

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



Natural building blocks for quality of life

**STATEMENT OF
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**TO THE
UNITED STATES SENATE COMMITTEE ON HEALTH,
EDUCATION, LABOR, AND PENSIONS**

ON

***“MINER HEALTH AND SAFETY ENHANCEMENT ACT OF 2007”
(S. 1655)***

OCTOBER 2, 2007

Mr. Chairman and Members of the Committee:

The National Stone, Sand and Gravel Association (NSSGA) appreciates the opportunity to submit a statement for the record of this hearing on the *Miner Health and Safety Enhancement Act of 2007 (S. 1655)*.

Based near the nation's capital, NSSGA is the world's largest mining association by product volume according to the U.S. Geological Survey. NSSGA's member companies represent more than 92 percent of the crushed stone and 75 percent of the sand and gravel consumed annually in the United States, and abide by three sets of guiding principles: safety and health of workforce and communities; environmental stewardship and compliance; and sustainability. Nearly three billion tons of aggregates (crushed stone, sand and gravel) were produced in 2006 at a value of approximately \$21 billion, contributing over \$40 billion to the GDP of the United States. Every \$1 million in aggregate sales creates 19.5 jobs, and every dollar of industry output returns \$1.58 to the economy.

There are more than 11,000 construction aggregate operations nationwide. Seventy percent of the nation's counties and virtually every congressional district are home to a crushed stone, sand or gravel operation. Aggregates are used in nearly all residential, commercial and industrial building construction and in most public works projects, such as roads, highways, bridges, railroad beds, dams, airports, water and sewage treatment plants and tunnels. While the American public may not be familiar with the uses of these raw natural materials, aggregates are the majority ingredient of asphalt and concrete, and also have environmental benefits with erosion control, storm water runoff, flue gas desulpherization, acidity control on land and in waters, and offer many reclaimed benefits to communities. Pulverized aggregates are used in the manufacture of glass, paper, paint, pharmaceuticals, cosmetics, chewing gum, household cleansers, and many other consumer goods.

The first priority of the aggregates industry is and will continue to be the safety and health of its workers. The safety record of the aggregates industry has improved due to the heightened level of effort invested by the industry to sustain an improved performance. The improvement in the aggregates industry safety record is attributable to several factors. The first is that aggregate companies have realized that to stay competitive in today's business environment, companies must provide a safe and healthy workplace or they will not be able to attract the best workforce possible. Companies realize that to remain competitive in America today you must care about your people.

The *Mine Improvement and New Emergency Response Act of 2006 (MINER Act)* was signed into law on June 15, 2006. We believe the *Miner Health and Safety Enhancement Act of 2007 (MHSE Act)* is premature because it comes before MSHA and the industry have had adequate time to fully implement the *MINER Act* and, therefore, could

undermine the success that has been achieved. Further, imposing another layer of regulation on an industry that already is highly regulated and has shown continued safety improvements at this time would create confusion and threaten further progress.

The *MHSE Act* takes a one-size fits all approach that fails to recognize that mines are unique. NSSGA members have achieved a continuously improving safety performance record. In fact, NSSGA members have never experienced an accident similar to the recent tragedies in the coal sector. Written as a result of these tragedies in the coal sector, the MINER Act has impacted the aggregates industry. Further extension of the *MHSE Act* to the stone, sand and gravel industry is not warranted and contradicted by the industry's safety performance.

Notice and comment rulemaking is a precept fundamental to the *MINER Act* and its predecessor statutes. The basic purpose of such rulemaking is to afford stakeholders the due process required by law of providing a reasoned forum that allows all interested parties to comment on proposed regulations. The *MHSE Act* would circumvent this crucial rulemaking process in key areas. The *MHSE Act* would require MSHA, with no opportunity for public comment, to automatically adopt the recommended exposure limits developed by the National Institute of Occupational Safety and Health (NIOSH) as legally enforceable Permissible Exposure Limits (PELs). The bill would also require MSHA to automatically adopt standards, such as the Hazard Communications standard, established by private and quasi-governmental organizations. To impose statutory health standards on the mining industry without benefit of notice and comment rulemaking to develop a rulemaking record that evaluates risk of material impairment of health, as well as technology and economic feasibility, is unwise, unjustified and could be counterproductive.

