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Via Email – zzMSHA-comments@dol.gov

MSHA, Office of Standards, Regulations
And Variances
201 12th Street South, Suite 4E401
Arlington, VA 2202-5452

Re: Safety Program for Surface Mobile Equipment
RIN 12-AB91
Docket No. MSHA 2018-0016

To Whom it May Concern:

Nevada Gold Mines ("NGM") submits the following comments in response to the proposed rule entitled Safety Program for Surface Mobile Equipment ("Proposed Rule"), 86 Fed. Reg. 50496 (Sept. 9, 2021).

NGM is a joint venture between Barrick and Newmont that combined the two companies' assets across the state of Nevada in 2019. NGM operates gold mines across the state of Nevada as the single largest gold-producing venture in the world. The assets of NGM comprise 10 underground and 12 open pit mines, two autoclave facilities, two roasting facilities, four oxide mills, a flotation plant and five heap leach facilities. Facilities operated by NGM are therefore covered by MSHA's standards at 30 C.F.R. Parts 56 and 57.

At NGM, we have put together a Journey to Zero Harm. It is a personal commitment at all levels of the organization to achieve our vision of "Every Person Going Home Safe and Healthy Every Day." A Zero Harm environment is where all employees are accountable for their own safety and it is underpinned by our Stop Unsafe Work authority under our Fatality Prevention Commitments. NGM's Journey to Zero Harm is based on four foundations of safety management: Leadership, Standards, Engagement and Accountability.

In regard to the concerns addressed by the Proposed Rule, NGM has various standards and controls in place already. For example, NGM has Traffic Management plans at each of its sites, which provide guidance for establishing a system of safe travel throughout all NGM sites. These plans detail safe practices and risk control measures to protect workers, equipment and facilities and are designed to prevent accidents by setting requirements for the operation of vehicles and equipment.

NGM believes that certain terms in the Proposed Rule should be deleted, modified or clarified. Specifically:

- MSHA should clarify that the definition of "surface mobile equipment" does not include underground equipment that operates to complete underground tasks beyond mine portals.

- The "responsible person" provision of the Proposed Rule should be stricken.

- MSHA should clarify that contractors and their equipment are not expected to be part of a production operator's safety program.

- MSHA has not adequately explained how the four items to be included in the required safety programs will result in a reduction of accidents.

- MSHA should clarify how certain information required to be collected should be documented and maintained.

- MSHA should clarify that the types of maintenance and repairs to be addressed in the safety program are only those that are safety sensitive.

- MSHA should clarify what constitute "feasible" technologies that mine operators should evaluate for adoption.

- MSHA should clarify certain terms related to the required evaluations and updating of the safety program.

Each point is discussed in turn below.

1. MSHA should clarify that "surface mobile equipment" does not include underground equipment that operates to complete underground tasks beyond mine portals.

The Proposed Rule states that "surface mobile equipment" is defined as "wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment or materials, excluding belt conveyors, at surface areas of underground metal and nonmetal mines." 86 Fed. Reg. at 50500. MSHA should clarify that with respect to the definition in Part 57, this definition does not include underground equipment that operates to complete underground tasks beyond mine portals. For example, an underground haul truck that exits the underground mine to dump at a stock pile beyond the mine portal should not be considered "surface mobile equipment" within the scope of the Proposed Rule. Such equipment operates to serve the underground mine and dumping at such a stock pile would occur only to complete tasks for the underground mine. Similarly, an underground piece of equipment that is brought to a surface maintenance shop also should not be considered a piece of "surface mobile equipment" by virtue of doing so. Here too, this would occur only to further the use of the item as an underground piece of equipment.

In its final rule, MSHA should make clear that underground equipment performing tasks such as these does not qualify as "surface mobile equipment" within the meaning of the Proposed Rule. Such clarification would be consistent with the purpose of the Proposed Rule, which is specific to surface mobile equipment only.

