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March 23, 2020

The Honorable David Zatezalo
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Re: Request for Written Statement and Guidance on MSHA Policy and Procedures in
Response to COVID-19 Emergency

Dear Assistant Secretary Zatezalo:

On behalf of the Portland Cement Association (PCA) and the larger cement manufacturing industry, let me express my sincere appreciation for the work you and your staff have done to open lines of communication with operators and promote miner health and safety through training, compliance assistance, and reasoned inspection policy.¹ These principles will be more important than ever as the cement industry and other mining sectors grapple with the emerging COVID-19 crisis.

While federal, state, and local emergency measures to contain the spread and impacts of COVID-19 are affecting all aspects of the economy, the cement industry is committed to continuing its operations in a manner that ensures the health and safety of miners, contractors, federal and state inspectors, and members of their host communities. Our members are taking a wide range of proactive measures to maintain safe and healthy workplaces, including limiting travel, limiting in-person meetings, implementing remote work for certain employees, and employing other social distancing and hygiene practices to slow the spread of the virus.

As operators make adjustments to maintain continuity and safety of operations, PCA urges MSHA to review its standard regulatory and inspection policies to assess areas where additional flexibility or adjustments may be needed to allow operators to adapt to current conditions and continue operations in a safe and healthy manner. In this regard, the entire

¹ Founded in 1916, PCA is the voice of the U.S. cement manufacturing industry and the widely-recognized authority on the technology, economics, and application of cement manufacturing. It represents more than 91% of the U.S. cement manufacturing capacity. PCA members cement manufacturing facilities in 35 states and related cement and concrete operations in all 50 states, servicing every Congressional district.

industry is grateful for the important initial step that MSHA has taken in informally providing extensions for annual refresher training deadlines and audiometric testing. Based on discussions with our members, there is still a number of areas that raise particular concern:

- *Inspection Policies.* Inspectors should be directed to strictly follow the current government guidelines on maintaining social distancing and hygiene. Mine operators have instituted these at their operations and facilities and MSHA has now posted links to these guidelines on its website. As a representative of a safety and health agency, it is especially important that inspectors exhibit good virus prevention practices in front of the miners. In this regard, it is critical that every inspector self-declare his/her COVID-19 status upon entering mine property so that avoidable quarantine procedures will not have to be implemented upon later discovery of inspector exposure. Our members will commit to providing inspectors with the same declaration.
- *Assembling Groups of Miners.* Inspectors frequently ask to speak with groups of miners about safety and health topics and this is something we encourage our members to facilitate. With the current virus challenges, however, we must ask that inspectors refrain from doing this with any more than the recommended number of individuals assembling per current government guidelines. The same would apply to conducting opening and close-out conferences.
- *Number of Inspectors on Site.* Mine operators are concerned that MSHA continues to send multiple inspectors at a time to conduct a regular inspection. This unnecessarily increases the potential for workplace exposure to the virus for both inspectors and mine employees. It also necessitates more mine employees, both management and hourly, to accompany the inspector which puts additional strain on what may already be a reduced workforce. We ask that the agency consider assigning just one inspector per inspection.
- *Riding in Separate Vehicles.* Consistent with the CDC's guideline regarding social distancing, we also respectfully request that inspectors honor operator's one vehicle per person procedures and utilize their own vehicles during inspections. Sharing vehicles during normal inspection circumstances is an appropriate and effective means for inspection parties to exchange information. During this health crisis, however, it unnecessarily places personnel too close together.
- *Timing for Annual Refresher Training.* We appreciate MSHA's informal indication that it will provide extensions to annual refresher training deadlines. We ask that MSHA also

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provide written guidance informing operators of the criteria the agency will use to make its case-by-case determinations that a training extension will be granted. This is essential for operators as they work to design any training program modifications that may be needed under their COVID-19 exposure protection measures.

- *Audiometric Testing.* We also understand that MSHA is considering providing extensions for completing audiometric testing, so that miners can be tested in a way that facilitates social distancing. We ask that MSHA provide written guidance for operators on the policy and criteria for these extensions.
- *First Aid Training.* Under 30 C.F.R. §56/57.18010, operators are required to provide “currently trained” personnel capable of providing first aid and CPR on each shift. This is a critical resource at every operation and our members will continue to meet this requirement. In this regard, we request that the agency exercise its enforcement discretion while operators work out logistical difficulties in ensuring that miners can be trained in a way that facilitates social distancing.
- *Respiratory Protection.* Due to the national shortage of N95 respirators, use of alternative types of respirators may be necessary. The CDC has indicated that use of respirators approved under other country’s standards may be appropriate for healthcare settings. The CDC’s guidance can be found on its website: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy/crisis-alternate-strategies.html>. Respirator manufacturer 3M has issued a Technical Bulletin providing its analysis and conclusions for comparison of US N95 certified respirators against other company standards, such as China’s KN95 standard, and found that they are comparable for many types of uses, including filtering non-oil based particles. The 3M Technical Bulletin may be accessed here: <https://multimedia.3m.com/mws/media/17915000/comparison-ffp2-kn95-n95-filtering-facepiece-respirator-classes-tb.pdf>. Because N95 respirators are in such short supply and to ensure that appropriate respiratory protection is available for miners, we ask that MSHA accept use of comparable respirators certified under other country’s standards, for applications where the data indicates it would be appropriate. In particular, members have indicated that approval to use KN95-certified respirators may be needed.
- *Placing and Removing Dosimeters and Air Sampling Devices.* Mine operators are implementing CDC and other government guidelines for social distancing, including keeping personnel at a distance from one another. Certain inspection activities, such as

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placing and removing dosimeters and personal air sampling devices, would violate those guidelines. We ask that inspectors be instructed to permit the miner to place and remove the sampling devices himself so that the inspector does not have to be in close proximity to the miner. Additionally, we request that MSHA publish guidelines regarding the procedures that will be followed by the agency to sanitize sampling equipment that will be placed in any miner's breathing zone. Until such procedures can be established, we would request a temporary moratorium on inspector air and noise sampling.

