Comments on Mine Safety and Health Administration
Proposed Rule Revising Part 100 Penalty System
Submitted by United States Steel Corporation – Minnesota Ore Operations
October 23, 2006

The United States Steel Corporation (USS) is pleased to submit the following comments 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). USS operates four taconite ore facilities in Minnesota, including mines, processing plants and maintenance shops. The Minnesota Ore Operations are under MSHA jurisdiction and are intensively inspected by the Duluth Metal/Nonmetal District Office.

Introduction

USS 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. We will not comment on those mandatory changes to Part 100, as MSHA lacks discretion to modify or otherwise delay implementation of the heightened penalties for selected classifications of citations.

However, the proposed rule includes many unwarranted and punitive modifications to existing Part 100 that are not statutorily required and which will only succeed in increasing litigation and adversarial relations between MSHA and its regulated community. It is unfortunate that MSHA has chosen to "fast track" these substantive changes with a short comment period, especially since it delayed posting transcripts from the public hearings until less than a week before the comment deadline. This will necessarily curtail the public's ability to fully address the impact of the proposal, as well as to verify, challenge or supplement the economic data contained in MSHA's grossly incomplete Regulatory Impact Analysis.

The following are USS' comments concerned the most critical sections of the proposed rule:

Single Penalty Assessment

MSHA's proposal to delete entirely the "Single Penalty Assessment" (currently $60) for non-Significant & Substantial (non-S&S) violations has no legitimate basis. In our experience, 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. In the case of taconite mines, many of the citations that USS receives concern housekeeping (e.g., wet floors, some build-up of material on

walkways or loose pellets in working areas) or things like ice on walkways during winter (a fact of nature in Minnesota which arises whenever there is precipitation in many months of the year). A majority of these citations are categorized as non-S&S. It is appropriate for these to be "punished" with a single penalty assessment, rather than using penalty point criteria, as the citations are not indicative of ongoing threats to safety and health. If MSHA, due to political pressure, believes these penalties must be heightened, then a reasonable increase should be considered in the basic penalty, rather than abandoning the single penalty concept entirely. Moreover, where non-S&S citations involve aggravating factors (e.g., high negligence), MSHA already possesses authority to impose special assessments that can raise the civil penalty to $60,000 per citation. No further enforcement powers are needed with respect to these minor transgressions.

Regular Assessment Criteria

USS supports the proposed reduction in the history of violations period from the previous 24-months to the previous 15-months and urges MSHA to clarify that this history criterion is only triggered by citations/orders that have been finally adjudicated. The agency should also define "inspection day" in this rulemaking as a calendar day, rather than having different criteria for metal/nonmetal and for coal. Currently, operators must guess at how MSHA is applying this criteria and we also urge the agency to provide an inspection-day count (as opposed to inspection hours) as part of the agency's on-line data retrieval system.

USS does not see any valid basis (other than trying to justify higher penalties) for raising the penalty points assigned to larger controlling companies, or for certain levels of gravity or negligence. In some cases, the proposed penalty point changes effectively eliminate any distinction between S&S and non-S&S citations from a penalty perspective and could even result in some non-S&S penalties exceeding other S&S citation penalties. The current penalty points for gravity, negligence and operator size should be maintained.

USS opposes the proposed reduction of the good faith penalty modification from 30 percent to 10 percent, as this is at odds with encouraging prompt abatement and operator cooperation with the agency.

Special Assessment Process

USS opposes the deletion of objective criteria from the special assessment process because it removes any constraints against use of this potentially punitive power against operators in an arbitrary manner. MSHA District Managers (or headquarters personnel) ought not to have unbridled discretion to specially assess any citations or orders and USS recommends retention of the existing list categories where special assessment is permitted. Any action to the contrary violates mine operators rights under the Fifth Amendment and the Administrative Procedure Act.

Repeat Violations

There is no need to include a "repeat violation" category in the regular assessment penalty point scheme and it should be deleted. This is redundant with the "history of violations" criteria because it "counts" the same citations multiple times for penalty enhancement purposes.

Moreover, in our operations, MSHA does not merge the same conditions into a single citation (as OSHA does), thereby naturally triggering multiple citations during a single inspection for such things as guards, equipment maintenance, electrical bushings, and housekeeping – all of which are standards subject to selective enforcement and arbitrary interpretation/application by enforcement personnel. A large facility, such as the taconite mines and plants that we operate, can expect to receive a far larger number of citations than would be received by a small sand and gravel pit. Yet the repeat criterion would be triggered by six (6) or more violations of the same standard within a retrospective 15-month period, regardless of its acreage, number of miners, individual pieces of equipment, or the complexity of its processes.

