

to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by December 8, 2006. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

#### Drafting Information

The principal author of these regulations is Winston H. Douglas, Office of the Associate Chief Counsel (Passthroughs and Special Industries).

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

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

**Authority:** 26 U.S.C. 7805 \* \* \*

**Par. 2.** Section 1.45G-0 is added to read as follows:

##### **§ 1.45G-0 Table of contents for the railroad track maintenance credit rules.**

[The text of this proposed section is the same as the text of § 1.45G-0T published elsewhere in this issue of the **Federal Register**.]

**Par. 3.** Section 1.45G-1 is added to read as follows:

##### **§ 1.45G-1 Railroad track maintenance credit.**

[The text of this proposed section is the same as the text of § 1.45G-1T published elsewhere in this issue of the **Federal Register**.]

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E6-14856 Filed 9-7-06; 8:45 am]

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#### DEPARTMENT OF LABOR

#### Mine Safety and Health Administration

#### 30 CFR Part 100

#### RIN 1219-AB51

#### Criteria and Procedures for Proposed Assessment of Civil Penalties

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Proposed rule.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is proposing to amend its civil penalty regulations to increase penalty amounts and to implement new requirements of the Mine Improvement and New Emergency Response (MINER) Act of 2006 amendments to the Mine Safety and Health Act of 1977 (Mine Act). In addition, MSHA is proposing to revise procedures for proposing civil monetary penalties to improve the efficiency and effectiveness of the civil penalty process. These changes are intended to induce greater mine operator compliance with the Mine Act and MSHA's safety and health standards and regulations, thereby improving safety and health for miners.

**DATES:** MSHA must receive comments on or before October 23, 2006. MSHA will hold six public hearings on September 26, 2006, September 28, 2006, October 4, 2006, October 6, 2006, October 17, 2006, and October 19, 2006. Details about the public hearings are in the **SUPPLEMENTARY INFORMATION** section of this document.

**ADDRESSES:** Comments must be clearly identified with as such and may be sent to MSHA by any of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

(2) *Electronic mail:* [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov). Include "RIN 1219-AB51" in the subject line of the message.

(3) *Telefax:* (202) 693-9441. Include "RIN 1219-AB51" in the subject.

(4) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939.

(5) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939. Stop by the 21st floor and sign in at the receptionist's desk.

**Docket:** Comments can be accessed electronically at [www.msha.gov](http://www.msha.gov) under the "Rules and Regs" link. MSHA will post all comments on the Internet without change, including any personal information provided. Comments may also be reviewed at the Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia.

MSHA maintains a listserv that enables subscribers to receive e-mail notification when rulemaking documents are published in the **Federal Register**. To subscribe to the listserv, go

to <http://www.msha.gov/subscriptions/subscribe.aspx>.

**Hearings:** Locations of the public hearings are in the **SUPPLEMENTARY INFORMATION** section of this document.

#### FOR FURTHER INFORMATION CONTACT:

Patricia W. Silvey, Acting Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939, [silvey.patricia@dol.gov](mailto:silvey.patricia@dol.gov) (e-mail), (202) 693-9440 (voice), or (202) 693-9441 (telefax).

#### SUPPLEMENTARY INFORMATION:

##### *Outline:*

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#### I. Public Hearings

MSHA will hold six public hearings on the proposed rule. The hearings will begin at 9 a.m., and will be held on the following dates and locations:

Date	Location	Phone
September 26, 2006 .....	Mine Safety and Health Administration, 1100 Wilson Blvd, 25th Floor, Conference Room, Arlington, Virginia 22209.	(202) 693-9440
September 28, 2006 .....	Sheraton Birmingham, 2101 Richard Arrington Jr. Blvd., North Birmingham, Alabama 35203.	(205) 324-5000
October 4, 2006 .....	Hilton Salt Lake City Center, 255 South West Temple, Salt Lake City, Utah 84101.	(801) 238-2999
October 6, 2006 .....	Hilton St. Louis Airport, 10330 Natural Bridge Road, St. Louis, Missouri 63134 ...	(800) 314-2117
October 17, 2006 .....	Charleston Marriott Town Center, 200 Lee Street East, Charleston, West Virginia 25301.	(304) 345-6500
October 19, 2006 .....	Pittsburgh Airport Marriott, 777 Aten Road, Coraopolis, Pennsylvania 15108 .....	(412) 490-6602

Requests to speak at a hearing should be made at least five days prior to the hearing dates. Requests to speak may be made by telephone (202-693-9440), telefax (202) 693-9441, or mail (MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Rm. 2350, Arlington, Virginia 22209-3939). Any unallocated time at the hearings will be made available to persons making same-day requests to speak.

The hearings will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations to a hearing panel. Speakers will be assigned in the order in which their requests are received. Speakers and other attendees may present written information or other articles to the MSHA panel for inclusion in the rulemaking record.

The hearings will be conducted in an informal manner. The hearing panel may ask questions of speakers. Formal rules of evidence and cross examination will not apply. The presiding official may limit presentations and exclude irrelevant or unduly repetitious material and questions to ensure the orderly progress of the hearings.

Transcripts of the hearings will be included in the rulemaking record. Copies of the transcripts will be available to the public, and can be viewed at <http://www.msha.gov>.

MSHA will accept post-hearing written comments and other appropriate data for the record from any interested party, including those not presenting oral statements. Comments must be received at MSHA no later than October 23, 2006.

## II. Background

### A. General

The Mine Act requires MSHA to issue citations or orders to mine operators for any violations of a mandatory health or safety standard, rule, order, or regulation promulgated under the Mine Act. Upon issuing a citation, the Secretary's authorized representative (inspector) specifies a time for the violation to be abated. If the operator

does not abate the condition within the allowed time, the inspector may extend the time to abate or issue an order requiring all persons to be withdrawn from the area affected by the violation until the violation is abated. The Mine Act further requires assessment of civil monetary penalties for violations. Sections 105 and 110 of the Mine Act provide for the assessment of these penalties. The following six criteria in section 110(i) of the Mine Act are used to assess civil monetary penalties:

- (1) The appropriateness of the penalty to the size of the business of the operator charged;
- (2) The operator's history of previous violations;
- (3) Whether the operator was negligent;
- (4) The gravity of the violation;
- (5) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and
- (6) The effect of the penalty on the operator's ability to continue in business.

MSHA proposes a civil penalty assessment for each violation. Upon receipt of the proposed assessment, the mine operator or other person has 30 days to contest the assessment before the Federal Mine Safety and Health Review Commission (Commission), an independent adjudicatory agency established under the Mine Act. A proposed assessment that is not contested within 30 days becomes a final order of the Commission by operation of law and will not be subject to review by any court or agency. A proposed assessment that is contested before the Commission is reviewed by the Commission *de novo*.

### B. Rulemaking History

On May 30, 1978, MSHA published its first final rule pertaining to the proposed assessment of civil penalties under the Mine Act for both coal mines and metal and nonmetal mines (47 FR 22286). The maximum civil penalty that MSHA could assess under the Mine Act at that time was \$10,000.

The 1978 rule consisted of a two-tiered system of assessing proposed penalties under either a regular assessment or a special assessment. Since 1978, MSHA has revised its civil penalty regulations in 30 CFR part 100 essentially to: (1) Add a single penalty assessment provision; (2) change the assessment process to conform to a court order concerning history of violations; (3) increase penalty amounts due to legislative action; and (4) change penalty amounts and processes due to other compelling circumstances.

Under the existing regulations, MSHA proposes penalties using a three-tiered process: (1) Regular assessments; (2) single penalty assessments; and (3) special assessments. The maximum civil penalty assessment is \$60,000. The single penalty assessment is \$60. The maximum daily civil penalty which may be assessed for failure to correct a violation within the time permitted is \$6,500 and the maximum penalty for smoking or carrying smoking materials underground is \$275.

## III. Discussion and Analysis of Proposed Changes to Part 100

### A. General Discussion

MSHA is proposing to revise its procedures for assessing proposed civil penalties to update and increase penalties for violations of the standards and regulations promulgated under the Mine Act and to implement new civil penalty requirements in the MINER Act (Pub. L. 109-236). These new requirements address civil penalties related to prompt incident notification, and flagrant and unwarrantable violations. In accordance with MINER Act requirements, citations and orders issued on or after June 16, 2006, will be subject to the minimum penalties specified in the Act for violations involving failure to promptly notify MSHA within 15 minutes and unwarrantable failure.

The intended purpose of civil penalties under the Mine Act is to "convince operators to comply with the Act's requirements." (S. Rep. No. 181, 95th Cong., 1st Sess. 45 (1977),

reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 633 (1978)). The Congress intended that the imposition of civil penalties would induce mine operators to be proactive in their approach to mine safety and health, and take necessary action to prevent safety and health hazards before they occur. In this proposal, the Agency is strengthening the civil penalty assessment regulations which will be an important tool in the reduction of fatalities and improvement in miner safety and health.

Under MSHA's existing procedures, a civil penalty can be assessed under the single penalty provision, the regular assessment provision, or the special assessment provision. The single penalty provision is applied to most violations that are not reasonably likely to result in a reasonably serious injury or illness (non-Significant and Substantial, or non-S&S) and that are abated in a timely manner, provided the operator does not have an excessive history of violations. The single penalty assessment is currently \$60.

The regular assessment is used to address most S&S violations, i.e., those that are reasonably likely to result in a reasonably serious injury or illness. Under the regular assessment provision, penalty points are assigned based on five statutory criteria: Operator's size, history, negligence, demonstrated good faith towards abatement, and the gravity of the violation. The total points are then converted into a dollar amount. The resulting amount constitutes the proposed penalty unless, under the sixth statutory criterion, the operator shows that the penalty would adversely affect its ability to continue in business. Currently, the minimum regular assessment is \$72 and the maximum regular assessment is \$60,000 for each violation.

Under the existing rule, MSHA reviews eight categories of violations for special assessment—those associated with fatalities as well as those associated with other aggravating circumstances. These are violations that MSHA believes, because of the particular circumstances surrounding the violation, should not be processed as a single penalty or regular assessment. The maximum special assessment is currently \$60,000.

MSHA reviewed the history of violations and penalty assessments at mines which have experienced fatal accidents recently. At these mines, MSHA found repeated violations of several standards for which the \$60

single penalty was assessed. MSHA also reviewed violations at all mines. The number of citations for violations of MSHA's standards and regulations has been on the rise since 2003.

Specifically, the number of all violations assessed increased from 103,404 in 2003 to 116,731 in 2005. The number of violations that received a single penalty assessment increased from 69,078 in 2003 to 75,394 in 2005; the number of violations that received a regular assessment increased from 32,608 in 2003 to 37,968 in 2005; and the number of violations that received a special assessment increased from 1,718 in 2003 to 3,369 in 2005.

MSHA is proposing to revise the civil penalty assessment process so that proposed penalties will increase proportionately to increases in operator size, history, and negligence and the gravity or seriousness of the violation. To accomplish this, the proposed rule would:

(1) Reformulate the existing process of assigning points under the regular assessment provision;

(2) Add a provision in an operator's history addressing repeat violations;

(3) Delete the existing single penalty assessment provision;

(4) Revise the penalty conversion table by increasing the dollar value of each point assigned under the regular assessment provision;

(5) Remove the limit on types of violations that MSHA will review for possible special assessment by removing the list of specific categories;

(6) Shorten the time allowed to request a conference; and

(7) Implement new requirements of the MINER Act.

