, particularly in 30 C.F.R. Part 75, which pertains to underground coal mines and is frequently cited. Standards such as 30 C.F.R. 75.400 (Accumulations of Combustible Material), 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) cover a vast array of conditions within the single standard. For example, violations of Section 75.370(a)(1) can range from a water spray at a belt transfer point to the amount of air required while cutting coal. Such conditions have nothing to do with each other in terms of efforts to maintain compliance, or hazards presented by noncompliance, but are treated as a violation of the same standard. Similarly, Section 75.400, the most frequently cited standard in underground coal mines, has been cited for vastly different conditions, including trash in an outby crosscut, coal along a beltline, or oil on a machine.

If MSHA insists on increasing the impact of violation history, provisions must be made to account for the differences in types of conditions that may fall under the same standard. Specific to Section 75.400, MSHA should take this as an opportunity to divide that standard into several standards, so that disparate types of conditions are not treated as violations of the same standard for purposes of violation history.

B. 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. CONSOL opposes these changes. We think the current five categories of negligence should be retained.

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.

The proposed Negligence criteria raise several very serious concerns.

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, CONSOL 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. The proposed rule is silent as to how citations currently marked as "Low" and "High" negligence would be treated under the proposed rule. If citations currently marked as "Low" would be subsumed in a "Negligent" finding under the proposed rule, as would be expected, 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. It is expected moreover that a certain percentage of "high" negligence findings will be substituted into "reckless disregard." 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, where by 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, CONSOL 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.

Third, 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."

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 could result in a dilution of the meaning of unwarrantable failure and, in turn, an increase in 104(d) citations and orders.

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.

C. 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 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 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. CONSOL strongly supports this change. In many ways, it replicates the prior practice of marking these persons "affected" as those likely to be injured. Such change in practice since 2007 has been a significant drive of increased penalties.

CONSOL 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 rule added definitions of each category as follows:

- Unlikely: Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.
- Reasonably Likely: Condition or practice cited 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 CONSOL believes that changes to the definitions set forth in the February 10 Notice are an improvement.

D. Good Faith Reduction

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 believes this provision falls within its consideration of good faith abatement of a citation.

CONSOL objects to this idea for two reasons.

First, by minimizing the need for contests, it fosters an implicit recognition that MSHA's findings in citations are correct. There is extensive data to show this is not the case. Approximately 20% of its S&S findings, for example, have been recognized as incorrect. In one case involving a pattern of violations notice with 54 S&S citations selected by MSHA, 45% of the citations were incorrectly issued.

Second, adoption of this proposal may give MSHA further justification for refusing to hold meaningful conferences or engage in settlement discussions. A better approach to alternative dispute resolution would be a system of merit-based conferencing. Any reference to conferencing is conspicuously absent from the proposed rule, which raises the question of whether this provision is designed to suppress any expectation of conferencing. CONSOL requests, if the proposed rule is adopted, that it include a provision that all conference requests made by operators will be granted in a timely fashion and such conference will not be conducted by MSHA personnel who report in any way to the District Manager.

E. Review of Penalties and Scope of Part 100

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 Commission. Put differently, under the proposed expanded scope, Administrative Law Judges would be bound by the provisions of Part 100 when deciding cases. We believe such provision would be inappropriate and join fully in the comments of the Natural Mining Association in this regard.

It should be noted that MSHA solicitors adamantly refuse to follow MSHA's penalty regulations in settlement discussions. MSHA seems to ignore the need for a credible and independent adjudicatory body to hear challenges to its actions. This attempt to undercut the Commission's authority should be rejected. MSHA seems intent on rendering the Commission irrelevant. Such efforts undermine MSHA's own credibility.

F. Effect on Penalty Amount

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 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.

