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Criteria and Procedures for Proposed Assessment of Civil Penalties; Final Rule

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: Final rule.

SUMMARY: This final rule revises MSHA's existing civil penalty assessment regulations and implements the civil penalty provisions of the Mine Improvement and New Emergency Response (MINER) Act of 2006.

This final rule will increase mine operator compliance with the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended by the MINER Act, and the agency's safety and health standards and regulations, thereby improving safety and health for miners.

DATES: *Effective Date:* This final rule is effective April 23, 2007.

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I. Background

On September 8, 2006, MSHA published a proposed rule to revise its civil penalty regulations (71 FR 53054). MSHA received written comments in response to the proposed rule. In addition, the agency held six public hearings on September 26, 2006 in Arlington, Virginia, September 28, 2006, in Birmingham, Alabama, October 4, 2006, in Salt Lake City, Utah, October 6, 2006, in St. Louis, Missouri, October 17, 2006, in Charleston, West Virginia, and October 19, 2006, in Coraopolis, Pennsylvania. The comment period closed on October 23, 2006. On October 26, 2006, MSHA reopened and extended the comment period to November 9, 2006 (71 FR 62572). MSHA reopened the comment period to restate and clarify language in the proposed rule pertaining to the proposed deleting of the existing single penalty assessment provision. MSHA clarified that violations that would have been processed under the single penalty provision of the existing rule would, under the proposed rule, be processed under the regular assessment provision.

In addition, MSHA reopened the comment period to provide interested persons additional time to comment on an issue that was raised at the public hearings in Charleston, West Virginia, and Pittsburgh, Pennsylvania, pertaining to safety and health conferences. MSHA stated that it intended to include a requirement in the final rule that a request for a safety and health conference be in writing and include a brief statement of the reason why each citation or order should be conferenced.

The section-by-section analysis of the final rule addresses issues raised by comments and testimony.

II. Discussion of the Final Rule

A. General Discussion

This final rule results in an across-the-board increase in penalties from the existing regulations; however, penalties increase more significantly for large mine operators, operators with a history of repeated violations of the same standard and for operators whose violations involve high degrees of negligence or gravity. The higher penalties in the final rule are intended to increase the incentives for mine operators to prevent and correct violations.

MSHA notes that under the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (Inflation Adjustment Act), as amended by the Debt Collection Improvement Act of 1996, the Agency is required to review and, as warranted, adjust penalties based on inflation at least every four years. On June 15, 2006, the MINER Act was enacted and amended section 110 of the Mine Act raising the maximum civil penalty to $220,000 for violations that are deemed to be flagrant. This final rule codifies the maximum penalty of $220,000 for flagrant violations. In addition, the MINER Act established minimum penalties of $2,000 and $4,000 for unwarrantable failure violations, and minimum penalties for failure to timely notify violations. Although this final rule does not increase the $60,000 maximum civil penalty for non-flagrant violations, the effect of the across-the-board penalty increases from the existing regulations is tantamount to an inflation adjustment. Due to these penalty increases, the penalties in this final rule will not be adjusted under the Inflation Adjustment Act until 2011.

MSHA received numerous comments in support of and opposed to the proposed rule. Many commenters stated that the proposed penalty increases were unnecessary because between 1990 and 2005, both injuries and fatalities have steadily declined. Other commenters stated that the proposed increased penalties will not induce greater compliance with the Mine Act or MSHA's safety and health standards and regulations. Some of these commenters stated that the proposed increases will merely result in operators diverting money from safety and health programs to penalty payments. Other commenters expressed concern that MSHA did not provide evidence that increased penalties would result in increased compliance and requested that MSHA immediately release all of the citation and accident history data necessary to do a thorough analysis of the premise underlying the Agency's proposal. One commenter stated the example that in the year following MSHA's increase in penalties in 2003, the number of citations actually increased by approximately 10%, from 110,038 to 121,225, and that that trend continued in 2005, when the number of citations again increased to 128,225. MSHA used 2005 assessed violation data as the baseline for its calculations of the

impact of both the proposed and final rules. The Agency has placed this 2005 violation data in the rulemaking record.

Although some commenters stated that increasing penalties will not result in increased compliance by operators, MSHA's experience shows that penalties are an important tool in reducing fatalities, injuries, illnesses, and violations. The Supreme Court recognized that civil penalties provide a ''deterrence'' that necessarily infrequent inspections cannot generate. *National Independent Coal Operators' Ass'n* v. *Kleppe,* 423 U.S. 388, 401 (1976) (speaking of the Federal Coal Mine Health and Safety Act of 1969 (Coal Act)).

The Agency recognizes that civil penalties alone may not significantly affect compliance with the Mine Act and MSHA's safety and health standards and regulations or reduce the number of mining accidents and injuries. The reductions in accidents and injuries that have been achieved since the civil penalty regulation was originally implemented are the result of a combination of factors such as stronger enforcement, changes in mining technology, improved training, accident reduction initiatives, compliance assistance activities, better safety and health programs and more attention to them on the part of mine management and miners, and the continued issuance of citations and orders and related civil penalties.

In addition, the Agency recognizes that the citations and orders are issued to induce miner operators to correct hazardous conditions thus reducing miners' exposure. Experience and data show that far greater resources are associated with the correction of hazardous conditions than payment of a civil penalty. Correcting the hazardous condition may require an interruption in production or other scheduled activities, necessitating change in personnel and equipment.

Nonetheless, civil penalties have contributed to improvements in fatalities and accident and injury rates in the mining industry. MSHA reviewed the Agency's accident and injury statistics for metal and nonmetal mines from 1973 to 2005. Since 1977, the year that the civil penalty sanction was applied to metal and nonmetal mining operations, the incidence rate for fatal injuries declined, and the incidence rate for the total of fatal injuries, non-fatal days lost injuries, and no days lost injuries also declined.

In October 1977, when Congress discussed adopting mandatory civil penalties for metal and nonmetal mines under the Mine Act, the Senate Committee on Human Resources (Committee) discussed the relative improvements in rates of fatal and serious non-fatal occurrences in the coal industry, where civil penalties had been mandatory since 1970, versus the non-coal segment of the industry, where there had been no provision for civil penalties, mandatory or permissive. Comparing the fatal and disabling injury rates between coal mines and metal and nonmetal mines for the years 1966 through 1976, the Committee found that the comparison:

> suggests clearly that even if the civil penalty system under the Coal Act has not been totally effective in implementation, the presence of the civil penalty sanction has resulted in substantial improvements which are not noted in the non-coal segment of the industry under the Metal Act.

S. Rep. No. 95–181, at 41 (1977).

MSHA's approach under this final rule is consistent with the intent of the drafters of the Mine Act. One of the goals of revising the civil penalty regulations in this final rule is to place more emphasis on the most severe violations, such as those contributing to accidents and injuries, and the most severe violators, such as those operators who exhibit high levels of negligence. MSHA has achieved this goal by revising the point tables for Negligence and Gravity-Severity and -Likelihood, so that the more severe violations will receive civil penalties at levels more likely to induce the operator's compliance.

Penalties are one of many tools that Congress approved to ensure ''a safe and healthful'' workplace for miners. Congress's intent was that civil penalties under the Mine Act be used to ''induce those officials responsible for the operation of a mine to comply with the Act and its standards.'' S. Rep. No. 95–181, at 41. Civil penalties were singled out by the sponsors of the Mine Act as ''the mechanism for encouraging operator compliance with safety and health standards.'' 123 Cong. Rec. 4388 (1977) (Feb. 11, 1977) (statement of Sen. Williams).

MSHA has structured the final rule so that increased penalties will induce operators to be more proactive in their approach to miner safety and health and will lead to overall safety and health improvements. Increasing penalties is consistent with Congress's intent that penalties:

> be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.

S. Rep. No. 95–181, at 41.

In response to comments that stated that the proposed penalty increases were unnecessary because injuries and fatalities have steadily declined since 1990, MSHA notes that the Mine Act has resulted in significant improvements in the health and safety of miners. Nevertheless, a review of MSHA's historical data shows a high number of fatal accidents in 2006—47 fatalities in coal mines and 25 fatalities in metal and nonmetal mines—and a rising number of violations in the past three years, including a rising number of violations of the same standard and a rise in the number of serious violations.

Several commenters supported increased penalties, but stated that the proposed increases were not sufficiently high to provide operators with enough compliance incentive. In support of this statement, these commenters provided the example that a violation that receives 50 points under the existing regulations would only receive the minimum penalty under the penalty conversion table in the proposed rule. MSHA notes that points assigned in the penalty tables for each of the statutory criteria have been changed in the proposed rule and, that this change prevents accurate comparisons between points assigned in the penalty tables under the existing regulation with the penalty conversion table in the proposed rule. Using the commenters' example, the 774 violations that received 50 penalty points under the penalty tables of the existing regulation received an average penalty of $636 (including a 30% discount for good faith, where applicable). These same violations would receive an average of 93 penalty points under the penalty tables in the proposed rule and would receive an average penalty of $2,134 (including a 10% discount for good faith, where applicable).

Several commenters stated that the proposed penalty increases were too high. These commenters provided MSHA with specific examples comparing penalties under the existing rule with projected penalties under the proposed rule. MSHA is impressed with the specific examples they submitted which included thoughtful analysis and attention to detail. MSHA has analyzed these examples using its data for 2005 assessed violations. MSHA notes that its data is comprised of all violations that were assessed in 2005. Some commenters may have submitted specific examples that relied on the issuance date rather than the assessment date of the violation. MSHA's analysis shows the following for some of the specific examples submitted by commenters.

1. Jim Walter Resources, Inc., (JWR) submitted summary estimates for Mine Number 4 and Mine Number 7. Regarding Mine Number 4, JWR stated that total penalties for 2005 were $97,288 and projected that penalties under the proposal would be $421,521, an increase of 333%. MSHA's analysis shows that total penalties assessed in 2005 for this mine were $128,540 and that the amount under the proposed rule would be $421,128, an increase of 228%. Under the final rule, the total penalties would be $344,423 or an increase of 168%.

Regarding Mine Number 7, JWR stated that total penalties for 2005 were $55,131 and projected that penalties under the proposal would be $286,389, representing an increase of 419%. MSHA's analysis shows that total penalties assessed in 2005 for this mine were $65,775 and that the amount under the proposed rule would be $378,907, an increase of 476%. Under the final rule, the total penalties would be $333,559 which is an increase of 407%. MSHA notes that the increase in penalties for Mine Number 7 as compared to Mine Number 4 is predominantly attributable to the difference in the number of penalty points for violations per inspection day. In addition, as stated above, MSHA's analysis is based on violations that were assessed in 2005 even though the violation may have been issued in a different year.

2. Peabody Energy (Peabody) provided projections of penalties for ''typical'' § 75.400 violations stating that if the single penalty is eliminated and penalties are solely based on points, large operators will be at an extreme disadvantage due to their sheer size and production. In each example, the size of the mine is over two million tons, the size of controlling entity is over 10 million tons, the history consists of a VPID exceeding 2.1 and more than 20 violations of the same standard, and the gravity consists of one person potentially affected. The first example involves a non-significant and substantial (non-S&S) violation: moderate negligence, ''unlikely'' occurrence, and ''lost work days or restricted duty.'' Peabody projected that under the proposed rule this violation would incur 106 penalty points for an initial proposed penalty of $4,440, which would be offset by a $444 reduction for timely abatement, resulting in a total penalty of $3,996.

The second example involves an S&S violation: moderate negligence, ''reasonably likely'' to occur, and ''lost work days or restricted duty.'' Peabody projected that under the proposed rule this violation would incur 126 penalty points for an initial proposed penalty of $21,993, which would be offset by a $2,199 reduction for timely abatement, resulting in a total penalty of $19,794.

The third example involves an S&S violation: High negligence, ''reasonably likely'' to occur, and ''lost work days or restricted duty.'' Peabody projected that under the proposed rule this violation would incur 141 penalty points for an initial proposed penalty of $60,000 which would be offset by a $6,000 reduction for timely abatement, resulting in a total penalty of $54,000.

MSHA reviewed its 2005 assessment violation data for all § 75.400 violations issued for Peabody's largest mines in 2005. MSHA calculated the average total penalty points and average proposed penalties under the existing, proposed, and final rules for Peabody mines that received maximum points for mine size. The results of MSHA's analysis are shown in the following table.

FY2005 75.400 Violations Issued to Peabody Energy Coal Mines Receiving Maximum Size Points	Existing Rule Average Points		Proposed Rule Average Points		Final Rule Average Points	
	Non S&S	S&S	Non S&S	S&S	Non S&S	S&S
Average of Mine Size Points	9	10	20	20	15	15
Average of Controller Size Points	5	5	5	5	10	10
Average of Violation Per Insp Day Points	7	6	7	5	8	6
Average of Repeat Violation Points	0	0	19	17	13	12
Average of Negligence Points	15	15	20	20	20	20
Average of Gravity Likelihood Points	2	5	10	30	10	30
Average of Gravity Injury (Severity) Points	3	3	4	5	4	5
Average of Gravity Persons Points	2	2	2	3	2	3
Average Total Points*	43	47	87	106	82	102
Average Proposed Penalty*	68	576	874	3,996	586	2,902

*Average points and penalty amounts for existing rule are based on actual point and penalty amounts.

*Average points and penalty amounts for proposed/final rules are based on proposed changes in points and penalty amounts.

*All proposed rule and final rule penalties are assumed to get good faith reductions

MSHA's analysis shows that under the existing rule, the total average points for all non-S&S § 75.400 violations was 43, resulting in an average proposed penalty of $68. MSHA's analysis revealed total average points for all S&S § 75.400 violations of 47, resulting in an average proposed penalty of $576.

Under the proposed rule, MSHA's analysis shows that the total average points for all non-S&S § 75.400 violations was 87, resulting in an average proposed penalty of $874, which includes the ''good faith'' reduction. MSHA's analysis revealed total average points for all S&S § 75.400 violations of 106, resulting in an average proposed penalty was $3,996, which includes the ''good faith'' reduction.

Under the final rule, MSHA's analysis shows that the total average points for all non-S&S § 75.400 violations was 82, resulting in an average proposed penalty of $586. MSHA's analysis revealed total average points for all S&S § 75.400 violations of 102, resulting in an average proposed penalty of $2,902, which includes the ''good faith'' reduction.

Peabody also submitted a fourth example showing the ''cheapest typical non-S&S'' violation. In this example, the size of mine is over two million tons, the size of controlling entity is over 10 million tons, the history consists of a VPID exceeding 2.1 and five or fewer repeat violations in the last 15 months, moderate negligence, an ''unlikely'' occurrence, a severity of ''lost work days or restricted duty,'' and one person potentially affected. Peabody projected that, under the proposed rule, such a violation would incur 86 penalty points for an initial proposed penalty of $897 which would be offset by a $90 reduction for timely abatement, resulting in a total penalty of $807. MSHA's analysis of an average non-S&S violation for Peabody mines with maximum points for mine size shows that under the existing rule, the average proposed penalty was $68, under the proposed rule, the average proposed penalty was $874, and under the final rule, the average proposed penalty was $586.

3. Pennsylvania Coal Association stated that the removal of the single penalty assessment will greatly increase penalties for non-S&S violations that present no real degree of hazard. Pennsylvania Coal gave the example that under the proposal, a section 104(a), non-S&S violation with moderate negligence, 1.1 violations per inspection day, production over two million tons per year, an unlikely likelihood of occurrence, a severity of lost work days, and two persons potentially affected would receive a penalty of $512, more than 8 times the $60 single penalty under the existing rule. Under MSHA's analysis, assuming three points for size of the controlling entity, the penalty for this violation would be $212 under the proposed rule, or $190 with the ''good faith'' reduction, an increase of 216%. Under the final rule, assuming five points for size of the controlling entity, the penalty for this violation would be $196 or $176 with the ''good faith'' reduction.

Pennsylvania Coal further stated that it believed that penalties under the proposal would result in an increase of 10 times over the existing penalties for commonly cited violations. Pennsylvania Coal provided the example that if the severity of the injury in the foregoing violation were permanently disabling and there was a ''repeat'' history of 10 points, the penalty would increase to $1,140. Under MSHA's analysis, assuming three points for size of the controlling entity, the penalty for this violation would be $473 under the proposed rule, or $425 with the ''good faith'' reduction, an increase of 7 times over the existing penalty. Under the final rule, assuming five points for size of the controlling entity, the penalty would be $651 or $586 with the ''good faith'' reduction.

After analyzing the commenters' projected penalties, MSHA agrees that the penalty increases can be substantial under the proposed rule; however, in many instances, the increases are not as great as commenters projected. This is due to a number of reasons including data based on issued rather than assessed violations, and use of hypothetical violations with sometimes incomplete data. The Agency believes that the penalty increases in the final rule are consistent with Congressional intent and are at an appropriate level to increase operator compliance with the Mine Act and MSHA's safety and health standards and regulations.

