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Examinations of Working Places in Metal and Nonmetal Mines. 30 CFR Parts 56 and 57

Comment On: MSHA-2014-0030-0054

Examinations of Working Places in Metal and Nonmetal Mines, Extension of comment period; close of record.

Document: MSHA-2014-0030-0086

Comment from Bryan Nicholson, Sorptive Minerals Institute (SMI)

Submitter Information

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General Comment

Please find attached the comments from the Sorptive Minerals Institute (SMI) on Docket No. MSHA-2014-0030, Examinations of Working Places in Metal and Nonmetal Mines.

Thank you,

Bryan D. Nicholson

SMI Executive Director

Attachments

MSHA-2014-0030-RIN1219-AB87_SMIComments_9_30_16

AB87-COMM-61

9/30/2016

SMI

SORPTIVE MINERALS INSTITUTE

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September 30, 2016

VIA ELECTRONIC SUBMISSION - zzMSHA-comments@dol.gov

Ms. Sheila A. McConnell
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration (MSHA)
201 12th Street South
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Arlington, Virginia 22202-5452

Re: RIN 1219-AB87
Docket No. MSHA-2014-0030
Examination of Working Places in Metal and Nonmetal Mines

Dear Ms. McConnell:

The Sorptive Minerals Institute (“SMI”) appreciates the opportunity to comment on the Mine Safety and Health Administration’s (“MSHA”) proposed rule on examinations of working places in metal and nonmetal mines (“Proposed Rule”) (30 CFR, Parts 56 and 57, June 27, 2016).

SMI is a Washington, DC-based trade association representing the manufacturers and marketers of absorbent clay products. Sorptive clays mined and processed by SMI members are used in a wide range of consumer products and commercial and industrial applications including clay-based pet litter, cosmetics, pharmaceuticals, animal feeds, specialized drilling muds and fluids used in oil, gas and water well drilling, sand mold binders in metal casting and environmental sealants for landfills and sewage lagoons. Additional information on SMI can be accessed at <http://www.sorptive.org>.

The mining and milling of sorptive clays falls within the regulatory responsibility of the Mine Safety and Health Administration (MSHA), Metal and Nonmetal Mine Safety and Health. In the

United States, sorptive clays are exclusively mined above ground in open pit mines. SMI and its members recognize that the health and safety of our employees is critical to our success. As a result, SMI has frequently interacted with MSHA to ensure that appropriate safety measures exist in the sorptive mining industry. SMI looks forward to continuing to foster its relationship with MSHA on our shared goal of producing sorptive products in a working environment that is safe for all of our employees.

In response to the Department of Labor's proposal to amend its Standard for the examination of working places in metal and nonmetal mines, the SMI requests that the Department consider the comments set out below.

General Concerns about the Proposed Rule

1. The Proposed Rule Will Make Mines Less Safe.

SMI appreciates and supports MSHA efforts to improve safety of all mines, and appreciates that adequate working place inspections are a cornerstone of an effective mine safety plan. However, SMI fundamentally disagrees that mine safety will be substantially improved by changes to the existing working place examination rule.

Consistent with the views of many of those who testified at MSHA's public hearings, SMI believes that the best way to ensure mine safety is to have the persons most familiar with the particular working place -- and the ones directly impacted by those working place conditions -- conduct the examination, identify the hazards, and address them immediately by correcting them or by alerting others in the organization when they cannot. These frontline individuals are rarely the best at paperwork completion. Accordingly, by placing a higher priority -- and financial risk -- on paperwork completion, the proposed Rule would encourage operators to transfer the examination responsibility to those individuals most likely to get paperwork completed according to the new Rule's requirements and less likely to be aware of, and motivated to react to, constantly changing potential hazards.

