PUBLIC SUBMISSION

As of: 12/3/14 4:07 PM
Received: December 03, 2014
Status: Posted
Posted: December 03, 2014
Tracking No. 1jy-8fuk-gvkr
Comments Due: January 09, 2015
Submission Type: Web

Docket: MSHA-2014-0009
Criteria and Procedures for Assessment of Civil Penalties, 30 CFR Part 100

Comment On: MSHA-2014-0009-0046
Criteria and Procedures for Assessment of Civil Penalties

Document: MSHA-2014-0009-0062
Comment from Mark Ellis, Industrial Minerals Association - North America

Submitter Information

Name: Mark Ellis
Organization: Industrial Minerals Association - North America

General Comment

Please see the attached.

Attachments

IMA-NA Comments on MSHA Part 100

Industrial Minerals Association — North America

December 3, 2014

VIA E-MAIL (zzMSHA-comments@dol.gov)
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:

The Industrial Minerals Association-North America ("IMA-NA") 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).

IMA-NA is a Washington, DC-based trade association created to advance the interests of North American companies that mine and/or process minerals used throughout the manufacturing and agricultural industries. Its producer membership is comprised of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. In addition, IMA-NA represents associate member companies that provide equipment and services to the industrial minerals industry. Additional information on IMA-NA can be accessed through the following hyperlink: http://www.ima-na.org.

IMA-NA and its members recognize that the first priority and concern of all in the mining industry must be the health and safety of its most important and precious resource -- the miner. Since its inception in 2002, IMA-NA has sought to work cooperatively with MSHA to continuously improve safety in the mining industry. IMA-NA appreciates the past and present opportunities and efforts to work with MSHA on our mutual goal of achieving a mining industry in the United States that is as safe as possible for all who work in and around mines.

General Comments on the Proposed Rule

IMA-NA supports MSHA's stated intent in the Proposed Rule "to simplify the criteria [for assessing civil penalties], which will 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). The presence of a fair and effective program for the assessment and resolution of civil penalties is an important tool for MSHA to ensure compliance with the Federal Mine Safety and Health Act of 1977 ("Mine Act") (30 U.S.C. § 801 et seq.) and its associated regulations.

Nevertheless, the Proposed Rule's attempt to change the scope of authority of the Federal Mine Safety and Health Review Commission ("FMSHRC" or "Commission") from *de novo* review to a diminished and restricted role exceeds the legal authority granted to MSHA by the Mine Act and subverts Congress's intent when enacting the Mine Act. Moreover, the Proposed Rule's requested simplification of the gravity and negligence of alleged violations, when combined with the proposed changes to FMSHRC's authority, transgresses all reasonable bounds of a mine operator's constitutionally protected due process rights, leaving FMSHRC's role to decide cases as an impartial adjudicator of alleged violations of the Mine Act largely illusory.

Overall, through its Proposed Rule, MSHA would reduce the range of possible violations (thus shrinking a mine operator's ability to challenge the agency's actions) while at the same time greatly truncating FMSHRC's authority to review the agency's enforcement action. The careful balance of the administrative enforcement process crafted by the Mine Act would tilt unconstitutionally in favor of unchecked agency power to cite, assess, and enforce civil penalties with little recourse for the affected parties. Such a change would tread on mine operators' constitutionally protected due process rights and almost certainly lead to protracted federal litigation. The civil penalty enforcement process would thus become anything but simplified as mine operators would have no choice but to appeal thousands of constitutionally inadequate FMSHRC decisions through the federal court system. MSHA cannot subvert its own enabling statute and re-write the role of an independent agency's judges into irrelevance simply because it does not favor the results of those judge's decisions.

Therefore, IMA-NA respectfully requests that MSHA eliminate its proposed changes to the scope of FMSHRC's authority. IMA-NA would be pleased to provide additional insight as to any of the elements of the Proposed Rule as the rulemaking process moves forward, but IMA-NA stands firm that the Proposed Rule's changes to the scope of FMSHRC's authority must be eliminated.

Administrative and Constitutional Principles

"One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.'" The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) (cited in *City of Arlington v. FCC*, 133 S.Ct. 1863, 1877-78 (2013), Roberts, C.J., dissenting).

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), the Supreme Court established a test for reviewing "an agency's construction of the statute which it administers." City of Arlington, 133 S.Ct. at 1878 (2013) (citing *Chevron*). "If Congress has 'directly spoken to the precise question at issue,' [the Court] said, 'that is the end of the matter.' *Id.* "A contrary agency interpretation must give way." *Id.* "But if Congress has not expressed a specific intent, a court is bound to defer to any 'permissible construction of the statute,' even if that is not the reading the court would have reached if the question initially had arisen in a judicial proceeding.'" *Id.*

Importantly, *Chevron* deference does not apply to agency action that falls outside of the scope of the agency's own implementing statute or Congress's intended delegation of authority. *United States v. Mead Corp.*, 533 U.S. 218, 231-232 (2001).

