

*Jasper, Ga., July 27, 2010-- The International Society of Mine Safety Professionals offers the following comments on the Robert C. Byrd Miner Safety and Health Act of 2010 (H.R. 5663) and the recent legislative proposals to amend the Mine Act.*

The International Society of Mine Safety Professionals (ISMSP) opposes efforts by Rep. George Miller (D. Ca.) to push through amendments to the Mine Act before the investigation of the Upper Big Branch mine disaster is complete. The ISMSP believes that the proposed *Mine Robert C. Byrd Miner Safety and Health Act of 2010 (H.R. 5663)* and the earlier drafts of the legislation represent a step in the wrong direction and will not improve the safety of the Nation's mines. Although the ISMSP does not oppose independent accident investigations, the society does oppose any increase in the powers and authority of the Mine Safety and Health Administration (MSHA).

### **Mine safety is ISMSP's only focus.**

The ISMSP is a professional society consisting of over 1000 safety professionals. The safety professionals in our society work in the fields of education, technology, training and, of course, mining. In the mining industry, our members represent every commodity group, including coal. Our members are bound by a code of ethics that requires them to pursue a single goal: "the highest degree of safety."

### **Safety is a value.**

As safety professionals, we strive to instill in the management teams and the workforces that we serve that "safety is a value." Unfortunately, the Mine Act, and the recent proposals to amend it, perpetuate the idea that safety is a legal obligation owed by management and a legal right of the workforce. In many respects, the old-school "rights and duties" approach to mine safety, which is embodied in the Mine Act, creates an inherent conflict with the safety cultures that modern mine operators are attempting to foster. Modern safety cultures depend upon the cooperation of management and miners to achieve a safe work environment. Cooperation is more difficult to achieve when the miners have a statutory entitlement to a safe workplace. Cooperation becomes especially difficult to achieve when miners are incentivized to raise safety concerns through government channels without first exhausting channels at their operations. It is the ISMSP's position that safety is the responsibility of everyone that works in the mining industry.

### **Safety and compliance are not synonymous.**

As safety professionals, we are keenly aware of the differences between safety and compliance. Compliance is measured in violations; whereas safety is measured in injuries. The distinction, which persons outside of the mining industry often fail to grasp, is significant. While an injury is a real event, a violation only represents the opinion of an inspector that a potential injury is theoretically possible. With respect to about 70% of the violations issued to the mining industry (non significant and substantial violations), MSHA concedes that the cited conditions are "unlikely" to ever result in an injury. With respect to the remaining 30% of violations, MSHA concedes that over 97% of the conditions result from the unintentional conduct of the mine operator. In many cases, the violations involve

conditions that have recently occurred and have not yet been identified by a mine operator for correction. The current attempt to further empower MSHA to reduce these non-serious and unintentional violations through stiffer enforcement is mis-guided. It has never been established that increased enforcement by MSHA results in greater industry compliance or that greater compliance with MSHA's regulations results in a reduction of injuries in the mining industry. In fact, the recent increase in enforcement by MSHA following the Sago mine disaster, which notably preceded the Upper Big Branch mine disaster, has not resulted in greater industry compliance. One of the probable reasons for the disparity is that MSHA's regulations, which do not compare favorably to the modern voluntary consensus standards that much of the mining industry already uses for guidance, are both ineffective and outdated. It is the ISMSP's position that additional emphasis on compliance with simplistic regulations will not result in a reduction of injuries in the mining industry.

### **MSHA has all the tools that it needs.**

As safety professionals, we have an ethical obligation to advise governmental authorities when an operator creates an unacceptable level of risk at an operation. In this context, and only with respect to the less than 3% of violations that are reasonably likely to result in injury and that can be attributed to malfeasance by the mine operator, there may be an appropriate law enforcement role for MSHA. However, MSHA already has all of the tools that it needs to protect miners at rogue operations. MSHA already has unlimited inspection authority, closure order authority for imminent dangers, unwarrantable failures, failures to abate and even pattern of violations as well as authority to issue both civil and criminal sanctions. In the last 35 years, MSHA has not been reluctant to exercise, and even abuse, this authority. It should also be emphasized that, contrary to popular perception, there are no legal loopholes through which mine operators can circumvent MSHA's authority. Realistically, an operator cannot challenge a violation until the condition or practice has been abated. It is the ISMSP's position that there are already sufficient tools with which MSHA can address recalcitrant mine operators.

