

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



*Natural building blocks for quality of life*

July 20, 2010

The Honorable George Miller  
Chairman  
Committee on Education and Labor  
U.S. House of Representatives  
Washington, DC 20515

The Honorable John Kline  
Ranking Member  
Committee on Education and Labor  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Miller, Mr. Kline and Members of the Committee:

The National Stone, Sand and Gravel Association appreciates the intent of the committee to help prevent tragedies such as the Upper Big Branch underground coal mine disaster of April 5 in West Virginia. The safety and health of our workforces are a value, not just a priority, in aggregates businesses from coast to coast. However, in its current form, we must oppose H.R. 5663, the “Robert C. Byrd Miner Safety and Health Act of 2010.” Perhaps unintentionally but, because of its wide net, this legislation captures the aggregates (crushed stone, sand and gravel) production industry with impositions so severe that they could be the tipping point for many of our companies. Our industry is dominated by small businesses/small operations in 10,400 locations throughout the United States, and our workers – American workers – will lose jobs and safety and health in our industry will not be improved.

Nearly 100% of the aggregates consumed in the U.S. are produced here by American workers. These workers are hired for good-paying jobs, are extensively trained for safe and healthful production and to assume environmental and community responsibility. For more than 100 years, our association has represented the industry that provides the natural building blocks for the foundation of American life. We supply the core material that is 80% of concrete and 94% of asphalt. Larger rocks are used for erosion control; smaller rocks used for street as well as rail base – rock without which Americans would not enjoy sturdy, long-standing homes, roads, schools, airports, offices, water treatment plants, bridges or hospitals. Through innovation and automation over more than a century, our industry has provided the materials for a quality of life unparalleled in the world.

Yet, our industry reacts to the economically depressed construction industries (aggregates production has dropped from three billion metric tons in 2006 to 1.9 billion metric tons in 2009): quarries, sand and gravel pits have been idled, shut down or closed all over the country and many highly trained American workers have already lost safe, good-paying jobs.

However, during a period of growth followed by the most severe decline in production ever, our industry’s leaders and our workforce have achieved remarkably safer and more healthful workplaces year by year. Since 2000, our national safety and health incidence rate has continued to decline to a record achievement of 2.62 by the end of 2008 (2.46 in 2009, a rate roughly equivalent to the risks in movie production), which is well under the 3.9% OSHA national incidence rate in 2008 for all businesses and industries.

Given the background of the aggregates industry's record safety and health achievements, knowing it was not the aggregates mining sector that prompted this legislation, and considering our current economic challenges, I hope you can appreciate the frustration in our industry over the punitive nature of H.R. 5663 and its application to aggregates simply because we are an MSHA stakeholder.

Because of already burdensome regulatory requirements, it takes many years from the time of the initial geologic and environmental studies to secure the necessary permits from local, state and federal agencies to open a quarry that has to operate for decades for its business model to work and for the operation to assist in the community's sustainability. These are not easy come, easy go operations, but investments in the future.

Based on experience, we expect the chairman's mark expansion of "significant and substantial," which includes administrative regulations, to escalate penalties and expand criminal liabilities in an industry sector whose record of safety achievements does not warrant such expansion.

Before investigations are even complete on the specifics that caused the fatal explosion and fire at the underground coal mine in West Virginia, H.R. 5663 proposes overly broad statutory changes that will adversely affect all mining, regardless of risk factors, regardless of need, regardless of safe and healthful operations. The legislation does not consider appropriateness for such increased penalties, increased liability and expanded enforcement authorities on the mostly small businesses and operations of our industry sector. Unlike most other MSHA stakeholders, the aggregates industry in America is dominated in numbers of operations and in tonnage by small companies with slim profit margins as compared to other mining sectors in a good economy.

Aggregates company owners and operators provide an enormous public service to society. Aggregates benefit all Americans as well as their communities, states and the nation. Hazards are managed to achieve record safety and health milestones. Our industry will beat their own records by intense focus, involved commitment and collaboration between workers and management. Our industry CEOs/owners are committed to building and training workforces that also are dedicated to attaining the highest safety and health goals.

We submit that the bill's focus should be on what is needed to bring recalcitrant operators and high-risk operations into full compliance with current safety and health laws and practices. There is no reason to impose increasing penalties and regulatory costs on an entire mining sector in attempting to address issues occurring totally outside that sector's sphere of influence.

