

NATIONAL STONE, SAND & GRAVEL ASSOCIATION



Natural building blocks for quality of life

**TESTIMONY
OF
LOUIS GRIESEMER
ON BEHALF OF THE
NATIONAL STONE, SAND & GRAVEL ASSOCIATION**

**BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
HEARING ON
“MODERNIZING MINE SAFETY”**

May 4, 2011

Thank you Chairman Walberg, Ranking Member Woolsey and Members of the Subcommittee for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) on worker safety and health. Also, we gratefully acknowledge this committee's work of last summer and the work of dedicated staff to focus mine safety reform on areas of greatest risk.

I am Louis Griesemer, president of Springfield Underground in Springfield, Mo. Springfield Underground was established by my father in 1946. My whole career has been with Springfield Underground. I, myself, am an MSHA-certified safety trainer and got my start in the aggregates business in our safety department. I know our employees personally. They are committed to their work and they are committed to safety on the job. We are proud of the accomplishments of our team and we look forward to improving steadily.

MSHA is integral to our operations. We are continually in the process of examining and maintaining our operations for compliance. Training of employees is an essential part of the process. My company has long been committed to worker safety, health and training. It is part of our commitment to all who work for us. Today, I am also the NSSGA co-chair of the MSHA-NSSGA Alliance, which has worked for a decade to establish useful training and education materials to enhance safety and health.

Aggregates Industry

The National Stone, Sand & Gravel Association represents the crushed stone, sand and gravel – or construction aggregates – industries. Its member companies produce more than 90 percent of the crushed stone and more than 70 percent of the sand and gravel consumed annually in the United States. There are more than 10,000 construction aggregate operations nationwide. Almost every congressional district is home to a crushed stone, sand or gravel operation. Proximity to market is critical due to high transportation costs, so 70 percent of our nation's counties include an aggregates operation. Of particular relevance to this hearing, 70 percent of NSSGA members are considered small businesses.

Industry's Demonstrated Commitment to Health and Safety

The crushed stone, sand and gravel industry has long been committed to the safest and most healthful possible production of aggregates. We're very pleased that this commitment to safety and health has resulted in the safest period in our sector's history. In fact, last year, we finished with an injury incidence rate of just 2.33 injuries per 200,000 hours worked. This was the 10th year in a row in which our sector achieved a lower injury rate than in the prior year. Also, this was the 19th of the last 20 years of consecutive rate reductions.

Addressing the Causes of Accidents, Injuries and Illnesses

Our workplace safety enhancements have come from constant efforts to train and remind employees of dangers they need to avoid. Just as in construction and manufacturing industries, primary dangers stem from the movement of heavy equipment. Employees must be constantly vigilant.

Not only do injury rates continue to decline in our segment of the industry, fatal accidents also continue to decline. Last year there were about 30,000 fatalities in automobile accidents on the Nation's highways. Comparatively, there were 23 fatal accidents at metal nonmetal mines; there were five fatalities among aggregates operator employees. While every fatal accident is a tragedy, we believe this reflects a remarkable level of safety controls at these workplaces.

As to what has been primary to our success, I would say that it has been a constant industry-wide effort to impress upon employees the importance of keeping their wits about them in the workplace, and not taking shortcuts. In spite of such training and reminders, there are still problems with employee compliance. No less than half of the fatal accidents last year were a result of employees' disregarding the most fundamental precautions around heavy equipment.

However, it seems that enforcement by MSHA is focused on everything but employee personal responsibility and precautions. We wish that MSHA would work with us more on programs that help instill in employees genuine respect for the precautions that MSHA and the companies require.

Year in and year out, MSHA inspections focus on a wide variety of things, many of which cannot be shown to have a material bearing on accidents or accident prevention—things such as adequacy of machine guards in inaccessible areas, fire extinguisher inspections on spare fire extinguishers, electrical ground testing on office equipment, the condition of the outer jackets of low voltage electrical cables, and so on. It is not that such things are unimportant. It is just that the most prevalent hazards are elsewhere. As long as human nature leads employees to believe they can take risks without consequences, we will, unfortunately, continue to experience serious accidents.

