

PUBLIC SUBMISSION

As of: 3/31/15 10:18 AM
Received: March 31, 2015
Status: Posted
Posted: March 31, 2015
Tracking No. 1jz-8i11-g2r
Comments Due: March 31, 2015
Submission Type: Web

Docket: MSHA-2014-0009

Criteria and Procedures for Assessment of Civil Penalties, 30 CFR Part 100

Comment On: MSHA-2014-0009-0090

Criteria and Procedures for Assessment of Civil Penalties, Proposed rule; extension of comment period; close of record.

Document: MSHA-2014-0009-0103

Comment from Thomas Harman, NA

Submitter Information

Name: Thomas Harman

Organization: NA

General Comment

See attached file(s)

Attachments

MSHA-2014-0009

AB72-COMM-62



March 31, 2015

Mine Safety and Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Boulevard
Arlington, VA 22209-9441

Dear Sir or Madam:

Re: Docket No. MSHA-2014-0009, RIN 1219-AB72

The Portland Cement Association (PCA) has prepared these comments in response to the Mine Safety and Health Administration's (MSHA) recently proposed "Criteria and Procedures for Assessment of Civil Penalties", as proposed in the *Federal Register* on July 31, 2014, at 79 Fed. Reg. 44494. This rulemaking is of significant interest to the members of PCA, who will be directly affected by its outcome.

The PCA today represents twenty-seven (27) cement companies operating eighty-two (82) manufacturing plants in thirty-five (35) states, with distribution centers in all fifty (50) states, servicing nearly every congressional district. Members of PCA account for approximately eighty percent (80%) of domestic cement-making capacity.

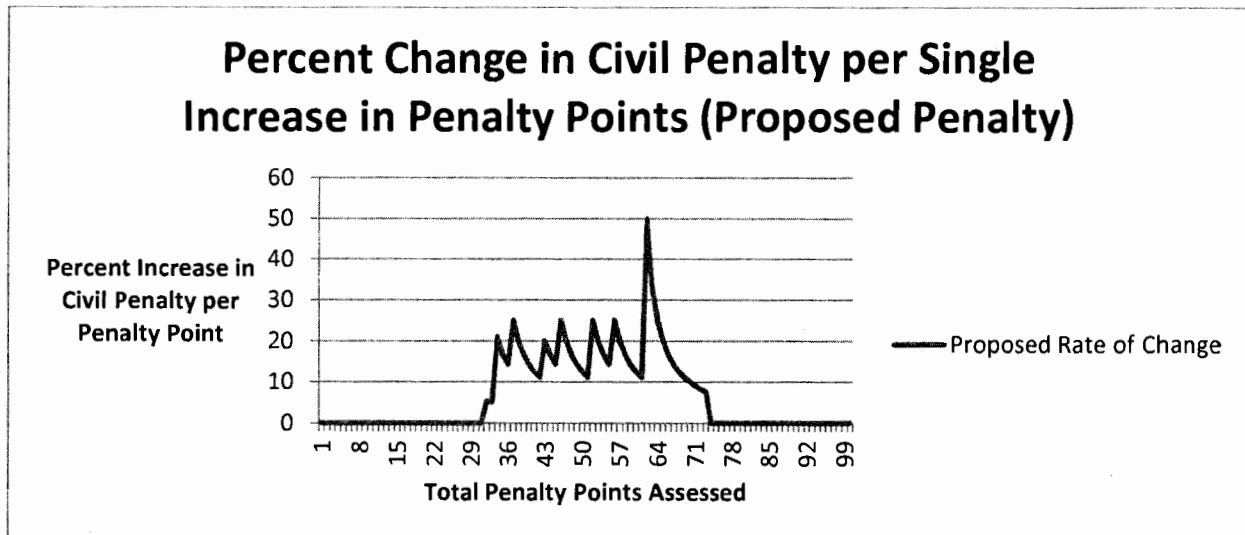
The PCA also filed joint comments (hereafter referred to as "Joint Comments") with the National Mining Association and The Fertilizer Institute in response to the proposed rule. PCA reiterates the position of NMA, TFI and PCA as stated in the Joint Comments filed on January 8, 2015.

