

May 11, 2001

Hand-delivered by Messenger

The Honorable Elaine Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

Dear Secretary Chao:

Request for Reconsideration and Stay of the
HazCom Rule As Applied to the Aggregates Industry

The National Stone, Sand & Gravel Association (NSSGA) is the world's largest mining association by production volume, representing more than 850 member companies and approximately 120,000 working men and women in the aggregates industry. We are writing to respectfully request reconsideration and a stay for the aggregates industry of the Mine Safety & Health Administration's (MSHA's) Interim Hazard Communication (HazCom) rule, published by the agency on October 3, 2000. As applied to our industry, the rule will impose considerable costs and burdens without a corresponding benefit to worker health and safety. This request is based in part on new information and analyses that were not and could not have been submitted during the comment period.

The grounds for this request are set forth in detail in the attached documents. In summary, NSSGA submits that the rule is unnecessary for our industry for four reasons: (1) it duplicates existing regulations, (2) effective enforcement of existing regulations would render HazCom unnecessary, (3) there is insignificant risk within the aggregates industry to justify such a comprehensive rule, and (4) the rule would not accomplish MSHA's goal in releasing it, which is to reduce the number of injuries and illnesses to miners from exposure to hazardous chemicals.

NSSGA also objects to the process that MSHA used to promulgate the rule. A decade elapsed between the time the agency proposed the rule and when MSHA released it. When the interim final HazCom rule was published in October 2000, stakeholders were permitted just 45 days to comment. The record reopened for another five days in December 2000 to take comment on a *single* public hearing the agency held on the rule. Industry complaints to MSHA about this accelerated review period were rebuffed. This was insufficient time for NSSGA to evaluate the voluminous record, including more than 5,000 entries in MSHA's database. Even the Office of Management and Budget, in its review of HazCom last summer, urged the agency to re-propose the rule.

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Underlying HazCom is the principle that miners need to know about the hazards of the chemicals they work with and how to handle them safely. NSSGA fully supports this principle, but disagrees sharply with MSHA on the means and methods to accomplish it. We will be pleased to discuss with you ways to develop a solution that accomplishes the goal of protecting worker safety and health while avoiding unnecessary and redundant requirements.

NSSGA has taken legal action to prevent implementation of HazCom. Another petitioner, FMC Corp., has filed a separate legal action. Although NSSGA has requested an expedited briefing schedule from the U.S. Court of Appeals for the D.C. Circuit, there is no guarantee legal proceedings will be concluded by October 3, 2001, when the rule is set to go into effect. Therefore, your prompt action on our request for reconsideration and a stay is vital to our industry to avoid confusion and maintain existing protection levels for our employees.

My staff and I are immediately available to discuss this issue with you. Please feel free to call me at 703-526-1060. I look forward to hearing from you.

Very truly yours,

Jennifer Joy Wilson
President and Chief Executive Officer

Enclosures

CC: David D. Lauriski

**MEMORANDUM IN SUPPORT OF NSSGA'S REQUEST FOR
RECONSIDERATION AND STAY OF THE HAZCOM RULE AS APPLIED TO THE
AGGREGATES INDUSTRY**

MSHA's HazCom regulation is very similar to the OSHA Hazard Communication Standard (HCS), and includes the following elements:

- identification of all chemicals at each mine site, determination if they are hazardous and preparation of a hazardous chemical inventory;
- preparation and/or collection of fact sheets called Material Safety Data Sheets (MSDSs) on the hazardous chemicals;
- development of a written plan for hazard chemical management;
- use of hazard warning labels;
- trade secrets protection;
- immediate employee access to HazCom information; and
- employee training.

NSSGA submits that the rule is unnecessary for the aggregates industry for four reasons: (1) it duplicates existing regulations, (2) effective enforcement of existing regulations would render HazCom unnecessary, (3) there is insignificant risk within the aggregates industry to justify such a comprehensive rule, and (4) the rule will not accomplish MSHA's goal in releasing it, which is to reduce the number of injuries and illnesses to miners from exposure to hazardous chemicals.

