From: Perlmutter, Willa B. <WPerlmutter@crowell.com>
Sent: Tuesday, March 31, 2015 2:46 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB72
Attachments: Part 100 Comment_001-c.pdf

MAR 31 2015

To Whom It May Concern:

Attached you will find the comments of BHP Billiton San Juan Coal Company, the Bituminous Coal Operators' Association and Interwest Mining Company on the Proposed Rule regarding Criteria and Procedures for Assessment of Civil Penalties, as published in the Federal Register on July 31, 2014, 79 Fed. Reg. 44,494. We appreciate the opportunity to offer our comments.

Best wishes,

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VIA ELECTRONIC MAIL

United States Department of Labor
Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

Re:Criteria and Procedures for Assessment of Civil Penalties
RIN 1219-AB72

This letter constitutes the comments of BHP Billiton San Juan Coal Company, the Bituminous Coal Operators' Association, and Interwest Mining Company (collectively, "the Companies") on the Mine Safety and Health Administration's ("MSHA's") proposed rule that if adopted would, among other things, amend the regular penalty assessment framework set forth at 30 C.F.R. Part 100, "Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule," 79 Fed. Reg. 44,494 (July 31, 2014) (to be codified at 30 C.F.R. Part 100) ("Proposed Rule"). In addition to these comments, the Companies hereby endorse and adopt as their own the testimony presented by Allen McGilton of Murray Energy Corporation, Bruce Watzman of the National Mining Association, and Allen Dupree of Alpha Natural Resources at the MSHA public hearing on the Proposed Rule, held in Arlington, Virginia on December 4, 2014.

As explained below, the Companies believe strongly that the Proposed Rule is unwise and would not serve the ends which MSHA has identified. Accordingly, the Companies urge MSHA to withdraw the rule in its entirety.

I. Introduction

The Proposed Rule would amend several key provisions of 30 C.F.R. Part 100, which sets forth MSHA's criteria and procedures for proposing civil penalties for alleged violations of the Mine Act. The Proposed Rule has two main parts: the first consists of planned modifications to MSHA's regular assessment process, primarily by reducing the number of options available to inspectors for characterizing the negligence and gravity of violations; the second contains three

alternative approaches to regulating the way the Federal Mine Safety and Health Review Commission ("the Commission") and its administrative law judges render final penalty assessments in contested cases.

Although the Companies take exception to MSHA's unprecedented and ill-considered proposal to dictate the way the Commission – an independent agency that functions pursuant to its own statutory mandates – assesses civil penalties, a number of comments have already been submitted and testimony provided that address the myriad legal deficiencies of that part of the Proposed Rule. Therefore, these comments will focus only on the proposed changes to MSHA's regular assessment process. Regarding that second part of the Proposed Rule, let it suffice to say that in addition to the comments set out in this letter, the Companies endorse and adopt as their own the written comments of the National Mining Association (submitted by Bruce Watzman, Senior Vice President of Regulatory Affairs), ten former members of the Commission (submitted by former Commission Chairman Michael F. Duffy), and those of the Industrial Minerals Association — North America (IMA-NA) (submitted by Mark Ellis, President).

In the Preamble to the Proposed Rule, MSHA articulated its justification for revising the Part 100 penalty criteria by describing "four key principles":

> (1) Improvement in consistency, objectivity, and efficiency in how inspectors write citations and orders by reducing the number of decisions needed;
>
> (2) Simplification of penalty criteria, which should lead to fewer areas of dispute and earlier resolution of enforcement issues;
>
> (3) Greater emphasis on the more serious safety and health conditions; and
>
> (4) Openness and transparency in the application of the Agency's regular formula penalty criteria.

79 Fed. Reg. at 44,495. MSHA has provided no empirical data to support the position that changes to the current penalty assessment framework are necessary, nor has it provided data to correlate the specific changes it proposes to any improvements in miner health and safety. Moreover, as currently structured, the Proposed Rule would not accomplish the goals articulated to justify the sweeping changes proposed to the existing civil penalty scheme, nor would it further MSHA's mandate to protect the health and safety of the nation's "most valuable resource – the miner." Mine Act § 2(a). For these reasons, addressed more fully below, the

Companies find the Proposed Rule to be arbitrary and capricious and respectfully ask that it be withdrawn.

