Portland Cement Association

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MSHA/OSRV

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Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
Room 2350
1100 Wilson Boulevard
Arlington, Virginia 22209-3939

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

Dear Sir/Madam:

The Portland Cement Association (PCA) welcomes the opportunity to comment on the proposed rulemaking on civil penalties published in the *Federal Register* on September 8, 2006 (71 Fed. Reg. 53054). The current rulemaking is a statutorily mandated response to the MINER Act recently enacted by Congress, but MSHA should deliberate thoughtfully on the development of criteria and procedures that it sets. Some of the measures contained in the proposal could result in significant administrative burdens for MSHA, mining facilities, and the legal system.

The Portland Cement Association is a trade association representing cement companies in the United States and Canada. PCA's U.S. membership consists of 45 companies operating 106 plants in 35 states and distribution centers in all 50 states servicing nearly every Congressional district. PCA members account for more than 95 percent of cement-making capacity in the United States and 100 percent in Canada. Since portland cement manufacturing facilities are regulated by MSHA, the current rulemaking is applicable to PCA's member companies.

Several provisions in the proposed rulemaking are much more far reaching than what is required by the MINER Act. It is unclear to the PCA why MSHA believes that such drastic increases in the penalty structure are needed across the entire metal/nonmetal mining industry or why the proposed changes would result in improved safety performance in the metal/nonmetal mining sector. On the contrary, the proposed changes, if enacted as written, are more likely to create more work for attorneys than improvement in safety. These changes include:

1. Section 100.3 (b) – significant increase in penalty points for the size of the operation (annual hours worked)
2. Section 100.3 (c) – three substantive changes to this section including the addition of a new history of repeated violations category;

3. Sections 100.3 (d) and (e) -- significant increases in penalty points in all categories (negligence and gravity, i.e. likelihood, severity and number of persons potentially affected);
4. Section 100.3 (f) -- the decrease of the “good faith reduction” from 30% to10%;
5. Section 100.4 -- removal of the single penalty assessment;
6. Section 100.5 (b) -- removal of the criteria for when to use special assessments;
7. Section 100.5 (e) – clarification of the application of “flagrant” violations; and,
8. Section 100.6 (b) -- reduction of time to request a conference from 10 to 5 days.

The PCA’s concerns and positions on these sections are set forth below:

1. Section 100.3 (b) Penalty points for the size of the operation

   The proposed rulemaking doubles the number of penalty points for all operations, regardless of size (the exception being operations with less than 10,000 annual hours). A large operation that has an otherwise strong safety record is unfairly penalized with the most penalty points, up to 20. MSHA seems to be overlooking the fact that serious hazards can exist at a facility regardless of size and that, in fact, smaller operations are less likely to put resources and effort into an effective safety program. The proposed penalty structure further encourages small operations to do less for safety.

   There needs to be parity in assessing penalty points and instead of continually escalating with increasing annual work hours, there needs to be a cap on penalty points after an operation has reached 100,000 annual hours. At a minimum, PCA supports assessing penalty points based on the size of the operation and not on the size of the controlling entity.

2. Section 100.3 (c) Violation history and penalty assessment

   One step of the proposed penalty calculation involves examining the violation history of the cited facility. It is fair and logical that this provision only take into account violations cited after the promulgation of this rulemaking.

   It would be unfair for an operator to be punished more severely for a future citation on the basis of past citations that were not contested but simply accepted out of cost or expediency considerations. The final regulation should make it clear that violation history for the purposes of calculating penalties will be based only on citations received after the effective date of the rulemaking.

For the same reason, only significant and substantial (S&S) penalties should be considered when calculating violation history. In order to focus the efforts of MSHA and operators on protecting miners, operators should be encouraged to cooperate with MSHA regarding minor violations. The proposed system will encourage operators to contest all citations because of the effect that final orders will have on their overall history.

PCA does not see any basis in the record to support the need for repeat violation criteria. Operators are already penalized with higher civil penalties as a result of their violation history. Therefore, this proposal appears to be duplicative. The PCA requests that this provision be eliminated from the proposed rule.