HazCom Duplicates Existing Regulations

In 1986, the agency itself asserted that a HazCom rule was unnecessary because existing regulations were sufficient to assuage the risk to miners. Program Information Bulletin (PIB) 86-2M, entitled Hazard Communication, cited the following regulations to demonstrate that no further regulatory action by MSHA was warranted on this issue:

- 30 CFR 56/57.16004 Containers for hazardous materials
- 30 CFR 56/57.20011 Barricades and warning signs
- 30 CFR 56/57.20012 Labeling of toxic materials
- 30 CFR 48.5 Training of new miners...
- 30 CFR 48.6 Training of newly employed experienced miners...
- 30 CFR 48.7 Training of miners assigned to a task in which they have no previous experience...
- 30 CFR 48.8 Annual refresher training of miners...
- 30 CFR 48.25 Training of new miners...
- 30 CFR 48.26 Training of newly employed experienced miners...
- 30 CFR 48.27 Training of miners assigned to a task in which they have no previous experience...
- 30 CFR 48.28 Annual refresher training of miners

There is yet a 12th regulation not mentioned in the memorandum that is applicable also: 30 CFR 77.208 Storage of materials.

The PIB author, Roy L. Bernard, then administrator for Metal/Nonmetal, also noted that state “right-to-know” laws in place at mining operations offered further protection to miners (and the general public) against hazardous chemicals:

...section 506 of the Mine Act permits application of State laws that do not conflict with its provisions or regulations. State laws that are more stringent than MSHA standards, or cover health and safety in mines where MSHA has no such standards, are still applicable to mines. In general, State right-to-know laws address the threat to public health caused by workplace hazardous substances in the environment and they may require employers to label hazardous chemicals in their workplaces and inform community residents of the potential hazards and associated exposure. Education and training of employees may also be required under State laws.

Today, according to MSHA, 43 states have their own unique Right-To-Know laws, although some exempt mining from their requirements.

Two years after release of the PIB, however, the agency abruptly changed course after receiving a union petition seeking a rule. A proposed regulation was issued in 1990. After a decade of inaction, the agency jumpstarted the regulation, and pushed it out the door as an “interim final” rule three months before the end of the Clinton Administration.

Aside from the union petition, we are unable to see any change that has occurred since the PIB memorandum was issued that would have led MSHA to reverse direction. The 11 regulations the agency put forth in 1986 as reasons no rule was necessary remain in force and effect to this day with a single, albeit important, change.

Eight of the 11 regulations Mr. Bernard cited reference 30 CFR 48, which at that time was the central safety and health training regulation applicable to all mining operations. Since then, however, a change has take place whereby Part 48 is no longer applicable to surface aggregates and related operations. Instead, some 10,200 mines across the nation now must comply with a new safety and health training regulation, 30 CFR 46, which only recently went into effect, on Oct. 2, 2000.

Four of the provisions of this new regulation are applicable to HazCom; they replace references to 30 CFR 48.25, .26, .27 and .28 above:

- 30 CFR 46.5 New miner training
- 30 CFR 46.6 Newly hired experienced miner training
- 30 CFR 46.7 New task training
- 30 CFR 46.8 Annual refresher training

NSSGA does not believe the agency can credibly argue this issue both ways by stating it needs a training rule to prevent accidents and then, after securing such a rule, make the same argument all over again for a *second*, training-based rule.

In promulgating Part 46, MSHA estimated that the rule would prevent about 10 fatalities and 557 injuries to miners every year. The regulation is now in place and is enforceable, and NSSGA expects it will reduce fatality and injury rates including those caused by hazardous chemicals. NSSGA believes MSHA should give Part 46 time to become institutionalized within the industry before imposing another regulation that has a common objective.

The single most important training provision under Part 46 that will impact safety and health is 46.7, task training. Under this provision, an experienced miner must be given training in the health and safety aspects of newly assigned tasks of which he or she is unfamiliar, and demonstrate proficiency to the satisfaction of a competent person *before* he or she is permitted to perform the task unsupervised.

In the Preamble to its Part 46 rule, MSHA is very specific about what it expects new task training to encompass:

We expect that effective new task training will include, at a minimum, instruction in the elements of the task, including hands-on training, and an explanation of the potential health or safety hazards associated with the task and ways of minimizing or avoiding exposure to these hazards. (p. 53116)

Further, that changes that affect the health and safety risks encountered by the miner, rather than a change in the assigned task, triggers the requirement for additional task training:

This means that task training is required whenever any change in the task could impact the health and safety conditions under which the miner works. (p. 53116)

The level of specificity defined in this guidance assures that training will be given on hazardous materials (1) if they are needed to perform the task, (2) if they are introduced after task training is given, or (3) if there is a change in the hazardous substance used to accomplish the task. Besides requiring task training for experienced miners, it is also required for new miners (46.5) and newly hired experienced miners (46.6), and may also be used to satisfy requirements of refresher training (46.7).