II. Argument

A. If adopted as proposed, the Proposed Rule would not improve consistency, objectivity or efficiency in the way inspectors write citations and orders.

It is true that the lack of consistent enforcement has long been an issue for mine operators. Each of the Companies has experienced inspections and enforcement actions that differ – sometimes by 180° – from how earlier inspections by different inspectors were carried out, turning on nothing more, it seems, than the fact that a new inspector had arrived onsite. Despite MSHA's claim to the contrary, however, the Proposed Rule would not reduce the number of *decisions* needed;[1] it would only reduce the number of *choices* available to inspectors for each of the subjective evaluations they must make as they write citations. While having fewer choices might make the details of citations and orders more facially consistent (simply by having fewer options to pick from), it will do nothing to bring real consistency to the subjective legal interpretations that inform how inspectors write citations or orders, which can vary wildly from one inspector to another. Moreover, it is not at all clear how objectivity and efficiency will be enhanced if the proposal takes effect. Nothing in the Proposed Rule explains MSHA's reasoning on this point.

B. The Proposed Rule does not simplify the penalty criteria and will not lead to quicker resolution of enforcement issues.

As explained in the proposal, "MSHA believes that reducing the number of negligence categories would ... [result] in fewer areas of disagreement, thereby facilitating resolution of enforcement issues,"[2] but no discernable connection exists between the goal of reducing areas of potential disagreement and MSHA's proposed methodology for doing that. The premise is a faulty one, confusing simplicity for transparency and objectivity. There is no basis for inferring a connection between the complexity of the penalty criteria and an operator's inclination to contest a

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[1] *Id.* at 44,495 (improvement would be effectuated "by reducing the number of decisions needed").

[2] *Id.* at 44,502.

violation or penalty. True, there would be fewer ways to define the conduct of the operator (negligence) and the hazard posed by a particular regulatory violation (gravity), but one can just as easily see that the broader (and therefore more vague) the definitions that underpin an inspector's gravity or negligence findings are, the more difficult it becomes to identify where on the spectrum a particular violation falls. There is no reason to believe that negligence (or, for that matter, gravity) determinations painted with a broader brush will be any less contentious than they are now. Indeed, since the Proposed Rule would do away with consideration of mitigating circumstances altogether, an operator that believes it had good reasons for engaging in the cited behavior would be penalized exactly the same as one that had no such justification. If the proposal is adopted, an operator that believes it was complying with the cited standard would seemingly have no opportunity to offer its explanation unless and until it is before an administrative law judge in a contest proceeding, and therefore the "simplification" proposed by the Secretary is likely to delay, not expedite, the resolution of enforcement cases for those operators who intend to have their day in court.

Indeed, if anything, the so-called "simplification" is more likely to result in greater, not fewer, areas of dispute, despite MSHA's assurances to the contrary. The Companies say this because the proposed changes will most assuredly run up against certain fundamental Mine Act principles. In turn, those impacts can be expected to increase the length of time it will take to resolve enforcement cases. The uncertainty of meaning that will be created by making definitions broader and less precise will undoubtedly raise questions and prompt mine operators to pursue enforcement challenges as long-settled principles come under attack through enforcement under the new Part 100 procedures.

For example, MSHA has said nothing about what impact the proposed change will have on § 104(d) enforcement, although an impact is likely. Under § 104(d) of the Mine Act as interpreted by the Commission, an "unwarrantable failure" is defined as "aggravated conduct constituting more than ordinary negligence."[3] The vast majority of unwarrantable failure citations and orders are written for alleged violations that are identified as being the result of the operator's "high negligence" or "reckless disregard."[4] MSHA predicts that inspectors will not

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[3] *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987).