MSHA is proposing to delete the single penalty assessment provision. MSHA has reevaluated the single penalty provision and believes that the proposed rule reflects a more appropriate and effective approach to achieving the congressional purpose with respect to civil monetary penalties.

MSHA is proposing to implement new penalty requirements in the MINER Act for prompt incident notification and flagrant violations in § 100.5.

MSHA is proposing a new provision in § 100.4 to implement MINER Act requirements related to unwarrantable failure penalties. This provision sets minimum penalties for any citation or order issued under § 104(d) of the Mine Act.

The proposed changes are intended to induce greater mine operator compliance with the Mine Act and MSHA's safety and health standards, thereby improving safety and health for miners. The proposed changes are

described in more detail in the following section-by-section analysis.

## B. Section-by-Section Analysis

### 1. Scope and Purpose (§ 100.1)

Existing § 100.1 would not change.

### 2. Applicability (§ 100.2)

Existing § 100.2 provides that the criteria and procedures in this part apply to all "evaluations and proposed assessments of civil penalties." The proposed rule would remove the word "evaluations" because the process of proposing assessments includes evaluations. This proposed section contains no substantive changes.

### 3. Determination of Penalty; Regular Assessment (§ 100.3)

*a. General (§ 100.3(a)).* Existing § 100.3 establishes the formula to apply the statutory criteria to violations that are not processed under the existing single penalty assessment (§ 100.4) or special assessment (§ 100.5) provisions. This formula is an administrative mechanism used by MSHA to determine the appropriate penalty by applying the statutory criteria to particular facts surrounding a violation. Existing § 100.3(a) lists the criteria described in §§ 105(b)(1)(B) and 110(i) of the Mine Act. The proposed rule makes several editorial changes for clarification and ease of reading, but makes no substantive changes to this section.

*b. Appropriateness of the penalty to the size of the operator's business (§ 100.3(b)).* Existing § 100.3(b) contains five tables assigning penalty points for size of coal mines, controlling entities of coal mines, metal and nonmetal mines, controlling entities of metal and nonmetal mines, and independent contractors. The size of coal mines and their controlling entities is measured by the amount of coal production. The size of metal and nonmetal mines and their controlling entities is measured by the number of hours worked. The size of independent contractors is measured by the total number of hours worked by the independent contractors at all mines regardless of the commodity being mined.

Existing § 100.3(b) assigns up to 10 penalty points for the size of mines or independent contractors based on a scale which consists of 11 levels. In addition, up to 5 penalty points are assigned for the size of the controlling entity of a coal mine or a metal or nonmetal mine.

MSHA is proposing editorial changes to § 100.3(b) to make the provision easier to read. MSHA is also proposing to clarify the existing provision by

adding a statement concerning the way size of coal mines and metal and nonmetal mines is determined. The existing provision only states how the size of an independent contractor is determined. There are no proposed changes to the point table addressing the size of controlling entities.

MSHA is proposing to increase the number of penalty points based on the operator's size. Tables III-1, III-2, and III-3 show both the existing and proposed point schedules. The maximum number of penalty points for size would increase from 10 to 20 to assure that the amount of the penalty is an appropriate economic inducement of future compliance by the operator. The proposed point increase is based on MSHA's analysis of existing size data for coal operators, metal and nonmetal operators, and independent contractors.

According to the 2005 data, nearly half of the existing coal mines had annual tonnage of up to 15,000 tons. Slightly more than half of the existing

metal and nonmetal mines had fewer than 10,000 annual hours worked. About half of independent contractors had fewer than 10,000 annual hours worked at all mines. Consistent with existing § 100.3(b), MSHA proposes that coal mines with an annual tonnage of up to 15,000 tons, metal and nonmetal mines with fewer than 10,000 hours worked, and independent contractors with fewer than 10,000 hours worked at all mines would all receive 0 penalty points for this criterion.

Under the proposal, the remaining coal mines, i.e., those with annual tonnage levels above 15,000 tons; the remaining metal and nonmetal mines, i.e., those with annual hours worked above 10,000; and the remaining independent contractors, i.e., those with annual hours worked at all mines above 10,000, would receive twice as many penalty points as under the existing rule, up to a maximum of 20.

The proposed size schedule would result in penalties that are, on average,

more than twice as high at the smallest (one to five employees) coal mines than at metal and nonmetal mines of similar size and over four times higher at coal mines in the five to 19 employee size range than similar sized metal and nonmetal mines.

The proposed point structure in paragraph (b) is designed so that higher penalties would be computed for larger operations. This proposal is consistent with the Mine Act's requirement to consider the size of the operation when assessing penalties. MSHA believes penalties assessed under the existing regulations are often too low to be an effective deterrent for noncompliance at some of the largest operations.

The proposal, like the existing rule, places greater emphasis on size of the mine than on size of the controlling entity in assigning penalty points. The Agency solicits comments on whether, in considering the size of the operator, greater weight should be placed on the size of the controlling entity.

TABLE III-1.—SIZE OF COAL MINE: ANNUAL TONNAGE OF MINE

Annual tonnage of mine	Existing penalty points	Proposed penalty points
0 to 15,000 .....	0	0
Over 15,000 to 30,000 .....	1	2
Over 30,000 to 50,000 .....	2	4
Over 50,000 to 100,000 .....	3	6
Over 100,000 to 200,000 .....	4	8
Over 200,000 to 300,000 .....	5	10
Over 300,000 to 500,000 .....	6	12
Over 500,000 to 800,000 .....	7	14
Over 800,000 to 1.1 million .....	8	16
Over 1.1 million to 2 million .....	9	18
Over 2 million .....	10	20

TABLE III-2.—SIZE OF METAL AND NONMETAL MINE: ANNUAL HOURS WORKED AT MINE

Annual hours worked at mine	Existing penalty points	Proposed penalty points
0 to 10,000 .....	0	0
Over 10,000 to 20,000 .....	1	2
Over 20,000 to 30,000 .....	2	4
Over 30,000 to 60,000 .....	3	6
Over 60,000 to 100,000 .....	4	8
Over 100,000 to 200,000 .....	5	10
Over 200,000 to 300,000 .....	6	12
Over 300,000 to 500,000 .....	7	14
Over 500,000 to 700,000 .....	8	16
Over 700,000 to 1 million .....	9	18
Over 1 million .....	10	20

TABLE III-3.—SIZE OF INDEPENDENT CONTRACTOR: ANNUAL HOURS WORKED AT ALL MINES

Annual hours worked at all mines	Existing penalty points	Proposed penalty points
0 to 10,000 .....	0	0
Over 10,000 to 20,000 .....	1	2
Over 20,000 to 30,000 .....	2	4

TABLE III-3.—SIZE OF INDEPENDENT CONTRACTOR: ANNUAL HOURS WORKED AT ALL MINES—Continued

Annual hours worked at all mines	Existing penalty points	Proposed penalty points
Over 30,000 to 60,000 .....	3	6
Over 60,000 to 100,000 .....	4	8
Over 100,000 to 200,000 .....	5	10
Over 200,000 to 300,000 .....	6	12
Over 300,000 to 500,000 .....	7	14
Over 500,000 to 700,000 .....	8	16
Over 700,000 to 1 million .....	9	18
Over 1 million .....	10	20

*c. History of previous violations (§ 100.3(c)).* Existing § 100.3(c) bases the operator's violation history on the number of violations received in a preceding 24-month period for which a civil penalty has been paid or finally adjudicated. For production operators, penalty points are calculated using the average number of violations per inspection day (VPID). For independent contractors, penalty points are calculated using the annual average number of violations at all mines in a preceding 24-month period. The proposal would add the phrase "or have become final orders of the Commission" in the second sentence of this paragraph. The proposal would retain MSHA's intent that only violations which have become final be included in an operator's history.

MSHA is proposing three several substantive changes to existing § 100.3(c). First, MSHA is proposing that violation history include two components: (1) Paragraph (c)(1) would address the total number of violations; and (2) paragraph (c)(2) would address the number of repeat violations of the same standard. Second, an operator's or independent contractor's history of violations would be based on a preceding 15-month period rather than a 24-month period. This change would apply to both components—overall history and repeat violations—of history. Third, MSHA is proposing to change the point tables for overall history and to add a new point table addressing repeat violations of the same standard. Finally, MSHA is proposing to revise the calculation that addresses the overall history of an independent contractor.

MSHA is proposing to reduce the 24-month review period to a 15-month review period because the agency believes that a period of 15 months would more accurately reflect an operator's current state of compliance. This change would provide MSHA with sufficient data to appropriately determine an operator's compliance

record, including any trend, even for mining operations that are inspected on a less frequent basis. This change would provide an incentive for improving safety and health to an operator that has a deteriorating safety and health record in the recent past.

Proposed § 100.3(c)(1) addresses the overall history of production operators and independent contractors. MSHA would continue to assign penalty points for production operators based on the number of assessed violations per inspection day. MSHA is proposing to increase the points assigned to the five highest levels of the VPID table. The highest level would be assigned the maximum of 25 points. MSHA is proposing to increase penalty points starting from the "over 1.3 to 1.5" level or mid-level of the VPID table because MSHA believes that operators of mines with a VPID in the mid- and upper levels show the least concern for compliance with the Mine Act and MSHA safety and health standards and regulations. Higher penalties for such operators may encourage them to comply with the Mine Act's requirements.

Under proposed § 100.3(c)(1), production operators with fewer than 10 assessed violations in a preceding 15-month period would not receive points. This proposed provision is similar to existing § 100.4(b) pertaining to excessive history. The proposed provision takes into consideration small mines that may receive a low number of inspection days in a preceding 15-month period. In such small operations, even though the total number of violations may be low, the VPID could easily be greater than the highest 2.1 VPID level. These small operations, however, are not necessarily the ones which MSHA is targeting in this aspect of the history criterion, since such a record may not reflect systemic problems of noncompliance. MSHA believes that these small operators should not receive points under this aspect of this criterion.

Under proposed § 100.3(c)(1), the number of violations for independent contractors would no longer be based on the average number of assessed violations per year at all mines as it is under existing § 100.3(c). The number of violations for independent contractors would be based on the total number of assessed violations at all mines during a preceding 15-month period. Since the Agency proposes to reduce the history time period from 24 to 15 months, this eliminates the need for an annual average. MSHA estimates that this change may result in a *de minimis* increase in the average assessment issued to independent contractors. The proposed point table reflects this change. MSHA solicits comments on this proposed approach to determining violation history for independent contractors, i.e., whether an annualized average should continue to be used. For independent contractors, MSHA is proposing to increase the number of penalty points for the levels starting with "over 30 to 35" and above and to increase the maximum number of points for this aspect of the history criterion from 20 to 25. MSHA believes that independent contractors with a greater number of violations in the preceding 15-month period show the least concern for compliance with the Mine Act and MSHA safety and health standards and regulations. MSHA intends that this aspect of the history criterion would serve as greater inducement for such operators to comply with the Mine Act and MSHA's safety and health standards and regulations. MSHA therefore proposes to increase the points for the upper five levels of the number of violations. See tables III-4 and III-5 for a comparison of the existing and proposed penalty point scales for production operators and independent contractors, respectively.

