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September 24, 2019

Sheila A. McConnell
Director

Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
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VIA EMAIL: zzMSHA-
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Re: Comments on MSHA regulatory reform

Dear Ms. McConnell:

On behalf of the Mining Coalition (the “Coalition”), we are pleased to submit the following comments in response to Executive Order 13777, calling for agencies to pursue regulatory reform initiatives and policies, as well as the Mine Safety and Health Administration’s (“MSHA”) web site and public requests for comments on regulatory reform.

The Mining Coalition is an informal group of metal and non-metal mining production and service companies, which support continuing safety improvements and sound regulations. Together, the Coalition members employ thousands of people and share MSHA’s goals of advancing miner safety and health.

We hope that the Coalition members’ experiences and ideas reflected in these comments will provide helpful inputs to MSHA’s regulatory reform process. Of course, we would be glad to provide further information as may be helpful, and we welcome a dialogue on these ideas.

Sincerely,



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Reg Reform Comm - 091-1

Mining Coalition Comments on MSHA Regulatory Reform

PROPOSAL NO. 1

MSHA should strengthen both safety and enforcement with a Voluntary Protection Program.

As fatal and serious mining accidents decline, the remaining accidents are often the toughest to prevent, often involving human behavior. Prevention requires active and cooperative efforts by miners, mine operators, and MSHA alike. Eliminating these last mining accidents requires that mine operators can devote maximum resources to implementing proactive, long-term, comprehensive safety programs and creating effective cultures of safety. Meanwhile, MSHA would benefit from a mechanism for focusing its enforcement energies on the operations that most need its attention. MSHA's sister agency, OSHA, has figured out how to meet these twin goals through its successful Voluntary Protection Program. MSHA should establish a pilot project to do the same.

VPP works to maximize both safety and enforcement.

Under OSHA's VPP, employers who demonstrate exemplary management and employee involvement, worksite analysis, hazard control, training programs, and safety results are exempt from programmed inspections when they achieve VPP status. The results are clear. VPP sites consistently have lower accident and workers' compensation rates. In 2017, for example, site-based non-construction VPP firms avoided over 10,000 TCIR and DART injuries. Site-based, non-construction VPP Star companies were 50% or more below industry TCIR and DART measures. 414 VPP companies had zero recordable injuries that year.¹

The program works because it improves safety. First, it creates incentives and support for employers to create long-term, systemic safety programs and cultures. Second, it multiplies OSHA's resources by putting OSHA and its VPP partners in close coordination on proactive efforts and thus enabling the agency to focus enforcement attention on those companies that most need it. According to OSHA, the VPP sites can also become great ambassadors to the rest of industry, showing the possibilities and benefits of greater worker safety and health, as well as experimenting with new and innovative safety programs and initiatives.

Mining is no more complicated or dangerous than industries where VPP now thrives. VPP has proliferated at some of the most complex and potentially hazardous facilities. According to OSHA, the top industry for federal VPP sites by far is the chemical industry, which is followed by the utilities industry. To be clear, VPP sites are not free of government scrutiny. Quite the contrary, they get more significant and valuable attention beyond on-site inspections – the kind of attention that is best suited and most helpful for sites with their strong safety track records.

¹ See <https://www.osha.gov/dcsp/vpp/evaluation.html>.

This model is ideal for mining today. It would address today's greatest risks by incentivizing companies and supporting them to further invest in long-term, pervasive safety programs and cultures. Meanwhile, it would allow MSHA to focus the greatest part of its resource-intensive, in-person enforcement on sites that need it most. In other words, VPP targets proactive planning, education, and technical support at sites that can best use it while focusing more enforcement at sites that most require it – giving each site the kind of engagement that will drive the best safety and compliance outcomes.

VPP is compatible with the Mine Act.

VPP might have been introduced long ago in mining except that many have incorrectly assumed it was impossible under the Mine Act. Many have long assumed that the requirement in Section 103(a) of the Mine Act to conduct at least two surface or four underground inspections per year at each mine “in its entirety” prevents the agency from creating a more targeted and thoughtful VPP initiative. On closer look, though, the Act allows ample room for VPP.

