



**ARIZONA
ROCK
PRODUCTS
ASSOCIATION**

July 21, 2016

MSHA Office of Standards, Regulations and Variances
201 12th Street South
Arlington, VA 22202-5452

RE: RIN1219-AB86 Docket No. MSHA 2014-0031 – Part 100 Proposed Rule Workplace Exams

The Arizona Rock Products Association (ARPA) is grateful for the opportunity to comment on the Part 100 workplace exam rule change proposal. ARPA acknowledges the Mine Safety and Health Administration's (MSHA)(Agency) intent with the Rule but the proposed rule amounts to a comprehensive rewrite of 30 C.F.R. Sections 56/57.18002. The changes add unnecessary burden to operators that will not result in safer workplaces but rather will divert attention desperately needed for training, developing awareness, behavior changes and creating safer operations to more administrative tasks and paperwork, procedurally disruptive practices and exposure to nebulous definitions that will keep our miners guessing. This is not the correct approach. The proposed rule, if fully implemented, is likely to result in increased liability of mine operators and supervisors in addition increase in the number of civil penalties assessed against workplace examiners for being aware of violations.

The proposed rule change is largely redundant to what's already mandated in the MSHA's standards. Additionally, it is rife with additional requirements that would not have the intended results and open up operations to multiple layers of enforcement scrutiny. Safety professionals today recognize that the overwhelming majority of accidents are functions of worker or management behavior rather than conditions at the workplace. A broad brush attempt to address workplace exams could have negative, unintended consequences and takes the autonomy away from successful operators, which is why ARPA is opposed to the proposed changes.

For almost 60 years, the ARPA has been providing representation for 47 member companies involved with the production of aggregates, ready mix concrete, asphalt, lime products, and portland cement. Our producer members, along with over 61 associate members that provide related transportation, contracting, and consulting services, make ARPA the oldest mining advocates in Arizona today. ARPA is very proud that the sand and gravel sector has attained its lowest injury rate in history. Today, the rate stands at 2.0. nationally and in Arizona it is even lower. Further, last year was the 15th consecutive year in which the rate dropped from its year-

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earlier level. Given the problems with the increased burden with no anticipated benefit, why is the proposed rule necessary?

While the aggregate industry is proud of safety improvements achieved, it is worth noting that the industry is still recovering from the effects of the recession. USGS data demonstrates that, after the drop in production of more than 1 billion metric tons from the year 2006, aggregate producers have regained only one-fourth of the pre-recession production levels. Any idea of a full economic recovery for aggregates is still far away. The economics of the industry should never get in the way of workplace safety, but when an industry is already achieving its safety objectives, economics should be a consideration. This is the intent of both Executive Order 12866 (1993) and Executive Order 13563 (2011). Moving ahead with this rule with no discernable benefit would be costly, confusing to operators as written and unnecessary given the industry's recent safety success rates.

Terms Throughout the Rule Are Vague and Leave Operations Susceptible to Interpretation

Fundamentally the rule is flawed by virtue of the undefined requirements. By derivation there are several terms used in the rule that would have to be addressed as they are very subjective and have no clear requirement or measureable threshold for accountability. At the very least the Rule should not move forward until these issues are discussed and addressed. Language such as "may adversely affect safety or health", "promptly notify", "made available", "adverse conditions," "description of each condition found," "promptly initiate," "appropriate action to correct," or "before the end of shift are vague terms with no clear understanding of what or how much would be acceptable. These requirements are throughout the proposal and must be addressed, defined or quantified. Otherwise, it leaves the operator susceptible to inspector interpretation which is unacceptable and contrary to the goals of MSHA to create more consistency among inspectors.

(56.18002a) Pre-Shift Exams

Employees are currently charged with taking ownership of the safety of their own work areas thus encouraging constant vigilance throughout a shift. Safety is not just a function of conditions at the beginning of a shift! The reality is that the mining is dynamic and ever changing, and must be addressed as changes occur, because a pre-shift inspection has been conducted does not ensure all hazards have been accounted for. As noted, the operator knows best when an exam should be conducted and how to address and communicate the issues identified. This may be before the shift, toward the beginning, or throughout. The proposed rule is silent regarding how long before miners begin working must the workplace examination be conducted anyway. The objective for all is safety, but how a facility manages itself should be left up to the operator.

MSHA inspectors have enormous discretion to issue enforcement actions for inadequate workplace examinations based solely on the inspector's subjective observations. This is likely to lead to the issuance of inadequate examination enforcement actions simply because a

condition exists. Another challenge to compliance with the proposal will be inevitable downtime, especially at facilities that operate three shifts and those where processes change within a shift. Ostensibly, all work would need to be halted to accommodate the multitude of pre-shift examinations, provided a company had a sufficient number of competent persons available before the area would be deemed safe to proceed. It is for that reason that the costs of the rule could be much higher than MSHA anticipated.

This provision will mean more work and lost revenue the likes of which is needed to pay the workers for this time not producing aggregates, not to mention the need for additional staff to accomplish the required exams. This will create scheduling challenges due to sick days, holidays, or work-related absence from the operation. Further, inspectors can simply compare recent examination reports to their observations to support enforcement actions, which poses a compliance double jeopardy for mine operators.