TABLE III-4.—PRODUCTION OPERATOR'S OVERALL HISTORY OF VIOLATIONS: AVERAGE NUMBER OF VIOLATIONS PER INSPECTION DAY

Violations per inspection day	Existing penalty points	Proposed penalty points
0 to 0.3 .....	0	0
Over 0.3 to 0.5 .....	2	2
Over 0.5 to 0.7 .....	4	4
Over 0.7 to 0.9 .....	6	6
Over 0.9 to 1.1 .....	8	8
Over 1.1 to 1.3 .....	10	10
Over 1.3 to 1.5 .....	12	13
Over 1.5 to 1.7 .....	14	16
Over 1.7 to 1.9 .....	16	19
Over 1.9 to 2.1 .....	18	22
Over 2.1 .....	20	25

TABLE III-5.—INDEPENDENT CONTRACTOR'S OVERALL HISTORY OF VIOLATIONS

Number of violations	Existing penalty points	Proposed penalty points
0 to 5 .....	0	0
Over 5 to 10 .....	2	2
Over 10 to 15 .....	4	4
Over 15 to 20 .....	6	6
Over 20 to 25 .....	8	8
Over 25 to 30 .....	10	10
Over 30 to 35 .....	12	13
Over 35 to 40 .....	14	16
Over 40 to 45 .....	16	19
Over 45 to 50 .....	18	22
Over 50 .....	20	25

Proposed § 100.3(c)(2) would add a new component to the history criterion: Repeat violations of the same standard. The number of repeat violations of the same standard in a preceding 15-month period would be part of the operator's history of violations. For the purpose of determining repeat violations, each citable standard would be considered a separate "standard." Repeat violations of the same standard would include only assessed violations of the relevant standard that are paid or finally adjudicated, or became final orders of the Commission. For example, previous assessments for violations of § 75.202(a) would not be included in the repeat history for a violation of § 75.202(b). Similarly, previous assessments for violations of § 56.14101(a)(1) would not be included in the repeat history for a violation of § 56.14101(a)(2). MSHA requests comments on this approach to determining repeat violations. In addition, MSHA solicits comments on whether, in determining penalty points for repeat violations of the same standard, the Agency should factor in the number of inspection days during which the repeat violations were cited.

MSHA also solicits comments on whether only S&S violations should be considered in determining repeat violations of the same standard.

A maximum of 20 penalty points could be assigned using this new component of the history criterion. MSHA is proposing this new provision because the Agency believes that operators who repeatedly violate the same standard may indicate an attitude which has little regard for getting to the root cause of violations of safe and healthful working conditions. The Agency believes that these operators show a lack of commitment to good mine safety and health practices by letting cited and corrected hazardous conditions recur.

The analysis of assessments for the 15-month period from January 1, 2005, through March 31, 2006 reveals that 698 of the 10,227 mines with violations each had at least six violations of the same standard. Furthermore, 99 of the 698 mines had more than twenty violations of the same standard during the 15 month period. MSHA believes that the Agency needs to adjust its civil penalty structure so that the penalties can more appropriately serve as a deterrent to this type of behavior, thereby resulting in greater compliance and more effective mine safety and health.

Under proposed § 100.3(c)(2), an operator with five or fewer repeat violations of the same standard in a preceding 15-month period would not receive penalty points. MSHA believes that that this new component of the history criterion should be applied to those operators who violate the same standard with a certain degree of repetition. Under the proposal, operators could receive a maximum of 20 penalty points for this aspect of the history criterion. MSHA believes that this new proposal will encourage greater operator compliance with the Mine Act and MSHA's safety and health standards and regulations, which is consistent with Congress' intent.

Penalty points proposed to be assigned to the number of repeat violations of the same standard are presented in Table III-6.

TABLE III-6.—NEW TABLE ADDRESSING REPEAT VIOLATIONS OF THE SAME STANDARD

Number of violations	Penalty points
5 or fewer .....	0
6 .....	1
7 .....	2
8 .....	3
9 .....	4

TABLE III-6.—NEW TABLE ADDRESSING REPEAT VIOLATIONS OF THE SAME STANDARD—Continued

Number of violations	Penalty points
10 .....	5
11 .....	6
12 .....	7
13 .....	8
14 .....	9
15 .....	10
16 .....	11
17 .....	12
18 .....	14
19 .....	16
20 .....	18
More than 20 .....	20

*d. Negligence (§ 100.3(d)).* Existing § 100.3(d) provides for evaluating the degree of negligence involved in a violation under 5 categories: No negligence, which means that the operator exercised diligence and could not have known of the violative condition or practice; low negligence, which means that the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances; moderate negligence, which means that the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances; high negligence, which means the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and reckless disregard, which means the operator displayed conduct which exhibits the absence of the slightest degree of care. An increased number of penalty points is assigned to the higher levels of negligence. The maximum number of points for negligence is 25 under existing § 100.3(d).

Proposed § 100.3(d) would retain the existing five levels of negligence, but would increase the maximum number of penalty points from 25 to 50 so that more penalty points would be assigned to operators who exhibit increasingly higher levels of negligence, i.e., a lack of care towards protection of miners from safety and health hazards. Under the proposed table, points for no negligence and low negligence would not change. Penalty points assigned under the three highest levels of negligence would increase more rapidly than under the existing regulation. Moderate negligence would add 20 points rather than 15 points as under the existing regulation; high negligence would add 35 points rather than the 20 points under the existing regulation; and reckless disregard would add 50

points rather than 25 points as under the existing regulation.

Table III-7 compares penalty points in existing and proposed § 100.3(d).

TABLE III-7.—NEGLIGENCE

Categories	Existing penalty points	Proposed penalty points
No negligence ..... (The operator exercised diligence and could not have known of the violative condition or practice.)	0	0
Low negligence ..... (The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.)	10	10
Moderate negligence ..... (The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.)	15	20
High negligence ..... (The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.)	20	35
Reckless disregard ..... (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	25	50

*e. Gravity (§ 100.3(e)).* Existing § 100.3(e) uses three factors to measure the gravity of a violation: (1) Likelihood of occurrence of an event, (2) severity of injury or illness if the event occurred or were to occur, and (3) the number of persons potentially affected if the event occurred or were to occur. A maximum of 10 penalty points may be assigned from each of the three factors, for a maximum of 30 points for the gravity criterion.

Proposed § 100.3(e) would retain the three measures of gravity, but would change the number of penalty points assigned for each. The maximum number of points assigned for likelihood

of occurrence of an event would increase from 10 to 50, the maximum number of points assigned for severity of injury or illness would increase from 10 to 20, and the maximum number of points assigned for the number of persons potentially affected would increase from 10 to 18. In addition, the number of categories in the Persons Potentially Affected Table would increase from 7 to 11. The total points that could be assigned for the gravity criterion would increase from 30 to 88.

MSHA is proposing to adjust the number of penalty points that may be assigned under the gravity criterion to focus attention on the more serious

mine safety and health hazards. MSHA believes that the penalty points in the proposed gravity tables will result in mine operators placing greater emphasis on correcting the more serious violations because they pose the greatest safety and health risk to miners. The proposal distinguishes the less serious violations so that they would receive an appropriate penalty under the regular assessment formula. Existing § 100.3(e) has also been reworded for easier reading. Tables III-8 through III-10 show both the existing and the proposed penalty points for likelihood, gravity, and persons potentially affected.

TABLE III-8.—LIKELIHOOD

Likelihood of occurrence	Existing penalty points	Proposed penalty points
No likelihood .....	0	0
Unlikely .....	2	10
Reasonably likely .....	5	30
Highly likely .....	7	40
Occurred .....	10	50

TABLE III-9.—SEVERITY

Severity of injury or illness if the event occurred or were to occur	Existing penalty points	Proposed penalty points
No lost work days ..... (All occupational injuries and illnesses as defined in 30 CFR part 50 except those listed below.)	0	0
Lost work days or restricted duty ..... (Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)	3	5
Permanently disabling ..... (Any injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body.)	7	10
Fatal ..... (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	10	20

TABLE III-10.—PERSONS POTENTIALLY AFFECTED

Number of persons potentially affected if the event occurred or were to occur			
Existing scale	Existing points	Proposed scale	Proposed points
0 .....	0	0 .....	0
1 .....	1	1 .....	1
2 .....	2	2 .....	2
3 .....	4	3 .....	4
4 to 5 .....	6	4 .....	6
6 to 9 .....	8	5 .....	8
More than 9 .....	10	6 .....	10
		7 .....	12
		8 .....	14
		9 .....	16
		10 or more .....	18

*f. Demonstrated good faith of the operator in abating the violation (§ 100.3(f)).* Existing § 100.3(f) allows for a 30% reduction in the amount of a regular assessment where the operator abates the violation within the time set by the inspector. When the operator does not abate the violation within the time set by the inspector, 10 penalty points are assigned.

Proposed § 100.3(f) would decrease the amount of the reduction from 30% to 10% where an operator abates a violation within the time set by the inspector. MSHA believes this is a more appropriate reduction because operators are required by law to timely abate violations.

MSHA is also proposing to delete the existing provision which assigns ten additional penalty points where an operator does not abate the violation within the specified time period. The Mine Act provides two sanctions for failure to correct violations within the time set by the inspector: § 104(b) requires a withdrawal order, which

effectively shuts down production in the area affected, and § 110(b) allows assessment of a daily penalty.

MSHA has reviewed the civil penalty assessment data for the last several years and believes that the proposed 10% good faith reduction is a more appropriate credit for mine operators who promptly correct hazardous conditions.

*g. Penalty conversion table (§ 100.3(g)).* Existing § 100.3(g) provides the penalty conversion table used to convert total penalty points to a dollar amount. The existing dollar amounts range from \$72 to \$60,000, and correspond to penalty points ranging from 20 or fewer to 100.

Under the proposed penalty conversion table, MSHA would retain the statutory maximum penalty of \$60,000, but would establish a new minimum penalty of \$112. The proposed dollar amounts would correspond to penalty points ranging from 60 or fewer to 140.

The proposed penalty conversion table is derived by combining two

methods of converting points to dollars. There is a lower section (from 60 or fewer to 133 points) and an upper section (above 133 points) of the proposed conversion table. The proposed table starts at \$112 when the number of points is 60 or fewer. Each additional point above 60 up to 133 causes the dollar value to increase by a fixed 8.33%. The dollar value assigned for 133 points is \$38,387. Above 133 points the dollar value increases by approximately \$3,070 for each penalty point. The maximum number of points is 140 and the maximum dollar value is \$60,000.

When applied to MSHA's 2005 assessment data, the penalty amounts under the proposed conversion table increase generally as severity of the violation and violation history increase. Section III of this preamble provides data showing the increased penalty amounts under the proposal. Table III-12 shows the existing and the proposed penalty conversion tables.

