

Editor's Note: MSHA has promulgated an interim final rule on Hazard Communications that is set to go into effect in October 2001. The rule requires operators, among other things, to identify and inventory all the hazardous substances present at each mine site, collect fact sheets on each hazardous substance, make such information readily available to miners and provide miner training. NSSGA has sued MSHA in an effort to remand the rule back to the agency. NSSGA commented on the rule at a public hearing held by MSHA Dec. 14, 2000. The letter below was written by NSSGA to Marvin Nichols, who chaired the MSHA hearing panel, after the hearing ended.

Dear Mr. Nichols:

I am writing to follow-up on the questions the MSHA panel raised and the comments it expressed at the public hearing Dec. 14 concerning the aggregates industry's opposition to the interim final HazCom rule. I would appreciate it if you would ensure these comments are entered into the official record of this rulemaking, and, to that end, will also forward them by e-mail to comments@msha.gov.

As noted in my testimony, we (the aggregates industry) do not oppose the principle of chemical hazard information collection and dissemination, which MSHA states is the chief purpose of this rulemaking. Obviously, miners need to be informed about potential hazards that might have an adverse impact on their health and safety in the workplace, including hazardous chemicals, and they need to be provided with the wherewithal to protect themselves against such hazards. And that information needs to be repeated at periodic intervals, both to reinforce and to assure miners do not forget.

Of course, once miners have been made aware of potential hazards, they have a responsibility to use the knowledge they have been given to safeguard their own health and that of their fellow miners. MSHA's regulations and our convictions on this point seem to diverge, as evidenced by the lack of punitive measures in MSHA regulations against those miners who, aside from smoking underground, fail to practice safety measures they have been taught.

MSHA and the industry also part company on the means to accomplish the worthwhile end of informing miners about chemical hazards on the job and of the means to protect themselves. You (MSHA) say HazCom is the way; we say instead that the rules you already have in place do the job adequately. We are specifically talking about Part 48 and Part 46 safety and health training regulations, and your labeling requirements, which represent several significant provisions in your already impressive regulatory arsenal.

Further, we consider in our opinion the pervasive OSHA HCS Standard, of which by your own admission HazCom is closely modeled, as well as right-to-know laws in 43 states. HCS affects aggregates operations that have active ready mix or asphalt operations directly. Right-to-know laws that do not exempt mining do as well.

Additionally, both HCS and the right-to-know laws impact mining indirectly. Product hazard warning labels and MSDSs, for instance, are an accepted part of doing business throughout this country today due to HCS and right-to-know regulations.

Where the Aggregates Industry Differs with MSHA on HazCom and Why

In the preamble to the noise standard, MSHA said that training is the first line of defense for a miner against workplace hazards. It should come as no surprise then that, since its inception, MSHA has emphasized the importance of miner training. The early passage of Part 48 safety training regulations supports the point.

The history of MSHA promulgation and enforcement of Part 48 and of its successor in aggregates mining, Part 46, actually closely illustrate the point the aggregates industry is now trying to make regarding HazCom. Aggregates protested Part 48 because it was a once-size-fits-all approach that failed to take into account the uniqueness of the aggregates industry. After a rider, renewed each year for 19 consecutive years by a Congress that, unlike MSHA, understood the aggregates industry's point of view, MSHA itself finally came around to agreeing that Part 48 was unsuitable for aggregates and put its support behind an alternative. With substantial input from the industry and its associates in labor, an acceptable alternative everyone could live with - Part 46 - was born.

Part 48 was enacted in 1978. Now 22 years later MSHA risks repeating the same mistake it made back then; that is, assuming all of mining is the same, and therefore an acceptable target of uniform rulemaking on hazard communications. We do not profess expert knowledge of coal or metal mining, but do know enough, for example, to appreciate that in some metal mining the use of hazardous chemicals such as cyanide are essential to the production process. That situation does not exist in aggregates mining.

In aggregates, relatively few hazardous chemicals are needed, and the hazards of these 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

Despite widespread awareness of their potentially harmful effects, these chemicals are distributed with labels that, thanks to HCS, already carry clear warnings about their potentially harmful effects and broad admonitions on use such as "Use in a Well

Ventilated Space" or "Avoid Eye and Skin Contact." Even if they do not enter the plant with those warnings or those warnings are removed, MSHA's existing regulations mandate that all hazardous products at the mine carry hazard warning labels. The need for a new labeling standard to replace existing MSHA labeling regulations, therefore, is unnecessary.

