

DEPARTMENT OF LABOR**Mine Safety and Health Administration****30 CFR Part 100**

RIN 1219-AA49

Criteria and Procedures for Proposed Assessment of Civil Penalties**AGENCY:** Mine Safety and Health Administration, Labor.**ACTION:** Proposed rule.

SUMMARY: This proposed rule revises the Mine Safety and Health Administration's (MSHA's) existing civil penalty assessment amounts under part 100. The proposal also adds a new provision which would codify the civil penalty amounts that may be assessed under Sections 110(a), 110(b), and 110(g) of the Federal Mine Safety and Health Act of 1977 (Mine Act). These changes are made as a result of a mandate by Congress in the Debt Collection Improvement Act of 1996, which requires that all civil penalties be increased by up to 10 percent, and that they be adjusted at least once every four years thereafter according to the formula specified in the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act).

DATES: Written comments must be submitted on or before November 7, 1997.

ADDRESSES: Comments on the proposed rule may be transmitted by electronic mail, fax, or mail. Comments by electronic mail must be clearly identified as such and sent to this e-mail address: psilvey@msha.gov. Comments by fax must be clearly identified as such and sent to: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, 703-235-5551. Send mail comments to: Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, Room 621, 4015 Wilson Boulevard, Arlington, Virginia 22203-1984. Interested persons are encouraged to supplement written comments with computer files or disks; please contact the Agency with any questions about format.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director; Office of Standards, Regulations and Variances, MSHA; 703-235-1910 (voice), 703-235-5551 (facsimile), psilvey@msha.gov (Internet e-mail).

SUPPLEMENTARY INFORMATION:**I. Rulemaking Background**

Under Sections 105(a) and 110 of the Mine Act, MSHA is required to assess

a civil penalty for each violation of the Mine Act and the mandatory safety and health standards promulgated by the Agency. The Mine Act originally provided in 1977 that the penalty for each violation would not exceed \$10,000, and that the maximum penalty for failure to correct a violation cited under Section 104(a) within the period permitted for its correction would not exceed \$1,000 for each day that the violation continued. Miners who willfully violated the mandatory safety standards relating to smoking or the carrying of smoking materials into a mine would be assessed a civil penalty of not more than \$250 for each violation.

MSHA promulgated its first regulations relating to civil penalty assessments under the Mine Act on May 30, 1978 (43 FR 23514). This rule included a penalty conversion table for regular assessments based on the six criteria enumerated in 30 CFR 100.3(a). On May 21, 1982 (47 FR 22286), MSHA promulgated a rule that revised its regular assessment civil penalty table, further defined the criteria for issuing special assessments, and created a \$20 single penalty assessment for those violations that were not reasonably likely to result in reasonably serious injury or illness and which were abated in a timely manner. There was no provision in either rule relating to civil penalties assessed for failing to abate violations of the Mine Act or for smoking or carrying smoking materials into a mine, as these penalty amounts were set by the Mine Act.

On November 5, 1990, the Omnibus Budget Reconciliation Act of 1990 (Budget Act), Pub.L. 101-508, was signed into law. Section 3102 of the Budget Act amended the Mine Act and raised the maximum MSHA civil penalty per violation from \$10,000 to \$50,000. The \$1,000 per day civil penalty for failure to correct a violation under Section 104(a) was raised to \$5,000 per day. The miner smoking penalty remained at \$250. Following the passage of the Budget Act, MSHA published a final rule on January 24, 1992 (57 FR 2968), as amended December 21, 1992 (57 FR 60690), which implemented the penalty increases prescribed by the Budget Act and accounted for inflation since 1982. A new civil penalty conversion table was published and the single penalty assessment was also raised to \$50 by this final rule.

Also in 1990, Congress passed P.L. 101-410, the Inflation Adjustment Act. On April 26, 1996, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA),

Pub.L. 104-131, was passed. Chapter 10 of the OCRAA, titled as the "Debt Collection Improvement Act of 1996" (DCIA), modifies the Inflation Adjustment Act and requires that the head of each agency adjust by regulation each civil monetary penalty provided for by law within its jurisdiction pursuant to the inflation adjustment described under Section 5 of the DCIA. The first adjustment of a civil monetary penalty may not exceed 10 percent of the existing penalty. The revised civil penalties will apply only to those violations occurring after the date the final rule takes effect.