TABLE III-12.—EXISTING AND PROPOSED PENALTY POINT CONVERSION TABLES

Current points	Current penalties	Proposed points	Proposed penalties
20 or fewer .....	\$72	60 or fewer .....	\$112
21 .....	80	61 .....	121
22 .....	87	62 .....	131
23 .....	94	63 .....	142
24 .....	101	64 .....	154
25 .....	109	65 .....	167
26 .....	120	66 .....	181
27 .....	131	67 .....	196
28 .....	142	68 .....	212
29 .....	153	69 .....	230
30 .....	164	70 .....	249
31 .....	178	71 .....	270
32 .....	193	72 .....	293
33 .....	207	73 .....	317
34 .....	221	74 .....	343
35 .....	237	75 .....	372
36 .....	254	76 .....	403
37 .....	273	77 .....	436
38 .....	291	78 .....	473



TABLE III-12.—EXISTING AND PROPOSED PENALTY POINT CONVERSION TABLES—Continued

Current points	Current penalties	Proposed points	Proposed penalties
39	310	79	512
40	327	80	555
41	354	81	601
42	383	82	651
43	409	83	705
44	437	84	764
45	463	85	828
46	500	86	897
47	536	87	971
48	629	88	1,052
49	749	89	1,140
50	878	90	1,235
51	1,033	91	1,337
52	1,198	92	1,449
53	1,376	93	1,569
54	1,566	94	1,700
55	1,769	95	1,842
56	2,003	96	1,995
57	2,252	97	2,161
58	2,515	98	2,341
59	2,793	99	2,536
60	3,086	100	2,748
61	3,419	101	2,976
62	3,770	102	3,224
63	4,137	103	3,493
64	4,521	104	3,784
65	4,856	105	4,099
66	5,099	106	4,440
67	5,342	107	4,810
68	5,585	108	5,211
69	5,828	109	5,645
70	6,071	110	6,115
71	6,374	111	6,624
72	6,678	112	7,176
73	6,981	113	7,774
74	7,285	114	8,421
75	7,588	115	9,122
76	7,892	116	9,882
77	8,499	117	10,705
78	9,106	118	11,597
79	9,713	119	12,563
80	10,321	120	13,609
81	11,535	121	14,743
82	12,749	122	15,971
83	13,963	123	17,301
84	15,177	124	18,742
85	16,392	125	20,302
86	18,213	126	21,993
87	20,642	127	23,825
88	23,070	128	25,810
89	25,498	129	27,959
90	27,927	130	30,288
91	30,355	131	32,810
92	33,391	132	35,543
93	36,427	133	38,503
94	39,462	134	41,574
95	42,498	135	44,645
96	45,533	136	47,716
97	48,569	137	50,787
98	51,605	138	53,858
99	54,640	139	56,929
100	60,000	140 or more	60,000

The range of points in the proposed conversion table to reflects proposed changes in the individual criteria tables in proposed § 100.3. The minimum penalty in the proposed conversion

table would be changed from \$72 to \$112. MSHA believes that this would represent a reasonable adjustment for many of the violations processed under the existing regulations as single penalty

assessments. Typically, single penalty assessments address non-S&S and paperwork type violations. The maximum penalty would remain at \$60,000 per violation.

*h. Effect on operator's ability to remain in business (§ 100.3(h)).* Existing § 100.3(h) provides that MSHA presumes that the operator's ability to continue in business will not be affected by payment of a civil penalty. In addition, it provides that MSHA may adjust the penalty if the operator submits information to MSHA concerning the business financial status which shows that payment of the penalty will adversely affect the operator's ability to continue in business. MSHA is proposing several editorial changes for easier reading and clarity, but there would be no substantive change to existing § 100.3(h).

#### 4. Determination of Penalty; Single Penalty Assessment (§ 100.4)

Existing § 100.4 provides for a \$60 penalty for non-S&S violations, *i.e.*, those that are not reasonably likely to result in reasonably serious injury or illness. The single penalty assessment is available only if the violation is abated within the time set by the inspector and the operator does not have an excessive history of violations. The existing provision defines excessive violation history.

MSHA is proposing to delete the single penalty assessment provision in § 100.4 based on an evaluation of agency data and a review of experience gained under the provision. The primary focus of the Mine Act, as reiterated in the MINER Act, is on the prevention and correction of violative conditions before they occur and the improvement of the safety and health of miners. MSHA believes that deletion of the single penalty provision will have a positive impact on miner safety and health. MSHA believes that deleting the single penalty provision will provide a greater incentive for mine operators to abate hazards. The Agency believes that deleting the single penalty provision will cause mine operators to focus their attention on preventing all hazardous conditions before they occur and promptly correct those violations that do occur. Therefore, MSHA is proposing to delete the single penalty provision.

#### 5. Unwarrantable Failure (§ 100.4)

Proposed § 100.4 would implement the MINER Act requirements related to minimum unwarrantable failure penalties. Section 8(a)(1)(B) of the MINER Act amends the Mine Act by setting a minimum penalty of \$2,000 for any citation or order issued under section 104(d)(1) and a minimum penalty of \$4,000 for any order issued under section 104(d)(2).

#### 6. Determination of Penalty; Special Assessment (§ 100.5)

Existing § 100.5 provides for a special assessment for those violations which MSHA believes should not be processed under the provision for a single penalty assessment or under the regular assessment provision.

Consistent with the proposal to delete the single penalty provision, MSHA is proposing to revise the first sentence in paragraph (a) of this section. The revision would remove the reference to the single assessment provision. MSHA proposes to remove the second sentence in existing paragraph (a) of § 100.5 that provides a general explanation stating when a special assessment would be applied. This sentence is "Although an effective penalty can generally be derived by using the regular assessment formula and the single assessment provision, some types of violations may be of such a nature or seriousness that it is not possible to determine an appropriate penalty under these provisions." This sentence is unnecessary because the first sentence specifies that it is within MSHA's discretion to waive the regular assessment depending upon the conditions surrounding the violation.

MSHA proposes to remove the list of eight categories of violations that will be reviewed for possible special assessment under existing § 100.5(b). As stated in existing and proposed § 100.5(a), MSHA has the discretion to waive the regular assessment formula if it determines that conditions warrant a special assessment for any type of violation. The existing list of eight categories of violations that MSHA would review, although not intended to be exclusive, resulted in a time-consuming and resource-intensive process. Under the proposed rule, MSHA would retain its discretion to determine which types of violations would be reviewed for a special assessment, without being limited to a specific list. MSHA anticipates that, under the proposal, the regular assessment provision would generally provide an appropriate penalty in most cases. This change will allow MSHA to focus its enforcement resources on more field enforcement activities, as opposed to administrative review activities. There would be circumstances, however, in which the regular assessment would not provide an appropriate penalty and thus the special assessment provision would be applied.

Changes in proposed § 100.5(b) would provide for easier reading and clarity and would be revised to include references to sections 105(b) and 110(i)

of the Mine Act. The reference to § 100.4(b) would be removed as the single penalty provision would be deleted. Paragraphs (c) and (d) would remain unchanged.

Proposed paragraphs (e) and (f) would implement new civil penalty provisions of the MINER Act. New paragraph (e) addresses penalties for flagrant violations. Under the MINER Act amendments to the Mine Act, violations that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. A "flagrant" violation is defined as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. Under the proposal these violations would be processed as a special assessment.

New paragraph (f) addresses penalties related to prompt incident notification. Under the MINER Act amendments to the Mine Act, an operator who fails to provide timely notification to the Secretary under section 103(j) (relating to the 15-minute requirement) shall be assessed a civil penalty of not less than \$5,000 and not more than \$60,000. Violations under this new paragraph would be processed as a special assessment.

#### 7. Procedures for Review of Citations and Orders; Procedures for Assessment of Civil Penalties and Conferences (§ 100.6)

Existing § 100.6 contains requirements and administrative procedures for review of citations and orders. Proposed § 100.6 remains substantively the same as existing § 100.6. MSHA believes that safety and health is improved when mine operators and miners or their representatives are afforded an opportunity to discuss safety and health issues after an inspection with the MSHA District Manager or designee. Like existing § 100.6, initial review of the citation or order would be conducted during the inspection closeout conference or at a time reasonably convenient to operators and miners or their representatives. In addition, the proposal, like the existing rule, allows the operator and miners or their representative to submit additional facts or to request a safety and health conference. Any of these parties may request to be notified of, and participate in, a safety and health conference initiated by one of the other parties. Safety and health conference requests would continue to be made with the MSHA District Office. When a request is

granted, conferences will be promptly conducted.

Proposed paragraph 100.6(a) contains editorial changes which incorporate concepts from existing paragraphs 100.6(a) and (c). Under proposed § 100.6(a), the review process would continue to provide any operator, and miners or their representatives, with an opportunity to (1) review the citation or order with MSHA, (2) submit additional information to MSHA, and (3) request a safety and health conference with the District Manager or designee. In addition, the provision in existing § 100.6(c), which provides that a request for a conference is within MSHA's discretion, would be moved to this paragraph.

Proposed § 100.6(b) would reduce the time, from ten days to five days, to submit additional information or request a safety and health conference. MSHA believes that the proposed reduction would result in a more effective civil penalty system because penalties would be assessed closer in time to the issuance of the citation. MSHA believes that all parties would be able to request a health and safety conference within this timeframe.

As stated above, the provision in existing § 100.6(c), which provides that a request for a conference is within MSHA's discretion, would be moved to proposed § 100.6(a). Existing 100.6(d) would be renumbered as § 100.6(c) and otherwise remain unchanged.

Existing §§ 100.6(e), (f), and (g) would be combined and incorporated into proposed § 100.6(d). The wording in paragraphs (e) and (g) would be unchanged. Paragraph (f) would be clarified to specify when the MSHA District managers are to refer citations and orders to MSHA's Office of Assessments but would remain substantively unchanged.

#### 8. Notice of Proposed Penalty; Notice of Contest (§ 100.7)

Existing § 100.7 provides for procedures applicable to a notice of proposed penalty and notice of penalty contest. Existing paragraph (a) sets out the circumstances under which a notice of proposed penalty will be served on the parties, paragraph (b) sets out the procedures for contesting a notice of proposed penalty, and paragraph (c) sets out when a proposed penalty becomes a final order of the Commission.

Proposed § 100.7(a), (b), and (c) include editorial changes for ease of reading, but remain substantively unchanged from the existing provision. Proposed § 100.7(b) would remove from the regulatory text: (1) The reference to a return mailing card that is used to

request a hearing before the Federal Mine Safety and Health Review Commission, (2) the reference to providing instructions for returning the card to MSHA, and (3) the provision that MSHA will immediately advise the Commission of the contest and also advise the Office of the Solicitor of the contest. MSHA is proposing these deletions because it is no longer using a return mailing card. Instead, MSHA currently provides a form that lists violations being assessed, instructions for paying or contesting assessments, and MSHA contact information to facilitate an operator's request for a hearing. MSHA intends to continue this practice. MSHA would continue to advise the Office of the Solicitor and the Commission of the notice of penalty contest.

#### 9. Service (§ 100.8)

Existing § 100.8 remains substantively unchanged. This section provides that service of proposed civil penalties will be made at the mailing address of record for an operator and miners' representative, that penalty assessments may be mailed to a different address if MSHA is notified in writing of the new address, and that operators who fail to file a notification of legal identity under 30 CFR Part 41 will be served at their last known business address. Specific references to part 40 (Representative of Miners) and part 41 (Notification of Legal Identity) would be changed to indicate they are parts contained in Chapter I of Title 30 CFR.

