

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



Natural building blocks for quality of life

January 25, 2005

Thomas Stock, Esq.
Office of the General Counsel
Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, NW.
Suite 9500
Washington, DC 20001

FACSIMILE: 202-434-9944

E-Mail: tstock@fmshrc.gov

Dear Mr. Stock:

The National Stone, Sand & Gravel Association (“NSSGA”) is pleased to offer the following comments to the Federal Mine Safety and Health Review Commission (“FMSHRC” or “Commission”) concerning its Advanced Notice of Proposed Rulemaking (“ANPRM”) for modification of the Commission’s Procedural Rules. The ANPRM would modify 29 CFR Parts 2700, 2701, 2702 and 2704, and the proposal was published at 69 Fed. Reg. 62632-62635 (October 27, 2004).

Based near the nation’s capital, NSSGA is the world’s largest mining association by product volume. Its member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the U.S. and approximately 120,000 working men and women in the aggregates industry. During 2003, a total of about 2.66 billion metric tons of crushed stone, sand and gravel, valued at \$14.4 billion, were produced and sold in the United States.

Many of the member companies are small businesses, as defined by the U.S. Small Business Administration, and they handle contests of citations issued by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”) as pro se litigants. In addition, a number of law firms that represent mine operators and/or miners in litigation before the Commission are also members of NSSGA’s Manufacturers and Services Division.

1605 KING STREET ■ ALEXANDRIA, VA 22314
703 525 8788 ■ 800 342 1415 ■ FAX 703 525 7782
WWW.NSSGA.ORG

NSSGA has consistently adopted policies and positions that promote miner health and safety, and that encourage reduction of unnecessary paperwork burdens on the regulated community and conservation of government fiscal resources. Consequently, many of the suggested revisions to the FMSHRC's procedural rules are welcome modifications that will reduce the costs of litigation, expedite the timeframe in which citation contests and discrimination actions can be resolved, and bring more consistency to the overall litigation process. It is also beneficial where, to the extent possible, the FMSHRC rules can conform with the Federal Rules of Civil Procedure that apply to litigation of mine safety cases above the Commission level.

As a general principle, any changes that reduce the paperwork burden and encourage the use of electronic technology in filings and case management are worthy improvements to the current system. However, the Commission must bear in mind that many small mine operations that contest citations/orders, and miners who may bring Section 105(c) actions in their own right, do not have easy access to computer technology or even facsimile machines. Therefore, any electronic filing options must remain voluntary at this point to permit *pro se* litigants' access to the legal system.

Specific Comments

Commission Rules 5(d) and 7(c), 29 CFR 2700.5(d) and 2700.7(c): NSSGA supports eliminating the requirement that notices of contest, complaints and applications for temporary reinstatement/relief be filed with the FMSHRC, and served on the opposing party, solely by personal delivery, registered or certified mail. As a practical matter, many parties already serve these materials via facsimile and/or first class mail, and the Commission normally does not reject filings on this basis. Because of the rural areas where mines are located, it may be difficult to satisfy the Certified/Registered mail requirement in a timely manner, whereas regular mail delivery is available in virtually all areas.

As a practical matter, parties may still wish to use Certified or Registered mail services, or other services such as Federal Express or UPS, in order to track their submissions and have verified proof of service. We note, however, that most facsimile machines will also provide printed verification of the date and time of transmission, along with proof of the number to which the transmission was sent. This, too, should be accepted as proof of service if a dispute arises.

NSSGA does recommend retaining the requirement that all documents sent to parties by the Commission be served via Certified Mail as it is critical for the Commission to know when (or if) materials were actually received by litigants in evaluating whether timely responses were filed. This is especially true when notices are sent to mines that have intermittent operations and may be closed for weeks at a time during the winter season due to weather conditions. Such mines may not have actual notice that litigation has commenced until after the period for a response has elapsed and use of Certified Mail will give the Commission notice that information has not been timely received. This will

be useful in determining whether it is appropriate to reopen a case or provide other requested relief in such circumstances.

