Industrial Minerals Association — North America

October 23, 2006

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

Re: RIN 1219-AB51
Criteria and Procedures for Proposed Assessment of Civil Penalties

Dear Sir or Madam:

The Industrial Minerals Association - North America (IMA-NA) is pleased to submit the following comments concerning the proposed rule promulgated by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) to revise its civil penalty system that is codified at 30 CFR Part 100 and to implement statutory changes in certain penalty categories pursuant to the Mine Improvement and New Emergency Response Act (MINER Act), Public Law 109-236 (amending 30 USC 801 et seq.). MSHA's proposed rule was published at 71 *Fed. Reg.* 53054 (September 8, 2006).

IMA-NA is a trade association representing 41 producer member companies who mine minerals through the United States including ball clay, bentonite, borates, calcium carbonate, feldspar, industrial sand, mica, talc, trona (soda ash), and other minerals. In addition, IMA-NA has 58 associate member companies, many of whom provide direct services at mine sites and hold MSHA Contractor Identification Numbers and, therefore, are also subject to MSHA civil penalties. Since its inception in 2002, IMA-NA has worked cooperatively with MSHA and has also had an alliance with the agency to foster better relations between the agency and the regulated community, to identify safety issues and to make strides toward improving the safety performance of industrial minerals producers and their contractors. IMA-NA and MSHA both recognize that the first priority and concern of all in the mining industry must be the health and safety of its most precious resource--the miner.

Scope of Rulemaking

As a general observation, it is unfortunate that MSHA has chosen to embark on this ill-conceived and hastily executed rulemaking initiative rather than working with its stakeholders to determine whether wholesale modifications of the Part 100 penalty structure are warranted. While IMA-NA is cognizant of the fact that Congress mandated certain changes through the MINER Act, and understands that MSHA is bound to implement those changes through rulemaking by the

close of 2006, there is no legitimate justification for the massive overhaul of the system in ways that are not statutorily required nor supported by any extrinsic evidence.

Our specific comments follow, but IMA-NA urges MSHA to take the time to more fully consider the non-statutorily required sections of this rulemaking by severing the provisions of the proposal intended to respond to the new civil penalty provisions specifically mandated by the MINER Act from the rest of the proposal. MSHA should move forward with implementing the MINER Act provisions as required by law. In doing so, the agency should recognize that Congress never intended increased civil penalties against the nonmetal mining industry for non-serious violations of the Mine Act, as MSHA's current proposal contemplates. The MINER Act adopted specific, detailed penalty provisions for the most serious violations and gross misconduct. Consequently, MSHA should limit the focus of this rulemaking and abandon all aspects of this proposal that are not required by the MINER Act.

Alternatively, the balance of the proposal should be rescinded and the Secretary of Labor should request the recommendation of an advisory committee appointed under section 102(c) of the Mine Act. This independent advisory committee should consider MSHA's enforcement history, trends in fatalities and serious injuries, the best means of preventing fatalities and serious injuries, inherent differences between the coal, metal and nonmetal mining sectors, and how the civil penalty system mandated by the Mine Act can best be applied to affect improvements in mine safety and health. This severance will allow additional time for compilation of data currently missing from the agency's Preliminary Regulatory Economic Analysis, for meetings between MSHA and its stakeholders, and for clarification of the agency's intent. Already it is clear from comments submitted that there is a great deal of confusion concerning MSHA's intentions in this rulemaking and their likely consequences.

It would not be particularly difficult for MSHA to limit the scope of this rulemaking to codifying the changes mandated in the MINER Act (e.g., statutory minimum penalties for violations under Section 104(d) of the Act, mandatory minimum penalties for "failure to immediately report" fatal and near-fatal accidents, and creation of a new $220,000 penalty for "flagrant violations"). The remainder of this proposed rule should be rescinded to permit a more thoughtful rulemaking following compilation and analysis of empirical data, evaluation by an independent advisory committee, stakeholder involvement, and consideration of the formal recommendation of the advisory committee by the Secretary of Labor.

The following are specific comments on the proposed rulemaking.

Single Penalty Assessment

It is clear from the testimony given at public hearings that the intent of the agency on this issue is unclear. On one hand, MSHA is stating its intention to eliminate the single penalty assessment for non-Significant and Substantial (non-S&S) citations, and to subject these citations to the regular penalty assessment formula. However, many miners who testified at the Birmingham hearing spoke against this proposal because they inferred that the intention was, in fact, to eliminate all penalties for non-S&S citations. Although this is not apparently the case, the fact

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that the miners could not infer MSHA's purpose from the rule speaks clearly to its inherent flaws and ambiguity.

