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TESTIMONY OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION CONCERNING MSHA'S PROPOSED RULE FOR ALCOHOL- AND DRUG-FREE MINES

**October 14, 2008
Arlington, VA Public Hearing**

On behalf of the National Stone, Sand & Gravel Association, I am pleased to present the following testimony concerning the Mine Safety & Health Administration proposed rule to establish policies, prohibitions, testing, and training requirements to establish alcohol- and drug-free mines in the United States, as published in the September 8, 2008, Federal Register. My name is Anne Kelhart and I manage safety and health for the Martin Stone Company in Bechtelsville, Pennsylvania, and also serve as Chair of NSSGA's safety and health committee.

NSSGA is the world's largest mining association by product volume. Its member companies represent approximately 118,000 working men and women; more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. More than three billion tons of aggregates were produced in 2007 at a value of approximately \$21.5 billion, contributing nearly \$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. Our members operate in every state in the nation. Of the 23,054 mines in this country, nearly half of them are in the aggregates industry, so NSSGA's membership will be heavily impacted by this proposal. A vast majority of these aggregate mines are classified as small businesses, both by the U.S. Small Business Administration's definition and by MSHA's own criteria. NSSGA applauds MSHA for tackling this issue in a proactive manner, and notes that its predecessor organization, the National Stone Association, served on a tripartite working group with MSHA, unions and state government representatives in the early 1990s to advance substance abuse prevention in mining.

We are pleased to see that MSHA has once again resumed work in this critical area. This testimony will focus on some of the main concerns that NSSGA has about the proposal, and we will submit more detailed written comments covering these issues, and additional matters pertaining to the rule, before the October 29 deadline.

Although many of the provisions of this proposed rule are acceptable, others need major work because of infeasibility, or because they run contrary to established employment law practices. While many of our larger corporate members already have substance abuse prevention programs in place and may utilize drug and/or alcohol testing under certain circumstances, many of the smaller companies do not yet have such a framework in place.

Therefore, we believe that MSHA has considerably underestimated the cost of the proposed rule, particularly its cost impact on smaller mines. We urge MSHA to reconfigure its regulatory impact analysis once more. Cost data on this proposal can be obtained through the notice-and-comment process.

Scope of Rule

NSSGA agrees that any proposal should apply in equal measure to coal and metal/nonmetal mines, both surface and underground. There is no basis for affording lesser protection to some miners than to others. Under the substance abuse testing/training requirements, MSHA would cover all miners who receive comprehensive training and who perform safety-sensitive job duties. Comprehensive training is defined as 24 hours training for surface mines and 40 hours for underground mines. However, the definition in 30 CFR 66.3 covers (quote) "any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death." For all practical purposes, this covers virtually everyone at the mine site. Mines are a dynamic work environment where even crossing the road to go to the parking lot could result in death due to a momentary lapse of concentration in the midst of heavy equipment. If MSHA intends to cover everyone at the mine who receives comprehensive Part 46 or 48 training, they should simply state that. Introducing subjective criteria that allows for arbitrary and capricious after the fact interpretation forces an operator to guess at an interpretation.

Independent Contractors

In general, we have concerns about how this rule will be enforced as it pertains to independent contractors; particularly those persons performing work at mines and whose employees become "miners" by definition - subject to comprehensive Part 46 or 48 training - but who do not normally work within MSHA jurisdictions. Those contractors are mine operators under the Mine Act, but too often of late, MSHA has issued duplicate citations to the production operator for contractor violations, invoking their unreviewable discretion under the 2006 *Twentymile Coal* decision of the U.S. Court of Appeals, D.C. Circuit. It will be quite problematic for a production operator to verify compliance with certain provisions of this rule, such as the drug testing of contractor employees, for short-term contractors whose coverage is triggered by being at the mine site more than five consecutive days. Privacy issues are just one of the obstacles faced by mine operators checking contractor compliance, although review of substance abuse programs and training records may be possible. A larger concern is that mining companies in rural areas do not have a large number of specialty contractors to choose from and if a contractor who is normally under OSHA jurisdiction will have to put an entire substance abuse program and testing framework into place just to perform a couple of weeks' work at a mine, it is likely to simply decline the work. This will not only create problems for mine operators in getting quality contract work done by such specialty sectors as crane companies, electricians, drillers and blasters but could possibly place miners at increased risk. MSHA needs to reconsider the scope of this rule, as it pertains to contractors, and perhaps come up with a different definition of "miner" that will exclude these short-term contract workers - whose work may undoubtedly involve safety-sensitive areas - or else affirm in the final rule that the "host" mine operator will not be cited for infractions by independent contractors who work at their mine sites.

Employment Law Issues

As noted, many of NSSGA's member companies have programs in place, and many of these are modeled on the U.S. Department of Transportation requirements for commercial drivers, since often such "CDL" employees are also miners. Quite a few of these programs, however, include a zero tolerance or one-strike-and-you're-out provision for those who have positive drug or alcohol tests. Although reinstatement is often made available to those who self-report a problem and go through appropriate treatment and counseling, this is not the case for those caught as the result of a random or post-accident test. The majority of states in this country have basic "employment at will" principles wherein all employees can be terminated at any time, with or without cause. The exceptions are those workers subject to an employment contract for a period of time, subject to a collective bargaining agreement or subject to other company-specific disciplinary procedures that preclude termination for certain offenses. Many companies also have seniority systems that dictate, in the event of layoffs, the order in which workers will be released.

