Hazard Communication Public Hearing
Opening Statement

Good morning. Welcome to MSHA's public hearing on our interim final rule for hazard communication in the mining industry.

I'm Marv Nichols, Administrator for Coal Mine Safety and Health.

I'm Ernie Teaster, Administrator for Metal and Nonmetal Mine Safety and Health.

The members of today's panel are _____.

We are here to listen to your comments on the hazard communication interim final rule which we published on October 3rd last year. We are holding this hearing in accordance with Section 101 of the Federal Mine Safety and Health Act of 1977. As is our practice, we will conduct the hearing in an informal manner. During the proceeding, panel members may ask questions of the presenter. Although formal rules of evidence will not apply, we will be taking a verbatim transcript of the hearing and will make it a part of the official rulemaking record. The hearing transcript will be available for review by the public, along with all of the comments and data that MSHA has received to date. The entire rulemaking record, of course, is available at our office in Arlington, Virginia.

If you wish a personal copy of the hearing transcript, please make your own arrangements with the court reporter.

Now, let me briefly give you some background on the interim final rule and highlight its major provisions. Following that I will share with you our reaction to some of the comments received thus far.

<u>Background</u>

On November 2, 1987, the United Mineworkers of America and the United Steelworkers of America jointly petitioned MSHA to adapt OSHA's hazard

communication standard to both coal and metal and nonmetal mines and propose it for the mining industry. They based their petition on the need for miners to be better informed about chemical hazards and that miners working at both surface and underground coal and metal and nonmetal mines are exposed to a variety of hazardous chemicals.

On March 30, 1988, in response to this petition, MSHA published an advanced notice of proposed rulemaking on hazard communication for the mining industry. In this notice, we indicated that we would use the OSHA hazard communication standard as the basis for our standard and requested specific comments on a number of related issues.

We published a notice of proposed rulemaking on hazard communication on November 2, 1990 and held three public hearings in October 1991. The record closed January 31, 1992.

In their comments on our advanced notice of proposed rulemaking and proposed rule, commenters represented—

- both small and large mining companies,
- individual miners,
- a variety of trade associations,
- state mining associations,
- chemical and equipment manufacturers,
- national and local unions,
- members of Congress, and
- federal agencies.

We re-opened the rulemaking record on March 30, 1999, requesting comments on the impact of the proposed rule on:

- the environment;

• small mines;

• state, local, and tribal governments; and

• the health and safety of children.

The National Environmental Policy Act and more recent statutes and executive orders included requirements for us to evaluate the impact of a regulatory action in these areas.

At that time, we also requested comments on the information collection and paperwork requirements of certain provisions of the proposal now considered as an information collection burden under the expanded definition of "information" under the Paperwork Reduction Act of 1995.

We received seven comments to the limited re-opening of the rulemaking record, primarily from trade associations and labor organizations. The rulemaking record closed June 1, 1999.

On October 3, 2000, we published an interim final rule on hazard communication with an effective date of October 3, 2001. We gave commenters until November 17, 2000, to submit comments. The interim final rule specifically requested comments on—

• the plain language format and the content of the interim final rule,

• mine operators' experience under the Occupational Safety and Health Administration's Hazard Communication Standard, and

• any changes in the mining industry since the publication of the proposed rule.

On December 7, 2000, we personally spoke with or e-mailed all commenters and other interested persons telling them of our decision to hold a public hearing in Washington, DC on December 14, 2000. The public notice of the hearing appeared in the Federal Register on December 11, 2000.

We received 22 written comments on the interim final rule and heard testimony from six persons at the public hearing on December 14, 2000.

Commenters objected to what they considered to be an inadequate comment period and an inadequate notice of the hearing. These commenters stated that they did not have sufficient time to fully analyze the impact of the interim final rule which affected their ability to develop and submit meaningful comments. They also stated that many operators were unable to testify at the hearing because they did not have enough time to prepare testimony and make plans to attend the hearing.

Members of the mining community have also stated that, because this is the first time MSHA promulgated an interim final rule, there is some confusion about their compliance obligations. The National Mining Association and the National Stone, Sand and Gravel Association have asked for a delay in the effective date of the interim final rule until we respond to their previous comments on it.

A number of mine operators and trade associations challenged the hazard communication interim final rule in the U.S. Court of Appeals and the United Mine Workers of America and the United Steelworkers of America have intervened in the litigation.

Major provisions of the rule

Now I will briefly highlight the six major provisions of the rule.

1. HAZARD DETERMINATION.

The hazard communication interim final rule requires mine operators to identify the chemicals at their mine and determine if they present a physical or health hazard to miners based on the chemical's label and material safety data sheet (MSDS) or on a review of the scientific evidence.

Under the interim final rule, for the purposes of hazard communication, MSHA considers a chemical hazardous and subject to the hazard communication rule if it is listed in any one of the following four recognized authorities or sources:

• Title 30 Code of Federal Regulations (30 CFR) chapter I.

• American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLV®s) and Biological Exposure Indices (latest edition).