MSHA discussed the regulatory impact analysis in support of the proposed rule in Section IV of the preamble to the proposed rule. The analysis of costs contained three inadvertent errors: (1) MSHA used the wrong employment size for a few independent contractor violations; (2) there was a small error in the formula for calculating the history for repeat violations; and (3) violation history penalty points were improperly assigned to operators with fewer than 10 violations over the previous 15-month period. The net effect of these errors was to underestimate the impact of costs of the proposal by about 2%. These errors have been corrected in MSHA's analysis of the final rule. A more detailed explanation is provided later in Section III (Executive Order 12866) of this preamble, and any data referenced by MSHA in support of the proposed rule reflect the corrections.

Some commenters expressed concern that MSHA does not use the Small Business Administration (SBA) definition of small business, creating an unfair trade disadvantage for crushed stone, sand, and gravel mines, which tend to be smaller mines. 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 established such an alternative definition 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 impact of agency rules on a subset of mines with 500 or fewer employees, i.e., those with fewer than 20 employees, which MSHA and the mining community traditionally have 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. Because of these factors, their costs of complying with MSHA's rules and the impact of the agency's rules on them also will tend to be different. It is for this reason that ''small mines,'' traditionally defined by MSHA as those employing fewer than 20 workers, are of special concern to MSHA. In addition, for this final rule, MSHA has examined the cost on mines with five or fewer employees to ensure that they are not significantly and adversely impacted by the final rule.

In the final rule, MSHA has carefully evaluated all of the comments and concerns. The Agency has revised some of the proposed provisions to reflect many of the commenters' concerns. MSHA's primary objective continues to be to develop and issue a final rule which promotes operator compliance with the Mine Act and MSHA's standards and regulations and thereby reduces violations and injuries, illnesses and fatalities in mines. By establishing more serious consequences for noncompliance with the Mine Act and MSHA's safety and health standards and regulations, the highest penalties under this final rule are directed towards those mine operators who continually allow hazardous conditions to exist. The final rule aims to direct mine operators who violate the Mine Act and MSHA's safety and health standards and regulations toward a more proactive approach to miner safety and health.

B. Section-by-Section Analysis

Scope and Purpose (§ 100.1)

Final § 100.1, like the existing rule, sets forth the scope and purpose of the final rule. It provides the criteria and procedures that MSHA uses to propose civil penalties under sections 105 and 110 of the Mine Act. Final § 100.1, like the existing rule, provides that the purpose of this rule is to: establish a fair and equitable procedure for the application of the statutory criteria in determining proposed penalties for violations; maximize the incentives for mine operators to prevent and correct hazardous conditions; and assure the prompt and efficient processing and collection of penalties.

Some commenters suggested that the final rule should be limited to the specific penalties mandated by the

MINER Act and that MSHA either should withdraw the proposed rule or delay promulgating a final rule and appoint an advisory committee to evaluate other aspects of the proposed rule before moving forward. In addition, some commenters expressed the opinion that Congress's silence in the MINER Act with respect to civil penalties other than those specifically mentioned indicated that Congress generally was satisfied with MSHA's existing penalty regulations. These commenters stated that MSHA should follow the clear and unmistakable direction provided by Congress and limit the final rule to only those penalty provisions included in the MINER Act. Other commenters opposed the appointment of an advisory committee to review civil penalties stating that it would be only a delay tactic.

Although Congress mandated only certain penalties under the MINER Act, it did so by amending the Mine Act and providing the Secretary with additional tools ''to improve the safety of mines and mining.'' PL 109–236, 120 Stat. 493 (June 15, 2006). MSHA has determined that there would be no benefit for miner safety and health by convening an advisory committee. The final rule is consistent with both the Mine Act and MINER Act's goals to improve miner safety and health through the use of effective civil penalties. In response to comments, and consistent with the MINER Act, under the final rule, operators who exhibit a lack of commitment to miner safety and health will receive the greatest increase in penalties.

Some commenters opposed the proposed rule's across-the-board penalty increases, stating that this was a one-size-fits-all approach that unfairly penalized operators with good safety records. Specifically, a number of sand and gravel operators commented that the proposed increases should be limited to coal mines because disasters in coal mines generated changes in the MINER Act. These commenters further stated that coal mines pose greater health and safety hazards to miners and that such mines experience a higher number of violations. Some small sand and gravel operations further commented that the proposed increases were excessively high and would put them out of business. These commenters provided no specific data in support of their conclusion. Under the final rule, MSHA estimates that metal and nonmetal operators, which include small sand and gravel operators, with one to five employees would average a yearly increase of $149 per mine, compared to $213 for those with one to 20 employees.

Under the final rule, like the existing rule, the size of the mining operation and the effect of a penalty on an operator's ability to continue in business are two of the statutory factors taken into consideration in determining penalties. MSHA's goal for this final rule is that all mine operators, consistent with the statutory purpose, will be in compliance with the Mine Act and Agency safety and health standards and regulations. In addition, consistent with the MINER Act, the Agency projects that operators who are the worst safety and health offenders will experience the largest penalty increases under the final rule.

One commenter expressed concern that the proposed rule did not provide equitable procedures for the application of the statutory criteria in determining proposed penalties because the proposed rule treated small mines differently from large mines and because it treated coal mines differently from metal and non-metal mines. MSHA does not agree that its application of the mine size penalty criteria is inequitable. Under the final rule, like the existing rule, the points and the penalties increase as the size of the operator or its parent company grows. In doing so, MSHA is assuring optimal consistency in accordance with Congressional intent in applying the statutory criteria pertaining to the size of the operator's business.

Historically, MSHA has treated coal mining operations differently from metal and nonmetal mining operations when determining size for purposes of assigning civil penalty points. This historical distinction was based on both Agency experience and mining industry conditions. MSHA has found that measuring the size of coal mining operations by tonnage produced is a reasonable indicator of the size of the business for coal operations. Tonnage produced, however, is not usually a useful indicator of size for metal and nonmetal mining operations because of the vast differences in commodities mined and methods of mining within that segment of the mining industry. In some instances, large volumes of material are mined for only a few ounces of a marketable commodity; in others, nearly one hundred percent of the mined material is marketable. In addition, the costs of production and the market prices may vary markedly within the metal and nonmetal industry. Thus, an annual tonnage measurement of metal and nonmetal operations would not enable MSHA to fairly evaluate the economic impact of the proposed penalty on each operator. MSHA's experience is that tonnage produced has proven to be effective for measuring the size of coal mining operations and annual hours worked has proven to be effective for measuring the size of metal and nonmetal operations.

No substantive changes to proposed § 100.1 were made in the final rule. Final § 100.1 adopts the language in the proposed rule.

Applicability (§ 100.2)

Final § 100.2, like the existing rule, sets forth the applicability of the final rule and provides that 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. Final § 100.2, like the existing rule, further provides that MSHA shall review each citation and order and shall make proposed assessments of civil penalties.

MSHA received no significant comments regarding proposed § 100.2. Final § 100.2 adopts the language in the proposed rule.

Determination of Penalty; Regular Assessment (§ 100.3)

(a) General

This section of the final rule addresses the determination of a penalty amount under the regular assessment provision. Final § 100.3(a)(1) is derived from existing § 100.3(a), and provides the criteria for determining penalty assessments. The final rule, like the proposal, makes several non-substantive, clarifying changes. It divides existing § 100.3(a) into two paragraphs designated as § 100.3(a)(1) and (a)(2).

Final § 100.3(a)(1), like the proposed rule, provides that the operator of any mine in which a violation of a mandatory health or safety standard occurs or who violates any other provision of the Mine Act shall be assessed a civil penalty of not more than $60,000. It further provides that each occurrence of a violation of a mandatory safety or health standard may constitute a separate offense. In addition, it provides that 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:

(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 received no comments on proposed § 100.3(a)(1) and final § 100.3(a)(1) adopts the language in the proposed rule.

Final § 100.3(a)(2), substantively unchanged from the existing rule, sets forth the process for determining a penalty under the regular assessment provision. Under paragraph (a)(2), a regular assessment is determined by first assigning the number of penalty points to the violation by using the criteria and tables set forth in this section. The total number of penalty points is then converted into a dollar amount under the penalty conversion table in paragraph (g) of this section. If applicable, the amount of the penalty will be adjusted for good faith as provided under paragraph (f) of this section, and/or the operator's ability to continue in business as provided under paragraph (g) of this section.

Several commenters suggested that MSHA replace the proposed point system with alternative methods for computing penalties. For example, one commenter suggested that MSHA consider an alternative to the regular assessment process in which each violation would have a designated baseline penalty. Under this suggested approach, factors such as an operator's history and negligence, and the gravity of the violation would be used to increase the penalty, but the baseline penalty would not be reduced because of an operator's size, good faith in abatement, or ability to continue in business. MSHA has evaluated this suggested alternative and determined that it is not in accord with the intent of the drafters of the Mine Act because it does not appropriately consider the statutory factors when determining penalties. Therefore, final § 100.3(a)(2) retains the proposed regular assessment structure and language.

(b) Appropriateness of the Penalty to the Size of the Operator's Business

Final § 100.3(b) is derived from existing § 100.3(b). Like the existing rule, final § 100.3(b) continues to provide that the appropriateness of the penalty to the size of the operator's business is calculated by using both the size of the mine and the size of the controlling entity of the mine. In addition, final paragraph (b) continues to provide that the terms ''annual tonnage'' and ''annual hours worked'' mean coal produced and hours worked, respectively, in the previous calendar year. It also continues to provide that where a full year of data is not available, the coal produced or hours worked is prorated on an annual basis. Finally, it increases the maximum number of points that can be accrued under this criterion, from 15 points under the existing rule to 25 points.

MSHA proposed editorial, clarifying changes to this provision. MSHA proposed adding the statement that 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, and the size of independent contractors is measured by the total hours worked at all mines. No comments were received regarding this proposed clarification. Therefore, final § 100.3(b) adopts the additional statement as proposed.

Although final § 100.3(b) retains the proposed 25 maximum number of points under the size criterion, allocation of points based on the size of coal mines, metal and nonmetal mines, controlling entities, and independent contractors is different from the proposed rule. Under final § 100.3(b), the maximum number of points based on the size of coal mines and metal and nonmetal mines is reduced from the proposed 20 points to 15 points, and the maximum number of points for controlling entities of coal mines and metal and nonmetal mines is increased from the proposed five points to 10 points. Accordingly, the total maximum number of points for the size of a coal or metal or nonmetal mining operation is 25. In addition, the maximum number of points for independent contractors is increased from 20 to 25 points.

MSHA received numerous comments both in support of and against point increases based on mine size. Commenters opposed to giving consideration to size expressed concern that, under the proposed rule, nearly a quarter of all coal mines and more than half of all metal and nonmetal mines were receiving fewer points merely because of size even though many health and safety violations are cited at such smaller operations. In addition, commenters expressed concern that larger operations would receive excessive points under the proposed rule even though larger mines typically have more comprehensive safety programs than smaller mines. This final rule is responsive to many of these concerns.

With respect to comments pertaining to the proposed increase in points for mine size, the Mine Act specifically requires that the size of an operator's business be considered in determining the amount of a penalty. In response to comments, however, MSHA has made several changes to the mine size point tables in the final rule. First, MSHA created more categories for the annual tonnage range for smaller coal mines and the annual hours worked range for smaller metal and nonmetal mines.

In addition, MSHA raised the penalty points for the smallest coal mine size from zero points to one point. This is because coal mines in the smallest mine size, according to annual tonnage, include preparation plants that report no production, although many employ 20 or more workers. Therefore, MSHA determined that it would further the purpose of this rulemaking to increase points in this size range. As a result of these changes, smaller coal mines would tend to receive more size penalty points on average under the final rule as compared with the proposed rule. For example, a small coal mine with coal production between 0 and 7,500 tons will receive one point under the final rule as opposed to 0 points under the proposed rule.

Under final § 100.3(b), MSHA has increased the maximum number of points from 10 under the existing rule to 15 for the largest coal operations and metal and nonmetal operations. MSHA proposed increased points for larger operations because in order to provide an equal deterrent, the penalties must be higher for larger mines (with potentially higher revenue) in order to provide an equal deterrent. In addition, the Agency anticipated that higher penalties would be needed to help induce these operations, with more complex management structures, to take notice of and correct safety and health violations. Accordingly, final § 100.3(b) increases the maximum number of points from 10 under the existing rule to 15 (as opposed to the 20 points in the proposal).

With respect to independent contractors, MSHA proposed to increase the maximum number of penalty points from 10 to 20 to assure that the amount of the penalty is an appropriate economic inducement of future compliance by the independent contractor. This was accomplished by doubling the number of penalty points for any given number of annual hours worked. MSHA has reviewed the violations assessed in 2005 pertaining to independent contractors and determined that the maximum number of points for independent contractor size should be raised from 20 in the proposed rule to 25 in the final rule.

Under the final rule, all mine operators are subject to a maximum of 25 points for size. MSHA reviewed the violations that were assessed in 2005 and found that for most employment sizes, operator penalties were at least 50% higher, and in some cases more than 100% higher, than the penalties received by independent contractors. MSHA has concluded, from its review of penalties under the proposed rule, that some significant part of the discrepancy between operator and independent contractor penalties was due to the fact that operators received a maximum of 25 penalty points for size while independent contractors received a maximum of 20 penalty points for size. Accordingly, MSHA has increased the maximum size penalty points for independent contractors to 25 points.

In addition, as was done for operators, MSHA has created more categories capturing the annual hours worked range for smaller independent contractors. As a result, smaller independent contractors would tend to receive more penalty points for size on average under the final rule than under the proposed rule. For example, an independent contractor with 5,001 to 10,000 annual hours worked would receive two penalty points for size under the final rule as compared to zero penalty points for size under the proposed rule.

In reallocating the points for size for independent contractors, MSHA evaluated the violations that were assessed in 2005 and compared the number of violations per contractor with the given contractor size points under the existing rule, proposed rule, and final rule. MSHA's primary concern was to ensure that the average penalties per violation for independent contractors of any given employment size would be similar to the average penalties for coal and metal and nonmetal operators of a similar employment size.

In addition, MSHA received comments both in support of and against the Agency's request for comments pertaining to whether greater weight should be placed on the size of controlling entities. Proposed § 100.3(b) retained the existing maximum of five points for controlling entities; however, MSHA specifically requested comments on whether, in considering the size of the operator, greater weight should be placed on the size of the controlling entity. Some commenters supported placing greater weight on controlling entities so that smaller individual mines that are owned and controlled by larger entities would receive higher penalties. Those commenters stated, however, that for purposes of assessing a sufficiently high penalty that would get the attention of the controlling entity, an accurate measure of the controlling entity's size should be revenues, and not annual tonnage or hours worked, because many controlling entities could be involved in a number of industries and businesses that are not mining-related. Other commenters who supported placing greater weight on controlling entities questioned whether it would be a workable provision. Those commenters were concerned that because the mining industry is so fluid, tracking such information may be all but impossible, overly burdensome, and too labor intensive, and therefore beyond the agency's ability to administer.

Some commenters opposed placing greater weight on the controlling entity. Some of those commenters stated that the Mine Act only specifies the size of the operator as a penalty criterion, and such specification implies that the size of some other entity in the corporate chain should not be a consideration in calculating the size of the penalty. Other commenters opposed placing greater weight on the controlling entity because it would create a financial disadvantage for small operations owned by larger companies and thereby promote an adverse competitive environment in local markets.

MSHA agrees with comments in support of placing greater weight on controlling entities and accordingly has increased the maximum controller size penalty points from five to 10. Congress specifically required that the size not only of the particular mine involved in the violation, but the size of the operator's ''business'' is to be taken into account. MSHA has historically interpreted this statutory provision to include both the size of the mine and the size of the entity that controls the mine. Business judgments affecting the health and safety of miners are made at various levels of an organization's structure. Penalties are intended to encourage management at all levels to respond positively to the health and safety concerns affecting miners. In addition, Congress expressed its intent to place the responsibility for compliance with the Mine Act on those who control or supervise the operation of mines as well as on those who operate them. S. Rep. No. 95–181, at 40–41. Upper-level management decisions such as those affecting capital expenditures, the basic nature and scope of a corporate safety and health program, the hiring of top mine management officials, and other policy matters have a profound effect upon safety and health conditions at individual mines. Thus, penalties should be increased for controlling entities in order to influence all levels of decisionmaking. Further, the Mine Act specifically requires consideration be given to the size of the operator's business. MSHA reallocated the points for controlling entities and coal and metal and nonmetal mine size to achieve a more equitable distribution of points.

MSHA does not think that the specific comment that opposed placing greater weight on the controlling entity because it would create a financial disadvantage for small operations owned by larger companies is accurate. The comment assumes that fines assessed against smaller operations owned by larger entities are not reflected in the overall profit margin of the controlling entity.