Effective Enforcement Of Existing Regulations Will Address MSHA's Concerns

NSSGA believes that Part 46, when effectively implemented, will largely accomplish in aggregate what MSHA says is the purpose of HazCom; i.e., to reduce fatalities, injuries and illnesses, and hence renders HazCom unnecessary. MSHA itself put forth the very same argument in its support of a new Part 46 training regulation. Arguing in support of a new training regulation for surface mining operations, then Assistant Secretary J. Davitt McAteer

asserted that MSHA fatal accident investigation data revealed many companies were not providing basic safety and health training. In a letter dated May 8, 1998 to Sen. Richard Shelby (R-AL), Mr. McAteer said:

In each of the last 2 years, 90 percent of the fatalities at surface metal and nonmetal mines occurred at operations where MSHA cannot determine compliance with basic training requirements. *Further, the accident investigations show that fewer than 25 percent of the workers involved in these accidents had been trained in accordance with the Federal Mine Safety and Health Act of 1977 (Mine Act) and MSHA regulations [emphasis added].*

As justification for HazCom, MSHA offered two databases that purport to identify all injuries and illnesses reported to the agency over the years from exposure to hazardous chemicals. But careful examination of the entries in the database shows that in nearly all instances the incident could have been prevented through compliance with existing regulations and their effective enforcement.

For instance, in the larger of the two databases, identified by MSHA as the “Chemical Burns Database, the overwhelming number of incidents involve injuries to the eye from solid or liquid materials. Yet 30 CFR 56/57.5004, Eye protection, speaks to this very hazard:

All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

30 CFR 56/57.15014, Eye protection when operating grinding wheels, is also relevant in this context.

Additionally, a large portion of incidents in the burns database also involve contact of a potentially hazardous agent with other body parts. Here again, existing regulations are applicable:

- 56/57.15002, Hard hats,
- 56/57.15003, Protective footwear,
- 56/57.15006, Protective equipment and clothing for hazards and irritants, and
- 56/57,15007, Protective equipment or clothing for welding, cutting, or working with molten metal.

In reviewing both the Chemical Burns Database and the Chemical Poisonings Data Base, NSSGA was limited in its ability to analyze entries because they were provided only in summary form. (MSHA indicated that a more complete data set could not be provided.) Without knowing in precise detail the circumstances surrounding each incident, it is difficult to determine with complete certitude how it might have been prevented. Nonetheless, each entry was examined with that purpose in mind, and in more than 99% of the cases, other regulations appeared to be pertinent. A list of those regulations follows:

- 56/57.4100 Smoking and use of open flames
- 56/57.4102 Spillage and leakage
- 56/57.4200 General requirements
- 56/57.4201 Inspection
- 56/57.4400 Use restrictions
- 56.4430 Storage facilities
- 57.4430 Surface storage facilities
- 56/57.4500 Heat sources
- 56/57.4502 Battery-charging stations
- 56/57.5001 Exposure limits for airborne contaminants
- 56/57.5005 Control of exposure to airborne contaminants
- 56/57.9315 Dust control
- 56/57.11001 Safe access
- 56/57.11027 Scaffold and working platforms
- 56/57.13019 Pressure system repairs
- 56/57.13020 Use of compressed air
- 56/57.13021 High pressure hose connections
- 56/57.14100 Safety defects; examination, correction and records
- 56/57.14104 Tire repairs
- 56/57.14105 Procedures during repairs or maintenance
- 56/57.14110 Flying or falling materials
- 56/57.14213 Ventilation and shielding for welding
- 56/57.15001 First aid materials
- 56/57.15002 Hard hats
- 56/57.15014 Eye protection when operating grinding wheels
- 56/57.16001 Stacking and storage of materials
- 56/57.16002 Bins, hoppers, silos, tanks and surge piles
- 56/57.16003 Storage of hazardous materials
- 56/57.16004 Containers for hazardous materials
- 56/57.16010 Dropping materials from overhead
- 56/57.16012 Storage of incompatible substances
- 56/57.17001 Illumination of surface working areas
- 56/57.18002 Examination of working places
- 56/57.18006 New employees
- 56/57.18010 First Aid
- 56/57.20003 Housekeeping
- 56/57.20011 Barricades and warning signs
- 56/57.20012 Labeling of toxic materials

The Risk In The Aggregates Industry Is Insignificant

In aggregates, relatively few hazardous chemicals are needed, and the hazards of and measures to prevent exposure to them are well-recognized, even by the lay public: welding fumes, motor fuels and lubricants, used motor oil, solvents, paints, varnishes, explosives, cleaners, antifreeze; battery acid. The public may be unfamiliar with the fact that rock containing crystalline silica may cause silicosis (under certain exposure conditions), but miners most certainly know this.