• National Toxicology Program (NTP) Annual Report On Carcinogens (latest edition).

• International Agency for Research on Cancer (IARC) Monographs or Supplements.

2. THE HAZARD COMMUNICATION PROGRAM.

The hazard communication interim final rule requires mine operators to develop, implement, and maintain a written plan to establish a hazard communication program. The program must include—

• procedures for implementing hazard communication through labeling, MSDSs, and training of miners;

• a list of the hazardous chemicals known to be present at the mine; and

• a description of how mine operators will inform miners of the chemical hazards present in non-routine tasks and of chemicals in unlabeled pipes and containers.

If the mine has more than one operator, or has an independent contractor on-site, the hazard communication program also would have to describe how the mine operator will inform the other operators about the chemical hazards and protective measures needed.

3. CONTAINER LABELING.

A label is an immediate warning about a chemical's most serious hazards. The hazard communication interim final rule requires mine operators to ensure that containers of hazardous chemicals are marked, tagged, or labeled with the identity of the hazardous chemical and appropriate hazard warnings. The label must be in English and prominently displayed.

I would like to clarify one point about the labeling requirements. Practically speaking, very little labeling is required. You only have to label stationary process containers and temporary portable containers and then only under some circumstances.

Chemicals coming onto mine property are almost always labeled. You would not have to re-label them unless the existing label becomes unreadable.

You would not have to label containers of raw material being mined or milled while they are on mine property.

You would not have to label mine products that go off mine property. You would have to provide the labeling information to downstream users upon request.

4. MATERIAL SAFETY DATA SHEET.

A chemical's material safety data sheet (the MSDS) provides comprehensive technical and emergency information. It is a reference document for mine operators, exposed miners, health professionals, and firefighters or other public safety workers. The hazard communication interim final rule requires mine operators to have an MSDS for each hazardous chemical at the mine.

Mine operators should already have MSDSs provided by the supplier for those chemicals brought to the mine. The MSDS must be accessible in the work area where the chemical is present or in a central location immediately accessible to miners in an emergency.

5. HAZCOM TRAINING.

The hazard communication interim final rule requires mine operators to establish a training program to ensure that miners understand the hazards of each chemical in their work area, the information on the MSDSs and labels, how to access this information when needed, and what measures they can take to protect themselves from harmful exposure. Under the interim final rule, mine operators have the flexibility of combining the training requirements for hazard communication with existing Part 46 and Part 48

training. The interim final rule does not require mine operators to have an independent training program separate from Part 46 and Part 48 training.

Many operators already cover some of the above information in their current training program. If so, they DO NOT have to re-train miners about the same information. We designed the hazard communication training requirements to be integrated into existing training programs for miners.

6. MAKING HAZCOM INFORMATION AVAILABLE.

The hazard communication interim final rule requires mine operators to provide miners, their designated representatives, MSHA, and NIOSH with access to materials that are part of the hazard communication program. These include the program itself, the list of hazardous chemicals, labeling information, MSDSs, training materials, and any other material associated with the program.

Mine operators DO NOT have to provide copies of training materials purchased for use in training sessions, such as videos.

Also, mine operators DO NOT have to disclose the identity of a trade secret chemical except when there is a compelling medical or occupational health need.

Comments

I will now share with you our thoughts on some of the comments received on the interim final rule.

Commenters representing the aggregate industry argued strenuously that the hazard communication rule is unnecessary and that the aggregate industry should be exempt from the rule.

The HazCom rule does not duplicate other MSHA standards, as claimed by some commenters representing the aggregate industry. It augments, supplements, and complements these existing standards. The rule specifically deals with chemicals and chemical exposures. Chemicals may be used in any mine, including those in the aggregate industry. There have been hundreds of chemical burns in the aggregate

industry. Chemical burns can occur on any part of the body. Skin burns may require multiple skin grafts and require repeated hospitalization. Eye burns can be serious and result in permanent loss of eyesight.

We believe the burden on small mines is less than some commenters stated. First, small mines typically use far fewer chemicals than large mines, and in many cases, no new chemicals.

Second, small mines typically use chemicals in small quantities and for shorter periods of time, similar to household use.

Third, many of the chemicals used at small mines are not covered by the rule. For example, soaps used for washing hands are "cosmetics" and are exempt. A can of spray paint is a "consumer product" and is exempt when used in small quantities intermittently. The length of exposure, as well as the amount, is really the determining factor -- a can of paint only lasts a short time. Glue or adhesives, when used intermittently in small quantities, are exempt. Again, the length of exposure, as well as the amount, is the determining factor in whether or not a consumer product is exempt.

We recognize, however, that not all mines are likely to use a wide range of chemicals. Although we cannot exempt the aggregates industry from hazard communication, as we said, there are steps we can take to minimize the burden of the rule. For example, we intend to make extensive Compliance Assistance Visits and conduct extensive outreach. We also will be publishing a compliance guide to help operators and miners understand the application of the HazCom final rule. We are developing a variety of compliance aids, such as model HazCom programs, a training video for mine operators about determining chemical hazards, and a training video for miners about chemical hazards and reading an MSDS.

