

March 5, 2021

Mr. Jim Frederick
Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health
Occupational Safety and Health Administration (“OSHA”)
U.S. Department of Labor

Dear Mr. Frederick:

On behalf of the National Stone, Sand & Gravel Association (“NSSGA”) and the aggregates industry, I would like to share our thoughts and concerns as OSHA considers the issuance of an Emergency Temporary Standard (ETS) in response to President Biden’s Executive Order on Protecting Worker Health and Safety.

The NSSGA is a trade association representing crushed stone, sand and gravel producers (consisting of approximately 11,000 operations), and the manufacturing and services providers that support the industry. Although quarrying activities are primarily regulated by the Mine Safety and Health Administration (MSHA), our members are also regulated by OSHA at office buildings, aggregate sales yards, and many other locations where no quarrying activities occur. Furthermore, many of our members have asphalt, paving, and construction divisions, which are regulated under OSHA.

These workplaces are meaningful parts of our members’ businesses, and the health and safety of the industry’s workforce is paramount, regardless of the applicable regulatory framework. Since the onset of the pandemic, the aggregates industry has been aggressive and creative in developing, implementing, and enforcing robust COVID-19 prevention programs. These efforts have been effective to ensure safe and healthy workplaces, which is evident in that no community outbreaks have been traced back to aggregate facilities. Our member companies also continue to adapt and evolve their programs as we learn more about COVID-19, and the ongoing partnership and work from OSHA to advance new guidance is critical to our success. We thank you for providing updated guidance, which has given employers the tools and flexibility needed to tailor their efforts to specific work environments.

Looking forward, we encourage OSHA to maintain this flexible guidance-based approach. We do not believe an ETS is either necessary or practical at this time, particularly for the aggregates industry, which already has strong tailored programs in place. If OSHA does determine an ETS should be issued, then the ETS should focus on industries that have demonstrated heightened risk, prioritize flexibility, and allow for a stakeholder comment period before it is issued.

An Emergency Temporary Standard is Neither Necessary nor Practical

Practices and Procedures Have Already Been Established

Since the onset of the pandemic, businesses large and small across the country had common goals: stay open, operate safely, and weather the storm of COVID-19. For nearly a year, aggregates operators and the manufacturers and service providers who support the industry have

created practices and procedures that have achieved these goals. Practices and procedures that were once novel in March of 2020 are now commonplace and personal protective equipment (PPE) shortages and demand surges have largely passed. Every workplace is unique, and NSSGA members have developed individual strategies that limit the spread of COVID-19 at their facilities. These include but are not limited to altering shift schedules, conducting daily screening of all personnel and contractors on-site, utilizing telework when practicable, modifying mobile equipment and practices to reduce driver and passenger contact, increasing the number of training programs to accommodate smaller class sizes, and restructuring workflow and workplace design to maintain social distancing. Our members have drawn from the extensive information, guidance, and recommendations provided by OSHA, the Centers for Disease Control (CDC), and industry health and safety experts.

Given the extensive (and evolving) information and recommendations already available to employers through such sources, an ETS would not give employers more resources, or OSHA any authority it does not already have. The general duty clause grants OSHA the authority to ensure the health and safety of American workers and it utilized this tool throughout the pandemic. While misinformation about the virus was abundant last year, aggregates operators listened to science, and those still operating today are doing so because they have implemented effective measures to combat COVID-19 – without an ETS.

The Problem is at Home, Not in the Workplace

In assessing the need for new workplace mandates, it is important to recognize the limited role the workplace plays in community spread at work environments like those in the aggregates industry. The coronavirus does not recognize boundaries. It does not distinguish between when a worker is at home, in the car, at the grocery store, or at work. Even in ideal work situations that establish and implement all protective measures perfectly, these workers face their greatest exposure risk from non-work activities. An ETS is the wrong tool in the wrong place to address these risks.