Notwithstanding this objection, PCA is further concerned that the repeat violations penalty (100.3 (c)(2)) will negatively affect many mining operations in unintended ways. Many standards are broad enough to include various types of violations, so what appears to be a repeat citation might actually refer to an entirely different set of facts. These catch-all standards address issues such as “defects affecting safety” and “safe access.” Issuance of a repeat violation should be based on an inspector’s identification of virtually identical facts as well as identical standards.

MSHA has asked for comments on the use of inspection days in calculating penalty points for repeat violations. PCA believes this is appropriate but requests that MSHA clarify the definition of an inspection day. PCA’s position is that an inspection day should be counted as any part of a calendar day. If multiple inspectors are present, then the inspection days for each should be separately counted.

MSHA requests comments on the proposal to create a simple threshold of 10 violations over 15 months to determine whether the facility will receive points for violation history. The Agency acknowledges that this approach will create a bias against large mines, which tend to be subjected to longer, more comprehensive inspections that result in a greater number of citations. This proposed threshold is confusing when read in conjunction with Table III-4. MSHA should reconcile the threshold with the means of calculating penalty points in a way that is more equitable to larger facilities that are typically subject to longer inspections.

3. Sections 100.3 (d) and (e) Penalty point increases for negligence and gravity

As MSHA concedes in its proposed rule, the increase in penalty points, and consequent increase in overall civil penalties, is based on the Agency’s belief that higher penalties will induce greater Mine Act

compliance. MSHA cites the fact that the number of citations issued to mine operators has increased over the last few years. However, nowhere in the proposed rule does MSHA acknowledge that from 2001 to 2005 the American mining community has produced steady decreases in fatalities, injuries and illnesses. MSHA has calculated a 16% decrease in such incidents over this same period. PCA member companies have contributed to this overall improvement. Many of these mining operations have experienced hundreds of days without lost time injuries or illnesses. With this said, however, while producing these exemplary no lost time statistics many of these companies have received record numbers of citations. MSHA has demonstrated no correlation between its uneven enforcement and increased safety.

Within this framework, PCA objects to the proposed penalty point increases for negligence and gravity.

Additionally, the drastic increase in penalty assessments in the "Likelihood of Occurrence" category is completely unwarranted and out of line with other increases in penalty points. The only portion of the scale that has any objective reliability is the "occurred" designation. In real world experience, citations are often marked as "highly likely" even if the operation has never experienced such an event. The escalation of the penalty points in this section is unnecessary and unfair.

4. Section 100.3 (f) Decrease in good faith reduction

MSHA proposes to reduce the good faith abatement reduction from 30 to 10 percent, yet offers no viable justification to support this reduction. This provision is designed to encourage operators to cooperate with MSHA. Slashing this incentive by two thirds will create a chilling effect on cooperation and encourage operators to contest more citations. Again, this will cost MSHA and operator staff time and money that should be devoted to protecting miners' health and safety.

5. Section 100.4 Removal of single penalty assessment

MSHA proposes deleting the existing single penalty assessment provision. PCA strongly opposes this change. Deleting the provision altogether will create a regulatory, administrative, and legal quagmire for MSHA and the operators regulated by MSHA.

There is already a considerable time lapse between the date of a citation and the determination of the level of the applicable penalty. This is likely to be significantly increased after the current rulemaking is promulgated, due to the complexity of the penalty formula. It is likely that a facility will not know the financial level of a penalty for a given citation until after the

deadline for requesting a conference or appeal of that citation has passed. If the operators of a facility know that each citation might result in a significant fine, they will be likely to conference each citation.

In 2005, roughly two thirds of all citations were minor single-penalty violations. Most of these have no direct adverse impact on miner safety. If the single-penalty category is removed, almost all violations will have the potential to be assessed significant penalties and will, therefore, be candidates for conferencing and/or litigation.

Even if the single-penalty provisions are retained, the incidence of conferencing and litigation are almost certain to increase on higher-level citations. Therefore, MSHA staff and mine safety professionals will spend more time administering appeals and less time protecting miners. After this rulemaking, a special category for single-penalty citations will be more essential than ever.

