I would like to submit the following comments on the Mine Safety and Health Administration's ("MSHA") Proposed Rule to amend the Criteria and Procedures for Assessment of Civil Penalties ("Civil Penalty"), **RIN 1219-AB72**.

I am the safety manager for the Lehigh SW Cement Company, in Tehachapi, California. These views and opinions are mine, and while based on my experience as an employee of Lehigh, in no way necessarily reflect the Corporate opinion of my company, although we share the same goals to protect miners in the workplace and assist them in fostering safety cultures and safe workplaces.

I believe the effects of the rule as proposed would be detrimental to mine operators, their right to contest alleged violations and have penalties impartially adjudicated by the Administrative Law Judges (ALJs). I believe it will actually increase litigation before the Federal Mine Safety and Health Review Commission (FMSHRC). Specifically, I believe the proposed modifications to both negligence and gravity classifications, the increased weight of violation history (including VPID and RPID), the proposed 50 percent increase in minimum penalties for unwarrantable failure violations under Sedtion 104(d) of the Mine Act, MSHA's additional 20% "good faith" reduction for not contesting the violation or penalty, and MSHA's attempt to govern and regulate the impartial third party decision-maker, the Federal Mine Safety and Health Review Commission will cause nothing but troubles for the system.

This proposed regulation will increase civil penalties virtually at our operations, and other surface mining operations, of that there is no doubt. MSHA's own data demonstrates that, by estimating that while the overall penalty assessments will remain flat (a prediction I DO NOT believe will be true, by the way), penalties in the coal sector and in small mines will decrease. It doesn't take a genius to figure out that means that penalties in the remaining sections MUST increase, and my plant is in that remaining section.

MSHA claims that this change will reduce litigation and contestments, but that "Pollyanna" view ignores that many contests are based on feasibility issues, errors of law in applying standards in erroneous manners, or violation of the mine operator's rights to fair notice and due process. In such cases, offering a 20 percent quick settlement with full admission of liability will not be a serious option for the operator. Money is not the only factor motivating litigation.

I believe this proposal would not decrease confusion, but cause MORE. There are many new, unanswered questions created by this proposed Civil Penalty rule:

- What affect will the new format of citation documentation have on the rate of Significant and Substantial (S&S) issuances;

- How will the new, and limited, negligence designations affect the issuance of 104(d) citations and orders, and the categorization of flagrant violations;

- How will the elimination of the "highly likely" gravity classification impact the criteria for designating a violation as an "imminent danger" under Section 107(a) of the Mine Act;
- How will MSHA's existing informal, pre-assessment, conferences be affected by the 20% "goof faith" penalty reduction for not contesting the "assessment or violation;" and
- Will requesting the informal, pre-assessment, conference remove an operator from eligibility for the proposed additional 20% "good faith" penalty reduction?

I strongly oppose the realignment of the negligence designation from five (5) categories to three (3). By removing the existing negligence designations of "Low Negligence" and "High Negligence," MSHA is proposing that mitigation is no longer a defense or taken into consideration during penalty assessment, or even possibly in litigation and settlement rationale. Currently, MSHA's citations allow for inspectors to determine operator negligence based on the amount of mitigating circumstances surrounding each issuance. Adopting the proposed Civil Penalty rule's new negligence designation would not only place a greater emphasis on negligence when determining the penalty assessment, but it would also disregard mitigation and group a wide range of conditions under the umbrella of "Negligent."

MSHA's intent to ignore relevant mitigating facts when determining penalty assessments and negligence will lead to steep increases in penalties for mine operators and difficulty settling formal and informal contests of citations after issuance. Given the proposed rule in its current state, MSHA would no longer accept mitigation provided by operators as justification for penalty reductions, and negligence modifications to citation documentation would be largely unavailable. This is unacceptable and would adversely affect all members of the mining industry.

I feel that the realignment of the likelihood of injury designations proposed in the Civil Penalty rule is a bad idea. As with the proposed modifications to the negligence category, MSHA proposal to reduce the existing likelihood of injury designations from five (5) options to three (3) is a poor idea. By removing the "No Likelihood" and "Highly Likely" categories, MSHA is once again proposing changes that would adversely affect operators monetarily, with no commensurate positive impact on miner safety and health.

The new proposal also infers that section 107(a) imminent danger orders could be redefined as only requiring something to be "reasonably likely" to occur. Many citations are written as reasonably likely, but only a very small percentage would be considered an imminent danger. MSHA needs to clarify its position on this issue, and also provide data on what percentage of S&S citations now issued as reasonably likely would be reclassified as an imminent danger under the new rules. This is highly important due to Section 107(a) orders being classified as "elevated actions" for pattern of violation purposes, and are also reportable to the SEC by publicly traded companies.

By removing the "Highly Likely" category, one could fear that MSHA will issue §107(a) Imminent Danger Orders in conjunction with a hazard that inspectors may feel is "Reasonably Likely" to occur. This would contradict existing Federal Mine Safety and Health Review Commission case law and the Mine Act which defines Imminent Dangers Orders as requiring

more serious circumstances than a Significant and Substantial violation. As proposed, the §107(a) issuance and underlying §104 issuance may mirror one another, thereby blurring that delineation, thereby exposing operators to more liberal, and unjustified, use of Imminent Danger Orders.

