



**DEPARTMENT OF LABOR**

**MINE SAFETY AND HEALTH ADMINISTRATION**

**30 CFR Part 100**

**[Docket No. MSHA-2014-0009]**

**RIN 1219-AB72**

**Criteria and Procedures for Assessment of Civil Penalties**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) is proposing to amend its civil penalty regulation to simplify the criteria, which will promote consistency, objectivity, and efficiency in the proposed assessment of civil penalties and facilitate the resolution of enforcement issues. The proposal would place a greater emphasis on the more serious safety and health conditions and provide improved safety and health for miners. MSHA is also proposing alternatives that would address the scope and applicability of its civil penalty regulation.

**DATES:** All comments must be received or postmarked by midnight Eastern Daylight Saving Time on [INSERT DATE 60 days after publication in the FEDERAL REGISTER].

**ADDRESSES:** Comments and informational materials must be identified with "RIN 1219-AB72" and sent to MSHA by one of the following methods:

- Federal E-Rulemaking Portal:  
<http://www.regulations.gov>. Follow the on-line instructions for submitting comments for Docket Number MSHA-2014-0009.
- Electronic Mail: [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov). Include "RIN 1219-AB72" in the subject line of the message.
- Mail: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939.
- Facsimile: 202-693-9441.
- Hand Delivery or Courier: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. For hand delivery, sign in at the receptionist's desk on the 21<sup>st</sup> floor.

**FOR FURTHER INFORMATION CONTACT:** Sheila A. McConnell, Acting Director, Office of Standards, Regulations, and Variances, MSHA, at [mcconnell.sheila.a@dol.gov](mailto:mcconnell.sheila.a@dol.gov) (e-mail); 202-693-9440 (voice); or 202-693-9441 (facsimile).

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**I. Availability of Information**

Public Comments: MSHA posts all comments without change, including any personal information provided.

Access comments electronically at

<http://www.msha.gov/currentcomments.asp> and on

<http://www.regulations.gov>. Review comments in person at

the Office of Standards, Regulations, and Variances, 1100

Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in

at the receptionist's desk on the 21<sup>st</sup> floor.

E-mail Notification: MSHA maintains a list that

enables subscribers to receive an e-mail notification when

the Agency publishes rulemaking documents in the *Federal*

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

## II. Background

### A. Statutory Background

Section 104 of the Federal Mine Safety and Health Act of 1977 (Mine Act) requires MSHA to issue citations or orders to mine operators for any violations of a mandatory safety or health standard, rule, order, or regulation promulgated under the Mine Act. On issuing a citation or order, the Secretary's authorized representative (inspector) specifies a time for the safety or health condition to be abated. Sections 105 and 110 of the Mine Act require MSHA to propose a civil penalty for these violations. The Mine Act further requires assessment of civil penalties for violations. The following six criteria listed in §§ 105(b)(1)(B) and 110(i) of the Mine Act are used to determine civil penalties:

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

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

30 U.S.C. 815(b)(1)(B), 820(i).

MSHA proposes a civil penalty assessment for each violation. On receipt of the proposed assessment, the mine operator has 30 days to contest the assessment before the Federal Mine Safety and Health Review Commission (Commission), an independent adjudicatory agency established under the Mine Act. A proposed assessment that is not contested within 30 days becomes a final order of the Commission. If the mine operator chooses to contest the proposed penalty, the matter proceeds to a hearing before a Commission administrative law judge (ALJ). The ALJ then "issue[s] an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty." 30 U.S.C. 815(d). The decision of the ALJ becomes the final order of the Commission unless the Commission decides to grant discretionary review within 40 days. 30 U.S.C. 823.

#### B. Regulatory Background

MSHA's civil penalty regulation at 30 CFR part 100 provides two methods for proposing civil penalties: regular formula assessments and special assessments. The regular assessment method, under which MSHA applies the

civil penalty formula in §§ 100.3 and 100.4 to each violation, provides an appropriate proposed penalty for most violations. The special assessment method, in which MSHA manually applies the statutory penalty criteria, is used in a much smaller number of cases, such as those involving fatalities or willful violations. See § 100.5. This proposed rule involves changes to MSHA's regular assessment penalty formula only. Because the proposed rule would require MSHA to change the Citation/Order form (MSHA Form 7000-3), and MSHA considers the inspector's evaluations of the criteria in proposing penalties, the proposed rule also may have an indirect impact on special assessments.

Since 2010, MSHA has implemented special initiatives and promulgated rules to enhance accountability of mine operators for violations and hazards at their mines. MSHA intended that its actions would encourage mine operators to find and fix conditions and practices that could lead to violations of a safety or health standard meant to prevent hazardous conditions or practices. One initiative, "Rules to Live By," identified the types of violations most likely to lead to an accident, injury, or illness. MSHA began conducting impact inspections at appropriate mines to focus

attention on prevention of hazards and prompt, continuing correction of violations.

MSHA believes that its efforts have worked. Although the total number of mining operations in the United States decreased by approximately 0.5 percent from 2010 to 2013 (from 13,830 in 2010 to 13,760 in 2013), the number of violations for which MSHA proposed a regular formula assessment decreased by approximately 26 percent (from 164,500 in 2010 to 121,100 in 2013) and the percentage of violations contested decreased by approximately 6 percent (from 26 percent in 2010 to 20 percent in 2013). Reduced numbers of violations, however, does not preclude the need for improvement in the civil penalty assessment process.

MSHA analyzed the impact of the proposed rule by the type of mine and size of mine. The distribution of the penalty amount by mine size would remain generally the same; however, the penalty amount for small M/NM mines would decrease.

### **III. Section-by-Section Analysis**

#### **A. §§ 100.1 and 100.2; Scope and Purpose; Applicability**

Existing §§ 100.1 and 100.2 limit the scope and applicability of part 100 to proposed civil penalties only. To enhance consistency and predictability in the assessment of civil penalties, MSHA is considering alternatives that



would broaden the scope and applicability of part 100 to include both proposed and assessed penalties. Section IV of this preamble explains these alternatives and their rationale.

B. General Discussion of § 100.3

MSHA's proposal to amend § 100.3 is guided by four key principles:

(1) Improvement in consistency, objectivity, and efficiency in how inspectors write citations and orders by reducing the number of decisions needed;

(2) Simplification of penalty criteria, which should lead to fewer areas of dispute and earlier resolution of enforcement issues;

(3) Greater emphasis on the more serious safety and health conditions; and

(4) Openness and transparency in the application of the Agency's regular formula penalty criteria.

When issuing citations or orders, inspectors are required to evaluate safety and health conditions and to make decisions about five of the six statutory criteria. The proposed rule would simplify the gravity and negligence criteria and place an increased emphasis on the more serious hazards. Simplifying the criteria would increase objectivity and clarity in the citation and order process.

The proposed changes should result in fewer areas of disagreement and earlier resolution of enforcement issues. The proposal would require corresponding changes to the Mine Citation/Order form (MSHA Form 7000-3).

The proposal is structured to encourage operators to be more accountable and proactive in addressing safety and health conditions at their mines. Under the proposal, total penalties proposed by MSHA would remain generally the same. The proposal would place an increased emphasis on Negligence, Violation History, and the Severity factor of Gravity to more appropriately address factors that directly impact miner safety and health. The proposal would place less emphasis on mine size, with slightly less emphasis on controller and contractor sizes.

Table 1 below shows the existing and proposed penalty point ranges for each of the criteria, including penalty point ranges as a percentage of the total maximum points under the existing and proposed rules. Proposed § 100.3 would reduce the maximum number of penalty points that could be assigned from 208 under the existing rule to 100.

Table 1: Existing and Proposed Penalty Point Ranges

Criteria	Existing Rule		Proposed Rule	
	Penalty Point Range	Penalty Point Range as a Percentage of Total Maximum Points** (***)	Penalty Point Range	Penalty Point Range as a Percentage of Total Maximum Points***
Mine Size	0 to 15	0% to 7%	0 to 4	0% to 4%
Controller Size	1 to 10	0.5% to 5%	1 to 4	1% to 4%
Contractor Size *	0 to 25	0% to 12%	0 to 8	0% to 8%
TOTAL Size Criterion	0 to 25	0% to 12%	0 to 8	0% to 8%
Overall Violations	0 to 25	0% to 12%	0 to 16	0% to 16%
Repeat Violations	0 to 20	0% to 10%	0 to 10	0% to 10%
TOTAL Violation History Criterion	0 to 45	0% to 22%	0 to 26	0% to 26%
TOTAL Negligence Criterion	0 to 50	0% to 24%	0 to 30	0% to 30%
Likelihood	0 to 50	0% to 24%	0 to 25	0% to 25%
Severity	0 to 20	0% to 10%	0 to 10	0% to 10%
Persons Affected	0 to 18	0% to 9%	0 to 1	0% to 1%
TOTAL Gravity Criterion	0 to 88	0% to 42%	0 to 36	0% to 36%
Total Maximum Points	208		100	

\* Points for contractor size equal the sum of the points for mine and controller sizes for operators.

\*\* Maximum points add to over 100 percent due to rounding.

\*\*\* Conversion uses 208 points for the existing rule and 100 points for the proposed rule.

In developing the proposal, MSHA evaluated the impact of the proposed changes using actual violation data. MSHA analyzed the 121,089 violations for which the Agency proposed assessments under the existing regular formula between January 1, 2013 and December 31, 2013 (baseline), the most recent year of available data. MSHA compared the impact of the proposed changes on individual penalties and on total penalties. First, the relative weights of the existing criteria were established as a benchmark by calculating the total points associated with each criterion as a percentage of total penalty points for all violations

assessed against mine operators and independent contractors during the baseline period. Next, MSHA applied the proposed criteria to each violation assessed during the baseline period. For some criteria (e.g., Size and Violation History), the calculation was straightforward. For other criteria (e.g., Negligence and Gravity), MSHA made assumptions about how the inspector would evaluate degrees of negligence and gravity and allocated proposed penalty points so that the aggregate civil penalty amount proposed under the proposed rule would be comparable to the aggregate civil penalty amount proposed under the existing rule. Finally, the relative weight of each proposed criterion was determined by calculating total points associated with each criterion as a percentage of total penalty points that would have been assessed if the proposed rule had been in effect during the baseline period. The results of this analysis are presented in Table 2 below.

Table 2: Comparison of Relative Weights of Criteria under the Existing and Proposed Rules

Criteria	Existing Rule		Proposed Rule	
	Penalty Points for Criterion	% of Total Penalty Points	Penalty Points for Criterion	% of Total Penalty Points
Mine Size	853,482	10.9%	218,902	5.7%
Controller Size	661,044	8.5%	272,712	7.1%
Contractor Size	56,077	0.7%	15,762	0.4%
TOTAL Size Criterion	1,570,603	20.1%	507,376	13.2%
Overall Violations*	758,394	9.7%	517,410	13.5%
Repeat Violations	145,111	1.9%	78,154	2.0%
TOTAL Violation History Criterion *	903,505	11.6%	595,564	15.5%
TOTAL Negligence Criterion *	2,350,120	30.1%	1,510,485	39.3%
Likelihood	1,799,400	23.1%	461,820	12.0%
Severity *	953,235	12.2%	651,120	17.0%
Persons Affected	228,835	2.9%	114,994	3.0%
TOTAL Gravity Criterion	2,981,470	38.2%	1,227,934	32.0%
TOTAL Penalty Points for 121,089 violations	7,805,698		3,841,359	

\* Proposal would increase the criterion's relative weight as a percentage of all penalty points.

MSHA's analysis indicates that the relative weights of penalty criteria would change under the proposed rule. The relative weights of the Size criterion, which reflects mine size, controller size, and contractor size, and the Gravity criterion, which reflects likelihood, severity, and persons affected, would decrease under the proposal. Although the total relative weight of the Gravity criterion would decrease, the relative weight of the Severity factor of the Gravity criterion would increase to reflect MSHA's increased emphasis on more serious hazards. The relative weights of the Violation History criterion, which reflects

overall violations plus repeat violations, and the Negligence criterion would increase under the proposal.