Additionally, MSHA's rule heads in the wrong direction by not addressing and resolving the inherent conflict and consequences presented by (a) its imposition of personal financial risk to personnel who fail to correct hazards and (b) the obligations in its proposed Rule to report hazards. If MSHA wants to motivate miners to report working place hazards, it should clearly and unequivocally remove individual liability for any item reported on an examination, to ensure that there is no possible conflict for the miner completing the examination. Such a "safe harbor" would ensure appropriate reporting while retaining liability on the operator for its failure to address serious hazards. Based on the current proposed Rule, MSHA is creating a system where a miner conducting an examination may be personally motivated to report only items that he or she corrected on the paperwork for fear of personal liability even if those actions result in a mine that is less safe and provides less information for the operator to assess mine conditions.

Finally, unless significant changes occur in the proposed Rule, SMI believes that the proposed Rule will deter competent employees from taking on examination roles for several reasons. First,

MSHA has reiterated in the commentary accompanying its extension of the comment period that it is very interested in subjecting examiners to personal liability. Second, MSHA's proposed Rule expands the burden of extensive documentation, even when conditions are immediately remediated, which will make these roles less appealing. Finally, miners may opt not to take on the examiner role to avoid being exposed to additional hazards. Due to the expansion of the obligations to examine unfamiliar areas that may contain hazards, potential examiners may opt for roles with less personal risk and time in potentially hazardous areas.

2. The Compressed Schedule of Activities to Support this Rulemaking is Inconsistent with the Significance of the Proposed Rule.

The timing of the promulgation of the proposed rule is premature. Both MSHA and the sorptive minerals industry agree that the health and safety of our employees is critically important. The current rule that outlines regulation of examinations of Working Places is effective and should not be amended unless driven by immediate need or by a clearly articulated stream of incremental benefits that will be realized from proposed changes. In this instance, neither exists.

3. The Proposed Rule Fails to Properly Assess its Cost/Benefit.

The proposed Rule will impose significant additional costs to manage inspections and document them. The proposed Rule completely fails to actually determine how much time compliance with the new Rule would require. At a minimum, the agency should assess the additional costs to train employees to be "competent" to conduct inspections, the additional time to document the results of inspections, the additional risk to examiners who will be spending more time in potentially hazardous areas and examining areas where miners only access for repairs or maintenance, delays in allowing miners to commence work until inspections by others have taken place, and the costs to communicate to all "affected" employees any conditions identified by the inspections. Once these costs have been tabulated, the agency should assess whether all of those costs outweigh any incremental benefit to safety that it can identify may derive from the Rule.

4. The Rule will be More Successful in Allowing MSHA to Fine Operators Than to Improve Safety.

Under the proposed Rule, operators will be required to provide MSHA with significantly greater documentation of hazardous conditions that were observed in the mine, and exactly when these conditions were addressed. By requiring additional documentation, this will take time away from having supervisors actually in the field improving safety.

While the time spent documenting that remedial actions were taken does not actually enhance mine safety at all, it will provide MSHA with a tremendous opportunity to enhance its penalties against operators. It is not hard to imagine that some MSHA inspectors will request the documentation for each inspection, and then determine that the operator was not "prompt" enough even when the operator addressed every condition that was identified. Given that there is no definition of what is sufficiently "prompt," an operator will likely have to litigate whether the

inspector properly exercised his or her discretion in this determination or accept penalties for citations that are not warranted.

5. The Proposed Rule Fails to Address Prior Interpretations and History, and Leaves Key Issues Unresolved or Undefined.

MSHA has revised the working place examination Rule on numerous occasions. Additionally, this Rule has been the subject of multiple Program Policy Letters (“PPL”), and has been referenced in MSHA reports following accidents. Finally, a number of administrative law and federal cases have addressed the Rule and the obligations on operators to follow it. Despite all of this material, MSHA inexplicably fails to address almost any of this background in the commentary to the proposed Rule or in the Rule itself.

Indeed, even the most recent PPL fails to provide the limitations on what is a “working place” and other explanations that MSHA opted to describe in the commentary to the proposed Rule, and in the commentary accompanying the comment extension period. As a result, many operators will have no idea that MSHA itself had no intent to cover areas in the mine when inspectors incorrectly cite inadequate examinations in these areas.

