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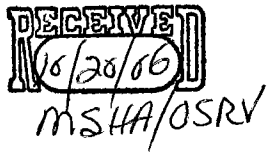
Ms. Patricia W. Silvey, Acting Director
Office of Standards, Regulations and Variances
US Department of Labor
Mine Safety & Health Administration
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939



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

Dear Ms. Silvey:

The Illinois Association of Aggregate Producers (IAAP) appreciates the opportunity to submit written comments regarding the Mine Safety and Health Administration's (MSHA) "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed on September 8, 2006.

In Illinois, aggregate producers are a numerous and very diverse industry. The IAAP's 106 producing members range in size from "mom and pop" operations that manufacture less than 100,000 tons of these products each year to companies that produce well over 20,000,000 tons annually. We operate nearly 400 surface and underground mines and are located in 80 out of 102 Illinois counties. In 2005, these companies produced about 121 million metric tons of crushed stone, sand and gravel. The value of these construction aggregates, when combined with the value of cement manufactured using crushed stone and the value of silica sand, equates to nearly one billion dollars annually.

Like MSHA, the IAAP is committed to safe mines and a healthy workforce. Safety is, and will continue to be, the number one priority of the Illinois aggregates industry. We have not had an aggregate mine fatality in Illinois since March 24, 2003 (nor a coal mine fatality since April 15, 2003) and are working hard to maintain this fine safety record.

The men and women employed by the Illinois aggregates industry are its most valuable asset. **Given this core value, please be advised that our strong safety record is not an accident given our industry's proactive efforts in three areas.**

First, this record is grounded on the Illinois aggregates industry's strong commitment to safety training. Our industry partnered with MSHA to implement Part 46 mine safety training rules and every subsequent federal regulatory initiative – from noise monitoring to hazard communication training to work on the MSHA Guarding Task Force.

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Second, this record is grounded on our industry's creation and support of a comprehensive Association safety awards program. For the 2005 Calendar year, 62 mines or associate member companies were awarded the IAAP's Rock Solid Excellence in Safety award which means they have outstanding safety programs, no reportable accidents and no S/S citations. Many of these awards are multi-year awards – some of our award applicants have gone two or even three years without reportable accidents or S/S citations.

Finally, this record is grounded on our industry's ongoing professional relationship with employees and officials from MSHA and our State grants program. MSHA and State grants people serve on the IAAP Safety Committee, they help conduct Association safety seminars, they operate booths at the IAAP annual convention in order to distribute safety materials and answer questions, they help to implement the Association's safety awards program and then actually present these awards during the IAAP's annual meeting. On May 18, 2006, Steve Richetta, Manager of MSHA's North Central District and Kevin LeGrand, MSHA Peru Field Office Supervisor, presented awards to 115 operations owned by 30 IAAP member companies (with 62 mines achieving the highest award possible).

The mining industry and MSHA have taken a beating in the press since the Sago Mine Disaster, a beating that is unwarranted. The IAAP is justifiably proud of our industry, our accomplishments and our collaborative relationship with MSHA. For that reason, we are deeply concerned that MSHA has proposed a sweeping rewrite of its civil penalty rules without providing ample time for review and comment. The IAAP is equally concerned that MSHA has proposed these rules without first engaging in the collaborative rulemaking process that was so successful in the development of MSHA's Part 46 rules.

The IAAP understands that the Mine Improvement and New Emergency Response (MINER) Act requires MSHA to implement (4) distinct civil penalty changes by December of 2006. However, MSHA's proposed rule goes significantly beyond what the MINER Act and Congress mandates. This proposed rule also contains a sweeping and complex rewrite of MSHA's penalty process yet gives insufficient time for industry to prepare its response. The first of six hearings began on September 26, 2006 with only three speakers present. We believe that the lack of participation at this hearing was not due to lack of interest, but to the abbreviated amount of time provided to prepare. Having presented this background information, the IAAP's comments are summarized below.

