From:	Jason W. Hardin <jhardin@fabianlaw.com>
Sent:	Tuesday, March 31, 2015 11:23 AM
To:	zzMSHA-Standards - Comments to Fed Reg Group
Cc:	Shannon Harkins
Subject:	RIN 1219-AB72 - Comments of Murray Energy Corporation
Attachments:	RIN 1219-AB72 - Murray Energy Comments.pdf; RIN 1219-AB72 - Part 100 Public data - Murray Energy revised.xlsb

Attached please find:

(1) The written comments of Murray Energy Corporation in RIN 1219-AB72, Docket No. MSHA 2014-0009, regarding the Proposed Rule for Criteria and Procedures for Assessment of Civil Penalties; and

(2) An Excel spreadsheet from Murray Energy Corporation ("Part 100 Public data – Murray Energy revised") in support of its written comments in RIN 1219-AB72, Docket No. MSHA 2014-0009.

Please let me know if you have any trouble opening or viewing either of the files.

Thank you,

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March 31, 2015

VIA ELECTRONIC MAIL ONLY

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
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Re: Criteria and Procedures for Assessment of Civil Penalties, Proposed Rule
RIN 1219-AB72,
Docket No. MSHA 2014-0009

To whom it may concern:

This letter is Murray Energy Corporation's formal written comments to the Mine Safety and Health Administration's ("**MSHA's**") proposed rule seeking to amend 30 C.F.R. Part 100, "Criteria and Procedures for Assessment of Civil Penalties; Proposed Rule," 79 Fed. Reg. 44,494 (July 31, 2014) (the "**Proposed Rule**"). In addition to the comments below, Murray Energy hereby endorses and adopts as its own:

(1) the combined written comments of the National Mining Association, the Portland Cement Association ("PCA") and The Fertilizer Institute ("TFI");

(2) the combined written comments of the Bituminous Coal Operators' Association, BHP Billiton New Mexico Coal, and Interwest Mining Company;

(3) 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, and

(4) the testimony presented by Jason Hardin of Fabian Clendenin at the MSHA public hearing on the Proposed Rule held in Denver, Colorado on December 9, 2014.

Further, in the interest of brevity, Murray Energy will not restate herein any of the comments or points addressed by these individuals or entities, but will focus on new analyses and comments not previously raised.

Murray Energy is the largest privately owned coal company in the United States, producing approximately 65 million tons of high quality bituminous coal each year. Murray Energy's subsidiaries employ approximately 7,400 hard-working Americans and currently operate thirteen (13) active coal mines, consisting of thirteen underground longwall mining systems and forty-six continuous mining units in Ohio, Illinois, Kentucky, Utah and West Virginia. Murray Energy provides high-paying, stable employment in some of the most economically disadvantaged areas of the country and is a low-cost producer of bituminous coal, helping to provide safe, reliable, and affordable energy. And on March 15, 2015, Murray Energy and Foresight Energy GP LLC ("FEGP") announced that Murray Energy and Foresight Reserves, LP (the current owner of FEGP) entered into a definitive agreement for a transaction whereby Murray Energy will acquire a controlling interest in Foresight Energy. In light of this agreement, Murray Energy will soon be the third largest coal producer in the United States. As a result, Murray Energy unquestionably has a substantial interest in this Proposed Rule.

Murray Energy feels strongly that MSHA should immediately withdraw the Proposed Rule. MSHA has failed to establish any basis or need for the many, significant changes set forth in the Proposed Rule. In large part, the Proposed Rule appears aimed at simplifying Part 100 to hopefully remedy MSHA's recent inability to train its current inspectors and personnel to consistently and accurately apply the existing Part 100. This is bad public policy and, frankly, an inappropriate and improper purpose for rulemaking. Furthermore, and as has been discussed at length in previous written comments and testimony, the Proposed Rule is, in many ways, contrary to the express provisions of the Mine Act and decades of interpretative case law and, inevitably, will spawn large amounts of litigation and administrative contest proceedings. In short, the Proposed Rule will create more problems than it will solve.

