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Ms Patricia W. Silvey, Acting Director
Office of Standards, Regulations and Variances
US Department of Labor
Mine Safety & Health Administration
1100 Wilson Blvd., Room 2350
Arlington, VA 22209-3939

Subject: RIN 1219-AB51 Comments to 30 CFR Part 100

Dear Ms Silvey,

Mulzer Crushed Stone, Inc (MCS) appreciates the opportunity to submit comments to the record regarding the Mine Safety and Health Administration's (MSHA) "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed on September 8, 2006.

Mulzer Crushed Stone Inc. is committed to safety and health of its employees. Safety is, and will continue to be, the number one value for our family owned business. The industry recognizes that its employees are its most valuable asset -- an asset that must be protected for the well being of the industry now and in the future.

Adequate time was not provided to industry to properly analyze the rule and be prepared to easily attend and speak at the hearings. The tragedies that happened in the coal mining industry over the past two years will never be forgotten. However the answer is not solutions based on the mighty dollar and the potential hardship of our industry. Any industry will reiterate that throwing money at the problem is never a practical or long term solution and only adds another wedge between MSHA and the mining community.

Response to MSHA's Proposed Rule

The items of the proposed rule changes that are significantly beyond those required by the MINER Act include the following:

- An increase of penalty points in all categories (size of operation, history, negligence and gravity).
- The decrease of the "good faith reduction" from 30%-10%, and the elimination of the addition of 10 points for failure to abate.
- Reduction of mine site history from a 24-month period to a 15-month period.
- Addition of a new history of repeated violations category.
- The minimum penalty for regular assessment of $112, the maximum penalty of $60,000.
- Removal of the single penalty assessment.
- Removal of the excessive history for non- significant and substantial (non S&S) violations.
- Removal of the criteria for when to use special assessments.
- Reduction of time to request a conference, from 10 to 5 days.

We do not want to see all mining companies penalized for the poor business practices of a few. There is no established data to suggest that increased penalties will drive improved safety performance within the overall mining industry. **Penalties do not drive compliance.**

Economic Data Provided to Public

There does not appear to be information available to either analyze, or confirm MSHA's assumptions within the proposed rule. The majority of the provided data is divided between coal, and the metal/non-metal industries. The stone, sand and gravel industry accounts for approximately 92% of the metal/non-metal industries. However, the stone, sand and gravel industry only accounts for 38% of the metal/non-metal industries' revenues. The proposed penalty increases will have a significant impact upon the stone, sand and gravel industries' businesses, based on the fact that there is a larger volume of plants across the country that are subject to mandatory inspections. In addition, the stone, sand and gravel industry does not hold the majority of the revenues that MSHA used to justify the overall metal/non-metal penalty increases. **As stated previously, penalties do not drive compliance.** It is our concern that the money used to pay resulting penalties may divert resources that could otherwise be used to enhance overall safety and health for the miners. MSHA provided no hard data to support their stated position of driving safety improvement by increasing penalties significantly for violations.

Definition of "Small Mine"

MSHA's definition of a small mine is different than the Small Business Administration's definition of small mine, which is defined as "less than 500 employees". In the crushed stone, sand and gravel industry, all mines are small mines, yet MSHA fails to recognize

this fact and arbitrarily established its own definition of small, medium and large mines. The agency needs to establish a definition that causes compliance records of all operators to be reviewed and to bring them into compliance without creating an unfair competitive advantage to any operator or mining sector.

Mine Site versus Controlling Entity

MSHA specifically requested comments whether "in considering the size of the operators, (should) great(er) weight should be placed on the size of the controlling entity." We plead that MSHA continue to look only at the individual mine site and not to place greater weight upon the size of the controlling entity. The stone, sand and gravel industry consists of numerous plants each in its own local market. To look at issues on a company-wide business would create a financial disadvantage against small businesses owned by large companies, and promote an adverse competitive environment in local markets. It is essential to ensure that all operations are treated equally with respect to violations and penalties that directly affect safety.

Single Penalty Assessment Criteria

MCS asks MSHA to retain the single penalty assessment. Operators must eliminate all hazards and legitimate violations, but the enforcement of the regulations by agency personnel is not equal and consistent. Removing the single penalty may result in higher penalties for citations erroneously issued, more contested citations, and the diversion of resources away from improving safety and health in the mine. Removing the single penalty has the potential to create a more adversarial relationship between MSHA and operators without making mines safer and healthier for miners.

It is important to recognize that such citations often occur for highly subjective conditions where one inspector may find a situation in full conformity with MSHA requirements, while another issues a citation because he/she speculates that a minor hazard might exist if the condition continued to exist in the future. Often, these involve housekeeping (e.g., small amounts of material on a walkway that is rarely accessed), dirty toilets, uncovered trash cans, minor holes in guards where no one has access to the area, and equipment defects where the equipment has not been inspected prior to being used for the day and is not in service).

Other categories of non-S&S citations include paperwork (e.g., late filing of a 7000-2 quarterly hours report), failure to note an inspection date on a fully-charged fire extinguisher, or faded labels or other technical violations of MSHA's hazard communication standard (30 CFR Part 47). Often, these are rated as "likelihood of injury" and "low" or "no" negligence.