Part 46 Will Satisfy the Need for Training

HazCom requires training, and MSHA's new rule assumes existing Part 46 training is insufficient to satisfy the requirement and thus must be augmented. Why, we ask? Part 46, and its predecessor in aggregates, Part 48, both require extensive training for new and experienced miners and refresher training every 12 months. More to the point, under both regulations, the miner must additionally be trained on the health and safety aspects of the task to which he or she is assigned before they are permitted to perform that task unsupervised. If the task requires the use of hazardous chemicals, these regulations require the miner to receive training on the hazard and how to work with it safely. If the requirements are already in place; what's the rationale for piling on new ones?

MSHA might respond to this question by pointing to its chemical illness/injury and poisoning databases. If existing training were effective, MSHA asserts, these databases would be devoid of cases where miners were hurt after exposure to hazardous chemicals.

We would remind MSHA that the agency, in arguing in 1998 and earlier for implementation of an enforceable safety and health training regulation in aggregates, justified the need for it by claiming it would reduce accidents, injuries and illnesses. As you know, the new rule, Part 46, just became enforceable on Oct. 2, 2000. If it meets MSHA's lofty projections regarding injury and fatality reduction, the cases contained in the databases MSHA trumpets as justifying the need for HazCom will melt away.

We would also point out that NAA-NSA is currently evaluating these databases to separate alleged injuries/illnesses that involve aggregates employees from those in other mining sectors, and then analyzing the data to ascertain if the incident could have been prevented if existing regulations had been followed, or, if not, if HazCom would have prevented the case from occurring in the first place. OSHA's HCS rule fails to assess this critical issue. As MSHA knows, this database was only recently made available to the industry, and the agency has failed to provide us with sufficient time to evaluate it fully and completely. We have requested additional time to submit comments on these data.

Therefore, as with the labeling requirements of HazCom, we are hard-pressed to appreciate the need for the training requirement contained in it.

MSDSs Are Flawed

Likewise, we are at a loss to understand MSHA's insistence on making Material Safety Data Sheets (MSDSs) readily available to miners so they can read about the hazards for themselves. First, according to old government figures, 13.4 percent of the U.S. population is functionally illiterate. We are aware that a significant percentage of miners have inadequate mastery of the written word. In fact, that very handicap is what has drawn some to mining. We estimate that from 10-20% of the very people MSHA is trying to reach by making MSDSs available are simply incapable of reading them anyway.

Even for those who can read, the MSDS presents a formidable challenge, for many use terms familiar only to the chemist, toxicologist, physician or industrial hygienist. The problem doesn't stop there. In earlier testimony, NAA-NSA cited studies that show a plethora of problems with MSDSs as a reliable, accurate, understandable document for relating essential information on a hazardous chemical to employees: MSDSs are incomplete, contradictory and therefore confusing, suffer from misplaced emphasis, are in some instances inaccurate, and often are provided for chemicals that have no hazardous ingredients at all.

Researchers comment that MSDSs are flawed as viable instruments of communication to workers because they try to serve too many potential audiences: lawyers, occupational physicians and nurses, industrial hygienists, marketing personnel, regulators, customers and workers, among others.

It comes as no surprise, then, when we learn from the 17-year-old history of HCS that MSDSs are widely ignored by workers. We cannot agree with MSHA's attempt to offer miners a source of information on hazardous chemicals that experience tells us loudly and clearly they will not use.

Experience has further informed us that what miners want (and need) is clear, accurate, and to-the-point information on how to protect themselves. Information so packaged is also best remembered. When describing a hazardous chemical and how to protect yourself from harm, there is a set of instructions that have nearly universal application:

If you don't use this substance right, it could hurt you or others around you, so when you use it, cover your eyes and bare skin, and be sure to use it out in the open or in an otherwise well ventilated space. If you get it on your skin or in your eyes, wash the affected parts in water for 10-15 minutes straight. If, after you start using it, you feel it is making you sick, stop what you are doing, go out into the fresh air, and call your supervisor.

If you spill it, quickly try to block it from going down the drain or into the soil if you can without putting yourself or others at risk, and call your supervisor at once. Also, never use a substance if you don't know what it is, and always report unidentified substances.

