

PUBLIC SUBMISSION

As of: December 08, 2014
Received: December 05, 2014
Status: Posted
Posted: December 08, 2014
Tracking No. 1jy-8fvw-kdi3
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-2014-0009-0064

Comment from Charles Rea, CalCIMA

DEC 08 2014

Submitter Information

Name: Charles Rea

Organization: CalCIMA

General Comment

A comment letter from the California Construction and Industrial Materials Association (CalCIMA) is attached.

Attachments

CalCIMA Part 100

AB72-COMM-3.7

12/8/2014



California Construction and
Industrial Materials Association

December 5, 2014

Mine Safety & Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

Re: Docket No. MSHA-2014-0009

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed changes for criteria and assessment of civil penalties under the Mine Safety & Health Act. We understand the proposals are intended to address consistency and clarification in standards, focus on serious hazards, and overall to improve mine safety. While we support these goals, we have comments and suggestions regarding the proposed changes.

CalCIMA

CalCIMA is the state-wide trade association for aggregate and industrial mineral producers in California. The industry provides materials to build roads, bridges, water ways, transit, schools, and hospitals, as well as a variety of specialized products for agriculture, manufacturing, and technology applications in lighting, electric vehicles, and wind mills. The 70 members of CalCIMA operate over 250 facilities in the state. The association works with the Mine Safety & Health Administration to keep members informed on safety practices and enforcement.

General Comment

One difficulty in evaluating this proposal is the lack of context and advance discussion. If this had resulted from a survey of stakeholders, been evaluated by a task group, or been the subject of a pilot project, then there might be context or analysis to understand the potential impacts better.

Reducing Negligence Criteria

MSHA proposes to reduce the number of "negligence" criteria from 5 to 3, removing "low" and "high" negligence from the current criteria. One concern is that with fewer categories, inspectors are more likely to cite a higher level of negligence than previously. Another concern is that the proposal does not provide information on how citations currently issued as "low" or "high" negligence would fit into the remaining categories.

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A significant change is that the "negligent" category would not include the consideration of mitigating factors. This removes criteria that allow consideration of whether an operator has attempted to address a potential hazard. By reducing an inspector's discretion, the proposal seems to remove a useful incentive to promote good safety practices.

Reducing Likelihood Categories

MSHA proposes to reduce the number of "likelihood" categories from 5 to 3, removing the "no likelihood," and "highly or likely" categories. This leaves the "unlikely," "reasonably likely," and "occurred" categories. The overall concern is that with fewer categories inspectors are more likely to cite a higher category than previously.

We are also concerned that there may be significant changes with regard to how "reasonably likely" and "occurred" are defined, and how this will impact certain types of citations. For instance, the proposed definition for "reasonably likely" as "...likely to cause an event that could result in an injury or illness," seems to imply it will be easier for such citations to be classified as Significant and Substantial or even Imminent Danger. It will be important for MSHA to provide a clear understanding of how the changes in "likelihood" criteria will impact issuance of S&S and Imminent Danger citations.

Also, the proposed change for the term "occurred" to include practices that "could have caused" events or injuries seems contrary to a common understanding of "occurred."

Proposed Additional 20% Good Faith Reduction

In addition, to the current 10% assessment reduction for abatements that occur within the required time period, MSHA proposes an additional 20% reduction for paying penalties within the time period, not contesting them, and not letting them become orders of the Commissioner.

We are concerned about how this proposal impacts informal conferences. We believe informal conferencing provides an important opportunity for operators and MSHA to discuss citations within the field and district office level.

In addition, we understand that informal conferences are an important means for MSHA to research and address systemic citation inconsistencies. The research from conferences helps MSHA trace back where inspectors get their understanding—such as the Academy—and then resolve those misinterpretations. It will be important to know more about how this proposal impacts informal conferences.

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Proposed Alternatives to Scope, Purpose, and Applicability of Part 100

MSHA solicits comments on two alternative proposals that would reduce discretion of the Mine Safety & Health Commission to independently review cases and set penalty amounts. Both would limit the Commission to determining whether MSHA has met its burden with regard to the facts. The first would require the Commission to follow MSHA's penalty formula; the second would give latitude to adjust the penalty, but based on MSHA's formula.

Operators are concerned about proposals to limit the Commission's ability to independently and impartially review facts and penalties. The Commission was created to address a concern with a predecessor agency that lacked independent judicial authority and led to questionable results. As a result, Congress created the Commission as a separate body, and stated "The Commission shall have the authority to assess all civil penalties provided in this Act." It was created to allow a judge to weigh the evidence and testimony of witnesses to determine if the proposed civil penalty is appropriate or not.

In response to MSHA's proposed reasons for the changes, we comment that the judges are there to adjust unfair or unfounded penalties made by inspectors. Judges provide an objective perspective. It is important to understand that operators are contesting citations not due to the dollar amount but to ensure fair enforcement of the standards. Many cases are pursued at a financial loss, and Commission judges have available to them the same information and criteria as MSHA in setting penalty amounts.

Cumulative Impacts

There is concern that in combination the changes could be unintentionally punitive for operators. The reduction of criteria, elimination of mitigating factors, and emphasis on repeat violations could overall cause higher level citations, with more of these being classified as S&S or Imminent Danger. This is combined with the fact that there does not appear to be a corresponding lowering of penalties where MSHA proposes reducing the weighting of factors. As a result, operators are concerned about the cumulative impacts on the types of citations.

We are also concerned that the proposed changes—if they lead to higher level citations—may have an adverse effect on workers, too. In many operations, workers are empowered to oversee and make improvements to their work areas. Workers see and interact with the inspectors and know the results of the citations. If inspectors have limited discretion and the charges lead to citing for higher and higher levels of negligence, likelihood, and severity, despite initiatives undertaken by operators and workers to improve safety, there is concern about how this impacts workers' morale.

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15 Month Penalty Cycle

Outside the changes MSHA proposes, we recommend MSHA address another issue in this proposal. This is the 15 month period for calculating assessments for surface mines. While this makes sense for the 15-month inspection cycle at underground mines, it does not fit in well with the 12-18 month inspection cycle at surface mines. Operators' assessment amounts can be compounded if their bi-annual inspections happen at the beginning or end of the fiscal year, but within a 15 month assessment cycle. Operators also get caught in the 15 month cycle when they appeal a citation. Since the citation is held until resolved, once resolved, an old citation can get added to the 15 month cycle. We respectfully request that MSHA adjust the penalty assessment cycle for surface mines.

We appreciate your consideration of these comments, and would look forward to opportunities to discuss further.

Sincerely,

A handwritten signature in black ink, reading "Charles L. Rea". The signature is fluid and cursive, with the first name "Charles" being more prominent.

Charles L. Rea
Director of Communications & Policy

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