A pilot operation should have implemented concerning the proposed Rule first to see what the ramifications would be including costs, administrative burdens, legal challenges with “agents” of a company, and personnel problems versus the actual safety benefits.

(56.18002a1) Notification of Hazards

It is unclear what MSHA aims to accomplish through this requirement, which ARPA believes is poorly conceived. Under the current rule and existing case law, it is the operator’s obligation to remedy a hazard when discovered. As a practical matter, affected employees are already made aware of this. Under the new rule it is unclear who needs to be notified for compliance purposes. Notifying others on the shift in the “affected area” but who are not truly affected by the hazard carries no safety benefit and will only serve to distract otherwise unconcerned workers and risk work slow-downs as a result. Further, a focus on excessive documentation diverts needed attention from real safety needs including addressing the actual problem, not to mention if a workplace examiner fails to create a record of the names of the individuals he notified and the time of the notification; this provides MSHA an opportunity to issue an enforcement action against the operator and quite possibly the workplace examiner.

The existing rule already requires operators to withdraw miners from the affected area in the event of an imminent danger. This proposed new provision for lesser hazards will only create confusion. What happens when an inspector observes a condition during an inspection that was not reported by the workplace examiner or may not have existed at the time of the examination? Has the operator violated subsection (a)(1) because the miners would not have been notified of a condition that developed between examinations? The type of “appropriate action” taken may be dependent on the nature and extent of the condition and will need to be evaluated on a case-by-case basis anyway.

Likewise, the proposal gives rise to administrative confusion and the undefined time sensitivity of compliance to the issue: Resources that would otherwise be deployed to remedy the hazard will now be diverted to (i) identifying the affected area; and (ii) identifying and notifying

workers in the affected area; (iii) messaging to those workers the nature of the hazard (something less than an imminent danger) and how it is being addressed; and (iv) documenting all of this in order to avoid citation by MSHA for failing to communicate the hazard. This is a poor use of resources and no benefit can be attributed to this process. What is appropriate for both notification and cordoning off the area until the hazard is addressed is also very unclear.

(56.18002b) Documentation of Hazards and Corrections:

ARPA is concerned that greater documentation of hazards will only lead to greater exposure from an enforcement standpoint. The goal of an examination program is to find and correct hazards. Documentation to record that the task has been accomplished is already required by the existing rule. More extensive documentation is neither necessary nor helpful. For one thing, documentation can never illustrate the precise cause of the hazard identified. Yet an inspector, perhaps perceiving a particular condition that had occurred months earlier, might take the information obtained from the examination documentation as grounds for writing a citation without any idea of what actually transpired, whether an inspection was performed or if any actual hazard existed.

Further, operators will now likely be subject to MSHA citations based on the level of detail needed and included in the exam records. There is no safety benefit to documented descriptions of locations and conditions. Even under the MSHA mobile equipment standard, a record of the defect is maintained only until the defect has been corrected.

At the end of the day, a provision such as this will create needless paperwork. Needless paperwork comes at the expense of valuable time that otherwise could be put toward actual safety management, conducting root cause analysis, behavior observations, coaching and training.

(56.18002b) Making Available Records to Inspectors and Representatives of Miners

This provision would in no way benefit safety. MSHA is already entitled to review examination records upon inspection. Obligating an operator to make its examination records available to the miners' representatives and even provide copies of those records upon request is a poor use of valuable resources. Review by MSHA to confirm compliance is one thing, but forcing operators to make books and records available to its rank-and-file personnel is wrong-headed, shows a total lack of respect by MSHA for the integrity of the management of our members' facilities, and could foment labor-management discontent by encouraging "vigilante" employee representatives to conduct their own investigations and second guess management. MSHA is not the mine operator and this is a management decision. MSHA should never meddle in labor-management relationships beyond those areas in which it is properly authorized to impose safety and health standards.

Moreover, the proposed requirement to make "copies" available to miners' representatives upon request is a recipe for disaster. What would stop disgruntled employees in possession of

examination records from posting them on social media, entirely out of context, in attempts to embarrass their employers on top of the already inherent administrative burden.

(56.18002a) Minimum Experience, Ability or Knowledge Level of a Competent Person

The operator knows far better than MSHA who is competent, yet the rule leaves this issue unclear. Further, there is no way an hourly employee is going to want the responsibility of signing off on the workplace exam given the legal responsibility he/she faces should an MSHA inspection occur due to the implication that the competent person is also an "agent" of the company. This issue will likely end up in litigation.

Summary

The proposed rule significantly increases mine operator responsibilities for reporting conditions that may adversely affect safety or health. It would be a morale killer for conscientious operators with excellent safety records. It is onerous, vague and unnecessary. Why set up honest hard working operators that are in compliance with potentially punitive and vague recordkeeping, notification and administrative exposure when the agency would be well served to allow operators to do what they do best. In some instances, it takes two MSHA inspectors ten days to do the level of workplace exam the agency is expecting industry to complete for three shifts every day! Why would the agency want to create a standard they themselves could not meet?

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Trussell". The signature is written in a cursive, flowing style.

Steve Trussell
Executive Director