From:	McConnell, Sheila A - MSHA
Sent:	Tuesday, March 31, 2015 4:17 PM
To:	Davis, Leah - MSHA
Subject:	FW: NSSGA comments on Part 100
Attachments:	NSSGAsubmitcivpens.pdf

From: Casper, Joseph S. [mailto:jcasper@nssga.org]
Sent: Tuesday, March 31, 2015 3:40 PM
To: McConnell, Sheila A - MSHA
Subject: NSSGA comments on Part 100

Sheila, thank you for helpfully emailing me! Thanks also if you could simply confirm receipt.

I appreciate all the help you've provided (and work you must have gone to) on this. Thank you.

Joe Casper

NSSGA Comments
MSHA Proposed Rule on Criteria and Procedures for Assessment of Civil Penalties

Federal E-rulemaking portal:
http://www.regulations.gov, follow instructions for submitting for docket number MSHA-2014-0009.
Email:
zzMSHA-comments@dol.gov

March 30, 2015

Introduction

The National Stone, Sand and Gravel Association (NSSGA) is pleased to have this opportunity to provide comments in response to the MSHA rule proposal on July 31, 2014, on Criteria and Procedures for Assessment of Civil Penalties ("civil penalties" rule) under 30 C.F.R. Part 100. *79 Fed. Reg. 44494.*

MSHA states that its proposed changes will (1) improve objectivity and consistency in how inspectors write citations and orders; (2) result in earlier resolution of enforcement issues due to fewer areas of dispute; (3) result in greater emphasis on more serious safety and health hazards; and (4) provide increased openness and transparency in the application of the regular formula penalty criteria.

NSSGA opposes the proposed rule for the reasons detailed in these comments. Principally, the proposed rule:

- Seeks to change to the scope of Part 100, such that it may purport to apply to both the proposal of penalties by MSHA and the assessment of penalties by the Federal Mine Safety and Health Review Commission. This is beyond the scope of MSHA's authority and is unsound policy.
- Seeks changes to "Negligence," which may disturb settled case law on the issue of unwarrantable failure designations.
- Fails to meet its stated goals in that it will lead to more, not fewer, areas of dispute.
- Would spawn dramatic increases in penalty assessments for NSSGA member operators, and thus lead to increased costs for the purchase of aggregates that are elemental to the built environment.

NSSGA believes that MSHA has neither conducted a data-driven analysis of penalties, safety and health performance, nor substantiated reasons for major regulatory change. Moreover, there appears to be no safety-based rationale for this proposal. NSSGA would be pleased to work with MSHA on an alternative means of enabling the agency to properly focus its enforcement resources on areas of greatest risk. However, we believe that this rulemaking should be withdrawn.

Background on NSSGA

NSSGA is the leading voice and advocate for the aggregates industry. Our members – stone, sand and gravel producers and the equipment manufacturers and service providers who support them – are responsible for the essential raw materials found in every home, building, road, bridge and public works project and represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the United States. Production of aggregates in the U.S. in 2014 was almost 2.2 billion metric tons at a value of $18.6 billion. The aggregates industry employs approximately 100,000 highly-skilled men and women, and every $1 million of stone, sand and gravel sales supports 19.5 jobs.

NSSGA has led the way for improved safety through a number of programs, including its Safety and Health Pledge program, its work with MSHA on the first ever Alliance for training and safety, public support of the goals of the 'Rules to Live By' program. **In each of the past 14 years, aggregates operators have reduced the industry's injury rate from the rate's year-earlier level. For 2014, the rate stood at 2.08 injuries per 200,000 hours worked.**

Additionally, NSSGA has collaborated with MSHA to reduce enforcement inconsistency through efforts of the MSHA-NSSGA Alliance's Technical Task Force, which has worked to clarify how operators can comply with certain standards. Also, NSSGA has helped prepare, promote, and participates in various MSHA stakeholder meetings around the country aimed at enhanced consistency and compliance.