NSSGA and its members have long recognized the critical importance of worker safety and health and historically have devoted an enormous amount of effort and resources to ensuring the wellbeing of our employees. This unequivocal dedication to safety and health compliance, already a culture of the industry, was elevated when in 2002, NSSGA's board of directors instituted a company-by-company Safety Pledge campaign to help cut the aggregates industry's national incidence rate in half.

Our industry consists of both surface and underground operations and we are unified in our position of this legislation. In aggregates, the only underground mines are stone mines. Because of the materials mined, our industry's cavernous stone mines have inherently lower risks than, for example, underground coal mines. Underground stone mines do not contain flammable gases or combustible dust. Stable underground stone mines do not pose the risks of retreat mining.

The committee majority asked for industry's prompt response to draft provisions. We have done our best to give you informed feedback on short notice. We appreciate the efforts made to address our objections. However, despite attempts to reduce draconian impacts, the suggested revisions do not *sufficiently* alter H.R. 5663 to allow us to change our position.

There are initiatives NSSGA and the industry believe would be helpful in improving safety and health. First, the focus of the underlying bill can be honed more to the highest risks. There are a number of ways that can be done. The Small Mines Office should be maintained and report separately to the Office of the Assistant Secretary rather than to field enforcement personnel. Its utility in offering expert compliance assistance to small operations results in better safety and health in the industry.

Without endorsing the imposition of any of H.R. 5663's provisions on any mining sector, we believe a better remedy for our industry, in which record safety and health incidence rates of 2.46 were achieved in 2009, is to remove from the bill its applicability to all aggregates operations, whether surface or underground. This would allow the legislation to focus only on the highest risk operations or recalcitrant operators. Despite attempts to adjust, but not eliminate, the original thrust of H.R. 5663, the adjusted provisions continue to retain profoundly inappropriate changes for our industry.

For the reasons outlined in this letter and the attached statements, NSSGA opposes application of H.R. 5663 to an industry with exceptionally strong safety records. Attached is a suggested legislative approach to do so.

NSSGA is dedicated to attaining zero fatalities. The culture of commitment our members have created – always striving to do better – and the record of safety and health they have achieved speaks eloquently of the value they place on a safe and healthy workforce. Thank you in advance for your consideration of our views.

Respectfully,

A handwritten signature in black ink, reading "Jennifer Joy Wilson". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer Joy Wilson  
President and CEO

Three (3) Attachments

## **Attachment 1**

### **NSSGA COMMENTS ON THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 5663**

#### **General Comments**

NSSGA needs to stress once again that the stone, sand and gravel industry is not part of the problem that the committee seeks to solve. This industry has continually improved its safety performance and has shown great commitment to compliance with MSHA regulations and standards. It does not need to be hammered in new legislation with excessive criminal and civil liability, investigations and increased occasions for civil penalty closure orders

If coal mine conditions have led to coal mine explosions, then it would seem only logical that concentrating on increased enforcement for stone, sand and gravel operations is a misdirection of resources, a dilution of effort and a miscarriage of government trust. Extending the heavier enforcement aspects of new legislation to aggregates operations will inevitably lead MSHA enforcement personnel to believe that mechanisms provided must be deployed. That would be most unfortunate in the vast majority of instances that could potentially arise.

MSHA is already conducting inspections and investigations in ways that are disproportionate to any conditions or violations being addressed. In routine inspections, inspectors may demand documents that are not required under MSHA regulations and far in excess of anything needed for the particular focus of the inspection. Also, inspectors have enormous influence over the amount of civil penalty and there is quite a bit of variation between and among inspectors. Misjudgments by inspectors may be costly and operators have no way to recover from such costs.

Small operators have received civil penalties approaching a hundred thousand or two hundred thousand dollars or more for a single two- or three-day inspection. Moreover, relatively insignificant violations, such as a leaky (but working) eye wash station at one plant, have been cited as “unwarrantable failures” and then made the subject of special investigation. While the investigation into the leaky eye wash sink did not result in the prosecution of any company supervisor or manager, the anxiety of supervisors, as well as expenditure of company resources associated with going through the investigation, were not warranted.