The obviously dangerous nature of explosives coupled with the heavy burden of training and other regulations imposed upon those who use them by the Bureau of Alcohol, Tobacco and Firearms has led most aggregate producers to turn over blasting activities to contractor specialists. For those that do their own blasting, this delicate operation is handled only by miners specially trained to meet the stringent explosive regulations. Therefore, explosives are not a hazard to all but a few specially trained miners. According to a newly released report entitled *New Forces At Work in Mining* (RAND: 2001), a trend in mining toward outsourcing not only blasting, but also lubrication, oil recovery and recycling "...is likely to lead to overall reduced exposures to hazardous materials." (p. 65)

MSHA has offered the aforementioned two databases to justify promulgation of the HazCom rule. Both databases consist of entries that occurred in all of mining, not just in aggregates.

Chemical Poisoning Database (covers period from 1983 through 1999)

Of 812 entries in this data set, 153 (18.9%) pertained to aggregates: i.e.,

- crushed & broken (C&B) limestone
- c&b sandstone
- construction sand & gravel
- c&b stone
- c&b traprock
- c&b granite
- c&b slate
- c&b marble
- common shale

Of 153 entries for aggregates, 25 (16.3%) are incidents that would not be covered under HazCom:

- Bite by insect/snake, etc. (6) (#s 147, 223, 227, 272, 323, 400)
- Suicide (1) (#202)
- Cut/puncture/bump/slip/trip (12) (#s 81, 136, 241, 243, 253, 298, 322, 383, 476, 501, 555, 752)
- Unconscious, cause unknown (3) (#s 352, 439, 736)
- Carpal tunnel syndrome (1) (#387)
- Illness (2) (#s 82, 342)

Of 153 entries for aggregates, 10 (6.5%) are unverified complaints by employees:

- Alleges overcome by carbon monoxide (#8)
- Alleges illness after handling ANFO (#106)
- Complaint of dizziness (#138)
- Complaint of illness (#182, 377)
- Alleges illness from steam cleaning (#416)
- Alleges illness from gas fumes in service truck (#467)
- Alleges illness that foreman thought was the flu (#486)

Alleges illness at work (performing sand tests) (#488)
Alleges exposure to toxic fumes (#679)

Of 153 entries for aggregates, 2 (1.3%) represent unauthorized work practices of employees:

Unauthorized cooking out of pond sediment (#506)
Siphoning diesel fuel (#629)

Of 153 entries for aggregates, insufficient information was provided on 15 (9.8%) and hence could not be evaluated:

Entries # 16, 164, 205, 207, 209, 312, 313, 314, 315, 316, 373, 485, 558, 634, 737

Removing the 52 entries above (that would not be covered by HazCom or which could not be evaluated with existing information) leaves a database of 101 entries for aggregates or 12.4% of the total database entries over the 17-year coverage period (1983-99), or slightly less than six occurrences per year, a figure that hardly seems to justify a separate regulation. Even if we add all of the 15 entries for which more information is needed, bringing the total to 116, the average annual count of injured miners only increases to less than 7. While even a single miner injury is one too many, this level of risk cannot reasonably justify a new, stand-alone regulation.

Chemical Burns Database (covers the period from 1983-99)

This database contains 4,703 entries, of which 892 (18.9%) involve aggregates employees. Of these, 17 (1.9%) appear to be incidents that would not be covered under HazCom:

Fell against hot oil heater (#38)
Injury to hand from tank hose (# 217)
Pulled muscle from picking up bucket of water (#236)
Can of ether exploded when opened car door (#250)
Injury to thumb from loader (302)
Injury to head from fall (323)
Injury to chest from auto accident (#328)
Injury to leg from chute liner (#329)
Injury to face from antifreeze spray (#801)
Injury to shin from wheelbarrow (#1505)
Coolant spray into face from bulldozer (#2047)
Injuries from exploding battery on personal auto (#2108, #3398, #4125))
Eye injury from wasp spray (#2134)
Mobile equipment overturned causing bruises and acid burns (#3802)
Employee sprayed by pesticide from crop-dusting helicopter (#3823)