Under MSHA's proposed rule, a worker who has a positive drug test gets preferential status when compared to workers who have not broken drug or alcohol rules insofar as the company would be required to preserve the miner's job while he/she obtains treatment and to reinstate the miner afterwards. The proposal is silent on what would happen if layoffs occur in the interim, which might have otherwise resulted in the layoff of the miner. But the rule does at least acknowledge that if the miner could be terminated for a different infraction, the company could legally take such action.

More significantly, however, we believe that the mandatory reinstatement provision actually will weaken existing programs and encourage drug and alcohol use by making mines a "safe harbor" for users - at least after the first positive test and completion of treatment. MSHA is, we believe, without authority to alter fundamental concepts of employment law that are well-established through case law in every state and at the federal level. If companies wish to retain a "one-strike" provision in their programs, they should be free to do so. Therefore, the provision in 66.400(b) must be stricken from this rule.

Drug Testing

MSHA should also permit existing programs that adhere to DOT "five-panel" criteria to continue, unaltered, including the decision to test for the same drugs as DOT requires under such programs, plus alcohol. This is also consistent with state mining laws in Kentucky and Virginia. If mine operators wish to add the other drugs listed by MSHA, they should be allowed to do so, after acceptable floor levels of synthetic opiates have been determined. But under no circumstances should mine operators be required to deviate from DOT testing criteria. The Secretary should not be permitted to add extra substances to the testing mandates in the future, unless she does so through formal notice-and-comment rulemaking.

This rule anticipates a high volume of drug tests that will be at the mine operator's expense, including various pre-hire, random, post-accident, return to duty, and suspicion criteria, plus the requirement to test any "positive" workers six times in the following 12 months. While we agree that the operator should pay for most testing, we believe that a "positive" tested worker should have to bear the expense for his/her monitoring if the miner returns to work following

treatment. Moreover, we question whether there are sufficient testing companies and Medical Review Officers available in many rural areas to handle the volume of tests in a timely manner. Most aggregate operators may not have a current relationship with a MRO. The rule is also quite burdensome in requiring an MRO to contact all doctors that may prescribe medications to each miner at the worksite who is subject to drug and alcohol testing. The feasibility of this must be re-examined when finalizing this rule.

NSSGA is also concerned that the "post accident" criteria is too broad, as it would mandate a test for any reportable injury, regardless of severity, as long as it triggered "medical treatment" under Part 50. We suggest that this testing trigger be limited to those incidents that are "immediately reportable" under 50.10 and which are defined as "accidents" in 50.2(h). Companies should be free, of course, to implement more stringent post-incident testing if they already do so under their existing programs and consistent with DOT criteria.

We also disagree that MSHA should be authorized, if it initiates an accident investigation in a timely manner, to order drug testing of any persons it believes contributed to the accident. This is overly broad and interferes with the employer/employee relationship. As a practical matter, neither MSHA nor the operator will be able to complete any type of adequate "root cause" investigation in the short window of time when drug/alcohol testing can be performed. In light of this, MSHA should defer to the employer's judgment on who must be tested in these situations.

NSSGA also has concerns about worker privacy issues, particularly since the rule envisions MSHA inspectors having access to information about positive tests. We understand that MSHA is exempt from the Health Insurance Portability and Accountability Act, also known as HIPAA requirements. However, there should still be some assurance that inspectors will not reveal one miner's personal information to others or through public release in a freedom of information act request. There should be sanctions available against inspectors who violate miner privacy interests.

Training

MSHA suggests that supervisors must receive twice the training - both initially and on an annual basis - than other miners receive relevant to substance abuse prevention, and indicates that such training must be in addition to the normal training required under Parts 46 and 48. Effectively, this increases annual refresher training from 8 hours to 8.5 hours for miners and to 9 hours for supervisors. There is no basis for expanding the new miner training or annual refresher training duration requirements. Many companies already cover substance abuse as part of their initial and refresher training and because MSHA acknowledges that this is a significant safety issue, it is appropriate to include this within the existing training framework. This should be clarified in the rule, and the same duration of training should be provided for both miners and supervisors so that separate training programs will not be required relative to substance abuse, and changes in the training plans will not be required. NSSGA agrees that any person training on substance abuse prevention should be competent to do so.

Conclusion

In conclusion, NSSGA supports a drug/alcohol free workplace in the mining industry and many of its members have been proactive in this area. We urge the agency to modify the proposed rule in a way that existing programs can continue to be used successfully, that any rule is consistent with DOT and state law requirements concerning both substance abuse prevention and basic concepts of employment-at-will, and that the privacy rights of all involved are adequately protected. Historically, NSSGA has worked with MSHA on a number of initiatives, including the initial work on this topic in 1990 and again in 2000 during the promulgation process for Part 46. We look forward to working with MSHA again to achieve the goal of a drug/alcohol free workplace. Thank you for considering our comments today and we will be pleased to answer any questions you might have.