[4] We recognize that the D.C. Circuit, in a non-precedential order, upheld a non-precedential decision of an administrative law judge that this is not legally

(Continued...)

use the "reckless disregard" designation to characterize violations that were previously identified as resulting from high negligence. *See, e.g., Transcript of Public Hearing* (December 4, 2014) (Arlington), p. 15 (Silvey) ("MSHA assumed that low, moderate and high negligence determinations would fall into the negligence category"). Time will tell if that is accurate. Regardless, if the only choices left to the inspector are that the operator acted either with "negligence" or "reckless disregard," surely some (and presumably many) citations issued as "negligent" will also be written under § 104(d). Absent the existing sorting (into low, moderate, and high) that MSHA does under the current rules, and without prior consideration of mitigating circumstances, operators will presumably be more, not less, inclined to challenge unwarrantable failure paper on grounds that it does not satisfy the Commission's settled "more than ordinary negligence" test. If that is the case, particularly when coupled with the Secretary's proposal to amend 30 C.F.R. § 100.4 to increase minimum penalties for § 104(d) violations by 50%, a proliferation of enforcement challenges is virtually inevitable. At best, the proposed changes will have no effect on contest rates; the idea that contests will actually decline in number is fanciful.

Indeed, our response to MSHA's purported belief that the Proposed Rule will "lead to fewer areas of dispute and earlier resolution of enforcement issues" is that history suggests the changes could have the opposite effect. The last overhaul of the penalty system, in 2007, led to a spike in enforcement proceedings at the Commission – even though MSHA asserted at the time that would not occur. The backlog that was created at the Commission as a direct result of the 2007 amendments diverted limited resources of MSHA, the Commission, and industry alike. Indeed, now that significant progress has been made toward reducing that backlog, it is not clear that making changes as part of an effort to achieve earlier resolution of enforcement issues is necessary or even appropriate. Moreover, as noted by many witnesses and commenters, penalties are likely to rise if the Proposed Rule takes effect, which may well presage another surge in Commission filings. It would be folly to risk another logjam by adopting the Proposed Rule in its current form.

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required. *Excel Mining, LLC v. Dep't of Labor*, 2013 U.S. App. LEXIS 5261, 1, 2013 WL 1155362 (D.C. Cir. Mar. 15, 2013).

C. If adopted, the Proposed Rule would not reduce or address more serious safety and health conditions.

As noted above, MSHA has not put forward any empirical data to support the plan to make adjustments to the current system for assessing civil penalties. In particular, there is no data or other evidence that links the size of a penalty to the level of miner safety and health that would be achieved at the cited mine. MSHA acknowledges that there has been a reduction in the number of violations being cited (which MSHA would presumably correlate to greater protection for miners), but it also expressly states that the regular assessment framework should be changed notwithstanding that reduction.[5] The most serious categories of violations – the violations that lead to special assessments under § 100.5, violations of the so-called "Rules To Live By," and flagrant violations under § 110(b)(2) of the Mine Act – are not addressed at all in the Proposed Rule.

Even when limited to the subset of violations that MSHA decides are not serious enough to merit § 100.5 special assessment, the proposed changes are at odds with the stated goal of enhancing safety and health. For example, as noted above, MSHA proposes to reduce the categories of negligence from five to three. While the definitions of "no negligence" and "reckless disregard" will remain the same, violations that were previously distinguishable as being the result of "low," "moderate" or "high" negligence would all be treated the same way. MSHA has not defined what it means by "more serious" health and safety conditions,[6] but in increasing the relative percentage of points that could be assigned for negligence, MSHA states that "the Proposed Rule would restructure the point table for the proposed categories to reflect an increase in the relative weight of this criterion. MSHA believes that this proposed change would result in assessments that appropriately reflect actions *under the control of operators* that have a direct impact on miner safety and health."[7] Directly contrary to that representation, violations that currently are viewed by the citing inspector as the result of "high" negligence and "low" negligence – concepts MSHA's current rules treat as vastly different in degree – would, under the Proposed Rule, receive identical treatment. Thus, to the extent that MSHA intends to emphasize violations where there is greater operator

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[5] 79 Fed. Reg. at 44,495 ("Reduced numbers of violations, however, does not preclude the need for improvement in the civil penalty assessment process.").

