

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: Final rule.

SUMMARY: This final rule revises the Mine Safety and Health Administration's (MSHA's) existing civil penalty assessment amounts under part 100. The rule also adds a new provision which codifies the civil penalty amounts that may be assessed under §§ 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 4 years thereafter according to the formula specified in the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act).

EFFECTIVE DATE: This final rule is effective June 22, 1998.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director; Office of Standards, Regulations, and Variances, MSHA; 703-235-1910.

SUPPLEMENTARY INFORMATION:**I. Rulemaking Background**

Under §§ 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 § 104(a) within the period permitted for its correction would not exceed \$1,000 for each day that the violation continued to exist. Miners who willfully violated the mandatory safety standards relating to smoking or the carrying of smoking materials would be assessed a civil penalty of not more than \$250 for each occurrence of such 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, 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 § 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 \$20 single penalty assessment was also raised to \$50.

Also in 1990, Congress passed Pub. 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 § 5 of the DCIA. The first adjustment of a civil 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.

On September 8, 1997, MSHA published a proposed rule in the **Federal Register** (62 FR 47330) notifying the public of the Agency's mandate to increase civil penalties by an amount not to exceed 10 percent of the existing penalty amounts. The rulemaking record closed on November 7, 1997. No requests for public hearings were received. This final rule is based on consideration of the entire

rulemaking record, including all written comments received.

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

In passing the DCIA, Congress demonstrated its concern that civil penalties be adjusted to produce desired results. MSHA is increasing its civil penalties in order to comply with Congress' mandate that agencies make inflation adjustments in their civil penalties.

Under § 5 of the Inflation Adjustment Act, civil 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 penalties 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:

480.2 (the CPI for the month of June 1997, 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)
 $480.2/419.9 = 1.14$ (inflation adjustment factor)
 $1.14 * \$100$ (a hypothetical penalty assessment) = \$114 (new assessment amount with full inflation adjustment)

But using the maximum inflation adjustment (10%) permitted by the DCIA, this hypothetical penalty assessment would be \$110 ($1.10 * \100)

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

480.2 (the CPI for the month of June 1997, 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)
 $480.2/195.3 = 2.5$ (inflation adjustment factor)
 $2.50 * \$250$ (the smoking penalty assessment) = \$625 (new assessment amount with full inflation adjustment)

But using the maximum inflation adjustment (10%) permitted by the

DCIA, penalty assessment would be \$275 ($1.10 \times \250)

One commenter generally agreed with the provisions of the proposed rule and supported the increase of monetary penalties. The commenter also suggested that the Agency quickly and efficiently implement the provisions of the proposed rule.

Another commenter stated that the proposed rule and the resulting increase in monetary penalties are excessive, especially for small companies. The adjustments contained in the final rule are Congressionally mandated and, therefore, agencies have no discretion to consider lower increases in penalties for small businesses. However, one criterion considered by MSHA when assessing civil penalties by the regular formula under 30 CFR 100.3(a)(1) is the size of the mine and the size of the controlling entity. A second criterion considered by MSHA is the mine operator's ability to continue in business. MSHA begins with the assumption that the civil penalty will not affect a mine operator's ability to continue in business. The burden is on the mine operator to demonstrate financial hardship. MSHA then reviews any financial documentation submitted by the mine operator and makes a determination as to whether the proposed penalty should be adjusted.

Two commenters suggested that MSHA modify part 100 to allow for penalty offsets or credits for those coal companies that maintain mine rescue teams. The commenters added that companies which continue to maintain mine rescue teams are at a competitive disadvantage with other coal companies. These commenters suggested that the Agency is presently considering crediting mining companies with mine rescue teams by automatically reducing their assessed civil penalties. Therefore, these commenters requested that MSHA extend the comment period or leave the rulemaking record open while this issue is being considered. One of the commenters also added that civil penalties could, and should, be used in part to fund some state agency mine rescue teams. While the Agency recognizes the importance of mine rescue teams and the significant role they play in ensuring miners' health and safety, the issue is beyond the scope of this rulemaking. Moreover, MSHA is presently not considering reducing civil penalties assessed to mining companies with mine rescue teams. MSHA does, however, plan to continue to provide funding through its State Grants program. Portions of this MSHA funding

program are used by some states for maintaining mine rescue teams.

B. Section-by-Section Analysis

The following section-by-section analysis explains the final rule and its effect on existing standards.

Section 100.3 Determination of Penalty Amount; Regular Assessment

Paragraph (a) of this section is amended to codify § 110(a) of the Mine Act. This revision also reflects the increase of the maximum civil penalty from \$50,000 to \$55,000 per violation. Existing paragraph (g) of this standard includes a revised penalty conversion table in which points assigned for each criterion enumerated in this section are totaled and a correlating civil penalty is determined. Current penalties range from \$60 to \$50,000. New paragraph (g) reflects the 10 percent maximum penalty increase prescribed by the DCIA, and civil penalties have been adjusted accordingly. Civil penalties in the final table range from \$66 to \$55,000.

Section 100.4 Determination of Penalty; Single Penalty Assessment

The single penalty assessment under the final rule is increased from the existing \$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. 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.

This section also addresses penalties which may be assessed daily to an operator for failure to correct a violation within the period permitted for its correction. The existing maximum daily civil penalty is increased from \$5,000 to \$5,500.