In any event, we in the stone, sand and gravel industry are committed to doing our part in this regard, and we believe that we continue to make substantial progress because of our efforts. A number of factors have contributed to this success. The first is leadership. Since 2002, we have spearheaded an effort to enlist CEOs committed to safety and health. Our industry-wide Safety Pledge program is the vehicle for this. I am pleased that more than 70 percent of our operator facilities, which account for more than 90 percent of industry employees, are headed by a CEO who has personally signed the Safety Pledge.

Safety Collaboration with Government

We have a record of collaborating with government agencies, most notably MSHA, with which NSSGA signed an alliance agreement. This has given birth to a number of effective compliance assistance programs such as Safety Alerts derived from MSHA injury data. Furthermore, we collaborated with MSHA on the development of the “Safety Pro in a Box” program in which we culled excellent training resources from the Mine Academy and made them available free of charge to aggregates operators.

Our industry’s CEOs have met several times with MSHA’s leadership to offer to work collaboratively to reduce injuries, illnesses and fatalities. In these meetings, we made a number of recommendations, including:

- Focusing enforcement on areas of highest risk;
- Improving communications between operators and inspectors to improve consistency in enforcement;
- Addressing the behavior component on safety and health, not just conditions;
- Ensuring that the metric for assessing MSHA’s success is focused on demonstrable safety accomplishment—rather than continual escalation of enforcement (which has certainly been the trend), and
- Providing aggregates-specific training for inspectors so that safety challenges from another sector don’t inappropriately affect enforcement in the metal/non-metal sector.

On the second point—concerning improved communications—we appreciate it when the agency properly and timely informs stakeholders of intended areas of enforcement concentration and actions advised 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 Assistant Secretary Main’s request, we have lent assistance on key initiatives. We supported the “Rules to Live By” fatality-prevention program. We also answered Mr. Main’s call to disseminate information about stepped-up enforcement of 56/57.5002, the airborne contaminants standard, and widely circulated our industry’s Occupational Health Program for compliance assistance.

In other instances, agency interaction with industry has been absent. A variety of enforcement initiatives were begun without notice and without stakeholder consultation. An example is truck scales. They are built by the manufacturers with rub rails, not guardrails. Suddenly, MSHA is enforcing a requirement for guardrails at virtually every scale in the country elevated more than 16 inches off the ground. As a result, many

operators were caught by surprise and found themselves being cited for things that MSHA had always deemed compliant in the past.

Regulatory Burden

Returning to MSHA, we do believe that the agency has become unduly reliant on trying to add regulations that, in our view, are not likely to make material contributions to enhancing safety and health, but rather will increase bureaucracy, administration and paperwork cost for companies. We cannot regulate our way to zero injuries.

Furthermore, MSHA should not add regulations that only increase opportunities for duplicate citations with respect to “paperwork” compliance obligations that already exist. The agency is preparing to propose a rule likely to mandate the use of “Safety and Health Management Systems” (SHMS), on top of the standards mandated by the Mine Act. This one-size-fits-all approach to rulemaking may also produce a one-size-fits-all rule for the largest to the smallest operators for managing their operations. Yet, operators need flexibility to tailor their efforts at hazard and risk reduction and legal compliance to the specific size and complexity of their facilities. Unless done properly, this could significantly add compliance burden with little or no benefit to safety and health.

Companies need to be able to focus on employee safety reminders and training in the field, not paperwork, and not more citations to be dealt with to no good safety or health advantage.

Regulation by Policy

Another concern is the issue of fair notice with respect to MSHA enforcement initiatives. The fact is that many MSHA requirements are coming at us without the type of rulemaking we think is required. As indicated above, MSHA has increasingly adopted novel enforcement policies without giving the industry advance warning or advice. The operator only learns of the changed interpretation once the operator is issued a citation by an inspector, often an inspector who found no fault with the identical condition previously.