The PCA requests that MSHA withdraw the proposed rule and instead convene an advisory committee that includes stakeholders to plan and oversee the conduct of either a six-month or a one-year trial of a revised citation format, with proposed new categories of findings, used by a representative number of inspectors from diverse districts to obtain data to compare with the previous corresponding period in order to determine the realistic impact of changing citation descriptions and Part 100 penalty categories. The advisory committee would design a

pilot program in which the existing assessment structure would continue, and a separate penalty assessment based on the proposed rulemaking would be compared against the existing structure to determine the real impacts of the revision. The PCA believes that the proposed rule, unless tested before being finalized, will result in unintended consequences for operators, the Mine Safety and Health Administration, and the Federal Mine Safety and Health Review Commission (the “Commission”).

- A. *Revising the criteria for penalty assessments is a significant regulatory change which requires additional analysis to determine impacts on all regulated sectors.*

PCA commends the agency for attempting to simplify the categorization of enforcement actions used by MSHA’s inspectorate. However, the agency failed to conduct a thorough analysis of how the changes will affect assessed penalties on all operators. For example, PCA conducted an analysis of assessed penalties at a cement plant in 2013, and the results of the analysis led PCA to conclude that the distribution of points to assessed dollars will look very similar to the graph depicted on page 8 of the Joint Comments, as shown below, thereby causing a disproportionate assessment to be given to an enforcement action, particularly in the 60 – 65 point range.



- B. *Finalizing the proposed penalty structure may place operators, the MSHA and the Commission in the same predicament as they were in 2008.*

The MSHA published clarifications to the rule on February 10, 2015, which provided additional descriptions about how negligence and likelihood determinations would be made. However, until an advisory committee is formed with stakeholders to study the effects of any proposed changes to how penalties are assessed, the real effects to assessments cannot be known. Indeed, lower level hazards can produce elevated penalty assessments, again as shown in the graph.

- C. *MSHA may not increase minimum penalties for unwarrantable failures; only Congress has the authority to increase these types of penalties.*

MSHA proposes to increase the minimum penalties for violations issued under Section 104(d)(1) and 104 (d)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). Minimum penalties for these violations were most recently revised in 2006 when the Act was last amended. Congress did not give MSHA the authority to raise the penalties for these violations. The Act allows the Secretary of Labor to utilize the rulemaking process to raise these penalties because of inflation and debt collection, but for no other reason. Inflation has not risen fifty percent since 2006.

D. MSHA cannot usurp the authority of the Commission in determining the final penalty for an alleged violative condition or practice.

MSHA assesses, or proposes, a penalty when there is an alleged violation of a safety and health standard, and if the operator disagrees, then the Commission has the responsibility to determine if there is a violation and what the penalty should be if the operator decides to contest the allegation. There are two distinct authorities in the framework of the Act: that of the Secretary of Labor (MSHA), and that of the Commission. The Commission was created to be independent in considering whether a violation occurred and what the penalty should be. The proposed rule seeks to place limits on the role of the Commission, but the Act mandates specific responsibilities for both the Secretary and the Commission.

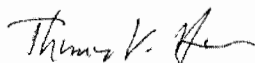
E. MSHA should provide an additional twenty percent (20%) reduction in an assessed penalty when an operator corrects the alleged violation within the prescribed time period.

The PCA recommends that a total thirty percent (30%) reduction from the assessment be given for good faith abatement of an alleged violation. The good faith penalty reduction of 30% should be available to an operator who chooses not to contest the penalty and the penalty is paid within 30-days of becoming a final order of the Commission.

In summary, PCA strongly encourages MSHA to withdraw the proposal and convene an advisory committee to conduct a field trial of how assessments in all regulated sectors would change, and PCA can participate in such an initiative. As shown in the 2006 penalty revisions, unintended consequences indeed occur when a significant proposal does not receive adequate scrutiny.

PCA appreciates the opportunity to comment on this proposal. Please contact Thomas Harman, Portland Cement Association, tharman@cement.org, if you have questions about these comments.

Respectfully submitted,



Thomas Harman
Portland Cement Association