



Natural building blocks for quality of life

Statement of
The National Stone, Sand & Gravel Association
To the
U.S. Senate Committee on Health, Education, Labor & Pensions
For a
Hearing on: “Putting Safety First: Strengthening Enforcement and Creating a Culture of
Compliance at Mines and Other Dangerous Workplaces”

Tuesday, April 26, 2010

On behalf of the National Stone, Sand and Gravel Association (NSSGA), we offer this testimony for the hearing on “Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces.”

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 percent of the crushed stone and 75 percent of the sand and gravel consumed annually in the United States. There are more than 10,000 construction aggregates operations nationwide. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs, so 70 percent of our nation’s counties include an aggregates operation. Of particular relevance to this hearing is the fact that 70 percent of NSSGA members are considered small businesses.

Unlike coal mines, 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 cavernous chambers for access by large equipment and to 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 mine openings. Because of the large open spaces and mining methods, mechanical mine ventilation generally is not required since natural ventilation provides an atmosphere in which people can work.

NSSGA and its member companies go to great lengths to provide safe and healthful environments for aggregates workers. Implicit in this effort is the industry's commitment to comply with all MSHA regulations and standards tied to worker safety and health.

The first priority of the aggregates industry is, and continues 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. Since 2000, the rate of injury-illness incidence for aggregates operators has been reduced by 41 percent, to 2.46. While fatalities in the aggregates industry continue to decline—seven in 2009—we believe even one fatality is too many and we are working tirelessly to take that number to zero.

The improvement in the aggregates industry safety record is attributable to several factors. The first is that aggregate companies understand that to stay competitive in today's business environment, they must provide a safe and healthful workplace or they will not be able to attract the best workforce possible. Companies know that to remain competitive in America today, you must first care about your people.

NSSGA developed and agreed to a set of safety principles to assist member companies in their efforts to instill safety consciousness as a top priority in their individual organizations as well as to the industry as a whole. In addition, a safety pledge was developed in 2008 incorporating the safety guiding principles. More than 70 percent of the NSSGA member company facilities are managed by CEOs who signed the NSSGA Safety Pledge, thus 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. 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 that 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 three day-long workshops on monitoring for both noise and dust, and diesel particulate matter. 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.

Because there's been much discussion of the Federal Mine Safety and Health Review Commission since the coal mining tragedy of April 5, we offer a number of suggestions for alleviating the case backlog at the Commission.

NSSGA is concerned about the delay in producers' ability to obtain from the Federal Mine Safety and Health Review Commission (FMSHRC) a timely hearing on alleged violations.

We applaud Assistant Secretary of Labor for Mine Safety & Health Joseph Main for his goal of improving training for inspectors on behalf of enforcement consistency. We understand that a number of contests from aggregates companies are due to strong disagreement on the basis of the severity finding on a citation. Inspectors need to do a proper job of evaluating and clearly identifying what is "Significant and Substantial" (S&S). NSSGA hears repeated expressions of concern that S&S is being over-written.

Also, we would like to see the agency communicate more proactively with stakeholders about agency changes in enforcement interpretations. Citations should not serve as first notice to stakeholders that there has been a change in the agency's interpretation of what is required to be in compliance. Rather, the agency should notify all stakeholders of such changes in interpretation before enforcement begins so that companies and their workforces are afforded adequate information needed for compliance.

Additionally, we recommend that MSHA reinstitute the process of conferencing citations before assessment of penalties. Before it was changed, pre-penalty conferencing enabled operators to close out on inspections satisfactorily without having to add to the Commission's docket.

Further, we encourage the agency to consider changes in civil penalty procedures hastily put in place contemporaneously with enactment of the MINER Act. A major concern, for example, is the regulatory provision specifying how an operator's history should be brought into calculation of civil penalties. While we understand the importance of scrutiny of every company's history in reviewing violations for assessment, the present procedure of assigning maximum penalty points for a fifteen-month average of 2.1 violations per inspection day is having a disparate and unfair impact on many companies. Take a small company, for example, that in its last two inspections of one day each in the previous 15 months, has a total of five violations for a total of two days of

inspections. This will cause 25 points to be added to this small company's civil penalty calculation, which can translate into very big fines. Twenty-five points will convert a \$555 penalty to \$4,099 and it will convert a \$4,099 penalty to \$30,288. There are small companies that have been assessed penalties as high as \$200,000 in a single inspection.

It is understandable that companies will not want a single underserved violation in their history and that they will do everything in their power to contest questionable citations.