Additionally, when MSHA released the Proposed Rule last summer, Murray Energy's first reaction was that the Proposed Rule's primary purposes actually were: (1) to create a system in which mine operators have fewer avenues to

contest citations and orders and thus to "encourage" mine operators to contest fewer violations and pay the assessed penalties quicker—regardless of any inaccuracies in the designations; and (2) to increase the overall amount of penalties assessed and collected by MSHA. During the public hearings, MSHA repeatedly stated that these types of concerns were unjustified "fears" and that MSHA's supposedly careful analyses, assumptions and projections indicated that overall penalties probably would decrease slightly after implementation of the Proposed Rule or, at most, stay about the same. (Dec. 4, 2014 Tr. at 11-12, 41; Dec. 9, 2014 Tr. at 9; Feb. 5, 2015 Tr. at 10; Feb. 12, 2015 Tr. at 8-9.) As Patricia Silvey, the Deputy Assistant Secretary of MSHA, stated at the December 4, 2014 public hearing in Arlington Virginia, "we did not project, and you can see it in our tables, any increase in overall penalties." (Dec. 4, 2014 Tr. at 41.)

As detailed below, however, Murray Energy has conducted a careful analysis of MSHA's publicly available data files, analyses and assumptions and has discovered significant errors and obviously flawed and extreme assumptions that have resulted in the gross under-estimation of the projected impacts of the Proposed Rule. To be clear, these conclusions are not just "fears" based on anecdotal evidence. Murray Energy's conclusions are based on MSHA's own, incorrect data set. And because of the large magnitude of the errors and flawed assumptions, MSHA should immediately withdraw the Proposed Rule and reconsider its approach. To do otherwise would be arbitrary and capricious because the data and projections upon which MSHA has been relying to justify the supposed reasonableness of its Proposed Rule *are flatly wrong and misleading.*

I. MSHA's Analysis of the 2013 Regular Assessment Data Contains Significant Errors and Flawed, Extreme Assumptions that Have Resulted in Misrepresentations of the Projected Impacts of the Proposed Rule.

The alleged reasonableness of MSHA's Proposed Rule (and the revised categories, designations and formulas therein) rests largely on MSHA's analysis of the 2013 Regular Assessment data and its projections of what the penalties in 2013 would have been using its new proposed system. Specifically, the Proposed Rule states that "MSHA analyzed the 121,089 violations for which the Agency proposed assessments under the existing regular formula between January 1, 2013 and December 31, 2013 (baseline), the most recent year of available data." 79 Fed. Reg. 44,496 (July 31, 2014). MSHA relies heavily on its analysis and projections in the Proposed Rule and repeatedly touted its analysis and projections during the public hearings. (*See, e.g.*, Dec, 4, 2014 at 48.)

Murray Energy has now analyzed the data and assumptions that MSHA has made publicly available. As detailed below, we have identified serious errors and flawed, extreme assumptions that have resulted in MSHA grossly under-estimating the projected impacts of the Proposed Rule. These errors and problematic assumptions are not trivial. They are significant and indicate that MSHA has not given the matters the careful thought claimed and that the projected impacts of the Proposed Rule will be much greater than has been portrayed. As a result, MSHA should withdraw the Proposed Rule immediately and, at a minimum, conduct further analyses to ensure the data upon which it relies is accurate and that the assumptions MSHA makes better reflect what will happen in practice.

A. MSHA Erroneously Attributes Zero (0) Points in Its Proposed Rule for the 20,329 Violations Assessed Low Negligence in 2013, *Resulting in a Massive $8,505,343 (or 10.7%) Under-Estimate.*