6. Section 100.5 (b) Elimination of special assessment criteria

PCA objects to the proposed elimination of the eight criteria for special assessments. Removing these criteria would expand the use of the special assessment process and result in a far more subjective penalty assessment process. Eliminating the criteria would also remove the legal basis on which operators could challenge the assessment as an abuse of discretion. Despite the extra work imposed on Agency personnel, the current criteria that MSHA uses for special assessments are essential and must be retained.

7. Section 100.5 (e) Clarification of the application of “flagrant” violations

The MINER Act established significantly higher penalties for citations involving flagrant violations. These provisions are spelled out in the regulatory language on page of 53074 of the *Federal Register* notice. MSHA should take this opportunity to more clearly define how the definition of the term flagrant violation will be interpreted by the Agency in their enforcement actions.

As used by MSHA, a flagrant violation is one which involves failure to attempt to “eliminate a known violation” of a standard that caused or could have caused death or serious injury. PCA urges MSHA to use this rulemaking to clarify that the word “known” in this context requires a pre-existing citation of the standard at hand. Since notice is at the root of this definition of flagrant, that notice should be well defined and clear. MSHA inspectors should not have the authority to cite the existence of a violation at a facility as grounds for conferring knowledge of that violation on the operator.

PCA also has concerns with the qualifiers to the term “failure to…eliminate a known violation.” The current definition uses “reckless or repeated failure.” The word “repeated” leaves room for unintended investigator subjectivity. In the worst case, it is conceivable that a citation issued on one day, and not corrected by the next day, could be considered a repeat violation. Flagrant violations should be cited only when a facility demonstrates a willful or reckless refusal to eliminate a violation.

There is also room for interpretation as to what constitutes reasonable efforts to eliminate a violation. Guidance on this phrasing should include reasonable efforts to protect miners from the hazards associated with a known violation. Some violations also present immediately hazardous conditions. In these cases it might be appropriate and reasonable for initial efforts to focus on protecting personnel from the hazard rather than eliminating the violation.

MSHA could sufficiently ensure due process and clarity in cases of alleged flagrant violations by adding three sentences after the definition of flagrant violation that say:

> “For purposes of enforcement of this provision, reckless or repeated violations should be those that demonstrate *willful or reckless* refusal to correct or eliminate the violation. Furthermore, a known violation must be an existing violation for which the operator has documented knowledge and the facility has previously received a citation from MSHA that addressed the same set of facts. Reasonable efforts include any reasonable actions that address the violation or the hazards to miners associated with the violation.”

8. Section 100.6 (b) Reduction of time to request a conference

The proposal suggests reducing the time to request a safety and health conference from the current ten days to five days. This reduction would not allow operators sufficient time to provide mitigating information in the conference request letter, as demanded by MSHA. More than five days is required to gather factual information from site personnel and other sources and conduct the necessary legal research to determine whether conferencing the citation is warranted. Shortening the time frame will have a detrimental effect on the operator's ability to request and prepare for a conference. If MSHA wishes to shorten the time frame for processing citations, the Agency should establish deadlines by which

conferences should take place, rather than shorten the time frame during which to request a conference.

The PCA takes issue with several of the provisions not specifically required by the MINER Act. We believe further review of the merits of these proposed revisions is in order. There is no support for MSHA's position that higher penalties will improve safety.

In summary, the PCA's positions on the provisions are as follows:

1. Cap penalty points after an operation has reached 100,000 annual hours. Eliminate the size of the controlling entity from consideration in assessing penalty points.
2. Use only citations that occur after promulgation of the final rule in determining violation history. Use only S&S violations in determining violation history.
3. Reduce the inflated penalty points proposed for the "Likelihood of Occurrence" section.
4. Retain the 30% good faith reduction.
5. Retain the single penalty assessment.
6. Retain the special assessment criteria.
7. Provide clarifying language for "flagrant" violations.
8. Retain the 10-day informal conference request period.

PCA appreciates the opportunity to comment on the civil penalties rulemaking. Please contact me at tcarter@cement.org or 202-408-9494 if you have any questions or comments.

Sincerely,

Thomas B. Carter
Staff Vice President
Environment, Health and Safety