2. The "responsible person" provision of the Proposed Rule should be stricken.

The Proposed Rule includes a requirement that operators designate a "responsible person" who would "have the authority and responsibility to evaluate and update a written safety program for surface mobile equipment." 86 Fed. Reg. at 50500. NGM submits that the "responsible person" provision should be stricken from the Proposed Rule. The provision serves no purpose relative to the enforcement scheme already in place under the Mine Act and certain MSHA regulations. The Mine Act is a strict liability statute, meaning that operators are required to comply with MSHA standards regardless of the actions taken by their individual employees. See Asarco, Inc.-Northwestern Mining Department v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). Operators, therefore, would be responsible for complying with the substantive requirements of Section 56/57.23000, et seq. irrespective of whether an individual employee, i.e., a "responsible person," takes certain action. To mandate certain actions by an individual employee, therefore, serves no function. Additionally, MSHA's regulations already require an operator to identify to MSHA "the name and address of the person at the mine in charge of health and safety" or "the name and address of the person with overall responsibility for a health and safety program at all of the operator's mines, if the operator is not directly involved in the daily operation of the mine." 30 C.F.R. §§41.11(b)(3) and (4). Therefore, an operator is already required to name what is effectively a "responsible person" for safety and health; it would be superfluous to require an operator to also name a "responsible person" solely for purposes of the Proposed Rule.

3. MSHA should clarify that contractors and their equipment are not expected to be part of a production operator's safety program.

The Proposed Rule is not clear on the effect of contractors and their equipment on a production operator's safety program. MSHA should clarify that contractors and their equipment are not expected to be part of the production operator's safety program. To require otherwise would be infeasible. Production operators engage contractors, in part, based on specialized equipment and their knowledge regarding that equipment. Production operators do not control equipment owned and operated by a contractor. Production operators cannot be reasonably expected to account for a contractor's hazard assessment, maintenance schedule and evaluation of technology in its own safety program. Such items are within the control of the contractor and would be better addressed in a safety program specific to the contractor. Moreover, contractors are considered to be "operators" under the Mine Act- see 30 U.S.C. § 802(d)- so they should be required to have their own safety programs independent of those of production operators.

4. MSHA has not explained why the four items it would mandate as part of operators' safety programs would reduce accidents.

MSHA stated that in developing the Proposed Rule, it believes that "mine operators should be allowed to tailor safety programs specifically to their mining conditions and operations…[so that] mine operators would be able to develop and implement safety program that work for their operation, mining conditions and miners." 86 Fed. Reg. at 50498. Yet, MSHA would mandate that the safety program required by proposed Sections 56/57.23003(a) include four specific actions:

(1) Actions that would identify and analyze hazards and reduce the resulting risks related to the movement and operation of surface mobile equipment;

(2) Development and maintenance and procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Actions to evaluate currently available and newly emerging feasible technologies that can enhance safety and evaluate whether to adopt them; and

(4) The training of miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

86 Fed. Reg. at 50500-01.

MSHA's mandating of certain actions to be included in operators' safety programs contradicts its statement that operators should be allowed to tailor their safety programs to their operations. Additionally, in promulgating a rule, an agency is required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" Nat'l Mining Ass'n v. Sec'y of Labor, 812 F.3d 843, 865 (11th Cir. 2016) (quoting Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)).

Here, MSHA has offered no such explanation as to why it selected these four specific actions as a means for reducing mobile equipment-related accidents and injuries. It is foreseeable that certain operators would be better served by a safety program with other elements that better suit the circumstances of their operations. For example, NGM's Traffic Management Plans, which operate as a company standard at all NGM sites, provide controls specific to those sites to prevent accidents related to surface powered haulage equipment. To the extent that MSHA promulgates a final rule that includes the requirement of a safety program, it should remove the four specific actions and allow the operators to tailor their safety programs to what best promotes mobile equipment safety at their operations.

5. MSHA should clarify how the information required to be collected should be documented and maintained.

As noted above, proposed Sections 56/57.2300(a)(1) would have operators include in their safety programs actions to "[i]dentify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment." 86 Fed. Reg. at 50511-12. In explaining what this requirement would entail, MSHA has stated that "The proposal would require mine operators to identify, collect and review information about hazards at their mines." 86 Fed. Reg. at 50500. MSHA has not explained the specifics of the documentation requirement in the connection and review and collection of this information, namely, what type of information would meet the requirement, how should it be maintained, for how long would it need to be kept and how would MSHA evaluate it for compliance. To the extent that MSHA promulgates a final rule that includes the requirements of proposed Sections 56/57.23003(a)(1), it should explain now this information would be documented.

