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The Honorable George Miller
Chairman
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-2031

RE: ASSE Comments on Mining Safety
Reform Legislation (HR 2768 and HR
2769)

Dear Chairman Miller:

On behalf of the 32,000 member safety, health and environmental (SH&E) professionals of the American Society of Safety Engineers (ASSE), we respectfully ask that you and the members of the Committee on Education and Labor consider the following comments on the two legislative initiatives aimed at improving mine safety currently pending before the Committee – the *Supplemental Mine Improvement and New Emergency Response Act of 2007 (S-MINER)* (H.R. 2768) and the *Miner Health Enhancement Act of 2007* (H.R. 2769).

Our comments reflect directly the experience and expertise of leading safety professionals in the mine industry who are members of ASSE's Mine Practice Specialty. The Mine Practice Specialty is one of thirteen practice specialties organized to help advance common principles of safety, health and environmental management to protect

workers in all workplaces. Like all Americans, our member mine safety professionals are deeply troubled by any death in a mine. They go to work each day to do all they can to prevent these tragedies. Like you and the Committee members, they want to make sure all that can be done to prevent the loss of life and injuries in this nation's mines is accomplished.

Needed: An Overall Mine Industry Risk Analysis

Most of what is proposed in HR 2768 and HR 2769 will help prevent loss of life and injuries. Some provisions are not realistic given the current capabilities of the Mine Safety and Health Administration (MSHA) and the National Institute for Occupational Safety and Health (NIOSH) and may take away from the ability of these agencies to advance safety in realistic ways. A few provisions, though not directly safety issues, challenge the due process rights of mine owners and may be unnecessarily overbearing for the great majority of mines that work safely. In that regard, it is also important to note that most mines are small businesses. Applying MSHA's definition for a small mine (fewer than 20 workers), about 56 percent were small mines in 2002. Using the Small Business Administration's definition (fewer than 500 employees), 95.5 percent of mines are considered small businesses.

Our member mine safety professionals strongly believe, however, that this legislation – as does the overall mine safety debate – misses a necessary approach to achieving safer mines. As our members see it, each time a mine disaster occurs, another serious mine safety problem comes to light that turns out to have been a known significant risk within the mining community. For example, underlying the specific failures that led to the Sago disaster was the industry's quick rush to opening long-closed mines due to the improving market for coal. In the most recent tragedy at Crandall Canyon, the mine's catastrophic failure may well have been impacted by flaws in the mining and roof control plans. When companies engage in such a meticulous process as retreat mining, it becomes critical to have mine plans examined and reviewed by experts with the requisite knowledge and experience to detect potential concerns. This may prove to be more an issue of inadequate support services and oversight than regulatory inspections.

This nation's mines are already the most regulated workplaces in America. When it is estimated that OSHA would need about 24 years to inspect every general industry and construction workplace in America once, MSHA inspects each mine in this nation multiple times each year. No doubt, specific improvements in inspections, enforcement and an emphasis on improved technology and rescue capabilities are needed. We urge the Committee, however, also to look beyond specific fixes to establishing an overall approach to assessing safety and health risks across the mining industry that would be similar to the way a safety professional approaches a troubled worksite.

When a safety professional enters a worksite, professional training dictates that the first task is to look throughout the workplace and make an assessment of the overall

safety and health risks. By developing risk-based priorities, he is able to make the most effective use of his resources to address the issues that most directly put workers in peril. Focusing too soon on specific risks could easily overwhelm the crucial need for an overall understanding of the relative risks workers face. Once an overall assessment is accomplished, the safety professional will address each risk in the order of their relative danger to workers, with the resources available to address each risk in mind.

ASSE believes that, at this time especially, the same kind of overall safety analysis is needed for the mine industry as a whole. We urge this Committee, through an amendment to this legislation, to task NIOSH to convene a stakeholder symposium with the specific goal of conducting a mine safety risk analysis for the mine industry that would identify the most dangerous risks and establish a hierarchical ranking of the severity of those risks so that the focus of mine owners, the resources of MSHA and NIOSH, and the actions of Congress can be targeted to the most dangerous risks first. Such an analysis would create the foundation for what safety and health professionals would hope could be the establishment of a risk-based approach to improving those key issues that have proven over the past twenty months to expose underground miners to the greatest peril.

