GRANITE CONSTRUCTION COMPANY SINCE 1922

October 23, 2006

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MSHA/OSRV

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

Subject: Comments on the Proposed Amendment of 30 CFR Part 100
RIN 1219-AB51

Dear Ms. Silvey:

Granite Construction is a relatively large, diverse heavy civil construction contractor and construction materials producer. During 2005, we employed approximately 5320 employees, approximately 435 of whom were employed in our surface rock, sand and gravel mining facilities. We have long been committed to providing a safe and healthful place of employment for our employees. That commitment, in part, has led to us being named as one of the 100 best companies to work for by Fortune during each of the last three years.

We would like to offer comments on MSHA's proposal to increase penalties. We understand the congressional mandate, to establish or raise civil penalties for five specific conditions, contained in the MINER Act. Unfortunately, MSHA has chosen to propose amendments to Part 100 that go significantly beyond the changes directed by congress. These additional proposed increases in penalties are unsupported by the record developed in this matter.

Though MSHA states that strengthening the penalty assessment regulations "will be an important tool in the reduction of fatalities" there is nothing in the record that supports the notion that raising penalties on non significant and substantial (non S&S) citations will have any affect on the frequency of fatal accidents or serious injuries. MSHA attempts to support it's assertion that higher penalties will result in fewer citations by pointing to a rise in the number of citations since 2003. MSHA does not state whether there was a change in the number of inspections or inspection days during that same time period. Using the number of non S&S citations assessed without also evaluating the number of inspection days used to identify those alleged violations does not support the assertion that the frequency of citations is increasing. The other fact missing from MSHA's analysis is the lack of correlation between the majority of non S&S violations and mine fatalities or injuries.

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MSHA speculates that these proposed amendments will induce greater compliance by mine operators. In making this assertion MSHA implies that concern over civil penalties is the primary motivator for employers to improve the safety and health of their employees. Nothing could be further from the truth! In fact, for most employers, fear of the government is not what is driving their safety and health programs. A significant increase of the penalties associated with non S&S citations will have the undesired affect of diverting employers' attention from conditions and work practices that cause or contribute to injuries and illnesses towards attempting to prevent the issuance of citations for "violations" that have no relationship to safety.

There is no reason to increase proposed assessments based on the size of the operator's business. Such a proposed increase is counter intuitive. It implies that larger employers are less safe or are not committing enough resources to their safety and health efforts. This is simply not true! Larger employers tend to have much more sophisticated safety systems and be much more successful at preventing serious injuries and fatalities. MSHA should not attempt to punish some employers more, simply because of there size. Penalizing one employer more that another for identical circumstances flies in the face of the idea of equal justice under the law.

MSHA, in the discussion and analysis of the proposal, states that it "believes penalties assessed under the existing regulations are often too low to be an effective deterrent for noncompliance at some of the largest operations." Again, this is a clear misstatement of the available facts. MSHA has available in the existing regulation the ability to propose a special assessment for any violations it believes, because of their nature or seriousness, could not result in "appropriate" penalties under the single penalty or regular assessment provisions.

There is no reason to compound the number of times a citation will be counted or increase the number of penalty points associated with an operators history of violations, especially in light of MSHA's intent to do away with the Single Penalty Assessment provisions of §100.4. The vague nature of MSHA's regulations leads to variable interpretation and application by MSHA's inspectors. What is acceptable and in compliance for one inspector may be characterized as an S&S citation by another. This variability in standard interpretation could lead to repeat citations for conditions that are factually different. The resulting increased penalties for alleged violations that have absolutely nothing to do with safety or health (e.g., a miscalculation of hours on a quarterly report or not notifying a district office of a temporary mine closure) will only increase the administrative burden of MSHA and mine operators.

Increasing the number of penalty points associated with negligence, likelihood and severity will most likely have the unintended consequence of increasing the number of citations that must be litigated. Since the assessments in these three areas are based on the purely subjective evaluation of the inspector and, as mentioned earlier, MSHA's intent to eliminate single penalty assessments it is much more likely that employers will be forced to resort to formal appeals of otherwise de minimis violations before the Review Commission.

