

**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 will actually 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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