Under Occupational Safety and Health Administration's (OSHA's) penalty system, similar violations are classified as "other than serious" (sometimes as "de minimis") and it is common that no penalty at all is assessed. It is sensible that, if MSHA must issue a

penalty, that the single penalty assessment be maintained for these low/no hazard technical violations. We do not object to the single penalty being raised to the minimum penalty under the revised Part 100 criteria, or $112 per citation, for those non-S&S citations that are rated as involving no, low or moderate negligence, and MSHA already has authority to specially assess "high" negligence non-S&S citations. Therefore, the proposed deletion of the single penalty is unnecessary.

The five-fold increase in penalty points for those citations classified as "unlikely" to result in injury or illness does not appear to be justified. This effectively eliminates the distinction between S&S and non-S&S citations from a penalty perspective (a non-S&S citation classified as unlikely/fatal would have 30 penalty points for gravity whereas an S&S citation classified as reasonably likely/lost workdays would carry 35 penalty points for gravity). The current penalty points for gravity should be maintained.

We oppose reducing the good faith penalty from 30% to 10%.

Repeat Violation Criteria

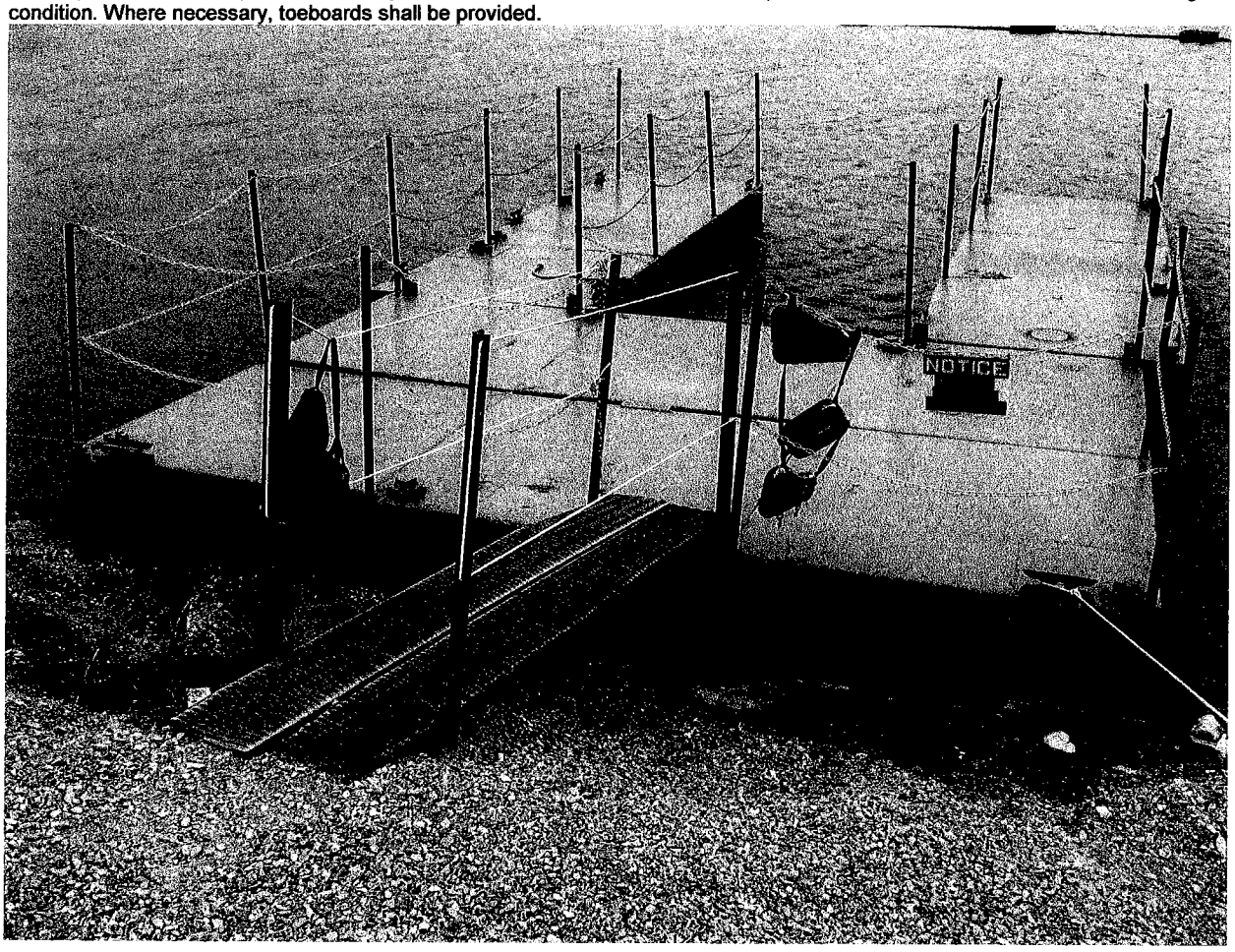
MCS does not identify a need to include the "repeat violation" category in the regular assessment penalty point scheme, and it should be deleted. The "repeat violation" category appears to be redundant with the "history of violations" criteria. Moreover, because many of MSHA's standards are subjectively interpreted, MSHA inspectors can use a single standard to cover a multitude of unrelated conditions (e.g., "safe access" under 30 CFR 56.11001 can relate to everything from a bent ladder step to a cable across a walkway, to having to step over a barrier to access a screen, to a method of accessing a dredge, to having a method of greasing a conveyor that an inspector does not prefer). Therefore, simply having a "history" of repeated citations under 56.11001 does not mean that the exact same condition is reoccurring. MSHA inspectors can use a single standard to cover a multitude of unrelated conditions, thereby creating an artificial history. In addition, MCS and aggregate associations have observed those standards which include training, using equipment tools upon manufacturers intended design, unsafe access, hazard communication, and barricading and posting signs warning against entry have been subjectively interpreted throughout the country.