At the same time, MSHA assistant secretary Joe Main reported that compliance is better than it's been in a decade. NSSGA has worked diligently to improve the compliance environment through work on boosting consistency through work among operators and MSHA personnel. Citation and penalty assessments have fallen in recent years. And the case backlog at the Review Commission, according to MSHA, has been reduced by almost 70 percent.

Section-by-Section Analysis

Mine and Controller Size

The proposed rule reduces the impact of the Mine and Controller Size considerations. While NSSGA appreciates the sensitivity to company and operator size, the Association does not support the idea of the agency enforcing more heavily against large operators than against small.

History of Previous Violations

While NSSGA appreciates the role of history in agency determination of penalty assessments, the Association believes that a 15 month-long look-back period is unwarranted. A 12 month-long look-back should afford the agency the opportunity to determine if an operator has corrected earlier compliance challenges. Therefore, the Association believes that a 12 month-long look-back is more appropriate.

Negligence

The number of negligence categories would be reduced from five to three: Not Negligent, Negligent and Reckless Disregard. Categories would be defined as follows:

Not Negligent: The operator exercised diligence and could not have known of the violative condition or practice.

Negligent: The operator knew or should have known about the violative condition or practice.

Reckless Disregard: The operator displayed conduct which exhibits the absence of the slightest degree of care.

It is noted that the definition of "Not Negligent" in the proposed rule is the same as the definition of "No Negligence" in the current rule. The definition of "Reckless Disregard" in the proposed rule is the same as it is in the current rule. However, the proposed Negligence criteria raise several concerns.

First, the proposed rule would eliminate the consideration of mitigating factors. Under the current rule, both moderate and low negligence account for the considerations of mitigating factors in assessing negligence. Mitigating factors should be considered since the regulations are primarily performance-based, and varying conditions may well result in a violation as a result of the dynamic nature of the mining environment. Consideration only of whether the operator knew or should have known of the condition does not provide an adequate account of the operator's negligence associated with a particular violation. Most operators appreciate the current opportunity to present mitigating factors to either the issuing inspector, or an MSHA representative during settlement negotiations. Yet, under the proposed definitions of negligence, such considerations would no longer be available.

We are encouraged that, in the agency's February 10, 2015 correction of the proposal, clarification is provided on how alleged violations pre-proposal for low, moderate and high negligence under the existing rule would be placed in the proposed Negligent category. Further, the agency asserted that "reckless disregard" would continue to mean "conduct exhibiting the absence of the slightest degree of care," and is distinguishable from the existing definition of "High Negligence," which is that the operator "knew, or should have known of the violative condition or practice, and there are no mitigating circumstances." The clarification of the intent of the rule is appreciated; however, we remain concerned that in practice, at least a portion of citations currently written as "high negligence" would be written as "reckless disregard" under the proposed rule. If MSHA is to achieve its intent that the current designations of high, moderate and low negligence would be subsumed into "Negligent" under the proposed rule, inspectors must be rigorously trained on this point.

Additionally, if the proposed three-pronged Negligence determination is adopted, the definition of "Not Negligent" should be simplified to "The operator did not know nor should have known of the violative condition or practice" so that it mirrors the definition of "Negligent." As it is currently constructed, the "Not Negligent" definition is too restrictive relative to the definition of "Negligent." Put differently, if mitigating factors are not to be considered, the sole consideration in a negligence determination is whether the operator knew or should have known of the

violative condition. If the operator did not know, nor is there any reason why it should have known, the proper finding should be "Not Negligent."

Also, the elimination of "High Negligence" raises significant questions as to the impact on "unwarrantable failure," defined as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Co.*, 9 FMSHRC 1997 (Rev. Comm. Dec. 1987). An "unwarrantable failure" would not be congruent with the "Negligent" category of the proposed rule, because such test for "unwarrantable failure" has been rejected. *See Emery Mining*, 9 FMSHRC at 1999. As such, under the current structure, "unwarrantable failure" is not typically associated with a "Moderate Negligence" finding, but rather a finding of either "High Negligence" or "Reckless Disregard," with high negligence being substantially more common.