From our members' viewpoint, the majority of workplaces that fall under the authority of the Mine Safety and Health Act of 1977 (Mine Act) share a risk profile that has more in common with heavy highway construction than with underground mining. They know that sand pits, quarries and other surface mining activities have maintained accident rates far lower than manufacturing and construction for several years. An industry-wide safety analysis could very well result in an understanding for the need for Congress to re-open the Mine Act to readjust the direction and scope of mine regulation so that the resources of MSHA especially could focus more directly on the elements of the industry and the risks that truly represent a clear and present danger to miners. Further emphasis on the broad scope of mining without consideration of these risks restricts MSHA from properly allocating and directing resources to the areas where they can do the most good.

This suggestion represents sound loss-prevention theory practiced by safety and health professionals in every kind of workplace, especially one troubled by injuries or loss of life. Given the repetitive tragedies that the mine industry has faced recently, the same overall approach is needed. ASSE and its members stand ready to help this Committee develop this kind of strategy.

Comments on S-MINER Act (HR 2768)

Supplementing Emergency Response Plans

ASSE greatly understands the urgency with which the provisions aimed at improving the chance that miners will survive a mine accident have been included in this bill. Each provision is worthy of further action, as each has the potential to save lives. Reiterating our previous comments, however, we urge you to amend the bill to make their implementation dependent on an industry-wide risk analysis to be conducted

under the direction of NIOSH before placing these provisions into law. Our fear is that all these activities, if required in the time frames indicated, will overwhelm even the best efforts of NIOSH and MSHA to bring them about.

Provisions included in this section requiring the establishment of an advisory committee to determine applicability of regulations to underground metal and nonmetal mines are consistent with ASSE's proposal. We hope that Congress will ensure that NIOSH plays a key role in this evaluation since it is best situated to understand the many distinctions between the coal and metal/nonmetal underground operations that led MSHA to create different sets of standards for these commodities in the first place – non-combustible ore and dusts, fewer gassy mine issues, natural ventilation in some mines, and differences in mining methods, for example.

Clearly, some provisions included in the section Supplementing Emergency Response Plans are needed immediately, like ensuring that mines have post-accident communication systems meeting the most effective systems currently used, ensuring safety communications among personnel between mine shifts, and requiring 6-month self-rescue device inspections and notification. For other provisions, NIOSH and MSHA will find it difficult to balance the desire to meet the directions given here with the realities of technology and their resources. For example, while it is laudable that the bill tasks the National Academy of Sciences with a study of lightening in mining, it is doubtful that mine inspectors or mine owners will be able to carry out the bill's provisions aimed at protecting miners. Each mine will have unique vulnerabilities to lightening, most of which we fear will be undiscoverable even under the best intentions. As safety professionals, our members are consistent in their dedication to using whatever knowledge and technologies are available to protect miners. But they do understand the frustration of being tasked to address relatively small risks when more pressing, even immediate risks need to be fixed.

TECHNOLOGY AND MINE EMERGENCY HEALTH AND SAFETY RESEARCH PRIORITIES – ASSE cautions against an effort by Congress to set research agendas without the willingness to fund additional research beyond what NIOSH is already undertaking. Each technology the bill would require NIOSH to give due consideration does deserve more research. However, NIOSH has already undertaken what we believe is a highly competent review of its research priorities in mining through the National Occupational Research Agenda (NORA). Under NORA, a Mining Sector Council is already undertaking the kind of research analysis needed to set priorities. Congressional action should not detract from that effort.

Supplementing Enforcement Authority

AUTHORITY OF INSPECTORS – ASSE supports provisions that clarify the authority of MSHA and its personnel to direct rescue and recovery activities. In any rescue and recovery operation, a clear authority to take responsibility is always needed.

TRANSITION TO A NEW GENERATION OF INSPECTORS – ASSE
commends Congress for addressing the loss of experienced mine inspectors. The mine safety community shares this concern, as MSHA is projected to lose half of its current workforce in the next two to five years. The bill's provisions to ensure a transition to a new generation of inspectors will help MSHA meet this daunting problem.