MSHA enforcement costs companies, and individuals within companies, in many ways. For example, some companies report that employees do not want to be promoted to supervisory jobs because of all that they have heard, and have sometimes experienced personally, with respect to MSHA special investigations. Companies also sustain significant costs in contesting citations that they are convinced are not unwarrantable, or are not properly designated as potentially fatal, or not due to high, or even moderate, negligence. All of these things have costs. All of this process diverts attention away from what logic suggests are the real issues that the committee is trying to address.

Findings in citations are often made by inspectors who do not have all the facts and quite often do not want to listen to explanations from the company. Nevertheless, their findings are converted into points that are converted into dollars that are assessed against the operator as proposed civil penalties. Because they are only proposed, and because only the Review Commission can actually assess penalties, operators do have a right to contest the penalties, but the time

delays and costs associated with such contests make them prohibitive and they are hardly worthwhile except for the importance of trying to keep the system fair. With new and inexperienced inspectors coming on now, the problem of securing fairness is likely to become much greater.

Other problems stone, sand and gravel operators experience under current law include novel interpretations, changes in longstanding enforcement that come as a complete surprise. The as-manufactured configuration of truck scales, for example, has not been a safety issue for most operators over all the years they have been under MSHA, and we are not aware of any accidents related to scales. Nevertheless, MSHA has recently decided that all scales need guard rails and operators are being cited and fined for their scales not having guard rails. There are many other examples. Under the proposed legislation, exposure to prosecution, criminal as well as civil, seems to be virtually unlimited.

### **Most Recent Draft Provisions**

You asked us for a prompt response to draft provisions you made available to us recently. We are doing our best to give you feedback on short notice. We point to at least a few of the many provisions that we consider inappropriate, excessive or unnecessary as they might pertain to surface and underground stone, sand and gravel (aggregates) operations, which supply building and construction materials throughout the country.

### **Section 102**

The draft revision to section 102 (subpoena authority) does not sufficiently deal with subpoena issues. Limiting subpoena power to inspections and investigations is no limitation at all. What is needed are provisions that guide appropriate use of such power and that prevent fishing expeditions by inspectors who think that by getting into company documents, they may find something they would not find otherwise. The problem is this sometimes means that a company must collect hundreds even thousands of documents. This is time consuming, burdensome, costly and takes people away from more important work including safety work. After all, the burden of collecting such documents will fall on the safety professionals as well as supervisors and management.

The provision is so broadly drafted that any authorized representative (inspector) could demand without limits documents during an MSHA inspection without regard to whether they are required for MSHA compliance or not. Right now, MSHA has a complete and absolute right to documents mandated by law, or the inspector can issue a withdrawal order. This draft provision is so broad that the inspector can demand "information," which can mean documents that do not even exist, that the operator would have to draft just to satisfy the subpoena. It is one thing for MSHA to exercise such authority during an investigation, but such authority should not be available for routine inspections. It could be too easily misused and could interfere with a degree of privacy to which a company should be entitled.

Companies manage with documents. They manage safety with documents. They should not be discouraged from using documents for management. Right now, inspectors will cite companies for violations based on what they may read in required documents. But suppose a company does a safety audit so it can correct deficiencies and make improvements. If an inspector were to demand all safety audits, the company could end up being cited for all sorts of things that either

had not yet been addressed fully or had been addressed, but that fact is not clear from the written record. This would be regrettable and counter-productive, to say the least. It most surely could bring a halt to future safety audits.

### **Section 104**

We agree with the draft provision in section 104(c) that would make independent contractors, rather than the mine operator of the mine property, responsible for reporting the accidents, injuries and illnesses of their own employees. The employer is always the appropriate party, and the party who has the best access to the necessary information.

We do not agree that MSHA should get involved in conflicts of interest issues for attorneys as would inevitably happen under section 104(e). There is no indication that attorney ethics and state bar requirements do not fully address these issues. There certainly have been no problems that we are aware of in the aggregates industry. It is important to understand that a supervisor, for example, could do something that an inspector decides is due to aggravated conduct (unwarrantable). After internal investigation, the operator may decide that there was a violation, but no unwarrantable failure. Under such circumstances, the operator will not want the unwarrantable failure on its record and will contest.

The operator's primary witness will be the supervisor. The supervisor may be separately charged in a case seeking an individual civil penalty for an alleged "knowing" violation. Everyone will agree on the facts. These cases will be tried together. It is completely appropriate for one attorney to handle the cases for both parties in a single consolidated proceeding. Judges hear such cases all the time. The provision in 104 (e) would inappropriately inject the government into attorney-client relationships. Worse yet, it seems designed to have an obstructive and chilling effect on perfectly legitimate and necessary procedures.

