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To:	zzMSHA-Standards - Comments to Fed Reg Group
Subject:	Comments, RIN 1219-AB87 // Docket No. MSHA-2014-0030
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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 Construction Aggregate Association.

Thank you,

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

To Whom It May Concern:

We submit these Comments on behalf of six trade 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 in response to the Mine Safety and Health Administration's ("MSHA") reopening of the rulemaking record with respect to the Agency's Final Rule on examinations of working places in metal and nonmetal mines. 82 Fed. Reg. 42757 (Sept. 12, 2017).

On January 23, 2017, 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 has not taken effect. By publication in the Federal Register on October 5, 2017, MSHA announced that the effective date of the Final Rule was stayed until June 2, 2018. The existing Working Place Examination standard, 30 C.F.R. §§ 56/57.18002, remains in effect.

The six associations represented in these Comments (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. Briefing is complete. By Order dated October 18, 2017, the matter has been stayed by the Court pending the outcome of the instant rulemaking.

On September 12, 2017, MSHA reopened the rulemaking record and proposed to amend the Final Rule by changing its provisions pertaining to: (1) when working place examinations must begin; and (2) the adverse conditions and related corrective actions that must be included in the examination record. 82 Fed. Reg. 42757 (hereinafter "Proposed Amendments"). While Petitioners appreciate MSHA's willingness to revisit certain of the problematic provisions of the Final Rule, Petitioners do not believe that the Proposed Amendments are sufficient to allay the safety, compliance and operational concerns the Final Rule presents. Numerous issues remain. As a result, Petitioners believe that the best course of action for both the regulated community and the Agency is a withdrawal of the Final Rule.[1]

I. The Proposed Amendments

A. Timing of Examinations

The initial version of the Final Rule includes the requirement that working place examinations must be conducted by a competent person "before miners begin work in that place." 82 Fed. Reg. at 7695. MSHA has proposed to amend the Final Rule such that examinations would be required "before work begins or as miners begin work in that place." 82 Fed. Reg. at 42759. While the proposed amendment may provide operators with a measure of flexibility relative to the initial version of the Final Rule, it continues to unnecessarily constrain when operators can conduct their working place examinations.

As the existing Working Place Examination standard currently provides, operators should be afforded the flexibility to conduct examinations at any point during the course of a shift as circumstances dictate. MSHA has shown no need for the regulated community to change this practice. The years leading up to the promulgation of the Final Rule have shown a continued trend of improved safety. MSHA advertised that 2015 – the year preceding the rulemaking that led to the Final Rule – was the safest year in mining history. That year, the "all-injury rate" for metal/non-metal mines was an all-time low of 2.02 for every 200,000 hours worked. The "lost-time injury rate" was an all-time low of 1.36 for every 200,000 hours worked. The "non-fatal lost time injury rate" matched its all-time low of 1.36 for every 200,000 hours worked.[2] Moreover, calendar

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[1] In its briefing before the Eleventh Circuit, Petitioners have argued that the Final Rule is invalid because it was not predicated upon any showing that the existing standard is inadequate or that the existing practice of working place examinations is unsafe, is an arbitrary and capricious exercise of rulemaking, contains impermissibly vague terms and violates applicable cost/benefit mandates. Petitioners maintain those positions and nothing contained herein constitutes a waiver of any argument before the Eleventh Circuit.

[2] For the statistics cited herein, see https://www.msha.gov/data-reports/ statistics/ mine-safety-and-health-glance.

year 2015 was not an anomaly but instead continued an industry trend of improving safety outcomes from year-to-year. It was the fifteenth consecutive year that the industry experienced a drop in the all-injury rate from the previous year. Thus, the existing practice of conducting working place examinations during the shift works.

Moreover, this approach constitutes a best safety practice. It accounts for changes in conditions that can occur during the course of a shift. MSHA seemingly agrees. It has "recognize[d] that mining is dynamic, conditions are always changing, and adverse conditions need to be identified and addressed throughout the shift, not just at the beginning." 82 Fed. Reg. at 42759. It is therefore not optimal for the required examination to take place prior to or at the beginning of work.[3] Operators know their work processes best. They are in the best position to tailor their examination practices to occur at a time that would provide the maximum safety benefit to miners.

