

NSSGA'S RESPONSE TO HOUSE OVERSIGHT & GOVERNMENT REFORM COMMITTEE CHAIRMAN ISSA'S REQUEST FOR REGULATORY REFORM IDEAS

NSSGA believes that, at this challenging time for our Nation's economy, government should consider the cumulative impact of the costs of compliance before more rules are imposed on industry. This would allow the capital costs and feasibility of compliance associated with a new rule to be more thoughtfully understood both by regulators and stakeholders. Federal regulatory decision-makers must wield their authority with care, and should base regulatory decisions on published, peer-reviewed assessments of risk. Rules thus based on "sound science" - defining the problem as well as a feasible solution to mitigate or reduce risk - may be debated from one scientific perspective or another but the basic rationale of risk may find common ground. We are wary of rules that create more stringent or even unattainable standards without sufficient statistical or analytical justification.

Further, agencies' more frequent issuance of "guidance" that circumvents formal notice and comment rulemaking allows the government to avoid providing needed notice to the regulated and interested publics. In these unfortunate instances, industry, and citizens are bereft of a suitable opportunity to analyze risk, as well as abatement, management and compliance costs. Also, this Government failure to provide notice and comment, leaves no chance for stakeholders to provide input, and/or to assure sufficient time for compliance.

NSSGA members long ago committed to Guiding Principles for environmental compliance, and recognize that the Earth's resources, upon which all of life depends, are finite and that wise environmental stewardship is necessary today to preserve the potential for a quality life for future generations. NSSGA members are committed to full compliance with all pertinent environmental law and regulations. Earlier, NSSGA members committed to Guiding Principles for Safety & Health to assure safe and healthy workplaces and practices for aggregates stone, sand and gravel workers. In this effort, NSSGA since 2003 has worked with the Mine Safety & Health Administration (MSHA) through an Alliance for education and training. Also, NSSGA Member Company CEOs representing more than 70 percent of all operations signed the NSSGA Safety Pledge, committing their companies to contribute to the industry's national incidence rate reduction of injuries by ten percent annually. This work has enabled the aggregates industry to attain nine consecutive years of injury rate reductions from prior-year levels. The last official level was a record low of 2.37 injuries per 200,000 hours worked. The industry leaders and their workforces are committed to continuous improvement.

The following paragraphs outline rulemakings or other practices that our members have found to be overly-burdensome, costly, or unnecessary. We have attempted to categorize them in several general areas, and provide examples for each.

1. ELIMINATE UNNECESSARY RULEMAKINGS

EPA – Regulation of Small Stationary Engines at Area Sources

Background:

EPA's final rule for engines sets strict emission limits and requires performance tests for new reciprocating internal combustion engines (RICE) used to power stationary equipment, including aggregates production equipment. EPA's success in air quality improvement has typically come from regulating very large or mobile sources. Regulating very small sources is of limited value environmentally, in comparison to the high cost to comply for affected industries. The impact of emissions from these types of smaller engines are usually limited to the immediate vicinity of the emission source itself; therefore, EPA's rationale that this rule is needed to protect public health beyond the property lines of the facility are unfounded.

Impact:

Previously unregulated small engines at tens of thousands of facilities, including aggregate operations, will need to undergo costly testing and upgrades, with very little positive net impact on overall air quality.

Recommendation:

EPA should exempt engines at minor industrial sources of air emissions from this rule as the cost-benefit analysis of environmental benefit versus economic impact does not justify the agency's action.

2. ELIMINATE DUPLICATIVE STANDARDS

MSHA – Mandated Use of Safety & Health Management Systems

Background:

The agency is preparing to propose a rule mandating the use of safety and health management systems (SHMS), on top of the standards mandated by the Mine Act. The effect could be that of duplication, given the wide tentacles of the Mine Act. The merits of SHMSs are well-documented; in fact, almost a half dozen NSSGA members testified at recent MSHA public meetings about the utility of SHMSs that these companies created for themselves. However, this rule will likely produce a one-size-fits-all approach to operators managing their facilities to reduce injuries and illnesses; whereas, operators need flexibility to tailor their efforts at hazards and risks unique to the size and complexity of their facilities.

Impact:

Once a SHMS rule is implemented, aggregates operators will likely be held to comply not just with the hundreds of standards implemented in support of the 1977 Mine Act, but

additional standards the company has/will have implemented of its own to ensure health and safety vis a vis a SHMS. With continually reduced injuries and fatalities, industry sees no justification for this increased compliance burden.

Recommended Action:

Agencies should not require mandatory adoption of a "one-size-fits-all" rule on SHMSs. This is particularly burdensome to small businesses that do not have the necessity or resources to implement all the requirements of such a system. Rather, SHMS adoption, certainly appropriate to be encouraged, should only be voluntary.

