



October 28, 2019

Ms. Sheila A. McConnell
Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
201 12th Street South, Suite 4E401
Arlington, Virginia 22202-5452

Re: Docket No. MSHA-2018-0015, Program Policy Letter No. P18-IV-__, Escapeways and Refuges in Underground Metal and Nonmetal Mines, Comments of the Industrial Minerals Association - North America

Filed via the Federal eRulemaking Portal: <http://www.regulations.gov>

Dear Ms. McConnell:

Please find below the comments of the Industrial Minerals Association-North America (IMA-NA) on the Mine Safety and Health Administration's (MSHA) Program Policy Letter No. P18-IV-__, Escapeways and Refuges in Underground Metal and Nonmetal Mines, published at 84 FR 36623 et seq. (July 29, 2019)(the PPL). IMA-NA is the representative voice of companies that extract and process a vital and beneficial group of raw materials known as industrial minerals. Industrial minerals are the ingredients for many of the products used in everyday life such as glass, ceramics, paper, plastics, paints and coatings, cosmetics, pharmaceuticals and laundry detergent. IMA-NA's companies and the people they employ are proud of their industry and the socially responsible methods they use to deliver these beneficial products. Industrial minerals include ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, perlite, soda ash (trona), talc and wollastonite, among others. IMA-NA also represents associate member companies that support the producers of industrial minerals. The safety and health of our employees are of paramount importance to IMA-NA members. IMA-NA and its member companies welcome the opportunity to submit these comments on the PPL.

At the outset, IMA-NA commends MSHA for publishing the PPL in the *Federal Register* and seeking public comment on it. IMA-NA also wishes to express its appreciation to MSHA for extending the public comment period at IMA-NA's request from the original September 27, 2019 deadline to the current October 28, 2019 deadline. The extension afforded IMA-NA much-needed time to focus proper attention on the PPL and on the comments it submits today. We trust the extension has significantly improved the likelihood that these comments are meaningful and constructive.

MSHA-2018-0015-0008

In the cited *Federal Register* notice MSHA makes clear that the PPL represents agency guidance, a determination reiterated at the public meeting MSHA held on October 10, 2019. This is not a rulemaking, but a welcome attempt by MSHA to seek public comment on guidance the agency has determined is significant because it “may reasonably be anticipated to raise novel legal or policy issues . . . and to clarify the existing standard regarding placement of refuges required by 30 CFR 57.11050(a)” 84 FR at 36624.

One of IMA-NA’s principal concerns with the PPL is that it departs substantially from the plain wording of the standard and, as agency policy, is binding on MSHA enforcement personnel. In preparing these comments, IMA-NA compared the PPL word-for-word with the applicable escapeways/refuges regulation at 30 CFR §57.11050. The results were rather alarming. The PPL, although it rearranges the wording, is fairly true to 30 CFR §57.11050(a). See IMA-NA Attachment 1. On the other hand, with best efforts employed, it appears that only seventeen words in the applicable portion of the PPL, few of them nouns, mirrored §57.11050(b)(i.e., in, to, a, refuge, be, for, cannot, the, surface, from, working, place, within, when, so, that, can). *Id.* Based on this analysis, IMA-NA offers the following observations:

- The PPL asserts that miners must have access to a refuge while a second opening to the surface is being developed AND during the exploration or development of an ore body. This assertion is not clearly mandated by 30 CFR §57.11050.
- There are no distances stated in 30 CFR §57.11050 (a) or (b). Only time frames and the use of normal exit methods.
- MSHA’s introduction of specific distances, a shorter than regulated time (10 minutes versus 30 minutes), and a travel time measured while walking and carrying an injured miner, even if only used as examples, depart from the plain wording of 30 CFR §57.11050 and are potential sources of confusion.
- Because MSHA policy guidance is binding on agency employees, IMA-NA supports making clear that the examples cited in the PPL do not constitute a basis for enforcement.
- IMA-NA is concerned that any new policy may constitute rulemaking through interpretation rather than through the notice and comment rulemaking required by the Federal Mine Safety and Health Act of 1977.
- IMA-NA supports MSHA’s consideration of mine-specific conditions and factors when developing and reviewing the mine’s escape and evacuation plan under 30 CFR §57.11053.