Additionally, the Proposed Amendment related to timing of the examinations contains an ambiguous key term. In allowing for examinations "as miners begin work in that place," the phrase "that place" is unclear and subject to varying interpretation. It raises uncertainty as to where specifically one should examine to cover work that is to be done by an oncoming shift. This concern is particularly apt for plants and processing facilities that may be large or include multiple levels. How much of such a facility should be examined prior to or at the start of work to constitute a compliant examination? It is feared that this ambiguity will lead to uncertainty in compliance efforts and inconsistent enforcement.

B. Documentation

The Final Rule substantially increases the requirements for examination records, requiring that the records include: the name of the person conducting the examination, the location of all areas examined, a description of each condition found that may adversely affect safety or health and, when necessary, be supplemented to include the date of corrective actions taken for adverse conditions. 82 Fed. Reg. at 7695. The Proposed Amendments would reduce the documentation requirement of the Final Rule such that conditions that are found and "corrected promptly" would no longer need to be recorded, nor would their corrections. 82 Fed. Reg. at 42759. MSHA has advised that, for purposes of this provision, "promptly" means "before miners are potentially exposed to adverse conditions." 82 Fed. Reg. at 42759. All other documentation requirements contained in the initial version of the Final Rule remain.

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[3] That operators can do additional examinations during the course of a shift beyond those required by the standard misses the point. Operators have always been free to exceed MSHA's requirements. However, the examination required by law should constitute a best practice.

This Proposed Amendment does offer operators a measure of appropriate relief over the recordkeeping requirement contained in the initial version of the Final Rule. Typically, a number of conditions found during a working place examination are able to be corrected during the examination. It is appropriate that they would not be required to be included in the examination record.

Petitioners suggest, however, that if any new recordkeeping provision is to take effect beyond the requirement of the existing rule, MSHA should further amend that provision such that conditions corrected on the shift which they are found should not have to be recorded. Such is appropriate because the Final Rule requires that the examination record for a given shift be made by the end of that shift. If conditions are corrected by the time the record is required, they should not have to be recorded. This additional amendment would further the intent of the Proposed Amendment, which is to encourage the timely correction of conditions. See 82 Fed. Reg. at 42759. Moreover, the function of the examination record is to document uncorrected conditions to facilitate their correction. If conditions have been corrected during the shift, they should no longer need to be recorded in the examination record that is to be completed by the end of that shift.

Petitioners further request that, if any new recordkeeping provision is to take effect, operators should be afforded maximum flexibility in the recording of conditions and corrections, including the use of work orders and existing electronic databases for documentation. Specifically, any new provision must permit employers to use currently-employed work order management systems that record the date of corrective action. The degree to which any new rule would minimize burden and avoid redundancy, while maximizing benefit, is largely dependent on the ability of operators to meet the new requirements with existing practices.

Petitioners remain concerned, however, that any increased documentation requirement beyond what is currently required will lead to additional enforcement based solely on examination records. Similarly, Petitioners are concerned that with an increased focus on records, any new Working Place Examination standard will more readily lead to MSHA inspectors issuing multiple citations for a single situation: one for the condition and one for the examination. Petitioners are also concerned that such records will be used against individuals for the assessment of penalties under Section 110 of the Mine Act, 30 U.S.C. § 820. Such would serve as a disincentive for miners to serve as competent persons who perform examinations. Petitioners request that MSHA ensure that additional enforcement not result from any new Working Place Examination standard and that examination records will not be used to assess personal penalties against individual miners under Section 110 of the Mine Act.

II. Costs

Executive Order 12866 (1993) requires that any new regulation represents "the most cost effective manner to achieve the regulatory objective." In doing so, the agency "shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities and the public), flexibility, distributive impacts, and equity." Likewise, Executive Order 13563 (2011) requires, in proposing new regulations, the agency is "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."

MSHA has run afoul of the provisions of Executive Order Nos. 12866 and 13563 in proposing the Final Rule and the Proposed Amendments do not cure this infirmity. Petitioners believe that MSHA significantly underestimated the costs associated with the initial proposed rule from 2016 and with the Proposed Amendments to the Final Rule. It is difficult to quantify the costs associated with this rulemaking because of the unclear requirements and vague terms of the Final Rule and the Proposed Amendments, as detailed below. Some of this difficulty is mirrored by MSHA's own comments about the uncertainty of its calculations. Such difficulty runs counter to the aforementioned Executive Orders, which mandate a quantifiable consideration of costs.