3. FAIR NOTICE SHOULD BE PROVIDED TO OPERATORS WHEN GOVERNMENT CHANGES COMPLIANCE STANDARDS

MSHA – Citations Issued Before Industry is Given Notice of Rule Changes

Background:

MSHA by law (The Federal Mine Safety & Health Act of 1977) is required to inspect all mines (surface operations) two times every year; underground mines are required to be inspected four times every year. Inspectors in the field may be newly assigned to a mining sector and they use their old sector's knowledge to judge their new beat. Or, inspectors may just have been assigned to a new territory, and decide to interpret a standard differently than previous MSHA inspectors had used. [Note: two exceptions in the past year ("Rules to Live By" program, and ramped-up enforcement of 56.5002, standards for compliance with exposure to dust), are examples of the agency having provided fair notice. This should be the rule, and not the exception.] But, if cited for behavior or actions that have previously passed government inspection without any prior notification of the changed interpretation, then operator efforts toward safety, health and compliance needlessly suffer. When the agency whether at the field, district or headquarters level, refuses to provide operators with fair notice of changes in how the agency interprets what is needed for stakeholder compliance, it amounts to a regrettable lack of transparency.

Impact:

Without prior notice, the operator only learns of a changed interpretation once the citation is issued. Two stark examples of this are on the issues of fall protection/safe access for mobile equipment, and berms/guardrails for truck scales. In each case, MSHA wrote citations prior to providing notice to any operators.

Recommended Action:

It is imperative that the regulated sectors be given fair notice of changes in interpretation of standard with which they must comply before citations are issued against the changed interpretations. If the interpretation is so far removed from former interpretation by the

government, as in, creating essentially a new standard or establishing a new level of risk management, more than prior notice should be required.

4. INSPECTOR TRAINING SHOULD NOT ARBITRARILY LEAD TO INTENSIFIED ENFORCEMENT

MSHA – Increased Inspections for Accountability

Background:

With MSHA's problems in cross-training inspectors in the various mining sectors of its jurisdiction, the agency recently has decided to increase reliance on accountability teams to double-check inspector performance. This has spawned harsher enforcement. For instance, MSHA is increasingly elevating less serious non-S&S citations to "Significant and Substantial" designation without valid or sufficient justification.

Impact:

Undoubtedly, this accountability in enforcement focus has resulted in increasing numbers of citations written by MSHA for fear that an inspector might be found to have missed opportunities for alleging violations (e.g., if an inspector is found to have issued few citations than expected at the initial inspection). This comes in the form of follow-up inspections by another group of inspectors, which might include the original inspector, area supervisor and someone from district office, or from another district. A review of data drawn from a period in which industry injury rates continue to fall - shows there has been a 50 percent increase in citations labeled "Significant & Substantial."

This behavior presumes that all workplaces violate standards. Instead of recognizing safe operators, MSHA sends more personnel to write a maximum number of citations. This is a cost not just to the operator (as employees must accompany each person during the inspection, resulting in lost production), but also a cost to taxpayers for a subsequent, unnecessary inspection.

The agency should improve its means of training inspectors on both recognition of hazards, and on the burdens imposed by an undue escalation in evaluations of higher degrees of gravity, negligence, etc., which drive up penalty assessment costs.

Recommended Action:

There should be increased cross-training of inspectors in the various mining sectors of agency jurisdiction for more accurate and appropriate evaluation of risk.

5. METRICS FOR DETERMINING AGENCY'S SUCCESS SHOULD BE INDUSTRY IMPROVEMENTS

MSHA- Industry Improvements in Health and Safety Should be Recognized

Background:

MSHA is focused on demonstrating its success strictly in terms of the number of citations written. But, this metric is flawed. We would submit that a critical criterion in evaluating MSHA's performance is improved safety and health of stone, sand and gravel workers, as demonstrated by commonly used total case incidence rates.

Impact:

Operations are hammered with excessive citations with no agency recognition of the aggregates industry's decades-worth of improvements in reducing injuries and fatalities. We would submit that, if injury and illness rates continue to decline, then so should the number of citations and assessment amounts.

Recommended Action:

The focus should be on improvements in safety and health, not an undue reliance on issuance of citations.

6. AGENCIES' DECISIONS BASED ON LACK OF SOUND SCIENCE**EPA – Proposed Rule to Reduce National Ambient Air Quality Standard (NAAQS) for Particulate Matter (PM10)****Background:**

EPA and their scientific advisory committee are recommending a reduction in the NAAQS for PM 10 from the present level of 150 to either 65 or 75 micrograms of dust per cubic meter of air. This expected change is difficult, if not impossible, to meet for mining, farming, ranching, transportation and other sources of coarse crustal fugitive dust emissions found in parts of the West, Southwest, Midwest and East. The proposed rule is expected in March. EPA admits there is very little health effects data to justify this new standard.