Our intent is not to be overly legalistic when addressing matters of policy, but when policy may be enforced as if carrying the weight of duly promulgated regulation we feel obligated to comment that a legal line may have been crossed. The cited *Federal Register* notice references at least two of the hallmarks for establishing that legal line, Executive Order (EO) 12866 on Regulatory Planning and Review (as amended by EO 13258 and EO 13422) and the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices. See IMA-NA Attachments 2 and 3. At the October 10, 2019 public meeting on the PPL it was brought to MSHA’s attention that two new relevant Executive Orders recently had been issued, EO 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents and EO 13892 on Promoting the Rule of Law Through Transparency and Fairness in Civil

Administrative Enforcement and Adjudication. See IMA-NA Attachments 4 and 5. EO 13891 allows agencies to continue to issue interpretive guidance, but it will not be considered “binding” and must contain language so stating. EO 13982, in Section 3, bars agencies from using guidance documents to impose new standards or to make a determination that has legal consequences. It also provides that noncompliance with a guidance document alone will not be a regulatory violation and that an agency may cite a guidance document in enforcement actions only if it previously published it. IMA-NA encourages MSHA to withdraw the PPL until such time as it has evaluated its compliance with these legal authorities.


Furthermore, MSHA’s determination in the *Federal Register* overview to the PPL that “. . . the guidance would not be economically significant as there would be no new costs . . .” does not acknowledge the cost of new refuge chambers and their attending support systems that would be required as a result of the PPL determining where refuge chambers should be required. The additional refuge chambers represent costs and these added refuge chambers require pipelines carrying compressed air and water. Installing these systems can be a serious undertaking for any underground operation without such permanent infrastructure in place and advancing such infrastructure is not only very costly, but takes a good deal of planning, time and labor, as this infrastructure also must be maintained.

The affected member companies of IMA-NA have been operating under 30 CFR §57.11050 and policy guidance contained in Program Policy Manual, Volume IV – Metal and Nonmetal Mines (the PPM) and Program Information Bulletin No. P09-09 (the PIB). See IMA-NA Attachments 6 and 7. While these latter guidance documents solely reflect MSHA’s interpretation of 30 CFR §57.11050, they at least adhere to the plain wording of the regulation by utilizing only time frames and the use of normal exit methods. Unlike the PPL, they do not introduce specific distances departing from the plain wording of 30 CFR §57.11050 and presenting potential sources of confusion. For these reasons, IMA-NA encourages MSHA to withdraw the PPL until it can be recast utilizing only time frames and the use of normal exit methods.

Safe escape and refuge in underground metal and nonmetal mines are not matters IMA-NA member companies take lightly, nor do we believe MSHA takes lightly. They are, after all, potentially matters of life and death. However, underground metal and nonmetal mines are not underground coal mines and 30 CFR §57.11050 and the PPM and PIB that pre-existed the PPL have served mine operators, miners and MSHA well for decades. The plain wording of the regulation, as supplemented by the guidance in the PPM and the PIB, and historical determinations evidenced in the many inspections MSHA has conducted at our members’ mines over these decades is very different from the guidance provided in the PPL, despite MSHA’s assertions to the contrary. Given the potential for the PPL to introduce confusion where little or none currently exists, IMA-NA recommends that MSHA return to the *status quo ante*.

Thank you for the opportunity to comment on the PPL. The IMA-NA looks forward to working with you further on the PPL and on other issues related to escapeways and refuges in underground metal and nonmetal mines.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark G. Ellis". The signature is fluid and cursive, with the first name "Mark" being the most prominent.

Mark G. Ellis
President

Attachments:

- IMA-NA Attachment 1
- IMA-NA Attachment 2
- IMA-NA Attachment 3
- IMA-NA Attachment 4
- IMA-NA Attachment 5
- IMA-NA Attachment 6
- IMA-NA Attachment 7

PUBLIC SUBMISSION

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Document: MSHA-2018-0015-0008

Comment from Mark Ellis, Industrial Minerals Association - North America (IMA-NA)

Submitter Information

Name: Mark Ellis

Organization: Industrial Minerals Association - North America (IMA-NA)

General Comment

Please see the attached.

Attachments

IMA-NA Comments on MSHA RFI on Escapeways-Refuges PPL

IMA-NA Attachment 2

IMA-NA Attachment 3

IMA-NA Attachment 1

IMA-NA Attachment 4

IMA-NA Attachment 6

IMA-NA Attachment 5

IMA-NA Attachment 7