6. As Demonstrated by Prior Policy Proposals, the Expansion of the Rule to Cover Maintenance and Repair Work Remains Ill Advised and MSHA Should Review its Prior Decision to Exclude These Activities as Part of this Rule Making Process.

In its commentary to the Proposed Rule, MSHA notes that its most recent PPL on the Rule states that “maintenance” and “repair” activities are covered by the working place examination requirement. However, MSHA fails to note that it previously submitted this proposal to public comment in 1995:

The working place for an individual assigned to perform maintenance or repair duties, for example, is the area where the individual performs the maintenance or repair work. For an operator to be in compliance, that area would need to be examined by a competent individual for hazardous conditions and any hazardous conditions would need to be promptly corrected.

60 Fed. Reg. 9987, 9988 (Feb. 22, 1995). Following comments to that Federal Register posting on its policy, MSHA published its final working place inspection policy, but opted to delete the references to maintenance and repair work completely. MSHA, Final Policy on Examinations of Working Places, 61 Fed. Reg. 42,787-88 (Aug. 19, 1996).

Before expressly covering maintenance and repair activities under the Working Place Examination Rule and referencing the appropriateness of the PPL for it, MSHA should assess why a change from its prior decision to exclude maintenance and repair activities is warranted.

Specific Concerns about the Proposed Rule

- 1. The Rule Should Reference its Limitation to “Locations in the Mine Where Miners Work in the Extraction and Milling Processes” Rather than Merely Having That Limitation in the PPL Where It Can be Disregarded.***

In its Commentary to the Rule, MSHA states that its PPLs on examinations have regularly “clarified” that the Working Place examination is limited to “locations at a mine where miners work in the extraction or milling processes.” This clarification is extremely important because the prior Rule itself defines “working place” to include “any place in or about a mine where work is being performed.” As MSHA frequently asserts in litigation that PPLs need not be followed, the Rule itself should expressly state that working place inspections will not be required outside of areas “where miners work in the extraction or milling processes.”

Further, as MSHA has failed to define the term “milling processes” in any Rule, it should include the definition in the Rule. At the very least, it should reference its prior definition of the term in the OSHA/MSHA Interagency Agreement Memorandum of Understanding dated March 29, 1979 (“Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated”) (available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=222).

The lack of a clear definition has led to the need for operators to litigate cases where MSHA claimed inspections were required outside of such areas, such as a recent case where an operator was cited for failing to inspect an elevator used to transport finished product, which is obviously not where miners work in either extraction or milling processes. Cemex Construction Materials, Atlantic, LLC, 38 FMSHRC 827 (April 29, 2016). Accordingly, the Rule should not only contain the existing “extraction and milling processes” limitation, but further clarify what it intended to cover by limiting it to “extraction processes” and “milling processes.”

2. The Rule Should Reference the Exclusions of Areas from Working Place Inspection Requirements Rather than Merely Identify Those Areas in the Rule’s Commentary.

In its commentary to the proposed rule, MSHA should be commended for continuing to exclude certain areas from the “working place” rule as it had done in its prior submissions for earlier rules. However, its failure to (a) include the excluded areas in the rule itself, (b) define better what constitutes an “isolated,” “idle” or “inactive” areas, and (c) address more clearly how to reconcile the exclusion of “isolated,” “idle” or “inactive” areas with its express inclusion of areas “where work is performed on an infrequent basis” results in a rule that makes application of the rule impractical.

First, nothing in the rule itself clarifies MSHA’s statement that certain areas of the mine, even though they may be arguably involved in mining and milling processes, are not covered by the working place inspection requirement. MSHA’s explanation in its commentary that “working place” does not include “roads not directly involved in the mining process, administrative office buildings, parking lots, lunchrooms, toilet facilities, or inactive storage areas” should be specifically included in the rule itself. Additionally, the rule should state, as already disclosed in its commentary, that “isolated, abandoned, or idle areas of mines or mills” would only be required to be examined “when miners have to perform work in these areas during the shift.”