Impact:

Many areas of the U.S. would fall into non-attainment, which would require states to reduce emissions of PM10 or face losing highway funding. Aggregates facilities already use best available dust control technologies to control for air emissions from rock crushing facilities. Most of the PM10 dust is generated from windblown dust from uncontrollable sources such as arid un-vegetated surfaces in rural areas, unpaved roads, and dry land farming and tilling. Industrial sources of PM10 are very small compared to these natural, municipal and agricultural sources. The only option for NSSGA members to reduce PM10 would be to reduce aggregate production and/or limit sales. One NSSGA member estimates that in order to meet this reduced air standard, they would

have to reduce production by more than two-thirds, thus eliminating a majority of jobs at each facility.

With the anticipated PM 10 NAAQS, NSSGA member companies will have extreme difficulty in expanding existing facilities or opening new ones to meet construction demands for aggregates. Prevailing background levels of PM10 due to natural dust sources, unpaved roads, agricultural operations, and industrial sources are already at levels at or above the anticipated PM10 NAAQS.

The dominance of natural dust sources (i.e. windblown dust from arid lands) and municipal unpaved roads is the main reason that some areas in the West and Southwest have been in continual non-attainment with PM10 standards since the late 1980s. There is no practical way to control these sources and reduce the PM10 ambient air concentrations. EPA has turned a blind eye to this long-term non-attainment condition, and claimed that attainment of a NAAQS is strictly a state-problem. This unusual position gives EPA the license to promulgate unworkable standards that hurt job growth without any health benefits.

Taken further, this cut in aggregate production would lead to a shortage of stone, concrete and asphalt for state and federal road building/repair, commercial and residential construction, which in turn would cause an increase in the price of stone for these projects ranging from 80 percent to 180 percent and further suppress employment in the construction industries.

The Clean Air Act requires EPA to set National Ambient Air Quality Standards to protect public health. However, in evaluating health effects of possible changes in the Standards, EPA has failed to consider the very significant adverse health effects caused by forced unemployment.

Recommended action:

Maintain the existing air standard until EPA has enough health effects data to determine an appropriate revised NAAQS.

EPA- Proposed Rule to Re-designate Coal Combustion Residue/Fly Ash as Hazardous Waste

Background:

EPA proposes to designate coal ash/ fly ash as hazardous solid waste. NSSGA supports the beneficial reuse of coal ash/fly ash in final manufactured and encapsulated products.

Impact:

Many aggregates facilities have ready mix concrete or asphalt plants co-located at aggregate facilities that use these materials in their final manufactured product. Fly ash

can also be used as a component in road base in highway projects. Changing the hazard designation or restricting use would lead to more of these materials being disposed of instead of reused and would require labeling of roadways and brick and mortar construction projects as containing hazardous materials.

Recommended Action:

Maintain non-hazardous waste designation for beneficial reuse of coal combustion residue by products.

OSHA/MSHA – Proposed Rule to Reduce Crystalline Silica Standard

Background:

The Department of Labor has on its regulatory agenda an April, 2011 deadline for a proposed rulemaking on worker exposure to silica, the world's second most common mineral. It is anticipated that the proposal will include a call for a substantial reduction in the permissible exposure limit (PEL) from the current 100 micrograms of silica per cubic meter of air down to as little as 50 or 25 micrograms. Unfortunately, the Department has not been consistently enforcing the current standard. Further, CDC-NIOSH data show a precipitous, downward trend in silicosis cases, and we know of no cases of lung cancer in the aggregates industry from silica exposure. Enforcement of the current silica limit within OSHA-regulated facilities is even more problematic. Why reduce the limit if the higher limit is not being effectively enforced and the resulting health benefits are questionable or non-existent?

Impact:

Implementation of a new silica rulemaking with lowered PEL would add millions of dollars in costs onto operators of stone, sand and gravel facilities, with no known health benefit. Unless and until the Labor Department can clearly prove either an association between contracting of the disease with some level(s) of exposure below the current PEL, or that a new PEL reduction would improve the health of our workers, there should be no mandatory PEL reduction.

Recommended action:

MSHA should maintain and enforce the current standard.

7. AGENCY OVERREACH

EPA – Use of Veto Authority to Revoke Previously Issued Operating Permits

Background:

In an attempt to stop mountaintop coal mining, EPA plans to use its questionable veto authority under the Clean Water Act to revoke previously issued, federally-approved U.S. Army Corps of Engineers operating permits for mining operations.