II. Discussion and Summary of the Proposed Rule**A. General Discussion**

MSHA is required by law to assess a civil penalty for each violation of the Mine Act or its regulations. The civil penalties are intended to serve as a means of encouraging mine operators to comply with the law and to deter them from allowing hazardous or unhealthy conditions to exist in their mines. In 1990, the maximum civil penalty that could be assessed for each violation of the Mine Act was raised from \$10,000 to \$50,000 under the Budget Act. MSHA issued regulations reflecting this increase on January 24, 1992 (57 FR 2968), as amended December 21, 1992 (57 FR 60690).

When Congress originally passed the Inflation Adjustment Act in 1990, the legislative history stated:

In the past 60 years, but most notably in the last 25 years, Congress has enacted numerous statutes intended to regulate conduct deemed harmful to the health and welfare of the U.S. citizenry. Typically, such statutes include provision for civil fines ("civil monetary penalties") to be used both to punish and to deter violations of the statute.

Recent studies, however, suggest that the desired impact of these penalties has eroded over time due to the failure to adjust civil penalties to keep pace with inflation. Thus, for example, where penalties to enforce workplace safety have remained unchanged since the enactment of the Occupational Health and Safety Act in 1970, such penalties have been effectively reduced to one-third of their original value if one takes into account the intervening rate of inflation.

In passing the DCIA, Congress again demonstrated its concern that civil penalties continue to have the same impact as was originally intended. MSHA is increasing its civil penalties in order to comply with Congress' mandate that agencies make inflation adjustments in their civil penalties.

Under the DCIA, MSHA is required to increase these civil penalties by an

amount not to exceed 10 percent. The amount of the increase is determined by the formula found in Section 5 of the Inflation Adjustment Act. Under Section 5, civil monetary penalties are to be increased by a cost-of-living adjustment. The statute defines "cost-of-living adjustment" as the percentage by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted. The term "Consumer Price Index" (CPI) means the Consumer Price Index for all-urban consumers published by the Department of Labor.

In order to determine the current cost-of-living adjustment for MSHA's civil penalties, MSHA made the following calculations:

469.5 (the CPI for the month of June 1996, the calendar year preceding the current adjustment.)

419.9 (the CPI for the month of June 1992, the calendar year in which the MSHA civil penalties were last adjusted)

$469.5/419.9 = 1.12$ (inflation adjustment factor)

By using the 1.12 inflation adjustment factor, MSHA would in effect increase its civil penalty assessments by 12 percent. However, because Congress has imposed a cap on the maximum increase of 10 percent, the increases contained within this rule would not exceed 10 percent.

In order to determine the current cost-of-living adjustment for the miner smoking penalty, MSHA made the following calculations:

469.5 (the CPI for the month of June 1996, the calendar year preceding the current adjustment.)

195.3 (the CPI for the month of June 1978, the calendar year in which the civil penalty was last adjusted)

$469.5/195.3 = 2.4$ (inflation adjustment factor)

Using the inflation adjustment factor of 2.4, MSHA would have to increase the miner smoking penalty 140 percent. However, as stated above, Congress has imposed a 10 percent cap on civil penalty increases. Therefore, all civil penalties under this proposal have been adjusted by multiplying each penalty by 1.10 (a 10 percent increase) and rounding to the nearest dollar.

B. Section-by-Section Analysis

The following section-by-section analysis explains the proposed rule and its effect on existing standards. The standards in part 100 apply to all mine operators.

Section 100.3 Determination of Penalty Amount; Regular Assessment

Paragraph (a) of this standard would be amended to codify Section 110(a) of the Mine Act. This revision would also reflect the increase of the maximum civil penalty to \$55,000 per violation. Paragraph (g) of this standard would set forth a revised penalty conversion table in which points assigned for each of the criteria enumerated in this section are totaled and a correlating civil penalty is assessed. Using the 10 percent maximum penalty increase prescribed by the DCIA, the civil penalty conversion table found in this section would be adjusted to reflect civil penalties ranging from \$66 to \$55,000.