Finally, this section addresses penalties which MSHA may assess miners who willfully violate mandatory safety standards relating to the use or carrying of smoking materials underground. This current penalty of \$250 is increased in the final rule to \$275.

III. Executive Order 12866

In accordance with Executive Order 12866, MSHA has prepared a Regulatory Impact Analysis (RIA) of the estimated costs and benefits associated with the revisions of the criteria and procedures for proposed assessment of civil penalties.

The RIA containing this analysis is available from MSHA. The Agency estimates that the final rule will result in increased costs to the mining industry of about \$2.6 million annually.

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

IV. Paperwork Reduction Act

This final 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.

V. Regulatory Flexibility Act

In accordance with § 605 of the Regulatory Flexibility Act (RFA), MSHA certifies that the civil penalty rule does not have a significant economic impact on a substantial number of small entities. This final regulation does no more than codify existing law and 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 final rule on mines with 500 employees or fewer. About 350 small governmental jurisdictions may be affected. Under the Small Business Regulatory Enforcement Fairness Act (SBREFA) amendments to the RFA, MSHA must include in the final rule a factual basis for this certification. The Agency is publishing the regulatory flexibility certification statement in the **Federal Register**, along with the factual basis. The Agency has provided the Small Business Administration (SBA) Office of

Advocacy a copy of the certification statement.

MSHA will also mail a copy of the final rule, including the preamble and certification statement, to mine operators and miners' representatives. The final rule will also be available on MSHA's Website.

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: coal mines and metal/nonmetal mining operations.

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 final rule for small and large mines using both the traditional Agency definition and SBA's definition, as required by RFA. The Agency compared the costs of the final rule 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.

One commenter stated that the SBA defines the small business entity for Standard Industrial Code (SIC) 3241 as

those employing 750 persons or less. SIC code 3241 includes establishments primarily engaged in manufacturing hydraulic cement, including portland cement. The commenter stated that of the 45 manufacturers of portland cement, nine qualified as small entities under this SBA definition. The commenter also requested that MSHA use this definition in all proposed rules. MSHA recognizes this SBA definition for businesses engaged in this type of mining. In this instance, however, the mandate by Congress in the DCIA to increase civil penalties applies across the board to all mine operators. Therefore, although some manufacturers of portland cement would be considered small mines under the SBA definition, they are still covered by the final rule.

The following table summarizes the results of the analysis.

MINES: COSTS COMPARED TO REVENUES

	Number of mines	Estimated cost of final rule	Estimated revenue (millions)	Estimated cost per mine	Cost as % of revenue
COAL MINES:					
Small <20	1617	\$1,149,957	\$836	\$711	0.14
Large >=20	1044	742,459	18,672	711	0.004
Small= <500	2650	1,884,593	18,689	711	0.01
Large >500	11	7,823	819	711	0.001
All Mines	2661	1,892,416	19,508	711	.01
M/NM MINES:					
Small <20	9238	584,462	11,929	63	0.005
Large >=20	1543	97,558	26,071	63	0.000
Small= <500	10,751	680,185	32,134	63	0.002
Large >500	29	1,835	5,866	63	0.000
All Mines	10,780	682,020	38,000	63	0.002

In determining revenues for coal mines, MSHA multiplied coal production data (in tons) for mines in specific size categories (reported to MSHA quarterly) by the average price per ton for coal as determined in the *Coal Industry Annual 1996*. (Published by the Department of Energy's Energy Information Administration.) MSHA obtained revenue data for metal and nonmetal mines from the *Mineral Commodities Summaries 1996*. (Published by the U.S. Department of the Interior.)

VI. 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 final rule 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 final rule does not significantly or uniquely affect these entities.

Analysis. Based on the analysis in the Agency's Final Regulatory Impact Statement, the cost of this final rule is estimated to be about \$2.6 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 final rule. The final rule will impact about 2,700 coal operations and 10,800 metal and nonmetal mining operations

of which approximately 350 sand and gravel or crushed stone operations are run by state, local, or tribal governments for the construction and repair of highways and roads. Of these entities, only those which are assessed a civil penalty will incur additional costs related to this final rule. These costs, however, would be minimal. Notwithstanding this conclusion, MSHA will mail a copy of the final rule to these 350 entities.

VII. Executive Order 13045

In accordance with Executive Order 13045, MSHA has evaluated the environmental health or safety effects of the rule on children. The Agency has determined that the final rule will have no effects on children.

List of Subjects in 30 CFR Part 100

Mine safety and health, Penalties.

Dated: April 15, 1998.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

Part 100, subchapter P, chapter I, title 30 of the Code of Federal Regulations is amended 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, 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 Mine 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
34	201
35	215

**PENALTY CONVERSION TABLE—
Continued**

Points	Penalty (\$)
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
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
94	35,750
95	38,500
96	41,250
97	44,000
98	46,750
99	49,500

**PENALTY CONVERSION TABLE—
Continued**

Points	Penalty (\$)
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.

(1) 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).

(2) 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).

* * * * *

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

§ 100.5 Determination of penalty; special assessment.

* * * * *

(c) Any operator who fails to correct a violation for which a citation has been issued under Sec. 104(a) of the 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.

[FR Doc. 98-10688 Filed 4-21-98; 8:45 am]

BILLING CODE 4510-43-P