Administrative agencies are likewise constitutionally constrained when making decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.*

Statutory Structure of FMSHRC

The Commission "is an entity independent of the Department of Labor which is composed of five members who are appointed by the President with the advice and consent of the Senate and are authorized to appoint such employees as they deem necessary to assist in the performance of the Commission's functions." W. Christian Schumann, *The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission?*, 98 W. Va. L. Rev. 1063, 1066. "Congress created the Commission to serve as 'a completely independent adjudicatory authority' which would 'review orders, citations, and penalties' and which, by providing 'administrative adjudication' of disputed cases under the Mine Act, would 'preserve[] due process and instill[] much more confidence in the program." *Id.* Mr. Schumann, who is currently the Counsel for Appellate Litigation in the Office of the Solicitor's Division of Mine Safety and Health, has opined that "the Commission, like a court, plays a role -- ensuring that the government acts within the parameters of the law and that private parties receive due process of law -- which is critically important to the administration of justice and, at the same time, limited in scope." 98 W. Va. L. Rev. 1063, 1067. We agree with Mr. Schumann.

The Mine Act makes clear that the Commission has the exclusive authority to assess all penalties. Likewise, the Commission must approve all settlements where penalties are compromised, mitigated, or settled. In that respect, the Act provides as follows:

> (i) *The Commission shall have authority to assess all civil penalties provided in this Act.* In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

. . .

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled *except with the approval of the Commission*. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

Mine Act, §§ 110(i), 110(k) (emphasis added).

Moreover, the legislative history of the Mine Act confirms that Congress intended the Secretary and the Commission to operate independently:

> The bill provides a right to contest orders and proposed penalties before the Commission.
>
> The Committee realizes that alternatives to the establishment of a new independent reviewing body exist. For example, under the present Coal Act, review of contested matters is an internal function of the Secretary of the Interior who has established a Board of Mine Operations Appeals to separate his prosecutorial and investigative functions from his adjudicatory functions.
>
> The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.
>
> ***The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and installs much more confidence in the program.***

S. Rep. No. 95-181, at 47, *reprinted in* COMMITTEE ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 635 (1978) (emphasis added);[1] *see also* Introductory Remarks of Mr. Williams on S. 717 (February 11,

---

[1] *See also* H. Rep. 94-1147 at 12, *reprinted in* COMMITTEE ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Vol. 4 at Tab. 33, p. 12 (1978) (a mine safety bill introduced in the House of Representatives, H.R. 13555, "would provide an operator an opportunity to contest any citation or penalty before the Commission. ***The Committee believes that in order to assure impartial adjudication, an independent Commission be set up.***") (emphasis added); *see also* S. Rep. 94-1198 at 40, *reprinted in* COMMITTEE ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Vol. 4 at Tab. 37, p. 40 (1978) (another mine safety bill introduced in the Senate, S. 1302, "provides to an operator the right to contest any citation, order or penalty before the Commission, which is established under section 114 of the

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

1977), *reprinted in* COMMITTEE ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 89 (1978) ("[t]he procedure for determining operator responsibility and liability is assigned to a truly independent Mine Safety and Health Review Commission, and the process is streamlined so that operators are provided with a fair method of contesting liability, but are not encouraged to delay factfinding and the administrative process or to seek duplicative factfinding in other forums."). There can be no doubt that Congress intended the Commission to act as an independent guarantor of due process when a mine operator contests MSHA's proposed penalty.

By the same token, the Act unequivocally commits to the Commission the obligation to adopt its own rules of procedure. Mine Act, § 113(d)(2) ("The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act"). MSHA's proposal to dictate the standards by which the Commission would review the penalty determinations made by administrative law judges is inconsistent with Congress's direction. Federal Register, Vol. 79, No. 147, pg. 44510-11.

The Proposed Rule's Modifications to FMSHRC's Authority

MSHA's Proposed Rule regarding FMSHRC's authority to assess penalties under the Mine Act has two alternatives (and a third, which would make no change to existing regulations, but would leave open the possibility that MSHA would pursue its agenda on an informal or case-by-case basis). Under the first alternative, §§ 100.1 and 100.2 would be revised such that "if the Secretary meets his burden to prove the penalty-related facts alleged, part 100 would require the ALJ to assess MSHA's proposed penalty." Federal Register, Vol. 79, No. 147, pg. 44510.

Likewise, alternative two would give the Commission some ability to modify MSHA's mandatory penalties, but only under heightened requirements, which the Proposed Rule claims are akin to the Federal Sentencing Guidelines, at least before those guidelines were found to be unconstitutional by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 244 (2005).[2] MSHA's proposed heightened requirements include mandating that ALJs identify "aggravating or mitigating circumstances of a kind, or to a degree, *not adequately taken into consideration by the Secretary when formulating the penalty regulations*," consider "MSHA's policy statements" which have not been subject to rule-making proceedings, list a "statement of reasons" for assessing the penalty, and "consider" the statutory penalty criteria. Federal Register, Vol. 79, No. 147, pg. 44511 (emphasis added).

On top of the proposed changes to the scope of FMSHRC's authority to assess penalties, MSHA also proposes "simplifying" its citation form and associated penalty calculations with respect to the possible ranges of negligence, gravity, and other statutory criteria identified by the Act. Federal Register, Vol. 79, No. 147, pg. 44495- 44508. This simplification would, for example, constrain MSHA inspectors to only three options for an operator's level of culpability:

Act. ***The Committee believes that an independent Commission is essential to provide impartial adjudication of these matters and protect the constitutional rights of operators.***") (emphasis added).

