



Essroc
Italcementi Group

3251 Bath Pike
Nazareth, PA 18064

VIA EMAIL 11/9/2006

The Honorable Richard Stickler,
Assistant Secretary of Labor; and
Ms. Patricia W. Silvey, Office of Standards
United States Department of Labor
Mine Safety & Health Administration
1100 Wilson Blvd., Room 2350
Arlington, Virginia 2209-3939

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

Dear Mr. Secretary and Director Silvey:

Essroc Cement Corp. welcomes the opportunity to provide comments on the proposed 30 CFR Part 100 – Criteria and Procedures for Proposed Assessment of Civil Penalties.

We want to focus our comments on the proposed 30 CFR 100.5(e) and, by association, address the appropriateness of the Procedures for Evaluating Flagrant Violations issued on 10/26/2006 (PIL). The proposed part 100.5(e) states:

Violations that are deemed to be flagrant under section 110(a)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For the purpose of this section, a flagrant violation means “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

With the promulgation of this regulation and the issuance of the PIL, MSHA has created a new class of violation that is beyond the scope of the penalty provisions that Congress mandated in the “MINER Act”. A review of the text of the Mine Safety & Health Act of 1977 as amended by the “MINER Act” indicates the intent of congress to establish minimum penalties for violations caused by unwarrantable failures under section 104(d); to raise the ceiling level of penalties for willful or knowing violations of mandatory standards; and to establish a high level penalty for failures to abate citations related to hazards that did, or could reasonably be expected to, cause death or serious bodily injury.

The amended portion of the 1977 Act related to Penalties reads: (changes underlined)

SEC. 110.(a) (1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 (now \$60,000) for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under paragraph (1) or section 105(c), shall, upon conviction, be punished by a fine of not more than \$250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than \$500,000, or by imprisonment for not more than five years, or both.

(3) (A) The minimum penalty for any citation or order issued under section 104(d)(1) shall be \$2,000.

(B) The minimum penalty for any order issued under section 104(d)(2) shall be \$4,000.

(4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 106, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.

(b) Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$1,000 (now \$6,500) for each day during which such failure or violation continues. Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term 'flagrant' with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

The intent of Congress was to provide for very significant penalties for willful violations of mandatory standards and similarly significant penalties for failures to correct violations related to hazards with grave or potentially grave consequences. It is not reasonable to act on the premise that Congress wanted to give MSHA two avenues to the same end as the proposed regulation and PIL stipulate. In the revised section 110(b) "flagrant" refers to failures to abate - not the evaluation of a violation when a citation is issued. The process for the initial evaluation of a violation and the assessment of penalties is defined otherwise by the proposed regulation and amended Mine Act.

With due consideration of Section 8(a)(2) of the MINER Act within the intended context of the 1977 Mine Safety & Health Act, the proposed penalty regulations should be corrected and the PIL of 10/26/06 should be withdrawn. Part 100.5(c) should be adjusted to provide for the definition and penalties associated with "flagrant" failures to correct cited violations and Part 100.5(e) should be deleted.

Respectfully

Bruce B. Springer,
Director of Safety

CC: Gordon Andrews, V.P. General Counsel