Of 892 entries for aggregates, 2 (0.22%) represent unauthorized work practices of employees:

Explosion of mixture as a result of horseplay (#2314)
Lime burns from failure to follow supervisor's orders re: personal hygiene #3190)

Of 892 entries for aggregates, insufficient information was provided for 16 (1.8%) entries, and hence they could not be evaluated:

Entries # 69, 97, 107, 111, 169, 248, 294, 296, 303, 308, 324, 704, 1467, 2397, 3719, 3894

The overwhelming numbers of cases in this database reflect injuries to the eye. Specifically, 566 of the 892 incidents (63.5%) involve a solid or liquid substance affecting the eye. And of these 566 incidents, a very large number involve entry into the eye of a solid foreign object, especially lime dust. Additionally, another 86 incidents (9.6%) involve injuries, overwhelmingly to the eye, from battery explosions or similar occurrences related to working with batteries. Further, several eye injuries were due to exposure to fumes and vapors, some of these during fueling operations. Thus, about three-quarters of all the injuries in this database are eye injuries.

This observation, i.e., that the eye is by far the organ most injured, leads to several conclusions. First, as mentioned above, an MSHA regulation long on the books, 56/57.15004, Eye protection, requires that employees be protected against such injuries through the use of appropriate personal protection. Secondly, it suggests a potential remedy to minimize such occurrences from now on; i.e.: a special emphasis on eye protection in general and when working around batteries or during refueling in particular through education, and improved enforcement by operators and MSHA alike.

If the chemical burns database eliminated the 19 cases that would not be covered by a HazCom rule anyway, and if all injuries to the eye from solids, liquids and battery incidents were excluded, just 214 cases would remain, which breaks down to an average of 12.6 cases per year over the 17-year period of coverage.

Moreover, MSHA ignores existing programs in effect for labeling and training. We believe that the injuries cited by MSHA could be addressed by the existing labeling and training regulations. Put differently, the new MSHA HazCom regulations will not significantly reduce risk to worker health and safety. Thus, MSHA cannot justify imposing the considerable burdens and costs associated with these rules.

Summary

After expunging from the chemical poisonings and chemical burns databases the incidents exempt from a HazCom rule, and removing from the burns database all eye injuries from solids and liquids, including batteries, we are left with a total of only 344 cases over the 17-year coverage period, or an average of 20.2 cases per year. Even this figure is probably high, since it assumes that all unverified complaints and all entries for which more information is needed would be bona fide, an unlikely assumption. The aggregates industry employs approximately 120,000 miners. While any injury is of concern, nonetheless, these figures simply do not support MSHA's contention either that a HazCom rule is needed in the aggregates industry, or its justification for one on the basis that significant risk from chemical exposure exists to aggregates miners.

HazCom Is Burdensome And Will Not Accomplish Its Purpose

MSHA describes HazCom as an information dissemination and training standard. We previously addressed training by noting that existing MSHA training regulations under Part 48 and Part 46 are more than adequate to accomplish that objective.

The information dissemination provisions of the regulation are embodied in the requirements for operators to develop a written plan, to inventory all hazardous chemicals, to provide appropriate labels, and to provide chemical fact sheets called Material Safety Data Sheets. As with training, we can dismiss the labeling requirement from this discussion because existing MSHA regulations already require labeling. That leaves for discussion requirements for a written program, a chemical inventory and MSDSs.

The experience of health and safety professionals outside industries heavily dependent upon hazardous chemicals as part of their manufacturing processes; e.g., the chemical, petroleum, petro-chemical, forest products, printing, rubber, and related industries, is that workers typically do not access information about hazardous materials that is readily available to them as a result of OSHA's HCS rule. This is so although these industries have been subject since 1987 to OSHA's expanded HCS rule, a regulation, we note, that was promulgated without the notice-and-comment requirements of the Administrative Procedures Act.

Information dissemination requirements of OSHA's HCS rule have been for a decade among the top 10 most cited of the agency's regulations. FY '99 is a case in point. In that year, the top OSHA citation involved some deficiency by employers in meeting the written program requirement of HCS. Safety and health professionals report a chronic problem with stimulating interest at individual worksites to either complete the written program requirement and inventory requirements at all or keep them updated.