IMA-NA opposes the proposed changes to the single penalty assessment insofar as it would effectively negate any distinction between S&S and non-S&S citations, making minor paperwork infractions that carry no likelihood of any injuries, and that involve in some cases no or low negligence, subject to penalties that could be 10 times higher or greater depending upon the operator's corporate and individual site size, history of violations, etc. These are the types of citations for which MSHA's sister agency, the Occupational Safety and Health Administration (OSHA), often imposes zero penalty. OSHA also may classify such citations as "other than serious" (OTS) or else as "*de minimis*," which means they are not part of the company's record for purposes of "repeat" violation criteria.

OSHA normally will group multiple violations of a single paperwork standard or other "OTS" violations of a single standard into one citation with either no penalty at all or else a minimal penalty. However, historically, MSHA does not combine such violations but instead issues a separate citation for each infraction. Thus, a Part 50 paperwork audit can result in dozens of such "no likelihood of injury" non-S&S citations for things like erroneous 7000-2 quarterly hour reports or incomplete 7000-1 injury forms, missing fire extinguisher tags, or missing Material Safety Data Sheets even where products are properly labeled with hazard warnings. Thus, the potential for multiple citations with much higher penalties exists under the proposed rule, with no resulting meaningful benefit to improvement of safety and health at mines. To the contrary, money spent on minor infractions may well be taken from a company's safety program budget to pay these penalties, depleting available resources for beneficial safety training programs and other improvements at the mine site.

If the single penalty assessment must be modified (and Congress has not dictated that it should be), IMA-NA would not object to an increase in the single penalty assessment from the current $60 level to $112 per citation, for those non-S&S citations that are rated as involving no, low or moderate negligence. We note that MSHA already reserves authority to specially assess "high" negligence non-S&S citations up to $60,000. Therefore, the proposed deletion of the single penalty is unnecessary.

Regular Assessment Criteria

Other than implementing the mandatory minimum penalties under the MINER Act for certain categories of citations and establishing the maximum $220,000 penalty for "flagrant violations," there is no congressional mandate to alter the regular assessment criteria. Although IMA-NA understands that MSHA has been under pressure from the media and certain quarters to expand its overall penalties, there does not seem to be any logic to the proposed alterations that would arbitrarily penalize those mine sites owned by larger companies, or those in certain commodity sectors.

IMA-NA does believe it is appropriate to reduce the history of violations/violations per inspection day (VPID) period for that criterion from a 24-month "look-back" to a 15-month period. MSHA needs to reaffirm that this look-back refers only to those citations/orders that

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finally have been adjudicated during the period, as is its current practice. The VPID criterion achieves the goal of discouraging high rates of citations and should be continued in its present form. We also support including a minimum number of citations (10 in the preceding 15 months, under the proposed rule) to trigger "history" points because many small operations may not have sufficient overall inspection days to offset such a relatively low number of citations.

MSHA also must clarify how "inspection day" is defined. In the past, variations in its computation made it difficult for any mine operator to determine how many inspection days it has accrued during a period until penalties are assessed. In some cases, MSHA has not counted visits to metal/nonmetal mine sites by inspectors (authorized representatives, or "ARs") if such visitation lasted less than five hours. IMA-NA's position is that whenever an inspector comes to the mine site as an authorized representative of the Secretary, this should count as an "inspection day" regardless of its duration in terms of hours. That way, calendar days can be used by both MSHA and the operator to track inspection days accurately. Of course, if an inspection or investigation involves multiple ARs, then the inspection days for each must be counted separately.

IMA-NA also urges MSHA to apply the same VPID criteria to both production operators and to contractors working at mines (zero points should be assessed up to 10 citations during a 15-month period, rather than capping zero points at five citations). MSHA seems to miss the point that contractors are required by law to have a single MSHA Contractor ID number for nationwide operations. If a contractor is working daily at multiple mine sites across the United States, it is likely to be inspected far more frequently than the average mine operator and can easily get more than 50 citations in a 15-month period (especially if the citations are non-S&S, for things like missing paperwork while working at another company's worksite). This does not reflect a poor safety performance or attitude, but simply enhanced inspection oversight and/or the difficulties in dealing with MSHA's many paperwork burdens in a transient work environment.

At the Arlington, VA, public hearing, MSHA stated that its "policy" is to clear a mine's history of violations if it is purchased by a new entity, although the mine identification number remains the same. However, MSHA has had a poor track record of doing this *sua sponte*, and of communicating to companies that they have the right to request a new number. MSHA's policy also does not seem to be clearly communicated to its field offices. Therefore, if MSHA pursues its VPID criterion, and will also use this for the proposed "repeat violation" category proposed as an addition to the penalty criteria, the agency specifically should state in the rule that any newly purchased mine will start with zero citations currently and for purposes of the "look back" period under this section of the penalty point criteria.