The Mine Act does not define “inspections of the mine in its entirety.” But, MSHA’s inspection practices over many years have shown how broad and flexible this language can be. MSHA rarely inspects a mine in one “inspection” in the strictest sense. An “inspection” by MSHA can take many weeks, sometimes with breaks along the way. Mine conditions change constantly. Conditions seen on the first day of a three- or six-week inspection are different by the last day. A single weeks-long inspection is really more a series of many individual spot inspections. In fact, in another context, courts have recognized that a complete “inspection” may actually be a series of partial or spot inspections.²

At the same time, courts have recognized that inspections are not solely about conditions but are also about the practices at a mine. Indeed, the Mine Act’s purpose is to prevent “unsafe and unhealthful conditions and practices.” 30 U.S.C. § 801. In keeping with these concepts, MSHA already has given a flexible interpretation to the mandate to inspect in “entirety.” While inspections in “entirety” should include both conditions and practices, MSHA’s current approach often favors one much more heavily than the other. Inspections today often focus very heavily (sometimes almost exclusively) on observing physical conditions on-site while paying far less attention to overall systems, key safety performance indicators, injury rates and causes, and mine-wide practices (such as risk assessment, safety-related disciplinary programs, or lock-out/tag-out practices).

Likewise, for many years, the burden of multiple extensive inspections at every mine site each year was so great that MSHA was not able to accomplish the task. Reportedly, 2008 was the first year in MSHA’s then 31-year history in which it actually completed all of its regular inspections. If completing regular inspections as MSHA now defines them is such a strain, isn’t it more faithful to the Act’s safety and enforcement interests to prioritize attention on sites that are

² Some court cases have focused on what kind of “inspection” is required for a mine to exit a 104(d) “unwarrantable failure chain” of violations. Arguably, that situation is more serious than a regular inspection and yet still allows for a flexible definition of inspections. *See, e.g., Sec’y v. Cyprus Cumberland Resources Corp.*, 21 F.M.S.H.R.C. 722 (1999); *Eastern Associated Coal Corp.* 3 IBMA 331 (IBMA 1974) (emphasis added).

falling behind? MSHA will get more safety benefit for its enforcement dollars if it finds a way to focus its energies where they are most needed. This also frees up mine operators' safety personnel at safer mines to spend their days advancing safety and building a culture of safety rather than accompanying MSHA inspections.

In short, MSHA could roll out (or pilot) a program in which:

- **Rigorous vetting and criteria would apply to enter and remain in the program.** Mines would undergo rigorous vetting to meet exemplary safety and health risk identification and management criteria. The goal is to surpass industry averages. Mines would have to maintain their strong safety records in order remain in the program, perhaps by exceeding industry averages over a rolling look-back period.

In addition, VPP sites would agree to implement key safety programs that are not otherwise required (but already undertaken voluntarily at many safe operations), including worksite analysis, hazard prevention and control, and safety and health training. The programs would have to engage all stakeholders, including the entire workforce, management, and unions.

- **Regular inspections at VPP sites would change and focus on confirming that sites maintain standards with safe workplaces.** Since MSHA would know that VPP sites have created successful safety programs and eliminated major hazards (reflected in better-than-average injury and illness statistics), MSHA can approach inspections at VPP sites differently. In keeping with the Mine Act, MSHA would still inspect at least twice or four times each year. But, inspecting the “entirety” of these sites would mean a holistic look at not only some conditions, but also some practices and performance measures. By adjusting the nature and quality of its review, MSHA could spend less time overall at VPP sites.

For instance, an inspector could start a regular inspection at a VPP mine by first spending time off-site, reviewing the site's injury rates, key safety performance indicators, any recent incident reports, and safety programs to ensure that VPP compliance continues. Then, the inspector could spend a couple days on site, doing a walk-through and performing spot checks. At a large site, over the course of a year, the inspector could aim to visit in person each key area.

This is no less an inspection of the “entirety” of the site than occurs now. It simply re-balances practices vs. conditions and on-site vs. off-site auditing. It also emphasizes safety outcomes above all else. By utilizing the required “twos and fours” as regular evaluations to confirm a site's continuing VPP qualifications, MSHA VPP sites would have even closer and more regular agency oversight than OSHA VPP sites.