A draft of the MSHA compliance guide has been on the MSHA web site for months. If you refer to the compliance guide, many of these issues are explained. If you have any questions in these areas, send them by e-mail to comments@MSHA.gov or to the Office of Standards at the address listed in the hearing notice. We will use these questions to clarify your responsibilities and include additional or better examples in the

compliance guide. As a rule of thumb, however, if you are in compliance with OSHA's rule, you will be in compliance with MSHA's.

In the same vein, mine operators may obtain help from organizations that have developed generic guides to meet OSHA's hazard communication standard because HazCom contains the same basic requirements. We will provide links on our website to some organizations which have developed a variety of generic HazCom materials. While it will remain the responsibility of each mine operator to develop and implement a HazCom program and to have MSDSs, to the extent possible, we will help you establish the hazard communication program if requested. We have already taken other steps in revising our interim final rule to make it easier for mine operators to comply, without reducing the protections offered by the rule.

We are considering the following substantive changes to the interim final rule in response to commenters' concerns. We also are considering several non-substantive changes to clarify our intent and correct errors based on commenters perspectives and questions.

Under "Hazard Determination," we may revise the reference to ACGIH, NTP, and IARC from those considered in determining if a chemical is a hazard and if the chemical is carcinogenic. One option we are considering in determining whether a chemical is a hazard is to refer to the 2001 editions of the ACGIH TLV booklet, IARC, and NTP. In determining whether a chemical is a carcinogen, we are considering referring only to the 2001 editions of NTP and IARC.

We had expected the use of the ACGIH, NTP, and IARC lists to reduce the burden on mine operators because mines use relatively few hazardous chemicals for which they would have to develop an MSDS and label. Commenters objected to the use of these lists stating that the organizations which compile them offer no opportunity for public comment; they impose unknown future requirements by citing the "latest edition;" and they violate regulations governing incorporation-by-reference. We are open to considering alternatives where the impact of the alternative would not reduce protection afforded miners by the interim final rule.

Concerning labels and MSDSs, commenters requested additional language to clarify that the designated "responsible person" mentioned on the labels and MSDSs can be the mine operator. Accordingly, we are considering changing these provisions to read "... the name, address, and telephone number of the operator or a responsible party who can provide ...".

Concerning the availability of MSDSs, commenters asked that we increase compliance flexibility and recognize that MSDSs may be stored in a computer. In response, we are considering modifying the requirement to have an MSDS available "for each hazardous chemical before using it" to one requiring the operator to have an MSDS available "for each hazardous chemical which they use."

MSHA is also considering accepting a listing of the OSHA PEL on an MSDS as an alternative to a listing of the MSHA PEL. This would facilitate the use of widespread existing MSDSs and reduce costs by eliminating the need to develop additional MSDSs.

In response to comments concerning hazard communication training, we are considering changing the language from requiring the operator to train the miner whenever introducing "... a new hazardous chemical into the miner's work area ..." to requiring training when the operator "... introduces a new chemical hazard into the miner's work area ..." This change would clarify MSHA's intent that when a new chemical is introduced additional training is required only if the hazard changes. This is the intent as discussed in the preamble to the interim final rule.

Also, in response to comments, we are considering revising the definition of health hazard. The interim final rule defines health hazard to include chemicals that "damage the nervous system including psychological or behavioral problems." We are considering deleting the phrase "psychological or behavioral problems." We are also considering adding the criteria "toxic or highly toxic" to more closely conform the language to that in OSHA's Hazard Communication Standard.

The hazard communication interim final rule is an information and training standard that requires mine operators to know about the chemicals at their mines and to inform miners about—

• the risks associated with exposure to hazardous chemicals,

• the safety measures implemented at the mine to control exposures, and

• safe work practices.

The hazard communication interim final rule DOES NOT restrict chemical use, require controls, or set exposure limits.

We will publish our response to the written comments, including those comments received today at this hearing, in the preamble to the hazard communication final rule. We will consider all comments contained in the rulemaking record, from the publication of the advanced notice of proposed rulemaking on March 30, 1988, through the close of the record on October 17, 2001, in the development of the final rule.

You may submit written comments to me during the hearing or send them to the address listed in the hearing notice. We will also accept additional written comments and other appropriate data on this final rulemaking from any interested party, including those who do not present oral statements. All comments and data submitted to MSHA, including that submitted to me today, will be included in the rulemaking record. The record will remain open until October 17, 2001, for the submission of post-hearing comments.

Please sign the attendance sheet at the back of the room and, if you wish to speak, there is a separate sign-in sheet for presenters.

We will begin with the folks that have signed up in advance to speak. If there's time at the end of that, anyone in the audience who wants to come up and make a statement will be able to do so. We will continue the hearing until all speakers have had an opportunity to address the panel. Should it be necessary to extend the hearing beyond 5:00 o'clock, we (may)(will) be able to do so.

This concludes my opening statement.