National Lime Association
LIME
The Versatile Chemical

October 23, 2006

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

(Also submitted electronically to
zzMSHA-Comments@dol.gov)

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

The National Lime Association (NLA) is pleased to present its comments on the Proposed Rule on Criteria and Procedures for Proposed Assessment of Civil Penalties. NLA is the trade association for manufacturers of calcium oxide and calcium hydroxide, collectively referred to as "lime." NLA's members operate both surface and underground mines under the jurisdiction of MSHA.

NLA's members are pledged to safety as a primary value of the lime industry, and NLA's Health and Safety Committee has worked with MSHA staff to improve the overall safety of the lime industry workforce. NLA stands ready to continue to work with MSHA as new rules and legislation are implemented.

NLA recognizes that a number of the proposed changes are mandated by the MINER Act. However, NLA believes that other changes are not mandated and are unnecessary, unfair, and counterproductive.

1. The Single Penalty Assessment Should Not Be Eliminated

NLA strongly believes that the current single penalty assessment option is an effective and appropriate mechanism for encouraging safe practices at mine operations. The single penalty is a means for emphasizing that even at a well-run, safety-conscious operation, there is always room for improvement. A thorough inspector will always be able to find minor housekeeping and recordkeeping violations, even at the best-run facility—especially if it is large—and the single penalty provision is an appropriate response to such violations. For an operation with a robust safety program and a strong safety culture, even a $60 penalty is a powerful motivator.

The current rule limits these assessments to situations in which the "violation is not reasonably likely to result in a reasonably serious injury or illness (non-S&S) and is abated

within the time set by the inspector" and also to facilities without an excessive history. These are just the kinds of facilities that do not need more stringent penalties for motivation.

In addition, the elimination of single penalty assessments will raise the stakes for all violations, and will thus greatly increase that likelihood that a particular violation will be conferenced and contested. This will include numerous circumstances in which the mine operator does not agree that the particular minor situation is a violation, but is willing to abate it and pay $60 rather than expend the cost of a conference or contest. When the penalties are significantly increased, however, and when the consequences of a larger number of even minor violations is increased, operators will be much more likely to conference and contest even minor violations.

The elimination of the single penalty assessment will not result in stronger penalties for operators with poor safety records and practices. Rather, it will unnecessarily penalize the operators with the best safety records, and create a more adversarial relationship between those operators and MSHA inspectors.

2. The "Repeat Violations of the Same Standard" Criterion Should Be Deleted

The proposed rule adds a second criterion to the "history of previous violations" element of the regular assessment procedure. This new criterion adds points for repeated violations of the "same standard." There are several problems with this proposed addition. First, it is unnecessarily duplicative of the existing criterion of total violations. Second, many standards are extremely broad, and different violations within the same standard do not necessarily imply any pattern of behavior. NLA also believes that repeated failure to address the exact same violation can be taken into account in evaluating negligence.

3. "Occurred" Should Not Be An Element of "Likelihood" or "Severity"

In the regular assessment procedure, the proposed rule imposes more points under "likelihood" if an accident has actually occurred, and similarly increases points under severity if specified harm has occurred. However, the fact that an event actually occurred should be irrelevant to an evaluation of whether it was likely to occur. If an accident is highly unlikely to occur, it makes no sense from an ethical or deterrent perspective to punish an operation where the accident occurred more severely than an operation with the same violation but where no accident occurred. Similarly, if an accident caused greater harm than could reasonably be expected, it is unreasonable to punish the operator more severely than if a reasonably expected harm had occurred.

4. MSHA Should Retain The 30% Penalty Reduction For Good Faith Abatement

The preamble to the proposed rule gives no reason for changing the good faith penalty reduction from 30% to 10%, other than a statement that MSHA reviewed civil penalty data for the last several years and believes that a 10% reduction is "more appropriate." NLA does not believe this is an adequate explanation for weakening a provision that encourages operators to promptly abate violations. Although it is true that violations must be abated under the law,

nevertheless Congress believed that this was an important criterion and explicitly directed MSHA to consider the operator's good faith in assessing penalties. NLA believes that a 10% reduction in penalties is too small to reflect Congress' concern, especially when compared to the use of other factors which can multiply a penalty by almost 600%.

5. MSHA Must Consider Whether A Penalty Will Have An Effect On The Operator's Ability To Continue In Business When Assessing Penalties

Section 110(i) of the Mine Act provides that "[i]n assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." This language requires each of these factors to be considered in **assessing** a penalty. The proposed language would consider the factor of the effect on the operator's ability to continue in business only in determining whether an assessed penalty should be **reduced**. This provision is thus contrary to the Act and should be revised to provide for consideration of this factor before assessment of a penalty.

6. Special Assessments Should Be Eliminated

The changes to penalties made by the MINER Act and the changes to the regular assessment procedure make the special assessment procedure unnecessary, and proposed sections 105(a) and (b) should be deleted.

Proposed sections 105 (c) through (f) cover situations in which Congress has determined that more stringent penalties than regular penalties should be imposed, and the regulations should reflect Congress' determination. The proposal does not identify any other situations in which the regular assessment procedure would be inadequate, and indeed, proposes to delete the current list of such situations. NLA believes that all of the situations on the current list can in fact be handled through the regular assessment procedure, especially since the point system has been adjusted to impose higher penalties for many violations.

NLA is particularly concerned by the idea that imposition of special assessments would be entirely within the discretion of MSHA without any structure similar to that of the regular assessment provisions. The current regulations give at least some shape to this discretion by listing the kinds of violations that might lead to special assessments; the proposed rule suggests a completely unfettered discretion. This approach is not fair to the regulated community, and will virtually guarantee that all special assessments will be contested, up to an including judicial review.

7. 15-Minute Notification Needs Clarification

The provisions relating to penalties for violation of the 15-minute notification requirement generally match the requirements of the MINER Act. However, MSHA needs to clarify how this provision interacts with the Emergency Temporary Standard, which requires 15-minute

notification for incidents that are not included in the MINER Act or in proposed section 105(f) (for example, an unplanned roof fall that causes no injury). It is NLA's understanding of the situation that certain violations of the 15-minute notification requirement—those referred to in section 105(f) of the proposed rule—would be subject to penalties between $5,000 and $60,000, whereas violations of the 15-minute notification requirement in the ETS that were not incorporated into the MINER Act would be subject to the regular assessment procedure, with a $112 minimum. MSHA should clarify this point. NLA notes that in both cases, MSHA is required to consider all the factors listed in Section 110(i) of the Mine Act when assessing the penalty amount.

8. The Ten-Day Period To Request A Conference Should Be Retained

The proposal would reduce the time in which a conference may be requested from 10 days to 5 days. NLA opposes this proposed change. Because this short period will make it difficult for operators to have enough time to determine whether it makes sense to conference a particular violation, one of two things will happen: either operators will decide to conference all violations as a matter of course, or the number of contested violations will increase substantially. Indeed, both of these things are likely to occur, with a resulting increase in both conferences and contests. MSHA should encourage, not discourage, conferences of violations where there is a real possibility of compromise.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

/s/

Hunter L. Prillaman
Director, Government Affairs
National Lime Association
200 N. Glebe Road
Arlington, VA 22203
703-908-0748
hprillaman@lime.org