Section 100.4 Determination of Penalty; Single Penalty Assessment

The single penalty assessment under this section would increase from \$50 to \$55, which reflects a 10 percent maximum increase.

Section 100.5 Determination of Penalty; Special Assessment

This section pertains to violations which are of such a nature or seriousness that MSHA cannot determine an appropriate penalty using the regular assessment formula or the single assessment provision. This section also addresses penalties which may be assessed to an operator for failure to correct a violation within the period required. Finally, this section addresses penalties which may be assessed for miners who willfully use or carry smoking materials underground.

The special assessment penalty is determined by experienced Agency mine safety and health specialists, based on the facts and circumstances of each case. Prior to a special assessment, Agency field personnel review certain categories of violations for special assessment.

The civil penalty provisions found in Sections 110(b) and 110(g) of the Mine Act would be codified under this section. The maximum civil penalty for failure to correct a violation for which a citation has been issued under Section 104(a) of the Mine Act would be increased to \$5,500 per violation per day. The maximum civil penalty for willful violation of mandatory standards pertaining to smoking or carrying of smoking materials into a mine by any miner would be raised to \$275 per violation.

IV. Executive Order 12866

In accordance with Executive Order 12866, MSHA has prepared a preliminary Regulatory Impact Analysis (RIA) of the estimated costs and benefits

associated with the proposed revisions of the criteria and procedures for proposed assessment of civil penalties.

The preliminary RIA containing this analysis is available from MSHA. MSHA welcomes comments on its analysis and methodology. The Agency estimates that the proposal would cost the mining industry slightly more than \$3 million annually. All penalties collected by MSHA are deposited in the U.S. Treasury.

Based upon the RIA, MSHA has determined that this rule is not an economically significant regulatory action pursuant to section 3(f)(1) of Executive Order 12866.

V. Paperwork Reduction Act

This proposed rule contains no information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

VI. Regulatory Flexibility Act

In accordance with § 605 of the Regulatory Flexibility Act (RFA), MSHA certifies that the civil penalty proposal does not have a significant economic impact on a substantial number of small entities. This proposed regulation does no more than to codify existing law and to mechanically increase certain civil money penalties to account for inflation, pursuant to specific directions set forth in the Federal Civil Penalties Inflation Adjustment Act, as amended. The statute specifies the procedure for calculating the adjusted civil money penalties and does not allow the Department to vary the calculation to minimize the effect on small entities. Moreover, the actual amount of the increase in penalties would not meet the threshold set forth in the Regulatory Flexibility Act. MSHA discusses its quantitative analysis warranting this conclusion below.

In the past, MSHA considered small mines to be mines with fewer than 20 employees. However, for the purposes of the RFA and this certification, MSHA has also evaluated the impact of the proposal on mines with 500 employees or fewer. No small governmental jurisdictions or nonprofit organizations are significantly or uniquely affected. Under the Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments to the RFA, MSHA must include in the proposal a factual basis for this certification. The Agency also must publish the regulatory flexibility certification statement in the **Federal Register**, along with the factual basis, followed by an opportunity for comment by the public.

MSHA specifically solicits comment on the Agency's determination in this regulatory flexibility certification statement, including cost data and data sources. To facilitate the public participation in the rulemaking process, MSHA will mail a copy of the proposed rule, including the preamble and regulatory flexibility certification statement, to mine operators and miners' representatives.

Factual basis for certification. MSHA explains below the Agency's quantitative approach in reaching its conclusion on the impact of the statutory provisions, as implemented by the rule. The Agency performed its analysis separately for two groups of mines: the coal mining sector as a whole, and the metal and nonmetal mining sector as a whole. Based on a review of available sources of public

data on the mining industry, the Agency believes that a quantitative analysis of the impacts on various mining subsectors may not be feasible. The Agency requests comments, however, on whether there are special circumstances that warrant separate quantification of the impact of this proposal on any mining subsector, and information on how it might readily obtain the data necessary to conduct such a quantitative analysis. The Agency is fully cognizant of the diversity of mining operations in each sector, and has applied that knowledge as it developed the proposal.