- *Timing for Abatement.* Some mine operations are now or could in the near future be on a reduced staffing status. Where that is the case, inspectors should take that into consideration when setting the time for abatement of violations and when responding to requests for extension of the abatement time. For certain violations, the reduced staffing would also mean that the possibility of exposure to the cited condition is likewise reduced; therefore, it would be reasonable and not deleterious to safety for MSHA to provide for additional time for abatement. Barricades and warning signs may be used in the meantime to protect persons from exposure.
- *Petitions for Modification.* If mines do find it necessary to make adjustments in their current practices, they may find that a Petition for Modification is needed. While we understand that MSHA cannot reduce the standard for granting a Petition, we do ask that the agency make every effort to review these quickly and efficiently so the mining operation may implement critical and appropriate modifications.
- *Time for Responding to Inspector and Investigator Requests for Documents.* We also ask that inspectors and investigators provide a reasonable time, given current operating and staffing conditions, to provide requested documents. This would pertain to training records, workplace exams and other documents that may take time to access and assemble.

MSHA Inspection Discretion

The mining industry fully supports the purpose of the Mine Act and MSHA's critical role in ensuring the safety of miners throughout the cement industry. We understand that to achieve that goal, the Mine Act establishes a basic framework for monitoring compliance and conducting enforcement. Specifically, Section 103(a) of the Mine Act requires that MSHA conduct inspections of each underground mine "in its entirety" at least four times per year, and of each surface mine "in its entirety" at least two times per year. To meet this statutory requirement,

Section 103(b) affords authorized representatives of the Mine Act an absolute right of entry to mines. We understand that MSHA views these statutory proscriptions – even in the face of a national health emergency – as inviolable.

Beyond this basic inspection framework, however, the Mine Act affords MSHA a great deal of flexibility and discretion as to how it executes an inspection on mine property. In fact, most decision-making with respect to inspection logistics and procedures employed is generally based on a variety of non-mandatory guidelines and other considerations. These include:

- District and Field Office manpower requirements
- Inspector experience and past practice
- Mine Safety and Health Enforcement General Inspection Procedures Handbook, PH19-IV / V-1 (December, 2019) (“General Inspection Handbook”)
- Metal / Nonmetal Health Inspection Procedures Handbook, PH-06-IV-1 (October 2006)(“Health Inspection Handbook”)

The issues we have identified above are certainly subject to reasonable adaptation given the health requirements of the current national emergency and making the requested modifications would not be inconsistent with statutory mandates. They fall within MSHA’s discretion as to how to conduct its mandatory enforcement functions.

For instance, decision making regarding how many inspectors are assigned to a particular inspection is not dictated by the Mine Act and, in general, is determined by manpower priorities set by district and/or field office management. Similarly, how opening and close-out conferences are conducted is left to the discretion of the inspector. All that is recommended in the General Inspection Handbook is that the “inspector will notify the operator and miners’ representative of the type of inspection to be conducted and afford the opportunity to exercise their rights under Section 103(f) of the Mine Act.” General Inspection Handbook at 3-1. The Handbook does not discuss procedures for close out conferences.

Additionally, the inspector practice of personally attaching air sampling devices and dosimeters to miners is essentially based on inspector training or past practice and experience. There is no direction in the Mine Act, the regulations, or even the non-mandatory Health Inspection Handbook that requires this procedure. The Health Inspection Handbook does mention that if an individual needs to leave the property during noise sampling, “the inspector should remove the personal noise dosimeter and place it in the pause or standby mode.” Health Inspection Handbook, at 3-7. This reference, however, hardly rises to the level of a mandatory

requirement.” A miner’s placing or removing the device himself, under observation of the inspector, does not interfere with the ability to do the sampling collection.

Conclusion

As set out above, the Mine Act establishes stringent policies governing the number of inspections to be conducted at underground and aboveground mining operations, as well as cement manufacturing facilities. The Act also allows for the exercise of significant discretion by MSHA in determining inspection procedures. This crisis will require both MSHA and operators to work together to maintain the health and safety of all miners. We have provided a specific set of proposals above that would provide effective progress in enabling the industry and MSHA to continue the important work of providing a safe and healthy work environment throughout this crisis.

It is crucial that MSHA provide guidance to the industry so that a coordinated and consistent plan for conducting and managing inspections – that enables social distancing and reduces potential COVID-19 exposure – is developed. Further, it is critical that this guidance is circulated to both inspectors and operators so that everyone knows the proper procedures. Importantly, PCA urges that MSHA delay or limit inspections and other non-time sensitive regulatory activities pending completion and distribution of this guidance.

PCA and its members are ready to work with you and your team to develop this much needed policy guidance so that we can continue to provide the materials needed to support America’s critical infrastructure while protecting the health of miners, inspectors, and the general public.

Sincerely,

Charles L. Franklin
Vice President & Counsel
Government Affairs