### **Section 201**

Regarding Section 201 (significant and substantial violations), this seems to allow even administrative requirements to be subject to highest levels of enforcement. We have a hard time imagining why this would be necessary. If elevated charges are to be made, such charges should be confined to standards that are produced as result of the very detailed and deliberate rulemaking required for mandatory standards.

### **Section 202**

Regarding Sec. 202 (Pattern of recurring non-compliance or accidents), the deletion of surface facilities should be expanded to include underground stone mines because they do not pose the risks of coal mines and do not have a history or record of comparable violations of law, standards or regulations. They are inspected by the same inspectors as inspect the surface stone operations. They do not have the complexities or hazards that coal mines have.

### **Section 301**

Regarding Sec. 301(b) (doubling penalties up to maximum for mines on pattern of violations following any review subsequent to the first performance review), this appears to be a "heap on"

provision. Like all of the other new pattern provisions, this is no more necessary or appropriate for underground stone than it is for surface stone, sand or gravel.

### **Sections 302 and 303**

Regarding provisions for criminal prosecutions of mine operators, there is no justification for the reduced threshold of “knowing” instead of “willful” based on anything that has happened at aggregates operations. They have not been criminally prosecuted in the past because they have not conducted themselves in ways that would warrant such prosecution. However, new laws could spur inspectors of these operations to try to find criminal conduct where none exists.

As indicated, aggregates operators already experience special investigations for relatively trivial matters. While these may end without a decision to prosecute, the anxiety and costs associated with these investigations are disproportionate to any potential for finding actual knowing misconduct. At the same time, the term “knowing” presents such a low threshold that almost any violation could be designated as falling into this category.

### **Latest Alteration of 303(a)**

Of particular concern is the latest proposed language in the chairman’s mark. We find this more problematic than anything we have seen thus far. Language in the bill is excessively broad, open-ended, undefined and goes far beyond existing law. Applied to any situation with after-the-fact analysis, even a perfectly good faith action or instruction by a supervisor that turns out to be a mistake or ill advised could be construed as a criminal act, particularly if something unanticipated happens.

### **Section 303(b)**

Regarding Sec. 303 (criminal penalties for retaliation), the increases in penalties seem arbitrary and unjustified. Clearly, miners need to be protected from discrimination related to safety activity. However, existing law has not been shown to be deficient with respect to aggregates operations. To provide for criminal prosecution with respect to protections for miners could occasion misuse, manipulation and even, conceivably, extortion against operators.

Under current law, it is relatively easy for a complainant to prove a case in civil terms. If an operator disagrees that there was discrimination, there is a notable burden to affirmatively prove that discrimination did not occur. If the miner has been discharged, that miner will be immediately reinstated. If the miner’s case is proved ultimately not to have merit, the operator has no recourse. Now the law would increase consequences for operators by providing minimum civil penalties and even “exemplary” damages. To add criminal sanctions goes beyond the pale.

It should not be forgotten that mines are perfectly legitimate, serious businesses that provide for the needs of the American public. There is probably no industry more safety conscious. No doubt the long history of government regulation has a lot to do with this, but without there being a showing of a need specific to our industry, criminalizing actions alleged to be discriminatory based on safety activity goes too far. It must be remembered that, for all practical purposes, everyone one at a mine engages in protected activity of one sort or another everyday.

Almost anyone could allege that discipline or discharge was pretextual. Employers find that when businesses decline and they need to lay off workers for the company's economic survival, claims suddenly arise from unexpected quarters. Day to day in good times, operators must look to the proper conduct of work. Miners who perform a particularly unsafe act are often subject to summary discharge. However, a potential for criminal penalties could induce employers to keep even unsafe employees in the workplace for fear of a spurious but devastating discrimination claim from a miner seeking to undo his firing.

### **Section 305**

Regarding Sec. 305 (interest on contested citations), we believe that if it is right for MSHA to demand payment of interest on assessments due after an operator loses a contest, then it's also right for MSHA to pay the operator the same interest rate if the operator wins the contest. Also, there should be no interest if the operator proceeds as expeditiously as possible. Certainly, an operator should not be liable for excessive interest payments by reason of delays occasioned, not by the operator, but rather by MSHA, the Solicitor or the Commission, or due to any other cause outside the operator's control.