The reason for this, these professional say, is that the requirements for a written program and chemical inventory are widely seen as irrelevant in chemical injury and illness prevention by employers and employees alike. Employers complain that these requirements are an unnecessary paperwork burden and an easy target for OSHA inspection personnel. Employers and employees share the view that these requirements do not contribute in any but the most trivial way to advance the cause of safety and health in their workplace.

Material Safety Data Sheets (MSDSs)

As for MSDSs, while they can be found at nearly all worksites, they typically are not kept up-to-date, and are largely ignored by workers:

Take the case of a plant of 1,200 employees where, since the effective date of the standard, only eight persons – an average of one per year – have asked for copies of MSDSs. That's less than 1 percent of the plant's population!

Another plant employing 250 workers received about 30 requests for MSDSs the first year when there were ill feelings between the bargaining unit and management, yet the same plant has received exactly zero subsequent requests! (Daugherty, 1995)

Patrick Rowsey of the National Automobile Association brought this issue to the attention of a working group of the National Advisory Committee of Construction Safety and Health (NACOSH) charged with examining OSHA's HCS when he testified: "...the actual use of MSDSs by employees for additional information is rare..." Philip K. Howard, author of a 1994 bestseller entitled *The Death of Common Sense*, described worker apathy toward MSDSs in the context of government regulators gone amok. Using a brick factory near Reading, Pennsylvania to illustrate his point, Howard had this to say about the frequency with which workers consult MSDSs:

As far as Ron Smeal [plant manager] can tell, no worker at the Glen-Gery plant has ever looked in an MSDS notebook. While walking around the factory together, we went over to one of the notebooks, dutifully hanging from a massive pillar. It was caked with dust. (Howard, 1994)

MSDSs provide essential information on hazardous chemicals, and hence one would think they would have real utility in the workplace. But experience tells a different story. The MSDSs are sufficiently complex and reading and comprehension skills of a significant sector of the employment workforce are such that employees either cannot grasp the material on MSDSs at all or are too daunted by the documents to be willing to read them. Research in this country and abroad has repeatedly shown that many MSDSs are flawed in some way; i.e., health effects data are frequently incomplete, chronic health data are more often incorrect (or less complete) than acute health effects data, and first-aid and personal protective equipment information are not useful for the user. Further, MSDSs that do provide information on a hazardous chemical lack essential data on exposure limits. (Kolp, et. al, 1995)

Moreover, under OSHA's HCS, MSDSs have been a paperwork problem. Here's a view from one writer (*ISHN*, 2000), who based his article on HCS on interviews with 40 safety and health practitioners:

Then there are MSDSs that create a paperwork nightmare. "It's a real pain when you have to copy five sets of 15-page MSDSs," says Edwin Hatfield, a human resources manager in Missouri. "You can easily say a lot of this stuff in a lot less words."

MSHA, by promulgating a standard with information dissemination requirements nearly identical to OSHA's HCS rule, will therefore be extending into the mining workforce the very deficiencies uncovered through years of experience with HCS. By ignoring the unfavorable experience with HCS, MSHA is violating Section (a)(6)(A) of the Federal Mine Safety and

Health Act of 1977 which requires the agency to consider the "...experience gained under this and other health and safety laws."

Again, we emphasize that the risks that MSHA appears to be concerned with are already addressed adequately by the existing training and labeling requirements applicable to the aggregates industry.

The Rulemaking Record Was Flawed

Soon after HazCom was released on Oct. 3, 2000, at NSSGA's request, the agency made available electronic versions of the two databases it is relying upon to justify that significant risk exists to warrant imposition of HazCom on the mining industry. The data set, when combined, contained 5,515 separate entries. A cursory examination of the data revealed that additional information was needed from MSHA not only to understand abbreviation codes attached to the data, but also to understand more clearly some of the entries.