It is well establish that Significant and Substantial citations carry greater effects in a mine's history, and can carry greater penalties. Additional Significant and Substantial issuances must be written at with the likelihood of injury at "Reasonably Likely" or greater. This proposed change will drastically increase the number of Significant and Substantial issuances, which would adversely affect all operators, through penalties for every inspection and for years to come (because of the cyclic nature of the History and VPID system).

Moreover, by blurring the delineation between Significant and Substantial and §107(a) issuances, including existing case law on what constitutes and Significant and Substantial violation, years of controlling case law would need to be reevaluated and re-litigated. The proposed changes would alter the meaning of existing case law and require clarification from the courts. S&S is already nearly impossible for the average inspector OR miner to correctly define, this proposal would simply give MSHA the ability to make each and every violation of the standard an S&S. There will be no more minor citations. Every citation will be S&S, and will carry penalties of $10,000 or more.

The proposed Civil Penalty rule's increased emphasis on history points during penalty assessment is tremendously flawed as well. Under the proposed rule the overall weight of the history of previous violations for a mine will increase in relation to each penalty assessment. MSHA claims this will greatly benefit small mine operators and it may. It will, however, be guaranteed to adversely affect medium to large mine operators and result in significant increases in penalties per issuance. One estimation, done for my company, predicts that a single non-S&S citation for which I would currently pay $800 will become an S&S citation, with a penalty of $30,000 under the new system. Not because the situation has changed, but because of this rule change.

With regard to modification in the determination of history points in the proposed Civil Penalty rule, MSHA suggests that mines with less than 10 inspection days in the previous 15 months will not receive any points under the VPID category. This will benefit small mines, but would not benefit medium to large mining operators, especially underground mines subject to at least four (4) inspections per year. Also, the proposed rule intends to cut in half the amount of violations required to receive the maximum amount of RPID points. Again, this will carry severe consequences for medium to large operators, and result in unjustifiably large penalties per issuance. Every single inspection of my operation requires 8 to 10 inspection days, simply due to size of the operation, and thus, we will always be penalized by a high VPID.

MSHA's proposal to offer an additional 20% "good faith" reduction in penalties to operators who forego contesting the violation or penalty is nothing more than a blatant attempt to lessen operator contests and limit operator exercise of the right to contest, and lower the data that implies MSHA inspectors may be writing poor citations. It is very similar to the county sheriff's

trick of pulling over cars, and citing seven things from taillights to window tinting, then offering "to let the whole thing go" if they'll just pay for the taillight. It's extortion.

The proposed Civil Penalty rule states that the additional 20% reduction would be incentive for operators to promptly abate and pay alleged violations, however abatement is already required when an alleged violation is issued and payment is due when the order becomes final regardless of the additional 20% reduction. This is just a means to discourage formal and informal contests of penalties and violations. Furthermore, MSHA fails to acknowledge what affect this would have on operators during the informal, pre-assessment, conferences or how the operators decision not to accept the additional 20% and exercise the right to formally contest the issuance would be affected.

We should all oppose and be deeply troubled by the proposed Civil Penalty rule's attempt to govern the Federal Mine Safety and Health Review Commission. The Federal Mine Safety and Health Review Commission was created under the Mine Act as an independent agency from the Department of Labor, and outside the governance of the Secretary of Labor specifically to remain an unbiased third-party decision maker for disputes between operators and MSHA.

MSHA's attempt to restrict the authority of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judges, and bind them to the penalty assessments determined by MSHA underscores the entire purpose of the independent agency. If MSHA is permitted to govern this third-party decision maker, operators are effectively without unbiased legal recourse until appeal to the United States Federal Courts of Appeal, and it is not clear whether the amount of oenalty could be reviewed at that stage. There has to be de novo penalty review, as now is the case for both FMSHRC and its sister adjudicators body, the Occupational Safety and Health Review Commission. There is no justification for giving mine operators lesser legal protections that other employers under OSHA. It is clear that Congress, when creating the FMSHRC and MSHA in the same legislation, the 1977 Mine Act, intended for FMSHRC to have the ability to independently review not only findings of fact and law but also the penalty criteria as applied to the mine operator. MSHA is not to fine companies out of business, which can easily occur when MSHA uses its secretive "special assessment" process. ALJs need de novo authority to make adjustments as warranted based on the totality of the evidence.

By the time Even if operators are able to appeal to an unbiased decision maker, not governed by MSHA, legal costs will be unsustainable for the vast majority of operators, thereby depriving the operator of the right to legally contest of MSHA issuance. I oppose both proposed modifications to the authority of the Federal Mine Safety and Health Review Commission, and request the commission and its judges retain *de novo* penalty authority.

Thank you for your consideration of my comments.

Sincerely,

Brian Bigley

Lehigh SW Cement