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**From:** Lee Coogan <lcoogan@navista.net>  
**Sent:** Wednesday, December 03, 2014 7:44 AM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** RIN 1219-AB72  
**Attachments:** Comments to Part 100 Proposed Rule FINAL.docx

**SMI**

**SORPTIVE MINERALS INSTITUTE**

**DEC - 3 2014**

December 3, 2014

United States Department of Labor  
Mine Safety and Health Administration  
Office of Standards, Regulations and Variances  
1100 Wilson Boulevard, Room 2350  
Arlington, Virginia 22209-3939

Re: Criteria and Procedures for Assessment of Civil Penalties  
RIN 1219-AB72, Docket No. MSHA-2014-0009

Dear Sir or Madam:

Attached are the comments of the Sorptive Minerals Institute on the above referenced proposed rule.

Sincerely,

Lee Coogan  
Executive Director  
Sorptive Minerals Institute  
1155 15<sup>th</sup> Street, NW, Suite 500  
Washington, DC 20005  
202-289-2760 (T)  
202-530-0659 (F)  
[lcoogan@navista.net](mailto:lcoogan@navista.net)



**SORPTIVE MINERALS INSTITUTE**

December 3, 2014

**VIA E-MAIL** ([zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov))

United States Department of Labor

Mine Safety and Health Administration

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1100 Wilson Boulevard, Room 2350

Arlington, Virginia 22209-3939

**Re: Criteria and Procedures for Assessment of Civil Penalties**

**RIN 1219-AB72, Docket No. MSHA-2014-0009**

Dear Sir or Madam:

The Sorptive Minerals Institute (SMI) appreciates the opportunity to comment on the Mine Safety and Health Administration's ("MSHA") proposed rule on the criteria and procedures for assessment of civil penalties ("Proposed Rule") (79 FR 44493, July 31, 2014).

The Sorptive Minerals Institute ("SMI") is a Washington, DC-based trade association representing the manufacturers and marketers of absorbent clay products. Sorptive clays mined

and processed by SMI members are used in a wide range of consumer products and commercial and industrial applications including clay-based pet litter, cosmetics, pharmaceuticals, animal feeds, specialized drilling muds and fluids used in oil, gas and water well drilling, sand mold binders in metal casting and environmental sealants for landfills and sewage lagoons.

Additional information on SMI can be accessed at <http://www.sorptive.org>.

The mining and milling of sorptive clays falls within the regulatory responsibility of the Mine Safety and Health Administration (MSHA), Metal and Nonmetal Mine Safety and Health. In the United States, sorptive clays are exclusively mined above ground in open pit mines.

SMI and its members recognize that the health and safety of our employees is critical to our success. As a result, SMI has frequently interacted with MSHA to ensure that appropriate safety measures exist in the sorptive mining industry. SMI looks forward to continuing to foster its relationship with MSHA on our shared goal of producing sorptive products in a working environment that is safe for all of our employees.

### **Comments on the Proposed Rule**

SMI appreciates MSHA's stated goal in the Proposed Rule to "promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues." (79 FR 44493, July 31, 2014). Further, SMI agrees with MSHA that the current structure is not a fair and effective program for the assessment and resolution of civil penalties under the Federal Mine Safety and Health Act of 1977 ("Mine Act") (30 U.S.C. § 801 et seq.) and its associated regulations.

Unfortunately, SMI cannot agree with MSHA's proposal to change the assessment and enforcement processes. As a primary matter, a regulation change is not the appropriate means to change the scope of authority of the Federal Mine Safety and Health Review Commission ("FMSHRC" or "Commission") which is set out in the Mine Act itself. Moreover, the Proposed Rule dramatically reduces FMSHRC's authority, and fails to protect mine operators' constitutional due process rights. SMI notes that Industrial Minerals Association - North America (IMA-NA) has elaborately identified the statutory limitations on MSHA to use a regulatory change to limit FMSHRC authority, and incorporates IMA-NA's comments and materials by reference into this comment.