Impact:

If allowed to stand, this action will disallow a previously permitted mountaintop coal mine. This, in turn, threatens recipients of all federally-issued Clean Water Act permits, including 402 NPDES permits issued by EPA or delegated states and 404 dredge-and-fill permits. This action calls into jeopardy all previously issued legal operating permits for any mining operation, including the ability to rely on the integrity of such permits and the permit process. It could also impact state-issued 401 Water Quality Certifications,

Recommended action:

EPA should only use their veto authority within a set time frame and statute of limitations.

8. AGENCY USE OF GUIDANCE CIRCUMVENTS RULEMAKING

MSHA – Use of Program Policy Letters Constitutes Rulemaking

Background:

The agency issues Program Policy Letters (PPLs) to operators announcing new mandates that sometimes constitute new policy. Yet, major, new policy changes require notice and comment rulemaking the likes of which the agency avoids.

In mid-2010, MSHA issued a PPL declaring a new policy in regard to standard 56.9300: that weigh scales traversed by slow-moving mine trucks, which are 16 inches or more off the ground, had to be retrofitted with the same guarding needed for bridges for high-speed passenger and freight vehicles. This constitutes a major policy change.

It is important to note that the weigh scales come from the manufacturer equipped with bumpers to keep the slow-moving trucks from accidentally driving off the edge onto the ground, one or two feet below the scale's edge. But, the agency failed to provide any justification or injury data demonstrating why a seemingly arbitrary 16 inch drop-off posed a safety hazard for slow-moving trucks on a scale.

While we appreciate guidance, we believe it should be developed consistent with the Administrative Procedures Act (APA). The type of policy change described here should be vetted through the APA-required notice and comment rulemaking process.

Impact:

Stakeholders do not get advanced notice of or ability to comment on, the agency's proposal for new policy, or to offer comments warranting agency review and analysis. This makes a mockery of the President's pledge of transparency in government operations.

Recommended Action:

MSHA should issue this change as a proposed rulemaking and allow for public notice and comment.

EPA – Creation of a New Water Quality Standard for Conductivity

Background:

As a further attempt to stop mountaintop coal mining, EPA has issued guidance on a new water quality standard (conductivity) with limited scientific supporting data and not allowing for notice and comment by industry. The "guidance" recommends a range of 300 to 500 micro-siemens per centimeter of conductivity, as an indicator of water pollution to protect aquatic life.

Impact:

In issuing this guidance, EPA has circumvented the rulemaking process, which allows for industry and public notice and comment. This level has been arbitrarily and capriciously set and has no basis in sound science, and could be applied to any mining facility with a water discharge in the U.S., with no indication that this will improve water quality or the environment.

Recommended action:

EPA should issue this change as proposed rulemaking and allow for public notice and comment.

EPA – Clean Water Protection Guidance

Background:

On December 20, 2010, EPA sent a new draft guidance document to the White House for review that will expand the scope of jurisdiction under the Clean Water Act (CWA). Although the document has not been publicly released, it is reported that this document will use a broad test for determining CWA jurisdiction that will subject waters near traditionally navigable waters to federal jurisdiction, including those waters suspected of only tenuous groundwater connections - not just surface waters. This agency action is in lieu of action by the 111th Congress on the Clean Water Restoration Act, which would have removed the term "navigable" from the CWA and redefined "waters of the United States" using very broad and inclusive terms. EPA is attempting to circumvent the

rulemaking process again by issuing “guidance” that is, in fact, a rule without allowing for industry and public notice and comment.

Impact:

EPA’s guidance is expected to expand the CWA beyond original Congressional intent and eliminate the federal/state partnership inherent in the law. By expanding jurisdiction under the CWA in such a way, aggregate operators will have to seek additional federal approvals and permits in order to complete reclamation projects at significant cost and delay. The guidance will also delay the permitting process for citing a new operation or expanding an existing operation.

Recommended Action:

EPA should issue this change as proposed rulemaking and allow for public notice and comment.

EPA – Storm Water Guidance

Background:

On November 12, 2010, EPA issued a memo to regional water directors with broad policy changes, including recommending stormwater permits include numeric flow limits. Additionally, EPA is developing revised construction and development effluent limitations guidelines which place a strict numeric discharge limit on turbidity; these limits may be applied to other types of activities. Previously, stormwater management has consisted of facilities adopting best management practices to prevent impact to the environment. As with other recent EPA actions, these have the potential to drastically change EPA policy without allowing for public notice and comment via rulemaking. Furthermore, EPA does not specify how facilities should measure flow, or provide any evidence that these costly changes will improve the environment.

Impact:

EPA’s guidance could require aggregate facilities to measure storm-water runoff by installing expensive equipment and possibly meet strict numeric limits on turbidity with no environmental improvement. This could cause delays in permitting as well as decreased production/job loss if limits cannot be met due to weather or other uncontrollable events.

Recommended Action:

EPA should issue this change as proposed rulemaking and allow for public notice and comment.