Therefore, the elimination of "High Negligence" under the proposed rule would result in either: (1) "unwarrantable failures" accompanied by findings of "Negligent;" or (2) an increase in the number of "Reckless Disregard" findings to support "unwarrantable failures." Both scenarios are problematic. With respect to the first, an "unwarrantable failure" must be "more than ordinary negligence" and therefore not supported by a finding that an operator was "Negligent." If MSHA were able to support an "unwarrantable failure" by a finding only that an operator is "Negligent," this would result in a dilution of the meaning of "unwarrantable failure" and, in turn, an increase in §104(d) citations and orders.

Regarding the second possible consequence, if "Negligent" is deemed to be insufficient to support an unwarrantable failure, this would require the use of a "Reckless Disregard" finding to support a citation or order issued under § 104(d). An increase in "Reckless Disregard" findings would obviously result in increased penalties and, most likely, an increase in the number of enforcement actions considered for a "flagrant" designation. In that regard, § 110(b)(2) of the Mine Act defines "flagrant" as:

> [A] reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. 30 U.S.C. § 820(b)(2).

Two Administrative Law Judges have defined "reckless" for purposes of a "Flagrant" designation as "consciously or deliberately disregard[ing] an unjustifiable risk of harm arising from [the operator's] failure to make reasonable efforts to eliminate a known violation of a mandatory . . . standard." *Rox Coal, Inc.*, 35 FMSHRC 625, 632 (ALJ Barbour March 2013); *Stillhouse Mining LLC*, 33 FMSHRC 778, 803 (ALJ Paez March 2011). As noted, the definition of "Reckless Disregard" is the same in both the current and proposed versions of Part 100. That definition overlaps with the definition of "reckless" for "flagrant." Therefore, an increase in citations with "Reckless Disregard" findings would likely lead to an increase in those considered for flagrant penalty designations.

We urge that MSHA recognize that the classification of a citation as "Reckless Disregard" as opposed to "High Negligence" is likely to result in a significant increase in civil litigation will

result because there are a number of states in which such a classification can trigger an exemption in workers' compensation coverage.

NSSGA strongly opposes these proposed changes.

Gravity

Initially, it should be noted that the change to consideration of number of persons affected is the most positive change in the proposed rule. Under the current rule, seemingly benign violations result in high penalties due to the maximum of 18 points that can be assigned for number affected. The proposed rule eliminates this possibility, as it contains only two categories for number affected: no persons affected and one or more persons affected. NSSGA supports this change.

The initial changes to the likelihood of occurrence criteria present several concerns. The proposed rule reduces the categories of likelihood of occurrence from five to three. The current rule does not include definitions of each category. The proposed rule adds definitions of each category, which initially were, as follows:

- Unlikely: Condition or practice has little or no likelihood of causing an event that could result in an injury or illness.

- Reasonably Likely: Condition or practice is likely to cause an event that could result in an injury or illness.

- Occurred: Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.

These definitions were highly objectionable, and NSSGA testified as much at the Arlington, VA public hearing. The February 10, 2015 Notice published by MSHA included revisions to these definitions. The February 10 clarification helped. It changed the definitions immediately above to the following:

- Unlikely: Condition or practice cited has little to no likelihood of causing an injury or illness.

- Reasonably likely: Condition or practice cited is likely to cause an injury or illness.

- Occurred: Condition or practice cited has caused an injury or illness.

Good Faith Reduction

Though not codified in the proposed regulations, MSHA has requested comment on an alternative that would afford operators up to 30 percent good faith penalty reduction if the operator accepts a citation as issued, and agrees not to contest it.. MSHA believes this provision falls within its consideration of good faith abatement of a citation.

NSSGA appreciates any attempt by MSHA to provide operators with choices as to how to respond to penalty assessments, and further appreciates any measure to reduce penalties. Individual companies will need to evaluate this option based on their own compliance/litigation strategies. The alternative, however, does present some concerns that need to be addressed.

First, by virtue of this apparent attempt to minimize the need for contests, the proposal implies that MSHA's findings in citations are always correct. Yet, there is extensive data to show this is not the case.