During the December 4, 2014 hearing, Patricia W. Silvey, the Deputy Assistant Secretary of MSHA, stated that "[c]ommenters projected that reducing the categories of negligence would result in violations being placed in a higher category, and would result in higher penalties. In MSHA's projection of penalties under the proposal, which is what we included in the proposed rule, MSHA did not make this assumption. Rather, **MSHA assumed that low**, moderate and high **negligence determinations would fall into the negligence category**, and that is what we assumed." (Dec. 4, 2014 Tr. at 15 (emphasis added).) Ms. Silvey later reiterated that "**our projection was that low**, moderate and high **negligence would be negligence**." (Dec. 4, 2014 Tr. at 108.) MSHA restated this assumption in all subsequent public hearings. And this assumption is consistent with the three proposed negligence-related definitions and the existing negligence-related definitions—i.e., the proposed definition of Not Negligent is the same as the existing definition of No Negligence, the definitions of Reckless Disregard are the same, but the Proposed Rule collapses the existing Low, Moderate and High Negligence categories into the single Negligent category, with a resultant fifteen (15) points. *Compare* 79 Fed. Reg. 44,517, Table X, to 30 CFR 100.3(d).

With these public statements and proposals in mind, MSHA's analysis of the 2013 Regular Assessment violations should have assumed and projected that the Low, Moderate and High Negligence violations from 2013 all would receive the new Negligent label and the fifteen (15) associated points. That, however, is not what MSHA did, as evidenced by MSHA's own Data Files.

Specifically, the Data Files that MSHA made available on its website[1] show that ***all* 20,329 violations that had been designated Low Negligence in 2013 received zero (0) points under the new proposal, when they should have received fifteen (15) points for falling into the new Negligent category.**[2] Zero (0) points and a Not Negligent designation for violations previously designated Low Negligence is irreconcilable with MSHA's repeated public statements. Indeed, statements that "MSHA assumed that low . . . negligence determinations would fall into the negligence category," (Silvey, Dec. 4, 2014 Tr. at 15), are outright misrepresentations.

This is a very significant error and under-estimate. When the "Part 100 Public data" Excel spreadsheet is corrected to attribute an additional fifteen (15) points to the 20,329 Low Negligence violations from 2013 consistent with MSHA's public statements of its intent, **the total projected penalty under the Proposed Rule for the 121,089 violations from 2013 rises from $79,806,937 to $88,312,280, *a massive $8,505,343 (or 10.7%) increase*.**

This error (or twisting of the data) has a cascading effect on several other conclusions and analyses in the Proposed Rule. For instance, the Proposed Rule states that "the projected impacts consist of slightly lower total payments by mine operators for penalties incurred," that "Tables 10 and 11 show the actual proposed civil penalties under the existing rule and projected proposed civil penalties under the proposed rule," that the "projected average proposed penalty decreases from $876 to $815 for penalties assessed at coal mines and increases from $459 to $480 for penalties assessed at M/NM mines," that "[t]otal penalties for the coal sector would decline approximately $3.9 million and increase approximately $1.2 million for the M/NM sectors," and that the "estimated penalty decrease of $2.7 million for all mines relative to aggregate penalty levels is 3 percent." 79 Fed. Reg. 44,513. *These statements, and the projected data set forth in Tables 11 and 12 of the Proposed Rule, however, are all wrong and grossly under-estimated given the Low Negligence point error identified by Murray Energy.* Indeed, this single error takes

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[1] Available at http://www.msha.gov/osrv/rules/2014/civil-penalty/Part%20100%20NPRM%20Public%20data.zip.

[2] We first checked the (very large) Excel spreadsheet entitled "Part 100 Public data" to see, generally, if it was consistent with what was discussed in the Proposed Rule. It appeared to be. For instance, it contained extensive data and projections for 121,089 different violations from 2013, as stated in the Proposed Rule. We also confirmed that the total penalty assessed in 2013 for these violations was $82,517,640 and that the total penalty MSHA projected after it applied the Proposed Rule was $79,806,937, a supposed (and touted) 3% decrease. And all High and Moderate Negligence violations from 2013 *did receive* the fifteen (15) Negligent points.