Under the SBREFA amendments to the RFA, MSHA must use the SBA definition for a small mine of 500 employees or fewer or, after consultation with the SBA Office of Advocacy, establish an alternative

definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. The alternative definition could be the Agency's traditional definition of "fewer than 20 miners," or some other definition. As reflected in the certification, MSHA analyzed the costs of this proposal for small and large mines using both the traditional Agency definition, and SBA's definition, as required by RFA, of a small mine. The Agency compared the costs of the proposal for small mines in each sector to the revenues for each sector for every size category analyzed. In each case, the results indicated that the costs as a percent of revenue are less than 1 percent.

The following table summarizes the results of this analysis.

SMALL MINES: COSTS COMPARED TO REVENUES

	Number of mines	Estimated cost of proposal	Estimated revenue (millions)	Estimated cost per mine	Cost as percent of revenue
Coal Mines:					
Small <20	1601	\$1,392,900	\$836	\$870	.17
Large >=20	1043	907,500	18,672	870	.005
Small <500	2633	2,290,800	18,689	870	.01
Large >=500	11	9,600	819	870	.002
All Mines	2644	2,300,400	19,508	870	.01
M/NM Mines:					
Small <20	9195	631,700	11,929	70	.005
Large >=20	1540	105,800	26,071	70	.000
Small <500	10706	735,500	32,134	70	.002
Large >=500	29	2,000	5,866	70	.000
All Mines	10735	737,500	38,000	70	.002

VII. Unfunded Mandates

The Unfunded Mandates Reform Act was enacted in 1995. While much of the Act is designed to assist the Congress in determining whether its actions will impose costly new mandates on State, local, and tribal governments, the Act also includes requirements to assist Federal agencies to make this same determination with respect to regulatory actions.

MSHA has determined that, for purposes of § 202 of the Unfunded Mandates Reform Act of 1995, this proposal does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments in the aggregate of more

than \$100 million, or increased expenditures by the private sector of more than \$100 million. Moreover, the Agency has determined that for purposes of § 203 of that Act, this proposed rule does not significantly or uniquely affect small governments.

Analysis. Based on the analysis in the Agency's preliminary Regulatory Impact Statement, the cost of this proposed rule for the entire mining industry is less than \$100 million. Accordingly, there is no need for further analysis under § 202 of the Unfunded Mandates Reform Act.

MSHA has concluded that small governmental entities are not significantly or uniquely impacted by the proposed regulation. The proposed rule will impact approximately 2,545

coal and 10,563 metal and nonmetal mining operations.

When MSHA issues the proposed rule, the Agency will affirmatively seek input of any state, local, and tribal government which may be affected by the civil penalty rulemaking. This would include state and local governmental entities who operate sand and gravel mines in the construction and repair of highways and roads. MSHA will mail a copy of the proposed rule to approximately 350 such entities.

Following is a state-by-state listing of sand and gravel mines owned or operated by state or local governments according to MSHA records. The Agency welcomes any comments or corrections.

STATE/COUNTY OWNED/OPERATED SAND AND GRAVEL OPERATIONS

[As of 12/08/95]

State	State owned	County owned	City owned
ARIZONA	2	2	.....

STATE/COUNTY OWNED/OPERATED SAND AND GRAVEL OPERATIONS—Continued

[As of 12/08/95]

State	State owned	County owned	City owned
ARKANSAS	5	.....
CALIFORNIA	4	.....
COLORADO	4	27	.....
IDAHO	13	.....
ILLINOIS	2	.....
INDIANA	5	.....
IOWA	2	.....
KANSAS	2	.....
MAINE	5	.....	.....
MARYLAND	6
MICHIGAN	8	.....
MISSISSIPPI	5	.....
MISSOURI	8	.....
MONTANA	8	34	.....
NEBRASKA	2	.....
NEVADA	1	.....
NEW MEXICO	4	.....
NEW YORK	15	95
OKLAHOMA	2	.....
OREGON	11	.....
PENNSYLVANIA	1
SOUTH CAROLINA	1	.....
SOUTH DAKOTA	15	.....
TENNESSEE	3	.....
TEXAS	6	.....
UTAH	1	5	.....
VERMONT	11
WASHINGTON	9	.....
WISCONSIN	20	1
WYOMING	1	.....
TOTAL (346)	20	212	114

List of Subjects in 30 CFR Part 100

Mine safety and health, Penalties.