Second, adoption of this proposal may give MSHA further basis for refusing to hold meaningful conferences or engage in settlement discussions. We contend that a better approach to alternative dispute resolution would be a system of merits-based conferencing. Any reference to conferencing is conspicuously absent from the proposed rule, which raises the question of whether this provision is designed to suppress any expectation of conferencing. In the February 10, 2015 notice, MSHA stated that the additional reduction would not be affected by a request for pre-assessment conferencing; however, the actual granting of a conference remains at the sole discretion of MSHA. MSHA should take this occasion as an opportunity to include a provision that all conference requests made by operators will be granted in a timely fashion.

Review of Penalties and Scope of Part 100

Under the current structure, MSHA proposes a penalty under Part 100; however, once the citation is contested, the Review Commission conducts a *de novo* review of the citation and penalty. Penalties assessed by the Commission are independent of what is proposed by MSHA. Under the proposed expanded scope, administrative law judges would be bound by the provisions of Part 100 when deciding cases.

The proposal includes the following two alternatives for changing the scope of Part 100:

A) Requiring the Commission to apply the penalty formula when assessing civil penalties; therefore, if MSHA meets its burden of proving penalty-related facts, the ALJ would be required to assess the penalty proposed by MSHA;

B) Requiring the Commission to consider the penalty formula when assessing penalties, but allow for departures when aggravating or mitigating factors are not adequately considered by the proposed penalty, and providing a written justification for doing so.

Any change to the scope of Part 100 is objectionable for several reasons.

The Proposed Change is Contrary to the Act

First, the proposed rule that pertains to the assessment of civil penalties exceeds the Secretary's authority and infringes on the Commission's authority.

The Mine Act sets forth separate responsibilities between the Secretary and the Commission for the imposition of penalties. The Act delegates to the Secretary the authority to propose civil

penalties. 30 U.S.C. §§ 815(a) and 820(a). However, § 110(i) provides that "The Commission shall have the authority to assess all civil penalties provided in this chapter." 30 U.S.C. § 820(i); *see also* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 906 (1978)(stating, "The Secretary proposes his penalty to the independent Mine Safety and Health Review Commission which has the final authority to assess penalties").

Such reliance would be inappropriate. Section 508 does not authorize the Secretary to promulgate regulations that govern the Commission. Section 508 was carried over into the Mine Act from the Federal Coal Mine Safety and Health Act of 1969 ("Coal Act"). The Coal Act authorized the Secretary of the Interior to enforce its provisions and provide for administrative adjudication of disputes. *See* 30 U.S.C. §§ 815 and 819(a)(3)(1969); *see also, UMWA v. Kleppe*, 561 F.2d 1258, 1261 (7th Cir. 1977) (noting that under the Coal Act, the Secretary of the Interior was charged with "administering and implementing the provisions of the Act [and] . . . allow[ing] for administrative adjudication"). Section 508, therefore, authorized the Secretary of the Interior to promulgate regulations covering both the administration and implementation of the Coal Act and administrative adjudication. *See UMWA v. Kleppe*, 561 at 1262.

This is not the case under the Mine Act. When Congress established the Mine Act in 1977, it established the Federal Mine Safety and Health Review Commission as a separate agency to provide for administrative adjudication of disputes under the Mine Act. 30 U.S.C. § 823 (establishing the Federal Mine Safety and Health Review Commission). The Conference Report of the 1977 Act highlights this change as follows:

> In the past, the Secretary of the Interior was given the responsibility both for enforcement of the act and for the administrative review of enforcement actions. Parties displeased with the Secretary's enforcement actions could take an appeal to the same Secretary. The conference report adopts the provisions of the Senate bill which establishes an independent commission to review enforcement actions. This will insure fairness and due process, and will also encourage the development of a sound and definitive body of case law which will enable the Secretary, the miners, and the mining industry to adopt a consistent course of conduct in every case.

Conf. Rep. on S. 717, *Federal Mine Safety and Health Amendments of Act of 1977*, reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1348 (1978).

The Conference Report further explains the significance of this change:

> The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are

> retained by the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program.

Conf. Rep. on S. 717, *Federal Mine Safety and Health Amendments of Act of 1977*, reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at1360 (1978).