Moreover, SMI believes that the Proposed Rule is not aimed at the part of the system that requires fixing. MSHA has correctly recognized that the current structure is broken -- the Review Commission is reducing penalties 15% on average when it affirms MSHA citations and the Commission has rejected MSHA's proposed penalties more often than it accepted them during 2012 and 2013. According to MSHA, its changes in the Proposed Rule will ensure that FMSHRC decisions will more frequently match MSHA's initial proposed resolutions. However, MSHA's solution is akin to moving the goal posts closer to a football kicker and then claiming that the kicker has gotten better because more field goals were scored. What is broken is not adjudicated decisions reached by an impartial FMSHRC judge. Rather, the problem is that initial penalties assessed by MSHA are not appropriate for the conduct alleged. Particularly when so few citations are ever challenged, MSHA should be using the Proposed Rule as an opportunity to

adjust its citation and penalty standards to reflect what the FMSHRC decisions are concluding would be a fair and appropriate resolution of violations.

Not only is MSHA's Proposed Rule fixing the wrong problem, but it will result in increasing litigation. MSHA suggests that the current rules encourage litigation because the Review Commission conducts a de novo review. However, MSHA completely ignores that under the current system, mine operators incur tremendous legal and manpower costs to challenge citations, so very few citations actually are ever challenged. If the Proposed Rule is adopted, mine operators will have no choice but to appeal thousands of constitutionally inadequate FMSHRC decisions through the federal court system because no relief at all will be available until then.

Additionally, MSHA's proposed changes to the rules fail to rectify discrepancies between citations involving Coal and Metal and Nonmetal Mines and instead amplify those discrepancies. MSHA's own 2013 data shows that coal mines continue to be far more dangerous than non-metal mines, with a 41% higher fatality rate, and a 32% higher overall injury rate. As for citations, however, 46% of MSHA's 2013 citations are assessed against Metal and Nonmetal mines, for a total of \$28.7 million in penalties. MSHA's proposed change in civil penalties does nothing to correct this imbalance and reward Metal and Nonmetal mines for their better safety record. Rather, MSHA itself acknowledges that the new rules will result in a further increase of 5.2% (estimated at \$1.2 million) in penalties on Nonmetal Mines. (Fed. Reg. at 44,513).

Another area that the Proposed Rule fails to address is the lack of any Secretarial review of contested assessments. Under the current process, only “submitted” information is considered before the Secretary of Labor initiates a proceeding before the Review Commission. (30 C.F.R. Sec. 100.6). As a result, MSHA citations receive no routine review for consistency or legality before they are litigated and all, or almost all, assessments contested by mine operators become litigated matters. As a practical matter, actual review and vetting of these assessments would allow MSHA to eliminate many of the most deficient citations from the process, reducing the number of instances where the Review Commission is forced to vacate citations or vary penalties. The Proposed Rule would continue the practice, despite this being an opportunity to eliminate the disparity between MSHA proposed assessments and Review Commission decisions.

Lastly, MSHA has dramatically underestimated the cost of implementing its proposed new civil penalties requirements and its impact on the mining industry. MSHA’s data shows that mines in 2012 received an average of 10 citations, and MSHA is not suggesting that its changes to the civil penalties will encourage mine operators to improve safety and health conditions. Instead, any changes will require management to take further time away from making their plants safer to learn how MSHA will be citing it.

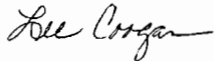
Therefore, SMI respectfully requests that MSHA eliminate its proposed changes to the scope of FMSHRC’s authority and instead look internally at what repeated FMSHRC rejections of its citations suggests. SMI would be pleased to provide additional insight on any of the

elements of the Proposed Rule as the rulemaking process moves forward, but SMI does not see how any rule change can alter the scope of FMSHRC's constitution and statutory authority.

### **Conclusion**

SMI appreciates the opportunity to comment on MSHA's Proposed Rule on the criteria and assessment of civil penalties and it stands ready to assist in developing an effective alternative rule in a constructive manner. Please do not hesitate to contact me should you have any questions regarding the content of this letter or regarding SMI's position on this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steve Coogan".

Stephen L. Coogan

Executive Director

Sorptive Minerals Institute