Dated: September 2, 1997.

J. Davitt McAteer,*Assistant Secretary for Mine Safety and Health.*

It is proposed to amend part 100, subchapter P, chapter I, title 30 of the Code of Federal Regulations as follows:

PART 100—CRITERIA AND PROCEDURES FOR PROPOSED ASSESSMENT OF CIVIL PENALTIES

1. The authority citation for part 100 continues to read as follows:

Authority: 30 U.S.C. 815, 820 and 957.

2. Section 100.3 is amended by revising the introductory text of paragraph (a) and revising paragraph (g) to read as follows:

§ 100.3 Determination of penalty amount; regular assessment.

(a) General. The operator of any mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of the Mine Act, shall be assessed a civil penalty of not more than \$55,000. Each occurrence of a violation of a mandatory

safety or health standard may constitute a separate offense. The amount of the civil penalty proposed shall be based upon the formula set forth in this section. The formula is based on the general criteria described in sections 105(b) and 110(i) of the Act. These criteria are:

(g) Penalty conversion table. The following penalty conversion table shall be used to convert the accumulation of penalty points to the appropriate proposed monetary assessment.

PENALTY CONVERSION TABLE

Points	Penalty
20 or fewer	66
21	73
22	79
23	86
24	92
25	99
26	109
27	119
28	129
29	139
30	149
31	162
32	175
33	188

PENALTY CONVERSION TABLE—Continued

Points	Penalty
34	201
35	215
36	231
37	248
38	264
39	281
40	297
41	321
42	347
43	371
44	396
45	420
46	453
47	486
48	570
49	679
50	796
51	936
52	1,086
53	1,247
54	1,419
55	1,603
56	1,815
57	2,041
58	2,279
59	2,531
60	2,796
61	3,098
62	3,416

PENALTY CONVERSION TABLE—
Continued

Points	Penalty
63	3,748
64	4,096
65	4,400
66	4,620
67	4,840
68	5,060
69	5,280
70	5,500
71	5,775
72	6,050
73	6,325
74	6,600
75	6,875
76	7,150
77	7,700
78	8,250
79	8,800
80	9,350
81	10,450
82	11,550
83	12,650
84	13,750
85	14,850
86	16,500
87	18,700
88	20,900
89	23,100
90	25,300
91	27,500
92	30,250
93	33,000

PENALTY CONVERSION TABLE—
Continued

Points	Penalty
94	35,750
95	38,500
96	41,250
97	44,000
98	46,750
99	49,500
100	55,000

* * * * *

3. Section 100.4 is amended by revising paragraph (a) to read as follows:

§ 100.4 Determination of penalty; single penalty assessment.

(a) An assessment of \$55 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness (non-S&S) and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the \$55 single penalty and will be processed through either the regular assessment provision (§ 100.3) or special assessment provision (§ 100.5). If the violation meets the criteria for excessive history under § 100.4(b), the violation will not be eligible for the \$55

single penalty and will be processed through the regular assessment provision (§ 100.3).

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4. Section 100.5 is amended by redesignating the introductory text as paragraph (a); paragraphs (a) through (h) as paragraphs (a) (1) through (8); concluding text as paragraph (b); and by adding new paragraphs (c), and (d) to read as follows:

§ 100.5 Determination of penalty; special assessment.

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(c) Any operator who fails to correct a violation for which a citation has been issued under Section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$5,500 for each day during which such failure or violation continues.

(d) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty which shall not be more than \$275 for each occurrence of such violation.

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