[2] It is a dubious enterprise to draw inspiration for administrative rule making on a law that was found to violate the fundamental constitutional rights of criminal defendants.

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

"Not Negligent, Negligent, or Reckless Disregard." As a result, MSHA inspectors will lose the discretion to issue a citation for High Negligence and will instead likely issue more citations under the categories of Reckless Disregard, which, in turn, will result in higher penalty assessment against operators.

Similarly, by deleting categories of gravity, the default position for MSHA will likely fall on the serious side. For example, MSHA inspectors will no longer have "no likelihood" or "permanently disabling" as options on the citation form and thus MSHA inspectors will necessarily have to choose higher levels of likelihood and "fatal" as designations on the citation. Thus, mine operators will experience more significant and substantial citations and higher penalties as a result.

IMA-NA's objection to the Proposed Rule is as fundamental as it is straightforward: alternative one takes the power to issue penalties, which is exclusively vested by the Act in the Commission, and puts it into the hands of the Secretary. It effectively makes MSHA's proposed penalties the mandatory penalties so long as the ALJ upholds the underlying violations and its associated factors such as negligence, size of the operator, and gravity, among others. At the same time, MSHA's "simplification" of the citation form and the re-weighting of the penalty criteria will likely force MSHA inspectors to choose higher levels of negligence, as well as other penalty factors, when issuing citations.

As a result, the Proposed Rule strengthens MSHA's enforcement power and increases the likely penalties against operators, while at the same time greatly limiting the Commission's ability to review MSHA's enforcement action and the Commission's power to assess alternative penalties as envisioned by the Act. Likewise, alternative two mandates that the Commission apply "MSHA policy statements," among other things, in addition to the statutory criteria provided in the Act. It thus imposes more stringent requirements on the Commission than those imposed by the Act and demands that the Commission apply additional factors beyond those identified in the Act.

Accordingly, the Proposed Rule exceeds the authority of the agency to provide for implementing regulations under the Act. MSHA's attempt to re-write the Act's language granting the exclusive authority to the Commission for the assessment of all penalties is outside the realm of permissible agency authority, and violates decades, if not a century, of Supreme Court jurisprudence. *E.g.*, *United States v. Mead Corp.*, *supra*, at 231-32. Indeed, the Proposed Rule violates the basic foundations of the government of United States accumulating within MSHA "all powers, legislative, executive, and judiciary, in the same hands." It is not merely the case that the Proposed Rule impermissibly seeks to impose new regulations in an area in which Congress has not delegated it the authority to do so, *contra Mead Corp.*, 533 U.S. at 231-32; rather, the Proposed Rule steps into the shoes of Congress and attempts to change the express authority granted to the Commission in the Act. This, MSHA cannot do.

The effect of the Proposed Rule's adjustment of the Commission's authority combined with the "simplification" of the penalty criteria in the MSHA citation form would also deprive mine operators their constitutionally protected procedural due process rights. The Proposed Rule, through either of its suggested alternatives, transforms the Commission's independent authority to review MSHA's enforcement actions into a rubber stamp giving MSHA *carte*

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org

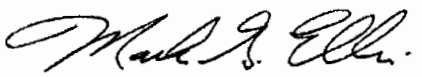
blanche to write its own regulations, propose its own penalties, and mandate enforcement without any meaningful opportunity for the regulated to be heard. Here, the risk of error in providing for virtually unchecked agency authority greatly outweighs MSHA's interest in expedited and predicable outcomes. *See Eldridge*, 424 U.S. at 333.

The Act is unambiguous with respect to the Commission's authority to impose penalties—it is the Commission's, not MSHA's, absolute and exclusive right to assess penalties under the six statutory criteria in the Act. *See* §§ 110(i) and 100(k). MSHA cannot change the statutory authority of an independent agency whose sole purpose is to provide for an impartial adjudicatory review of MSHA's actions. W. Christian Schumann, 98 W. Va. L. Rev. 1063, 1066. Therefore, IMA-NA strongly urges MSHA to abandon the Proposed Rule in its current form. The only avenue for changing the authority of the Commission runs through the halls of Congress.

Conclusion

IMA-NA 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.[3] Please do not hesitate to contact me should you have any questions regarding the content of this letter or regarding IMA-NA's position on this matter.

Sincerely,



Mark G. Ellis
President

[3] For example, IMA-NA supports the Proposed Rule's procedure for a 20% reduction in proposed MSHA penalties if such penalties are paid within 30 days. IMA-NA believes such a procedure would result in less litigation overall and would have a net positive effect for operators willing to accept MSHA citations, but who may otherwise be financially constrained from doing so if required to pay 100% of the penalty. Likewise, IMA-NA supports the Proposed Rule's reduction in weight of the "persons affected" and operator size criteria.

2011 Pennsylvania Avenue, NW, Suite 301, Washington, DC 20006 | 202-457-0200 | fax 202-457-0287 | www.ima-na.org