C. § 100.3(b) The Appropriateness of the Penalty to the Size of the Business of the Operator Charged

Proposed § 100.3(b) would reduce the penalty points for operator and contractor size. The existing rule contains five tables assigning penalty points for size of coal mines, controlling entities of coal mines, metal and nonmetal mines (M/NM), controlling entities of M/NM mines, and independent contractors. The size of coal mines and their controlling entities is measured by the amount of coal production. The size of M/NM mines and their controlling entities is measured by the number of hours worked. The size of independent contractors is measured by the total number of hours worked by the independent contractor at all mines regardless of the commodity being mined. Existing § 100.3(b) assigns up to 15 penalty points for mine size, up to 10 penalty points for the size of the controlling entity, and up to 25 penalty points for the size of independent contractors.

Under this provision, MSHA proposes to reduce the penalty points for mine size and controlling entity and decrease the number of penalty points for operators and independent contractors. The maximum number of penalty

points would decrease from 15 to 4 for mine size, from 10 to 4 for size of controlling entity, and from 25 to 8 for size of independent contractor. As seen in Table 1 of this preamble, this proposed change would decrease the maximum points for this criterion as a percentage of total maximum points, from 12 percent (25/208) under the existing rule to 8 percent (8/100) under the proposed rule. As seen in Table 2 of this preamble, the proposed rule would decrease the relative weight of mine size (i.e., from 10.9 percent of total penalty points under the existing rule to 5.7 percent under the proposal); controller size (i.e., from 8.5 percent of total penalty points under the existing rule to 7.1 percent under the proposal); and contractor size (i.e., from 0.7 percent of total penalty points under the existing rule to 0.4 percent under the proposal). Refer to section VII.B. Factual Basis for Certification of this preamble for the explanation of MSHA's evaluation of the projected impact of the proposal on small entities.

Part 100 Table I—Size of Coal Mine

Existing Rule		Proposed Rule	
Annual Tonnage of Mine (x 1,000)	Penalty Points (out of maximum 208 points)	Annual Tonnage of Mine (x 1,000)	Penalty Points (out of maximum 100 points)
0 to 7.5	1	0 to 50	1
>7.5 to 10	2		
>10 to 15	3		
>15 to 20	4		
>20 to 30	5		
>30 to 50	6		
>50 to 70	7	>50 to 500	2
>70 to 100	8		
>100 to 200	9		
>200 to 300	10		
>300 to 500	11		
>500 to 700	12		
>700 to 1,000	13	>500 to 1,000	3
>1,000 to 2,000	14		
>2,000	15	>1,000	4

Part 100 Table II—Size of Controlling Entity—Coal Mine

Existing Rule		Proposed Rule	
Annual Tonnage (x 1,000)	Penalty Points (out of maximum 208 points)	Annual Tonnage (x 1,000)	Penalty Points (out of maximum 100 points)
0 to 50	1	0 to 200	1
>50 to 100	2		
>100 to 200	3		
>200 to 300	4	>200 to 700	2
>300 to 500	5		
>500 to 700	6		
>700 to 1,000	7	>700 to 3,000	3
>1,000 to 3,000	8		
>3,000 to 10,000	9	>3,000	4
>10,000	10		



Part 100 Table III–Size of Metal/Nonmetal Mine

Existing Rule		Proposed Rule	
Annual Hours Worked at Mine (x 1,000)	Penalty Points (out of maximum 208 points)	Annual Hours Worked at Mine (x 1,000)	Penalty Points (out of maximum 100 points)
0 to 5	0	0 to 5	0
>5 to 10	1	>5 to 200	1
>10 to 20	2		
>20 to 30	3		
>30 to 50	4		
>50 to 100	5		
>100 to 200	6		
>200 to 300	7		
>300 to 500	8	>200 to 1,500	2
>500 to 700	9		
>700 to 1,000	10		
>1,000 to 1,500	11		
>1,500 to 2,000	12	>1,500 to 3,000	3
>2,000 to 3,000	13		
>3,000 to 5,000	14	>3,000	4
>5,000	15		

Part 100 Table IV–Size of Controlling Entity–Metal/Nonmetal Mine

Existing Rule		Proposed Rule	
Annual Hours Worked (x 1,000)	Penalty Points (out of maximum 208 points)	Annual Hours Worked (x 1,000)	Penalty Points (out of maximum 100 points)
0 to 50	0	0 to 50	0
>50 to 100	1	>50 to 300	1
>100 to 200	2		
>200 to 300	3		
>300 to 500	4		
>500 to 1,000	5	>300 to 2,000	2
>1,000 to 2,000	6		
>2,000 to 3,000	7		
>3,000 to 5,000	8	>2,000 to 5,000	3
>5,000 to 10,000	9		
>10,000	10	>5,000	4

Part 100 Table V—Size of Independent Contractor

Existing Rule		Proposed Rule	
Annual Hours Worked at All Mines (x 1,000)	Penalty Points (out of maximum 208 points)	Annual Hours Worked at All Mines (x 1,000)	Penalty Points (out of maximum 100 points)
0 to 5	0	0 to 5	0
>5 to 7	2	>5 to 10	1
>7 to 10	4		
>10 to 20	6	>10 to 30	2
>20 to 30	8		
>30 to 50	10	>30 to 70	3
>50 to 70	12		
>70 to 100	14	>70 to 200	4
>100 to 200	16		
>200 to 300	18	>200 to 500	5
>300 to 500	20		
>500 to 700	22	>500 to 700	6
>700 to 1,000	24	>700 to 1,000	7
>1,000	25	>1,000	8

D. § 100.3(c) History of Previous Violations

The proposal would revise § 100.3(c), history of previous violations, to increase the penalty points for this criterion as a percentage of total penalty points. Existing § 100.3(c) bases the operator's violation history on the total number of violations and the number of repeat violations of the same citable provision of a standard in the 15-month period preceding the occurrence date of the violation being assessed. The existing rule states that only "violations that have been paid, finally adjudicated, or have become final orders of the Commission" (final orders) are included in determining an operator's violation history. MSHA is proposing to clarify its intent under the existing rule that only "violations that have become final

orders of the Commission" are included in determining an operator's violation history. This proposed change is nonsubstantive and would reduce confusion and more accurately reflect the Agency's intent to use only violations that became final orders during the 15-month period preceding the occurrence date of the violation being assessed in calculating violation history.

Under the existing rule, operators are assigned penalty points based on the number of Violations Per Inspection Day and the number of Repeat Violations Per Inspection Day. For independent contractors, penalty points are assigned on the basis of the total number of violations and total number of repeat violations at all mines. MSHA is proposing to clarify paragraph (c) by removing the reference to paragraph (c)(2) and stating directly in paragraph (c)(2) when the repeat aspect of the Violation History criterion applies.

As shown in Table 2 of this preamble, the proposed changes would increase the relative weight for the History of Violations criterion penalty points from 11.6 percent of total penalty points under the existing rule to 15.5 percent under the proposed rule. The relative weight for overall violations penalty points would increase from 9.7 percent of total penalty points under the existing rule to

13.5 percent under the proposal, in recognition of the importance of the need for operators to prevent violations from occurring. The relative weight for repeat violations penalty points would remain unchanged at approximately 2 percent of total penalty points under the existing and proposed rules.

1. History of Overall Violations

MSHA is proposing to change how an operator's overall violation history would be determined. The Violations Per Inspection Day formula under the existing rule may result in relatively high violation history points that do not reflect conditions at the smaller M/NM operations. At these mines, a small number of violations over a one or two-day inspection can result in a relatively high Violations Per Inspection Day rate. During the baseline period, 12 percent of the M/NM violations received the maximum 25 points compared with one percent of the coal violations. MSHA's proposed revision would address this concern. Tables 3 and 4 below show the distributions of penalty points for Violations Per Inspection Day for mines under the existing and the proposed rules.

Table 3: Existing Distribution of Penalty Points for Violations Per Inspection Day

Points	Coal Mines		M/NM Mines		Total
0	8,713	14%	28,042	55%	36,755
2	10,816	18%	1,322	3%	12,138
5	15,917	26%	2,432	5%	18,349
8	11,590	19%	2,543	5%	14,133
10	5,240	9%	2,784	5%	8,024
12	3,449	6%	2,319	5%	5,768
14	2,543	4%	1,895	4%	4,438
16	1,124	2%	1,519	3%	2,643
19	655	1%	1,296	3%	1,951
22	318	1%	1,016	2%	1,334
25	589	1%	6,215	12%	6,804
Total	60,954		51,383		112,337

Table 4: Projected Distribution of Penalty Points for Violations Per Inspection Day under the Proposed Rule

Points	Coal Mines		M/NM Mines		Total
0	8,862	15%	34,519	67%	43,381
2	10,816	18%	1,322	3%	12,138
5	15,917	26%	2,432	5%	18,349
8	11,590	19%	2,543	5%	14,133
10	5,237	9%	2,694	5%	7,931
11	3,433	6%	2,020	4%	5,453
12	2,529	4%	1,432	3%	3,961
13	1,113	2%	1,060	2%	2,173
14	628	1%	831	2%	1,459
15	312	1%	607	1%	919
16	517	1%	1,923	4%	2,440
Total	60,954		51,383		112,337

The proposed rule would provide for a more equitable impact of the Violations Per Inspection Day formula on small mines. The existing rule assigns zero points when a mine has fewer than 10 violations that became final orders over the 15-month period preceding the occurrence date of the violation being assessed. Under the proposal, MSHA would assign zero points when a mine has either fewer than 10 violations or 10 or fewer inspection days over the 15-

month period preceding the occurrence date of the violation being assessed. MSHA analyzed this approach using historical data from the baseline period and determined that although it would reduce the impact of Violations Per Inspection Day on smaller mines, it would continue to hold operators of small mines accountable for repeat violations.

MSHA is proposing to restructure the point tables related to Violation History to reflect a modest increase in the relative weight of this criterion. Part 100 Table VI shows both the existing and proposed point schedules for overall history of violations for mine operators. Part 100 Table VII shows both the existing and proposed point schedules for overall history of violations for independent contractors. Under the proposal, the maximum number of penalty points for Violation History would decrease from 25 to 16 for both mine operators and independent contractors.

Part 100 Table VI—History of Previous Violations-  
Mine Operators\*

Overall History: Number of Violations Per Inspection Day	Existing Penalty Points (out of maximum 208 points)	Proposed Penalty Points (out of maximum 100 points)
0 to 0.3	0	0
>0.3 to 0.5	2	2
>0.5 to 0.7	5	5
>0.7 to 0.9	8	8
>0.9 to 1.1	10	10
>1.1 to 1.3	12	11
>1.3 to 1.5	14	12
>1.5 to 1.7	16	13
>1.7 to 1.9	19	14
>1.9 to 2.1	22	15
>2.1	25	16

\* Under the proposal, MSHA would assign zero points when a mine has either fewer than 10 violations that became final orders or 10 or fewer inspection days over the 15-month period preceding the occurrence date of the violation being assessed.

Part 100 Table VII—History of Previous Violations—  
Independent Contractors\*

Existing Rule		Proposed Rule	
Overall History: Number of Violations at All Mines	Penalty Points (out of maximum 208 points)	Overall History: Number of Violations at All Mines	Penalty Points (out of maximum 100 points)
0 to 5	0	0 to 5	0
6	1	6-7	1
7	2		
8	3	8-9	2
9	4		
10	5	10-11	3
11	6		
12	7	12-13	4
13	8		
14	9	14-15	5
15	10		
16	11	16-17	6
17	12		
18	13	18-19	7
19	14		
20	15	20-21	8
21	16		
22	17	22-23	9
23	18		
24	19	24	10
25	20	25	11
26	21	26	12
27	22	27	13
28	23	28	14
29	24	29	15
>29	25	>29	16

\* Under the proposal, MSHA would assign zero points when an independent contractor has fewer than six violations that became final orders over the 15-month period preceding the occurrence date of the violation being assessed.