First, regarding the four penalty changes mandated by the MINER Act, we submit that the proposed regulation implementing the $5,000 minimum penalty for failing to notify MSHA in 15 minutes about a fatality, serious injury or entrapment should be amended.

Second, we contend that the remainder of the rulemaking not mandated by the MINER Act be withdrawn. We respectfully submit that MSHA sit down with all of the stakeholders in order to determine if the criteria and procedures for the proposed assessment of civil penalties should be amended and then work to come up with a system that is both fair and effective. In the event that such rules are not withdrawn, we have identified some areas that should be addressed.

Amend the Rule Implementing the MINER Act's Notification Requirement

The IAAP has concerns regarding the impact of the regulation implementing the MINER Act's 15 minute notification requirement as set forth below in §100.5(f):

> **(f) The penalty for failure to provide timely notification to the Secretary under section 103(j) of the Mine Act will be not less than $5,000 and not more than $60,000 for the following accidents:**
>
> > **(1) The death of an individual at the mine, or**
> >
> > **(2) An injury or entrapment of an individual at the mine which has a reasonable potential to cause death.**

Although the penalty range in §100.5(f) is mandated by the MINER Act, the IAAP submits that additional language must be inserted in MSHA's rule in order to carry out the intent of Congress without sacrificing the safety of our workforce. The need for this additional regulatory language is grounded upon a simple fact: many aggregates operations have few people on site.

For example, the mine manager or foreman charged with calling MSHA may also be needed to administer first aid to the victim in order to stabilize his/her condition; that same mine manager or foreman may also be needed to contact emergency vehicles and then guide the vehicles to the injured person for evacuation. It makes no sense for this person to spend precious seconds calling MSHA instead of trying to save the life of an injured worker. The IAAP therefore submits the following new §100.5 (g) that tracks Congressional intent without putting the health and safety of our workforce at risk:

> **(g) Timely notification to the Secretary under section 103(j) of the Mine Act will be determined as follows:**
>
> > **(1) Fifteen minutes from the time that the death of an individual at the mine has been confirmed;**
> >
> > **(2) Fifteen minutes from the time that an entrapment of an individual at the mine which has a reasonable potential to cause death has been confirmed; or**
> >
> > **(3) Fifteen minutes from the time that an individual with an injury at the mine which has a reasonable potential to cause death has been located, received first aid, stabilized and evacuated from the mine property.**

Section 100.5(f), as written, hampers quick decision-making during an emergency. Adding the language suggested above ensures that our work force concentrates on life saving when seconds matter and then quickly contacts MSHA after the crisis is passed.

Remand All Elements of the Rulemaking Not Mandated by the MINER Act

The IAAP respectfully requests that the remainder of the rulemaking not mandated by the MINER Act be withdrawn so that MSHA can sit down with all of the stakeholders in order to determine if the criteria and procedures for assessing civil penalties should be amended. The basis for this request is set forth below.

I. Lack of Required Economic Data

MSHA has not taken the time necessary to perform the cost/benefit analysis mandated by Federal law before promulgating these rules. The IAAP has conducted a review of the statistics and tables provided within the proposed rule. Based on this review, we are unable to identify information adequate to confirm MSHA's assumptions within the proposed rule.

The proposal does not quantify the improvement in safety and health it purports to promote, devoting a mere paragraph to "benefits" in the preamble. Unlike other MSHA rules that are specific about the number of injuries or diseases prevented, this proposal never goes that far. In essence, this proposal presents the estimated cost impact but never quantifies the benefits.

In the *Preliminary Regulatory Economic Analysis* for these rules, at page 12, MSHA says as much: "The likely reduction in violations and the benefits resulting from increased compliance has not been scientifically established...Accordingly, MSHA has not provided a quantitative estimate of the reduction in injuries and fatalities due to the proposed rule." Effectively ignoring the benefit component of the cost-benefit equation would seem to violate regulatory requirements overseen by the Office of Management and Budget (OMB) and should be called to OMB's attention. That OMB reviewed the draft proposal before it was released will serve as no deterrent to seeking this review at a later date.

