

## NATIONAL STONE, SAND &amp; GRAVEL ASSOCIATION



*Natural building blocks for quality of life*

2011 APR 19 A 10:03

April 15, 2011

U.S. Mine Safety and Health Administration  
Office of Standards, Regulations and Variances  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209-3939

RE: Proposed Rule, Pattern of Violations, RIN 1219-AB73

Dear Madam or Sir:

NSSGA is the world's largest mining association by product volume. Its member companies represent more than 92 percent of the crushed stone and 75 percent of the sand and gravel (or aggregates) produced annually in the U.S. and approximately 118,000 working men and women in the aggregates industry. During 2010, a total of nearly 1.9 billion metric tons of aggregates, valued at \$17 billion, were produced and sold in the United States. The aggregates industry has demonstrated a steadfast commitment to worker safety and health, resulting in nine consecutive years of falling rates of injury and illness in the aggregates industry. This includes a continual decrease in number of fatalities amongst aggregates operator employees. Both are at historically low levels.

On behalf of the National Stone, Sand & Gravel Association (NSSGA), we provide the following comments on the proposed rule on Pattern of Violations (POV).

This program should be carefully crafted so that it targets those mine operators that repeatedly fail to live up to their obligations to provide miners with a safe place to work. Although the proposed rule takes several important steps toward this goal, there are a number of significant improvements that must be made before it is finalized.

NSSGA is concerned that there are significant gaps in the proposal. Currently, it is impossible for commenters to thoroughly understand and assess the proposal. Therefore, NSSGA requests that MSHA re-propose the rule to address these gaps, and allow operators a fair opportunity to comment on the fully proposed POV program, as a whole. Also, this rulemaking should include public hearings. Following is the summation of primary areas of concern:

The POV Criteria Should Be Specified in the Rule

MSHA proposes to list its specific criteria for POV status on the Agency's website, but has not included specific criteria in the rule itself.

NSSGA believes that the specific POV criteria to be used for selecting operators for POV should be detailed in the proposal itself. These criteria are not simply guidance, but are intended to be binding criteria that will determine whether mines are subject to substantially increased enforcement. It is essential that the criteria not be a moving target especially if operators are expected to monitor their own performance to avoid POV status.

NSSGA notes that MSHA asks for comments on its projections of the number of mines likely to be subject to POV status under the new rule, and what the projected costs to the mining industry might be. It is impossible to make such estimates without knowing what the specific POV selection criteria will be.

#### The POV Criteria Should Be Clear and Easy to Access

NSSGA agrees with MSHA's stated goal to provide clear, transparent, and accessible POV criteria. Each mine should be able to immediately determine its potential POV status by viewing publicly available information on MSHA's website. We recommend that this information be collected in a single location, and that mine operators (and other interested parties) be able to view all of the relevant information at once by entering the mine ID number.

This will necessitate the creation of a computer program that can properly and accurately compile and display this information. We strongly urge MSHA to pilot any such program with the assistance of mine operators and other stakeholders, in order to ensure that the information and calculations it provides are accurate, timely, and usable. MSHA should also review the data quality control measures it uses for its data retrieval system, to ensure that the data provided are of sufficient accuracy and timeliness to allow mine operators and others to depend on the results. These data can have significant consequences for operators, and thus accuracy is essential. (We note that the necessity for accurate information also makes it unlikely that monitoring of this information will take only five minutes, because operators will likely review their own records and other MSHA data to verify it, especially if it suggests that POV status is imminent.) If there is inaccuracy, irreparable harm can come to operators erroneously placed onto pattern when their operation's citation history doesn't warrant it.

Further, we are struck that the proposal deletes the current provision allowing for "proposed" POV notification of a facility allowing for remedial steps to be taken, as well as an opportunity for the operator to meet with a district manager to review the basis for a proposed POV designation.