MSHA is interested in alternatives that address the proposed point tables for Violation History for mine operators and independent contractors. MSHA is particularly interested in alternatives that address the impact of the proposed Violations Per Inspection Day formula on small mine operators with fewer than 10 violations that became final orders or 10 or fewer



inspection days over the 15-month period preceding the occurrence date of the violation being assessed.

Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternative.

## 2. History of Repeat Violations

The proposed rule would clarify that the repeat violations aspect of the proposal would apply only after—

- A mine operator has, over the 15-month period preceding the occurrence date of the violation being assessed—
  - A minimum of 10 violations, which became final orders, and
  - More than 10 inspection days, and
  - Six repeat violations of the same citable provision of a standard, which became final orders; or
- An independent contractor has, over the 15-month period preceding the occurrence date of the violation being assessed—
  - A minimum of six violations at all mines, which became final orders, and

- o Six repeat violations of the same citable provision of a standard, which became final orders.

MSHA proposes to revise the point tables for repeat violations of the same standard to reduce the penalty points from a maximum of 20 points to a maximum of 10 points. This proposed change would not result in a change in the maximum points for this criterion as a percentage of total maximum points, as it is currently 10 percent.

The proposed point structure would lower the value at which a mine operator would receive the maximum penalty points for Repeat Violations Per Inspection Day from >1.0 under the existing rule to >0.5 under the proposed rule because a history of repeat violations demonstrates a lack of concern for the safety and health of miners. Higher penalties for these operators would serve to encourage them to be more proactive in their approach to safety and health and prevent safety and health hazards before they occur.

Part 100 Tables VIII and IX in this preamble show both the existing and proposed point schedules for Repeat Violations.

Part 100 Table VIII—History of Previous Violations—  
Repeat Violations for Coal and Metal/Nonmetal Mine  
Operators with a Minimum of Six Repeat Violations\*

Existing Rule		Proposed Rule	
Number of Repeat Violations Per Inspection Day	Penalty Points (out of maximum 208 points)	Number of Repeat Violations Per Inspection Day	Penalty Points (out of maximum 100 points)
0 to 0.01	0	0 to 0.01	0
>0.01 to 0.015	1	>0.01 to 0.02	1
>0.015 to 0.02	2		
>0.02 to 0.025	3	>0.02 to 0.03	2
>0.025 to 0.03	4		
>0.03 to 0.04	5	>0.03 to 0.05	3
>0.04 to 0.05	6		
>0.05 to 0.06	7	>0.05 to 0.08	4
>0.06 to 0.08	8		
>0.08 to 0.10	9	>0.08 to 0.12	5
>0.10 to 0.12	10		
>0.12 to 0.14	11	>0.12 to 0.16	6
>0.14 to 0.16	12		
>0.16 to 0.18	13	>0.16 to 0.20	7
>0.18 to 0.20	14		
>0.20 to 0.25	15	>0.2 to 0.3	8
>0.25 to 0.3	16		
>0.3 to 0.4	17	>0.3 to 0.5	9
>0.4 to 0.5	18		
>0.5 to 1.0	19	>0.5	10
>1.0	20		

\* Under the proposal, MSHA would assign zero points when a mine has either fewer than 10 violations that became final orders or 10 or fewer inspection days, and fewer than six repeat violations that became final orders, over the 15-month period preceding the occurrence date of the violation being assessed.

Part 100 Table IX—History of Previous Violations—Repeat Violations for Independent Contractors\*

Number of Repeat Violations of the Same Standard at All Mines	Existing Penalty Points (out of maximum 208 points)	Proposed Penalty Points (out of maximum 100 points)
<6	0	0
6	2	1
7	4	2
8	6	3
9	8	4
10	10	5
11	12	6
12	14	7
13	16	8
14	18	9
>14	20	10

\* Under the proposal, MSHA would assign zero points when an independent contractor has fewer than six violations or fewer than six repeat violations that became final orders over the 15-month period preceding the occurrence date of the violation being assessed.

MSHA is interested in comments that address alternatives to the proposed revisions to the point tables for Repeat Violations Per Inspection Day for mine operators and Total Number of Repeat Violations at All Mines for independent contractors. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternative.

*E. § 100.3(d) Negligence*

Proposed § 100.3(d) would revise the negligence criterion to increase accountability for operators who either knew, or should have known, of safety and health hazards at their mines. It would reduce the number of negligence categories from five to three. The existing rule lists the following five categories that MSHA uses to

evaluate the degree of negligence involved with a violation:

(1) No Negligence means that the operator exercised diligence and could not have known of the violative condition or practice.

(2) Low Negligence means that the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.

(3) Moderate Negligence means that the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.

(4) High Negligence means the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.

(5) Reckless Disregard means the operator displayed conduct that exhibits the absence of the slightest degree of care.

In the majority of contested cases before the Commission, the issue is not whether a violation occurred. Rather, the parties disagree on the gravity of the violation, the degree of mine operator negligence, and other criteria.

Regarding negligence, § 105(b)(1)(B) of the Mine Act requires that the Secretary determine whether the operator

was negligent. MSHA believes that reducing the number of negligence categories would improve objectivity and consistency in the evaluation of negligence, resulting in fewer areas of disagreement, thereby facilitating resolution of enforcement issues. The proposal would reduce the existing five categories of negligence to three: (1) Not Negligent; (2) Negligent; or (3) Reckless Disregard. The proposed reduction in the number of categories would not change the definitions of the remaining categories, with one exception. The definition of Negligent would read that "The operator knew or should have known about the violative condition or practice." The existing Mine Citation/Order form (MSHA Form 7000-3) that MSHA inspectors use when issuing citations and orders would also be revised to reflect the proposed changes.

Correspondingly, the proposed rule would restructure the point table for the proposed categories to reflect an increase in the relative weight of this criterion. MSHA believes that this proposed change would result in assessments that appropriately reflect actions under the control of operators that have a direct impact on miner safety and health. Part 100 Table X in this preamble shows the existing and proposed schedules for negligence.

Under the proposal, the maximum number of penalty points for this criterion would decrease from 50 to 30 and the maximum points as a percentage of total maximum points would increase from 24 percent to 30 percent. Under the proposed rule, points for "No Negligence" would not change. Penalty points assigned under the remaining two categories of negligence would decrease from the values under the existing regulation. As shown in Table 2 of this preamble, MSHA's evaluation of the impact of the proposed changes, based on baseline violation data, indicates that the relative weight of Negligence penalty points would increase from 30 percent of total penalty points under the existing rule to 39 percent of total penalty points under the proposed rule.

Part 100 Table X–Negligence

Existing Rule		Proposed Rule	
Categories	Penalty Points (out of maximum 208 points)	Categories	Penalty Points (out of maximum 100 points)
<u>No Negligence</u> (The operator exercised diligence and could not have known of the violative condition or practice.)	0	<u>Not Negligent</u> (The operator exercised diligence and could not have known of the violative condition or practice.)	0
<u>Low Negligence</u> (The operator knew or should have known about the violative condition or practice, but there are considerable mitigating circumstances.)	10	<u>Negligent</u> (The operator knew or should have known about the violative condition or practice.)	15
<u>Moderate Negligence</u> (The operator knew or should have known about the violative condition or practice, but there are mitigating circumstances.)	20		
<u>High Negligence</u> (The operator knew or should have known about the violative condition or practice, but there are no mitigating circumstances.)	35		
<u>Reckless Disregard</u> (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	50	<u>Reckless Disregard</u> (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	30

MSHA is interested in comments that address alternatives to improving consistency and objectivity in the application of the proposed negligence criterion. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternative.



F. § 100.3(e) Gravity

Proposed § 100.3(e) would revise the existing gravity criterion to reduce the overall impact of this criterion, but increase the aspect of the criterion as it relates to more serious hazards.

The existing rule provides three factors to measure the gravity of a violation: (1) the likelihood of the occurrence of an event against which a standard is directed (five categories for a maximum of 50 points); (2) the severity of injury or illness if the event occurred or were to occur (four categories for a maximum of 20 points); and (3) the number of persons potentially affected if the event occurred or were to occur (11 categories for a maximum of 18 points). MSHA is proposing to adjust the maximum number of penalty points for the Gravity criterion from 88 total points under the existing rule to 36 total points under the proposed rule and redistribute the weights of penalty points to reflect an increased emphasis on the severity of safety and health hazards.

The proposed provision would retain the three Gravity factors but would reduce the number of subcategories associated with each factor. Similar to the Agency's proposed changes to the Negligence criterion, the proposal would simplify the categories in each proposed Gravity

factor to decrease subjectivity and improve objectivity and consistency. MSHA believes that the Likelihood of the occurrence of an event that could result in an injury or illness and the Severity of a potential injury or illness if the event were to occur, are both important to miner safety and health. The proposal, however, would decrease the relative weight of Likelihood penalty points and increase the relative weight of Severity penalty points as a percentage of total penalty points. Tables XI through XIII show both the existing and the proposed points for the three Gravity criterion factors.

Likelihood. The proposal would reduce the existing five categories of Likelihood of the occurrence of an event against which a standard is directed to three:

(1) Unlikely; (2) Reasonably Likely; or (3) Occurred. It would combine the existing categories of "No Likelihood" and "Unlikely" to improve objectivity and consistency of enforcement. Also to improve consistency, the proposal would eliminate the "Highly Likely" category. Part 100 Table XI would include a proposed definition for each category. These proposed changes would simplify the enforcement process, improve objectivity and consistency, and improve safety and health protection for miners.

The proposal would restructure the point table to reflect a decrease in the relative weight of Likelihood. As shown in Table 2 of this preamble, MSHA's evaluation of the impact of the proposed changes, based on baseline violation data, indicates that the relative weight of Likelihood is projected to decrease from 23.1 percent of total penalty points under the existing rule to 12.0 percent under the proposal.

Part 100 Table XI in this preamble shows the existing and proposed penalty point schedule for Likelihood. The maximum number of penalty points would decrease from 50 under the existing rule to 25 under the proposal. Under the proposed rule, "Unlikely" would not accrue any points. The proposed penalty points assigned to "Reasonably Likely", as a percentage of total penalty points, would remain about the same. The proposed maximum points for Likelihood, like the existing rule, would be 25 percent of total maximum points.

Part 100 Table XI–Gravity: Likelihood

Existing Rule		Proposed Rule	
Likelihood of Occurrence	Penalty Points (out of maximum 208 points)	Likelihood of Occurrence	Penalty Points (out of maximum 100 points)
No Likelihood	0	<u>Unlikely</u> (Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.)	0
Unlikely	10		
Reasonably Likely	30	<u>Reasonably Likely</u> (Condition or practice cited is likely to cause an event that could result in an injury or illness.)	14
Highly Likely	40		
Occurred	50	<u>Occurred</u> (Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.)	25

MSHA solicits comments on alternatives to the proposed Likelihood factor of the Gravity criterion that would improve objectivity and consistency in enforcement. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternative.

Severity. The proposal would reduce the four existing categories of severity of injury or illness to three:

(1) No Lost Workdays; (2) Lost Workdays or Restricted Duty; or (3) Fatal. It would eliminate the existing "Permanently Disabling" category, which is often difficult to anticipate. Consistent with proposed changes for other criteria, MSHA believes that reducing the number of

categories would simplify the Severity factor, resulting in improved objectivity and consistency in the enforcement process.