Therefore, under the Mine Act, § 508 does not authorize the Secretary to promulgate regulations that cover administrative adjudication because the Secretary is no longer charged with that role. Indeed, it is worth considering the language of § 508, which authorizes the Secretary "to issue such regulations as each deems appropriate to carry out any provision of this chapter." 30 U.S.C. § 957 (emphasis added). Unlike the Coal Act, the Secretary is not authorized "to carry out" administrative adjudication of disputes under the Mine Act. Therefore, § 508 does not authorize him to promulgate regulations in furtherance of that function.

The Proposed Change is Contrary to Commission Precedent

Second, the proposal is contrary to Commission precedent. The Commission has consistently recognized that, under the Mine Act, the Secretary proposes penalties but it ultimately assesses them. In *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (Rev. Comm. May 2000), the Commission succinctly summarized this process as follows:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. §§ 815(a) and 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that "[i]n assessing civil monetary penalties, the Commission shall consider the six statutory penalty criteria[.]

22 FMSHRC at 600; *see also Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Rev. Comm. March 1983) (finding that "[I]t is clear that under the Act the Secretary of Labor's and the Commission's roles regarding the assessment of penalties are separate and independent. The Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses a penalty based on record information developed in the course of an adjudicative proceeding."); *see also Spartan Mining Co.*, 30 FMSHRC 699, 723 (Rev. Comm. Aug. 2008)(recognizing that "In determining the amount of the penalty, neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary").

Furthermore, the Commission has held that it is not within the Secretary's province to set forth a specific test for adjudicating charges. In *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Rev. Comm. Dec. 1999), the Commission held that such was its role and not the Secretary's. It stated:

> We are not bound to defer to any specific tests proposed by the Secretary . . . It is hardly open to question that this Commission has the authority to interpret the Mine Act and adopt a specific test for adjudicating charges thereunder.

Berwind, 21 FMSHRC at 1317; *see also Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Rev. Comm. Jan. 1984) (adopting four-part test for determining whether a violation is "significant and substantial" under § 104(d) of the Mine Act); *Kenny Richardson*, 3 FMSHRC 8, 16 (Rev. Comm. Jan. 1981) (adopting standard for determining liability under § 110(c)), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

The proposed amendments to Part 100 seeks to bind the Commission to the specific benchmarks set forth by the Secretary. It would impose upon the Commission and its judges certain definitions of gravity and negligence, as well as a prescribed penalty structure. The potential abrogation of the case law definitions of "significant and substantial" and "unwarrantable failure" is foreseeable under the proposal. The amendments, therefore, amount to the very sort of action that the Commission has already found to be outside the Secretary's province.

No Deference Should be Afforded to the Secretary's Proposed Penalties

Third, in addition to running counter to the Mine Act and longstanding Commission case law, the proposed amendment that would render Part 100 applicable to the Commission is unsound policy. Complete independence of the Commission from the Secretary is of paramount importance. As noted above, Congress recognized that the creation of the Commission "preserves due process and instills confidence in the program." Conf. Rep. on S. 717, *Federal Mine Safety and Health Amendments of Act of 1977*, reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1360 (1978).

The proposed changes would amount to undue deference afforded to the Secretary's litigating ability in contested cases. The Commission should give no deference to any of MSHA's determinations, including penalty proposals. Because the penalty is often connected to an ALJ's substantive findings, the ALJ must have the ability to fashion a penalty in accordance with his/her findings. The Secretary criticizes the Commission for, on occasion, lowering the assessed penalty in cases where it affirms the enforcement action with no modification. *79 Fed. Reg. at 44508*. Yet, such reductions are based on the evidence established before the Administrative Law Judge, which may include factors not considered by the Secretary or reflected in his proposed penalty. The penalty changes, therefore, may be justified despite the fact that the enforcement action is not modified. *See, e,g., Peabody Midwest Mining LLC*, 35 FMSHRC 2419, 2440 (ALJ Manning Aug. 2013)(reducing penalties for two unwarrantable failure orders, despite affirming the orders with no modifications, because "Although [the operator] demonstrated aggravated conduct constituting more than ordinary negligence, its conduct demonstrated a "serious lack of reasonable care" rather than "reckless disregard," "intentional misconduct," or "indifference").