Earlier, I mentioned the example of guardrails for truck scales (which involve no small expense incidentally for questionable safety advantage, if any). Another notable example has to do with issues of fall protection and safe access for mobile equipment. Operators purchase large haul trucks, for example, that are fully fitted out with ladders and other means of access by the manufacturers. However, MSHA is now saying that the equipment as manufactured is not safe and must be retrofitted by the operator.

No other federal law requires such changes to the equipment when it is used in any other industry as far as we know. In mining, many operators have found themselves receiving citations from MSHA requiring them to retrofit their equipment even though they have had no prior notice, and even though it is perfectly lawful for the equipment manufacturers to sell the equipment configured just as they manufacture it without the features demanded by MSHA. Needless to say, not only have mine operators not had fair

notice, they are caught completely in the middle on these types of issues. Changes in requirements should come only through notice and comment rulemaking, not unilateral policy changes or “guidance” by MSHA.

Enforcement Issues

Of increasing frustration to NSSGA members is what the aggregates industry believes is inconsistent and unpredictable enforcement. Sometimes it appears that we must pay a heavy price for speaking up and seeking fairness. MSHA is training inspectors and then auditing them in the field, but the result seems to be heavier, not fairer, enforcement.

The problem is further complicated. With MSHA’s problems in cross-training inspectors in the various sectors of its jurisdiction (pointed out in dozens of recently issued Accountability Office audit reports from 2008-10), the agency recently decided to increase reliance on accountability teams to double-check inspector performance. This, too, was often followed by harsher enforcement.

It seems clear to us that focus on “accountability in enforcement” has resulted in not more balanced enforcement, but rather increased numbers and severity of citations written by MSHA for fear that an inspector might be found to have missed opportunities for alleging violations (for example, if too few citations had been issued at the initial inspection). This comes in the form of follow-up inspections by another group of inspectors, which might include the original inspector, area supervisor and someone from district office, or from another district. Again, I must stress that, while all this is going on, our industry quietly and steadily proceeds on its own to become safer and safer. A review of data shows that while injury rates continue to fall, there has been a substantial increase in citations labeled ‘Significant & Substantial.’ It is only sensible to ask, why is this happening and how can it be fair?

The agency should improve its means of training inspectors on both recognition of hazards, and on the burdens imposed by inappropriate enforcement, including undue escalation in penalty assessments. After all, every elevated finding in a citation by an inspector converts to substantial dollar increases when penalties are proposed. For example, a single change in finding in a single citation could raise a \$2,000 penalty for that citation to \$10,000.

Penalty assessments for stone, sand and gravel operators are up more than double the levels from the period before the 2006 Miner Act; yet, in this time, our injury rates have continued to fall. The rates are falling because of good safety management, not civil penalties. This dichotomy—of more citations and more expensive enforcement despite excellent industry accomplishments—risks undercutting the cause for safety and health as well as the perception of MSHA as a respected government entity working for the common good.

Ways in Which MSHA Enforcement Can Get it Wrong

1. MSHA inspectors cite conditions that are not hazardous.
2. MSHA inspectors cite violations, but over-write the gravity, e.g., an inspector asserting that a ladder in need of minor repair is “highly likely” to cause injury versus the more practical: “unlikely,” or “reasonably likely.”
3. MSHA inspectors cite violations, but over-write the 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 them “significant & substantial” (that is, the violation could reasonably be expected to cause an injury of a reasonably serious nature). One such citation was issued for a piece of trash that was blown by the wind to within 25 feet of an electrical installation.
5. MSHA inspectors demand abatement that is either unnecessary or inappropriate, which leads to increased costs that are in no way justified and typically cannot be recouped if the enforcement turns out to be wrong. For example, at one operator’s plant, an inspector demanded that – due to an alleged fire hazard - expensive changes be made to a surge tunnel because of an ostensible fear of belt slippage. The citation was ultimately vacated, but not before the company was forced to squander \$10, 000 in unnecessary abatements.
6. MSHA inspectors issue threats about future enforcement if the operator does not divulge every single bit of information an inspector is seeking, including sometimes information from company records that are not part of MSHA compliance.
7. MSHA is very often unwilling to correct an inappropriate citation until just before a hearing so that the agency does not incur a judicial loss concerning a standard deemed important for the agency’s future enforcement.
8. There is often a sense of threat from inspectors when they refuse discussion.