#### IV. Executive Order 12866

Executive Order (E.O.) 12866 as amended by E.O. 13258 (Amending Executive Order 12866 on Regulatory Planning and Review) requires that regulatory agencies assess both the costs and benefits of regulations. To comply with E.O. 12866, MSHA has prepared a Preliminary Regulatory Economic Analysis (PREA) for the proposed rule. The PREA contains supporting data and explanation for the summary materials presented in sections IV–VII of this preamble, including the covered mining industry, costs and benefits, feasibility, small business impacts, and paperwork. The PREA is located on MSHA's Web site at <http://www.msha.gov/REGSINFO.HTM>. A printed copy of the PREA can be obtained from MSHA's Office of Standards, Regulations, and Variances.

Based on the PREA, MSHA has determined that the proposed rule would not have an annual effect of \$100 million or more on the economy and that, therefore, it is not an economically

“significant regulatory action” pursuant to Section 3, paragraph (f) of E.O. 12866.

#### A. Population at Risk

Based on 2004 data, the proposed rule would apply to the entire mining industry, covering all 14,480 mine operators and 6,693 independent contractors in the United States, as well as the 214,450 miners and 72,739 contract workers they employ.

#### B. Costs

In order to derive and explain the cost impact of the proposed rule on the mining industry, MSHA has divided its analysis into three sections: (1) The baseline—the total number and monetary amount of civil penalty assessments proposed by MSHA in 2005, the year prior to the proposed rule; (2) the impact of the proposed rule on civil penalty assessments under the assumption that mine operators and independent contractors take no actions, in response to higher proposed penalty assessments, to increase compliance with MSHA standards and regulations; and (3) the impact of the proposed rule on the number and amount of civil penalty assessments taking into account the anticipated response of mine operators and independent contractors to increase compliance with MSHA standards and regulations and thereby reduce the number of civil penalty assessments they would otherwise receive.

Before proceeding, it is important to note the nature of the impacts associated with the proposed rule. For most MSHA rules, the estimated impact reflects the cost to the mining industry of achieving compliance with the rule. For this proposed rule, the estimated impact consists of two parts: (1) Higher payments for penalties received and (2) expenses incurred to increase compliance with MSHA standards and regulations so as to reduce the number and amount of civil penalties otherwise received. Although the former impact is not a traditional compliance cost, but rather a cost specifically due to non-compliance, for the purposes of this analysis, MSHA has shown these costs. The latter costs are compliance costs, but for existing MSHA standards and regulations. These costs were included in economic assumptions made when those standards and regulations were promulgated. At that time, MSHA generally assumed full industry compliance. Therefore, compliance efforts made in response to higher penalties are not a cost attributable to the proposed rule. However, for illustrative purposes only, this analysis

reflects additional expenditures associated with improved compliance.

#### 1. Baseline

The first step in estimating the impact of the proposed rule is to establish a

baseline: The number and monetary amount of civil penalty assessments in the absence of the proposed rule. For this purpose, MSHA chose all civil penalty assessments for 2005, the last full calendar year of data prior to the

proposed rule. Table IV-1 shows the number of civil penalty assessments issued in 2005, disaggregated by mine employment size, by coal and MNM, and by operators and independent contractors.

TABLE IV-1.—BASELINE NUMBER OF CIVIL PENALTY ASSESSMENTS FOR 2005

Contractor/mine employment size	Coal-M/NM, operator/contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	All violations
1-5 .....	2,856	2,741	1,609	12,528	19,734
6-19 .....	757	9,063	1,048	16,125	26,993
20-500 .....	1,479	43,428	1,183	17,685	63,775
501+ .....	1	4,432	66	1,672	6,171
All Mine Sizes .....	5,093	59,664	3,906	48,010	116,673

The mine size and independent contractor size categories being used are 1-5 employees, 6-19 employees, 20-500 employees, and more than 500 employees. These categories are relevant for the analysis of impacts in section VI of this preamble, to determine whether small mines, as defined by the Small Business Administration (SBA) and MSHA, would be significantly impacted by the proposed rule. Mines with 500 or fewer employees meet SBA's definition of a small mine. Mines with fewer than 20 employees meet MSHA's traditional definition of a small mine.

Mine violation data have been broken out by coal and metal/nonmetal (MNM) and by operator and independent contractor. The employment sizes shown are contractor size for

independent contractors and mine size for mine operators.

Of the 116,673 civil penalty assessments issued in 2005, 113,484, or about 97.3%, were single penalty or regular assessments. The remaining 3,189, or 2.7%, were special assessments.

As can be calculated from Table IV-1, there were about 25% more coal violations than MNM violations in 2005, even though there were more than 3½ times as many MNM operators and independent contractors as there were coal operators and independent contractors. One reason for the larger number of coal violations is that there are about 3 times as many underground coal mines as underground MNM mines. There are a number of circumstances surrounding

underground mines which tend to result in a greater number of violations. They are required to be inspected more often, and conditions are generally more dangerous and subject to change. Another reason for more coal violations is that coal mines are, on average, larger operations than MNM mines, and larger mines tend to receive more violations, on average, than smaller mines. The average coal mine operator employed about 3 times as many miners as the average MNM operator in 2004.

The 2005 civil penalty monetary amount used as a baseline was the penalty proposed by MSHA. Table IV-2 shows, by contractor/mine employment size and coal-MNM, operator-independent contractor, the total baseline dollar amount of civil penalties proposed by MSHA in 2005.

TABLE IV-2.—BASELINE TOTAL OF PROPOSED CIVIL PENALTY ASSESSMENTS FOR 2005

Contractor/mine employment size	Coal-M/NM, operator/contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	All violations
1-5 .....	\$308,649	\$463,277	\$200,947	\$1,887,443	\$2,860,316
6-19 .....	86,319	1,492,545	109,837	2,535,563	4,224,264
20-500 .....	314,195	11,010,009	192,151	3,890,799	15,407,154
501+ .....	2,000	1,706,750	14,876	634,888	2,358,514
All Mine Sizes .....	711,163	14,672,581	517,811	8,948,693	24,850,248

Of the \$24.9 million in civil penalties proposed by MSHA in 2005, \$16.6 million, or about 67%, were from single penalty and regular assessments. The remaining \$8.2 million were from special assessments. Of this amount, about \$0.3 million were issued to agents of mine operators and another \$1.5

million were issued for violations involving a fatality.

Table IV-3 displays the baseline average dollar amount of a proposed civil penalty in 2005 disaggregated by mine size and coal-MNM, operator-independent contractor. The average penalty assessment for a violation in 2005 was \$213. For a regular or single

penalty assessment, the average penalty was \$147. For a special assessment, the average penalty was \$2,385. For special assessments issued to agents of the mine operator, the average assessment was \$582, and for special assessments involving a fatality, the average penalty was \$27,181.

TABLE IV-3.—BASELINE AVERAGE PROPOSED CIVIL PENALTY ASSESSMENT PER VIOLATION IN 2005

Contractor/mine employment size	Coal-M/NM, operator contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	Average for all violations
1-5 .....	\$108	\$169	\$125	\$151	\$145
6-19 .....	114	165	105	157	156
20-500 .....	212	254	162	220	242
501+ .....	2,000	385	225	380	382
All Mine Sizes .....	140	246	133	186	213

Consistent with the formulas used to calculate regular assessments under the existing regulations, Table IV-3 shows that the average proposed penalty assessment in 2005 tended to increase as mine size increased. This effect is consistent, particularly for mine operators with 20 or more employees.

Table IV-3 also indicates that the difference in average penalties between coal and MNM mines and independent contractors of a given employment size is generally small.

Table IV-2 reveals that total civil penalty assessments in 2005 were substantially larger, more than 50% larger, for coal mines than for MNM mines. The larger aggregate penalty assessment for coal mines is due to the larger number of violations issued to coal mines and the higher average penalty per violation. Coal violations tend to be more serious, on average, than MNM violations (e.g., 40% of coal violations are Significant and Substantial, or S&S, versus 23% for MNM violations).

## 2. Impacts If No Compliance Response to Higher Penalties

With the baseline established, the next task in the cost analysis is to determine the impact of the proposed rule on civil penalty assessments under

the assumption that mine operators and independent contractors take no actions, in response to higher proposed penalty assessments, to increase compliance with MSHA standards and regulations. This task is an intermediate step in determining the total cost impact of the proposed rule, as MSHA's assumption in IV.B.3 of this preamble is that mine operators and independent contractors will change their compliance behavior in response to increased penalties.

Given the assumption of no compliance response by mine operators and independent contractors, the number of violations would not change in response to the proposed rule. They would remain the same as presented in Table IV-1 for the baseline. However, the type of the violations would change under the proposed rule. In the analysis, all 2005 regular and single penalty assessments would be issued as regular assessments under the proposed rule. MSHA assumed that most unwarrantable failure citations and orders would be processed as regular assessments under the minimum penalty requirements of the MINER Act. MSHA further assumed that the 2005 special assessments issued to agents, those involving a fatality, those involving failure to promptly notify MSHA, and those involving flagrant

violations would be assessed as special assessments under the proposed rule. MSHA assumed that all other 2005 special assessments would be processed as regular assessments. Thus, under the proposed rule, MSHA estimates that the number of special assessments would decline by 85%, from 3,189 to 491. MSHA anticipates that, under the proposal, the regular assessment provision would generally provide an appropriate penalty in most cases. Equally significant, this will allow MSHA to focus its enforcement resources on more field enforcement activities, as opposed to administrative review activities.

Tables IV-4 and IV-5 show the estimated total dollar amount and average dollar amount, respectively, of civil penalties under the proposed rule, assuming no compliance response by mine operators and independent contractors. Table IV-6 shows, relative to the baseline, the estimated percentage increase of civil penalties (both total and average) under the proposed rule, assuming no compliance response by mine operators and independent contractors. All of these tables are disaggregated by contractor/mine employment size, coal-MNM, and operator/contractor.

TABLE IV-4.—TOTAL PROPOSED CIVIL PENALTY ASSESSMENTS UNDER PROPOSED RULE, ASSUMING NO COMPLIANCE RESPONSE

Contractor/mine employment size	Coal-M/NM, operator/contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	All violations
1-5 .....	\$414,826	\$684,448	\$410,544	\$3,207,759	\$4,717,577
6-19 .....	133,074	2,287,667	187,432	4,744,450	7,352,623
20-500 .....	415,811	37,598,722	340,542	8,365,383	46,720,458
501+ .....	807	7,394,118	43,973	2,288,395	9,727,293
All Mine Sizes .....	964,518	47,964,955	982,491	18,605,987	68,517,951

TABLE IV-5.—AVERAGE OF PROPOSED CIVIL PENALTY ASSESSMENTS UNDER PROPOSED RULE, ASSUMING NO COMPLIANCE RESPONSE

Contractor/mine employment size	Coal-M/NM, operator/contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	Average for all violations
1-5 .....	\$145	\$250	\$255	\$256	\$239
6-19 .....	176	252	179	294	272
20-500 .....	281	866	288	473	733
501+ .....	807	1,668	666	1,369	1,576
All Mine Sizes .....	189	804	252	388	587

TABLE IV-6.—PERCENTAGE INCREASE IN TOTAL AND AVERAGE PROPOSED CIVIL PENALTY ASSESSMENTS UNDER PROPOSED RULE, ASSUMING NO COMPLIANCE RESPONSE

Contractor/mine employment size	Coal-M/NM, operator/contractor				
	Coal contractor	Coal operator	M/NM contractor	M/NM operator	Average percentage increase for all violations
1-5 .....	34	48	104	70	65
6-19 .....	54	53	71	87	74
20-500 .....	32	241	77	115	203
501+ .....	-60	333	196	260	312
All Mine Sizes .....	36	227	90	108	176

As indicated in these tables, MSHA estimates that total civil penalty assessments would increase under the proposed rule, assuming no compliance response, from \$24.9 million in the baseline to \$68.5 million, an increase of \$43.7 million, or 176%. Approximately \$2.5 million, or about 4% of the \$68.5 million, would come from special assessments. Of the \$43.7 million increase, approximately \$1.9 million would result from the minimum penalty provisions for unwarrantable violations in the MINER Act. In its analysis of 2005 data, MSHA found one violation which met the failure to provide timely notification provisions in the MINER Act. For this category of violations, the MINER Act imposes a penalty of \$5,000 to \$60,000. However, the particular violation had already received a special assessment in excess of \$5,000. Thus, MSHA did not adjust penalty totals to account for this provision of the MINER Act.