In addition, for the same reasons stated in the above discussion concerning measuring the size of coal mines and metal and nonmetal mines, MSHA will continue to measure the size of controlling entities under this final rule as it does under the existing rule. The size of a controlling entity for coal mines is measured by annual tonnage and the size of a controlling entity for metal and nonmetal mines is measured by annual hours worked. MSHA intends to continue its existing practice of considering only the mining operations in which a controlling entity is involved in when determining the size of the controlling entity. This method has been effective as a proxy for revenue and the data are readily available to MSHA through the existing reporting requirements under 30 CFR part 50.

Final § 100.3(b) modifies the points for size from the proposed rule. Relative to the existing rule, final § 100.3(b) increases the points for the size according to the following tables.

Table II-1 -- Size of Coal Mine: Annual Tonnage of Mine

Annual tonnage of mine	Existing Rule Penalty Points
0 to 15,000	0
Over 15,000 to 30,000	1
Over 30,000 to 50,000	2
Over 50,000 to 100,000	3
Over 100,000 to 200,000	4
Over 200,000 to 300,000	5
Over 300,000 to 500,000	6
Over 500,000 to 800,000	7
Over 800,000 to 1.1 million	8
Over 1.1 million to 2 million	9
Over 2 million	10

Annual tonnage of mine	Final Rule Penalty Points
0 to 7,500	1
Over 7,500 to 10,000	2
Over 10,000 to 15,000	3
Over 15,000 to 20,000	4
Over 20,000 to 30,000	5
Over 30,000 to 50,000	6
Over 50,000 to 70,000	7
Over 70,000 to 100,000	8
Over 100,000 to 200,000	9
Over 200,000 to 300,000	10
Over 300,000 to 500,000	11
Over 500,000 to 700,000	12
Over 700,000 to 1,000,000	13
Over 1,000,000 to 2,000,000	14
Over 2,000,000	15

Table II—2 -- Size of Controlling Entity: Coal Mine

Annual tonnage	Existing Rule 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

Annual tonnage	Final Rule Penalty Points
0 to 50,000	1
Over 50,000 to 100,000	2
Over 100,000 to 200,000	3
Over 200,000 to 300,000	4
Over 300,000 to 500,000	5
Over 500,000 to 700,000	6
Over 700,000 to 1,000,000	7
Over 1,000,000 to 3,000,000	8
Over 3,000,000 to 10,000,000	9

Over 10,000,000	10

Table II-3 -- Size of Metal and Nonmetal Mine: Annual Hours Worked at Mine

Annual hours worked at mine	Existing Rule Penalty Points
0 to 10,000	0
Over 10,000 to 20,000	1
Over 20,000 to 30,000	2
Over 30,000 to 60,000	3
Over 60,000 to 100,000	4
Over 100,000 to 200,000	5
Over 200,000 to 300,000	6
Over 300,000 to 500,000	7
Over 500,000 to 700,000	8
Over 700,000 to 1 million	9
Over 1 million	10

Annual hours worked at mine	Final Rule Penalty Points
0 to 5,000	0
Over 5,000 to 10,000	1
Over 10,000 to 20,000	2
Over 20,000 to 30,000	3
Over 30,000 to 50,000	4
Over 50,000 to 100,000	5
Over 100,000 to 200,000	6
Over 200,000 to 300,000	7
Over 300,000 to 500,000	8
Over 500,000 to 700,000	9
Over 700,000 to 1,000,000	10
Over 1,000,000 to 1,500,000	11
Over 1,500,000 to 2,000,000	12
Over 2,000,000 to 3,000,000	13
Over 3,000,000 to 5,000,000	14

Over 5,000,000	15

Table II-4 -- Size of Controlling Entity: Metal/Nonmetal Mine

Annual hours worked	Existing Rule 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

Annual hours worked	Final Rule Penalty Points
0 to 50,000	0
Over 50,000 to 100,000	1
Over 100,000 to 200,000	2
Over 200,000 to 300,000	3
Over 300,000 to 500,000	4
Over 500,000 to 1,000,000	5
Over 1,000,000 to 2,000,000	6
Over 2,000,000 to 3,000,000	7
Over 3,000,000 to 5,000,000	8
Over 5,000,000 to 10,000,000	9
Over 10,000,000	10

Table II-5 -- Size of Independent Contractor: Annual Hours Worked at All Mines

Annual hours worked at all mines	Existing Rule Penalty Points
0 to 10,000	0
Over 10,000 to 20,000	1
Over 20,000 to 30,000	2

Over 30,000 to 60,000	3
Over 60,000 to 100,000	4
Over 100,000 to 200,000	5
Over 200,000 to 300,000	6
Over 300,000 to 500,000	7
Over 500,000 to 700,000	8
Over 700,000 to 1 million	9
Over 1 million	10

Annual hours worked at all mines	Final Rule Penalty Points
0 to 5,000	0
Over 5,000 to 7,000	2
Over 7,000 to 10,000	4
Over 10,000 to 20,000	6
Over 20,000 to 30,000	8
Over 30,000 to 50,000	10
Over 50,000 to 70,000	12
Over 70,000 to 100,000	14
Over 100,000 to 200,000	16
Over 200,000 to 300,000	18
Over 300,000 to 500,000	20
Over 500,000 to 700,000	22
Over 700,000 to 1,000,000	24
Over 1,000,000	25

(c) History of Previous Violations

Final § 100.3(c) is derived from existing § 100.3(c). Final § 100.3(c), like the proposed rule, provides that 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 citable provision of a standard in a preceding 15-month period. Final § 100.3(c) clarifies that the repeat aspect of the history criterion in paragraph (c)(2) applies to operators only after an operator has received 10 violations, and to independent contractor operators only after an independent contractor has received 6 violations. In addition, only assessed violations that have been paid or finally adjudicated, or have become final orders of the Federal Mine Safety and Health Review Commission (Commission), will be included in determining an operator's history.

Proposed § 100.3(c) clarified the existing provision by adding the phrase ''or have become final orders of the Commission'' in the second sentence of this paragraph to reflect MSHA's intent that only violations which have become final be included in an operator's history. In addition, the proposal made several substantive changes to existing § 100.3(c). An operator's history of violations under existing § 100.3(c) was based solely on the overall number of violations cited against an operator during a preceding 24-month period. Under the proposal, the period of time would be shortened to 15 months and an operator's history of violations would include two components: the total number of violations and the number of repeat violations in that 15-month period.

MSHA received numerous comments with respect to these proposed changes. Several commenters opposed the 15-month period. These commenters expressed concern that the proposed 15-month period would deprive MSHA of critical information about an operator's past safety record, particularly for aggregate mining operations that are seasonal or intermittent, and could result in lower penalties, particularly for repeat violators. One commenter criticized MSHA for not publishing data that the Agency used to determine that the effect of the shorter time period would have a negligible effect on an independent contractor's history. On the other hand, many commenters supported the shorter time period because it provided a more current or

more realistic indication of an operator's compliance.

MSHA has determined that the proposed 15-month period will provide the Agency with sufficient data to accurately evaluate an operator's compliance record, including any trend, even for mining operations that are inspected on a less-frequent basis, e.g., seasonal or intermittent operations. MSHA reviewed violations that were assessed in 2005 and determined that because it takes approximately three months for a penalty assessment to become a final order of the Commission, the proposed 15-month period would provide the Agency with at least one full year of data for coal and metal and nonmetal operations, and for independent contractors.

The shortened timeframe of 15 months provides MSHA with a more recent compliance history than the 24-month period under the existing rule. In addition, MSHA believes that operators who violate the Mine Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior.

For coal and metal and nonmetal operations, the data would be normalized by the amount of inspection time resulting in data comparable to that of the 24-month period under the existing rule. MSHA analyzed the data for operator violations that were assessed in 2005 to determine the impact of changing to a 15-month period. For coal and metal and nonmetal operator violations that were assigned history penalty points in 2005, and had a minimum of 10 violations during the 15-month period, the average penalty points using a preceding 24-month period was 7.5 per violation. Using a preceding 15-month period, the average was 7.6 penalty points per violation.

For independent contractors, there is a negligible difference between calculating an independent contractor's history of violations under the proposed rule and under the existing rule. This is so because it generally takes up to three months for a violation to become a final order and, therefore, the 15-month period provides MSHA with at least one full year of data from which to calculate violation history. MSHA reviewed violations that were assessed in 2005, which show that there were 3,844 contractors that were issued at least one citation in the 24-month period from January 1, 2004 to December 31, 2005. Using the same number of months and the annualized calculation that is used to determine violation history in the existing rule, these contractors were issued an average of 2.3 violations per year with a median of one violation per year during this time frame. Using the 15-month period without annualizing the number of violations as proposed, these same contractors were issued an average of 2.9 violations with a median of one violation during the 15-month period between October 1, 2004 and December 31, 2005.

Several commenters expressed concern with the Agency's proposal to use violations that have become final orders of the Commission, stating that this will encourage operators to increase penalty contests to avoid counting the violation in an operator's history. MSHA included the insertion of the phrase ''final orders of the Commission'' to clarify the Agency's practice, in existence since 1982, to use only violations that have become final orders of the Commission in determining an operator's history of violations. This practice will continue to provide a measure of fairness by not including in an operator's history those violations that are in the adjudicatory process which may ultimately be dismissed or vacated. As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final.

In consideration of all comments, final § 100.3(c) retains the final order language and shortens the period of time from 24 to 15 months for determining an operator's history of violations as proposed.

Several commenters expressed confusion regarding the number of violations that would trigger application of the repeat violation provision in proposed paragraph (c)(2). MSHA intends that the repeat violation provision in final paragraph (c)(2) would only apply to contractors after an operator has received 10 violations, and to independent contractor operators only after an independent contractor has received 6 violations. Therefore, final § 100.3(c) includes clarifying language.

Final § 100.3(c)(1) is a new paragraph derived from existing § 100.3(c). Final § 100.3(c)(1), like the proposed rule, provides that history penalty points are assigned on the basis of the number of violations per inspection day (VPID) for coal operations and metal and nonmetal operations. Under final paragraph (c)(1), penalty points are not assigned to coal operations and metal and nonmetal operations that receive fewer than 10 violations in a preceding 15-month period. For independent contractors, final § 100.3(c)(1), like the proposed rule, provides that penalty points are assigned on the basis of the total number of violations at all mines. Penalty points are not assigned to independent contractors with fewer than 6 violations. The maximum number of points that an operator may receive for this criterion is 25 points.

Most commenters supported the proposed continuation of using VPID to calculate points for coal and metal and nonmetal operator's history of violations, stating that VPID provides the truest measure of an operator's compliance. Some of these commenters, however, requested that MSHA clarify its definition of an inspection day. These commenters stated that MSHA's method of determining inspection days is different between coal mines and metal and nonmetal mines, which affects how points are computed.

MSHA's definition of VPID (Violations per Inspection Day) is calculated by taking the total number of assessed violations at a mine for a specified period that have either been paid or have become a final order of the Commission and dividing it by the total number of inspection days at the mine during the same specified period. There is no functional difference between a violation that an operator pays and a final order of the Commission.

Prior to April 2005, MSHA used different definitions of an inspection day for coal and metal and nonmetal mines. For coal mines, each mine visit by each Authorized Representative of the Secretary (AR) was considered a separate inspection day. For metal and nonmetal mines, the total time for each inspection event was divided by five hours to determine the number of inspection days for that event. For both coal and metal and nonmetal operations, the number of inspection days were then summed for the specified period. In April 2005, MSHA began its transition to use the per-visit method previously used only for coal mines for all types of mines. MSHA currently calculates inspection days for assessment purposes by counting one inspection day for each AR that spends any on-site inspection time during any calendar day. Supervisory and trainee time is excluded from the inspection day calculation as are non-inspection activities. The same method is used for all coal, metal, and nonmetal mines.

Some commenters expressed concern that the proposed new provision that history penalty points not be assigned to coal operations and metal and nonmetal operations with fewer than 10 violations in a preceding 15-month period essentially amounted to a free pass for small mines and constituted selective enforcement of the Mine Act. MSHA

projects that this new provision would work similar to existing § 100.4(b), which excludes from excessive history mines having 10 or fewer assessed violations in a preceding 24-month period. In making a decision to include the new provision in the proposed rule, MSHA considered various factors, such as small, seasonal, and intermittent operations, all of which may result in an operation having a low number of inspection days during the specified period. For such operations, even though the total number of violations may be low, i.e., three violations in a preceding 15-month period, the VPID could easily be greater than the highest VPID level, or 2.1, and the operator would receive the maximum number of 25 points. To avoid the inequitable result of subjecting any mining operation with only a few violations in a preceding 15-month period to an unrealistically high VPID, MSHA concludes that the new provision, under which penalty points are not assigned to coal operations and metal and nonmetal operations with fewer than ten violations in a preceding 15-month period, is necessary. Therefore, the final rule includes the proposed language.

Several commenters suggested, as an alternative to the proposal, that the final rule include a provision that history penalty points not be assigned to independent contractors with fewer than 10 violations in a preceding 15-month period. In considering this suggestion, MSHA reviewed its violation data which showed that between October 1, 2004 and December 31, 2005, approximately 500 contractors would have received history penalty points for 6 or more violations during a 15-month period. This number would be reduced, however, to approximately 200 if contractors with fewer than 10 violations were not assessed history points. Stated differently, under MSHA's violation data, 11% of the independent contractor violations would have received history penalty points for six or more violations during a previous 15-month period. This percentage would be reduced, however, to approximately 6% if contractors with fewer than 10 violations were not assessed history points. Although there was strong support for the suggested alternative, MSHA has decided that the alternative does not further the purpose of this rulemaking and that the Agency will retain the proposed language that penalty points not be assigned to independent contractors with fewer than 6 violations in a preceding 15-month period.

MSHA specifically requested comments as to whether the Agency should adopt the proposed approach for calculating an independent contractor's history of violations by using the total number of assessed violations at all mines during a preceding 15-month period, or whether the Agency should use an annualized 2-year average as it does under the existing rule. Under the existing rule, the number of violations for independent contractors is based on an annual average of all violations over a two year period at all mines. MSHA received several comments expressing skepticism with the Agency's statement that only a minimal increase in the average assessment issued to independent contractors would result by eliminating the annualized average. In addition, some commenters suggested that MSHA use VPIDs when computing contractor history. These commenters stated that contractors are required to have a single MSHA contractor ID number for nationwide operations, and that if working daily at multiple mine sites across the country, that contractor is likely to be inspected far more frequently than the average mine operator. These commenters concluded that MSHA's proposal lacks an adequate foundation and results in unfair treatment of independent contractors.

VPID cannot be used to calculate a contractor's history of violations because MSHA does not record inspection time for contractors. As explained above, MSHA tracks contractor violations by counting total violations within a specified period. Although MSHA received some comments critical of the proposed method, it has proved to be both successful and practical in calculating a contractor's violation history under the existing rule.

The proposed rule increased the maximum number of points under this criterion from 20 under the existing regulation to 25 points. The final rule retains the proposed 25 maximum points; however, MSHA raised penalty points for independent contractors with 8 to 50 violations during the previous 15-month period, relative to what was proposed. The additional increase in points reflects MSHA's desire to increase points for independent contractors so as to reduce the discrepancy in penalties between operators and independent contractors.

Tables II–6 and II–7 compare the existing and final penalty point scales for coal and metal and nonmetal operators and independent contractors.

Table II-6 -- History of Previous Violations: Mine Operators

Violations per inspection day	Existing Rule 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	12
Over 1.5 to 1.7	14
Over 1.7 to 1.9	16
Over 1.9 to 2.1	18
Over 2.1	20

Mine Operator's Overall History of Violations Per Inspection Day	Final Rule Penalty Points
0 to 0.3	0
Over 0.3 to 0.5	2
Over 0.5 to 0 7	5
Over 0.7 to 0.9	8
Over 0.9 to 1.1	10
Over 1.1 to 1.3	12
Over 1.3 to 1.5	14
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 II-7 -- History of Previous Violations: Independent Contractors

Number of violations	Existing Rule 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	12
Over 35 to 40	14
Over 40 to 45	16
Over 45 to 50	18
Over 50	20

Independent Contractor's Overall History of Number of Violations	Final Rule Penalty Points
0 to 5	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	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
Over 29	25

In the proposal, the Agency added a new component to the history criterion to target operators who allowed the same violations to recur, without correcting the underlying root cause. The new § 100.3(c)(2), like the proposal,

adds repeat violations of the same citable provision of a standard to an operator's history of violations and could account for a maximum of 20 penalty points. Under the final rule, an operator would not receive repeat penalty points until that operator had a minimum of 6 repeat violations in a preceding 15-month period.