Ideas for Improving MSHA Regulation of Safety & Health in the Future

We believe that there could be a more enlightened approach to encouraging and assisting mine operators in their efforts to secure worker safety other than issuance of citations for each apparent discrepancy, no matter how unlikely that it would ever contribute to a hazard. We contend that the agency should be free to focus its enforcement resources on areas and operations posing the greatest risk. We believe that consideration should be given to the issue of whether mandatory minimum inspections twice a year for surface facilities or four times a year for underground are indispensable.

After all: only three years ago did the agency for the first time complete 100 percent of the mandated two inspections of surface, and four inspections of underground facilities mentioned in the Act. This was well after our industry had begun its decade-long string of annual reductions in injury rates. So, for some, the two inspections for surface and four for underground operations may be appropriate, but for others it may not be the best use of resources.

I think this is especially the case given the severe budgetary constraints on the Federal government.

Moreover, if MSHA's resources are limited or reduced, we prefer a reduction in the number of inspections rather than reductions in compliance assistance, training and other areas that are helping industry improve safety.

We believe there is often an excessive concentration of enforcement on the mine operator with no emphasis on contributions to violations from other parties, including individual employees when they act contrary to training and instructions, and independent contractors that are realistically outside the mine operator's control. We believe that MSHA could take stronger actions to help induce employee and contractor cooperation with mine operators on achievement of safety and compliance.

For the future as well as now, we support further investment in compliance assistance by MSHA. For instance, we support the continued utilization of the very successful Small Mine Office, as it has been structured. We also encourage new cooperative initiatives.

Behavior-based safety is a widely accepted concept instructing that all who are on a worksite hold some degree of responsibility for their own safety and health and the safety and health of others on the property. In fact, there is no way our industry would have achieved the reductions in injuries in the past ten years had it not been for company-wide programs aimed at safer work. Any expert in workplace health and safety would support this. And, our laws and enforcement should recognize this, as well.

NSSGA would be pleased to play a central role in working to achieve the most enlightened regulations and enforcement possible under our existing mine safety and health law. There is precedent for this. In 1997, NSSGA member companies joined forces with miners' representatives and MSHA to develop a key training regulation so that all stone, sand and gravel workers would obtain critical training. This resulted in training mandates much more appropriate to the stone, sand and gravel industry. In the same manner, we would be pleased to work with MSHA and representatives of miners to update approaches to regulation and enforcement of mine safety and health generally.

Furthermore, a specific point: we believe that modernization would be achieved if MSHA would establish a Pattern of Compliance Program, which would give some form of credit to operators for outstanding adherence to MSHA standards and keeping low rates of injuries. It is anticipated that this 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:

- Providing credit for excellent compliance so that future citation assessments received can see financial costs mitigated (for example, increase the good-faith credit from 10 percent back up to 30 percent for timely abatement);
- Allowing inspectors to issue a notice in lieu of citation for a de minimis hazard, and/or elimination of citation if immediate abatement is accomplished by the operator;
- Developing guidelines for inspectors directing that they focus their inspection hours on the most troubled operations (for example, inspectors could only spend a limited amount of time inspecting operations with excellent compliance record versus camping out at a good operation for an unduly long time);
- And if MSHA is interested in Safety and Health Management Systems, as reflected in the impending June rulemaking proposal on this matter, then perhaps MSHA could at least provide an incentive to operators, especially small ones, by granting credits against other enforcement actions, such as reduced civil penalties, in the manner described above for abatement credits.

Conclusion

NSSGA appreciates this opportunity to present new ideas for enhancing worker health and safety. We respectfully urge that more be done in the area of assisting operators in compliance, allowing optimal resources to be focused on the areas of greatest risk.

Thank you.