MSHA has determined that flagrant violations will be processed under the special assessment provision. As stated in the proposal, MSHA will use the definition for flagrant violation in the MINER Act, but the Agency cannot estimate, at this point in the rulemaking process, the specific impact of this new requirement in the MINER Act. The Agency does, however, anticipate that penalties will increase due to this provision.

MSHA estimates that the average penalty assessment would increase

under the proposed rule, assuming no compliance response, from \$213 (shown in Table IV-3) to \$587 (shown in Table IV-5), an increase of 176% (shown in Table IV-6). Consistent with Congressional intent, the average penalty generally increases as mine size or contractor size increases (shown in Table IV-5).

For purposes of the analysis, special assessments that remain as special assessments were assumed to receive the same penalty, unless they would be impacted by the minimum penalty provisions of the MINER Act. All special assessments in 2005 involving a fatality exceeded the new minimum penalty provisions, so these penalties are assumed unchanged by the proposed rule. However, the average penalty for special assessments issued to agents of the mine operator is estimated to increase by 367% under the proposed rule. This increase is entirely due to the application of the minimum penalty provisions for unwarrantable violations in the MINER Act.

For purposes of analysis, the remaining special assessments are assumed to be treated as regular assessments under the proposal. In the analysis, the average penalty for 2005 special assessments, assumed to be issued as regular assessments under the proposed rule, increased by 84%.

### 3. Impacts With Compliance Response to Higher Penalties

MSHA intends and expects that higher penalty assessments will lead to efforts by mine operators and independent contractors to increase compliance with MSHA standards and regulations and ultimately to decreased violations. MSHA assumes that each violation is associated with a probability of occurrence that declines as penalty assessments rise. To estimate this impact, MSHA assumes that each 10% increase in penalty for a violation is associated with a 3% decrease in its probability of occurrence.

In economic terms, this is equivalent to assuming an elasticity of -0.3 between the number of violations and the dollar size of penalties. The numbers derived from this elasticity assumption are for illustrative purposes only. A lower elasticity number (e.g., -0.1) would yield less impact and a higher number (e.g., -0.9) would yield more impact. This elasticity of -0.3 was previously assumed by MSHA in its regulatory economic analysis for the 2003 direct final rule to adjust civil penalties for inflation. Further explanation and mathematics are provided in the PREA for this proposed rule.

MSHA has consistently applied this assumption to each assessed violation in the 2005 database. For most violations, the proposed rule would result in a penalty increase. Accordingly, MSHA has computed a reduction (or in the rare

case, an increase) in the probability of the violation's occurrence. The reduction is larger as the penalty increases.

Tables IV-7 and IV-8 estimate the increased compliance response of the industry to higher penalty assessments. Table IV-7 provides estimates for mine operators and Table IV-8 provides

estimates for independent contractors. Tables IV-7 and IV-8 show, by mine or contractor employment size and by coal and MNM, the number of violations and the dollar amount of penalties in the 2005 database ("Old"). Using the assumption that the elasticity of response is -0.3 for each violation, Tables IV-7 and IV-8 estimate the new

reduced number of violations and the higher penalties associated with these violations ("New"). Taking into account the mine industry's compliance response, MSHA estimates that were the proposed rule in effect in 2005, total violations would have declined from 116,673 to 95,035, a reduction of about 19% in the total number of violations.

**TABLE IV-7.—IMPACT OF PROPOSED RULE ON MINE OPERATORS GIVEN INCREASED COMPLIANCE RESPONSE TO HIGHER PENALTY ASSESSMENTS**

Mine employment size	Old number of violations	Old proposed penalties	New number of violations	New proposed penalties	Change in penalties	Additional expenditures to improve compliance*
<b>Impact on Coal Mine Operators</b>						
1-5 .....	2,741	\$463,277	2,476	\$566,992	\$103,715	\$44,449
6-19 .....	9,063	1,492,545	8,145	1,895,806	403,261	172,826
20-500 .....	43,428	11,010,009	33,616	23,661,984	12,651,975	5,422,275
501+ .....	4,432	1,706,750	2,941	4,356,873	2,650,123	1,135,767
All Mine Sizes .....	59,664	14,672,581	47,178	30,481,655	15,809,074	6,775,317
<b>Impact on Metal/Nonmetal Mine Operators</b>						
1-5 .....	12,528	\$1,887,443	10,955	\$2,562,832	675,389	\$289,453
6-19 .....	16,125	2,535,563	13,846	3,632,672	1,097,109	470,190
20-500 .....	17,685	3,890,799	13,986	6,110,644	2,219,845	951,362
501+ .....	1,672	634,888	1,101	1,381,516	746,628	319,983
All Mine Sizes .....	48,010	8,948,693	39,889	13,687,664	4,738,971	2,030,988

\*These additional expenditures are shown for illustrative purposes only and are not included in the costs of this proposal, since they were included in analyses of costs when standards were promulgated.

**TABLE IV-8.—IMPACT OF PROPOSED RULE ON INDEPENDENT CONTRACTORS GIVEN INCREASED COMPLIANCE RESPONSE TO HIGHER PENALTY ASSESSMENTS**

Contractor employment size	Old number of violations	Old proposed penalties	New number of violations	New proposed penalties	Change in penalties	Additional expenditures to improve compliance*
<b>Impact on Coal Independent Contractors</b>						
1-5 .....	2,856	\$308,649	2,607	\$361,058	\$52,409	\$22,461
6-19 .....	757	86,319	678	113,178	26,859	11,511
20-500 .....	1,479	314,195	1,349	355,952	41,757	17,896
501+ .....	1	2,000	1	1,060	-940	-403
All Contractor Sizes .....	5,093	711,163	4,636	831,247	120,084	51,465
<b>Impact on Metal/Nonmetal Independent Contractors</b>						
1-5 .....	1,609	\$200,947	1,377	\$318,731	\$117,784	\$50,479
6-19 .....	1,048	109,837	905	150,508	40,671	17,430
20-500 .....	1,183	192,151	998	267,210	75,059	32,168
501+ .....	66	14,876	52	30,615	15,739	6,745
All Contractor Sizes .....	3,906	517,811	3,332	767,064	249,253	106,823

\*These additional expenditures are shown for illustrative purposes only and are not included in the costs of this proposal, since they were included in analyses of costs when standards were promulgated.

The "Change in Penalties" column represents the increase in penalties, relative to the baseline, for remaining violations. The total change in proposed penalty assessments is approximately \$15.8 million for coal mine operators,

\$0.1 million for coal independent contractors, \$4.7 million for MNM mine operators, and \$0.2 million for MNM independent contractors. The sum of these four numbers, \$20.9 million, is the total cost of the proposed rule.

To reduce the number of violations in response to the higher penalty assessments, MSHA assumes that mines will increase costs to improve compliance. The column, "Additional Expenditures to Improve Compliance,"

represents MSHA's estimate of these increased compliance costs. These estimates are based on the same assumption that the elasticity of response is -0.3 and the additional assumption that the increased

compliance activities will be undertaken by the mining industry to avoid increased penalties. These increased compliance costs to avoid higher penalties are not counted as a cost of this proposed rule, because full

compliance with MSHA standards is assumed when standards are promulgated.

Table IV-9 summarizes the impacts by mining sector.

TABLE IV-9.—IMPACT OF PROPOSED RULE, BOTH WITH UNCHANGED COMPLIANCE AND WITH INCREASED COMPLIANCE RESPONSE TO HIGHER PENALTY ASSESSMENTS

Mining sector	Old proposed penalties	New proposed penalties, same compliance	Change in penalties, same compliance	Percent change in penalties, same compliance
<b>Same Number of Violations</b>				
Coal .....	\$15,383,744	\$48,929,473	\$33,545,729	218
Metal .....	1,396,682	4,054,371	2,657,689	190
Nonmetal .....	594,888	1,171,774	576,886	97
Sand and Gravel .....	3,113,522	5,544,307	2,430,785	78
Stone .....	4,361,412	8,818,026	4,456,614	102
Total .....	24,850,248	68,517,951	43,667,703	176
Mining sector	Additional expenditures to improve compliance*	New proposed penalties, improved compliance	Change in penalties, improved compliance	Percent change in penalties, improved compliance
<b>Reduced Number of Violations</b>				
Coal .....	\$6,826,782	\$31,312,902	\$15,929,158	104
Metal .....	524,403	2,620,288	1,223,606	88
Nonmetal .....	132,222	903,406	308,518	52
Sand and Gravel .....	522,167	4,331,911	1,218,389	39
Stone .....	959,019	6,599,123	2,237,711	51
Total .....	8,964,592	45,767,630	20,917,382	84

\* These additional expenditures are shown for illustrative purposes only and are not included in the costs of this proposal, since they were included in analyses of costs when standards were promulgated.

### C. Benefits

The benefits of the proposed rule are the reduced number of injuries and fatalities that would result from increased compliance with MSHA's health and safety standards and regulations in response to higher penalty assessments. MSHA projects that higher penalties will induce mine operators to reduce all safety and health violations. The reduction in the number of violations, particularly S&S violations, or those reasonably likely to result in reasonably serious injury or illness, will reduce the number and severity of injuries and illnesses.

### V. Feasibility

MSHA has concluded that the requirements of the proposed rule are technologically and economically feasible.

#### A. Technological Feasibility

The proposed rule is a regulation, not a standard. It does not involve activities on the frontiers of scientific knowledge. The mining industry has been

complying with the adjudication and payment of civil penalties for decades. MSHA concludes, therefore, that the proposed rule is technologically feasible.