In response to MSHA's request for comments on this proposal, many commenters opposed it because they believed that it counted some violations twice, once in the overall violation history and again in the repeat violation category, merely for the purpose of increasing penalties. In addition, some of these commenters stated that MSHA's many broad performance-oriented standards are sometimes applied to multiple conditions that are in reality, quite different and that, in these circumstances, operators would be unfairly penalized for repeat violations which were intended to cover only the same or similar conditions. Also, some commenters expressed concern that increased penalties for repeat violations would be unfair in situations in which an MSHA inspector issues multiple citations for multiple violations of the same hazard.

Although some commenters opposed the repeat violation provision as being unfair and redundant, other commenters supported it. MSHA believes that this new provision is consistent with and responsive to Congress's desire to curb repeat violations. Reporting on the bill that became the Mine Act, the Senate Committee on Human Resources stated:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation.

S. Rep. No. 95–181, at 43.

MSHA analyzed violation data for the 15-month period from January 1, 2005, through March 31, 2006. These data showed that often inspectors issued citations for the same safety and health hazards at the same operation within a specified period of time. From these data, the Agency concludes that once a condition is identified, these operators are correcting that particular condition without addressing the root cause of the problem. This new provision is aimed at preventing these types of occurrences and thereby providing a systematic improvement to miner safety and health.

Some of the commenters who supported the proposed repeat violation provision expressed concern that it was too narrowly construed because it only counted violations of the same subsection of an MSHA standard. One commenter provided the example that violations for combustible materials under 30 CFR 75.400 should not be dissected into the specific nature of the combustible material, i.e., paper, coal dust, wood, etc., when considering repeat status. Another commenter suggested, as an alternative, that MSHA retain its discretion to use broader categories of violations of standards in determining whether a company is a repeat violator.

MSHA does not agree that the repeat provision should include broader categories of violations. MSHA analyzed violation data for the 15-month period from January 1, 2005, through March 31, 2006. MSHA's analysis, interpreting ''same standard'' to mean ''same citable provision,'' showed that 698 of the 10,227 mines with violations had at least 6 violations of the same citable provision of a standard. Further, 99 of the 698 mines had more than 20 violations of the same citable provision during the 15-month period. Limiting repeat violations to the same citable provision targets those operators who show a repeated lack of commitment to miner safety and health; this is precisely the type of behavior that the Agency seeks to change.

MSHA specifically requested comments on whether, in determining penalty points for repeat violations, the Agency should factor in the number of inspection days during which the repeat violations were cited.

Several commenters opposed factoring in the number of inspection days when counting violations under this provision. Most commenters, however, supported using repeat violations per inspection day (RPID) to calculate repeat violations. These commenters expressed concern that operators of large mines generally receive more violations than smaller mines solely because larger mines have a greater number of inspections and, therefore, calculating repeat violations using RPID would provide a level of fairness missing from the proposed rule. The application of RPID to the new repeat provision would account for increased inspector presence in large mines and would place all mines on a more equitable basis. Therefore, this final rule incorporates a new repeat violations table which applies RPID to the calculation for coal and metal and nonmetal operations. Under this table, repeat points apply only where there have been a minimum of 6 repeat violations. In addition, for the same reasons as stated previously, MSHA will not apply the repeat criterion until a coal and metal and nonmetal operator has received a minimum of 10 violations within a preceding 15-month period.

RPID cannot be used to calculate repeat violations for independent contractors because MSHA does not record inspection time for contractors. Therefore, the final rule, like the proposed rule, uses the total number of violations in a 15-month period for establishing repeat violation history for independent contractors. Although MSHA received some comments critical of the proposal with respect to independent contractors, the Agency's historical method of calculating history for independent contractors has proved to be both successful and practical.

The final rule revises the proposed table for repeat violations for independent contractors by raising the penalty points for contractors with 6 to 20 repeat violations during the previous 15-month period. Under the final rule, an independent contractor will receive the maximum 20 points for 15 or more repeat violations during the previous 15-month period. These revisions reflect MSHA's desire to increase points for independent contractors, so as to reduce the discrepancy in penalties between operators and independent contractors. The final rule, therefore, retains the proposed provision for repeat violations for independent contractors.

MSHA requested comments on whether all violations should be used to calculate repeat violations, or whether only S&S violations should be used. Many commenters stated it is unfair to count non-S&S violations in the repeat violations provision because it would subject operators to significantly higher penalties for repeated violations that have little or nothing to do with miner safety and health, such as repeated violations of paperwork standards or merely technical violations.

Other commenters, however, stated that MSHA should look at all violations, including non-S&S citations, in calculating penalties for repeat violations because even non-S&S violations can adversely affect miner safety and health. MSHA agrees. The final rule includes all violations, both S&S and non-S&S, in the calculation of repeat violation history. Even though the violations that were assessed in 2005 show that two-thirds of all violations were non-S&S violations, non-S&S violations of technical

standards and low-gravity violations have the potential to pose a health or safety danger to miners. By excluding non-S&S violations from this provision, MSHA would not be taking a proactive approach to advancing miner safety and health; non-S&S violations can lead to S&S violations and even greater hazards to miners. In addition, including non-S&S violations would be consistent with Congress's intent that penalties must provide an effective deterrent against all offenders, and particularly against offenders with records of past violations, regardless of whether they are S&S or non-S&S.

Some commenters who opposed the proposed repeat violation provision stated that, if the provision is adopted, MSHA should avoid retroactive application of the provision by not including violations that occurred before promulgation of the final rule. These commenters stated that, had they known that violations that occurred prior to the final rule could be used to trigger significantly higher penalties, they would have contested those violations to avoid inclusion under the repeat violations provision. Final paragraph (c)(2) does not apply the repeat violation provision retroactively. The repeat violation provision under paragraph (c)(2), like the total number of violations provision under paragraph (c)(1), imposes higher penalties for violations that occur after publication of this final rule. MSHA, however, has the authority to consider violations which occurred before promulgation of this final rule as part of an operator's history of violations, when determining penalties for violations that occur after issuance of the final rule. In taking this action, MSHA would not be impairing operator rights, increasing an operator's liability for past violations, or imposing new duties with respect to violations that have already occurred. Rather, MSHA would be taking past violations into consideration in determining a penalty for a violation that occurred after promulgation of this final rule. MSHA, however, plans to pay particular attention to any circumstances resulting in an unfair penalty increase. Under such circumstances, MSHA may process the violation under the special assessment provision to determine a more appropriate penalty.

Penalty points for the number of repeat violations for coal and metal and nonmetal operations are presented in Table II–8. Penalty points for the number of repeat violations for independent contractors are presented in Table II–9.

Table II-8 -- History of Previous Violations-Repeat Violations Coal and Metal and Nonmetal Operators with a Minimum of 6 Repeated Violations

Number of Repeat Violations Per Inspection Day	Final Rule Penalty Points
0 to 0.01	0
Over 0.01 to 0.015	1
Over 0.015 to 0.02	2
Over 0.02 to 0.025	3
Over 0.025 to 0.03	4
Over 0.03 to 0.04	5
Over 0.04 to 0.05	6
Over 0.05 to 0.06	7
Over 0.06 to 0.08	8
Over 0.08 to 0.10	9
Over 0.10 to 0.12	10
Over 0.12 to 0.14	11
Over 0.14 to 0.16	12
Over 0.16 to 0.18	13
Over 0.18 to 0.20	14
Over 0.20 to 0.25	15
Over 0.25 to 0.3	16
Over 0.3 to 0.4	17
Over 0.4 to 0.5	18
Over 0.5 to 1.0	19
Over 1.0	20

Table II-9 -- History of Previous Violations: Repeat Violations for Independent Contractors.

Number of Repeat Violations of the Same Standard	Final Rule Penalty Points
5 or fewer	0
6	2
7	4
8	6
9	8
10	10
11	12
12	14
13	16
14	18
More than 14	20

(d) Negligence

Final § 100.3(d), derived from the existing rule, provides for evaluating the degree of negligence involved in a violation under five categories: No negligence, low negligence, moderate negligence, high negligence, and reckless disregard. Under the final rule, like the proposal, no negligence receives 0 points, low negligence receives 10 points, moderate negligence receives 20 points, high negligence receives 35 points, and reckless disregard receives 50 points. Moderate negligence, high negligence, and reckless disregard receive increasingly higher penalty points under the final rule. Penalty points for these latter categories also are higher than those in the existing rule, reflecting MSHA's intent to target operators who exhibit an increasing lack of commitment to and disregard for miner safety and health.

Several commenters agreed with the proposed points increase for the three highest levels of negligence. Several commenters opposed the proposed increases as being excessive and stated that the degrees of negligence are subjective and are often evaluated inconsistently by MSHA inspectors.

MSHA expanded the levels of negligence from three to five in 1982, in response to comments recommending more definite criteria for the assignment of penalty points to an operator's negligence. 47 FR 22286, 22289–90 (May 21, 1982). In so doing, MSHA intended that five levels of negligence would allow inspectors to more appropriately consider all of the facts and circumstances surrounding a violative condition or practice. Although negligence evaluations can be subjective, the five levels of negligence permit MSHA inspectors to exercise independent judgment based on the circumstances surrounding the violation and to make appropriate decisions with respect to the nature or existence of mitigating circumstances. Negligence is defined in the rule and in the negligence section of the ''Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines'' at *http://www.MSHA.gov.* The Handbook provides guidance to MSHA compliance personnel when issuing or reviewing citations and orders, and is intended to achieve consistent enforcement.

MSHA disagrees with the comments that the increase in penalty points for negligence is excessive. The increase in penalty points included in the final rule is in accord with the Mine Act's requirement to consider an operator's negligence when assessing penalties. This aspect of the final rule was designed so that higher penalties 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. MSHA intends that the final rule's increase in penalty points for the negligence criterion will result in increased compliance with the Mine Act and MSHA's safety and health standards and regulations and a greater commitment to safety and health on the part of mine operators. No changes were made to the proposal; the final rule adopts the proposed language.

Table II–10 shows the penalty points for negligence under the existing and final rule.

Categories	Existing Rule Penalty Points	Final Rule 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, and there are no mitigating circumstances.)	20	35
Reckless Disregard (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	25	50

(e) Gravity

Final § 100.3(e) is derived from the existing provision and, like the proposal, provides that the gravity or seriousness of a violation is determined by three factors: (1) The likelihood of occurrence of an event, (2) the severity of injury or illness if the event has occurred or were to occur, and (3) the number of persons potentially affected. The final rule, like the proposal, increases penalty points assigned under this provision for each of the three gravity factors as follows: (1) Points for likelihood of occurrence increase from 10 to 50; (2) points for severity of injury or illness increase from 10 to 20; and (3) points for the number of persons potentially affected increase from 10 to 18. The total maximum points is increased from 30 to 88 under the final gravity criterion.

Several commenters supported the proposed increased points for gravity. One commenter suggested that the proposed points for the severity and persons potentially affected should have increased at the same rate as the likelihood factor. Another commenter, who supported increased points for gravity in general, expressed concern that the factor pertaining to persons potentially affected is routinely understated by MSHA inspectors, and results in fewer penalty points and thus a lower penalty than what should be assessed.

Other commenters opposed the increase in points for gravity. These commenters expressed concern that MSHA essentially eliminated the distinction between S&S and non-S&S violations from a penalty perspective. These commenters gave the example that a non-S&S violation with an unlikely likelihood and a fatal severity would receive 30 gravity points whereas an S&S violation with a reasonably likely likelihood and a lost workdays severity would receive 35 gravity points.

MSHA disagrees with comments stating that proposed increased points for gravity are excessively high. Increased points for gravity are directed at operators whose mines experience the more serious mine safety and health hazards. Increased points, which result in increased penalties, should encourage these operators to place greater emphasis on immediately correcting the more serious violations

because they pose the greatest safety and health risk to miners.

The Agency does not believe that this aspect of the final rule results in a blurred distinction between S&S and non-S&S violations. MSHA reviewed violations that were assessed in 2005 and projects that S&S violations would receive an average penalty of $1,385 under the final rule and non-S&S violations would receive an average penalty of $207.

Moreover, MSHA's intent is to place much more emphasis on the overall gravity of a violation. To achieve this goal, each of the three gravity point tables is revised to increase the points for likelihood, severity, and persons potentially affected. In doing so, the Agency allocated twice as many points for a permanently disabling injury than an injury that resulted only in lost work days. MSHA also doubled the number of points for a fatal injury, as compared with a permanently disabling injury. This approach to increasing gravity points for severity is reasonable and necessary because MSHA believes that, while all three components of the gravity determination are important in determining risk, the likelihood or probability of an injury occurring should carry more weight in the overall penalty determination.

For likelihood, MSHA made the increase in gravity points between levels more pronounced as the likelihood of an injury increased. An unlikely situation has some potential to result in an injury, and a reasonably likely situation has a higher potential for an injury to occur. MSHA's position is that those violations with any degree of likelihood should receive more points and, as the likelihood increases, the number of associated points should increase significantly. The Agency considers a situation that resulted in a ''highly likely'' or ''occurred'' likelihood as a worst-case scenario deserving significantly higher points.

Regarding MSHA inspectors' evaluation of the number of persons potentially affected, MSHA continues to evaluate inspector citations to determine where improvements can be made. The ''number of persons potentially affected'' is a topic covered in the gravity section of the ''Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines'' at *http://www.MSHA.gov.* The Handbook provides guidance to MSHA compliance personnel when issuing or reviewing citations and orders, and is intended to achieve consistent enforcement. MSHA has identified the ''number of persons potentially affected'' as an area that needs to be emphasized in both new and refresher inspector training. In an effort to improve inspector performance and consistency in this area, the Agency has undertaken a number of initiatives. It is emphasizing this area in inspector training, placing greater emphasis on this issue in staff meetings at all levels—headquarters and field, and improving enforcement oversight.

Final § 100.3(e) adopts the language in the proposed rule.

Tables II–11, II–12, and II–13 show the existing and final penalty points for gravity.

Table II-11--Gravity: Likelihood

Likelihood of occurrence	Existing Rule Penalty Points	Final Rule Penalty Points
No likelihood	0	0
Unlikely	2	10
Reasonably likely	5	30
Highly likely	7	40
Occurred	10	50

Table II-12--Gravity: Severity

Severity of injury or illness if the event has occurred or were to occur	Existing Rule Penalty Points	Final Rule 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 II-13--Gravity: Persons Potentially Affected

Number of persons potentially affected if the event has occurred or were to occur	Existing Rule Penalty Points
0	0
1	1
2	2
3	4
4 to 5	6
6 to 9	8
More than 9	10

Number of persons potentially affected if the event has occurred or were to occur	Final Rule 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) Demonstrated Good Faith of the Operator in Abating the Violation

Final § 100.3(f), like the proposal, decreases the amount of the reduction of the penalty, where the operator abates the violation within the time set by the inspector, from 30% under the existing rule to 10% under this final rule. In addition, the final rule, like the proposal, eliminates the existing provision which adds 10 points where an operator does not abate the violation within the specified time period.

As stated throughout this rulemaking, MSHA takes the demonstrated good faith of the operator in abating the violation into consideration because it is one of the statutory criteria to be used in determining civil penalties under the Mine Act. Several commenters supported the proposed decrease in the ''good faith'' reduction from 30% to 10%, but others opposed the decrease, stating that MSHA should retain the existing 30% reduction because any smaller amount would be a disincentive for operators to promptly abate violations.

MSHA does not anticipate that changing the good faith reduction from 30% to 10% would adversely affect miner health and safety or the prompt abatement of violations. Based on 2005 assessed violation data, mine operators realized a $5.7 million decrease in proposed civil penalty assessments due to the 30% good faith reduction. MSHA projects that the 10% good faith reduction in the final rule will result in a $4.7 million decrease in proposed penalty assessments, although the Agency acknowledges that total penalties increase significantly under the final rule. MSHA believes that the $4.7 million decrease under the final rule provides an incentive equivalent to that in the existing rule for mine operators to abate violations in a timely manner.

The strongest incentive for abatement under the final rule is a withdrawal order issued under section 104(b) of the Mine Act. The Mine Act requires that the inspector set a ''reasonable time'' for abatement for all violations, regardless of severity. The inspector sets the abatement time based on the nature of the hazard and the corrective actions needed. Should the mine operator fail to abate the hazard within the prescribed time, the inspector will issue a withdrawal order closing the affected

area of the mine. In 2006, MSHA used this regulatory tool and issued 1,200 withdrawal orders that resulted in closure of the area of the mine affected by the violation.

All mine operators should take their responsibilities for mine safety and health seriously and promptly abate all violations of the Mine Act and MSHA's safety and health standards and regulations. The Agency also takes seriously its responsibility to administer the civil penalty provisions in the Mine Act in accordance with the statutory criteria. Congress intended that MSHA provide some consideration to mine operators who, when issued a citation for a violation of a safety and health standard, correct that violation within the time set by the inspector. In recognition of the statutory intent, the final rule includes an appropriate ''good faith'' reduction. MSHA continues to believe that operators should take prompt corrective action, regardless of the amount of the monetary incentive, in order to avoid the prolonged existence of a violative or dangerous condition in the mine. In the event, however, that an operator does not abate a violation within the time set by the inspector, MSHA believes that the Mine Act's provisions for withdrawal orders and daily penalties, discussed below, provide an adequate compliance incentive. For these reasons, and in response to comments, the final rule retains the 10% ''good faith'' reduction, as proposed.

