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Sent:	Sunday, March 08, 2015 9:19 PM
To:	zzMSHA-Standards - Comments to Fed Reg Group
Cc:	Efrain Carreras
Subject:	Docket No. MSHA–2014–0009 COMMENTS
Attachments:	AIPA Comments on Docket No. MSHA–2014–0009.doc

MAR 09 2015

Comments to MSHA's Proposed Rules to 30 CFR Part 100. **Criteria and Procedures for Assessment of Civil Penalties**
RIN 1219-AB72, Docket No. MSHA-2014-0009
on behalf of:

Puerto Rico Aggregates Association (AIPA)

Efraín Carreras
President

AB72-COMM-48

March 8, 2015

Sheila A. McConnell, Acting Director
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Re: The Asociación de Industrias Productoras de Agregados de Puerto Rico Comments to MSHA's Proposed Rules to 30 CFR Part 100. **Criteria and Procedures for Assessment of Civil Penalties RIN 1219-AB72, Docket No. MSHA-2014-0009**

Introduction

The Asociaciación de Industrias Productoras de Agregados de Puerto Rico (*AIPA*) 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). AIPA is a Puerto Rico based trade association representing the majority in a per ton basis of the manufacturers of aggregates products, cement, lime, among others. AIPA is in the metal/non-metal mining sector and the only association of its class in Puerto Rico.

The proposed rule changes to 30 CFR Part 100, if approved, will have a substantial and direct negative impact on AIPA, on it's members and non members of the industry. It will have a negative effect in Puerto Rico's already fragile economy.

The following comments set out below are filed on behalf of AIPA and represent the total of our comments, on the proposed rule for MSHA consideration.

In the proposed rule **Summary** MSHA states and we quote:

The Mine Safety and Health Administration (MSHA) is proposing to amend its civil penalty regulation to simplify the criteria, which will promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues.

It is our belief that this proposed change will be anything but that which the summary states. The civil penalty enforcement process will become anything but simplified as mine operators would have no choice but to appeal thousands of citations through the administrative process and eventually through the federal court system.

B. Regulatory Background states and we quote:

This proposed rule involves changes to MSHA's regular assessment penalty formula only. Because the proposed rule would require MSHA to change the Citation/Order form (MSHA Form 7000–3), and MSHA considers the inspector's evaluations of the criteria in proposing penalties, the proposed rule also may have an indirect impact on special assessments.

It is our opinion that the proposed change NOT ONLY affects the penalty formula. As you will further on see this change will also affect five of the six criteria listed in §§ 105(b)(1)(B) and 110(i) of the Mine Act which are used to determine civil penalties and five of them are directly impacted with this revision. All the criteria except (6) *The effect of the penalty on the operator's ability to continue in business* according to MSHA.

Additionally MSHA states and we quote:

MSHA analyzed the impact of the proposed rule by the type of mine and size of mine. The distribution of the penalty amount by mine size would remain generally the same; however, the penalty amount for small M/NM mines would decrease.

In reality MSHA has not complied with the following paragraph:

A. Definition of a Small Mine Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA's) definition for a small entity, or after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the Federal Register for notice and comment. MSHA has not established an alternative definition, and is required to use SBA's definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees.

As a result MSHA must use the SBA definition and has not complied with the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA). We understand that until such a time as MSHA complies with this ACT this proposed rule change can not proceed.

III. **Section-by-Section Analysis**

In Section C Part 100 Table III-Size of Metal/Nonmetal Mine under the heading of proposed rule we believe there is an error in that you are using Annual Tonnage of Mine instead of Annual Hours Worked at mine. This is confirmed by and we quote: *The size of M/NM mines and their controlling entities is measured by the number of hours worked.* Additionally on Section **Proposed Alternatives To Change the Scope, Purpose, and Applicability of This Part:**

Section A Parragraph 1: *Operator Size: The second statutory criterion requires consideration of "the appropriateness of such penalty to the size of the business of the operator charged," but does not provide any details regarding how "size" should be calculated or compared. Both existing and proposed § 100.3(b) interpret this Criterion by specifying that: (1) "Size" refers both to the size of the mine cited and to the size of the mine's controlling entity; (2) "size" is measured in terms of hours worked in the case of metal and nonmetal mines and by production in the case of coal mines; and (3) in the case of independent contractors, "size" is measured in terms of hours worked at all mine.*

Therefore it is clear that the heading should be in terms of Annual Hours Worked at mine an not tonnage.

D. § 100.3(c) History of Previous Violations

AIPA supports proposed changes to History of Previous Violations .

2. *History of Repeat Violations*

The proposed rule would clarify that the repeat violations aspect of the proposal would apply only after

- *A mine operator has, over the 15- month period preceding the occurrence date of the violation being assessed—*
- *A minimum of 10 violations, which became final orders, and*
- *More than 10 inspection days, and*
- *Six repeat violations of the same citable provision of a standard, which became final orders*

AIPA supports the proposed wording as presented by MSHA and quoted above.

