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October 19, 2006

Ms. Patricia W. Silvey, Acting Director  
Office of Standards, Regulations, and Variances  
Mine Safety & Health Administration  
1100 Wilson Blvd., Room 2350  
Arlington, VA 22209-3939

**VIA E-mail: [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov)**  
**VIA Federal Express**

Re: RIN 1219-AB51 Comments to 30 CFR Part 100

Dear Ms Silvey:

On behalf of the Florida Minerals & Chemistry Council (FMCC), I am submitting this letter for the purpose of providing written comments in regard to proposed changes to the Mine Safety & Health Administration's (MSHA) "Criteria and Procedures for Proposed Assessment of Civil Penalties", which was proposed in the Code of Federal Regulations (CFR) on September 8, 2006. Florida Minerals & Chemistry Council membership includes a number of mining companies in Florida mining phosphate, fuller's earth, and mineral sands, making Florida one of the top five mining states in the United States.

The FMCC and member companies are committed to the safety and health of those employed in the mines, plants, and the public with which they interact. Safety is, and will continue to be, the top priority of member companies within FMCC.

The Florida Minerals & Chemistry Council's written comments concerning the agency proposed changes are provided below and, where appropriate, reference page and line numbers are included.

### **General Comments**

The Florida Minerals & Chemistry Council believes that adequate lead time to properly assess the impact of rules prior to the hearings offered was not provided. Thus, FMCC comments are limited to the written comments provided herein. FMCC understands that the Mine Improvement and New Emergency Response (MINER) Act requires that civil penalties be added for changes in this Act, but the scope of what was proposed in the September 8, 2006 CFR offering goes well beyond what this Act requires. FMCC believes that MSHA should withdraw all changes proposed that are beyond what the MINER Act requires, for reasons outlined herein.

### **Specific Response To Proposed Rulemaking**

FMCC agrees that some of the proposed rules are required by the MINER Act of 2006. These include:

- a civil penalty of \$5,000 to \$60,000 for failure to report an incident/accident which poses a reasonable risk of death within 15 minutes of occurrence
- a minimum penalty for 104(d)(1) violation of \$2,000
- a minimum penalty for 104(d)(2) violation of \$4,000
- the addition of "flagrant violations" with an assessed penalty of not more than \$220,000

The proposed rules above that FMCC does not contest are within the mandate of the MINER Act. Furthermore, FMCC does not have any opposition to the content as presented in the September 8, 2006 CFR.

The remaining changes as presented, however, were not included in the MINER Act, and significantly alter many of the existing requirements of the regulations. The proposals as written appear to penalize the entire mining industry based on the actions of a few. The data presented in the CFR in no way suggests or proves that by increasing penalties to the mining industry for cited violations, an improvement in the safety performance will result. Concerns in the proposed rules beyond what is required in the MINER Act are outlined below.

### **Mine Site versus Controlling Entity**

MSHA requested in the CFR comments on whether “in considering the size of the operators, (should) great(er) weight be placed on the size of the controlling entity.” FMCC believes that MSHA should look at each mine site and assess compliance with MSHA requirements. For a particular violation, assessing a citation at one site and not assessing it at another is creating an adverse competitive environment and potentially putting some miners at risk. Consistency in mine inspections must be a goal that MSHA seeks to achieve.

### **Single Penalty Assessment Criteria**

FMCC recommends that MSHA retain the existing single penalty assessment. The agency inspectors do not always enforce the regulations in a consistent and equal manner. FMCC does not oppose citations for legitimate violations, but in the mining industry citations are sometimes issued for highly subjective conditions that have been accepted by numerous inspectors over many inspection cycles. Often these involve low or no hazard situations such as minor housekeeping issues, paperwork errors, etc.

The Occupational Safety & Health Administration (OSHA) has an analogous penalty system for violations considered “other than serious,” and it is common that no penalty is assessed in many of these. The same logic should remain in place with MSHA, in the form of single penalty assessments for low and no hazard violations. FMCC does not see the need to increase the amount of the penalties for no, low, and moderate hazard citations, noting that MSHA already has the authority to specially assess negligent non-S&S citations.

### **Regular Assessment Criteria**

FMCC has concerns with the Violations Per Inspection Day (VPID) criteria as presented. An intermittent mine may be inspected only once per year, while a full time mine may receive two or more inspections. If both mines receive the same number of citations, one would have a VPID at least double the other, but there be no less level of compliance with the Mine Act.

FMCC opposes the concept of reducing the good faith penalty from 30% to 10%, but supports the removal of the ten point penalty for failure to abate.

FMCC questions the logic of increasing penalty points five-fold for citations classified as unlikely. By doing so, MSHA proposes essentially to eliminate any distinction between S&S and non-S&S citations from a penalty point perspective. FMCC believes the current penalty point based on gravity should be maintained as it presently exists.

### **Repeat Violation Criteria**

FMCC does not support the creation of a “repeat violation” category under the penalty point system. Since many MSHA regulations can be subjectively interpreted and applied, and inspectors inconsistently applying these interpretations, as well as the fact that inspectors can already apply an increased gravity for violations that they believe are repeat violations, addition of this criteria is unjustified. Additionally, a single section of the rule can be applied to a number of unrelated violations, giving the appearance of repeat violations that is not valid.

Another concern would be the issuance by an inspector of multiple violations, for items such as training, equipment inspections, etc. where an inspector cites each individual occurrence. An example might be an inspection that determined that five MSDS sheets are missing, two labels are faded, and training of three employees in HAZCOM was not properly documented. An inspector may cite each individual occurrence, for a total of ten citations, or three, one addressing each lapse of the standard. In the first case, it may trigger “repeat” points for future inspections, while the second case likely would not. Until MSHA can ensure greater consistency in enforcement of standards, the repeat citation criteria should be rejected.

### **Special Assessment Criteria**

The Special Assessments Criteria that is presently needed, and should not be eliminated. Agency personnel have and can interpret regulations in a subjective and inconsistent manner. By removing standard criteria, the objectivity of the special assessment process could be lost.

### **Conference Requests**

FMCC is opposed to the reduction of the 10-day period to request a conference of a citation. In fact, if anything, MSHA should consider emulating OSHA on this matter, where a 15-day period is allotted. Mine operators often must seek technical guidance to determine from their companies or other mine operators before deciding if a conference is justified. In some cases, MSHA inspectors have mailed citations to mine operators a week after completing an inspection, or modified the content (and gravity) of a citation after returning and discussing the citation issued. In these cases, a reduction to the five day conference timing would effectively eliminate any opportunity to conference on a citation.

### **Conclusion**

The Florida Minerals & Chemistry Council very much appreciates the consideration that MSHA gives its comments and comments of the regulated community. After you have reviewed these comments, should you have any questions, please do not hesitate to contact me.

October 19, 2006  
Page 5 of 5

Sincerely,

*Nancy D. Stephens*

Nancy D. Stephens, CAE  
Executive Director

Dm/ns