Some commenters opposed eliminating the 10 additional points under the existing rule where an operator does not abate the violation within the time specified, while others supported the proposed elimination of 10 additional points. In retaining this aspect of the proposal, the Agency intends that the Mine Act's following two sanctions for an operator's failure to correct violations within the time set by the inspector be applied: (1) issuance of a withdrawal order under § 104(b) of the Mine Act,; and (2) application of the daily penalty under § 110(b) of the Act. MSHA believes that these two sanctions are adequate tools for the Agency to use to address the circumstances in which an operator does not abate the violation within the time specified by the MSHA inspector.

Final § 100.3(f) adopts the language in the proposed rule.

(g) Penalty Conversion Table

Final § 100.3(g), like the proposal, provides the penalty conversion table used to convert total penalty points to a dollar amount. The final rule, like the proposal, retains the statutory maximum penalty of $60,000. In addition, it establishes a new minimum penalty of $112, up from $72 in the existing rule.

The proposed rule converted points to dollars as follows: for 60 points or fewer, the minimum dollar amount was $112. Each additional point above 60 up to 133 caused the dollar value to increase by a fixed 8.33%. The dollar value assigned for 133 points was $38,387. At 133 points, the dollar value increased by approximately $3,070 for each additional penalty point. The maximum number of points was 140 and the maximum dollar value was $60,000.

MSHA received some comments stating that the $112 minimum penalty was too low. The final rule retains the $112 minimum penalty, which is a 56% increase from the minimum penalty under the existing rule, and which MSHA believes represents a reasonable adjustment upward from the $60 minimum penalty under the existing penalty regulations.

Several commenters stated that penalties under the proposed rule could result in lower penalties than under the existing regulations. One commenter provided the example that under the existing regulations 89 points are required before MSHA imposes a fine of more than $25,000, while under the proposed regulations, 128 points would be required before MSHA would impose a fine of more than $25,000. As stated earlier in this preamble, to accurately determine a penalty under the proposed rule one cannot do a side-by-side comparison of existing to proposed penalties without also considering how the point tables have changed.

Although MSHA projects that the vast majority of violations will receive an increase in penalties under this final rule, MSHA's analysis of violations that were assessed in 2005 shows that a small percentage of violations—5%, or 5,858 of the 116,673 total violations—would receive a lower penalty under the final rule than under the existing regulations. Of the violations that would receive a lower penalty, approximately 3,485 result from use of the 15-month period and the 10-violation threshold for assigning penalty points under violation history. MSHA believes that the penalty reductions in these cases are appropriate in that they generally reflect an improvement in the most recent violation history or a small number of safety and health hazards.

The remaining 2%, approximately 2,400 violations, involve a reduction in the penalty for other reasons. Of these, 945 are violations which were assessed under the special assessment provision of the existing rule, but would receive a regular assessment under the final rule. As mentioned, however, in any circumstance in which MSHA's regular assessment may result in anomalies or inequitable results, MSHA may choose to apply the special assessment provision of this final rule to assure that the penalty is appropriate. Another 671 are violations which, under the final rule, would not receive the 10-point penalty for failure to abate under the existing rule. As stated previously, MSHA believes that the Mine Act's two sanctions for an operator's failure to correct violations within the time set by the inspector—the issuance of a withdrawal order under § 104(b) of the Mine Act and the daily penalty under § 110(b) of the Act—are adequate tools for the Agency to use to address the circumstances in which an operator does not abate the violation within the time specified by the MSHA inspector. The final 757 violations involve a lowering of the penalty by a negligible amount.

Final § 100.3(g) adopts the language in the proposed rule.

Table III-14 -- Existing and final penalty point conversion tables.

Points	Penalty Amount Under Existing Rule	Penalty Amount Under Final Rule
0	$72	$112
1	$72	$112
2	$72	$112
3	$72	$112
4	$72	$112
5	$72	$112
6	$72	$112
7	$72	$112
8	$72	$112
9	$72	$112
10	$72	$112
11	$72	$112
12	$72	$112
13	$72	$112
14	$72	$112
15	$72	$112
16	$72	$112
17	$72	$112
18	$72	$112
19	$72	$112
20	$72	$112
21	$80	$112
22	$87	$112
23	$94	$112
24	$101	$112
25	$109	$112
26	$120	$112
27	$131	$112
28	$142	$112
29	$153	$112
30	$164	$112
31	$178	$112
32	$193	$112

33	$207	$112
34	$221	$112
35	$237	$112
36	$254	$112
37	$273	$112
38	$291	$112
39	$310	$112
40	$327	$112
41	$354	$112
42	$383	$112
43	$409	$112
44	$437	$112
45	$463	$112
46	$500	$112
47	$536	$112
48	$629	$112
49	$749	$112
50	$878	$112
51	$1,033	$112
52	$1,198	$112
53	$1,376	$112
54	$1,566	$112
55	$1,769	$112
56	$2,003	$112
57	$2,252	$112
58	$2,515	$112
59	$2,793	$112
60	$3,086	$112
61	$3,419	$121
62	$3,770	$131
63	$4,137	$142
64	$4,521	$154
65	$4,856	$167
66	$5,099	$181
67	$5,342	$196
68	$5,585	$212
69	$5,828	$230
70	$6,071	$249
71	$6,374	$270
72	$6,678	$293
73	$6,981	$317
74	$7,285	$343
75	$7,588	$372
76	$7,892	$403
77	$8,499	$436

78	$9,106	$473
79	$9,713	$512
80	$10,321	$555
81	$11,535	$601
82	$12,749	$651
83	$13,963	$705
84	$15,177	$764
85	$16,392	$828
86	$18,213	$897
87	$20,642	$971
88	$23,070	$1,052
89	$25,498	$1,140
90	$27,927	$1,235
91	$30,355	$1,337
92	$33,391	$1,449
93	$36,427	$1,569
94	$39,462	$1,700
95	$42,498	$1,842
96	$45,533	$1,995
97	$48,569	$2,161
98	$51,605	$2,341
99	$54,640	$2,536
100	$60,000	$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) Effect on Operator's Ability To Remain in Business

Final § 100.3(h), like the proposal, 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, like the proposal, it provides that MSHA may adjust the penalty if the operator submits information to MSHA concerning the operation's financial status which shows that payment of the penalty will adversely affect the operator's ability to continue in business.

In the proposal, MSHA made several non-substantive editorial changes for clarity.

Several commenters expressed concern that the proposed increase in penalties would put small operations out of business. Many of these commenters requested a variance from the penalty regulations. In addition, one commenter stated that MSHA should not take an operator's ability to continue in business into consideration when determining a penalty. This commenter expressed concern that an operator that cannot afford to pay its penalties should not operate at all.

MSHA takes an operator's ability to continue in business into consideration because it is one of the statutory criteria to be used in determining civil penalties under the Mine Act. Under this final rule, as in the existing rule, MSHA may adjust the penalty if the operator demonstrates that the amount of the penalty will adversely affect the operator's ability to continue in business. A variance cannot be granted, however, because under the Mine Act, MSHA may modify only the application of a safety standard.

Final § 100.3(h) adopts the language in the proposed rule.

Unwarrantable Failure (§ 100.4)

Final § 100.4, like the proposal, deletes the single penalty assessment provision in existing § 100.4. The existing single penalty assessment provided for a $60 penalty for certain non-S&S violations, *i.e.*, those violations that were not reasonably likely to result in reasonably serious injury or illness, that were abated within the time set by the inspector, and that did not involve an operator with an excessive history of violations.

MSHA received numerous comments on the proposed deletion of the single penalty assessment provision. Some commenters supported deleting the single penalty assessment because they stated that these violations were often perceived as insignificant and accepted as the cost of doing business. Some of these commenters provided examples of operators receiving $60 single penalties for violations pertaining to accumulations of combustible material, roof control problems, and ventilation problems, where it was cheaper to pay the $60 penalty than to correct the underlying violative condition.

Other commenters opposed deleting the single penalty assessment. Those commenters stated that the single penalty is generally reserved for non-S&S violations that have little or no safety consequences and, therefore, these violations should receive minimal penalties. Most of the commenters opposed to deleting the single penalty assessment expressed concern that operators would be required to spend disproportionate amounts of time and resources on violations having minimal impact on safety and health. In addition, some commenters expressed concern that deleting the single penalty assessment will result in increased contests and litigation. After careful review of all comments, an examination of Agency data, and based upon Agency experience, MSHA has decided that the single penalty assessment should not be included in the final rule.

As mentioned earlier, the agency has structured a civil penalty regulation which focuses on reducing all mine safety and health hazards—both non-S&S and S&S. MSHA believes that every violation has the potential to contribute to hazardous or unhealthful conditions and should be individually assessed a civil penalty that is commensurate with the severity of the violation. Also, MSHA's experience and data reveal that often non-S&S violations, if left uncorrected, will lead to more hazardous situations. For this reason, MSHA is deleting the single penalty assessment provision in an effort to prompt the mining community to pay attention to, and promptly abate, all violations.

Non-S&S violations are not always trivial violations deserving nominal penalties. Accurate recordkeeping, good housekeeping, and meaningful training are essential elements of an effective safety and health program in the workplace. For example, an operator's failure to properly train a miner in first aid is often classified as a non-S&S violation; however, such a violation sometimes can result in fatal consequences.

Moreover, a violation that is not reasonably likely to result in a reasonably serious injury or illness may eventually result in a serious injury or illness if it is not corrected. By deleting the single penalty assessment provision, the Agency believes that mine operators will focus more attention on identifying and correcting the root causes of mine safety and health hazards. These non-S&S violations should not be viewed as an insignificant part of the cost of doing business. Rather, they should be evaluated under the regular assessment provision so that the operator's size, history, negligence, and the gravity of the violation can be taken into consideration in determining the amount of the penalty assessment. Operators with a low history of violations, violations that truly involve minor or technical violations, that pose less serious threats to health and safety, that involve low or no negligence, and that are abated within the time set by the inspector, likely will receive a total of 60 points or fewer and a penalty of only $100 (including application of the ''good faith'' reduction) under the regular assessment provision of this final rule.

Some commenters requested that MSHA include empirical data and projections pertaining to deleting the single penalty assessment provision. MSHA, using violations that were assessed in 2005, converted penalties assessed under the single penalty provision of the existing rule to penalties under the regular assessment provision of this final rule. MSHA found that the $60 penalties assessed under the single penalty provision would range from $100 (assuming application of the ''good faith'' reduction) to $14,343 for metal and nonmetal mines and from $112 to $21,442 for coal mines. The Agency is providing this information for illustrative purposes only. The highest ranges of penalties occurred for one coal violation and for one metal/nonmetal violation and are anomalies. MSHA does not expect non-S&S violations to result in penalties of this level under the final rule; however, in the event that a regular assessment produces an inappropriate result, the penalty would be processed under the special assessment provision. Under the final rule, MSHA estimates the average non-S&S penalty would be $192.

In addition, under the final rule, MSHA projects that 44% of violations (32% for coal and 59% for metal and nonmetal mines) would receive the minimum penalty (including application of the ''good faith'' reduction). This compares with 64% of violations (58% for coal and 72% for metal and nonmetal mines) that received the single penalty under the existing rule.

Based on the Agency's evaluation of the violations that were assessed in 2005 and the Agency's experience gained under the existing single penalty provision, MSHA believes that deleting the single penalty assessment will encourage compliance with the Mine Act and MSHA's safety and health standards and regulations and prompt abatement of violations.

For the foregoing reasons, the single penalty assessment provision is deleted from this final rule.

Final § 100.4 is a new provision which replaces existing § 100.4 pertaining to the single penalty assessment. Final § 100.4, like the proposal, implements Section 8(a)(1)(B) of the MINER Act related to minimum unwarrantable failure penalties. It establishes a minimum penalty of $2,000 for any citation or order issued under section 104(d)(1) of the Mine Act, and establishes a minimum penalty of $4,000 for any order issued under section 104(d)(2) of the Mine Act.

Commenters generally were in agreement with the proposed provision. Some commenters, however, expressed concern that the statutory minimum penalties of $2,000 and $4,000 would become default penalties. They stated that these penalties should either be the statutory minimum amount or the amount assessed under the regular assessment formula, whichever is greater. MSHA agrees. Under the final rule, penalties for unwarrantable failure violations processed through the regular assessment provision will receive at least the minimum amount as specified in the MINER Act. Unwarrantable failure violations processed as regular assessments which generate a penalty greater than the statutory minimum will receive that penalty. As appropriate, unwarrantable failure violations also may continue to be processed under the special assessment provision.

Final § 100.4 adopts the language of the proposed rule.

Determination of Penalty; Special Assessment (§ 100.5)

Final § 100.5, like the proposed rule, is derived from existing § 100.5, and, like the proposal, provides for a special assessment for those violations which MSHA believes should not be processed under the regular assessment provision. It also removes the second sentence in existing § 100.5(a) which states that:

> 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.

In addition, this provision, like the proposal, removes the existing list of eight categories of violations that MSHA reviews for possible special assessment.

MSHA received numerous comments on the Agency's proposal to delete the eight categories of violations which are reviewed for special assessment in the existing rule. Some commenters supported processing most violations under the regular assessment provision, stating that the existing special assessment process sometimes results in extended periods between the issuance of a citation or order and the issuance of the penalty. These commenters indicated that MSHA has sometimes taken over one year to issue a penalty under the special assessment provision, and stated that penalties would be processed in a timelier manner under the proposal. Other commenters supported the proposal, stating that it would remove arbitrary penalties from being issued under the special assessment provision.

Some commenters opposed the proposal. They expressed concern that processing violations that fall in the eight categories in the existing rule as regular assessments would result in lower penalties. Some of these commenters stated that the final rule should levy heavy penalties on blatant violations and operators who flout the law, and that eliminating the eight categories of violations that receive consideration for special assessments under the existing rule will create confusion for companies by eliminating certainty about when they will be subject to special assessments. Other commenters who opposed the proposal expressed concern that MSHA would exercise unfettered discretion in assessing any violation under the special assessment provision.

MSHA agrees with the commenters who stated that processing most violations under the regular assessment provision will enhance the consistency

and timeliness of the assessment process. One of MSHA's goals for this rulemaking is to improve the effectiveness and efficiency of the civil penalty process. As stated in the preamble to the proposed rule, the existing special assessment provision has resulted in a time-consuming and resource-intensive process. For violations specially assessed in 2005, it took an average of 168 days from the date a violation was terminated to the date the assessment was mailed. Under the regular assessment, such violations generally are assessed within 70 days of the termination date. MSHA strongly believes that penalties issued closer to the issuance of the citation or order will have a more meaningful, behavior-changing effect on mine operators.

In addition, because MSHA is retaining its discretion to determine which types of violations would be reviewed for special assessment, removal of the eight categories of violations will not limit the Agency's authority to waive the regular assessment if the Agency determines that a special assessment is appropriate for any type of violation. Indeed, as stated in the preamble to the proposed rule, MSHA never intended the existing eight categories to be an exhaustive list of the types of violations that could be assessed under the special assessment provision. This final rule clarifies the Agency's intent. Further, as stated throughout this rulemaking, by removing the specific list of violations, MSHA will be able to focus its enforcement resources on more field enforcement activities, as opposed to administrative review activities.

MSHA projects that the regular assessment provision will provide an appropriate penalty for most violations. By way of illustration, using data for violations that were assessed in 2005, MSHA compared the penalty for 2,698 of the 3,189 violations assessed under the special assessment provision to the penalty that would have been assessed under the regular assessment provision of this final rule. The Agency excluded violations that involved a fatality and those issued to agents of the mine operator from this comparison because those violations would continue to be processed as special assessments under the final rule. MSHA found that the penalty for these 2,698 violations would have increased by approximately 98% under the regular assessment provision of this final rule. Nevertheless, MSHA expects that there will be circumstances in which the regular assessment provision of this final rule will not provide an appropriate penalty for particular violations. The Agency found, in reviewing violations that were assessed in 2005, approximately 35% of all violations issued under the special assessment provision of the existing rule would have received a lower penalty under the regular assessment provision of this final rule. MSHA intends to apply the special assessment provision of this final rule for those violations where the regular assessment does not provide an appropriate penalty. Consistent with a commenter's request, MSHA intends to review the special assessment provision in the future to determine whether it is achieving its purpose or whether changes are needed. MSHA monitors, on a monthly basis, the number of assessments under the existing special assessment provision. MSHA intends to continue this monitoring and to analyze the monitoring results. In addition, as stated previously, MSHA intends to continue to process violations involving a fatality and those issued to agents of the mine operator as special assessments. MSHA will also process flagrant violations, violations for failure to timely notify MSHA, and timely abate violations, and smoking violations, as listed under sections 100.5(c) through (f) as special assessments.