Another concern occurs when violations are not grouped into a single citation, using a "blanket citation" often exercised by other federal agencies, like OSHA. If an operator missed inspecting its fire extinguishers by a few days and is in technical violation, it will find that it gets a separate citation for each fire extinguisher on the mine site. It would easily be possible to acquire 10 or more citations for this under a single inspection. MSHA's paperwork standards are also easily prone to multiple citations under a single standard (e.g., the HazCom standard, under which a separate citation is issued for each missing MSDS, faded label, or substance that was inadvertently omitted from a chemical inventory list). In recent years, there has been a trend toward scrutinizing 7000-2 quarterly hour reports and, if the inspector disagreed with how hours were computed, he would issue separate citations for each quarter going back three years

(for a total of 12 citations). Such a scenario would, under the proposed criteria, trigger 7 "repeat" points for future inspections. This would ultimately build a history for "de minimus" issues that may not necessarily be hazardous to the miner, not to mention the extremely negative and immeasurable impact it would have upon the public perception of the individual mine site.

Until MSHA can ensure consistency in its enforcement and unless it switches from performance oriented standards to objective criteria, the repeat citation criteria should be rejected.

Let Mulzer Crushed Stone explain using one of our citations as an example toward many of these areas. Citation No. 6171596 which was cited as an S&S citation based on a potential fall. 30 CFR § 56.11002 Handrails and toeboards. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.



An employee wanting not to dirty his shoes places an eight foot piece of catwalk material onto a boat dock from the ground. This allowed the employee to step onto the dock without getting his shoes dirty. An inspector cited MCS for failure to provide handrails on a walkway that was <16 inches off the ground thus citing us for an employee thinking about himself and his new work boots. We then contested the citation only to find that person upheld the citation stating he "must" consider the opinion of the inspector. This mine site consists of four people: a dredge operator, loader operator, scale person, and part time supervisor.

This inconsistency places us at US Department of Labor - MSHA mercy. Where will these types of arguments end after purposed changes are made when repeats, size of mine, etc are considered?

Special Assessment Criteria

The current criteria MSHA intends to use for special assessments are needed and should not be eliminated. Though not intended, removing the eight criteria could potentially expand the use of special assessments, increasing demand on company and MSHA resources. As stated previously, agency personnel can interpret regulations in an inconsistent and subjective manner. Removing standard criteria would decrease the possibility of the special assessment process being objective. Without specific criteria, discretionary special assessments will drive operators to contest more violations, increasing workload for both the operator and MSHA.

Conference Requests

MCS recommends that MSHA be consistent with OSHA, where a 15-day time period to submit additional information or request a safety and health conference is granted. At a minimum, we recommend that MSHA maintain the current 10 day period. MSHA's proposed change would not provide mine operators with sufficient time to evaluate and determine the appropriate course of action to take following issuance of citations by MSHA. MCS has many remote locations that it may take us much as four days for paperwork to reach the proper people to evaluate such citations. Thus it is very possible for a citation not to reach the proper hands in the amount of time to request a safety and health conference. In addition, all operations need time to seek the appropriate guidance before moving forward with a safety and health conference. In any case, clarification must be made as to whether this is working days or calendar days.

Conclusion

Mulzer Crushed Stone safety programs give the employees ownership of our safety program similar to the direction of MSHA's SLAM RISK program. The purposed changes of 30 CFR Part 100 is not a behavioral based modification, but a reaction to chain of unfortunate events. These purposed changes do not allow mine operators, mine employees, and representatives of Secretary to continue to strive for a safe and healthy mine sites as a "team." These changes back more of an "us against them" mentality which is not a healthy relationship.

If Washingtons' purpose of this rule making is not financially driven then why not allow mining companies the opportunity to spend penalties on mine safety improvement efforts rather than shipping monies to Washington. The key to making mining safer is investing in your people and your business, and not simply writing a check.

Thank you for the opportunity to make the concerns of the Mulzer Crushed Stone known to MSHA during this comment period. Safety is a concern to both government and private mining companies. Making proposals that affect all mines without cause does not bridge the relationship between the Mine Safety & Health Administration and the private Mining companies such as Mulzer Crushed Stone.

Sincerely with Honor,

Matthew Bunner
Mulzer Crushed Stone