The proposal would restructure the point table to reflect a moderate increase in the relative weight of the maximum points for Severity. Part 100 Table XII in this preamble shows the existing and proposed points for each Severity category. The proposal would reduce the maximum points for Severity from 20 points under the existing rule to 10 points. Under the proposal, points for "No Lost Work Days" would not change. The proposal would decrease penalty points assigned to the remaining two categories. The proposed definitions of the remaining Severity categories would not change. The proposed rule would result in no change in the maximum points for this Gravity criterion as a percentage of total maximum points, remaining at 10 percent. As shown in Table 2 of this preamble, MSHA's evaluation of the impact of the proposed changes, based on baseline violation data, indicates that the relative weight of the Severity penalty points would increase from 12.2 percent of total penalty points under the existing rule to 17.0 percent under the proposal, appropriately reflecting the impact of the Severity factor on the safety and health of miners.

Part 100 Table XII-Gravity: Severity

Existing Rule		Proposed Rule	
Severity of Injury or Illness If the Event Has Occurred or Were To Occur	Penalty Points (out of maximum 208 points)	Severity of Injury or Illness If the Event Has Occurred or Were To Occur	Penalty Points (out of maximum 100 points)
<u>No lost work days</u> (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	0	<u>No lost work days</u> (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	0
<u>Lost workdays or restricted duty</u> (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	<u>Lost work days or restricted duty</u> (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
<u>Permanently disabling</u> (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		10
<u>Fatal</u> (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	20	<u>Fatal</u> (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	10

MSHA is particularly interested in comments that address alternatives to improve consistency and objectivity in the application of the Severity factor of the Gravity criterion. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternatives.

Persons Affected. The proposed rule would simplify this Gravity factor to improve objectivity and consistency

in the enforcement process. Part 100 Table XIII shows the existing and proposed penalty points for the number of persons affected. The existing Gravity factor related to persons affected is currently comprised of 11 categories ranging from zero persons potentially affected to 10 or more. The proposal would reduce the 11 categories into two: no persons are affected and one or more persons are affected. This proposed change would eliminate the need for MSHA inspectors to estimate how many persons potentially would be affected if the event were to occur, thereby reducing contests related to the inspector's estimates. The proposal would revise the point table to reflect the reduction in the number of categories. Consistent with the existing rule, if no persons are affected, no points would be assigned. If persons are affected or potentially affected, one point would be assigned regardless of the number of persons.

This proposed change would decrease the maximum points for this criterion as a percentage of total maximum points, from 9 percent under the existing rule to 1 percent under the proposed rule. As shown in Table 2 of this preamble, MSHA's evaluation of the impact of the proposed changes, based on baseline violation data, indicates that the relative weight of Persons Affected penalty points would

remain unchanged from the existing rule, at 3 percent of total penalty points.

Part 100 Table XIII–Gravity: Persons Potentially Affected

Existing Rule		Proposed Rule	
Number of Persons Potentially Affected If the Event Has Occurred or Were To Occur	Penalty Points (out of maximum 208 points)	Persons Potentially Affected If the Event Has Occurred or Were To Occur	Penalty Points (out of maximum 100 points)
0	0	No (No persons are affected by the condition or practice cited.)	0
1	1	Yes (One or more persons are affected by the condition or practice cited.)	1
2	2		
3	4		
4	6		
5	8		
6	10		
7	12		
8	14		
9	16		
10 or more	18		

MSHA is interested in comments that address alternatives to the proposed rule that would improve objectivity and consistency in the application of the Persons Affected factor of the Gravity criterion. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any comment or suggested alternative.

G. § 100.3(f) Demonstrated Good Faith of the Operator in Abating the Violation

The proposal, like existing § 100.3(f), would provide for a 10 percent reduction in the penalty amount of a regular assessment where the operator abates the violation



within the time set by the inspector. Under the proposal, operators could save up to \$8 million (based on Table 12 in this preamble) in penalty reductions for prompt abatement of violations within the time set by the inspector.

In an effort to provide for increased operator focus on prevention of safety and health hazards, MSHA is considering an alternative that would recognize both prompt operator abatement of safety and health hazards as well as prompt payment of proposed penalties. Consistent with the statute, and with the prior civil penalty regulation, this alternative would provide an additional 20 percent Good Faith reduction in proposed penalties when neither the penalty nor the violation is contested and the penalty is paid before it becomes a final order of the Commission. Under this alternative, operators that promptly abate safety and health hazards and promptly pay the penalties associated with the violations could be eligible for up to a 30 percent overall Good-Faith reduction in the amount of the penalties. MSHA would provide these incentives to encourage operators to allocate more resources for the prevention of safety and health hazards.

MSHA is interested in comments that address this alternative, including other alternatives that would encourage operators to resolve enforcement issues quickly

and increase resources allocated to improving the safety and health of miners. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternatives.

H. § 100.3(g) Penalty Conversion Table

As described in the preceding sections for each of the proposed criteria, MSHA proposes to revise the penalty point tables for each criterion. The proposed penalty conversion table would retain the existing minimum penalty of \$112 and the maximum penalty of \$70,000 for non-flagrant violations. The proposal would reduce the maximum number of penalty points from 208 to 100.

The penalty conversion table in existing § 100.3(g) converts the total penalty points associated with a citation or order into penalties starting at \$112 when the point total is 60 or fewer to \$70,000 when the point total is 144 or more. The proposal would revise the penalty conversion table to convert total points from "31 or fewer" to "73 or more" into penalties from \$112 to \$70,000, respectively.

Except for the points assigned to the minimum and maximum penalty, the proposed penalty conversion table combines two methods of converting points to dollars. The

lower section of the proposed table (32 to 62 points) reflects an exponential curve and the upper section (>62 to >73 points) is linear. The proposed table starts at \$112 when the number of points associated with a citation or order is 31 or fewer. Each additional point from 32 up to 62 would increase the penalty dollar value by an average of 17 percent, or a range of 5 to 25 percent. The proposed penalty dollar value assigned for 62 points is \$15,000. Above 62 points the proposed penalty dollar value would increase by \$5,000 for each penalty point to a maximum of \$70,000 at 73 or more points. MSHA's evaluation of the impact of the proposed changes to criteria categories and the penalty points, based on baseline violation data, indicates that estimated aggregate monetary penalties under the proposed rule would remain basically the same as under the existing rule.

Part 100 Table XIV below shows the existing and the proposed penalty conversion tables.

Part 100 Table XIV—Penalty Conversion Table

Existing Points	Existing Penalty (\$)	Proposed Points	Proposed Penalty (\$)
60 or fewer	112	31 or fewer	112
61	121	32	118
62	131	33	124
63	142	34	150
64	154		
65	167	35	175
66	181		
67	196	36	200
68	212		

Existing Points	Existing Penalty (\$)	Proposed Points	Proposed Penalty (\$)
69	230	37	250
70	249		
71	270		
72	293	38	300
73	317		
74	343	39	350
75	372		
76	403	40	400
77	436	41	450
78	473		
79	512	42	500
80	555		
81	601	43	600
82	651		
83	705	44	700
84	764		
85	828	45	800
86	897		
87	971	46	1,000
88	1,052		
89	1,140	47	1,200
90	1,235		
91	1,337	48	1,400
92	1,449		
93	1,569	49	1,600
94	1,700		
95	1,842	50	1,800
96	1,995	51	2,000
97	2,161		
98	2,341	52	2,500
99	2,536		
100	2,748	53	3,000
101	2,976		
102	3,224	54	3,500
103	3,493		
104	3,784	55	4,000
105	4,099		
106	4,440	56	5,000
107	4,810		
108	5,211	57	6,000
109	5,645		
110	6,115	58	7,000
111	6,624		
112	7,176	59	8,000
113	7,774		
114	8,421	60	9,000
115	9,122		
116	9,882	61	10,000
117	10,705		
118	11,597	62	15,000
119	12,563		
120	13,609		

Existing Points	Existing Penalty (\$)	Proposed Points	Proposed Penalty (\$)
121	14,743		
122	15,971		
123	17,301		
124	18,742		
125	20,302	63	20,000
126	21,993		
127	23,825	64	25,000
128	25,810		
129	27,959	65	30,000
130	30,288		
131	32,810	66	35,000
132	35,543		
133	38,503	67	40,000
134	41,574		
135	44,645	68	45,000
136	47,716	69	50,000
137	50,787		
138	53,858	70	55,000
139	56,929		
140	60,000	71	60,000
141	63,071		
142	66,142	72	65,000
143	69,213		
144 or more	70,000	73 or more	70,000

I. § 100.3(h) The Effect of the Penalty on the Operator's Ability To Continue in Business

Except for a non-substantive change, proposed § 100.3(h), related to the effect of the penalty on the operator's ability to continue in business, would not change. Under the existing rule, MSHA presumes that the operator's ability to continue in business would not be affected by the assessment of a civil penalty. Under the existing rule, the operator may submit information to the District Manager concerning the financial status of the business.

The proposal would require that operators notify and submit financial information to the Office of Assessments, Accountability, Special Enforcement and Investigations (OAASEI), rather than the District Manager, that civil penalties would affect their ability to continue in business. This proposal would be a non-substantive change to align the proposal with MSHA's procedures for processing financial hardship claims. Under existing procedures, MSHA's OAASEI reviews the financial documents operators submit. This proposed change would simplify and expedite that process.

*J. § 100.4 Unwarrantable Failure and Immediate Notification*

The Mine Improvement and New Emergency Response Act (MINER Act) established minimum penalties for citations and orders issued under § 104(d) of the Mine Act, that resulted from an operator's unwarrantable failure to comply with mandatory safety and health standards. MSHA believes that operators and independent contractors who receive citations and orders designated as unwarrantable failures do not demonstrate appropriate safety and health management practices that provide for optimum safety and health conditions for miners.

MSHA is proposing to increase the minimum penalties for unwarrantable failures by 50 percent to provide greater deterrence for operators who allow these types of violations to occur. The proposed rule would hold operators accountable for their actions as well as encourage more diligent compliance. Under the proposal, the minimum penalty for any citation or order issued under § 104(d)(1) of the Mine Act would be \$3,000, and the minimum penalty for orders under § 104(d)(2) would be \$6,000.

MSHA is interested in comments that address this proposed change, including the deterrent effect on safety and health hazards. MSHA is also interested in alternatives that would improve safety and health conditions for miners. Commenters are requested to be specific in their comments and submit detailed rationale and supporting documentation for any suggested alternative.

#### **IV. Proposed Alternatives To Change the Scope, Purpose, and Applicability of This Part**

Existing §§ 100.1 and 100.2 limit the scope and applicability of 30 CFR part 100 to proposed civil penalties only. To enhance consistency and predictability in the assessment of civil penalties, MSHA is considering two alternatives that would broaden the scope and

applicability of part 100 to include both proposed and assessed penalties. MSHA solicits comments on these alternatives, as well as on whether and why MSHA should retain the existing language.

A. Regulatory Background and Commission Precedent

The Mine Act requires that both the Secretary's penalty proposals and the Commission's penalty assessments reflect the same six statutory penalty criteria. The criteria are general in nature; each criterion requires further interpretation or elaboration before it can be applied to the facts of a particular case. The statute does not detail how the six statutory criteria should be balanced when determining an appropriate civil penalty. Both the exercise of proposing and the exercise of assessing an appropriate civil penalty, therefore, involve interpreting the statutory penalty criteria and determining a method for balancing each criterion's relative weight. Under the existing rule and legal precedent, MSHA and the Commission take different approaches to these tasks.

1. MSHA's Approach to Proposing Civil Penalties

MSHA's regular assessment penalty formula interprets the six statutory civil penalty criteria and establishes a policy for balancing the criteria and arriving at a proposed penalty amount. Under existing and proposed



§ 100.3, MSHA interprets the six statutory penalty criteria to give each criterion more specificity.