Final § 100.5(a) adopts the language of the proposed rule.

Final § 100.5(b), like the proposal, contains non-substantive changes for clarity. It removes the reference to existing § 100.4(b) because the single penalty provision is deleted in this final rule. MSHA received no comments on this proposal and made no changes to it. Therefore, final § 100.5(b) adopts the language of the proposed rule.

Final § 100.5(c), like the proposal, remains unchanged from existing § 100.5(c). It provides that 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.

One commenter stated that MSHA should apply the maximum daily penalty of $6,500 while abatement work is being performed and it should continue to be applied every day until all such work is completed. MSHA will continue to enforce the daily penalty in accordance with the Mine Act, which provides for a ''reasonable time'' for abatement. The final rule adopts the language used in the proposal.

Final § 100.5(d), like the proposed rule, remains unchanged from existing § 100.5(d). This provision pertains to penalties for miners who violate standards related to smoking and smoking materials. MSHA received a few comments on this proposal. They suggested that MSHA increase the maximum penalty that could be assessed against a miner for a smoking violation. One commenter suggested an increase from $275 to $500 and another commenter suggested an increase to $220,000, similar to the maximum penalty for flagrant violations. The maximum penalty for miners who violate standards related to smoking or smoking materials, however, is established by statute, and can be adjusted only for inflation unless specifically adjusted by Congress. Therefore, the final rule retains the language of existing paragraph (d) as proposed.

Final § 100.5(e), like the proposal, implements the provision of the MINER Act pertaining to penalties for flagrant violations. Under the MINER Act, violations that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. The proposal, which adopted the definition in the MINER Act, defined a ''flagrant'' violation 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.

Several commenters stated that the proposed language with respect to flagrant violations was too vague. They suggested that flagrant violations be limited to repeated violations of the same standard that were issued under Section 104(d) of the Mine Act, characterized as involving reckless disregard. They further suggested that flagrant violations be limited to violations that have been finally adjudicated. MSHA considered these suggestions in developing this final rule and has determined that it would be most beneficial to miner's safety and health to retain the proposed language. In addition, the proposed language mirrors the MINER Act. Violations that are deemed to be flagrant would be subject to a penalty of up to $220,000 under the special assessment provision of this final rule.

Several commenters expressed concern that proposed § 100.5(e) wrongly applied the penalty for flagrant violations to violations under section 110(a) of the Mine Act. They stated that Congress adopted penalties for flagrant violations by amending section 110(b) of the Mine Act, which pertains to penalties assessed to operators who have failed to correct a violation. They asserted that Congress intended the

penalty for flagrant violations to apply only to failures to correct a violation under section 110(b).

Section 1301 of the Pension Protection Act contains technical amendments to the MINER Act. Public Law No. 109–280 (Aug. 17, 2006). The provision for criminal penalties was moved from section 110(a)(2) of the Mine Act and is now the new section 110(d). Section 110(b) of the Mine Act now has two sub-subsections. Section 110(b)(1) provides for assessment of a daily civil penalty for violations that have not been corrected. Section 110(b)(2) provides for assessment of a civil penalty of not more than $220,000 for violations that are deemed to be flagrant.

For a number of reasons, MSHA believes that a flagrant violation under section 110(b)(2) is not limited to a violation that an operator has failed to correct under section 110(b)(1). First, section 110(b)(1) specifically applies to failure to correct a ''violation for which a citation has been issued.'' In contrast, section 110(b)(2) applies to failure to eliminate a ''known violation,'' and does not specify that a ''known violation'' must be a violation which has been cited.

Second, the Senate Report accompanying the MINER Act discusses flagrant violations without any reference to section 110(b) and without any indication that a flagrant violation must be a violation which has been cited. S. Rep. No. 109–365 (Dec. 6, 2006).

Third, section 110(b)(2) applies to failure to eliminate violations ''under this section'' (emphasis added) that are deemed to be flagrant. Section 110(b)(2) cannot be read as applying only to violations under section 110(b) because section 110(b) is a subsection, not a section. Instead, Section 110(b)(2) must be read as applying to violations under the section in which it appears—i.e., section 110—including section 110(a).

Fourth, section 110(b)(2) is, by virtue of its designation as a sub-subsection separate and distinct from section 110(b)(1), a provision distinct and independent from section 110(b)(1). That designation suggests that section 110(b)(2) is not limited to violations encompassed by section 110(b)(1).

Finally, it would be illogical to limit flagrant violations to violations which have been cited. Plainly, failure to eliminate a violation which is known to the operator but which has not been cited by MSHA—perhaps because MSHA has not conducted an inspection since the violation arose—can be just as dangerous, and just as deserving of an enhanced penalty, as a violation which is known to the operator and which has been cited.

Accordingly, the proposal has been modified. Final § 100.5(e) includes a reference to section 110(b)(2) of the Mine Act.

Final § 100.5(f), like the proposal, implements the penalty provisions of the MINER Act pertaining to prompt incident notification. Under the MINER Act, an operator who fails to provide timely notification to the Secretary, in the event of a death, or an injury or entrapment with reasonable potential to cause death, 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.

One commenter expressed concern that proposed § 100.5(f) would be applied to all violations under part 50.10, stating that for example, violations for failure to report a fire or hoist problems would be included. Final § 100.5(f), like the proposed rule, implements the penalty provisions of the MINER Act pertaining to prompt incident notification. In this regard, final § 100.5(f) is applicable only to the following events: the failure to notify MSHA of a death, or an injury or entrapment which has a reasonable potential to cause death.

Several commenters stated that this proposed provision is counterproductive and could inhibit first responders from time-critical stabilization of a victim. They suggested adding language, for example, that in a case in which delay has the potential to cause additional injuries, or the victim of an accident requires first aid, the 15 minutes shall begin upon stabilization of the site and the victim. This same issue was raised during the rulemaking concerning MSHA's Emergency Mine Evacuation Final Rule published on December 8, 2006. In the preamble to that rule, MSHA addressed the issue in the following manner:

> If a situation were to arise involving extenuating circumstances, such as an operator having to choose between saving someone's life and notifying MSHA, enforcement discretion would take those circumstances into account. MSHA does not expect that an operator who has to make a decision between rendering life-saving assistance and calling MSHA would be penalized for providing that assistance.

71 FR 71430 (Dec. 8, 2006). MSHA supports the foregoing conclusion.

No changes were made to proposed § 100.5(f) and the final rule adopts the proposed language.

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

Final § 100.6, like the proposed rule, contains requirements and administrative procedures for review of citations and orders.

Final § 100.6(a), like the proposal, contains the provision in existing 100.6(a) that all parties, i.e., the operator and miners or their representatives, shall have the opportunity to review each citation and order with MSHA. In addition, it incorporates existing § 100.6(c), which provides that the decision to grant a request for a conference is within MSHA's discretion. MSHA received no comments on the proposed reorganization of § 100.6(a). Therefore, the final rule adopts the language in the proposal.

Final § 100.6(b), like the proposal, is derived from existing § 100.6(b). MSHA proposed modifying the existing provision by reducing the period, from 10 days to five days, within which an operator could submit additional information or request a safety and health conference with the District Manager or designee.

In addition, at the last two public hearings during this rulemaking, the Agency stated in its opening statement that it intended to include a requirement that a request for a safety and health conference be in writing and include a brief statement as to why each citation or order should be conferenced. The Agency requested comment on this issue. To allow all parties an opportunity to comment on this issue, MSHA reopened the comment period to this rulemaking and specifically requested comments as to whether a request for a safety and health conference should be in writing and whether such a request should include a brief statement of the reason why each citation or order should be conferenced.

A few commenters supported the proposed reduction of the period within which an operator could submit additional information or request a safety and health conference. One commenter stated that the proposal would result in a more effective civil penalty system because penalties would be assessed closer in time to the issuance of the citation.

Almost all commenters, however, opposed the proposed reduction in the time period for requesting a safety and health conference. They stated that they would not have sufficient time to evaluate a citation or order and determine the appropriate course of action to take. In addition, they stated

that delays in scheduling conferences often cause delays in the issuance of penalties. Several commenters noted that conferences sometimes are not held until several months after a request has been made because MSHA's Conference and Litigation Representatives (CLRs) have a backlog of conferences.

After receiving comments, MSHA decided not to reduce the 10-day period within which a party may submit additional information or request a safety and health conference. In making this decision, the Agency believes that the safety and health of miners is improved when, after an inspection, operators and miners or their representatives are afforded an ample opportunity to discuss safety and health issues with the MSHA District Manager or designee.

MSHA received one comment in support of and several comments opposed to the proposed requirement that a request for a safety and health conference be in writing and include a brief statement of the reason why each citation or order should be conferenced. Commenters opposed to the proposal stated that a requirement that conference requests be in writing would cause extreme difficulties for the operator and ultimately result in discouraging the conference process. Specifically, these commenters stated that the proposed requirement places an unnecessary burden on operators who have limited administrative resources to thoroughly investigate citations and orders and gather documentation within a limited amount of time pertaining to each citation and order.

One commenter generally agreed with the proposal that the request for a safety and health conference be in writing and include a brief statement as to why each citation or order should be conferenced, but stated that the requirement should not be mandatory. Several commenters stated that some MSHA districts currently require safety and health conference requests to be in writing. One commenter mistakenly believed that the existing regulations require that safety and health conference requests be in writing.

After reviewing all comments, MSHA has decided to include in the final rule the proposed requirement that the request for a safety and health conference be in writing and include a brief statement as to why each citation should be conferenced. In making this decision, MSHA anticipates that this provision will assist parties requesting a conference to focus on the issues to be discussed at the conference. It is not MSHA's intent under this proposal to require operators and/or miners' representatives to provide a large amount of documentation. Rather, it is MSHA's intent that operators and/or miners' representatives provide a concise statement concerning the reason the requesting parties wish to discuss each violation. MSHA notes that the Agency does not intend to limit discussion at the safety and health conference to the specific points raised in the written statement.

MSHA projects that this proposed provision will lead to a more meaningful and effective conference for all parties. Also, it will help expedite the conference process by providing the District Manager with necessary information prior to conducting the conference, including information that may assist the District Manager in deciding whether to grant a conference. Therefore, the final rule includes the requirement that a request for a safety and health conference be in writing and include a brief statement as to why each citation should be conferenced.

Final 100.6(c), like the proposal, is derived from and remains unchanged from existing § 100.6(d). MSHA received no comments on this proposal.

Final 100.6(d), like the proposal, is derived from existing §§ 100.6(e), (f), and (g). The final rule remains substantively unchanged from the proposed rule. MSHA received no comments on the proposal.

Notice of Proposed Penalty; Notice of Contest (§ 100.7)

Final § 100.7, like the proposal, is derived from existing 100.7, and provides for procedures applicable to a notice of proposed penalty and notice of penalty contest. Final paragraph (a) sets out the circumstances under which a notice of proposed penalty will be served on the parties, and final paragraph (b) sets out the procedures for contesting a notice of proposed penalty, and final order of the Commission.

The final rule, like the proposal, includes editorial changes for clarity, but remains substantively unchanged from the existing provision. Proposed paragraph (a) stated that a notice of proposed penalty will be issued and served by certified mail. MSHA is interpreting ''certified mail'' to include delivery methods such as Federal Express that offer proof of delivery. The existing provision is therefore amended to include the equivalent of certified mail as a means of service of the notice of proposed penalty.

Proposed § 100.7(b) deleted from the regulatory text the following: (1) The reference to a return mailing card that is used to request a hearing before the 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 proposed these deletions because the Agency is no longer using a return mailing card. Instead, MSHA currently provides a statement 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. In addition, MSHA intends to continue to advise the Office of the Solicitor and the Commission of the notices of penalty contest. MSHA has determined that this manner of operator notification of contested assessments does not constitute an Information collection activity by MSHA.

Several commenters stated that MSHA should include in this rule a provision to force operators to pay assessed penalties. They expressed concern that uncollected fines send a message to all operators that MSHA is not serious about Mine Act enforcement. One commenter stated that it is within the Secretary's authority to pursue such operators aggressively, that MSHA should do so, and that if MSHA believes that it has insufficient authority to do this, MSHA should submit legislative proposals to strengthen its ability to enforce the law.

MSHA vigorously collects penalties and takes its collection activities seriously. In fact, for the 10-year period from 1997 through 2006, MSHA issued over $239 million in civil penalties and has collected nearly $175 million of that. In addition, MSHA notes that each agency that collects civil monetary penalties must have a policy to send delinquency letters to employers who have not made payments on the assessed penalties. According to the Debt Collection Improvement Act of 1996, once the debt has been delinquent for 180 days, the debt should be sent to the U.S. Department of Treasury for collection. MSHA has the authority to refer delinquent civil penalty debt to Treasury and, on a weekly basis, refers unpaid debt to Treasury. Furthermore, MSHA has explored innovative ways to legally force operators to pay penalties and to deal aggressively with those who do not. Further suggestions related to collection activities, however, are beyond the scope of this rulemaking.

No changes were made to proposed § 100.7 and the final rule adopts the proposed language.

Service (§ 100.8)

Final § 100.8, like the proposal, is substantively unchanged from the existing rule. It 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. Like the proposed rule, specific references to part 40 (Representative of Miners) and part 41 (Notification of Legal Identity) have been changed from existing § 100.8 to indicate that they are parts contained in Chapter I of Title 30 CFR. MSHA received no comments on this proposal.

No changes were made to proposed § 100.8 and the final rule adopts the proposed language.

III. Executive Order 12866

Executive Order 12866 as amended by Executive Order 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 Executive Order 12866, MSHA has prepared a Regulatory Economic Analysis (REA) for the final rule. The REA contains supporting data and explanation for the summary materials presented in sections III–VI of this preamble, including the covered mining industry, costs and benefits, feasibility, small business impact, and paperwork. The REA is located on MSHA's Web site at *http://www.msha.gov/regsinfo.htm.* A copy of the REA can be obtained from MSHA's Office of Standards, Regulations, and Variances.

Executive Order 12866 classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. MSHA has determined that, based on the REA, the final rule would not have an annual effect of $100 million or more on the economy and, therefore, would not be an economically significant regulatory action under Section 3, paragraph (f) of Executive Order 12866. MSHA, however, has concluded that the final rule is otherwise significant under Executive Order 12866 because it raises novel legal or policy issues.

A. Population at Risk

Based on 2005 data, the final rule will apply to the entire mining industry, covering all 14,666 mine operators and 6,585 independent contractors in the United States, as well as the 261,449 miners and 83,267 contract workers they employ.

B. Costs

In order to derive and explain the cost impact of the final 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; (2) the impact of the final rule on civil penalty assessments under the assumption that mine operators and independent contractors take no actions, in response to increased proposed penalty assessments, to improve compliance with MSHA standards and regulations; and (3) the impact of the final 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 otherwise would receive. There is an additional cost in the final rule associated with a new requirement that mine operators request a safety and health conference in writing and include a brief statement of the reason why each citation or order should be conferenced.

It is important to note the nature of the increase in civil penalties as it impacts the mining industry. For most MSHA rules, the estimated impact reflects the cost to the mining industry of achieving compliance with the rule. For this final rule, the estimated impact consists of two parts: (1) Increased payments for penalties 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. This analysis assumes, in the baseline against which the impacts of the rulemaking will be compared, a certain amount of non-compliance with current MSHA standards and regulations. Therefore, compliance efforts made in response to increased penalties are a cost shown in the final rule. This analysis reflects additional expenditures associated with improved compliance.

1. Baseline

The first step in estimating the impact of the final rule is to establish a baseline: the number and monetary amount of civil penalty assessments in the absence of the final rule. For this purpose, MSHA chose all violations that were assessed in 2005. Table III–1 shows the number of civil penalty assessments issued in 2005, disaggregated by employment size for coal and metal and nonmetal (M/NM) operations, and independent contractors at coal and metal and nonmetal operations.[1]

[1] The total number of violations for 2005 is the same as was presented in the analysis in support of the proposed rule. A few dozen independent contractor violations, however, were misclassified by employment size in that analysis. These have been corrected in MSHA's analysis of the final rule.

Table III-1. Baseline Number of Violations Assessed - 2005

Employment Size	Mine		Contractor		Total Violations Assessed
	Coal	M/NM	Coal	M/NM	
1-5	2,741	12,528	2,848	1,605	19,722
6-19	9,063	16,125	761	1,050	26,999
20-500	43,428	17,685	1,466	1,185	63,764
501+	4,432	1,672	18	66	6,188
All Sizes	59,664	48,010	5,093	3,906	116,673

The employment 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 impact in Section V of this preamble, to determine whether small mines, as defined by the SBA and MSHA, will be significantly impacted by the final rule.

