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Sent: Tuesday, March 31, 2015 12:43 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: National Lime Association additional comments on Criteria and Procedures for Proposed Assessment of Civil Penalties: Proposed Rule (RIN 1219-AB72)
Attachments: NLA Comments on MSHA civil penalty rule Mar 31 2015.docx

MAR 31 2015

Attached please find the additional comments of the National Lime Association (NLA) on the Proposed Rule on Criteria and Procedures for Proposed Assessment of Civil Penalties (RIN 1219-AB72). Please let me know if you have any difficulties opening the document. Thanks.

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AB72-COMM-67

March 31, 2015

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Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2250
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(Submitted electronically to
zzMSHA-Comments@dol.gov)

RE: Criteria and Procedures for Proposed Assessment of Civil Penalties: Proposed Rule (RIN 1219-AB72)

The National Lime Association (NLA) is pleased to present additional comments on the Proposed Rule on Criteria and Procedures for Proposed Assessment of Civil Penalties. NLA's prior comments, dated Dec. 3, 2014, as well as the testimony of Hunter Prillaman at the Dec. 4 hearing on the proposal, are incorporated herein by reference. The comments below respond to the clarifications to the proposal posted by MSHA on Feb. 10, 2015.

NLA commends MSHA for the desire to improve the "consistency, objectivity and efficiency" of the assessment of civil penalties, and some of the proposed changes, in NLA's opinion, will serve those goals. However, as explained below, NLA believes that other changes will create, rather than mitigate, problems, even as clarified in MSHA's new posting.

1. The Negligence Criterion Needs Further Changes

In the clarification, MSHA states that it is its intention that the new "Negligent" category would encompass violations that would currently be categorized as Low, Moderate, or High Negligence, and that the current No Negligence and Reckless Disregard categories would remain essentially unchanged. This appears to be in response to many concerns expressed by the regulated community, including many at the public hearings, that the change in the rules will cause an increase in Reckless Disregard citations, as violations that would previously have been labelled High Negligence are pushed up into the Reckless Disregard category.

NLA commends MSHA for its statement that it does not intend for the revisions in the rule to increase the number of Reckless Disregard citations. However, NLA believes that the revision creates a strong likelihood that this will occur, even if the initial intention is to the contrary. When all negligence cases are lumped into a single category, including both minor and serious infractions, the pressure will be strong for inspectors to carve out the more serious violations and to categorize them as Reckless Disregard.

NLA believes that this likelihood is simply another manifestation of an excessive blunting of the instrument of the negligence criterion. Simply put, the range of negligent violations being grouped together are too broad.

As stated in its prior comments, NLA strongly opposes the elimination of the "low negligence" category. As noted previously, this change will largely result in substantially higher penalties for what would have been considered low negligence violations under the current rules – but it will also contribute to an inevitable pressure to delink minor and more serious violations, which, under the new approach, can only be done by labeling a violation as Reckless Disregard. (It should be added that this pressure will be exerted in only one direction, as it is highly unlikely that inspectors will feel any impulse to identify more violations as Not Negligent.)

There are many violations that represent low negligence, as MSHA inspectors have been well aware for many years. At the very least, the low negligence category should be retained. Even combining moderate and high negligence into a single category is likely to push more citations into the Reckless Disregard category, but the problem will be even worse if low negligence violations are included.

2. NLA Supports the Modification of the Proposed Definition of "Occurred"

NLA supports MSHA's clarification that in the proposed revisions of the likelihood categories, the most serious category, "occurred," should include only situations in which the condition or practice cited has caused an injury or illness, as is the case under the current approach. As NLA previously commented, expanding this definition to events that could have caused an injury would have injected additional vagueness and speculation into the decision-making process, since the assessor will have to determine not only the likelihood of the event, but the likelihood that it could have caused an injury – which would have confused this category with severity.

3. NLA Supports MSHA's Clarification on Good Faith Reductions and Conferences

NLA commends MSHA's clarification that requesting a pre-assessment conference would not render the proposed good faith reduction unavailable. As NLA previously noted, conferencing should be encouraged, not discouraged, as it gives both operators and MSHA an opportunity to work out disagreements and issues without the need for further review.

NLA continues to believe, however, that a better alternative to the proposed good faith reduction would be reinstatement of the 30% reduction for prompt abatement that existed before the last revision of the rule, for the reasons set out in NLA's prior comments.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

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