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**Sent:** Wednesday, April 26, 2017 12:08 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** Comments, RIN 1219-AB87; Docket No. MSHA-2014-0030  
**Attachments:** Ltr MSHA, Comments of Petitioner.pdf

To Whom it May Concern:

Attached please find Comments with respect to RIN 1219-AB87; Docket No. MSHA-2014-0030, filed on behalf of National Mining Association, National Stone, Sand & Gravel Association, Portland Cement Association, American Iron and Steel Institute, Georgia Mining Association and Georgia Mineral Aggregate Association.

Thank you,

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April 26, 2017

**Via Email**

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Re: RIN 1219-AB87  
Docket No.: MSHA-2014-0030

To Whom it May Concern:

On January 23, 2017, the Mine Safety and Health Administration (“MSHA”) published a Final Rule entitled “Examinations of Working Places in Metal and Nonmetal Mines.” 82 Fed. Reg. 7680 (hereinafter “Final Rule”). The Final Rule included many flaws, failed to adequately respond to substantive comments raised during the comment period, and is an arbitrary, capricious and unlawful application of MSHA’s authority. To preserve their rights and correct the Final Rule’s unlawful flaws, a coalition of six associations – National Mining Association, National Stone, Sand & Gravel Association, Portland Cement Association, American Iron and Steel Institute, Georgia Mining Association and Georgia Construction Aggregate Association (hereinafter “Petitioners”) – filed a Petition for Review of the Final Rule in the United States Court of Appeals for the Eleventh Circuit on March 17, 2017. Petitioners now submit these Comments in response to MSHA’s proposed extension of the effective date of the Final Rule from May 23, 2017 to July 24, 2017, as set forth in 82 Fed. Reg. 15173 (March 27, 2017).

**The Final Rule Should be Rescinded**

After its publication on January 23, 2017, MSHA indicated to industry leaders that the Final Rule is “paused” so that it may be reviewed at a “policy level.” To date, MSHA has not indicated the results of that review or the status of the Final Rule. The Petitioners encourage MSHA to take this opportunity to rescind the Final Rule for the reasons stated below.

- **The Final Rule is not necessary.** MSHA claims that the Final Rule is necessary to “[improve] miner’s safety and health” in metal and non-metal mines. 82 Fed. Reg. 7681. Yet, MSHA fails to explain why the changes in the Final Rule are necessary, instead arbitrarily relying on its speculative “belief” about what benefits the rule may provide. The record lacks any justification or evidence of a failure of the existing examination

requirements or a demonstrable basis for why the new requirements are necessary. To the contrary, MSHA's own statistics for 2016 show that safety and compliance efforts are steadily improving under the current standard.<sup>1</sup> The Metal/Non-metal "All Injury Rate" was at an all-time low of 1.92 for every 200,000 hours worked. Total citations and orders issued and total penalties have consistently trended downward. The data, therefore, demonstrates that there is no need to overhaul the process of workplace examinations to achieve safe workplaces.

- The Final Rule provides no demonstrated benefit. In its June 8, 2016 Proposed Rule, MSHA conceded that it "is unable to quantify the benefits from this proposed rulemaking[.]" 81 Fed. Reg. 36, 823. It still cannot. Despite receiving dozens of responsive comments and conducting four public hearings, MSHA is still "unable to quantify the benefits" of the Final Rule. 82 Fed. Reg. at 7689. Instead, as with the Proposed Rule, the benefits the Final Rule purports to achieve are only those that MSHA arbitrarily "anticipates." 82 Fed. Reg. at 7688. Even more telling, the Agency conceded that it "is unable to separate the benefits of the new requirements under the final rule from those benefits attributable to conducting a workplace examination under the existing standards." 82 Fed. Reg. 7689. Given the significant costs operators will incur to comply with the Final Rule, and the fact that MSHA cannot demonstrate that it will provide any more benefit than the current standard, the rule is particularly unjustified.
- The costs of the Final Rule would be substantial. Although MSHA claims to have responded to cost concerns raised in the comments, its analysis again amounts to arbitrary "estimates" based on its purported "experience." 82 Fed. Reg. at 7690. It contains no empirical evidence and, except for differences of operational size, fails to account for the wide variety of mining operations in the metal/non-metal sector. Petitioners' member companies report that compliance costs could be in the tens of thousands of dollars, which would include, but not limited to, personnel, scheduling, training and record keeping.
- The requirements of the Final Rule do not constitute best practices. MSHA claims that the Final Rule "will result in more effective and consistent working place examinations." 82 Fed. Reg. at 7681. Petitioners disagree.
  - Timing of Examination. The current workplace examinations standard, which allows for flexibility in the timing of the examination, is the best practice. The current standard allows operators to tailor the timing of the examination to the nature of the work in a particular area. Not all work areas are the same. Under the Final Rule, however, operators must develop examination schedules to treat all work areas the same. The Final Rule also fails to account for changes that may

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<sup>1</sup> For the statistics cited here, see <http://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance>.

occur in a workplace during the course of a shift. The current standard more readily allows the person performing the examination to respond to such changes.