Finally, the proposal makes no mention of special assessments. However, if the proposed rule is adopted, the logical next step is for MSHA to seek affirmance of specially assessed penalties if a

violation is upheld. This is contrary to current practice, which requires the Secretary to prove the propriety of a specially assessed penalty. *See, e.g., Cement Division, National Gypsum Co.*, 1 FMSHRC 2115, 2118 (ALJ Broderick Dec. 1979), *rev'd on other grounds* 3 FMSHRC 822 (Rev. Comm. April 1981); *see also S&M Construction, Inc.*, 18 FMSHRC 1018, 1052-53 (ALJ Koutras June 1996) (declining to impose the specially assessed penalties requested by the Secretary because they were "unsupported"); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller Jan. 2013)(holding that the Secretary has the burden of establishing why a specially assessed penalty should be above the normal standard); *Big Ridge Inc.*, 35 FMSHRC 3168, 3206 (ALJ McCarthy Sept. 24, 2013) (noting that the Secretary bears the burden of "provid[ing] . . . evidence concerning the justification for the special assessments").

NSSGA strongly opposes these changes.

Higher Minimum Penalties for Unwarrantable Failure

The proposed regulation contains a provision that would increase minimum penalties for unwarrantable failure violations from $2,000 to $3,000 for a citation or order issued under § 104(d)(1) and from $4,000 to $6,000 for an order issued under § 104(d)(2). This provision is objectionable for several reasons.

MSHA is without authority to change the minimum penalties for unwarrantable failures. The minimum penalty for an unwarrantable failure is established by statute. Section 110(a) of the Mine Act establishes that the minimum penalty for a § 104(d)(1) citation/order is $2,000 and the minimum for a § 104(d)(2) order is $4,000. 30 U.S.C. § 820(a)(3)-(4). The assertion of authority by MSHA to establish minimum penalties for unwarrantable failure violations appears to be contrary to the Act. To that end, by setting the minimum penalties in § 110(a) of the Act, Congress reserved that authority for itself. It did not delegate that authority to the Secretary.

Moreover, Congress established those minimums as $2,000 and $4,000, respectively. In *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that when considering an agency's construction of a statute which it administers, "First, as always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]" 467 U.S. at 842. Here, Congress' intent could not be clearer: the minimum penalties for §§ 104(d)(1) and 104(d)(2) citations and orders are $2,000 and $4,000, respectively. *Cf. Stansley Mineral Resources, Inc.*, 35 FMSHRC 1177, 1180 (Rev. Comm. May 2013) (concluding that "the language of Section 110(a)(3) is clear"). The Secretary must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43.

Also, MSHA's proposal to increase minimum penalties for unwarrantable failures is not supported by sound policy considerations. MSHA contends that it proposes the increases "to provide greater deterrence for operators who allow these types of violations to occur." *79 Fed. Reg. at 44507.* This rationale is a bold assertion and devoid of any support. MSHA has provided no data or evidence that the $2,000 and $4,000 minimum penalties do not provide sufficient deterrence for operators. The proposal contains no evidentiary rationale for increasing the minimum unwarrantable failure penalty amounts.

Effect on Penalty Amount

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. *79 Fed Reg. at 44511.* The analysis leading to this conclusion is based on MSHA's "projection of inspector behavior," and is, therefore, inherently suspect. *79 Fed. Reg. at 44513.* Any contention that the proposed regulations would lower penalties should be viewed with skepticism. Further, the proposal gives no evidence that MSHA has conducted a data-driven analysis of penalties. Absent such an analysis, impact of the proposed rule on total penalties is incomplete.

Finally, NSSGA performed calculations of cost impacts for small, medium and large operations, and found increases ranging between 50 and 80 percent. This flies in the face of the proposal's assertion that fewer penalty dollars will be assessed on operators once the proposal is implemented.