Operator History: The first statutory criterion instructs that a penalty should reflect "the operator's history of previous violations." Both existing and proposed § 100.3(c) interpret this criterion by

- (1) establishing the relevant time period;
- (2) distinguishing between the total number of violations and the number of repeat violations of the same provision;
- and (3) establishing that only violations that have become final orders of the Commission will be used to determine an operator's history.

Operator Size: The second statutory criterion requires consideration of "the appropriateness of such penalty to the size of the business of the operator charged," but does not provide any details regarding how "size" should be calculated or compared. Both existing and proposed § 100.3(b) interpret this criterion by specifying that:

- (1) "size" refers both to the size of the mine cited and to the size of the mine's controlling entity;
- (2) "size" is measured in terms of hours worked in the case of metal and nonmetal mines and by production in the case of coal mines; and (3) in the case of independent

contractors, "size" is measured in terms of hours worked at all mines.

Negligence: The third statutory criterion states that a penalty should reflect "whether the operator was negligent." Both existing and proposed § 100.3(d) interpret this criterion by defining the term "negligence" as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." Both existing and proposed § 100.3(d) further specify that "[u]nder the Mine Act, an operator is held to a high standard of care." Finally, both existing and proposed § 100.3(d) create and define categories of negligence and assign penalty points based on the degree to which the operator failed to exercise a high standard of care.

Effect on Business: The fourth statutory criterion states that a penalty should reflect "the effect on the operator's ability to continue in business." Both existing and proposed § 100.3(h) establish a presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Both existing and proposed § 100.3(h) also provide for the operator to submit financial information to MSHA and for MSHA to reduce the penalty as appropriate.

Gravity: The fifth statutory criterion states that a penalty should reflect "the gravity of the violation." Both existing and proposed § 100.3(e) define gravity as an evaluation of the seriousness of the violation and specify that gravity is determined by three factors: likelihood, severity, and the number of persons potentially affected. Section 100.3(e) defines likelihood as the likelihood of the occurrence of the event against which a standard is directed and severity as the severity of the illness or injury if the event has occurred or were to occur. Proposed § 100.3 would retain the three existing gravity factors, but would reduce the number of possible categories within each factor, and define each category.

Operator's Good Faith: Finally, the sixth statutory criterion states that a penalty should reflect "the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." Existing § 100.3(f) defines good faith as abatement of the violation within the time set by the inspector and provides for a 10 percent reduction in the penalty when the mine operator meets the inspector's deadline. In this proposed rule, MSHA is considering redefining good faith to include both prompt abatement of

safety and health hazards and prompt payment of proposed penalties.

In addition to providing a substantive interpretation of each statutory criterion, § 100.3 also establishes a formula for converting MSHA's factual allegations under the six criteria into a dollar amount. Mine operators accumulate penalty points under each criterion according to the tables throughout § 100.3. Through the penalty point tables, contained in each subsection of § 100.3, the Secretary adjusts the relative importance of the six statutory penalty criteria.

The sum of penalty points is then converted into a dollar amount using the penalty conversion table in § 100.3(g). The conversion table at § 100.3(g) sets penalties at the level the Secretary considers necessary to protect the safety and health of miners, consistent with the statutory criteria and penalty limits set by Congress. In 2007, the Secretary's revision to part 100 was explicitly intended to result in an across-the-board increase in penalties to increase the incentives for mine operators to prevent and correct violations. Criteria and Procedures for Proposed Assessment of Civil Penalties, March 22, 2007 (72 FR 13592). Under the provisions in this proposed rule, the total amount of penalties assessed by

MSHA would remain generally the same, but the emphasis on certain criteria would be adjusted.

When MSHA proposes civil penalties, it provides the operator with an exhibit that details MSHA's summary of facts supporting the proposed penalty. Both the operator and, in the case of a penalty contest, the Commission have the opportunity to see how MSHA applied part 100's interpretations and formula to the facts of a particular citation or order. The penalty summary lists the number of penalty points assessed under each statutory penalty criterion and the total resulting penalty amount.

## 2. The Commission's Approach to Assessing Civil Penalties

Historically, the Secretary (through MSHA), has affirmatively limited the scope, purpose, and applicability of part 100's penalty formula by explicitly stating that the Commission is not expected to consider the formula when assessing civil penalties. See 30 CFR 100.1 and 100.2 (limiting scope and applicability of part 100 to MSHA's proposed penalties). In the preamble to the 1982 Final Rule, MSHA stated:

When a proposed penalty is contested, neither the formula nor any other aspect of these regulations applies. If the proposed penalty is contested, the Mine Safety and Health Review Commission exercises independent review, and applies the six statutory criteria without consideration of these regulations.

Criteria and Procedures for Proposed Assessment of Civil Penalties (May 21, 1982, 47 FR 22286-87)

The stated practice of the Commission, therefore, has been to assess penalties *de novo* according to the six statutory criteria. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission has relied, in part, on the Secretary's regulatory limitations on the reach of part 100 to hold that it possesses *de novo* authority. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (1983), *aff'd Sellersburg Stone Co. v. Federal Mine Safety & Health Rev. Comm'n*, 736 F.2d 1147 (7th Cir. 1984).

In contrast to part 100, the Commission's case law does not interpret or define the statutory penalty criteria. To guide the *de novo* exercise of the authority of Commission administrative law judges (ALJs), the Commission has instead established basic procedures for Commission ALJs to follow when assessing civil penalties. The Commission's Procedural Rule 30 instructs Commission ALJs to issue a written opinion that makes findings of fact and conclusions of law with regard to each of the statutory criteria. 29 CFR 2700.30. Commission case law also requires that ALJs provide a "sufficient explanation of the bases underlying the penalties assessed by the Commission" for penalties that "substantially diverge from those

originally proposed." *Spartan Mining Co.*, 30 FMSHRC at 723 (quoting *Sellersburg*, 5 FMSHRC at 293).

The Commission's adequate explanation requirement is purely procedural; it does not purport to establish any deference toward the Secretary's proposed penalties. Thus, the Commission has unequivocally stated in its rules and decisions that its ALJs are bound by neither the Secretary's penalty regulations nor the Secretary's proposed penalty. 30 CFR 2700.30; *Mize Granite Quarries*, 34 FMSHRC 1760, 1763 (Aug. 7, 2012). The Commission has held that its ALJs need not even give a presumption of validity to the Secretary's proposed assessments. *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 6, 2011). Finally, the Commission has held that an ALJ who sustains all of the Secretary's factual allegations - or even finds greater gravity or negligence than that alleged - is free to assess lower penalties than those proposed by the Secretary, so long as the ALJ provides an adequate explanation for the penalty assessed. *Cantera Green*, 22 FMSHRC 616, 622 (May 2000).

### 3. Shortcomings of the Existing Approach to Part 100's Scope and Applicability

MSHA is concerned that the existing approach to part 100's scope and applicability - under which MSHA applies

part 100's substantive penalty regulations when proposing a penalty, and the Commission assesses penalties *de novo* without reference to MSHA's interpretations or policy choices – has several shortcomings that are detrimental to the effectiveness of the Mine Act's civil penalty scheme.

First, the existing approach fails to provide sufficient predictability and consistency. Under the existing approach, the Secretary can sustain his burden to prove the violation and all penalty-related facts, and the Commission may nonetheless assess a civil penalty that differs from that proposed by the Secretary. Indeed, according to the penalty contest data analyzed by MSHA, the Commission takes varied approaches when the Secretary sustains his burden of proof. In cases decided from 2008 through 2013 in which MSHA proposed a regular formula penalty under the existing penalty regulations, and the Commission affirmed the violation with no modifications, the Commission has assessed the penalty proposed by the Secretary in 60 percent of cases; a lower penalty in 33 percent of cases; and a higher penalty in 7 percent of cases. See Table 5 below.



Table 5: Frequency of Penalty Divergence for Decisions in Which Commission Affirmed Violation with No Modifications to Citation or Order

Decision CY*	Number of Citations and Orders Decided - No Modifications	Commission Assessed Same Penalty	Commission Assessed Higher Penalty	Commission Assessed Lower Penalty
2008	14	71%	0%	29%
2009	116	62%	9%	29%
2010	56	38%	7%	55%
2011	507	79%	5%	16%
2012	145	43%	21%	36%
2013	414	44%	5%	51%
Totals	1,252	60%	7%	33%

\* Decision results recorded in MSHA systems as of 4/1/2014.

The Commission is even more likely to diverge from the penalty indicated by part 100's formula when a judge modifies the citation or order. In such cases, the Commission assessed the penalty that would have been indicated by applying MSHA's penalty regulations to the judge's factual findings in only 22 percent of the cases decided. See Table 6 below.

Table 6: Frequency of Penalty Divergence from MSHA's Regular Penalty Formula for Decisions in which Commission Affirmed Violation but Modified the Citation or Order

Decision CY*	Number of Violations Affirmed with Modification to Citation or Order	Commission Assessed Same Penalty	Commission Assessed Higher Penalty	Commission Assessed Lower Penalty
2008	3	0%	0%	100%
2009	14	7%	50%	43%
2010	19	47%	16%	37%
2011	101	22%	37%	42%
2012	66	18%	32%	50%
2013	91	24%	57%	19%
Totals	294	22%	41%	37%

\* Decision results recorded in MSHA systems as of 4/1/2014.

Such inconsistencies undermine MSHA's efforts to achieve evenhanded and predictable treatment among violators by

promulgating a civil penalty policy that gives fair notice of the consequences of infractions.

Second, MSHA is concerned that mine operators hold a perception that a lower penalty can be obtained by bringing a penalty contest before the Commission because the Commission is not required to follow MSHA's penalty regulations. Indeed, since MSHA began proposing civil penalties under the existing rule, in cases where the Commission has affirmed the Secretary's citation or order and found that the Secretary met his burden to prove all penalty-related facts, the Commission has assessed total civil penalties that are \$579,345, or 15 percent, less than those MSHA originally proposed:

Table 7: Comparison of Total Civil Penalties Proposed By MSHA and Total Civil Penalties Assessed By Commission in Cases Where Commission Affirmed Citation or Order with No Modifications to Citation or Order

Decision CY*	Number of Citations and Orders Decided With No Modifications to Citation or Order	MSHA's Proposed Penalties Under Existing Rule	Commission's Penalty Assessments After Adjudication	Percent Change in Penalties
2008	14	\$17,879	\$16,654	-7%
2009	116	\$142,477	\$122,803	-14%
2010	56	\$469,084	\$391,058	-17%
2011	507	\$1,554,639	\$1,331,850	-14%
2012	145	\$900,311	\$769,975	-14%
2013	414	\$701,796	\$574,501	-18%
Totals	1,252	\$3,786,186	\$3,206,841	-15%

\* Decision results recorded in MSHA systems as of 4/1/2014.

MSHA is concerned that the perception that a lower penalty can be achieved at the Commission – even when the Secretary sustains his burden of proof – is exacerbating

the number of contested cases under the Mine Act by creating an extra and unnecessary incentive for mine operators to contest MSHA's proposed penalties. An excessive number of penalty contests, in turn, hinder efficient and effective enforcement of the Mine Act.

Third, MSHA is concerned that the integrity of penalty decisions is compromised by the lack of substantive rules to guide the Commission's penalty analysis. Commission ALJs identify and discuss the six statutory penalty criteria before arriving at a penalty, but the Commission's precedent, unlike part 100, provides ALJs with no consistent method to interpret each criterion or to translate that discussion into a penalty amount. Because Congress did not give the Commission the authority to make law or policy, but rather gave the Commission limited authority to issue procedural rules, see 30 U.S.C. 823(d)(2), the Commission's lack of substantive guidance to its ALJs on the meaning of the six statutory penalty criteria cannot be remedied through Commission rulemaking or adjudication.