### **More is not always better.**

As safety professionals, we have an ethical obligation to cooperate in any effort that advances mine safety. In the current enforcement environment, cooperation with MSHA on a mine specific basis is difficult to achieve. The civil and criminal liabilities set forth in the Mine Act, which are slated for significant increases in the legislative proposals, will effectively prevent safety and other mining professionals from having a candid exchange of information and ideas, which are essential to reducing injuries, with MSHA. Because of concerns regarding successful prosecutions, MSHA also has been reluctant to share information with the mining industry. Providing MSHA with greater enforcement powers, especially related to criminal sanctions, will only serve to widen the current divide between the mining industry and the federal government. It is worth noting that the continuing downward trend in mining fatalities in the coal industry was steeper prior to the 1969 Coal Act, when the government and the mining industry did not have an adversarial relationship. It is also worth pointing out that the Upper Big Branch disaster followed a significant increase in liabilities imposed upon mine operators. It is the ISMSP's

position that an adversarial relationship between industry and government is counterproductive.

### **Law enforcement is a growing distraction.**

As safety professionals, our focus is on eliminating injuries. We achieve safety at our operations through risk assessment (eg. job safety analysis and workplace audits) and through risk management (eg. training and development of safe work procedures). However, after the changes to the Mine Act and 30 C.F.R. Part 100 following the Sago mine disaster in 2006, an increasing part of a safety manager's responsibilities now includes accommodating MSHA inspections and addressing the citations that MSHA inspectors issue and the fines that the agency assesses. Other mine personnel are also diverted from safety related work activities to law enforcement issues. The workload that results from dealing with the law enforcement matters is a significant distraction to mine operators. The distraction diverts safety and other mining professionals from not only production but also from their injury prevention work. It is the ISMSP's position that additional law enforcement, especially at operations that have achieved low injury rates, will be a further distraction.

### **MSHA does not know best.**

As safety professionals, we welcome other ideas, perspectives and assessments that will help us improve safety. In this respect, walkarounds with MSHA inspectors can be beneficial. However, more often than not, the MSHA inspectorate does not have the experience or training that is necessary to enable them to offer information to mine operators that will improve safety. There are very few inspectors that have extensive mining or safety experience, if their government service is not included. In general, the experience of MSHA personnel pales in comparison to the experience of the safety and mining professionals that they are charged with second-guessing. In addition, MSHA inspectors are not trained as professional safety managers; they are trained as law enforcement personnel. They are skilled at note-taking, evidence collection and interview techniques. However, they are usually not skilled at assessing, evaluating and prioritizing mine hazards. Their gravity findings are often unrealistic and not based on established risk management principles. It is the ISMSP's position that ambiguous standards, such as "reasonable likelihood" or "reasonable possibility," do not adequately compel the MSHA inspectorate to assess risks in a manner that furthers safety.

### **Bureaucracy does not improve safety.**

As safety professionals, we know that the persons most able to prevent an injury are the persons with the most information about the hazard. However, the proposed legislation gives MSHA increased control over the operating plans developed by the mine operator. The government officials at MSHA, who do not work at the mine and who are often less experienced than their industry counterparts, are not in the best position to make decisions about operating plans. Plans approved by government tend to stifle innovation by relying on generic principles that are not tailored to mine specific conditions. It is the

ISMSP's position that decisions about safe operating practices should be fully vested in the mine operators that are familiar with mine specific conditions.

**There is no free lunch.**

As safety professionals, we are concerned when scarce safety resources are diverted to low-level hazards. Every citation issued by MSHA essentially represents a disagreement with the mine operator as to whether the cited condition presents a hazard to the workforce. As indicated above, 70% of the time, both MSHA and the operator agree that the cited condition is "unlikely" to result in an injury. Nonetheless, the operator is still required to immediately abate the cited non-serious condition. Because the resources of a mine operator are not infinite, the abatement of these non-serious conditions diverts operator resources from the other safety priorities that it has identified. It is the ISMSP's position that safety resources should be allocated by the more experienced and more familiar professionals that have to operate the mine.

**Calls for change are premature.**

As safety professionals, we know that to prevent a reoccurrence of an accident, it is absolutely essential to have a complete understanding of the root cause. Although the Upper Big Branch mine disaster was undoubtedly a terrible tragedy, the causes of the disaster are completely unknown at this point. The investigation is just barely underway. From a safety perspective, any changes to current law are premature. As safety professionals, we know that long-term and overall improvement in safety results only from thorough investigation and planning, not from 'knee jerk' responses to incidents. In this respect, it is worth emphasizing that the most recent amendments to the Mine Act, which did not prevent the Upper Big Branch disaster, were enacted in haste before the investigation of the Sago mine disaster was complete. The Sago investigation ultimately concluded that noncompliance was not a contributing factor to the disaster. It is the ISMSP's position that, at the very minimum, Congress should postpone legislative action until the causes of the Upper Big Branch disaster are better understood.

**The ISMSP is committed to participation.**

The Congress needs to hear from the safety professionals that are the individuals ultimately responsible for developing and implementing plans to reduce injuries at mining operations. Agency officials and union leaders, that have institutional objectives, are not providing the Congress with the full picture about mine safety.