Second, MSHA should take this opportunity to clarify what constitutes an “isolated,” “idle” or “inactive” area that does not require a working place inspection. These words are not defined, and provide no clarity to operators as to what areas actually can be excluded from inspection because they fall within these definitions. Although administrative judges will often reference dictionary definitions for undefined terms, the rule making process provides a much better means to ensure clarity on these terms.

Third, the rule is particularly unclear because MSHA maintains that areas where “infrequent” work is performed must be inspected even though “isolated” and “inactive” areas need not be inspected. Rather than force operators to litigate the interconnection of these terms, MSHA should simply state that an inspection of an area of the mine where maintenance or clean up occurs only is required if this work is actually scheduled to occur there during the shift. Further, MSHA should state that for unscheduled tasks, the inspection must still occur, but it can happen immediately prior to the work being performed rather than at the beginning of the shift.

Finally, the further commentary accompanying the extension of the comment period did not sufficiently limit the future application of a broad definition of “working place” by inspectors. Therefore, while it is helpful that MSHA expressly limited what “working place” covered, it nevertheless failed to sufficiently address any of the ambiguous areas discussed above, and failed to suggest that the rule would contain further definition:

A “working place” is not the entire mine unless miners will be working in all areas of the mine.

The proposed rule, like the existing rule, would require examinations in only those areas where work will be performed. As MSHA stated in the preamble, a “working place” applies to all locations at a mine where miners work in the extraction or milling processes. (81 FR 36821) MSHA clarifies that consistent with the existing definition of “working place,” this includes roads traveled to and from a work area.

3. The Rule Should Expressly Limit the Obligation to Maintain Records of Examination to those Areas Where Miners are Working.

In its proposed rule, MSHA deters broader inspections because it requires the operator to create a record of “all areas examined,” and to “promptly initiate appropriate actions to correct such conditions” even though only “working places” must be inspected, and only “before miners begin work in that place.” MSHA’s rule should be modified to cover only “all areas examined because they are working places.” This change would further enable operators to prioritize risks and focus their remediation and training efforts. Absent this change, efforts by an operator to have areas that are not working places inspected will require it to promptly initiate remedial actions or risk MSHA penalties. This could encourage narrower inspections to avoid the need to engage in remedial efforts in non-working places, which may actually lead to more hazardous conditions if a miner wanders into these non-inspected areas.

4. The Proposed Rule Needs to Clarify Working Place Inspection Expectations.

In its proposed rule commentary, MSHA provides three examples of incidents that it believes an adequate Working Place inspection would have prevented. One incident that was described

was a March 2011 fatal accident which occurred to a contractor due to a malfunctioning pipe – fusion machine. To determine that a pipe-fusion machine was defective requires more than an observant inspector, and places a much higher burden on inspectors than is warranted. Moreover, to expect that a miner would need to assess the functionality of machinery that is controlled by a contractor is inappropriate. MSHA should specifically explain more fully why it believed that the inspection was inadequate in this situation, or specifically renounce its use of this example.

As for another example that MSHA provided, a March 2015 fatal accident involving an excavator operator and a water-filled ditch, it failed to satisfactorily explain how it was clear that the accident occurred following an insufficient working place examination, noting the following:

Three days prior to the accident, several inches of rain fell in the area causing the ditch to fill with water and overflow, making the ditch invisible to persons working in the area. MSHA believes that had a competent person conducted a workplace examination before miners started working in the area the hazard would have been identified; notification to affected miners of the water-filled ditch would have made them aware of the hazardous condition; and a record of the hazardous condition would have prompted corrective action and prevented the fatality.

Indeed, it appears just as likely that the accident occurred while the working place was being examined for safety.