Commission Rule 5(e), 29 CFR 2700.5(e): NSSGA supports reducing to one (1) the number of copies of any pleading that must be filed with the Commission.

Commission Rule 8, 29 CFR 2700.8: NSSGA supports expanding the number of days for a response under Rule 8 to exclude weekends and legal holidays where the time for a response is less than eleven (11) days. This conforms to Fed. R. Civ. P. 6 (a) and Fed. R. App. Proc. 26 (a)(2). As noted above, at some mines with intermittent operations, the time for response may lapse under the current system before an operator has notice and opportunity to respond.

NSSGA would suggest retaining the “5 day” rule for service of a document by mail, to afford parties maximum flexibility in responding to Complaints and other filings. NSSGA agrees that, where the 40th day following a judge’s decision falls on a weekend day or federal holiday, the Commission should be able to render a decision on a Petition for Discretionary Review until the close of the next business day.

Commission Rule 10(c), 29 CFR 2700.10(c): NSSGA supports clarifying that the requirement to confer with the opposing parties should be limited to non-dispositive motions and that this should be set forth in the rule.

Subparts B and C: NSSGA supports elimination of the requirement to file a separate penalty contest if the citation/order at issue is already the subject of an ongoing Contest Proceeding (where no decision has been issued). A review of recent Commission decisions clearly indicates that quite a few mine operators (both large and small) remain confused by the dual contest requirements and this wastes the resources of all concerned by requiring the Commission to rule constantly on Petitions to Reopen such penalty cases, and the need to remand such cases to the Administrative Law Judges (“ALJs”) for further consideration. In some months, such “reopening” proceedings constitute the majority of Commission action.

There is also confusion engendered because the current system results in two distinct docket numbers (one for the contest proceeding and a different number for the civil penalty proceeding). At times, different representatives from the Office of the Solicitor are assigned to each phase of the case and more than one set of discovery may be served on a party because of the involvement of multiple solicitors, further adding to the cost and burden of such litigation on small mine operators.

Any action to streamline contest proceedings (while preserving operators’ rights to seek an expedited hearing on the underlying citations/orders, where necessary) would be a significant improvement to the FMSHRC procedural rules, assuming such a change can be made consistent with Sections 105(a) and 105(d) of the Mine Act. With respect to the options delineated in the ANPRM, we support clarifying that, by filing a notice of

contest, the party will be deemed also to contest any subsequent proposed penalty assessment.

Commission Rule 44(a) and 28(b), 29 CFR 2700.44(a) and 2700.28(b): NSSGA supports the suggested change to Rule 28(b) that would require the Secretary to add a short and plain statement of supporting reasons based on the criteria for penalty assessment, consistent with Section 110(i) of the Mine Act. This also adds consistency to the rules by requiring the same information regarding civil penalties in Petitions issued pursuant to both Rule 28 and Rule 44. Adding this notice requirement will help mine operators understand more fully the basis of the Secretary's allegations and permit a more complete response.

Commission Rule 45, 29 CFR 2700.45: NSSGA support revisions to Rule 45 that would give the Administrative Law Judge continuing jurisdiction over a temporary reinstatement proceeding brought pursuant to Section 105(c) of the Mine Act until such time as a final order is issued. This will eliminate the need for filing complicated new pleadings by *pro se* litigants, should circumstances warrant reopening of the temporary reinstatement matter prior to final adjudication but after MSHA determines that it will not represent the miner in such circumstances.

Commission Rule 54, 29 CFR 2700.54: NSSGA supports requiring Administrative Law Judges to consult with both parties before setting a hearing date and location, as this will reduce the need to file Motions for Continuance. This commonly occurs under the present system, when one or both parties learn they have schedule conflicts after a scheduling order is issued by the ALJ *ex parte*. Initial conference calls for this purpose may also have an added benefit of narrowing the issues for a hearing and/or encouraging the parties to engage in settlement discussions at an earlier stage of the proceedings.

