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To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: COMMENT: RIN 1219-AB72

To Whom It May Concern:

In regards to MSHA's proposed rule to amend its civil penalty procedures, I oppose the proposed rule.

I am a senior Mine Safety and Health Professional with nearly 30-years of mine safety experience and currently serve as the Regional Director of Health and Safety for Lehigh Hanson, a major producer of construction aggregates in the United States. In drafting my objection, I have conferred with other Safety Professionals and Mine Safety Advocates for input into this comment. Their statements, comments and observations have been used with permission.

It is clear that the proposed rule would limit or perhaps even eliminate the independent role that judges currently exercise in setting fines for contested MSHA citations and orders. The current system provides a judge to objectively weigh the evidence, testimony of witnesses and facts to determine if the civil penalty as proposed by MSHA is appropriate or not. Currently, Administrative Law Judges will uphold the proposed penalty, reduce it or if in the opinion of the judge that the violation and the facts surrounding it warrants it, can increase the penalty.

As an operator, an increase in the penalty is undesirable, but what is important here is that the judge acts an impartial and objective arbiter in such matters. This system is grounded in due process and codified in the Mine Act, Section 110(k) states that "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission." Absent the reference to 105(a), the sentence is repeated verbatim in MSHA's own regulations at Part 100.7(b)(2). The language unambiguously sets forth the intent of Congress to give the Commission exclusive authority over contested MSHA penalty assessments.

It was forged from the crucible of experience with the Coal Act of 1969, predecessor legislation to the Mine Act eight years later. According to the legislative history of the Mine Act; i.e., Senate Report 95-181, common practice at the time was to settle contested penalties behind closed doors. ALJs did not figure into the approval process for settlements. Lawmakers believed that approach weakened the deterrent effect of penalties, increased the potential for abuse and failed to preserve the public interest. Section 110(k) was created to change that. To erase any doubt about Commission authority, Congress began Section 110(i) with this statement, "The Commission shall have the authority to assess all civil penalties provided in this Act."

As mentioned above, judges often will raise penalties when in their view, such increases are necessary to serve as a deterrent to violators. They also provide a means to reduce arbitrary reductions in penalties as worked out between the Agency and Operators in sometimes what might be described as "horse trading."

In 2010, Judge Margaret Miller refused to accept MSHA's motions to settle three dockets of violations against Black Beauty Coal Co. in which the agency proposed reductions of greater than 80%. She said she could not okay the settlements without information to support the reductions and complained the reductions may not serve the deterrent aim of the Mine Act. MSHA appealed to the full Commission, which sided with Miller. In their decision, the commissioners contended deterrence is among the criteria judges may weigh when considering the appropriateness of penalties.

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MSHA's proposal would usurp Commission authority by reinstating a previously discredited arrangement which experience had shown was not promoting deterrence. As such, it represents an unnecessary and questionable attempt to bypass the intent of Congress and the very law the agency is charged with upholding. That puts an ironic twist to MSHA's plan, since MSHA is now trying to undo a scheme put in place to improve deterrence by restoring one Congress rejected decades ago because it did not promote deterrence.

In its proposal, MSHA raises four objections to the current Commission practice of assessing fines. The first is that it fails to provide sufficient predictability and consistency. Examining penalty contest data from 2008 through 2013, MSHA complained that even when judges affirmed MSHA citations and orders as written, they assessed the penalty MSHA had proposed in only 60% of the cases. Of the remaining 40%, ALJs lowered the fine in 33% of the cases and raised it in 7%. Despite comments to the contrary, it is clear that judges DO use the proposed penalties as their starting point.

MSHA does not provide a further breakdown to determine which judges were making the changes and for what amounts. If the practice was confined to a few, then addressing those ALJs individually would seem to be more meaningful than changing the entire system due to the perceived actions of a few. But, more importantly, MSHA's civil penalty proposal is also intended to reweigh and rebalance violation criteria to remove inequities.

In my experience, when there has been a reduction in proposed penalties, the judges actions are there to adjust likely unfair or even unfounded penalties in the first place. They are able to better assess the gravity of the alleged violations due to their objective perspective. This is why we contest citations in the first place.

The agency has stated that ALJs have an even worse track record when they modify a citation or order. In those instances, judges applied MSHA's penalty regulations in only 22% of the decided cases, according to the agency. A few years ago, a judge learned from a conference and litigation representative in District 4 that inspectors were under pressure to overwrite citations as a result of major coal disasters in the district. An indication the phenomenon is not localized comes from a National Mining Association analysis of MSHA data, which showed a third of all contested S&S violations were vacated, dismissed or modified during formal litigation. Judges are human; they can be expected to react negatively when their workload explodes because of unnecessarily heavy enforcement paper. A certain way for MSHA to greatly improve its batting average with judges is to write good paper to start with.

MSHA's second argument is that operators contest penalties because they believe they can get a reduction from a judge, even when the judge fully sustains MSHA's enforcement action. Again, this argument ignores inequities in the current weighting of the penalty criteria that MSHA's own proposal is designed to correct.