Finally, MSHA is concerned that the existing approach undermines the Secretary's ability to establish a penalty policy that achieves the deterrent purposes of civil penalties under the Mine Act. Under the Mine Act's split-

enforcement model, the Secretary has exclusive policymaking authority, and the Commission is "the equivalent of a court." See, e.g., *Jeroski v. Sec'y of Labor*, 697 F.3d 651, 653 (7th Cir. 2012). If the Secretary decides that an across-the-board increase or decrease in civil penalties is necessary to achieve the purposes of the Mine Act, the Commission's overall assessments should also reflect that policy choice, so long as the Secretary sustains his burden of proof regarding the facts of each violation and the six penalty criteria.

B. Proposed Alternatives to the Existing Approach to §§ 100.1 and 100.2

MSHA is considering two alternative proposals to bring greater consistency and predictability to the assessment of civil penalties than achieved by the existing approach to §§ 100.1 and 100.2. The third alternative would be to leave these sections unchanged.

1. Modify the Scope and Applicability of Part 100 to Make § 100.3 a Legislative Rule Governing Both the Proposal and the Assessment of Civil Penalties

MSHA's first proposed alternative is to modify the scope and applicability of part 100 so that § 100.3 is a legislative rule that governs both MSHA's proposal and the Commission's assessment of civil penalties. This

alternative would require the Commission to apply the penalty formula when assessing civil penalties according to the six statutory criteria.

Under the first alternative, §§ 100.1 and 100.2 would be revised to read as follows:

§ 100.1 Scope and purpose.

This part provides the criteria and procedures for the proposal and assessment of civil penalties under §§ 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 penalties by both MSHA and the Commission, to maximize the incentives for mine operators to prevent and correct hazardous conditions, to encourage the consistent and predictable assessment of civil penalties, 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 the proposal and assessment of civil penalties for violations of the Mine Act and the standards and regulations promulgated pursuant to the Mine Act, as amended.

(a) MSHA shall review each citation and order and shall make proposed assessments of civil penalties.

(b) When MSHA elects to make a regular formula assessment, the Federal Mine Safety and Health Review Commission shall determine whether MSHA has met its burden to establish the facts required to sustain each proposed assessment and shall assess a penalty in accordance with the civil penalty formula established in §§ 100.3 and 100.4 of this part.

Under this alternative, as under the existing rule, MSHA would propose a penalty according to the part 100

formula. If the mine operator contests the penalty, an ALJ would make findings of fact under each of the six penalty criteria.

This alternative would take a different approach than the existing rule to the application of the penalty formula to the facts found by the ALJ. Under this alternative, if the Secretary meets his burden to prove the penalty-related facts alleged, part 100 would require the ALJ to assess MSHA's proposed penalty. If the Secretary does not meet his burden of proof, the judge would apply part 100's penalty formula to the adjudicated facts to arrive at a new assessment.

Under this proposed alternative, the Commission, when reviewing contested penalty assessments, would review the ALJ's factual findings for substantial evidence as it has under the existing rule. The proposed alternative would additionally require the Commission to review whether the ALJ correctly applied part 100 to the penalty-related facts.

2. Modify the Scope and Applicability of Part 100 While Allowing the Commission to Depart from the Formula Penalty

MSHA's second proposed alternative is similar to the first, but would give the Commission flexibility to depart from the part 100 penalty formula in much the same way that

district court judges were authorized, in limited circumstances, to depart from the Sentencing Guidelines before the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005). Under that framework, the district court first calculated the applicable Sentencing Guidelines range, and then considered whether to grant an upward or downward departure. See, e.g., *Koon v. United States*, 518 U.S. 81, 88-89 (1996).<sup>1</sup>

The Sentencing Reform Act of 1984 contemplated that district court judges would grant a departure for "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b)(1). To determine whether the Sentencing Commission had adequately considered a circumstance, Congress instructed courts to consider the Sentencing Guidelines, policy statements, and official commentary of the Sentencing Commission. *Id.*

The Commission's Manual elaborated on the concept of departures by explaining that departures were warranted in

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<sup>1</sup> The pre-*Booker* Sentencing Guidelines are more analogous to this rulemaking than the post-*Booker* Guidelines because the criminal constitutional protections motivating the Supreme Court's decision in *Booker* are inapplicable to the assessment of civil penalties under the Mine Act.

unusual or atypical cases and described such cases as "one[s] to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Koon*, 518 U.S. at 93 (quoting 1995 U.S.S.G. ch. 1, pt. A, intro. comment. 4(b)).

Under MSHA's second alternative, part 100 would employ a similar legal standard and allow Commission ALJs to make an upward or downward departure from MSHA's formula when justified. Sections 100.1 and 100.2 would be revised to read as follows:

§ 100.1 Scope and purpose.

This part provides the criteria and procedures for the proposal and assessment of civil penalties under §§ 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 penalties by both MSHA and the Commission, to maximize the incentives for mine operators to prevent and correct hazardous conditions, to encourage the consistent and predictable assessment of civil penalties, 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 the proposal and assessment of civil penalties for violations of the Mine Act and the standards and regulations promulgated pursuant to the Mine Act, as amended.

MSHA would also incorporate a new § 100.9 to identify the applicable legal standard for Commission ALJs to apply



to the Secretary's proposed regular assessments. The new § 100.9 would read as follows:

§ 100.9 Commission Review of the Secretary's Proposed Regular Assessments.

(a) When MSHA elects to make a regular formula assessment, the Federal Mine Safety and Health Review Commission shall determine whether MSHA has met its burden to establish the facts required to sustain each proposed assessment and shall assess a penalty in accordance with the civil penalty formula established in §§ 100.3 and 100.4 of this part.

(b) Notwithstanding § 100.9(a), if the administrative law judge (ALJ) finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Secretary when formulating the penalty regulations, the ALJ may assess a penalty other than that indicated by the formula so long as:

(1) The ALJ considers the penalty regulations in part 100, the relevant regulatory history, and MSHA's policy statements when determining whether the Secretary adequately considered the circumstance.

(2) The ALJ provides a statement of reasons for assessing a civil penalty that is higher or lower than the penalty indicated by applying §§ 100.3 and 100.4 to the penalty-related facts as found by the ALJ.

(3) The ALJ considers the statutory penalty criteria and the purposes of this part identified in § 100.1.

(4) The ALJ assesses a civil penalty that is consistent with statutory minimum and maximum penalties.

Under the second proposed alternative, the Secretary anticipates that the Commission would review the ALJ's findings of penalty-related facts for substantial evidence; the ALJ's application of the civil penalty formula in

§§ 100.3 and 100.4 to the penalty-related facts *de novo*; and the ALJ's assessment of a penalty under § 100.9(b) for abuse of discretion. MSHA's second proposed alternative would promote greater consistency and predictability than the existing rule because Commission ALJs would assess the formula penalty indicated by the adjudicated facts in many, if not most, cases. When departing from the formula penalty, Commission ALJs would not disregard the Secretary's penalty regulations, but rather would engage in a reasoned examination of them. Through the process of explaining justified departures from the penalty regulations in a limited number of cases, the Commission and its ALJs could contribute to a dialogue with the Secretary, mine operators, and other interested parties about ways in which the Secretary could continue to refine and improve the regular assessment rules to better serve the purposes of the Mine Act.

### 3. No Change to Regulatory Language

MSHA's third proposed alternative is to make no change to the existing scope and applicability of part 100. Under this alternative, the Secretary could pursue his penalty objectives through a case-by-case approach in penalty contests before the Commission. In litigation, the Secretary could ask the Commission to establish a

presumption of validity in favor of the penalty indicated by part 100 by requiring its ALJs to give an explanation for why the part 100 penalty is inadequate, rather than an explanation for the bases of the Commission's *de novo* assessment according to the six statutory criteria. The Secretary could also request that the Commission provide more guidance to Commission ALJs about what an adequate explanation of a penalty assessment involves. Finally, the Secretary could ask the Commission to defer to the Secretary's interpretations of the penalty factors in part 100, even if the Commission does not weigh and balance those factors as the Secretary does in § 100.3(g)'s penalty conversion table.

C. Request for Comments

MSHA seeks comments addressing which of these three proposed alternatives would best achieve the purposes of the Mine Act's civil penalty scheme. In particular, MSHA seeks comments addressing whether part 100's civil penalty formula should govern the Commission's penalty assessments in addition to MSHA's penalty proposals, or whether MSHA should instead continue to address penalty-related issues on a case-by-case basis through litigation rather than rulemaking. MSHA also seeks comments addressing whether the Commission should be able to depart from the penalty

formula and what requirements the Commission should satisfy when departing from the formula.

**V. Preliminary Regulatory Economic Analysis**

MSHA has not prepared a separate regulatory economic analysis for this rulemaking. Rather, the analysis is presented below. MSHA requests comments on all estimates of costs and benefits presented in this preamble, and on the data and assumptions the Agency used to develop estimates.

**A. Executive Orders (E.O.) 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public safety and health effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under E.O. 12866, a significant regulatory action is one meeting any of a number of specified conditions, including the following: 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 the proposed rule is a significant regulatory action because it raises novel legal and policy issues.

The analysis below indicates that the total transfer of monetary penalties from the mining industry to the Federal government would decrease by approximately \$2.7 million from \$82.5 million under the existing rule to \$79.8 million under the proposed rule. For analysis purposes under E.O. 12866, there are no costs or quantified benefits.

*B. Population at Risk*

The proposed rule applies to all mines in the United States. MSHA divides the mining industry into two major sectors based on commodity: (1) coal mines and (2) metal and nonmetal (M/NM) mines. The Agency maintains data on the number of mines and on mining employment by mine type and size. MSHA also collects data on employment at independent contractor firms performing certain types of work at mines and on mining operations owned or operated by state or local governments. As shown in Table 8, MSHA estimates that there were 13,757 mines with employment in 2013, including 149 mines owned or operated by state or

local governments. These mines employed 340,000 miners, including contract workers and excluding office workers.

Table 8: Number of Mines, and Employment, Excluding Office Employees, by Employment Size of Mine, in 2013

Size of Mine (# Employees)	# Coal Mines	# M/NM Mines	Total # Mines	Non-Office Employment at Coal Mines	Non-Office Employment at M/NM Mines	Non-Office Employment at All Mines
1-19	991	10,654	11,645	6,305	48,697	55,002
20-500	688	1,368	2,056	56,727	72,697	129,424
501+	23	33	56	17,041	23,477	40,518
Contractors	--	--	--	--	--	114,911
Total	1,702	12,055	13,757	80,073	144,871	339,855

MSHA estimates the value of coal produced in 2013 using coal production, and the most recent price of coal from the U.S. Department of Energy (DOE), Energy Information Administration (EIA), adjusted to 2013 dollars using the GDP price deflator from the Bureau of Economic Analysis. MSHA estimates the 2013 price per ton of underground coal to be \$67.56, and the 2013 price per ton of surface coal to be \$26.83. The estimated value of coal produced in U.S. coal mines in 2013 was \$40.3 billion, of which \$23.1 billion was from underground coal and \$17.2 billion from surface coal.

The U.S. Department of the Interior (DOI) estimated the value of the U.S. mining industry's M/NM output in 2013 to be approximately \$74.2 billion. The value of production estimates are from DOI, U.S. Geological Survey (USGS), Mineral Commodity Summaries 2014, February 2014, page 8.

As shown in Table 9, the combined value of production from all U.S. mines in 2013 was \$114.5 billion.