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

As can be calculated from Table III–1, there were approximately 25% more coal violations than metal and nonmetal violations in 2005, even though there were more than 3½ times as many metal and nonmetal 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 approximately three times as many underground coal mines as underground metal and nonmetal 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 metal and nonmetal mines, and larger mines tend to receive more violations, on average, than smaller mines. The average coal mine operator employed approximately three times as many miners as the average metal and nonmetal operator in 2005.

The amount used for each 2005 civil penalty assessment in the baseline was the penalty proposed by MSHA. Table III–2 shows, by employment size, the total baseline dollar amount of civil penalties proposed by MSHA in 2005 for coal and metal and nonmetal mining operations and for independent contractors at coal and metal and nonmetal mines.

Table III-2. Baseline Total of Proposed Civil Penalty Assessments for 2005

Employment Size	Mine		Contractor		Total Assessed Penalties
	Coal	M/NM	Coal	M/NM	
1-5	$463,277	$1,887,443	$303,374	$196,722	$2,850,816
6-19	$1,492,545	$2,535,563	$88,219	$112,762	$4,229,089
20-500	$11,010,009	$3,890,799	$313,795	$193,451	$15,408,054
501+	$1,706,750	$634,888	$5,775	$14,876	$2,362,289
All Sizes	$14,672,581	$8,948,693	$711,163	$517,811	$24,850,248

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

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

Table III–3 displays the baseline average dollar amount of a proposed civil penalty in 2005 disaggregated by employment size for coal and metal and nonmetal mining operations and for independent contractors at coal and metal and nonmetal mines. The average penalty assessment for a violation in 2005 was $213. For a single penalty assessment, the average penalty was $60. For a regular penalty assessment, the average penalty was $316. For a special assessment, the average penalty was $2,574. For special assessments issued to agents of the mine operator, the average assessment was $582; for special assessments involving a fatality, the average penalty was $27,181; and for all other special assessments, the average penalty was $2,385.

Table III-3. Baseline Average Proposed Civil Penalty Assessment per Violation in 2005

Employment Size	Mine		Contractor		Average of All Violations
	Coal	M/NM	Coal	M/NM	
1-5	$169	$151	$107	$123	$145
6-19	$165	$157	$116	$107	$157
20-500	$254	$220	$214	$163	$242
501+	$385	$380	$321	$225	$382
All Sizes	$246	$186	$140	$133	$213

Table III–3 shows that the average proposed penalty assessment in 2005 generally tended to increase as mine size increased. The result is consistent, particularly for mine operators with 20 or more employees.

Table III–3 also indicates that the difference in average penalties between coal and metal and nonmetal mining operations of a given employment size and between independent contractors for a given employment size at coal and metal and nonmetal mines is generally small.

2. Impact If No Compliance Response to Increased Penalties

With the baseline established, the next task in the cost analysis is to determine the impact of the final rule on civil penalty assessments under the assumption that mine operators and independent contractors take no actions, in response to increased 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 final rule, as MSHA's assumption in III.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 final rule. They would remain the same as presented in Table III–1 for the baseline. The type of the violations, however, will change under the final rule. In the analysis, all 2005 regular and single penalty assessments will be issued as regular assessments under the final rule. MSHA assumed that most unwarrantable failure violations would be processed as regular assessments, but would receive at least the minimum penalty amounts required in the MINER Act. MSHA also assumed that violations issued to agents, those involving a fatality and processed as a special assessment in 2005, those involving failure to promptly notify MSHA, and those determined to be flagrant will be processed as special assessments under the final rule. For purposes of this analysis, MSHA further assumed that all other 2005 special assessments will be processed as regular assessments. Thus, under the final rule, MSHA estimates that the number of special assessments will decline by 85%, from 3,189 to 491. MSHA anticipates that, under the final rule, the regular assessment provision will generally provide an appropriate penalty for most violations previously processed as special assessments. Equally significant, this will allow MSHA to focus its enforcement resources on more field enforcement activities, as opposed to administrative review activities.

Tables III–4 and III–5 show the estimated total dollar amount and average dollar amount, respectively, of civil penalties under the final rule, assuming no compliance response by mine operators and independent contractors.[2] Table III–6 shows, relative to the baseline, the estimated percentage increase of civil penalties (both total and average) under the final rule, assuming no compliance response by mine operators and independent contractors. All of these tables are disaggregated by employment size, coal and metal and nonmetal mining operations, and independent contractors at coal and metal and nonmetal mines.

[2] The analysis in support of the proposed rule had a minor error in the formula for calculating history for repeat violations of the same standard, the effect of which was to slightly underestimate the impact of the proposed rule. The analysis also improperly assigned history points to operators with fewer than 10 violations over a previous 15-month period, the effect of which was to slightly overestimate the impact of the proposed rule. These errors have been corrected in MSHA's analysis of the final rule. The corrected estimate of total civil penalties under the proposed rule, assuming no compliance response by industry, is $70.0 million (rather than $68.5 million); the average civil penalty is $600 (rather than $587); and the percentage increase of civil penalties is 182% (rather than 176%).

Table III-4. Total Proposed Civil Penalty Assessments Under Final Rule, Assuming No Compliance Response

Employment Size	Mine		Contractor		Total Assessed Penalties
	Coal	M/NM	Coal	M/NM	
1-5	$767,042	$3,012,830	$481,319	$411,043	$4,672,234
6-19	$3,084,550	$4,351,900	$185,137	$216,073	$7,837,660
20-500	$39,453,598	$8,511,820	$813,547	$586,656	$49,365,621
501+	$5,720,223	$1,664,345	$19,356	$66,223	$7,470,147
All Sizes	$49,025,413	$17,540,895	$1,499,359	$1,279,995	$69,345,662

Table III-5. Average Proposed Civil Penalty Assessment per Violation Under Final Rule, Assuming No Compliance Response

Employment Size	Mine		Contractor		Average of All Violations
	Coal	M/NM	Coal	M/NM	
1-5	$280	$240	$169	$256	$237
6-19	$340	$270	$243	$206	$290
20-500	$908	$481	$555	$495	$774
501+	$1,291	$995	$1,075	$1,003	$1,207
All Sizes	$822	$365	$294	$328	$594

Table III-6. Percentage Increase in Total and Average Proposed Civil Penalty Assessments Under Final Rule, Assuming No Compliance Response

Employment Size	Mine		Contractor		Average Percentage Increase All Violations
	Coal	M/NM	Coal	M/NM	
1-5	66%	60%	59%	109%	64%
6-19	107%	72%	110%	92%	85%
20-500	258%	119%	159%	203%	220%
501+	235%	162%	235%	345%	216%
All Sizes	234%	96%	111%	147%	179%

As indicated in these tables, MSHA estimates that total civil penalty assessments will increase under the final rule, assuming no compliance response, from $24.9 million to $69.3 million, an increase of $44.5 million, or 179%. Approximately $2.5 million, or 4%, will come from special assessments. Of the $44.5 million increase, approximately $1.9 million will 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 provision in the MINER Act. For this category of violations, the MINER Act imposes a penalty of $5,000 to $60,000. The particular violation, however, 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 final rule, 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 will increase under the final rule, assuming no compliance response, from $213 (shown in Table III–3) to $594 (shown in Table III–5), an increase of 179% (shown in Table III–

6). Consistent with Congressional intent, the average penalty generally increases as mine size or contractor size increases (shown in Table III–5).

For purposes of the analysis, special assessments that would be processed as special assessments under the final rule were assumed to receive the same penalty, unless they would be impacted by the minimum penalty provisions of the MINER Act. The average penalty for special assessments issued to agents of the mine operator is estimated to increase by 367% under the final rule. All of this increase is due to the application of the minimum penalty provisions for unwarrantable violations in the MINER Act.

For purposes of analysis, MSHA assumes that all specially assessed violations, except those involving fatalities, agents, failure to timely notify MSHA, and flagrant violations, would be processed as regular assessments under the final rule. In the analysis, the average penalty increased by 98% for those 2005 special assessments that would be processed as regular assessments under the final rule.

3. Impact With Improved Compliance Response to Increased Penalties

MSHA intends and expects that increased penalty assessments will lead to efforts by mine operators and independent contractors to increase compliance with MSHA standards and regulations and ultimately to fewer violations and improved mine safety and health. 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, at the margin, each 10% increase in penalty for a violation is associated with a 3% decrease in its probability of occurrence.[3]

In economic terms, this is equivalent to assuming an elasticity of –0.3 between the number of violations and the dollar size of penalties. This elasticity of –0.3 was assumed by MSHA in its regulatory economic analysis for the 2003 direct final rule to adjust civil penalties for inflation.

MSHA has applied this assumption to each assessed violation in the 2005 database. For most violations, the final rule will result in a penalty increase. Accordingly, MSHA has computed a reduction (or in rare cases, an increase) in the probability of the violation's occurrence. The reduction is larger as the penalty increases.

Tables III–7 and III–8 estimate the improved compliance response of the industry to increased penalty assessments.[4] Table III–7 provides estimates for mine operators and Table III–8 provides estimates for independent contractors. Tables III–7 and III–8 show, by employment size, by coal and metal and nonmetal mining operations, and by independent contractors at coal and metal and nonmetal mines, the number of violations and the dollar amount of penalties in the 2005 database under the existing rule. Further, using the assumption that the elasticity of response is –0.3 for each violation, Tables III–7 and III–8 estimate the new reduced number of violations and the increased penalties associated with these violations under the final rule. Taking into account the mining industry's improved compliance response, MSHA estimates that, were the final rule in effect in 2005, total violations would have declined from 116,673 to 93,422, or a reduction of approximately 20%.

[3] MSHA included this sentence in the preamble and PREA for the proposed rule without the qualifying phrase ''at the margin.'' The phrase was added to address one commenter's erroneous conclusion that the sentence implied [according to MSHA's model] that a 99% decrease in the probability of a violation could be achieved by a 330% increase in penalties. As MSHA indicated in both the PREA for the proposed rule and the REA for this final rule, MSHA's constant elasticity formula, $P = AQ(1/\varepsilon)$ (where P = the penalty amount, Q = the number of violations, A is an arbitrary parameter, and ε = elasticity = –0.3) can be used to derive $(Q2/Q1) = (P2/P1)(-0.3)$. Thus, for example, an increase in a penalty from $60 to $100 would be associated with a reduction in the frequency of that violation from 1.0 to 0.86 (a 14% reduction). And a 330% increase in a penalty would be associated with a reduction in the frequency of that violation, not of 99%, but of 35%.

[4] The analysis in support of the proposed rule had a minor error in the formula for calculating history for repeat violations of the same standard, the effect of which was to slightly underestimate the impact of the proposed rule. The analysis also improperly assigned history points to operators with fewer than 10 violations over a previous 15-month period, the effect of which was to slightly overestimate the impact of the proposed rule. These errors have been corrected in MSHA's analysis of the final rule. The corrected estimate of total civil penalties under the proposed rule, after improved compliance response by industry, is $46.3 million (rather than $45.8 million in the proposal); the additional expenditures to improve compliance are $9.2 million (rather than $9.0 million); and the percentage increase after improved compliance response, is 86% (rather than 84%).

Table III-7. Impact of Final Rule on Coal and Metal and Nonmetal Operators Given Improved Compliance Response to Increased Penalty Assessments

Impact on Coal Mine Operators						
Mine Employment Size	Existing Rule Number of Violations	Existing Rule Proposed Penalties	Final Rule Number of Violations	Final Rule Proposed Penalties	Increase in Penalties	Additional Expenditures to Improve Compliance
1-5	2,741	$463,277	2,443	$614,479	$151,202	$64,801
6-19	9,063	$1,492,545	7,773	$2,319,422	$826,877	$354,376
20-500	43,428	$11,010,009	31,949	$25,160,777	$14,150,768	$6,064,615
501+	4,432	$1,706,750	3,051	$3,726,434	$2,019,684	$865,579
All Sizes	59,664	$14,672,581	45,216	$31,821,111	$17,148,530	$7,349,370
Impact on Metal/Nonmetal Mine Operators						
Mine Employment Size	Existing Rule Number of Violations	Existing Rule Proposed Penalties	Final Rule Number of Violations	Final Rule Proposed Penalties	Increase in Penalties	Additional Expenditures to Improve Compliance
1-5	12,528	$1,887,443	11,148	$2,436,219	$548,776	$235,190
6-19	16,125	$2,535,563	14,103	$3,407,749	$872,186	$373,794
20-500	17,685	$3,890,799	14,082	$6,114,139	$2,223,340	$952,860
501+	1,672	$634,888	1,189	$1,145,273	$510,385	$218,736
All Sizes	48,010	$8,948,693	40,522	$13,103,381	$4,154,688	$1,780,580

Table III-8. Impact of Final Rule on Coal and Metal and Nonmetal Independent Contractors Given Improved Compliance Response to Increased Penalty Assessments

Impact on Coal Independent Contractors						
Contractor Employment Size	Existing Rule Number of Violations	Existing Rule Proposed Penalties	Final Rule Number of Violations	Final Rule Proposed Penalties	Increase in Penalties	Additional Expenditures to Improve Compliance
1-5	2,848	$303,374	2,560	$393,119	$89,745	$38,462
6-19	761	$88,219	650	$139,732	$51,513	$22,077
20-500	1,466	$313,795	1,209	$548,085	$234,290	$100,410
501+	18	$5,775	13	$13,077	$7,302	$3,130
All Sizes	5,093	$711,163	4,432	$1,094,013	$382,850	$164,078
Impact on Metal/Nonmetal Independent Contractors						
Contractor Employment Size	Existing Rule Number of Violations	Existing Rule Proposed Penalties	Final Rule Number of Violations	Final Rule Proposed Penalties	Increase in Penalties	Additional Expenditures to Improve Compliance
1-5	1,605	$196,722	1,370	$316,750	$120,028	$51,441
6-19	1,050	$112,762	892	$166,448	$53,686	$23,008
20-500	1,185	$193,451	943	$369,680	$176,229	$75,527
501+	66	$14,876	47	$40,596	$25,720	$11,023
All Sizes	3,906	$517,811	3,252	$893,474	$375,663	$160,999

The ''Increase in Penalties'' column represents the increase in penalties, relative to the baseline, for remaining violations. The increase in proposed penalty assessments is approximately $17.1 million for coal mine operators,

$0.4 million for coal independent contractors, $4.2 million for metal and nonmetal mine operators, and $0.4 million for metal and nonmetal independent contractors. The increase for all operators, $22.1 million, reflects the total increase in penalties for the final rule, taking into account mine operators' improved compliance behavior.

To reduce the number of violations in response to the increased penalty assessments, MSHA assumes that mines will increase expenditures to improve compliance with MSHA safety and health standards. (The REA for the final rule provides an explanation of how expenditures are calculated.) The column, ''Additional Expenditures to Improve Compliance,'' represents MSHA's estimate of these expenditures. 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.

Table III–9 summarizes the impact of the final rule by mining sector and indicates that the combined impact of additional expenditures to improve compliance and the increase in penalties, given improved compliance is $31.5 million a year.

Table III-9. Total Impact of Final Rule, Both With No Compliance Response and With Improved Compliance Response to Increased Penalty Assessments

No Compliance Response - Same Number of Violations						
Mining Sector	Existing Rule Proposed Penalties	Final Rule Proposed Penalties, Same Compliance	Increase in Penalties, Same Compliance	Additional Expenditures to Improve Compliance (None)	Total Cost Increase, Same Compliance	% Increase in Total Cost, Same Compliance
Coal	$15,383,744	$50,524,772	$35,141,028	$0	$35,141,028	228%
Metal	$1,396,682	$3,527,234	$2,130,552	$0	$2,130,552	153%
Nonmetal	$594,888	$1,122,694	$527,806	$0	$527,806	89%
Sand & Gravel	$3,113,522	$5,206,593	$2,093,071	$0	$2,093,071	67%
Stone	$4,361,412	$8,964,369	$4,602,957	$0	$4,602,957	106%
Total	$24,850,248	$69,345,662	$44,495,414	$0	$44,495,414	179%

Improved Compliance Response - Reduced Number of Violations						
Mining Sector	Existing Rule Proposed Penalties	Final Rule Proposed Penalties, Improved Compliance	Increase in Penalties, Improved Compliance	Additional Expenditures to Improve Compliance	Total Cost Increase, Improved Compliance	% Increase in Total Cost, Improved Compliance
Coal	$15,383,744	$32,915,124	$17,531,380	$7,513,449	$25,044,829	163%
Metal	$1,396,682	$2,410,136	$1,013,454	$434,337	$1,447,791	104%
Nonmetal	$594,888	$873,542	$278,654	$119,423	$398,076	67%
Sand & Gravel	$3,113,522	$4,122,806	$1,009,284	$432,550	$1,441,835	46%
Stone	$4,361,412	$6,590,371	$2,228,959	$955,268	$3,184,227	73%
Total	$24,850,248	$46,911,979	$22,061,731	$9,455,028	$31,516,759	127%

4. Impact of Increased Cost of Safety and Health Conferences

Section 100.6 of 30 CFR allows all parties to request a safety and health conference with the district manager and designee. The final rule includes a new requirement in § 100.6(b) that the request for a safety and health conference be in writing and include a brief statement of the reason why each citation or order should be conferenced.