It also ignores the financial and human resources the operator must commit after it files a notice of contest. A California operator spent nearly $41,000 for a lawyer to defend it against a $35,000 special assessment. The money was paid back by the agency after MSHA's position was determined not to be substantially justified, but the operator had no assurance of that outcome when he filed his appeal. It is clear and obvious to the Agency and Operators that the cost of litigation is itself a deterrent to contesting a violation. Most litigation is brought by operators willing to bear the associated burden in legal fees and human capital because they believe they have been wronged. Such decisions to contest citations are not done without careful consideration of the facts and the rights afforded us under the Mine Act.

MSHA's third contention is that penalty decisions are being compromised by a lack of rules available to judges to guide their penalty analysis. But judges do have guidance, and they are required to follow it. As noted, in assessing fines, judges must consider six statutory criteria: appropriateness of the penalty to the size of the business, negligence, gravity, history of previous violations, good faith efforts at achieving rapid compliance and the penalty's effect on the ability of the operator to remain in business. As we have seen, the Commission has recently added a seventh: the effect of the penalty in achieving deterrence.

In proposing fines, MSHA must also follow the six criteria. The agency complains that, unlike the Commission, it has objectified the criteria in order to produce fines that are consistent. Because the Commission hasn't, MSHA argues, judges are left with no consistent method to interpret each criterion or translate that discussion

into an appropriate penalty amount. But, as mentioned, in setting penalties judges frequently reference MSHA's guidance, such as the agency's interpretation of negligence and its belief operators are to be held to a high standard of care. Judges also see, and often reference, the exhibit MSHA prepares, which details MSHA's justification for a proposed penalty.

MSHA's fourth contention, that the existing approach undermines deterrence has already been addressed above.

In short, the existing system was created literally by an act of Congress to correct an arrangement shown to be ineffective. It deftly balances the public interest in deterring operators from putting miners' health and safety at continuing risk with operators' due process guarantees. Formal challenges to MSHA enforcement bring two sides together before a neutral judge to plead their respective cases. The judge, acting independently yet not without guidance, makes a decision based on the preponderance of evidence. This is the very essence of American jurisprudence.

A provision of MSHA's proposal would raise minimum fines under Sec. 104(d) of the Mine Act. Under (d)(1), the fine would jump to $3,000; under (d)(2), to $6,000. The section addresses unwarrantable failure, which courts have defined as aggravated conduct beyond ordinary negligence.

We question the necessity for these increases, which are 50% above the current levels. In the preamble, the agency states its rationale as seeking to "provide greater deterrence" and "encourage more diligent compliance." However, elsewhere in the preamble MSHA notes it has "implemented special initiatives," such as Rules to Live By, and "promulgated rules" to enhance operator accountability for violations and hazards, then proudly declares "its efforts have worked." If the initiatives have worked, why is there a need for more deterrence?

Section 104(d) violations are elevated enforcement actions, one of five in MSHA's toolbox. Based on agency data, the amount of elevated enforcement paper has dropped since 2010. A total of 6,207 such violations were written that year. They have dropped every year since, and last year stood at 3,328. The positive trend would suggest existing fines are achieving their deterrent purpose. Federal regulations are intended to bring about a change benefitting the public interest that cannot be accomplished any other way. If existing penalties are doing their job, what's the pressing need?

The proposed increases also put the agency in a contradictory position. On the one hand, MSHA says its incentive to add a 20% good faith reduction in penalties would "encourage operators to allocate more resources for the prevention of safety and health hazards." Yet, it proposes to take money out of the pockets of operators who might otherwise use the money for prevention. MSHA also does not want to add to the civil case backlog, yet raising these fines is sure to encourage more penalty contests. For a case in point, look no further than the explosion of litigation that followed the 2007 penalty increases.

The agency actually predicts its proposal would result in a modest decrease in penalties of about $2.7 million. Operators have every reason to be suspicious of this economic forecast. That is because the last time MSHA provided estimates in connection with a revision to its civil penalty proposal, it missed the mark profoundly. The previous rule revision became effective in April 2007. The agency predicted the changes would add $31.5 million annually to the industry's federal enforcement liability. The industry's assessment bill in 2006 was $35.2 million. Thus, total fines for 2008, the first full calendar year after the changes went into effect, would have come to $66.7 million. Instead, MSHA proposed a record $194.3 million in fines in 2008, up 191% over what the agency had estimated. In the years that followed, the agency has never come close to hitting its estimate.

We are not suggesting MSHA will be as far off the mark this time around. But given the imprecision of its work in the past, we cannot give much credence to the current estimates.

In summary, the current system is working. If in the estimation of some that it's not working optimally, then minor adjustments could be in order to improve it. But to scrap major provisions of the current system,

undermine due process, undo a process that provides increased transparency and even run counter to a Congressional Act is certainly unwarranted.

Sincerely Yours,

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