We based these calculations (not affected by the proposal change announced on February 10, 2015) on responses to a member survey conducted shortly after the rule was proposed. The survey captured mine ID and hours worked for each mine operated by the particular company. The 2700 hour total for the mine listed below pertains only to mine size, not controller size. Controller size is the number of hours for all the mines of that particular entity. This mine had 0 points for mine size. To determine size of controlling entity, we added the total number of hours for all of that particular company's mines, and then correlated the number with the MSHA penalty points chart in the proposed rule. For example, the small mine was from a company that listed five mines and a total of 57,108 hours for those five mines. This correlates to 1 point for controlling entity size under the new rule. All other values were taken from the point system described in the proposed rule, and factored against the point scales provided.

Small Mine

	Current Rule	Proposed Rule
Mine Size	0	0
Controller Size	1	1
VPID	0	0
HPID	0	0
Negligence	20	15
Likelihood	30	14
Severity	5	5
Persons Affected	1	1
Total Points	57	36
Penalty	$100	$180

Medium-sized Mine

	Current Rule	Proposed Rule
Mine Size	5	1
Controller Size	4	2
VPID	0	0
MPID	0	0
Negligence	20	15
Likelihood	30	14
Severity	5	5
Persons Affected	1	1
Total Points	65	38
Penalty	$150	$270

arge-sized Mine

	Current Rule	Proposed Rule
Mine Size	6	1
Controller Size	4	2
VPID	5	5
MPID	0	0
Negligence	20	15
Likelihood	30	14
Severity	20	10
Persons Affected	1	1
Total Points	86	48
Penalty	$807	$1,260

The Role of Special Assessments

The proposed rule addresses only penalties assessed under a regular assessment, pursuant to 30 C.F.R. § 100.3. The proposal makes no mention of penalties assessed under a special assessment, pursuant to 30 C.F.R. § 100.5. MSHA retains discretion to propose specially assessed penalties, which can result in fines upwards of four times the amount of their regularly assessed counterparts. Although the proposed rule does not involve specially assessed penalties, any consideration of total penalties to be incurred by the mining industry must account for specially assessed penalties. If not, it is incomplete as to the actual penalties operators face. Moreover, MSHA utilizes a matrix when arriving at a specially assessed penalty, but typically does not disclose the use of that matrix in contested cases. In accordance with its stated

objective for this proposed rule of providing increased transparency, MSHA should include in the rule the matrix it uses for proposing specially-assessed penalties.

Conclusion

The changes contemplated would be arbitrary and capricious because the proposal lacks data-driven analysis to justify the disparate effects that would occur. The proposal seems to be either change for change's sake, or an effort to ease the Secretary's burden of proof in enforcement actions and increase penalties without safety rationale.

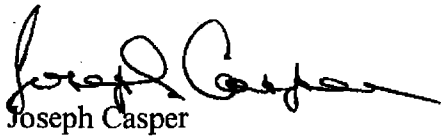
Although the specific impact of the proposed regulation will vary facility by facility, it raises larger concerns that will likely affect every operator. Principally, for the reasons detailed above, the following items in the proposed rule are most objectionable:

- The proposed change to the scope of Part 100, such that it may apply to both the proposal of penalties by MSHA and the assessment of penalties by the Commission.
- The proposed changes to "Negligence," and possible effect on unwarrantable failure designations, as well as the elimination of consideration of mitigating factors.
- The proposal fails to meet its stated goals.
- The proposed would result in dramatic increases in penalty assessments for NSSGA member operators.

NSSGA regrets that MSHA failed to take the opportunity to develop an approach for granting some measure of enforcement credit to excellent operators. This could be done by re-instituting the "Single Penalty" provision in place before the 2008 Part 100 changes, or by implementing the NSSGA-supported 'Pattern of Compliance' program of granting some enforcement relief (from some of the mandatory 2's and 4's) for operators with an excellent record of compliance and safety.

NSSGA would be pleased to work with MSHA on an alternative means of enabling the agency to properly focus its enforcement resources on areas of greatest risk. However, we believe that this rulemaking should be withdrawn. NSSGA appreciates consideration of these comments.

Sincerely,



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