- **MSHA and the operator would both gain new resources for better safety and compliance.** Not all violations are equal, especially under the Mine Act's strict liability regime. When MSHA feels compelled to spend as much time at a site with an injury rate

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double the industry average as it does at an operation with excellent safety performance, it finds different types of violations. At one site, it may find multiple serious hazards. At the other, it may end up with a stack of minor citations for housekeeping or missing electrical cover plates in remote locations.

Unfortunately, this approach comes at a cost. MSHA could be spending more time with those who clearly need both enforcement attention and educational and training support to improve their safety programs. Meanwhile, the operator at the high-performing site could be spending less time accompanying MSHA and more time innovating even more effective safety programs to share with the industry. A VPP program allows both MSHA and the above-average operator to put that time and energy to the best use for safety's sake without sacrificing or risking compliance.

Adopting such a program not only would learn appropriate lessons from OSHA's experience, but it would also fit well with comments by MSHA's current leadership about its commitment to efficiency, effectiveness, and innovation in mine safety regulation and enforcement.

PROPOSAL NO. 2

MSHA should adopt criteria to prioritize hazard complaints that require investigation.

MSHA could gain efficiency by adopting another successful OSHA methodology when it comes to investigating hazard complaints. The ability of anyone to inform MSHA about a possible mine hazard is a critical feature of the Mine Act. It can help ensure that important issues get the attention they deserve. Sometimes, however, MSHA conducts a full on-site investigation of a hazard complaint only to determine that the complaint was entirely meritless. In fact, sometimes, even assuming the complaint is true, it does not even allege concerns relevant to the Mine Act. In these cases, the resources expended by MSHA, mine operators, and miner's representatives for full-blown, on-site investigations can go to waste and distract safety personnel from proactive safety efforts.

Again, OSHA has found an alternative approach that works and is worth considering. Rather than having every allegation become an on-site investigation, OSHA has developed a set of criteria for evaluating complaints it receives. It generally launches an in-person inspection when it has allegations of physical harm, a claim of imminent danger, or a written, signed complaint by an employee (or employee representative) with enough detail that OSHA can determine a violation, danger, or harm likely exists.

But, under many other circumstances that do not rise to these levels of concern, OSHA often will start with a speedy off-site investigation, obtaining more information from the employer first so it can develop a more complete set of facts and understanding. If within a few days, OSHA receives information indicating that the employer is aware of the hazard and is correcting it (or that no hazard exists), OSHA may decide not to inspect on-site.³ This system not only prioritizes agency resources and preserves time-sensitive, on-site inspections for the highest priority issues, but it also gives employers incentives to address concerns promptly even in cases where those concerns are not actually legal violations.

Of course, MSHA must work within the constraints of the Mine Act. Section 103(g) of the Mine Act gives a miner or miner's representative the "right to obtain an immediate inspection" by giving MSHA a signed, written notice of a violation or imminent danger. However, that provision also provides parameters that MSHA could use in performing triage before committing to an on-site inspection. Currently, MSHA appears to investigate complaints that do not meet these standards.

MSHA could set criteria that it will investigate on-site if a complaint meets Mine Act requirements that it: (1) is written, (2) is signed, and (3) is based on reasonable grounds to believe that a violation of the Mine Act or imminent danger exists. In other cases, however, MSHA could exercise its judgment and where appropriate, decide to promptly obtain additional information informally from the mine operator before deciding to investigate in person.

³ OSHA summarizes this policy at <https://www.osha.gov/as/opa/worker/handling.html>.

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This general triage approach is consistent with MSHA's current guidance in its Hazardous Condition Complaint Procedures Handbook. The Handbook suggests that certain types of complaints may merit immediate inspection while others may receive attention at a future regular inspection. But, currently, only in very limited circumstances does MSHA's policy seem to contemplate resolving the allegations through an off-site investigation.

To the extent that MSHA's current procedures would launch in-person investigations with unsigned complaints, unwritten complaints, complaints not from miners or miner's representatives, or complaints that fail to allege a Mine Act violation or danger as requiring on-site inspections, these procedures go beyond the Mine Act's requirements. Some may view this approach as more protective, but in truth, this allocation of resources comes at a cost. It diverts both MSHA and operators to spend more time investigating certain complaints than justified. As a result, these procedures may unreasonably tie MSHA's hands and prevent MSHA from exercising the discretion and flexibility provided to it by the Mine Act to efficiently allocate its resources to the complaints that are most pressing and most likely to have merit.