Table 9: Coal and M/NM Mine Revenue, by Employment Size of Mine, in 2013

Size of Mine (# Employees)	Coal Revenue (Millions of Dollars)	M/NM Revenue (Millions of Dollars)	Total Revenue (Millions of Dollars)
1-19	\$603	\$16,803	\$17,405
20-500	\$24,921	\$39,431	\$64,352
501+	\$14,771	\$17,967	\$32,738
Total	\$40,295	\$74,200	\$114,495

C. Benefits

The proposed changes to part 100 would improve the efficiency of the Agency's enforcement efforts and minimize disputes. When issuing citations or orders, inspectors are required to evaluate safety and health conditions and make decisions about five of the six statutory criteria. The proposed rule would simplify the gravity and negligence criteria and place an increased emphasis on the more serious hazards. Simplifying the criteria would increase objectivity and clarity in the citation and order process. The proposed changes should result in fewer areas of disagreement and earlier resolution of enforcement issues, which should result in fewer contests of violations or proposed assessments.

MSHA conducted a detailed analysis of the 121,089 violations for which MSHA proposed penalties under the

regular formula during the 12-month baseline (2013). In reviewing the existing distribution of the factors used to calculate the civil penalties, MSHA determined that there were noticeable differences in the way inspectors evaluated subjective factors such as the likelihood of the cited condition or practice causing an accident, the expected severity of any injury the condition or practice might cause, and the degree of negligence attributed to the mine operator in allowing the condition or practice to occur. For example, negligence attributed to the violator currently accounts for 30 percent of the penalty points assigned to all violations. The data revealed that M/NM mine inspectors assessed "High Negligence" in 10 percent of the violations while inspectors in coal mines assessed "High Negligence" in five percent of the violations. An even larger difference exists with the inspectors' evaluation of injury severity. M/NM mine inspectors evaluate the potential injury to be "Fatal" in 24 percent of the violations cited compared to 11 percent for coal mine inspectors. MSHA's existing Form 7000-3 "Mine Citation/Order Form" is both outdated and complex. With 1,000 possible permutations for Gravity and Negligence, the existing form lends itself to subjectivity and ambiguity when evaluating these factors. The proposed citation/order



form would reduce the number of permutations to 54, simplifying the criteria to increase objectivity and the form's clarity consistent with changes in the proposed rule. The proposed revisions to the citation/order form would result in fewer areas of disagreement and earlier resolution of enforcement issues.

The proposal is structured to encourage operators to be more proactive in addressing safety and health conditions at their mines. Under the proposal, total monetary civil penalties would remain generally the same as MSHA's proposed penalties under the existing rule. The proposal would place an increased emphasis on negligence and gravity to more appropriately address factors that directly impact miner safety and health. The proposal would place less emphasis on mine size, with slightly less emphasis on controller and contractor sizes.

Finally, MSHA is proposing to increase the minimum penalties for unwarrantable failure to provide greater deterrent for operators who allow these types of violations to occur.

Although MSHA has identified potential benefits of the proposed rule, the Agency has no basis to quantify or monetize these potential benefits. Further, MSHA's analysis of the projected benefits considered only the

effect of the proposal on MSHA's proposed penalties and did not consider the impact of the proposal on final orders of the Commission. MSHA has no basis from which to project how the proposed changes to §§ 100.1 and 100.2 might affect final orders of the Commission.

D. Projected Impacts

For most MSHA rules, the estimated impact associated with a proposed rule reflects the cost to the mining industry of achieving compliance with the rule. For this proposed rule, the projected impacts consist of slightly lower total payments by mine operators for penalties incurred.

In response to the proposed changes to the regular penalty formula, a mine operator could invest in complying with safety and health standards and regulations. When MSHA promulgates a new standard, it generally assumes full industry compliance with the existing standard when estimating compliance costs. Any compliance costs incurred in response to adjustments in the penalty tables, therefore, are not costs attributable to this proposed rule. MSHA is aware that some state and local governments own or operate mines. MSHA does not propose penalties for violations at these mines; therefore, state and local governments are not directly impacted by this proposal.

Any increase in proposed MSHA assessments that may occur would be a transfer of resources between government and private industry. It would not be a cost to society as a whole, although it would be a private cost to mine operators and independent contractors.

MSHA evaluated the impact of the proposed changes using actual violation data. MSHA conducted a detailed analysis of the 121,089 citations and orders for which MSHA proposed assessments under the regular formula between January 1, 2013 and December 31, 2013 (baseline), the most current year of data available at the time of the analysis. A critical aspect of the analysis was the projection of inspector behavior under the proposed revisions. Due to the reduction in the number of categories for some criteria, MSHA combined some of the existing categories. For example, the existing categories of "No Likelihood" and "Unlikely" were combined in the proposed category of "Unlikely" and the existing categories of "Reasonably Likely" and "Highly Likely" were combined in the proposed category of "Reasonably Likely."

Tables 10 and 11 show the actual proposed civil penalties under the existing rule and projected proposed civil penalties under the proposed rule. The projected average proposed penalty decreases from \$876 to \$815 for

penalties assessed at coal mines and increases from \$459 to \$480 for penalties assessed at M/NM mines. Total penalties for the coal sector would decline approximately \$3.9 million and increase approximately \$1.2 million for the M/NM sectors. The estimated penalty decrease of \$2.7 million for all mines relative to aggregate penalty levels is 3 percent.

Table 12 shows the number and dollar amounts of all regular formula proposed civil penalties for mine operators and independent contractors for the 12-month baseline period. Of the \$82.5 million actual proposed penalties, 69 percent were for the coal mine sector and 31 percent were for the M/NM mine sector. Of the \$79.8 million projected proposed penalties, 66 percent were for the coal mine sector and 34 percent were for the M/NM mine sector. Penalties assessed on independent contractors account for five percent (\$4.5 million) of the \$82.5 million actual proposed penalties and six percent (\$4.6 million) of the \$79.8 million projected proposed penalties.

Table 10: Actual Proposed Civil Penalties under the Existing Regulation, Coal and Metal/Nonmetal, 2013

Penalty Range	Coal			Metal/Nonmetal		
	Violations Assessed	Penalty	% of Violations	Violations Assessed	Penalty	% of Violations
Minimum	18,478	\$2,069,536	28%	32,052	\$3,589,824	56%
<\$500	25,495	\$6,243,120	42%	15,452	\$3,715,074	30%
\$500 to \$1,000	9,070	\$6,467,964	12%	4,002	\$2,855,905	6%
\$1,001 to \$5,000	9,887	\$20,770,995	15%	4,228	\$8,782,850	7%
\$5,001 to \$10,000	1,194	\$8,344,876	2%	430	\$3,044,725	1%
\$10,001 to \$69,999	590	\$11,517,886	1%	192	\$3,784,885	<1%
Maximum	18	\$1,260,000	<1%	1	\$70,000	<1%
Total	64,732	\$56,674,377		56,357	\$25,843,263	
Average		\$876			\$459	

Table 11: Projected Proposed Civil Penalties under the Proposed Regulation, Coal and Metal/Nonmetal, 2013

Penalty Range	Coal			Metal/Nonmetal		
	Violations Assessed	Penalty	% of Violations	Violations Assessed	Penalty	% of Violations
Minimum	22,898	\$2,564,576	35%	34,571	\$3,871,952	61%
<\$500	23,857	\$5,754,830	37%	14,751	\$3,877,979	26%
\$500 to \$1,000	6,898	\$4,793,200	11%	2,944	\$1,951,900	5%
\$1,001 to \$5,000	9,347	\$22,187,200	14%	3,340	\$8,009,300	6%
\$5,001 to \$10,000	1,455	\$10,445,000	2%	541	\$3,951,000	1%
\$10,001 to \$69,999	274	\$6,820,000	<1%	209	\$5,300,000	<1%
Maximum	3	\$210,000	<1%	1	\$70,000	<1%
Total	64,732	\$52,774,806		56,357	\$27,032,131	
Average		\$815			\$480	

Table 12: Actual and Projected Proposed Civil Penalties under the Existing and Proposed Regulations, All Mines

Penalty Range	Total Actual Civil Penalties Proposed (2013)			Total Projected Civil Penalties Proposed Based on 2013 Violations		
	Violations Assessed	Penalty Proposed	% of Violations	Violations Assessed	Projected Penalty	% of Violations
Minimum	50,530	\$5,659,360	42%	57,469	\$6,436,528	47%
<\$500	40,947	\$9,958,194	34%	38,608	\$9,632,809	32%
\$500 to \$1,000	13,072	\$9,323,869	11%	9,842	\$6,745,100	8%
\$1,001 to \$5,000	14,115	\$29,553,845	12%	12,687	\$30,196,500	10%
\$5,001 to \$10,000	1,624	\$11,389,601	1%	1,996	\$14,396,000	2%
\$10,001 to \$69,999	782	\$15,302,771	1%	483	\$12,120,000	<1%
Maximum	19	\$1,330,000	<1%	4	\$280,000	<1%
Total	121,089	\$82,517,640		121,089	\$79,806,937	
Average		\$681			\$659	

**VI. Feasibility**

MSHA has concluded that the proposed revisions to part 100 civil penalties are technologically and economically feasible. Because the proposed rule is not technology-forcing, MSHA concludes that the rule is technologically feasible. MSHA has traditionally used a revenue screening test – whether the yearly impacts of a regulation are less than one percent of revenues – to establish presumptively that the regulation is economically feasible for the mining community. Because the proposed rule is projected to decrease the proposed penalty amounts by approximately \$2.7 million on an industry with estimated annual revenues of \$114.5 billion, MSHA concludes that the proposed rule would be economically feasible for the mining industry.

**VII. 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 compliance cost impact of the proposed rule on small entities. Based on that analysis, MSHA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities in terms of compliance costs. Therefore, the Agency is not required to develop an initial regulatory flexibility analysis.

The factual basis for this certification is presented below.

**A. Definition of a Small Mine**

Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA's) 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 alternative definition, and is required to use SBA's 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 the proposed rule on 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.

This analysis complies with the requirements of the RFA for an analysis of the impact on small entities while continuing MSHA's traditional definition of "small mines."

*B. Factual Basis for Certification*

MSHA initially evaluates the impacts on small entities by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated compliance costs are less than one percent of the estimated revenues, the Agency believes it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. When estimated compliance costs exceed one percent of revenues, MSHA investigates whether further analysis is required.



Under the existing rule, proposed assessments on mines with 1 to 500 employees amount to 85 percent of total proposed assessments. Under the proposal, MSHA projects that total penalties would remain basically the same as under the existing rule. As shown in Table 13 of this preamble, MSHA projects that proposed penalties at mines with 1 to 500 employees would decrease under the proposed rule by \$1.6 million. Proposed penalties at mines with 1 to 19 employees are projected to decrease by \$0.2 million.

Table 13: Projected Change in Proposed Penalties under the Proposed Rule, and the Percent of Total Projected Penalty Amount

Size of Mine (# Employees)	Projected Impact (\$ Million)	Percent of Total Projected Penalty Amount	2013 Revenue (\$ Million)	Projected Impact as a Percentage of Revenue
M/NM Mines				
1 to 19	-\$1.8	26%	\$16,803	N/A
1 to 500	\$0.7	81%	\$56,233	<0.1%
Coal Mines				
1 to 19	\$1.6	11%	\$603	<1%
1 to 500	-\$2.3	88%	\$25,524	N/A
All Mines				
1 to 19	-\$0.2	16%	\$17,405	N/A
1 to 500	-\$1.6	86%	\$81,757	N/A

N/A - Not Applicable

MSHA projects that proposed penalties at M/NM mines with 1 to 500 employees would increase by \$0.7 million under this proposed rule, which rounds to zero percent of 2013 annual revenue. Proposed penalties at M/NM mines with 1 to 19 employees are projected to decrease by \$1.8 million. This is due in part to proposed § 100.3(c)(1),

which would assign zero violation history points when a mine has 10 or fewer inspection days over the preceding 15-month period.

MSHA projects that proposed penalties at coal mines with 1 to 500 employees would decrease by \$2.3 million under this proposed rule. Projected proposed penalties at coal mines with 1 to 19 employees represent 11 percent of total projected penalties for coal mines. The projected impact on the 991 small coal mines with 1 to 19 employees would increase proposed penalties by \$1.6 million or about \$1,600 per mine. This represents <1 percent (about 0.27 percent) of 2013 annual revenue for these small coal mines.

