From: Ryan Seelke <rseelke@steelmanandgaunt.com>
Sent: Wednesday, November 26, 2014 11:14 AM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: Jessica Guinn

Subject: RIN 1219-AB72: Comments to Proposed Rule regarding Criteria and Procedures for Assessment of Civil Penalties
Attachments: MS Lime - Comments to Proposed Assessment Rule Changes - 9-2-2014.docx

Good morning,

Attached are comments to the Proposed Rule regarding Criteria and Procedures for Assessment of Civil Penalties. Please let me know if you have any questions. Thank you.

Respectfully,
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November 26, 2014

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Re: RIN 1219-AB72: The Mississippi Lime Company's Comments to MSHA's Proposed Rules to 30 CFR Part 100.

Introduction

The Mississippi Lime Company is a leading manufacturer of calcium products and calcium based solutions including hydrated lime, quicklime, ground calcium carbonate and precipitated calcium carbonate products. Mississippi Lime is in the metal/non-metal mining sector and has surface and underground operations throughout many states.

The proposed rule changes to 30 CFR Part 100, if finalized, will have a direct and significant impact on Mississippi Lime. Accordingly, Mississippi Lime respectfully submits the following comments and informational material for MSHA's consideration.

Official Comments

Mississippi Lime objects to many of the proposed changes asserted by MSHA. Notably, the company's chief concerns surround the proposed changes to: (1) Negligence, (2) Gravity, (3) Judicial Review, (4) Good Faith Reduction, and (5) Statutory Minimum for 104(d) Enforcement Actions.

1. Negligence:

Under the proposed rule, the number of descriptive categories for operator negligence will be reduced from five (No Negligence, Low Negligence, Moderate Negligence, High Negligence and Reckless Disregard) to three (Not Negligent, Negligent, and Reckless Disregard). The points for the proposed "Negligent" category will be 15 (out of a possible 100, i.e. 15%) which equates to a higher penalty than the current "Moderate Negligence" category which is 20 points (out of a possible 208, i.e. 9.62%) and almost on par with a current finding of "High Negligence" which is 35 points (out of a possible 208, i.e. 16.8%).

In practice, MSHA rarely finds the absence of negligence. Indeed, not one time during the last three (3) years had MSHA ever issued a "Not Negligent" citation to Mississippi Lime. On the other hand, during this same time period MSHA issued Mississippi Lime sixty-three (63) "Low Negligence" citations. Clearly, the proposed change will result in higher penalties for what would have been considered sixty-three low negligence violations under the current rules. In other words, under the proposed rule the sixty-three "Low Negligence" citations will be penalized as if they were "High Negligence" citations under the current rule.

Additionally, under the proposed rule MSHA defines "Negligent" as "the operator knew or should have known about the violative condition or practice." This definition eradicates mitigating circumstances as a defense to the negligence designation and eliminates them from consideration by the MSHA inspector. In other words, the narrowing of choices for negligence will brand operators as negligent for nearly every violation, despite the existence of facts which would have previously reduced actionable culpability and in turn, penalty. Accordingly, the proposed changes will result in making it much more difficult to challenge citations.

Going forward, Mississippi Lime proposes that MSHA eliminate the current categories of "Not Negligent" and "Moderate Negligence." At the same time MSHA should retain the categories of "Low Negligence", "High Negligence" and "Reckless Disregard." The definitions for "High Negligence" and "Reckless Disregard" should remain the same while the definition for "Low Negligence" should read as "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." This proposal will simplify the negligence analysis and will not require MSHA inspectors to evaluate different levels of mitigating circumstances. It will also accord mine operators the long-standing ability and flexibility to contest negligence findings on the basis of mitigating circumstances, albeit in a more streamlined manner.