We are concerned that the *MHSE Act* changes the rules and responsibilities of MSHA and NIOSH in a number of key respects. It also introduces an organization unfamiliar with the mining industry into the safety process which will create regulatory confusion. Under the *Federal Mine Safety and Health Act of 1977*, the role of NIOSH in standard-setting is advisory in nature. The *MHSE Act* would require NIOSH to establish the frequency of dust sampling rather than MSHA. The *MHSE Act* would also require MSHA to adopt technology designed and certified by NIOSH. This would undermine a well-established and effective standard setting regime by mandating that MSHA simply accept NIOSH recommendations. It would circumvent the current approval and certification process.

The *MHSE Act* contains several provisions that are impractical and will be administratively difficult to implement. For example, it would require all mine operators to notify MSHA of a number of incidents that are not likely to cause injury or are otherwise life-threatening. Notifying the agency of a near miss incident or other events that are not clearly defined by the *MHSE Act* will lead to confusion and a waste of valuable time and resources by both operators and MSHA inspectors.

It is imperative that when a serious accident or mine disaster occurs, that a comprehensive and unbiased investigation takes place to prevent a recurrence. The

MHSE Act would permit a “miner’s representative” or a representative of the injured party’s family to request a public hearing or special investigation. This process does not lend itself to an objective investigation of the facts. Other motives, such as politics, labor-management issues, or potential future civil litigation should take a back seat to determining the facts contributing to an incident for purposes of prevention.

The *MINER Act* substantially increased penalties. In addition to proposing more penalty increases, the *MHSE Act* requires the Secretary of Labor (the Secretary) to revise section 104(e) of Federal Mine Safety and Health of 1977, which addresses “pattern of violations”, or *POV*, and restricts the ability of mine operators to contest inappropriate enforcement actions. MSHA published new civil penalty regulations, covering all mines, on March 22, 2007. The new regulations addressed the statutory requirements of the *MINER Act* related to civil penalties. They also revised the agency’s formula for calculating assessments related to violations. MSHA estimated that the cost increase of these new penalty regulations would range from 127 percent to 228 percent. Many conservative estimates from mine operators project penalty cost increases of 200 percent to 300 percent. MSHA’s new penalty regulations should be given a chance to work before any further statutory changes are made.

The *MHSE Act* would require mine operators to escrow the assessment related to a contested violation pending resolution of dispute. This requirement is clearly designed to discourage mining companies from contesting enforcement actions, thereby forcing many small businesses to choose between placing funds in escrow and meeting payroll for their employees. It also would limit the ability of mine operators to defend themselves against unfair treatment and inappropriate actions. A significant consequence of this provision would place another burden on an individual miner who has a *bona fide* disagreement with a personal citation the miner receives if the miner wishes to contest the citation. By requiring an individual miner to escrow payment when there is simply a difference in opinion, the *MHSE Act* unduly burdens the individual miner that the statute would protect.

If enacted, the *MHSE Act* will result in many mines installing inappropriate or unnecessary technology. The proposed legislation is prescriptive, as opposed to being risk-based in design. Mine operators would be required to adopt technology that is neither proven to be safe nor commercially viable at this time. While the majority of aggregate operations are above ground, there are a significant number of other types, ranging from water based dredging to underground operations that may require different types of technology.

In addition to increased penalties, the industry continues to endure a lack of consistency from MSHA during inspections and issuance of citations. Lack of consistency also may be due to inadequate training. MSHA inspectors do not necessarily have training facilities which clearly differentiate between the various mining sectors and the different types of product within each sector (i.e., granite mine, limestone mine, sand and gravel operation). Proper training of inspectors ensures an improved consistency in inspection and issuance of citation, and therefore, an improved compliance on behalf of operators.

NSSGA strongly supports improving the training capabilities of MSHA inspectors, so they are prepared to conduct consistent and comprehensive inspections of stone, or sand and gravel operations.