These instructions are far more meaningful than MSDSs for the typical miner.

The Requirement to Inventory Chemicals Should be Stricken

HazCom also requires each operator to inventory all hazardous chemicals at the mine site, and to keep that inventory up-to-date. The thinking here is the operator must first know what hazardous chemicals are present in the workplace before an information and dissemination program can be developed around them.

Compliance with this requirement will be almost impossible, and for that reason this provision of HazCom is technically infeasible. Sure, at the outset, a list can be drawn up, although, for the diligent, it will amount to considerable effort. But keeping the list current will be virtually unachievable. Why? Purchasing gets a better offer for a "hazardous" product such as paint or oil and, without telling anyone, goes ahead and buys it. A miner brings onto the property a solvent containing methylene chloride he or she believes is more effective than the product supplied by the operator. A miner routinely stores hazardous materials in the pickup truck he uses to commute to and from the mine site. Independent contractors leave hazardous chemicals behind after finishing a job. On any given day, therefore, the inventory is almost certain to be incomplete and thus lead to a citation.

Besides being unachievable, this requirement of HazCom serves no useful purpose. Its intent is to call the operator's attention to the hazardous materials that exist on the property so that affected miners can be duly informed about them. But the labeling and training requirements of HazCom already serve to meet this objective. Miners already know from their safety and health training how to handle generic products such as paints, oils, and solvents, and that knowledge is still relevant if one type of paint, oil or solvent is replaced by another. The provision, therefore, is unnecessary. This same argument can be made for the hazardous waste requirement in HazCom.

HazCom also requires development of a written plan that delineates how the operator will comply with the regulation. Operators will meet this requirement by obtaining a generic plan from their trade association or elsewhere, and will file it away and forget it, at least until the MSHA inspector arrives. This conclusion is based on years of experience with seeing how a similar provision in HCS has been implemented in OSHA-regulated industries.

While the written program will do nothing to advance the goals of HazCom, its counterpart in HCS has had a profound effect at OSHA. Failure to produce for the inspector a complete HCS written program has been the source of hundreds of thousands of citations since HCS went into effect in 1983. Other provisions of HCS, namely the inventory and MSDSs provisions, have likewise been at the top of OSHA's most-cited list for years. We are under no illusion that MSHA enforcement of HazCom will be any different.

HazCom Will Be a Paperwork Nightmare

The 17-year-old lesson of HCS is that it represents a paperwork shuffle that has drawn resources away from legitimate health and safety concerns. Moreover, because it bleeds off resources and is a bottomless pit of citation activity, it has bred cynicism about government health and safety efforts among business owners and industry health and

safety practitioners alike, some of whom once supported government initiatives in safety and health. MSHA's HazCom, with 24 of 30 provisions carrying a paperwork burden, is poised to spread OSHA's mistake into the mining sector, where the outcome will be the same.

OSHA's rule might well have a place in the 20 industrial classifications, including the chemical and petrochemical industries, for which it was initially proposed. But these industries are vastly different from the aggregates industry with respect to the quantity and nature of the hazardous substances present at the workplace. OSHA's rule has proven burdensome with no concomitant benefit in the remainder of OSHA-regulated U.S. industry where it applies. We wish to remind MSHA, as we have done in the past, that HCS was extended beyond the original SIC classifications without benefit of notice and comment rulemaking.

MSHA had it right long ago when it concluded that no hazard communication rule was necessary in the mining industry because sufficient regulations were already in place to protect the miner. Now, 15 years later, in light of Part 46, Paperwork Reduction Act amendments and more, MSHA's conclusion is even more relevant.

MSHA detracts from its stated goals when it insists on moving forward in great haste with a regulation that fails to advance the cause of health and safety, fails to take into account significant differences among industries, and fails to take into account prior and relatively recent regulations designed to improve worker health and safety. We request that the aggregates industry not be covered by HazCom because workers in this industry are already adequately protected by existing regulations, because HazCom will impose significant burdens on the industry, and because there is no reason to think that the rule will result in any significant improvement in worker health or safety; indeed it will detract from such efforts.

We welcome the opportunity to meet with you to answer any questions and discuss these issues with you more fully.

Sincerely,

James Sharpe, CIH
Director of Safety & Health Services