Commission Rule 56(d) and (e), 29 CFR 2700.56 (d) and (e): NSSGA supports the modification of discovery deadlines and believes the current deadlines are confusing for many *pro se* litigants and may be impractical for companies that have substantial periods when their operations are closed. An extension also provides more opportunity for the parties to engage in substantive settlement discussions before incurring the cost and burden of propounding and responding to written discovery and/or conducting depositions. NSSGA agrees that, absent approval of the ALJ and all parties, the discovery period should close 30 days before the scheduled hearing date.

Commission Rule 67, 29 CFR 2700.67: NSSGA supports the proposed change in the deadline for filing dispositive motions (for summary decision) under this rule to 30 calendar days prior to a hearing. We also suggest that the ALJ should be required to rule on such motions no later than 10 calendar days before the hearing, as this will avoid unnecessary burdens on the parties in terms of travel to the hearing location and notification of third party or expert witnesses who must make travel arrangements in advance.

Commission Rule 69, 29 CFR 2700.69: NSSGA supports clarifying that clerical changes to a decision by the ALJ do not toll the period for filing a Petition for Review, prior to the decision becoming a final order of the Commission.

Commission Rule 70(h), 29 CFR 2700.70(h): Consistent with our comments concerning Commission Rule 8, *supra*, NSSGA supports permitting the Commission to act on a Petition for Discretionary Review on the first business day following the 40th day after the ALJ's decision, where the 40th day would otherwise fall on a weekend or federal holiday.

Commission Rule 72, 29 CFR 2700.72: NSSGA supports implementing a system that requires unreviewed decisions by an Administrative Law Judge cited in pleadings to be so identified. This will assist the reader and reviewing courts in determining which case law constitutes binding precedent on the Commission, MSHA and the regulated community. A clear system for designating cases should be published so there is uniformity. Failure to utilize the system should not, however, be the sole basis for rejecting pleadings or ruling against a party, as *pro se* litigants may have trouble understanding the distinctions between different categories of cases.

Commission Rule 76, 29 CFR 2700.76: NSSGA does not believe any changes are needed to the rule related to defining the record for interlocutory review.

Commission Rule 78, 29 CFR 2700.78: NSSGA supports amending the current rule to provide that filing a petition for reconsideration will toll the period for filing an appeal for judicial review, until after the Commission rules on the reconsideration action. This may conserve resources in avoiding unnecessary actions in the U.S. Courts of Appeal and expedite final resolution of such matters.

Commission Rule 80, 29 CFR 2700.80: NSSGA is unable to comment on this proposal, as the Commission has not yet stated what "ethical conduct" (in addition to what is already required of individuals) would be added as a requirement for practice before the FMSHRC and its judges.

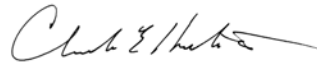
Miscellaneous

NSSGA supports implementation of an electronic case filing ("ECF") system, similar to those used by the U.S. District Courts, on a voluntary basis. If the Commission could adopt the ECF system, coupled with the "PACER" system for checking dockets and downloading copies of pleadings, this would facilitate status reporting and permit parties to submit pleadings electronically in PDF format to the FMSHRC and other parties. It may be possible to assign a system identification number to mines and contractors, linked to the MSHA Mine or Contractor Identification number, as these numbers already appear on all pleadings. Attorneys for the U.S. Department of Labor and attorneys for parties could use their normal registration approaches for these systems (e.g., use of Bar ID numbers, with assigned user names and passwords). As noted above, however, regular

“paper” filings should remain an optional method of filing and service for the foreseeable future.

Thank you for your consideration of NSSGA’s position. If you have any questions or comments, please do not hesitate to contact us.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chuck E. Hartman", with a long horizontal flourish extending to the right.

Executive Vice President and COO