5. The Proposed Rule Fails to Adequately Describe the Obligations Following Examinations.

Under the current rule, it is acceptable for miners to conduct their own working place inspection. Under the proposed rule, the operator must designate a person to complete the examination before miners begin work. The proposed rule then requires that the operator “promptly notify miners in any affected areas of any adverse condition.” In its extension of the comment period, MSHA further clarified that:

“to promptly notify miners” means any notification to the miners that alerts them to adverse conditions in their working place so that they can take necessary precautions to avoid an accident or injury before they begin work in that area. This notification could take any form that is effective to notify affected miners of the particular condition: Verbal notification, prominent warning signage, other written notification, etc. MSHA believes that, in most cases, verbal notification or descriptive warning signage would be needed to ensure that all affected miners received actual notification of the specific condition in question. MSHA also clarifies that a “prompt” notification would occur before miners are potentially exposed to the condition; *e.g.*, before miners begin work in the affected areas, or as soon as possible after work begins if the condition is discovered while they are working in an area. For example, this notification could occur when miners are given work-shift assignments.

MSHA does not suggest that it will alter its proposed Rule to reflect this clarification. If it isn’t in the Rule, inspectors will continue to exercise their discretion and say the format of the notification was insufficient. But even if that further clarification is part of the Rule, the notification obligation remains unclear, needs further refinement, and adds significant cost to the operator. The proposed rule on notification contains several words that are not defined and are subject to ambiguity: “prompt”; “affected”; and “may adversely affect.”

As a starting point, it still remains far from clear what notification is sufficient. Indeed, even the further commentary only provides three (3) means to effect notification, and fails to reference

some forms of notification that should be sufficient for adverse conditions that always exist at the mine, such as mine training.

Further, the operator will need to document the notification in some manner in order to demonstrate that it has actually done so, and that the notice was “prompt.” MSHA itself has estimated that five (5) minutes of additional time to document each examination alone will add between \$9 Million and \$10 Million to industry costs per year, but it did not provide an estimate of the cost to “notify” miners. This is a new cost, as miners can no longer be the examiners of their own working places, so an actual communication will need to take place. Even assuming that communicating to affected miners will take only five (5) minutes, the operator will incur that expense each shift for both the time spent communicating the information to the miner, and the time spent by the miner receiving the communication. Using the hours worked in the industry, and MSHA’s calculation methodology, this adds significant costs to the industry.

6. The Proposed Rule Requires Action Whenever There is an “Adverse” Condition and this is Too Broad an Obligation.

In its proposed Rule, MSHA seeks to maintain the ambiguous language that an operator must examine working places for "conditions that may adversely affect safety and health" and then "promptly initiate appropriate action to correct such conditions." This language should be clarified, as there are many situations where an examination will note an adverse condition, but there is no means for the operator to correct it. For example, rain is obviously a condition that may adversely affect safety by making things more slippery, but there is nothing an operator can do to “correct” that condition as the proposed Rule requires. The Rule should be modified to clarify that only conditions that would result in a Standards violation if not addressed by shift end need to be promptly corrected.

7. The Proposed Rule’s Timing of Inspection Should be Corrected.

The proposed Rule requires an inspection to occur “before miners begin work in that place” and once each shift. MSHA has offered the possibility that the inspection could occur within a specified time period (MSHA suggested 2 hours) before work starts, but the current rule’s combination of the words “before miners begin work” and “once each shift” currently anticipates that the inspection must actually occur at the beginning of each shift before miners begin work. Further, the Rule’s Commentary states MSHA’s belief that the “best practice” would be that a foreman or other supervisor conduct the examination. 81 Fed. Reg. at 36,821. After presenting this explanation of the proposed Rule, MSHA has largely repudiated it in the commentary accompanying the comment extension:

“Before work begins in an area” may or may not coincide with the start of any particular shift; it depends on when miners actually will be working in any particular working place.

No explanation is given as to how the proposed Rule will be modified to address the discrepancy.

Conclusion

SMI appreciates the opportunity to comment on MSHA's Proposed Rule on examinations of working places in metal and nonmetal mines and it stands ready to assist in developing an effective alternative rule in a constructive manner. Please do not hesitate to contact me should you have any questions regarding the content of this letter or regarding SMI's position on this matter.

Sincerely,

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

Bryan D. Nicholson
Executive Director
Sorptive Minerals Institute (SMI)