MSHA's total projected penalty from a 3% overall decrease ***to a 7% overall increase.***

MSHA's twisting of the Low Negligence data also affects several other of MSHA's projections in the Proposed Rule. For example, Table 2 compares the relative weights of the various criteria under the existing and proposed rules. The Proposed Rule section refers to 1,510,485 points for the "TOTAL Negligence Criterion." But when the fifteen (15) point corrections are made to the 20,329 Low Negligence violations from 2013, the projected "TOTAL Negligence Criterion" rises to 1,815,420, *a 20.2% increase.* This in turn, increases the projected "TOTAL Penalty Points for 121,089 violations" from 3,841,359 to 4,146,294, and increases the "% of total penalty points" of the negligence criterion from 39.3% to 43.8%. The relative %'s of the other criteria will, as a result, all decrease. In other words, the Proposed Rule tilts penalties significantly more in favor of the negligence criteria than represented in the Proposed Rule and at the public hearings. This is just one example of the several calculations and conclusions in MSHA's Proposed Rule that are impacted by the Low negligence point error.

It is critical that MSHA be honest to the industry and the American public. It must recalculate all of its projections and present the true effect of its Proposed Rule. And because of the large magnitude of the error—*an almost 11% increase to the total projected penalty*—MSHA should immediately withdraw the Proposed Rule and reconsider its approach. To do otherwise would not only be unwise and hasty, but also arbitrary and capricious because the data and projections upon which MSHA has been relying to justify the supposed reasonableness of its Proposed Rule *are flatly wrong and inconsistent with MSHA's repeated statements made at the public hearings.*[3]

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[3] Reasoned decision-making requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action[s]." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System, supra*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). "Normally, an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* (emphasis added). Agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion," *Catawba Cnty. v. EPA*, 571 F.3d 20, 45 (D.C.Cir.2009), (quoting *American Iron & Steel Institute v. EPA*, 115 F.3d 979, 1007 (D.C.Cir.1991)), and to "reexamine" their approaches "if a significant factual predicate" changes, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C.Cir.1992).

B. MSHA's Assumption that *All* 19,137 Violations That Were Designated Permanently Disabling in 2013 Would Be Designated as Lost Workdays or Restricted Duty Under the Proposed Rule Is Wrong and Grossly Misleading.

In addition, MSHA's Data Files indicate that MSHA assumed *all* 19,137 violations that had been designated Permanent Disabling in 2013 would be designated as Lost Workdays or Restricted Duty under the Proposed Rule. Some assumption regarding these 19,137 violations is necessary because the Proposed Rule deletes the long used Permanently Disabling category from the Gravity: Severity of injury or illness criteria. The two replacement options under the Proposed Rule are:

> *Lost workdays or restricted duty: [five (5) points]*
>
> > (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)
>
> *Fatal: [ten (10) points]*
>
> > (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)

79 Fed. Reg. at 44,518. These definitions are the same as those that already exist in 30 CFR 100.3(e).

Significantly, from the Data Files, it is clear that MSHA assumed that *all* 19,137 violations from 2013 that garnered the existing Permanently Disabling designation would receive only the Lost Workdays or Restricted Duty designation under the Proposed Rule. This assumption is wrong and obviously was chosen to minimize, as much as possible, the potential impact of the Proposed Rule and its deletion of the Permanently Disabling category. If the Proposed Rule were adopted, inspectors who previously and routinely designated certain types of violations as Permanently Disabling would be forced to pick a new designation, either Lost Workdays or Restricted Duty or Fatal. Murray Energy strongly believes that MSHA's inspectors—either on their own or following the guidance and direction of MSHA—will re-label a very large portion of these violations as Fatal because they will be re-construed as having "*a reasonable potential* to cause death." The Proposed Rule makes no mention of how the formerly Permanently Disabling violations will or should be re-categorized and, despite multiple

commenters raising this question and concern, MSHA has yet to provide any guidance on the question.

