



STATEMENT OF

**ED ELLIOTT
DIRECTOR OF SAFETY & HEALTH
THE ROGERS GROUP, INC.**

ON BEHALF OF

**THE NATIONAL STONE, SAND & GRAVEL
ASSOCIATION**

**BEFORE THE HOUSE EDUCATION & THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

HEARING ON

**“PROTECTING AMERICA’S WORKERS: REVIEWING MINE
SAFETY POLICIES WITH STAKEHOLDERS”**

OCTOBER 21, 2015

Thank you Chairman Walberg, ranking member Wilson, and members of the subcommittee on workforce protections. My name is Ed Elliott. I am the director of safety and health for Rogers Group, Inc. Today, I am pleased to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA). My testimony will inform on our industry's demonstrated commitment to safety and health, and offer ideas to aid MSHA in its efforts to achieve zero injuries. One point of emphasis will be the importance of maintaining an appropriately collaborative relationship with MSHA that is critical to boosting compliance, as well as supporting aggregates operators' efforts to further reduce injuries.

Background

With over 1,800 employees, 70 stone quarries and 42 asphalt plants, Rogers Group is the largest privately owned crushed stone provider in the nation (the eighth largest overall), providing construction-grade aggregates and transportation and infrastructure construction services in 11 states. The shareholders and leadership of Rogers Group Inc., are committed to the safety and well-being of their employees, neighbors and communities. Our owners, the Rechter family, are strong proponents of safety and health as an integral part of their business philosophy. Past CEO, Don Williamson, was the first leader of the MSHA-NSSGA Alliance for education and training and spearheaded the NSSGA Safety Pledge. Jerry Geraghty, our current CEO, addressed the Joseph Holmes national safety association meeting in Indianapolis, and expanded the dialog on safety and health nationally. Our COO Darin Matson is an active member of the NSSGA/MSHA Technical Task Force and works to expand dialog with MSHA on many safety and health matters.

Rogers Group is a member of the National Stone, Sand & Gravel Association, the world's largest mining association by product volume. NSSGA represents the crushed stone, sand and gravel industries and its member companies produce more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. The industry employs over 100,000 men and women. Our company, like many others in the industry, produces aggregates utilized for critical infrastructure projects including highways, bridges and mass transit, as well as environmental applications such as wastewater treatment, sewage control and drinking water facilities.

Industry's Demonstrated Commitment to Health and Safety

The aggregates industry has a long history of commitment to becoming the safest and healthiest possible in production of aggregates. We are very pleased this commitment has resulted in the safest stone, sand and gravel sector in history. Last year, our industry finished with an injury incidence rate of just 2.08 injuries per 200,000 hours worked. This was the 14th consecutive year in which our sector achieved a lower rate than in the previous year.

Unlike other sectors, the stone, sand and gravel sector rarely experiences multiple-fatality incidents. Not since the early stage of World War II has there been a disaster – defined as a multi-fatality incident with five or more victims - in an aggregates facility. Such are the distinctions between the risk profile of aggregates facilities and those in other sectors.

A number of factors have contributed to this success. The first is leadership. Since 2002, we have spearheaded an effort to enlist CEOs commitment to safety and health. Our Safety and Health Pledge program is the vehicle for this. I am pleased that more than 70 percent of our operator facilities are headed by a CEO who has signed the Safety and Health Pledge. And, we continue to work to achieve 100 percent. The pledge commits the signer to helping the industry reduce the injury rate.

Second, we collaborate with government agencies, most notably MSHA, with which NSSGA signed an Alliance agreement for education and training 13 years ago. This has given birth to a number of effective compliance assistance programs such as Safety Alerts derived from MSHA injury data. It resulted in clarification of the fall protection standard and we collaborated with MSHA on the development of an instructional video for MSHA inspector trainees on the operator perspective on compliance.

Additionally, our industry's CEOs meet periodically with MSHA's leadership to collaborate to reduce injuries, illnesses and fatalities. We remind them aggregates are not coal. and in these meetings we have made a number of recommendations, including:

- Focus enforcement on areas of highest risk.
- Address the behavior component of safety and health, not just a facility's physical conditions.

- Ensure that the metric for assessing MSHA's success includes the critical factor of safer and healthier workplaces - not just more enforcement.
- Provide aggregate-specific training for inspectors so that safety challenges from another sector don't inappropriately affect enforcement in the metal/non-metal sector.
- Improve communications among operators and inspectors to continue improving consistency in enforcement.

We acknowledge the agency's efforts to properly inform stakeholders of changes needed for compliance. Two such examples are the Rules to Live By initiative and planned enforcement ramp-up of the 56.57/5002 airborne contaminants standard.

At Secretary Main's request, we have assisted on key initiatives. We publicly supported MSHA's communication of the Rules to Live By fatality-prevention initiative. Also, we answered the Secretary's call to disseminate information about stepped up enforcement of 56/57.5002, and widely circulated our industry's Occupational Health Program for use to comply.

Regulation is Overly-Burdensome

Despite improvements in stakeholder outreach and collaboration, we find many of MSHA's regulations overly burdensome without requisite benefits to health and safety. We believe the proposed Civil Penalties Reform rule does not meet its stated goals. MSHA states that the proposed rule will increase consistency and reduce potential areas for dispute, but the proposal contains several confusing points that we believe will actually lead to more disputes.

The proposed rule seeks to change the scope of Part 100, such that it purports to apply to both the proposal of penalties by MSHA and the assessment of penalties by the Federal Mine Safety and Health Review Commission. Such a provision is beyond the scope of MSHA's authority, and amounts to unsound policy. This action would be contrary to the independence of the Federal Mine Safety and Health Review Commission as originally intended in the 1977 Mine Act.