In preparing these comments, USS reviewed the history at one of its mining operations. There, USS received more than 125 housekeeping citations during the previous 15 month period. The majority of these were non-S&S and no injuries occurred related to these conditions. Despite best efforts, the mining/processing of taconite is a wet and dirty process and these conditions will continue to arise although they do not create a hazard to workers. In fact, at the operation referenced above, the mine's non-fatal days lost (NFDL) rate for 2005 was 0.71, compared to the mining industry's average of 1.81. Yet, due to the high number of housekeeping citations, an uninformed observer would consider this to be an unsafe operation. At that worksite, the proposed "repeat" criterion would be triggered under at least six standards – and the vast majority of the triggering citations are non-S&S.

We submit that simply having a "history" of repeated citations under § 56.20003 does not mean that the same condition is occurring over and over, or that the mine has ignored the need to address housekeeping. Viewing another commonly cited standard, § 56.14100(b), equipment defects can range from a broken mirror on a haul truck or ineffective air conditioning to a cracked ladder rung or defective hand tool. Again, multiple citations under this standard do not mean that the same condition continues to occur.

Even situations such as missing paperwork under Part 50, missing inspection dates on fully charged fire extinguishers, or illegible labels on containers (all non-S&S under MSHA's usual enforcement habits) could be subject to the "repeat" criterion and have penalties in the thousands of dollars per citation result if this proposal were to be adopted.

There is no need for inclusion of a new "repeat" criterion in the Part 100 penalty point system. If MSHA is determined to move forward with approach, all non-S&S citations must be excluded from consideration. The "repeat" category appears to mimic MSHA's pattern of violations system under 30 CFR Part 104 (pursuant to Section 104(e) of the

Mine Act). Under Part 104, only S&S citations are used to consider whether a "pattern of violations" exists. It would be highly confusing to the regulated community to have to two separate systems implemented by the same agency when viewing enforcement trends and repeated violations. Therefore, consistency demands that only finally adjudicated S&S citations/orders would be used for computation of repeat penalties.

Finally, any "repeat" criterion must be prospective in nature and cannot consider any citations that were issued or finally adjudicated prior to the final rule's effective date. There is a legal presumption against the retroactivity of laws. As the Supreme Court has held, "[r]etroactivity is not favored in the law," *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), a maxim the Court has repeatedly reaffirmed. *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). As the high court noted in *Lynce v. Mathis*, 519 U.S. 433, 439 (1996), "the presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. . . . In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects." Thus, MSHA cannot legally use a mine operator's previous citations/orders to trigger heightened future penalties under a scheme that did not exist at the time that the operator elected to pay a proposed penalty, entered into a settlement with the agency, or decided to decline to appeal an Administrative Law Judge's ruling.

Many companies, including USS, do not litigate low penalty citations (especially those non-S&S single penalty citations) out of economic convenience even where the company believes that the underlying citation is fatally flawed. Obviously, the situation would have been difference if we had actual or constructive notice that these low-dollar citations could subsequently be used for up to 15 months in the future to trigger heightened penalties for violations of the same standard. No doubt all such cases will be litigated in the future if the rule takes effect in the same form as proposed. This will result in a litigation explosion that MSHA and the Federal Mine Safety and Health Administration will be hard-pressed to deal with. But in the interim, MSHA must make it clear that the citations/order predating a final rule will not be used as a springboard for heightened penalties, and it must limit this and other provisions to prospective application.

Conference Requests

It makes no sense to truncate the period for requesting an informal conference, unless MSHA's goal is to encourage more litigation. The conference is an integral part of MSHA's ACRI process and should be fostered, not thwarted. To the extent that conferences delay assessment of citation penalties, the root cause is a backlog in cases handled by the agency's CLRs – and removing five days from the front end will not solve this except to preclude the conference utilization entirely for many companies due to their internal citation review processes that may take more than five days after initial receipt of a citation or order. If MSHA cannot handle the volume of requests, it should hire more CLRs and train its enforcement personnel to more carefully scrutinize the legitimacy of citations/orders before issuing them.

Economic Impact

MSHA has estimated that penalties would increase across-the-board from $24.8 million to $68.5 million per year (given continuation of current citation rates). MSHA has grossly underestimated the economic impact of this rule because it has failed to consider attorney costs, lost production from involvement in such litigation, and the economic impact on other witnesses (within and outside the agency). MSHA's rush to regulate has obviated its ability to perform a thoughtful and comprehensive regulatory impact analysis and this defect must be cured before proceeding to a final rule.

Conclusion

We hope that MSHA will reconsider the need for this rule, in general, insofar as it goes beyond the prescribed congressional directives. If additional modifications to Part 100 are needed, the agency should consider refraining from moving forward on the non-statutorily required sections of this rule and, instead, forming an advisory committee where the enforcement and penalty scheme can be considered in totality with full input from all affected parties.

Thank you for your consideration of our comments on this proposed rule. Please let us know if we can provide any additional information.