Your proposed Part 100 Table X – Negligence is as follows:

PART 100 TABLE X—NEGLIGENCE

Existing rule		Proposed rule	
Categories			
No Negligence (The operator exercised diligence and could not have known of the violative condition or practice.).	0	Not Negligent (The operator exercised diligence and could not have known of the violative condition or practice.).	0
Low Negligence (The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances.).	10		
Moderate Negligent (The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.).	20	Negligent (The operator knew or should have known about the violative condition or practice.).	15
High Negligence (The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.).	35		
Reckless Disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.).	50	Reckless Disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.).	30

We propose the following table in lieu of your table. Our logic is that inspectors almost never find no negligence and in very few occasions find reckless disregard so the tendency will go toward the highest element (Reckless disregard) since they will not have a reasonable choice. Our concern is that reckless disregard will be the new high negligence.

PART 100 TABLE X—NEGLIGENCE

Existing rule		Proposed rule	
Categories			
No Negligence (The operator exercised diligence and could not have known of the violative condition or practice.).	0	Not Negligent (The operator exercised diligence and could not have known of the violative condition or practice.).	0
Low Negligence (The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances.).	10		
Moderate Negligent (The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.).	20	Negligent (The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances,).	15
High Negligence (The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.).	35	High Negligence (The operator knew or should have known about the violative condition or practice but there are mitigating circumstances.).	20
Reckless Disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.).	50	Reckless Disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.).	30

Our comments on Table XI-Gravity: Likelihood are the following:

That all the numbers begin with your TABLE 2—COMPARISON OF RELATIVE WEIGHTS OF CRITERIA UNDER THE EXISTING AND PROPOSED RULES under Criteria Likelihood MSHA determined that 23.1% of all penalty points fall under this category. While attending the Southeastern Mine and Safety Health Conference on November of this year, we requested the referenced baseline raw data. We have no reasonable way to determine what percentage of the 23.1% corresponds to Unlikely, Reasonable Likely, Highly Likely or Occurred for we have not received the requested baseline data.

The proposal requires to be specific in our comments and submit detail rationale and supporting documentation for any suggested alternative. As of today we have not been provided said data so we are unable to present to MSHA our detailed comments on this Table XI. We therefore ask that this baseline data be provided to us so we can make proper comments. Until such a time our comments are the following:

AIPA supports proposed changes to Table XI with respect to joining No Likelihood and Unlikely as one

with zero (0) points. We also suggest joining Reasonably Likely with Highly Likely instead of deleting the later one. Under Occurred our proposed definition is: **Condition or practice cited has caused an event that has resulted in an injury**.

Occurred by definition is an event that has happened (Past tense of occur) therefore it should not be associated with an event that may occur. That is what Reasonably likely and Highly likely are for. Additionally even MSHA admits that some events are often difficult to anticipate as stated in your proposal under Severity.

Our comments on Table XII-Gravity: Severity are the following:

AIPA supports proposed changes to Table XII with respect to deleting Permanently Disabling Rule and definition. However on loss workday or Restricted duty the proposed penalty points was doubled by virtue of the re calibrated point scale (5/208*100=2.4% vs 5/100*100=5%) we propose that the new penalty points be two (2), so this reduction is in agreement with the criteria established by MSHA as a percentage of total maximum points based on the proposed one hundred (100) points scale.

***Section 30 CFR 100.1 and 100.2**; Scope and Purpose; Applicability, and proposed section 30 **CFR 100.9** Commission Review of the Secretary's Proposed Assessment as they would apply to the assessment of civil penalties by the independent Review Commission and its administrative law judges.*

AIPA's supports the opinion expressed by the former members of the Federal Mine Safety and Health Review Commission in their comments AB72-COMM-27 Submitted December 2, 2014. in which they state and we quote this excerpt:

The Commission strongly opposes that portion of the proposed rule that would amend MSHA's Part 100 regulations to require that Commission Administrative Law Judges and the Commission itself apply Part 100 in assessing final penalties. The proposed rule would substantially and impermissibly restrict the authority of Commission Judges to carry out their independent statutory responsibility to assess final penalties in proceedings under the Mine Act. As discussed below, the proposed rule directly contravenes the Mine Act's clear statutory language, Congress' intent as demonstrated in the Act's legislative history, relevant Commission and appellate court precedent, basic principles of administrative law, and more than 36 years of interpretation and practice.

One of the provisions of MSHA's proposal would raise minimum fines under Sec. 104(d) of the Mine Act. Under (d)(1), the fine would increase from $3,000; under (d)(2), to $6,000. The section addresses unwarrantable failure, which courts have defined as aggravated conduct beyond ordinary negligence. Why are these 50% increases above the current levels necessary? In MSHA's preamble, the agency states its rationale as seeking to "*provide greater deterrence*" and "*encourage more diligent compliance.*" However, elsewhere in the preamble MSHA notes it has *"implemented special initiatives," such as Rules to Live By, and "promulgated rules" to enhance operator accountability for violations and hazards, and declares "its efforts have worked."* Why more deterrence if the special initiatives have worked?

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. This 30% maximum reduction is not offered if the operator contests the citations.
AIPA proposes that informal contests, including 10 day conference requests, not affect the ability to qualify for the 30% maximum reduction. Operators should not be penalized for disagreements over the facts and finding of a citation. Many issues can and are resolved at informal conferences and should not affect the miner to assert it's rights.

AIPA appreciates the opportunity to comment on the proposed rule and hopes that they be taken into consideration.

Respectfully Submitted;

Efrain Carreras
President
AIPA