We believe the cost of this proposal has been understated. For example, missing from MSHA's analysis are huge potential costs associated with increased litigation, which is virtually certain to occur not only because penalties are being raised so substantially, but also because the Agency is actually cutting in half the time allowed for operators to request a meeting to negotiate a settlement. MSHA's "Assessments Q & A" published on its website states that 6% of its proposed assessments last year were litigated. This figure could easily double if the new penalty scheme became a reality.

The Agency has also totally ignored the impact this proposal will have on the budgets of safety professionals. How much of the corporate safety budget will have to go toward paying for penalties and litigation, thus shrinking the amount of money left for accident prevention, compliance assistance, safety training resources and equipment?

In short, the current proposal lacks the economic data required to authorize such sweeping changes.

II. Unfair Impact

Many of the proposed changes would penalize the vast majority of the mining industry for the actions of a few bad actors. MSHA has not offered data in support of its notion that increased penalties will drive improved safety performance within the overall mining industry.

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. Given that the stone, sand and gravel industry does not generate the majority of the revenues that MSHA used to justify the overall metal/non-metal penalty increases, these rules will have an unfair impact on the aggregates industry.

III. Unintended Consequences

The IAAP and the industry it represents is concerned that increasing penalties will promote litigation rather than promote safety, thereby moving us away from our current cooperative relationship with MSHA. Money used to pay resulting penalties may divert resources that could otherwise be used to enhance overall safety and health for the miners. MSHA has provided no data to support their stated position of driving safety improvement by increasing penalties significantly for violations.

IV. Faulty Underlying Assumptions

MSHA's revamped penalty proposal is ultimately grounded on a number of false assumptions set forth in this rulemaking:

First, MSHA states at 71 *Fed. Reg.* 53056 that the number of violations of MSHA's standards and regulations has been on the rise since 2003. This increase in violations is offered as a rationale for a new civil penalty process that will result in higher penalties. The underlying assumption, as stated at the bottom of this column, is that the "proposed changes are intended to induce greater mine operator compliance with the Mine Act and MSHA's safety and health standards, thereby improving safety and health for miners."

Yet MSHA's own statistical data clearly shows that the total case incident rate for the aggregates industry declined from 2003-2005. Our mines have become safer during this time period, thereby negating the need for additional penalties. As shown in the enclosed chart summarizing MSHA's own data, the total case incident rate for the aggregates industry has steadily declined since 1989. In essence, MSHA lacks any rational basis in support of the need for additional penalties given that this agency's own statistical data shows that the current violation and penalty system is working to reduce injuries at aggregate mines.

Second, MSHA states, at 71 *Fed. Reg.* 53066, its assumption that "mine operators and independent contractors will change their compliance behavior in response to increased penalties." In reality, most operators and independent contractors have already changed their compliance behavior in response to MSHA's enforcement approach and continually increasing worker's compensation premiums. In essence, most operators and independent contractors are at a plateau that will be hard to improve upon given inconsistencies in regulatory interpretation and enforcement by MSHA inspectors.

Third, MSHA states, at 71 *Fed. Reg.* 53069, in **Section C Benefits** that: "The reduction in the number of violations, particularly S&S violations . . . will reduce the number and severity of injuries and illnesses." The problem with this assumption is that safety professionals generally agree that the biggest share of MSHA violations are for allegedly unsafe conditions while the biggest share of accidents are caused by unsafe behaviors. MSHA has done nothing to address the unsafe behavior of miners.

In summary, the lack of required economic data, the unfair impact on the aggregates industry, the unintended consequences flowing from these rules and the underlying faulty assumptions for this new penalty system supports the IAAP's request that elements of this rulemaking not mandated by the MINER Act be withdrawn. Instead of moving forward on these non-mandated issues, MSHA and its stakeholders should collectively determine if the current violation and civil penalty system should be reformed. In the event that MSHA elects to proceed with the pending rulemaking, the IAAP has identified specific concerns regarding those elements not mandated by the MINER Act.