6. MSHA should clarify that the types of maintenance and repairs to be addressed in proposed Sections 56/57.23003(a)(2) are only those that are safety-sensitive.

Proposed Sections 56/57.23003(a)(2) would "require operators to develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment." 86 Fed. Reg. at 50500. The Proposed Rule does not define the scope of the maintenance and repairs contemplated by this provision. To the extent that the final rule contains a requirement for a safety program that includes such a provision, MSHA should clarify that the maintenance and repairs contemplated by it are only those that qualify as safety sensitive. Such clarification would be in keeping with existing law, namely MSHA's current standards at 30 C.F.R. §56/57.14100(b), which requires that "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. §56/57.14100(b) (emphasis added). Additionally, requiring that the safety program account for all maintenance, even that which is not safety sensitive, would be overbroad and not serve the purpose of the Proposed Rule.

Similarly, in addressing proposed Section 56/57.23003(a)(2), MSHA refers to a mine operator integrating its processes "with any manufacturer's recommendations." 86 Fed. Reg. at 50500. Such suggestion is misguided and should not be included in the Preamble to the final rule. Manufacturer's recommendations for mobile equipment are not necessarily safety sensitive in nature. Indeed, in NGM's experience, there are times when MSHA and its inspectors have required actions that are not guided by manufacturer's recommendations in the course of enforcing mandatory standards. To accord manufacturer's recommendations de facto force of law would be misguided for a rule whose focus is on addressing safety sensitive hazards.

7. MSHA should clarify what constitutes "feasible" technologies for purposes of proposed Sections 56/57.23003(a)(3).

Proposed Sections 56/57.23003(a)(3) would require that an operator's safety program "include actions the mine operator would take to evaluate currently available and newly emerging feasible technologies that can enhance safety and evaluate whether to adopt them." 86 Fed. Reg. at 50500. The Proposed Rule does not explain what is meant by a "feasible" technology. This term is critical as it implicates what technologies must be considered and what sort of evaluation the operator must undertake. As courts have held, "a regulation cannot be construed to mean what an agency intended but did not adequately express." Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1192 (9th Cir. 1982) (citing Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). It is incumbent upon the agency to explain what is meant by this critical term if it is included in the final rule.

8. MSHA should clarify the requirements for updating the safety program under proposed Sections 56/57.23003(b).

Proposed Sections 56/57.23003(b) would require the responsible person "to evaluate and update the written safety program at least annually or as mining conditions or practices change, accidents or injuries occur, or as surface mobile equipment changes, or modifications are made."

86 Fed. Reg. at 50501. This proposed provision contains a number of unclear terms that MSHA should clarify. Namely:

(1) What is required for the safety program to be "evaluate[d]" and "update[d]"? A clear statement of what actions are expected of operators and how those actions are to be documented should be provided.

(2) What constitutes a change in mining conditions or practices that would trigger the provision? Mining is dynamic by nature. It would not stand to reason that every change in conditions or practices would necessitate an evaluation and updating of the safety program for mobile equipment. MSHA should establish a threshold level of materiality in changes to mining conditions or practices to necessitate such actions.

(3) What types of injuries would trigger the provision? Here too, there should be a threshold level of the type of injury that would trigger the requirements of the provision. NGM submits that only injuries that meet the definition of "accident" under 30 C.F.R. §50.2(h) should necessitate the evaluation and updating of the safety program described in the proposed provision. To require that any type of injury- including those that are minor- would necessitate a review of the safety program would be overbroad not serve the purpose of the Proposed Rule.

NGM appreciates the opportunity to provide its comments on this Proposed Rule. Please let me know if you have any questions. Thank you for your courtesy and attention to this matter.

Very truly yours,

Detlev Van Der Veen
Head of Health and Safety
Nevada Gold Mines