OHIO AGGREGATES & INDUSTRIAL MINERALS ASSOCIATION

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

The following comments are offered on behalf of the Ohio Aggregates & Industrial Minerals Association (OAIMA), concerning the Mine Safety and Health Administration's (MSHA) proposed rule that revises the agency's civil penalty system, as published in the September 8, 2006, Federal Register (71 Fed. Reg.53054).

The OAIMA represents 94 producers of construction aggregate and industrial minerals mined in Ohio. These include limestone; sand and gravel, clay, shale, industrial sands and salt representing over 480 active surface mine sites. OAIMA represents approximately 90% of the 150 million tons of industrial minerals mined each year in Ohio with a value exceeding $1.2 Billion. Our industry employs more than 5,500 personnel in well paying jobs (averaging over $42,000 annual salary) and supports another 40,000 employees such as mechanics, electricians, truck drivers and equipment manufacturers and suppliers. Ohio ranks in the top ten in the production of lime, salt, sand and gravel, clay and limestone.

The OAIMA and the industry in Ohio take safety seriously. Our employees are our number-one assets and in many cases are family members, friends and long-time acquaintances. Indeed, our members are essentially an extension of our families and we take their safety and well being very seriously. We work closely with MSHA, the Ohio Department of Natural Resources Division of Mining and Reclamation, the Ohio Bureau of Workers Compensation and many other safety professional to provide our members with the resources, training and materials they need to promote a safe work environment.

Given the above, the comments presented here are made with the intent of promoting safety, enhancing safe practices and providing the tools and training necessary to prevent accidents.

OAIMA recognizes that many of the proposed revisions are required in order to conform to the statutory changes implemented in Public Law 109-236, the Mine Improvement and New Emergency Response (MINER) Act of 2006 amendments to the Mine Safety and Health Act of 1977 (Mine Act), which was signed into law in June 2006. However, MSHA's proposal goes far beyond what is necessary to meet its obligations under the new law, Section 105 and Section 110 of the Mine Act (as amended by the MINER Act), and the proposed modifications to 30 CFR Part 100 have several significant flaws that must be addressed before the rule is finalized. These are outlined below.

The statutory language requires the following criteria to be considered when assessing civil penalties:
(1) The appropriateness of the penalty to the size of the business of the operator charged;
(2) The operator's history of previous violations;

(3) Whether the operator was negligent;
(4) The gravity of the violation;
(5) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and
(6) The effect of the penalty on the operator's ability to continue in business.

When MSHA was first created under the 1977 Mine Act, the maximum civil penalty was $10,000. It has since been increased several times, to the current maximum penalty of $60,000. When Congress amended the 1977 law this year in the MINER Act, a new maximum penalty for "flagrant" violations was set at $220,000, and certain statutory minimum penalties were designated for Section 104(d) citations/orders as well as for violations of the "immediate reporting" requirement in 30 CFR Part 50.10.

OAIMA recognizes that MSHA has no discretion to deviate from these statutory minimums and must also implement the $220,000 maximum penalty for flagrant offenses for those citations issued after June 16, 2006. Therefore, we limit our comments to those areas where MSHA has gone beyond the directives from Congress in ways that are punitive, violative of due process rights or which will have a counterproductive impact on abatement of alleged violations. Moreover, the changes to the special assessment procedures are arbitrary, capricious and set the stage for abuse of discretion by District Managers and other MSHA personnel.

Single Penalty Assessment (Part 100.4): OAIMA opposes MSHA's proposal to delete entirely the "Single Penalty Assessment" (currently $60) for non-Significant & Substantial (non-S&S) violations. 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 or rags that are on a floor instead of in the trash), 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 pre-shifted yet for the day and is not in service. Often, the mine operator is not on notice of a potential violation because other inspectors did not see a problem with the condition.

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.

Under OSHA's analogous 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. OAIMA believes that raising the single minimum penalty from $60 to $112 under the revised Part 100 criteria, for those non-S&S citations that are rated as involving no, low or moderate negligence serves no discernable purpose other than to increase revenue.

Regular Assessment Criteria (Part 100.3):

OAIMA supports the reduction of the history of violations period from the previous 24-months to the previous 15-months and to clarify that this refers only to those citations/orders that have been finally adjudicated. OAIMA opposes the new "repeat violation" criteria (as discussed in more detail below). The

VPID (Violations Per Inspection Day) criteria achieves the goal of discouraging high rates of citations and should be continued in its present form. We support including a minimum number of citations (10 in the preceding 15 months, under the proposed rule) to trigger "history" points because many small operations may not have sufficient overall inspection days to offset such a relatively low number of citations.

