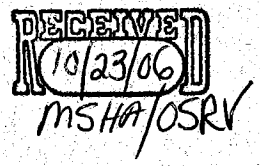
GEORGIA MINING ASSOCIATION

October 16, 2006



Ms. Patricia W. Silvey, Acting Director
Office of Standards, Regulations and Variances
US Department of Labor
Mine Safety & Health Administration
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

Subject: RIN 1219-AB51 Comments to 30 CFR Part 100

VIA E-MAIL: zzMSHA-comments@dol.gov.
VIA Hand Delivery

Dear Ms. Silvey:

The Georgia Mining Association (GMA) and the Georgia Construction Aggregates Association (GCAA) appreciate the opportunity to submit comments to the record regarding the Mine Safety and Health Administration's (MSHA) "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed on September 8, 2006.

GMA is made up of 42 mining companies and 170 associate companies, representing almost 8,000 miners in the state of Georgia. An additional 1,000 to 3,000 people work in our industry as contractors. Our industry produces 17 different industrial minerals mined in over 500 mining quarries, pits or dredging operations throughout the state of Georgia. These mines and manufacturing facilities produce $1.6 billion worth of mineral production each year.

GCAA is made up of 9 crushed stone producers, 100 trucking operations and over 150 associate companies operating in 80 facilities in Georgia. The annual production of these companies is over 86 million tons with an estimated value of over $650 million. Aggregates are used in nearly all residential, commercial and industrial buildings and is a principal component in all highway construction.

GMA and GCAA are committed to the safety of Georgia miners. Safety is, and will continue to be, the number one priority for the mining industry. Our Associations have a joint safety committee of some 55 safety professionals, which meets monthly. Our committee has reviewed comments provided by NSSGA regarding the proposed assessment of civil penalties and we are in total agreement with their position. In

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addition we have included some additional concerns that we have with this proposed rule.

Our committee is concerned that we were not provided with an adequate opportunity to attend the public hearings that were held with regards to proposed rule. With the number of mining facilities in the state of Georgia, it was our hope that a hearing would have been held at a location such as Atlanta. The closest hearing to our state was held in Birmingham, AL.

Response to MSHA's Proposed Rule

We realize that some of the proposed revisions are required by the MINER Act of 2006. The items which will most adversely impact the mining industry include the following:

- A civil penalty of $5,000-$60,000 for failing to report an incident/accident which poses a reasonable risk of death within the first 15 minutes of occurrence. We would like clarification with regards to when this 15 minute rule begins in the event of an incident/accident that poses a reasonable risk of death.
- A minimum penalty for 104 (d)(1) of $2,000.
- A minimum penalty for 104 (d)(2) of $4,000.
- The addition of "flagrant violations", with an assessed civil penalty of not more than $220,000.

Our Associations understand that these specific provisions were mandated by Congress, and will not further comment on these changes within this document.

However, the balance of the rule proposes changes that are significantly beyond those required by the MINER Act. These items include the following:

- An increase of penalty points in all categories (size of operation, history, negligence and gravity).
- The decrease of the "good faith reduction" from 30%-10%, and the elimination of the addition of 10 points for failure to abate.
- Reduction of mine site history from a 24-month period to a 15-month period.
- Addition of a new history of repeated violations category.
- The minimum penalty for regular assessment of $112, the maximum penalty of $60,000.
- Removal of the single penalty assessment.
- Removal of the excessive history for non-substantial and significant (S&S) violations.
- Removal of the criteria for when to use special assessments.
- Reduction of time to request a conference, from 10 to 5 days.

GMA and GCAA feel that some of the rules proposed changes would penalize the vast majority of the industry, for the action of few. There is no established data to suggest that increased penalties will drive improved safety performance within the overall mining industry. According to our statistics, the number of citations in Georgia have increased

over the last two years, however our incident frequency rate remains the same. Regardless of the number of citations that have been written, Georgia has always maintained one of the best safety records in the nation because of our commitment to employee safety. Our concerns with MSHA's proposed rule, as well as answers to MSHA's inquiries, are outlined below.

Economic Data Provided to Public

GMA and GCAA reviewed the provided statistics and tables within the proposed rule. There does not appear to be information available to either analyze, or confirm MSHA's assumptions within the proposed rule. The majority of the provided data is divided between coal, and the metal/non-metal industries. The proposed penalty increases will have a significant impact upon the stone, sand and industrial mineral industries' businesses, based on the fact that there is a larger volume of plants that are subject to mandatory inspections. As stated previously, **penalties do not drive compliance; we believe that it is counterproductive.** It is our concern that the money used to pay resulting penalties may divert resources that could otherwise be used to enhance overall safety and health for the miners. MSHA provided no hard data to support their stated position of driving safety improvement by increasing penalties significantly for violations. Our request that MSHA provide the public with the sources of data that was used to conduct their varying analyses.