MINER OMBUDSMAN – As written, ASSE cannot support provisions requiring creation of the Office of Miner Ombudsman within the Department of Labor (DoL). Given the discord and lack of trust that now exists between workers and the mining industry and MSHA, we fully understand the need for some assistance in representing those interests wanting to make mines safer and healthier for workers. However, much of what this position hopes to achieve is already addressed in MSHA regulations (some specifics?). We also do not believe that simply adding another position to an infrastructure for complaints, even if it is not working as well as it should, would guarantee the results the bill understandably wants to achieve. We urge you and the Committee to consider another approach.

What is needed in the mining industry is less another advocate than someone who could help resolve the various differences that separate not only miners from the industry and MSHA, but also industry from MSHA. We urge you to consider the creation under DoL of an independent office for arbitration of mining conflicts. Under rules established by the American Arbitration Association or similar organization, such an office could serve as a non-mandatory middle ground to resolve issues beyond MSHA's failure to listen to miner complaints about mine hazards. Other problems plague the industry and take away from effective safety enforcement, including inspectors with inadequate understanding of their responsibilities and small business mine owners feeling helpless in the face of a legal process easily brought to bear by MSHA. As it does in other industries, arbitration could very well prove to lessen the costs of enforcement. If such an office were staffed with mine safety and health expertise, as current provisions in the bill require an ombudsman to be, we believe the current difficulties in identifying and addressing mining risks could be improved.

PATTERN OF VIOLATIONS – While the intent of these provisions is well meaning, ASSE cannot support the provisions addressing pattern of violations. We would hope that Congressional efforts could focus on changes that will directly advance safety. From the experience of our members, MSHA already uses its pattern of violations powers and recently published a policy document to explain how patterns will be determined with more precision. A new penalty component is not necessary at this point, given the impact that a pattern finding will already have on mine operations. It would also be redundant given MSHA's new "repeat violation" penalty criterion in 30 CFR Part 100. MSHA added this in an effort to go beyond the dictates of the *Mine Improvement and New Emergency Response (MINER) Act* in order to heighten penalties for all classes of violations that indicate a pattern or practice of certain types of safety or health deficiencies. Consistent with our overall

comments, we would hope that the attention of both Congress and MSHA could be directed to more pressing needs for improvement. This is not one of those areas.

NOTIFICATION OF ABATEMENT – Given recent history, believing that all personnel need to be removed from a mine following an operator’s failure to notify MSHA that any violation has been abated is understandable. However, not every violation in a mine threatens lives and, under current law, MSHA already is empowered to impose a \$6,500 per day penalty for failure to abate. It also may issue orders under Section 104(b) of the Mine Act that trigger withdrawal of miners from all or part of a mine under such circumstances. Also, our members report that MSHA inspectors are generally quick to revisit the mine to determine whether abatement has occurred. To ensure that this provision is targeted to truly threatening situations, where MSHA’s resources should be targeted, we urge that the requirement to remove personnel following failure to abate be limited to citations that are significant and substantial.

FAILURE TO TIMELY PAY PENALTY ASSESSMENTS – ASSE has no position on provisions aimed at ensuring timely payment of penalty assessments. This is not directly a safety issue. Our members, however, report that the difficulty often appears to be the MSHA’s inability to ensure that penalties are collected and that adequate communications exist with the Department of Justice to ensure enforcement. While we understand the frustration in Congress with the failure to correct this problem, this provision could very well result in the closure of an entire mine over non-payment of a \$112 penalty. Given the administrative problems MSHA has demonstrated in enforcing penalty assessments, such a result may be too harsh.

PENALTIES – The appropriateness of the various penalty provisions contained in the bill is beyond ASSE’s expertise. In general, we do not take positions on what amounts are appropriate both to penalize those who violate safety and health laws and to ensure an employer’s commitment to safety and health in the future. We would hope this issue could be the subject of research by NIOSH so that penalties can be constructed in a way that effectively brings about safe and healthy mines. Until research can provide that insight, it is difficult for our members to determine effective penalties.