The same criteria should also apply to contractors working at mines (zero points should be assessed up to 10 citations during a 15-month period, rather than capping zero points at 5 citations). We disagree with enhancing history penalty criteria for contractors, as many contractors have a single MSHA Contractor ID number for nationwide operations. If a contractor is working daily at 50-plus mine sites, it is likely to be inspected far more frequently than the average mine operator and can easily get more than 20 or 30 citations in a 15 month period (especially if these are non-S&S, for things like missing paperwork while they are at another company's worksite). This does not reflect a poor safety performance or attitude but simply enhanced inspection oversight and/or the difficulties in dealing with MSHA's many paperwork burdens in a transient work environment. If MSHA is going to "crack down" on contractors in this rule, it perhaps can consider excluding non-S&S citations from the contractor's history of violations so that only those violations involving actual safety hazards are considered.

Moreover, OAIMA recommends that MSHA permit issuance of a new mine/contractor ID number where a mine is purchased by a new, unrelated. This often happens when a large corporation purchases a small independent mine that was poorly run by its previous owners. It is unjust to require the new owner to inherit an adverse history of violations for which it bore no responsibility – especially where there have been significant changes in the internal mine management personnel under the new ownership – and to be forced to pay heightened penalties for the next 15 months based on conditions over which it had no control. The current practice of refusing to issue new ID numbers (which has no statutory basis and conflicts with past practices) is arbitrary and capricious, and must be eliminated.

OAIMA does not oppose increasing the penalty points associated with negligence ratings for citations. It does oppose the five-fold increase in penalty points for those citations classified as "unlikely" to result in injury or illness as 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). Since the gravity findings by an inspector are highly subjective (very few can explain how they determined a distinction between lost workdays and permanently disabling when questioned in depositions or at trial), and since far fewer citations will be conferenced in the future if this proposed rule is adopted (due to the truncated conference period), many non-S&S citations will have to proceed to trial if these heightened penalties are adopted. OAIMA recommends that the current penalty points for gravity be maintained.

OAIMA does not oppose the modification of points for "persons potentially affected" but does encourage MSHA to be realistic about the application of this criterion. Some inspectors routinely log "one miner" for this (which may not be realistic) while others go to the other extreme (counting every employee as potentially affected, even where they never go into the cited area of the mine). Some guidance to the regulated community – and to compliance officers - as to how this will be computed is required.

OAIMA opposes reducing the good faith penalty decrease from 30 percent to 10 percent, as this is a disincentive to prompt abatement and seems contrary to the letter and spirit of the Mine/MINER Acts. OAIMA does support deletion of the 10-penalty point addition for failure to abate since this has always been redundant with the imposition of separate penalties under Section 110(B), as well as the injunctive relief available under Section 104(B) of the Act.

Special Assessment Process (Part 100.5): OAIMA opposes the revision of the special assessment process

because it removes virtually all constraints against use of this potentially punitive power against operators in an arbitrary manner. MSHA should not have complete discretion to specially assess any citations it chooses as this can be used to selectively target operators who are critical of MSHA, or who exercise their due process rights under the law. The existing list of eight categories where special assessment is permitted should be retained, as should public guidance that clarifies how special assessment computations are obtained.

OAIMA recognizes that the new penalty of $220,000 is required under the MINER Act for "flagrant violations" but it is concerned that the definition of "flagrant violation" contained in the proposed rule[1] is overly vague and will be susceptible to capricious and inconsistent enforcement. As noted below, the inclusion of the term "repeated" can lead to subjective results and should be eliminated. The $220,000 penalty should be limited to repeated violations of the same standard that were issued under Section 104(d) of the Act and were characterized as involving "reckless disregard." Moreover, to trigger this maximum special assessment, any previous violations considered must have already been finally adjudicated at the time that the new citation is issued (in other words, those that are still pending in litigation cannot trigger the heightened penalty for a subsequent citation under the same standard).