PROPOSAL NO. 3

MSHA should enhance the Petition for Modification process so it can be a powerful tool in modernizing regulations.

One of the first initiatives of the current MSHA leadership was to seek input on how to modernize mine safety and health regulations. MSHA asked stakeholders for suggestions. Unfortunately, even acting on some of these suggestions will leave MSHA with the same problem it now has: a long and slow rulemaking process, leading to a set of relatively static regulations that are constantly overtaken by ever more rapidly changing technology. The Mine Act, however, holds a key to a process that could, if improved: (1) accomplish a good deal of modernization, (2) in far less time than notice-and-comment rulemaking, and (3) remain flexible over time to accommodate future changes in mining.

The Mine already contains a regulatory reform tool: petitions for modification.

Section 101(a) of the Act requires that all regulations promulgated under its authority must be promulgated in accordance with the Administrative Procedure Act (5 U.S.C. § 553, *et seq.*). That process, which requires multiple publications in the Federal Register and potentially lengthy comment periods, is cumbersome and resource-intensive. Most agencies, including MSHA, do not have sufficient resources to carry out their statutory responsibilities and also routinely promulgate new regulations to keep pace with innovation. As a result, regulations often become either irrelevant or outdated as technology improves and industry evolves.

Congress built into the Mine Act a solution, however. Recognizing the need for a nimbler process at times and also recognizing that each mine is different, the Mine Act has a procedure for modifying rules based on specific mine needs or circumstances. Section 101(c) allows an operator to petition for the modification of any mandatory standard if: (1) the modification “will, at all times guarantee no less than the same measure of protection afforded . . . by” the original standard, or (2) applying the original standard will result in a “diminution of safety” to miners. The Act requires only that for each petition, MSHA (a) publish a notice of its filing, (b) conduct an “appropriate” investigation, (c) provide opportunity for public hearing during the investigation at the request of “any interested party,” and (d) publicize all findings and notify the operator and miner’s representative(s) before a decision becomes final.

The current PFM process is a potential solution if it is reformed.

The Mine Act’s petition process presents an opportunity for MSHA to respond more quickly to a changing mining world, but only with some changes to MSHA’s current implementation of the process. In 1990, MSHA adopted elaborate procedures for considering Petitions for Modification that imposed stricter requirements than the statute and also appears to omit a key step (30 C.F.R. Part 44). MSHA says that a petition may only seek to modify a single standard for a single mine operator. So, a mine asking to modify multiple standards, all based on the same underlying rationale, must submit multiple petitions. Likewise, multiple mine operators facing the same challenge – and seeking the same solution – must approach MSHA individually.

Even once a modification is approved for one mine operator, other mines must file their own petitions to get the same arrangement. Meanwhile, the Part 44 regulations currently do not provide a public hearing during the investigation, as required by statute. That closes the process and prevents “any interested party” from participating and presenting relevant information at this stage, as the Mine Act intends.

Importantly, MSHA recently asked for ideas on modernizing both this process and the rest of its regulations. In particular, MSHA expressed interest in a possible procedure for a streamlined petition process whenever mine operators seek changes that have already been granted multiple times to others. This presents a key opportunity. Since the Part 44 rules are erroneous on their face (for lack of an investigative hearing option), MSHA has reason to modify them. As it does, it can convert the petition for modification process into a valuable tool for MSHA, industry, and mine safety – one that conserves rulemaking resources and keeps regulations in sync with the latest mining technology, trends, and practices.

A workable, new petition process would have the following features:

1. Streamline the petition process, including internal review and investigation, for faster output.
2. Make the investigation process inclusive and interactive, as the statute suggests, including a public hearing provision for “any interested party” to present information.
3. Reduce duplicative petitions by allowing mine operators to apply together when seeking the same modification for the same reasons and circumstances.
4. Allow a mine operator to seek modification of multiple standards at once, especially when justified by the same general rationale or circumstances.
5. Once a petition is granted, allow other mine operators to elect to adopt the same modification when they have similar circumstances (perhaps upon MSHA confirmation that the same circumstances exist).

The result would be a vehicle for MSHA to efficiently consider adaptations to a fast-changing mining world. Its safety mandates could keep pace with evolving technology and tools. In fact, these changes could help MSHA become an incubator of innovation and safety leadership.