In general, however, penalties that fail to cause mine operators to protect miners adequately are too small, and penalties that cause a mine owner to give up a business when conditions are correctable and the owner has demonstrated an overall commitment to operate safely are too large. From ASSE’s viewpoint, a safety and health professional’s work is to protect workers and property and to help a business do well. Good safety has a direct and positive effect on the bottom line of any business, including mines. We urge you and the Committee to keep that fundamental principal to safety in mind when considering appropriate penalties.

In that light, our members disagree with the elimination of criteria that consider the impact of penalties on a company's ability to remain in business. Small 5-person mines, for example, should not be faced with the same minimum penalties as multi-national corporations when it comes to citations. A case-by-case analysis must be retained at all levels of enforcement.

FEDERAL LICENSING ADVISORY COMMITTEE – ASSE applauds the inclusion of this provision in the bill, supports its enactment and respectfully asks that ASSE members be included in such an advisory committee. Many states already provide for licensing of certain categories of miners, foremen and those engaged in special activities, including blasters and electricians. Federal licensing could enhance portability of skills and give assurances to mine operators of employee competence. We urge inclusion of appropriately mine safety and health personnel who have the needed experience and have achieved appropriate accredited certifications such as the Certified Safety Professional (CSP), Certified Industrial Hygienist (CIH) or Certified Mine Professional (CMP). These certifications would fit well any federal licensing program.

Rescue, Recovery and Incident Investigation Authority

EMERGENCY CALL CENTER/CONTACT INFORMATION/MINE LOCATION MAPS – ASSE supports provisions requiring MSHA to staff with qualified personnel a 24/7 emergency call center as well as the detailed contact information of rescue and mine personnel. Requiring maps of all operating and abandoned mines to be maintained on the DoL website is also a positive step forward. We do, however, question the need to provide search capabilities that allow mines to be located by congressional district. While a small point, anything that can be done to de-politicize this nation's commitment to mine safety needs to be taken. The other search criteria are useful enough for those who might know congressional districts.

REQUIRED NOTIFICATION OF EMERGENCIES AND SERIOUS INCIDENTS – ASSE supports provisions clarifying that certain categories of “accidents” could be reported within one hour, rather than within 15 minutes. In our members' experience to date, the 15-minute rule is already proving somewhat infeasible, especially for underground operations with limited personnel available to render assistance while also being able to communicate with MSHA. Perhaps Congress can revisit this issue in general and take testimony about the practical impact of the “15-minute” rule, especially now that MSHA's final report in the Sago case has indicated that the notification of MSHA was not a causal or indirect factor in the loss of life at that operation.

EMERGENCY MEDICAL RESPONSE – ASSE supports provisions intended to improve emergency medical response capabilities following mine emergencies. As we have expressed with other provisions, however, we urge that implementation of these provisions be done in the context of a thoughtful analysis of all the issues impacting the survival of miners and the capabilities of MSHA.

CSB – ASSE fully supports the good work of the U.S. Chemical Safety and Hazard Investigation Board’s (CSB) efforts in helping industry understand and address chemical safety issues. We also understand the implied goal here of having for the mining industry what exists for the chemical industry and, with the National Traffic Safety Board (NTSB), for transportation – an independent authority with expertise to give industry unbiased assessments of accidents to help ensure they do not reoccur. Nevertheless, we cannot support this specific means of achieving that aim. CSB has specific capabilities in addressing chemical risks, as the NTSB does in transportation. It would only dilute that capability to ask it to become expert in mining. We urge you and the Committee to consider other alternatives, perhaps even establishing a separate independent agency to take on this work.

Respirable Dust Standards

The need to set appropriate crystalline silica and respirable coal dust standards is clear and long overdue. While the desire to set standards legislatively is attractive given the failure of OSHA and MSHA to move these issues forward, ASSE must be concerned with setting a precedent in dispensing with rulemaking, as the bill would do. ASSE’s own proposal to update exposure limits urges use of negotiated rulemaking. Even under the best circumstances, setting an exposure limit is difficult given the litigious environment surrounding the safety and health field. Providing a means for all stakeholders to participate in a process will help disarm those who are intent on inhibiting any forward movement on exposure limits. In addition, the provision that specifies the sampling protocol is redundant and could cause confusion. NIOSH currently has sampling methods established for monitoring the respirable silica dust for both coal mines as well as other mines (NIOSH method 7603 and method 7500). These methods are effective when used in conjunction with good industrial hygiene practices – initial evaluation to determine those areas and operations to be tested, personal monitoring of representative operations for two individuals in the area in case of equipment malfunctioning or tampering, full shift sampling, and use of the specified number of blanks per samples collected to correct for contamination.