The proposed reduction of good faith credit from 30% to 10% for mine operators who diligently work to address and correct the alleged violations identified by the agencies inspectors is counter productive. It assumes that MSHA's inspectors are infallible and that most employers intend not to comply with the regulations. Unfortunately the strict liability nature of the Mine Act does not allow MSHA to take into consideration any mitigating circumstances when an alleged violation of a mandatory regulation is identified. The existing 30% good faith credit helps reduce the number of citations that are formally appealed to the Review Commission. It provides some positive adjustment for those employers that are making efforts to abate the conditions that resulted in citations. In fact, it is the only existing method MSHA currently uses to "reward" employers for their efforts. This part of the proposal reinforces the industry's perception that MSHA does not understand how positive and negative reinforcement work. Rather than proposing a system that rewards desired behavior MSHA, with this proposal, simply increases the size of the stick with which it will beat employers, even those who have done exactly what MSHA wanted, abate the conditions that led to a citation in a timely manner. A significant reduction in assessed penalties for employers who abate the conditions the led to the issuance of citations would reinforce that behavior.

Perhaps the most egregious provision of this proposal is the deletion of the single penalty assessment. Since the vast majority of citations issued by MSHA are for conditions that ARE NOT reasonably likely to result in a reasonably serious injury or illness (non S&S), the assertion that increasing penalties for those conditions will have as MSHA says "a positive impact on miner safety and health" is without merit.

The proposed reduction of time to request a safety and health conference to five days will not as MSHA suggests "result in a more effective civil penalty system." The net result of a 50% reduction in the time available to employers to receive and evaluate citations or orders and then request a conference with a District Manager will result in more employers filing formal notices of contest for citations or the length of time fixed for abatement simply to protect their due process rights. As currently being implemented safety and health conferences are rarely completed before the statutory 30 day limit for filing a notice of contest with the Secretary and the Review Commission. If MSHS is genuinely interested in improving the efficiency and effectiveness of the assessment process it should be working towards more, not fewer, ways to informally settle citations.

MSHA's Preliminary Regulatory Economic Analysis (PREA) woefully underestimates the potential cost impacts of this proposal. As we have pointed out earlier one unintended consequence of this proposal will be a significant increase in the number of citations and proposed civil penalties that will be formally litigated. In the PREA MSHA presumes that eliminating the single penalty assessment, shortening the time allowed for operators to request a conference and generally increasing penalties will have no affect on the rate of litigated cases. This presumption is wrong! By MSHA's own estimate only about 6% of all the proposed assessments between 1996 and 2005 were contested. Thought MSHA does not make this information available we assume that the vast majority of those proposed assessments contested were related to citations

characterize as S&S. These were contested because the employer believed the proposed penalty was too high and that litigation was an economically viable alternative. As currently enforced the penalties assessed for non S&S citations, which do not receive special assessments, are largely accepted without contest, in part, because of the costs associated with litigation greatly exceeds the value of the proposed penalties. Few employers are willing to incur the cost of stopping their mining operations for a day or more to make their employees available to help litigate a citation with a $60.00 proposed penalty, even when they believe the inspector misinterpreted or misapplied the regulation or that the citation was issued in error. This basic fact may be the primary reason only 6% of proposed assessments are contested. Some commenters have already referred to this proposal as the "Mine Lawyers Employment Act" and rightly so. The changes proposed will result in a significant increase on the number of citations and proposed assessments litigated. The increase in costs related to litigation for employers, MSHA and the Review Commission have not been identified, evaluated or addressed in the proposal.

We believe that MSHA should withdraw this proposal and adopt the minimum regulations necessary to meet the congressional mandate of the MINER Act before the December 31, 2006 deadline. If after doing that MSHA continues to believe that other amendments to Part 100 are necessary it should do a much more thorough evaluation of the citation and penalty data available and then share the information with the stake holders, employers and employees. Consultation with these important participants is much more likely to result in a consensus standard that both meets the congressional intent and encourages employers and employees to work together to prevent injuries and illnesses.

Thank you for your kind consideration and evaluation of my comments and recommendations.

Sincerely yours,

GRAINTE CONSTRUCTION COMPANY

William R. E. Jackson, CSP
Director of Safety