#### B. Economic Feasibility

MSHA estimates that the yearly increased penalty assessments issued to coal mines as a result of the proposed rule will be \$15.9 million dollars, which is equal to about 0.07 percent of coal mine sector revenues of \$22.1 billion in 2004. MSHA estimates that the yearly increased penalty assessments issued to MNM mines as a result of the proposed rule will be \$5.0 million dollars, which is equal to about 0.01 percent of MNM mine sector revenues of \$44.0 billion in 2004. Since the total estimated increased penalty assessments for both the coal and MNM mine sectors are well below one percent of their estimated revenues, MSHA concludes that the

proposed rule is economically feasible for the mining industry.<sup>1</sup>

### VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act (SBREFA)

Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA has analyzed the impact of the proposed rule on small entities. Based on that analysis, MSHA has made a determination with respect to whether

<sup>1</sup> As shown earlier, in response to increased penalty assessments, MSHA expects that coal mine operators and contractors will spend an additional \$6.8 million and MNM operators and contractors an additional \$2.1 million to increase compliance with MSHA standards and regulations so as to reduce the number and amount of civil penalty assessments otherwise received. But the costs to achieve compliance with these standards and regulations have already been estimated and recognized, under full compliance assumptions, when the standards and regulations were promulgated. Therefore, the costs associated with improved compliance are not properly attributable to the proposed rule. To include them as a cost of the proposed rule would be to double-count them.



the agency can certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. Unless able to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities, MSHA must develop an initial regulatory flexibility analysis.

MSHA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities that are covered by this rulemaking. The factual basis for this certification is presented in full in Chapter V of the PREA and in summary form below.

#### A. Definition of a Small Mine

Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the SBA definition for a small entity 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. MSHA has not taken such an action and hence is required to use the SBA definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees.

MSHA has also examined the impacts of agency rules on a subset of mines with 500 or fewer employees—those with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as “small mines.” These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, their costs of complying with MSHA’s rules and the impact of the agency’s rules on them will also tend to be different. It is for this reason that “small mines,” as traditionally defined by MSHA as those employing fewer than 20 workers, are of special concern to MSHA. In addition, for this proposed

rule, MSHA has examined the cost on mines with five or fewer employees to ensure that this subset of mines is not significantly and adversely impacted by the proposed rule.

This analysis complies with the requirements of the RFA for an analysis of the impacts on “small entities” while continuing MSHA’s traditional definition of “small mines.” Both the proposal and this analysis reflect MSHA’s concern for mines with 5 or fewer employees. MSHA concludes that it can certify that the proposed rule would not have a significant economic impact on a substantial number of small entities that are covered by this rulemaking. MSHA has determined that this is the case for mines with fewer than 20 employees and mines with 500 or fewer employees. In its detailed factual basis below, MSHA will also show effects of the proposal on mines with 5 or fewer employees.

#### B. Factual Basis for Certification

MSHA’s analysis of impacts on “small entities” begins with a “screening” analysis. The screening compares the estimated costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated costs are less than one percent of the estimated revenues, MSHA believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. When estimated costs are equal to or exceed one percent of revenues, it tends to indicate that further analysis may be warranted.

Normally, the analysis of the costs or economic impact of a rule assumes that mine operators are in 100% compliance with a rule. Under the assumption that mine operators are in 100% compliance with all of MSHA’s rules, there would be no cost of compliance with the proposed rule, since no mine operator would be exposed to civil penalties. For purposes of analyzing the effects on small mines, MSHA reverses this usual

assumption and instead analyzes the increased penalty assessments for mines not in compliance with the agency’s other rules.

For coal mines, estimated 2004 production was 4.6 million tons for mines with 1–5 employees, 28.7 million tons for mines with 1–19 employees, and 896.8 million tons for mines with 1–500 employees. Using the 2004 price of coal of \$19.93 per ton, the 2004 coal revenues are estimated to be approximately \$91 million for mines with 1–5 employees, \$572 million for mines with 1–19 employees, and \$17,872 million for mines with 1–500 employees. Dividing the increase in penalties by the revenues in each mine size category, the cost of the rule for coal mines is 0.17% of revenues for mines with 1–5 employees, 0.10% of revenues for mines with 1–19 employees, and 0.07% of revenues for mines with 1–500 employees. Further details are shown in Table VI–1.

For MNM mines, the total 2004 revenue generated by the MNM industry (\$44.0 billion)<sup>2</sup> was divided by the total number of employee hours to arrive at the average revenue per hour of employee production (\$145.90). The \$145.90 was multiplied by employee hours in specific mine size categories to arrive at estimated revenues for these categories. This approach was used to determine the estimated revenues for the MNM mining industry because MSHA does not collect data on MNM production. The 2004 MNM revenues are estimated to be approximately \$3.9 billion for mines with 1–5 employees, \$15.4 billion for mines with 1–19 employees, and \$40.6 billion for mines with 1–500 employees. Dividing the increase in penalties by the revenues in each mine size category, the cost of the rule for MNM mines is 0.02% of revenues for mines with 1–5 employees, 0.01% of revenues for mines with 1–19 employees, and 0.01% of revenues for mines with 1–500 employees. Further details are shown in Table VI–1.

TABLE VI–1.—INCREASE IN PENALTIES DUE TO PROPOSED RULE COMPARED TO MINE REVENUES, BY MINE SIZE

Employment size	Number of mines	Increase in penalties	Estimated revenue (millions)	Increase in penalties per mine	Penalty increase as % of revenue
<b>Coal Mines</b>					
1–5 employees .....	560	\$156,124	\$91	\$279	0.17
1–19 employees .....	1,149	586,243	572	510	0.10
1–500 employees .....	2,000	13,279,975	17,872	6,640	0.07

<sup>2</sup> U.S. Department of the Interior, U.S. Geological Survey, *Mineral Commodity Summaries 2005*, January 2005, p. 8.

TABLE VI-1.—INCREASE IN PENALTIES DUE TO PROPOSED RULE COMPARED TO MINE REVENUES, BY MINE SIZE—  
Continued

Employment size	Number of mines	Increase in penalties	Estimated revenue (millions)	Increase in penalties per mine	Penalty increase as % of revenue
All mines .....	2,011	15,929,158	22,144	7,921	0.07
<b>M/NM Mines</b>					
1–5 employees .....	6,370	793,173	3,903	125	0.02
1–19 employees .....	10,771	1,930,953	15,379	179	0.01
1–500 employees .....	12,447	4,225,857	40,628	340	0.01
All mines .....	12,467	4,988,224	44,000	400	0.01

As shown in Table VI-1, when applying MSHA's and SBA's definitions of small mines, yearly costs of the proposed rule are substantially less than 1 percent of estimated yearly revenues, well below the level suggesting that the rule might have a significant economic impact on a substantial number of small entities. Accordingly, MSHA has certified that the proposed rule would not have a significant economic impact on a substantial number of small entities that are covered by the rule.

#### VII. Paperwork Reduction Act of 1995

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

#### VIII. Other Regulatory Considerations

##### A. The Unfunded Mandates Reform Act of 1995

The proposed rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments; nor does it increase private sector expenditures by more than \$100 million annually; nor does it significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.) requires no further agency action or analysis.

##### B. Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

The proposed rule would have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

##### C. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

The proposed rule would not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

##### D. Executive Order 12988: Civil Justice Reform

The proposed rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. The proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. MSHA has determined that the proposed rule would meet the applicable standards provided in Section 3 of Executive Order 12988.

##### E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The proposed rule would have no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

##### F. Executive Order 13132: Federalism

The proposed rule does not have "federalism implications" because it does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Accordingly, Executive Order 13132, Federalism, requires no further agency action or analysis.

##### G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

The proposed rule does not have "tribal implications" because it does not "have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

##### H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The proposed rule has been reviewed for its impact on the supply, distribution, and use of energy because it applies to the coal mining industry. Insofar as the proposed rule will result in added yearly civil penalty assessments of approximately \$15.9 million to the coal mining industry, relative to annual revenues of \$22.1 billion in 2004, it is not a "significant energy action" because it is not "likely to have a significant adverse effect on the supply, distribution, or use of energy \* \* \* (including a shortfall in supply, price increases, and increased use of foreign supplies)." Accordingly, E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, requires no further Agency action or analysis.

##### I. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has thoroughly reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined

and certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 30 CFR Part 100

Mine safety and health, Penalties.

Dated: September 5, 2006.

David G. Dye,

Acting Assistant Secretary for Mine Safety and Health.

For the reasons set forth in the preamble, MSHA proposes to revise 30 CFR part 100 to read as follows:

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

Sec.

100.1 Scope and purpose.

100.2 Applicability.

100.3 Determination of penalty amount; regular assessment.

100.4 Unwarrantable failure.

100.5 Determination of penalty; special assessment.

100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.

100.7 Notice of proposed penalty; notice of contest.

100.8 Service.

**Authority:** 30 U.S.C. 815, 820, and 957; Pub. L. 109–236, 120 Stat. 493.

##### § 100.1 Scope and purpose.

This part provides the criteria and procedures for proposing civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (Mine Act). The purpose of this part is to provide a fair and equitable procedure for the application of the statutory criteria in determining proposed penalties for violations, to maximize the incentives for mine operators to prevent and correct hazardous conditions, and to assure the prompt and efficient processing and collection of penalties.

##### § 100.2 Applicability.

The criteria and procedures in this part are applicable to all proposed assessments of civil penalties for violations of the Mine Act and the standards and regulations promulgated pursuant to the Mine Act, as amended. MSHA shall review each citation and order and shall make proposed assessments of civil penalties.

##### § 100.3 Determination of penalty amount; regular assessment.

(a) *General.* (1) 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 \$60,000. Each

occurrence of a violation of a mandatory safety or health standard may constitute a separate offense. The amount of the proposed civil penalty shall be based on the criteria set forth in sections 105(b) and 110(i) of the Mine Act. These criteria are:

(i) The appropriateness of the penalty to the size of the business of the operator charged;

(ii) The operator's history of previous violations;

(iii) Whether the operator was negligent;

(iv) The gravity of the violation;

(v) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and

(vi) The effect of the penalty on the operator's ability to continue in business.

(2) A regular assessment is determined by first assigning the appropriate number of penalty points to the violation by using the appropriate criteria and tables set forth in this section. The total number of penalty points will then be converted into a dollar amount under the penalty conversion table in paragraph (g) of this section. The penalty amount will be adjusted for demonstrated good faith in accordance with paragraph (f) of this section.

(b) *The appropriateness of the penalty to the size of the business of the operator charged.* The appropriateness of the penalty to the size of the production operator's business is calculated by using both the size of the mine cited and the size of the controlling entity of the mine. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V of this section. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year. In cases where a full year of data is not available, the coal produced or hours worked is prorated to an annual basis. This criterion accounts for a maximum of 25 penalty points.