MSHA data indicate that 9,287 violations were conferenced in 2005–4,567 by coal operators and contractors, and 4,720 by metal and nonmetal operators and contractors.[5] For purposes of estimating costs, MSHA assumes that the annual number of safety and health conference requests will be the same, after the final rule takes effect (the reduced number of violations due to increased penalties and improved compliance offset by the additional incentive, due to increased penalties, to request a safety and health conference). Table III–10 shows the estimated number of written requests for a safety and health conference to review a violation, disaggregated by employment size, coal and metal and nonmetal operations, and independent contractors at coal and metal and nonmetal mines.

Table III-10: Number of Violations for Which a Safety and Health Conference is Requested*

Employment Size	Mine		Contractor		Total Number
	Coal	M/NM	Coal	M/NM	
1-5	193	1,139	201	146	1,679
6-19	639	1,466	54	95	2,254
20-500	3,063	1,608	103	108	4,882
501+	313	152	1	6	472
All Sizes	4,209	4,365	359	355	9,288

* Estimates of the total number of violations for which a conference is requested are based on MSHA conference and violation data for 2005.

MSHA estimates that it would take approximately 9 minutes per violation for a mine supervisor to prepare a written request for a safety and health conference. Because each request for a safety and health conference bundles together an average of between three and four violations, the 9 minutes per violation is equivalent to between 27 and 36 minutes to prepare a written request for each safety and health conference. The hourly wage rate for a coal supervisor is $63.39; the hourly wage rate for a metal and nonmetal supervisor is $47.10.[6] MSHA estimates that it will cost, on average, approximately $1 to submit each written request (by mail, fax, or e-mail). Based on this information, each written request for a conference would cost approximately $10.51 for a coal operator or contractor and $8.06 for a metal and nonmetal operator or contractor. Table III–11 provides MSHA's estimate of the annual costs for coal and metal and nonmetal mine contactors and operators to make written requests for conferences.

Table III-11: Total Annual Costs to Make Written Requests for a Safety and Health Conference*

Employment Size	Mine		Contractor		Total Cost
	Coal	M/NM	Coal	M/NM	
1-5	$2,032	$9,185	$2,111	$1,177	$14,505
6-19	$6,719	$11,823	$564	$770	$19,875
20-500	$32,194	$12,966	$1,087	$869	$47,116
501+	$3,285	$1,226	$13	$48	$4,573
All Sizes	$44,230	$35,200	$3,776	$2,864	$86,069

* (Total cost for written request) = (total # of violations reviewed in conference) x [(# of hours per violation needed to make a written request for a conference) x (hourly wage rate for a supervisor) + (submission cost for a request)].

[5] Typically, multiple violations are combined into a single safety and health conference request. In 2005, the 4,567 coal violations were reviewed in 1,585 safety and health conferences, and the 4,720 M/NM violations were reviewed in 1,123 safety and health conferences. In the text, the costs for a safety and health conference are estimated per violation, not per conference.

[6] Data from pp. 6, B3 of U.S. Coal Mines Salaries, Wages, and Benefits—2005 Survey Results, Western Mine Engineering Inc.; pp. 8, B2 of U.S. Metal and Industrial Mineral Mine Salaries, Wages, and Benefits—2005 Survey Results, Western Mine Engineering Inc.; and MSHA calculations.

C. Benefits

The benefits of the final rule are the reduced number of injuries and fatalities that would result from improved compliance with MSHA's health and safety standards and regulations in response to increased penalty assessments. MSHA projects that increased penalties will induce mine operators to reduce all safety and health violations. The reduction in all violations, and 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.

IV. Feasibility

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

A. Technological Feasibility

The final 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 final rule is technologically feasible.

B. Economic Feasibility

MSHA estimates that the yearly increased compliance costs and penalty assessments for coal mines as a result of the final rule will be $25.1 million dollars, which is equal to approximately 0.09 percent of coal mine sector revenues of $26.7 billion in 2005. MSHA estimates that the yearly increased compliance costs and penalty assessments for metal and nonmetal mines as a result of the final rule will be $6.5 million dollars, which is equal to approximately 0.01 percent of metal and nonmetal mine sector revenues of $51.5 billion in 2005. Penalty assessment estimates for both coal and metal and nonmetal include MSHA's assumption that mine operators will change their behavior and improve compliance as a result of increased penalties, and thereby receive fewer violations. Since the total estimated increased penalty assessments for both the coal and metal and nonmetal mine operators are well below one percent of their estimated revenue, MSHA concludes that the final rule is economically feasible for the mining industry.

V. 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 final rule on small entities. Based on that analysis, MSHA certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is presented below.

A. Definition of a Small Mine

Under the RFA, in analyzing the impact of a final rule on small entities, MSHA must use the Small Business Administration's (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 established an alternate definition, 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 (13 CFR 121.201).

MSHA has also examined the impact of agency rules on a subset of mines with 500 or fewer employees—mines 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 final 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 final rule.

This analysis complies with the legal requirements of the RFA for an analysis of the impact on ''small entities'' while continuing MSHA's traditional definition of ''small mines.'' Both the final rule and this analysis also reflect MSHA's concern for mines with five or fewer employees. MSHA concludes that it can certify that the final rule will not have a significant economic impact on a substantial number of small entities. 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 the impact of the final rule on mines with five or fewer employees.

B. Factual Basis for Certification

MSHA's analysis of the economic impact on ''small entities'' begins with a ''screening'' analysis. The screening compares the estimated costs of a rule for small entities to the estimated revenue. When estimated costs are less than one percent of estimated revenue (for the size categories considered), MSHA believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. If estimated costs are equal to or exceed one percent of revenue, 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 final rule, since no mine operator would be liable for 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 safety and health standards and regulations.

Total underground and surface coal production was 368 million tons and 765 million tons, respectively. The 2005 price of underground and surface coal was $36.42 and $17.37 per ton, respectively.[7] Thus, total estimated coal revenue in 2005 was $26.7 billion ($13.4 billion for underground and $13.3 billion for surface production). Using the same approach, the estimated 2005 coal revenue by employment size category is estimated to be approximately $75 million for mines with 1–5 employees, $657 million for mines with 1–19 employees, and $20.5 billion for mines with 1–500 employees.

For metal and nonmetal mines, the total 2005 estimated revenue generated by the metal and nonmetal industry ($51.5 billion)[8] was divided by the total number of employee hours to arrive at the average revenue per hour of employee production ($165.19). The $165.19 was multiplied by employee hours in specific mine size categories to arrive at estimated revenue for these categories. This approach was used to determine the estimated revenue for the metal and nonmetal mining industry

[7] The average price for underground and surface coal of $36.42 and $17.37 per ton, respectively, comes from the U.S. Department of Energy, Energy Information Administration, ''Annual Coal Report 2005,'' Table 28, October 2006.

[8] U.S. Department of the Interior, U.S. Geological Survey, ''Mineral Commodity Summaries 2006,'' p. 8, January 2006

because MSHA does not collect data on metal and nonmetal production. The 2005 metal and nonmetal revenue is estimated to be approximately $3.4 billion for mines with 1–5 employees, $15.6 billion for mines with 1–19 employees, and $46.5 billion for mines with 1–500 employees.

Table V–1 below shows that when dividing the increase in penalties and safety and health conference costs by the revenue in each mine size category, the cost of the rule for coal mines is 0.46% of revenue for mines with 1–5 employees, 0.25% of revenue for mines with 1–19 employees, and 0.11% of revenue for mines with 1–500 employees. Table V–1 also shows the penalty and cost increase as a percentage of revenue for all coal mines to be 0.09%.

Table V–1 also shows that when dividing the increase in penalties and safety and health conference costs by the revenue in each mine size category, the cost of the rule for metal and nonmetal mines is 0.03% of revenue for mines with 1–5 employees, 0.01% of revenue for mines with 1–19 employees, and 0.01% of revenue for mines with 1–500 employees. Table V–1 shows the penalty and cost increase as a percentage of revenue for all metal and nonmetal mines to be 0.01%.

For coal mines, Table V–1 further shows that the final rule will result in an average increase in costs and penalties per mine of: $619 for mines with 1–5 employees; $1,405 for mines with 1–19 employees; and $10,821 for mines with 500 or fewer employees. For metal and nonmetal mines, Table V–1 shows that the final rule will result in an average increase in costs and penalties per mine of: $149 for mines with 1–5 employees; $213 for mines with 1–19 employees; and $457 for mines with 500 or fewer employees.

Table V-1. Increase in Costs and Penalties Due to Final Rule Compared to Mine Revenue, by Mine Size

Employment Size	Number of Mines	Increase in Penalties and Compliance Costs	Estimated Revenue (Millions)	Increase in Costs and Penalties Per Mine	Penalty and Cost Increases as % of Revenue
Coal Mines					
1-5 employees	563	$348,353	$75	$619	0.46%
1-19 employees	1,146	$1,610,478	$657	$1,405	0.25%
1-500 employees	2,051	$22,193,841	$20,492	$10,821	0.11%
All sizes	2,065	$25,092,834	$26,709	$12,151	0.09%
M/NM Mines					
1-5 employees	6,469	$965,796	$3,384	$149	0.03%
1-19 employees	10,820	$2,301,064	$15,607	$213	0.01%
1-500 employees	12,580	$5,742,855	$46,480	$457	0.01%
All sizes	12,601	$6,509,994	$51,500	$517	0.01%

As shown in Table V–1, when applying MSHA's and SBA's definitions of small mines, yearly costs of the final rule are substantially less than one percent of estimated yearly revenue, 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 final rule will not have a significant economic impact on a substantial number of small entities that are covered by the rule.

VI. Paperwork Reduction Act of 1995

This final rule contains no information collection requirements subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA).

Revised paragraph (b) in § 100.6 requires that a request for a safety and health conference be in writing and include a brief statement of the reason that each citation or order should be conferenced. MSHA views this new provision as an administrative action that is not subject to the PRA.

VII. Other Regulatory Considerations

A. Unfunded Mandates Reform Act of 1995

The final 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 final rule will have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, § 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 final rule will 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 final rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. The final 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 final rule meets the

applicable standards provided in § 3 of Executive Order 12988.

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

The final rule will 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 final 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 Governments

The final 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 final 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 final rule will result in added yearly compliance costs and civil penalty assessments of approximately $25.1 million to the coal mining industry, relative to annual revenue of $26.7 billion in 2005, 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, Executive Order 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 final 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 final rule will 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: March 15, 2007.

Richard E. Stickler,

Assistant Secretary for Mine Safety and Health.

■ For the reasons set out in the preamble and under the authority of the Mine Safety and Health Act of 1977, as amended, Chapter I of Title 30, Code of Federal Regulations, part 100 is revised 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 amount; 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, 957.

§ 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) Except as provided in § 100.5(e), 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, as amended, 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 mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. 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. 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 7,500	1
Over 7,500 to 10,000	2
Over 10,000 to 15,000	3
Over 15,000 to 20,000	4
Over 20,000 to 30,000	5
Over 30,000 to 50,000	6
Over 50,000 to 70,000	7
Over 70,000 to 100,000	8
Over 100,000 to 200,000	9
Over 200,000 to 300,000	10
Over 300,000 to 500,000	11
Over 500,000 to 700,000	12
Over 700,000 to 1,000,000	13
Over 1,000,000 to 2,000,000	14
Over 2,000,000	15

Table II—Size of Controlling Entity—Coal Mine

Annual tonnage	Penalty Points
0 to 50,000	1
Over 50,000 to 100,000	2
Over 100,000 to 200,000	3
Over 200,000 to 300,000	4
Over 300,000 to 500,000	5
Over 500,000 to 700,000	6
Over 700,000 to 1,000,000	7
Over 1,000,000 to 3,000,000	8
Over 3,000,000 to 10,000,000	9
Over 10,000,000	10

Table III—Size of Metal/Nonmetal Mine

Annual hours worked at mine	Penalty Points
0 to 5,000	0
Over 5,000 to 10,000	1
Over 10,000 to 20,000	2
Over 20,000 to 30,000	3
Over 30,000 to 50,000	4
Over 50,000 to 100,000	5
Over 100,000 to 200,000	6
Over 200,000 to 300,000	7
Over 300,000 to 500,000	8
Over 500,000 to 700,000	9
Over 700,000 to 1,000,000	10
Over 1,000,000 to 1,500,000	11
Over 1,500,000 to 2,000,000	12
Over 2,000,000 to 3,000,000	13
Over 3,000,000 to 5,000,000	14
Over 5,000,000	15

Table IV—Size of Controlling Entity—Metal/Nonmetal Mine

Annual hours worked	Penalty Points
0 to 50,000	0
Over 50,000 to 100,000	1
Over 100,000 to 200,000	2
Over 200,000 to 300,000	3
Over 300,000 to 500,000	4
Over 500,000 to 1,000,000	5
Over 1,000,000 to 2,000,000	6
Over 2,000,000 to 3,000,000	7
Over 3,000,000 to 5,000,000	8
Over 5,000,000 to 10,000,000	9
Over 10,000,000	10

Table V—Size of Independent Contractor

Annual hours worked at all mines	Penalty Points
0 to 5,000	0
Over 5,000 to 7,000	2
Over 7,000 to 10,000	4
Over 10,000 to 20,000	6
Over 20,000 to 30,000	8
Over 30,000 to 50,000	10
Over 50,000 to 70,000	12
Over 70,000 to 100,000	14
Over 100,000 to 200,000	16
Over 200,000 to 300,000	18
Over 300,000 to 500,000	20
Over 500,000 to 700,000	22
Over 700,000 to 1,000,000	24
Over 1,000,000	25

(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 citable provision of a 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. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

(1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

Table VI—History of Previous Violations-Mine Operators

Mine Operator's Overall History of Violations Per Inspection Day	Penalty Points
0 to 0.3	0
Over 0.3 to 0.5	2
Over 0.5 to 0 7	5
Over 0.7 to 0.9	8
Over 0.9 to 1.1	10
Over 1.1 to 1.3	12
Over 1.3 to 1.5	14
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—History of Previous Violations-Independent Contractors

Independent Contractor's Overall History of Number of Violations	Penalty Points
0 to 5	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	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
Over 29	25

(2) Repeat violations of the same standard. Repeat violation history is based on the number of violations of the same citable provision of a standard in a preceding 15-month period. For coal and metal and nonmetal mine operators with a minimum of six repeat violations, penalty points are assigned on the basis of the number of repeat violations per inspection day (RPID) (Table VIII). For independent contractors, penalty points are assigned on the basis of the number of violations at all mines (Table IX). This aspect of the history criterion accounts for a maximum of 20 penalty points (Table VIII).

Table VIII-History of Previous Violations-Repeat Violations for Coal and Metal and Nonmetal Operators with a Minimum of 6 Repeat Violations

Number of Repeat Violations Per Inspection Day	Final Rule Penalty Points
0 to 0.01	0
Over 0.01 to 0.015	1
Over 0.015 to 0.02	2
Over 0.02 to 0.025	3
Over 0.025 to 0.03	4
Over 0.03 to 0.04	5
Over 0.04 to 0.05	6
Over 0.05 to 0.06	7
Over 0.06 to 0.08	8
Over 0.08 to 0.10	9
Over 0.10 to 0.12	10
Over 0.12 to 0.14	11
Over 0.14 to 0.16	12
Over 0.16 to 0.18	13
Over 0.18 to 0.20	14
Over 0.20 to 0.25	15
Over 0.25 to 0.3	16
Over 0.3 to 0.4	17
Over 0.4 to 0.5	18
Over 0.5 to 1.0	19
Over 1.0	20

Table IX-History of Previous Violations-Repeat Violations for Independent Contractors

Number of Repeat Violations of the Same Standard	Final Rule Penalty Points
5 or fewer	0
6	2
7	4
8	6
9	8
10	10
11	12
12	14
13	16
14	18
More than 14	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 X.

Table X—Negligence

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

(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 XI through XIII. Gravity is determined by the likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

Table XI—Gravity: Likelihood

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

Table XII—Gravity: Severity

Severity of injury or illness if the event has occurred or were to occur	Penalty Points
No lost work days (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	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.)	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.)	10
Fatal (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	20

Table XIII—Gravity: Persons Potentially Affected

Number of persons potentially affected if the event has 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) *Demonstrated good faith of the operator in abating the 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 XIV—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
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

Points	Penalty ($)
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(b)(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 10 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. A conference request must be in writing and must include a brief statement of the reason why each citation or order should be conferenced.

(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, or the equivalent, 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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