What is apparent, unsurprisingly, is that MSHA has assumed the extreme best case for the industry in its Data Files and projections to minimize, as much as possible, the impact of the Proposed Rule on the projected future penalties. **When the other extreme scenario is input into MSHA's Data Files (i.e., all formerly Permanently Disabling injuries are re-designated *as Fatal*, thereby garnering 10 points versus 5), the projected total penalty rises from the $79,806,937 total projected penalty in the Proposed Rule to $95,640,235, *a massive $15,833,298 (or 19.8%) increase*. This result also would be a $13,122,595 (or 15.9%) increase from the actual total Regular Assessments from 2013 for the 121,089 violations listed in MSHA's Data Files.** Even if only half of the previous Permanently Disabling designations are re-labeled as Fatal, the approximate increase to the total projected penalty would be $7,916,649 (or 9.9%) and to the actual total Regular Assessments for 2013 would be $6,561,298 (or 7.9%). (To be clear, these calculations do not correct the Low Negligence point error discussed above in section I.A., but assume no changes have been made.)

Given MSHA's aggressive tactics the past several years and simply because of the limited options presented by the new Gravity: Severity categories, Murray Energy strongly believes that between 50% and 100% of the previously labeled Permanently Disabling violations would be designated Fatal under the new proposed system. Certainly, there is a stronger argument that MSHA's inspectors would designate Fatal more often than Lost Workdays or Restricted Duty for these violations.

As a result, MSHA's assumption on the Permanently Disabling re-designations intentionally mischaracterizes and significantly downplays the potential impacts of the Proposed Rule. MSHA's assumption and the projections based on this assumption, thus, can only be described as arbitrary and capricious. MSHA should withdraw the Proposed Rule immediately or, at a minimum, extend the comment period, make a more reasonable assumption on the Permanently Disabled re-designations, recalculate its projections and other metrics, and make this information available to the public for further comment and analysis.[4]

[4] *See supra* note 3.

C. Together, the Low Negligence Point Error and Permanently Disabling Extreme Assumption Alter MSHA's Projections by as Much as $25,879,736, or *a 32.4% Increase*, Over Its Projections.

If the Low Negligence point error is corrected **and** all of the Permanently Disabled designations are changed to Fatal (i.e., the other end of the spectrum from MSHA's misleading under-assumption), then **the total projected penalty rises by $25,879,736 to a whopping $105,686,673, a 32.4% increase across the board from the total projection in the Proposed Rule.** This would be a $23,169,033 increase (or 28.1%) from the actual Regular Assessments for the 121,089 violations from 2013.

It is clear to Murray Energy that MSHA has deliberately underestimated the potential impact of its Proposed Rule on the industry. Even if just the result of carelessness, the two issues discovered by Murray Energy[5] discussed in these comments indicate that total penalties industry-wide could increase by almost 30% if the Proposed Rule goes into effect, and almost certainly more than 20%. There is simply no justification for such a massive increase in penalties. The errors and mischaracterizations in its data coupled with the many other legal and practical concerns previously raised by Murray Energy and other commenters should persuade MSHA to withdraw the Proposed Rule immediately and re-think what it is doing.

[5] There certainly could be additional errors and other extreme or incorrect assumptions that Murray Energy did not catch or did not analyze in detail in this comment. For instance, a reasonable assumption is that at least some, and perhaps many, of the violations that were designated High Negligence in 2013 would be designated Reckless Disregard under the Proposed Rule (because there is no longer a High Negligence option and inspectors might deem a Reckless Disregard label necessary to better support an unwarrantable failure). Consistent with the errors and extreme assumptions discussed above, MSHA also assumed the extreme best case for the industry, that zero (0) of the 8,820 High Negligence violations from 2013 would be designated Reckless Disregard under the Proposed Rule. This compounds the gross under-estimate even more. Finally, the analysis of MSHA's data and projections was made difficult because MSHA's Data Files (at least the Excel spreadsheet) do not contain the formulas used by MSHA in reaching its projections.

Finally, for reference, we are submitting concurrently with this comment a copy of MSHA's "Part 100 Public data" file as modified by us (in an Excel spreadsheet). Because of the size restrictions for electronically submitted documents, we had to remove our own formulas. We are happy, however, to share the entire file with anyone who would like a copy and requests it.

Of course, we appreciate the opportunity to comment on the Proposed Rule.

Very truly yours,

MURRAY ENERGY CORPORATION

E. Patrick Brady

E. Patrick Brady
Corporate Director of Safety

Enclosure