MSHA historically identifies mine size based on employment at the mine. Some mines with fewer than 19 employees are controlled by much larger entities. MSHA estimates that 252 or 24 percent of the small mines where MSHA proposed civil penalties for citations/orders in 2013 were controlled by entities with more than 500 employees. The 252 small coal mines would see an increase of \$808,000 in penalties under the proposed rule, or 41 percent of the \$1.6 million penalties assessed on all small coal mines.

MSHA issued 8,752 citations/orders to independent contractors in 2013. MSHA estimates that independent

contractors would see an increase in penalties from \$4.5 million to \$4.6 million as a result of the proposed rule.

Accordingly, MSHA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

#### **VIII. Paperwork Reduction Act of 1995**

This proposed rule contains no additional information collections subject to review by OMB under the Paperwork Reduction Act. MSHA Form 7000-3 is solely used by MSHA's personnel as part of the Agency's enforcement activities. Any burden associated with the form is not subject to the Paperwork Reduction Act.

#### **IX. Other Regulatory Considerations**

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

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this proposed rule would not include any federal mandate that may result in increased expenditures by state, local, or tribal governments; nor would it increase private sector expenditures by more than \$100 million, adjusted for inflation, in any one year or significantly or uniquely affect small governmental jurisdictions. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further Agency action or analysis.

MSHA is aware that some state and local governments own or operate mines. MSHA does not propose penalties for violations at these mines; therefore, state and local governments are not directly impacted by this proposal.

*B. Executive Order 13132: Federalism*

This proposed rule would not have "federalism implications" because it would 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, under E.O. 13132, no further Agency action or analysis is required.

*C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that this proposed rule would have no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children. This proposed rule impacts only the mining industry. Accordingly, MSHA

certifies that this proposed rule would not impact family well-being.

D. Executive Order 12630: Government Actions and Interference with Constitutionally Protected Property Rights

The proposed rule would not implement a policy with takings implications. Accordingly, under E.O. 12630, no further Agency action or analysis is required.

E. Executive Order 12988: Civil Justice Reform

This proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. Accordingly, this proposed rule would meet the applicable standards provided in § 3 of E.O. 12988, Civil Justice Reform.

F. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This proposed rule would have no adverse impact on children. Accordingly, under E.O. 13045, no further Agency action or analysis is required.

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

This proposed rule would not have "tribal implications" because it would 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, under E.O. 13175, no further Agency action or analysis is required.

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

Executive Order 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action (i.e., it adversely affects energy supply, distribution, or use). MSHA has reviewed this proposed rule for its energy effects because the proposed rule applies to the coal mining sector. Because this proposed rule would result in a reduction in expenditures by the coal mining industry, MSHA has concluded that 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. Accordingly, under this analysis, no further Agency action or analysis is required.

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

MSHA has reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined and certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 30 CFR Part 100

Mine safety and health, Penalties.

\_\_\_\_\_  
Joseph A. Main  
Assistant Secretary of Labor for  
Mine Safety and Health

Dated: July 25, 2014

For the reasons set out in the preamble and under the authority of the Federal Mine Safety and Health Act of 1977, as amended, MSHA is proposing to amend chapter I of title 30, part 100 of the Code of Federal Regulations as follows:

PART 100-CRITERIA AND PROCEDURES FOR ASSESSMENT OF CIVIL  
PENALTIES

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

AUTHORITY: 30 U.S.C. 815, 820, 957.

2. Revise the heading for part 100 to read as set forth above.

3. In § 100.3, revise paragraphs (b), (c), (d), (e), (g), and (h) to read as follows:

§ 100.3 Determination of penalty amount; regular assessment.

\* \* \* \* \*

(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 through V of this section. As used in these tables, the term "annual tonnage" means tons of coal produced by the mine in the previous calendar year and "annual hours worked" means total hours worked by



all employees at the mine 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 8 penalty points.

TABLE I—SIZE OF COAL MINE

Annual Tonnage of Mine	Penalty Points
<50,000	1
>50,000 to 500,000	2
>500,000 to 1,000,000	3
>1,000,000	4

TABLE II—SIZE OF CONTROLLING ENTITY-COAL MINE

Annual Tonnage	Penalty Points
<200,000	1
>200,000 to 700,000	2
>700,000 to 3,000,000	3
>3,000,000	4

TABLE III—SIZE OF METAL/NONMETAL MINE

Annual Hours Worked at Mine	Penalty Points
<5,000	0
>5,000 to 200,000	1
>200,000 to 1,500,000	2
>1,500,000 to 3,000,000	3
>3,000,000	4

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

Annual Hours Worked	Penalty Points
<50,000	0
>50,000 to 300,000	1
>300,000 to 2,000,000	2
>2,000,000 to 5,000,000	3
>5,000,000	4

TABLE V—SIZE OF INDEPENDENT CONTRACTOR

Annual Hours Worked at All Mines	Penalty Points
<5,000	0
>5,000 to 10,000	1
>10,000 to 30,000	2
>30,000 to 70,000	3
>70,000 to 200,000	4
>200,000 to 500,000	5
>500,000 to 700,000	6
>700,000 to 1,000,000	7
>1,000,000	8

(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 the 15-month period preceding the occurrence date of the violation being assessed. Only assessed violations that have become final orders of the Federal Mine Safety and Health Review Commission will be included in determining an operator's violation history.

(1) Total number of violations. For mine operators, penalty points are assigned for violations per inspection day based on Table VI of this section. Penalty points are not assigned for mines with fewer than 10 violations or 10 or fewer inspection days in the specified history period. For independent contractors, penalty points are assigned for the total number of violations at all mines based on Table VII of this section. Penalty points are not assigned for independent contractors with fewer than six violations in the specified history period. This aspect of the history criterion accounts for a maximum of 16 penalty points.

TABLE VI—HISTORY OF PREVIOUS VIOLATIONS—MINE OPERATORS

Overall History: Violations Per Inspection Day	Penalty Points
<0.3	0
>0.3 to 0.5	2
>0.5 to 0.7	5
>0.7 to 0.9	8
>0.9 to 1.1	10
>1.1 to 1.3	11
>1.3 to 1.5	12
>1.5 to 1.7	13
>1.7 to 1.9	14
>1.9 to 2.1	15
>2.1	16

TABLE VII—HISTORY OF PREVIOUS VIOLATIONS—  
INDEPENDENT CONTRACTORS

Overall History: Total Violations at All Mines	Penalty Points
0 to 5	0
6 to 7	1
8 to 9	2
10 to 11	3
12 to 13	4
14 to 15	5
16 to 17	6
18 to 19	7
20 to 21	8
22 to 23	9
24	10
25	11
26	12
27	13
28	14
29	15
>29	16

(2) Repeat violations of the same standard. This section applies only after an operator has a minimum of 10 violations and more than 10 inspection days or an independent contractor has a minimum of six violations in the specified history period. Repeat violation history is based on the number of violations of the same citable provision of a standard. For coal and metal and nonmetal mine operators with a minimum of six repeat violations, penalty points are assigned for the number of repeat violations per inspection day (RPID) based on Table VIII of this section. For independent contractors, penalty points

are assigned for the number of repeat violations at all mines based on Table IX of this section. This aspect of the history criterion accounts for a maximum of 10 penalty points.

TABLE VIII—HISTORY OF PREVIOUS VIOLATIONS—REPEAT VIOLATIONS FOR COAL AND METAL/NONMETAL OPERATORS WITH A MINIMUM OF SIX REPEAT VIOLATIONS

Number of Repeat Violations Per Inspection Day	Penalty Points
<0.01	0
>0.01 to 0.02	1
>0.02 to 0.03	2
>0.03 to 0.05	3
>0.05 to 0.08	4
>0.08 to 0.12	5
>0.12 to 0.16	6
>0.16 to 0.20	7
>0.2 to 0.3	8
>0.3 to 0.5	9
>0.5	10

TABLE IX—HISTORY OF PREVIOUS VIOLATIONS—REPEAT VIOLATIONS FOR INDEPENDENT CONTRACTORS

Number of Repeat Violations at All Mines	Penalty Points
<6	0
6	1
7	2
8	3
9	4
10	5
11	6
12	7
13	8
14	9
>14	10

(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, 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 of a mine operator to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points for the degree to which the operator failed to exercise a high standard of care based on conduct evaluated according to Table X of this section. This criterion accounts for a maximum of 30 penalty points.

TABLE X—NEGLIGENCE

Standard of Care	Penalty Points
<u>Not Negligent</u> (The operator exercised diligence and could not have known of the violative condition or practice.)	0
<u>Negligent</u> (The operator knew or should have known of the violative condition or practice.)	15
<u>Reckless Disregard</u> (The operator displayed conduct which exhibits the absence of the slightest degree of care.)	30

(e) Gravity. Gravity is an evaluation of the seriousness of the violation. 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 were to occur; and whether or not persons are potentially affected if the event has occurred or were to occur. The gravity criterion assigns penalty points based on Tables XI through XIII of this section. This criterion accounts for a maximum of 36 penalty points.

TABLE XI—GRAVITY: LIKELIHOOD

Likelihood of Occurrence	Penalty Points
<u>Unlikely</u> (Condition or practice cited has little or no likelihood of causing an event that could result in an injury or illness.)	0
<u>Reasonably Likely</u> (Condition or practice cited is likely to cause an event that could result in an injury or illness.)	14
<u>Occurred</u> (Condition or practice cited has caused an event that has resulted or could have resulted in an injury or illness.)	25

TABLE XII—GRAVITY: SEVERITY

Severity of Injury or Illness If the Event Has Occurred or Were to Occur	Penalty Points
<u>No lost work days</u> (All occupational injuries and illnesses as defined in 30 CFR Part 50 except those listed below.)	0
<u>Lost workdays or restricted duty</u> (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
<u>Fatal</u> (Any work-related injury or illness resulting in death, or which has a reasonable potential to cause death.)	10

TABLE XIII—GRAVITY: PERSONS POTENTIALLY AFFECTED

Persons Potentially Affected If the Event Has Occurred or Were to Occur	Penalty Points
<u>No</u> (No persons are affected by the condition or practice cited.)	0
<u>Yes</u> (One or more persons are affected by the condition or practice cited.)	1

\* \* \* \* \*

(g) Penalty conversion table. The penalty conversion table is used to convert the sum of penalty points assigned for a violation (in paragraphs (b) through (f) of this section) to a civil penalty amount in dollars (\$).



TABLE XIV—PENALTY CONVERSION TABLE

Points	Penalty (\$)
31 or fewer	112
32	118
33	124
34	150
35	175
36	200
37	250
38	300
39	350
40	400
41	450
42	500
43	600
44	700
45	800
46	1,000
47	1,200
48	1,400
49	1,600
50	1,800
51	2,000
52	2,500
53	3,000
54	3,500
55	4,000
56	5,000
57	6,000
58	7,000
59	8,000
60	9,000
61	10,000
62	15,000
63	20,000
64	25,000
65	30,000
66	35,000
67	40,000
68	45,000
69	50,000

Points	Penalty (\$)
70	55,000
71	60,000
72	65,000
73 or more	70,000

(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 financial information to MSHA's Office of Assessments, Accountability, Special Enforcement and Investigations at 1100 Wilson Boulevard, 25<sup>th</sup> Floor, Arlington, Virginia 22209, 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.

4. In § 100.4, revise paragraphs (a) and (b) to read as follows:

§ 100.4 Unwarrantable failure and immediate notification.

(a) The minimum penalty for any citation or order issued under § 104(d)(1) of the Mine Act shall be \$3,000.

(b) The minimum penalty for any order issued under § 104(d)(2) of the Mine Act shall be \$6,000.

\* \* \* \* \*

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