While an employer oversees an employee while they are on the job, they cannot control a worker's time off the clock. An employer cannot mandate what an employee does at home, which may include social gatherings, attending events larger than CDC recommendations, or not wearing a mask. While NSSGA member companies encourage employees to practice safe behaviors outside the work environment, OSHA should not base its ETS determination on factors and exposure risks that are outside the control of employers. This is especially true for workplace environments OSHA has deemed to be low or medium-risk environments, such as aggregates operations, where current practices are already providing effective controls.

An Emergency Temporary Standard now would Create an Undue Burden in the Future

Not only is an ETS unnecessary for the aggregates industry, developing any ETS at this point would be untimely, and possibly counterproductive. Under the Executive Order, should OSHA determine an ETS is required at this time, it would have limited time to draft and issue the standard. Further, OSHA would be required to develop a permanent standard within six months thereafter. Six months does not allow adequate time to create a meaningful, research-based, fair, and effective standard for the great diversity of businesses and work environments under OSHA's jurisdiction. Although we have learned much about COVID-19 since the onset of the

pandemic, we also know there is much we do not understand. The future of COVID-19 is uncertain and constantly changing, and our understanding about new variants, workplace and community spread, and effective work practices for different work environments will continue to evolve. A permanent standard developed in such a short time period, for such a broad and diverse range of work environments, would not capture the many possibilities and contingencies we could face. An ETS would also cause further confusion when assessing the dynamic nature of guidance arising from the CDC. For example, OSHA guidance issued on January 29th indicated that employers should not distinguish between workers vaccinated and those that are not. Then on February 11th the CDC issued guidance that suggested employers should in some circumstances (i.e. when managing the quarantine of close COVID contacts) distinguish between vaccinated employees and those that have not been vaccinated. Indeed, it could have unintended consequences by misdirecting resources and hindering timely adaptation to unforeseen risks.

Should an ETS be Issued, it Should be Limited to High-Risk Industries and be Flexible

While NSSGA does not believe that an ETS is necessary, should OSHA decide otherwise, it should be applied to industries that have demonstrated serious risks. Any standard implemented must provide the flexibility needed to accommodate the diversity of work and workplace environments. Specifically, a standard should focus on the workplaces OSHA has deemed to pose high or very high exposure risks.¹ For workplaces in the lower risk categories, OSHA should continue to provide employers and employees with the information, guidance, and recommendations necessary to establish safe and protective workplaces tailored to the unique work environment, without imposing undue regulatory requirements that may hinder workplace safety.

Should OSHA determine an ETS is necessary, then stakeholders should have the opportunity to review and comment on the proposed standard prior to implementation. Variations of emergency temporary standards have been implemented at the state level across the country during the pandemic and have had varying degrees of success. For example, within two months of its implementation, multiple lawsuits were filed against the ETS in California, which began implementation in late 2020. Should OSHA follow through on an ETS, it would be prudent to incorporate prior stakeholder input to avoid potential lawsuits that waste resources and do not contribute to worker health and safety. Prior to the implementation of a federal standard, the lessons learned by state ETS implementation should be taken into consideration and a regulatory docket should be opened to accept extensive and detailed comments.

COVID-19 has posed tremendous challenges for the aggregates industry and its workforce over the last year. Changes have been difficult on workers and companies that are facing financial struggles due to the pandemic have spared no expense to keep their employees safe. Despite these challenges, our members have remained committed to ensuring safe and healthy work environments for all employees, using the full range of controls and practices available and suitable to their operations. We urge you to allow companies to maintain these successful practices and programs without creating additional, prescriptive requirements that would put

¹¹ See, e.g., OSHA, *Hazard Recognition* webpage (last visited Feb. 15, 2021), available at <https://www.osha.gov/coronavirus/hazards>.

unnecessary burdens on America's businesses and those manufacturing critical infrastructure materials.

Please do not hesitate to reach out if we may be able to provide any further resources that may be useful. We look forward to a strong working partnership in the coming years to promote the health and safety of the men and women who work in the aggregates industry.

Sincerely,

A handwritten signature in cursive script, appearing to read "Libby Pritchard".

Libby Pritchard
Director, Construction Materials Safety Policy
National Stone, Sand & Gravel Association