In our view, to be truly successful, a regulatory system should engender respect from the regulated parties. Respect is dependent on fairness and opportunities to ensure fairness. The contest process before an independent Commission is an indispensable part of this. In contrast, provisions that create a chilling effect, or deter or punish efforts of any party to obtain review are wholly without justification.

As a minimum, there must be clarification as to what happens if the operator "prevails" partially, *e.g.*, the citation is modified downward in terms of gravity or negligence. These are things that operators really care about and will contest (previously seek conference on) virtually without regard to penalty. What happens if the operator wishes to obtain review without regard to any potential civil penalty reductions? Presently, many cases are settled by changes in findings that the operator disagrees with but no penalty change.

We should add that currently, it is almost impossible for an operator to obtain a hearing without challenging the civil penalty. Payment of penalty moots any pre-penalty contest, and pre-penalty contests are not heard typically unless and until there is a proposed civil penalty. Operators care about fairness to the point that they are prepared to spend more than the amount of any penalty to seek review. Of course, operators want fairness in penalties as well.

### **Section 505**

Regarding Sec. 505 (training), would impose further burden and expense on mines considering that all such training will have to be done by outside third party providers if not the government. Moreover, the level of distrust that this implies is wholly unwarranted. We are not aware of a single circumstance where a stone sand or gravel company tried to provide less than the required level of instruction regarding miners' rights.

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## **Attachment 2**

# **Statement of the National Stone, Sand and Gravel Association For the Record of the House Education & Labor Committee Hearing on H.R. 5663 Miner Safety and Health Act of 2010**

**July 13, 2010**

Mr. Chairman and Members of the Committee:

This testimony for the hearing on “H.R. 5663, Miner Safety and Health Act of 2010” is offered on behalf of the National Stone, Sand and Gravel Association (NSSGA).

By way of background, the U.S. Geological Survey reports that NSSGA is the largest mining association by product volume in the world and represents the crushed stone, sand and gravel – or construction aggregates – industries that constitute by far the largest segment of the mining industry in the United States. Our member companies produce more than 90% of the crushed stone and 75% of the sand and gravel consumed annually in the United States. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs thus 70% of our nation’s counties include an aggregates operation.

Aggregates are ubiquitous and essential to the built environment. Currently, the construction industry is suffering the highest unemployment level of any industry sector – 21.1% – more than double the national average. According to the U.S. Geological Survey, an estimated 317 million metric tons (Mt) of total construction aggregates were produced and sold in the United States in the first quarter of 2010, a decrease of 11% compared with that of the same period of 2009. The estimated annual output of aggregates in 2009 was 1.92 billion metric tons (Gt), a 23% decrease compared with that of 2008. Companies in our industry have had layoffs for the first time in their history. Although the Reinvestment and Recovery Act has helped to keep the aggregates industry from falling into a deeper recession, if the stimulus funding runs out without an extension of the surface transportation law (the current extension of transportation law expires Dec. 31, 2010), more job losses unfortunately cannot be prevented unless home, office building and commercial construction soar by that time..

We believe that introduction of H.R. 5663, “Miner Safety and Health Act of 2010” misses an opportunity for meaningful, bipartisan mine safety reform. Instead, H.R. 5663 proposes overly broad statutory changes that will adversely affect all mining, and particularly the aggregates production industry. We would submit that the bill’s focus should be on requiring recalcitrant mine operators to bring their operations into compliance with current safety and health laws and practices.

This bill includes new increases in penalties just four years after passage of the MINER Act in 2006. Since 2006, penalty assessments for aggregates operators have more than doubled to

\$17.4 million in 2009. Also, the bill establishes two new funds. The dollars required for these funds are dollars that will not be spent on hiring workers, and making needed investments in safety and health. In addition, the bill lacks provisions for compliance assistance, calls for several rulemakings and includes an unprecedented increase in the authority of the Secretary of Labor. We believe it is premature to grant more authority to a regulatory regime that President Obama recently said is deserving of more review before conclusion of the studies into the cause of the West Virginia coal mine disaster.

NSSGA and its members continue to be committed to providing the safest and healthiest work environments possible. This commitment is demonstrated by NSSGA's work with the U.S. Mine Safety and Health Administration (MSHA), primarily through the MSHA-NSSGA Alliance for education and training. The agreement, into which MSHA entered, is said to be the most productive such relationship MSHA has with industry. Through the alliance, NSSGA has worked collaboratively to perform analysis on safety data, develop "best practices" materials, and communicate to members the importance of safety and health.