- Notification to Miners. The Final Rule's requirement to provide notification to miners of certain conditions continues to be a source of confusion to the regulated community. The Final Rule opaquely mandates that operators "promptly notify miners in affected areas." Operators are left with no certainty as to which employees to notify, when to notify them and how notification is achieved. This vague language fails to adequately describe the required and prohibited conduct and is bound to lead to disparate application and enforcement in the field.
- Recordkeeping. The Final Rule's requirement of listing conditions found during the examination, the date of correction and the name of the person conducting the examination will impose a significant burden on operators with no safety benefit. Operators are already strictly liable for complying with all safety and health standards. Requiring additional documentation does nothing to promote safe workplaces when operators are already required to do so. To the contrary, Petitioners are concerned that the Final Rule will divert resources that would be better spent on safety than on recordkeeping and report writing. Petitioners also believe that this additional documentation will provide the Agency an unnecessary trove for additional citations and enforcement actions. MSHA inspectors will be tempted to draw inferences based on entries in record books to issue additional or heightened enforcement actions. Additionally, by requiring the name of the examiner, Petitioners remain concerned about additional potential for individual liability under Section 110 of the Mine Act. Potential liability and fear of this potential may disincentivize miners from serving the important role of performing workplace examinations.
- The Final Rule contains vague terms. The Final Rule contains several vague terms, including what constitutes a "working place," a "condition that may adversely affect safety and health," "prompt" notification and "prompt" initiation of appropriate action. This is particularly troubling as these terms are among the touchstones for the requirements of the rule. MSHA has been inconsistent in its guidance as to what constitutes a "working place," particularly relative to whether it includes roadways or other areas of travel. Additionally, following issuance of the Proposed Rule, commenters sought clarification of what constitutes a "condition that may adversely affect safety and health," and MSHA expressly declined to provide any such guidance. See 82 Fed. Reg. at 7684. Unreasonably vague rules like this one cause significant due and administrative process concerns, and also cause significant amounts of regulatory uncertainty, unreasonable compliance risk, disparate applications and conflict.

**If the Final Rule is not Rescinded, its Effective  
Date Should be Stayed Until  
The Conclusion of Petitioners' Legal Challenge  
and the Validity of the Rule is Resolved**

As stated above, Petitioners have filed a Petition for Review of the Final Rule in the Eleventh Circuit Court of Appeals. In the context of that Petition, on March 29, 2017, Petitioners filed with MSHA a Request for Stay of Effective Date of Workplace Examination Rule. On April 21, 2017, MSHA sent Petitioners an "interim response" in which it deferred responding to the stay request until after the close of the comment period for the proposed effective date.

Consistent with their Request for Stay, Petitioners now reiterate their request that the effective date of the Final Rule be stayed until full completion of the pending litigation and final adjudication of the validity of the rule in federal court. Such action is appropriate. As noted above, MSHA has "paused" the Final Rule so that it may be reviewed at a "policy level." The outcome of that review is not known. Officials from the current Administration have not had a chance to evaluate the rule, particularly as a new Assistant Secretary has not yet been named. Additionally, Petitioners anticipate that the Eleventh Circuit proceeding will involve significant issues of law and policy.

Operators and the Agency will be required to undertake significant compliance assistance, training and planning to prepare for the requirements of the Final Rule. Undertaking these efforts, which could very likely be rendered unnecessary after further review of the Final Rule by the Administration or courts presents a terribly inefficient and potentially unnecessary use of resources. Meanwhile, a stay of the Final Rule would have no adverse effect on working conditions. The current examination requirements, which have not been shown to be inadequate, would remain in place.

**If an Indefinite Stay Pending Final Adjudication  
in Federal Court is not Granted, the  
Proposed Date of July 24, 2017 is Insufficient**

The proposed extended effective date of July 24, 2017 is woefully insufficient to allow operators the time necessary to prepare for requirements of the Final Rule. It is anticipated that the Eleventh Circuit proceeding will extend beyond the length of the Secretary's contemplated postponement. Additionally, should the rule take effect, MSHA has recognized the need for a period of compliance assistance and meaningful guidance will be necessary in light of the changes posed by the rule and the lack of clarity of certain key terms, as described above. Following this period of compliance assistance from MSHA, operators will be required to engage in significant planning to develop appropriate compliance programs, including but not limited to: developing and implementing new systems to schedule personnel and stage work crews so that examinations are performed in the timeframe set forth by the Final Rule; developing and implementing training programs to ensure that those conducting examinations

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are complying with the Final Rule; and developing new systems of recordkeeping maintenance to comply with the requirements of the rule.

The challenge of such planning will be compounded for operators with multiple sites, particularly those whose sites are dissimilar, as each site may be required to plan differently based on the particularities of that site. Compliance with the Final Rule may require additional staffing which could require budgeting and hiring. Finally, we would expect for MSHA to take sufficient time to train its inspectors on the requirements of the Final Rule so that it is enforced appropriately and consistently, should it go into effect.

Please let us know if we may be of further assistance. Thank you for your courtesy and attention to this matter.

Very truly yours,



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