Changes to "Negligence" in the proposed rule may have an adverse effect on an inspector's designation of "unwarrantable failure." Currently, an "unwarrantable failure" designation is accompanied by a negligence finding of either "high" or "reckless disregard." The proposed rule

would eliminate the “high” negligence designation, which would likely lead to an increase in “reckless disregard” findings in order to support an inspector’s declaration of “unwarrantable failure.” Accordingly, an increase in “reckless disregard” will increase penalties, increase the number of violations potentially considered for flagrant status, and could have civil liability consequences.

We believe the proposed rule is likely to result in dramatic increases in penalty assessments. Analyses of operator surveys comparing the penalty assessment for the same or similar citations have demonstrated that assessments will be between 50 and 80 percent higher under the proposed rule. It also would restrict the MSHA inspector’s flexibility to accurately reflect circumstances with respect to operator and agency perspectives and it proposes restricting the rights of the operator to correct inadvertent errors by an inspector. The potential impact is troubling both for operator rights and economically, as the aggregates sector last year was assessed more than \$12 million in MSHA penalties.

Additionally, we are concerned that the MSHA regulatory agenda calls for a rule on crystalline silica to be proposed next April. We believe that an objective rendering of the relevant scientific evidence demonstrates that the current permissible exposure limit, if fully complied with and enforced, is protective of worker health.

Enforcement Challenges Can Impede the Cause for Safety and Health

MSHA is to be applauded for its good stakeholder outreach, which has been ramped up in the past several years. Also, the agency has achieved important reductions in inconsistent enforcement by its inspectors, although improvements are still needed with ongoing vigilance by agency leadership.

Regrettably, however, we believe that MSHA enforcement efforts have not focused as much as they should on those conditions of highest risk, especially in today’s resource-challenged environment. We believe that MSHA enforcement should focus on areas of greatest potential peril.

One illustration of the challenge is that penalty assessments for stone, sand and gravel operators are up 6 percent while our injury rates continue to fall. This dichotomy of more

citations and more expensive enforcement simultaneous to operators' success in continuing to reduce injuries and fatalities risks undercutting the cause for safety and health, as well as the perception of MSHA as a genuine and respected government entity working for the common good.

Ways in which we believe MSHA enforcement sometimes errs are:

1. MSHA inspectors at times cite conditions never before found to be hazardous.
2. MSHA inspectors cite violations, but over-write the alleged gravity, e.g., an inspector asserting that a rarely-used ladder in need of repair is "highly likely" to cause injury versus the more practical: "unlikely," or "reasonably likely."
3. MSHA inspectors cite violations, but over-write the alleged negligence, e.g., a guard fell off a piece of equipment earlier in the day, and it is said to constitute "high" negligence versus "low."
4. MSHA inspectors cite violations, but over-write by labeling it "significant & substantial" (i.e., the violation could reasonably be expected to cause an injury of a reasonably serious nature), when a piece of trash was blown by the wind to within 25 feet of an electrical installation.

Finally, many operators fear there is a bureaucratic push within the agency for inspectors to meet a quota of citations written. While agency leaders deny any quotas, it is difficult for operators to conclude anything else based on experience. One excellent operator last year saw around half of all routine inspections result in zero citations. This makes sense because the operator has been diligent in investing time and capital into clearly meeting all MSHA standards requirements. However, what does not make sense is in 2015, inspectors have issued a significant increase in the number of citations simultaneous to the company having further improved its safety performance. Inspectors arrive saying in advance 'this will not be a zero-citation inspection.'

As I hope you understand: operators cannot help but wonder if a decision on whether a violation actually exists is based on the Mine Act requirement or on some bureaucracy-based

pressure within the agency to boost the number of citations issued. This is hardly good for the operator sense of receiving a fair shake in MSHA's enforcement of safety standards.

Recommendations for More Effective Enforcement

We believe that improvement would be achieved if MSHA would establish a Pattern of Compliance Program, which enables the inspectorate to grant some form of enforcement credit to operators for outstanding adherence to MSHA standards, and keeping low rates of injuries. You have heard this idea from NSSGA before. It is anticipated that a pattern of compliance program would help the agency streamline and make more efficient the inspection process, thus freeing resources to be targeted at areas of greatest risk. Ideas for this include authorizing MSHA to:

- Develop guidelines for inspectors directing that they focus their inspection hours on most troubled operations, e.g., inspectors could only spend a limited amount of time inspecting operations with excellent compliance records....versus inspections at a good operation for an unduly long time; and,
- Allow inspectors to issue a notice in lieu of citation for a de minimis hazard, and / or elimination of a citation for immediate abatement.

We support further investment in compliance assistance as called for in the Mine Act. Quality training materials that demonstrate compliant practices should become an agency point of emphasis. Too many training materials are outdated, and in some cases are downright non-compliant. Yet, thousands of operations rely on MSHA for reliable compliance assistance. MSHA has taken steps in this direction, but we call on MSHA to invest significantly more in up-to-date training materials.

Also, we support revitalization of the agency's provision of quality compliance assistance materials to small mine operators. Indeed, it is the small mine operators who face the largest challenges in managing for safety, health and compliance. We regret that the Small Mines Office was closed, and folded into another division within MSHA.

Conclusion

NSSGA appreciates this opportunity to present ideas for updating the Government's role in regulating and enforcing for safety and health at stone, sand and gravel operations. We stand ready to work with MSHA in a common-sense approach to regulation and enforcement. Further, we urge that MSHA seek new and innovative ways to help us achieve our common goal of zero injuries in a way that the limited resources of the Federal government can be targeted at the most serious hazards. Thank you.

###