#### POV Status Should Only Result from Repeated Violations

As MSHA notes, Congress intended for the POV program to apply to "mine operators with a record of repeated S&S violations" "who have not responded to the Agency's other enforcement efforts." We are concerned that the proposed rule does not adequately reflect the legislative intent that POV is intended for circumstances of repeated violations by unresponsive operators.

Rather, MSHA's criteria are based on multiple violations. Thus, under the current proposal, a facility can be placed into PPOV status as a result of a single inspection with multiple citations, or as a result of one or two inspections with few citations, followed by one with a large number

of citations. This is clearly not the Congressional intent for the POV tool, and a revision of the rule should squarely address this problem.

Under the current rule and criteria, a single inspection with multiple citations and orders can place a mine into PPOV status. However, a facility is not currently placed into full POV status unless it fails to improve its performance over a period of time. While this still does not necessarily capture mines that are repeated violators, it at least means that POV status is based on a series of inspections.

If there is to be no official PPOV status under the proposed rule, the problem is that it may be difficult, if not impossible, for a mine to determine if it is threatened with POV status. The preamble discussion imagines that a facility will be able to tell if it is close to POV status by reviewing MSHA's data. But how close is close? If POV status can be triggered by a single inspection, then no mine operator can feel confident that it is not threatened with POV status.

It is difficult to comment on exactly how the criteria should reflect the need to address repeated violations, as opposed to multiple violations, without knowing what criteria MSHA proposes to apply.

#### If POV Status Is Not Based on Final Orders, Punitive Elements Violate Due Process Rights

NSSGA understands MSHA's preference to base POV status on citations and orders issued, as opposed to final orders, because there can be a substantial delay in the final determination of a citation or order challenged by an operator. This delay hampers MSHA's ability to use POV as a timely tool to address current problems.

However, it is essential to note that, if actions are to be based upon non-final orders, they may not be punitive in nature without violating the operator's due process rights. The Fourteenth Amendment prohibits the federal government from depriving citizens of liberty or property without due process of law – and this means that actions that are punitive cannot be taken without appropriate access to review.

This does not mean that MSHA can take no actions prior to a final order. Certainly it can take actions designed to protect miners from harm, and it certainly has the discretion to increase its level of scrutiny of a mine with repeated citations or orders. Such measures are not punitive.

#### If POV Status is Based on Citations Subsequently Vacated, POV Status Must Be Terminated

The proposed rule calls for terminating POV status only if an inspection of the entire mine reveals no S&S violations. However, because the proposal calls for basing POV status on non-final orders, POV status must also be terminated if citations or orders upon which the status is based are subsequently reversed, or reduced in severity.

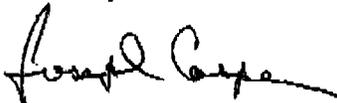
#### Remedial Plans Should Not Be Confused with Comprehensive Safety and Health Management Programs

MSHA indicates in the preamble that a mine operator finding that a mine is at risk of POV status may submit a "written safety and health management program" to MSHA for approval, and that such a program may serve as a mitigating circumstance that may avoid POV status. NSSGA does not object to the concept of a mine operator working with MSHA to develop a remedial plan to address problems that could lead to POV. However, NSSGA is concerned that the language in the preamble may suggest that MSHA will require comprehensive safety and health management programs that go beyond the particular concerns that underlie the potential for POV status.

The proposed rule stands as a positive effort toward developing a program that will be transparent and effective. However, more work needs to be done. MSHA should re-propose the rule and include the criteria that it plans to use, to allow operators and other stakeholders to comment on the proposed program as a whole. In particular, reasonable cost estimates cannot be performed without an understanding of the POV criteria that will actually be imposed. Also, determination of an operator's POV status must be based solely on those citations that are fully adjudicated. Also, we believe that this rulemaking should include public hearings.

Thank you for this opportunity to comment. If you have any questions, please feel free to contact me at (703) 526-1074.

Sincerely,



Joseph Casper  
VP, Safety