P.O. Box 872
Green River, WY 82935

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

RE: Comments on Proposed Rule Criteria and Procedures for Proposed Assessment of Civil Penalties
RIN 1219-AB51

FMC appreciates the opportunity to provide comments on the proposed rule regarding the revisions to the violation penalty assessments regulation, 30 CFR Part 100. FMC, like MSHA, is genuinely concerned about the safety of our miners and has a multi pronged safety program, striving for continuous improvement of the safety and health of our miners. Although the events at Sago and Darby were tragic, these unfortunate situations have been within the coal mining industry and not the Metal/Non-Metal industry. FMC supports MSHA's agenda of protecting miners and searching for ways to improve the industry. However, MSHA should focus their efforts where the problems occur. MSHA's shotgun approach to a broad-brush cure all, lumping all mining operations together, is not the answer. The unfortunate events that occurred at Sago and Darby became a media event with politicians attempting to enact knee jerk regulations that do little to improve the overall safety of miners, much less bring focus to the real issues in the industry.

As a conscientious operator, FMC takes exception to the quote on page 53055, bottom of the third column:

> *The intended purpose of civil penalties under the Mine Act is to "convince operators to comply with the Act's requirements."*

Understanding this quote is nearly 30 years old; MSHA again insinuates dereliction of compliance with MSHA standards on page 53056 bottom of the middle column reading as follows:

> *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.*

FMC has a dedicated safety staff, provides countless hours of training, employs a Behavior Based Safety System, performs >1000 physical conditions audits per year, and has a sound safety partnership with our Union leadership. The key to improved safety

and health of our miners is engaging every employee and visitor in the safety process and holding them accountable for compliance with all safety rules and regulations. Increasing penalties will not accomplish fundamental safety accountability unless directed at the root cause of the violation, which in many cases is beyond the control of the mine operator.

The scope of operator responsibility can be determined by evaluating the overall safety program, training provided to miners, policies and procedures in place, and proactive safety efforts that are in place and documented. Operators should receive credit for implemented safety activities that are designed to be proactive and not reactive. The change in Good Faith efforts percentage, if any change is made, should be increased for those operators who diligently correct violations in a timely manner. The proposal is not appropriate for the efforts made to quickly abate violations.

It is well understood that any violation of a mandatory safety standard is in fact a violation; however, citations that have not shown any correlation with the mechanism of injury has not been considered in this rulemaking process. Operators that spend countless hours performing those tasks that are considered "upstream safety indicators" will be unjustly punished for minor violations of a safety standard. FMC and other large operations will also be unjustly punished due to our size alone. In 2006 year to date, only one fatal accident has occurred at operations with more than 500 employees. Therefore, it begs the question of why are larger operations automatically imposed higher penalties? Is it only because we can afford the penalties, at least when our markets are strong? An axiom in American justice is the punishment should fit the crime; this should not be modified just by the number of people a mine employs. Is a trash can without a lid a bigger violation at a large operation than it is at a small operation? Fatality numbers for large M/NM operations (>500 employees) for previous years break down as follows:

Fatalities from Large Operators (>500 employees) vs. Total Industry

Year	Number of Fatal Accidents for Large Operators	Total for Mining Industry
2005	4 (11% of total)	35
2004	2 (7% of total)	27
2003	1 (3.8% of total)	26
2002	5 (12% of total)	42

As the above illustrates, large M/NM operations account for only an average of 9.2% of the fatal accidents that have occurred in the last 4 years. In 2005 alone, 67% of all M/NM Fatalities occurred at operations with less than 100 employees. However, the proposed rule is designed to punish the large operators who realistically have better safety records and historically have received many 104(a), non Significant and Substantial (Non-S&S) violations for items such as missing the monthly inspection on one fire extinguisher out of 400 that we have on property, or a guard that is in place but the bolt wasn't holding it on the bracket or a trash can without a lid. If inspectors want citations, they can find them in any operation- even Sentinels of Safety winners' operations which we all commend for their efforts. It is with considerable effort and

dedication to safety that FMC's citation history shows very few S&S violations and that we have very, very few high negligence violations. MSHA should closely analyze their accident data and look to drive results where the accidents are occurring. MSHA would note, during such an analysis, that their own accident data indicates that the larger operations are the safer operations.