Definition of "Small Mine"

MSHA's definition of a small mine is different than the Small Business Administration's definition of small mine, which is defined as "less than 500 employees". In the crushed stone, sand and gravel industry, all mines are small mines, yet MSHA fails to recognize this fact and arbitrarily established its own definition of small, medium and large mines. Furthermore, many industrial mineral operations would also fall under the definition of a "small mine". The agency needs to establish a definition that causes compliance records of all operators to be reviewed and to bring them into compliance without creating an unfair competitive advantage to any operator or mining sector.

Mine Site versus Controlling Entity

MSHA specifically requested comments whether "in considering the size of the operators, (should) great(er) weight should be placed on the size of the controlling entity." We agree with NSSGA's recommendation that MSHA continue to look only at the individual mine site and not to place greater weight upon the size of the controlling entity. The stone, sand and gravel industry consists of numerous plants each in its own local market. To look at issues on a company-wide business would create a financial disadvantage against small businesses owned by large companies, and promote an adverse competitive environment in local markets. It is essential to ensure that all operations are treated equally with respect to violations and penalties that directly affect safety.

Single Penalty Assessment Criteria

We urge MSHA to retain the single penalty assessment. Operators must eliminate all hazards and legitimate violations, but the enforcement of the regulations by agency personnel is not equal and consistent. Removing the single penalty may result in higher penalties for citations erroneously issued, more contested citations, and the diversion of resources away from improving safety and health in the mine. Removing the single penalty has the potential to create a more adversarial relationship between MSHA and operators without making mines safer and healthier for miners.

It is important to recognize that 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. Often, these involve housekeeping (e.g., small amounts of material on a walkway that is rarely accessed, uncovered trash cans, minor holes in guards where no one has access to the area, and equipment defects where the equipment has not been inspected prior to being used for the day and is not in service).

Other categories of non-S&S citations include paperwork (e.g., late filing of a 7000-2 quarterly hours report), failure to note an inspection date on a fully-charged fire extinguisher, or faded labels or other technical violations of MSHA's hazard communication standard (30 CFR Part 47). Often, these are rated as "no likelihood of injury" and "low" or "no" negligence.

Under Occupational Safety and Health Administration's (OSHA's) analogous penalty system, similar violations are classified as "other than serious" (sometimes as "de minimis") and it is common that no penalty at all is assessed. It is sensible that, if MSHA must issue a penalty that the single penalty assessment is maintained for these low/no hazard technical violations. We do not object to the single penalty being raised to the minimum penalty under the revised Part 100 criteria, or $112 per citation, for those non-S&S citations that are rated as involving no, low or moderate negligence, and MSHA already has authority to specially assess "high" negligence non-S&S citations. Therefore, the proposed deletion of the single penalty is unnecessary.

Regular Assessment Criteria

Perspective 1: GMA and GCAA support the VPID criteria, due to the fact that it discourages high rates of citations. In addition, NSSGA supports establishing minimum number of citations (10 in the preceding 15 months, under the proposed rule) which trigger history points, because many small or intermittent operations may not have sufficient overall inspection days to offset such a relatively low number of citations. In addition, we support the same criteria applying to contractors working at mines. Many small businesses hire out contractors for their business needs. Penalizing contractors may deter their business, and bring unnecessary hardship upon smaller operations.

Perspective 2: [GMA and GCAA have several concerns with the proposed regular assessment criteria. The Violation Per Inspection Day (VPID) criterion does not recognize the difference between surface mines, underground mines, and intermittent mines. These mines have varying amounts of inspections, which may impact their VPID. For example, an intermittent mine may be inspected only once per year during a 10 hour inspection. If the mine obtains ten violations, that would amount to a VPID of 2. According to the proposed rule, "MSHA believes that operators of mines with a VPID in the mid and upper levels show the least concern for compliance with the Mine Act and MSHA safety and health standards and regulations." However, if this same mine would have an additional inspection within the calendar year; it may reduce its VPID.]

The five-fold increase in penalty points for those citations classified as "unlikely" to result in injury or illness does not appear to be justified. This effectively eliminates 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). The current penalty points for gravity should be maintained.

GMA and GCAA oppose reducing the good faith penalty from 30% to 10%. GMA and GCAA support the removal of the ten-point penalty for failure to abate. Reducing the percentage may be a disincentive for operators to abate in a timely fashion.