II. The Effect of the Proposed Regulations on CONSOL

Although MSHA speculates that the mining industry will receive a modest reduction in total penalties under the proposed rule, an analysis of citations at CONSOL mines indicates significant increases in penalty amounts under the proposed rule versus the existing rule. CONSOL evaluated six citations/orders recently issued to its mines, and compared the penalties assessed for those enforcement actions versus how they would have been assessed under the proposed rule. The analysis is summarized below, including a description of each citation/order, and a chart comparing the penalty assessment under the current rule versus the proposed rule:

Citation No. 1

Citation No. 1 was issued to CONSOL under Section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.1403. The Citation was designated Non-S&S, unlikely to result in a lost workdays or restricted duty injury, one person affected and the result of low negligence.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	5	3
RPID	8	8
Negligence	10	15
Likelihood	10	0
Severity	5	5
Persons Affected	1	1
Total Points	64	40
Penalty	$154	$400
Penalty less good faith reduction	$138	$360
Penalty less additional reduction for not contesting		$280

Citation No. 2

Citation No. 2 was issued to CONSOL under Section 104(d)(2) of the Act and alleges a violation of 30 C.F.R. § 75.1400-4. The Citation was designated S&S, reasonably likely to result in a lost workdays or restricted duty injury, one person affected, high negligence and the result of an unwarrantable failure.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	0	0
RPID	0	0
Negligence	35	15
Likelihood	30	14
Severity	5	5
Persons Affected	1	1
Total Points	96	43
Penalty	$4,000	$6,000
Penalty less good faith reduction		
Penalty less additional reduction for not contesting		

Citation No. 3

Citation No. 3 was issued to CONSOL under Section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.370(a)(1). The Citation was designated S&S, reasonably likely to result in a fatal injury, one person affected, and the result of low negligence.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	5	5
RPID	10	6
Negligence	10	15
Likelihood	30	14
Severity	20	10
Persons Affected	1	1
Total Points	101	59
Penalty	$2,976	$8,000
Penalty less good faith reduction	$2,678	$7,200
Penalty less additional reduction for not contesting		$5,600

Citation No. 4

Citation No. 4 was issued to CONSOL under Section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.380(d)(7)(iv). The Citation was designated Non-S&S, unlikely to result in a fatal injury one person affected and the result of moderate negligence.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	0	0
RPID	0	0
Negligence	20	15
Likelihood	10	14
Severity	20	10
Persons Affected	1	1
Total Points	76	48
Penalty	$403	$1,400
Penalty less good faith reduction	$382	$1,260
Penalty less additional reduction for not contesting		$980

Citation No. 5

Citation No. 5 was issued to CONSOL under Section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.202(a). The Citation was designated S&S, reasonably likely to result in fatal injury, one person affected and the result of low negligence.

	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	2	2
RPID	1	1
Negligence	10	15
Likelihood	30	14
Severity	20	10
Persons Affected	1	1
Total Points	89	51
Penalty	$1,140	$2,000
Penalty less good faith reduction	$1,026	$1,800
Penalty less additional reduction for not contesting		$1,400

Citation No. 6

Citation No. was issued to CONSOL under Section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.400. It was designated S&S, reasonably likely to result in a fatal injury, one person affected and the result of low negligence.

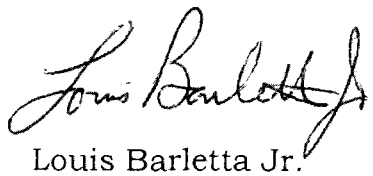
	Current Rule	Proposed Rule
Mine Size	15	4
Controller Size	10	4
VPID	8	8
RPID	10	6
Negligence	10	15
Likelihood	30	14
Severity	20	10
Persons Affected	1	1
Total Points	104	62
Penalty	$3,784	$15,000
Penalty less good faith reduction	$3,405	$13,500
Penalty less additional reduction for not contesting		$10,500

III. 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, and for this reason, CONSOL opposes the adoption of the proposed rule.

CONSOL appreciates the opportunity to provide its comments and looks forward to a continued role in improving the safety and compliance efforts this nation's mines.

Sincerely,



Louis Barletta Jr.