Questions also arise as to the root cause of fatal accidents. Were the primary causes of those accidents conditions or behaviors? In cases where a miner made a conscious choice to disregard a safety standard after receiving proper training, having access to safety equipment and/or violating a company policy, MSHA cites the operator as being in violation when clearly it was a personal choice that caused the accident. Is expanding MSHA's ability for citing individuals unrealistic? That mechanism is already in place within *The Act.*

MSHA also seeks comments on how to assess repeat violations. The penalty assessments for repeat violations should be considered only for S&S violations. Typically an S&S violation is one that would have a direct impact on safety and therefore, the penalty for repeat violations should only be covered for repeat S&S violations. FMC also questions where the magical number 6 was derived for entering the repeat violation criteria. In a large operation, 6 violations for any one standard in 15 months could very easily happen. Entering into the repeat violation assessment may be warranted after 10 violations of the same standard, but 6 violations of one standard for a large operation seems to be very unrealistic.

MSHA is also requesting comments on shortening the conferencing time period. Shortening the conferencing time period will have no impact on improving safety nor will it provide any advantage for MSHA. The conferencing process is overloaded at the present time and shortening the time period will merely add to this burden. Given a shortened time period, conscientious operators will react in one of two ways. First, if the operator missed the deadline inadvertently, citations that don't go to the conferencing officer will be contested on the penalty assessment and taken to the Review Commission adding to their work load. Secondly, operators who are investigating mitigating circumstance and run out of time will send more citations to conference than is necessary just to make sure all bases are covered. Both of these situations will further bog down the already overloaded system by taking up operator time which could be used for safety enhancements / program implementation / employee contacts etc., taking inspection time from the MSHA inspectors and field office supervisors, increasing Solicitor work load and take potential safety dollars out of the safety budget due to legal fee increases.

The problems with the conferencing process are not necessarily with taking citations through the proper channels, but with the inefficiency of the process in general. FMC has had citations in conference for 6 months at present time and has also requested an expedited conference in July on one citation well within the 10 day time frame and has yet to receive a reply to this request. It is also very difficult to take care of citations at the inspection close-out (negating the need to conference) when all inspectors participating in the inspection are not present at the closeout.

In addition to the conferencing process, we continue to have problems with assessments. For the past two years, penalty assessments have been wrong, payments made to one case number applied to a different case number and in one instance to a completely different Mine ID number (even when the desired case for payment is written on the check stub as FMC continues to do). FMC has also had citations that were still in the conferencing process have penalty assessments completed and processed by the Assessments Office. In this case, we were informed at the citation conference that the assessment process would be put on hold until the conferencing process had been completed. All in all, changing this system now is going to make this process worse with no advantage to either party

In summary, FMC believes there are serious problems with a proposed rule that begins with larger penalties for large operators who consistently contribute greatly to the industry safety record being as low as it has ever been. These very operators have stepped up to the plate, time and time again for partnership projects, safety studies, etc., because we typically have good safety records. Now the agency intends to punish us for nothing more than our size. Also, depending on where the inspector "feels" the negligence should go, could cost an operator thousands of dollars based on a pen stroke. MSHA should also be looking at region specific history in writing citations. FMC has never had a fatality based on a violation for permissible equipment although any time a permissibility violation is written, the likelihood is marked fatal. Shortening the conferencing time will only bog down an already overburdened system and ultimately require more MSHA resources to handle the workload, with no apparent relationship to increased safety. Finally, cited safety violations and mechanisms of injuries have historically shown no correlation, so there is no basis for the Agency's action to increase monetary penalties. There are many other ways to improve the overall industry safety record and we would encourage MSHA to seek the formation of an advisory council in addressing this rule and determining avenues for safety improvements instead of trying to force compliance by increasing penalties.

Thank you for your consideration,

Michael W. Crum, CSP
Safety Team Leader