Unlike coal, underground stone mines produce material that is non-combustible and non-flammable. No combustible gas such as methane is present, and no underground stone mine is categorized as liberating methane or containing a combustible ore. MSHA-approved (“permissible”) equipment is not required in underground stone mines because mine fires or explosions cannot occur due to electrical equipment contacting an explosive gas, since explosive gas is not present. Mining methods create large open spaces for access by large equipment. Large openings accommodate emergency equipment used by non-mine emergency services. More stable mineral formations result in stable mine roofs, minimizing the need for additional roof supports and emergency escape is easier due to the large spaces in the mine. Because of large open spaces and mining methods, mechanical mine ventilation generally is not required since natural ventilation provides an atmosphere in which people can work.

Additionally, while most quarries are mined for decades, some sand and gravel operations move rapidly from one site to another. Also, there is a wide range of climate differences among the 11,000 plus operations nationwide that may make certain safety technologies more feasible than others. Operators should have the flexibility to introduce the types of technology best suited to their mines and specific circumstances. In other words, “one size does not fit all.”

NSSGA developed and agreed to a set of safety principles to assist member companies in their efforts to understand the importance to their individual organizations, as well as to the industry as a whole. In addition, a safety pledge was developed in 2002 incorporating the safety guiding principles. More than 90 percent of the NSSGA member companies now have agreed to the pledge, signifying the importance of safety and a commitment toward ensuring the safety and health of all their employees.

NSSGA was one of the first organizations that formalized an alliance with MSHA. Subsequently, MSHA has entered into alliances with other industries it regulates, as well as with labor organizations, including the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and the International Union of Operating Engineers. Important alliances also exist with the National Safety Council and the American Society of Safety Engineers. While some argue that these alliances have aligned the agency too closely with the regulated community, we would argue the opposite. In 2002, NSSGA and MSHA set forth a cooperative agreement to develop programs and tools for the improvement of safety and health in the aggregates industry. The reduced incidence rates that resulted speak for themselves. Through these alliances, individual working miners have gained access to more educational materials from their companies, and MSHA has been able to enhance its mission of protecting worker safety and health.

Another collaborative effort resulted in the MSHA Part 46 “Training and Retraining of Miners” regulation in 2000. This effective regulation ensures every miner knows and understands how to perform their job safely by covering the important safety and health information prior to starting work and annually thereafter. This regulation was developed collaboratively, with input from both labor and industry groups, guaranteeing support of the rule by all involved stakeholders and assuring their commitment to the ultimate goal of injury reduction. The Coalition for Effective Miner Training included many industry groups working in a joint industry/labor arrangement in conjunction with MSHA to develop an effective standard for the aggregates industry, and the part 46 miner training resulted from the group’s combined efforts.

Another example of an effective collaboration between MSHA and NSSGA is a cooperative workplace-based training program of noise and dust monitoring workshops. Agency and association leadership developed and signed an agreement, and the training workshop program launched on December 1, 1997. These workshops have been given every year since 1997, and training specialists from the Mine Safety Academy have educated miners in dust and noise issues. The joint venture aimed at reducing hearing loss and silicosis through a program of recognition, evaluation and control of workplace hazards has won two awards from Innovations in American Government.

The NSSGA/MSHA Alliance does not interfere with the compliance program of the agency, but instead enhances communications and understanding of risk for improved education and training. MSHA has an important role in ensuring that aggregates mines and quarries maintain safety standards that protect employees. The MSHA enforcement program operates independently of any of the cooperative industry alliances. Unlike any other safety and health enforcement agency enabling legislation, the *Act* requires complete inspections of every mine property two or four times per year depending on whether it is surface or underground, respectively.

It is imperative that Congress allow the original *MINER Act* to be fully implemented in order that the overall impact of it can be comprehensively measured. Congress should exercise caution before rushing to impose another layer of regulations on the already highly-regulated mining sector so as not to jeopardize the progress being made in enhancing the safety of miners. Congress must look to MSHA to develop a model that combines enforcement with incentives for safety performance and with education and training and assistance on best safety practices rather than penalties as the sole motivator.

The first priority for the aggregates industry is and will continue to be the safety and health of its miners. The industry recognizes that its employees are its most valuable asset, an asset that must be protected for the well being of the industry now and in the future.

Attachment: Workhours vs. Incident Rate-Aggregates Industry