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Examinations of Working Places in Metal and Nonmetal Mines - Proposed rule, limited reopening of the rulemaking record; notice of public hearings; close of comment period.

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General Comment

Please find enclosed the comments of the National Lime Association.

Attachments

NLA Comments on workplace exam revision NPRM Nov 13 2017

NATIONAL LIME ASSOCIATION

November 13, 2017

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(Submitted electronically at http://www.regulations.gov)

RE: Examinations of Working Places in Metal and Nonmetal Mines: Proposed Rule; limited reopening of the rulemaking record; notice of public hearings; close of comment period (RIN 1219-AB87)

The National Lime Association (NLA) appreciates the opportunity to provide comments on MSHA's notice referenced above. The notice proposes to make two substantive changes to the agency's January 23, 2017, final rule on examinations of working places in metal and nonmetal mines.

NLA is the trade association for manufacturers of high calcium quicklime, dolomitic quicklime, and hydrated lime, collectively referred to as "lime." Lime is a chemical without substitute, providing cost-effective solutions to many of society's environmental problems. Lime is produced by calcining limestone, and thus most lime manufacturers also quarry limestone, with mining operations under the jurisdiction of MSHA.

NLA commends MSHA for reopening the rulemaking record on the workplace examination rule. Both of the substantive changes that have been proposed are improvements, as explained in more detail below. However, NLA continues to believe that the rule, even with these changes, is seriously flawed and should be withdrawn, or, at the least, reopened for further comment on and consideration of all aspects of the rule.

(NLA commented on prior stages of this rulemaking in comments dated September 29, 2016, April 26, 2017, and September 26, 2017. In addition, NLA provided public testimony at public hearings on July 26, 2016, and October 24, 2017. Please consider these prior comments and testimony to be incorporated herein by reference.)

1. Allowing Inspections "As" Work Begins Is an Improvement

MSHA proposes to allow workplace inspections to be performed not only "before work begins" as in the final rule, but also "as" miners begin work in a working place. As NLA explained in earlier comments and testimony, many NLA members believe that it is best to train miners to

perform examinations of their own working areas, and thus it is appropriate to allow inspections "as" they begin work, so that it is clear that they can perform these exams themselves.

NLA believes, however, that there needs to be more clarity about working places, and about what "as" work begins means. For example, MSHA should clarify how this provision would apply to the inspection of travelways. At the least, MSHA should make clear that its revised language allowing inspection "as" miners enter an area for work applies to travelways as well.

2. **Promptly Corrected Adverse Conditions Should Not Require Notation**

NLA supports MSHA's proposal that adverse conditions that are promptly corrected should not have to be noted on examination forms. Without such a change, it is inevitable that the forms will be overwhelmed by minor housekeeping issues that can be and routinely are immediately corrected.

3. **MSHA Should Clarify How Examination Forms Will Be Used in Enforcement**

While MSHA has only proposed limited changes to the rule, this should also be an opportunity for the agency to provide clarifications on other issues with the rule that may not require modification of the rule language itself.

For example, NLA and other commenters strongly urged MSHA to make clear that it would not issue citations based on adverse conditions noted in examination records, as long as the conditions were promptly corrected with proper notice to miners. In the January 23, 2017, rule preamble, the agency states:

> Many commenters were concerned that the Agency will use the examination record to write citations based solely on the adverse conditions identified in the record. This is not MSHA's intent, nor do we plan to train our inspectors to do this. 82 FR 7687.

NLA believe that MSHA should state this more definitively as a matter of policy, and not just a statement of intent and plans.

As NLA commented on the original proposed rule:

> MSHA should clearly state the following policy in conjunction with this rule:
>
> > No citation will be issued for a condition that was identified pursuant to a workplace examination if:
> >
> > (1) The appropriate miners were notified of the condition and appropriate steps were taken to protect miners from the risk pending corrective action; and
> >
> > (2) Appropriate corrective action was performed in a timely manner.
>
> This policy would be consistent with MSHA's policy as expressed in its Enforcement Manual that citations should not be issued for defects in equipment if the equipment has been tagged and removed from service as a result of a preoperational inspection.

MSHA should make it clear to inspectors, and to the regulated community, that this is agency policy, and not simply a matter of intention.

4. MSHA Should Repropose the Entire Rule

NLA continues to believe that the entire workplace examination rule is flawed. As many commenters have noted, the rule was rushed, and many concerns expressed in comments and testimony were not addressed in the rule or its preamble. Although the current proposal addresses two of those concerns, there are many more.

In addition, the status of the rule is currently unclear as a legal and procedural matter. The rule was promulgated after the issuance of an executive order "freezing" most new regulations, and the question of whether that order applied to the final rule here has not yet been definitively answered. Furthermore, several mining organizations have challenged the validity of the rule in federal court, on both procedural and substantive grounds. This creates additional uncertainty as to the status of the rule.

MSHA should address these problems by suspending the rule's effective date indefinitely, and reopening the rule in its entirety for further comment and consideration by the agency.

5. The Rule Is No Longer Final, and the Effective Date Should Be Suspended

On the same day as the notice addressed herein, MSHA published another proposed rule (82 Fed. Reg. 42765), under which it proposed to extend the effective date of the final rule, and on October 5, it issued a final rule extending the effective date until June 2, 2018.

While NLA appreciates that MSHA delayed the effective date of the rule significantly, the current proposal essentially means that the rule is no longer final. The rule's effective date should only occur after a final rule is promulgated on the proposed changes. When MSHA first promulgated the final workplace examination rule, it set an effective date four months after that date of publication, and many stakeholders complained that significantly more time—at least six months—would be needed to make the kinds of changes mandated by the rule.

Moreover, MSHA has made it clear that it intends to engage in outreach to the regulated community and to provide guidance before the rule becomes effective. Clearly, this can only occur after the rule is finalized, and if it is to be done properly, will take several months at a minimum.

Finally, until MSHA promulgates a final rule, it is unknown just how significant the changes to the rule will be, and whether those changes would mandate more time for compliance.

Accordingly, the prudent course for MSHA would be to suspend the effective date of the workplace examination rule as it currently exists, and to establish a new effective date when the proposed changes are finalized, at least six months after the publication of the final rule.

NLA appreciates the opportunity to comment on these important issues.

Very truly yours,

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