As noted above, MSHA essentially has eliminated the distinction between S&S and non-S&S citations from a penalty perspective (a non-S&S citation classified as unlikely/fatal would have 30 penalty points for gravity, whereas an S&S citation classified as reasonably likely/lost workdays would carry 35 penalty points for gravity). Since the gravity findings by an inspector are highly subjective, and since far fewer citations will be conferenced in the future if this proposed rule is adopted (due to the truncated conference period), many non-S&S citations will have to proceed to trial if these heightened penalties are adopted. The current penalty points for gravity should be maintained.

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Finally, IMA-NA opposes reducing the good faith penalty decrease from 30 percent to 10 percent, as this is a disincentive to prompt abatement and seems contrary to the letter and spirit of the Mine/MINER Acts.

Repeat Violation Criteria

MSHA has demonstrated no rationale to include a "Repeat Violation" criterion in its Part 100 penalty point system, and it should be deleted. The "repeat violation" category is duplicative of the "history of violations" criterion and results in a double-counting of selected citations. Moreover, because of MSHA's subjective standards, MSHA inspectors use a single section number to cover a multitude of unrelated conditions (e.g., the "safe access" standard for metal/nonmetal – 30 CFR §§ 56/57.11001 - can apply to mobile equipment, stationary equipment, water-based operations such as dredges and boats, and even walkways or interiors of trailers; 30 CFR §§ 56/57.14100 refers to equipment defects on such varied items as 150-ton haul trucks and hand-held drills). Therefore, having "Repeat" violations under this or similarly ambiguous standards (which are adjudicated under a "reasonable miner" standard of interpretation) does not infer that a mine operator is having the same condition constantly reoccur. To use a citation history in this manner for penalty purposes creates a highly arbitrary criterion.

MSHA also has proposed using a 15-month look-back period for determining whether the repeated violations warrant imposition of additional penalty points. If MSHA persists in including "Repeat" findings in this rule to enhance regularly assessed penalties, the criterion should have prospective implementation: to wit, only those citations and orders issued after the publication date of the final rule should be eligible for inclusion in this category and, of course, only finally adjudicated citation may be counted toward an operator's "repeat" history.

The United States Supreme Court made it clear as early as 1926 that there is a legal presumption against retroactivity of laws. [1] Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[2] No doubt many mine operators and contractors would have contested and litigated many of the non-S&S citations they received had they been aware that MSHA was contemplating using such minimal infractions as a springboard for much higher penalties in the future. Because MSHA has not yet determined what criterion it will use (e.g., whether non-S&S citations would count toward repeat violation findings) there is still no actual or constructive notice to guide litigation decisions. Therefore, with the effective date of the new rule, all operators should be given a clean slate and their past history should not be utilized for the Repeat criteria.

Finally, if MSHA persists in creation of a "Repeat Violation" category for penalty points, only significant and substantial citations should be included when determining a mine or contractor's history for this subpart.

[1] A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." *United States v. St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926).
[2] *Landgraf v. USI Film Products*, 511 U. S. 244, 280 (1994).

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Special Assessment Process

IMA-NA opposes the revision of the special assessment process because it removes virtually all constraints against use of this potentially punitive power against operators in an arbitrary manner. MSHA should not have unfettered discretion to specially assess any citations it chooses as this can be used to selectively target operators who are critical of MSHA, or who exercise their due process rights under the law. MSHA also has inconsistently explained its intention concerning this proposal. At the Arlington public hearing, MSHA explained that it anticipates reduced use of special assessments under the rule. This is inherently contradictory with other statements by MSHA personnel that the intention of the rule is to raise penalties against mine operators through more stringent penalty actions. MSHA cannot have it both ways. It must clarify the purpose of removing any objective criteria from the special assessment process or else eliminate special assessments entirely.

With regard to the statutory minimum penalty for immediate notification, in Part 100.5(f), only those citations issued for failure to notify of death or an accident with a reasonable likelihood of resulting in death should receive such a penalty. MSHA must make it clear in this rulemaking that other Part 50.10 violations (e.g., failure to report a fire or hoist problem) will not be subject to the $5,000 minimum penalty. IMA-NA renews comments it previously communicated to MSHA on this subject with respect to its proposed rule on Emergency Mine Evacuations. *See* AB47-Comm-15 (May 22, 2006) and AB47-Comm-29 (June 23, 2006).