2. Gravity:

The Mississippi Lime Company disagrees with the proposed changes relating to gravity because it believes nearly all violations will be classified as "serious" thereby bypassing the long-standing significant and substantial (S&S) analysis. The long-established case law requires MSHA inspectors and administrative law judges to apply a four-part elemental test to determine whether a citation is S&S. In sum, the test requires a showing that the facts and circumstances associated with the alleged violation are reasonably likely to lead to an injury and that the injury is reasonably likely to be a serious injury. The current proposal seeks to narrow the current five choices for inspectors to address the likelihood of an injury to three: unlikely, reasonably likely and occurred. Under the proposal, inspectors will likely be expected to choose "reasonably likely" for *all* violations that did not in fact result in an injury. This will have the effect of causing nearly all violations to be designated S&S. That said, Mississippi Lime proposes that the current likelihood categories remain in place.

3. Judicial Review:

Currently, if a mine operator contests a violation or penalty, administrative law judges of the Federal Mine Safety and Health Review Commission (FMSHRC) take a *de novo* look at the facts and issue decisions based on an independent evaluation of the alleged violation and six statutory criteria. Moreover, the FMSHRC judges are not bound by MSHA's numerical formula for calculating penalties. MSHA believes that Commission judges reduce penalties in approximately one third of all contested cases and that such reductions create an inconsistency. The current proposal attempts to thwart independent judicial discretion by subjecting judges to the same penalty formula utilized by inspectors. This change is highly provocative and is a direct assault on the statutorily embedded checks and balances. This is significant because commission judges serve within an independent agency which is not part of the United States Department of Labor. They are intended to be separate and impartial decision makers for MSHA and the mining industry to plead their cases before. By allowing MSHA to regulate the Commission's ability to decide cases, mine operators will be placed at a great disadvantage in the contest process by not having a mechanism to plead their cases that is not controlled by MSHA. Indeed, this issue will be exacerbated given the proposed changes which make it more difficult to challenge negligence and gravity levels.

Rather than stripping the independent discretion of judges, Mississippi Lime proposes that MSHA first attempt less intrusive means of resolving inconsistencies, such as proper training and accountability of MSHA inspectors. That said, MSHA should form a committee to analyze ALJ and Commission decisions in order to identify the situations in which the Commission is most likely to reduce penalties. The following step would then be to retrain current MSHA inspectors on the law and on how to issue proper citations. The next step would be to hold inspectors accountable for enforcement actions that are later modified or vacated. Currently, there is no formal system in place that formally reprimands inspectors for improperly written paper. In fact, there is not even a formal system in place that informs an inspector what happens to his or her citation after it is written. On an accountability standpoint, this is a practice that must change or else the inconsistency which MSHA complains about will continue, regardless of the proposed changes. At the very least, Mississippi Lime proposes that MSHA follow its third proposal which is to retain the current review system with *de novo* review.

4. Good Faith Reduction:

Under the proposed rule, a mine operator will be eligible for an additional 20% penalty reduction on top of an already existing 10% good faith reduction so long as the operator does not contest issued citations, promptly abate cited conditions, and pays the penalties before any citation or order became final. The 30% maximum reduction, however, is not offered if the operator contests the citations. The proposed rule fails to address how informal conferences may affect an operator's ability to qualify for the reduction.

Mississippi Lime proposes that informal contests (and 10 day conference requests) not affect an operator's ability to qualify for the 30% maximum reduction. Mine operators consider a multitude of motivating factors when deciding to informally contest a citation. Such factors

include minor disagreements over facts of a violation, S&S classifications, unduly burdensome abatement requirements, jurisdiction, etc. Many of these issues can be resolved at the informal conference stage and an operator should not be penalized for preliminarily asserting its rights and defenses.

5. Statutory Minimum for 104(d) Enforcement Actions

Mississippi Lime proposes that MSHA retain the current minimum penalty levels for 104(d) enforcement actions. Mississippi Lime does not believe that raising the minimum penalty level will reduce the amount of unwarrantable failure designations, especially in the metal/non-metal sector.

Conclusion

In sum, Mississippi Lime believes the aforementioned proposals will strengthen the currently proposed rule changes and will further MSHA's desired effect of avoiding inconsistencies.