This commitment has paid off. In 2009, aggregates operators achieved the lowest total injury incidence rate on record: just 2.46 injuries per 200,000 hours worked. It is the ninth consecutive year in which aggregates operators reduced their injury rate from the previous year. Also, through sustained management's emphasis on safety and health, employee training and education, and other programs, we have reduced the number of aggregates operator fatalities to seven, the lowest number ever. While we are proud of this improvement, we will not rest until we have reduced the number of fatalities to zero.

NSSGA and its members have long recognized the critical importance of worker safety and health and historically have devoted an enormous amount of effort and resources to ensuring the wellbeing of our employees. This unequivocal dedication to safety and MSHA compliance was demonstrated when the NSSGA board of directors authorized a company-by-company Safety Pledge campaign to cut the aggregates industry's national incidence rate in half. There are more than 10,400 pits and quarries in this industry, both small and large. They have achieved unprecedented levels of safety, and under no circumstances do they pose the hazards of underground coal mines.

While not intending to be in any way pejorative towards coal, an essential element of the nation's energy mix, we believe that it is critical to point out distinct differences in the risks posed by aggregates operations from those posed in coal mining. For instance, while more than 40% of all coal mines are underground, underground aggregates (stone) mines constitute slightly less than one percent of all aggregate mines. Underground stone mines are cavernous and contain no methane or other flammable gases. Nor is stone dust combustible. Full-sized off-road equipment from dump trucks to front-end loaders is able to drive into underground stone mines; ventilation issues are not comparable to underground coal or other tunneled mines. Also, accidents involving the death of more than one aggregates worker at a time are not characteristic of our industry. They are so rare the last time there was a double fatality accident in the aggregates industry was more than a dozen years ago. According to MSHA's online records, the last time there was an aggregates disaster – classified by MSHA as an accident causing five or more fatalities – was almost 70 years ago, in 1942. To help illustrate these and other substantial distinctions

in mine structure, mined materials and operational methodologies, we invite you and your staff to tour an underground stone mine.

We applaud the Committee's exploration of issues tied to safety in the nation's mines; however, we are concerned with a number of provisions of H.R. 5663. Fundamentally, we believe the bill misses the opportunity to improve the regulation and enforcement of mine safety. This bill seems to have been spawned exclusively by the coal disaster at Upper Big Branch. Yet, the safety issues confronting the aggregates sector are fundamentally different from those of the coal sector.

For instance, expansion of the "significant and substantial," or "S&S" category, to apply in cases in which there is a reasonable possibility that such violation could result in *any* injury or illness, no matter how minor, is inappropriate. It unnecessarily broadens this important classification and eliminates the current requirement that an S&S violation be of a "reasonably serious nature." If this were to be enacted, most violations would satisfy the heightened designation of "S&S." An on-going concern of ours has been that we believe that S&S is very inconsistently applied, and we fear a broadening of this powerful provision.

Further, we think there would be an incentive to ever safer behavior and attentiveness as we get to lower and lower incidence rates if a provision could be added to the law for a *de minimis* violation. An alternate solution would be to provide inspectors the discretion to issue a "warning" so that something can be abated at a timeframe appropriate without resulting in a citation. We believe the law has been lacking in this discretion and the ability to downgrade a violation is a must to encourage and focus inspectors, as well as workforces and management to concentrate on compliance, prevention and elimination of issues based on level of risk. .

The process of making violation of *any* requirement of the Act or regulations – no matter how minor – a felony, and reducing the threshold for criminal liability from "willful" to "knowing," would be counter-productive. This provision would criminalize the management of a mine, especially mine personnel who first encounter and assess particular conditions or practices. It would make even minor housekeeping and paperwork violations criminal felonies. We contend that, at the least, a felony should require that the defendant have knowledge that his actions exposed a miner to a reasonable risk of serious injury or illness or death.

Expansion of section 110(c) provisions dealing with personal liability of any officers, directors or agents of the company is overly broad. It would extend liability not only to violations authorized or carried out by officers but also to "any policy or practice that contributed to such violation," without any further definition of the meaning of this phrase. This provision apparently would criminalize entirely legal policies that might be deemed to have "contributed" to a violation.