Conference Procedures

IMA-NA advises MSHA to retain the status quo and provide mine operators and contractors with a 10-day window in which to request an informal conference. The proposed reduction to 5 days will unnecessarily decrease utilization of conference, and will result in an increased need to file formal Notices of Contest with the Federal Mine Safety and Health Review Commission (FMSHRC). Not only does this undercut the purpose of the Alternative Case Resolution Initiative (ACRI), but it will impose economic costs on operators, MSHA, the Department of Labor's Office of the Solicitor, and the FMSHRC. The informal conference is a valuable tool insofar as it provides an opportunity for an operator to present mitigating information that may result in a reduction of gravity or negligence (eliminating many contests) or may result in vacating citations if it turns out that the inspector was mistaken about factual matters or misapplied a standard.

Contrary to MSHA's assertions in its preamble, the 10-day period afforded operators to request a conference at the front end is not the cause of delays in the system. Even requests that currently are made within a five-day period often are met with delays on MSHA's end due to the case load carried by the agency's Conference and Litigation Representatives – a case load that surely will increase in light of the heightened penalties.

A five-day reduction will, in our opinion, have no meaningful impact on the timetable for assessing civil penalties but it will eliminate the ability of most larger companies and contractors to use this tool to resolve disputes, to offer mitigating information and to avoid litigation in the first instance. The proposed five-day conference request period is infeasible

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for all but the smallest of operators to satisfy. Most large operations – as well as those independent contractors who must handle nationwide MSHA citation review from multiple worksites through a central office -- will have to include involvement of regional or corporate safety managers in conference activities and decisions and it may take more than five days for paperwork on citations to be received/reviewed at a central location. Alternatively, larger operators and contracts may elect to conference all citations to preserve that right while they evaluate the factual and legal basis for the citations. The system must be improved, but shortening the request period is not the answer.

IMA-NA believes the solution is to add CLRs so that there will be sufficient district office personnel who can schedule a conference in a timely manner, rather than waiting until after the 30-day Notice of Contest deadline (as often occurs under the present system due to backlog of cases). Moreover, for those conferences conducted early in the 30 window, CLRs must be encouraged to not return their findings to the operator before the 30-day contest deadline expires so that operators will not be forced to file suit in order to preserve their rights (e.g., imminent danger findings must be litigated under a Notice of Contest or else arguments are waived, under prevailing FMSHRC case law).

Finally, MSHA has taken the position that informal conference are at the discretion of the District Manager. This permits abuse of the process by certain MSHA personnel who may have animosity toward selected operators. Because informal conferences are an inherent part of the ACRI process, they should be available upon request by all operators and contractors on a non-discretionary basis.

Costs of the Rule and Preliminary Regulatory Economic Analysis

MSHA has grossly underestimated the economic impact of this rulemaking. Even by MSHA's own estimates, penalties would increase across-the-board from $24.8 million to $68.5 million per year (given continuation of current citation rates). However, elimination of the single penalty assessment, tightening of conference opportunities, and the higher penalties will lead to either more contests or, alternatively, more conference requests, and fewer settlements before trial. More litigation of citations and orders is an inevitable result of the proposed rule. The costs of this litigation, in terms of attorney fees and costs as well as lost production due to mine personnel being involved in different phases of the litigation process (depositions, trials, etc.) must be added into the equation.

MSHA itself also will have its resources adversely impacted because more inspectors, field office and district office personnel will be involved in hearings and this will diminish their availability for mine inspections and compliance assistance.

In its Preliminary Regulatory Economic Analysis (PREA) "MSHA ***projects*** (emphasis added) that higher penalties will induce mine operators to reduce all safety and health violations." PREA at 12. However, MSHA acknowledges: "[t]he likely reduction in violations and the benefits resulting from increased compliance has not been scientifically established to be at any particular level. Accordingly, MSHA has not provided a quantitative estimate of the reduction in injuries and fatalities due to the proposed rule." *Id.*

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MSHA offers no data directly supporting this projection which underlies the proposed rule. Nor does MSHA present an analysis of penalty assessments for S&S versus non-S&S violations, nor a detailed analysis of unwarrantable violations and assessments, nor an analysis of the flagrant violations addressed by the MINER Act, nor an analysis of the late notification minimum penalty proposed by the Act. However, MSHA is in possession of empirical data that could help verify or refute its projection. It has chosen not to develop it before moving forward with its proposal. IMA-NA suggests that this data should be compiled, analyzed and published for public comment as part of this, or any subsequent, rulemaking proposal.

Finally, MSHA's definition of a "small mine" differs from the Small Business Administration's (SBA) definition for a small entity. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees. 13 CFR §121.201. MSHA's should use the accepted SBA definition of a small entity in the mining industry as the basis for its PREA or any other mandated regulatory considerations.

Conclusion

IMA-NA thanks MSHA for its consideration of our members' perspectives on the proposed Part 100 penalty rule and we again urge restraint in moving forward with the non-statutorily required sections of this proposal. It benefits neither stakeholders nor the agency to regulate at haste and repent at leisure.

Respectfully submitted,

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President

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