TABLE I.—SIZE OF COAL MINE

Annual tonnage of mine	Penalty points
0 to 15,000 .....	0
Over 15,000 to 30,000 .....	2

TABLE I.—SIZE OF COAL MINE—Continued

Annual tonnage of mine	Penalty points
Over 30,000 to 50,000 .....	4
Over 50,000 to 100,000 .....	6
Over 100,000 to 200,000 .....	8
Over 200,000 to 300,000 .....	10
Over 300,000 to 500,000 .....	12
Over 500,000 to 800,000 .....	14
Over 800,000 to 1.1 million .....	16
Over 1.1 million to 2 million .....	18
Over 2 million .....	20

TABLE II.—SIZE OF CONTROLLING ENTITY—COAL MINE

Annual tonnage	Penalty points
0 to 100,000 .....	0
Over 100,000 to 700,000 .....	1
Over 700,000 to 1.5 million .....	2
Over 1.5 million to 5 million .....	3
Over 5 million to 10 million .....	4
Over 10 million .....	5

TABLE III.—SIZE OF METAL/NONMETAL MINE

Annual hours worked at mine	Penalty points
0 to 10,000 .....	0
Over 10,000 to 20,000 .....	2
Over 20,000 to 30,000 .....	4
Over 30,000 to 60,000 .....	6
Over 60,000 to 100,000 .....	8
Over 100,000 to 200,000 .....	10
Over 200,000 to 300,000 .....	12
Over 300,000 to 500,000 .....	14
Over 500,000 to 700,000 .....	16
Over 700,000 to 1 million .....	18
Over 1 million .....	20

TABLE IV.—SIZE OF CONTROLLING ENTITY—METAL/NONMETAL MINE

Annual hours worked	Penalty points
0 to 60,000 .....	0
Over 60,000 to 400,000 .....	1
Over 400,000 to 900,000 .....	2
Over 900,000 to 3 million .....	3
Over 3 million to 6 million .....	4
Over 6 million .....	5

TABLE V.—SIZE OF INDEPENDENT CONTRACTOR

Annual hours worked at all mines	Penalty points
0 to 10,000 .....	0
Over 10,000 to 20,000 .....	2
Over 20,000 to 30,000 .....	4
Over 30,000 to 60,000 .....	6
Over 60,000 to 100,000 .....	8
Over 100,000 to 200,000 .....	10

TABLE V.—SIZE OF INDEPENDENT CONTRACTOR—Continued

Annual hours worked at all mines	Penalty points
Over 200,000 to 300,000 .....	12
Over 300,000 to 500,000 .....	14
Over 500,000 to 700,000 .....	16
Over 700,000 to 1 million .....	18
Over 1 million .....	20

(c) *History of previous violations.* An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history.

(1) *Total number of violations.* For production operators, penalty points are calculated on the basis of the number of violations per inspection day (VPID)(Table VI of this section). Penalty points are not calculated for mines with fewer than ten violations in the specified history period. For independent contractors, penalty points are calculated on the basis of the total number of violations at all mines (Table VII of this section). This aspect of the history criterion accounts for a maximum of 25 penalty points.

TABLE VI.—MINE OPERATORS

Violations per inspection day	Penalty points
0 to 0.3 .....	0
Over 0.3 to 0.5 .....	2
Over 0.5 to 0.7 .....	4
Over 0.7 to 0.9 .....	6
Over 0.9 to 1.1 .....	8
Over 1.1 to 1.3 .....	10
Over 1.3 to 1.5 .....	13
Over 1.5 to 1.7 .....	16
Over 1.7 to 1.9 .....	19
Over 1.9 to 2.1 .....	22
Over 2.1 .....	25

TABLE VII.—INDEPENDENT CONTRACTORS

Number of violations	Penalty points
0 to 5 .....	0
Over 5 to 10 .....	2
Over 10 to 15 .....	4
Over 15 to 20 .....	6
Over 20 to 25 .....	8
Over 25 to 30 .....	10
Over 30 to 35 .....	13
Over 35 to 40 .....	16
Over 40 to 45 .....	19
Over 45 to 50 .....	22

TABLE VII.—INDEPENDENT CONTRACTORS—Continued

Number of violations	Penalty points
Over 50 .....	25

(2) *Repeat violations of the same standard.* Repeat violation history is based on the number of violations of the same standard. This aspect of the history criterion accounts for a maximum of 20 penalty points (Table VIII of this section).

TABLE VIII.—REPEAT VIOLATIONS OF THE SAME STANDARD

Number of violations	Penalty points
5 or fewer .....	0
6 .....	1
7 .....	2
8 .....	3
9 .....	4
10 .....	5
11 .....	6
12 .....	7
13 .....	8
14 .....	9
15 .....	10
16 .....	11
17 .....	12
18 .....	14
19 .....	16
20 .....	18
More than 20 .....	20

(d) *Negligence.* Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table IX of this section.

TABLE IX.—NEGLIGENCE

Categories	Penalty points
No negligence .....	0
(The operator exercised diligence and could not have known of the violative condition or practice.)	
Low negligence .....	10
(The operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.)	
Moderate negligence .....	20
(The operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.)	
High negligence .....	35
(The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.)	
Reckless disregard .....	50
(The operator displayed conduct which exhibits the absence of the slightest degree of care.)	

(e) *Gravity.* Gravity is an evaluation of the seriousness of the violation. This criterion accounts for a maximum of 88 penalty points, as derived from the Tables X through XII of this section. Gravity is determined by:

(1) The likelihood of the occurrence of the event against which a standard is directed;

(2) The severity of the illness or injury if the event occurred or were to occur; and

(3) The number of persons potentially affected if the event occurred or were to occur.

TABLE X.—LIKELIHOOD

Likelihood of occurrence	Penalty points
No likelihood .....	0
Unlikely .....	10
Reasonably likely .....	30
Highly likely .....	40
Occurred .....	50

TABLE XI.—SEVERITY

Severity of injury or illness if the event occurred or were to occur	Penalty points
No lost work days .....	0
(All occupational injuries and illnesses as defined in 30 CFR part 50 except those listed below.)	
Lost work days or restricted duty .....	5

TABLE XI.—SEVERITY—Continued

Severity of injury or illness if the event occurred or were to occur	Penalty points
(Any injury or illness which would cause the injured or ill person to lose one full day of work or more after the day of the injury or illness, or which would cause one full day or more of restricted duty.)	10
Permanently disabling .....	
(Any injury or illness which would be likely to result in the total or partial loss of the use of any member or function of the body.)	
Fatal .....	
(Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	20

TABLE XII.—PERSONS POTENTIALLY AFFECTED

Number of persons potentially affected if the event occurred or were to occur	Penalty points
0 .....	0
1 .....	1
2 .....	2
3 .....	4
4 .....	6
5 .....	8
6 .....	10
7 .....	12
8 .....	14
9 .....	16
10 or more .....	18

(f) *The demonstrated good faith of the operator in abating violation.* This criterion provides a 10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector.

(g) *Penalty conversion table.* The penalty conversion table is used to convert the total penalty points to a dollar amount.

TABLE XIII.—PENALTY CONVERSION TABLE

Points	Penalty (\$)
60 or fewer .....	112
61 .....	121
62 .....	131
63 .....	142
64 .....	154
65 .....	167
66 .....	181
67 .....	196
68 .....	212
69 .....	230
70 .....	249
71 .....	270

TABLE XIII.—PENALTY CONVERSION TABLE—Continued

Points	Penalty (\$)
72 .....	293
73 .....	317
74 .....	343
75 .....	372
76 .....	403
77 .....	436
78 .....	473
79 .....	512
80 .....	555
81 .....	601
82 .....	651
83 .....	705
84 .....	764
85 .....	828
86 .....	897
87 .....	971
88 .....	1,052
89 .....	1,140
90 .....	1,235
91 .....	1,337
92 .....	1,449
93 .....	1,569
94 .....	1,700
95 .....	1,842
96 .....	1,995
97 .....	2,161
98 .....	2,341
99 .....	2,536
100 .....	2,748
101 .....	2,976
102 .....	3,224
103 .....	3,493
104 .....	3,784
105 .....	4,099
106 .....	4,440
107 .....	4,810
108 .....	5,211
109 .....	5,645
110 .....	6,115
111 .....	6,624
112 .....	7,176
113 .....	7,774
114 .....	8,421
115 .....	9,122
116 .....	9,882
117 .....	10,705
118 .....	11,597
119 .....	12,563
120 .....	13,609
121 .....	14,743
122 .....	15,971
123 .....	17,301
124 .....	18,742
125 .....	20,302
126 .....	21,993
127 .....	23,825
128 .....	25,810
129 .....	27,959
130 .....	30,288
131 .....	32,810
132 .....	35,543
133 .....	38,503
134 .....	41,574
135 .....	44,645
136 .....	47,716
137 .....	50,787
138 .....	53,858
139 .....	56,929
140 or more .....	60,000

(h) *The effect of the penalty on the operator's ability to continue in business.* MSHA presumes that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The operator may, however, submit information to the District Manager concerning the financial status of the business. If the information provided by the operator indicates that the penalty will adversely affect the operator's ability to continue in business, the penalty may be reduced.

#### § 100.4 Unwarrantable failure.

(a) The minimum penalty for any citation or order issued under section 104(d)(1) of the Mine Act shall be \$2,000.

(b) The minimum penalty for any order issued under section 104(d)(2) of the Mine Act shall be \$4,000.

#### § 100.5 Determination of penalty amount; special assessment.

(a) MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment.

(b) When MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form.

(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 \$6,500 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.

(e) Violations that are deemed to be flagrant under section 110(a)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For purposes of this section, a flagrant violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

(f) The penalty for failure to provide timely notification to the Secretary under section 103(j) of the Mine Act will be not less than \$5,000 and not more than \$60,000 for the following accidents:

(1) The death of an individual at the mine, or

(2) An injury or entrapment of an individual at the mine which has a reasonable potential to cause death.

**§ 100.6 Procedures for review of citations and orders; procedures for assessment of civil penalties and conferences.**

(a) All parties shall be afforded the opportunity to review with MSHA each citation and order issued during an inspection. It is within the sole discretion of MSHA to grant a request for a conference and to determine the nature of the conference.

(b) Upon notice by MSHA, all parties will have five days within which to submit additional information or request a safety and health conference with the District Manager or designee. A conference request may include a request to be notified of, and to participate in, a conference initiated by another party.

(c) When a conference is conducted, the parties may submit any additional relevant information relating to the violation, either prior to or at the conference. To expedite the conference, the official assigned to the case may contact the parties to discuss the issues involved prior to the conference.

(d) MSHA will consider all relevant information submitted in a timely manner by the parties with respect to the violation. When the facts warrant a finding that no violation occurred, the citation or order will be vacated. Upon

conclusion of the conference, or expiration of the conference request period, all citations that are abated and all orders will be promptly referred to MSHA's Office of Assessments. The Office of Assessments will use the citations, orders, and inspector's evaluation as the basis for determining the appropriate amount of a proposed penalty.

**§ 100.7 Notice of proposed penalty; notice of contest.**

(a) A notice of proposed penalty will be issued and served by certified mail upon the party to be charged and by regular mail to the representative of miners at the mine after the time permitted to request a conference under § 100.6 expires, or upon the completion of a conference, or upon review by MSHA of additional information submitted in a timely manner.

(b) Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to either:

(1) Pay the proposed assessment. Acceptance by MSHA of payment tendered by the party charged will close the case.

(2) Notify MSHA in writing of the intention to contest the proposed penalty. When MSHA receives the notice of contest, it advises the Federal Mine Safety and Health Review Commission ("Commission") of such notice. No proposed penalty which has

been contested before the Commission shall be compromised, mitigated or settled except with the approval of the Commission.

(c) If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the Commission and is not subject to review by any court or agency.

**§ 100.8 Service.**

(a) All operators are required by part 41 (Notification of Legal Identity) of this chapter to file with MSHA the name and address of record of the operator. All representatives of miners are required by part 40 (Representative of Miners) of this chapter to file with MSHA the mailing address of the person or organization acting in a representative capacity. Proposed penalty assessments delivered to those addresses shall constitute service.

(b) If any of the parties choose to have proposed penalty assessments mailed to a different address, the Office of Assessments must be notified in writing of the new address. Delivery to this address shall also constitute service.

(c) Service for operators who fail to file under part 41 of this chapter will be upon the last known business address recorded with MSHA.

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