Increases in maximum criminal and civil penalties are unwarranted for a sector that has continued to reduce injury and illness rates that have been declining for ten years (and six before passage of the MINER Act.) There is no evidence that current penalties – when actually imposed and collected – are insufficient to deter and punish improper behavior.

The overhaul of the Pattern of Violations (POV) provisions is overly broad and actually will result in perverse consequences that will harm aggregates without improving safety. If a mine is

placed on POV status, the *entire mine* (not just the portion with safety issues) would be closed down until it can comply with an MSHA remediation order. Penalties and inspections are doubled while a mine is on POV status. The legislation would allow MSHA to impose rules that base a finding of a POV on an unspecified combination of violations, orders, accidents or injuries, without identifying the degree of risk of injury or illness that should lead to such status. While the current POV program needs revision, this represents regulatory over-reach and will lead to unnecessary mine closures. At the very least, pattern status should be limited to mines where a clear pattern of violations, orders, or accidents indicates a significant risk to miners of serious injury or illness or death. The consequences of pattern status are so severe that they should not be imposed due to a “pattern” of minor violations that do not risk significant harm.

NSSGA could support a well-defined system through which a sustained pattern of violations representing genuine risk could lead to a mine closure. But, we would not support the granting of authority to MSHA to shut down a mine without third-party review.

Increases in penalties for retaliation against whistleblowers should be refined. The Mine Act currently prohibits retaliation against whistleblowers, and provides for compensation of miners when sections of the mine are closed for safety reasons. While we support a reasonable extension in the period of such compensation, it is unreasonable to require compensation for an indefinite period, especially if there are no means of recouping those costs in the event that there's a vacation of the citation that will have led to the closure.

Expansion of subpoena authority to “any functions under this Act” is too open-ended. As written, there are no criteria or limitations for this use of subpoena power. NSSGA could support closure of a possible loophole, but does not support a blanket, vague extension.

Making advance notice of inspections a federal felony is unwise. It is unclear what constitutes advance notice. We support enforcement action against anyone who attempts to subvert mine inspections. However, the definition of what constitutes “advance notice” must be thoughtfully defined. Confidential communication is a primary method by which miners protect themselves, and keeping any information completely confidential in the close confines of a mine or mine site is a challenge. For instance, it is commonplace to inform miners when visitors are on-site, and it may be necessary to summon certain managers and employees to meet with the inspectors as they arrive. Any number of other actions could be incorrectly interpreted as subversive; thus, a much improved definition is necessary to prevent well-intended communication among miners from being construed as inappropriate.

Limitation on use of the same attorneys by operators and operator company employees for defense against alleged violations is ill-advised. This provision injects MSHA into the attorney-client relationship, and is unnecessary because bar standards already prohibit attorneys from representing multiple clients with conflicts of interest, unless there is mutual consent of all parties.

Requirement that operators include independent contractors in injury and illness reports is not appropriate. The Mine Act currently gives production operators and independent contractors equal status and responsibilities under the law. Yet, this requirement constitutes a substantial challenge administratively, as the HIPAA Act prohibits operators from obtaining the required health information and accident details on employees of independent contractors.

If the Act is amended with such a broadening of enforcement powers, it may actually make the problems with the underlying statute worse, which we believe should focus on areas of highest risk first (save lives), then prevent injury or illness, and finally to assure legal requirements are being met. The potential for overreach, regulatory or enforcement misjudgment, reduction of compliance efforts on priority areas of highest risk and instead a very scattered focus on any and all issues from a broken mirror to an uncovered trashcan could result. This would lessen, not improve, our culture of safety.

We appreciate the opportunity to submit this statement for the record of the hearing on H.R. 5663, the Miner Safety and Health Act of 2010.

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Attachment 3

**DRAFT**  
**NSSGA Amendment Language for**  
**H.R. 5663, Miner Safety and Health Act of 2010**

Option 1

Sec 2. Except in title VII and as otherwise expressly provided, whenever in this Act an amendment is expressed as an amendment to a section or other provision, the reference shall be considered to be made to a section of the Federal Mine Safety and Health Act of 1977 (30 U.S.C 801 et seq.) **and such amendment shall be applicable only to such mines as are covered under Titles II and III of that Act (30 U.S.C. 841 – 878)**

or

**and such amendment shall be applicable only to such mines as are defined in section 3(h)(2) of that Act (30 U.S.C. 803(h)(2))**

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