With regard to the statutory minimum penalty for notification within 15-minutes, in Part 100.5(f), we feel that this provision is counterproductive and inhibits first responders from time-critical stabilization of the victim and/or the situation. At no time, should the fear of a financial penalty come into play when an accident has, or may have occurred. Unlike, underground mining operations, where reaching the site can likely take significant time, surface mines are accessible and stabilization of the situation is the first priority. OAIMA feels that any time wasted making a phone call, looking up the number, even dialing the number is time that can be crucial to the victim. MSHA's own "Stakeholders Best Practices, Tailgate Health Meeting Series II" regarding Cardiac arrest, states that, "a persons chance for survival decreases approximately 10% for each minute without intervention. The first 4-5 minutes offer the greatest opportunity to revive a person." In the event of an accident, seconds count and our priority as an industry and MSHA's priority should be stabilization of the victim and/or the situation. OAIMA believes that language should be added to acknowledge this fact.

Possible language could include: "For the purposes of the preceding sentence, the notification required shall be provide by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury of entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred. (Add the following) In the case where the situation has the potential to cause additional injuries or the victim or victims of an accident require first-aid, the 15 minutes shall begin upon stabilization of the site and/or the victim(s)"

Repeat Violations: There is no need to include a "repeat violation" category in the regular assessment penalty point scheme and it should be deleted. OAA believes that this is redundant with the "history of violations" criteria and considers the same citations twice, in many cases, solely for the purpose of imposing punitive civil penalties. Moreover, because many of MSHA's standards are subjective, rather than objective, 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 like). Therefore, simply having a "history" of repeated citations under 56.11001 does not mean that the same condition is occurring over and over. Similarly, equipment defects cited under 56.14100(a) can range from a missing railing on a haul truck to a broken come-along. Housekeeping is another standard that often is used in unpredictable ways by inspectors.

Another problem is that, unlike OSHA, MSHA does not "group" violations into a single citation. Therefore, 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,

[1] The proposed rules states, relative to 30 CFR 100.5(e): "A 'flagrant' violation is defined as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." Although OAIMA recognizes that this is a statutory definition, it urges clarification from MSHA so provide full notice to mine operators, and also restraint in the utilization of this penalty.

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 was 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.

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. At a minimum, only S&S citations should be included under the "repeat" criterion and the number of inspection days should also be considered (with an exemption for small operations that have relatively few inspection days, as noted above for the VPID criterion).

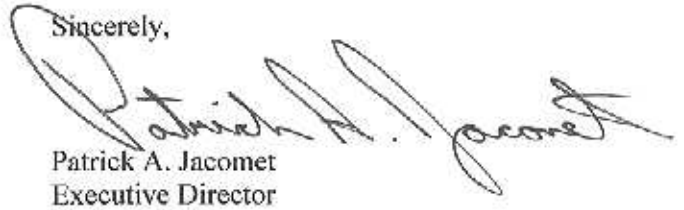
Finally, this criterion should only be prospective in nature and should not consider any citations that were issued prior to the rule's effective date. There is a legal presumption against the retroactivity of laws. In this situation, operators would be penalized for citations that they accepted and paid for economic/administrative convenience before they had actual or constructive notice that they could be used for up to 15 months in the future to trigger heightened penalties for violations of the same standard. No doubt many such cases would have been adjudicated if this information had been available. Because mine operators are precluded from reopening cases that have closed (through payment or settlement) simply because of the proposed rule, the repeat penalty criterion must be limited to prospective application.

Conference Requests: OAIMA is puzzled by the inclusion of a shortened period for requesting an informal conference, as this seems designed to thwart early settlement attempts and to encourage protracted and expensive litigation. MSHA needs to understand that for many larger companies (production operators and contractors), citations may be received at the mine site – which can be a small satellite facility such as a portable plant or local office. It may take a week or more for the citations to be forwarded to the appropriate person within the larger corporate safety department of the company, where citations are processed and reviewed to determine whether to dispute the allegations. In some cases, mail must be forwarded if a mine operates intermittently, seasonally or is a portable operation. In some cases, MSHA inspectors have been known to leave a contractor's citations at the mine office, rather than delivering them to the contractor itself. This can further delay the ability to request a conference within the allotted time.

By reducing the time to request a conference from 10 days to 5 days, this may preclude utilization of the conference process entirely for a large number of citations and operators. Because litigation costs often come out of a safety department's budgets, this approach is also harmful because it will reduce resources that could otherwise be dedicated to training programs, purchase of safety equipment etc. We recommend that the 10-day conference request deadline be maintained.

Thank you for your consideration of OAIMA's perspective on this proposed rule. Please let us know if we can provide any additional information.

Sincerely,



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