Subject: RIN 1219-AB72 / Comments to 30 CFR Part 100

From: John Henriksen [mailto:john@iaap-aggregates.org]
Sent: Tuesday, March 31, 2015 9:43 AM
To: McConnell, Sheila A - MSHA
Cc: Shawn McKinney; Dan Eichholz
Subject: RIN 1219-AB72 / Comments to 30 CFR Part 100

MAR 31 2015

Ms. Sheila McConnell, Acting Director
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Dear Ms. McConnell:

The Illinois Association of Aggregate Producers (IAAP) appreciates the opportunity to submit written comments regarding the "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed by the Mine Safety and Health Administration (MSHA) on July 31, 2014.

In Illinois, companies that mine and produce crushed stone, sand, gravel and silica sand are a numerous and very diverse industry. The IAAP's 92 producing members range in size from "mom and pop" operations that manufacture less than 100,000 tons of these products each year to companies that produce well over 20,000,000 tons annually. IAAP members operate 230 surface and underground mines and processing plants located in 70 out of 102 Illinois counties. In 2014, these companies produced over 93 million metric tons of crushed stone, sand, gravel and silica sand.

Like MSHA, the IAAP is committed to safe mines and a healthy workforce. Safety is, and will continue to be, the number one priority of the Illinois aggregates industry. We have not had an aggregates mining fatality in Illinois since March 24, 2003 and are working hard to maintain our fine safety record. With this background in mind I would like to outline our concerns regarding this proposed rule.

First, the IAAP is concerned that MSHA's proposed changes to the Part 100 penalty point schedule will lead to an increase in the number of citations and civil penalties. MSHA claims that the proposed amendments would have resulted in $2.7 million less in assessed penalties for citations issued in 2013 than was assessed under the current penalty regulations.

However, the National Stone Sand and Gravel Association has performed some initial calculations of cost impacts for small, medium and large operations – with both current and proposed regulations definitions and factors in place – and found penalty assessment cost increases ranging of over 50 percent. These costs will be borne by customers working to construct housing, office buildings, schools, hospitals and highways needed by our communities. These cost increases seriously challenge MSHA's claim that operators will see a reduced level of penalty assessments. **MSHA should withdraw its proposed changes to the Part 100 penalty point schedule.**

AB72-COMM-64

Second, the IAAP opposes MSHA's proposed changes to its negligence criteria. Reducing an inspector's range of choices from five levels of negligence to just three limits an operator's opportunity to raise mitigating factors that could tend to reduce the civil penalty amount assessed. It is also our belief that eliminating "low negligence" category will essentially shift the negligence findings to the next level – from low negligence to negligence (formerly moderate negligence. This shift will result in higher penalties. **MSHA should withdraw this proposed change to its negligence criteria.**

Third, the IAAP opposes both alternatives proposed by MSHA to limit the Federal Mine Safety and Health Commission's independent role in assessing civil penalties under the Mine Act as being patently unlawful.

The plain language of Section 110 of the Act and its legislative history demonstrate that Congress made a deliberate decision to create a wholly independent Commission to adjudicate disputes under the Act and to grant the Commission exclusive authority to assess final civil penalties. In particular, Section 110(i) of the Act shows that Congress intended the Commission to conduct a de novo review of the citations being contested when assessing civil penalties -- and that no deference be afforded to the Secretary's proposed penalties. More significantly, MSHA has provided no legal or factual justification for such a drastic change that runs contrary to long-standing Commission precedent. **Therefore, MSHA should withdraw its proposed attempts to bind the Commission's decision-making process relating to civil penalty assessments.**

Although we have identified concerns with MSHA's proposal, this rulemaking does present an opportunity to promote workplace safety and health by incentivizing mine operators. And the first way to incentivize mine operators would be to expand MSHA's good faith credit concept.

MSHA has proposed to increase the 10% good faith credit for prompt abatement to a 30% credit that would then be linked to an operator's promise to not contest the underlying violation.
The IAAP is concerned that MSHA's proposal will induce operators to not contest improper citations – to essentially plea bargain fines that have been generated by bad paper. Although the proposed expansion of good faith credit may save operators money in the short term, this practice may serve to unfairly increase an operator's violation history and therefore increase penalties over the long term. **We suggest that MSHA consider a more innovative approach – allow up to 100% good faith credit coupled with the option to vacate the citation upon prompt abatement.**

This expansion of good faith credit is based on the assumption that MSHA is interested in making the workplace safer for all rather than generating civil penalties. If MSHA's focus is improved workplace health and safety, inspectors should be given the ability to essentially issue warnings for non-S&S violations that are promptly abated – and then concentrate upon serious violations encountered. This approach also allows MSHA inspectors to concentrate their efforts on the miniscule number of aggregate mine operators who are not concerned about safety. In summary, this regulatory change would encourage more open communication between MSHA enforcement staff and mine personnel while promoting a safer workplace.

A second way to incentivize mine operators would be to reinstitute the "Single Penalty" provision for non-serious violations in place before the 2008 Part 100 changes. Although operators must eliminate all hazards and legitimate violations, the enforcement of regulations by agency personnel is not equal and consistent. MSHA's decision in 2008 to remove the single penalty assessment resulted in higher penalties for citations erroneously issued, more contested citations, and the diversion of resources away from improving safety and health in the mine. Removing the single penalty assessment created a more adversarial relationship between MSHA and operators without making mines safer and healthier for miners.

It is important to recognize that citations often occur for highly subjective conditions where one inspector may find a situation in full conformity with MSHA requirements, while another issues a citation because he/she speculates that a minor hazard might exist if the condition continued to exist in the future. Often, these involve housekeeping (e.g., small amounts of material on a walkway that is rarely accessed), dirty toilets, uncovered trash cans, minor holes in guards where no one has access to the area, and equipment defects where the equipment has not been inspected prior to being used for the day and is not in service.

Other categories of non-S&S citations include paperwork (e.g., late filing of a 7000-2 quarterly hours report), failure to note an inspection date on a fully-charged fire extinguisher, or faded labels or other technical violations of MSHA's hazard communication standard (30 CFR Part 47). Often, these are rated as "no likelihood of injury" and "low" or "no" negligence. Employing the single penalty assessment was an effective way to resolve many safety and health issues at our mines without having to issue large penalties—and without triggering contested cases. **In summary, reinstituting the single penalty assessment would lessen the adversarial relationship between MSHA and operators, thereby making mines safer and healthier for miners.**

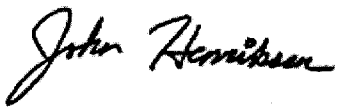
Conclusion

The "Criteria and Procedures for Proposed Assessment of Civil Penalties" rule proposed by the Mine Safety and Health Administration (MSHA) on July 31, 2014 will put the mining industry and MSHA back in the same predicament it was in in 2008 – higher civil penalties and a higher rate of contested cases. We are concerned that money used to pay resulting penalties and costs of litigation may divert resources that could otherwise be used to enhance overall safety and health for the miners as well as increase mine productivity.

For that reason, we request that you withdraw these rules and convene an advisory panel to work on developing a Part 100 rule that would go much farther to achieve our goal of zero fatalities. MSHA did this with the Part 46 training and education rules – a collaborative effort has been a major factor in the reduction of the total case injury rate in our industry. We were able to work together to develop a training rule that was modern and effective with broad support.

In the event that this rulemaking is not withdrawn, we request that you make the rule changes suggested in our comments. Thank you for the opportunity to make our concerns known.

Respectfully,



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