Nonetheless, using most of the same factors as were used in the June 2016 proposal, for small operators in the aggregates industry, National Stone, Sand & Gravel Association ("NSSGA") came up with estimated costs for small operators (facilities with 19 or fewer miners) related to the documentation requirement of the 2016 proposal that were three times larger than the original estimate by MSHA.[4] Therefore, Petitioners also believe that MSHA's cost estimates are contrary to the Executive Orders because they are not accurate.

The only conclusion that can be drawn with certainty is that this wide-ranging rule will have a significant economic cost to the industries without any increase in the level of safety for miners. Under these circumstances, the Final Rule, with or with the Proposed Amendments, contravenes the requirements of Executive Order Nos. 12866 and 13563. Accordingly, it should be withdrawn.

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[4] NSSGA's calculations differed from MSHA's in that MSHA assumed one examiner per facility whereas NSSGA, more realistically, assumed up to two examiners for half of small operators and up to four examiners for the other half of small operators. In practice, the number examiners per location could even be higher and, thus, the impact could exceed even NSSGA's cost projections. Such uncertainty further underscores the Final Rule's failings with respect to cost estimates, a problem left unresolved by the Proposed Amendments.

III. The Proposed Amendments' Shortcomings

Although the Proposed Amendments provide a measure of relief in the areas of timing of examinations and recordkeeping, they do not address numerous flaws exhibited by the Final Rule. To the extent that any new Working Place Examination standard ultimately takes effect, MSHA should take this as an opportunity to correct those flaws.

A. Notification

The Final Rule requires that operators "promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health[.]" 82 Fed. Reg. at 7695. It does not define what constitutes "notification" or the "affected area" or which miners would be affected by a given condition. The Proposed Amendments do nothing to provide clarification. The uncertainty surrounding the notification provision materially impacts the timing of examinations, which is the subject of the first Proposed Amendment. To that end, it is expected that in many instances, the examiner would be responsible for initiating the efforts to notify miners. Without a clearer explanation of the scope of the notification requirements, the burden placed on the individual performing the examination remains undefined and subject to guesswork.

B. Vague and Unclear Terms and Provisions

The Final Rule contained many vague and unclear terms and provisions. The Proposed Amendments do not offer any clarification of these terms. Vague and unclear terms include:

- The term "working place" for purposes of §§ 56/57.18002(a). It remains troublesome that MSHA appears to consider areas commonly thought of as "travelways" as "working places" when the existing standard already differentiates between a "working place" and a "travelway." 30 C.F.R. §§ 56/57.2.

- The term "conditions that may adversely affect safety and health" for purposes of 30 C.F.R. §§ 56/57.18002(a)(1). During the comment period preceding the promulgation of the Final Rule, commenters raised that this term is potentially ambiguous, yet MSHA expressly declined to provide definitional guidance for this term. That is particularly problematic because examining for "conditions that may adversely affect safety and health" is the touchstone of the entire rule, including the changes contemplated by the Proposed Amendments.

- The term "promptly" for purposes of the notification requirement and remediation requirement of 30 C.F.R. §§ 56/57.18002(a)(1). This term is subjective and could result in varying interpretations in enforcement. The

term also appears in the Proposed Amendment with respect to when conditions need not be recorded. Although MSHA has provided some guidance as to the meaning of the term in this context, that guidance remains subject to interpretation and in need of clarification. To that end, for the purpose of this provision, MSHA has stated that "promptly" means "before miners are potentially exposed to adverse conditions." 82 Fed. Reg. at 42759. This raises questions as to what constitutes exposure, what scope of area is considered and which miners are affected? Further clarification of this term is necessary for this provision as well.

- The term "initiate appropriate action" for the remediation provision of 30 C.F.R. §§ 56/57.18002(a)(1). This term is also subjective and could result in varying interpretations in enforcement.

IV. Conclusion

In sum, the Proposed Amendments provide a measure of appropriate relief relative to the initial version of the Final Rule. To the degree that any new Working Place Examination standard ultimately takes effect, Petitioners offer a qualified measure of support for the Proposed Amendments over the initial version of the Final Rule, subject to the points described above. However, the Final Rule, even with Proposed Amendments, remains unnecessarily burdensome, vague and devoid of any appreciable safety benefit. Therefore, an even more appropriate action would be to withdraw the Final Rule altogether.

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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