Comments on Miner Health Enhancement Act of 2007 (HR 2769)

Air Contaminants

ASSE fully agrees that the existing health standards now enforced by MSHA are outdated and are in need of revision. For the metal/nonmetal sector, MSHA had incorporated by reference the 1973 version of the American Conference of Governmental Industrial Hygienists’ (ACGIH) Threshold Limit Values and the coal sector is governed by the 1972 TLVs. ASSE has long supported a comprehensive overhaul of both MSHA and OSHA permissible exposure limits (PELs) and has suggested that this be done through negotiated rulemaking, as discussed above. We

maintain that this is preferable to dispensing entirely with rulemaking and simply adopting the existing and future NIOSH Recommended Exposure Limits (RELs).

Although NIOSH is well-qualified to make recommendations on appropriate health standards, these provisions are legally flawed because it would render the Administrative Procedure Act a nullity for the mining industry, depriving its members of their due process rights to be part of the rulemaking process through notice-and-comment standards development, as required by federal law. A simple fix to this problem is appealing, but simply mandating a solution would set a harmful precedent for avoiding formal rulemaking on other subjects relative to occupational and mine safety and health. The rulemaking process is one of the key mechanisms for ensuring that appropriate technology and sound science are recognized when setting requirements that carry heavy civil and criminal sanctions.

Asbestos

With respect to provisions intended to update MSHA's asbestos standard, ASSE urges caution in moving forward legislatively. ASSE participated in the ongoing MSHA rulemaking on this subject and fully supported adoption of the OSHA PEL by MSHA. Since that rule is near completion, it would be difficult to abandon the regulatory administrative record that been created and substitute congressional fiat when dealing with the technological, scientific and geological issues related to sampling, analysis and mineral definitions that are so important when measuring asbestos in an environment containing naturally occurring non-asbestiform minerals. These provisions should be replaced with provisions mandating that MSHA complete its rulemaking.

Hazard Communication

ASSE understands the bill's intent to require MSHA to move forward in advancing hazard communications. However, the bill misses an opportunity to help the mining industry take the lead on an initiative that will bring it in line with the world's economy. Instead of requiring the agency to apply provisions of its October 2000 interim final rule, which was modeled on the now outdated OSHA HazCom Standard at 29 CFR 1910.1200, Congress should be requiring MSHA to look forward. The bill should require MSHA to begin revision of its HazCom standard (30 CFR Part 47) to adopt the Global Harmonization Standard (GHS), which is already under consideration by OSHA. It is critical for all sectors of American commerce to be able to market its products on a global basis. Mining cannot be left behind, and allowing it to do so makes little sense given the multi-national ownership of many U.S.-based mines.

Conclusion

The mining industry as a whole has made significant advances in mine safety since enactment of the Mine Act in 1977. Although the last several years have been marred

by several high-profile underground coal mine disasters, both coal and metal/nonmetal fatalities and injury rates have been steadily declining. More focus in preventing deaths and injuries in minds is needed, however, and ASSE is committed to working with Congress and MSHA to further enhance mine safety and health through proactive initiatives and programs that can protect miners while also giving mine operators the tools they need to implement best practices and the latest technology.

ASSE was active during consideration of the MINER bill and in the MSHA oversight hearings during 2006. The Administrator of ASSE's Mining Practice Specialty, Michael Neason, provided helpful testimony before the Senate Health, Education, Labor and Pensions Committee on the Sago tragedy from the perspective of a mine safety expert. ASSE again offers the expertise and experience of its members in the event that the Committee holds mine safety hearings. ASSE and its members are pleased to be able to work with Congress to achieve our mutual goal of helping ensure that every miner has a chance every day to go home safe and healthy to their families.

Sincerely,

Michael W. Thompson, CSP
President

cc: Representative Howard P. McKeon
Ranking Member
Representative Lynn C. Woolsey
Representative Joe Wilson