We are committed to the notion that operators have every right and need to contest citations with which they do not agree. We hasten to add that history is by no means the sole issue. Every undeserved subjective finding by an inspector will add underserved points to the company's penalty calculations. These are unaudited findings and they represent big money liability. Only by seeking review before the Federal Mine Safety and Health Review Commission – the agency with exclusive authority to assess penalties – can an operator have a voice in the process. Indeed, even MSHA now is telling operators that if they want a conference regarding a citation, they will have to contest the citation formally before the Commission. We have mentioned only some of the concerns of operators that are prompting contests, but the system as a whole is deemed unfair and the only avenue that operators have to bring issues to light is through the contest process. NSSGA would be pleased to work with MSHA to address this and possible solutions.

Also, we offer the attached article, which was published in *Mine Safety and Health News* on Jan. 25, 2010. It was authored by an NSSGA Manufacturers and Services Division member and discusses the background of the backlog, relevant legal issues and includes suggestions for addressing the backlog. For your information, the author participated in an Energy and Mineral Law Foundation Special Institute (March 23 and 24) in Washington, D.C., with attorneys from the Solicitor of Labor's office and Judges from the Federal Mine Safety and Health Review Commission. The goal of the panel was to constructively address civil penalty case backlog issues and how they might be resolved for everyone's benefit.

Additionally, we cannot mention either our commitment to – or achievements in – worker safety and health without citing the importance of effective compliance assistance by MSHA. In that vein, we respectfully urge that the Administration change course on plans to shut down the Small Mine Office (SMO): we believe the provision of quality compliance assistance geared to smaller operations adds significantly to the safety and health of our workforce.

SMO compliance assistance has helped operators 1) provide safer and more healthful work environments; 2) boost compliance; and 3) experience smoother inspections because the operation and workforce were better prepared. Moreover, we're pleased that SMO works on a key priority of yours, the development of a written safety and health plan for every operator. As illustrated at www.msha.gov, SMO's compliance assistance correlates to more rapid reductions in injury/illness incidence rates than for those of the overall aggregates industry.

NSSGA and our state aggregate association partners find SMO's work to be critically important to continuing improvements in safety and health among aggregates industry workers.

This guidance was considered most useful when it could be provided without "coordination" or immediate follow-on by an inspector. Operators are concerned that, if compliance assistance visits are followed immediately by enforcement action, inspections will target the very issues focused upon in the compliance assistance visit before adequate time allows for resolution of deficiencies. Presently, it is our understanding that SMO provides compliance assistance without specific knowledge of when an inspection may be forthcoming. This allows the development of greater trust that the assistance is offered for the safety and health benefit of the workers, and with the purpose of enhancing compliance.

SMO's work has enabled companies to more readily comply with pertinent regulations and standards, the enforcement of which has dramatically increased since enactment of the MINER Act. This is critical. Given that many NSSGA member companies – replete with strong staffs involved in safety and health training and compliance – are themselves facing increased compliance pressures. One can only imagine the burdens weighing on small operators.

NSSGA is in receipt of more than one hundred stories of SMO personnel having delivered effective compliance assistance. Outlined below are just a few testimonials from around the country:

- Small mines officer helped us quickly bring our operations up to speed on safety.
- Assistance on training plans made for a thorough understanding; for instance: he delivered easy-to-understand explanations.
- Officer conducted a thorough examination via a courtesy walk-through on the range of things inspectors would be checking for.
- Because of our visit with the SMO representative, we had a zero citation inspection.
- The SMO representative provided guidance on updating records and training materials.
- The instruction was so helpful that our contractors have called to express thanks.
- One inspector took the trouble to make a second visit to our facility because the first day's provision of information had been so overwhelming.
- Officer helped us organize all of our training information.
- Officer made my safety training work much more efficient.
- Officer streamlined our paperwork organization so that there will be fewer headaches in the future.

These testimonials describe the qualities of SMO representatives, reflecting favorably on the agency and its mission:

- Very professional, and business-like and added a measure of personal concern.
- Helped us realize that our full compliance was possible.
- Helped us solve our safety problems on numerous occasions.
- After our meeting, I feel really good about spreading the good news.
- I feel that you could not put a monetary value on the small mine program because it does what it is designed for, to save lives, reduce accidents, and help improve operator awareness.
- I can feel comfortable calling this person, instead of an inspector; he was genuinely interested in helping.
- Materials he provided are my new best friends.
- Don't know what small miners would do without you.
- [on courtesy walk-through] It's not easy being picky and polite at the same time, but the SMO representative did.

In closing, we respectfully urge continuation of SMO's critical work to boost compliance in smaller operations that are unlikely otherwise have the staff complement sufficient to oversee in-house compliance assistance with the same level of expertise. Most importantly, SMO's continued existence will help us continue our nine consecutive years of improvements in the aggregates industry's injury-illness incidence rates.

Thank you for the opportunity to submit these views.