[6] *Id.*

[7] *Id.* at 44,502 (emphasis added).

culpability, the Proposed Rule would do the opposite, along with removing the current economic incentive for operators to exercise care in preventing violations from happening.

By the same token, the Proposed Rule would condense the current five categories of likelihood into three. Violations that are currently identified as "reasonably likely" to lead to an injury or illness and those that are considered "highly likely" to do so would under the proposal receive the same number of penalty points. Now, "highly likely" violations receive 40 (just over 19%) out of a maximum 208 points. If the proposal is adopted, however, those same violations would receive only 14 penalty points, 14% of the possible total, thereby reducing by about 27% the relative weight of violations MSHA finds to be "highly likely" to lead to an illness or injury. When everything else is equal, *lowering* penalties for violations that under the current rule would be deemed "highly likely" to lead to illnesses or injuries would have the opposite effect than MSHA claims to intend.

D. The Proposed Rule will not in any way improve openness or the transparency of the assessment process.

Finally, as far as the Companies are concerned, "openness and transparency" has never been a significant issue for regular assessments under 30 C.F.R. § 100.3, which is the focus of the proposal. The regular assessment regulations set out an understandable methodology for applying the Mine Act § 110(i) penalty criteria to an inspector's findings regarding the elements of each violation. In contrast, the lack of openness and transparency has been an ongoing concern when violations are *specially assessed* under § 100.5, a process the proposal does not address at all, and which lost what little transparency it had back in 2007, when MSHA eliminated any description of the violations that would be specially assessed. The methodology for special assessments would remain unchanged, as opaque as ever. Transparency is also an issue when MSHA personnel refuse to recalculate even those penalties that are regularly assessed under § 100.3 when a citation or order is modified as a result of settlement discussions.[8] The Proposed Rule would do nothing to improve

[8] The current practice of refusing to modify penalties commensurate to modifications to citations and orders made in conference or through settlement negotiations undercuts any pretense that a relationship exists between a penalty and the severity of the threat to health and safety or the degree of care exercised by the operator. *See also* p. 6, above (change to penalty system warranted despite reductions in number of violations issued).

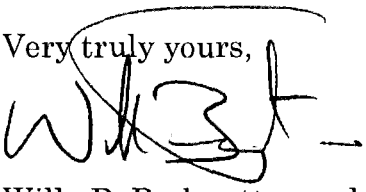
transparency, either where greater transparency is needed or where greater transparency is unnecessary. Thus, practically speaking, MSHA's failure to at long last bring its special assessment process into the light of day is, if nothing else, a lost opportunity[9] and militates in favor of the proposal being scrapped altogether or at least withdrawn for further consideration.

IV. Conclusion

To conclude, for the reasons set forth above, the Companies respectfully urge MSHA to withdraw the Proposed Rule in favor of other approaches to the stated goals. More and better training for inspectors would more effectively improve consistency, objectivity, and efficiency in citation-writing. MSHA can and should improve inspector training on what is expected of operators and how the inspectors should interpret regulations. Inspectors should receive feedback on the changes that are made to the citations or orders they write, and on legal developments generally. Openness and transparency would be improved if the basis and methodology for special assessments were specified and made public, and if Conference and Litigation Representatives and attorneys in the Solicitor's office were required or instructed to adjust penalties to reflect modifications to citations and orders. In short, there are other (and better) solutions to accomplish MSHA's stated goals than this rulemaking.

The Companies appreciate the opportunity to comment on the Proposed Rule.

Very truly yours,



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Attorneys for the Companies

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[9] *See American Coal Co.*, 35 FMSHRC 1774, 1822-24 (June 2013) (ALJ) (discussing lack of transparency of MSHA's special assessment process and how it frustrates the ALJ's ability to compare and explain his or her own assessment).