For example, in the chemical burns database, columns entitled "degree," "source," and "code" required clarification. Additionally, summaries of the incidents, in some instances, required a level of elaboration not available in the databases in order to understand the nature of the injury and how it occurred. Examples of such entries follow:

Chemical Poisonings Database

- #16 - "lack of circulation in header"
- #164- "removing side ware plates, heater outside"
- #207 - "climbed on loader, became disoriented, passed out twice"
- #485 - "cleaning up cement spill in north alley way. Became sick shortly after finishing"

Chemical Burns Database

- #97- "Conveyor belt touched PVC pipe and wore a hole in it"
- #107 - "added training and greater availability of eyewash"
- #111 - (no narrative)
- #169 - "moved wire on starter solenoid, creating spark and igniting unnoticed gas fumes"

Over the course of the period MSHA allowed for comment on its interim final rule, discussions aimed at resolving these interpretive problems ensued between NSSGA and agency staff personnel. While interpretation was provided for most, but not all, of the codes, the Agency said it could not easily provide additional information on shortcomings in the narratives. In explanation, an Agency spokesperson said database entries were based on submittals to MSHA from mine operators on MSHA form 7000-1, Mine Accident, Injury and Illness Report. These reports were archived, and to obtain them would be both time-consuming and expensive. They would probably not add much more information anyway, the spokesperson said.

NSSGA asked to see sample copies of completed entries, and 25 completed 7000-1 forms were faxed to NSSGA on Feb. 2, 2001, 2 ½ months after the comment period closed. (MSHA reopened the comment period from Dec. 14-19, 2000 after holding a public hearing on HazCom on Dec. 14 in Washington, D.C.) The forms provide additional information related to the name of the mine and controlling company, where the victim was working at the time of the injury and what he/she was doing then, time of the incident, victim gender and date of birth, job title, agent or substance causing injury, nature of the injury or illness, and experience in the job at the time of the injury. Victim identifying information was also provided but was obliterated due to privacy concerns. While limited, the additional information would have contributed to a better understanding of at least some database entries. But, as stated above, the agency spokesperson discouraged access to this information, and a sampling of it was not made available during the comment period.

The comment period itself was an unreasonably short 45 days. NSSGA twice officially requested that the length of the comment period be extended from 45 days to 90 days, but the requests were denied. The record will show that numerous other interests also requested an extension, and were similarly refused. How, we asked in requesting an extension of a trifling month and a half, could the agency refuse such a request when it took 119 months to finalize the regulation? Our conclusion is that MSHA's aim was to issue the regulation in final form before the new administration took office, an endeavor that ultimately failed.

We have noted above that MSHA reopened the rulemaking record to take comment at a public hearing the agency held on the interim final rule on Dec. 14, 2000 in Washington, D.C. Only three-business days' official notice was given for this hearing, and no other hearings were held anywhere else in the country. The hearing comment period closed Dec. 19. Additional written protests by stakeholder to the agency about the abbreviated hearing schedule were summarily dismissed. Once again, this behavior by the agency to pay lip-service only to requirements for adequate public notice and comment of its regulations violates the spirit, if not the letter, of the Administrative Procedures Act, and reinforces our view that MSHA's motivation in abridging the comment period stemmed from its desire to see a final HazCom regulation published before inauguration day.

NSSGA asserts that the length of the comment period was too brief to permit a critical review of the regulation and its accompanying Preamble, as well as the supporting economic analysis and technical databases. Further, that information from the 7000-1 forms that might have aided in interpretation of some database entries was not made available during the comment period.

OMB Urges That The Rule Be Re-proposed

In reviewing HazCom last summer, the Office of Management and Budget (OMB) reportedly recommended that MSHA re-propose the standard to determine the effect upon it of new technology, of MSHA's new Part 46 training standard at surface mines, and to allow for more recent public comments on the mining industry's experiences with OSHA's HCS rule. This recommendation was not followed.

Conclusion

HazCom is both unsuitable and unnecessary for the aggregates industry, and the process MSHA followed to bring it to life raised concern from another government agency, OMB, and subverted Congressionally imposed procedures for proper notice and comment. As such, we urge a stay of this regulation and remand to the agency for reconsideration. NSSGA's position is that, while the regulation is unacceptable, opportunities exist to collaborate with MSHA on the issue of hazardous substances in the aggregates workplace. For instance, we would favor working with the agency to develop educational materials to spotlight eye injuries and their prevention. We would also work together to provide specialized materials that educate miners on how to work safely around batteries and in fueling operations.

NSSGA has filed suit against the agency to prevent the promulgation and enforcement of HazCom. Rather than engage in a protracted, expensive battle in the courts, we favor a settlement through negotiations and once again urge the Department of Labor to set this process in motion. We have repeatedly explained our position to MSHA without avail, and enclose our most recent correspondence with the agency on this matter.

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