

PUBLIC SUBMISSION

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Docket: MSHA-2014-0030

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

Comment On: MSHA-2014-0030-0179

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.

Document: MSHA-2014-0030-DRAFT-0254

Comment from Bryan Nicholson, Sorptive Minerals Institute (SMI)

Submitter Information

Name: Bryan Nicholson

Organization: Sorptive Minerals Institute (SMI)

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, and MSHA's Limited Reopening of the Rulemaking Record; Notice of Public Hearings; and Close of Comment Period.

Regards,

Bryan D. Nicholson
SMI Executive Director

Attachments

MSHA_RIN1219_AB87_SMIComments_11_13_17

AB87-COMM-184



SORPTIVE MINERALS INSTITUTE

November 13, 2017

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
Suite 4E401
Arlington, Virginia 22202-5452

**Re: RIN 1219-AB87
Docket No. MSHA-2014-0030; Proposed rule, Limited Reopening of the
Rulemaking Record; Notice of Public Hearings; Close of Comment Period.**

Dear Ms. McConnell:

The Sorptive Minerals Institute (“SMI”) appreciates the opportunity to comment further on the Mine Safety and Health Administration’s (“MSHA”) Final Rule on examinations of working places in metal and nonmetal mines (“Final Rule”) published on January 23, 2017 (82 FR 7695), to be effective May 23, 2017, delayed on May 22, 2017 (82 FR 23139), until October 2, 2017 (82 FR 23139), and subsequently delayed on September 12, 2017 until March 2, 2018 (82 FR 42765).

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.

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 that were held as part of this Rulemaking process and provided written comments regarding the same, 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.

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 in deeper detail 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.

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 clear and consistent 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.

Through the years, 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 its previous commentary to the proposed Rule or in the Rule itself.

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 work begins or as miners begin their work in a 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.

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 work begins or as miners begin their work in a place. The proposed rule on notification contains several words that are not defined and are subject to ambiguity, including: “prompt”; “affected”; and “may adversely affect.”

MSHA seeks to maintain this 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.

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.

SMI appreciates the opportunity to comment further 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,



Bryan D. Nicholson
Sorptive Minerals Institute (SMI)
1800 M Street, NW, Suite #400S
Washington, DC 20036
Direct: (202) 289-2760
Fax: (202) 530-0659
bnicholson@amsnavista.com