Repeat Violation Criteria

GMA and GCAA do not identify a need to include the "repeat violation" category in the regular assessment penalty point scheme, and it should be deleted. The "repeat violation" category appears to be redundant with the "history of violations" criteria. Moreover, because many of MSHA's standards are subjectively interpreted, MSHA inspectors can use a single standard to cover a multitude of unrelated conditions (e.g., "safety defects" under 30 CFR 56.14100 can relate to everything from a broken taillight, a cracked mirror, or a defective windshield wiper. This standard is a broad standard so a true history with this standard may not be the same specific violation.). Therefore, a "history" of repeated citations under 56.14100 does not mean that the exact same condition is reoccurring. MSHA inspectors can use a single standard to cover a multitude of unrelated conditions, thereby creating an unfair history.

Another concern occurs when violations are not grouped into a single citation, using a "blanket citation" often exercised by other federal agencies, like OSHA. If an operator missed inspecting its fire extinguishers by a few days and is in technical violation, it will find that it gets a separate citation for each fire extinguisher on the mine site. It would easily be possible to acquire 10 or more citations for this under a single inspection. MSHA's paperwork standards are also easily prone to multiple citations under a single standard (e.g., the HazCom standard, under which a separate citation is issued for each missing MSDS, faded label, or substance that was inadvertently omitted from a chemical inventory list). In recent years, there has been a trend toward scrutinizing 7000-2 quarterly hour reports and, if the inspector disagreed with how hours were

computed, he would issue separate citations for each quarter going back three years (for a total of 12 citations). Such a scenario would, under the proposed criteria, trigger 7 "repeat" points for future inspections. This would ultimately build a history for "de minimus" issues that may not necessarily be hazardous to the miner, not to mention the extremely negative and immeasurable impact it would have upon the public perception of the individual mine site.

Since the Sago mine incident, our members have experienced an increase in the negligence level from being mostly low to moderate to moderate to high without any apparent justification. This recent change in negligence level will negatively impact our repeat violation criteria. Until MSHA can ensure consistency in its enforcement and unless it switches from performance oriented standards to objective criteria, the repeat citation criteria should be rejected. At a minimum, only S&S citations should be included under the "repeat" criterion and the number of inspection days should also be considered (with an exemption for small operations that have relatively few inspection days, as noted above for the VPID criterion).

Special Assessment Criteria

The current criteria MSHA intends to use for special assessments are needed and should not be eliminated. Though not intended, removing the eight criteria could potentially expand the use of special assessments, increasing demand on company and MSHA resources. As stated previously, agency personnel can interpret regulations in an inconsistent and subjective manner. Removing standard criteria would decrease the possibility of the special assessment process being objective. Without specific criteria, discretionary special assessments will drive operators to contest more violations, increasing workload for both the operator and MSHA.

Conference Requests

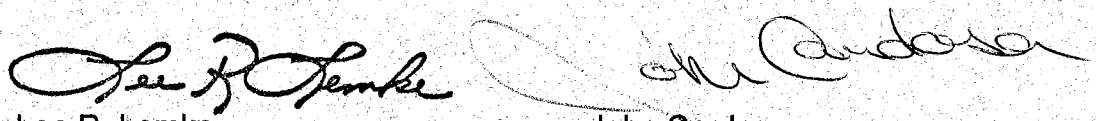
GMA and GCAA recommend that MSHA be consistent with OSHA, where a 15-day time period to submit additional information or request a safety and health conference is granted. At a minimum, we recommend that MSHA maintain the current 10–day period. MSHA's proposed change would not provide mine operators with sufficient time to evaluate and determine the appropriate course of action to take following issuance of citations by MSHA. We would also like to request that MSHA make the time period begin at the conference close out date instead of the date of the citation. Our reasoning for this suggestion is that recently some of our members have received citations or a change in a citation after the inspection close out via mail (for example, one of our members had an inspection where no citation was written at the time, the inspection was closed and 3 ½ weeks later they received a citation in the mail, which was past the existing 10 day time period to schedule a conference and thus leaving the operator with no other recourse than legal action). The stone, sand and gravel industry is somewhat unique due to the fact that many of our members have remote locations. It is very possible for a citation not to reach the proper hands in the amount of time to request a safety and health conference. In addition, all operations need time to seek the

appropriate guidance before moving forward with a safety and health conference. In any case, clarification must be made as to whether this is working days or calendar days.

Conclusion

Thank you for the opportunity to make the concerns of our Associations known to MSHA during this comment period. Our goal is very simple in our industry, we want daily to have every employee go home in the same physical condition that they experienced when they arrived at the mine site.

Sincerely,



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Cc: Ed Egee, Office of Senator Johnny Isakson