Specific Concerns Regarding Rulemaking Not Mandated by the MINER Act

I. Retain the Single Penalty Assessment Criteria

IAAP urges MSHA to retain the current single penalty assessment for non-serious violations. Operators must eliminate all hazards and legitimate violations; however, the enforcement of regulations by agency personnel is not equal and consistent. Removing the single penalty assessment 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 into 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 "no likelihood of injury" and "low" or "no" negligence. Despite the low fines associated with the single penalty assessment, MSHA's own data tends to prove that this class of violations has helped to improve safety and health at our mines.

MSHA's rationale for deleting the single penalty provision found at 71 *Fed. Reg.* 53063 states "deleting the single penalty provision will cause mine operators to focus their attention on preventing all hazardous conditions before they occur and promptly correct those violations that do occur." Yet in the preceding paragraph MSHA flatly states that the penalty assessment they want to delete is for **non-S&S violations,** i.e., those that are not reasonably likely to result in reasonably serious injury or illness. In essence, the stated rationale for eliminating the single penalty assessment is contradicted by MSHA's own description of this penalty.

II. Delete the Repeat Violation Criteria

The "repeat violation" category should not be included in the regular assessment penalty point scheme and should therefore be deleted. The "repeat violation" category appears to be redundant with the current "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 could relate to a bent ladder step, a cable across a walkway, having to step over a barrier to access a screen, an allegedly unsafe method of accessing a dredge or using a method of greasing a conveyor an inspector does not prefer). Therefore, simply having a "history" of repeated citations under Section 56.11001 does not mean that the 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, IAAP members have observed standards such as using equipment in a manner that exceeds the manufacturer's intended design, unsafe access, hazard communication, and posting signs warning against entry that have been subjectively interpreted throughout the country. Because a standard sometimes covers so many different areas of a property it is impossible to determine, with precision, the scope of a repeat violation. Until MSHA can ensure consistency in its enforcement by switching from performance-oriented standards to objective criteria, the proposed repeat citation criteria should be rejected.

III. Do Not Reduce the Time for Requesting a Conference

IAAP 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, IAAP recommends 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.

Many stone, sand and gravel mines operate in remote locations. It is very possible that a citation does not reach the proper hands within the timeframe for requesting a safety and health conference. A mine operator could be on vacation during the 5-day period or be otherwise unavailable to respond. In addition, all operators need time to seek the appropriate guidance before moving forward with a safety and health conference. In any case, the rule should be clarified to state whether the days in question are working days or calendar days.

MSHA states, at 71 *Fed. Reg.* 53064, that the reduction of conference time to 5 days "would result in a more effective civil penalty system because penalties would be assessed closer in time to the issuance of the citation." In reality, the reduction to 5 days would have no bearing what so ever on this process. It is normally months before an assessment is received now. If a citation is conferenced, it may take several weeks for the conference then several more weeks for the result and then months before the assessment, if any, is issued. This is a problem with MSHA's system that can't be corrected by reducing the right to conference by 5 days. It will only hinder an operator's right to conference.

Conclusion

The IAAP respectfully requests that MSHA adopt proposed new §100.5(g), as set forth above, in order to ensure that the 15 minute notification rule carries out the intent of Congress without sacrificing the safety of our workforce. The IAAP further requests MSHA withdraw all elements of this rule that are not specifically noted in the MINER Act of 2006 and work collaboratively with all stakeholders in an effort to achieve our goal of zero fatalities. MSHA's prior collaborative effort with the Part 46 mine safety training rule has been a major factor in the reduction of the total case injury rate in our industry. Aggregate producers were able to work with MSHA to develop a training rule that was modern, effective and enjoyed broad support. Finally, in the event that MSHA elects to proceed with this rulemaking, the IAAP request that MSHA respond as outlined in our comments.

Respectfully,

John Henriksen

John Henriksen, Executive Director
Illinois Association of Aggregate Producers

JCH/gls (Enclosure)
Cc: IAAP Board
IAAP Safety Committee

Total Case Incident Rate for Aggregates Industry (1989-2005)